

United States district court — eastern district for Tennessee, civil division

David Jonathan Tulis
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Plaintiff

V.

Flexibility Capital
 Suite 1511
 1501 Broadway
 New York, NY 10036-5505

Mary Cheadle
 Cheadle Law Firm
 2404 Crestmoor Road
 Nashville, TN 37215

Funding Metrics LLC d/b/a/ Lendini
 3220 Tillman Drive, Suite 200
 Bensalem, PA 19020

TBF Financial LLC
 870 Sheridan Road
 Highwood, IL 60040

James B.M. Hooper
 Knight & Hooper PLLC
 701 Market St. Ste. 330
 Chattanooga, TN 37401

Defendants

FILED

AUG 12 2024

Clerk, U. S. District Court
 Eastern District of Tennessee
 At Chattanooga

Case no.

1:24-cv-0240-TRM-SKL

Jury trial demand

Amended affidavit & complaint for usury & fraud

Amended affidavit & complaint for usury & fraud

Being of sound mind and body, and acting in good faith, plaintiff states that he lives in Hamilton County, Tenn., at % 10520 Brickhill Lane, Soddy-Daisy, Tenn., and testifies to the following facts and points of law to the best of his knowledge and ability, as follows:

1. Defendant predatory lenders or debt buyers Flexibility Capital, Funding Metrics d/b/a/ Lendini and TBF Financial, supported by their law firm debt collectors, are in the MCA business, or merchant cash advance industry.
2. They are business funders in interstate commerce, using instrumentalities of such commerce, who pretend not to be lenders and sellers of loans subject to regulation, but factors or buyers at discount of future receivables or receipts, which practice is legal in Tennessee.
3. Tennessee calls sale of accounts or receivables “account purchase transactions.”

“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, regardless of whether the commercial entity has a repurchase obligation related to the transaction.

Tenn. Code Ann. § 47-14-102

4. The state’s usury law applies to loans. “‘Usury’ is the collection of interest in excess of the maximum amounts authorized by or pursuant to this chapter or any other statute” 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 debtor defense against suit to collect. “(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. Tenn. Code Ann. § 47-14-112.

5. Flexibility, Lendini and other merchant cash advance lenders peddle take-it-or-leave-it applications that appear to be risk-sharing purchases of future receipts. But they require a personal guarantee of business owners or principals, callable in full if the merchant has trouble generating receipts and liable for paying the whole sum balance due under hair-trigger default provisions.
6. Lenders’ absolute right to receive full repayment makes these arrangements effectively personal loans to merchant principals outlawed as usury under Tennessee law, given predatory annual percentage rates.
7. If Flexibility and Lendini grants of credit are not absolutely repayable, and if these businesses share downside risk and repayment variability with cash-pressed merchant customers, defendants might have a profitable — and honorable — business. But defendants absolutely require repayment under deceptive contracts, with unvarying daily payment rates and claims on assets other than receipts.
8. That means that the substance of their customer relationship is that of *lender-borrower*, not *buyer-seller*.
9. Defendants sue plaintiff, a news-talk radio station principle, for loans 20 times the Tennessee usury limit (Flexibility, Cheadle) and nearly 60 times the legal limit (Lendini, TBF, Knight Hooper).
10. The Flexibility Capital annual rate of interest is **208.05 percent**. The ostensible buyer of Lendini’s loan, TBF, sues plaintiff in Hamilton County general sessions

for unpaid balance of contracted profit on the loan with a 593.44 percent per annum rate of interest.

Jurisdiction

11. The U.S. racketeering influenced corrupt organization (“RICO”) act 18 U.S. Code §§ 1962, 1964 protects plaintiff’s federally guaranteed right to be unmolested and free of damage by predatory lenders involved in issuing and collecting unlawful debt in interstate commerce.
12. The court has authority to hear the case under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, under which law plaintiff, as a radio station operator subject to a Federal Communications Commission license, ran NoogaRadio Network at 92.7 FM with signal covering Tennessee and Georgia, which company, Hot News Talk Radio, obtained loans from defendants.
13. The court has authority to administer disputes over commercial activity subject to the U.S. congress via U.S. const. art. 1, sect. 8, “[t]o regulate Commerce *** among the several States[.]” Defendants use interstate channels of commerce and instrumentalities of such commerce, namely websites, e-mails and telephones to commit violations of the Tennessee usury law at § 47-14-103., and to commit deception, fraud and vexatious litigation against plaintiff.
14. Further, plaintiff asserts his rights under the federal 14th amendment seeking equal protection against unequal protection of federal rights by state of Tennessee, the courts of which uphold a case filed against plaintiff by Flexibility Capital, in which cause Flexibility prevails despite proper pleadings the action is a debt collection lawsuit by parties with dirty hands for an unenforceable criminal usury loan, giving no subject matter jurisdiction to any state judge, a body of such jurists

