The Matrix of Merchant Cash Advances: Characterization, Avoidance and Litigation Issues

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Introduction

Why MCAs matter in bankruptcy cases

- Increasing financial pressures on small and mid-size businesses.
  - On 2/9/26, NPR ran a story regarding the use of MCAs by a business scrambling to pay newly-imposed tariffs. (https://www.npr.org/transcripts/nx-s1-5628425, 2/9/2026 ("[L]oans take time and meticulous paperwork. A merchant cash advance is technically not a loan, and so most lending laws do not apply. The lenders do not have to be licensed. Their money is often due within weeks, and they take payments directly from your bank account. And the fees they can charge legally have no cap."))
  - According to the story, the SBA no longer refinances MCAs.

- Rapid growth in alternative financing for small- and mid-size businesses.
  - U.S. market size for MCAs estimated to be about $20 billion, and growing rapidly. (https://news.bloomberglaw.com/bankruptcy-law/merchant-cash-advances-piling-up-in-small-business-bankruptcies, 2/24/2026)

- Increasing frequency in small chapter 11 and sub v cases.

- By the time they file for bankruptcy, debtors who use MCAs often have multiple (aka "stacked") outstanding advances.
  - Does this raise priority disputes in accounts?
  - Do MCA funders care?

Core tension: Form versus substance

- Form: On their faces, MCAs involve a purchase by a funder of the debtor's future receipts (or receivables).

- Substance: Many MCAs are disguised high-interest loans.

- In a bankruptcy case, how an MCA is treated depends on whether it is characterized as a sale or a loan.
  - Requires scrutiny of terms of the agreement between the Funder and the debtor.
  - Answer as to one MCA may be different than the answer as to another MCA.

- In a bankruptcy case, a debtor often blames the stacked MCA(s) for killing the business. MCA(s) view themselves as the life raft for a business that just needs a little more time to turn the corner.

Structure & Characterization

Typical structural features

- Generally, a “Funder” (or “Buyer”) pays a “Merchant” (or “Seller”) a certain amount (the “Purchase Price”) in exchange for a fixed amount of Merchant’s future receipts (the “Purchased Amount”), typically from credit/debit card sales. (These are “accounts” that do not yet exist.)
- Described as a “purchase” or “sale” of future receipts, not a loan.
- The Purchased Amount is significantly more than the Purchase Price.
- Often, there are significant up-front “underwriting” or “broker” fees.
- Daily or weekly ACH withdrawals from Merchant’s bank account. There won’t be a long delay from a monetary default to enforcement steps.

Typical structural features

Purchase Price	Net Funding	%	Purchased Amount	Profit*	Daily** Payment	Appx. APR*
$110,000	$93,500	25%	$170,500	$60,500	$4,736.11	398%
$200,000	$187,965	40%	$290,000	$90,000	$6,444.44	261%
$110,000	$104,500	?	$148,500	$38,500	$1,237.50	76%
$185,000	$177,600	9%	$268,250	$83,250	$2,682.50	117%
$300,000	$285,000	?	$405,000	$105,000	$3,375.00	76%
$142,500	$142,500	?	$202,500	$60,000	$1,840.91	100%
$150,000	$142,500	?	$202,500	$52,500	$1,840.91	83%
$270,000	$378,000	10.6%	$251,000	$108,000	$5,400.00	149%
$225,000	$211,500	9.3%	$314,775	$89,775	$3,320.00	110%

* Based on the Purchase Price, not the Net Funding.

** Agreements calling for weekly payments have been adjusted to reflect the effective amount per day.

Typical structural features

- Reconciliation process:
  - The daily or weekly rate is an “estimate” of the receipts purchased by Funder.
  - Merchant (and sometimes Funder) has a contractual right to adjust the periodic payment amount to better reflect actual revenue as it changes over time.
  - Example of reconciliation process:
    - Merchant requests a reconciliation. Provides data re recent receipts.
    - Funder calculates Merchant’s average daily or weekly revenue for the 60-day period before the request was made (the “Review Period”).
    - Funder analyzes whether the total of all payments made during the Review Period was greater or less than the specified percentage of Merchant’s receipts.
    - Based on the analysis, the periodic payment amount is decreased (or may be increased) going forward.

- Stacking w/o Funder’s consent prohibited – but new MCAs may not conduct due diligence to check for existing MCAs.

Typical structural features

- Security interests.
  - Sometimes the scope of collateral is very broad (e.g., all assets).
  - Sometimes the scope is limited to accounts and payment intangibles.
  - Funders' security interests are perfected (perhaps) by UCC-1 financing statements.
    - Sometimes Funders fail to file.
    - Secured party is often a filing service, as representative of the undisclosed Funder.

Secured Party Information:

Secured Party Name	Mailing Address
C T CORPORATION SYSTEM, AS REPRESENTATIVE	330 N BRAND BLVD GLENDALE, CA 91203

Typical structural features

- Often, personally guaranteed by Merchant's principal(s).
  - Some are performance guaranties, not (expressly) payment guaranties.

- *Fleetwood Servs., LLC v. Ram Cap. Funding, LLC*, 2022 WL 1997207 (S.D.N.Y. June 6, 2022)
  - Guaranty guarantied Merchant's performance of "all . . . covenants made by Merchant" in the MCA agreement, including its obligation to remit the specified percentage into a designated account.
  - If Merchant failed to satisfy that covenant, Funder could seek recovery from Guarantors for all "losses and damages" including the right to the full Purchased Amount.
  - "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."
  - In *Fleetwood*, in part b/c of the breadth of the guaranty, the transaction was a loan.

Typical structural features

- In theory, risk of nonpayment is borne by Funder.
  - However, some MCA agreements require confessions of judgment.

AGREED JUDGMENT

On this day came to be considered the above-styled and numbered cause, wherein Plaintiff is UPTOWN FUND LLC and Defendants are CONSTANTINOU GROUP, INC. DBA FRIEDMANS HOME EXPERIENCE, d/b/a FRIEDMANS HOME EXPERIENCE, ULTRA BATHROOM AND KITCHEN, INC and COSTAS C CONSTANTINOU ("Defendants"). The Court, after having considered the pleadings, finds that Plaintiff is entitled to judgment as provided for herein. It is therefore,

ORDERED that Plaintiff have and recover judgment against Defendants in the amount of $314,775.00. It is further,

ORDERED that Plaintiff have and recover attorney's fees in the sum of $79,000.00. This judgment is final and appealable.

Signed this costas constantinou day of 06/18/2024 ,20___.

JUDGE PRESIDING

MCA Funders ≠ Tradional Factors

- Factoring is the debtor's sale of receivables (usually evidenced by work orders, invoices, etc.) that exist before funds are advanced by the factor to the debtor. The accounts exist before they are factored.
- Factors always conduct due diligence regarding the credit worthiness of the debtor's customers.
- The debtor and factor enter into a factoring agreement.
- When a receivable is generated, the factor pays an advance to the debtor pursuant to the terms set forth in the factoring agreement.
- Factors often collect factored receivables directly from the debtor's customers.
- When the customer pays, the factor subtracts its fee and remits the balance (net of the advance) to the debtor.
- "Spot factoring" can involve a single invoice or specific invoices.
- Factoring can be helpful in seasonal industries.

Characterization

Feature	Loan-Like	Sale-Like
Fees and charges	✓	✓
Fixed payment amount	✓	
No fixed maturity date		✓
Early payment authorized	✓	
UCC-1 financing statement to be filed	✓	✓
Security interest (esp. if “all assets”)	✓	
Reconciliation process		✓
Risk to Funder of nonpayment		✓
Personal payment guaranty	✓	
Confession of judgment	✓	

Characterization – Global Energy Svcs.

Guttman v. EBF Holdings, LLC (*In re Global Energy Services, LLC*)
2025 WL 1012721, *1, 4 (Bankr. D. Md. Mar. 31, 2025)

- "A threshold question raised in this case is whether the MCA agreement constitutes a loan or a sale. The Trustee maintains that the Funding Agreement constitutes a disguised loan and among other things, is unenforceable because it has a usurious rate of interest. EBF insists that it is a true sale."

- Following guidance of NY courts, courts often identify three factors:
  - Whether there is a reconciliation process.
  - Whether the MCA agreement has a finite term.
  - Whether there is any recourse if the debtor files for bankruptcy.

- These factors are non-exhaustive and not determinative of the outcome.

- Overarching consideration is whether the risk of non-payment by the account debtor was transferred from Merchant to Funder.

Characterization – Shoot the Moon

Cap Call, LLC v. Foster (*In re Shoot the Moon, LLC*)
635 B.R. 797 (Bankr. D. Mont. 2021)

- Funder argued that funds received by the trustee postpetition had been purchased by, and therefore belonged to, Funder.

- Trustee countered that the MCA transactions were disguised loans, not sales. Trustee also sought to avoid prepetition payments to Funder as preferential transfers.

- "Article 9 treats both secured loans and 'a sale of accounts, chattel paper, payment intangibles, or promissory notes' as secured transactions subject to that statute's detailed rules regarding perfection and priority. The statute stops short of 'delineat[ing] how a particular transaction is to be classified' and, by design, the 'issue is left to the courts.' Courts have formulated a holistic, multipart framework to examine a transaction on the way to classifying it as a sale or a loan."

Characterization – Shoot the Moon

- Judge Holt stated that courts often consider the following factors:
  - Whether Funder has a right of recourse against Merchant.
  - Whether Merchant continues to service the accounts and commingles receipts with its operating funds.
  - Whether there was an independent investigation by Merchant of the account debtor.
  - Whether Merchant has a right to excess collections.
  - Whether Merchant retains an option to repurchase the accounts.
  - Whether Funder can unilaterally alter the pricing terms.
  - Whether Merchant has the absolute power to alter or compromise the terms of the underlying account(s).
  - Language of the MCA agreement and conduct of the parties.

- A consideration "that overlays and unites the factors is how the parties allocated *risk*." If risk of loss passed to Funder, it is typically a sale.

Characterization – Shoot the Moon

- Judge Holt found that the transactions were loans, not sales.
- Among other things:
  - Funder's security interests were significantly broader than those associated with sales.
  - Agreements gave Funder recourse against third parties (e.g., related entities and guarantors) that was inconsistent with a sale.
  - The parties themselves referred to the transactions as loans when discussing them.
- Existence of reconciliation provisions and the absence of a fixed term were not enough to overcome the overwhelming indicia of loan-ness.

Characterization – Reconciliation clauses

- If there is a reconciliation provision that requires Funder **to adjust the periodic payment amount upon Merchant's request**, that favors a determination that it is a sale. *See Global Energy Services*, 2025 WL 1012721 at *5.

- **If a reconciliation actually occurs**, the transaction is even more likely to be considered a sale. *In re McKenzie Contracting, LLC*, 2024 WL 3508375, *3 (Bankr. M.D. Fla. July 19, 2024).

- If there is **no reconciliation provision**, that makes it look like a loan. *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 57 N.Y.S.3d 625, 633 (2017).

- If there is a reconciliation provision, but it is **illusory** because of other provisions in the MCA agreement, it may be considered a loan. *See GMI Group, Inc. v. Unique Funding Solutions, LLC* (*In re GMI Group, Inc.*), 606 B.R. 467, 486-88 (Bankr. N.D. Ga. 2019).

Characterization – Scope of security

- If Funder is granted a security interest in all of Merchant's assets, or significantly more than just accounts (aka receivables) and deposit accounts, it looks more like a loan than a sale.

- If the security interest is limited to future receipts/receivables, it looks more like a sale. (Except, well, the accounts don't yet exist.)

- *Global Energy Services*, 2025 WL 1012721 at *9: "[T]he security interest at issue here is limited to [Merchant's] future sales and does not support a finding that the [MCA agreement] is a loan."

Characterization – Contract remedies

- Remedies that try to eliminate or limit Funder's risk of loss militate toward a determination that the transaction is a loan.

> **Remedies for Seller's Breach of this Agreement.** If Seller violates any term or covenant in this Agreement, Buyer may proceed to protect and enforce its rights including, but not limited to, the following:
>
> a. The Specified Percentage shall equal 100%. The full undelivered Purchased Amount plus all fees and charges (including legal fees) assessed under this Agreement will become due and payable in full immediately.
>
> d. Buyer may debit depository accounts wherever situated by means of ACH debit or facsimile signature on a computer-generated check drawn on any of Seller's banking accounts for all sums due to Buyer.

- Is non-payment a breach under the terms of the MCA agreement?

Characterization – Contract remedies

- What is a "default" under the MCA agreement?

Fleetwood Servs., LLC v. Ram Cap. Funding, LLC
2022 WL 1997207 (S.D.N.Y. June 6, 2022)

- "Events of Default" under the MCA agreement in *Fleetwood* included:
  - Merchant or Guarantor shall violate any term or covenant in this Agreement.
  - Any representation or warranty by Merchant in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made.
  - Merchant shall transport, move, interrupt, suspend, dissolve or terminate its business.
  - Merchant shall transfer or sell all or substantially all of its assets.
  - Merchant shall use multiple depository accounts without the prior written consent of [Funder].
  - Merchant shall perform any act that reduces the value of any Collateral granted under this Agreement.

Characterization – Personal guaranties

- Personal guaranties tend to favor a determination that it is a loan.
- But what if the personal guaranties are limited by the contingent nature of Merchant's obligations?
  - Is Guarantor guarantying payment in full?
  - Or is Guarantor guarantying that, e.g., Merchant won't divert receipts to an account that Funder isn't authorized to draw from?
  - Maybe guarantee covers false representations and warranties in MCA agreement. Narrow performance guaranties might be less problematic.

Characterization

LG Funding, LLC v. United Senior Properties of Olathe, LLC
122 N.Y.S.3d 309 (2020)

- MCA agreement provided that, if Merchant defaulted, the full uncollected Purchased Amount plus fees would be immediately due and payable.
- Reconciliation clause provided that Funder could, *in its sole discretion*, adjust the payment amount if requested by Merchant.
- Third parties executed guaranties.
- These facts supported a determination that the transaction was a loan, not a purchase of future receipts.

Characterization

Denali Constr. Svcs., LLC v. Cloudfund, LLC (In re Denali Constr. Svcs., LLC) 2026 WL 800949 (Bankr. N.D. Tex. Mar. 20, 2026)

- Debtor had at least 10 MCAs with 8 different Funders over 2 years.
- Debtor entered into 2 MCA agreements with Infusion.
  - First was a purchase price of $500k before $60k of fees, purchased amount of ~$750k, daily payments of ~$12,500. Court calculated APR of 427.9%. [JNT says "only" 217%.]
  - Second was a purchase price of $1m, purchased amount of ~1.5m, daily payments of $18,738. Court calculated APR of 348.3%. [JNT says "only" 163%.]
- Court determined that the transactions were loans.
  - "Despite being labeled 'Purchase and Sale of Future Receivables' and containing language characterizing the transactions as purchases of future receivables, the [MCA] Agreements constitute loans under Texas law based on their economic substance and the true intention of the parties as disclosed by the contracts and attending circumstances.
  - Origination fees (which were substantial) were treated as interest.

Avoidance Issues

(No, not *those* avoidance issues)

Non-participating Funders

- Funders frequently do not appear in bankruptcy cases. Why?
  - They may be demonized for having caused the bankruptcy filing. (Is this fair?)
  - Not participating is consistent with their position that the transaction is a sale.
    - If it is a sale, what upside do they have in participating?
    - Do they realize they likely do not have an interest in postpetition receipts?
  - Being a squeaky wheel makes them a target. Participating…
    - Increases the risk that the court will characterize the transaction as a loan. May create negative legal precedent that can be used against them in future cases.
    - May result in liability under usury laws if applicable law permits claw-backs.
    - Might precipitate the filing of avoidance actions.
  - Recognition that their collateral lacks value (or at least not enough value).
  - Does participating increase the risk that they are deemed to consent to entry of final judgments by the bankruptcy court?
  - If Merchant does not have relevant documents, participating requires disclosure.
  - Nature of the business model?

Usury

Usury

Cap Call, LLC v. Foster (*In re Shoot the Moon, LLC*)
635 B.R. 797 (Bankr. D. Mont. 2021)

- Having found that the transactions were loans, Judge Holt examined whether the loans were usurious.

- Public policy of Montana warranted application of Montana law instead of New York law, despite a choice-of-law provision in the agreement.
  - MCA agreements typically provide that they are governed by New York Law.
  - In New York, there is a presumption that a transaction is not usurious.

- Under Montana law, the loans were usurious. The trustee therefore was entitled to certain remedies under Montana law.

Usury

- *G Cos. Mgmt., LLC v. LREP Arizona, LLC*, 88 Cal.App.5th 342, 354 (2023).
  - California has a strong, fundamental public policy against usury.
  - Protections of the usury law cannot be waived.
  - The usury law protects sophisticated borrowers as well as unsophisticated ones.

- California Constitution, Article XV, § 1
  - 10% for loans of money, goods, or things in action for use primarily for personal, family or household purposes.
  - For other loans, higher of (1) 10% or (2) 5% plus the federal discount rate [currently 3.75%] on the 25th day of the month preceding the earlier of (a) the date of execution of the contract to make the loan, or (b) the date on which the loan is made.
  - Multiple exemptions in the California Constitution and other California laws.

- Civil Code § 1916-1, et seq., applies to the extent not in conflict with the California Constitution.

Usury

- Elements *(Moon v. Milestone Financial, LLC* (*In re Moon*), 639 B.R. 190 (Bankr. N.D. Cal. 2022)):
  - The transaction must be a loan or forbearance.
  - The interest to be paid must exceed the statutory maximum.
  - The loan and interest must be absolutely repayable by the borrower.
  - The lender must have a willful intent to enter into a usurious transaction. The only intent necessary is to take the amount of interest which it receives.

- Ramifications
  - Interest provision is void; the principal sum is deemed due at maturity of the loan without interest (i.e., any interest paid is applied against the principal). *Soleiman v. Narimanzadeh*, 78 Cal.App.5th 915, 918 (2022).
  - Borrower may recover treble the amount of money paid in violation of the usury law, if the action is brought within one year after payment. Civ. Code § 1916-3(a). Whether to impose treble damages is within the trial court's discretion. *Bisno v. Kahn*, 225 Cal.App.4th 1087, 1108 (2014).
  - Lender may be criminally guilty of loan-sharking. Civ. Code § 1916-3(b).

Usury

Cal. Civ. Code § 1916-3(a)
Civil and criminal liability for violations

Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery.

Usury

Cal. Civ. Code § 1916-3(b)
Civil and criminal liability for violations

Any person who willfully makes or negotiates, for himself or another, a loan of money, credit, goods, or things in action, and who **directly or indirectly charges, contracts for, or receives with respect to any such loan any interest or charge of any nature, the value of which is in excess of that allowed by law, is guilty of loan-sharking**, a felony, and is punishable by imprisonment in the state prison for not more than five years or in the county jail for not more than one year.

This subdivision shall not apply to any person licensed to make or negotiate, for himself or another, loans of money, credit, goods, or things in action, or expressly exempted from compliance by the laws of this state with respect to such licensure or interest or other charge, or to any agent or employee of such person when acting within the scope of his agency or employment.

Usury

- New York imposes two separate rates for determining usury.

- Civil usury – 16% per annum.*
  - General Obligations Law § 5-501(1), incorporating the rate set in Banking Law § 14-a.
  - Does not apply to loans of $250,000 or more. GOL § 5-501(6)(a).
  - Loans to corps and LLCs are generally exempt from the civil usury cap. GOL § 5-521(1).

- Criminal usury – 25% per annum.*
  - Penal Law §§ 190.40 and 190.42.
  - Does not apply to loans of $2.5 million or more. GOL § 5-501(6)(b).
  - Corps and LLCs may raise criminal usury as a defense. GOL § 5-521(3).

- Ramifications
  - A loan that is usurious is void. GOL § 5-511; *Kingsize Entertainment, LLC v. Martino*, 63 N.Y.S.3d 714, 715 (N.Y. App. Div. 2017) ("[A] loan that is criminally usurious is void.").
  - A determination that a loan is usurious results in the uncollectability of both principal and interest. *Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320, 326 (N.Y. 2021).

* Certain loans, such as loans made by state-chartered banks, and loans secured by 1- or 2-family residences, have different rules.

Usury

Williams Land Clearing, Grading, and Timber Logging, LLC v. Apex Funding Source, LLC (*In re Williams Land Clearing, Grading, and Timber Logging, LLC*) 2025 WL 1426503 (Bankr. E.D.N.C. 2025)

- Merchant granted Funder a junior security interest in all of Merchant's assets. (Fun fact… Funder did not bother to search the UCC records before funding.)
- Court determined that the transaction was a loan, not a sale.
- Loan was criminally usurious under NY law (effective APR was 101.1%).
- Transfer made within 90 days prepetition was avoidable.

Usury

Crystal Spring Capital, Inc. v. Big Thicket Coin, LLC
198 N.Y.S.3d 142 (N.Y. App. Div. 2023)

- Big Thicket (Merchant) entered into MCA Agreement with Crystal Spring Capital (Funder); sold $140k of future receipts for $90k.

- Transaction was a criminally usurious loan.
  - Funder was under no obligation to reconcile the payments.
  - Funder was entitled to collect the full amount in the event of a default.

- Based on the documentary evidence, trial court should have dismissed Funder's complaint against Merchant and Guarantor.

Usury

Denali Constr. Svcs., LLC v. Cloudfund, LLC (In re Denali Constr. Svcs., LLC) 2026 WL 800949 (Bankr. N.D. Tex. Mar. 20, 2026)

- After determining that the MCA transactions were loans, the Court concluded that they violated Texas' usury laws.

- Court awarded over $2.6 million of damages against Funder (including treble damages), with respect to the usurious interest.

Sub V Debt Limit

Sub v debt limit

- Current debt limit for sub v cases is $3,424,000.
- If an MCA transaction is a loan, the balance due counts against the cap (unless the debt can be characterized as contingent or unliquidated).
- *In re McKenzie Contracting, LLC*, 2024 WL 3508375 (Bankr. M.D. Fla. 2024):
  - Creditor objected to debtor's sub v designation.
  - Creditor argued that debtor grossly understated its debt by omitting MCA claimants.
  - Debtor argued that MCA transactions were true sales.
  - Court agreed with debtor. Also ruled that the debts were contingent and unliquidated.
- Could create perverse incentives for debtors trying to stay under the cap.
- An increasing number of chapter 11 debtors (not just sub v debtors) are scheduling Funders as disputed, contingent and/or unliquidated.

Property of the Estate and the Trustee's Strong-Arm Powers

Property of the estate

- 11 U.S.C. § 541(a): Estate generally consists of all legal or equitable interests of the debtor in property as of the commencement of the case.
- UCC 9-109(a)(3): With certain exceptions, Article 9 applies to sales of accounts (i.e., rights to payment of monetary obligations).
- UCC 9-318(a): "A debtor that has sold an account . . . does not retain a legal or equitable interest in the collateral sold."
- But is a "future receipt" sold under an MCA agreement an "account"?

Property of the estate

John F. Hilson and Stephen L. Sepinuck
A "Sale" of Future Receivables: Disguising a Secured Loan as a Purchase of Hope,
9 Transactional Law. 14 (April 2019)

- "[A] putative present sale of rights to payment that do not yet exist . . . is both a metaphysical and legal impossibility."
- "The buyer's property interest arises, if at all, when the seller first obtains an interest in the applicable right to payment." *See* UCC 9-203(b)(2).
- A debtor can execute a security agreement purporting to grant a security interest in future receivables, but the security interest will not attach until the debtor acquires rights in those receivables.
- If an MCA transaction is characterized as a loan, "there can be little doubt that § 552(a) will cut off the lender's security interest in post-petition receivables." Even if the transaction is characterized as a sale, § 552(a) may be a problem since "the 'sold' rights of payment are not proceeds of collateral or proceeds of the transferee's property."

Property of the estate

11 U.S.C. § 552

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

Trustee's strong-arm powers

- UCC 9-318(b): "For purposes of determining the rights of creditors of, and purchasers for value of an account . . . from, a debtor that has sold an account . . . while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account . . . identical to those the debtor sold." Thus, if Funder's security interest is unperfected:
  - For purposes of determining the rights of certain third parties, the debtor/seller is deemed to still have all rights and title that the debtor/seller sold.
  - The debtor/seller can transfer, and the creditors of the debtor/seller can reach, the account as if it had not been sold.

- 11 U.S.C. § 544(a): A trustee has rights and powers of, or may avoid any transfer of property of the debtor that is voidable by, a hypothetical judicial lien creditor.

- Thus, even if an MCA transaction is a sale of an account, the trustee's rights are superior to Funder's if Funder did not file a UCC-1 financing statement.

Nondischargeability

Nondischargeability

- Still an open issue in the Ninth Circuit whether 523(a) applies in non-individual sub v cases. *Compare*:
  - *Lafferty v. Off-Spec Solutions, LLC* (*In re Off-Spec Solutions, LLC*), 651 B.R. 862 (9th Cir. BAP 2023) (nondischargeability provisions do not apply); *Alers v. Windsor Terrace Healthcare, LLC* (*In re Windsor Terrace Healthcare, LLC*), 2025 WL 3760306 (C.D. Cal. Dec. 23, 2025) (same).
  - *Ivanov v. Van's Aircraft, Inc.* (*In re Van's Aircraft, Inc.*), 2024 WL 2947601 (Bankr. D. Or. June 11, 2024) (nondischargeability provisions do apply).
- Although it appears to be rare, individuals can be Merchants.
- Nondischargeability issues can arise if an individual debtor guarantied Merchant's obligations and/or performance.

Nondischargeability

- 11 U.S.C. § 523(a)(2)(A): Debt for money or an extension of credit to the extent obtained by false pretenses, false representations, or actual fraud.

- 11 U.S.C. § 523(a)(2)(B): Debt for money or an extension of credit to the extent obtained by use of a statement in writing
  (i) that is materially false,
  (ii) respecting the debtor's or an insider's financial condition,
  (iii) on which the creditor reasonably relied, and
  (iv) that the debtor caused to be made or published with intent to deceive.

- 11 U.S.C. § 523(a)(3): Unscheduled in time to permit a creditor who does not know about the case to timely file a proof of claim and, if applicable, a nondischargeability complaint.
  - Merchant-Debtor might not schedule Funder in belief that the MCA transaction is a sale.

- 11 U.S.C. § 523(a)(6): Willful and malicious injury.

Nondischargeability

- Potential grounds for nondischargeability complaints against Merchants.
  - Merchant makes various representations in the MCA agreement.
    - All info provided to Funder is truthful, accurate and complete.
    - Bank and financial statements furnished to Funder fairly represent the financial condition of Merchant as of the dates of those statements.
    - Merchant will not enter into any MCA agreement or loan agreement that relates to or encumbers future receipts or requires daily payments.
    - Merchant has no intention to close or modify its business operations.
    - Merchant is not contemplating bankruptcy.
  - Given the lack of significant due diligence, is Funder's reliance reasonable?
    - If MCA agreement gives Funder the ability to obtain info from Merchant's banks to verify info provided by Merchant, and Funder does not do so, is Funder at least in part responsible for its own loss?
    - Can any Funder reasonably rely on a no-stacking representation?
  - Willful and malicious injury if Merchant diverts receipts to another account?

Nondischargeability

- Nondischargeability complaint against Guarantor.
  - Important to scrutinize scope of the guaranty.
  - Where guaranty covers representations and warranties made by Merchant in the MCA agreement, Guarantor may be held liable if they were fraudulently made.
  - Where the guaranty covers performance, Guarantor may be able to litigate regarding damages proximately caused by Merchant's breach.

Strategic Funding Source, Inc. v. Dockum (In re Dockum)
2024 WL 3633220 (Bankr. D. Vt. Aug. 1, 2024)

- Factoring agreement represented, inter alia, that company's financial statements were accurate, company was solvent, and funding would be used for business purposes.
- Prepetition, judgment entered against Merchant and Guarantor for fraud.
- Judgment against Guarantor held nondischargeable under § 523(a)(2)(A). Having made that determination, the court declined to consider the factor's claims under § 523(a)(4) and (6).

Cash Management Issues

Cash management

- Common first-day motion seeks authority to continue using the debtor's prepetition bank accounts.

- MCA agreements typically allow Funders to debit the payments from Merchants' bank account(s) by either ACH or electronic check.
  - MCA agreement may say that ACH authorization is irrevocable.
  - MCA agreement may say that, if Merchant opens another bank account, Funder has the right to notify the new bank of the MCA agreement and direct the new bank of remit to Funder all or any portion of the amounts received by the new bank.

- Something to be aware of in the context of a cash management motions.

Cash Collateral Issues

Cash collateral

- Many Funders seem to avoid participating in bankruptcy cases, with their absence conspicuously noticeable at the cash collateral stage.

- 11 U.S.C. § 363(a): Cash collateral includes cash, deposit accounts, and other cash equivalents in which the estate and an entity other than the estate have an interest.

- Threshold question: Do Merchant ***and*** Funder each have an interest in the cash collateral that Merchant seeks authority to use?

Cash collateral

Existing Cash Collateral (As of the Petition Date)

- Does Merchant have an interest in the cash, deposit accounts and other cash equivalents as of the Petition Date?
  - If the MCA transaction was a sale, Merchant may not have an interest in property to the extent it was sold to Funder prepetition.

> **Future Receipts.** "Future Receipts" includes all payments made by cash, check, Automated Clearing House ("ACH") or other electronic transfer, credit card, debit card, bank card, charge card . . . or other form of monetary payment in the ordinary course of Seller's business.

  - 11 U.S.C. § 541(d): "Property in which the debtor holds . . . only legal title and not an equitable interest . . . becomes property of the estate under [§ 541(a)(1) or (2)] only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

Cash collateral

- If Merchant has an interest in such property on the Petition Date, does Funder have an interest in the property?
  - What does the MCA agreement actually say?

> **Acknowledgment of Security Interest and Security Agreement.** The Future Receipts sold by Seller to Buyer pursuant to this Agreement shall constitute and shall be construed and treated for all purposes as a true and complete sale, conveying good title to the Future Receipts free and clear of any liens and encumbrances, from Seller to Buyer. To the extent the Future Receipts are "accounts" or "payment intangibles" as those terms are defined in the Uniform Commercial Code as in effect in the state in which the Seller is located ("UCC") then: (i) the sale of the Future Receipts creates a security interest as defined in the UCC, (ii) this Agreement constitutes a "security agreement" under the UCC, and (iii) Buyer has all the rights of a secured party under the UCC with respect to such Future Receipts.

  - This language does not give Funder a security interest in cash and deposit accounts.
  - Because cash and deposit accounts are not accounts or payment intangibles, this language does not appear to give Funder an interest in cash collateral.

Cash collateral

Future Cash Collateral Based on Existing Accounts

- Receivables existing on the Petition Date are property of the estate.

- 11 U.S.C. § 552(b)(1):
  - If a security interest "extends to property of the debtor *acquired [prepetition]* and to proceeds . . . of such property, then such security interest extends to such proceeds . . . acquired by the estate [postpetition] to the extent provided by such security agreement and by applicable nonbankruptcy law . . .." (Emphasis added.)
    - If the MCA agreement granted Funder a security interest in accounts, postpetition receipts with respect to existing accounts would be cash collateral.
    - Section 552(b)(1) does not apply to accounts acquired postpetition (except to the extent they constitute proceeds, products, offspring or profits of other prepetition collateral, such as goods).

  - ". . . except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

Cash collateral

Future Receipts Not Based on Existing Accounts or Other Property

- In terms of categories of property interests, what is a "future receipt"?
  - Not an "account" because there is not yet right to payment. UCC 9-102(a)(2).
  - Similarly, not a "payment intangible," because Merchant does not yet have a property interest. *See* UCC 9-102(a)(42) (general intangible), (61) (payment intangible).
  - At best, it is a potential right to payment that does not yet exist.

- Because Merchant does not have a present property interest in a "future receipt," Funder cannot have a security interest in a "future receipt."
  - UCC 9-203(b): Unless the security agreement provides for a later time, a security interest "attaches" when, inter alia, "[t]he debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party."
  - Could state law give debtors the power to transfer rights they do not yet have?

- 11 U.S.C. § 552(a) should govern.

Cash collateral

- If there is a dispute regarding the validity, priority and/or extent of Funder's interest, how does Merchant tee up the question?

- 11 U.S.C. § 363(c)(2): Trustee may not use cash collateral in the ordinary course of business "unless . . . (B) the court, after notice and a hearing, authorizes such use . . . in accordance with the provisions of this section."
  - "After notice and a hearing" means "after such notice as is appropriate under the circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances."

- 11 U.S.C. § 363(e): If requested by an entity that has an interest in property used or proposed to be used by the trustee, the court must prohibit or condition such use as is necessary to provide adequate protection of such interest.

- 11 U.S.C. § 363(p): In any hearing under this section, (1) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest, and (2) the trustee has the BOP on the issue of adequate protection.

Cash collateral

Evolution Credit Partners v. First Brands Group, LLC
(*In re First Brands Group, LLC*)
2026 WL 253634 (S.D. Tex. Jan. 31, 2026)

- Debtor had about $106m of cash collateral.
  - Evolution (a factor) was owed $60.5m and claimed to have a first-priority security interest.
  - Bankruptcy court authorized debtor to use up to $60m of the cash collateral.
  - Court stated it was not convinced that Evolution had priority over other creditors.

- District court: Under § 363, courts may inquire into the validity of an asserted property interest only to see if the creditor can establish a prima facie or colorable claim to that property interest.
  - Courts may consider whether evidence clearly refutes a creditor's assertion of an interest.
  - The substantive consideration of such evidence should stop as soon as it appears that the creditor has a colorable claim. To do otherwise bypasses FRBP 7001.
  - Claimant is entitled to adequate protection until an adversary proceeding determines the validity, extent, and priority of the asserted property interest.

Cash collateral

- Priorities of Funders' security interests often are difficult to determine in a short period of time.
  - Sometimes difficult to obtain copies of the MCA agreements.
  - "Stacked" obligations to multiple Funders.
  - UCC-1 financing statements often do not identify Funders by name.
  - Funders may not appear or even file proof of claims.

- Depending on overall case strategy, Merchant's best approach may be to propose no AP for Funders in hope that they either sit on the sidelines or request AP and provide documents to establish a colorable claim.

Avoidability as Preferential Transfers: Five Major Issues

Preferences – Issue #1

Did the debtor transfer "an interest of the debtor in property"?

- 11 U.S.C. § 547(b): Trustee may "avoid any transfer of an interest of the debtor in property . . .."
- If the transaction is a true sale of accounts, the debtor may not have had a legal or equitable interest in the funds paid to Funder. UCC 9-318(a).
  - *But see Gecker v. LG Funding, LLC* (*In re Hill*), 589 B.R. 614, 623 (Bankr. N.D. Ill. 2018).
    - Although the transaction was deemed a sale, the court ruled that payments to Funder constituted transfers of an interest of Merchant in property.
    - Court reasoned that the transfer deprived the estate of something which could otherwise be used to satisfy creditors' claims.
    - Court did not address UCC 9-318(a).
  - What if payments made to Funder exceeded the percentage of receipts sold?

Preferences – Issue #2

Was the transfer made "to or for the benefit of a creditor" and "for or on account of an antecedent debt"?

- 11 U.S.C. § 547(b)(1) and (2).

- Because of the broad definitions of "debt" and "claim," courts seem to have little difficulty determining that, even if the MCA transaction is a sale, payments still are to or for the benefit of a creditor, and for or on account of an antecedent debt. *See Hill*, 589 B.R. at 622.

Preferences – Issue #3

Did Funder receive more as a result of the transfer than it would have received had the transfer not been made?

- 11 U.S.C. § 547(b)(5).
- Can require a detailed analysis under § 506, which in turn requires an analysis of the priority of Funder's security interest.
  - Figuring out whether Funder filed a UCC-1 can be cumbersome.
  - Figuring out the priority of Funder's interest in a stack can be even worse.
  - Scope of Funder's security interest relevant.
  - Source of funds paid to Funder should also be relevant. What if Funder was paid from non-receipts (e.g., funding from new MCAs)?
- If the "Purchased Amount" is not fully paid prior to the Petition Date, is the MCA Agreement an executory contract?
  - Can trustees reject partially-performed MCAs if material obligations remain on both sides?
  - If so, even if a transaction is a true sale, could this allow a trustee to satisfy § 547(b)(5)?
  - Impact of 11 U.S.C. § 365(c)(2) ("The trustee may not assume or assign any executory contract . . . of the debtor ... if such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor . . .").

Preferences – Issue #4

Was the debt incurred in the ordinary course?

- 11 U.S.C. § 547(c)(2): "The trustee may not avoid under this section a transfer . . . to the extent that such transfer was in payment of a debt *incurred by the debtor in the ordinary course of business or financial affairs of the debtor* and the transferee . . .."

- There are two oft-cited cases involving LG Funding:
  - *Gecker v. LG Funding, LLC* (*In re Hill*), 589 B.R. 614 (Bankr. N.D. Ill. 2018).
  - *Official Committee of Unsecured Creditors v. LG Funding, LLC* (*In re Cornerstone Tower Services, Inc.*), 2018 WL 6199131 (Bankr. D. Neb. Nov. 9, 2018).

Preferences – Issue #4

Gecker v. LG Funding, LLC (In re Hill)
589 B.R. 614 (Bankr. N.D. Ill. 2018)

- Debtor entered into MCA agreements with at least 13 Funders to operate a salon and support her family from January 2013 through May 2016.

- The court ruled that because Merchant (1) entered into MCA agreements with other Funders for almost 2 years before entering in the MCA agreement with the defendant-Funder, and (2) regularly entered into MCA transactions during that time period, MCA transactions had become part of Merchant's normal course of business.

- Would the result have been different if the defendant-Funder was one of the first Funders?

Preferences – Issue #4

Official Committee of Unsecured Creditors v. LG Funding, LLC
(In re Cornerstone Tower Services, Inc.)
2018 WL 6199131 (Bankr. D. Neb. Nov. 9, 2018)

- Court stated that a debt will be considered not incurred in the OCB if creation of the debt was atypical, fraudulent or not consistent with an arm's length commercial transaction.

- Because Merchant had not been using MCAs for several years like the debtor in *Hill*, the court decided that the issue of whether the transfers were made in the ordinary course needed to be set for trial.
  - Because Merchant and Funder had entered into the MCA agreement only about 2-1/2 months before Merchant filed for bankruptcy, the parties did not have a history of such transactions.
  - Funder was 1 of 4 entities from whom Merchant borrowed money or to whom Merchant sold receivables within 6 months prior to the petition date.

Preferences – Issue #5

Even if the debt was incurred in the ordinary course, was the transfer made in the ordinary course?

- 11 U.S.C. § 547(c)(2): ". . . and such transfer was – (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms."

- This seems hard to contest if Funder followed the industry-standard practice of drawing a fixed amount from Merchant's bank account each day or week (if doing so was consistent with the MCA agreement).

Preferences – Other defenses?

- 11 U.S.C. § 547(c)(4)
  - "The trustee may not avoid under this section a transfer . . . to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor – (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."
  - New advances could give rise to a new value defense.

- 11 U.S.C. § 547(c)(5)
  - The "improvement of position" test.
  - "The trustee may not avoid under this section a transfer . . . that creates a perfected security interest in . . . a receivable or the proceeds . . . except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of . . .."

Avoidability as Fraudulent Transfers

Fraudulent transfers / obligations

- 11 U.S.C. § 548(a)(1): "The trustee may avoid any transfer . . . of an interest in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the [petition date] . . .."

- If Merchant had many MCAs, and if funds from later Funders are used to pay earlier Funders, may § 548 be used to avoid payments on the theory that Merchant was operating a Ponzi scheme? [Bovitz says, "WHAT??"]
  - "A Ponzi scheme is a financial fraud that induces investment by promising high returns, usually in a short time period, where in fact no legitimate profit-making business opportunity exists." *Kirkland v. Rund* (*In re EPD Investment Co., LLC*), 114 F.4th 1148, 1156 (9th Cir. 2024).
  - "If the trustee proves that the debtor operated a Ponzi scheme, the trustee is entitled to the *irrebuttable* presumption that the debtor transferred money with actual fraudulent intent under section 548." *Id.* at 1157 (emphasis added).
  - Does it matter that Funders are (purportedly) buying future receipts, whereas a typical Ponzi scheme involves the purchase of a note or an equity investment?

Fraudulent transfers / obligations

- May § 548 be used to avoid a security interest granted to Funder to the extent Merchant did not receive reasonably equivalent value?
  - "Reasonably equivalent value" may depend on the MCA agreement's terms.
    - On the whole, how oppressive are the terms?
    - An APR of 398% for an estimated 7-week payback period seems a lot worse than an APR of 76% for an estimated 24-week payback period.
    - Do Funders set their own market, and thereby establish what is reasonable?
  - If it is a true sale with relatively low indicia of loan-ness, it may be hard to quantify value. Merchant likely is in dire straits. How do you price the risk of loss?
  - How does the (typical) lack of due diligence factor into the equation?

- May § 548 be used to avoid the *obligation* to the extent Merchant did not receive reasonably equivalent value? [Bovitz says, "No."]
  - Potential battle of experts regarding the discount (aka profit).
  - It is reasonable to expect a buyer of a payment stream to apply some discount to account for the risk of loss. But how large a discount?

Fraudulent transfers / obligations

Sommers v. Global Merchant Cash, Inc.
(*In re Anadrill Directional Services, Inc.*)
2026 WL 234908 (Bankr. S.D. Tex. Jan. 28, 2026)

- Trustee sought to avoid payments as fraudulent transfers, arguing that the MCA transaction was a usurious loan. Funder moved to dismiss.

- First, the court determined that the complaint made a plausible case that the transaction was a loan.

- Second, the court ruled that even though criminal usury gives rise to a defense, the trustee could plausibly argue that because the agreement was void it did not provide reasonably equivalent value.

Fraudulent transfers / obligations

Sommers v. RDM Capital Funding, LLC
(*In re Anadrill Directional Services, Inc.*)
2026 WL 407859 (Bankr. S.D. Tex. Feb. 12, 2026)

- Cross-MSJs by trustee and Funder.

- Court ruled that there were genuine issues of material fact as to whether the MCA agreement was a usurious loan or a sale.
  - Court said there was a genuine issue "because the parties dispute that the terms of reconciliation are, whether the Agreement specifies a finite term for repayment, and whether the Agreement requires [Merchant] to make a weekly payment for a set dollar amount or for a percentage of the total amount [Merchant] owes to [Funder]."
  - Unclear why the terms of the MCA agreement did not speak for themselves.

Fraudulent transfers / obligations

Denali Constr. Svcs., LLC v. Cloudfund, LLC (In re Denali Constr. Svcs., LLC) 2026 WL 800949 (Bankr. N.D. Tex. Mar. 20, 2026)

- The MCA agreements were avoided pursuant to § 548(a)(1)(B) as constructively fraudulent obligations.

- Lien granted to Funder was avoided pursuant to § 548(a)(1)(B) as a constructively fraudulent transfer.

A Few Words On Classification and Treatment in Chapter 11 Cases

Classification and treatment

- If transaction is a loan, the plan should separately classify and provide treatment of Funder's claim to the extent it is an allowed secured claim.
  - If a complaint has not already been filed, proponent may file complaint to determine the allowed amount of Funder's secured claim under § 506; treatment dictated accordingly.
  - Funders may be more willing to go along (i.e., default) if complaint just seeks a valuation determination. Thus, for strategic reasons, Merchant may want to not challenge issues Funders care about most (e.g., sale v. loan, usury).

Classification and treatment

- But what if the transaction is a sale?
  - 11 U.S.C. § 101(5): "Claim" is a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.
  - 11 U.S.C. § 102(2): In the Code, "claim against the debtor" includes a claim against property of the debtor.
    - This was intended to cover nonrecourse loan obligations.
    - Could it also cover MCA true-sale transactions where Funder has a security interest in more than the future receipts that have been sold?
  - If Funder has a claim, the claim must be placed into a class and treated under the plan.
    - Sections 506, 1122, 1129(b), etc., come into play.
    - Given that Funders often do not participate in bankruptcy cases, Merchant-Debtor may not be able to count on Funder to vote (if its claim is impaired).

Equitable Subordination

Equitable subordination

- 11 U.S.C. § 510(c)(1): "[A]fter notice and a hearing, the court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim . . .."
- Appropriate when (1) the claimant engaged in some type of inequitable conduct, (2) the misconduct injured creditors or conferred an unfair advantage on the holder of the claim sought to be subordinated, and (3) subordination would not be inconsistent with the Code. *Henry v. Lehman Commercial Paper, Inc.* (*In re First Alliance Mortgage Co.*), 471 F.3d 977, 1006 (9th Cir. 2006).
- "Where non-insider, non-fiduciary claims are involved, as is the case here, the level of pleading and proof is elevated: gross and egregious conduct will be required before a court will equitably subordinate a claim." *Id.*
- Could a particularly onerous MCA agreement – especially if it is determined to be a usurious loan – satisfy these standards?

Q & A

Exhibits

1. *Cap Call, LLC v. Foster* (*In re Shoot the Moon, LLC*), 635 B.R. 797 (Bankr. D. Mont. 2021)
2. *Denali Constr. Svcs., LLC v. Cloudfund, LLC* (*In re Denali Constr. Svcs., LLC*), 2026 WL 800949 (Bankr. N.D. Tex. Mar. 20, 2026)
3. MCA exemplar: Alpha Equity Fund
4. MCA exemplar: Forward Financing
5. MCA exemplar: Samson
6. Factoring agreement exemplar: Capital Freight Factoring
7. John F. Hilson and Stephen L. Sepinuck, *A "Sale" of Future Receivables: Disguising a Secured Loan as a Purchase of Hope*, 9 Transactional Law. 14 (April 2019)
8. John F. Hilson and Stephen L. Sepinuck, *A "Sale" of Future Receivables: Criminal Usury in Another Form*, 9 Transactional Law. 14 (August 2019)

KeyCite Yellow Flag
Distinguished by In re Level 8 Apparel, LLC, Bankr.S.D.N.Y., July 11, 2024

635 B.R. 797
United States Bankruptcy Court, D. Montana.

IN RE: SHOOT THE MOON, LLC, Debtor.
Cap Call, LLC, Plaintiff and Counterclaim-defendant,
v.
Jeremiah J. Foster, Defendant and Counterclaim-plaintiff.

Case No. 2:15-bk-60979-WLH
|
Adv. Proc. No. 2:17-ap-00028-WLH
|
Signed September 10, 2021.

Synopsis

Background: Merchant cash advance company that provided prepetition financing to Chapter 11 debtor, a limited liability company (LLC) that operated numerous restaurants, filed adversary complaint against Chapter 11 trustee, seeking declaratory relief that it owned remaining balance in segregated account into which certain restaurant customer credit card payments had been deposited, judgment against trustee for converting postpetition receipts, and other miscellaneous fees, costs, and interest. Trustee filed counterclaim seeking, inter alia, declaratory relief that the parties' transactions were disguised loans, not sales, unencumbered title to segregated account, avoidance and recovery of allegedly preferential transfers, and remedies stemming from company's alleged usurious interest rates. Trial was held.

Holdings: The Bankruptcy Court, Whitman L. Holt, J., held that:

[1] trustee had standing to pursue his declaratory relief claims;

[2] under either Montana or New York law, the transactions at issue were loans, not sales;

[3] under "federal" choice-of-law rules, the law of Montana, not New York, governed trustee's usury claim;

[4] company violated Montana usury law, entitling trustee to judgment in the amount of $1,216,685;

[5] trustee established his preference claim with respect to funds received by company within 90 days immediately preceding the petition date on account of its loans to debtor entities;

[6] company was not entitled to the receivables in the segregated account;

[7] adversary proceeding involved an action "on the contract" and, thus, trustee was entitled to award of attorney fees against company pursuant to Montana's reciprocal fee statute; and

[8] under the circumstances, a reasonable fee consisted of 30% of balance of segregated funds, 20% of amount of Montana usury penalty, and 10% of amount of avoided preferential transfers, for total award of $424,756.58.

Judgment for trustee.

Procedural Posture(s): Request for Declaratory Judgment.

West Headnotes (51)

[1] **Bankruptcy** In general; standing
Bankruptcy Trustee as representative of debtor or creditors

Chapter 11 trustee, who filed counterclaim against merchant cash advance company seeking declaratory relief that company's prepetition transactions with debtor were disguised loans, not sales, as well as recovery on preference and usury claims, had standing to pursue his claims, even if issues were not technically cognizable as standalone causes of action under the Declaratory Judgment Act; trustee had Article III standing generally, as the litigation involved particularized and non-theoretical claims against company for losses that could be redressed by a decision for trustee, and, more specifically, trustee could seek judicial determination concerning nature of parties' transactions, as that was predicate question requiring resolution en route to bankruptcy court's determination of trustee's preference

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claims, which arose under the Bankruptcy Code, and court also had to decide choice-of-law issue to resolve trustee's usury claim. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201; 11 U.S.C.A. §§ 547, 550.

More cases on this issue

[2] **Bankruptcy** Effect of state law in general
Bankruptcy Effect of state law, in general

Absent contrary rule in Bankruptcy Code, contours of claims and property rights in bankruptcy cases are sculpted by applicable nonbankruptcy law.

[3] **Bankruptcy** Effect of state law in general

Under modern approach to determining applicable substantive law in bankruptcy, absent a contrary rule in the Bankruptcy Code, property rights are determined by applicable nonbankruptcy law; such approach is in tension with older Supreme Court precedent, which reflects a tradition of allowing bankruptcy courts to determine transactional substance as a matter of generalized bankruptcy law.

[4] **Action** What law governs

Choice-of-law determination is necessary only when a difference in the law will result in a different outcome.

[5] **Corporations and Business Organizations** Negotiation and sale

In contrast to the straightforward sale transaction that occurs when party A sells receivables to party B, "securitization" is a more complex form of sale transaction whereby the seller transfers the receivables to a special purpose entity, which entity then issues to third parties debt securities collateralized by the receivables in exchange for capital that completes the purchase transaction.

[6] **Secured Transactions** Nature and essentials of secured transactions in general

Article 9 of the Uniform Commercial Code (UCC) treats both secured loans and a sale of accounts, chattel paper, payment intangibles, or promissory notes as secured transactions subject to that statute's detailed rules regarding perfection and priority. U.C.C. § 9-109(a)(3).

1 Case that cites this headnote

[7] **Secured Transactions** Other transactions distinguished

Article 9 of the Uniform Commercial Code (UCC) does not delineate whether a particular transaction is to be classified as a secured loan or a sale; instead, the issue is left to the courts. U.C.C. § 9-109, Cmt. 4.

[8] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

Although no individual factor or combination thereof is determinative, among the factors that courts may consider in determining whether a transaction was a loan or a sale are: (1) whether the buyer has a right of recourse against the seller, (2) whether the seller continues to service the accounts and commingles receipts with its operating funds, (3) whether there was an independent investigation by the buyer of the account debtor, (4) whether the seller has a right to excess collections, (5) whether the seller retains an option to repurchase accounts, (6) whether the buyer can unilaterally alter the pricing terms, (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset, and (8) the language of the agreement and the conduct of the parties.

1 Case that cites this headnote

[9] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

Inquiry into whether a transaction was a loan or a sale is not a quantitative exercise susceptible

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to replication by a computer program, but a comprehensive and heavily contextual endeavor.

[10] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

In classifying a transaction as a sale or a loan, court's analysis of the various factors and their impact on the nature of the parties' agreement is fact-intensive, and determination must be made based on the totality of the circumstances.

2 Cases that cite this headnote

[11] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

In determining whether a transaction was a sale or a loan, a consideration that overlays and unites the factors is how the parties allocated risk: a sale typically occurs when the risk of loss from the purchased assets passes to the buyer, a gamble usually reflected in the purchase price, while conversely, in a disguised loan, the parties may employ various methods to allocate risk, and the putative seller typically remains exposed to the underlying receivables and may grant the putative buyer recourse to sources of recovery beyond the receivables.

1 Case that cites this headnote

[12] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

Under New York law, in determining whether a transaction was a sale or a loan, the transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it.

[13] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

Under Montana law, in determining whether a transaction was a sale or a loan, the law looks to the substance rather than the form.

[14] **Secured Transactions** Other transactions distinguished

Under either Montana or New York law, prepetition transactions between merchant cash advance company and Chapter 11 debtor, a limited liability company (LLC) that operated numerous restaurants, were loans, not sales, despite merchant agreements' loan-disclaimer language; security interests reflected in transaction documents were significantly broader than those associated with a sale and much more akin to those associated with a loan, company's financing statements similarly described collateral broadly, as extending far beyond the receivables purportedly purchased, debtor entities commingled funds from accounts receivable with other funds, with company's approval, transaction documents gave company rights and recourse against property in addition to overbroad collateral package, and parties' course of performance reflected a debtor-creditor relationship, including language used to describe transactions and practice of "stacking" or "rolling" funds from one transaction to the next.

1 Case that cites this headnote

[15] **Secured Transactions** Other transactions distinguished

Filing of a financing statement, by itself, is not indicative of a secured loan.

[16] **Secured Transactions** Accounts or contract rights, security interests in

Secured Transactions Unperfected Security Interests, Priority Over

Under Article 9 of the Uniform Commercial Code (UCC), a buyer of accounts who fails to perfect its interest in that property by filing a financing statement runs the risk of becoming subordinate to a subsequent buyer or other secured party who is perfected. U.C.C. § 9-318, Cmt. 3.

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[17] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

In determining whether a transaction was a sale or a loan, court's task is to apply the law to the facts before it; policy arguments related to industry practices, asserted market expectations, or the like are properly left to legislative branch.

[18] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

For purposes of determining whether a transaction was a sale or a loan, simply calling transactions "sales" does not make them so; labels cannot change the true nature of the underlying transactions.

[19] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

Legal test for determining whether a transaction was a sale or a loan requires a holistic approach keyed to specific facts and a weighing of factors.

[20] **Sales** Nature and Definition of Sale; Other Transactions Distinguished

In determining whether a transaction was a sale or a loan, when counterparty has legal right to be paid in full by business, existence of that legal right would be indicative of debtor-creditor relationship even if practical realization of that legal right is contingent on merchant's success and hence not assured.

[21] **Federal Courts** Conflict of Laws; Choice of Law

In federal cases predicated on bankruptcy jurisdiction, courts in the Ninth Circuit apply the "federal" choice-of-law rules based on the Restatement (Second) of Conflict of Laws. Restatement (Second) of Conflict of Laws § 1 et seq.

[22] **Usury** What Law Governs

Under "federal" choice-of-law rules, the law of Montana, not New York, governed Chapter 11 trustee's usury claim against merchant cash advance company that provided prepetition financing to debtor, a Montana limited liability company (LLC) that operated numerous restaurants; financing was not one multistate transaction among all parties, but series of 18 separately documented, standalone transactions between company and each applicable debtor entity, analyzed on contract-by-contract basis, and though 11 agreements at issue provided that law of New York, where company was based and operated, would apply, Montana law governed, as applying New York law would be inimical to fundamental policy animating Montana usury law, that of protecting borrowers lacking real bargaining power, Montana had materially greater interest in regulating lending transactions involving its citizens, and Montana, which was hub of performance, had most significant relationship to transactions and parties. Restatement (Second) of Conflict of Laws §§ 187(2), 188(1), 188(2).

More cases on this issue

[23] **Contracts** What law governs

Choice-of-law analysis should be performed on contract-by-contract basis when dispute involves multiple contracts that are related but nevertheless separate.

[24] **Contracts** What law governs

Under "federal" choice-of-law rules, for purposes of section of the Restatement (Second) of Conflict of Laws setting forth general rule for disputes involving contracts, a "fundamental" policy is one reflected by substantive rule, rather than mere legal formality, such as in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Restatement (Second) of Conflict of Laws § 187(2).

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[25] **Usury** Constitutional and Statutory Provisions

Montana usury statutes protect borrowers who lack real bargaining power against overreaching by creditors and advance an important public policy in favor of protecting the debtor. Mont. Code Ann. §§ 31-1-104, 31-1-107, 31-1-108.

[26] **Usury** Loans or Advances of Money

Merchant cash advance company that provided prepetition financing to Chapter 11 debtor, a limited liability company (LLC) that operated numerous restaurants, violated Montana usury law, entitling Chapter 11 trustee to judgment in the amount of $1,216,685; company did not contend that it qualified as "regulated lender" to which usury statutes did not apply, nor was there any evidence supporting such qualification, trustee made required written demand for return of interest paid on 11 loans in question, company did not challenge calculations made by trustee's expert witness quantifying interest rates applicable to specified transactions, which ranged from 82.7% and 175.13%, and resulting penalty, and, given parties' relative sophistication and overall context of transactions, specifically, company's vast experience transacting with merchants and its exclusive control over the legal documentation, no equitable consideration weighed against enforcing full penalty. Mont. Code Ann. §§ 31-1-104, 31-1-107, 31-1-108, 31-1-111.

[27] **Usury** Rate and amount of interest in general

Under Montana usury law, a lender need not know that the particular interest rate is usurious and illegal, but merely needs to consummate a transaction charging an interest rate that is usurious in fact. Mont. Code Ann. §§ 31-1-104, 31-1-107, 31-1-108.

[28] **Bankruptcy** Preferences

Preference actions under the Bankruptcy Code are intended to deter the proverbial "race to courthouse" or other collection activity against an insolvent debtor and to further the prime bankruptcy policy of equality of distribution among similarly situated creditors. 11 U.S.C.A. §§ 547(b), 550.

[29] **Bankruptcy** Elements and Exceptions

Bankruptcy Preferences

To prevail on preference claim, bankruptcy trustee has the burden of proving, by a preponderance of the evidence, seven elements: (1) a transfer (2) of the debtor's property (3) to or for the benefit of a creditor (4) for or on account of an antecedent debt (5) made while the debtor was insolvent (6) within 90 days of the filing of the petition in bankruptcy (7) that enables the creditor to receive more than he would under a Chapter 7 liquidation. 11 U.S.C.A. §§ 547(b), 547(g).

[30] **Bankruptcy** Inventory and receivables security interests

Bankruptcy Avoidance rights and limits thereon, in general

Chapter 11 trustee established preference claim against merchant cash advance company that provided prepetition financing to debtor, a limited liability company (LLC) that operated numerous restaurants, subject to potential reduction for any overlap with trustee's usury claim against company; transfers aggregating $1,129,071 were made to or for benefit of company, funds transferred were debtor's property even though various debtor entities did not merge into debtor until after transfers were made, as transfers ultimately diminished debtor's bankruptcy estate, transfers were to or for benefit of company as "creditor," were used to satisfy debtor's prepetition loan obligations, and were made while debtor entities were "trapped in a death spiral" and insolvent, and challenged transfers were made within 90 days of petition date and enabled company, whose security interests were junior to those of other

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creditors, to receive more than it would have in a Chapter 7 liquidation. 11 U.S.C.A. §§ 547(b), 550, 550(d).

[31] **Bankruptcy** Property of Estate in General

Scope of property in the bankruptcy context is given a broad construction.

[32] **Bankruptcy** Ownership of interest transferred

"Property of the debtor" subject to the Bankruptcy Code's preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. 11 U.S.C.A. § 547(b).

[33] **Bankruptcy** Elements and Exceptions

Preference actions are creatures of the Bankruptcy Code that exist only postpetition for the benefit of the estate, not the debtor, and hence are unaffected by prepetition acts of the debtor. 11 U.S.C.A. § 547(b).

[34] **Bankruptcy** Insolvency

Bankruptcy trustee bringing a preference avoidance claim enjoys a presumption of insolvency. 11 U.S.C.A. §§ 547(b), 547(f).

[35] **Bankruptcy** Effect to give more than under bankruptcy distribution

Final inquiry in determining whether a Chapter 11 trustee can prevail on his preference claim, which requires a determination of whether the challenged transfer enables the creditor to receive more than he would under a Chapter 7 liquidation, is sometimes referred to as the "greater amount" test and requires the court to construct a hypothetical Chapter 7 case and determine what the creditor would have received if the case had proceeded under Chapter 7. 11 U.S.C.A. § 547(b).

[36] **Bankruptcy** Avoidance rights and limits thereon, in general

Although trustee prevails on preference claim, he is entitled to only single satisfaction in avoidance action. 11 U.S.C.A. §§ 547(b), 550(d).

[37] **Bankruptcy** Liens and security interests in general

Chapter 11 trustee, not merchant cash advance company that provided prepetition financing to debtor, a limited liability company (LLC) that operated numerous restaurants, was entitled to receivables in segregated account into which certain restaurant customer credit card payments had been deposited after the petition date; company did not purchase debtor's receivables but, instead, extended loans collateralized by the assets, and those loans were ultimately unsecured, such that company lacked an ownership or enforceable security interest in the receivables.

1 Case that cites this headnote

[38] **Bankruptcy** Liens securing claims not allowed

Subsection of the Bankruptcy Code providing that, to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is generally void, is, by its terms, self-operative; provision declares that a lien falling within its scope "is void" as opposed to being potentially "voidable" through litigation. 11 U.S.C.A. § 506(d).

[39] **Bankruptcy** Conclusiveness

Merchant cash advance company that provided prepetition financing to Chapter 11 debtor was bound by terms of confirmed plan providing that any creditor with a lien that no longer had any value would become a general unsecured creditor, as well as by the Bankruptcy Code's generalized free-and-clear provision; company received notice of plan and had

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participated in debtor's bankruptcy, including through stipulation regarding segregated funds in particular account and by filing a proof of claim, and segregated account was "dealt with" in plan. 11 U.S.C.A. § 1141(c).

[40] **Bankruptcy** Effect of avoidable transfer and surrender thereof

Where merchant cash advance company that provided prepetition financing to Chapter 11 debtor was obligated to the bankruptcy estate on trustee's preference claim, company was not entitled to payment on its proof of claim until it had satisfied the judgment in favor of trustee. 11 U.S.C.A. §§ 502(d), 547(b).

1 Case that cites this headnote

[41] **Costs, Fees, and Sanctions** Contracts

Montana's reciprocal fee statute makes unilateral fee provisions bilateral regarding "any action on the contract" and entitles the prevailing party in such an action to recover reasonable attorney fees from the losing party. Mont. Code Ann. § 28-3-704.

[42] **Costs, Fees, and Sanctions** Contracts

Policy purposes served by Montana's reciprocal fee statute are expansive and grounded in protecting parties with inferior bargaining power from contractual overreaching. Mont. Code Ann. § 28-3-704.

[43] **Costs, Fees, and Sanctions** Contracts

Because the policy purposes served by Montana's reciprocal fee statute are expansive and grounded in protecting parties with inferior bargaining power from contractual overreaching, the fee statute represents a fundamental policy of the state for purposes of any choice-of-law analysis. Mont. Code Ann. § 28-3-704.

[44] **Costs, Fees, and Sanctions** Contracts

For purposes of Montana's reciprocal fee statute, which makes unilateral fee provisions bilateral regarding "any action on the contract" and entitles the prevailing party in such an action to recover reasonable attorney fees from the losing party, Montana courts apply concept of "action on the contract" broadly and award reciprocal attorney fees in varied contexts even when contract is successfully attacked; focus should be on role and import of contract in litigation as well as whether losing party could have sought fees under contract had it prevailed. Mont. Code Ann. § 28-3-704.

[45] **Costs, Fees, and Sanctions** Contracts

That particular litigation arises in a bankruptcy context, involves some bankruptcy issues, or is even largely premised on a dispute about the Bankruptcy Code's operation does not affect whether an action is "on the contract," for purposes of Montana's reciprocal fee statute. Mont. Code Ann. § 28-3-704.

[46] **Costs, Fees, and Sanctions** Contracts

Adversary proceeding brought against Chapter 11 trustee by merchant cash advance company that provided prepetition financing to Chapter 11 debtor involved an action "on the contract," and thus trustee was entitled to award of attorney fees against company pursuant to Montana's reciprocal fee statute; broad fee provisions in parties' merchant agreements would have entitled company to fees upon prevailing on particular issues in the adversary proceeding, specifically, as to whether parties' transactions were true sales or disguised loans, whether company was entitled to funds in segregated account, parties' choice-of-law and usury disputes, and trustee's preference claim, company in fact sought such fees, and so the litigation arose from the merchant agreements and triggered their fee provisions. 11 U.S.C.A. § 547(b); Mont. Code Ann. § 28-3-704.

[47] **Costs, Fees, and Sanctions** Contracts

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Award of attorney fees under Montana's reciprocal fee statute must be "reasonable." Mont. Code Ann. § 28-3-704.

[48] Costs, Fees, and Sanctions Contracts

Determination of reasonable attorney fee amount, for purposes of Montana's reciprocal fee statute, is committed to trial court's discretion. Mont. Code Ann. § 28-3-704.

[49] Costs, Fees, and Sanctions Contracts

When fixing amount of reasonable attorney fee under Montana's reciprocal fee statute, trial court may consider but is not bound by contingent fee agreement; rather, overarching inquiry must incorporate typical factors Montana courts use to determine reasonable award. Mont. Code Ann. § 28-3-704.

[50] Costs, Fees, and Sanctions Contracts

Under Montana's reciprocal fee statute, Chapter 11 trustee, who prevailed on counterclaims against merchant cash advance company that provided prepetition financing to debtor for, inter alia, preferential transfers and usury, was entitled to reasonable fee consisting of 30% of balance of segregated funds in disputed account, which was found to belong to debtor, not company, 20% of Montana usury penalty, and 10% of amount of avoided preferential transfers, for total award of $424,756.58; although trustee's fee agreement with his counsel, which was filed and approved in underlying bankruptcy case, contained 40% contingency amount and many factors supported substantial award, including four-year pendency of litigation, significant legal work performed by trustee, and multi-million-dollar judgment for trustee, awarding full contingency fee was excessive, as some parts of judgment reflected penalty component or did not involve Montana parties. 11 U.S.C.A. § 547(b); Mont. Code Ann. § 28-3-704.

[51] Costs, Fees, and Sanctions Contracts

Montana's reciprocal fee statute imposes a reciprocal obligation only regarding attorney fees, not costs. Mont. Code Ann. § 28-3-704.

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MEMORANDUM OPINION

WHITMAN L. HOLT, U.S. BANKRUPTCY JUDGE

Legal relationships between private parties are largely defined by contract. When these contracts are implicated in litigation, courts must assess the terms and other relevant evidence to classify and determine the parties' rights and liabilities, often months or years after the original deal. In some instances, this after-the-fact analysis reveals legally significant aspects of the contractual relationship that the parties might not have appreciated when contracting.

In this adversary proceeding, a bankruptcy trustee and CapCall, LLC disagree about the legal classification and ramifications of prepetition transactions. After fully considering the evidence presented at trial, as well as briefing and oral argument offered by both sides, the court has determined that the trustee is entitled to entry of a judgment against CapCall. The details follow below. [1]

FACTUAL BACKGROUND & PROCEDURAL POSTURE

The Shoot the Moon Enterprise Generally

In the early 2000s, Kenneth Hatzenbeller and two other principal investors created a business generally known as Shoot the Moon. Over time this enterprise grew ***805** to consist of nineteen LLCs formed pursuant to Idaho,

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Montana, and Washington law that owned and operated sixteen restaurants located throughout the three states.[2] Among other forms of customer payment, the restaurants accepted credit cards, which generated a revenue stream for the Shoot the Moon entities through a processing company called Heartland Payment Systems, Inc.[3] Until shortly before the underlying Shoot the Moon bankruptcy case discussed later, Mr. Hatzenbeller exercised day-to-day management and control of all Shoot the Moon entities from his office in Great Falls, Montana.

The Shoot the Moon restaurants eventually encountered various financial pressures, including due to the 2007-2009 Great Recession and improvements demanded by some of the restaurants' franchisors. Hoping to combat these pressures, Mr. Hatzenbeller sought additional financing from various sources. Initial sources included himself and the original investors, family and friends, additional third-party investors, traditional bank lenders, and trade creditors. Some creditors obtained and perfected security interests regarding all assets of various of the entities (including accounts receivable) via UCC-1 financing statements that predate the CapCall transactions.[4]

Prepetition Merchant Cash Transactions With CapCall, LLC

Once the Shoot the Moon entities exhausted the sources of capital mentioned above, several sought additional financing from merchant cash advance companies such as CapCall. Between October 2014 and September 2015, the Shoot the Moon entities and CapCall consummated eighteen transactions. The parties detailed the terms in written Merchant Agreements and associated documents (including confessions of judgment, personal guaranties by Shoot the Moon's principals, and UCC-1 financing statements).[5] The Merchant Agreements are generally similar but contain minor variations.

The economic core of these transactions was that CapCall provided the Shoot the Moon entities with immediate cash (and hence liquidity to operate) upon closing. In exchange, CapCall received a portion of future receivables generated through the restaurant operations. The amounts promised to CapCall substantially exceeded the amount of cash CapCall paid, which created possible profit for CapCall and represented the cost to the Shoot the Moon entities of obtaining financing in this fashion.

