


Vol 2

E2023. 00335. COA. R3. CV

**TECHNICAL RECORD**

VOLUME TWO (2) (PAGES 150-293)

CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE  
LARRY L. HENRY, CLERK

FILED  
JUL 26 2023  
Clerk of the Appellate Courts  
Rec'd by 

**Kyle E. Hedrick**  
Judge of the Circuit Court  
Division No. IV  
(Order Entered 12.05.2022)

DOCKET NO. 22C429  
CIRCUIT COURT

DOCKET NO. E2023-00335-COA-R3-CV  
COURT OF APPEALS

*FLEXIBILITY CAPITAL, INC.* VS. *SABATINO CUPELLI*  
*DAVID JONATHAN TULIS D/B/A*  
*HOT NEWS TALK RADIO (NOOGA RADIO)*

*Appellee's*

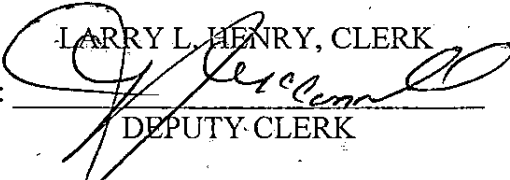
*Appellant*

<p>CHEADLE LAW 2404 CRESTMOORE ROAD NASHVILLE, TN 37215 JOHN CHEADLE           BPR# 6053 MARY BARNARD         BPR# 27084 (615) 254-1009</p>	<p>SABATINO CUPPELLI, PRO-SE 8665 SUMMIT PARKWAY APARTMENT 204 OOLTEWAH, TN 37363 (423) 458-5563</p> <p>DAVID JONATHAN TULIS, PRO-SE 10520 BRICKHILL LANE SODDY DAISY, TN 37379 (423) 316-2680</p>
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*Attorney for Appellee's*

*Attorney for Appellant*

FILED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

LARRY L. HENRY, CLERK  
BY:   
DEPUTY CLERK

THIS TECHNICAL RECORD TRANSMITTED TO THE CLERK, COURT OF APPEALS  
THIS 30 DAY OF JUNE, 2023.

unforeseeable government action. Stipulations such as “shall immediately pay the unpaid portion of the purchased amount” are an impossibility built originally into the contract, unperformable by merchant and unperformable by guarantors personally.

Remedies upon default include suit of the company’s owners under “the provisions of the personal guarantee of performance” without first suing Hot News Talk Radio LLC. The contract lets Flexibility “assign, transfer or sell its rights or delegate its duties hereunder \*\*\* without notice” (§ 33).

The terms of making good are the “personal guaranty of performance.”

**2. Guaranty of obligations:** Guarantor hereby irrevocably, absolutely and unconditionally guarantees to Buyer prompt, full, faithful and complete performance and observance of all the merchant’s obligations; and guarantor unconditionally covenants to buyer that if default or breach shall at any time be made \*\*\*, guarantor shall well and truly pay or perform (or cause to be paid or performed) the obligations and pay all damages. \*\*\*

Contract, p. 11, § 2

Again, the contract insists that “guarantor specifically acknowledges buyer is not a lender, bank or credit card processor, and that buyer has not offered any loans to merchant, and guarantor waives any claims or defenses of usury” (§ 5).

Defendants accepted the proposed part of the contract because they have had every intention of paying all amounts owed as the cost of keeping radio programming in public service. They had already had one good and equitable contract with Flexibility Capital prior to the contract in dispute, with both parties coming out ahead in a future receivables sales and purchase agreement.

# Grounds for summary judgment & dismissal

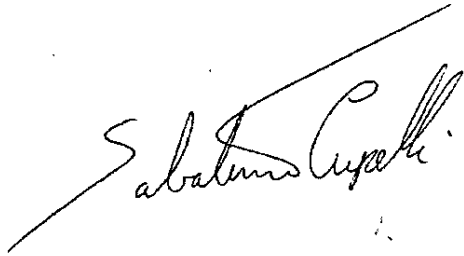
Accused make the case the lawsuit should be dismissed on the following grounds.

1. A *supervening impossibility* is imposed upon the relationship between parties to make the contract unenforceable, an event wholly outside the contemplation of the parties. That is the conversion of state of Tennessee and its people into a penal colony, starting March 12, 2020, with Gov. Bill Lee's first executive order in the erstwhile Covid-19 pandemic, followed by an illegal, fraudulent "safer at home" executive order April 2, 2020, imposing home confinement on 7 million people without lawful cause, legal reason, warrant or nonfraudulent exigency, as defendants have averred by separate motion, herein incorporated.
2. An original impossibility is in the contract. The personal guaranty of performance ordains the defendants to "immediately pay Flexibility the unpaid portion of the purchased amount" (§ 23) if they default. Therefore, the contract lacks the legal authority to empower the court to enforce the future receivables sale and purchase agreement upon defendants.
3. Their business mortally harmed, accused stopped making payments. The amounts due are impossible to generate in the form of purchased receipts arising from the business of Hot News Talk Radio LLC. That business no longer exists, nor do defendants have means to pay by any other business in which they might be involved.
4. Such requirement for payment of future and existing receivables is *an original impossibility*,<sup>3</sup> part of the contract that, under *supervening impossibility* and third-party intervention, has been rendered unenforceable.

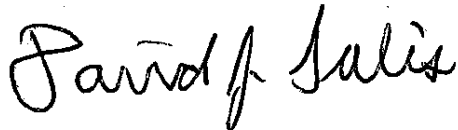
## Relief sought

Defendants pray (1) for relief of the court, that the lawsuit be dismissed, with prejudice, on the above-stated grounds, and (2) that defendants' costs associated with this action be taxed to the plaintiff.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sabatino Cupelli". The signature is written in black ink and is positioned above a horizontal line.

By \_\_\_\_\_  
Sabatino Cupelli

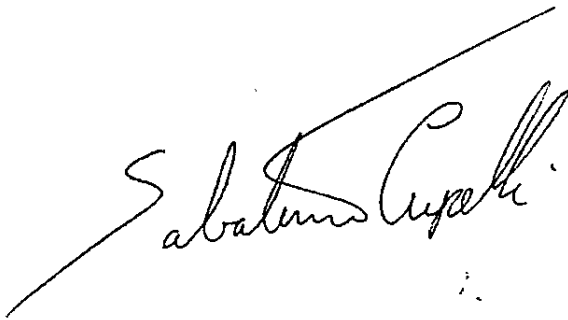
A handwritten signature in cursive script that reads "David Jonathan Tulis". The signature is written in black ink and is positioned above a horizontal line.

By \_\_\_\_\_  
David Jonathan Tulis

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this motion is being sent by first-class mail this 13th day of September, 2022, to:

Mary Barnard Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215

A handwritten signature in cursive script that reads "Sabatino Cupelli". The signature is written in black ink and is positioned above a horizontal line.

---

Sabatino Cupelli

A handwritten signature in cursive script that reads "David Jonathan Tulis". The signature is written in black ink and is positioned above a horizontal line.

---

David Jonathan Tulis

## Appendix



Pieter Breughel's "The Land of Cockaigne," 1567

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
 AT CHATTANOOGA  
 DIVISION IV

FLEXIBILITY CAPITAL, INC. )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 SABATINO CUPELLI AND )  
 DAVID JONATHAN TULIS, )  
 D/B/A HOT NEWS TALK RADIO )  
 )  
 Defendants. )

NO. 22C429

IV

FILED IN OFFICE  
 2022 SEP 22 AM 10:26  
 LARRY L. HENRY, CLERK  
 BY JHB DC

PLAINTIFF'S REPLY TO DEFENDANTS' AMENDED ANSWER TO  
 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, John R. Cheadle, Jr. and Mary Barnard Cheadle, and in reply to defendants' amended answer to plaintiff's motion for summary judgment, would reply:

1. It is undisputed that defendants received an advance of future receivables. It is undisputed that defendants failed to pay as promised. Defendants have not disputed the amount due.

2. Defendants assert that due to the shutdown during the COVID Pandemic, "it was impossible to generate sales, pay rent and to maintain accounts among small business owners - its chief advertising customer base." Essentially, defendants assert that they could not pay plaintiff because of the shutdown. Defendants have failed to provide any financial documentation to support this assertion.

3. Defendants admit that as of June 2022, Hot News Talk Radio is dissolved for not being in good standing.

4. Defendants assert that plaintiff's motion for summary judgment shall be denied because plaintiff advanced future

receivables and by doing so, assumed the risk that plaintiff may not get paid.

5. The Future Receivables Sale and Purchase Agreement provides:

"b. Flexibility's Risk Acknowledgments. Flexibility agrees to purchase the Purchased Future Receipts knowing the risks that Merchant's business may slow down or fail, and Flexibility assumes these risks based exclusively upon the information provided to it by Merchant and related to the business operations of Merchant business prior to the date hereof and upon Merchant's representations, warranties and covenants in this Agreement that are designed to give Flexibility a reasonable and fair opportunity to receive the benefit of its bargain. (Emphasis added). Furthermore, Flexibility hereby acknowledges and agrees that Merchant shall be excused from performing its obligations under this Agreement in the event Merchant's business ceases its operations exclusively due to the following reasons (collectively, the "Valid Excuses"):

- i. adverse business conditions that occurred for reasons outside Merchant's control and not due to Merchant's willful or negligent mishandling of its business;
- ii. loss of the premises where the business operates (but not due to Merchant's violation of its obligations to its landlord);
- iii. bankruptcy of Merchant;
- iv. natural disasters or similar occurrences beyond Merchant's control."

Attached is a copy of the Future Receivables Sale and Purchase Agreement.

6. The Agreement further provides:

**"REPRESENTATION, WARRANTIES AND COVENANTS**

15. Merchant represents, warrants and covenants that as of this date and during the term of this Agreement:

. . .

c. Good Standing. Merchant is a corporation, limited



liability company, limited partnership, other type of entity that is in good standing and duly incorporated or otherwise organized and validly existing under the laws of its jurisdiction of incorporation or organization, and has full power and authority necessary to carry its business as it is now being conducted."

7. Defendants applied for advance future receivables under the name "Hot News Talk Radio, LLC, d/b/a NoogaRadio 92.7 FM - 95.3 HD 4" operating at 5512 Ringgold Road, Suite 216, Chattanooga, Tennessee 37412. Attached as Exhibit 2 is a copy of the application. Defendants asserted that they were operating as a limited liability company. Included with defendants' application, defendants included a certificate of formation for Hot News Talk Radio LLC from the Delaware Secretary of State dated May 6, 2014.

8. Defendants represented to plaintiff that Hot News Talk Radio was an active limited liability company in good standing.

10. The Delaware Secretary of States shows that Hot News Talk Radio, LLC is not in good standing and has been inactive since September 23, 2016, prior to the execution of the underlying Agreement. Attached as Exhibit 3 is a copy of the standing status for Hot News Talk Radio from the Delaware Secretary of State.

11. Pursuant to the terms of the Agreement, plaintiff assumes a risk "based exclusively upon the information provided to it by Merchant and related to the business operations of Merchant business" and "upon Merchant's representations, warranties and covenants."

12. Defendants misrepresented to plaintiff that Hot New Talk Radio was a limited liability company in good standing. Since there was no active limited liability company at the time the Agreement was executed, then defendants essentially executed the

Agreement and personal guaranty as a d/b/a.

13. Defendants provided false information to plaintiff. Defendants may not now assert that plaintiff "assumed the risk" when the Agreement sets out the representations, warranties and covenants required and that any risk will be solely based upon these representations, warranties and covenants.

14. Defendants are still operating NoogoRadio.

15. Defendants are individually liable on a Future Receivables Sale and Purchase Agreement and Personal Guaranty of Performance. Plaintiff advanced future receivables for defendants' business. Defendants failed to pay as promised. A balance remains due.

WHEREFORE, plaintiff respectfully requests that plaintiff's motion for summary judgment be granted.

DATED: September 21, 2022.

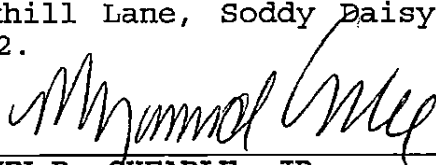
Respectfully submitted,



JOHN R. CHEADLE, JR. (6053)  
MARY BARNARD CHEADLE (27084)  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

CERTIFICATE

I hereby certify that copies of the foregoing have been mailed, postage paid, to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga TN 37412, to defendant Sabatino Cupelli at 8665 Summit Creek Way, Chattanooga, TN 37363, and to defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, this 21<sup>st</sup> day of September, 2022.



---

JOHN R. CHEADLE, JR.  
MARY BARNARD CHEADLE

(p.shell; 21001231)

# FLEXIBILITY CAPITAL INC.

## FUTURE RECEIVABLES SALE AND PURCHASE AGREEMENT

This Future Receivables Sale and Purchase Agreement (this "Agreement") dated as of February 6, 2020, is made by and between Flexibility Capital, Inc., a New York corporation ("Flexibility"), and the merchant which name, address and other pertinent information appear below (the "Merchant"):

Legal Business Name: Hot News Talk Radio, LLC  
D/B/A: NoogaRadio 92.7 FM-95.3 HD 4  
Type of Entity: Limited Liability Company  
Business Physical Address: 5512 Ringgold Rd Suite 216, Chattanooga, TN 37412  
Business Mailing Address: 5512 Ringgold Rd Suite 216, Chattanooga, TN 37412  
Business Phone Number: 423-800-8949 Email: hotnewstalkradio@gmail.com  
Banking Information:  
Bank Name: Tennessee Valley FCU Bank ABA: [REDACTED]  
Bank Account Holder's Name: Hot News Talk Radio LLC  
Account # [REDACTED] EIN: 46-5621711

WHEREAS, the Merchant is desirous to sell to Flexibility, and Flexibility is desirous to purchase from Merchant, a Specified Percentage of the Merchant's Future Receipts, but only on the terms and conditions set forth in this Agreement (all capitalized terms shall have the meanings ascribed to them below).

NOW, THEREFORE, for good and valuable consideration, the mutual receipts and sufficiency of which is hereby acknowledged by both parties, Flexibility and Merchant hereby agree to the foregoing and as follows:

### 1. Basic Terms and Definitions.

- a. "Effective Date" shall mean the later of: (i) the date set forth in the preamble to this Agreement, and (ii) the date when Flexibility paid the Purchase Price to Merchant.
- b. "Specified Percentage" shall mean TEN PERCENT (10 .00%) of each and every sum from sale made by Merchant.
- c. "Future Receipts" shall mean, collectively, all of Merchant's receipts of monies paid and delivered to Merchant by Merchant's customers' and/or other vendees after the Effective Date of this Agreement; which payments or deliveries of monies can be made in the form of cash, check, credit, charge, or debit card, ACH or other electronic transfer or any other form of monetary payment in the ordinary course of Merchant's business.
- d. "Purchased Amount" shall mean the total amount of the Specified Percentage of the Future Receipts that Merchant shall be under obligation to deliver to Flexibility pursuant to this Agreement. The parties agree that the Purchased Amount shall be \$ 24,140.00.
- e. "Purchase Price" shall mean the total amount that Flexibility agrees to pay for the Future Purchased Receipts. The parties agree that the Purchase Price shall be \$ 17,000.00.
- f. "Daily Installment" shall mean the fixed amount that Merchant and Flexibility agree to be a good faith approximation of the Specified Percentage of Merchant's daily Future Receipts. Merchant and Flexibility further agree that, based upon the information provided by Merchant to Flexibility concerning Merchant's most recent accounts receivables, and subject to Merchant's right of adjustment/reconciliation set forth in this Agreement, as of the Effective Date the Daily Installment shall be \$ 164.22.
- g. "Workday" shall mean Monday through Friday except on days when banking institutions are closed for the holidays and do not process ACH payments.

2. The Term. The term of this Agreement shall commence on the Effective Date and expire on the date when the Purchased Amount is received by Flexibility in full.


3. Sale of Purchased Future Receipts. Merchant hereby sells, assigns, transfers and conveys (hereinafter, the "Sale") unto Flexibility all of Merchant's right, title and interest in to the Specified Percentage of the Future Receipts until the Purchased Amount shall have been delivered by Merchant to Flexibility (the "Purchased Future Receipts"); to have and hold the same unto Flexibility, its successors and assigns, forever. This Sale of the Purchased Future Receipts is made without express or implied warranty to Flexibility of collectability of the Purchased Future Receipts by Flexibility and without recourse against Merchant except as specifically set forth in this Agreement. By virtue of this Agreement, Merchant transfers to Flexibility full and complete ownership of the Purchased Future Receipts and Merchant retains no legal or equitable interest therein.

Guarantor #1: [ SC

] 

1

Guarantor #2: [ DJT

] 

4. **Payment of Purchase Price.** In consideration of the sale by Merchant to Flexibility of the Purchased Future Receipts pursuant to Flexibility agrees to pay to Merchant the Purchase Price; the Purchase Price shall be turned over and delivered to Merchant immediately after the Effective Date of this Agreement.
5. **Use of Purchase Price.** Merchant hereby acknowledges that it fully understands that: (i) Flexibility's ability to collect the Purchased Amount (or any portion thereof) is contingent upon Merchant's continued operation of its business and successful generation of the Future Receipts until the Purchased Amount is delivered to Flexibility in full; (ii) that in the event of decreased efficiency or total failure of Merchant's business Flexibility's receipt of the full or any portion of the Purchased Amount may be delayed indefinitely. Based upon the forgoing, Merchant agrees to use the Purchase Price exclusively for the benefit and advancement of Merchant's business operations and for no other purpose.
6. **Daily Installments of Purchased Amount.** The Purchased Amount of the Specified Percentage of Future Receipts shall be delivered to Flexibility daily on Workdays in Daily Installments.
7. **Approved Bank Account and Credit Card Processor.** During the term of this Agreement, Merchant shall: (i) deposit all Future Receipts into one (and only one) bank account which bank account shall be acceptable and preapproved by Flexibility (the "Approved Bank Account"), (ii) use one (and only one) credit card processor which processor shall be acceptable and preapproved by Flexibility (the "Approved Processor") and (iii) deposit all credit card receipts into the Approved Bank Account. In the event the Approved Bank Account or Approved Processor shall become unavailable or shall cease providing services to Merchant during the term of this Agreement, prior to the first date of such unavailability or cessation of services, Merchant shall arrange for another Approved Bank Account or Approved Processor, as the case may be.
8. **Authorization to Debit Approved Bank Account.** Merchant hereby authorizes Flexibility to initiate electronic checks or ACH debits from the Approved Bank Account in the amount of Daily Installment each Workday until Flexibility receive the full Purchased Amount; Merchant shall provide Flexibility with all access code(s) for the Approved Bank Account, by signing this authorization the merchant agrees to be bound by the NACHA Operating rules."
9. **Fees Associated with Debiting Approved Bank Account.** It shall be Merchant's exclusive responsibility to pay to its banking institution and/or Flexibility's banking institution directly (or to compensate Flexibility, in case it is charged) all fees, charges and expenses incurred by either Merchant or Flexibility due to rejected electronic checks or ACH debit attempts, overdrafts or rejections by Merchant's banking institution of the transactions contemplated by this Agreement.
10. **Merchant's Right for Reconciliation.** Merchant and Flexibility each acknowledges and agrees that:
- If any time during the term of this Agreement Merchant will experience sporadic increase or decrease in its daily receipts, Merchant shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 11 below, to request retroactive reconciliation of the Merchant's actual daily receipts for one full calendar month immediately preceding the day when such request for reconciliation is received by Flexibility (each such calendar month, a "Reconciliation Month").
  - Such reconciliation (the "reconciliation") of the Merchant's daily receipts for a Reconciliation Month shall be performed by Flexibility within five (5) Workdays following its receipt of the Merchant's request for reconciliation by either crediting or debiting the difference back to or from the Approved Bank Account so that the total amount debited by Flexibility from the Approved Bank Account during the Reconciliation Month at issue equal the Specific Percentage of the Future Receipts that Merchant collected during the Reconciliation Month at issue.
  - One or more Reconciliation procedures performed by Flexibility may reduce the effective Daily Installment amount during the Reconciliation Month in comparison to the one set forth in Section 1 of this Agreement, and, as the result of such reduction, the term of this Agreement during which Flexibility will be debiting the Approved Bank Account may extend substantially.
11. **Request for Reconciliation Procedure.**
- It shall be Merchant's sole responsibility and the right hereunder to initiate Reconciliation of Merchant's actual receipts during any Reconciliation Month by sending a request for reconciliation to Flexibility.
  - Any such request for Reconciliation of the Merchant's daily receipts for a specific Reconciliation Month shall be in writing, shall include a copy of Merchant's bank statement and a credit card processing statement for the Reconciliation Month at issue, and shall be received by Flexibility via email to [admin@Flexibilitycapital.com](mailto:admin@Flexibilitycapital.com), with the subject line "REQUEST FOR RECONCILIATION," within five (5) Workdays after the last day of the Reconciliation Month at issue (time being of the essence as to the last day of the period during which such demand for reconciliation shall be received by Flexibility).
  - Flexibility's receipt of Merchant's request for Reconciliation after the expiration of the 5-Workday period following the last day of the Reconciliation Month for which such reconciliation is requested nullifies and makes obsolete Merchant's request for Reconciliation for that specific Reconciliation Month.
  - Merchant shall have the right to request Reconciliation as many times during the term of this Agreement as it deems proper, and Flexibility shall comply with such request, provided that:
    - Each such request is made in accordance with the terms of this Section 11.
 If a request for Reconciliation is made after the expiration of the term of this Agreement and, as the result of such Reconciliation, the total amount actually debited by Flexibility from the Approved Bank Account will become less than the Purchased Amount, then and such event the term of this Agreement shall automatically be extended until the time when the total amount actually debited from Approved

Bank Account pursuant to this Agreement shall become equal to the Purchased Amount.

iii. In the event after the last day of the term of this Agreement Merchant will determine in good faith that the actual amount debited by Flexibility from the Approved Bank Account pursuant to this Agreement is greater than the Purchased Amount, then and in such event Merchant shall have the right to request final Reconciliation within five (5) Workdays following the expiration date of the term of this Agreement (time being of the essence) and Flexibility shall honor such request within five (5) Workdays following the day of its receipt of such request.

e. Nothing set forth in Sections 10 or 11 of this Agreement shall be deemed to provide Merchant with the right to interfere with Flexibility's right and ability to debit the Approved Bank Account while the request for Reconciliation of Merchant's receipts is pending or until the Purchased Amount is collected by Flexibility in full.

**12. Adjustment of Daily Installment.** Merchant and Flexibility each acknowledge and agree that:

a. If any time during the term of this Agreement Merchant will experience steady increase or decrease in its daily receipts, Merchant shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 13 below, to request modification ("Adjustment") of the amount of the Daily Installment that Merchant is obligated to deliver daily to Flexibility in accordance with the provisions of Section 6 above. Such Adjustment shall become effective as of the date it is granted and the new adjusted amount of the Daily Installment (the "Adjusted Daily Installment") shall replace and supersede the amount of the Daily Installment set forth in Section 1 above.

b. The Adjustment of the Daily Installment shall be performed by Flexibility within five (5) Workdays following its receipt of the Merchant's request for Adjustment by modifying daily amounts that shall be debited from the Approved Bank Account until the Purchased Amount is paid in full. Notwithstanding anything to the contrary set forth in Sections 12 and 13 hereof, no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place resulting in reduction of the total amount debited from Merchant's Approved Bank Account during the Reconciliation Month by at least 15% in comparison to the amount that would have been debited during that month without Reconciliation.

c. One or more Adjustments performed by Flexibility may substantially extend the term of this Agreement.

**13. Request for Adjustment Procedure.**

a. It shall be Merchant's sole responsibility and the right to initiate the Adjustment by sending a request for Adjustment to Flexibility.

b. A request for Adjustment (an "Adjustment Request") shall be in writing, shall include copies of: (i) Merchant's three (3) consecutive bank statements of the Approved Bank Account and credit card processing statements immediately preceding the date of Flexibility's receipt of the Adjustment Request, and (ii) Merchant's bank statements and credit card processing statements previously provided by Merchant to Flexibility based upon which statements the amount of Daily Installment set forth in Section 1 above (or the then current Adjusted Daily Installment, as the case may be) was determined, and shall be received by Flexibility by email at [admin@Flexibilitycapital.com](mailto:admin@Flexibilitycapital.com), with the subject line "REQUEST FOR ADJUSTMENT," within five (5) Workdays after the date that is the latest of the last day of the latest bank statement enclosed with the Adjustment Request and the last date of the latest card processing statement enclosed with the Adjustment Request (time being of the essence as to the last day of the period during which an Adjustment Request shall be received by Flexibility).

c. Flexibility's receipt of a Merchant's Adjustment Request after the expiration of the above referenced 5-Workday period nullifies and makes obsolete such Adjustment Request.

d. Merchant shall have the right to request Adjustment of the Daily Installments as many times during the term of this Agreement as it seems proper, and Flexibility shall comply with such request, provided that:

i. Each such request for Adjustment is made in accordance with the terms of this Section 13.

ii. A request for Adjustment shall not be made after the expiration of the term of this Agreement.

e. Nothing set forth in Sections 12 or 13 of this Agreement shall be deemed to provide Merchant with the right to interfere with Flexibility's right and ability to debit the Approved Bank Account while the request for Adjustment is pending or until the Purchased Amount is collected by Flexibility in full.

**14. Risk Sharing Acknowledgments and Arrangements.**

a. Merchant and Flexibility each hereby acknowledges and agrees that:

i. The Purchased Future Receipts represent a portion of Merchant's Future Receipts.

ii. This Agreement consummates the sale of the Purchased Future Receipts at a discount, not borrowing funds by Merchant from Flexibility. Flexibility does not charge Merchant and will not collect from Merchant any interest on the monies spent on the purchase of the Purchased Future Receipts. The period of time that it will take Flexibility to collect the Purchased Amount is not fixed, is unknown to both parties as of the Effective Date of this Agreement and will depend on the how well or not well Merchant's business will be performing following the Effective Date. As an extreme example, in the event Merchant's business ceases to exist after Flexibility's purchase of the Purchased Future Receipts for reason outside Merchant's control, Flexibility may never recover any moneys spent on such purchase.

- iii. The amount of the Daily Installment set forth in Section 1 of this Agreement is calculated based upon the information concerning an average amount of daily receipts collected by Merchant's business immediately prior to the Effective Date of this Agreement which information was provided by Merchant to Flexibility.
  - iv. The amounts of Merchant's future daily receipts may increase or decrease over time.
  - v. If, based upon the Reconciliation and/or the Adjustment procedures described above, it will be determined that the actual daily amounts of the Specified Percentage of the Future Receipts get reduced in comparison to the amount of the Daily Installment as of the Effective Date set forth in Section 1 of this Agreement, and in comparison to the amount that both Merchant and Flexibility may have anticipated or projected because Seller's business has slowed down, or if the full Purchased Amount is not remitted because Merchant's business went bankrupt or otherwise ceased operations in the ordinary course of business (but not due to Merchant's willful or negligent mishandling of its business), and Merchant shall have not breached this Agreement, Merchant would not owe anything to Flexibility and would not be in breach of or in default under this Agreement.
- b. **Flexibility's Risk Acknowledgments.** Flexibility agrees to purchase the Purchased Future Receipts knowing the risks that Merchant's business may slow down or fail, and Flexibility assumes these risks based exclusively upon the information provided to it by Merchant and related to the business operations of Merchant's business prior to the date hereof and upon Merchant's representations, warranties and covenants in this Agreement that are designed to give Flexibility a reasonable and fair opportunity to receive the benefit of its bargain. Furthermore, Flexibility hereby acknowledges and agrees that Merchant shall be excused from performing its obligations under this Agreement in the event Merchant's business ceases its operations exclusively due to the following reasons (collectively, the "Valid Excuses"):
- i. adverse business conditions that occurred for reasons outside Merchant's control and not due to Merchant's willful or negligent mishandling of its business;
  - ii. loss of the premises where the business operates (but not due to Merchant's violation of its obligations to its landlord);
  - iii. bankruptcy of Merchant;
  - iv. natural disasters or similar occurrences beyond Merchant's control.
- c. **Not a Loan.** Merchant and Flexibility agree that the Purchase Price is paid to Merchant in consideration for the ownership of the Purchased Future Receipts and that payment of the Purchase Price by Flexibility is not intended to be, nor shall it be construed as a loan from Flexibility to Merchant that requires absolute and unconditional repayment on a maturity date. To the contrary, Flexibility's ability to receive the Purchased Amount pursuant to this Agreement, and the date when the Purchased Amount is paid in full (if ever) are subject to and conditioned upon performance of Merchant's business. If, nevertheless, a court having jurisdiction over this Agreement and the parties hereto shall have determined that Merchant received a loan from Flexibility, and Flexibility has charged or received interest hereunder in excess of the highest rate allowed by law, then the rate in effect hereunder shall automatically be reduced to the maximum rate permitted by applicable law and Flexibility shall promptly refund to Merchant any interest received by Flexibility in excess of the maximum lawful rate.