in the Tennessee supreme court April 11, 2024, denying a hearing and upholding a judgment against accused despite a Tenn. R.Civ. Proc. 60.02 pleading that the case Flexibility Capital Inc. v. Sabatino Cupelli et al, No. E2023-00335-SC-R11-CV, is void *ab initio*.

15. The amount of money at issue exceeds \$75,000. Plaintiff certifies he is not using the court for a harmful, annoying, threatening, demeaning, illicit or harassing purpose.

Parties

16. Plaintiff is an investigative journalist from Soddy-Daisy, Tenn., focusing on public justice, legal reform, local economy, free markets and Christendom, 12 years on the FM airwaves at Copperhead Radio and NoogaRadio Network. He blogs at DavidTulis.Substack.com and TNtrafficticket.US. He holds a master's degree in English from University of Tennessee, a bachelor's degree in English from University of Virginia, and is married with four grown homeschooled children. He worked 24 years as copy editor at Chattanooga Times Free Press, handling the business section of the newspaper. He sues in his proper person without legal counsel.
17. Flexibility Capital Inc. ("Flexibility") is an ongoing enterprise engaged in activities in interstate commerce. It is a merchant cash advance funder and styles itself an accounts receivable financier. The citizen of New York with principal place of business in that state extends loans to individuals and businesses. Its address is at 1501 Broadway, Ste. 1511, New York, N.Y. 10036-5505. It is served at that address.

18. Mary Cheadle, (“Cheadle”) a state licensed attorney, and her Cheadle law firm are debt collectors who prosecute Flexibility claims in state court, joined by agreement in a joint enterprise to collect unlawful debt. Mrs. Cheadle is sued and served in her person as a principal at Cheadle Law at 2404 Crestmoor Road, Nashville, Tenn. 37215. She and her business are subject to Tennessee law and she to Rule 8, the attorney rules of professional conduct prohibiting cooperation with criminal acts.

19. Flexibility and Cheadle constitute “Flexibility parties.”

20. Funding Metrics d/b/a/ Lendini (“Lendini”) is an ongoing enterprise engaged in activities in interstate commerce in the loan business. It is incorporated as an LLC in Delaware with principal place of business in Pennsylvania. On its website Lendini describes itself as “a leading provider of alternative funding solutions” and peddles “revenue-based financing” loans disguised as advance purchases of future receivables. The company is served at its address, 3220 Tillman Drive, Suite 200, Bensalem, PA 19020.

21. TBF Financial (“TBF”), an ongoing enterprise operating in interstate commerce, is a buyer of soured debt incorporated in Illinois with its principal place of business there. On its website, it says, “We buy non-performing commercial accounts *** from online small business lenders, banks, equipment finance companies and merchant cash advance businesses. We purchase loans, cash advances, equipment leases, lines of credit and commercial credit card accounts that have personal guarantees, no personal guarantees, are secured, unsecured, pre-agency, post-agency, pre-litigation and/or reduced to judgment.” It is served at 870 Sheridan Road in Highwood, Ill. 60040.

22. Knight & Hooper Law (“Knight Hooper”) is an ongoing enterprise led by James B.M. Hooper at 701 Market St., Ste. 330, Chattanooga, Tenn. 37402-4828, where it is served. Mr. Hooper’s of counsel, Timothy Millirons, prosecutes plaintiff for TBF Financial in state courts. Mr. Hooper and his outfit are subject to state law and he and assisting attorneys to Rule 8, state licensee rules of professional conduct that bar his and Mr. Millirons’ aiding and assisting violations of state law.