Return transfers to CapCall were effected via fixed daily ACH debits (in the "Specified Daily Amount" per each agreement) against bank accounts Mr. Hatzenbeller specified. The debits continued regarding a given agreement until CapCall received a total "Receipts Purchased Amount" set forth in that agreement. A significant majority of the transfers were made using the bank account of an entity – Shoot the Moon Grizzly, LLC – that was not party to any of the agreements and did not operate any restaurants generating ***806** receivables.[6] Jason Leak, the primary representative of CapCall, knew about this mismatch between the contractual counterparty entities and the entity used to fund payments. Mr. Leak expressed no concern other than to request that there was "an account that will clear all the time."[7]

Mr. Hatzenbeller and Mr. Leak arranged each transaction via email.[8] In these emails, the two primarily addressed the amount CapCall would advance to a particular Shoot the Moon entity. Before funding, Mr. Leak emailed Mr. Hatzenbeller legal documents for signature – CapCall apparently never countersigned any of the agreements. CapCall and each specific entity documented each transaction via a separate, standalone Merchant Agreement. CapCall selected the terms and conditions of these agreements by using its form documents; Mr. Hatzenbeller testified that the two negotiated no specific terms beyond the basic economics and that he in fact did not read the documents before signing them. Although Mr. Leak occasionally suggested to Mr. Hatzenbeller that he could obtain regular financing, there was no binding commitment to lend or make future advances and each new transaction was subject to separate investor approval and documentation.[9] Emails between Mr. Hatzenbeller and Mr. Leak often referred to the transactions as "loans" or "notes" and on at least one occasion, there was specific negotiation regarding the temporal "term" of a transaction.[10]

The Shoot the Moon Bankruptcy Generally

On October 20, 2015, all nineteen Shoot the Moon entities merged into Shoot the Moon, LLC.[11] The following day, this entity filed the underlying chapter 11 bankruptcy petition here.[12]

During the bankruptcy case, Jeremiah J. Foster (the "Trustee") was appointed as the chapter 11 trustee and then as trustee of the STM Liquidating Trust pursuant to the confirmed chapter 11 plan.[13]

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For purposes of this dispute, material events during the course of the bankruptcy case include:

- The Trustee sold substantially all of the bankruptcy estate's business assets via Bankruptcy Code section 363(b). The net proceeds realized from this sale were substantially less than the amount of the claims of numerous secured creditors (including ***807** those with perfected security interests senior to CapCall), leaving them with significant unsecured deficiency claims under Bankruptcy Code section 506(a).[14] CapCall did not object to the sale or to a stipulation regarding distribution of the proceeds to certain of the senior secured creditors.

- The Trustee moved to obtain turnover of certain funds held by Heartland consisting of restaurant customer credit card payments processed prepetition but not transferred to any Shoot the Moon accounts before the petition date.[15] The Trustee and CapCall subsequently stipulated to segregate these funds pending resolution of the parties' disputes. The balance is $228,449.93.[16]

- CapCall filed a proof of claim asserting a claim for conversion of receivables that CapCall contended it owned. CapCall acknowledged that the claim was unsecured and that CapCall held no security interest in property of the debtor.[17]

Posture of This Adversary Proceeding

In August 2017, CapCall commenced this adversary proceeding. CapCall seeks declaratory relief that it owns the remaining balance deposited in the segregated account, a judgment against the Trustee for converting postpetition receipts, and other miscellaneous fees, costs, and interest components. The Trustee counterclaimed seeking declaratory relief about which state's law applies to the transactions and that the transactions are disguised loans rather than sales. The Trustee also seeks unencumbered title to the segregated account, avoidance and recovery of allegedly preferential transfers, and remedies stemming from CapCall's alleged usurious interest rates.

The court conducted a trial commencing June 29, 2021, and concluding the following day. At trial, the court admitted numerous exhibits and deposition excerpts.[18] The parties presented the following testimony:

- **Evan Marmott**. Mr. Marmott is the CEO and owner of CapCall. He testified about the general nature of CapCall's business and his understanding of how the Merchant Agreements operate, including features of the documents that he believes are standard industry practice. Mr. Marmott testified about the due diligence CapCall did before entering into transactions, including reviewing account statements from the credit-card payment processer and checking Mr. Hatzenbeller's credit report. Mr. Marmott conceded on cross-examination that he had no direct personal contact with Mr. Hatzenbeller and that such interactions occurred with CapCall's "outside brokers" such as Mr. Leak. Aside from this basic background information, the court did not find Mr. Marmott credible or persuasive. He was often evasive, his description of the relationship between CapCall and the Shoot the Moon entities was largely conclusory and self-serving (and hearsay due to his lack of interaction with Mr. Hatzenbeller), and ***808** his description of the Merchant Agreements frequently conflicted with the plain terms of the documents. For example, Mr. Marmott adamantly disclaimed the expansive scope of the collateral package granted to CapCall in the documents despite being shown the specific and unambiguous language.

- **Jeremiah Foster**. The Trustee testified about his experience as a turnaround professional and his involvement with the Shoot the Moon entities. Mr. Foster explained that Western Alliance Bank brought him into the situation, that he participated in a pre-bankruptcy meeting of creditors, and that he then became chapter 11 trustee. Mr. Foster detailed the section 363(b) sales process he coordinated, the resolution regarding distribution of the proceeds to various secured creditors (specifically noting the reasons CapCall was not invited to participate in the settlement process and that CapCall received notice but did not object to the final resolution), and the shift into a litigation mode. Overall, the court found Mr. Foster professional and credible. His testimony provided helpful context about events occurring during the bankruptcy case.

- **Nicole Manos**. Ms. Manos is a Senior Managing Director of Resolute, a financial services firm headed by Mr. Foster and retained to provide litigation support and financial advisory services to the Trustee. The Trustee offered Ms. Manos as an expert witness regarding the Shoot the Moon entities' financial condition and

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transactions. CapCall did not file a *Daubert* motion or otherwise challenge Ms. Manos' qualifications. Ms. Manos explained that she reviewed the assets and liabilities of the Shoot the Moon entities and concluded all relevant entities were insolvent both individually and collectively.[19] Ms. Manos further testified that she reviewed the entities' bank statements and prepared a schedule of transfers made to or for the benefit of CapCall within the 90 days prior to the petition date.[20] Based on the premise that the transactions at issue constitute loans governed by Montana law, Ms. Manos also detailed her analysis used to compute the imputed interest rate of the loans and the applicable usury penalty.[21] Ms. Manos also analyzed whether prepetition transfers to CapCall allowed it to receive more than if the Shoot the Moon entities liquidated in chapter 7. Based on a valuation of the Shoot the Moon entities' assets and the existence of various creditors with undersecured liens, but still senior to CapCall, Ms. Manos' analysis revealed that: (i) CapCall received a greater recovery than possible in a hypothetical chapter 7 case absent the transfers and (ii) CapCall has no viable security interest in the receivables the Trustee allegedly converted or in the segregated funds. Overall, the court found Ms. Manos clear and credible. Ms. Manos' written materials and supporting testimony appear both comprehensive and easy to comprehend.

***809** • **Kenneth Hatzenbeller (testimony via Zoom)**. Mr. Hatzenbeller is one of the founders and former manager of Shoot the Moon. He testified about the general history of the business and how he ended up dealing with merchant cash advance parties and CapCall specifically. Mr. Hatzenbeller described his understanding of the CapCall transactions and discussed his interactions with Mr. Leak regarding new transactions. Mr. Hatzenbeller explained how the transactions evolved into a series of "stacked" or "rolled" contracts whereby a portion of CapCall's later advances were used to pay off obligations from earlier agreements.[22] Mr. Hatzenbeller outlined how he used the bank account of a defunct entity, Shoot the Moon Grizzly, LLC, as a central clearinghouse to fund payments for various other Shoot the Moon entities, including to CapCall. Mr. Hatzenbeller detailed how the individual transactions with CapCall were not negotiated, but instead were "take-it-or-leave-it" deals offered using form documents Mr. Leak emailed; Mr. Hatzenbeller explained that he would look at the topline economic terms but otherwise did not read the contracts before signing. Mr. Hatzenbeller acknowledged that he pled guilty for certain crimes relating to Shoot the Moon, but noted that he served his prison sentence and that the criminal activities were unrelated to anything involving CapCall. On cross-examination, Mr. Hatzenbeller admitted that he made bad decisions as manager of the Shoot the Moon entities and that he could have had legal counsel review the CapCall contracts but chose not to. Mr. Hatzenbeller further testified that funds received from CapCall were commingled and used to pay expenses across the entire Shoot the Moon enterprise, although he noted on redirect that he recorded movement of money across different entities via intercompany payables and receivables.[23] Overall, the court found Mr. Hatzenbeller sincere and genuinely contrite about events that occurred during his management of the Shoot the Moon entities, including regarding the CapCall transactions.

After trial, the court requested written submissions regarding several specified issues and heard closing argument. The matter is now ready for decision.

LEGAL ANALYSIS

Jurisdiction & Power

The court has subject matter jurisdiction regarding this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) & 157(a) and Standing Order No. DLC-43 (D. Mont. Jan. 16, 2019). This court is a proper venue for this litigation as a result of the pendency of the underlying Shoot the Moon bankruptcy case in this district.[24] Previous orders entered in this adversary proceeding reflect the parties' agreement that this is a "core" proceeding as well as each side's express consent to a final adjudication by this bankruptcy court.[25] Accordingly, ***810** the court may properly exercise the judicial power necessary to finally decide this dispute.[26]

Constitutional & Other Standing Issues

[1] In its post-trial submission, CapCall maintains that the Trustee lacks standing to pursue its declaratory relief claims.[27] The thrust of the argument is not clear, but CapCall appears to contend that the Trustee's claims are predicated on past, not recurring or "prospective," injuries and that the legal issues are not sufficiently related to a cause of

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action separately supporting federal jurisdiction. Although CapCall's counsel declined to press the point during closing argument, because CapCall frames things as at least partially a matter of "constitutional standing" implicating this court's jurisdiction, the court is compelled to address this threshold consideration.[28] For the reasons set forth below, the court concludes that the Trustee possesses the requisite standing.

To begin, this litigation involves an obvious case or controversy in which the Trustee has standing generally. The Trustee's counterclaims (1) are based on an injury in fact that is concrete and particularized insofar as the Trustee, on behalf of the bankruptcy estate, seeks to recover for allegedly usurious payments made to CapCall and to avoid and recover allegedly preferential transfers made to or for the benefit of CapCall; (2) stem from an injury that is directly traceable to the challenged actions of CapCall insofar as CapCall is the transactional counterparty of the Shoot the Moon entities and transferee of the challenged transfers; and (3) are causes of action as to which it is highly likely that the injury will be redressed by a favorable decision insofar as the court can enter a monetary judgment against CapCall. In short, this litigation involves particularized and non-theoretical claims against CapCall for losses that can be redressed by a decision for the Trustee, which provides Article III standing.[29]

More specifically, in the present context the Trustee may appropriately seek a judicial determination whether the transactions at issue were sales or loans – a question the Trustee frames as declaratory relief.[30] Indeed, this is a predicate question requiring resolution en route to the court's determination of the Trustee's preference claims – claims arising under the Bankruptcy Code. As discussed in detail later, ***811** without classifying the transactions as the Trustee requests, the court cannot determine whether payments made to CapCall on account of the transactions were preferences. Notably, while CapCall now contends that the Trustee lacks standing to seek declaratory relief on this question, CapCall asks the court to resolve the very same issue. In its own amended complaint, CapCall seeks the same relief in order to address whether CapCall's purported purchase of the receivables entitles it to funds currently held in the segregated account and those the Trustee allegedly converted. CapCall fails to reconcile the discrepancy.

Further, like the classification issue, the court must determine whether Montana law applies to the transactions to resolve the Trustee's usury claim.

In sum, CapCall provides no basis (and the court sees none) to conclude that standing principles prevent the Trustee from pressing issues central to the outcome of this litigation, even if these issues are not technically cognizable as standalone causes of action under the Declaratory Judgment Act.[31] Thus, the court concludes that there is no "standing" issue here, constitutional or otherwise.[32]

Classification of the Transactions as True Sales or Loans

As mentioned, the parties disagree about the legal classification of the transactions at issue: CapCall argues they are sales and the Trustee contends they are loans. If sales, CapCall acquired absolute ownership of the subject receivables. If loans, CapCall's advances entitled it to a security, rather than an ownership, interest in the receivables junior to several other interests. As also stated, the court must resolve this threshold question before addressing whether certain transfers to CapCall were preferences and whether CapCall violated Montana usury law. If CapCall's advanced funds purchased property, any subsequent transfer of that property to CapCall would not be a preference. Likewise, if there was no loan, CapCall could not have violated usury laws. The court now turns to this question.

I. Applicable Substantive Law

[2] **[3]** Absent a contrary rule in the Bankruptcy Code, the contours of claims and property rights in bankruptcy cases are sculpted by applicable nonbankruptcy ***812** law.[33] Neither the Bankruptcy Code nor any other federal statute prescribes how to differentiate true sales from loans, which means bankruptcy courts must turn to state law.[34]

[4] Of course, the parties disagree about which state's law the court should apply to classify the transactions; CapCall maintains that New York law applies while the Trustee urges application of Montana law. This appears to tee up a potential choice-of-law issue. But the outcome of the true-sale-or-loan dispute remains the same regardless which state's law applies. The court therefore is constrained by the principle that a "choice-of-law determination is necessary only when a difference in the law will result in a different outcome."[35] Thus, the court need not make such a generalized determination at this step (though we will revisit the question later in connection with the usury claim).

II. Differentiating True Sales from Loans

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[5] **[6]** **[7]** An entity seeking liquidity may monetize its present or future accounts receivable in two primary ways: by either selling or borrowing against the receivables.[36] While the monetization methods differ in obvious and key respects, they are not entirely dissimilar. The shared aspects are reflected in the commentary to Article 9 of the Uniform Commercial Code where the drafters recognize that "[i]n many ***813** commercial financing transactions the distinction is blurred."[37] In light of this, Article 9 treats both secured loans and "a sale of accounts, chattel paper, payment intangibles, or promissory notes" as secured transactions subject to that statute's detailed rules regarding perfection and priority.[38] The statute stops short of "delineat[ing] how a particular transaction is to be classified" and, by design, the "issue is left to the courts."[39]

[8] **[9]** **[10]** **[11]** Courts have formulated a holistic, multipart framework to examine a transaction on the way to classifying it as a sale or a loan. In a notable article, Robert D. Aicher and William J. Fellerhoff catalog factors courts often consider:

(1) whether the buyer has a right of recourse against the seller;

(2) whether the seller continues to service the accounts and commingles receipts with its operating funds;

(3) whether there was an independent investigation by the buyer of the account debtor;

(4) whether the seller has a right to excess collections;

(5) whether the seller retains an option to repurchase accounts;

(6) whether the buyer can unilaterally alter the pricing terms;

(7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and

(8) the language of the agreement and the conduct of the parties.[40]

As with many multi-factor tests, no individual factor or combination thereof is determinative.[41] The inquiry is not a quantitative exercise susceptible to replication by a computer program, but a comprehensive and heavily contextual endeavor. A court's "[a]nalysis of the various factors and their impact on the nature of the parties' agreement is fact-intensive, and a determination must be made based on the totality of the circumstances."[42] That said, a consideration that overlays and unites the factors is how the parties allocated ***risk***.[43] A sale ***814** typically occurs when the risk of loss from the purchased assets passes to the buyer – a gamble usually reflected in the purchase price. Conversely, in a disguised loan, the parties may employ various methods to allocate risk – the putative seller typically remains exposed to the underlying receivables and may grant the putative buyer recourse to sources of recovery beyond the receivables.

[12] **[13]** To elaborate on a point touched earlier, the court perceives no material difference in particular states' laws regarding the distinction between sales and loans. Nor do the parties clearly frame one (both have cited case law from assorted jurisdictions). Courts applying New York law look to the same sorts of factors, including those described in the Aicher and Fellerhoff article, as courts applying other states' law.[44] Moreover, New York courts have long approached this sort of problem by examining "the substance of the transaction between the parties" and identifying "the essential character of the transaction."[45] In New York, a "transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it."[46] Montana, too, is a jurisdiction where "[t]he law looks to the substance rather than the form."[47] Thus, the court will apply those factors from the Aicher and Fellerhoff article and look to the overall transactional substance rather than attempt to formulate a material discrepancy between New York and Montana law on the matter.

III. Application of the Law to the Facts

[14] Applying the standards discussed above to the totality of the record established at trial, the court determines that the transactions at issue are loans. The following findings and conclusions support this determination.

First, the security interests reflected in the transaction documents are significantly broader than those associated with a sale and much more akin to those associated with a loan. For instance, a January 22, 2015 Merchant Agreement purports to secure the Shoot the Moon entity's "payment and performance obligations to" CapCall ***815** with "a security interest in all ... payment and general intangibles (including but not limited to tax refunds, registered and unregistered patents, trademarks, service marks, copyrights,

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trade names, trade secrets, customer lists, licenses, [etc.]); goods; inventory; equipment and fixtures ..., and all proceeds of the foregoing."[48] While this represents only a single example, other agreements contain substantially similar language conferring security interests overly generous for a sale. Consistent with these broad granting clauses, CapCall's UCC-1 financing statements usually describe the collateral as "[a]ll assets of the ***Debtor***, now existing and hereafter arising, wherever located" (emphasis added).[49]

[15] **[16]** The filing of a financing statement by itself is not indicative of a loan,[50] but the content of CapCall's statements is. Outside the context of a secured loan, there is no reason why CapCall should receive and perfect security interests in assorted assets other than the purchased receivables. Yet, as shown above, the typical Merchant Agreement and financing statement awarded CapCall a liberal security interest in the Shoot the Moon entity's assets. The restaurants' inventory, equipment, service marks, and other assets swept into the security agreements have little relation to the accounts that CapCall purportedly purchased.[51] The fact that the documents contemplate a broad security package for CapCall to generally collateralize payment obligations is indicative of a loan, not a sale.

[17] To address CapCall's motive for filing UCC-1 financing statements, Mr. Marmott testified that merchant cash advance parties file UCC-1 financing statements as a matter of industry practice. This is undoubtedly true as far as it goes for the reasons already discussed. But Mr. Marmott's testimony did not rebut – nor did any other evidence – that collateral packages and financing statements of the exceptionally broad scope seen here are well beyond those associated with sales.[52] ***816** This evidence alone weighs powerfully in favor of classifying the transactions as loans. Mr. Marmott no doubt recognized this. At trial, he chose to outright deny CapCall's security interests in anything but the receivables despite being shown the broad scope of the granting clause explicit in the Merchant Agreements.

CapCall's financing statements contain another revealing indicator that they relate to secured loans: they identify each applicable Shoot the Moon entity as a "debtor." This is telling because CapCall could have easily referred to each as a "seller" or words of similar import if CapCall deemed such designation more accurate.[53]

Second, the transaction documents give CapCall rights and recourse against property in addition to the overbroad collateral package. To provide a common example, a March 16, 2015 Merchant Agreement and related documents provide the following:

- A broad personal guaranty by Shoot the Moon's principal that "is an absolute, primary, and continuing guaranty of ***payment and performance***" (emphasis added), "is a guaranty of payment and not merely a guaranty of collection," renders the guarantor "primarily liable, jointly and severally," with the Shoot the Moon entity, and includes various waivers such as of any requirement that CapCall "take any action ... against any security or collateral" before demanding payment from the guarantor.[54]

- An affidavit of confession of judgment whereby both the Shoot the Moon entity and the personal guarantor confess to a generalized judgment in a fixed sum equal to the total amount to be paid to CapCall plus legal fees and "interest at the rate of 16% per annum." The "judgment is for a debt due to [CapCall] arising from Defendants' failure to pay to [CapCall], [the Shoot the Moon entity's] accounts-receivable ... and for Defendants' breach of the secured Merchant Agreement" more generally.[55]

- Various "Protections Against Default" and other extraordinary rights, including provisions creating a broad power of attorney for CapCall, generally accelerating "[t]he full uncollected Purchased Amount," allowing CapCall to "enforce its security interest in the Collateral identified herein" (recall that this "Collateral" is far broader than just the putative purchased receivables), permitting CapCall to generally enforce "its rights and remedies by lawsuit," authorizing CapCall to exercise rights under an assignment of lease ***817** of the Shoot the Moon entity's premises (it is unclear how this would work in practice, but in theory it allows CapCall to take over the Shoot the Moon restaurants), and enabling CapCall to debit any of the Shoot the Moon entity's deposit accounts.[56]

- A continuing requirement that the Shoot the Moon entity provide CapCall with financial statements within five business days of CapCall's request; "failure to do so is a material breach of this Agreement."[57]

Although none of these features is dispositive alone, their collective effect weighs heavily in favor of characterizing the

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transactions as loans. As a whole, they provide CapCall with at least conditional recourse and expanded legal rights against the Shoot the Moon entities and the personal guarantors. Plus, they allocate great risk to the Shoot the Moon counterparty while protecting CapCall with much more than just the receivables. CapCall's panoply of rights, remedies, and potential control is highly unusual in the context of an asset sale. Such an overall arrangement is consistent with a debtor-creditor relationship, not a seller-buyer relationship.

This certainly did not escape Mr. Marmott. In familiar fashion, he tried to extinguish the extensive rights created for CapCall by simply denying that CapCall ever enforced them. These efforts are unavailing. As a foundational matter, Mr. Marmott's generous, and unilateral, waiver of CapCall's remedies is meaningless. Mr. Hatzenbeller testified that he was not made aware of any such waiver. What's more, the Merchant Agreements contain typical integration provisions stating that they embody the entire agreement. [58] So, Mr. Hatezenbeller could not rely on an undisclosed waiver much less one that conflicts with the agreements' terms. More significantly, it is immaterial whether CapCall exercised its rights. Many contracts crafted in myriad contexts – such as credit agreements, bond indentures, M&A agreements, intercreditor agreements, commercial leases, insurance contracts, and bankruptcy plans – have detailed (if not mind-numbing) provisions specifying the contracting parties' rights, remedies, and options in various scenarios. Most will never come to pass; others may, but a party might elect not to enforce or to forgo some or all of its rights (either formally, as in a forbearance agreement, or informally, such as by simple inaction). Refraining from enforcement does not render forgone rights void ab initio or strip them from a contract. In fact, the Merchant Agreements explicitly preserved for CapCall any rights it declined to enforce. [59] CapCall drafted the agreements and, in doing so, extended itself significant protections. CapCall cannot now simply disclaim those features to reframe the transactions as sales.

Third, the parties' course of performance also reflects a debtor-creditor relationship. The evidence at trial demonstrated that:

818** • The business actors often discussed the transactions in vernacular reserved for debtor-creditor relationships, such as "loans" with "terms" and "balances." Contemporaneous emails between Mr. Leak and Mr. Hatzenbeller are replete with references to and discussions of the parties' "loans" and economic arrangements (such as balances and terms) consistent with loans. [60] And recall from an earlier discussion that CapCall's financing statements labelled the Shoot the Moon entities as "debtors***." This jargon reflected the parties' subjective understanding of their transactions. Indeed, Mr. Hatzenbeller specifically testified that he conceptualized the transactions as "notes" akin to the promissory notes he signed when obtaining a traditional bank loan.

- Mr. Hatzenbeller funded many payments to CapCall through the deposit account of an entity having no operations or relationship to CapCall. The account commingled receivables CapCall purportedly bought with other funds, including those used to operate the restaurants. Mr. Leak, acting on CapCall's behalf, knew about the commingling, expressed no objection, and encouraged Mr. Hatzenbeller to structure the flow of funds however he preferred. Mr. Hatzenbeller testified that CapCall wanted only payment and communicated no interest in the source.

- The parties "stacked" or "rolled" funds from one transaction to the next. This practice committed a portion of the proceeds from a later transaction to satisfy the outstanding obligations of earlier transactions, effectively refinancing the earlier transactions. [61] This makes sense only ***819** in the context of a loan. Although theoretically possible, the transaction steps in the sale context would require the Shoot the Moon entities to rebuy future receivables previously sold to CapCall only to turn around and immediately resell the same receivables, and others, back to CapCall. Such circuitous behavior is nonsensical.

This evidence reveals a course of dealing deeply inconsistent with true sales of receivables. CapCall presented no countervailing evidence to the contrary. As such, the court concludes that the parties' actions show that they intended to transact via loans.

Specifically applying the Aicher and Fellerhoff factors to the discussion above, the court notes that three weigh heavily in favor of classifying the transactions as loans. [62] First, as contemplated in the first factor, CapCall retained a definite right of recourse against the Shoot the Moon entities and several other parties. Second, as the second factor contemplates, the Shoot the Moon entities commingled funds from the accounts receivable with other funds and specifically

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those used to operate the restaurants, with CapCall's approval to boot. Finally, as contemplated by the eighth factor, the language contained in the agreements and the conduct of the parties reveal an apparent debtor-creditor, rather than seller-buyer, relationship. Considered in conjunction with the overall economic substance and risk allocation that connects the factors, the court concludes that the transactions are substantially similar to a loan.

[18] **[19]** **[20]** While so concluding, the court acknowledges that the evidence is not entirely one-sided. The Merchant Agreements include lengthy provisions regarding how the central transaction "is not intended to be, nor shall it be construed as a loan" but instead is a purchase of receipts for an amount that "equals the fair market value of such [r]eceipts."[63] But this *ipse dixit* is hardly convincing; "[s]imply calling transactions 'sales' does not make them so" because "[l]abels cannot change the true nature of the underlying transactions."[64] In this case, the countervailing evidence reveals that the term "sale" in the agreements is nothing more than a conclusory and self-serving label. Perhaps a little more favorable to CapCall is case law in which courts found somewhat similar agreements to be sale transactions based on the inclusion of reconciliation provisions and the absence of fixed terms.[65] Here, at least some agreements ***820** include reconciliation provisions and none specify a fixed term. These aspects, however, do not outweigh the overwhelming other loan-like aspects of the transactions or the parties' dealings (including the express negotiation of de facto "terms" for some transactions). Finally, a few of the Aicher and Fellerhoff factors support CapCall's position to some extent. These include the absence of any provisions allowing the Shoot the Moon entities to repurchase the receivables as contemplated in factor five or permitting CapCall to alter the pricing terms as contemplated in factor six. It would be the rare case, though, when every factor points in the same direction. The applicable legal test requires a holistic approach keyed to specific facts and a weighing of factors. Here, the court has taken this approach and, after fully considering all the evidentiary support in CapCall's favor, concludes that it is comparatively insignificant and insufficient to overcome the determination the court reached above.

Montana Usury Claim

Now that the transactions are properly classified, the court can proceed to the Trustee's claim that the economic terms of certain loans expose CapCall to a usury penalty under Montana law. The Trustee limits this claim to the eleven transactions involving a Shoot the Moon LLC formed under Montana law. CapCall, in opposition, addresses little of the substance but strongly disputes that Montana law applies and urges application of New York law. Since New York lacks a usury statute analogous to Montana's, adopting the law of either state has drastic implications on the outcome of the Trustee's claim. As such, the court must resolve the choice-of-law question.

I. Choice of Law Analysis

[21] In federal cases predicated on bankruptcy jurisdiction, courts in the Ninth Circuit apply the "federal" choice-of-law rules based on the Restatement (Second) of Conflict of Laws.[66]

Restatement section 187(2) sets forth a general rule for disputes involving contracts with two exceptions:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the ***821** transaction and there is no other reasonable basis for the parties choice, or
>
> (b) application of the law of the chosen state would be [1] contrary to a fundamental policy of a state which [2] has a materially greater interest than the chosen state in the determination of the particular issue and [3] which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[67]

The Restatement commentary explains that contract law generally operates "to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract," but this predictability value is overcome when a fundamental policy of a state that would otherwise provide the applicable law is in play since judicial "regard must also be had for state interests and for state regulation."[68]

[22] Before applying this framework, the court must consider the scope of its application. Broadly, CapCall urges the court to construe the arrangements as part of a single

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larger agreement rather than several discrete agreements. Based on this construction, CapCall recasts its relationship with the Shoot the Moon entities as one involving a "multistate transaction" since CapCall also transacted with entities formed and operating in Idaho and Washington. CapCall insists that this construction is most faithful to the predictability rules endorsed by the Restatement. [69] CapCall's position is flawed.

[23] CapCall's argument is predicated on an inaccurate characterization of the arrangements – there was not one multistate transaction ***among*** all parties, but a series of eighteen separately documented, standalone transactions ***between*** CapCall and each applicable Shoot the Moon entity. [70] CapCall asserts that the court can disregard the separateness of the eighteen transactions for two reasons. First, CapCall suggests the Shoot the Moon entities should not be treated as distinct legal persons. The record, however, provides no evidence to justify disregarding the foundational boundaries separating entities. Although Mr. Hatzenbeller used a consolidated account to move money throughout the enterprise, he documented the flow of funds as intercompany loans. Further, there is no evidence of hopeless entanglement among the entities or of any creditor confusion. [71] Second, CapCall argues that ***822** the individual transactions should be collapsed into a single integrated deal. Again, the record does not support this theory. Although there is some loose relationship among the transactions (particularly those refinancing others), the documents clearly set forth discrete, self-contained transactions with integration clauses that cut against the consideration of external factors as CapCall proposes. [72] Any evidence suggesting stronger linkage lacks clarity and weight. [73] Unfortunately for CapCall's current litigation position, it chose not to structure these transactions as part of a single, larger agreement. [74] The court declines CapCall's invitation to construe the agreements in such a manner now and applies the Restatement's framework on a contract-by-contract basis.

The eleven agreements at issue all provide that New York law applies. [75] Thus, this provision controls unless a Restatement section 187(2) exception applies. [76] The first, under paragraph (a), does not. CapCall is based and operates in New York, which creates the necessary relationship and some reasonable basis for the choice-of-law clause. If Montana law is to apply, then, all three conjunctive factors found in paragraph (b) must favor application of that state's law. The court concludes that each factor supports application of Montana law based on the following analysis.

[24] **[25]** ***Factor one***: Applying New York law is inimical to the fundamental policy animating Montana's usury law. A "fundamental" policy is one reflected by a substantive rule, rather than a mere legal formality, such as "in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior ***823** bargaining power." [77] This is the very policy and purpose of Montana's usury statute. As the Montana Supreme Court highlighted, "[u]sury statutes protect borrowers who lack real bargaining power against overreaching by creditors" and advance an important "public policy in favor of protecting the debtor." [78] And, as mentioned, New York lacks an analogous statute. Thus, applying that state's law would circumvent Montana's protections entirely. As such, the first factor is satisfied. [79]

Factor two: Montana has a materially greater interest in the determination of this particular issue than does New York. The borrowers in these transactions were legal entities formed under and governed by Montana law, owned by individual Montana citizens, and operated by an individual Montana citizen working from a Montana office. The only relevant link to New York is CapCall's place of business. This superficial connection generates little to no stake for New York in the outcome here. By contrast, among Montana's significant interests in regulating lending transactions involving its citizens is the harm to borrowers and collateral damage to other Montanans and the local economy when problematic transactions break bad. The underlying bankruptcy case here illustrates these interests well. As the evidence shows, the extremely high cost of the CapCall loans contributed to the Shoot the Moon entities' downward spiral. In turn, the failure of the businesses resulted in, among other things, financial losses for numerous Montana citizens. [80] As between the two states, Montana has a substantially greater interest in preventing lenders from circumventing its usury laws in transactions involving Montana borrowers. [81] Because of this materially greater interest, the second factor is satisfied.

Factor three: Under Restatement section 188, Montana law would control in the absence of an effective choice of law. Section 188(1) generally provides that "[t]he rights and duties of the parties with respect ***824** to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship

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to the transaction and the parties under the" overarching choice-of-law principles in Restatement section 6.[82] When applying those overarching principles, Restatement section 188(2) illustrates relevant contacts for consideration: "(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."[83] The "contacts are to be evaluated according to their relative importance with respect to the particular issue."[84] The commentary further instructs that "the interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties."[85] Finally, the section 188(2) "factors are not to be applied mechanistically but qualitatively (based on the nature of the contract) in deciding which state has the most significant relationship to the parties and the contract."[86]

A holistic and qualitative evaluation of the relevant contacts in this proceeding demonstrates that Montana has the most significant relationship to the transactions and parties. Specifically:

- Though negotiations occurred via telephone and internet, the signatures necessary to make the documents binding always physically occurred in Montana.[87] No corresponding act occurred in New York.

- Montana was also the hub of performance. CapCall processed the agreed upon funding to fulfill its role while the Shoot the Moon entities fulfilled their primary role by repaying the "Specified Daily Amount." As Mr. Leak encouraged as CapCall's representative, both sides channeled the monetary performance through a Montana entity (Shoot the Moon Grizzly) using its account at a Montana bank (Prairie Mountain Bank).[88] Other than repayment, the agreements required the Shoot the Moon entities to comply with various negative covenants and other restrictions. These restrictions constrained how Mr. Hatzenbeller could operate the restaurants located in Montana from his Great Falls office.

- The subject matter of the agreements is also largely concentrated in Montana. The cash advances were intended to fund Montana entities, operating restaurants in Montana, managed solely by a Montana resident, from an office located in Montana, and utilizing accounts at a Montana bank. The ineluctable connection ***825** to Montana is evident on the face of each Merchant Agreement CapCall prepared as well as the UCC-1 financing statements CapCall filed with the Montana Secretary of State.[89]

- Finally, aside from CapCall, all players domiciled, resided, incorporated, and operated in Montana. CapCall is a Delaware LLC with a principal place of business in New York. The relevant Shoot the Moon entities all organized and conducted business in Montana – the same locale where Mr. Hatzenbeller resided and operated the businesses. Likewise, the personal guarantors and signatories of confessions of judgment all resided in Montana.

Montana's contacts permeate every aspect of the relevant agreements while any contacts attributable elsewhere, including New York, are de minimis. As such, the court concludes that Montana has, by a wide margin, the most significant relationship to the transactions and parties as contemplated by Restatement section 188(1). This conclusion satisfies the third factor of section 187(2)(b). Since all three criteria are satisfied, Montana law applies to the Trustee's claim concerning the eleven agreements with Montana entities.[90]

II. Application of Montana Law

[26] Montana enacted statutes limiting the interest lenders (other than "regulated lenders") may charge.[91] Accordingly, contracting "[p]arties may agree in writing to the payment of any rate of interest that does not exceed the greater of 15% or an amount that is 6 percentage points per year above the prime rate published by the federal reserve system in its statistical release H.15 Selected Interest Rates for bank prime loans dated 3 business days prior to the execution of the agreement."[92] Here, there appears to be no dispute that the greater of the two amounts is 15%.

[27] When a lender has taken, received, reserved, or charged interest greater than legally permitted, the statutory penalty is "forfeiture of a sum double the amount of interest" charged and an express remedy for the borrower or its successor to recover "a sum double the amount of interest paid."[93] The lender "need not know that the particular interest rate is usurious and illegal" but merely needs to consummate a transaction charging an interest rate that is usurious in ***826**

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fact.[94] "[B]efore any suit may be brought to recover the usurious interest, the party bringing suit" must make "written demand for return of the interest paid."[95]

The Trustee made the required written demand in relation to the eleven loans here.[96] The Trustee's expert witness, Ms. Manos, performed a detailed analysis of the relevant transactions to calculate (i) the effective rate of interest CapCall charged and (ii) the applicable usury penalty under Montana law.[97] CapCall did not challenge the details of the calculations or introduce evidence or analysis supporting alternative amounts. Based on the lack of objection, Ms. Manos' credibility, and an independent review of her analysis, the court finds that the calculations appropriately quantify the interest rates applicable to the specified transactions and the resulting penalty.[98] Additionally, based on the parties' relative sophistication and the overall context of the transactions, specifically CapCall's vast experience transacting with merchants and its exclusive control over the legal documentation, the court concludes that there is no equitable consideration weighing against enforcing the full penalty.[99] To the contrary, straightforward application of Montana law advances the statutory purpose of "protect[ing] borrowers who lack real bargaining power against overreaching by creditors."[100] Thus, the court imposes the statutory penalty in its entirety.

III. Judgment

Based on the above analysis, the Trustee is entitled to judgment on his usury claim against CapCall in the amount of $1,216,685.

Preference Claim

[28] According to the Trustee's second claim, CapCall received funds within the 90 days immediately preceding the petition date on account of its loans to the Shoot the Moon entities. The Trustee asserts these transfers are avoidable and recoverable pursuant to Bankruptcy Code sections 547 and 550. Preference actions under the Bankruptcy Code are intended to deter the proverbial "race to courthouse" or other collection activity against an insolvent debtor and to further the prime bankruptcy policy of equality of distribution among ***827** similarly situated creditors.[101] Indeed, the authority "to avoid preferential transfers and to recover the transferred property ... has been a core aspect of the administration of bankrupt estates since at least the 18th century."[102]

I. Statutory Preference Elements

[29] **[30]** To prevail on his preference claim, the Trustee has the burden of proving, by a preponderance of the evidence,[103] the following seven elements:[104]

(1) a transfer

(2) of the debtor's property

(3) to or for the benefit of a creditor

(4) for or on account of an antecedent debt

(5) made while the debtor was insolvent

(6) within 90 days of the filing of the petition in bankruptcy

(7) that enables the creditor to receive more than he would under a Chapter 7 liquidation.[105]

Based on the totality of the record established at trial, the court determines that the Trustee has sustained this burden and, therefore, is entitled to avoid and recover the challenged transfers from CapCall, subject to one caveat discussed below. Following the elements above in turn, the record demonstrates that:

First, transfers in the aggregate of $1,129,071.00 were made to or for the benefit of CapCall.[106] CapCall has offered no evidence or allegation otherwise.

[31] **[32]** **[33]** ***Second***, the $1,129,071 transferred was the debtor's property. While CapCall does not dispute that the funds belonged to the various Shoot the Moon entities upon transfer, it does dispute that these funds belonged to the debtor. The argument is that the several entities merged on the eve of bankruptcy to form a single entity that became the debtor, hence the funds could not have belonged to the "debtor" because it did not exist at the relevant date. Bankruptcy Judge Terry L. Myers rejected an identical argument made in one of the several related adversary proceedings.[107] The court agrees with and adopts Judge Myers' analysis regarding the issue.[108] The rationale is consistent ***828** with precedent giving a broad construction to the scope of property in the bankruptcy context.[109] Moreover, " 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred

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before the commencement of bankruptcy proceedings." [110] In short, if the funds were not transferred to CapCall, they would have remained property of the Shoot the Moon entities before the merger, then property of the merged entity, and finally property of the estate. These transfers ultimately diminished the Shoot the Moon bankruptcy estate, which means they were transfers of the debtor's property for purposes of Bankruptcy Code section 547. [111]

Third, the $1,129,071 in transfers were to or for the benefit of CapCall in its capacity as a "creditor." [112]

Fourth, the transferred funds were used to satisfy the prepetition loan obligations already discussed. Thus, the transfers were for or on account of an antecedent debt. [113]

[34] ***Fifth***, the transfers were made while the Shoot the Moon entities were insolvent. As an initial matter, the Trustee enjoys a presumption of insolvency [114] and CapCall introduced no evidence or argument to rebut the presumption. Aside from this, the Trustee presented evidence of insolvency. Ms. Manos testified that the entities were insolvent, both individually ***829** and collectively, and she offered documents showing the work she used to arrive at this conclusion. [115] Mr. Hatzenbeller also testified that the Shoot the Moon enterprise had effectively become trapped in a death spiral by no later than the summer of 2015.

Sixth, all the challenged transfers were made within 90 days of the petition date. The bankruptcy case was filed on October 21, 2015, and Ms. Manos' calculations are specifically limited to payments within the previous 90 days. [116]

[35] ***Seventh***, the transfers enabled CapCall to receive more than it would have in a chapter 7 liquidation. This final inquiry is "sometimes referred to as the 'greater amount' test [and] requires the court to construct a hypothetical chapter 7 case and determine what the creditor would have received if the case had proceeded under chapter 7." [117] In this case, the scenario is something less than hypothetical because the Trustee actually liquidated most of the bankruptcy estate property in the same manner a hypothetical chapter 7 trustee would proceed. Nevertheless, the court will embark on the complete exercise.

In a hypothetical chapter 7 case, the funds transferred to CapCall would have instead become property of the chapter 7 estate subject to the security interests of CapCall that are junior to other security interests in the same assets. A chapter 7 trustee might seek to use this cash collateral to operate the restaurants for a limited period to preserve assets. [118] The chapter 7 trustee then would try to do what the Trustee actually did here – reduce the business assets to cash via a section 363 sale. [119] The hypothetical sale could not have obtained a greater net purchase price than the Trustee's actual sale and likely would have obtained less. The chapter 7 trustee thus would be left with, at best, the same sale proceeds and the cash that counterfactually was not transferred to CapCall. As with the present case, this amount would be insufficient to satisfy secured claims senior to CapCall. [120] CapCall therefore would have only a general unsecured claim, [121] which would generate a limited, if any, distribution from the chapter 7 estate. As Ms. Manos testified at trial, then, the prepetition transfers to CapCall enabled CapCall to recover significantly more than CapCall would have received in a hypothetical chapter 7 liquidation and the "greater amount" test is satisfied. [122]

In its post-trial submission, CapCall offers the following arguments regarding the "greater amount" test:

> CapCall's claims in a hypothetical Chapter 7 would have resulted in an enforceable lien both at the time of filing said petition for Chapter 7 protection as well as during the pendency of the case administration. ***830** Specifically, CapCall would have had a lien on the debtor's accounts at the time of filing. The extent to which there were other creditors that similarly had liens does not affect the extent to which the lien would be legally enforceable. Further, the primary asset secured by CapCall's lien would be not just the accounts of the debtor but the *future* receivables as well and their proceeds as liquidated. [123]

These points ignore fundamentals of the Bankruptcy Code. The "extent to which there were other creditors that similarly

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had liens" on the same collateral certainly ***does*** "affect the extent to which the lien would be legally enforceable" under Bankruptcy Code section 506. This section limits a secured claim "to the extent of the value of such creditor's interest in the estate's interest in such property" and bifurcates the remainder as "an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim." [124] Thus, if liens senior to CapCall's exceed the value of the collateral, then CapCall is left with an unsecured claim (because the value of its junior, out-of-the-money interest is $0) and no enforceable lien. [125] Further, CapCall's security interest regarding future receivables not existing on the petition date terminates under Bankruptcy Code section 552 insofar as those future receivables are "property acquired by the estate or by the debtor after the commencement of the case" but not "proceeds, products, offspring, or profits" of property in which CapCall had a security interest and which was extant on the petition date. [126] And, even absent section 552, CapCall's lien would still be junior to senior, but undersecured, lienholders and CapCall would be back where it started: with an unsecured claim and an unenforceable lien. Despite CapCall's efforts, it cannot spoil the Bankruptcy Code fruits growing from the seed of senior-yet-undersecured liens on the collateral granted to secure the Shoot the Moon entities' obligations to CapCall. [127]

II. Recovery Limitations

[36] Although the Trustee prevails on the preference claim under Bankruptcy Code section 547(b), he is "entitled to only a single satisfaction" in an avoidance action. [128] Consistent with this mandate, the court should eliminate any overlap between recovery on the claim here and recovery on the usury claim above. [129] Some ***831** preferential transfers include interest CapCall must return because of the judgment on the usury claim. The Trustee could obtain more than a single recovery if CapCall is required to return the same money to satisfy each judgment separately. Therefore, the Trustee is entitled to a judgment in the full amount of the preferential transfers subject to a reduction on a dollar-for-dollar basis equal to any imputed interest included within the preferential payments, but only to the extent CapCall actually satisfies in full its liability to the Trustee under the Montana usury statute.

III. Judgment

Subject to the judgment-reduction provision above, the Trustee is entitled to avoidance and recovery of preferential transfers totaling $1,129,071.

Other Issues

The parties raise a handful of other claims and issues requiring attention.

I. CapCall's Claims

[37] **[38]** **[39]** After the petition date, credit card payments continued to be processed from business operations. CapCall asserts ownership of the funds based on its purported purchase of the receivables. The Trustee received and utilized a portion of those funds, and the balance is held in the segregated account mentioned previously. CapCall seeks (i) a monetary judgment against the Trustee for conversion of the portion of the funds the Trustee received and (ii) a declaratory judgment that the remaining balance held in the segregated account belongs to CapCall. The court effectively disposed of these claims upon determining that CapCall did not purchase the receivables but extended loans collateralized by the assets – loans that are ultimately unsecured for the reasons described above. [130] Because CapCall lacks an ownership or enforceable security interest in the receivables, these claims are nonstarters and the Trustee is entitled to the ***832** remaining segregated account. [131]

II. CapCall's General Unsecured Claim: Allowance & Subordination

[40] Because CapCall is obligated to the bankruptcy estate on the preference claim, CapCall is not entitled to payment on its proof of claim until it has satisfied the judgment set forth herein. [132] Thus, CapCall's claim is presently disallowed. CapCall may file an amended proof of claim, within 30 days after satisfying the judgment related to the preference claim, detailing any additional amounts that CapCall asserts under Bankruptcy Code section 502(h). The Trustee must object within 60 days or CapCall's amended proof of claim will constitute CapCall's allowed general unsecured claim for all purposes in the bankruptcy case. [133]

III. Attorneys' Fees and Costs

[41] **[42]** **[43]** The Trustee asserts a right to an award of attorneys' fees against CapCall pursuant to Montana's reciprocal fee statute, which makes unilateral fee provisions

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bilateral regarding "any action on the contract" and entitles the prevailing party in such an action "to recover reasonable attorney fees from the losing party." [134] The eleven agreements subject to ***833** Montana law each create an express right for CapCall to recover court costs and attorneys' fees associated with CapCall's enforcement of its broadly-defined rights and remedies. [135] Thus, the court must assess whether these proceedings involve an action "on the contract." [136]

i. This Litigation Arises From the Merchant Agreements

[44] **[45]** In answering such questions, Montana courts apply the concept broadly and award reciprocal fees in varied contexts even when a contract is successfully attacked. [137] This broad approach is consistent with decisions of the Ninth Circuit Court of Appeals applying similar reciprocal fee statutes of other states and concluding that actions are "on a contract" when the litigation generally "involves" that contract or a party's efforts "to enforce, or avoid enforcement of, the provisions of the contract." [138] That the litigation arises in a bankruptcy context, involves some bankruptcy issues, or perhaps is even largely premised on a dispute about the Bankruptcy Code's operation does not affect whether an action is on the contract. [139] Rather, the focus should be on the role and import of the contract in the litigation as well as whether the losing party "*could* have sought fees under the contract" had it prevailed. [140]

[46] The court concludes that the following aspects of this adversary proceeding constitute an "action on the contract" for purposes of Montana's fee-shifting statute:

- **True sales vs. disguised loans, conversion, and segregated funds**. The parties' dispute regarding these matters stems entirely from CapCall's efforts to enforce provisions of the Merchant Agreements based on its interpretation of those agreements. As the court's extensive earlier discussion demonstrates, resolution of the dispute requires significant review and interpretation of numerous aspects of the agreements and related documents.

- **Choice-of-law and usury disputes**. The genesis of both issues is again the Merchant Agreements. To reach the usury claim, the court needed to resolve two threshold questions: first, whether the transactions amounted to loans or sales and, second, whether New York or Montana law applies. Again, these issues cannot ***834** be resolved without closely considering the substance of the Merchant Agreements. Once resolved, the next step required the court to examine the payment obligations under the agreements to determine the imputed interest rates for the transactions, as Ms. Manos did during her expert testimony.

- **Preference claim**. As Bankruptcy Judge Charles Novack explained in the context of California's similar reciprocal fee statute, "[a] preference action is premised on an 'antecedent debt' (i.e. a contractual obligation) and payments being made on that debt (which payments the Trustee sought to avoid)." [141] As in Judge Novack's case, resolution of the preference claim here required consideration of the Merchant Agreements and related documents and, of course, determination whether CapCall was a creditor or a purchaser.

The broad fee provisions in sections 3.2 and 3.3 of the agreements would entitle CapCall to attorneys' fees upon prevailing in the adversary proceeding. CapCall has in fact sought such fees. Therefore, CapCall recognizes that this litigation arises from the Merchant Agreements and triggers their fee provisions.

ii. Fee Award

[47] **[48]** **[49]** An award of attorneys' fees under Montana Code section 28-3-704 must be "reasonable." The determination of a reasonable fee amount is committed to the trial court's discretion. [142] The Trustee argues that the court should key an award to the contingency-fee arrangement with his counsel and "award attorney's fees in the amount of 40% of the gross sum of any judgment entered in this matter." [143] When fixing the amount of a reasonable fee, the trial court may consider but "is not bound [by] a contingent fee agreement." [144] Rather, the overarching inquiry must incorporate the typical factors Montana courts use to determine a reasonable award. [145]

[50] Here, many factors support a substantial award for the Trustee. This litigation has been pending for four years and involved significant legal work, including discovery, several rounds of motion practice, a formal mediation and other settlement ***835** efforts, a multiday trial, and post-

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trial briefing and argument. The amount of money at stake is substantial and the issues are largely binary, which creates a material risk of no recovery for the Trustee's counsel. As this opinion evinces, the issues involved in this case are complicated and highly factual.[146] Moreover, the litigation has been hard-fought by competent lawyers zealously advocating for CapCall (including, at one point, lawyers with a national practice based in New York, as well as several experienced and reputable Montana lawyers). To the best of the court's knowledge, the Trustee counsel have a fine reputation for character and standing in the profession and the court has been impressed with the quality of their legal work, particularly the efficient and professional presentation of evidence and witness examination at trial. Finally, the results secured by counsel's service are significant – this adversary proceeding yields a multi-million-dollar judgment and potential recovery for the benefit of the bankruptcy estate – and there may be additional work the Trustee's counsel must do in connection with any appeals or to enforce the judgment.

All that said, the court deems it excessive to require CapCall to pay an additional 40% of the entire gross judgment. Some amounts reflect a penalty component (such as the usury claim). Awarding a full contingency fee based on these penalties is simply inflating the judgment.[147] Additionally, the nominal amount of the judgment to be entered regarding the preference claim will be reduced by a yet-to-be-determined amount if and when CapCall pays the full amount of the Montana usury penalty. And some of the preferential transfers related to Merchant Agreements that did not involve Montana parties. Thus, a downward adjustment is warranted.

After considering the totality of the circumstances and the specific factors courts utilize under Montana law, the court concludes that a reasonable fee under Montana Code section 28-3-704 is: **[a]** 30% of the balance of the segregated funds ($68,512.48), **[b]** 20% of the amount of the Montana usury penalty ($243,337), and **[c]** 10% of the amount of the avoided preferential transfers ($112,907.10), which results in a total fee award of $424,756.58.[148]

iii. Costs

[51] The Trustee also seeks recovery of $2,159.75 in costs. The plain text of Montana Code section 28-3-704 does not mention costs and imposes a reciprocal obligation only regarding attorneys' fees.[149] The Trustee identifies no other basis for an award of costs and the court therefore denies the request.

SUMMATION

The Trustee is entitled to a judgment against CapCall consistent with this opinion. The Trustee should submit a proposed ***836** form of final judgment and indicate whether CapCall agrees to or contests the proposed form.

All Citations

635 B.R. 797, 70 Bankr.Ct.Dec. 187

Footnotes

1 This opinion sets forth the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52(a). If any findings of fact are more properly construed as conclusions of law, or vice versa, they are adopted and should be construed as such.

2 *See* Final Pretrial Order ¶¶ IV.1, 3-5, ECF No. 260.

3 *See, e.g.*, Trial Exs. 30-77.

4 *See, e.g.*, Trial Exs. 147 (Prairie Mountain Bank filings with the Idaho and Montana Secretaries of State), 148 (American Express Bank filings with the Montana Secretary of State), 149 (US Foods filing with the Montana Secretary of State).

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5 *See* Final Pretrial Order ¶ IV.6, ECF No. 260; Trial Exs. 19 (the date of the agreement listed as item no. 6 was orally corrected at trial as 4/6/15), 101-118, 204-211.

6 *See, e.g.*, Trial Ex. 144.

7 Trial Ex. 138. *See also, e.g.*, Trial Exs. 130, 133; Leak Dep. 38:14-41:9, ECF No. 268-1; Leak 30(b)(6) Dep. 38:2-39:19, ECF No. 268-2.

8 In his emails, Mr. Leak's signature block represented that he was a "Sr. Underwriting Manager" of CapCall, however, he worked as an independent contractor for CapCall rather than as an employee. *See, e.g.*, Trial Ex. 127. In letters printed on CapCall letterhead, Mr. Leak also called himself a "Managing Director" of CapCall. *See* Trial Exs. 140-141. Aspects of the email arrangements Mr. Leak used seem highly unusual. For example, on March 10, 2015, Mr. Hatzenbeller wrote Mr. Leak at his usual email address, but appears to have received a response from a "Josh Altman" from a different email address, followed five minutes later by a textually-identical response from Mr. Leak. *See* Trial Ex. 127. No explanation was provided at trial regarding who Mr. Altman is or why he was responding to emails sent to Mr. Leak.

9 *See, e.g.*, Trial Exs. 133, 136.

10 *See* Trial Exs. 127-129, 136, 139.

11 *See* Final Pretrial Order ¶ IV.8, ECF No. 260; Trial Exs. 180-192.

12 *See* Final Pretrial Order ¶ IV.9, ECF No. 260.

13 *See, e.g.*, Trial Ex. 155.

14 *See* Trial Ex. 152 (column for claims that were "Secured Converted to Unsecured after Sale Closure").

15 *See* Final Pretrial Order ¶ IV.10, ECF No. 260.

16 *See id.* ¶¶ IV.11-12; Trial Exs. 161-162.

17 *See* Final Pretrial Order ¶ IV.13, ECF No. 260; Trial Ex. 142.

18 *See* ECF Nos. 268, 271, 272.

19 *See* Trial Ex. 157.

20 *See* Trial Ex. 144; see also Trial Exs. 158-160 (compilations of the underlying bank statements).

21 *See* Trial Ex. 145.

22 *See also* Trial Ex. 129 (reflecting the arrangement of such a transaction).

23 *See also* Hatzenbeller Dep. 19:18-22:20, 34:14-23, ECF No. 271-1.

24 *See* 28 U.S.C. § 1409(a).

25 *See, e.g.*, Preliminary Pretrial Order ¶ 2, ECF No. 26; Stipulated Sch. Order ¶ 4, ECF No. 53, Final Pretrial Order ¶ II, ECF No. 260 (bilateral order recites that the adversary proceeding is core).

26 *See* 28 U.S.C. § 157(b)(1), (c)(2); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 674-81, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015).

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27 *See* Suppl. Post Trial Br. 8-12, ECF No. 275.

28 *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-97, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

29 *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, —— U.S. ——, 137 S. Ct. 973, 983, 197 L.Ed.2d 398 (2017).

30 CapCall's arguments regarding the Trustee's standing to pursue claims for declaratory relief are analytically odd. The usual problem courts address regarding attacks on claims asserted under the Declaratory Relief Act occurs when those claims are pursued as standalone claims (often seeking what amounts to an advisory opinion) without an independent basis for federal jurisdiction. *See, e.g.*, *Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014). Here, however, there is no dispute that the court has federal bankruptcy jurisdiction pursuant to 28 U.S.C. §§ 1334(b) & 157(a). *See, e.g.*, Final Pretrial Order ¶ II, ECF No. 260. Indeed, it was CapCall that commenced this adversary proceeding and first invoked this court's federal bankruptcy jurisdiction. *See* Compl., ECF No. 1 ¶ 1.

31 *See, e.g.*, *Seitz v. 6130 W., LLC (In re Joey's Steakhouse, LLC)*, 474 B.R. 167, 183-84 (Bankr. E.D. Pa. 2012) (concluding that request for declaratory relief was moot when the parties were "engaged in full-blown litigation" requiring adjudication of substantive issues that "will perforce determine the rights of each party").

32 To conclude otherwise would render strange results. Since state law largely dictates property rights in bankruptcy, a party's inability to press a dispute about an interest in property would render meaningless many statutory rights and powers conferred by the Bankruptcy Code. The rules of procedure recognize these rights and powers and specifically require "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" to commence by adversary complaint. Fed. R. Bankr. P. 7001(2).

33 *See, e.g.*, *Midland Funding, LLC v. Johnson*, —— U.S. ——, 137 S. Ct. 1407, 1411-12, 197 L.Ed.2d 790 (2017); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 450-51, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007); *Butner v. United States*, 440 U.S. 48, 55-57, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141, 1146-49 (9th Cir. 2013). This modern approach is in tension with older Supreme Court precedent, which reflects a tradition of allowing bankruptcy courts to determine transactional substance as a matter of generalized bankruptcy law. *See, e.g.*, *Pepper v. Litton*, 308 U.S. 295, 304-06, 60 S.Ct. 238, 84 L.Ed. 281 (1939) (Douglas, J.); *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610, 619-22, 21 L.Ed. 731 (1873). When the applicable state law adopts a searching, fact-specific, and holistic inquiry into the substance of the transaction, however, this often will be a distinction that makes little or no difference to the ultimate outcome. *See, e.g.*, *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 613-15 (7th Cir. 2005).

34 *See, e.g.*, *In re R&J Pizza Corp.*, 2014 Bankr. LEXIS 5461, at *5-6 (Bankr. E.D.N.Y. Oct. 14, 2014); *Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hosp. of Hyde Park, Inc.)*, 507 B.R. 558, 708 (Bankr. N.D. Ill. 2013); *In re Criimi Mae, Inc.*, 251 B.R. 796, 801 (Bankr. D. Md. 2000).

35 *Villarreal v. Arnold*, 2016 WL 7374272, at *2, 2016 U.S. Dist. LEXIS 176103, at *5 (N.D. Ill. Dec. 20, 2016). *See also, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (explaining that a choice-of-law inquiry is not necessary when both options "dictate the same outcome"); *In re Aircrash Disaster Near Roselawn*, 948 F. Supp. 747, 750 (N.D. Ill. 1996) ("A court need not conduct a choice of law determination unless there is an actual conflict in the substantive law such that the case could have a different outcome depending on which law is applied.").

36 The most straightforward sale transaction occurs when party A sells receivables to party B. A "securitization" is a more complex form of sale transaction whereby the seller transfers the receivables to a special purpose entity, which entity then issues to third parties debt securities collateralized by the receivables in exchange

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for capital that completes the purchase transaction. *See generally* Kenneth N. Klee & Brendt C. Butler, *Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues*, ALI-ABA Course of Study Materials SJ082 (June 2004). Securitizations are commonly used in the context of mortgage loans, student loans, and assorted other debt obligations.

37 U.C.C. § 9-109 Official Comment 4.

38 *See id*. § 9-109(a)(3). There are some specific exceptions to this general rule. *See id*. § 9-109(d)(4)-(7). There are also some Article 9 provisions providing rules specifically for sold rights to payment. See, e.g., id. §§ 9-309(3)-(4); 9-318.

39 *Id*. § 9-109 Official Comment 4. See also id. § 9-318 Official Comment 2 (similarly noting that "[n]either this article nor the definition of 'security interest' in section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation").

40 *See* Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor*, 65 AM. BANKR. L.J. 181, 186-94 (1991). The Aicher and Fellerhoff article cites and collects various cases to support its inventory of the relevant factors. Other courts have since relied on this articulation of the relevant legal principles. *See, e.g.*, *Dryden Advisory Grp., LLC v. Beneficial Mut. Sav. Bank (In re Dryden Advisory Grp., LLC)*, 534 B.R. 612, 620 (Bankr. M.D. Pa. 2015); *In re R&J Pizza Corp.*, 2014 Bankr. LEXIS 5461, at *7-8 (Bankr. E.D.N.Y. Oct. 14, 2014); *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 371 B.R. 680, 686-87 (Bankr. S.D.N.Y. 2007).

41 Official Comm. of Unsecured Creditors v. LG Funding, LLC (In re Cornerstone Tower Servs.), 2018 WL 6199131, at *5-6, 2018 Bankr. LEXIS 3562, at *13 (Bankr. D. Neb. Nov. 9, 2018).

42 *In re Dryden Advisory Grp.*, 534 B.R. at 620.

43 *See, e.g.*, *S & H Packing & Sales Co. v. Tanimura Distrib.*, 883 F.3d 797, 802 (9th Cir. 2018) (en banc) (holding, in the PACA trust context, that a "court should look to the substance of the transaction to determine whether the transaction is a true sale or a secured loan" and "[i]n doing so, the transfer of risk should be a primary factor to which a court looks"); *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 1995) (explaining that "[t]he root of all of these factors is the transfer of risk"); *Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 545-46 (3d Cir. 1979) (discussing various aspects of how a transaction allocated risk and concluding "that on this record none of the risks present in a true sale is present here"); *In re Dryden Advisory Grp.*, 534 B.R. at 620 ("To classify a transaction accurately, several attributes must be examined, primarily the allocation of risk."); *In re Cornerstone Tower Servs.*, 2018 WL 6199131, at *5-6, 2018 Bankr. LEXIS 3562, at *13 (emphasizing how, across the holistic analysis, "the allocation of risk is primary to the determination").

44 *See, e.g.*, *In re Dryden Advisory Grp.*, 534 B.R. at 620-26; *In re Cornerstone Tower Servs.*, 2018 WL 6199131, at *5-8, 2018 Bankr. LEXIS 3562, at *12-22.

45 *See, e.g.*, *Hall v. Eagle Ins.*, 151 A.D. 815, 822-26, 136 N.Y.S. 774 (N.Y. App. Div. 1912), aff'd, 211 N.Y. 507, 105 N.E. 1085 (1914).

46 *Quackenbos v. Sayer*, 62 N.Y. 344, 346 (1875). *See also, e.g.*, *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 467 (9th Cir. 2020) (noting how the court is "bound by New York law to analyze the transaction and determine its 'real character' ").

47 *Stanhope v. Shambow*, 54 Mont. 360, 363, 170 P. 752 (1918). *See also, e.g.*, Mont. Code Ann. § 1-3-219 ("The law respects form less than substance."); *In re Charles M. Bair Family Trust*, 343 Mont. 138, 148, 183

P.3d 61 (2008) (discussing how Montana courts "emphasize substance over form" when interpreting legal instruments).

48 Trial Ex. 102 at p. 2.

49 *See* Trial Exs. 204, 206, 208-211. One financing statement has a longer and more precise description of the collateral, but it too extends far beyond receivables by including, among other things, "general intangibles," "goods," "inventory equipment and fixtures," and "all computer programs." *See* Trial Ex. 205.

50 Recall that Article 9 of the UCC applies to sales of accounts. So, it is not surprising that CapCall filed financing statements to perfect its interest in the putative purchased accounts – a buyer of accounts who fails to perfect its interest in that property by filing a financing statement runs the risk of becoming subordinate to a subsequent buyer or other secured party who is perfected. *See* U.C.C. § 9-318 Official Comment 3 (example describing contest between Buyer-1 and Buyer-2).

51 To crystalize the point by analogy, someone agreeing to buy a house six months in the future may record an interest against the house in order to protect against intervening buyers or judgment creditors (or a bankruptcy trustee) but would not record any interest against the seller's car or personal property.

52 Even assuming CapCall introduced evidence of an on-point "industry practice" or "commercial expectation," it is questionable its relevance to resolving the dispute before the court. The court's task is to apply the law to the facts before it; policy arguments related to industry practices, asserted market expectations, or the like are properly left to the legislative branch. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012); *W. Pac. Airlines v. GATX Capital (In re W. Pac. Airlines)*, 221 B.R. 1, 6 (D. Colo. 1998); *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.)*, 422 B.R. 407, 422 n.9 (Bankr. S.D.N.Y. 2010). That said, if what occurred in this case actually is the industry's practice in the context of transactions intended to be true sales of receivables, it is misguided and warrants reconsideration, including in light of the Uniform Commercial Code sections and commentary cited above.

53 *See* U.C.C. § 9-505(a).

54 Trial Ex. 105 at p. 2. Once again, the plain terms of the documents are inconsistent with Mr. Marmott's trial testimony. Mr. Marmott testified that all the guaranties were ***only*** of performance, not payment. The emphasized language quoted above says precisely the opposite. Indeed, more than half of the Merchant Agreements include language expressly creating an "absolute ... guaranty of payment" (i.e., trial exhibits 101-108, 110, 113). The other Merchant Agreements are somewhat more limited in the scope of the guaranty, but that is a distinction without a difference insofar as the personal guaranty of "performance" of an "obligation" to pay money to CapCall is functionally a payment guaranty, as the affidavits of confession of judgment imposing accelerated liquidated sums due by the guarantors demonstrate.

55 Trial Ex. 105 at pp. bates stamped Cap Call - 000052 through 000054.

56 *See* Trial Ex. 105 at pp. 3-5 §§ 1.10, 1.11, 3.1, 3.2. The agreements are not uniform in terms of the ramifications of a Shoot the Moon bankruptcy filing. Some simply provide that a bankruptcy filing will trigger the "protections" related to the confessions of judgment and personal guaranties. Others treat a bankruptcy filing as a broader event of default that could perhaps support broader remedies (or "claims" in the bankruptcy case). These Merchant Agreements are not models of precision or legal drafting.

57 *See id*. at p. 4 § 2.1.

58 *See id*. at p. 5 § 4.8.

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59 *See id*. at p. 5 § 4.4.

60 *See* Trial Exs. 127 (email subject "Loan"), 128 (Hatzenbeller requesting list of "the notes I have with you and the amount left on them"), 129 (Hatzenbeller asking, "Which loan are we going to pay off?"; Leak responding with "the balance on that one"), 136 (email subject "Loans" and Hatzenbeller requesting summary of "all the loans I have with you and the amounts owing on each"; later messages about refinancing the "balance" owed on one of the "loans"), 139 (Hatzenbeller requesting a "statement for the out standing [sic] loans with you"; Hatzenbeller and Leak then negotiating for a "six month term").

61 In its post-trial submission CapCall asserts that there is insufficient evidence these "rolling" transactions actually occurred. *See* Suppl. Post Trial Br. 2-3, ECF No. 275. The court disagrees. First, as CapCall acknowledges, Mr. Hatzenbeller specifically testified that transactions with CapCall were rolled; this testimony was not rebutted by any other witness or challenged through cross-examination. Second, Mr. Hatzenbeller's testimony is corroborated by contemporaneous emails in which he and Mr. Leak are negotiating a "rolling" or "stacking" transaction. *See* Trial Ex. 129. Third, the absence of lump-sum payments in the Trustee's accounting of prepetition transfers does not prove that no "rolling" transactions happened – there is no reason why CapCall would need to advance 100% of the new money to the Shoot the Moon entity only to have the Shoot the Moon entity immediately pay some portion back to CapCall in satisfaction of the preexisting Merchant Agreement. Rather, as is typical in many debt refinancing transactions, CapCall could simply adjust the balances on its own books and transfer only the net amount of any new advance. In fact, this appears to be exactly what happened with the transaction Mr. Hatzenbeller and Mr. Leak were arranging. *See* Trial Exs. 109 at p.1 (new cash advance of nominal $175,000), 159 at p. bates stamped STM 004323 (July 2 credit to account of $136,541), 129 (Leak citing balance of preexisting agreement to be satisfied as $40,158 a couple days earlier, which would leave a net advance of approximately what was actually credited once the intervening days of ACH debits are subtracted from Leak's stated balance). In sum, the weight of the evidence supports a factual finding that the transactions to which Mr. Hatzenbeller testified occurred.

62 Some of the factors do not tilt in either direction or are irrelevant. For example, since CapCall purportedly bought "future" receivables (i.e., payments made by customers who ate at the restaurants after the transactions closed), there were no account debtors who could be investigated by CapCall.

63 Trial Ex. 105 at p. 3 § 1.9.

64 *Fireman's Fund Ins. v. Grover (In re Woodson Co.)*, 813 F.2d 266, 272 (9th Cir. 1987).

65 *See, e.g.*, *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807, 817-18 (N.Y. Sup. Ct. 2017). The court finds unpersuasive CapCall's arguments and authorities regarding how transactions should be classified as sales when the buyer cannot "be assured of repayment, because its agreements are contingent on a merchant's success." *Id*. at 818. Many lenders are not "assured of repayment" if the borrower's business does not succeed. In countless chapter 11 and chapter 7 cases, unsecured and undersecured creditors have received cents on the dollar when a business they financed failed to blossom. In the context of a restaurant business such as Shoot the Moon, most of the value of the enterprise and the debtor's ability to generate liquidity for debt service depends on successful future operations. When operations are impacted – because the restaurant is no longer serving food that people want to eat, is unable to open due to governmental restrictions such as those occasioned by the COVID-19 situation, is impacted by broader economic or cultural shifts, or is affected by any of the many other events that can cause a deterioration in performance – many or all of the restaurant's creditors will likely suffer losses, particularly since food inventory and fixtures rarely have substantial residual liquidation value. The analysis should not focus on whether the counterparty is "assured of repayment" or depends "on a merchant's success," but instead on whether the counterparty's right to recovery is limited to a specific res of purchased assets. When the counterparty has a ***legal right*** to be paid in full by the business, the existence of that legal right would be indicative of a debtor-creditor

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relationship even if ***practical realization of that legal right*** is "contingent on a merchant's success" and hence not assured.

66 *See, e.g.*, *First Cmty. Bank v. Gaughan (In re Miller)*, 853 F.3d 508, 515-16 (9th Cir. 2017). This approach is not used everywhere. *See* *PNC Bank v. Sterba (In re Sterba)*, 852 F.3d 1175, 1177 & 1177 n.1 (9th Cir. 2017) (noting that "[w]hen it comes to conflicts of law, bankruptcy is a bit of an odd duck" and highlighting a circuit split regarding which choice-of-law rules should apply).

67 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Am. Law Inst. 1971) ("RESTATEMENT") § 187(2).

68 *Id*. § 187 cmts. e, g.

69 *See, e.g., id*. § 187 cmt. e. ("Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby."); § 188 cmt. b. (highlighting "the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international").

70 Case law demonstrates that the choice-of-law analysis should be performed on a contract-by-contract basis when a dispute involves multiple contracts that are related but nevertheless separate. *See, e.g.*, *Barnes Grp., Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1026-32 (4th Cir. 1983); *Discover Prop. & Cas. Ins. v. TETCO, Inc.*, 2014 WL 685367, at *4, 2014 U.S. Dist. LEXIS 20306, at *15-17 (D. Conn. Feb. 19, 2014); *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 862 (D. Md. 2013).

71 Cf. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 765-67 (9th Cir. 2000) (outlining factors that could support substantive consolidation of separate legal persons in bankruptcy).

72 *See, e.g.*, Trial Ex. 105 at p. 5 § 4.8.

73 For example, CapCall points to two letters Mr. Leak signed that reference a series of four transactions recurring every two weeks. *See* Trial Exs. 140-141. The purpose of these letters is unclear as they do not request any action by the putative recipients or explain the details of any intended "information purpose." In any event, it is unclear whether these letters were actually sent to anyone, the letters are extrinsic to written agreements containing integration clauses, and the letters are facially inaccurate when describing the transactions as being "between your account holder, Ken Hatzenbeller, and CapCall." Indeed, one of the letters appears nonsensical as it is addressed to "Stockman Bank Account Manager." *See* Trial Ex. 141. Mr. Hatzenbeller's unrebutted testimony is that the Shoot the Moon entities never had accounts at Stockman Bank. It is difficult to draw much of consequence from these two documents and they are certainly not a sufficient basis on which to justify collapsing eighteen separately documented transactions.