#### REPRESENTATIONS, WARRANTIES AND COVENANTS

15. Merchant represents, warrants and covenants that as of this date and during the term of this Agreement:

- a. **Financial Condition and Financial Information.** Merchant's bank and financial statements, copies of which have been furnished to Flexibility, and future statements which may be furnished hereafter pursuant to this Agreement or upon Flexibility's request, fairly represent the financial condition of Merchant as of the dates such statements are issues, and prior to execution of the Agreement there has been no material adverse changes, financial or otherwise, in such condition, operation or ownership of Merchant. Merchant has a continuing, affirmative obligation to advise Flexibility of any material adverse change in its financial condition, operation or ownership. Flexibility may request statements at any time during the term of this Agreement and Merchant shall provide them to Flexibility within 5 business days. Merchant's failure to do so is a material breach of this Agreement.
- b. **Governmental Approvals.** Merchant is in compliance and, during the term of this Agreement, shall be in compliance 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.
- c. **Good Standing.** Merchant is a corporation/limited liability company/limited partnership/other type of entity that is in good standing and duly incorporated or otherwise organized and validly existing under the laws of its jurisdiction of incorporation or organization, and has full power and authority necessary to carry its business as it is now being conducted.
- d. **Authorization.** Merchant has all requisite power to execute, deliver and perform this Agreement and consummate the transactions contemplated hereunder; entering into this Agreement will not result in breach

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or violation of, or default under, any agreement or instrument by which Merchant is bound or any statute, rule, regulation, order or other law to which Merchant is subject, nor require the obtaining of any consent, approval, permit or license from any governmental authority having jurisdiction over Merchant. All organizational and other proceedings required to be taken by Merchant to authorize the execution, delivery and performance of this Agreement have been taken. The person signing this Agreement on behalf of Merchant has full power and authority to bind Merchant to perform its obligations under this Agreement.

- e. **Accounting Records and Tax Returns.** Merchant will treat receipt of the Purchase Price and payment of the Purchased Amount in a manner evidencing sale of its future receipts in its accounting records and tax returns and further agrees that Flexibility is entitled to audit Merchant's accounting records upon reasonable Notice in order to verify compliance. Merchant hereby waives any rights of privacy, confidentiality or taxpayer privilege in any litigation or arbitration arising out of this Agreement in which Merchant asserts that this transaction is anything other than a sale of future receipts.
- f. **Taxes: Workers Compensation Insurance.** Merchant will promptly pay, when due, all taxes, including without limitation, income, employment, sales and use taxes, imposed upon Merchant's business by law, and will maintain workers compensation insurance required by applicable governmental authorities.
- g. **Business Insurance.** Merchant will maintain general liability and business-interruption insurance naming Flexibility as loss payee and additional insured in the amounts and against risks as are satisfactory to Flexibility and shall provide Flexibility proof of such insurance upon request.
- h. **Electronic Check Processing Agreement.** Merchant shall 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 or impede Flexibility's rights under this Agreement, without Flexibility's prior written consent.
- i. **No Diversion of Future Receipts.** Merchant shall not allow any event to occur that would cause a diversion of any portion of Merchant's Future receipts from the Approved Bank Account without first notifying Flexibility of such diversion.
- j. **Change of Name or Location.** Merchant shall not conduct Merchant's businesses under any name other than as disclosed to the Processor and Flexibility and will not change any of its places of business without first obtaining Flexibility's written consent.
- k. **Prohibited Business Transactions:** Merchant shall not: (i) transfer or sell all or substantially all of its assets (including without limitation the Collateral or any portion thereof) without first obtaining Flexibility's consent; or (ii) make or send notice of its intended bulk sale or transfer.
- l. **No Closing of Business.** Merchant will not sell, dispose, transfer or otherwise convey all or substantially all of its business or assets without first: (i) obtaining the express written consent of Flexibility, and (ii) providing Flexibility with a written agreement of a purchaser or transferee of Merchant's business or assets assuming all of Merchant's obligations under this Agreement pursuant to documentation satisfactory to Flexibility. Merchant represents that it has no current plans to close its business either temporarily (for renovations, repairs or any other purpose), or permanently. Merchant agrees that until Flexibility shall have received all of the Purchased Amount, Merchant will not voluntarily close its business on a permanent or temporarily basis for renovations, repairs, or any other purposes. Notwithstanding the foregoing, Merchant shall have the right to close its business temporarily if such closing is necessitated by a requirement to conduct renovations or repairs imposed upon Merchant's business by legal authorities having jurisdiction over Merchant's business (such as from a health department or fire department, or if such closing is necessitated by circumstances outside Merchant's reasonable control. Prior to any such temporary closure of its business, Merchant shall provide Flexibility ten (10) business days advance notice.
- m. **No Pending Bankruptcy.** As of the date of Merchant's execution of this Agreement, Merchant is not insolvent, has not filed, and does not contemplate filing, any petition for bankruptcy protection under Title 11 of the United States Code and there has been no involuntary bankruptcy petition brought or pending against Merchant. Merchant represents that it has not consulted with a bankruptcy attorney on the issue of filing bankruptcy within six months immediately preceding the date of this Agreement.
- n. **Estoppel Certificate.** Merchant will at any time, and from time to time, upon at least one (1) day's prior notice from Flexibility to Merchant, execute, acknowledge and deliver to Flexibility and/or to any other person or entity specified by Flexibility in its notice, 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 modification(s) and stating the date(s) on which the Purchased Amount or any portion thereof has been repaid.
- o. **Working Capital Funding.** Merchant shall not further encumber the Future Receipts, without first obtaining written consent of Flexibility.
- p. **Unencumbered Future Receipts.** Merchant has and will continue to have good, complete and marketable title to all Future Receipts, free and clear of any and all liabilities, liens, claims, charges, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges and encumbrances of any kind or nature whatsoever or any other rights or interests other than by virtue of entering into this Agreement.

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- q. **Business Purpose.** Merchant is entering into this Agreement solely for business purposes and not as a consumer for personal, family or household purposes.
- r. **No Default under Contracts with Third Parties.** Merchant's execution of and/or performance of its obligations under this Agreement will not cause or create an event of default by Merchant under any contract, which Merchant is or may become a party to.
- s. **Right of Access.** In order to ensure Merchant's compliance with the terms of this Agreement, Merchant hereby grants Flexibility the right to enter, without notice, the premises of Merchant'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 Merchant's daily receipts to the Processor and to ensure that Merchant has not violated any other provision of this Agreement. Furthermore, Merchant hereby grants Flexibility and its employees and consultants access to Merchant's employees and records and all other items of property located at the Merchant's place of business during the term of this Agreement. Merchant hereby agrees to provide Flexibility, upon request, all and any information concerning Merchant's business operations, banking relationships, names and contact information of Merchant's suppliers, vendors and landlord(s), to allow Flexibility to interview any of those parties.
- t. **Phone Recordings and Contact.** Merchant agrees that any call between Merchant and Flexibility and its owners, managers, employees and agents may be recorded and/or monitored. Furthermore, Merchant acknowledges and agrees that: (i) it has an established business relationship with Flexibility, its managers, employees and agents (collectively, the "Flexibility Parties") and that Merchant may be contacted by any of the Flexibility Parties from time-to-time regarding Merchant's performance of its obligations under this Agreement or regarding other business transactions; (ii) it will not claim that such communications and contacts are unsolicited or inconvenient; and (iii) that any such contact may be made by any of the Flexibility Parties in person or at any phone number (including mobile phone number), email addresses, or facsimile number belonging to Merchant's office, or its owners, managers, officers, or employees.
- u. **Knowledge and Experience of Decision Makers.** The persons authorized to make management and financial decisions on behalf Merchant with respect to this Agreement have such knowledge, experience and skill in financial and business matters in general and with respect to transactions of a nature similar to the one contemplated by this Agreement so as to be capable of evaluating the merits and risks of, and making an informed business decision with regard to, Merchant entering into this Agreement.
- v. **Merchant's Due Diligence.** The person authorized to sign this Agreement on behalf of Merchant: (i) has received all information that such person deemed necessary to make an informed decision with respect to a transaction contemplated by this Agreement; and (ii) has had unrestricted opportunity to make such investigation as such person desired pertaining to the transaction contemplated by this Agreement and verify any such information furnished to him or her by Flexibility.
- w. **Arm-Length Transaction.** The person signing this Agreement of behalf of Merchant: (a) has read and fully understands content of this Agreement; (b) has consulted to the extent he/she wished with Merchant's own counsel in connection with the entering into this Agreement; (c) he or she has made sufficient investigation and inquiry to determine whether this Agreement is fair and reasonable to Merchant, and whether this Agreement adequately reflects his or her understanding of its terms.
- x. **Flexibility's Consent.** Merchant agrees that in every instance Merchant's rights under this Agreement are contingent upon first obtaining Flexibility's consent, such consent may be withheld, granted or conditioned at Flexibility's sole and absolute discretion.
- y. **No Reliance on Oral Representations.** This Agreement contains the entire agreement between Merchant and Flexibility with respect to the subject matter of this Agreement, and supersedes each course of conduct previously pursued or acquiesced in, and each oral agreement and representation previously made, by Flexibility or any of the Flexibility Parties with respect thereto (if any), whether or not relied or acted upon. No course of performance or other conduct subsequently pursued or acquiesced in, and no oral agreement or representation subsequently made, by the Flexibility Parties, whether or not relied or acted upon, and no usage of trade, whether or not relied or acted upon, shall amend this Agreement or impair or otherwise affect Merchant's obligations pursuant to this Agreement or any rights and remedies of the parties to this Agreement.

**PLEDGE OF SECURITY**

- 16. **Pledge.** As security for the prompt and complete payment and performance of any and all liabilities, obligations, covenants or agreements of Merchant under this Agreement, now or hereafter arising from, out of or relating to this Agreement, whether direct, indirect, contingent or otherwise (hereinafter referred to collectively as the "Obligations"), Merchant hereby pledges, assigns and hypothecates to Flexibility and grants to Flexibility a continuing, perfected and first priority lien upon and security interest in, to and under all of Merchant's right, title and interest in and to the following (collectively, the "Collateral"), whether now existing or hereafter from time to time acquired:
  - 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

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defined by Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Merchant; and

b. all Merchant's proceeds, as that term is defined by Article 9 of the UCC.

17. **Termination of Pledge.** Upon the payment and performance by Merchant in full of the Obligations, the security interest in the Collateral pursuant to this Pledge shall automatically terminate without any further act of either party being required, and all rights to the Collateral shall revert to Merchant. Upon any such termination, Flexibility will execute, acknowledge (where applicable) and deliver such satisfactions, releases and termination statements, as Merchant shall reasonably request.
18. **Representations with Respect to Collateral.** Merchant hereby represents and warrants to Flexibility that: the execution, delivery and performance by Merchant of this Pledge, and the remedies in respect of the Collateral under this Pledge (i) have been duly authorized; (ii) do not require the approval of any governmental authority or other third party or require any action of, or filing with, any governmental authority or other third party to authorize same (other than the filing of the UCC-1's); (iii) do not and shall not (A) violate or result in the breach of any provision of law or regulation, any order or decree of any court or other governmental authority, (B) violate, result in the breach of or constitute a default under or conflict with any indenture, mortgage, deed of trust, agreement or any other instrument to which Merchant is a party or by which any of Merchant's assets (including, without limitation, the Collateral) are bound.
19. **Further Assurances.** Upon the request of Flexibility, Merchant, at Merchant's sole cost and expense, shall execute and deliver all such further UCC-1s, continuation statements, assurances and assignments of the Collateral and consents with respect to the pledge of the Collateral and the execution of this Pledge, and shall execute and deliver such further instruments, agreements and other documents and do such further acts and things, as Flexibility may request in order to more fully effectuate the purposes of this Pledge and the assignment of the Collateral and obtain the full benefits of this Pledge and the rights and powers herein created.
20. **Attorney-in-fact.** Merchant hereby authorizes Flexibility at any time to take any action and to execute any instrument, including without limitation to file one or more financing statements and/or continuation statements, to evidence and perfect the security interest created hereby and irrevocably appoints Flexibility as its true and lawful attorney-in-fact, which power of attorney shall be coupled with an interest, with full authority in the place and stead of Merchant and in the name of Merchant or otherwise, from time to time, in Flexibility's sole and absolute discretion, including without limitation (a) for the purpose of executing such statements in the name of and on behalf of Merchant, and thereafter filing any such financing and/or continuation statements and (b) to receive, endorse and collect all instruments made payable to Merchant.

#### EVENTS OF DEFAULT AND REMEDIES

21. **Events of Default.** The occurrence of any of the following events shall constitute an "Event of Default" by Merchant:
- Merchant shall violate any term, condition or covenant in this Agreement for any reason whatsoever other than as the result of Merchant's business ceases its operations exclusively due to any of the Valid Excuses.
  - Any representation or warranty by Merchant made in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made.
  - Merchant shall default under any of the terms, covenants and conditions of any other agreement with Flexibility (if any).
  - Merchant uses multiple depository accounts without obtaining prior written consent of Flexibility in each instance.
  - Merchant fails to deposit any portion of its future Receipts into the Approved Bank Account;
  - Merchant changes the Approved Bank Account or Approved Processor without obtaining prior written consent of Flexibility in each instance;
  - Merchant interferes with Flexibility collection of Daily Installments.
  - Four (4) or more ACH transactions attempted by Flexibility in one calendar month are rejected by Merchant's bank.
22. **Default under the Agreement.** In case any Event of Default occurs and is not waived by Flexibility, Flexibility may declare Merchant in default under this Agreement by sending a default notice to Merchant, provided, nevertheless, that no default notice is required upon Merchant's default in performance of its obligations under Section 6 of this Agreement.
23. **Merchant's Obligations Upon Default.** Upon receipt of such default notice, Merchant shall immediately pay Flexibility the unpaid portion of the Purchased Amount. ~~In addition, Merchant shall also pay to Flexibility, as additional damages, any reasonable expenses incurred by Flexibility in connection with recovering the monies due to Flexibility from Merchant pursuant to this Agreement, including without limitation the costs of retaining collection firms and reasonable attorneys' fees and disbursements (collectively, "Reasonable Damages"). The parties agree that Flexibility shall not be required to itemize or prove its Reasonable Damages and that the fair value of the Reasonable Damages shall be calculated as twenty-five percent (25%) of the unpaid portion of the Purchased Amount. Furthermore, if the amount of the unpaid portion of the Purchased Amount specified in the default notice is not paid on the fifth (5th) Business Day following the date of the default notice (the "Default Payment Date"), the entire sum due to Flexibility pursuant to this Section 23 shall bear simple interest from the Default Payment Date until is paid in full, at the rate of 12.00% per annum~~

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(and such interest shall accrue daily).

24. **Remedies Upon Default.** Upon Merchant's default, Flexibility may immediately proceed to protect and enforce its rights under this Agreement and/or Guaranty by:
- Enforcing its rights as a secured creditor under the Uniform Commercial Code including, without limitation, notifying any account debtor(s) of Merchant of Flexibility's security interest;
  - Enforcing the provisions of the Personal Guarantee of Performance against the Guarantor(s) without first seeking recourse from Merchant;
  - Filing the affidavit of confession of judgment (the "Affidavit") executed by the Guarantor(s), individually and on Merchant's behalf, in connection with this Agreement in the amount of the unpaid portion of the Purchased Amount, plus the Reasonable Damages, enter the judgment with the Clerk of the Court, without notice, and execute thereon;
  - Notifying Merchant's credit card processor of the sale of Future Purchase Receipts hereunder and to direct such credit card processor to make payment to Flexibility of all or any portion of the amounts received by such credit card processor on behalf of Merchant.
  - Commencing a suit in equity or by action at law, or both, whether for the specific performance of any covenant, agreement or other provision contained herein, or to enforce the discharge of Merchant's obligations hereunder (including the Personal Guarantee) or any other legal or equitable right or remedy including without limitation Flexibility's rights of a secured party under the UCC.
25. **Remedies are not Exclusive.** All rights, powers and remedies of Flexibility in connection with this Agreement may be exercised at any time after the occurrence of any Event of Default, and are cumulative and not exclusive, and shall be in addition to any other rights, powers or remedies provided to Flexibility by law or equity.
26. **Power of Attorney.** Merchant irrevocably appoints Flexibility and its representatives as its agents and attorneys-in-fact with full authority to take any action or execute any instrument or document to do the following: (A) to settle all obligations due to Flexibility from any credit card processor and/or account debtor(s) of Merchant; (B) upon occurrence of an Event of Default under Section 19 hereof, to perform any and all obligations of Merchant under this Agreement, including without limitation (i) to obtain and adjust insurance; (ii) to collect monies due or to become due under or in respect of any of the Collateral; (iii) to receive, endorse and collect any checks, notes, drafts, instruments, documents or chattel paper in connection with clause (i) or clause (ii) above; (iv) to sign Merchant's name on any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to Flexibility; and (v) to file any claims or take any action or institute any proceeding which Flexibility 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.

#### ADDITIONAL TERMS

27. **Merchant Deposit Agreement.** Merchant shall execute an agreement with Flexibility that would authorize Flexibility to arrange for electronic fund transfer services and/or "ACH" payments of Daily Installments from the Approved Bank Account. Merchant shall provide Flexibility and/or its authorized agent with all information, authorizations and passwords necessary to verify Merchant's receivables, receipts and deposits into the Approved Bank Account. Merchant shall authorize Flexibility and/or its agent to deduct daily the amounts of Daily Installment to Flexibility from settlement amounts which would otherwise be due to Merchant from electronic check transactions and to pay such amounts to Flexibility by permitting Flexibility to withdraw the Daily Installments from such the account. The authorization shall be irrevocable.
28. **Financial Condition.** Merchant and its Guarantor(s) authorize Flexibility and its agents to investigate their financial responsibility and history, and will provide to Flexibility any bank or financial statements, tax returns, etc., as deems necessary prior to or at any time after execution of this Agreement. A photocopy of this authorization will be deemed as acceptable for release of financial information. is authorized to update such information and financial profiles from time to time as it deems appropriate.
29. **Transactional History.** Merchant shall execute written authorization(s) to their bank(s) to provide Flexibility with Merchant's banking and/or credit-card processing history.
30. **Indemnification.** Merchant and its Guarantor(s) jointly and severally indemnify and hold harmless Approved Processor, its officers, directors and shareholders against all losses, damages, claims, liabilities and expenses (including reasonable attorney's fees) incurred by Approved Processor resulting from (a) claims asserted by Flexibility for monies owed to Flexibility from Merchant and (b) actions taken by Approved Processor in reliance upon information or instructions provided by Flexibility.
31. **No Liability.** In no event shall Flexibility be liable for any claims asserted by Merchant or its Guarantor under any legal theory for lost profits, lost revenues, lost business opportunities, exemplary, punitive, special, incidental, indirect or consequential damages, each of which is waived by Merchant and Guarantor(s).

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32. **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 both parties.
33. **Assignment.** Flexibility may assign, transfer or sell its rights or delegate its duties hereunder, either in whole or in part without prior notice to the Merchant. Merchant shall not assign its rights or obligations under this Agreement without first obtaining Flexibility's written consent.
34. **Notices.** All notices, requests, consent, demands and other communications hereunder shall be delivered by certified mail, return receipt requested, to the respective parties to this Agreement at the addresses set forth in this Agreement and shall become effective as of the date of receipt or declined receipt.
35. **Waiver Remedies.** No failure on the part of 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.
36. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.
37. **Governing Law, Venue and Jurisdiction.** This Agreement shall be governed by and construed exclusively in accordance with the laws of the State of New York, without regards to any applicable principles of conflicts of law. Any lawsuit, action or proceeding arising out of or in connection with this Agreement shall be instituted exclusively in any court sitting in New York State, (the "Acceptable Forums"). The parties agree that the Acceptable Forums are convenient, and submit to the jurisdiction of the Acceptable Forums and waive any and all objections to inconvenience of the 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.
38. **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.
39. **Severability.** In case any of the provisions in this Agreement is found to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of any other provision contained herein shall not in any way be affected or impaired.
40. **Entire Agreement.** Any provision hereof prohibited by law shall be ineffective only to the extent of such prohibition without invalidating the remaining provisions hereof. This Agreement and Security Agreement hereto embody the entire agreement between Merchant and Flexibility and supersede all prior agreements and understandings relating to the subject matter hereof.
41. **JURY TRIAL WAIVER.** THE PARTIES HERETO WAIVE TRIAL BY JURY IN ANY COURT IN ANY SUIT, ACTION OR PROCEEDING ON ANY MATTER ARISING IN CONNECTION WITH OR IN ANY WAY RELATED TO THE TRANSACTIONS OF WHICH THIS AGREEMENT IS A PART OR THE ENFORCEMENT HEREOF. THE PARTIES HERETO ACKNOWLEDGE THAT EACH MAKES THIS WAIVER KNOWINGLY, WILLINGLY AND VOLUNTARILY AND WITHOUT DURESS, AND ONLY AFTER EXTENSIVE CONSIDERATION OF THE RAMIFICATIONS OF THIS WAIVER WITH THEIR ATTORNEYS.
42. **CLASS ACTION WAIVER.** THE PARTIES HERETO WAIVE ANY RIGHT TO ASSERT ANY CLAIMS AGAINST THE OTHER PARTY, AS A REPRESENTATIVE OR MEMBER IN ANY CLASS OR REPRESENTATIVE ACTION, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW AGAINST PUBLIC POLICY. TO THE EXTENT EITHER PARTY IS PERMITTED BY LAW OR COURT OF LAW TO PROCEED WITH A CLASS OR REPRESENTATIVE ACTION AGAINST THE OTHER, THE PARTIES HEREBY AGREE THAT: (1) THE PREVAILING PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEYS' FEES OR COSTS ASSOCIATED WITH PURSUING THE CLASS OR REPRESENTATIVE ACTION (NOTWITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT TO THE CONTRARY); 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.
43. **ARBITRATION.** THE PARTIES ACKNOWLEDGE AND AGREE THAT, PROVIDED THAT NO SUIT, ACTION OR PROCEEDING (INCLUDING WITHOUT LIMITATION FILING OF AN AFFIDAVIT OF CONFESSION OF JUDGMENT) HAS BEEN ALREADY COMMENCED IN CONNECTION WITH ANY MATTER ARISING OUT OF OR RELATED TO THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT, EACH FLEXIBILITY, MERCHANT, AND ANY GUARANTOR SHALL HAVE THE RIGHT TO REQUEST THAT ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THE CONSTRUCTION AND INTERPRETATION OF THIS AGREEMENT, ARE SUBMITTED TO ARBITRATION. THE PARTY SEEKING ARBITRATION SHALL FIRST SEND A WRITTEN NOTICE OF INTENT TO ARBITRATE TO ALL OTHER PARTIES, BY CERTIFIED MAIL. UPON SENDING OF SUCH NOTICE, A PARTY REQUESTING ARBITRATION MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR NATIONAL ARBITRATION FORUM ("NAF"). EACH MERCHANT, GUARANTOR AND FLEXIBILITY SHALL PAY THEIR OWN ATTORNEYS' FEES INCURRED DURING THE ARBITRATION PROCEEDING. THE PARTY INITIATING THE ARBITRATION SHALL PAY ANY ARBITRATION FILING FEE, ADMINISTRATION FEE AND ARBITRATOR'S FEE.
44. **Counterparts and Facsimile Signatures.** This Agreement can 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. Signatures

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delivered via facsimile and/or via Portable Digital Format (PDF) shall be deemed acceptable for all purposes, including without limitation the evidentially purposes.


IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

**THE MERCHANT:**


By: \_\_\_\_\_   
Name: Sabatino Cupelli  
Title: Owner/Agent/Manager  
SSN: \_\_\_\_\_

By: *David J Tulis* \_\_\_\_\_   
Name: David Jonathan Tulis  
Title: Owner/Agent/Manager  
SSN: \_\_\_\_\_

**OWNER/GUARANTOR #1:**

\_\_\_\_\_   
Name: Sabatino Cupelli  
SSN: \_\_\_\_\_

**OWNER/GUARANTOR #2:**

*David J Tulis* \_\_\_\_\_   
Name: David Jonathan Tulis  
SSN: \_\_\_\_\_

**FLEXIBILITY CAPITAL, INC.**

By: \_\_\_\_\_  
Name:  
Title:

**PERSONAL GUARANTY OF PERFORMANCE**

This Personal Guaranty of Performance (this "Guaranty") is executed as of February 6, 2020, by the undersigned individual(s) listed herein (individually and collectively, jointly and severally, "Guarantor") for the benefit of FLEXIBILITY CAPITAL, INC. ("Buyer").

**WHEREAS:**

A. Pursuant to that Future Receivables Sale and Purchase Agreement (the "Agreement"), dated as of February 6, 2020, between Buyer and the merchant(s) listed below ("Merchant"), Buyer has purchased Future Receipts of Merchant.

**THE MERCHANT:**

Legal Business Name: Hot News Talk Radio, LLC

D/B/A: NoogaRadio 92.7 FM-95.3 HD 4

B. Each Guarantor is an owner, officer, or manager of Merchant and will directly benefit from Buyer and Merchant entering into the Agreement.

C. Buyer is not willing to enter into the Agreement unless Guarantor irrevocably, absolutely and unconditionally guarantees prompt and complete performance to Buyer of all of the obligations of Merchant under the Agreement (collectively, the "Obligations").

NOW, THEREFORE, as an inducement for Buyer to enter into the Agreement, and for other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, Guarantor does hereby agree as follows:

1. **Defined Terms:** All capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

2. **Guaranty of Obligations:** Guarantor hereby irrevocably, absolutely and unconditionally guarantees to Buyer prompt, full, faithful and complete performance and observance of all of Merchant's Obligations; and Guarantor unconditionally covenants to Buyer that if default or breach shall at any time be made by Merchant in the Obligations, Guarantor shall well and truly pay or perform (or cause to be paid or performed) the Obligations and pay all damages and other amounts stipulated in the Agreement with respect to the non-performance of the Obligations, or any of them.

3. **Guarantor's Other Agreements:** Guarantor will not dispose, convey, sell or otherwise transfer, or cause Merchant to dispose, convey, sell or otherwise transfer, any material business assets of Merchant without the prior written consent of Buyer, which consent may be withheld for any reason, until receipt of the entire Purchased Amount. Guarantor shall pay to Buyer upon demand all expenses (including, without limitation, reasonable attorneys' fees and disbursements) of, or incidental to, or relating to the enforcement or protection of Buyer's rights hereunder or Buyer's rights under the Agreement. This Guaranty is binding upon Guarantor and Guarantor's heirs, legal representatives, successors and assigns and shall inure to the benefit of and may be enforced by the successors or assigns of Buyer. If there is more than one Guarantor, the obligations of the Guarantors hereunder shall be joint and several. The obligation of Guarantor shall be unconditional and absolute, regardless of the unenforceability of any provision of any agreement between Merchant and Buyer, or the existence of any defense, setoff or counterclaim, which Merchant may assert. Buyer is hereby authorized, without notice or demand and without affecting the liability of Guarantor hereunder, to at any time renew or extend Merchant's obligations under the Agreement or otherwise modify, amend or change the terms of the Agreement. Guarantor is hereby notified that a negative credit report reflecting on his/her credit record may be submitted to a credit-reporting agency if the Guarantor does not honor the terms of this Guaranty.

4. **Waiver; Remedies:** No failure on the part of Buyer to exercise, and no delay in exercising, any right under this Guaranty shall operate as a waiver, nor shall any single or partial exercise of any right under this Guaranty preclude any other or further exercise of any other right. The remedies provided in this Guaranty are cumulative and not exclusive of any remedies provided by law or equity. In the event that Merchant fails to perform any obligation under the Agreement, Buyer may enforce its rights under this Guaranty without first seeking to obtain performance for such default from Merchant or any other guarantor.

5. **Acknowledgment of Purchase:** Guarantor acknowledges and agrees that the Purchase Price paid by Buyer to Merchant in

Guarantor #1 Initials: [ SC



Guarantor #2 Initials: [ DJT



exchange for the Purchased Amount is a payment for an adequate consideration and is not intended to be treated as a loan or financial accommodation from Buyer to Merchant. Guarantor specifically acknowledges Buyer is not a lender, bank or credit card processor, and that Buyer has not offered any loans to Merchant, and Guarantor waives any claims or defenses of usury in any action arising out of this Guaranty. Guarantor acknowledges the Purchase Price paid to Merchant is good and valuable consideration for the sale of the Purchased Amount of Future Receipts.

