IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-cv-81205-RAR

SECURITIES & EXCHANGE COMMISSION	:
Plaintiff,	:
-against-	:
COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et. al.,	:
Defendants.	:

EXPEDITED MOTION FOR LIFT OF LITIGATION STAY AND OTHER RELIEF AND INCORPORATED MEMORANDUM OF LAW ON BEHALF OF NON-PARTY MOVANTS RADIANT IMAGES, INC., GIANE WOLFE, TOURMAPPERS NORTH AMERICA, LLC, JULIE PAULA KATZ, FLEETWOOD SERVICES, LLC, ROBERT FLEETWOOD, PAMELA FLEETWOOD, GEX MANAGEMENT, INC., CARL DORVIL, KARA DIPIETRO, MH MARKETING SOLUTIONS GROUP, INC., MICHAEL HELLER, SUNROOMS AMERICA, INC., MICHAEL FOTI, PETROPANGEA, INC., JOHNNY HARRISON, SEAN WHALEN AND YNGYIN IRIS CHEN

(Pursuant to Local Rule 7.1(d)(2), Movants seek an expedite ruling by 5 p.m. on March 20, 2022 as the Claims Bar date is March 22, 2023 at 11:59 p.m. and the Receiver only refused to consent to the relief herein by email dated March 9, 2023)

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Non-parties Radiant Images, Inc., Giane Wolfe, Tourmappers North America, LLC, Julie Paula Katz, Fleetwood Services, LLC, Robert Fleetwood, Pamela Fleetwood, Gex Management, Inc., Carl Dorvil, Kara DiPietro, MH Marketing Solutions Group, Inc., Michael Heller, Sunrooms America, Inc., Michael Foti, Petropangea, Inc., Johnny Harrison, Sean Whalen and Yngyin Iris Chen (collectively, the "Movants"), by and through their undersigned attorneys, respectfully submit the within motion (the "Motion") seeking an order: (i) lifting the litigation stay entered in this action to permit Movants to proceed with the litigations or assert counterclaims in proceedings listed in Schedule and (ii) permitting the Movants to file proofs of claim in this action without prejudicing their rights to pursue claims in the litigations and proceedings listed in Schedule A.

An expedited ruling by March 20, 2023 is necessary because the claims bar date is March 22, 2023, and despite exhaustive, good-faith efforts to resolve their claims amicably with the Receiver before the claims bar date, the Receiver informed Movants on March 9, 2023 that it would not agree to lift the litigation stay and that it would not entertain settlement discussions. Copies of the communications with the Receiver are attached as Exhibit 2 to the Declaration of Shane R. Heskin dated March 10, 2023 (the "Heskin Decl.") which is being submitted in connection with the Motion. In support of the Motion, the Movants respectfully state as follows:

PRELIMINARY STATEMENT

The Movants are all merchants who fell victim to the predatory lending and abusive collection tactics of Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par Funding"). These tactics, which still continue, include:

a) On March 2, 2023, at around the same time as the threatening calls to the Abbonizios, government witness K.D. [Movant] received a threatening call in a male voice from the same spoofed number that had called the Abbonizios. The

caller said, "We're coming after you. We're going to split your head open." Heskin Decl., Ex. 1.

b) Threatening physical harm to merchants if they failed to repay Par Funding, including advising one Movant that failing to pay Par Fund could affect "wives, households and children" and could make widows and telling multiple Movants that Par Funding would "blow up" their house;

c) Sending thousands of UCC lien notices to merchants' families, friends, neighbors vendors, customers and other business relations including, in one instance, the Movant's niece and to the school of the Movant's child;

d) Harassing the Movants, their spouses and employees with endless phone calls, email and text messages threatening to destroy their business and/or take everything they have;

e) Forging and doctoring confessions of judgments to obtain fraudulent judgments in jurisdictions with favorable judgment enforcement laws;

f) Obtaining hundreds of confessed judgments based upon the admittedly forged signature of an attorney and notary;

g) Confessing judgments against merchants for amounts that are grossly exaggerated and in instances where there was no breach of the underlying agreements and no basis for the entry of a confessed judgment; and

h) Claiming its merchant agreements are legitimate purchases of receivables but forcing merchants to sign mortgages that expressly acknowledge the agreements are actually absolutely repayable loans that charge interest at rates exceeding 700% per annum in violation of various state criminal usury laws;

These tactics have given rise to a variety of claims by the Movants sounding in breach of contract, fraud, usury and federal civil RICO charges stemming from wire fraud, mail fraud, the collection of an unlawful debt and extortion. Most of these claims were asserted by the Movants in actions pending *before* the appointment of Ryan Stumphauzer as the Receiver of Par Funding (the "Receiver") on July 27, 2020 [ECF No. 36] and/or the imposition of the initial litigation stay on July 31, 2020 [ECF No. 56], and certain of these actions are asserted as class actions that seek to vindicate the rights not only of the respective Movant but also the rights of potentially thousands of other similarly situated victims whose claims may now be barred by the applicable statute of limitations. Absent the ability to pursue these claims, thousands of Par Funding's

victims may not have any redress. Notably, the class actions include claims against "The John and Jane Doe Investors," which until this SEC action, were previously unidentified.[1]

The Movants have attempted to resolve their claims with the Receiver to no avail. While the Receiver has previously expressed an interest in a global resolution, he has since refused to engage in any good-faith discussions to afford remuneration to Par Funding's many hundreds of merchant victims, while simultaneously providing a mechanism to protect investor exposure. By refusing to engage in good-faith negotiations, which could obtain releases for investors, the Receiver is only increasing investor exposure by continuing to collect upon unlawful debt.

For example, on August 5, 2022, the Receiver commenced an action against Movant GEX Management in Pennsylvania state court and proceeded to obtain a default judgment against both the business and its individual owner. The Receiver did so despite the fact that GEX is a Texas merchant, and is a putative class member in *Fleetwood v. CBSG, infra,*, which asserts RICO claims. *See Lateral Recovery, LLC v. Cap. Merch. Servs., LLC*, 2022 U.S. Dist. LEXIS 181044, *97 (S.D.N.Y. Sept. 30, 2022) ("The RICO statute of limitations is satisfied so long as an overt act that is part of the violation and injures the plaintiff occurs within the four years prior to the filing of a complaint asserting the RICO claim.") (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)).

Counsel for the Movants has repeatedly advised the Receiver that the continued efforts to collect from one or more of the Movants, among other things, constitutes a continuation of the same predatory and abusive tactics that give rise to the Movants' claims against Par Funding and

[1] Many of the Receivership Entities are likely the John and Jane Doe Investors, such as ABetterFinancialPlan.com LLC and the various ABFP Funds, MK Corporate Debt Investment Company LLC, United Fidelis Group Corp., Fidelis Financial Planning LLC, Retirement Evolution Group, LLC, RE Income Fund LLC, RE Income Fund 2 LLC, Capital Source 2000, Inc., Fast Advance Funding LLC, Beta Abigail, LLC, New Field Ventures, LLC, Heritage Business Consulting, Inc. and Eagle Six Consultants, Inc.

has demanded that the Receiver alert this Court to genesis of the Movants' claims, but he has failed and refused to so do, prompting the Movants to make the present application to protect their rights and claims. In so doing, the Movants are merely asking this Court to grant lift-stay relief to pursue a determination of liability with respect to their claims, subject to their later right to seek payment as part of the claims process.

Accordingly, for the reasons set forth more fully below, the Movants seek entry of an order: (i) lifting the stay insofar as it applies to the actions and proceedings listed in schedule A (collectively, the "Proceedings") and (ii) allowing the Movants to file proofs of claims without prejudicing their rights to pursue liquidate their claims in the Proceedings.

STATEMENT OF FACTS

Below is summary of the facts and procedural background of the Proceedings and claims with respect to which the Movants seek lift-stay and other relief. In considering these facts, the Movants note that Par Funding's enforcer, Renato Gioe a/k/a "Gino", plead guilty to making extortionate threats to merchants, including one or more of the Movants, to collect upon Par Funding agreements and is currently awaiting sentencing. *See* Gino Criminal Information, *U.S. v. Renato Gioe*, EDPA, Case No. 22-cr-00279, Heskin Decl., Ex. 3. Even more recently, James Laforte, Joseph Laforte's brother, was arrested and charged with physically assaulting the Receiver's attorney on the streets of Philadelphia following a zoom conference with the Court on February 28, 2023. *See* Laforte Criminal Complaint, *U.S. v. James Laforte*, EDPA, Case No. 23-mj-464, Heskin Decl., Ex. 4.

1. *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe,* 18-cv-04013 (KSM) (the "Radiant Action"). Radiant Images, Inc. ("Radiant") is an award-winning

service provider to the motion picture industry located in Los Angeles California. Between 2015 and January 2018, Radiant entered into a series of so-called "Future Receivable Purchase Agreements" with one or more of Par Funding, Broadway Advance, LLC ("Broadway") and Fast Advance Funding ("Fast Advance"). When Radiant's receivable collections slowed and it could no longer make the $60,000 weekly payments, Par Funding sent Gino to collect. Among other things, Gino told Radiant's owners a story about a borrower who failed to repay Par Funding and ended up in a huge car accident at which time Gino informed Radiant's owners that failing to pay Par Funding is "the kind of thing[] which strongly effect[s] wives and children" and makes widows. *See* Gino Criminal Indictment, ¶ 3 b; Certification of Gianna Wolfe in Support of Motion to Open the Judgment dated September 24, 2018 (the "Wolfe Cert."), ¶¶ 3-16, Heskin Decl., Ex. 5 Thereafter, Par Funding tried to destroy Radiant's reputation by sending UCC notices to members of the American Society of Cinematographers, an invitation only organization, who was not an account debtor of Radiant and with respect to which Par Funding had no reasonable basis to belief its members owed any debts to Radiant that could be collected by Radiant. Wolfe Cert. ¶¶ 17-19. The notices were repeatedly sent solely to damage Radiant's business reputation and force the company to settle.

Radiant was compelled to commence two separate actions against Par Funding before ultimately entering into a settlement agreement dated March 16, 2018, which required Radiant to make certain payments according to a schedule and Par Funding to immediately retract the UCC lien notices that were destroying Radiant's reputation. *See* Radiant Settlement, Heskin Decl., Ex. 6. The settlement agreement also contained a mutual release of all claims arising up and until the date of the settlement agreement. Significantly, the settlement agreement **did not** contain a provision allowing Par Funding to enter a confession of judgment provision upon default or

granting Par Funding a security interest in any collateral. Par Funding never issued the required retraction letters thereby causing further reputational and economic harm to Radiant's business. Then, in July 2018, Par Funding claimed that Radiant had missed or shorted payments due under the settlement agreement. This was patently false. Wolfe Cert., ¶¶ 21-24. Nevertheless, and notwithstanding that it had no right to do so under the Settlement, Par Funding filed a confessed judgment against Radiant and its owner and sought payment of amounts that not only had already been paid to Par Funding but for claims that had already been released under the settlement agreement. Wolfe Cert., ¶¶ 25-26.

In the Radiant Action, Radiant sought to open the confessed judgment on various grounds. By order dated July 31, 2019, the EDPA opened the confessed judgment on the grounds that there were issues of fact that precluded its entry. *See* Order dated July 31, 2019, Heskin Decl., Ex. 7. Thereafter, the Radiant Action was stayed by the Litigation Injunction. Radiant seeks lift-stay relief to formally and finally vacate the confessed judgment under Pennsylvania law. Radiant also intends to amend its pleadings to assert claims against Par Funding stemming from its bad-faith faith failure to perform under the settlement agreement and its fraudulent entry of the confessed judgment which damages include not only substantial attorneys' fees, but also the loss of business and reputational damages caused by Par Funding's failure to retract the improperly issued UCC lien notices.

2. *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Tourmappers North America, LLC d/b/a Tourmappers North America and Julie Paula Katz,* Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 200401028 (the "Tourmappers Proceeding") and *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration

Case No. 01-20-0005-3591 (the "Tourmappers Arbitration"). Tourmappers North American, LLC ("Tourmappers") is a small Massachusetts based travel company that provides travel services to people travelling into the United States from Europe and other international locations. *See* Declaration of Julie Katz dated June 17, 2020 (the "Katz Decl."), ¶¶ 2-3, Heskin Decl., Ex. 8. On January 10, 2020, Tourmappers entered into a so-called "Future Receivables Purchase Agreement" with Par Funding pursuant to which Par Funding advanced funds to Tourmappers allegedly in exchange for the purchase of certain future receivables. *Id.* at ¶ 8. Less than two months later, on March 12, 2020, the Government effectively shut down Tourmappers' business when it elected to close international borders and health travel due to the impending threat of the COVID-19 pandemic. *Id.* at ¶¶ 18-19. Despite the fact that Tourmappers had no income and contrary to the express terms of its agreement, Par Funding continued to demand that Tourmappers make daily payments under its agreement. *Id.* at ¶¶ 20-40. When Tourmappers literally ran out of money, Par Funding called a default, filed a confessed judgment in the Philadelphia County Court of Common Pleas, and started repeatedly peppering Tourmappers' customers, prospective customers, hotels, vendors and other travel agencies with UCC lien notices in an apparent attempt to tarnish Tourmappers' good name and reputation and extort a large lumpsum settlement from the company. *Id.* at ¶¶ 41-61.

Tourmappers moved to strike and/or opened the confessed judgment in the Tourmappers Proceeding and simultaneously commenced the Tourmappers Arbitration seeking, among other things, damages stemming Par Funding's unconscionable and unfair business practices in violation of Massachusetts law. In the arbitration, Tourmappers moved for emergency injunctive relief preventing Par Funding from sending out any further UCC lien notices and ordering Par Funding to retract the notices that had already been sent.

By decision dated July 24, 2020, the JAMS arbitrator determined that: (i) the UCC lien notices violated the UCC and "were not issued in good faith but were rather a campaign of harassment against Tourmappers;" (ii) Tourmappers had suffered irreparable harm due to Par Funding's harassment; and (iii) Tourmappers had no current obligations to Par Funding under the agreement. As a result, the arbitrator: (i) enjoined Par Funding from sending out any further UCC lien notices and (ii) required that Par Funding issue retraction letters within three (3) business days of the Order. *See* Order, pp. 4-5, Heskin Decl., Ex. 9. The motion to open the judgment is still pending but, in light of the arbitrator's findings, it is foregone conclusion that it will be granted.[2] Tourmappers seeks lift-stay relief to pursue both the Tourmappers Proceeding and the Tourmappers Arbitration. In addition to claims for damages under Massachusetts law, Tourmappers intends to amend its arbitration demand to seek damages for bad-faith conduct under UCC 9-625, including attorneys' fees.

3. *Fleetwood Services, LLC, Robert Fleetwood and Pamela Fleetwood Complete Business Solutions Group, Inc., d/b/a/ Par Funding; Prime Time Funding LLC and John and Jane Doe Investors*, United states District Court for the Eastern District of Pennsylvania, Case No. 18-cv-00268(JS) (the "Fleetwood Class Action"). This is a Texas usury and RICO class action claim stemming from Par Funding's collection of an unlawful debt wherein plaintiffs allege that Par Funding and others induced merchants to enter into future account receivable purchase agreements that in form, substance and every conceivable were intended by Par Funding to function as absolutely repayable loans that charged interest rates in excess of 300%

[2] In his most recent Status Report [ECF No. 1504], the Receiver advised this Court that it had initiated 55 actions against merchants in Philadelphia Count of Common Pleas and that merchant challenges to those judgments have been unsuccessful. [ECF No. 1504, p. 5]. Tellingly, the Receiver has not yet elected to proceed against Tourmappers in either the Tourmappers Proceeding or Tourmappers Arbitration, but plainly in light of the arbitrator's decision, Tourmappes challenge to the confessed judgment will be successful.

per annum. *See* Second Amended Complaint, ¶ 1, Heskin Decl., Ex. 10. The EDPA denied Par Funding's motion to dismiss and determined that Texas law applied to the plaintiff's claims. *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp.*, 374 F.Supp. 3d 361 (2019). Class discovery has been completed and a motion for class certification as been fully briefed and remains pending before the EDPA. The proposed class consists of all merchants and guarantors who are citizens of Texas and entered into a Par Funding agreement on or after January 22, 2015. *See* Second Amended Complaint, ¶¶ 100-101.

Under Texas law, a borrower subject to usurious rates can recover the principal, interest and multiples of the excess usurious interest. *See* Tex. Fin Code §§ 306.103 and 305.001(a). Plaintiffs estimates that there are approximately 570 Texas merchants making up the class with potential damages exceeding $50 million. Notwithstanding his knowledge of this claim, the Receiver continues to seek lift-stay relief and pursue judgment against Texas merchants who would fall with the certified class, thereby exposing the Receiver to liability for collection of an unlawful debt and violations of Texas law.

4. *Complete Business Solutions Group, Inc., by and through its Court-Appointed Receiver Ryan K. Stumphauzer v. Gex Management, Inc. and Carl Dorvil*, United States District Court for the Eastern District of Pennsylvania, Case No. 22-cv-4043 (the "Gex Action"). This is an example of where the Receiver continues to pursue claims against Texas citizens notwithstanding his awareness of the Fleetwood Class Action and their inclusion within Fleetwood's proposed classes. While the Receiver has obtained a default judgment in the Gex Action, the defendants dispute service and, upon lifting of the stay, they indeed to seek to vacate the default and pursue various remedies. Among other things, Defendants contend that they have paid their obligations in full and will seek to join the Fleetwood Class Action if the class is

certified or, alternatively, assert their own RICO claims against Par Funding. On March 9, 2023, the Receiver indicated it may conditionally vacate the default judgment.

5. *HMC Incorporated and Kara DiPietro v. Complete Business Group, Inc. d/b/a Par Funding and Fast Advance Funding, Inc.*, United States District Court, Eastern District of Pennsylvania, Case No., 19-cv-3285. In this RICO action, plaintiffs allege that Par Funding and others engaged in a scheme to committee mail and wire fraud in the servicing of various agreements and to carry extortionist threats. Among other things, Par Funding is accused of charging plaintiffs hundreds of thousands of dollars in fictitious finance fees, papering plaintiffs' contacts and family members with hundreds of false UCC lien notices and threatening to "blow up" Ms. DiPietro's home if she failed to pay Par Funding. The death threats have continued during this Receivership and as recently as March 2, 2023. Ms. DiPietro seeks leave to pursue her claims against Par Funding.

6. *Complete Business Solutions Group Inc. v. MH Marketing Solutions Group, Inc. and Michael Heller*, Philadelphia Court of Common Pleas, Case No. 190606813. Defendants removed this case to the EPDA and filed a Petition to Strike or Open a Confession of Judgment on the grounds that confession was entered without authority and in violation of the agreements' terms and to assert meritorious defenses of unconscionability and applicable criminal usury statutes. *See generally,* Petition, Heskin Decl., Ex. 11. Among other things, Heller only guaranteed performance of the representations and warranties in the applicable Par Funding agreement and Par Funding did not allege any breach of those warranties in filing the confessed judgment. *See CBSG v. NG Consulting Services, LLC*, 2017 Phil. Ct. Pl., LEXIS 14 at *5 (Pa. Ct. Comm. Pl. Feb. 16, 2017) (striking confessed judgment under identical guaranty where Par Funding failed to allege a breach of the representations and warranties). Further, as collateral for

the advance, Par Funding required that Heller mortgage his home in New Jersey and the mortgage expressly describes Par Funding as a "lender," and the applicable Par Funding receivable purchase agreement as a "note" and the transaction as a "loan," not the sale/purchase of receivables. *Id.* at ¶ 11. Under New Jersey law, "lenders" such as Par Funding are prohibited from charge in excess of 50% interest per annum. N.J. Rev. Stat. §2C:21-19.

The matter has been remanded to state court where the motion to strike and/or open the confessed judgment is pending. Upon striking or opening of the confessed judgment, the defendants intend to assert affirmative claims for usury and RICO claims for the collection of an unlawful debt.

7. *Complete Business Solutions Group, Inc. v Sunrooms, Inc. and Michael Foti*, Philadelphia Court of Common Pleas, Case No. 190606813. Defendants removed this case to EDPA and filed a Petition to Strike or Open a Confession of Judgment on the grounds that confession was entered without authority and in violation of the agreements' terms and to assert meritorious defenses of unconscionability and applicable criminal usury statutes. Once again, Par Funding improperly confessed judgment against the guarantor by failing to allege a breach of the guaranteed obligations. Par Funding further engaged in unconscionable behavior including: (i) repeatedly sending UCC lien notices to business contacts, friends and family including a college-age niece; and (ii) threatening to destroy Sunrooms, Inc. business and stating that they hoped its owner, Michael Foti, would get hit by car. *See* Petition, ¶¶ 1-20. Thereafter, the matter was remanded to state court where the motion to strike and/or open the confessed judgment is pending. Upon striking or opening of the confessed judgment, the defendants intend to assert affirmative claims for usury and RICO claims for the collection of an unlawful debt.

8. *Petropangea, Inc., Johnny Harrison; Volunteer Pharmacy, Inc. and Toby C. Frost v. Complete Business Solutions Group, LLC; Fast Advance Funding LLC; MCA Capital Fund I, LLC; MCA National Fund, LLC, Recruiting and Marketing Resources, Inc. and Full Spectrum Processing, Inc.*, Court of Common Pleas: Philadelphia County, Case No. 200202013 (the "Petropangea Action") and *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Petropangea and Johnny Harrison*, Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 1906067 (the "Petropangea Proceeding"). On July 29, 2020, the plaintiffs commence the Petropangea Action asserting, among other things, class action RICO claims Par Funding and others arising from the collection of an unlawful debt and extortionist tactics in violation of the Hobbs Act. The proposed class included Texas merchants who contracted with Fast Advance[3] and Tennessee merchants who contracted with Par Funding. *See* Complaint, Heskin Decl., Ex. 12. Plaintiffs seek class-wide damages that likely exceed $20 million. Simultaneously with the commencing the class action, Petropangea commenced the Petropangea Proceeding seeking to open or strike a confessed judgment on the grounds, among others, that it was entered without authority and that a meritorious defense exists to the claims.

9. *Complete Business Solutions Group, Inc. v. Sean Whalen and Yingyin Iris Chen*, United States District Court, Eastern District of Pennsylvania, Case No. 19-cv-06181 (the "Whalen Action"). CBSG initially commenced this action against Whalen and Chen in the Court of Common Pleas: Philadelphia County, and the action was removed by the defendants to the EDPA. Thereafter, the Whalen and Chen removed the case to the EDPA. Whalen, Chen and their company, Flexogenix Group, Inc., on behalf of themselves and other similarly situated California merchants and owners, assert RICO claims against Par Funding and others based upon

[3] The proposed class in the Fleetwood Class Action only includes those Texas citizens who had agreements with Complete Business Solutions Group, LLC, not Fast Advance.

the collection of an unlawful debt. *See* Answer and Counterclaims, Heskin Decl., Ex. 13. The counterclaim plaintiffs each filed motions to dismiss which have been fully briefed and are pending before the EDPA.

LEGAL ARGUMENT

I. THE STAY SHOULD BE LIFTED.

Courts consider three factors commonly referred to as the *Wencke* factors: (i) whether refusing to lift the stay genuinely preserves the status quo or result in substantial injury to the moving party if not permitted to proceed; (ii) when in the course of the receivership the motion for stay relief is made; and (iii) the merits of the moving party's underlying claim. *S.E.C. v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) ("*Wencke II*"). Evaluating these factors requires the court to "balance the interests of the Receiver and the moving party." *Id.* (internal quotations and citations omitted). If the balance of these factors tips in favor of the moving party, the stay should be lifted. *See e.g., SEC v. One Equity Corp.*, 2010 U.S. Dist. LEXIS 124013 at *19-24, 2010 WL 4878993 (S.D. Ohio Nov. 23, 2010) (lifting stay where *Wencke* factors weighed in favor of moving party). Here, each of these factors weighs heavily in favor of the Movants and lifting the stay to assert their claims and counterclaims (collectively, the "Claims").

A. Lifting the stay will not disrupt the status quo, but the Movants will suffer substantial injury if the stay is not lifted.

A stay of the Claims is not necessary to preserve the status quo because the Claims do not seek to obtain possession of estate assets or disrupt the priority of distribution of any estate assets. The Claims seek to establish the liability of Par Funding and/or the Receiver to the Movants. The United States Supreme Court has "distinguished between liquidating a claim, which does not interfere with the receivership court's authority, and distributing assets, which is the essence of the receivership court's authority." *Riehle v. Margolies*, 270 U.S. 218, 224 (1929).

This distinction means that "the establishment of the existence and amount of a claim against [a Receivership Entity] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." *Morris v. Jones*, 329 U.S. 545, 549 (1947). Relying upon this distinction between a liquidating claim and a claim that effects estate assets, the *One Equity* court lifted a broad litigation stay imposed in an SEC receivership to permit the creditor to liquate pending claims against receivership entities and/or assert counterclaims in a state court action commenced by the receiver. *One Equity*, 2010 U.S. Dist. LEXIS 124013 at *19-24. The same result is warranted.

While lifting the stay will not upset the status quo in the Receivership, subjecting the Claims to the stay will substantially injure the Movants. Many Claims are in advanced stages of litigations or are to be asserted in cases commenced in other courts by the Receiver.[4] Substantial time and money have already been spent litigating the Claims in other jurisdictions and before other courts who are familiar with the relevant issues and parties. Compelling the Movants to essentially relitigate these issues and/or defend against the Receiver's claims in one court and pursue claims in this Court is both prejudicial and a waste of judicial resources. For that reason, the first *Wencke* factor weighs heavily in favor of granting the Movants lift-stay relief.

B. The Receivership has reached a point where lifting the stay is appropriate.

The timing factor is fact-specific and "based on the number of entities, the complexity of the scheme, and any number of other factors." *Stanford Int'l Bank Ltd.*, 424 F. App'x at 341; *see*

[4] Movants seek stay relief to assert counterclaims out of an abundance of caution. In *Klein v. Johnson,* Case No. 2:19-cv-00625, 2019 WL 6700245 (D. Utah Dec. 9, 2019), the court dismissed a defendants' counterclaims against an SEC receiver, in part, because the defendant had not first obtained lift-stay relief, and in a pending SEC receivership proceeding, the receiver has similarly sought to dismiss counterclaims asserted by a defendant in an action commenced by the receiver. *See Kent v. Galvin*, Case No. 2:21-cv-13105, ECF No. 25 (Motion to Dismiss All Counterclaims).

also SEC v. Wing, 599 F.3d 1189, 1197 (10th Cir. 2010) ("the timing factor is case-specific"). As the Ninth Circuit explained:

> [w]here the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance.

S.E.C. v. Wencke I, 622 F.2d 1363, 1373-74 (9th Cir. 1980) ("*Wencke I*").

Here, the Receivership is nearing an end. A claims procedure process has been approved, a March 22, 2023 claims bar date has been established and in his most recent status report, the Receiver has advised that he expects the distribution process to begin after the conclusion of the claims process [DE 1504 at p. 9]. In short, this Receivership is nearing an end and there is simply no reason to maintain the litigation injunction. *See Wencke II*, 742 F.2d at 1232 (district court abused its discretion in refusing to lift stay preventing commencement of suits against receivership where receiver was ready to distribute assets of the estate, receivership had been in existence for over seven years with no new material facts having been discovered for at least six years, and disgorgement order had been entered requiring transfer of shares to receiver for benefit of public shareholders); *S.E.C. v. Provident Royalties, L.L.C.*, 3:09-CV-1238-L, 2011 U.S. Dist. LEXIS 74304, 2011 WL 2678840 (N.D. Tex. July 7, 2011) (timing factor weighed heavily in favor of lifting stay where receivership was almost two years old, receiver had marshaled almost all receivership assets and had proposed a plan of distribution); *SEC v. Private Equity Mgmt. Grp., LLC*, CV 09-2901 PSG EX, 2010 U.S. Dist. LEXIS 126337, 2010 WL 4794701 (C.D. Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was

well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

C. The Claims have merit.

With respect to the third *Wencke* factor, "a district court need only determine whether the party has *colorable* claims to assert which justify lifting the receivership stay." *Acorn,* 429 F.3d at 444 (citing *Wencke II*, 742 F.2d at 1232). "[I]f a claim may have merit - and factual development [through discovery] may be necessary to assess this," the third factor weighs in favor of lifting the stay. *Id.* Such is the case here.

There can be no question that the Movants' claims have merit. First, the court already denied Par Funding's motion to dismiss the Fleetwood Class Action. *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp.*, 374 F.Supp. 3d 361 (2019). Second, Par Funding's enforcer, Gino Renata, has been arrested and pled guilty to making extortionist threats to Radiant's owners and other Par Funding borrowers in violation of federal law. Heskin Decl. Ex. 3, 5. Third, an arbitrator has already determined that Tourmappers did not breach its contract with Par Funding and that Par Funding engaged in harassment and bad-faith conduct that has resulted in real and irreparable damages to Tourmappers' business and reputation. Heskin Decl. Ex. 9. Fourth, a court has already vacated a confessed judgment because Par Funding failed to allege facts demonstrating a breach of Par Funding's form guaranty and Par Funding continued to file confession judgments against guarantors when there was no breach of the guaranteed obligations. *CBSG v. NG Consulting Services, LLC*, 2017 Phil. Ct. Pl., LEXIS 14 at *5 (Pa. Ct. Comm. Pl. Feb. 16, 2017) (striking confessed judgment under identical guaranty where Par Funding failed to allege a breach of the representations and warranties).

Finally, the overwhelming documentary and other evidence demonstrates that Par Funding's agreements in substance and every conceivable way were intended to and did in fact,

operate as absolute repayable loans giving rise to the Movant's RICO claims for the collection of an unlawful debt. The essential characteristic of a loan is that it be absolutely repayable. *See* Tex. Fin. Code, § 306.001(1) (defining a "loan" under Texas law as "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor"); *Rubenstein v. Small*, 273 A.D.2d 102, 104 (1st Dep't 1947) (Under New York law, "[f]or a true loan it is essential to provide for repayment absolutely and at all events of that the principal in some way be secured as distinguished from being put in hazard."); *Eisenhardt v. Schmidt*, 27 N.J. Super. 76, 82 (Ch. Div. 1953) (same under New Jersey law). "To determine whether a transaction is a loan or a sale, courts ascertain the intentions of the parties as disclosed by the contract, attending circumstances, or both." *Korrody v. Miller*, S.W.3d 224, 226 (Tex. App. 4th Dist. 2003); *see also Endico Potatoes, Inc. v. Git Grp./Factoring, Inc.*, 67 F.3d 1063, 1068 (2d Cir. 1995) (Whether an assignment of accounts receivable is a loan "depends on the substance of the relationship" between the parties "and not simply the label attached to the transaction."); *Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.3d 538, 543 (3d Cir. 1979) ("Courts will not be controlled by the nomenclature the parties apply to their relationship when it comes to determining whether a transaction is a loan or a true sale.").

Both the terms of the agreements and Par Funding's actions demonstrate that the transactions are loans. A sample form agreement is attached as Exhibit 14 to the Heskin Decl. The following provisions demonstrate, on their face, Par Funding's agreements are loans:

a) The agreements have set terms and fixed daily payment obligations. Heskin Decl. Ex. 14, p. 1 ("Daily Specific Amount $5000.25 for 110 days."); *Funding Metrics v. NRO Boston, LLC*, 64204/2016, 2019 N.Y. Misc. LEXIS 4878, at *10 (Sup. Ct. N.Y. Cnty., Aug. 28, 2019) (A future receivable purchase agreement with a fixed term is evidence of a loan.)

b) Merchant is obligated to "ensure that funds adequate to cover the [Daily Specific Amount] to be debited by CBSG remains in the account." Heskin Decl. Ex. 14, p. 1; *Hi Bar Capital LLC v. Parkway Dental Servs., LLC*, 533245/2021, 2022 N.Y. Misc.

LEXIS 5814, *13-14 (Sup. Ct. Kings Cnty. Aug. 25, 2022) (finding agreement like a loan where merchant was required to maintain sufficient funds in the designated account for the fixed daily payments); *Lateral Recovery, LLC v. Capital Merchant Services LLC,* Case No. 21-cv-9336, 2022 WL 4815615, 2022 U.S. Dist. LEXIS 181044 (S.D.N.Y. Sept. 30, 2022) (denying motion to dismiss unlawful debt claims where receivable purchase agreement required the merchant to maintain specific amounts in designated accounts).

c) Violating any term of or covenant of the agreements, including the convent to ensure that sufficient funds are available to cover the Daily Specific Amount, is a breach of the agreements. Heskin Decl., Ex. 14, 3.1(a); *see Parkway*, 2022 N.Y. Mic. LEXIS 5814 at *14 (finding merchant had plead future receivable purchase agreements were loans where there were "virtually no circumstances" under the agreements where purchaser's risk of non-payment was placed at risk);

d) Bankruptcy is an event of default. Heskin Decl., Ex. 14, 3.1(c); *see also Davis v. Richmond Capital Group, LLC,* 194 A.D.3d 516, 517 (1st Dep't 2021) (denying dismissal of merchant's RICO claims where future receivables agreement contained bankruptcy as an event of default).

e) Four insufficient fund notices constitutes an event of default. Heskin Decl., Ex. 14 Appendix A, 3. (NSF Fee) *See CMS*, 73-74 (ruling agreement to be like a loan where it provided for a default after a specific number of missed payments); *Lateral Recovery LLC v. Queen Funding, LLC*, 21-cv-9607-LGS, 2022 U.S. Dist. LEXIS 129032, *16 (S.D.N.Y. July 20, 2022) (same)

f) The agreements do not contain a reconciliation provision by which Par Funding would credit the merchant for any amounts collected in excess of the specified percentage. *See K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 57 N.Y.S.3d 625, 634 (N.Y. Sup. Crt. West. Cty. May 4, 2017) (finding that a receivable purchase agreement may be a loan where it has no reconciliation provision).

g) The merchants could request a reduction in the Daily Specific Amount, but Par Funding was not obligated to grant the request. Heskin Decl., Ex. 14, p. 1. *Fleetwood Servs., LLC v. Ram Capital Funding, LLC*, Case No. 20-cv-5120, 2022 WL 1997207, 2022 U.S. Dist. LEXIS 100837 at *44-45 (S.D.N.Y. June 6, 2022) (finding a future receivables purchase agreement to be a loan as a matter of law where buyer had right to decline a request by a debtor to reduce the daily payments).

The conclusion that Par Funding's agreements are absolutely repayable loans are further supported by Par Funding's conduct with respect to the Movants:

a) Par Funding demanded that Tourmappers continue to make payments under its form agreements even though its business had been shut down by the government in response to the COVID-19 pandemic and it had no receivables. *See* Heskin Decl., Exs. 8 and 9.

b) To secure certain of its agreements, Par Funding obtained mortgages from the merchant's owners which mortgages admitted that Par Funding was a "lender," the agreement was a "Note" and a failure to make any payments under the agreement constituted a default entitling Par Funding to foreclose on the mortgaged property. Heskin Decl., Ex. 11.

c) When merchants were unable to pay because their business revenues had slowed down, Par Funding sent Gino, a convicted felon who has admitted to using extortionists threats to collect upon Par Funding's agreements in violation of federal law. Heskin Decl., Ex. 3.

d) Par Funding routinely filed confessions of judgment against guarantors even though the guaranteed obligations had not been triggered. Heskin Decl. Exs. 8, 11.

e) Par Funding routinely harassed merchants and their guarantors to make payments under their agreements by repeatedly sending UCC lien notices to merchants' customers, potential customers, friends, family and business colleagues solely to tarnish the merchants' business reputations and extort a lumpsum payment from the merchant. Heskin Decl., Exs. 5, 8, 9 and 11.

Plainly, Movant's RICO claims have merit and they should be allowed to pursue them.

II. The Movants should be permitted to file proofs of claims.

In lifting the stay, the Movants are not seeking a determination that they are entitled to any Receivership assets or distribution thereof. They are merely seeking to have the issue of liability determined by courts already familiar with the proceedings or before which the Receiver has already commenced a proceeding. Upon determination of liability, the Movants intend to seek distribution of any amounts as part of the established claims procedure. Accordingly, to ensure their participation in those proceedings, the Movants request that in addition to lift-stay relief, the Court permit the Movants to submit proofs of claim without prejudicing their right to pursue their claims in the litigations.

CONCLUSION

The fraudulent and unlawful scheme perpetrated by the Receivership Entities casts a wide net. On the one hand, numerous innocent investors have been defrauded by the Ponzi scheme orchestrated by a multitude of culpable persons, many of whom have already plead guilty to

extortion, securities fraud, and/or have been recently arrested by law enforcement for federal crimes related to this proceeding. On the other hand, an even wider group of victims have been patiently waiting for their day in court while this proceeding nears a resolution. This latter group of victims have been terrorized by the Receivership Entities and have suffered many millions of dollars in damages to their businesses and their persons. These victims had their claims on file long before this action, and merely seek not to be prejudiced any further.

Notably, the Movants have been pleading with the Receiver to engage in good-faith settlement discussions to no avail. The position taken by the Receiver is putting the investors at risk by further exposing them to individual liability if settlements are not reached. The video of the investor presentation by A Better Financial Plan was originally taken in *Fleetwood* action for a specific reason: The presentation expressly informs investors that the underlying agreements are loans to small businesses with interest rates exceeding 30%. The maximum interest rate in Florida and New York is 25%, and in Texas, it is 28%. Even if these investors were not aware of these usury laws, it is well settled that ignorance of the law is bliss.

In addition to granting the expedited relief requested, Movants also request that the Court direct the Receiver to engage in good-faith settlement negotiations that will also shield investors. If he does not, it will only ensure future litigation over any distribution of Receiver funds to the investors, whether it be in this Court or elsewhere.

REQUEST FOR EXPEDITED RULING

Pursuant to Local Rule 7.1(d)(2), Movants seek an expedite ruling by 5 p.m. on March 20, 2022 as the Claims Bar date is March 22, 2023 at 11:59 p.m.

CERTIFICATION REGARDING PRE-FILING CONFERENCE

Pursuant to Local Rule 7.1(a)(3), undersigned counsel, Shane R. Heskin, has conferred with counsel for the Receiver and counsel for the SEC regarding the relief sought by this Motion. Counsel certifies that the SEC has consented to the relief sought by this Motion but, by email dated March 9, 2023, the Received refused to consent.

THE HESKIN-MARTINEZ LAW GROUP

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SCHEDULE A

a) *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe,* United States District Court for the Eastern District of Pennsylvania, Case No. 18-cv-04013 (KSM)

b) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Tourmappers North America, LLC d/b/a Tourmappers North America and Julie Paula Katz,* Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 200401028.

c) *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration Case No. 01-20-0005-3591.

d) *Fleetwood Services, LLC, Robert Fleetwood and Pamela Fleetwood Complete Business Solutions Group, Inc., d/b/a/ Par Funding; Prime Time Funding LLC and John and Jane Doe Investors*, United states District Court for the Eastern District of Pennsylvania, Case No. 18-cv-00268 (JS).

e) *Complete Business Solutions Group, Inc., by and through its Court-Appointed Receiver Ryan K. Stumphauzer v. Gex Management, Inc. and Carl Dorvil*, United States District Court for the Eastern District of Pennsylvania, Case No. 22-cv-4043.

f) *HMC Incorporated and Kara DiPietro v. Complete Business Group, Inc. d/b/a Par Funding and Fast Advance Funding, Inc.*, United States District Court, Eastern District of Pennsylvania, Case No., 19-cv-3285.

g) *Complete Business Solutions Group Inc. v. MH Marketing Solutions Group, Inc. and Michael Heller*, Philadelphia Court of Common Pleas, Case No. 190606813.

h) *Complete Business Solutions Group, Inc. v Sunrooms, Inc. and Michael Foti*, Philadelphia Court of Common Pleas, Case No. 190606813.

i) *Petropangea, Inc., Johnny Harrison; Volunteer Pharmacy, Inc. and Toby C. Frost v. Complete Business Solutions Group, LLC; Fast Advance Funding LLC; MCA Capital Fund I, LLC; MCA National Fund, LLC, Recruiting and Marketing Resources, Inc. and Full Spectrum Processing, Inc.*, Court of Common Pleas: Philadelphia County, Case No. 200202013.

j) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Petropangea and Johnny Harrison*, Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 1906067.

k) *Complete Business Solutions Group, Inc. v. Sean Whalen and Yingyin Iris Chen*, United States District Court, Eastern District of Pennsylvania, Case No. 19-cv-06181.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-cv-81205-RAR

SECURITIES & EXCHANGE COMMISSION Plaintiff, -against- COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et. al., Defendants.	**DECLARATION OF SHANE R. HESKIN IN SUPPORT OF EXPEDITED MOTION TO LIFT THE LITIGATION STAY AND FOR OTHER RELIEF**

SHANE R. HESKIN, pursuant to 28 U.S.C. § 1746, declares under penalties of perjury that the foregoing is true and correct:

1. I am a member of White and Williams LLC, attorneys for non-parties Radiant Images, Inc., Giane Wolfe, Tourmappers North America, LLC, Julie Paula Katz, Fleetwood Services, LLC, Robert Fleetwood, Pamela Fleetwood, Gex Management, Inc., Carl Dorvil, Kara DiPietro, MH Marketing Solutions Group, Inc., Michael Heller, Sunrooms Group, Inc., Michael Foti, Petropangea, Inc., Johnny Harrison, Sean Whalen and Yngyin Iris Chen (collectively, the "Movants") in various matters involving the Movants and Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par Funding") and/or other receivership entities.

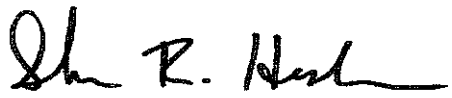
2. I am admitted to practice law and in good standing before the state courts of Pennsylvania, Massachusetts and New York, the United States District Court for the Southern District of New York and the United States District Court for the Eastern District of Pennsylvania, among other courts. I make this declaration in support of the Movants' Motion to Lift the Litigation Stay and for Other Relief (the "Motion").

3. In support of the Motion, I hereby state that attached hereto are true and accurate copies of the following documents as the following exhibits:

EXHIBIT	DESCRIPTION
1.	Jeremy Roebuck and Joseph N. DiSefano, *Witnesses tied to Par probe threatened, feds say; At least to received anonymous calls two days after an attach on a lawyer investigating the company.*, Philadelphia Inquirer, March 10, 2023,
2.	Communications with Receiver concerning offer to conduct settlement discussions and request to consent to lift-stay relief.
3.	Gino Renato Criminal Information *U.S. v. Renato Gioe*, United States District Court for the Eastern District of Pennsylvania, Case No. 22-cr-00279
4.	James Laforte Criminal Complaint, *U.S. v. James Laforte*, United States District Court for the Eastern District of Pennsylvania, Case No. 23-mj-464
5.	Certification of Gianna Wolfe in Support of Motion to Open the Judgment dated September 24, 2018 filed in *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe.,* United States District Court for the Eastern District of Pennsylvania, Case No. 18-cv-04013
6.	Settlement Agreement and Release between CBSG, Broadway Advance, and Fast Advance Funding and Radiant Images, Inc. and Gianna Wolf dated March 16, 2018
7.	Order dated July 31, 2019 entered in *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe.,* United States District Court for the Eastern District of Pennsylvania, Case No. 18-cv-04013
8.	Declaration of Julie Katz dated June 17, 2020 submitted in *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration Case No. 01-20-0005-3591

EXHIBIT	DESCRIPTION
9.	Order by Arbitrator in *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration Case No. 01-20-0005-3591
10.	Second Amended Complaint, *Fleetwood Services, LLC, Robert Fleetwood and Pamela Fleetwood Complete Business Solutions Group, Inc., d/b/a/ Par Funding; Prime Time Funding LLC and John and Jane Doe Investors*, United states District Court for the Eastern District of Pennsylvania, Case No. 18-cv-00268 (JS)
11.	Michael Heller Petition to Open Judgment filed in *Complete Business Solutions Group Inc. v. MH Marketing Solutions Group, Inc. and Michael Heller*, Philadelphia Court of Common Pleas, Case No. 190606813
12.	Complaint, *Petropangea, Inc., Johnny Harrison; Volunteer Pharmacy, Inc. and Toby C. Frost v. Complete Business Solutions Group, LLC; Fast Advance Funding LLC; MCA Capital Fund I, LLC; MCA National Fund, LLC, Recruiting and Marketing Resources, Inc. and Full Spectrum Processing, Inc.*, Court of Common Pleas: Philadelphia County, Case No. 200202013
13.	Answer and Counterclaims, *Complete Business Solutions Group, Inc. v. Sean Whalen and Yingyin Iris Chen*, United States District Court, Eastern District of Pennsylvania, Case No. 19-cv-06181
14.	Sample Par Funding Factoring Agreement between Fleetwood Services LLC and Complete Business Solutions Group dated January 4, 2017

Dated: March 10, 2023



Shane R. Heskin

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-cv-81205-RAR

SECURITIES & EXCHANGE COMMISSION	:
Plaintiff,	:
-against-	:
COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et. al.,	:
Defendants.	:

ORDER GRANTING MOVANTS' MOTION TO LIFT THE LITIGATION INJUNCTION AS TO CERTAIN PROCEEDINGS AND TO ASSERT CERTAIN CLAIMS AND TO PERMIT MOVANTS TO FILE PROOFS OF CLAIMS WITHOUT PREJUDICING THE MOVANTS' RIGHTS TO PURSUE LITIGATION

THIS CAUSE comes before the Court upon the Motion of non-parties Radiant Images, Inc., Giane Wolfe, Tourmappers North America, LLC, Julie Paula Katz, Fleetwood Services, LLC, Robert Fleetwood, Pamela Fleetwood, Gex Management, Inc., Carl Dorvil, Kara DiPietro, MH Marketing Solutions Group, Inc., Michael Heller, Sunrooms Group, Inc., Michael Foti, Petropangea, Inc., Johnny Harrison, Sean Walen and Yngyin Iris Chen (collectively, the "Movants") to: (i) lift the Litigation Injunction as to certain proceedings and (ii) file proofs of claims without prejudice to the right to pursue claims in certain proceedings.

The Movants have made a sufficient and proper showing in support of the relief requested. Accordingly, it is hereby:

ORDER AND ADJUDGED that the Movants' Motion is **GRANTED** with respect to the request to lift the litigation stay. Specifically, the litigation injunction set forth in the Court's Amended Order Appointing Receiver dated August 13, 2020 [ECF No. 141] is hereby lifted in the following matters (collectively, the "Proceedings") to allow the Movants, individually and where

asserted, on behalf of others similarly situated, to pursue their claims and counterclaims as more fully set forth in the Motion:

a) *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe,* United States District Court for the Eastern District of Pennsylvania, Case No. 18-cv-04013 (KSM)

b) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Tourmappers North America, LLC d/b/a Tourmappers North America and Julie Paula Katz,* Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 200401028.

c) *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration Case No. 01-20-0005-3591.

d) *Fleetwood Services, LLC, Robert Fleetwood and Pamela Fleetwood Complete Business Solutions Group, Inc., d/b/a/ Par Funding; Prime Time Funding LLC and John and Jane Doe Investors*, United states District Court for the Eastern District of Pennsylvania, Case No. 18-cv-00268 (JS).

e) *Complete Business Solutions Group, Inc., by and through its Court-Appointed Receiver Ryan K. Stumphauzer v. Gex Management, Inc. and Carl Dorvil*, United States District Court for the Eastern District of Pennsylvania, Case No. 22-cv-4043.

f) *HMC Incorporated and Kara DiPietro v. Complete Business Group, Inc. d/b/a Par Funding and Fast Advance Funding, Inc.*, United States District Court, Eastern District of Pennsylvania, Case No., 19-cv-3285.

g) *Complete Business Solutions Group Inc. v. MH Marketing Solutions Group, Inc. and Michael Heller*, Philadelphia Court of Common Pleas, Case No. 190606813.

h) *Complete Business Solutions Group, Inc. v Sunrooms*, *Inc. and Michael Foti*, Philadelphia Court of Common Pleas, Case No. 190606813.

i) *Petropangea, Inc., Johnny Harrison; Volunteer Pharmacy, Inc. and Toby C. Frost v. Complete Business Solutions Group, LLC; Fast Advance Funding LLC; MCA Capital Fund I, LLC; MCA National Fund, LLC, Recruiting and Marketing Resources, Inc. and Full Spectrum Processing, Inc.*, Court of Common Pleas: Philadelphia County, Case No. 200202013.

j) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Petropangea and Johnny Harrison*, Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 1906067.

k) *Complete Business Solutions Group, Inc. v. Sean Whalen and Yingyin Iris Chen*, United States District Court, Eastern District of Pennsylvania, Case No. 19-cv-06181.

IT IF FURTHER ORDERED AND ADJUDGED that the Movants shall be permitted to file proofs of claims in accordance with the Court's Order (1) Approving Proof of Claim Form; (2) Establishing Claims Bar Date and Notice Procedures; and (3) Approving Procedure to Administer and Determine Claims dated December 23, 2022 [ECF No. 1471] and that such proofs of claims will be without prejudice to and shall not preclude the Movants from pursuing any claims and counterclaims in the Proceedings.

DONE AND ORDERED in Miami, Florida, this ___ day of March, 2023.

_____
RODOLFO A. RUIZ III
UNITED STATES DISTRICT JUDGE

Exhibit 1

Witnesses tied to Par probe threatened, feds say; At least two received anonymous calls two days after an attack on a lawyer investigating the company.

The Philadelphia Inquirer

March 10, 2023 Friday

Section: LOCAL NEWS; Pg. B1

Length: 981 words

Byline: Jeremy Roebuck and Joseph N. DiStefano (Staff Writers)

Body

ABSTRACT

Two days after a broad-daylight attack on a Center City lawyer investigating a Philadelphia cash-advance company at the center of an alleged $500 million fraud, at least two other people connected to the probe received anonymous phone calls threatening them with violence, federal authorities said.

Prosecutors disclosed those threats in a court filing Wednesday seeking to keep James LaForte, the man accused of assaulting attorney Gaetan Alfano last week, in custody until his trial.

And while they did not directly accuse LaForte of making those calls, they said in the filing the FBI continues to investigate what appears to be a pattern of intimidation by Par Funding associates as the firm finds itself under increasing pressure from civil and criminal investigations.

LaForte, the brother of Par Funding founder and CEO Joseph LaForte and a former supervisor at the company, "poses a continued danger to the community, including numerous witnesses, parties and lawyers," Assistant U.S. Attorney Matthew Todd Newcomer wrote.

FBI agents arrested James LaForte on Monday, alleging he stalked and ambushed Alfano, a lawyer working to investigate the firm's assets as part of an ongoing civil suit filed by the U.S. Securities and Exchange Commission.

Moments before that Feb. 28 attack, Alfano - who represents the court-appointed receiver in the case - had been participating in an online hearing on topics including whether Joseph LaForte and his wife, Lisa McElhone, should have to give up their Haverford home to satisfy a $191 million civil judgment against them on behalf of hundreds of investors their company is accused of defrauding.

James LaForte, prosecutors say, sneaked up behind Alfano as he left his law office near 18th and Market Streets, hit him over the head with what they believe to be a flashlight and left him bleeding in the street, suffering from injuries that required seven staples to his head.

Investigators say they were later able to identify LaForte as the attacker through surveillance video and found the sweatshirt and sweatpants Alfano's assailant was wearing in the back of LaForte's car.

"This is an exceedingly egregious and cowardly crime of violence with an exceptionally alarming motive," Newcomer wrote in Wednesday's filing. "James LaForte brutally attacked an unarmed lawyer ... in retaliation for the lawyer's legal efforts to hold the LaForte family responsible for their SEC violations."

Witnesses tied to Par probe threatened, feds say; At least two received anonymous calls two days after an attack on a lawyer investigating the company.

But, Newcomer added, the threats didn't stop there.

Two days after the attack on Alfano, Perry Abbonizio - a former Par Funding insider who pleaded guilty last month to conspiring to defraud company investors and who is cooperating with investigators in an ongoing criminal investigation into Par's other leaders - reported receiving an anonymous phone call from a fake number.

The caller warned him to "retract those lies or we're coming for the girls" - an apparent reference to his adult daughters, the government said in its filing.

One of Abbonizio's daughters also received a threatening call from the same number that night, warning her that the caller knew where she lived, prosecutors said.

Around the same time, that anonymous number also called a potential witness in the case, whom prosecutors did not identify in their filing.

"We're coming after you," the caller said, according to court papers. "We're going to split your head open."

Though it remains unclear who was behind those calls, prosecutors have said such violent threats were a standard method of doing business at Par - a company they've painted in previous court filings as a Mafia-style loan-sharking operation dressed up in a business suit.

Par Funding made its money by raising millions of dollars from investors and then lending it out - often at high interest rates - to cash-strapped small-business owners deemed too risky to borrow from traditional banks.

Several borrowers who failed to pay their debts on time were subjected to threats from the LaFortes or others at the firm, prosecutors have said.

Last year, Renato "Gino" Gioe, a bodybuilder and reputed mob associate of New York's Gambino crime family, admitted in court that he'd used mob-style extortion tactics - including threatening to "stick a fork in the head" of one borrower and vowing to cut off the hands of another - in efforts to persuade borrowers to pay up.

In their filing Wednesday, prosecutors said James LaForte had warned another delinquent debtor that he was not a person to be messed with because he'd previously torched people's cars and kicked their teeth in.

That wasn't just bluster. In 2009, he pleaded guilty to conspiring to torch the car of a former employee who had left to work for a competitor.

"The government's evidence suggests that these threats were not isolated incidents by a lone bad actor," Newcomer wrote, "but were instead a favored method of doing business and ensuring that the LaForte family always came out on top."

So far, LaForte's attorney, Thomas Mirigliano, has said little about the accusations involving the attack on Alfano or the suggestion by the government that his client is a danger to others associated with the investigations. A hearing on the government's motion to detain LaForte has been scheduled for next week.

But in a brief court appearance Thursday, Mirigliano signaled that LaForte planned to plead not guilty and questioned why what he deemed to be a simple assault case had landed in federal court.

LaForte is charged with retaliating against a witness and obstruction of a court proceeding - felonies punishable by up to 25 years in prison.

As U.S. Marshals led him out of court and back to lockup Thursday, the man prosecutors had just portrayed as a menace paused, nodded to family members seated in the courtroom gallery, and quietly blew them a kiss.

jroebuck@inquirer.com and JoeD@inquirer.com

Witnesses tied to Par probe threatened, feds say; At least two received anonymous calls two days after an attack on a lawyer investigating the company.

jeremyrroebuck and PhillyJoeD

215-854-2608 and 215 854 5194

Load-Date: March 10, 2023

End of Document

Exhibit 2

Wells, Stuart

From: Heskin, Shane
Sent: Thursday, March 9, 2023 2:02 PM
To: Wells, Stuart
Subject: Fwd: Rule 7.1 Meet and Confer on Expedited Motion to Lift Litigation Stay and Other Relief

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From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Thursday, March 9, 2023 2:00:40 PM
To: Heskin, Shane <heskins@whiteandwilliams.com>
Cc: Eric Soller <EGS@Pietragallo.com>; Timothy Kolaya <tkolaya@sknlaw.com>
Subject: RE: Rule 7.1 Meet and Confer on Expedited Motion to Lift Litigation Stay and Other Relief

Good afternoon Shane,

The Receiver has reviewed your various requests. We will not agree to lift the litigation injunction with respect to any claims by your clients. Any such claims are specifically covered by the claims process. The claims and distribution process is the appropriate time to make any arguments about the validity, priority and/or resolution of claims.

With respect to the litigation in the Court of Common Pleas, we will agree to vacate the default judgments against Gex Management and Mr. Dorvill. This agreement is conditioned upon Mr. Dorvill agreeing to an interview by the Receiver concerning the alleged pre-Receivership settlement between Gex and CBSG, previously provided to us by other counsel for these Defendants. Please note that our willingness to vacate the defaults is due to this alleged agreement, and not based upon your argument concerning the putative application of Texas or any other state's laws to the MCA agreements between Gex and CBSG.

Thank you and please feel free to contact me if you would like to discuss any aspect of this further.

Gaetan

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Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Friday, March 3, 2023 10:42 AM
To: Gaetan J. Alfano <GJA@Pietragallo.com>
Cc: Eric Soller <EGS@Pietragallo.com>; berlina@sec.gov; Wells, Stuart <Wellss@whiteandwilliams.com>; Keersten Martinez (kmartinez@heskinmartinezlaw.com) <kmartinez@heskinmartinezlaw.com>; Proper, Justin <Properj@whiteandwilliams.com>
Subject: Re: Rule 7.1 Meet and Confer on Expedited Motion to Lift Litigation Stay and Other Relief

Thank you.

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Friday, March 3, 2023 10:40:56 AM
To: Heskin, Shane <heskins@whiteandwilliams.com>
Cc: Eric Soller <EGS@Pietragallo.com>; berlina@sec.gov <berlina@sec.gov>; Wells, Stuart <Wellss@whiteandwilliams.com>; Keersten Martinez (kmartinez@heskinmartinezlaw.com) <kmartinez@heskinmartinezlaw.com>; Proper, Justin <Properj@whiteandwilliams.com>
Subject: Re: Rule 7.1 Meet and Confer on Expedited Motion to Lift Litigation Stay and Other Relief

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Shane. I am unable to respond presently but hope to do so early next week.

Thank you

Sent from my iPhone

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard

On Mar 3, 2023, at 10:23 AM, Heskin, Shane <heskins@whiteandwilliams.com> wrote:

Eric,

Can I get a response to this?

From: Heskin, Shane
Sent: Wednesday, March 1, 2023 4:12:11 PM
To: Eric Soller <egs@pietragallo.com>
Cc: GJA@Pietragallo.com <gja@pietragallo.com>; BerlinA@sec.gov <berlina@sec.gov>; Wells, Stuart <Wellss@whiteandwilliams.com>; Keersten Martinez (kmartinez@heskinmartinezlaw.com) <kmartinez@heskinmartinezlaw.com>; Proper, Justin <Properj@whiteandwilliams.com>
Subject: Rule 7.1 Meet and Confer on Expedited Motion to Lift Litigation Stay and Other Relief

Eric,

In light of the Receiver's failure to respond to our repeated global settlement demands, we intend to move for: (1) emergent relief from litigation stay on all of our pending client matters (see attached list of matters, plus B&T Supply/Odzer); and (2) an order declaring that by submitting a claim through the claims process, our clients are not waiving their right to litigate their previously, first-filed claims in state or federal court or arbitration (Katz/TourMappers).

We need to move on an emergent basis because the Receiver has failed to engage in any settlement negotiations at all, despite its numerous promises to do so. This representation to engage in good-faith negotiations was recently made before Judge Sanchez, and despite Judge Sanchez's urging, we are still not in receipt of any settlement response at all. Gaetan and I also had multiple conversations wherein he represented that the Receiver would respond to my global settlement demand but has yet to do so. Instead of engaging in good-faith settlement discussions, I recently discovered that the Receiver is instead going around obtaining default judgments against Class Members (Carl Dorvil) in the very litigation pending before Judge Sanchez.

I do not understand why the Receiver has refused to engage in good-faith settlement discussions, despite its numerous prior promises to do so. Our hands are now tied and we must go to the Court for immediate relief.

Please let us know the Receiver's position as soon as possible. We intend to file the motion on Thursday.

Regards,
-Shane

<image003.jpg>

Shane Heskin
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6329 | Fax 215.864.7123
heskins@whiteandwilliams.com | whiteandwilliams.com

result in legal action being instituted against you. Please reply to the sender advising of the error in transmission and delete the message and any accompanying documents from your system immediately. Thank you.

From: Eric Soller <EGS@Pietragallo.com>
Sent: Monday, February 20, 2023 2:54 PM
To: Heskin, Shane <heskins@whiteandwilliams.com>; Gaetan J. Alfano <GJA@Pietragallo.com>
Subject: RE: CBSG Status Reports for EDPA cases

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

See attached.

Eric Soller, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219
Office: (412) 263-1836 | Fax: (412) 263-4242
EGS@Pietragallo.com| BIO|vCard
Connect with me on LinkedIn:

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Monday, February 20, 2023 2:50 PM
To: Eric Soller <EGS@Pietragallo.com>; Gaetan J. Alfano <GJA@Pietragallo.com>
Subject: Re: CBSG Status Reports for EDPA cases

Thanks Eric. I would add the following:

Plaintiffs have made a demand for a global resolution and, despite repeated requests for a response, the Receiver has failed to respond, forcing Plaintiffs to seek relief from the litigation stay.

From: Eric Soller <EGS@Pietragallo.com>
Sent: Monday, February 20, 2023 2:20:03 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>; Heskin, Shane <heskins@whiteandwilliams.com>
Subject: RE: CBSG Status Reports for EDPA cases

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

All revised and redlines attached. I got rid of “Plaintiff” and “Defendant” and instead used the names of the parties. We must have agreed to the Fleetwood text report and copied it over in past quarters.

Please let me know if these are acceptable for filing.

Thank you.

Regards,

Eric

Eric Soller, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219
Office: (412) 263-1836 | Fax: (412) 263-4242
EGS@Pietragallo.com| BIO|vCard
Connect with me on LinkedIn:

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Monday, February 20, 2023 2:03 PM
To: Eric Soller <EGS@Pietragallo.com>; Heskin, Shane <heskins@whiteandwilliams.com>
Subject: RE: CBSG Status Reports for EDPA cases

The first part is not the Receiver's Position.

Gaetan J. Alfano, Esquire
Office: (215) 988-1441
Fax: (215) 754-5181

From: Eric Soller <EGS@Pietragallo.com>
Sent: Monday, February 20, 2023 1:58 PM
To: Heskin, Shane <heskins@whiteandwilliams.com>; Gaetan J. Alfano <GJA@Pietragallo.com>
Subject: RE: CBSG Status Reports for EDPA cases

Shane,

Please see the attached redlined version whereby I added the information regarding the claims administration process. Please provide a draft of anything you feel should also be added.

Once we are satisfied with this version, we can make the same changes to reports due in the other cases. Thank you.

Regards,
Eric

Eric Soller, Esquire
Office: (412) 263-1836
Fax: (412) 263-4242

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Thursday, February 16, 2023 9:13 AM
To: Eric Soller <EGS@Pietragallo.com>; Gaetan J. Alfano <GJA@Pietragallo.com>
Subject: Re: CBSG Status Reports for EDPA cases

Eric,

We should put something in here about the claims process and about how we intend to seek a lift of the stay if the receiver does not engage in good faith settlwment discussions before March 1. I need a global settlement response to our global proposal of a debt reduction ASAP or we will need to move to lift the stay. Our actions were filed long before the SEC action, and our claims should be given priority.

Happy to discuss but we really need a response.

From: Eric Soller <EGS@Pietragallo.com>
Sent: Thursday, February 16, 2023 8:53:04 AM
To: Heskin, Shane <heskins@whiteandwilliams.com>
Subject: CBSG Status Reports for EDPA cases

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Please see attached. Thank you.

Eric

Eric Soller, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219
Office: (412) 263-1836 | Fax: (412) 263-4242
EGS@Pietragallo.com| BIO|vCard
Connect with me on LinkedIn:

Wells, Stuart

From: Heskin, Shane
Sent: Tuesday, October 4, 2022 7:47 AM
To: Gaetan Alfanso; David Almeida (DAlmeida@beneschlaw.com)
Subject: Fwd: Activity in Case 1:21-cv-09336-LJL Lateral Recovery, LLC, et al v. Capital Merchant Services, LLC et al Memorandum & Opinion
Attachments: Lateral v. CMS - Opinion re MTD.pdf

Gaetan,

Attached is a 100-page decision holding conclusively that the form agreements like those used by CBSG are loans as a matter of law. See analysis on Form 2.

We again ask the Receiver to cease its collection of unlawful debt.

From: Corey, Alex <Coreya@whiteandwilliams.com>
Sent: Monday, October 3, 2022 11:35:19 AM
To: Heskin, Shane <heskins@whiteandwilliams.com>; Wells, Stuart <Wellss@whiteandwilliams.com>
Subject: RE: Activity in Case 1:21-cv-09336-LJL Lateral Recovery, LLC, et al v. Capital Merchant Services, LLC et al Memorandum & Opinion

White and Williams LLP
Alex D. Corey
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6221 | Fax 215.789.7686
coreya@whiteandwilliams.com | whiteandwilliams.com

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Monday, October 3, 2022 11:20 AM
To: Wells, Stuart <Wellss@whiteandwilliams.com>; Corey, Alex <Coreya@whiteandwilliams.com>
Subject: Fwd: Activity in Case 1:21-cv-09336-LJL Lateral Recovery, LLC, et al v. Capital Merchant Services, LLC et al Memorandum & Opinion

Can one of you corculate?

From: NYSD_ECF_Pool@nysd.uscourts.gov <NYSD_ECF_Pool@nysd.uscourts.gov>
Sent: Monday, October 3, 2022 10:38:52 AM
To: CourtMail@nysd.uscourts.gov <CourtMail@nysd.uscourts.gov>

Subject: Activity in Case 1:21-cv-09336-LJL Lateral Recovery, LLC, et al v. Capital Merchant Services, LLC et al Memorandum & Opinion

U.S. District Court

Southern District of New York

Notice of Electronic Filing

The following transaction was entered on 10/3/2022 at 10:38 AM EDT and filed on 9/30/2022
Case Name: Lateral Recovery, LLC, et al v. Capital Merchant Services, LLC et al
Case Number: 1:21-cv-09336-LJL
Filer:
Document Number: 49

Docket Text:
OPINION AND ORDER: The motions to dismiss are GRANTED IN PART and DENIED IN PART. The Court grants the motions to dismiss on the common law fraud claims with prejudice. The Court denies the motions to dismiss as to the RICO conspiracy claim and the substantive RICO claim. The Clerk of Court is respectfully directed to close Dkt. Nos. 21, 24, 26, and 43. SO ORDERED. (Signed by Judge Lewis J. Liman on 9/30/2022) (va)

1:21-cv-09336-LJL Notice has been electronically mailed to:

Gabriel Mendelberg gabe@mendelberglaw.com

Howard Jay Kaplan hkaplan@kaplanrice.com, aboken@kaplanrice.com, amian@kaplanrice.com, atesar@kaplanrice.com, meggenberger@kaplanrice.com, tkaca@kaplanrice.com

Shane R. Heskin heskins@whiteandwilliams.com

Christopher Ryan Murray cmurray@murraylegalpllc.com, cmurrayesq@gmail.com

Michael Eggenberger meggenberger@kaplanrice.com

1:21-cv-09336-LJL Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1008691343 [Date=10/3/2022] [FileNumber=28399564-

Wells, Stuart

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Wednesday, September 7, 2022 6:28 PM
To: Heskin, Shane
Cc: Byron Lynch; Richard J. Parks
Subject: Re: Wood's Residence
Attachments: Gino Criminal Information (EDPA).pdf

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Thank you Shane. We will study the information but on first review I am confident that the Receiver is not employing violent or threatened violence as a collection tactic.

Sent from my iPhone

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard

On Sep 7, 2022, at 6:13 PM, Heskin, Shane <heskins@whiteandwilliams.com> wrote:

I would hope that the Receiver immediately cease all collection efforts after having notice of the attached.

From: Byron Lynch <bllynch44@gmail.com>
Sent: Wednesday, September 7, 2022 1:04 PM
To: Richard J. Parks <RJP@Pietragallo.com>
Cc: Gaetan J. Alfano <GJA@Pietragallo.com>; Heskin, Shane <heskins@whiteandwilliams.com>
Subject: Re: Wood's Residence

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Rich to be clear, the receiver does not own the residence. CBSG has a recorded deed of trust, which is a lien against the residence to secure an obligation. The obligation is in dispute and releasing the security interest does not affect the obligation amount nor any claim as to its integrity by either party.

Exhibit A. **Correspondence Placing the Receiver on Notice.**

8/18/2020

Heskin Written Congressional Testimony.pdf
503 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Tuesday, Aug 18, 2020, 7:03 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>
Subject: [Cleaned] Legal Opinion

Hi Gaetan,

We may be able to help you on the legality of the agreements. Attached is my testimony before Congress explaining the distinction between a loan and a legitimate factoring agreement.

As PREVIOUSLY written and as PREVIOUSLY enforced, I believe the CBSG agreements were illegal loans in many states and potentially Florida where CBSG purportedly operates. But if you were to treat them as legitimate factoring agreements, you could legally collect. It would have to be based on the small business's actual receivables and the percentage actually purchased, which is typically 10%. You should look at our briefing in the Fleetwood and Whalen case. We lay out the law in both those cases.

The current version (post June 2019) is actually well written and I would agree is arguably not a loan on its face. But it is a loan when considering the way CBSG previously treated them.

We have an obvious conflict with our existing cases but I may be willing to opine that the current form (post June 2019) are legal if treated properly.

As you will see with the Katz case, CBSG treated them as absolutely repayable loans regardless of future receipt generation, which made them usurious loans. But if you treated them like actual factoring agreements, they would be legal in all states, including Florida.

Let me know if you want to discuss. It's a complicated issue.

-Shane

8/19/2020

TBLF WIN C6.pdf
387 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Wednesday, Aug 19, 2020, 3:16 PM
To: Gaetan Alfanso <GJA@Pietragallo.com>
Subject: [Cleaned] Recent Usury Decision

Just FYI. Hot off the presses.

Exhibit A and B.pdf
5 MB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Wednesday, Aug 19, 2020, 4:31 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>
Subject: [Cleaned] FW: Checking account

Hi Gaetan,

See below. I guess CBSG did execute a levy in violation of an injunction. See attached decision and order.

We need to get the writs and judgment vacated.

Let me know if you want to discuss.

Regards,
-Shane

8/25/2020

Brief in Support of Motion to Amend.pdf
171 KB

Exhibit A Proposed Second Amended Complaint.pdf
208 KB

Exhibit B Redline.pdf
249 KB

Exhibit C Cole Tr. Excepts.pdf
325 KB

Exhibit D - McElhone Affidaivit.pdf

Exhibit E - PROPOSED ORDER (LEAVE TO AMEND).pdf

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Tuesday, Aug 25, 2020, 7:24 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>, Eric Soller <EGS@Pietragallo.com>
Subject: FW: Updated SJ

FYI. On potential applicability of Florida usury law.

1-22-19- WEEKLY AGREEMENT -- MH MARKETING SOLUTIONS GROUP, INC.pdf 830 KB
Recorded DOT - MH Marketing.pdf 1 MB
FW notarized documents.eml 198 KB
Filed COJ.pdf 554 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Tuesday, Aug 25, 2020, 7:50 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>, Eric Soller <EGS@Pietragallo.com>
Subject: FW: heller

Check out this mortgage. It defines the MCA agreement as a Loan.

9/16/2020

Sheehan v. Richardson_ 315 B.R. 226.pdf 159 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Wednesday, Sep 16, 2020, 5:56 PM
To: Gaetan Alfanso <GJA@Pietragallo.com>, 'Eric Soller' <EGS@Pietragallo.com>
Subject: FW: Email:Sheehan v. Richardson_ 315 B.R. 226

Hi Gaetan,

I just wanted to alert you to the attached case. In states like NY, NJ and Texas, it is unlawful to collect on principal or interest. As a result, the merchant would be entitled to three times the amount paid regardless of whether it is principal or interest. In Texas, it's actually much worse than that. You get all principal and interest charged, plus triple the interest charged regardless of whether it is actually paid. As held in Fleetwood, these damages can not be avoided through a choice of law provision because usury is a strong public policy.

Let me know if you would like to to discuss.

-Shane

9/17/2020

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Monday, August 17, 2020 9:56 AM
To: Heskin, Shane <heskins@whiteandwilliams.com>; ANTHONY KARAKOSTA <akarakos@nycourts.gov>; bberman@foxrothschild.com; mschenker@foxrothschild.com; Kelly Swasey <kswasey@nycourts.gov>
Subject: RE: NY Unity Factor 151807/2018 Motion Argument 12:00 Skype

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Good Morning,

I represent the Receiver of CBSG, Par, and Full Spectrum Processing, among other entities. I attach a copy of the Court's Order's Order, dated August 13. Paragraph 27 enjoins litigation against any of the Receivership Entities, including subsidiaries and partnerships.

Thank you. Please call me with any questions.

Gaetan Alfano

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
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PIETRAGALLO
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

9/24/2020

Exhibit A and B.pdf 5 MB | Reply Brief (Quantico).DOCX 48 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Thursday, Sep 24, 2020, 7:47 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>, esm@dhclegal.com <esm@dhclegal.com>
Subject: RE: NY Unity Factor 151807/2018 Motion Argument 12:00 Skype

Hi Gaetan,

I would like to start getting these cases resolved because the existence of some of these judgments is causing continuing harm. In Quantico, (brief attached above), CBSG, through NY Unity Factor, filed a forged confession of judgment against my client. At a minimum, the litigation stay should be lifted in order to vacate the fraudulent judgment. We currently have a motion for sanctions pending. We would recommend withdrawing the motion for sanctions and provide a mutual release if CBSG agrees to pay our reasonable attorney's fees incurred for bringing the motion to vacate.

In addition, we would like to resolve the Julie Katz matter. We already obtained a decision (attached) finding that the COJ was filed without basis, and that CBSG violated the UCC by sending UCC notices to numerous private parties. CBSG is currently in violation of the decision and order by failing to send out retraction notices to all of the entities that have received the UCC Notices. Although CBSG did issue a handful of retraction notices, numerous more need to be sent out. Although we would be entitled to treble damages under 93A if we pursued our claims through arbitration, we would be similarly willing to resolve this claim for a mutual release and payment of our reasonable fees incurred for bringing the arbitration.

We have many more cases to resolve, but I figured we should start with the smaller ones, and go from there.

I look forward to working with you.

Regards,
-Shane

9/25/2020

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Date: Friday, Sep 25, 2020, 9:05 AM
To: Heskin, Shane <heskins@whiteandwilliams.com>, esm@dhclegal.com <esm@dhclegal.com>
Subject: RE: NY Unity Factor 151807/2018 Motion Argument 12:00 Skype

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Shane,

I'm happy to consider all alternatives to resolving matters BUT none that involve paying Receivership Entity funds at this time. Once the SEC trial has concluded, we hope to be in a position to set forth a distribution plan/claims adjudication process. As I'm sure you appreciate, our overarching goal is to recover as much as possible for investors and we are very early in that process. It is impossible to predict a particular level of recovery for investors at this time and whether there may be funds ultimately available to pay non-investor claims.

If you want to propose a solution that does not involve any payment from Receivership Entity funds, I'm always willing to consider it.

Thanks

Gaetan

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Friday, Sep 25, 2020, 9:29 AM
To: Gaetan J. Alfano <GJA@Pietragallo.com>, esm@dhclegal.com <esm@dhclegal.com>
Subject: RE: NY Unity Factor 151807/2018 Motion Argument 12:00 Skype

Hi Gaetan,

Thank you for the quick response. At a minimum, the two judgments should be immediately vacated. One is clearly fraudulent, and the other has already been found by the arbitrator to have been improperly entered. CBSG should also comply with the arbitration order by issuing retraction letters.

I will look at other claims that may be resolved without affirmative payment. For example, I would recommend a mutual release for Heller. CBSG placed a mortgage on his home, and called the transaction a loan in the mortgage. Heller was a significant victim and lost his business due to CBSG's unlawful collection tactics, which included its sending of UCC notices to everyone and anyone.

Perhaps we try to get that one approved and go from there. I think it would give the court a good flavor of the type of claims it is facing and let the court understand the investors are not the only victims.

I should note that equitable principles should apply in any distribution and there are victims on both sides. It should be further noted that resolving our claims would help limit the exposure to investors because almost all of our claims are against the investors as participants in the RICO conspiracy. The investors were clearly told that the MCAs were loans with interest in excess of 30% interest. So any distribution should take into consideration our affirmative claims against the investors.

Happy to discuss and thank you again.

-Shane

11/25/2020

Consent-Order-Allup-Finance-LLC.pdf
51 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Wednesday, Nov 25, 2020, 7:35 AM
To: 'Eric Soller' <EGS@Pietragallo.com>, 'Gaetan J. Alfano' <GJA@Pietragallo.com>
Cc: Bradley Sharp <bsharp@dsiconsulting.com>
Subject: California Class Action

Hi Gaetan,

I wanted to provide this to you for two reasons. First, I don't want the Receiver to expose itself to further liability collecting on the existing CA MCAs. Second, we have a CA class action through Whalen so we may be able to assist your collection efforts through a class settlement that gives a credit on what is due.

Under CA law, the merchant is entitled to 3X the amount of interest actually paid and that credit can be used to offset remaining principal. In other words, the merchant must still repay principal but not interest.

Let me know if you want to discuss.

Have a safe and happy Thanksgiving.

-Shane

12/18/2020

From: **Aubrey Brown** <abrown@parfunding.com>
Date: Fri, Dec 18, 2020 at 1:16 PM
Subject: severely delinquent payment terms
To: <jayhoehn@gmail.com>

ATTENTION NEEDED IMMEDIATELY

Mr. Martin Jay Hoehn,

JAY COMPLETE HEALTH

My name is Aubrey Brown, I work alongside the court appointed receivership attorney for the PAR FUNDING legal matter. I am trying to reach you to speak or communicate with you to work on fixing your delinquent payments that you haven't made a good payment since June 28,2020 $25.00DEBIT. So, it's been over 5-6 months with zero dollars coming in on your outstanding balance. I think WE HAVE been fair with you by giving you months to get things resolved on your end and for you to reach our office back. So, if you are not aware the company was taken over by the U.S Government and attorneys were put in place to organize the company and get the clients back on payments that haven't been met since. At this time, I want to try and work on this with you prior to the court attorney to start the legal process of either freezing all new or old bank accounts, paypal, cash app, venmo's, credit card processor's etc again as that was done prior with your clients to obtain payment and get your attention to resolve. If that does happen its going be very hard for things to be reversed and fixed with the Government place doing things and that's not what we want to happen to slow your business up any more than it was in the past when covid hit the country. So please contact me prior to these actions being taken. Again, I'd rather work with you on these easy terms then the terms after the bank accounts get frozen and getting paid and start their own repayment towards the remaining balance of $14,978.92. Don't miss out on the opportunity to resolve this balance before fees of nonpayment get put on to the account. So, the time is now to get back on payment terms since our accounting department no longer are running clients debit cards or credit cards for payments and after giving you the entire month of August off. Also, we ARE NOT saying you must pay the lump sum to resolve this delinquency. So please call me so we can fix this and move forward. If you need the help to make payments, communication is better than not communicating and I will work with you. I also attached all the documentation for your review. So, hope you take the time to look this over in contact me in the next couple days, don't wait until your accounts are frozen to decide to call in to want us to fix this, again once the U.S Government who is in control of Par Funding does anything like that my hands are tied to help you.

payment history and transaction list of remaining balance owed.pdf 69 KB
CBSG-ACH FORM.pdf 65 KB
WIRE INSTRUCTIONS CBSG City National Bank of Florida.pdf 95 KB
CBSG Receiver Letter.pdf 169 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Friday, Dec 18, 2020, 10:50 PM
To: 'Gaetan J. Alfano' <GJA@Pietragallo.com>, 'Eric Soller' <EGS@Pietragallo.com>
Subject: FW: Fwd: severely delinquent payment terms

Hi Gaetan,

Sorry to bother you on the weekend but emails like below cannot happen. First, CA is a usury state with strong licensing laws. I recently sent you the consent order from the State of California holding that MCAs are loans subject to the CA Licensed Lenders statute. I already have a CA class action and do not want the Receiver exposing itself to liability. This has to stop and all emails like this should be retracted. The Receiver can ask for voluntary payment but it cannot threaten to seize bank accounts. Second, the email below is very misleading because it suggests that it is the US government taking the collection action.

This has to stop and all emails like this should be retracted. The Receiver can ask for voluntary payment but it cannot threaten to seize bank accounts on behalf of the US government.

Let me know if you want to discuss.

Thanks and happy holidays!

-Shane

4/27/2021

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Tuesday, Apr 27, 2021, 9:14 AM
To: Eric Soller <EGS@Pietragallo.com>, Gaetan Alfanso <GJA@Pietragallo.com>
Subject: FW: Fin tech article

FYI.

Fintech Borrowers Get Class Cert. In Tribe-Linked Usury Suit

By **Elise Hansen**

Law360 (April 26, 2021, 8:56 PM EDT) — Golden State residents who received loans from defunct online lender Think Finance can pursue class claims that they were charged illegally high interest rates by lenders leveraging tribal immunity, a California federal judge has found.

U.S. District Judge William H. Orrick on Friday approved borrower Kimetra Brice's request to certify a class of California residents who were allegedly charged interest rates that surpassed the state's legal limits. According to Brice, the borrowers were victims of a scheme to use tribal entities — and therefore tribal sovereign immunity — to market and collect high-interest loans.

The proposed class met the requirements for certification, including that the borrowers brought a common, predominant claim, the opinion said.

"The claims asserted are all based on the theory that a usurious or otherwise illegal rate of interest was charged," the opinion said.

The class of borrowers will include California residents who received loans from Great Plains Lending LLC, an entity owned by the Otoe-Missouria tribe in Oklahoma, and California residents who obtained loans from Plain Green LLC prior to June 2016, the filing said. Plain Green LLC is owned by Chippewa Cree Tribe in Montana, according to court filings.

Great Plains and Plain Green have been dismissed from the case, court filings show. The plaintiffs reached settlement agreements with Plain Green in Virginia federal court and in Think Finance's bankruptcy case, according to court filings. But some individuals and entities said to be Think Finance LLC's founders, shareholders and owners are still facing claims, court filings show.

Judge Orrick nixed the defendants' arguments that the borrowers had signed class action waivers, finding the agreements unenforceable. The judge had previously found Great Plains' and Plain Green's arbitration agreements to be unenforceable, and the same applies here, the opinion said.

"The text of the class action waiver is located wholly within the 'Waiver of Jury Trial and Arbitration Agreement' that I found to be unenforceable," Judge Orrick said. "The section containing the class action waiver … has been nullified."

The judge also found that the data used to identify the potential class members and the potential size of the damages was reliable enough to proceed. The data, Think Finance's consumer-level account information, became available thanks to Think Finance's bankruptcy case in Texas and a class action in Virginia, the filing noted.

The data "has been used in at least three proceedings to effectuate class action settlements," Judge Orrick said.

While the defendants had pointed to one error in the data regarding a plaintiff's residency, the error wasn't enough to undermine the entire data set, the order said.

"Despite the error … [the] consumer-level data for each transaction provides a fair basis for identifying the scope of the class and aggregate damages for the California class," Judge Orrick said.

Anna Haac of Tycko & Zavareei LLP, counsel to Brice and the borrowers, praised the court's decision on Monday.

"We are pleased with the judge's ruling," Haac said in an email to Law360. "The unenforceable class action waiver is just one of many ways defendants' alleged lending scheme sought to evade the law and shield itself from liability."

Borrowers have filed similar claims involving Think Finance in Virginia federal court, nabbing a recent **class action settlement** worth $50 million. Think Finance has also **faced probes** from Pennsylvania's attorney general and from the **Consumer Financial Protection Bureau**.

Counsel for the defendants did not immediately respond to requests for comment on Monday.

Brice and the borrowers are represented by Anna C. Haac, Mark A. Clifford and Sabita Soneji of Tycko & Zavareei LLP, Craig C. Marchiando, Leonard A. Bennett and Amy Leigh Austin of Consumer Litigation Associates PC and Kristi C. Kelly and Andrew Guzzo of Kelly & Guzzo PLC.

The defendants are represented by Anna S. McLean and Michael A. Lundholm of Sheppard Mullin Richter & Hampton LLP and Richard L. Scheff, Jonathan Boughrum, Michael C. Witsch and David F. Herman of Armstrong Teasdale LLP.

The cases are Kimetra Brice et al. v. Haynes Investments LLC et al., case number 3:18-cv-01200, and Kimetra Brice et al. v. Mike Stinson et al., case number 3:19-cv-01481, in the U.S. District Court for the Northern District of California, San Francisco Division.

--Additional reporting by Diamond Naga Siu and Matthew Santoni. Editing by Janice Carter Brown.

5/5/2021 (correspondence regarding Woodside Investments settlement proposal)

On May 5, 2021, at 1:04 PM, Heskin, Shane <heskins@whiteandwilliams.com> wrote:

Hi Gaetan,

As you know, I represent Woodside Investments and their owners. CBSG obtained a confession of judgment against them and exercised its enforcement rights in violation of PA law. Among other things, CBSG never provided notice of the judgment or the writ of execution. This, unfortunately, was a common defect in all of the judgments filed by John Hartley. Attached is a copy of the docket and judgment for your convenience. You will notice that there is no affidavit of service on the docket.

I also understand that the Receiver has used the existence of this judgment and writ of execution to secure retirement funds of my client in an escrow account. Given that the underlying judgment and execution thereon violated PA law, I am asking the Receiver to agree to immediately release the funds being held in escrow.

In addition, CBSG has a lien on my client's personal residence. My client is a CA resident, and thus, the lien is unlawful. I have attached a recently filed brief on the issue, as well as a consent order by the State of California on enforceability of MCAs, and their violation of the CA Finance Lenders Law.

If my client is forced to litigate these claims, they would be entitled to 3x the interest paid under controlling CA law. Given the long history with CBSG, that will be a massive claim that could bankrupt the Receiver's assets.

With all of this said, I am not asking to litigate the issue now, nor am I asking that we reach an immediate resolution of the claims. I am simply asking the Receiver to vacate the improper judgment, release the lien on the home, and release the funds currently being held in escrow, which are my client's retirement funds.

I have copied my client's California counsel on this in case he has anything further to add.

Thank you and I look forward to hearing from you.

Regards,
-Shane
<Civil Docket Report - Complete Business Solutions 3-9-21.pdf>
<Confession of Judgment.pdf>
<Confidential Document Form.pdf>
<Exhibit 5.pdf>
<Brief.pdf>

On May 5, 2021, at 10:07 AM, Gaetan J. Alfano <GJA@Pietragallo.com> wrote:

Thanks Shane. As part of the agreed upon sale of the property, your client had agreed to this escrow.

We won't release it but will entertain a realistic settlement proposal.

Thanks again
Sent from my iPhone

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard

On May 5, 2021, at 2:03 PM, Byron Lynch <bllynch44@gmail.com> wrote:

Hello Gaton:

We have made two settlement proposals to you. a 5% in writing and $300,000 in a discussion. You stated that you would discuss with the receiver and get back to me. I am still waiting.

In the interim I have discovered that our basis for the 5% and $300,000.00 proposals was Rich Parks assertion that the Pennsylvania Judgment was final and now, with the aid of Shane, i discover it is not. The 5% proposal was based on nuisance value and still stands. We have sent you an accounting to demonstrate that over 100% of CBSG's money was repaid to it. If you side has any factual or legal basis to support you client's claim of entitlement to the money in escrow please tell me what it is.

Shane and I are happy to work toward a resolution but that effort needs to be reciprocal. Our frustration is that we don't preceive an effort on your firms part to resolve this matter, or in the alternative, stipulate to relief from the stay to allow the Florida Court to resolve it.

Thanks for your time. Please respond.

Byron

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Date: Wednesday, May 05, 2021, 3:25 PM
To: Byron Lynch <bllynch44@gmail.com>
Cc: Heskin, Shane <heskins@whiteandwilliams.com>, Eric Soller <EGS@Pietragallo.com>
Subject: Re: Woodside Investment

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

It is not acceptable. Please consider a more realistic offer. Thank you

Sent from my iPhone
Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard
PIETRAGALLO
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Wednesday, May 5, 2021 3:29 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>; Byron Lynch <bllynch44@gmail.com>
Cc: Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside Investment

Gaetan,

Will you agree to lift the litigation stay so this matter can be litigated? The stay is adversely impacting my client's retirement funds and ability to sell their property.

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Date: Wednesday, May 05, 2021, 3:32 PM
To: Heskin, Shane <heskins@whiteandwilliams.com>, Byron Lynch <bllynch44@gmail.com>
Cc: Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside Investment

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Not at the present time. We will consider a more realistic offer.

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard
PIETRAGALLO
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

From: Heskin, Shane <heskins@whiteandwilliams.com>
Sent: Wednesday, May 5, 2021 3:34 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>; Byron Lynch <bllynch44@gmail.com>
Cc: Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside Investment

We are not bidding against ourselves. Please provide a counter.

From: Gaetan J. Alfano <GJA@Pietragallo.com>
Date: Wednesday, May 05, 2021, 3:41 PM
To: Heskin, Shane <heskins@whiteandwilliams.com>, Byron Lynch <bllynch44@gmail.com>
Cc: Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside Investment

CAUTION: This message originated outside of the firm. Use caution when opening attachments, clicking links or responding to requests for information.

Shane – 5% is not a realistic offer and is not worth countering.

Gaetan J. Alfano, Esquire
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Office: (215) 988-1441 | Fax: (215) 754-5181
GJA@Pietragallo.com| BIO|vCard
PIETRAGALLO
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Wednesday, May 05, 2021, 4:34 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>, Byron Lynch <bllynch44@gmail.com>
Cc: Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside Investment

How is that not a realistic offer? CBSG is a criminal enterprise and the loans are illegal. If litigated, CBSG would be paying us money plus our fees. CBSG has already received their principal back and then some. Anything over principal is a windfall for the Receiver. It would also provide a release of claims against the investors. Judge Sanchez has already upheld our RICO claims against CBSG and their investors. Plus, all of the regulatory bodies, including those in CA, NY and NJ, are cracking down on MCAs. The Receiver is also in possession of their emails and internal documents so it knows CBSG engaged in criminal activity and is now using the fruits of that criminal conduct in the collection of an unlawful debt.

If you will not counter and will not agree to lift the stay, we will be forced to file our own motion seeking relief from the stay. These clients are victims yet they are still willing to pay a reasonable amount of interest. I just don't understand how you can reject payback of principal plus an interest rate of 6% when interest rates are at historic lows.

What interest rate do you feel is reasonable?

5/21/2021

JAMES_DAVIS_II_et_al_v_JAMES_DAVIS_II_et_al_DECISION_AND_ORDER_24.pdf
115 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Friday, May 21, 2021, 8:10 AM
To: Gaetan J. Alfano <GJA@Pietragallo.com>, Joseph B. Shumofsky <jshumofsky@sillscummis.com>
Cc: Bradley Sharp <bsharp@dsiconsulting.com>, George E. Shoup III (gshoup@dsiconsulting.com) <gshoup@dsiconsulting.com>, Richard Sapinski <RSAPINSKI@sillscummis.com>
Subject: RE: B & T

You should be aware of the attached. NY law applies, not PA. Judge Sanchez has already ruled that CBSG's choice of law provision is unenforceable and upheld our RICO claims. If the stay is lifted, CBSG and its investors will be exposed to hundreds of millions in damages. If the Receiver wants to discuss an equitable settlement, we remain open to negotiations. If not, the Receiver is hereby on notice that any effort to collect upon this debt constitutes the collection of an unlawful debt under RICO. The interest rate is more than twice the amount permitted under NY law.

7/13/2021

TOURMAPPERS NORTH AMERICA, LLC dba & JULIE KATZ v. COMPLETE BUSINESS SOLUTIONS GROUP, INC., D...
91 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Tuesday, Jul 13, 2021, 2:11 PM
To: Daniel J. Stermer <DStermer@DSIConsulting.com>, Gaetan Alfanso <GJA@Pietragallo.com>, Eric Soller <EGS@Pietragallo.com>
Subject: FW: [Cleaned] FW: TourMappers North America, LLC and Julie Katz v. Complete Business Solutions Group 01-20-0005-3591

Arbitration award attached.

9/13/2021

CapCall_ LLC v. Foster _In re Shoot the Moon_ LLC__ 2021 Bankr. LEXIS 2482.pdf
443 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Monday, Sep 13, 2021, 2:46 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>
Cc: Byron <bllynch44@gmail.com>, Eric Soller <EGS@Pietragallo.com>
Subject: RE: Woodside v. CBSG

Hi Gaetan,

Please see the attached recent decision concerning the legality of MCA agreements.

Regards,
-Shane

10/21/21

Adar Bays_ LLC v. GeneSYS ID_ Inc._ 2021 N.Y. LEXIS 2206.pdf
248 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Thursday, Oct 21, 2021, 2:53 PM
To: Gaetan Alfanso <GJA@Pietragallo.com>
Subject: NY Court of Appeals Decision

Hi Gaetan,

Attached is an important usury decision that just came out last week from NY's highest court. Just FYI.

White and Williams LLP
Shane Heskin
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6329 | Fax 215.864.7123
heskins@whiteandwilliams.com | whiteandwilliams.com

11/3/2021

Wing Tel, Inc. - Demand Letter.pdf
294 KB

CapCall_ LLC v. Foster _In re Shoot the Moon_ LLC__ 2021 Bankr. LEXIS 2482.pdf
278 KB

NRO v. Funding Metrics Decsision.pdf
33 KB

Sanchez Decision.pdf
166 KB

Fleetwood-Richmond Decision.pdf

McNider Decision (Erie County Motion to Dismiss).pdf

Gaetan:

Please be advised that I represent the above merchant in this matter.

As I have repeatedly advised, the attached demands by the Receiver constitute the collection of an unlawful debt under RICO. This merchant is a NY company, and the letter was sent in NY. Contrary to the assertions in the attached letter, counsel for the owners of CBSG has admitted in open court numerous times that the transactions are fully secured loans. CBSG is now judicially estopped from arguing otherwise.

I again attach a series of decisions upholding RICO claims, including one from the Eastern District of Pennsylvania upholding not just the RICO claims, but also class action claims. In a separate decision, the same Court refused to force the choice of law provision because usury was against the strong public policy of Texas. The same reasoning applies in NY.

As one New York court explained:

> [u]sury laws are a declaration of the State's public policy. The First Department has characterized usury as a question of supervening public policy. *See Guerin v. New York Life Ins. Co.*, 271 AD 110, 62 N.Y.S.2d 805 (1st Dept 1946). The Court of Appeals has stated in *Schneider v Phelps* (41 NY2d 238, 243, 359 N.E.2d 1362, 391 N.Y.S.2d 568 (1977)), "[the] purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation." Further, it has been reasoned from these cases that "the policy underlying our State's usury laws is in fact of a fundamental nature."

Clover Wine, Inc. v 999 Fleet Corp., 2007 WL 5204767 (N.Y. Sup. Ct. Oct. 12, 2007); see also Madden v. Midland Funding, LLC, 2017 U.S. Dist. LEXIS 27203, *28-29 (S.D.N.Y. Feb. 27, 2017) ("A number of cases have applied New York law — despite the parties' choice of another forum's law — because New York's usury prohibition constitutes a fundamental public policy.) (citing *Am. Equities Grp.*, 2004 U.S. Dist. LEXIS 6979, 2004 WL 870260, at *9 ("New York has a strong public policy against interest rates which exceed 25%, which policy must be enforced."); *In re McCortel Pub'g, Inc.*, 96 B.R. 763, 769 (Bankr. S.D.N.Y. 1988) (holding that enforcing New Jersey law would violate New York's "strong public policy against interest rates which exceed 25%, which policy must be enforced"); *Arch*, 853 N.Y.S.2d at 446 ("New York has a strong public policy against interest rates which are excessive and this is a policy the courts must enforce."); *N. Am. Bank, Ltd. v. Schulman*, 474 N.Y.S.2d 383, 387 (N.Y. Sup. Ct. 1986) ("[T]he policy underlying our state's usury laws is in fact of a fundamental nature."); *Guerin v. N.Y. Life Ins. Co.*, 62 N.Y.S.2d 805, 810 (1st Dep't 1946) ("Usury is a question of supervening public policy and relates to charges which are in themselves prohibited."); *State ex rel. Cooper v. Western Sky Fin., LLC*, 2015 NCBC LEXIS 67, at *28 (N.C. Super. Ct. 2015) ("The North Carolina usury statute makes clear that "[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws."); *O'Brien v. Swanson Hayden Stove, Inc.*, 586 P.2d 830, 833-34 (Wash. 1978) (disregarding choice-of-law provision based on usury statute).

The New Jersey Superior Court has likewise held that the purpose of a criminal usury statute is to protect its citizens from usury even if, like here, the funds originate from another state:

> We have no doubt that the evil sought to be remedied by N.J.S.A. 17:11C-1 et seq. is the charging of excessive interest to New Jersey consumers. That evil is of such a nature that we are confident the Legislature did not intend to discriminate on the basis of the source of supply. Rather, it endeavored to protect residents of this State from that evil irrespective of whether its source was in-state or out-of-state.

Turner v. Aldens, Inc., 433 A.2d 430, 442-44 (N.J. Super. 1981).

The California Appeals Court reached the same irrefutable conclusion:

> [T]he Legislature, in expressly preventing any attempt to avoid its provisions by making loans outside the state, by voiding contracts made in violation of the Finance Lenders Law and in creating a licensing scheme through which it directly regulates the finance lenders market, has made it clear that the Finance Lenders Law is a matter of significant importance to the state and, like the provisions of Corporate Securities Law of 1968 and the CLRA, is fundamental and may not be waived.

Brazil v. Dirty Lean Co., Ltd., 164 Cal. App. 4th 1352, 1326, 80 Cal. Rptr. 3d 275, 284 (Cal. App. 2008); see also *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014) (holding New York usury laws applied despite choice of law provision); *W. Sky Fin., LLC v. State ex rel. Olens*, 799 S.E.2d 157, 166 (Ga. 2016) ("Again, the police power to enforce the criminal laws of this State cannot be defeated by the efforts of parties to an agreement to contract around it."); *Ginsberg Bookkiller, Inc. v. Chandler*, 518 S.E.2d 343 (2006) ("The parties to a private contract who admittedly make loans to Georgia residents cannot, by virtue of a choice of law provision, exempt themselves from investigation for potential violations of Georgia's usury laws."); *Western Sky*, 2015 NCBC LEXIS 67, at *67 (N.C. Sup. Ct. Aug. 27, 2015) (same).

Furthermore, the overwhelming trend of NY decisions have found that MCA agreements may be criminally usurious loans. *See CapCall, LLC v. Foster (In re Shoot the Moon LLC)*, Adv. Proc. No. 17-ap-00028, 2021 Bankr. LEXIS 2482 at *20 (Bankr. Mont. Sept. 10, 2021) (finding that under either New York or Montana law MCA agreement was a loan because there was no transfer of risk or benefits of ownership from merchant to MCA company); *Funding Metrics v. NRO Boston, LLC*, Index No. 04204/2016, 2015 N.Y. Misc. LEXIS 4878, at *10 (N.Y. Sup. Ct., August 28, 2015) ("In short, there is no competent evidence that QFC 'purchased' the NROs' receivables. The NROs retained ownership of the receivables, were required to collect them, bore all risk of non-collection, gave QFC a guaranty on the money advanced that was absolutely repayable during a fixed time period with calculated interest that exceeds the legal rate."); *McNider Kier, LLC v. Yellowstone Capital, LLC*, Index No. 806756/2020, 2018 N.Y. Misc. LEXIS 6165 at *5 (N.Y. Sup. Ct. Erie Cty. Nov. 19, 2018) (denying MCA companies' motion to dismiss usury and RICO claims for collection of an unlawful debt); *NRO Boston LLC v. Yellowstone Capital LLC*, Index No. 037005/2019, 72 Misc. 3d 267, 273-274(N.Y. Sup. Ct. Rockland Cty. April 9, 2021) (proposed amended complaint asserted plausible RICO violation for collection an unlawful debt against owner of an MCA company); *Dash v. Richmond Capital Group*, 104 A.D.3d 516, 517 (1st Dep't 2013) (plaintiff sufficiently alleged that MCA agreements were loans subject to usury laws and RICO); *Pearl Capital Risk Ventures, LLC v. RDN Constr.*, Index No. 705310/13, 54 Misc. 3d 470, 475 (N.Y. Sup. Ct. Kings Cty. Dec. 25, 2016) ("The court comes to the inevitable conclusion that the real purpose of the [MCA] agreement was for plaintiff to lend money to defendants at the usurious interest rate set forth therein, and that defendant[s] agreed to borrow money based on same usurious terms directed by plaintiff. Denominating a loan document by another name, as in this case, by calling it a 'Merchant Agreement,' does not shield it from the judicial determination that it contemplates a criminally usurious contract."); *Fleetwood Servs., LLC v. Ram Capital Funding*, Case No. 20-cv-5128(JL), 2022 U.S. Dist. LEXIS 94341 *5-7 (S.D.N.Y. May 19, 2022) (complaint asserted valid RICO claim against MCA owner for the collection of an unlawful debt); *LG Funding LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 364 (1st Dep't 2020) (denying MCA companies motion to dismiss merchant's usury defense); *Topnotch Funding LLC v. Simco Land Dev. LLC*, Index No. 604882/2020, 2021 NYLJ LEXIS 776 at *5 (N.Y. Sup. Ct. Nassau Cty. Aug. 5, 2021) (denying MCA company summary judgment with respect to merchant's usury defense); *Eln Cap v. Lee's Foodservice Parts & Repairs*, Index No. 2021, N.Y. Misc. LEXIS 1486 at *6 (N.Y. Sup. Ct. N.Y. Cty. April 15, 2021) (finding questions of fact existed concerning whether MCA agreement was a usurious loan so as to preclude summary judgment in favor of MCA); *In re AY Wines, Inc. v. CB Capital Funding LLC*, Index No. 127355-2020, 2020 N.Y. Misc. LEXIS 4642 (N.Y. Sup. Ct. Ontario Cty. Aug. 19, 2020) (on a motion for a preliminary injunction, merchant established likelihood of success that MCA agreement was criminally usurious loan); *LG Funding, LLC v. Caribbean Linked Shipping, Inc.*, Index No. 515962/2016, 2020 N.Y. Misc. LEXIS 2488 at *7-10 (N.Y. Sup. Ct., Kings Cty, June 3, 2020) (refusing to dismiss merchant's claim that MCA agreement constituted a criminally usurious loan); *GMF Grp. Inc. v. Unique Funding Sols., LLC (In re GMF Grp., Inc.)*, 606 B.R. 467, 480 (Bankr. N.D. Ga. Aug. 9, 2020) (finding, as a matter of law, that MCA contract was a criminally usurious loan under New York law); *Green Partners LLC v. Merch. Cash & Capital*, Case No. 11-00484-CAS (MRWx), 2011 U.S. Dist. LEXIS 172116 at *18 (C.D. Ca. Aug. 1, 2011) ("It is apparent that the only purpose of the [MCA] transactions was for loan money at a usurious rate of interest; therefore, the Court finds the subject transactions are loans.); *NRO Boston v. Funding Metrics*, Case No. 17-cv-5939, 2018 U.S. Dist. LEXIS 230152 at *1 n.1 (E.D. Pa. May 24, 2018) (denying MCA company's motion to dismiss merchant's RICO claims based upon collection of an unlawful debt).

As I have previously advised the Receiver, numerous governmental agencies have taken action to enjoin the unlawful actions by MCA companies, which include the NY AG, the NJ AG, and the FTC. Importantly, both the NY AG and the NJ AG have found that the specific conduct of MCAs demonstrated that the parties treated the MCAs as absolutely repayable loans, and thus were subject to NY's criminal usury laws. Again, the principals of CBSG have admitted in open court that the CBSG transactions are fully secured loans. The Receiver also has access to all of CBSG's business records so it is on notice of the criminal nature of these transactions.

Accordingly, the Receiver has no credible, good-faith basis to collect upon any CBSG transaction involving a NY resident or company. To be sure, the highest court of NY recently held that usury is the strong public policy of NY, and thus, loans that exceed the 25% usury cap are void ab initio in *Adar Bays* (attached). As a result, the borrower owes no obligation to pay either principal or interest.

Respectfully,

6/17/2022

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Friday, Jun 17, 2022, 4:15 PM
To: Gaetan Alfanso <GJA@Pietragallo.com>
Subject: FW: Fwd: CBSG Par Funding :: Returned Settlement Payment :: NSF :: MBM GROUP LLC D/B/A MANTRA BOUTIQUE MANAGEMENT D/B/A MBM GROUP

Hi Gaetan,

Please be advised that I am representing the below client.

I am again attaching a decision from the SDNY holding that an MCA was a loan as a matter of law under similar facts. Like the MCA at issue in Fleetwood, the MCA here is a loan on its face because, in addition to Par's abusive collection tactics, admitting the inability to pay debts is an express default under the agreements.

Please direct Mr. Wheeler to cease and desist all further collection attempts. The merchant is a NY resident.

Regards,
-Shane

6/27/2022

22cv1245 - June 27, 2022 - Opinion and Order on MTD.pdf
271 KB

From: Heskin, Shane <heskins@whiteandwilliams.com>
Date: Monday, Jun 27, 2022, 2:53 PM
To: Gaetan Alfanso <GJA@Pietragallo.com>
Subject: FW: Haymount v. GoFund Advance | 22-cv-1245 (JSR) | Opinion and Order

Hi Gaetan,

Another one placing the Receiver on notice.

Exhibit 3

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO.** _____
v.	:	**DATE FILED:** _____
RENATO GIOE **a/k/a "Gino"**	: : : :	**VIOLATIONS:** **18 U.S.C. § 894(a) (conspiracy to use extortionate means to collect an extension of credit – 1 count)** **18 U.S.C. § 894(a) (extortionate collections of credit – 2 counts)** **Notice of forfeiture**

INFORMATION

COUNT ONE

THE UNITED STATES ATTORNEY CHARGES THAT:

At all times material to this information:

1. Defendant RENATO GIOE worked for the collections department for Complete Business Solutions Group, Inc., doing business as Par Funding ("Par Funding"), and at the direction of Person No. 1, known to the United States Attorney, acted as an "enforcer" and used extortionate means, including express and implied threats of violence, to collect payments from its customers.

2. From at least 2013 through in or about July 2020, Par Funding was in the business of funding businesses ("merchant-customers") through short-term financing transactions, referred to by Par Funding as merchant-cash advances ("MCAs"). In these transactions, Par Funding purported to purchase these merchant-customers' future receivables at a discounted price. The purchase price was given to the merchant-customer – typically in a lump

sum – with the expectation that the merchant-customer would use the funds to operate its business. The merchant-customer typically repaid Par Funding the purchase price advanced to it plus an additional amount, which was typically 30% or more of the purchase price. Par Funding typically collected these repayments in installments through daily or weekly debits from the merchant-customer's bank accounts.

3. From at least 2013 through in or about July 2020, Person No. 1 controlled Par Funding's day-to-day operations and owned it indirectly through his wife, who served as his nominee. This structure was designed to hide Person No. 1's control of Par Funding from the outside world, including from investors, due to Person No. 1's significant criminal history, including for convictions of grand larceny and money laundering in connection with a multi-million-dollar fraud.

4. Par Funding's principal place of business was at 141 N. 2nd Street, Philadelphia, Pennsylvania and then 20-22 N. 3rd Street, Philadelphia, Pennsylvania, with an accounting office based at 205 Arch Street, Philadelphia, Pennsylvania.

5. Fast Advance Funding was an entity affiliated with Par Funding. Fast Advance Funding was incorporated in Pennsylvania in July 2013. This entity was an MCA company that at times used the same addresses in Philadelphia that Par Funding used. Fast Advance Funding's 2013 corporation filing with the Pennsylvania Department of State listed its address as 141 North 2nd Street, Philadelphia, Pennsylvania, which was then Par Funding's address. Throughout this conspiracy, Fast Advance Funding's MCAs were underwritten, funded, and collected by the same employees of Par Funding and for all practical purposes functioned as the same entity as Par Funding.

6. Defendant RENATO GIOE worked for Par Funding from approximately 2013 through 2018 as a contractor for Par Funding's collections department. During this time, defendant GIOE worked out of Par Funding's Philadelphia offices, where he reported to and took direction from Person No. 1. Defendant GIOE performed this work through a limited liability company formed in Delaware called Stern Group & Associates. Person No. 1 played a direct role in setting up defendant GIOE's limited liability company.

7. Par Funding's collections department was responsible for collecting funds from merchant-customers who did not make their payments on time. Person No. 1, and defendant RENATO GIOE at Person No. 1's direction, contacted delinquent borrowers via phone calls, text messages, and personal visits to their homes and businesses to make express and implied threats of violence to the merchant-customers and their families, such as threats to stick a fork in a merchant-customer's head or to cut off the merchant-customer's hands. The collections department also used various other techniques to harass delinquent merchant-customers, including by making repeated phone calls and emails to representatives of the merchant-customers as well as the merchant-customers' family members, friends, neighbors, religious organizations, and schools.

8. On or about July 27, 2020, the United States District Court for the Southern District of Florida appointed a receiver to operate Par Funding and many of its related entities including Fast Advance Funding.

LOANS MADE BY PAR FUNDING AND FAST ADVANCE FUNDING AND COLLECTED BY EXTORTIONATE MEANS

9. On or about July 22, 2014, Fast Advance Funding agreed to provide approximately $8,000 to Victim Business No. 1, owned by Extortion Victim No. 1, which operated several barbershops in Philadelphia, Pennsylvania. This funding was advanced pursuant to an MCA agreement that required Victim Business No. 1 to repay a total of $10,640 over 100 daily payments. Fast Advance Funding and Par Funding subsequently provided additional funding to Victim Business No. 1 through additional agreements, some of which were refinancing agreements – known as "reload" agreements – that incorporated Victim Business No. 1's unpaid balance into a new, larger balance. According to Par Funding's records, Par Funding advanced an approximate total of $120,158.12 to Victim Business No. 1 pursuant to the parties' various MCA agreements.

10. On or about November 30, 2015, Par Funding agreed to provide approximately $118,132 to a technology company, Victim Business No. 2, in Los Angeles, California, and co-owned by Extortion Victims No. 2 and 3, pursuant to an MCA agreement that required Victim Business No. 2 to pay Par Funding at a 1.42 factor rate over 132 payments, for a total repayment amount of $170,400. Victim Business No. 2 subsequently entered into additional "reload" agreements, which increased Victim Business No. 2's debt to Par Funding. According to Par Funding's records, Par Funding advanced an approximate total of $3,590,150 to Victim Business No. 2 pursuant to the parties' various MCA agreements.

11. On or about October 7, 2016, Par Funding agreed to provide approximately $75,000 to a retail hardware business, Victim Business No. 3, owned by Extortion Victim No. 4, with a business address in Lancaster County, Pennsylvania. Par Funding provided

the funds pursuant to an MCA agreement that required Victim Business No. 3 to pay back $106,500 in 132 business days. Victim Business No. 3 subsequently entered into additional "reload" agreements, which increased Victim Business No. 3's debt to Par Funding. According to Par Funding's records, Par Funding advanced an approximate total of $179,125 to Victim Business No. 3 pursuant to the parties' various MCA agreements.

12. On or about October 11, 2017, Par Funding agreed to provide approximately $325,000 to a real estate company, Victim Business No. 4, owned by Extortion Victim No. 5, with a business address in Miami, Florida. Par Funding provided the funds pursuant to an MCA agreement that required Victim Business No. 4 to pay back $455,000 in 120 business days. Victim Business No. 4 subsequently entered into additional "reload" agreements, which increased Victim Business No. 4's debt to Par Funding. According to Par Funding's records, Par Funding advanced an approximate total of $4,135,624 to Victim Business No. 4 pursuant to the parties' various MCA agreements.

13. From no later than in or about 2016 until at least in or about July 2020, in the Eastern District of Pennsylvania and elsewhere, defendant

RENATO GIOE,
a/k/a "Gino,"

knowingly conspired and agreed with Person No. 1, known to the United States Attorney, and with others known and unknown to the United States Attorney to participate in the use of extortionate means within the meaning of Title 18, United States Code, Section 891(7), to collect and attempt to collect extensions of credit from multiple merchant-customers, including Extortion Victim No. 1, Extortion Victims No. 2 and 3, Extortion Victim No. 4, and Extortion

Victim No. 5 , all persons known to the United States Attorney, in violation of Title 18, United States Code, Section 894(a).

MANNER AND MEANS

It was part of the conspiracy that:

14. Person No. 1 directed defendant RENATO GIOE to travel throughout the United States to make unannounced personal visits to the businesses and homes of representatives of the merchant-customers, in order to make hostile, threatening, and intimidating communications to these representatives.

15. Defendant RENATO GIOE traveled throughout the United States and made unannounced personal visits to representatives of merchant-customers and made hostile threatening and intimidating communications to those representatives.

16. During these collection efforts, and often in conjunction with defendant RENATO GIOE's personal visits to representatives of the merchant-customers, Person No. 1 made hostile, threatening, and intimidating electronic and telephone communications to these representatives. After defendant RENATO GIOE visited these representatives of the merchant-customers, Par Funding and Person No. 1 continued to collect funds from the merchant-customers and continued to make hostile, threatening, and intimidating electronic and telephone communications as necessary to collect on delinquent credit

OVERT ACTS

In furtherance of the conspiracy, and to accomplish its object, defendant RENATO GIOE, along with Person No. 1, and others both known and unknown to the United

States Attorney, committed the following overt acts, among others, in the Eastern District of Pennsylvania and elsewhere:

1. On multiple occasions beginning no later than in or around early 2016, at a time when Victim Business No. 1 was financially unable to meet Par Funding's repayment terms, defendant RENATO GIOE – at the direction of Person No. 1 – appeared unannounced at Victim Business No. 1's barbershops in Philadelphia on a weekly basis, where defendant GIOE demanded cash payments from Extortion Victim No. 1.

2. When Extortion Victim No. 1 did not have sufficient cash to meet defendant RENATO GIOE's demands, defendant GIOE made hostile, threatening, and intimidating statements to Extortion Victim No. 1, including that he would physically harm Extortion Victim No. 1. Par Funding continued to collect repayments made by Extortion Victim No. 1 after these threats were made until on or about September 16, 2019.

3. On or about February 15, 2018, at a time when Victim Business No. 2 was financially unable to meet Par Funding's repayment terms:

a. At the direction of Person No. 1, defendant RENATO GIOE appeared unannounced at Victim Business No. 2's Los Angeles office and demanded to speak with Extortion Victim No. 2. Defendant GIOE then spoke to Extortion Victim No. 3 and demanded payment on behalf of Par Funding.

b. While at Victim Business No. 2's office, defendant RENATO GIOE made hostile, threatening, and intimidating statements to Extortion Victim No. 3, including telling him that the fact that Victim Business No. 2 owed money to Par Funding could affect "wives, households, and children" and could make widows, and telling Extortion Victim

No. 3 a story about a suspicious car accident involving another person from whom defendant GIOE was trying to collect money on behalf of Par Funding.

4. On or about February 16, 2018:

a. Defendant RENATO GIOE returned to Victim Business No. 2's Los Angeles office and again demanded that Extortion Victim No. 3 "just pay the fucking money," while denying that he had threatened Extortion Victim No. 3 the previous day.

b. Defendant RENATO GIOE participated in a telephone call with Person No. 1 in the presence of Extortion Victims No. 2 and 3 using the speakerphone function, during which Person No. 1 told defendant GIOE and Extortion Victims No. 2 and 3 that defendant GIOE knew "what to do with this guy [Extortion Victim No. 3]" and to "take care of him [Extortion Victim No. 3]." Par Funding continued to collect repayments made by Extortion Victims No. 2 and 3 after these threats were made until on or about July 10, 2020.

c. Defendant RENATO GIOE texted Person No. 1 and Person No. 2, another Par Funding employee, known to the United States Attorney, in a group message and stated, "I'm on top of [a New York merchant, known to the United States Attorney]. I'll find out tomorrow with you. Let me feel him. By the way [Extortion Victim No. 3] is scared could not believe I arrived." Person No. 1 then replied, in pertinent part, "Get all monies in. Also you got a few others."

5. In or around the Spring of 2017, at a time when Victim Business No. 3 was financially unable to meet Par Funding's repayment terms, defendant RENATO GIOE – at the direction of Person No. 1 – appeared unannounced at Victim Business No. 3's retail store, where defendant GIOE made hostile, threatening, and intimidating statements to Extortion

Victim No. 4 while Person No. 1 was listening on the phone, causing Extortion Victim No. 4 to cry. Par Funding continued to collect repayments made by Extortion Victim No. 4 after these threats were made until in or about April 2018.

6. On or about June 2, 2018, at a time when Victim Business No. 4 was financially unable to meet Par Funding's repayment terms, Person No. 1 texted Extortion Victim No. 5, stating "U believe I got to send Gino [defendant RENATO GIOE] at you on Monday to get my payments. Btw your paying for these trips. He isn't cheap." Person No. 1 then texted Extortion Victim No. 5 along with defendant GIOE, stating that defendant GIOE would visit with Extortion Victim No. 5 on Monday, June 4, 2018, "with the hopes of receiving our funds on Monday by business close." Person No.1 then asked Extortion Victim No. 5 in a text, "If this cannot be accomplished, would u mind if Gino [defendant GIOE] could be a guest at your home until this can be procured." When Extortion Victim No. 5 responded that he would be willing to let defendant GIOE stay at Extortion Victim No. 5's beach house, Person No. 1 responded, "I thought it would be nice if u stayed together."

7. On or about June 4, 2018:

a. At the direction of Person No. 1, defendant RENATO GIOE arrived at Extortion Victim No. 5's office in Florida, demanded repayment, acted in a hostile and intimidating manner, and refused to leave for approximately eight hours.

b. While defendant RENATO GIOE was at Extortion Victim No. 5's office, defendant GIOE and Extortion Victim No. 5 spoke by phone with Person No. 1 about repayment of the funds advanced to Victim Business No. 4. Person No. 1 and Extortion Victim No. 5 also exchanged text messages, during which Extortion Victim No. 5 pleaded with Person

No. 1, "Can you please get Gino [defendant GIOE] the fuck out of my office, i can't have this shit! I get it, but this doesn't help and I don't want any kind [of] scene."

c. Defendant RENATO GIOE took Extortion Victim No. 5's Rolex watch, which Extortion Victim No. 5 had offered as a gift of appeasement, prompting Extortion Victim No. 5 to plead by text with Person No. 1, "Please call off the hounds.. [sic] and by that I mean that animal [defendant GIOE] you sent down here."

8. Par Funding continued to collect repayments made by Extortion Victim No. 5 after these threats were made until on or about January 31, 2020.

All in violation of Title 18, United States Code, Section 894(a).

COUNT TWO

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:

From in or about 2016 through in or about April 2021, in the Eastern District of Pennsylvania, defendant

RENATO GIOE,
a/k/a "Gino,"

knowingly used extortionate means within the meaning of Title 18, United States Code, Section 891(7), to collect and attempt to collect extensions of credit from Extortion Victim No. 6, a person known to the United States Attorney.

In violation of Title 18, United States Code, Section 894(a).

COUNT THREE

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:

From in or about 2018 through in or about September 22, 2019, in the District of New Jersey, and elsewhere, defendant

RENATO GIOE,
a/k/a "Gino,"

knowingly used extortionate means within the meaning of Title 18, United States Code, Section 891(7), to collect and attempt to collect extensions of credit from Extortion Victim No. 7, a person known to the United States Attorney.

In violation of Title 18, United States Code, Section 894(a).

NOTICE OF FORFEITURE

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:

1. As a result of the violation of Title 18, United States Code, Section 894(a), set forth in this information, defendant

RENATO GIOE,
a/k/a "Gino,"

shall forfeit to the United States of America any property, real or personal, that constitutes or is derived from proceeds traceable to the commission of such violations.

2. If any of the property subject to forfeiture, as a result of any act or omission of the defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 28, United States Code, Section 2461(c), incorporating Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant up to the value of the property subject to forfeiture.

All pursuant to Title 28, United States Code, Section 2461(c) and Title 18, United States Code, Section 981(a)(1)(C).

JACQUELINE C. ROMERO
UNITED STATES ATTORNEY

No. 22- _ _ _ _ _ _ _ _ _ _

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania
Criminal Division

THE UNITED STATES OF AMERICA

vs.

RENATO GIOE
a/k/a "Gino"

INFORMATION
Count
18 U.S.C. § 894(a) (conspiracy to use extortionate means to collect an extension of credit – 1 count); 18 U.S.C. § 894(a) (extortionate collections of credit – 2 counts); Notice of Forfeiture

A true bill.

_____
Foreman

Filed in open court this _____day,
Of _____A.D. 20_____

_____
Clerk

Bail, $_____

Exhibit 4

UNITED STATES DISTRICT COURT

for the

Eastern District of Pennsylvania

United States of America v. James LaForte	)))))))	Case No. 23-mj-464

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of February 28, 2023 in the county of Philadelphia in the Eastern District of Pennsylvania, the defendant(s) violated:

Code Section	*Offense Description*
18 U.S.C. §§ 1505, 1513(b)	Obstruction of proceedings, retaliation against party or witness causing bodily injury

This criminal complaint is based on these facts:

See attached Affidavit.

☑ Continued on the attached sheet.

/s/ John Murray
Complainant's signature

SA John Murray, FBI
Printed name and title

Sworn to before me and signed in my presence.

Date: 03/05/2023

/s Hon. Richard A. Lloret
Judge's signature

City and state: Cherry Hill, New Jersey

HON. RICHARD A. LLORET, US MAG. JUDGE
Printed name and title

AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

I, John Murray, being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. I make this affidavit in support of an application for a criminal complaint for JAMES LAFORTE for violations of 18 U.S.C. § 1513(b) (retaliation against a party or witness causing bodily injury) and 18 U.S.C. § 1505 (obstruction of proceedings).

AGENT BACKGROUND

2. I am employed as a Special Agent of the Federal Bureau of Investigation ("FBI"). I have been employed as an FBI Special Agent since May 2011. In that time, I have participated in numerous investigations of violations of federal criminal law, including organized crime, narcotics, public corruption, money laundering, fraud, and violent crime matters. I have received specialized training from the FBI Academy located in Quantico, Virginia pertaining to these matters, in addition to other training courses. As part of my official duties, I have conducted physical and electronic surveillance, debriefed confidential informants, coordinated consensual monitoring with cooperating witnesses, reviewed financial documents and participated in the execution of numerous search and arrest warrants. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, and am empowered by law to conduct investigations of and make arrests for offenses enumerated in the United States Code, Title 18 and Title 21. Prior to joining the FBI, I graduated from Temple University Beasley School of Law and served as an Assistant District Attorney from 2008 through 2011 with the Philadelphia District Attorney's Office. During my tenure there, I prosecuted violent crimes and narcotics related offenses, in addition to other state violations.

3. Because this affidavit is submitted for the limited purpose of obtaining a criminal complaint, I have not included all information known by me or other agents concerning this investigation. I have set forth only those facts I believe are essential to establish probable cause for the complaint. This affidavit does not exhaust my knowledge or that of other agents of the facts and circumstances surrounding this investigation.

PROBABLE CUASE

4. This affidavit is being submitted for the purpose of establishing that there is probable cause that defendant JAMES LAFORTE violated 18 U.S.C. § 1513(b) (retaliation against a party or witness causing bodily injury) and 18 U.S.C. § 1505 (obstruction of proceedings).

I. Summary

5. This affidavit concerns the efforts by defendant JAMES LAFORTE to cause serious bodily injury to a Philadelphia attorney with the initials G.A., who is presently representing a party at a federal district court lawsuit (discussed below) that is adversarial to JAMES LAFORTE's brother, Joseph LaForte, and Joseph LaForte's wife, Lisa McElhone. As set forth below, there is probable cause to believe that on the afternoon of Tuesday, February 28, 2023, JAMES LAFORTE physically assaulted, and hospitalized, G.A. after G.A. left his business office in Center City, Philadelphia, Pennsylvania. There is probable cause to believe that JAMES LAFORTE's assault constituted a violation of 18 U.S.C. § 1513(b) (retaliation against a party or witness causing bodily injury) and 18 U.S.C. § 1505 (obstruction of proceedings).

II. Background of Par Funding

6. In July 2020, federal law enforcement officers executed search warrants at the principal places of business of Complete Business Solutions Group, Inc., doing business as Par Funding ("Par Funding"), located at 20-22 N. 3rd Street, Philadelphia, Pennsylvania, and 205 Arch Street, Philadelphia, Pennsylvania, as well as at the residence and vacation homes of Joseph LaForte and Lisa McElhone.

7. Par Funding was incorporated in Delaware and its principal place of business was and is in Philadelphia, Pennsylvania. Par Funding held itself out to be a Merchant Cash Advance (or "MCA") and factoring lender.[1]

8. Multiple witness interviews and numerous documents have shown that Par Funding and its agents used fraudulent and extortionate means to collect payments from merchant-debtors to whom Par Funding and its affiliates loaned money, and used fraudulent representations and omissions to induce individuals to invest in Par Funding. Multiple witness interviews and numerous documents have shown that (i) Joseph LaForte operated Par Funding's day-to-day operations,[2] (ii) his brother, defendant JAMES LAFORTE, worked at Par Funding

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[1] MCA and factor funding are commonly used to describe a variety of small business financing that involves the purchase of future receivables by the funder from a merchant.

[2] By way of background, in October 2006, JAMES LAFORTE and Joseph LaForte pleaded guilty to multiple felony counts of grand larceny, money laundering, and conspiracy in Nassau County, New York after the brothers created a law firm in 2004 and falsely held themselves out as attorneys for banks in real estate transactions, Dkt. No. IND-00928N-2006. The LaFortes and other coconspirators defrauded over 30 homeowners of over $14 million dollars over 17 months. For his part in the conspiracy, JAMES LAFORTE was sentenced to 5 to 15 years' incarceration, Joseph LaForte was sentenced to 3 ½ to 10 ½ years' incarceration, and they were both ordered to repay $14.1 million to their victims. Since their release from prison, the $14 million in restitution remains outstanding.

In 2009, JAMES LAFORTE pleaded guilty to violating 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 894 (collection of credit by extortionate means), and 18 U.S.C. § 1951 (interference with

for a period of time, (iii) Lisa McElhone served as its nominal owner and President, (iv) Joseph Louis Cole Barleta served as Par Funding's Chief Financial Officer, (v) Perry Abbonizio raised funds from investors for Par Funding,[3] and (vi) Renato Gioe, a/k/a "Gino," provided collection services to Par Funding.[4]

9. As referenced above, agents have learned through multiple interviews of merchant-debtors that Joseph LaForte directed Par Funding employee Gioe to travel to the business locations and personal residences of merchant-debtors and attempt to intimidate them into making payments through threats of physical violence. Law enforcement interviews with

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commerce by threats or violence) in the United States District Court for the District of New Jersey for conspiring to commit arson in connection with his efforts to collect on a debt, 3:09-cr-00439. He was sentenced to 36 months' incarceration followed by 36 months' supervised release.