74 There are many examples of transaction structures in which a single, backbone agreement is used to accommodate numerous individual transactions. Some exemplars include: revolving lines of credit, debt issuances in which a base indenture is coupled with supplemental indentures for specific issuances, commercial leasing in multiple locations subject to a master lease and individual location leases, derivative transactions using an ISDA master agreement and individual trade confirmations, law firm engagements utilizing a master retention agreement and separate addenda for each individual matter, and film distribution agreements whereby a uniform distribution agreement is supplemented with the details for individual films.

75 *See, e.g.*, Trial Ex. 105 at p. 5 § 4.5.

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76 Although the court ultimately does not reach or decide this issue, the record contains evidence that could support a general invalidation of the New York choice-of-law provisions given the minimal bargaining leverage of Mr. Hatzenbeller and the "take-it-or-leave-it" basis on which the deals were offered to him. *See* RESTATEMENT § 187 cmt. b, illus. 3.

77 *Id*. § 187 cmt. g.

78 *Scarr v. Boyer*, 250 Mont. 248, 252, 818 P.2d 381 (1991).

79 *See, e.g.*, *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009) (determining "that Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy that we must apply Pennsylvania law"); *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp., Inc.*, 374 F. Supp. 3d 361, 372 (E.D. Pa. 2019) (concluding that Texas usury law constituted a fundamental public policy of that state when applying Restatement section 187(2)(b)).

80 *See, e.g.*, Trial Ex. 152 (listing creditors that will receive significantly less than recovery in full, including various Montana business and governmental entities). *Cf. Colorado v. W. Sky Fin., L.L.C.*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011) (observing, in litigation about allegedly improper lending practices, how "[t]he impact of the allegedly excessive charges was felt in Colorado").

81 This point is highlighted later in the Restatement. *See* RESTATEMENT § 188 cmt. c. ("So the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power."); *see also, e.g.*, *DJR Assocs., LLC v. Hammonds*, 241 F. Supp. 3d 1208, 1232 n.11 (N.D. Ala. 2017) ("[A]n operating principle the court must respect is that each state is entitled to determine its own policies, and no state may insist that its laws be applied within other states to the exclusion of the power of such other states to decide for themselves what is good policy for regulating economic relationships within their own borders."); *Ribbens Int'l, S.A. de C.V. v. Transp. Int'l Pool, Inc.*, 47 F. Supp. 2d 1117, 1123 (C.D. Cal. 1999) (noting, during choice-of-law analysis, that "California, on the other hand, maintains a weighty and substantial interest in regulating commercial transactions that take place within its border").

82 RESTATEMENT § 188(1).

83 *Id*. § 188(2).

84 *Id*.

85 *Id*. cmt. c.

86 *Bixler v. Next Fin. Grp., Inc.*, 858 F. Supp. 2d 1136, 1143 (D. Mont. 2012).

87 RESTATEMENT § 188 cmt. e. (explaining that "the place of contracting is the place where occurred the last act necessary ... to give the contract binding effect" and that the place of negotiation "is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone").

88 *See, e.g.*, Trial Ex. 130.

89 *See* Trial Exs. 102 at p. 1, 103 at p. 1, 104 at p. 1, 106 at p. 1, 109 at p. 1, 110 at p. 1, 111 at p. 1, 113 at p. 1, 115 at p. 1 (note that this agreement erroneously identifies the particular Shoot the Moon entity as being

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organized in Idaho despite CapCall contracting with that entity and correctly identifying it as a Montana entity twice before, see Trial Exs. 103, 104), 116 at p. 1, 118 at p. 1, 204, 205, 209, 210, 211.

90 *Cf*. *Casarotto v. Lombardi*, 268 Mont. 369, 373-75, 886 P.2d 931 (1994) (applying Restatement sections 187(2)(b) and 188 and concluding that Montana law applied to franchise dispute when franchisee restaurant would be operated in Great Falls by Great Falls residents and the primary connection to a different state was that the franchisor "was incorporated in that state and apparently had its home office in that state at the time of the parties' agreement"), *rev'd on other grounds sub nom. Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

91 *See* Mont. Code Ann. § 31-1-111 (defining "regulated lender"). CapCall does not contend it qualifies as a "regulated lender" and the record contains no evidence supporting such qualification.

92 *Id.* § 31-1-107(1).

93 *See id.* § 31-1-108(1), (2).

94 *Scarr*, 250 Mont. at 253, 818 P.2d 381. *See also Bowden v. Gabel*, 105 Mont. 477, 477, 76 P.2d 334 (1937).

95 Mont. Code Ann. § 31-1-108(2).

96 *See* Trial Ex. 146.

97 *See* Trial Ex. 145. Although CapCall did not make any argument regarding the special usury rule in Restatement section 203, the court notes that the effective interest rates Ms. Manos calculated (between 82.7% at the low end and 175.13% at the high end) are many multiples of the permissible 15% and therefore are "greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188." RESTATEMENT § 203.

98 Ms. Manos' approach to calculating the applicable interest rates squares with the broad statutory definition of interest as any "compensation allowed by law or fixed by the parties for the use or forbearance or detention of money and includes loan origination fees, points, and prepaid finance charges, as defined in 12 CFR 226.2." Mont. Code Ann. § 31-1-104. *See also, e.g.*, *Brummer v. TMG Life Ins. Co. (In re Brummer)*, 147 B.R. 552, 558-59 (Bankr. D. Mont. 1992) (discussing how amounts are treated as interest under this statute "[r]egardless of the label used" if "the substance of the transaction" is to compensate the lender for an advance of money).

99 *Cf. In re Dale*, 2021 Bankr. LEXIS 348, at *8-10 (Bankr. D. Mont. Feb. 12, 2021) (reducing usury penalty based on equitable considerations including the document drafting history and the parties' relative business experience).

100 *Scarr*, 250 Mont. at 252, 818 P.2d 381.

101 *See, e.g.*, *Union Bank v. Wolas*, 502 U.S. 151, 160-61, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991).

102 *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006).

103 *See, e.g.*, 11 U.S.C. § 547(g); *Batlan v. TransAm. Com. Fin. Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 967 (9th Cir. 2001).

104 The Small Business Reorganization Act of 2019 amended section 547(b) to require "reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative

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defenses under subsection (c)" as part of a trustee's prima facie case. The legislation was not effective until after the relevant time period here and was not retroactive regarding pending preference claims.

105 *United States v. Daniel (In re R & T Roofing Structures & Com. Framing)*, 887 F.2d 981, 984 (9th Cir. 1989).

106 *See* Trial Ex. 144. Ms. Manos testified that she prepared this document after evaluating the underlying bank statements. See Trial Exs. 158-160.

107 *See Foster v. IOU Cent., Inc. (In re Shoot the Moon, LLC)*, 2020 WL 2621173, at *5, *8-9, 2020 Bankr. LEXIS 1374, at *13-16, *26-29 (Bankr. D. Mont. May 21, 2020).

108 The court has a different perspective regarding another aspect of Judge Myers' opinion, which deals with an argument that CapCall generally deploys based on anti-assignment provisions in the Merchant Agreements. *See, e.g.*, Trial Ex. 105 at p. 5 § 4.2 (precluding the Shoot the Moon entity "from transferring or assigning this Agreement, or any of its rights or obligations hereunder, without [CapCall]'s written consent"). Judge Myers concluded that "rights are generally assignable unless the contract provides otherwise or an exception applies" and "the right to avoid a preferential transfer or challenge allegedly usurious interest rates does not fall into the enumerated exceptions." *See* 2020 WL 2621173, at *5, 2020 Bankr. LEXIS 1374, at *12. The right to avoid a preference, however, was never one the debtor enjoyed – preference actions are creatures of the Bankruptcy Code that exist only postpetition for the benefit of the estate, not the debtor, and hence are unaffected by prepetition acts of the debtor. *See, e.g.*, *Cont'l Ins. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1026 (9th Cir. 2012) (explaining how "purported prepetition waivers of the protections of the Bankruptcy Code" are generally unenforceable); *Bakst v. Bank Leumi, USA (In re D.I.T., Inc.)*, 575 B.R. 534, 536 (Bankr. S.D. Fla. 2017) (describing how various nonbankruptcy defenses, such as *in pari delicto*, "may not be raised in response to an action brought by the estate representative under the provisions of the Bankruptcy Code itself, including fraudulent transfer and preference actions"). Additionally, neither a preference claim nor a Montana usury claim is a right arising under or pursuant to the Merchant Agreements. Rather, both rights are the product of statutory regimes that exist apart from the agreements. Because the Trustee is not seeking to assert any of the Shoot the Moon entities' "rights or obligations hereunder," the anti-assignment provisions in the Merchant Agreements are irrelevant to the preference and usury claims.

109 *See, e.g.*, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983).

110 *Begier v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990). *See also, e.g.*, *United States v. Sims (In re Feiler)*, 218 F.3d 948, 953 (9th Cir. 2000) (explaining that avoidance actions allow "a trustee to avoid transfers of property that should have been the property of the estate, but for an improper transfer"); *Mardick v. Stover*, 392 F.2d 561, 565 (9th Cir. 1968) (discussing how "the concept of voidable preference" is intended to capture "property of any bankrupt which would, but for transfer, have constituted part of his estate").

111 *See, e.g.*, *Adams v. Anderson (In re Superior Stamp & Coin Co.)*, 223 F.3d 1004, 1007 (9th Cir. 2000).

112 *See* 11 U.S.C. § 101(5)(A), (10)(A) (defining the terms "claim" and "creditor").

113 *See id*. § 101(12) (defining the term "debt").

114 *See id*. § 547(f).

115 *See* Trial Ex. 157.

116 *See* Trial Ex. 144.

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117 *Alvarado v. Walsh (In re LCO Enters.)*, 12 F.3d 938, 941 (9th Cir. 1993).

118 *See* 11 U.S.C. § 721.

119 *See id*. § 704(a)(1).

120 *See* Trial Ex. 152 (column for claims that were "Secured Converted to Unsecured after Sale Closure," which include deficiency claim amounts significantly in excess of the aggregate amount of the CapCall transfers).

121 *See* 11 U.S.C. § 506(a).

122 *See, e.g.*, *Am. Honda Fin. Corp. v. A. Angelle, Inc. (In re A. Angelle, Inc.)*, 230 B.R. 287, 300 (Bankr. W.D. La. 1998) (concluding that greater amount test was satisfied when the transferee "did not enjoy a senior secured position with respect to [the collateral], nor to the proceeds resulting from the sale thereof, and, accordingly, was not fully secured with respect to that transfer").

123 Suppl. Post Trial Br. 8, ECF No. 275.

124 11 U.S.C. § 506(a).

125 *See id*. § 506(d).

126 *See id*. § 552(a)-(b)(1); see also, e.g., *Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Designated Activity Co. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 948 F.3d 457, 466-72 (1st Cir.), *cert. denied*, —— U.S. ——, 141 S. Ct. 844, 208 L.Ed.2d 422 (2020); *Sims v. Jamison*, 67 F.2d 409, 411 (9th Cir. 1933).

127 It bears noting that CapCall could have avoided the position in which it now finds itself. Mr. Marmott testified that he is familiar with the operation of UCC-1 financing statements and that it is standard practice in the industry for merchant cash advance parties to file such financing statements. If it is not industry practice to perform a precautionary search for other financing statements before making a cash advance, it certainly should be. Had CapCall performed such a search, CapCall likely would have realized that there were preexisting lenders with first-in-time financing statements encumbering all assets of the relevant Shoot the Moon entities, including their accounts receivable, which may have deterred CapCall from engaging in the transactions.

128 11 U.S.C. § 550(d).

129 *See, e.g.*, *Samson v. W. Cap. Partners, LLC (In re Blixseth)*, 489 B.R. 154, 202 (Bankr. D. Mont. 2013) (describing similar issue when there was an overlap between amounts recoverable based on fraudulent transfer theory and amounts recoverable under the Montana usury statute), aff'd, 514 B.R. 871 (D. Mont. 2014), aff'd in part, rev'd in part, 679 F. App'x 611 (9th Cir. 2017) (the basis for reversal related to a totally separate issue).

130 In its post-trial submission, CapCall contends that "there are no claims either pleaded or proofs offered toward claims of lien stripping under 11 U.S.C. § 506(d)." Suppl. Post Trial Br. 7, ECF No. 275. Regarding the former point, CapCall is correct that the Trustee did not plead a formal count under Bankruptcy Code section 506(d). It is unclear that such formal pleading is necessary, however; section 506(d) by its terms is self-operative when it declares that a lien falling within its scope "is void" as opposed to being potentially "voidable" through litigation. *Compare* 11 U.S.C. § 506(d), *with, e.g., id*. §§ 544(a)-(b)(1), 545, 547(b), 548(a)-(c), 549(a); *see also, e.g., id*. § 551 (clearly differentiating between a transfer that "is avoided" under various sections and "any lien void under section 506(d)"); *Bank of N.Y. Mellon v. Enchantment at Sunset Bay Condo. Ass'n*, 2 F.4th 1229, 1235-37 (9th Cir. 2021) (VanDyke, J., concurring) (tracing historical distinction between the separate concepts of "void" and "voidable" in the context of the automatic stay; noting that "[i]f a transaction is void,

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it is null—it is as if it never existed"). In any event, the Trustee's position throughout this litigation has been that CapCall's potential collateral is unencumbered property of the estate, which necessarily challenges any lien that CapCall asserts. *See, e.g.*, Def.'s Countercl. 11 ¶ 45, ECF No. 17; Final Pretrial Order 8-9, 24, ECF No. 260. Regarding the latter point, CapCall is incorrect that there were no "proofs offered" in support of lien-stripping – the Trustee introduced clear evidence, which CapCall failed to rebut, demonstrating the existence of senior liens on all of CapCall's collateral and that those senior liens are undersecured, which is all the proof necessary to leave CapCall with no allowable secured claim under Bankruptcy Code section 506(a) and hence only void liens under section 506(d).

131 Adding to these considerations, CapCall is also bound by the terms of the confirmed plan providing that "[a]ny creditor with a lien that no longer has any value will become a general unsecured creditor." *See* I*n re Shoot the Moon, LLC*, No. 2:15-bk-60979-WLH (Bankr. D. Mont.), Plan of Liquidation § 3.9, ECF No. 1056; *see also id*. § 1.0 (advising parties to carefully review the disclosure statement and evaluate "the impact of the plan upon your claims or security interests" (all-caps font removed)). CapCall received notice of the plan and had participated in the Shoot the Moon bankruptcy (including through the stipulation regarding the segregated funds and by filing a proof of claim) and thus CapCall is bound by the plan as well as by Bankruptcy Code section 1141(c)'s generalized free-and-clear provision. *See* 11 U.S.C. § 1141(c) (providing that, subject to certain inapplicable exceptions, "except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor"). The segregated account is "dealt with" in section 2.15 of the confirmed plan, which transfers "all remaining assets of the Estate" to the STM Liquidating Trust. *See also* Trial Ex. 155 § 2.2. Given the terms of the confirmed plan and CapCall's participation in the bankruptcy case, this is not a context where the "ride through" doctrine has any application. *See, e.g.*, *Acceptance Loan Co. v. S. White Transp., Inc. (In re S. White Transp., Inc.)*, 725 F.3d 494, 496 (5th Cir. 2013); *In re Penrod*, 50 F.3d 459, 461-64 (7th Cir. 1995). The unpublished case CapCall cites regarding the "ride through" doctrine is distinguishable because that litigation arose from a chapter 7 case in which there was no plan and no role for section 1141(c). *See Nagata v. HFS Fed. Credit Union (In re Nagata)*, 2006 WL 2131318, at *2, 2006 Bankr. LEXIS 1634, at *2, *6-7 (Bankr. D. Haw. July 20, 2006).

132 *See* 11 U.S.C. § 502(d).

133 The Trustee argued in post-trial briefing that the court should equitably subordinate all of CapCall's claims pursuant to Bankruptcy Code section 510(c). *See* Trustee's Post-Trial Br. 13-16, ECF No. 274. The court need not reach the details of this theory because counsel withdrew the new claim during closing argument and acknowledged that the issue was not raised before trial. *See, e.g.*, *Greenstar, LLC v. Heller*, 934 F. Supp. 2d 672, 696 (D. Del. 2013).

134 Mont. Code Ann. § 28-3-704(1). As with the Montana usury statute, the policy purposes served by Montana's reciprocal fee statute are expansive and grounded in protecting parties with inferior bargaining power from contractual overreaching, which means the fee statute likewise represents a fundamental policy of the state for purposes of any choice-of-law analysis. *See, e.g.*, *Medcorp Int'l, L.L.C. v. Leslie*, 1998 WL 657770, at *3, 1998 U.S. App. LEXIS 21714, at *14 (9th Cir. Sept. 3, 1998).

135 *See* Trial Exs. 102 at p. 5 §§ 3.2-3.3, 103 at p. 5 §§ 3.2-3.3, 104 at p. 5 §§ 3.2-3.3, 106 at p. 5 §§ 3.2-3.3, 109 at p. 5 §§ 3.2-3.3, 110 at p. 5 §§ 3.2-3.3, 111 at p. 5 §§ 3.2-3.3, 113 at p. 5 §§ 3.2-3.3, 115 at p. 5 §§ 3.2-3.3, 116 at p. 5 §§ 3.2-3.3, 118 at p. 2 §§ 3.2-3.3.

136 This reciprocal right is one arising under Montana statute, not under the Merchant Agreements themselves. As such, the anti-assignment provisions in the Merchant Agreements are not violated by their own terms

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and do not bear on the Trustee's ability to assert a claim to reciprocal attorneys' fees as successor to the applicable Shoot the Moon entities. See note 108, supra.

137 *See, e.g.*, *Gandy v. Eschler*, 261 Mont. 355, 360-61, 862 P.2d 1116 (1993); *Carey v. Wallner*, 223 Mont. 260, 267, 725 P.2d 557 (1986); *Preston v. McDonnell*, 203 Mont. 64, 68, 659 P.2d 276 (1983); *Bartmess v. Bourassa*, 196 Mont. 231, 234, 639 P.2d 1147 (1982); *see also generally* *Dickman v. Ford New Holland*, 1993 WL 430044, at *2, 1993 U.S. App. LEXIS 28731, at *6-7 (9th Cir. Oct. 25, 1993) (describing how "the Montana Supreme Court has construed" fee-shifting provisions such as section 28-3-704 "very liberally").

138 *Penrod v. AmeriCredit Fin. Servs. (In re Penrod)*, 802 F.3d 1084, 1088 (9th Cir. 2015). See also, e.g., *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 442-43 (9th Cir. 1997).

139 *See* *In re Penrod*, 802 F.3d at 1088-89.

140 *See* *id*. at 1090.

141 *In re Mac-Go Corp.*, 541 B.R. 706, 715 (Bankr. N.D. Cal. 2015).

142 *See, e.g.*, *Transaction Network v. Wellington Techs.*, 301 Mont. 212, 221, 7 P.3d 409 (2000); *Majers v. Shining Mountains*, 230 Mont. 373, 380, 750 P.2d 449 (1988).

143 Trustee's Post-Trial Br. 13, ECF No. 274. Pursuant to Federal Rule of Evidence 201(c)(1) & (d), the court takes judicial notice of the fee agreement containing the 40% contingency amount, which was filed and approved in the underlying bankruptcy case. *See In re Shoot the Moon, LLC*, No. 2:15-bk-60979-WLH (Bankr. D. Mont.), ECF Nos. 1052, 1072.

144 *Weinberg v. Farmers State Bank*, 231 Mont. 10, 34, 752 P.2d 719 (1988), superseded by statute on other grounds, Mont. Code Ann. § 27-1-220(1), as recognized in *Folsom v. Mont. Pub. Emps. Ass'n*, 388 Mont. 307, 400 P.3d 706 (2017). *See also, e.g.*, *West v. Club at Spanish Peaks L.L.C.*, 343 Mont. 434, 460-62, 186 P.3d 1228 (2008) (affirming use of 40% contingency fee arrangement to calculate reasonable fee for the prevailing party).

145 *See* *Weinberg*, 231 Mont. at 35, 752 P.2d 719 (quoting factors as "the amount and character of the services rendered; the labor, time, and trouble involved, the character and importance of litigation in which the services were rendered, the amount of money or the value of property to be affected, the professional skill and experience called for, the character and standing in the profession of the attorneys; ... the result secured by the services of the attorneys may be considered as an important element in determining their value").

146 The complexity associated with this litigation is amplified somewhat by the assignment of three different bankruptcy judges to the Shoot the Moon bankruptcy case. Whenever a new judge, such as the undersigned, takes over, there is additional work counsel must do to familiarize that judge with past events bearing on the litigation. The Trustee's counsel has done a fine job here.

147 For example, a 40% fee regarding the usury penalty would by itself equal 80% of the interest CapCall was paid in the first instance.

148 To be clear, this is the amount that the Trustee is entitled to include in a judgment against CapCall pursuant to Montana Code section 28-3-704. The amount that the Trustee's counsel is entitled to receive for payment of their services is a separate matter governed by the terms of the operative agreement with the Trustee.

149 *See* *Masters Grp. Int'l, Inc. v. Comerica Bank*, 404 Mont. 434, 471 (2021).

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2026 WL 800949
Only the Westlaw citation
is currently available.
United States Bankruptcy Court,
N.D. Texas, Dallas Division.

In re: DENALI CONSTRUCTION SERVICES, LLC. Debtor.
DENALI CONSTRUCTION SERVICES, LLC., Plaintiff,
v.
CLOUDFUND, LLC; TRUE BUSINESS FUNDING LLC; INSTAFUNDING D/B/A TVT SVPL; INFUSION CAPITAL GROUP, LLC; SKYLINE BUSINESS CAPITAL, LLC; TOP TIER CAPITAL, LLC; PARKSIDE FUNDING GROUP, LLC; and ELITE FUNDING, LLC, Defendants.
INFUSION CAPITAL GROUP, LLC, Third-Party Plaintiff,
v.
MICHELLE LYNN THRAILKILL AND VICKEY LYNN WIENER, Third-Party Defendants.

CASE NO. 24-33155-MVL11
|
ADVERSARY NO. 24-3083-MVL
|
Filed 03/20/2026

(CHAPTER 11)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

***1** This Court issues the following findings of fact and conclusion of law after the trial that took place on January 28, 2026 (the "**Trial**"), which followed upon that certain summary judgment order dated December 18, 2025, the *Order Granting in part and Denying in part Infusion Capital Group's Motion for Partial Summary Judgment* [ECF No. 193],[1] and two resulting Judgments, the *Summary Judgment as to InstaFunding d/b/a/TVT SPVL*, dated December 19, 2025 [ECF No. 195], and the *Summary Judgment as to Infusion Capital Group, LLC* dated December 22, 2025 [ECF No. 196], the terms of which are incorporated into these Findings of Fact and Conclusions of Law as if set forth at length. The Trial was conducted on the *Second Amended Complaint* (the "**Complaint**") [ECF No. 118], filed by Denali Construction Services, LLC ("**Denali**" or the "**Debtor**" or the "**Plaintiff**") on July 31, 2025, against True Business Funding LLC ("**TBF**") and Infusion Capital Group, LLC ("**Infusion**"), InstaFunding D/B/A TVT SPVL ("**InstaFunding**"), Infusion, Top Tier Capital, LLC, Parkside Funding Group, and Cloudfund, LLC (collectively, the "**Defendants**"), as well as the *First Amended Answer to Plaintiff's Second Amended Complaint, Affirmative Defenses, and Third-Party Complaint* [ECF No. 139], filed by Infusion on August 28, 2025. The Court notes that all of the Defendants, other than InstaFunding and Infusion, settled with Denali prior to the Trial. The Court conducted a one-day trial. The Court heard the testimony of two witnesses. Neither InstaFunding nor Infusion appeared at the Trial. At the conclusion of the trial, the Court took the matter under advisement and allowed the Plaintiff to submit post-hearing briefing as to attorney's fees. On February 3, 2025,

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the Plaintiff filed a post-hearing supplemental brief. ECF No. 210.

The following constitutes the Court's findings of fact and conclusion of law as to the Damages Trial.[2]

FINDINGS OF FACT

A. THE PARTIES

1. Denali Construction Services, LP was originally formed on December 31, 2012.

2. Plaintiff Denali is a limited liability company that was converted from Denali Construction Services, LP on January 17, 2023.

3. Michelle Lynn Thrailkill was formally appointed as Denali's President in 2014 and has managed Denali since that time.

4. In 2020, Ms. Thrailkill obtained 70% of Denali's equity from Vickey Lynn Weiner.

5. Ms. Thrailkill and Ms. Wiener are the Third-Party Defendants and guarantors (the "**Third-Party Defendants**" or the "**Guarantors**") in this matter.

6. Defendant Infusion is a limited liability company that has been organized under the laws of New York, Connecticut and Florida from time to time.

7. Infusion offers financing to corporate entities.

8. InstaFunding is a limited liability company organized under the laws of Florida and New York, which offers financing to corporate entities.

B. DENALI'S FINANCIAL DISTRESS

***2** 9. In 2019, Denali discovered that its Chief Financial Officer, Robert Rice, had used his position to embezzle approximately $2 million.

10. Mr. Rice had embezzled these funds not from Denali's income, but by underfunding Denali's contributions to unions and taxing authorities.

11. In addition to the $2 million loss Denali suffered from Mr. Rice's theft, Denali had to pay the arrears it owed to unions and taxing authorities.

12. Mr. Rice's embezzlement caused severe financial distress to Denali.

13. That financial distress was exacerbated by the onset of the COVID-19 pandemic in the spring of 2020.

14. In response to Denali's financial distress, from 2019 through 2022, Ms. Thrailkill attempted to find financing for Denali.

15. Ms. Thrailkill met with numerous banks and financial institutions, but Denali was unable to secure traditional financing.

16. By late 2022, Denali had reached a crisis point and was unable to continue operating without outside financing due to delayed payment of money owed to it and other business factors associated with the commercial construction business.

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17. Unable to obtain financing from traditional sources, Denali began to obtain **merchant cash advances** (each an, "**MCA**") starting in October 2022 to assist it with bridging its cashflow needs.

18. Over approximately two years, Denali entered at least 10 separate MCAs with 8 different providers between October 2022 and September 2024.

19. At the time Denali entered into these agreements, Ms. Thrailkill did not fully understand what an MCA was and thought Denali was obtaining financing that would allow it to continue to operate until cashflow improved.

20. Ms. Thrailkill believed that all the MCAs Denali entered into were loans and that she could repay them with the money she expected to receive from business operations and an ERC credit that Denali was entitled to receive from the Internal Revenue Service.

21. The cashflow of the business did not improve, and Denali did not receive the ERC credit from the IRS.

22. As a result, Denali was forced to obtain additional MCAs to repay the prior MCAs and to pay for business operations because the cashflow to service the debt owed to the MCA lenders was leaving insufficient **cash** to operate the business.

C. THE FIRST INFUSION AGREEMENT

23. On June 11, 2024, Plaintiff entered into a **Merchant** Agreement with Infusion (the "**First Infusion Agreement**"). A true and correct copy of the First Infusion Agreement was introduced into evidence as Exhibit 13.

24. In the First Infusion Agreement, Infusion purported to purchase 45% of Denali's future receipts up to $749,500.00 (as defined in the First Infusion Agreement, the "**Purchased Amount**") for $500,000.00 (as defined in the First Infusion Agreement, the "**Purchase Price**").

25. As part of the First Infusion Agreement transaction, Infusion provided net proceeds to Denali in the amount of $440,000.00. Specifically, Infusion paid itself $60,000.00 from the $500,000.00 Purchase Price as origination and underwriting fees for the First Infusio Agreement.

26. Under the First Infusion Agreement, Denali was required to allow Infusion to deduct $12,499.00 per business day by ACH withdrawal from Denali's bank account until the sum of $749,500.00 was paid to Infusion.

***3** 27. Infusion withdrew from Denali's bank account, under the terms of the First Infusion Agreement, $299,976.00 between June 12, 2024, and July 12, 2024, at the rate of $12,499.00 per business day.

D. THE SECOND INFUSION AGREEMENT

28. On July 12, 2024, approximately one month after the First Infusion Agreement, Plaintiff entered into a second **Merchant** Agreement (the "**Second Infusion Agreement**") with Infusion. A true and correct copy of the Second Infusion Agreement was introduced into evidence as Exhibit 14.

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29. In the Second Infusion Agreement, Infusion purported to purchase 45% of Plaintiff's future receipts up to $1,499,000.00 (as defined in the Second Infusion Agreement, the "**Purchased Amount**") for $1,000,000.00 (as defined in the Second Infusion Agreement, the "**Purchase Price**").

30. From the $1,000,000 Purchase Price proceeds under the Second Infusion Agreement, Infusion paid itself $500,000.00 to fully satisfy the liability that Infusion calculated was owed to it under the First Infusion Agreement as of July 12, 2024.

31. As part of the Second Infusion Agreement transaction, Infusion retained $150,000.00 as an origination and underwriting fees for the Second Infusion Agreement.

32. Infusion deposited $350,000.00 into Plaintiff's bank account under the Second Infusion Agreement, representing the net funding actually provided to Denali.

33. Under the Second Infusion Agreement, Denali was required to allow Infusion to deduct a daily remittance of $18,738.00 per business day by ACH withdrawal from Denali's bank account until the sum of $1,499,000.00 was paid to Infusion.

34. Infusion withdrew $487,188.00 from Denali's bank account, under the terms of the Second Infusion Agreement. The last withdrawal by Infusion under the Second Infusion Agreement occurred on August 21, 2024, as Denali had insufficient funds in the account to pay the required remittance thereafter.

35. Infusion applied a default fee of $206,309.00 to Denali's account balance.

36. The First Infusion Agreement and the Second Infusion Agreement are collectively referred to hereinafter as the "**Infusion Agreements**".

E. MATERIAL TERMS OF THE INFUSION AGREEMENTS

37. The Infusion Agreements contain materially similar terms.

38. The Infusion Agreements contain language stating that "**Merchant**[3] hereby sells, assigns and transfers to [Infusion] (making [Infusion] the absolute owner)" a purchased percentage of all future receipts.

39. The Infusion Agreements state: "**Merchant** is selling a portion of a future revenue stream to [Infusion] at a discount, not borrowing money from [Infusion], therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [Infusion]."

40. The Infusion Agreements provide that the remittance is "a good faith estimate of Purchased Percentage multiplied by revenues of **Merchant**."

41. The Infusion Agreements state that "**Merchant** going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting its receivables,

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in and of itself, does not constitute a breach of this Agreement."

***4** 42. The Infusion Agreements acknowledge that "[Infusion] is entering this Agreement knowing the risks that **Merchant's** business may slow down or fail, and [Infusion] assumes these risks."

43. The Infusion Agreements state that "**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."

44. The Infusion Agreements authorize Defendant "to ACH debit the initial Remittance from the Account on the agreed upon Payment Frequency; a daily basis means any day that is not a United States banking holiday."

45. The Infusion Agreements provide that "[Infusion] will debit the Remittance each business day from only one depositing bank account ... until such time as [Infusion] receives payment in full of the Purchased Amount."

46. The Infusion Agreements state that "**Merchant** understands that it is responsible for ensuring that the initial Remittance to be debited by [Infusion] remains in the Account and will be held responsible for any fees incurred by [Infusion] resulting from a rejected ACH attempt or an Event of Default."

47. The Infusion Agreements contain a provision stating: "Notwithstanding anything to the contrary in this Agreement or any other agreement between [Infusion] and **Merchant**, upon the occurrence of an Event of Default of the **MERCHANT** AGREEMENT TERMS AND CONDITIONS the Purchased Percentage shall equal 100%."

48. The events of default under the Infusion Agreements relate to Denali's "violation of any term or covenant in this Agreement" or Infusion's ability to collect the Infusion Specified Percentage.

49. Upon an event of default under the Infusion Agreements, if Denali attempted to interfere with Infusion's ability to collect the Infusion Specified Percentage, the entire unremitted Purchase Amount would become due, and Infusion could exercise its default remedies against Denali.

50. The Infusion Agreements contained a reconciliation provision that stated, "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."

51. Under the reconciliation provision, if Denali's receipts for a prior month were less than anticipated, Denali could get credited back into its bank account the amount the Infusion Withdrawals exceeded the amount Infusion was entitled to under the Infusion Agreements (i.e., the Infusion Specified Percentage).

52. The Infusion Agreements also contained an "Adjustment to the Remittance" provision allowing Denali, if it experienced a prolonged downturn, to submit its last two weeks of bank account records, and Infusion could adjust the Infusion Withdrawal to an estimate of

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the Infusion Specified Percentage based on those two weeks instead of Infusion's original underwriting for a period of two weeks.

53. As part of the Infusion Agreements, Denali granted Infusion a security interest in substantially all of its accounts chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the "**UCC**"), all proceeds, as that term is defined in Article 9 of the UCC, funds at any time in the **Merchant's** and/or Guarantor(s) Account, regardless of the source of such funds, present and future Electronic Check Transactions, and any amount which may be due to Infusion under the Agreements, including but not limited to all rights to receive any payments or credits under the Agreements. In addition, under the Infusion Agreements, if at any time there are insufficient funds in its Account to cover a daily remittance, the Infusion Security Agreement automatically expanded to include a security interest in all of Denali's assets of any kind.

***5** 54. Infusion **advanced** funds to Plaintiff with the expectation and contractual right to receive back a specific, predetermined amount that was substantially greater than the amount it **advanced**.

55. Infusion did not assume genuine risk that the amount it would receive would vary based on Plaintiff's actual business revenues or receivables.

56. The daily ACH debit mechanism provided Infusion with a fixed payment stream from Plaintiff's bank account regardless of whether Plaintiff actually received corresponding customer receipts on any given day.

57. Infusion retained the contractual right to collect the full Purchased Amount from Plaintiff through daily ACH debits.

58. Plaintiff bore the risk of ensuring sufficient funds remained in the Account to satisfy the daily ACH debits, with liability for any rejected ACH attempts or defaults.

59. The provision allowing Infusion to increase the Purchased Percentage to 100% upon an Event of Default operated as an acceleration clause, providing Infusion with immediate rights to all of Plaintiff's receipts upon default.

60. The reconciliation and adjustment provisions in the Infusion Agreements could only be invoked if Denali had not defaulted, were discretionary on Infusion's part, and did not alter the fixed total amount owed.

61. The language in the Infusion Agreements stating that business slowdowns would not constitute a breach is contradicted by the requirement that Denali maintain sufficient funds for daily ACH debits and the liability imposed for rejected ACH attempts.

62. Infusion **advanced** money to enable Denali to engage in its business venture with the understanding that the **advance** and an added amount were to be returned to Infusion. That added amount under the Infusion Agreements constituted interest.

63. Denali's repayment obligation was specific and fixed.

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64. Denali's repayment obligation was not contingent on the existence or amount of its cashflow.

65. As part of the Infusion Agreements, Ms. Thrailkill and Ms. Wiener guaranteed Denali's obligations under the Infusion Agreements.

66. The Infusion Agreements provide that Connecticut law shall govern.

67. On December 19, 2025, this Court entered an Order finding that Texas law governs the Infusion Agreements. ECF No. 195.

68. The Infusion Agreements contain merger clauses providing: "This Agreement and the Security Agreement and Guaranty hereto embody the entire agreement between **Merchant** and [Infusion] and supersede all prior agreements and understandings relating to the subject matter hereof."

69. The Plaintiff transferred an interest in property of the Plaintiff to Infusion by granting a security interest to Infusion pursuant to the Infusion Agreements. Infusion filed a UCC-1 financing statement on or about July 18, 2024.

70. Pursuant to the First Infusion Agreement, Infusion purportedly purchased $749,500.00 of Plaintiff's accounts receivable in exchange for $500,000.00. However, Infusion provided net funding of only $440,000.00 to the Plaintiff. In return, the Plaintiff incurred the obligation to repay Infusion $749,500.00. Thus, pursuant to the First Infusion Agreement, Infusion charged Denali interest of $309,500.00. Upon entry into the First Infusion Agreement, Infusion automatically deducted by ACH withdrawal the sum of $12,499.00 per business day. Denali repaid Infusion $799,976.00 over 33 days. Accordingly, the effective interest rate for the First Infusion Agreement was 427.9%, and Infusion received $359,976.00 more than the value it provided to the Plaintiff.

***6** 71. Plaintiff did not receive reasonably equivalent value for the obligations incurred to Infusion pursuant to the First Infusion Agreement.

72. Denali was insolvent on June 11, 2024.

73. Pursuant to the Second Infusion Agreement, Infusion purportedly purchased $1,499,000.00 of Plaintiff's accounts receivable in exchange for $1,000,000.00. However, Infusion provided net funding of only $850,000.00 to the Plaintiff, and Infusion used $500,000.00 of such net funding to retire the balance of the First Infusion Agreement as well as pay itself $50,476.00 more than it was entitled to under the terms of the First Infusion Agreement. Upon entry into the Second Infusion Agreement, Infusion automatically deducted by ACH withdrawal the sum of $18,738.00 per business day. In return, Plaintiff incurred the obligation to repay Infusion $1,499,000.00 over 80 days. Accordingly, the effective interest rate for the Second Infusion Agreement was 348.3%, and Plaintiff incurred the obligation to pay $649,000.00 more than the value Infusion provided to Plaintiff.

74. Plaintiff did not receive reasonably equivalent value for the obligations incurred

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to Infusion pursuant to the Second Infusion Agreement.

75. Denali was insolvent on July 12, 2024.

76. The obligations incurred and transfers made to Infusion occurred at a time when the Plaintiff was insolvent. Preceding the Plaintiff's entry into the Infusion Agreements, the Plaintiff suffered losses from internal embezzlement coupled with the COVID-19 pandemic and associated government lockdowns which rendered the Plaintiff generally unable to pay its debts as they came due. At that time, and all the way through the October 4, 2024 (the "**Petition Date**"), the sum of the Plaintiff's debts was greater than all of Plaintiff's property at a fair valuation. Plaintiff's schedules filed in the Bankruptcy Case indicate total assets of $6,032,087.35 and total liabilities of $7,033,354.48 as of the Petition Date. 11 U.S.C. § 101(32)(A); *Summary of Assets and Liabilities for Non-Individuals* [Main Bankruptcy Case, ECF No. 142]. Moreover, as a result of the Infusion Agreements, Infusion automatically deducted from Plaintiff's bank account sums ranging from $12,499.00 to $18,738.00 *per day* until the Plaintiff was utterly depleted of all capital. These deductions left Denali unable to pay its debts when they came due. Likewise, entry into the Infusion Agreements left the Plaintiff with an unreasonably small capital.

77. Plaintiff did not receive reasonably equivalent value for the obligations incurred and transfers made pursuant to the Infusion Agreements, which Plaintiff entered into while insolvent or which rendered Plaintiff insolvent as a result of the Infusion Agreements.

F. THE INSTAFUNDING AGREEMENT

78. On December 19, 2025, this Court entered that certain *Summary Judgment as to Instafunding d/b/a/TVT SPVL* (the "**InstaFunding Judgment**") [ECF No. 195]. Plaintiff was awarded judgment against InstaFunding as to Counts I and II. Counts III and IV were dismissed. The terms of the InstaFunding Judgment and the bench ruling supporting same are adopted in their entirety.

79. At the Trial, the Plaintiff determined to forgo proceeding on Counts VI, VII, VIII and IX against InstaFunding. All other Counts against InstaFunding have been dismissed.

H. ECONOMIC SUBSTANCE OF THE INFUSION AGREEMENTS

***7** 80. Under the First Infusion Agreement, Plaintiff received net funding of $440,000.00

81. The term of the payments for the First Infusion Agreement is 60 days ($749,500.00 Purchase Price divided by the $12,499.00 Daily Remittance), which is also .1644 of a year (60/365).

82. The interest charged under the First Infusion Agreement is $309,500.00 ($749,500.00 Purchase Price less $440,000 net funding amount).

83. The APR for the First Infusion Agreement was 427.9% ($309,500/($440,000.00 * .1644)).

84. Under the Second Infusion Agreement, Plaintiff received net funding of $850,000.00

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($350,000 disbursed to Plaintiff and $500,000 to pay off the First Infusion Agreement).

85. The term of the payments for the Second Infusion Agreement is 80 days ($1,499,000.00 Purchase Price divided by the $18,738.00 Daily Remittance), which is also .2192 of a year (80/365).

86. The interest charged under the Second Infusion Agreement is $649,00.00 ($1,499,000.00 Purchase Price less $850,000 net funding amount).

87. The APR for the Second Infusion Agreement was 348.3% ($649,000.00/($850,000.00 * .2192)).

I. BANKRUPTCY FILING AND ADVERSARY PROCEEDING

88. On the Petition Date, Denali filed a voluntary Chapter 11 petition in this Court.

89. Shortly after commencing its bankruptcy case, on October 7, 2024, Denali commenced the above-captioned adversary proceeding against the Defendants.

90. On July 31, 2025, Denali filed its Second Amended Complaint.

91. On August 28, 2025, Infusion filed an answer to the Second Amended Complaint and brought third-party claims for breach of guaranty against the Guarantors, Ms. Thrailkill and Ms. Wiener.

92. InstaFunding filed an answer to Plaintiff's Original Petition on December 16, 2024.

93. Despite proper notice, InstaFunding did not file an Answer to Plaintiff's Second Amended Petition.

94. Despite proper notice, InstaFunding did not respond to the Requests for Admission or Interrogatories served on InstaFunding on July 25, 2025.

95. Despite proper notice, InstaFunding failed to attend the duly noticed FRCP 30(b)(6) deposition of its corporate representative scheduled for September 18, 2025.

96. Despite proper notice, InstaFunding failed to attend the duly noticed hearing on Plaintiff's Motion for Summary Judgment scheduled for October 23, 2025 or the Trial. Despite proper notice, Infusion failed to attend the Trial.

CONCLUSIONS OF LAW

A. APPLICABLE LEGAL STANDARD

97. Under Texas law, a "loan" is defined 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." Tex. Fin. Code § 301.002(a)(10).

98. An "account purchase transaction" is "an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper ... at a discount." Tex. Fin. Code § 306.001(1).

99. The distinction between purchase and lending transactions can be "blurred". *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable*

Co., 336 F.3d 410, 416 (5th Cir. 2003); Tex. Bus. & Comm. Code § 9.109 cmt. 4.

100. To determine whether a transaction is a loan or a sale, courts ascertain the "intention of the parties as disclosed by the contract, attending circumstances, or both." *Korrody v. Miller*, 126 S.W.3d 224, 226 (Tex. App.—San Antonio 2003, no pet.); *Express Working Capital, LLC v. Starving Students, Inc.*, 28 F. Supp. 3d 660, 666-67 (N.D. Tex. 2014).

***8** 101. "Whether an amount of money constitutes interest depends not on what the parties call it but on the substance of the transaction." *First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 627 (Tex. 1997).

102. When there are no disputed facts, courts may determine as a matter of law whether a charge is "additional interest" for the lending of money. *Swank v. Sverdlin*, 121 S.W.3d 785, 791-92 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

103. In a contract to loan money, the material terms generally include the amount to be loaned, the maturity date of the loan, the interest rate, and the repayment terms. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

104. "When money is **advanced** to enable one to engage in a business venture with the understanding that the **advance** and an added amount are to be returned, there is a loan, and the added amount is interest, which may not exceed the statutory maximum, regardless of the form of transaction." *Koch v. Boxicon, LLC*, No. 05-14-01424, 2016 WL 1254048, * 6 (Tex. App.— Dallas Mar. 30, 2016, no pet.) (quoting *Johns v. Jaeb*, 518 S.W.2d 857, 859 (Tex. App.—Dallas 1974, no writ)) (cleaned up).

105. The subjective intent of the parties is presumed to be reflected in the documents which they signed. *Johns v. Jaeb*, 518 S.W.2d at 860.

106. The subjective intent of the lender is irrelevant if, in fact, the lender has contracted for, charged or received interest on a loan in excess of the maximum permitted by law. *Cochran v. American Sav. and Loan Ass'n of Houston*, 586 S.W.2d 849 (Tex. 1979).

B. CHARACTERIZATION OF THE INFUSION AGREEMENTS AS LOANS

107. Despite being labeled "Purchase and Sale of Future Receivables" and containing language characterizing the transactions as purchases of future receivables, the Infusion Agreements constitute loans under Texas law based on their economic substance and the true intention of the parties as disclosed by the contracts and attending circumstances.

108. Under the First Infusion Agreement, Infusion **advanced** $440,000 in net proceeds to Plaintiff with an absolute obligation that Plaintiff repay $749,500—a predetermined, fixed amount that did not vary based on Plaintiff's actual business receipts or receivables.

109. Under the Second Infusion Agreement, Infusion **advanced** $350,000 in net proceeds to Plaintiff with an absolute obligation that Plaintiff repay $1,499,000—a predetermined, fixed amount that did not vary based

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on Plaintiff's actual business receipts or receivables.

110. The daily ACH debit mechanism of the Infusion Agreements constitutes a payment schedule requiring Plaintiff to ensure sufficient funds remained in the designated account, effectively creating fixed payment obligations regardless of actual customer receipts.

111. Plaintiff bore the full risk of repayment, being held responsible for rejected ACH attempts and any fees resulting from insufficient funds, demonstrating that the First Infusion Agreement did not involve a true purchase where Infusion assumed the risk of Plaintiff's business performance.

112. The provision increasing the Purchased Percentage to 100% upon an Event of Default operates as an acceleration clause typical of loan agreements.

***9** 113. The Infusion Agreements collectively lack the characteristics of a true account purchase transaction because Infusion did not assume any meaningful risk that the amount received would be less than the Purchased Amount based on Plaintiff's actual business receipts.

114. The requirements that Plaintiff maintain sufficient funds for daily ACH debits, notify Infusion if funds would not be in the account, coupled with its liability for rejected ACH attempts contradict the provisions of the Infusion Agreements that Plaintiff's bankruptcy, business closure, or slowdown would not constitute a breach.

115. The statement that "**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" is belied by the contractual mechanisms that effectively guarantee payment of the full Purchased Amount through daily ACH debits and default provisions.

116. The economic reality of the Infusion Agreements is that Infusion **advanced** money to Plaintiff with the expectation and contractual right to receive back a predetermined amount significantly exceeding the **advance**, satisfying the definition of a loan under Section 301.002(a)(10) of the Texas Finance Code.

117. The Infusion Agreements contained data that allows the Court to calculate the traditional loan terms of an interest rate and specific maturity date.

118. There was an exchange where money was **advanced** with an obligation to repay a fixed, predetermined amount plus additional compensation.

119. The form of the transaction—*i.e*, calling it a purchase rather than a loan—does not control where the substance demonstrates a lending transaction. *First USA Mgmt.*, 960 S.W.2d at 627.

120. The reconciliation and adjustment provisions in the Infusion Agreements do not transform the transactions into true purchases because: (a) they were discretionary; (b) they were only available if Denali had not defaulted;

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and (c) they did not alter the fixed total amount owed.

121. Based on the contractual terms and attending circumstances, the Court concludes that the Infusion Agreements constitute loans of money under Texas law.

C. USURY VIOLATION—INFUSION AGREEMENTS

122. Under Texas law, a transaction is considered "usurious" if: (1) it is a loan of money; (2) there is an absolute obligation to repay the principal; and (3) if there is exaction of a greater compensation than allowed by law for the use of the money by the borrower. *See* *First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285, 287 (Tex. 1994).

123. The Infusion Agreements constitute money loans for the reasons set forth above.

124. Plaintiff had an absolute obligation to repay the principal amount **advanced**, as evidenced by the daily ACH debit requirement, the liability for rejected ACH attempts, and the acceleration provisions upon default.

125. For commercial loans under Texas law, a creditor may contract for and receive interest that does not exceed 28 percent per year. Tex. Fin. Code §§ 303.009(c), 306.002(a).

126. The difference between the amount Plaintiff received ($350,000) and the amount Plaintiff was obligated to repay ($1,499,000), or $1,149,000, represents the interest charged on the loan.

127. The $1,149,000 difference between the net proceeds and the Purchased Amount under the Second Infusion Agreement represents compensation for the use of money, which constitutes interest under Texas law regardless of how the parties labeled it. *First USA Mgmt*, 960 S.W.2d at 627.

***10** 128. Given that Infusion did not use a third-party originator and the origination appeared perfunctory at best, the $150,000 origination fee under the Second Infusion Agreement, representing 15% of the stated Purchase Price or over 42% of the net proceeds actually **advanced** to Plaintiff, likewise constitutes interest. *Swank*, 121 S.W.3d at 791-92.

129. Even accounting for various calculation methodologies and timeframes, the interest rate charged under the Infusion Agreements manifestly and substantially exceeds the 28% maximum annual rate permitted for commercial loans under Texas Finance Code § 303.009(c).

130. Where the contract on its face reserves more than legal interest, the usurious intent is apparent, and no room exists for a contrary presumption. *Maxwell v. Estate of Bankston*, 433 S.W.2d 229, 233 (Tex. App.—Texarkana 1968, no writ). Even if a contrary presumption were to exist, Infusion failed to defend the allegations at Trial.

131. Infusion contracted for and charged interest vastly in excess of the maximum permitted by Texas law in connection with a commercial transaction.

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132. The Infusion Agreements violate Texas usury laws and are contrary to public policy. Tex. Fin. Code § 302.001(b).

133. Any provision of the Infusion Agreements violative of Texas usury law is void under Texas law and of no effect.

D. INAPPLICABILITY OF DEFENSES

134. The Infusion Agreements do not qualify as "account purchase transactions" under Texas Finance Code § 306.001(1) because they are loans, not true purchases of accounts or receivables.

135. The charging of usurious interest was not an accidental or bona fide error under Texas Finance Code § 305.101 where the contracts on their face charged interest vastly exceeding legal limits.

136. The correction provisions of Section 305.103 of the Texas Finance Code do not apply where, as here, the lender has not taken steps to correct the usurious charge prior to litigation.

137. Defendant cannot avoid liability for usury by labeling the transactions as purchases of future receivables where the economic substance is that of a loan.

E. DAMAGES AND REMEDIES

138. All contracts for usurious interest are contrary to public policy and subject to the appropriate penalty prescribed by Chapter 305 of the Texas Finance Code. Tex. Fin. Code § 302.001(b).

139. A creditor who contracts for interest that is greater than the amount authorized by the Texas Finance Code in connection with a commercial transaction is liable to the obligor for an amount equal to three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for, charged, or received. Tex. Fin. Code § 305.001(a-1).

140. Plaintiff is entitled to statutory damages under Texas Finance Code § 305.001(a-1) based on the usurious interest contracted for in the Infusion Agreements.

141. The Court awards Plaintiff treble damages calculated as three times the difference between the interest actually contracted for and the maximum legal interest that could have been charged at 28% per annum.

142. Under the First Infusion Agreement, Infusion contracted for $309,500.00 in interest. Under Texas law, Infusion was only allowed 28% annual interest, given the 60 day life of the loan and the amount disbursed to the Debtor, $440,000.00, which equates to lawful interest totaling $20,254.08. After subtracting the amount allowed by law, $20,254.08, from the contracted amount of $309,500.00, $289,245.92 constitutes excess usurious interest. Under Section 305.001(a-1) of the Texas Finance Code, treble damages equal $867,737.76 with respect to the First Infusion Agreement.

***11** 143. Under the Second Infusion Agreement, Infusion contracted for $649,000.00 in interest. Under Texas law, Infusion was only allowed 28% annual interest,

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given the 80-day life of the loan and the amount disbursed to the Debtor, $850,000.00, which equates to lawful interest totaling $52,169.60. After subtracting the amount allowed by law, $52,169.60, from the contracted amount of $649,000.00, $596,830.40 constitutes excess usurious interest. Under Section 305.001(a-1) of the Texas Finance Code, treble damages equal $1,790,491.20 with respect to the Second Infusion Agreement.

144. The total amount of damages owed by Infusion to Denali with respect to the violative portions of the Infusion Agreements relative to usurious interest is $2,658,228.96**.**

145. Plaintiff is entitled to declaratory relief concluding that the Infusion Agreements constitute usurious loans under Texas law.

146. Under Texas law, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019) (citation omitted) (internal quotations omitted).

147. Under the lodestar analysis adopted by the Supreme Court of Texas, the first step in the analysis in calculating an attorney's fee award is "determining the reasonable hours worked multiplied by a reasonable hourly rate." *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 354 (Tex. 2020) (quoting *Rohrmoos*, 578 S.W.3d at 498).

148. The burden is on the claimant to show that the requested fees are reasonable. *Id.* To satisfy the burden, the claimant's evidence should include, at a minimum, evidence of: "(1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.*

149. In *Rohrmoos*, the Texas Supreme Court noted what bankruptcy courts typically refer to as the *Johnson* factors to determine reasonableness:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

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Rohrmoos, 578 S.W.3d at 490–91 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

150. There was no substantive challenge to the reasonableness of Plaintiff's counsel's fees and expenses.

151. The fees and expenses billed by counsel to Denali, the Nelson Law Group [ECF Nos. 208-34–35 and ECF No. 210], were below market and constituted reasonable fees and expenses. The fees and expenses were reasonable in the amount of time required to perform the services, and the hourly rate for each person performing such services. The attorneys at Nelson Law Group are skilled, reputable attorneys, respected in their field.

152. Plaintiff is entitled to reasonable and necessary attorney's fees and costs as provided by law. Tex. Fin. Code § 305.005.

153. The Plaintiff requested $65,777.28 in attorney's fees related to the Adversary Proceeding relative specifically as to Infusion. ECF No. 210. The Plaintiff requested $43,888.13 in attorney's fees related to the Adversary Proceeding relative specifically as to InstaFunding. *Id.* The total attorney's fees for the Adversary Proceeding owed by Denali totaled $464,010.50. *Id.* There was no evidence from which the Court could assess any additional fees relative to fees attributable to all Defendants.

***12** 154. Plaintiff is entitled to reasonable and necessary attorney's fees and costs against InstaFunding in the amount of $43,888.13.

155. Plaintiff is entitled to reasonable and necessary attorney's fees and costs against Infusion in the amount of $65,777.28.

F. THIRD-PARTY DEFENDANTS

156. The Third-Party Defendants, Ms. Thrailkill and Ms. Wiener, served as guarantors under the Infusion Agreements.

157. Because the underlying Infusion Agreements are usurious, all interest and fees charged in connection with same are void under Texas law.

158. The Infusion Agreements expressly state that "**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."

159. Even if the guaranties were enforceable, the Third-Party Defendants did not guarantee payment of the Purchased Amount but only Denali's performance of the agreement terms.

160. The Guarantors have no further liability to repay any debts under the Infusion Agreements or the related guaranties.

161. Infusion failed to appear at Trial and prosecute its Third-Party Complaint. The Court awards judgment in favor of Ms. Thrailkill and Ms. Wiener on all Counts asserted therein.

G. CONSTRUCTIVELY FRAUDULENT TRANSFER

162. The Infusion Agreements constitute obligations incurred by the Plaintiff on June

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11, 2024, and July 12, 2024—each within two years before the Petition Date. The lien granted by Plaintiff to Infusion pursuant to the Infusion Agreements constitutes a transfer of an interest of the Plaintiff in property. 11 U.S.C. § 101(54). Infusion filed a UCC-1 financing statement on or about July 18, 2024, constituting a "transfer" as of that date. 11 U.S.C. § 548(d)(1).

163. To establish a *prima facie* case for avoiding a transfer as constructively fraudulent, the plaintiff must demonstrate that the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." *In re Hannover Corp.*, 310 F.3d 796 (5th Cir. 2002) (quoting 11 U.S.C. § 548(a)(1)(B)(i)).

164. Reasonably equivalent value is not defined in the Bankruptcy Code. In the Fifth Circuit, to satisfy this element, the debtor must have "received value that is substantially comparable to the worth of the transferred property." *Stanley v. U.S. Bank Nat'l Ass'n. (In re TransTexas Gas Corp.)*, 597 F.3d 298, 306 (5th Cir. 2010) (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 548 (1994)) (internal quotations omitted).

165. Reasonably equivalent value is measured from the standpoint of creditors and the proper focus is on the net effect of the transfers on the debtor's estate, and the funds available to unsecured creditors. *Id.* (citing *In re Hinsley*, 201 F.3d 638, 644 (5th Cir. 2000)) (internal citation omitted) (internal quotations omitted).

166. Plaintiff did not receive reasonably equivalent value for the obligations incurred and transfers made to Infusion pursuant to the Infusion Agreements.

167. Pursuant to the First Infusion Agreement, Infusion received $359,976.00 *more* than the value it provided to the Plaintiff.

168. Pursuant to the Second Infusion Agreement, Infusion received $649,000.00 *more* than the value it provided to Plaintiff.

***13** 169. In total, Infusion received $1,008,976.00 *more* than the value it provided to Plaintiff.

170. At the time of the obligations incurred and transfers made to Infusion, the sum of the Plaintiff's liabilities was greater than all of Plaintiff's assets at a fair valuation; Plaintiff's engagement in the transactions underlying the Infusion Agreements left the Plaintiff with unreasonably small capital; or the Plaintiff was insolvent or became insolvent as a result of the transfers made and obligations incurred in connection with the Infusion Agreements.

171. Therefore, (i) the Infusion Agreements are hereby avoided pursuant to 11 U.S.C. § 548(a)(1)(B) as constructively fraudulent obligations; and (ii) any lien granted by Plaintiff to Infusion is hereby avoided pursuant to 11 U.S.C. § 548(a)(1)(B) as a constructively fraudulent transfer.

Counsel for Plaintiff is directed to upload a form of Judgment consistent with these Findings of Fact and Conclusions of Law.

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All Citations

Slip Copy, 2026 WL 800949

Footnotes

1 Unless otherwise stated, all ECF No. references are herein made with respect to the docket in Adversary Proceeding No. 24-3083-mvl.

2 Any findings of fact that constitute conclusions of law shall be deemed such and *vice versa*.

3 Any capitalized term not defined herein shall adhere to the meaning ascribed to such term in the Infusion Agreements.

End of Document

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MERCHANT INFORMATION

CONSTANTINOU GROUP, INC.	CONSTANTINOU GROUP	
Merchant's Legal Business Name	D/B/A(s)	
83-9897756	CA	Corporation
FEIN	State of Incorporation	Type of Entity
1827 EAST SPRING ST		
Physical Address		
LONG BEACH	CA	90806
City	State	Zip Code

COSTAS C CONSTANTINOU		
Owner (#1) Name	Owner (#2) Name	
[redacted]	[redacted]	
Business Number	Email Address	
[redacted]		
Mailing Address		
[redacted]	[redacted]	[redacted]
City	State	Zip Code

This purchase and sell of future receivable agreement dated Sep. 25, 2024 by and between Alpha Equity Fund (AEF), as purchaser and merchant as found above as seller. Merchant hereby sells, assigns and transfers to AEF (making AEF the absolute owner) in consideration of the "Purchase Price" specified above, the Purchased Percentage of all of Merchant's Future Receipts, 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 "Future Receipts" defined as all payments made by cash, check, electronic transfer or other form of monetary payment deposited into Merchants Bank Account), for the payments to Merchant as a result of Merchant's sale of goods and / or services (the "Transactions'") until the "Purchased Amount has been delivered by or on behalf of Merchant to AEF Merchant is selling a portion of a future revenue stream to AEF at a discount, not borrowing money from AEF, therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by AEF. 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. AEF is entering this Agreement knowing the risks that Merchant's business may slow down or fail, and AEF assumes these risks based on Merchant's representations, warranties, and covenants in this Agreement, which are designed to give AEF a reasonable and fair opportunity to receive the benefit of its bargain.

Merchant and Guarantor are only guaranteeing them 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 in Paragraph 1.4 and Paragraph 1.5.AEF will debit the Remittance each business day from only one depositing bank account, which account must be acceptable to, and pre-approved by, AEF (the "Account") into which Merchant and Merchant's customers shall remit the Receipts from each Transaction, until such time as AEF receives payment in full of the Purchased Amount. Merchant hereby authorizes AEF to ACH debit the initial Remittance from the Account on the agreed upon Payment Frequency; a daily basis means any day that is not a United States banking holiday. AEF's payment of the Purchase Price shall be deemed the acceptance and performance by AEF of this Agreement. Merchant understands that it is responsible for ensuring that the initial Remittance to be debited by AEF remains in the Account and will be held responsible for any fees incurred by AEF resulting from a rejected ACH attempt or an Event of Default. AEF is not responsible for any overdrafts or rejected transactions that may result from AEF's ACH debiting the Agreed Remittance under the terms of this Agreement. Notwithstanding anything to the contrary in this Agreement or any other agreement between AEF and Merchant, upon the occurrence of an Event of Default of this PURCHASE AND SELL OF FUTURE RECEIVABLES AGREEMENT the Purchased Percentage shall equal 100%. A list of all fees applicable under this Agreement is contained in Appendix A and are hereby agreed to by Merchant.

110,000.00	25.00%	170,500.00
Purchase Price ($)	Purchased Percent (%)	Purchased Amount ($)
per day	4,736.11	
Payment Frequency	Remittance ($)	
[redacted]	DocuSigned by: [redacted]	Sep. 25, 2024
FOR THE MERCHANT (#1) BY (Print Name and Title)	Signature	Date
		Sep. 25, 2024
FOR THE MERCHANT (#2) BY (Print Name and Title)	Signature	Date

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any interest received by AEF in excess of the maximum lawful rate, it being intended that Merchant not pay or contract to pay, and that AEF 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. As a result, thereof, Merchant knowingly and willingly waives the defense of Usury in any action or proceeding.

1.12. Power of Attorney

Merchant irrevocably appoints AEF 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 AEF from Processor, or in the case of a violation by Merchant of Section lor the occurrence of an Event of Default under Section 3 hereof, including without limitation (1) to obtain and adjust insurance; (2) to collect monies due or to become due under or in respect of any of the Collateral; (3) to receive, endorse and collect any checks, notes, drafts, instruments, documents or chattel paper in connection with clause (1) or clause (2) above; (4) to sign Merchant's name on any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to AEF; and (5) to contact Merchant's banks and financial institutions using Merchant and Guarantor(s) personal information to verify the existence of an account and obtain account balances (6) to file any claims or take any action or institute any proceeding which AEF 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. In connection therewith, all costs, expenses, and fees, including legal fees, shall be payable by merchant.

1.13. Protections Against Default

The following Protections 1 through 8 may be invoked by AEF 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 or other payments or deposits 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 AEF electronic check processor; (b) Merchant changes its arrangements with Processor or the Bank in any way that is adverse or unacceptable to AEF; (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 or deposit transactions to another processor; (d) Merchant intentionally interrupts the operation of this business transfers, moves, sells, disposes, or otherwise conveys its business and / or assets without (1) the express prior written consent of AEF, and (2) the written agreement of any AEF or transferee to the assumption of all of Merchant 'obligations under this Agreement pursuant to documentation satisfactory to AEF; (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 payments, checks or deposits that are settled through Processor, (f) Merchant fails to provide AEF with copies of any documents related to Merchant's card processing activity of financial and banking affairs within five days after a request from AEF, or (g) Merchant breaches any terms of this Agreement, including but not limited any of the Events of Default contained in Section 3.1 herein. These protections are in addition to any other remedies available to AEF at law, in equity or otherwise pursuant to this Agreement.

Protection 1

The full uncollected Purchased Amount plus all fees (including reasonable attorney's fees) due under this Agreement and the attached Security Agreement become due and payable in full immediately.

Protection 2

AEF may enforce the provisions of the Limited Personal Guaranty of Performance against the Guarantor(s).

Protection 3

AEF may enforce its security interest in the Collateral.

Protection 4

The entire Purchased Amount and all fee (including reasonable attorney's fees) shall become immediately payable to AEF from Merchant.

Protection 5

AEF may proceed to protect and enforce its right and remedies by lawsuit. In any such lawsuit, if AEF recovers a Judgment against Merchant, Merchant shall be liable for all of AEF's costs of the lawsuit, including but not limited to all reasonable attorneys' fees and court costs.

Protection 6

This Agreement shall be deemed Merchant's Assignment of Merchant's Lease of Merchant's business premises to AEF. Upon breach of any provision in this Agreement, AEF may exercise its rights under this Assignment of Lease without prior Notice to Merchant.

Protection 7

AEF 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 for all sums due to AEF.

1.14. Protection of Information

Merchant and each person signing this Agreement on behalf of Merchant and / or as Owner or Guarantor, in respect of himself or herself personally, authorizes AEF to disclose information concerning Merchant's and each Owner's and each Guarantor's credit standing (including credit bureau reports that AEF obtains) and business conduct only to agents, affiliates, subsidiaries, and credit reporting bureaus. Merchant and each Owner and each Guarantor hereby and each waives to the maximum extent permitted by law any claim for damages against AEF or any of its affiliates relating to any (1) investigation undertaken by or on behalf of AEF as permitted by this Agreement or (2) disclosure of information as permitted by this Agreement. Any Merchant may give written notice to AEF requesting that AEF conduct a reconciliation in order to ensure that the amount that AEF has collected equals the Specified Percentage of Merchant(s)'s Receivables under this Agreement. Any Merchant may give written notice requesting a reconciliation. A reconciliation may also be requested by e-mail to office@alphaefund.com and such notice will be deemed to have been received if and when AEF sends a reply e-mail (but not a read receipt). If such reconciliation determines that AEF collected more than it was entitled to, then AEF will credit to the Account all amounts to which AEF was not entitled within seven days thereafter. If such reconciliation determines that AEF collected less than it was entitled to, then AEF will debit from the Account all additional amounts to which AEF was entitled within seven days thereafter. In order to effectuate this reconciliation, any Merchant must produce with its request the login and password for the Account and any and all bank statements and merchant statements covering the period from the date of this Agreement through the date of the request for a reconciliation. AEF will complete each such reconciliation within two business days after receipt of a written request for one accompanied by the information and documents required for it. Nothing herein limits the amount of times that such a reconciliation may be requested.

1.15. Confidentiality

Merchant understands and agrees that the terms and conditions of the products and services offered by AEF, including this Agreement and any other AEF documents (collectively, "Confidential Information') are proprietary and confidential information of AEF. Accordingly, unless disclosure is required by law or court order, Merchant shall not disclose Confidential Information of AEF to any person other than an attorney, accountant, financial adviser or employee of Merchant who needs to know such information for the purpose of advising Merchant ("Adviser"), provided such Adviser uses such information solely for the purpose of advising Merchant and first agrees in writing to be bound by the terms of this section. A breach hereof entitles AEF to not only damages and reasonable attorney's fees but also to both a Temporary Restraining Order and a Preliminary Injunction without Bond or Security.

1.16. Publicity

Merchant and each of Merchant's Owners and all Guarantors hereto all hereby authorizes AEF to use its, his or her name in listings of clients and in advertising and marketing materials.

1.17. D/B/As

Merchant hereby acknowledges and agrees that AEF may be using "doing business as" or "d/b/a" names in connection with various matters relating to the transaction between AEF and Merchant, including the filing of UCC-1 financing statements and other notices or filings.

2. 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

Merchant's and Guarantors' bank and financial statements, copies of which have been furnished to AEF, and future statements which will be

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furnished hereafter at the discretion of AEF, 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. Merchant and Guarantors have a continuing, affirmative obligation to advise AEF of any material adverse change in their financial condition, operation, or ownership. AEF may request statements at any time during the performance of this Agreement and the Merchant and Guarantors shall provide them to AEF within five business days after request from AEF. Merchant's or Guarantors' 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 and/or will engage in hereafter.

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. Use of Funds

Merchant agrees that it shall use the Purchase Price for business purposes and not for personal, family, or household purposes.

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 AEF's prior written consent. Any such changes 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 AEF, nor shall Merchant change any of its places of business without prior written consent by AEF.

2.7. Daily Batch Out

Merchant will batch out receipts with the Processor on a daily basis if applicable.

2.8. Estoppel Certificate

Merchant will at every and all times, and from time to time, upon at least one day's prior notice from AEF to Merchant, execute, acknowledge and deliver to AEF and/or to any other person, firm or corporation specified by AEF, 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 is not insolvent and does not contemplate filing for bankruptcy in the next six months and has not consulted with a bankruptcy attorney or 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.

2.10. Unencumbered Receipts

Merchant has good, complete, unencumbered, and marketable title to all Receipts, free and clear of any and all liabilities, liens, claims, changes, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges and encumbrances of any kind or nature whatsoever or any other rights or interests that may be inconsistent with the transactions contemplated with, or adverse to the interests of AEF.

2.11. Business Purpose

Merchant is a valid business in good standing under the laws of the jurisdictions in which it is organized and/operates, and Merchant is entering into this Agreement for business purposes and not as a consumer for personal, family or household purposes.

2.12. Defaults 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.

2.13. Good Faith

Merchant and Guarantors hereby affirm that Merchant is receiving the Purchase Price and selling AEF the Purchased Amount in good faith and will use the purchase price funds to maintain and grow (mer) business.

3. 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 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) the sending of notice of termination by Merchant or verbally notifying AEF of its intent to breach this Agreement; (d) the Merchant fails to give AEF 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, and the Merchant fails to supply all requested documentation and allow for daily and / or real time monitoring of its bank account; (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; (h) Merchant shall use multiple depository accounts without the prior written consent of AEF; (i) Merchant shall enter into any financing agreements with any other party including but not limited to: Loans, Merchant Cash Advances, Receivables financing, or any other agreement that will increase the total debt owed by Merchant to any other party; (j) Merchant shall change its depositing account without the prior written consent of AEF; or (k) Merchant shall close its depositing account used for ACH debits without the prior written consent of AEF; (l) Merchant's bank returns a code other than NSF cutting AEF from its collections; (m) Merchant shall default under any of the terms, covenants, and conditions of any other agreement with AEF.

3.2. Limited Personal Guaranty

The Personal Guaranty that is executed in connection with this Agreement is a limited and non-recourse guaranty in that Guarantor shall not be liable hereunder if Merchant ceases operations / goes out of business.