**6. Governing Law and Jurisdiction:** This Guaranty shall be governed by, and constructed in accordance with, the internal laws of the State of New York without regard to principles of conflicts of law. Except as provided in Section 9 of this Guaranty, Guarantor submits to the nonexclusive jurisdiction and venue of any state or federal courts sitting in New York State or otherwise having jurisdiction over this Guaranty and Guarantor, for resolution of any claim or action arising, directly or indirectly, out of or related to this Guaranty. The parties stipulate that the venues referenced in this Agreement are convenient. The parties further agree that the mailing by certified or registered mail, return receipt requested, 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.

**7. 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 GUARANTY 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 MAKES THIS WAIVER KNOWINGLY, WILLINGLY AND VOLUNTARILY AND WITHOUT DURESS, AND ONLY AFTER EXTENSIVE CONSIDERATION OF THE RAMIFICATIONS OF THIS WAIVER WITH THEIR ATTORNEYS.

**8. CLASS ACTION WAIVER:** THE PARTIES 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 OR DEEMED BY A COURT OF LAW TO BE 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 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.

**9. ARBITRATION:** THE PARTIES ACKNOWLEDGE AND AGREE THAT, PROVIDED THAT NO SUIT, ACTION OR PROCEEDING (INCLUDING WITHOUT LIMITATION FILING OF AN AFFIDAVIT OF CONFESSION OF JUDGMENT) HAS BEEN ALREADY COMMENCED IN CONNECTION WITH ANY MATTER ARISING OUT OF OR RELATED TO THIS GUARANTY AND/OR THE TRANSACTION CONTEMPLATED BY THE AGREEMENT, EACH BUYER, MERCHANT AND GUARANTOR SHALL HAVE THE RIGHT TO REQUEST THAT ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THE CONSTRUCTION AND/OR INTERPRETATION OF THIS GUARANTY ARE SUBMITTED TO ARBITRATION. THE PARTY SEEKING ARBITRATION SHALL FIRST SEND A WRITTEN NOTICE OF INTENT TO ARBITRATE TO ALL OTHER PARTIES, BY CERTIFIED MAIL. UPON SENDING OF SUCH NOTICE, A PARTY REQUESTING ARBITRATION MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR NATIONAL ARBITRATION FORUM ("NAF"). EACH MERCHANT, GUARANTOR AND BUYER SHALL PAY THEIR OWN ATTORNEYS' FEES INCURRED DURING THE ARBITRATION PROCEEDING. THE PARTY INITIATING THE ARBITRATION SHALL PAY ANY ARBITRATION FILING FEE, ADMINISTRATION FEE AND ARBITRATOR'S FEE.

**12. Severability:** If for any reason any court of competent jurisdiction finds any provisions of this Guaranty to be void or voidable, the parties agree that the court may reform such provision(s) to render the provision(s) enforceable ensuring that the restrictions and prohibitions contained in this Guaranty shall be effective to the fullest extent allowed under applicable law.

**13. Opportunity for Attorney Review:** The Guarantor represents that he/she has carefully read this Guaranty and has, or had a reasonable opportunity to, consult with his or her attorney. Guarantor understands the contents of this Guaranty, and signs this Guaranty as his or her free act and deed.

**14. Counterparts and Facsimile Signatures:** This Guaranty 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. Facsimile or scanned documents shall have the same legal force and effect as an original and shall be treated as an original document for evidentiary

Guarantor #1 Initials: [ SC

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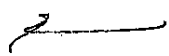
Guarantor #2 Initials: [ DJT

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purposes.

**OWNER/GUARANTOR #1:**

**OWNER/GUARANTOR #2:**

  
Name: Sabatino Cupelli  
Address: 6140 Lynn Rd  
Harrison, TN 37341  
SSN: [REDACTED]



*David Stale*  
Name: David Jonathan Tulis  
Address: 10520 Brickhill Ln  
Soddy Daisy, TN 37379  
SSN: [REDACTED]



Guarantor #1 Initials: [ SC



Guarantor #2 Initials: [ DJT





**APPENDIX A  
FEE STRUCTURE**

Pursuant to that Future Receivables Sale and Purchase Agreement (the "Agreement"), dated as of February 8, 2020 \_\_\_\_\_, between Buyer and the merchant(s) listed below ("Merchant"),


Buyer and Merchant agree to the following fee schedule:


**THE MERCHANT:**

Legal Business Name: Hot News Talk Radio, LLC  
D/B/A: NoogaRadio 92.7 FM-95.3 HD 4

- A. **Origination Fee:** \$ 680.00 (to cover underwriting and related expenses).
- B. **NSF Fee:** \$3500 each occurrence (up to two occurrences before a default is declared).
- C. **Rejected ACH:** \$100.00 (if a merchant directs the bank to reject our debit ACH).
- D. **Bank Change Fee:** \$50.00 (If Merchant requires a change of account to be debited requiring us to adjust our system).
- E. **Unauthorized Account Fee:** \$5,000.00 (i.e., if Merchant blocks Flexibility Capital's ACH debit of the account, bounces more than 4 debits of the Account, or simultaneously uses multiple bank accounts, or credit-card processors to process its receipts.)
- F. **Default Fee:** \$2,500.00 (i.e., if Merchant changes bank accounts or switches to another credit-card processor without Flexibility Capital's consent, or commits another default pursuant to the Agreement).
- G. **Miscellaneous Service Fees:** Merchant shall pay certain fees for services related to the origination and maintenance of accounts. Each Merchant shall receive their funding electronically to their designated bank account and will be charged \$30.00 for a Fed Wire.
- H. **UCC Fee:** \$19500

**THE MERCHANT:**

By: \_\_\_\_\_   
Name: Sabatino Cupelli  
Title: Owner/Agent/Manager  
SSN: \_\_\_\_\_

By: David J Tulis   
Name: David Jonathan Tulis  
Title: Owner/Agent/Manager  
SSN: \_\_\_\_\_



# KAPITUS

Sales ID: \_\_\_\_\_

## COMMERCIAL FUNDING APPLICATION

Please fill out the form in its entirety and return by email or fax.

By doing so, you are giving Kapitus and certain other entities permission to review your business and personal credit history.

Business Information	
Legal Business Name ("Merchant"): Hot News Talk Radio, LLC	Business DBA Name: NoogaRadio 92.7 FM - 95.3 HD 4
Address: 5512 Ringgold Rd., Suite 216	City, State Zip: Chattanooga, TN 37412
Phone: 423-300-8949, 423-300-6110	Fax:
Website: www.noogaradio.com	Email: Hotnewstalkradio@gmail.com
Entity: <input type="checkbox"/> Sole Prop <input type="checkbox"/> INC <input checked="" type="checkbox"/> LLC <input type="checkbox"/> Partner <input type="checkbox"/> Other State DEL	Federal Tax ID: #46-5621711
Industry Type (NAICS or description):	Business Start Date (current ownership): 05-17-2012
Business Location: <input type="checkbox"/> Home <input checked="" type="checkbox"/> Commercial Location	Business Description: Commercial FM Radio - 92.7 Fm - 95.3 HD 4
Financial Information	
Existing Funding Company? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Balance: \$28,000	Requested Funding Amount: \$50,000 - \$250,000
Funding Company Name: Direct Funding	Use of Funds: Hiring Sales Representatives
Gross Annual Sales (Previous year's Tax return): \$458,000.00	
Owner/Principal Information	
Owner 1 (Primary Credit Pull): Sabatino Cupelli	Owner 2: David Tulis
Address: 6140 Lynn Road	Address: 10520 Brickhill Lane
City, State Zip: Harrison, TN 37341	City, State Zip: Soddy-Daisy, TN 37379
Home Phone:	Home Phone:
Mobile: 423-458-5563	Mobile: 423-216-3690
Email: sabatinocupelli@gmail.com	Email: noogaradio@gmail.com
% of Ownership: 50	% of Ownership: 50
Date of Birth: 12-09-1957	Date of Birth: 06/08/1959
SSN#:	SSN#:
Property Information	
Property: <input checked="" type="checkbox"/> Own <input type="checkbox"/> Rent	(If owned, by who?)
Landlord Name (if renting):	Landlord Contact Number (if renting):
Landlord Fax (if renting):	Landlord Email (if renting):

The Merchant and Owner(s) identified above (collectively, the "Applicant") each represent, acknowledge and agree that: (1) all information provided in connection with this application is true, accurate and complete; (2) Applicant will immediately notify Kapitus and/or its subsidiaries, affiliates or agents ("Kapitus") of any change in such information or in the Applicant's financial condition; (3) Applicant agrees that Kapitus may disclose all information and documents obtained, including credit reports (the "Application"), to financial institutions, lenders, loan servicers, purchasers of accounts receivable, factoring companies, equipment finance or leasing companies, or other similar sources of commercial financing for the purpose of considering the Applicant's request for financing; (4) Kapitus and other parties to whom the Application is provided are authorized to request and receive consumer or personal, and business or entity, credit reports from one or more credit bureaus, such as TransUnion, Experian or Equifax, investigative reports about the Applicant from third party data aggregators, and other financial information about Applicant, including credit card processor statements and bank statements, directly from credit bureaus, banks, creditors or other third parties; (5) Applicant waives and releases any claims against Kapitus or other parties to whom the Application is provided or who provide information arising from any act or omission relating to the requesting, receiving or release of information; and (6) each Owner represents that they are authorized to execute any documents on behalf of the Merchant and to bind the Merchant. Kapitus may, from time to time, notify Applicant of various promotional offers and other marketing information, or contact Applicant in connection with the servicing of any financing, or in connection with any default under any financing. Applicant expressly consents and authorizes Kapitus to call, e-mail, send text messages, and/or send other electronic messages (including prerecorded or artificial voice messages) using an automatic telephone dialing system to any telephone number provided by Applicant, and any telephone number included in any and all documents or forms submitted, including cellular phone numbers and landlines, regardless of their inclusion on any do not call list, for purposes of servicing, collections, marketing or promoting any product offered by Kapitus. Please note that you are not required to consent to be contacted for marketing or promotional purposes in order to qualify for financing or obtain any other products or services from Kapitus. If you do not agree to be called for marketing or promotional purposes please call (844) 547-9396 or email DNC@kapitus.com

DocuSigned by:  
 Sabatino Cupelli  
 Owner 1 Signature: \_\_\_\_\_  
 Date: 2/4/2020

DocuSigned by:  
 David Tulis  
 Owner 2 Signature: \_\_\_\_\_  
 Date: 2/4/2020



PO Box 23967 Chattanooga, TN 37422

HOT NEWS TALK RADIO LLC  
5512 RINGGOLD ROAD  
SUITE 216  
CHATTANOOGA TN 37412

Statement Period  
10/1/2019 - 10/31/2019

Account #



Statement Summary					
<b>Deposit Accounts</b>				<b>Total Balance:</b>	<b>\$2,591.01</b>
Account Type	Previous Balance	Deposits	Withdrawals	Ending Balance	
SMALL BUSINESS CKG(SFX#10)	3,575.21	39,339.00	40,323.20	2,591.01	
<b>Loan Accounts</b>				<b>Total Balance:</b>	<b>\$12,054.62</b>
Account Type	Previous Balance	Principal Pmt	Advances	Ending Balance	
2005 HUMMER H2V8 103(SFX#01)	12,363.01	308.39	0.00	12,054.62	

SMALL BUSINESS CKG (10)					
				PREVIOUS BALANCE:	\$3,575.21
Tran. Date	Eff. Date	Description	Amount	Balance	
	10/01	PAYROLL DEDUCTION - S/E FINANCIAL	-290.04	3,285.17	
	10/01	PAYROLL DEDUCTION - Funding Metrics	-176.04	3,109.13	
	10/01	PAYROLL DEDUCTION - FORWARD FINANCIN	-26.75	3,082.38	
	10/01	POS FROM SHARE - MAPCO 3660.6120 HIGHWAY 58 HARRISON TNUS	-38.35	3,044.03	
	10/01	POS FROM SHARE - BASICTALK BASICTALK.COM NJUS	-16.38	3,027.65	
	10/01	WIRE IN 36180645	18,905.00	21,932.65	
	10/01	WIRE FEE 36180645	-10.00	21,922.65	
	10/01	SHARE DEPOSIT	1,350.00	23,272.65	
	10/01	TFR TO LOAN XXXXX3538-01	-384.60	22,888.05	
	10/01	SHARE DRAFT # 2262	-600.00	22,288.05	
	10/02	10/01 POS FROM SHARE - MURPHY7208ATWALMART SODDY DAISY TNUS	-35.00	22,253.05	
	10/02	- Credit One Bank - Payment	-50.00	22,203.05	
	10/02	PAYROLL DEDUCTION - Advantage Platfo	-204.41	21,998.64	
	10/02	PAYROLL DEDUCTION - Funding Metrics	-176.04	21,822.60	
	10/02	- CARDMEMBER SERV - WEB PYMT	-46.00	21,776.60	
	10/02	SHARE DRAFT # 2263	-100.00	21,676.60	
	10/02	SHARE DRAFT # 2193	-312.50	21,364.10	
	10/02	SHARE DRAFT # 2268	-550.00	20,814.10	
	10/02	SHARE DRAFT # 2192	-850.00	19,964.10	
	10/02	SHARE DRAFT # 2194	-1,500.00	18,464.10	

Tran. Date	Eff. Date	Description	Amount	Balance
	10/02	SHARE DRAFT # 2191	-6,365.33	12,098.77
10/03	10/01	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-49.23	12,049.54
10/03	10/01	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-51.73	11,997.81
10/03	10/02	POS FROM SHARE - VOLUNTEER ENERGY CO EBILL.VEC.ORG TNUS	-216.39	11,781.42
10/03	10/02	POS FROM SHARE - EPB 423-6481641 TNUS	-416.43	11,364.99
	10/03	PAYROLL DEDUCTION - Advantage Platfo	-204.41	11,160.58
	10/03	PAYROLL DEDUCTION - 338 HEIGHTS FINA	-67.00	11,093.58
	10/03	PAYROLL DEDUCTION - Funding Metrics	-176.04	10,917.54
	10/03	- CARDMEMBER SERV - WEB PYMT	-500.00	10,417.54
10/03	10/02	POS FROM SHARE - EAST RIDGE AUTO ALL CHATTANOOGA TNUS	-586.67	9,830.87
10/03		POS FROM SHARE - SPEEDWAY 07109 435 CHATTANOOGA TNUS	-57.04	9,773.83
	10/03	SHARE DRAFT # 2325	-20.00	9,753.83
	10/03	SHARE DRAFT # 906	-300.00	9,453.83
	10/03	SHARE DRAFT # 1043	-300.00	9,153.83
	10/03	SHARE DRAFT # 1044	-300.00	8,853.83
	10/03	SHARE DRAFT # 2324	-500.00	8,353.83
	10/03	SHARE DRAFT # 1042	-850.00	7,503.83
10/04	10/03	POS FROM SHARE - WEB NETWORK SOLUTION 888-6429675 FLUS	-6.99	7,496.84
	10/04	PAYROLL DEDUCTION - Straight Line So	-185.29	7,311.55
	10/04	PAYROLL DEDUCTION - Advantage Platfo	-204.41	7,107.14
10/04	10/03	POS FROM SHARE - MURPHY7208ATWALMART SODDY DAISY TNUS	-40.00	7,067.14
	10/04	SHARE DEPOSIT	100.00	7,167.14
	10/04	- Credit One Bank - Payment	-40.00	7,127.14
	10/04	PAYROLL DEDUCTION - Funding Metrics	-176.04	6,951.10
	10/04	POS FROM SHARE - WM SUPERCENTER Wal-Mart Super Cent HIXON	-33.60	6,917.50
	10/04	SHARE DRAFT # 2264	-200.00	6,717.50
	10/04	SHARE DRAFT # 907	-211.75	6,505.75
	10/04	SHARE DRAFT # 908	-300.00	6,205.75
	10/04	SHARE DRAFT # 2321	-300.00	5,905.75
	10/04	SHARE DRAFT # 2320	-385.00	5,520.75
	10/04	SHARE DRAFT # 7	-495.00	5,025.75
10/07	10/03	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-20.00	5,005.75
10/07	10/04	POS FROM SHARE - MARSHAS BACKSTREET CHATTANOOGA TNUS	-33.84	4,971.91
10/07	10/04	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-43.00	4,928.91
10/07	10/05	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-30.00	4,898.91
10/07	10/05	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-6.00	4,892.91
10/07	10/05	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-40.00	4,852.91
	10/07	PAYROLL DEDUCTION - Advantage Platfo	-204.41	4,648.50
10/07	10/05	POS FROM SHARE - ADVANCE AUTO PARTS SODDY DAISY TNUS	-18.55	4,629.95
	10/07	PAYROLL DEDUCTION - Funding Metrics	-176.04	4,453.91
	10/07	POS FROM SHARE - SPEEDWAY 07109 435 CHATTANOOGA TNUS	-49.65	4,404.26
	10/07	SHARE DRAFT # 2323	-438.32	3,965.94
10/08	10/06	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-50.00	3,915.94
	10/08	PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,711.53
	10/08	PAYROLL DEDUCTION - Funding Metrics	-176.04	3,535.49
10/09	10/08	POS FROM SHARE - WINTERS USA FUELS CHATTANOOGA TNUS	-40.00	3,495.49
	10/09	PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,291.08
	10/09	PAYROLL DEDUCTION - Funding Metrics	-176.04	3,115.04
	10/09	SHARE DEPOSIT	1,199.00	4,314.04



Statement Period  
10/1/2019 - 10/31/2019

Account #  
[REDACTED]

Tran. Date	Eff. Date	Description	Amount	Balance
10/10	10/08	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-49.52	4,264.52
10/10		PAYROLL DEDUCTION - Advantage Platfo	-204.41	4,060.11
10/10		PAYROLL DEDUCTION - Funding Metrics	-176.04	3,884.07
10/10		SHARE DEPOSIT	1,200.00	5,084.07
10/10		POS FROM SHARE - SPEEDWAY 07109.435 CHATTANOOGA TNUS	-51.72	5,032.35
10/10		POS FROM SHARE - Wal-Mart Super 1606 WAL-SAMS HIXON TNUS	-22.71	5,009.64
10/10		SHARE DRAFT # 2332	-300.00	4,709.64
10/10		SHARE DRAFT # 2334	-305.00	4,404.64
10/10		SHARE DRAFT # 2333	-385.00	4,019.64
10/10		SHARE DRAFT # 2330	-730.00	3,289.64
10/11	10/09	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-50.00	3,239.64
10/11	10/10	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-24.00	3,215.64
10/11		PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,011.23
10/11	10/10	POS FROM SHARE - MURPHY6727ATWALMART HIXSON TNUS	-30.00	2,981.23
10/11		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,805.19
10/11		SHARE DEPOSIT	1,600.00	4,405.19
10/11		SHARE DEPOSIT	200.00	4,605.19
10/11	10/10	POS FROM SHARE - SAVANNAH VALLEY UTI 423-344-8440 TNUS	-66.82	4,538.37
10/15	10/12	POS FROM SHARE - SPECTRUM 855-707-7328 MOUS	-214.04	4,324.33
10/15	10/11	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-199.57	4,124.76
10/15	10/12	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-89.52	4,035.24
10/15	10/12	POS FROM SHARE - MIDAS AUTO SERVICE HIXSON TNUS	-394.51	3,640.73
10/15	10/13	POS FROM SHARE - BASICTALK-BASICTALK.COM NJUS	-16.28	3,624.45
10/15	10/13	POS FROM SHARE - MURPHY7208ATWALMART SODDY DAISY TNUS	-32.02	3,592.43
10/15	10/14	POS FROM SHARE - BASICTALK-BASICTALK.COM NJUS	-16.28	3,576.15
10/15	10/13	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-30.00	3,546.15
10/15	10/14	POS FROM SHARE - WEB*NETWORKSOLUTION 888-6429675 FLUS	-1.99	3,544.16
10/15		PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,339.75
10/15		PAYROLL DEDUCTION - Funding Metrics	-176.04	3,163.71
10/15		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,987.67
10/15		POS FROM SHARE - GEICO *AUTO 800-841-3000 DCUS	-265.08	2,722.59
10/15		ATM DEPOSIT - TENNESSEE VALLE 4974 HIGHWAY 58 CHATTANOOGA	300.00	3,022.59
10/15		ATM DEPOSIT - TENNESSEE VALLE 4974 HIGHWAY 58 CHATTANOOGA	500.00	3,522.59
10/15		SHARE DRAFT # 1041	-300.00	3,222.59
10/16	10/14	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-20.00	3,202.59
10/16	10/15	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-40.00	3,162.59
10/16		PAYROLL DEDUCTION - Advantage Platfo	-204.41	2,958.18
10/16		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,782.14
10/16		SHARE DEPOSIT	400.00	3,182.14
10/16		SHARE DRAFT # 2329	-54.63	3,127.51
10/16		SHARE DRAFT # 2328	-300.00	2,827.51
10/17	10/15	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-19.31	2,808.20
10/17		PAYROLL DEDUCTION - Advantage Platfo	-204.41	2,603.79
10/17	10/15	POS FROM SHARE - ADVANCE AUTO PARTS SODDY DAISY TNUS	-29.49	2,574.30
10/17		SHARE DEPOSIT	1,500.00	4,074.30
10/17		PAYROLL DEDUCTION - Funding Metrics	-176.04	3,898.26
10/17		SHARE DEPOSIT	400.00	4,298.26

Tran. Date	Eff. Date	Description	Amount	Balance
10/17		SHARE DRAFT # 2337	-50.00	4,248.26
10/17		SHARE DRAFT # 2339	-250.00	3,998.26
10/17		SHARE DRAFT # 2342	-250.00	3,748.26
10/17		SHARE DRAFT # 2338	-300.00	3,448.26
10/17		SHARE DRAFT # 2340	-385.00	3,063.26
10/17		SHARE DRAFT # 2341	-1,240.00	1,823.26
10/17		ATM DEPOSIT - TENNESSEE VALLE 4974 HIGHWAY 58 CHATTANOOGA	85.00	1,908.26
10/18		PAYROLL DEDUCTION - Advantage Platfo	-204.41	1,703.85
10/18	10/17	POS FROM SHARE - MURPHY7208ATWALMART SODDY DAISY TNUS	-35.00	1,668.85
10/18		PAYROLL DEDUCTION - Funding Metrics	-176.04	1,492.81
10/18		POS FROM SHARE - WAL-MART #4692 4150 MONROE ST EAST RIDGE	-45.98	1,446.83
10/18		SHARE DEPOSIT	1,000.00	2,446.83
10/18		POS FROM SHARE - T-MOBILE 5559 LITTL OOLTEWAH TNUS	-103.57	2,343.26
10/21	10/17	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-22.00	2,321.26
10/21	10/18	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-135.74	2,185.52
10/21	10/19	POS FROM SHARE - KANKUS #3 CHATTANOOGA TNUS	-20.00	2,165.52
10/21	10/20	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-10.00	2,155.52
10/21	10/20	POS FROM SHARE - BLUEBIRD.COM 877-486-5990 GAUS	-20.00	2,135.52
10/21	10/20	POS FROM SHARE - WEB*NETWORKSOLUTION 888-6429675 FLUS	-34.90	2,100.62
10/21		PAYROLL DEDUCTION - Advantage Platfo	-204.41	1,896.21
10/21		PAYROLL DEDUCTION - Funding Metrics	-176.04	1,720.17
10/21		Western Union Ft San Francisco CAUS	-56.99	1,663.18
10/21		SHARE DRAFT # 2335	-1,536.38	126.80
10/22		INSUFFICIENT FUNDS - Advantage Platfo NSF	-204.41	126.80
10/22		NSF FEE - Advantage Platfo	-34.00	92.80
10/22		SHARE DEPOSIT	1,000.00	1,092.80
10/22		PAYROLL DEDUCTION - Funding Metrics	-176.04	916.76
10/22		SHARE DEPOSIT	1,000.00	1,916.76
10/22		POS FROM SHARE - TST* BUD S SPORTS B CHATTANOOGA TNUS	-64.65	1,852.11
10/22		SHARE DEPOSIT	335.00	2,187.11
10/23	10/22	POS FROM SHARE - EPB 423-6481372 TNUS	-330.98	1,856.13
10/23		PAYROLL DEDUCTION - Advantage Platfo	-204.41	1,651.72
10/23	10/22	POS FROM SHARE - MURPHY7074ATWALMART CHATTANOOGA TNUS	-35.00	1,616.72
10/23		PAYROLL DEDUCTION - Funding Metrics	-176.04	1,440.68
10/23		SHARE DEPOSIT	1,000.00	2,440.68
10/23		SHARE DEPOSIT	400.00	2,840.68
10/23		POS FROM SHARE - SPEEDWAY 07109 435 CHATTANOOGA TNUS	-30.00	2,810.68
10/23		SHARE DEPOSIT	1,000.00	3,810.68
10/23		SHARE WITHDRAWAL	-20.00	3,790.68
10/23		SHARE DRAFT # 2190	-300.00	3,490.68
10/23		SHARE DRAFT # 2344	-606.00	2,884.68
10/24		PAYROLL DEDUCTION - Advantage Platfo	-204.41	2,680.27
10/24		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,504.23
10/24		POS FROM SHARE - MURPHY6727ATWAL 5716 HWY. 153 CHATTANOOG	-49.93	2,454.30
10/24		POS FROM SHARE - TMOBILE*POSTPAID TE 800-937-8997 WAUS	-376.09	2,078.21
10/24		SHARE DRAFT # 2360	-68.00	2,010.21
10/24		SHARE DRAFT # 801	-100.00	1,910.21
10/24		SHARE DRAFT # 802	-100.00	1,810.21
10/24		SHARE DRAFT # 2345	-250.00	1,560.21



**Statement Period**  
10/1/2019 - 10/31/2019

**Account #**  
[REDACTED]

Tran. Date	Eff. Date	Description	Amount	Balance
10/24		SHARE DRAFT # 2348	-300.00	1,260.21
10/24		SHARE DRAFT # 2346	-385.00	875.21
10/24		SHARE DRAFT # 2347	-420.00	455.21
10/25		PAYROLL DEDUCTION - Advantage Platfo	-204.41	250.80
10/25		SHARE DEPOSIT	1,200.00	1,450.80
10/25		PAYROLL DEDUCTION - Funding Metrics	-176.04	1,274.76
10/25		SHARE DEPOSIT	1,500.00	2,774.76
10/28	10/25	POS FROM SHARE - MURPHY6727ATWALMART HIXSON TNUS	-35.00	2,739.76
10/28	10/25	POS FROM SHARE - WEB*NETWORKSOLUTION:888-6429675 PLUS	-23.95	2,715.81
10/28		PAYROLL DEDUCTION - Advantage Platfo	-204.41	2,511.40
10/28		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,335.36
10/28		- SQC*ID Visa Direct CAUS	500.00	2,835.36
10/28		SHARE DEPOSIT	1,215.00	4,050.36
10/28		SHARE DRAFT # 804	-100.00	3,950.36
10/29		PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,745.95
10/29		PAYROLL DEDUCTION - Funding Metrics	-176.04	3,569.91
10/29		SHARE DEPOSIT	200.00	3,769.91
10/29		POS FROM SHARE - GEICO *COMMERCIAL MACON DCUS	-68.00	3,701.91
10/29		SHARE DRAFT # 803	-100.00	3,601.91
10/29		SHARE DRAFT # 2349	-100.00	3,501.91
10/29		SHARE DRAFT # 2343	-300.00	3,201.91
10/30		PAYROLL DEDUCTION - Advantage Platfo	-204.41	2,997.50
10/30		PAYROLL DEDUCTION - Funding Metrics	-176.04	2,821.46
10/30		SHARE DEPOSIT	550.00	3,371.46
10/30		POS FROM SHARE - SPEEDWAY 07109435 CHATTANOOGA TNUS	-30.00	3,341.46
10/31		PAYROLL DEDUCTION - Advantage Platfo	-204.41	3,137.05
10/31	10/30	POS FROM SHARE - MURPHY7208ATWALMART SODDY DAISY TNUS	-35.00	3,102.05
10/31		- SQC*ID Visa Direct CAUS	700.00	3,802.05
10/31		PAYROLL DEDUCTION - Funding Metrics	-176.04	3,626.01
10/31		SHARE DRAFT # 2353	-250.00	3,376.01
10/31		SHARE DRAFT # 2352	-300.00	3,076.01
10/31		SHARE DRAFT # 2354	-485.00	2,591.01

**ENDING BALANCE: \$2,591.01**

Check #	Date	Amount	Trace Number	Check #	Date	Amount	Trace Number
7	10/04	495.00	765799630	1044	10/03	300.00	002477610
801*	10/24	100.00	002439720	2190*	10/23	300.00	002435440
802	10/24	100.00	002439705	2191	10/02	6,365.33	132979478
803	10/29	100.00	002450650	2192	10/02	850.00	132979480
804	10/28	100.00	133972780	2193	10/02	312.50	132970102
906*	10/03	300.00	002477985	2194	10/02	1,500.00	132970100
907	10/04	211.75	002478725	2262*	10/01	600.00	002471850
908	10/04	300.00	002481790	2263	10/02	100.00	002474725
1041*	10/15	300.00	766322064	2264	10/04	200.00	133060598
1042	10/03	850.00	002477140	2268*	10/02	550.00	132970098
1043	10/03	300.00	002477570	2320*	10/04	385.00	002481885

Check #	Date	Amount	Trace Number	Check #	Date	Amount	Trace Number
2321	10/04	300.00	133058908	2341	10/17	1,240.00	002417790
2323*	10/07	438.32	765859144	2342	10/17	250.00	133600070
2324	10/03	500.00	002477115	2343	10/29	300.00	767134408
2325	10/03	20.00	002477130	2344	10/23	606.00	133840928
2328*	10/16	300.00	766471894	2345	10/24	250.00	002439275
2329	10/16	54.63	766471896	2346	10/24	385.00	133869264
2330	10/10	730.00	002499020	2347	10/24	420.00	133870878
2332*	10/10	300.00	002499270	2348	10/24	300.00	002439295
2333	10/10	385.00	002499015	2349	10/29	100.00	134023490
2334	10/10	305.00	133327458	2352*	10/31	300.00	002457505
2335	10/21	1,536.38	766673536	2353	10/31	250.00	002457870
2337*	10/17	50.00	133600072	2354	10/31	485.00	134134918
2338	10/17	300.00	002415895	2360*	10/24	68.00	002439280
2339	10/17	250.00	002416165	TOTAL:		25,427.91	
2340	10/17	385.00	002417770				

\* Indicates checks out of sequence.