In 2009, Joseph LaForte was charged in the United States District Court for the District of New Jersey with conspiracy to operate an illegal gambling business in violation of 18 U.S.C. § 371 (conspiracy) for his participation in operating an offshore gambling enterprise, an offense for which he subsequently pleaded guilty in 2010, 3:09-cr-00941. He was sentenced to 10 months' incarceration followed by three years supervised release.

In 2012, JAMES LAFORTE was charged in a separate case in the United States District Court for the Eastern District of New York for operating an illegal gambling business, in violation of 18 U.S.C. § 1955 (illegal gambling), 1:12-cr-00050-CBA-5. He subsequently pleaded guilty and was sentenced to 17 months' incarceration.

[3] Abbonizio was a consultant for Par Funding who used the title Principal. Abbonizio has admitted to Agents that he was responsible for a significant amount of the company's fundraising efforts from 2016 through mid-2020. On February 15, 2022, Abbonizio entered a guilty plea pursuant to an Information in the Eastern District of Pennsylvania before Judge Mark A. Kearney (23-cr-10) for violation of 18 U.S.C. § 371 (conspiracy to commit wire fraud and securities fraud).

[4] On September 6, 2022, Gioe entered a guilty plea pursuant to an Information in the Eastern District of Pennsylvania before the Honorable Mark A. Kearney (22-cr-279). Gioe pled guilty to violations of 18 U.S.C. § 894(a) (conspiracy to use extortionate means to collect an extension of credit) and 18 U.S.C. § 894(a) (extortionate collections of credit).

merchant-debtors also revealed that Joseph LaForte and defendant JAMES LAFORTE made threats of physical harm to merchant-debtors themselves.

10. Based on multiple interviews and numerous documents, before the appointment of the receiver for Par Funding in July 2020 (discussed below), Joseph LaForte was extensively involved in the daily operations of Par Funding and functioned as its Chief Executive Officer.

11. Through multiple interviews and my review of open-source records, defendant JAMES LAFORTE acted in a supervisory capacity at Par Funding. The review of various documents, including bank records, vehicle documentation, and rental documents, show that that before Par Funding was under the control of the receiver, JAMES LAFORTE lived a life of luxury, residing in expensive high-rise apartments in Manhattan, driving high-end cars, and having large amount of money at his disposal.

III. The SEC Lawsuit Against Par Funding

12. On or about July 24, 2020, the U.S. Securities and Exchange Commission (the "SEC") filed a civil complaint in the United States District Court for the Southern District of Florida against Par Funding, Joseph LaForte, Lisa McElhone, and others associated with Par Funding and/or funds that invested in Par Funding.[5]

13. On or about July 27, 2020, the Florida district court appointed Ryan K. Stumphauzer of Stumphauzer Foslid Sloman Ross & Kolaya, PLLC as the receiver (the

[5] *SEC v. Complete Business Solutions Group, et al.*, 9:20-cv-81205-RAR (S.D. Fl.). All defendants in the above-referenced SEC action eventually settled with the SEC with the exception of one defendant, who subsequently was found liable at trial. Joseph LaForte and Lisa McElhone settled with the SEC in November 2021, and in December 2022, the Florida district court ordered Par Funding, Joseph LaForte, and Lisa McElhone, to pay $163.1 million in "disgorgement" of investors' money and $12.2 million in interest, plus civil penalties totaling $43.7 million.

"Receiver") over Par Funding and many of its related entities. Stumphauzer practices law in Miami, Florida.

14. On behalf of the Receiver, Stumphauzer has offered testimony as a witness in the SEC civil action, including by way of an April 15, 2022 sworn declaration submitted in support of the SEC's Motion for Final Judgements against Joseph LaForte, Lisa McElhone, and others. ECF No. 1214, 20-cv-81205 (S.D. Fl.).

15. On or about July 31, 2020, the Florida district court granted an order permitting G.A., a partner at the law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, to enter his appearance on behalf of the Receiver for Par Funding. The law firm Pietragallo Gordon Alfano Bosick & Raspanti, LLP, is located at 1818 Market Street, Philadelphia, Pennsylvania.

16. G.A. has stated that since that time, he has regularly appeared at every hearing and deposition in that federal case. G.A. has also explained that among his primary responsibilities has been the identification of assets and securing of assets for disgorgement. Those assets have included approximately $100 million of personal and real property under the control of Joseph LaForte and Lisa McElhone. As detailed below, G.A.'s representation of the Receiver for Par Funding has been widely publicized in the Philadelphia media, including as recently as January 12, 2023.

17. As noted, in addition to making regular court appearances on behalf of the Receiver at court hearings, as lead counsel for the Receiver, G.A. has been a visible public figure related to his representation of the Receiver, particularly in news articles featured in the Philadelphia Inquirer and Philadelphia Daily News.[6] At least one of these articles featured

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[6] Par Funding was unprofitable and $144 million in payments to owners made it worse, accountants say, *Philadelphia Inquirer* (Dec. 12, 2020); New kickback allegations rock the Par

G.A.'s image as the most prominent photo in the article. Most recently, on January 23, 2023, an article in the Philadelphia Inquirer reported on the efforts of the court-appointed receiver to forfeit the homes of Joseph LaForte and Lisa McElhone as well as to evict them from their primary residence in Haverford, Pennsylvania. As has been typical with the news reporting of this matter, G.A. was referenced as one of the attorneys representing the court-appointed receiver.[7] A photograph of G.A. is available on his law firm's public website.

18. According to a review of court records and an interview of G.A., on Tuesday, February 28, 2023, shortly before the assault, G.A. addressed the Florida district court via an online hearing regarding the need for Joseph LaForte and Lisa McElhone to pay outstanding bills or vacate their home in Haverford, Pennsylvania.

IV. Participation of JAMES LAFORTE

19. As referenced above, defendant JAMES LAFORTE was an active participant in Par Funding. As set forth below, following the SEC action in July 2020, JAMES LAFORTE played an active role in assisting his brother's defense. On September 17, 2020, a phone number known to be used by JAMES LAFORTE texted a phone number belonging to a Par Funding employee and LaForte associate, Anthony Fazio, the following message: "Do research on receiver." Fazio responded, "I am."[8]

Funding fraud case, *Philadelphia Inquirer* (May 24, 2022); From nail salon to near billionaire: How Par Funding owner amassed a fortune, *Philadelphia Inquirer* (Oct. 8, 2020).

[7] Pay up or leave: Judge threatens to evict Par Funding owners from Haverford home over debt, reporting that Joseph LaForte and Lisa McElhone couple owe $61,000 in overdue rent and property maintenance fees for the Haverford house and two vacation homes, *Philadelphia Inquirer* (Jan. 23, 2023).

[8] On March 30, 2021, Agents executed search warrants at a residence in Philadelphia. The search warrants were issued by the Honorable Carol Sandra Moore Wells, United States Magistrate Judge in the Eastern District of Pennsylvania. The warrants were authorized for both the property

20. In July 2022, the Receiver asked the Florida district court to hold Joseph LaForte and Lisa McElhone in contempt for diverting approximately $5 million for personal expenses from accounts that the Receiver argued should have been under the Receiver's control. The Receiver's motion specifically cited the efforts of JAMES LAFORTE to disperse these funds. The Receiver's motion was co-signed by G.A. as co-counsel for the Receiver. ECF No. 1328, 20-cv-81205 (S.D. Fl.).

21. Defendant JAMES LAFORTE[9] took an active role in responding to the complaint. For instance, agents interviewed a witness who advised that JAMES LAFORTE contacted him/her and attempted to get him/her to sign a declaration that would support the defense.

22. In response to the Receiver's request, defendant JAMES LAFORTE also signed a sworn declaration in support of Joseph LaForte and Lisa McElhone's Response in Opposition to Receiver's Motion for an Order to Show Cause.[10] ECF No. 1385-1, 20-cv-81205 (S.D. Fl.). In this declaration, dated August 29, 2022, JAMES LAFORTE swore to the following:

---

and an iPhone with a telephone number ending x6748. That iPhone was recovered from the property and subsequently searched. As a result of that search, Agents observed the cited text exchange with telephone number ending x6073 with the contact name listed as "Jimmy." Agents have spoken to multiple individuals who have identified that number as being used by JAMES LAFORTE.

[9] Your Affiant notes that on November 15, 2021, the Receiver filed a motion to lift the litigation stay to allow commencement of proceedings against defendant JAMES LAFORTE (as well as Joseph LaForte), who was alleged to have worked with Joseph LaForte to "siphon[] funds legally owned by the Receivership Entities for their personal benefit." ECF No. 949, 20-cv-81205 (S.D. Fl.). On December 17, 2021, the Florida district court granted the Receiver's motion to lift the litigation stay to allow commencement of proceedings against JAMES LAFORTE. ECF No. 1106, 20-cv-81205 (S.D. Fl.). Your Affiant notes that defendant JAMES LAFORTE is not listed on the ECF notices for the SEC litigation.

[10] The motion was submitted by attorneys David Ferguson, Alan Futerfas, and James Kaplan, who have represented Joseph LaForte and Lisa McElhone throughout the SEC action.

> Joseph LaForte is my brother and Lisa McElhone is my sister-in-law. After my brother was arrested and this lawsuit began in July of 2020, I did what I could to help Joe make bail and get good legal counsel. From the beginning of this lawsuit through today, I have helped Joe and Lisa with their legal fees and other expenses as much as I can . . . .
>
> I obtained a $3 Million loan from Financial Mutual in order to help pay Joe and Lisa's attorneys and cover other costs for them . . . .
>
> The loan from Financial Mutual was not paid out to me in a lump sum. Instead, it was made available to me like a line of credit I could draw from. I asked Frank Scarpati to make payments to attorneys and to other professionals for Joe and Lisa's defense and to count those payments as advances against the amount Financial Mutual agreed to lend to me. I asked Financial Mutual to make $492,654 in payments to Alejandro Soto, $431,500 to the Berkowitz accounting firm, $95,000 to Kopelowitz Ostrow P.A., $762,500 to Alan Futerfas, $225,000 to James Froccaro and $350,000 to Michael Bachner . . .
>
> I also made some payments to attorneys and professionals through my company, Bushwick Beer Garden . . . .
>
> I did all of this because I love my brother and sister-in-law and wanted to help them. At the time I arranged for the loan agreement with Financial Mutual I thought the Receivership would be over quickly and that CBSG would go back to being a very profitable business . . . .

23. There is probable cause to believe that defendant JAMES LAFORTE's declaration of August 29, 2022, demonstrates that JAMES LAFORTE has a significant level of familiarity with the SEC lawsuit and the Receiver's role in this litigation, as well as his active involvement in his brother and sister-in-law's civil case with the SEC.

24. As noted above, this declaration was in support of Joseph LaForte and Lisa McElhone's Response in Opposition to Receiver's Motion for an Order to Show Cause, filed on August 29, 2022. In this Response submitted by Joseph LaForte's attorneys, JAMES LAFORTE's name is mentioned 22 times. Joseph LaForte's attorneys included the following arguments in support of their motion:

> Although it is not the Defendants' burden to prove a negative, this response will show that the Receiver has misapprehended various payments from third-parties

> which it points to as evidence of wrong-doing. In particular, the evidence will show that Joseph LaForte's brother, James LaForte, used his personal income, and borrowed money from his personal and business contacts, in order to help pay for the Defendants' legal fees and otherwise assist them in paying their expenses while Defendants' assets are frozen . . . .
>
> However, all of these payments were arranged by Joseph LaForte's brother, James LaForte, out of legitimate monies he was entitled to as part of his efforts to assist his family with their legal problems in their hour of need. (See, generally, James LaForte Declaration, Exhibit 1).

V. JAMES LAFORTE's Assault of G.A. on February 28, 2023

25. As explained below, G.A. reported to law enforcement on February 28, 2023, that he was assaulted on 19th Street in Philadelphia, between Ludlow Street and Chestnut Street. Upon learning this information, FBI agents and other law enforcement went to the scene of the assault and gathered security videos in an effort to identify the assailant. The law enforcement officers obtained voluntarily-provided videos from businesses on the street upon which the assault occurred, as well as surrounding streets, and were able to track the masked assailant to a location on the 2000 block of Market Street where he entered a taxicab heading west. The law enforcement officers then identified the taxicab and determined that it had driven its passenger to the intersection of 23rd Street and St. James Place. Law enforcement officers obtained additional security video from this location. This video showed that the assailant had removed his mask. As explained below, upon reviewing this video from St. James Place, law enforcement officers identified the assailant as JAMES LAFORTE.

26. Since at least early 2019, defendant JAMES LAFORTE has been a subject of FBI investigation. JAMES LAFORTE has been observed on multiple occasions at close range by at least three Special Agents of the FBI since that time, including by your Affiant, Special Agent Robert Lythgoe, and Special Agent Kaitlyn Bush. These three agents have also regularly

reviewed his image, captured during surveillance, as well as driver's licenses/arrests photos. In addition, Special Agent Lythgoe personally spoke with JAMES LAFORTE on July 27, 2020.

27. Your Affiant, Agent Lythgoe, and Agent Bush reviewed the video from St. James Place and have positively identified the person in the St. James Place video as defendant JAMES LAFORTE.

28. Furthermore, a comparison of a law enforcement surveillance photograph taken of defendant JAMES LAFORTE in September 2021 (on the left below) and an image from the St. James Place video (on the right below) provides probable cause to believe that G.A.'s assailant was JAMES LAFORTE.

29. Law enforcement officers also interviewed G.A. regarding the assault on Tuesday, March 28, 2023. He provided the following information:

a. On February 28, 2023, G.A. participated in a court conference with the Florida district court concerning the SEC matter in the Southern District of

Florida. He participated via videoconference from his office at 1818 Market Street, Philadelphia, Pennsylvania. Also appearing on the videoconference from other physical locations were David Ferguson, attorney for JAMES LAFORTE, and Alan Futerfas and James Kaplan, attorneys for Lisa McElhone.

b. Shortly after the conclusion of the videoconference, G.A. left his office and walked south on 19th Street toward Chestnut Street. Approximately halfway up the block, G.A. was struck in the back of the head by an unknown object that he believed to be metal.

c. G.A. turned around and saw a male running away, heading diagonally across the street towards an Enterprise parking garage. G.A. reported that the male was wearing a black jacket, with a dark hoodie, dark sweatpants, and what he believed to be white sneakers.

d. G.A. was then transported by ambulance to a nearby hospital where he was given an MRI examination and treated with seven staples to his head.

30. Later on February 28, 2023, FBI agents spoke with an attorney from G.A.'s law firm regarding the incident. This individual stated that he had responded to the scene to aid G.A.. He explained that at the scene, he observed a broken flashlight on the ground. The attorney recovered the flashlight and released it to the custody of the FBI that evening.

31. At approximately 7 p.m. on February 28, 2023, agents reviewed the scene of the attack and observed a significant amount of blood on the sidewalk at the location described by G.A.as the scene of the assault.

32. During a review of the various videos, agents observed the following:

a. At approximately 3:15 p.m. on February 28, 2023, a white male, subsequently determined to be JAMES LAFORTE, was observed on 19th Street in Philadelphia near the intersection of 19th Street and Ludlow Street. JAMES LAFORTE crossed the street to near the area of the side entrance of 1818 Market Street (G.A.'s firm's building) and then walked back across to the west side of 19th Street.[11] JAMES LAFORTE was observed to be wearing white sneakers, gray sweatpants, a gray hooded sweatshirt, a black winter coat, a black medical mask, a black knit cap, and black gloves.

b. G.A. was then observed walking south on the east side of 19th Street, between Ludlow Street and Chestnut Street, at approximately 3:17 p.m. No one is visible walking close behind G.A.. As G.A. was approximately midway to Chestnut Street, JAMES LAFORTE was observed walking back across to the east side of the street, on a diagonal, towards G.A., who was walking away from him. In the video recording, as JAMES LAFORTE approached G.A. from behind, JAMES LAFORTE increased his pace to a jog. At this point, G.A. and JAMES LAFORTE moved out of the sight of the camera.

c. At approximately 3:17 p.m., approximately six seconds after G.A. and JAMES LAFORTE move out of sight of the camera, JAMES LAFORTE was observed running north on the east side of 19th Street, back from the

[11] For the sake of clarity, the assailant is identified here as JAMES LAFORTE. As explained above, it was not until later, after he removed his face coverings, that he was positively identified.

direction he and G.A. came. He was then observed crossing 19th Street and turning west onto Ludlow Street.

d. JAMES LAFORTE was subsequently observed running west on Ludlow Street, emerging from 20th Street onto Market Street, and then walking across the Market Street to the concourse area of 2001 Market Street.

e. At approximately 3:21 p.m., JAMES LAFORTE was observed removing his black jacket and putting it in a trash can in a concourse area of 2001 Market Street. (Law enforcement officers subsequently recovered a black jacket from this trash can in the concourse area of 2001 Market Street.)

f. JAMES LAFORTE was next observed walking out of the concourse area, back towards Market Street, at approximately 3:22 p.m., this time without his black hat, black jacket, or facemask. His face was not clearly visible on this video. He was observed to be wearing the same gray sweatpants, gray hooded sweatshirt, and white sneakers as before.

g. At approximately 3:22 p.m., JAMES LAFORTE was observed entering a taxicab driving west on Market Street.[12]

h. At approximately 3:27 p.m., JAMES LAFORTE was observed near the intersection of S. 23rd Street and St. James Place. JAMES LAFORTE was observed walking east on St. James Place. Behind him, a taxicab is visible, slowly entering traffic and heading south on S. 23rd Street. JAMES

[12] Agents subsequently identified the taxicab that JAMES LAFORTE entered. The driver recalled driving a white male, described as balding or with a receding hairline, approximately 5'3" or 5'4", from 21st and Market Streets and dropping the man off a few blocks later. JAMES LAFORTE's Pennsylvania Driver's license from 2020 lists his height as 5'6".

LAFORTE is wearing the same clothing as the previously observed individual. During this video, the hood on JAMES LAFORTE's sweatshirt was now down and his full face and head were visible. JAMES LAFORTE was also observed to be holding black objects in his hands that appear consistent with the black knit cap or black gloves worn by the assailant in the earlier videos. The still frame picture in paragraph 25 above was taken from this video.[13]

33. Your Affiant has reviewed the video on the masked assailant before the assault on 19th Street and the video of JAMES LAFORTE walking east on St. James Place and concluded that the body structure and the gait of these two individuals is similar.

34. Public records show that JAMES LAFORTE has registered a Lexus SUV with license plate number NY KJB8165. Law enforcement officers observed this vehicle parked on the street outside the Haverford residence of Joseph LaForte and Lisa McElhone at approximately 7:12 p.m. on March 4, 2023, and approximately noon on March 5, 2023.

[13] Agents are still working to identify additional video evidence of the assault and JAMES LAFORTE's flight from the scene.

CONCLUSION

35. Based on the forgoing, your Affiant believes that there is probable cause to believe that on February 28, 2023, JAMES LAFORTE engaged in a physical attack upon G.A. and in doing so violated 18 U.S.C. § 1513(b) and 18 U.S.C. § 1505.

Respectfully submitted,

/s/ John F. Murray
John F. Murray
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me on March 5th, 2023

/s/ Hon. Richard A. Lloret
Honorable Richard A. Lloret
UNITED STATES MAGISTRATE JUDGE

Exhibit 5

COMPLETE BUSINESS SOLUTIONS GROUP, INC. BROADWAY ADVANCE, LLC, AND FAST ADVANCE FUNDING, LLC, Plaintiffs, v. RADIANT IMAGES, INC. AND GIANNA WOLFE, Defendants.	CIVIL ACTION NO.:2:18-cv-04013-PBT **CERTIFICATION OF GIANNA WOLFE IN SUPPORT OF MOTION TO OPEN THE JUDGMENT**

I, Gianna Wolfe, being of full age, hereby certify and say:

1. I am the individual owner of Radiant Images, d/b/a HD Camera Rentals, a service provider to the motion picture industry located in Los Angeles, California.

2. I have a high school education.

3. Between November 25, 2015 and January 17, 2018, I was induced into a predatory lending Ponzi scheme, whereby Plaintiffs in this matter provided a series of high-interest loans to me that required successive loans to pay off the prior loans, and resulted in a staggering interest rate of over 1,000%.

4. On February 14, 2018, I could no longer afford to pay the unconscionable interest rates charged by Plaintiffs.

5. On February 15, 2018, Plaintiffs sent an "associate" to my place of business located in the State of California to collect upon a debt.

6. The "associate" entered the premises under the false name of Gino Gioelli and the encounter was recorded by surveillance cameras.

7. Gino, a former felon with a physically imposing built, demanded to know why payments had stopped, at which point he learned that my company placed a stop payment on the daily and weekly ACH withdrawals being electronically debited by Plaintiffs, which were in excess of $60,000 per week.

8. Gino noted that stopping payments was an aggressive move. He proceeded to tell an intimidating story where he visited a man by the name of "Danny" in Idaho who similarly borrowed a lot of money from Plaintiffs and would not respond to them. He said he went to Idaho, noting that Idaho was the flattest place on earth, the middle of nowhere and as he was proceeding on the highway, he came up to a huge car accident. When he looked inside the car, it was "Danny." He proceed to say that that our "aggressive move," meaning the halt to payments, was "the kind of thing that strongly affects wives and children."

9. Gino then inquired about one of Radiant's principals, Michael Mansouri, about his office hours and how late he works. Gino made it a point to state that it was very important to take care of this immediately and asked how much Radiant could pay. He then said he would call the next day, February 16th at 9 am. After Mansouri informed Gino that we needed more time, Gino called Joe Mack and placed him on speakerphone. His real name is Joseph LaForte, Jr. Joe Mack answered the call and immediately asked: "Where is my money?" He admitted that we had previously informed him of their cash flow problems but that he did not want to hear any excuses, he wanted his money. He reiterated that "it is a lot of money and he would crush" Defendants.

10. On the phone call, "Joe Mack" got into a screaming match with Mansouri, ultimately informing Mansouri that he did not want to deal with this clown anymore, and

instructed Gino that he knew what he had to do, and to "take care of him. It's all in your hands now."

11. After this phone call, Mansouri purchased a bulletproof jacket and a gun because he was in fear for his life and physical safety. The other employee who witnessed these events stated that he liked working for the company but not enough to die.

12. On February 18th, Radiant reported this incident to the Los Angeles Police Department. We then filed an action against Plaintiffs in the Southern District of New York on February 19, 2018.

13. On February 22, 2018, Gino came back to Radiant's California offices. Gino said he came to obtain a payment plan and repeatedly demanded that we pay back the money.

14. Gino confirmed that the transactions were loans and that the money advanced was absolutely repayable.

15. Gino then accused Mansouri of being the real gangster because "you took my f'ing half million dollars and you don't want to pay it back."

16. Gino also accused Plaintiffs of committing a "fraudulent criminal act" because they took his money and did not pay it back. Gino then accused Mansouri of destroying my life and my business.

17. After Gino left, Plaintiff then acted on their threats of destroying the business by sending nearly 100 e-mails to Radiant's customers and business relationships accusing us of defaulting on their debt, and instructing our customers to pay them directly.

Specifically, Plaintiffs sent Radiant's customers an email stating:

> We have purchased the future receivables for Radiant Images Inc. DBA HD Camera Rentals. Please see the attached correspondence which details said transaction. Despite our contractual agreement,

> Radiant Images Inc. DBA HD Camera Rentals has since defaulted on their payment. Accordingly, per UCC 9-406, please allow this correspondence to serve as a request that you hold all funds payable to Radiant Images Inc. DBA HD Camera Rentals in reserve until $2,651,880.22 is accrued.[1]

18. The email also contained a notice, purportedly prepared by CBSG's attorney that indicated that all payments should be forwarded to CBSG. Further, CBSG informed at least 19 members of the American Society of Cinematographers ("The ASC"), an invitation only organization where only directors of photography and special effects experts with distinguished credits may join, of Radiant's debt. The ASC, however, is not one of Radiant's account debtors.

19. I executed a settlement agreement on March 16, 2018 in attempt of resolving this matter. Plaintiffs also signed this settlement agreement on March19, 2018. *See* a copy of the settlement agreement attached as **Exhibit B**.

20. Pursuant to the settlement, I agreed to pay the total sum of $2,382,741.10 in accordance with the pay schedule attached to the settlement.

21. After the Settlement, Plaintiffs failed to issue a retraction letter to the email they had sent to Radiant's customers, as required.

22. Plaintiffs' failure to comply with the terms of the settlement led to Radiant dramatically losing revenue in sales.

23. On June 22 and on July 27, 2018, Radiant received a communication from Par Funding regarding missing payments and shortened payments, starting in April 2018, in the total of $19,500.00 as of July 27.

24. These calculations were incorrect. A true and correct schedule of the payments is attached as **Exhibit C**, along with proof of payments.

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[1] **Exhibit A.**

25. Plaintiffs filed a Copy of a Consent of Judgment ("COJ") on July 19, 2018. The documents was inaccurate in several ways. The over 50 pages included in the filing, stated that Radiant entered into 17 agreements, and included agreements that were paid in full prior to the date Radiant stopped making payments.

26. Further, the funding history document attached to the COJ as "Exhibit R" did not reflect actual payments made by Radiant Images and appeared to be someone else's payment history. I suspected that the decision to file the judgment was based on another client's payment or history and reviewing the documents submitted confirmed this suspicion.

27. The documents filed also included my full DL number, exposing me to the risk of identity theft.

28. The document submitted included a payment history that was not corrected even after errors were brought to Plaintiffs' attention.

29. I, as well as my business, did not fail to make payments as reflected in the payment histories provided by Plaintiffs in this matter.

30. I signed the COJ not understanding the significance and consequences that it would lead to and did not know I was waiving my constitutional rights.

31. I did not consult with an attorney prior to signing the COJ.

32. I, in no way possess the legal and business sophistication necessary to understand that by signing the COJ I would be willingly surrendering my due process rights.

33. It was not my intention to waive my constitutional rights and I did not do so knowingly, voluntarily, and intelligently.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Gianna Wolfe

Dated: September 24, 2018

21530776v.1

Exhibit 6

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE

This Confidential Settlement Agreement and Release ("Agreement") is made and entered into as of the date all signatories below have executed the agreement (the "Effective Date") by Defendants, Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, LLC("Defendants") and Plaintiffs, Radiant Images, Inc. and Gianna Wolfe, ("Plaintiffs"). Defendants and Plaintiffs are collectively the "Parties" and each individually is a "Party."

RECITALS

This Agreement is entered into with reference to the following facts and recitals which are true to the best of the Parties' knowledge and belief, and are made part of this Agreement:

WHEREAS, Parties entered into a series of Factoring Agreements wherein Defendants presently have the outstanding amount of $2,382,741.10 of Plaintiff, Radiant Images' receivables;

WHEREAS, all of the aforementioned Factoring Agreements had the personal guaranty of Plaintiff, Gianna Wolfe;

WHEREAS, on or about February 16, 2018, Plaintiffs filed a Civil Complaint (the "Complaint") against Defendants in the Federal District Court for the Southern District of New York, Docket 1:18-cv-01492-LAK, Radiant Images, Inc. et al. v. Broadway Advance Funding, LLC et al. (the "Legal Action"); and

WHEREAS, on or about March 2, 2018 Defendants filed a Motion to Dismiss Plaintiffs' Complaint in the aforementioned matter (the "Motion to Dismiss"); and

WHEREAS, the Parties agree that it is in their mutual interests to avoid the uncertainty and expense of this Legal Action or future related legal action by reaching a settlement and accommodation of the certain matters encompassed herein, without any admission of law or fact;

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties covenant and agree as follows:

TERMS AND RELEASES

1. **Recitals**. The recitals and prefatory phrases and paragraphs set forth above are hereby incorporated in full and made a part of this Agreement.

2. **Payment by Radiant Images, Inc. and Gianna Wolfe.** Plaintiffs shall cause to be paid to Defendants the total sum of $2,382,741.10 (the "Settlement Amount"). The Settlement Amount shall be paid by Defendants in accordance with the payout schedule attached herewith as Schedule "A" (each, an "Installment Payment," and collectively, the "Installment Payments"), beginning on April 3, 2018 and with the final payment scheduled to be on 3/12/24. The Installment Payments shall be made by ACH payments withdrawn by Defendants from a bank account designated by Plaintiffs.

3. **Discontinuance of Legal Action**. Within five (5) business days of the Effective Date of this Agreement, Plaintiffs and Defendants shall cause to be filed a Discontinuance of the Legal Action.

4. **Retraction Letter**. Upon execution of this Agreement, Defendants shall provide a retraction letter to all recipients of any communication sent by Defendants to Plaintiffs customers or business contacts alleging that Defendants have purchased Plaintiffs' receivables and directing them to pay Defendants directly. The retraction letter shall state as follows:

> Please be advised that you may disregard any prior correspondence sent on behalf of CBSG alleging that CBSG has purchased Radiant Images' receivables and directing them to pay CBSG directly. All future payments should be paid directly to Radiant Images.

5. **Default.** The Parties agree that if any of the Installment Payments referenced in Paragraph 2 (and given in detail in Schedule "A" attached to this Agreement) of this Agreement are not made in compliance with Paragraph 2 of this Agreement, Defendants shall provide Plaintiffs notice of same, with such notice of be provided to counsel for Defendants, via email at: heskins@whiteandwilliams.com on receipt of notice from Defendants, any untimely Installment Payment is not remitted to Plaintiffs within fifteen (15) days of its due date, Defendants shall be entitled to pursue the full legal remedies it possessed prior to the execution of this Agreement, less any payment made by Plaintiffs, whether such payments were made pursuant to this Agreement, or otherwise.

6. **Full Satisfaction**. The Settlement Amount, when paid in full, is in full satisfaction of each and every claim of Defendants against Plaintiffs and all outstanding Merchant Cash Advance Agreements and it includes all attorneys' fees and costs that Defendants may have incurred in connection with pursuit of these claims. Upon signing this Agreement, Plaintiffs agree that all claims against Defendants, their agents, employees, officers and investors are hereby settled, dismissed and extinguished.

7. **Adequate Consideration.** The consideration received in connection with this Agreement is fair, adequate and substantial and consists only of the terms set forth in this Agreement.

8. **Confidentiality**. The Parties expressly understand and agree that this Agreement and its contents (including, but not limited to, the fact of payment and the amounts to be paid hereunder) shall remain confidential and shall not be disclosed to any third party whatsoever, except the Parties' counsel, accountants, financial advisors, tax professionals retained by them, any federal, state or local government taxing or regulatory authority, and the Parties' management, officers and Board of Directors, and except as required by law or order of court. Any person identified in the preceding sentence to whom information concerning this Agreement is disclosed is bound by this confidentiality provision. Nothing contained in this paragraph shall prevent any Party from stating that the Parties have "amicably resolve all differences," provided, however, that in so doing, the Parties shall not disclose the fact or amount of any payments made or to be made hereunder and shall not disclose any other terms of this Agreement or the settlement described herein. If any subpoena, order or discovery request is received by any of the Parties hereto calling for the production of the Agreement, such Party shall promptly notify the other Parties hereto prior

to any disclosure of same. In such case, the subpoenaed Party shall: (a) make available as soon as practicable (and in any event prior to the disclosure), for inspection and copying, a copy of the Agreement it intends to produce pursuant to the document request unless such disclosure is otherwise prohibited by law; and (b) to the extent possible, shall not produce anything in response to the document request for at least ten (10) business days following such notice. If necessary, the subpoenaed Party shall take appropriate actions to resist production, as permitted by law, so as to allow the Parties to try to reach agreement on what shall be produced. This paragraph is a material part of this Agreement.

9. **No Admission.** Each of the Parties understands and agrees that this Agreement and the settlement provided for herein, are intended to compromise disputed claims and defenses, to avoid litigation and to buy peace, and that this Agreement and the settlement provided for herein shall not be construed or viewed as an admission by any Party of liability or wrongdoing, such liability being expressly denied. This Agreement, and the settlement provided for herein, shall not be admissible in any legal action, administrative action, or any judicial or administrative proceeding if offered to show, demonstrate, evidence or support a contention that any of the Parties acted illegally, improperly, or in breach of law, contract or proper conduct.

10. **Mutual Releases.** The Parties, on behalf of themselves, their heirs, predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns, and its and their past, present and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns, and successors in interest, and all persons acting by, through, under, or in concert with them, and each of them, hereby releases and discharges the other Party, together with their heirs, predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns and its and their past, present and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns and successors in interest, and all persons acting by, through, under or in concert with them, and each of them, from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, wages, medical costs, pain and suffering, mental anguish, emotional distress, expenses (including attorneys' fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has, or may have had, against the other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions related to or arising from the Legal Action.

IT IS THE INTENTION AND EFFECT OF THIS MUTUAL RELEASE THAT ALL CLAIMS THE PARTIES HAVE, OR MAY HAVE, AGAINST EACH OTHER, UP UNTIL AND INCLUDING THE DATE OF THE EXECUTION OF THIS AGREEMENT, REGARDING THE MATTERS ADDRESSED HEREIN, ARE FULLY AND COMPLETELY RELEASED.

11. **Release Limitations.** The releases contained in Paragraph 9 of this Agreement do not release any claims arising out of the failure of any Party to perform in conformity with the terms of this Agreement.

12. **Further Assurances.** The Parties shall, at the reasonable request of the others, execute, acknowledge and deliver whatever additional documents, and do such other acts, as may be reasonably required or convenient to carry out the intent and purpose of this Agreement, provided that none of the Parties shall be required to incur more than normal costs or expenses in complying with a reasonable request of the others.

13. **Attorneys' Fees.** Unless otherwise expressly set forth herein, each of the Parties shall bear its own attorney's fees, costs, and expenses in connection with the matters set forth in the Agreement, including, but not limited to, the Legal Action and the negotiations and preparation of this Agreement. However, if any Party institutes legal proceedings over the enforcement of this Agreement or any provision of it, the prevailing Party shall be entitled to recover from the losing Party its costs, including reasonable attorneys' fees, at both the trial and appellate levels.

14. **Choice of Law, Jury Waiver.** This Agreement is entered into in the Commonwealth of Pennsylvania, and the Agreement and any rights, remedies, or obligations provided for in this Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania with regard to its conflicts of law provision. The Parties voluntarily and intentionally waive any right that they may have to a trial by jury in any action, proceeding or litigation directly or indirectly arising out of, or relating to, this Agreement.

15. **Taxes**. This Agreement is enforceable regardless of its tax consequences. The Parties understand and agree that the payments set forth in this Agreement reflect the settlement of disputed legal claims, and that neither of the Parties makes any representations regarding the Agreement's tax consequences. Each Party hereto specifically agrees that it is solely responsible for any and all taxes arising as a result of the any of the payments made hereunder.

16. **Neutral Interpretation and Counterparts.** The Parties shall be deemed to have cooperated in the drafting and preparation of this Agreement. Hence, any construction to be made of this Agreement shall not be construed against any Party. This Agreement may be executed in counterparts and each executed counterpart shall be effective as the original. All faxed, emailed, or electronic signatures affirming this Agreement constitute an original signature.

17. **No Oral Modification.** This Agreement shall not be altered, amended or modified by oral representation made before or after the execution of this Agreement. All amendments or changes of any kind must be in writing, executed by all Parties.

18. **Representations, Indemnifications.** The Parties represent and warrant to each other that each is the sole and lawful owner of all right, title and interest in and to every claim and other matter which each releases in this Agreement and that they have not previously assigned or transferred, or purported to do so, to any person or other entity any right, title or interest in any such claim or other matter. In the event that such representation is false and any such claim or matter is asserted against any Party by anyone who is the assignee or transferee of such a claim or matter, than the Party who assigned or transferred such claim or matter shall fully indemnify, defend and hold harmless the Party against whom such claim or matter is asserted and its successors from and against such claim or matter and from all actual costs, attorneys' fees, expenses, liabilities and damages which that Party and its successors incur as a result of the assertion of such claim or matter.

19. **Advice of Counsel.** Each Party to this Agreement acknowledges that it has had the benefit of advice of competent legal counsel or the opportunity to retain such counsel with respect to its decision to enter into this Agreement. The individuals whose signatures are affixed to this Agreement in a personal or representative capacity represent that they are competent to enter into this Agreement and are doing so freely and without coercion by any other Party or non-party hereto.

20. **Waiver.** The failure of Defendants to demand from Plaintiffs performance of any act under the Agreement shall not be construed as a waiver of Defendants' right to demand, at any subsequent time, such performance. The failure of Defendants to demand from Plaintiffs performance of any act under the Agreement shall not be construed as a waiver of Defendants' right to demand, at any subsequent time, such performance.

21. **Headings and Captions**. The headings and captions inserted into this Agreement are for convenience only and in no way define, limit or otherwise describe the scope or intent of this Agreement, or any provision hereof, or in any way affect the interpretation of this Agreement.

22. **Severability.** If any provision of the Agreement or the application thereof is held invalid by a court, arbitrator or government agency of competent jurisdiction, the Parties agree that such a determination of invalidity shall not affect other provisions or applications of the Agreement which can be given effect without the invalid provisions and thus shall remain in full force and effect or application.

23. **Successors.** This Agreement shall inure to the benefit of the respective heirs, successors, and assigns of the Parties, and each and every one of the Releasees shall be deemed to be intended third-party beneficiaries of this Agreement.

24. **Counterparts and Facsimile Signatures**: This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same Settlement Agreement. Facsimile, e-mail and/or photo copies of signatures on this Settlement Agreement shall be deemed valid and original for all purposes.

SIGNATURE PAGE TO FOLLOW

IN WITNESS WHEREOF, the Parties have each caused this Settlement Agreement to be executed as of the date first set out above.

COMPLETE BUSINESS SOLUTIONS GROUP, INC., BROADWAY ADVANCE, LLC AND FAST ADVANCE FUNDING, LLC

Date: 3/19/18

By: _____
LISA McElhane - President

RADIANT IMAGES, INC. AND GIANNA WOLFE

Date: 03.16.18

Gianna Wolfe
Gianna Wolfe – Individually and as President of Radiant Images, Inc.

Radiant Images Payment Proposal - 03/13/18

CBSG Daily Balance:	$	714,654.75
CBSG Weekly Balance:	$	1,027,694.25
FAF Weekly Balance:	$	640,392.10
Total Balance:	**$**	**2,382,741.10**

Date		Payment		Ending Balance
04/03/18	$	1,500.00	$	2,381,241.10
04/10/18	$	1,500.00	$	2,379,741.10
04/17/18	$	1,500.00	$	2,378,241.10
04/24/18	$	1,500.00	$	2,376,741.10
05/01/18	$	1,500.00	$	2,375,241.10
05/08/18	$	3,000.00	$	2,372,241.10
05/15/18	$	3,000.00	$	2,369,241.10
05/22/18	$	3,000.00	$	2,366,241.10
05/29/18	$	3,000.00	$	2,363,241.10
06/05/18	$	3,000.00	$	2,360,241.10
06/12/18	$	3,500.00	$	2,356,741.10
06/19/18	$	3,500.00	$	2,353,241.10
06/26/18	$	3,500.00	$	2,349,741.10
07/03/18	$	3,500.00	$	2,346,241.10
07/10/18	$	3,500.00	$	2,342,741.10
07/17/18	$	4,500.00	$	2,338,241.10
07/24/18	$	4,500.00	$	2,333,741.10
07/31/18	$	4,500.00	$	2,329,241.10
08/07/18	$	4,500.00	$	2,324,741.10
08/14/18	$	4,500.00	$	2,320,241.10
08/21/18	$	6,500.00	$	2,313,741.10
08/28/18	$	6,500.00	$	2,307,241.10
09/04/18	$	6,500.00	$	2,300,741.10
09/11/18	$	6,500.00	$	2,294,241.10
09/18/18	$	6,500.00	$	2,287,741.10
09/25/18	$	8,000.00	$	2,279,741.10
10/02/18	$	8,000.00	$	2,271,741.10
10/09/18	$	8,000.00	$	2,263,741.10
10/16/18	$	8,000.00	$	2,255,741.10
10/23/18	$	8,000.00	$	2,247,741.10
10/30/18	$	8,000.00	$	2,239,741.10
11/06/18	$	8,000.00	$	2,231,741.10
11/13/18	$	8,000.00	$	2,223,741.10
11/20/18	$	8,000.00	$	2,215,741.10
11/27/18	$	8,000.00	$	2,207,741.10
12/04/18	$	8,000.00	$	2,199,741.10
12/11/18	$	8,000.00	$	2,191,741.10

12/18/18	$	8,000.00	$	2,183,741.10
12/25/18	$	8,000.00	$	2,175,741.10
01/01/19	$	8,000.00	$	2,167,741.10
01/08/19	$	8,000.00	$	2,159,741.10
01/15/19	$	8,000.00	$	2,151,741.10
01/22/19	$	8,000.00	$	2,143,741.10
01/29/19	$	8,000.00	$	2,135,741.10
02/05/19	$	8,000.00	$	2,127,741.10
02/12/19	$	8,000.00	$	2,119,741.10
02/19/19	$	8,000.00	$	2,111,741.10
02/26/19	$	8,000.00	$	2,103,741.10
03/05/19	$	8,000.00	$	2,095,741.10
03/12/19	$	8,000.00	$	2,087,741.10
03/19/19	$	8,000.00	$	2,079,741.10
03/26/19	$	8,000.00	$	2,071,741.10
04/02/19	$	8,000.00	$	2,063,741.10
04/09/19	$	8,000.00	$	2,055,741.10
04/16/19	$	8,000.00	$	2,047,741.10
04/23/19	$	8,000.00	$	2,039,741.10
04/30/19	$	8,000.00	$	2,031,741.10
05/07/19	$	8,000.00	$	2,023,741.10
05/14/19	$	8,000.00	$	2,015,741.10
05/21/19	$	8,000.00	$	2,007,741.10
05/28/19	$	8,000.00	$	1,999,741.10
06/04/19	$	8,000.00	$	1,991,741.10
06/11/19	$	8,000.00	$	1,983,741.10
06/18/19	$	8,000.00	$	1,975,741.10
06/25/19	$	8,000.00	$	1,967,741.10
07/02/19	$	8,000.00	$	1,959,741.10
07/09/19	$	8,000.00	$	1,951,741.10
07/16/19	$	8,000.00	$	1,943,741.10
07/23/19	$	8,000.00	$	1,935,741.10
07/30/19	$	8,000.00	$	1,927,741.10
08/06/19	$	8,000.00	$	1,919,741.10
08/13/19	$	8,000.00	$	1,911,741.10
08/20/19	$	8,000.00	$	1,903,741.10
08/27/19	$	8,000.00	$	1,895,741.10
09/03/19	$	8,000.00	$	1,887,741.10
09/10/19	$	8,000.00	$	1,879,741.10
09/17/19	$	8,000.00	$	1,871,741.10
09/24/19	$	8,000.00	$	1,863,741.10
10/01/19	$	8,000.00	$	1,855,741.10
10/08/19	$	8,000.00	$	1,847,741.10
10/15/19	$	8,000.00	$	1,839,741.10
10/22/19	$	8,000.00	$	1,831,741.10

10/29/19	$	8,000.00	$	1,823,741.10
11/05/19	$	8,000.00	$	1,815,741.10
11/12/19	$	8,000.00	$	1,807,741.10
11/19/19	$	8,000.00	$	1,799,741.10
11/26/19	$	8,000.00	$	1,791,741.10
12/03/19	$	8,000.00	$	1,783,741.10
12/10/19	$	8,000.00	$	1,775,741.10
12/17/19	$	8,000.00	$	1,767,741.10
12/24/19	$	8,000.00	$	1,759,741.10
12/31/19	$	8,000.00	$	1,751,741.10
01/07/20	$	8,000.00	$	1,743,741.10
01/14/20	$	8,000.00	$	1,735,741.10
01/21/20	$	8,000.00	$	1,727,741.10
01/28/20	$	8,000.00	$	1,719,741.10
02/04/20	$	8,000.00	$	1,711,741.10
02/11/20	$	8,000.00	$	1,703,741.10
02/18/20	$	8,000.00	$	1,695,741.10
02/25/20	$	8,000.00	$	1,687,741.10
03/03/20	$	8,000.00	$	1,679,741.10
03/10/20	$	8,000.00	$	1,671,741.10
03/17/20	$	8,000.00	$	1,663,741.10
03/24/20	$	8,000.00	$	1,655,741.10
03/31/20	$	8,000.00	$	1,647,741.10
04/07/20	$	8,000.00	$	1,639,741.10
04/14/20	$	8,000.00	$	1,631,741.10
04/21/20	$	8,000.00	$	1,623,741.10
04/28/20	$	8,000.00	$	1,615,741.10
05/05/20	$	8,000.00	$	1,607,741.10
05/12/20	$	8,000.00	$	1,599,741.10
05/19/20	$	8,000.00	$	1,591,741.10
05/26/20	$	8,000.00	$	1,583,741.10
06/02/20	$	8,000.00	$	1,575,741.10
06/09/20	$	8,000.00	$	1,567,741.10
06/16/20	$	8,000.00	$	1,559,741.10
06/23/20	$	8,000.00	$	1,551,741.10
06/30/20	$	8,000.00	$	1,543,741.10
07/07/20	$	8,000.00	$	1,535,741.10
07/14/20	$	8,000.00	$	1,527,741.10
07/21/20	$	8,000.00	$	1,519,741.10
07/28/20	$	8,000.00	$	1,511,741.10
08/04/20	$	8,000.00	$	1,503,741.10
08/11/20	$	8,000.00	$	1,495,741.10
08/18/20	$	8,000.00	$	1,487,741.10
08/25/20	$	8,000.00	$	1,479,741.10
09/01/20	$	8,000.00	$	1,471,741.10

09/08/20	$	8,000.00	$	1,463,741.10
09/15/20	$	8,000.00	$	1,455,741.10
09/22/20	$	8,000.00	$	1,447,741.10
09/29/20	$	8,000.00	$	1,439,741.10
10/06/20	$	8,000.00	$	1,431,741.10
10/13/20	$	8,000.00	$	1,423,741.10
10/20/20	$	8,000.00	$	1,415,741.10
10/27/20	$	8,000.00	$	1,407,741.10
11/03/20	$	8,000.00	$	1,399,741.10
11/10/20	$	8,000.00	$	1,391,741.10
11/17/20	$	8,000.00	$	1,383,741.10
11/24/20	$	8,000.00	$	1,375,741.10
12/01/20	$	8,000.00	$	1,367,741.10
12/08/20	$	8,000.00	$	1,359,741.10
12/15/20	$	8,000.00	$	1,351,741.10
12/22/20	$	8,000.00	$	1,343,741.10
12/29/20	$	8,000.00	$	1,335,741.10
01/05/21	$	8,000.00	$	1,327,741.10
01/12/21	$	8,000.00	$	1,319,741.10
01/19/21	$	8,000.00	$	1,311,741.10
01/26/21	$	8,000.00	$	1,303,741.10
02/02/21	$	8,000.00	$	1,295,741.10
02/09/21	$	8,000.00	$	1,287,741.10
02/16/21	$	8,000.00	$	1,279,741.10
02/23/21	$	8,000.00	$	1,271,741.10
03/02/21	$	8,000.00	$	1,263,741.10
03/09/21	$	8,000.00	$	1,255,741.10
03/16/21	$	8,000.00	$	1,247,741.10
03/23/21	$	8,000.00	$	1,239,741.10
03/30/21	$	8,000.00	$	1,231,741.10
04/06/21	$	8,000.00	$	1,223,741.10
04/13/21	$	8,000.00	$	1,215,741.10
04/20/21	$	8,000.00	$	1,207,741.10
04/27/21	$	8,000.00	$	1,199,741.10
05/04/21	$	8,000.00	$	1,191,741.10
05/11/21	$	8,000.00	$	1,183,741.10
05/18/21	$	8,000.00	$	1,175,741.10
05/25/21	$	8,000.00	$	1,167,741.10
06/01/21	$	8,000.00	$	1,159,741.10
06/08/21	$	8,000.00	$	1,151,741.10
06/15/21	$	8,000.00	$	1,143,741.10
06/22/21	$	8,000.00	$	1,135,741.10
06/29/21	$	8,000.00	$	1,127,741.10
07/06/21	$	8,000.00	$	1,119,741.10
07/13/21	$	8,000.00	$	1,111,741.10

07/20/21	$	8,000.00	$	1,103,741.10
07/27/21	$	8,000.00	$	1,095,741.10
08/03/21	$	8,000.00	$	1,087,741.10
08/10/21	$	8,000.00	$	1,079,741.10
08/17/21	$	8,000.00	$	1,071,741.10
08/24/21	$	8,000.00	$	1,063,741.10
08/31/21	$	8,000.00	$	1,055,741.10
09/07/21	$	8,000.00	$	1,047,741.10
09/14/21	$	8,000.00	$	1,039,741.10
09/21/21	$	8,000.00	$	1,031,741.10
09/28/21	$	8,000.00	$	1,023,741.10
10/05/21	$	8,000.00	$	1,015,741.10
10/12/21	$	8,000.00	$	1,007,741.10
10/19/21	$	8,000.00	$	999,741.10
10/26/21	$	8,000.00	$	991,741.10
11/02/21	$	8,000.00	$	983,741.10
11/09/21	$	8,000.00	$	975,741.10
11/16/21	$	8,000.00	$	967,741.10
11/23/21	$	8,000.00	$	959,741.10
11/30/21	$	8,000.00	$	951,741.10
12/07/21	$	8,000.00	$	943,741.10
12/14/21	$	8,000.00	$	935,741.10
12/21/21	$	8,000.00	$	927,741.10
12/28/21	$	8,000.00	$	919,741.10
01/04/22	$	8,000.00	$	911,741.10
01/11/22	$	8,000.00	$	903,741.10
01/18/22	$	8,000.00	$	895,741.10
01/25/22	$	8,000.00	$	887,741.10
02/01/22	$	8,000.00	$	879,741.10
02/08/22	$	8,000.00	$	871,741.10
02/15/22	$	8,000.00	$	863,741.10
02/22/22	$	8,000.00	$	855,741.10
03/01/22	$	8,000.00	$	847,741.10
03/08/22	$	8,000.00	$	839,741.10
03/15/22	$	8,000.00	$	831,741.10
03/22/22	$	8,000.00	$	823,741.10
03/29/22	$	8,000.00	$	815,741.10
04/05/22	$	8,000.00	$	807,741.10
04/12/22	$	8,000.00	$	799,741.10
04/19/22	$	8,000.00	$	791,741.10
04/26/22	$	8,000.00	$	783,741.10
05/03/22	$	8,000.00	$	775,741.10
05/10/22	$	8,000.00	$	767,741.10
05/17/22	$	8,000.00	$	759,741.10
05/24/22	$	8,000.00	$	751,741.10

05/31/22	$	8,000.00	$	743,741.10
06/07/22	$	8,000.00	$	735,741.10
06/14/22	$	8,000.00	$	727,741.10
06/21/22	$	8,000.00	$	719,741.10
06/28/22	$	8,000.00	$	711,741.10
07/05/22	$	8,000.00	$	703,741.10
07/12/22	$	8,000.00	$	695,741.10
07/19/22	$	8,000.00	$	687,741.10
07/26/22	$	8,000.00	$	679,741.10
08/02/22	$	8,000.00	$	671,741.10
08/09/22	$	8,000.00	$	663,741.10
08/16/22	$	8,000.00	$	655,741.10
08/23/22	$	8,000.00	$	647,741.10
08/30/22	$	8,000.00	$	639,741.10
09/06/22	$	8,000.00	$	631,741.10
09/13/22	$	8,000.00	$	623,741.10
09/20/22	$	8,000.00	$	615,741.10
09/27/22	$	8,000.00	$	607,741.10
10/04/22	$	8,000.00	$	599,741.10
10/11/22	$	8,000.00	$	591,741.10
10/18/22	$	8,000.00	$	583,741.10
10/25/22	$	8,000.00	$	575,741.10
11/01/22	$	8,000.00	$	567,741.10
11/08/22	$	8,000.00	$	559,741.10
11/15/22	$	8,000.00	$	551,741.10
11/22/22	$	8,000.00	$	543,741.10
11/29/22	$	8,000.00	$	535,741.10
12/06/22	$	8,000.00	$	527,741.10
12/13/22	$	8,000.00	$	519,741.10
12/20/22	$	8,000.00	$	511,741.10
12/27/22	$	8,000.00	$	503,741.10
01/03/23	$	8,000.00	$	495,741.10
01/10/23	$	8,000.00	$	487,741.10
01/17/23	$	8,000.00	$	479,741.10
01/24/23	$	8,000.00	$	471,741.10
01/31/23	$	8,000.00	$	463,741.10
02/07/23	$	8,000.00	$	455,741.10
02/14/23	$	8,000.00	$	447,741.10
02/21/23	$	8,000.00	$	439,741.10
02/28/23	$	8,000.00	$	431,741.10
03/07/23	$	8,000.00	$	423,741.10
03/14/23	$	8,000.00	$	415,741.10
03/21/23	$	8,000.00	$	407,741.10
03/28/23	$	8,000.00	$	399,741.10
04/04/23	$	8,000.00	$	391,741.10

04/11/23	$	8,000.00	$	383,741.10
04/18/23	$	8,000.00	$	375,741.10
04/25/23	$	8,000.00	$	367,741.10
05/02/23	$	8,000.00	$	359,741.10
05/09/23	$	8,000.00	$	351,741.10
05/16/23	$	8,000.00	$	343,741.10
05/23/23	$	8,000.00	$	335,741.10
05/30/23	$	8,000.00	$	327,741.10
06/06/23	$	8,000.00	$	319,741.10
06/13/23	$	8,000.00	$	311,741.10
06/20/23	$	8,000.00	$	303,741.10
06/27/23	$	8,000.00	$	295,741.10
07/04/23	$	8,000.00	$	287,741.10
07/11/23	$	8,000.00	$	279,741.10
07/18/23	$	8,000.00	$	271,741.10
07/25/23	$	8,000.00	$	263,741.10
08/01/23	$	8,000.00	$	255,741.10
08/08/23	$	8,000.00	$	247,741.10
08/15/23	$	8,000.00	$	239,741.10
08/22/23	$	8,000.00	$	231,741.10
08/29/23	$	8,000.00	$	223,741.10
09/05/23	$	8,000.00	$	215,741.10
09/12/23	$	8,000.00	$	207,741.10
09/19/23	$	8,000.00	$	199,741.10
09/26/23	$	8,000.00	$	191,741.10
10/03/23	$	8,000.00	$	183,741.10
10/10/23	$	8,000.00	$	175,741.10
10/17/23	$	8,000.00	$	167,741.10
10/24/23	$	8,000.00	$	159,741.10
10/31/23	$	8,000.00	$	151,741.10
11/07/23	$	8,000.00	$	143,741.10
11/14/23	$	8,000.00	$	135,741.10
11/21/23	$	8,000.00	$	127,741.10
11/28/23	$	8,000.00	$	119,741.10
12/05/23	$	8,000.00	$	111,741.10
12/12/23	$	8,000.00	$	103,741.10
12/19/23	$	8,000.00	$	95,741.10
12/26/23	$	8,000.00	$	87,741.10
01/02/24	$	8,000.00	$	79,741.10
01/09/24	$	8,000.00	$	71,741.10
01/16/24	$	8,000.00	$	63,741.10
01/23/24	$	8,000.00	$	55,741.10
01/30/24	$	8,000.00	$	47,741.10
02/06/24	$	8,000.00	$	39,741.10
02/13/24	$	8,000.00	$	31,741.10

02/20/24	$	8,000.00	$	23,741.10
02/27/24	$	8,000.00	$	15,741.10
03/05/24	$	8,000.00	$	7,741.10
03/12/24	$	7,741.10	$	0.00
	$	**2,382,741.10**		

Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMPLETE BUSINESS SOLUTIONS GROUP, INC., et al.,	:	
Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 18-4013**
RADIANT IMAGES, INC., d/b/a/ HD CAMERA RENTALS, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this __31st___ day of July, 2019, upon consideration of Defendants' Motion to Open Confession of Judgment ("Motion") (Doc. 2) and Plaintiffs' Response in Opposition (Doc. 3), **IT IS HEREBY ORDERED AND DECREED** that Defendants' Motion is **GRANTED** and the Judgment is **OPENED**.[i]

IT IS FURTHER ORDERED that Defendants shall file a responsive pleading in the manner and time required by the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

I. FACTUAL BACKGROUND

Defendant Radiant Images, located in Los Angeles, California, is a service provider to the motion picture industry. Mot. to Open Mem. 3, Doc. 2. Defendant Gianna Wolfe ("Wolfe") is the individual owner of Radiant Images. Mot. to Open Mem. 3. From November 25, 2015 to January 17, 2018, the Parties entered into seventeen agreements whereby Defendants sold all their future accounts receivables to Plaintiffs Complete Business Solutions Group, Broadway Advance, and Fast Advance Funding (collectively, "Plaintiffs"); Wolfe agreed to serve as a guarantor for each agreement. Compl. ¶ 7, Doc. 1; Mot. to Open Mem. 4. Per the agreements, Defendants were to repay Plaintiffs fixed amounts, transmitted daily or weekly, until Plaintiffs received full repayment. Mot. to Open Mem. 8. Around February 2018, Defendants defaulted on the payments because they could no longer pay the interest rates. Mot. to Open Mem. 3.

On July 19, 2018, Plaintiffs filed a complaint against Defendants Radiant Images and Gianna Wolfe (collectively, "Defendants") in the Philadelphia Court of Common Pleas where Plaintiffs alleged Defendants defaulted on over $2,300,000.00 worth of outstanding debt owed to Plaintiffs. Compl. ¶¶ 26–27. That same day, the Court of Common Pleas' Prothonotary granted Plaintiffs' request for an entry of judgment against Defendants in the amount of $2,356,741.10, pursuant to the "WARRANT OF ATTORNEY TO CONFESS JUDGMENT" clauses in the Parties' agreements. Notice J. 12, Doc. 1.

Defendants timely filed a Notice of Removal on September 17, 2018, pursuant to 28 U.S.C. §§ 1332 and 1441. Notice of Removal, Doc. 1. On September 24, 2018, Defendants filed a Motion to Open the Confession of Judgment, arguing that the motion should be granted because (1) the settlement agreement entered into by the Parties released Defendants from the

Warrant of Attorney to Confess Judgment Clauses contained in the original agreements; (2) the settlement agreement did not contain a confession of judgment clause; and (3) Defendants' due process rights were violated. Mot. Open the Conf. J. 10–14, Doc. 2. In its Memorandum in Opposition of Defendants' Motion to Open Judgment, Plaintiffs argue that the settlement agreement permits a confession of judgment. Pls.' Mem. Opp'n Defs.' Mot. Open J. 1–2, Doc. 3.

II. DISCUSSION

Generally contained within a contractual agreement between parties, "a confession of judgment clause operates as a contractual waiver of all prejudgment procedures." *AmQuip Corp. v. Pearson*, 101 F.R.D. 332, 336 (E.D. Pa. 1984). Governed under Pennsylvania law and also known as a cognovit clause, a confession of judgment permits the plaintiff's attorney to personally "effectuate the entire procedure;" after a confession of judgment commences, the prothonotary of the court is given the power to enter a judgment in favor of the plaintiff and notice is not provided to the defendant until after the judgment has already been entered." *Swarb v. Lennox*, 405 U.S. 191, 195 (1972).

To dispute the confessed judgment, a defendant must file a motion to open the judgment. *F.D.I.C. v. Deglau*, 207 F.3d 153, 159 (3d Cir. 2000). If the motion to open contains "meritorious defense[s] sufficient to create a triable issue of fact, the judgment will be opened." *Id.* The motion to open must be granted "if [the] evidence is produced which in a jury trial would require the issues to be submitted to the jury." *Id.* at 168 (quoting Pa. R. Civ. P. 2959(e)). In analyzing the motion to open, the court must "view all the evidence in the light most favorable to the petitioner and [must] accept as true all evidence and proper inferences . . . which support [the petitioner]. *Deglau*, 207 F.3d at 168. Procedurally, a motion to open a confessed judgment is governed by Federal Rule of Civil Procedure 60 when the issue is brought in a federal district

court. *Id.* at 161. In Pennsylvania, defendants are required to present "clear, direct, precise, and believable evidence" in support of a meritorious defense. *Id.* at 168 (internal citations and quotation marks omitted). Among other things, meritorious defenses can concern due process violations, discrimination, fraud, and agreements releasing the parties from previous contracts. *Id.* at 168-175.

A. Defendants' Due Process Argument Is a Meritorious Defense Because It Is a Triable Issue of Fact

"The constitutional validity of any particular confession of judgment [clause] depends on the validity of the debtor's waiver." *Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1272 (3d Cir. 1994). The Supreme Court has held that a confessed judgment clause does not violate the defendant's due process rights per se. *D.H. Overmeyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972). However, a due process defense is considered sufficiently meritorious if the defendant can show that he is not a "reasonably sophisticated, corporate debtor." *Deglau*, 207 F.3d at 168 (holding that a defendant's argument that a confessed judgment clause was placed "inconspicuously" and therefore deprived him of his due process rights failed because he was a "sophisticated businessman") (relying on *Jordan*, 20 F.3d at 1272); *see also Hazer v. Zabala*, 26 A.3d 1166, 1172 (Pa. Super. Ct. 2011) (holding that a confessed judgment clause was invalid and unenforceable because it was attached to the agreement as an addendum and was therefore inconspicuous). "[A] debtor can waive its due process rights . . . when it voluntarily and intelligently consents to an agreement containing a cognovit clause." *Jordan*, 20 F.3d at 1272. Issues surrounding the waiver of due process rights are "usually a question of fact." *Id.* If the contract in question is "one of adhesion, [and if] there is a great disparity in bargaining power,"

the validity of the confessed judgment clause is called into question. *Id.* (quoting *Overmeyer*. 405 U.S. at 188).

Defendants claim they did not voluntarily, knowingly, or intelligently waive their due process rights when entering into the agreements in question. Mot. Open the Conf. J. 14, Doc. 2. Defendants claim the contracts in question were of adhesion, pointing to the same form language used in each agreement. Mot. Open the Conf. J. 15, Doc. 2. Defendants also claim that there was a "great disparity in bargaining power" between the two parties, evidenced by the 1,000% interest rate of the transactions. Mot. Open the Conf. J. 15, Doc. 2. Plaintiffs argue that Defendants are a sophisticated entity which has not provided evidence that they were either confused by any of the terms of the agreements or that they did not have an opportunity to have the terms of the agreement explained to them. Pls.' Mem. Opp'n Defs.' Mot. Open J. 2, 7 Doc. 3. Because issues of due process waiver are generally issues of fact, and because Defendants' argument that its due process rights were violated is a triable issue of fact, Defendants' due process argument is a meritorious defense.

B. Defendants' Argument That the Settlement Agreement Releases Them from the Previous Confessed Judgment Clause Is a Meritorious Defense Because It Is a Triable Issue of Fact

Pennsylvania law requires "strict adherence to the rules governing . . . confessed judgments." *Hazer*, 26 A.3d at 1169. Confessed judgments cannot be implied through the wording of a contract and accordingly require the parties' signatures to be considered valid and enforceable. *Id.* at 1171. "[A] warrant of attorney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference." *Id.*

The Parties disagree over the effect of the updated Settlement Agreement entered in March of 2018. Defendants read the agreement to "fully and completely release[]" them from

"all claims the parties have, or may have, against each other." Mot. Open the Conf. J. 10, Doc. 2. Plaintiffs believe that the agreement entitles Plaintiffs to "pursue the full legal remedies it possessed prior to the execution of [the Settlement Agreement]." Pls.' Mem. Opp'n Defs.' Mot. Open J. 2, 7 Doc. 3. Further, Defendants claim that the Settlement Agreement did not contain a confessed judgment clause and the judgment against them should therefore be vacated. Mot. Open the Conf. J. 11, Doc. 2. Because the Parties disagree over the meaning and effect of the March 2018 Settlement Agreement, Defendants have presented a sufficient meritorious defense because there is a triable issue of fact as to what the Settlement Agreement empowers the Parties to do, and what responsibilities it releases the Parties from. If Defendants' allegations are substantiated, the judgment would be found to be invalid because they cannot be entered into a confessed judgment clause by implication. Similarly, if Plaintiffs' allegations are substantiated, Defendants may still be liable for the Confessed Judgment clause contained in the initial agreements.

III. CONCLUSION

Defendants' have provided sufficient evidence to support their meritorious defenses. The meritorious defenses provided by Defendants contain triable issues of fact. Accordingly, Defendants' Motion is GRANTED.

Exhibit 8

TOURMAPPERS NORTH AMERICA, LLC d/b/a TOURMAPPERS NORTH AMERICA, and JULIE PAULA KATZ, Guarantor, Claimants v. COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING Respondent.	Arbitration Case No. 01-20-0005-3591

DECLARATION OF JULIE KATZ

I**, JULIE KATZ,** under penalty of perjury, do hereby declare and say that the below statements are true and correct to the best of my knowledge, information and belief:

1. I am the managing member of TourMappers North America, LLC ("TourMappers" or "Company"), a business-to-business travel company based in Boston, MA that provides travel accommodations to Europeans and other foreigners traveling into the United States. I am responsible for the day-to-day operations of TourMappers, including dealing with TourMappers' customers and managing the Company's finances. I make this declaration in support of TourMappers's Request for Emergency Relief that: (i) temporarily restrains and enjoins Complete Business Solutions Group, Inc. d/b/a Par Funding ("CBSG") during the pendency of this Arbitration from: (x) executing upon or otherwise attempting to enforce an improperly obtained Pennsylvania confessed judgment in the amount of $127,687.96 (the

"Judgement") and (y) sending out any lien notices, contacting any individuals or taking any further actions to collect upon the debt underlying the Judgment; and (ii) requires CBSG to retract and withdraw lien notice and assignment letters that have already been sent to TourMappers' existing customers, former customers, vendors, competitors and others. Unless otherwise stated, I am personally familiar with the facts set forth below.

INTRODUCTION

2. TourMappers books and sells hotel rooms, transportation, and event tickets to international tour operators for retail sale to clients wishing to travel to and within the United States. When President Trump and other foreign leaders suddenly closed their countries' borders to international travel in response to COVID-19, TourMappers' business immediately dried up. People stopped booking excursions to the United States and we were forced to return deposits on trips that had already been booked. Accordingly, for months, TourMappers has had virtually no revenue.

3. In connection with its business operations, TourMappers obtained financing from CBSG pursuant to an agreement (the "Agreement"), the repayment of which is supposed to be contingent upon the generation and collection of actual Receivables by the Company through the sale of its services. Since TourMappers has no Receivables, it should not be obligated to pay anything to CBSG. However, when TourMappers stopped paying CBSG under the Agreement because it had no sales, CBSG declared a default, filed the Judgment and began sending lien notices (the "Lien Notices") to TourMappers' former, present, and future customers, vendors, and others in the industry in a transparent attempt to tarnish TourMappers' name and reputation and extort a favorable settlement. If unabated, CBSG's conduct will permanently destroy TourMappers' reputation such that no one will want to do business with the Company once the

borders are reopened and travelers are once again allowed to enter the United States. Emergency injunctive relief is necessary to prevent this result or TourMappers will have no choice but to close its doors and cease operations.

FACTUAL BACKGROUND

A. TourMappers' Business

4. TourMappers is a business-to-business travel company. We provide hotel, event, and bus accommodations and tour packages to international tour operators for resale to foreign travelers coming to the United States, mostly from Europe. Among other things, we purchase hotel rooms, event tickets and book transportation for our international clients. We also offer other agencies pre-packaged tours of: (i) the South's music capitals, (ii) the cities surrounding the Great Lakes, and (iii) the Pacific Northwest.

5. We employ 10 people, plus 2 full-time consultants, and have one office in Boston, Massachusetts.

6. As with any travel agency, our revenues are entirely dependent upon tourism and are subject to its seasonal ups and downs. Generally speaking, TourMappers' revenue is higher in the spring and summer, and lower in the winter. Our costs, however, remain high during the winter. Not only are we required to pay normal operating costs such as employee salaries and benefits, but we are sometimes required to advance funds to make travel arrangements months in advance of the actual travel date and sometimes before we receive any deposit or other payment from our clients.

B. The CBSG Agreement

7. In late 2019/early 2020, I began looking for additional financing to help TourMappers address the ebbs and flows of its largely seasonal business.

8. On or about January 10, 2020, TourMappers entered into a so-called Agreement for the Purchase and Sale of Future Receivables (the "Agreement") with CBSG, a copy of which is attached here as Exhibit 1.

9. Pursuant to the Agreement, in exchange for $150,000 (the "Purchase Price"), CBSG purportedly purchased all of TourMappers' receivables (the "Receivables") until it was paid $208,500 (the "Purchased Amount"). *See* Agreement, §1, §5 a.

10. The Purchased Amount was to be repaid through weekly ACH withdrawals from a specified TourMappers' account (the "Account"), each in the equal amount of $10,425 (a "Weekly Payment") for a period of 20 weeks, which translates into an effective interest rate of more than 257% per annum. *See* Agreement, § 1, and Computation of Interest Rate, Exhibit 2.

11. The Weekly Payments supposedly represented 10% of the proceeds from TourMappers' anticipated weekly collections. *See* Agreement, § 1, §2 g.

12. In other words, if TourMappers did not have any collections, it should not have had to pay CBSG.

13. Indeed, the Agreement specifically provides that the Weekly Payments are **conditioned upon the generation and collection of Receivables through sales**:

> Payments made to Purchaser towards the total Receivables Purchase Amount **shall be conditioned upon (i) Merchant Seller's sale of products and/or services and (ii) the payment of such goods and/or services to Merchant Seller by its customers** pursuant to the terms of this Purchase Agreement.

See Agreement, §5 b. (emphasis added).

14. While TourMappers defaulted under the Agreement if it failed to make a required payment (Agreement, § 10 h.), it was not a default if TourMappers' business was suspended or terminated by "adverse weather, natural disasters, or acts of God." *See* Agreement, § 10 d.

15. Accordingly, by the interlocking terms of Sections 5 and 10 of the Agreement, TourMappers was not required to make a Weekly Payment if it was not generating sales or collecting Receivables and it could not be held in default if its business was interrupted by events outside its control such as a pandemic.

16. Upon an "Event of Default," CBSG had the right to obtain a confessed judgment. *See* Agreement, § 12. TourMappers also granted CBSG a security interest in substantially all of its assets and, upon an Event of Default, CBSG was entitled to exercise all of the rights and remedies available to a secured creditor under the Uniform Commercial Code ("UCC"). *See* Agreement at p.15, Security Agreement.

17. Absent an Event of Default under the Agreement, CBSG had no right to confess judgment, contact TourMappers' clients or exercise any rights under the UCC.

C. TourMappers' Business is Suddenly Shut Down by Order of President Trump.

18. On or about March 12, 2020, the United States Government announced that it was closing international borders and halting European and other international travel due to the impending threat of the COVID-19 pandemic. Several European and other governments similarly followed suit and, generally speaking, all travel into the United States stopped at that time.

19. I knew that halting travel into the United States would dramatically impact, if not altogether suspend, TourMappers' business so long as the travel ban was in effect and, on or about March 20, 2020, I called CBSG and spoke with two representatives. Among other things, I advised them that: (i) TourMappers was an inbound travel company; (ii) the travel ban would negatively impact our business if not totally freeze new bookings, require refunds of old bookings, and very quickly dry up TourMappers' sales and Receivable collections, and (iii) I did

not expect to generate any new sales while the travel ban remained in effect. I asked CBSG to temporarily stop the Weekly Payments or, at the very least, substantially reduce them because TourMappers would simply not have any sale collections to pay CBSG.

20. CBSG did not stop the Weekly Payments. Instead, it changed the Weekly Payments to daily payments in the amount of $950, or the equivalent of $4,750 per week. This made the situation even worse for TourMappers because, unlike retail stores such as Macy's, we do not generate and collect receivables every day. We can go days without making a sale or collecting a receivable depending on the time of year and tourism demand.

21. On March 16, 2020, CBSG began debiting $950 per day from the Account. I knew this was simply not sustainable. I immediately called CBSG, and eventually spoke with a representative named Alex, and advised CBSG that the Company simply could not afford to pay $950 per day because no one was permitted to travel into the United States and, as a result, the Company was not generating any sales to collect. Alex advised that he would have to discuss the matter internally and get back to me.

22. On March 17, 2020, after not having heard back from CBSG, I tried calling several times, and when no one answered or returned my voicemail, I emailed CBSG to advise that I could not make any payments, would be placing a stop payment on the Account and would resume making payments when the border was reopened and TourMappers began generating sales and Receivables again. *See* Email dated March 17, 2020 at 4:31 p.m., a copy of which is attached hereto as Exhibit 3.

23. Thereafter, I offered to pay CBSG $100 per day going forward. *See* Email dated March 17, 2020 at 5:00 p.m., Exhibit 4.

24. Even though I had repeatedly told CBSG that the Company was not generating any receivables and could not even afford the $100 I had offered to pay, CBSG refused to stop the payments or accept $100 per day.

25. Instead, CBSG demanded that TourMappers pay $300 per day, an amount which was in no way tied to the Company's current or anticipated revenues. *See* Email dated March 17, 2020 at 6:17 p.m., Exhibit 5.

26. TourMappers made the $300 daily payments from March 18 through March 23, 2020, but by then TourMappers sales, receivables and collections had dried up and I again advised CBSG that we simply could not make the daily payments. By email to Alex, I again requested that they temporarily stop the daily withdrawals. *See* Email dated March 24, 2020 at 2:51 p.m., Exhibit 6.

27. Initially, Alex responded to my email by curtly stating: "I reduced the payments I helped you." *See* Email dated March 24, 2020 at 3:22 p.m., Exhibit 7.

28. The following day, however, CBSG agreed to reduce the daily payments to $25 per day. Even then, CBSG continued to string me along. *See e.g*, Email dated March 25, 2020 at 12 at 12:28, Exhibit 8. Instead of agreeing to reduce the daily payments for the duration of the travel ban that was preventing TourMappers from generating any new Receivables to collect, CBSG, only agreed to reduce the payments for two weeks. *Id.*

29. At the end of the two-week period, on April 8, 2020, I again emailed CBSG and requested that they stop the daily payments because the travel ban had not been lifted and "I simply have no cash coming in and the account is almost dry." *See* Email dated April 8, 2020 at 9:06 a.m., Exhibit 8.

30. CBSG requested copies of the Company's recent bank statements for March 2020, which I duly provided by email. *See* Email dated April 8, 2020 at 12:40 p.m., a copy of which, with attachments, is attached hereto as Exhibit 9.

31. Upon receipt of the bank statements, Alex not only refused to stop the payments, but he also threatened to put the payments back to $10,425 per week:

> Julie, is this a Joke? you are doing good, I am putting payments back to normal. I want to see accounts 1549 and 8982.

See Email dated April 8, 2020 at 12:40 p.m., Exhibit 9.

32. How Alex could even think that an inbound travel agency was doing "good" when the United States Government banned travel into this country, is telling. Alex never asked me any questions about the statements or the flow of funds into and out of the Account.

33. As CBSG was aware, TourMappers maintains three accounts: (i) a business checking account (the "Operating Account"); (ii) a sweep account (the "Sweep Account") and (iii) a money market account (the "MM Account"). For security reasons, our international clients wire funds into the Sweep Account and, on a daily basis, the deposits are automatically swept into the Operating Account leaving a zero daily balance in the Sweep Account. We use the money in the Operating Account to pay our bills including the weekly/daily payments to CBSG. Occasionally, I transfer funds from the Operating Account to the MM Account so that TourMappers can earn interest and then I retransfer the funds to the Operating Account as needed to satisfy TourMappers' operating expenses. Accordingly, the transfers between TourMappers' accounts did not represent new sales and the proceeds of new Receivables from such sales, but merely the transfer of funds among the Company's accounts.

34. Indeed, consistent with the slowdown of TourMappers' business due to the travel ban, on April 8, 2020, I sent Alex a snapshot of TourMapper's bank accounts reflecting that as of April 7, 2020, the aggregate balance in the three accounts was less than $1,300. *See* Emails dated April 8, 2020 at 1:00 p.m., Exhibit 9.

35. Moreover, the bank statements and an attachment that I subsequent provided to CBSG at its request (Exhibit 10), reflected that between March 21, 2020 and April 14, 2020, the Company had received deposits totaling $10,349.26 of which, according to the Company's books and records, less than $4,000 were attributable to collection of any Receivable:

DATE	ACCOUNT	AMOUNT	SOURCE
4/2/2020	Operating Account	$2,378.20	Reimbursement for health care payment that was erroneously deducted the same day.
4/1/2020	Operating Account	$100.00	Returned stop payment item.
4/1/2020	Operating Account	$2,366.00	Receivable Payment
4/6/2020	Operating Account	$1,172.00	Receivable Payment
4/7/2020	Operating Account	$416.00	Receivable Payment
4/14/2020	Operating Account	$3,917.06	Partial refund for cancelled trade show in Berlin
TOTAL DEPOSITS		$10,349.26	
TOTAL ACCOUNT RECEIVABLES		$3,954.00	

See Exhibits 9 and 10.

36. Under the reduce payments, TourMappers made payments to CBSG totaling $875.00 which is more than 22% of TourMappers' receivable collections between March 21, 2020 and April 14, 2020, or more **twice** the Specified Percentage of Receivables that CBSG was entitled to collect under the Agreement. This left TourMappers with no money to operate. See Exs. 9 and 10.

37. In response to my April 8 emails, Alex requested that I prepare a "hardship letter," one again, asking CBSG to stop its daily collections until the borders opened up and Europeans began flying to the United States:

> As discussed, I have an international inbound travel service. All clients are overseas and therefore I have no business at the present time, nor will I have business till borders open and Europeans begin to fly in. As you could see by my bank statements, I have no cash flow at the present time and have laid off all staff except for 1 person. I'm down to $1200.00 between my business and personal combined.
>
> I need Par to hold payments till I get some funds from the government or travel resumes, whichever is first.

See Email and attachment dated April 8, 2020 at 1:33 p.m., attached hereto as Exhibit 11.

38. After sending the letter to Alex as he requested, I repeatedly called him on April 8 and again on April 9, 2020, but he did not return my messages or answer his phone. No one from CBSG ever contacted me concerning my hardship request and CBSG continued to withdraw funds from the Account.

39. At that point, the aggregate balance in all three of the TourMappers' accounts was less than $800 and with virtual no money to operate on even a minimal basis, I had no choice but to place a stop making the daily payments on or about April 10, 2020.

40. At the time TourMappers stopped making payments, the Company had paid CBS a total of $108,520.45, leaving an outstanding Purchased Amount balance of $99,979.55.

D. CBSG Files the COJ and begins UCC collection efforts.

41. Without notice to me, on April 21, 2020, CBSG filed a Confession of Judgment in the Philadelphia County Court of Common Pleas and obtained the Judgment against TourMappers, as primary obligor, and me, as guarantor. A copy of Judgment is attached hereto as Exhibit 12.

42. In support of the Judgment, CBSG filed an Affidavit of Default and a Complaint, copies of which are attached hereto as Exhibits 13 and 14.

43. The Complaint and Affidavit of Default declared that TourMappers had defaulted under the Agreement by "fail[ing] to deliver to CBSG the Receivables required." *See* Affidavit at p. 2; Complaint at ¶ 8.

44. These statements are indisputably false. As set forth above, TourMappers did not default under the Agreement, rather, our sales suddenly stopped and our revenues dried up because the borders were closed due to the world's COVID-19 response.

45. CBSG's lies and deceitful practices did not end with entry of the Judgment.

E. CBSG's bad faith collection tactics and commercially unreasonable behavior.

46. After learning that the Judgment had been entered, I retained White & Williams. Almost immediately thereafter, CBSG began a campaign to extort payment by slandering TourMappers' good name and reputation and driving TourMappers' business into the ground.

47. Beginning on or about May 27, 2020 and continuing at various dates thereafter, CBSG emailed so-called "Notices of Assignment and Liens" (collectively, the "Lien Notices") to certain of TourMappers' existing customers, as well as to certain of its former customers,

existing vendors and even to TourMappers' competitors. Copies of the May 27 Lien Notices are attached hereto as Exhibit 15.

48. The Lien Notices contained numerous false and misleading representations, including that: (i) CBSG had purchased TourMappers Receivables; (ii) TourMappers had defaulted under the Agreement; (iii) the recipients had made payments to TourMappers that represented some of the Receivables allegedly purchased by CBSG and (iv) TourMappers owed CBSG $121,379.55 under the Agreement. *See* Ex. 15. Additionally, the Lien Notices requested that the recipients "hold in reserve all funds payable to Merchant and forward them to CBSG immediately upon receipt of this letter and to continue doing so until you receive from us a release of the UCC-1 filing." *Id.*

49. Attached to each Lien Notice was a UCC-1 stating that "Contract Financing Solutions, Inc.," not CBSG, had purchased TourMappers' Receivables:

> THE FILING IS TO INDICATE, AND NOTIFY OF, CONTRACT FINANCING SOLUTIONS, INC. ("CFS") ABSOLUTE PURCHASE OR RECEIVABLES/ACCOUNTS RECEIVABLE OF DEBTOR, SUCH THAT CFS IS THE PRESENT AND ABSOLUTE OWNER OF SUCH RECEIVABLES/ACCOUNTS RECEIVABLE.

See Ex. 15.

50. TourMappers contracted with CBSG, not CFS. Prior to receiving copies of the Lien Notices, I had never heard of CFS and I was never made aware that CBSG had assigned any rights to CFS.

i. CBSG falsely represented that it had purchased TourMappers' Receivables.

51. Although the Agreement purports to be a purchase of Receivables, CBSG's conduct in this case plainly demonstrates that it never intended to purchase anything and that it

treated the Agreement as if it were a loan requiring absolute repayment of the Purchased Amount under any circumstances.

52. Section 5 of the Agreement specifically conditioned TourMappers' payment obligations upon the sale of TourMappers service and the collection of Receivables from TourMappers' clients and Section 10 expressly provided that the suspension of TourMappers' business due to an Act of God would not be considered an Event of Default under the Agreement. *See* Agreement, § 5 b and § b.

53. However, when TourMappers stopped generating sales and Receivables to collect, CBSG refused to stop the payments under the Agreement and when TourMapper's business dried up because of an Act of God, i.e – the COVID-19 pandemic, CBSG filed a confessed judgment and sent out the Lien Notices claiming TourMappers defaulted under the Agreement.

54. Attempting to collect under the Agreement even when TourMapers was not generating sales or collecting Receivables from its clients and its business had been shut down by an Act of God, indicates that CBSG considered TourMappers' repayment obligations as absolute which is consistent with a loan and not the purchase of receivables.

ii. CSBG falsely represented that TourMappers had defaulted under the Agreement.

55. TourMappers did not default under the Agreement. TourMappers stopped generating sales and collecting Receivables because the COVID-19 pandemic forced the United States and other countries to ban travel into the United States. TourMappers is an inbound travel agency. If people cannot travel into the United States, TourMappers cannot generate sales and Receivables and there is nothing to collect.

56. As set forth above, Section 5 of the Agreement specifically conditioned TourMappers' payment obligations upon the generation of sales and collection of resulting Receivables and Section 10 expressly provided that the interruption of TourMappers' business due to an Act of God is not an Event of Default under the Agreement. *See* Agreement, §§ 5 b. and 10 d. Since that was exactly what happened, TourMappers cannot possibly have defaulted under the Agreement.

iii. CBSG falsely represented that vendors, former customers and others had made payments to TourMappers that represented some of the Receivables allegedly purchased by CBSG.

57. The Lien Notices were sent to hotels, tourist attractions, travel companies and other vendors from whom TourMappers purchases rooms, tour packages, event tickets, travel tickets and other accommodations for its customers. These entities could not possibly have made payments to TourMappers that represented "some of the Receivables purchased by CBSG." These entities were not and never could be account debtors of TourMappers, they represented TourMappers' accounts payable obligees, not the Company's accounts receivable obligors.

58. Moreover, TourMappers did not do any business with many of the recipients of the Lien Notices or had not done business with certain recipients for several years. Indeed, certain of the Lien Notices were sent to former clients of TourMappers and to agencies who were perspective clients of the Company, but with whom TourMappers had not yet done any business.

59. By sending the Lien Notices to vendors, former clients and potential clients, CBSG was plainly not acting in good faith to collect upon a legitimate debt, but rather, CBSG was trying to tarnish the Company's good name and extort a settlement payment from TourMappers.

iv. CBSG overstated the amounts due.

60. The Lien Notices also overstate the amounts due under the Agreement. According to TourMappers' books and records, the principal outstanding balance is $99, 979.55, not $121,379.55, as CBSG claimed in the Lien Notices.

61. By overstating the amount due by nearly twenty percent (20%), CBSG was plainly attempting to recover more than it would have been entitled to in the event of a default and extort even a larger settlement from TourMappers.

F. CBSG bad faith collection efforts have not stopped.

62. CBSG is continuing in its efforts to smear TourMappers' name and drive the Company out of business. The day after commencement of these emergency proceedings, and a week after TourMappers' filed a demand for arbitration with AAA, CBSG sent out more Lien Notices to vendors, former clients and prospective clients. *See* Lien Notices dated June 3, 2020, attached as Exhibit 16 hereto.

63. These Lien Notices continued to falsely allege that (i) CBSG had purchased TourMappers' receivables; (ii) TourMappers had defaulted under the Agreement; (iii) the recipients had made payments to TourMappers that represented some of the Receivables allegedly purchased by CBSG TourMappers had defaulted under the Agreement; and (iv) TourMappers owed CBSG $121,379.55 under the Agreement and. *Id.*

64. CBSG has made it patently clear that they will not stop sending the Lien Notices until TourMappers' reputation is destroyed beyond repair or I figure out a way to come up with the money to pay them.

65. On or about June 11, 2020, I received a telephone call from a CBSG representative demanding that I resume making the $25 daily payments because that amount was

"lunch money." When I asked that he speak with my attorneys, he said CBSG "does not deal with attorneys" and threatened to send even more Lien Notices, and that is exactly what they did.

66. By emails dated June 12, 2020, CBSG sent another 12 Lien Notices to the same vendors, former clients and potential clients to whom it had previously sent such Lien Notices. *See* June 12 Lien Notices, attached hereto as Exhibit 17. The June 12 Lien Notices contained the exact same false representations as the previous Lien Notices.

67. Amazingly, while the pandemic lingers on, CBSG has gotten even more aggressive. On June 16, 2020, CBSG sent Lien Notices to 10 hotels and a competing travel agency. *See* June 16 Lien Notices, Exhibit 18. Plainly, these entities do not owe any money to TourMappers and could never owe any money to TourMappers because, at best, TourMappers would *owe them money* for hotel reservations, etc. It could not be more clear that the latest Lien Notices are designed only to further the irreparable harm caused to TourMappers business reputation and drive the Company into the ground. Indeed, they underscore the need for the emergency relief sought herein.

CBSG IS IRREPARABLY DAMAGING MY BUSINESS

68. TourMappers business has already been dramatically impacted by COVID-19 and the continued shutdown of the United States' borders to international travelers. CBSG's conduct is ensuring that even when the borders open, TourMappers' business will not recover.

69. Name recognition and reputation are everything in the travel industry. If companies' can't trust you with their client's money; they won't send you any business.

70. By sending Lien Notices to TourMappers' former, existing, and future clients, CBSG is ensuring that these companies will not do business with TourMappers in the future.

71. Further, by sending Lien Notices to hotels, airlines, event venues, and travel companies, CBSG is ensuring that TourMappers will not able to book any travel plans in the future.

72. If left unabated, CBSG's conduct will ensure that TourMappers will not be able to generate any business in the future, even when the current travel bans are lifted and international visitors are allowed to travel into the United States. No one will want to book a trip through TourMappers if they are required to pay the proceeds to CBSG as required by the Lien Notice and no hotel or other vendor will want to do business with TourMappers if all of our proceeds are to be paid to CBSG.

73. Accordingly, for the above reasons, it is respectfully submitted that TourMappers be granted the requested emergency relief.

I, JULIE KATZ, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

JULIE KATZ

Executed this 17th day of June, 2020

Exhibit 9

TOURMAPPERS NORTH AMERICA, LLC d/b/a TOURMAPPERS NORTH AMERICA, and JULIE PAULA KATZ, Guarantor, Claimants v. COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING Respondent.	Arbitration Case No. 01-20-0005-3591

ORDER

WHEREAS, on or about January 10, 2020, Respondent Complete Business Solutions Group, Inc. d/b/a Par Funding ("Respondent" or "CBSG") and Claimant TourMappers North America, LLC d/b/a TourMappers North America ("TourMappers"), as primary obligor, and Claimant Julie Paula Katz ("Katz" and together with TourMappers, the "Claimants"), as guarantor, entered into an agreement entitled "Agreement for the Purchase and Sale of Future Receivables" (the "Agreement").

WHEREAS, Respondent alleges that Claimants have breached the Agreement by failing to deliver to Respondent certain receivables that were allegedly due and owing to Respondent under the Agreement;

WHEREAS, on or about April 21, 2020, obtained confessed judgment against Claimants in the amount of $127,687.96 (the "Judgment") in an action entitled *Complete Business Solutions Group, Inc. d/b/a Par Funding v. TourMappers North America LLC d/b/a TourMappers North*

America and Julie Paula Katz, Court of Common Pleas, Philadelphia County, Case No. 200401028 (the "State Court Action");

WHEREAS, on or about May 21, 2020, the Claimants filed (i) a Petition to Strike/Open (the "Petition") the Judgment on various grounds and (ii) an arbitration demand (the "Arbitration Demand") with the American Arbitration Association ("AAA") which, among other things, sought a determination on the merits of the Petition;

WHEREAS, by letter to AAA dated June 1, 2020 (the "Injunction Letter"), the Claimants sought emergency injunctive relief pursuant to AAA Commercial Rule 30(b);

WHEREAS, by letter to AAA dated June 3, 2020 (the "Reply Letter"), the Respondent disputed Claimants assertions in the Injunction Letter and objected to the issuance of any emergency injunctive relief;

WHEREAS, the Honorable Linda R. ~~Fineberg~~ Feinberg was appointed to serve as the emergency arbitrator (the "Emergency Arbitrator") and a briefing schedule was agreed to by the Claimants and Respondent;

WHEREAS, on or about June 17, 2020, Claimants filed a Request for Emergency Relief Pursuant to AAA Commercial Arbitration Rule 38 (the "Application") that: (i) temporarily restrained and enjoined Respondent during the pendency of the Arbitration from: (a) executing upon or otherwise attempting to enforce Judgement and (b) sending out any lien notices, contacting any individuals or taking any further actions to collect upon the debt underlying the Judgment; and (ii) required the Respondent to retract and withdraw lien notice and assignment letters (collectively, the "Lien Notices") already sent to TourMappers' existing customers, former customers, vendors, competitors and others. Among other things, the Claimants contended that was no default under the Agreement, the Lien Notices were issues in bad faith

and the Agreement was a criminally usurious and unenforceable loan. In support of the Application, the Claimants submitted the Declaration of Shane R. Heskin dated June 17, 2020 (the "Heskin Mov. Decl.") and the Declaration of Julie Katz dated June 17, 2020 (the "Katz Mov. Decl."), together with 26 exhibits attached thereto.

WHEREAS, on or about June 26, 2020, the Respondent filed a Brief in Opposition to Claimants' Request for Emergency Relief Pursuant to AAA Commercial Rule 38, together with certain exhibits attached thereto (collectively, the "Opp. Br.") wherein, among other things, the Respondent requested that the Application be denied because (i) the Application was procedurally improper and facially defective and (ii) the Claimants' failed to satisfy the standard for injunctive relief. Additionally, the Respondent asked the Emergency Arbitrator to shift all fees and costs related to the Application to the Claimants.

WHEREAS, on or about July 6, 2020, the Claimants filed: (i) a Reply Memorandum of Law (the "Reply Br."); (ii) Reply Declaration of Shane R. Heskin dated July 6, 2020 (the "Heskin Reply Decl."), together with exhibits thereto; and (iii) the Reply Declaration of Julie Katz dated July 6, 2020 (the "Katz Reply Decl."), together with exhibits.

WHEREAS, counsel for the Claimants and Respondents each declined the offer of the Emergency Arbitrator to conduct oral argument with respect to the Application;

WHEREAS, having read and considered all of the above, the Emergency Arbitrator issued a written decision dated July 15, 2020 (the "Decision") that granted the Application, without the need to post an injunctive bond, and denied the Respondent's request for the shifting of costs and fees.

NOW, THEREFORE, in light of the foregoing, pursuant to AAA Commercial Rule 38 i

NOW, THEREFORE, based upon the foregoing record and for the reasons set forth more fully in the Decision which is incorporated herein and attached hereto as Exhibit A, pursuant to AAA Commercial Rule 38, the Emergency Arbitrator:

FINDS, THAT:

1. The Emergency Arbitrator has the power pursuant to AAA Commercial Rule 38 to adjudicate and grant the relief requested by the Agreement.
2. There was no default under the Agreement.
3. The Respondent violated the UCC by sending out Lien Notices it knew or should have known were not Claimants' account debtors.
4. The Lien Notices were not issued in good faith but were rather a campaign of harassment against TourMappers.
5. The Claimants have and will suffer irreparable harm due to the Respondent's campaign of harassment.
6. The Claimants have no current obligations to Respondent under the Agreement.
7. The Respondent violated the UCC by sending out Lien Notices it knew or should have known were not Claimants' account debtors.
8. The Claimants have satisfied the standards for granting injunctive relief.
9. Requiring an injunctive bond would impose an undue hardship under the circumstances.

AND HEREBY ORDERS THAT:

1. The fee-shifting relief requested by the Respondent in the Opp. Br. is denied in its entirety;
2. The Application is granted in its entirety;

3. Except as may otherwise be provided herein, immediately and continuing through the duration of this Arbitration, the Respondent, and anyone acting on its behalf or at its direction, is hereby enjoined and restrained from: (a) executing upon or otherwise attempting to enforce Judgement and (b) sending out any lien notices, contacting any individuals or taking any further actions to collect upon the debt underlying the Judgment;

4. Within three (3) business days of this signed Order being delivered to its counsel of record in this Arbitration; the Respondent is required to email letters (each, a the "Retraction Letter") to all addressees of its previously issued Lien Notices in the form attached hereto as Exhibit B; and.

5. The Respondent shall provide counsel for the Claimants with copies each Retraction Letter simultaneously as they are emailed to each Lien Notice recipient.

DATED: July 24th, 2020

Hon. Linda R. Feinberg (Ret.)

Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FLEETWOOD SERVICES, LLC, ROBERT L. FLEETWOOD and PAMELA A. FLEETWOOD, individually and on behalf of all others similarly situated, Plaintiffs, v. COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING; THE JOHN AND JANE DOES Defendants.	Civil Action No. 18-cv-00268 (JS) JURY TRIAL DEMANDED **SECOND AMENDED COMPLAINT**

Plaintiffs Fleetwood Services, LLC, Robert L. Fleetwood and Pamela A. Fleetwood, by and through their undersigned attorneys, individually and on behalf of all others similarly situated, file their Second Amended Complaint against Defendant Complete Business Solutions Group, Inc. d/b/a Par Funding, and the John and Jane Doe investors and allege as follows upon personal knowledge as to themselves and their own acts and experience, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

NATURE OF THE ACTION

1. This is a RICO action to save a small Texas business, and other similarly situated small businesses, from financial ruin at the hands of a scheme (the "Lending Enterprise") by the Defendants to originate, fund and collect on usurious and illegal loans.

2. Defendants' scheme prey upon small, financially distressed businesses in Texas and throughout the United States, and fraudulently induces them into advances pursuant to so-

called future account receivable purchase agreements or merchant case advance agreements. (collectively, the "CBSG Agreements").

3. The terms and conditions of these agreements are wholly inaccurate, and knowingly designed and/or used by the Defendants to deceive the small businesses and others into believing the agreements do not contemplate a loan transaction so that they do not trigger the usury laws of various states.

4. When Plaintiffs and other similarly situated businesses cannot meet their obligations under these agreements, Defendants offer new advances under even more unconscionable terms.

5. Eventually, the terms become too oppressive, small businesses default, and the Defendants aggressively pursue small businesses and their owners for repayment of the amounts due under the agreements, often employing threatening, deceptive, and illegal collection tactics.

6. In the end, Plaintiffs and other similarly situated businesses face certain financial ruin while Defendants recover not only the principal advanced, but also interest at rates that exceed 300%, which rate is far greater than any interest permitted by applicable law.

INTRODUCTION

7. Plaintiffs Fleetwood Services, Mr. Fleetwood and Mrs. Fleetwood were victimized by a predatory merchant cash advance lender and its respective broker, who intentionally and systematically took advantage of Plaintiff Fleetwood Services at a time when it was experiencing cash-flow issues.

8. Plaintiffs are not alone. Numerous other small businesses and citizens in Texas and across the nation have similarly been victimized by the same predatory lending scheme, as evidenced by the number of lawsuits filed by victims in California, Massachusetts, Michigan,

Mississippi, New York, and Pennsylvania, all claiming similar cash advance transactions were based upon false and misleading representations.

9. Defendants' financing activities are not regulated by the government and the fees, penalties and rates are not subject to any regulatory oversight.

10. Defendants use this lack of regulatory oversight to evade state usury laws by creating agreements that are wholly misleading, and intended to deceive courts around the country into believing the agreements do not constitute a loan transaction but, rather, the purchase of future receivables to which usury laws do not apply. In reality, no receivables are assigned or transferred, the small businesses continue to collect the proceeds thereof and the amounts advanced are repaid through daily payments by the small businesses at annualize that in this case exceed 114% and, in other cases, may exceed 300%.

11. As Bloomberg News has reported, the merchant cash advance industry in which the Defendants operate is "essentially payday lending for businesses.[1] It's a high-risk market, and interest rates can exceed 500 percent a year, or 50 to 100 times higher than a bank's." *Id.*

12. The industry has increasingly come under national scrutiny for its devastating impact upon small businesses. In June of 2017, Congressman Emanuel Cleaver, II launched an investigation of small business financial technology ("FinTech").

13. Congressman Clever was "particularly interested in payday loans for small businesses, also known as 'merchant cash advance"[2] such as the one at issue in this litigation.

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[1] Zeke Faux and Dune Lawrence, *Is OnDeck Capital the Next Generation of Lender or Boiler Room?*, BLOOMBERG (Nov. 13, 2014, 6:07 AM), https://www.bloomberg.com/news/articles/2014-11-13/ondeck-ipo-shady-brokers-add-risk-in-high-interest-loans.

[2] Scott M. Pearson, *House Member Launches FinTech Lending Investigation*, CONSUMER FINANCE MONITOR (June 26, 2017), https://www.consumerfinancemonitor.com/2017/06/26/house-member-launches-fintech-lending-investigation/.

14. He expressed concern that "some FinTech lenders may be trapping small business owners in cycles of debt…"

15. The National Consumer Law Center came to the same conclusion:

> Merchant cash advances operate very similarly to payday loans and have similar problems. A lump sum of cash is taken out as an advance on a borrower's future sales. The merchant then pays back this balance in addition to an expensive premium through automatic deductions from the merchant's daily credit card or debit card sales or from its bank account.[3]

16. As reported by CNN, "[m]any business owners take out new advances in order to pay off outstanding balances on previous advances, plunging them into a cycle of debt."[4]

17. According to the Consumer Financial Protection Bureau, over 19 million U.S. households resort to payday loans. Of that number, almost 70% of borrowers have to take out a second loan to cover the first, and 20% end up saddled with 10 or more loans, one after the other.

18. The New York State Department of Financial Services has recognized "the harmful impact of high-interest payday loans that trap consumers in a cycle of increasing debt and predatory collection practices," and has vowed "to protect New Yorkers from unscrupulous practices and [] oppose any attempt to evade New York's laws."[5]

19. The New York Attorney General's Office has also acknowledged the damage these loans do, stating: "[a]lthough many of these companies profess to offer cash-strapped consumers much needed access to loans, they typically charge exorbitant interest rates that

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[3] National Consumer Law Center, Comments to the Comptroller of the Currency Office of the Comptroller of the Currency on *Exploring Special Purpose National Bank Charters for Fintech Companies*, National Consumer Law Center (Jan. 17, 2017)http://www.nclc.org/images/pdf/banking_and_payment_systems/ fintech/comments-fintech-jan2017.pdf..

[4] Octavio Blanco, *Controversial Cash Advances Come At A High Cost To Small Businesses*, CNNMONEY (Dec. 1, 2016, 2:28 PM), http://money.cnn.com/2016/12/01/news/economy/merchant-cash-advance/index.

[5] Letters from Maria T. Vullo, Superintendent, New York State Department of Financial Services, to the Honorable Thomas J. Curry, Comptroller, OFFICE OF THE COMPTROLLER OF THE CURRENCY (January 17, 2017 and April 14, 2017), https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-nys-dept-financial-services.pdf.

essentially force struggling consumers to roll over one payday loan into another and that trap consumers in a vicious, never ending cycle of high-cost borrowing that they can never repay."[6]

20. Defendants are the commercial equivalent of payday lenders.

21. Defendants' scheme is designed to trap the small business in a cycle of never ending debt so that Defendants can reap as much profit as quickly as possible. When small businesses cannot make the daily payments required by their agreements, they offer small businesses new advances under more onerous terms. Ultimately, small businesses cannot keep up with the daily payments required under these agreements, and upon default, Defendants aggressively pursue their full recourse rights against the small businesses and their owners who frequently personally guarantee repayment of the advances.

22. As one small business protection advocate has put it, Defendants are "in the business of helping [small] businesses fail." *Bloomberg, supra.*

THE PARTIES

23. Plaintiff Fleetwood Services, LLC ("Fleetwood") is a Texas limited liability company with its principal office in Dallas, Dallas County, Texas.

24. Plaintiff Robert L. Fleetwood ("Mr. Fleetwood") is a natural person residing in Dallas, Dallas County, Texas.

25. Plaintiff Pamela A. Fleetwood ("Mrs. Fleetwood") is a natural person residing in Dallas, Dallas County, Texas.

26. Upon information and belief, Defendant Complete Business Solutions Group, Inc. d/b/a Par Funding ("CBSG") is a corporation organized and existing under the laws of

[6] Letter from Jane M. Azia, Bureau Chief, Consumer Frauds and Protection, to the Honorable Thomas J. Curry, Comptroller, OFFICE OF THE COMPTROLLER OF THE CURRENCY (January 17, 2017), https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-ny-atty-general.pdf.

Pennsylvania, with a principal place of business located at 141 N. 2nd St., Philadelphia, Pennsylvania, 19106.

27. On information and belief, each of the John and Jane Doe Defendants (the "Investors Defendants") are investors in CBSG and each are citizens of New York, New Jersey, and Pennsylvania.

JURISDICTION AND VENUE

28. This Court has subject-matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 based on Plaintiffs' claims, individually, and on behalf of similarly situated persons, for violations of the Racketeer Influenced and Corruption Organizations Act, 18 U.S. C. §§ 1961–68. The Court has subject-matter jurisdiction over the state-law claims of the Plaintiffs' and putative Class Members because they are so related to the federal claims asserted herein that they form part of the same case or controversy under Article III of the United States Constitution.

29. Additionally, this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because there is diversity of citizenship and the amount in controversy exceeds $75,000, exclusive of interest, costs, and attorney's fees.

30. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this action occurred here.

31. Each Defendant is subject to the personal jurisdiction of this Court because each Defendant has voluntarily subjected itself/himself/herself to the jurisdiction of this Court; regularly transacts business within the State of Pennsylvania, and/or has purposefully availed himself of the jurisdiction of this Court for the specific transactions at issue.

FACTUAL BACKGROUND

32. Plaintiff Fleetwood is a small business, providing golf course construction, development, renovation and remodeling. It is owned and operated by Plaintiffs Robert Fleetwood and Pamela Fleetwood.

33. Pamela Fleetwood has no financial experience and her highest level of education is a high school diploma.

34. Robert Fleetwood has an associate's degree in general studies, and is by trade a construction worker.

35. Defendant CBSG is a lender in the merchant cash advance industry, tempting its customers with promises of immediate working cash.

36. Like many small construction businesses, Fleetwood does not immediately get paid for its services. Generally speaking, it provides the service to its customers and invoices the customers on 30-60 date terms. Thus, there is a delay between the time Fleetwood generates a receivable and gets paid which, at times, can cause cash flow issues for the company.

37. As a result, like many thousands of other small business victims, Fleetwood was induced into a never-ending series of merchant cash advance agreements, whereby Fleetwood was forced to take out new MCA agreements just to pay off the prior MCA agreements in what would eventually become a never-ending cycle of debt.

38. Defendants' entire scheme preys upon and targets unsophisticated small businesses, like Fleetwood, that are caught in an unsustainable cycle of debt.

39. In preying upon these small business victims, Defendants fraudulently induce their victims into entering into a new MCA loan with Defendants at even more onerous interest

rates by falsely promising that their loan product will consolidate all of their existing MCA debt and lower the interest and payments that they were previously paying.

40. Plaintiffs are one of these victims.

41. By January 2017, Plaintiffs were drowning in MCA debt, and Defendants knew it.

42. In total, Plaintiffs had at least six other MCA agreements that required onerous daily payments that Plaintiffs could not afford to pay.

43. Enter Defendants.

44. Preying upon Plaintiffs' desperate financial condition, Defendants approached Plaintiffs through a broker, Prime Time Funding, in or around January 2017.

45. Defendants promised to consolidate and lower Plaintiffs' existing payments and lower the interest that Plaintiffs were previously paying under their existing MCA agreements.

46. As part of these promises, Defendants presented Plaintiffs with a take-it-or leave-it contract of adhesion, which falsely represented that Defendants were purchasing Fleetwood's future receivables.

47. The contract presented to Plaintiffs was a complete and utter sham designed to evade the criminal usury laws of Texas, and to fraudulently conceal the illegal nature of the transaction at issue.

48. The unlawful contract of adhesion was also riddled with unfair and oppressive provisions designed to shield Defendants from its criminal conduct.

49. Among these unfair and oppressive provisions, Defendants included

- A Pennsylvania choice-of-law provision, which was designed to evade the criminal usury laws of Plaintiffs' home state;
- A Pennsylvania venue provision requiring Plaintiffs to litigate hundreds of miles away from their home state;

- An attorneys' fees provision awarding Defendants and Defendants only 10% of the funded amount in the event of a breach;
- A warrant of attorney permitting Defendants to confess judgment against Plaintiffs;
- A jury trial waiver;
- A limitation of damages provision;
- A personal guarantee;
- A power of attorney;
- A UCC lien on all of their assets;
- A requirement to purchase business interruption insurance;
- A provision prohibiting Plaintiffs from taking out other loans or financing with any other party; and
- A class action waiver.

50. None of the above provisions was negotiated. Rather, the provisions were take-it-or-leave-it provisions unilaterally dictated by Defendants.

51. On or about January 4, 2017, Fleetwood capitulated to the unconscionable demands of Defendants and signed the contract of adhesion now at issue (the "Agreement").

52. The Agreement purported to be a sale of Fleetwood's future receivables. It was not.

53. The Transaction provided as follows:

Purchase Amount	Purchase Price	ACH Payments	Other Fees	"Specified Percentage"	Undisclosed APR
$370,000	$547,600	$5,000.25 x 110	$995.00	25%	114.07%

54. Terms of the Agreement included, but were not limited to:

a. In exchange for providing a total of $370,000.00, Fleetwood became obligated to repay $547,600.00 by way of 110 payments of $5,000.25, with payment in full estimated to be made by June 12, 2017;

b. Full recourse protection for Defendant CBSG in event of default or bankruptcy. Fleetwood was required to execute a security agreement; Plaintiffs Mr. Fleetwood and Mrs. Fleetwood were required to execute personal guarantees as well as confessions of judgment as a condition of the transaction, thereby permitting Defendant CBSG to immediately seize Fleetwood's business assets as well as the personal assets of Plaintiffs Mr. Fleetwood and Mrs. Fleetwood and to obtain a Judgment by Confession without even notifying them;

c. Plaintiff Fleetwood was required to turn over all its user names, passwords and bank account information. Any attempt by Fleetwood to change either the user name or password without advising Defendant CBSG was defined as an event of default;

d. Failure by Fleetwood to make the daily fixed payment was defined as an event of default, even if Plaintiff Fleetwood Services had no receivables that day;

e. A purported 25% was identified as the specified percentage of receivables at issue, which had nothing to do with the terms of repayment other than to appear as though that was the percentage of interest being charged for the loan; and,

f. Substantial fees could be assessed by Defendant CBSG for, including but not limited to, insufficient funds ($75.00 each up to four times before default declared), rejected ACH attempts ($100.00), change of bank accounts ($50.00), default fee ($5,000), and collection expenses in event of default.

55. The purported fair market value of Fleetwood's future receivables was unilaterally dictated by Defendant CBSG, and was based upon the credit worthiness of Fleetwood. In contrast, a true factoring agreement determines the fair market value of the receivable, based on the credit worthiness of the customer who is expected to pay the receivable.

56. Here, Defendant CBSG's fixed daily debits have nothing to do with any calculation of Fleetwood's receivables. Rather, any and all receivables from any customer in any amount based on any sale is subject to transfer to Defendant CBSG for payment of the daily fixed debit.

57. Pursuant to the terms of the Agreement, as opposed to a true factoring arrangement, Plaintiffs Mr. Fleetwood and Mrs. Fleetwood bear the entire risk of a customer not paying, rather than CBSG.

58. In reality, the true purpose of the Agreement was to protect the financial interests of CBSG, while increasing Fleetwood's dependence on future loans, because the debt consolidation program offered by CBSG was designed to fail.

59. In furtherance of their fraudulent and deceptive scheme, Defendants fraudulently and/or negligently induced Fleetwood to enter into the purported debt consolidation program by making knowingly false and misleading representations such as that "the purpose of the [CBSG] consolidation funding program is for [Fleetwood] to move away from cash advance companies."

60. CBSG repeatedly represented that the consolidation funding would alleviate daily cash flow concerns by reducing Fleetwood's daily ACH debits from $6,667.00 per business day to $5,000.25, a savings represented to be of approximately $1,666.75 each business day.

61. In an effort to intentionally mislead and/or negligently make Fleetwood believe that its cash flow would improve, CBSG represented that it would be wiring in a set amount of cash infusion over an initial nine (9) weeks of the loan, so that those funds could be used to make Fleetwood's payments to other lenders. However, by the time CBSG took the 33rd ACH from Fleetwood's bank account, all of the upfront cash infusion that was used to induce Fleetwood into the debt consolidation program was used up. As a result, Fleetwood was left paying thousands of dollars more to CBSG than it had been paying prior to the debt consolidation program offered.

62. The Broker and CBSG conspired to make these knowingly false, misleading and/or negligent representations in an intentional attempt to lead Fleetwood to believe that this consolidation program would improve its cash flow, when in actuality, it was purposefully and/or negligently designed to worsen Fleetwood's cash flow, and thereby increasing its dependence on further loans exclusively from Defendant CBSG. In fact, another hidden term of

the Agreement conveniently limited Fleetwood to seeking any further business loans exclusively from Defendant CBSG.

63. The cash flow benefit touted by CBSG not only quickly evaporated over the life of the loan, but resulted in a longer loan term and the payment of additional interest. As expected and/or negligently designed, the daily payments under the debt consolidation program forced Fleetwood to either come up with its own additional capital or borrow even more money from CBSG. Coincidentally, it was about that time that Fleetwood became financially strained from the existing relationship with CBSG, that it was offered an opportunity by CBSG to refinance its remaining balance, at a reduced daily rate, but for an extended additional period of time.

64. During the course of the Agreement, there were days when there were insufficient funds to cover the daily ACH debit taken by CBSG. On a number of occasions, threats were made by a representative at CBSG that unless payments in full were made, a default would be declared. Further, Plaintiffs Mr. and Mrs. Fleetwood were warned that if default was declared they would lose the business, their house, and all their personal assets. These threats caused tremendous emotional and mental distress to Plaintiffs Mr. Fleetwood and Mrs. Fleetwood since everything they owned was at risk of seizure and/or foreclosure.

65. Moreover, in direct conflict with the reconciliation provision of the contract, CBSG charged Fleetwood over $11,000 in admitted "Finance Charges" in exchange for lowing the daily payment amount:

03/16/17	$ 5,000.25	$ 312,588.25	Payment
03/17/17	$ 3,250.00	$ 309,338.25	Payment
03/17/17	$ (7,001.00)	$ 316,339.25	Finance Fee

04/28/17	$ 5,000.25	$ 209,712.25	Payment
05/01/17	$ 3,000.00	$ 206,712.25	Payment
05/01/17	$ (4,000.00)	$ 210,712.25	Finance Fee

66. That is absolutely not how a factoring agreement works, but it is exactly how a loan works. Even more troubling, CBSG charged Fleetwood this "Finance Fee" even though there is absolutely no right to charge a "Finance Fee" anywhere in the agreement.

67. After being trapped in CBSG's tentacles without the ability to put an end to the debt consolidation scheme, Fleetwood finally qualified for a Small Business Loan with a traditional lender. On July 5, 2017, Fleetwood was able to pay-off Defendant CBSG in full. Nevertheless, Fleetwood continues to receive calls from brokers and lenders seeking to tempt Fleetwood with additional merchant cash advances.

I. The Agreement is not an account purchase transaction, but rather, it is a disguised loan.

a. There was no "sale" of receivables.

68. Pursuant to the Agreement, CBSG advanced $370,000 (the "Purchase Price") to Fleetwood in exchange for the repayment of $547,600 (the "Purchase Amount") by way of 110 daily ACH withdrawals (each, the "Daily Specified Amount") from a designated Fleetwood account (the "Account").

69. While the Agreement used terms such as "factoring agreement," "sale," and "purchase," the Transaction had none of the hallmarks of a true sale and all of the hallmarks of the loan that charged a usurious interest rate of more than 114%.

70. The quintessential element of any sale is the absolute transfer of the benefits and burdens of the ownership of the subject asset from the seller to the buyer. That did not occur here for several reasons.

71. First, notwithstanding the fact that the Transaction was denominated a "sale" of Fleetwood's future receipts, CBSG acquired only a temporary interest in Fleetwood's receivables.

72. Second, CBSG's temporary interest did not divest Fleetwood of the most important benefit of ownership – the right to use the proceeds of the Receipts. Pursuant to the Agreement, Fleetwood was only obligated to deposit a specific amount of its receivable collections into the Account so that CBSG could withdraw the Daily Specified Amount.

73. Accordingly, by the express terms of the Agreement, Fleetwood retained the right to use the proceeds of the very assets CBSG was allegedly purchasing. In fact, Fleetwood was *required* to use such proceeds to operate its business, because the Agreement prohibited Fleetwood from obtaining any other additional financing.

74. Third, Fleetwood's repayment obligations were not limited to delivery of the purchased Receipts or even some percentage thereof. CBSG purportedly purchased Fleetwood's future Receipts, but the Agreement reflects that CBSG plainly did not want to wait to be repaid until such receipts were generated and collected. Pursuant to the Agreement, although CBSG purchased Fleetwood's future Receipts, Fleetwood was required to pay the Purchased Amount by remitting an amount of all its receipts.

75. In other words, rather than getting paid from what it allegedly purchased, CBSG required Fleetwood to repay the Purchased Amount through independent funds – an obligation that is inconsistent with a true sale.

76. Finally, by operation of the Agreement's default rights and remedies, repayment of the Purchased Amount was put beyond any risk of non-payment and Fleetwood remained absolutely liable for repayment of the Purchased Amount.

77. Under the Agreement, if an Event of Default occurred, Plaintiffs immediately became liable for the full outstanding Purchased Amount, together with additional fees and costs due under the Agreement, and CBSG had the right and power, among other things, to confess judgment against the Plaintiffs for this amount.

78. An Event of Default is defined under the Agreement so that a default would occur under any and every conceivable circumstance wherein Fleetwood failed to generate or collect future Receipts to repay CBSG including, if Fleetwood: (i) failed to timely make the Daily Payments; (ii) became insolvent or filed for bankruptcy, (iii) transferred or otherwise sold its assets or (iv) moved, terminated, interrupted or suspended its business in any way.

79. Accordingly, even if Fleetwood's business were destroyed or suspended by a hurricane, flood, fire or other Act of God, it would in default of the Agreement and, pursuant to the remedies provided by the agreement, Plaintiffs would be liable for the full outstanding balance of Receipts Purchased Amount, plus all fees and costs due under the Agreement.

b. The "Daily Specified Amount" is a disguised, fixed, loan payment

80. According to the Agreement, the "Daily Specified Amount" was allegedly based on a good-faith estimate of Fleetwood's daily future receipts, however, that could not have been possible because Fleetwood's business did not generate daily receipts, it invoiced its customers on terms. In reality, the Daily Specified Amount is a knowingly false term unilaterally dictated by CBSG in an attempt to avoid usury laws. In fact, the payment is based on the value of the loan, not Fleetwood's daily receivables.

81. Fleetwood was required to pay the "Daily Specified Amount" until CBSG received the "Purchased Amount" in full.

c. The Purchased Amount is the disguised repayment of principal and interest

82. The purported Purchase Amount of the Future Receipts is also complete fiction. In the Agreement, Defendant CBSG represents that the "Purchased Amount" is tied to the value of the purchased receivables. In reality, however, the alleged fair market value was unilaterally dictated by CBSG based on the creditworthiness of the merchant. In contrast, true factoring agreements determine the fair market value of the receivable based on the credit worthiness of the customer expected to pay the receivable.

83. Furthermore, the Agreement is not tied to specific and existing contracts for goods already delivered by the merchant to a customer. In other words, the right to repayment is not tied to the value or money owed to CBSG based on goods or services already provided to a customer who has not yet paid, but instead is based on any and all future receivables based on the sale of goods or services by Fleetwood until the "factoring agreement" was paid in full. By definition, these terms do not constitute a factoring agreement, but rather a loan.

d. Agreements provided for full recourse in the event of a default or bankruptcy.

84. Unlike a true factoring agreement, the terms of the Agreement provided for absolute payment for the Plaintiffs.

85. If the Fleetwoods were ever to miss a payment, they would be in default and CBSG would be entitled to confess judgment against the Plaintiffs.

86. The Agreements allowed for up to four nonsufficient fund fees of $75 before default would occur.

87. In order to obtain the loans, Fleetwood was required to grant to CBSG "a security interest in (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory … now or hereafter owned or acquired by SELLER/MERCHANT and (b) all proceeds, as that term is defined in Article 9 of the UCC . . . ."

88. The security agreement further provided that, upon default, Defendant CBSG "may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce, or satisfy any obligations then owing, whether by acceleration of otherwise."

89. Mr. and Mrs. Fleetwood were also required to personally guarantee performance of the representations, warranties and covenants under the Agreements.

90. Further, should Plaintiffs ever enter bankruptcy, the Agreements provided "Protections 2 [confession of judgment] and 3[enforcement of security interest in collateral] are immediately invoked."

e. CBSG's conduct demonstrates the Agreement was intended to be a loan.

91. CBSG's conduct demonstrates that the CBSG Agreements, including the Agreement with Fleetwood, are intended to be loans.

92. On December 20, 2018, Bloomberg News published an article exposing the unlawful collection tactics employed by CBSG when a merchant fails to pay:[7]

[7] https://www.bloomberg.com/graphics/2018-confessions-of-judgment-visit-from-gino/

Gino Gioe enters the Los Angeles office of Radiant Images on Feb. 15, 2018, captured by a surveillance camera. SOURCE: COMPLAINT FILED IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

93. As Bloomberg News revealed, CBSG routinely employs mob-like intimidation tactics when a merchant cannot pay:

> Gioe's travels around the U.S. show how the regulatory vacuum is enabling intimidation tactics that seem like relics of a lawless past.
>
> Ten of Gioe's unannounced visits to borrowers, from Chicago to small-town Alabama, were described in court papers and interviews with Bloomberg News. He made "threats of violence and physical harm" to employees of a California rehab center, according to one court complaint. A tire-shop owner near Boston said in another court filing he "felt that physical harm would come to me and my family" when Gioe walked into his shop in 2016 demanding immediate payment.
>
> A third borrower, recounting Gioe's visit to his Maryland trucking company last year, described him in an affidavit as resembling "an aging but still formidable character ripped from the World Wrestling Federation" who had been sent not to negotiate but to "intimidate me into making a lump-sum payment."[8]

94. In the Bloomberg article, both "Gino" and the principal owner of CBSG, Joseph LaForte, admitted to Bloomberg News that its merchants are "borrowers" and that CBSG is a

[8] *Id.*

"lender." *See id.* ("Gioe said the former owner had borrowed $1 million from Par with no intention of paying it back…"), ("Joseph LaForte says his brother is an outside broker for Par who sometimes helps him collect debts but isn't an employee. He says Par had a right to pursue Sharma for reneging on millions of dollars of debt."), ("Joseph LaForte says that even though Gioe was helping borrowers, a few did complain about getting a visit.").

95. The Bloomberg article further goes on to detail numerous examples where CBSG is treating its agreements as absolutely repayable loans and not true sales. As described by Bloomberg News, "Gioe's visits followed a pattern. He would show up unannounced, demand to speak to the owner and say he wasn't leaving until he got paid, according to the people who described the visits in court records and interviews. All of the people say Gioe seemed to be trying to intimidate them. Four say they called the police, though no charges were filed." *Id.*

96. In fact, CBSG treats its merchant transactions as so absolutely repayable, that not even a bankruptcy court can stop their collection tactics. *See id.* ("Gioe could be persistent. When he showed up at a beauty-supply warehouse in Chicago last year, its new owner, George Souri, told him a bankruptcy judge had ordered creditors to back off. 'We don't deal with courts, we have our own ways to collect,' Gioe responded, according to an affidavit Souri filed in the bankruptcy case. When Souri forbade him from speaking to the warehouse's former proprietor, Gioe remarked, 'We'll go to her house and deal with her there,' the affidavit states.").

97. If the CBSG Agreements reflected true account purchase transactions, "Gino" would be paying visits to the companies who owed the receivables allegedly purchased and CBSG would not be employing Mafioso-style intimidation tactics against *the seller*.

CLASS ALLEGATIONS

98. Plaintiffs and the putative Class Members repeat and re-allege the allegations of each of the foregoing paragraphs as if fully alleged herein.

99. Plaintiffs bring this action pursuant to Fed. R. Civ. Pr. 23(b)(2) and 23(b)(3).

100. Plaintiff Fleetwood brings this action individually and on behalf of a class of similarly situated persons defined as follows:

> **Merchant Class**: All citizens of Texas who, on or after January 22, 2015, paid money to a member of the Lending Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding twenty-eight percent.
>
> **Merchant Class**: All citizens of Texas who, on or after January 22, 2015, paid money to a member of the Lending Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding fifty-six percent.

101. Plaintiffs Mr. and Mrs. Fleetwood bring this action individually and on behalf of a class of similarly situated persons defined as follows:

> **Principal Class:** All citizens of Texas who, on or after January 22, 2015, paid money to a member of the Lending Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding twenty-eight percent.
>
> **Principal Class:** All citizens of Texas who, on or after January 22, 2015, paid money to a member of the Lending Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding fifty-six percent.

102. The following people are excluded from the Classes: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and its current or former employees, officers, and directors; (3) persons who properly execute and file a timely request for exclusion from the Classes; (4)

persons whose claims in this matter have been finally adjudicated on the merits or otherwise released or waiver; (5) Plaintiffs' and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

103. **Numerosity**: The exact number of members of the Classes is unknown and is not available to Plaintiffs at this time, but individual joinder is impracticable. Based on publically available documents, each of the Classes likely numbers are in the hundreds or more.

104. **Commonality and Predominance.** There are many questions of law and fact common to the claims of Plaintiffs and the other Class members, and those questions predominate over any questions that may affect individual members of the Classes. Common questions for the Classes include, without limitation, the following;

a) Whether the CBSG Agreements are loans or account purchase transactions under Tex. Fin. Code § 306.001(1);

b) Whether or to what extent Tex. Fin. Code 306.103(b) is applicable to the CBSG Agreements;

b) Whether the CBSG Agreements are usurious under Tex. Fin. Code §305.001(a);

c) Whether the Plaintiffs may recover moneys paid to the Lending Enterprise pursuant to the CBSG Agreements;

d) Whether the CBSG Agreements violate Tex. Bus. & Comm. Code 17.44(a);

105. **Typically:** Plaintiffs' claims are typical of the claims of the other members of the Classes. Plaintiffs and members of the Classes sustained damages as a result of Defendants' uniform wrongful conduct during transactions with Plaintiffs and the Classes.

106. **Adequate Representation:** Plaintiffs have and will continue to fairly and adequately represents the interests of the Classes, and have retained counsel competent and

experienced in complex litigation and class actions. Plaintiffs have no interests antagonistic to those of the Classes, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and they have the resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to those of the other members of the Classes.

107. **Superiority**: This case is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The injuries suffered by the individual members of the Classes are likely prosecution of the litigation necessitated by Defendants' actions. Absent a class action, it would be difficult, if not impossible, for the individual members of the Classes to obtain effective relief from Defendants. Even if members of the Classes themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented herein. By contrast, a class action presents far fewer management difficulties and provides benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

FIRST CAUSE OF ACTION
Texas Usury Statute
(CBSG)

108. Plaintiffs individually and on behalf of the Class Members, repeat and incorporate the allegations forth above.

109. Tex. Fin. Code §305.001(a-1) and §305.003 each provide that a creditor who contracts for, charges, or receives interest greater than the legal maximum is liable to the

obligor for an amount that is equal to three times the difference between the maximum allowable legal interest and the total amount of interest charged.

110. The maximum interest rate allowed under Tex. Fin. Code §303.009(c) is 28%.

111. The CBSG Agreements with Fleetwood, and the Putative Class Members, each charged interest that was twice the maximum 28% permitted by Texas law.

112. Fleetwood and the Putative Class Members did in fact pay interest to CBSG in excess of 28%.

113. With respect to Fleetwood, the most that the Agreement between CBSG and Fleetwood could have been charged in interest under Texas law is $23,379.93.

114. The interest rate of the Agreement between Fleetwood and CBSG was at least 110%.

115. The Agreement charged $177,600 in interest, which is a difference of $154,220.07.

116. Accordingly, Fleetwood is entitled to statutory damages in the amount of $462,660.21 under Tex. Fin. Code §305.001(a).

117. In addition, Tex. Fin. Code § 305.004(a) provides that: "***In addition to the amount determined under Section 305.003***, a creditor who charges and receives legal interest that is greater than twice the amount authorized by this subtitle is liable to the obligor for:

(1) the principal amount on which the interest is charged and received; and

(2) the interest and all other amounts charged and received.