3.3. Remedies

In case any Event of Default occurs and is not waived pursuant to Section 4.4. hereof, AEF 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 herein, or to enforce the discharge of Merchant's obligations hereunder (including the Guaranty) or any other legal or equitable right or remedy, including but not limited to filing of an ex-parte prejudgment remedy, and / or enforcing the Security Agreement contained herein. All rights, powers, and remedies of AEF in connection with this Agreement may be exercised at any time by AEF 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.

3.4. Costs

Merchant shall pay to AEF all reasonable costs associated with (a) an Event or Default, (b) breach by Merchant of the Covenants in this Agreement and the enforcement thereof, and(c) the enforcement of AEF's remedies set forth in this Agreement, including but not limited to court costs and attorneys' fees.

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3.5. Required Notifications

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

4. 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 AEF.

4.2. Assignment

AEF 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, 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 AEF shall become effective only upon receipt by AEF. Notices to Merchant shall become effective three days after mailing.

4.4. Waiver Remedies

No failure on the part of AEF 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 the parties 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 AEF which consent may be withheld in AEF's sole discretion. This Agreement shall be governed by and construed in accordance with the laws of the State Connecticut or the State of New York. Any suit, action or proceeding arising hereunder, or the interpretation, performance, or breach hereof, shall be, if AEF so elects, instituted in any Connecticut state court sitting in the county of New Haven or any Court in the State of New York without regard to conflict of law provisions (the "Acceptable Forum"). The parties agree that the Acceptable Forum shall be the sole and exclusive forum for any and all disputes and / or litigation arising out of or relating to this Agreement and the Parties agree that the Acceptable Forum is convenient and submit to the jurisdiction of the Acceptable Forum and irrevocably waive any and all objections to jurisdiction or venue. Should a proceeding be initiated in any other forum, the parties waive any right to oppose any motion or application made by either party to transfer such proceeding to an Acceptable Forum. Merchant and Guarantor hereby agree that the mailing of any Summons and Complaint in any proceeding commenced by AEF 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 service of process against them without the necessity for service by any other means provided by statute or rule of court, but without invalidating service performed in accordance with such other provisions.

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. Interpretation

All Parties hereto have reviewed this Agreement with attorney of their own choosing and have relied only on their own attorneys' guidance and advice. No construction determinations shall be made against either Party hereto as drafter.

4.8. Severability

In case any of the provisions in this Agreement or any security or guaranty of 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.

4.9. 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 the Security Agreement and Guaranty hereto embody the entire agreement between Merchant and AEF and supersede all prior agreements and understandings relating to the subject matter hereof.

4.10. JURY TRIAL WAIVER

THE PARTIES HERETO WAIVE TRIAL BY JURYIN ANY COURT IN ANY SUIT, ACTION OR PROCEEDING ON ANY MATTER ARISING INCONNECTION WITH OR IN ANY WAY RELATEDTO THE TRANSACTIONS 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.

4.11. 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 AS 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 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.

4.12. Facsimile and Digital Acceptance

Facsimile signatures and digital signatures hereon shall be deemed acceptable for all purposes.

4.13. COMMERCIAL PREJUDGMENT REMEDY WAIVER

EACH AND EVERY MERCHANT AND GUARANTOR OF THIS AGREEMENT, AND EACH OTHER 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 EXTEND ALLOWED UNDER CONNECTICUT GENERAL STATUTES SECTIONS 52-278m, INCLUSIVE, OR BY OTHER APPLICABLE LAW EACH AND EVERY MERCHANT 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 AEF 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 AEF POST A BOND, WITH OR WITHOUT SURETY, TO PROTECT SAID MERCHANT OR GUARANTOR AGAINST DAMAGES THAT MAY BE CAUSED BY ANY PREJUDGMENT REMEDY SOUGHT OR OBTAINED BY AEF BY VIRTUE OF ANY DEFAULT OR PROVISION OF THIS AGREEMENT OR SECURITY OR GUARANTY AGREEMENT SECURING THIS AGREEMENT.

AS CONDITION OF THIS AGREEMENT AND AS PART OF THE SAID PREJUDGMENT REMEDY WAIVER ABOVE, BUT NOT AN EXCLUSIVED REMEDY, EACH AND EVERY MERCHANT AND GUARANTOR OF THIS AGREEMENT, AND EACH OTHER PERSON OR ENTITY WHO MAY BECOME LIABLE FOR ALL OR ANY PART OF THIS OBLIGATION HEREBY ACKNOWLEDGE, UNDERSTAND, AGREE AND CONSENT THAT AEF MAY ATTACH OR GARNISH ANY AND ALL OF MERCHANT AND GUARANTOR'S MONEY HELD IN ANY BANK ACCOUNT AT ANY BANKING INSTITUTION IF THAT BANKING INSTITUTION HAS A BRANCH OR OFFICE PHYSICALLY LOCATED IN CONNECTIVE AND / OR IS REGISTERED WITH THE SECRETARY OF STATE / AUTHORIZED TO CONDUCT BUSINESS IN CONNECTICUT. THE PARTIES HERE TO AGREE THAT THEY HAVE HAD THE OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL OF THEIR OWN CHOOSING WITH RESPECT TO THE TERMS AND CONDITIONS HEREIN, AS WELL AS THEIR MEANING.

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GUARANTY OF PERFORMANCE

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. AEF As an additional inducement for AEF to enter into this Agreement, the undersigned Guarantor(s) hereby provides AEF with this Guaranty. Guarantor(s) will not be personally liable for any amount due under this Agreement unless Merchant commits an Event of Default pursuant to Paragraph 3.1 of this Agreement. Each Guarantor shall be jointly and severally liable for all amounts owed to AEF in the Event of Default. Guarantor(s) guarantee Merchant's good faith, truthfulness, and performance of all of the representations, warranties, covenants made by Merchant in this Agreement as each 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, warranty, or covenant made by Merchant in the Agreement. Guarantor Waivers. In the event of a breach of the above, AEF may seek recovery from Guarantors for all of AEF's losses and damages by enforcement of AEF's rights under this Agreement without first seeking to obtain payment from Merchant, any other guarantor, or any Collateral or Additional Collateral AEF may hold pursuant to this Agreement or any other guaranty. AEF 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: (1) Merchant's failure to pay timely any amount required under the Merchant Agreement; (2) any adverse change in Merchant's financial condition or business;(3) any sale or other disposition of any collateral securing the Guaranteed Obligations or any other guaranty of the Guaranteed Obligations; (4) AEF's acceptance of this Agreement; and (5) any renewal, extension or other modification of the Merchant Agreement or Merchant's other obligations to AEF. In addition, AEF may take any of the following actions without releasing Guarantor from any of its obligations under this Agreement: (1) renew, extend, or otherwise modify the Merchant Agreement or Merchant's other obligations to AEF; (2) release Merchant from its obligations to AEF; (3) sell, release, impair, waive, or otherwise fail to realize upon any collateral securing the Guaranteed Obligations or any other guaranty of the Guaranteed Obligations; and (4) foreclose on any collateral securing the Guaranteed Obligations or any other guaranty of the Guaranteed Obligations in a manner that impairs or precludes the right of Guarantor to obtain reimbursement for payment under this Agreement. Until the Purchased Amount and Merchant's other obligations to AEF under the Merchant 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 Merchant, any other guarantor, or any collateral provided by Merchant or any other guarantor, for any amounts paid by it, or acts performed by it, under this Agreement: (1) subrogation; (2) reimbursement; (3) performance; (4) indemnification; or (5) contribution. In the event that AEF 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. Guarantor Acknowledgment. Guarantor acknowledges that: (1) He / She is bound by the Prejudgment Remedy Waiver and Class Action Waiver provisions in the Merchant Agreement Terms and Conditions, as well as all other terms and conditions therein, which are incorporated herein by reference; (2) He / She understands the seriousness of the provisions of this Agreement; (3) He / She has had a full opportunity to consult with counsel of his / her choice; and (4) He / She has consulted with counsel of its choice or has decided not to avail himself / herself of that opportunity.

IN WITNESS WHEREOF, the Parties have duly executed and delivered this Agreement as of the date first above written:

FOR MERCHANT (#1)

[redacted]

DocuSigned by:
D1E3D51DBD344F3...

BY (Print Name and Title) **Signature**

[redacted] [redacted]

Social Security Number **Driver's License Number**

FOR MERCHANT (#2)

BY (Print Name and Title) **Signature**

Social Security Number **Driver's License Number**

OWNER / GUARANTOR (#1)

[redacted]

DocuSigned by:
D1E3D51DBD344F3...

BY (Print Name and Title) **Signature**

[redacted] [redacted]

Social Security Number **Driver's License Number**

OWNER / GUARANTOR (#2)

BY (Print Name and Title) **Signature**

Social Security Number **Driver's License Number**

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APPENDIX A: THE FEE STRUCTURE

1. **Purchased Receivables Security Deposit**: Upon funding there may be a security deposit hold of up to 50% of the receivables purchase amount. This deposit can either be deposited by the merchant or Alpha Equity Fund on the merchants behalf. This security deposit can be applied to the balance or returned upon the purchased receivable being paid in full.
2. **Daily Remittance Security Deposit**: On the first day that the remittance payment occurs there shall be an additional security payment that shall be drafted in the amount of the initial remittance payment amount, this security deposit can be applied to the balance or returned upon the purchased receivable being paid in full.
3. **Underwriting and Broker Fees**: A minimum of $1,000.00 or up to 20% of the purchase price for underwriting fees, broker fees (Usually 15-20%) and/or related expenses. These fees shall be deducted upfront from the Purchase Price stated above with the remaining net being disbursed to Merchant.
4. **Admin and Origination Fees**: A minimum of $1,000.00 or up to 10% of the purchase price to cover the cost of Origination and ACH Setup. These fees shall occur upon the signing of this contract and shall be paid upfront irrespectively if funding occurs. These fees may be deducted from the Purchase Price stated above or be paid directly by the merchant
5. **NSF Fee (Standard)**: $35.00 (each). Each returned payment without notice is a default.
6. **Bank Change Fee**: $50.00. When Merchant requires a change of Bank Account to be Debited, requiring us to adjust our system.
7. **Inaccessible Login Fee**: $50.00 per day. When Merchant changes bank account login during duration of the Merchant Agreement. If login will not be provided it will be considered a default.
8. **Wire Fee**: Each Merchant shall receive their funding electronically to their designated bank account and will be charged $50.00 for a Fed Wire or $0.00 for a bank ACH.
9. **Attorney's Fee:** AEF shall be entitled to its reasonable attorney's fees and costs in addition to any other relief, at law or equity, awarded by a court of competent jurisdiction if it prevails on any claim, causes of action and / or defense, including an appeal. AEF shall also be permitted to collect its reasonably attorney's fees if AEF refers this Agreement to legal counsel, pre-judgment, to collect any balance due resulting from a breach of this Agreement by Merchant or Guarantor.
10. **Default Fee**: $5,000.00 or up to 10% of the funded amount (if a merchant changes bank accounts or switches to another credit card processor without AEF's consent or commits another default pursuant to the Agreement) or bounces a debit without notification.
11. **Stacking**: Merchant shall not take any further financing from any other finance / factoring company while this agreement is in place. A violation of this section shall be a breach of this agreement and permit AEF to immediately be permitted to collect the remaining balance owned under this agreement.
12. **Risk Assessment Fee**: $249.00
13. **UCC Filing Fee**: $195.00
14. **UCC Termination Fee:** $100.00
15. **Management Fee**: Commencing at date funded (the "Start Date"), merchant shall pay a fee of $499.00 per month (the "Monthly Fee"), at a minimum of three months.

I have read and agree to the terms and constitutions set forth above.

$ 93,500.00

Total Agreed Net Funding

FOR MERCHANT (#1)

[redacted]

DocuSigned by:
D1E3D51DBD344F3...

BY (Print Name and Title) **Signature**

FOR MERCHANT (#2)

BY (Print Name and Title) **Signature**

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AUTHORIZATION FOR DIRECT DEPOSIT (ACH CREDIT) AND DIRECT PAYMENTS (ACH DEBITS)

Merchant Agreement between Alpha Equity Fund and Merchant, dated as of Sep. 25, 2024 .

CONSTANTINOU GROUP, INC.		
Merchant's Legal Name		
CONSTANTINOU GROUP	**83-9897756**	
D/B/A	**Federal ID Number**	
1827 EAST SPRING ST		
Physical Address		
LONG BEACH	**CA**	**90806**
City	**State**	**Zip Code**

Capitalized terms used in this Authorization Agreement without definition shall have the meanings set forth in the Merchant Agreement. By signing below, Merchant attests that the Designated Checking Account was established for business purposes and not primarily for personal, family or household purposes. This Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits), and Check Debit is part of (and incorporated by reference into) the Merchant Agreement. Merchant should keep a copy of this important legal document for Merchant's records.

DISBURSEMENT OF ADVANCE PROCEEDS

By signing below, Merchant authorizes Alpha Equity Fund, to disburse the Advance proceeds less the amount of any applicable fees upon Advance approval by initiating ACH credits to the Designated Checking Account, in the amounts and at the times specified in the Merchant Agreement. By signing below, Merchant also authorizes Alpha Equity Fund to collect amounts due from Merchant under the Merchant Agreement by initiating ACH debits to the Designated Checking Account, as follows:

4,736.11	25	MONDAY - FRIDAY
Daily Amount ($)... OR	**Percentage of Each Banking Deposit (%)**	**On the Following Days**
	25	
Weekly Amount ($)... OR	**Percentage of Each Banking Deposit (%)**	**On the Following Days**
500.00	25	25th
Monthly Fee Amount ($)... OR	**Percentage of Each Banking Deposit (%)**	**On the Following Days**

If any payment date falls on a weekend or holiday, I understand and agree that the payment may be executed on the next business day. If a payment is rejected by Merchant's financial institution for any reason, including without limitation insufficient funds, Merchant understands that Alpha Equity Fund, may, at its discretion, attempt to process the payment again as permitted under applicable ACH rules. Merchant also authorizes Alpha Equity Fund, to initiate ACH entries to correct any erroneous payment transaction.

MISCELLANEOUS

Alpha Equity Fund is not responsible for any fees charged by Merchant's bank as the result of credits or debits initiated under this Authorization Agreement. The origination of ACH debits and credits to the Designated Checking Account must comply with applicable provisions of state and federal law, and the rules and operating guidelines of NACHA (formerly known as the National Automated Clearing House Association). Merchant agrees to be bound by the ACH Rules as set forth by NACHA. This Authorization Agreement is to remain in full force and effect until Alpha Equity Fund, has received written notification from Merchant at the address set forth below at least five banking days prior of its termination to afford Alpha Equity Fund, a reasonable opportunity to act on it. The individual signing below on behalf of Merchant certifies that he / she is an authorized signer on the Designated Checking Account. Merchant will not dispute any ACH transaction initiated pursuant to this Authorization Agreement, provided the transaction corresponds to the terms of this Authorization Agreement. Merchant requests the financial institution that holds the Designated Checking Account to honor all ACH entries initiated in accordance with this Authorization Agreement.

[redacted]	[redacted]	[redacted]
Name of Bank	**ABA Transit / Routing Number**	**Checking Account Number**
[redacted]	[redacted]	[redacted]
Name of Bank	**ABA Transit / Routing Number**	**Checking Account Number**

FOR MERCHANT (#1)

[redacted]	[redacted]
Merchant (Merchant's Legal Name)	**Print Name**
DocuSigned by: [signature]	president
Signature	**Title**

FOR MERCHANT (#2)

Merchant (Merchant's Legal Name)	**Print Name**
Signature	**Title**

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BANK LOGIN AUTHORIZATION

Dear Merchant:

Thank you for accepting this offer from Alpha Equity Fund ("AEF"). We look forward to being your funding partner for as long as you need.

We will require viewing access s to your bank account, each business day, in order to verify the amount of your daily payment. Please be assured that we carefully safeguard your confidential information, and only essential personnel will have access to it.

We will also require viewing access to your bank account, prior to funding, as part of our underwriting process.

Please fill out the form below with the information necessary to access your account. (*Be sure to indicate capital or lower- case letters.)

FIRST BANK

[redacted]	na
Name of Bank	**Bank Portal Website**
na	na
User Name	**Password**
na	
Security Question / Answer 1	
na	
Security Question / Answer 2	
na	
Security Question / Answer 3	
na	
Any Other Information Necessary to Access Your Account	

SECOND BANK

na	na
Name of Bank	**Bank Portal Website**
na	na
User Name	**Password**
na	
Security Question / Answer 1	
na	
Security Question / Answer 2	
na	
Security Question / Answer 3	
na	
Any Other Information Necessary to Access Your Account	

AGREED AND ACKNOWLEDGED

OWNER (#1)

[redacted]	[redacted]
Print Name (Owner's Name)	**Merchant's Legal Name**
DocuSigned by: [redacted]	Sep. 25, 2024
Signature	**Date**

OWNER (#2)

Print Name (Owner's Name)	**Merchant's Legal Name**
	Sep. 25, 2024
Signature	**Date**

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EMERGENCY CONTACTS

To receive funding, providing four emergency contacts is required. Contacts will be verified.

na	na	na	na
Contact Name	**Relationship**	**Cellphone Number**	**Email Address**
na	na	na	na
Contact Name	**Relationship**	**Cellphone Number**	**Email Address**
na	na	na	na
Contact Name	**Relationship**	**Cellphone Number**	**Email Address**
na	na	na	na
Contact Name	**Relationship**	**Cellphone Number**	**Email Address**

ACCOUNTS RECEIVABLES CONTACTS

To receive funding, providing the four largest Account Receivables contact information is required. Contacts will be verified.

na	na	na	na
Business Name	**Contact Name**	**Contact Number**	**Email Address**
na	na	na	na
Business Name	**Contact Name**	**Contact Number**	**Email Address**
na	na	na	na
Business Name	**Contact Name**	**Contact Number**	**Email Address**
na	na	na	na
Business Name	**Contact Name**	**Contact Number**	**Email Address**

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ADDENDUM TO STANDARD MERCHANT CASH ADVANCE AGREEMENT FOR PAYMENT OF PURCHASE PRICE IN INSTALLMENTS

This is an Addendum dated Sep. 25, 2024 to the Standard Merchant Cash Advance Agreement ("Agreement") dated Sep. 25, 2024 between ALPHA EQUITY FUND LLC ("AEF") and CONSTANTINOU GROUP, INC. ("Merchant"). This Addendum incorporates the Agreement by reference. The terms of this Addendum will control to the extent they conflict with any of the terms in the Agreement.

43. Schedule of Payments. AEF will purchase Receivables from Merchant in installments instead of a single payment. The schedule below ("Payment Schedule") lists the date on or after which AEF will pay Merchant, the amount that will be paid in that installment, and the corresponding amount of Receivables purchased by the payment. Merchant has no right to repurchase Receivables from AEF. No payment by AEF hereunder is intended to be a repurchase of Receivables by Merchant, nor shall any such payment be construed as a repurchase of Receivables by Merchant.

Payment Schedule

Date	Payment Amount	Receivables Purchased
First Installment: Day 1	$55,000.00	$85,250.00
Day 19	$55,000.00	$170,500.00

44. Deduction of Fees. AEF may collect the fee listed in Section 1(A) of the Agreement in installments by deducting from each payment to Merchant in the Payment Schedule an amount equal to the total amount of the fee divided by the number of installments to be paid in the Payment Schedule. AEF may collect any fee due under Sections 1(B), (D), and (E) of the Agreement by deducting the amount due from any payment to Merchant in the Payment Schedule.

45. Cancellation of Scheduled Payments. AEF may elect not to make a payment to Merchant under the Payment Schedule if: (1) an Event of Default has occurred under the Agreement; (2) the Agreement has been terminated; or (3) Merchant admits in writing its inability to pay its debts, makes a general assignment for the benefit of creditors, institutes or has instituted against it any proceeding seeking to adjudicate Merchant bankrupt or insolvent, or seeks reorganization, arrangement, adjustment, or composition of itself or its debts.

46. Redefinitions of Terms. The term "Purchase Price" as it is used in the Agreement refers to the sum of all payments that have been made by AEF to Merchant under the Agreement. The term "Receivables Purchased Amount" as it is used in the Agreement refers to all Receivables that have been paid for by AEF under the Agreement.

47. Limitation on Termination. Even if AEF receives all Receivables for which it paid Merchant, the Agreement will not be considered to have terminated for payment of

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the full Receivables Purchased Amount as set forth in Section 3 of the Agreement unless AEF made all of the payments listed in the Payment Schedule and received all of the corresponding Receivables purchased by those payments.

48. Security Interest. If the security interest granted in Section 28 of the Agreement would not otherwise be required to be terminated, then it will not be terminated for payment of the full Receivables Purchased Amount if AEF has not yet made all of the payments listed in the Payment Schedule.

49. Headings. Headings of the various articles and/or sections of the Agreement and this Addendum are for convenience only and do not necessarily define, limit, describe, or construe the contents of such articles or sections.

FOR THE MERCHANT/OWNER (#1)

By: [redacted]

DocuSigned by:
D1E3D51DBD344F3...

(Print Name and Title) (Signature)

FOR THE MERCHANT/OWNER (#2)

By:

(Print Name and Title) (Signature)

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Addendum to Merchant Agreement between Alpha Equity Fund and Merchant, dated as of 09/25/2024.

CONSTANTINOU GROUP, INC.	CONSTANTINOU GROUP
Merchant's Legal Name	**D/B/A(s)**

This addendum incorporates the Agreement by reference. The terms of this Addendum will control to the extent they conflict with any of the terms in the Agreement.

ADDITIONAL SECURITY INTERESTS

Each entity and/or sole proprietor listed below ("Additional Security Interest Grantor") agrees to the following terms and conditions. All references herein to Additional Security Interest Grantor refer to each entity and/or sole proprietor both in the collective and the alternative.

In addition to the security interest granted by Merchant in the Agreement, each Additional Security Interest Grantor grants to AEF a security interest in collateral (the "Additional Collateral"), that is defined as collectively: (a) all accounts, including without limitation, all deposit accounts, accounts-receivable, and other receivables, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined by Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by that Additional Security Interest Grantor; and (b) all proceeds, as that term is defined by Article 9 of the UCC. Each Additional Security Interest Grantor acknowledges and agrees that any security interest granted to AEF under any other agreement between Merchant and AEF (the "Cross-Collateral") will secure the obligations hereunder and under this Addendum. Negative Pledge: Each Additional Security Interest Grantor agrees not to create, incur, assume, or permit to exist, directly or indirectly, any lien on or with respect to any of the Additional Collateral or the Cross-Collateral, as applicable.

Each Additional Security Interest Grantor agrees to execute any documents or take any action in connection with this Addendum as AEF deems necessary to perfect or maintain AEF's first priority security interest in the Additional Collateral and the Cross-Collateral, including the execution of any account control agreements. Each Additional Security Interest Grantor hereby authorizes AEF to file any financing statements deemed necessary by AEF to perfect or maintain AEF's security interest, which financing statements may contain notification that the Additional Security Interest Grantor has granted a negative pledge to AEF with respect to the Additional Collateral and the Cross-Collateral, and that any subsequent lienor may be tortiously interfering with AEF's rights. Each Additional Security Interest Grantor shall be liable for and AEF may charge and collect all costs and expenses, including but not limited to attorney fees, which may be incurred by AEF in protecting, preserving, and enforcing AEF's security interest and rights granted by that Additional Security Interest Grantor. Each Additional Security Interest Grantor further acknowledges that AEF may use another legal name and/or D/B/A or an agent when designating the Secured Party when AEF files the above-referenced financing statement(s).

This Addendum will be governed by and construed in accordance with the laws of the State of New York, without regard to any applicable principles of conflict of laws. Any litigation relating to this Addendum must be commenced and maintained in any court located in the Counties of Nassau, New York, Queens, or Kings in the State of New York (the "Acceptable Forums"), however any action or proceeding to enforce a judgment or arbitration award may also be commenced and maintained in any other court of competent jurisdiction. Each Additional Security Interest Grantor agrees that the Acceptable Forums are convenient, submits to the jurisdiction of the Acceptable Forums, and waives any and all objections to the jurisdiction or venue of the Acceptable Forums. If any litigation is initiated in any other venue or forum, each Additional Security Interest Grantor waives any right to oppose any motion or application made by any party to transfer such litigation to an Acceptable Forum. AEF and each Additional Security Interest Grantor agree to waive trial by jury in any dispute between them. In any litigation or arbitration commenced by AEF, each Additional Security Interest Grantor will not be permitted to interpose any counterclaim. Each Additional Security Interest Grantor agrees that any claim that is not asserted against AEF within 1 year of its accrual will be time barred. If AEF obtains the entry of a money judgment against any Additional Security Interest Grantor, then the judgment will accrue interest at a rate of 16% per annum, which rate will govern over the statutory rate of interest up until actual satisfaction of the judgment. AEF and each Additional Security Interest Grantor agree that they may bring claims against each other relating to this Addendum only in their individual capacities, and not as a plaintiff or class action member in any purported class or representative proceedings. Any action or dispute relating to this Addendum, including, but not limited to issues of arbitrability, will, at the option of any party to such action or dispute, be determined by arbitration to be administered by Arbitration Services, Inc. before a single arbitrator under its Commercial Arbitration Rules as are in effect at that time, which Rules are available at www.arbitrationservicesinc.com. Any arbitration relating to this Addendum must be conducted in the Counties of Nassau, New York, Queens, or Kings in the State of New York. Notwithstanding any provision of the Commercial Arbitration Rules, any witness in such an arbitration who does not reside in or have a place for the regular transaction of business located in New York City or the Counties of Nassau, Suffolk, or Westchester in the State of New York will be permitted to appear and testify remotely by telephone or video conferencing. The arbitration agreement contained in this Addendum may also be enforced by any employee, agent, attorney, member, manager, officer, subsidiary, affiliate entity, successor, or assignee of AEF. Each Additional Security Interest Grantor consents to service of process and legal notices made by First Class or Priority Mail delivered by the United States Postal Service and addressed to its corresponding Contact Address listed below or any other address(es) provided in writing to AEF by that Additional Security Interest Grantor, and unless applicable law or rules provide otherwise, any such service will be deemed complete 3 days after dispatch. Each Additional Security Interest Grantor agrees that it will be precluded from asserting that they did not receive service of process or any other notice mailed to its respective Contact Address if it does not furnish a certified mail return receipt signed by AEF demonstrating that AEF was provided with notice of a change in the Contact Address.

DS

Initial: 

Docusign Envelope ID: E66AD4F4-69D5-4C08-88CA-D57A564AFE0B

Legal Name of Entity	Business Address	Tax Identification Number
ULTRA BATHROOM AND KITCHEN, INC.	na	na
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number
Legal Name of Entity	Business Address	Tax Identification Number

FOR MERCHANT (#1)

[redacted] [redacted]

Merchant (Merchant's Legal Name) **Print Name**

DocuSigned by: president

D1E3D51DBD344F3...

Signature **Title**

FOR MERCHANT (#2)

Merchant (Merchant's Legal Name) **Print Name**

Signature **Title**

Customer Statement
As of 10/21/25

Customer	Image Locations Inc
Date of Advance	05/20/25
Advance Amount	$300,000.00
Total Amount	$417,000.00
Sold On	

Type	Description	Amount	Date
upfront	Processing Fee	$0.00	05/20/2025
upfront	Wire Fee	$95.00	05/20/2025
legal	Blocked Account Damages (zero'd out BK fees)	$0.00	09/10/2025

Date	Holdback Amount
05/28/25	$8,687.50
06/04/25	$8,687.50
06/11/25	$8,687.50
06/18/25	$8,687.50
06/25/25	$8,687.50
07/02/25	$8,687.50
07/09/25	$3,400.00
07/16/25	$3,400.00
07/23/25	$3,400.00
07/30/25	$3,400.00
08/06/25	$8,687.50
08/13/25	$5,000.00
08/20/25	$5,000.00
08/27/25	$5,000.00
09/03/25	$5,000.00
09/10/25	$0.00
Total Collected	$94,412.50
Balance Outstanding	$322,587.50
Due to Customer	$0.00

FORWARD FINANCING LLC

FUTURE RECEIPTS SALE AGREEMENT

Effective Date: May 19, 2025

This Future Receipts Sale Agreement ("Agreement") dated above, is made by and between Forward Financing LLC, a Delaware limited liability company (together with its successors and/or assigns, "Purchaser" or "Forward Financing"), and Customer and Principal(s) (as identified below).

CUSTOMER INFORMATION:

Customer Legal Name ("Customer"):	Image Locations Inc
DBA Name:	Image Locations
Physical Address:	9663 Santa Monica Blvd Ste 842, Beverly Hills, CA 90210
Type of Entity:	Corporation

PRINCIPAL(S) INFORMATION:

Name of Principal (1):	Paul Kim
Address:	34 Deerhill Dr, Rolling Hills, CA 90274

KEY TERMS:

Amount Sold: **The total dollar amount of Future Receipts being sold by Customer.**	**$417,000.00**
Purchase Price: The dollar amount Purchaser is paying to Customer for the Amount Sold.	$300,000.00
Origination Fee: The fee associated with processing and originating the transaction. This is deducted from the Purchase Price paid to Customer.	$0.00
Net Purchase Price: **The net Purchase Price after the Origination Fee is deducted from the Purchase Price paid to Customer.**	**$300,000.00**
Minus funds used to satisfy prior transaction entered with Forward Financing (if any)	$0.00
TOTAL AMOUNT TO BE DEPOSITED INTO CUSTOMER'S BANK ACCOUNT (minus $95 if Customer elects to receive funds by wire)	**$300,000.00**
Monthly Percentage: The percentage of Customer's Future Receipts that Purchaser may collect each month.	4%
Weekly Amount: The dollar amount of Future Receipts that Customer authorizes Purchaser to collect each week. Please refer to Section 1(b) (Adjustment of Weekly Amount) to learn how you can adjust the Weekly Amount.	$8,687.50

Through this Agreement, Customer is selling Future Receipts to Purchaser at a discount. "Future Receipts" as used in this Agreement means any payments received from customers and other third-party payors in exchange for Customer's goods or

Referring third party (unrelated to Forward Financing):
Wisco Capital

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services, including payments received in any form including but not limited to, cash, check, payment card and electronic transfers.

Accordingly, Customer hereby sells, assigns and transfers Future Receipts totaling the "Amount Sold" to Purchaser (making Purchaser the absolute owner), in exchange for the "Net Purchase Price." The Amount Sold shall be delivered to Purchaser through remittance of the "Monthly Percentage" of Customer's Future Receipts until such time as Purchaser receives the Amount Sold.

In order to simplify Customer's delivery to Purchaser of the Monthly Percentage of Customer's Future Receipts, Customer authorizes Purchaser to ACH debit the "Weekly Amount" every seven (7) days, beginning 7 days after the date the Purchase Price is paid, and continuing every 7 days thereafter, from the bank account (the "Approved Account") into which all of Customer's Future Receipts are deposited, until the earlier of (a) the date on which the full Amount Sold, and any other fees or amounts due under this Agreement, have been received by Purchaser; or (b) the date that is three years from the Effective Date of this Agreement. The parties agree that, based upon information provided by Customer, Purchaser's debiting of the Weekly Amount each week should result in Purchaser receiving an amount of Future Receipts each month that is approximately equal to the Monthly Percentage of Customer's Future Receipts.

The Approved Account is identified in the Authorization Agreement for Direct Deposits (ACH Credits) and Direct Payments (ACH Debits), attached hereto and incorporated herein by reference.

CUSTOMER ACKNOWLEDGES THAT:

- **It is selling a portion of its Future Receipts to Forward Financing at a discount, not borrowing money from Forward Financing. THIS PURCHASE OF FUTURE RECEIPTS IS NOT A LOAN. There is no interest rate associated with this transaction, and no time period during which the Amount Sold must be collected because the Weekly Amount is subject to adjustment based on the Future Receipts actually generated by Customer. Accordingly, there is no fixed term associated with this transaction.**
- **This financing may be more expensive than a traditional bank loan. Please review the financial figures listed on the preceding page under "KEY TERMS," and all other terms in this contract.**
- **The Weekly Amount is intended to equal the amount of Future Receipts that Purchaser may collect each week in order to collect the Monthly Percentage of Future Receipts each month. If Customer's revenues decline so that collection of the Weekly Amount will result in Purchaser collecting more than the Monthly Percentage of Customer's Future Receipts during a given month, *Customer has the right to an adjustment of the Weekly Amount pursuant to Paragraph 1(b)(2) below*.**
- **In the event Principal(s) cause(s) or through omission permit(s) Customer to (a) divert Future Receipts away from the Approved Account; (b) allow its account to incur four (4) insufficient funds bounces without providing Purchaser with bank information demonstrating lack of revenues; or (c) block its bank account from Purchaser's access for ACH debits, Principal(s) shall be liable for such actions, as more particularly set out in Paragraph 2 below.**
- **It is not a breach of this Agreement if Customer generates no further Future Receipts or generates Future Receipts less quickly than projected at the time this Agreement is executed, provided that Customer has not breached any other provision of this Agreement.**
- **Forward Financing is entering into this Agreement knowing the risks that Customer's business may slow down or ultimately fail, and assumes these risks based on Customer's representations, warranties and**

Initial here on behalf of Customer X CPK

covenants in this Agreement, which are intended to provide Forward Financing with a reasonable and fair opportunity to receive the benefit of its bargain.

This Agreement is by and between Forward Financing and Customer/Principal(s). Any broker or independent sales organization that acted as an intermediary between Forward Financing and Customer/Principal(s) is in no way authorized to act as an agent of Forward Financing, or bind Forward Financing in any way. *CUSTOMER AND EACH PRINCIPAL ACKNOWLEDGES AND AGREES THAT IT IS NOT ENTERING THIS TRANSACTION BASED ON ANY REPRESENTATIONS OR STATEMENTS MADE BY ANY BROKER, INDEPENDENT SALES ORGANIZATION, INTERMEDIARY OR OTHER PERSON* (INCLUDING BUT NOT LIMITED TO ANY THIRD PARTY LISTED AS "REFERRING THIRD PARTY" IN THE LOWER LEFT CORNER OF PAGE 1 OF THIS CONTRACT), AND THAT IT IS RELYING SOLELY ON THE TERMS SET FORTH IN THIS AGREEMENT IN DECIDING TO ENTER INTO THIS TRANSACTION.

Customer represents and warrants that it is not prohibited from entering this transaction by any other agreement to which Customer or any Principal is a party, including but not limited to any other sale of future receipts agreement, any loan agreement, any organizational documents or otherwise. If Customer or any Principal is found to be in breach of this representation and warranty, the indemnification provisions set forth in Paragraph 9 below shall apply.

This Future Receipts Sale Agreement is further governed by the following "Terms & Conditions":

TERMS & CONDITIONS

1. Collection of Weekly Amount, Monthly Reconciliation and Adjustment of Weekly Amount.

(a) Collection of Weekly Amount. Customer authorizes Purchaser to collect from the Approved Account the Weekly Amount each week, beginning 7 days after the Purchase Price is paid, and continuing 7 days thereafter,) until the earlier of: (a) the date on which the full Amount Sold, and any other fees or amounts due under this Agreement, have been received by Purchaser; or (b) the date that is three years from the Effective Date of this Agreement. Customer agrees to complete all necessary forms to establish and maintain the Approved Account and agrees to deposit or cause to be deposited all funds arising from Future Receipts into the Approved Account. Customer agrees not to deposit any funds into the Approved Account other than funds arising from Future Receipts.

(b) Reconciliations.

(1) Return of Overages. Customer agrees that, as of the Effective Date of this Agreement, the Weekly Amount represents the parties' best estimate of the amount of Future Receipts that Purchaser may collect each week in order to collect the Monthly Percentage of Future Receipts each month. If the Weekly Amounts collected by or delivered to Purchaser during any given calendar month exceeded the Monthly Percentage of Future Receipts actually generated during that calendar month ("Overage") Customer has the right to receive a return of such Overage. To receive a return of an Overage, Customer may send a request for a return of an Overage to reconciliation@forwardfinancing.com (the "Designated Email") and include either (a) confirmation that read-only access to the Approved Account exists for Purchaser, or (b) complete bank statements for the calendar month at issue. This notice must be sent by the 90th day following the end of the relevant month. If Customer provides a timely Reconciliation Notice to Purchaser at the Designated Email, then Purchaser shall reconcile Customer's account by crediting the Overage due back to the Approved Account via ACH transaction ("Monthly Reconciliation") within ten (10) Business Days of receiving the Reconciliation Notice.

(2) Adjustment of Weekly Amount. If at any time Customer's actual Future Receipts have decreased such that Purchaser will be receiving an amount of Future Receipts that varies from the Monthly Percentage of Customer's Future Receipts, then Customer has the right to an adjustment of the Weekly Amount ("Adjusted Weekly Amount") by sending to the Designated Email (reconciliation@forwardfinancing.com) a request for an Adjusted Weekly Amount, along with bank statements evidencing all customer receipts for the prior thirty (30) days. Upon receiving such information, Purchaser shall calculate the Adjusted Weekly Amount by multiplying the Future Receipts actually generated during the prior thirty (30) days by the Monthly Percentage, and then dividing that product by 20, which represents the average number of Business Days in a month, and multiplied by five (5), which represents the number of Business Days in a week. Customer shall be entitled to remit the Adjusted Weekly Amount for a period of fourteen (14) days, and continue remitting the Adjusted Weekly Amount for as long as it continues to provide bank statements warranting the adjustment every fourteen (14) days thereafter. If at the end of any fourteen (14) day period, the Customer has not provided updated bank statements demonstrating a continued adjustment is warranted, the Weekly Amount will revert back to the amount stated under the "KEY TERMS" section of this Agreement.

(c) Conversion of Daily Payments. In the event Customer misses two (2) consecutive weekly payments, Forward shall, on the next Business Day following the second missed payment,

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convert the payment schedule from weekly to daily payments. The amount of each daily payment shall be calculated by dividing the weekly payment amount into five (5) equal payments. Daily payments will be drawn from the Approved Account on each Business Day.

2. Principal(s)'s Guarantee of Performance and Liability For Breach of Representation, Warranty or Covenant. Each Principal signing this Agreement agrees that it shall not undertake any action or through omission permit Customer to divert its revenues or intentionally deprive Purchaser of the value of assets purchased. Accordingly, each Principal irrevocably and unconditionally guarantees to Purchaser prompt and complete performance of the following Customer obligations:

(a) not to deposit customer receipts anywhere other than the Approved Account (per Paragraphs 6(v) below);

(b) not to block Purchaser's access to the Approved Account (per Paragraph 6(vi) below);

(c) to provide Purchaser with bank or other financial statements demonstrating a decrease in revenues in the event there are four (4) or more consecutive Returned ACH Events, as described in Paragraphs 5(c) and 6(vii) below;

(d) to provide truthful, accurate, timely and complete information as required by this Agreement; and

(e) to comply with all Customer obligations related to any sale of the business, as outlined in paragraph 6(x).

In the event a breach of any of the above listed obligations occurs, Principal(s) assume(s) and jointly and severally guarantee(s) the full, complete and timely performance of Customer's obligations hereunder. **The parties agree that, provided that Customer has not violated any of the representations, warranties or covenants in this Agreement, it shall not constitute a breach of this Agreement if Customer generates no further Future Receipts and therefore has no funds to remit the Amount Sold.**

3. Authorization to File UCC Financing Statements. The sale of Future Receipts by Customer to Purchaser pursuant to this Agreement are "accounts," "general intangibles" or "payment intangibles" as those terms are defined in the Uniform Commercial Code ("UCC"), and such a sale constitutes a true and complete sale, conveying good title to the Future Receipts, from Customer to Purchaser. To the extent the Future Receipts are "accounts" or "payment intangibles" then (i) the sale of the Future Receipts creates a security interest as defined in the UCC, (ii) this Agreement constitutes a "security agreement" under the UCC and (iii) Purchaser has all the rights of a secured party under the UCC with respect to such Future Receipts. Customer authorizes Purchaser to file a financing statement pursuant to the UCC to evidence such a sale. The UCC financing statement may state that the sale of the Future Receipts is intended to be a sale and not an assignment for security. Customer and each Principal agree to execute any documents or take any action in connection with this Agreement that Purchaser deems necessary to perfect or maintain Purchaser's interest in the Future Receipts purchased pursuant to this Agreement. Customer further agrees that Purchaser may notify account debtors or other persons obligated on the Future Receipts, of Customer's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Purchaser.

4. Right to Cancel. Customer may cancel this transaction at any time prior to midnight of the second Business Day after Purchaser forwards the Net Purchase Price to Customer ("Cancellation Deadline"). To cancel the transaction, Customer must return the full Purchase Price to Purchaser by the Cancellation Deadline. Upon the Purchase Price being returned, all Parties to this Agreement shall be deemed to have released each other from any claims or liabilities related to this Agreement.

5. Fees and Damages.

(a) Origination Fee. Customer agrees to pay Purchaser the Origination Fee listed under the "KEY TERMS" section of this Agreement. Purchaser will deduct the amount of the Origination Fee from the Purchase Price that is to be paid to Customer.

(b) Bank Wire Fee. Customer may request to receive payment of the Net Purchase Price by wire transfer. Purchaser has sole discretion in determining whether it will agree to such a request. In the event Purchaser pays the Purchase Price by wire transfer, Customer agrees to pay Purchaser a $95 fee, which includes the administrative, technological and banking costs for paying by wire transfer. Purchaser will deduct this fee from the Purchase Price that is to be paid to Customer.

(c) Returned ACH Fee. Customer agrees to pay Purchaser promptly upon demand a fee of $35 (a "Returned ACH Fee") if an electronic debit is returned unpaid or cannot be processed, or if a check, draft or similar instrument issued by Customer or anyone on its behalf is not honored or cannot be processed. At Purchaser's option, Purchaser will assess this fee any time a debit is not honored or paid, even if it is later honored or paid following resubmission. Customer and any individual that signs this Agreement authorize Purchaser to resubmit returned debits in its discretion. Any check, draft or similar instrument may be collected electronically if returned for insufficient or uncollected funds. Customer will be in breach of the covenant set forth in Paragraph 6(vii) of this Agreement if it accumulates four (4) consecutive Returned ACH Fees during the course of the Agreement, and does not provide Purchaser with bank statements demonstrating decreased revenues within five (5) calendar days of the first Returned ACH Fee. **It is expressly agreed that if Customer is not generating sufficient Future Receipts to satisfy the Weekly Amount, Customer has the obligation to request a reconciliation of the Weekly Amount, as provided for in Paragraph 1(b)(2) above, rather than incur Returned ACH Fees.**

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(d) Blocked Account Damages. If Customer puts a block on the Approved Account or takes any such action that would prevent Purchaser from debiting the Approved Account as permitted by this Agreement, which action will constitute Customer's breach of the covenant set forth in Paragraph 6(vi) below, Customer agrees to pay Purchaser a fee of $2,500, plus all other damages permissible under this Agreement. The parties agree that this fee is a good faith estimate of the costs incurred by Purchaser caused by such a breach of the Agreement, including the increased resources required to be expended by Purchaser to respond to the breach, the increased cost of funds to Purchaser caused by the failure to receive expected funds, the risk to Purchaser's ability to request ACH debits through the NACHA system caused by initiating rejected ACHs and other damages and expenses caused by the breach.

6. Customer's Representations, Warranties and Covenants. Customer represents, warrants and covenants that as of the Effective Date, and during the course of this Agreement:

(i) The Future Receipts are freely assignable to Purchaser and are not subject to any claims, charges, liens, restrictions, encumbrances or security interests of any nature whatsoever, except as disclosed to Purchaser in writing prior to the Effective Date of this Agreement;

(ii) Customer has disclosed all active financial obligations in which it has sold, collateralized, or encumbered its Future Receipts;

(iii) In the event that by entering this Agreement, Customer or any Principal will be in breach of the terms of any other agreement to which either is subject (including but not limited to any other financing agreements, organizational documents, etc.), Customer agrees to remedy such breach within 24 hours of receiving funding under this Agreement;

(iv) Customer is in compliance with all laws applicable to Customer's business and has all permits, licenses, approvals, consents and authorizations necessary to conduct its business and will promptly pay all necessary taxes, including but not limited to employment, sales and use taxes;

(v) Customer will deposit all funds arising from Future Receipts into the Approved Account;

(vi) Customer will not block Purchaser from, and will provide Purchaser with full access to, the Approved Account, as described in Paragraphs 5(d) and 8 herein;

(vii) Because it is Customer's responsibility to alert Purchaser if it is generating Future Receipts insufficient to pay the Weekly Amount, in the event that the Approved Account accumulates four (4) consecutive Returned ACH Events, Customer will provide Purchaser with bank statements demonstrating a decrease in revenues within five (5) calendar days of the first Returned ACH Event (as defined in Paragraph 5(c) above);

(viii) Customer will provide Purchaser legible, complete and unredacted copies of all bank statements from Customer's banks, financial information regarding Future Receipts from credit card processors and other Receivables Recipients (as that term is defined in Paragraph 12 below) within five (5) calendar days of a request by Purchaser;

(ix) Customer will permit Purchaser to conduct a site inspection of Customer's business, including an inspection of Customer's credit card terminals, at any reasonable time during the course of this Agreement with or without notice to Customer;

(x) Because Purchaser has entered into this Agreement based on the current operations of Customer, Customer will not undertake any transaction involving the sale of Customer, either by an issuance, sale or voluntary transfer of ownership interests in Customer that results in a change in ownership or voting control of Customer, or by a sale or transfer of substantially all of the assets of Customer, without 1) prior written notice to Purchaser and 2) obtaining the new majority owner(s)'s signed agreement to perform the obligations of Principal(s) and otherwise abide by all terms of this Agreement;

(xi) All information provided by Customer to Purchaser in this Agreement, Customer's funding application, Customer's interview with Purchaser or otherwise and all of Customer's financial statements and other financial documents provided to Purchaser, are true, correct, complete and accurately reflect Customer's financial condition and results of operations at the time such information and materials were provided to Purchaser;

(xii) As of the Effective Date of this Agreement, Customer is not contemplating the filing of a bankruptcy proceeding, closing Customer's business, winding down Customer's business operations, or selling Customer's business and has no reason to believe that a bankruptcy petition or other proceeding will be filed or brought against it;

(xiii) Customer will use the Purchase Price solely for legal business purposes and will not use the Purchase Price for personal, family or household purposes;

(xiv) Customer and Principal(s) have full power and authority to enter into and perform the obligations under this Agreement; and

(xv) Customer and Principal(s) have not committed, and will not commit, fraud in connection with the negotiation or execution of, or performance under, this Agreement.

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The violation by Customer of any of the representations, warranties and covenants in this Paragraph 6 will constitute a breach of the Agreement by the Customer, *provided that* if Customer breaches subparagraph 6(vi) (blocked accounts) due to a decrease in receivables, then customer shall have five (5) days to cure such breach by contacting Purchaser and further complying with the provisions of Paragraph 1(b)(2).

7. Telephone Monitoring, Recording and Contacts.

(a) Customer and each Principal consents by electronic signature and expressly authorizes Purchaser, its affiliates, agents and independent contractors to contact Customer or any Principal by telephone using any kind of telecommunications or telephony technology, including but not limited to telephone, cellular telephone, automatic telephone dialing system, automated or automatic dialer, artificial intelligence (AI) system, artificial or prerecorded voice systems, or text messaging system, for informational, transactional, debt collection, marketing, sales or any other purposes. Customer and each Principal understand and agree that their express consent and authorization to such telephonic communications are not required to purchase products or services from Purchaser, its affiliates, agents or independent contractors. Customer and each Principal further expressly consent and agree that any of these telephonic communications may be monitored or recorded for any purposes. Customer and each Principal agree that their express consent and authorization to telephonic communications from Purchaser, its affiliates, agents and independent contractors extends to all telephone numbers (including wireless, landline and voice over IP numbers) that Customer or any Principal provides to Purchaser, from which Customer or any Principal calls Purchaser, or at which Purchaser believes it can reach Customer or any Principal. Customer and each Principal agree that anyone with access to its telephone or email account(s) may listen to or read the messages that Purchaser leaves or sends to Customer or any Principal. Customer and each Principal agrees that Purchaser will not be liable for anyone accessing those messages, or for any charges that Customer incurs in connection with those messages.

(b) Customer and each Principal agrees to provide immediate Notice to Purchaser if Customer or any Principal changes telephone numbers or is no longer the subscriber or usual user of a telephone number that Customer or any Principal provides to Purchaser. To stop Purchaser's marketing text messages, Customer may reply "STOP" to the text message; to stop Purchaser's marketing emails, Customer must follow the opt-out instructions provided at the bottom of such emails.

8. Bank Account Access.

(a) If requested by Purchaser, Customer agrees to provide Purchaser with read only streaming access to the Approved Account, via a secure third party banking link, including by providing all necessary passwords and online log-in information.

(b) Customer and each Principal authorize Purchaser to indefinitely store the read only data contained in any streaming bank account to which Customer provides Purchaser access, to utilize this data for any purpose described in this Agreement, to market, and to determining Customer's eligibility to enter into any future agreement with Purchaser.

(c) Customer may disconnect read only access at any time after its payment obligation to Purchaser has been satisfied. The obligation to disconnect read only access is exclusively on the Customer.

9. Indemnification For Claims Brought By Third Parties. Customer and each Principal represents and warrant that the Amount Sold is freely assignable by Customer and that this Agreement does not violate the terms of any other agreement to which Customer or any Principal is subject (including but not limited to any other sale of future receipts agreement or any loans). It is expressly agreed that Customer and each Principal, jointly and severally, shall assume liability for and do hereby agree to indemnify and hold harmless Purchaser and its agents, affiliates and representatives, from and against any and all losses, damages, claims, penalties, liabilities and expenses (including reasonable attorneys' fees and in-house attorneys' fees) of any nature whatsoever imposed on, incurred by or asserted against Purchaser or its agents, affiliates and representatives, in any way relating to or growing out of any claim by any third party that this Agreement violates the terms of any other agreement to which Customer or any Principal is subject.

10. Mandatory Arbitration of Disputes / Waivers.

(a) All disputes and claims that any party may have, now or in the future, of any kind or nature whatsoever with or against any other party or its affiliates arising out of or relating to this Agreement, shall be settled by arbitration administered by either the American Arbitration Association ("AAA") in accordance with its Commercial Arbitration Rules, or Resolute Systems, LLC in accordance with its Financial Dispute Arbitration Rules. In any arbitration matter brought before the AAA, regardless of claim amount, interest, and/or arbitration fees and costs, the Expedited Procedures of the Commercial Arbitration Rules shall apply. In any arbitration matter brought before Resolute Systems, LLC, exclusive of claim amount, interest, and/or arbitration fees and costs, the Document Submission only Procedures of the Financial Dispute Arbitration Rules shall apply.

Judgment on the award rendered by the arbitrator will be final and binding, and may be entered in any court having jurisdiction thereof. A party may demand arbitration any time after the dispute or claim in question has arisen even if a lawsuit has been filed. The Parties agree to accept service of the demand in the manner prescribed in Paragraph 18. This Paragraph 10 is a material inducement for Purchaser to enter into this Agreement.

(b) Except as prohibited by law, the arbitration proceedings shall be conducted in confidence, and all documents, written testimony and records therein shall be received, heard and maintained by the arbitrator in confidence, available for inspection only by the parties, their respective attorneys and experts, who shall agree,

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in advance and in writing, to maintain the confidentiality of such information. The parties shall be allowed adequate discovery as part of the arbitration process, meaning reasonable access to essential documents as determined by agreement or the arbitrator. Parties may choose to present written testimony to support their positions through the submission of written affidavits, in accordance with the documents-based resolution format.

(c) All arbitration matters shall be conducted by and decided on document submissions by the parties. All necessary hearings associated with arbitration matters shall be conducted telephonically, with video conferencing used only if necessary. The arbitrator shall issue a "standard" form of award, which shall state only the relief to which the parties are or are not entitled. Except as otherwise specified herein, the arbitrator shall have the authority to award equitable relief, damages, costs and fees to the extent permitted by law, including but not limited to, any remedy or relief that a governing court might order; provided, however, that the arbitrator may not award any declaratory, injunctive or other relief for the benefit of the general public or any third party. If a court decides that applicable law precludes enforcement of the foregoing limitations as to a claim for injunctive relief, then after all appeals from that decision have been exhausted, that claim (and only that claim) must be severed from the arbitration and may be brought in court after the arbitration of the remaining claims has been concluded.

(d) The parties agree that this Agreement, any arbitration under this Agreement and any arbitration award rendered in such arbitration shall be governed by the Federal Arbitration Act and the applicable laws of the Commonwealth of Massachusetts. The parties further agree that the arbitrator shall determine all issues and disputes including those related to arbitrability, including but not limited to the meaning, construction, validity, scope and/or enforceability of this Paragraph 10.

(e) Class Action Waiver. EACH PARTY AGREES THAT ANY CLAIMS MUST BE BROUGHT ON AN INDIVIDUAL BASIS; CLASS ACTIONS ARE NOT PERMITTED. NO PARTY MAY BRING AN ACTION IN A CLASS OR REPRESENTATIVE MATTER, REGARDLESS OF WHETHER SUCH CLAIM IS BROUGHT AS LITIGATION OR ARBITRATION. EACH PARTY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ITS RIGHT TO PARTICIPATE IN A CLASS ACTION, PRIVATE ATTORNEY GENERAL ACTION, CLASS ARBITRATION OR OTHER REPRESENTATIVE ACTION IN ANY MATTER BROUGHT AGAINST ANY OTHER PARTY. FURTHER, THE PARTIES AGREE THAT IN ANY ARBITRATION MATTER, THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS FOR MORE THAN ONE PARTY'S CLAIMS, EXCEPT FOR CLAIMS BY OR AGAINST CUSTOMER AND/OR RELATED PRINCIPAL(S).

(f) Severability of Arbitration Provision. If any portion of this Paragraph 10 is deemed invalid or unenforceable, the remaining portions shall nevertheless remain in force. However, if a determination is made with respect to any claim that the class action waiver in Paragraph 10(e) (the "Class Action Waiver") is unenforceable, only this Section (f) of Paragraph 10 will remain in force with respect to that claim and the remaining provisions of this Paragraph 10 shall be null and void, provided that the determination concerning the Class Action Waiver shall be subject to appeal.

11. Jury Trial Waiver. UNLESS PROHIBITED BY LAW, THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY, WITHOUT DURESS AND AFTER DISCUSSING OR HAVING THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH THEIR ATTORNEYS, WAIVE THE RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY CONTROVERSY, DISPUTE OR CLAIM, INCLUDING ALL CLAIMS SOUNDING IN CONTRACT OR TORT, ARISING FROM OR RELATING TO THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREIN. THIS WAIVER OF TRIAL BY JURY PROVISION IS A MATERIAL INDUCEMENT FOR PURCHASER TO ENTER INTO THIS AGREEMENT.

12. Financial Condition and History.

(a) Customer and Principal(s) authorize Purchaser and its agents to investigate their financial condition and history and authorize each of Customer's card processors and other recipients of Customer's Receivables ("Receivables Recipients"), as well as any of Customer's customers, to provide Purchaser with Customer's payment card, check processing and customer payment activity statements and any other reasonably requested information on Customer upon Purchaser's request. Customer and each Principal authorize Purchaser to obtain a consumer or business credit report and a background report on Customer and each Principal that signs this Agreement at any time during the term of this Agreement, for as long as Customer or Principal(s) continue to have any payment obligation to Purchaser, and for up to three (3) years after Customer fully completes all of its payment obligations under this Agreement, for purposes of Purchaser's determining Customer's eligibility to enter into any future agreement with Purchaser. Customer will provide to Purchaser within five (5) days of a request by Purchaser any reasonably requested documents relating to Customer's financial condition and history including but not limited to, Customer's bank statements, financial statements, tax returns and credit card and check processing activity statements. Such documents shall be legible, complete and unredacted. A photocopy of this authorization will be deemed acceptable for release of financial information.

(b) Customer agrees that Purchaser may share information regarding the Amount Sold and/or payments made or owed by Customer to Purchaser in accordance with this Agreement with: (i) any broker or other third party that introduced Customer to Purchaser and any of Customer's existing funders or creditors; (ii) any attorney, accountant, financial advisor or employee for the purpose of advising Purchaser; and (iii) any credit reporting entities for the purpose of reporting Customer's performance under this Agreement.

(c) Customer may revoke this authorization at any time after its payment obligation to Purchaser has been satisfied by emailing notices@forwardfinancing.com.

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13. Indemnification of Card Processors, Other Receivables Recipients and Customers. Customer and each Principal agree to jointly and severally indemnify and hold harmless each of Customer's card processors and other Receivables Recipients, and each of their respective officers, directors and shareholders against all losses, damages, claims, liabilities and expenses (including reasonable attorneys' fees and in-house attorneys' fees) incurred by Customer's card processor or other Receivables Recipient resulting from (i) claims asserted by Purchaser for monies owed to Purchaser as a result of Customer's breach of this Agreement and (ii) actions taken by Customer's card processor or other Receivables Recipient in reliance upon information or instructions provided by Purchaser. Customer agrees to promptly, but in no event more than three (3) Business Days from Customer's receipt of such request from Purchaser and/or credit card processor or other Receivables Recipient, execute any authorizations or other documents that a credit card processor, other Receivables Recipient or customer may require in order to release funds directly to Purchaser.

14. Reliance on Terms. Paragraphs 12 and 13 of this Agreement are agreed to for the benefit of Customer, Purchaser and each of Customer's card processors and other Receivables Recipients, and notwithstanding the fact that each of Customer's card processors, other Receivables Recipients and customers is not a party to this Agreement, each of Customer's card processors, other Receivables Recipients and customers may rely upon their terms and raise them as a defense in any action.

15. Closing of Customer's Business. Provided that Customer has not violated any of the representations, warranties and covenants in this Agreement, upon written Notice to Purchaser by Customer, and provision of such reasonable proof as requested by Purchaser, that the Customer has closed its business and is no longer generating Future Receipts, Purchaser agrees that it shall have no further right to collect Weekly Amounts or Adjusted Weekly Amounts.

16. Remedies. In the event Customer breaches or violates any provision of this Agreement, including but not limited to the representations, warranties and covenants made in Paragraph 6 above: (i) Purchaser shall be entitled to all remedies available under the law; and (ii) in any action for damages, Purchaser shall be entitled to the "Uncollected Future Receipts" (defined as Amount Sold less the amount of Future Receipts received by Purchaser) plus any fees due to it under this Agreement. **Because the transaction evidenced by this Agreement is not a loan, if Customer closes its business and has not violated any of the representations, warranties and covenants in this Agreement, there shall be no default or breach of this Agreement, as long as Customer has submitted an amount equal to the Monthly Percentage of Future Receipts through the date of business closure.**

17. Indemnification of Purchaser for Breach; Attorneys' Fees and Costs. Customer and Principal(s) shall jointly and severally indemnify and hold harmless Purchaser and its agents from and against any and all liabilities, claims, obligations, damages, penalties, actions and suits of whatsoever nature incurred by Purchaser or its agents, in any way relating to or arising out of this Agreement, but specifically any claim that Customer or any Principal has breached this Agreement, including, without limitation, and to the extent not prohibited by applicable law, the payment of all costs and expenses of every kind for the enforcement of Purchaser's rights and remedies hereunder and/or the collection of amounts due to Purchaser hereunder, including but not limited to reasonable attorneys' fees, in-house attorneys' fees, arbitration and court costs and collection agency costs (collectively, "Indemnified Amounts").

18. Limitation of Liability**.** Except where prohibited by law, Purchaser will not be liable to Customer or Principal(s) under any legal theory for lost profits, revenue, goodwill or business opportunities, or any punitive, indirect or consequential damages, based in tort, contract, negligence or otherwise, all of which are waived by Customer and Principal(s). In the event these claims are nonetheless raised, Customer or Principal(s) will be liable for all of Purchaser's legal fees and expenses resulting therefrom. With respect to any claims Customer or Principal(s) may have against Purchaser, Customer's sole remedy will be actual money damages that shall not exceed the amount of any funds delivered to Purchaser.

19. Prior Claims Waiver. Unless prohibited by law, upon the Effective Date, the Customer and Principal(s) hereby irrevocably waive and release Purchaser and any of its affiliates, employees, and representatives from any and all claims, demands, causes of action, and liabilities of any nature, whether known or unknown, arising out of or in connection with any previous agreement entered into between Purchaser and Customer or Principal(s) prior to the Effective Date of this Agreement. This waiver shall not affect any rights or obligations arising from or related to this Agreement or any claims that arise after the Effective Date of this Agreement.

20. Notices. Except as otherwise provided herein, each Party giving any notice or other communication ("Notice") pursuant to this Agreement shall do so by email. Notice to Customer and Principal(s) shall be sent to their email addresses as shown on the front page of this contract, and notice to Purchaser shall be sent to notices@forwardfinancing.com. If an email bounces or otherwise cannot be delivered, then notice shall be sent to the physical mailing address listed on the front page of this Agreement. Any party changing its email or physical address shall provide Notice to all other parties. If an addressee rejects or otherwise refuses to accept a Notice, or if the Notice cannot be delivered by both email and physical mail because of a change in address for which no Notice was given, then such Notice shall be deemed to have been received upon the rejection, refusal or inability to deliver.

21. Assignment. Customer and Principal(s) shall not assign their rights or obligations under this Agreement or any interest in this

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Agreement without the prior written consent of Purchaser, which consent may be withheld in Purchaser's sole discretion. Purchaser reserves the right to assign this Agreement or any interest under this Agreement without prior notice to Customer or Principal(s).

22. Non-waiver. Purchaser's failure to exercise, or delay in exercising, any right under this Agreement, will not constitute a waiver of any such right.

23. Definitions and Interpretation. "Customer" shall be interpreted to include Customer and each Principal unless such interpretation would be redundant or inapplicable. All paragraph and section headings in this Agreement are inserted for convenience only and are not intended to affect the interpretation of the Agreement.

24. Construction. No provision of this Agreement shall be construed or enforced against any party hereto because such party drafted or caused to be drafted such provision; all provisions shall be construed as if they had been drafted by all parties hereto.

25. Consent to Publication. By signing this Agreement, Customer and Principal(s) agree that Purchaser may republish any reviews, testimonials or other statements that Customer or Principal(s) makes publicly regarding Purchaser.

26. Use of Information. Customer and Principal(s) agree that any information it provides to Purchaser, including but not limited to personally identifiable information, may be used or disclosed for business purposes by Purchaser in its discretion, without the need for prior consent, unless otherwise prohibited by law.

27. Miscellaneous. This Agreement shall be binding upon Customer and Principal(s) and inure to the benefit of Purchaser, its successors and assigns. This Agreement constitutes the entire Agreement between the parties, and no representations, agreements or understandings of any kind, either written or oral, shall be binding upon the parties unless expressly contained herein. The parties may modify any of the terms of this Agreement or amend this Agreement only by a written document signed by all parties. If any of the provisions of this Agreement are determined to be invalid, illegal or unenforceable in any respect, the remaining provisions shall not be affected in any manner. The parties agree to execute such further and additional documents, instruments and writings as may be necessary for the purpose of fully effectuating the terms and provisions of this Agreement. Electronic signatures hereto shall be deemed acceptable for all purposes. Paragraphs 2, 7, 9-12, 16-18, 20, and 23-25 shall survive any termination, satisfaction or cancellation of this Agreement.

28. Severability. Except as provided otherwise in Paragraph 10, if any provision of this Agreement is deemed to be void or unenforceable by a court of competent jurisdiction or any governmental agency, that provision will continue to be enforceable to the extent permitted by that court or agency, and the remainder of that provision will no longer be considered as part of this Agreement. All other provisions of this Agreement will, however, remain in full force and effect.

29. Privacy. Purchaser's privacy policy can be found at: https://www.forwardfinancing.com/privacy-policy/. Purchaser's privacy policy for California residents can be found at: https://www.forwardfinancing.com/privacy-policy/#californiaprivacypolicy/.

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EACH PARTY ACKNOWLEDGES THAT THEY HAVE READ, UNDERSTAND AND AGREE TO THE TERMS OF THIS "FUTURE RECEIPTS SALE AGREEMENT" AND UPON EXECUTION OF THE AGREEMENT SHALL BE OBLIGATED TO ALL OF THE FOREGOING TERMS AND CONDITIONS—INCLUDING THE JURY TRIAL WAIVER AND CLASS ACTION WAIVER—AND THE AUTHORIZATION AGREEMENT FOR DIRECT DEPOSITS (ACH CREDITS) AND DIRECT PAYMENTS (ACH DEBITS) AND ANY OTHER EXHIBITS, ADDENDA OR SCHEDULES THAT MAY BE ADDED OR ATTACHED HERETO. The person executing this Agreement on behalf of Customer warrants and represents that he/she is authorized to bind Customer to all of the terms and conditions set forth in this Agreement and that all of the information provided herein is true and accurate in all respects. Purchaser's payment of the Purchase Price shall be deemed Purchaser's acceptance of this Agreement, notwithstanding any failure by Purchaser to sign this Agreement.

ANY MISREPRESENTATION MADE BY CUSTOMER OR ANY PRINCIPAL IN CONNECTION WITH THIS AGREEMENT MAY CONSTITUTE FRAUD OR INTENTIONAL MISREPRESENTATION.

Forward Financing LLC

Signature: 

Name: Sara Sudbay

Title: Director, Sales

Date: May 19, 2025

Customer (Business)

Signature X 

Name: Paul Kim

Title: Owner

Date: May 19, 2025

Principal 1 (individually)

Signature X 

Name: Paul Kim

Date: May 19, 2025

FORWARD FINANCING LLC

AUTHORIZATION AGREEMENT FOR
DIRECT DEPOSITS (ACH CREDITS) AND
DIRECT PAYMENTS (ACH DEBITS)

This Authorization Agreement for Direct Deposits (ACH Credits) and Direct Payments (ACH Debits) (the "Authorization") is part of (and incorporated by reference into) the Future Receipts Sale Agreement (the "Agreement").

All capitalized terms used in this Authorization shall have the same meaning assigned to such terms in the Agreement unless otherwise noted herein.

DISBURSEMENT OF PURCHASE PRICE AND OTHER AMOUNTS OWED TO CUSTOMER. By signing below, Customer authorizes Purchaser to disburse, by initiating an Automated Clearing House ("ACH") credit to the checking account(s) identified below or any other deposit account that Customer specifies as belonging to it (hereinafter referred to as the "Approved Account"), (i) the Purchase Price set forth in the Agreement less the amount of any applicable fees; and (ii) any Monthly Reconciliation and other amounts that Customer may become entitled to under the Agreement. In the event Purchaser makes an error in disbursing the Purchase Price, Customer authorizes Purchaser to initiate a credit or debit to correct the error.

WEEKLY ACH COLLECTIONS. By signing below, Customer enrolls in Purchaser's Automatic Collection Program and authorizes Purchaser to collect each week the Weekly Amount of Future Receipts (or Adjusted Weekly Amount of Future Receipts, if applicable) and any fees or other amounts that Customer owes Purchaser pursuant to the Future Receipts Sale Agreement by initiating ACH debits to the Approved Account in accordance with the terms of the Agreement. Customer irrevocably authorizes Purchaser (which includes for the purposes of this Authorization, Purchaser's agents, service providers, successors and assigns) to initiate electronic debit entries via the ACH network or similar network to the Approved Account or any substitute bank accounts Customer later identifies for any amounts due to Purchaser, including Weekly Amounts and Adjusted Weekly Amounts, on or after the dates such amounts come due. Customer will not allow the Approved Account (or any later identified substitute account) to be closed or replaced unless Customer provides Purchaser at least ten (10) days' advance written Notice and sufficient information and documentation for Purchaser to update its records relating to a replacement bank account. The Notice must be sent to notices@forwardfinancing.com. If Purchaser is unable to withdraw amounts from Customer's account for any reason, Customer agrees to pay Purchaser a $35 Returned ACH Fee for each such occurrence as set forth in the Agreement in addition to all other remedies available to Purchaser. Customer authorizes Purchaser to initiate a separate debit to the Approved Account (or any later identified substitute account) for the Returned ACH Fee or to add this fee to a debit for a subsequent Weekly Amount or Adjusted Weekly Amount. In the event Purchaser makes an error in initiating a debit or credit, Customer authorizes Purchaser to initiate a credit or debit to correct the error. To the extent that Purchaser initiates debits over the ACH network, Customer agrees to be bound by the rules governing the ACH network. Customer agrees that it will not cancel this Authorization or instruct any depository holding Future Receipts that Purchaser has purchased to reject Purchaser's debits. In the event that Customer breaches the Agreement by (as discussed in the Agreement) intentionally blocking Purchaser's access to the Approved Account, or incurring four (4) Returned ACH Fees without providing bank statements, Customer authorizes Purchaser to debit any and all accounts controlled by Customer or any entity with the same federal tax identification number as Customer up to the total amount due to Purchaser under the Agreement.

BUSINESS PURPOSE ACCOUNT. By signing below, Customer attests that the Approved Account was established for business purposes and not for personal, family or household purposes.

ACCOUNT CHANGES. Customer agrees to provide prompt Notice to Purchaser if there are any changes to the Approved Account and/or routing numbers of the Approved Account.

MISCELLANEOUS. Purchaser is not responsible for any fees charged by Customer's bank as the result of credits or debits initiated under this Agreement. The origination of ACH transactions to Customer's bank accounts, including but not limited to, the Approved Account, must comply with the provisions of U.S. law.