	THIS STATEMENT PERIOD	YEAR TO DATE
TOTAL FEES FOR PAYING OVERDRAFTS	0.00	0.00
TOTAL FEES FOR RETURNING ITEMS UNPAID	34.00	1,054.00
DEPOSITS	39,339.00	
CHECKS CLEARED	25,427.91	
MISC DEDUCTIONS	14,895.29	
SERVICE FEES	0.00	
ASSOCIATE DESCRIPTION	ASSOCIATE NAME	
BUSINESS OWNER	DAVID J TULIS	
BUSINESS OWNER	SABATINO COPELLI	
TRUTH IN SAVINGS INFORMATION		
ANNUAL PERCENTAGE YIELD	0.00%	
REPORTING SSN		
YTD DIVIDEND	0.00	

2005 HUMMER H2V8 103 (01)							
Tran. Date	Eff. Date	Description	Tran Amt	Prin. Pmt or Adv	Interest Charge	Fees/Charges	Balance
							PREVIOUS BALANCE: \$12,363.01
	10/01	TFR FROM SHARES XXXX3538-10	384.60	308.39	76.21		12,054.62
							ENDING BALANCE: \$12,054.62
** ANNUAL PERCENTAGE RATE			7.5000%				
DAILY PERIODIC RATE			0.0205479%				
YTD FINANCE CHARGE PAID			856.56				
PAYMENTS & CREDITS			308.39				
DEBITS			0.00				
** FINANCE CHARGE**			76.21				







Regions Bank  
 4538 Hwy 58 Chattanooga  
 4538 Highway 58  
 Chattanooga, TN 37416

HOT NEWS TALK RADIO LLC  
 5512 RINGGOLD RD STE 216  
 CHATTANOOGA TN 37412-3174

ACCOUNT # [REDACTED]

Cycle 053  
 Enclosures 26  
 Page 0  
 1 of 3

**LIFEGREEN BUSINESS CHECKING**  
 November 1, 2019 through November 29, 2019

**SUMMARY**

Beginning Balance	\$94.97	Minimum Balance	\$372-
Deposits & Credits	\$15,120.00 +	Average Balance	\$1,322
Withdrawals	\$1,016.46 -		
Fees	\$190.00 -		
Automatic Transfers	\$0.00 +		
Checks	\$13,630.83 -		
Ending Balance	\$377.68		

**DEPOSITS & CREDITS**

11/01	Deposit - Thank You	8,000.00
11/06	Deposit - Thank You	2,000.00
11/19	ATM Imaged Deposit	500.00
11/19	ATM Imaged Deposit	2,200.00
11/20	ATM Imaged Deposit	600.00
11/20	ATM Imaged Deposit	900.00
11/25	Merchant Service Merch Adj Noogaradio 8035218703	70.00
11/25	ATM Imaged Deposit	100.00
11/26	Deposit - Thank You	500.00
11/29	ATM Imaged Deposit	250.00
Total Deposits & Credits		\$15,120.00

**WITHDRAWALS**

11/01	Merchant Service Merch Fee Noogaradio 8035218703	70.00
11/06	Card Purchase Cash App*sabatl 4829 8774174551 CA 94103 4292	20.00
11/08	Card Purchase Paypal *Ebay 58 5732 402-935-7733 CA 95131 4292	70.00
11/08	Card Purchase Spectrum 4899 855-707-7328 MO 63131 4292	80.00
11/12	Card Purchase Cash App*sabatl 4829 8774174551 CA 94103 4292	5.00
11/13	Card Purchase Hotelscom921025 4722 Hotels.Com NV 94596 4292	168.43
11/22	Rtrn Depstd ltm # of ltm(S) 0001	500.00
11/25	Card Purchase Urban Stack 5812 Chattanooga TN 37402 4292	36.02
11/25	Card Purchase Raceway 6866 3 5541 Chattanooga TN 37408 4292	37.01
11/25	Card Purchase Cash App*sabatl 4829 8774174551 CA 94103 4292	20.00

For all your banking needs, please call 1-800-REGIONS (734-4667)  
 or visit us on the internet at www.regions.com. (TTY/TDD 1-800-374-5791)



Thank You For Banking With Regions!  
 2019 Regions Bank Member FDIC. All loans subject to credit approval.



Regions Bank  
 4538 Hwy 58 Chattanooga  
 4538 Highway 58  
 Chattanooga, TN 37416

HOT NEWS TALK RADIO LLC  
 5512 RINGGOLD RD STE 216  
 CHATTANOOGA TN 37412-3174

ACCOUNT # [REDACTED]

Cycle 053  
 Enclosures 26  
 Page 0  
 2 of 3

**WITHDRAWALS (CONTINUED)**

11/25	Card Purchase Cash App*sabati 4829 8774-174551 CA 94103 4292	10.00
Total Withdrawals		\$1,016.46

**FEES**

11/22	Rtn Dep Itm Fee	10.00
11/25	Paid Overdraft Item Fee	180.00
Total Fees		\$190.00

**CHECKS**

Date	Check No.	Amount	Date	Check No.	Amount
11/25	1001	640.00	11/04	1006	312.50
11/20	1002	1,085.00	11/20	1008 *	610.00
11/20	1003	250.00	11/06	1007	1,500.00
11/04	1004	6,365.33	11/20	1007 *	400.00
11/20	1004 *	68.00	11/20	1008	450.00
11/04	1005	850.00	11/12	1041 *	500.00
11/20	1005 *	300.00	11/22	1042	300.00
				Total Checks	\$13,630.83

\* Break in Check Number Sequence.

**DAILY BALANCE SUMMARY**

Date	Balance	Date	Balance	Date	Balance
11/01	8,024.97	11/12	322.14	11/22	380.71
11/04	497.14	11/13	153.71	11/25	372.32
11/06	977.14	11/19	2,853.71	11/26	127.68
11/08	827.14	11/20	1,190.71	11/29	377.68

**PRICING FOR CERTAIN TREASURY MANAGEMENT SERVICES AND ANALYZED DEPOSITORY PRODUCTS IS CHANGING EFFECTIVE JANUARY 1, 2020. CHANGES WILL BE REFLECTED BEGINNING WITH THE JANUARY ANALYSIS STATEMENT YOU WILL RECEIVE IN FEBRUARY. TO VIEW ALL CHANGES VISIT REGIONS.COM/SPECIALMESSAGE. PLEASE CONTACT YOUR TREASURY MANAGEMENT OFFICER WITH QUESTIONS SPECIFIC TO YOUR ACCOUNT.**



State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 09:14 AM 05/06/2014  
FILED 09:12 AM 05/06/2014  
SRV 140567791 - 5528383 FILE

**CERTIFICATE OF FORMATION**

**OF**

**Hot News Talk Radio LLC**

The undersigned authorized person hereby certifies that:

**FIRST.** The name of the limited liability company (hereafter the "Company") is:

**Hot News Talk Radio LLC**

**SECOND.** The address of the Company's registered office in the State of Delaware is 3511 Silverside Road, Suite 105, Wilmington, Delaware USA 19810. The name of the registered agent at such address for service of process is *DELAWARE REGISTRY, LTD.*

**THIRD.** The initial member[s] of the Company is [are]:

Sabatino Cupelli  
David Tulis

**FOURTH.** The Authority of the undersigned authorized person is limited to, and solely for the purpose of, executing and filing this Certificate of Formation.

**IN WITNESS WHEREOF,** the undersigned has executed this Certificate of Formation of the company this 6th day of May, 2014.

**DELAWARE REGISTRY, LTD.**

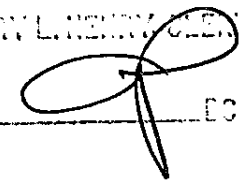
By: Doreen E. Abbott  
Doreen E. Abbott, Assistant Secretary  
Authorized Person



IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
AT CHATTANOOGA  
DIVISION IV

FILED IN OFFICE  
2022 SEP 26 PM 3:55

LARRY L. HENRY, CLERK

BY:  EC

FLEXIBILITY CAPITAL, INC. )  
 )  
Plaintiff, )  
 )  
VS. ) NO. 22C429  
 )  
SABATINO CUPELLI AND )  
DAVID JONATHAN TULIS, )  
D/B/A HOT NEWS TALK RADIO )  
 )  
Defendants. )

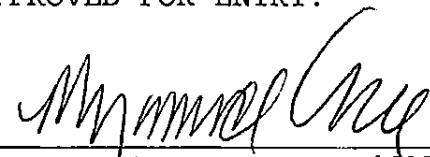
ORDER TO SET

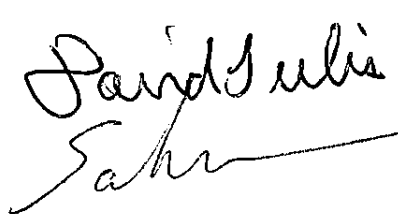
It is ORDERED that this non-jury case be scheduled for trial on December 9, 2022, at 9:00 a.m.

ENTER this 26<sup>th</sup> day of September, 2022.

  
CIRCUIT COURT JUDGE

APPROVED FOR ENTRY:

  
JOHN R. CHEADLE, JR. (6053)  
MARY BARNARD CHEADLE (27084)  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, Tennessee 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
[jcheadle@cheadlelaw.com](mailto:jcheadle@cheadlelaw.com)  
[mcheadle@cheadlelaw.com](mailto:mcheadle@cheadlelaw.com)



**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga TN 37412, to defendant Sabatino Cupelli at 8665 Summit Creek Way, Chattanooga, TN 37363, and to defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, this 26<sup>th</sup> day of September, 2022.



---

**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(21001231)



IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
 AT CHATTANOOGA  
 DIVISION IV

FLEXIBILITY CAPITAL, INC. )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 SABATINO CUPELLI and )  
 DAVID JONATHAN TULIS, )  
 D/B/A HOT NEWS TALK RADIO )  
 )  
 Defendants. )

NO. 22C429

Div IV

FILED IN OFFICE  
 2022 NOV -1 AM 9:28  
 LARRY L. HENRY, CLERK  
 BY DS

PLAINTIFF'S RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, John R. Cheadle, Jr. and Mary Barnard Cheadle, and in response to defendants' motion for summary judgment, would respond as follows:

1. Defendants have failed to comply with Rule 56.03, Tennessee Rules of Civil Procedure. Defendants' motion for summary is not "accompanied by a separate concise statement facts." Further, defendants motion for summary judgment is not supported by any affidavits.

2. Defendants assert that the shutdown during the COVID Pandemic made it financially impossible for defendants to comply with the terms of the underlying agreement, and, therefore, the agreement is unenforceable. Defendants have failed to support this argument with any financial documentation or supporting affidavits.

3. Plaintiff incorporates by reference Plaintiff's Reply to Defendants' Amended Answer to Plaintiff's Motion for Summary Judgment. Hot News Talk Radio, LLC is not in good standing and has been inactive since September 23, 2016, prior to the execution

of the underlying Agreement. Defendants have failed to rebut this fact.

4. On September 29, 2022, plaintiff propounded to defendants Requests for Admission. Attached is a copy of defendants' handwritten response. Defendants have responded:

"5. Admit that Hot News Talk Radio LLC was not in good standing with the Delaware Secretary of State when defendants executed the Future Receivables Sale and Purchase Agreement.

RESPONSE: NA

6. Admit that Hot News Talk Radio has not been in good standing with the Delaware Secretary of State since September 23, 2016.

RESPONSE: NA

7. Admit that defendants warranted to plaintiff when the Future Receivables Sale and Purchase Agreement was executed that Hot News Talk Radio LLC was in good standing.

RESPONSE: NA"

5. Defendants have failed to comply with Rule 36.01, Tennessee Rules of Civil Procedure. The response of "NA" is not in compliance with Rule 36.01. Further, defendants, failure to deny the above requests for admission, means that such requests are deemed admitted.

6. Further, it is of importance if Hot News Talk Radio was in good standing at the time that the underlying Agreement was executed by defendants. Plaintiff assumed a risk only based upon the information provided to plaintiff and warranted by defendants. Defendants misrepresented to plaintiff that Hot News Talk Radio was a limited liability company in good standing. Defendants executed the underlying agreement as a d/b/a and, therefore, are personally

liable.

WHEREFORE, plaintiff respectfully requests that defendants' motion for summary judgment be denied.

DATED: November 1, 2022.

Respectfully submitted,



**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga TN 37412, to defendant Sabatino Cupelli at 8665 Summit Creek Way, Chattanooga, TN 37363, and to defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and by email at davidtuliseditor@gmail.com, this 1<sup>st</sup> day of November, 2022.



**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.shell; 21001231)

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
AT CHATTANOOGA  
DIVISION IV

FLEXIBILITY CAPITAL, INC. )  
 )  
Plaintiff, )  
 )  
VS. ) NO. 22C429  
 ) 10  
 )  
SABATINO CUPELLI and )  
DAVID JONATHAN TULIS, )  
D/B/A HOT NEWS TALK RADIO )  
 )  
Defendants. )

FILED IN OFFICE  
2022 SEP 25 AM 9:34  
LARRY L. BERRY, CLERK  
0.5

REQUESTS FOR ADMISSION

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, and propounds the following requests for admission to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, pursuant to Rule 36, Tennessee Rules of Civil Procedure.

1. Admit that on February 4, 2020, defendants applied for commercial funding. *Yes*

RESPONSE:

2. Admit that on February 6, 2020, defendants executed a future receivables sale and purchase agreement with plaintiff in the name of Hot News Talk Radio, LLC, d/b/a NoogaRadio 92.7 FM-95.3 HD 4.

RESPONSE: *Yes*

3. Admit that defendants received advanced future receivables. *Yes*

RESPONSE:

4. Admit that defendants stopped paying pursuant to the "Daily Installment" terms of the underlying Future Receivables Sale and Purchase Agreement.

RESPONSE: *NO*

5. Admit that Hot News Talk Radio LLC was not in good standing with the Delaware Secretary of State when defendants executed the Future Receivables Sale and Purchase Agreement.

RESPONSE: *NA*

6. Admit that Hot News Talk Radio LLC has not been in good standing with the Delaware Secretary of State since September 23, 2016.

RESPONSE: *NA*

7. Admit that defendants warranted to plaintiff when the Future Receivables Sale and Purchase agreement was executed that Hot News Talk Radio LLC was in good standing.

RESPONSE: *NA*

8. Admit that defendants are still doing business as NoogaRadio.

RESPONSE: *NO*

DATED: September 29, 2022.

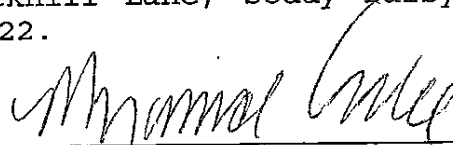
Respectfully submitted,



JOHN R. CHEADLE, JR. (6053)  
MARY BARNARD CHEADLE (27084)  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

CERTIFICATE

I hereby certify that copies of the foregoing have been mailed, postage paid, to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga TN 37412, to defendant Sabatino Cupelli at 8665 Summit Creek Way, Chattanooga, TN 37363, and to defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, this 29<sup>th</sup> day of September, 2022.



JOHN R. CHEADLE, JR.  
MARY BARNARD CHEADLE

(p.shell; 21001231)

## Additional Tulis - Cupelli admissions

NoogaRadio 92.7 longer exists. The lease to operate on 92.7 FM and 95.3 FM HD4 expired. As of October 2021, the commercial format and programming of NoogaRadio ceased operations.

NoogaRadio 92.7, aka Hot News Talk Radio LLC, no longer leases tower space, property, space or frequencies.

The current operators of the NoogaRadio Network do not own, operate or lease any radio stations. NoogaRadio Network is a mere service that provides content for low-power radio stations. These low-power stations are non-commercial 501(c)3s.

The term NoogaRadio is a moniker that could be used by anyone. It is not a corporate entity.

It's basically Chattanooga radio without the "chatta."

To imply in any way, shape or form that in the NoogaRadio Network is anything similar to NoogaRadio 92.7 is an assumption and ridiculous.

NoogaRadio 92.7 was commercial in nature and carried commercial programming and major networks such as Glenn Beck, Sean Hannity, NASCAR and a variety of other national programming. The only local or national programming that remains and is on the NoogaRadio Network is the David Tulis show.

NoogaRadio 92.7 FM was a commercial operation and was authorized to air commercials. The current NoogaRadio Network is not a commercial operation and it is not legal to air commercials.

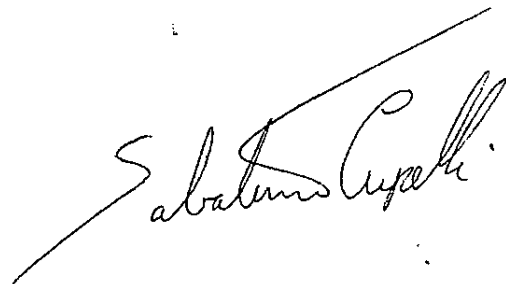
The location is even different for the NoogaRadio Network.

To restate, NoogaRadio Network is a platform to provide content to LP radio stations. NoogaRadio Network owns no radio stations, nor is NoogaRadio Network leasing any radio stations.

None of these stations pay NoogaRadio for the content NoogaRadio delivers. NoogaRadio Network is without authority to run commercials, but accepts underwriting.

We also mention that NoogaRadio Network plays nonstop music from Friday 6 p.m. to Monday 6 a.m. without any underwriting interruptions.

NoogaRadio 92.7 as a commercial operator ran a variety of network programming over the weekend, including NASCAR. NoogaRadio Network has no authority to air that content.



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Sabatino Cupelli

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
 )  
vs. )  
 )  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. 4

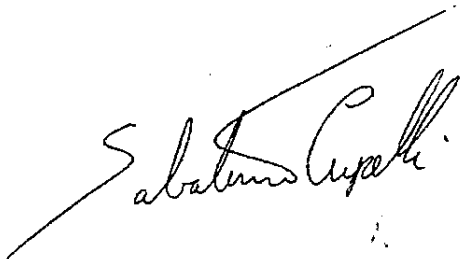
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BY MM

Supplemental Filing

The accused in the above-styled matter submit into the court's record the following:

- 1. Admissions and confessions, 8pp
- 2. Interrogatories, 6pp. /

Respectfully submitted,



By \_\_\_\_\_  
Sabatino Cupelli

By David J. Tulis  
David Jonathan Tulis



# Admissions and confessions

Flexibility Capital Inc. vs. Sabatino Cupelli and David Jonathan Tulis  
In the circuit court of Hamilton County, Tenn.  
docket no. 22C429

Will the plaintiff:

1. Admit that Flexibility Capital refused negotiations until Hot News Talk Radio LLC gave it access once again to the bank account of Hot News Talk Radio LLC?
2. Admit that Flexibility Capital's withdrawing money daily from Hot News Talk Radio LLC overdrafted the company's account several times, meaning that the account is put in the negative, subject to bank fees and penalties?
3. Admit that Flexibility, through its representatives, have refused to negotiate a settlement as envisioned at contract ¶ 43?
4. Admit that Flexibility Capital, through its representative, at the hearing Sept. 26, 2022, made statements from hearsay it obtained presenting conclusions of facts not in evidence as to defendants' current business model of broadcasters David Tulis and Sabatino Cupelli?
5. Admit that Flexibility Capital did not give Hot News Talk Radio LLC a loan?
6. Admit that Flexibility did not lend Hot News Talk Radio LLC money?
7. Admit that Flexibility did not extend a financial accommodation to the merchant?
8. Admit that Flexibility advanced funds on receivables based on prior performance, good faith operation of the company and expected future performance?
9. Admit that the radio station business per se, with or without a valid LLC relationship with state of Delaware, is the entity from which money receivables were anticipated under the alleged contract?
10. Admit that Flexibility Capital or the alleged original contracting party did not check incorporation status prior to the contract being signed?

11. Admit that, through no fault of managing partner Sabatino Cupelli and partner David Tulis of Hot News Talk Radio LLC, that Hot News Talk Radio was incapable of repaying money advanced by Flexibility?
12. Admit that Flexibility Capital was able to retrieve more than \$3,200 from the Hot News Talk Radio LLC bank account
13. Admit that Flexibility does not negotiate a settlement and that it has taken accused to court, foreclosing arbitration, as per guaranty paragraph no. 9.
14. Admit that Flexibility obtained the application information for an advance on future receivables from Kapitus?
15. Admit that Kapitus established the funding under the contract?

### Followup on June 5, 2022, discovery

16. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request or documents that included the following?
  1. **Electronically stored information.** Please produce any and all information beyond that supplied by plaintiff in motion for summary judgment bearing defendants' names that is stored in any and all electronic media and is retrievable in perceivable form;
17. Admit that Flexibility has been ordered by the court in its Sept. 9, 2022, to produce this answer?
18. Admit that Flexibility to date has not provided this information?
19. Admit that no ESI exists for the contract in dispute?
20. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request or documents that included the following?
  2. **Personal knowledge witness information.** Please produce the identity, title and location of all natural persons having personal firsthand knowledge of any matter leading to the discovery of admissible evidence

relevant to the pending action against defendant, per Tennessee evidence rule 602;

21. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?
22. Admit that Flexibility to date has not provided personal knowledge witness information?
23. Admit that no natural person exists having firsthand personal knowledge of any matter leading to the discovery of admissible evidence relevant to the pending action against defendant, per Tennessee evidence rule 602?
24. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request or documents that included the following?

**3. Alleged original creditor.** Please provide the name and address of the original creditor if different from FLEXIBILITY CAPITAL INC., the purported plaintiff in this case;

25. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?
26. Admit that its answer to the above question earlier is, ““Flexibility Capital is the original creditor””?
27. Admit that this answer is false?
28. Admit that Kapitus is the original lender, as the application for the advance on future receivables (see exhibit) is Kapitus?
29. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request or documents that included the following?

**4. Holder in due course.** Please provide verified (sworn to by affidavit) evidence that the alleged creditor, FLEXIBILITY CAPITAL INC., is the secured party in the instant matter, i.e., holder in due course, and has a perfected security interest in the aforesaid alleged agreement and alleged debt;

30. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?
31. Admit that Flexibility to date has not provided this information?

32. Admit that Flexibility Capital Inc. is not the secured party, as Cheadle has provided no evidence that Flexibility is holder in due course and the secured party, and no evidence to which it can swear is true, correct and complete?

33. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following?

**5. Alleged original agreement:** Please provide defendants a verified copy, both front and back, of the alleged original agreement and any other alleged original security instruments in their entirety, including the allonge,<sup>1</sup> affixed to the original alleged agreement for indorsements. Note: Said affidavit is to be sworn to be true, correct, complete, and not misleading, by a properly identified and authorized officer of the alleged creditor, who states that he or she has personal, first hand knowledge of the validity of said alleged original document(s);

34. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?

35. Admit that Flexibility to date has not provided this information?

36. Admit that Flexibility has no copy of an original agreement for which it can swear the authenticity as true, correct and complete?

37. Admit that Flexibility cannot produce a copy of any contract signed by any human being working at Flexibility Capital?

38. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following?

**8. Proof of value given.** Please provide verified copies, both front and back, of all documents and records with respect to the aforesaid alleged agreement and alleged debt from the beginning, including but not limited to, any and all lender issued canceled certified checks, cashiers' checks, money equivalents or similar instruments, identified as or evidencing assets provided by the alleged creditor and/or the alleged original creditor to us — and indorsed by the accused parties;

39. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?

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<sup>1</sup> Allonge. A piece of paper annexed to a negotiable instrument or credit card agreement, on which to write indorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof. U.C.C. § 3-202(2). Black's Law Dictionary, 6th Edition, page 76.

40. Admit that Flexibility to date has not provided this information?

41. Admit that Flexibility has no document or proof of value given, and that it cannot provide verified/sworn copies of which it can swear the authenticity as true, correct and complete?

42. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following?

**9. Deposit slip and wire transfer proof.** Please provide a verified copy of the deposit slip for the deposit of my alleged agreement in its entirety by the alleged creditor associated with the alleged account number ending in 8101, and a verified copy of the wire transfer issued by the alleged creditor as payor in payment for my alleged agreement in its entirety and any other alleged related security instruments;

43. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?

44. Admit that Flexibility to date has not provided this information in verified form sworn to by the man or woman with authority over the document?

45. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following?

**10. Affidavit of debt & damages.** Please provide an affidavit of debt and damages incurred, sworn to be true, correct, complete, and not misleading, by a properly identified and authorized officer of the alleged creditor, hereinafter "affiant," upon his or her personal knowledge (Evidence Rule 602) stating:

1) that the alleged creditor provided consideration to the alleged debtor from the assets it had on hand BEFORE the alleged consideration for future receipts was made, and incurred a financial loss under the full and complete alleged original agreement and alleged debt, and state each and every loss that the alleged creditor incurred to date under the alleged debt in issue, and

1. 2) that affiant has personal, firsthand knowledge (TRE Rule 602) regarding the facts of the alleged debt and is the original custodian of the books of entry, or directly supervises said original custodian of the records.

46. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?
47. Admit that Flexibility to date has not provided this information?
48. Admit that Flexibility has no document to which it can swear authenticity giving evidence of debt and damages connected with the contract in dispute in this case?
49. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following:

**11. Bookkeeping journal / account ledger entries.** Please provide a verified (sworn to by affidavit) copy of the complete set of original bookkeeping journal / account ledger entries associated with defendants' alleged agreement and alleged account number using Generally Accepted Accounting Principles per 12 U.S.C. § 1831n, showing all debits and credits and identifying the source(s) and amount of the credit loan funds/assets; Note: The verifying affidavit of journal / account ledger bookkeeping entries is to be completed by the original custodian of the books and records, sworn to be true, correct, complete, and not misleading. Further, said affidavit shall contain positive identification of the custodian, and state that he or she has personal, firsthand knowledge (TRE Rule 602) of said entries;

50. Admit that the court ordered Flexibility Sept. 9, 2022, to produce this answer?
51. Admit that Flexibility to date has not provided this information?
52. Admit that on June 5, 2022, Flexibility through agent Cheadle received discovery request for documents that included the following?

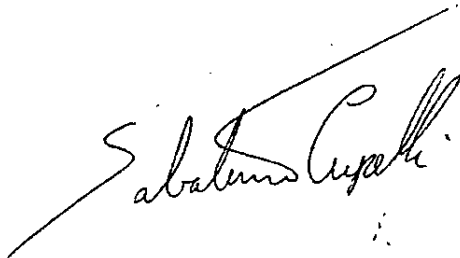
**12. Assignment contract.** Please provide verified (sworn to by affidavit) proof of an assignment contract in its entirety—if applicable—of the alleged original agreement and the alleged debt in issue from an alleged original creditor, as assignor, to the alleged creditor/debt collector, as assignee;

53. Admit that Flexibility answered this request by saying that “there has been no assignment of the debt.”
54. Admit that on Sept. 9, 2022, the court ordered Flexibility to produce this answer.