118. The CBCG agreements with Fleetwood and the Putative Class Members charged interest in excess of fifty-six percent.

119. Accordingly, Fleetwood and the Putative Class Members are entitled to a return of all principal and interest charged by CBSG.

120. With respect to Fleetwood alone, in addition to the $462,660.21 required under Tex. Fin. Code §305.001(a), Fleetwood is also entitled to $558,700 in total principal, fees and interest charged by Defendants.

121. By reason of the foregoing violations, Plaintiffs are entitled to recover against CBSG an amount to be determined at trial but, in any event, not less than $1,021,360 and the putative Class Members are similarly entitled to recover three times the amount of improperly charged and collect interest plus all principal, fees and interest charged by CBSG under their respective CBSG Agreements.

SECOND CAUSE OF ACTION
Attorney's Fees
(CBSG)

122. Plaintiffs, individually and on behalf of the Class Members, repeat and incorporate the allegations forth above.

123. Plaintiffs have incurred, and will in the future continue to incur reasonable attorney fees as a result of Defendants violations of Tex. Fin. Code §§ 305.001 and 305.003.

124. Pursuant to Tex. Fin. Code. §305.005, "[a] creditor who is liable under Section 305.001 or 305.003 is also liable to the obligor for reasonable attorney's fees set by the court."

125. By reason of the foregoing, Plaintiffs and the Putative Class Members are entitled to recover from CBSG reasonable attorneys' fees incurred and to be incurred in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Fraud
(CBSG)

126. Plaintiffs, individually and on behalf of the Class Members, repeat and incorporate the allegations forth above.

127. CBSG intentionally misrepresented the true nature of the transactions to the Plaintiffs and Putative Class Members in order to avoid application of Texas usury laws.

128. CBSG knowingly misrepresented that the disguised loans were enforceable when they were illegal under law by, *inter alia*, e-mailing Plaintiffs and Class Members copies of the CBSG Agreements, requesting that Plaintiffs and the Class Members execute one or more of the CBSG Agreements and requesting that Plaintiffs and Class Members authorize CBSG to make daily withdrawals of the Daily Specific Amount from the bank accounts, all of which created the false impression that the CBSG Agreements are legally enforceable and that Plaintiffs and Class Members were and/or are obligated to repay when they were not.

129. CBSG obtained Plaintiffs and the Class Members' written authorization to collect on the CBSG Agreements via daily ACH withdrawals from the designated bank account and CBSG collected upon these illegal contracts via ACH withdrawals from the designated bank account, which created the false impression that the CBSG Agreements are legally enforceable and that Plaintiffs and the Class Members were and/or are obligated to repay when they were not.

130. These false impressions were material, and Plaintiffs did not reasonably know that the contracts were illegal. In fact, Plaintiffs only became aware of their illegality when informed by counsel.

131. In addition, CBSG falsely represented the market value of the future receivables that CBSG purported to purchase in each of the CBSG Agreements. This stated value was not based on any true market value assessment, but rather was a knowingly false representation unilaterally made by Defendants in order to disguise the true nature of the Transactions.

132. Further, CBSG falsely represented that it would only require repayment if Plaintiffs and/or the Class Members paid the future receipts they were purportedly purchasing under the CBSG Agreements when, in fact, CBSG required repayment even before the allegedly purchased receipts were generated and collected.

133. CBSG's misrepresentations were intended to induce reliance because if Plaintiffs and the Class Members were aware that (1) the Agreements were illegal and (2) the market value of the receipts were incorrect, and/or (3) the repayment obligations were misrepresented, the Plaintiffs and Class Members would not have executed the CBSG Agreements and entered into the transactions with CBSG.

134. CBSG knew that the representations were false at the time they were made.

135. CBSG made these representations with the intent to deceive Plaintiffs and the Putative Class Members, and with the intent to avoid the criminal usury laws.

136. Plaintiffs and the Putative Class Members reasonably relied upon these knowingly false representations to their detriment, as they executed the CBSG Agreements and were forced to pay interest in excess of Texas' criminal usury threshold.

137. Plaintiffs and the Putative Class Members were directly and proximately damaged by CBSG's knowingly false representations by paying interest and principal on criminally usurious loans for which they had no legal obligation to repay.

FOURTH CAUSE OF ACTION
Violation of 18 U.S.C. § 1962(c)
(CBSG)

138. Plaintiffs, individually and on behalf of the Class Members, repeat and incorporate the allegations set forth above.

A. Culpable Persons

139. CBSG is a limited liability company capable of holding a legal interest in property and are thus "persons" within the meaning of 18 U.S.C. § 1962(c) as the term is defined by 18 U.S.C. § 1961(3).

B. The Association-in-Fact Enterprise

140. The Investor Defendants, CBSG and various brokers (the "Brokers") are separate individuals or entities associated with each other by shared personal and/or one or more contracts or agreements for the purpose of originating, underwriting, servicing and collecting usurious loans to the Plaintiffs and countless other small businesses throughout the United States.

141. This association of the Investor Defendants, CBSG, and the Brokers constitute a single association-in-fact enterprise (the "Lending Enterprise") within the meaning of 18 U.S.C. § 1962(c), as the term is defined in 18 U.S.C. § 1961(4).

142. The Lending Enterprise has an existence separate and apart from the illegal activity in which it engages by entering into legal financing agreements and attempting to collect lawful debts using legal collection practices.

C. The distinct roles in the Enterprise.

143. Each of the Lending Enterprise Members has a distinct role in the Lending Enterprise.

144. The Investor Defendants provide capital for investment by the Lending Enterprise in lawful and unlawful loans, including the Agreements.

145. The Brokers soliciting borrowers, including the Plaintiffs, obtaining necessary underwriting information for use by CBSG in underwriting the lawful and unlawful loans and assisting the collection of the lawful and unlawful loans by obtaining the borrowers authorization to effect daily ACH withdrawals from specified bank accounts.

146. CBSG underwrites, funds, services, and collects lawful and unlawful loans on behalf of the Lending Enterprise including the Agreements and exercises managerial authority over the Lending Enterprise.

D. Engagement in Interstate Commerce

147. The Lending Enterprise is engaged in interstate commerce and uses instrumentalities of interstate commerce in its daily business activities.

148. Specifically, the members of the Lending Enterprise maintain offices in Pennsylvania and use personnel in these offices to originate, underwrite, fund, service and collect on loans made by the Lending Enterprise to borrowers in Texas and throughout the United States via the extensive use of interstate emails, telephone calls, wire transfers and bank withdrawals processed electronically through an automated clearing house.

149. In the present case, all communications between the Lending Enterprise and Plaintiffs were by interstate email, telephone calls, wire transfers or other interstate wire communications. Specifically, the Lending Enterprise used interstate emails and telephone calls to originate, underwrite, service and collect upon the Agreements, fund the advances under each of the Agreements, and collect the Daily Specific Amount via electronic interstate withdrawals processed through an automated clearing house.

E. Conducting Affairs through a Pattern of Racketeering.

150. CBSG conducted the affairs of the Lending Enterprise or participated in the affairs of the Lending Enterprise, directly or indirectly, though a pattern of racketeering activity (wire fraud) in violation of 18 U.S.C. 1962(c).

151. Beginning no later than September 1, 2014 and continuing today, CBSG devised and carried out a scheme to conduct the affairs of the Lending Enterprise to intentionally defraud borrowers in Texas and throughout the United States, including the Plaintiffs and Class Members, to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay and to intentionally defraud others into satisfying such loan obligations when a borrower defaulted.

152. Since CBSG and the Brokers are each web-based companies that conduct virtually all of their business through the internet, email communications, telephone calls, and wire transfers, it was reasonably foreseeable that interstate emails, telephone calls, and wire transfers would be used in furtherance of the scheme, and, in fact, intestate emails, telephone calls and wire transfers are used in furtherance of the scheme.

153. Specifically, CBSG directed, approved or ratified, the Broker's use of the internet, interstate email, telephone calls, and other communications to intentionally defraud borrowers in Texas and throughout the United States, including the Plaintiffs and Class Members, to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay.

154. As part of this scheme, by the use of interstate emails and telephone calls, the Brokers target and solicit cash-strapped businesses upon which to pawn of usurious loans funded by CBSG. These interstate emails and telephone calls intentionally create the false impression that the usurious loans are legally enforceable by:

(i) misrepresenting the true nature of the loan transactions as receivable sales in order to avoid applicable criminal usury laws;

(ii) falsely representing that disguised loan contracts are enforceable when they are illegal under Texas or other applicable law;

(iii) falsely claiming that the contracts are governed under the laws of Pennsylvania when CBSG and its affiliates know strong public policy considerations dictate that Texas or other state's laws would govern construction of the contracts;

(iv) advising the illegal loans would be funded through interstate wire transfers; and

(v) directing all loan repayments to be made by electronic interstate bank withdrawals via an automated clearing house.

155. Once the loans are approved by CBSG, CBSG furthers the scheme by using interstate wires to fund the unlawful loans and electronic interstate bank withdrawals to repay the amounts advanced under the disguised loans, all of which further create the impression that the usurious loans are legally enforceable contracts which CBSG knows to be false.

156. If a borrower defaults, CBSG uses interstate e-mails and telephone calls to once again fraudulently induce the borrowers to obtain new advances under loans funded by CBSG that CBSG knows misrepresent the true nature of the transaction in an effort to evade applicable usury laws and create the false impression that the contracts are legally enforceable when they are not thereby inducing the borrowers to enter into and make payments on new usurious agreements to pay off the obligations under the old ones.

157. Upon information and belief, borrowers in Texas and throughout the United States, like the Plaintiffs and Class Members, reasonably rely upon these knowingly false representations in order to enter into and make payments on criminally usurious loans.

158. In the present case, through a series of interstate e-mails in January 2017, the Broker solicited Plaintiffs, provided Plaintiffs with a copy of the loan application, processed the

loan application, and, upon approval by CBSG, provided Plaintiffs with a copy of the Agreement dated January 4, 2017 which the Broker asked that Plaintiffs execute, together with a form authorizing CBSG to electronically withdrawal the daily payments from Fleetwood's Bank Account. The Broker's actions were intentionally designed to and, in fact did, create the impression that the January 4, 2017 Agreement was a legally enforceable contract which Defendants knew to be false.

159. CBSG furthered the scheme against Plaintiffs by funding the January 2017 loan through an interstate wire transfer and thereafter withdrawing the Daily Specific Amount due under the Agreement by electronic interstate withdrawals processed through an automated clearing house, all of which was intentionally designed by CBSG to and, in fact did, create the impression that the Agreement was legally enforceable contract which CBSG knew to be false.

160. CBSG's scheme continued long after January 2017. When Plaintiffs and/or the Putative Class Members had difficulty making the daily payments under the CBSG Agreements, CBSG or the Brokers, used similar emails and wire communications to intentionally create the false impression that each successive disguised loan was a legally enforceable contract in order to induce the Plaintiffs to enter into and make payments on the criminally usurious loans.

161. Plaintiffs and the Putative Class Members reasonably relied upon these knowingly false representations to their detriment, as they executed each of the Agreements and were forced to pay interest in excess of Texas's criminal usury threshold.

162. CBSG's conduct constitutes "fraud by wire" within the meaning of 18 U.S.C. § 1343 which is a "racketeering activity" as defined by 18 U.S.C. 1961(1). Its repeated and continuous use of such conduct to participate in the affairs of the Lending Enterprise constitutions a pattern of racketeering activity in violation of 18 U.S.C. 1962(c).

F. Conducting Affairs Through the Collection of an Unlawful Debt

163. The CBSG Agreements between Plaintiffs, the Putative Class Members, and CBSG constitute unlawful debt within the meaning of 18 U.S.C. 1962(c) because (1) they violate applicable criminal usury statutes, and (2) the rates are more than twice the legal rate.

164. CBSG conducted the affairs of the Lending Enterprise or participated in the affairs of the Lending Enterprise, directly or indirectly, though the collection of this unlawful debt in violation of 18 U.S.C. 1962(c).

165. Specifically, CBSG directed, approved or ratified, the obtainment by the Borker or others of Plaintiffs' authorization to electronically withdrawal payments on an unlawful debt from designated bank accounts.

166. Upon receipt of such authorization, CBSG did, in fact, make the daily withdrawals required by the Agreements.

G. Injury

167. As a direct and proximate cause of Defendants' violation of 18 U.S.C. § 1962(c), Plaintiffs and the Putative Class Members have suffered, and continue to suffer, substantial injury to their business and/or property as Plaintiffs and the Putative Class Members were forced to pay usurious amounts of interest and have lost, and will continue to lose, customers, profits, goodwill and business value.

FIFTH CAUSE OF ACTION
Conspiracy under 18 U.S.C. § 1962(A)

(All Defendants)

168. Plaintiffs, individually and on behalf of the Class Members, repeat and incorporate the allegations forth above.

169. Defendants have unlawfully, knowingly, and willfully, combined, conspired, confederated, and agreed together to violate 18 U.S.C. 1962(c) as described above, in violation of 18 U.S.C. § 1962(d).

170. By and through each of the Defendants' business relationships with one another, their close coordinate with one another in the affairs of the Lending Enterprise, and frequent emails communications among the Defendants concerning the underwriting, funding, servicing and collection of unlawful loans, including the Agreement and other CBSG Agreements, each Defendant knew the nature of the Lending Enterprise and each Defendant knew that the Lending Enterprise extended beyond each Defendant's limited role. Moreover, though the same connections and coordination, each Defendants combined to accomplish an unlawful purpose and/or to accomplish a lawful purpose by unlawful means. Defendants acted maliciously, without legal justification, and with the intent of injuring Plaintiffs. As such, Defendants have engaged in a civil conspiracy. In the course of their civil conspiracy, Defendants committed one or more unlawful, overt acts. Such unlawful, overt acts include Defendants' conduct described above. Such actions by Defendants subject such Defendants to joint and several liability.

171. Each Defendant agreed to facilitate, conduct, and participate in the conduct, management, or operation of the Lending Enterprise's affairs in order to collect upon unlawful debts, including the CBSG Agreements, in violation of 18 U.S.C. § 1962(c). In particular, each Defendant was a knowing, willing, and active participant in the Lending Enterprise and its affairs, and each of the Defendants shared a common purpose, namely, the orchestration, planning, preparation, and execution of the scheme to solicit, underwrite, fund and collect upon unlawful debts, including the Agreements.

172. The participation and agreement of each of Defendant was necessary to allow the commission of this scheme.

173. Plaintiffs and the Putative Class Members have been and will continue to be injured in their business and property by reason of the Defendants violations of 18 U.S.C. § 1962(d), in an amount to be determined at trial. The injuries to the Plaintiffs directly, proximately, and reasonably foreseeably resulting from or cause these violations of 18 U.S.C. § 1962(d) include, but are not limited to, tens of thousands of dollars in improperly collected loan payments; attorneys' fees and costs, including attorneys' fees and costs associated with exposing and prosecuting the RICO Defendants' criminal activities.

174. Pursuant to 18 U.S.C. § 1964(c), Plaintiffs and the Putative Class Members are entitled to treble damages, plus costs and attorneys' fees from the Defendants. The Court should also enter such equitable relief as it deems just and proper to preclude the Defendants from continuing to solicit, fund and collect upon unlawful debt, including the Agreements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Fleetwood Services, LLC, Robert L. Fleetwood and Pamela A. Fleetwood and the Putative Class Members respectfully request that this Court enter an order:

a) Certifying the proposed Classes;

b) Appointing Plaintiffs as Class Representatives for the respective classes;

c) Appointing Plaintiffs' attorneys below at Benesch, Friedlander, Coplan & Aronoff, LLP as Class Counsel for the classes and subclasses;

d) Requiring CBSG to pay Plaintiffs and each Class Member three times (3x) the difference between the maximum allowable legal interest and the total amount of interest charged and collected on their respective CBSG Agreements;

e) Requiring CBSG to pay Plaintiffs and each Class Member all principal, interest, costs and fees collected under their respective CBSG Agreements;

f) Awarding Plaintiffs and the Class Members treble damages pursuant to RICO;

g) Requiring CBSG to pay Plaintiffs and the Class Members reasonable attorneys' fees and costs; and

h) Granting such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury for all claims that may be so tried.

Dated: October 29, 2019

BY: _____

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Attorneys for Plaintiffs Fleetwood Services, LLC, Robert L. Fleetwood and Pamela A. Fleetwood, and putative class members.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Second Amended Complaint has been served via first class mail and via e-mail upon counsel of record, on this 29th day of October, 2019.

Shane R. Heskin, Esq.

Exhibit 11

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING Plaintiff, v. MH MARKETING SOLUTIONS GROUP, INC., d/b/a MH MARKETING SOLUTIONS GROUP, and MICHAEL HELLER, GUARANTOR Defendants	CIVIL ACTION C.A. NO.: 20-cv-849

ORDER

AND NOW, on this _____ day of _____, 2020, upon consideration of the foregoing petition, it is hereby ordered that:

1) a rule is issued upon Complete Business Group Solutions, Inc. ("CBSG") to show cause why MH Marketing Solutions Group, Inc. and Michael Heller ("MH Marketing") and Michael Heller (collectively, "Defendants") are not entitled to the relief requested;

2) CBSG shall file an answer to the petition within twenty days of service upon the CBSG of the petition;

3) the petition shall be decided under Pa.R.C.P. 206.7;

4) depositions shall be completed within____days of this date;

5) argument shall be held on _____, _____ in Courtroom _____ of the United States District Court for the Eastern District of Pennsylvania; and

6) notice of the entry of this order shall be provided to all parties by Defendants.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING Plaintiff, v. MH MARKETING SOLUTIONS GROUP, INC., d/b/a MH MARKETING SOLUTIONS GROUP, and MICHAEL HELLER, GUARANTOR Defendants	CIVIL ACTION C.A. NO.: 20-cv-849

DEFENDANTS' PETITION TO STRIKE OR, ALTERNATIVELY, TO OPEN CONFESSED JUDGMENT

AND NOW, come Defendants MH Marketing Solutions Group, Inc. d/b/a MH Marketing Solutions Group, and Michael Heller (collectively "MH Marketing" or "Defendants"), by and through their undersigned attorney, White and Williams, LLP, pursuant to Pa. R. C. P. 2959, file their Petition to Strike Off or Open the Confession of Judgment recently filed by Plaintiff Complete Business Solutions Group's ("CBSG" or "Plaintiff") and, show this Honorable Court as follows:

NATURE OF THE CASE

1. This is a Petition to strike or, alternatively to open, a confessed judgment in the amount of $224,324.32 (the "Confessed Judgment ") open a confessed judgment based on numerous meritorious defenses. *See* Heskin Decl., Exhibit A.

FACTUAL BACKGROUND

A. The Parties

2. MH Marketing is an online advertising and marketing company.

3. The company is owned and operated by Michael Heller, a New Jersey resident.

4. CBSG is a Florida MCA company that purports to purchase the future receivables of small businesses at discounted prices under so called factoring agreements. While repayment of the advanced sums is purportedly tied to the ebbs and flows of a merchant's generation and collection of future receipts, as this case unfortunately shows, CBSG treats its agreements just like loans that are absolutely repayable.

B. The Agreements

i. The October 24, 2018 Agreement

5. MH Marketing first entered into an agreement with CBSG on October 24, 2018.

6. The loan amount was $250,000 and the principal and interest was $387,500. *See* Heskin Decl. Ex. B.

7. As expressly negotiated by the parties, MH Marketing was required to repay the loan in 250 business days through 250 fixed daily payments of $1,550. Ex. B. The interest rate on the face of the agreement is 175%. *See* Heskin Decl. Ex. D; *See* also Ex. E, Expert Report by C. Lunden.

8. Most notably, in securing the loan, CBSG required Mr. Heller to mortgage his New Jersey home.

9. CBSG expressly defined the MCA Agreement as a loan:

(A) **"Security Instrument"** means this document, which is dated October 25, 2018, together with all Riders to this document.
(B) **"Borrower"** is Michael Heller. Borrower is the mortgagor under this Security Instrument.
(C) **"Lender"** is Complete Business Solutions Group, Inc. Lender is a corporation organized and existing under the laws of the State of Delaware. Lender's address is 20 North 3rd Street, Philadelphia, Pennsylvania 19106. Lender is the mortgagee under this Security Instrument.
(D) **"Note"** means the Factoring Agreement signed by Borrower and dated October 25, 2018. The Note states that Borrower owes Lender Three Hundred Eighty-Seven Thousand Five Hundred and 00/100 Dollars (U.S. $387,500.00) plus fees.
(E) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."
(F) **"Loan"** means the debt evidenced by the Note, plus fees, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus fees.

ii. The March 28, 2019 Agreement[1]

10. The second Agreement was entered into on March 28, 2019. The loan amount was $25,000 and the principal and interest was $31,500. *See* Heskin Decl. Ex. C.

11. As expressly negotiated by the parties, MH Marketing was required to repay the loan in 20 weeks through 20 fixed weekly payments of $1,575. The interest rate on the face of the agreement is 158%.

12. Under the Agreement, Section 1.13, provides for the filing of a confession of judgment as a Protection against Default. (*See* protection 2). The Confession must be filed pursuant to the terms of the Warrant of Attorney, also contained in the Agreement, Section 3.4. The Warrant of Attorney allows filing of the Confession against the Merchant Seller:

3.4 WARRANT OF ATTORNEY TO CONFESS JUDGMENT. UPON THE OCCURRENCE OF A VIOLATION OF THE REPRESENTATIONS AND WARRANTIES MADE HERETOFORE BY MERCHANT, MERCHANT IRREVOCABLY AUTHORIZE AND EMPOWER ANY ATTORNEY OR ANY CLERK OF ANY COURT OF RECORD, TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MERCHANT FOR SUCH SUMS AS ARE DUE AND/OR MAY BECOME DUE UNDER THIS MERCHANT AGREEMENT OR ANY ACCOMPANYING DOCUMENTS, WITH OR WITHOUT DECLARATION, WITH COSTS OF SUIT,

[1] As listed in the Confession of Judgment filed by CBSG.

See Ex. C, Section 3.4 pg. 5.

13. The Agreement identifies MH Marketing as the merchant seller. *See* Agreement pg. 2.

14. The Agreement also provides for reconciliation of the account based on the receivables earned by the Merchant. *See* Ex. C, pg. 3.

> **1.11 Monthly Assessment of Merchant Cash Flow** Merchant hereby authorizes PURCHASER to initiate one or more ACH debits at the specified "Daily Retrieval Rate" from the Account as an approximation of the base payment due under the Specified Percentage. It is the Merchant's responsibility to provide financial information (e.g. bank statements, credit card processing statements, general ledger) regarding its gross receivables, to reconcile the daily payments made against the Specified Percentage, permitting PURCHASER to debit or credit the difference to Merchant on a monthly basis so that the Daily Retrieval Rate equals the Specified Percentage.
> **1.12 Power of Attorney** Merchant irrevocably

15. MH Marketing provided CBSG with account information and access upon signing the Agreement. *See* Ex. C, pg. 14.

C. Events and Threats

16. In May 2019, MH Marketing had lost its largest client and could no longer keep up with the onerous terms dictated under the MCA Agreements.

17. After informing CBSG that MH Marketing could not make payment, LaForte verbally abused Heller, calling him a moron and threating to take his house away.

D. AR Smash

18. Upon missing payment, CBSG unleashed its AR Smash.

19. As a direct result of the AR Smash, things went from bad to worse. MH Marketing lost even more large accounts and revenue declined even more.

20. In August 2019, CBSG initially agreed to a modification of the repayment term, but immediately confessed judgment against MH Marketing and Mr. Heller personally after just one missed payment.

21. CBSG harassed Heller and his wife with repeated phone calls, text messages, and emails, including hundreds of emails sent to customers. As an example, CBSG sent the following text to Heller: Fwd:Well, umm... This is awkward... We just sent your wife an email and several text messages with the Deed of Trust pertaining to the Collateral that is your home... We also just emaieled (sic) her the Foreclosure Warning Letter per your default and refusal to pay."

E. The Confession of Judgment

22. CBSG filed a confession of judgment against Mr. Heller—even though it had no right to confess judgment against Mr. Heller personally.

23. In filing the confession of judgment, CBSG filed a knowingly false verified complaint attesting under penalties of perjury that it was entitled to confess judgment against Mr. Heller.

24. CBSG froze Heller and his wife's joint bank account at Bank of America.

25. As a direct result of CBSG's actions, Michael and his wife were forced to file for Chapter 13 bankruptcy and their home is still at risk at foreclosure.

LEGAL ARGUMENT

I. THE MCA AGREEMENTS ARE DISGUISED LOANS

A. Plaintiff cannot avoid state usury laws through shams.

26. "Where usury does not appear on the face of the note, usury is a question of fact." *Freitas v. Geddes S&L Ass'n*, 471 N.E.2d 437, 422 (N.Y. 1984). The reason has been long recognized:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered.

Vee Bee Serv. Co. v. Household Fin. Corp., 51 N.Y.S.2d 590, 592 (N.Y. Sup. Ct. 1944), *aff'd*, 55 N.Y.S.2d 570 (1st Dept. 1945); *see also Fleishman v. Hyman*, 2004 U.S. Dist. LEXIS 19793, at *20 (S.D.N.Y. 2004) ("[W]hen a transaction is challenged as usurious ... [it] must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it."); *Bouffard v. Befese, LLC*, 111 A.D.3d 866, 869 (2d Dep't 2013) (being a "hard money lender" to those "unable to obtain conventional financing" is nothing more than "plainly usurious" lending); *Topping v. Bank of New York*, 86 F.2d 116, 117-18 (2d Cir. 1936) ("A usurious loan is not made lawful by falsely terming it a sale, or a corporate obligation. . . ."); *Mandelino v. Fribourg*, 242 N.E.2d 823, 826 (N.Y. 1968) ("An instrument which appears on its face to be a purchase-money mortgage may in truth be a cloak for an actual loan at excessive interest and in this situation it may be deemed usurious."); *Feivel Funding Assoc. v Bender*, 156 A.D.3d 416, 417 (1st Dep't 2017) ("Contrary to plaintiff's argument that parol evidence cannot be used to raise an issue of fact as to whether a note legal on its face is usurious, usury may be established by extrinsic facts concerning the 'real character' of the transaction."); *In re Rosner*, 48 B.R. 538 (E.D.N.Y. 1985) ("It is no accident that two of the precedents cited by the Second Circuit involve usurious transactions. *Quackenbos v. Sayer* and *Topping v. Bank of New York*. This is because persons intending to enter into usurious transactions take pains to camouflage as payment for services or property, or anything other than what it really is, the interest they are exacting.").

27. Thus, the mere fact that a transaction may have been denominated as an asset sale is not determinative; the Court must look beyond the curtain. *See Lange v. Inova Capital Funding, LLC*, 441 B.R. 325, 230 (8th Cir. 2011) (finding the purchase of receivables constituted a loan rather than a sale because the agreement "shift[ed] all risk" onto the seller); *Major's Furniture Mart, Inc.*, 602 F.2d 538, 546 (3d Cir. 1979) ("It is apparent to us on the record none of the risks present in a true sale is present here."); *Kerr v. Commer. Credit Group, Inc.*, 456 B.R. 597, 607 (N.D. Ga. 2011) ("[B]uyer's recourse against Debtor effectively transfers the risk of non-collection on Debtor. The Court therefore construes the transaction as a loan, not a sale.").

B. Courts must look at all of the negotiations, circumstances, and relationship of the parties to determine the true nature of the transaction.

28. The *sine qua non* of a loan is that the money advanced is absolutely repayable. *Endico Potatoes*, 67 F.3d at 1069 ("The root of all of these factors is the transfer of risk."); *TIFD III-E, Inc. v. United States*, 459 F.3d 220 (2d Cir. 2006) (citing *Estate of Mixon v. United States*, 464 F.2d 394, 405 (5th Cir. 1972) ("If there is a definite obligation to repay the advance, the transaction [will] take on some indicia of a loan."); *Rosenberg v. Commissioner*, 79 T.C.M. (CCH) 1769 (2000) ("right to enforce repayment of an advance suggests that the advance is a loan.")).

29. Black Law Dictionary's defines a loan as "a thing lent for the borrower's temporary use; esp., a sum of money lent at interest." *Loan*, Black's Law Dictionary (10th ed. 2014). The Second Circuit has long held the same. *See Cazenovia College v. Renshaw (In re Renshaw)*, 222 F.3d 82, 88 (2d Cir. 2000) ("To constitute a loan there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services, to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date. This definition implies that the contract to transfer items in return for payment later must be reached prior to or contemporaneous with the

transfer. Where such is the intent of the parties, the transaction will be considered a loan regardless of its form.") (citing *In re Grand Union Co*., 219 F. 353, 356 (2d Cir. 1914)).

30. In determining its true nature, the conduct and intent of the parties is instructive:

> A loan. . .is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form. Emphasizing the necessity of appraising the transaction as disclosed by the evidence as a whole rather than by what the transaction appears or is represented by the parties to be, we observed that "All of the negotiations, circumstances and conduct of the parties surrounding and connected with their contracts may be material in determining whether the form thereof covered an intent to violate the usury law . . . ."

West Pico Furniture Co. v. Pacific Fin. Loans, 469 P.2d 665, 671-72 (Cal. 1970); *see also Endico Potatoes v. CIT Group/Factoring,* 67 F.3d 1063, 1068 (2d Cir. 1995) ("Resolution of whether the 'contemporaneous transfer,' as CIT describes Merberg's assignment of accounts receivable to CIT and CIT's loan advances to Merberg, constitutes a purchase for value or whether the exchange provides CIT with no more than a security interest, depends on the substance of the relationship between CIT and Merberg, and not simply the label attached to the transaction.").

C. The MCA Agreements Operate as Absolutely Repayable Loans.

31. While the Agreements used terms such as "factoring agreement," "sale," and "purchase," the Transaction had none of the hallmarks of a true sale and all of the hallmarks of a loan that charged a usurious interest rate of more than 150%. *See* Heskin Decl., Ex. D.

32. Through the Agreements, MH Marketing did nothing more than pledge its future receivables as security for repayment of the Purchased Amount.

33. The Agreements lacked the quintessential elements of a sale.

34. First, CBSG only acquired a temporary right in MH Marketing' receivables "until such time as the [Purchased Amount] has been delivered by [MH Marketing] to CBSG." *See* Ex. C, Agreement, p.2.

35. Second, CBSG's temporary interest did not divest MH Marketing of the right to use the proceeds of the Receipts. Pursuant to the Agreement, MH Marketing was only obligated to deposit a specific amount of its receivable collections into the Account so that CBSG could withdraw the Daily and or Weekly Payments. MH Marketing retained the right to use the proceeds of the assets CBSG allegedly purchased. In fact, MH Marketing was *required* to use such proceeds to operate its business, because the Agreement provided that "If [MH Marketing] takes additional funding at any point after being funded by CBSG, without prior notice to and consent by CSBG, a fee amounting to 15 % of the amount of the advance shall automatically be added to the payback amount of the advance." *See* Ex. C, Agreement pg. 1, Stacking Fee.

36. Third, MH Marketing's repayment obligations were not limited to delivery of the purchased Receipts or even a percentage thereof. The Agreement reflects that CBSG plainly would not wait to be repaid until such receipts were generated and collected. Consequently, CBSG required MH Marketing to repay the Purchased Amount through independent funds.

37. As demonstrated in the attachments and allegations contained in the New Matter (which are incorporated herein), CBSG also treats its MCA Agreements as absolutely repayable loans.

38. Finally, repayment of the Purchased Amount was put beyond any risk of non-payment and CBSG retained full recourse against MH Marketing. Under the Agreement, if an Default occurred, the Merchant immediately became liable for the full outstanding Purchased Amount, together with other fees and costs. *See* Agreement, p. 2. CBSG could confess judgment

against the Merchant for this amount. *See* Ex. C, Warrant of Attorney, Section 3.4, pg. 5. A breach of representation, Warranties and Covenants was defined under a number of situations, including bankruptcy proceedings or inability to pay. *See* Ex. C pg. 4, Section 2.9.

39. The Agreements are loans, not sales. The Agreements had a specified term, and required Weekly or Daily Specified Payments in specific amounts. *See, e.g.,* Agreement, p. 2:

Purchase Price: $25,000.00 Specified Percentage: 6% Weekly Specified Amount: $1,575.00 for 20 Weeks Receipts Purchased Amount: $31,500.00
***Merchant qualifies for renewal at 60% completion**

40. The Agreement was also with "full recourse," such that MH Marketing's performance under the Agreement (including its payment obligations) was secured by (i) substantially all of MH Marketing's assets, (ii) Michael Heller's personal guaranty, and (iii) the right of CBSG to confess judgment against the Merchant Seller upon default.

C. The Agreements are Loans as a Matter of Law.

41. When, as here, a seller retains the right to use even a portion of the allegedly purchased assets, courts have found the transaction did not constitute a true sale. *See NetBank, FSB v. Kipperman (In Re Commer. Money Ctr. Inc.)*, 350 B.R. 465, (9th Cir. 2006) (finding transaction to be a loan rather than a sale where seller/assignor retained right to surplus proceeds); *JMW Auto Sales, Ltd. v. FT Dev. Inc. (In re Moye)*, 2010 Bankr. LEXIS 4378 (S.D. Tex. 2010) (Agreement "did not evidence a consummated transfer of the benefits and burdens of ownership" so as to constitute a true sale under Texas law); *Callow v. Comm'r*, 135 T.C. 26, 33-34 (U.S. Tax Crt. 2010) ("[T]he key to deciding whether the transaction was a sale or other disposition is to determine whether the benefits and burdens of ownership have passed" from seller to buyer.); *In re Elkhorn Coal Corp.*, 19 B.R. 609, 614 (Bankr. W.D. Ky. 1982), aff'd in relevant part and rev'd on other grounds, 32 B.R. 737 (W.D. Ky. 1983) (court found the transaction constituted a loan

because debtor retained right to use proceeds in excess of amount advanced by the bank); *In re O.P.M. Leasing, Inc.*, 30 B.R. 642, 648 (Bankr. S.D.N.Y. 1983) (assignment of fraction of lease proceeds was a loan transaction rather than a sale because assignor retained the right to use the balance of lease payments).

42. Second, the MCA Agreements are not sales of receivables, because obligations thereunder could be repaid with independent funds. A quintessential element of a true sale of receivables is that the purchaser is repaid through the collection of the purchased receivables. *See Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1068 (2d Cir. 1995). Thus, in a bona fide factoring arrangement, the factor is repaid through the account debtor's payment of the purchased receivable to a lockbox or some other account controlled by the factor. *See Grossman v. Butcher*, 1992 Ohio App. LEXIS 3653 at 7 (Ct. App. 10th Dist. June 30, 1992) ("[G]enerally speaking, an agreement to factor contains some variation of the following terms . . . an agreement that the invoice will notify the customer of the sale of the account to the factor, and the customer will be required to pay the factor directly."). However, where the advanced funds could be repaid with independent funds, courts have found the transaction was a loan and not a true sale. *See, e.g., In re Joseph Kanner Hat Co.*, 482 F.2d 937, 940 (2d Cir. 1973) (finding an agreement to be a loan where the "bank office testified that any payment received under the assignment would applied to reduce the amount of the loan"); *In re Evergreen Valley Resort, Inc.*, 23 B.R. 659, 662 (Bankr. Me. 1982) (finding agreement to be a loan where the seller "acknowledges its rights to the assignment would be extinguished were Evergreen to pay the debt in full from some other source").

43. Here, not only could the Purchased Amount be repaid with independent funds, but CBSG required that MH Marketing repay the Purchased Amount with independent funds. Under the terms of the Agreement, CBSG allegedly purchased all of MH Marketing's future Receipts

(capital "R"), but it required that MH Marketing to repay the Purchased Amount from MH Marketing's collection of any "receipts" (little "r"), including receivables that had been issued at the time of the Agreements but not yet paid. Requiring that MH Marketing repay the Purchased Amount from receivables that were not purchased by CBSG demonstrates the transaction was not a true sale and, hence, not an account purchase transaction.

44. Third and perhaps most crucially, this was not a sale because MH Marketing remained liable for repayment of the Purchased Amount even if its receivables proved insufficient. The risk of loss associated with the purportedly sold receivables, both in form and practice, remained with MH Marketing, which is completely inconsistent with a bona fide factoring arrangement. In a true factoring arrangement, the factor purchases the receivables and assumes the risk that factor client will pay the receivable. *Lange v. Inova Capital Funding, LLC*, 441 B.R. 325, 230 (8th Cir. 2011) (finding the purchase of receivables constituted a loan rather than a sale because the agreement "shift[ed] all risk" onto the seller); *Major's Furniture Mart, Inc.*, 602 F.2d 538, 546 (3d Cir. 1979) ("It is apparent to us on the record none of the risks present in a true sale is present here."); *Kerr v. Commer. Credit Group, Inc.*, 456 B.R. 597, 607 (N.D. Ga. 2011) ("[B]uyer's recourse against Debtor effectively transfers the risk of non-collection on Debtor. The Court therefore construes the transaction as a loan, not a sale.").

45. This essential passing of risk does not occur under the Agreements. To the contrary, the Agreement's provisions operated to ensure that the MH Marketing retained all risks, including the risk that it would fail to generate or collect upon sufficient receivables to repay CBSG. As shown above, a breach would be included under the Agreement, in the event MH Marketing was unable to collect sufficient revenue to pay the Specified Amounts. If default were to occur, MH Marketing immediately became liable for the full outstanding Purchased Amount,

together with additional fees and costs due under the Agreement, and CBSG had the right and power to confess judgment against MH Marketing for this amount and "Power of Attorney" to do anything necessary to collect the amount owed. *See* Agreement p. 3. For these reasons, the transaction between the parties constitutes not an account purchase agreement, but a disguised loan.

46. As explained by the court in *Math Magicians*:

> The merchant cash advances are loans. Defendant requires the merchant cash advance be repaid in full. Defendant's only obligation is to advance cash to the borrower. Defendant does not bear any financial risk other than the borrower being unable to pay. Defendant requires borrower to reimburse it for any losses incurred related to the advance. In the event of a default, defendant is entitled to accelerate the borrower's payments. Borrowers must submit a credit application. Borrowers must agree to a credit check prior to entering into the merchant cash advance agreement. Defendant underwrites the merchant cash advance by assessing the borrower's creditworthiness. Defendant collateralizes the merchant cash advance by filing Uniform Commercial Code-1 financing statements. Defendant requires owners of the borrowers, such as Ms. Sinness, to execute personal guarantees.

Math Magicians, Inc. v. Capital for Merchs. LLC, 2013 Cal. App. Unpub. LEXIS 8694, at *8-9 (Cal. Ct. App. Nov. 26, 2013); *see also Essex Partners Ltd. v. Merch. Cash & Capital*, No. CV1103366CASMRW, 2011 WL 13123326, at *6 (C.D. Cal. Aug. 1, 2011) (holding that a merchant cash advance agreement was a loan, not a purchase of receivables); *Milana v. Credit Discount Co.*, 163 P.2d 869, 871 (Cal. 1945) ("The significant fact is that if the defendants had really purchased the accounts and had taken absolute title there would be no occasion for the provision or practice relating to guarantees of payment within specified periods."); *Techner v.*

Klassman, 240 Cal. App. 2d 514, 521 (Cal. App. Ct. 1966) (noting that for a loan to be usurious, "it is essential that the sum loaned shall be repayable absolutely").[2]

47. Because the MCA Agreements are an absolutely repayable obligation secured by collateral, which put CBSG beyond all financial risk of loss besides non-payment, the CBSG Agreements are loans as a matter of law. *See also Koch v. Boxicon,* 2016 Tex. App. LEXIS 3274 at *18-9 (Tex. App. March 30 2016) (holding that a contract that purported to be an account purchase transaction, but which in fact imposed an absolute obligation to repay the principal and established a fixed payment schedule was in fact a disguised usurious loan); *Funding Metrics, LLC v. NRO Boston, LLC*, 2019 N.Y. Misc. LEXIS 4878, at *11 (NY Sup. Ct. Aug. 28, 2019) (finding agreements substantially similar to the Agreement to be disguised usurious loans); *McNider Marine, LLC v. Yellowstone Capital, LLC*, NY Misc. LEXIS 6165, at *9 (NY. Sup. Ct. Nov. 19, 2019) (same).

II. CBSG CANNOT EVADE STATE CRIMINAL LAWS AND STRONG PUBLIC POLICY THROUGH THE SWIPE OF A PEN

A. New Jersey law applies under this forum's choice-of-law principles.

48. When conducting a conflicts of law analysis, a court starts by considering the law of its forum in order to determine whether a conflicts of law analysis is necessary. Restatement (Second) of Conflicts § 6. Rather, it applies the choice of law rules of its forum state in order to determine which state's law applies. *See* Restatement (Second) of Conflicts of Laws, §§ 7(2), 7(3) (noting that conflicts of laws concepts are to be characterized according to conflicts of law principles, and local law concepts are to be characterized according to local law principles).

[2] Further, CBSG has conceded that its Agreements are loans because it has filed a claim in bankruptcy court against another small business in an attempt to enforce a substantially similar agreement. *See In re A Goodnight Sleepstore, Inc.*, 2019 Bankr. LEXIS 190, at *15-16 (Bankr. E.D.N.C. Jan. 25, 2019) (noting that, when a party files a claim in bankruptcy, it concedes it is a creditor, not an owner of receivables).

49. It is axiomatic that a federal district court sitting in diversity applies the conflict of laws principles of the state in which it sits. *Air Prods. & Chems, Inc. v. Eaton Metal Prods, Co.*, 272 F. Supp. 2d 482, 497 (E.D.Pa. 2003). Under Pennsylvania law, courts first determine whether a true conflict exists between the laws of the states with competing interests in adjudicating the dispute. *Fleetwood Servs v. CBSG*, 374 F. Supp.3d 361, 369-370 (E.D. Pa. 2019).

50. Here, it is clear that Pennsylvania and New Jersey law conflict on the question of whether a commercial loan can be usurious. *Compare* 41 P.S. § 201 ("The maximum lawful rate of interest set forth in this section shall not apply to:… (3) business loans of any principal amount.") *with* N.J. Stat. § 2C:21-19 (declaring it a crime in the second degree to charge more than 50% to any business). Accordingly, there is a true conflict between the laws of Pennsylvania and New Jersey.

51. Under Pennsylvania conflicts of law, a contractual choice of law provision fails if:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, ***or***
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188 of the Restatement (Second) of Conflicts of Law, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Kaneff v. Del. Title Loans, Inc. 587 F.3d 616, 621-22 (3d Cir. 2009) (quoting *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455, 463 (3d Cir. 2006)) (emphasis added).[3] Here, the contractual choice

[3] Additionally, sister federal courts have found that "[a] claim that goes to 'the validity of the **formation** of the contract…cannot be categorized as one involving the rights or obligations arising under the contract,' and thus 'the claim falls outside the contract's choice of law clause'." *Kaur v. World Bus. Lenders*, 2020 U.S. Dist. LEXIS 31306, at *9 (D. Mass. Feb 24, 2020) (quoting *Northeast Data Sys. v. McDonnell Douglas Computer Sys.*, 986 F.2d 607, 611 (1st Cir. 1993)). Here, Defendants allege unconscionability, which goes to the formation of the contract.

of law provision in the CBSG Agreements fails for two reasons. First, Pennsylvania bears no reasonable relationship to the parties or the transactions underlying the CBSG Agreements, because none of the parties are Pennsylvania citizens, and the transactions do not implicate any possible interest of Pennsylvania. Second, application of Pennsylvania law would violate New Jersey's fundamental public policy regarding usury, and New Jersey, as the jurisdiction most affected by the financial exploitation of its residents, has a materially greater interest in the litigation, and would be selected as the state of applicable law in the absence of an effective choice of law by the parties.

B. Pennsylvania has no substantial relationship to the transactions at issue, and there is no reasonable basis to impose Pennsylvania law.

52. Because Pennsylvania has no substantial relationship to the transactions underlying the CBSG Agreements, New Jersey law governs, not Pennsylvania law. Under the Restatement (Second) of Conflicts of Law, courts, when determining what state's law covers the rights and duties with respect to an issue in contract, consider the following factors in determining which state has the most significant relationship: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." Restatement (Second) of Conflicts of Law §188(2).

53. Here, the factors do not favor Pennsylvania.

i. Defendants executed the CBSG Agreements in New Jersey and transmitted them to CBSG via email.

ii. CBSG is a Delaware corporation with a principal place of business located in the State of Florida.

iii. Heller is a citizen of New Jersey. MH Marketing is located in New Jersey, though incorporated in Pennsylvania.

iv. The subject matter of the Agreements, the monies financed to MH Marketing and the Daily Specified Amount paid to CBSG, thus involved the wiring of funds between a business located in Florida and a New Jersey business owner ; and

v. The collateral of the loan were the assets of MH Marketing, but also Heller's home, located, again, in New Jersey. Further, Heller a New Jersey citizen, was required to personally guarantee MH Marketing's performance of the CBSG Agreements.

54. In a December 5, 2019 deposition in the *Fleetwood* case, Joseph Laforte, who identifies himself as the Sales Director of CBSG, and whom CBSG's attorneys have variously identified as CBSG's President, testified that CBSG is a Florida company:

Q: What is the business address for CBSG?
A: CBSG is located in Florida.
Q: Does CBSG have an office in Philadelphia?
A: No.

LaForte Dep. 56:11-24, attached as Heskin Decl. Ex. F. Additionally, CBSG's 30(b)(6) witness in the same case reiterated, in a February 11, 2020 deposition, Mr. LaForte's claim that CBSG's principal place of business is in Florida, not Pennsylvania. *See* Heskin Decl. Ex. G.

55. Given the tenuous relationship to the state, the choice of Pennsylvania law is a transparent sham aimed at circumventing New Jersey's prohibition against usury.

C. New Jersey has a materially greater interest in the CBSG Agreements.

56. Even if this Court were to find that Pennsylvania bears some reasonable relationship to the CBSG Agreements, New Jersey law still applies because New Jersey has a materially greater interest than Pennsylvania, and because New Jersey's usury laws and licensure requirements constitute its fundamental public policy. The Third Circuit and the Pennsylvania Supreme Court have made it clear that a usurious lender cannot avoid the criminal usury statutes of another state by unilaterally imposing a choice of law clause. As the Third Circuit, rejecting the application of a choice of law clause, put it in *Kaneff v. Del Title Loans, Inc:*

> [T]he methods used by usurious lenders, often involv[e] subterfuge, to attempt to circumvent fundamental public policy. The Supreme

> Court noted the well-established principle articulated over 100 years ago in *Earnest v. Hoskins*, 100 Pa. 551, 41 Legal. Int. 346 (1882), that the Commonwealth's public policy prohibits usurious lending, and it cited a decision entered almost 70 years ago in [*Equitable Credit & Discount Co. v. Geier*, 342 Pa. 445, 21 A.2d 54 (1941)], holding that it is well settled in constitutional law that the regulation of interest rates is a subject within the police power of the state particularly when it comes to cases involving small loans, which profoundly affect the social life of the community.

587 F.3d 616, 621-22 (3d. Cir. 2009).

57. In *Kaneff*, a class action was brought against a lender that charged over 300% interest on its transactions. *Id.* at 624. On appeal, the Third Circuit was tasked with determining whether the laws Delaware—which was selected by the loan's choice of law clause, and had no usury statute—or Pennsylvania—where the plaintiff resided, where the loan's collateral was located, and which had a usury statute—should apply to the loan. *Id.* at 622. In light of the debtor's residence, as well as the fact that Pennsylvania would have to "live with the aftermath of the transaction," the Third Circuit, after recognizing that "the regulation of interest rates is a subject within the police power of the state," held that Pennsylvania had a materially greater interest in the loans than Delaware. *Id.* at 622-24; *see also Gregoria v. Total Asset Recovery, Inc.*, 2015 U.S. Dist. LEXIS 1818, at *11 (E.D. Pa. Jan 7, 2015) (rejecting the use of a choice of law clause to evade usury laws); *Clerk v. First Bank*, 735 F. Supp. 2d 170, 178 (E.D. Pa. 2010) (same).

58. The Pennsylvania Supreme Court has twice rejected similar attempts by usurious lenders to avoid the strong public policies of the Commonwealth through choice-of-law provisions. *See Cash America Net of Nevada, LLC v. PA Dept. of Banking*, 8 A.3d 282 (Pa. 2010) (holding that an out-of-state lender, that supplied loans to Pennsylvania residents over the internet, was subject to Pennsylvania law); *Pa. Dep't of Banking v. NCAS of Del., LLC*, 948 A.2d 752, 777 (Pa. 2008) ("Any interest that Delaware may have in permitting Cash Advance Centers to charge the

Monthly Participation Fee is minimal, at best, and is outweighed by Pennsylvania's significant interest in protecting Commonwealth borrowers from exploitative lending practices.”).

59. It is also well settled that usury laws evince a state’s strong public policies:

> [U]sury laws are a declaration of this State’s public policy. The First Department has characterized usury as a question of supervening public policy. *See Guerin v. New York Life Ins. Co.*, 271 AD 110, 62 N.Y.S.2d 805 (1st Dept 1946). The Court of Appeals has stated in *Schneider v Phelps* [41 NY2d 238, 243, 359 N.E.2d 1361, 391 N.Y.S.2d 568 (1977)], “[the] purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation.” Further, it has been reasoned from these cases that “the policy underlying our State’s usury laws is in fact of a fundamental nature.”

Clever Ideas, Inc. v 999 Rest. Corp., 2007 WL 3234747 (N.Y. Sup. Ct. Oct. 12, 2007). *Madden v. Midland Funding, LLC*, 2017 U.S. Dist. LEXIS 27109, *28-29 (S.D.N.Y. Feb. 27, 2017) (“A number of cases have applied New York law — despite the parties' choice of another forum's law — because New York’s usury prohibition constitutes a fundamental public policy.) (citing *Am. Equities Grp.*, 2004 U.S. Dist. LEXIS 6970, 2004 WL 870260, at *8 (“New York has a strong public policy against interest rates which exceed 25%, which policy must be enforced.") *Assih*, 893 N.Y.S.2d at 446 (“New York has a strong public policy against interest rates which are excessive and this is a policy the courts must enforce.”); *N. Am. Bank, Ltd. v. Schulman*, 474 N.Y.S.2d 383, 387 (N.Y. Sup. Ct. 1984) (“[T]he policy underlying our state's usury laws is in fact of a fundamental nature.”); *Guerin v. N.Y. Life Ins. Co.*, 62 N.Y.S.2d 805, 810 (1st Dep’t 1946) (“Usury is a question of supervening public policy and relates to charges which are in themselves prohibited.”)); *State ex rel. Cooper v. Western Sky Fin., LLC*, 2015 NCBC LEXIS 87, at *28 (N.C. Super. Ct. 2015) (“The North Carolina usury statute makes clear that ‘[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.’”); *O'Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830, 833-34

(Wash. 1978) (disregarding choice-of-law provision based on usury statute).

60. Courts interpreting New Jersey's usury statute are in accord—even as it applies to businesses. *See In re McCorhill Publ'g, Inc.*, 86 B.R. 783, 793 (Bankr. S.D.N.Y. 1988) (holding that enforcing New Jersey law would violate New York's "strong public policy against interest rates which exceed 25%, which policy must be enforced"); *Business Incentives Co. v. Sony Corp. of Amer.,* 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (disregarding choice-of-law provision because New Jersey has a strong public policy to protect small businesses from commercial giants).

61. Indeed, the New Jersey Superior Court has held that the purpose of a criminal usury statute is to protect its citizens from usury:

> We have no doubt that the evil sought to be remedied by *N.J.S.A.* 17:16C-1 *et seq.* is the charging of excessive interest to New Jersey consumers. That evil is of such a nature that we are confident the Legislature did not intend to discriminate on the basis of the source of supply. Rather, it endeavored to protect residents of this State from that evil irrespective of whether its source was in-state or out-of-state.

Turner v. Aldens, Inc., 433 A.2d 439, 442-44 (N.J. Super. 1981).

62. It is also well settled that a party cannot contract around the criminal laws of a state. *See Cashcall, Inc. v. Mass. Div. of Banks,* 3 Mass. L. Rep. 5 (Mass. Super. Ct. 2015) (holding that Massachusetts criminal usury laws applied to out-of-state resident despite choice-of-law provision because "[a]ll of the loans were applied for, paid from, and collected from Massachusetts."); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014) (same); *W. Sky Fin., LLC v. State ex rel. Olens*, 793 S.E.2d 357, 366 (Ga. 2016) ("Again, the police power to enforce the criminal laws of this State cannot be defeated by the efforts of parties to an agreement to contract around it.") (citing *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343 (2004) ("The parties to a private contract who admittedly make loans to Georgia residents cannot, by virtue of a choice of law provision, exempt themselves from investigation for potential violations of

Georgia's usury laws."); *Western Sky*, 2015 NCBC LEXIS 87, at *87 (N.C. Sup. Ct. Aug. 27, 2015) (same).

III. THE MCA AGREEMENTS ARE UNCONSCIONABLE

63. The MCA Agreements entered into with the CBSG are unconscionable contracts of adhesion that are not negotiated at arms-length nor in good faith.

64. Instead, they contain unconscionable, wholly unfair and one-sided terms that prey upon the desperation of the small business and their individual owners and obfuscate the fact that the contemplated transactions, are, in reality, loans that are absolutely guaranteed and repayable regardless of any change in circumstance or inability to pay.

65. Among these one-sided terms, the MCA Agreements include: (1) a provision giving the CBSG the irrevocable right to withdraw money directly from the merchant's bank accounts, including collecting checks and signing invoices in the merchant's name, (2) a provision preventing the merchant from transferring, (3) moving or selling the business or any assets without permission from CBSG, (4) a one-sided attorneys' fees provision obligating the merchant to pay the CBSG's attorneys' fees but not the other way around, (5) a venue and choice-of-law provision requiring the merchant to litigate in a foreign jurisdiction under the laws of a foreign jurisdiction, (6) a personal guarantee, the revocation of which is an event of default, (7) a jury trial waiver, (8) a class action waiver, (9) a collateral and security agreement providing a UCC lien over all of the merchant's assets, (10) prohibitions or penalties of obtaining financing from other sources, (11) the maintenance of business interruption insurance, (12) an assignment of lease of merchant's premises in favor of CBSG, (13) the right to direct all credit card processing payments to CBSG, (14) a power-of-attorney "to take any and all action necessary to direct such new or additional credit card processor to make payment to [CBSG]," and (15) a power of attorney authorizing the CBSG "to take any action or execute any instrument or document to settle all obligations due…."

66. The MCA Agreements are also unconscionable because they contain numerous knowingly false statements. Among these knowingly false statements are that: (1) the transaction is not a loan, (2) the daily payment is a good-faith estimate of the merchant's receivables, and (3) (4) that the automated ACH program is labor intensive and is not an automated process, requiring the MCA company to charge an exorbitant ACH Program Fee or Origination Fee.

67. The MCA Agreements are also unconscionable because they are designed to fail. Among other things, the MCA Agreements are designed to result in a default in the event that the merchant's business suffers any downturn in sales by: (1) forcing the merchant to wait until the end of the month before entitling it to invoke the reconciliation provision, (2) preventing the merchant from obtaining other financing, and (3) and requiring the merchant to continuously represent and warrant that there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership of merchant.

68. The MCA Agreements also contain numerous improper penalties that violate the strong public policy of various states, including New Jersey. Among these improper penalties, the MCA Agreements: (1) require the merchant to sign a confession of judgment entitling the MCA company to liquidated attorneys' fees based on a percentage of the amount owed rather than a good-faith estimate of the attorneys' fees required to file a confession of judgment, (2) accelerate the entire debt upon an Event of Default, and (3) require the merchant to turn over 100% of all of its receivables if it misses just four fixed daily payments.

69. The MCA Agreements are unconscionable and unenforceable as a matter of law.

IV. GROUNDS TO STRIKE THE CONFESSION OF JUDGMENT

70. "A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record." *Resolution Tr. Corp. v. Copley Qu-Wayne Associates*, 546 Pa. 98, 106, 683 A.2d 269, 273 (1996).

71. "A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record." *Resolution Tr.,* 546 Pa. at 106. "In considering the merits of a petition to strike, the court will be limited to a review of only the record *as filed by the party in whose favor the warrant is given,* i.e., the complaint and the documents which contain confession of judgment clauses." *Id*.

72. Any "warrant to confess judgment must be explicit and will be strictly construed, with any ambiguities resolved against the party in whose favor the warrant is given." *Dime Bank v. Andrews*, 2015 PA Super 114, 115 A.3d 358, 371 (Pa. Super. Ct. 2015).

73. "An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered." *Resolution Tr.*, 546 Pa. 98 at 106. *See* Pa.R.C.P. No. 2959.

74. Recently, in another fraudulent confession of judgment CBSG filed against another extortion victim, Judge Djerassi found "that the record is fatally flawed" and struck CBSG's confession of judgment. *Complete Business Solutions Group, Inc. v. NG Consulting Services, LLC*, 2017 WL 680045, at *3 (Pa. Com. Pl. 2017).

A. The Judgement was entered against the wrong party

75. As part of the Agreement, Defendant Heller was required to execute a personal guaranty limited to performance of the representations and warranties:

> **Personal Guaranty of Performance**. The undersigned Guarantor(s) hereby guarantees to PURCHASER, SELLER/MERCHANT'S performance of all of the representations, and warranties made by SELLER/MERCHANT in this Agreement and the Factoring Agreement, as each agreement may be renewed, amended, extended or otherwise modified (the "Guaranteed Obligations"). Guarantor's obligations are due at the time of any breach by Merchant of any representation or warranty, or covenant made by Merchant in this Agreement and the Merchant Agreement.

76. The representations and warranties are found in Section II of the Agreement.

77. The only breach alleged on the face of the Complaint for Confession of Judgment is that MH Marketing "has failed to deliver to CBSG the Receivables required." *See* Heskin Decl., Ex. C, pg. 4. This is not among the representations and warranties in the Agreement.

78. A plain review of the contract demonstrates that no breach of the representations and warranties is factually alleged.

79. "Pennsylvania law instructs courts to apply the exact language of a warrant of attorney when they enforce a confession of judgment." *See Complete Bus. Solutions Grp., Inc. v. HMC*, Inc., 2019 U.S. Dist. LEXIS 170909, at *5 (E.D.Pa. Oct. 2, 2009) (citing to *Neducsin v. Caplan*, 2015 Pa. Super. 158, 121 A.3d 498, 505 (Pa. Super. Ct. 2015)). A Judgment "will be stricken" if it is not "made in rigid adherence to the provisions of the warrant of attorney." *Neducsin*, 2015 Pa. Super. at 121. And the warrant "will be strictly construed, with any ambiguities resolved against the party whose favor the warrant is given [i.e. Complete Business]." *Id*. Here, the language in the warrant is clear when it mentions that COJs will be filed "against merchant seller." Accordingly, CBSG cannot confess judgment against Heller.

80. This is not the first time that CBSG has confessed judgment against the wrong party. *See HMC*, 2019 U.S. Dist. LEXIS at *5. In *HMC*, the Court rejected CBSG's attempt to argue that the court should construe the "merchant seller" to include the guarantor just because he signed the application in both capacities where the applicable Agreement identified the "merchant seller" as the company. *Id*. at *6.

81. The confession in this case, similarly to the confession in HMC, superficially identifies the merchant seller as the company and the owner as the guarantor. *Id*. at *6. *See* Ex. C, Agreement pg. 2.

82. Pursuant to well-settled law, any ambiguities must be construed against CBSG. *Id.* at *6.

83. For those reasons, the judgment against Defendant Heller should be stricken.

B. The Judgment was entered without authority

84. "Because a warrant of attorney authorizing confession of judgment can be an oppressive weapon, a judgment entered pursuant thereto can be accomplished only by strict adherence to the provisions of the warrant of attorney." *Langman v. Metro Acceptance Corp.,* 318 Pa. Super. 381, 384, 465 A.2d 5, 7 (1983) As such, "[a]ny doubt as to the validity of such a judgment must be resolved against the party entering the judgment." *Id.*

85. Pursuant to the Agreement, Heller only guaranteed performance of the representations and warranties contained in the Agreement.

86. He did not guarantee performance of all of MH Marketing's obligations under the Agreement. *See* Agreement Guaranty, pg. 9

87. The representations and warranties contained in the Agreement are limited and do not include ensuring timely delivery of the allegedly purchased Receivables—which is the only breach of the Agreement alleged in the Confession of Judgment. *See* Complaint in Confession of Judgment ¶8 (Ex.A).

88. Once again, this is not the first time CBSG fails to aver facts warranting entry of a confessed judgment. In *Complete Business Solutions Group, Inc. v. NG Consulting Services, LLC*, 2017 Phil. Ct. Com. Pl., LEXIS 14, at *5 (Pa. Ct. Comm. Pl. Feb. 16, 2017) CBSG entered a confession against a guarantor under a similar guaranty, but failed to aver facts establishing that the merchant had breached any representation and warranties under the applicable agreement.) In *NG*, the court rejected CBSG's "scrivener's error" argument that they purported had no material

impact on the case, and struck the judgment against the guarantor. *Id.* The same result is warranted here.

C. The MCA Agreements are unconscionable

89. Under New Jersey law, unconscionability is fact-dependent. *See, e.g., Delta Funding Corp. v. Harris,* 189 N.J. 28, 912 A.2d 104, 110-11 (N.J. 2006).

90. "Courts have recognized that a contract may be either procedurally or substantively unconscionable." *Falk v. Aetna Life Ins. Co*., 2019 U.S. Dist. LEXIS 148962, *6-7, 2019 WL 4143882 (D.N.J. Aug. 31, 2019)

91. "Procedural unconscionability refers to ... 'the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language'… 'Substantive unconscionability looks to whether the […] provision unreasonably favors the party asserting it.'" *Id*. at *7 (internal citations omitted).

92. Here, the Agreements are unconscionable because of the specific circumstances leading to them, as well as because of their terms.

93. Courts have broad discretion in determining the remedy for both forms of unconscionability. *Sitogum Holdings, Inc. v. Ropes,* 352 N.J. Super. 555, 800 A.2d 915, 919 (N.J. Super. Ct. Ch. Div. 2002).

94. "[T]he court may refuse to enforce the entire agreement, strike the unconscionable provision and enforce the remainder of the agreement, or limit the application of the unconscionable provision as to avoid an unconscionable result." *Id.; See also* N.J. Stat. Ann. § 12A:2-302.

95. The unconscionable nature of the CBSG's agreements has been noted in other cases. *See Fleetwood Servs. LLC v. Complete Bus. Solutions Group*, 2019 U.S. Dist. LEXIS 183250, * 9, 2019 WL 5422884 (E.D.Pa. Oct. 23, 2019)

96. In *Fleetwood*, CBSG also took advantage of a small business' "desperate financial condition" to bind them into unconscionable agreements that provided among other things: "a provision giving complete Business the irrevocable right to withdraw money directly from Fleetwood's bank accounts; a provision giving complete Business the power of attorney to act as if it were Fleetwood, including collecting checks and signing invoices in Fleetwood's name , a provision preventing Fleetwood from transferring, moving or selling the business or any asset without permission from Complete Business; and a one-sided attorneys' fees provision…" Id. at *9.

97. Courts have also recognized that "[a]s with any other price term in an agreement. . . [] may be deemed unconscionable." *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 976, 422 P.3d 1004, 1009, 236 Cal. Rptr. 3d 353, 359 (2018).

D. The Agreements are usurious under New Jersey Law (All Agreements)

98. Although the terms of the Agreements mention that Pennsylvania law was to apply to disputes arising from the transaction, this choice of law would contradict the fundamental policy against usury in New Jersey, a state with a materially greater interest in this matter.

99. Under New Jersey Law, the public policy of prohibiting usury is so important, it is embodied in N.J. Rev. Stat. §2C:21-19, which prohibits charging an interest in excess of 50% of loans.

100. Violation of N.J. Rev. Stat. §2C:21-19 is a felony punishable with up to three years in prison.

101. Despite their documented form, the Agreements are, in economic reality, loans that are absolutely repayable.

102. Therefore, the Agreements are subject to the restriction of New Jersey's usury laws.

103. Pennsylvania does have a general prohibition against usury, but where, as here, the loan is for business purposes, lenders are exempt. 41 Pa. Stat. Ann. § 301 ("The maximum lawful rate of interest set forth in this section shall not apply to... (v) business loans of any principal amount."); *see also Smith v. Mitchell*, 420 Pa. Super. 137, 141-42, 616 A.2d 17, 22(1992) (requiring a borrower to pay usurious interest due to the business loan exception).

104. When determining which state has a materially greater interest, Pennsylvania courts have looked to the factors set forth in § 188 of the Restatement (Second) of Conflicts. *See Pa. Dep't of Banking v. NCAS of Del., LLC*, 596 Pa. 638, 649, 948 A.2d 752, 776-77 (2008). These factors include: "(a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.*

105. The factors "are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) of Conflicts of Laws § 188 (1971).

106. Here, New Jersey law should govern this dispute. As previously stated, the application of Pennsylvania law would contravene New Jersey's fundamental public policy of prohibiting usurious lending.

107. New Jersey also has a materially greater interest in this dispute than Pennsylvania. While many of the § 188 factors are evenly split (the contract was negotiated and entered into via telephone and email, and the parties have principle places of business in different states) the most important factor here favors the application of New Jersey law: the place of performance. New Jersey is the place of performance because it is where Defendant makes payments on the usurious loans. As such, New Jersey law should apply to this matter.

108. Additionally, under the terms of MCA Agreements themselves, CBSG is limited to the maximum interest rate permitted by law in the event that the Court finds that the MCA Agreements are, in fact, loans. *See* Agreement, pg. 18.

E. CBSG failed to follow the required steps to reconcile the account

109. The Agreement provides that CBSG was to withdraw 6% of the receivables accrued by MH Marketing on a weekly basis. Agreement, Ex C, pg. 2.

110. The Agreement also provides for "Monthly Assessment of Merchant Cash Flow," whereby the Merchant was to provide financial information regarding its gross receivables "to reconcile the daily payments made against the Specified Percentage permitting PURCHASER to debit or credit the difference to Merchant on a monthly basis so that the Daily Retrieval Rate equals the Specified Percentage." Agreement, pg. 3.

111. MH Marketing provided CBSG with account information and access upon signing the Agreement. *See* Ex. C, pg. 14.

112. Notwithstanding their knowledge that MH Marketing's receivables had decreased, and their unfettered access to MH Marketing's bank account, CBSG failed to reconcile the payments made, against the alleged "Specified Percentage."

113. According to the terms of the Agreement, the account should have been reconciled to reflect the lower receivables accrued by MH Marketing.

114. Had CBSG complied with the terms of the Agreement, they would have had to debit the difference to MH Marketing so that the Daily Retrieval Rate equaled the Specified Percentage.

V. GROUNDS TO OPEN THE CONFESSION OF JUDGMENT

115. Alternatively, and at a minimum, "if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike." *Resolution Tr.,* 546 Pa. at 106.

116. A "petition to open rests within the discretion of the trial court, and may be granted if the petitioner (1) acts promptly, (2) alleges a meritorious defense, and (3) can produce sufficient evidence to require submission of the case to a jury." *RAIT P'ship, LP v. E Pointe Properties I, Ltd.*, 2008 PA Super 225, ¶ 4, 957 A.2d 1275, 1277 (Pa. Super. Ct. 2008).

117. Here, Defendants have acted promptly and have numerous meritorious defenses which are more than sufficient to require submission of this case to a jury.

RELIEF

118. Based upon the defects in the face of the Judgment and supporting documents set forth above, it is respectfully submitted that the Judgment be stricken.

119. Alternatively, based on the timely asserted meritorious defenses asserted above, Defendants respectfully request that this Honorable Court open the Judgment, stay its enforcement and stay the this action until this Petition is resolved.

WHITE AND WILLIAMS LLP

BY: 

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Attorneys for Defendants

Dated: March 30, 2020

VERIFICATION

I, Michael Heller, state that I am authorized to make this verification individually because I am a Defendant in this action and on behalf of MH Marketing Solutions Group, Inc. ("MH Marketing") because I am the owner, and Managing Member of MH Marketing. In such capacity, I oversee MH Marketing's financing, accounting, sales and operations and was responsible for all aspects of MH Marketing's relationship with Complete Business Solutions Group., Inc. The facts asserted in this Petition are based upon MH Marketing' books and records and my personal knowledge and I hereby verify that such facts are true and correct to the best of my knowledge, information and belief. The undersigned understands that the statements therein are made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.

Dated: March 23, 2020

Michael Heller

Sworn to and subscribed before me

this ___ Day of March 2020

Notary Public

Exhibit 12

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

PETROPANGEA, INC.; JOHNNY HARRISON; VOLUNTEER PHARMACY, INC., and TOBY C. FROST; individually and on behalf of all those similarly situated, Plaintiffs, v. COMPLETE BUSINESS SOLUTIONS GROUP, LLC; FAST ADVANCE FUNDING, LLC; MCA CAPITAL FUND I, LLC; MCA NATIONAL FUND, LLC; RECRUITING AND MARKETING RESOURCES, INC.; FULL SPECTRUM PROCESSING, INC. Defendants.	COURT OF COMMON PLEAS TERM 2020 **Civ. A. No. _____**

NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take actions within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by an attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE, IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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CIVIL ACTION COMPLAINT

Plaintiffs Petropangea, Inc., and Volunteer Pharmacy, Inc. (collectively, the "Merchant Plaintiffs") and Johnny Harrison, and Toby C. Frost, respectively (collectively, the "Individual Plaintiffs"), individually and on behalf of all others similarly situated, brings this class action lawsuit against Defendants Complete Business Solutions Group ("CBSG"), Fast Advance Funding, LLC ("Fast Advance"), Full Spectrum Processing, Inc. ("Full Spectrum"), Recruiting and Marketing Resources, Inc. ("RMR"), MCA National Fund, LLC, MCA Capital Fund I, LLC ("MCA Capital") (collectively, the "Defendants") to obtain legal and equitable relief including damages, restitution and injunctive relief for the Class, as defined below. Plaintiffs make the

following allegations upon information and belief, except as to their own actions, the investigation of their counsel and the facts that are a matter of public record:

NATURE OF THE ACTION

1. This class action lawsuit seeks to save small businesses and their owners from financial ruin at the hands of an unlawful and unscrupulous loansharking scheme that is crushing small businesses all over the country and devastating the lives of their individual owners.

2. The extortionate collection tactics are so outrageous and unscrupulous that an employee of one these small business victims recently committed suicide immediately after being berated and accused of fraud by one of Defendants' collections personnel.

3. Joseph LaForte, Jr. operates the unlawful loansharking scheme through, among other fronts, Defendants CBSG, Fast Advance, Full Spectrum, RMR, MCA National Fund, LLC, New York Unity Factor, LLC ("Unity")" and MCA Capital (collectively, the "Enterprise").

4. The Enterprise preys upon individual owners of small businesses who are in desperate need of funding and cannot obtain financing from traditional lenders.

5. The interest rates charged are unconscionable and deceptive. The interest rates charged to Plaintiffs are as high as ***875 %***.

6. When these small businesses ultimately can no longer afford to pay the unlawful and/or unconscionable interest rates charged, the Enterprise uses extortionate collection practices that are designed to embarrass, intimidate and extort their victims into paying even if the victim has to borrow, pay from individual sources, or sell their personal assets, ***including their homes***.

7. These unconscionable and extortionate tactics include the following:

a) Filing ***forged*** confessions of judgments in a foreign jurisdiction with absolutely zero relationship to the parties;

b) Employing Mafioso-style tactics by sending a former ex-felon and reputed former Mafia soldier to personally visit the victims and demand payment;

c) Threatening to throw their spouses and small children out of their home and onto the streets;

d) Sending thousands of default notices to friends, family, neighbors, vendors, customers, and other business relations, alleging that the victims have defaulted on their debts. Defendants' tactics stoop so low that, in this very case, Defendants actually sent default letters to a victim's niece and to the school of a victim's child;

e) Sending fraudulent UCC notices that intentionally overinflate the amount allegedly borrowed;

f) Harassing victims, spouses, and employees with endless phone calls, emails and text messages, threatening to destroy their business and/or take everything they have;

g) Confessing judgment against the merchants for amounts that are grossly exaggerated and not supported by any good-faith basis in law;

h) Confessing judgment against the individual owners despite no legal basis to do so;

i) Unlawfully seizing the victim's bank accounts without providing notice as required under the Due Process Clause, controlling Third Circuit precedent and Pennsylvania law; and

j) Intimidating their victims by threatening physical bodily harm. Among the physical threats in this case, LaForte personally threatened to pursue a victim ***until he was dead***, told the victim that he hoped he got ***hit by a car***, and threatened to ***blow the doors off both the victim and his counsel, i.e., the undersigned***.

8. In conducting its illegal loansharking scheme, the Enterprise disguises its predatory, high-interest loans through so-called factoring agreements, which purport to purchase a merchant's future receivables.

9. Under a legitimate factoring agreement, a factor assumes the risk of loss in the event that the receivables become uncollectable.

10. In reality and practice, however, the Enterprise assumes no risk of loss, and instead enforces its sham factoring agreements as absolutely repayable loans even if the merchant goes out of business or files for bankruptcy.

11. The unlawful collection tactics employed by the Enterprise are as brazen as it gets.

12. Among the most shocking is the Enterprise's use of **forged confessions of judgment.**

13. The outrageous collection tactics by the Enterprise and the merchant cash advance ("MCA") industry were recently exposed by Bloomberg News, and have sparked investigations by state and federal regulators, as well as legislation by the United States Congress.

14. As a direct result of the type of conduct described herein, the New York State Legislature banned the use of confessions of judgment on out-of-state victims like Plaintiffs here. The Financial Services Committee of the United States House of Representatives has gone further and passed a bill that would outright ban the use of confessions of judgment nationally. *See* Exs. 1.

15. Since 2018, the Enterprise has filed nearly 2,500 confessions of judgment against its small business victims and their individual owners. Over 1,100 of these were filed right here in Philadelphia. Over 750 were filed in the State of New York. Around 138 confessions of judgment were filed in Philadelphia County only since the beginning of the Covid-19 pandemic.

16. Plaintiffs now bring this class action in order to recompense the many thousands of similarly situated victims that have been preyed upon by the Enterprise through their predatory and unlawful loansharking scheme.

THE PARTIES

17. Plaintiff Petropangea, Inc. is a Texas corporation with a principal place of business in located in Texas.

18. Plaintiff Johnny R. Harrison is an adult resident and citizen of Texas and is the owner of Petropangea, Inc.

19. Plaintiff Volunteer Pharmacy, Inc. is a Tennessee corporation with a principal place of business located in Tennessee.

20. Plaintiff Toby C. Frost is an adult resident and citizen of Tennessee and is the owner of Volunteer Pharmacy, Inc.

21. Defendant Complete Business Solutions Group, Inc. d/b/a Par Funding is a Delaware corporation with its principal place of business located in the State of Florida.

22. Defendant Fast Advance Funding, LLC d/b/a Par Funding is a Delaware corporation with a principal place of business located in the State of Florida. It is owned by Lisa McElhorne, who is a Florida resident and citizen.

23. Defendant Full Spectrum Processing, Inc. is a Pennsylvania corporation with its principal place of business located at 20 N. 3rd Street, Philadelphia, PA 19106.

24. Defendant Recruiting and Marketing Resources, Inc. is a Pennsylvania corporation with its principal place of business located at 20 N. 3rd Street, Philadelphia, PA 19106.

25. Defendant MCA National Fund, LLC is a limited liability company located at 1080 N. Delaware Ave., Suite 505, Philadelphia, PA 19125. It is owned by Lisa McElhorne, who is a Florida resident and citizen.

26. Defendant MCA Capital Fund I, LLC is a limited liability company located at 1080 N. Delaware Ave., Suite 505, Philadelphia, PA 19125. It is owned by Lisa McElhorne, who is a Florida resident and citizen.

JURISDICTION AND VENUE

27. Jurisdiction and venue are property in the Court of Common Pleas of Philadelphia County, Pennsylvania because Defendants have confessed judgment against Plaintiffs in this very venue.

28. Each Defendant is subject to the personal jurisdiction of this Court because each has voluntarily subjected itself/himself/herself to the jurisdiction of this Court, regularly transacts business within the Commonwealth of Pennsylvania, and has purposefully availed himself of the jurisdiction of this Court for the specific transactions at issue.

COMMON FACTUAL ALLEGATIONS

A. The Structure of the Enterprise

29. The Enterprise consists of a group of associated-in-fact entities that are, on paper, owned by Joseph LaForte's wife, Lisa McElhorne, but in reality owned and controlled by LaForte.

30. Each entity has a unique and separate role in conducting the affairs of the Enterprise.

31. Defendants CBSG and Fast Advance act as the lenders on paper.

32. Defendants MCA Capital and MCA National provide the financing for the Enterprise through securities backed investment products that are offered to the public.

33. Defendant Recruiting and Marketing Resources employs LaForte on paper and is owned on paper by his wife Lisa McElhorne. Recruiting and Marketing Resources is a necessary part of the Enterprise because CBSG cannot employ LaForte due to his prior criminal background.

34. Defendant Full Spectrum Processing underwrites and collects upon the loans.

35. LaForte directs and controls the affairs of the Enterprise through each of these separate entities.

36. Each of the Plaintiffs and the Class Members have been directly injured by the unlawful conduct of the Enterprise.

B. The Predatory MCA Industry

37. As Bloomberg News has reported, the MCA industry is "essentially payday lending for businesses," and "interest rates can exceed 500 percent a year, or 50 to 100 times higher than

a bank's." *See* Ex. 2. The MCA industry is a breeding ground for "brokers convicted of stock scams, insider trading, embezzlement, gambling, and dealing ecstasy." *Id.* As one of these brokers admitted, the "industry is absolutely crazy. … There's lots of people who've been banned from brokerage. There's no license you need to file for. It's pretty much unregulated." *Id.*

38. The National Consumer Law Center also recognized that these lending practices are predatory because they are underwritten based on the ability to collect, rather than the ability of the borrower to repay without going out of business. *See* National Consumer Law Center, *supra*.

39. This is because MCA companies "receive the bulk of their revenues from the origination process rather than from performance of the loan [and thus] may have weaker incentives to properly ensure long-term affordability, just as pre-2008 mortgage lenders did." *Id.* ("[A] fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective borrowers who simply cannot afford the credit on the terms being offered. Typically, such credit is underwritten predominantly on the basis of liquidation value of the collateral, without regard to the borrower's ability to service and repay the loan according to its terms absent resorting to that collateral.").

40. The MCA companies care only about whether they can collect upon default, and not whether the small business can survive.

C. The Enterprise's conduct demonstrates the Agreements are treated as loans.

41. On December 20, 2018, Bloomberg News published an article exposing the unlawful collection tactics employed by the Enterprise when a merchant fails to pay:[1]

[1]Ex. 3, https://www.bloomberg.com/graphics/2018-confessions-of-judgment-visit-from-gino/

Gino Gioe enters the Los Angeles office of Radiant Images on Feb. 15, 2018, captured by a surveillance camera. SOURCE: COMPLAINT FILED IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

42. As Bloomberg News revealed, the Enterprise routinely employs mob-like intimidation tactics when a merchant cannot pay:

> Gioe's travels around the U.S. show how the regulatory vacuum is enabling intimidation tactics that seem like relics of a lawless past.
>
> Ten of Gioe's unannounced visits to borrowers, from Chicago to small-town Alabama, were described in court papers and interviews with Bloomberg News. He made "threats of violence and physical harm" to employees of a California rehab center, according to one court complaint. A tire-shop owner near Boston said in another court filing he "felt that physical harm would come to me and my family" when Gioe walked into his shop in 2016 demanding immediate payment.
>
> A third borrower, recounting Gioe's visit to his Maryland trucking company last year, described him in an affidavit as resembling "an aging but still formidable character ripped from the World Wrestling

> Federation" who had been sent not to negotiate but to "intimidate me into making a lump-sum payment."[2]

43. In the Bloomberg article, both "Gino" and the principal owner of CBSG, Joseph LaForte, admitted to Bloomberg News that its merchants are "borrowers" and that CBSG is a "lender." *See id.* ("Gioe said the former owner had borrowed $1 million from Par with no intention of paying it back…"), ("Joseph LaForte says his brother is an outside broker for Par who sometimes helps him collect debts but isn't an employee. He says Par had a right to pursue Sharma for reneging on millions of dollars of debt."), ("Joseph LaForte says that even though Gioe was helping borrowers, a few did complain about getting a visit.").

44. The Bloomberg article further goes onto detail numerous examples where the Enterprise is treating its agreements as absolutely repayable loans and not true sales. As described by Bloomberg News, "Gioe's visits followed a pattern. He would show up unannounced, demand to speak to the owner and say he wasn't leaving until he got paid, according to the people who described the visits in court records and interviews. All of the people say Gioe seemed to be trying to intimidate them. Four say they called the police, though no charges were filed." *Id.*

45. In fact, the Enterprise treats its MCA Agreements as so absolutely repayable, that not even a bankruptcy court can stop their collection tactics. *See id.* ("Gioe could be persistent. When he showed up at a beauty-supply warehouse in Chicago last year, its new owner, George Souri, told him a bankruptcy judge had ordered creditors to back off. 'We don't deal with courts, we have our own ways to collect,' Gioe responded, according to an affidavit Souri filed in the bankruptcy case. When Souri forbade him from speaking to the warehouse's former proprietor, Gioe remarked, 'We'll go to her house and deal with her there,' the affidavit states.").

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[2] *Id.*

46. Apparently, the Enterprise did not learn its lesson. On August 27, 2019, CBSG was sanctioned nearly $50,000 by the United States Bankruptcy Court for the Central District of California. *See* Ex. 4.

47. If the CBSG Agreements reflected true account purchase transactions, "Gino" would be paying visits to the companies who owed the receivables allegedly purchased and CBSG would not be employing Mafioso-style intimidation tactics against *the seller*.

FACTS SPECIFIC TO PLAINTIFFS

A. Volunteer Pharmacy (Tennessee): Usury (Tennessee), Threats of Physical Harm (Gino), AR Smash, Verbal Abuse.

48. Volunteer Pharmacy provides prescription and non-prescription drugs to local residents in Tennessee.

49. The company is owned and operated by Toby C. Frost, a Tennessee resident.

50. Between November 5, 2013 and May 16, 2016, Volunteer Pharmacy entered into a series of forty-one usurious loans with the Enterprise. *See* Ex. 5.

51. Each contained the same common terms and conditions, and each charged an interest rate in excess of 100%.

52. Like the Enterprise's other victims, the unlawful and unconscionable interest payments pushed Volunteer Pharmacy into financial catastrophe by causing it to take out more and more unlawful loans with the Enterprise.

53. In 2016, Volunteer Pharmacy could no longer sustain the onerous daily payments.

54. Frost called LaForte and asked for longer payment terms. In order to consolidate some of the existing debt and extend the term of the loans, LaForte demanded that Frost put up his home as collateral. Frost had no choice but to comply with the demand so he put up his home as security.

55. In 2017, Volunteer Pharmacy began missing payments due to insufficient funds.

56. LaForte immediately called Frost to verbally abuse him. In addition to cursing out Frost, LaForte instructed Frost to obtain payment by any means possible even if he had to borrow the money from friends or family.

57. If Frost did not come up with the payment, LaForte threatened to throw Frost's wife and children out of their home and onto the streets because he held a mortgage on their home.

58. In addition, the Enterprise launched its AR Smash, and began calling employees of Volunteer Pharmacy to further harass, embarrass and extort payment.

59. The threats ultimately worked and Frost agreed to pay $4,000 per week.

60. Despite continuing to pay $4,000 each and every week as agreed, LaForte instructed Gino to pay Frost a visit.

61. The Enterprise's conduct cannot get more despicable.

62. One late summer evening in 2017, Gino showed up at the home of Toby Frost.

63. His seven-year old son answered the door.

64. Gino demanded to see his dad, and warned the kid that he knew his father was home, and to go get him.

65. After relaying the message to his father, both his son and his young daughter locked their selves in their parent's bedroom, hiding in fear.

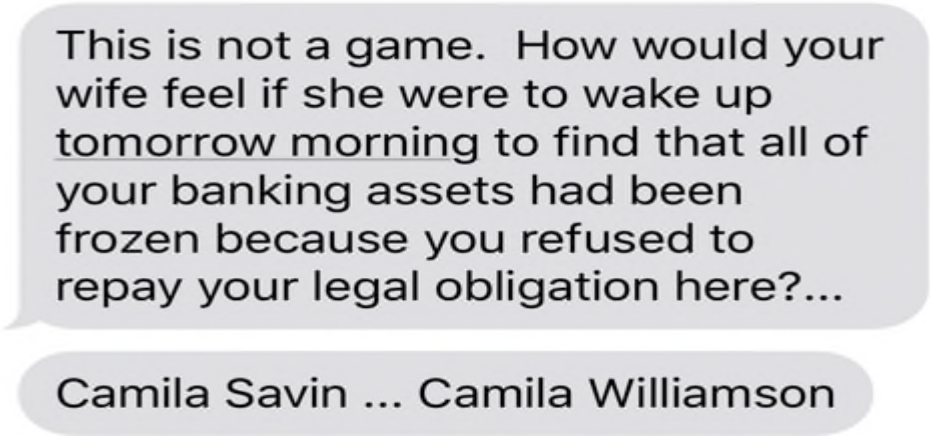
66. Gino confronted Frost and asked why he doesn't pay his bills. He informed Frost that he had been sent by LaForte, and that he had just gotten back from a visit in Texas where a merchant pulled a shotgun on him.

67. Gino left without incident but the message was received.

68. Frost continued to make his $4,000 weekly payments over the next two years.

69. In November 2019, Frost demanded an accounting of everything he received and paid to date. The Enterprise claimed that Volunteer Pharmacy still owed $281,539, despite paying over $1,426,491 more than advanced.

70. On January 27, 2020, the Enterprise threatened to harass Mr. Frost's wife, sending the following text:



71. The Enterprise followed through with their threats and sent numerous text messages to Mr. Frost's wife that same day.

72. The Enterprise also sent Mr. Frost a text message informing him that the debt owed CBSG was absolutely repayable even if the business is no longer operational, and that if he failed to pay, all of his personal income and assets would be seized. *See* Ex. 6.

B. Petropangea: Usury (Texas), and Unlawful Bank Levies

73. Petropangea is an independent broker providing wholesale petroleum products on a global scale to the oil and gas industry to include drilling, offshore, resellers, construction, and petrochemical.

74. It is a Texas corporation located in League City, Texas.

75. The company is owned and operated by Johnny R. Harrison, a resident of Texas.

76. Petropangea entered into an MCA Agreement with Broadway Advance on April 4, 2019.The loan amount was $25,000, and the principal and interest was $33,750. Petropangea was required to make fixed daily payments of $281.25.

77. The term of the loan was 120 business days, and the interest rate was an unconscionable 187%.

78. In or around May 21, 2019, Petropangea was contacted by its bank, Capital One, NA's, fraud division about a voided check had been forged and cashed.

79. The check that was forged was a voided check that Petropangea previously sent to CBSG as a condition of the loan.

80. Petrogangea notified CBSG that the account was frozen and that CBSG would be unable to debit the account.

81. Petropangea advised CBSG that it needed to open a new account and that it would provide CBSG with the account information when it was opened.

82. CBSG treated its inability to debit Petropangea's account as a default, despite the fact that CBSG directly and/or indirectly was responsible for the forgery that necessitated the bank freezing the account.

83. The Enterprise responded by filing a confessed judgment against Petropangea and Johnny R. Harrison in the amount of $28,350.52 on June 13, 2019.

84. In doing so, the Enterprise confessed attorney's fees of $1,348.13.

85. After confessing judgment, the Enterprise also filed a UCC Lien in Texas.

86. Some of Petropangea's customers responded by simply not paying outstanding invoices, which caused tremendous strain on the business.

87. Other, among Petropangea's established customers, actually sent money to CBSG as directed by the UCC Notices they received, and then subsequently stopped doing business with Petropangea.

88. Two of Petropangea's oldest customers of over 13 years, stopped doing business with them after they were harassed by CBSG's numerous phone calls and tactics.

89. As a result of the Enterprise's aggressive tactics, some of Petropangea experienced a substantial loss of revenue.

90. Petrogangea could not afford to pay the outstanding balance because of the harm that was caused by the Enterprise's extortionist tactics.

91. However, Petropangea needed to stop the harassment of its customers so it agreed to a reduced payment of $25,000 in full satisfaction of the debt.

92. Petropangea paid the $25,000.

93. Despite acknowledging that Petropangea had a zero balance, the Enterprise unlawfully and without proper service levied an account at Branch Bank and Trust.

94. The Enterprise took an additional $6,800 from that account.

95. Petropangea advised CBSG that the levy violated their settlement agreement to which CBSG responded that the money would never be refunded.

96. The Enterprise also knowingly collected more than permitted under its judgment. The judgment amount was for $28,350.52, and it collected $31,800.

ADDITIONAL VICTIMS

A. Quantico Business Center: Forgery, AR Smash, Fraudulent UCC, Fraudulent Default, and Fraudulent COJ.

97. Quantico Business Center ("QBC") provided office space to businesses that do business with the Federal Bureau of Investigation. It is a limited liability company organize under the laws of Virginia.

98. The company is owned and operated by Dr. Christine Rainwater, a Virginia resident.

99. On March 100, 2018, QBC entered into a high-interest loan with the Enterprise. The loan amount was $61,983 and the principal and interest was $92,975.

100. While on its face, QBC was to repay the loan based on 10% of its daily receivables, the Enterprise unilaterally included this term to disguise the true nature of the transaction.

101. As expressly negotiated by the parties, QBC was required to repay the loan in 40 weeks through 200 fixed daily payments of $465 every business day.

102. In order to avoid the usury laws of various states, the Enterprise disguised this fixed daily payment by falsely representing that $465 per day was a good-faith estimate of 10% of QBC's receivables.

103. As negotiated by the parties, the Enterprise intended to charge and collect the full repayment amount in exactly 40 weeks, which resulted in an unconscionable interest rate of ***535%***.

104. The amount lent, however, was to be disbursed in weekly tranches.

105. Thus, each week, the Enterprise would deposit a certain amount, while simultaneously debiting $465 per day.

106. In early May 2018, however, the Enterprise stopped making the weekly deposits as required under Schedule A of the agreement.

107. As a direct result of this breach of contract, QBC was unable to make the fixed daily payments required under the MCA Agreement.

108. QBC immediately informed CBSG of this breach. In response, CBSG claimed that it was having technical problems making the deposit. This excuse was untenable because it was successfully debiting the account at the same time. In other words, CBSG was claiming it could not deposit funds while at the same time it was debiting funds.

109. After a full three weeks of CBSG's failure to deposit the funds owed under Schedule A, QBS placed a stop payment on its account.

110. In response, the Enterprise unleashed its arsenal of unconscionable and unlawful collection tactics on QBS and Dr. Rainwater.

111. First, the Enterprise verbally abused Dr. Rainwater through numerous phone calls threatening to destroy her business and ruin her financially.

112. Second, the Enterprise unleashed its AR Smash, issuing hundreds of emails to various business contacts regardless of whether those businesses owed QBS receivables. The AR Smash also included sending emails to friends and family, which included Dr. Rainwater's brother, nephew, sister-in-law, brother-in-law, and even a second cousin. The sending of UCC Notices to family members and other non-account debtors was not a commercially reasonable effort to collect upon a debt, but rather was intend solely to embarrass and to harass QBC into paying a settlement.

113. Third, the Enterprise sent out ***fraudulent UCC Notices*** to various clients that grossly overstated the amount allegedly owed. Although it is undisputable that the Enterprise allegedly purchased, at most, $92,975 in receivables from QBC, the Enterprise nevertheless sent UCC Notices directing QBC's clients to pay CBSG $211,400:

Please be advised that the Merchant has defaulted on a secured merchant agreement entered into by and between the Merchant and CBSG (the "Agreement"). The balance currently due and owing to CBSG pursuant to the Agreement is *$211,400.00.*

114. There was absolutely no good-faith basis for directing QBC's clients to pay CBSG $211,400. That was blatant mail fraud.

115. To be sure, the Enterprise subsequently confessed judgment against QBC and Dr. Rainwater in the State of New York, on July 2, 2018, admitting that the most due and owing was $38,126.

116. But even worse than the mail fraud, in obtaining the confessed judgment through New York Unity Factor, the Enterprise ***forged*** the affidavit of confession by altering the state and county in which the confession of judgment was authorized.

117. Below is the original affidavit actually signed by Rainwater:

4. Merchant Defendant hereby confesses judgment and authorizes entry of judgment in favor of Plaintiff and against Defendants in the Federal District Court for the , Court of Common Jurisdiction for the County of Prince William in the State of VA the sum of $92,975.30 less any payments timely

118. And below is the forged affidavit filed by Enterprise's own attorney:

4. Merchant Defendant hereby confesses judgment and authorizes entry of judgment in favor of Plaintiff and against Defendants in the Supreme District Court for the Southern District of New York , Court of Common Jurisdiction for the County of Richmond in the State of New York the sum of $92,975.30 less any payments timely made pursuant to the secured Merchant Agreement dated MARCH 30, 2018, plus legal fees to Plaintiff

119. That fraudulent judgment remains on the docket to this day. Incredibly, the above is not an isolated incident. Attached are the above mentioned and additional examples of obvious forgeries where the date of the notary precedes the date of the MCA Agreements. *See* Ex. 7.

120. As a direct result of the Enterprise's unlawful and fraudulent conduct, QBC was forced to close its business.

i. Annie's Pooch: Usury (New Jersey), AR Smash, Fraudulent COJ, and Fraudulent Default

121. Annie's Pooch is a manufacturer of pet foods to national retailers. It is a limited liability company organized under the laws of New Jersey.

122. The company is owned and operated by Ann Hartig, a New Jersey resident.

123. On March 2, 2019, Annie's Pooch entered into a criminally usurious loan with the Enterprise. The loan amount was $40,000 and the principal and interest was $56,000.

124. While on its face, Annie's Pooch was to repay the loan based on 10% of its daily receivables, the Enterprise unilaterally included this term to disguise the true nature of the transaction.

125. As expressly negotiated by the parties, Annie's Pooch was required to repay the loan in 28 weeks through 140 fixed daily payments of $400 every business day.

126. In order to avoid the usury laws, the Enterprise disguised this fixed daily payment by falsely representing that $400 per day was a good-faith estimate of 10% of Annie's Pooch's receivables.

127. As negotiated by the parties, the Enterprise intended to charge and collect the full repayment amount in exactly 28 weeks, which resulted in a usurious and unconscionable simple interest rate of 75%.

128. The Enterprise deducted $400 per day just as contemplated under the agreement each and every day without incident for the first two months.

129. In early May 2019, however, Annie's Pooch had to close its bank account because of potential identity fraud.

130. Annie's Pooch promptly informed CBSG that it had to close its bank account and that it would make up the payments once its new bank account was set up.

131. Incredibly, the Enterprise declared a default, entered a confession of judgment against both Annie's Pooch and Ms. Hartig personally, and also charged numerous default fees and attorney's fees.

132. The judgment obtained Ms. Hartig was fraudulent. In obtaining the judgment by confession, the Enterprise fraudulently represented that Ms. Hartig provided a power of attorney to CBSG authorizing it to confess judgment against them individually as guarantors. That was a knowingly false statement. Pursuant to 3.4 of the MCA Agreement, CBSG is only authorizes to enter judgment against "the Merchant."

133. In addition, the Enterprise launched what it coins as its "AR Smash," where it sends out hundreds and oftentimes thousands of emails to literally anyone and everyone found on the victim's bank statements, which, as described below, have been illegally stolen.

134. These emails often misstate the amount owed and falsely accuse the merchant and individual owner of being in default.

135. The emails are intended to harass, embarrass, and compel the merchant and the individual owner to pay the Enterprise even if they have to borrow funds or exhaust personal resources.

136. In this case, the Enterprise downloaded at least twelve months of bank statements during the funding call without notice or permission.

137. The merchant was told that the purpose of the funding call was to confirm that the merchant's accounts were in good standing. The Enterprise, however, surreptitiously used their

limited access to the merchant's bank accounts to download at least twelve months of bank statements in order to execute its "AR Smash" upon any future non-payment.

138. In executing its "AR Smash," the Enterprise sent out default letters to hundreds of business relationships that did not owe receivables to the merchant, and which the Enterprise had no good-faith basis to believe that the entity owed receivables to the merchant.

139. As a direct result of the AR Smash, Annie's Pooch has lost hundreds of thousands of dollars in business. The Enterprise's conduct has also resulted in the devaluation of the business, and has forced Hartig to sell the business.

ii. Sunrooms America: Usury (New Jersey), Threats of Physical Harm, AR Smash, Mail Fraud, and Fraudulent COJ.

140. Sunrooms America is a second-generation, family owned designer and installer of sunrooms, patio covers, pergolas, and screen rooms. It is a New Jersey corporation with its principal place of business located in Williamstown, New Jersey.

141. The company is owned and operated by Michael V. Foti, a New Jersey resident.

142. Between June 5, 2019 and January 2, 2020, entered into a series of seventeen criminally usurious loans. *See* Ex. 8.

143. Each contained the same common terms and conditions, and each charged an interest rate in excess of 100%.

144. Like the Enterprise's other victims, the unlawful and unconscionable interest payments pushed Sunrooms into financial catastrophe by causing it to take out more and more unlawful loans with the Enterprise.

145. As a direct result of these unlawful and unconscionable terms, Sunrooms could no longer sustain the fixed daily payments required under the loans and stay in business.

146. Thus, on or around January 10, 2020, Sunrooms stopped making payments.

147. Immediately upon missing a payment, Sunrooms' owner, Mr. Foti, was besieged by phone calls, emails and text messages demanding payment.

148. On January 15, 2020, the Enterprise confessed judgment against both Sunrooms and Foti personally in the amount of $1,361,845.70. In doing so, the Enterprise fraudulently confessed judgment against Foti under the June 4, 2019 agreement in the amount of $259,791.06. Under the June 4, 2019 agreement, the Enterprise knew that Foti had only guaranteed performance of the representations and warranties. To be sure, the Enterprise changed the form of its agreements in or around July 2019 to require that the guarantor also guarantee all terms, obligations and covenants, which was non-existent in the June 4, 2019 agreement.

149. That same day, the Enterprise also sent hundreds of emails to clients, vendors, business contacts and personal contacts of Foti, claiming that Sunrooms was in default and owed CBSG $1,296,173.93. CBSG also claimed to possess a UCC-1 form, requiring the recipient to forward payments of $1,296,173.93 directly to CBSG. Conspicuously missing, however, was the UCC-1 form. That is because CBSG did not file the UCC until January 16, 2020, and it was not entered until January 22, 2020. CBSG thus engaged in numerous counts of mail fraud.

150. In addition to sending default notices to business entities that did not owe Sunrooms receivables, the Enterprise also sent out default notices to friends and family of Foti, which included his college-age niece.

151. These notices were sent to harass, intimidate and extort Sunrooms and Foti into making payment from any source available, even if they had to borrow money.

152. On January 15, 2020, a guy by the name of Anthony also called Foti berating him for missing payments. He then gave the phone to LaForte, who yelled and screamed at Foti.

153. Among the verbal attacks, LaForte told Foti that he was a "f*&^ing piece of shit" and warned Foti that he would destroy his business, and pursue him personally until the day he died. He also stated that he hoped Foti would get hit by a car. He further threatened to open up a competing Sunroom company to put him out of business.

154. On January 16, 2020, without providing the required notice under Pennsylvania law, CBSG had a sheriff serve a Writ of Execution on numerous banks located in Pennsylvania. As a direct result, the Wells Fargo bank accounts of M. Foti and his wife were unlawfully frozen. CBSG also unlawfully froze the bank account of Sunrooms with Franklin Savings Bank.

155. On January 17, 2020, LaForte called Foti again to verbally abuse him. Among other extortionate tactics, LaForte threatened to "blow the doors" off of both Foti and his counsel. Given the tone and rage in which the threat was made, Foti took this as a physical threat and was in fear for the health and safety of himself and his family.

156. The Enterprise was informed that it had unlawfully frozen the bank account of Ms. Foti, a fourth grade school teacher. To this day, the Enterprise refuses to release the bank account.

iii. Michael Heller: Usury (New Jersey), AR Smash, Fraudulent COJ

157. MH Marketing is an online advertising and marketing company.

158. The company is owned and operated by Michael Heller, a New Jersey resident.

159. MH Marketing entered into two MCA Agreements with the Enterprise.

160. The first was entered into on October 24, 2018. The loan amount was $250,000 and the principal and interest was $387,500.

161. As expressly negotiated by the parties, MH Marketing was required to repay the loan in 250 business days through 250 fixed daily payments of $1,550. The interest rate on the face of the agreement is 175%.

162. Most notably, in securing the loan, the Enterprise required Mr. Heller to mortgage his New Jersey home. The Enterprise expressly defined the MCA Agreement as a loan:

> **(A) "Security Instrument"** means this document, which is dated October 25, 2018, together with all Riders to this document.
> **(B) "Borrower"** is Michael Heller. Borrower is the mortgagor under this Security Instrument.
> **(C) "Lender"** is Complete Business Solutions Group, Inc. Lender is a corporation organized and existing under the laws of the State of Delaware. Lender's address is 20 North 3rd Street, Philadelphia, Pennsylvania 19106. Lender is the mortgagee under this Security Instrument.
> **(D) "Note"** means the Factoring Agreement signed by Borrower and dated October 25, 2018. The Note states that Borrower owes Lender Three Hundred Eighty-Seven Thousand Five Hundred and 00/100 Dollars (U.S. $387,500.00) plus fees.
> **(E) "Property"** means the property that is described below under the heading "Transfer of Rights in the Property."
> **(F) "Loan"** means the debt evidenced by the Note, plus fees, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus fees.

163. The second was entered into on January 22, 2019. The loan amount was $25,000 and the principal and interest was $31,500.

164. As expressly negotiated by the parties, MH Marketing was required to repay the loan in 20 weeks through 20 fixed weekly payments of $1,575. The interest rate on the face of the agreement is 158%.

165. In May 2019, MH Marketing had lost its largest client and could no longer keep up with the onerous terms dictated under the MCA Agreements.

166. After informing CBSG that MH Marketing could not make payment, LaForte verbally abused Heller, calling him a "moron" and threating to take his house away.

167. Upon missing payment, the Enterprise unleashed its AR Smash.

168. As a direct result of the AR Smash, things went from bad to worse. MH Heller lost even more large accounts and revenue declined even worse.

169. In August 2019, the Enterprise initially agreed to a modification of the repayment term, but immediately confessed judgment against MH Marketing and Mr. Heller personally after just one missed payment.

170. The Enterprise harassed Heller and his wife with repeated phone calls, text messages, and emails, including hundreds of emails sent to customers. As an example, the Enterprise sent the following text to Heller: Fwd:Well, umm... This is awkward... We just sent your wife an email and several text messages with the Deed of Trust pertaining to the Collateral that is your home... We also just emaieled (sic) her the Foreclosure Warning Letter per your default and refusal to pay."

171. On June 21, 2019, the Enterprise filed a confession of judgment against Mr. Heller—even though it had no right to confess judgment against Mr. Heller personally.

172. Under the express terms of the MCA Agreement, CBSG may only confess judgment against—the merchant.

173. In filing the confession of judgment, the Enterprise filed a knowingly false verified complaint attesting under penalties of perjury that it was entitled to confess judgment against Mr. Heller.

174. As a direct result of the Enterprise's actions, Michael and his wife were forced to file for Chapter 13 bankruptcy and their home is still at risk at foreclosure.

iv. National RX: Usury (Tennessee), Fraudulent COJ, Verbal Abuse and Unlawful Bank Levies

175. National RX provides prescription and non-prescription drugs to local residents in Tennessee.

176. The company is owned and operated by James Frost, a Tennessee resident, and father of Toby Frost.

177. National RX entered into an MCA Agreement with the Enterprise on April 6, 2016.

178. The loan amount was $40,000, and the principal and interest was $56,000. National RX was required to make fixed daily payments of $466.66, resulting in an interest rate of 221%.

179. After deducting fees, National RX actually only received $38,832.

180. In or around May 2016, National RX was having difficulty making the fixed daily payments, and informed CBSG that it had insufficient funds to make the fixed daily payments.

181. After four payments were returned for insufficient funds, the Enterprise confessed judgment against National RX and J. Frost personally in the amount of $65,931.87.

182. In doing so, the Enterprise confessed default fees of $15,215.05 and attorney's fees of $5,000.

183. The Enterprise also falsely represented that it was entitled to confess judgment against J. Frost personally as a guarantor of the MCA Agreement.

184. The guarantee, however, only applies to a breach of any representation, warranty or covenant contained in the MCA Agreement.

185. The confession of judgment does not allege a breach of any representation, warranty, or covenant. Thus, on its face, the confession of judgment is invalid.

186. After confessing judgment, National RX agreed to make payments of $300 per week until judgment amount of $65,931.87 was paid in full.

187. Beginning on July 14, 2016, National RX made the $300 payments each and every week just as agreed.

188. After making total payments of $64,544, J. Frost contacted CBSG and asked for a payoff amount. CBSG claimed that National RX owed a total of $82,000, of which $15,231.87 remained due.

189. Despite not missing a single payment as previously agreed, the Enterprise confessed judgment against National RX and J. Frost personally again on October 30, 2019 in the amount of $16,482.16.

190. Incredibly, in confessing judgment—a second time—CBSG represented under penalty of perjury that "No judgment has been entered in any jurisdiction."

191. The Enterprise also confessed $746.59 in additional attorney's fees, and a $650 domestication fee.

192. On November 7, 2019, the Enterprise then sent Writs of Execution on various bank accounts, including Wells Fargo, Bank of America, and Chase without providing proper service under Pennsylvania law.

193. On November 21, 2019, Colin Pirrone of CBSG sent the following text to J. Frost:

> Mr. Frost… here is where everything is. Every 120 days is a default on the original term since 2016. Yes, you have paid much into this, you have paid well over your original factoring, but that was not done within 120 days…it was not done in 240 days, nor was it done within 360 days… They charge 5k every 120 days for defaulting on the agreed upon term.

194. The above representations are not found anywhere in the MCA Agreement. Instead, the fees charged are just additional interest that the Enterprise extorts from their victims.

195. On January 28, 2020, Pirrone verbally abused J. Frost threating to ruin his business, accused him of conspiring with his son T. Frost, represented that J. Frost was personally liable for the debt owed by his son and Volunteer Pharmacy. He also referenced J. Frost's former service to the Navy and called him "a disgrace to the Navy uniform."

196. The Enterprise continues to harass and threaten J. Frost in an attempt to extort money that is not even owed under the plain terms of the MCA agreement.

v. Knavas Bounce House: AR Smash

197. Joshua Speakman is a Missouri resident and a fulltime paramedic.

198. On the side, he owns a small business called Knava's Bounce House, which rents inflatable jump houses for children's birthday parties, school functions and other social events.

199. Like many other MCA victims, Mr. Speakman became trapped in MCA debt and was paying nearly $500 per day.

200. On September 12, 2019, Knava's Bounce House was induced to enter into an unconscionable high-interest loan with the Enterprise that promised to free Knava's Bounce House from its MCA debt.

201. The loan amount was $27,000 and principal and interest was $36,450.

202. While on its face, Knava's Bounce House Rentals was to repay the loan based on 10% of its daily receivables, the Enterprise unilaterally included this term to disguise the true nature of the transaction.

203. As expressly negotiated by the parties, Knava's Bounce House Rentals was required to repay the loan in 123 days, which resulted in an unconscionable interest rate of 607%. The loan also included an unconscionable $5,000 default fee, a $5,000 stacking fee, and an attorney's fees provision.

204. The loan proceeds were to be disbursed weekly over fifteen weeks. At the same time, the Enterprise also deducted $295.90 per day as contemplated under the agreement each and every day until November 22, 2019. In effect, the Enterprise was loaning Knava's Bounce House $2,144 each week, while simultaneously being paid back $1,475 each week. That is why the effective interest rate is an unconscionable 607%.

205. In November 2019, Knava's Bounce House suffered a downturn in sales and could not continue with the unconscionable terms of the MCA Agreement.

206. Knava's Bounce House sought to terminate the unconscionable loan by offering to pay off the existing balance and stop any further weekly cash deposits to its bank account.

207. CBSG refused and continue to deposit cash funds into Knava's Bounce House's bank account while also withdrawing the daily amount, thereby increasing Knava's Bounce House's debt to CBSG and further straining its business operations and cash flow.

208. In an effort to control its own bank account and not take on additional debt the company could not afford, on or about November 21, 2019, Knava's Bounce House stopped payment on the CBSG loan.

209. In response, on November 25, 2019, CBSG contacted Mr. Speakman directly and insisted that he remove the stop payment and resume acceptance of the CBSG deposits to his company's bank account. When Mr. Speakman declined, CBSG responded that the debt would be transferred to collections.

210. On November 25, 2019, CBSG's Chief Financial Officer emailed Mr. Speakman a "Payoff Letter" demanding an immediate cash payment in the amount of $14,251.70. The letter also stated, "Once we have received this payoff amount, a termination of our UCC will be filed. . . . The payoff amount as stated in this letter is valid only until 5:00 p.m. EST on 11/25/19." Unfortunately, Mr. Speakman did not have $14,000 cash on hand for a wire transfer to CBSG's bank account by 5 p.m.

211. Over the next two days, CBSG undertook "collections" efforts that included texts and emails that were both harassing and even threatening at times, along with hostile and intimidating phone calls to Mr. Speakman, all demanding that he immediately resume daily payments to CBSG. With each contact, the strong-arm tactics intensified to that point that Mr. Speakman began to sense a growing threat to his personal safety.

212. Numerous emails clearly intended to embarrass and shame Mr. Speakman into acquiescence were sent to radio advertisers, his girlfriend, his former state representative,

employees, his brother and even a charitable organization his company had donated money to in the past. These emails informed the recipients that Mr. Speakman had defaulted on a debt and that any money they owed Mr. Speakman should be sent directly to CBSG instead. The emails included an attached "Notice of Assignment and Lien" and "First Notice." Mr. Speakman interpreted CBSG's tactics as a direct threat to his ability to continue operating his business.

213. On November 26, 2019, Mr. Speakman attempted to convey to CBSG his intention to pay his debt to them, but he also needed to save his business so that he could pay them. At this point, Knava's Bounce House had failed to remit only **two** daily payments totaling $591.80.

214. On November 26, 2019, CBSG filed a creditor's UCC Financing Statement naming Knava's Bounce House Rentals LLC and Mr. Speakman as its debtors and claiming its security interest in any property owned or acquired by the debtors.

215. On November 27, 2019, Mr. Speakman resumed his efforts to renegotiate payment of the loan to no avail. CBSG's response included only more intimidation and ruthlessness.

216. On December 5, 2019 CBSG filed a Judgment by Confession in the Court of Common Pleas for Philadelphia County. The Confession of Judgment claimed a default in unpaid receivables from November 22, 2019 in the amount of $14,251.70 plus 6% interest, attorney fees and domestication fees ($1369.62), or $15,621.32.

217. On December 12, 2019, CBSG obtained a Writ of Attachment against Wells Fargo Bank, N.A. seeking to collect on the Confession of Judgment plus additional interest and costs for a total of $15,825.25. In doing so, CBSG violated Pennsylvania law by failing to serve notice as required by the United States Due Process Clause and Pennsylvania law.

218. On February 6, 2020, Larry Baronofsky confirmed the true nature of the transaction, i.e., an absolutely repayable loan, by threatening to garnish his wages as a paramedic, issue a blanket writ on all of his companies, and lock up his credit card processors:

> Lindsey – copied here is judgement debtor Joshua Speakman, owner of default merchant referenced above. In the absence of reply from text message I sent him earlier offering to settle, I recommend we domesticate the judgement to Stoddard County (MO) as he is gainfully employed w/ Air Evac Lifeteam and his wages can be attached.

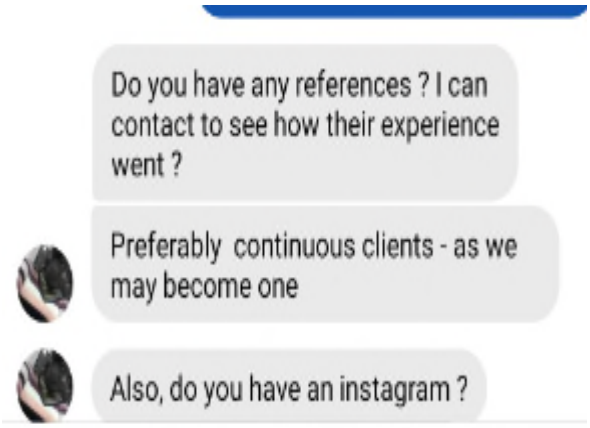
219. On February 10, 2020, Baronofsky threatened Speakman yet again:

> Hey Corey – copied here is judgement debtor Joshua Speakman, owner of default merchant referenced above. See attached – can we issue blanket writs on all his companies? Lock up merchant services processor and other electronic payment methods?
>
> We're hoping to domesticate and attach his weekly wages from job.

Hello, this is Lindsey reaching out regarding your DEFAULTED merchant cash

220. On February 14, 2020, Lindsey Mahon at LMahon@parfunding.com sent a "To Whom It May Concern" email to several individuals employed by at least one school customer notifying those individuals of the Notice of Assignment and UCC lien against "Knavas House Rentals LLC" for defaulting on its contract for future receivables and requesting that the recipients "hold all funds payable in reserve, and then forward to CBSG until $15,043.50 is accrued."

221. Apparently that was not enough. On February 19, 2020, received a fake solicitation from Olivia Wiggins, asking Mr. Speakman for references from "continuous clients," and claiming that she hoped to become one too:



222. Ms. Wiggins, however, lives in Mays Landing, New Jersey—not Missouri. It is therefore clear that this inquiry was nothing more than a fraudulent attempt to find out the identity of Knava's most important clients in order to further extort and harass.

vi. Capital Jet: Usury (Texas), Fraudulent COJ, AR Smash, Verbal Abuse

223. Capital Jet charters flights for corporate and retail clients.

224. The company is owned and operated by Craig Campbell and Mary Carleton, residents of Texas.

225. Capital Jet entered into two MCA Agreements with the Enterprise.

226. The first was on August 9, 2019.

227. The loan amount was $112,536.13, and the principal and interest was $151,923.78. Capital Jet was required to make fixed daily payments of $994.09.

228. The term of the loan was 153 business days, and the interest rate was an unconscionable 281%. The first was on August 9, 2019.

229. The second was on September 3, 2019.

230. The loan amount was $25,000, and the principal and interest was $31,000. Capital Jet was required to make fixed weekly payments of $2,214.29.

231. The term of the loan was fourteen weeks, and the interest rate was an unconscionable 206%.

232. In late November 2019, Capital Jet was having difficulty making the fixed daily payments due to a mechanical failure on its only aircraft, and informed CBSG that it had insufficient funds to make the fixed daily payments.

233. On December 2, 2019, after four payments were returned for insufficient funds, the Enterprise confessed judgment against Capital Jet and Mary Carleton and Craig Campbell personally in the amount of $79,915.20.

234. In doing so, the Enterprise confessed default attorney's fees of $3,773.94 and a domestication fee of $650.

235. On December 5, 2019, CBSG obtained a Writ of Attachment against Wells Fargo Bank, N.A. Bank of America, Capital One, and JP Morgan seeking to collect on the Confession of Judgment plus additional interest and costs for a total of $79,915.20. In doing so, CBSG violated Pennsylvania law by failing to serve notice as required by the United States Due Process Clause and Pennsylvania law.

236. On December 18, 2019, one of the Enterprise's collection's agents called Capital Jet in a fraudulent attempt to book a charter flight. The person identified himself as "Seth."

237. The call was answered by Capital Jet's employee named Darrell. Darrell was forty six-years old, and married with two young kids.

238. After Darrell informed "Seth" that he could accommodate the charter request (by subcontracting it out to another company), "Seth" verbally abused and berated Darrell accusing him and his owners of fraud.

239. Darrell was visibly shaken and distraught. He was also in fear of losing his job.

240. Two days, later, on December 20, 2019, Darrell committed suicide.

CLASS ALLEGATIONS

241. Plaintiffs repeat and re-allege the allegations of each of the foregoing paragraphs.

242. Plaintiffs bring this action pursuant to Fed. R. Civ. Pr. 23(b)(2) and 23(b)(3).

243. The Merchant Plaintiffs bring this action individually and on behalf of a class of similarly situated persons defined as follows:

> **RICO Merchant Class**: All merchants that, on or after March 10, 2016, paid money pursuant to a CBSG Agreement as a result of extortionate conduct in violation of the Hobbs Act.
>
> **Unconscionability Merchant Subclass**: All merchants that, on or after July 29, 2016, paid money pursuant to a CBSG Agreement charging an unconscionable interest rate.
>
> **UCC Merchant Subclass**: All merchants that, on or after July 29, 2016, had a UCC notice sent by a member of the Enterprise pursuant to a CBSG Agreement in violation of UCC 9-625.

244. The Individual Plaintiffs bring this action individually and on behalf of a class of similarly situated persons defined as follows:

> **RICO Individual Class:** All individuals that, on or after July 29, 2016, paid money pursuant to a CBSG Agreement as a result of extortionate conduct in violation of the Hobbs Act.
>
> **Unconscionability Individual Subclass**: All individuals that, on or after July 29, 2016, guaranteed a CBSG Agreement charging an unconscionable interest rate.
>
> **UCC Individual Subclass**: All individuals who, on or after July 29, 2016, had a UCC notice sent by a member of the Enterprise pursuant to a CBSG Agreement in violation of UCC 9-625.

245. Plaintiff Petropongea brings this action individually and on behalf of a class of similarly situated persons defined as follows:

> **Texas Merchant Class:** All merchants residing in Texas that, on or after July 29, 2016, paid money pursuant to a Broadway Advance

Agreement with an effective interest rate exceeding twenty-eight percent.

Texas Merchant RICO Subclass: All merchants residing in Texas that, on or after July 29, 2016, paid money pursuant to a Broadway Advance Agreement with an effective interest rate exceeding fifty-six percent.

246. Plaintiff Harrison brings this action individually and on behalf of a class of similarly situated persons defined as follows:

Texas Individual Class: All individuals residing in Texas who, on or after July 29, 2016, guaranteed a Broadway Advance Agreement with an effective interest rate exceeding twenty-eight percent.

Texas Individual RICO Subclass: All individuals residing in Texas who, on or after July 29, 2016, guaranteed a Broadway Advance Agreement with an effective interest rate exceeding fifty-six percent.

247. Plaintiffs Volunteer Pharmacy and RX Pharmacy bring this action individually and on behalf of a class of similarly situated persons defined as follows:

Tennessee Merchant Class: All merchants residing in Tennessee that, on or after July 29, 2016, paid money pursuant to a CBSG Agreement with an effective interest rate exceeding twenty-four percent.

Tennessee Merchant RICO Subclass: All merchants residing in Tennessee that, on or after July 29, 2016, paid money pursuant to a CBSG Agreement with an effective interest rate exceeding forty-eight percent.

248. Plaintiffs Frost and bring this action individually and on behalf of a class of similarly situated persons defined as follows:

Tennessee Individual Class: All individuals merchants residing in Tennessee who, on or after July 29, 2016, guaranteed a CBSG Agreement with an effective interest rate exceeding twenty-four percent.

Tennessee Merchant RICO Subclass: All individuals merchants residing in Tennessee who, on or after July 29, 2016, guaranteed a

> CBSG Agreement with an effective interest rate exceeding forty-eight percent.

249. Plaintiff Petropongea bring this action individually and on behalf of a class of similarly situated persons defined as follows:

> **Writ of Execution Merchant Class:** All merchants that, on or after July 29, 2016, had a writ of execution issued against it in violation of the Due Process Clause and Pennsylvania law.

250. The following people are excluded from the Classes: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and its current or former employees, officers, and directors; (3) persons who properly execute and file a timely request for exclusion from the Classes; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released or waiver; (5) Plaintiffs' and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

251. **Numerosity**: The exact number of members of the Classes is unknown and is not available to Plaintiffs at this time, but individual joinder is impracticable. Based on publically available documents, each of the Classes likely numbers are in the many hundreds or more.

252. **Commonality and Predominance.** There are many questions of law and fact common to the claims of Plaintiffs and the other Class members, and those questions predominate over any questions that may affect individual members of the Classes. Common questions for the Classes include, without limitation, the following;

a) Whether the MCA Agreements are disguised loans;

b) Whether the choice of law provisions in the MCA Agreements are enforceable;

c) Whether the MCA Agreements are usurious under applicable state law;

d) Whether the merchants are entitled to treble damages under RICO;

e) Whether the Enterprise has engaged in extortionate conduct in violation of the Hobbs Act;

f) Whether the Enterprise has violated Pennsylvania's judgment collection laws; and

g) Whether the Enterprise has violated the Due Process Clause.

253. **Typically:** Plaintiffs' claims are typical of the claims of the other members of the Classes. Plaintiffs and members of the Classes sustained damages as a result of Defendants' uniform wrongful conduct during transactions with Plaintiffs and the Classes.

254. **Adequate Representation:** Plaintiffs have and will continue to fairly and adequately represents the interests of the Classes, and have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs have no interests antagonistic to those of the Classes, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and they have the resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to those of the other members of the Classes.

255. **Superiority**: This case is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The injuries suffered by the individual members of the Classes are likely prosecution of the litigation necessitated by Defendants' actions. Absent a class action, it would be difficult, if not impossible, for the individual members of the Classes to obtain effective relief from Defendants. Even if members of the Classes themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented herein. By contrast, a class action presents far fewer management difficulties and

provides benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

FIRST CAUSE OF ACTION (RICO)
(Violation of 18 U.S.C. § 1962(c))
By all Plaintiffs

256. Plaintiffs repeat and re-allege the allegations of each of the foregoing paragraphs.

A. Culpable Persons

257. Defendants are individuals capable of holding legal interest in property and are thus "persons" within the meaning of 18 U.S.C. § 1962(c) as the term is defined by 18 U.S.C. § 1961(3).

B. The Association-in-Fact Enterprise

258. Defendants are separate individuals or entities associated with each other by shared personal and/or one or more contracts or agreements for the purpose of originating, underwriting, servicing and collecting usurious loans to the Plaintiffs and countless other small businesses throughout the United States.

259. Defendants are also associated-in-fact through common ownership. Specifically, LaForte owns CBSG, Fast Advance, Full Spectrum, Recruiting & Marketing, and MCA Fund, although it is fronted by his wife Lisa McElhorne.

260. Since at least 2014 and continuing through the present, the members of the Enterprise have had ongoing relations with each other through common control/ownership, shared personnel and/or one or more contracts or agreements relating to and for the purpose of originating, underwriting, servicing and collecting upon unlawful debt issued by the Enterprise to small businesses throughout the United States, including Plaintiffs and the Class Members.

261. The debt, including such debt evidenced by the Agreements, constitutes unlawful debt within the meaning of 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1961(6) because (i) it

violates applicable criminal usury statutes and (ii) the rates are more than twice the legal rate permitted under the laws of Texas (Tex. Fin. Code §305.001(a-1) et al.) and Tennessee (Tenn. Ann. Code § 47-14-103).

262. This association of Defendants constitute a single association-in-fact enterprise (the "Enterprise") within the meaning of 18 U.S.C. § 1962(c), as the term is defined in 18 U.S.C. § 1961(4).

263. The Enterprise has an existence separate and apart from the illegal activity in which it engages by entering into legal financing agreements and attempting to collect lawful debts using legal collection practices.

C. The distinct roles in the Enterprise.

264. The Enterprise has organized itself into a cohesive group with specific and assigned responsibilities and a command structure to operate as a unit in order to accomplish the common goals and purposes of collecting upon unlawful debts as follows:

i. Defendant CBSG

265. CBSG maintains officers, books, records, and bank accounts independent of the other Defendants.

266. Directly and through LaForte and its other agent employees, CBSG has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. CBSG has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation agreements with Investors to fund the usurious loans; (ii) pooling the funds of investors in order to fund each usurious loan; (iii) underwriting the usurious loans and determining the ultimate rate of usurious interest to be charged under each loan; (iv) entering into the so-called merchant agreements on

behalf of the Enterprise; (v) servicing the usurious loans; (vi) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (v) obtaining judgments in its name to further collect upon the unlawful debt.

267. In this case, CBSG: (i) solicited borrowers, including Plaintiffs and other Class Members; (ii) pooled funds from investors to fund the Agreements; (iii) underwrote the Agreements; (iv) entered into the Agreements; (v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Plaintiffs and the Class Members; and (vi) upon the alleged default by Plaintiffs and other Class Members, filed suit in CBSG's name to collect upon the unlawful debt evidenced therein.

268. CBSG ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds and to the investors of the deals, certain of which, upon information and belief, CBSG has also directly participated.

ii. Defendant Fast Advance

269. Fast Advance maintains officers, books, records, and bank accounts independent of the other Defendants.

270. Directly and through LaForte and its other agent employees, Fast Advance has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. Fast Advance has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation agreements with Investors to fund the usurious loans; (ii) pooling the funds of investors in order to fund each usurious loan; (iii) underwriting the usurious loans and determining the ultimate rate

of usurious interest to be charged under each loan; (iv) entering into the so-called merchant agreements on behalf of the Enterprise; (v) servicing the usurious loans; (vi) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (v) obtaining judgments in its name to further collect upon the unlawful debt.

271. In this case, Fast Advance: (i) solicited borrowers, including Plaintiffs Petropongea and Harrison and other Class Members; (ii) pooled funds from investors to fund the Agreements; (iii) underwrote the Agreements; (iv) entered into the Agreements; (v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Plaintiffs and the Class Members; and (vi) upon the alleged default by Plaintiffs and other Class Members, filed suit in Fast Advance's name to collect upon the unlawful debt evidenced therein.

272. Fast Advance ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds and to the investors of the deals, certain of which, upon information and belief, Fast Advance has also directly participated.

iii. Defendant Full Spectrum Processing

273. Full Spectrum maintains officers, books, records, and bank accounts independent of the other Defendants.

274. Directly and through LaForte and its other agent employees, Full Spectrum has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. Full Spectrum has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation agreements with Investors to fund the usurious loans; (ii) underwriting the usurious loans and

determining the ultimate rate of usurious interest to be charged under each loan; (iii) entering into the so-called merchant agreements on behalf of the Enterprise; (iv) servicing the usurious loans; (v) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (vi) obtaining judgments in its name to further collect upon the unlawful debt.