Depository Name:	First Bank		
City / State / Zip:	Huntington Beach, CA 92647		
Business Name:	Image Locations Inc	Account No:	XXXXXX1396

Signature: X Paul Kim Title: Owner

Name: Paul Kim Date: May 19, 2025

FORWARD FINANCING LLC

FUTURE RECEIPTS SALE AGREEMENT ADDENDUM

VIA EMAIL

Image Locations Inc
9663 Santa Monica Blvd Ste 842
Beverly Hills, CA 90210

May 19, 2025

RE: Forward Financing / Early Delivery Discount

We refer to the Future Receipts Sale Agreement dated May 19, 2025 (as amended from time to time, the "Agreement") between Image Locations Inc ("Customer") and Forward Financing LLC ("Purchaser" or "Forward Financing"). Capitalized terms used and not defined in this addendum have the meanings as used in the Agreement. Pursuant to the Agreement, Forward Financing has agreed to pay Customer the amount of the "Purchase Price" (as set forth in the Agreement) in exchange for the "Amount Sold" (as set forth in the Agreement) of Customer's Future Receipts. The Parties desire to add the following terms to the Agreement:
Customer and Forward Financing hereby agree that notwithstanding anything to the contrary in the Agreement, Customer has the right (but not the obligation) to request an early delivery discount as outlined below. Customer is not entitled to an early delivery discount when using funds provided by Forward Financing to satisfy an outstanding balance.

A. Customer may request an early performance discount by offering to pay Purchaser on or before the 90th day after the date of the Agreement (First Optional Discount Date) an amount such that Purchaser will have received on or before the First Optional Discount Date a total of $363,000.00 in connection with the Agreement.
B. Customer may request an early performance discount by offering to pay Purchaser on or before the 120th day after the date of the Agreement (Second Optional Discount Date) an amount such that Purchaser will have received on or before the Second Optional Discount Date a total of $369,000.00 in connection with the Agreement.
C. Customer may request an early performance discount by offering to pay Purchaser on or before the 150th day after the date of the Agreement (Third Optional Discount Date) an amount such that Purchaser will have received on or before the Third Optional Discount Date a total of $375,000.00 in connection with the Agreement.
D. Customer may request an early performance discount by offering to pay Purchaser on or before the 180th day after the date of the Agreement (Fourth Optional Discount Date) an amount such that Purchaser will have received on or before the Fourth Optional Discount Date a total of $381,000.00 in connection with the Agreement.
E. Customer may request an early performance discount by offering to pay Purchaser on or before the 210th day after the date of the Agreement (Fifth Optional Discount Date) an amount such that Purchaser will have received on or before the Fifth Optional Discount Date a total of $387,000.00 in connection with the Agreement.
F. Customer may request an early performance discount by offering to pay Purchaser on or before the 240th day after the date of the Agreement (Sixth Optional Discount Date) an amount such that Purchaser will have received on or before the Sixth Optional Discount Date a total of $393,000.00 in connection with the Agreement.
G. Customer may request an early perforamnce discount by offering to pay Purchaser on or before the 270th day after the date of the Agreement (Seventh Optional Repurchase Date) an amount such that Purchaser will have received on or before the Seventh Optional Discount Date a total of $399,000.00 in connection with the Agreement.
H. Customer may request an early performance discount by offering to pay Purchaser on or before the 300th day after the date of the Agreement (Eighth Optional Discount Date) an amount such that Purchaser will have received on or before the Eighth Optional Discount Date a total of $405,000.00 in connection with the Agreement.
I. Customer may request an early performance discount by offering to pay Purchaser on or before the 330th day after the date of the Agreement (Ninth Optional Discount Date) an amount such that Purchaser will have received on or before the Ninth Optional Discount Date a total of

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$411,000.00 in connection with the Agreement.
J. Customer may request an early performance discount by offering to pay Purchaser on or before the 360th day after the date of the Agreement (Tenth Optional Discount Date) an amount such that Purchaser will have received on or before the Tenth Optional Discount Date a total of $417,000.00 in connection with the Agreement.

In the event that Customer breaches the Agreement in any manner, including, without limitation, by breaching any of the representations, warranties or covenants set forth in Paragraph 6 of the Agreement, the early delivery discount schedule set forth above will no longer be available, but Customer still may request to terminate this contract by paying Forward Financing that portion of the Amount Sold that Forward Financing has not yet collected ("Uncollected Future Receipts"), along with any other fees due under this Agreement.

Customer may request an early delivery discount by contacting notices@forwardfinancing.com. Purchaser will respond to Customer regarding any such requests promptly.

Except as modified by this addendum, the Agreement remains in full force and effect. Customer agrees to execute any documents and/or agreements in order to implement the provisions of this addendum.

This addendum may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument. Executed signature pages transmitted by means of electronic delivery shall be legally valid and binding against the Parties.

By executing this addendum at the appropriate place below, Customer and Forward Financing acknowledge and agree to the terms and conditions of this addendum.

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Forward Financing LLC

Signature: 

Name: Sara Sudbay

Title: Director, Sales

Date: May 19, 2025

Customer (Business)

Signature X Paul Kim

Name: Paul Kim

Title: Owner

Date: May 19, 2025

Principal 1 (individually)

Signature X Paul Kim

Name: Paul Kim

Date: May 19, 2025

OFFER SUMMARY – REVENUE BASED FINANCING

Funding Provided	$609,250.00	This is how much funding Samson MCA LLC will provide. Due to deductions or payments to others, the total funds that will be provided to you directly is $199,250.00. For more information on what amounts will be deducted, please review the attached document "Itemization of Amount Financed." The total funds provided to you directly may change if the amounts needed to pay toward or satisfy other obligations changes between when we prepared this disclosure and funding.
Estimated Annual Percentage Rate (APR)	54.1%	APR is the estimated cost of your financing expressed as a yearly rate. APR incorporates the amount and timing of the funding you receive, fees you pay, and the periodic payments you make. This calculation assumes your estimated average monthly income through sales of goods and services will be $199,250.00. Since your actual income may vary from our estimate, your effective APR may also vary. APR is not an interest rate. The cost of this financing is based upon fees charged by Samson MCA LLC rather than interest that accrues over time.
Finance Charge	$228,250.00	This is the dollar cost of your financing.
Estimated Total Payment Amount	$837,500.00	This is the total dollar amount of payments we estimate you will make under the contract.
Estimated Monthly Cost	$52,343.75	Although you do not make payments on a monthly basis, this is our calculation of your average monthly cost based upon the payment amounts disclosed below.
Estimated Payment	$13,085.94/weekly	
Payment Terms	Why your payment is "Estimated." We based your payment on 6% of your estimated weekly sales revenue. Because we cannot predict the exact dollar amount of sales revenue your business will collect in the future, your payment is "Estimated." How you can change the payment amount. You have the right to obtain a lower payment amount if your sales revenue decreases. For more details on your right to change the payment amount, see Section 1.3 of your contract. How we collect your payments. We will debit your business bank account. If a debit is scheduled for a bank holiday, the payment will be debited the next business day.	
Estimated Term	449 Calendar Days	Based on assumptions we made about your income, this is our estimate of how long it will

		take to collect amounts due to us under your contract.
Prepayment	If you pay off the financing faster than required, you still must pay all or a portion of the finance charge, up to to $228,250.00 based upon our estimates.	
	If you pay off the financing faster than required, you will not be required to pay additional fees.	

Applicable law requires this information to be provided to you to help you make an informed decision. By signing below, you are confirming that you received this information.



Recipient Signature

12/20/2024

Date

ITEMIZATION OF AMOUNT FINANCED	
1. Amount Given Directly to You	$199,250.00
2. Origination Fee	$15,750.00
3. Amount paid on your behalf to third parties (3a + 3b + 3c)	$0.00
3a. [name of third party]	$0.00
3b. [name of third party]	$0.00
3c. [name of third party]	$0.00
4. Amount Paid on Your Account with Us (#40523099)	$410,000.00
5. Amount Provided to You or on Your Behalf (1 + 2 + 3+4)	$625,000.00
6. Prepaid Finance Charges	$15,750.00
7. Amount Financed (5 minus 6)	$609,250.00

Sale of Future Receipts Agreement

Seller's Legal Name: IMAGE LOCATIONS INC	D/B/A: IMAGE LOCATIONS / IMAGE LOCATIONS, INC.	Form of Business Entity and State of Incorporation: S-CORP / CA
Street Address: 9663 SANTA MONICA BLVD 842	City, State: BEVERLY HILLS, CA	Zip: 90210
Mailing Address:	City, State:	Zip:
Primary Contact Name: PAUL KIM	Primary Contact Title: OWNER	Primary Contact Phone Number:
Primary Contact E-Mail Address: PAULIMAGE@ME.COM		
Secondary Contact Name:	Secondary Contact Title:	Secondary Contact Phone Number:
Secondary Contact E-Mail Address:		

Seller's Deposit Account

Name of Depository Institution:_____ ABA Transit/Routing #:_____ Checking Account #: _____

Purchase Price Paid to Seller $625,000.00	Initial Periodic Amount $13,085.94
Purchased Amount of Future Receipts $837,500.00	**What is the Initial Periodic Amount?** The Initial Periodic Amount is an estimate of the Specified Percentage of your average sales revenue. We will debit the Periodic Amount from your Account (as defined herein) each WEEK ON MONDAYS, subject to your actual revenue. We based the Initial Periodic Amount on information you provided or made available to us to calculate your average revenue over a period of time prior to the date of this Agreement. Please refer to Section 4 of this Agreement for how you can adjust the Periodic Amount.
Specified Percentage 6%	
Periodic Frequency [*WEEKLY*]	

Itemization Of Net Amount Funded To Seller	**Purchase Price**	$625,000.00	
	Origination Fee	$15,750.00	
	Prior balances	$410,000.00	DISCOUNTED SAMSON CONTRACT 40523099 DATED 7/1/2024
	Processing Fee	$0.00	
	Administrative Fee	$0.00	Administrative Fee (applied on the initial day of funding and every 30 days to follow, until the specified amount is paid in full). NOT INCLUDED IN TOTAL DEDUCTION BELOW
	Wire/ACH Fee	$0.00	not included in total deductions
	Net Amount Funded to Seller	$199,250.00	

This Sale of Future Receipts Agreement ("Agreement") effective December 20, 2024, is made by and between Samson MCA LLC ("Buyer"), the business identified above ("Seller"), and each Guarantor identified below (each a "Guarantor").

Seller, hereby sells, and assigns to Buyer, without recourse, the Purchased Amount of Future Receipts identified above (the "Purchased Amount") of the proceeds of each future sale made by Seller (collectively "Future Receipts") and will deliver the Specified Percentage of Future Receipts and pay the origination fee identified above (the "Origination Fee") in accordance with this Agreement. Seller, in collecting the Future Receipts, shall be deemed a trustee of the specified percentage of receivables for the benefit of Buyer. It being expressly acknowledged that Merchant is merely holding such funds in trust for the benefit of Buyer and at all times Buyer is the sole owner of its share of the future receipts.

Agreement of Seller: By signing below Seller agrees to the terms and conditions contained in this Agreement, including those terms and conditions on the following pages, and further agrees that this transaction is for business purposes.

Seller: [IMAGE LOCATIONS INC dba IMAGE LOCATIONS / IMAGE LOCATIONS, INC.]

Agreed to by: PAUL KIM Signature,  its President (Title)

Agreed to by:_____ Signature,_____ its_____ (Title)

Agreement of Each Guarantor: By signing below each Guarantor agrees to the terms and conditions contained in this Agreement, including those terms and conditions on the following pages, and further agrees that this transaction is for business purposes.

Notice: This Agreement contains a personal guaranty of performance, and by signing below, you agree that you will be personally liable for the prompt and complete performance of certain obligations of Seller as described in this Agreement.

Name: PAUL KIM Signature: 

Name: Signature:

Terms and Conditions

1. **Future Receipts.** "Future Receipts" includes all payments made by cash, check, Automated Clearing House ("ACH") or other electronic transfer, credit card, debit card, bank card, charge card (each such card shall be referred to herein as a "Payment Card") or other form of monetary payment in the ordinary course of Seller's business. As payment for the Purchased Amount, Buyer will pay to Seller the Purchase Price, minus any fees and amounts to satisfy prior balances shown above.

2. **Buyer's Acceptance of Agreement.** The obligation of Buyer under this Agreement will not be effective unless and until Buyer has completed its review of the Seller and has accepted this Agreement by delivering the Net Amount Funded to Seller, shown above. Prior to accepting this Agreement, Buyer may conduct a processing trial to confirm its access to Seller's account, shown above (the "Account"), which is held at the bank or depository institution referenced above (the "bank"), and the ability to withdraw the Initial Periodic Amount. If the processing trial is not completed to the satisfaction of Buyer, Buyer will refund to Seller all funds that were obtained by Buyer during the processing trial.

3. **Delivery of Purchased Amount.** Seller shall, on each Remittance Date remit the Specified Percentage of its actually collected receipts to Buyer until such time as the full Purchased Amount, and any and all fees and other charges due to Buyer are fully remitted to Buyer. The Parties agree, solely as a convenience, to utilize the Initial Periodic Amount set forth above, subject to Reconciliation and Adjusting the Periodic Amount as set forth below, in lieu of calculating the Specified Percentage of Seller's actually collected receipts on daily basis. Seller authorizes Buyer to debit the Initial Periodic Amount or any updated periodic amount (the "Periodic Amount") from the Account each Remittance Date by either ACH or electronic check. Seller will provide Buyer with all required Account information and agrees not to change them without prior written consent from Buyer. Seller will provide an appropriate ACH authorization to Buyer. If any draft or electronic debit is returned for insufficient funds, then Seller will be responsible for any fees incurred by Buyer resulting from a rejected electronic or other remotely created check or ACH debit attempt. Buyer is not responsible for any overdrafts or rejected transactions that may result from Buyer's debiting any amount authorized under the terms of this Agreement. Seller understands that the foregoing ACH authorization is a fundamental condition to induce Buyer to accept the Agreement. Consequently, such authorization is intended to be irrevocable during the course of this Agreement, subject to the Reconciliation and Adjusting the Periodic Amount provisions contained herein.

   In the event that Seller changes or permits changes to the Account or the ACH authorization approved by the Buyer or adds an additional bank or depository institution account (each such additional entity, also referred to as a bank), Buyer shall have the right, without waiving any of its rights and remedies and without notice to Seller or any Guarantor, to notify the new or additional bank of this Agreement and to direct such new or additional bank to remit to the Buyer all or any portion of the amounts received by such bank in the aggregate totaling the Periodic Amount. Any such new account shall also be deemed an Account.

4. **Reconciliation and Adjusting the Periodic Amount (IMPORTANT PROTECTION FOR SELLER).** The initial Periodic Amount is intended to represent the Specified Percentage of the Future Receipts. At any time, Seller or Buyer may request a reconciliation of Seller's actual revenue to adjust the Periodic Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage.

a. **How Seller may Request a Reconciliation**. Seller may request a reconciliation in writing via e-mail at reconciliations@samsonfunding.com

b. **How Buyer may Request a Reconciliation**. Buyer may request a reconciliation in writing via e-mail at the Primary Contact E-Mail Address set forth above.

c. **Review of Reconciliation Information.** Any reconciliation request by Seller must include a copy of a bank statement for each account into which Seller deposits receipts from sales itemizing account activity from the date of this Agreement through the date of the reconciliation request (the "Applicable Period). Buyer shall within three business days review Seller's bank statements to determine if the aggregate amount of remittances during the Applicable Period was greater or less than the Specified Percentage of Seller's actual receipts for that period (the "Reconciliation Review"). If necessary to verify the bank statements, Buyer may request reasonable additional documentation including view-only access to each account. Buyer shall not declare Seller in breach of this Agreement while Buyer is reviewing Seller's reconciliation request.

d. **Refund Reconciliation.** In connection with any Reconciliation Review, either party may request a refund reconciliation. If requested, Buyer will determine whether the amount by which the aggregate amount of all of Seller's remittances to Buyer over the course of this Agreement was greater or less than the Specified Percentage of Seller's actual receipts during the course of this Agreement. Within three business days after completing the Reconciliation Review, Buyer shall credit the Authorized Account with any excess or debit the Authorized Account for any shortfall. If the Seller is entitled to a credit, Buyer shall not declare Seller in breach of this Agreement for three business days including the date Buyer credits the Authorized Account with any excess funds. For the avoidance of doubt, the day Seller initiates payment to the Buyer shall count as day one.

e. **Changes to the Periodic Amount.** Within three business days after any Reconciliation Review, Buyer shall modify the Periodic Amount to more closely reflect the Specified Percentage of Seller's actual receipts in the previous (2) calendar weeks. At the end of two (2) calendar week period, the Seller may request another adjustment pursuant to this paragraph or it is agreed that the Periodic Amount shall revert to the Periodic Amount as agreed upon on Page 1 of this Agreement.

5. **Nonrecourse Sale of Future Receipts (THIS IS NOT A LOAN).** Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer. Seller acknowledges that it has no right to repurchase the Purchased Amount from Buyer. Buyer assumes the risk that Future Receipts may be remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, and the risk that the full Purchased Amount may never be remitted because Seller's business goes bankrupt or Seller otherwise ceased operations in the ordinary course of business. Buyer is buying the Purchased Amount knowing the risks that Seller's business may slow down or fail, and Buyer assumes these risks based on Seller's representations, warranties and covenants in this Agreement that are designed to give Buyer a reasonable and fair opportunity to receive the benefit of its bargain. By this Agreement, Seller transfers to Buyer full and complete ownership of the Purchased Amount and Seller retains no legal or equitable interest therein.

6. **Fees and Charges.** The fees and charges owed by Seller are as described in this Agreement. Some or all of the Origination Fee may be paid to a broker engaged by the Seller. Otherwise, Buyer is NOT CHARGING ANY BROKER FEES to Seller. If Seller is charged another such fee, Seller acknowledges that it is not being charged by Buyer.

7. **Credit Report and Financial Information Authorizations.**

a. Seller and each of the Guarantors signing above authorize Buyer, its agents and representatives and any credit reporting agency engaged by Buyer, to (i) investigate any references given or any other statements or data obtained from or about Seller or any of the Guarantors for the purpose of this Agreement, (ii) obtain consumer and business credit reports on the Seller and any of its Owners, and (iii) to contact personal and business references provided by the Seller in the Application, at any time now or for so long as Seller and/or Guarantors continue to have any obligations to Buyer as a consequence of this Agreement or for Buyer's ability to determine Seller's eligibility to enter into any future agreement with Buyer.

b. Seller authorizes Buyer and its agents to investigate its financial responsibility and history, and will provide to Buyer any authorizations, banking or financial statements, tax returns, etc., as Buyer deems necessary and reasonable prior to or

at any time after execution of this Agreement. A photocopy of this authorization will be deemed acceptable as an authorization for release of financial and credit information. Buyer is authorized to update such information and financial and credit profiles from time to time as it deems appropriate.

c. Seller waives, to the maximum extent permitted by law, any claim for damages against Buyer or any of its affiliates relating to any investigation undertaken by or on behalf of Buyer as permitted by this Agreement or disclosure of information as permitted by this Agreement.

8. **Authorization to Contact Current and Prior Banks.** Seller authorizes all of its banks and brokers and its Payment Card processor(s) to provide Buyer with Seller's banking, brokerage and/or processing history to determine qualification or continuation in this program, or for collections upon a breach of this Agreement. Seller hereby further authorizes Buyer to contact any current or prior bank of the Seller in order to obtain whatever information it may require regarding Seller's transactions with any such bank. Such information may include but is not limited to, information necessary to verify the amount of Future Receipts previously processed on behalf of Seller and any fees that may have been charged by the bank. In addition, Seller authorizes Buyer to contact any current or prior bank of the Seller for collection purposes and in order to confirm that Seller is exclusively using the Account identified above, or any other Account approved by Buyer, for the deposit of all sales receipts of the Seller.

9. **Right to Cancel.** Seller understands that Buyer offers Seller a right to cancel this Agreement at any time within three (3) calendar days after Buyer has delivered the Net Amount Funded. Seller may exercise this right by notifying Buyer that it is cancelling this Agreement and returning the Net Amount Funded to Buyer. For the Seller's right to cancel to be effective, Buyer must receive both the notice and the return of the Net Amount Funded within three (3) calendar days after the Buyer has delivered the Net Amount Funded.

10. **Application of Amounts Received by Buyer.** Buyer reserves the right to apply amounts received by it under this Agreement to any fees or other charges due to Buyer from Seller prior to applying such amounts to reduce the amount of any outstanding Purchased Amount.

11. **Representations, Warranties and Covenants of Seller.** As of the date of this Agreement and, unless expressly stated otherwise, continuing until Buyer has received 1) the Purchased Amount and 2) all fees and charges due under this Agreement, Seller represents, warrants and covenants to Buyer as follows:

a. **No Diversion of Future Receipts.** Seller must deposit all Future Receipts into the Account on a daily basis and must instruct Seller's credit card processor, which must be approved by Buyer (the "Processor") to deposit all Payment Card receipts of Seller into the Account on a daily basis. Seller agrees not to (i) change the Account without the express written consent of Buyer, (ii) add an additional Account, (iii) revoke Buyer's authorization to debit the Account, (iv) close the Account without the express written consent of Buyer or, (v) take any other action with the intent to interfere with Buyer's right to collect the purchased Future Receipts.

b. **Stacking Prohibited.** Seller shall not, without Buyer's prior written consent, enter into any loan agreement or any agreement for the sale of Future Receipts. Buyer may share information regarding this Agreement with any third party in order to determine whether Seller is in compliance with this provision.

c. **Financial Condition and Financial Information.** Any bank statements and financial statements of Seller that have been furnished to Buyer, and future statements that will be furnished to Buyer, fairly and accurately represent the financial condition of Seller at such dates. Furthermore, Seller represents that all documents, forms and recorded interviews provided to or with Buyer are true, accurate and complete in all respects, and accurately reflect Seller's financial condition and results of operations at the time they are provided. Seller further agrees to authorize the release of any past or future tax returns to Buyer.

d. **Compliance with Law and Governmental Approvals.** Seller is in compliance and shall comply with all applicable federal, state and local laws, rules and regulations and has valid permits, authorizations and licenses to own, operate and lease its properties and to conduct the businesses in which it is presently engaged and/or will engage in hereafter.

e. **Authority to Enter into This Agreement.** Seller and the person(s) signing this Agreement on behalf of Seller, have full power and authority to incur and perform the obligations under this Agreement, all of which have been duly authorized.

f. **Change of Name or Location or Sale or Closing of Business.** For so long as the full Purchased Amount has not been remitted to Buyer, Seller will not conduct Seller's businesses under any name other than as disclosed to Buyer or change

any of its places of business without prior written consent of Buyer. Except pursuant to the filing for Bankruptcy, Seller will not voluntarily sell, dispose, transfer or otherwise convey all or substantially all of its business or assets without (i) the express prior written consent of Buyer, and (ii) the written agreement of any purchaser or transferee assuming all of Seller's obligations under this Agreement pursuant to documentation satisfactory to Buyer. Except as disclosed to Buyer in writing, Seller has no current plans to close its business either temporarily, whether for renovations, repairs or any other purpose, or permanently. Seller will not voluntarily close its business on a temporary basis for renovations, repairs, or any other voluntary purposes. This provision, however, does not prohibit Seller from closing its business temporarily if such closing is required to conduct renovations or repairs that are required by local ordinance or other legal order, such as from a health or fire inspector, or if otherwise forced to do so by circumstances outside of the control of Seller. Prior to any such closure, Seller will provide Buyer 10 calendar days' notice to the extent practicable.

g. **No Pending or Contemplated Bankruptcy as of the Date of this Agreement.** As of the date of this Agreement, Seller 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 Seller. Seller represents that it has not consulted with a bankruptcy attorney or a debt relief organization within six months prior to the date of this Agreement. Seller further warrants that as of the date of this Agreement (i) it does not anticipate filing a bankruptcy petition nor engaging the services of a debt relief organization, (ii) it does not anticipate that an involuntary petition will be filed against it and (iii) it does not have an intent to shut down or dissolve the business in the imminent future.

h. **Seller to Pay Taxes Promptly.** Seller will promptly pay all necessary taxes and other assessments, including but not limited to employment, sales and use taxes.

i. **No Violation of Prior Agreements.** Seller's execution and performance of this Agreement will not conflict with any other agreement, obligation, promise, court order, administrative order or decree, law or regulation to which Seller is subject, including any agreement that prohibits the sale or pledge of Seller's Future Receipts.

j. **Seller's Knowledge and Representation.** Seller represents, warrants, and agrees that it is a sophisticated business entity familiar with the kind of transaction covered by the Agreement; it was represented by counsel or had full opportunity to consult with counsel.

k. **Accurate and Complete Information.** Seller represents, warrants, and agrees that all information provided to Buyer and all statements made to Buyer relating to this transaction in any way have been truthful, accurate, and complete. Seller further agrees that Seller will be truthful in all future statements to Buyer, and will provide Buyer with accurate and complete information regarding Seller's business as required by this Agreement.

12. Rights of Buyer.

a. **Acknowledgment of Security Interest and Security Agreement.** The Future Receipts sold by Seller to Buyer pursuant to this Agreement shall constitute and shall be construed and treated for all purposes as a true and complete sale, conveying good title to the Future Receipts free and clear of any liens and encumbrances, from Seller to Buyer. To the extent the Future Receipts are "accounts" or "payment intangibles" as those terms are defined in the Uniform Commercial Code as in effect in the state in which the Seller is located ("UCC") then: (i) the sale of the Future Receipts creates a security interest as defined in the UCC, (ii) this Agreement constitutes a "security agreement" under the UCC, and (iii) Buyer has all the rights of a secured party under the UCC with respect to such Future Receipts. Seller further agrees that, with or without a breach of this Agreement, Buyer may notify account debtors, or other persons obligated on the Future Receipts, or holding the Future Receipts, of Seller's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Buyer.

b. **Financing Statements.** Seller authorizes Buyer to file one or more UCC-1 forms consistent with the UCC to give notice that the Purchased Amount is the sole property of Buyer. The UCC filing may state that such sale is intended to be a sale and not an assignment for security and may state that the Seller is prohibited from obtaining any financing that impairs the value of the Future Receipts or Buyer's right to collect same. Seller authorizes Buyer to debit the Account for all costs incurred by Buyer associated with the filing, amendment or termination of any UCC filings.

c. **Right of Access.** In order to ensure that Seller is complying with the terms of this Agreement, Buyer shall have the right to (i) enter during regular business hours, without notice, the premises of Seller's business for the purpose of inspecting and checking Seller's transaction processing terminals to ensure the terminals are properly programmed to submit and

or batch Seller's daily receipts to the Processor and to ensure that Seller has not violated any other provision of this Agreement, (ii) Seller shall provide access to its employees and records and all other items as requested by Buyer; and (iii) have Seller provide information about its business operations, banking relationships, vendors, landlord and other information to allow Buyer to interview any relevant parties.

d. **Phone Recordings and Contact.** Seller agrees that any call between Buyer and Seller, and their agents and employees may be recorded or monitored. Further, Seller agrees that (i) it has an established business relationship with Buyer, its employees and agents and that Seller may be contacted from time-to-time regarding this or other business transactions, (ii) that such communications and contacts are not unsolicited or inconvenient, and (iii) that any such contact may be made at any phone number, email address, or facsimile number given to Buyer by the Seller, its agents or employees, including cellular telephones.

e. **ACH Authorization.** Seller represents and warrants that (i) the Account is solely owned by Seller; (ii) the person executing this Authorization on behalf of Seller is an authorized signer on the Account and has the power and authority to authorize Buyer to initiate ACH transactions to and from the Account, and (iii) the Account is a legitimate, open, and active bank account used solely for business purposes and not for personal, family or household purposes. If an ACH transaction is rejected by Seller's bank for any reason other than a stop payment order placed by Seller with its bank, including without limitation insufficient funds, Seller agrees that Buyer may resubmit up to two times any ACH transaction that is dishonored. Seller's bank may charge Seller fees for unsuccessful ACH entries. Seller agrees that Buyer will have no liability to Seller for such fees. In the event Buyer makes an error in processing any payment or credit, Seller authorizes Buyer to initiate ACH entries to or from the Account to correct the error. Seller acknowledges that the origination of ACH entries to and from the Account must comply with applicable law and applicable network rules. Seller agrees to be bound by the Rules and Operating Guidelines of NACHA (formerly known as the National Automated Clearing House Association). Seller will not dispute any ACH transaction initiated pursuant to this Authorization, provided the transaction corresponds to the terms of this Authorization. Seller requests the bank that holds the Account to honor all ACH entries initiated in accordance with this Authorization.

13. Remedies for Seller's Breach of this Agreement. If Seller violates any term or covenant in this Agreement, Buyer may proceed to protect and enforce its rights including, but not limited to, the following:

a. The Specified Percentage shall equal 100%. The full undelivered Purchased Amount plus all fees and charges (including collection and legal fees as more fully described in this Agreement) assessed under this Agreement will become due and payable in full immediately.

b. Buyer may enforce the provisions of the Personal Guaranty of Performance against each Guarantor.

c. Seller shall pay to Buyer all reasonable costs associated with Seller's breach including but not limited to court fees and attorney's fees calculated at 30% of the unremitted Purchased Amount at the time of Seller's breach. Buyer may proceed to protect and enforce its rights and remedies by arbitration or lawsuit. In any such arbitration or lawsuit, under which Buyer shall recover Judgment against Seller, Seller shall be liable for all of Buyer's costs, including but not limited to all reasonable attorneys' fees and court costs. However, the rights of Buyer under this provision shall be limited as provided in the arbitration provision set forth below.

d. Buyer may debit depository accounts wherever situated by means of ACH debit or facsimile signature on a computer-generated check drawn on any of Seller's banking accounts for all sums due to Buyer.

e. Subject to arbitration as provided in Section 28 of this Agreement, all rights, powers and remedies of Buyer in connection with this Agreement may be exercised at any time by Buyer after the occurrence of breach, are cumulative and not exclusive, and shall be in addition to any other rights, powers or remedies provided by law or equity.

14. Modifications, Amendments. No modification, amendment, waiver or consent of any provision of this Agreement shall be effective unless the same is in writing and signed by all Parties.

15. Assignment. Buyer may assign, transfer or sell its rights to receive the Purchased Amount or delegate its duties hereunder, either in whole or in part, with or without prior written notice to Seller.

16. **Personal Guaranty of Performance.** Guarantor agrees to irrevocably, absolutely and unconditionally guarantee to Buyer prompt and complete performance of the following obligations of Seller (the "Guaranteed Obligations"):

    a. Seller's obligation to remit the Specified Percentage of its future receipts until the Purchased Amount is fully remitted to Buyer;

    b. Seller's obligation to not (i) change the Account, (ii) add an additional Account, (iii) revoke Buyer's authorization to debit the Account, (iv) close the Account without the express written consent of Buyer or (v) take any other action with the intent to interfere with Buyer's right to collect the purchased Future Receipts;

    c. Seller's obligation to not conduct Seller's businesses under any name other than as disclosed to Buyer;

    d. Seller's obligation to not change any of its places of business without prior written consent by Buyer;

    e. Seller's obligation to not voluntarily sell, dispose, transfer or otherwise convey its business or substantially all business assets without (i) the express prior written consent of Buyer, and (ii) the written agreement of any purchaser or transferee assuming all of Seller's obligations under this Agreement pursuant to documentation satisfactory to Buyer;

    f. Seller's obligation to not enter into any merchant cash advance or any loan agreement that relates to or encumbers its Future Receipts with any party other than Buyer without Buyer's prior written consent for the duration of this Agreement; and

    g. Seller's obligation to provide truthful, accurate, and complete information as required by this Agreement.

17. **Guarantor Waivers.** Buyer does not have to notify Guarantor of any of the following events and Guarantor will not be released from its obligations under the Agreement and this Personal Guaranty of Performance if it is not notified of: (i) Seller's failure to timely perform any obligation under the Agreement, (ii) any adverse change in Seller's financial condition or business, (iii) Buyer's acceptance of the Agreement, and (iv) any renewal, extension or other modification of the Agreement or Seller's other obligations to Buyer. In addition, Buyer may take any of the following actions without releasing Guarantor from any of its obligations under the Agreement and this Performance Guaranty: (i) renew, extend or otherwise modify the Agreement or Seller's other obligations to Buyer, and (ii) release Seller from its obligations to Buyer. Guarantor shall not seek reimbursement from Seller or any other guarantor for any amounts paid by it under the Agreement or this Performance Guaranty. Guarantor permanently waives and shall not seek to exercise any of the following rights that it may have against Seller, or any other guarantor, for any amounts paid by it, or acts performed by it, under the Agreement or this Performance Guaranty: (i) subrogation, (ii) reimbursement, (iii) performance, (iv) indemnification, or (v) contribution.

18. **Guarantor Acknowledgement**. Guarantor acknowledges that Guarantor understands the seriousness of the provisions of the Agreement, including the Jury Waiver, Class Action Waiver and Arbitration sections.

19. **Notices.**

    a. **Notices from Buyer.** Buyer may send any notices, disclosures, terms and conditions, other documents, and any future changes to Seller and Guarantor (as applicable) by regular mail or by e-mail, at Buyer's option and Seller and Guarantor each consent to such electronic delivery. Notices sent by e-mail are effective when sent. Notices sent by regular mail become effective three days after mailing to Seller's address set forth in this Agreement.

    b. **Notices from Seller and Guarantor.** Subject to Section 4 of this Agreement, Seller and Guarantor may send any notices to Buyer by e-mail only upon the prior written consent of Buyer, which consent may be withheld or revoked at any time in Buyer's sole discretion. Otherwise, any notices or other communications from Seller and Guarantor to Buyer must be delivered by certified mail, return receipt requested, to Buyer's address set forth in this Agreement. Notices sent to Buyer shall become effective only upon receipt by Buyer.

20. **Binding Effect, Governing Law, Venue and Jurisdiction.** This Agreement shall be binding upon and inure to the benefit of Seller, Buyer, Guarantor and their respective successors and assigns, except that neither Seller nor Guarantor shall not have the right to assign its respective rights hereunder or any interest herein without the prior written consent of Buyer which consent may be withheld in Buyer's sole discretion. Except as set forth in the Arbitration section, this Agreement shall be governed by and

construed in accordance with the laws of the state of New York without regard to any applicable principles of conflicts of law. Seller and Guarantor understand and agrees that (i) Buyer is located in New York, (ii) Buyer makes all decisions from Buyer's office in New York, (iii) the Agreement is made in New York (that is, no binding contract will be formed until Buyer receives and accepts Seller's signed Agreement in New York, and (iv) Seller's payments are not accepted until received by Buyer in New York. Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach of this Agreement, shall, if Buyer so elects, be instituted in any state court sitting in New York (the "Acceptable Forums"). Seller and Guarantor hereby waive their right to remove any action commenced by Buyer in connection to this Agreement to any federal court. Seller and Guarantor agree that the Acceptable Forums are convenient to it, and submit 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, Seller and Guarantor waive any right to oppose any motion or application made by Buyer to transfer such proceeding to an Acceptable Forum. Buyer, Seller and Guarantor further agree that the mailing by certified or registered mail, of any process required by any such court will constitute valid and lawful service of process against them, without the necessity for service by any other means provided by statute or rule of court, but without invalidating service performed in accordance with such other provisions.

21. **Survival of Representations, Warranties and Covenants.** 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.

22. **Interpretation.** All parties hereto have had the opportunity to review this Agreement with an attorney of their own choosing and have relied only on their own attorney's guidance and advice or have been provided sufficient opportunity to have an attorney of their choosing review the Agreement. No construction determinations shall be made against Buyer as drafter.

23. **Entire Agreement and Severability.** This Agreement embodies the entire agreement among Seller, Guarantor, and Buyer and supersedes all prior agreements and understandings relating to the subject matter hereof. 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.

24. **Execution.** Facsimile signatures, or any other electronic means reflecting the party's signature hereto, shall be deemed acceptable for all purposes. The parties agree that if a duly authorized representative of each of the parties signs this Agreement and transmits such Agreement to the other party via facsimile or electronically transmitted portable document format, such transmission shall be treated in all manner and respects as an original signature (or counterpart thereof) and shall be considered to have the same binding legal effects as if it were the original signed version thereof delivered in person. At the request of a party hereto, each other party hereto shall re-execute original forms thereof and deliver them to all other parties. No party hereto shall raise the use of a facsimile machine or electronic transmission in portable document format to deliver a signature or the fact that any signature was transmitted or communicated through the use of facsimile machine or electronic transmission in portable document format as a defense to this Agreement and each such party forever waives any such defense. This Agreement may be signed in one or more counterparts, each of which shall constitute an original and all of which when taken together shall constitute one and the same agreement.

25. **Authorization to Contact.**

    a. **Authorization to Contact by Phone.** Seller and Guarantor authorize Buyer, its affiliates, agents and independent contractors to contact Seller or Guarantor at any telephone number Seller or Guarantor provide to Buyer or from which Seller or Guarantor places a call to Buyer, or any telephone number where Buyer believes it may reach Seller or Guarantor, using any means of communication, including but not limited to calls or text messages to mobile, cellular, wireless or similar devices or calls or text messages using an automated telephone dialing system and/or artificial voices or prerecorded messages, even if Seller or Guarantor incurs charges for receiving such communications.

    b. **Authorization to Contact by Other Means.** Seller and Guarantor also agree that Buyer, its affiliates, agents and independent contractors, may use any other medium not prohibited by law including, but not limited to, mail, e-mail and facsimile, to contact Seller and Guarantor. Seller and Guarantor expressly consent to conduct business by electronic means.

26. **JURY WAIVER. THE PARTIES WAIVE THE RIGHT TO A 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 ITS ENFORCEMENT, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW OR DEEMED BY A COURT OF LAW TO BE AGAINST PUBLIC POLICY. THE PARTIES ACKNOWLEDGE THAT EACH PARTY MAKES THIS WAIVER KNOWINGLY, WILLINGLY**

AND VOLUNTARILY AND WITHOUT DURESS, AND ACKNOWLEDGE THEIR RIGHT TO REVIEW THE RAMIFICATIONS OF THIS WAIVER WITH THEIR ATTORNEYS.

27. **CLASS ACTION WAIVER. BUYER, SELLER, AND EACH GUARANTOR ACKNOWLEDGE AND AGREE THAT THE AMOUNT AT ISSUE IN THIS TRANSACTION AND ANY DISPUTES THAT ARISE BETWEEN THEM ARE LARGE ENOUGH TO JUSTIFY DISPUTE RESOLUTION ON AN INDIVIDUAL BASIS. EACH PARTY HERETO WAIVES ANY RIGHT TO ASSERT ANY CLAIMS AGAINST THE OTHER PARTIES AS A REPRESENTATIVE OR MEMBER IN ANY CLASS OR REPRESENTATIVE ACTION, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW OR DEEMED BY A COURT OF LAW TO BE AGAINST PUBLIC POLICY. TO THE EXTENT ANY PARTY IS PERMITTED BY LAW OR A COURT OF LAW TO PROCEED WITH A CLASS OR REPRESENTATIVE ACTION AGAINST THE OTHER, THE PARTIES AGREE THAT: (I) THE PREVAILING PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEYS' FEES OR COSTS ASSOCIATED WITH PURSUING THE CLASS OR REPRESENTATIVE ACTION (NOT WITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT), AND (II) 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.**

28. **ARBITRATION. IF BUYER, SELLER OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF BUYER, SELLER OR ANY GUARANTOR SEEKS TO HAVE A DISPUTE SETTLED BY ARBITRATION, THAT PARTY MUST FIRST SEND TO ALL OTHER PARTIES, BY CERTIFIED MAIL, A WRITTEN NOTICE OF INTENT TO ARBITRATE. IF BUYER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, BUYER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR THE FORUM. A COPY OF THE APPLICABLE RULES MAY BE FOUND AT HTTPS://WWW.ADR.ORG/RULES UNDER COMMERCIAL ARBITRATION RULES. EACH PARTY SHALL BEAR ITS OWN EXPENSES REGARDING ARBITRATION FILING FEES AND, EXCEPT AS PROVIDED IN THE NEXT SENTENCE, THE PARTIES AGREE TO EQUALLY SHARE ADMINISTRATIVE COSTS AND ARBITRATOR FEES. IF THE ARBITRATOR FINDS THAT EITHER THE SUBSTANCE OF THE CLAIM RAISED BY SELLER OR GUARANTOR OR THE RELIEF SOUGHT BY SELLER OR GUARANTOR IS IMPROPER OR NOT WARRANTED, AS MEASURED BY THE STANDARDS SET FORTH IN FEDERAL RULE OF PROCEDURE 11(B), THEN BUYER WILL PAY THESE FEES ONLY IF REQUIRED BY THE AAA OR FORUM RULES. SELLER AND GUARANTOR AGREE THAT, BY ENTERING INTO THIS AGREEMENT, THEY ARE WAIVING THE RIGHT TO TRIAL BY JURY. BUYER, SELLER OR ANY GUARANTOR MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. FURTHER, BUYER, SELLER AND ANY GUARANTOR AGREE THAT THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS FOR MORE THAN ONE PERSON'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING, AND THAT IF THIS SPECIFIC PROVISION DEALING WITH THE PROHIBITION ON CONSOLIDATED, CLASS OR AGGREGATED CLAIMS IS FOUND UNENFORCEABLE, THEN THE ENTIRETY OF THIS ARBITRATION CLAUSE SHALL BE NULL AND VOID. THIS AGREEMENT TO ARBITRATE IS GOVERNED BY THE FEDERAL ARBITRATION ACT AND NOT BY ANY STATE LAW REGULATING THE ARBITRATION OF DISPUTES. THIS AGREEMENT IS FINAL AND BINDING EXCEPT TO THE EXTENT THAT AN APPEAL MAY BE MADE UNDER THE FAA. ANY ARBITRATION DECISION RENDERED PURSUANT TO THIS ARBITRATION AGREEMENT MAY BE ENFORCED IN ANY COURT WITH JURISDICTION. THE TERMS "DISPUTES" AND "CLAIMS" SHALL HAVE THE BROADEST POSSIBLE MEANING.**

29. **RIGHT TO OPT OUT OF ARBITRATION. SELLER AND GUARANTOR(S) MAY OPT OUT OF THE ARBITRATION PROVISION ABOVE. TO OPT OUT OF THE ARBITRATION CLAUSE, SELLER AND EACH GUARANTOR MUST SEND BUYER A NOTICE THAT THE SELLER AND EACH GUARANTOR DOES NOT WANT THE CLAUSE TO APPLY TO THIS AGREEMENT. FOR ANY OPT OUT TO BE EFFECTIVE, SELLER AND EACH GUARANTOR MUST SEND AN OPT OUT NOTICE TO THE FOLLOWING ADDRESS BY REGISTERED MAIL, WITHIN 14 DAYS AFTER THE DATE OF THIS AGREEMENT: 17 STATE STREET, SUITE 630, NEW YORK, NEW YORK 10004 ATTENTION: SAMSON MCA LLC**

AUTHORIZATION AGREEMENT
FOR AUTOMATED CLEARING HOUSE TRANSACTIONS

[IMAGE LOCATIONS INC dba IMAGE LOCATIONS / IMAGE LOCATIONS, INC.] ("Seller") hereby authorizes Samson MCA LLC ("Buyer") to present automated clearing house (ACH) debits to the following account in the amount of fees and other payments due to Buyer from Seller under the terms of that Purchase and Sale of Future Receipts Agreement (the "Agreement") entered into between Seller and Buyer, as it may be amended, supplemented or replaced from time to time. Seller also authorizes Buyer to initiate additional entries (debits and credits) to correct any erroneous transfers. In addition, if Seller breaches the Agreement, Seller authorizes Buyer to debit any and all accounts controlled by Seller or controlled by any entity with the same Federal Tax Identification Number as Seller up to the total amount, including but not limited to, all fees and charges, due to Buyer from Seller under the terms of the Agreement.

Seller agrees to be bound by the Rules and Operating Guidelines of NACHA and represents and warrants that the designated account is established and used primarily for commercial/business purposes, and not for consumer, family or household purposes. Seller authorizes Buyer to contact Seller's financial institution to obtain available funds information and/or to verify any information Seller has provided about the designated checking account and to correct any missing, erroneous or out-of-date information. Seller understands and agrees that any revocation or attempted revocation of this Authorization will constitute a breach of the Agreement for the Sale of Future Receipts. In the event that Seller closes the designated checking account, or the designated checking account has insufficient funds for any ACH transaction under this Authorization, Seller authorizes Buyer to contact Seller's financial institution and obtain information (including account number, routing number and available balance) concerning any other deposit account(s) maintained by Seller with Seller's financial institution, and to initiate ACH transactions under this Authorization to such additional account(s). To the extent necessary, Seller grants Buyer a limited Power of Attorney to take action in Seller's name to facilitate this authorization.

Transfer Funds To/From: Name of Bank: _____

ABA Transit/Routing #: _____

Account #: _____

This authorization is to remain in full force and effect until Buyer has received all amounts due or that may become due to Buyer under the Agreement.

Seller Information: Seller's Name: IMAGE LOCATIONS INC dba IMAGE LOCATIONS / IMAGE LOCATIONS, INC.

Signature of Authorized Representative: _____

Print Name: PAUL KIM

Title: President

Seller's Tax ID:

Date: 12/20/2024

eCAPITAL® | FREIGHT FACTORING

FACTORING AGREEMENT

Agreement for:

[redacted]

March 28, 2022

Prepared by:

[redacted]

FACTORING AGREEMENT

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Factoring Master Agreement SECTION A
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Factoring Agreement Terms & Conditions SECTION B
This is where we list your terms and conditions

Guaranty and Security Agreement SECTION C
Some additional legal language pertaining to our factoring relationship

Certified Copy of Resolutions SECTION D
A document showing who is able to sign for your company

Funding Transfer Instructions SECTION E
This is where you'll let us know how you'd like to receive your money

Notice of Assignment SUPPLEMENTAL
A letter to your customers that lets them know where to make payment

Check when completed

- ☐ Factoring Master Agreement **(Section A)** is signed and dated
- ☐ Guaranty and Security Agreement **(Section C)** is signed and dated
- ☐ Certified Copy of Resolutions **(Section D)** is signed and dated
- ☐ Funding Transfer Instructions **(Section E)** sheet is completed, signed and dated
- ☐ Notice of Assignment **(Supplemental)** is signed

Please email your entire factoring agreement package to: signup@ecapital.com
or fax to 760.496.3652

This Factoring Master Agreement is made on between eCapital Freight Factoring Corp. ("Purchaser"), located at 20807 Biscayne Boulevard #203 Aventura, Florida 33180 ("Purchaser"), and: [redacted] ("Seller"). Seller also does or has done business under the following names (DBAs):

Seller agrees to notify Purchaser in writing thirty days prior to the proposed/actual use of a change of Seller's name, identity, corporate structure, licensing, legal trade names, owners, executive officers, partners or change of address.

Seller's Address: [redacted]

1. **This Factoring Master Agreement incorporates by reference the Factoring Agreement Terms and Conditions (the "Terms and Conditions"), published at us.terms.eCapital.com or any redirect as if the Terms and Conditions are fully set forth herein.** By Seller's signature below, Seller acknowledges and agrees that Seller has read and agrees that the Terms and Conditions shall bind Seller as if fully incorporated herein, and supersede any prior agreements or understandings between Purchaser and Seller. Seller acknowledges and agrees without limitation; (1) to granting Purchaser inter alia a continuing first priority interest in and to the Collateral (including but not limited to Seller's currently existing and hereafter arising accounts) to secure the Seller's Obligations to Purchaser, (2) to the Termination provisions therein, which provisions shall be legally binding whether or not any advances are made hereunder, and (3) that Purchaser is authorized to file an initial financing statement consistent with Article 9 of the Uniform Commercial Code.

   Seller hereby authorizes Purchaser and/or its agent/affiliates to verify and investigate at any time the information provided including the obtaining of consumer and other credit reports.

2. **Where applicable, terms used herein shall have the meanings defined in the Terms and Conditions.** The following terms used herein shall have the following meaning:

Account Limit:	$3,500,000
Advance/Reserve Percentage:	100.00 % / 0.00 %
Starting Tier[1]:	1.45 %
Initial Fee Period:	90 days
Additional Fee Period[2]:	0 days
Advance Fee:	N/A
Ineligible Date:	90 days
Contract Term	12 months
Trial Period[3]:	90 days
Documentation Fee[4]:	$0
Fuel Advance Fee:	$25.00 per Fuel Advance
Carrier Payment Fee[5]:	$5 per Carrier Payment

This fee table is hereby incorporated into the Factoring Master Agreement between eCapital Freight Factoring Corp. and Kodiak Trucking Inc. (the "Agreement").

GROWTH ADVANTAGE TABLE

DOLLAR VOLUME OF MONTHLY ACCOUNTS PURCHASED	INITIAL FEE	ADDITIONAL FEE
*$0 - $0	1.45 %	0.00 %
$1+	1.00 %	0.00 %

[1]**Starting Tier:** The more you factor, the lower your fees. Each month your fees are assessed based on the total Dollar Volume of Monthly Receivables purchased by us in the previous month. If the Dollar Volume of Monthly Receivables pushes you into another tier of the Growth Advantage Table a rebate will be issued to your Reserve Account for the difference in your applicable fees.

[2]**Additional Fee Period:** The Additional Fee is only applicable for each Additional Fee Period after the Initial Fee Period up to the Ineligible Date.

[3]**The Trial Period** allows you to try our service for 90 days and make sure it fits with your business needs. The Trial Period begins on the day you sign the Agreement or submit your first invoices for funding. To cancel, submit a written notice within 30 days after your 90 days ends.

[4]**Documentation Fee:** This one-time fee is waived if your initial funding is $10,000 or higher.

[5]**Carrier Payment(s)** – Seller to notify Purchaser immediately whenever Seller makes arrangements with an operator to carry the goods of a customer by a commercial motor vehicle for compensation.

Early Termination Fee: In the unlikely event that you need to end the Agreement with us after your Trial Period, but within the Contract Term, you will be responsible for the Early Termination Fee of 2.00 % multiplied by your Account Limit.

As Utilized Fees: Invoice Processing Fee: $2 per invoice, Wires: $15, ACH: $9, Money Code: $10, Check by Mail: $10, InstaPay: $10

The aforementioned As Utilized Fees are subject to revisions with 30 days' notice by Purchase to Seller.

Non-Recourse Credit Guarantee: Declined By declining, Seller acknowledges that Seller is responsible for all credit-related losses of any kind without limitation.

3. Assignment and Sale.

3.1 Seller shall sell to Purchaser as absolute owner such of Seller's Accounts as are listed from time to time on Accounts Transmittals in accordance with Section 2.1 of the Terms and Conditions.

3.2 Each Accounts Transmittal shall be accompanied by such documentation supporting and evidencing the Account as Purchaser shall from time-to-time request.

3.3 Purchaser shall purchase from Seller such Accounts as Purchaser determines to be an Eligible Account, subject further to the Terms and Conditions.

4. Counterparts. This Factoring Master Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if all signatures were upon the same instrument. Delivery of an executed counterpart by facsimile shall be as effective as if manually delivered.

IN WITNESS WHEREOF, the Parties have executed this Agreement in Aventura, FL on the day and year first written above.

[redacted]

SIGN HERE **By:** [redacted]
Name:
Title:

Date: 3/28/2022

ACKNOWLEDGMENT

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

See Attached

State of California }
County of Kern }

On _____, 2021, before me, _____, Notary Public
(insert name of the officer)

personally appeared _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature_____ (Seal)

CALIFORNIA ACKNOWLEDGMENT CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Kern }

On 3.28.2022 before me, Kevin Berg Notary public.
Date *Here Insert Name and Title of the Officer*

personally appeared [redacted]
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KEVIN BERG
Notary Public - California
Kern County
Commission # 2348258
My Comm. Expires Feb 21, 2025

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Kevin Berg
Signature of Notary Public

Place Notary Seal and/or Stamp Above

OPTIONAL

Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____	Signer's Name: _____
☐ Corporate Officer – Title(s): _____	☐ Corporate Officer – Title(s): _____
☐ Partner – ☐ Limited ☐ General	☐ Partner – ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer is Representing: _____	Signer is Representing: _____

©2019 National Notary Association

The following are the Factoring Agreement Terms and Conditions (Terms and Conditions) that are incorporated by reference in the Factoring Master Agreement between Seller and, as applicable and as according to the Factoring Master Agreement itself, either eCapital Groups [ECAPITAL FREIGHT FACTORING, INC., ECAPITAL FREIGHT FACTORING ITC INC., ECAPITAL FREIGHT FACTORING, LTD., ECAPITAL FREIGHT FACTORING CORP., or ECAPITAL FREIGHT FACTORING (EAST) CORP., (collectively referred to as "eCapital Group", from time to time), ("Purchaser", as applicable)] and Seller. Each of the aforementioned companies are separate and distinct entities, although through servicing agreements, common ownership or otherwise, utilize these Terms and Conditions interchangeably. They are referred to herein collectively for convenient reference only. Nothing contained herein shall alter the Factoring Master Agreement with respect to which specific Purchaser is a party thereto, and nothing contained herein shall create liability among the remaining entities for the debts and obligations of the particular entity that is the exact Purchaser under the applicable Factoring Master Agreement. Capitalized terms not herein defined shall have the meaning set forth in the Factoring Master Agreement and vice versa. All other capitalized terms not otherwise defined shall have the meaning set forth in the Uniform Commercial Code.

1. Definitions. The following terms used herein and in the Factoring Master Agreement shall have the following meaning:

"30-day Notice Window" – Means a 30-day period determined from the end of the Trial Period.

"Account Limit" – The amount specified in the Factoring Master Agreement.

"Account/s"– Means all currently existing and hereafter arising accounts, contract rights, and all other forms of obligations owing to Seller arising out of the sale or lease of goods or the rendition of services by Seller irrespective of whether earned by performance, and any and all credit insurance, guaranties, or security therefor.

"Account Debtor" – The obligor on an Account.

"Accounts Transmittal Form" – A form that may be supplied by Purchaser from time to time wherein Seller lists such of its Accounts as it requests that Purchaser purchase under the terms of this Agreement.

"Accounts Transmittal Upload" – A transmission initiated by Seller of images or digital information in a form required by Purchaser, listing such of its Accounts as it requests that Purchaser purchase under the terms of this Agreement.

"Accounts Transmittal" – An Accounts Transmittal Form or an Accounts Transmittal Upload, as applicable.

"Additional Fee" – The Additional Fee Percent or Additional Fee % specified in the Factoring Master Agreement, multiplied by the stated Face Amount of a Purchased Account at the time of purchase by Purchaser, for each Additional Fee Period specified in the Factoring Master Agreement, or portion thereof that all or any portion thereof remains unpaid, computed from the end of the Initial Fee Period.

"Advance Fee" – A fee of specified in the Factoring Master Agreement above the Prime Rate or LIBOR Rate as specified in the Factoring Master Agreement, charged on the average daily net Funds Advanced outstanding hereunder, calculated monthly and payable on the last day of each calendar month (at a rate computed on the basis of the actual number of days elapsed over a year of 360 days).

"Advance Percentage" or "Advance %" – The percentage specified in the Factoring Master Agreement multiplied by the Face Amount of each Purchased Account. The percentage may vary on Accounts owed by different Account Debtors. Upon any Event of Default, Purchaser may change the Advance Percentage as it deems necessary, in its sole discretion.

"Affiliate of Seller" – Any Person (other than Purchaser): (i) directly or indirectly controlling, controlled by, or under common control with, Seller; (ii) directly or indirectly owning or holding five percent (5%) or more of any equity interest in Seller; or (iii) five percent (5%) or more of whose voting stock or other equity interest is directly or indirectly owned or held by Seller. For purposes of this definition, "control" (including the correlative meanings, the terms "controlling", "controlled by" and "under common control with") means the power, directly or indirectly, to determine management and policies of a Person, whether through the ownership of voting securities or by contract or otherwise.

"Agreement" – The Factoring Master Agreement, incorporating these Terms and Conditions, and any extensions, riders, supplements, amendments, or modifications thereto or in connection therewith.

"Avoidance Claim" – Any claim that any payment received by Purchaser from or for the account of an Account Debtor is avoidable under the Bankruptcy Code or any other debtor relief statute, other than claims which relate solely to Non-Recourse Accounts, if any.

"Clearance Days" – Up to three (3) business days.

"Clearance Day Payments" – Payments received by Purchaser in whatever form and from whatever source, in reduction of the Obligations.

"Client Profile" – Any application submitted by Seller setting forth details regarding Seller's business.

"Closed" – A Purchased Account is closed upon the first to occur of (i) receipt by Purchaser of full payment; (ii) the unpaid Face Amount has been charged to the Reserve Account by Purchaser pursuant to the terms hereof. The closure of any Purchased Account by Purchaser shall not be construed so as to relieve Seller of any of its Obligations provided herein. Seller shall not be deemed to have satisfied its repurchase obligation if a Reserve Shortfall exists.

"Closing Date" – The date on which Seller executes this Agreement. Purchaser's payment of the Purchase Price on any Account shall be deemed Purchaser's acceptance and performance of the Factoring Master Agreement, notwithstanding Purchaser not executing the Factoring Master Agreement.

"Collateral" – All now owned and hereafter acquired personal property and fixtures, including without limitation Accounts, Chattel Paper, Goods (including Inventory and Equipment), Instruments, Investment Property, Documents, Payment Intangibles, General Intangibles, and Intellectual Property, and all proceeds of the foregoing (including proceeds of proceeds).

"Contract Term" – Means either the Initial Term any Renewal Term or Subsequent Term of this Agreement

"Date of Acceptance" or "DOA" – means the date upon which any Addendum stating revised terms to the Agreement is signed by the Parties, and if unsigned by Purchaser, the date upon which Purchaser updates its systems to give effect to such revised terms, which shall apply to all subsequently purchased invoices.

"Depository" – As specified by Seller on the Funding Transfer Instructions form provided by Purchaser, or any demand deposit account maintained by Seller or any Guarantor or represented by an employee of Seller to be maintained by Seller, or any other account of Seller, including fuel card accounts, into which Seller directs Purchaser to make advances or payments of any obligations owed to Seller by Purchaser pursuant to the terms hereof.

"Default Rate" – One and one-half percent (1.5%) for each thirty (30) days, commencing on the date any Event of Default first occurs.

"Early Termination Fee" The Early Termination Fee Percent or Early Termination Fee % specified in the Factoring Master Agreement multiplied by the stated Account Limit at the time of termination not to exceed 10%

"Eligible Account" – An Account that is acceptable for purchase as determined by Purchaser in the exercise of its sole credit or business judgment.

"Email/Fax Submission" – An Invoice and/or associated documents provided by Seller to Purchaser pursuant to the Email/Fax Submission Program via an electronically transmitted image in advance of the provision of an original Invoice representing a corresponding Account.

"Email/Fax Submission Program" – Purchaser may accept images of Invoices and associated paperwork/backup documents submitted by Seller via email and/or fax as evidence of an Eligible Account at Purchaser's sole discretion subject to the following requirements and limitations: (i) only Invoices for completed services and/or delivered services are eligible for submission; (ii) Invoice and associated paperwork/backup documents must be received by Purchaser based on its cut-off time as set from time to time to be eligible for same day funding; (iii) images may include the following and be in order as follows: Accounts Transmittal, Invoice, rate confirmation, signed bill of lading or other proof of delivery, any other applicable documents such as lumper receipts or scale tickets; (iv) a late penalty of two hundred dollars ($200) shall be due from Seller to Purchaser for each Purchased Account submitted via email or fax for which Purchaser has requested and not received original documents within ten (10) days of purchase of said Purchased Account(s); (v) Seller's eligibility to submit Accounts for purchase by Purchaser via email and/or fax is at the sole discretion of Purchaser and may be revoked by Purchaser at any time.

"Exposed Payments" – Payments received by Purchaser from an Account Debtor that has become subject to a bankruptcy proceeding, to the extent such payments cleared said Account Debtor's deposit account within ninety (90) days of the commencement of said bankruptcy case.

"Face Amount" – The face amount due on an Account.

"Factoring Master Agreement" – The Factoring Master Agreement by and between the Parties.

"Finance Application" – Any application (including, but not limited to the Client Profile) submitted by Seller to Purchaser for the purpose of procuring financing from Purchaser, together with any supporting information provided by Seller to Purchaser in connection therewith.

"Fuel Advance" – Funds advanced to Seller by Purchaser pursuant to the Fuel Advance Program against future Accounts that have yet to be assigned an Invoice and are not yet Eligible Accounts.

"Fuel Advance Fee" – $25 per Fuel Advance paid by the Purchaser to the Seller under the Fuel Advance Program.

"Fuel Advance Program" – Fuel Advances may be made to Seller at Purchaser's sole discretion subject to the following requirements and limitations: (i) maximum Fuel Advance amount of the lower of fifty percent (50%) of the Face Value of the future Account or three thousand dollars ($3,000); (ii) goods to be delivered associated with the future Account must be loaded on to the Seller's truck but not yet delivered; (iii) the Account Debtor on the future Account has been credit approved by Purchaser; (iv) a late penalty of one tenth of a percent (.1%) per diem shall accrue on the Face Value of the entire future Account for which a proof of delivery sufficient to evidence an Eligible Account has not been provided by Seller to Purchaser within ten (10) days of the provision of the Fuel Advance by Purchaser to Seller; (v) no other advance may be taken by Seller from any other party on a future Account for which Purchaser has made or will make a Fuel Advance; (vi) any checks or payments of any kind received by Seller on a future Account for which Purchaser has made a Fuel Advance must be forwarded to Purchaser without first being deposited or otherwise uncashed; (vii) Seller's eligibility to receive Fuel Advances may be revoked at the sole discretion of Purchaser at any time; (viii) the maximum number of Fuel Advances the Seller may receive in any given time period under the Fuel Advance Program is determined at the sole discretion of Purchaser and may be changed by Purchaser at any time; (ix) Seller shall pay an Fuel Advance Fee to Purchaser on each future Account for which Purchaser makes a Fuel Advance in addition to, at the discretion of Purchaser, expenses (both out-of-pocket expenses and allocated internal costs) incurred by Purchaser in connection with the transfer of the Fuel Advance to Seller.

"Funds Advanced" – The daily net balance (after the setting off of any and all fees or other amounts or Obligations owing by Seller to Purchaser as provided in this Agreement) of any monies remitted, paid or otherwise transferred to Seller by Purchaser.

"Funding Transfer Instructions" – A form provided by Purchaser and submitted by Seller indicating Seller's chosen method of transfer of funds owed to Seller by Purchaser pursuant to the terms hereof.

"Ineligible Date" – The date which is the last day of the Ineligible Date period specified in the Factoring Master Agreement, computed from the Invoice Date.

"Insolvent" – An Account Debtor has become Insolvent if it is the subject of (i) a petition under any state or federal debtor relief or liquidation statute filed within the Insolvency Period, or (ii) a proceeding under Chapters 11 or 13 of the Bankruptcy Code filed on or before the Purchase Date, the conversion of said case to or under Chapter 7 thereunder within the Insolvency Period (iii), or has ceased operations due to financial hardship within the Insolvency Period.

"Initial Fee" – The Initial Fee Percent or Initial Fee % specified in the Factoring Master Agreement multiplied by the stated Face Amount of a Purchased Account at the time of purchase by Purchaser.

"Initial Fee Period" – The number of days specified in the Factoring Master Agreement, computed from the Purchase Date.

"Insolvency Period" – The earlier of (i) the Ineligible Date or (ii) the date on which the Seller could be required to repurchase an account under the section hereof entitled "Repurchase of Accounts."

"Invoice" – The document that evidences or is intended to evidence an Account. Where the context so requires, references to an Invoice shall be deemed to refer to the Account to which it relates.

"Invoice Date" – The date of creation of an Invoice, which shall be no earlier than the date of Account completion, recorded thereupon.

"Late Charge" – One and one-half percent (1.5%) for each thirty (30) days commencing on the date of any Reserve Shortfall.

"Late Invoice Date" – The date which is the last day of the Ineligible Date period specified in the Factoring Master Agreement, computed from the Invoice Date.

"LIBOR" as of any date of determination, the per annum rate of interest (rounded up to the nearest 1/8th of 1%) determined by Wells Fargo Bank at or about 11:00 a.m. (London time) as of the first day of the month in which such determination is made, for a one month term, equal to the London Interbank Offered Rate, or comparable or successor rate approved by Wells Fargo Bank, as published on the applicable Wall Street Journal screen page (or other commercially available source designated by Wells Fargo Bank from time to time); provided, that any such comparable or successor rate shall be applied by Well Fargo Bank, if administratively feasible, in a manner consistent with market practice; provided, further, that in no event shall LIBOR be less than 0.13%.

"Misdirected Payment Fee" – Fifteen percent (15%) for the first event, (increasing by 10% for each subsequent event) of the amount of any payment on account of a Purchased Account (a) which has been received by Seller and not delivered in kind to Purchaser on the next banking day following the date of receipt by Seller, or (b) which Seller has attempted directly or indirectly to divert from direct payment to Purchaser's address.

"Missing Notation Fee" – Fifteen percent (15%) of the Face Amount of any Purchased Account.

"Non-Recourse Account" – A Purchased Account other than a Recourse Account.

"Non-Recourse Credit Guarantee" – Means the assumption by Purchaser of the risk of non-payment on certain Purchased Accounts identified by Purchaser, provided the cause of non-payment is solely due to an Account Debtor becoming Insolvent subject further to the provisions of Section 2.

"Non-Recourse Credit Guarantee Fee"- A fee due to Purchaser for the provision of the Non-Recourse Credit Guarantee where applicable.

"Obligations" – All present and future obligations of Seller to Purchaser and/or Purchaser's Affiliates whether direct or indirect, absolute or contingent, due or to become due, joint or several, primary or secondary, liquidated or unliquidated, secured or unsecured, whether arising before, during or after the commencement of any Bankruptcy Case in which Seller is a Debtor, including but not limited to any obligations arising pursuant to letters of credit or acceptance transactions or any other financial accommodations; and all principal, interest, fees, charges, expenses, attorneys' fees chargeable to Seller or incurred by Purchaser in connection with this Agreement.

"Parties" – Seller and Purchaser specified in the Factoring Master Agreement.

"Payments" – Payments received by Purchaser, in whatever form and from whatever source, in reduction of the Obligations.

"Person" – Means and includes natural persons, corporations, limited partnerships, general partnerships, limited liability companies, joint stock companies, joint ventures, associations, companies, trusts, banks, trust companies, land trusts, business trusts or other organizations, whether or not legal entities, and governments and agencies and political subdivisions thereof.

"Prime Rate" the rate of interest announced by Wells Fargo Bank from time to time as its prime rate but not less than 3.25%

"Purchase Date" – The date upon which an account has been deemed to have been purchased as set forth in Section 2.1.7 herein.

"Purchase Price" – The Face Amount, less (a) duplication, discounts, returns, credits or allowances of any nature at any time issued, owing, granted or outstanding, and (b) the Initial Fee.

"Purchase Summary Report" – Means a report prepared by Purchaser, which may occur upon receipt of an Accounts Transmittal, indicating those accounts of Seller that Purchaser intends to purchase.

"Purchased Accounts" – Accounts purchased hereunder which have not been Repurchased.

"Purchaser's Affiliates" – With respect to Purchaser, any affiliated or subsidiary companies, entities, members, owners, joint ventures, and Purchaser's managers, directors, officers, employees or agent and representatives.

"Rebate" – As described in Section 3.3.6

"Recourse Accounts" – See Section 2.1.2

"Repurchased" – An Account has been repurchased when Seller has paid to Purchaser the then unpaid Face Amount, together with any unpaid fees relating to the Purchased Account, upon demand by Purchaser under the terms hereof.

"Required Reserve Amount" – The Reserve Percentage multiplied by the balance of Purchased Accounts.

"Reserve Account" – A bookkeeping account on the books of the Purchaser representing an unpaid portion of the Purchase Price, maintained by Purchaser to ensure Seller's performance with the provisions hereof.

"Reserve Percentage" or "Reserve %" – The percentage specified in the Factoring Master Agreement, provided, that Purchaser may, in its sole discretion, from time to time increase the Reserve Percentage to the extent that Purchaser determines that: (a) the dilution with respect to the Accounts for any period has increased in any material respect or may be reasonably anticipated to increase in any material respect above historical levels, (b) the general creditworthiness of Account Debtors has declined, or (c) Seller has failed to comply with the Terms and Conditions. At Purchaser's sole discretion, the Reserve Percentage may vary on Accounts owed by different Account Debtors.

"Reserve Shortfall" – The amount by which the Reserve Account is less than the Required Reserve Amount.

"Trial Period" – Means the period as may be specified in the Factoring Master Agreement determined from the later of (i) the date on which Seller executes this Agreement; or (ii) the initial Purchase Date under the Factoring Master Agreement.

2. Sale; Purchase Price; Billing; Reserve

2.1. Assignment and Sale.

IF THE NON-RECOURSE CREDIT GUARANTEE OPTION IS "ACCEPTED" OR "INCLUDED" ON THE FACTORING MASTER AGREEMENT, THEN WITH RESPECT TO THE REST OF THIS SECTION 2, THE FOLLOWING PARAGRAPHS 2.1.1, 2.1.2, AND 2.1.4 – 2.1.8 SHALL APPLY:

2.1.1. From time to time, Seller may transmit to Purchaser a list of Seller's Accounts by Accounts Transmittal. Purchaser may thereafter provide to Seller a Purchase Summary Report based on such Accounts Transmittal, and Seller shall sell to Purchaser, as absolute owner, such of Seller's Accounts as are listed on such Purchase Summary Report. Upon purchase, and subject to any obligation by Seller to repurchase such Account as provided in Section (4), Purchaser will assume the risk of non-payment on such Purchased Accounts not to exceed the Covered Amount, provided: (i) the cause of non-payment is solely due to an Account Debtor becoming Insolvent prior to the Ineligible Date and, (ii) the Account Debtor is not an Affiliate of Seller, and (iii) Seller has obtained a credit approval for the Account Debtor in the eCapital credit database prior to the load being hauled that is within the approved credit limit, and (iv) Seller has provided all original backup documentation relating to the unpaid Purchased Account (to include but not limited to rate sheets, delivery notices and properly signed bills of lading) within 7 days of such a request being made by Purchaser to Seller. "Covered Amount" means as to any single Account Debtor, any amount not to exceed $5,000 per Invoice, and not to exceed in total $50,000 for all sums due to Purchaser by such Account Debtor.