**CERTIFICATE OF SERVICE**

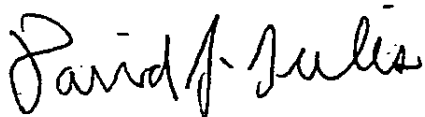
Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this motion is being sent by email to Mary Cheadle at mheadle@cheadlelaw.com on this 29<sup>th</sup> day of October, 2022

Mary Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215



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Sabatino Cupelli



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David Jonathan Tulis

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
 )  
vs. )  
 )  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429  
Div. IV  
2022 NOV 17 PM 12:35  
FILED IN OFFICE  
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DS

Motion to reconsider

Accused in this lawsuit demand reconsideration of the court's finding that plaintiff's material facts control in such a way that an illegal usury contract past 10 percent for a loan of money in Tennessee shall taint the honorable court.

At a hearing Nov. 7, the court rules that the Flexibility motion for summary judgment controls the case and that all plaintiff facts are admitted by accused. The court rules that a Rule 56 violation by accused (failure to enter a statement of material facts) forces them to yield all facts claimed in the lawsuit, leaving the court no option but to rule for plaintiff.

The court's recitation of the statement of facts confirms orally the written submission by plaintiff. Flexibility and debt collectors Cheadle Law are prosecuting a case of loaned money in violation of N.Y. Penal Law § 190.40 with its ban of interest above 25 percent and in violation of Tenn. Code Ann. § 47-14-103 limiting interest to 10 percent.



The contract pp. 1-10 is an advance purchase of future receivables. Converting the agreement into a usurious loan is the “personal guaranty of performance” beginning p. 11, with an absolute requirement for repayment. The forbearance or interest in the loan involved in this case is 47.9 percent for a period of 29 weeks under the repayment schedule. The effective annual interest rate is nearly 100 percent.

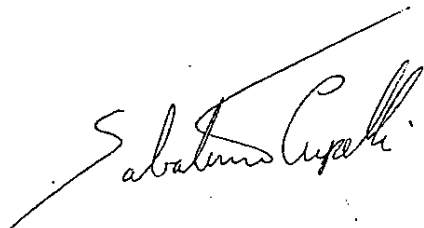
Accused refer the court to a brief in support of this motion.

## Relief sought

In light of the state of law in Tennessee regarding the defense of usury, accused ask the court to rescind its grant of summary judgment, as follows:

1. That said contract be declared void *ab initio* as against the law of state of Tennessee and against public policy prohibiting usury;
2. That the order for summary judgment proposed at the Nov. 9, 2022, hearing be stricken;
3. That costs for this action be assigned to plaintiff.

Respectfully submitted,



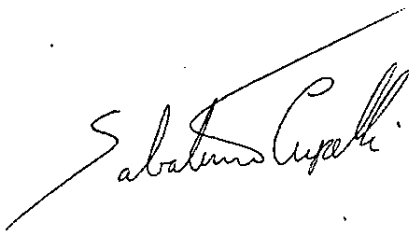
By \_\_\_\_\_  
Sabatino Cupelli

By David Jonathan Tulis  
David Jonathan Tulis

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being sent by first-class mail with sufficient postage to deliver it to its destination this 17<sup>th</sup> day of November 2022, to:

Mary Barnard Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215



\_\_\_\_\_  
Sabatino Cupelli



\_\_\_\_\_  
David Jonathan Tulis

22C 429

# Affidavit of David Jonathan Tulis

## Regarding usury in Flexibility Capital loan

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I, David Jonathan Tulis, being of sound mind and body, testify that I am a resident of Hamilton County, Tenn., and reside at 10520 Brickhill Lane, Soddy-Daisy. I declare the following to be true, to the best of my knowledge ability.

1. On Feb. 6, 2020, I entered into a contract with Flexibility Capital for a loan described in a contract as an advance purchase of future receivables. My business partner, Sabatino Cupelli, and I at Hot News Talk Radio LLC received \$16,320 in a loan.
2. The agreement required us to pay \$164.22 every weekday. The balance due at the beginning of the arrangement was \$24,140, or \$7,820 more than the money extended. It would have taken 147 weekdays to pay off the loan, or 29.4 weeks, slightly more than half a year.
3. The rate of interest is 47.916 percent for the 29 week period, or nearly 100 percent per annum.
4. This contract is abusive, unconscionable and violates the ban in state law at T.C.A. § 47-14-103 prohibiting usury, that being an annual interest rate past 10 percent.

Further affiant sayeth naught.

David Jonathan Tulis  
David Jonathan Tulis

STATE OF TENNESSEE, COUNTY OF HAMILTON — I, the undersigned Notary Public, do hereby affirm that David Jonathan Tulis personally appeared before me on the 17th day of November 2022, and signed this affidavit as his free and voluntary act and deed.

Margaret Banks  
Notary Public



My Commission Expires : 12/05/2022

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
 )  
vs. )  
 )  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429  
Div. IV  
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Brief in support of motion to reconsider

The court is asked to reconsider its grant of plaintiff’s motion for summary judgment on grounds that a ruling against accused approves plaintiff actions that violate state law and abrogate New York’s ban on usury and involve the court — as intended by plaintiffs — in fraud on the court and an abuse of judicial machinery.

Flexibility and Cheadle Law firm confess the transaction is a loan with an absolute duty for repayment in an attempt to exact usurious interest.

Plaintiff admissions are as follows:

1. “6. On February 6, 2020, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, executed a future receivables sale and purchase agreement with Flexibility Capital. 7. Flexibility Capital loaned Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, money.”

Affidavit of Gina Monteforte, president of Flexibility Capital (emphasis added)

2. “Defendants **borrowed money** from plaintiff and failed to pay as promised. This is a straight-forward collection case to recover the **balance due on a loan.**”

Plaintiff’s motion for summary judgment (emphasis added)

3. “Plaintiff **loaned defendants money.** Defendants failed to pay the money back.

Plaintiff’s motion for summary judgment (emphasis added)

4. “Plaintiff **loaned defendants money.**”

Plaintiff’s brief in support of summary judgment (emphasis added)

5. “Defendants executed the agreement. Plaintiff **loaned defendants money.**”

Plaintiff’s brief in support of summary judgment (emphasis added)

6. “Plaintiff **loan[s] defendants money.** Defendants failed to pay as promised. A balance remains due. There remains no genuine issue as to any material fact, and plaintiff is entitled to a judgment as a matter of law.”

Plaintiff’s brief in support of summary judgment (emphasis added)

The president of Flexibility Mrs. Monteforte and company debt collectors Mary Cheadle and John Cheadle of Nashville describe the transaction *in terms of lending money.*

These statements of material fact contradict the face of the contract. That document declares in numerous ways the contract is not a loan of money, but an advanced purchase of future receivables.

The accused asks the court to view the plaintiff’s words about the contract — ones it has approved as controlling — as being a loan of money as **statements against interest,** ones

sure to be trustworthy, credible and material as they tend to injure the claims of the declarants in face of law in two states forbidding usury.

## Laws limit usury

**TENNESSEE LAW.** Tennessee recognizes purchases in advance of business receivables. ““Account purchase transaction” means an agreement under which a commercial entity sells accounts, instruments, documents, or chattel paper to another commercial entity subject to a discount or fee \*\*\* ” Tenn. Code Ann. § 47-14-102.

Tennessee bans interest in many types of loans beyond 10 percent per year § 47-14-103. Maximum rates. The law provides a defense against suit such as this one. “(a) A defendant sued for money may avoid the excess over lawful interest by pleading usury, setting forth the amount of such excess. (b) In order to sustain a defense of usury, the burden is on the party claiming usury” Tenn. Code Ann. § 47-14-110.

Willful usury is a Class A misdemeanor. T.C.A. § 47-14-112.

To constitute usury, there must be a requirement that the money loaned be repayable absolutely; if it is payable only upon some contingency, the transaction is not usurious. Lake Hiwassee Development Co., Inc. v. Pioneer Bank, 1976, 535 S.W.2d 323. Usury imports the existence of four elements: (1) A loan or forbearance, either express or implied; (2) an understanding between the parties that the principal shall be repayable absolutely; (3) the exaction of a greater profit than allowed by law; and (4) an intention to violate the law. Jenkins v. Dugger, 96 F.2d 727, 729 (6th Cir. 1938).

**NEW YORK LAW.** New York law prohibits usury past 25 percent per year in two laws. First-degree usury is an act by someone with a criminal record. Second degree criminal usury lacks the criminal record element, and is as follows:

A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.

Criminal usury in the second degree is a class E felony.

N.Y. Penal Law § 190.40 (McKinney)

Crime of criminal usury in the second degree requires proof only that defendant charged or received money or other property as interest on a usurious loan. McKinney's Penal Law § 190.40. \*\*\* Finding that defendant received interest on usurious loan as part of a scheme or business of making or collecting usurious loans was supported by evidence that he made a loan of \$2,000 for which he required interest payments at the rate of \$100 per week, that he later twice renegotiated the loan, requiring interest at effective annual rates of 109.2% and 145.6%, and that he directly participated in collection efforts on two of the loans.

People v. Valentzas, 70 N.Y.2d 446, 517 N.E.2d 198 (1987)

## Flexibility contract requires absolute repayment

The contract disputed in this case admits itself into the world of loans for money by having a personal guaranty section of the agreement that makes the funds repayable absolutely.

c. Buyer is not willing to enter into the Agreement unless Guarantor irrevocably, absolutely and unconditionally guarantees prompt and

complete performance to Buyer of all the obligations of Merchant under the Agreement (collectively, “the Obligations”).

(Contract, p. 11)

As an inducement to take risk, Flexibility requires the merchants to make absolute guarantee of repayment of the full amount to Flexibility.

2. Guaranty of Obligations. Guarantor hereby irrevocably, **absolutely and unconditionally guarantees** to Buyer prompt, **full, faithful and complete performance** and observance of all Merchant’s Obligations; and Guarantor unconditionally covenants to Buyer that if default or breach shall at any time be made by Merchant in the Obligations, Guarantor **shall well and truly pay or perform** (or cause to be paid or performed) the Obligations and pay all damages and other amounts stipulated in the Agreement with respect to the nonperformance of the Obligations, or any of them.

(Contract p. 11) (emphasis added)

The exchange for the purchased amount (of receivables) is “payment for an adequate consideration and is not intended to be treated as a loan or financial accommodation from Buyer to Merchant.” To cover its actions, plaintiff wins defendants’ “[acknowledgment]” that Flexibility is “not a lender, bank or credit card processor, and that Buyer has not offered any loans to Merchant, and Guarantor waives any claims or defenses of usury in any action arising out of this Guaranty” (p. 12, ¶ 5).

The accused incorporate by reference their motion for summary judgment and its supporting brief. These documents highlight the *supervening impossibility* of performance of the contract (Gov. Bill Lee shutdown of the entire state’s economy) and the contract’s *original impossibility* (accused are supposed to generate receipts from a failing business). The contract itself goes to great lengths to avoid appearances that the purchase for advance receivables is a loan at usury.



The “personal guaranty of performance” is on the face of the 14-page contract at pp. 11-13, its page numbers included on front-facing pages. This guarantee on the face of the contract — and not apart from it — makes the money absolutely repayable.

Accused remind the court that no one at Flexibility signed the contract, indicating a failure to have a meeting of the minds among the parties or a desire on the part of Flexibility staff to avoid personal responsibility for violating New York’s usury ban.

## Analysis

Usury is not presumed, but, on the contrary, there is a strong presumption against the finding of usury and in favor of legality of the transaction. Where usury is not determined by the court on the face of the instrument, it is determinable as a matter of law.<sup>1</sup>

The parties agreeing to waive a claim of usury in the contract in no way makes the contract enforceable in Tennessee or in New York, the laws of which latter state control, contract p. 9, ¶ 37; also personal guaranty, p. 11, ¶ 6.

Accused have a right to raise the usury defense, and do so under accompanying affidavit. “Consent or cooperation of one paying usurious interest is immaterial; thus, fact that corporate borrower executed written waiver of defense of usury at time promissory note was signed did not preclude corporate borrower from raising defense of usury in action to recover on promissory note. T.C.A. §§ 47-14-104, 47-14-112, 48-402; Const. art. 11, § 7.” Aztec Properties, Inc. v. Union Planters Nat. Bank of Memphis, 530 S.W.2d 756 (Tenn. 1975).

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<sup>1</sup> 45 AmJur 2d, Interest and Usury, § 354

The funds in the Flexibility contract are repayable absolutely under terms of the contract's personal guaranty provisions, pp. 11-13.

Accused at Hot News Talk Radio received \$16,320 in a loan. The agreement requires it to pay \$164.22 every weekday. The balance due at the beginning of the arrangement is \$24,140, or \$7,820 more than the money extended. It takes 147 weekdays to pay off the loan, or 29.4 weeks, slightly more than half a year.

The rate of interest is 47.916 percent for the 29 week period, or nearly 100 percent per annum.

In business, receivables vary widely day to day. The contract says the payments are an advance purchase of future receivables. But Flexibility's payment schedule is the same number of dollars every weekday, as if there were no connection between receivables and repayment. Repayment is fixed daily upon a loan of money, as admitted in the finding of material fact.

## Fraud on the court

It has taken this long for accused to realize they are victims of fraud of which this prosecution is a part. By this motion they take action forthwith and do not sit on their rights by remaining silent and not demanding relief. They declaim against fraud and by notice of this motion attempt to remove themselves from its taint and spare the court from being smeared in it.

Fraud on the court is a grievous matter involving attorneys and judges. The standard is set forth in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993), with

[T]he elements of fraud upon the court \*\*\* consisting of conduct:

1. On the part of an officer of the court;
2. That is directed to the “judicial machinery” itself;
3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.

The 10th Circuit defines fraud on the court as “‘Fraud on the court’ other than fraud as to jurisdiction, is fraud which is directed to judicial machinery itself and is not fraud between parties or fraudulent documents, false statements or perjury; it is thus fraud where court or member is corrupted or influenced or influence is attempted or where judge has not performed his judicial function so that impartial functions of court have been directly corrupted” Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985). “[F]raud upon the court has been found usually involved ‘ ‘the most egregious conduct involving a corruption of the judicial process itself.’” \*\*\* In Livingston v. Livingston, 572 P.2d 79, 82 (Alaska 1977), we recognized that relief is not appropriate in cases in which the wrong “‘was only between the parties in the case and involved no direct assault on the integrity of the judicial process. Nondisclosure by a party or his attorney has not been enough.’”” O’Link v. O’Link, 632 P.2d 225, 230 (Alaska 1981).

Fraud is defined as “[a]nything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.” Delahany v. First Pennsylvania Bank, N.A., 318 PaSupper. 90, 464 A.2d 1243, 1251. *Black’s Law Dictionary*, 6th Ed., p. 660.

Fraud by definition: "It is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception." *Black's Law Dictionary*, 6th Ed., p. 661.

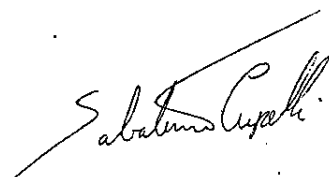
Actual fraud is an intentional and knowing misrepresentation of the truth or intentional and knowing concealment of a known fact (committed with actual knowledge) that constitutes common law fraud.

Flexibility and attorneys John and Mary Cheadle are suing to enforce a contract they call a loan for money that puts the entire action under the shadow of Tennessee's usury ban. They have acted deceitfully and fraudulently upon the accused. They act deceitfully and dishonestly upon the court, knowingly and intentionally, as officers of the court, and induce the court to perform injustice against defendants, in violation of state law and Rule 8.

## Relief sought

Accused demand relief as noted in the attached motion for reconsideration. Also attached, an affidavit attesting to defendant usury defense herein described.

Respectfully submitted,



By \_\_\_\_\_  
Sabatino Cupelli

By David J. Tulis  
David Jonathan Tulis

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being sent by first-class mail with sufficient postage to deliver it to its destination this 17th day of November 2022, to:

Mary Barnard Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215

*David J. Tulis*

\_\_\_\_\_  
David Jonathan Tulis



facts, on May 16, 2022, with a hearing date of June 20, 2022. The hearing on plaintiff's motion for summary judgment was continued to July 18, 2022. The hearing on plaintiff's motion for summary judgment was continued again to July 25, 2022, and then to August 15, 2022. The hearing on plaintiff's motion for summary judgment was continued to September 26, 2022, for plaintiff to provide additional financial documentation to defendants. On September 13, 2022, defendants filed a motion for summary judgment, setting their motion to be heard on September 26, 2022. At the hearing on September 26, 2022, the Court continued the pending motions for summary judgment to November 7, 2022, since defendants' motion for summary judgment had not been pending for thirty (30) days. The Court instructed the pro se defendants to review Rule 56, Tennessee Rules of Civil Procedure.

Plaintiff's motion for summary judgment has been pending for almost six (6) months. Defendants have failed to respond to plaintiff's specification of material facts as required by Rule 56.03, T.R.C.P. The Court finds that the following material facts are undisputed. On February 4, 2020, defendants applied for commercial funding. On February 6, 2020, defendants executed a future receivables sale and purchase agreement with plaintiff. Plaintiff advanced future receivables to defendants. Defendants failed to pay as promised. The amount due plaintiff by defendants was \$21,061.38 as of August 5, 2020. The agreement provides for the continuing accrual of interest and for the payment by defendants of plaintiff's attorney's fees of 25 percent of the balance due. The agreement is secured by a UCC-1 lien. Defendants

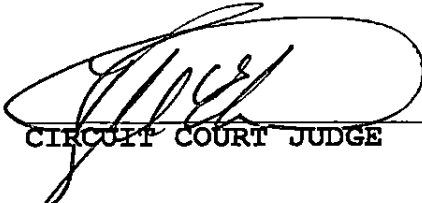
detain plaintiff's collateral and have declined to turn over possession of the collateral to plaintiff. Pursuant to Rule 56, Tennessee Rules of Civil Procedure, plaintiff is entitled to a summary judgment as a matter of law, there being no genuine issue as to any material fact.

It is, accordingly, ORDERED, ADJUDGED AND DECREED that defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, pay to plaintiff, Flexibility Capital, Inc, the sum of \$21,061.38, plus pre-judgment interest to date of \$5,705.61, and plaintiff's reasonable attorney's fees of \$5,265.35, both pursuant to the documents underlying this suit, for a total of \$32,032.34; to accrue post-judgment interest at the rate of 12 percent per annum, pursuant to T.C.A., § 47-14-121.

It is further ORDERED that defendants' motion for summary judgment is stricken.

The court costs of this cause are assessed to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio; for all of the foregoing execution may issue. This is a final judgment, pursuant to Rule 54.02, Tennessee Rules of Civil Procedure, there being no just reason for delay.

ENTER this 5<sup>th</sup> day of <sup>December</sup> ~~November~~, 2022.

  
CIRCUIT COURT JUDGE



SUBMITTED FOR ENTRY:

*John R. Cheadle, Jr.*

**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, Tennessee 37215  
(615) 254-1009 Office  
(615) 254-9298 Fax  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, Chattanooga TN 37412, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 10<sup>th</sup> day of November, 2022.

*John R. Cheadle, Jr.*

**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.osj; 21001231)

**CLERK CERTIFICATE**

The undersigned hereby certifies that a copy of this Order has been mailed to all parties or to counsel of all parties in this cause.

This 5 day of Dec. 2022

LARRY L. HENRY, CLERK

By *Larry L. Henry* D.C.

*Mary B. Cheadle*  
*Sabatino Cupelli*  
*David J. Tulis*

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
 AT CHATTANOOGA  
 DIVISION IV

FLEXIBILITY CAPITAL, INC. )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 SABATINO CUPELLI and )  
 DAVID JONATHAN TULIS, )  
 D/B/A HOT NEWS TALK RADIO )  
 )  
 Defendants. )

NO. 22C429

*Div. IV*

FILED IN OFFICE  
 2022 DEC -9 PM 12:58  
 LARRY L. HENRY, CLERK  
 BY SD DC

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, John R. Cheadle, Jr. and Mary Barnard Cheadle, and in response to defendants' motion to reconsider, would respond:

1. On May 16, 2022, plaintiff filed a motion for summary judgment, with a supporting specification of material facts, plaintiff's supporting brief, the affidavit of Gina Monteforte and plaintiff's affidavit for attorney's fees. Plaintiff's motion for summary judgment was scheduled to be heard on June 20, 2022.

2. Plaintiff's motion for summary judgment was continued numerous times, with the Court setting plaintiff's motion for summary judgment for a final hearing on November 7, 2022. At the prior hearings, the Court suggested to pro se defendants that they review Rule 56, Tennessee Rules of Civil Procedure.

3. On August 10, 2022, defendants filed an "affidavit and amended answer to plaintiff's motion for summary judgment". Defendants failed to file a response to plaintiff's specification of material facts. Further, defendants did not raise the defense of "an illegal usury contract" as they are now belatedly attempting

to assert.

4. On September 22, 2022, plaintiff filed a reply to defendants' amended answer to plaintiff's motion for summary judgment.

5. On November 7, 2022, the Court properly granted plaintiff's motion for summary judgment that had been pending for six (6) months. The Court held that defendants failed to file a response to each fact set forth in plaintiff's statement of material facts, pursuant to Rule 56.03, Tennessee Rules of Civil Procedure and, therefore, each fact set forth by plaintiff is undisputed.

6. On November 17, 2022, defendants filed a motion to reconsider.

7. Rule 56.03, Tennessee Rules of Civil Procedure, provides:

"In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure **shall be accompanied by a separate concise statement of the material facts** as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Any party opposing the motion for summary judgment must, not later than five days before the hearing, serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment."

8. In Holland vs. City of Memphis, 125 S.W.3d 425, 428

(Tenn.Ct.App. 2003), the Tennessee Court of Appeals held that "the material facts set forth in the statement of the moving party may be deemed admitted in the absence of a statement controverting them by the opposing party. Accordingly, failure to file a response in opposition to a motion for summary judgment generally will prove fatal in the trial court and upon appeal."

9. In F&M Bank vs. Fleming, 2021 WL 4438550, 9 (Tenn.Ct.App. 2021), the Tennessee Court of Appeal reiterated its ruling in Holland, and held that "[a]ppellant's failure to respond to the statement of undisputed facts therefore unfortunately 'prove[d] fatal in the trial court and upon appeal.'"

10. Plaintiff properly filed plaintiff's specification of material facts with its motion for summary judgment setting out each fact in a separate, numbered paragraph supported by a specific citation to the record. Plaintiff complied with Rule 56.03, T.R.C.P. The Court properly held that defendants failed to file a response to plaintiff's statement of facts. The Court properly held that plaintiff's statement of facts were undisputed, and granted plaintiff's motion for summary judgment.

11. Defendants have now belatedly asserted that the underlying Future Receivables Sales and Purchase Agreement is "an illegal usury contract". Defendants did not raise this assertion prior to the hearing on plaintiff's motion for summary judgment and, therefore, they have waived this defense.

12. The agreement provides for interest at the rate of 10 percent. Defendants defaulted in their payments. Pursuant to the terms of the agreement, upon default, the entire sum will be due at

the rate of 12 percent per annum.

13. Tennessee Courts have long allowed default interest at the contractual rate of 24 percent per annum and held that such a rate is not usurious. J. & B. Investments v. Surti, 258 S.W.3d 127, 136-137 (Tenn.Ct.App. 2007). The interest provided for in the underlying agreement is not usurious.

WHEREFORE, plaintiff respectfully request that defendants' motion to reconsider be denied.

DATED: December 9, 2022.


Respectfully submitted,



**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, Chattanooga TN 37412, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 9<sup>th</sup> day of December, 2022.



**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.shell; 21001231)

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
)  
vs. )  
)  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. IV

FILED IN OFFICE  
2022 DEC 19 AM 8:47  
LARRY L. HENRY, CLERK  
D.S. [unclear]

Answer to plaintiff response to motion to reconsider, challenge  
to subject matter jurisdiction

Accused enter this answer in support of their oral arguments on this date to demand dismissal of the action against them for the lack of the court's having subject matter jurisdiction on grounds of it being induced to enforce an unconscionable contract.

1. This motion incorporates by reference accuseds' previous motions and petitions, notably their Nov. 17, 2022, motion to reconsider and a supporting brief, touching on the grounds as to why the court lacks subject matter jurisdiction.
2. This answer consummates accuseds' analysis of the illegality of the Flexibility contract to show, thusly, plaintiff's lack standing with which to file the lawsuit, not having ground to bring suit, and lacking wherewithal to give the court subject matter jurisdiction over the dispute between the parties.

## 'Belated' assertion

3. Plaintiff's answer, received Dec.15, 2022, objects to the "belatedly asserted" usury and unconscionable contract defense, that accused "did not raise this assertion prior to the hearing on plaintiff's motion for summary judgment" and thus "have waived this defense." Movants cite J. & B. Investments v. Surti, 258, S.W. 3d 127 (Tenn.Ct.App. 2007), suggesting that what is commonly known as a "wildcard statute," T.C.A. § 45-2-601, applicable to state-chartered banks in competition with national banks, has bearing in this case because it allows a 24 percent rate of interest.<sup>1</sup>
4. Plaintiff argues that the failure of pro se defendants to proffer a statement of material facts is fatal to their cause, and that its judicial conquest is just and overdue. But that's like saying a lawsuit by a mobster for extortion payments is just because the shopkeep had agreed to pay. Such a suit is incapable of stirring a court to act for failing to give it subject matter jurisdiction.
5. Subject matter jurisdiction involves the court's lawful authority to adjudicate a controversy. Chapman v. DaVita, Inc., 380 S.W.3d 710, 712 (Tenn.2012); Meighan v. U.S. Sprint Commc'ns Co., 924 S.W.2d 632, 639 (Tenn.1996). Subject matter jurisdiction is conferred by statute or the Tennessee constitution; the parties cannot confer it by appearance, plea, consent, silence, or waiver. In re Estate of Trigg, 368 S.W.3d 483, 489 (Tenn.2012). Any order entered by a court lacking jurisdiction over the subject matter is void. Id. Therefore, subject matter jurisdiction is a threshold inquiry, which may be raised at any time in any court. Id.

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<sup>1</sup> This law is an exception to the 10 percent interest limit in Tennessee. "The United States Congress has authorized national banks to charge interest at the rates allowed by the laws of the state in which the banks are located. See 12 U.S.C. § 85. As we stated earlier, Tennessee expressly authorizes industrial loan and thrift companies to charge an interest of 24% per annum. See Tenn.Code Ann. § 45-5-301(2)(b). As a consequence of the interplay of the state and federal legislation, The Bank of Nashville was authorized to charge interest at the default rate of 24% when the Note at issue was executed. Accordingly, the default interest rate of 24% is not usurious."

6. Where subject matter jurisdiction is challenged, the party asserting that subject matter jurisdiction exists must secure it. Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436, 445 (Tenn.2012). A determination of subject matter jurisdiction involves questions of law; therefore, rulings on such questions are reviewed de novo on appeal, without any presumption of correctness. In re Estate of Trigg, 368 S.W.3d at 489; see also Lovlace v. Copley, 418 S.W.3d 1, 17 (Tenn.2013).
7. Accused object that the court is using judicial power to hear the lawsuit and issue summary judgment for plaintiff. The unconscionability and illegality of the loan for money contract, as court and plaintiffs call it, impliedly fail to give the court subject matter jurisdiction. But as accused have not argued subject matter jurisdiction until now, they wish to brief the matter for the record.

## Subject matter jurisdiction

8. The court lacks subject matter jurisdiction on grounds of (1) unconscionability of the agreement, and, (2) plaintiff's resultant lack of standing upon which to seek redress in a plea for which relief may be granted.
9. **Unconscionability and illegality.** Accused contend the loan in dispute is illegal because it is not a merchant cash advance, is not an advance purchase of future receivables that would be legal. It is a loan absolutely required to be repaid, and not a good-faith purchase of merchant future receivables.
10. **Standing.** Plaintiffs are seeking to enforce an illegal contract with 208.05 percent annual interest rate, a loan for money.<sup>2</sup>

---

<sup>2</sup> This figure corrects accuseds' earlier lower estimate of the annual interest rate they were paying.