275. In this case, Full Spectrum: (i) solicited borrowers, including Plaintiffs and other Class Members; (ii) underwrote the Agreements; (iii) entered into the Agreements; i(v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Plaintiffs and the Class Members; and (v) upon the alleged default by Plaintiffs and other Class Members, filed suit in CBSG's name to collect upon the unlawful debt evidenced therein.

276. Full Spectrum ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds to the other members of the Enterprise.

iv. Defendant Recruiting and Marketing Services ("RMS")

277. RMS maintains officers, books, records, and bank accounts independent of the other Defendants.

278. Directly and through LaForte and its other agent employees, RMS has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. RMS has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation agreements with Investors to fund the usurious loans; (ii) pooling the funds of investors in order to fund each usurious loan; (iii) underwriting the usurious loans and determining the ultimate rate of usurious

interest to be charged under each loan; (iv) entering into the so-called merchant agreements on behalf of the Enterprise; (v) servicing the usurious loans; (vi) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (v) obtaining judgments in its name to further collect upon the unlawful debt.

279. In this case, RMS: (i) solicited borrowers, including Plaintiffs and other Class Members; (ii) pooled funds from investors to fund the Agreements; (iii) underwrote the Agreements; (iv) entered into the Agreements; (v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Plaintiffs and the Class Members; and (vi) upon the alleged default by Plaintiffs and other Class Members, filed suit in CBSG's name to collect upon the unlawful debt evidenced therein.

280. RMS ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds to the other members of the Enterprise.

v. Defendant MCA Capital Fund I, LLC

281. MCA Capital maintains separate officers, books, records, and bank accounts independent of the other Defendants.

282. Directly and through their members, agent officers, and/or employees, MCA Capital has been and continue to be responsible for providing CBSG and New York Unity with all or a portion of the pooled funds necessary to fund the usurious loans, including the Agreements with Plaintiffs and the Class Members.

283. Among other things, MCA Capital solicits institutional and individual investors to raise capital for the fund. In doing so, MCA Capital represents to these individual investors that

the MCA Agreements are loans with interest rates in excess of 33%, and that the default rate on the loans is one percent.

284. MCA Capital, as an extension of CBSG, has paid these investors interest rate returns between 12% to 44% annually.

285. After being fined by the State of New Jersey and the Commonwealth of Pennsylvania for offering unregistered securities to fund the Enterprise, MCA Capital has since registered the securities it offers to the public.

286. On information and belief, MCA Capital provided the capital to fund the Agreements with Plaintiffs and the Class Members.

287. MCA Capital ultimately benefits from the Enterprise's unlawful activity when the proceeds of collecting upon the unlawful debts are funneled to it. Among other things, MCA Capital is paid a portion of the interest charged to Plaintiffs and the other Class Members in consideration of the capital it provides to the Enterprise.

vi. Defendant MCA National Fund, LLC

288. MCA National maintains separate officers, books, records, and bank accounts independent of the other Defendants.

289. Directly and through their members, agent officers, and/or employees, MCA National has been and continue to be responsible for providing CBSG and New York Unity with all or a portion of the pooled funds necessary to fund the usurious loans, including the Agreements with Plaintiffs and the Class Members.

290. Among other things, MCA National solicits institutional and individual investors to raise capital for the fund. In doing so, MCA National represents to these individual investors

that the MCA Agreements are loans with interest rates in excess of 33%, and that the default rate on the loans is one percent.

291. MCA National, as an extension of CBSG, has paid these investors interest rate returns between 12% to 44% annually.

292. After being fined by the State of New Jersey and the Commonwealth of Pennsylvania for offering unregistered securities to fund the Enterprise, MCA National has since registered the securities it offers to the public.

293. On information and belief, MCA National provided the capital to fund the Agreements with Plaintiffs and the Class Members.

294. MCA National ultimately benefits from the Enterprise's unlawful activity when the proceeds of collecting upon the unlawful debts are funneled to it. Among other things, MCA National is paid a portion of the interest charged to Plaintiffs and the other Class Members in consideration of the capital it provides to the Enterprise

D. Engagement in Interstate Commerce

295. The Enterprise is engaged in interstate commerce and uses instrumentalities of interstate commerce in its daily business activities.

296. Specifically, the members of the Enterprise maintain offices in Florida and Pennsylvania, and use personnel in these offices to originate, underwrite, fund, service and collect on loans made by the Enterprise to borrowers throughout the United States via the extensive use of interstate emails, telephone calls, wire transfers and bank withdrawals processed electronically through an automated clearing house.

297. In the present case, all communications between the Enterprise and Plaintiffs were by interstate email, telephone calls, wire transfers or other interstate wire communications.

Specifically, the Enterprise used interstate emails and telephone calls to originate, underwrite, service and collect upon the Agreements, fund the advances under each of the Agreements, and collect the Daily Specific Amount via electronic interstate withdrawals processed through an automated clearing house.

E. Conducting Affairs through a Pattern of Racketeering.

298. Defendants conducted the affairs of the Enterprise or participated in the affairs of the Enterprise, directly or indirectly, though a pattern of racketeering activity (wire fraud and extortion) in violation of 18 U.S.C. 1962(c).

299. Beginning no later than 2016 and continuing today, Defendants devised and carried out a scheme to conduct the affairs of the Enterprise to intentionally defraud not only Plaintiffs and their business, but other businesses and their owners throughout the United States, and induce them to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay and/or to intentionally defraud others into satisfying such loan obligations when a borrower defaulted.

300. Since Defendants and its agents are web-based companies that conduct virtually all of their business through the internet, email communications, telephone calls, and wire transfers, it was reasonably foreseeable that interstate emails, telephone calls, and wire transfers would be used in furtherance of the scheme, and, in fact, intestate emails, telephone calls and wire transfers are used in furtherance of the scheme.

301. Specifically, Defendants directed, approved or ratified, their agents' use of the internet, interstate email, telephone calls, and other communications to intentionally defraud borrowers throughout the United States, including the Plaintiffs, and to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay.

302. As part of this scheme, by the use of interstate emails and telephone calls, Defendants' agents target and solicit cash-strapped businesses upon which to pawn off usurious loans funded by Defendants and others. In addition to the fraudulent conduct described in the individual sections above, these interstate emails and telephone calls intentionally created the false impression that the usurious loans are legally enforceable. The Enterprise also engaged in extortion in violation of the Hobbs Act. This fraudulent and extortionate conduct includes:

> (i) misrepresenting the true nature of the loan transactions as receivable sales in order to avoid applicable criminal usury laws;
>
> (ii) falsely representing that disguised loan contracts are enforceable when they are illegal under applicable state law;
>
> (iii) falsely claiming that the contracts are governed under the laws of Pennsylvania when Defendants and its affiliates know strong public policy considerations dictate that another state's laws would govern construction of the contracts;
>
> (iv) advising the illegal loans would be funded through interstate wire transfers;
>
> (v) directing all loan repayments to be made by electronic interstate bank withdrawals via an automated clearing house;
>
> (vi) sending UCC notices that fraudulently represent that CBSG owns the merchant's receivables;
>
> (vii) sending UCC notices and emails fraudulently overstating the amounts due under the loans;
>
> (viii) making phone calls threatening to destroy the merchant's business and ruin the personal lives of the individual owners if they fail to make payment;
>
> (ix) filing judgments of confession using forged instruments;
>
> (x) filing judgments of confession against the individual owners even though the agreements do not permit judgment to be confessed against the individual owners;
>
> (xi) filing judgments of confession for amounts more than permitted under the agreements; and

(xii) sending a former ex-con to intimidate the merchants and their individual owners into making payment.

303. Once the loans are approved by Defendants, Defendants further the scheme by using interstate wires to fund the unlawful loans and electronic interstate bank withdrawals to repay the amounts advanced under the disguised loans, all of which further creates the impression that the usurious loans are legally enforceable contracts which Defendants know to be false.

304. If a borrower defaults, Defendants use interstate e-mails and telephone calls to once again fraudulently induce the borrowers to obtain new advances under loans funded by Defendants that Defendants know misrepresent the true nature of the transaction in an effort to evade applicable usury laws and create the false impression that the contracts are legally enforceable when they are not thereby inducing the borrowers to enter into and make payments on new usurious agreements to pay off the obligations under the old ones.

305. In this case, Defendants used interstate emails, telephone calls, electronic interstate bank withdrawals to transmit and collect on a series of "factoring agreements" with Plaintiffs between 2016 and 2020 that stated Pennsylvania law applied to the MCA Agreements, all with the intent to deceive and defraud Plaintiffs and the putative Class Members.

306. Upon information and belief, borrowers throughout the United States, like Plaintiffs, reasonably rely upon these knowingly false representations in order to enter into and make payments on criminally usurious and/or unconscionable loans.

307. In the present case, through a series of interstate e-mails between November 2013 and January 2020, the Enterprise solicited Plaintiffs, provided Plaintiffs with a copy of the loan application, processed the loan application, and, upon approval by the Enterprise, provided Plaintiffs with a copy of the first Agreement dated April 6, 2016, which the agent asked Plaintiffs to execute, together with a form authorizing the Enterprise to electronically withdraw the daily

payments from Plaintiffs' Bank Account. The agent's actions were intentionally designed to and, in fact did, create the impression that the MCA Agreement, and each additional MCA Agreement thereafter, was a legally enforceable contract which Defendants knew to be false.

308. Defendants furthered the scheme against Plaintiffs by funding the MCA Agreements through an interstate wire transfer and thereafter withdrawing the Daily Specified Amount due under the MCA Agreements by electronic interstate withdrawals processed through an automated clearing house, all of which was intentionally designed by Defendants to and, in fact did, create the impression that the MCA Agreements were legally enforceable contracts which Defendants knew to be false.

309. In keeping with its routine business practices, Defendants' scheme included withdrawal of the Daily Specified Amount stated in the MCA Agreements, each and every day as permitted under the MCA Agreements, even if Plaintiffs had not received sufficient payments, reimbursements or other monies from its clients, customers and related third parties to cover full withdrawal of the Daily Specified Amount.

310. Defendants' scheme continued, generating new usurious MCA Agreements until January 2020 and continues today. When Plaintiffs had difficulty making the daily payments under the MCA agreements, Defendants, and/or their agents, used similar emails and wire communications to intentionally create the false impression that each successive disguised loan was a legally enforceable contract in order to induce the Plaintiffs to enter into and make payments on the criminally usurious loans.

311. Plaintiffs reasonably relied upon these knowingly false representations to their detriment, as they executed each of the MCA Agreements and were forced to pay interest in excess of the applicable criminal usury threshold and/or permitted by law.

312. Defendants' conduct constitutes "fraud by wire" within the meaning of 18 U.S.C. § 1343 which is a "racketeering activity" as defined by 18 U.S.C. § 1961(1). Its repeated and continuous use of such conduct to participate in the affairs of the Enterprise constitutions a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

313. As described above in detail, Defendants also engaged in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. Among their extortionate conduct, Defendants have used threats of physical harm and financial catastrophe to coerce Plaintiffs into paying money to the Enterprise. Defendants' repeated and continuous use of such conduct to participate in the affairs of the Enterprise constitutions a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

F. Conducting Affairs Through the Collection of an Unlawful Debt

314. The MCA Agreements constitute unlawful debt within the meaning of 18 U.S.C. 1962(c) because (1) they violate applicable criminal usury statutes, and (2) the rates are more than twice the legal rate.

315. Defendants conducted the affairs of the Enterprise or participated in the affairs of the Lending Enterprise, directly or indirectly, though the collection of this unlawful debt in violation of 18 U.S.C. 1962(c).

316. Specifically, Defendants directed, approved or ratified, its agents to obtain Plaintiffs' authorization to electronically withdrawal payments on an unlawful debt from designated bank accounts.

317. Upon receipt of such authorization, Defendants did, in fact, make the daily withdrawals required by the MCA Agreements.

G. Injury

318. As a direct and proximate cause of Defendants' violation of 18 U.S.C. § 1962(c), Plaintiffs and the Class Members have suffered, and continue to suffer, substantial injury to their

business and/or property as Plaintiffs business has been forced into bankruptcy as a direct result of Defendants' demand that they pay usurious amounts of interest based upon an illegal contract.

SECOND CAUSE OF ACTION
(Conspiracy under 18 U.S.C. § 1962(d))
By all Plaintiffs

319. Defendants have unlawfully, knowingly, and willfully, combined, conspired, confederated, and agreed together to violate 18 U.S.C. § 1962(c) as describe above, in violation of 18 U.S.C. § 1962(d).

320. By and through each of the Defendants' business relationships with one another, their close coordination with one another in the affairs of the Enterprise, and frequent email communications among Defendants concerning the underwriting, funding, servicing and collection of the unlawful loans, including the MCA Agreements, each Defendant knew the nature of the Enterprise and each Defendant knew that the Enterprise extended beyond each Defendant's individual role. Moreover, through the same connections and coordination, each Defendant knew that the other Defendants were engaged in a conspiracy to collect upon unlawful debts in violation of 18 U.S.C. § 1962(c).

321. Each Defendant agreed to facilitate, conduct, and participate in the conduct, management, or operation of the Lending Enterprise's affairs in order to collect upon unlawful debts, including the MCA Agreements, in violation of 18 U.S.C. § 1962(c). In particular, each Defendant was a knowing, willing, and active participant in the Enterprise and its affairs, and each of the Defendants shared a common purpose, namely, the orchestration, planning, preparation, and execution of the scheme to solicit, underwrite, fund and collect upon unlawful debts, including the CBSG Agreements.

322. The participation and agreement of each of the Defendants was necessary to allow the commission of this scheme.

323. Plaintiffs have been and will continue to be injured in their business and property by reason of the Defendants' violations of 18 U.S.C. § 1962(d), in an amount to be determined at trial.

324. The injuries to the Plaintiffs directly, proximately, and reasonably foreseeably resulting from or cause these continuous violations of 18 U.S.C. § 1962(d) include, but are not limited to, millions of dollars in improperly collected loan payments and the unlawful entry and enforcement of judgments.

325. Plaintiffs and the Class Members have also suffered damages by incurring attorneys' fees and costs associated with exposing and prosecuting Defendants' criminal activities.

326. Pursuant to 18 U.S.C. § 1964(c), Plaintiffs and the Class Members are entitled to treble damages, plus costs and attorneys' fees from the Defendants. The Court should also enter such equitable relief as it deems just and proper to preclude the Defendants from continuing to solicit, fund and collect upon unlawful debt, including the CBSG Agreements.

THIRD CAUSE OF ACTION
(Usury: Tenn. Ann. Code §§ 47-14-103, 47-14-110, 47-14-117)
By Volunteer Pharmacy and T. Frost

327. Plaintiffs repeat and incorporate the allegations set forth above.

328. The MCA Agreements with Plaintiffs and the Tennessee Merchant Class and Tennessee Individual Class Members charged interest rates in excess of the interest rates permitted under Tenn. Code Ann. § 47-14-103.

329. Under Tenn. Code Ann. § 47-14-110 and Tenn. Code Ann. § 47-14-117, the Enterprise therefore may not collect interest above 24%.

330. Defendants have engaged in unconscionable conduct as defined by Tenn. Code Ann. § 47-14-17(c)(1).

331. Accordingly, Defendants must repay twice the amount of interest collected, and pay Plaintiffs' reasonable attorney's fees.

FOURTH CAUSE OF ACTION
(Usury: Tex. Fin. Code §305.001(a-1) et al.)
By Petropangea

332. Plaintiffs repeat and incorporate the allegations set forth above.

333. The MCA Agreements with Plaintiffs and the Texas Merchant Class and Texas Individual Class Members are loans charging interest rates in excess of 28% in violation of Tex. Fin. Code §305.001.

334. Tex. Fin. Code §305.001(a-1) and §305.003 each provide that a creditor who contracts for, charges, or receives interest greater than the legal maximum is liable to the obligor for an amount that is equal to three times the difference between the maximum allowable legal interest and the total amount of interest charged.

335. The maximum interest rate allowed under Tex. Fin. Code §303.009(c) is 28%.

336. The CBSG Agreements with Petropangea, and the Putative Class Members, each charged interest that was twice the maximum 28% permitted by Texas law.

The April 2019 Agreement (Petropangea)

337. The most that the April 2019 Agreement between CBSG and Petropangea could have been charged in interest under Texas law is $1,523.

338. The actual interest rate of the April 2019 Agreement between Petropangea and CBSG was at least 187%.

339. The Agreement charged $8,750 in interest, which is a difference of $7,227.

340. Accordingly, Petropangea is entitled to statutory damages in the amount of $26,250 under Tex. Fin. Code §305.001(a).

341. In addition, Tex. Fin. Code § 305.004(a) provides that: "***In addition to the amount determined under Section 305.003***, a creditor who charges and receives legal interest that is greater than twice the amount authorized by this subtitle is liable to the obligor for:

(1) the principal amount on which the interest is charged and received; and

(2) the interest and all other amounts charged and received.

342. The CBSG agreements with Petropangea and the Putative Class Members charged interest in excess of fifty-six percent.

343. Accordingly, Petropangea is entitled to a return of all principal and interest charged.

344. In addition to the $26,250 required under Tex. Fin. Code §305.001(a), Petropangea is entitled to $33,750 in total principal, fees and interest charged by Defendants under the April 2019 Agreement.

345. In total, Petropangea is entitled to $60,000 under the April 2019 Agreement.

346. Plaintiffs have incurred, and will in the future continue to incur reasonable attorney fees as a result of Defendants violations of Tex. Fin. Code §§ 305.001 and 305.003.

347. Pursuant to Tex. Fin. Code. §305.005, "[a] creditor who is liable under Section 305.001 or 305.003 is also liable to the obligor for reasonable attorney's fees set by the court."

348. By reason of the foregoing, Plaintiffs and the Putative Class Members are entitled to recover from CBSG reasonable attorneys' fees incurred and to be incurred in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(Usury: Fla. Stat. §687.03 and §687.071)
By All Plaintiff

349. Plaintiffs repeat and incorporate the allegations set forth above.

350. The MCA Agreements with Plaintiffs are loans charging interest rates in excess of 18% in violation of Fla. Stat. §687.03.

351. Under Florida Law, the public policy of prohibiting usury is so important, that it is embodied in Florida Statutes §687.03 and §687.071, prohibiting charging interest in excess of the 18%.

352. Pursuant to Florida Statutes §687.071(7), a criminally usurious debt is unenforceable and Defendants are entitled to the return of amounts paid to CBSG.

353. By reason of the foregoing, Defendants are entitled to damages in the amount paid to CBSG under the Agreement and a declaration that the Agreement is a criminally usurious and unenforceable loan.

SIXTH CAUSE OF ACTION
(Wrongful Execution)
By Petropangea

354. Plaintiffs repeat and incorporate the allegations above.

355. Pursuant 2959(a)(3), a judgment creditor who elects to proceed immediately with enforcing a judgment, must serve notice of execution contemporaneous with executing upon a writ.

356. Pursuant to Rule 405, "The person serving the notice shall file a return of service as provided by Rule 405."

357. To this day, CBSG has not served a notice of execution on any Plaintiff, nor has CBSG filed a return of service as provided by Rule 405.

358. Nonetheless, CBSG has wrongfully served a Writ of Execution upon BB&T, Fulton Bank, TD Bank, PNC, Wells Fargo, Bank of America, JP Morgan Chase and others.

359. Because CBSG has failed to comply with the service requirements of Pennsylvania law, the writs of execution are void.

360. As a result of CBSG's wrongful execution, the bank accounts of Petropangea, have had their bank accounts frozen and/or levied at BB&T, Fulton Bank, TD Bank, PNC, Wells Fargo, Bank of America, and JP Morgan Chase.

SEVENTH CAUSE OF ACTION
(Violation of UCC 9-625)
By all Plaintiffs

361. Plaintiffs repeat and incorporate the allegations above.

362. The transactions between CBSG and Plaintiffs are secured transactions governed by Article 9 of the Uniform Commercial Code 9-625 (the "UCC").

363. Pursuant to the MCA Agreements, upon an Event of Default, CBSG was granted the right to notify the merchant's account debtors and direct that they make payments of their accounts directly to CBSG.

364. In exercising this right, the UCC requires that a secured party act in good faith, which is defined as "honesty in fact in the transaction or conduct concern."

365. Pursuant to UCC 9-625(a) and (b), if a secured party fails to act in good faith: (i) a court may order or restrain collection, enforcement or disposition of collateral and (ii) a debtor may recover damages flowing from the secured party's failure to comply with its obligation to act in good faith including, without limitation, attorneys' fees.

366. In sending out the UCC Lien Notices, CBSG has failed to act in good faith.

367. First, the UCC Lien Notices wrongfully claim that CBSG has purchased the Receivables of Plaintiffs.

368. Second, the UCC Lien Notices were emailed to hundreds, and sometimes thousands, of current and former customers and vendors without regard to whether such recipients actually owed any money to the merchant. The notices were also sent to neighbors, friends and family that had absolutely no expectation of holding receivables due to the merchant. Instead, the notices were sent with the express purpose of harassing, embarrassing, and extorting the merchants into making payments. Hence, rather than being a good faith effort to collect upon a debt under the UCC, the UCC Lien Notices were designed and intended to tarnish the business reputations or extort a settlement.

369. Third, the UCC Lien Notices instructed each recipient to withhold payment and forward the funds directly to CBSG. By requiring hundreds, if not thousands of current and former customers and vendors each to withhold substantial payments, it is transparent that, rather than attempting to collect upon a debt in good faith, the Enterprise had set about attempting to drive Plaintiffs into the ground and extort payment.

370. Plaintiffs are therefore entitled to a permanent injunction under UCC 9-625(a) restraining CBSG from attempting to collect upon any amounts due and owing under the MCA Agreements and to an award of damages under UCC 9-625(b), including attorney's fees, in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
(Unconscionability)
By all Plaintiffs

371. Plaintiffs repeat and incorporate the allegations above.

372. The MCA Agreements entered into with the Enterprise are unconscionable contracts of adhesion that are not negotiated at arms-length nor in good faith.

373. Instead, they contain unconscionable, wholly unfair and one-sided terms that prey upon the desperation of the small business and their individual owners and obfuscate the fact that the contemplated transactions, including those involving the Plaintiffs, are, in reality, loans that are absolutely guaranteed and repayable regardless of any change in circumstance or inability to pay.

374. Among these one-sided terms, the MCA Agreements include: (1) a provision giving the MCA company the irrevocable right to withdraw money directly from the merchant's bank accounts, including collecting checks and signing invoices in the merchant's name, (2) a provision preventing the merchant from transferring, (3) moving or selling the business or any assets without permission from the MCA company, (4) a one-sided attorneys' fees provision obligating the merchant to pay the MCA company's attorneys' fees but not the other way around, (5) a venue and choice-of-law provision requiring the merchant to litigate in a foreign jurisdiction under the laws of a foreign jurisdiction, (6) a personal guarantee, the revocation of which is an event of default, (7) a jury trial waiver, (8) a class action waiver, (9) a collateral and security agreement providing a UCC lien over all of the merchant's assets, (10) a prohibition of obtaining financing from other sources, (11) the maintenance of business interruption insurance, (12) an assignment of lease of merchant's premises in favor of the MCA company, (13) the right to direct all credit card processing payments to the MCA company, (14) a power-of-attorney "to take any and all action necessary to direct such new or additional credit card processor to make payment to [the Enterprise]," and (15) a power of attorney authorizing the MCA company "to take any action or execute any instrument or document to settle all obligations due…."

375. The MCA Agreements are also unconscionable because they contain numerous knowingly false statements. Among these knowingly false statements are that: (1) the transaction

is not a loan, (2) the daily payment is a good-faith estimate of the merchant's receivables, and (3) (4) that the automated ACH program is labor intensive and is not an automated process, requiring the MCA company to charge an exorbitant ACH Program Fee or Origination Fee.

376. The MCA Agreements are also unconscionable because they are designed to fail. Among other things, the MCA Agreements are designed to result in a default in the event that the merchant's business suffers any downturn in sales by: (1) forcing the merchant to wait until the end of the month before entitling it to invoke the reconciliation provision, (2) preventing the merchant from obtaining other financing, and (3) and requiring the merchant to continuously represent and warrant that there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership of merchant.

377. The MCA Agreements also contain numerous improper penalties that violate the strong public policy of various states, including Florida, Tennessee, and Texas. Among these improper penalties, the MCA Agreements: (1) require the merchant to sign a confession of judgment entitling the MCA company to liquidated attorneys' fees based on a percentage of the amount owed rather than a good-faith estimate of the attorneys' fees required to file a confession of judgment, (2) accelerate the entire debt upon an Event of Default, and (3) require the merchant to turn over 100% of all of its receivables if it misses just four fixed daily payments. The Enterprise, with the intent to defraud and deceive Plaintiffs and the Class Members.

378. The MCA Agreements are unconscionable and unenforceable as a matter of law.

NINTH CAUSE OF ACTION
(Fraud)
By all Plaintiffs

379. Plaintiffs repeat and incorporate the allegations above.

380. With respect to all Plaintiffs, the Enterprise intentionally and with the intent to deceive misrepresented the true nature of the MCA Agreements.

381. Contrary to the representations on the face of the agreements, the MCA Agreements are in fact disguised loans.

382. With respect to Harrison, the Enterprise intentionally and with the intent to deceive misrepresented the true nature of the guarantees and confessions of judgments contained in the MCA Agreements when confessing judgment against the Plaintiffs identified above. Contrary to the representations of the Enterprise when confessing judgment, the individuals only guaranteed the representations and warranties contained in the MCA Agreements. Also contrary to the representations of the Enterprise when confessing judgment, the confessions of judgment contained in the MCA Agreements did not permit judgment to be confessed against the individual guarantor.

383. Plaintiffs, the Class Members and/or third-parties reasonably relied upon these knowingly false representations by the Enterprise.

384. Plaintiffs and the Class Members were directly and proximately damaged by these knowingly false representations made by the Enterprise.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, and seek an order from the Court:

a) Certifying this case as a class action on behalf of the Classes and Subclasses defined above, appointing Plaintiffs as Class representatives, and appointing their attorneys as class counsel;

b) Declaring that the MCA Agreements entered into between Plaintiffs, the Class Members and Defendants constitute loan transactions in violation of applicable state usury laws;

c) Declaring that the MCA Agreements entered into between Plaintiffs, the Class Members and Defendants are unconscionable and therefore unenforceable;

d) Declaring that the writs of execution used by Defendants violated the Due Process Clause and Pennsylvania law;

e) Declaring that the UCC notices sent by Defendants violated UCC 9-625;

f) Ordering Defendants to pay Plaintiffs and the Class Members statutory damages in connection with the criminally usurious loans, including prejudgment interest;

g) Permanently enjoining Defendants from enforcing any of their rights under the criminally usurious and/or unconscionable loans;

h) Permanently enjoining Defendants from engaging in further unlawful conduct;

i) Awarding Plaintiffs and the Class Members direct and consequential damages;

j) Awarding Plaintiffs and the Class Members treble damages under RICO;

k) Awarding Plaintiffs and the Class Members their attorneys' fees and costs incurred in this action; and

l) Granting such other and further relief as this Court deems just and proper.

Dated: July 29, 2020

WHITE AND WILLIAMS LLP

By: _____

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Exhibit 13

Exhibit 12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMPLETE BUSINESS SOLUTIONS GROUP, LLC, Plaintiff, v. SEAN WHALEN and YINGYIN IRIS CHEN Defendants.	CIV. A. NO: 19-cv-06181-JS
SEAN WHALEN, YINGYIN IRIS CHEN and FLEXOGENIX GROUP, INC., individually and on behalf of all those similarly situated, Counterclaim Plaintiffs, v. COMPLETE BUSINESS SOLUTIONS GROUP, LLC; BROADWAY ADVANCE, LLC; and MCA CAPITAL FUND I, LLC, Counterclaim Defendants.	

DEFENDANTS' ANSWER AND CLASS-ACTION COUNTERCLAIMS

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Attorneys for Defendants, Counterclaim Plaintiffs and the Putative Class Members

ANSWER

Defendants Sean Whalen and Yingyin Iris Chen (collectively "Defendants"), by their attorneys, White and Williams LLP, as and for its answer to Complete Business Solutions Group, Inc.'s ("CBSG") Complaint, responds as follows:

FACTUAL ALLEGATIONS

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. The Agreements attached to the Complaint as Exhibit "A" are a collection of written documents, each of which speaks for itself. By way of further response, while the documents attached as Exhibit "A" to CBSG's Complaint purport to be "factoring agreements," they are in substance criminally usurious loans that are: (1) in violation of applicable California usury laws and licensing statutes; and (2) contrary to strong public policy enunciated by both the State of California and the Commonwealth of Pennsylvania against usury.

5. Denied. By way of further response, Defendants deny the allegations for the reasons stated in their response to the allegations in Paragraph 4.

6. The allegations contained in this paragraph are legal conclusions to which no further response is required. To the extent a response is required, the allegation is denied. By way of further response, Defendants deny the allegations for the reasons previously stated in their response to the allegations in Paragraph 4.

7. The allegations contained in this paragraph are legal conclusions to which no further response is required. To the extent a response is required, the allegation is denied. By way

of further response, Defendants deny the allegations for the reasons previously stated in their response to the allegations in Paragraph 4.

8. The allegations contained in this paragraph are legal conclusions to which no further response is required. To the extent a response is required, the allegation is denied. By way of further response, CBSG has instituted a creditors' claim against Flexogenix in the United States Bankruptcy Court for the Central District of California. *See* Creditor's Proof of Claim, filed 7/17/2019, Dkt. 2:19-bk-12927-BR.

9. The allegations contained in this paragraph are legal conclusions to which no further response is required. To the extent a response is required, the allegation is denied. By way of further response, Defendants deny the allegations for the reasons previously stated in their response to the allegations in Paragraph 4.

10. The allegations contained in this paragraph are legal conclusions to which no further response is required. To the extent a response is required, the allegation is denied. By way of further response, Defendants deny the allegations for the reasons previously stated in their response to the allegations in Paragraph 4.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses and reserves the right to assert others that may emerge as the case proceeds:

First Affirmative Defense

11. Plaintiff's claims are barred as they arise out of an illegal contract.

Second Affirmative Defense

12. Plaintiff's claims are barred as they arise out of fraudulent activity.

Third Affirmative Defense

13. Plaintiff's claims are barred under the Constitution of the State of California, Article XV, Section 1 and the California Financial Code § 22000 et seq.

Fourth Affirmative Defense

14. Plaintiff's claims are barred as they arise out of an illegal contract.

Fifth Affirmative Defense

15. The Agreements between CBSG and Defendants is unenforceable on the grounds of unconscionability because, among other things and without limitation, Plaintiff knowingly preyed a upon financially distressed company, the Agreements charge a usurious rate of interest and conceal the true nature of the transaction, the purchase price is not, as the Agreements claim, a fair market value of Flexogenix's future receivables but rather the aggregate interest that Plaintiff wanted to collect under the Agreements, the Pennsylvania choice of law provision is intended to and does conceal the actual applicable state law, and the purported reconciliation provision is illusory, impossible to comply with and intentionally inserted by CBSG to further conceal the true nature of the transaction.

CLASS ACTION COUNTERCLAIMS

Counterclaim Plaintiffs Sean Whalen and Yingyin Iris Chen, and Plaintiff Flexogenix Group, Inc. (collectively, "Counterclaim Plaintiffs"), by their attorneys, White and Williams LLP, as and for their counterclaims allege:

NATURE OF THE ACTION

1. This class action seeks to save small businesses and their owners from personal financial ruin at the hands of an unlawful scheme by the Counterclaim Defendants to originate, fund and collect on usurious and illegal loans charging interest rates in excess of 215%. The maximum amount permitted under the California Constitution is 10%.

2. Counterclaim Defendants Complete Business Solutions Group, Inc. ("CBSG") and Broadway Advance, LLC, which are led and/or directed by Joseph LaForte, Jr., are two of a growing number of merchant cash advance ("MCA") companies whose entire scheme preys upon struggling small businesses (collectively, with the Defendant MCA Capital Fund, I, LLC ("MCA Capital,"), the "Enterprise").

3. The Enterprise preys upon financially distressed businesses and their individual owners throughout the country, and fraudulently induces them into so-called "factoring agreements" that are nothing more than disguised loans.

4. The terms and conditions of these agreements are wholly inaccurate, and knowingly designed and/or used by the Enterprise to deceive courts and law enforcement into believing the agreements do not contemplate a loan transaction so that they do not trigger the usury laws of various states, including California.

5. A central component of the scheme includes pushing cash poor businesses to the point that they cannot meet their obligations under existing MCA agreements, at which point the

Enterprise offers new advances with even more unconscionable terms, pushing businesses and their individual owners towards a financial cliff.

6. Eventually, the terms become too oppressive, small businesses default, and the Enterprise aggressively pursues small businesses and their individual owners for repayment of the amounts due under the loans, often employing threatening, deceptive, and illegal collection tactics.

7. In the end, these victims face certain financial ruin while the Enterprise levels threats of legal action in order to recover not only the principal advanced, but also interest at rates that exceed 200%, which rate is far greater than any interest permitted by applicable law.

8. The conduct by the Enterprise has resulted in a national epidemic that has sparked the attention of Governor Cuomo, the New York State Legislature, the New York Attorney General, the Manhattan District Attorney, the New Jersey Attorney General, the Federal Trade Commission, and the United States Congress.

9. As a direct result of the conduct exemplified by this class action, the New York State Legislature banned the use of confessions of judgment on out-of-state victims like Plaintiffs here. The Financial Services Committee of the United States House of Representatives has gone further and passed a bill that would outright ban the use of confessions of judgment nationally.

10. Plaintiffs now bring this class action in order to recompense the many hundreds of similarly situated victims that have been preyed upon by the Enterprise through their predatory and unlawful loansharking scheme.

THE PARTIES

11. Counterclaim Plaintiff Sean Whalen ("Whalen") is an adult resident and citizen of California and is a co-owner of Flexogenix Group, Inc. d/b/a Flexogenix North Carolina, PC d/b/a Flexogenix Georgia, PC d/b/a Flexogenix, Inc. d/b/a Flexogenix PC.

12. Counterclaim Plaintiff Yingyin Iris Chen ("Chen") is an adult resident and citizen of California and is a co-owner of Flexogenix Group, Inc. d/b/a Flexogenix North Carolina, PC d/b/a Flexogenix Georgia, PC d/b/a Flexogenix, Inc. d/b/a Flexogenix PC.

13. Plaintiff Flexogenix Group Inc. ("Flexogenix") is a California corporation owned and operated by Counterclaim Plaintiffs Whalen and Chen, located at 7422 Garvey Ave., Rosemead, California 91770.

14. Counterclaim Defendant Complete Business Solutions Group, Inc. d/b/a Par Funding ("Counterclaim Defendant CBSG") is a Delaware corporation with a principal place of business located in the State of Florida.

15. Counterclaim Defendant Broadway Advance, LLC is a New York limited liability company with a principal place of business located in the Commonwealth of Pennsylvania.

16. Counterclaim Defendant MCA Capital Fund I, LLC is a New Jersey limited liability company with its principal place of business located at 1080 N. Delaware Ave., Suite 505, Philadelphia, PA 19125.

JURISDICTION AND VENUE

17. This Court has subject-matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 based on Counterclaim Plaintiffs' claims for violations of the Racketeer Influenced and Corruption Organizations Act, 18 U.S. C. §§ 1961--1968. The Court has subject-matter jurisdiction over the state-law claims of the Counterclaim Plaintiffs because they are so related to the federal claims asserted herein that they form part of the same case or controversy under Article III of the United States Constitution.

18. Additionally, this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because there is diversity of citizenship and the amount in controversy exceeds $75,000, exclusive of interest, costs, and attorney's fees.

19. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this action occurred here.

20. Each Counterclaim Defendant is subject to the personal jurisdiction of this Court because each has voluntarily subjected itself/himself/herself to the jurisdiction of this Court, regularly transacts business within the Commonwealth of Pennsylvania, and has purposefully availed himself of the jurisdiction of this Court for the specific transactions at issue.

COMMON FACTUAL ALLEGATIONS

A. The Predatory MCA Industry

21. As Bloomberg News has reported, the MCA industry is "essentially payday lending for businesses," and "interest rates can exceed 500 percent a year, or 50 to 100 times higher than a bank's."[1] The MCA industry is a breeding ground for "brokers convicted of stock scams, insider trading, embezzlement, gambling, and dealing ecstasy."[2] As one of these brokers admitted, the "industry is absolutely crazy. … There's lots of people who've been banned from brokerage. There's no license you need to file for. It's pretty much unregulated."[3]

22. The National Consumer Law Center also recognized that these lending practices are predatory because they are underwritten based on the ability to collect, rather than the ability of the borrower to repay without going out of business. National Consumer Law Center, *supra*.

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[1] Zeke Faux and Dune Lawrence, *Is OnDeck Capital the Next Generation of Lender or Boiler Room?*, BLOOMBERG (Nov. 13, 2014, 6:07 AM), https://www.bloomberg.com/news/articles/2014-11-13/ondeck-ipo-shady-brokers-add-risk-in-high-interest-loans.
[2] *Id.*
[3] *Id.*

23. This is because MCA companies "receive the bulk of their revenues from the origination process rather than from performance of the loan [and thus] may have weaker incentives to properly ensure long-term affordability, just as pre-2008 mortgage lenders did." *Id.* ("[A] fundamental characteristic of predatory lending is the aggressive marketing of credit to prospective borrowers who simply cannot afford the credit on the terms being offered. Typically, such credit is underwritten predominantly on the basis of liquidation value of the collateral, without regard to the borrower's ability to service and repay the loan according to its terms absent resorting to that collateral.").

24. The MCA companies only care about whether they can collect upon default, and not whether the small business can survive.

B. The MCA Agreements Are Substantively And Procedurally Unconscionable.

25. The Enterprise agreements (the "MCA Agreements"), including those entered into by the Counterclaim Plaintiffs, are unconscionable contracts of adhesion that are not negotiated at arms-length.

26. Instead, they contain one-sided terms that prey upon the desperation of the small business and their individual owners and help conceal the fact that the transactions, including those involving the Plaintiffs, are really loans.

27. Among these one-sided terms, the MCA Agreements include: (1) a provision giving the MCA company the irrevocable right to withdraw money directly from the merchant's bank accounts, including collecting checks and signing invoices in the merchant's name, (2) a provision preventing the merchant from transferring, (3) moving or selling the business or any assets without permission from the MCA company, (4) a one-sided attorneys' fees provision obligating the merchant to pay the MCA company's attorneys' fees but not the other way around,

(5) a venue and choice-of-law provision requiring the merchant to litigate in a foreign jurisdiction under the laws of a foreign jurisdiction, (6) a personal guarantee, the revocation of which is an event of default, (7) a jury trial waiver, (8) a class action waiver, (9) a collateral and security agreement providing a UCC lien over all of the merchant's assets, (10) a prohibition of obtaining financing from other sources, (11) the maintenance of business interruption insurance, (12) an assignment of lease of merchant's premises in favor of the MCA company, (13) the right to direct all credit card processing payments to the MCA company, (14) a power-of-attorney "to take any and all action necessary to direct such new or additional credit card processor to make payment to [the Enterprise]," and (15) a power of attorney authorizing the MCA company "to take any action or execute any instrument or document to settle all obligations due…."

28. The MCA Agreements are also unconscionable because they contain numerous knowingly false statements. Among these knowingly false statements are that: (1) the transaction is not a loan, (2) the daily payment is a good-faith estimate of the merchant's receivables, and (3) (4) that the automated ACH program is labor intensive and is not an automated process, requiring the MCA company to charge an exorbitant ACH Program Fee or Origination Fee.

29. The MCA Agreements are also unconscionable because they are designed to fail. Among other things, the MCA Agreements are designed to result in a default in the event that the merchant's business suffers any downturn in sales by (1) forcing the merchant to wait until the end of the month before entitling it to invoke the reconciliation provision, (2) preventing the merchant from obtaining other financing, (3) and requiring the merchant to continuously represent and warrant that there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership of merchant.

30. The MCA Agreements also contain numerous improper penalties that violate the strong public policy of both California and New York. Among these improper penalties, the MCA Agreements (1) require the merchant to sign a confession of judgment entitling the MCA company to liquidated attorneys' fees based on a percentage of the amount owed rather than a good-faith estimate of the attorneys' fees required to file a confession of judgment, (2) accelerate the entire debt upon an Event of Default, and (3) require the merchant to turn over 100% of all of its receivables if it misses just four fixed daily payments.

D. The MCA Agreements are not an account purchase transaction, but rather, disguised loans.

a. There was no "sale" of receivables.

31. Pursuant to the MCA Agreements, the Enterprise advanced money (the "Purchase Price") in exchange for the repayment of principal and interest (the "Purchase Amount") by way of fixed daily ACH withdrawals (each, the "Daily Specified Amount") from a designated account (the "Account").

32. While the MCA Agreements used terms such as "factoring agreement," "sale," and "purchase," the Transaction had none of the hallmarks of a true sale and all of the hallmarks of the loan that charged a usurious interest rate of more than 215%.

33. The quintessential element of any sale is the absolute transfer of the benefits and burdens of the ownership of the subject asset from the seller to the buyer. That did not occur here for several reasons.

34. First, notwithstanding the fact that the transaction was denominated a "sale" of future receipts, the Enterprise acquired only a temporary interest in the receivables.

35. Second, the Enterprise's temporary interest did not divest the merchant of the most important benefit of ownership – the right to use the proceeds of the Receipts. Pursuant to the

MCA Agreements, the merchant was only obligated to deposit a specific amount of its receivable collections into the Account so that the Enterprise could withdraw the Daily Specified Amount.

36. Accordingly, by the express terms of the MCA Agreements, the merchants retained the right to use the proceeds of the very assets the Enterprise was allegedly purchasing. In fact, the merchant was *required* to use such proceeds to operate its business, because the MCA Agreement prohibited the merchant from obtaining any other additional financing.

37. Third, the merchant's repayment obligations were not limited to delivery of the purchased Receipts or even some percentage thereof. The Enterprise purportedly purchased the merchant's future Receipts, but the MCA Agreement reflects that the Enterprise plainly did not want to wait to be repaid until such receipts were generated and collected. Pursuant to the MCA Agreement, although the Enterprise purchased the merchant's future Receipts, the merchant was required to pay the Purchased Amount by remitting an amount of all its receipts.

38. In other words, rather than getting paid from what it allegedly purchased, the enterprise required the merchant to repay the Purchased Amount through independent funds – an obligation that is inconsistent with a true sale.

39. Finally, by operation of the MCA Agreement's default rights and remedies, repayment of the Purchased Amount was put beyond any risk of non-payment and the merchant remained absolutely liable for repayment of the Purchased Amount.

40. Under the Agreement, if an Event of Default occurred, the merchant immediately became liable for the full outstanding Purchased Amount, together with additional fees and costs due under the MCA Agreement, and the Enterprise had the right and power, among other things, to confess judgment against the merchant for this amount.

41. An Event of Default is defined under the MCA Agreement so that a default would occur under any and every conceivable circumstance wherein the merchant failed to generate or collect future Receipts to repay the Enterprise including, if the merchant: (i) failed to timely make the Daily Payments; (ii) became insolvent or filed for bankruptcy, (iii) transferred or otherwise sold its assets or (iv) moved, terminated, interrupted or suspended its business in any way.

42. Accordingly, even if the merchant's business were destroyed or suspended by a hurricane, flood, fire or other Act of God, it would in default of the MCA Agreement and, pursuant to the remedies provided by the agreement, the merchant would be liable for the full outstanding balance of Receipts Purchased Amount, plus all fees and costs due under the MCA Agreement.

b. The "Daily Specified Amount" is a disguised, fixed, loan payment

43. According to the MCA Agreement, the "Daily Specified Amount" was allegedly based on a good-faith estimate of the merchant's daily future receipts, however, that could not have been possible because the merchant's business did not generate daily receipts, it invoiced its customers on terms. In reality, the Daily Specified Amount is a knowingly false term unilaterally dictated by the Enterprise in an attempt to avoid usury laws. In fact, the payment is based on the value of the loan, not the merchant's daily receivables.

44. The merchant was required to pay the "Daily Specified Amount" until the Enterprise received the "Purchased Amount" in full.

c. The Purchased Amount is the disguised repayment of principal and interest

45. The purported Purchase Amount of the Future Receipts is also complete fiction. In the MCA Agreement, the Enterprise represents that the "Purchased Amount" is tied to the value of the purchased receivables. In reality, however, the alleged fair market value was unilaterally dictated by the Enterprise based on the creditworthiness of the merchant. In contrast, true factoring

agreements determine the fair market value of the receivable based on the credit worthiness of the customer expected to pay the receivable.

46. Furthermore, the MCA Agreement is not tied to specific and existing contracts for goods already delivered by the merchant to a customer. In other words, the right to repayment is not tied to the value or money owed to the Enterprise based on goods or services already provided to a customer who has not yet paid, but instead is based on any and all future receivables based on the sale of goods or services by the merchant until the "factoring agreement" was paid in full. By definition, these terms do not constitute a factoring agreement, but rather a loan.

d. The MCA Agreements provide full recourse in the event of a default or bankruptcy.

47. Unlike a true factoring agreement, the terms of the MCA Agreement provide for absolute payment.

48. If the merchant missed just four payments, it would be in default and the Enterprise would be entitled to confess judgment against the merchant.

49. In order to obtain the loans, the merchant was required to grant to the Enterprise "a security interest in (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory … now or hereafter owned or acquired by SELLER/MERCHANT and (b) all proceeds, as that term is defined in Article 9 of the UCC . . . ."

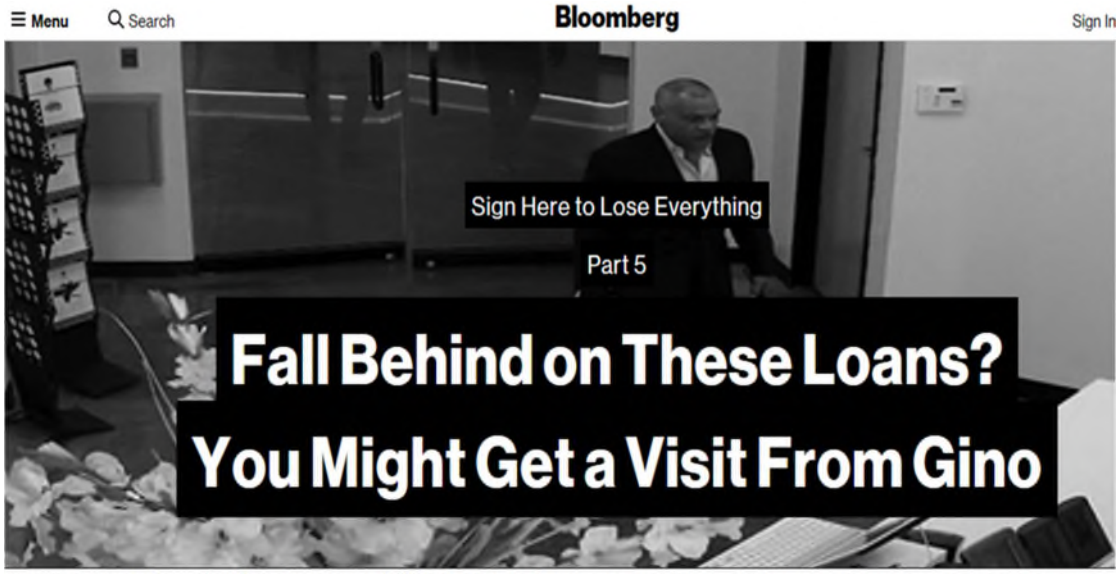
50. The security agreement further provided that, upon default, the Enterprise "may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce, or satisfy any obligations then owing, whether by acceleration of otherwise."

51. The individual owners were also required to personally guarantee performance of the representations, warranties and covenants under the Agreements.

e. The Enterprise's conduct demonstrates the MCA Agreements are loans.

52. The Enterprise's conduct demonstrates that the MCA Agreements are intended to be loans.

53. On December 20, 2018, Bloomberg News published an article exposing the unlawful collection tactics employed by the Enterprise when a merchant fails to pay:[4]



Gino Gioe enters the Los Angeles office of Radiant Images on Feb. 15, 2018, captured by a surveillance camera. SOURCE: COMPLAINT FILED IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

54. As Bloomberg News revealed, the Enterprise routinely employs mob-like intimidation tactics when a merchant cannot pay:

> Gioe's travels around the U.S. show how the regulatory vacuum is enabling intimidation tactics that seem like relics of a lawless past.
>
> Ten of Gioe's unannounced visits to borrowers, from Chicago to small-town Alabama, were described in court papers and interviews with Bloomberg News. He made "threats of violence and physical harm" to employees of a California rehab center, according to one court complaint. A tire-shop owner near Boston said in another court filing he "felt that physical harm would come to me and my family" when Gioe walked into his shop in 2016 demanding immediate payment.

[4] https://www.bloomberg.com/graphics/2018-confessions-of-judgment-visit-from-gino/

> A third borrower, recounting Gioe's visit to his Maryland trucking company last year, described him in an affidavit as resembling "an aging but still formidable character ripped from the World Wrestling Federation" who had been sent not to negotiate but to "intimidate me into making a lump-sum payment."[5]

55. In the Bloomberg article, both "Gino" and the principal owner of CBSG, Joseph LaForte, admitted to Bloomberg News that its merchants are "borrowers" and that CBSG is a "lender." *See id.* ("Gioe said the former owner had borrowed $1 million from Par with no intention of paying it back…"), ("Joseph LaForte says his brother is an outside broker for Par who sometimes helps him collect debts but isn't an employee. He says Par had a right to pursue Sharma for reneging on millions of dollars of debt."), ("Joseph LaForte says that even though Gioe was helping borrowers, a few did complain about getting a visit.").

56. The Bloomberg article further goes on to detail numerous examples where the Enterprise is treating its agreements as absolutely repayable loans and not true sales. As described by Bloomberg News, "Gioe's visits followed a pattern. He would show up unannounced, demand to speak to the owner and say he wasn't leaving until he got paid, according to the people who described the visits in court records and interviews. All of the people say Gioe seemed to be trying to intimidate them. Four say they called the police, though no charges were filed." *Id.*

57. In fact, as evidenced by this very action, the Enterprise treats its merchant transactions as so absolutely repayable, that not even a bankruptcy court can stop their collection tactics. *See id.* ("Gioe could be persistent. When he showed up at a beauty-supply warehouse in Chicago last year, its new owner, George Souri, told him a bankruptcy judge had ordered creditors to back off. 'We don't deal with courts, we have our own ways to collect,' Gioe responded, according to an affidavit Souri filed in the bankruptcy case. When Souri forbade him from speaking

[5] *Id.*

to the warehouse's former proprietor, Gioe remarked, 'We'll go to her house and deal with her there,' the affidavit states.").

58. Apparently, Bloomberg News was spot on because the Enterprise was recently sanction by a California Bankruptcy Court for violating a bankruptcy stay. *See* Ex. 1.

59. If the MCA Agreements truly reflected true account purchase transactions, "Gino" would be paying visits to the companies who owed the receivables allegedly purchased and CBSG would not be employing Mafioso-style intimidation tactics against *the seller*.

FACTS SPECIFIC TO COUNTERCLAIM PLAINTIFFS

60. Flexogenix operates joint care clinics in the Los Angeles, California area and in several other U.S. cities as an affiliate.

61. The company is owned and operated by Counterclaim Plaintiffs Sean Whalen and Yingyin Iris Chen.

62. Between November 21, 2017 and September 12, 2018, Flexogenix paid the Enterprise, through Broadway Advance, nearly $800,000 in unlawful interest under three prior agreements.

63. The terms of these agreements are as follows:

Date of Loan	Amount of Loan	Daily Payment	Payback Term	Total Payback	Interest Rate
11/21/2017	$1,000,000.00	$ 6,331.06	237 days	$ 1,500,000.00	151.76%
12/1/2017	$ 500,000.00	$ 4,406.25	160 days	$ 705,000.00	215.2%
12/21/2017	$ 250,000.00	$ 2,556.81	132 days	$ 337,500.00	215.81%
Totals	**$ 1,750,000.00**			**$ 2,542,500.00**	

64. These unlawful and unconscionable interest payments pushed Flexogenix into financial catastrophe by causing it to take out more and more unlawful loans with the Enterprise through Defendant CBSG.

65. The terms of these agreements are as follows:

Date of Loan	Amount of Loan	Daily Payment	Payback term	Total Payback	Interest Rate
9/12/2018	$ 900,000.00	$ 6,331.06	199 days	$ 1,260,000.00	150.5%
10/1/2018	$ 800,000.00	$ 5,628.14	199 days	$ 1,120,000.00	150.6%
10/24/2018	$1,200,000.00	$ 7,304.35	230 days	$ 1,680,000.00	120.2%
11/20/2018	$1,000,000.00	$ 5,600.00	250 days	$ 1,400,000.00	106.99%
12/17/2018	$ 500,000.00	$ 2,800.00	250 days	$ 700,000.00	106.99%
Totals	**$ 4,400,000.00**			**$ 6,160,000.00**	

66. As a direct result of the unlawful and unconscionable terms of these MCA Agreements, Flexogenix was ultimately forced to file for Chapter 11 bankruptcy protection.

67. Although the MCA Agreements purport to only purchase future receivables, the sham nature of these agreements have been proven by this very action.

68. In addition to filing a proof of claim in the Chapter 11 bankruptcy proceeding, Counterclaim Defendant CBSG filed the instant lawsuit seeking to hold the individual owners of Flexogenix, Ms. Chen and Mr. Whalen, personally liable for the full unpaid balance of the receivables purportedly purchased.

69. This action thus proves that the Enterprise treats its so-called "factoring agreements" as absolutely repayable loans even if the business fails to generate receipts, fails for any reason, or even files for bankruptcy.

CLASS ALLEGATIONS

70. Counterclaim Plaintiffs repeat and re-allege the allegations of each of the foregoing paragraphs as if fully alleged herein.

71. Counterclaim Plaintiffs bring this action pursuant to Fed. R. Civ. Pr. 23(b)(2) and 23(b)(3).

72. Counterclaim Plaintiff Flexogenix brings this action individually and on behalf of a class of similarly situated persons defined as follows:

> **CBSG California Merchant Class**: All California merchants that, on or after January 21, 2016, paid money to a member of the Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding ten percent.
>
> **Broadway Advance Merchant Class**: All merchants that, on or after January 21, 2016, paid money to a member of the Enterprise pursuant to a Broadway Advance Agreement with an effective interest rate exceeding twenty-five percent.

73. Counterclaim Plaintiffs Sean Whalen and Yingyin Iris Chen bring this action individually and on behalf of a class of similarly situated persons defined as follows:

> **CBSG California Principal Class:** All individual citizens of California who, on or after January 21, 2016, were sued by a member of the Enterprise pursuant to a CBSG Agreement with an effective interest rate exceeding ten percent.
>
> **Broadway Advance Principal Class:** All individuals who, on or after January 21, 2016, were sued by a member of the Enterprise pursuant to a Broadway Advance Agreement with an effective interest rate exceeding twenty-five percent.

74. The following people are excluded from the Classes: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Counterclaim Defendants, Counterclaim Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Counterclaim Defendants or their parents have a controlling interest and its current or former

employees, officers, and directors; (3) persons who properly execute and file a timely request for exclusion from the Classes; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released or waiver; (5) Counterclaim Plaintiffs' and Counterclaim Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

75. **Numerosity**: The exact number of members of the Classes is unknown and is not available to Plaintiffs at this time, but individual joinder is impracticable. Based on publically available documents, each of the Classes likely numbers are in the many hundreds or more.

76. **Commonality and Predominance.** There are many questions of law and fact common to the claims of Counterclaim Plaintiffs and the other Class members, and those questions predominate over any questions that may affect individual members of the Classes. Common questions for the Classes include, without limitation, the following;

a) Whether the MCA Agreements are disguised loans;

b) Whether the MCA Agreements are governed by California law;

c) Whether the MCA Agreements are usurious under New York and California law;

d) Whether the merchants are entitled to treble damages under RICO and/or California law;

e) Whether the Broadway Advance Agreements are void under New York law;

f) Whether Counterclaim Plaintiffs and the Classes may recover all moneys paid to the Enterprise pursuant to the Broadway Advance Agreements; and

g) Whether Counterclaim Defendants' conduct was willful or knowing;

77. **Typically:** Counterclaim Plaintiffs' claims are typical of the claims of the other members of the Classes. Counterclaim Plaintiffs and members of the Classes sustained damages

as a result of Counterclaim Defendants' uniform wrongful conduct during transactions with Counterclaim Plaintiffs and the Classes.

78. **Adequate Representation:** Counterclaim Plaintiffs have and will continue to fairly and adequately represents the interests of the Classes, and have retained counsel competent and experienced in complex litigation and class actions. Counterclaim Plaintiffs have no interests antagonistic to those of the Classes, and Counterclaim Defendants have no defenses unique to Counterclaim Plaintiffs. Counterclaim Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and they have the resources to do so. Neither Counterclaim Plaintiffs nor their counsel have any interest adverse to those of the other members of the Classes.

79. **Superiority**: This case is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The injuries suffered by the individual members of the Classes are likely prosecution of the litigation necessitated by Counterclaim Defendants' actions. Absent a class action, it would be difficult, if not impossible, for the individual members of the Classes to obtain effective relief from Counterclaim Defendants. Even if members of the Classes themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented herein. By contrast, a class action presents far fewer management difficulties and provides benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

FIRST CAUSE OF ACTION (RICO)
(Violation of 18 U.S.C. § 1962(c))

80. Plaintiffs repeat and re-allege the allegations of each of the foregoing paragraphs.

A. The Unlawful Activity.

81. More than a dozen states, including New York, place limits on the amount of interest that can be charged in connection with providing a loan.

82. In 1965, the Legislature of New York commissioned an investigation into the illegal practice of loansharking, which, prior to 1965, was not illegal with respect to businesses.

83. As recognized by the New York Court of Appeals in *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 589 (1981), the Report by the New York State Commission on Investigation entitled An Investigation of the Loan-Shark Racket brought to the attention of the Governor and the public the need for change in both, as well as for change in the immunity statute, and for provisions making criminal the possession of loan-shark records and increasing the grade of assault with respect to the "roughing up tactics" used by usurious lenders to enforce payment."

84. As a result of this Report, a bill was proposed to allow corporations to interpose the defense of usury in actions to collect principal or interest on loans given at interest greater than twenty-five percent per annum.

85. This measure was deemed vital in curbing the loan-shark racket as a complement to the basic proposal creating the crime of criminal usury.

86. As noted above, loan-sharks with full knowledge of the prior law, made it a policy to loan to corporations.

87. The investigation also disclosed that individual borrowers were required to incorporate before being granted a usurious loan.

88. Like here, this was a purely artificial device used by the loanshark to evade the law—an evasion that the Legislature sought to prevent.

89. Among other things, the Report recognized that "it would be most inappropriate to permit a usurer to recover on a loan for which he could be prosecuted," which is exactly the goal of the Enterprise.

B. Culpable Person

90. Joseph LaForte, Jr. ("LaForte") is an individual capable of holding legal interest in property and is thus a "person" within the meaning of 18 U.S.C. § 1962(c) as the term is defined by 18 U.S.C. § 1961(3).

B. The Association-in-Fact Enterprise

91. LaForte and Counterclaim Defendants are separate individuals or entities associated with each other by shared personal and/or one or more contracts or agreements for the purpose of originating, underwriting, servicing and collecting usurious loans to the Counterclaim Plaintiffs and countless other small businesses throughout the United States.

92. Since at least 2016 and continuing through the present, the members of the Enterprise have had ongoing relations with each other through common control/ownership, shared personnel and/or one or more contracts or agreements relating to and for the purpose of originating, underwriting, servicing and collecting upon unlawful debt issued by the Enterprise to small businesses throughout the United States, including Counterclaim Plaintiffs and the Class Members.

93. The debt, including such debt evidenced by the Agreements, constitutes unlawful debt within the meaning of 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1961(6) because (i) it violates applicable criminal usury statutes and (ii) the rates are more than twice the legal rate

permitted under New York Penal Law §190.40 and Stats. 1919, p. lxxxiii; § 2; and Stats. 1919, p. lxxxiii, § 3 and Article XV, § 1 of the California Constitution, (the higher of 10%, or 5% plus prevailing rate of the Federal Reserve Bank).

94. This association of LaForte and Counterclaim Defendants constitute a single association-in-fact enterprise (the "Enterprise") within the meaning of 18 U.S.C. § 1962(c), as the term is defined in 18 U.S.C. § 1961(4).

95. The Enterprise has an existence separate and apart from the illegal activity in which it engages by entering into legal financing agreements and attempting to collect lawful debts using legal collection practices.

C. The distinct roles in the Enterprise.

96. The Enterprise has organized itself into a cohesive group with specific and assigned responsibilities and a command structure to operate as a unit in order to accomplish the common goals and purposes of collecting upon unlawful debts as follows:

i. Joseph LaForte, Jr.

97. LaForte is the leader and mastermind of the Enterprise. LaForte is the true owner and operator of CBSG and Broadway Advance. LaForte is responsible for the day-to-day operations of the Enterprise and has final say on all business decisions of the Enterprise including, without limitation, which usurious loans the Enterprise will fund, how such loans will be funded, which investors will fund each loan and the ultimate payment terms, amount and period of each usurious loan, including the loans extended to Flexogenix and the Class Members.

98. In his capacity as the day-to-day leader of the Enterprise, LaForte is responsible for creating, approving and implementing the policies, practices and instrumentalities used by the Enterprise to accomplish its common goals and purposes including: (i) the form of merchant

agreements used by the Enterprise to attempt to disguise the unlawful loans as receivable purchase agreements to avoid applicable usury laws and conceal the Enterprise's collection of an unlawful debt; (ii) the method of collecting the daily payments via ACH withdrawals; and (iii) the collection tactics used when a merchant is unable to pay. All such forms and collection tactics were used to make and collect upon the unlawful loans including, without limitation, loans extended to Flexogenix and the Class Members.

99. LaForte has also taken actions and, directed other members of the Enterprise to take actions necessary to accomplish the overall goals and purposes of the Enterprise including directing the affairs of the Enterprise, funding the Enterprise, soliciting and recruiting members of the Enterprise, directing members of the Enterprise to collect upon the unlawful loans and executing legal documents in support of the Enterprise.

100. LaForte has ultimately benefited from the Enterprise's funneling of the usurious loan proceeds to Counterclaim Defendants from the unlawful profits earned by the Enterprise on account of the loans.

ii. Counterclaim Defendant CBSG

101. CBSG is organized under the laws of Delaware and maintains officers, books, records, and bank accounts independent of LaForte, Broadway Advance, and MCA Capital.

102. Directly and through LaForte and its other agent employees, CBSG has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. CBSG has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation agreements with Investors to fund the usurious loans; (ii) pooling the funds of investors in order to fund each

usurious loan; (iii) underwriting the usurious loans and determining the ultimate rate of usurious interest to be charged under each loan; (iv) entering into the so-called merchant agreements on behalf of the Enterprise; (v) servicing the usurious loans; (vi) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (v) obtaining judgments in its name to further collect upon the unlawful debt.

103. In this case, CBSG: (i) solicited borrowers, including Flexogenix and other Class Members; (ii) pooled funds from investors to fund the Agreements; (iii) underwrote the Agreements; (iv) entered into the Agreements; (v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Flexognix and the Class Members; and (vi) upon the alleged default by Flexogenix and other Class Members, filed suit in CBSG's name to collect upon the unlawful debt evidenced therein.

104. CBSG ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds and to the investors of the deals, certain of which, upon information and belief, CBSG has also directly participated.

iii. Counterclaim Defendant Broadway Advance

105. Broadway Advance is organized under the laws of New York and maintains officers, books, records, and bank accounts independent of LaForte, CBSG, and MCA Capital.

106. Directly and through LaForte and its other agent employees, Broadway Advance has been an active participant and central person in the operation and management of the Enterprise and its affairs, and in the orchestration, perpetration, and execution of the Enterprise's collection of unlawful debts. Broadway Advance has been and continues to be responsible for: (i) entering into contracts with brokers to solicit borrowers for the Enterprise's usurious loans and participation

agreements with Investors to fund the usurious loans; (ii) pooling the funds of investors in order to fund each usurious loan; (iii) underwriting the usurious loans and determining the ultimate rate of usurious interest to be charged under each loan; (iv) entering into the so-called merchant agreements on behalf of the Enterprise; (v) servicing the usurious loans; (vi) setting up and implementing the ACH withdrawals used by the Enterprise to collect upon the unlawful debt; and (v) obtaining judgments in its name to further collect upon the unlawful debt.

107. In this case, Broadway Advance: (i) solicited borrowers, including Flexogenix and other Class Members; (ii) pooled funds from investors to fund the Agreements; (iii) underwrote the Agreements; (iv) entered into the Agreements; and (v) collected upon the unlawful debt evidenced by the Agreements by effecting daily ACH withdrawals from the bank accounts of Flexognix and the Class Members.

108. Broadway Advance ultimately benefits from the Enterprise's unlawful activity by receiving a management fee from the proceeds of the unlawful debt from the Enterprise's funneling of the usurious loan proceeds and to the investors of the deals, certain of which, upon information and belief, Broadway Advance has also directly participated.

iv. Counterclaim Defendant MCA Capital Fund I, LLC

109. MCA Capital is organized under the laws of New Jersey and maintains separate officers, books, records, and bank accounts independent of LaForte, CBSG, and Broadway Advance.

110. Directly and through their members, agent officers, and/or employees, MCA Capital has been and continue to be responsible for providing CBSG and Broadway Advance with all or a portion of the pooled funds necessary to fund the usurious loans, including the Agreements with Flexogenix and the Class Members.

111. Among other things, MCA Capital solicits institutional and individual investors to raise capital for the fund. In doing so, MCA Capital represents to these individual investors that the MCA Agreements are loans with interest rates in excess of 33%, and that the default rate on the loans is one percent.

112. MCA Capital, as an extension of CBSG, has paid these investors interest rate returns between 12% to 44% annually. *See* Ex. 2.

113. After being fined by the State of New Jersey and the Commonwealth of Pennsylvania for offering unregistered securities to fund the Enterprise (*see* Exs. 2-3), MCA Capital has since registered the securities it offers to the public. *See* Ex. 4.

114. On information and belief, MCA Capital provided the capital to fund the Agreements with Flexogenix and the Class Members.

115. MCA Capital ultimately benefits from the Enterprise's unlawful activity when the proceeds of collecting upon the unlawful debts are funneled to it. Among other things, MCA Capital is paid a portion of the interest charged to Flexogenix and the other Class Members in consideration of the capital it provides to the Enterprise.

D. Engagement in Interstate Commerce

116. The Enterprise is engaged in interstate commerce and uses instrumentalities of interstate commerce in its daily business activities.

117. Specifically, the members of the Enterprise maintain offices in Florida and Pennsylvania, and use personnel in these offices to originate, underwrite, fund, service and collect on loans made by the Enterprise to borrowers throughout the United States via the extensive use of interstate emails, telephone calls, wire transfers and bank withdrawals processed electronically through an automated clearing house.

118. In the present case, all communications between the Enterprise and Counterclaim Plaintiffs were by interstate email, telephone calls, wire transfers or other interstate wire communications. Specifically, the Enterprise used interstate emails and telephone calls to originate, underwrite, service and collect upon the Agreements, fund the advances under each of the Agreements, and collect the Daily Specific Amount via electronic interstate withdrawals processed through an automated clearing house.

E. Conducting Affairs through a Pattern of Racketeering.

119. Counterclaim Defendants conducted the affairs of the Enterprise or participated in the affairs of the Lending Enterprise, directly or indirectly, though a pattern of racketeering activity (wire fraud) in violation of 18 U.S.C. 1962(c).

120. Beginning no later than 2016 and continuing today, Counterclaim Defendants devised and carried out a scheme to conduct the affairs of the Enterprise to intentionally defraud not only Counterclaim Plaintiffs and their business, but other businesses and their owners throughout the United States, and induce them to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay and to intentionally defraud others into satisfying such loan obligations when a borrower defaulted.

121. Since Counterclaim Defendants and its agents are web-based companies that conduct virtually all of their business through the internet, email communications, telephone calls, and wire transfers, it was reasonably foreseeable that interstate emails, telephone calls, and wire transfers would be used in furtherance of the scheme, and, in fact, intestate emails, telephone calls and wire transfers are used in furtherance of the scheme.

122. Specifically, Counterclaim Defendants directed, approved or ratified, their agents' use of the internet, interstate email, telephone calls, and other communications to intentionally

defraud borrowers in California and throughout the United States, including the Counterclaim Plaintiffs, and to enter into and make payments on criminally usurious loans for which they had no legal obligation to pay.

123. As part of this scheme, by the use of interstate emails and telephone calls, Counterclaim Defendants' agents target and solicit cash-strapped businesses upon which to pawn off usurious loans funded by Counterclaim Defendants and possibly others. These interstate emails and telephone calls intentionally create the false impression that the usurious loans are legally enforceable by:

> (i) misrepresenting the true nature of the loan transactions as receivable sales in order to avoid applicable criminal usury laws;
>
> (ii) falsely representing that disguised loan contracts are enforceable when they are illegal under California or other applicable law;
>
> (iii) falsely claiming that the contracts are governed under the laws of Pennsylvania and New York when Counterclaim Defendants and its affiliates know strong public policy considerations dictate that California or another state's laws would govern construction of the contracts;
>
> (iv) advising the illegal loans would be funded through interstate wire transfers; and
>
> (v) directing all loan repayments to be made by electronic interstate bank withdrawals via an automated clearing house.

124. Once the loans are approved by Counterclaim Defendants, Counterclaim Defendants further the scheme by using interstate wires to fund the unlawful loans and electronic interstate bank withdrawals to repay the amounts advanced under the disguised loans, all of which further creates the impression that the usurious loans are legally enforceable contracts which Counterclaim Defendants know to be false.

125. If a borrower defaults, Counterclaim Defendants use interstate e-mails and telephone calls to once again fraudulently induce the borrowers to obtain new advances under

loans funded by Counterclaim Defendants that Counterclaim Defendants know misrepresent the true nature of the transaction in an effort to evade applicable usury laws and create the false impression that the contracts are legally enforceable when they are not thereby inducing the borrowers to enter into and make payments on new usurious agreements to pay off the obligations under the old ones.

126. In this case, Counterclaim Defendants used interstate emails, telephone calls, electronic interstate bank withdrawals to transmit and collect on a series of "factoring agreements" with Counterclaim Plaintiffs in 2017 and 2018 that stated two different "Governing Law" jurisdictions, all with the intent to deceive and defraud Counterclaim Plaintiffs.

127. Upon information and belief, borrowers in California and throughout the United States, like the Counterclaim Plaintiffs, reasonably rely upon these knowingly false representations in order to enter into and make payments on criminally usurious loans.

128. In the present case, through a series of interstate e-mails between November 2017 and December 2018, agents solicited Counterclaim Plaintiffs, provided Counterclaim Plaintiffs with a copy of the loan application, processed the loan application, and, upon approval by Counterclaim Defendants, provided Plaintiffs with a copy of the first Agreement dated November 21, 2017, which the agent asked Counterclaim Plaintiffs to execute, together with a form authorizing Counterclaim Defendants to electronically withdraw the daily payments from Flexogenix's Bank Account. The agent's actions were intentionally designed to and, in fact did, create the impression that the Broadway Advance Agreement dated November 21, 2017, and each additional Broadway Advance and CBSG Agreement thereafter, was a legally enforceable contract which Counterclaim Defendants knew to be false.

129. Counterclaim Defendants furthered the scheme against Counterclaim Plaintiffs by funding the November 21, 2017 loan through an interstate wire transfer and thereafter withdrawing the Daily Specified Amount due under the CBSG Agreements by electronic interstate withdrawals processed through an automated clearing house, all of which was intentionally designed by Counterclaim Defendants to and, in fact did, create the impression that the CBSG Agreement was legally enforceable contract which Counterclaim Defendants knew to be false.

130. In keeping with its routine business practices, Counterclaim Defendants' scheme included withdrawal of the Daily Specified Amount stated in the MCA Agreements, each and every day as permitted under the MCA Agreements, even if Counterclaim Plaintiffs had not received sufficient payments, reimbursements or other monies from its clients, customers and related third parties to cover full withdrawal of the Daily Specified Amount.

131. Counterclaim Defendants' scheme continued, generating new usurious MCA Agreements until December 2018. When Counterclaim Plaintiffs had difficulty making the daily payments under the MCA agreements, Counterclaim Defendants, and/or their agents, used similar emails and wire communications to intentionally create the false impression that each successive disguised loan was a legally enforceable contract in order to induce the Counterclaim Plaintiffs to enter into and make payments on the criminally usurious loans.

132. Counterclaim Plaintiffs reasonably relied upon these knowingly false representations to their detriment, as they executed each of the MCA Agreements and were forced to pay interest in excess of California's criminal usury threshold.

133. Counterclaim Defendants' conduct constitutes "fraud by wire" within the meaning of 18 U.S.C. § 1343 which is a "racketeering activity" as defined by 18 U.S.C. 1961(1). Its

repeated and continuous use of such conduct to participate in the affairs of the Enterprise constitutions a pattern of racketeering activity in violation of 18 U.S.C. 1962(c).

F. Conducting Affairs Through the Collection of an Unlawful Debt

134. The MCA Agreements constitute unlawful debt within the meaning of 18 U.S.C. 1962(c) because (1) they violate applicable criminal usury statutes, and (2) the rates are more than twice the legal rate.

135. Counterclaim Defendants conducted the affairs of the Enterprise or participated in the affairs of the Lending Enterprise, directly or indirectly, though the collection of this unlawful debt in violation of 18 U.S.C. 1962(c).

136. Specifically, Counterclaim Defendants directed, approved or ratified, its agents to obtain Counterclaim Plaintiffs' authorization to electronically withdrawal payments on an unlawful debt from designated bank accounts.

137. Upon receipt of such authorization, Counterclaim Defendants did, in fact, make the daily withdrawals required by the MCA Agreements.

G. Injury

138. As a direct and proximate cause of Counterclaim Defendants' violation of 18 U.S.C. § 1962(c), Counterclaim Plaintiffs and the Class Members have suffered, and continue to suffer, substantial injury to their business and/or property as Counterclaim Plaintiffs business has been forced into bankruptcy as a direct result of Counterclaim Defendants' demand that they pay usurious amounts of interest based upon an illegal contract.

SECOND CAUSE OF ACTION
(Conspiracy under 18 U.S.C. § 1962(d))

139. Counterclaim Defendants have unlawfully, knowingly, and willfully, combined, conspired, confederated, and agreed together to violate 18 U.S.C. § 1962(c) as describe above, in violation of 18 U.S.C. § 1962(d).

140. By and through each of the Counterclaim Defendants' business relationships with one another, their close coordination with one another in the affairs of the Enterprise, and frequent email communications among the Counterclaim Defendants concerning the underwriting, funding, servicing and collection of the unlawful loans, including the MCA Agreements, each Counterclaim Defendant knew the nature of the Enterprise and each Counterclaim Defendant knew that the Enterprise extended beyond each Counterclaim Defendant's individual role. Moreover, through the same connections and coordination, each Counterclaim Defendant knew that the other Counterclaim Defendants were engaged in a conspiracy to collect upon unlawful debts in violation of 18 U.S.C. § 1962(c).

141. Each Counterclaim Defendant agreed to facilitate, conduct, and participate in the conduct, management, or operation of the Lending Enterprise's affairs in order to collect upon unlawful debts, including the MCA Agreements, in violation of 18 U.S.C. § 1962(c). In particular, each Counterclaim Defendant was a knowing, willing, and active participant in the Enterprise and its affairs, and each of the Counterclaim Defendants shared a common purpose, namely, the orchestration, planning, preparation, and execution of the scheme to solicit, underwrite, fund and collect upon unlawful debts, including the CBSG Agreements.

142. The participation and agreement of each of the Counterclaim Defendants was necessary to allow the commission of this scheme.

143. Counterclaim Plaintiffs have been and will continue to be injured in their business and property by reason of the Counterclaim Defendants' violations of 18 U.S.C. § 1962(d), in an amount to be determined at trial.

144. The injuries to the Counterclaim Plaintiffs directly, proximately, and reasonably foreseeably resulting from or cause these continuous violations of 18 U.S.C. § 1962(d) include, but are not limited to, millions of dollars in improperly collected loan payments and the unlawful entry and enforcement of judgments.

145. Counterclaim Plaintiffs and the Class Members have also suffered damages by incurring attorneys' fees and costs associated with exposing and prosecuting Counterclaim Defendants' criminal activities.

146. Pursuant to 18 U.S.C. § 1964(c), Counterclaim Plaintiffs and the Class Members are entitled to treble damages, plus costs and attorneys' fees from the Counterclaim Defendants. The Court should also enter such equitable relief as it deems just and proper to preclude the Counterclaim Defendants from continuing to solicit, fund and collect upon unlawful debt, including the CBSG Agreements.

THIRD CAUSE OF ACTION
(Violation of California Usury Law
Cal. Const. Art. XV, § 1 and/or New York Penal Law §190.40)

147. Counterclaim Plaintiffs repeat and incorporate the allegations set forth above.

148. Under controlling Pennsylvania choice-of-law principles, Counterclaim Defendants cannot avoid California usury and licensing statutes by mandating that another state's law applies through its contracts of adhesion. The Third Circuit and the Pennsylvania Supreme Court have repeatedly held that a party cannot contract around the strong public policies of another state through the swipe of a pen. *See Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 621-22 (3d

Cir. 2009)("[T]he methods used by usurious lenders, often involv[e] subterfuge, to attempt to circumvent fundamental public policy."); *Cash America Net of Nevada LLC v. Commonwealth, Dept. of Banking*, 607 Pa. 432, 437-38, 8 A.3d 282, 285-86 (out-of-state lender cannot avoid Pennsylvania's usury and licensing laws because it operated outside of Pennsylvania).

149. Here, Counterclaim Defendants cannot avoid California's usury and licensing laws merely by including a Pennsylvania or New York choice-of-law provision.

150. Counterclaim Plaintiffs, California residents and a California business, should not be bound to the mandate of Pennsylvania law where this mandate is dictated by a usurious lending agreement.

151. Counterclaim Defendants' transactions should be reviewed pursuant to the public policies and regulations of California.

152. Under California law, a merchant cash advance is a disguised loan that is subject to California usury laws and licensing requirements. *See Math Magicians v. Capital,* 2013 Cal. App. Unpub. LEXIS 8694 (2d App. Dist. Nov. 26, 2013); *see also Western Auto Supply*, 277 S.E.2d 360, 368 (N.C. 1981); ("If the purchaser of a note requires the endorsement of the seller as a guaranty of payment . . . the transaction is, in effect, a loan."); *Milana v. Credit Discount Co.*, 163 P.2d 869, 871 (Cal. 1945) ("The significant fact is that if the defendants had really purchased the accounts and had taken absolute title there would be no occasion for the provision or practice relating to guarantees of payment within specified periods. . . ."); *Brack v. Omni Loan Co., Ltd.*, 164 Cal. App. 4th 1312, 1326, 80 Cal. Rptr. 3d 275, 284 (Cal. App. 2008) (Finance Lending Laws were a matter of vital public policy that could not be evaded through a choice-of-law provision).

153. Here, Counterclaim Defendants are not licensed to conduct business in California, and on information and belief, nor could they be for the very reasons that occurred in this case.

154. Pennsylvania should not impose its laws on non-residents based upon a contact of adhesion.

155. In the alternative, Counterclaim Defendants violated New York Penal Law §190.40 with respect to the Broadway Advance Agreements.

156. The MCA Agreements with Flexogenix and the Class Members charged interest rates in excess of the interest rates permitted under New York Penal Law §190.40 (25%) and Stats. 1919, p. lxxxiii; § 2; and Stats. 1919, p. lxxxiii, § 3 and Article XV, § 1 of the California Constitution, (the higher of 10%, or 5% plus prevailing rate of the Federal Reserve Bank).

FOURTH CAUSE OF ACTION
(Violation of California Financing Law
Cal. Fin. Code §§ 22000 *et seq.*)

157. Counterclaim Plaintiffs repeat and incorporate the allegations set forth above.

158. California Financial Code §§ 22000 *et seq*. ("Financing Law") prohibits any unlawful, unfair, or fraudulent representation in connection with the making or brokering of a loan.

159. Since at least 2017, Counterclaim Defendants willfully and knowingly engaged in unlawful practices that they knew were prohibited by the California Financing Law, and as further described in this Counterclaim-Complaint:

a. Acting as a lender for a commercial loan without a license in violation of Fin. Code §§ 22001, 22009, 22502, 22604, 22502, and 22780; and

b. Violating Cal. Bus. & Prof. Code § 17200 making numerous false and misleading representations described *supra*.

160. As a direct and proximate result of Counterclaim Defendants' violations of the Financing Law, Counterclaim Plaintiffs and the Class Members continue to suffer, substantial injury to his business and/or property as they were forced to pay usurious amounts of interest and has lost, and will continue to lose, customers, profits, goodwill, and business value.

FIFTH CAUSE OF ACTION
(Violation of California Bus. & Prof. Code § 17200 *et seq*.)

161. Counterclaim Plaintiffs repeat and incorporate the allegations set forth above.

162. California Business & Profession Code §§ 17200, *et seq*. ("UCL") prohibits "unfair competition" in the form of any unlawful, unfair, or fraudulent business act or practice.

163. Since at least 2017, Counterclaim Defendants have engaged in an unlawful business practices as prohibited by the UCL involving "a segment of the factoring industry known as the MCA business, wherein CBSG purchases future accounts receivables from merchants." *CBSG v. Lindsay Blake Inc. and Robert D. Frei*, Civil Action No. 19-4236 (E.D. Pa.), at Doc. No. 1, ¶ 7.

164. As part of its normal business practices, Counterclaim Defendant CBSG "retains" the services of "consultant[s] to locate sources of funding for CBSG's factoring business." *Id.* at ¶ 9.

165. Counterclaim Defendants' business practices constitute prohibited conduct for:

a. Violating Cal. Const. Art. XV § 1 by charging interest rates in excess of 10% or 5% plus the applicable Federal Reserve rate;

b. Violating 18 U.S.C. § 1343 by furthering their scheme to defraud Counterclaim Plaintiffs by (i) making and receiving wire transfers, and (ii) using wires to transmit fraudulent communications;

c. Violating 18 U.S.C. § 1951 by using extortionate collection tactics to collect upon its unlawful debts; and

d. Violating Cal. Bus. & Prof. Code § 17500.

166. Additionally, Counterclaim Defendants engaged in unfair and fraudulent conduct by making false and misleading statements in connection with MCA Agreements and contracts of adhesion.

167. Specifically, Counterclaim Defendants as part of their commercial advertising and promotion misrepresented the nature, characteristics and qualities of these transactions, which are in effect disguised loans.

168. Counterclaim Defendants' misrepresentations included, among other things, stating that: (1) the transactions were not subject to California law; (2) deceptively disclosing and/or failing to disclose the unconscionable interest rate; and (3) that the individual Counterclaim Plaintiffs were personally liable for Flexogenix's alleged default under each of the loans and/or merchant agreements.

169. Each of these representations was false.

170. Counterclaim Defendants knew that these representations were false at the time they were made.

171. Counterclaim Defendants misrepresentations were material and actually did influence Counterclaim Plaintiffs' decision to enter into the CBSG Agreements.

172. Counterclaim Defendants knew and/or had reason to know that its misrepresentations have the tendency to deceive small businesses in need of financing and actually deceived Counterclaim Plaintiffs.

173. Counterclaim Defendants knew and/or had reason to know that its misrepresentations are likely to influence the purchasing decisions of small businesses in need of financing and actually influenced Counterclaim Plaintiffs in their decision to enter into usurious merchant agreements with Counterclaim Defendants.

174. Counterclaim Defendants knew and/or had reason to know that it was placing its false and misleading advertising in interstate commerce both through its website and other forms of social media.

175. Counterclaim Defendants, directly or indirectly, participated in the false advertisements for their collective benefit and as part of a larger conspiracy to harm Counterclaim Plaintiffs and the Class Members.

176. Counterclaim Defendants engaged in these actions to further their business activities, *i.e.*, the issuing and collection of debts.

177. In addition to their falsity and unlawfulness, Counterclaim Defendants' loans to Counterclaim Plaintiffs charged unconscionably high interest rates and were made with the knowledge that Counterclaim Plaintiffs likely would be unable to pay the excessive accrued interest, and would be forced to incur additional debt by taking out new loans to payoff existing debt with new merchant agreements issued by Counterclaim Defendants until ultimately defaulting and triggering the default fees under the merchant agreements.

178. Counterclaim Defendants' business practices and schemes offend California's established public polices, and are immoral, unethical, oppressive, unscrupulous and substantially injurious to consumers.

179. As a direct and proximate result of Counterclaim Defendants' violations of the UCL, Counterclaim Plaintiffs suffered, and continue to suffer, substantial injury to their business and/or property as they were forced to pay usurious amounts of interest and has lost, and will continue to lose, customers, profits, goodwill, and business value.

180. As a direct and proximate result of Counterclaim Defendants' violations of the UCL, Counterclaim Plaintiffs and the Class Members suffered, and continue to suffer, injury through mental anguish, harassment, and attorney's fees and costs incurred to defend against Counterclaim Defendants' baseless claims asserted against Counterclaim Plaintiffs.

SIXTH CAUSE OF ACTION
(Violation of California Bus. & Prof. Code § 17500)

181. Counterclaim Plaintiffs repeat and incorporate the allegations set forth above.

182. Counterclaim Defendants, working in concert separately and together, operate a Lending Enterprise disseminating advertising in California through Counterclaim Defendants' websites and other forms of social media.

183. California's False Advertising Law, Business and Professions Code, § 17500 *et seq*. ("FAL") prohibits false and misleading statements in advertising.

184. A violation of the False Advertising Law is a misdemeanor, punishable by fine or imprisonment.

185. Counterclaim Defendants, directly or indirectly as part of a larger fraudulent conspiracy, participated in advertising the Counterclaim Defendants' Lending Enterprise in a false and misleading manner, which included both material misrepresentations and omissions.

186. The misrepresentations and omissions included, among other things, stating that: (1) the transactions were not subject to California law; (2) Counterclaim Defendants were legally permitted to issue loans and/or merchant agreements for the disbursement of cash funds in the State of California; and (3) deceptively disclosing and/or failing to disclose the unconscionable interest rate.

187. Counterclaim Defendants knew, or by the exercise of reasonable diligence should have known, that the above statements were untrue or misleading, and/or omitted to state the truth about its merchant agreements.

188. Counterclaim Plaintiffs relied upon and were actually deceived by the misrepresentations made by Counterclaim Defendants.

189. Counterclaim Defendants' misrepresentations also are likely to deceive other California small business owners.

190. Counterclaim Defendants are directly and/or vicariously liable for the harm suffered by the Counterclaim Plaintiffs and the Class Members who were deceived by their business scheme.

191. As a direct and proximate result of each of the merchant agreements entered into with Counterclaim Defendants, Counterclaim Plaintiffs and the Class Members suffered injury by paying unlawful interest.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim Plaintiffs Sean Whalen, Yingyin Iris Chen and Flexogenix Group, Inc., demand judgment in their favor against Counterclaim Defendants, jointly and severally, and seek an order from the Court:

a) Certifying this case as a class action on behalf of the Classes defined above, appointing Counterclaim Plaintiffs as Class representatives, and appointing their attorneys as class counsel;

b) Declaring that the MCA Agreements entered into between Counterclaim Plaintiffs, the Class Members and Counterclaim Defendants constitute loan transactions in violation of New York Penal Law §190.40 (25%) and Stats. 1919, p. lxxxiii; § 2; and Stats. 1919, p. lxxxiii, § 3 and Article XV, § 1 of the California Constitution, (the higher of 10%, or 5% plus prevailing rate of the Federal Reserve Bank);

c) Ordering Counterclaim Defendants to pay Counterclaim Plaintiffs and the Class Members all principal, interest, costs and fees collected in connection with the criminally usurious loans, including prejudgment interest;

d) Granting an injunction against Counterclaim Defendants permanently enjoining them from enforcing any of their rights under the criminally usurious loans;

e) Awarding Counterclaim Plaintiffs and the Class Members direct and consequential damages;

f) Awarding Counterclaim Plaintiffs and the Class Members treble damages;

g) Awarding Counterclaim Plaintiffs and the Class Members their attorneys' fees and costs incurred in this action; and

h) Granting such other and further relief as this Court deems just and proper.

Dated: January 21, 2020

WHITE AND WILLIAMS LLP

By: _____

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Attorneys for Defendants, Counterclaim Plaintiffs and the Putative Class Members

Exhibit 14

141 N. 2nd Street Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

FACTORING AGREEMENT

Dated the 4th day of January, 2017 by and between Complete Business Solutions Group, Inc. ("CBSG" and/or "PURCHASER") and the "SELLER/MERCHANT" listed below (as "Seller/Merchant" or "the Merchant").
Business Legal Name: FLEETWOOD SERVICES LLC
D/B/A: FLEETWOOD SERVICES LLC
Type of entity (check one) ____ Corporation __X__ LLC ___ Limited Partnership __ Limited Liability Partnership ____ Sole Proprietor
Physical Address: 4311 WILLOW ST, DALLAS, TX 75226
Mailing Address: 4311 WILLOW ST, DALLAS, TX 75226
Fed ID#:

PURCHASE AND SALE OF FUTURE RECEIPTS WITH SELLER RECOURSE

Seller/Merchant hereby sells, assigns and transfers to CBSG (making CBSG the absolute owner) in consideration of the funds provided ("Purchase Price") specified below, all of Seller/Merchant's future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies from Seller/Merchant's customers' and/or other third party payers (collectively the "Receipts" defined as all payments made by cash, check, credit or debit card, electronic transfer or other form of monetary payment in the ordinary course of the merchant's business) until such time as the "Receipts Purchased Amount (RPA)" has been delivered by Seller/Merchant to CBSG.

THIS IS A FACTORING AGREEMENT WITH RECOURSE.
The Purchased Amount shall be paid to CBSG by Seller/Merchant's irrevocably authorizing only one depositing account acceptable to CBSG (the "Account") to remit the Daily Specified Amount from the Seller/Merchant's receipts until such time as CBSG receives payment in full of the Receipts Purchased Amount. In consideration of servicing the account, the Seller/Merchant hereby authorizes CBSG to ACH debit the "Specified Daily Amount" from the merchant's bank account. It is the Seller/Merchant's responsibility to provide bank statements for any and all bank accounts by the Merchant to reconcile the daily payments made against the Daily Specified Amount. Failure to provide all of their bank statements in a timely manner or missing a month shall forfeit all rights to future reconciliations. CBSG may, upon Seller/Merchant's request, adjust the amount of any payment due under this Agreement at CBSG's sole discretion and as it deems appropriate in servicing this Agreement. Seller/Merchant warrants that it will ensure that funds adequate to cover the amount to be debited by CBSG remains in the account. Seller/Merchant will be held responsible for any fees incurred by CBSG resulting from a rejected ACH attempt or an event of default. (See Appendix A). CBSG is not responsible for any overdrafts or rejected transactions in the Seller/Merchants account which may result from CBSG's scheduled ACH debit under the terms of this agreement. Notwithstanding anything to the contrary in this Agreement or any other agreement between CBSG and Seller/Merchant, upon the violation of any provision contained in Section 1.11 of the FACTORING AGREEMENT TERMS AND CONDITIONS, shall be deemed a breach of the representations and warranties contained herein. A list of all fees applicable under this FACTORING AGREEMENT is contained in Appendix A.

Purchase Price: $370,000.00 Specified Percentage: 25% Daily Specified Amount: $5,000.35 for 110 days Receipts Purchased Amount: $547,600.00
Estimated Final Receipt Date: June 13, 2017
SEE SCHEDULE A

THE TERMS, DEFINITIONS, CONDITIONS AND INFORMATION SET FORTH ON PAGES 2 THROUGH 12 HEREOF ARE HERBY INCORPORATED HEREIN AND MADE A PART OF THIS FACTORING AGREEMENT.

FOR THE SELLER/MERCHANT
By: PAM FLEETWOOD x Pam Fleetwood
(Seller/Merchant Signature)

OWNER
By: PAM FLEETWOOD x Pam Fleetwood
(Owner Signature)

FOR THE SELLER/MERCHANT
By: ROBERT FLEETWOOD x
(Seller/Merchant Signature)

OWNER
By: ROBERT FLEETWOOD x
(Owner Signature)

COMPLETE BUSINESS SOLUTIONS GROUP, INC.

By _____
Company Officer

To the extent set forth herein, each of the parties is obligated upon his, her or its execution of the Agreement to all terms of the Agreement, including the Additional Terms set forth below. Each of above-signed Merchant and Owner(s) represents that he or she is authorized to sign this Agreement for Merchant, legally binding said Merchant

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to honor the terms of this obligation and that the information provided herein and in all of CBSG documents, forms and recorded interviews is true, accurate and complete in all respects. If any such information is false or misleading, Merchant shall be deemed in material breach of all agreements and the representations and warranties contained herein between Merchant and CBSG and CBSG shall be entitled to all remedies available under law. Merchant and each of the above-signed Owners authorizes CBSG, its agents and representatives and any credit-reporting agency engaged by CBSG, to (i) investigate any references given or any other statements or data obtained from or about Merchant or any of its Owners for the purpose of this Agreement, and (ii) pull credit report at any time now or for so long as Merchant and/Owner(s) continue to have any obligation owed to CBSG.

ANY MISREPRESENTATION MADE BY SELLER/MERCHANT OR OWNER IN CONNECTION WITH THIS AGREEMENT MAY CONSTITUTE A SEPARATE CAUSE OF ACTION FOR FRAUD OR INTENTIONAL MISREPRESENTATION

FACTORING AGREEMENT TERMS AND CONDITIONS

I. TERMS OF ENROLLMENT IN PROGRAM

1.1 Electronic Fund Transfer. Upon request from PURCHASER ("hereinafter CBSG or Purchaser") Seller/Merchant ("hereinafter Merchant") shall execute such forms or agreements acceptable to PURCHASER, with Bank acceptable to PURCHASER, to obtain electronic fund transfer services. Merchant shall provide PURCHASER, and/or its authorized agent with all the information, authorization and passwords necessary for verifying Merchant's receivable, receipts and deposits into the account Merchant shall authorize PURCHASER and/or it's agent to deduct the amounts owed to PURCHASER for the Receipts as specified herein from settlement amounts which would otherwise be due to Merchant from electronic check transactions and to pay such amounts to PURCHASER by permitting PURCHASER to withdraw the SPECIFIED DAILY AMOUNT by ACH debiting of the account. The authorization shall be irrevocable without the written consent of PURCHASER.

1.2 Deposit Agreement. Seller/Merchant shall execute an agreement (the "Deposit Agreement") acceptable to PURCHASER, with a Bank acceptable to PURCHASER, to obtain electronic fund transfer services. Merchant shall provide PURCHASER and/or its authorized agent with all of the information, authorizations and passwords necessary for verifying Merchant's receivables, receipts and deposits into the account. Merchant shall authorize PURCHASER and/or it's agent to deduct the amounts owed to PURCHASER for the Receipts as specified herein from settlement amounts which would otherwise be due to Merchant from electronic check transactions and to pay such amounts to PURCHASER by permitting PURCHASER to withdraw the specified percentages by ACH debiting of the account. The authorization shall be irrevocable without the written consent of PURCHASER.

1.3 Term of Agreement. This Agreement shall have a term as set forth above. Upon the expiration of the term, this Agreement shall automatically renew for successive similar terms, provided, however, that during the renewal term(s) Merchant may terminate this Agreement upon ninety days' prior written notice (effective upon receipt) to PURCHASER. The termination of this Agreement shall not affect Merchant's responsibility to satisfy all outstanding obligations to PURCHASER at the time of termination.

1.4 Future Purchases. PURCHASER reserves the right to rescind the offer to make any purchase payments hereunder, in its sole discretion.

1.5 Financial Condition. Merchant and Guarantor(s) authorize PURCHASER and its agents to investigate their financial responsibility and history, and will provide to PURCHASER any bank or financial statements, tax returns, etc., as PURCHASER deems necessary prior to or at any time after execution of this Agreement. A photocopy of this authorization will be deemed as acceptable for release of financial information. PURCHASER is authorized to update such information and financial profiles from time to time as it deems appropriate.

1.6 Transactional History. Merchant authorizes their bank to provide PURCHASER with Merchant's banking or processing history to determine qualification or continuation in this program.

1.7 Indemnification. Merchant and Guarantor(s) jointly and severally indemnify and hold harmless Processor, its officers, directors and shareholders against all losses, damages, claims, liabilities and expenses (including reasonable attorney's fees) incurred by Processor resulting from (a) claims asserted by PURCHASER for monies owed to PURCHASER from Merchant and (b) actions taken by Processor in reliance upon information or instructions provided by PURCHASER.

1.8 No Liability. In no event will CBSG be liable for any claims asserted by Merchant under any legal theory for lost profits, lost revenues, lost business opportunities, exemplary, punitive, special, incidental, indirect or consequential damages, each of which is waived by Merchant and Guarantor(s).

1.9 Reliance on Terms. Section 1.1, 1.7, 1.8 and 2.5 of this Agreement are agreed to for the benefit of Merchant, PUNDER and Processor, and notwithstanding the fact that Processor is not a party of this Agreement, Processor may rely upon their terms and raise them as a defense in any action.

1.10 Sale of Receipts. Merchant and CBSG agree that the Purchase Price under this Agreement is in exchange for the Purchased Amount and that such Purchase Price is not intended to be, nor shall it be construed as a loan from PURCHASER to Merchant. Merchant agrees that the Purchase Price is in exchange for Future Receipts pursuant to this Agreement equals the fair market value of such Receipts. PURCHASER has purchased and shall own all the Receipts described in this Agreement up to the full Purchased Amount as the Receipts are created. Payments made to PURCHASER with respect to the full amount of the Receipts shall be conditioned upon Merchant's sale of products and services and the payment therefore by Merchant's customers in the manner provided in Section 1.1. IN NO EVENT SHALL THE AGGREGATE OF THE AMOUNTS RECEIVED BE DEEMED AS INTEREST HEREUNDER. In the event that a court determines that PURCHASER has charged or received interest hereunder, and that said amount is in excess of the highest applicable rate, the rate in effect hereunder shall automatically be reduced to the maximum rate permitted by applicable law and PURCHASER shall promptly refund to Merchant any interest received by PURCHASER in excess of the maximum lawful rate, it being intended that Merchant not pay or contract to pay, and that PURCHASER not receive or contract to receive, directly or indirectly in any manner whatsoever, interest in excess of that which may be paid by Merchant under applicable law. MERCHANT ACKNOWLEDGES THAT PENNSYLVANIA LAW APPLIES TO THE WITHIN AGREEMENT.

1.11 Power of Attorney. Merchant irrevocably appoints PURCHASER as its agent and attorney-in-fact with full authority to take any action or execute any instrument or document to settle all obligations due to PURCHASER from Processor, or in the case of a violation by Merchant of Section 1.12 or the occurrence of an Event of Default under Section 4 hereof, from Merchant, under this Agreement, including without limitation (i) to obtain and adjust insurance; (ii) to collect monies due or to become due under or in respect of any of the Collateral; (iii) to receive, endorse and collect any checks, notes, drafts, instruments, documents or chattel paper in connection with clause (i) or clause (ii) above; (iv) to sign Merchant's name on any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to PURCHASER; and (v) to file any claims or take any action or institute any proceeding which PURCHASER may deem necessary for the collection of any of the unpaid Purchased Amount from the Collateral, or otherwise to enforce its rights with respect to payment of the Purchased Amount.

1.12 Protections Against Default. Merchant represents and warrants that it will not violate Conditions (a) through (e) below and in the event of default thereunder the following Protections 1 through 8 may be invoked by PURCHASER, immediately and without notice to Merchant in the event: (a) Merchant takes any action to discourage the use of electronic check processing that are settled through Processor, or permits any event to occur that could have an adverse effect on the use, acceptance, or authorization of checks for the purchase of Merchant's services and products including but not limited to direct deposit of any checks into a bank account without scanning into the PURCHASER electronic check processor; (b) Merchant changes its arrangements with Processor in any way that is adverse to PURCHASER; (c) Merchant changes the electronic check processor through which the Receipts are settled from Processor to another electronic check processor, or permits any event to occur that could cause diversion of any of Merchant's check transactions to another processor; (d) Merchant interrupts the operation of this business (other than adverse weather, natural disasters or acts of God) transfers, moves, sells, disposes, transfers or otherwise conveys its business or assets without (i) the express prior written consent of PURCHASER, and (ii) the written agreement of any purchaser or transferee to the assumption of all of Merchant's obligations under this Agreement pursuant to documentation satisfactory to PURCHASER; or (e) Merchant takes any action, fails to take any action, or offers any incentive—economic or otherwise—the result of which will be to induce any customer or customers to pay for Merchant's services with any means other than checks that are settled through Processor. These protections are in addition to

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any other remedies available to PURCHASER at law, in equity or otherwise pursuant to this Agreement.

Protection 1. The full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement become due and payable in full immediately.

Protection 2. Upon breach of any provision OR BREACH OF REPRESENTATIONS AND WARRANTIES in paragraph 1.11, PURCHASER may enter that confession of judgment as a judgment with the Clerk of the Court and execute thereon.

Protection 3. Purchaser may enforce its security interest in the Collateral identified in Article III hereof.

Protection 4. The entire Unpaid Purchase Amount shall become immediately refundable to FUNDER from Merchant.

Protection 5. Purchaser may proceed to protect and enforce its rights and remedies by lawsuit. In any such lawsuit, in which Purchaser shall recover judgment against Merchant, Merchant shall be liable for all of PURCHASER'S costs of lawsuit, including but not limited to all reasonable attorneys' fees and court costs.

Protection 7. Merchant shall, upon execution of this Agreement, deliver to FUNDER an executed assignment of lease of Merchant's premises in favor of CBSG. Upon breach of any provision in this paragraph 1.12, PURCHASER may exercise its rights under such assignment of lease.

Protection 8. FUNDER may debit Merchant's depository accounts wherever situated by means of ACH debit or facsimile signature on a computer-generated check drawn on Merchant's bank account or otherwise.

Protection 9. In the event Merchant changes or permits the change of the Processor approved by CBSG, or adds an additional Processor, in violation of Section 1.11 above, CBSG shall have the right, without waiving any of its rights and remedies and without notice to Merchant, to notify the new or additional Processor of the sale of the Receipts hereunder and to direct such new or additional Processor to make payment directly to CBSG of all or any portion of the amount received by such Processor.

1.13 Protection of Information. Merchant and each person signing this Agreement on behalf of Merchant and/or as Owner, in respect of himself or herself personally, authorizes PURCHASER to disclose information concerning Merchant's and each Owner's credit standing (including credit bureau reports that PURCHASER obtains) and business conduct only to agents, affiliates, subsidiaries, and credit reporting bureaus. Merchant and each Owner hereby waives to the maximum extent permitted by law any claim for damages against PURCHASER or any of its affiliates relating to any (i) investigation undertaken by or on behalf of PURCHASER as permitted by this Agreement or (ii) disclosure of information as permitted by this Agreement.

1.14 Confidentiality. Merchant understands and agrees that the terms and conditions of the products and services offered by PURCHASER, including this Agreement and any other PURCHASER documentations (collectively, "Confidential Information") are proprietary and confidential information of PURCHASER. Accordingly, unless disclosure is required by law or court order, Merchant shall not disclose Confidential Information of FUNDER to any person other than an attorney, accountant, financial advisor or employee of Merchant who needs to know such information for the purpose of advising Merchant ("Advisor"), provided such Advisor uses such information solely for the purpose of advising Merchant and first agrees in writing to be bound by the terms of this Section 1.13.

1.15 Publicity. Merchant and each Owner only authorizes FUNDER to use its, his or her name in a listing of clients and in advertising and marketing materials with their express written consent.

1.16 D/B/A's. Merchant hereby acknowledges and agrees that PURCHASER may be using "doing business as" or "d/b/a" names in connection with various matters relating to the transaction between PURCHASER and Merchant, including the filing of UCC-1 financing statements and other notices or filings.

II. REPRESENTATIONS, WARRANTIES AND COVENANTS Merchant represents, warrants and covenants that as of this date and during the term of this Agreement:

2.1 Financial Condition and Financial Information. Its bank and financial statements, copies of which have been furnished to PURCHASER, and future statements which will be furnished hereafter at the discretion of PURCHASER, fairly represent the financial condition of Merchant at such dates, and since those dates there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership of Merchant. [OMITTED] Merchant has a continuing, affirmative obligation to advise FUNDER of any material adverse change in its financial condition, operation or ownership. FUNDER may request statements at any time during the performance of this Agreement and the Merchant shall provide them to FUNDER within 5 business days. Merchant's failure to do so is a material breach of this Agreement.

2.2 Governmental Approvals. Merchant is in compliance and shall comply with all laws and has valid permits, authorizations and licenses to own, operate and lease its properties and to conduct the business in which it is presently engaged.

2.3 Authorization. Merchant, and the person(s) signing this Agreement on behalf of Merchant, have full power and authority to incur and perform the obligations under this Agreement, all of which have been duly authorized.

2.4 Insurance. Merchant will maintain business-interruption insurance naming CBSG as loss payee and additional insured in amounts and against risks as are satisfactory to PURCHASER and shall provide PURCHASER proof of such insurance upon request.

2.5 Electronic Check Processing Agreement. Merchant will not change its processor, add terminals, change its financial institution or bank account(s) or take any other action that could have any adverse effect upon Merchant's obligations under this Agreement, without PURCHASER'S prior written consent. Any such change shall be a material breach of this Agreement.

2.6 Change of Name or Location. Merchant will not conduct Merchant's businesses under any name other than as disclosed to the Processor and PURCHASER or change any of its places of business.

2.7 Daily Batch Out. Merchant will batch out receipts with the Processor on a daily basis.

2.8 Estoppel Certificate. Merchant will at any time, and from time to time, upon at least one (1) day's prior notice from PURCHASER to Merchant, execute, acknowledge and deliver to PURCHASER and/or to any other person, person firm or corporation specified by PURCHASER, a statement certifying that this Agreement is unmodified and in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified and stating the modifications) and stating the dates which the Purchased Amount or any portion thereof has been repaid.

2.9 No Bankruptcy. As of the date of this Agreement, Merchant does not contemplate and has not filed any petition for bankruptcy protection under Title 11 of the United States Code and there has been no involuntary petition brought or pending against Merchant. Merchant further warrants that it does not anticipate filing any such bankruptcy petition and it does not anticipate that an involuntary petition will be filed against it. In the event that the Merchant files for bankruptcy protection or is placed under an involuntary filing Protections 2 and 3 are immediately invoked.

2.10 Working Capital Funding. Merchant shall not enter into any arrangement, agreement or commitment that relates to or involves the Receipts, whether in the form of a purchase of, a loan against, collateral against or the sale or purchase of credits against, Receipts or future check sales with any party other than PURCHASER.

2.11 Unencumbered Receipts. Merchant has good, complete 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 whatsoever or any other rights or interests that may be inconsistent with the transactions contemplated with, or adverse to the interests of PURCHASER.

2.12 Business Purpose. Merchant is a valid business in good standing under the laws of the jurisdictions in which it is organized and/or operates, and Merchant is entering into this Agreement FOR BUSINESS PURPOSES ONLY and not as a consumer for personal, family or household purposes.

2.13 Default under Other Contracts. Merchant's execution of and/or performance under this Agreement will not cause or create an event of default by Merchant under any contract with another person or entity.

III. EVENTS OF DEFAULT AND REMEDIES

3.1 Events of Default. The occurrence of any of the following events shall constitute an "Event of Default" hereunder: (a) Merchant shall violate any term or covenant in this Agreement; (b) Any representation or warranty by Merchant in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made; (c) Merchant shall admit in writing its inability to pay its debts, or shall make a general assignment for the benefit of creditors; or any proceeding shall be instituted by or against Merchant seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts; (d) the sending of notice of termination by Guarantor; (e) Merchant shall transport, move, interrupt, suspend, dissolve or terminate its business; (f) Merchant shall transfer or sell all or substantially all of its assets; (h) Merchant shall make or send notice of any intended bulk sale or transfer by Merchant; (i) Merchant shall use multiple depository accounts without the prior written consent of PURCHASER; (j) Merchant shall change its depositing account without the prior written consent of PURCHASER; (k) Merchant shall perform any act that reduces the value of any Collateral granted under this Agreement; or (l) Merchant shall default under any of the terms, covenants and conditions of any other agreement with PURCHASER.

3.2 Remedies. In case any Event of Default occurs and is not waived pursuant to Section 4.3.1 hereof, PURCHASER may proceed to protect and enforce its rights or remedies by suit in equity or by action at law, or both, whether for the specific performance of any covenant, agreement or other provision contained

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herein, or to enforce the discharge of Merchant's obligations hereunder (including the Personal Guarantee) or any other legal or equitable right or remedy. IN THE EVENT OF VIOLATION OF THE REPRESENTATIONS AND WARRANTIES BY PURCHASER, AND ONLY IN THAT EVENT, PURCHASER may also file a Complaint in Confession of Judgment pursuant to the Warrant of Attorney contained herein. All rights, powers and remedies of PURCHASER in connection with this Agreement may be exercised at any time by PURCHASER after the occurrence of an Event of Default, are cumulative and not exclusive, and shall be in addition to any other rights, powers or remedies provided by law or equity.

3.3 WARRANT OF ATTORNEY TO CONFESS JUDGMENT. UPON THE OCCURRENCE OF A VIOLATION OF THE REPRESENTATIONS AND WARRANTIES MADE HERETOFORE BY MERCHANT, MERCHANT AND GUARANTOR IRREVOCABLY AUTHORIZE AND EMPOWER ANY ATTORNEY OR ANY CLERK OF ANY COURT OF RECORD, TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MERCHANT AND GUARANTOR FOR SUCH SUMS AS ARE DUE AND/OR MAY BECOME DUE UNDER THIS MERCHANT AGREEMENT OR ANY ACCOMPANYING DOCUMENTS, WITH OR WITHOUT DECLARATION, WITH COSTS OF SUIT, WITHOUT STAY OF EXECUTION AND WITH AN AMOUNT, FOR LIEN PRIORITY PURPOSES, EQUAL TO TEN PERCENT (10%) OF THE AMOUNT OF SUCH JUDGMENT, BUT NOT LESS THAN ONE THOUSAND DOLLARS ($1,000.00), ADDED FOR ATTORNEYS' COLLECTION FEES, WITH THE ACTUAL AMOUNT OF ATTORNEY'S FEES AND COSTS TO BE DETERMINED IN ACCORDANCE WITH THE SECTION OF THIS MERCHANT AGREEMENT "ATTORNEY'S FEES AND COLLECTION COSTS." TO THE EXTENT PERMITTED BY LAW, MERCHANT AND GUARANTOR: (1) WAIVE THE RIGHT OF INQUISITION ON ANY REAL ESTATE LEVIED ON, VOLUNTARILY CONDEMNS THE SAME, AUTHORIZES THE PROTHONOTARY OR CLERK TO ENTER UPON THE WRIT OF EXECUTION THIS VOLUNTARY CONDEMNATION AND AGREES THAT ANY REAL ESTATE MAY BE SOLD ON A WRIT OF EXECUTION; (2) WAIVE AND RELEASE ALL RELIEF FROM ALL APPRAISEMENT, STAY, EXEMPTION OR APPEAL LAWS OF ANY STATE NOW IN FORCE OR HEREINAFTER ENACTED; AND (3) RELEASE ALL ERRORS IN SUCH PROCEEDINGS. IF A COPY OF THIS MERCHANT AGREEMENT, VERIFIED BY AFFIDAVIT BY OR ON BEHALF OF FUNDER SHALL HAVE BEEN FILED IN SUCH ACTION, IT SHALL NOT BE NECESSARY TO FILE THE ORIGINAL MERCHANT AGREEMENT AS A WARRANT OF ATTORNEY. THE AUTHORITY AND POWER TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MERCHANT AND GUARANTOR SHALL NOT BE EXHAUSTED BY THE INITIAL EXERCISE THEREOF AND MAY BE EXERCISED AS OFTEN AS FUNDER SHALL FIND IT NECESSARY AND DESIRABLE AND THIS BUSINESS CASH ADVANCE AND SECURITY AGREEMENT SHALL BE A SUFFICIENT WARRANT THEREFOR. FUNDER MAY CONFESS ONE OR MORE JUDGMENTS IN THE SAME OR DIFFERENT JURISDICTIONS FOR ALL OR ANY PART OF THE AMOUNTS OWING HEREUNDER, WITHOUT REGARD TO WHETHER JUDGMENT HAS THERETOFORE BEEN CONFESSED ON MORE THAN ONE OCCASION FOR THE SAME AMOUNTS. IN THE EVENT ANY JUDGMENT CONFESSED AGAINST THE MERCHANT OR GUARANTOR HEREUNDER IS STRICKEN OR OPENED UPON APPLICATION BY OR ON MERCHANT'S OR GUARANTOR'S BEHALF FOR ANY REASON, FUNDER IS HEREBY AUTHORIZED AND EMPOWERED TO AGAIN APPEAR FOR AND CONFESS JUDGMENT AGAINST MERCHANT OR GUARANTOR FOR ANY PART OR ALL OF THE AMOUNTS OWED HEREUNDER, AS PROVIDED FOR HERKIN, IF DOING SO WILL CURE ANY ERRORS AND DEFECTS IN SUCH PRIOR PROCEEDINGS.

3.31 NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE FACTORING AGREEMENT, THE GUARANTY, THE CONFESSION OF JUDGMENT, THE SECURITY AGREEMENT, OR ANY OTHER DOCUMENTS EXECUTED BY GUARANTOR IN CONNECTION WITH THE ADVANCE OF FUNDS TO SELLER, ALL PARTIES ACKNOWLEDGE THAT RECOURSE TO THE GUARANTOR AND THE GUARANTOR'S ASSETS IS PERMITTED ONLY FOR BREACHES OF THE REPRESENTATIONS AND WARRANTIES MADE BY THE SELLER IN THE FACTORING AGREEMENT.

3.4 Costs. Merchant shall pay to PURCHASER all reasonable costs associated with (a) a breach by Merchant of the Covenants in this Agreement and the enforcement thereof, and (b) the enforcement of PURCHASER'S remedies set forth in Section 4.2 above, including but not limited to court costs and attorneys' fees.

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.

IV. MISCELLANEOUS

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.

4.2 Assignment. PURCHASER may assign, transfer or sell its rights to receive the Purchased Amount or delegate its duties hereunder, either in whole or in part.

4.3 Notices. All notices, requests, consent, 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 and shall become effective only upon receipt.

4.4 Waiver Remedies. No failure on the part of PURCHASER to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right under this Agreement preclude any other or further exercise thereof or the exercise of any other right. The remedies provided hereunder are cumulative and not exclusive of any remedies provided by law or equity.

4.5 Binding Effect; Governing Law, Venue and Jurisdiction. This Agreement shall be binding upon and inure to the benefit of Merchant, PURCHASER and their respective successors and assigns, except that Merchant shall not have the right to assign its rights hereunder or any interest herein without the prior written consent of PURCHASER which consent may be withheld in PURCHASER'S sole discretion. PURCHASER reserves the rights to assign this Agreement with or without prior written notice to Merchant. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, without regards to any applicable principals of conflicts of law. Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if PURCHASER so elects, be instituted in any court sitting in Pennsylvania, (the "Acceptable Forums"). Merchant agrees that the Acceptable Forums are convenient to it, and submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue. Should such proceeding be initiated in any other forum, Merchant waives any right to oppose any motion or application made by PURCHASER to transfer such proceeding to an Acceptable Forum.

4.6 Survival of Representation, etc. All representations, warranties and covenants herein shall survive the execution and delivery of this Agreement and shall continue in full force until all obligations under this Agreement shall have been satisfied in full and this Agreement shall have terminated.

4.7 Severability in case any of the provisions in this Agreement is found to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of any other provision contained herein shall not in any way be affected or impaired.

4.8 Entire Agreement. Any provision hereof prohibited by law shall be ineffective only to the extent of such prohibition without invalidating the remaining provisions hereof. This Agreement and Security Agreement hereto embody the entire agreement between Merchant and FUNDER and supersede all prior agreements and understandings relating to the subject matter hereof.

4.9 JURY TRIAL WAIVER. THE PARTIES HERETO WAIVE TRIAL BY JURY IN ANY COURT IN ANY SUIT, ACTION OR PROCEEDING ON ANY MATTER ARISING IN CONNECTION WITH OR IN ANY WAY RELATED TO THE TRANSACTIONS OF WHICH THIS AGREEMENT IS A PART OR THE ENFORCEMENT HEREOF. THE PARTIES HERETO ACKNOWLEDGE THAT EACH MAKES THIS WAIVER KNOWINGLY, WILLINGLY AND VOLUNTARILY AND WITHOUT DURESS, AND ONLY AFTER EXTENSIVE CONSIDERATION OF THE RAMIFICATIONS OF THIS WAIVER WITH THEIR ATTORNEYS.

4.10 CLASS ACTION WAIVER. THE PARTIES HERETO WAIVE ANY RIGHT TO ASSERT ANY CLAIMS AGAINST THE OTHER PARTY AS A REPRESENTATIVE OR MEMBER IN ANY CLASS OR REPRESENTATIVE ACTION, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW AGAINST PUBLIC POLICY. TO THE EXTENT EITHER PARTY IS PERMITTED BY LAW OR COURT OF LAW TO PROCEED WITH A CLASS OR REPRESENTATIVE ACTION AGAINST THE OTHER, THE PARTIES HEREBY AGREE THAT: (1) THE PREVAILING PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEYS' FEES OR COSTS ASSOCIATED WITH PURSUING THE CLASS OR REPRESENTATIVE ACTION (NOT

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WITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT); AND (2) THE PARTY WHO INITIATES OR PARTICIPATES AS A MEMBER OF THE CLASS WILL NOT SUBMIT A CLAIM OR OTHERWISE PARTICIPATE IN ANY RECOVERY SECURED THROUGH THE CLASS OR REPRESENTATIVE ACTION.

4.11 Counterparts & Facsimile/Email Signatures. This Agreement may be executed in any number of counterparts each of which shall be deemed to be an original, all of which together shall be deemed one and the same instrument. Further, facsimile and email signatures shall be deemed to be originals for all purposes.

Seller/Merchant's Legal Name: FLEETWOOD SERVICES LLC

Guarantor's Legal Name: PAM FLEETWOOD
SS # (Guarantor):

Guarantor's Legal Name: ROBERT FLEETWOOD
SS # (Guarantor):

Physical Address: 4311 WILLOW ST, DALLAS, TX 75226

FED ID # (Merchant):

SECURITY AGREEMENT

Security Interest. To secure SELLER/MERCHANTS'S performance obligations to PURCHASER under the "Factoring Agreement", SELLER/MERCHANT hereby grants to PURCHASER a security interest in (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as these terms are defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by SELLER/MERCHANT; and (b) all proceeds, as that term is defined in Article 9 of the UCC (a and b collectively, the "Collateral")

Cross-Collateral. To secure Guarantor's payment and performance obligations to PURCHASER under this Security Agreement and Guaranty (the "Agreement"), Guarantor hereby grants PURCHASER a security interest in __ (the "Additional Collateral"). Guarantor understands that PURCHASER will have a security interest in the aforesaid Additional Collateral upon execution of this Agreement.

SELLER/MERCHANT and Guarantor each acknowledge and agree that any security interest granted to PURCHASER under any other agreement between SELLER/MERCHANT or Guarantor and PURCHASER (the "Cross-Collateral") will secure the obligations hereunder and under the FACTORING Agreement.

SELLER/MERCHANT and Guarantor each agrees to execute any documents or take any action in connection with this Agreement as PURCHASER deems necessary to perfect or maintain PURCHASER'S first priority security interest in the Collateral, the Additional Collateral and the Cross-Collateral, including the execution of any account control agreements. SELLER/MERCHANT and Guarantor each hereby authorizes PURCHASER to file any financing statements deemed necessary by PURCHASER to perfect or maintain FUNDER's security interest, which financing statement may contain notification that SELLER/MERCHANT and Guarantor have granted a negative pledge to PURCHASER with respect to the Collateral, the Additional Collateral and the Cross-Collateral, and that any subsequent lien or may be tortuously interfering with FUNDER's rights. SELLER/MERCHANT and Guarantor shall be liable for and PURCHASER may charge and collect all costs and expenses, including but not limited to attorney's fees, which may be incurred by FUNDER in protecting, preserving and enforcing PURCHASER'S security interest and rights.

Negative Pledge. SELLER/MERCHANT and Guarantor each agrees not to create, incur, assume, or permit to exist, directly or indirectly, any lien on or with respect to any of the Collateral, the Additional Collateral or the Cross-Collateral, as applicable.

Consent to Enter Premises and Assign Lease. PURCHASER shall have the right to cure SELLER/MERCHANT default in the payment of rent on the following terms. In the event SELLER/MERCHANT is served with papers in an action against SELLER/MERCHANT for nonpayment of rent or for summary eviction, PURCHASER may exercise its rights and remedies under the Assignment of Lease. SELLER/MERCHANT also agrees that FUNDER may enter into an agreement with SELLER/MERCHANT landlord giving PURCHASER the right: (a) to enter SELLER/MERCHANT'S premises and to take possession of the fixtures and equipment therein for the purpose of protecting and preserving same; and (b) to assign SELLER/MERCHANT'S lease to another qualified SELLER/MERCHANT capable of operating a business comparable to SELLER/MERCHANT at such premises.

Remedies. Upon any Event of Default, PURCHASER may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce, or satisfy any obligations then owing, whether by acceleration or otherwise.

SELLER/MERCHANT
BY: PAM FLEETWOOD

(Signature)

SELLER/MERCHANT
BY: ROBERT FLEETWOOD

(Signature)

Merchant Initials _____ *Merchant Initials* _____

141 N. 2nd Street, Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

GUARANTY

Personal Guaranty of Performance. The undersigned Guarantor(s) hereby guarantees to PURCHASER, SELLER/MERCHANT'S performance of all of the representations, and warranties made by SELLER/MERCHANT in this Agreement and the Factoring Agreement, as each agreement may be renewed, amended, extended or otherwise modified (the "Guaranteed Obligations"). Guarantor's obligations are due at the time of any breach by Merchant of any representation or warranty, or covenant made by Merchant in this Agreement and the Merchant Agreement.

Guarantor Waivers. In the event that SELLER/MERCHANT violates its representations and warranties under the FACTORING AGREEMENT, PURCHASER may enforce its rights under this Agreement without first seeking to obtain payment from Merchant, any other guarantor, or any Collateral, Additional Collateral or Cross-Collateral PURCHASER may hold pursuant to this Agreement or any other guaranty.

PURCHASER does not have to notify Guarantor of any of the following events and Guarantor will not be released from its obligations under this Agreement if it is not notified of: (i) SELLER/MERCHANT'S violation of the representations and warranties of the FACTORING AGREEMENT or any renewal, extension or other modification of the FACTORING AGREEMENT. In addition, PURCHASER may take any of the following actions without releasing Guarantor from any of its obligations under this Agreement : (i) renew, extend or otherwise modify the FACTORING AGREEMENT or SELLER/MERCHANT'S other obligations to PURCHASER; (ii) release SELLER/MERCHANT from its obligations to PURCHASER; (iii) sell, release, impair, waive or otherwise execute upon any collateral securing the Guaranteed Obligations ; and (iv) foreclose on any collateral securing the Guaranteed Obligations or any other guarantee of the Guaranteed Obligations in a manner that impairs or precludes the right of Guarantor to obtain reimbursement for payment under this Agreement. Until all obligations are fulfilled under the FACTORING AGREEMENT and SELLER/MERCHANT'S other obligations to PURCHASER under the FACTORING AGREEMENT and this Agreement are paid in full, Guarantor shall not seek reimbursement from Merchant or any other guarantor for any amounts paid by it under this Agreement. Guarantor permanently waives and shall not seek to exercise any of the following rights that it may have against SELLER/MERCHANT, any other guarantor, or any collateral provided by SELLER/MERCHANT or any other guarantor, for any amounts paid by it, or acts performed by it, under this Agreement: (i) subrogation; (ii) reimbursement; (iii) performance; (iv) indemnification; or (v) contribution. In the event that PURCHASER must return any amount paid by SELLER/MERCHANT or any other guarantor of the Guaranteed Obligations because that person has become subject to a proceeding under the United States Bankruptcy Code or any similar law, Guarantor's obligations under this Agreement shall include that amount. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE FACTORING AGREEMENT, THE GUARANTY, THE CONFESSION OF JUDGMENT, THE SECURITY AGREEMENT, OR ANY OTHER DOCUMENTS EXECUTED BY GUARANTOR IN CONNECTION WITH THE ADVANCE OF FUNDS TO SELLER, ALL PARTIES ACKNOWLEDGE THAT RECOURSE TO THE GUARANTOR AND THE GUARANTOR'S ASSETS IS PERMITTED ONLY FOR BREACHES OF THE REPRESENTATIONS AND WARRANTIES MADE BY THE SELLER IN THE FACTORING AGREEMENT.

GUARANTOR ACKNOWLEDGEMENT. Guarantor acknowledges that: (i) He/She understands the seriousness of the provisions of this Agreement; (ii) He/She has had a full opportunity to consult with counsel of his/her choice; and (iii) He/She has consulted with counsel of its choice or has decided not to avail himself/herself of that opportunity.

JOINT AND SEVERAL LIABILITY. The obligations hereunder of the persons or entities constituting Guarantor under this Agreement are joint and several.

SELLER/MERCHANT
By: PAM FLEETWOOD

Pam Fleetwood
(Signature)

EIN#

Driver's License Number: /

OWNER/GUARANTOR
BY: PAM FLEETWOOD

Pam Fleetwood
(Signature)

SS

Driver's License Number:

SELLER/MERCHANT
By: ROBERT FLEETWOOD

(Signature)

EIN#

Driver's License Number

OWNER/GUARANTOR
BY: PAM FLEETWOOD

Pam Fleetwood
(Signature)

SS#

Driver's License Number:

THE TERMS, DEFINITIONS, CONDITIONS AND INFORMATION SET FORTH IN THE "MERCHANT AGREEMENT", INCLUDING THE "TERMS AND CONDITIONS", ARE HEREBY INCORPORATED IN AND MADE A PART OF THIS SECURITY AGREEMENT AND GUARANTY.