2.1.2. Notwithstanding the foregoing, Purchaser may also from time-to-time purchase Accounts from Seller with full recourse to Seller ("Recourse Accounts"). Such Accounts shall be listed on a Purchase Summary Report indicating those Accounts that are being purchased as Recourse Accounts.

IF THE NON-RECOURSE CREDIT GUARANTEE OPTION IS NOT OFFERED, OR IS DECLINED OR N/A ON THE FACTORING MASTER AGREEMENT, THEN WITH RESPECT TO THE REST OF THIS SECTION 2, THE FOLLOWING PARAGRAPHS 2.1.3 - 2.1.8 SHALL APPLY:

2.1.3. From time to time, Seller may transmit to Purchaser a list of Seller's Accounts by Accounts Transmittal. Purchaser may send to Seller a Purchase Summary Report based on such Accounts Transmittal, and Seller shall sell to Purchaser, as absolute owner, with full recourse, such of Seller's Accounts as are listed on such Purchase Summary Report.

2.1.4. Each Accounts Transmittal shall be accompanied by such documentation supporting and evidencing the Account, as Purchaser shall from time-to-time request.

2.1.5. Purchaser may in the exercise of its sole discretion purchase from Seller such Accounts as Purchaser determines to be an Eligible Account, so long as the total outstanding Face Amount of Purchased Accounts does not exceed, before and after such purchase, the Account Limit. Purchaser may, in Purchaser's sole credit judgment exercised in good faith, either increase or decrease the Account Limit. To the extent Purchaser's purchase of any Purchased Account shall cause the total outstanding Face Amount of Purchased Accounts to exceed the Account Limit, the then existing Account Limit shall, as of the date of such purchase, be automatically increased by an amount equal to the amount by which the total outstanding Face Amount of Purchased Accounts exceeds the Account Limit as a result of such purchase.

2.1.6. All parties hereto agree than an Account with Invoice Date thirty (30) or more days prior to the then current date shall not be considered an Eligible Account. Notwithstanding the foregoing, Purchaser may in the exercise of its sole discretion determine that an Account with Invoice Date thirty (30) or more days prior to the then current date shall be an Eligible Account.

2.1.7. Purchaser shall pay the Purchase Price, less any amounts due to Purchaser from Seller, including, without limitation, any amounts due under Section 2.3.2 hereof, of any Purchased Account to Seller's Depository within three business days of Purchaser's decision to purchase the Accounts, whereupon the Accounts shall be deemed purchased hereunder.

2.1.8. Purchaser may instruct each Account Debtor to remit all payments due under the related Account to Purchaser provided, that any Account Debtor may be permitted to pay all payments by the automatic debit of its account through the Automatic Clearing House System for payment to an account of Purchaser.

2.2. Notification and Billing. Purchaser may send a statement to any or all Account Debtors itemizing their account activity. All Account Debtors will be instructed to make payments to Purchaser.

2.3. Reserve Account.

2.3.1. Purchaser may pay to Seller any amount by which collected funds in the Reserve Account are greater than the Required Reserve Amount; provided, that no Event of Default exists hereunder, and provided further Purchaser, in its sole discretion and acting in good faith, has no concerns about Seller's ability to continue to perform its obligations hereunder. Payment by Purchaser of said funds to Seller shall be made in accordance with any written instructions of Seller which are agreed to by Purchaser.

2.3.2. Purchaser may apply a portion of any Purchase Price to the Reserve Account in the amount of the Reserve Shortfall.

2.3.3. Seller shall pay to Purchaser, on demand, the amount of any Reserve Shortfall.

2.3.4. Purchaser may (i) charge the Reserve Account with any Obligation, including any amounts due from Seller to Purchaser hereunder; and (ii) pay any amounts due Seller hereunder by a credit to the Reserve Account. Purchaser has the express right of setoff and recoupment as to the Reserve Account.

2.3.5. Exposed Payments.

2.3.5.1. Upon termination of this Agreement, Seller shall pay to Purchaser (or Purchaser may retain), to hold in a non-segregated non-interest-bearing account the amount of all Exposed Payments (the "Preference Reserve").

2.3.5.2. Purchaser may charge the Preference Reserve with the amount of any Exposed Payments that Purchaser pays to the bankruptcy estate of the Account Debtor that made the Exposed Payment, on account of a claim asserted under Section 547 of the Bankruptcy Code. Purchaser has the express right of setoff and recoupment as to the Preference Reserve.

2.3.5.3. Purchaser shall refund to Seller from time to time that balance of the Preference Reserve for which a claim under Section 547 of the Bankruptcy Code can no longer be asserted due to the passage of the statute of limitations, settlement with the bankruptcy estate of the Account Debtor or otherwise.

2.3.5.4. Purchaser may retain the Reserve Account and/or Preference Reserve unless and until Seller has executed and delivered to Purchaser a general release (which shall be notarized if required by Purchaser) in the form contained on the final page of the Terms and Conditions.

2.4. Payments and Collections. Purchaser shall, for the purpose of the computation of fees due hereunder, add the Clearance Days to any Clearance Day Payments which is acknowledged by the parties to constitute an integral aspect of the pricing of Seller's facility to Purchaser, and shall apply irrespective of the characterization of whether receipts are owned by Purchaser or Seller. Should any check or item of payment not be honored when presented for payment, then payment shall be deemed not to have been made, and the fees shall be recalculated accordingly.

3. Fees.

Seller shall pay to Purchaser, on demand, all fees and other amounts due hereunder, including but not limited to:

3.1. Documentation Fee. The Documentation Fee specified in the Factoring Master Agreement upon Purchaser's first purchase of Accounts.

3.2. Initial Fee. The Initial Fee immediately upon its accrual, calculated using the applicable Initial Fee Percent specified in the Factoring Master Agreement as follows:

IF THE FACTORING MASTER AGREEMENT DOES NOT CONTAIN A GROWTH ADVANTAGE TABLE, THE FOLLOWING PARAGRAPH 3.2.1 SHALL APPLY:

3.2.1. The Initial Fee Percent specified in the Factoring Master Agreement.

IF THE FACTORING MASTER AGREEMENT CONTAINS A GROWTH ADVANTAGE TABLE , THEN WITH RESPECT TO THE REST OF THIS SECTION 3.2, THE FOLLOWING PARAGRAPHS 3.2.2 – 3.2.4 SHALL APPLY:

3.2.2. The Initial Fee Percent shall be the percentage in the row designated as the Starting Tier in the Factoring Master Agreement or otherwise incorporated into the Factoring Master Agreement.

3.2.3. If the Initial Fee Percent herein are based on a tiered pricing model and are therefore determined by the volume of the Face Amount of Invoices sold hereunder, then as an incentive for Seller to sell additional Eligible Accounts to Purchaser, the lowered tiered pricing as indicated in the Growth Advantage Table of the Factoring Master Agreement for the tier in which the aggregate Face Amounts of Invoices sold in that month falls shall be applied retroactively to the prior month's Purchased Accounts on Purchase Accounts exceeding the Starting Tier, if applicable. In other words, if Seller achieves more favorable pricing in a particular month due to a higher volume of Purchased Accounts, then that same pricing formula shall be applied retroactively to the Purchased Accounts from the prior month on Purchase Accounts exceeding the Starting Tier, and any surplus generated thereby shall be released to Seller as a Rebate (but subject to Purchaser's express rights of setoff and recoupment, which are reserved hereby) in the same manner as the Reserve Account.

3.2.4. Regardless of the prior calendar month's dollar volume of monthly Accounts purchased, if an Event of Default under the Agreement has occurred and is continuing without cure the Initial Fee Percent may without notice be increased to the highest Initial Fee Percent set forth in the fee table.

3.3. Additional Fee. In connection with each Purchased Account, the Additional Fee at the time each such Purchased Account is Closed, calculated using the Additional Fee Percent specified in the Factoring Master Agreement as follows:

IF THE FACTORING MASTER AGREEMENT DOES NOT CONTAIN A GROWTH ADVANTAGE TABLE OR ADVANCE FEE, THE FOLLOWING PARAGRAPH 3.3.1 SHALL APPLY:

3.3.1. The Additional Fee Percent specified in the Factoring Master Agreement.

IF THE FACTORING MASTER AGREEMENT CONTAINS A GROWTH ADVANTAGE TABLE, THEN WITH RESPECT TO THE REST OF THIS SECTION 3.3, THE FOLLOWING PARAGRAPHS 3.3.2 – 3.3.4 SHALL APPLY:

3.3.2. The Additional Fee Percent in the row designated as the Starting Tier in the Growth Advantage Table of the Factoring Master Agreement or otherwise incorporated into the Factoring Master Agreement. Such row shall be the "Starting Tier" for the purposes of Section 3.3.3.

3.3.3. If the Additional Fee Percent herein are based on a tiered pricing model and are therefore determined by the volume of the Face Amount of Invoices sold hereunder, then as an incentive for Seller to sell additional eligible Accounts to Purchaser, the lowered tiered pricing shall be applied retroactively to the prior month's Purchased Accounts on Purchase Accounts exceeding the Starting Tier, if applicable. In other words, if Seller achieves more favorable pricing in a particular month due to a higher volume of Purchased Accounts, then that same pricing formula shall be applied retroactively to the Purchased Accounts from the prior month on Purchase Accounts exceeding the Starting Tier, and any surplus generated thereby shall be released to Seller as a Rebate (but subject to Purchaser's express rights of setoff and recoupment, which are reserved hereby) in the same manner as the Reserve Account.

3.3.4. Regardless of the prior calendar month's dollar volume of monthly Accounts purchased, if an Event of Default under the Agreement has occurred and is continuing without cure the Additional Fee Percent may be increased to the highest Additional Fee Percent set forth in the fee table.

IF THE FACTORING MASTER AGREEMENT CONTAINS AN ADVANCE FEE, THEN WITH RESPECT TO THE REST OF THIS SECTION 3.3, THE FOLLOWING PARAGRAPHS 3.3.5 – 3.3.6 SHALL APPLY:

3.3.5. The Advance Fee Specified in the Factoring Master Agreement.

3.3.6. The Additional Fee Percent specified in the Factoring Master Agreement.

3.4. Non-Recourse Credit Guarantee Fee. The Non-Recourse Credit Guarantee Fee specified in the Factoring Master Agreement, if applicable. The parties acknowledge that it is an integral part of the pricing that such Non-Recourse Credit Guarantee Fee shall apply to all Accounts purchased notwithstanding the fact that not all Accounts are purchased with a Non-Recourse Credit Guarantee.

3.5. Misdirected Payment Fee. Any Misdirected Payment Fee immediately upon its accrual.

3.6. Missing Notation Fee. Any Missing Notation Fee on any Invoice that is sent by Seller to an Account Debtor that does not contain the notice as required by Section 8.3 hereof. It is recognized that the costs imposed upon Purchaser by the Seller's action or inaction resulting in the imposition of this penalty are difficult to ascertain, and this fee represents the good faith effort to compensate Purchaser without imposing upon the parties the expensive burden of litigating that cost and is the agreed liquidated damages with result therefrom.

3.7. Payment by Credit Card. In the event an Account Debtor makes a payment to Purchaser using a credit card, Purchaser shall credit to the obligation of the Account Debtor the amount credited to Purchaser by Purchaser's credit card processor, net of any processing fees.

3.8. Late Charge. The Late Charge on:

3.8.1. All past due amounts due from Seller to Purchaser hereunder; and

3.8.2. The amount of any Reserve Shortfall.

3.9. Out-Of-Pocket Expenses. The out-of-pocket expenses and allocated internal costs incurred by Purchaser in the administration of this Agreement and billed to Seller at Purchaser's normal and customary rates (including but not limited to such fees as may be stated in a listing or Schedule of "As Utilized Fees" issued by Purchaser from time to time), which includes re-documentation fees (minimum fee of $150 shall apply), wire transfer fees, invoice handling/postage fees, fees for handling of payments received by Purchaser on account of Seller that are not Purchased Accounts, and audit fees. At Purchaser's discretion, Seller shall pay for the cost of any filing (including UCC filings), or searching, or obtaining any public or other record. In the event that Seller requires or requests that Purchaser enter into negotiations with a secured party of Seller in connection with the termination of this Agreement, or review or sign any agreement with or for the benefit of such secured party, Seller shall pay Purchaser out-of-pocket costs of its counsel and other advisors, as well as an hourly rate of $250.00 for the reasonable time of Purchaser's personnel spend in connection therewith (collectively the "Buyout Fee"). The Buyout Fee shall be in addition to the Termination Amount that may be due under section 13.8 hereof.

3.9.1. Buyout Fee and/or UCC Release /Termination fee. A minimum of seven hundred and fifty dollars ($750).

3.10. Non-Factored Account Processing Fee. At discretion of Purchaser and without notice to Seller, a processing fee of 0.5% of the invoice amount for any non-factored invoice that is paid to Purchaser for account of Seller.

4. Repurchase of Accounts.

4.1. Purchaser may require that Seller repurchase, by payment of the unpaid Face Amount thereof, together with any unpaid fees relating to the Purchased Account, on demand, or at the Purchaser's option, by Purchaser's charge to the Reserve Account:

4.1.1. Any Purchased Account, including a Non-Recourse Account, the payment of which has been disputed by the Account Debtor obligated thereon, Purchaser being under no obligation to determine the bona fides of such dispute.

4.1.2. Any Purchased Account including a Non-Recourse Account, regarding which Seller has breached any representation or warranty under this Agreement, or upon the occurrence of an Event of Default, or upon the termination date of this Agreement.

4.1.3. Any Purchased Account including a Non-Recourse Account, for which Seller fails to provide all original backup documentation (to include but not limited to invoices, delivery notices and properly signed bills of lading) relating to the unpaid Purchased Account, within 7 days of Purchaser's request.

4.1.4. Any Purchased Account (absent an Account Debtor becoming Insolvent within the Insolvency Period with respect to a Non-Recourse Account) where in Purchaser's reasonable judgment Account Debtor has indicated or demonstrated an unwillingness to pay the Purchased Account when due, or any portion of any Purchased Account which remains unpaid beyond either the Ineligible Date or the Late Invoice Date, as determined in the sole discretion of Purchaser.

4.1.5. All of the Purchased Accounts including Non-Recourse Accounts of any Account Debtor obligated thereon, in the event that greater than ten percent (10%) of Purchased Accounts due from that Account Debtor remain unpaid beyond either the Ineligible Date or the Late Invoice Date, as determined in the sole discretion of Purchaser.

4.1.6. Any Account other than a Non-Recourse Account that remains unpaid for any reason whatsoever beyond the Ineligible Date, it being understood and agreed that any such Account is hereby deemed disputed.

4.2. The repurchase of a Purchased Account shall not constitute a reassignment of such Account, and a security interest therein shall remain in the Purchaser.

5. Repayment of Fuel Advance. Purchaser may require Seller to repay any Fuel Advance, including any fees owed to Purchaser thereon, on demand, or at Purchaser's option, by charge to the Reserve Account, any Fuel Advance:

5.1. Made 5 days or greater from the date of said request for repayment, for which an original Invoice sufficient to evidence an Eligible Account has not been provided by Seller to Purchaser; or

5.2. That in the sole judgment of Purchaser does not represent an Account that will become an Eligible Account.

6. Security Interest. As collateral securing the Obligations, Seller grants to Purchaser a continuing first priority security interest in and to the Collateral.

7. Authorization to Purchaser.

7.1. Seller irrevocably authorizes Purchaser to exercise at any time, any of the following powers, at Seller's sole expense, until all of the Obligations have been paid in full: (a) receive, take, endorse, assign, deliver, accept and deposit, in the name of Purchaser or Seller, any and all proceeds

of any Collateral securing the Obligations or the proceeds thereof; (b) take or bring, in the name of Purchaser or Seller, all steps, actions, suits or proceedings deemed by Purchaser necessary or desirable to effect collection of or other realization upon the Collateral; (c) pay any sums necessary to discharge any lien or encumbrance which is, or may become senior to Purchaser's security interest in any assets of Seller, which sums shall be included as Obligations and debited to the Reserve Account; (d) initiate electronic debit or credit entries through any electronic clearinghouse or other system for presentment including but not limited to Electronic Check Presentment, and ACH systems to or from the Depository, or any deposit (or other) account maintained by Seller wherever located; (e) file in the name of the Seller or Purchaser or both: Mechanic's Lien or related notices, and/or claims under any bond, in connection with goods or services sold or provided by Seller; (f) notify any Account Debtor obligated with respect to any Account, that the underlying Account has been assigned to Purchaser by Seller and that payment thereof is to be made to the order of and directly and solely to Purchaser; (g) communicate directly with Seller's Account Debtors to verify the amount and validity of any Account created by Seller; (h) after an Event of Default, change the address for delivery of mail (inclusive of FedEx, UPS or similar service) to Seller and to receive and open mail addressed to Seller; (i) after an Event of Default, extend the time of payment of, compromise or settle for cash, credit, return of merchandise, and upon any terms or conditions, any and all Accounts and discharge or release any Account Debtor or other obligor (including filing of any public record releasing any lien granted to Seller by any such Account Debtor), without affecting any of the Obligations; (j) disclose such information to third parties making credit inquiries about Seller as Purchaser deems necessary, including but not limited to any such inquiries made by credit reporting agencies.

7.2. Seller irrevocably authorizes Purchaser at any time and from time to time to file any initial financing statements and amendments thereto that: (a) indicate the Collateral as all assets of the Seller or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the UCC, or as being of an equal or lesser scope or with greater detail, (b) contain any other information required by part 5 of Article 9 of the UCC for the sufficiency or filing office acceptance of any financing statement or amendment, including (i) whether the Seller is an organization, the type of organization, and any organization identification number issued to the Seller and (ii) in the case of a financing statement filed as a fixture filing or indicating Collateral as as-extracted collateral or timber to be cut, a sufficient description of real property to which the Collateral relates; (c) contain a notification that the Seller has granted a negative pledge to the Purchaser, and that any subsequent lienor may be tortuously interfering with Purchaser's rights, and advises third parties that any notification of Seller's Account Debtors will interfere with Purchaser's collection rights.

7.3. Purchaser shall not have any duties or obligations (implied or otherwise) except those expressly set forth in this Agreement. None of Purchaser, its officers, employees, agents or designees shall have, and Seller hereby releases and exculpates all of such persons and entities, from any liability arising from any acts under this Agreement or in furtherance thereof whether of omission or commission, and whether based upon any error of judgment or mistake of law or fact, except for willful misconduct. In no event will Purchaser have any liability to Seller for lost profits or other special or consequential damages. Without limiting the generality of the foregoing, Seller releases Purchaser from any claims which Seller may now or hereafter have arising out of Purchaser's endorsement and deposit of checks issued by Seller's customers stating that they were in full payment of an account but issued for less than the full amount which may have been owed on the account.

7.4. Seller hereby gives its consent to Purchaser, without compensation or any other limitation, to publish or display testimonials or other statements from Seller and by any means in any media for Purchaser's advertising or promotional purposes.

7.5. Seller hereby gives its consent to Purchaser, without compensation or any other limitation, to share information about Seller including transactional data and information with non-affiliated third parties for any purpose including marketing to Seller of special offers and trade discounts.

7.6. Seller hereby ratifies its authorization to Purchaser to file, prior to the date hereof, any initial financing statements or amendments which indicates the Collateral as all assets of the Seller or words of similar effect.

7.7. Seller hereby grants Purchaser the limited power of attorney to (a) correct and/or execute or initial all typographical or clerical errors discovered in any of the documents executed by Seller in connection herewith, (b) make, amend or correct any filing required by the Federal Motor Carrier Safety Administration or any governmental agency having jurisdiction over Seller, including but not limited to the correction of inconsistent names under which Seller is listed, (c) file or advertise fictitious names for the Seller in the name of and at the cost of Seller, including doing so through the use of a third-party vendor such as www.mycorporation.com, (d) prepare and sign, on behalf of Seller, notice of assignment of all of Seller's Accounts to Purchaser, said notice to be provided to any Account Debtor of Seller at Purchaser's sole discretion, and (e) prepare and sign, on behalf of Seller, authorization documentation necessary to enroll Seller for any applicable fuel program facilitated by Purchaser with any third party at Purchaser's sole discretion. In the event that Purchaser corrects and/or executes or initials any errors in accordance with this Section 7.7, Purchaser will send Seller a copy of the document so executed or initialed on Seller's behalf; provided, that failure to do so shall not invalidate the correction.

7.8. Seller hereby acknowledges and agrees that Purchaser shall have no obligation to rescind any notice(s) of assignment provided to any Account Debtor of Seller while any Obligations, including any loan or working capital advance, remain unpaid.

7.9. Seller hereby gives its consent to Purchaser and/or its agent/affiliates to verify and investigate at any time the information provided including the obtaining of consumer and other credit reports.

8. Covenants by Seller.

8.1. After written notice by Purchaser to Seller, and automatically, without notice, after an Event of Default, Seller shall not (a) grant any extension of time for payment of any of its Accounts, (b) compromise or settle its Accounts for less than the full amount thereof, (c) release in whole or in part any Account Debtor, or (d) grant any credits, discounts, allowances, deductions, return authorizations or the like with respect to any of the Accounts.

8.2. From time to time as requested by Purchaser, at the sole expense of Seller, Purchaser or its designee shall have access, during reasonable business hours if prior to an Event of Default and at any time if on or after an Event of Default, to all premises where Collateral is located for the purposes of inspecting (and removing, if after the occurrence of an Event of Default) any of the Collateral, including Seller's books and records, and Seller shall permit Purchaser or its designee to make copies of such books and records or extracts therefrom as Purchaser may request. Without expense to Purchaser, Purchaser may use any of Seller's personnel, equipment, including computer equipment, programs, printed output and computer readable media, supplies and premises for the collection of accounts and realization on other Collateral as Purchaser, in its sole discretion, deems appropriate. Seller hereby irrevocably authorizes all accountants and third parties to disclose and

deliver to Purchaser at Seller's expense all financial information, books and records, work papers, management reports and other information in their possession relating to Seller.

8.3. Before sending any Invoice to an Account Debtor, Seller shall mark same with a notice of assignment as may be required by Purchaser.

8.4. Seller shall pay when due all payroll and other taxes and shall provide proof thereof to Purchaser in such form as Purchaser shall reasonably require.

8.5. Seller shall not create, incur, assume or permit to exist any lien upon or with respect to any assets in which Purchaser now or hereafter holds a security interest.

8.6. Seller shall maintain surety bonds and all insurances required by law to operate its business, as well as insurances on all insurable property owned or leased by Seller in the manner, to the extent and against at least such risks (in any event but not limited to fire and business interruption insurance) as usually maintained by owners of similar businesses and properties in similar geographic areas. All such insurance shall be in the amounts and form and with insurance companies acceptable to Purchaser in its sole discretion. Seller shall furnish to Purchaser: (a) upon written request, any and all information concerning such insurance carried; (b) upon written request, lender loss payable endorsements naming Purchaser as loss payee, in form and substance satisfactory to Purchaser; and (c) at least annually and at such other times as reasonably requested by Purchaser, certificates of insurance from Insurance companies showing Purchaser as loss payee. All policies of insurance shall provide for not less than thirty (30) days prior written cancellation notice to Purchaser.

8.7. Notwithstanding Seller's obligation to pay the Misdirected Payment Fee or the Missing Notation Fee pursuant to Sections 3.5 or 3.6 hereof, Seller shall pay the amount of any payment on account of a Purchased Account, or after the occurrence of an Event of Default any payment of any Account, received by Seller to Purchaser on the next banking day following the date of receipt thereof by Seller. Any such payment received by Seller shall be held by Seller in trust for Purchaser and shall not be commingled with any funds of Seller.

8.8. Seller shall not, without Purchaser's prior written consent, enter into any consolidation, merger, or other combination, or become a partner in a partnership, a member of a joint venture, or a member of a limited liability company.

8.9. Seller shall not, without Purchaser's prior written consent, have any existing, or make any new, investments in any individual or entity, or make any capital contributions or other transfers of assets to any individual or entity.

8.10. For the duration of this Agreement, Seller shall furnish to Purchaser, upon written request, within three business days of such request, with (i) Seller's current customer list, including customer name, email address, mailing address, phone number and contact person, and (ii) Seller's updated accounts receivable aging.

8.11. For the duration of this Agreement, Seller agrees that it shall not undertake any other financing or sell its future receivables to any entity other than Purchaser or Purchaser's Affiliates without the express written consent of Purchaser and hereby acknowledges that such action may constitute a material dilution of Purchaser's interest in the Collateral. In the event that Seller breaches this covenant, Seller shall pay to Purchaser the sum of ten percent (10%) of the financing received without Purchaser's consent, in addition to any other remedies available to Purchaser under this Agreement.

8.12. Upon execution of this Agreement, Seller shall, if requested by Purchaser, deliver to Purchaser an executed Confession of Judgment (the "Confession of Judgment"), in the form provided by Purchaser, in favor of Purchaser in the amount of the outstanding Obligations.

9. Account Disputes. Seller shall notify Purchaser promptly of and, if requested by Purchaser, will settle all disputes concerning any Purchased Account, at Seller's sole cost and expense. However, Seller shall not, without Purchaser's prior written consent, compromise or adjust any Purchased Account or grant any additional discounts, allowances or credits thereon. Purchaser may, but is not required to, attempt to settle, compromise, or litigate (collectively, "Resolve") the dispute upon such terms, as Purchaser in its sole discretion deems advisable, for Seller's account and risk and at Seller's sole expense. Upon the occurrence of an Event of Default Purchaser may Resolve such issues with respect to any Account of Seller.

10. Avoidance Claims. IF THE NON-RECOURSE CREDIT GUARANTEE FEE IS "ACCEPTED" OR "INCLUDED" ON THE FACTORING MASTER AGREEMENT, THEN WITH RESPECT TO THE REST OF THIS SECTION 10, THE PARAGRAPHS 10.1, 10.3 AND 10.4 SHALL APPLY:

10.1. Seller shall indemnify Purchaser from any loss arising out of the assertion of any Avoidance Claim other than such claims that relate to Purchased Accounts that are owed by an Account Debtor which was Insolvent and shall pay to Purchaser on demand the amount thereof. IF NON-RECOURSE CREDIT GUARANTEE FEE IS "DECLINED" ON THE FACTORING MASTER AGREEMENT, THEN WITH RESPECT TO THE REST OF THIS SECTION 10, THE FOLLOWING PARAGRAPHS 10.2 - 10.4 SHALL APPLY.

10.2. Seller shall indemnify Purchaser from any loss arising out of the assertion of any Avoidance Claim and shall pay to Purchaser on demand the amount thereof.

10.3. Seller shall notify Purchaser within two (2) business days of it becoming aware of the assertion of an Avoidance Claim.

10.4. This provision shall survive termination of this Agreement.

11. Representation and Warranty. Seller represents and warrants that:

11.1. It is fully authorized to enter into this Agreement and to perform hereunder.

11.2. This Agreement constitutes its legal, valid and binding obligation.

11.3. Seller is solvent and in good standing in the State of its organization.

11.4. Seller has not received notice or otherwise learned of actual or imminent bankruptcy, insolvency, or material impairment of the financial condition of any applicable Account Debtor regarding Purchased Accounts.

11.5. Its financial statements, if provided to Purchaser, and any financial statements furnished to Purchaser hereafter, fairly represent the financial condition of Seller and each Guarantor at such dates, and since those dates there has been no material adverse change, financial or otherwise, in such condition or in the operation or ownership of Seller. Regardless of whether financial statements were provided to Purchaser, Seller has a continuing, affirmative obligation to advise Purchaser of any material adverse change in its financial condition, operation or ownership. Purchaser shall require bank login access, or bank statements if online access is unavailable, to any bank account maintained by Seller or Affiliate of Seller at any time during the performance of this Agreement and the Seller shall provide them to Purchaser within three (3) business days of Purchaser's request. Seller's failure to do so will constitute a material breach of this Agreement.

11.6. The Purchased Accounts are and will remain:

11.6.1. Bona fide existing obligations created by the sale and delivery of goods or the rendition of services in the ordinary course of Seller's business and are not sales to any entity that is an Affiliate of Seller or in any way not an "arm's length" transaction.

11.6.2. Unconditionally owed and will be paid to Purchaser without defenses, disputes, offsets, counterclaims, or rights of return or cancellation other than, with respect to a Non-Recourse Account, Accounts owed by an Account Debtor which was Insolvent.

12. Default.

12.1. Events of Default. The following events will constitute an Event of Default hereunder: (a) Seller defaults in the payment of any Obligations or in the performance of any provision hereof or of any other agreement now or hereafter entered into with Purchaser, including with Purchaser's Affiliates and any third party servicers, or any warranty or representation made at any time by Seller to Purchaser, including to Purchaser's Affiliates and any third party servicers, proves to be false in any way, however minor, (b) Seller or any guarantor of the Obligations becomes subject to any debtor-relief proceedings, (c) any such guarantor fails to perform or observe any of such guarantor's obligations to Purchaser or shall notify Purchaser of its intention to rescind, modify, terminate or revoke any guaranty of the Obligations, or any such guaranty shall cease to be in full force and effect for any reason whatever, (d) Purchaser for any reason, in good faith, deems itself insecure with respect to the prospect of repayment or performance of the Obligations, (e) failure of Seller or any guarantor to notify Purchaser in writing at least thirty (30) days prior to changing its name, jurisdiction of organization, organizational structure, or incorporating or otherwise initiating a new business substantially similar in ownership or operation (including a transportation brokerage) to that of Seller, (f) a change of twenty (20%) or more in the direct or indirect capital ownership of the Seller, (g) Seller suspends or discontinues its business as conducted on the date hereof for any reason, or at any time Seller has not submitted Accounts to Purchaser for purchase for a period of ninety (90) days or (h) Seller enables or permits any third party to directly or indirectly access any information contained in those areas of Purchaser's website or account portal which are accessible with the use of a password provided to Seller by Purchaser, including but not limited to any access to printouts, or paper or electronic copies of such information from Purchaser's website.

12.2. Effect of Default. Upon the occurrence of any Event of Default, (a) the Default Rate shall accrue and is payable on all Obligations, and in addition to any rights Purchaser has under this Agreement or applicable law, Purchaser may immediately terminate this Agreement, at which time all Obligations shall immediately become due and payable without notice, and (b) any fees due hereunder and previously waived by Purchaser shall be automatically reinstated, all such fees having been waived on the condition that no Event of Default was existing or shall thereafter occur. Further, upon the occurrence of any Event of Default or after the giving of any notice of termination pursuant to Section 13 hereof, Purchaser may in its sole discretion, deny Seller access to any remotely accessed reporting or credit system (including any online or telephone systems or account portal) that may be maintained by Purchaser. Upon the waiver by Purchaser of any Event of Default hereunder, Seller shall pay Purchaser a default waiver fee equal to ten percent (10%) of the then existing Account Limit. Any failure by Purchaser to assess such default waiver fee immediately upon the occurrence of an Event of Default shall not be deemed a waiver by Purchaser to charge such fee.

12.3. Waiver of Notice. SELLER WAIVES ANY REQUIREMENT THAT PURCHASER INFORM SELLER BY AFFIRMATIVE ACT OR OTHERWISE OF ANY ACCELERATION OF SELLER'S OBLIGATIONS HEREUNDER. FURTHER, PURCHASER'S FAILURE TO CHARGE OR ACCRUE INTEREST OR ANY FEES DUE HEREUNDER SHALL NOT BE DEEMED A WAIVER BY PURCHASER OF ITS CLAIM THERETO.

13. Termination.

13.1. This Agreement will be effective on the Closing Date and will continue in full force and effect until Purchaser has released its lien in accordance with paragraph 16 hereof.

13.2. Unless otherwise provided in the Factoring Master Agreement, an Initial Term equal to 12 months from the Closing Date ("Initial Term") shall apply.

13.3. At the end of the then-current term, being either an Initial Term or any Subsequent Term, unless (a) notice to terminate is given 60 days prior to the end of the then-current term and (b) full payment of all outstanding Obligations has been made by Seller to Purchaser prior to the end of the then-current term, this Agreement shall be extended automatically for "Subsequent Term/s" which shall each comprise a 12-month period (unless otherwise agreed in writing).

13.4. Seller may give notice to terminate this agreement without incurring an Early Termination Fee provided such notice is given 60 days prior to the end of the then-current term. If no such notice is given, this Agreement shall be automatically extended for a Subsequent Term or further Subsequent Term. It is agreed that during and after any notice this Agreement shall continue to be in full force and effect until Purchaser releases its lien in accordance with paragraph 16 hereof.

13.5. Notwithstanding the foregoing, at the end of the Trial Period Seller may give notice to terminate this Agreement without incurring an Early Termination Fee provided such notice is given within a 30-day Notice Window. Seller understands and agrees that this Agreement is ineligible for termination within the Trial Period.

13.6. It is agreed that during and after any notice of termination this Agreement shall continue to be in full force and effect until Purchaser releases its lien in accordance with paragraph 16 hereof.

13.7. Any notice to terminate this Agreement by Seller must be given either by a) email to Purchaser sent to: contracts@ecapital.com or b) by mail addressed to: eCapital, Attn: Contracts Department, at 20807 Biscayne Boulevard, Number 203, Aventura, Florida 33180. Termination notices sent by any other method or to any other email address will be deemed invalid.

13.8. Early Termination. Seller shall also have the option at any time upon 30 days prior written notice to Purchaser, to terminate this Agreement by paying to Purchaser in cash the amount of the outstanding Obligations. In such case, at the time of said early termination, Seller shall also pay to Purchaser an Early Termination Fee. (collectively the "Termination Amount").

Notwithstanding any other provision of this Agreement, Seller shall pay to Purchaser any Buyout Fees as may be due under section 3.9.1 hereof.

13.9. Purchaser may terminate this Agreement without notice following the occurrence of an Event of Default, after which event Seller shall pay to Purchaser the Termination Amount.

13.10. Any payments received by Purchaser from any Account Debtor following the termination of this Agreement may be, at Purchaser's option, (a) applied to repay any outstanding Obligations hereunder, (b) forwarded to Seller, or (c) returned to such Account Debtor. Notwithstanding the foregoing, Purchaser (i) shall not bear any responsibility or liability with respect to any such payments, and (ii) may retain 2.5% of the amount of any such payments received to cover Purchaser's costs of handling such payments.

14. Account Stated. Purchaser shall render to Seller, from time to time, a statement by email or online setting forth the transactions arising hereunder. Each statement shall be considered correct and binding upon Seller as an Account Stated, except to the extent that Purchaser receives, within thirty (30) days after providing such statement, written notice from Seller of any specific exceptions by Seller to that statement, where after it shall be binding against Seller as to any items to which it has not objected.

15. Amendment. PURCHASER RESERVES THE RIGHT TO AMEND THESE TERMS AND CONDITIONS at any time, and from time to time, by publishing a revised version of the Terms and Conditions at the following site, www.us.terms.eCapital.com. Seller's submission of Accounts to Purchaser for purchase following the posting of any such amendments to the Terms and Conditions constitutes Seller's acceptance of those revisions, and Purchaser has no obligation to inform Seller of such changes in any other manner. Further, if an increase in either the Libor Rate as of any date of determination, the per annum rate of interest (rounded up to the nearest 1/8th of 1%) determined by Wells Fargo at or about 11:00 a.m. (London time) as of the first day of the month in which such determination is made, for a one month term, equal to the London Interbank Offered Rate, or comparable or successor rate approved by Wells Fargo, as published in the Wall Street Journal (or other commercially available source designated by Wells Fargo from time to time); provided, that any such comparable or successor rate shall be applied by Wells Fargo, if administratively feasible, in a manner consistent with market practice or the Prime Rate the rate of interest announced by Wells Fargo from time to time as its prime rateover that paid by Purchaser at the Closing Date raises the Purchaser's cost of borrowing, then in such event, Purchaser may immediately increase the Fees (including the Initial Fee and Additional Fee) then charged to Seller so as to recoup Purchaser's increased costs of borrowing with respect to subsequently Purchased Accounts. No failure to exercise and no delay in exercising any right hereunder shall impair any such right that Purchaser may have, nor shall any waiver by Purchaser hereunder be deemed a waiver of any default or breach subsequently occurring. Purchaser's rights and remedies herein are cumulative and not exclusive of each other or of any rights or remedies that Purchaser would otherwise have.

16. No Lien Termination without Release. In recognition of the Purchaser's right to have its attorneys' fees and other expenses incurred in connection with this Agreement secured by the Collateral, notwithstanding payment in full of all Obligations by Seller, Purchaser shall not be required to record any terminations or satisfactions of any of Purchaser's liens on the Collateral unless and until Seller has executed and delivered to Purchaser a general release (which shall be notarized if required by Purchaser) in the form and substance similar to the form contained on the final page of the Terms and Conditions, or as otherwise required by Purchaser. Seller understands that this provision constitutes a waiver of its rights under §9-513 of the UCC. Seller shall pay to Purchaser any fees that may be due under section 3.9.1 of this Agreement.

17. Attorneys' Fees. Seller agrees to reimburse Purchaser on demand for:

17.1. The actual amount of all costs and expenses, including attorneys' fees, which Purchaser has incurred or may incur in negotiating, preparing, or administering this Agreement and any documents prepared in connection herewith.

17.2. The actual costs, including photocopying, travel, and attorneys' fees and expenses incurred in complying with any subpoena or other legal process attendant to any litigation in which Seller is a party.

17.3. Either (the choice of which shall be in the sole discretion of Purchaser):

17.3.1. The actual amount of all costs and expenses, including attorneys' fees, which Purchaser may incur in enforcing this Agreement and any documents prepared in connection herewith, or in connection with any federal or state insolvency proceeding commenced by or against Seller, including those (a) arising out of the automatic stay, (b) seeking dismissal or conversion of the bankruptcy proceeding or (c) opposing confirmation of Seller's plan thereunder, and protecting, preserving or enforcing any lien, security interest or other right granted by Seller to Purchaser or arising under applicable law, whether or not suit is brought, including but not limited to the defense of any Avoidance Claims.

17.3.2. Twenty percent (20%) of the amount of the claim of Purchaser against Seller, which Seller agrees shall constitute a reasonable substitute for such actual fees and expenses.

18. Reaffirmation of Finance Application. To induce Purchaser to enter into this Agreement, Seller hereby ratios and affirms all representations and warranties it made in the Finance Application.

19. Entire Agreement. This Agreement supersedes all prior agreements and understandings between said parties, verbal or written, express or implied, relating to the subject matter hereof. No course of dealing, course of performance or trade usage, and no parole evidence of any nature, shall be used to supplement or modify any terms of this Agreement.

Jury Trial Waiver. IN RECOGNITION OF THE HIGHER COSTS AND DELAYS WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (I) ARISING HEREUNDER, OR (II) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY; AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHTS TO TRIAL BY JURY. THE PARTIES HERETO ACKNOWLEDGE THAT EACH MAKES THIS WAIVER KNOWINGLY, WILLINGLY, VOLUNTARILY AND WITHOUT DURESS, AND ONLY AFTER EXTENSIVE CONSIDERATION OF THE RAMIFICATIONS OF THIS WAIVER WITH ITS ATTORNEYS.

20. Arbitration of all Disputes and Claims.

20.1. In order to gain the benefits of a speedy, impartial and cost-effective dispute procedure, and for good and valid consideration as covenanted herein, and intending to be legally bound, Purchaser, Seller and Guarantor(s) hereby agree that, except as otherwise provided herein, at the election of any party by notice to the other parties, all disputes and claims for which a court otherwise would be authorized by law to grant relief, in any manner, that Seller and/or Guarantor(s) may have, now or in the future, of any and every kind of nature whatsoever with or against Purchaser or Purchaser's Affiliates or any third party servicer, shall be submitted to the American Arbitration Association ("AAA") to be resolved and determined through final and binding arbitration according to the Commercial Arbitration Rules of the AAA. This Section 21 is a material inducement for Purchaser to enter into this Agreement.

20.2. Each party shall have the right to representation by counsel with respect to arbitration of any dispute arising out of or related to this Agreement. Except as prohibited by law, at the request of any party, the arbitration proceedings shall be conducted in confidence, and, in such a case, all documents, testimony, and records shall be received, heard, and maintained by the arbitrator in confidence, available for inspection only by the parties, their respective attorneys, and experts, who shall agree, in advance and in writing, to receive all such information confidentially and to maintain the secrecy of such information until it shall become generally known. The parties shall be allowed adequate discovery as part of the arbitration process, including reasonable access to essential documents and witnesses as determined by agreement or the arbitrator.

20.3. Unless the parties agree otherwise, any arbitration hearings shall take place in Miami-Dade County, Florida. If the claim against Purchaser or Seller is for $100,000 or less, the parties agree the arbitration will be conducted solely on the basis of the documents submitted to the arbitrator, through a telephonic hearing. If the claim exceeds $100,000, unless the parties agree otherwise, the arbitration will be conducted by an in-person hearing. If the arbitration is conducted by an in-person hearing, the arbitrator shall conduct a full hearing as to all issues and disputes not resolved by dispositive motion. At such hearing, the parties shall be entitled to present evidence and examine and cross-examine witnesses. The arbitrator shall issue a written decision revealing the essential findings and conclusions upon which any award is based. In addition, except as otherwise specified herein, the arbitrator shall have the authority to award equitable relief, and damages, including, but not limited to, any remedy or relief that a governing court might order.

20.4. The parties agree that any arbitration award rendered as the result of any arbitration under this Agreement shall be final and binding, and judgment on the award may be entered and enforced in any court having jurisdiction thereof.

20.5. The parties agree that this Agreement, any arbitration under this Agreement, and any arbitration award rendered in such arbitration shall be governed by the Federal Arbitration Act. The parties further agree that any issues as to arbitrability of a dispute, including but not limited to this Section 20, shall be resolved and decided by the arbitrator. All statutes of limitations which would be applicable to a judicial proceeding shall be applicable to an arbitration proceeding under this Agreement.

20.6. With respect to all costs and fees of the arbitration, the parties agree that each party shall bear its own costs and fees, including witness fees and attorneys' fees, and that each party shall bear an equal share of the arbitrator's fees. The arbitrator shall award to the prevailing party in the arbitration all of their costs and fees of the arbitration, including witness and attorneys' fees.

20.7. Nothing in this Section 20 shall limit the right of a party (i) to exercise self-help remedies available under this Agreement, including, without limitation, setoff or exercising its rights under the UCC, or (ii) to obtain from a court provisional or ancillary remedies such as, but not limited to, injunctive relief, specific performance, attachment, or the appointment of a receiver from a court having jurisdiction before, during, or after the pendency of any arbitration proceeding. The pursuit of provisional or ancillary remedies or exercise of self-help remedies shall not constitute a waiver of the right of any party to submit such dispute or claim to arbitration.

20.8. CLASS ACTION WAIVER. THE PARTIES HERETO WAIVE ANY RIGHT TO ASSERT ANY CLAIM AGAINST THE OTHER PARTY AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OR REPRESENTATIVE ACTION, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW AS 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 CLASS HEREBY AGREE THAT: (1) THE PREVAILING PARTY SHALL NOT BE ENTAILED TO RECOVER ATTORNEYS FEES OR COSTS ASSOCIATED WITH PURSUING THE CLASS OR REPRESENTATIVE ACTION (NOT WITHSTANDING ANY OTHER PROVISIONS 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.

21. Covenant Not to Sue.

21.1. Seller and Guarantor(s) agree that they will never institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action or cause of action at law or in equity against the Purchaser, Purchaser's Affiliates or any third party servicer for a claim of usury, a claim that that the Purchaser is required to have any lending license, or any other claim contending that the Purchase Price paid by the Purchaser in

exchange for the Purchased Accounts is, or should be construed as, a loan from the Purchaser to the Seller. Nothing in this Section 21 is intended to prevent Seller or Guarantor from complying with any lawfully issued subpoena or court ordered discovery.

21.2. This Section 21 is a covenant not to sue, and not a release. In the event that the Seller or any Guarantor breaches or in any way violates the terms of this Section 22 the Sellers and Guarantors jointly and severally agree to indemnify the Purchaser for all damages arising from that breach, including without limitation the payment of all costs and expenses of every kind for the enforcement of Purchaser's rights and remedies under this section, including any and all attorneys' fees and costs in any trial court or appellate court proceeding, any administrative proceeding, any arbitration or mediation, or any negotiations or consultations in connection with breach of this Section 21.

21.3. This covenant shall inure to the benefit of Purchaser, Purchaser's Affiliates and any third-party servicers, and shall bind Seller, Guarantor(s) and their respective successors and/or assigns, any of their respective affiliated or subsidiary companies, partners, owners, joint ventures, and/or any of Seller's managers, directors, officers, employers or agents.

22. No Liability for Special Damages.

22.1. Purchaser may from time to time promote or provide to Seller the products or services of third parties, such as (but not limited to) fuel cards, fuel discounts, insurance, and roadside services, ("the Services'). The Seller acknowledges and agrees that the Purchaser is acting as a facilitator in the provision of the Services and does not provide any guaranty or warranty of performance by itself or by such third party. Seller hereby indemnifies Purchaser against any claim it may have arising out of the provision of the Services.

22.2. In no event (including but not limited to any claim under 22.1) will Purchaser be liable for any claims asserted by Seller 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 Seller and each Guarantor.

23. Indemnified Amounts. Upon the occurrence of an Event of Default, except as otherwise provided in Section 20, Seller and Guarantor(s), jointly and severally, shall assume liability for and do hereby agree to indemnify, protect, save and keep harmless Purchaser, Purchaser's Affiliates, and any third party servicers from and against any and all liabilities, claims, losses, obligations, damages, penalties, actions and suits of whatsoever kind and nature imposed on, incurred by or asserted against Purchaser, Purchaser's Affiliates or any third party servicers, in any way relating to or growing out of such Event of Default (collectively, "Indemnified Amounts"), including without limitation the payment of all costs and expense of every kind for the enforcement of Purchaser's rights and remedies hereunder and/or the collection of amounts due to Purchaser hereunder, including attorneys' fees and costs in any trial court or appellate court proceeding, any administrative proceeding, any arbitration or mediation, or any negotiations or consultations in connection with any Event of Default. Such Indemnified Amounts shall bear interest at the highest rate of interest allowed by applicable law until paid.

24. Notice. All notices required to be given to Purchaser, except as specified in paragraph 13.4 (notice of termination), shall be sent to: 20807 Biscayne Blvd #203, Aventura, FL 33180 ; Attn: The General Manager; and if to Seller, at the address, fax number or email address furnished on the Finance Application or Factoring Master Agreement, or to such other addresses as each such party may in writing hereafter indicate.

25. Mechanic's Lien. Where applicable, Seller hereby agrees at Purchaser's request to file a Notice of Mechanic's Lien on any real property improvement upon which it has performed labor or furnished materials, the Account for which labor and/or materials it has assigned to Purchaser. In the event Seller fails to promptly comply with such request, Seller does hereby constitute and appoint Purchaser as its agent to execute and file in the name of Seller a Notice of Mechanic's Lien to the extent of the debt due from the Account Debtor for and on account of such labor and material. In connection with the filing of such Notice of Mechanic's Lien, the Seller agrees to periodically advise the Purchaser of the amount or amounts owed by the Account Debtor in connection with each real improvement so that the Notice of Mechanic's Lien will be accurate in all respects. Seller further agrees not to provide the Account Debtor with a "Waiver of Right to File a Notice of Mechanic's Lien" without the prior written consent of Purchaser.

26. Conflict. Unless otherwise expressly stated in any other agreement between Purchaser and Seller, if a conflict exists between the provisions of this Agreement and the provisions of such other agreement, the provisions of this Agreement shall control.

27. Severability. In the event anyone or more of the provisions contained in this Agreement is held to be invalid, illegal or unenforceable in any respect, then such provisions shall be ineffective only to the extent of such prohibition or invalidity, and the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

28. Relationship of Parties. The relationship of the parties hereto shall be that of Seller and Purchaser of Accounts, and no lender/borrower relationship is established or created hereby, and Purchaser shall not be a fiduciary of the Seller, although Seller may be a fiduciary of the Purchaser. Purchaser may, at Purchaser's option, contract with one or more third parties chosen by Purchaser, including but not limited to Capital Partners Services, to perform all or part of Purchaser's duties hereunder. The parties have classified this Agreement and the Factoring Master Agreement as a true sale of accounts receivable and not as a loan.

29. Service of Process. Seller agrees that Purchaser may affect service of process upon Seller by regular mail at the address for notices set forth in section 24 of this Agreement, or at the option of Purchaser, if Seller is a Registered Organization, by service upon Seller's agent for the service of process

30. Successors and Assigns.

30.1. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

30.2. Purchaser may assign its rights and delegate its duties hereunder. Upon such assignment, Seller shall be deemed to have attorned to such assignee and shall owe the same obligations to such assignee and shall accept performance hereunder by such assignee as if such assignee were Purchaser. Such assignment shall constitute a novation whereby Seller shall agree that the assignee assumes Purchaser's obligations under this Agreement and Purchaser is released from further liability under this Agreement. Seller may not assign its rights or delegate its duties hereunder, without Purchaser's prior written consent.

31. Choice of Law and Venue. This Agreement and all transactions or disputes arising directly or indirectly hereunder shall be governed by, construed under and enforced in accordance with the internal laws of the State of Florida. Subject to the mandatory arbitration requirements set forth in Section 20, and all subsections thereto, any suit, action or proceeding arising out of the subject matter hereof, or the interpretation, performance or breach of this Agreement shall, if Purchaser so elects, be instituted in the United States District Court for the Southern District of Florida, the Eleventh Judicial Circuit Court of Florida, or any other judicial forum located in the state of Florida (the "Acceptable Forums"). Each party agrees that the Acceptable Forums are convenient to it, and each party irrevocably submits to the jurisdiction of the Acceptable Forums, irrevocably agrees to be bound by any

judgment rendered thereby in connection with this Agreement and waives any and all objections to jurisdiction or venue that it may have under the laws of the State of Florida or otherwise in those courts in any such suit, action or proceeding. Should such proceeding be initiated in any other forum, Seller waives any right to oppose any motion or application made by Purchaser as a consequence of such proceeding having been commenced in a forum other than an Acceptable Forum.

32. Headings and Titles of Clauses. The headings and the titles of clauses in this Agreement are for descriptive purposes only and do not control or alter the meaning of this Agreement as set forth in the text thereof and are not to be taken into account in the construction or interpretation of any provisions to which they refer.

33. Usury Savings Clause. For the avoidance of doubt, the factoring fees and other fees charged herein shall not be construed as interest. In the event such charges are reclassified or deemed interest by a court or in arbitration, then to the extent that such fees would, when annualized, create a rate that exceeds the highest lawful rate (e.g. the applicable usury ceiling), then such rate shall be automatically and retroactively reduced by the Purchaser and any amounts received in excess shall at the option of Purchaser be promptly returned to the Seller (subject still to Purchaser's right of setoff and recoupment) without further penalty and as Seller's exclusive remedy with respect to the same.

FORM OF GENERAL RELEASE

For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the undersigned and each of them (collectively "Releasor") hereby forever releases, discharges and acquits eCapital Freight Factoring, Inc. ("Releasee"), its parent, affiliates, subsidiaries, directors, shareholders, agents, contractors and employees, of and from any and all claims, demands, obligations, liabilities, indebtedness, breaches of contract, breaches of duty of any relationship, acts, omissions, misfeasance, malfeasance, cause or causes of action, debts, sums of money, accounts, compensations, contracts, controversies, promises, damages, costs, losses and expenses (collectively "Claims"), of every type, kind, nature, description or character, and irrespective of how, why, or by reason of what facts, whether heretofore existing, now existing or hereafter arising, or which could, might, or may be claimed to exist, of whatever kind or name, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length, to the extent that they arise out of or are in way connected to or are related to Releasor's factoring relationship with Releasee.

Releasor agrees that the matters released herein are not limited to matters which are known or disclosed, and the Releasor waives any and all rights and benefits which it now has, or in the future may have, conferred upon it by virtue of the provisions of the laws of any state that may impose a limit or limits on the extent to which a general release may exclude matters which are not known by or disclosed to Releasor.

Releasor acknowledges that factual matters now unknown to it may have given or may hereafter give rise to Claims which are presently unknown, unanticipated and unsuspected, and it acknowledges that this Release has been negotiated and agreed upon in light of that realization and that it nevertheless hereby intends to release, discharge and acquit the Releasee from any such unknown Claims.

GUARANTY AND SECURITY AGREEMENT

SECTION C

This GUARANTY AND SECURITY AGREEMENT dated as of is made by the entities or individuals which have signed below (individually or collectively, "Guarantor"), in favor of eCapital Freight Factoring Corp., a Florida corporation ("Creditor").

FOR GOOD AND VALUABLE CONSIDERATION, and to induce Creditor to extend financial accommodations to Debtor (as defined below), Guarantor agrees as follows:

1. **DEFINITIONS AND CONSTRUCTION.** As used herein:
   - 1.1. **"Acceptable forums"** – see section 16 hereof.
   - 1.2. **"Agreement"** – this guaranty, as amended.
   - 1.3. **"Bankruptcy code"** – title 11 of the united states code.
   - 1.4. **"Chosen state"** – Florida
   - 1.5. **"Collateral"** – all guarantor's present and future accounts, chattel paper; goods, including inventory and equipment; instruments, investment property; documents; and general intangibles (including intellectual property such as copyrights, patents, trademarks and the like) and the proceeds thereof.
   - **1.6. "Credit documents"**
     - 1.6.1. That certain factoring and security agreement and/or direct bill purchase agreement dated of essentially even date herewith between, inter alia, Kodiak Trucking Inc. and Creditor, all documents executed in connection therewith, and all amendments or renewals to or of any of the foregoing, or any other document evidencing a guaranteed obligation.
   - 1.7. **"Creditor"** – eCapital Freight Factoring Corp.,
   - 1.8. **"Debtor"** - Kodiak Trucking Inc. who may from time to time do business as the DBA noted on Master Factoring Agreement and all its successors-in-interest by operation of law or otherwise, including any trustee (as defined in the bankruptcy code) or debtor-in-possession, and any successor-in-interest arising out of any merger or reorganization involving such entity, whether it is the surviving or the disappearing entity.
   - **1.9. "Guaranteed obligations"**
     - 1.9.1. All present and future obligations of Debtor to Creditor, of any kind or type, including recourse obligations under factoring facilities or traditional loan obligations, and including but not limited to obligations arising out of the Credit Documents, including interest that, but for the filing of a petition under the Bankruptcy Code with respect to Debtor, would have accrued on any such obligations, and attorneys' fees.
   - 1.10. **"Guarantor"** –

     Marco Arambula

2. **GUARANTY.**
   - 2.1. **Promise to Pay and Perform.** Guarantor unconditionally and irrevocably guarantees to Creditor the prompt payment and performance of the Guaranteed Obligations whether or not the Guaranteed Obligations are found to be invalid, illegal or unenforceable, this being a guaranty of payment and not a guaranty of collection.
   - 2.2. **Cumulative Obligations.** The obligations hereunder are in addition to any other obligations of Guarantor under any other guaranties of the indebtedness or other obligations of Debtor or any other person at any time given to Creditor. This Agreement shall not affect or invalidate any such other guaranties.
   - 2.3. **Continuing Guaranty.** This Agreement shall remain in full force and effect notwithstanding the fact that, at any particular time, no Guaranteed Obligations may be outstanding.
   - 2.4. **Joint and Several Obligation;** Independent Obligation. Guarantor is directly, jointly, and severally with all other guarantors of the Guaranteed Obligations liable to Creditor. The obligations of Guarantor hereunder are direct and primary and are independent of the obligations of Debtor or any other such guarantor, and a separate action may be brought against Guarantor irrespective of whether an action is brought against Debtor or any other guarantor or whether Debtor or any such other guarantor is joined in such action. Guarantor's liability hereunder shall not be contingent upon the exercise or enforcement by Creditor of any remedies it may have against Debtor or any other guarantor or the enforcement of any lien or realization upon any security Creditor may at any time possess. Any release that may be given by Creditor to Debtor or any other guarantor shall not release Guarantor.

3. **COVENANTS.**
   - 3.1. Guarantor shall keep informed of Debtor's financial condition as well as all other circumstances that bear upon the risk of nonpayment of the Guaranteed Obligations.
   - 3.2. Guarantor shall, from time to time, at the expense of Guarantor, promptly execute and deliver all further documents and take all further action that may be necessary, or that Creditor may reasonably request, to enable Creditor to exercise and enforce its rights and remedies hereunder.
   - 3.3. Guarantor shall not create, incur, assume or permit to exist any non-purchase-money lien upon or with respect to any of its assets. Guarantor authorizes Creditor to record a record in any public records filing office advising third parties that the taking of any such lien by them may constitute the tortuous interference with Creditor's rights hereunder.
   - 3.4. Creditor may inspect any Collateral at any time upon reasonable notice.
   - 3.5. Creditor may at any time notify any Account Debtors to make payments directly to Creditor.

4. **PAYMENTS.**
   - **4.1. Nature and Application of Payments.** Creditor may apply any payment with respect to the Guaranteed Obligations or any other amounts due hereunder in such order, as Creditor shall in its sole and absolute discretion determine, irrespective of any contrary instructions received from any other person.
   - **4.2. Indefeasible Payment;** Revival. If any portion of any payment to Creditor hereunder is set aside and repaid by Creditor for any reason after being made by Guarantor, the amount so set aside shall be revived as a Guaranteed Obligation and Guarantor shall be liable for the full amount Creditor is required to repay plus all costs and expenses (including attorneys' fees, costs, and expenses) incurred by Creditor in connection therewith.
   - **4.3. ACH Authorization.** In order to satisfy any of the Guaranteed Obligations, Guarantor authorizes Creditor to initiate electronic debit or credit entries through the ACH system to any deposit account maintained by Guarantor.

5. **PROCEEDS HELD IN TRUST.**
   - **5.1.** Guarantor acknowledges that, pursuant to the Credit Documents, proceeds of Collateral (as defined therein) are held in trust for Creditor and, except to the extent that Creditor authorizes Debtor to use any such proceeds for some other purpose:
     - **5.1.1.** Debtor must deliver such proceeds to Creditor as required in the Credit Documents, and
     - **5.1.2.** Until such proceeds are delivered to Lender, Debtor must maintain such proceeds separate from Debtor's other property and must administer, protect, and care for such proceeds for Lender's benefit.
     - **5.1.3.** Guarantor acknowledges that the above duties of Debtor are fiduciary obligations.
     - **5.1.4.** Guarantor shall assist Debtor in complying with and fulfilling these fiduciary duties and shall not in any way interfere with Debtor's compliance therewith.

6. **REPRESENTATIONS AND WARRANTIES.**
   - **6.1.** Guarantor represents and warrants as follows (which representations and warranties shall be true, correct, and complete at all times):
     - **6.1.1.** This Agreement is not made by Guarantor in reliance on any representation or warranty, express or implied, by Creditor concerning the financial condition of Debtor, the nature, value, or extent of any security for the Guaranteed Obligations, or any other matter, and no promises have been made to Guarantor by any person to induce Guarantor to enter into this Agreement, except as set forth in this Agreement. Guarantor is presently informed of the financial condition of Debtor and of all other circumstances that a diligent inquiry would reveal and which bear upon the risk of nonpayment of the Guaranteed Obligations.
     - **6.1.2.** The consideration received by Guarantor in connection with this Agreement is adequate and satisfactory in all respects, and represents reasonably equivalent value, to support this Agreement and Guarantor's obligations hereunder.
     - **6.1.3.** With respect to any Guarantor which is not a natural person, it:
       - **a.** Is organized, validly existing, and in good standing under the laws of the jurisdiction of its formation;
       - **b.** Has the power and authority and all governmental licenses, authorizations, consents, and approvals to execute, deliver, and perform its obligations hereunder;
       - **c.** This Agreement has been authorized by all necessary action by Guarantor, and does not and will not:
         - **i.** Contravene the terms of Guarantor's organizational documents;
         - **ii.** Conflict with or result in any breach or contravention of, any contractual obligation to which Guarantor is a party or any order, injunction, writ, or decree of any governmental authority to which Guarantor or Guarantor's properties are subject; or
         - **iii.** Violate any law, rule, or regulation of any governmental authority.
     - **6.1.4.** There are no actions, suits, proceedings, claims, or disputes pending, or, to the best knowledge of Guarantor, threatened or contemplated, at law, in equity, in arbitration, or before any governmental authority, against Guarantor or any of Guarantor's properties which purport to affect or pertain to this Agreement or any of the transactions contemplated hereby or thereby.
   - **6.2. Modifications to Credit Documents and Guaranteed Obligations.** Without notice to Guarantor and without affecting or impairing the obligations of Guarantor hereunder, Creditor may, compromise or settle, extend the period of duration or the time for the payment, or discharge the performance of, or may refuse to, or otherwise not enforce, or may, release any obligor of the Guaranteed Obligations or may grant other indulgences to Debtor in respect thereof, or may amend the Credit Documents, or may enforce, exchange, release, or waive any security for the Guaranteed Obligations or any guaranty of the Guaranteed Obligations.
   - **6.3. Subordination.** All present and future indebtedness of Debtor to Guarantor is subordinated to the payment of the Guaranteed Obligations. In this regard, no payment of any kind whatsoever shall be made with respect to such indebtedness until the Guaranteed Obligations have been indefeasibly paid in full. Any payment received by Guarantor in respect of such indebtedness shall be held by Guarantor as trustee for Creditor, and promptly paid over to Creditor on account of the Guaranteed Obligations but without reducing or affecting in any manner the liability of Guarantor under the other provisions of this Agreement. Upon request by Creditor, any notes or other instruments now or hereafter evidencing such indebtedness of Debtor to Guarantor, shall be marked with a legend that the same are subject to this Agreement or shall be delivered to Creditor for safekeeping.
   - **6.4. Commercially Reasonable Disposition of Collateral.** Any disposition of any collateral securing the Guaranteed Obligations shall be deemed commercially reasonable if, in the written opinion of three commercial loan officers with three or more years of workout experience each, the manner of the disposition was not inconsistent with the manner in which such commercial loan officers would have handled the disposition.

7. **WAIVERS.** Guarantor waives:
   - **7.1.** ANY AND ALL SURETYSHIP DEFENSES, WHETHER ARISING BY CONTRACT, STATUTE OR BY OPERATION OF LAW.
   - **7.2.** Notice of (a) any adverse change in the financial condition of any Debtor, (b) any default in the performance of the Guaranteed Obligations; and (c) any other notice to which Guarantor might be entitled.
   - **7.3.** Any defense or claim arising out of (a) the release of any collateral securing the Guaranteed Obligations or (b) any fact that may increase Guarantor's risk hereunder.
   - **7.4.** Any claim of usury.
   - **7.5.** Any other defense arising by reason of any disability or other defense (other than the defense that the Guaranteed Obligations have been fully paid) of Debtor including any defense arising from any statute of limitations.
   - **7.6.** Any defense based on the invalidity, irregularity, or unenforceability of all or any part of the Guaranteed Obligations or any other circumstance which might constitute a defense of a guarantor.
   - **7.7.** Any claim or defense based on (a) the validity, legality or enforceability in whole or in part of the Guaranteed Obligations, (b) any assignment, amendment, transfer, modification, renewal, waiver, compromise, addition or supplement relating to Guaranteed Obligations, (c) any setoff, counterclaim or any circumstances which might constitute a defense or discharge of Guarantor.
   - **7.8.** Any lack of power or authority of Debtor.
   - **7.9.** Any defense to payment hereunder resulting from Creditor's releasing the Debtor or any other obligor owing the Guaranteed Obligations from their obligation to pay the Guaranteed Obligations, as well as Creditor's failure to give Guarantor notice thereof.

7.10. All Guarantor's rights of reimbursement, indemnification, and contribution and any other rights and defenses that are or may become available to Guarantor.

7.11. All rights and defenses arising out of an election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed Guarantor's rights of subrogation and reimbursement against the Debtor.

8. ACKNOWLEDGEMENTS AND AGREEMENTS.

8.1. Modifications to Credit Documents and Guaranteed Obligations. Without notice to Guarantor and without affecting or impairing the obligations of Guarantor hereunder, Creditor may, compromise or settle, extend the period of duration or the time for the payment, or discharge the performance of, or may refuse to, or otherwise not enforce, or may, release any obligor of the Guaranteed Obligations or may grant other indulgences to Debtor in respect thereof, or may amend the Credit Documents, or may enforce, exchange, release, or waive any security for the Guaranteed Obligations or any guaranty of the Guaranteed Obligations.

8.2. Subordination. All present and future indebtedness of Debtor to Guarantor is subordinated to the payment of the Guaranteed Obligations. In this regard, no payment of any kind whatsoever shall be made with respect to such indebtedness until the Guaranteed Obligations have been indefeasibly paid in full. Any payment received by Guarantor in respect of such indebtedness shall be held by Guarantor as trustee for Creditor, and promptly paid over to Creditor on account of the Guaranteed Obligations but without reducing or affecting in any manner the liability of Guarantor under the other provisions of this Agreement. Upon request by Creditor, any notes or other instruments now or hereafter evidencing such indebtedness of Debtor to Guarantor, shall be marked with a legend that the same are subject to this Agreement or shall be delivered to Creditor for safekeeping.

8.3. Commercially Reasonable Disposition of Collateral. Any disposition of any collateral securing the Guaranteed Obligations shall be deemed commercially reasonable if, in the written opinion of three commercial loan officers with three or more years of workout experience each, the manner of the disposition was not inconsistent with the manner in which such commercial loan officers would have handled the disposition.

9. NOTICES.

9.1. All notices shall be effective upon: (a) the sending of an email to one of the email addresses associated with the entity and/or individuals defined in sections 1.7, 1.8, and 1.10 as provided in the Express Sign Up Agreement or (b) delivery to a recognized overnight delivery service of a properly addressed notice, delivery prepaid, with instructions to make delivery on the next business day. For purposes hereof, the addresses of the parties are as set forth in as provided in Section A of the Express Sign Up Agreement or as may otherwise be specified from time to time in a writing sent by one party to the other in accordance with the provisions hereof.

10. AMENDMENT AND WAIVER.

10.1. Only a writing signed by all parties hereto may amend this Agreement. No failure or delay in exercising any right hereunder shall impair any such right that Creditor may have, nor shall any waiver by Creditor hereunder be deemed a waiver of any default or breach subsequently occurring. Creditor's rights and remedies herein are cumulative and not exclusive of each other or of any rights or remedies that Creditor would otherwise have.

11. COSTS AND EXPENSES.

11.1. Guarantor agrees to reimburse Creditor on demand for the actual costs including:

11.1.1. Attorneys' fees, which Creditor has incurred or may incur in enforcing this Agreement or in connection with any federal or state insolvency proceeding commenced by or against Guarantor, including those (a) arising out of the automatic stay, (b) seeking dismissal or conversion of the bankruptcy proceeding or (c) opposing confirmation of Guarantor's plan thereunder.

11.1.2. Photocopying (which, if performed by Creditor's employees, shall be at the rate of $.10/page), travel, and attorneys' fees and expenses incurred in complying with any subpoena or other legal process attendant to any litigation in which Guarantor is a party.

12. SUCCESSORS AND ASSIGNS.

12.1. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

12.2. Creditor may assign its rights and delegate its duties hereunder in connection with an assignment of the Guaranteed Obligations. Upon such assignment, Guarantor shall be deemed to have attorned to such assignee and shall owe the same obligations to such assignee and shall accept performance hereunder by such assignee as if such assignee were Creditor.

13. ENTIRE AGREEMENT.

13.1. No promises of any kind have been made by Creditor or any third party to induce Guarantor to execute this Agreement. No course of dealing, course of performance or trade usage, and no parole evidence of any nature, shall be used to supplement or modify any terms of this Agreement.

14. REVOCATION.

14.1. Guarantor waives any right to revoke the Agreement as to future Guaranteed Obligations.

14.2. If, contrary to the express intent of this agreement, any such revocation is attempted by Guarantor:

14.2.1. It shall not be effective until thirty days after written notice thereof has been actually received by any officer of Creditor;

14.2.2. It shall not apply to any Guaranteed Obligations in existence on such date (including any subsequent continuation, extension, or renewal thereof);

14.2.3. It shall not apply to any Guaranteed Obligations made or created after such date pursuant to a commitment of Creditor which was, or is believed in good faith by Creditor to be, in existence on the date of such revocation;

14.2.4. No payment by any other guarantor or Debtor, or from any other source, prior to the date of such revocation shall reduce the obligations of Guarantor hereunder; and

14.2.5. Payment by any other Guarantor or Debtor, or from any other source shall be first applied to Guaranteed Obligations, if any, as to which the revocation by Guarantor is effective and, to the extent so applied, shall not reduce the obligations of Guarantor hereunder.

15. CHOICE OF LAW.

15.1. This Agreement and all transactions contemplated hereunder and/or evidenced hereby shall be governed by, construed under, and enforced in accordance with the internal laws of the Chosen State.

16. VENUE; JURISDICTION.

16.1. Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if Creditor so elects, be instituted in any court sitting in the Chosen State, in the city in which Creditor's chief executive office is located, or if none, any court sitting in Miami-Dade County, Florida (the "Acceptable Forums"). Guarantor 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, Guarantor waives any right to oppose any motion or application made by Creditor to transfer such proceeding to an Acceptable Forum.

17. SERVICE OF PROCESS.

17.1. Guarantor agrees that Creditor may effect service of process upon Guarantor by regular mail at the address set forth herein or at such other address as may be reflected in the records of Creditor, or at the option of Creditor by service upon Guarantor's agent for the service of process.

18. ELECTRONIC SIGNATURES.

18.1. Guarantor consents to conducting and transacting business electronically. Any PDF, electronic, facsimile or other similar signature representation, including "click-on" agreements and acknowledgments, fingerprint capture, or DocuSign (or similar electronic signature programs), shall be as valid and enforceable as a "wet ink" signature. Guarantor consents to document imaging of this Agreement and all Credit Documents and waiver any objection or defense related to the absence of original documents.

19. JURY TRIAL WAIVER.

19.1. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS SECURITY AGREEMENT (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY). EACH PARTY HERETO CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND DEBTOR ACKNOWLEDGES THAT SECURED PARTY HAS BEEN INDUCED TO ENTER INTO THIS SECURITY AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS JURY TRIAL WAIVER SECTION.