- a. The 14-page contract contains 10 pages that describe an advance purchase of future receivables, a form of transaction that is unmolested as free enterprise capitalism under Tennessee law. Three following pages are a “personal guaranty of performance.” These provisions make repayment an “irrevocably, absolutely and unconditionally” a guarantee in the contract (contract p. 11). They convert the entirety of the agreement into a loan for money, as described by plaintiffs in the court record as cited in accuseds’ motion to reconsider, which money loan terms are orally recited by the court in the Nov. 7, 2022, hearing in which the court reads aloud the summary judgment motion and grants relief to Flexibility.
- b. The transaction as a loan is evidenced in the future receivables part of the contract (pp. 1-10) in reference to a pledge of security, p. 6, including “equipment, general intangibles, instruments, and inventory.” If Flexibility is a buyer of accounts rather than a secured lender, it would not demand recourse against property other than receivables.
- c. Such loan for money, being illegal in Tennessee as violating the 10 percent loan limit at T.C.A. § 47-14-103, and subject to attack under the usury law at T.C.A. § 47-14-110, confers no standing on Flexibility to sue.
- d. Accused, in keeping with the provision of the usury defense law, set forth the amount of excess at \$6,188.<sup>3</sup>
- e. To obtain standing, plaintiff must show redressability by the court, causal connection between the claimed injury and the challenged conduct, and injury to itself. It must show “distinct, concrete injury in fact” or “particularized injury” Am. C.L. Union of Tennessee v. Darnell, 195 S.W.3d 612, 621 (Tenn. 2006).

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<sup>3</sup> Accused received \$16,320 in a loan, the balance due was \$24,140, or \$7,820 more than funds provided, payable over 147 weekdays. Ten percent of \$16,320 is \$1,632. The excess is \$6,188.

“[C]onjectural or hypothetical injuries are not sufficient,” Id.

- f. Accuseds’ nonpayment of an illegal money loan — under aforementioned sets of supervening and original impossibility — is not a distinct and palpable injury sufficient to give standing to Flexibility to sue, nor sufficient ground to give the court subject matter jurisdiction.
11. If a party shows a court that it lacks subject matter jurisdiction, its only option appears to be the ministerial function of dismissal.
  12. The court is asked to review a similar case to this one, CapCall LLC v. Jeremiah Foster, a memorandum regarding Shoot the Moon LLC in which case a Montana-based restaurant chain in U.S. bankruptcy court, district of Montana, gets a fair hearing of the trustee’s claims as against a buyer of advanced receivables, CapCall. The judge uses an eight-part test (see p. 6) devised in an influential 1991 law review article to guide his sifting of a complicated set of facts. A Memorandum disposition resolving competing motions for partial summary judgment, 15pp, is attached as **Exhibit No. 1**.
  13. Accused ask for relief from the nominal party in the case, Flexibility Capital; the seeming party in interest is the Cheadle law firm in Nashville, which has a great book of business in Hamilton County and other sessions courts. On Nov. 22, 2022, defendant Tulis and Mrs. Cheadle emailed about calendars; she demurred on one hearing date because she was in Knoxville sessions court with 75 cases. **See Exhibit No. 2**. The people of Tennessee need protection from this racketeering business that uses sophisticated techniques to prey on small businesses and men and women unable to afford counsel or representation. The adhesion contracts of the kind argued in this case

## MCA calculator

# Merchant cash advance APR calculator

Find out what your merchant cash advance is really costing you.

Merchant cash advance amount (required)

16320

Payback terms (required)

Total payback amount

Total payback amount (required)

24140

Payment is based on (required)

Fixed daily payment

Fixed daily payment (required)

164.22



Approximate daily payment:

\$164.22

Repayment period:

147 days

Total payback amount:

\$24,140

Effective APR:

208.05%

See how this APR stacks up against other small-business loans.



### Flexibility contract put into a calculator with its 208% APR

<https://www.nerdwallet.com/article/small-business/merchant-cash-advance-mca-calculator>

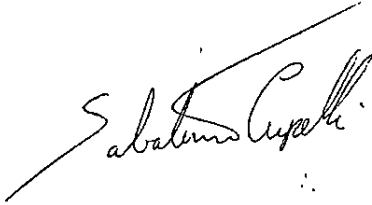
are injected into local economy and free markets. They bristle with noise and jargon, threats and absolutes, and are so complicated that even the purveyors of the loans, and their Tennessee law firm, seem scarcely to understand them. Cheadle and the CEO of Flexibility call the disputed transaction a “loan for money” when they mean to say that, no, it is strictly an advance purchase of future receivables. Turns out that in all these

statements about lending money — statements against interest, if you will — *they accidentally tell the truth*. In this case, despite themselves, the contract is a loan for money with an absolute duty to repay, and with a rate of interest past 10 percent, past 24 percent. They admit the factoring advance receivables agreement — in toto, from p. 1 to p. 14 — is ultimately a loan, though pp. 1-10 lay out a merchant cash advance. They show themselves as predator lenders, as loan sharks. *If you don't pay us 208.05 percent APR usury in daily payments sucked from your account, we'll eat you alive in a lawsuit, buster*. The Cheadles are extorting defendants statewide, including the accused.

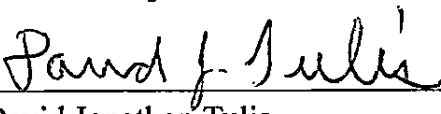
## Relief sought

14. The foregoing indicate the court does not have subject matter jurisdiction to hear this case. The grounds for judicial impotence are the lack of standing on the part of Flexibility Capital and its Cheadle debt collectors/lawyer. **They lack standing because the contract they ask the court's aid in enforcing is unconscionable, illegal, usurious under T.C.A. 47-14-103, made without their signature in bad faith, with evil and fraudulent intent by which they ensnare the honorable Hamilton County circuit court.**
15. Accused demand said contract be declared void *ab initio* as against the law of state of Tennessee and against public policy prohibiting usury; and, also,
16. That the summary judgment order issued orally at the Nov. 9, 2022, hearing and entered into the record Dec. 5, 2022, be stricken and the case dismissed ministerially, with prejudice; and
17. That costs for this action be taxed to plaintiff.

Respectfully submitted,



By \_\_\_\_\_  
Sabatino Cupelli

By  \_\_\_\_\_  
David Jonathan Tulis

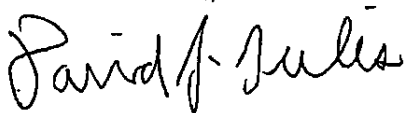
## Exhibits

1. A Memorandum disposition resolving competing motions for partial summary judgment, in CapCall LLC v. Jeremiah Foster, 15pp
2. Correspondence between David Tulis and Mary Cheadle, 2pp

### CERTIFICATE OF SERVICE

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being given personally to Flexibility Capital attorney Mary Cheadle, or her alternate, in Hamilton County circuit court this 19th day of December, 2022; or, if she is not in the court, mailed to her first-class at the following address.

Mary Barnard Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215



\_\_\_\_\_  
David Jonathan Tulis

**Exhibit 1**

**2020**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MONTANA**

In re:  
  
SHOOT THE MOON, LLC,  
  
Debtor.

Case No. 2:15-bk-60979-WLH

CAP CALL, LLC,  
  
Plaintiff and  
Counterclaim-defendant,

Adv. Proc. No. 2:17-ap-00028-WLH

v.

JEREMIAH J. FOSTER,  
  
Defendant and  
Counterclaim-plaintiff.

**MEMORANDUM DISPOSITION  
RESOLVING COMPETING  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT**

~~FILED IN OFFICE  
2022 DEC 19 11:08:47  
LARRY LITWACK, CLERK~~

A lot of legal work involves categorizing. The classification of a given event can yield different results under a range of legal regimes – including, for example, tax, bankruptcy, commercial, and securities law – or determine whether those regimes apply at all. The specifics of any given taxonomic exercise will differ based on the factual and legal contexts, but a common (although by no means universal) maxim is that the task must be guided by the substance of the event rather than by labels or other formalism.

Among other issues raised here, Jeremiah J. Foster (the “Trustee”)<sup>1</sup> and CapCall, LLC dispute whether certain financial transactions should be classified as loans or as true sales of receivables. Both sides appear confident in their positions and have accordingly cross-moved for partial summary judgment regarding this issue. For the reasons discussed below, the court concludes that neither party is entitled to summary judgment. As such, the court denies both motions.

<sup>1</sup> The U.S. trustee appointed Jeremiah J. Foster as the chapter 11 trustee in the main case. Foster then became the trustee of the STM Liquidating Trust pursuant to a confirmed chapter 11 plan.

## BACKGROUND & PROCEDURAL POSTURE

Various entities that were predecessors of the debtor<sup>2</sup> in the main bankruptcy case operated restaurants in Idaho, Montana, and Washington.<sup>3</sup> When these Shoot the Moon entities needed further financing, several engaged in transactions with merchant cash advance companies, including CapCall.<sup>4</sup> At least twelve transactions were consummated between Shoot the Moon entities and CapCall, the terms of which are set forth in written Merchant Agreements and associated documents (including confessions of judgment, personal guaranties by Shoot the Moon's principal, and UCC-1 financing statements).<sup>5</sup>

The economic core of these transactions was that CapCall provided the Shoot the Moon entities with immediate cash (and hence liquidity to operate their business) upon closing of each transaction. In exchange, CapCall received an agreed portion of future receivables generated through the Shoot the Moon entities' operation of the restaurants. The amounts promised to CapCall exceeded the amount of cash CapCall paid the Shoot the Moon entities, which created possible profit for CapCall and represented the cost to the Shoot the Moon entities of obtaining financing in this fashion. Before the Shoot the Moon bankruptcy filing, CapCall received payments as a result of these transactions but claims it did not receive all monies promised.<sup>6</sup>

Some funds that the Shoot the Moon entities received before the petition date but did not pay to CapCall are currently deposited in a restricted account.<sup>7</sup> Some of the amounts that the debtor received after the petition were apparently utilized during the bankruptcy case.<sup>8</sup>

CapCall's operative complaint seeks declaratory relief that CapCall owns the balance of the restricted account, judgment against the Trustee for converting the

---

<sup>2</sup> Shortly before the debtor filed a chapter 11 petition, the various entities merged into the debtor. The details are not relevant for present purposes, but for a further discussion see generally *Foster v. IOU Cent., Inc. (In re Shoot the Moon, LLC)*, 2020 Bankr. LEXIS 1374 (Bankr. D. Mont. May 21, 2020).

<sup>3</sup> See ECF No. 162 ¶ 22; ECF No. 171 ¶ 1.

<sup>4</sup> See ECF No. 162 ¶ 23; ECF No. 171 ¶¶ 2-4.

<sup>5</sup> See ECF No. 161 Annexes "A" – "M"; ECF No. 171 Exs. "B" – "M".

<sup>6</sup> See ECF No. 162 ¶ 38; ECF No. 171 ¶¶ 35 & 38.

<sup>7</sup> See ECF No. 162 ¶¶ 9-10 & 17-18; ECF No. 171 ¶¶ 39-42.

<sup>8</sup> See ECF No. 162 ¶¶ 19-20; ECF No. 171 ¶ 40.

postpetition receipts,<sup>9</sup> and other miscellaneous fees, costs, and interest components.

The Trustee's answer includes various counterclaims against CapCall, including seeking declaratory relief regarding the applicable state law governing the transactions at issue and that these transactions amounted to disguised loans, avoidance and recovery of allegedly voidable transfers, and remedies stemming from CapCall allegedly charging usurious interest rates.

The present dispute began with CapCall's motion requesting partial summary judgment regarding (i) choice-of-law issues, (ii) the classification of CapCall's transactions with the Shoot the Moon entities as sales or loans, and (iii) the Trustee's avoidance action counterclaims. The Trustee opposed CapCall's motion and cross-moved for partial summary judgment regarding the first two issues. After the completion of briefing, the court heard oral argument by counsel for each party. The matter is now ready for decision.

## DISCUSSION

### *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.<sup>10</sup> Previous orders entered in this adversary proceeding reflect the parties' agreement that this is a "core" proceeding and each side's express consent to a final adjudication by this bankruptcy court.<sup>11</sup> Accordingly, the court may properly exercise the judicial power necessary to finally decide this dispute.

### *Standard for Partial Summary Judgment*

Federal Rule of Civil Procedure 56, which applies here through Bankruptcy Rule 7056, allows a party to move for complete or partial summary judgment. This relief should be granted only "if the movant shows that there is no genuine

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<sup>9</sup> CapCall's amended complaint refers to this count as "Court 2 – Conversation" but the court presumes this is a typo. See ECF No. 12 at 3.

<sup>10</sup> See 28 U.S.C. § 1409(a).

<sup>11</sup> See, e.g., ECF No. 26 ¶ 2; ECF No. 53 ¶ 4.



dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

“The determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. To defeat summary judgment, the nonmoving party must produce evidence of a genuine dispute of material fact that could satisfy its burden at trial.”<sup>12</sup>

A summary judgment analysis requires the court to consider the evidence offered by the parties at that stage of the case “in the light most favorable to the nonmoving party.”<sup>13</sup> When, as here, the parties have filed cross-motions for summary judgment, courts will “evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences.”<sup>14</sup>

Finally, summary judgment is generally disfavored in the context of disputes that are intensely factual.<sup>15</sup>

### ***Applicable Substantive Law***

Absent a contrary rule in the Bankruptcy Code, the contours of claims and property rights in bankruptcy cases are sculpted by applicable nonbankruptcy law.<sup>16</sup> Neither the Bankruptcy Code nor any other federal statute prescribes how to

<sup>12</sup> *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (cleaned up).

<sup>13</sup> *See, e.g., Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 973 F.3d 953, 961 (9th Cir. 2020).

<sup>14</sup> *See, e.g., ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

<sup>15</sup> *See, e.g., Marketquest Grp., Inc. v. BIC Corp.*, 862 F.3d 927, 932 (9th Cir. 2017); *Int’l Healthcare Mgmt. v. Haw. Coalition for Health*, 332 F.3d 600, 604 (9th Cir. 2003).

<sup>16</sup> *See, e.g., Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1411-12 (2017); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 450-51 (2007); *Butner v. United States*, 440 U.S. 48, 55-57 (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 (1939) (Douglas, J.); *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610, 619-22 (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).

differentiate true sales from loans, which means that bankruptcy courts should use the applicable state law.<sup>17</sup>

### *Differentiating True Sales from Loans*

*transfer title  
to buyer*

An entity needing liquidity can monetize its present or future accounts receivable in two primary ways: it can sell the receivables at a discount to a buyer<sup>18</sup> or it can use the receivables as collateral for a loan. These two methods differ in key respects (including because the seller transfers title to the receivables in a sale transaction whereas the borrower retains title in a loan transaction), but they are not dissimilar. Indeed, Article 9 of the Uniform Commercial Code 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,<sup>19</sup> which its commentary explains reflects how “[i]n many commercial financing transactions the distinction is blurred.”<sup>20</sup> The UCC, however, never “delineates how a particular transaction is to be classified” and its commentary instead notes that this “issue is left to the courts.”<sup>21</sup>

The courts have responded by formulating a holistic, multipart framework to examine the substance of a given transaction. A notable law review article cataloged factors that are often considered:

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

<sup>17</sup> 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).

<sup>18</sup> 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 that are collateralized by the receivables in order to obtain 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.

<sup>19</sup> See U.C.C. § 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.

<sup>20</sup> See *id.* § 9-109 Official Comment 4.

<sup>21</sup> *Id.* 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”).

- (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.<sup>22</sup>

As with many multi-factor legal tests, no individual factor or combination of factors is determinative in a given case.<sup>23</sup> This legal inquiry is not a quantitative exercise subject to replication by a computer program, but instead is a comprehensive and contextual endeavor in which “[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.”<sup>24</sup> One consideration that transcends and unites the specific factors, however, is the nature of how the parties allocated *risk* – in sales, the risk of loss from the purchased assets typically passes to the buyer whereas in disguised loans, various methods may be used to allocate risk such that the putative seller remains exposed to the

<sup>22</sup> 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 factors. Various other courts have since relied on the article’s 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).

<sup>23</sup> See, e.g., *Official Comm. of Unsecured Creditors v. LG Funding, LLC (In re Cornerstone Tower Servs.)*, 2018 Bankr. LEXIS 3562, at \*13 (Bankr. D. Neb. Nov. 9, 2018).

<sup>24</sup> *In re Dryden Advisory Grp.*, 534 B.R. at 620.

underlying receivables or has otherwise provided the putative buyer recourse to sources of recovery beyond the receivables.<sup>25</sup>

## CONCLUSIONS ON SUMMARY JUDGMENT<sup>26</sup>

After reviewing the materials filed by CapCall and the Trustee in the light most favorable to the respective nonmoving party, the court ultimately concludes that (i) it is inappropriate and unnecessary at this stage to determine any choice-of-law issue and (ii) there are genuine disputes of material of fact precluding summary judgment regarding the substantive issues presently before the court.

### *Choice of Law*

The parties disagree about which state's law governs; CapCall maintains that New York law should apply while the Trustee urges application of Montana law. This disagreement tees up a potential choice-of-law issue on which both sides have sought declaratory relief and cross-moved for summary judgment. The court is constrained, however, by the principle that “[a] choice-of-law determination is necessary only when a difference in the law will result in a different outcome.”<sup>27</sup> Indeed, courts should and do decline to resolve these issues “in the abstract” apart

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<sup>25</sup> 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 Bankr. LEXIS 3562, at \*13 (emphasizing how, across the holistic analysis, “the allocation of risk is primary to the determination”).

<sup>26</sup> The discussion in this part provides the court's conclusions in a general sense regarding the parties' dueling motions. Consistent with Federal Rule of Civil Procedure 52(a)(3), which applies here through Bankruptcy Rule 7052, the court makes no factual findings or legal conclusions at this stage of the litigation.

<sup>27</sup> *Villarreal v. Arnold*, 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.”).

from underlying substantive claims.<sup>28</sup> Such judicial restraint comports with the prohibition on federal courts issuing advisory opinions.<sup>29</sup>

The court perceives no material difference in particular states' laws regarding the substantive issues presently before the court (i.e., whether the transactions between CapCall and the Shoot the Moon entities were so plainly true sales or loans such that one side is entitled to summary judgment). Nor do the parties—each citing case law from assorted jurisdictions—clearly frame any outcome-determinative difference.

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.<sup>30</sup> Moreover, New York's 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."<sup>31</sup> 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."<sup>32</sup> Montana, too, is a jurisdiction where "[t]he law looks to the substance rather than the form."<sup>33</sup> New York and Montana likewise take similar approaches to determining whether contracts are ambiguous and utilizing extra-contractual evidence to establish the parties' intent.<sup>34</sup>

NO  
advisory  
opinion

<sup>28</sup> See, e.g., *In re Bayer Phillips Colon Health Probiotic Sales Practices Litig.*, 2014 U.S. Dist. LEXIS 158233, at \*25 (D.N.J. Nov. 6, 2014).

<sup>29</sup> See, e.g., *Hall v. Beals*, 396 U.S. 45, 48 (1969) (articulating general rule that courts should "avoid advisory opinions on abstract propositions of law"); *Gerhart v. United States Dept. of Health and Human Servs.*, 242 F. Supp. 3d 806, 817 (S.D. Iowa 2017) (noting how "issuing a decision on the choice-of-law claim—detached from any underlying claims—would be tantamount to an advisory opinion"); *United Int'l Holdings v. Wharf (Holdings) Ltd.*, 946 F. Supp. 861, 866 (D. Colo. 1996) (declining to rule on choice-of-law issue when such a declaration "would be nothing more than an advisory opinion").

<sup>30</sup> See, e.g., *In re Dryden Advisory Grp.*, 534 B.R. at 620-26; *In re Cornerstone Tower Servs.*, 2018 Bankr. LEXIS 3562, at \*12-22.

<sup>31</sup> See, e.g., *Hall v. Eagle Ins.*, 151 A.D. 815, 822-26 (N.Y. App. Div. 1912), *aff'd*, 211 N.Y. 507 (1914).

<sup>32</sup> *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'").

<sup>33</sup> *Stanhope v. Shambow*, 54 Mont. 360, 363 (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 (2008) (discussing how Montana courts "emphasize substance over form" when interpreting legal instruments).

<sup>34</sup> Compare, e.g., *Ames v. Cty. of Monroe*, 162 A.D.3d 1724, 1725-26 (N.Y. App. Div. 2018), with, e.g., *Wicklund v. Sundheim*, 383 Mont. 1, 6 (2016).

Sale? Loan?

Because the outcome here remains the same regardless of which state's law applies,<sup>35</sup> the court declines to make a general choice-of-law determination at this juncture in the litigation and, therefore, denies the cross-motions for partial summary judgment requesting such a determination.

### *Disposition of CapCall's Substantive Issues*

#### 1. True Sale v. Loan

As discussed, CapCall asks the court to declare that the financial transactions at issue here were sales rather than loans. Even without viewing the record in the Trustee's favor, however, there are several legitimate reasons why the transactions would be classified as loans.

First, the security interests reflected in the parties' documents are significantly broader than one would expect from a sale. For instance, a January 22, 2015 Merchant Agreement purports to secure the Shoot the Moon entity's "payment and performance obligations to" CapCall 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, trade names, trade secrets, customer lists, licenses, [etc.]); goods; inventory; equipment and fixtures . . . and all proceeds of the foregoing."<sup>36</sup> Consistent with this broad granting clause, the UCC-1 financing statements CapCall filed describe the collateral as "[a]ll assets of the Debtor, now existing and hereafter arising, wherever located."<sup>37</sup>

To be sure, the filing of a financing statement alone is not conclusive evidence of a loan. Because Article 9 of the UCC applies to sales of accounts, it is not surprising that CapCall would file financing statements to perfect its interest in the putative purchased accounts – a buyer of accounts who fails to perfect its interest runs the risk of becoming subordinate to a subsequent buyer or other

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<sup>35</sup> The same conclusion may not follow in the context of other issues that may arise in this adversary proceeding. For example, if the court ultimately determines that the transactions at issue were loans, the Trustee asserts that those loans were usurious in violation of Montana law. CapCall may or may not have defenses to the Montana usury claim, but CapCall also argues that application of Montana law is unwarranted. If the ultimate outcome of the usury issue would differ based on the applicable state law, then the court will need to complete a choice-of-law analysis to finally adjudicate that dispute. At this point, however, it would be premature to perform that analysis in the abstract and when it is unclear whether fixing the applicable state law makes any difference.

<sup>36</sup> ECF No. 161-1, Annex "A" at p. 2.

<sup>37</sup> See, e.g., ECF No. 180-3.

secured party who is perfected.<sup>38</sup> The court sees no reason, however, why a buyer of accounts should receive and potentially perfect security interests in assorted assets beyond what it purchases.

Thus, it would be unwarranted for CapCall as a buyer of accounts, rather than a secured lender, to perfect an interest in the Shoot the Moon restaurants' inventory, equipment, service marks, and other assets unrelated to the receivables conveyed. To make this clearer through example, a buyer agreeing to purchase a house six months in the future might 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 in other property not subject to the sale, such as the seller's car. The fact that the documents at issue here include a broad security package for CapCall to generally collateralize the Shoot the Moon entities' payment obligations is indicative of a secured loan, not a sale. This interpretation is further supported by CapCall's own characterization in all-asset UCC-1 financing statements describing each Shoot the Moon entity as a "debtor" rather than a "seller" or words of similar import.<sup>39</sup>

Second, the transactions include various loan-like features that give CapCall recourse against property other than the receivables. For instance, a March 16, 2015 Merchant Agreement and related documents contain the following:

- A broad personal guaranty by Shoot the Moon's principal that "is an absolute, primary, and continuing guarantee of *payment* and performance" (emphasis added), "is a guarantee 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.<sup>40</sup>
- 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

<sup>38</sup> See U.C.C. § 9-318 Official Comment 3 (example describing contest between Buyer-1 and Buyer-2).

<sup>39</sup> See *id.* § 9-505(a).

<sup>40</sup> ECF No. 161-1, Annex "C" at p. 2.

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.<sup>41</sup>

- Various "Protections Against Default," including provisions 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 purchased accounts), permitting CapCall to generally enforce "its rights and remedies by lawsuit," authorizing CapCall to exercise rights under an assignment of lease 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 generally debit any of the Shoot the Moon entity's deposit accounts.<sup>42</sup>
- 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."<sup>43</sup>

Although none of these features is dispositive, their collective effect appears to provide CapCall with at least conditional recourse against the Shoot the Moon entities and the personal guarantor more generally. At a minimum, these provisions all reflect an allocation of risk whereby CapCall is protected by significantly more than just the value of the receivables it purportedly bought while the Shoot the Moon entity remains exposed. Such an overall arrangement is consistent with a debtor-creditor relationship, not a seller-buyer relationship.

Third, the parties' course of performance reflects a debtor-creditor relationship. The Trustee provided copies of emails in which the business principals describe the relationship as one involving "loans" with "terms."<sup>44</sup> Even

<sup>41</sup> *Id.* at pp. 37-38 of 200 per the ECF pagination.

<sup>42</sup> *Id.* ¶ 1.11 at pp. 3-4. 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.

<sup>43</sup> *Id.* ¶ 2.1 at p. 4.

<sup>44</sup> *See, e.g.*, ECF Nos. 171-15, 180-1.



more problematic for CapCall are materials provided by the Trustee that appear to demonstrate that the payments made to CapCall were funded through a deposit account owned by a Shoot the Moon entity that had no relationship with CapCall, that this deposit account commingled receivables CapCall purportedly bought with other funds, and that CapCall business people were aware of (and perhaps encouraged) this structure for processing the payments.<sup>45</sup> The evidence of the parties' course of dealing and understanding of the true substance of their relationship could be more fully developed at trial, but certainly the Trustee has provided evidence of conduct deeply inconsistent with true sales of receivables.

Absent compelling evidence to the contrary, this record supports a determination that the transactions between the Shoot the Moon entities and CapCall are loans. Factors (1), (2), and (8) from the Aicher and Fellerhoff article support a loan characterization.<sup>46</sup> Moreover, the overall economic substance and risk allocation of these transactions appear substantially similar to a loan. The multifaceted support for the Trustee's position in the current record means that CapCall is not entitled to summary judgment regarding this issue.

risk allocation

## 2. Trustee's Avoidance Actions

Finally, CapCall is not entitled to summary judgment regarding the Trustee's avoidance action claims. CapCall's request is based on its assertion that the Trustee has not identified the transfers at issue. Yet the Trustee has provided a declaration and spreadsheet detailing numerous transfers totaling more than \$1.1 million made to or for the benefit of CapCall within the 90 days before the Shoot the Moon bankruptcy filing.<sup>47</sup> Moreover, there is no dispute that CapCall actually received some restaurant receipts generated by the Shoot the Moon entities pursuant to the parties' Merchant Agreements – i.e., that property was in fact transferred to CapCall before the bankruptcy. Although it remains to be seen whether CapCall merely received a conveyance of property it previously purchased (pursuant to a true sale) or was the transferee of property in which the Shoot the Moon entities otherwise had an interest (pursuant to a secured loan), the Trustee has presented evidence of transfers that suffices to establish genuine issues of material fact regarding the Trustee's avoidance action claims. As such, CapCall's

<sup>45</sup> See, e.g., ECF No. 180-1.

<sup>46</sup> Some of the factors are unlikely to tilt in either direction or be relevant in this context. For example, since CapCall was purportedly buying "future" receivables (i.e., payments made by restaurant customers after the transactions closed), there were no account debtors who could be investigated by CapCall.

<sup>47</sup> ECF No. 171-14.

request for summary judgment regarding these counts of the Trustee's counterclaims must be denied.

### *Disposition of the Trustee's Substantive Issues*

In contrast to CapCall, the Trustee asks the court to summarily determine that the transactions at issue constitute loans. As described above, there is significant evidence supporting the Trustee's position. Nevertheless, at least when viewed in the light most favorable to CapCall, the record contains some evidence that could support a determination that the transactions were true sales.

First, the terms of 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."<sup>48</sup> Although "[s]imply calling transactions 'sales' does not make them so" because "[l]abels cannot change the true nature of the underlying transactions,"<sup>49</sup> these contractual provisions are not irrelevant and provide some evidence that could support a finding that the transactions were true sales.

Second, CapCall's position finds some support in case law in which courts found broadly similar agreements to be sales transactions based on the agreements' inclusion of reconciliation provisions and absence of fixed terms.<sup>50</sup> Here, at least some of the agreements include reconciliation provisions and none of the

<sup>48</sup> See, e.g., ECF No. 161-1 ¶ 1.9 at p. 3.

<sup>49</sup> *In re Woodson Co.*, 813 F.2d 266, 272 (9th Cir. 1987).

<sup>50</sup> 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 did not 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 recently 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 relationship even if *practical realization of that legal right* is "contingent on a merchant's success" and hence not assured.

agreements specifies a fixed term. Although the Trustee argues that the reconciliation provisions are illusory and were never actually utilized and that each of the transactions had an effective term which could be mathematically derived (as reflected in contemporaneous emails), these arguments require a full examination of the course of dealing between the parties and weighing of the evidence. Put differently, viewed in the light most favorable to CapCall, there are genuine issues of material fact regarding whether the inclusion of reconciliation provisions and absence of fixed terms are sufficiently indicative of sale transactions.