CAPITALIZED TERMS NOT DEFINED IN THIS SECURITY AGREEMENT AND GUARANTY, SHALL HAVE THE MEANING SET FORTH IN THE MERCHANT AGREEMENT, INCLUDING THE TERMS AND CONDITIONS.

Merchant Initials PF *Merchant Initials* PF

141 N. 2nd Street Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

DISCLOSURE FOR CONFESSION OF JUDGMENT

AFFIANT: PAM FLEETWOOD
ROBERT FLEETWOOD

OBLIGEE: Complete Business Solutions Group, Inc. d/b/a Par Funding

The undersigned has executed, and/or is executing, on even date herewith, one or more of the following instruments under which the undersigned is obligated to repay monies to Obligee:

I. Factoring Agreement dated January 4, 2017; and

A. THE UNDERSIGNED ACKNOWLEDGES AND AGREES THAT THE ABOVE DOCUMENTS CONTAIN PROVISIONS UNDER WHICH OBLIGEE MAY ENTER JUDGMENT BY CONFESSION AGAINST THE UNDERSIGNED. BEING FULLY AWARE OF THE UNDERSIGNED'S RIGHTS TO PRIOR NOTICE AND A HEARING ON THE VALIDITY OF ANY JUDGMENT OR OTHER CLAIMS THAT MAY BE ASSERTED AGAINST THE UNDERSIGNED BY OBLIGEE THEREUNDER BEFORE JUDGMENT IS ENTERED, THE UNDERSIGNED HEREBY FREELY, KNOWINGLY, AND INTELLIGENTLY WAIVES THESE RIGHTS AND EXPRESSLY AGREES AND CONSENTS TO OBLIGEE'S ENTERING JUDGMENT AGAINST THE UNDERSIGNED BY CONFESSION PURSUANT TO THE TERMS THEREOF.

B. THE UNDERSIGNED ALSO ACKNOWLEDGES AND AGREES THAT THE ABOVE DOCUMENTS CONTAIN PROVISIONS UNDER WHICH OBLIGEE MAY, AFTER ENTRY OF JUDGMENT AND WITHOUT EITHER NOTICE OR A HEARING, FORECLOSE UPON, ATTACH, LEVY, OR OTHERWISE SEIZE PROPERTY OR PROCEED AGAINST THE INTERESTS OF THE UNDERSIGNED IN PROPERTY (REAL OR PERSONAL) IN FULL OR PARTIAL PAYMENT OR SATISFACTION OF THE JUDGMENT OR JUDGMENTS. BEING FULLY AWARE OF THE UNDERSIGNED'S RIGHTS AFTER JUDGMENT IS ENTERED (INCLUDING THE RIGHT TO MOVE TO OPEN OR STRIKE THE JUDGMENT OR JUDGMENTS), THE UNDERSIGNED HEREBY FREELY, KNOWINGLY AND INTELLIGENTLY WAIVES THESE RIGHTS AND EXPRESSLY AGREES AND CONSENTS TO OBLIGEE'S TAKING SUCH ACTIONS AS MAY BE PERMITTED UNDER APPLICABLE STATE AND FEDERAL LAW WITHOUT PRIOR NOTICE TO THE UNDERSIGNED.

C. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE FACTORING AGREEMENT, THE GUARANTY, THE CONFESSION OF JUDGMENT, THE SECURITY AGREEMENT, OR ANY OTHER DOCUMENTS EXECUTED BY GUARANTOR IN CONNECTION WITH THE ADVANCE OF FUNDS TO SELLER, ALL PARTIES ACKNOWLEDGE THAT RECOURSE TO THE GUARANTOR AND THE GUARANTOR'S ASSETS IS PERMITTED ONLY FOR BREACHES OF THE REPRESENTATIONS AND WARRANTIES MADE BY THE SELLER IN THE FACTORING AGREEMENT.

D. The undersigned hereby certifies that the financial accommodations being provided by the Obligee are for a business purpose, and not for personal, family or household use.

E. The statements made in this Disclosure for Confession of Judgment are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

SELLER/MERCHANT
By: PAM FLEETWOOD

Pam Fleetwood
(Signature)

EIN#

Driver's License Number:

OWNER/GUARANTOR
BY: PAM FLEETWOOD

Pam Fleetwood
(Signature)

SS#

Driver's License Number:

SELLER/MERCHANT
By: ROBERT FLEETWOOD

(Signature)

EIN#

Driver's License Number:

OWNER/GUARANTOR
BY: PAM FLEETWOOD

Pam Fleetwood
(Signature)

SS#

Driver's License Number:

Merchant Initials _____ Merchant Initials _____

141 N. 2nd Street Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

APPENDIX A: THE FEE STRUCTURE

1. Origination Fee: $295.00 to cover underwriting and related expenses
2. ACH Program Fee - $399.00 – The ACH program is labor intensive and is not an automated process, requiring us to charge this fee to cover related costs;
3. NSF Fee - $75.00 (each) - Up to FOUR TIMES ONLY before a default is declared;
4. Rejected ACH - $100.00 – If a merchant directs the bank to reject our debit ACH;
5. Bank Change Fee - $50.00 – If a merchant requires a change of account to be debited requiring us to adjust our system;
6. Blocked Account - $250.00 – If a merchant blocks CBSG's ACH debit of the Account, bounces more than 4 debits of the Account or simultaneously uses multiple bank accounts or credit-card processors to process its receipts;
7. Default Fee - $5,000.00 default fee – If a merchant changes bank accounts or switches to another credit card processor without CBSG's consent, or commits another default pursuant to the Agreement;
8. Collections Expense – In the event of default, Seller / Merchant shall be responsible for all reasonable costs of collections, including, but not limited to, counsel fees, filing fees and any other fees which may be incurred.
9. Miscellaneous Service Fees – Merchant shall pay certain fees for services related to the origination and maintenance of accounts. Each Merchant shall receive their funding electronically to their designated bank account and will be charged $30.00 for a Fed Wire. The current charge for the underwriting, UCC, ACH Program and origination of each Merchant will be paid from the funded amount. Merchant will be charged $100.00 for every additional change of their operating bank account once they are active with CBSG. Additional copies of prior monthly statements will incur a fee of $10.00 each.
10. Risk Assessment Fee - $249.00
11. UCC Fee – $195.00

Merchant Signature: Pam Fleetwood Name: Pam Fleetwood [redacted]

Guarantor Signature: Pam Fleetwood Name: Pam Fleetwood [redacted]

Merchant Signature: Name: Robert Fleetwood [redacted]

Guarantor Signature: Name: Robert Fleetwood [redacted]

4828-2033-7954, v. 1

Merchant Initials RF Merchant Initials R.F

141 N. 2nd Street Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

SCHEDULE A
ADDENDUM TO MCA CONSOLIDATION PROGRAM AGREEMENT DATED JANUARY 4, 2017
SCHEDULED PURCHASES OF FUTURE RECEIVABLES

Your Company, FLEETWOOD SERVICES LLC (hereinafter referred to as "Company" or "Client"), and Pam and Robert Fleetwood (hereinafter referred to as "Guarantor") are entering into this Agreement with Complete Business Solutions Group (hereinafter referred to as "CBSG") wherein your Company is obtaining funding through the sale of its future receivables to CBSG. Company will collect the payments on these receivables and allow CBSG to retrieve them through ACH payments from the client's designated bank account. This MCA Consolidation Program sets a schedule for purchases of Company's accounts receivable. Participation in this Program requires that clients adhere to the obligations set forth in this document, which are required in addition to those spelled out in the attached Factoring Agreement. Below are the terms regarding CBSG's purchase of Company's receivables

Term Outline:
The Purchase Price for your receivables under this Program (Amount paid to Company): $370,000.00

Amount of Purchased Receivables during the terms of this Agreement: $547,600.00;

Specified Percentage: 25% (the ratio of Receivables Purchased for the amount of purchase price).

Term of MCA Consolidation Program: 110 days;

Daily ACH retrieved from your bank account by CBSG (paid each banking day): $5,000.25;
*First week funding will be less any applicable fees

Payment/Purchase Schedule:
The aforementioned Purchase of your company's receivable will take place in WEEKLY installments for 9 weeks.
Week 1 – CBSG will transmit the purchase price of $133,335.00* to your account;
Weeks 2-8 CBSG will transmit the purchase price of $33,335.00 to your account;
Week 9 (Final Week) CBSG will transmit the purchase price of $3,320.00 to your account.

Buyout Option for Receivables: If during the term of this Agreement, client decides to purchase CBSG's interest in Client's receivables, it can do so on a discounted basis (thus saving money). The terms for each buyout option are unique in that they may simply allow for an accelerated payment schedule or may consist of a lump sum buyout for purchased receivables. You are urged to contact your CBSG representative and discuss the terms of any potential buyout. You could preserve a lot of capital if you do.

Covenants of Agreement:
Pursuant to our agreement, Guarantor is authorized to bind Company and Guarantor to the terms of this Agreement. It is agreed that Company shall not enter into any Merchant Cash Advances, arrangement, agreement or commitment that encumbers, liens, relates to or involves Company Receivables, whether in the form of a purchase of, a loan against, collateral against or the sale or purchase of credits against, Receivables) or future check sales with any party other than Complete Business Solutions Group (CBSG).
It is hereby agreed and understood that the terms of this MCA Consolidation Program include that the following obligations:
_There will be no negative balance at any time during the term of this Program;

Merchant Initials _____ *Merchant Initials* _____

141 N. 2nd Street Philadelphia, Pennsylvania 19106
Phone: 215-922-2636 Fax: 888-803-4886

_There will be no return payments for any existing advances;
_There will be no return payments for any of the consolidated funding;
_There shall be NO further additional fundings (Sales of Receivables) without the explicit written consent of CBSG.
_There shall be no blocking or prevention of access to bank login or decision logic affecting CBSG;
_There shall be no modification or amendment of payments on any advance

Default

Should there be a failure to meet any of the above-given terms of this MCA Consolidation Program, it is understood that (at CBSG's sole discretion) Company can be in default and out of the MCA Consolidation Program. The consequences of being pushed out of the MCA Consolidation Program are as follows:

1) Automatically, additional purchases of receivables as scheduled under the Agreement shall cease; and 2) Company shall be obligated to allow CBSG to retrieve all receivables purchased on an before the declaration of default on a uniform weekly draws for a 120 day term. The same specified percentage will apply to this amount.
2) Should CBSG determines that Company's breach of its covenant not to take further MCA obligations is severe enough to call into question the likelihood or viability of CBSG's ability to retrieve the receivables it had already purchased on the date of default, CBSG reserves the right to immediately pursue legal action against Company, prior to the end of the term for the original MCA Consolidation Program in order to protect the value of its purchased receivables.

I hereby agree that I will not take out another Merchant Cash Advance without explicit written consent of CBSG. Terms of the original agreement must be met or additional funding becomes forfeit at the discretion of CBSG. Other terms include, Merchant/Seller cannot stack additional funding, must have successful daily payback each day or additional funding may be determined as forfeited per the terms of the original agreement. If all terms of the Factoring Agreement are not met this will be a default and all funding will stop, see terms of default in Factoring Agreement.

Pam Fleetwood
Merchant/Seller/Owner
FLEETWOOD SERVICES LLC

Pam Fleetwood
Guarantor
PAM FLEETWOOD

Guarantor
ROBERT FLEETWOOD

Merchant Initials PF *Merchant Initials* R.F.

Exhibit 15

LIST OF CASES

a) *Complete Business Solutions Group, Inc., Broadway Advance, LLC and Fast Advance Funding, v. Radiant Images, Inc. d/b/a HD Camera Rentals and Giania Wolfe,* United States District Court for the Eastern District of Pennsylvania, Case No. 18-cv-04013 (KSM)

b) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Tourmappers North America, LLC d/b/a Tourmappers North America and Julie Paula Katz,* Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 200401028.

c) *Tourmappers North America, LLC d/b/a Tourmappers North America LLC and Julie Katz v. Complete Business Solutions Group Inc. d/b/a Par Funding,* JAMS Arbitration Case No. 01-20-0005-3591.

d) *Fleetwood Services, LLC, Robert Fleetwood and Pamela Fleetwood Complete Business Solutions Group, Inc., d/b/a/ Par Funding; Prime Time Funding LLC and John and Jane Doe Investors*, United states District Court for the Eastern District of Pennsylvania, Case No. 18-cv-00268 (JS).

e) *Complete Business Solutions Group, Inc., by and through its Court-Appointed Receiver Ryan K. Stumphauzer v. Gex Management, Inc. and Carl Dorvil*, United States District Court for the Eastern District of Pennsylvania, Case No. 22-cv-4043.

f) *HMC Incorporated and Kara DiPietro v. Complete Business Group, Inc. d/b/a Par Funding and Fast Advance Funding, Inc.*, United States District Court, Eastern District of Pennsylvania, Case No., 19-cv-3285.

g) *Complete Business Solutions Group Inc. v. MH Marketing Solutions Group, Inc. and Michael Heller*, Philadelphia Court of Common Pleas, Case No. 190606813.

h) *Complete Business Solutions Group, Inc. v Sunrooms, Inc. and Michael Foti*, Philadelphia Court of Common Pleas, Case No. 190606813.

i) *Petropangea, Inc., Johnny Harrison; Volunteer Pharmacy, Inc. and Toby C. Frost v. Complete Business Solutions Group, LLC; Fast Advance Funding LLC; MCA Capital Fund I, LLC; MCA National Fund, LLC, Recruiting and Marketing Resources, Inc. and Full Spectrum Processing, Inc.*, Court of Common Pleas: Philadelphia County, Case No. 200202013.

j) *Complete Business Solutions Group, Inc. d/b/a Par Funding v. Petropangea and Johnny Harrison*, Pennsylvania Court of Common Pleas: Philadelphia County, Case No. 1906067.

k) *Complete Business Solutions Group, Inc. v. Sean Whalen and Yingyin Iris Chen*, United States District Court, Eastern District of Pennsylvania, Case No. 19-cv-06181.

Exhibit 16

Complete Bus. Solutions Group, Inc. v. NG Consulting Servs., LLC

Common Pleas Court of Philadelphia County, First Judicial District of Pennsylvania, Civil Trial Division

February 15, 2017, Decided; February 16, 2017, Filed

Case No. 03192 Commerce Program

Reporter
2017 Phila. Ct. Com. Pl. LEXIS 14 *

COMPLETE BUSINESS SOLUTIONS GROUP, INC., Plaintiff v. NG CONSULTING SERVICES, LLC, NEXGEN MEDICAL SOLUTIONS, LLC, NEXGEN PROPERTY SOLUTIONS, LLC and ANDRES GONZALES, Defendants

Core Terms

confession of judgment, representations, warranties, Merchant, confession, stricken

Case Summary

Overview
HOLDINGS: [1]-A borrower and guarantor's petition to strike a confession of judgment had merit, as the lender's complaint-in-confession-of-judgment did not aver that the borrowers violated certain representations and warranties, which was required under the warrant-of-attorney clause within the loan/factoring agreement of the parties.

Outcome
Petition to strike granted; judgment by confession stricken.

LexisNexis® Headnotes

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Vacation of Judgments

HN1[] **Grounds for Relief from Final Judgment, Order or Proceeding, Vacation of Judgments**

In Pennsylvania, a petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.

Civil Procedure > Judgments > Pretrial Judgments > Judgments by Confession

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Vacation of Judgments

HN2[] **Pretrial Judgments, Judgments by Confession**

In Pennsylvania, a warrant of attorney to confess judgment constitutes a grant of authority by one contracting party to the other to enter that which results ordinarily only after a trial of the issue between the parties. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses.

Civil Procedure > Judgments > Pretrial Judgments > Judgments by Confession

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Vacation of

Judgments

HN3[] **Pretrial Judgments, Judgments by Confession**

Entry of a valid judgment by confession must be made in rigid adherence to the provisions of the warrant of attorney; otherwise, such judgment will be stricken. A warrant to confess judgment will be strictly construed, with any ambiguities resolved against the party in whose favor the warrant is given.

Judges: [*1] RAMY I. DJERASSI, J.

Opinion by: RAMY I. DJERASSI

Opinion

ORDER

AND NOW, this 15 day of February, 2017, upon consideration of the petition to strike or open confession of judgment and for a stay of execution, the response in opposition, and the parties' respective *memoranda* of law, it is **ORDERED** that the petition to strike is **GRANTED** and **JUDGMENT BY CONFESSION IS STRICKEN**.

BY THE COURT,

/s/ Ramy I. Djerassi

RAMY I. DJERASSI, J.

***Memorandum* Opinion**

The petition to strike judgment by confession requires this Court to determine whether plaintiffs complaint-in-confession-of-judgment avers that defendants violated certain representations and warranties, as required under the *cognovit* clause within the parties' agreement. For the reason below, the Court finds that the complaint-in-confession-of-judgment fails to aver such violations; therefore, the petition to strike judgment by confession is granted and the judgment is stricken.

Background

Plaintiff is Complete Business Solutions Group, Inc., a Philadelphia, Pennsylvania-based corporation *(hereinafter*, "Lender"). Corporate defendants are NG Consulting Services, LLC, Nexgen Medical Solutions, LLC and Nexgen Property Solutions, LLC, all of which are based in the State of **[*2]** Texas ("the Borrowers"). Individual defendant is Andres Gonzales ("Gonzales" or "Guarantor"). Whenever required, Borrowers and Gonzales/Guarantor will be collectively identified hereinafter as "Defendants."

On May 31, 2016, Lender and Borrowers entered into a "Factoring Agreement."[1] Individual defendant Gonzales personally guaranteed to Lender the "performance of all the representations, and warranties made by [Borrowers] in ... the Factoring Agreement...."[2]

Pursuant to the terms of the Factoring Agreement, Lender loaned to Borrowers $150,000.00; simultaneously, Borrowers agreed to repay Lender the amount of $217,500.00 in "Specified Daily Amounts " of $1,686.05, over a period of 129 days.[3] The loan document was drafted in the guise of a sale: it identified Borrowers as the "Seller/Merchant," Lender as a "Purchaser," and the transaction itself as a "Purchase and Sale of Future Receipts...."[4] Pursuant to the loan, Lender was empowered to directly tap into the bank account of Borrowers and withdraw the Specified Daily Amounts until satisfaction of the entire obligation.[5]

The loan/Factoring Agreement contained certain provisions of relevance to the instant petition to strike the confessed **[*3]** judgment. The provisions specifically stated:

III. **EVENTS OF DEFAULT AND REMEDIES**.

* * *

3.2 **Remedies**.
* * *

IN THE EVENT OF VIOLATIONS OF THE REPRESENTATIONS AND WARRANTIES BY PURCHASER *[Sid* AND ONLY IN THAT EVENT,

---

[1] Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment.

[2] Guaranty, Exhibit A to the complaint-in-confession-of-judgment.

[3] Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 1.

[4] Id.

[5] Id.

> PURCHASER *[sic]* may also file a Complaint in Confession of Judgment pursuant to the Warrant of Attorney contained herein....
>
> 3.3 **WARRANT OF ATTORNEY TO CONFESS JUDGMENT. UPON THE OCCURRENCE OF A VIOLATION OF THE REPRESENTATIONS AND WARRANTIES MADE HERETOFORE BY MERCHANT [BORROWER], MERCHANT AND GUARANTOR IRREVOCABLY AUTHORIZE AND EMPOWER ANY ATTORNEY OR ANY CLERK OF ANY COURT OR RECORD, TO APPEAR FOR AND CONFESS JUDGMENT AGAINST MERCHANT AND GUARANTOR FOR SUCH SUMS AS ARE DUE AND/OR MAY BECOME DUE UNDER THIS MERCHANT AGREEMENT OR ANY ACCOMPANYING DOCUMENTS**....[6]

On October 12, 2016, Lender confessed judgment against Borrowers and Guarantor for their failure "to tender payments" to Lender "in accordance with the ... written obligations."[7] The amount confessed by Lender is $171,532.45, which includes a principal of $161,032.45, default and finance fees of $500.00, and counsel fees of $10,000.00.[8]

On January 17, 2017, Defendants filed a petition to strike or open the confession of **[*4]** judgment and for a stay of execution; on February 6, 2017, Lender filed its answer in opposition. The parties briefed their respective positions and the petition is now ripe for a resolution. The Court shall focus on the petition to strike the confessed judgment, and will not address the issues presented in the petition to open.

DISCUSSION

HN1[] In Pennsylvania—

> [a] petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record....
> * * *
> An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered.[9]

In the petition to strike, Defendants note that under the express language of the warrant-of-attorney within the Factoring Agreement, Lender may confess judgment only "upon the occurrence of a **violation of the representations and warranties** made ... by Merchant [i.e., Borrowers].[10] Next, Defendants note that in the complaint-in-confession-of-judgment, Lender avers as follows:

> **[a]s a result of the Defendants' failure to cure the default(s)** on their obligations to ... **[*5]** [Lender] Defendants are presently liable to ... [Lender]....[11]

Based on the foregoing language, Defendants conclude that the confessed judgment must be stricken because—

> the Complaint fails to allege a violation of representations and warranties ... [and therefore] there are irregularities and fatal defects appearing on the face of the record.[12]

In the response in opposition, Lender asserts that "Defendants make much to do over a scriveners *[sic]* error which misstates the Factoring Agreement...."[13] Lender also concedes that "[t]his is the only mistake" and concludes that such an error "poses no material difference to the [warrant-of-attorney] clause."[14] The Court rejects Lender's argument.

HN2[] In Pennsylvania—

> [a] warrant of attorney [to confess judgment] constitutes a grant of authority by one contracting party to the other ... to enter that which results ordinarily only after a trial of the issue between the parties....[15]
>
> In considering the merits of a petition to strike, the court will be limited to a review of only the record as

---

[6] Id., pp. 3-4.

[7] Complaint-in-confession-of-judgment, ¶ 11.

[8] Id., ¶ 14.

[9] *Neducsin v. Caplan, 2015 PA Super 158, 121 A.3d 498, 504 (Pa. Super. 2015)*, appeal denied, ***131 A.3d 492 (Pa. 2016)***.

[10] Petition to strike, ¶ 14 (emphasis supplied), (quoting the Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 3, ¶ 3.3).

[11] Id., ¶ 28 (emphasis supplied).

[12] Id., ¶ 37.

[13] Response in opposition, ¶ 9.

[14] Id.

[15] *TCPF Ltd. P'ship v. Skatell, 2009 PA Super 112, 976 A.2d 571, 575 n. 5, (Pa. Super. 2009)*.

filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment **[*6]** clauses....[16]

HN3[] Entry of a valid judgment by confession must be made in rigid adherence to the provisions of the warrant of attorney; otherwise, such judgment will be stricken. **A warrant to confess judgment ... will be strictly construed**, with any ambiguities resolved against the party in whose favor the warrant is given.[17]

In this case, the warrant-of-attorney provision within the Factoring Agreement exclusively authorizes Lender to confess judgment against Defendants "upon the occurrence of a violation of the representations and warranties made ... by [Borrower]."[18] Notwithstanding this clear requirement, the complaint-in-confession-of-judgment fails to aver that Defendants violated their representations and warranties; rather, the complaint avers that "[a]s a result of Defendants' failure to cure the default(s) on their obligations to ... [Lender], Defendants are presently liable to Plaintiff...."[19] After a careful reading of the complaint and the warrant-of-attorney clause within the Factoring Agreement, this Court finds that the record is fatally flawed and rules that the petition to strike is granted and the confession-of-judgment is stricken.

BY THE COURT,

/s/ Ramy I. Djerassi

RAMY I. DJERASSI, J.

End of Document

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[16] *Hazer v. Zabala, 2011 PA Super 168, 26 A.3d 1166, 1169 (Pa. Super. 2011)*.

[17] *Dime Bank v. Andrews, 2015 PA Super 114, 115 A.3d 358, 371 (Pa. Super. 2015)*.

[18] Factoring Agreement, Exhibit A to the complaint-in-confession-of-judgment, p. 3 at ¶ 3.3.

[19] Complaint-in-confession-of-judgment, ¶ 13. To be clear, the complaint-in-confession-of-judgment is stricken because Lender failed to allege that Defendants violated any of the enumerated "REPRESENTATIONS, WARRANTIES AND **[*7]** COVENANTS" described in the Factoring Agreement at paragraph II.

Exhibit 17

HI Bar Capital LLC v. Parkway Dental Servs., LLC

Supreme Court of New York, Kings County

August 25, 2022, Decided

Index No. 533245/2021

Reporter
2022 N.Y. Misc. LEXIS 5814 *; 2022 NY Slip Op 32934(U) **

[1]** HI BAR CAPITAL LLC D/B/A KINGDOM KAPITAL, Plaintiff, - against - PARKWAY DENTAL SERVICES, LLC, and CHRISTOPHER COOLEY, Defendants,

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

merchant, reconciliation, default, receivables, funder, cash advance, Remittance, notice, loans, mailing, good faith estimate, entitlements, repayment, receipts, funds

Judges: **[*1]** PRESENT: HON. LEON RUCHELSMAN, JSC.

Opinion by: LEON RUCHELSMAN

Opinion

Decision and order

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to reargue a decision and Order dated March 25, 2022. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on October U, 2021 the plaintiff a merchant cash advance funding provider entered into a contract with defendants located in Florida, Pursuant to the agreement the plaintiff purchased $472,500 of defendants future receivable for $50,000, The parties further agreed that the plaintiff would be able to obtain a daily amount of $4,725 until the amount of $472,500 was fully paid. Moreover, the defendants executed a guaranty and a security agreement. The defendants stopped remittances it December 2021 and still owed $292,950. An action was commenced on. December 29, 2021 which the defendants did not answer. The plaintiff then obtained a default judgement, Which was entered on February 4, 2022. The court denied the **[**2]** defendants motion seeking to vacate, the default on the grounds there was no service of process **[*2]** and on the grounds: the agreement was really a usurious loan, 'The defendants now move seeking to reargue that determination.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some ether reason mistakenly arrived at in its earlier decision (*Deutsche Bank National Trust Co., v. Russo, 170 A.D.3d 952, 96 NYS2d 617 [2d Dept., 2019]*).

As recorded in the prior order and recently reiterated in *Principis Capital LLC v. I Do, Inc., 201 AD3d 752, 160 NYS3d 325 [2d Dept., 2022]* "the court must examine. Whether the plaintiff is absolutely entitled to repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. Usually, courts weigh three factors when determining whether repayment is absolute or contingent (1) whether there is a reconciliation provision in the agreement (2) whether the agreement has a finite term; and (3) whether there any recourse should the merchant declare bankruptcy" (*id*).

Preliminarily, the recent Court 161 Appeals decision in *Adar Bays, LLC v, Genesys ID Inc., 37 NY3d 320, 157 NYS3d 800, 179 N.E.3d 612 [2021]* did not fundamentally altar the analysis whether usurious loans **[**3]** exist in the merchant cash advance context. In that case the plaintiff Adar Bays loaned money to Genesys and had the option of seeking Genesys stock

instead of a return of the amount loaned plus interest. The court considered **[*3]** whether conversion option that permits a lender to convert outstanding balance to shares of stock at a fixed discount should be treated as interest for purposes of a usury determination' and concluded that "in assessing whether the interest on a given loan has exceeded the statutory usury cap, the value of the floating-price convertible options should, be included.' in the determination of interest" (id) The Court explained that usury only applied to loans and that equity purchases and joint ventures are not loans and hence not subject to usury' The court emphasized a number of factors to discern whether a: particular transaction is a loan. For example, the court noted that 'parties who are not directly exposed to market risk In the value of the underlying assets are likely to be lenders, not investors. Moreover, the court stressed that "context, such as whether a party applied to the other for a loan or had ;outstanding, separate transactions, help's to distinguish between intent to borrow arid intent to engage in a joint transaction or exchange money for some other reason" (id). Those observations however, did not establish any new criteria: when evaluating usury in the merchant **[*4]** cash advance context. Indeed, the court-acknowledged that evading usury laws is nothing. **[**4]** new and loans have been disguised as a "sale of chases in action" exempted from the law (id) and that legislative changes-were Made "in response to the 'vacuum' in the law that failed to deter the usurious exploitation of corporations by criminal syndicates" and "ended the practice by limiting the corporate exception" (id), The court concluded that "if misused, the convertible option may constitute another form of usury cloaked in novel form" (id.) Noticeably absent from the litany of usury-evading activity 1st the merchant cash advance Agreement. The court's omission of this prevalent and pervasive business model and its reliance instead upon centuries old practices addressed in *Quackenbos v. Sayer, 62 NY 344, 17 Sickels 34 [1875]* and *Meaker v. Fiero, 145 NY 165, 100 Sickels 165, 39 N.E. 714* [1.8951 only confirms the status quo when analyzing merchant cash agreements. The omission is all the more curious since Adar Bays (supra) was authored, by Judge Wilson who dissented in *Plymouth Venture Partners II LP v. GTR Source LLC, 37 NY3d 591, 163 N.Y.S.3d 467, 183 N.E.3d 1185 [2021]* where he raised Concerns that merchant cash advance agreements may be considered "high-interest loans that might trigger usury concerns" (id. at Footnote. 2), Thus, this court will, only examine the three criteria noted, as well **[*5]** as precedent in this regard, to determine Whether the agreement was in fact a usurious loan,

The defendants argue that even though the agreement. **[**5]** contained a reconciliation provision, such provision is a sham for four reasons. First, the provision does contain A definite: term, second, that the daily" payment is not a good-faith estimate of receivables, third, that the provision in practically impossible to secure and lastly, that the agreement provides for recourse in bankruptcy. These arguments are also included within the proposed answer and counterclaims filed.

First, the agreement itself states that the merchant "is not borrowing money from KDK, therefore there is no interest rate or payment schedule and no tithe period during which thePurchased Amount must be collected by KDK" (see, Revenue Purchase Agreement, page 1 [NYSCEF Doc. #2] see, also, *Pirs Capital LLC v. D & M Fire Truck, Tire & Trailer Repair Inc., 69 Misc3d 457, 129 NYS3d 734* [Supreme Court New York 'County 2020.]). Further, the agreement also' states that "merchant going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting its receivables, in and of itself, does not constitute a breach of this Agreement (id.). The mere fact the guaranty states that if the plaintiff **[*6]** has to return any amount paid to the plaintiff because a guarantor has declared bankruptcy: then the guarantor's obligations include that amount does not Mean the plaintiff has recourse in the event of a bankruptcy.

There is only one case that held a merchant agreement was really a loan, based in part, on the fact the daily payment rate **[**6]** did not represent: a good faith estimate of receivables ('See, *Davis v. Richmond Capital Group LLC, 194 AD3d 516, 150 NYS3d 2 [1st Dept., 2021]*). In *Davis*, the court explained a merchant Agreement was really a loan for five distinct reasons. First, the reconciliation provision was discretionary, second, the funder refused to permit reconciliation, third, "the selection of daily payment rates that did not appear to represent a good faith estimate of receivables (id), fourth, the agreement made rejection of automated debits on two or three. occasions an improper event of default, and lastly, the agreement authorized collection on a personal guaranty in the event of bankruptcy. Thus, based upon that 'decision the defendants argue: the, reconciliation provision in this case is a sham because there is no good faith basis the daily 'amount taken each day is a good faith estimate of receivables. In: truth, there is no way of knowing whether **[*7]** such daily amount represents a good faith estimate of receivables and for that very reason the merchant may reconcile if the amount taken is to high. To be sure,

such estimate must be based upon the merchant's representations of daily revenue Tiny changes in revenue can surely trigger the reconciliation as noted. Moreover, it is unlikely the—court in *Davis* sought to create a new basis to challenge the reasonableness of a merchant cash agreement standing alone, on the grounds the amount taken is not correlative to revenue, As **[**7]** noted, that was one reason among five, rendering the agreement problematic in totality (see, *Haymount Urgent Care P.C., GoFund Advance LLC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768 [2022]*). Thus, this 'contention, in isolation, is really another way of arguing the funder did not permit, or the-agreement did not allow, reconciliation In this, case the agreement states that the daily remittence "is a good faith estimate of KDK's share of the future revenue stream" (See, Revenue Purchase Agreeent, Page 1) and any reconciliations sought are delineated in Section 1,4 That section states that the "Merchant may give notice to KD.K to request a decrease in the Remittance, should they: experience a decrease in its Future Receipts" (id). Further, all such requests "Must **[*8]** include copies of all of Merchant's bank account statements, credit card processing statements, and accounts, receivable report Outstanding from the date of this Agreement through and including the date the request is made!! (id). Further, the Remittance shall be Modified to More closely reflect the Merchant's actual receipts by multiplying tie Merchant's actual receipts by the Purchased Percentage: divided by the number of business days' in the previous (21 calendar weeks" (id). Thus, the funder has a contractual obligation to reconcile and adjust the daily remittence accordingly This provision is not discretionary at all. Moreover, the plaintiff's alleged refusal to reconcile does not mean the reconciliation provision **[**8]** is illusory, rather, those allegations can raise claims for breach of contract (see, *OriainClear Inc., v. GTR Source LLC, 2021 U.S. Dist. LEXIS 239013, 2021 WL 5907878 [W.D.N.Y. 2021]*). Nor is the reconciliation provision discretionary because the finder has the right to ask for the production of specific documentation. As noted, assuming all conditions precedent are satisfied the funder maintains a contractual obligation to reconcile.

Next, the defendants argue the reconciliation provision is functionally, impossible to implement rendering it illusory. The defendants **[*9]** assert that the agreement provides the funder "five days after the end of the calendar month to review reconciliation requests, but only two missed ACH payments will constitute an event Of default. Read in conjunction with the default provisions, reconciliation is functionally inaccessible under this contract by its language alone" (see, Memorandum in Support, Page 14 [NYSCEF Doc. #50]). In Reply, the defendants similarly argue that according to the agreement, "a reconciliation may only occur if there has been no breach. The reconciliation process takes at least two business days, and during that period, the merchant cannot place a stop payment on its bank accounts. Thus, if the merchant's receipts are insufficient to make the daily payment while seeking a reconciliation., a default will occur before the right to reconciliation occurs. To be sure, the agreement expressly provides: "NSF Fee Standard: $50.00 **[**9]** (each) up to TWO TIMES ONLY before a default is declared" (see, Memorandum in Reply, Page 6 [NYSCEF Doc. #121). First, the above arguments blame, the funder for taking two days to review the reconciliation request where, perhaps, the merchant waited too long seeking the request **[*10]** in the first place. Thus, the merchant cannot make a reconciliation request and expect an immediate response. The inability to provide a response the same day does not mean the reconciliation provision is functionally inoperable. Rather, the merchant, like all merchants, must bear the responsibility for making a timely reconciliation request gauging the trajectory of its daily revenue. The fact the reconciliation cannot be approved immediately and the merchant must still permit daily remittances while the reconciliation request is being reviewed does not render the reconciliation provision illusory at all.

Thus, the specific provisions challenged do not by themselves raise any issues concerning the agreement. However, there are other arguments presented which raise significant defenses whether the agreement in this case is really a high-interest loan. Recently, Federal courts have engaged in a more thorough and exacting scrutiny of merchant cash advance agreements, looking at the agreements in, a holistic and comprehensive manner and the conclusions they have reached are compelling. Thus, in *Haymount Urgent Care P.C., v. GoFund **[**10]** Advance LLC, supra*) the court explained that where an agreement contains a clause that a default exists if the **[*11]** bank withdrawing the funds rejects an automated debit without the merchant provided prior notice then such agreement is more akin to a high interest loan. Likewise, in *Lateral Recovery LLC v. Queen Funding LLC, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913 [S.D.N.Y. 2022]* the court noted that failing to notify the funder of an impending rejection or two rejected attempts to withdraw the daily amount really means there is no risk to the funder. Again, in *Fleetwood Services LLC v. Ram Capital*

Funding LLC, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207 [S.D.N.Y., 2022], Fleetwood received money from Ram and Richmond Capital. The court explained the "real character" of the reconciliation provisions in that case demonstrated they were loans. The court observed that "the lender Vis absolutely entitled to repayment [by Fleetwood] under all circumstances,' ...and it is the borrower-and not the lender-who bears the risk of the account debtor's nonpayment. On the most elementary level, the Agreement places the obligation on Fleetwood and not on any account debtor to repay Richmond and sets that sum not as a percentage Of the receipts from account debtors but as an absolute figure of "the Specific daily amount" of $1,399 "each business day," regardless of whether any accounts receivable are collectible or not...Thus, Fleetwood, not the account debtors, assumes responsibility 'for ensuring that the specified **[*12]** percentage to be debited ... remains **[**11]** in the Account'...The Designated Account is to be the 'only one depositing bank account'...And if Fleetwood fails in its obligation to ensure that the 'specified percentage to be debited remains in the account,' then Richmond is entitled to remedies against Fleetwood and not against the account debtors. Among other things, if the Designated Account does not have sufficient funds to cover the withdrawals of the daily amount more than four times, a default is declared,.....the full uncollected Purchased Amount becoming immediately due and payable, and Richmond has the right to pursue all remedies provided for in the Agreement against Fleetwood and the guarantors" (id). The court further noted that the purported agreement concerning accounts receivable was mere "window dressing" and did not have any of the "characteristics of the sale of receivables in terms of the transfer of risk and rewards. The Fleetwood Agreement provides that Fleetwood "sells, assigns and transfers" not just its accounts receivable but 'all of [its] future accounts', contract rights and other entitlements arising from or relating to the payment of monies from Merchants' customers **[*13]** and/or third party payors ... for the payments due to Merchant as a result of Merchant's sale of goods or services' until the total 'Purchased Amount' is repaid. . .That language is so broad as to be essentially vacuous. It captures not just future accounts from Fleetwood's customers but gives Richmond the right to all **[**12]** Fleetwood revenues up to the full uncollected. 'Purchased Amount. It covers all contract rights and other entitlements as long as those entitlements relate to the payment of monies' from any third-party payors related to the sale of goods or services. Tellingly, Defendants do not identify any revenue that Fleetwood, or any operating business, could receive that would not somehow be captured by this broad language, and it is difficult to imagine what revenue would not fall within it" (id).

The agreement in this case states that an event of default will exist if "the Merchant fails to give KDK 24 hours advance notice that there will be insufficient funds in the account such that the ACH of the Remittance amount will not be honored by Merchant's bank" (see, Revenue Purchase Agreement, ¶ 3.1(d)). Further, the security agreement provides the funder with a security interest **[*14]** in "all of Merchant's assets of any kind whatsoever, and such assets shall then become Secured Assets. These security interests and liens will secure all of KDK's entitlements under this Agreement and any other agreements now existing or later entered into between Merchant, KDK Or an affiliate of KDK is authorized to file any and all notices or filings it deems necessary or appropriate to enforce its entitlements hereunder" (see, Security Agreement and Guaranty of Performance, Page 1). Lastly, the agreement only permits the merchant two instances of insufficient funds before declaring a **[**13]** full default (see, Appendix A-The Fee Structure, C). While that eventuality is not listed as a default among the Events of Default found in Section 3 of the Agreement it is nevertheless found in the appendix and there is no reason to believe such provision, would not enforced by the funder. "Thus, under the Agreement, there are virtually no circumstances where, if the accounts receivable would not be sufficient to pay the Purchased Amounts, Richmond would not be absolutely entitled to repayment of that amount by Fleetwood" (*Fleetwood, supra*).

In this case, there are surely questions raised whether the **[*15]** agreement comports with the requirements necessary to be considered a genuine cash advance agreement.

Lastly, Section 4.3 of the Agreement states that "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 Merchant shall become effective three days after mailing" (id). Section 4-5 states that "Merchant and Guarantor(s) hereby agree that the mailing of any Summons and Complaint in any proceeding commenced by KDK by certified or registered mail, return receipt requested to the Mailing Address listed on this Agreement, or via email to the Email Address listed on this Agreement, or any other

process required by any such court will constitute valid and lawful **[**14]** service of process against them without the necessity for service by any other means provided by statute or rule of court" (id).

The defendants argue that although the judgement was filed thirty days after three days of the mailing of the summons and complaint it was filed before the defendants actually received the summons and complaint rendering **[*16]** the judgement invalid. Therefore, there are surely questions raised whether the defendants were timely served with the summons and complaint.

Consequently, focusing upon the guidance of the above noted decisions, the motion seeking reargument is granted and upon reargument the motion seeking to vacate the default is granted.

So ordered.

ENTER:

DATED: August 25, 2022

Brooklyn N.Y.

/s/ Leon Ruchelsman

Hon. Leon Ruchelsman

JSC

Exhibit 18

Neutral
As of: March 10, 2023 9:22 PM Z

Fleetwood Servs., LLC v. Complete Bus. Solutions Group, Inc.

United States District Court for the Eastern District of Pennsylvania

October 23, 2019, Decided; October 23, 2019, Filed

CIVIL ACTION No. 18-268

Reporter
2019 U.S. Dist. LEXIS 183250 *; 2019 WL 5422884

FLEETWOOD SERVICES, LLC, et al. v. COMPLETE BUSINESS SOLUTIONS GROUP, INC. doing business as PAR FUNDING

Prior History: *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp., 374 F. Supp. 3d 361, 2019 U.S. Dist. LEXIS 61504 (E.D. Pa., Apr. 10, 2019)*

Core Terms

allegations, injunctive, unconscionable, futile, declaratory relief, private plaintiff, receivables, voluntary payment, changes, injunctive relief, irreparable harm, equitable, courts

Counsel: **[*1]** For FLEETWOOD SERVICES, LLC, ROBERT L. FLEETWOOD, PAMELA A. FLEETWOOD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs: MATTHEW K. DAVIS, LEAD ATTORNEY, JONES DAVID & JACKSON PC, DALLAS, TX; WENDY D. DAWER, LEAD ATTORNEY, JONES DAVIS & JACKSON PC, DALLAS, TX; JUSTIN E. PROPER, SHANE R. HESKIN, WHITE & WILLIAMS LLP, PHILADELPHIA, PA.

For COMPLETE BUSINESS SOLUTIONS GROUP, INC., doing business as PAR FUNDING, Defendant: NORMAN M. VALZ, LEAD ATTORNEY, LAW OFFICES OF NORMAN M. VALZ, P.C., BLUE BELL, PA; CYNTHIA A. CLARK, PAR FUNDING, PHILADELPHIA, PA.

For PRIME TIME FUNDING, LLC, Defendant: ANTHONY A. PETROCCHI, LEAD ATTORNEY, ANTHONY A PETROCCHI PC, DALLAS, TX; ERIC R. SOLOMON, LEAD ATTORNEY, SOLOMON LAW GROUP, LLC, CONSHOHOCKEN, PA; ERIC R. SOLOMON, SOLOMON LAW GROUP, LLC, CONSHOHOCKEN, PA.

Judges: Juan R. Sánchez, Chief Judge.

Opinion by: Juan R. Sánchez

Opinion

MEMORANDUM

Juan R. Sánchez, C.J.

Plaintiffs Fleetwood Services LLC, Robert Fleetwood, and Pamela Fleetwood filed a Complaint alleging they were the victims of a financial fraud perpetrated by Defendants Complete Business Solutions Group, Inc. and John and Jane Doe investors. Plaintiffs have moved to amend their Complaint. Among other changes, **[*2]** they would like to add class claims, request injunctive and declaratory relief, and include allegations related to a Bloomberg article. While the Court will grant leave to amend the Complaint, it will not allow the request for injunctive and declaratory relief. The Court finds amending the Complaint to seek injunctive and declaratory relief would be futile.

BACKGROUND

Fleetwood Services is a golf course construction company owned by Robert and Pamela Fleetwood. Complete Business is a company that buys future receivables from small businesses.[1] In January 2017, Complete Business allegedly approached Fleetwood Services with a plan to consolidate Fleetwood Services' debt. Fleetwood Services agreed to this consolidation plan. To implement the plan, the two companies signed an agreement in which Complete Business paid $370,000.00 for $547,600.00 of future receivables.

[1] Future receivables are money a business expects to receive, typically money owed to a business by its customers.

According to Fleetwood Services, this agreement was not a purchase of future receivables. Instead, Fleetwood Services alleges, the agreement was actually a loan designed to keep Fleetwood Services in never-ending debt. Plaintiffs allege Complete Business demanded daily payments unrelated to any future receivables. They also allege **[*3]** Complete Business charged usurious interest rates and unauthorized fees. When Fleetwood Services got behind on its payments, Complete Business allegedly called Mr. and Mrs. Fleetwood and threatened to take away their business and their personal assets if they did not pay. In July 2017, Fleetwood paid back the money it owed to Complete Business with a loan from another company.

On January 22, 2018, Fleetwood Services and Mr. and Mrs. Fleetwood filed a Complaint in this case. Complete Business moved to dismiss. Plaintiffs responded to the motion to dismiss by filing their First Amended Complaint. The First Amended Complaint included claims for violations of Texas usury laws, fraud, negligent misrepresentation, damages pursuant to a term in the contract, and violations of the *Racketeer Influence and Corrupt Organizations Act (RICO)*. Complete Business then moved to dismiss the First Amended Complaint. On March 29, 2019, the Court dismissed the contract claim in the First Amended Complaint, but allowed the rest of the Complaint to go forward.

On July 19, 2019, Plaintiffs sought leave to file a Second Amended Complaint. The Second Amended Complaint included many of the same claims as the First **[*4]** Amended Complaint: violations of Texas usury law, fraud, and *RICO*. It also removed some of the claims in the First Amended Complaint; it removed the negligent misrepresentation claim and a claim relying on an inapplicable Texas law. The Second Amended Complaint added a new claim for attorneys' fees and a new request for injunctive and declaratory relief. Finally, the Second Amended Complaint included additional allegations such as: facts tending to show the agreement the parties signed was unconscionable; facts tending to show the agreement the parties signed was a loan rather than a purchase agreement for future receivables; and class action allegations.[2] To demonstrate that Complete Business treated its agreements with businesses like loans instead of purchases of future receivables, Plaintiffs included allegations related to a Bloomberg article. This article focused on Complete Business's "mob-like intimidation tactics" when a business cannot pay. Pl.'s Mot. for Leave to File Second Am. Compl. (Pl.'s Mot.), Ex. A at ¶ 93. According to Plaintiffs, if the agreements were actually for future receivables as they purported to be, Complete Business would have contacted the business's customers **[*5]** rather than the business itself.

As explained in detail below, Complete Business opposes three of the changes in the Second Amended Complaint. It urges the Court to deny Plaintiffs leave to make those three changes. The Court will allow Plaintiffs to make two of these three changes, but the Court finds that the remaining change—the new request for injunctive and declaratory relief—is futile.

DISCUSSION

A court may grant leave to amend a pleading under *Federal Rule of Civil Procedure 15(a)(2)*. This rule instructs a court to "freely give leave [to amend] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. A court can deny leave to amend, however, when the amendment would be futile. *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp, 908 F.3d 872, 878, 69 V.I. 1034 (3d Cir. 2018)*. An amendment is futile when it "could not withstand a renewed motion to dismiss." *Id.* (internal quotations omitted). A court may also strike allegations in a complaint when they are "redundant, immaterial, impertinent, or scandalous." *Fed. R. Civ. P. 12(f)*.

Complete Business argues two changes in the proposed Second Amended Complaint are futile: the new class action allegations and the new request for declaratory and injunctive relief. Complete Business also argues the allegations relying on the Bloomberg article (in paragraph 91-97 of the Second Amended Complaint) should be stricken under **[*6]** *Rule 12(f)* as "immaterial, impertinent, or scandalous." The Court will address each of these proposed changes in turn.

Plaintiffs' amendment adding class allegations is not futile. Complete Business makes two arguments to the contrary, but neither is persuasive. First, Complete Business argues Plaintiffs cannot represent the class because their claims are barred by Texas's voluntary payment rule.[3] Second, Complete Business argues the

[2] While Plaintiffs had originally styled this case as a class action, they did not include any class action allegations in their First Amended Complaint.

[3] In its memorandum dated April 10, 2019, the Court found

class allegations are futile because of the class action waiver in the parties' contract.

Complete Business's voluntary payment argument fails because the voluntary payment rule does not apply to the claims in this case. The voluntary payment rule is a defense to equitable claims for unjust enrichment. *BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 768 (Tex. 2005)*. A defendant can assert this defense when the plaintiff voluntarily pays money "on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion." *Id.* Because the voluntary payment rule is an equitable defense, it does not apply to claims based on a statutory scheme. *Id. at 776 n. 9*. ("[T]he voluntary-payment rule would not apply to situations in which the Legislature or commonlaw has provided a right of recovery even though payment **[*7]** is voluntary."). In particular, this defense is not available when a plaintiff brings a claim under Texas's usury laws. *Id. at 770* (explaining that, since 1890, Texas courts have held the "usury statute prevented [the] voluntary-payment defense"). Because the claims in this case are under Texas's usury laws, the voluntary payment defense does not apply here.

Complete Business's argument that the class action waiver makes the class claims futile is unpersuasive because Plaintiffs plausibly allege the contract was unconscionable. Complete Business correctly points out Plaintiffs waived their right to bring a class action in the parties' contract. The contract says "the parties hereto waive any right to assert any claims against [an]other party as a representative or member in any class or representative action, except where such waiver is prohibited by law against public policy." Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to File Second Am. Compl. (Def's Resp.), Ex. A at 5. Plaintiffs do not argue this language would allow them to bring a class action. Instead, they argue this waiver cannot be enforced because the contract is unconscionable.

Texas law "recognizes both substantive and procedural **[*8]** unconscionability." *In re Olshan Found. Repair Co., LLC, 328 S.W.3d 883, 892 (Tex. 2010)*. Substantive unconscionability refers to the unconscionable terms in a contract, while procedural unconscionability refers to the unconscionable methods used to negotiate the contract. *Id.* The Texas Supreme Court has noted that determining whether a contract is unconscionable can "involve[] a highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public-policy concerns, and the agreement's oppressive or shocking nature." *Venture Cotton Co-op. v. Freeman, 435 S.W.3d 222, 228 (Tex. 2014)*. A contract is not unconscionable solely because it is a contract of adhesion. *In re Lyon Fin. Servs., Inc., 257 S.W.3d 228, 233 (Tex. 2008)*.

At this stage, Plaintiffs have alleged enough facts to be entitled to further discovery regarding whether the contract was unconscionable. They allege Complete Business fraudulently coerced them into signing an agreement with unfair and one-sided terms. Regarding procedural unconscionability, they allege Complete Business falsely represented the nature and purpose of the contract. Pl.'s Mot., Ex. A at ¶¶ 44-46. They also allege Complete Business took advantage of Fleetwood's "desperate **[*9]** financial condition." *Id.* at ¶ 44. Regarding substantive unconscionability, the contract's provisions included: a provision giving Complete Business the irrevocable right to withdraw money directly from Fleetwood's bank accounts; a provision giving Complete Business the power of attorney to act as if it were Fleetwood, including collecting checks and signing invoices in Fleetwood's name; a provision preventing Fleetwood from transferring, moving or selling the business or any assets without permission from Complete Business; and a one-sided attorneys' fees provision obligating Fleetwood to pay Complete Business's attorneys' fees if Complete Business won any litigation but not obligating Complete Business to pay Fleetwood's attorneys' fees if Fleetwood won. Def.'s Resp., Ex. A. at 3-4. Given the allegations of substantive and procedural unconscionability, the Court will not foreclose discovery on the unconscionability of the contract. If Plaintiffs move to certify a class, the Court will have an opportunity to address the contract's unconscionability with the benefit of discovery.[4]

Next, the Court addresses Plaintiffs' amendment requesting injunctive and declaratory relief and finds this **[*10]** amendment would be futile. A party seeking an injunction must prove "(1) it will suffer irreparable

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Texas law applies to the contract in this case.

[4] The Court notes, even if the contract is unconscionable, Plaintiffs still may not meet the requirements under *Federal Rule of Civil Procedure 23* for class certification. If Plaintiffs file a motion for class certification, the Court will address the *Rule 23* requirements when it rules on that motion.

injury, (2) no remedy available at law could adequately remedy that injury, (3) the balance of hardships tips in its favor, and (4) an injunction would not disserve the public interest." *TD Bank N.A. v. Hill, 928 F.3d 259, 278 (3d Cir. 2019)*. Declaratory relief can be appropriate "to settle actual controversies before they ripen into violations of a law or a breach of duty." *Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 215 (3d Cir. 2008)*. Like injunctive relief, declaratory judgments are "by definition prospective in nature." *CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 628 (3d Cir. 2013)*. In other words, both injunctive and declaratory relief prevent future harm.

Plaintiffs will not suffer any future harm here. In their complaint, they conceded they have already paid Complete Business the money they owed under the contract. First Am. Compl. ¶ 46. Since they have already paid off the contract, there is no likelihood they will have to pay more in the future. At oral argument, they conceded they could not prove they would suffer any future irreparable harm. Instead, they argued they did not have to prove future irreparable harm because they are seeking an injunction under *RICO*.

The Third Circuit has not addressed injunctions for private plaintiffs under *RICO*. *See* ***[*11]*** *Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1355 (3d Cir. 1989)* (declining to address whether injunctive relief is available to private plaintiffs under *RICO*). Other courts are split on whether private plaintiffs in *RICO* actions can request equitable relief. *Compare Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986)* (finding private plaintiffs are not entitled to equitable relief under *RICO*), *with Chevron Corp. v. Donziger, 833 F.3d 74, 137 (2d Cir. 2016)* (finding private plaintiffs are entitled to equitable relief under *RICO*). Even if injunctions are available for private plaintiffs in *RICO* actions, courts have found that private plaintiffs must still show future irreparable harm. *See, e.g., Trane Co. v. O'Connor Sec., 718 F.2d 26, 29 (2d Cir. 1983)* ("[T]o obtain a preliminary injunction under *RICO* there must be established a likelihood of irreparable harm."); *see also Jackson v. Rohm & Haas Co., No. 05-4988, 2009 U.S. Dist. LEXIS 23194, 2009 WL 948741, at *4 (E.D. Pa. Mar. 20, 2009)*, *aff'd*, *366 F. App'x 342 (3d Cir. 2010)* (explaining that "[w]here a private plaintiff in a civil *RICO* action has been permitted to seek preliminary injunctive relief, the courts have consistently applied traditional preliminary injunction standards, including the requirement of irreparable harm in the absence of an injunction" and listing cases). Because Plaintiffs admit they cannot show any future harm, they would not be entitled to injunctive relief under *RICO* even if such relief were available for private plaintiffs.

Finally, the Court will deny Complete Business's request **[*12]** to strike the Second Amended Complaint's allegations about the Bloomberg article. Under *Federal Rule of Civil Procedure 12(f)* a court may strike an allegation that is "redundant, immaterial, impertinent, or scandalous." "Motions to strike are not favored and usually will be denied unless the allegations have no possible relation to the controversy." *Associated Builders & Contractors, E. Pa. Chapter, Inc. v. Cty. of Northampton, 376 F. Supp. 3d 476, 522 (E.D. Pa. 2019)* (internal quotations omitted). Courts should only grant a motion to strike when the allegations "are so unrelated to plaintiffs' claims as to be unworthy of any consideration." *Id.* (internal quotations omitted).

The Bloomberg allegations do not meet the high standard for a motion to strike. These allegations are related to the case because they tend to support the idea that Complete Business treated the contracts as loans rather than as contracts for future receivables. The allegations are also not "impertinent or scandalous" under *Rule 12(f)*. They are based on a public report from a reputable news source. They are not unsupported allegations nor do they maliciously publicize previously private information. The Court will therefore allow Plaintiffs to include the Bloomberg allegations in their Second Amended Complaint.

In sum, the Court finds the amendment adding the class allegations **[*13]** is not futile, the amendment requesting injunctive and declaratory relief is futile, and the Bloomberg claims should not be stricken. The Court will therefore give Plaintiffs leave to file their Second Amended Complaint after they remove their request for injunctive and declaratory relief.

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez

Juan R. Sánchez, C.J.

ORDER

AND NOW, this 23rd day of October, 2019, upon consideration of Plaintiffs Fleetwood Services, Robert Fleetwood and Pamela Fleetwood's Motion for Leave to File a Second Amended Complaint, Defendant

Complete Business Solutions Group, Inc.'s opposition thereto, and the parties' presentations at the September 16, 2019, oral argument on the Motion, and for the reasons set forth in the accompanying Memorandum, it is ORDERED Plaintiffs' Motion (Document 55) is GRANTED in part insofar as Plaintiffs are granted leave to file their Second Amended Complaint after they remove their request for injunctive and declaratory relief.
BY THE COURT:

BY THE COURT:

/s/ Juan R. Sánchez

Juan R. Sánchez, C.J.

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Exhibit 19

Neutral
As of: March 10, 2023 9:22 PM Z

Fleetwood Servs., LLC v. Ram Capital Funding, LLC

United States District Court for the Southern District of New York

June 6, 2022, Decided; June 6, 2022, Filed

20-cv-5120 (LJL)

Reporter
2022 U.S. Dist. LEXIS 100837 *; 2022 WL 1997207

FLEETWOOD SERVICES, LLC, Plaintiff, -v- RAM CAPITAL FUNDING, LLC, TSVI REICH a/k/a STEVE REICH, RICHMOND CAPITAL GROUP LLC n/k/a RCG ADVANCES LLC, and ROBERT GIARDINA, Defendants.

Prior History: *Fleetwood Servs., LLC v. Ram Capital Funding, LLC, 2021 U.S. Dist. LEXIS 85108, 2021 WL 9099984 (S.D.N.Y., May 4, 2021)*

Core Terms

Merchant, choice-of-law, funds, parties, rights, reconciliation, receivables, collection, summary judgment, debited, damages, interest rate, Designated, customers, event of default, contractual, repayment, default, obligations, guarantors, courts, lender, center of gravity, depositing, bears, summary judgment motion, reasonable relation, purchase price, unenforceable, borrower

Counsel: **[*1]** For Fleetwood Services, LLC, Plaintiff: Shane R. Heskin, LEAD ATTORNEY, White & Williams, LLP(Philadelphia), Philadelphia, PA.

For Ram Capital Funding, LLC, TSVI Reich, also known as, Steve Reich, Defendants: Abraham S Beinhorn, Jacobowitz Newman Tversky LLP, NY, Cedarhurst, NY.

For Richmond Capital Group LLC, now known as, RCG Advances LLC, Robert Giardina, Defendants: Jeremy M Iandolo, LEAD ATTORNEY, J. Iandolo Law, PC, Brooklyn, NY.

Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Plaintiff Fleetwood Services, LLC ("Plaintiff" or "Fleetwood") moves, pursuant to *Federal Rule of Civil Procedure 56*, for an order granting it summary judgment with respect to the five causes of action it brought in the Amended Complaint. Dkt. No. 74.

For the following reasons, the motion for summary judgment is granted in part and denied in part.

BACKGROUND

The following facts are undisputed for the purposes of summary judgment except where otherwise indicated.

I. The Parties

Fleetwood is a small Texas business, providing golf course construction, development, renovation, and remolding for courses and country clubs in and around the Dallas area. Dkt. No. 79 ¶ 11. Its owners **[*2]** are Pamela Fleetwood and Robert Fleetwood. *Id.* ¶ 15. Richmond Capital Group n/k/a RCG Advances LLC ("Richmond") is a New York limited liability company that also operates under the name Ram Capital Funding ("Ram Capital"). *Id.* ¶ 2. Robert Giardina ("Giardina" and together with Ram Capital, "Defendants") is the founder and sole managing member of Richmond. *Id.* ¶ 3. Ram Capital Funding LLC ("Ram LLC") and Tsvi Reich a/k/a Steve Reich were initially named as defendants in this action, but Fleetwood voluntarily dismissed its claims against them after entering into a settlement agreement with those entities in September 2020. *See* Dkt. No. 13; Dkt. No. 28 at 1 n.1; Dkt. No. 38-14. Richmond d/b/a Ram Capital and Ram LLC were both involved in the cash advance business. Dkt. No. 78-10 at 19-20.

Beginning at least as early as July 2015 and continuing

through the end of 2018, Richmond was in the business of advancing funds to small businesses in Texas and throughout the United States. Dkt. No. 79 ¶ 4. Richmond advanced these funds pursuant to agreements called "Merchant Agreements." Each of the Merchant Agreements used by Richmond contained identical assignment and payment language, representations **[*3]** and warranties, events of default, default rights and remedies, a security agreement, a personal guaranty, a reconciliation provision, and Automated Clearing House ("ACH") authorization terms. *Id.* ¶ 5. In connection with the transactions governed by each of the Merchant Agreements, merchants were required to complete a form that provided Richmond with the merchant's log-in information to its bank account; it stated: "[t]he way your advance is set up RCG needs viewing access to your bank accounts each business day in order to calculate the amount of your daily payment." *Id.* ¶ 7. In addition, each merchant was required to execute a confession of judgment that, upon an event of default, permitted Richmond to obtain a judgment against the merchant and any guarantor in New York without notice or the need to commence a plenary action. *Id.*

II. The Fleetwood Agreement

In November 2016, as it was experiencing cash-flow issues, Fleetwood was contacted by a broker offering financing through Ram LLC. *Id.* ¶ 12. On or about November 28, 2016, Fleetwood entered into a Merchant Agreement written on the paper of Ram LLC (the "Fleetwood Agreement" or the "Agreement"), listing "Ram Capital Funding LLC **[*4]** ("RCF")" as the counterparty. *Id.* ¶ 13; Dkt. No. 77-4 at 1. Though the Agreement was on the paper of Ram LLC, Richmond advanced the $100,000 purchase price (the "Purchase Price"), less applicable fees, to Fleetwood, and Richmond collected the daily payments due pursuant to the Agreement. Dkt. No. 79 ¶ 35.

The Fleetwood Agreement was identical in form and substance to the Merchant Agreements. *Id.* at ¶ 13. As part of the transaction (the "Fleetwood Transaction"), Pamela and Robert Fleetwood also executed (i) a security agreement and personal guaranty; (ii) a confession of judgment; and (iii) an authorization agreement for direct deposit and direct payments. *Id.* ¶ 15. The provisions of the Fleetwood Agreement are analyzed elsewhere in this Opinion; here, it is sufficient to describe certain of the material terms. Pursuant to the terms of the Fleetwood Agreement, Ram LLC agreed to advance Fleetwood $100,000 in exchange for the purported purchase of what was defined as all of Fleetwood's "future receivables" until Fleetwood had repaid the sum of $149,900 (the "Purchased Amount"). *Id.* ¶¶ 16, 44. The Purchased Amount was to be repaid through daily ACH withdrawals from a designated account **[*5]** (the "Designated Account") located at a Texas branch of JPMorgan Chase Bank, N.A., each in the equal amount of $1,399.00, which was stated to equal 10% of Fleetwood's daily receipts. *Id.* ¶¶ 17-18, 45.

The first paragraph of the Fleetwood Agreement contains the provision regarding the purported "Purchase and Sale of Future Receivables" and reads in part as follows:

> **PURCHASE AND SALE OF FUTURE RECEIVABLES**
> Merchant ("Merchant" or "Seller") hereby sells, assigns and transfers to RCF ("RCF" or "Buyer") (making RCF the absolute owner) in consideration of the funds provided ("Purchase Price") [$100,000] specified, below, all of Merchant's future accounts, contract rights and other entitlements arising from or relating to the payment of monies from Merchant's customers' and/or other third party payors (the "Receipts" defined as all payments made by cash, check, electronic transfer or other form of monetary payment in the ordinary course of the Merchant's business), for the payments due to Merchant as a result of Merchant's sale of goods or services (the "Transactions") until the amount specified below (the "Purchased Amount") has been delivered by or on behalf of Merchant to RCF.
>
> The Purchased **[*6]** Amount [$149,900] shall be paid to RCF by Merchant's irrevocably directing and authorizing that there be only one depositing bank account, which account must be acceptable to, and preapproved by, RCF (the "Account") into which Merchant and Merchant's customers shall remit the percentage specified below (the "Specified Percentage") [10%] of the Merchant's settlement amounts due from each Transaction, until such time as RCF receives payment in full of the Purchased Amount. Merchant hereby authorizes RCF to ACH Debit the specified remittances from the merchant's Account on a daily basis and will provide RCF with all required access codes, and monthly bank statements. Merchant understands that it is responsible for ensuring that the specified

> percentage to be debited by RCF remains in the Account and will be held responsible for any fees incurred by RCF resulting from a rejected ACH attempt or an event of default. RCF is not responsible for any overdrafts or rejected transactions that may result from RCF's ACH debiting the specified amounts under the terms of this agreement. RCF will debit the specific daily amount each business day and upon receipt of the Merchant's monthly bank statements **[*7]** on or about the eighteenth day of each month reconcile the Merchant's Account by either crediting or debiting the difference from or back to the Merchant's Account so that the amount debited each month equals the specified percentage. RCF may, upon Merchant's request, adjust the amount of any payment due under this Agreement at RCF's sole discretion and as it deems appropriate. Notwithstanding anything to the contrary in this Agreement or in any other agreement between RCF and Merchant, upon the violation of any provision contained in Section 1.11 of the MERCHANT AGREEMENT TERMS AND CONDITIONS or the occurrence of an Event of Default under Section 3 of the MERCHANT AGREEMENT TERMS AND CONDITIONS, the Specified Percentage shall equal 100%. A list of all fees applicable under this Agreement is contained in Appendix A.

Dkt. No. 77-1 at 1; *see also* Dkt. No. 79 ¶¶ 48-49, 52. Although stated to be for "future receivables," the defined term "Transaction" is broader. It includes "the payment of monies from Merchant's customers' and/or other third party payors . . . for the payments due to Merchant as a result of Merchant's sale of goods or services." Dkt. No. 77-1 at 1.

Section 3.1 of Fleetwood **[*8]** Agreement with respect to "Events of Default" reads as follows:

> **3.1 Events of Default**. The occurrence of any of the following events shall constitute an "Event of Default" hereunder: (a) Merchant or Guarantor shall violate any term or covenant in this Agreement; (b) Any representation or warranty by Merchant in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made; (c) Merchant shall admit in writing its inability to pay its debts, or shall make a general assignment for the benefit of creditors, or any proceeding shall be instituted by or against Merchant seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts; (d) the sending of notice of termination by Merchant; (e) Merchant shall transport, move, interrupt, suspend, dissolve or terminate its business; (f) Merchant shall transfer or sell all or substantially all of its assets; (g) Merchant shall make or send notice of any intended bulk sale or transfer by Merchant; (f) Merchant shall use multiple depository accounts without the prior written consent of RCF; (i) Merchant shall change its depositing account **[*9]** without the prior written consent of RCF; (j) Merchant shall perform any act that reduces the value of any Collateral granted under this Agreement; or (k) Merchant shall default under any of the terms, covenants and conditions of any other agreement with RCF.

Dkt No. 77-1 § 3.1. Appendix A to the Agreement provides that there is a fee for insufficient funds in the Designated Account but provides that it shall be "[u]p to FOUR TIMES ONLY before a default is declared." *See* Dkt. No. 77-1 at ECF p. 7; Dkt. No. 79 ¶ 58. An authorization agreement signed by Robert Fleetwood authorized Ram LLC to debit the Designated Account $1,399.00 each day, Monday through Friday. Dkt. No. 77-1 at ECF p. 6.

Upon an Event of Default, the full amount of the outstanding Purchased Amount plus any additional fees, including legal fees, became immediately due and owing. Dkt. No. 79 ¶ 60. In that case, the counterparty to the Agreement had the ability to exercise all rights or remedies available at law or in equity or as a secured creditor under the Uniform Commercial Code. *Id.* In addition, upon an Event of Default, it had the right to: (i) obtain insurance, (ii) collect monies due and owing from Fleetwood's account **[*10]** debtors; (iii) receive, endorse and collect any checks, notes, drafts of other chattel paper; (v) sign Fleetwood's name to any invoice and direct that Fleetwood's customers pay the counterparty and (vi) file any claims or pursue any actions to collect upon a Fleetwood receivable.[1] *Id.* ¶ 61.

In connection with the Fleetwood Agreement, Fleetwood

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[1] In its Rule 56.1 Statement, Plaintiff refers to the counterparty of the Fleetwood Agreement as "Richmond," even though it is written on the paper of Ram LLC and Ram LLC is identified as the counterparty in the text of the Agreement. For ease of reference, and because the Court concludes that Richmond performed the obligations under the Fleetwood Agreement, the Court will refer to Fleetwood's counterparty to the Agreement as Richmond in this Opinion.

granted Richmond a security interest in and lien upon: (a) "all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory"; (b) all proceeds thereof; and (c) "all funds at time in the Merchant's Account, regardless of the source of the funds." *Id.* ¶ 63. To further secure Fleetwood's performance under the Fleetwood Agreement, Pamela and Robert Fleetwood personally guaranteed Fleetwood's "good faith, truthfulness, and performance of all representations, warranties and covenants" in the Agreement (the "Personal Guaranties"). *Id.* ¶ 64. And, pursuant to Sections 1.11 and 2.9 of the Fleetwood Agreement, if Fleetwood filed for bankruptcy Pamela and Robert Fleetwood's obligations under the Personal Guaranties would be triggered. *Id.* ¶ 65.

The Fleetwood Agreement contains a choice of law clause. It reads, in relevant **[*11]** part, as follows:

> 4.5 **Binding Effect: Governing Law, Venue and Jurisdiction**. . . . This Agreement shall be governed by and construed in accordance with the laws of the state of New York, without regards to any applicable principles of conflicts of law.

Dkt. No. 72-4 § 4.5.

The Agreement was signed by Robert Fleetwood and Pamela Fleetwood on behalf of Fleetwood with a physical address in Rockwall, Texas. *Id.* at 1. It was not countersigned by Ram LLC. *Id.*; *see also* Dkt. No. 79 ¶ 19. The address for Ram Capital Funding, LLC listed on the agreement is in Lakewood, New Jersey. Dkt. No. 77-1 at 1. Richmond is a New York limited liability company. Dkt. No. 79 ¶ 2.

In connection with the Fleetwood Agreement, Pamela Fleetwood received and executed a form that requested her to provide information to access the Designated Account so that Richmond could calculate the daily payment amount. *Id.* ¶ 57. The form stated:

> Please note that the way your advance is set up RCF needs viewing access to your bank account each business day in order to calculate the amount of daily payment

Id.

III. Richmond's Funding Pursuant to the MCA

On November 29, 2016, the sum of $44,500 was wired into the Designated Account from **[*12]** an account at Empire State Bank in the name of Richmond (the "Empire Account"). *Id.* ¶¶ 21-22; 39.[2] The "Wire Transfer of Funds Notice" issued by Empire State Bank for this transaction reflects that the originator was "Richmond Capital Group LLC" with the contact email "rgiardina@richmondcapitalgroup.com" and that the wire was charged to an identification number that corresponds to Richmond's identification number. Dkt. No. 78-17.

The wire transfer was reflected in the Designated Account statement by a notice that read in part: "Fedwire Credit Via: Empire State Bank . . . Richmond Capital Group LLC, New York NY." Dkt. No. 79 ¶ 40. The Empire Account had been opened by Richmond in or around June 2016 in the name "Richmond Capital Group d/b/a RAM Capital Funding." Dkt. No. 78-16; Dkt. No. 79 ¶¶ 36-37. The sum wired on November 29th equaled half the Purchase Price less applicable fees. Dkt. No. 79 ¶ 23. By email on or about December 8, 2016, Fleetwood contacted its broker to request payment of the remaining $50,000. *Id.* ¶ 24. In response, Fleetwood was offered a second $50,000 receivables purchase agreement, but Fleetwood rejected the offer and demanded payment of the full Purchase Price. **[*13]** *Id.* ¶¶ 24-25. Fleetwood was then told that the additional funds "won't release til [sic] the New Year." *Id.* ¶ 25. Neither Ram LLC nor Richmond ever advanced the additional $50,000 owed pursuant to the Fleetwood Agreement, *id.* ¶ 26, and Ram LLC never advanced any funds to Fleetwood, *id.* ¶¶ 22, 26, 35. Nor did Ram LLC sign the Fleetwood Agreement. *Id.* ¶ 19.

On or around July 17, 2016, shortly after Richmond opened the Empire Account, Richmond entered into an agreement with Actum Processing ("Actum"), pursuant to which Actum agreed to provide ACH services to Richmond d/b/a Ram Capital. *Id.* ¶ 38. On November 30, 2016, Actum, on behalf of Richmond d/b/a Ram Capital, effected a withdrawal of $1,399 from the Fleetwood Account. *Id.* ¶¶ 41-42. Thereafter, from November 30, 2016 through and including April 10, 2017, Actum continued to deduct daily payments—almost always in the amount of $1,399[3] —from the

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[2] In one paragraph, Plaintiff's Rule 56.1 Statement refers to the payment being made on November 29, 2021. *See* Dkt. No. 79 ¶ 21. That is obviously a typographical error. The Court uses the date in the underlying evidence.

[3] The accompanying bank records reflect that $1,399 was occasionally deducted twice in one day around holidays, and that for five days in March 2017, only $700 per day was deducted. *See* Dkt. No. 77-7.

Fleetwood Account on behalf of Richmond d/b/a Ram Capital. *Id.* ¶ 43; Dkt No. 77-7.[4] By email dated March 17, 2017 to Richmond at its d/b/a Ram Capital email address, Fleetwood requested a brief pause in its daily payments because it had not yet received expected payments on certain invoices and **[*14]** was running low on funds. *Id.* ¶ 27. A collection agent, Michelle Gregg, immediately responded: "UNFORTUNATELY ... WE DO NOT OFFER 'BREAKS'. DOING THAT WOULD PUT YOU IN AUTOMATIC DEFAULT," and Richmond continued to debit amounts from the Fleetwood Account. *Id.* ¶¶ 28-29. By April 2017, a total of $119,617 had been debited from the Fleetwood Account—$44,667 more than Richmond was entitled to under the Fleetwood Agreement. *Id.* ¶ 31; *see also* Dkt. No. 77 ¶ 17 ("Since Richmond had only provided half the Purchase Price, it was only entitled to collect half the Purchased Amount or $74,950."). By letter dated April 28, 2017, Fleetwood, by and through its attorneys, demanded that the sum of $44,667 (the "Excess Funds") be returned to Fleetwood. Dkt. ¶¶ 31-32. By letter dated September 27, 2019, Fleetwood's counsel again demanded the return of the Excess Funds plus additional amounts deemed to be usurious interest under Texas law. *Id.* ¶ 33. To date, Richmond has not returned any funds to Fleetwood. *Id.* ¶ 34. And notwithstanding the provision regarding reconciliations in the Fleetwood Agreement, Richmond never performed a reconciliation on Fleetwood's account. *Id.* ¶ 53; *see also id.* § 54 ("Richmond **[*15]** never reviewed a merchant's account to determine the proper amount of a daily payment and it never reconciled any merchant's account.").

On the assumption, discussed below, that the Agreement constituted a loan, the relationship between the Purchase Price and the Purchased Amount calculated over the 107 days from when the Purchase Price was to be paid and the Purchased Amount was to be returned would translate to an annual interest rate of 99.8%. When the excess withdrawals are taken into consideration, the nominal interest rate would be 278.5% per annum. Dkt. No. 78-19 at ECF p. 9.

IV. Other Similar MCAs

Richmond and Giardina have engaged in similar conduct with other merchants. On or about June 10, 2020, the New York Attorney General (the "NYAG") filed a petition against Richmond, Giardina, and others in *James v. Richmond Capital Group LLC*, Index No. 451328/2020 (the "NYAG Action"), alleging, among other things, that Richmond, Giardina, and others have preyed upon thousands of small businesses throughout the United States by offering funding under "merchant cash advances" that "are in fact fraudulent, usurious loans with interest rates in the triple and even quadruple digits, **[*16]** far above the maximum rate permissible for a loan under New York law." Dkt. No. 79 ¶¶ 66-67. Shortly after the commencement of the NYAG Action, the Federal Trade Commission commenced a separate action against Richmond, Giardina, and others entitled *Federal Trade Commission v. RCG Advances, LLC*, No. 20-cv-4432 (S.D.N.Y.), alleging that defendants engaged in deceptive conduct including, among other things, promising consumers specific amounts of financing but providing a much smaller amount, making unauthorized debits from merchant accounts and threatening physical violence when the merchants advise that they cannot make the payments required by the Agreements. *Id.* ¶¶ 68-69.

The NYAG has obtained affidavits from merchants testifying that Richmond never performed any reconciliations and failed and refused to reduce their daily payments when the merchant's receivable collections slowed down; instead of reducing the daily payments, Richmond threatened to destroy the merchant's business and, in some instances, implied that they would harm the merchant's owner if the merchant failed to make the daily payments required by the Agreements. *Id.* ¶¶ 71-72. Those affidavits are undisputed on this **[*17]** record. *See* Dkt. No. 78-32.

For example, Richmond refused to grant a reduction to the owner of another Texas entity, Texas Tactical Gear & Firearms, who had explained that it anticipated a slowdown in receivables and would be unable to make daily payments; Richmond continued to withdraw the daily payments until the company could not make any further payments and defaulted. *Id.* ¶ 73. When a small chocolatier in Las Vegas, Nevada was unable to make the required daily payments due to a seasonal business slowdown in the Spring of 2017 and requested a reduction in the amount of its payments, Richmond responded: "We will take everything from you. . . . We are from New York. . . . Don't mess with us." *Id.* ¶ 74. Richmond has offered no evidence to dispute this, despite offering a 30(b)(6) witness to answer questions about Richmond's other customers. *See generally* Dkt.

[4] Plaintiff's Rule 56.1 Statement recites dates in the year 2021, *see id.* ¶¶ 41-43 but the actual underlying evidence refers to 2016 to 2017. The Court uses the underlying evidence.

No. 78-32 at 110-15.

Richmond responded similarly to a request for a payment reduction by J.B. Plumbing & Heating of Virginia, Inc., a small family-owned company located in Virginia. When the merchant's owner called Richmond in December 2015 and requested a one-week adjustment of its payments because the company was awaiting payments **[*18]** of receivables from its clients, Richmond refused the request and responded: "I don't care about your problems," and "I'll default you before you can get out of the bathroom." *Id.* ¶ 75.

In another instance, Richmond advanced funds to a Brooklyn synagogue operating under the name Congregation Shule, Inc. When the synagogue's donations slowed down in October 2017 and were insufficient to make the daily payments, Richmond did not reconcile the synagogue's account and responded to the synagogue's request for a reduction in payments with a series of vivid physical threats. *Id.* ¶¶ 76-77. After Richmond obtained a confessed judgment against the rabbi and synagogue, its harassment grew more intense with threats of a sexual and physical nature to the point where the Rabbi was forced to apply for an order of protection, which the Rabbi received. *Id.* ¶ 78.

V. Invocation of the *Fifth Amendment* and the 30(b)(6) Testimony

In depositions conducted in this case, Giardina and two other individuals who worked as contractors to Richmond, Michelle Gregg and Jose DaSilva, invoked their *Fifth Amendment* rights against self-incrimination to virtually every question asked of them in deposition. *Id.* ¶¶ 82-83. Those questions included whether **[*19]** Giardina had been "involved in any transactions involving Fleetwood Services" or involved in or aware of any transactions "between Fleetwood Services and Richmond," Dkt. No. 78-28 at 68:25-69:11, whether the Fleetwood Transaction was funded by Richmond, *id.* at 71:7-71:12; Dkt. No. 78-30 at 39:7-39:13, whether Giardina was involved in negotiating the terms of the Fleetwood Transaction, Dkt. No. 78-28 at 75:2-75:5, whether the daily payments under Richmond agreements had a connection to a merchant's anticipated sales amounts, *id.* at 84:21-85:23, and whether Richmond monitored merchant accounts to ensure that it was collecting only a specified percentage of the merchant's daily receipts, *id.* at 86:17-87:23; Dkt. No. 78-30 at 55:10-56:24.

Fleetwood took the 30(b)(6) deposition of a corporate representative of Richmond. *Id.* ¶¶ 84-85. The representative testified on behalf of Richmond that she was not aware of any grounds to dispute the following allegations in the Amended Complaint, among others: (i) the Fleetwood Agreement failed to transfer the benefits and risks of ownership from Fleetwood to Richmond; (ii) Fleetwood remained absolutely liable for repayment of the Purchased Amount and **[*20]** Richmond retained full recourse rights against Fleetwood; (iii) the daily payments were fixed and resulted in a usurious interest rate; and (iv) Giardina exercised control over Richmond and the alleged RICO enterprise. *Id.* ¶ 86; *see generally* Dkt. No. 78-31

PROCEDURAL HISTORY

Plaintiff filed this action on or about March 18, 2020 in New York State Supreme Court asserting a number of claims, including a violation of the Racketeer Influenced Corrupt Organizations Act ("RICO"). Dkt No. 1. On July 3, 2020, Defendants removed the action to this Court on the basis of federal question jurisdiction, pursuant to *28 U.S.C. §§ 1331*, *1332*, *1441*, and *1446*. Dkt No. 1.

On December 7, 2020, Plaintiff filed its First Amended Complaint. Dkt No. 28. Plaintiff's first cause of action asserts a claim for breach of contract and breach of the duty of good faith and fair dealing as a result of Richmond's provision of only $50,000 towards the purchase price (rather than the full $100,000), entitling Richmond to debit no more than half the Purchased Amount of $74,950 from the Fleetwood Account; Plaintiff alleges it is entitled to an award of damages in the amount of $44,667, the excess of the amount that was taken from the Fleetwood Account **[*21]** over the amount to which Richmond would have been entitled based on half of the Purchase Price. *Id.* ¶¶ 114-124. Plaintiff's second cause of action pleads, in the alternative, a claim for money had and received for Richmond's retention of the Excess Funds in the amount of $44,667. *Id.* ¶¶ 125-129. The third count pleads a claim for violation of the Texas usury statute, *Tex. Fin. Code § 305.001(a-1)* and *§ 305.003* on the theory that the sums extended pursuant to the Merchant Agreement were a loan and that the rate of interest on that loan was 400%, more than twice the maximum of 28% permitted by Texas law and above the rate of interest permitted by New York law. *Id.* ¶¶ 130-149. The fourth count contains a claim for reasonable attorneys' fees under the Texas usury statute, *Tex. Fin. Code § 305.001* and *305.003*. *Id.* ¶¶ 150-153. Finally, count five asserts a claim for violation of RICO, *18 U.S.C. §*

1962(c) against Giardina. *Id.* ¶¶ 154-179.

On May 18, 2020, the Court issued an Opinion and Order which, among other things, denied Defendants' motion to dismiss the complaint. Dkt. No. 56.

On September 28, 2021, Plaintiff filed this motion for summary judgment. Dkt. Nos. 74-79. Defendants filed an affirmation in opposition to the motion for summary judgment on October 18, 2021. Dkt. **[*22]** No. 80. On November 2, 2021, Plaintiff filed a reply memorandum of law in further support of the motion for summary judgment along with a response to defendant's statement of facts and a reply affirmation. Dkt. Nos. 81-83.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 113-14 (2d Cir. 2017) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "The movant bears the burden of 'demonstrat[ing] the absence of a genuine issue of material fact.'" *Id. at 114* (quoting Celotex, 477 U.S. at 323). In deciding a motion for summary judgment, the Court must "construe the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in its favor." Gilman v. Marsh & McLennan Cos., Inc., 826 F.3d 69, 73 (2d Cir. 2016).

If the movant meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008). It may not rely on "mere speculation or conjecture as to the true nature of the facts," Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted), or "on the allegations **[*23]** in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible," Gottlieb v. Cnty. of Orange, 84 F.3d 511, 518 (2d Cir. 1996) (internal citation omitted). Rather, to survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record," Fed. R. Civ. P. 56(c)(1)(A), and demonstrating more than "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *see also* Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). If "the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," summary judgment must be denied. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9-10 (2d Cir. 1983).

Defendant Giardina and others associated with Richmond refused to answer questions in reliance on their Fifth Amendment privilege against self-incrimination. "A defendant in a civil proceeding who invokes the Fifth Amendment as a result of an overlapping criminal investigation or proceeding risk[s] the adverse inference arising from [his or her] assertion of the privilege." Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 97-98 (2d Cir. 2012) (internal citations omitted). However, even at trial, "'[i]f defendants choose to remain silent, the adverse inference that may be drawn will be only one of a number of factors the factfinder will consider and will be given no more evidentiary value than the facts of the case warrant.'" **[*24]** *Id. at 103* (quoting United States v. Dist. Council of New York City, 782 F. Supp. 920, 925-26 (S.D.N.Y.1992)). The Fifth Amendment permits, but does not require, the jury to draw "adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); it is up to the jury to decide whether it should draw an adverse inference and how much weight to put on that inference. It follows that "adverse inferences cannot be drawn against a non-moving party at summary judgment based on an invocation of the Fifth Amendment privilege." Amusement Indus., Inc. v. Stern, 721 F. App'x 9, 11 (2d Cir. 2018) (summary order) (citing 650 Fifth Ave. v. Alavi Found., 830 F.3d 66, 93 n.25 (2d Cir. 2016)); *see also* S.E.C. v. Suman, 684 F. Supp. 2d 378, 386-87 (S.D.N.Y. 2010) ("[A] motion for summary judgment cannot be granted on an adverse inference alone."). Where the party moving for summary judgment bears the burden of proof on a particular element, "invocation of the Fifth Amendment is not a substitute for relevant evidence" and does not free a litigant "from adducing proof in support of a burden which would otherwise have been his." United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn,

N.Y., 55 F.3d 78, 83 (2d Cir. 1995) (internal quotation marks omitted). Thus, on summary judgment, a defendant's invocation of the Fifth Amendment may functionally prevent the defendant from offering evidence in opposition to the motion, such that "'the lack of testimony from . . . witnesses [who took the Fifth Amendment] meant that there was no record evidence to dispute the overwhelming evidence' proffered **[*25]** by the moving party," Amusement Indus., Inc., 721 F. App'x at 11 (quoting 650 Fifth Ave. v. Alavi Found., 830 F.3d at 93 n.25), but it will not itself satisfy the plaintiff's burden—as the moving party—to demonstrate that facts exist supporting its right to judgment on each element as to which it bears the burden of proof.

Richmond's corporate representative, testifying pursuant to Federal Rule of Civil Procedure 30(b)(6), was confronted with many of the allegations in the Amended Complaint and testified that she had no information that would refute those allegations. *See* Dkt. No. 78-32 at 75-77, 82, 84-86. The representative thus indicated on behalf of Richmond that there were no sources that Plaintiffs needed to discover in order to refute any potential answers by Richmond to those allegations. That testimony "is 'binding' in the sense that whatever [an organization's] deponent says can be used against the organization," although it does not "preclude[] the deponent from correcting, explaining, or supplementing its statements." Keepers, Inc. v. City of Milford, 807 F.3d 24, 34 (2d Cir. 2015). "[B]ecause a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know." Snapp v. United Transp. Union, 889 F.3d 1088, 1103 (9th Cir. 2018) (quoting Moore's Federal Practice § 30.25[3]).[5]

[5] Local Civil Rule 56.1 states that "[e]ach numbered paragraph in the [moving party's] statement of material facts . . . will be deemed to be admitted for the purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party," Local Civ. R. 56.1(c), and that "each statement controverting any statement of material fact[] must be followed by citation to evidence which would be admissible," *id.* at (d). Assertions that Defendants lack information to deny facts contained in the statement is insufficient, without more, to render those facts genuinely disputed. The Court will consider such statements to be undisputed. *See* Russell v. Aid to Developmentally Disabled, Inc., 753 F. App'x 9, 12-13 (2d Cir. 2018) (summary order) (holding that the district court did not abuse its discretion in "crediting as undisputed those facts that [plaintiff] did not properly controvert in her opposition" where "defendants properly cited to the record to support their facts," the district court conducted some scrutiny into the record, and the plaintiff responded to defendants' Rule 56.1 statement "by stating, for example, she 'lacks sufficient knowledge or information to admit or deny'").

DISCUSSION

Plaintiff **[*26]** moves for summary judgment on all five of its claims. As noted, it asserts claims for usury and RICO, as well as for breach of contract and the duty of good faith and fair dealing and for money had and received. It argues that the undisputed facts entitle it to summary judgment on the usury and RICO claims. In the event that the Court decides that the Fleetwood Agreement does not constitute a loan giving rise to a claim for usury, it argues that it is entitled to summary judgment on the contract and money had and received claims. The preliminary question is the proper characterization of the Fleetwood Agreement—that is, whether the agreement constitutes a loan or a true purchase of future receivables. The Court starts there and then continues to address Plaintiff's entitlement to summary judgment.

I. Whether the Fleetwood Agreement Constitutes a Loan

The parties agree that New York law applies to the interpretation of the Fleetwood Agreement. *See* Dkt. No. 76 at 16-18 (Plaintiff arguing that New York law applies to the interpretation of the Agreement because there is no conflict between the relevant New York and Texas laws); Dkt. No. 80 at ECF p. 7-8 (Defendants arguing that New York **[*27]** law generally applies because of the Agreement's choice-of-law clause); *cf.* Flatiron Acquisition Vehicle, LLC v. CSE Mortg. LLC, 2019 U.S. Dist. LEXIS 43682, 2019 WL 1244294, at *6 (S.D.N.Y. Mar. 18, 2019) ("Where '[t]he parties' briefs assume' that a certain body of law controls, 'such implied consent is sufficient to establish choice of law.'" (quoting Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000)).

New York and Texas apply similar principles in determining whether a transaction constitutes a true sale or a secured loan. The hallmark of a loan is that the lender "'is absolutely entitled to repayment under all circumstances,'" or put otherwise, the "principal sum is repayable absolutely." LG Funding, LLC v. United

Senior Props. of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 (2d Dep't 2020) (quoting K9 Bytes, Inc. v. Arch Cap. Funding, LLC, 56 Misc. 3d 807, 57 N.Y.S.3d 625, 632 (Sup. Ct. Westchester Cnty. 2017)). "[T]he name, color, or form which the parties have seen fit to give [an agreement]" are not dispositive, *id.*; rather, the court considers the agreement "'in its totality and judge[s] it by its real character,'" to determine whether it constitutes a loan. *Id.* (quoting Abir v. Malky, Inc., 59 A.D.3d 646, 873 N.Y.S.2d 350, 354 (2d Dep't 2009)); *see also* Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 157 N.Y.S.3d 800, 179 N.E.3d 612, 621-22 (N.Y. 2021) ("When determining whether a transaction is a loan, substance—not form—controls."); Gonzalez Cnty. Sav. & Loan Ass'n v. Freeman, 534 S.W.2d 903, 906 (Tex. 1976) ("It has often been said that courts will look beyond the form of the transaction to its substance in determining the existence or nonexistence of usury. . . . Labels put on particular charges are not controlling."). The analysis usually is guided by examining three factors to "determin[e] whether **[*28]** repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy." LG Funding, 122 N.Y.S.3d at 312. A reconciliation provision is relevant because it can shift the risk of nonpayment away from the merchant by "allow[ing] the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof). If a merchant is doing poorly, the merchant will pay less and will receive a refund of anything taken by the company exceeding the specified percentage. . . . If there is no reconciliation provision, the agreement may be considered a loan." K9 Bytes, Inc., LLC, 57 N.Y.S.3d at 632-33. Moreover, if the amount of monthly payments can change pursuant to reconciliations, then the term of the agreement is necessarily not finite. *See* Principis Cap., LLC v. I Do, Inc., 201 A.D.3d 752, 160 N.Y.S.3d 325, 327 (2d Dep't 2022). And "[i]f the term is indefinite, then it 'is consistent with the contingent nature of each and every collection of future sales proceeds under the contract.'" K9 Bytes, Inc., LLC, 57 N.Y.S.3d (quoting IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071, at *5 (Sup Ct. Nassau Cnty. Mar. 10, 2017)). In determining whether the merchant retains the risk of nonpayment, it is significant that "the agreement provides that [defendant's] written admission of its inability **[*29]** to pay its debt or its bankruptcy constitute events of default under the agreement, which entitle the plaintiff to the immediate full repayment of any of the unpaid purchased amount." LG Funding, 122 N.Y.S.3d at 313.

The LG Funding court explained that certain features of an agreement suggested that the merchant's "obligation to repay was absolute and not contingent on its actual accounts receivable," including that:

> [t]he agreement provides that in the event [the merchant] files for bankruptcy or is placed under an involuntary filing, the plaintiff would be entitled to enforce the provisions of the personal guaranty executed by [the individual defendants], [the merchant defendant] would be required to deliver to the plaintiff a confession of judgment in the amount of the purchased amount, and the plaintiff would be allowed to enter the confession of judgment as a judgment.

Id.

The three factors provide only a guide to analysis. They do not dictate the conclusion, and a court need not find the presence of all three factors in concluding that a transaction is a loan. *See, e.g.,* LG Funding, 122 N.Y.S.3d at 312-13 (affirming denial of motion to dismiss affirmative defenses alleging that the transaction was a criminally usurious loan without considering whether **[*30]** the agreement had a finite term); Davis v. Richmond Cap. Grp., LLC, 194 A.D.3d 516, 150 N.Y.S.3d 2, at 4 (1st Dep't 2021) (concluding that plaintiffs sufficiently alleged that agreements were loans subject to usury laws and reciting characteristics of agreement relating to reconciliation and recourse but not finite term of agreement); *Advance Servs. Grp. v. Acadian Props. Austin LLC, 70 Misc. 3d 1225(A), 141 N.Y.S.3d 834, at *5 (Sup. Ct. Kings Cnty. 2021)* (concluding that repayment was absolute and therefore agreement was a loan notwithstanding the lack of a finite term in the agreement); Pirs Capital, LLC v. D & M Truck, Tire & Trailer Repair Inc., 69 Misc. 3d 457, 129 N.Y.S.3d 734, 74 (Sup. Ct. N.Y. Cnty. 2020) (concluding that, notwithstanding a recourse provision in an agreement, "the other aspects of the transaction render the [a]greement . . . 'sufficiently risky such that they cannot be considered loans, as a matter of law'" where those other aspects included a reconciliation provision and a non-finite repayment term (quoting K9 Bytes, Inc., 57 N.Y.S.3d at 633 (Sup. Ct. Westchester Cnty. 2017)). Rather, the essential question under New York law is whether the contracting party "is absolutely entitled to repayment under all circumstances." LG Funding, 122 N.Y.S.3d at 312 (quoting K9 Bytes, Inc., 57 N.Y.S.3d at 632). Thus, an agreement can be a loan notwithstanding the presence of a reconciliation provision and a non-finite term. *See* Legend Advance

Funding II, LLC v. Almeida's Auto Repair, Inc., 2022 N.Y. Misc. LEXIS 1550, 2022 WL 885718, at *2-3 (Sup. Ct. N.Y. Cnty. Mar. 24, 2022) (denying summary judgment to putative lender where an agreement included a reconciliation provision and was for a non-finite term but where the "plaintiff has multiple means of recourse if merchant declares **[*31]** bankruptcy").

The Second and Fifth Circuits engage in a similar analysis to distinguish a true sale from a transfer of collateral in connection with a secured financing. In both Circuits, the characterization turns upon "the substance of the transaction," and not on the label attached to it by the parties. Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1068-69 (2d Cir. 1995); *see also* Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co., 336 F.3d 410, 414 (5th Cir. 2003) ("Characterization of the agreement at issue turns on 'the substance of the relationship . . . not simply the label attached to the transaction . . . .'" (quoting Endico Potatoes, 67 F.3d at 1068)); In re R&J Pizza Corp., 2014 Bankr. LEXIS 5461, 2014 WL 12973408 at *3 (Bankr. E.D.N.Y. Oct. 14, 2014) ("[T]he case law focuses on the economics of the transaction and which party bears the risk of non-collection from the account debtor in determining whether a sale of accounts is a true sale or a secured transaction. While the terminology and characterization of the transaction in the agreement itself is a factor to be considered, it is not conclusive." (citation omitted)). The courts applying Endico Potatoes consider a number of factors including:

> the right of the creditor to recover from the debtor any deficiency if the assets assigned are not sufficient to satisfy the debt, the effect on the creditor's right to the assets assigned if the debtor were to pay the debt from independent funds, whether the debtor has a right **[*32]** to any funds recovered from the sale of assets above that necessary to satisfy the debt, and whether the assignment itself reduces the debt.

Endico Potatoes, 67 F.3d at 1068; *see also* Sotheby's Inc. v. Minor, 2010 U.S. Dist. LEXIS 160557, 2010 WL 11601336, at *9 (S.D.N.Y. Mar. 30, 2010) (reciting Endico Potatoes factors in analyzing breach of contract claim and explaining that "the root of all of these factors is the transfer of risk"). The ultimate question, like that in LG Funding, relates to whether the transaction involves a transfer of risk. Where the putative "lender and not the [putative] borrower bears the risk of non-performance by the account debtor" and "the borrower's debt is extinguished" by the transaction, then "the lender's risk with regard to the performance of the accounts is direct," and the transaction is properly characterized as the purchase of accounts receivable. Endico Potatoes, 67 F.3d at 1069. By contrast, the transaction is properly characterized as a loan where "the lender holds only a security interest [and] 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." *Id.*; *see also* Adar Bays, LLC, 179 N.E.3d at 622 ("[P]arties who are not directly exposed to **[*33]** market risk in the value of the underlying assets are likely to be lenders, not investors.").

Whether the Court looks to the LG Funding or Endico Potatoes factors, the result here is the same. Reading the agreement in its totality and by its real character, it constitutes a loan and not a sale of assets. The lender "is absolutely entitled to repayment [by Fleetwod] under all circumstances," LG Funding, 122 N.Y.S.3d at 312 (quoting K9 Bytes, Inc., 57 N.Y.S.3d at 632), and it is the borrower—and not the lender—who bears the risk of the account debtor's nonpayment. On the most elementary level, the Agreement places the obligation on Fleetwood and not on any account debtor to repay Richmond and sets that sum not as a percentage of the receipts from account debtors but as an absolute figure of "the specific daily amount" of $1,399 "each business day," regardless of whether any accounts receivable are collectible or not. *Id.* Thus, Fleetwood, not the account debtors, assumes responsibility "for ensuring that the specified percentage to be debited . . . remains in the Account." *Id.* The Designated Account is to be the "only one depositing bank account." *Id.* And if Fleetwood fails in its obligation to ensure that the "specified percentage to be debited remains in the account," then **[*34]** Richmond is entitled to remedies against *Fleetwood* and not against the account debtors. Among other things, if the Designated Account does not have sufficient funds to cover the withdrawals of the daily amount more than four times, a default is declared, *id.* at ECF p. 7, the full uncollected Purchased Amount becoming immediately due and payable, and Richmond has the right to pursue all remedies provided for in the Agreement against Fleetwood and the guarantors, *id.* § 1.11.

Although on its face the Agreement purports to provide for the sale of accounts receivables, that is just window dressing. The Agreement has none of the characteristics of the sale of receivables in terms of the transfer of risk and rewards. The Fleetwood Agreement

provides that Fleetwood "sells, assigns and transfers" not just its accounts receivable but "all of [its] *future accounts, contract rights and other entitlements arising from or relating to* the payment of monies from Merchants' customers and/or third party payors . . . for the payments due to Merchant as a result of Merchant's sale of goods or services" until the total "Purchased Amount" is repaid. Dkt. No. 77-1 at 1. That language is so broad as to be **[*35]** essentially vacuous. It captures not just future accounts from Fleetwood's customers but gives Richmond the right to *all* Fleetwood revenues up to the full uncollected Purchased Amount. It covers all contract rights and other entitlements as long as those entitlements relate to the payment of monies from any third-party payors related to the sale of goods *or* services. Tellingly, Defendants do not identify any revenue that Fleetwood, or any operating business, could receive that would not somehow be captured by this broad language, and it is difficult to imagine what revenue would not fall within it.

Furthermore, the rights and risks that Richmond obtains do not bear any resemblance to the purchase of assets. Richmond itself has no obligation, or (ordinarily no) right, to collect on the "receivables." That obligation rests entirely on Fleetwood, and Fleetwood is required to remit the specified percentage into the Designated Account, regardless whether the "Merchant's customers" are able to do so. Richmond has no responsibility to contact Fleetwood's customers; indeed, it is given the right to collect directly from them only in the event of a default. Dkt. No. 77-1 § 1.10. The risk of **[*36]** non-payment thus falls entirely on Fleetwood. The failure of an account debtor has no consequence on the amount due. If a Fleetwood account debtor failed to pay its debt or became insolvent, there would be no reduction in the Purchased Amount or on Fleetwood's obligations to pay the daily amount; Richmond would be repaid from the proceeds of any other Transaction. *Cf. Funding Metrics, LLC v. NRO Boston, LLC, 2019 N.Y. Misc. LEXIS 4878, 2019 WL 4376780, at *4 (Sup. Ct. N.Y. Cnty. Aug. 28, 2019)* ("Denominating loan documents by another name, such as 'Merchant Agreements' as in this case, and including in such documents language of [the putative lender's purported purchase of account receivables that is unsupported by actual [borrower] receivables dedicated to repayment, does not shield it from the judicial determination that it contemplates a criminally usurious transaction, which is void *ab initio* as a matter of law.").

Richmond also does not receive the reward of performance by the account debtors. Under the Agreement, it is entitled to only the Purchased Amount, and not more. Fleetwood has use of the Designated Account, and Richmond's right to draw from it is extinguished at "such time as [Richmond] receives payment in full of the Purchased Amount." Dkt No. 77-1 at 1. Thus, even if the account debtors perform **[*37]** better than expected, Richmond's recovery is capped, and it will receive no benefit from that performance. Indeed, so long as Fleetwood has enough money to cover the daily payment amount in the Designated Account, Fleetwood can use the proceeds from Transactions however it likes—the receipts need not be deposited in an escrow account or otherwise held in trust for Richmond's benefit. Fleetwood enjoys the use of the proceeds. Richmond has none of the rights of ownership—it does not have the right to possess, use, or convey any of the accounts it supposedly has purchased. *See* Black's Law Dictionary (11th ed. 2019) (defining ownership as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to covey it to others. . . . Ownership rights are general, permanent, and heritable."); *Handelman v. Commissioner, 509 F.2d 1067, 1071 (2d Cir. 1975)* (referring to "the greater bundle of rights and attributes of ownership" as "including title, possession and management, and the burdens and benefits accompanying same" (internal quotation marks omitted)).

Under the Agreement, Fleetwood and Pamela and Robert Fleetwood, as guarantors, have the obligation to conduct due diligence and credit checks on the customers whose accounts **[*38]** Richmond supposedly has purchased; Richmond does not. The Agreement gives Richmond itself neither the obligation nor the right, absent a default, to collect on the accounts. Fleetwood and the guarantors:

> agree[d], warrant[ed] and represent[ed] ... that they w[ould] constantly perform all appropriate Due Diligence and credit checks of all of the customers' finance, cash flow, solvency, good faith, payment histories, and business reputations (the 'Due Diligence Requirements') as may suffice to ensure any and all products and/or services provided sold or delivered by [Fleetwood] to said customers will be paid for by customers in full and on time, and will not result in the creation of an unpaid account.

Dkt. No. 77-1 § 2.14.

Fleetwood is obligated to "expend its Best Efforts to maintain and to grow its business, to ensure that [Richmond] obtains the full Purchased Amount," and a breach of that obligation constitutes a default giving rise

to the full remedies against both Fleetwood and the guarantors. Dkt. No. 77-4 § 2.14. And significantly, Fleetwood, as the "Merchant," agreed that, if it interrupts the operation of the business, or transfers, moves, sells, disposes, or otherwise conveys **[*39]** its business or assets without Richmond's express written consent, the "full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement become due and payable in full immediately." *Id.* § 1.11.

Richmond is entitled to repayment in full from Fleetwood in virtually every imaginable circumstance. The Agreement contains provisions that provide recourse for Richmond against Fleetwood and its guarantors in the case of Fleetwood declaring bankruptcy. In the Fleetwood Agreement, Fleetwood's written admission of its inability to pay debts or its bankruptcy or insolvency each constitutes an "Event of Default," pursuant to which Richmond

> may proceed to protect and enforce its rights or remedies by suit in equity or by action at law or both . . . or to enforce the discharge of Merchant's obligations hereunder (including the Guaranty) or any other legal or equitable right or remedy. All rights, powers and remedies of [Richmond] in connection with this Agreement may be exercised at any time by [Richmond] after the occurrence of an Event of Default . . . and shall be in addition to any other rights, powers or remedies provided by law or equity.

Dkt. No. 77-1 **[*40]** § 3.3. The Agreement also provides that "[i]n the event that the Merchant files for bankruptcy protection or is placed under an involuntary filing Protections 2 and 3 are immediately invoked." *Id.* § 2.9. Protection 2 allows Richmond to "enforce the provisions of the Personal Guaranty of Performance against the Guarantor," while under Protection 3, Fleetwood authorized Richmond to execute in the name of Fleetwood a confession of judgment in favor of Richmond "in the amount of the Purchase Amount stated in the Agreement." *Id.* § 1.11.[6] As in *LG Funding*, if Fleetwood files for bankruptcy, Richmond would be entitled to repayment of the full Purchase Amount—not just the amount that it paid upfront—through a court-filed confession of judgment, suggesting that the agreement is a loan. *See Advance Servs. Grp., 141 N.Y.S.3d at *5* ("Finally, paragraphs 2.9 and 1.11 of the Merchant Agreement provide that if Acadian files for bankruptcy or is placed under an involuntary filing, Advance is immediately entitled to enforce the personal guaranties and enter a confession of judgment against Acadian. These provisions reflect that bankruptcy is a default under the Merchant Agreement, entitling Advance to an immediate judgment against Acadian. Thus, Advance **[*41]** did *not* assume the risk that Acadian would have no future receivables and repayment was absolute, not contingent, and weighs in favor of treating this transaction as a loan rather than a purchase of receivables.").

The guaranty signed by Pamela and Robert Fleetwood guarantees Fleetwood's performance of "all representations, warranties, covenants made by Merchant in the [Fleetwood] Agreement in Sections thereof 2.3, 2.5, 2.6, 2.9 [relating to bankruptcy], 2.10, 2.11, 2.12, 2.13, 2.14" and provides that "Guarantor's obligations are due at the time of any breach by Merchant of any representation, warranty, or covenant made by Merchant in the Agreement." *Id.* at ECF p. 4. Those representations, warranties, and covenants include the obligation to remit the specified percentage into the Designated Account. If Fleetwood fails to satisfy that covenant, Richmond is entitled to seek recovery from the guarantors for all "losses and damages by enforcement of [Richmond's] rights under th[e] Agreement," including the right to the full Purchased Amount. *Id.* at ECF p. 4. Upon the occurrence of an "Event of Default" listed in Section 3.1—including if Fleetwood is unable to pay its debts or its files **[*42]** for bankruptcy—Richmond may "enforce the discharge of Merchant's obligations hereunder (including the Guaranty)." Dkt. No. 77-1 § 3.3. Courts have observed that personal guarantees are "consideration[s] pointing toward treating the agreement being treated as a loan rather than a receivables purchase" but have also observed that personal guarantees that are limited by the contingent nature of the merchant's obligations under an agreement may not render the agreement a loan. *Pirs Cap., LLC, 129 N.Y.S.3d at 740*; *see also OriginClear Inc. v. GTR Source, LLC, 2021 U.S. Dist. LEXIS 239013, 2021 WL 5907878, at *6 (W.D.N.Y. Dec. 14, 2021)*. Here, the Guaranty is tied to the merchant's obligations under the Agreement, but those obligations are not contingent upon the receipt of future receivables—if Fleetwood declared bankruptcy, it would

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[6] Protection 3 states that "[u]pon breach of any provision in this paragraph 1.11, [Richmond] may enter that Confession of Judgment as a Judgment with the Clerk of any Court and execute thereon," *id.*, but in order for Section 2.9's reference to Protection 3 to have any meaning, it must be interpreted to mean that Richmond can enter with a court the confession of judgment that was previously authorized upon filing for bankruptcy protection.

be subject to a confession of judgment for the full Purchase Amount of $149,900.00. *See* Dkt. No. 77-4 § 1.11.

Thus, under the Agreement, there are virtually no circumstances where, if the accounts receivable would not be sufficient to pay the Purchased Amounts, Richmond would not be absolutely entitled to repayment of that amount by Fleetwood. "Beyond the superficial hazard associated with a [merchant's] relatively meager chance of success, [Richmond] backed up the risk with [a] personal guarantee and a **[*43]** security interest in [Fleetwood's] property. Moreover, any default of the Agreements (including [Fleetwood's] closing or bankruptcy) would trigger payment." *Clever Ideas, Inc. v. 999 Rest. Corp., 2007 N.Y. Misc. LEXIS 9248, 2007 WL 3234747 (Sup. Ct. N.Y. Cnty. Oct. 12, 2007)*.

The Fleetwood Agreement nominally has a reconciliation provision, Dkt. No. 77-1 at 1 ("RCF *will* debit the specific daily amount each business day and upon receipt of the Merchant's monthly bank statements on or about the eighteenth day of each month *reconcile the Merchant's Account* by either crediting or debiting the difference from or back to the Merchant's Account so that the amount debited per month equals the specified percentage" (emphasis added)). But that provision functions in such a way that renders it largely illusory. It does not relieve Fleetwood of the obligation, if the merchants do not pay the specific daily amount, for Fleetwood to pay the specific daily amount, nor does it qualify the right of Richmond, if the specific daily amount is not paid for four days, to declare the full Purchased Amount immediately due and payable and to exercise its rights to collect as against Fleetwood.

The reconciliation provision provides that it will "upon receipt of the Merchant's monthly bank statements on or about the eighteenth **[*44]** day of each month reconcile the Merchant's Account by either crediting or debiting the difference from or back to the Merchant's Account so that the amount debited per month equals the specified percentage." *Id.* Notably, the provision does not provide that the daily amount would change upon reconciliation—indeed, the only way the specific daily amount would actually change would be if Richmond "upon Merchant's request, adjust[ed] the amount of any payment due under this Agreement at [its] *sole discretion and as it deems appropriate*." *Id.; see also Am. Water Restoration, Inc. v. AKF Inc., 74 Misc. 3d 1203(A), 157 N.Y.S.3d 919, at *4 (Sup. Ct. Ontario Cnty. 2002)* (concluding usurious loan contention was negated where reconciliation provision required adjustment of daily amount debited after reconciliation "to more closely reflect the Merchant's actual Receipts times the Specified Percentage"). Thus, as Richmond itself made clear in its communications to Fleetwood and to its other debtors, *see supra* at p. 10, it had the right to decline a request by a debtor to reduce the amount that needed to be deposited into the designated account even if the debtor did not have sufficient funds to deposit into the account, *see, e.g.*, Dkt. No. 77-6; Dkt. No. 79 ¶¶ 70-72 (citing to affidavits of Richmond's customers **[*45]** that Richmond refused to reduce the daily payments of merchants when the merchant's receivable collections slowed down"). Even if the business was not performing and a reconciliation would show that the daily amount Richmond was deducting from Fleetwood's account was far above the specified percentage of Transactions to which it was entitled, Fleetwood would continue to be charged that daily amount each day regardless of the result of that reconciliation absent Richmond's unilateral decision to reduce the amount. If the merchant is unable to pay that daily amount for more than four days, the merchant would be in default pursuant to the language in Appendix A.[7] Since a "default under any of the terms, covenants, and conditions of any other agreement with RCF" is an "Event of Default" under the Fleetwood Agreement, Richmond would be entitled to 100% of the amounts due from each Transaction, *see* Dkt. No. 77-1 at 1, in addition to "[a]ll rights, powers, and remedies of RCF in connection with th[e] Agreement, *id.* § 3.3. Among the "rights, powers, and remedies" granted to RCF in connection with the Fleetwood Agreement are: (1) the "full uncollected Purchase Amount plus all fees

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[7] A simple example illustrates the point. Suppose, for example, that Fleetwood's receipts from defined Transactions equaled $1,300 per day, Richmond still would have the right to withdraw $1,399 per day. The deficit between what Fleetwood received from defined Transactions and the Specified Percentage would not affect Richmond's right on a daily basis to withdraw $1,399. Richmond would have the obligation, on the 18th of the month, to credit Fleetwood back the difference between $1,399 and 10% of the $1,300 (or $130). But Fleetwood's right to the credit would be illusory. If the $1,300 it received on a daily basis was insufficient for Richmond to withdraw $1,399 on a daily basis for a four-day period, Richmond could declare an Event of Default and Richmond would owe the full Purchase Amount. Fleetwood would never reach the 18th day of the month. That is exactly the point that Richmond made in its correspondence with its merchant customers. It could declare them in default and obtain the full Purchase Amount regardless of the performance of the accounts.

(including **[*46]** legal fees) due under the[s] Agreement and the attached Security Agreement becom[ing] due and payable in full immediate," *id.* § 1.11 (Protection 1); (2) "enforc[ing] the provisions of the Personal Guaranty of Performance against the Guarantor(s)," *id.* (Protection 2); (3) entering a confession in favor of RCF in the amount of the full Purchase Amount with the clerk of any court, *id.* (Protection 3); (4) the "entire Purchase Amount and all fees (including legal fees) . . . becom[ing] immediately refundable and payable to RCF from Merchant," *id.* (Protection 5); and (5) "proceed[ing] to protect and enforce its rights or remedies by suit in equity or by action at law, or both . . . to enforce the discharge of Merchant's obligations hereunder (including the Guaranty)," *id.* § 3.3.

Viewing the Agreement as a whole, the Court concludes that it is a loan and not a contract for the purchase of future receivables. It thus may be subject to usury laws. *LG Funding, 122 N.Y.S.3d at 312* ("The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be.").

II. Usury Claim

Plaintiff seeks summary judgment for its third cause **[*47]** of action, which is for usury in violation of the Texas Finance Code, and its fourth cause of action, for associated attorneys' fees. The essential elements of a usury claim under Texas law are: "(1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the extraction of a greater compensation than allowed by law for the use of the money by the borrower." *First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285, 287 (Tex. 1994)*. Under Texas law, the maximum interest rate "[f]or a contract made, extended, or renewed under which credit is extended for a business, commercial, investment, or similar purpose" is 28% per year. *Tex. Fin. Code § 303.009(c)*. Under *Section 305.003 of the Texas Finance Code*, "[a] creditor who charges or receives legal interest that is greater than the amount authorized" is liable to the borrower for "an amount that is equal to . . . three times the difference between the maximum allowable legal interest and the total amount of interest charged." *Id. § 305.003*. If the interest charged and collected is more than twice the legal maximum, then, in addition to any amounts due under *Section 305.003*, the creditor is entitled to "(1) the principal amount on which the interest is charged and received; and (2) the interest and all other amounts charged and received" by the creditor. *See Tex. Fin. Code § 305.004(a)*.

Plaintiff argues that, **[*48]** on its face, the Agreement charged a nominal interest rate of 99.8% per year, but, considering the excess withdrawals, the nominal interest rate was actually 278.5% per year. Dkt. No. 76 at 35. In support of these figures, Plaintiff submits an expert report of a Charles S. Lunden, a "Certified Public Accountant with more than forty years of experience assessing damages," *id.*, who calculated these figures, Dkt. No. 78-19 at ECF p. 9.

A. Choice-of-Law

The preliminary gating question is whether Texas law applies. The Fleetwood Agreement has a choice-of-law provision stating that the "Agreement shall be governed by and construed in accordance with the laws of the state of New York, without regards to any applicable principles of conflicts of law." Dkt No. 77-1 § 4.5. Plaintiff argues that the choice-of-law provision governs only the construction of the Fleetwood Agreement and not extra-contractual causes of action such as usury. Dkt. No. 76 at 18. Defendants assert that New York law applies, arguing that the law chosen by the parties is relevant and explaining that "New York has a superior interest in resolving the matters at issue herein, as the Defendants reside in the metropolitan area, **[*49]** did business in the NY metropolitan area, bank in the NY metropolitan area, and most importantly . . . ., have been successfully defending multiple governmental agencies [sic] within the NY metropolitan area." Dkt. No. 80 at ECF p. 8.

"In a federal question action where a federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state." *Manning Int'l Inc. v. Home Shopping Network, Inc., 152 F. Supp. 2d 432, 436 n.3 (S.D.N.Y. 2001)* (citing *Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989)*). Moreover, the validity of a contractual choice-of-law provision is "decided not under the law specified in the clause, but under the relevant forum's choice-of-law rules governing the effectiveness of such clauses." *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 332, 335 (2d Cir. 2005)*. "Under New York law, great deference is to be given a contract's designation of the law that is to govern disputes arising from the contract, and that designation is determinative if the state selected has sufficient contacts with the transaction." *Zerman v. Ball, 735 F.2d 15, 20 (2d Cir. 1984)*; *see also IBM v. Mueller, 2017*

U.S. Dist. LEXIS 159618, 2017 WL 4326114, at *4 (S.D.N.Y. 2017) (same).

If a claim falls within a contract's choice-of-law provision and the provision calls for New York law, New York law will generally be applied "so long as the chosen law bears a reasonable relationship to the parties or the transaction," but it will not be applied "where the chosen law **[*50]** 'violates some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'" Welsbach Elec. Corp. v. MasTec N. Am., Inc., 7 N.Y.3d 624, 859 N.E.2d 498, 500-01, 825 N.Y.S.2d 692 (N.Y. 2006); *see also* United States v. Moseley, 980 F.3d 9, 20 (2d Cir. 2020) ("'New York law is unambiguous in the area of express choice of law provisions in a contract. Absent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction.'" (quoting *Int'l Minerals & Res., S.A. v. Pappas, 96 F.3d 586, 592 (2d Cir. 1996)*); Medtronic, Inc. v. Walland, 2021 U.S. Dist. LEXIS 172235, 2021 WL 4131657, at *4-6 (S.D.N.Y. Sept. 10, 2022) (explaining that, even after the New York Court of Appeal's decision in Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 25 N.Y.S.3d 21, 45 N.E.3d 917 (N.Y. 2015)—which stated that "New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract"—a court should consider whether a choice-of-law provision bears a reasonable relationship to the parties or transaction or violates a fundamental policy of a state with a materially greater interest than the chosen state). The rule protects the justified expectations of the parties to an agreement and honors the principle that "persons are free within broad limits to determine the nature of their contractual obligations" and "the demands of certainty, predictability and convenience," while at the same time preventing parties **[*51]** from opting into the law of a particular state that has no reasonable relationship to the parties or the transaction simply because the law is convenient. *See* Restatement (Second) Conflict of Laws § 187 comment e.

The application of a choice-of-law provision to a usury claim can make a material difference to the success or failure of that claim. Assuming that the usury claim falls within the scope of the choice-of-law provision, the parties' choice of law is respected and will be enforced unless the chosen law bears no reasonable relationship to the transaction or the parties or if enforcement of it would be intolerable for the court. By contrast, in the absence of a choice-oflaw provision, New York applies a "center of gravity" approach to contract cases, Moseley, 980 F.3d at 23, and an interest analysis to tort cases, Toretto v. Donnelley Fin. Solutions, Inc., 583 F. Supp. 3d 570, 2022 U.S. Dist. LEXIS 20558, 2022 WL 348412, at *5 (Feb. 4, 2022). The center of gravity approach focuses on the place with "the most significant contacts with the matter in dispute," looking to "five generally significant contacts: the places of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties." Moseley, 980 F.3d at 23 (internal quotation marks and citations omitted) (alterations adopted) (analyzing which state's usury laws would apply under **[*52]** "center of gravity" approach); *see also* A. Conner Gen. Contracting Inc. v. Rols Cap. Co., 145 A.D.2d 452, 535 N.Y.S.2d 420, 421 (2d Dep't 1988). In this approach, "public policy considerations . . . may also bear on the analysis in cases 'where the policies underlying conflicting laws in a contract dispute . . . reflect strong governmental interests." *Id.* (quoting In re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 613 N.E.2d 936, 597 N.Y.S.2d 904 (N.Y. 1993)). In tort cases, the "'law of the jurisdiction having the greatest interest in the litigation [will] be applied.'" Krock v. Lipsay, 97 F.3d 640, 645-46 (2d Cir. 1996) (alterations adopted) (quoting Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993)). For the purposes of the interest analysis, "the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734 (N.Y. 1968). Factors to be considered in applying the interest analysis include "[t]he contacts of the parties and occurrences with each jurisdiction . . .[,] the policies underlying each jurisdiction's rules, the strength of the governmental interests embodied in these policies, and the extent to which these interests are implicated by the contacts." Fin. One Pub. Co., 414 F.3d at 337. Moreover, the interest analysis approach looks to whether the law under consideration is "conduct-regulating" rather than "loss-allocating," where "[c]onduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from **[*53]** occurring," while "[l]oss allocating rules . . . prohibit, assign, or limit liability after the tort occurs." Padula v. Lilarn Props. Corp., 84 N.Y.2d 519, 644 N.E.2d 1001, 1003, 620 N.Y.S.2d 310 (N.Y. 1994); *see also* In re Thelen LLP, 736 F.3d 213, 220 (2d Cir.), *certified question accepted sub nom. Thelen LLP. v. Seyfarth Shaw LLP, 22 N.Y.3d 1017, 981 N.Y.S.2d 349, 4 N.E.3d 359 (N.Y. 2013)*, and *certified question answered*, 24 N.Y.3d 16, 995 N.Y.S.2d 534, 20 N.E.3d 264 (N.Y. 2014) (internal quotation marks and citations omitted).

The threshold question is thus whether or not Plaintiff's usury claim may fall within the choice-of-law provision in the Agreement. '"[T]he effect of a choice-of-law clause depends on its scope,' and New York courts are 'reluctant to read choice-of-law clauses broadly.'" *Arnone v. Aetna Life Ins. Co., 860 F.3d 97, 108 (2d Cir. 2017)* (alterations adopted) (quoting *Fin. One Pub. Co., 414 F.3d at 332, 335*). Specifically, there is "a reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action." *Fin. One Public Co., 414 F.3d at 334*. Thus, "New York courts typically apply the law selected in contractual choice-of-law clauses only to causes of action sounding in contract unless 'the express language of the choice-of-law provision is sufficiently broad as to encompass the entire relationship between the contracting parties.'" *EMA Fin., LLC v. NRusz, Inc., 444 F. Supp. 3d 530, 540 (S.D.N.Y. 2020)* (quoting *H.S.W. Enters. v. Woo Lae Oak, Inc., 171 F. Supp. 2d 135, 141 (S.D.N.Y. 2001)*).

The law is not completely settled in the Second Circuit whether a usury claim falls within a "narrow" choice of law provision. The Second Circuit has observed that a **[*54]** choice-of-law provision that states "[t]his Agreement will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine)" is "not broad enough to reach tort claims incident to the contractual relationship," *Fin. One Pub. Co., 414 F.3d at 335* (citing *Knieriemen v. Bache Halsey Stuart Shields Inc., 74 A.D.2d 290, 427 N.Y.S.2d 10, 12-13 (1st Dep't 1980)*), or to reach other non-contractual causes of action, *see Mayagüez S.A. v. Citigroup, Inc., 2018 U.S. Dist. LEXIS 51931, 2018 WL 1587597, at *7 (S.D.N.Y. Mar. 28, 2018)*. Such language "merely specif[ies] the law that applies to claims *arising from the* contract but not to non-contractual claims (*e.g.*, consumer protection statutes sounding in fraud)." *Heskiaoff v. Sling Media, Inc., 719 F. App'x 28, 31 (2d Cir. 2017)* (summary order). Thus, "language in a choice-of-law provision indicating that the *contract* will be governed by a certain body of law is insufficient to determine which law will govern *tort claims arising out of* that contract." *Bausch & Lomb Inc. v. Mimetogen Pharms., Inc., 2016 U.S. Dist. LEXIS 59941, 2016 WL 2622013, at *8 (W.D.N.Y. May 5, 2016)*. Extra-contractual claims will not fall within the scope of a narrow choice-of-law provision "even where the rights at issue are closely related to contractual rights and obligations." *Mayagüez S.A., 2018 U.S. Dist. LEXIS 51931, 2018 WL 1587597, at *7*.

A narrow choice-of-law provision has been held insufficient to cover tort claims such as fraudulent conveyance claims, *Ramiro Aviles v. S&P Glob., Inc., 380 F. Supp. 3d 221, 271 (S.D.N.Y. 2019)*, fraudulent misrepresentation claims, *Krock, 97 F.3d at 645*, fraudulent inducement claims, fraudulent concealment claims, negligent misrepresentation claims, *Mayagüez S.A., 2018 U.S. Dist. LEXIS 51931, 2018 WL 1587597, at *7*, and **[*55]** tortious interference claims even if they arise in connection with a contract, *Manbro Energy Corp. v. Chatterjee Advisors, LLC, 2021 U.S. Dist. LEXIS 97031, 2021 WL 2037552, at *3 (S.D.N.Y. May 21, 2021)*. It also does not cover claims that are non-contractual in nature like promissory estoppel and unjust enrichment claims. *Mayagüez S.A., 2018 U.S. Dist. LEXIS 51931, 2018 WL 1587597, at *7*. "[I]n order for a choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be 'sufficiently broad' as to encompass the entire relationship between the contracting parties." *Krock, 97 F.3d at 645* (quoting *Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 309-10 (2d Cir. 1994)*).