SIGN HERE **Signature:** [redacted] **Date:** 3/28/2022

Guarantor:

Title:

ACKNOWLEDGMENT

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

See Attached

State of California }
}
County of _____ }

On _____, 2021, before me, _____, Notary Public
(insert name of the officer)

personally appeared _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature_____ (Seal)

CALIFORNIA ACKNOWLEDGMENT CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Kern }

On 3-28-2022 before me, Kevin Berg Notary Public,
Date *Here Insert Name and Title of the Officer*

personally appeared [redacted]
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KEVIN BERG
Notary Public - California
Kern County
Commission # 2348258
My Comm. Expires Feb 21, 2025

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Kevin Berg
Signature of Notary Public

Place Notary Seal and/or Stamp Above

OPTIONAL

Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____	Signer's Name: _____
☐ Corporate Officer – Title(s): _____	☐ Corporate Officer – Title(s): _____
☐ Partner – ☐ Limited ☐ General	☐ Partner – ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer is Representing: _____	Signer is Representing: _____

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CERTIFIED COPY OF RESOLUTIONS

BY (the "Company" or "Seller"): [redacted]

RESOLVED, that the Factoring Master Agreement (the "Agreement"), dated , entered into between the Company and eCapital Freight Factoring Corp. ("eCapital"), and all other agreements and documents connected therewith be, and the same hereby are, approved on the terms and conditions as set forth therein;

RESOLVED FURTHER, that any officer/owner/partner/manager/member/agent of this company, or her/his designees, be, and she/he hereby is, authorized and directed to enter into said Agreement and all other agreements and documents connected therewith and to execute the same for and on behalf of this Company on the terms and conditions set forth herein;

RESOLVED FURTHER, that any officer/owner/partner/manager/member/agent of this company, or her/his designees, be, and she/he hereby is, authorized and directed to negotiate, agree upon, execute and deliver, from time to time, in the name of, and on behalf of this Company, such agreements, amendments and supplements to said Agreement or any other agreement or document connected therewith, and all other documents, instruments, certificates, notices and further assurances, and to perform any and all such acts and things as may be required by eCapital in connection with said Agreement or any other agreement or document connected therewith, or that may to her/him seem necessary or proper to implement and effect the complete consummation of said Agreement or any other agreement or document connected therewith in all respects and for the purposes set forth in these resolutions;

RESOLVED FURTHER, that these resolutions shall remain in full force and effect until written notice of their amendment or repeal shall be received by eCapital in writing, and until all indebtedness and obligations arising out of said Agreement and all other agreements and documents connected therewith shall have been paid and satisfied in full;
The undersigned, acting as the duly elected and qualified Secretary or Record Keeper of the Company, does hereby certify that the foregoing is a true and correct copy of the resolutions duly adopted at a meeting of the Board of Directors/owners/partners/managers/ members/governing body of the Company, duly called, noticed and held on March 28, 2022, at which meeting there was at all times present and acting, at least, the minimum number of members of said Board of Directors/owners/partners/managers/members/governing body as are required by law and by the Articles of Incorporation/By-laws/Proprietorship Agreement/Partnership Agreement/Articles of Organization/other governing documents of the Company to bind the Company; that said resolutions are in full force and effect; and that the following is a true and correct list of the present officers/owners/partners/ managers/members/agents of this company that may obligate and otherwise bind, or whose designees may obligate and otherwise bind, the Company:

Officers/Owners/Partners/Managers/Members/Agents:

Name: [redacted]

IN WITNESS WHEREOF, the undersigned has executed this Certified Copy of Resolutions, as of the day and date set forth above.

SIGN HERE

By: [redacted]
Name:
Title:

Date: 3/28/2022

ACKNOWLEDGMENT

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

See Attached

State of California)
)
County of _____)

On _____, 2021, before me, _____, Notary Public
(insert name of the officer)

personally appeared _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature_____ (Seal)

CALIFORNIA ACKNOWLEDGMENT CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Kern }

On 3-28-2022 before me, Kevin Berg Notary Public,
Date *Here Insert Name and Title of the Officer*

personally appeared [redacted]
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KEVIN BERG
Notary Public - California
Kern County
Commission # 2348258
My Comm. Expires Feb 21, 2025

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Kevin Berg

Place Notary Seal and/or Stamp Above

Signature of Notary Public

OPTIONAL

Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____	Signer's Name: _____
☐ Corporate Officer – Title(s): _____	☐ Corporate Officer – Title(s): _____
☐ Partner – ☐ Limited ☐ General	☐ Partner – ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer is Representing: _____	Signer is Representing: _____

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The Transactional Lawyer

A Publication of the Commercial Law Center

GONZAGA UNIVERSITY SCHOOL OF LAW

Modernizing Your Contracts and Living to Tell the Tale

Tina L. Stark

Introduction

This two-part article suggests down and dirty changes to improve a lawyer's drafting. Lawyers can pick and choose which changes they make and when.

Part 1 of the article suggests stylistic and formatting changes that facilitate reading a contract. These changes turn labyrinthian provisions into multiple, discrete sections by showing how parts of a provision relate to each other through subsections and white space. Even more basically, sentences are shortened; subjects are kept next to verbs and verbs kept next to objects. Although formatting and style may seem inconsequential, the clarity that results may unearth an ambiguous provision or reveal a provision that inadequately or incompletely memorializes the business deal. Part 2, which will appear in an upcoming issue of this newsletter, will discuss common causes of ambiguity and how to fix them.

I've spent considerable time on the remainder of this Introduction. That said, I have always told my students that practitioners have little time and less patience. Don't hesitate to delve right into the article's suggestions. They begin immediately after the bolded heading "Suggestions for improved contract drafting." Come back any time to the remainder of Introduction.

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Kudos to you for implementing any of the changes in either part of this article. All will improve your drafting.

* * *

Many practitioners would profoundly appreciate a magic spell that transformed their contracts into paradigms of modern drafting. Unfortunately, Harry Potter is nowhere to be found. Commentators' exhortations to change, along with recriminations for failing to do so, are inappropriate. Most practitioners pride themselves on their work product and work diligently to produce a contract that is both well drafted and that achieves their clients' goals.

Most deal lawyers of a certain age began practicing well before law schools added drafting courses to the law school curriculum. Unfortunately, no law school course introduced them to drafting principles in a systematic, pedagogically sound manner. Instead, these lawyers learned through osmosis and the venerated, but flawed, precedents their mentors bequeathed to them. Stated succinctly, part of the oft-bemoaned "drafting problem" is generational.

I know how I drafted when I first began teaching in 1993. I had been a corporate partner in New York. On reflection, I drafted not badly, but not well by the standards I now apply. Change was uncomfortable and required relinquishing what I had accepted as "truth."

Over the past 25 years, I have watched veteran lawyers, now adjuncts teaching drafting, grapple with the substantive and stylistic guidelines in my textbook. Frequently, these guidelines differ from the adjuncts' past practices. These lawyers will not teach the "new" guidelines (and rightly so) until convinced of their merit. Almost without exception, they struggle to reconcile what they "know" with what they are learning. The relearning is arduous. Suggesting that overworked practitioners fully engage in this time-consuming, reflective process while simultaneously practicing full-throttle is fanciful.

Modernizing a contract has no quick fix. It's not a matter of carving out a day. A contract's problems reflect not a single, repetitive error, fixable with a click on Replace All. Rather traditional contracts are replete with a plethora of wide-ranging problems.

The following provision shows how many problems a single sentence may have. Each superscript letter in the provision refers to a Comment that follows. A revised version follows the Comments.

Version 1 – Original

> **Liability for Fraud.** Nothing herein[a] shall operate[b] to relieve a Seller Party of any common law liability to Buyer for Fraud in the event[c] such[d] Seller Party is finally determined by a court of competent jurisdiction[e] to have committed Fraud against the Buyer; provided, however,[f] in no event[g] shall[h] a Seller Party incur liability for an act of Fraud committed by another Seller Party.[i]

Comment a – *Nothing herein* is legalese. In addition, it can be ambiguous because *herein* is a pointing word, and the parties could dispute whether it points to a section or the agreement.

Comment b – *Shall operate* misuses *shall*. *Shall* signals a party's obligation, and *nothing herein* is not a party.

Comment c – *In the event* uses three words when the single word *if* expresses the same point.

Comment d – *Such* is legalese. It is also a pointing word with the attendant problems.

Comment e – *Is finally determined by a court of competent jurisdiction* is in the passive voice. Restating it in the active voice puts the actor upfront, shortens the sentence, and conveys the sentence's meaning more quickly and forcefully.

Comment f – *Provided, however* is ambiguous. *Provided* can signal an exception, a condition, or additional material. Here, it signals additional material. The proviso is also problematic because it unnecessarily lengthens the sentence. Creating a second sentence and using the transitional phrase *in addition* makes the entire provision easier to read.

Comment g – *In no event* is surplusage. It adds nothing substantive by being emphatic.

Comment h – *Shall* is again misused. The clause in the exemplar does not memorialize a party's obligation. Instead, it is a *declaration* – a contract concept used to establish a contract policy to which both parties agree.[1] Declarations should be drafted in the present tense. (More in Part 2.)

Version 2 – Revised

> **Liability for Fraud.** Nothing in this Agreement relieves any Seller Party of any common law liability for Fraud if a court of competent jurisdiction finally determines that that Seller Party has committed Fraud against the Buyer. In addition, no Seller Party is liable for an act of Fraud that another Seller Party commits. [In addition, no Seller Party is liable for another Seller Party's act of Fraud.][2]

This article cannot address the full scope of problems that afflict modern contracts. Instead, it suggests discrete, practical ways that you can improve your contract drafting, both in style and substance - while concurrently producing timely, cost-efficient contracts.

To improve your contracts and live to tell the tale, you should engage in triage. Pick the suggestions from this article that seem most likely to improve your contracts concretely and quickly – the ones you consider to be most important and the easiest to implement. Trying to implement them all, and at once, is a fool's errand. It would be akin to a crash diet – destined to fail. Making incremental changes over time will eventually transform your contracts. Each time you add a "suggestion" to your drafting "repertoire," it will become part of how you draft. You'll do it reflexively. It becomes your new, ingrained knowledge.

One final comment before turning to this article's suggestions. This article focuses on drafting complex commercial agreements, not consumer agreements. It espouses a style of drafting that I have dubbed *contemporary commercial drafting*. It resembles plain English, but it is not the same. It draws on the principles of plain English and promotes clarity through among other things, simpler language, shorter sentences, and formatting.[3] The two styles of drafting do differ, however, in their approach to substance. Plain English contract provisions are pared down to their essentials, while a business contract's provisions are hefty, retaining all provisions that might add value or protect against risk.[4]

Suggestions for improved contract drafting

1. *Use short sentences.* A reader can only digest a certain quantum of information at one time. If a sentence exceeds that quantum, the reader loses the thread and is unable to process a provision's subtleties. Try applying the three-line rule: If a sentence is longer than three lines, it's too long. In a long sentence, you are probably trying to combine multiple ideas into a single sentence. Better to limit a sentence to a single idea, so the reader doesn't unintentionally and inaccurately conflate the ideas. Sentences that include a semi-colon are *de facto* (don't use Latin) problems. Each clause should be its own sentence.

Problematic

> **Termination on Fire or Casualty**. If a fire or other casualty destroys the Building, the Landlord may terminate the Lease by notifying the Tenant in writing,[5] and then, all Base Rent and Additional Rent due under this Lease ceases as of the date of the casualty, and the Tenant shall remove its trade fixtures and personal property from the Premises no later than 35 calendar days after it receives the Landlord's termination notice, whereupon both parties are released from all further obligations under this Lease, except from any obligations previously incurred.

Better

> **Termination on Fire or Casualty**. If a fire or other casualty destroys the Building, the Landlord may terminate the Lease by notifying the Tenant in writing. In that event, all Base Rent and Additional Rent due under this Lease ceases as of the date of the [fire or other][6] casualty. The Tenant shall remove its trade fixtures and personal property from the Premises no later than 35 calendar days after it receives the Landlord's termination notice. On completion of that removal, both parties are released from all further obligations under this Lease, but not from any obligations previously incurred.

2. *Draft in the active voice*. No doubt, your sixth-grade teacher and legal writing professor drilled this rule into you. But you probably violate it as often as you honor it.[7] In contract drafting, it's not just a good writing rule. It can affect substance and be litigation cannon fodder.

Wrong

> **Distributions.** No later than fifteen (15) days after the closing of any Capital Transaction, all Partnership Capital Event Receipts shall be paid or distributed according to a formula for calculating the amount of the distribution to the Class A Partners.

This provision is based on contract language disputed in a case.[8] The covenant, drafted in the passive voice, left open which party was obligated to pay the Partnership Capital Event Receipts. Was it the Second General Partner or the Limited Partnership? The provision showcases the worst-case scenario of the use of the passive voice: a covenant without even a by clause (shall be paid by X) to tell the reader which party is obligated to pay. The fix is simple: use active voice.

Correct

> **Distributions**. No later than 15 days after the closing of any Capital Transaction, the Second General Partner shall pay or distribute all Partnership Capital Event Receipts according to a formula for calculating the amount of the distribution to the Class A Partners.

Most word-processing apps make passive voice errors easy to avoid. They can mark grammatical errors as you type. In Word™, click on "File"; scroll to the bottom and choose "Options"; click on "Proofing," check the box "Mark grammar errors as you type;" choose "Grammar and Refinements" from the dropdown menu for "Writing Style;" and then check the boxes associated with the passive voice. While there, also check the box for nominalizations.[9]

While you should generally draft representations in the active voice, that is not always the case. Sometimes the voice used makes a substantive difference: the absence or presence of the actor in a provision can change its meaning. For example, when purchasing a used parachute, most buyers would want to know the total number of times the parachute had been used, not how many times the seller had used it.

Active voice

> **Prior Use.** The Seller has used the parachute six times.

Passive voice

> **Prior Use.** The parachute has been used six times.

When the issue is the action rather than the actor, the passive voice is appropriate. The passive voice may also be appropriate for conditions to closing when the issue is the completion of an act, not who completes it.

Passive voice

> **The Manufacturing Facility.** The Manufacturing Facility must have been demolished and all debris removed on or before the Closing Date.

Active voice

> **The Manufacturing Facility**. The Seller must have demolished the Manufacturing Facility and removed all debris on or before the Closing Date.

If the Seller intends to hire an outside contractor to demolish and remove the debris, it would prefer a condition drafted in the passive voice. That would preclude a buyer from arguing that the Seller failed to satisfy the condition because it hired an outside contractor, rather than performing the work itself.

3. *Keep the subject, verb, and object close together and in the beginning of the sentence.* Keeping the subject, verb, and object together and in the beginning of the sentence facilitates understanding. The mind needs the information that these core words provide as soon as possible to quickly assimilate the sentence's purpose and meaning.

4. *Turn monolithic provisions into sections and subsections.* Many contemporary contracts include full pages of solid text. These monolithic provisions create MEGO - mine eyes glaze over - inattention, resulting in the reader's inability to readily absorb the substantive business and legal issues. Most MEGO provisions contain multiple ideas. Therefore, a drafter can "chunk" the information; that is, a drafter can separate the ideas as if they were separate paragraphs of a narrative. Each "paragraph" becomes a new section of the agreement. If a paragraph/section has subparts, also use subsections. Add headings to the sections and subsections to signal what's coming, helping to provide context.

This simple formatting technique facilitates reading. Smaller chunks of information are easier to work with. In addition, each time a new section or subsection begins, it slows down the reader and prevents the reader from inadvertently mushing together different concepts. ("Mushing" is a technical term.) Equally as important, the process may unearth an ambiguity or unclear provision.

You can create sections and subsections relatively easily by using the Enter and Tab keys or a word-processing app's built-in formatting program. Assuming you intend not to revise the provision substantively, consider delegating this task to a junior lawyer or even an assistant, thereby minimizing cost to the client and the time you spend.

Please see Exhibit A to this article for an example of a MEGO provision and its redraft.

5. *Tabulate.* Some sentences in an agreement call out to be separated into subparts to facilitate reading. They may already have imbedded subsections that are identified through letters and numbers. That's helpful. But a ten-line monolithic sentence with multiple subsections running together remains, at best, difficult to parse and understand. The cure is tabulation, reformatting the sentence using the identifying letters and numbers, indentation, and white space to show the relationship of a sentence's parts. (Tabulation takes its name from the use of the Tab key to create the indents that reflect the relationship between varying levels of subsections.) If the identifying numbers and letters already appear in a draft, it's another perfect task to delegate.

Tabulating has an additional use beyond subdividing the sentence into introductory language and subsections. You can also use it to join together sentences with related ideas, thereby shortening a provision while enhancing readability.

Rumor has it that some lawyers dislike tabulation because it makes a contract longer. It's true that a tabulated contract sometimes takes more paper to print. Arguably, the clarity counterbalances the extra length. But even if your client nixes the tabulation in the final agreement, that shouldn't dissuade you from using tabulation as an analytical technique. If the other side sends a MEGO sentence that you're having trouble parsing, you can't successfully negotiate its substance: you don't fully understand it. If you don't negotiate the sentence, you've lost any points embedded in the sentence before the negotiation has even started. Tabulating the sentence first may reveal its traps, a valuable and justifiable endeavor -- even if you have to "mush" it back together after having unpacked it.

Here are some examples.

Version 1 consists of two sentences on the same topic. Version 2 creates a unified provision by drafting introductory language that grammatically introduces the substantive information from each sentence. That information then becomes an enumerated item (a subsection). When a reader sees this formatting, it signals that the subsections are related, thereby facilitating an understanding of the business deal.

Version 1 – Untabulated sentences

> **Noncompetition.** For a one-year period after the Term, the Executive shall not employ any person who was an employee during the Term. In addition, during that period, the Executive shall not interfere with the relationship between the Company and any of its employees.

Version 2 – Tabulated sentence

> **Noncompetition.** For a one-year period after the Term, the Executive
> (a) shall not employ any person who was an employee during the Term; and
> (b) shall not interfere with the relationship between the Company and any of its employees.[10]

The style of tabulation used in Version 2 is known as the *sentence format* because the introductory language and each enumerated item would create a complete sentence if they were joined together.

Version 3 – Tabulated provision recast as separate sentences but using the same introductory language

> **Sentence 1**
> For a one-year period after the Term, the Executive shall not employ any person who was an employee during the Term.
>
> **Sentence 2**
> For a one-year period after the Term, the Executive shall not interfere with the relationship between the Company and any of its employees.

Despite rumors to the contrary, there are punctuation rules that apply to the sentence format of tabulation.

- The grammar of the sentence determines the punctuation to be used (or not used) at the end of the introductory language. So, in Version 2, no punctuation follows "the Executive" because if the introductory language were joined with subsection (a) to create a stand-alone sentence (as in Version 3), no punctuation would follow "the Executive." Some drafters would insert a colon after "Executive." Why? The untabulated sentences as in Version 3 have no colon; neither should the tabulated sentence.

- A semi-colon punctuates all but the final enumerated item. The semi-colon reflects the use of the sentence format: that each enumerated item ends a "sentence."

- An *and* or *or* (as appropriate) follows the semi-colon of the penultimate enumerated item.

- A period ends the tabulated sentence.

The following example demonstrates when a comma should end the introductory language of a tabulated sentence. For example, if an untabulated sentence begins with a prepositional phrase that ends with a comma, then that same introductory language retains the comma in the tabulated version. The comma is grammatically correct in both versions.

Version 1 – Untabulated sentence

> **Contractor's Obligations after a Force Majeure Event.** If a Force Majeure Event occurs, the Contractor shall advise the Owner of its existence as soon as possible after its occurrence, and the Contractor's obligation to perform is suspended until the Force Majeure Event ends.

Version 2 – Tabulated sentence

> **Contractor's Obligations after a Force Majeure Event.** If a Force Majeure Event occurs,
> (a) the Contractor shall advise the Owner of its existence as soon as possible after its occurrence; and
> (b) the Contractor's obligation to perform is suspended until the Force Majeure Event ends.

Drafters often use an alternative tabulation format: the *list format*. The introductory language of this type of tabulation uses *follows* or one of its variations and ends with colon. In addition, each enumerated item begins with a capital letter and ends with a period.

The first couple of times you use the list format punctuation, especially when the enumerated item is a single word, the sentence will seem weird and wrong. You may even viscerally recoil. But the punctuation is correct.

Almost all sentences tabulated in the sentence format can be redrafted using the list format. Here's a provision in the list format that the article first presented in the sentence format.

Version 1

> **Noncompetition.** For a one-year period after the Term, the Executive shall not do the following:
> (a) Employ any person who was an employee during the Term.
> (b) Interfere with the relationship between the Company and any of its employees.

Although you can generally cast a sentence in either format, the introductory language of the list format has an advantage. It can signal clearly whether the enumerated items in the list are cumulative or alternative. In Version 1 immediately preceding this paragraph, litigators would happily dispute whether the covenant was enforceable against the Executive only if the Executive violated both subsections (a) and (b). But adding a few

words to the introductory language immediately clarifies any ambiguity.

Version 2

> **Noncompetition.** For a one-year period after the Term, the Executive shall not do either or both of the following:

Here are three additional examples of language you can use to clarify the relationship of enumerated items.

Example 1

> **Termination.** The Company may terminate the Executive for any one or more of the following reasons:

Example 2

> **Duties.** During the Term, the Executive shall perform all of the following duties:

Example 3

> **Notice.** When the Company sends a notice, it shall use one of the following methods, but it may choose which one:

6. *Replace legalese with clear, modern language*. Delete *herein*, *hereof*, *Witnesseth*, *hereinbefore*, *wheresoever*, etc. Instead, use contemporary equivalents. Also, avoid meaningless couplets, such as *null and void*. The history of the phrase may provide comfort when abandoning the couplet. After the Normans invaded England in 1066, French slowly became the language in which the English wrote statutes and conducted their legal proceedings; hence *nul*. But as English reasserted itself as the country's primary language, English lawyers had to translate French concepts into English. As would any lawyer, they worried that *void* was not synonymous with *nul*. They chose the obvious fix: use both. That's not a problem so much anymore.

7. *Modernize the introductory provisions*. The introductory provisions of a contract consist of the preamble, recitals, and statement of a consideration. They are replete with legalese. Revising these provisions may well be one of the easiest ways to begin transforming your documents. Each time you draft a contract, part of what you must do is to draft these provisions. If nothing else, the names of the parties and the date need to be changed. By modernizing these provisions in a precedent that you regularly use, you and your colleagues have cleaned up a portion of the contract the client always reads. Here are some details.

(a) The *preamble*. The preamble consists of the name of the contract, the date, and the parties. Versions 1 and 2 show both the traditional way to draft a preamble and a more contemporary version.

Version 1 – Traditional drafting

> THIS NONCOMPETITION AGREEMENT, made the 16th day of March, 20XX, by and between ATTORNEY STAFFING ACQUISITION CO., a corporation organized under the laws of Delaware (hereinafter, the "Company"), and RODRIGUEZ LLC, a limited liability company organized under the laws of South Carolina (hereinafter "the Executive").

(42 words)

Version 2 – Contemporary drafting

> This Noncompetition Agreement, dated March 16, 20XX, between Attorney Staffing Acquisition Co., a Delaware corporation ("Staffing"), and Rodriguez LLC, a South Carolina limited liability company ("Rodriguez").

(26 words)

Although contemporary Version 2 is 38% more concise than Version 1, the two versions are substantively the same.

Drafting tips:

- Don't create two defined terms for a party (or in connection with any definition). It opens the door to confusion and litigation.
- Draft the signature lines at the same time you draft the preamble. It will decrease the possibility of the signature block names differing from those in the preamble.

(b) The *recitals* follow the preamble. Use them to explain a transaction's background; that is, the parties' relationship and why they are entering into the agreement that follows.

Recitals are part of a contract in that the entire contract consists of the introductory language, the parties' agreement, and the signature lines. That said, courts generally do not consider them part of the contract that binds the parties.[11] They precede the language of agreement. Because of this, they cannot create enforceable, operative provisions of a contract. Therefore, save representations and warranties,

covenants, and conditions for the body of the agreement. That said, courts regularly use recitals to help determine the parties' intent when an agreement's provisions are unclear or ambiguous. Accordingly, draft the recitals with care, making sure that everything they state is true and cannot be construed to your client's detriment.

Fixing the recitals is easy. If you use *Recitals* as a title to precede the recitals, replace it with the more modern *Background*. Next change each *whereas* clause to a full sentence, ending each sentence, of course, with a period. Know this: *Whereas* is legalese and is completely, utterly, totally superfluous (as were all those adjectives). *Whereas* has no place in contemporary commercial drafting. Banish it from your lexicon.

No need for semicolons after each recital or an and at the end of the penultimate sentence. Sentences end with periods. Enumerating the sentences is a good idea. Those negotiating can more easily find the recital under discussion. Finally, if you decide that you could compose a nifty paragraph from the three or four sentences in the recitals, it's fine to draft a paragraph.

(c) The last part of the introductory provisions is the *statement of consideration*, fondly known in today's law schools as the *words of agreement*. No statement of consideration can create consideration,[12] but in some states it can create a rebuttable presumption of consideration.[13] It can state for the record that the parties' exchange of promises in the agreement is the contract's consideration.

Example 1 – Traditional statement of consideration

> NOW, THEREFORE, in consideration of the premises[14] stated, $10 paid in hand, and other good and valuable consideration the receipt of which is hereby acknowledged, the parties agree as follows:

Example 2 – Contemporary statement of consideration

> Accordingly, in consideration of the promises exchanged in this Agreement, the parties agree as follows:

Some commentators have suggested that only a statement of the parties' agreement is necessary ("Accordingly, the parties agree:")[15] That is generally true. But stating the consideration has more benefits than that gained by minimizing the number of words in the contract. Cases that focus on whether consideration existed do not crowd the courts' dockets. Nonetheless, when these cases do arise, a simple statement of consideration often carries disproportionate weight.[16] Therefore, for many lawyers, the risk/benefit analysis weighs in favor of the extra words.

* * *

As noted earlier, Part 2 of this article will discuss common ambiguities and how to cure them. It will appear in an upcoming newsletter.

Exhibit A
MEGO Provisions

Problematic

> **9.3 Officers of the Joint Venture.** The Managing Venturer shall appoint the chief executive officer, chief financial officer, and other officers of the Joint Venture. The officers are to perform those duties and have those responsibilities that the Managing Venturer assigns to them. The Non-Managing Venturer must approve the appointment and replacement of the chief executive officer and shall not unreasonably withhold or delay its approval. The Managing Venturer may appoint one or more officers of either Venturer to be an officer of the Joint Venture, but only if that officer intends to devote substantially full time to the Joint Venture. If that officer fails to devote substantially full time to the Joint Venture, the Managing Venturer shall terminate that officer's employment. The Managing Venturer may determine, in its sole discretion, the benefits to be offered to any officer appointed in accordance with this subsection. The Joint Venture shall indemnify and defend each officer of the Joint Venture against all claims, losses, damages and liabilities, including reasonable attorneys' fees, relating to any act or failure to act by that officer, but only if the officer's act or failure to act was in good faith and, in both cases, in a manner that officer reasonably believed to be in, or not opposed to, the Joint Venture's best interests; or if the officer relied on the opinion or advice of competent legal counsel. Any indemnity under this Section is to be paid from the Joint Venture's assets, and no Venturer has any individual liability on account of the indemnity under this Section 9.3.

Better

> **9.3 The Joint Venture's Officers.**
>
> (a) **Appointment of Officers.** The Managing Venturer shall appoint the chief executive officer, chief financial officer, and other officers of the Joint

Venture. The officers are to perform those duties and have those responsibilities that the Managing Venturer assigns to them.

(b) **Approval of Chief Executive Officer's Appointment.** The Non-Managing Venturer must approve the appointment and replacement of the chief executive officer and shall not unreasonably withhold or delay its approval.

(c) **Appointment of a Venturer's Officer.** The Managing Venturer may appoint one or more officers of either Venturer to be an officer of the Joint Venture, but only if that officer intends to devote substantially full time to the Joint Venture. If that officer fails to devote substantially full time to the Joint Venture, the Managing Venturer shall terminate that officer's employment. The Managing Venturer may determine, in its sole discretion, the benefits to be offered to any officer appointed in accordance with this subsection.

(d) **Indemnity of Officers.** The Joint Venture shall indemnify and defend each officer of the Joint Venture against all claims, losses, damages and liabilities, including reasonable attorneys' fees, relating to any act or failure to act by that officer, but only if

(i) the officer's act or failure to act was in good faith and, in both cases, in a manner that the officer reasonably believed to be in, or not opposed to, the Joint Venture's best interests; or

(ii) the officer relied on the opinion or advice of competent legal counsel.

(e) **Source of Funds.** Any indemnity under this Section 9.3 is to be paid from the Joint Venture's assets, and no Venturer has any individual liability on account of the indemnity under this Section.

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Notes:

1. Many lawyers are unfamiliar with the contract concept of declarations. Of course, they don't know about the concept because they never learned about it in law school. Despite that, declarations pervade contracts.

2. The bracketed language recasts the last sentence using the possessive. It shortens the sentence, deleting superfluous words.

3. This article draws heavily on the author's textbook DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2d ed. Wolters Kluwer 2014). In many instances it quotes or paraphrases the textbook, but it has omitted the quotation marks to facilitate reading.

4. Carl Felsenfeld, one of the first proponents of plain English, stated the following: "The plain English movement requires a new drafting approach. Each provision [of a consumer contract] must be analyzed one at a time against the specific transaction and the type of protection required. Many of the traditional legal provisions may well be found essentially unnecessary. . . . The point is that consumer drafting must be regarded as *a separate process from business drafting*. A legal principle derived from this, while perhaps extreme, does lead the way: 'In a business transaction, if a risk can be perceived draft for it. In a consumer transaction, unless a risk seems likely, forget it.' " Carl Felsenfeld, *Language Simplification and Consumer Legal Forms*, remarks made at program on simplified legal drafting, American Bar Association, New York City, Aug. 7, 1978, in F. REED DICKERSON, MATERIALS ON LEGAL DRAFTING 267 (2d ed., Little, Brown & Co. 1986) (emphasis added). *See also* CARL FELSENFELD & ALAN SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH 28-29 (West 1981).

5. Stating that the notice must be in writing is superfluous if the contract's notice provision requires all notices to be in writing.

6. The addition of the bracketed language is necessary so that the first and second sentences say the same thing the same way. Without it, an inventive litigator might argue that the Lease ends but rent continues if the casualty is a fire.

7. Yes. Despite what Mrs. Smith told you in sixth grade, you may begin a sentence with a conjunction and not hang your head with shame.

8. ASR 2620-2630 Fountainview, LP v. ASR 2620-2630 Fountainview GP, LLC, 2019 WL 470240 (Tex. Ct. App. 2019).

9. *Nominalizing* a word converts it from a verb to a phrase that includes the noun form of the word. Compare the preceding sentence to its alternative: The

nominalization of a word is the *conversion* of a verb into a phrase that includes the noun form of the word. With a word-processing app's grammar check, you can easily and quickly catch any nominalizations and improve your writing style.

10. Although the general rule is to include in the introductory language all words common to each enumerated item, the author suggests a stylistic exception with negative covenants. Including *shall not* with each enumerated item reminds the reader that each subsection prohibits an act. It's a personal preference - the exception to the rule.

11. *See* Williams v. Barkley, 58 N.E. 765, 767 (N.Y. 1900) ("The promise is what the parties agreed to do, and hence is the operative part of the instrument, while the recital states what led up to the promise and gives the inducement for making it"); *see also* Fugate v. Town of Payson, 791 P.2d 1092, 1094 (Ariz. App. 1990) ("A recital . . . is not strictly part of the contract"). *But see* Cal. Evid. Code § 622 ("[t]he facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest"); Or. Rev. Stat. § 42.300 ("Except for the recital of a consideration, the truth of the facts recited from the recital in a written instrument shall not be denied by the parties thereto").

12. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS vol. 1, § 2.20 (4th ed., Wolters Kluwer 2019).

13. *See, e.g.*, Earl v. St. Louis U., 875 S.W.2d 234, 237 (Mo. App. 1994); Finegan v. Prudential Ins. Co., 14 N.E.2d 172, 175-176 (Mass. 1938). In some states, statutes provide that a written instrument is presumptive evidence of consideration. *See* Okla. Stat. tit. 15, § 114; Idaho Code § 29-104. *See also* Farnsworth on Contracts, *supra* n.12, vol. 1, 158, and the cases cited therein.

14. *Premises* is not a typo. It means that which came before. Lawyers used it frequently in old (approximately 17th century and later) English contracts.

15. KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING 35-40 (4th ed. ABA).

16. *See* NANCY S. KIM, THE FUNDAMENTALS OF CONTRACT LAW AND CLAUSES: A PRACTICAL APPROACH 29-39 (2016 Edward Elgar Publg. Ltd.).

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Persistent Ambiguity in Contracts: Extrinsic Evidence to the Rescue?

Sue Payne

Even the most careful contract drafters sometimes draft ambiguous provisions. This is partly due to the slippery nature of language; the meaning of a word is not entirely consistent from person to person and place to place. Although the careful drafter strives to make the language of the contract clearly express what the parties' intend it to mean, ambiguity sometimes creeps in. As the three recent cases discussed below demonstrate, some litigants engaged in ambiguity disputes turn to extrinsic evidence for help. Nevertheless, ambiguity often persists.

ASARCO, LLC v. Montana Resources, Inc.[1]

ASARCO involved a Partnership Agreement (the "Agreement") containing a reinstatement provision with two incorrect cross-references in the Agreement: one leading to the wrong section and the other to a non-existing section.[2] In the context of a post-discovery motion for summary judgment, the defendants sought to clarify the Agreement by introducing two pieces of extrinsic evidence: (1) two newly discovered drafts of the Agreement (located by searching through an off-site storage unit); and (2) an affidavit from the lawyer who represented the defendants during the negotiation and drafting.[3] The defendants argued that comparing the earlier drafts to the final version identified the sections to which the "dead-end" cross-references were supposed to refer.[4] Consequently, according to the defendants, the parties' intent was clear: a defaulting partner could cure and be reinstated only if the non-defaulting partner took the specific steps enumerated in the two correctly referenced provisions.[5]

The lawyer's affidavit attested to what has to be one of every contract drafter's worst nightmares: In editing the document, the drafter re-labeled and renumbered the sections, but forgot to update the cross-references.[6] The defendants contended that this explanation of the drafting error – coupled with the newly discovered earlier drafts of the Agreement – resolved the ambiguity of the reinstatement provision.[7]

The ASARCO court acknowledged that the prior drafts and the lawyer's affidavit provided "some insight into the parties' intent."[8] However, while characterizing the defendants' argument as "certainly persuasive," the court concluded that it could not "weigh competing

evidence at this stage of the litigation."[9] Therefore, the court denied the defendants' motion for summary judgment.[10]

DRAFTING LESSON LEARNED: First, avoid being the lawyer who has to provide the "Whoops, we made a mistake!" affidavit. "Dead-ends" are not merely annoying; they can plunge parties into lengthy and costly court battles with unpredictable outcomes. Second, be aware that, to resolve an ambiguity dispute, some courts will consider extrinsic evidence contained in documents like prior drafts of an agreement and an affidavit from the drafter. If you find yourself in the unenviable position of having drafted an ambiguous contract, your counsel may be able to clarify the parties' intent by introducing the prior drafts. While not determinative in the summary judgment context of ASARCO, if a court can weigh competing evidence, the prior drafts might be persuasive. With any luck, you will not have to search through an off-site storage unit to find them.

Smith v. Bank of Hawaii[11]

In this putative class action, Smith challenged the Bank of Hawaii's custom of using an "available balance method" rather than a "ledger balance method" to determine when a customer's account funds are insufficient to cover a transaction (*i.e.*, when an "overdraft" has occurred).[12] The available balance method takes into account "authorized but unsettled" transactions and "holds" on deposits that have not yet cleared.[13] According to Smith, by using the available balance method (as opposed to the ledger balance method) to determine when an overdraft has occurred, the Bank breached its own overdraft program documents and charged its customers unwarranted overdraft fees.[14]

As established in two prior decisions in the case (*Smith I* and *Smith II*),[15] the Bank's overdraft program documents included an account agreement, fee schedule, and opt-in agreement (collectively, the "Agreements").[16] In the instant case (*Smith III*) the Bank posited that a change-in-terms notice ("CIT") distributed to customers should be considered an additional agreement in the Bank's overdraft protection program.[17] On reviewing the CIT, the court found that the Bank used the words "available balance" but failed to define them.[18] Observing that the CIT suffered from the "same flaws *Smith I* identified in the Agreements," the court then quoted the *Smith I* court's rationale for finding the Agreements ambiguous:

> At no point in . . . the Agreements does [the Bank] define the meaning of "available" when describing balances. [The Bank] apparently assumes that the customer will read the word "available" in six scattered sections spanning the thirty-six-page Account Agreement and come to a conclusion – [the Bank] will use the available balance method when determining overdraft fees. But this assumes too much. The word "available" simply cannot shoulder the weight of all the assumptions [the Bank] seeks to place on it.[19]

The *Smith III* court then found that, even if the court were to read the CIT along with the Agreements, the ambiguity about the Bank's overdraft calculation method persisted.[20]

The Bank also offered a variety of extrinsic evidence to establish a course of dealing between the parties and demonstrate that the Agreements were not ambiguous.[21] The court reviewed: a "Frequently Asked Questions" document delivered to Smith by hand and by mail; an "Understanding Overdrafts" page appearing on the Bank's website; a mobile app displaying Smith's "current" and "available" balances; overdraft notices and monthly account statements displaying Smith's balance; and Bank employees' conversations with Smith regarding the Bank's overdraft program.[22]

The court also reviewed Smith's testimony about the extrinsic evidence offered by the Bank. For example, Smith said that he looked at the Bank's website several times but never saw the page about overdraft fees.[23] He also said that, while he sometimes used the Bank's mobile app to check his balance, he never paid attention to the difference between current and available balances.[24] Though a bank employee once mentioned "holds" to him, Smith claimed that no one had ever explained "available balance."[25] And, finally, he related that he had called the Bank five or six times to complain about an incorrect balance resulting in a mistakenly charged overdraft fee.[26] In sum, Smith testified that he never understood the difference between available balance and ledger balance.[27]

Taking all of the extrinsic and other evidence into account, the *Smith III* court held that, even if it were to find the Bank's extrinsic evidence "somewhat persuasive," a genuine question of fact still existed regarding Smith's knowledge about what method the Bank used to identify an overdraft, and thus whether Smith had acquiesced to the claimed course of dealing.[28] Therefore, the court denied the Bank's motion for summary judgment on Smith's breach of contract claim.[29]

Significantly, the court also ruled that a genuine issue of fact existed regarding whether the Bank's practices violated Hawaii's Unfair or Deceptive Trade Practices Act ("UDAP").[30] *Smith I* held that a trier of fact could reasonably find that the Agreements contained a "deceptive representation" or that omitting the applicable

balance calculation method from the Agreements constituted a "deceptive act or practice" under the UDAP.[31] Finding that none of the Bank's evidence had "meaningfully challenged this reasoning," the *Smith III* court denied the Bank's motion for summary judgment on the UDAP claim.[32]

DRAFTING LESSON LEARNED: The Bank and its attorneys made a big mistake by failing to define "available balance" and failing to communicate precisely how the overdraft program worked. The resulting ambiguity left the Bank open to a putative class action brought on behalf of every Bank customer like Smith, who did not understand the difference between an available balance and a ledger balance. The Bank now faces potential liability to Smith and similarly situated Bank customers for breach of contract and UDAP violations.[33]

Smith III demonstrates how important it is to draft explicit, clear definitions of key terms and use those terms, as defined, consistently throughout the agreement (or "Agreements," as the case may be). In addition, *Smith III* shows that extrinsic evidence, though profuse and somewhat persuasive, may still not save the day. Ambiguity is tough. It can survive multiple attempts at clarification, which may serve only to strengthen it. Don't expect your reader to figure out what a term means if you don't define the term but nevertheless use it in multiple places in multiple documents. That's expecting the reader to do too much work.

Cadence Education, LLC v. Vore[34]

As part of an asset purchase transaction, the defendants' holding company, FHD, sublet from Cadence a portion of a building housing a childhood educational facility.[35] Although the sublease referred to an attached diagram of the space, the parties did not attach the diagram to the sublease.[36] Moreover, the sublease did not contain a description of the subleased premises other than to state that the space consisted of approximately 11,500 square feet.[37] According to Cadence, the subleased square footage referred to "the non-tuition generating classrooms capable of being licensed for enrolled students."[38] Defendants, on the other hand, claimed that the sublease covered a roughly 10,400 square foot area in "the back half" of the building behind a set of fire doors.[39] Oddly, the parties did not discuss the square footage of the subleased space before entering into the sublease.[40]

Pursuant to the sublease, FHD was to pay rent to Cadence for the subleased premises and FHD's rent amount was to shrink proportionately as Cadence expanded into the subleased premises.[41] When FHD – which was not occupying the subleased premises at all – failed to pay rent, Cadence alleged that FHD had breached the terms of the sublease. However, FHD claimed that no rent was due because Cadence had expanded fully into and now occupied all of the subleased premises, thereby reducing FHD's rent to zero.[42]

The court in *Cadence* found that the words "subleased premises" and "occupancy" were not adequately defined in the sublease.[43] While Cadence argued that the parties understood "subleased premises" to mean certain classrooms, the court found "equally reasonable" the defendants' belief that "subleased premises" meant the back half of the building.[44] Regarding "occupancy," the court found that both Cadence's interpretation (use of rooms for licensed classrooms) and the defendants' interpretation (use of rooms for other education-related purposes) were credible.[45]

Unable to resolve these ambiguities in the sublease, the *Cadence* court considered extrinsic evidence in order to determine the parties' intent. The court reviewed the meaning of "occupancy" in the early childhood education business.[46] Although Cadence argued that "occupancy" typically means the use of space as classrooms, the court rejected this construction because Cadence failed to produce evidence supporting it.[47] The court also considered how the space had been used before the sublease (for storage), concluding that it would be reasonable to assume that the parties considered storage use to be a "baseline."[48] The court found that Cadence's "occupancy" of the subleased premises would likely require some use beyond the baseline.[49] Ultimately, however, the court held that the parties' intentions could not be ascertained.[50] Therefore, the court denied the defendants' motion for summary judgment on Cadence's breach of contract claim.[51]

DRAFTING LESSON LEARNED: Carefully identify what needs to be defined (not just "subleased premises," but "occupancy" as well) and assure that those defined terms work well together and with other provisions in the contract (like a rent reduction provision with the amount of the reduction tied to one party's "occupancy" of the "subleased premises"). And, perhaps it goes without saying, but it's important to know what the parties' intend before you choose words to embody that intent. Learn about your client's business. Find out what the client hopes to accomplish through the transaction and explore how your client's objectives mesh with the other party's objectives. Discover all you can about the parties' relationship and prior course of dealing. And, monitor that relationship as it develops during the negotiation and drafting process. In short, do your best to assure that the parties are on the same page when they sign the contract you have drafted.

Conclusion

Since even careful contract drafters cannot eradicate ambiguity, courts will continue to spend much of their time interpreting ambiguous contracts. Litigants will continue to introduce extrinsic evidence to take advantage of persistent ambiguity or to vanquish it. The careful contract drafter will continue to draft carefully but will also be mindful of how extrinsic evidence could inform the meaning of the words in the contract. Contract drafters sometimes say that their work "memorializes" the transaction. "Memorialize" makes the contract seems like it needs a tombstone. Don't let your epitaph be "Here lies the contract drafter: Felled by persistent ambiguity when extrinsic evidence failed to rescue him."

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Notes:

1. 2019 WL 195059 (S.D. Tex. 2019).
2. *Id.* at *2.
3. *Id.* at *18, 20.
4. *Id.* at *18-19.
5. *Id.* at *19.
6. *Id.* at *18.
7. *Id.* at *19.
8. *Id.*
9. *Id.* at *19-20.
10. *Id.* at *20.
11. 2019 WL 404423 (D. Haw. 2019).
12. *Id.* at *1.
13. *Id.*
14. *Id.*
15. *See* Smith v. Bank of Hawaii, 2017 WL 3597522 (D. Haw. April 13, 2017) ("*Smith I*") (denying the Bank's motion to dismiss); Smith v. Bank of Hawaii, 2018 WL 1662107 (D. Haw. April 5, 2018) ("*Smith II*") (granting in part and denying in part the Bank's first motion for summary judgment).
16. *Smith III* at *1.
17. *Id.* at 3-4.
18. *Id.* at *6.
19. *Id.*, citing *Smith I* at *7.
20. *Id.* at *5.
21. *Id.* at *6-8.
22. *Id.*
23. *Id.* at *3, 7.
24. *Id.* at *3, 8.
25. *Id.*
26. *Id.* at *3, 9.
27. *Id.* at *8.
28. *Id.* at *9.
29. *Id.*
30. *Id.* at 11. Haw. Rev. Stat. § 480-2.
31. *Smith I* at *9.
32. *Smith III* at *11.
33. Smith also alleged that the Bank violated the Electronic Funds Transfer Act, known as "Regulation E" (15 U.S.C. §§ 1693 -1693(r)) by failing to provide a "clear and readily understandable description of the overdraft service." *Smith I* at *7-8. Holding that genuine issues of material fact existed regarding the Regulation E claim, the *Smith III* court denied the Bank's motion for summary judgment. *Id.* at *13.
34. 2019 WL 917020 (D. Kan. 2019).
35. *Id.* at *1-3.
36. *Id.* at *2.
37. *Id.* at *4.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* *1.
42. *Id.* at *10.
43. *Id.* at *10-11.
44. *Id.* at *10.
45. *Id.* at *11.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

50. *Id.*

51. *Id.*

52. Thank you to my valued Research Assistant, Jasmine Bell (Emory Law 3L), for the assistance she gave me as I prepared to write this article.

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Zombie Documents: A Dissenting View

Scott Burnham

In a recent article,[1] the authors warned of "zombie documents" that might come back to infect a more recent transaction. The article was prompted by the case of *Jipping v. First National Bank Alaska*.[2] In *Jipping*, the parties entered into a security agreement in 2009 in which the collateral included deposit accounts; the agreement contained a future advances clause. The loan was then paid off in 2011 and in 2013 the parties entered into another security agreement that did not include deposit accounts as collateral. On default, the creditor foreclosed on the deposit accounts over the protests of the debtor, who claimed that the 2009 agreement was no longer binding on the parties. The Ninth Circuit ultimately held that the court was barred from looking to the 2009 agreement because the merger clause in the 2013 agreement rendered that agreement fully integrated, thus barring terms that would vary or contradict it under the parol evidence rule.

The authors hypothesize that the parties may have forgotten about the 2009 agreement and use the case as an object lesson to warn practitioners that past agreements they thought were dead may rise up and infect present agreements. Fair enough. But *Jipping* is a dangerous precedent because there is nothing in the opinion to indicate that the holding would be confined only to a future advances clause that the parties had forgotten about. Therefore, it would bar the application not only of zombie documents but living documents as well.

The authors suggest that the decision might be correct. I disagree, for the court misunderstood the role of the parol evidence rule and made the merger clause do too much work.[3] The parol evidence rule is easy to state and hard to apply (which is to say, easy for courts to manipulate). The court stated the parol evidence rule as found in an earlier Alaska case: "Under the terms of the parol evidence rule an integrated written contract cannot be varied or contradicted by prior negotiations or agreements."[4] The court correctly concluded that the 2013 transaction was an integrated agreement, as evidenced by the merger clause.[5]

But let's go back a step. Some time ago I wrote an article on the parol evidence rule.[6] Mortified by cases in which courts discussed the admissibility of extrinsic evidence without telling us what that evidence was, I suggested that the first step in analyzing a parol evidence problem is to ask, "What evidence are you offering?"[7] That is, what is the understanding that a party wishes to have incorporated into this agreement? For example, if the parties' written security agreement stated that the collateral was equipment and the creditor claimed that the parties had agreed that the collateral was not only equipment but deposit accounts, then "we agreed that the collateral would be deposit accounts" would be the parol evidence. If the court found that the written agreement was fully integrated, then the court would exclude that understanding.[8]

What is the parol evidence that was offered in *Jipping*? That is, what is the understanding that the creditor wished to incorporate into the 2013 writing as fully as if it had been typed in before the parties signed it? The answer is – there isn't any! For the creditor to prevail, it does not have to offer any evidence to "vary or contradict" the written agreement. Since extrinsic evidence is not being offered to vary anything in the 2013 agreement, the parol evidence rule is not relevant. Of course, the parties were free to provide that the 2013 loan was not to be considered a future advance. This would best be accomplished by inserting an affirmative statement to that effect rather than relying on the merger clause to do the heavy lifting.

Instead of asking whether the 2013 agreement was integrated, the inquiry should begin with the 2009 agreement. It states that the collateral (which included deposit accounts) is also collateral for any future advances from the creditor to the debtor. Was there a later advance from the creditor to the debtor? Yes – the 2013 agreement. End of inquiry. We do not need to add anything to the 2013 agreement to come to that conclusion. The 2013 agreement does not have to provide that the collateral includes deposit accounts because that work is done by the future advances clause in the 2009 agreement; to require the creditor to provide it in the later agreement would vitiate the future advances clause.

Indeed, vitiation of the future advances clause may have been the court's intent. As the authors suggest with

their discussion of the much-reviled "relatedness rule," the court may have been indirectly invoking that rule to keep the future advances clause from applying to what it perceived to be an unrelated transaction.[9] If so, the court might have had the honesty to invoke the relatedness rule instead of torturing the poor parol evidence rule.

I agree with the authors that it is possible another court will follow *Jipping* – though by electing not to publish the opinion in West's Federal Reporter, the court may have wanted it to quietly disappear. Therefore, the cautious practitioner might want to add to the merger clause the language suggested by the authors that would prevent this outcome.[10] It might also be worth noting that the creditor used a document assembly program to put together this transaction.[11] It is important to remember when generating documents that every transaction must be adapted to a particular client in a particular situation.

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Notes:

1. E.H. Geiger and Stephen L. Sepinuck, *Zombie Documents*, 9 THE TRANSACTIONAL LAWYER 1 (Feb. 2019).

2. 735 F. App'x 436 (9th Cir. 2018).

3. For another discussion of how courts occasionally treat a merger clause as relevant to something other than the parol evidence rule, see Stephen L. Sepinuck, *Drafting a Merger Clause for an Integrated Transaction*, 4 THE TRANSACTIONAL LAWYER 2 (Dec. 2014).

4. Still v. Cunningham, 94 P.3d 1104, 1109 (Alaska 2004).

5. The merger clause stated in full: "This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement." 735 F. App'x at 436.

6. Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93 (1994).

7. *Id.* at 95.

8. *See, e.g.*, In re Doctors Hosp. of Hyde Park, Inc., 474 B.R. 576 (Bankr. N.D. Ill. 2012) (other documents executed contemporaneously with security agreement would not be considered in determining scope of collateral covered).

9. *Zombie Documents*, *supra* note 1, at 3.

10. *Id.*

11. In re Omni Enterprises, Inc., 2016 WL 3213562 at *2 (Bankr. D. Alaska 2016), *rev'd*, 735 F. App'x 436 (9th Cir. 2018).

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A "Sale" of Future Receivables: Disguising a Secured Loan as a Purchase of Hope

John F. Hilson
Stephen L. Sepinuck

In the last few years, a new type of factoring transaction has emerged that involves what purports to be a present sale of future receivables. This article explores the transaction and explains why it does not achieve what its creators likely intended.

A Case Study

In early 2016, Cornerstone Tower Services, Inc. entered into a Merchant Cash Advance agreement with LG Funding. In return for a cash infusion of $50,690, Cornerstone purported to "sell" to LG all of Cornerstone's future accounts "until" LG received the "Purchased Amount," which was specified to be $65,897.[1] To facilitate collection of the Purchased Amount, the parties established a mechanism for automatic debits from one of Cornerstone's deposit accounts, and limited the amount thereof to $500 per day out of the receipts for that day. If, on any day, there were no receipts, LG was to receive nothing but, of course, the Purchased Amount would not be reduced. The agreement gave LG a backup security interest in all of Cornerstone's existing and after-acquired accounts, but it also expressly provided that the amount LG paid – referred to as the Purchase Price – was in exchange for the interest in future accounts and that "such Purchase Price is not intended to be, nor shall be construed as, a loan."[2]

Less than three weeks later, apparently still in need of cash, Cornerstone entered into a similar transaction with EBF Partners, LLC. Under this transaction, EBF paid Cornerstone $75,000 for a "Specified Percentage of the proceeds of each future sale by [Cornerstone] until [$105,000] has been delivered to EBF by or on behalf of [Cornerstone]."[3] The agreement then specified that EBF

was to receive 15% of Cornerstone's future receipts, up to a daily maximum of $875. As with the transaction between Cornerstone and LG, there was a backup grant of a security interest and the documents expressly declared that Cornerstone was "selling a portion of a future revenue stream to EBF at a discount, not borrowing money from EBF."[4]

Less than two months later, Cornerstone filed for bankruptcy protection. In part because neither LG nor EBF had filed a financing statement prepetition, the trustee brought a preference action against each of them to recover the amounts they received prepetition. LG and EBF each argued that, as a buyer of accounts, it was not a creditor and thus the funds they received could not be avoidable preferences.

The court, in two separate decisions – *Cornerstone I* and *Cornerstone II* – agreed that each transaction was a sale, not a loan, but nevertheless concluded that because LG and EBF had not filed, Cornerstone retained its right to the accounts and a *prima facie* case for preference avoidance was met.[5] However, in each case, the court declined to decide on summary judgment whether the payments were protected from avoidance under § 547(c)(2) of the Bankruptcy Code as payments made in the ordinary course of business.[6]

The portion of the court's opinions that is relevant to this article is the discussion – arguably dicta – of whether Cornerstone's transactions with these financiers were sales or loans.[7] Before examining the court's analysis, however, it is useful to consider the framework in which that analysis should be conducted.

Nemo Dat

To begin with, the type of transaction at issue in the *Cornerstone* cases – a putative present sale of rights to payment that do not yet exist (or, more accurately, of an undivided share of such nonexistent rights) – is both a metaphysical and legal impossibility. It is metaphysically impossible because the essence of a sale is the transfer to the buyer of that which is being purchased. A transfer of future rights to payment – that is, rights that as yet do not exist[8] – cannot occur unless and until the rights to payment arise.

It is a legal impossibility for much the same reason. The law simply does not comprehend or countenance a present transfer of future property. It might recognize and even enforce a *promise* to transfer property that the promisor hopes later to acquire, but that is something different. As one court put it, "[a]t law one cannot transfer by a present sale what he does not then own, although he expects to acquire it. But, while [such a] contract [is] without effect at law as a contract of sale, it operate[s] as an executory agreement to sell."[9] Indeed, it is a basic legal maxim that "one cannot give what one does not have" (or, in one of several phrasings in Latin, "*nemo dat qui non habet*").[10]

Thus, "[t]here is no doubt that the assignment of a truly future claim or interest does not work a present transfer of property. It does not because it cannot; no property yet exists."[11] It is simply incoherent to assert that a putative buyer has purchased rights to payment that do not exist at the time of the transaction and that may never exist. The buyer's property interest arises, if at all, when the seller first obtains an interest in the applicable right to payment.[12]

The provisions of the Uniform Commercial Code are consistent with these concepts. Specifically, Article 9 does not allow a party to create a security interest in property that does not yet exist.[13] Under U.C.C. § 9-203(b)(2), a debtor must have "rights in the collateral or the power to transfer rights in the collateral" in order for a security interest (including the security interest of a purchaser of receivables) to attach. As the Official Comments to that section explain, "[a] debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be."[14]

To be clear, a debtor can authenticate a security agreement purporting to grant a security interest in existing and after-acquired receivables. But the security interest will not attach to receivables that the debtor does not own at the time of authentication until the debtor acquires rights in those receivables.[15] Alternatively, a debtor that has a present right to a stream of future payments[16] – as an annuitant might – can, assuming there are no effective restrictions on alienation, grant a security interest in the payments not yet due. In that case, the debtor has a right that is unmatured, but a present right nonetheless. People have been selling *rights* to future payments for hundreds of years and they have been borrowing against such rights for almost as long. But it is impossible to grant a security interest in the mere *hope* of future revenue. A hope or dream of future wealth is not property. Without property, there can be no collateral.

Sale vs. Secured Financing

The discussion above does not by itself fully answer the question of whether the Cornerstone transactions were sales or loans. It demonstrates only that, at the time the documents were signed, the financiers received no

property rights to either Cornerstone's future accounts or the proceeds of those future accounts. The documents could have, however, at least theoretically, provided for an automatic transfer of each new account (or, more accurately, a fractional share of each new account) the instant Cornerstone generated it. Such an automatic transfer would be similar to what happens when a security interest attaches to after-acquired collateral. It would also be analogous to the doctrine of after-acquired title (also known as estoppel by deed), which applies when a grantor of real property, who did not actually have property rights when the grantor purported to convey them, later acquires such rights.[17] In short, while the transaction documents did not create a present sale of future receivables, they could have created either: (i) a future sale of future receivables; or (ii) a loan that would become secured by future receivables.

Article 9 applies to both of these types of transactions: a sale of accounts or payment intangibles, as well as a transaction in which accounts or payment intangibles secure an indebtedness.[18] One of the reasons that it does so is to limit the circumstances in which it is necessary to determine which type of transaction is involved, in part because the distinction between the two types of transactions is often blurred and occasionally difficult to make.[19] However, the Official Comments expressly indicate that whether a transaction is a true sale or a secured loan is an issue that Article 9 itself does not answer and instead leaves to the courts, presumably to determine under other law.[20] Despite that, the distinction between a sale[21] of receivables and an obligation secured by receivables can be important for a variety of reasons, both inside and outside of Article 9. These reasons include:

- Whether the transaction is subject to the automatic perfection rule of § 9-309(3);[22]
- Whether § 9-406 or § 9-408, which have slightly different rules overriding restrictions on assignment, applies to the transaction;[23]
- Whether the transferor is entitled to any surplus under § 9-608;[24]
- Whether the receivables become property of the bankruptcy estate of the transferor;[25]
- When the transfer occurred, which can affect whether it is an avoidable preference;[26]
- Whether the transaction is subject to statutes on usury;[27] and
- Whether the transferee takes free under PACA of the rights of produce suppliers to the transferor.[28]

For each of these purposes, the analysis is largely the same, although courts have not articulated a precise test or standard for determining whether a transaction structured as a sale of receivables is really a secured obligation. Instead, they have merely identified factors that should be considered. These factors including the following:

- Whether the putative buyer acquires the risk of loss or whether that risk remains on the seller (such as by having to indemnify the buyer for losses or having to repurchase a receivable after the account debtor defaults);[29]
- Whether the putative buyer acquires the opportunity for gain (such as by retaining all collections in excess of the purchase price paid, plus interest);[30]
- Whether the putative seller continues to collect the receivables and, if so, whether it commingles the receipts with its other funds;[31] and
- Whether the putative buyer acquires the other incidents of ownership, such as the authority to determine what collection actions to take, the authority to change the servicer, the authority to enter into a binding settlement with the account debtor, the right to assign, the duty to maintain records relating to the receivables, and the burden of collection costs.[32]

It is worth noting that an approach such as this – a list of factors to consider but no standard to apply – is inherently problematic. It provides courts with little real guidance and can instead be used to mask decisions based on other considerations.[33] This problem is exacerbated by the fact that the list of factors is not exhaustive and courts consider other factors, such as how the transaction documents label the transaction[34] or whether the putative buyer filed a financing statement,[35] which are of dubious relevance.[36] Some courts also state that the issue is one of the parties' intent,[37] but such a statement is at best misleading because the parties' intent is to be determined objectively, rather than subjectively,[38] and thus such a statement is really no more than a shorthand way of referring to all the other factors.

Fortunately, courts generally agree that, although no single factor is controlling, the first factor – which party bears the risk of loss -- is the most important.[39]

Substance

Applying these factors, the *Cornerstone* court concluded that both transactions were true sales. The court noted that the documents clearly stated that the transactions were sales and that Cornerstone retained the

right and obligation to service the accounts.[40] To its credit, the court spent most of its analysis on the risk of loss. Unfortunately, in doing so it stressed the absence of any obligation by Cornerstone to repurchase the accounts,[41] and failed to appreciate that the structure really did leave Cornerstone with virtually all of the risk. This is evidenced principally by three aspects of the transactions, each of which distinguishes them from true sales of receivables.

First, in a typical sale of receivables, the buyer acquires receivables totaling a specified sum due from known account debtors. In contrast, in the Cornerstone transactions, the transfers were not limited to specific receivables owed by identified account debtors or even to receivables of a specified amount. Instead, the "buyers" received an unlimited amount of receivables until the respective buyer received payment of an amount that was identified in the documents as the "Purchased Amount" (*i.e.*, the amount that must be repaid to the "buyer" from collections on all future receivables of the "seller").

Second, in true sale transactions, the receivables usually have a face amount that is greater than the purchase consideration, but knowledge of the face amount is necessary to determine the consideration that the buyer is to pay. In other words, the price to be paid is typically determined by the face amount of the receivables, discounted by the risk of delay and nonpayment, and adjusted for prevailing interest rates. In most cases, the adjustment for risk requires some knowledge of the creditworthiness of the account debtors, even if that determination is not made individually, but in the aggregate. Put simply, buyers of receivables rarely pay substantial sums for whatever Monty Hall is hiding behind the curtain. However, the transaction between the putative buyers and the seller in the Cornerstone transactions lacked any such information. It is true that the transactions involved a specified *percentage* of the future receivables, but there was no way for the parties to know – at the time they entered into the transactions – what amount of receivables would have to be generated to pay the buyer the Purchased Amount.

Finally, and perhaps more to the point, each of the transactions encompassed a specified portion of future receivables from the transaction's inception until the respective Purchased Amount was remitted to the buyer. In other words, the transactions purported to transfer future receivables in perpetuity until a specified amount was received by the buyer. Because of this, the seller retained the risk of loss with respect to each individual account. The buyer was in no way injured if any particular account debtor did not pay; in essence the property purportedly "sold" would shift to ensure that the "buyer" received full value. Thus, while nothing in the transactions purported to give the buyer recourse against the seller in the event that the receivables were less than anticipated, the structure of the transactions effectively meant that the seller bore the risk of the collectability of the individual receivables. The only risk the putative buyer bore was if seller stopped generating accounts. This characteristic of the transactions strongly suggests that they involved secured obligations rather than an outright sale. That is, the receivables were assigned to the buyer to satisfy the obligation to repay the Purchase Price plus an implied interest rate.

Risk of loss aside, the remedies accorded the putative buyer in the event of a default by the seller also strongly suggest that the transactions were loans. Those remedies included the right of the buyer to accelerate the uncollected portion of the Purchase Price.[42] Of course, if these transactions were truly sales, there should be no concept of making the uncollected portion of the Purchased Amount becoming due and payable; it would simply be collected (or not) from the receivables. What is more, the transaction documents gave the buyers the right to change the Specified Percentage to 100% of the receivables.[43] But the idea that a buyer of a specified percentage of a seller's receivables could unilaterally change that percentage to another, higher percentage if a default occurs – that is, the buyer could unilaterally increase the property "sold" – is inconsistent with a true sale. That is a remedy far more consistent with a secured loan.

Accordingly, the *Cornerstone* court should have regarded these transactions, and all courts should regard similarly structured deals, as secured loans.[44] The consequences of doing so are potentially quite significant.

Subject to Usury Statutes

First, and probably foremost, the transaction might be illegally usurious. The stated Purchase Price would actually be the original principal amount of a loan and the Purchased Amount would be the amount that the borrower must repay, consisting of both principal and interest. The interest rate is not a fixed rate because it is impossible to tell, at the outset of the transaction, how long it will take until the daily remittances total the Purchased Amount. Nevertheless, ignoring the complexity of that timing variable, the implicit interest rates in these transactions are extremely high.[45]

In *Cornerstone I*, the Purchase Price was $50,690, for which the buyer "purchased" 5% (the "Specified Percentage") of the seller's future receipts, and the Purchased Amount was $65,897. Pursuant to the documentation, the buyer agreed to a per-month limit of its right to receive those receipts.[46] If collected on a

timely basis, that amount would repay the Purchased Amount with 6 months' worth of receipts and that would result in an implicit annual rate of interest of approximately 60%.[47]

In *Cornerstone II*, the Purchase Price was $75,000 for which the buyer "purchased" a Specified Percentage of 15% of the seller's future receipts, and the Purchased Amount was $105,000. Pursuant to the documentation, the buyer was entitled to receive $875 per day. Assuming that there are 21 business days per month and collections are made on a timely basis, that amount would repay the Purchased Amount in approximately 5½ months, and would result in an implicit annual rate of interest of approximately 90%.[48]

These high rates of implicit interest – and the desire to avoid applicable usury limitations – is no doubt one of the principal reasons the transactions were structured as they were. Recharacterizing the transactions as loans – which is what they are in economic substance – reveals their predatory nature.

Perfection

Second, the method for perfecting the transferee's interest might change. If the rights to payment are accounts (as that term is defined in Article 9),[49] then the transferee needs to file a financing statement in order to be perfected irrespective of whether the transaction is a sale or a security interest securing an obligation.[50] If, on the other hand, the transaction involves an interest in payment intangibles (as that term is defined in Article 9),[51] then re-characterizing the transaction as a loan will mean that the transferee needs to file a financing statement. In contrast, if the transaction were a true sale, the buyer's interest would be automatically perfected pursuant to U.C.C. § 9-309(3), without the need to file a financing statement.

Bankruptcy Code § 552.

The last risk with the *Cornerstone*-type transactions comes from Bankruptcy Code § 552,[52] but this risk probably exists regardless of whether the transaction is a sale or a secured financing, whether the receivable is an account or a payment intangible, or whether the buyer filed an appropriate financing statement.

Subsection (a) of § 552 prevents a security interest from attaching to property acquired by the debtor after the petition is filed. Subsection (b) creates an exception for post-petition property that is proceeds of prepetition collateral. Thus, for example, a security agreement purporting to encumber existing and after-acquired inventory can attach to post-petition proceeds of prepetition inventory collateral. If the inventory existed when the petition was filed, nothing in § 552 prevents the security interest from attaching to the post-petition proceeds, whether those proceeds be accounts, money, or payment intangibles. However, the security interest will not attach to inventory that the debtor acquires post-petition unless that new inventory is demonstrated to be proceeds of prepetition collateral.[53] Similarly, if a lender has a security agreement covering existing and after-acquired receivables, § 552 will prevent the security interest from attaching to receivables that arise post-petition unless those receivable are proceeds of pre-petition collateral. Stated simply, § 552 does not allow a security interest to attach to the post-petition proceeds of a prepetition hope (*i.e.*, a future receivable).

If a *Cornerstone*-type transaction is re-characterized as a loan, there can be little doubt that § 552(a) will cut off the lender's security interest in post-petition receivables, irrespective of whether they are accounts or payment intangibles. Even in the absence of re-characterization, however, § 552(a) is likely to be a problem. After all, the "sold" rights of payment are not proceeds of collateral or proceeds of the transferee's property.[54]

Conclusion

Transactional lawyers that represent the financiers engaged in these transactions should be very careful not to rely on the documented structure. While the *Cornerstone* court did conclude that the transactions at issue were true sales, that conclusion was not necessary to the court's decision, and thus was arguably only dicta. More important, the court's analysis was seriously flawed. While several other courts, mostly in New York, have ruled similarly,[55] the fact remains that these types of transactions are better viewed as loans. The financiers therefore need to file to perfect their interests and should be very concerned about violating applicable usury laws and the potential application of Bankruptcy Code § 552.

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Notes:

1. In re Cornerstone Tower Services, Inc., 2018 WL 6199131 (Bankr. D. Neb. 2018) ("Cornerstone I").

2. *Id.* at *2-3.

3. In re Cornerstone Tower Services, Inc., 2019 WL 127359 at *1-2 (Bankr. D. Neb. 2019) ("Cornerstone II").

4. *Id.* at *2, 4.

5. Cornerstone II at *6; Cornerstone I at *8. The court added that the accounts were therefore "property of the estate," Cornerstone II at *6; Cornerstone I at *8, but of course to the extent that the accounts were paid prepetition, the accounts themselves would no longer exist and could not possibly be property of the estate.

6. Cornerstone II at *8-9; Cornerstone I at *10-11.

7. *See also* In re A Goodnight Sleepstore, Inc., 2019 WL 342577 (E.D.N.C. 2019); EBF Partners, LLC v. Burklow Pharmacy, Inc., 2018 WL 6620582 (Fla. Cir. Ct. 2018); GTR Source, LLC v. FutureNet Group, Inc., 89 N.Y.S.3d 528 (N.Y. Sup. Ct. 2018) (each involving a purported "sale" of future receivables).

8. As the discussion below makes clear, there is a difference between an attempted present sale of a future right to payment, and a present sale of an existing right to payment due in the future.

9. T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42 (2d Cir. 1915), *rev'd on other groaunds*, 231 F. 645 (2d Cir. 1916).

10. As the Supreme Court has observed: "a person cannot grant a thing which he has not: *ille non habet, non dat*; . . . equity no more than law can deny it. *The thing itself is an impossibility*." Pennock v. Coe, 64 U.S. 117, 128 (1859) (emphasis added).

11. Stathos v. Murphy, 276 N.Y.S.2d 727, 730 (N.Y. App. Div. 1966); *see also* In re Hamilton, 18 B.R. 868, 870 (Bankr. D. Colo. 1982) ("[i]t is impossible on the face to have a vested property right in after-acquired property . . . because, by definition, after-acquired property is a mere contingency.").