Third, at least some of the Aicher and Fellerhoff factors appear to support CapCall's position, including the absence of any provisions allowing the Shoot the Moon entities to repurchase the receivables or permitting CapCall to alter the pricing terms.

In sum, when viewed in the light most favorable to CapCall, the evidence creates some possibility that the court could ultimately conclude that the transactions were true sales. To be sure, the Trustee looks to have the better side of the dispute, but a final resolution either way requires the development of a complete record that the court can analyze through an impartial lens (rather than in the light most favorable to the nonmoving party as required at the summary judgment stage). At day's end, distinguishing true sales from loans is a fact-intensive and holistic exercise ill suited for resolution under Rule 56.<sup>51</sup>

## SUMMATION

To wrap up, the court concludes that neither CapCall nor the Trustee is entitled to summary judgment on any issue. At this stage, it is premature for the court to decide which state's law should apply. Likewise, the court cannot decide whether these transactions constitute loans or true sales at the summary judgment stage. Although the evidence supporting the Trustee's side of this issue is much more robust, the court ultimately cannot resolve such a highly factual question without development of a complete record at trial. Finally, there are sufficient factual questions related to the Trustee's avoidance actions for those claims to survive a Rule 56 motion. Because neither party is entitled to partial summary judgment, the court denies both motions.

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<sup>51</sup> See, e.g., *IT Grp., Inc. v. Anderson Equip. Co. (In re IT Grp., Inc.)*, 332 B.R. 673, 676 n.7 (Bankr. D. Del. 2005).

DATED: November 6, 2020.



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WHITMAN L. HOLT  
U.S. BANKRUPTCY JUDGE

12/18/22, 4:07 PM

Gmail - FW: Flexibility Capital v. Sabatino Cupelli et al 22C429



EXHIBIT 2

David Tulis <davidtuliseditor@gmail.com>

**FW: Flexibility Capital v. Sabatino Cupelli, et al 22C429**

3 messages

Mary Cheadle <mtheadle@theadlelaw.com>  
To: "Parham, Catherine" <CatherineP@mail.hamiltontn.gov>  
Cc: David Tulis <davidtuliseditor@gmail.com>

Tue, Nov 22, 2022 at 11:45 AM

Ms. Parham -

The parties have agreed to continue the defendants' motion to reconsider from November 28, 2022, to December 19, 2022.

Thank you -

Mary Barnard Cheadle

CHEADLE | Law  
2404 Crestmoor Road  
Nashville, TN 37215  
mtheadle@theadlelaw.com  
www.theadlelaw.com  
615.254.1009 (Office)  
615.254-9298 (Fax)

FILED IN OFFICE  
2022 DEC 19 AM 8:47  
LARRY L. HENRY, CLERK  
BY \_\_\_\_\_ DS

This is an attempt to collect a debt and any information obtained will be used for that purpose. This communication is from a debt collector.

**From:** David Tulis <davidtuliseditor@gmail.com>  
**Sent:** Tuesday, November 22, 2022 10:38 AM  
**To:** Mary Cheadle <mtheadle@theadlelaw.com>  
**Subject:** Re: Flexibility Capital v. Sabatino Cupelli, et al

Mrs. Cheadle, This is quite all right with me. Thank you for letting me know what works for you. Please tell Cathy I consent. David

On Tue, Nov 22, 2022, 11:12 AM Mary Cheadle <mtheadle@theadlelaw.com> wrote:

Mr. Tulis -

250

12/18/22, 4:07 PM

Gmail - FW: Flexibility Capital v. Sabatino Cr... et al 22C429

I have received your motion to reconsider that is scheduled to be heard on Monday, November 28, 2022.

I am already scheduled to be in Court in Knox County General Sessions Court on Monday, November 28, 2022, for 75 cases. I am next available on December 19, 2022.

Would you agree for your pending motion to reconsider to be heard on December 19, 2022?

Sincerely -

Mary Barnard Cheadle

CHEADLE | Law

2404 Crestmoor Road

Nashville, TN 37215

mcheadle@cheadlelaw.com

www.cheadlelaw.com

615.254.1009 (Office)

615.254-9298 (Fax)

This is an attempt to collect a debt and any information obtained will be used for that purpose. This communication is from a debt collector.

---

Parham, Catherine <CatherineP@hamiltontn.gov>

Tue, Nov 22, 2022 at 12:03 PM

To: Mary Cheadle <mcheadle@cheadlelaw.com>

Cc: David Tulis <davidtuliseditor@gmail.com>

Good, thanks for letting me know. I will pass the motion to the 19<sup>th</sup> of December. Happy Thanksgiving to you all!

[Quoted text hidden]

---

David Tulis <davidtuliseditor@gmail.com>

Tue, Nov 22, 2022 at 12:18 PM

To: "Parham, Catherine" <CatherineP@hamiltontn.gov>

Yes, ma'am. Calendar adjusted. David

[Quoted text hidden]

David Tulis

NoogaRadio 96.9 FM

Your USA Radio News affiliate

(423) 316-2680 c

251

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

FILED IN OFFICE  
2022 DEC 22 PM 3:50  
LARRY L. HENRY, CLERK  
ALP  
DC

Flexibility Capital Inc. )  
)  
vs. )  
)  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. IV

Filed by email Dec. 22, 2022  
circuitpleadings@hamiltonTN.gov

Motion to set aside order for intrinsic fraud,  
& demand for mandatory judicial notice

Accused in this dispute on whether Flexibility Capital can sue to enforce an illegal usury contract demand the court set aside its Dec. 5, 2022, order for summary judgment in favor of plaintiff.

1. The court at a hearing Dec. 19, 2022, heard defendants' motion filed Nov. 17, 2022, in which the demand for relief highlights two areas of the lawsuit requiring review. (1) The contract is illegal as a usurious loan prohibited by Tenn. Code Ann. § 47-14-103 (10 percent max limit) and under § 47-14-110 (usury defense). (2) The prosecution of the case is by a party engaging in intrinsic fraud.
2. The court heard oral arguments about how a fraudulent contract prevents Flexibility and Cheadle Law from having standing to sue, and that any suit presented to a judge to secure advantages of such contract fails to give the court subject matter jurisdiction.

3. Accuseds' "Answer to plaintiff response to motion to reconsider, challenge to subject matter jurisdiction," filed with the clerk just before the hearing and served on plaintiff in open court, gives details that are basis of oral argument.
4. Whenever a court's subject-matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has jurisdiction to adjudicate the claim. Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012). Attorney Mary Cheadle does not rise to offer such proof of jurisdiction at the Dec. 19 hearing, so the court can make a determination on the spot of subject matter jurisdiction. Nor does she dispute anything in accuseds' motion or in their oral argument that Flexibility and Cheadle Law are engaged in a fraud on the court, which grievance plaintiff briefs in his motion to reconsider.

## Demand for mandatory judicial notice

5. The court rejects the duty in well established law to have its conscience shocked at fraud, deceit, usury, ill-dealings.<sup>1</sup> Defendants demand it take mandatory judicial notice of the law, per Tennessee evidence rule no. 202 as regards the control of state **law and court rulings**.<sup>2</sup> These authorities are laws that control interest rates

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<sup>1</sup> "Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest the craft of men should find ways of committing fraud which might evade such a definition. In its most general sense, it embraces all 'acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.' 1 Bouv.L.D., page 613."

New York Life Ins. Co. v. Nashville Tr. Co., 200 Tenn. 513, 523, 292 S.W.2d 749, 754 (1956) (emphasis added)

<sup>2</sup> **Rule 202: Judicial notice of law.**

(a) Mandatory Judicial Notice of Law. The court shall take judicial notice of  
(1) the common law,



for loans, forbid usury; rules that require a court to have subject matter jurisdiction before hearing a case; and canons relating to judicial ethics.

a. Tenn. Code Ann. § 47-14-103 establishes a maximum loan limit of 10 percent.

b. Tenn. Code Ann. § 45-5-301 allows certain types of lenders to charge interest rates treble the general limit. "On loans where the amount financed is one hundred dollars (\$100) or more, up to five thousand dollars (\$5,000), on the principal at any rate not in excess of a maximum effective rate of thirty percent (30%) per annum."

c. Other loans allowed under this provision allow 24 percent interest.

d. Willful usury is a class A misdemeanor. T.C.A. § 47-14-112.

e. Willful is "proceeding from a conscious motion of the will; voluntary. Intractable having a headstrong disposition to act by the rule of contradiction. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." *Black's Law Dictionary*, Rev. 4th ed.

f. Accused have a right to due process under the 14th amendment to not be sued or tried in any court lacking subject matter jurisdiction, and no court rule or custom can deprive them of that right. "Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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(2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States,

(3) all rules adopted by the United States Supreme Court or by the Tennessee Supreme Court, and

(4) any rule or regulation of which a statute of the United States or Tennessee mandates judicial notice.

g. Rule 10 in the code of judicial conduct specifies that “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially,” Rule 2.2, impartiality and fairness. “A judge shall hear and decide matters assigned to the judge, except when disqualification is required \*\*\* ,” Rule 2.7, responsibility to decide.

h. From fraud no action arises. — Legal maxim

6. Accused demand the court take judicial notice of evidence rule no. 201 regarding **adjudicative facts**,<sup>3</sup> as follows:

a. The 14-page Flexibility contract provides on pp. 11, 12 a “personal guaranty of performance.” This provision contradicts the document that on p. 1 calls itself a “future receivables sale and purchase agreement.”

b. The personal guaranty, counted by page numbers as being on the face of the contract, makes the contract for future receivables a loan in fact for which repayment is absolutely required.

c. The rate of interest is 208 percent, 198 percentage points more than what is allowed by law.

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<sup>3</sup> **Rule 201: Judicial notice of adjudicative facts.**

(b) Kinds of Facts - A judicially noticed fact must be one not subject to reasonable dispute, in that it is either

- (1) generally known within the territorial jurisdiction of the trial court or
- (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(d) When Mandatory - A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard - A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice is taken.

(f) Time of Taking Notice - Judicial notice may be taken at any stage of the proceeding. (emphasis added)

d. The court is asked to take notice of the procedural and inculpatory legal facts of this case, the course of proceedings including motion for reconsideration filed Nov. 17, eighteen days before the court signed the order granting summary judgment.<sup>4</sup> The motion to reconsider and supporting brief show the Flexibility contract is usurious, fraudulent, deceptive and unenforceable against accused, and that Flexibility, aided by Cheadle Law, is working a fraud on the court.

e. The elements of fraud on the court are developed in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993), p. 7ff of the brief.

f. At the hearing, Flexibility does not defend the subject matter jurisdiction of the court, which is its duty to perform once subject matter jurisdiction of the court is challenged. Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012). It simply asks that the order for summary judgment be upheld, stating no grounds.

7. Plaintiff cites Holland v. City of Memphis, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003) to secure the finality of the court's summary judgment. "Failure to file a response in opposition to a motion for summary judgment *generally* will prove fatal in the trial court and upon appeal" (emphasis added).
8. Omission of a statement of material facts is fatal to a case, generally. *It depends on the case*. Defendant's procedural goofs are unjust to flag when the case itself flutters the pennant of the Jolly Roger, deserving no berth in this port.

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<sup>4</sup> The order for summary judgment, drafted by Flexibility attorney Cheadle, materially alters the language of the undisputed material facts alleged in the complaint. In the complaint and supporting exhibits, Flexibility uses "loan" and "money" language suitable to a lender-debtor relationship. The court on Nov. 7 read from the complaint using this terminology. (See Motion to reconsider, pp. 1, 2, tracking these admissions.) The draft order omits loan language entirely, misleading the court in breach of attorney candor rule at Rule 3.3 in Cheadle's persistent efforts to violate Rule 1.2(d), assisting a client involved in crime, for which breach Mrs. Cheadle deserves sanction.

## Intrinsic fraud

9. Flexibility takes shelter in the rules of civil procedure that provide thin cover as against claims raised Nov. 17, 2022, and onward. In answer filed Dec. 9 (mailed only on Dec. 12) it says its motion for summary judgment “had been pending for six (6) months,” that its statement of facts is “deemed admitted,” that the accused’ fraud issue is “belatedly” raised and thus waived. Plaintiff says 24 percent interest is “not usurious,” citing Tenn. Code Ann. § 45-5-301, insisting “[t]he interest provided for in the underlying agreement is not usurious.” At the hearing Flexibility says fraud and subject matter jurisdiction are “new arguments \*\*\*late in the game” and “should have been brought up in the very beginning.” Flexibility defends the summary judgment.
10. It does not deny intrinsic fraud. Except for the written claim the contract is “not usurious,” it doesn’t deny its loan’s 208.05 percent annual percentage rate. It does not deny fraud on the court. When defendant challenges the court’s subject matter jurisdiction, plaintiff has the burden of demonstrating that the court has jurisdiction to adjudicate the claim. Redwing, Id. Plaintiff does not defend the court’s subject matter jurisdiction.
11. Intrinsic fraud in these proceedings is shown in the evidentiary facts (the contract, the rate of interest on the loan) as under the ultimate fact of the law (state ban on usury, procedural due process right to raise issue of subject matter jurisdiction at any time).
12. A petition within the operation of a court case to overturn a judgment for fraud must cite intrinsic fraud, or a wrong that is “part of the internal chain composing the process of adjudication” Rollins v. Rollins, No. 85-248-II, 1986 WL 4005, at \*2 (Tenn. Ct. App. Apr. 4, 1986). “Intrinsic fraud occurs ‘within the subject matter

of the litigation,’ and it includes such things as falsified evidence, forged documents, or perjured testimony. Whitaker v. Whirlpool Corp., 32 S.W.3d 222, 229–30 (Tenn.Ct.App.2000). Extrinsic fraud, on the other hand, ‘involves deception as to matters not at issue in the case which prevented the defrauded party from receiving a fair hearing.’” Black v. Black, 166 S.W.3d 699, 703–04 (Tenn. 2005). Where a decree or judgment is sought to be set aside because procured by fraud, facts must be proven which show a contrivance by one party to keep the other party in ignorance of the real facts touching the matter in litigation, whereby a wrong conclusion was reached, and positive injury done to the rights of the complaining party. Smith v. Miller, Tenn.Ch.App. 1897, 42 SW 182. Rollins, Id.

13. Contract in dispute is for a loan at 208.05 percent interest, illegal in Tennessee under the usury law and not allowed state chartered banks in T.C.A. § 45-5-301.

## ‘Earliest possible opportunity’

14. “As orders and judgments entered by courts lacking subject matter jurisdiction are void, ‘issues regarding subject matter jurisdiction should be considered as a threshold inquiry’ and “resolved at the earliest possible opportunity.”” Nandigam Neurology, PLC v. Beavers, 639 S.W.3d 651, 660 (Tenn. Ct. App. 2021) It is plain error to not make a determination immediately Dec. 19, 2022, and to dismiss accuseds’ motion for reconsideration and not rule on the foundational threshold question of subject matter jurisdiction based on oral and written pleadings;<sup>5</sup>

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<sup>5</sup> Had it not read the motion, the court could have adjourned five minutes, read accused's Answer to plaintiff response to motion to reconsider, filed that morning, and made a ruling on subject matter jurisdiction.

15. It is unjust for the court to say effectively, because accused failed to heed the court's lenity regarding their missing-in-action statement of material facts, "What I have written, I have written."
16. Flexibility is a corporation alien to state of Tennessee avoiding regulation for lending practices by being not a lender, but a factor, a purchaser of merchant future receivables. In bad faith Flexibility does business under this subterfuge. Confusion early in the case as to the nature of the agreement shows no meeting of the minds were it to have been a legal contract, signed by all parties (which it wasn't).
17. It is oppressive, with parties present, to say accused can petition the court of appeals when rules for judges to settle disputes before the bar, and not shove them to the appellate court. As the petition is void from inception, being a fraud, there is no case to appeal as circuit court has no subject matter jurisdiction. The court prolongs injustice, increases an unnecessary workload to appeal, and increases costs on the parties, contrary to law or rule for speedy and just disposal, if the presumed subject matter jurisdiction is overturned.

## Demand for relief

Requesting the court's fair reading of surviving elements of earlier motions, and of the foregoing, defendants seek redress as follows:

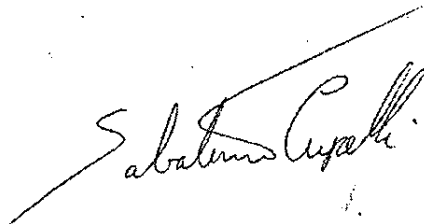
18. ➤ This rule 60.02 motion to overturn a judgment is timely made within the one-year limit; if anything is lacking, *pro se* defendants request word from the court about shortcomings in their petition so that it might fulfill their intentions, in the interest of equity, reserving their right to amend the filing.

19. ➤ Defendants give mandatory judicial notice as to matters of law and fact herein detailed, and appreciate the court's consideration and time. Earlier demands for relief in this case not stated here are incorporated by reference.

20. ➤ Petitioners demand a setting aside of the court's Dec. 5, 2022, order of summary judgment if only for purposes of the docket. A set-aside would allow time for a hearing and for the court to reset the 30-day clock for notice of appeal, which toll otherwise hits Jan. 4.

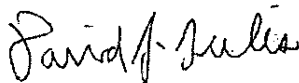
21. ➤ Accused demand the court write an order stating its findings of law and fact for purposes of appeal and also, if accused are correct, to serve as notice to foreign entities such as Flexibility Capital and others in like situation bold enough to entrap people in Tennessee to eat out their substance.

Respectfully submitted,



By \_\_\_\_\_

Sabatino Cupelli

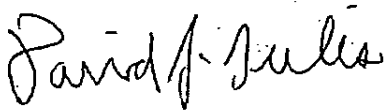


By \_\_\_\_\_

David Jonathan Tulis

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being emailed to attorney Mary Cheadle at [mcheadle@cheadlelaw.com](mailto:mcheadle@cheadlelaw.com) this 22nd day of December, 2022, her mailing address as follows: Mary Barnard Cheadle 2404 Crestmoor Road Nashville, TN 37215



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David Jonathan Tulis



IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
 )  
vs. )  
 )  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. IV

Filed by email Dec. 29, 2022  
circuitpleadings@hamiltonTN.gov

**FILED IN OFFICE**  
**DATE/TIME** 12/29/22  
**LARRY L. HENRY, CLERK**  
**BY** mm

Motion to delay clock on notice of appeal

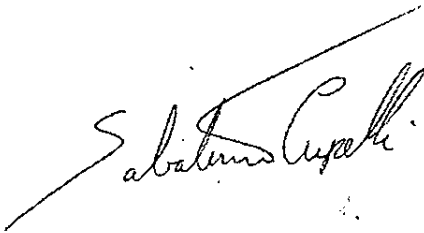
The accused move the court under Tennessee rule of appellate procedure 4(b)(4) to halt the tolling of the clock that controls the time limit after a final judgment, a 30-day window in which to give such notice of appeal.

Dec. 4, 2022, is the date of the court's issuing a summary judgment against defendants, with Jan. 4, 2023, marking the closing date of the 30-day appeal window, per TRAP rule 4(a). However, on Dec. 22 at 3:44 p.m., a Thursday, accused filed a Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice, which filing triggers the court's calendar for personal appearance Jan. 2, 2023.

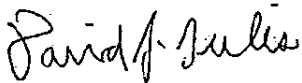
In the event that Jan. 2 does not work for plaintiff, and the court will need time to issue an order, accused move the court to secure the appeal window opening until after the hearing

and after any order issued thereafter, per Rule 4(b)(4), <sup>1</sup> so that equity may prevail between the parties and justice served.

Respectfully submitted,



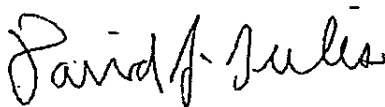
By \_\_\_\_\_  
Sabatino Cupelli



By \_\_\_\_\_  
David Jonathan Tulis

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being emailed to attorney Mary Cheadle at [mcheadle@cheadlelaw.com](mailto:mcheadle@cheadlelaw.com) this 29th day of December, 2022, her mailing address as follows: Mary Barnard Cheadle 2404 Crestmoor Road Nashville, TN 37215



\_\_\_\_\_  
David Jonathan Tulis

<sup>1</sup> (4) under Rule 59.04 to alter or amend the judgment; the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.




It is, accordingly, ORDERED, ADJUDGED AND DECREED that defendants motion to reconsider is denied.

ENTER this 18<sup>th</sup> day of Jan, 2022.

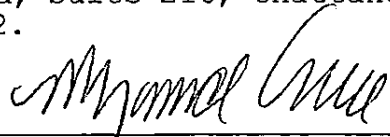
  
CIRCUIT COURT JUDGE

SUBMITTED FOR ENTRY:

  
**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 30<sup>th</sup> day of December, 2022.

  
\_\_\_\_\_  
**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.shell; 21001231)

**CLERK CERTIFICATE**

The undersigned hereby certifies that a copy of this Order has been mailed to all parties or to counsel of all parties in this cause.

This 18 day of Jan 2022

By LARRY E HENRY CLERK D.C.

Mary B. Cheadle  
Sabatino Cupelli  
David J. Tulis.

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
AT CHATTANOOGA  
DIVISION IV

FILED IN OFFICE  
2023 FEB -6 AM 10:46  
LARRY L. HENRY, CLERK  
BY HPA DC

FLEXIBILITY CAPITAL, INC. )  
 )  
Plaintiff, )  
 )  
VS. )  
 )  
SABATINO CUPELLI and )  
DAVID JONATHAN TULIS, )  
D/B/A HOT NEWS TALK RADIO )  
 )  
Defendants. )

NO. 22C429

IV

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION  
TO SET ASIDE ORDER

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, John R. Cheadle, Jr. and Mary Barnard Cheadle, and in response to defendants' motion to set aside order, would respond:

1. Defendants previously filed a motion to reconsider on November 11, 2022. Defendants' motion to reconsider was heard on December 19, 2022. At the hearing, defendant David Jonathan Tulis provided at the hearing to plaintiff's counsel a copy of defendants' "answer to plaintiff response to motion to reconsider, challenge to subject matter jurisdiction."

2. At the conclusion of the hearing on December 19, 2022, the Court denied defendants' motion to reconsider and found that defendants' assertion that the Court does not have subject matter jurisdiction has been waived as not previously asserted.

3. On January 3, 2023, the Court entered an order denying defendants' motion to reconsider.

4. Defendants have now filed a motion to set aside the order of summary judgment entered on December 5, 2022. This motion

is the same as defendants' motion to reconsider that the Court has previously denied. The defendants are asserting the same belated arguments that they asserted at the hearing on their motion to reconsider.

5. The Court properly granted plaintiff's motion for summary judgment, as the Court reaffirmed in the order denying defendants' motion to reconsider.

6. This is another attempt by the defendants to assert the same belated arguments that they made in their motion to reconsider, that was denied.

THEREFORE, plaintiff respectfully requests that defendants' motion to set aside order be denied.

DATED: January 31, 2023.

Respectfully submitted,



**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 31<sup>st</sup> day of January, 2023.



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**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.shell; 21001231)

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

FILED IN OFFICE  
2023 FEB 27 PM 1:09  
LARRY L. HENRY, CLERK  
BY DMH DR

Flexibility Capital Inc. )  
)  
vs. )  
)  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429  
IV  
Div. IV Judge Kyle Hedrick

### Affidavit and objection to signing final order

Comes now, David Jonathan Tulis, of sound mind and body, declaring the following facts true and points of law correct to the best of his firsthand knowledge and study, as follows:

1. Accused object to the court's signing a proposed final order giving judgment in favor of Flexibility Capital, the nominal plaintiff, and Cheadle Law, prosecuting the matter as debt collector, as the court has no subject matter jurisdiction to sign a judgment. It may under law do a single thing: *Dismiss the case ministerially, with prejudice*, as follows.
2. The court lacks subject matter jurisdiction because plaintiffs are pursuing a case rife with intrinsic fraud, a loan agreement illegal in Tennessee and in New York, where it is headquartered, given that the unsigned contract at issue is not an advance purchase of future receivables, but a loan. And that loan has an annual percentage rate passing 208 percent.



3. The court is insensible to the law's claims upon it regarding subject matter jurisdiction. Accused's objection incorporates their (1) Motion to set aside order for intrinsic fraud, & demand or judicial notice, and (2) Answer to plaintiff response to motion to reconsider, challenge to subject matter jurisdiction, and (3) Motion to reconsider and its supporting brief, all of record. In these filings, and in oral presentation, accused have presented defects lethal to plaintiff.
4. The order says "the Court will not disturb its earlier ruling. Defendants failed to respond to plaintiff's specification of material facts as required by Rule 56.03." Accused "are now attempting to belatedly assert new defenses, including subject matter jurisdiction. The time has run out to assert such defenses. The judgment is final." Their motions to reconsider — denied. Motion to set aside — denied.

## Plaintiff must establish subject matter jurisdiction

5. Plaintiff has given no answer to accused's challenge to jurisdiction, as required by law. The reply from Flexibility, which drafted the court's order, is that the time has elapsed to challenge it. The doctrine applies in administrative disputes. "We hold that a trial court does not have subject matter jurisdiction of a workers' compensation case until the plaintiff employee has exhausted the benefit review conference process. \*\*\* Where subject matter jurisdiction is challenged under Rule 12.02(1), the party asserting that subject matter jurisdiction exists \*\*\* has the burden of proof." Chapman v. DaVita, Inc., 380 S.W.3d 710, 712 (Tenn. 2012)
6. The court pits a procedural signpost against a piece of legal infrastructure and finds the infrastructure wanting. Accused object. A procedural error is of little matter when plaintiff and court, as if on a team, fail to establish subject matter

- jurisdiction, unmistakable as law in Tennessee, foundational across American jurisprudence.
7. ➤ “Whenever subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has jurisdiction to adjudicate the claim.” Redwing v. Cath. Bishop for Diocese of Memphis, 363 S.W.3d 436, 445 (Tenn. 2012)
  8. ➤ “A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.” Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)
  9. ➤ “If it were a case of intrinsic fraud, the court would clearly have no jurisdiction of the case.” New York Life Ins. Co. v. Nashville Tr. Co., 200 Tenn. 513, 532, 292 S.W.2d 749, 758 (1956)
  10. ➤ “Judgment of court without jurisdiction is void.” Harvey v. City of Oneonta, 715 So. 2d 779 (Ala. 1998)
  11. ➤ “Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction.” *See* F.R.Civ.P. 12(h)(3), *supra* note 1. Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973)
  12. ➤ “The lack of subject matter jurisdiction may properly be raised for the first time at the appellate stage.” Hill Top Devs. v. Holiday Pines Serv. Corp., 478 So. 2d 368, 370 (Fla. Dist. Ct. App. 1985)

13. ➤ “However, when the parties have not provided sufficient legal or factual justification for this Court's jurisdiction, this Court is *not* obligated to embark on its own expedition beyond the parties' arguments in pursuit of a reason to exercise jurisdiction. The burden of establishing the existence of subject-matter jurisdiction falls on the party invoking that jurisdiction.” Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008)
14. ➤ “Once jurisdiction has been challenged, the plaintiff bears the burden of proving the existence of jurisdiction. Once the plaintiff makes out a prima facie showing, the burden shifts to the moving party to show a lack of jurisdiction.” Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651, 653 (8th Cir.1982) (citations omitted) Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 42 (8th Cir. 1988)
15. ➤ “A judgment is void if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process.” Klugh v. United States, 620 F. Supp. 892, 901 (D.S.C. 1985), aff'd in part, vacated in part, 818 F.2d 294 (4th Cir. 1987)
16. ➤ “A court's authority to exercise its subject matter jurisdiction over a case may be restricted by a failure to comply with statutory requirements that are mandatory in nature and, thus, are prerequisite to a court's lawful exercise of that jurisdiction.” Moore v. Commonwealth, 259 Va. 405, 409, 527 S.E.2d 415, 417 (2000)
17. ➤ “As orders and judgments entered by courts lacking subject matter jurisdiction are void, ‘issues regarding subject matter jurisdiction should be considered as a threshold inquiry’ and ‘resolved at the earliest possible opportunity.’” Nandigam Neurology, PLC v. Beavers, 639 S.W.3d 651, 660 (Tenn. Ct. App. 2021)

18. Flexibility, a corporation, is a creature of government. "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." Ex parte Rhodes, 202 Ala. 68, 71, 79 So. 462, 465 (1918)

## Fraud, fraud on the court

19. This case is void. It is without form. As a matter of law it is a nullity for reasons adverted to in the record, namely lack of subject matter jurisdiction. The movant operates a criminal lending enterprise. Its attorney, Cheadle Law, is debt collector in intentional and knowing activity that is a felony in New York and a misdemeanor in Tennessee, even when looking most leniently at Tennessee statutory limits on loan interest rates.