Claims that a contract is unconscionable, on the other hand, have been found to sound in contract and thus to fall within a narrow choice-of-law provision. *See, e.g., Mayagüez S.A., 2018 U.S. Dist. LEXIS 51931, 2018 WL 1587597, at *10* ("Because Mayagüez's unconscionability claim is a contract-based claim, it is subject to the choice of law provision in the [agreement]."); *WeWork Cos. v. Zoumer, 2016 U.S. Dist. LEXIS 46033, 2016 WL 1337280, at *5 (S.D.N.Y. April 5, 2016)* (applying New York law to unconscionability claim where choice-of-law provision was narrow).[8]

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[8] Courts outside the Second Circuit appear to be split on whether usury claims are contractual. *Compare Hengle v. Asner, 433 F. Supp.3d 825, 864 (E.D. Va. 2020)* (applying Virginia's choice-of-law rules to usury claim and, in so doing, noting that "courts considering *contract-related* claims will give a choice-of-law provision in a contract the fullest effect intended by the parties absent unusual circumstances" (emphasis added)); *with BREA 3-2 LLC v. Hagshama Florida 8 Sarasota, LLC, 327 So.3d 926, 935 n.6 (Ct. App. Fl. 3d Dist. 2021)* (analyzing usury claim as tort claim in determining whether it fell within the scope of an arbitration provision); *Sake TN, LLC v. Cain, 2022 U.S. Dist. LEXIS 30599, 2022 WL 525993, at *8-9 (M.D. Tenn. Feb. 22, 2022)* (observing that usury is a cause of action that lies in both tort and contract and finding allegations of violations of state usury statute sufficient to adequately allege an underlying tort to support conspiracy claim). A few decisions have treated usury claims as non-contractual and falling outside a narrow choice-of-law

The foregoing cases beg the question, rather than answering it, whether a usury claim should be considered to be contractual for purposes of choice-of-law. Although the answer is not free from doubt, it appears that the approach that is most consistent with Second Circuit law **[*56]** is to treat usury claims as contractual for purposes of choice-of-law analysis and to give effect to the parties' choice of the law that they desire to apply to the enforceability of the interest provision of a contract as long as that law has a reasonable relationship to the transaction and/or the parties and is not against public policy. In particular, in *United States v. Moseley*, the Second Circuit considered a relatively broad choice-of-law provision that stated that the law of a jurisdiction "shall control the rights, duties, and obligations of the parties hetero without regard to [the jurisdiction's] choice of law provisions." *980 F.3d at 19* (internal quotation marks omitted). While not considering the breadth of the choice-of-law provision, the Circuit apparently agreed that a usury claim would fall within it and proceeded to analyze whether the choice-of-law provision would otherwise be effective in light of New York's public policy in favor of enforcing its usury laws to protect its residents. *Id. at 20-22*. After concluding that the choice-of-law provision would not be effective because "provisions specifying foreign jurisdictions without usury laws are unenforceable in New York as against its public policy," *id. at 22*, the Circuit **[*57]** applied the "center of gravity" approach that is applicable to "adjudicating the choice of law for a contract dispute," *id. at 23*.

The Circuit's use of the "center of gravity" approach to choice-of-law issues, rather than the "interest analysis" advocated for by Fleetwood and applicable to tort claims, suggests at least an implicit conclusion that usury claims sound in contract and not in tort. *Cf. Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 394 (2d Cir. 2001)* (applying "center of gravity" analysis to determine "which state has the most significant relationship to the transaction and the parties" to claim that "sounds more in contract than in tort"); *Fin. One Pub. Co., 414 F.3d at 336* (analyzing whether a claim fit within a narrow choice-of-law provision separately from whether the "center of gravity" choice-of-law approach applicable to contract claims or the "interest analysis" approach applied but ultimately concluding that the claim both fell outside the choice-of-law provision and was better suited to using an "interest analysis" approach).

New York courts, as well as courts within the Second Circuit, have similarly applied the "center of gravity" approach to cases involving usury, suggesting that usury is a contract-based claim. In *A. Conner General Contracting Inc.*, the Appellate **[*58]** Division appeared to conflate the "center of gravity" approach and the interest analysis, explaining that:

> New York's present choice-of-law rule, dubbed the center of gravity approach is that the law of the state having the most significant contacts with the matter in dispute will be applied, even where the matter in dispute in usury. . . . [T]he Court of Appeals has not articulated a special rule for usury cases. Rather, it appears to remain that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or

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provision. *See, e.g., Clark v. Advanceme, Inc., 2009 U.S. Dist. LEXIS 140364, 2009 WL 10672598, at *3 (C.D. Cal. 2009)* (holding New York law was not applicable to plaintiffs' usury claims where contractual choice-of-law provision read that the agreement "shall be governed by, and construed in accordance with, the internal laws of the State of New York" because of persuasive authority "that a usury claim is non-contractual"); *Essex Partners Ltd. v. Merchant Cash & Cap., 2011 U.S. Dist. LEXIS 172116, 2011 WL 13123326, at *3-4 (C.D. Cal. Aug. 1, 2011)* (citing cases that hold that usury claims are non-contractual, including *Clark*, and thus fall outside of contract's New York choice-of-law clause and concluding the same).

Courts have opined that "the right to recover usurious interest is not predicated upon the written contract . . . under which the usury was paid, but rather on a duty imposed by law to repay an unjust and unmerited enrichment. The liability based upon an obligation of this kind arises purely upon an implication of law, independent of the agreement or intention of the parties." *Miller v. York, 92 Nev. 226, 548 P.2d 941, 945 (Nev. 1976)*; *see also Clark, 2009 U.S. Dist. LEXIS 140364, 2009 WL 10672598, at *3 n.5* (citing *Miller* and stating that, while it is not "directly on point," "its reasoning is instructive and consistent with [p]laintiffs' contention that a usury claim is non-contractual"). In that view, the violation would pertain to a duty "imposed by law in recognition of public policy and is generally owed to others besides the contracting party" and does not "emanate from a[] duty created by the parties' unique contractual relationship." *BREA 3-2 LLC, 327 So.3d at 935* (internal quotation marks omitted); *see also Dunn v. Global Trust Mgmt., LLC, 506 F.Supp.3d 1214, 1222 (M.D. Fl. 2020)*. Under this theory, because it arises from a duty other than one that is imposed by contract, Plaintiffs' usury claim would not fall within the narrow choice-of-law provision agreed by the parties pursuant to the contract. *See Travelers Ins. Co. v. Sequa Corp., 2014 U.S. Dist. LEXIS 205829, 2014 WL 12812403, at *2 (S.D.N.Y. Mar. 10, 2014)* ("Where the claim requires 'the interpretation and enforcement of the rights and duties of the parties' under the contract . . . it falls within the law agreed upon by the parties pursuant to the contract.").

> contracts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."

535 N.Y.S.2d at 422 (quoting Miller, 237 N.E.2d at 879). But courts following A. Conner—both state and federal—have cited that case as holding that the "center of gravity" approach should apply. *See* Indus. Dev. Bank of Isr. Ltd. v. Bier, 149 Misc. 2d 797, 565 N.Y.S.2d 980, 984 (Sup. Ct. N.Y. Cnty. 1991) (citing A. Conner in considering whether a loan agreement that allegedly contained a usurious interest rate should be enforced and holding that, because "agreements and guarantees were entered into Israel, the parties all resided in Israel at the time, and performance was to take place there . . . [Israel] has the most substantial relationship to these transactions, **[*59]** and it is the law of that country which should be applied"); Am. Equities Grp. v. Ahava Dairy Prods. Corp., 2004 U.S. Dist. LEXIS 6970, 2004 WL 870260, at *9 (S.D.N.Y. Apr. 23 2004) (applying New York law "[b]ecause New York is the state with the most significant contacts to the parties in the context of the Agreement"); Am. Exp. Travel Related Servs. Co. v. Assih, 26 Misc. 3d 1016, 893 N.Y.S.2d 438, 447 (Civ. Ct. Richmond Cnty. 2009) (concluding "that New York has the most significant contacts to the parties and New York law will apply to the Agreement in reference to whether or not the interest being charged is usurious"); *cf.* Leasing Serv. Corp. v. Graham, 646 F. Supp. 1410, 1417 (S.D.N.Y. 1986) (applying "most significant contacts" test to determine whether conflicting Texas or New York usury law should be applied to agreements). And courts in this Circuit have treated the affirmative defense of usury as a claim as falling within a narrow contractual choice-of-law provision, even though they have done so without expressly analyzing whether the scope of the contractual provision includes such claims, instead appearing to assume that it does. *See, e.g.,* Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 147-48 (S.D.N.Y. 2017) (declining to apply Delaware choice-of-law provision because applying Delaware usury law would violate a fundamental public policy of New York); Power Up Lending Grp. v. Alliance Bioenergy Plus, Inc., 2019 U.S. Dist. LEXIS 33274, 2019 WL 1322621, at *3-4 (declining to ignore choice-of-law provision to allow for defense based on New York usury law on public policy grounds); EMA Fin., 444 F. Supp. 3d at 540 (applying usury law of state provided for in choice-of-law provision). **[*60]** It thus follows that, at least for choice-of-law purposes, a usury claim is considered to be contractual and to be encompassed by a narrow choice-of-law provision.[9]

This approach is similar to that which the Restatement (Second) of Conflict of Laws takes to usury claims. The Restatement permits parties to agree by contract to the law that will govern whether the interest rate in a contract is usurious out of respect for the principles of freedom of contract and on the general view that, oftentimes and as with New York and Texas law, "the permissible rate of interest will vary only slightly from state to state." Restatement (Second) of Conflict of Laws § 203 comment b. At the same time, it recognizes that the purposes of usury laws "to protect a person against the oppressive use of superior bargaining power" would otherwise "be deprived of efficacy if the parties could effectively choose to be governed as to usury by the local law of a state which has no substantial relationship to the contract." *Id.* at comment e. Thus, under New York law, while courts have suggested that a parties' principal place of business being in the selected forum may create the requisite reasonable relationship, a broad statement that a company's "headquarters" are **[*61]** located in a state is not sufficient to meet the reasonable relationship requirement. *See* Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 366 (2d Cir. 2003)

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[9] That usury as a contract defense is treated as contractual for the purposes of choice-of-law analysis, *see, e.g.,* Power Up Lending Grp., 2019 U.S. Dist. LEXIS 33274, 2019 WL 1322621, at *3-5; EMA Fin., LLC, 444 F. Supp. 3d at 539-43, further suggests that affirmative usury claims should also be treated as such. In response to a breach of contract claim, the defendant who has agreed to the laws of a state that has a reasonable relationship to the transaction and that permits a high interest rate to be charged (albeit one that is not against public policy) cannot argue that it should be relieved of its contractual duties because another state has a more significant relationship with the transaction and the agreed-upon interest rate is usurious under the law of that second state. That is, having agreed to the application of the law of State 1, a party cannot later avoid its obligations and argue in response to a suit that the law of State 2 should be applied and that the agreed rate is unlawful and unenforceable. It would follow as a necessary corollary that when a party is seeking to not to defend against a failure to pay but to affirmatively have an obligation declared to be unenforceable, the choice of law provision also should apply. A different rule would induce a race to the courthouse and make the law applicable to a contract turn not upon the expressed understandings of the parties or even the interests of the potential states involved but on the fortuity of which party—the person seeking to enforce the interest rate provision or the person seeking to avoid it—filed its claim first.

(vacating and remanding for further findings on choice-of-law question where record "merely reveal[ed]" that the company's "'headquarters' are in New York[] [w]ithout any further explanation of the extent of [the company's] presence in New York"); *see also* Power Up Lending Grp., 2019 U.S. Dist. LEXIS 33274, 2019 WL 1322621, *4 (citing Finucane v. Interior Const. Corp., 264 A.D.2d 618, 695 N.Y.S.2d 322, 325 (1st Dep't 1999)) (explaining that the "reasonable relationship" test may be satisfied so long as "one of the parties' principal place of business is in the selected forum"); *see also* TransAtlantic Lines LLC v. Amergent Techs, LLC, 2017 U.S. Dist. LEXIS 2217, 2017 WL 78511, at *4 n.6 (S.D.N.Y. Jan. 6, 2017) (same); Zerman, 735 F.2d at 20 ("The present transaction had a reasonable relationship to New York, where Hutton had its headquarters and where the margin loan was payable."); *cf.* Clever Ideas, 2007 N.Y. Misc. LEXIS 9248, 2007 WL 3234747 (concluding that choice-of-law provision selecting Illinois law would not be given effect where, although the lender was an Illinois corporation, agreements were signed in New York, borrower was a New York corporation, the guarantor was a New York resident, and the action was initiated in New York). And a court may consider whether a party is seeking to evade usury laws by "nominally operating" in another jurisdiction. *See* Power Up Lending Grp., 2019 U.S. Dist. LEXIS 33274, 2019 WL 1322621, at *4 (citing Culbert v. Rols Cap. Co., 184 A.D.2d 612, 585 N.Y.S.2d 67, 67 (2d Dep't 1992)).

The foregoing analysis is dispositive of Fleetwood's motion for summary judgment **[*62]** on its Texas usury claim and the associated claim for attorneys' fees. The undisputed facts do not establish, as a matter of law, that Texas law applies. That is, Fleetwood has not pointed to undisputed evidence that there is no reasonable relationship between New York or the parties, nor has it argued that applying New York usury law would be offensive to the public policy of New York. *Cf.* Dkt. No. 77 ¶ 2 (noting that Richmond is a New York limited liability company; *id.* ¶ 74 (quoting a Richmond representative as stating "[w]e are from New York"); *id.* ¶ 22 (explaining that the relevant funds were wired from Richmond's Empire State Bank account).

In light of the Second Circuit's treatment of usury claims as contractual and the weight of in-Circuit and New York cases applying contractual choice-of-law principles to usury claims, the Court cannot say as a matter of law that the choice-of-law provision in the Fleetwood Agreement is inapplicable to Fleetwood's usury claim and that Texas law should apply. Fleetwood is therefore not entitled to summary judgment on its Texas usury claims.

III. RICO Claim

Fleetwood moves for summary judgment on its RICO claim, which it brings against Giardina. **[*63]** Section 1962(c) of RICO makes it unlawful for a person "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity *or* collection of unlawful debt." 18 U.S.C. § 1962(c) (emphasis added). RICO defines "unlawful debt" to mean:

> a debt (A) incurred or contracted in gambling activity which was in violation of the law . . . or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6).

Moreover, "[u]nlike a 'pattern of racketeering activity' which requires proof of two or more predicate acts, to satisfy RICO's 'collection of unlawful debt' definition the [plaintiff] need only demonstrate a single collection." United States v. Giovanelli, 945 F.2d 479, 490 (2d Cir. 1991); *see also* United States v. Grote, 961 F.3d 105, 119 (2d Cir. 2020) ("RICO offenses may be predicated on a single instance of collection of unlawful debt, as well as on a pattern of racketeering activity."). **[*64]** At the same time, however, the statute does not reach the collection of a loan that is made occasionally and not as part of the "business of lending money" at a usurious rate. *See* Egerique v. Chowaiki, 2020 U.S. Dist. LEXIS 73060, 2020 WL 1974228, at *19 (S.D.N.Y. Apr. 24, 2020), *vacated in part for other reasons sub nom.* Weiss v. David Benrimon Fine Art LLC, 2021 U.S. App. LEXIS 38395, 2021 WL 6128437 (2d Cir. Dec. 28, 2021). That is, "[t]he first part of § 1961(6) requires that 'unlawful debt' either (1) be incurred or contracted in some form of illegal gambling activity or (2) be unenforceable by virtue of state or federal usury laws. The second part—subsection (B)—further narrows the definition, requiring, *inter alia*, that the 'unlawful debt' be incurred in connection with an illegal 'business.'" United States v. Persico, 2011 U.S. Dist. LEXIS 63034, 2011 WL 2433728, at *2 (E.D.N.Y. June 14, 2011); *see also*

Wade Park Land Holdings, LLC v. Kalikow, 589 F. Supp. 3d 335, 2022 U.S. Dist. LEXIS 38828, 2022 WL 657664, at *23 (S.D.N.Y. Mar. 4, 2022).

"The inclusion of 'collection of unlawful debt' as a major predicate for RICO liability [was] an explicit recognition of the evils of loan sharking . . . ." Durante Bros. & Sons v. Flushing Nat'l Bank, 755 F.2d 239, 250 (2d Cir. 1985). To that end, the statute requires "that the loan have been incurred in connection with 'the business of' making usurious loans" and excludes from the definition of unlawful debt the "occasional usurious transactions by one not in the business of loan sharking." Id. at 250.

A civil RICO claim under Section 1962(c) requires a showing that, among other things, there was a RICO enterprise whose activities affected interstate commerce; that an individual participated in **[*65]** the conduct of the affairs of the enterprise through the collection of an unlawful debt; and that as a result of the enterprise collecting an unlawful debt, a party—here Fleetwood—was injured in its business or property. Durante Bros., 755 F.2d at 248. "[T]o prove that what was collected was an unlawful debt within the meaning of RICO, [a plaintiff] would have to show that [1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with 'the business of lending money . . . at a [usurious] rate,' and [3] the usurious rate was at least twice the enforceable rate. *Id.*; *see also* Dae Hyuk Kwon v. Santander Consumer USA, 742 F. App'x 537, 539 (2d Cir. 2018) (summary order).

Defendants argue that Plaintiff is not entitled to summary judgment on it its RICO claim for two reasons: First, there is no evidence that Richmond or Giardina are liable for wrongdoing because the Agreement is not a loan, Dkt. No. 80 at ECF pp. 8-10—an argument that the Court has already rejected; and second, Plaintiff has not demonstrated "actual damages" because Plaintiff settled with Ram LLC for an undisclosed amount and because Pamela Fleetwood "could not quantify her damages when asked under oath," *id.* at ECF p. 13.

The undisputed evidence **[*66]** entitles Plaintiff to summary judgment against Giardina on Plaintiff's RICO claim. The undisputed evidence establishes that Richmond constitutes an enterprise, defined by RICO to include "any individual, partnership, corporation, association, or other legal entity," 18 U.S.C. § 1961(4), and that the enterprise affected interstate commerce. As set forth in Plaintiff's Rule 56.1 Statement, Richmond is a limited liability company that, for over three years, "advanced funds to small businesses in Texas and throughout the United States." Dkt. No. 79 ¶¶ 2, 4. It is also undisputed that Giardina—the founder and sole managing member of Richmond, *id.* ¶ 3—was an individual who participated in the conduct of Richmond, as he "oversaw the operations of Richmond and had final veto power over every decision made by Richmond" during the relevant times, *id.* ¶ 8.

There also is no material dispute of fact that Giardina—a natural person legally distinct from Richmond, *see* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161-63, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)—participated in this enterprise through the collection of an unlawful debt; not only has Plaintiff offered evidence that the agreements entered into by Richmond and merchants across the country were identical, in sum and substance, to the Agreement that the Court **[*67]** has concluded is a loan, including with respect to the effective interest rates, *see, e.g.*, Dkt. No. 78-7, and Defendants do not proffer evidence to dispute this, but the undisputed evidence shows that Giardina and Richmond collected an unlawful debt, within the meaning of RICO, from Plaintiff itself.

Plaintiff contends that the Fleetwood Agreement is unenforceable under the usury laws of either Texas or New York law. "Under Texas law, a 'usury' claim has three elements: '(1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by loan for use of the money by the borrower.'" Vanderbilt Mortg. & Fin., Inc. v. Flores, 735 F. Supp. 2d 679, 696 (S.D. Tex. 2010) (quoting Tony's Tortilla Factory, Inc., 877 S.W.2d at 287). The maximum permissible interest rate under Texas law for commercial loans is 28% per year. Tex. Fin. Code § 303.009(c). If more than twice that amount is charged and received, the creditor is liable to the obligor for the principal, interest, and all other amounts charged and received. *Id.* § 305.004; *cf.* Miller v. First State Bank, 551 S.W.2d 89, 95-96 (Tex. Civ. Ct. App. 1977) ("A usurious contract is unenforceable as to the interest contracted for, charged or received."); Danziger v. San Jacinto Sav. Ass'n, 732 S.W.2d 300, 304 (Tex. 1987). Under New York law, a loan is criminally usurious if it has an annual interest rate exceeding 25%, N.Y. Pen. L. § 190.40, and such a usurious loan is void and unenforceable, *see* Adar Bays, LLC, 179 N.E.3d at 616. **[*68]** Plaintiff has submitted an expert report that calculates the annual interest rate of 99.8%, *see* Dkt. No. 79 ¶ 47, and Defendants do not challenge this figure. Nor do Defendants contest that, if the Agreement is considered a loan, the interest rate would be usurious

under New York or Texas law and the debt would be unenforceable at least in part, instead stating that "Plaintiff has not determined [sic] that the debt owed . . . was in fact illegal" and supporting this contention with arguments that the Agreement is a factoring agreement and not a usurious loan. *See* Dkt. No. 80 at ECF p. 12 n.10. Plaintiff has thus demonstrated that the first and third prongs of the "unlawful debt" test are met: the debt incurred pursuant to the Agreement is unenforceable at least in part under either Texas or New York laws relating to usury, and the interest rate on the debt was at least twice the enforceable rate under either state's statutes (28% for Texas and 25% for New York).

The second prong of the "unlawful debt" test asks if the debt was incurred in connection with the business of lending money at a usurious rate. Richmond was engaged in the business of lending money at usurious rates over the **[*69]** course of years by advancing funds to small businesses across the country and entering into agreements with these businesses that contained identical language to the Agreement the Court has concluded was a usurious loan. That was Richmond's principal business. Richmond has admitted that it has no evidence to refute the allegations of the Amended Complaint—and that are reflected in the agreements and affidavits submitted in connection with summary judgment—that it entered into usurious agreements with numerous merchants and enforced those agreements forcefully over time. *See* Dkt. No. 78-32 at 77, 82, 86-87; Dkt. No. 28 ¶¶ 8, 10-11, 33, 92-97 (setting forth allegations regarding those agreements); Dkt. No. 79 ¶¶ 2-7; Dkt. Nos. 78-5 (agreement between Galaxy United Services, LLC and Richmond); 78-6 (agreement between Eagle Painting Company and Richmond); 78-7 (agreement between Richmond and Triad Well Service, LLC); 78-23 (affidavit of president of JMA Chocolates, a customer of Richmond, describing merchant agreement); 78-24 (affidavit of former owner of J.B. Plumbing & Heating of Virginia, a customer of Richmond, describing merchant agreement). Nor has Giardina offered any evidence in **[*70]** response to Plaintiff's evidence that would create a genuine issue of material fact.

The undisputed evidence also shows that Fleetwood's debt was incurred in connection with this business. While Defendants make much of the fact that the Fleetwood Agreement was written on the paper of Ram LLC and identified Ram LLC as the contractual counterparty, *see* Dkt. No. 80-4 ¶¶ 2, 17, 18, it is undisputed that the funds paid pursuant to the Fleetwood Agreement were wired from the account of Richmond "d/b/a Ram Capital Funding," Dkt. No. 79 ¶¶ 35-37, 39, 40. It is also undisputed that the daily withdrawals were processed by "Actum on behalf of Richmond d/b/a Ram Capital." Dkt. No. 79 ¶¶ 41-43. When Plaintiff sought a pause in its payments so that it would not default on its obligations under the Agreement, it wrote to Richmond at its d/b/a/ Ram Capital email address and corresponded with Michelle Gregg, who was a collection agent of Richmond. *Id.* ¶¶ 27-28. Thus, even though the Agreement was nominally with Ram LLC, the Fleetwood's debt was incurred in connection with the business of Richmond, who advanced the funds, withdrew the funds, and handled repayment requests. *Cf.* *Recticel Foam Corp. v. Bay Indus., 128 F. App'x 798, 799 (2d Cir. 2005)* (summary order) ("New **[*71]** York law provides that if a party objectively manifests an intent to be bound by a contract, that intent controls, even if the party does not sign the written agreement.").

Defendants argue that Plaintiff still has not made out a claim for RICO because it has not shown that it was damaged by a RICO violation associated with the Fleetwood Agreement. "Victims of racketeering who have been deprived of their monetary resources as a direct result of racketeers' predicate acts should, under the most natural interpretation of the phrase 'business or property,' recover their pecuniary losses." *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221, 229 (E.D.N.Y. 1999)*. And RICO damages should be "sufficient to place the plaintiff in the same financial position [it] would have occupied absent the illegal conduct." *Bankers Trust Co v. Rhoades, 859 F.2d 1096, 1106 (2d Cir. 1988)*. As Plaintiff points out, "[t]here is no dispute that $119,617 was collected from Fleetwood's account by Richmond." Dkt. No. 81 at 21-22. Richmond points to evidence that Plaintiff entered into a settlement agreement in connection with this case for an undisclosed sum, Dkt. No. 80-4 ¶ 12, and that, in response to the question "what is your economic damage relating to this [agreement]," Pamela Fleetwood responded "I can't answer that", *id.* ¶ 29, but Defendant **[*72]** does not proffer any evidence that would suggest that Plaintiff recovered the full amount of damages pursuant to this agreement or that Pamela Fleetwood's personal inability to quantify her damages means Fleetwood did not suffer any or would preclude Fleetwood from offering evidence of those damages. Nor have Defendants suggested that the settlement agreement placed Fleetwood in the same position they would have been in without the illegal conduct. Defendants instead argue that "upon information and belief," the settlement amount was somewhere around

$40,000; even if that were so, it would fall well below the actual damages suffered by Plaintiff not to mention those damages when trebled. Dkt. No. 80-4; *cf.* *Comm. Union Assur. Co. v. Milken, 17 F.3d 608, 612 (2d Cir. 1994)* (noting that "[i]f a portion or all of their investment in the partnership was unrecoverable, a treble damage award might be appropriate, assuming the other RICO requirements were satisfied" but concluding no viable RICO cause of action may be maintained where defendants placed plaintiffs in the same position in the same position they would have been absent illegal conduct by returning their initial investment and a double-digit return on their capital). Indeed, where treble damages **[*73]** are available—as in RICO cases—courts "routinely treble damages before setoff in cases where a plaintiff sues multiple defendants . . ., settles with one or more of them, and then prevails against the remaining defendants." *Creel v. Dr. Says, LLC, 2022 U.S. Dist. LEXIS 60155, 2022 WL 987815, at *4 (E.D. Tex. Mar. 31, 2022)* (trebling RICO damages before crediting settlement amount) (citing *Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc., 635 F.2d 118, 130 (2d Cir. 1980)*, *aff'd*, *456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)* and *New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1086-87 (2d Cir.)*, *cert. denied*, *488 U.S. 848, 109 S. Ct. 128, 102 L. Ed. 2d 101 (1988)*); *see also* *New York City Dist. Council of Carpenters Pension Fund v. Forde, 2018 U.S. Dist. LEXIS 92145, 2018 WL 2455437, at *20-21 (S.D.N.Y. June 1, 2018)* (following *Hydrolevel Corp.* because "the *Clayton Act* is the model for RICO's private right of action" and deducting compensation for RICO injuries "only after the trebling of damages").

Absent Defendant proffering any evidence to dispute that Plaintiff suffered damages, and because Plaintiff was deprived of its monetary resources as a result of Richmond's usurious lending practices, Plaintiff has shown that it was damaged. Because Plaintiff has demonstrated that all elements of its RICO claim have been met, it is entitled to summary judgment on liability on this count.

IV. Fleetwood's Alternative Claims

Fleetwood argues that, "[i]n the event that this Court does not conclude that the Fleetwood Agreement is a usurious and unenforceable loan agreement, Fleetwood is entitled to summary judgment on its breach of contract/duty of good faith claim." Dkt. No. 76 at 42. The Court has concluded **[*74]** that Fleetwood is not entitled to summary judgment on its usury claim under Texas law and that further factual presentations or trial are required before the Court can determine whether New York law or Texas law applies to that claim. Accordingly, since that claim is still open, Fleetwood's argument in the alternative for summary judgment on its breach of contract and duty of good faith claims is premature and is denied.

CONCLUSION

The motion for summary judgment GRANTED IN PART and DENIED IN PART. Plaintiff's motion for summary judgment is GRANTED against Giardina on count five. The motion is otherwise DENIED.

The Clerk of Court is respectfully directed to close Dkt. No. 74.

SO ORDERED.

Dated: June 6, 2022

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

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Exhibit 20

Funding Metrics, LLC v NRO Boston, LLC

Supreme Court of New York, Westchester County

August 28, 2019, Decided

64204/2016

Reporter
2019 N.Y. Misc. LEXIS 4878 *; 2019 NY Slip Op 32651(U) **

[1]** FUNDING METRICS, LLC D/B/A QUICK FIX CAPITAL, Plaintiff, -against- NRO BOSTON, LLC and ALICE INDELICATO, Defendants. Index No.: 64204/2016;FUNDING METRICS, LLC D/B/A/ QUICK FIX CAPITAL, Plaintiff, -against- NRO EDGARTOWN, LLC and ALICE INDELICATO, Defendants. Index No.: 65963/2016

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

receivables, motions, repayment, funds, Default, interest rate, annual, lender, terms, Judgments, amounts, vacated, repaid

Judges: **[*1]** HON. JOHN P. COLANGELO, J.S.C.

Opinion by: JOHN P. COLANGELO

Opinion

DECISION AND ORDER

COLANGELO, J.

The defendants in the above-captioned actions, NRO Boston, NRO Edgartown and Alice Indelicato ("Defendants") have filed motions pursuant to *CPLR §5015(a)(3)* seeking to vacate the Judgments by Confession entered against them (against NRO Boston and Alice Indelicato on October 3, 2016, and against NRO Edgartown and Alice Indelicato on October 21, 2016) on the grounds of fraud, misrepresentation and misconduct of an adverse party and on the ground that **[**2]** such Judgments violate the strong policies of this State against the enforcement of criminally usurious loans. The motions involve the same parties, underlying forms of agreements, and issues of law, and to conserve judicial resources, the motions are hereby consolidated pursuant to *CPLR §602(a)*.

Relevant Background

Defendants are the owners/operators of a small chain of clothing outfitters located in Massachusetts. Pursuant to Merchant Agreements between Defendants and Plaintiff Funding Metrics, LLC, d/b/a Quick Fix Capital ("QFC" or "Plaintiff"), QFC advanced funds to each of the NROs in return for the purported purchase of all of NROs' future receipts up to a specified amount. The specified **[*2]** amount was to be paid via fixed daily online Automated Clearing House ("ACH") debits in equal amounts that purportedly represented a specified percentage of NROs' future receipts. The essence of Defendants' motions is that the ACH withdrawals resulted in the charging of interest at rates in excess of 90% per annum.

QFC opposes the motions on substantive and procedural grounds, contending that each transaction was not a usurious loan nor was there usurious intent. As a procedural matter, QFC **[**3]** argues that the motions should be denied because Defendants failed to proceed by plenary action, the motions are untimely, and the motions are facially defective since the judgments sought to be vacated are not attached thereto.

In support of the motions, Defendants cite to the case of *QFC, LLC v. Iron Centurian, LLC, 2017 N.Y. Misc. LEXIS 2609, 2017 WL 2989222 (Sup. Ct. Westchester Cty 2017)*, where a contract identical to the Merchant Agreements in the instant cases (except for the difference in the amount of loans, the daily payments and the specified percentages) was found to be criminally usurious. Defendants take the position in the instant motions that the Judgments must be vacated

because the financial arrangement contemplated under the Merchant Agreements was a usurious loan cloaked as a purchase **[*3]** of Defendants' receivables for the following reasons: there was no transfer of ownership of NROs' receivables despite QFC's "purchase" of same" by virtue of NROs' retention of control of the receivables and NRO's obligation to repay the purchased amounts from independent funds in the event there were insufficient funds to satisfy the daily ACH withdrawals; the Merchant Agreements eliminated all risk and contingency from QFC's ability to collect the daily ACH amounts; the fixed time period in which the purchased amount of receivables was required to be repaid; and the annual percentage rates for the loans being well in excess of legal rate of interest of 25% for a corporation (see *Penal Law §190.40*) given the amount of the fixed daily payments required to be paid over a fixed period of time.

According to the terms of the Merchant Agreement between QFC and NRO Edgartown dated June 7, 2016, QFC advanced NRO Edgartown the sum of $200,000 in exchange for the purported purchase of all of NRO Edgartown's account receivables in the amount of $286,000 (the "Purchased Amount"). The Purchased Amount was to be repaid by NRO Edgartown by **[**4]** daily online ACH debits (referred to as "daily increments") of $2,600 which **[*4]** amount would be equal to the Specified Percentage of 114.40% as set forth on the first page of the Merchant Agreement. (Defs Exh. 2, p. 1 ¶2). Notwithstanding the Specified Percentage set forth in the Agreement, QFC estimated the repayment in real dollars to be $2,600 per day. By remitting the sum of $2,600 to QFC on a daily basis, the Purchased Amount of $286,000 would be repaid in 110 payments or 22 weeks. The annualized interest rate for repayment of the Purchased Amount in this period of time was in actuality 102%. (Defs. Exh. 3).

The Merchant Agreement between QFC and NRO Boston dated July 7, 2016 called for QFC to advance the sum of $200,000 in exchange for the purported purchase of all of NRO Boston's account receivables in the amount of $286,000 (the "Purchased Amount"). The Purchased Amount was to be repaid by NRO Boston by daily online ACH debits (referred to as "daily increments") of $2,363.64 which amount would be equal to the Specified Percentage of 11.64% as set forth on the first page of the Merchant Agreement. (Defs Exh. 4, p.1 ¶2). Notwithstanding the Specified Percentage set forth in the Agreement, QFC estimated the repayment in real dollars to be $2,363.64 per day. **[*5]** By remitting the sum of $2,363.64 to QFC on a daily basis, the Purchased Amount of $286,000 would be repaid in 116 payments or 24 weeks. The annualized interest rate for repayment of the Purchased Amount in this time period was in actuality 93%. (Defs. Exh.5).

It is clear that the time periods for repayment of the Purchased Amount were to be strictly adhered to, because as with the identical terms in *Iron Centurion*, each NRO would be charged a restructuring fee of $20,000 if the "term" of the NRO Agreements was restructured and/or extended. (See Addendums to Agreements, Exhs. 2 & 4).

[5]** The Merchant Agreements between QFC and NROs Edgartown and Boston shifted all risk and contingency from QFC's ability to collect the receivables, and made no provision for forgiveness of the loan in the event NRO could not collect the daily amount required by QFC. To the contrary, under the Agreements, Defendants remain absolutely liable for the Purchased Amount under all circumstances, and in the event of a default, which appears to be a virtual certainty under the Agreements' terms, Defendants became liable not only for the balance of the Purchased Amount, but also for additional fees and costs which **[*6]** include a "Default Fee of Twenty (20%) Percent of the of the original advanced amount or $5,000, whichever is greater." Such fees would cost each NRO $20,000. (See Addendums, Default Fee). Further, as Defendants correctly contend, an Event of Default would occur in any conceivable circumstance in which repayment of the Purchased Amount was at risk, including, without limitation, circumstances in which the NRO failed to collect or generate sufficient account receivables to make the daily payments and there were insufficient funds in the designated bank account for three consecutive days. (See Addendums, NSF fee).

CPLR §5015(a)(3) provides that the Court may vacate a judgment on grounds of "fraud, misrepresentation, or other misconduct of an adverse party." As in *Iron Centurion*, Defendants contend that the Merchant Agreements are criminally usurious and void *ab initio* as a matter of law because they contemplate payments by a corporate entity of interest at an annual rate well in excess of the legal rate of interest of 25% in violation of *Penal Law §190.40*. As the court stated in *Merchant Funding Services, LLC v. Volunteer Pharm. Inc., 55 Misc. 3d 316, 320, 44 N.Y.S.3d 876 (Sup.Ct., West. County 2016)* "while the defense of civil usury is unavailable to corporate entities in New York, the defense of criminal usury may lie where the lender **[*7]** knowingly charges a corporate entity **[**6]** annual

interest in excess of 25% on a loan."

A finding of criminal usury requires: "proof that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25% (3) on a loan or forbearance. The first element requires proof of the general intent to charge a rate in excess of the legal rate rather than the specific intent to violate the usury statute. Accordingly, the borrower satisfies his prima facie burden of proving usury by showing that the note given to the lender evidences a loan and reserves an illegal rate of interest. If usury is proved, the loan is deemed void, and the lender sacrifices his principal and interest" (*In re David Schick, Venture Mtge. Corp., and A & D Trading Group, LLC, Debtors, 245 B.R. 460, 473-474 [Bankr.S.D.N.Y.] [2000]* [internal citations omitted]; *General Obligations Law § 5-511[2]*).

In *Merchant Funding, LLC v. Volunteer Pharmacy Inc, 55 Misc.3d 316, 320, 44 N.Y.S.3d 876 (Sup. Ct., West. Co. 2016)*, the court recognized that "[i]n order for a transaction to constitute a loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (*Donatelli v. Siskind, 170 A.D.2d 433, 565 N.Y.S.2d 224[2d Dept.1991]* [internal citations omitted])."Further, there can be no usury unless the principal sum is repayable absolutely" **[*8]** (*Transmedia Rest. Co. v. 33 E. 61st Rest. Corp., 184 Misc.2d 706, 711, 710 N.Y.S.2d 756 [Sup.Ct., N.Y. Co. 2000])*.

In both Merchant Agreements, the Purchased Amounts were absolutely repayable. Moreover, NRO Edgartown was required on a daily basis to remit more than 100% of its collection of purchased receivables. The Merchant Agreement prohibited NRO Edgartown from obtaining any further financing (*Id.* §T2.1 (v)), and the funds to maintain the daily remittance **[**7]** amount in the account inevitably had to come from independent funds. As Defendants correctly point out, by requiring NRO Edgartown to remit all of the proceeds from its collected receivables and more to satisfy the daily payments, QFC ensured that NRO Edgartown would have insufficient funds to pay operating expenses, and would violate multiple covenants under the Agreement and likely default due to insolvency, bankruptcy, or temporary closure.

The same principle applies to the Merchant Agreement between QFC and NRO Boston, where the daily fee set by QFC required NRO Boston to pay 93% of its receivables on a daily basis, or risk the likely default due to insolvency, bankruptcy, or temporary closure.

QFC opposes the motions as procedurally defective for not proceeding by plenary action, and on the ground that the Merchant Agreements at issue **[*9]** are not usurious because they memorialized a purchase and sale of future receivables, and were not loans. QFC further contends that the motions must be denied as untimely. This Court finds all of QFC's contentions to be unavailing. The language of the Merchant Agreements and the requirement that there be a guarantor liable under the Merchant Agreements, in this Court's view, belies QFC's claim that the Merchant Agreements were in fact purchase and sale transactions.

The Purchased Amounts advanced were absolutely repayable, within a fixed period of time, with calculated interest that exceeds the legal rate. The terms of the Merchant Agreements placed an onerous burden on the Defendants to repay the Purchased Amounts so much so that a Default Event would occur and hefty financial penalties and fees assessed against Defendants if the daily repayment amount could not be maintained at the designated bank for three consecutive days. In addition and as set forth above, the Merchant Agreements eliminated all risk and contingency of non-collection from QFC, shifted the entire risk to Defendants and provided QFC **[**8]** with full recourse in the event a customers' account was not collectible. (See Section 3.3 **[*10]** Chargeback). In order to further secure Defendants' payments under the Merchant Agreements, Alice Indelicato executed a guaranty and an Affidavit of Confession of Judgment with respect to each Merchant Agreement, whereby in addition to the indebtedness for the balance of the Purchased Amounts due, she would be liable for attorney's fees calculated at twenty-five (25%) percent of such sums. (Defs. Exhs. 10 & 11).

In short, there is no competent evidence that QFC "purchased" the NROs' receivables. The NROs retained ownership of the receivables, were required to collect them, bore all risk of non-collection, gave QFC a guaranty on the money advanced that was absolutely repayable during a fixed time period with calculated interest that exceeds the legal rate. Denominating loan documents by another name, such as "Merchant Agreements" as in this case, and including in such documents language of QFC's purported purchase of account receivables that is unsupported by actual NRO receivables dedicated to repayment, does not shield it from the judicial determination that it contemplates a

criminally usurious transaction, which is void *ab initio* as a matter of law. (*See Merchant Funding Services, LLC v. Volunteer Pharm. Inc., supra; see also Merchant Funding LLC v. Volunteer Pharmacy Inc., supra at 322*).

Based upon the **[*11]** foregoing, this Court finds that the real purpose of the Merchant Agreements was to lend money to NRO Edgartown and NRO Boston at the usurious interest rates set forth therein, and Defendants agreed to borrow the money based upon the same usurious terms dictated by QFC. The requirement of a guarantor for the Merchant Agreements, coupled with the facts and circumstances heretofore stated, demonstrate that the principal sums advanced were absolutely repayable with calculated interest that exceeds the legal rate. Defendants have **[**9]** satisfied their *prima facie* burden proving usury by showing that the Merchant Agreements evidence a loan and reserves an illegal rate of interest. QFC has failed to come forward with competent evidence to the contrary.

This Court disagrees with QFC's contention that it must deny Defendants' motions due to their failure to proceed by plenary action. In *Oppenheimer v. Westcott, 47 N.Y.2d 595, 602-603, 393 N.E.2d 982, 419 N.Y.S.2d 908 (1979)*, the Court of Appeals concluded that "it was an abuse of discretion as a matter of law to require that a litigant seeking to attack a judgment directly, proceed instead by the much more rigid and, therefore, more difficult and hazardous independent action route." The enactment of *CPLR 5015* "was intended to assure that a **[*12]** broad class of persons, not limited to parties in the formal sense, could move in the original action on grounds vastly broader than permitted at common law or under prior practice, and thus to minimize the necessity for use of independent procedures of collateral attack upon a judgment." (*Id.*). The Merchant Agreements and other exhibits submitted in support of these motions clearly and unequivocally demonstrate that the Merchant Agreements are criminally usurious on their face, obviating the need for a superfluous plenary action. (*See Merchant Funding Services, LLC v. Volunteer Pharm. Inc., supra; see also Merchant Funding, LLC v. Volunteer Pharmacy Inc., supra*).

Accordingly, it is hereby

ORDERED that Defendants' motions are granted; and it is further

ORDERED that the Confession of Judgments, under Index numbers 64204/2016 and 65963/2016, entered in the Office of the Westchester Count Clerk on October 3, 2016 and October 21, 2016, respectively, are vacated; and it is further

ORDERED that the Judgment Clerk mark the judgment records accordingly.

[10]** The foregoing constitutes the Decision and Order of the Court.

Dated: August 28, 2019

White Plains, New York

/s/ John P. Colangelo

HON. JOHN P. COLANGELO, J.S.C.

End of Document

Exhibit 21

Caution
As of: March 10, 2023 9:19 PM Z

Haymount Urgent Care PC v. GoFund Advance, LLC

United States District Court for the Southern District of New York

June 27, 2022, Decided; June 27, 2022, Filed

22-cv-1245 (JSR)

Reporter
2022 U.S. Dist. LEXIS 112768 *; __ F.Supp.3d __; 2022 WL 2297768

HAYMOUNT URGENT CARE PC; ROBERT A. CLINTON, JR.; INDIGO INSTALLATIONS, INC.; and CHRISTOPHER A. TURRENTINE; et al., Plaintiffs, -v- GOFUND ADVANCE, LLC; FUNDING 123, LLC; MERCHANT CAPITAL LLC; ALPHA RECOVERY PARTNERS, LLC; YITZCHOK ("ISAAC") WOLF; JOSEF BREZEL; JOSEPH KROEN; AND YISROEL C. GETTER, Defendants.

Prior History: *Haymount Urgent Care Pc v. Gofund Advance, 2022 U.S. Dist. LEXIS 50229, 2022 WL 836743 (S.D.N.Y., Mar. 21, 2022)*

Core Terms

merchant, receivables, settlement, lender, reconciliation, collection, loans, defendants', remittance, alleges, wire fraud, notice, declaratory judgment, factors, prejudgment remedy, bank account, racketeering, transactions, predicate, default, void, fraud claim, withdrawals, attachment, conspiracy, provisions, purport, declaration, borrower, parties

Case Summary

Overview
HOLDINGS: [1]-In a putative class action alleging that defendants make allegedly fraudulent and usurious loans, defendants' motion to dismiss was denied, in part, because the Complaint adequately pled that the merchant cash advance (MCA) agreements functioned as loans and, as such, since defendants did not dispute that the implied interest rates on the transactions far exceed 50% per annum, which was twice the New York State criminal usury rate, the Complaint adequately pled that the debts were unenforceable, unlawful debts under the RICO statute; [2]-The court held that defendants' motion to dismiss was denied with respect to the substantive and conspiratorial RICO claims, although plaintiffs could not proceed with the aspect of the wire fraud prong of the substantive RICO claim predicated on allegedly excessive fees that were disclosed in the MCA agreements.

Outcome
Defendants' motion to dismiss the First Amended Complaint granted in part and denied in part.

LexisNexis® Headnotes

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Contracts Law > Defenses > Usury

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

HN1[] **Interest & Usury, Rate & Recovery of Interest**

The RICO statute, *18 U.S.C.S. § 1962(c)*, declares that it is unlawful for any person employed by or associated with any enterprise engaged in interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through collection of unlawful debt. The statute defines an unlawful debt as a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate. *18 U.S.C.S. § 1961(6)*.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN2[] Standards of Performance, Creditors & Debtors

As the Second Circuit explains in Moseley for the purposes of RICO liability, New York law governs the issues of whether the contracts amount to loans, and, if they are loans, whether they are unlawful debt under RICO.

Banking Law > ... > Banking & Finance > Consumer Protection > Predatory Lending

Contracts Law > Defenses > Usury

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

HN3[] Consumer Protection, Predatory Lending

Liability for an unlawful debt RICO violation requires proof of five elements: 1) that a debt existed, 2) that it was unenforceable under New York's usury laws, 3) that it was incurred in connection with the business of lending money at more than twice the legal rate, 4) that the defendant aided collection of the debt in some manner, and 5) that the defendant acted knowingly, willfully and unlawfully. However, even when a transaction is unmistakably a loan, the lender is entitled to a presumption that the loan is lawful, so the borrower must establish by clear evidence that a transaction is a usurious loan.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Contracts Law > Defenses > Usury

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

HN4[] Interest & Usury, Rate & Recovery of Interest

Under New York law, usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be. New York courts uniformly hold that when determining whether a transaction is a loan, substance -- not form -- controls.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN5[] Standards of Performance, Creditors & Debtors

In assessing the substance of financial transactions, the Court of Appeals has focused on how the contract at issue allocates risk between the parties. As the Second Circuit has explained, when determining whether a transaction was a true sale of receivables, the root of the analysis is the transfer of risk. 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. However, where economic analysis reveals that 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 pay, then there has not been a bona fide purchase of receivables and the transaction is, in substance, a loan. Parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders.

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Contracts Law > Defenses > Usury

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Business & Corporate Compliance > ... > Discharge & Payment > Payments > Interest

HN6[] Interest & Usury, Usury Litigation

Usurious intent is an essential element of usury and where usury does not appear on the face of the note, usury is a question of fact.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN7[] Standards of Performance, Creditors & Debtors

A default then entitles the lender to immediate repayment of the full amount of the transaction outstanding.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN8[] Private Actions, Racketeer Influenced & Corrupt Organizations

Pleading a RICO claim based on a pattern of racketeering activity requires alleging (1) at least two predicate acts of racketeering occurring within a ten-year period; (2) that these predicate acts are related to each other; and (3) that these predicate acts amount to or pose a threat of continuing criminal activity.

Civil Procedure > ... > Justiciability > Mootness > Voluntary Cessation Exception

HN9[] Mootness, Voluntary Cessation Exception

A party may establish open-ended continuity by alleging predicate acts occurring over a short period of time so long as there is a threat that such conduct will recur in the future. The threat that such illegal conduct will recur in the future exists when: (1) a specific threat of repetition exists, (2) the predicates are a regular way of conducting an ongoing legitimate business, or (3) the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.

Civil Procedure > Remedies > Prejudgment Remedies > Application for Remedies

Civil Procedure > Remedies > Provisional Remedies > Attachment

HN10[] Prejudgment Remedies, Application for Remedies

In any event, the United States Supreme Court has repeatedly explained that *42 U.S.C.S. § 1983* liability may lie for either abusive use of a prejudgment attachment statute or knowing or reckless use of an unconstitutional prejudgment remedy where the alleged deprivation was caused by the exercise of a power created by the state and the party charged with the deprivation is a person who he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Attorneys employing a confession of judgment statute to attach private property without notice or hearing may be treated as state actors, because they enlist the compulsive powers of the state to seize property by executing on a judgment without pre-deprivation notice or hearing and so they act under color of law.

Civil Procedure > ... > Writs > Ancillary Writs > Writs of Attachment

HN11[] Ancillary Writs, Writs of Attachment

It is a constitutionally delicate matter for a state to permit a private party's attorney to issue writs of attachment purportedly in aid of pending litigation but without any judicial supervision and without proper notice or hearing.

Civil Procedure > Remedies > Provisional Remedies > Attachment

HN12[] Provisional Remedies, Attachment

The mere fact that the plaintiffs waived their rights to a pre-deprivation hearing does not inoculate defendants from *42 U.S.C.S. § 1983* liability where they employ the prejudgment attachment statute maliciously, that is, where they pursue a purportedly lawful end by

intentionally unlawful means.

Civil Procedure > Remedies > Prejudgment Remedies > Application for Remedies

Civil Procedure > Remedies > Prejudgment Remedies > Hearings on Remedies

HN13[] Prejudgment Remedies, Application for Remedies

It is well established that litigants challenging an allegedly unconstitutional prejudgment remedy may seek relief in a federal court under 42 U.S.C.S. § 1983, even if there is a pending state court action associated with the prejudgment remedy.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Contracts Law > Defenses > Usury

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

Business & Corporate Compliance > ... > Discharge & Payment > Payments > Interest

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

HN14[] Interest & Usury, Rate & Recovery of Interest

The New York usury statute prohibits corporations from interposing a defense of usury to an action to collect a debt except insofar as the rate of interest exceeds the criminal usury rate of 25% per annum, set out in Penal Code § 190.40. N.Y. Gen. Oblig. L. § 5-521. Where the interest rate exceeds the criminal usury rate, a corporation may interpose an affirmative defense of usury and, if successful, obtain a declaration that invalidates the debt instrument ab initio. However, New York courts have uniformly construed this statute as limited to the affirmative defense, and they have prohibited corporations from bringing affirmative claims or counterclaims alleging criminal usury and seeking to invalidate an agreement.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Real Property Law > ... > Contracts of Sale > Enforceability > Undue Influence

Civil Procedure > Settlements > Releases From Liability > General Releases

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN15[] Types of Contracts, Releases

It is well established under New York law that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties. A release of claims in a settlement agreement is therefore binding on the parties absent a showing of fraud, duress, undue influence, or some other valid legal defense.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > Economic Duress

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

HN16[] Types of Contracts, Releases

Under New York law, a release agreement may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of his free will. Parties seeking to establish duress from one-sided economic advantage must carry a heavy burden.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN17[] Actual Fraud, Elements

In New York, the elements of a cause of action for fraud

are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN18[] **Actual Fraud, Elements**

Under New York law, to maintain a claim of fraud in such a situation, a plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.

Counsel: [*1] For Haymount Urgent Care PC, Robert A. Clinton, Jr., individually and on behalf of all those similarly situated, Plaintiffs: Agatha Christina Mingos, White and Williams LLP, New York, NY; Shane R. Heskin, White & Williams, LLP(Philadelphia), Philadelphia, PA.

For Indigo Installations, Inc., Christopher A. Turrentine, individually and on behalf of all those similarly situated, Plaintiffs: Shane R. Heskin, White & Williams, LLP(Philadelphia), Philadelphia, PA.

For GoFund Advance, LLC, Funding 123 LLC, Merchant Capital LLC, Yisroel C. Getter, Joseph Kroen, Yitzchok Wolf, Isaac, Josef Brezel, Defendants: John Albert Mueller, Harter,Secrest & Emery, LLP (Bflo), Buffalo, NY.

Judges: JED S. RAKOFF, UNITED STATES DISTRICT JUDGE.

Opinion by: JED S. RAKOFF

Opinion

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.:

This is a putative class action alleging that defendants make allegedly fraudulent and usurious loans and then engage in abusive collection tactics. The defendants are companies and individuals engaged in the "merchant cash advance" ("MCA") industry. MCA agreements are financial products, often marketed to small businesses through high-pressure sales operations resembling "boiler rooms," that purport to purchase at a discount **[*2]** a portion of a business's future receivables. The plaintiffs here are two small businesses (a North Carolina urgent care facility and a Texas construction contractor) and their principals that entered into MCA agreements with defendants that they have since come to regret. Plaintiffs' amended complaint, ECF 22 ("Complaint" or "FAC"), brings claims sounding in RICO, racketeering conspiracy, breach of contract, *§ 1983*, and fraud.

Now before the Court is defendants' motion to dismiss all claims other than the breach of contract claims. ECF 68 ("Mot."). The Court has carefully considered the parties' briefing and the presentations of counsel at oral argument. As explained further below, defendants' motion to dismiss is granted in part and denied in part.

Specifically, the motion is granted in part with respect to the declaratory judgment claim, which is dismissed against all defendants except GoFund Advance, against whom only the aspect of the claim concerning the validity of the Indigo settlement may proceed. The motion is also granted in part with respect to the fraud claim, which is dismissed against all defendants other than GoFund Advance, against whom only the aspect of the claim concerning **[*3]** allegedly fraudulent electronic bank transfers may proceed. The motion is otherwise denied. With this motion resolved, the Court also lifts the stay of these proceedings previously imposed, and the parties are directed to follow the procedures set forth in the conclusion of this Opinion to develop a new case management plan that will move this litigation expeditiously toward trial.

I. Background

A. Factual Background[1]

1. MCA Agreement Terms

The MCA transactions here at issue relate to purported purchases of a portion of the plaintiff merchants' receivables in exchange for up-front payments. The MCA agreements specify a purchase price to be paid by

[1] The factual allegations here are taken from the Complaint and the documents referenced therein and integral thereto.

the MCA company to the merchant, an amount of receivables purchased, the percentage of the merchant's total receivables that the purchase purportedly represents, and a daily "remittance" amount. See, e.g., ECF 69-2 at 3.[2] The merchant is obligated to pay that daily remittance amount through an ACH bank transfer unless the amount is adjusted. Id. The owner of the merchant company is also required to sign the agreement in his personal capacity as a "guarantor." Id.

The first page of the agreement includes the following statements under the heading **[*4]** "Purchase and sale of future receivables:"

> Merchant is selling a portion of a future revenue stream to GFA at a discount, not borrowing money from GFA, therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by GFA. The Remittance is a good faith estimate of Purchased Percentage multiplied by revenues of Merchant. Merchant going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting its receivables, in and of itself, does not constitute a breach of this Agreement. GFA is entering this Agreement knowing the risks that Merchant's business may slow down or fail, and GFA assumes these risks based on Merchant's representations, warranties and covenants.... Merchant and Guarantor are only guaranteeing their performance of the terms of this Revenue Purchase Agreement, and are not guaranteeing the payment of the Purchased Amount. The initial Remittance shall be as described above. The Remittance is subject to adjustment as set forth [herein].

ECF 69-2 at 3. The MCA agreement also includes a "reconciliation" provision that purports to result in adjustment of the daily remittance **[*5]** amount. This provision states, in relevant part:

> As long as an Event of Default, or breach of this Agreement, has not occurred, once per calendar month Merchant may request a retroactive reconciliation of the total Remittance Amount (for the purposes of this Agreement "total Remittance Amount" shall be defined as all payments made by Merchant to GFA after GFA remitted the Purchase Price to Merchant). All requests hereunder must be in writing to eric@gofundadvance.com within five (5) business days of the close of the calendar month. Said request must include copies of all of Merchant's bank account statements, credit card processing statements, and accounts receivable report if applicable, for the requested month. GFA retains the right to request additional documentation such as bank login ... to view Merchant's accounts, refusal to provide access shall be a breach of this Agreement and GFA shall have no obligation to reconcile. Such reconciliation, if applicable, shall be performed by GFA within five (5) Business Days following its receipt of Merchant's request for reconciliation by either crediting or debiting the difference back to, or from, Merchants Bank Account so that the total **[*6]** amount debited by GFA shall equal the Specific Percentage of the Future Receipts that Merchant Collected from the date of this Agreement up to and including the date of the Reconciliation request.

ECF 69-2 at 4 (§ 1.4).

The MCA agreement also provides GFA with various "Protections Against Default," should various listed events occur, including collection of the "full uncollected Purchased Amount plus all fees ... immediately," enforcement of the "Limited Personal Guaranty of Performance against the Garantor(s)," and "execut[ion] [by GFA] in the name of the Merchant [of] a Confession of Judgment in favor of GFA in the amount of Purchased Amount stated in the Agreement." ECF 69-2 at 5 (§ 1.13). For okaintiffs Haymount and Indigo, the personal guaranty was executed by their principals, also plaintiffs here. See, e.g., ECF 69-2 at 9. The MCA agreements state that "[s]aid Guarantors will be jointly and severally liable to GFA for all of GFA's losses and damages, in additional to all costs and expenses and legal fees associated with such enforcement." ECF 69-2 at 6 (§ 3.2). As for the "confession of judgment" protection, the MCA agreement states in part:

> Each and every merchant, endorser guarantor **[*7]** and surety of this agreement, and each other

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[2] In analyzing the MCA transactions at issue here, this Opinion references the terms from a GoFund Advance agreement, ECF 69-2, since that is the most common agreement form in the case. This agreement is cognizable on a motion to dismiss because it is incorporated by reference in and integral to the Complaint. Neither party has identified material differences in the agreement terms among the companies, so for the purpose of this motion, the Court treats these terms as applying to all transactions presently at issue. For convenience, the Court will use "GFA" to refer collectively to defendants GoFund Advance, Merchant Capital, and Funding 123, the three purported "purchasers" of the merchants' receivables.

> person or entity who may become liable for all or any part of this obligation, hereby acknowledge that the transaction of which this agreement is a part is a commercial transaction, and to the extent allowed under *Connecticut General Statutes sections 52-278a to 52-278m*, inclusive, or by other applicable law each and every merchant, endorser and guarantor of this agreement hereby waive (a) all rights to notice and prior court hearing or court order in connection with any and all prejudgment remedies to which FCG hereof may become entitled by virtue of any default or provision of this agreement or security agreement securing this agreement and (b) all rights to request that FCG hereof post a bond....

ECF 69-2 at 7 (§ 4.13). Finally, the MCA agreement also includes a security agreement, permitting UCC lien notices to be sent to the merchant's banks and counterparties, freezing its accounts. ECF 69-2 at 8.

The MCA agreements also contain a fee structure document. It lists various large fees, including "Underwriting Fee: Minimum of $500.00 or up to 12% of the purchase price for underwriting and related expenses," and "ACH Origination Fee: Minimum of $500.00 or up to 10% of the purchase price to cover **[*8]** cost of Origination and ACH Setup." Id at 10.

2. Haymount Urgent Care

Haymount is an urgent care and primary care facility located in Fayetteville N.C. at which more than 100 employees provide medical care to approximately 300 people per day. FAC ¶¶ 87-88. Plaintiff Dr. Robert Clinton Jr. is Haymount's owner. See ECF 69-2 at 9. Haymount's financial position allegedly came under strain as a result of the COVID-19 pandemic, both because of additional costs (e.g., setting up a PCR lab, hiring additional staff, and purchasing supplies and personal protective equipment) and because of slow payments for care provided to uninsured and Medicare-insured patients. FAC ¶¶ 91-100.

Haymount was therefore seeking additional financing to help it sustain operations with limited cash flows. FAC ¶ 101. Haymount entered into the six MCA agreements with defendants GoFund Advance, Merchant Capital, and Funding123 summarized below:

Go to table1

See FCA ¶¶ 103-186.

Haymount alleges that these figures represent the terms of short-term commercial loans, rather than purchases of receivables for reasons that are discussed below at length. Haymount points out that these agreements reflect widely varying estimates of the company's daily revenue. For instance, the MCA agreement dated December 16, 2021 estimated that 45% of the company's daily revenues was $35,000, whereas the MCA agreement dated December 27, 2021 estimated that 45% of daily revenues was $80,000. See FAC ¶¶ 139-140, 155. There is no basis, Haymount argues, for the defendants to have concluded that its revenues more than doubled in 11 days, thus supporting the inference that these figures are not good faith reflections of revenues purportedly purchased.[4]

Moreover, Haymount alleges that it would repeatedly not receive its full advance, with defendants disbursing only part of the amount and then waiting until that had been more than paid back before dispensing the rest. This is the basis of the breach of contract claim, **[*10]** which is not at issue in the instant motion. See FAC ¶¶ 308-314.

Alpha Recovery Partners allegedly serves as the collection arm of the RICO enterprise, setting up and operating the ACH withdrawals and, upon default, issuing UCC liens and attachment orders pursuant to a Connecticut pre-judgment relief statute. In Haymount's case, Alpha froze bank accounts and medical insurance reimbursement accounts, effectively debilitating Haymount's business.

3. Indigo

Indigo, through its principal, plaintiff Christopher Turrentine, entered an MCA agreement in which it would be advanced $40,000 for a $63,960 payback at a rate of $2,200 per day, purporting to be for 45% of revenues. FAC ¶¶ 195, 203. Like Haymount, Indigo alleges that the advance was not paid in full, and that the balance -- minus the allegedly fraudulent fees -- was only paid after Indigo's total repayment was more than the value of the first advance. FAC ¶¶ 205-207.

Alpha Recovery Partners used the Connecticut pre-judgment relief procedure to freeze Indigo's Texas bank account by serving a writ of attachment on a Connecticut branch of PNC Bank on or about February

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[4] Haymount also points to text messages that suggest negotiations over fixed loan terms rather than purchases of receivables. See Opp. 6. However, plaintiffs have identified no adequate rationale for the Court considering these documents, which are neither referenced in nor integral to the Complaint.

24, 2022. FAC ¶ 328. Defendants allegedly provided Indigo and Turrentine **[*11]** no notice of this attachment, either before or after the writ was issued. Moreover, the defendants allegedly failed to serve on Indigo or PNC a copy of any underlying Connecticut civil action, a sworn affidavit as required by statute, or a statutorily required notice. FAC ¶ 329. Indigo agreed to a settlement with defendants where it paid $4,000 to settle outstanding claims and, as part of that settlement, to release claims against defendants. See ECF 69-9 ¶ 11.

B. Procedural Background

The putative class action Complaint pleads six counts: (i) RICO, based on collection of an unlawful debt or, in the alternative, based on a pattern of wire fraud; (ii) racketeering conspiracy, based on an alleged conspiracy to commit the substantive RICO scheme alleged in Count I; (iii) declaratory judgment, seeking a declaration that the MCA agreements are void ab initio as usurious loans, and that the settlement with Indigo is void; (iv) common law fraud, related to the imposition of excessive fees; (v) breach of contract, related to the timing of payments from GFA to the merchants; and (vi) *section 1983*, related to allegedly abusive use of the Connecticut pre-judgment relief statute.

On March 21, 2022, the Court **[*12]** granted Haymount's motion for a preliminary injunction against GoFund Advance, prohibiting defendants from freezing Haymount's bank and medical insurance reimbursement accounts. ECF 66. Defendants now move for dismissal of all claims other than the claim for breach of contract.

II. Discussion

Defendants seek dismissal of the RICO, *section 1983*, declaratory judgment, and fraud claims. Most of these claims are also multifaceted, in that they contain two unrelated theories of liability under a single claim. The Court addresses the arguments against each claim in turn.

A. RICO

The Complaint's core claim is that defendants are liable under the *Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.*, for illegally operating an enterprise that loans money to small businesses at criminally usurious interest rates and then uses various improper tactics to collect on those loans. The catch, however, is that RICO's application to an enterprise engaged in the collection of an unlawful debt requires that the transactions at issue be loans, since the outstanding balance on a financing transaction that is not a loan cannot, by definition, constitute an unlawful debt. The plaintiffs therefore plead, apparently in the alternative, that RICO liability also lies on the **[*13]** basis of a pattern of wire fraud, and they argue that both the MCA agreements' excessive fees and defendants' deceptive ACH transfer practices might constitute wire fraud. Finally, the Complaint pleads a racketeering conspiracy claim.

For the reasons explained further below, the Court finds that the Complaint states claims for substantive and conspiratorial RICO violations, both predicated on the collection of unlawful debts and on a pattern of wire fraud involving allegedly manipulative use of ACH withdrawals.

1. Collection of an Unlawful Debt

The Complaint's principal theory of RICO liability is that the defendants are operating an enterprise dedicated to making and collecting on usurious loans. The potentially dispositive issue raised by the instant motion is whether the MCA agreements amount to loans under applicable state law, because it is undisputed that the implied interest rates of these agreements far exceed the cap in applicable New York usury law.

HN1[] The RICO statute declares that it is "unlawful for any person employed by or associated with any enterprise engaged in ... interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's **[*14]** affairs through ... collection of unlawful debt." *18 U.S.C. § 1962(c)*. As relevant here, the statute defines an "unlawful debt" as a "debt (A) ... which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with ... the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." *18 U.S.C. § 1961(6)*.

Since RICO's "definition of 'unlawful debt' invokes state as well as federal laws related to usury to provide substance to the concept of 'unlawful[ness],'" the first question is what state's law applies to the transactions at issue. *United States v. Moseley, 980 F.3d 9, 18 (2d Cir. 2020)*. The MCA agreements at issue expressly

choose that New York law will govern their terms. See, e.g., ECF 69-2 at 6 (§ 4.5). And there is no apparent reason why those choice of law provisions would be held unenforceable under either the laws of New York, of North Carolina (Haymount's domicile), or of Texas (Indigo's domicile), particularly since New York's usury laws are the strictest among these three states. See generally ECF 82, 83. ***HN2***[] Therefore, as the Second Circuit explained in *Moseley*, for **[*15]** the purposes of RICO liability, New York law governs the issues of whether the contracts amount to loans, and, if they are loans, whether they are unlawful debt under RICO. *980 F.3d at 20*.

HN3[] Here, therefore, liability for an "unlawful debt" RICO violation requires proof of five elements: "[1] that a debt existed, [2] that it was unenforceable under New York's usury laws, [3] that it was incurred in connection with the business of lending money at more than twice the legal rate, [4] that the defendant aided collection of the debt in some manner, and [5] that the defendant acted knowingly, willfully and unlawfully." *United States v. Biasucci, 786 F.2d 504, 513 (2d Cir. 1986)*. The instant motion challenges only the second element. The motion's core argument is that the debts arising from the MCA agreements are not unenforceable under New York's usury laws because the MCA agreements are genuine purchases of receivables, not loans. Defendants effectively concede, at least for now, that if the transactions amount to loans, then the implied interest rates are well above 50%, which is the twice the rate of criminal usury under New York law (25%), *N.Y. Penal L. § 190.40*. However, even when a transaction is unmistakably a loan, the lender is entitled to a presumption that the loan is lawful, **[*16]** so the borrower must establish by "clear evidence" that a transaction is a usurious loan. *Giventer v. Arnow, 37 N.Y.2d 305, 309, 333 N.E.2d 366, 372 N.Y.S.2d 63 (1975)*.

HN4[] Under New York law, "[u]sury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." *Seidel v. 18 E. 17th St. Owners, Inc., 79 N.Y.2d 735, 744, 598 N.E.2d 7, 586 N.Y.S.2d 240 (1992)*. New York courts uniformly hold that "[w]hen determining whether a transaction is a loan, substance -- not form -- controls." *Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 334, 157 N.Y.S.3d 800, 179 N.E.3d 612 (2021)*.

HN5[] In assessing the substance of financial transactions, the Court of Appeals has focused on how the contract at issue allocates risk between the parties. As the Second Circuit has explained, when determining whether a transaction was a true sale of receivables, "[t]he root of [the analysis] is the transfer of risk. 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." *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)*. However, where economic analysis reveals that "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 **[*17]** the lender only bears the risk that the account debtor's non-payment will leave the borrower unable to [pay]," then there has not been a bona fide purchase of receivables and the transaction is, in substance, a loan. Id. See also *Adar Bays, 37 N.Y.3d at 334* ("[P]arties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders."). In addition to an economic analysis of the transaction, the New York Court of Appeals has also considered objective indicia of the parties' intent to "distinguish between intent to borrow and intent to engage in a joint transaction or exchange money for some other reason." *Adar Bays, 37 N.Y.3d at 334*. ***HN6***[] "Usurious intent is an essential element of usury and where usury does not appear on the face of the note, usury is a question of fact" *Id. at 336*.

The New York Court of Appeals has not yet addressed how to apply these general principals to MCA agreements, so this Court's task is necessarily to predict how the Court of Appeals would treat an MCA agreement. While there have been several Appellate Division decisions and numerous trial court cases on the issue, the outcomes are strongly fact-bound and vary considerably. The Court's review of the caselaw suggests that, contrary **[*18]** to defendants' suggestion, the Appellate Divisions have yet to settle on any specific framework for classifying MCA agreements.

Defendants suggest that the Court should treat as dispositive a set of three factors that the Second Department and various trial courts have repeatedly applied: "(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy." *LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309 (2d Dep't 2020)*. To that end, defendants argue that the MCA agreements at issue

here cannot be loans because they contain a reconciliation provision that can be read as mandatory, lack a stated term, and do not treat the merchant's bankruptcy filing as an event of default. See Mot. 14.

But the Court concludes that, while these three factors may be relevant to the analysis, they are far from dispositive. To start, other Departments have analyzed MCA contracts without applying these factors. See, e.g., *Davis v. Richmond Capital Group LLC, 194 A.D.3d 516, 517, 150 N.Y.S.3d 2 (1st Dep't 2021)*. But even the Second Department has not reduced the question of whether a particular MCA contract is a loan to a mechanical application of these three factors, as the defendants urge the Court to do. For instance, in *LG Funding*, the Second **[*19]** Department considered the three factors as part of an overall analysis of the transaction, but its holding that the MCA contract at issue was a loan subject the usury laws depended on the conclusion that "[t]he agreement also contains provisions suggesting that [the merchant's] obligation to repay was absolute and not contingent on its actual accounts receivable." *181 A.D.3d at 666*. Indeed, the *LG Funding* decision's holding is ultimately about whether the transaction represented a real transfer of risk, concluding that the contract's "provisions suggest that the [MCA lender] did not assume the risk that [the merchant] would have less-than-expected or no revenues," so the economic substance of the transaction was a loan, not a purchase of receivables. Id. Other judges in this District have similarly considered the three Second Department factors but ultimately determined that the essential question was whether the purported MCA purchaser actually bears the risk of a revenue shortfall or if the agreement is structured to ensure an "absolute payment obligation." *Womack v. Cap. Stack, LLC, 2019 U.S. Dist. LEXIS 148644, 2019 WL 4142740, at *5-*7 (S.D.N.Y. Aug. 30, 2019)* (collecting cases); see also, e.g., *Fleetwood Servs., LLC v. Ram Cap. Funding, LLC, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *9 (S.D.N.Y. June 6, 2022)* ("The three factors provide only a guide to analysis. They do not dictate the conclusion.").

Starting with the Second **[*20]** Department's three factors, defendants contend that applying these factors to the face of the MCA agreements at issue weigh against finding them to be loans: none of the agreements have definite terms,[5] none names the merchant's bankruptcy as a default event, and all purport to have mandatory reconciliation provisions. See ECF 69-2 at 6. However, the actual operation of the contracts muddies this picture. Although the reconciliation provision is styled as a mechanism requiring defendants to adjust the remittance amount upon the merchant's application, the actual structure of the provision makes it often impossible to use and leaves the lender with substantial discretion to prevent adjustment. To begin with, the merchant may only seek reconciliation once per calendar month, and then only during the last five business days of a month. See ECF 69-2 at 4 (§ 1.4). Therefore, the contract only permits the merchant to seek reconciliation about 20% of the time. This limitation is particularly significant because some of the MCA agreements here at issue had implied repayment periods of less than one month, see Opp. 5, reflecting the high daily remittance amounts, and thus a corresponding likelihood **[*21]** that the merchant's need for reconciliation might be urgent. If a mid-month decline in revenues would lead a merchant to have insufficient cash to fund its high daily remittance, its inability to even apply for reconciliation could lead its account to return an insufficient funds message to the lender, which would trigger a default under the contract and entitle the lender to immediately seek the whole uncollected amount due from the merchant's principal, via the personal guaranty. See ECF 69-2 at 5-6 (§§ 1.13, 3.1). Moreover, while the reconciliation provision purports to be "mandatory," its structure nonetheless vests substantial discretion in GFA to deny reconciliation: the reconciliation provision expressly permits the lender "to request additional documentation such as bank login," and notes that "refusal to provide access shall be a breach" such that the lender "shall have no obligation to reconcile." ECF 69-2 at 4 (§ 1.4). It is readily apparent how the lender could use this contractual right to obtain from the merchant further documentation as a procedural pretext for denying reconciliation.

In any event, drawing back from the aforementioned three factors, which are neither **[*22]** exclusive nor dispositive, the MCA agreements at issue here have many features that weigh in favor of finding the transactions to be loans, rather than bona fide

[5] While none of the MCA agreements have definite terms spelled out in the texts of those contracts, the expected duration of the repayment period is readily calculable, since the merchant's total repayment amount due is known, as is the daily remittance amount. While that remittance is subject to reconciliation, and thus to extension of the loan term, "the contingent nature of [potential future payments] [do not] remove the loan from the scrutiny of the usury law." *Adar Bays, 37 N.Y.3d at 338*.

purchases of receivables, because they operate to prevent GFA from taking on the risk of shortfalls in the merchants' receivables. See *Endico Potatoes, Inc., 67 F.3d at 1069*. And New York courts have found that many of these features weigh in favor of finding MCA transactions to constitute loans subject to the usury laws. For instance, the daily remittance amounts described in the MCA agreements and alleged to have been negotiated are fixed dollar amounts, and the Complaint adequately alleges that these amounts appear not to be good faith estimates of the merchant's receivables. See *Davis, 194 A.D.3d at 517*. Nor does any MCA agreement identify particular revenues or accounts that were supposedly purchased, so there is no transfer of "risk of nonpayment by any specific customer." *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC, 37 N.Y.3d 591, 609 n. 2, 163 N.Y.S.3d 467, 183 N.E.3d 1185 (2021)* (Wilson, J. dissenting). Moreover, the MCA agreements leave merchants with the responsibility to collect revenues from all their accounts, and merchants may possess and use those revenues so long as the daily remittances are made. All these features of the MCA agreements are more consistent with an "intent to **[*23]** borrow" a fixed sum through a loan rather than an intent to purchase specified receivables of an independent business. *Adar Bays, 37 N.Y.3d at 334*.

The repayment and remedy terms of the MCA agreements also operate in a manner more akin to a standard, high interest-rate loan than to a genuine transfer of the risks associated with specified receivables. For instance, they provide that a merchant defaults on the MCA agreement if its bank rejects the automated debit for one of those remittances without the merchant having provided prior notice. ***HN7***[] This default then entitles the lender to immediate repayment of the full amount of the transaction outstanding. See *Davis, 194 A.D.3d at 517*. And should a merchant default and the lender be unable to recover the outstanding balance from the merchant's bank accounts, the MCA agreements entitle the lender to obtain full repayment from the merchant's principal, via the personal guaranty. See id. Finally, GFA's risks of nonpayment are further mitigated by the MCA agreements' provisions permitting GFA to use the Connecticut confession of judgment process, including the incorporation of a waiver permitting the lender to issue a writ of attachment on the merchant's accounts and assets without a judicial **[*24]** hearing. See *LG Funding, 181 A.D. 3d at 666*. Together, "[t]hese provisions suggest that the plaintiff did not assume the risk that [merchants] would have less-than-expected or no revenues." Id.

Considering all of these factors, as well as the factual questions raised concerning the defendants' alleged usurious intent, the Court concludes that the Complaint has adequately pled that the MCA agreements at issue here function as loans. Because the transactions should be treated as loans, at least at this juncture, and because defendants do not dispute that the implied interest rates on these transactions far exceed 50% per annum (twice the New York State criminal usury rate), the Court holds that the Complaint has adequately pled that the debts created by the MCA agreements that the defendants issue are unenforceable, "unlawful debts" under the RICO statute. Since this was the only element of the RICO claim that defendants challenged on this motion, the Court's conclusion that the transactions amount to loans is sufficient to deny the prong of the motion concerning the RICO claim for collection of unlawful debts.

2. Pattern of Wire Fraud

In the alternative, the Complaint pleads a RICO claim predicated on a patter of racketeering **[*25]** activity, to wit, wire fraud. Plaintiffs allege that two types of activities described in the Complaint amount to wire fraud: (i) the use of email to transmit agreements that misrepresent the nature of the fees they were charging, and (ii) the use of ACH withdrawals, including through use of misleading names, to extract unrecorded payments or payments after merchants blocked access to their accounts. See Opp. 18. For the reasons explained below, the Court concludes that only the second allegation adequately pleads a pattern of wire fraud sufficient to support a RICO claim.

HN8[] Pleading a RICO claim based on a pattern of racketeering activity requires alleging "(1) at least two predicate acts of racketeering occurring within a ten-year period; (2) that these predicate acts are related to each other; and (3) that these predicate acts amount to or pose a threat of continuing criminal activity." *Related Companies, L.P. v. Ruthling, 2017 U.S. Dist. LEXIS 207857, 2017 WL 6507759, at *18 (S.D.N.Y. Dec. 18, 2017)*. Defendants contend the wire fraud allegations are not pled with particularity and that there is no adequate continuity of the alleged fraud.

Plaintiffs' first theory of wire fraud is that defendants charge exorbitant fees for "underwriting" and "ACH setup" that far exceed any actually incurred expenses. **[*26]** However, the MCA agreements disclose the amounts of these fees. See ECF 69-2 at 9.

While they are plainly exorbitant and do not reflect real costs, they are disclosed. Plaintiffs provide no authority that charging excessive but disclosed fees pursuant to a contract amounts to wire fraud. To the extent that plaintiffs allege that no services were actually performed in exchange for these fees, or that the work performed materially differed from the descriptions in the fee schedule, plaintiffs' complaints sound in breach of contract, not fraud.[6] Accordingly, this theory is not a viable basis for a RICO claim.

However, the Complaint also alleges that GoFund Advance made ACH withdrawals from Haymount's account (after Haymount attempted to block further withdrawals) by using misleading names to evade the blocks. See FAC ¶¶ 180-186. As discussed further in Section II.D infra, this allegation just barely clears the *Rule 9(b)* barrier for pleading fraud claims with particularity.

That still leaves the issue of continuity. The several "attacks" on Haymount's bank account are isolated and close in time, so there is no closed-end continuity. See *DeFalco v. Bernas, 244 F.3d 286, 321 (2d Cir. 2001)* (the Second Circuit has not recently upheld closed end continuity **[*27]** where acts occurred over a period of less than two years). Moreover, the tactic of using deceptive party names to evade blocks on ACH withdrawals is only alleged in relation to Haymount, not Indigo. See FAC ¶¶ 306-307.

However, the Complaint has, just barely, alleged that open-ended continuity applies to the second variant of the wire fraud theory. ***HN9***[] "A party may establish open-ended continuity by alleging predicate acts occurring over a short period of time so long as there is a threat that such conduct will recur in the future. The threat that such illegal conduct will recur in the future exists when: (1) a specific threat of repetition exists, (2) the predicates are a regular way of conducting an ongoing legitimate business, or (3) the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." Rakoff & Goldstein, RICO: Civil and Criminal Law and Strategy § 1.04[2] (2021). Here, ACH withdrawals are a regular means of collecting on the MCA agreements. Taking the Complaint's allegations as a whole, specifically including the repeated attempts to debit Haymount's Bank of America account on at least five days spread over **[*28]** several weeks, see FAC ¶¶ 183-184, and considering these allegations in the light most favorable to the plaintiffs, it is plausible to infer that the alleged RICO enterprise regularly conducted business using these tactics. Accordingly, the Court concludes that the Complaint alleges facts that can support a finding of open-ended continuity, and thus, pleads a claim for a RICO violation predicated on a pattern of wire fraud activity.

3. Racketeering Conspiracy

Defendants' only argument against the claim that they engaged in a racketeering conspiracy in violation of *18 U.S.C. § 1962(d)* is derivative of their objections to the substantive RICO claim. Specifically, defendants cite First Cap. Asset Mgmt., Inc. v. Satinwood, Inc. for the proposition that a RICO conspiracy claim is properly dismissed where a complaint fails to state a substantive RICO claim. *385 F.3d 159, 182 (2d Cir. 2004)*. However, since the Court has concluded that the substantive RICO claim is adequately pled, there is no reason at this juncture to dismiss the racketeering conspiracy claim.

For these reasons, the Court concludes that the motion to dismiss is denied with respect to the RICO and racketeering conspiracy claims.[7]

B. *Section 1983*

Plaintiffs allege that defendants have violated **[*29]** their constitutional right to due process while acting under color of Connecticut state law, all in violation of *42 U.S.C. § 1983*. The complaint alleges that defendants had their attorneys issue writs of attachment on the plaintiffs' bank and medical insurance reimbursement accounts, but that defendants failed to adhere to the statutory requirements for use of this as a form of prejudgment remedy without any court order or procedure. This, plaintiffs claim, violates procedural due process, even considering the creditor-friendly provisions of the Connecticut prejudgment attachment statute.

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[6] The same is true regarding the allegations that certain remittances were not properly credited to Haymount's accounts. This may be a breach of contract, but the Complaint does not sufficiently allege that this constitutes a fraud, let alone a pattern of fraud.

[7] However, as explained above, the plaintiffs are precluded from proceeding on the aspect of the wire fraud prong of the substantive RICO claim concerning the allegedly excessive fees that were, nevertheless, disclosed, and this limitation applies to the conspiracy claim as well.

Defendants move to dismiss this claim, contending that the MCA agreements contained valid waivers permitting their attorneys to issue writs, without any court process, and thereby freeze the merchants' accounts. Defendants argue, therefore, that plaintiffs have waived any due process objections they now make to their use of this procedure. Defendants further contend that if there were procedural deficiencies or other issues with their use of the pre-judgment remedy, then plaintiffs should have raised those issues in Connecticut court, not made them the basis of a federal constitutional claim. However, taking the plaintiffs' **[*30]** allegations as true, the Court concludes that the complaint states a claim under *section 1983*.[8]

Connecticut's prejudgment attachment statute provides, in relevant part:

> In an action upon a commercial transaction, ... wherein the defendant has waived his right to a notice and hearing..., the attorney for the plaintiff shall issue the writ for a prejudgment remedy without securing a court order provided that (1) the complaint shall set forth a copy of the waiver; (2) the plaintiff shall file an affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that a [net] judgment in the amount of [or greater than] the prejudgment remedy sought, ... will be rendered in the matter in favor of the plaintiff; and (3) the plaintiff shall include in the process served on the defendant a notice satisfying the requirements of [another provision].

Conn. Gen. Stat. Ann. § 52-278f. According to the Complaint, the Connecticut judiciary also publishes a practice guide explaining in more details the three procedural requirements for issuing a writ pursuant to a waiver. See FAC § 323. As the defendants contend, the MCA agreements contain boilerplate language **[*31]** designed to operate as a waiver of judicial process, see, e.g., ECF 69-3 at 7, § 4.13, and so defendants appear eligible to use this prejudgment remedy provision without notice and hearing. Plaintiffs respond that, to the extent the relevant provisions of the MCA agreements would operate as a waiver of due process requirements, their purported waiver was neither knowing nor intentional, since the provisions were buried in a dense, adhesive contract. See FAC ¶¶ 9, 319, 330-331. But the Court need not address, at this juncture, whether the waiver was valid, because the Complaint adequately alleges that the defendants failed to follow any of the procedural requirements set forth in *section 52-278f*.

Specifically, the Complaint alleges that defendants did not draft -- or at least did not serve on plaintiffs or their bank -- a complaint, a supporting factual affidavit, or the statutorily required notice. FAC ¶ 325. Instead, defendants allegedly have a practice of serving writs directly on a financial institution, and even those papers served on the banks do not include either a complaint or an sworn affidavit. ¶¶ 328-329. Rather than an orderly processed linked to a meritorious lawsuit, as the statute envisions, **[*32]** plaintiffs allege that defendants "first freeze the merchant's bank accounts by serving writs of attachment on the bank only, and then immediately demand a settlement under duress and the threat of financial ruin." FAC ¶ 326. The inference that defendants have abused Connecticut's prejudgment remedy is also supported by the allegation that, at least in the case of a writ served on plaintiff Indigo's bank, defendants have never "provided a copy of the complaint or the supporting affidavit ... despite numerous requests by Indigo's counsel." FAC ¶ 329.

Treating the Complaint's allegations as true, as required on a motion to dismiss, the Court concludes that neither defendants' substantive nor their procedural argument is

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[8] Although they are private parties, defendants do not challenge that the Complaint adequately alleges that they acted "under color of state law" and with a sufficient nexus to state action in their allegedly unlawful use of the prejudgment attachment statute. ***HN10***[] In any event, the Supreme Court has repeatedly explained that *section 1983* liability may lie for either abusive use of a prejudgment attachment statute or knowing or reckless use of an unconstitutional prejudgment remedy where the alleged deprivation was caused by the exercise of a power created by the state and the party charged with the deprivation is a person who "he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*. See also, e.g., *Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991)*; *North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975)*. Attorneys employing a confession of judgment statute to attach private property without notice or hearing may be treated as state actors, because they "enlist[] the compulsive powers of the state to seize property by executing on a judgment without pre-deprivation notice or hearing [and so they] act[] under color of law." *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1267 (3d Cir. 1994)*. Here, the writs of attachment purported to be issued in aid of a pending lawsuit, and so the banks froze the plaintiffs' accounts because the writs purported to "use the state's power of legal compulsion to deprive another of property." Id.

availing. Substantively, the allegations that defendants routinely fail to follow § 52-278f's procedural requirements undercut defendants' position that their conduct comports with due process. **HN11**[] It is a constitutionally delicate matter for a state to permit a private party's attorney to issue writs of attachment purportedly in aid of pending litigation but without any judicial supervision and without proper notice or hearing. See, e.g., Doehr, 501 U.S. at 9-10. Section 52-278f's procedural safeguards, which defendants **[*33]** are alleged to have flagrantly ignored, are therefore crucial to a private entity's lawful use of the statute, assuming arguendo that the statute is constitutional if properly employed. **HN12**[] The mere fact that the plaintiffs waived their rights to a pre-deprivation hearing does not inoculate defendants from section 1983 liability where they employ the prejudgment attachment statute maliciously, that is, where they pursue a purportedly "lawful end by ... intentionally unlawful means." Pinsky v. Duncan, 79 F.3d 306, 313 (2d Cir. 1996). The Complaint has therefore adequately alleged that defendants employ attorneys who act under the color of state law to deprive the plaintiffs of property without due process of law.

Defendants' procedural objection -- that the plaintiffs should have raised these complaints in Connecticut state court "where the underlying litigation was filed" -- is also unavailing. Although Connecticut law provides a procedure by which a properly obtained prejudgment remedy may be modified or vacated, see Conn. Gen. Stat. Ann. § 52-278k, the Complaint alleges that defendants issue their writs without ever commencing actions in state court. FAC ¶ 9. Indeed, defendants have not identified that they ever "filed" any "underlying litigation[s]" in Connecticut in which **[*34]** the plaintiffs could have raised the issues of which they complain. **HN13**[] But, in any event, it is well established that litigants challenging an allegedly unconstitutional prejudgment remedy may seek relief in a federal court under section 1983, even if there is a pending state court action associated with the prejudgment remedy. See, e.g., Pinsky, 79 F.3d at 308.

The Court therefore concludes that none of defendants' arguments justifies dismissing the section 1983 claim.

C. Declaratory Judgment

The Complaint pleads a single declaratory judgment count that nonetheless seeks two distinct declarations. First, plaintiffs ask the Court to declare that the MCA agreements were void ab initio, because they function as criminally usurious loans. However, as explained below, New York law prohibits corporations from seeking affirmative relief in this manner, so this aspect of the claim is precluded. Second, Indigo and Turrentine seek a declaration invalidating the settlement agreement they consummated with GoFund Advance is void because it was obtained under economic duress and by circumventing plaintiff's counsel. None of defendants' arguments justify dismissal of this aspect of the claim.

In sum, the declaratory judgment claim is dismissed against **[*35]** all defendants except GoFund Advance, which is the only one of the defendants that is party to the Indigo settlement.

1. MCA Agreements

HN14[] The New York usury statute prohibits corporations from interposing a defense of usury to an action to collect a debt except insofar as the rate of interest exceeds the criminal usury rate of 25% per annum, set out in Penal Code § 190.40. N.Y. Gen. Oblig. L. § 5-521. Where the interest rate exceeds the criminal usury rate, a corporation may interpose an affirmative defense of usury and, if successful, obtain a declaration that invalidates the debt instrument ab initio. See Adar Bays, 37 N.Y.3d at 333. However, New York courts have uniformly construed this statute as limited to the affirmative defense, and they have prohibited corporations from bringing affirmative claims or counterclaims alleging criminal usury and seeking to invalidate an agreement. See, e.g., Paycation Travel, Inc. v. Glob. Merch. Cash, Inc., 192 A.D.3d 1040, 1041, 141 N.Y.S.3d 319 (2d Dep't 2021); LG Funding, 181 A.D.3d at 666-67; Intima-Eighteen, Inc. v. A.H. Schreiber Co., 172 A.D.2d 456, 457, 568 N.Y.S.2d 802 (1st Dep't 1991). Plaintiffs present no countervailing case law suggesting that they can seek affirmative relief under the New York usury statute.

Therefore, the Court dismisses the declaratory judgment count insofar as it seeks a declaration that the MCA agreements are void ab initio.

2. Indigo Settlement

As explained above, Indigo alleges that its accounts and assets were the subject **[*36]** of UCC lien notices sent by defendants seeking to collect on the outstanding MCA agreements. FCA ¶¶ 278-288. During negotiations over those liens, defendants allegedly induced and, while this case was pending, allegedly got Indigo to sign

a settlement agreement in which it paid $4,000 to settle claims of $33,000 and thereby had the liens withdrawn. ¶¶ 278-288; ECF 69-9. Plaintiffs seek a declaratory judgment that the settlement is void because it was obtained under economic duress and by circumventing Indigo's counsel. Defendants move for dismissal of this claim, arguing that the Indigo principal stated that he consulted with a different lawyer and that there was no wrongful threat.

Parties seeking to void a settlement agreement releasing claims face a steep climb. ***HN15***[] "It is well established under New York law that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties." *Berman v. Parco, 986 F.Supp. 195, 208 (S.D.N.Y. 1997)*.[9] A release of claims in a settlement agreement is therefore "binding on the parties absent a showing of fraud, duress, undue influence, or some other valid legal defense." *Davis & Assocs., Inc. v. Health Mgmt. Servs., Inc., 168 F. Supp. 2d 109, 113 (S.D.N.Y. 2001)* (Lynch, J.).

With regard to the issue of whether defendants circumvented Indigo's counsel in obtaining its agreement to the settlement, defendants argue that a representative was told that Turrentine consulted with an attorney other than his counsel in this litigation.[10] Even if this assertion were cognizable on a motion to dismiss, it still might not justify dismissal, because the complaint and its supporting materials clearly allege that the defendants' counsel sought to negotiate and consummate the settlement directly with Indigo, knowing that Indigo was represented and despite efforts by Indigo's counsel to intervene.[11] The principal evidence on the issue of circumvention is an email chain attached to the Complaint that indicates that defendants' counsel (not the attorney of record in this litigation) was advising defendants with respect to the settlement agreement and caused a representative of his clients to contact Indigo with a proposed settlement and release document. See ECF 22-11. Plaintiffs allege that this conduct violated Rule 4.2(b) of the New York Rules of Professional Conduct, which states in part:

> [A] lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel **[*38]** the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

22 NYCRR 1200.0 (Rule 4.2(b)). In this posture, there is no evidence that any advance notice to counsel was ever provided. And plaintiffs assert, without any dispute from defendants, that the New York Rules apply to this conduct. Accordingly, the Complaint adequately alleges that the settlement was obtained in circumvention of the N.Y. rules of professional conduct. Defendants never suggest the settlement would be valid if obtained by an attorney's conduct that violated applicable rules of professional conduct; presumably this conduct might amount to undue influence, though plaintiffs never explain why. But since defendants never raise these legal issues, the Court need not reach the questions of whether the New York Rules apply or whether a settlement obtained in violation of Rule 4.2(b) may be voidable.

Indeed, even if defendants had raised these legal issues regarding circumvention of counsel, the Court would not

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[9] The Indigo settlement agreement does not specify which state's law governs its terms, and neither party addressed this issue. See generally ECF 69-9. But the Court need not decide the choice of law issue at this juncture. The potentially relevant grounds for voiding the settlement -- undue influence and duress -- are similar under both New York law (which might apply because the settled claims arose from an MCA agreement that specified New York law, see ECF 69-8 at 6 (¶ 4.5)) and Connecticut law (which might be relevant because the settlement could be read to settle litigation supposedly pending in Stamford, Connecticut), see ECF 69-9 at 2. See **[*37]** also *Doherty v. Sullivan, 29 Conn. App. 736, 618 A.2d 56, 59 (Conn. App. 1992)* ("Our law has long been clear that a 'compromise agreement ... if free from fraud, mistake or undue influence ... is conclusive between the parties.'") (quoting *Azzolina v. Sons of Italy, 119 Conn. 681, 179 A. 201, 204 (1935)*)). The Court therefore assumes without deciding that the Indigo settlement agreement is governed by New York law.

[10] In response, defendants submitted an affidavit attaching a text message exchange between a GoFund Advance representative and Turrentine. See ECF 77-1. But defendants have offered no authority for why these communications, which are neither integral to the complaint nor incorporated by reference, are cognizable on a motion to dismiss.

[11] Indeed, the text messages submitted by defendants, see n. 10 supra, read in the light most favorable to the plaintiffs, support the inference that the defendants knew that Indigo's counsel in this litigation sought to advise his client on the proposed settlement, which was plainly devised to torpedo the instant lawsuit.

need to decide now whether they could independently justify voiding the settlement, because the second allegation **[*39]** -- that the settlement was obtained under economic duress -- is effectively unchallenged at this stage. ***HN16***[] Under New York law, "[a] release agreement may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of his free will." *Davis & Assocs., Inc., 168 F. Supp. 2d at 114*. Parties seeking to establish duress from one-sided economic advantage must carry a "heavy burden." Id. However, the alleged threats at issue here -- unlawful use of a prejudgment remedy to induce financial paralysis as a means of collecting on a criminally usurious debt -- would almost certainly be wrongful if proven.[12] Defendants have little to say on this issue. Their only response is to conclusively assert that Indigo was not deprived of its free will because, according to the non-cognizable text messages, Turrentine appeared to have had time to consult with an unspecified company attorney before signing the settlement. Mot. 20. But even if there were a procedural basis to consider this fact-dependent contention, it would be irrelevant: the possibility that Turrentine had time to consult a lawyer before signing says nothing about whether the defendants **[*40]** induced consent to the release through wrongful economic duress by allegedly holding Indigo's bank account ransom with unlawfully issued UCC lien notices.

Since there is no merit to any of defendants' attacks on the aspect of the declaratory judgment claim concerning the Indigo settlement, that prong of the motion is denied. Since GoFund Advance is Indigo and Turrentine's only counterparty in the settlement, this aspect of the claim is irrelevant to the other defendants.[13] Therefore, since New York law does not permit the affirmative relief sought by the aspect of the declaratory judgment claim concerning the validity of the MCA agreements themselves, the declaratory judgment claim is dismissed against all defendants other than GoFund Advance.

D. Fraud

The Complaint also pleads a fraud claim under state law. ***HN17***[] In New York, "[t]he elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559, 910 N.E.2d 976, 883 N.Y.S.2d 147 (2009)*. The Complaint's fraud count suggests several theories for how defendants committed fraud, two of which require analysis.[14]

The first theory is based on the allegation **[*41]** that defendants charged excessive fees purportedly for origination and servicing of the MCA agreements. Specifically, plaintiffs allege that defendants falsely represented that the fees were charged to offset actual fees and costs incurred by the MCA companies, when in fact the companies undertook no meaningful activities for which the fees were charged (e.g., an "underwriting" fee amounting to 12% of the MCA loan amount) or the actual costs involved were much lower than the fees charged (e.g., for ACH setup, which is very fast and cheap but led to a fee of 10% of the MCA loan amount). FAC ¶¶ 292-302.

This theory fails to state a claim for fraud. The allegedly excessive fees arise under a contract, which plainly discloses the existence and amounts of the fees. See FAC ¶ 291. Plaintiffs make no meaningful showing that liability for fraud lies where a business charged excessive fees that are prominently disclosed in the contract. The only authority they cite involves submission and payment of false invoices, a case that is not analogous and does not establish the existence of an actionable misrepresentation here. See *Needham & Co., LLC v. Access Staffing, LLC, 2016 U.S. Dist. LEXIS 111925, 2016 WL 4399288, at *2 (S.D.N.Y. Aug. 12, 2016)*.

While plaintiffs sufficiently allege that the fees far exceed the costs **[*42]** for which they purport to relate, there is no allegation that the actions for which the fees were charged did not occur. For instance, while ACH

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[12] Indeed, the settlement's reference to a lawsuit supposedly pending in Connecticut state court might justify voiding the settlement for fraud, should it turn out that no such lawsuit ever existed. See ECF 69-9 at 2.

[13] The Court notes, however, that the settlement purports to extend its release to apply to claims against any individuals or "affiliated businesses" associated with GoFund Advance. See ECF 69-9 at 3. Obviously, if the Court declares against GoFund that the settlement is void, none of the other defendants will be heard to argue that they have standing to revive the release as third-party beneficiaries.

[14] To the extent that any other theories of fraud lurk in count four of the Complaint, the Court finds that they fail to state a claim.

setup does not cost tens of thousands of dollars, the rate was disclosed in the contract, and plaintiffs do not allege that defendants failed to set up ACH payments. And even if that allegation had been made, it would sound in breach of contract, not fraud. ***HN18***[] Under New York law, "[t]o maintain a claim of fraud in such a situation, a plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2d Cir. 1996)*. Plaintiffs make none of these showings.[15]

The second theory is that defendants committed fraud by extracting unauthorized debits from their bank accounts using misleading names calculated to evade stop payment orders entered by plaintiffs' banks to prevent further ACH withdrawals. FAC ¶¶ 306-307, 180-186. Specifically, the Complaint alleges that "On February 16, 2022, February 18, 2022 and February 23, 2022, GoFund **[*43]** attempted to bypass its block from debiting from Plaintiff's account by fraudulently debiting $60,000 from the Plaintiff's bank account under the name 'GoFund b' as opposed to 'GoFund.'" FAC ¶ 186. The Court concludes that this suffices to state a claim for fraud against defendant GoFund Advance. However, since any fraud claim must be pled with specificity, see *Fed. R. Civ. P. 9(b)*, and the Complaint's allegations on this point relate to no defendant other than GoFund Advance, the fraud count fails to state a claim as to any of the other defendants.

Since there is no other viable fraud claim pled, the Court will dismiss the fraud count against all defendants other than GoFund Advance.

III. Conclusion

For the reasons explained above, defendants' motion to dismiss the First Amended Complaint is granted in part and denied in part. The motion is denied with respect to the substantive and conspiratorial RICO claims, although the plaintiffs may not proceed with the aspect of the wire fraud prong of the substantive RICO claim predicated on allegedly excessive fees that were disclosed in the MCA agreements. The motion is denied with respect to the *section 1983* claim, which survives in its entirety. The declaratory judgment **[*44]** claim has two parts, one of which -- seeking a declaration that the MCA agreements are void ab initio -- is dismissed. The aspect of the declaratory judgment claim concerning the validity of the Indigo settlement survives, but only as against GoFund Advance. Finally, the fraud claim is dismissed against all defendants other than GoFund Advance, and then only the aspect of the claim concerning allegedly fraudulent ACH withdrawals may proceed.

Following argument on the instant motion, the Court stayed discovery and all further proceedings in this case, which was then less than three months from being ready for trial. That stay is now dissolved. The parties are directed to complete a new case management plan, using the template available on the Court's website and inserting a ready-for-trial date three months from the date of this order. The parties shall email this proposed case management plan to Chambers and then initiate a joint phone conference with the Court's law clerk within one week of the entry of this order.

SO ORDERED.

New York, NY

June 27, 2022

/s/ Jed S. Rakoff

JED S. RAKOFF, U.S.D.J.

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[15] The same conclusion applies to the complaint's suggestion that defendants "failed to properly account for [Haymount's] payments," and various other alleged failures to properly service the MCA agreement. FAC ¶ 305.

Table1 (*Return to related document text*)

Contract Date	MCA Entity	Purchase Price	Amount of Purchased Receivables	Stated Percentage of Revenue	Stated Daily Remittance	Implied Interest Rate[3]
8/25/21	Merchant Capital	$200,000	$275,000	45%	$7,299	263%
8/26/21	GoFund Advance	$250,000	$349,750	25%	$8,000	242%
9/27/21	GoFund Advance	$150,000	$224,850	25%	$7,500	650%
12/16/21 **[*9]**	GoFund Advance	$1,000,000	$1,350,000	45%	$35,000	319%
12/27/21	Funding123	$2,000,000	$2,998,000	45%	$80,000	405%
1/20/22	GoFund Advance	$1,000,000	$1,499,990	45%	$60,000	612%

Table1 (*Return to related document text*)

End of Document

[3] As explained, the MCA agreements expressly state that there is no interest rate associated with the contemplated financial transactions. However, the Complaint alleges that there are implied interest rates, based on the total amount borrowed, the total amount to be repaid, and the number of days over which repayment is expected.

Exhibit 22

Neutral
As of: May 31, 2022 3:41 PM Z

Klein v. Johnson

United States District Court for the District of Utah

December 9, 2019, Decided; December 9, 2019, Filed

Case No. 2:19-cv-00625-DN-PK

Reporter
2019 U.S. Dist. LEXIS 212744 *; 2019 WL 6700245

R. WAYNE KLEIN, as Receiver, Plaintiff, v. GLENDA E. JOHNSON, an individual, Defendant.

Subsequent History: Stay denied by *Klein v. Johnson, 2020 U.S. Dist. LEXIS 29595, 2020 WL 816242 (D. Utah, Feb. 18, 2020)*

Motion granted by *Klein v. Johnson, 2021 U.S. Dist. LEXIS 147488, 2021 WL 3423343 (D. Utah, Aug. 5, 2021)*

Prior History: *United States v. RaPower-3, LLC, 2016 U.S. Dist. LEXIS 58586, 2016 WL 11728713 (D. Utah, May 2, 2016)*

Core Terms

counterclaims, receiver, shares, Receivership, cancellation, argues, immune, motion to dismiss, liquidation

Counsel: [*1] For R. Wayne Klein, as Receiver, Plaintiff: Jonathan O. Hafen, LEAD ATTORNEY, Jeffery A. Balls, Michael S. Lehr, PARR BROWN GEE & LOVELESS, SALT LAKE CITY, UT.

For Glenda E. Johnson, an individual, Glenda E. Johnson, an individual, Defendants: Steven R. Paul, NELSON SNUFFER DAHLE & POULSEN, SANDY, UT.

For R. Wayne Klein, as Receiver, Counter Defendant: Jonathan O. Hafen, LEAD ATTORNEY, Jeffery A. Balls, Michael S. Lehr, PARR BROWN GEE & LOVELESS, SALT LAKE CITY, UT.

Judges: David Nuffer, United States District Judge. Magistrate Judge Paul Kohler.

Opinion by: David Nuffer

Opinion

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

Plaintiff R. Wayne Klein was appointed as receiver in *United States v. RaPower-3, LLC, et al.*, Case No. 2:15-cv-00828-DN-EJF (D. Utah) ("*RaPower-3*"), over RaPower-3, LLC ("RaPower"), International Automated Systems Inc. ("IAS"), LTB1 LLC ("LTB1"), their subsidiaries and affiliates (collectively, the "Receivership Entities"), and the assets of Neldon Johnson and R. Gregory Shepard.[1] As the receiver in *RaPower-3*, Plaintiff moved to cancel IAS shares.[2] That motion was granted.[3]

For the benefit of the receivership estate, **[*2]** Plaintiff subsequently initiated this case to recover funds that are alleged to have been improperly transferred to Defendant from the Receivership Entities.[4] Defendant asserted counterclaims against Plaintiff for inverse condemnation and a *Bivens* violation of due process

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[1] Corrected Receivership Order ("*RaPower-3* Receivership Order"), ECF no. 491 in *RaPower-3*, filed Nov. 1, 2018.

[2] Receiver's Motion for Order Canceling Shares of International Automated Systems, Inc. ("Motion to Cancel IAS Shares"), ECF no. 682 in *RaPower-3*, filed May 27, 2019.

[3] Order Canceling International Automated System Inc.'s Shares ("IAS Cancellation Order"), ECF no. 719 in *RaPower-3*, filed July 8, 2019.

[4] Complaint, docket no. 2, filed Sept. 4, 2019.

relating to the cancellation of the IAS shares.[5]

Plaintiff now seeks dismissal of Defendant's counterclaims under *FED. R. CIV. P. 12(b)(1)* ("Motion").[6] Because subject matter jurisdiction over Defendant's counterclaims is lacking, Plaintiff's Motion[7] is GRANTED. Defendant's counterclaims[8] are DISMISSED without prejudice.

STANDARD OF REVIEW

Plaintiff moves to dismiss Defendant's counterclaims under *FED. R. CIV. P. 12(b)(1)*,[9] which is "jurisdictional in nature."[10] In responding to the Motion, Defendant argues that "[u]nder the standards of review for a motion to dismiss . . . the allegations of the counterclaim must be taken as true and the court must draw all reasonable inferences in favor of the non-moving party."[11] Defendant is mistaken. Defendant identifies the standard of review for a motion under *FED. R. CIV. P. 12(b)(6)*,[12] which differs from the standard of review on Plaintiff's Motion made under *Rule 12(b)(1)*.

A *Rule 12(b)(1)* motion to dismiss may take one of two forms: The motion may be a facial attack that "questions **[*3]** the sufficiency of the complaint;"[13] Or, the motion may be a factual attack that "challenge[s] the facts upon which subject matter jurisdiction depends."[14] When the challenge to the complaint is a facial challenge, "a district court must accept the allegations in the complaint as true."[15] However, on a factual challenge, the court is *not* required to accept the complaint's allegations as true and "may not presume" that they are true.[16] A factual Rule "*12(b)(1)* motion is considered a 'speaking motion' and can include references to evidence extraneous to the complaint."[17] And the court enjoys "wide discretion to . . . resolve disputed jurisdictional facts.[18]

Plaintiff's Motion is a factual challenge under *Rule 12(b)(1)* because it challenges the facts underlying the purported jurisdiction over Defendant's counterclaims.[19] Plaintiff argues that the counterclaims are barred under the *Barton* doctrine and the *RaPower-3* Receivership Order.[20] Plaintiff also argues that he is immune from suit as a receiver, and that Defendant lacks standing.[21] Defendant argues in response that the *Barton* doctrine barring jurisdiction does not apply because Plaintiff's actions were *ultra vires*.[22] Defendant also argues that the issue of **[*4]** Plaintiff's immunity is not properly raised on a motion to dismiss.[23] Defendant did not respond to Plaintiff's argument regarding standing.

DISCUSSION

Defendant's counterclaims are barred by the *Barton* Doctrine and the *RaPower-3* Receivership Order

Plaintiff argues that Defendant's counterclaims should be dismissed because Defendant did not obtain leave to bring them.[24] The United States Supreme Court held in *Barton v. Barbour* that "before suit is brought against a

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[5] Answer, Jury Demand and Counterclaim ("Counterclaim") at 15-18, docket no. 5, filed Sept. 27, 2019.

[6] Plaintiff's 12(b)(1) Motion to Dismiss Defendant's Counterclaims ("Motion"), docket no. 8, filed Oct. 9, 2019.

[7] *Id.*

[8] Counterclaim at 15-18.

[9] Motion.

[10] *Satterfield v. Malloy, 700 F.3d 1231, 1234 (10th Cir. 2012)*.

[11] Opposition to Plaintiff's Motion to Dismiss ("Response") at 6, docket no. 16, filed Nov. 18, 2019.

[12] *GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997)*.

[13] *Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995)*.

[14] *Id.*

[15] *Id.*

[16] *Id. at 1003*.

[17] *Wheeler v. Hurdman, 825 F.2d 257, 259 n.5 (10th Cir. 1987)*.

[18] *Id.*

[19] Motion at 3-14.

[20] *Id.* at 8-11.

[21] *Id.* at 11-14.

[22] Response at 2-7.

[23] *Id.* at 7.

[24] Motion at 8-11.

receiver[,] leave of the court by which he was appointed must be obtained."[25] The *Barton* doctrine bars claims based on a receiver's actions arising from their official duties, out of a concern that allowing receivers to be vulnerable to suit would render the courts unable to "preserve and distribute" relevant property.[26]

Defendant contends that the *Barton* doctrine does not apply if a receiver acted *ultra vires*.[27] But Defendant does not clarify which specific acts were outside of Plaintiff's court-appointed authority. In the *RaPower-3* Receivership Order, the court ordered Plaintiff to "provide a recommendation" regarding whether IAS should be "liquidated or dissolved."[28] The Receivership Order further directed that, should liquidation be **[*5]** appropriate, "the Receiver shall propose a liquidation plan."[29]

Plaintiff followed this directive and drafted a plan of liquidation[30] and moved for the cancellation of IAS shares.[31] The liquidation plan was adopted[32] and the court—not the Plaintiff—cancelled the IAS shares.[33] Plaintiff's acts were not *ultra vires*. They were within the scope of Plaintiff's court-appointed authority. Therefore, the *Barton* doctrine applies to Defendant's counterclaims. And because Defendant did not seek leave to file the counterclaims in *RaPower-3*, the *Barton* doctrine bars the counterclaims.

Additionally, and separate from the *Barton* doctrine, the court in *RaPower-3* ordered that ancillary "actions of any nature involving [] the Receiver in his capacity as Receiver" are "stayed until further order of this Court."[34] That stay of actions has not been lifted as to Defendant's counterclaims. Therefore, Defendant's counterclaims violate the stay of actions imposed in *RaPower-3*.

Because the *Barton* doctrine bars Defendant's counterclaims, and because the counterclaims violate the stay of actions imposed in *RaPower-3*, subject matter jurisdiction over the counterclaims is lacking.

Defendant fails to address [*6] how Plaintiff is not immune from suit, or how orders entered in *RaPower-3* may be challenged in this separate action, or how Defendant has standing

Defendant's counterclaim for inverse condemnation alleges a violation of constitutional rights by the cancellation of the IAS shares under a takings theory.[35] Defendant's counterclaim for a *Bivens* violation alleges that the cancellation of the IAS shares violated Defendant's due process rights.[36] Plaintiff argues that Defendant cannot succeed on either counterclaim because the cancellation of the IAS shares was court ordered; because Plaintiff is immune from suit; and because Defendant lacks standing.[37]

Defendant's counterclaims effectively seek collateral review of judicial orders entered in *RaPower-3* relating to Plaintiff's authority as a receiver and the cancellation of IAS shares. But "a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity."[38] This is the case even where constitutional violations are alleged.[39] Defendant fails to address how Plaintiff, acting as a receiver under court authority, is not immune from suit. And Defendant cites no legal authority **[*7]** that this separate action may challenge orders entered in

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[25] *Barton v. Barbour, 104 U.S. 126, 128, 26 L. Ed. 672 (1881)*.

[26] *Id. at 136*.

[27] Response at 2-4.

[28] Receivership Order ¶ 85.

[29] *Id.*

[30] Receiver's Accounting, Recommendation on Publicly-Traded Status of International Automated Systems, and Liquidation Plan, ECF no. 552 in *RaPower-3*, filed Dec. 31, 2018.

[31] Motion to Cancel IAS Shares at 1.

[32] IAS Cancellation Order at 1.

[33] *Id.* at 5.

[34] *RaPower-3* Receivership Order ¶ 44.

[35] Counterclaim at 16. Argument that IAS shareholders would lose property that they valued was raised in *RaPower-3*. Opposition to Receiver's Motion for an Order Canceling Shares of International Automated Systems Inc. at 3, docket no. 690 in *RaPower-3*, filed June 7, 2019. That argument was rejected. IAS Cancellation Order at 2 n.7.

[36] Counterclaim at 17.

[37] Motion at 8-14.

[38] *Swain v. Seaman, 505 F. App'x 773, 775 (10th Cir. 2012)* (unpublished) (quoting *T & W Inv. Co. v. Kurtz, 588 F.2d 801, 802 (10th Cir. 1978))*.

[39] *Id.*

RaPower-3. Moreover, Defendant fails to address Plaintiff's argument that Defendant lacks standing. Therefore, subject matter jurisdictional over Defendant's counterclaims is lacking.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion[40] is GRANTED. Defendant's counterclaims[41] are DISMISSED without prejudice for lack of subject matter jurisdiction.

Signed December 9, 2019

BY THE COURT

/s/ David Nuffer

David Nuffer

United States District Judge

End of Document

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[40] Docket no. 8, filed Oct. 9, 2019.

[41] Counterclaim at 15-18, docket no. 5, filed Sept. 27, 2019.

Exhibit 23

Neutral
As of: March 10, 2023 9:19 PM Z

Lateral Recovery, LLC v. Cap. Merch. Servs., LLC

United States District Court for the Southern District of New York

September 30, 2022, Decided; September 30, 2022, Filed

21-cv-9336 (LJL)

Reporter
2022 U.S. Dist. LEXIS 181044 *; __ F.Supp.3d __; 2022 WL 4815615

LATERAL RECOVERY, LLC et al., Plaintiffs, -v- CAPITAL MERCHANT SERVICES, LLC et al., Defendants.

Subsequent History: Dismissed by, Without prejudice, Motion dismissed by, As moot *Lateral Recovery, LLC v. Capital Merch. Servs. Defendant, 2022 U.S. Dist. LEXIS 221802 (S.D.N.Y., Dec. 8, 2022)*

Prior History: *Capital Merch. Servs., LLC v. Lateral Recovery, LLC, 2021 U.S. Dist. LEXIS 228977 (S.D.N.Y., Nov. 24, 2021)*

Core Terms

Merchant, funder, reconciliation, Enterprise, obligations, collection, loans, receivables, amended complaint, default, Foreclosure, transactions, allegations, documents, receipts, funds, motion to dismiss, event of default, Origination, provisions, terms, Defendants', champerty, repaid, Guarantor, settlement agreement, causation, entities, debited, Installment

Counsel: **[*1]** For Lateral Recovery, LLC, as assignee of Benchmark Builders, Inc., FTE Networks, Inc, Jus-Com LLC, Focus Wireless, LLC, Lateral Recovery, LLC, Benchmark Builders, Inc., Plaintiffs: Shane R. Heskin, White & Williams, LLP(Philadelphia), Philadelphia, PA.

For Capital Merchant Services, LLC, Green Capital Funding, LLC, Midnight Capital, LLC, Yitzhak Stern, Defendants: Christopher Ryan Murray, LEAD ATTORNEY, Murray Legal, PLLC, Mineola, NY.

For David Glass, Defendant: Gabriel Mendelberg, Mendelberg PC, New York, NY.

For Tsvi Davis, Defendant: Howard Jay Kaplan, Michael Eggenberger, LEAD ATTORNEYS, Kaplan Rice LLP, New York, NY.

Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Plaintiffs Lateral Recovery LLC ("Lateral"); Benchmark Builders, Inc. ("Benchmark"); FTE Networks, Inc. ("FTE Networks"); Jus-Com LLC ("Jus-Com"); and Focus Wireless, LLC ("Focus Wireless," and together with Benchmark, Jus-Com, and FTE Networks, "FTE") (collectively, "Plaintiffs") bring this action against Defendants Capital Merchant Services, LLC ("Capital Merchant"); Green Capital Funding, LLC ("Green Capital"); Midnight Capital, LLC ("Midnight Capital"); **[*2]** Yitzhak Stern ("Stern"); David Glass ("Glass"); and Tsvi Davis ("Davis") (collectively, "Defendants"),[1] alleging violations of the *Racketeering Influenced and Corrupt Organizations Act* ("RICO"), *18 U.S.C. § 1962*; RICO conspiracy; and fraud. *See* Dkt. Nos. 1, 20.

Defendants have filed three separate motions to dismiss the amended complaint (the "Amended Complaint") brought against them, all pursuant to *Federal Rule of Civil Procedure 12(b)(6)*: Capital Merchant, Green Capital, Midnight Capital, and Stern (together, the "Capital Defendants") jointly filed one, Dkt. No. 21; Glass filed a second, Dkt. No. 24; and Davis filed a

[1] Plaintiffs also sued "Jane and John Doe Investors," described in their Amended Complaint as "individuals and business entities organized under various state laws," Dkt. No. 20 ¶ 21, and identified by name certain individuals and entities that are "potential John and Jane Doe investors that provided funding to Enterprise," *id.* ¶ 53.

third, Dkt. No. 26.

For the following reasons, the motions to dismiss are granted in part and denied in part.

BACKGROUND

For purposes of this motion, the Court assumes the truth of the factual allegations of the Amended Complaint as supplemented by the documents referred to in the Amended Complaint and incorporated by reference therein.

I. The Parties

A. Plaintiffs

FTE Networks was a corporation organized under the laws of Nevada with its principal place of business located in Naples, Florida. Dkt. No. 20 ¶ 10. It was the sole owner of Benchmark, a New York corporation with its principal place of business in New York, New York. **[*3]** *Id.* ¶¶ 10, 11. FTE Networks was also the sole owner and managing member of Jus-Com, a limited liability company organized under the laws of Indiana with its principal place of business in Naples, Florida, *id.* ¶¶ 10, 12, and Focus Wireless, a limited liability company organized under the laws of Florida with its principal place of business also in Naples, Florida, *id.* ¶¶ 10, 13.

At all times material to this case, FTE Networks and its wholly owned subsidiaries provided innovative, technology-oriented solutions for smart platforms, network infrastructures, and buildings. *Id.* ¶ 111. They provided end-to-end design, construction management, and built and supported solutions for state-of-the-art networks, data centers, residential and commercial properties, and services for Fortune 100/500 companies. *Id.* FTE Network's operations were generally divided into three sections—construction, telecommunication design and solutions, and wireless equipment installation—and each section was managed by Benchmark, Jus-Com, or Focus Wireless. *Id.* Benchmark was a construction manager and general contractor serving clients in the telecommunications, retail, professional-services, industrial, technology, **[*4]** and financial-services industries, *id.* ¶ 112; Jus-Com provided telecommunications solutions in the wireline and wireless telecommunications industry, *id.* ¶ 113; and Focus Wireless provided wireless solutions, including equipment installation, fiber backhaul, antennae installation and testing, fiber-to-site, and other turnkey solutions to major wireless carriers, *id.* ¶ 114.

On or about October 28, 2016, Lateral, as administrative agent for lenders, entered into a Credit Agreement (the "Credit Agreement") with Jus-Com, FTE Networks, and Benchmark as borrowers and Focus Wireless and other subsidiaries of FTE Networks as guarantors. *Id.* ¶ 115. Pursuant to the Credit Agreement, lenders agreed to extend loans and other financial accommodations up to a maximum amount, as amended from time-to-time; that amount was approximately $50 million as of July 2019. *Id.* FTE's obligations under the Credit Agreement were secured by an interest in substantially all of FTE's assets, *id.* ¶ 116, and Lateral properly perfected its interests in the collateral by making appropriate and timely Uniform Commercial Code ("UCC") filings in the relevant jurisdictions, *id.* ¶ 117.

In or around July 2019, FTE defaulted **[*5]** under the terms of the Credit Agreement. *Id.* ¶ 118. Thereafter, Lateral declared a default and, pursuant to a Surrender of Collateral and Strict Foreclosure dated as of October 10, 2019 (the "Foreclosure Agreement"), FTE agreed to surrender and turn over its interest in the collateral allegedly including, without limitation, the claims asserted herein. *Id.*

B. Defendants

Plaintiffs allege that certain acts were taken by the "Enterprise," which they define to be comprised of Yellowstone and MCA Recovery, and Defendants Capital Merchant Services, Green Capital Funding, Midnight Capital (the "Entity Defendants"). *Id.* ¶ 214. (The Court understands the Amended Complaint to refer to Yellowstone and the Entity Defendants as the Enterprise MCA Companies. *Id.* ¶ 108.) Yellowstone is a company organized under the laws of New York that was founded in 2009 and includes multiple Merchant Cash Advance ("MCA") companies that operate under its management and control. *Id.* ¶¶ 37, 259. Its parent company is Pinnex. *Id.* ¶¶ 247, 253. Defendants Capital Merchant, Green Capital, and Midnight Capital are wholly owned and controlled by Yellowstone. *Id.* ¶ 259; *see also id.* ¶ 37. MCA Recovery is a debt-collection **[*6]** company that is organized under the laws of New York and maintains officers, books, records, and bank accounts that are independent of Yellowstone and the Defendants. *Id.* ¶ 265. Upon default of a borrower's obligations under usurious loan

agreements, and at the direction of Defendants and in furtherance of the Enterprise's goal of collecting the debts owed, MCA Recovery prepares affidavits for execution by Defendants' employees that misrepresent the true nature of the transactions, *id.* ¶ 266; it has filed thousands of affidavits of confessions with New York courts, *id.* ¶ 267.

Plaintiffs allege that Yellowstone, MCA Recovery and the Entity Defendants are associated in fact and through relations of ownerships, and that these entities—the Enterprise—share a common goal of soliciting, funding, servicing, and collecting upon usurious loans that charge interest at more than twice the enforceable rate under New York law. *Id.* ¶ 215. Since at least 2012 and continuing through the present, the members of the Enterprise have had ongoing relations relating to and for the purpose of collecting upon fraudulent fees through electronic wires. *Id.* ¶ 218. Defendants Glass, Stern, Davis, and other investors **[*7]** ("Individual Defendants") have operated Yellowstone as part of an unlawful Enterprise to collect upon unlawful debt and commit wire fraud. *Id.* ¶ 260. Through their close coordination, frequent communications, and business relationships with one another, each of the Defendants knew the nature of the Enterprise, knew that the Enterprise extended beyond its individual role, and knew that the other Defendants were engaged in a conspiracy to collect upon unlawful debts. *Id.* ¶ 279.

As part of Yellowstone's membership in the Enterprise, Yellowstone: (1) entered into contracts with brokers to solicit borrowers for usurious loans and agreements with investors for funding those loans; (2) pooled investor funds to finance the usurious loans; (3) underwrote and set the interest rate for each usurious loan; (4) entered into merchant agreements on behalf of the Enterprise; (5) serviced the usurious loans; (6) set up and implemented the ACH withdrawals used to collect upon the unlawful debts; and (7) obtained judgments to further collect upon the debts. *Id.* ¶ 260. In this case, through Defendants, Yellowstone: (1) solicited borrowers; (2) pooled investor funds to fund the agreements; (3) underwrote **[*8]** the agreements; (4) entered into the agreements; and (5) collected the debts owed under the agreements by effecting daily ACH withdrawals from FTE's bank accounts. *Id.* ¶ 261.

Many of the companies that fall under Yellowstone's umbrella, including Capital Merchant and Green Capital, use the same location of 30 Broad Street, 14th Floor, New York, NY 10004 on their contracts but are actually operated out of Yellowstone's headquarters in Jersey City, New Jersey. *Id.* ¶ 37. Although they operate in New Jersey, these companies were strategically organized under the laws of New York to allow them to take advance of New York's confession-of-judgment statute and post-judgment collection devices. *Id.* ¶ 38. Like Capital Merchant and Green Capital, Midnight Capital is a limited liability company organized under the laws of New York with its principal place of business in New Jersey. *Id.* ¶ 17.

Stern, Glass, and Davis each have an ownership interest in Yellowstone, and each has benefited from the Enterprise's funneling of usurious loan proceeds to Yellowstone, MCA Recovery, and the other Individual Defendants. *Id.* ¶¶ 210-212, 233, 242, 255. Stern was the Chief Executive Officer ("CEO") of Yellowstone **[*9]** at all relevant times. *Id.* ¶¶ 211, 243. Even though he is no longer the CEO, Stern still exercises authority over the Enterprise and has authority to execute contracts on its behalf. *Id.* ¶ 211. Glass was the "mastermind" of the Enterprise. *Id.* ¶ 210. He and Stern controlled transactions within the Enterprise during the relevant time period. *Id.*; *see also id.* ¶ 211. At all relevant times, Davis was Yellowstone's Director of Underwriting. *Id.* ¶ 243. While Davis's status with Yellowstone changed in August 2018, he continued assisting with collections after that time and continues to hold a distribution-generating ownership interest in Yellowstone's parent company. *Id.* ¶ 212: *see also id.* ¶¶ 7, 253, 257.

Stern and Glass are, and Davis was, responsible for creating, approving, and implementing the policies, practices, and instrumentalities used by the Enterprise to accomplish its common goals, such as the form of merchant agreements used by the Enterprise, the method of collecting daily payments, and the form affidavits of confession used by the Enterprise, all of which were used in connection with the FTE transactions. *Id.* ¶¶ 227, 239, 244; *see also id.* ¶ 228. Stern and Glass have, and **[*10]** Davis had, final say on the financial decisions of the Enterprise, including with respect to the details of the funding of loans and the ultimate terms of those loans, *id.* ¶¶ 221, 234, 243; *see also id.* ¶¶ 222-226, 235, 237-238, and they directed other members of the Enterprise to take actions necessary to accomplish its goals, including directing members to collect upon unlawful loans, *id.* ¶¶ 229, 240, 245. Glass purports to have divested from Yellowstone prior to the transactions at issue, but he has actually maintained an interest in it, operating the company through Stern. *Id.* ¶ 230; *see also id.* ¶ 231.

On January 16, 2015, the Enterprise, through Stern,

entered into an agreement (the "Pinnex Agreement") with various investors to fund the Enterprise's loan business. *Id.* ¶ 45. Of the $55 million the Pinnex Agreement provided to fund the Enterprise, Stern personally contributed over $20 million. *Id.* ¶¶ 46-47. Davis and his company, Caporly, *id.* ¶¶ 247, 256, contributed $4,230,000. *Id.* ¶ 49. The Pinnex Agreement does not identify Glass as an investor, but Plaintiffs allege, on information and belief, that Glass is a silent investor through Stern. *Id.* ¶ 48.

II. The MCA Agreements

The **[*11]** Enterprise offers MCA agreements, and the Plaintiffs entered into such agreements with the Entity Defendants. *Id.* ¶ 74. Central to this dispute is whether the agreements are properly characterized as loans. The Amended Complaint contains allegations regarding the form of the loans and the intent of the Defendants and other members of the Enterprise in support of Plaintiffs' allegation that the agreements are actually loans. And viewed as such, the interest rates on these "loans" are routinely far in excess of the rates permitted by usury laws. *See id.* ¶ 100.

A. Form of the MCA Agreements

Plaintiffs allege that the agreements "contain one-sided terms that prey upon the desperation of the small business and their individual owners and help conceal the fact that the transactions, including those involving FTE, are really loans." *Id.* ¶ 75. There are a number of such "one-sided terms" in these agreements alleged in the Amended Complaint:

> (1) a provision giving the MCA company the irrevocable right to withdraw money directly from the merchant's bank accounts, including collecting checks and signing invoices in the merchant's name, (2) a provision preventing the merchant from transferring, (3) **[*12]** moving or selling the business or any assets without permission from the MCA company, (4) a one-sided attorneys' fees provision obligating the merchant to pay the MCA company's attorneys' fees but not the other way around, (5) a venue and choice-of-law provision requiring the merchant to litigate in a foreign jurisdiction under the laws of a foreign jurisdiction, (6) a personal guarantee, the revocation of which is an event of default, (7) a jury trial waiver, (8) a class action waiver, (9) a collateral and security agreement providing a UCC lien over all of the merchant's assets, (10) a prohibition of obtaining financing from other sources, (11) the maintenance of business interruption insurance, (12) an assignment of lease of merchant's premises in favor of the MCA company, (13) the right to direct all credit card processing payments to the MCA company, (14) a power-of-attorney to take any and all action necessary to direct such new or additional credit card processor to make payment to Yellowstone, and (15) a power of attorney authorizing the MCA company to take any action or execute any instrument or document to settle all obligations due.