12. The *T.B. Harms* case does include language that "[t]o every contract of sale an actually *or potentially existing* subject is necessary." However, "potentially existing" does not simply mean the potential to exist. Rather, in the old common law of sales, something was deemed to "potentially exist" if it was the natural "product or increase" of property already owned by the seller. A mere expectancy could never be the subject of a sale. "Thus, a man has no potential property in a catch of fish which he expects to make, even though he has a ship and nets and all the other appliances necessary for catching fish. He has no property, actual or potential, in any fish until they are actually caught, and hence cannot pass any property right in them until that time." Modern American Law: A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Rev. Ed. of Blackstone's Commentaries, Volume 4, Eugene Allen Gilmore & William Charles Wermuth, January 1, 1914 (Blackstone Institute).

13. The UCC does permit the parties to create a security interest in after-acquired collateral. *See* § 9-204. This flexibility does not, however, represent a departure from the fundamental principle that the debtor needs to have rights in the collateral for the security interest to attach. Not only does that baseline rule requiring that the debtor have rights in the collateral apply as to original collateral, it applies with equal force to after-acquired collateral. As explained by comment 2 to § 9-204: "This section adopts the principle of a 'continuing general lien' or 'floating lien.' It validates a security interest in the debtor's existing and (*upon acquisition*) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral" (emphasis added). A purported present sale of future receivables may be effective as a contract and may be effective as and when the receivables are created, but until the receivables are created it is an unattached security interest.

14. § 9-102 cmt. 6. *See also* Steven L. Harris and Charles W. Mooney Jr., *Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing*, 46 GONZ. L. REV. 297, 302 (2011) "Under section 9-203(b)(2), a security interest does not attach unless the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party. The first quoted phrase reflects *nemo dat*. *A debtor cannot create a security interest in collateral in which the debtor has no rights, and a debtor who has rights in collateral can create a security interest only in those rights that it has*." (emphasis added).

15. § 9-203(b)(2) (also indicating that attachment can occur if the debtor has the power to transfer rights in the collateral).

16. In Cornerstone II, the financier argued (albeit in a different context) that "under the terms of the agreement, it purchased a 'stream of payments.' " Cornerstone II at *7. This is an echo of a long since discredited "stream" theory of collateral. In some cases decided under the former Bankruptcy Act, courts held that rights to payment could not be avoided as preferential transfers if they were acquired by the debtor in the flow of a payment "stream" originating prior to the commencement of the preference period. *See, e.g.*, DuBay v. Williams, 417 F.2d 1277 (9th Cir. 1969); Grain Merchants of Indiana, Inc. v. Union Bank & Savings. Co., 408 F.2d 209 (7th Cir. 1969). The theory was that the creditor's security interest attached to

the entire "stream" of payments when the security interest was granted. Those decisions, which were widely criticized, were legislatively overruled by the Bankruptcy Code. *See* H.R. Rep. No. 95-595, at 373 (1977); S. Rep. No. 95-989, at 88 (1978) ("Paragraph (5) of Bankruptcy Code § 547(c) codifies the improvement in position test, and thereby 'overrules' cases such as *DuBay* and *Grain Merchants*"). Just as a security interest cannot attach to a "stream" of payments if the rights to payment have not yet arisen, ownership of future payments cannot be transferred in the present.

17. *See, e.g.,* BMCL Holding LLC v. Wilmington Trust, 201 So. 3d 109 (Fla. Dist. Ct. App. 2015); Rabo Agrifinance, Inc. v. Terra XXI, Ltd., 336 P.3d 972 (N.M. Ct. App. 2014).

18. *See* § 9-109(a)(1), (3). Article 9 also applies to the sale of chattel paper and promissory notes.

19. *See* § 9-109 cmt. 4. Another reason Article 9 applies to sales of receivables is to subject those transactions to the filing system that Article 9 creates for perfection. That filing system is designed principally to deal with the ostensible ownership problem that results from the creation of a lien securing an obligation: both the debtor and the secured party have property rights in the collateral but that fact might not be readily apparent to others who might wish to acquire an interest in such property. When receivables are truly sold there are not multiple owners, but there is often still an ostensible ownership problem: the seller, who created the receivable and might normally be presumed to be the owner, in fact no longer is. By covering sales of receivables, Article 9 impels the buyer to give public notice of its interest, thereby reducing the risk that the seller could purport to sell the receivables to others (or use them as collateral for a loan).

20. § 9-109 cmt. 4 ("Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of 'security interest' delineates how a particular transaction is to be classified. That issue is left to the courts.").

21. Article 9 does incorporate the definition of sale from Article 2 ("A 'sale' consists in the passing of title from the seller to the buyer for a price."). *See* §§ 2-106(1), 9-102(b).

22. *See, e.g.*, In re Commercial Money Center, Inc., 350 B.R. 465 (9th Cir. BAP 2006).

23. *See* §§ 9-406(e), 9-408(b). *See also* Fenway Fin. LLC v. Greater Columbus Realty, LLC, 995 N.E.2d 1225 (Ohio Ct. App. 2013) (dealing with whether a transaction labeled as a sale of accounts by a real estate agent was really a secured loan, and therefore subject to an Ohio statute that prohibits real estate brokers from paying an agent's commission to a creditor of the agent).

24. *See* § 9-608(a)(4), (b). *See also* § 9-602(5) (making a borrower's right to a surplus not subject to variation by agreement); Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538 (3d Cir. 1979).

In addition, a secured party has an obligation to act in a commercially reasonable manner when collecting receivables only if the secured party has a right of recourse against the debtor. *See* § 9-607(c). The existence or absence of such a right of recourse is not the same thing as the distinction between a loan and a sale, but it is a highly relevant factor. *See infra* notes 29-32 and accompanying text.

25. *See, e.g.*, In re Contractors Equip. Supply Co., 861 F.2d 241 (9th Cir. 1988); In re Dryden Advisory Group, LLC, 534 B.R. 612 (Bankr. M.D. Pa. 2015); In re Siskey Hauling Co., 456 B.R. 597 (Bankr. N.D. Ga. 2011).

26. *See, e.g.*, In re Qualia Clinical Serv., Inc., 441 B.R. 325 (8th Cir. BAP 2011). *See also* 11 U.S.C. § 547(e)(2) (providing that a transfer of a security interest occurs when it is perfected, not when it is attached, if it is perfected more than 30 days after it attaches).

27. *See, e.g.*, Funding Metrics, LLC v. D&V Hospitality, Inc., 2019 WL 138614 (N.Y. Sup. Ct. 2019) (vacating a confession of judgment in a *Cornerstone*-type transaction so that a defense of usury could be adjudicated); In re Hill, 589 B.R. 614, 621-22 (Bankr. N.D. Ill. 2018) (citing numerous earlier decisions that in New York such *Cornerstone*-type transactions are not loans, and hence not usurious); Express Working Cap., LLC v. Starving Students, Inc., 28 F. Supp. 3d 660 (N.D. Tex. 2014); Carter v. Four Seasons Funding Corp., 97 S.W.3d 387 (Ark. 2003).

28. *See* S & H Packing & Sales Co. v. Tanimura Distrib., Inc., 883 F.3d 797 (9th Cir. 2018); Nickey Gregory Co. v. AgriCap, LLC, 597 F.3d 591 (4th Cir. 2010); Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co., 336 F.3d 410 (5th Cir. 2003); Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063 (2d Cir. 1995); Classic Harvest LLC v. Freshworks LLC, 158 F. Supp. 3d 1317 (N.D. Ga. 2015).

29. *See, e.g.,* Nickey Gregory Co., 597 F.3d at 602; Reaves Brokerage, 336 F.3d at 414; Endico Potatoes, 67 F.3d at 1068-69; Dryden Advisory Group, 534 B.R. at 620; Qualia Clinical Serv., 441 B.R. at 330; Commercial Money Center, 350 B.R. at 483-84; Fenway Fin., 995 N.E.2d at 1231.

30. *See, e.g.,* Reaves Brokerage Co. 336 F.3d at 414; Endico Potatoes, Inc., 67 F.3d at 1068-69. *See also*

Dryden Advisory Group, 534 B.R. at 620 (referring to whether the seller has the option to repurchase the receivables).

31. *See, e.g.,* Dryden Advisory Group, 534 B.R. at 620, 622.

32. *See, e.g.*, *id.* at 620; Carter, 97 S.W.2d at 655-56; Fenway Fin., 995 N.E.2d at 1229-30 (discussing whether transactions between the putative seller and its customers required credit approval of the factor and which party had the duty to maintain records relating to the receivables).

33. *See* Stephen L. Sepinuck, *Rethinking Unfair Discrimination in Chapter 13*, 74 AM. J. BANKR. L. 341, 356-57 (2000) (discussing cases that have made this point in other contexts).

34. *See, e.g.,* Cornerstone II at *4; Cornerstone I at *5; Nickey Gregory Co., 597 F.3d at 601-03 (but also looking at the language of preliminary transaction documents and other transaction documents, including a financing statement that referred to "advances" under the factoring agreement); Reaves Brokerage, 336 F.3d at 415-16 (noting that the agreement referred to "advances" that would be "charge[d]" to the assignor's account); In re Jersey Tractor Trailer Training, Inc., 2007 WL 2892956 at *7 (Bankr. D.N.J. 2007), *vacated in part on other grounds*, 580 F.3d 147 (3d Cir. 2009); Fenway Fin., 995 N.E.2d at 1229.

35. *See, e.g.*, Fenway Fin., 995 N.E.2d at 1233-34.

36. The labels that the parties use should not matter because the determination is to be based on the substance of the transaction, not its form. *See* U.C.C. § 9-109(a)(1) & cmt. 2. The filing of a financing statement should not matter because the assignee has reason to file regardless of whether the transaction is a sale or a secured loan. *See* U.C.C. § 9-505(b) ("the filing [of a financing statement] is not itself a factor in determining whether the collateral secures an obligation").

37. Express Working Cap., 28 F. Supp. 3d at 666-67; Carter, 97 S.W.2d at 655. *See also* Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor*, 65 Am. Bankr. L.J. 181, 206 (1991).

38. Article 9 used to expressly state that it applied to any transaction, regardless of its form that was intended to create a security interest in personal property or fixtures. U.C.C. § 9-102 (repealed). Revised Article 9 omits that reference to "intent." *See* U.C.C. § 9-109(a)(1). The purpose of this revision was not to change the law, but to make it clear that the subjective intent of the parties with respect to the legal characterization was never relevant, and instead the economic substance of the transaction is what controls. *See id.* at cmt. 2.

39. *See, e.g.,* Nickey Gregory Co., 597 F.3d at 602; Endico Potatoes, 67 F.3d at 1068-69; Classic Harvest, 158 F. Supp. 3d at 1326-28; In re Qualia Clinical Serv., 441 B.R. at 330; Carter, 97 S.W.2d at 656-67; Fenway Fin., 995 N.E.2d at 1231; Siskey Hauling, 456 B.R. at 607; Wiers Farm, Inc. v. Waverly Farms, Inc., 2011 WL 1296867 (M.D. Fla. 2011). *But cf.* Major's Furniture Mart, 602 F.2d at 544 ("the presence of recourse in a sale agreement without more will not automatically convert a sale into a security interest"); Express Working Cap., 28 F. Supp. 3d at 669-70 ("the presence of recourse provisions in the Agreements does not transform the arrangement into a loan because recourse provisions vary from contract to contract," a statement based largely on a nonuniform provision added to the Texas version of § 9-109).

40. *See* Cornerstone II at *5; Cornerstone I at *6. The court also noted that there was no evidence that LG or EBF had investigated any of Cornerstone's account debtors, and in doing so implied that this also suggested that the transactions were loans. To the extent that such investigation merits consideration at all, it seems that the court misunderstood why and which way it cuts. A buyer of accounts is much more likely to investigate the creditworthiness of account debtors than is a lender that takes a security interest in accounts because a buyer typically has more at stake from any individual account debtor's failure to pay. Accordingly, the court misapplied this factor; it should have suggested that the transaction was a loan, not a sale.

41. Cornerstone II at *6, Cornerstone I at *8.

42. "The full uncollected Purchased Amount plus all fees (including legal fees) due under this Agreement and the attached Security Agreement will become due and payable in full immediately." Cornerstone II at *6.

43. "The Specified Percentage shall equal 100%." *Id.*

44. If the transaction as structured is determined to be a secured loan, then the collateral would seem to be not all of the borrower's rights to payment, but merely the identified percentage of those rights to payment. Because that structure might present a problem if the lender ever declares a default and seeks to exercise collection rights, both of the "buyers" in Cornerstone I and II required Cornerstone to grant a blanket security interest in all receivables, not merely a percentage of them.

45. As the trustee in Cornerstone I asserted, "The plaintiff argues that it is a financing agreement with an exorbitant rate of interest." Cornerstone I at *1.

46. "LG Funding agrees not to take more than $10,982.00 per month." *Id.* at *2.

47. The implicit rate of interest is calculated as ($50,690) times (x%) = $65,897 or x% = $65,897/$50,690. This equation produces a 30% annual interest rate, but the buyer's anticipation was that the loan would be repaid in a 6-month period and, if it were, the result is an annual rate of interest of approximately 60%.

48. The implicit rate of interest is calculated as ($75,000) times (x%) = $105,000 or x% = $105,000 /$75,000. This equation produces a 40% annual rate of interest, but the buyer's anticipation was that the loan would be repaid in a 5½-month period and, if it were, the result is an annual rate of interest of approximately 90%.

49. "Account" is defined to include "a right to payment of a monetary obligation, . . . for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of." U.C.C. § 9-102(a)(2).

50. *See* § 9-310(a).

51. A "payment intangible" is defined as "a general intangible under which the account debtor's principal obligation is a monetary obligation." § 9-102(a)(42). Although that seems very broad, the term "general intangible" is in turn defined as a catch-all term that excludes the other classifications of property. *See* U.C.C. § 9-102(a)(42). Thus, a payment intangible is defined, at least in part, as a right to payment of a monetary obligation that is not an account.

Analysis of the difference between rights to payment that are accounts versus those that are payment intangibles is beyond the scope of this article. In many cases, the determination is not a simple task. As two examples, courts have found that a right to the return of an overpayment made in connection with the purchase of goods, and a claim for breach of warranty in connection with a sale of goods, to be payment intangibles rather than accounts. *See* In re Iroquois Energy Mgmt., LLC, 284 B.R. 28 (Bankr. W.D.N.Y. 2002) (based on old Article 9); Millennium Bank v. UPS Cap. Bus. Credit, 327 P.3d 335 (Colo. Ct. App. 2014).

52. The section provides:

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b) (1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

53. If the debtor is in a service industry, and therefore generates receivables from the provision of services rather than from the sale of inventory, it is unlikely that receivables generated post-petition will be proceeds of pre-petition collateral.

54. There is a textual obstacle in applying Bankruptcy Code § 552 to a true sale transaction. The section provides that it cuts off a lien as to after-acquired property acquired post-petition where the lien results from a security agreement. The term "security agreement" is defined in Bankruptcy Code § 101(50) as an "agreement that creates or provides for a security interest" and the term "security interest" is, in turn, defined in Bankruptcy Code § 101(51) as a "lien created by an agreement." Finally, the term "lien" is defined in Bankruptcy Code § 101(37) as a "charge against or interest in property that secures payment of a debt or performance of an obligation." Note that, unlike the definition of security interest under the U.C.C. (§ 1-201(35)), this definition of lien does not include the interest of a purchaser of accounts or payment intangibles. While the language has clear application to a security interest securing an obligation, the language does not fit nicely with respect to a sale of rights to payment. The policy underlying the section would, however, seem to be equally applicable to both structures. Perhaps an alternative remedy of the bankruptcy trustee with respect to post-petition receivables would be found in Bankruptcy Code § 549, which avoids post-petition transfers.

55. *See* cases cited *supra* n.27.

■ ■ ■

Recent Cases

SECURED TRANSACTIONS

Attachment Issues

In re Pettit Oil Co.,
2019 WL 1104662 (9th Cir. 2019)
A consignor that did not file a financing statement was not the owner of the cash and accounts constituting proceeds of the consigned fuel, but instead had an unperfected security interest in those proceeds, which the consignee's bankruptcy trustee could avoid.

Church Crop Ins. Servs., Inc. v. GemCap Lending I, LLC,
2019 WL 1057095 (Iowa Ct. App. 2019)
An intermediary insurance broker, which had a right to receive commissions from an insurance company and an obligation to pay commissions to the agency that solicited applications for the insurance policies issued, could and did grant to an accounts financier a security interest in the right to receive future commissions. The language of the relevant agreements made the broker "solely responsible for all commissions" owed to the agency, indicating that the broker was not a mere conduit and thus had sufficient rights in the future payments from the insurance company for a security interest to attach. Moreover, the insurance company had acknowledged that the grant of the security interest did not constitute a default of the broker's agreement with the insurance company, further indicating that the broker had the right to the payments.

Perfection Issues

In re First River Energy, LLC,
2019 WL 1103294 (Bankr. W.D. Tex. 2019)
The law of the jurisdiction where the debtor is located – Delaware – governs the perfection and priority of security interests in the debtor's inventory of fuel, not the law of Texas, which provides for an automatically perfected PMSI in favor of oil producers. Because the Texas producers did not file a financing statement in Delaware, their security interests in the inventory and its proceeds were unperfected and subordinate to the rights of a secured party that did perfect its security interest. In contrast, Oklahoma law governs the perfection and priority of an Oklahoma statutory lien in favor of oil producers.

Priority Issues

Liberty Mutual Insurance Co. v. SBN V FNBC LLC,
2019 WL 346707 (E.D.N.C. 2019)
A secured party with a perfected security interest in a contractor's accounts, which acknowledged that its interest in the receivables due on any bonded project was subordinate to the rights of the insurer that both issued the performance bond for the project and incurred expenses to complete that project, had superior rights to the net receivables due on each bonded project. The insurer was not entitled to offset losses on some projects against net receivables on other projects, even if the account debtor on the projects was the same.

Liability Issues

Kapor v. RJC Investment, Inc.,
434 P.3d 869 (Mont. 2019)
Although the debtor voluntarily vacated the mobile home serving as collateral, allowed the secured party to take possession of the home, and thereafter signed a document purporting to release all rights in the home, she remained the debtor in a secured transaction and was entitled to the surplus the secured party received upon selling the mobile home. Section 9-602(5) prohibits the debtor from waiving the right to a surplus. The secured party had not conducted a strict foreclosure because the release did not state that the secured party accepted or consented to accept the collateral in full satisfaction of the debt; the released purported to waive the debtor's rights but included no commitment by the secured party.

GUARANTIES & RELATED MATTERS

In re Republic Airways Holdings Inc.,
2019 WL 630336 (Bankr. S.D.N.Y. 2019)
Because the liquidated damages provisions in aircraft leases were unenforceable penalties, they could not be enforced against the guarantors of the leases. Although guarantors are generally permitted to waive affirmative defenses, and the unenforceability of the principal obligation is an affirmative defense, the invalidity of a contract based on illegality or public policy cannot be waived.

Capital Finance LLC v. Rosenberg,
2019 WL 296706 (D. Md. 2019)
The individuals who executed bad boy guarantees for their companies' loans, triggered by (i) an improper involuntary bankruptcy; (ii) an improper voluntary bankruptcy; "and" (iii) fraud or other illegal actions, were personally liable for the debt because the borrower illegally failed to pay payroll taxes, provided false borrowing base certificates, and diverted the proceeds of accounts receivable. The triggers to liability had to be interpreted disjunctively, and thus there was no requirement that all three triggers had to occur.

Apex Bank v. Thompson,
2019 WL 1090573 (Ga. Ct. App. 2019)
Although guarantors can waive the requirement of judicial confirmation of a nonjudicial foreclosure sale of real property that serves as collateral for the debt, none of the transaction documents in this case contained an adequate waiver. The promissory note indicated that a change in terms of the note would not release the guarantors and provided that the lender had discretion over which collateral to foreclose upon first and how to apply the proceeds, but neither of those terms evidenced a waiver of the guarantors' rights under the confirmation statute. A simultaneously executed Assignment of Deposit Account provided that one guarantor would "remain liable under the Note no matter what action Lender takes or fails to take *under this Agreement*" (emphasis added), but that language dealt with the Deposit Account Agreement, not the confirmation statute. Other language in that agreement providing that the guarantor "waives any defenses that may arise because of any action or inaction of Lender" could be interpreted to apply to the failure to seek confirmation of the foreclosure sale, but could also be interpreted to mean that the guarantors were waiving only those defenses relating to enforcement of that agreement, and thus there was no sufficiently clear waiver.

LENDING & CONTRACTING

Central Bank of India v. U.S. Bank,
2019 WL 1206489 (S.D.N.Y. 2019)
An intercreditor agreement pursuant to which each creditor promised to "not challenge or question in any proceeding" the validity of any secured obligation owed to the others or the attachment, perfections, or priority of each other's lien, but which also provided that nothing in the agreement restricts any creditor's right "to object in any insolvency proceeding," did not prevent one creditor from objecting to another's claim in the debtor's bankruptcy proceeding.

In re Republic Airways Holdings Inc.,
2019 WL 630336 (Bankr. S.D.N.Y. 2019)
The liquidated damages provisions in aircraft leases – which entitled the lessor to unpaid rent plus an amount that compensated the lessor for both the future rent (discounted to present value) and the diminished value of the aircraft – were unenforceable penalties. Because the lessor would bear the risk of diminished value if the lessee had fully performed, providing for recovery of that in the event of default, in addition to the other amounts, was an unenforceable penalty. For example, if the lessee defaulted at the end of the lease term, the lessee would have to pay more than 50 times the total amount of unpaid rent; the total cost of performance when the debtor rejected the leases was $12.5 million but the liquidated damages were $52.7 million.

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A "SALE" OF FUTURE RECEIVABLES: CRIMINAL USURY IN ANOTHER FORM

John F. Hilson & Stephen L. Sepinuck

In our article in the April issue of this newsletter,[1] we attempted to show that transactions in which a financier purports to buy a fixed percentage of the future receivables of a business, and then collects each day either a specified amount or specified percentage of receipts until the financier receives a specified total, are really loans. Nevertheless, courts continue to rule that many – but not all – such transactions are not loans for the purposes of New York's criminal usury statute.[2] This follow-up article explores more fully why most of those decisions are wrong and their analysis is misguided.

BACKGROUND ON SALES VS. LOANS

Before delving into the details of New York law, it is useful to explore the distinction between a sale and a collateralized loan. In a pure sale of an asset, all of the attributes of ownership shift from the seller to buyer. Chief among these attributes are the right to the benefit of appreciation, the risk of loss or depreciation, the right to control or possess the asset, and the right to transfer the asset to others. In general,[3] this is true regardless of the nature of the asset. The buyer of a vehicle, a painting, shares of stock in a corporation, or a receivable acquires all of these things.

Focusing on receivables, consider a buyer who pays $8,000 for a receivable with a face amount of $10,000. Of course, as is true with respect to any property that is sold, the receivable might be worth more or less than the purchase price at the time of the transaction. The potential gain or loss from such a discrepancy now falls on the buyer. More importantly, if the receivable appreciates – as it might, for example, if the receivable bears interest at a fixed rate and market interest rates decline – the buyer can realize that benefit by reselling the receivable. If the receivable depreciates – as it might if interest rates rise or the obligor becomes insolvent – the buyer suffers the loss. Finally, the buyer is now the person who can exercise rights associated with the receivable: accelerate the debt after a default, bring a collection action, or agree to a modification with the obligor.

Now consider a transaction in which the owner of a $10,000 receivable uses the receivable as collateral for an $8,000 loan. In the normal course of events, the lender acquires none of the attributes of ownership. If the receivable appreciates, the loan might be more secure, but the lender receives no direct benefit from the appreciation. That benefit inures to the borrower. If the receivable depreciates, the loan becomes less secure, but the borrower remains liable for the full amount of the debt. Finally, the borrower retains the rights to accelerate after default, sue to collect, and agree to a modification.[4]

But this stark contrast between a sale and a loan is somewhat illusory. They are instead merely the two endpoints on a continuum of possibilities:



In other words, the parties can by their agreement transfer only some of these attributes of ownership. For example, a seller might retain the right and the responsibility to service the receivable – that is, to collect and enforce it – even though the buyer acquires the benefit of appreciation and the risk of loss or depreciation. Alternatively, the parties can allocate between themselves the benefit of appreciation and the risk of loss, with one of them getting the former and the other the latter. In a non-recourse, secured loan, for example, the borrower does not retain the risk of loss or depreciation. The following chart summarizes the possibilities (using the terms "original owner" and "transferee" throughout, to avoid confusion and more readily illustrate the differences):

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	Benefit of Appreciation	Risk of Loss
Secured Loan	Original Owner	Original Owner
Nonrecourse Loan	Original Owner	Transferee
Sale with Recourse	Transferee	Original Owner
Pure Sale	Transferee	Transferee

These possibilities can be further refined by structuring the transaction to transfer only a portion of the benefit of appreciation or only a portion of the risk of loss.

Fortunately, when the attributes of ownership are divided, for some purposes it does not matter whether the transaction is characterized as a loan or a sale. For example, Article 9 of the Uniform Commercial Code generally applies to both a loan secured by receivables and a sale of receivables, as well as to all the variations in between.[5] Usury law, in contrast, applies only to loans (and in some cases to other extensions of credit); it does not apply to sales.[6] For this purpose, therefore, courts have had to distinguish sales from loans, and they understandably have struggled to do so when confronted with transactions that bear some resemblance to each.

BACKGROUND ON CRIMINAL USURY IN NEW YORK

In general, in New York, loans that bear interest in excess of 16% are usurious under civil law,[7] and those that charge interest in excess of 25% per year are criminally usurious.[8] Subject to several exceptions, usurious contracts are void.[9] The consequences to the lender if a transaction is usurious are rather harsh: the borrower is relieved of all further obligation to pay – not only interest but also outstanding principal – and any liens securing payment are canceled.[10] In effect, the borrower can simply keep the borrowed funds and walk away from the agreement. Moreover, the borrower can recover any interest payments made in excess of the applicable maximum rate.[11]

However, numerous statutory and judicial exceptions mitigate this harshness. Corporations are generally ineligible to raise a defense based on civil usury, although they can raise a defense based on criminal usury.[12] Banks charging a usurious rate forfeit interest but not principal.[13] Moreover, a usury defense can be waived or the borrower can be estopped from asserting it.[14]

Perhaps most importantly, courts have developed a variety of rules to distinguish lending transactions subject to usury restrictions from other sorts of financing arrangements that are not. For example, a litigation funding arrangement in which the financier is to be paid only out of the proceeds of the litigation, if any, is deemed to be a transfer of an ownership interest in the proceeds of the litigated claim, rather than a loan, and hence is not subject to the prohibitions on usury.[15]

Courts have reached this conclusion regarding litigation funding arrangements in large measure after reasoning from a more general premise stated three-quarters of a century ago in *Rubenstein v Small*: for a transaction to constitute a loan, "it is essential to provide for repayment absolutely."[16] In reliance on this premise, New York courts have distinguished between transactions supported by a guaranty and those that are not. Specifically, a sale of future receivables supported by a guaranty that imposes liability regardless of the reason for nonpayment can be usurious, whereas such a transaction supported by a very limited guaranty or by no guaranty at all is treated as an investment, the return on which is contingent on the success of the business.[17] As a result, the transaction is not a loan and cannot be usurious.

Even if a sale of future receivables includes a guaranty or is otherwise structured so that liability is absolute, New York courts will still normally treat the transaction as a sale, rather than as a loan, unless there is: (i) a definite term;[18] and (ii) no "reconciliation provision,"[19] a term discussed below.

CRITIQUE OF NEW YORK USURY LAW

Much of the courts' analysis is misguided. Let us begin with the oft-stated requirement that there must be some absolute repayment obligation for a transaction to constitute a loan. There are at least five reasons why that requirement is at least questionable, if not outright wrong.

First, the quoted line from *Rubenstein* is not part of the court's holding or even its reasoning, and thus is the weakest form of dicta. The *Rubenstein* case did not involve a claim of usury. Nor was it about whether a financial transaction structured as something other than a loan should be re-characterized as a loan. In fact, it was the reverse: whether a transaction structured as a loan to finance a theatrical production – but which provided for payment of a percentage of net revenue, rather than interest – was sufficiently like a partnership agreement so as to entitle the financier to an accounting. Quite frankly, nothing about the court's decision really stands for the proposition that without absolute personal liability, there is no loan.

Second, if the requirement of absolute liability were taken literally, then a non-recourse loan would not be treated as a loan for the purposes of usury. Even an over-secured, non-recourse loan would be exempt from the protections against usury. But there is no good reason why that should be the case. Indeed, policy dictates quite the opposite approach. Interest is designed to compensate for both the time value of money and the risk of nonpayment. If a loan is heavily over-secured, then all other things being equal, this should lead to a lower interest rate and make the charging of usurious interest even more egregious.

Third, if usury laws ceased to apply merely because the transaction documents specify a contingency that absolves the financier's client of liability, then it would be very easy for lenders to evade the prohibitions on usury. They could simply include in the transaction documents a clause providing that no further payment is due after a nuclear war or meteorite strike disrupts the client's business (when, by the way, the financier would have far weightier things to deal with than recovering the amount advanced). This would allow form to rule over substance and seriously undermine the restrictions on usury. It is unlikely that the courts would countenance such an artifice. In short, courts do not really believe the dicta from *Rubenstein*, and thus their repeated citation to it does not support their position.

Fourth, even if the search for some absolute payment obligation makes sense in some contexts, it does not in transactions involving a purported sale of a fraction of future receivables. In the litigation funding scenario, for example, in which the financier is to be repaid only from the proceeds of the litigation, the financier accepts a risk completely unrelated to the creditworthiness of its client. The high rate of return that the transaction typically calls for compensates for that risk. It makes some sense, therefore, to exempt that rate of return from the restrictions on usury – and also makes some sense to remove that exemption if the client promises to repay the advance regardless of the results of the litigation.

In a sale of future receivables, however, the risk that there will be no receivables from which to extract payment is not appreciably different from the risks associated with the creditworthiness of the client. In other words, if a business ceases to generate income, it can neither repay a true loan nor return an advance against future receivables. The risk is essentially the same. Moreover, it is the risk that interest rates traditionally compensate for, and hence a risk that should not exempt the financier from usury laws.

Finally, if adding a guaranty makes a transaction a loan, then the guaranty ceases to be merely a promise to perform a stated obligation; it is instead something that actually transforms the obligation. That is not what guaranties normally do.

Let us now examine the other factors courts tend to cite when concluding that a sale of future receivables is not a usurious loan: the lack of a definite term and the presence of a reconciliation clause. Properly understood, these factors have no bearing on whether the transaction is a loan, but they might affect whether the transaction is usurious.

Consider first the lack of a definite term. Nothing about a loan transaction requires that it have a fixed term. Indeed, the U.C.C. expressly provides that a negotiable promissory note can provide for payment on demand,[20] and certainly a negotiable demand note providing for interest at a rate in excess of 25% would be usurious under New York law.[21] Thus, the absence of a fixed term does not, by itself, mean that a transaction is not a loan.

The same is true for a so-called "reconciliation provision." In most transactions involving a sale of future receivables, the financier pays a "Purchase Price" in return for a "Specified Percentage" of the business's future receipts until the "Purchased Amount" is repaid. The agreements provide for the financier to automatically debit the business's deposit account by a specified amount each day or each business day. Obviously, the specified amount might or might not equal the "Specified Percentage" of receipts on any given day. If the agreement contains a reconciliation provision, then at specified intervals, either automatically or at the request of the business, the parties will review past receipts and payments to determine if the sum of the daily payments totaled more than what the Specified Percentage should have yielded and, if so, require reimbursement of the excess. In short, a reconciliation clause ensures that the business is really paying a *percentage* of its receipts rather than a *fixed amount*.

Courts regard this difference in how the financier is compensated as relevant for two interrelated reasons. First, if the financier is receiving a percentage of receipts, then the financier has a bit more risk and the transaction more closely resembles a purchase of the receivables than a loan. Of course, that resemblance is belied by the fact that the financier remains entitled to payments until it receives the Purchased Amount, so the financier really has few or none of the attributes of ownership of any particular receivable or set of receivables. Second, if the financier is entitled to a fixed amount each day, then it is easy to determine how long it will take for the business to fully pay the Purchased Amount, and from that to calculate the effective interest rate on the advance. If, however, the financier is really entitled to receive a percentage of receipts, it becomes difficult or impossible to predict how long it will take for the business to fully pay the Purchased Amount, and thus difficult or impossible to calculate the effective interest rate.

But none of this should have any bearing on whether the transaction is a loan. At most it affects what the interest rate is. A fixed payment schedule leads to a determinable interest rate. A variable payment means the interest rate is indeterminate (and the longer payment takes, the lower the financier's rate of return). Given the severity of the penalties for usury, courts are

justifiably concerned about the uncertainty in ascertaining the financier's rate of return.[22]

But this legitimate concern should not obscure the reality that in many sales of future receivables, the effective rate of return is so far above the rate for criminal usury that the usurious nature of the transaction cannot truly be doubted. Even if, as is true in New York, the borrower has the burden of proving that a loan is usurious,[23] courts should not allow a highly unlikely contingency to deprive borrowers of the protection that usury law is intended to provide. A loan that is usurious except when pigs fly, is usurious.

CONCLUDING THOUGHTS & ADVICE

We have spent much of our professional lives representing creditors. We believe that freely available credit is vital to both the national and global economies, a proposition readily confirmed by the financial crisis of a decade ago. We also believe in the memorable line from the movie *Repo Man* that "credit is a sacred trust"; borrowers should pay their debts. Finally, we are more than willing to question the desirability of restrictions on usury, something Jeremy Bentham famously and ably did more than two centuries ago.[24] But if the law is going to prohibit usury, it should do so effectively.

It is impossible to predict whether the points we have made above will ever persuade courts to alter their analysis and application of New York usury law.[25] Nevertheless, we believe that transactions structured as a sale of a percentage of future receivables are often usurious and hence are more risky for the financier than a cursory reading of the cases would suggest. Counsel for those financiers should advise their clients accordingly.

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Notes:

1. John F. Hilson & Stephen L. Sepinuck, *A "Sale" of Future Receivables: Disguising a Secured Loan as a Purchase of Hope*, 9 THE TRANSACTIONAL LAWYER 14 (April 2019).

2. *See, e.g.*, Power Up Lending Group, Ltd. v. Cardinal Energy Group, Inc., 2019 WL 1473090 (E.D.N.Y. 2019).

3. The most common exception would probably be if there is a legal or valid contractual restriction on the right to transfer. For example, the buyer of a license to operate a taxicab or casino might not be able to transfer the license without the prior approval of the governmental agency that issued it. The buyer of a membership interest in a limited liability company might not be able to transfer that interest without the prior approval of the other members.

4. Absent an agreement to the contrary, the lender acquires these rights after the borrower's default. *See* U.C.C. § 9-607.

5. *See* U.C.C. § 9-109(a)(1), (3), (d)(4)–(7).

6. *See, e.g.*, DeSimon v. Ogden Associates, 454 N.Y.S.2d 721, 725 (App. Div. 1982) ("A seller's extension of credit by demanding a premium (a time-price differential) in the amount representing the difference between a cash and credit price is not considered to be a loan of money for usury purposes.").

7. N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a.

8. N.Y. Penal Law § 190.40.

9. *See* N.Y. Gen. Oblig. Law § 5-511.

10. *See, e.g.*, Seidel v. 18 East 17th Street Owners, Inc., 598 N.E.2d 7 (N.Y. 1992); Szerdahelyi v. Harris, 490 N.E.2d 517, 521 (N.Y. 1986).

11. N.Y. Gen. Oblig. Law § 5-513.

12. N.Y. Gen. Oblig. Law § 5-521(1), (3). Even in a criminally usurious transaction, a corporate borrower may raise the issue only as an affirmative defense; it may not use the usurious nature of the transaction as the basis for an affirmative claim. *See, e.g.*, K9 Bytes, Inc. v Arch Capital Funding, LLC, 57 N.Y.S.3d 625, 631 (Sup. Ct. 2017); Colonial Funding Network, Inc. v. Epazz, Inc. 252 F. Supp. 3d 274, 280 (S.D.N.Y. 2017) (citing cases).

13. N.Y. Gen. Oblig. Law § 5-511(1).

14. *See, e.g.*, Hammelburger v. Foursome Inn Corp., 431 N.E.2d 278, 282-85 (N.Y. 1981) (ruling that estoppel *in pais* applies even to defense of criminal usury). *See also Seidel*, 598 N.E.2d 7 (acknowledging the potential application of waiver and estoppel *in pais* to a usury defense, but concluding neither applied in the case).

15. *See, e.g.*, Cash4Cases, Inc. v. Brunetti, 90 N.Y.S.3d 154 (App. Div. 2018); Kelly, Grossman & Flanigan, LLP v. Quick Cash, Inc., 950 N.Y.S.2d 723 (Sup. Ct. 2012); MoneyForLawsuits V LP v. Rowe, 2012 WL 1068171 (E.D. Mich. 2012) (applying NY law); Lynx Strategies, LLC v. Ferreira, 957 N.Y.S.2d 636 (Sup. Ct. 2010).

16. Rubenstein v Small, 75 N.Y.S.2d 483, 485 (App. Div. 1947).

For cases dealing with a sale of future receivables, in which the court quoted and relied on this statement, see NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc., 98 N.Y.S.3d 501, at *6 (Sup. Ct. 2018); Rapid Capital Fin., LLC v. Natures Market Corp., 66 N.Y.S.3d 797, 800 (Sup. Ct. 2017); Principis Capital,

LLC v Simmons, 2017 WL 4076754, at *2 (N.Y. Sup. Ct. 2017); K9 Bytes, Inc. v Arch Capital Funding, LLC, 57 N.Y.S.3d 625, 632 (Sup. Ct. 2017); Merchant Cash & Capital, LLC v Frederick & Cole, LLC, 2016 WL 9026152, at *5 (N.Y. Sup. Ct. 2016); Merchant Cash & Capital v. Transfer Int'l, Inc., 2016 WL 7213444, at *3 (S.D.N.Y. 2016); Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC, 2012 WL 12284924, at *5 (N.Y. Sup. Ct. 2012).

For other future receivables cases relying on the same point without quoting *Rubenstein* directly, but quoting or citing a case that does, see Power Up Lending Group, Ltd. v. Cardinal Energy Group, Inc., 2019 WL 1473090, at *5; In re Ortega's Mexican Rest., LLC, 597 B.R. 442, 446 (Bankr. D. Conn. 2019); Yellowstone Capital LLC v. Central USA Wireless LLC, 2018 WL 3765121, at *4 (N.Y. Sup. Ct. 2018); QFC, LLC v Iron Centurian, LLC, 2017 WL 2989222, at *3 (N.Y. Sup. Ct. 2017); IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071, at *2-4 (N.Y. Sup. Ct. 2017); Merchant Funding Servs., LLC v. Volunteer Pharmacy Inc., 44 N.Y.S.3d 876, 880 (Sup. Ct. 2016); Pearl Capital Rivis Ventures, LLC v. RDN Constr., Inc., 41 N.Y.S.3d 397, 401 (Sup. Ct. 2016); Transmedia Rest. Co. v. 33 E. 61st Street Rest. Corp., 710 N.Y.S.2d 756, 760 (Sup. Ct. 2000).

17. *Compare* In re Cornerstone Tower Servs., Inc., 2018 WL 6199131, at *6-8 (Bankr. D. Neb. 2018) (an individual guaranty of a sale of future receivables did not make the obligations absolutely repayable because the guaranty was limited and did not cover mere non-collection); Platinum Rapid Funding Group Ltd. v. VIP Limousine Servs., Inc., 2016 WL 6603853 (N.Y. Sup. Ct. 2016) (a guaranty that was no broader than the obligations of the merchant under an agreement to sell future receivables did not make the obligation absolutely repayable), *with* QFC, LLC v Iron Centurian, LLC, 2017 WL 2989222, at *4 (the requirement of a guarantor demonstrated that the funds provided to purchase receivables were absolutely repayable with calculated interest exceeding the legal rate); Merchant Funding Servs., LLC v Volunteer Pharm. Inc., 44 N.Y.S.3d 876, 881-82 (Sup. Ct. 2016) (a sale of future receivables supported by two guaranties was "absolutely repayable" and a usurious loan); Pearl Capital Rivis Ventures, LLC v. RDN Construction, Inc., 41 N.Y.S.3d 397 (Sup. Ct. 2016) (the presence of an individual guaranty made the principal's sale of future receivables a usurious loan). *See also* Clever Ideas, Inc. v 999 Rest. Corp., 2007 WL 3234747 (N.Y. Sup. Ct. 2007) (involving "advance meal sales" and distinguishing an earlier case involving a similar transaction but which lacked an individual guaranty).

18. *See, e.g.*, Power Up Lending Group, Ltd. v. Cardinal Energy Group, Inc., 2019 WL 1473090, at *5; In re Ortega's Mexican Rest., LLC, 597 B.R. at 446; NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc., 98 N.Y.S.3d 501, at *7-8; Rapid Capital Fin., LLC v. Natures Market Corp., 66 N.Y.S.3d 797, 801 (Sup. Ct. 2017); K9 Bytes, Inc. v Arch Capital Funding, LLC, 57 N.Y.S.3d at 633.

19. *See, e.g.*, Power Up Lending Group, Ltd. v. Cardinal Energy Group, Inc., 2019 WL 1473090, at *5; In re Ortega's Mexican Rest., LLC, 597 B.R. at 446; Yellowstone Capital LLC v. Central USA Wireless LLC, 2018 WL 3765121, at *4; NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc., 98 N.Y.S.3d 501, at *7; Rapid Capital Fin., LLC v. Natures Market Corp., 66 N.Y.S.3d at 800-01; K9 Bytes, Inc. v Arch Capital Funding, LLC, 57 N.Y.S.3d at 632-33; IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071, at *3. *See also* Retail Capital, LLC v. Spice Intentions Inc., 2017 WL 123374 (Sup. Ct. 2017) (refusing to treat a purported sale of future receivables as a usurious loan in part because the transaction documents included "a reconciliation on demand provision," whereby the parties could ensure that the financier collected no more than it was contractually entitled to collect); Merchant Cash & Capital v. Transfer Int'l, Inc., 2016 WL 7213444, at *3 (refusing to treat a sale of future receivables as a loan because of the existence of a reconciliation term).

In other decisions, courts have avoided direct discussion of whether the transaction documents contain a reconciliation provision by focusing on why such a provision matters: whether the financier is to receive a specified *amount* each day or a specified *percentage* of collections. *See, e.g.*, Principis Capital, LLC v Simmons, 2017 WL 4076754 (because a term in the parties' agreement providing for payment of a fixed percentage of receipts or receivables was superseded by a provision setting a fixed daily payment, a triable issue of fact existed as to whether the transaction was a usurious loan); QFC, LLC v Iron Centurian, LLC, 2017 WL 2989222, at *4 (a term providing for payment of a fixed amount per day superseded a term providing for payment of a specified percentage of collections, resulting in transaction being a usurious loan); Retail Capital, LLC v. Spice Intentions Inc., 2017 WL 123374 (Sup. Ct. 2017) (refusing to treat a purported sale of future receivables as a usurious loan in part because the transaction documents included "a reconciliation on demand provision," whereby the parties could ensure that the financier collected no more than it was contractually entitled to collect); Merchant Funding Servs., LLC v. Volunteer Pharmacy Inc., 44 N.Y.S.3d at 880-81 (because the daily percentage was modified to be a specified amount per day, the transaction was a usurious loan); Merchant Cash & Capital v. Transfer Int'l, Inc., 2016 WL 7213444, at *3 (refusing to treat a sale of future receivables as a loan because of the existence of a reconciliation term). *See also* the discussion of reconciliation provisions, *infra* page 3.

20. *See* U.C.C. § 3-104(a)(2). *See also* § 3-108(a) (defining "payable on demand").

21. *See, e.g.*, Crowford v. Carlton 422 N.Y.S.2d 402 (App. Div. 2919) (demand note with a stated interest rate of 10% was usurious). *See also* Venables v. Sagona, 925 N.Y.S.2d 578 (App. Div. 2011) (involving a usurious note labeled as a "demand note" but which required payment in one year).

22. *See, e.g.*, IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071, at *4 ("Defendants' argued interest rate calculations are nothing more than mere speculation based upon assumptions and hypotheses regarding what might have occurred under a very specific set of circumstances"); Merchant Cash & Capital v. Transfer Int'l, Inc., 2016 WL 7213444, at *3 ("defendants' calculation of 'interest' is speculative at best, and rests upon the unwarranted presumption that the daily payment amount is immutable. In view of the foregoing, the Court finds no basis to re-characterize the Agreement as a usurious loan.").

23. *E.g.*, Frietas v. Geddes Sav. & Loan Ass'n, 471 N.E.2d 437, 442 (N.Y. 1984).

24. JEREMY BENTHAM, DEFENSE OF USURY, SHEWING THE IMPOLICY OF THE PRESENT LEGAL RESTRAINTS ON THE TERMS OF PECUNIARY BARGAINS IN A SERIES OF LETTERS TO A FRIEND (1787).

25. In some cases dealing with the issue, the courts emphasize repeatedly that the issue has been raised and resolved many times, and seem to be frustrated with having to deal with it again. *See, e.g.*, Yellowstone Capital LLC v. Central USA Wireless LLC, 2018 WL 3765121 (awarding attorney's fees to the financier "in light of the history of these litigated matters and known binding precedent").

■ ■ ■

EVADING PROHIBITIONS ON USURY THROUGH CHOICE OF LAW

William B. Emmal

Lenders frequently include a choice-of-law clause in their loan agreements. After all, a lender that operates in multiple states, or that lends to a borrower residing or conducting business in a state where the lender is not located, has a legitimate interest in knowing what law governs a particular loan transaction. Some lenders might also use such a choice-of-law clause to ensure that law more favorable to the lender applies. In particular, a lender might use a choice-of-law clause to avoid the usury law of the state whose law would apply if no choice were made.[1]

However, the freedom to choose which state's law governs a contractual relationship is not absolute. Parties are generally free to select what law governs their contract, provided, as § 187 of the Restatement (Second) of Conflict of Laws states: "(i) the chosen state has a substantial relationship to the parties or the transaction, or there is some other reasonable basis for the choice; and (ii) application of the law chosen law does not violate fundamental policy of the state that has a materially greater interest in the issue and whose law would otherwise govern."

The Restatement suggests that "fundamental policy" is a somewhat malleable concept, affected by such things as: (i) the difficulty in ascertaining which state's law would apply in the absence of the choice, (ii) the amount of contacts the parties and the transaction have with the chosen state,[2] and the amount by which the interest rate exceeds the rate permitted by the law of the state that would otherwise govern.[3] Nevertheless, the fact remains that states have different views on whether the protections against usury represent fundamental policy of the state, such that a contractual choice of another state's law – one that permits higher interest rates or has no restriction on usury – will be disregarded.

Below is a chart summarizing which states treat their usury laws as establishing "fundamental policy," so as to disregard a contractual selection of another state's law (or, to put it another way, which states treat their laws against usury as reflecting a stronger policy than freedom of contract).

Fundamental Policy	Not Fundamental Policy	Unclear or Follows a Different Approach
Pennsylvania[4] South Dakota[5] Washington[6] West Virginia[7]	Arkansas[8] Florida[9] Illinois[10] Kentucky[11] Massachusetts[12] Michigan[13] Tennessee[14] Texas[15]	California[16] Nebraska[17] Nevada[18] New Jersey[19] New York[20] Rhode Island[21]

CONCLUSION

A lender seeking to utilize a contractual choice-of-law provision to avoid the usury law of a state whose law might otherwise apply to the transaction should be wary. The tactic can be effective to avoid the usury law of some states, but not all, particularly if the contractual interest rate is substantially above what is permitted by the state whose law would otherwise apply. Other tactics, such as the use of a usury savings clause, are also effective only in some states.[22] So, lenders need to carefully check the law of any state that might apply to a transaction.

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Notes:

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). This article does not address the extent to which federal law preempts state restrictions on usury. *See* 12 U.S.C. § 85 (permitting national banks to charge the interest rate allowed by the laws of the state or territory where the bank is located); 12 U.S.C. § 1831d(1) (permitting federally insured, state-chartered banks to charge the rate allowed by the laws of the state or territory where the bank is located). This article also does not address the extent to which the choice-of-law rules in U.C.C. § 1-301(a) override or alter the conflict-of-laws analysis as expressed in the Restatement.

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, at cmt. g.

3. *Id.* at § 203.

4. Gregoria v. Total Asset Recovery, Inc., 2015 WL 115501, at *4 (E.D. Pa. 2015); Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616, 620-24 (3d Cir.2009) (so ruling in connection with a claim that the contract was unconscionable that the parties' choice of law would violate Pennsylvania public policy). *See also* Pennsylvania Dep't of Banking v. NCAS of Delaware, LLC, 948 A.2d 752, 759 n.9 (Pa. 2008) (parties' contractual choice of law had no bearing on an action by the state Department of Banking for violating state law by charging fees that made the transaction usurious; suggesting in a footnote that the choice would not be enforceable anyway because it violates fundamental policy of the state).

5. State ex rel. Meierhenry v. Spiegel, Inc., 277 N.W.2d 298, 301 (S.D. 1979)).

6. O'Brien v. Shearson Hayden Stone, Inc., 586 P.2d 830, 833 (Wash. 1978). In a subsequent opinion in the case, the court suggested that if the contractual rate were only one or two percent higher than the maximum rate allowed under Washington law, the contractual choice of New York would have been permissible. *See* O'Brien v. Shearson Hayden Stone, Inc., 605 P.2d 779 (Wash. 1980).

7. Gen. Elec. Co. v. Keyser, 275 S.E.2d 289, 292-95 (W. Va. 1981).

8. National Sur. Corp. v. Inland Properties, Inc., 286 F. Supp. 173, 188-90 (E.D. Ark. 1968), *aff'd*, 416 F.2d 457 (8th Cir. 1969). *See also* Bice Constr. Co. v. CIT Corp. of the S., 27 B.R. 543, 546 (E.D. Ark. 1982), *aff'd*, 700 F.2d 465 (8th Cir. 1983) (apparently not applying the fundamental policy standard from § 187, but coming to the same conclusion as *Inland Properties*).

9. Burroughs Corp. v. Suntogs of Miami, Inc., 472 So. 2d 1166, 1167 (Fla. 1985); Morgan Walton Properties, Inc. v. International City Bank & Trust Co., 404 So. 2d 1059 (Fla. 1981). *See also* L'Arbalete, Inc. v. Zaczac, 474 F. Supp. 2d 1314, 1321 (S.D. Fla. 2007) (following both *Suntogs* and *Morgan Walton* by concluding that Florida courts will uphold choice-of-law provisions that evade in-state usury laws); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507, 510 (Fla. 1981) (stating that there is no public policy support for upholding Florida usury law over the parties' choice-of-law provision).

10. Mell v. Goodbody & Co., 295 N.E.2d 97, 100 (Ill. App. Ct. 1973).

11. Big Four Mills v. Commercial Credit Co., 211 S.W.2d 831, 836 (Ky. 1948).

12. Brooklawn Capital LLC v. Epox-Z Corp., 2019 WL 508819 (Mass. Ct. App. 2019).

13. MoneyForLawsuits V LP v. Rowe, 2012 WL 1068760 (E.D. Mich. 2012), *aff'd*, 570 F. App'x 442 (6th Cir. 2014) (enforcing a choice of New York law, which limits the usury defense to loans, but distinguishing an earlier unpublished decision refusing to enforce a choice of Nevada law because that state has no prohibition on usury). *Cf.* Midwest Bus. Credit, L.L.C. v. TTOD Liquidation, Inc., 2012 WL 12268402, at *4 (Mich. Ct. App. 2012) (upholding a choice of Illinois law even though Illinois allows business entities to be charged any rate of interest).

14. *Cf.* Goodwin Bros. Leasing, Inc. v. H & B Inc., 597 S.W.2d 303, 307 (Tenn. 1980) (contracting parties may in good faith select as governing law the law of a state with a reasonable relationship to the parties or the transaction even if the transaction would be usurious under Tennessee law but not usurious under the chosen state's law).

15. Saturn Capital Corp. v. Dorsey, 2006 WL 1767602, at *7-9 (Tex. Ct. App. 2006) (holding that "[i]n Texas, there is nothing inherently violative of public policy in contracting for another state's usury laws to apply).

16. Palm Ridge, LLC v. Ahlers, 2008 WL 11339594, at *3 (C.D. Cal. 2008) (apparently establishing a range of interest rates in choice-of-law provisions that are permissible under California public policy despite recognizing a strong policy against usury). *See also* Sarlot-Kantarjian v. First Pa. Mortgage Trust, 599 F.2d 915, 918 (9th Cir. 1979) (a rate of 13.47% to 18% was not so far above the permitted rate of 10% to violate California's policy against usury); Ury v. Jewelers Acceptance Corp., 38 Cal. Rptr. 376, 382-83 (1964) (parties' choice of law establishing an interest rate of 20.3% was not so excessive as to violate California public policy); Gamer v. duPont Glore Forgan, Inc., 135 Cal. Rptr. 230, 234-35 (1976) (parties' choice of law allowing New York interest rate of 12.25% was not so excessive as to violate public policy).

17. Exch. Bank & Tr. Co. v. Tamerius, 265 N.W.2d 847, 850 (Neb. 1978) (indicating that usury laws are "not so distinctive

a part of public policy" as to invalidate a contractual choice of law but ruling primarily that Texas law would have governed even absent its express selection in a promissory note because that was the place performance was due).

18. Ferdie Sievers & Lake Tahoe Land Co., Inc. v. Diversified Mortgage Investors, 603 P.2d 270, 273-74 (Nev. 1979) (upholding the parties' choice of Massachusetts Law, which allowed a slightly higher interest rate, because Massachusetts was the state with the "dominant interest" in the transaction but also indicating that a choice of another state's law should not be deemed to violate Nevada public policy unless "the rate is substantially above what our law allows so as to shock the conscience of the court.").

19. Moore v. Fischer, 2018 WL 4868289, at *5 (N.J. Super. Ct. App. Div. 2018) (reversing a trial court's ruling that the chosen law – Delaware – would have applied even absent the parties' contractual choice thereof without discussing the trial court's dicta that it is fundamental policy of New Jersey law to protect its residents from usurious loans).

20. Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 150-51 (S.D.N.Y. 2017) (citing other cases ruling similarly). *See also* N. Am. Bank, Ltd. v. Schulman, 474 N.Y.S.2d 383, 386-87 (Cty. Ct. 1984) (the parties' contractual choice of Israeli law, which has no prohibition on usury, would violate fundamental policy of New York but suggesting that selecting the law of a jurisdiction with only a slightly higher permissible interest rate would not violate fundamental policy of New York). *But cf.* A. Connor General Contracting, Inc. v. Rols Capital Co., 535 N.Y.S.2d 420, 421-22 (App. Div. 1988) (indicating that, in dealing with usury issues, New York courts apply the law of the state having the most significant contacts with the matter); Walter E. Heller & Co. v. Chopp-Wincraft Printing Specialties, Inc., 587 F. Supp. 557 (S.D.N.Y. 1982) (ruling that the chosen law – Illinois – would govern even absent the choice, but also suggesting that fundamental public policy of New York would not be offended by the choice because "the forum state chooses the state whose usury statute would sustain the contract in full or else impose the lightest penalty for usury from the set of all states that have a substantial relationship to the contract.").

21. Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc., 731 A.2d 708, 710 (R.I. 1999) (upholding a choice of Connecticut law despite a claim of usury without considering whether the choice would violate fundamental policy of Rhode Island).

22. *See* Amy Carter, *The Efficacy and Risk of Usury Savings Clauses*, 2 THE TRANSACTIONAL LAWYER 3 (Oct. 2012).

■ ■ ■

NON-UNIFORM UCC TEXT JEOPARDIZES ALL SECURED TRANSACTIONS GOVERNED BY MISSISSIPPI LAW

Stephen L. Sepinuck

Most, if not all, states varied the official text of the U.C.C. when enacting its various articles. Unfortunately, some of those involved lacked the commercial-law expertise or experience in legislative drafting needed to make the variation work as intended. Such appears to have been the case in Mississippi, where some non-uniform text added to § 9-623 poses a significant danger to secured transactions in that state.

The Mississippi version of § 9-623(b)[1] provides in pertinent part as follows (red underlined text is additional, non-uniform language):

> (b) To redeem collateral, a person shall tender:
>
> (1) Fulfillment of all obligations secured by the collateral **then due or past due (excluding any sums that would not be due except for an acceleration provision)**; and . . . .

The official text gives a debtor, a secondary obligor, and other lienholders a right to redeem the collateral by satisfying all the secured obligations. In all likelihood, the additional text was intended to give debtors a right to cure a default by paying the current and past-due portions of the secured obligation.[2] But that is not what the text purports to do; the entire clause still refers to *redeeming the collateral*, not to *curing the default*. Applied as written, the non-uniform text allows the debtor to free the collateral from the secured obligation – *i.e.*, discharge the security interest – by paying current and past-due charges.[3]

But it is even worse than that. The non-uniform language dates back to Mississippi's old Article 9,[4] but at least that provision applied only "after default." There is no such limiting language in either the uniform or Mississippi version of revised § 9-623(b). Accordingly, strict adherence to the text would permit a debtor in any Article 9 transaction governed by Mississippi law, immediately after the transaction was entered into when no amount was yet due, to redeem the collateral by paying nothing. In essence, the debtor has the unfettered right to convert a secured debt into an unsecured debt.

It is impossible to predict whether courts will follow the non-uniform text as written – and allow the debtor to redeem the collateral – or instead limit it to its likely intended meaning – by allowing the debtor to cure the default. Accordingly, until courts definitively answer that question or the legislature amends the provision, transactional lawyers need to be careful.

Fortunately, there is a partial solution to this problem. The debtor cannot waive the right to redeem prior to default,[5] but parties to a secured transaction are free to select which state's law governs their rights and duties,[6] provided the chosen state bears a reasonable relation to the transaction.[7] So, a Mississippi debtor and a lender located in another state and should be able, in the security agreement, to select the law of the lender's state to govern such matters as redemption, even if the collateral is located in Mississippi. For a wholly intrastate transaction, in which both parties and the collateral are located in Mississippi, however, there is no easy solution.

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Notes:

1. Miss. Stat. § 75-9-623.

2. See Black v. Peoples Bank and Trust Co., 437 So. 2d 26, 30 (Miss. 1983) (by adding the identical non-uniform text added to § 9-506 of old Article 9, "our legislature modified it to give the debtor an opportunity to mend the breach."). *See also* Rankin Properties, Ltd. v. Woodhollow Estates, 714 F. Supp. 800, 802 & 803 n.7 (S.D. Miss. 1989) (referring to a debtor's "attempt[] to cure" by invoking the non-uniform redemption right in old § 9-506 and stating that "Mississippi's version of this section lessens the requirement of curing a default, allowing a debtor to tender only those amounts then due or past due."). A right to cure is granted in another Mississippi statutes, *see* Miss. Stat. § 89-1-59, but that statute has limited applicability. *See* Dungan v. Dick Moore, Inc., 463 So. 2d 1094, 1099 (Miss. 1985).

3. There is also some authority for the proposition that, to exercise this right, the debtor must also cure non-monetary defaults. *See* Bombardier Capital, Inc. v. Royer Homes of Mississippi, Inc., 2005 WL 8170128. S.D. Miss. 2005).

4. *See* Miss. Stat. § 75-9-506 (repealed).

5. *See* Miss. Stat. §§ 75-9-602(11), 75-9-624(c) (each containing the official text). The right to redeem cannot be waived in a consumer-goods transaction even after default.

6. *See* U.C.C. § 9-301 cmt. 2.

7. *See* U.C.C. § 1-301(a).

■ ■ ■

Recent Cases

SECURED TRANSACTIONS

Attachment Issues

In re Bates Drug Stores, Inc.,
2019 WL 2763356 (Wash. Ct. App. 2019)

A bank's security interest in "[a]ll accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section" covered general intangibles only if they arose from the disposition of the described Collateral: inventory, accounts, and equipment. The bank's security interest in "[a]ll records and data relating to any of the property described in this Collateral section" was similarly limited to records and data that relate to inventory, accounts, and equipment. Because the trial court made no determination of whether a receiver's sale of "contracts, books and records, and intangibles," related to inventory, accounts, or equipment, the case had to be remanded for a proper determination of whether the bank had a security interest in the proceeds.

In re Castillo,
2019 WL 2553610 (Bankr. N.D. Cal. 2019)

A debtor's down payment made in connection with the purchase of a new car and the trade-in of a used car with negative equity was, pursuant to the terms of the contract, properly allocated toward reducing the negative equity. Because the financier's security interest in the new car is not a PMSI to the extent of the negative equity, this increased the purchase-money nature of the security interest, thereby reducing the portion of the security interest that the debtor could treat as unsecured in his Chapter 13 bankruptcy. The court would not determine how payments on the loan should be allocated between the PMSI and non-PMSI portions because that issue was not properly raised or briefed.

In re Financial Oversight and Mgmt. Board for Puerto Rico,
2019 WL 2636270 (D.P.R. 2019)

Bondholders' security interest in future employer contributions to an employee retirement system could not attach until the contingent factors affecting the amount of the contributions were fixed. Such factors included the size of the employer's payroll and the number of former employee pensioners. The contributions were not proceeds of other collateral. Accordingly, the bondholders' security interest in contributions made or due post-petition was cut off by § 552 of the Bankruptcy Code.

Perfection Issues

In re Wastetech, LLC,
2019 WL 2351877 (Bankr. N.D. Ga. 2019)
A factor that filed a financing statement identifying the debtor as "NTC Waste Group, LLC," approximately four months after the debtor had changed its name to "Wastetech, LLC," did not have a perfected security interest because a search under the debtor's correct name at the time the financing statement was filed would not have disclosed the financing statement. It did not matter that the factor was unaware of the name change or had begun its relationship with the debtor prior to the change in name. The financing statement's collateral description – "[c]ertain future receivables . . . purchased by Crown Funding Group, Inc., . . . pursuant to that certain purchase and sale of future receivables agreement between seller and purchaser dated 8/7/2017" – was also inadequate to perfect because none of the agreements between the debtor and the factor bore that date and the factor was not Crown Funding Group.

Enforcement Issues

Hussein v. UBS Bank USA,
2019 WL 2376112 (Utah Ct. App. 2019)
Because the loan documents expressly gave the bank the right to accelerate the debt and liquidate the collateral – shares of stock in a corporation – whenever the bank deemed "itself or its security interest in the Collateral insecure," the debtor had no cause of action against the bank for accelerating the debt and liquidating the collateral after the collateral had declined in value. It did not matter that the debtor had substantial assets because the clause dealt with whether the security interest had become insecure, not the insecurity of the loans.

People's United Equipment Finance Corp v. TAK, LLC,
2019 WL 2744481 (E.D. La. 2019)
Because courts have discretion, under Louisiana law, to order sequestration of property without bond, and the parties' security agreement expressly entitled the secured party to issuance of a writ of possession without the need to post a bond, a writ of seizure for the collateral – a wheel loader – would be issued without the secured party having to post a bond.

Wells Fargo Bank v. Suburu 46, LLC,
2019 WL 2592566 (N.J. Super. Ct. App. Div. 2019)
The clause in the credit agreement between a floor plan financier and several car dealerships, which provided for arbitration of "any claim or controversy arising out of or relating to the Loan Documents" other than "disputes under or related to swap agreements" and actions to foreclose, included the financier's action on the debt. Even though computation of damages required using the rates and formula incorporated into the parties' swap agreement, the swap agreement itself was not the subject of a dispute.

Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC, 2019 WL 2374960 (N.Y. App. Div. 2019)
Even if the secured party conducted the disposition of collateral – equity interests in a subsidiary – in a commercially unreasonable manner, and even if the transferee did not act in good faith, the disposition transaction could not be unwound. Pursuant to § 9-617, the bad-faith transferee would take subject to the debtor's rights, which at most would mean that the debtor could still exercise its right to redeem.

BANKRUPTCY ISSUES

Automatic Stay & Injunctions

In re Deemer,
2019 WL 2513136 (Bankr. M.D. Ala. 2019)
A secured party that declined to repossess the inoperable car that the debtor had surrendered violated the discharge injunction by refusing to release the title certificate without payment because this prevented the debtor from disposing of the car.

Executory Contracts & Unexpired Leases

In re Woodfield,
2019 WL 2183039 (Bankr. D. Or. 2019)
The dissociation provision in an LLC operating agreement, which provided that upon filing a bankruptcy petition a member would no longer have the right to receive regular distributions but would instead be entitled to payment of the member's capital-account balance over four years, was preempted by § 541(c)(1). Section 541(c)(1) also preempted the portion of the state LLC Act that provided for members to lose their membership status and voting rights upon filing for bankruptcy. However, even though the operating agreement was an executory contract, the debtor could not assign his interest without the consent of the other members, because state law made such consent necessary for any assignment to be effective, not merely for an assignment by a debtor in bankruptcy.

In re Orama Hospitality Group, Ltd.,
2019 WL 2500404 (Bankr. D.N.J. 2019)
A landlord that had sold a liquor license to the debtor on credit and had an option to repurchase the license by setting off amounts due from the debtor, but which had not exercised the repurchase option prepetition, could not exercise the option postpetition for three reasons: (i) the landlord did not have a security interest in the liquor license because applicable state law does not permit one; (ii) the repurchase option was an executory contract that had been rejected; and (iii) the repurchase option, coupled with the right to pay by setting off the debtor's obligation, was effectively an effort to create a prohibited security interest, and hence was unenforceable.

Avoidance Powers

In re Wagenknecht,
2019 WL 2353534 (10th Cir. BAP 2019), *appeal filed* (10th Cir. June 11, 2019)

A creditor that received payment during the preference period from the debtor's mother, who in return received a promissory note from the debtor, did receive an interest of the debtor in property. Even though the mother signed an affidavit stating that she advanced the funds exclusively for the purpose of paying the creditor, and that the debtor could not have used the funds for any other purpose, the debtor had the ability to control the loan proceeds because he could have refused to accept a loan from his mother.

In re Robert L. Dawson Farms, LLC,
2019 WL 2366418 (Bankr. E.D.N.C. 2019)

A debtor in possession, which was the surviving entity in a merger of limited liability companies that occurred the day before the bankruptcy petition was filed, cannot avoid as a preference a transfer deemed made when a secured party perfected the security interest granted by the non-surviving company. Even if the property transferred was property of the debtor, the property was not transferred on account of the antecedent debt of the debtor because the debtor could not have become liable for the debt until the merger occurred.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

In re Energy Future Holdings Corp.,
2019 WL 2535700 (3d Cir. 2019)

The holders of the highest tranche of first-lien debt – the whole of which was undersecured – were not entitled to post-petition interest out of the adequate protection payments and plan distributions allocated to the lower tranches because the waterfall in the intercreditor agreement dealt only with payments out of the proceeds of collateral or the exercise of remedies by the collateral agent. The payments were not made from property in which the creditors had a lien or from the exercise of remedies by the collateral agent.

Rockstone Capital, LLC v. Sanzo,
2019 WL 3058964 (Conn. 2019)

Judgment debtors who entered into a forbearance agreement pursuant to which they granted the judgment creditor a mortgage on their home thereby lost the ability to claim the homestead exemption. Although the homestead exemption cannot normally be waived, the mortgage was more than a mere waiver of the exemption because it subordinated the judgment creditor to two other liens that were recorded after its judgment but before the mortgage and it secured additional fees and costs stemming from the forbearance.

Spec's Family Partners, Ltd. v. First Data Merchant Services LLC, 2019 WL 2407306 (6th Cir. 2019)

A liquor retailer that was the victim of two attacks on its computer network was not liable to its data processor for the millions of dollars in fraudulent credit card charges that Visa and MasterCard passed on to the card issuers, which in turn passed them on to the data processor. Although the indemnification clause in the retailer's contract with the data processor covered all losses and liability relating to any breach of the agreement, and the retailer had breached the agreement by failing to maintain data security, the clause also excluded liability for consequential damages, and the charges were consequential damages.

Katun International, Inc. v. Exworks Capital, LLC,
2019 WL 3202233 (Cal. Ct. App. 2019)

Because the communications between a prospective borrower and a potential lender expressly disclaimed any commitment to fund the borrower's planned acquisition, and instead stated that the lender was merely agreeing to proceed with a review of the proposal, the borrower had no breach of contract claim against the lender for failing to fund the acquisition. However, the borrower did state claims for fraud and negligent misrepresentation by claiming that the lender had falsely indicated its ability to fund the acquisition.

■ ■ ■

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AMICUS INITIATIVE MOVES FORWARD

New Directors – First Partnership with Law Schools – First Brief

The Commercial Law Amicus Initiative ("CLAI") is delighted to make the following three announcements.

First, the following eight experts in commercial law have agreed to serve on CLAI's Board of Directors:

Teresa W. Harmon	Juliet M. Moringiello
Danielle K. Hart	Sandra M. Rocks
John F. Hilson	Edwin E. Smith
Christina Kunz	Robert Zadek

The Board, now consists of these individuals plus the three founding directors – Stephen L. Sepinuck, Kristen D. Adams, and Jennifer S. Martin.

Second, students at both Gonzaga University School of Law and St Thomas University School of Law will be eligible to receive academic credit this fall for their work in furtherance of CLAI's stated mission:

1. To assist the courts in faithfully interpreting and applying the Uniform Commercial Code, other commercial statutes, and related common law, in order to achieve the laws' underlying policies and to facilitate consistent decision-making by the courts;

2. To advance education at law schools by providing law students with training and practical experience in pro bono advocacy relating to the proper application and interpretation of commercial law; and

3. To offer research and recommendations on matters of commercial law to non-profit organizations such as the American Law Institute and the Uniform Law Commission, in connection with such organizations' preparation of uniform or model legislation or restatements of the law.

Finally CLAI has completed and is awaiting permission to file its first *amicus curiae* brief. The brief, addressed to the Idaho Supreme Court, explains when a purchaser of goods acquires voidable title to the goods and when such a purchaser has the power to convey good title to a good faith purchaser for value. Anyone who wishes to receive a copy of the brief may request it by email to Professor Stephen L. Sepinuck at sepinuck@gonzaga.edu.

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Working together for the common good

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