20. Flexibility and Cheadle Law, under notice in writing by accused in this case, impose a fraud on the court — getting the court to uphold an unconscionable and unenforceable contract, the defects of which deny sufficiency to any pretense of subject matter jurisdiction. Plaintiffs make no defense of the court's subject matter jurisdiction, nor has the court turned to plaintiffs to demand their defense of its authority.

21. The court, under notice of undenied intrinsic fraud and fraud on the court by accused, is urged to consult Rule 10 for a basis for its refusal to hear appeals alleging plain error and acting to extend litigation into the court of appeals when the law is clear that the case must be dismissed ministerially, and with prejudice.

Further, at this time, affiant sayeth naught.

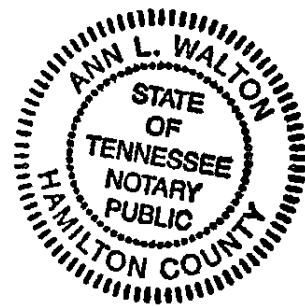
Respectfully submitted,

David Jonathan Tulis

David Jonathan Tulis

STATE OF TENNESSEE, COUNTY OF Hamilton — I, the undersigned notary public, do hereby affirm that David Jonathan Tulis was present before me on the 25<sup>th</sup> day of February 2023, and signed this affidavit as his free and voluntary act and deed.

Ann L. Walton  
(notary public) Commission Exp.: 8/12/2026



Sabatino Cupelli

By \_\_\_\_\_  
Sabatino Cupelli

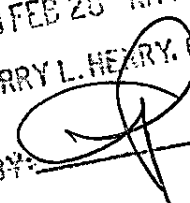
**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this document is being emailed to attorney Mary Cheadle at mcheadle@cheadlelaw.com this 27<sup>th</sup> day of February, 2023, or sent to her mailing address as follows: Mary Barnard Cheadle 2404 Crestmoor Road Nashville, TN 37215

David J. Tulis

\_\_\_\_\_  
David Jonathan Tulis

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

FILED IN OFFICE  
2023 FEB 28 AM 11:04  
LARRY L. HENRY, CLERK  
BY:  DC

FLEXIBILITY CAPITAL, INC.  
Plaintiff/Appellee  
VS

DOCKET NO. 22C429  
DIVISION IV

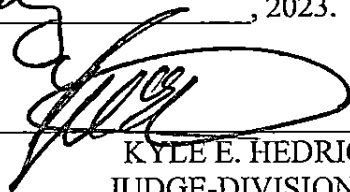
SABATINO CUPELLI and DAVID  
JONATHAN TULIS, D/B/A HOT NEWS  
TALK RADIO  
Defendants/Appellants

ORDER

This matter came before the Court on February 6, 2023, upon defendants' Motion to Delay Clock on Notice of Appeal. Upon argument of counsel and the record as a whole, the Court found the motion was not well taken.

It is therefore ORDERED that defendants' Motion to Delay Clock on Notice of Appeal is hereby denied.

Entered this 28<sup>th</sup> day of Feb, 2023.



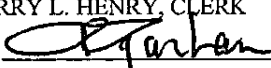
KYLE E. HEDRICK  
JUDGE-DIVISION IV

CLERK CERTIFICATE

The undersigned hereby certifies that a copy of this order has been mailed to all parties or counsel to all parties in this cause.

This 28 day of February 2023

LARRY L. HENRY, CLERK

BY  D.C.

Mary B. Cheadle  
Sabatino Cupelli  
David J. Tulis

RECEIVED

MAR - 8 2023

Clerk of the Appellate Courts  
Received by *[Signature]*

8:00 a.m.

2023-00335-CA-03-CV

In the court of appeals in Knoxville

FILED
MAR - 8 2023
Clerk of the Appellate Courts Rec'd by <i>[Signature]</i>

Flexibility Capital Inc. )  
 )  
 vs. )  
 )  
 Sabatino Cupelli )  
 8665 Summit Creek Way )  
 Chattanooga, TN37363 )  
 David Jonathan Tulis )  
 10520 Brickhill Lane )  
 Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. IV Judge Kyle Hedrick

### Notice of appeal

Notice is hereby given that defendants appeal summary judgment against them as matter of right, pursuant to oral denial Feb. 6, 2023, of accuseds' "Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice" at a hearing in Hamilton County circuit court Feb. 6, 2023.

Respectfully submitted,

*David Jonathan Tulis*  
 \_\_\_\_\_  
 David Jonathan Tulis

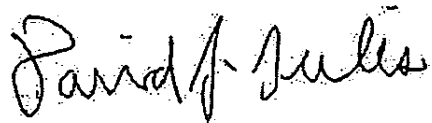
*Sabatino Cupelli*  
 \_\_\_\_\_

Sabatino Cupelli

**CERTIFICATE OF SERVICE**

Sabatino Cupelli and David Jonathan Tulis certify that a true and exact copy of this motion is being sent by first-class mail this 13th day of September, 2022, to:

Mary Barnard Cheadle  
2404 Crestmoor Road  
Nashville, TN 37215

A handwritten signature in cursive script that reads "David Jonathan Tulis". The signature is written in dark ink and is positioned above a horizontal line.

---

David Jonathan Tulis



IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENN.

Flexibility Capital Inc. )  
)  
vs. )  
)  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

FILED IN OFFICE  
DATE/TIME 3-29-23  
LARRY L. HENRY, CLERK  
BY [Signature] D.C.

Case No.

22C429

Div. IV

Filed by email March 29, 2023

Circuitpleadings@hamiltonTN.gov

Motion to reverse garnishment order pending appeal

Comes now David Jonathan Tulis, accused in above case, to move the court to stay garnishment action pending appeal, and to move immediately in the interest of equity as petitioner received no service of summons.

1. Petitioner's notice of appeal is filed March 8 in the court of appeals under petition in pauperis. **EXHIBIT No. 1.**
2. Accused objects to lack of service from Cheadle Law, to Flexibility's debt collector attorney's failing to give him summons. Plaintiff sent service of garnishment summons to a former company address at 5512 Ringgold Road in East Ridge. Plaintiff knows full well the mailing address of accused, as this address appears at the top of every filing in the case.
3. The lawsuit is against accused personally, and not against the corporation Hot News Talk Radio. It is bad faith to send service of summons to an incorrect party

at a dead address and thus deny service to petitioner, and notice, as law requires.

**EXHIBIT No. 2.**

4. The document indicates the sheriff's department "was served on \*\*\* garnishee" March 8, 2023. The garnishment order is filed with circuit court clerk March 27, 2023.
5. Plaintiff seized funds from two trusts March 28, 2023 at Tennessee Valley Federal Credit Union, said trusts being parties not involved in this lawsuit and petitioner injured, as beneficiary, by their seizure under the court's order..
  - a. DAVID J. TULIS TRUST, Acct. no. XXXXXXXX380. The amount seized is \$299.01.
  - b. DAVID J. TULIS TRUST, Acct. no. XXXXXXXX966. The amount seized is \$1,562.78
6. Accused moves for a stay of execution pursuant to Rules 62.03 and 62:04.
7. The grounds for relief from execution of garnishment are equitable. It is unjust and improper to allow garnishment upon in pauperis appellant that is not equitable but imposing a negative equity upon petitioner protected by Tennessee usury law and the court's duty to secure justice in the litigation.
8. Accused has an equitable interest in relief from prosecution of an illegal contract in the case, and to be secured in the equitable use of entrusted property until the appeal is complete.

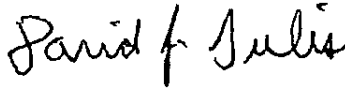
## Relief sought

9. Petitioner asks the court to remand, stay and rescind the garnishment order of March 27, 2023.

10. He asks that the order direct Tennessee Valley Federal Credit Union involved in tis action to restore his use of the property.

11. He asks the order clearly stay execution on any other property, pending appeal and a final order in circuit pursuant to a court of appeals order.

Respectfully submitted,



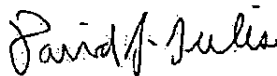
---

David Jonathan Tulis

#### CERTIFICATE OF SERVICE

David Jonathan Tulis certifies that a true and exact copy of this motion is being sent this 29th day of March to this address.

John R. Cheadle Jr.  
2404 Crestmoor Road  
Nashville, TN 37215



---

David Jonathan Tulis

RECEIVED  
MAR - 8 7 23  
Clerk of the Appellate Courts  
Received by: [Signature]  
8:00 a.m.

Exhibit 1  
E 2023-00322-CV R3-CV

FILED  
MAR - 8 2023  
Clerk of the Appellate Courts  
Rec'd by: [Signature]

In the court of appeals in Knoxville

Flexibility Capital Inc. )  
)  
vs. )  
)  
Sabatino Cupelli )  
8665 Summit Creek Way )  
Chattanooga, TN37363 )  
David Jonathan Tulis )  
10520 Brickhill Lane )  
Soddy-Daisy TN 37379 )

Case No.  
22C429

Div. IV Judge Kyle Hedrick

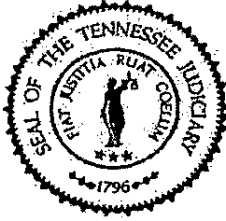
Notice of appeal

Notice is hereby given that defendants appeal summary judgment against them as matter of right, pursuant to oral denial Feb. 6, 2023, of accuseds' "Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice" at a hearing in Hamilton County circuit court Feb. 6, 2023.

Respectfully submitted,

David Jonathan Tulis  
David Jonathan Tulis

Sabatino Cupelli  
Sabatino Cupelli



Court of Appeals – Eastern Division  
Appellate Court Clerk's Office - Knoxville  
Supreme Court Building  
505 Main Street, Suite 200  
Knoxville, TN 37902  
(865) 594-6700

David Jonathan Tulis  
c/o 10520 Brickhill Lane  
Soddy-Daisy TN 37379

Re: E2023-00335-COA-R3-CV - FLEXIBILITY CAPITAL INC. v. SABATINO CUPELLI,  
ET AL.

Notice: Initiating Document - TRAP 3 Notice of Appeal Filed

Enclosed with this cover letter, please find a notice issued in the above referenced case. If you have any questions, please feel free to call our office at the number provided above.

Sincerely,

James M. Hivner  
Clerk of the Appellate Courts

cc: David Jonathan Tulis  
Sabatino Cupelli  
Mary Barnard Cheadle  
Judge Kyle E. Hedrick  
Hamilton County Circuit Court

**NOTICE TO JUDGMENT DEBTOR  
(NON-WAGE GARNISHMENT)**

To collect a judgment against you in this lawsuit, your money or other property has been seized by execution or garnishment. An execution allows the sheriff to sell the property levied upon. A garnishment requires your bank (or other person holding your money or property) to transfer your property to the court or to hold it to satisfy the judgment.

**READ THIS CAREFULLY. YOU MAY BE ABLE TO KEEP YOUR MONEY OR PROPERTY OR GET IT BACK.**

State and federal laws prevent certain types of money or property from being used to pay a judgment. Such money or property is "exempt." Examples of exempt money are: Social Security benefits, SSI, unemployment benefits, Veteran's benefits, AFDC, and most government pensions. Examples of exempt property are certain health care aids and "tools of trade." These examples of exempt money and property constitute only a partial list, and you may have other exemptions.

If you think you have exempt money or property that has been seized, you have the right to file a motion with the court clerk's office identified below claiming your exemption and asking for the release or return of your money or property.

You can get a form for filing this motion at the clerk's office below, or the clerk may have supplied such a form on the back of this notice. **YOU SHOULD ACT QUICKLY.** If you file a motion within twenty (20) days from the date this notice was mailed to you or was given to you, the court must hear and decide your motion promptly, and in no event later than fourteen (14) days from filing. The clerk will notify you of the time, date, and place of the hearing.

**IF YOU DO NOT UNDERSTAND YOUR RIGHTS OR HOW TO EXERCISE THEM, YOU MAY WISH TO CONSULT WITH A LAWYER. IF YOU CANNOT AFFORD A LAWYER, YOU MAY BE ELIGIBLE FOR FREE LEGAL ASSISTANCE.**

The court clerk's office can provide you with forms and with information about legal services in your area, but the clerk cannot give you legal advice.

**NOTICE TO JUDGMENT DEBTOR  
(WAGE GARNISHMENT ONLY)**

**THE DEBTOR (EMPLOYEE):** Your earnings have been subjected to a garnishment which has been levied by your employer. The garnishment creates a lien on a portion of your wages until the judgment is satisfied, or until the judgment is paid in full, whichever occurs first. You have the following rights:

1. Your wages are protected by state and federal law from garnishment. See the notice below to the employer to determine how much of your wages are protected from garnishment.

2. **EMPLOYER IS TAKING TOO MUCH MONEY FROM YOUR WAGES:** You may apply to the court at the clerk's office shown below within twenty (20) days from any improper withholding of your wages for a motion to stop the garnishment. The court clerk identified below shall provide you with a form for filing a motion, or may have supplied a form motion on the back of this notice. You may wish to seek the counsel of an attorney. If you are unable to afford an attorney, you may be eligible for free legal services to assist you.

3. **NOTE:** If you file a motion, the court must hear and decide your motion promptly, and in no event later than fourteen (14) days from filing. The clerk will notify you of the time, date, and place of hearing. The court clerk's office can provide you with information about legal services in your area, but the clerk cannot give you legal advice.

4. **THE AMOUNT OF MONEY IS BEING TAKEN FROM YOUR WAGES BUT YOU WANT TO GET THE GARNISHMENT STOPPED THROUGH A PAYMENT PLAN:** You may apply to the court for an order suspending further garnishments by the same creditor upon your paying a certain amount of money weekly, bi-weekly, or monthly to pay the judgment. If you file this motion, the garnishment of your wages will stop for as long as you make the payments ordered by the court.

The court clerk shall provide you with the necessary forms to make this application, or you may seek the counsel of an attorney. If you are unable to afford an attorney, you may be eligible for free legal services to assist you.

NAME: LARRY L. HENRY, Clerk  
CIRCUIT COURT  
ADDRESS: ROOM 500 - COURTHOUSE  
CHATTANOOGA, TN 37402  
(423) 209-6700

Sabatino Cupelli  
David Jonathan Tulis, D/B/A Hot News Talk Radio

SEE ADDRESS AT RIGHT  
Judgment Debtor's Name and Last Known Address  
(Must Be Provided by Creditor)

**SHERIFF'S RETURN**

acknowledge receipt of the garnishment summons on the \_\_\_\_\_  
Executed by serving TVFCU  
above-mentioned employee on 3-27, 2023  
on 3-27, 2023  
\_\_\_\_\_  
Sheriff  
\_\_\_\_\_  
N. Peter Bisset Deputy Sheriff  
Employer or Employer's Agent

**AFFIDAVIT FOR SHERIFF**

I, \_\_\_\_\_, Deputy Sheriff  
after being sworn, make oath that:

A garnishment summons was served on \_\_\_\_\_, garnishee, on 2023 MAR - 8 AM 2023, and that the garnishee refused to sign a receipt acknowledging service of said summons.  
 A copy of the execution by levy was mailed or delivered in person to the judgment debtor at the address provided by the judgment creditor MM, D1

Sheriff  
D.S.

Notary

My commission expires: \_\_\_\_\_

**STATEMENT OF ADDRESSES FOR  
MAILING NOTICES**  
(as required by TCA 26-2-402)

**JUDGMENT CREDITOR'S ADDRESS:**

Flexibility Capital, Inc  
c/o John R. Cheadle, Jr.  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009

**JUDGMENT DEBTOR'S LAST KNOWN  
ADDRESS:**

Sabatino Cupelli  
David Jonathan Tulis, D/B/A Hot News Talk Radio  
5512 Ringgold Road, Suite 216  
Chattanooga, TN 37412

BY: [Signature]  
Judgment Creditor/Agent

**EXECUTION and GARNISHMENT**

**CIRCUIT COURT**

CASE No. 22C429

TO: \*\*\*BANK LEVY\*\*\*  
Tennessee Valley Federal Credit Union  
Garnishee  
728 Market Street, Suite 112B Chattanooga, TN 37402

**Flexibility Capital, Inc**

PLAINTIFF

VS.

Sabatino Cupelli  
David Jonathan Tulis, D/B/A Hot News Talk Radio

DEFENDANT

Cupelli SSN: \*\*\*-\*\*-1089  
Tulis SSN: \*\*\*-\*\*-5029

DEKALB COUNTY  
CLERK OF COURT  
OFFICE  
100 N. MAIN ST.  
MARIETTA, GA 30060  
404-875-1313  
02 MAR 13 AM 11:50  
CIVIL PROCESS

Judgment ..... \$ 32,032.34  
Less: Credit ..... \$ 0.00  
Bill of Costs ..... \$ 446.75  
Garnishment Costs ..... \$ 65.00  
Interest ..... \$ 916.21  
Commissions ..... \$ \_\_\_\_\_  
Total ..... 33460.30

Date of Judgment December 5, 2022

Issued this 3/10/2023

LARRY L. HENRY, Clerk

By [Signature] D.C.  
John R. Cheadle, Jr.  
Plaintiff's Atty.

**EACH GARNISHMENT MUST  
BE PAID BY SEPARATE CHECK  
TO COURT.**

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
AT CHATTANOOGA  
DIVISION IV

FILED IN OFFICE

2023 APR -6 AM 10: 04

FLEXIBILITY CAPITAL, INC. )

Plaintiff, )

VS. )

SABATINO CUPELLI and )  
DAVID JONATHAN TULIS, )  
D/B/A HOT NEWS TALK RADIO )

Defendant. )

NO. 22C429

LARRY L. HENRY, CLERK

BY: JH EC

PLAINTIFF'S RESPONSE TO DEFENDANT DAVID JONATHAN TULIS'  
MOTION TO REVERSE GARNISHMENT ORDER PENDING APPEAL

Comes the plaintiff, Flexibility Capital, Inc., by and through counsel, John R. Cheadle, Jr. and Mary Barnard Cheadle, and in response to defendant David Jonathan Tulis' motion to reverse garnishment order pending appeal, would respond:

1. On December 5, 2022, an order of summary judgment was entered in favor of plaintiff, Flexibility Capital, Inc., against defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, for \$32,032.34, plus court cost.

2. On November 17, 2022, defendants filed a motion to reconsider. On January 18, 2023, the Court entered an order denying defendants' motion to reconsider.

3. On December 22, 2022, defendants filed a motion to set aside order (the order of summary judgment entered on December 5, 2022). The Court properly denied defendants' motion to set aside order as the Court previously addressed the defendants' identical assertions in its order denying defendants' motion to reconsider on January 18, 2023.

4. On March 8, 2023, defendants filed an untimely notice of

appeal to the Tennessee Court of Appeals.

5. Plaintiff has properly proceeded forward with enforcing the judgment. On March 10, 2023, plaintiff filed an execution upon defendants' bank accounts at Tennessee Valley Federal Credit Union.

6. Rule 62.04, Tennessee Rules of Civil Procedure, provides:

"Except as otherwise provided in Rule 62.01, when an appeal is taken the appellant by giving a bond may obtain a stay. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the bond is approved by the Court."

7. Rule 62.05, Tennessee Rules of Civil Procedure, provides:

"A bond for stay shall have sufficient surety and:  
(1) If an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages, and costs on appeal . . ."

8. Defendants have not filed a motion to stay enforcement of the judgment. Further, defendants have not filed a bond. The mere filing of an appeal does not stay the enforcement of the judgment.

9. Defendant Tulis incorrectly states that Hot News Talk Radio is not a party to this lawsuit. The judgment is against defendants "d/b/a Hot News Talk Radio". To plaintiff's knowledge, defendants are still operating business at 5512 Ringgold Road, Suite 216, Chattanooga, Tennessee 37412. Plaintiff has forwarded all pleadings filed in this case to this address. None have been returned.

10. There is no requirement that plaintiff serve upon defendants a copy of the garnishment. The garnishment is served



solely upon the garnishee.

11. Pursuant to T.C.A. § 26-2-203, it is the duty of the garnishee to "furnish a copy of the garnishment summons and Notice to Judgment Debtor by mailing them first class, postage prepaid, to the judgment debtor's last known address as shown by [garnishee's] records, or by actual delivery to the judgment debtor. If the address shown by [garnishee's] records differs from that shown on [the] execution form, [garnishee] shall also mail a copy of the garnishment and notice to the latter address."

12. Defendant Tulis has not provided any supporting documentation that plaintiff is not entitled to the funds from the bank accounts that were executed upon.

WHEREFORE, plaintiff respectfully requests that defendant David Jonathan Tulis' motion to reverse garnishment order pending appeal be denied.

DATED: April 6, 2023.

Respectfully submitted,



**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 6<sup>th</sup> day of April, 2023.



---

JOHN R. CHEADLE, JR.  
MARY BARNARD CHEADLE

(21001231)

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
 AT CHATTANOOGA  
 DIVISION IV

FILED IN OFFICE  
 2023 APR 10 AM 9:52  
 LARRY L. HENRY, CLERK  
 BY DS DC

FLEXIBILITY CAPITAL, INC. )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 SABATINO CUPELLI and )  
 DAVID JONATHAN TULIS, )  
 D/B/A HOT NEWS TALK RADIO )  
 )  
 Defendants. )

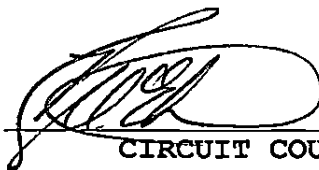
NO. 22C429  
 Div IV

ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE ORDER FOR INTRINSIC FRAUD AND DEMAND FOR MANDATORY JUDICIAL NOTICE

This cause came on to be heard on February 6, 2023, upon defendants' motion to set aside order for intrinsic fraud and demand for mandatory judicial notice, plaintiff's response, the statements of plaintiff's counsel and defendant David Tulis, and the record as a whole; from all of which the Court finds that the Court has previously addressed and denied defendants' request upon hearing defendants' previously filed motion to reconsider. An order was entered on January 18, 2023, denying defendants' motion to reconsider. Defendants' motion to set aside is also denied.

It is, accordingly, ORDERED, ADJUDGED AND DECREED defendants' motion to set aside for intrinsic fraud and demand for mandatory judicial notice is denied.

ENTER this 10<sup>th</sup> day of April, 2023. None Pro Fanc  
to Feby 15, 2023

  
 \_\_\_\_\_  
 CIRCUIT COURT JUDGE

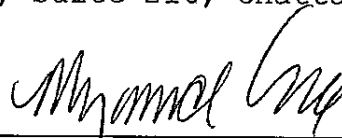
SUBMITTED FOR ENTRY:



**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
Attorneys for Plaintiff  
2404 Crestmoor Road  
Nashville, TN 37215  
(615) 254-1009 Office  
(615) 254-9298 Facsimile  
jcheadle@cheadlelaw.com  
mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 8<sup>th</sup> day of February, 2023.



**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

(p.shell; 21001231)

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE  
AT CHATTANOOGA

FILED IN OFFICE  
DIVISION IV  
2023 MAR 23  
LARRY L. HENRY, CLERK

FLEXIBILITY CAPITAL, INC

Plaintiff,

VS.

SABATINO CUPELLI and  
DAVID JONATHAN TULIS,  
D/B/A HOT NEWS TALK RADIO

Defendants.

NO. 22C429

IV

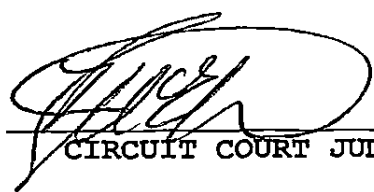
PROPOSED  
FILED IN OFFICE  
DATE/TIME 4-17-23  
BY LARRY L. HENRY, CLERK  
D.C.

ORDER DENYING DEFENDANT DAVID JONATHAN TULIS'  
MOTION TO REVERSE GARNISHMENT ORDER PENDING APPEAL


This cause came on to be heard on April 10, 2023, up defendant David Jonathan Tulis' motion to reverse garnishment order pending appeal, plaintiff's response to defendant David Jonathan Tulis' motion to reverse garnishment order pending appeal, defendant David Jonathan Tulis' email to the Deputy Clerk for Division IV stating that he could not attend and requesting a "written ruling", the statements of plaintiff's counsel, and the entire record herein; from all of which it appears to the Court the defendants have filed a notice of appeal but they have not posted a bond to stay the enforcement of the judgment.

It is, accordingly, ORDERED, ADJUDGED AND DECREED that defendant David Jonathan Tulis' motion to reverse garnishment order pending appeal shall be denied.

ENTERED this 1<sup>st</sup> day of ~~April~~ <sup>May</sup>, 2023.

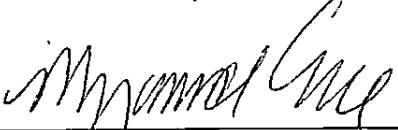
  
CIRCUIT COURT JUDGE

SUBMITTED FOR ENTRY:

  
 \_\_\_\_\_  
**JOHN R. CHEADLE, JR. (6053)**  
**MARY BARNARD CHEADLE (27084)**  
 Attorneys for Plaintiff  
 2404 Crestmoor Road  
 Nashville, TN 37215  
 (615) 254-1009 Office  
 (615) 254-9298 Facsimile  
 jcheadle@cheadlelaw.com  
 mcheadle@cheadlelaw.com

**CERTIFICATE**

I hereby certify that copies of the foregoing have been mailed, postage paid, to the defendant Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, defendant David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, and to defendants, Sabatino Cupelli and David Jonathan Tulis, d/b/a Hot News Talk Radio, at 5512 Ringgold Road, Suite 216, Chattanooga, TN 37412, this 12<sup>th</sup> day of April, 2023.

  
 \_\_\_\_\_  
**JOHN R. CHEADLE, JR.**  
**MARY BARNARD CHEADLE**

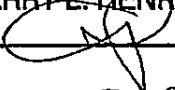
(p.shell; 21001231)

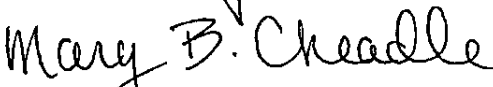
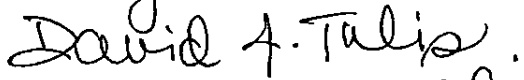
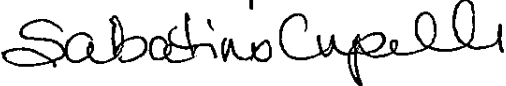
**CLERK CERTIFICATE**

The undersigned hereby certifies that a copy of this Order has been mailed to all parties or to counsel of all parties in this cause.

This 1st day of May 2023

LARRY L. HENRY, CLERK

By  D.C.



**Moseley, Margaret**

---

**From:** David Tulis (via Google Docs) <davidtuliseditor@gmail.com>  
**Sent:** Friday, May 19, 2023 2:43 PM  
**To:** circuitpleadings  
**Subject:** Notice on appellate record, Flexibility v. Cupelli & Tulis  
**Attachments:** Flexibility notice about record.pdf

## David Tulis attached a document

David Tulis (davidtuliseditor@gmail.com) has attached the following document:

Dear Mr. Henry,


I just now am speaking with Tracy at the court of appeals in Knoxville. She says the attached notice needs to be sent to your office rather than hers.

Please note the attached filing that includes the case number and notice to the court regarding the record.

Please contact me if this document does not properly open in service of this appeal, and I will resubmit it. I would appreciate confirmation from you that it has reached you.

Respectfully yours,

David

 Flexibility notice about record



**IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE**

**FLEXIBILITY CAPITAL, INC.**

**Docket No. 22C429**

**Division: IV**

**VS.**

**SABATINO CUPELLI  
DAVID JONATHAN TULIS d/b/a  
HOT NEWS TALK RADIO (NOOGA RADIO)**

**Docket: E2023-00335-COA-R3-CV**

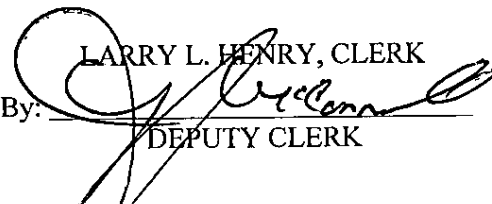
**CERTIFICATE OF APPELLATE RECORD**

I, LARRY L. HENRY, Clerk of the Circuit Court of Hamilton County, Tennessee, do hereby certify that the foregoing items herewith transmitted to the Court of Appeals are originals or true and correct copies of all of the designated papers on file in my office in the captioned case.

1. Technical Record attached to this Certificate and consisting of 293 pages contained in Two (2) Volumes.
  - VOLUME ONE = PAGES 1-150
  - VOLUME TWO = PAGES 151-293

This 30 day of JUNE, 2023.



LARRY L. HENRY, CLERK  
By:   
DEPUTY CLERK