Id. ¶ 76 (internal quotation marks omitted). **[*13]**

Plaintiff also allege that the MCA agreements contain a number of knowingly false statements, including: "(1) the transaction is not a loan, (2) the daily payment is a good-faith estimate of the merchant's receivables, (3) the fixed daily payment is for the merchant's convenience, (4) that the automated ACH program is labor intensive and is not an automated process, requiring the MCA company to charge an exorbitant ACH Program Fee or Origination Fee." *Id.* ¶ 77. For example, an Appendix to the MCA agreements which states the amount of the Origination Fee contains a parenthetical that it is "to cover underwriting and related expenses." *Id.* ¶ 290. The same appendix which also states the ACH Program Fee contains a parenthetical that reads: "the ACH program is labor intensive and is not an automated process, requiring us to charge this fee to cover related costs." *Id.* ¶ 292.

The agreements are also "designed to result in a default in the event that the merchant's business suffers any downturn in sales," in that they (1) force the merchant to wait until the end of the month before it is entitled to invoke the reconciliation provision, (2) prevent the merchant from obtaining other financing, **[*14]** and (3) require the merchant "to continuously represent and warrant that there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership" of the merchant. *Id.* ¶ 78. And they contain penalties, including (1) a requirement that "the merchant . . . sign a confession of judgment entitling the MCA company to liquidated attorneys' fees based on a percentage of the amount owed rather than a good-faith estimate of the attorneys' fees required to file a confession of judgment," (2) acceleration of the entire debt upon an event of default, and (3) a requirement that the merchant turn over all of its

receivables if it misses just one daily payment. *Id.* ¶ 79.

The MCA agreements contain reconciliation provisions, which Plaintiffs allege are "sham" provisions used to give the appearance that the loans do not have a definite term and to evade state usury laws. *Id.* ¶ 80. Under a legitimate reconciliation provision, if a merchant pays more through its daily payments than it actually received in receivables, the merchant may seek repayment of the excess money paid, meaning that if sales decrease, the payments owed do as well. *Id.* ¶ 81. To ensure that a merchant **[*15]** can never use the sham reconciliation provision, the agreements falsely represent that the fixed daily payment amount is a good-faith estimate of the percentage of receivables purchased when it is not, such that if sales decrease, the fixed daily payment amount stays the same. *Id.* ¶ 83; *see also id.* ¶ 84. Rather than representing a good-faith estimate of the receivables purchased, the daily payment amount is calculated by dividing the payback amount by the intended duration of the loan. *Id.* ¶ 85. This "term" of the loan is a vital part of approving the transaction. *Id.* ¶ 86. Plaintiffs allege, on information and belief, that "the Enterprise does not have a reconciliation department, does not perform reconciliations, and has never refunded a merchant money as required under their sham reconciliation provision." *Id.* ¶ 94.

Plaintiffs identify nine "hallmarks of a loan" that the MCA agreements contain, alleging that "[d]espite their documented form, the transactions are, in economic reality, loans that are absolutely repayable," *id.* ¶ 95:

> (a) The Daily Payments were fixed and the so-called reconciliation provision was mere subterfuge to avoid this state's usury law. Rather, just like any **[*16]** other loan, the Purchased Amount was to be repaid within a specified time;
> (b) The default and remedy provisions purported to hold the merchants absolutely liable for repayment of the Purchased Amount. The loans sought to obligate the merchants to ensure sufficient funds were maintained in the Account to make the Daily/Weekly Payments and, after a certain number of instances of insufficient funds being maintained in the Account, the merchants were in default and, upon default, the outstanding balance of the Purchased Amount became immediately due and owing;
> (c) While the agreements purport to "assign" all of the merchant's future account receivables to the Enterprise until the Purchased Amount was paid, the merchants retained all the indicia and benefits of ownership of the account receivables including the right to collect, possess and use the proceeds thereof. Indeed, rather than purchasing receivables, the Enterprise merely acquired a security interest in the merchant's accounts to secure payment of the Purchased Amount;
> (d) The transaction was underwritten based upon an assessment of the merchant's credit worthiness; not the creditworthiness of any account debtor;
>
> (e) The Purchased **[*17]** Amount was not calculated based upon the fair market value of the merchant's future receivables, but rather was unilaterally dictated by the Enterprise based upon the interest rate it wanted to be paid. Indeed, as part of the underwriting process, the Enterprise did not request any information concerning the merchant's account debtors upon which to make a fair market determination of their value;
> (f) The amount of the Daily Payments was determined based upon when the Enterprise wanted to be paid, and not based upon any good-faith estimate of the merchant's future account receivables;
> (g) The Enterprise assumed no risk of loss due to the merchant's failure to generate sufficient receivables because the failure to maintain sufficient funds in the Account constituted a default under the agreements;
>
> (h) The Enterprise required that the merchants . . . undertake certain affirmative obligations and make certain representations and warranties that were aimed at ensuring the company would continue to operate and generate receivables and a breach of such obligations, representations and warranties constituted a default, which fully protected the Enterprise from any risk of loss resulting from **[*18]** the merchant's failure to generate and collect receivables[;] [and]
> (i) The Enterprise required that the merchant grant it a security interest in its receivables and other intangibles and, further that the individual owners personally guarantee the performance of the representations, warranties and covenants, which the Enterprise knew were breached from day one.

Id.

B. Treatment of MCA Agreements by Yellowstone and Defendants

1. Internal Communications and Practices

Plaintiffs allege that usurious intent underlying the MCA agreements "can be discerned from internal negotiations, practices, and underwriting practices of Yellowstone which determine the payback based on the number of days in which Yellowstone wants to be paid back." *Id.* ¶ 96. Internal emails show that the daily payment disguises a finite term for repayment, *id.* ¶ 97, and internal emails authorizing transactions use the length of payback as a critical factor often omit references to the percentage of receivables and sometimes expressly refer to the "term" of the agreement, *id.* ¶ 98. On information and belief, the Enterprise MCA companies systemically offer refinancing to merchants to address cash-flow problems so that the MCA **[*19]** companies can reap additional benefits from the loans and avoid any reconciliation. *Id.* ¶ 103.

The Enterprise MCA companies also use underwriting practices that Plaintiffs say indicate the agreements are loans, not purchases of accounts receivables. *Id.* ¶ 105. When underwriting new transactions, the companies do not evaluate the merchants' receivables, instead they focus on factors like the credit ratings and bank balances of the merchants, if they perform any due diligence at all. *Id.* This is in contrast to the extensive due diligence undertaken by banks and other institutions that purchase accounts receivable, which look into the creditworthiness of the account debtors whose receivables they are purchasing. *Id.*

When the companies collect upon the agreements, they treat them like loans in that they require a merchant to make fixed daily payments and to grant security interests to the companies in substantially all of the merchant's assets. *Id.* ¶ 106. They also require merchants to execute confessions of judgments that may be filed if the merchant fails to make as few as two daily payments under its agreement. *Id.* ¶ 107. Moreover, the form of contract Yellowstone used for a loan is largely **[*20]** the same as the form agreement that Stern directed be used for MCA agreements. *Id.* ¶¶ 3-4.

2. Government Investigations and Actions

Defendants have been sued in the past for conduct like that at issue here. *Id.* ¶ 6. The New Jersey Attorney General's Office ("NJAG") and the Federal Trade Commission ("FTC") each filed actions against Defendants and others, alleging that, for years, they had engaged in deceptive conduct to conceal the true nature of their transactions with merchants. *Id.*

The NJAG conducted an investigation of Yellowstone, in which it found that Yellowstone customers were unable to modify daily payments through reconciliation. *Id.* ¶ 90. The investigation found that merchants were frequently induced to "refinance" rather than engage in reconciliation, a practice that would result in double the interest on the same principal amount. *Id.* ¶¶ 93, 101-102. In its complaint against Yellowstone, the NJAG noted that some merchants were unable to reach Yellowstone to request a reconciliation, while Yellowstone refused to adjust the amount for other merchants, citing specific instances of this refusal. *Id.* ¶¶ 91, 92.

3. The Enterprise's Description of the Agreements

In or around early **[*21]** 2016, Yellowstone and other MCA companies responded to litigation and regulatory scrutiny by conforming their advertising materials with the language in their agreements. *Id.* ¶ 54. Prior to this time, however, Yellowstone admitted in advertising and promotional materials that it was a direct lender and that its MCA agreements are actually loans. *Id.* ¶ 56. For example, Yellowstone targeted small businesses that were in need of a "loan" through print advertising, *id.* ¶ 57, and it retained a professional marketing company to create promotional videos that appeared on a YouTube channel Yellowstone created for those videos called "EZBusinessLoans," *id.* ¶¶ 60-61. The actors in all of the videos were employees of Yellowstone, and the premise of each video was that "anyone with a pulse" can get a loan from Yellowstone, even those who cannot get approved for a loan from a traditional bank. *Id.* ¶¶ 62-63. For example, in one video titled "Bad Credit Business Loans TM | 855-455-9649," an actor explains that he needed a business loan but was denied one at the bank so he "went online and found Yellowstone Capital[,] . . . applied for a loan on Monday based on [his] monthly sales and on Wednesday **[*22]** they gave [him his] money." *Id.* ¶ 67 (emphasis omitted). As the video played, subtitles explained:

> Yellowstone Capital makes it easy to obtain an unsecured bad credit business loan if you have been turned away by your bank in search of an unsecured bad credit business loan, or unsecured business funding.
>
> We keep our application process super short, and

> super easy. Once you submit your application, your business funding offer can be approved in the same day. Many of your [sic] clients receive their bad credit business loans in as little as three days.
> Been turned away for a small business credit card? Apply at Yellowstone Capital for a bad credit business loan, also known as a business cash advance, or a merchant cash advance.
> Need money for remodeling, upgrades, or to buy a new location? Our small business loans are easy to obtain for these things.
> Our business loans are unsecured. There are no set minimum monthly payments, which means there are never any late fees. So what are you waiting for? Click the link at the top of the description to get started with your bad credit business loan application today!

Id. ¶ 69 (emphasis omitted).

In their direct communications with merchants, the Enterprise **[*23]** MCA companies consistently describe their products as "loans," and they describe themselves as "lenders" and the merchants as "borrowing" funds. *Id.* ¶ 104.

C. Other Bad Behavior

The Enterprise MCA companies engage in other unscrupulous behavior toward the merchants with whom they transact. *Id.* ¶ 108. For example, they often fail to advance merchants the full amounts that are provided for in their agreements; over-collect the daily payments due under the relevant agreements so that merchants end up paying more than is actually owed under the agreement; fail to properly record payments, resulting in this overpayment, and fail to give credit to the merchant or to repay the merchant upon demand; and charge high fees for services never provided and costs never incurred. *Id.* ¶¶ 108, 110. In its complaint against Yellowstone, the FTC recited evidence of misrepresentations about the financing amount that would be provided to merchants, noting that merchants may only learn the funding that they are to receive after the documents have been signed. *Id.* ¶ 109.

III. FTE's Funding Agreements

Beginning in 2017, FTE received financing from certain of the Defendants through various transactions. These **[*24]** transactions were ostensibly for a purchase of FTE's receivables; Defendants "purportedly paid lump sums to purchase FTE's future receipts at a discount and FTE agreed to repay the face value of its receipts through daily payments." *Id.* ¶ 1. Plaintiffs allege that the terms and conditions of these agreements and the Defendants' actions demonstrate that no sale of receivables ever took place. *Id.* They allege, on information and belief, that the lenders' intentions behind these transactions were to make term loans and that internal approval for the transaction relied on the weekly terms associated with the agreements, not the percentage of receivables. *Id.* ¶¶ 138, 146, 155, 162, 170, 177, 186, 193.

In connection with these transactions, the relevant funder agreed to advance FTE a certain sum, but they invariably advanced a lower amount than agreed due to an "Origination Fee and ACH Program Fee" that was deducted in each transaction. While the Origination and ACH (Automated Clearing House) Program Fees purportedly related to the costs of due diligence and withdrawing the daily payments owed in connection with the transactions, the lenders performed little, if any, due diligence, and the **[*25]** actual costs of the ACH withdrawals were a fraction of the fees, making the Origination and ACH Program Fees "additional disguised interest." *Id.* ¶¶ 124, 133, 157, 165, 172, 180, 188, 196. Specifically, Plaintiffs allege that Defendants represented that an origination fee would be charged in connection with each of the MCA loans "to cover underwriting and related expenses," *id.* ¶ 290, but in fact, no due diligence was performed on FTE, *id.* ¶ 291. And Defendants represented that "the ACH program is labor intensive and is not an automated process, requiring Defendants to charge this fee to cover related costs," *id.* ¶ 292 (alteration adopted), but the ACH program was actually an automated process and required no labor at all, *id.* ¶ 293.

The agreements underlying each of the transactions are similar to one another. *See* Dkt. Nos. 23-13-23-21.[2] As a result of the transactions, detailed below, FTE received $2,146,844 from Defendants and paid back $6,766,975, all in the span of only fourteen months. Dkt. No. 20 ¶ 8. They paid substantial fees in reliance on the false representations Defendants made regarding the

[2] The actual agreements are attached to a declaration submitted in support of a motion to dismiss. *See* Dkt. Nos. 23; 23-12-23-21. Because they are incorporated by reference in the Amended Complaint, they may be considered in connection with the motions to dismiss. *See* *Gray v. Wesco Aircraft Holdings, Inc., 454 F. Supp. 3d 366, 382-83 (S.D.N.Y. 2020)*.

origination and ACH processes. *Id.* ¶¶ 294-295.

A. Capital Merchant Transactions [*26]

Over a three-month period from September 21, 2018 to November 28, 2018, FTE entered into a series of three transactions with Capital Merchant, pursuant to which Capital Merchant advanced FTE $596,000 in cash and collected $2,323,500. *Id.* ¶ 120. FTE entered into the second transaction to satisfy its obligations under the first transaction; it entered into the third transaction to satisfy its obligations under the second transaction. *See id.* ¶¶ 131, 139.

In connection with the first transaction, entered into on September 21, 2018, Capital Merchant advanced FTE $235,000, for a "purchase price" of $250,000, reduced by a deducted Origination and ACH Program Fee in the amount of $15,000, in exchange for $374,750 to be collected. *Id.* ¶ 123; Dkt. No. 23-19 at 1. On or about October 12, 2018, FTE entered into a second agreement with Capital Merchant to pay off its obligations under the first transaction. Pursuant to the second transaction, Capital Merchant agreed to advance $500,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until such time as the amount of $749,050 was repaid. Dkt. No. 20 ¶¶ 127-128, 136. In connection with this second transaction, Capital **[*27]** Merchant charged FTE an Origination and ACH Program Fee of $30,000. *Id.* ¶¶ 132, 140.

The $749,050 owed under the October transaction was to be repaid through daily ACH withdrawals in the amount of $8,999 such that the $749,050 would be repaid in sixteen weeks. *Id.* ¶¶ 129, 137. The daily payments owed purportedly represented a specified percentage of FTE's daily collections, but in both the September 21st and October 12th agreements, the specified percentage was replaced with a fixed $8,999 daily payment. *Id.* Thus, on its face, the October 12th agreement charged an annual interest rate of more than 100% per year. *Id.* However, when the $30,000 Origination and ACH Program Fee charge is taken into account, the actual interest rate on the sums paid to FTE exceeded 400% per year. *Id.* ¶¶ 134, 124. After taking into account the sums used to pay off the prior transaction, Capital Merchant advanced FTE only $185,000 in cash. *Id.* ¶ 139.

On or about November 28, 2018, FTE entered into a third agreement with Capital Merchant. *Id.* ¶ 143. Under it, Capital Merchant agreed to advance $750,000 to FTE in exchange for the purported purchase of all of FTE's future receipts, until such time as the amount **[*28]** of $1,199,250 was repaid. *Id.* ¶ 144. The amount was to be repaid through daily ACH withdrawals in the amount of $29,891 for eight weeks. *Id.* ¶ 145. As in the prior agreements, even though the daily payments purportedly represented a specified percentage of FTE's daily collections, the "specified percentage" in the November agreement was replaced with the fixed daily payment amount of $29,891. *Id.*[3] Ultimately, Capital Merchant advanced FTE only $176,412 in connection with the November transaction because the proceeds of this agreement were used to pay off the prior transaction and because Capital Merchant charged FTE an Origination and ACH Program Fee of $97,500. *Id.* ¶¶ 147-148. Taking the fees into account, the actual interest rate exceeded 500% per year. *Id.* ¶150.

B. Green Capital Transactions

Over a fourteen-month period between September 14, 2017 and November 27, 2018, FTE entered into a series of transactions with Green Capital, pursuant to which Green Capital advanced FTE $813,173 in cash but collected $2,120,025. *Id.* ¶ 151.

Under the first agreement between FTE and Green Capital, entered into on or about September 14, 2017, Green Capital agreed to advance **[*29]** $75,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until $112,125 was repaid. *Id.* ¶ 153. The $112,125 would be repaid through daily ACH withdrawals in the amount of $1,876, resulting in repayment in twelve weeks. *Id.* ¶ 154. This translates to an annual interest rate of more than 300% per year. *Id.*

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[3] After setting forth the terms of the November 28th agreement, Plaintiffs allege: "Thus, on its face, the *10/12 CMS Agreement* charged an annual interest rate of more than 300% per annum or more than 16 times the maximum 25% rate permitted under New York Penal Law." *Id.* ¶ 145 (emphasis added). From the context of the Amended Complaint, including the rest of this paragraph and the prior paragraphs alleging that the facial interest rate of the October 12th agreement was more than 100%, *id.* ¶¶ 129, 137, it appears that Plaintiffs intended to allege that the facial interest rate of the November agreement—not the October agreement—was more than 300% per annum. In any event, an independent calculation of the interest owed in connection with the November 28th agreement—$1,199,250 owed on $750,000, to be paid back in eight weeks—yields an annual interest rate of over 300%.

In connection with this agreement, Green Capital advanced FTE $64,837—not $75,000—after deducting a $2,625 Origination and ACH Program Fee, *id.* ¶ 156; when this fee is taken into consideration, the actual interest rate exceeded 325% per year, *id.* ¶ 158.

On or about October 20, 2017, FTE entered into a second agreement with Green Capital, pursuant to which Green Capital agreed to advance $200,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until $299,000 was repaid. *Id.* ¶ 160. The $299,00 sum was to be repaid through daily ACH withdrawals in the amount of $3,323 such that the sum would be repaid in eighteen weeks. *Id.* ¶ 161. The daily payment amounts purportedly represented a specified percentage of FTE's daily collections, but by addendum the specified percentage was replaced with the fixed $3,323 figure. *Id.* On its face, **[*30]** the October 20th agreement charged an annual interest rate of more than 100% per year. *Id.* But taking into account the Origination and ACH Program Fee of $7,000, the actual interest rate exceeded 125% per year. *Id.* ¶¶ 164, 166.

Approximately one year later, on or about October 12, 2018, FTE entered into a third agreement with Green Capital, pursuant to which Green Capital agreed to advance $500,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until $749,050 was repaid. *Id.* ¶ 168. The $749,050 was to be repaid through daily ACH withdrawals in the amount of $8,999 such that the total sum was to be repaid in sixteen weeks. *Id.* ¶ 169. In this agreement, as with the other agreements, the daily payments were purported to represent a specified percentage of FTE's daily collections, but the specified percentage was replaced by addendum with the fixed $8,999 daily payment amount. *Id.* On its face, the October 12th Green Capital agreement charged an interest rate of more than 100% per year, *id.* ¶ 169, but after accounting for an Origination and ACH Program Fee of $30,000 deducted from the $500,000 that Green Capital agreed to advance, the actual interest rate was **[*31]** above 125% per year, *id.* ¶¶ 171, 173.

On or about November 27, 2018, FTE entered into another agreement, pursuant to which Green Capital agreed to advance $600,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until such time as $959,400 was repaid. *Id.* ¶¶ 174, 175. The $959,400 was to be repaid in eight weeks through daily ACH withdrawals in the amount of $24,999. *Id.* ¶ 176. Again, the daily payments owed pursuant to the agreement purportedly represented a specified percentage of FTE's daily collections, but by addendum the specified percentage was replaced in the agreement with the fixed $29,999 daily payment. *Id.* On its face, the agreement charged an annual interest rate of over 300% per year, *id.*, but after accounting for an Origination and ACH Program Fee of $133,900, the actual interest rate exceeded 500% per year, *id.* ¶¶ 179, 181. In connection with this transaction, Green Capital only advanced FTE $177,461 because, among other things, the proceeds of this agreement were used to pay off the prior agreement. *Id.* ¶ 178.

C. Midnight Capital

Over a fourteen-month period between December 6, 2017 and January 19, 2018, FTE entered into a series of transactions **[*32]** with Midnight Capital. *Id.* ¶ 182. Pursuant to these transactions, Midnight Capital advanced FTE $737,671 in cash but collected $2,323,450. *Id.*

Plaintiffs make specific allegations with respect to two of these transactions. On or about December 6, 2017, FTE entered into its first agreement with Midnight Capital; under this agreement, Midnight agreed to advance $200,000 to FTE in exchange for the purported purchase of all of FTE's future receipts until $299,800 was repaid. *Id.* ¶ 184. The amount due under this agreement—$299,800—was to be repaid through daily ACH withdrawals in the amount of $9,999 for six weeks. *Id.* ¶ 185. On its face, the December 6th agreement thus charged more than 400% per year. *Id.* However, Midnight Capital only advanced $176,500 after deducing an Origination and ACH Program Fee of $23,500, making the actual interest rate over 425% per year. *Id.* ¶¶ 187, 189.

On or about December 15, 2017,[4] FTE entered into a second agreement with Midnight Capital, pursuant to which Midnight Capital agreed to advance $500,000 to FTE in exchange for the purported purchase of all of

[4] The Amended Complaint alleges that this transaction took place on December 18, 2017. The parties appear to agree that the correct date for this agreement is December 15, 2017, which is the date on the underlying agreement that the Capital Defendants submitted in connection with its motion to dismiss. *See* Dkt. No. 23 ¶ 13 ("The three [Midnight Capital] Agreements (dated 12/16/17, 12/15/17, and 1/19/18) alleged in the Complaint are collectively attached hereto as Exhibit K."); Dkt. No. 31 at 10.

FTE's future receipts until $749,000 was repaid. *Id.* ¶¶ 190-191. The $749,000 was to be repaid through **[*33]** daily ACH withdrawals in the amount of $15,999 such that $749,000 would be repaid in less than ten weeks. *Id.* ¶ 192. This daily amount of $15,999 purportedly represented a specified percentage of FTE's daily collection, but by addendum the specified percentage was replaced with the fixed daily payment. *Id.* On its face, the December 15th agreement charged an interest rate of more than 300% per year, *id.*, but after accounting for the Origination and ACH Program Fee of $25,000 that was charged, the actual interest rate exceeded 400% per year, *id.* ¶ 197. Midnight Capital only advanced $225,005 pursuant to the December 15th agreement because it used the proceeds of this agreement to pay off the prior one. *Id.* ¶ 194.

Plaintiffs make no allegations with respect to the agreement between FTE and Midnight Capital of January 19, 2018, except that the sums from this transaction appear to be included in the total amount Plaintiffs alleged to be advanced and collected by Midnight Capital.[5]

D. The Alleged Loan Agreements

The terms of the agreements FTE entered into with Capital Merchant, Green Capital, and Midnight Capital[6] generally take three forms, such that the agreements that take one form are **[*34]** identical in nearly all material respects to the other agreements that take that form.[7] The Court will review the relevant terms of two such agreements for the first form ("Form One") and then will review the terms of an agreement that takes the second form ("Form Two") and third form ("Form Three"). It refers back to this discussion later in its analysis of whether the agreements constitute loans.

1. Form One

The September 21, 2018 agreement and the October 12, 2018 agreement between FTE and Capital Merchant each states that FTE, as "Merchant" "sells, assigns and transfers" to Capital Merchant a

> Specified Percentage . . . of Merchant's future accounts, contract rights and other obligations arising from or relating to the payment of monies from Merchant's customers[] and/or other third party payors . . . defined as all payments made by cash, check, credit or debit card, electronic transfer, or other form of monetary payment in the ordinary course of merchant's business[], for the payment of Merchant's sale of goods or services until the amount specified below has been delivered by Merchant to [Capital Merchant].

Dkt. No. 23-19 at 1; Dkt. No. 23-20 at 1. They require FTE to authorize **[*35]** one depositing account, acceptable to Capital Merchant, to remit the specified percentage of the settlement amounts due from each transaction until Capital Merchant receives the full "Purchased Amount"—the total amount due in connection with the relevant agreement. *Id.* The agreements also authorize Capital Merchant to debit, by ACH, the specified amounts from FTE's bank account on a daily basis and recite that "Merchant understands that it is responsible for ensuring that the specified percentage to be debited by [Capital Merchant] remains in the account." *Id.* They permit Capital Merchant to, "upon Merchant's request, adjust the amount of any payment due under this Agreement at [Capital Merchant's] sole discretion and as it deems appropriate." *Id.* Importantly, in the event there is a violation of a provision contained in the "Merchant Agreement Terms and Conditions" or the occurrence of an "Event of Default" under the same, the "Specified Percentage" automatically is defined to equal 100%. *Id.*

In the "Merchant Agreement Terms and Conditions," the agreements disavow that they are loans or that the amounts charged therein are interest and states that the "Purchase Price" is in exchange **[*36]** for receipts and equals the fair market value of the receipts. *See* Dkt.

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[5] Plaintiffs state that the amounts from the January 19, 2018 transaction were "erroneously include[d] . . . in totaling the amounts of the [Midnight Capital] loans." Dkt. No. 31 at 44 n.23.

[6] The agreements between FTE and Midnight Capital—sued here as "Midnight Capital, LLC"—are on the paper of "Midnight Advance Capital, LLC." *See* Dkt. Nos. 23-12-23-14. The parties assume that Midnight Advance Capital, LLC and Midnight Capital, LLC are the same entity, *see* Dkt. No. 22 at 9 (naming as a defendant "Midnight Advance Capital, LLC . . . i/s/h/a Midnight Capital, LLC"), and the Court will do so as well.

[7] There are differences in the agreements with respect to the date, the funding entity, and the amounts funded and "purchased" under the agreements. These characteristics are not material for the inquiry whether the agreements are actually loans; the characteristics that are material are recited herein.

No. 23-19 § 1.8; Dkt. No. 23-20 § 1.8.[8] They contain "protections against default," which may be invoked by Capital Merchant without notice to FTE in the event that: (1) FTE takes certain actions that would interfere with the payment processor; (2) "interrupts the operation of this business (other than adverse weather, natural disasters or acts of God)[,] transfers, moves, sells, disposes, transfers [sic] or otherwise conveys its business or assets without (i) the express prior written consent of [Capital Merchant], and (ii) the written agreement of any purchaser or transferee to the assumption of all of Merchant's obligations under this Agreement pursuant to documentation satisfactory to [Capital Merchant];" or (3) "takes any action, fails to take any action, or offers any incentive—economic or otherwise—the result of which will be to induce any customer or customers to pay for Marchant's services with any means other than checks that are settled through Processor." Dkt. No. 23-19 § 1.10; Dkt. No. 23-20 § 1.10. The eight "protections against default," which are "in addition to any other remedies available to [Capital **[*37]** Merchant] at law, in equity or otherwise pursuant to this Agreement," set out in the agreements are:

> **Protection 1**: The full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement become due and payable in full immediately. **Protection 2**. [Capital Merchant] may enforce the provisions of the Personal Guarantee of Performance against the Guarantor(s). **Protection 3**. Merchant shall, upon execution of the Agreement, deliver to [Capital Merchant] an executed confession of judgment in favor of [Capital Merchant] in the amount of the Purchase Amount stated in the Agreement, plus attorneys' fees calculated at twenty-five percent (25%) of the balance due hereunder at the time of breach. Upon breach of any provision in this paragraph 1.10, [Capital Merchant] may enter that confession of judgment as a judgment with the Clerk of the Court, without notice, and execute thereon. **Protection 4**. [Capital Merchant] may enforce its security interest in the Collateral identified in the Security Agreement herein. **Protection 5**. [Capital Merchant] may proceed to protect and enforce its rights and remedies by lawsuit. In any such lawsuit, in which CMA shall recover **[*38]** judgment against Merchant, Merchant shall be liable for all of CMS's costs of lawsuit, including but not limited to all reasonable attorneys' fees and court costs . . . . **Protection 6**. Merchant shall upon execution of this Agreement, delivery [sic] to [Capital Merchant] an executed assignment of lease of Merchant's premises in favor of [Capital Merchant]. Upon breach of any provision in this paragraph 1.10, [Capital Merchant] may exercise its rights under such assignment. **Protection 7**. [Capital Merchant] may debit Merchant's depository accounts wherever situated by means of ACH debit or facsimile signature on a computer-generated check drawn on Merchant's bank account or otherwise, in an amount consistent with the Specified Percentage. **Protection 8**. [Capital Merchant] shall have the right, without waiving any of its rights and remedies and without notice to Marchant and/or Guarantor(s) to notify Merchant's credit card processor of the sale of Receipts hereunder and to direct such credit card processor to make payments to [Capital Merchant] of all or any portion of the amounts received by such credit card processor on behalf of Merchant. Merchant hereby grants to [Capital Merchant] **[*39]** an irrevocable power-ofattorney, which power-of-attorney shall be coupled with an interest, and hereby appoints [Capital Merchant] or any of [Capital Merchant] representatives as Merchant's attorney-in-fact, to take any and all action necessary to direct such new or additional credit card processor to may payment to [Capital Merchant] as contemplated by this Section.

Dkt. No. 23-19 § 1.10; Dkt. No. 23-20 § 1.10. The agreements also require FTE to maintain business-interruption insurance, naming Capital Merchant as loss payee and additional insured; the insurance shall be "in amounts and against risks as are satisfactory to [Capital Merchant]." Dkt. No. 23-19 § 2.4; Dkt. No. 23-20 § 2.4.

The agreements set forth a number of events, the occurrence of which will constitute an "Event of Default." Dkt. No. 23-19 § 3.1; Dkt. No. 23-20 § 3.1. Such an

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[8] The agreements also provide: "In the event that a court determines that [Capital Merchant] has charged or received interest hereunder in excess of the highest rate allowed by law, then the rate in effect hereunder shall automatically be reduced to the maximum rate permitted by applicable law and [Capital Merchant] shall promptly refund to Merchant any interest received by [Capital Merchant] in excess of the maximum lawful rate . . . ." *Id.* Such a clause would not save an otherwise usurious loan. *See* *Am. E Grp. LLC v. Livewire Ergogenics Inc., 2022 U.S. App. LEXIS 17159, 2022 WL 2236947, at *1 (2d Cir. June 22, 2022)* (summary order) (concluding that section of loan instrument "which purports to cap the interest rate at 20%, does not save the Note from being usurious" and voiding the loan).

event occurs where:

> (a) Merchant shall violate any term or covenant in this Agreement; (b) Any representation or warranty by Merchant in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made; (c) the sending of notice of termination by Guarantor(s) prior to the Purchased Amount being paid **[*40]** to [Capital Merchant]; (d) Except for: (i) as a result of an Act of God, (ii) filing for protection under applicable bankruptcy law, (iii) an assignment for the benefit of creditors, and (iv) similar protection; (e) Merchant shall transfer or sell all or substantially all of its assets; (f) Merchant shall make or send notice of any intended bulk sale or transfer by Merchant; (g) Merchant shall use multiple depositor[y] accounts without the prior written consent of [Capital Merchant]; (h) Merchant shall change its depositing account without the prior written consent of [Capital Merchant]; (i) Merchant shall perform any act that reduces the value of any Collateral granted under this Agreement; (j) Merchant shall default under any of the terms, covenants and conditions of any other agreement with [Capital Merchant]; or (k) Merchant shall fail to deposit its Receipts into the Account.

Id.

Upon an "Event of Default" or a violation of Section 1.10 of the agreement by FTE, Capital Merchant may settle obligations due to it from FTE including collection of 100% of the Specified Percentage by: (1) obtaining and adjusting insurance; (2) collecting "monies due or to become due under or in respect **[*41]** of any of the Collateral"; (3) receiving, endorsing, and collecting "any checks, notes, drafts, instruments, documents, or chattel paper in connection with" (1) or (2); (4) signing FTE's "name on any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to [Capital Merchant];" and (5) filing any claims or taking any action or instituting any proceeding that Capital Merchant "may deem necessary for the collection of any of the unpaid Purchased Amount from the Collateral, or otherwise to enforce its rights with respect to the payment of the Purchased Amount." Dkt. No. 23-19 § 1.9; Dkt. No. 23-20 § 1.9.

In the case of an Event of Default, Capital Merchant may enforce its rights, again including collection of 100% of the Specified Percentage "by suit in equity or by action at law, or both, whether for the specific performance of any covenant, agreement or other provision contained herein, or to enforce the discharge of Merchant's obligations hereunder (including the Personal Guarantee) or any other legal equitable right or remedy." Dkt. No. 23-19 § 3.2; Dkt. No. 23-20 § 3.2. The agreements further provide that "[a]ll rights, powers and remedies **[*42]** of [Capital Merchant] in connection with this Agreement," such as the acceleration in the "Protections against Default" section, "may be exercised at any time by [Capital Merchant] after the occurrence of an Event of Default, are cumulative and not exclusive, and shall be in addition to any other rights, powers or remedies provided by law or equity." *Id.*

The filing of bankruptcy does not constitute an "Event of Default" under the agreements. However, if FTE makes a filing under Title 11 of the United States Code—the Bankruptcy Code—it must give Capital Merchant written notice within 24 hours of the filing. Dkt. No. 23-19 § 3.4; Dkt. No. 23-20 § 3.4. FTE must also give Capital Merchant seven days' written notice before the closing of any sale of all or substantially all of its assets or stocks. *Id.*

The agreements as a whole each consist of a number of other documents attached to the main agreement. One is a "Security Agreement," by which FTE grants to Capital Merchant "a security interest in all assets now owned, or hereafter acquired, including without limitation: (a) all accounts . . . , chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms **[*43]** are defined by *Article 9 of the [UCC]*, now or hereafter owned or acquired by Merchant; and (b) all proceeds, as that term is defined by Article 9 of the UCC." Dkt. No. 23-19 at 6; Dkt. No. 23-20 at 6. There is also a "Guaranty," which provides that the undersigned Guarantors:

> guarantee[] to [Capital Merchant] Merchant's performance of all of the representations, warranties, covenants made by Merchant in this Security Agreement and Guarantee, and the Merchant Agreement, as each agreement may be renewed, amended, extended or otherwise modified . . . . Guarantor's obligations are due . . . at the time of any breach by Merchant of any representation, warranty, or covenant made by Merchant in this Agreement and the Merchant Agreement . . . .

Id. The Guaranty also states that "[i]n the event that CMS must return any amount paid by Merchant or any other guarantor of the Guaranteed Obligations because that person has become subject to a proceeding under

the United States Bankruptcy Code or any similar law, Guarantor's obligations under this Agreement shall include that amount." Dkt. No. 23-19 at 7; Dkt. No. 23-20 at 7.

"Appendix A" contains a "Fee Structure" which sets forth the amounts of the **[*44]** "Origination Fee" and "ACH Program Fee." Dkt. No. 23-19 at 8; Dkt. No. 23-20 at 8. Next to the Origination Fee, it says "to cover underwriting and related expenses," and next to the ACH Program Fee, it says "the ACH program is labor intensive and is not an automated process, requiring us to charge this fee to cover related costs." *Id.* There are also various fees for rejected ACH debits, for defaults under the agreement, and for insufficient funds. *Id.*

An "Addendum" to the agreements states that the "Specified Percentage" shall instead be a fixed sum "per business [d]ay," referred to as the "Daily Payment," which the Addendum recites "the parties agree is a good-faith approximation of the Specified Percentage, based on the Merchant's prior receipts due to [Capital Merchant] pursuant the [sic] Agreement." Dkt. No. 23-19 at 12; Dkt. No. 23-20 at 9. The Addendum contains a "reconciliation provision"; it provides:

> At the Merchant's option, within five (5) business [sic] following the end of a calendar month, the Merchant may request a reconciliation to take place, whereby [Capital Merchant] shall ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal **[*45]** to the amount of the Specified Percentage (the "Reconciliation"). However, in order to effectuate the Reconciliation, upon submitting the request for the Reconciliation to [Capital Merchant]—but in no event later than give (5) business days following the end of the calendar month—the Merchant must produce any and all evidence and documentation requested by [Capital Merchant] in its sole and absolute discretion, necessary to identify the appropriate amount of—and effectuate—the Specified Percentage.

Dkt. No. 23-19 at 12(c); Dkt. No. 23-20 at 9(c). After setting forth the "reconciliation provision," the Addendum provides:

> The Merchant specifically acknowledges that the Daily Payment in lieu of the Specified Percentage is being provided to the Merchant as a courtesy, and if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, then [Capital Merchant] shall not be obligated to effectuate the Reconciliation discussed in Section (c) herein. Additionally, as the Daily Payment is being provided to Merchant as a courtesy, the Merchant may elect, upon timely notice as outlined above to [Capital Merchant], to remit receipts **[*46]** via Specified Percentage instead of the Daily Payment.

Dkt. No. 23-19 at 12(d).

In addition to appearing in the two Capital Merchant agreements, the above terms appear in the December 6, 2017 Midnight Capital agreement, Dkt. No. 23-12, and the September 21, 2018 Green Capital agreement, Dkt. No. 23-17.

2. Form Two

With a few material exceptions that will be analyzed in more detail below,[9] the same terms as appear in Form One generally also appear in Form Two agreements,[10] which are found at Dkt. No. 23-13 (December 15, 2017 agreement with Midnight Capital), Dkt. No. 23-15 (September 14, 2017 agreement with Green Capital), and Dkt. No. 23-16 (October 20, 2017 agreement with Green Capital).[11] The important differences are as

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[9] The non-material exceptions are as follows: "Protection 3" in these agreements state that the confession of judgment is only in the amount of the "Purchase Amount" stated in the agreement and not the Purchase Amount plus attorneys' fees, *see* Dkt. No. 23-13 § 1.10; "Protection 5" does not contain the language "in addition to any remedies pursuant to Protection 3 of this section 1.10," *id.*; due to the numbering of some of the agreements, the internal cross-references vary; and minor grammatical and word changes were made, none of which changes the meaning of the terms.

[10] The second page of the Security Agreement and Guaranty appears not to have been included in the exhibit attaching this agreement, but the pages that are included indicate that the agreement is identical to the other Form Two agreements in all relevant respects.

[11] The January 19, 2018 agreement between FTE and Midnight Capital—submitted in connection with the Capital Defendants' motion to dismiss, *see* Dkt. No. 23-14—also appears to be a "Form Two" agreement, but the Amended Complaint alleges no details of that transaction and Plaintiffs do not base their claims on that transaction. *See* Dkt. No. 31 at 44 ("Plaintiffs base no claim on [the January 19, 2018] agreement."). Because Plaintiffs do not base any claim on this agreement or make allegations such that the agreement could be properly deemed incorporated by reference or integral to the Amended Complaint and because it is not a document

follows: First, in the section titled "Events of Default"; the language "(d) Except for: (i) as a result of an Act of God, (ii) filing for protection under applicable bankruptcy law, (iii) an assignment for the benefit of the creditors, and (iv) similar protection" has been deleted and is replaced with the following "Event of Default": "Merchant shall transport, move interrupt, suspend, dissolve or terminate its business." Dkt. No. 23-13 § 3.1 (d). Thus, the exception for **[*47]** a filing under the Bankruptcy Code is eliminated. Second, the Guaranty in the Form Two agreements provides that the Guarantors' obligations are due not only upon breach of the agreement but also "at the time Merchant admits its inability to pay its debts, or makes a general assignment for the benefit of creditors, or any proceeding shall be instituted by or against Merchant seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts." Dkt. No. 23-13 at 6. And third, "Appendix A" to Form Two agreements, which sets forth the relevant fee structure, provides that the nonsufficient funds fee is "$35.00 fee each occurrence (*up to two occurrences before a default is declared*)." Dkt. No. 23-13 at 8 (emphasis added).

There is also a significant difference between the "reconciliation" provisions in the addenda to the Form One and Form Two agreements. Like the Form One agreements, the Form Two agreements provide that the "Specified Percentage" is revised to a fix sum per business day and that the merchant may request a reconciliation. The Form Two agreements does not state that the funder "*shall* ensure **[*48]** that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage," *see, e.g.*, Dkt. No. 23-20 at 9 (emphasis added)—instead, it states that the funder "*may* ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage," *see, e.g.*, Dkt. No. 23-13 at 10 (emphasis added). Indeed, the Form Two agreements goes on to state:

> The Merchant specifically acknowledges that: (i) the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and that [Midnight Capital] is under no obligation to provide same, and (ii) if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, then [Midnight Capital] shall not effectuate the reconciliation discussed above.

Id.

3. Form Three Agreements

The third form of an agreement—referred to herein as a "Form Three" agreement—was entered into by FTE on November 27, 2018, with Green Capital, and on November 28, 2018, with Capital Merchant. Pursuant to these agreements, FTE, as "Seller" "sells, assigns, transfers **[*49]** and conveys . . . unto" Green Capital or Capital Merchant, whatever the case may be (and referred to in the descriptions of the Form Three agreements as the "Funder") "all of Seller's right, title and interest in to the Specified Percentage of the Future Receipts until the Purchased Amount shall have been delivered by Seller to" the Funder. Dkt. No. 23-18 § 3. The agreements state that "[b]y virtue of this Agreement, Seller transfers to [Funder] full and complete ownership of the Purchased Future Receipts and Seller retains no legal or equitable interest therein." *Id.* Under the agreements, ECF is required to deposit all future receipts—defined as "all of Seller's receipts of monies for the sale of its goods and services that monies shall be paid and delivered to Seller by Seller's customers and/or other vendees after the Effective Date of the Agreement," *id.* § 1(c)—into one Funder-approved bank account. *Id.* § 7. The Funder is authorized to debit a set daily amount from that bank account each "Workday"—Monday through Friday except for bank holidays—and the Seller is required to deliver that daily amount on each Workday. *Id.* §§ 1(h), 6, 8.

The agreements disavow that the full amount purchased **[*50]** under them is absolutely collectable. They state: "[t]his Sale of the Purchased Future Receipts is made without express or implied warranty to [Funder] of collectability of the Purchased Future Receipts by [Funder] and without recourse against Seller and/or Guarantor(s) except as specifically set forth in this Agreement." *Id.* § 3. They also recite that:

> Seller hereby acknowledges that it full understands that: (i) [Funder's] ability to collect the Purchased Amount (or any portion thereof) is contingent upon Seller's continued operation of its business and successful generation of the Future Receipts until the Purchased Amount is delivered to [Funder] in full; and (ii) that in the event of decreased efficiency or total failure of Seller's business [Funder's] receipt

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publicly filed in another action, *see* "Legal Standard" *infra*, the agreement is not properly before the Court, and the Court will not consider it in connection with this motion.

> of the full or any portion of the Purchased Amount may be delayed indefinitely.

Id. § 5. They also disavow that the agreements are loans, stating that the agreements "consummate[] the sale of the Purchased Future Receipts at a discount, not the borrowing of funds by Seller from [Funder]. [Funder] does not charge Seller and will not collect from Seller any interest on the monies used by [Funder] for the purchase of the Purchased **[*51]** Future Receipts." *Id.* § 16(a)(ii); *see also id.* § 16(d) (reciting that "payment of the Purchase Price by [Funder] is not intended to be, not shall it be construed as, a loan . . . that requires absolute and unconditional repayment on a maturity date"). They state that the "period of time that it will take [Funder] to collect the Purchased Amount is not fixed . . . and will depend on how well or not well Seller's business will be performing following the Effective Date." *Id.* § 16(a)(ii).

The agreements contain reconciliation provisions; those provisions state:

> If at any time during the term of this Agreement Seller will experience unforeseen decrease or increase in its Daily Receipts, Seller shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 11 below, to request retroactive reconciliation of the Initial Daily Installments for one (1) full calendar month immediately preceding the day when such request for reconciliation is received by [Funder] (each such calendar month, a "Reconciliation Month") . . . . Such reconciliation of the Seller's Initial Daily Installment for a Reconciliation Month shall be performed by Funder within five (5) Workdays following its receipt **[*52]** of the Seller's request for Reconciliation by either crediting or debiting the difference back to, or from, the Approved Bank Account so that the total amount debited by [Funder] from the Approved Bank Account during the Reconciliation Month at issue is equal to the Specific Percentage of the Future Receipts that Seller collected during the Reconciliation Month at issue.

Id. § 10(a), (b). According to the agreements, as a result of a reconciliation, the "effective Initial Daily Installment amount during the Reconciliation Month" may be reduced or increased "in comparison to the one set forth" earlier in the agreements, "and, as the result of such reduction, the term of this Agreement during which [Funder] will be debiting the Approved Bank Account may get shortened or extended indefinitely." *Id.* § 10(c). Seller has the sole responsibility and right to initiate the reconciliation process by sending a request to the Funder, and the Seller must provide specific information to the Funder and make the request so that it is received "within five (5) Workdays after the last day of the Reconciliation Month." *Id.* § 11(b). If Seller makes a request after that period, the reconciliation request is nullified for that **[*53]** month. *Id.* § 11 (c).

The reconciliation provisions by themselves do not "modify the amount of the Initial Daily Installment for any calendar month during the term of th[e] Agreement other than during the Reconciliation Month(s) as the result of the Reconciliation." *Id.* § 11(e). However, in addition to a reconciliation process, the agreements provide for a possible adjustment of the daily payment due thereunder. They state:

> (a) If at any time during the term of this Agreement Seller experiences a steady decrease in its Daily Receipts, Seller shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 13 below, to request modification ("Adjustment") of the amount of the Initial Daily Installment that Seller is obligated to deliver daily to [Funder] in accordance with the provisions of Section 6 above. Such Adjustment shall become effective as of the date it is granted and the new adjustment amount of the Initial Daily Installment (the "Adjusted Daily Installment") shall replace and supersede the amount of the Initial Daily Installment set forth in Section 1 above.
>
> (b) The Adjustment of the Initial Daily Installment shall be performed by [Funder] within five (5) **[*54]** Workdays following its receipt of the Seller's request for Adjustment by modifying the amount of the Initial Daily Installment that shall be debited from the Approved Bank Account until the Purchased Amount is paid in full. Notwithstanding anything to the contrary set forth in Sections 12 and 13 hereof, no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place resulting in the reduction of the total amount debited from Seller's Approved Bank Account during the Reconciliation Month by at least fifteen percent (15%) in comparison to the amount that would have been debited during that month without Reconciliation.

Id. § 12. As with the reconciliation, it is Seller's sole responsibility and right to initiate an adjustment by requesting one from the Funder. Such a request must

be in writing and accompanied by certain documents, *id.* § 13(a), and it must be received by the Funder by email within five Workdays "after the date that is the later of (i) the last day of the latest bank statement enclosed with the Adjustment Request and (ii) the last date of the latest credit card processing statement enclosed with the Adjustment Request," *id.* § 13(b); if **[*55]** the request is not made within that time period, the request is nullified, *id.* § 13(c). The Seller does not have a right under the agreement to request a retroactive adjustment. *Id.* § 13(e).

The Seller's declaring bankruptcy or otherwise stopping operations does not constitute a default or a breach under the agreements. Rather, the agreements provide:

> [I]f the full Purchased Amount is not remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business (but not due to Seller's willful or negligent mishandling of its business or due to Seller's failure to comply with its obligations under this Agreement), Seller would not be in breach of or in default under this Agreement.

Id. § 16(a)(v). In a similar vein, they provide that

> Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the following reasons:
> i. adverse business conditions that occurred for reasons outside Seller's control and not due to Seller's willful or negligence mishandling of its business;
>
> ii. loss of the premises where the business operates (but not due to Seller's breach of its obligations to its landlord), **[*56]** provided however that Seller does not continue and/or resume business operations at another location;
> iii. bankruptcy of Seller; and/or
> iv. natural disasters or similar occurrences beyond Seller's control.

Id. § 16(b) (the "Valid Excuses").

The Form Three agreements do share some characteristics with the Form One and Form Two agreements. For example, the Form Three agreements require FTE to maintain "business-interruption insurance naming [Funder] as a loss payee and additional insured in the amounts and against risks as are satisfactory to [Funder] and shall provide [Funder] proof of such insurance upon request." *Id.* § 21(g). FTE is also prohibited from transferring or selling all or substantially all of its assets without the Funder's prior consent and from making or sending notice of its intended bulk sale or transfer. *Id.* § 21(k). If FTE does sell, dispose, transfer or convey all or substantially all of its business or assets, it must first obtain the express written consent of the Funder and provide the Funder "with a written agreement of a purchaser or transferee of Seller's business or assets to assume all of Seller's obligations under this Agreement pursuant to documentation satisfactory to" the Funder. **[*57]** *Id.* § 21(*l*). Additionally, under the Form Three agreements, FTE granted the Funder "a continuing, perfected and first priority lien upon and security interest in . . . a. all accounts . . ., chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined by Article 9 of the [UCC], now or hereafter owned or acquired by Seller; and b. all Seller's proceeds, as such term is defined by Article 9 of the UCC." *Id.* § 22.

As with the other forms of agreements, there are enumerated "Events of Default" under the Form Three agreements. They differ from those under the other two forms of agreement. They are:

> a. Seller shall violate any term, condition or covenant in this Agreement governing Seller's obligations of timely delivery and in full of Initial Daily Installments (or Adjusted Daily Installments, as the case may be) to [Funder], and timely and in full payment to [Funder] of any other sums due for any reasons whatsoever other than as a result of the Seller's business ceasing its operations exclusively due to any of the Valid Excuses.
>
> b. Any representation or warranty by Seller made in this Agreement shall prove to have been incorrect, false or misleading **[*58]** in any material respect when made.
> c. Seller shall default under any of the terms, covenants and conditions of any other agreement with [Funder] (if any) which is related to the instant Agreement.
> d. Seller uses multiple depository accounts without obtaining prior written consent of [Funder] in each instance.
> e. Seller fails to deposit any portion of its Future Receipts into the Approved Bank Account;
> f. Seller changes the Approved Bank Account or Approved Processor without obtaining prior written consent of [Funder] in each instance.
> g. Seller interferes with [Funder] collection of Initial Daily Installments (or Adjusted Daily Installments, as the case may be).

h. Four (4) or more ACH transactions attempted by [Funder] are rejected by Seller's bank.
i. The Guaranty shall for any reason cease to be in full force and effect.

Id. § 27.

To reiterate, a "Valid Excuse" is defined to include that "Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the following reasons: . . . adverse business conditions that occurred for reasons outside Seller's control and not due to Seller's willful or negligence mishandling **[*59]** of its business; [and/or] bankruptcy of Seller." *Id.* § 16(b).

Upon an Event of Default, Seller must immediately deliver to the Funder the entire unpaid portion of the "Purchased Amount"—the total amount due to Funder under the agreement—and the agreement entitles the Funder to additional amounts in the form of damages and interest on the unpaid portion upon default. *Id.* § 29. Upon default, the Funder may "protect and enforce its rights" under the agreement by: enforcing its rights as a secured creditor under the UCC, enforcing the personal guaranty of performance against the guarantors without first seeking to be made whole from the Seller, filing an affidavit of confession of judgment executed by the guarantor, directing Seller's credit card processor to make payment to the Funder of any all or any portion of the amounts received by the processor on behalf of the Seller, and filing suit for specific performance or to enforce the Seller's obligations under the agreement (including the personal guaranty). *Id.* § 30. In an Event of Default, the Funder may also "perform any and all obligations of Seller" under the agreement, including obtaining insurance on the collateral securing the agreement; collecting **[*60]** money due with respect to that collateral; signing Seller's name on invoices, bills of lading, or assignments directing customers or account debtors to make payment directly to the Funder; or filing claims or taking actions the Funder deems necessary to collect the unpaid amount. *Id.* § 32. The "Personal Guaranty of Performance" provides that, if Seller defaults or breaches in the obligations under the agreement, the guarantors shall pay or perform the obligations and other amounts stipulated in the agreement. *Id.* at 13 § 2.

A rider to the agreements provides for a "Due Diligence Fee," described as follows: "the cost of the due diligence of Seller'[s] business performed by [Funder]. As a general rule, the Due Diligence Fee varies and depends on the complexity of underwriting required on a business including without limitation, sophistication of Seller's principals, difficulty in ascertaining Seller's receivables and account debtors, sources of Seller's revenue flow, etc." *Id.* at 16 § 3(a). It also provides for an "ACH Program Fee" "to cover the expense of ACH processing program." *Id.* at 16 § 3(b). Another rider permits the charging of an "Origination Fee." *Id.* at 18.

PROCEDURAL HISTORY

Lateral **[*61]** initially filed this lawsuit on November 11, 2021. Dkt. No. 1. After some of the Defendants moved to dismiss the complaint, Dkt. No. 10, Plaintiffs filed the instant Amended Complaint, Dkt. No. 20. In their Amended Complaint, Plaintiffs bring three causes of action: (1) a substantive violation of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §1962*; (2) RICO conspiracy, in violation of *18 U.S.C. §1962(d)*; and (3) fraud. *See id.* ¶¶ 198-295.

On February 25, 2022, Defendants filed three separate motions to dismiss all claims. Dkt. Nos. 21, 24, 26. The Capital Defendants move for dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, "the applicable statutes of limitations, *N.Y. Jud. Law §489(1)*, documentary evidence, and lack of standing."[12] Dkt. No. 21 at 1. Glass moves for dismissal on the same basis. *See* Dkt. No. 24. Davis moves to dismiss pursuant to *Rule 12(b)(6)*. Dkt. No. 26. Plaintiffs filed a memorandum of law in opposition to the motions to dismiss on April 1, 2022. Dkt. No. 31. On April 22, 2022, Defendants filed their reply memoranda of law and supporting affirmations. *See* Dkt. Nos. 32-36.

On August 23, 2022, the Court issued an Order inviting the parties to submit letter briefs addressing what effect, if any, the Court's decisions in *Fleetwood Services,* ***[*62]*** *LLC v. Ram Capital Funding, LLC*, No. 20-cv-5120 (LJL) (S.D.N.Y.) have on the motions pending in this case. Dkt. No. 38. On August 30, 2022, the Capital Defendants, Glass, Davis, and Plaintiffs each submitted letter briefs addressed to this question. Dkt. Nos. 39-42.[13]

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[12] It does not appear that the Capital Defendants are contending that Plaintiffs lack Article III standing and that the Court therefore does not have subject-matter jurisdiction to hear this case.

[13] On August 31, 2022, the Capital Defendants filed a letter motion for leave to file a response to the letter filed by Plaintiffs or, in the alternative, to strike misrepresented

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2006)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This "does not impose a probability requirement at the pleading stage" but rather "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." Twombly, 550 U.S. at 556. That is, a complaint need not allege "detailed factual allegations," but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555.

In reviewing a motion to dismiss under Rule 12(b)(6), a court "accept[s] all factual **[*63]** allegations as true, and draw[s] all reasonable inferences in the plaintiff's favor." Austin v. Town of Farmington, 826 F.3d 622, 625 (2d Cir. 2016). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is in inapplicable to legal conclusions." Iqbal, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *id.*, and a complaint must offer more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action" to survive dismissal, Twombly, 550 U.S. at 555.

In considering a Rule 12(b)(6) motion, which "challenges the complaint as presented by the plaintiff, taking no account of its basis in evidence, a court adjudicating such a motion may review only a narrow universe of materials. Generally, [a court] do[es] not look beyond 'facts stated on the face of the complaint, documents appended to the complaint or incorporated in the complaint by reference, and matters of which judicial notice may be taken.'" Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016) (alterations adopted) (quoting Concord Assocs., L.P. v. Entm't Props. Tr., 817 F.3d 46, 51 n. 2 (2d Cir. 2016)). "[I]n some cases, a document not expressly incorporated by reference in the complaint is nevertheless 'integral' to the complaint and, accordingly, a fair object of consideration on a motion to dismiss." *Id.*; *see also* Nam v. Permanent Mission of Republic of Korea to United Nations, 581 F. Supp. 3d 643, 647 (S.D.N.Y. 2022) **[*64]** (Nathan, J.) ("The Court may consider only the allegations in the complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or 'documents either in plaintiff's possession or of which plaintiffs had knowledge and relied on in bringing suit.'" (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)).

"To be incorporated by reference, the complaint must make a clear, definite and substantial reference to the documents." McKeefry v. Town of Bedford, 2019 U.S. Dist. LEXIS 207874, 2019 WL 6498312, at *3 (S.D.N.Y. Dec. 2, 2019) (quoting DeLuca v. AccessIT Grp., Inc., 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010)). Documents that are "integral" to a complaint such that they can be considered on a motion to dismiss despite not being incorporated by reference are those "where the complaint relies heavily upon [their] terms and effect." Goel, 820 F.3d at 560 (quoting Chambers, 282 F.3d at 153). "Merely mentioning a document in the complaint will not satisfy this standard; indeed, even offering limited quotations from the document is not enough." *Id.* (alteration adopted) (internal quotation marks and citation omitted). Rather, in determining whether a document is integral to a complaint, a court will consider whether the contents of the document "appear to have been necessary to the 'short and plain statement of the claim showing that [a plaintiff is] entitled to relief.'" Sahu v. Union Carbide Corp., 548 F.3d 59, 68 (2d Cir. 2008) (quoting **[*65]** Fed. R. Civ. P. 8(a)(2)). "[A] necessary prerequisite" to a finding that materials are integral to a complaint "is that the 'plaintiff[] *rel*[*y*] on the terms and effect of [the] document in drafting the complaint . . . ; mere notice or possession is not enough.'" Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006)). And "[w]hen a court takes judicial notice of a document on a motion to dismiss, it should generally do so only 'to determine what statements the documents contain not for the truth of the matters asserted.'" McKeefry, 2019 U.S. Dist. LEXIS 207874, 2019 WL 6498312, at *3 (alterations adopted) (quoting Schubert v. City of Rye, 775 F. Supp. 2d 689, 698 (S.D.N.Y. 2011)). However, courts have recognized

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contract terms. Dkt. No. 43. The Court is capable of reading the contracts at issue, and it will consider the contractual provisions as written, not as restated by either party. The motion is therefore denied, and the Court will not consider the arguments made therein or in the response to that letter filed by Plaintiffs at Dkt. No. 44.

that "it is proper to consider public documents on a motion to dismiss to determine whether claims are barred by prior litigation." *Cowan v. Ernest Codelia, P.C., 149 F. Supp. 2d 67, 2001 WL 856606, at *1 (S.D.N.Y. 2001)*; *see also* *Lucky Brand Dungarees Inc. v. Ally Apparel Resources LLC, 2006 U.S. Dist. LEXIS 91998, 2006 WL 3771005, at *1 (S.D.N.Y. Dec. 20, 2006)* (same).

"An affirmative defense may be raised by a pre-answer motion to dismiss under *Rule 12(b)(6)*, without resort to summary judgment procedure, if the defense appears on the face of the complaint." *Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 74 (2d Cir. 1998)*. "The following matters outside the four corners of the complaint may be considered without triggering the standard governing a motion for summary judgment: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated **[*66]** by reference, are 'integral' to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case." *LeChase Constr. Servs., LLC v. Escobar Constr., Inc., 2019 U.S. Dist. LEXIS 109168, 2019 WL 2743637, at *6 & n.4 (N.D.N.Y. July 1, 2019)* (citing cases); *see also* *Semente v. Empire Healthchoice Assurance, Inc., 147 F. Supp. 3d 117, 120 (E.D.N.Y. 2015)* (providing that the "four corners" requirement "has been interpreted broadly" to include the four exceptions outlined above).

DISCUSSION

Defendants make overlapping arguments for why they are entitled to dismissal. The Capital Defendants argue that (1) the action must be dismissed because the assignment to Lateral is void under *New York Judiciary Law § 489(1)* and, in any event, did not include statutory claims like Plaintiffs' RICO causes of action, which are based on unassignable usury claims; (2) *res judicata* and a settlement agreement compels dismissal of claims arising from the first two Green Capital agreements and all of the Midnight Capital agreements; (3) the RICO claims fail because there was no substantive RICO violation (including because that the agreements did not violate New York's usury laws), the facts are not pleaded with sufficient particularity, and because the claims are at least partially time barred; and (4) Plaintiffs' fraud claim fails because Plaintiffs do not allege transaction causation (or reliance), a fraud claim **[*67]** cannot arise out of a misrepresentation made within a contract, and the fraud claim is at least partially time barred. *See* Dkt. No. 22. Glass argues that (1) Plaintiffs fail to plead a distinct RICO enterprise; (2) the transactions are not loans and thus cannot charge usurious interest; and (3) Plaintiffs pleaded no wrongdoing by Glass. *See* Dkt. No. 25. Davis argues that (1) Plaintiffs have not made factual allegations that could support a fraud claim against him; (2) Plaintiffs' RICO claim fails because Plaintiffs cannot pursue a civil usury claim pursuant to New York law and thus cannot sustain a RICO claim, the claims are time barred, and the alleged facts do not establish Davis's role in the Enterprise or that he agreed to further its illicit goals; and (3) the RICO conspiracy claim fails because Plaintiffs have not sufficiently alleged a substantive violation of RICO or that Davis agreed to the alleged conspiracy. Dkt. No. 27.

The Court will consider the motions together, as Plaintiffs did in their opposition. *See* Dkt. No. 31. It will first address the assignment of the claims to Lateral, followed by the contracts that may form the basis of Plaintiffs' claims; it will then address **[*68]** the RICO claims and the claims of the Individual Defendants. Finally, it will address the fraud claim. It addresses only those issues necessary to decide the present motions.

I. Lateral's Assignment

The Capital Defendants argue that Plaintiffs' action must be dismissed as "illegal, champertous, and void" under *New York Judicial Law § 489(1)*, asserting that the "primary purpose of the assignment was Lateral's intent to sue on the assigned claims." Dkt. No. 22 at 2-3. In addition, they argue that Lateral lacks standing for the statutory claims of RICO and usury because FTE, as assignors, did not assign any statutory claims to Lateral. *Id.* at 4-5. Finally, they assert that the usury claims and defenses are not assignable. *Id.* at 6. Plaintiffs argue that this is a "largely academic point" as "the Amended Complaint added the assignors . . . as Plaintiffs." Dkt. No. 31 at 46-47. Plaintiffs further argue that *Section 489(1)* is not applicable to the assignment to Lateral and that ambiguity in the assignment of claims must be resolved by ascertaining the parties' intent. *Id.* at 48-49.

For the reasons stated below, the Court cannot consider the assignment contract to Lateral or the Capital Defendants' affirmative defense of champerty at **[*69]** this stage because "material disputed issues of fact regarding the relevance of the document" prevent the argument from being addressed on a *Rule 12(b)(6)*

motion to dismiss. *See* Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006). Consideration of the Foreclosure Agreement is, however, appropriate for determining whether Plaintiffs assigned statutory claims to Lateral because no material disputed issues of fact exist for that issue. After review, the Court concludes that the terms of the Foreclosure Agreement includes the RICO claims. Because the Capital Defendants have not met their burden of proving champerty at this stage and the Foreclosure Agreement is otherwise presumed valid, Lateral has both prudential and constitutional standing to assert its claims.

A. Champerty

New York courts have described champerty as an affirmative defense. *See* Bluebird Partners, L.P. v. First Fid. Bank, N.A., 94 N.Y.2d 726, 729, 731 N.E.2d 581, 709 N.Y.S.2d 865 (2000) (describing champerty as a "an affirmative defense"). The defense of champerty can be found in New York Judicial Law § 489(1), titled "Purchase of claims by corporations or collection agencies," which provides:

> *No person or co-partnership*, engaged directly or indirectly in the business of collection and adjustment of claims, *and no corporation or association*, directly or indirectly, itself or by or through its officers, agents or employees, **[*70]** *shall solicit, buy or take an assignment of*, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other *thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon*; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise.

N.Y. Judiciary Law § 489(1) (emphasis added). The New York Court of Appeals has interpreted Section 489 as "restrict[ing] individuals and companies from purchasing or taking an assignment of notes or other securities 'with the intent and for the purpose of bringing an action or proceeding thereon.'" Justinian Cap. SPC v. WestLB AG, 28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E.3d 1253, 1256 (N.Y. 2016) (quoting N.Y. Judiciary Law § 489). In addition, "to constitute the offense of champerty[,] the *primary purpose* of the purchase must be to enable one to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" **[*71]** *Id.* (quoting Moses v. McDivitt, 88 N.Y. 62, 65 (1882)) (alterations adopted) (emphasis in original). In other words, the assignment of a claim is champertous when "the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence." Id. at 1257. New York courts thus distinguish "between acquiring a thing in action in order to obtain costs[, which is champerty,] and acquiring it in order to protect an independent right of the assignee." Id. at 1256 (quoting Tr. for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp., 13 N.Y.3d 190, 918 N.E.2d 889, 894, 890 N.Y.S.2d 377 (N.Y. 2009)).[14] The defendant bears the burden of proving champerty. *See* Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n, 2020 U.S. Dist. LEXIS 46950, 2020 WL 1285783, at *11 (S.D.N.Y. Mar. 18, 2020). Further, it is "presum[ed] that a debt is purchased for legitimate purposes." Elliott Assocs., L.P. v. Republic of Peru, 948 F. Supp. 1203, 1209 (S.D.N.Y. 1996).

The Capital Defendants argue that the assignment of claims to Lateral constitutes champerty based on exhibits including an affidavit submitted by Richard de Silva, a managing member of Lateral, in a separate suit in New York state court. That affidavit includes an attached copy of the Foreclosure Agreement. Dkt. No. 23-4. Defendants also submit as an attachment the LLC registration of Lateral in Delaware. Dkt. No. 23-5. As a preliminary matter, the Court must determine whether it may properly consider these materials, which the Capital Defendants submitted as Exhibits C and D of a declaration submitted **[*72]** in support of their motion to dismiss. Dkt. No. 22 at 3; Dkt. Nos. 23-4-23-5. While neither of the parties has addressed the issue, the Court

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[14] There is a safe harbor provision from champerty if the assignee pays, or has a "binding and *bona fide* obligation" to pay a "'purchase price of at least five hundred thousand dollars' . . . . independent of the successful outcome of the lawsuit." Id. at 1258; *see also* N.Y. Judiciary Law § 489(2); Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n, 2020 U.S. Dist. LEXIS 46950, 2020 WL 1285783, at *11 (S.D.N.Y. Mar. 18, 2020) (describing the safe harbor provision). This provision is immaterial to this Court's decision given the Court's conclusion that the defense of champerty may not be resolved on the pleadings.

may not consider any of these materials—and particularly the Foreclosure Agreement—for the purposes of resolving Capital Defendants' affirmative defense of champerty. Such materials must be considered on a motion for summary judgment as to the champerty defense. Fed. R. Civ. P. 12(d).

The Foreclosure Agreement, the Delaware registration, and de Silva's affidavit do not qualify for any of the four means by which a court may consider materials outside the complaint. First, none of the materials are attached to the Amended Complaint. Second, the Foreclosure Agreement is not incorporated by reference in the Amended Complaint. The sole mention of the Foreclosure Agreement occurs in Paragraph 118 of the Amended Complaint, which describes Lateral's interest in the collateral of the other Plaintiffs following the default of FTE. The paragraph states that:

> In or around July 2019, FTE defaulted under the terms of the Credit Agreement [dated October 28, 2016 and thereafter amended or supplemented]. Thereafter, Lateral declared a default and pursuant to a Surrender of Collateral **[*73]** and Strict Foreclosure dated as of October 10, 2019 (the "Foreclosure Agreement"), FTE agreed to surrender and turn over its interest in the collateral including, without limitation, the claims asserted herein.

Dkt. No. 20 ¶ 118. Prior to Paragraph 118, the Amended Complaint states that:

> Lateral, as administrative agent for the lenders, entered into a Credit Agreement . . . pursuant to which the lenders agreed to extend loans and other financial accommodations up to a maximum amount . . . , which was approximately $50 million as of July 2019.

Id. ¶ 115. There is no mention of the "Foreclosure Agreement" in the Amended Complaint aside from Paragraph 118. For the purposes of incorporation by reference, "[a] mere passing reference or even references . . . to a document outside of the complaint does not, on its own, incorporate the document into the complaint itself." SEC v. Medallion Fin. Corp., 2022 U.S. Dist. LEXIS 137463, 2022 WL 3043224, at *1 (S.D.N.Y. Aug. 2, 2022). "To be incorporated by reference, the Complaint must make a clear, definite and substantial reference to the documents." Helprin v. Harcourt, Inc., 277 F. Supp. 2d 327, 331 (S.D.N.Y. 2003). The Amended Complaint does not quote or even base its primary allegations on the Foreclosure Agreement, and it references the Foreclosure Agreement only once—hardly enough to constitute "substantial" reference. **[*74]** *Cf.* Helprin, 277 F. Supp. 2d at 331 (finding that document was related when it "makes several substantial references to the Agreement, . . . quot[es] certain paragraphs of the Agreement verbatim[,] and the Complaint is based mainly on interpreting specific terms of the Agreement"). This lone paragraph is insufficient to conclude that the Amended Complaint incorporates the Foreclosure Agreement by reference. In addition, there is no reference in the Amended Complaint to de Silva's affidavit. Finally, while there is a single reference to the fact that "[a]t all times material hereto, Lateral was a limited liability company duly organized under the laws of Delaware," Dkt. No. 20 at ¶ 14, there is no reference specifically to Lateral's registration statement, let alone a quotation from it. That single paragraph—otherwise immaterial to the claims asserted in the Amended Complaint—is not enough to show that Lateral's registration statement was incorporated by reference. *See* Medallion Fin. Corp., 2022 U.S. Dist. LEXIS 137463, 2022 WL 3043224, at *1; Berkley v. City of New Rochelle, 2022 U.S. Dist. LEXIS 46069, 2022 WL 784018, at *2 (S.D.N.Y. Mar. 15, 2022) (concluding that a limited reference, let alone quotation, to a single phone call was not incorporated by reference).

Third, while the Foreclosure Agreement is arguably "integral" with respect to Plaintiff Lateral's claims, material issues of fact **[*75]** prevent the Court from considering the Foreclosure Agreement at the motion to dismiss stage with respect to the champerty defense. The registration statement and de Silva's affidavit are not integral to the Amended Complaint. "Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 230 (2d Cir. 2016) (quoting DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)); *see also* Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991). "A 'necessary prerequisite' for taking into account materials extraneous to the complaint 'is that the plaintiff rely on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough.'" *Id.* (quoting Global Network Commc'ns, 458 F.3d at 156). "This generally occurs when the material considered is a "contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Id.* (quoting Global

Network Commc'ns, Inc., 458 F.3d at 157). All of Lateral's claims "stand[] or fall[]" on the obligations in the Foreclosure Agreement. If the assignment is void, Lateral itself has **[*76]** no claims. *Id.* Lateral thus relies on the terms and effect of the Foreclosure Agreement to sustain its claims—as evinced by Paragraph 118 of the Amended Complaint—and clearly had notice of the Foreclosure Agreement. And the Foreclosure Agreement bears a signature from Lateral's Manager, de Silva. *Cf.* Chambers, 282 F.3d at 154 (finding that certain Codes were not integral when "the Amended Complaint does not refer to the Codes, plaintiffs apparently did not rely on them in drafting it, and none of the Codes submitted to the court were signed by the Record Companies.").

Despite the Foreclosure Agreement's "integral" nature, however, Lateral should "have an opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). The exception for materials "integral" to a complaint does not apply where there are "material disputed issues of fact regarding the relevance of the document." Faulkner, 463 F.3d at 134. "This principle is driven by a concern that a plaintiff may lack notice that the material will be considered to resolve factual matters." Nicosia, 834 F.3d at 231. Here, the affirmative defense of champerty requires an assessment of more than the terms contained within the four corners of the contract—the analysis entails looking at the "actual purpose **[*77]** and intent" of the parties involved. Justinian Cap. SPC, 65 N.E.3d at 1255 (internal quotation marks and citation omitted); *see also* N.Y. Judiciary Law § 489(1) (containing specific requirement of "with the intent and for the purpose" for champerty defense). For that reason, resolution of the champerty defense generally occurs after some discovery and on summary judgment. *See, e.g.*, Phoenix Light SF Ltd., 2020 U.S. Dist. LEXIS 46950, 2020 WL 1285783, at *3 (considering champerty on summary judgment after previously denying motion to dismiss on the basis of champerty without prejudice so that more discovery could take place); CIBC Bank & Tr. Co. (Cayman) v. Banco Cent. do Brasil, 886 F. Supp. 1105, 1111 (S.D.N.Y. 1995) (noting that courts "on occasion" have found a champertous assignment on a motion to dismiss but declining to do so); Justinian Cap. SPC, 65 N.E.3d at 1255 (explaining that summary judgment was granted only after "champerty-related discovery was complete").

This case requires "champerty-related discovery." Justinian Cap. SPC, 65 N.E.3d at 1255. Plaintiffs have presented clear "questions of fact surrounding [Lateral]'s actual purpose and intent in purchasing the [claim] that require further discovery to resolve." *Id.* (internal quotation marks and citation omitted). This includes their assertion that Lateral, as an agent for the lenders, had entered into a "Credit Agreement" with the other Plaintiffs nearly three years earlier in October 2016, Dkt. No. 20 ¶ 115, where FTE's **[*78]** obligations "were secured by the grant of a security interest in substantially all of FTE's assets," *id.* ¶ 116, and that Lateral had perfected those interests, *id.* ¶ 117. Plaintiffs' statement in the Amended Complaint that Lateral existed in 2016 is in conflict with Capital Defendants' assertion—based on Lateral's Delaware registration statement—that Lateral did not exist until shortly before it had signed the Foreclosure Agreement in 2019, Dkt. No. 22 at 3. Plaintiffs' additional allegations regarding Lateral's behavior are material and possibly show that Lateral's "purpose and intent" of its assigned claim was to "protect an independent right" rather than simply "obtain costs," Justinian Cap. SPC, 65 N.E.3d at 1256 (citation omitted). Even the quoted excerpt from de Silva's affidavit in Capital Defendants' memorandum in support of their motion is not as unambiguous as they make it seem: "Lateral Recovery was organized, *among other reasons*, for the specific purpose of taking possession of and pursuing certain commercial claims." Dkt. 24-3 at ECF 2 (emphasis added). Those "other reasons" could provide a basis for showing that Lateral's assignment did not constitute champerty. Because material disputes of fact exist with **[*79]** respect to the relevance of the Foreclosure Agreement for assessing the champerty defense, the Court declines to consider the Foreclosure Agreement at the motion to dismiss stage despite its "integral" nature.

Finally, while the Court can take judicial notice of Exhibits C and D, it may not rely on them for the truth of the matter asserted. Defendants attempt to introduce the Foreclosure Agreement by submitting an affidavit supporting a motion in an action in New York state court involving assorted members of Plaintiffs and Defendants, including other parties not involved in the current suit. Dkt. No. 23-4. "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Glob. Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006); *see also* Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425 (2d Cir. 2008) (stating that it is proper to take judicial notice of regulatory filings as long as it is not for the truth of the matter asserted). Here, Defendants attempt to assert the truth of the matter asserted in all three documents.

They argue, based on de Silva's affidavit, that "Lateral Recovery . . . was organized, among other reasons, for the specific purpose of taking **[*80]** possession of and pursuing certain commercial claims." Dkt. No. 23-4 at ECF 2. The motion to dismiss cites the Foreclosure Agreement to claim that "Lateral took nothing under the alleged assignment," Dkt. No. 22 at 3, "Lateral did not pay for the assignment," *id.*, "[t]he assignment contract states that Lateral will be entitled to any recovery under $25 million dollars, and any recovery in excess of $25 million shall be paid over to the Assignors," *id.* Similarly, Defendants rely on the date of registration in Lateral's registration document as truth. *Id.* While the Court may take judicial notice that the contract, affidavit, and registration document were filed and contain certain information, it may not rely on truth of the matters asserted within them, as Defendants urge the Court to do. In short, the Court may not consider the Foreclosure Contract, affidavit, or registration statement, in this manner to support the Capital Defendants' motion to dismiss.

Because Defendants have not met their burden on their affirmative defense, and because the assignment is presumed valid, Lateral has an interest in this dispute. Thus, at this stage, Lateral also has standing to bring its claims.

B. [*81] Assignment of Statutory Claims

Because there are no material disputed issues of fact over the scope of the Foreclosure Agreement with respect to the claims it assigned to Lateral, the Court may consider the Foreclosure Agreement for that purpose. That is, while the defense of champerty requires an exploration of the intent and purpose of the assignment contract, "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" for contract interpretation under New York law. *W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 566 N.E.2d 639, 642, 565 N.Y.S.2d 440 (N.Y. 1990)*. Moreover, under New York law, "the question of whether a written contract is ambiguous is a question of law for the court." *JA Apparel Corp. v. Abboud, 568 F.3d 390, 397 (2d Cir. 2009)*. And when "interpreting an unambiguous contract, the court is to consider its '[p]articular words' not in isolation 'but in the light of the obligation as a whole and the intention of the parties as manifested thereby,' but the court is not to consider any extrinsic evidence as to the parties' intentions." *Id.* (quoting *Kass v. Kass, 91 N.Y.2d 554, 696 N.E.2d 174, 180-81, 673 N.Y.S.2d 350 (N.Y. 1998)*). "However, where the contract language creates ambiguity, extrinsic evidence as to the parties' intent may properly be considered." *Id.* "Contract language is ambiguous if **[*82]** it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" *Nippon Yusen Kaisha v. FIL Lines USA Inc., 977 F. Supp. 2d 343, 349 (S.D.N.Y. 2013)* (quoting *Am. Home. Assur. Co. v. Hapag Lloyd Container Linie, GmbH, 446 F.3d 313, 316 (2d Cir. 2006)*). The Court has already determined that the Foreclosure Agreement is integral to Lateral's claims. But as opposed to champerty, no discovery (unless the contract is ambiguous) is required to interpret the contract—there are no "material disputed *issues of fact* regarding the relevance of the document" with respect to its coverage. *Faulkner, 463 F.3d at 134* (emphasis added).

The Foreclosure Agreement includes the assignment of statutory claims because "commercial tort claims," as defined in this context, does not specifically exclude torts rooted in statute.[15] As an agreement concerning security interests in foreclosure, the Foreclosure Agreement clearly contemplates that the term "commercial tort claim" or "commercial tort litigation claim" will resemble its usage as a defined term in Article 9 of the UCC as part of the "customs, practices, usages and terminology," *Nippon Yusen Kaisha, 977 F. Supp. 2d at 349*, of agreements governing secured interests. **[*83]** [16] *See, e.g., Breckenridge Edison Dev.,*

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[15] To the extent that the Capital Defendants assert that Lateral's UCC-1 financing statement "states that the commercial tort claims were limited to claims against 'certain officers and directors' of FTE," they are mistaken. Dkt. No. 22 at 5. The UCC-1 financing statement is not limited to claims *against* the directors and officers—it includes claims "*arising from* the actions of certain officers and directors of Debtor . . . taken in connection with alleged prior defaults of the Credit Agreement." Dkt. No. 23-6 at 2 (emphasis added). That language includes, within its scope, claims "against . . . various lenders." Dkt. No. 23-4 at ECF 6.

[16] For those reasons, the cases cited by the Defendants that torts are limited to common law claims are inapposite. The cases that Defendants cite refer to the Notice of Claim requirement to file a tort claim against municipalities in New York State. *See, e.g., Cirigliano v. Vill. of Afton, N.Y., 2012*

L.C. v. Sheraton Operating Corp., 2015 U.S. Dist. LEXIS 126857, 2015 WL 5459833, at *3 (S.D.N.Y. June 2, 2015) (describing references to "commercial tort claims" when discussing collateral); *see also* N.Y. U.C.C. § 9-109(d)(12) (providing that Article 9 does not apply to "an assignment of a claim arising in tort, other than a commercial tort claim"); *id.* cmt. 15 (providing that "[t]his Article now applies to assignments of "commercial tort claims" (defined in Section 9-102) as well as to security interests in tort claims that constitute proceeds of other collateral"); *see also* N.Y. U.C.C. §§ 9-108, 9-204, 9-702, 9-319-9-322 (all making reference, in some form, to "commercial tort claims"). Article 9 specifically defines a "commercial tort claim" as "a claim arising in tort with respect to which: (A) the claimant is an organization; or (B) the claimant is an individual and the claim: (i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual." N.Y. U.C.C. § 9-102. It is clear that the Plaintiffs are all "organizations" for the purposes of Article 9. The relevant question is thus whether the claims "aris[e] in tort." *Id.*

The Court does not find that the source of the tort—be it from statute or common law—bears on whether it is a claim that "aris[es] in **[*84]** tort" within the meaning of the Foreclosure Agreement. While torts are typically rooted in common law, such torts can also be codified in statute. All kinds of tort obligations are defined in statute.[17] Civil RICO—the primary claim that Plaintiffs assert here—is often described as one such "statutory tort." *See, e.g.,* Reynolds v. E. Dyer Dev. Co., 882 F.2d 1249, 1253 (7th Cir. 1989) ("Civil RICO is a statutory tort, so causation principles that generally apply in tort cases apply in civil RICO cases."); *see also* Kaufman v. BDO Seidman, 984 F.2d 182, 185 (6th Cir. 1993) (same); Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988) ("Civil RICO is of course a statutory tort remedy—simply one with particularly drastic remedies."), *abrogated on other grounds by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996); *Maersk, Inc. v. Neewra, Inc., 687 F. Supp. 2d 300, 340 (S.D.N.Y. 2009)*, *aff'd sub nom.* Maersk, Inc. v. Sahni, 450 F. App'x 3 (2d Cir. 2011) ("A civil RICO claim closely resembles an action sounding in tort that would have been recognized as legal in 18th-century England."); NSC Int'l Corp. v. Ryan, 531 F. Supp. 362, 363 (N.D. Ill. 1981) (stating that RICO "resembles an action for tortious interference with economic relations"). There is no indication that Article 9 of the UCC intended to exclude commercial tort claims if they were rooted in statute. That would disallow security interests in commercial tort claims that a legislature has chosen to codify—a conclusion that would make no sense.

Moreover, courts often consider "commercial tort claims" to include violations **[*85]** of statute. *See, e.g.,* Kenney v. Independent Order of Foresters, 744 F.3d 901, 907 (4th Cir. 2014) (explaining that West Virginia unfair trade practices act claim "sounds in tort" given type of relief available under statute and sought in complaint); In re JMF CAB, Inc., 614 B.R. 648, 651 (Bankr. D. Mass. 2020) ("[T]here are no allegations that JMF or any of the other plaintiffs in the Uber litigation contracted with Uber; rather, the claims are based on Uber's alleged violation of statutory, regulatory, and common law. Accordingly, the claims asserted in the Uber litigation are commercial tort claims."); In re Connolly Geaney Ablitt & Willard, P.C., 585 B.R. 644, 653 (Bankr. D. Mass. 2018) ("Count IV of the Plaintiff's Complaint is a commercial tort claim as the Plaintiff alleges tortious conduct in violation of Mass. Gen. Laws ch. 93A, §§ 2 and 11."); Ins. Co. of N. Am. v. Della Indus., Inc., 998 F. Supp. 159, 163 (D. Conn. 1998), *vacated on other grounds*, *229 F.3d 1135 (2d Cir. 1999)* (construing the term "*arising* out of tort" to indicate the language "must be construed to cast a broader penumbra than torts alone" to encompass an unfair competition statutory claim (emphasis in original)); *see also* In re Peaslee, 13 N.Y.3d 75, 913 N.E.2d 387, 390, 885 N.Y.S.2d 1 (N.Y. 2009) (stating that it is New York's policy that the "UCC 'be liberally construed and applied to promote its underlying purposes and policies'" (citation omitted)). The first and second causes of action—for RICO and RICO conspiracy—were thus assigned to Lateral in the Foreclosure Agreement.[18] It is undisputed that the third

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U.S. Dist. LEXIS 94615, 2012 WL 2752867, at *9 (N.D.N.Y. July 9, 2012). And even one of the cases cited in Cirigliano indicates that the Notice of Claim requirement can apply to tort duties arising from federal statute. *See* Hardy v. New York City Health & Hosps. Corp., 164 F.3d 789, 793 (2d Cir. 1999) (applying New York Notice of Claim requirement to the Emergency Medical Treatment and Active Labor Act). Similarly, Treanor v. Metro. Transp. Auth., 414 F. Supp. 2d 297 (S.D.N.Y. 2005), is inapposite because the Court there found that the discrimination claims at issue bear no similarity to traditional tort claims. Id. at 303.

[17] *See generally* Guido Calabresi, Common Law Courts in the Age of Statutes (1982); Mark A. Geistfeld, *Tort Law in the Age of Statues*, 99 Iowa L. Rev. 957 (2014).

[18] The Foreclosure Agreement also assigns the RICO

cause of action for fraud **[*86]** was assigned to Lateral.[19]

II. Contracts Considered

In their memorandum of law in support of their motion to dismiss, the Capital Defendants argue that the Court should dismiss Plaintiffs' claims that arise from "the first two [Green Capital] Agreements and all of the [Midnight Capital] Agreements based upon *res judicata* and a settlement agreement with release." Dkt. No. 22 at 19. They explain that, after FTE breached the Midnight Capital agreements, a judgment was entered against FTE in New York Supreme Court, Richmond County, Dkt. No. 23-7, leading to litigation, a settlement agreement (the "Settlement Agreement"), Dkt. No. 23-8, and a satisfaction of that judgment, Dkt. No. 23-9. The Capital Defendants contend that New York's transactional *res judicata* rule precludes these claims in light of the judgment entered in Richmond County and that, "[w]here a New York judgment has been entered that upholds a contract, *res judicata* explicitly bars subsequent claims seeking to hold that contract void for usury." Dkt. No. 22 at 20. They also argue that the Settlement Agreement, entered into on February 21, 2018, released Midnight Capital **[*87]** and affiliated persons and entities from claims arising from or related to the Midnight Capital agreements and the first two Green Capital agreements. *Id.* at 21.

Plaintiffs respond that the Settlement Agreement only applies to one transaction with Midnight Capital, dated January 19, 2018, and that, by its terms, the Settlement Agreement's release only applies to claims arising out of or relating to that January 19, 2018 transaction. Dkt. No. 31 at 44-46. Because the Amended Complaint does not allege violations of law in connection with this transaction, Plaintiffs argue, the Settlement Agreement's release does not cover the claims asserted in the Amended Complaint. *Id.*

In reply, the Capital Defendants call Plaintiffs' argument "nonsensical," explaining for the first time that the January 2018 Midnight Capital agreement superseded all prior agreements, including the December 15, 2017 Midnight Capital agreement, which had itself superseded the prior agreement. Dkt. No. 34 at 26. The Capital Defendants' position appears to be that, since the prior agreements were superseded by the agreement that was the subject of the release, any claims related to those superseded agreements are released **[*88]** as well. And as to the Green Capital agreements, the Capital Defendants read the Settlement Agreement's release language to include Green Capital, an affiliate of Midnight Capital, from claims relating any *agreements* that are related. Dkt. No. 34 at 27. In support of their argument, the Capital Defendants point out that Plaintiffs' RICO claims are premised upon the contention that the agreements are related. *Id.* The Capital Defendants also reiterate that

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conspiracy claim to Lateral. The Supreme Court has analogized common law civil conspiracy to RICO conspiracy as well. *See* Beck v. Prupis, 529 U.S. 494, 504, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000) ("We presume, therefore, that when Congress established in RICO a civil cause of action for a person "injured . . . by reason of" a "conspir[acy]," it meant to adopt these well-established common-law civil conspiracy principles"). Like RICO conspiracy, civil conspiracy is a claim recognized at New York common law as long as there is an underlying (tort) offense. *See, e.g.,* Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 905 N.Y.S.2d 585, 588 (1st Dep't 2010).

[19] Defendants also assert that usury claims are not assignable as a matter of law in New York. Dkt. No. 22 at 6. The argument overstates New York law and misunderstands the claim in the Amended Complaint. Under New York law, "[u]sury is a personal defense and may be asserted only by the borrower or those in privity with him." Edelman v. Cymberg, 261 A.D. 698, 27 N.Y.S.2d 151, 152 (3d Dep't 1941); *see also* Thorer & Hollander v. Fuchs, 241 A.D. 359, 272 N.Y.S. 350, 354 (1st Dep't 1934) ("A mere stranger cannot insist upon the invalidity of a usurious security, * * * but the defense of usury may be set up by any one who claims under the mortgagor, and in privity with him. . . ." (quoting Williams v. Tilt, 36 N.Y. 319, 325, 2 Transc. App. 133 (N.Y. 1867)). The Amended Complaint alleges facts that would establish that the original "borrowers" here are in privity with Lateral—FTE's obligations under the Credit Agreement were secured by an interest in substantially all of FTE's assets, *id.* ¶ 116; Lateral properly perfected its interests, *id.* ¶ 117., and following FTE's default, FTE agreed to surrender and turn over its interest in the collateral including, without limitation, allegedly the claims asserted herein, *id.* ¶ 118. More importantly, this case does not involve the assertion of usury as a defense, but the allegation of a violation of RICO as a claim, and RICO is not addressed to the mere collection of a loan that is usurious but to the operation of "the 'business of lending money' at a usurious rate," Fleetwood Servs., LLC, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *18. There is no dispute that RICO claims, unlike claims for usury, can be assigned. *See* Nastasi & Assocs., Inc. v. Bloomberg, L.P., 2020 U.S. Dist. LEXIS 42701, 2020 WL 1166055, at *2 (S.D.N.Y. Mar. 11, 2020), *vacated on other grounds*, 843 F. App'x 413 (2d Cir. 2021); Zap Cellular, Inc. v. Kurland, 2015 U.S. Dist. LEXIS 163314, 2015 WL 8207315, at *6 (E.D.N.Y. Dec. 6, 2015); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 213, 217 (E.D.N.Y. 1999).

the any dispute over the Midnight Capital agreements is barred by *res judicata* and argue that Plaintiffs do not dispute that *res judiciata* bars challenges to the Midnight Capital agreements. *Id.* at 26.

The Capital Defendants' argument based on the Settlement Agreement's release and on *res judicata* invokes affirmative defenses. They do not challenge the sufficiency of Plaintiffs' allegations but argue that those claims cannot be pursued based on release and preclusion. But, as noted above, "a defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion [only] if the defense appears on the face of the complaint." Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425 (2d Cir. 2008); *see also* Jones v. Bloomingdale's, 2018 U.S. Dist. LEXIS 38572, 2018 WL 1281819, at *3 (S.D.N.Y. Mar. 8, 2018) ("Affirmative defenses may be considered on a motion to dismiss 'only where the defense appears on the face **[*89]** of the pleading and the documents incorporated therein.'" (quoting *Levine v. Columbia Labs., Inc.*, 2004 WL 1392372, at *1 (S.D.N.Y. June 22, 2004))). "An affirmative defense of release may be raised under a Rule 12(b)(6) motion to dismiss provided that 'all relevant facts are shown by the court's own records.'" Nam, 581 F. Supp. 3d at 647 (quoting Patrowicz v. Transamerica HomeFirst, Inc., 359 F. Supp. 2d 140, 144 (D. Conn. 2005)). Similarly, "[t]he affirmative defense of *res judicata* may be the basis of a motion to dismiss a pleading when it is clear from the records properly before the Court that the doctrine applies." Lucky Brand Dungarees Inc., 2006 U.S. Dist. LEXIS 91998, 2006 WL 3771005, at *1 (S.D.N.Y. Dec. 20, 2006) (citing Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992)).

The Settlement Agreement upon whose release the Capital Defendants rely is neither attached to the Amended Complaint, nor it is incorporated by reference in it or integral to it. As to its possible incorporation by reference, "[t]he fundamental difficulty here [for the Capital Defendants] is that the release is not referred to in the [Amended Complaint]." *Levine v. Columbia Labs., Inc.*, 2004 WL 1392372, at *1 (S.D.N.Y. June 22, 2004). There is no mention in the Amended Complaint of the Settlement Agreement or the lawsuit that gave rise to the it. *See id.* ("Although the complaint contains a passing reference to the Separation and Consulting Agreement [that contains the subject release], it would be inappropriate to regard it as incorporating that document by reference."); Sahu, 548 F.3d at 67 (explaining that "limited references are insufficient to incorporate **[*90]** documents or exhibits into the complaint"). Nor does the Amended Complaint rely on the Settlement Agreement such that it can be said to be integral to the Amended Complaint. The Settlement Agreement does not impose obligations upon which Plaintiffs' claim rises or falls and is not "necessary" to the Plaintiffs' entitlement to relief—Plaintiffs are not, for example, alleging a breach of the Settlement Agreement in their claims. *See, e.g.,* Gallo v. Inter-Con Security Sys. Inc., 2021 U.S. Dist. LEXIS 166061, 2021 WL 391539, at *2 n.2 (S.D.N.Y. Sept. 1, 2021) (concluding thata settlement agreement was integral to the complaint where the plaintiff claimed that the defendant had not adhered to obligations under the settlement agreement and "relie[d] heavily" on the agreement); *see also* Goel, 820 F.3d at 559 ("In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." (quoting Global Network Commc'ns, 458 F.3d at 157)).

There is also no basis to conclude that the Settlement Agreement is a publicly filed document or document filed in other litigation for which judicial **[*91]** notice can be taken. *See* Wolson v. Reed Elsevier Inc., 2010 U.S. Dist. LEXIS 7533, 2010 WL 334919, at *1 (S.D.N.Y. Jan. 29, 2010) (Chin, J.) (taking judicial notice of settlement agreement filed in another action but concluding that the determination whether instant claims are barred by the settlement agreement "will depend on further proceedings in this case"). The Settlement Agreement itself states that "[t]his Settlement Agreement, its terms and information contained herein is confidential." Dkt. No. 23-8 § 14. There is no stamp that indicates it was filed on the docket in a prior action, much less that it was publicly filed. *See* Cowan, 149 F. Supp. 2d 67, 2001 WL 856606, at *1; *cf.* Williams v. N.Y.C. Housing Auth., 816 F. App'x 532, 534 (2d Cir. 2020) (summary order) (noting that "the district court accurately cited caselaw holding that it may consider public records that may be judicially noticed in ruling on motions made pursuant to Rule 12(b)(6)" and holding that "[t]he district court did not err in considering [plaintiff's] Article 78 petition and state court decision because they were public records, and thus appropriate for judicial notice"); Byrd v. City of New York, 2005 U.S. App. LEXIS 10820, 2005 WL 1349876, at *1 (2d Cir. 2005) (summary order) (stating that, while stipulation of settlement that was "so ordered by the court" was permissibly considered as part of a Rule 12(c) motion to

dismiss, it was "less clear whether the Release, which does not appear to have been filed with the court, would have **[*92]** been subject to judicial notice").[20] Because the Settlement Agreement does not satisfy any of the categories of documents that the Court is permitted to consider on a motion to dismiss, the Capital Defendants' arguments based on release must be denied.[21]

The Capital Defendants' *res judicata* argument also is not cognizable on this Rule 12(b)(6) motion to dismiss. Even if the Court were to take judicial notice of the filings submitted by the Capital Defendants, the relevant filings from the Richmond County litigation state only that (1) FTE confessed judgment to Midnight Capital in the amount of $1,214,092.36 and such judgment by confession was filed and docketed with the Richmond County Clerk on February 1, 2018, Dkt. No. 23-7; and (2) that judgment was wholly paid and fully satisfied on or before February 23, 2018, Dkt. No. 23-9. "Under both New York law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that [a] final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." Associated Fin. Corp. v. Kleckner, 480 F. App'x 89, 90 (2d Cir. 2012) (summary order) (quoting Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 195 (2d Cir. 2010)). "[U]nder New York's transactional analysis approach to res judicata, 'once a claim is brought **[*93]** to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" In re Hunter, 4 N.Y.3d 260, 827 N.E.2d 269, 274, 794 N.Y.S.2d 286 (N.Y. 2005) (quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 1159, 445 N.Y.S.2d 687 (N.Y. 1981)). The documents submitted by Defendants provide no basis from which the Court could determine conclusively that the claims brought in this action "aris[e] out of the same transaction or series of transactions." In re Hunter, 827 N.E.2d at 274.

Thus, at this juncture, the Capital Defendants cannot bar consideration of the two Midnight Capital agreements at issue in this dispute or the first two Green Capital agreements by invoking the affirmative defenses of release and *res judicata*.

III. RICO Claims

RICO Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). It further makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *Id.* § 1962(d).

"Section 1964(c) of RICO . . . provides a private right of action to any person **[*94]** injured in its business or property by reason of a violation of the activities prohibited by section 1962." Kim v. Kimm, 884 F.3d 98, 103 (2d Cir. 2018); *see also* 18 U.S.C. § 1964(c). As the statutory language suggests, "RICO offenses may be predicated on a single instance of collection of unlawful debt, as well as a pattern of racketeering activity." United States v. Grote, 961 F.3d 105, 119 (2d Cir. 2020). Plaintiffs allege that Defendants violated RICO in both ways. *See* Dkt. No. 20 ¶¶ 216-219, 260. They further allege that each Defendant "agreed to facilitate, conduct, and participate in the conduct, management, or operation of the Enterprise's affairs in order to collect upon unlawful debts," *id.* ¶ 280, and in order to commit wire fraud through a pattern of racketeering activity, *id.* ¶ 281, thereby violating 18 U.S.C. § 1962(d).

All Defendants seek dismissal of Plaintiffs' RICO and RICO conspiracy claims. They advance a variety of arguments. The Capital Defendants and Davis argue that at least some of the facts underlying Plaintiffs' RICO claims are time barred. The Capital Defendants also argue generally that Plaintiffs have not pleaded their RICO claims with sufficient facts—instead making

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[20] Even if the Settlement Agreement had been filed with another court, it is not at all clear that the Court would be able to consider it for the purposes offered by the Capital Defendants. As the Second Circuit has repeatedly recognized, "[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Global Network Commc'ns., 458 F.3d at 157(quoting Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998)).

[21] Of course, this conclusion is without prejudice to the Capital Defendants renewing the argument at a later stage of the proceedings better suited to the "fact-sensitive inquiry" of whether a release is valid. Malaney v. Elal Israel Arilines, 331 F. Appx 772, 774 (2d Cir. 2009) (summary order) ("[T]he validity of a release is a peculiarly fact-sensitive inquiry." (internal quotation marks and citation omitted)).

conclusory allegations and allegations "upon information and belief"—to make out RICO claims, an argument that is considered in connection **[*95]** with each of the specific arguments regarding RICO. The Capital Defendants and Glass contend that Plaintiffs have not adequately pleaded a RICO enterprise that consists of entities and individuals distinct from one another. They further assert that a RICO claim cannot be sustained on the theory that the Defendants participated in the collection of an unlawful debt because the agreements at issue here were not loans and therefore could not violate the usury laws of New York. Glass argues there was no wrongdoing by him, and Davis argues he did not participate in the conduct that is objectionable.

A. Timeliness of RICO Claims

The Capital Defendants argue that, because RICO claims have a four-year statute of limitations, Lateral's RICO claims from before November 11, 2017—four years before the initial complaint was filed by Lateral "as assignee" of FTE—and FTE's RICO claims from before February 17, 2018—four years before the Amended Complaint was filed by all Plaintiffs—are time barred. Dkt. No. 22 at 19. Davis argues that the claims related to the purchase agreements that were entered into more than four years before the initial complaint was filed on November 11, 2021 are time barred. **[*96]** Dkt. No. 27 at 11-12.

Plaintiffs respond that the claims are not time-barred because of the relation-back rule and the discovery rule. Dkt. No. 31 at 32-35. With respect to the relation-back rule, Plaintiffs argue that the claims of the Plaintiffs other than Lateral in the Amended Complaint relate back to the initial complaint filed by Lateral as assignee and that the claims of all Plaintiffs should relate back to an arbitration that was previously filed and which case was deemed related to this one. As to the discovery rule, Plaintiffs argue that FTE was unaware of the RICO injury through at least late 2018 "and mistakenly thought it was paying on a valid contract." *Id.* at 35. The Capital Defendants respond that: (1) Plaintiffs knew about the basis for their injury at the time they entered into the agreements; (2) statutes of limitations are not tolled by the commencement and termination of an action, such as the arbitration, if the action is voluntarily dismissed and the arbitration was not consolidated with the case and just marked as related; and (3) there has not been a substitution of parties under *Federal Rule of Civil Procedure 17(a)*, just a joinder, and thus the assignor Plaintiffs cannot take advantage of the **[*97]** date of Lateral's earlier-filed action. Dkt. No. 34 at 24-25.

Defendants' arguments are premature. For the most part, they are directed to a litigation in which the assignors, including FTE, are asserting claims and not to one in which Lateral is asserting claims and seeking damages. But the Court has concluded that the motion to dismiss Lateral's claim must be denied and, as a result, the Amended Complaint cannot be dismissed because the claims of the other Plaintiffs are untimely—an issue that may well be moot if Lateral's claim continues to survive and that the Court therefore declines to consider at this stage. The RICO statute of limitations is satisfied so long as an overt act that is part of the violation and injures the plaintiff occurs within the four years prior to the filing of a complaint asserting the RICO claim. *See* *Stolow v. Greg Manning Auctions Inc., 80 F. App'x 722, 725-26 (2d Cir. 2003)* (summary order) (citing *Klehr v. A.O. Smith Corp., 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*).

The initial complaint was filed by Lateral on November 11, 2021. A collection of unlawful debt (as well as a RICO predicate act) is alleged to have occurred after November 11, 2017. Accordingly, the motion to dismiss the Amended Complaint based on the statute of limitations is denied.[22]

B. Merits of RICO

"To establish a RICO claim, a **[*98]** plaintiff must show: (1) a violation of the RICO statute, *18 U.S.C. § 1962*; (2) an injury to business or property; and (3) that the injury was caused by the violation of *Section 1962*." *Cruz v. FX DirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013)* (quoting *De Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001)*). To plead a violation of *Section 1962*, a complaint must allege that the defendant engaged in (1) conduct (2) of an enterprise (3) through either: (a) a pattern of racketeering activity—requiring a pleading both of pattern and racketeering activity; or (b) collection

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[22] Because Lateral is still properly in this suit, the Court need not consider whether the claims should be measured from the date that other plaintiffs entered the suit through the Amended Complaint. And because there is one of each relevant form of agreement that was entered into after this date, the Court need not consider at this juncture whether an earlier accrual date for statute of limitations purposes would be appropriate either under the discovery rule or by relating back the filing of the initial complaint in this action to the commencement of the arbitration-related suit.

of an unlawful debt. *See id.;* Lateral Recovery LLC v. Queen Funding, LLC, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913, at *2 (S.D.N.Y. July 20, 2022); 18 U.S.C. § 1962(c). Because RICO "contemplate[s] that a *person* violates the statute by conducting an enterprise through a pattern of criminality," Cruz, 720 F.3d at 120, a plaintiff must also plead "the existence of two distinct entities: (a) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name," U1it4less, Inc. v. Fedex Corp., 871 F.3d 199, 205 (2d Cir. 2017) (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)).

The Court first considers whether Plaintiffs have adequately pleaded the collection of an unlawful debt. Concluding that Plaintiffs have pleaded the collection of an unlawful debt, the Court then considers whether the Amended Complaint alleges that Defendants engaged in "conduct" of an "enterprise" through this collection and that there are "two distinct entities." Cruz, 720 F.3d at 121 (internal quotation marks omitted). Because the Court **[*99]** concludes that Plaintiffs have pleaded a predicate RICO violation through a collection of an unlawful debt, it is unnecessary for the Court to examine whether Plaintiffs have pleaded a pattern of racketeering activity.

1. Predicate RICO Violation — Collection of Unlawful Debt

As explained above, Section 1962(c) of RICO makes it unlawful for a person "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through . . . collection of unlawful debt." 18 U.S.C. § 1962(c). An "unlawful debt" for the purposes of RICO means, in relevant part:

> a debt (A) . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Id. § 1961(6).

Although violation of the unlawful-debt-collection provision of RICO "may be predicated on a single instance of collection of unlawful debt," Grote, 961 F.3d at 119, RICO "does not reach the **[*100]** collection of a loan that is made occasionally and not as part of the 'business of lending money' at a usurious rate," *See* Fleetwood Services, LLC v. Ram Capital Funding, LLC, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *18 (S.D.N.Y. June 6, 2022). "That is, '[t]he first part of § 1961(6) requires that "unlawful debt" either (1) be incurred or contracted in some form of illegal gambling activity or (2) be enforceable by virtue of state or federal usury laws. The second part—subsection (B)—further narrows the definition, requiring, *inter alia*, that the "unlawful debt" be incurred in connection with an illegal "business."'" 2022 U.S. Dist. LEXIS 100837, [WL] at *18 (quoting United States v. Persico, 2011 U.S. Dist. LEXIS 63034, 2011 WL 2433728, at *2 (E.D.N.Y. June 14, 2011); *see also* Durante Bros. & Sons v. Flushing Nat'l Bank, 755 F.2d 239, 250 (2d Cir. 1985).

"[T]o prove that what was collected was an unlawful debt within the meaning of RICO, [a plaintiff] would have to show that [1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with 'the business of lending money . . . at a [usurious] rate,' and [3] the usurious rate was at least twice the enforceable rate." Durante Bros., 755 F.2d at 248; *see also* Dae Hyuk Kwon v. Santander Consumer USA, 742 F. App'x 537, 539 (2d Cir. 2018) (summary order). "Under New York law, a loan is criminally usurious if it has an annual interest rate exceeding 25%, N.Y. Pen. L. § 190.40, and such a usurious loan is void and unenforceable, *see* Adar Bays, LLC, 179 N.E.3d at 616." Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *20.

Defendants dispute only that the agreements are loans that could be subject to usury laws. Plaintiffs have **[*101]** alleged that, on their faces, the relevant agreements have interest rates that are more than twice the enforceable rate under New York law; Defendants do not dispute that this would be true if the agreements are loans. Plaintiffs have also alleged facts from which it can be inferred that Defendants' transactions are not merely episodic but reflect that Defendants are in the business of lending money at usurious rates, and Defendants do not dispute that entering into the types of transactions at issue here is a regular part of their business. Thus, the dispositive issue for the purposes of Plaintiffs' RICO claims is whether a collected debt was a loan subject to usury laws.

a. Legal Principles

The Capital Defendants and Glass contend that the agreements cannot form the basis of collection of unlawful debt RICO violation because the agreements are not loans but rather are sales of future receivables. If they are not loans, Defendants argue, the agreements cannot be usurious. That is because under New York law, "[i]f the transaction is not a loan, 'there can be no usury, however unconscionable the contract may be.'" *Seidel v. 18 E. 17th Street Owners, Inc., 79 N.Y.2d 735, 598 N.E.2d 7, 11-12, 586 N.Y.S.2d 240 (N.Y. 1992)* (quoting *Orvis v. Curtiss, 157 N.Y. 657, 52 N.E. 690, 691 (N.Y. 1899)*).

The Court has recently considered the principles applicable **[*102]** to whether a funding agreement constitutes a loan or is a sale of future receivables. *See Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207*. The analysis "usually is guided by examining three factors to 'determine whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy.'" *2022 U.S. Dist. LEXIS 100837, [WL] , at *9* (quoting *LG Funding, LLC v. United Senior Props. of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 (2d Dep't 2020)*). "The three factors provide only a guide to [the] analysis[;] [t]hey do not dictate the conclusion," and they operate in tandem. *Id.* (citing cases); *see also Haymount Urgent Care PC v. GoFund Advance, F. Supp. 3d , 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7 (S.D.N.Y. June 27, 2022)* (explaining that "while these three factors may be relevant to the analysis, they are far from dispositive," and citing with approval *Fleetwood*'s language that "[t]he three factors provide only a guide to [the] analysis. They do not dictate the conclusion."). The Court applies familiar principles of contract interpretation. It reads the agreement as a whole, and "substance—not form—controls." *Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 157 N.Y.S.3d 800, 179 N.E.3d 612, 621-22 (N.Y. 2021)*. It thus is not sufficient that that agreement is stated to have a reconciliation provision, an indefinite term, and be non-recourse if those provisions are illusory. *See Queen Funding, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913, at *5-6* (holding that complaint pled that an agreement was a loan because it **[*103]** sufficiently and plausibly alleged that a reconciliation provision was a "sham" and that, while the agreement had a "seemingly indefinite term," "a de facto fixed term plausibly exists"); *Haymount, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7* (holding that an agreement was a loan notwithstanding a reconciliation provision because "the actual structure of the provision makes it often impossible to use and leaves the lender with substantial discretion to prevent adjustment"); *Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *13* (holding that an agreement was a loan where, while it nominally had a reconciliation provision, that provision was largely illusory); *Davis v. Richmond Capital Grp., LLC, 194 A.D.3d 516, 150 N.Y.S.3d 2, 4 (1st Dep't 2021)* (holding that a complaint sufficiently alleged that agreements were loans subject to usury laws based on, among other things, the discretionary nature of the reconciliation provisions and provisions authorizing defendants to collect on the personal guaranty in the event of plaintiff business's inability to pay or bankruptcy). The Court judges the agreement "by its real character, to determine whether it constitutes a loan." *Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *9* (alterations adopted) (internal quotation marks omitted) (quoting *LG Funding, LLC, 122 N.Y.S.3d at 313*). Ultimately, the three guides reduce to one overarching principle. "The hallmark of a loan is that the lender 'is absolutely entitled to repayment **[*104]** under all circumstances,' or put otherwise, the 'principal sum is repayable absolutely.'" *2022 U.S. Dist. LEXIS 100837, [WL] at *9* (internal quotation marks omitted) (quoting *LG Funding, LLC, 122 N.Y.S.3d at 312*). The root of the analysis involves the question of "whether the transaction involves a transfer of risk." *2022 U.S. Dist. LEXIS 100837, [WL]at *10*; *see Haymount, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7* (stating that "the *LG Funding* decision's holding is ultimately about whether the transaction represented a real transfer of risk"); *Queen Funding, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913, at *4* ("[W] hen determining whether a transaction was a true sale of receivables or a loan, '[t]he root of [the analysis] is the transfer of risk.'" (quoting *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)*)). As the New York Court of Appeals recognized just last year, "parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders, not investors." *Adar Bays, LLC, 179 N.E.3d at 622*; *see also OriginClear Inc. v. GTR Source, LLC, 2021 U.S. Dist. LEXIS 239013, 2021 WL 5907878, at *5 (W.D.N.Y. Dec. 14, 2021)* ("[T]he primary indicator of a loan is the debtor's absolute obligation to repay the principal sum without risk to the creditor of the debtor's business failure.").

The Court rejects the argument of the Capital Defendants that this Court in *Fleetwood*—and presumably the courts in *Haymount* and *Queen*

Funding—misconstrued New York law. Dkt. No. 39 at 1-2. The argument rests on the premise that "the Court held that a buyer of accounts receivable must prove that a transaction is a 'true sale' under **[*105]** Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)." *Id.* at 2. That argument is mistaken. Rather than holding that a merchant "must prove that a transaction is a 'true sale' under Endico Potatoes," id. at 2, the Court explained that "the essential question under New York law is whether the contracting party 'is absolutely entitled to repayment under all circumstances,'" Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *9 (quoting LG Funding, 122 N.Y.S.3d at 312). The Court noted that the three factors set forth in LG Funding usually guides the analysis but that the factors set forth under Endico Potatoes may also help the Court conclude whether the debt was repayable absolutely or whether the purported purchaser actually took on some risk that the merchant would be unable to pay. 2022 U.S. Dist. LEXIS 100837, [WL] at *9-10. The Court did not base its conclusion solely on the Endico Potatoes factors; it expressly stated that under either sets of factors, the agreement was a loan: "*Whether the Court looks to the* LG Funding *or* Endico Potatoes *factors, the result here is the same*." 2022 U.S. Dist. LEXIS 100837, [WL] at *10 (emphasis added).[23]

Indeed, just last month, the analysis employed in *Fleetwood, Haymount*, and Queen Funding was endorsed by one New York court, which reconsidered its prior decision denying a motion to vacate a default judgment on the grounds that an agreement giving rise to **[*106]** judgment the was really a usurious loan. *See Hi Bar Capital LLC v. Parkway Dental Servs., LLC*, 2022 WL 3757589 (Sup. Ct. Kings Cnty. Aug. 25, 2022). On reargument, the court granted a motion to vacate the default judgment, explaining that "the specific provisions challenged"—including a reconciliation provision that defendants asserted was "functionally impossible to implement"—"do not by themselves raise any issues concerning the agreement," but that "there are other arguments presented which raise significant defenses whether the agreement in this case is really a high-interest loan." *Id.* at *3. The court continued: "Recently, Federal courts have engaged in a more thorough and exacting scrutiny of merchant cash advance agreements, looking at the agreements in a holistic and comprehensive manner and the conclusions they have reached are compelling." *Id.* The court cited heavily from Fleetwood and compared provisions in agreement at issue there to the provisions this Court found relevant in Fleetwood, including provisions that a default occurs upon only a limited number of instances of insufficient funds and granting a security interest in all assets. *Id.* at *3-4. It then concluded: "[i]n this case, there are surely questions raised whether the agreement comports with the requirements necessary to be considered a genuine **[*107]** cash advance agreement." *Id.*[24]

b. Application

The Court considers each form of the agreements to determine whether the agreement is a loan. Considering

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[23] Nor do the New York cases appended in the Capital Defendants' supplemental briefing letter support their proposition that Fleetwood is contrary to New York law. The first, National Risk Experts, LLC v. GHI Funding, LLC, Index No.: 616193/2021, 2022 N.Y. Misc. LEXIS 4478, Nassau Cnty. (Aug. 12, 2022), simply states that court's view that the particular agreement at issue there was a loan and that "the binding precedents [of New York] indicate" that the case will not be kept alive by "a Southern District case." Dkt. No. 39-1 at 6. It says nothing about the mode of analysis employed in Fleetwood. The second, Spin Capital v. Texas Medical Center, Index No.:130439-2021, 2022 N.Y. Misc. LEXIS 4555, Monroe Cnty. (Aug. 29, 2022), says nothing more than that the defendants' "post-reply submissions," which the Court assumes for present purposes to include Fleetwood "do not convince this Court to abandon" a case where an attempt to set aside a confession of judgment based upon the argument that a merchant cash advance agreement was really a usurious loan was rejected. Dkt. No. 39-2 at 8-9. It too does not say anything about Fleetwood's analysis.

[24] In his dissenting opinion in *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, Judge Wilson expressed similar views:

> Although the GTR and CMS agreements are described as "factoring" agreements, they do not bear several of the hallmarks of traditional factoring agreements, 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.

37 N.Y.3d 591, 163 N.Y.S.3d 467, 183 N.E.3d 1185, 1196 (N.Y. 2021) (Wilson, J. dissenting).

each relevant agreement "in its totality" and "judging [it] by its real character," *LG Funding, 122 N.Y.S.3d at 312* (internal quotation marks omitted), the Court concludes that the Form Two agreements are loans on their face, the Form Three agreements are not loans, and it is ambiguous whether the Form One agreements are loans and thus the issue **[*108]** cannot be decided as a matter of law and parol evidence must be taken. Accordingly, Defendants' motion based on the argument that the Amended Complaint fails to allege the unlawful collection of debt is denied.

i. Form Two Agreement

There are three "Form Two" agreements alleged, but only one that was entered into after November 2017: the December 15, 2017 agreement with Midnight Capital, Dkt. No. 23-13. This agreement is a loan. And as a loan, the 300% annual interest rate on its face renders it usurious.

The Form Two agreements share certain characteristics with the other forms of agreements. In both Form One and Form Two agreements, FTE, not the account debtors, is understood to be responsible "for ensuring the specified percentage"—which is initially set as fixed daily amount—is "debited by [the funder] remains in the account." *See, e.g.*, Dkt. No. 23-13 at 1; Dkt. No. 23-20 at 1; *see also* *Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *10*. In both, the funder's remedies for a failure by FTE in its obligation under the agreements include the enforcement of a Personal Guaranty of Performance against guarantors, a security interest in FTE's assets, and the filing of a confession of judgment with the court. *See, e.g.*, Dkt. No. 23-13 § **[*109]** 1.10; Dkt. No. 23-20 § 1.10 ("Protections against Default"). Also, in all forms of agreements, the funders themselves "ha[ve] no obligation, or (ordinarily no) right, to collect on the 'receivables.' That obligation rests entirely on [FTE] . . . [The relevant funder] has no responsibility to contact [FTE's] customers; indeed, it is given the right to collect directly from them only in the event of a default" or violation of a specified subsection of the agreement. *Fleetwood, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *11*; *see, e.g.*, Dkt. No. 23-13 § 1.9 (granting the funder the power of attorney to settle obligations due from merchant "in case of a violation by Merchant of Section 1.12 or on the occurrence of an Event of Default"); Dkt. No. 23-20 § 1.9 (granting the funder the power of attorney to settle obligations due from merchant "in the case of a violation by Merchant of Section 1.10 or the occurrence of an Event of Default"); Dkt. No. 23-18 § 32 (granting the funder power of attorney to, "upon occurrence of an Event of Default to perform any and all obligations of [merchant] under this Agreement").

Those features of the agreements are not alone dispositive of their characterizations as a loan or a sale of receivables. A legitimate agreement **[*110]** for the sale of receivables can, and in many cases will, place the obligation to collect the receivables on the merchant in the first place and provide remedies such as those set forth in the agreements if the merchant fails in its obligations.

The critical features of the Form Two agreements, which dictate its characterization, are those that relate to the operation of the reconciliation provision, the de facto term of the agreement, and the recourse should the merchant declare bankruptcy. In the case of the Form Two agreements, the effect of the agreements is that if either the merchant terminates or interrupts its business or the merchant fails to make its fixed daily payments more than twice, the obligation to pay the full unpaid Purchased Amount accelerates and the funder is made whole for that amount. And if the merchant declares bankruptcy, it is still bound by its obligations under the agreement, and the guarantor's obligations become due. The effect is that the agreement has a "de facto fixed term," *Queen Funding, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913, at *6*, the lender is absolutely entitled to repayment under all circumstances, and the only risk that the lender takes on is the credit risk of the borrower and the guarantor. There **[*111]** is no transfer of risk.

As in the other agreements, the Form Two agreements define the "Specified Percentage" as a fixed amount—of $15,999 per business day in the December 15th agreement—and define it as the obligation of the merchant (FTE) for ensuring that such amount remains in the designated account so as to pay the funder on a daily basis. The Form Two agreement, however, provides both that the merchant "understands that it is responsible for ensuring that the specified percentage to be debited by [the funder] remains in the account," Dkt. No. 23-13 at 1—language that, as explained in connection with the Form One agreement, may be read to impose a covenant that there shall never be insufficient funds—and also that a default occurs after there are insufficient funds in the merchant's bank account for a withdrawal just three times. *Id.* at 8 ("**D. NSF Fee: $35.00 each occurrence** (up to two occurrences before a default is declared)"). And upon a

violation of "any term or covenant in" that agreement or a default "under any of the terms, covenants and conditions of any other agreement with [the funder]," the "Specified Percentage" becomes 100% of the Purchased Amount and an "Event of **[*112]** Default" takes place. The funder may exercise "all rights, powers and remedies of [the funder] in connection with" the agreement. *Id.* §§ 3.1(a), (j); 3.2. In particular, the "full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement [become]. . . due and payable in full immediately." *Id.* § 1.10. In addition, the funder may: enforce "the provisions of the Personal Guarantee of Performance against the Guarantor"; enforce the funder's "security interest in the Collateral identified in the Security Agreement herein"; and enter "[a] confession of judgment [in favor of the funder in the amount of the Purchase Amount] as a judgment with the Clerk of the Court and execute theron." *Id.* Thus, in the event that for any three business days the merchant fails to make a payment owed—regardless of the receivables it receives—the funder can accelerate the full Purchase Amount and collect it not from the account debtors but from the merchant itself. A merchant cannot avoid a default because they do not have sufficient funds to pay by temporarily or permanently shutting down its business. Both instances constitute an Event of Default under the agreement. **[*113]** *See id.* §§ 3.1 (naming as "Events of Default" interrupting, suspending, dissolving, or terminating the business); *See id.* §§ 1.10(d) (allowing "Protections against Default," including the full uncollected Purchased Amount becoming automatically due and payable, to be invoked if the merchant interrupts the operation of the business without the express written consent of the funder *and* the written agreement of a purchaser or transferee of the assumption of merchant's obligations). And if the merchant declares bankruptcy, the funder still does not take on any risk; the guarantors' obligations, which includes a guarantee of FTE's "performance of all of the representations, warranties, [and] covenants made by Merchant in this Agreement and the Merchant Agreement," are due "at the time Merchant admits its inability to pay its debts, or makes a general assignment for the benefits of creditors, *or any proceeding shall be instituted by or against the Merchant seeking to adjudicate it bankrupt* or insolvent, or seeking reorganization, arrangement, adjustment, or composition of it or its debts." *Id.* at 6 (emphasis added).

The combination of a default after just three missed payments and the inability **[*114]** of the merchant to relieve itself from its obligations by temporarily shutting down its business make the reconciliation provision illusory. In any event, the reconciliation provision is wholly discretionary; it provides: "At the Merchant's option, within five (5) business days following the end of a calendar month, the Merchant may request a reconciliation to take place, whereby [the funder] *may* ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage." *Id.* at 10 (emphasis added). If the "may" language were not enough to suggest discretion, the addendum where the provision appears goes on to state: "The Merchant specifically acknowledges that . . . the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and that [the funder] is under no obligation to provide same." *Id.* The plain import of this language is not only that the revision of the "specified percentage" to a fixed daily sum per day is a courtesy, but also that the reconciliation itself, which the funder "may" provide, is a courtesy and is not obligatory.[25] The funder can ignore a request **[*115]** for reconciliation if it so chooses. The discretionary nature of the reconciliation provision is reinforced by the language earlier in the agreement that the funder "may, upon Merchant's request, adjust the amount of any payment due under this Agreement at [the funder's] sole discretion and as it deems appropriate"—language that appears in Form One agreements but takes on added significance in the absence of *any* mandatory language with respect to the reconciliation provision. *See* *LG Funding, 122 N.Y.S.3d at 312* (reciting same language and referring to it as a "reconciliation provision"). But even if the reconciliation provision were not purely hortatory, it would be illusory. The reconciliation provision is effective when the merchant can continue in business. It permits the funder and the merchant after-the-fact to adjust the payments due if the merchant has paid more than the generation and collection of receivables would support. In the

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[25] The Court is aware that a New York court has read a substantially similar provision differently. *See* *Merchant Funding Servs. LLC v. Micromanos Corp., 2017 N.Y. Misc. LEXIS 2451, at *7 (Sup. Ct. Orange Cnty. May 4, 2017)* ("Contrary to Defendants' assertion, the gist of paragraph "d" is that the institution of the fixed Daily Payment plus month-end reconciliation mechanism as a substitute for Micromanos' daily payment of 15% of its actual receipts was a non-obligatory courtesy"). With all due respect to the *Micromanos* court, the Court finds this reading difficult to reconcile with the discretionary language in the reconciliation provision itself and declines to adhere to the same reading.

situation where the merchant is unable to continue to generate and collect receivables—where it cannot generate the funds to put in the account—the reconciliation provision is meaningless. The circumstances permitting the funder to call an Event of Default and to require the merchant **[*116]** to pay 100% of the uncollected Purchased Amount will occur long before a reconciliation could take place.

This understanding of the reconciliation provision—that it is illusory in practice—is further informed by Plaintiffs' allegation "[o]n information and belief," that the Enterprise "does not have a reconciliation department, does not perform reconciliations, and has never refunded a merchant money as required under their sham reconciliation provisions." Dkt. No. 20 ¶ 94. The Amended Complaint provides a basis for that belief. The New Jersey Attorney General alleged, after an investigation taken into the matter and based on a review of business records and interviews with merchants, that Yellowstone—the company with which the Defendants are affiliated—ignored reconciliation requests in multiple situations and induced merchants to refinance rather than engage in reconciliation. *Id.* ¶¶ 86-93. This alleged fact does not go just to whether the funder satisfied its contractual obligations under the agreements; it is also relevant evidence with respect to the funder's contemporaneous understandings of its contractual obligations. *See* *Blum v. Spaha Cap. Mgmt. 44 F. Supp. 3d 482, 491 (S.D.N.Y. 2014)* ("Once an ambiguity in the agreement is found, a **[*117]** court may consider evidence such as 'exchanges between the contracting parties during the course of negotiations, as well as post-execution conduct of the parties in performing the contract, admissions by the parties and—in appropriate circumstances—industry usage or practice.'" (quoting *Fitzpatrick v. Am. Int'l Grp., Inc., 2013 U.S. Dist. LEXIS 143541, 2013 WL 5427883, at *3 (S.D.N.Y. Sept. 27, 2013)*); *see also* *Davis, 150 N.Y.S. 3d at 4* (explaining that allegations that the funders refused to permit reconciliation counseled in favor of a finding that a transaction was a loan). It thus further supports the claim that the funder always understood the reconciliation provision to be illusory—it would never be invoked because it could never be invoked. And without a mandatory reconciliation provision or a provision that could require the funder to convert the fixed daily sum into a different amount, the term of the agreement is fixed to the number of days that it would take for the fixed daily sum to pay off the Purchased Amount. As in *Queen Funding*, the Form Two agreements thus have a "de facto fixed term." In the case of the December 15, 2017 agreement with Midnight Capital, that fixed term is just over nine weeks; it would take approximately 47 business days for FTE to pay off the Purchased Amount of $749,500 by making fixed payments **[*118]** of $15,999 per day. Aside from the title, the agreement is indistinguishable from a loan.

The effect of these features, when considered as a whole, is to eliminate any risk on the part of the funder and to give it the right to repayment under all circumstances. Although the agreement is nominally one for the sale of receivables, that is a matter of label or form only; the substance is a loan. The merchant has to pay a fixed amount on a daily basis. If it fails to do so just three times, a default is declared and the funder suddenly has access to all rights and remedies provided in the agreement, including filing a confession of judgment for the full Purchased Amount, enforcing security interests it had perfected in all of FTE's assets, and going after the guarantors for the amount it is owed. The agreement nominally has a reconciliation provision pursuant to which the fixed amount could be changed and adjusted based on the receivables the merchant receives, but that provision is purely illusory. It can be invoked only at the discretion of the funder and, even then, because it can be invoked only five business days after the end of the calendar month, the provision may well become meaningless. **[*119]** In the event that the receivables that the funder ostensibly is purchasing are insufficient to satisfy the merchant's obligations, the funder would have long since accelerated the entire amount due from the merchant itself. As in *LG Funding*, the funder does "not assume the risk that [the merchant] would have less-than-expected or no revenues." *LG Funding, 122 N.Y.S.3d at 313*. Because the agreement as pleaded is a loan and the interest rate on the face of the agreement is alleged to be more than twice that enforceable under New York law, Plaintiffs have adequately alleged the collection of an unlawful debt.

ii. Form Three Agreements

The Form Three agreements are those entered into on November 27, 2018 with Green Capital, Dkt. No. 23-18, and November 28, 2018 with Capital Merchant, Dkt. No. 23-21.

The Form Three agreements, by contrast, are agreements for the purchase of receivables when viewed in their totality. The funder agrees to purchase a specified amount of receivables in exchange for a purchase amount to be satisfied by the debit from an account to which the funder has access of a fixed initial

daily installment that, as in the other agreements, is represented to be "a good faith approximation of the Specified Percentage **[*120]** of Seller's Daily Future Receipts." Dkt. No. 23-18 § 1(g). As with the other agreements, the Seller (or merchant) generally is obligated to make the fixed payments, and the failure to do so on a timely basis may give rise to an "Event of Default," triggering the Seller's obligation to immediately deliver to the funder the entire unpaid portion of the Purchased Amount and the funder's right to avail itself of all of its legal rights or remedies. *See id.* § 27. Such rights and remedies include enforcing its rights as a secured creditor, filing an affidavit of confession of judgment, or enforcing the professions of a personal guarantee. *Id.* § 30. And, as with the other agreements, the merchant generally is required to continue its business, *id.* § 21(*l*), its failure to do so again constituting an Event of Default, *id.* § 27(a). Those provisions protect the funder in getting access to the receivables and prevent the merchant from defeating the funder's rights, and its interests in the receivables, by the expedience of closing its business or selling, disposing, transferring, or otherwise conveying its business and assets, *id.* § 21(*l*).

A reconciliation and an adjustment provision help ensure that, on a retrospective basis, **[*121]** the merchant has not paid an amount that is disproportionate to the receivables that the funder has actually acquired, and going forward, where the merchant has experienced "a steady decrease in its Daily Receipts," the merchant has the right to request a modification of the amount of the fixed daily payment. *Id.* §§ 10-13.

Those provisions, read in isolation, share some of the same characteristics that render similar provisions problematic in the context of the other agreements. While reconciliation requires supporting documentation—the composition of which is not left to the discretion of the funder—and works in tandem with an adjustment provision that can lead to a revised daily payment upon a successful reconciliation, the reconciliation and associated adjustment may only be requested at limited times. The reconciliation request must be made after the close of the reconciliation month—during the first five business days of the month, *id.* §§ 10-11—and the adjustment requests must be made within five business days after the date of certain financial statements and may only take place following a reconciliation showing a 15% dip in receivables relative to what the fixed payment would expect, *id.* §§ 12-13. **[*122]** Those provisions thus necessarily raise the prospect that the merchant will have failed to make a fixed payment the requisite number of times and will have defaulted, triggering the acceleration of the full unpaid Purchased Amount, prior to the time within which the merchant can take advantage of the reconciliation provision.

However, there is a significant, and dispositive, difference between Form Two and Form Three. In the case of Form Two agreements, the merchant is placed between a rock and a hard place in the event the continuing stream of receivables is not sufficient to pay off the Purchased Amount on the implied timetable set forth in the agreements. It can either close its business and file for bankruptcy, triggering an event of default which will make the full unpaid Purchased Amount immediately payable and making the guarantor's obligations due. Or it can fail in its covenant to make the fixed daily payments (without ever having the opportunity ever to avail itself of the reconciliation provision) triggering an event of default making the full unpaid Purchased Amount immediately payable. The merchant in the case of Form Three agreements is confronted with no such choice. **[*123]** It has a way out of the obligations to either continue to make the fixed daily payments or to accelerate repayment of the full unpaid Purchased Amount, and a way therefore to put the funder at risk that the continuing stream of receivables will not be sufficient to satisfy the repayment of the Purchased Amount. The merchant's covenant not to close its business is qualified by the exception that the "Seller shall have the right to close its business temporarily . . . . or if such closing is necessitated by circumstances outside Seller's reasonable control."[26] *Id.* § 21(*l*). The Form Three agreements expressly contemplate circumstances in which the merchant is forced to go out of business and thus is is unable to generate and continue to collective receivables. The agreements provide:

> [I]f the full Purchased Amount is not remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business (but not due to Seller's willful or negligent mishandling of its business or due to Seller's failure to comply with its obligations under this Agreement), Seller would not be in breach of or in default under this Agreement.

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[26] The merchant is required to provide ten business days of advance notice before it temporarily closes its business. *See id.*

Dkt. No. 23-18 § 16(a)(v). The agreement to **[*124]** remit the fixed daily amount is qualified by the provision that the amounts must be paid on a timely basis regardless "of any reason *whatsoever other than as the result of the Seller's business ceasing its operations exclusively due to any of the Valid Excuses*." *Id.* § 27(a) (emphasis added). It defines as a Valid Excuse that "Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the following reasons: . . . adverse business conditions that occurred for reasons outside Seller's control and not due to Seller's willful or negligence mishandling of its business; [and/or] bankruptcy of Seller." *Id.* § 16(b).

Viewed in this context and in light of the agreement as a whole, the reconciliation provision in the Form Three agreements take on an entirely different color than in the other agreements. They no longer offer the false comfort that if the merchant is required to continue in a business confronted with unforeseen adverse business conditions, lest its failure to do so accelerate its obligations under the funding, the merchant can pass the risk of those unforeseen adverse business conditions back to the **[*125]** funder through reconciliation. Rather, the reconciliation provisions in the Form Three agreements assume that there is no unforeseen adverse business development outside the control of the merchant that would cause the merchant to cease business; the agreements provide that in that circumstance—the circumstance in which the business is able to continue to operate—the merchant may use the reconciliation provision to align the amount that the merchant has paid with what, during the prior month, it has received. If the merchant ceases business, use of the reconciliation provision is not necessary because the obligations do not apply. The fixed time period in which the reconciliation may be requested is not in the Form Three agreements a sham that creates the illusion of an opportunity for the return of funds that will never be exercised. It instead reflects the necessary fact that a reconciliation may be made only after the end of the time period during which the receipts are obtained and the payments are made that are to be reconciled.

Thus, the funder takes on risk in the Form Three agreements. If, as a result of unforeseen circumstances, the merchant is no longer able to generate and **[*126]** collect receivables, the funder will lose. The merchant can close without owing the funder anything.[27] In light of this escape route for the merchant and risk accepted by the funder, the Court cannot say that the Form Three agreements are loans.

iii. Form One Agreements

The "Form One" agreements include, among others, the first two agreements alleged in the Amended Complaint—hence the moniker "Form One"—and consist of: (1) the December 6, 2017 agreement with Midnight Capital, Dkt. No. 23-12; (2) the September 21, 2018 agreement with Capital Merchant, Dkt. No. 23-19; (3) the September 21, 2018 agreement with Green Capital, Dkt. No. 23-17; and (4) the October 12, 2018 agreement with Capital Merchant, Dkt. No. 23-20.

Despite having some shared characteristics with the Form Two agreement, the proper characterization of the Form One agreements is ambiguous. The agreement is not at all clear about what happens when a merchant no longer is earning enough to cover its daily payment amount and, thus, whether the funder takes on the risk of that occurrence or the merchant does. This, in turn, also makes the effect of the reconciliation provision and its terms ambiguous. Its lawfulness cannot be conclusively **[*127]** judged on the papers at the motion to dismiss stage.

Form One agreements contain the general and somewhat ambiguous language that the merchant agrees that it is "responsible for ensuring that the specified percentage to be debited by [the funder] remains in the account." Dkt. No. 23-20 at 1. This language can be understood as a "covenant" the violation of which on any one day would trigger an "Event of Default," and the full acceleration of the unpaid Purchased Amount. The merchants may default under the Form One agreements in other ways: unlike the Form Three agreements, there is no language in the Form One agreements that relieve the merchant from exposure to having to pay the full unpaid Purchased Amount if it closes its business temporarily because of circumstances outside of the Seller's reasonable control or if it ceases operations in the ordinary course as the result of non-willful and non-negligent handling of its business. To the contrary, while FTE's filing for bankruptcy does not itself constitute an "Event of Default" under the Form One agreements, the language of the agreements could be read to permit the occurrence of some other act—such as the interruption

[27] This is in contrast to a lender, who may still have a claim against the merchant for amounts unpaid notwithstanding cessation of operations.

of the merchant's **[*128]** business—not to be excused by the filing of a petition for protection under the Bankruptcy Code. The Form One agreements can be read to permit the funder to take all of the actions permitted by the Protections against Default — including the "full uncollected Purchase Amount plus all fees due . . . becom[ing] due and payable in full immediately," *id.* § 1.10, upon any of those events including the stoppage of business for one day, whether or not that stoppage has anything to do with a bankruptcy filing.

It is thus also plausible to read the reconciliation provision as being virtually illusory. In the first place, the provision is contingent upon the merchant producing satisfactory documentation to the funder providing the funder a ready means to deny reconciliation—a feature that other courts have observed places the risk of default on the merchant. *See* *AKF, Inc. v. W. Foot & Ankle Ctr., 2022 U.S. Dist. LEXIS 176467, 2022 WL 45388869, at *7 (E.D.N.Y. Sept. 28, 2022)* (concluding that the reconciliation provision placed risk of default on merchants where the ability to reconcile hinged on ability to produce any information—without limitation—that the funder required and there was a narrow temporal opportunity to request reconciliation); *Haymount, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7* (explaining that the discretion possessed by funder to request **[*129]** documentation makes it "readily apparent how the [funder] could use this contractual right to obtain from the merchant further documentation as a procedural pretext for denying reconciliation"); *McNider Marine, LLC v. Yellowstone Capital, LLC, 2019 N.Y. Misc. LEXIS 6165, 2019 WL 6257463, at *4 (Sup. Ct. Erie Cnty. 19, 2019)* (finding a reconciliation provision in a Yellowstone agreement to be illusory and explaining that "Yellowstone likely could refuse to even consider reconciliation if it contended that [the merchant] McNider Marine failed to sufficiently document a basis for it"). Moreover, although the reconciliation provision ostensibly exists to protect the merchant in the circumstances where its receipts are not sufficient to pay its obligations, that protection may be meaningless if the merchant cannot survive until the provision can be invoked.

As in the other agreements, the daily payment amount is fixed—if the reconciliation is unavailable, the daily payment amount would never change, and the agreement would have a finite term. *See* *AKF, Inc., 2022 U.S. Dist. LEXIS 176467, 2022 WL 4538869, at *8* (discerning definite term from payment structure where, "[b]arring any reconciliation," the agreement mandated the payment of a fixed term); *Queen Funding, LLC, 2022 U.S. Dist. LEXIS 129032, 2022 WL 2829913, at *6* (explaining that "a de facto term plausibly exists[] [where] [t]he period of payment can be easily calculated by dividing the amount **[*130]** [the merchant] owes by the amount of daily payments"). Under these circumstances, there may be no transfer of risk.

That plausible interpretation is further reinforced by other allegations in the Amended Complaint. As noted, the Amended Complaint alleges "[o]n information and belief," that the Enterprise "does not have a reconciliation department, does not perform reconciliations, and has never refunded a merchant money as required under their sham reconciliation provisions." Dkt. No. 20 ¶ 94; *see* *Davis, 150 N.Y.S. 3d at 4* (explaining that allegations that the funders refused to permit reconciliation counseled in favor of a finding that a transaction was a loan). It also alleges that statements reciting that the daily payment is a "good-faith estimate of the merchant's receivables," are "knowingly false." Dkt. No. 20 ¶ 77; *see* *Davis, 150 N.Y.S. 3d at 4* (suggesting that such an allegation counsels in favor of the agreements being a loan).

It may be that Plaintiffs are unable to prove that the Form One agreements are loans. Unlike the Form Two and Form Three agreements, Form One agreements do not contain a provision that provides that a default will be declared after a certain number of debits for which there are insufficient funds, just **[*131]** the ambiguous statement that the merchant understands it is responsible for ensuring sufficient funds are in the account. *See, e.g.*, Dkt. No. 23-20 at 1, 8. Moreover, FTE's filing for bankruptcy does not constitute an "Event of Default"; indeed, it is expressly carved out from the enumerated "Events of Default." *See, e.g.*, Dkt. No. 23-20 § 3.1(d).

At this stage however, given that there is a plausible reading of the Form One agreements that would make them loans, and because findings of usurious loans often turn on factual questions, including the intent of the funders, Plaintiffs' allegations are sufficient to survive Defendants' motion to dismiss. *See* *Clever Ideas v. 999 Rest. Corp., 2007 N.Y. Misc. LEXIS 9248, 2007 WL 3234747 (Sup. Ct. N.Y. Cnty. Oct. 12, 2007)* ("Due to the absence of an interest of an interest rate and a repayment period, the Court finds the intent of the parties at issue. Therefore, further discovery is required to delve further into the parties' intent."); *Haymount, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *8* ("Considering all of these factors, as well as the factual questions raised concerning the defendants' alleged

usurious intent, the Court concludes that the Complaint has adequately plead that the MCA agreements at issue here function as loans.").

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At this juncture, Plaintiffs have adequately pleaded that at least **[*132]** some of the agreements are loans. "Because the transactions should be treated as loans, at least at this juncture, and because defendants do not dispute that the implied interest rates on these transactions far exceed 50% per annum (twice the New York State criminal usury rate), the Court holds that the Complaint has adequately pled that the debts created by the MCA agreements that the defendants issue are unenforceable, 'unlawful debts' under the RICO statute." *2022 U.S. Dist. LEXIS 112768, [WL] at *8*.

2. Predicate RICO Violation — Pattern of Racketeering Activity (Wire Fraud)

The Capital Defendants contend that Plaintiffs fail to explain why the transactions at issue constitute wire fraud. Dkt. No. 22 at 18. Glass and Davis contend similarly. Dkt. No. 25 at 6; Dkt. No. 27 at 12 n.7. Plaintiffs argue that they have pleaded enough facts to show the predicate act of a pattern of racketeering activity vis-à-vis wire fraud. Dkt. No. 31 at 27-28. Because the Court concludes that Plaintiffs have sufficiently pleaded that there is a valid predicate RICO violation in the collection of unlawful debt, *see Angermeir v. Cohen, 14 F. Supp. 3d 134, 154 (S.D.N.Y. 2014)*, the Court need not determine whether the additional wire fraud predicate acts have been adequately pleaded.

3. Distinctness of [*133] the RICO Enterprise

The Capital Defendants argue that Plaintiffs have not pleaded "a RICO enterprise distinct from the RICO person." Dkt. No. 22 at 12. They argue that the alleged Enterprise is "merely Yellowstone alongside its alleged employees and subsidiaries carrying out business . . . through its officers, agents, subsidiaries and employees." *Id.* at 13. They further contend that "[t]here are no factual allegations alleging how the actions of the 'enterprise' were distinct from the ordinary business carried out by alleged officers, agents, subsidiaries, and employees." *Id.* Glass makes similar arguments. Dkt. No. 25 at 4. Plaintiffs contend that they adequately plead a distinct RICO Enterprise. Dkt. No. 31 at 29-30. For the following reasons, the Court concludes that Plaintiffs have adequately pleaded a distinct RICO enterprise.

"[T]o establish liability under *§ 1962(c)* one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd., 533 U.S. at 161 (2001)*. "A 'person' is defined as 'any individual or entity capable of holding a legal or beneficial interest in property,'" while an "'enterprise' is defined **[*134]** as 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" *Cruz, 720 F.3d at 120* (quoting *City of New York v. Smokes—Spirits.com, Inc., 541 F.3d 425, 447 (2d Cir. 2008)*, in turn quoting *18 U.S.C. § 1961(3)*, *(4)*). The two cannot be one and the same; a "person" is not liable under *Section 1962(c)* for participating in that same person's "affairs through a pattern of racketeering activity." *See Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)* (RICO liability "depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs" (emphasis in original)); *Cruz, 720 F.3d at 120* ("[A] corporate person cannot violate the statute by corrupting itself."). "A corporate entity can be sued as a RICO 'person' or named as a RICO 'enterprise,' but the same entity cannot be both the RICO person and the enterprise." *U1it4less, Inc., 871 F.3d at 205*.

Plaintiffs' allegations satisfy the Supreme Court's standards. As for a RICO "enterprise," Plaintiffs allege an association-in-fact consisting of "Yellowstone, Capital Merchant Services, Green Capital Funding, and Midnight Capital, and MCA Recovery." Dkt No. 20 ¶ 214. Plaintiffs allege that the culpable persons under RICO are "Glass, Stern, Davis, and John and Jane Doe Investors." *Id.* ¶ 209. The two are not one and **[*135]** the same. Glass is alleged to have been "an owner and the mastermind of the Enterprise," *id.* ¶ 221; *see also id.* ¶ 227; while he is alleged to have exercised authority on behalf of the Enterprise and to have had a "financial interest and contractual rights" in portions of the Enterprise, *id.* ¶¶ 221-33, he is not alleged to have comprised part of the association-in-fact that constituted the Enterprise. Stern was "an owner of Yellowstone and its Chief Executive Officer." *Id.* ¶ 234. He is not alleged to have been an employee of any of the other entities that were part of the association-in-fact and is not part of the association-in-fact itself. Davis was also "an owner of Yellowstone and . . . was its Director of Underwriting

at all relevant times." *Id.* ¶ 243. He too is not alleged to have been an employee of any other member of the Enterprise or to have been a member of the Enterprise himself. None of the corporate entities alleged to be part of the Enterprise are alleged to be "persons" liable under RICO.

The Supreme Court's decision in *Cedric Kushner* is squarely on point. In *Cedric Kushner*, the Supreme Court determined that a "president and sole shareholder" of a "closely held corporation" was a "person" distinct **[*136]** from the enterprise consisting of that corporation. *Cedric Kushner Promotions, Ltd., 533 U.S. at 160*. The Court reasoned that as a matter of law a natural person "is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status," that as a linguistic matter, "an employee who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any 'person' unlawfully to conduct an 'enterprise,'" and that "the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner," *id. at 163*. The Court also concluded that the application of RICO to a person who conducts the affairs of the corporation by whom he is employed through a pattern of racketeering activity was "consistent with the statute's basic purposes," *id. at 164*. "RICO both protects a legitimate 'enterprise' from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a vehicle through which unlawful . . . activity is committed." *Id.* (internal citations and quotations omitted).

The Second Circuit's decisions in *U1it4less, Inc. v. Fedex Corp., 871 F.3d 199, 208 (2d Cir. 2017)* and **[*137]** *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994)*, upon which Defendants rely, are distinguishable. In those cases, the plaintiff named, as the RICO person, the same company that—along with the company's employees and agents—was also alleged to be the RICO enterprise. The Circuit held "a plaintiff may not circumvent the distinctness requirement 'by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant.'" *U1it4less, 871 F.3d at 206* (quoting *Riverwoods, 30 F.3d at 344*). Because "[a] corporation can act only through its employees, subsidiaries, or agents. . . . 'if a corporate defendant can be liable for participating in an enterprise comprised only of its agents—even if those agents are separately incorporated legal entities—then RICO liability will attach to any act of corporate wrong-doing and the statute's distinctness requirement will be rendered meaningless.'" *Id.* (quoting *In re ClassicStar Mare Lease Litig., 727 F.3d 473, 492 (6th Cir. 2013)*).

Here, by contrast, Plaintiffs do not seek to hold a corporation liable as a RICO person by virtue of the acts of the corporation and those acting on its behalf. It seeks to hold the three named individual defendants and various Jane Doe and John Doe defendants liable for using the association-in-fact **[*138]** for their unlawful purposes. The allegations directly meet the language and purpose of RICO as those have been defined in *Cedric Kushner. See NRO Bos. LLC v. Yellowstone Cap. LLC, 72 Misc. 3d 267, 147 N.Y.S.3d 375, 381 (Sup. Ct. Rockland Cnty. 2021)* (concluding similarly in a case involving Yellowstone on the basis that the same persons alleged here—Davis, Glass, and Stern—were all natural persons); *McNider Marine, LLC, 2019 N.Y. Misc. LEXIS 6165, 2019 WL 6257463, at *6* (concluding that there was RICO distinctness in a case involving Yellowstone).

4. Individual Conduct[28]

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[28] For the reasons articulated in this section, the Court denies Defendants' motion to dismiss the RICO Conspiracy count under *18 U.S.C. § 1962(d)*. The Capital Defendants argue that there is no underlying offense and that there are no factual allegations of an unlawful agreement. Dkt. No. 22 at 19. Davis also argues that he did not agree to the alleged conspiracy. Dkt. No. 27 at 15. "To establish a conspiracy to violate the civil RICO statute pursuant to *18 U.S.C. § 1962(d)* . . . plaintiff must prove (1) that there existed a conspiracy to commit acts that, if successful, would constitute a substantive civil RICO violation; (2) that defendant agreed to join in, and knowingly participated in, that conspiracy; and (3) that defendant acted in furtherance of the conspiracy in some manner (although not necessarily by the commission of any RICO predicate acts himself)." *Martin Hilti Fam. Tr. v. Knoedler Gallery, LLC, 386 F. Supp. 3d 319, 340 (S.D.N.Y. 2019)*. The allegations supporting the underlying substantive RICO claims suffice to also sustain the RICO civil conspiracy count and establish agreement given the positions of the Defendants in the Enterprise, the acts that they took, and the financial benefits alleged. In addition to Glass and Davis, Plaintiffs made sufficient allegations as to Stern to show his participation and agreement in the conspiracy as well as his conduct generally in the affairs of the Enterprise. Plaintiffs alleged that Stern was the "Chief Executive Officer . . . responsible for the day-to-day operations of the Enterprise," exercised that broad operational authority, including with respect to setting loan rates, set

Glass contends that "Plaintiffs have pled no facts stating a claim against . . . Glass for 'racketeering' based on the collection of 'unlawful debt.'" Dkt. No. 25 at 6. Davis also contends that the Amended Complaint "fails to allege facts establishing that Davis directed or was aware of any alleged illegal activities committed by the Enterprise." Dkt. No. 27 at 12. Davis also challenges whether Amended Complaint alleges any facts regarding his intent. *Id.* Those arguments lack merit.

A civil RICO plaintiff must allege that each defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of such enterprise's affairs." *18 U.S.C. § 1962(c)*. "[T]he RICO defendant must have participated "in the operation or management of the enterprise." *Sky Med. Supply Inc. v. SCS Support Claims Servs., Inc., 17 F. Supp. 3d 207, 224 (E.D.N.Y. 2014)* (Bianco, J.) (quoting *De Falco, 244 F.3d at 309*, in turn citing *Reves, 507 U.S. at 185*). This **[*139]** requires that "the defendant must have had '*some* part in directing [the enterprise's] affairs.'" *First Cap. Asset Mgmt., Inc., 385 F.3d 159, 176 (2d Cir. 2004)* (emphasis added), and "has proven to be a relatively low hurdle for plaintiffs to clear," *id.* "Of course, the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise." *Id.* (quoting *Reves, 507 U.S. at 179*). However, a person may not be held liable merely for taking directions and performing tasks that are 'necessary and helpful to the enterprise,' or for providing 'goods and services that ultimately benefit the enterprise.'" *Sky Med. Supply Inc., 17 F. Supp. 3d at 224*. "[F]ailing to allege that members of an association-in-fact enterprise shared a wrongful intent to violate RICO is fatal to an *18 U.S.C. § 1962(c)* claim." *Moss v. BMO Harris Bank, N.A., 258 F. Supp. 3d 289, 299 (E.D.N.Y. 2017)*.

The Amended Complaint adequately alleges the role of Glass in the operation and management of the Enterprise. The Amended Complaint states that Glass was an "owner and mastermind" who had "final say on all financial decisions of the Enterprise including, without limitation, which usurious loans the Enterprise will fund, how such loans will **[*140]** be funded, which of Investors will fund each loan and the ultimate payment terms, and period of each usurious loan." Dkt. No. 20 ¶ 221. Plaintiffs also excerpt an affidavit, which the Court may consider due to its attachment to the complaint, describing Glass as the "money man" and how "[a]nything to do with money had to go directly through . . . Glass." *Id.* ¶ 222. In addition, Glass "disseminated financial information," "knew when a wire had been received," and "had authority to increase the funding limit" and "lower a . . . funding limit," *id.* ¶¶ 221, 223-226. The Amended Complaint further alleges that Glass "is responsible for creating, approving and implementing the policies, practices and instrumentalities used by the Enterprise to accomplish its common goals and purposes including: (i) the form of merchant agreements used by the Enterprise to attempt to disguise the unlawful loans as receivable purchase agreements to avoid applicable usury laws and conceal the Enterprise's collection of an unlawful debt" and "form Affidavits of Confession used by the Enterprise to collect upon the unlawful debt if the borrower defaults upon its obligations" that were "used to make and collect **[*141]** upon the unlawful loans." *Id.* ¶ 227. Glass's role in management was confirmed by an interaction with Davis, in which Davis told him that he "obviously ha[s] first right" if Davis sells equity, *id.* ¶ 231, and the fact that he was updated when new forms were being used, *see id.* ¶ 228. He also funded the exercise and directed members of the Enterprise to "collect upon the unlawful loans." *Id.* ¶ 229. These allegations are sufficient to meet the "low hurdle" that a person has participated in a RICO enterprise with requisite intent.

The Amended Complaint also adequately alleges the role of Davis in the operation and management of the Enterprise and his intent to further the goals of the Enterprise. Davis was a "Director of Underwriting" who "[took] actions and[] directed other members of the

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company policy, and benefitted from loan proceeds. Dkt. No. 20 ¶¶ 234-42. *See* *Bd. of Managers of Trump Tower at City Ctr. Condo. by Neiditch v. Palazzolo, 346 F. Supp. 3d 432, 465 (S.D.N.Y. 2018)* (citing cases to support that even "conclusory statement" of conspiracy was adequate when supported with allegations regarding "their positions within the Palazzolo Enterprise and the individual acts that they undertook on its behalf"); *see also id.* (citing cases); *Related Companies, L.P. v. Ruthling, 2017 U.S. Dist. LEXIS 207857, 2017 WL 6507759, at *21 (S.D.N.Y. Dec. 18, 2017)*; *U.S. Fire Ins. Co. v. United Limousine Serv., Inc., 303 F.Supp.2d 432, 454 (S.D.N.Y. 2004)*. Unlike with respect to the substantive RICO claim, Plaintiffs allege that "[e]ach Defendant" is liable for RICO conspiracy. Dkt. No. 20 ¶¶ 279-282. However, the Amended Complaint alleges only that the individual Defendants are RICO "persons." The parties have not addressed whether on these pleadings the Entity Defendants who are alleged only to comprise the Enterprise and not to be "persons" who illegally participated in the affairs of the Enterprise can be liable for RICO conspiracy. That question will have to await future briefing, which the Court invites.

Enterprise to take actions," and had a "substantial" "scope of . . . the Enterprise" under his "control," *id.* at ¶¶ 243, 245, 249. He is also an owner of Yellowstone, *id.* ¶ 342, and holds an interest in Yellowstone's parent company, *id.* ¶ 257. Like Glass, the complaint alleges that Davis was responsible for "policies, practices and instrumentalities" that covered the same areas as Glass. *Id.* ¶ 244. He **[*142]** also "fund[ed] the Enterprise, solict[ed] and recruit[ed] members of the Enterprise, [and] direct[ed] members of the Enterprise to collect upon the unlawful loans." *Id.* ¶ 245. In addition, Davis is also responsible for multiple companies that operate as IFOs and also provide a substantial portion of Yellowstone's profit share. *Id.* 246. The complaint alleges specifically that he also had "full control of the portion of the Enterprise made up of . . . $40 million in outstanding receivables as of August 2018." *Id.* ¶ 249. When trying to sell his equity, he was also told by Glass that the "[t]he company is up to its *** in lawsuits and government investigations . . . . All there is no is unlimited personal liability." *Id.* ¶ 231. Glass also states that "[they] are hoping to not be charged" and asks Davis facetiously, when Davis seeks to sell his shares, whether he has heard of the "NEW YORK STATE ATTORNEY GENERAL." *Id.* These allegations, again, are sufficient to meet the "low hurdle" that a person has participated in a RICO enterprise and to show his intent to achieve the shared goal with the other defendants of illegal loans.

IV. Fraud

Capital Defendants argue that Plaintiffs do not plead **[*143]** sufficient facts for transaction causation or reliance. In particular, they argue that Plaintiffs "never allege that the Assignors would not have paid or agreed to the 'ACH program' or origination fees but for an alleged misrepresentation." Dkt. No. 22 at 7. They also argue that Plaintiffs "do not allege that the Assignors were induced to enter the Agreements based on any alleged misrepresentation about the 'ACH program' or origination fees." *Id.* Defendant Davis argues similarly. Dkt. No. 27 at 10. Plaintiffs contend that they are not required to allege transaction causation and analogizes the alleged fraud to false invoicing. Dkt. No. 31 at 38. The Court agrees that the Plaintiffs have failed to sufficiently plead reliance—in particular, transaction causation, or "but-for" causation—and grants the motion to dismiss Plaintiffs' fraud claims.

The elements of a claim of fraud under New York law are: "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 910 N.E.2d 976, 979, 883 N.Y.S.2d 147 (N.Y. 2009)*; *see also Wade Park Land Holdings, LLC v. Kalikow, 589 F. Supp. 3d 335, 2022 U.S. Dist. LEXIS 38828, 2022 WL 657664, at *31 (S.D.N.Y. Mar. 4, 2022)*, *amended*, *2022 U.S. Dist. LEXIS 118899, 2022 WL 2479110 (S.D.N.Y. July 6, 2022)*. Fraud claims under New York law must be pled with heightened particularity under *Federal Rule of Civil Procedure 9(b)*. *Budhani v. Monster Energy Co., 527 F. Supp. 3d 667, 687 (S.D.N.Y. 2021)*. The Second Circuit has explained **[*144]** that "in order to comply with *Rule 9(b)*, '[a] complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006)* (quoting *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993)*). "*Rule 9(b)* also requires a plaintiff to 'allege facts that give rise to a strong inference of fraudulent intent.'" *Budhani, 527 F. Supp. 3d at 687* (quoting *Lerner, 459 F.3d at 290*). This "strong inference" can be established by either (a) "alleging facts to show that defendants had both motive and opportunity to commit fraud," or (b) "alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner, 459 F.3d at 290* (internal quotation marks omitted) (quoting *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)*). Even with fraud claims, "allegations may be based on information and belief when facts are particularly within the opposing party's knowledge," provided that they "adduce specific facts supporting a strong inference of fraud." *Alix v. McKinsey & Co., 23 F.4th 196, 209 (2d Cir. 2022)* (quoting *Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990)*).

In order to plead fraud under New York common law, "a plaintiff must demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses." *Vandashield Ltd. v. Isaacson, 146 A.D.3d 552, 46 N.Y.S.3d 18, 22 (1st Dep't 2017)*. A "plaintiff must show both that defendant's misrepresentation induced plaintiff to **[*145]** engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Laub v. Faessel, 297 A.D.2d 28, 745 N.Y.S.2d 534, 536 (1st Dep't 2002)*; *see also Ambac Assur. Corp. v. Countrywide Hosme Loans, Inc., 54 Misc. 3d 1215[A], 54 N.Y.S.3d 54, 2016 NY Slip Op 51864[U] (N.Y. Sup.*

Ct. 2016) (same). "Under . . . the common law . . . , the plaintiffs must allege . . . 'transaction causation, *i.e.* that but for the fraudulent statement or omission, the plaintiff would not have entered into the transaction.'" *Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd., 383 F. Supp. 2d 428, 455 (S.D.N.Y. 2003)*; *see also Amusement Indus., Inc. v. Stern, 786 F. Supp. 2d 758, 776 (S.D.N.Y. 2011)* ("Transaction causation is often synonymous with 'but for' causation."); *accord AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000)* ("Transaction causation means that the violations in question caused the appellant to engage in the transaction in question."). Thus, "[i]n a fraud action, the plaintiff must show a belief in the truth of the representation and a change of position in reliance on that belief.'" *Fin. Guaranty Ins. Co. v. Putnam Advisory Co., LLC, 2020 U.S. Dist. LEXIS 155918, 2020 WL 5518146, at *91 (S.D.N.Y. 2020)* (quoting *Hecht v. Components Int'l, Inc., 22 Misc. 3d 360, 867 N.Y.S.2d 889, 895 (N.Y. Sup. Ct. Nassau Cty. 2008)*). "Transaction causation is also known as 'reliance' in fraud cases." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 182 (2d Cir. 2015)*.

Plaintiffs fail to plead facts sufficient to support reliance or transaction causation. Plaintiffs make the conclusory allegation that they "reasonably relied on these knowingly false representations by agreeing to pay these fees" and that they have "in fact, paid substantial fees as a direct and proximate result of these knowingly false representations **[*146]** by Defendants." Dkt. No. 20 ¶¶ 294-295. But they do not allege facts that would support that allegation. On Plaintiffs' allegations, FTE originally entered into the transactions because it "needed additional financing" and Defendants were willing to provide it. *Id.* ¶ 119. According to Plaintiffs, the "predatory" MCA industry generally, and Yellowstone in particular, "prey[s] upon the desperation of [] small business and their individual owners" with advertising pitches targeted towards "small businesses cannot get approved for a loan from a traditional bank." *Id.* ¶¶ A., 26, 63, 75. FTE also entered numerous subsequent funding agreements to pay off earlier agreements. *Id.* ¶¶ 131, 139, 147, 163, 178, 194.

Plaintiffs do not allege that the representations in the funding agreements that, *e.g.*, "the ACH program is labor intensive and is not an automated process, requiring us to charge this fee to cover related costs" and the "Origination Fee" is imposed "to cover underwriting and related expenses," Dkt. No. 23-20 at ECF 8, induced them in any respect to agree to the funding agreements. Nor do they allege that they would not have agreed to make those payments if they knew that not all of **[*147]** the funds that were advanced for those putative purposes were, in fact, used for those purposes. Plaintiffs affirmatively concede that "they are not arguing that these misrepresentations induced them to enter the Agreements for funding." Dkt. No. 31 at 38. FTE appears to have entered the agreements because of the funds they received under them and the terms under which they would have to pay the Defendants. How Defendants used those funds and whether they "cover[ed] underwriting and related expenses," Dkt. No. 20 ¶ 290, or simply went to Defendants' bottom line would have been a matter of indifference. The key issue—and the asserted basis for the decision whether to enter the agreements—was what FTE received and what it would have to pay and whether it could have gotten a better deal elsewhere. Even without the deductions for ACH and due diligence, FTE's agreement was to repay Defendants for the funds that had been advanced to it at an effective interest rate in excess of 100%.

The facts pleaded thus do not support a claim that FTE entered into agreements because of Defendants' alleged misrepresentations regarding how Defendants would apply the due diligence and ACH program and origination **[*148]** fees. Because Plaintiffs do not allege that "but for" Defendants' alleged misrepresentations that the ACH program was labor intensive and that the fees were to cover related costs and expenses, Plaintiffs would not have entered into the funding agreements, Plaintiffs cannot establish transaction causation in connection with the decision to enter into those agreements. *See, e.g.,* *Matana v. Merkin, 989 F. Supp. 2d 313, 325 (S.D.N.Y. 2013)* (dismissing complaint due to failure to "plead facts that supply a plausible basis from which a factfinder could infer that, but for these representations, KM would have [acted differently]"); *OSJ Inc. v. Work, 273 A.D.2d 721, 710 N.Y.S.2d 666, 668 (3d Dep't 2000)* (holding that there was no reliance because "[t]here is no basis to conclude that but for defendants' allegedly tortious conduct, plaintiffs would not have sustained the identical damages"); *Matthews v. Schusheim, 42 A.D.2d 217, 346 N.Y.S.2d 386, 391 (2d Dep't 1973)*, *aff'd*, *35 N.Y.2d 686, 319 N.E.2d 422, 361 N.Y.S.2d 160 (1974)* (finding that plaintiff has "failed to prove" but for causation); *Gould v. Flato, 170 Misc. 378, 10 N.Y.S.2d 361, 366 (N.Y. Sup. Ct. New York Cty. 1938)* (finding no reliance where "[t]he facts in the instant case do not warrant a finding that the plaintiff would not have entered into the bargain except for the representation of the defendants"); *cf.* *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 402*

(finding that "FGIC has sufficiently pleaded transaction causation, as the SAC contains repeated allegations that but for Putnam's fraudulent misrepresentations, **[*149]** FGIC would not have entered into the transaction"); *Sterling Nat. Bank v. Ernst & Young LLP, 62 A.D.3d 584, 881 N.Y.S.2d 39, 40 (1st Dep't 2009)* (finding that transaction causation was found on summary judgment when "the subject loans would not have been advanced without a 'clean opinion' as to Allied's 2000 financial statements").

Moreover, Plaintiffs cannot allege that they changed any position *after* they signed the funding agreements and as a result of the alleged misrepresentations. There is no allegation that FTE changed its position in any way as a result of the alleged misrepresentation. After FTE signed the funding agreements, the ACH and origination fees were deducted automatically from what was advanced to them; Plaintiffs took no action to pay Defendants the fees for ACH and due diligence. *See* Dkt. No. 20 ¶¶ 123, 132, 140, 148, 156, 164, 171, 179, 187. Furthermore, those fees were deducted by Defendants in the exercise of Defendants' contractual rights that FTE gave them without regard to the alleged misrepresentation. To the extent that FTE could be deemed to have taken action by engaging in non-action—by not objecting to the deduction of the fees—that was because the contract gave Defendants the right to deduct those fees and not because of any alleged misrepresentations **[*150]** by Defendants.

In essence, Plaintiffs has not alleged "it took any action, refrained from acting, or entered into any transaction, as a result of, or in reliance upon, the defendants' alleged misstatements or omissions." *Prime Mover Cap. Partners, L.P. v. Elixir Gaming Techs., Inc., 793 F. Supp. 2d 651, 663 (S.D.N.Y. 2011)* (dismissing common law fraud claims because at the motion to dismiss stage because of failure to allege transaction causation). The false representation by the Defendants did not "cause[] the appellant to engage in the transaction in question." *AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000)*.

The allegations of the complaint are readily distinguishable from those in the false invoicing cases upon which Plaintiffs rely. See Dkt. No. 31 at 37-38 (citing *Needham & Co., LLC v. Access Staffing, LLC, 2016 U.S. Dist. LEXIS 111925, 2016 WL 4399288 (S.D.N.Y. Aug. 12, 2016)*; *Eagle One Roofing Contractors, Inc. v. Acquafredda, 2018 U.S. Dist. LEXIS 59969, 2018 WL 1701939 (E.D.N.Y. Mar. 31, 2018)*; *Brooke v. Schlesinger, 898 F. Supp. 1076, 1087 (S.D.N.Y. 1995)*, and *Silverboys, LLC v. Skordas, 2019 N.Y. Misc. LEXIS 546, 2019 WL 587426, at *1 (N.Y. Sup. Ct. Feb. 11, 2019)*). Plaintiffs in those cases relied upon the accuracy of the invoices and paid them—there was no preexisting obligation to pay the amount of the invoices. For example, in *Needham*, the defendants had sent "falsified invoices for staffing services that were never rendered to or requested by" the plaintiff, who had even asserted "that no contract existed." *Needham, 2016 U.S. Dist. LEXIS 111925, 2016 WL 4399288, at *1 (S.D.N.Y. Aug. 12, 2016)*. And in *Brooke*, there was no contract alleged as the scheme there involved the defendant insiders seeking "improper advances" to the plaintiff's company and pocketing the proceeds. *Brooke, 898 F. Supp. at 1081*. Similarly in *Acquafredda* and *Silverboys*, the fraudulent **[*151]** subcontractors had been hired to perform certain construction jobs and submitted invoices "bill[ing] them for equipment and services that were not delivered," *Silverboys, 2019 N.Y. Misc. LEXIS 546, 2019 WL 587426, at *2*; *see also Acquafredda, 2018 U.S. Dist. LEXIS 59969, 2018 WL 1701939, at *2*.

In this case, by contrast, FTE took no action based on the alleged misrepresentation. It did not enter into the transactions and agree that the amounts could be debited based upon the misrepresentation. It also did not take action after the agreements were signed based on the alleged misrepresentation. Nor—unlike the cases of invoices—do the alleged misrepresentations here adjust or modify the total amount of the ACH and origination fees, which remain fixed. The cases thus are inapposite.

CONCLUSION

The motions to dismiss are GRANTED IN PART and DENIED IN PART. The Court grants the motions to dismiss on the common law fraud claims with prejudice. The Court denies the motions to dismiss as to the RICO conspiracy claim and the substantive RICO claim.

The Clerk of Court is respectfully directed to close Dkt. Nos. 21, 24, 26, and 43.

SO ORDERED.

Dated: September 30, 2022

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

End of Document

Exhibit 24

Lateral Recovery LLC v. Queen Funding, LLC

United States District Court for the Southern District of New York

July 20, 2022, Decided; July 20, 2022, Filed

21 Civ. 9607 (LGS)

Reporter
2022 U.S. Dist. LEXIS 129032 *; 2022 WL 2829913

LATERAL RECOVERY LLC, et al., Plaintiffs, -against- QUEEN FUNDING, LLC, et al., Defendants.

Subsequent History: Appeal filed, 09/01/2022

Later proceeding at *Lateral Recovery, LLC v. Queen Funding, LLC, 2022 U.S. Dist. LEXIS 169206, 2022 WL 4245207 (S.D.N.Y., Sept. 15, 2022)*

Core Terms

Merchant, Funding, receivables, alleges, wire fraud, reconciliation, collection, predicate act, lender, loans, conspiracy, fraudulent, event of default, particularity, enterprise, quotation, default, debit, marks, pattern of racketeering activity, motion to dismiss, mail, wire, statute of limitations, indefinite term, interest rate, transactions, borrower's, continuity, provisions

Counsel: [*1] For Lateral Recovery, LLC, as assignee of Benchmark Builders, Inc., FTE Networks, Inc, Jus-Com LLC, Focus Wireless, LLC, Plaintiffs: Shane R. Heskin, White & Williams, LLP(Philadelphia), Philadelphia, PA.

For Queen Funding, LLC, Yehuda Klein, Defendants: Jacob Zev Weinstein, LEAD ATTORNEY, Weinstein & Weinstein LLP, Flushing, NY.

Judges: LORNA G. SCHOFIELD, UNITED STATES DISTRICT JUDGE.

Opinion by: LORNA G. SCHOFIELD

Opinion

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiffs bring this civil action against Defendants Queen Funding, LLC ("Queen Funding"), Yehuda Klein and John and Jane Doe Investors in Queen Funding who funded its operations. Plaintiffs allege that Queen Funding, which is a merchant cash advance ("MCA") company, Klein and other affiliated investors violated the *Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.*, by engaging in wire fraud and collecting unlawful debt. Defendants move to dismiss both the RICO substantive claim and the RICO conspiracy claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons below, Defendants' motion is denied.

I. BACKGROUND

The following facts are taken from the Complaint and documents attached to, or incorporated by reference in, the Complaint and are construed in the light most favorable to Plaintiffs. *See R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp., 959 F.3d 509, 512 (2d Cir. 2020)*.

Plaintiffs include **[*2]** FTE Networks, Inc., and its three subsidiaries Benchmark Builders, Inc., Jus-Com LLC and Focus Wireless, LLC (collectively, "FTE"). Plaintiff Lateral Recovery LLC is an assignee of FTE's claims pursuant to a foreclosure.

Defendant Queen Funding is an MCA company controlled by Klein that provides funds to small businesses through MCA agreements. Between November 2017 and November 2018, the parties here entered into seven MCA Agreements (the "Merchant Agreements"). Under each Merchant Agreement, Queen Funding purported to purchase a portion of Plaintiffs' receivables in exchange for up-front payments to FTE. The Merchant Agreements specify a purchase price to be paid by Queen Funding, a dollar amount of receivables purchased, the percentage of the

merchant's total receivables that the purchase purportedly represents and a daily payment amount to be paid by FTE. FTE's daily payment was debited directly from an FTE bank account. The daily payment amount purported to be a "good-faith estimate of the percentage of receivables purchased" for that month, which in each Merchant Agreement was 13%, regardless of the amount actually purchased. Under the Merchant Agreements, Queen Funding advanced **[*3]** FTE approximately $6,500,000 in cash but collected about $10,500,000 in daily payments during a two-year period. Each Merchant Agreement had an effective annual interest rate between 100% and 300%.

For example, under the parties' first Merchant Agreement, Queen Funding purchased $149,900 of FTE's receivables for a purchase price of $100,000. Queen Funding actually advanced $95,000 to FTE, which was the purchase price less a fee of $5,000. The amount of receivables purchased purportedly represented 13% of FTE's total receivables, resulting in a daily payment by FTE of $4,999 to be paid over six weeks. FTE's payments in this first Merchant Agreement had an equivalent effective annual interest rate of 300% per annum.

The Merchant Agreements include provisions that grant Defendants the irrevocable right to withdraw money directly from FTE's bank accounts -- including collecting checks and signing invoices in FTE's name -- and that prohibit FTE from transferring, moving or selling the business or any assets without permission from Defendants. The Merchant Agreements also contain numerous default and remedy provisions. One of these states that an "Event of Default" occurs when "the attempted **[*4]** ACH debit of the [daily payment amount] is rejected two times during the term of [the] Agreement and Merchant does not contact [Queen Funding] in advance of the ACH debit being rejected." The "Protections against Default" provision states that, upon any of the several events of default listed, "the full uncollected Purchase Amount plus all fees due under this Agreement and the attached Security Agreement become due and payable in full immediately." The Merchant Agreements also allow Defendants to collect on the personal guaranty by the borrower's individual owners if Plaintiffs are unable to pay or are bankrupt.

II. LEGAL STANDARD FOR MOTION TO DISMISS

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party but does not consider "conclusory allegations or legal conclusions couched as factual allegations." *Dixon v. von Blanckensee, 994 F.3d 95, 101 (2d Cir. 2021)* (internal quotation marks omitted). To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 854 (2d Cir. 2021)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*). "Threadbare recitals of the elements of a cause of action, supported by **[*5]** mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*; *accord* *Dane v. UnitedHealthcare Ins. Co., 974 F.3d 183, 189 (2d Cir. 2020)*. It is not enough for a plaintiff to allege facts that are consistent with liability; the complaint must "nudge[] [plaintiff's] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *accord* *Bensch v. Est. of Umar, 2 F.4th 70, 80 (2d Cir. 2021)*. To survive dismissal, "plaintiffs must provide the grounds upon which [their] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Rich v. Fox News Network, LLC, 939 F.3d 112, 121 (2d Cir. 2019)* (alteration in original) (internal quotation marks omitted).

III. DISCUSSION

A. RICO Legal Standard

To state a civil RICO claim under *18 U.S.C. § 1964*, a complaint must plead (1) "that the individual defendants committed a substantive RICO violation" and (2) "that the violation proximately caused an injury to [the plaintiffs'] business or property." *NRP Holdings LLC v. City of Buffalo, 916 F.3d 177, 196 (2d Cir. 2019)*; *see also* *18 U.S.C. § 1964(c)* (providing a private right of action for persons injured "by reason of" a substantive RICO violation). To plead a substantive RICO violation, a complaint must allege that the defendant engaged in "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" or "through . . . collection of unlawful debt." *18 U.S.C. § 1962(c)*; *Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 n.1 (2d Cir. 2013)* (quoting *DeFalco v. Bernas, 244 F.3d 286, 306 (2d Cir. 2001)*); *Sonterra Cap. Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 554 (S.D.N.Y. 2018)*. "Racketeering activity," for purposes of RICO, includes "any 'act' indictable **[*6]** under various specified federal statutes, including the mail and wire

fraud statutes . . . ." *Kim v. Kimm, 884 F.3d 98, 103 (2d Cir. 2018)* (citing *18 U.S.C. § 1961(1)*). A RICO claim must allege every essential element of each predicate act. *See, e.g.,* *Lundy v. Cath. Health Sys. of Long Island Inc., 711 F.3d 106, 119 (2d Cir. 2013)* (dismissing a RICO claim where the complaint failed to plead predicate acts of mail fraud with particularity).

Conspiracy to violate *§ 1962(c)* is also actionable under *§ 1964*. *See* *18 U.S.C. §§ 1962(d)*, *1964*. To state a RICO conspiracy, a plaintiff must allege "the existence of an agreement to violate RICO's substantive provisions." *Williams v. Affinion Grp., LLC, 889 F.3d 116, 124 (2d Cir. 2018)* (internal quotation marks omitted). If a complaint fails to state a substantive RICO claim, it also does not state a claim for RICO conspiracy. *See* *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996)*, *vacated on other grounds*, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *Nygård v. Bacon, No. 19 Civ. 1559, 2021 U.S. Dist. LEXIS 157972, 2021 WL 3721347 at *3 (S.D.N.Y. Aug. 20, 2021)*. The Complaint alleges a violation of RICO and a RICO conspiracy under two independent theories of (1) a pattern of racketeering activity based on wire fraud and (2) the collection of unlawful debt.

B. Pattern of Racketeering Activity -- Wire Fraud

1. Wire Fraud

Defendants argue that the Complaint fails to plead with particularity a RICO predicate act of wire fraud. This argument is incorrect; the Complaint pleads wire fraud with particularity.

Under RICO, wire fraud is one of the predicate offenses that constitute "racketeering activity." **[*7]** *18 U.S.C. 1961(1)*. "The essential elements of [mail and wire fraud] are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of [interstate] mails or wires to further the scheme." *United States v. Weaver, 860 F.3d 90, 94 (2d Cir. 2017)* (internal quotation marks omitted) (second alteration added); *see* *18 U.S.C. § 1343*. Where an alleged predicate act sounds in fraud, such as wire fraud, the plaintiff "must state with particularity the circumstances constituting fraud or mistake." *Lundy, 711 F.3d at 119* (regarding pleading standard for predicate act of mail fraud for RICO claim) (quoting *Fed. R. Civ. P. 9(b)*); *accord* *Monterey Bay Mil. Hous., LLC v. Ambac Assurance Corp., 531 F. Supp. 3d 673, 726 (S.D.N.Y. Mar. 31, 2021)*. "The complaint must detail the specific statements that are false or fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams, 889 F.3d at 124*. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*; *see* *Setzer v. Omega Healthcare Invs., Inc., 968 F.3d 204, 212 (2d Cir. 2020)*.

The Complaint alleges facts with sufficient particularity for the underlying wire fraud claim. The Complaint alleges that the seven Merchant Agreements contain the following false statements: "(1) the transaction is not a loan, (2) the daily payment is a good-faith estimate of the merchant's receivables, (3) the fixed daily payment is for the merchant's convenience, **[*8]** (4) that the automated ACH program is labor intensive and is not an automated process, requiring the MCA company to charge an exorbitant ACH Program Fee or Origination Fee." The Complaint alleges how each misstatement was false: (1) that the transactions were loans because, notwithstanding the reconciliation provision, the Merchant Agreements required fixed daily payments, a security interest in all of FTE's receivables, and the personal guarantee of the individual owners and because the agreements relied on the creditworthiness of FTE rather than its customers who owed the receivables, among other reasons; (2) that FTE's required daily payments represented a specified percentage of a good-faith estimate of its monthly receivables purchased is belied by the Merchant Agreements themselves, all of which specify a percentage of 13% even though the amount of receivables purchased varied dramatically from $149,900 to $2,848,100 and the daily payments ranged from $4,999 to $49,900; (3) that FTE's required daily payments were not for the convenience of FTE but instead were to ensure that Defendants were paid and would not have to bear the risk of the creditworthiness of the purchased receivables **[*9]** and (4) "[w]hile the Origination Fee and ACH Program Fee purportedly related to the costs of due diligence and withdrawing the Daily Payments, Queen Funding performed little or no due diligence, and the actual costs of the ACH withdrawals were a fraction of the fee."

The false statements are alleged with particularity. A complaint alleging acts of mail and wire fraud are generally required to "detail the specific statements that are false or fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams, 889 F.3d at 124*. Here, the allegedly false statements are contained

in the seven Merchant Agreements, which are incorporated in the Complaint. The Complaint also alleges with particularity what role each Defendant played in the RICO scheme.

The Complaint also sufficiently alleges use of interstate wires. "Use of wire" includes email communication and wire transfer of money. *See* United States v. Percoco, 13 F.4th 158, 174 (2d Cir. 2021) (email); United States v. Vilar, 729 F.3d 62, 95 (2d Cir. 2013) (wire transfer of money); 18 U.S.C. § 1343. The Complaint alleges that Defendants used emails to "originate, underwrite, service and collect upon the Agreements," which contained the false statements. Defendants also allegedly collected amounts due under the Agreements **[*10]** via interstate electronic ACH debits. Use of wires is sufficiently pleaded as are the remaining elements of the predicate act of wire fraud.

2. Pattern of Racketeering Activity

The Complaint alleges sufficient facts to show a pattern of racketeering activity based on continuity of the alleged enterprise. "The plaintiff must plead at least two predicate acts . . . and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." GICC Cap. Corp. v. Tech. Fin. Grp., Inc., 67 F.3d 463, 465 (2d Cir. 1995) (citing § 1961(5) and H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)); *accord* Haymount Urgent Care PC v. GoFund Advance, LLC, No. 22 Civ. 1245, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *9 (SDNY June 27, 2022). RICO targets conduct that "amount[s] to or pose[s] a threat of continued criminal activity," which may be closed- or open-ended. Reich v. Lopez, 858 F.3d 55, 60 (2d Cir. 2017) (quoting H.J. Inc., 492 U.S. at 239) (alteration in original). "Criminal activity that occurred over a long period of time in the past has closed-ended continuity . . . ." Lopez, 858 F.3d at 60 (quoting H.J. Inc., 492 U.S. at 242). The Second Circuit generally requires the predicate acts to have extended over at least two years. Lopez, 858 F.3d at 60 (citing Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 184 (2d Cir. 2008)). The continuity requirement applies only to the pattern of racketeering activity for wire fraud and not unlawful debt. *See* United States v. Grote, 961 F.3d 105, 119 (2d Cir. 2020) ("RICO offenses may be predicated on a single instance of collection of an unlawful debt . . . .").

The Complaint sufficiently alleges closed-ended continuity of **[*11]** the enterprise. The Complaint alleges not only that Defendants defrauded Plaintiffs through a series of fraudulent Merchant Agreements, but also that such practices were part of a regular way of operating their business. Defendants entered into seven different Merchant Agreements with Plaintiffs over the course of two years, which sufficiently alleges closed-ended continuity and a pattern of racketeering activity. The ACH withdrawals, which also serve as the basis for the predicate of wire fraud, were a "regular means of collecting on the [Merchant Agreements]." Haymount Urgent Care PC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *9. The Complaint sufficiently alleges a violation of RICO predicated on a pattern of wire fraud activity.

C. Unlawful Debt

Defendants argue that the RICO claim cannot be based on the collection of an unlawful debt because that there was no unlawful debt. This argument is unpersuasive because the Complaint sufficiently alleges an unlawful debt.

RICO defines "unlawful debt" as a debt (A) "which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury," and (B) "which was incurred in connection with . . . the business of lending money or a thing of value at a **[*12]** rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . ." 18 U.S.C. § 1961(6).

"Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735, 598 N.E.2d 7, 11-12, 586 N.Y.S.2d 240 (N.Y. 1992) (citation omitted) (internal quotation marks omitted). Under New York law, "[w]hen determining whether a transaction is a loan, substance - - not form -- controls." Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 157 N.Y.S.3d 800, 179 N.E.3d 612, 621-22 (N.Y. 2021). Courts must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" and the "principal sum advanced is repayable absolutely." *See* LG Funding, LLC v. United Senior Props. of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 (2d Dep't 2020).

Put differently, when determining whether a transaction was a true sale of receivables or a loan, "[t]he root of

[the analysis] is the transfer of risk. 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." *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)*; *accord* *Haymount Urgent Care PC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *6*. Courts have considered, among others, the following three factors to analyze who bears the ultimate risk that the borrower's customers will not pay: **[*13]** (1) whether there is a reconciliation provision; (2) whether the agreement has an indefinite term and (3) whether the lender has any recourse should the merchant declare bankruptcy. *See* *LG Funding, 122 N.Y.S.3d at 312*; *see, e.g.,* *Davis v. Richmond Cap. Grp., LLC, 194 A.D.3d 516, 150 N.Y.S.3d 2, 5 (1st Dep't 2021)* (holding the RICO claim based on unlawful debt was sufficiently alleged based on allegations that "defendants refused to permit reconciliation, the selection of daily payment rates that did not appear to represent a good faith estimate of receivables, provisions making rejection of an automated debit on two or three occasions without prior notice an event of default entitling defendants to immediate repayment of the full uncollected purchased amount, and provisions authorizing defendants to collect on the personal guaranty in the event of plaintiff business's inability to pay or bankruptcy"); *Haymount Urgent Care PC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7* (same on a motion to dismiss). The issue is "ultimately about whether the transaction represented a real transfer of risk . . . so the economic substance of the transaction was a loan, not a purchase of receivables." *Id.; see* *Fleetwood Servs., LLC v. Ram Cap. Funding, LLC, No. 20 Civ. 5120, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *10 (S.D.N.Y. June 6, 2022)* (holding in a summary judgment motion that the three *LG Funding* factors and other considerations suggested that the purchase of receivables in reality constituted a loan).[1]

1. Reconciliation [*14] Provision

The Complaint's alleged facts are sufficient to plead that the transactions between FTE and Queen Funding were loans. The first *LG Funding* factor is whether there was a reconciliation provision. By its terms, the reconciliation provision in the Merchant Agreements is to ensure that the sum of FTE's daily payments to Queen Funding in any given month actually is 13% of its monthly receipts. In theory, the presence of such a provision would suggest that the transaction is not a loan, but rather a purchase where Queen Funding bears the risk of loss if receivables are not paid.

Here, the Complaint sufficiently and plausibly alleges that the reconciliation provision was a "sham." First, Defendants "do[] not have a reconciliation department, do[] not perform reconciliations, and [have] never refunded a merchant money as required under their sham reconciliation provision."

Second, the Merchant Agreements by their terms do not to require a reconciliation. The Merchant Agreement contains a provision that permits the merchant to request Queen Funding to reconcile the daily payment amount going forward to more closely reflect the agreed upon 13%.[2] The "Addendum to Secured Merchant Agreement" further **[*15]** provides that the merchant may request a reconciliation to ensure that the amount FTE actually paid for a prior month is 13% of its actual receipts.[3] In each case, any obligation that Queen

[1] On June 8, 2022, Plaintiffs filed a notice of supplemental authority and attached the opinion in *Fleetwood Services, LLC v. Ram Capital Funding, LLC, No. 20 Civ. 5120, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207 (S.D.N.Y. June 6, 2022)*. Defendants moved to strike based on ***Federal Rule of Appellate Procedure 28(j)***, arguing that the notice is irrelevant. The motion to strike is denied as the decision is relevant to the legal issues in this case.

[2] Paragraph 1.4 of the Merchant Agreement states: "The Specific Amount is intended to represent the Specified Percentage of Merchant's Receipts each calendar month. At any time, [Queen Funding] may adjust the Specific Amount so that the amount received by [Queen Funding] in the future more closely represents the Specified Percentage. Also, once each calendar month Merchant may request that [Queen Funding] reconcile Merchant's actual receipts and adjust the Specific Amount so that the amount received by [Queen Funding] in the future more closely represents the Specified Percentage. Upon receipt of a written reconciliation request from Merchant, [Queen Funding] may request any and all information from Merchant that [Queen Funding], in its sole judgment, believes is necessary to accurately reconcile the amount [Queen Funding] has received from Merchant with the actual Specified Percentage. [Queen Funding] shall not be required to adjust the Specific Amount until such time as it has received all such requested information."

[3] Paragraph c. states: "At the Merchant's option, within five (5) business [sic] following the end of a calendar month, the Merchant may request a reconciliation to take place, whereby Queen Funding may ensure that the cumulative amount

Funding may have is contingent on the merchant's providing documentation requested by Queen Funding "in its sole judgment" and in its "sole and absolute discretion," respectively. Queen Funding consequently has the absolute ability to nullify any obligation to reconcile.

Moreover, the Addendum expressly states that Queen Funding has no obligation to reconcile any past payments in excess of the 13% and describes the potential reconciliation as "a courtesy, and that Queen Funding is under no obligation to provide same." The Addendum goes on to emphasize that "if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, then Queen Funding shall not effectuate the reconciliation discussed above."

2. Indefinite Term

The *LG Funding* second factor is whether the Merchant Agreements have an indefinite term. A fixed term is typical of a loan, while an indefinite term of receiving a fixed percentage of actual receipts may suggest that the lender has assumed **[*16]** the risk associated with the receivables not being collectable. *See Fleetwood Servs., 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *9* ("If the term is indefinite, then it is consistent with the contingent nature of each and every collection of future sales proceeds under the contract.") (internal quotation marks omitted). The Master Agreement provides for a seemingly indefinite term, in stating that the merchant must continue to pay the daily amount until it has fully paid the amount of receivables that Queen Funding purportedly purchased -- i.e., the amount FTE owes for the cash advance. However, a de facto fixed term plausibly exists. The period of payment can be easily calculated by dividing the amount FTE owes by the amount of daily payments. A failure to pay will not indefinitely extend the term because the Merchant agreement provides that a default will occur if two daily payments are not made during the term of the agreement and the merchant does not contact Queen Funding in advance. Upon an event of Default, Queen Funding has the right to exercise all remedies in connection with the Agreement, including accelerating the debt and collect the entire amount owed, enforcing its security interest in the collateral (i.e., all of FTE's receivables) **[*17]** and enforcing the guarantee.

3. Lender Recourse in an Event of Bankruptcy

The third *LG Funding* factor is whether the lender has recourse should the merchant declare bankruptcy. If the merchant's bankruptcy triggers a default, this factor would weigh in favor of finding the agreement to be a loan because it would suggest that the lender has not assumed the risk of loss of not collecting on the receivables but instead is relying on the creditworthiness of the borrower to be repaid. *See Fleetwood Servs., 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *9* ("In determining whether the merchant retains the risk of nonpayment, it is significant that 'the agreement provides that [defendant's] written admission of its inability to pay its debt or its bankruptcy constitute events of default under the agreement, which entitle the plaintiff to the immediate full repayment of any of the unpaid purchased amount.'") (quoting *LG Funding, 122 N.Y.S.3d at 313*).

This factor weighs in favor of finding the transactions to be loans. The Merchant Agreements' exacting event of default provision, the "Protections against Default" provision making payment due immediately and permitting seizure of the collateral in case of a default and the personal guaranty provision effectively shield the lender from the risk of loss **[*18]** when the creditor is nearly or actually bankrupt. The lender bears nearly no risk of the receivables' non-performance and would recover the Purchased Amount even if the receivables turned out to be uncollectable.

4. Other Factors Affecting Ultimate Transfer of Risk

In addition to the three *LG Factors*, the Complaint alleges additional facts to show that the transactions were loans. The repayment and remedy terms of the Merchant Agreements shield Defendants from the risk that the purchased receivables may be uncollectable. For example, an "Event of Default" occurs if "attempted ACH debit of the Specific Daily Amount is rejected two times during the term of [the Merchant Agreement] and the Merchant does not contact [Queen Funding] in advance of the ACH debit being rejected." In such

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remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage. However, in order to effectuate this reconciliation, upon submitting the request for reconciliation to Queen Funding -- but in no event later than five (5) business days following the end of the calendar month -- the Merchant must produce any and all evidence and documentation requested by Queen Funding in its sole and absolute discretion, necessary to identify the appropriate amount of the Specified Percentage."

cases, payment becomes immediately due and Defendants are allowed to foreclose on the collateral, including any collateral held by the guarantor. For this reason as well, Defendants bore no "real transfer of risk," and therefore, "the economic substance of the transaction was a loan, not a purchase of receivables." *Haymount Urgent Care PC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *7*. On balance, the Complaint pleads sufficient facts to show that the transactions reflected in **[*19]** the Merchant Agreements are loans subject to usury laws. *See Davis. v. Richmond Capital Group, 194 A.D.3d 516, 150 N.Y.S.3d 2, 4 (1st Dep't 2021)*.

5. Usury

The usury element of unlawful debt under RICO is also adequately pleaded. RICO prohibits an enterprise's collection of unlawful debt. *18 U.S.C. § 1962 (c)*. "Unlawful debt" under RICO is a debt "which is unenforceable under State or Federal law . . . because of the laws relating to usury," and "where the usurious rate is at least twice the enforceable rate." *18 U.S.C. § 1961(6)*. Under New York law, a loan is usurious if the interest rate exceeds "six per centum per annum," *N.Y. Gen. Oblig. L. § 5-501* and criminally usurious if it has an interest rate "exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period," *N.Y. Penal Law § 190.40*. The effective interest rates of the Merchant Agreements range from 100% to 300% per annum, which far exceed the New York criminal usury law's limit of 25%. Usurious intent, which is usually a question of fact for the jury, is also adequately alleged. *See Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 157 N.Y.S.3d 800, 179 N.E.3d 612, 623 (N.Y. 2021)*. The Complaint sufficiently and plausibly alleges collection of unlawful debt in violation of RICO.

D. Standing

Defendants' argument that Plaintiffs lack standing because the Complaint does not allege "definite damages" or injury is unpersuasive. To satisfy RICO's standing requirements, **[*20]** a plaintiff must demonstrate "(1) a violation of *[18 U.S.C. §] 1962*; (2) injury to business or property; and (3) causation of the injury by the violation." *Motorola Credit Corp. v. Uzan, 322 F.3d 130, 135 (2d Cir. 2003)* (per curiam) (quoting *Hecht v. Com. Clearing House, Inc., 897 F.2d 21, 23 (2d Cir.1990)*) (internal quotation marks omitted); *accord Black v. Ganieva, No. 21 Civ. 8824, 2022 U.S. Dist. LEXIS 116239, 2022 WL 2374514, *26 (S.D.N.Y. June 30, 2022)*. "RICO standing is a more rigorous matter than standing under Article III." *Denney v. Deutsche Bank AG, 443 F.3d 253, 266 (2d Cir. 2006)*; *accord Petroff Amshen LLP v. Alfa Rehab PT PC, No. 21-847, 2022 U.S. App. LEXIS 4312, 2022 WL 480475, at *2 (2d Cir. Feb. 17, 2022)* (summary order). "[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite." *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 (2d Cir. 1994)*; *accord Black, 2022 U.S. Dist. LEXIS 116239, 2022 WL 2374514, *26*.

Plaintiffs plead allegedly fraudulent agreements or usurious debt. All of Plaintiffs' payments pursuant to the Merchant Agreements apparently have been made. What amounted to allegedly fraudulent or usurious interest payments represent concrete injury and damage sufficient to establish standing. *See Motorola Credit Corp. v. Uzan, 322 F.3d 130, 135 (2d Cir. 2003)* ("To satisfy RICO's standing requirements, a plaintiff must demonstrate . . . a violation of [RICO] [and] injury to business or property . . . ").

The case cited by Defendants is inapposite. In *First Nationwide Bank v. Gelt Funding Corp.*, plaintiffs brought a RICO claim against loan brokers whose loans defaulted at a higher rate. *27 F.3d 763, 767 (2d Cir. 1994)*. Defendants argued that a portion of plaintiffs' claim for damages was based on loans that "had not been sold, foreclosed, or restructured" and from which plaintiffs suffered **[*21]** no damages. *See id.* The Second Circuit held that "with respect to those loans not foreclosed, [plaintiff] has not alleged an injury ripe for suit under RICO." *Id. at 772*. In our case, Plaintiffs sufficiently allege that they suffered damages based on the fraudulent or otherwise unenforceable interest payments.

E. Statute of Limitations

Defendants are incorrect that the claims are barred by the statute of limitation. RICO claims are subject to a four-year statute of limitations. *Rotella v. Wood, 528 U.S. 549, 552, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*; *accord Simmons v. Reich, No. 20-4114, 2021 U.S. App. LEXIS 32372, 2021 WL 5023354, at *2 (2d Cir. Oct. 29, 2021)*. The statute of limitations for RICO is unaffected by the predicate act's statute of limitations, even when the predicate act arises out of a state law claim. *United States v. Paone, 782 F.2d 386, 393 (2d*

Cir. 1986); *accord* Monterey Bay Mil. Hous., LLC v. Ambac Assurance Corp., 531 F. Supp. 3d 673, 711 (S.D.N.Y. 2021). The Complaint was filed on November 19, 2021, which is one day less than four years from the date the first Merchant Agreement was signed. The claims are timely.

F. Other Elements of RICO Violation

Contrary to Defendants' arguments, the Complaint sufficiently pleads the other elements of a RICO violation sufficient to state a claim. The Complaint sufficiently alleges an "enterprise," which is distinct from the "person" who has violated RICO. Any legal entity may qualify as a RICO enterprise, 18 U.S.C. § 1961(4), and "[t]he corporate owner/employee, a natural person, **[*22]** is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its difference legal status." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001); *accord* In re Arab Bank, PLC Alien Tort Statute Litig., 822 F.3d 34, 40 (2d Cir. 2016) (Cabranes, J., concurring). Queen Funding is a legal entity that falls within the definition of a RICO enterprise and is distinct from Klein, a natural person. *See, e.g.,* Fleetwood Servs., 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at *19 (finding an MCA company to be an enterprise under RICO); Haymount Urgent Care PC, 2022 U.S. Dist. LEXIS 112768, 2022 WL 2297768, at *9 (same).

G. RICO Conspiracy

The Complaint's RICO conspiracy claim also survives. Defendants' only argument is that the conspiracy claim fails because the underlying substantive RICO claim fails. For reasons above, this argument is without merit.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is DENIED. The stay of discovery is lifted. By July 27, 2022, the parties shall file a proposed case management plan as outlined in the Court's Individual Rules. The Clerk of Court is respectfully directed to close the motions at Dkt. No. 19 and 34.

Dated: July 20, 2022

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

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Exhibit 25

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As of: March 10, 2023 9:20 PM Z

SEC v. One Equity Corp.

United States District Court for the Southern District of Ohio, Eastern Division

November 23, 2010, Decided; November 23, 2010, Filed

Case No. 2:08-cv-667

Reporter
2010 U.S. Dist. LEXIS 124013 *; 2010 WL 4878993

SECURITIES & EXCHANGE COMMISSION, Plaintiff, v. ONE EQUITY CORPORATION, et al., Defendants.

Subsequent History: Motion granted by *SEC v. One Equity Corp., 2010 U.S. Dist. LEXIS 136308 (S.D. Ohio, Nov. 30, 2010)*

Prior History: *SEC v. One Equity Corp., 2009 U.S. Dist. LEXIS 94876 (S.D. Ohio, Sept. 30, 2009)*

Core Terms

Receiver, receivership, lift, receivership estate, proof of claim, Notice, Appointed, stock, Filings, counterclaims, Declaration, liquidate, shares, pursue a claim, borrowers, alleges, motions, orders, loans, prior court, Approving, factors

Case Summary

Overview
The receiver's motion for declaration that a company was barred from pursuing claims against the receivership estate was denied because issues such as off-set and recoupment could be decided in this action after judgment was rendered in the California case. Additionally, the procedural juncture of the proceedings in the California action and in this case weighed in favor of permitting the company to assert its claim against the receivership estate.

Outcome
Motion denied.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > Remedies > Receiverships > General Overview

HN1[] **Judges, Discretionary Powers**

Subject to the dictates of due process, a district court has broad powers and wide discretion in fashioning relief in an equity receivership proceeding.

Bankruptcy Law > Claims > Proof of Claim > General Overview

HN2[] **Claims, Proof of Claim**

The notion of informal proof of claims has been in existence for approximately a century. It permits a bankruptcy court to treat the pre-bar data filings of a creditor as an informal proof of claim which can be amended after the bar date so that it is in conformity with the requirements of *Fed. R. Bankr. P. 3001(a)*. Creditors who have failed to adhere to the strict formalities of the Bankruptcy Code but who have taken some measures to protect their interests in the bankruptcy estate may be able to preserve those interests by showing that they have complied with the spirit of the rules.

Bankruptcy Law > Claims > Proof of Claim > General Overview

HN3[] Claims, Proof of Claim

The intent of the informal Proof of Claim concept is to alleviate problems with form over substance; that is, equitably preventing the potentially devastating effect of the failure of a creditor to formally comply with the requirements of the Bankruptcy Code in the filing of a Proof of Claim, when, in fact, pleadings filed by the party asserting the claim during the claims filing period in a bankruptcy case puts all parties on sufficient notice that a claim is asserted by a particular creditor.

Bankruptcy Law > Claims > Proof of Claim > General Overview

HN4[] Claims, Proof of Claim

The determination of whether to allow an informal proof of claim is conferred to the equitable discretion of the bankruptcy court. Given the similarly broad equitable discretion that district courts have in fashioning relief in a receivership proceeding, whether or not to permit an informal proof of claim is a determination that falls well within that discretion.

Bankruptcy Law > Claims > Proof of Claim > General Overview

HN5[] Claims, Proof of Claim

Four factors for determining the validity of the proposed claim, as adapted from the bankruptcy context for the present receivership context, must be met: (1) the proof of claim must be in writing; (2) the writing must contain a demand by the creditor on the receivership estate; (3) the writing must express an intent to present a claim in the receivership; and (4) the proof of claim must be filed with the receivership court. If a filing meets the above considerations, the court may consider the equities in deciding whether to allow the claim to be asserted against the receivership estate.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > Remedies > Receiverships > General Overview

HN6[] Entry of Judgments, Stays of Judgments

The Wencke test involves a three-pronged analysis: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > Remedies > Receiverships > General Overview

HN7[] Entry of Judgments, Stays of Judgments

Under the third prong of the Wencke test, the party requesting a lift of stay is not required to show that it is likely to prevail on the merits. Rather, the inquiry is whether the moving party has colorable claims to assert which justify lifting the receivership stay.

Civil Procedure > Remedies > Receiverships > General Overview

HN8[] Remedies, Receiverships

The United States Supreme Court has distinguished between liquidating a claim, which does not interfere with the receivership court's authority, and distributing assets, which is the essence of the receivership court's authority. This distinction means that the establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.

Counsel: [*1] For Frederick L Ransier, Receiver: Frederick Langdon Ransier, LEAD ATTORNEY, Joseph R Miller, Robert A Bell, Jr, Vorys Sater Seymour & Pease - 2, Columbus, OH; Brenda K Bowers, Jonathan P Corwin, Vorys, Sater, Seymour & Pease, LLP, Columbus, OH.

For Carl Amari, Charles C. Mottley, Alan Smith, other AG Solutions LTD, Interested Parties: Amelia A Bower,

LEAD ATTORNEY, Plunkett & Cooney PC - 1, Columbus, OH; Marta A Richards, PRO HAC VICE, Baton Rouge, LA.

For Spartan Marketing Limited, Interested Party: Reuel D Ash, LEAD ATTORNEY, Jessica Iwler Oldham, Ulmer & Berne LLP, Cincinnati, OH.

For Robert Schwartz, Interested Party: Amelia A Bower, LEAD ATTORNEY, Plunkett & Cooney PC - 1, Columbus, OH.

For Securities And Exchange Commission, Plaintiff: Mark Thomas D'Alessandro, LEAD ATTORNEY, United States Attorney's Office - 2, Columbus, OH; Adolph J. Dean, Jr., Thomas J Meier, U.S. Securities and Exchange Commission, Chicago, IL; Frank Daniel Goldman, US Department of Justice, Chicago, IL; Jerrold H Kohn, Securities and Exchange Commission, Chicago, IL.

For Elite Shine Group Limited, Defendant, Intervenor: William Chester Wilkinson, LEAD ATTORNEY, Thompson Hine LLP, Columbus, OH; David J Schindler, **[*2]** PRO HAC VICE, Latham & Watkins LLP, Los Angeles, CA; Deborah L Steiner, PRO HAC VICE, Latham & Watkins LLP, Chicago, IL.

For Tadd W. Byers, Movant: George Cook Ford, III, LEAD ATTORNEY, Norwalk, OH.

Travis G Stange, Hunter Investigations, Movant, Pro se, Whitehall, OH.

For Brightest Power Holdings Limited, Luck Great Investments Limited, Intervenors: William Chester Wilkinson, LEAD ATTORNEY, Thompson Hine LLP, Columbus, OH; David J Schindler, PRO HAC VICE, Latham & Watkins LLP, Los Angeles, CA; Deborah L Steiner, PRO HAC VICE, Latham & Watkins LLP, Chicago, IL.

Judges: JUDGE EDMUND A. SARGUS, JR., UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE MARK R. ABEL.

Opinion by: EDMUND A. SARGUS, JR.

Opinion

OPINION AND ORDER

This matter is before the Court on the following motions: Receiver Frederick L. Ransier's Motion for Declaration that Spartan Marketing Limited is Barred from Pursuing Claims Against the Receivership Estates (D.E. 140) ("Bar Claims Mot."); Interested Party Spartan Marketing Limited's Motion for Consideration of Prior Court Filings as Informal Proof of Claim (D.E. 145) ("Informal Proof of Claim Mot."); and Interested Party Spartan Marketing Limited's Renewed Motion to Lift Receivership Stay as to Spartan **[*3]** Marketing Limited (D.E. 146) ("Lift Stay Mot."). These motions have been fully briefed and are now ripe for disposition. For the following reasons, Receiver Frederick L. Ransier's Motion to Exclude Motion of Court Appointed Receiver for Declaration that Spartan Marketing Limited is Barred from Pursuing Claims Against the Receivership Estates (D.E. 140) is denied; Interested Party Spartan Marketing Limited's Motion for Consideration of Prior Court Filings as Informal Proof of Claim (D.E. 145) is granted; and Interested Party Spartan Marketing Limited's Renewed Motion to Lift Receivership Stay as to Spartan Marketing Limited (D.E. 146) is granted in part.

I. Background

On July 10, 2008, the Securities and Exchange Commission ("SEC") initiated this action against various individuals and corporate entities. Among the corporate entities named as defendants are One Equity Corporation and Triangle Equities Group, Inc. ("the One Equity Companies"). [1] The complaint alleges that the defendants operated a stock-based loan program which they used to defraud approximately 125 borrowers out of millions of dollars. (Compl. ¶ 1.) Specifically, the complaint alleges that as part of the fraudulent scheme, **[*4]** the defendants induced borrowers to transfer publicly traded stock shares to them as collateral for a non-recourse loan of up to 85% of the value of the stock. (Compl. ¶ 1.) According to the complaint, the defendants falsely promised to return the shares to the borrowers upon repayment of the loans. (Compl. ¶ 1.) Instead, the complaint alleges, the defendants sold the stock that the borrowers transferred to them, and then used the proceeds to fund each loan and to pay expenses but did not set aside cash reserves that would enable them to repurchase the stock and return the shares to borrowers who repaid their loans. (Compl. ¶ 1.) The complaint also alleges that the defendants retained substantial proceeds from the sale of the

[1] Also named as corporate defendants are Victory Management Group, Inc. and Dafcan Finance, Inc. The individual defendants are Michael S. Spillan and Melissa K. Spillan. These defendants are not parties to the motions currently under the Court's consideration.

stocks even after funding each loan because the loans were typically funded at between 10% and 50% less than the market value of the shares transferred. (Compl. ¶ 1.)

By order dated July 17, 2008, the Court **[*5]** appointed Frederick L. Ransier as Receiver for the estates of, inter alia, the one Equity Companies. (Order Appointing Receiver, July 17, 2008, D.E. 14. ("Order App'tg. Recr.")) In the same order, the Court authorized the Receiver to "pursue, resist, and defend all suits which may now be pending or which may be brought by or asserted against the Receiver Estates." (Order App'tg. Recr.) Pending at the time of the July 17, 2008 order was an action initiated in a California state court by One Equity Corporation against Spartan Marketing, Limited ("Spartan"). [2] (Order App'tg. Recr.) In that action, Spartan had asserted a counterclaim against One Equity. This Court's July 17, 2008 order stayed that action, (Order App'tg. Recr.)

Thereafter, the Receiver moved this Court to appoint counsel to continue prosecution of One Equity Corporation's complaint against Spartan Marketing in the California case. The Court granted that motion on October 21, 2008. (Order Approving Appl. by Receiver to Employ Cochran, Davis & Associates, P.C., **[*6]** as Special Counsel, October 21, 2008, D.E. 53). [3]

Spartan Marketing then filed a motion with this Court requesting a lift of the receivership stay to enable Spartan to pursue its counterclaims in the California action at the same time that the Receiver pursued the One Equity Companies Receivership Estate claims against Spartan. (Motion of Spartan Marketing Limited to Lift the Receivership Stay, January 7, 2009, D.E. 63). In its motion, Spartan asserted that its counterclaims against the One Equity Companies arose from two non-recourse loan agreements—one reached on or about January 3, 2007, and one reached on or about January 26, 2007—involving the transfer of shares of publicly-traded stock from Spartan to One Equity as collateral for a loan of 85% of the total worth of the shares. In its counterclaim in the California action, Spartan asserted causes of action based in contract, as well as claims for fraud; negligent misrepresentation; violation of *California Corporations Code § 25401*, by making untrue statements or omissions in connection with the purchase or sale of a security; unjust enrichment; violation of *California Business and Professions Code §§ 17200 et seq.*, **[*7]** by engaging in an unlawful or unfair or fraudulent business act or practice; and promissory estoppel. In its motion, Spartan represented to this Court that its purpose in requesting a lift of the stay was to liquidate its claims against the One Equity Receivership Estate in the California action and to proceed with collecting on the judgment (if it prevails on its claims) only at such time as the other creditors of the One Equity Receivership Estate seek distribution in this action.

In orders entered on February 17 and 19, 2009, the Court granted in part and denied in part, without prejudice, Spartan's motion to lift the stay. (Order, February 17, 2009, D.E. 71; Order, February 19, 2009, D.E. 72). Specifically, the Court lifted the stay with respect to Spartan's contract claims against One Equity involving the second loan agreement (that is, the agreement reached on or about January 26, 2007) and any claims pending by or against other parties not subject to the Receivership appointment, but declined at that time to lift the stay with respect to Spartan's fraud claims against the One Equity Receivership Estate. (Order, February 17, 2009, D.E. 71; Order, February 19, 2009, D.E. 72).

Subsequently, **[*8]** upon receipt of the Receiver's Fifth Report and Application to Establish Proof of Claims Notice and Procedure (D.E. 105), this Court entered an order establishing March 10, 2010 as the bar date for delivering claims to the Receiver. (Order Approving Fifth Report of Court Appointed Receiver and Appl. to Establish Proof of Claims Notice and Procedure, January 8, 2010, D.E. 106). The Court's order stated that "any holder of a claim against the receivership estate who fails to timely deliver that holder's proof of claim upon the Receiver shall be barred from asserting such a claim and participating in any distribution in this receivership case on account of such claim." (Order Approving Fifth Report of Court Appointed Receiver and Appl. to Establish Proof of Claims Notice and Procedure, January 8, 2010, D.E. 106). (*Id.*)

Pursuant to the Court's order, the Receiver sent the Notice of Bar Date to File Claim and a Proof of Claim Form, among other items, to counsel for Spartan; published the Notice of Bar Date in the "Legal Monday" section of USA Today on February i, 2010; and published a notice on the SEC's website reporting updates for the litigation in this Court. (Receiver's Sixth

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[2] *One Equity Corporation v. Spartan Marketing, Ltd., et al*, pending in the Superior Court of the State of California, County of Los Angeles, West District, No. SC 094111.

[3] The Order was docketed on October 22, 2008.

Report **[*9]** and Appl. to Establish Proof of Claims Notice and Procedure, D.E. 113). Spartan did not return a Proof of Claim form. (Aff. of Brenda Bowers, September 9, 2010 ¶ 8, attached to Mot. of Court Appointed Receiver for Decl. that Spartan Marketing Ltd. is Barred from Pursuing Claims Against Receivership Estates, D.E. 140).

Meanwhile, in the California action, that court, upon motion by the Receiver, dismissed Spartan's contract-based claims against the One Equity Companies but left intact Spartan's fraud-based claims. [4] (Renewed Mot. of Spartan Marketing Ltd. to Lift Receivership Stay, D.E. 146, at 9; Opp'n of Court Appointed Receiver to Renewed Mot. of Spartan Marketing Ltd. to Lift Receivership Stay, D.E. 158, at 6).

On September 9, 2010, the Receiver filed a motion requesting this Court to issue a declaration that Spartan is barred from pursuing claims against the receivership estates. (D.E. 140). Spartan filed a response in opposition (D.E. 144), to which the Receiver replied (D.E. 156). On October 1, 2010, Spartan filed two motions, one asking this Court to recognize its prior court **[*10]** filings as informal proof of claim against the receivership estates (D.E. 145), and the other asking this Court to grant a limited lift of the receivership stay to enable Spartan to pursue its claims against the One Equity Companies Receivership Estate in the California action (D.E. 146). The Receiver filed separate responses in opposition to each of Spartan's motions (D.E. 157 and D.E. 158), and Spartan then filed separate replies (D.E. 160 and D.E. 161). On November 2, 2010, this Court held a hearing on these motions. The Court now turns to consideration of the merits of these motions.

II. Analysis

A. The Receiver's Motion for Declaration that Spartan is Barred from Pursuing Claims Against the Receivership Estate and Spartan's Motion for Consideration of Prior Court Filings as Informal Proof of Claim [5]

HN1[] Subject to the **[*11]** dictates of due process, "[a] district court has broad powers and wide discretion in fashioning relief in an equity receivership proceeding." *Liberte Capital Grp., LLC v. Capwill, 421 F.3d 377, 382 (6th Cir. 2005)*. The Receiver contends that, in the exercise of the Court's broad discretion, the Court should issue a declaration that Spartan is barred from asserting affirmative claims or a defensive set-off in receivership. The Receiver also urges the Court to continue to stay Spartan's claims against the One Equity Companies in the California action. Spartan contends that it has the right to assert affirmative claims or a defensive set-off in receivership and believes that the stay of its claims against the One Equity Companies should be lifted.

1. Formal Proof of Claim

According to the Receiver, Spartan should not be allowed to assert any claims for relief against the One Equity Companies receivership entities because Spartan failed to file a formal proof of claim in receivership on or before the bar date, despite having received notice of the bar date. The Receiver states that, as a matter of law, a creditor that fails to file a proof of claim by the bar date is forever barred from **[*12]** asserting the claim, and the receivership is discharged from any liability. As support for this proposition, the receiver cites a number of unpublished cases from other districts and one unpublished case from the United States Court of Appeals for the Sixth Circuit. *See* *SEC v. Princeton Econs. Int'l Ltd., Nos. 99 Civ. 9667 (PKC), 99 Civ. 9669(PKC), 2008 U.S. Dist. LEXIS 115301, 2008 WL 7826694, *4 (S.D.N.Y. Sept. 30, 2008)* (order of court approving final distribution of receivership assets barred unfiled claims); *Commodity Futures Trading Comm'n v. Wall St. Underground, Inc., Case No. 03-2193-CM, 2007 U.S. Dist. LEXIS 38753, 2007 WL 1531856, *4 (D. Kan. May 25, 2007)* (same); *Clayton v. Heartland Res., Inc., Case No. 1:08-cv-94-M, 2009 U.S. Dist. LEXIS 107519, *22 (W.D. Ky. Nov. 17, 2009)* (order appointing receiver and directing receiver to give notice of bar claims date stated that claims not filed by the date established would be barred); *United States v. Berthel SBIC, LLC, Case No. 08-CV-151-LRR, 2009 U.S. Dist. LEXIS 58904, *4 (N.D, Iowa July 10, 2009)* (order directing Receiver to give notice of bar claims date stated that claims not filed by the date established and in the form required would be barred); *Geig v. The March Co., No. 94-3105, 1995 U.S. App. LEXIS 15761, 1995 WL 376717, *2 (6th Cir. June 22,*

[4] The California court's ruling on Spartan's stayed claims was prompted by the Receiver's motion to dismiss.

[5] Because of the overlapping nature of the issues presented both in the Receiver's motion requesting a declaration that Spartan is barred from pursuing claims against the receivership estate and in Spartan's motion asking this Court to recognize its prior court filings as informal proof of claim against the receivership estate, the Court considers these motions together.

1995) **[*13]** (reversing district court's award of default judgment against defendants who did not answer complaint or make appearance in action until default judgment was entered against them). [6]

These cases, however, simply do not stand for the broad proposition for which the Receiver invokes them. In *Princeton Economics* and *Wall Street Underground*, the courts declaring future claims barred did so in the context of orders approving final distribution of receivership assets. See Princeton Econ., 2008 U.S. Dist. LEXIS 115301, 2008 WL 7826694, *4; Wall Street Underground, 2007 U.S. Dist. LEXIS 38753, 2007 WL 1531856, *4. Here, the receivership is not at the stage of final distribution. In *Clayton* and *Berthel*, the courts' orders stated that claims not filed by the bar date would be barred. At the stage of the proceedings at which the orders were issued, no claims had in fact been barred. *See* Clayton, 2009 U.S. Dist. LEXIS 107519, *22; Berthel, 2009 U.S. Dist. LEXIS 58904, *4. Moreover, none of the cases the **[*14]** Receiver cites involved circumstances in which the potential claimant against the receivership estate had been actively seeking to liquidate its claims in litigation initiated in another forum by the receivership entity before being placed in receivership. Thus, whether the courts issuing the orders in the cases cited by the Receiver would admit to no exception to their orders stating that untimely claims would be barred— irrespective of the equities—remains an open question.

2. Informal Proof of Claim

Spartan does not dispute that it failed to file a formal proof of claim. Rather, Spartan urges this Court to borrow principles from bankruptcy law and to consider Spartan's prior filings in both this action and in the California action as informal proof of its claim against the receivership estate. Spartan directs this Court's attention to In re M.J. Waterman & Assocs, Inc., 227 F.3d 604 (6th Cir. 2000), in support of its view. This Court finds the Sixth Circuit's rationale in that case relevant to the issues presented in this action:

> **HN2**[] The notion of informal proof of claims has been in existence for [approximately] a century. It permits a bankruptcy court to treat the pre-bar data filings **[*15]** of a creditor as an informal proof of claim which can be amended after the bar date so that it is in conformity with the requirements of Fed. R. Bankr.P. 3001(a).
>
> Creditors who have failed to adhere to the strict formalities of the Bankruptcy Code but who have taken some measures to protect their interests in the bankruptcy estate may be able to preserve those interests by showing that they have complied with the spirit of the rules.

In re M.J. Waterman, 227 F.3d at 608-09 (citing Hutchinson v. Otis, 190 U.S. 552, 555, 23 S. Ct. 778, 47 L. Ed. 1179 (1903); J.B. Orcutt Co. v. Green, 204 U.S. 96, 102, 27 S. Ct. 195, 51 L. Ed. 390 (1907) (internal citations omitted from quoted text)). Further explaining the rationale for allowing informal proof of claims in a bankruptcy case, the Sixth Circuit stated:

> **HN3**[] "The intent of the informal Proof of Claim concept is to alleviate problems with form over substance; that is, equitably preventing the potentially devastating effect of the failure of a creditor to formally comply with the requirements of the Code in the filing of a Proof of Claim, when, in fact, pleadings filed by the party asserting the claim during the claims filing period in a bankruptcy case puts all parties on sufficient notice that a claim is **[*16]** asserted by a particular creditor."

Id. at 609 (quoting In re WPRV-TV, Inc., 102 B.R. 234, 238 (Bankr. E.D. Okla. 1989)). **HN4**[] The determination of whether to allow an informal proof of claim is conferred to the equitable discretion of the bankruptcy court. Id. at 607. Given the similarly broad equitable discretion that district courts have in fashioning relief in a receivership proceeding, this Court concludes that whether or not to permit an informal proof of claim is a determination that falls well within that discretion. Spartan's argument that bankruptcy law offers a useful guide in this regard is therefore well-taken.

a. *Validity of Informal Proof of Claim*

HN5[] Four factors for determining the validity of the proposed claim, as adapted from the bankruptcy context for the present receivership context, must be met: (1) the proof of claim must be in writing; (2) the writing must contain a demand by the creditor on the receivership estate; (3) the writing must express an intent to present a claim in the receivership; and (4) the proof of claim must be filed with the receivership court. *See*

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[6] It is unclear why the Receiver cites Geig, which, as discussed below, supports Spartan's position that it should be permitted to liquidate its claims in the California action and, if it prevails, seek satisfaction of judgment in the receivership action.

Waterman, at 609 (listing the following four factors in the bankruptcy context: "(1) the proof of claim **[*17]** must be in writing; (2) The writing must contain a demand by the creditor on the debtor's estate; (3) The writing must express an intent to hold the debtor liable for the debt; and (4) The proof of claim must be filed with the bankruptcy court"). If a filing meets the above considerations, the court may consider the equities in deciding whether to allow the claim to be asserted against the receivership estate. *See* Waterman, at 609.

The Court finds that Spartan meets the foregoing standard. Spartan's pre-bar pleadings and other filings in the California litigation and Spartan's first motion in this action to lift the receivership stay made a claim in writing of an unliquidated amount; contained a demand against the One Equity Companies that are now in receivership; signaled an intent to hold the receivership liable for the unliquidated claim amount; and were filed in this Court directly or by incorporation. Thus, the Court finds the proposed claim valid.

b. *Equities in Permitting Claim to be Asserted*

The next inquiry is whether it would be equitable to allow the informal proof of claim to be asserted against the receivership estate. The Court concludes that the equities favor allowing **[*18]** the claim.

Given Spartan's counterclaims and amended counterclaims in the California action and in its first motion in this Court to lift the receivership stay, filed on January 7, 2009, in which Spartan stated its intent to liquidate its claim in the California action while subjecting any favorable judgment to the receivership, [7] the Receiver has been on notice since long before the bar date that Spartan has an active claim that it intends to assert against the One Equity Companies receivership estate. In addition, issues such as off-set and recoupment can be decided in this action after judgment is rendered in the California case. [8] Finally, the procedural juncture of the proceedings in the California action and in this case weigh in favor of permitting Spartan to assert its claim against the receivership estate. At the November 2, 2010 hearing in this case, the parties represented to the Court that the pleading stage has terminated in the California action, which is now ripe for that court to schedule a trial date. In this action, the receivership estate is not yet ripe for the Receiver to propose a plan of distribution. [9] In view of these facts, the Court concludes that Spartan's **[*19]** claim against the receivership estate should be allowed to proceed. The Court recognizes that the trajectory of the California litigation may not align perfectly with the ripening of a plan of distribution for the receivership estate and simply notes that anything the California court can do in the interest of comity to expedite the action there will be appreciated.

B. Spartan's Renewed Motion to Lift the Receivership Stay

The United States Court of Appeals for the Sixth Circuit has not articulated a test for determining whether a receivership stay should be lifted. The parties, however, agree that the factors set forth by the United States Court of Appeals for the Ninth Circuit in SEC v. Wencke, 622 F.2d 1363 (9th Cir. 1980) ("*Wencke I*") and SEC v. Wencke, 742 F.2d 1230 (9th Cir. 1984) ("*Wenke II*") (collectively "*Wencke*"), which has been subsequently adopted by many federal courts, appears to be the applicable standard. ***HN6***[] The *Wencke* test involves a three-pronged analysis:

> (1) [w]hether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

Wencke II, 742 F.2d at 1231.

Regarding the first of these factors, the Court finds that the stay is not needed to preserve the status quo because the disputed funds have been frozen subject **[*21]** to a court order in the California action. Although

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[7] Spartan has consistently maintained this position throughout its representations to this Court, repeating it most recently at the November 2, 2010 motions hearing.

[8] As discussed below, the stay currently imposed on Spartan's claims against the One Equity receivership estate in the California action will be lifted in part for the California court to determine liability on Spartan's fraud-based claims and liquidation, if any, of those claim before any recoupment or set-off, which will be determined by this Court if Spartan prevails in the California action.

[9] The Court notes that should the receivership estate become ripe for the preparation of a distribution plan before me California action has reached completion, the Receiver has at his disposal various methods, such as partial distribution, by which he can hold the appropriate **[*20]** amount funds in an escrow account pending resolution of the California action.

the Receiver correctly observes that lifting the stay will require the Receiver to litigate additional claims in California, the Receiver is already litigating claims against Spartan in that forum, and the additional claims arise from the same set of underlying facts. The Court further finds that Spartan will suffer substantial prejudice if Spartan is simultaneously prevented from liquidating its claims against the One Equity Companies in the California court and required to defend itself against One Equity's claims there.

The second factor also weighs in Spartan's favor. When the Court denied Spartan's first motion to lift the receivership stay, the receivership was in its early stages. At that time, the Receiver needed additional time to identify receivership assets and to investigate and resolve relevant issues pertaining thereto. During the intervening months, the Receiver has done precisely that. Accordingly, the Receiver no longer contends that he needs additional time to understand the scope of the receivership.

Finally, the third factor supports Spartan's position. ***HN7***[] Under the third prong of the *Wencke* test, the party requesting **[*22]** a lift of stay is not required to show that it is likely to prevail on the merits. Rather, the inquiry is whether "the [moving] party has *colorable* claims to assert which justify lifting the receivership stay." *United States v. Acorn Tech. Fund, L.P., 429 F.3d 438, 443 (3d Cir. 2005)* (citing *Wencke II, 742 F.2d at 1232*). Here, Spartan has asserted colorably meritorious claims in the California court, alleging that the One Equity Companies and others acquired publicly traded stock owned by Spartan as collateral for loans which the One Equity Companies knew were sham loans but which they offered as legitimate loans. Spartan additionally alleges that despite promises to return the stock shares upon repayment of the loan, the One Equity Companies never intended to do so, but rather sold or intended to sell the stocks without paying for or intending to pay for the stocks. The California court has recently ruled that the fraud-based causes of action arising from Spartan's allegations survive the Receiver's and third parties' motions to dismiss. Although the Receiver vigorously disputes the legitimacy of Spartan's claim to the funds at issue in the California action, resolution of that dispute **[*23]** may proceed in the California forum insofar as the action there liquidates Spartan's claim. Accordingly, this Court concludes that Spartan has asserted colorably meritorious claims sufficient to tip the third *Wencke* factor in its favor.

Given the Court's determination that the three *Wencke* factors weigh in Spartan's favor, the Court concludes that a lift of the receivership stay as to Spartan's counterclaims in the California litigation is warranted. This outcome is further supported by the Sixth Circuit's decision in *Geig*, which observed that ***HN8***[] the United States Supreme Court has "distinguished between liquidating a claim, which does not interfere with the receivership court's authority, and distributing assets, which is the essence of the receivership court's authority." *Geig, 59 F.3d at 170* (citing *Riehle v. Margolies, 279 U.S. 218, 224, 49 S. Ct. 310, 73 L. Ed. 669 (1929))*. This distinction means that "'[t]he establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.'" *Id*. (quoting *Morris v. Jones, 329 U.S. 545, 549, 67 S. Ct. 451, 91 L. Ed. 488 (1947)* **[*24]** and citing *Coit Independence Joint Venture v. F.S.L.C., 489 U.S. 561, 575, 109 S. Ct. 1361, 103 L. Ed. 2d 602 (1989))*.

III. Conclusion

For the reasons articulated above, Receiver Frederick L. Ransier's Motion to Exclude Motion of Court Appointed Receiver for Declaration that Spartan Marketing Limited is Barred from Pursuing Claims Against the Receivership Estates (D.E. 140) is **DENIED**; Interested Party Spartan Marketing Limited's Motion for Consideration of Prior Court Filings as Informal Proof of Claim (D.E. 145) is **GRANTED**; and Interested Party Spartan Marketing Limited's Renewed Motion to Lift Receivership Stay as to Spartan Marketing Limited (D.E. 146) is **GRANTED IN PART**. It is ordered that the **STAY** with respect to Spartan's fraud-based claims in the California litigation be, and hereby is, **LIFTED IN PART**, consistent with this Order.

IT IS SO ORDERED.

11-23-2010

DATED

/s/ Edmund A. Sargus, Jr.

EDMUND A. SARGUS, JR.

UNITED STATES DISTRICT JUDGE

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Exhibit 26

Neutral
As of: March 10, 2023 9:21 PM Z

SEC v. Private Equity Mgmt. Group, LLC

United States District Court for the Central District of California

November 18, 2010, Decided; November 18, 2010, Filed

Case No. CV 09-2901 PSG (Ex)

Reporter
2010 U.S. Dist. LEXIS 126337 *; 2010 WL 4794701

SEC v. Private Equity Management Group, LLC, et al.

Subsequent History: Costs and fees proceeding at, Motion denied by *SEC v. Private Equity Mgmt. Group, 2012 U.S. Dist. LEXIS 195214 (C.D. Cal., May 1, 2012)*

Later proceeding at *SEC v. Private Equity Mgmt. Group, 2013 U.S. Dist. LEXIS 70648 (C.D. Cal., May 17, 2013)*

Prior History: *SEC v. Private Equity Mgmt. Group, LLC, 2010 U.S. Dist. LEXIS 55644 (C.D. Cal., May 10, 2010)*

Core Terms

receiver, preliminary injunction, receivership, lift, insurable interest, status quo, entities, void, insurance policy, moving party

Counsel: [*1] Attorneys Present for Plaintiff(s): Not Present.

Attorneys Present for Defendant(s): Not Present.

Judges: The Honorable Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order GRANTING non-party Principal Life Insurance Company's motion for leave to file an action against the Receiver seeking declaratory judgment.

Before the Court is a motion filed by non-party Principal Life Insurance Company ("Principal Life") seeking leave to sue Robert P. Mosier (the "Receiver"). The Court finds this matter appropriate for decision without oral argument. *See Fed. R. Civ. P. 78*; *L.R. 7-15*. Having considered the papers submitted in support of and in opposition to the motion, the Court GRANTS Principal Life's motion.

I. Background

On April 24, 2009, the Securities and Exchange Commission initiated an action against defendants Private Equity Management Group, Inc., Private Equity Management Group LLC (collectively, "PEMGroup"), and Danny Pang. On August 4, 2009, the Court issued a preliminary injunction and order ("Preliminary Injunction") that, among other things, appointed Robert P. Mosier (the "Receiver") as permanent receiver of PEMGroup and **[*2]** its subsidiaries and affiliates. *See Preliminary Injunction* (Dkt # 246). The Preliminary Injunction further ordered that "except by leave of this Court, during the pendency of this receivership, all . . . persons or entities seeking relief of any kind . . . are hereby preliminary restrained and enjoined from . . . commencing, prosecuting, continuing or enforcing any suit or proceeding" against PEMGroup and from "doing any act or thing whatsoever to interfere with taking control, possession or management by the permanent receiver . . . or in any way to interfere with or harass the permanent receiver." *See id.* at § IX.

On September 23, 2010, non-party Principal Life Insurance Company ("Principal Life") filed a motion seeking leave to file an action against the Receiver challenging the validity of an insurance policy issued on the life of Barbara Doricott (the "Policy"), which was among PEMGroup's investment life insurance policies. Principal Life asserts that the Policy was procured through fraud and misrepresentations, and that it would never have issued the policy had all material information been disclosed. *Mot*. 2:21-26. In addition to being voidable on these grounds, Principal Life **[*3]** further contends that the Policy is void and/or voidable due to a

lack of insurable interest. *Id.* 3:1-9. Specifically, it claims that the Policy was procured through a "stranger-originated life insurance ("STOLI") transaction whereby strangers to Ms. Dorricott sought to gamble on her life and profit from her death." *Id.* 3:1-2.

II. Legal Standard

As the Ninth Circuit has recognized, "[f]ederal courts have inherent equitable authority to issue a variety of ancillary relief measures in actions brought by Securities and Exchange Commission to enforce federal securities laws." *S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980)*. Included in this authority is the ability to issue a blanket stay prohibiting all persons, including non-parties, from commencing any suit against the receivership entities except by leave of the court. *See id. 1369-70*.

"Determining whether an exception should be made in a particular case to a previously entered blanket stay involves a comparison of the interests of the receiver (and the parties the receiver seeks to protect) and of the moving party." *Wencke, 622 F.2d at 1373*. Only if the party's interests outweigh those of the receiver will the stay be lifted. *See* ***[*4]*** *FTC v. 3R Bancorp, 2005 U.S. Dist. LEXIS 12503, 2005 WL 497784 (N. D. Ill. 2005)*. In particular, three factors are to be considered in determining whether to lift a blanket stay:

> (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

SEC v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984) ("*Wencke II*") (citing *Wencke, 622 F.2d at 1374*). The burden is on the moving party to show that the balance weighs in its favor. *See United States v. ESIC Capital, Inc., 675 F. Supp. 1462 (D. Md. 1987)*.

III. Discussion

The Receiver contends that Principal Life failed to demonstrate good cause to lift the Preliminary Injunction. *Opp.* 6:7-17. The Court, however, finds that, to the contrary, application of the three factors set forth in *Wencke* support modifying the Preliminary Injunction to allow Principal Life to proceed on its claim that the Policy is void/voidable based on the alleged material misrepresentations and/or the absence of insurable interest.

A. Status Quo vs. Substantial **[*5]** Injury

The first inquiry under the *Wencke* framework is "whether refusing to lift the stay genuinely preserves the status quo, or whether the moving party will suffer substantial injury if not permitted to proceed." *Wencke II, 742 F.2d at 1231*. Accordingly, one purpose of the Court's Preliminary Injunction is "to maintain the status quo to preserve funds that will be redistributed to investors." *See* Dkt. #424 (May 7, 2010). In *S.E.C. v. Byers*, a district court found that maintaining the stay undeniably maintained the status quo where the moving party was "only concerned with recouping their own investments, presumably even at the expense of other investors." *592 F. Supp. 2d 532, 537 (S.D.N.Y., 2008)*.

Likewise, maintaining the stay preserves the status quo in this matter. Allowing Principal Life leave to sue so that it might avoid paying out life insurance benefits under the Policy would be to the detriment of the receivership estate, which includes among its assets numerous valuable life insurance policies that other life insurance companies might seek to rescind in the event Principal Life was granted leave to proceed. Additionally, the Court is not persuaded that Principal Life would **[*6]** suffer injury, let alone *substantial* injury, if not permitted to proceed. Indeed, given that Principal Life has been accepting premiums on the Policy (including a payment of $6,900 on September 13, 2010, *see Mot.* 6:17-19), its allegations of injury are unconvincing. Thus, the first *Wencke* factor favors the Receiver.

B. Timing with Respect to the Receivership

The Ninth Circuit has explained that:

> Where the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance.

Wencke, 622 F.2d at 1373-1374. Here, the receivership has been in place for well over a year. *See Preliminary Injunction* § VI, (Dkt. #246). Through regular status reports, the Court has been kept abreast of the Receiver's effort to "organize and understand the entities" under his control. *See, e.g., Receiver's Seventh*

[*7] *Status Report* (Dkt # 459). As the Court is satisfied that the Receiver has progressed sufficiently in that effort, the second *Wencke* factor cuts against the Receiver.

C. The Merit of Principal Life's Claim

Under the third prong of the *Wencke* framework, the Court must consider the merit of Principal Life's claim that the Policy is invalid. "Where the claim is unlikely to succeed (and the receiver therefore likely to prevail), there may be less reason to require the receiver to defend the action now rather than defer its resolution." *Wencke, 622 F.2d at 1373*. "On the other hand, where the likelihood that the receiver will prevail is small, when the receiver's position is considered realistically and not in the abstract, there is less reason to permit the receiver to avoid resolving the claim; a blanket stay should not be used to prejudice the rights which innocent and legitimate creditors may have against the receivership entities." *Id.*

Although Principal Life presents an interesting background discussion regarding the hazards of stranger-originated life insurance, *see Mot.* 9:10-13:7, it is not clear that it would prevail on the merits of its claim. However, in ruling on a motion to lift **[*8]** a stay, the Court need not evaluate whether Principal Life would be ultimately successful. Rather, the proper inquiry is whether Principal Life has alleged a "colorable claim" that would justify lifting the stay. *Wencke II, 742 F.2d at 1232*. Here, while Principal Life's contentions that the Policy was fraudulent and based on misrepresentations are speculative, they nonetheless suffice at this stage in the proceedings. *See Mot.* 15:3-26.

Likewise, although it is unclear whether the Policy would ultimately be deemed void for lack of an insurable interest, the Court finds that Principal Life has alleged a colorable claim to that effect. In opposing Principal Life's motion, the Receiver relies on *Lincoln Nat. Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust*, in which the court held that life insurance policies were not void for having been procured by STOLI practices where the trust, its settlor, and its beneficiaries had insurable interests in settlor's life at time of inception. *638 F. Supp. 2d 1170, 1177 (C. D. Cal., 2009)* ("an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs.").

On **[*9]** one hand, it appears to be undisputed that the Dorricott trust was the beneficiary of the policy at the time of issuance. *See Mot.* 4:5-6. However, in contrast to *Lincoln*, in which no interest in the policy was sold until nearly two years after issuance, here, Ms. Dorricott's daughter allegedly sold 100% of the interest in the policy less than three weeks after the policy was issued. *Mot.* 15:6-8; *Reply* 9 n.11. Thus, while further factual development is necessary to establish whether the Policy is actually void for lack of insurable interest, based on the foregoing, the Court finds that Principal Life's claim has sufficient potential merit to satisfy the third *Wencke* factor.

The Court further notes that in opposing this motion, the Receiver contends that because Principal Life failed to contest the Policy before the applicable contestability period expired, Principal Life's claim is now barred. *Opp.* 3:16-6:3. At this stage in the proceeding, given the limited briefing on this issue, the Court is unable to ascertain conclusively whether Principal Life's motion adequately "contests" the Policy for purposes of the contestability period.

IV. Conclusion

In sum, application of the factors set **[*10]** forth by the Ninth Circuit in *Wencke* demonstrates that Principal Life is entitled to have the stay lifted so as to pursue its claim that a life insurance policy under which it has been regularly collecting proceeds is void/voidable for lack of an insurable interest and/or material misrepresentations. Accordingly, for the foregoing reasons, Principal Life's motion is GRANTED.

IT IS SO ORDERED.

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Exhibit 27

Neutral
As of: March 10, 2023 9:21 PM Z

SEC v. Provident Royalties, L.L.C.

United States District Court for the Northern District of Texas, Dallas Division

July 7, 2011, Decided; July 7, 2011, Filed

Civil Action No. 3:09-CV-1238-L

Reporter
2011 U.S. Dist. LEXIS 74304 *; 2011 WL 2678840

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PROVIDENT ROYALTIES, L.L.C., et al., Defendants. and SHALE ROYALTIES 21, INC., et. al., Relief Defendants

Subsequent History: Magistrate's recommendation at *SEC v. Provident Royalties, LLC, 2013 U.S. Dist. LEXIS 136607 (N.D. Tex., Aug. 26, 2013)*

Prior History: *SEC v. Provident Royalties, LLC, 2010 U.S. Dist. LEXIS 102778 (N.D. Tex., Sept. 25, 2010)*

Core Terms

receivership, liquidating, lifting, receiver, proceedings, substantial injury, fiduciary duty

Case Summary

Overview
Plaintiff SEC filed a securities fraud action. An order staying proceedings had been issued. A related bankruptcy action was pending. Movant, the liquidating trustee and representative of debtors' estates, moved to lift the stay to pursue claims against the directors and officers of debtors. The court granted the motion. The court held that lifting the stay would not disturb the status quo because, inter alia, the motion had been approved by the receiver, who was in the best position to decide whether the liquidating trustee's litigation would interfere with the interests of the receivership.

Outcome
The motion to lift the stay was granted.

LexisNexis® Headnotes

Civil Procedure > ... > Receiverships > Jurisdiction Over Receivers > General Overview

Securities Law > ... > US Securities & Exchange Commission > Judicial Review > General Overview

HN1[] **Receiverships, Jurisdiction Over Receivers**

The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the Securities and Exchange Commission to enforce the federal securities laws. To that end, a district court has broad authority to issue orders preventing interference with its administration of the receivership property, such as orders imposing blanket stays of litigation. Such orders can serve as an important tool permitting a district court to prevent dissipation of property or assets subject to multiple claims in different locales and to prevent piecemeal resolution of issues that call for a uniform result. Further, a receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > Remedies > Receiverships > General Overview

HN2[] **Entry of Judgments, Stays of Judgments**

To determine whether to make an exception to a stay of proceedings, a court should consider: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the

course of the receivership at which the motion for relief from stay is made; and (3) the merit of the moving party's underlying claim. The issue under the test is not if but when during the course of a receivership should the stay be lifted and claims allowed to proceed because at some point, persons with claims against the receivership should have their day in court.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Civil Procedure > Remedies > Receiverships > General Overview

HN3[] Entry of Judgments, Stays of Judgments

To determine whether to make an exception to a stay of proceedings, the first factor balances the receiver's interests with those of the moving party. When determining the receiver's broad interest in preserving the status quo, the court considers not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy. In determining the moving party's interests, the court considers whether the moving party will suffer substantial injury if not allowed to proceed.

Civil Procedure > ... > Receiverships > Receivers > General Overview

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

HN4[] Receiverships, Receivers

To determine whether to make an exception to a stay of proceedings, the second factor, timing in the course of the receivership, is fact specific, and takes into account the number of entities, the complexity of the scheme, and any number of other factors. A court may therefore lift or decline to lift a litigation stay anywhere from a few months to a few years into the receivership, depending on the particular circumstances of the case.

Civil Procedure > ... > Receiverships > Receivers > General Overview

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

HN5[] Receiverships, Receivers

To determine whether to make an exception to a stay of proceedings, under the third factor of the analysis, the moving party is not required to show that it is likely to prevail on the merits, only that it has "colorable" claims that justify lifting the stay.

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For James P McAluney, Movant: Alan S Loewinsohn, LEAD ATTORNEY, Carol E Farquhar, Wilson E Wray, Jr, Loewinsohn Flegle Deary LLP, Dallas, TX.

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For Ocwen Loan Services LLC, as Mortgage Servicer for the lender Wells **[*3]** Fargo Bank, Movant: Robert Lee Horn, LEAD ATTORNEY, Beirne Maynard & Parsons LLP, Houston, TX.

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For The Curtis Law Firm, P.C., Interested Party: Stephanie D Curtis, LEAD ATTORNEY, Mark A Castillo, Curtis | Castillo PC, Dallas, TX; Christopher W Elsberry, Mullin Hoard & Brown LLP, Dallas, TX.

For Hicks Higuchi Corporation 401(k) Profit Sharing Plan, Interested Party: Leonard Ladd A Hirsch, LEAD ATTORNEY, Wm Lane Arnold, Diamond McCarthy LLP, Dallas, TX; Brian A Abramson, The Lanier Law Firm, Houston, TX.

For Certain Investors in the Shale Synergy Entities, Interested Party: Leonard Ladd A Hirsch, LEAD ATTORNEY, Diamond McCarthy LLP, Dallas, TX.

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Judges: IRMA CARRILLO RAMIREZ, UNITED STATES MAGISTRATE JUDGE.

Opinion by: IRMA CARRILLO RAMIREZ

Opinion

MEMORANDUM OPINION AND ORDER

Pursuant to the *Standing Order of Reference* dated March 11, 2010, this case has been referred for pretrial management, including the determination of non-dispositive motions and issuance of findings of facts and recommendations on dispositive motions. Before the Court is *Liquidating Trustee's Motion to Lift Stay of Proceedings Against Defendants Henry D. Harrison, Brendan W. Coughlin and Paul R. Melbye* (doc. 284), filed March 8, 2011. Based on the relevant filings and applicable law, the **[*5]** motion is **GRANTED.**

I. BACKGROUND

This is a securities fraud action brought by the Securities and Exchange Commission (the "SEC") against several business entities, including Provident Royalties, LLC ("Provident"), Shale Royalties II, Inc. ("Shale"), and several individuals, including Provident founders and managers Henry D. Harrison, Brendan W. Coughlin, Paul R. Melbye, and Joseph S. Blimline. (doc. 85.) The SEC has also joined several other business entities that received assets, funds, or other properties derived from the allegedly fraudulent offering as "relief defendants". (*Id.*) Dennis S. Roossien, Jr., has been appointed receiver for the estates of Provident, Shale, and certain other defendants and relief defendants (collectively the "Receivership Defendants"), and the

following proceedings have been stayed:

> All civil proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in his capacity as Receiver; (b) any Receivership Property, wherever located; (c) any of the Receivership Defendants, including subsidiaries, or partnerships, **[*6]** or (d) any of the Receivership Defendants' past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise.

(*See* docs. 14, 83.) Further, any applicable statute of limitation has been tolled during the period in which the stay is in effect "as to a cause of action accrued or accruing in favor of one or more of the Receivership Defendants against a third person or party." (doc. 83.)

A related bankruptcy proceeding is pending. (*See* Case No. 09-33886, docs. 748, 860.) Roossien has been appointed the Chapter 11 Trustee for Provident, Shale, and several other business entities (collectively the "debtors") in that proceeding. Under the current consolidated plan for liquidation of the debtors' estates, Milo H. Segner has been appointed the liquidating trustee of the Provident Liquidating Trust and a representative of the debtors' estates and has been assigned certain causes of action, including the debtors' claims against their directors and officers for breach of their fiduciary **[*7]** duties. (*Id.*) The liquidating trustee now moves to lift the stay on litigation to allow him to pursue those claims against the directors and officers of the debtors, including Harrison, Coughlin, and Melbye. (doc. 284.) The receiver has agreed to the motion, the SEC does not oppose the motion, and Coughlin and Harrison ("Respondents") have jointly filed a response in opposition to the motion. (docs. 284, 298.) With a timely filed reply, the motion is now ripe for determination. (doc. 303.)

II. ANALYSIS

HN1[] "The federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws." *SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982)* (quoting *SEC v. Wencke ("Wencke I"), 622 F.2d 1363, 1369 (9th Cir. 1980))*. To that end, a district court has broad authority to issue orders preventing interference with its administration of the receivership property, such as orders imposing blanket stays of litigation. *See* *Schauss v. Metals Depository Corp., 757 F.2d 649, 654 (5th Cir. 1983)*; *SEC v. Stanford Int'l Bank Ltd., 424 Fed. Appx. 338, 2011 U.S. App. LEXIS 9386, 2011 WL 1758763, at *1 (5th Cir. 2011)*. "Such orders can serve as an important **[*8]** tool permitting a district court to prevent dissipation of property or assets subject to multiple claims in different locales" and to prevent "'piecemeal resolution of issues that call for a uniform result." *Schauss, 757 F.2d at 654* (quoting *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 729 (5th Cir. 1985))*. Further, "[a] receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant." *United States v. Acorn tech. Fund, LP, 429 F.3d 438, 443 (3rd Cir. 2005)*.

HN2[] To determine whether to make an exception to a stay of proceedings, a court should consider: "'(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from stay is made; and (3) the merit of the moving party's underlying claim." *Stanford, 2011 U.S. App. LEXIS 9386, 2011 WL 1758763, at *2* (quoting *SEC v. Wencke ("Wencke II"), 742 F.2d 1230, 1231 (9th Cir. 1984))*. The issue under the test is not *if* but *when* during the course of a receivership should the stay be lifted **[*9]** and claims allowed to proceed because "at some point, persons with claims against the receivership should have their day in court." *Wencke II, 742 F.2d at 1231*.

A. Status Quo vs. Substantial Injury

HN3[] The first factor balances the receiver's interests with those of the moving party. *Stanford, 2011 U.S. App. LEXIS 9386, 2011 WL 1758763, at *2* (citing *United States v. Acorn tech. Fund, LP, 429 F.3d 438, 443 (3rd Cir. 2005))*. When determining the receiver's broad interest in preserving the status quo, the court considers "not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *Acorn Tech, 429 F.3d at 443* (citing *SEC v. Universal Fin., 760 F.2d 1034, 1038 (9th Cir. 1985))*. In determining the moving party's interests, the court considers whether the moving party will suffer

substantial injury if not allowed to proceed. *Wencke II, 742 F.2d at 1231*.

Lifting the stay in this case will not disturb the status quo for three reasons. First, this motion has been approved by the receiver, who is in the best position to decided whether the liquidating trustee's litigation would interfere with the interests of the receivership. Second, there are no overarching **[*10]** concerns about duplicative lawsuits or inconsistent holdings. While this action asserts claims under the Securities Act of 1933 and the Securities Exchange Act based on the purchase, offer, or sale of securities, the proposed litigation seeks to assert claims for breach of fiduciary duties of care, good faith, and loyalty under state law based on allegations that Harrison, Coughlin, and Melbye allowed millions of dollars to be "loaned" with no expectation of repayment, purchased assets for many times market value, and received fraudulent transfer of property of the Provident debtors. Finally, because the liquidating trustee's litigation seeks to assert identical claims against other defendants not covered by the stay, the interests of judicial economy will be well-served by allowing the claims against Harrison, Coughlin, and Melbye to proceed in that same litigation. The fact that they face multiple lawsuits is irrelevant because the purpose of the receivership and the accompanying stay on litigation is to protect the interests of the defrauded investors and not their individual interests.

Also to be considered is whether the liquidating trustee will suffer substantial injury if not **[*11]** permitted to proceed with his claims. The liquidating trustee argues that the four-year statute of limitations may bar his claims for breach of fiduciary duties because they are premised on acts or omissions beginning as early as 2007. (doc. 303, p. 3.) He fails, however, to address whether the statute of limitations on his claims has been tolled during the period the stay is in effect. The liquidating trustee also argues that the Provident Debtors' Directors & Officers Liability Policy (the "Policy") is the most viable source of recovery for the claims and is in danger of depletion, as almost $4 million of the $10 million have already been expended on defense costs in less than two years of litigation. (*Id.*, pp. 3-4.) Again, he does not adequately address Respondents' arguments that the Policy covers their defense before any other claims under a bankruptcy court order, and that allowing a second suit to proceed against them will simply erode the policy at an accelerated rate. (doc. 299, p. 7; doc. 303, p. 4.) Although the liquidating trustee has failed to make a persuasive case that he will suffer substantial injury if not allowed to proceed with his claims, on balance, the first **[*12]** factor weighs in favor of lifting the stay.

B. Timing in the Course of the Receivership

HN4[] The second factor, timing in the course of the receivership, is fact specific, and takes into account "the number of entities, the complexity of the scheme, and any number of other factors." *Stanford, 2011 U.S. App. LEXIS 9386, 2011 WL 1758763, at *2* (citing *Wencke II, 742 F.2d at 1231-32*; *Universal Fin., 760 F.2d at 1039*). A court may therefore lift or decline to lift a litigation stay anywhere from a few months to a few years into the receivership, depending on the particular circumstances of the case. *See e.g.* *Stanford, 2011 U.S. App. LEXIS 9386, 2011 WL 1758763, at *2* (upholding a stay one year into the receivership); *Universal Fin., 760 F.2d at 1039* (upholding a stay four years into the receivership); *SEC v. Stanford Int'l Bank, Ltd., Inc., Civil Action No. 3:09-CV-0298-N, 2011 U.S. Dist. LEXIS 80293 (N.D. Tex. May 6, 2011)* (lifting a stay when the receivership was "relatively young" at "just over two years old"); *FTC v. 3R Bancorp, 2005 U.S. Dist. LEXIS 12503, 2005 WL 497784, at *3 (N.D. Ill. 2005)* (upholding a stay because the receiver had little more than three months to unravel the "labyrinthine entanglements" of the receivership). *But see* *Wencke II, 742 F.2d at 1232* (holding that the district court **[*13]** abused its discretion by not lifting a stay in place for over seven years).

This receivership began in July 2009, almost two years ago. Since then, the receiver has marshaled almost all of the receivership assets and has proposed a plan of distribution, as evidenced by the receiver's sixth and seventh quarterly reports. (docs. 282, 312.) The receiver, moreover, acknowledges in his sixth quarterly report that "the receivership is moving toward a close." (doc. 282, p. 3.) Based on these facts, the timing factor weighs in favor of lifting the stay.

C. Merit of the Claims

HN5[] Under the third factor of the analysis, the moving party is not required to show that it is likely to prevail on the merits, only that it has "colorable" claims that justify lifting the stay. *Wencke II, 742 F.2d at 1232*. Here, the liquidating trustee's claims against Harrison, Coughlin, and Melbye appear meritorious on their face. In order to dispute their merit, Respondents make a two-step argument. (doc. 299, pp. 6-7.) They first argue that the Delaware Limited Liability Act allows members or

managers to adopt provisions eliminating or limiting their liability for breach of fiduciary duties. (*Id.*) They then contend that **[*14]** Provident has adopted a provision limiting its officer's or manager's liability for any loss or damage sustained by the company, and that Shale has limited its directors' liability for breach of their fiduciary duties. (*Id.*) Upon close reading, however, the first provision makes an exception for "loss or damage resulting from intentional misconduct or knowing violation of law" and for a transaction for which the manager or officer received a personal benefit in violation of the provisions of Provident's Limited Liability Company Agreement. (*Id.*) The second provision, which may not be applicable because of its specific reference to directors, also makes exceptions for a director's breach of his duty of loyalty to the corporation or its stockholder, "for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law", for liability under *§ 174* of the Delaware General Corporation Law, and "for any transaction from which the director derived any improper personal benefit." (*Id.*, p. 4.) Given these exceptions, the liquidating trustee holds colorable claims against Harrison, Coughlin, and Melbye.

The three factors, considered together, justify lifting **[*15]** the stay to allow the liquidating trustee's claims to proceed against the Officers.

III. CONCLUSION

Liquidating Trustee's Motion to Lift Stay of Proceedings Against Defendants Henry D. Harrison, Brendan W. Coughlin and Paul R. Melbye is **GRANTED.**

SO ORDERED on this 7th day of July, 2011.

/s/ Irma Carrillo Ramirez

IRMA CARRILLO RAMIREZ

UNITED STATES MAGISTRATE JUDGE