23. Defendants in ¶¶ 20-22 are styled “Lendini parties.”

24. Petitioner demands relief from similar acts by two sets of otherwise unrelated defendants for fraud, deception, usury, abuse and their misuse of Tennessee courts, seeking redress via the following: (1) actual and punitive damages for malicious bad faith abuse of legal process, (2) award of legal costs, (3) two-year injunction upon Flexibility Capital and Lendini in doing any business with any Tennessee resident or citizen, and, (4) permanent injunction against each of the five parties selling or servicing in Tennessee unlawful MCA debt contracts like the two contracts that are exhibits in this case, an injunction drafted to be applicable via service against any financier party in like station as defendants doing business in Tennessee and in any state covered by federal appellate courts’ sixth circuit, such injunction in keeping with plaintiff’s intent to protect other members of the public against predatory lending.

25. Plaintiff reserves the right to join other parties to this case who sell or service unlawful debt and who make any fraudulent claim against him in court.

Tennessee litigation summary

26. This complaint seeks redress of harm in Tennessee court cases in which —

- Flexibility parties win an appeals court order upholding of a judgment against plaintiff despite a record showing the Tennessee case, Flexibility Capital Inc. v. Sabatino Cupelli et al (No. E2023-00335-COA-R3-CV, Jan. 5, 2024), is a fraud, a violation of the state usury law and void from inception, arising from a state trial court with no subject matter jurisdiction, and;
- Lendini sells plaintiff's nonperforming contract to bad-debt buyer TBF Financial, which hires debt collector defendant Knight Hooper PLLC to review and study the contract, to better enforce it. The TBF cause, pursued in combination with Knight Hooper, is by reason of usury and fraud void from inception, a breach of Tenn. Code Ann. § 47-14-103 on usury and is unenforceable in Tennessee.

27. The application documents that become the contract are, for Flexibility parties, a 14-page "Future receivables sales and purchase agreement," and, for TBF-Lendini parties, a 17-page "Merchant agreement" and a "Merchant security agreement and guaranty," comprising a single agreement.

28. FLEXIBILITY CASE. Plaintiff's merchant radio station ("radio") borrowed \$16,320 on Feb. 6, 2020, from Flexibility. On March 3, 2020, radio begins having shortage in its stock of receipts to remit under automatic deduction payments, at which time daily payment exceeded not just receipts, but money in radio's account. The agreement requires radio pay \$164.22 every weekday.

29. The balance due in the contract was \$24,140, or \$7,820 more than the credit extended. The interest rate is 208.05 percent.

30. In the so-called Covid-19 pandemic, radio is unable to meet its obligations as state and federal governments shut down the economy. Payments falter starting March 3, 2020, with the \$164.22 intended to be collected more than the balance in the account from radio advertising receipts.
31. The governor declares a state of emergency March 12, 2020. He imposes a “safer at home” executive order April 2, 2020, which begins a monthslong “lockdown” against marketplace activities from which radio sales do not recover, the station unable to stock the receipts Flexibility ostensibly is buying. Radio’s last payment is March 12.
32. Flexibility sues plaintiff and radio business partner Sabatino Cupelli in Hamilton County general sessions court Aug. 4, 2021. To get discovery, accused accept default judgment, and appeal to county circuit court, whereinafter Flexibility files a motion for summary judgment May 16, 2022.
33. Circuit’s order of summary judgment is entered Dec. 5, 2022, despite challenge to subject matter jurisdiction for fraud.
34. The controversy is whether the Tennessee usury law with a 10 percent annual interest rate limit on loans applies to the contract that, if it is a loan, has a 208.05 percent per annum interest rate. Under state law, it is a loan if it is absolutely repayable, and thus is not a risk-sharing advance purchase of future receivables.
35. Subject matter jurisdiction is a challenge that can be made any time. In the trial court in Hamilton County circuit, plaintiff raises the usury, fraud, standing and lack of subject matter jurisdiction issues in detail Nov. 17, 2022, by pleading and orally Nov. 19, 2022.

36. Well-known rules of subject matter jurisdiction are raised in detail: Answer to plaintiff response to motion to reconsider challenge to subject matter jurisdiction, Dec. 19, 2022; Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice, Dec. 22, 2022; and more. The court denies these pleadings orally at the hearing; it reads approvingly Flexiblity's motion for summary judgment.
37. Its grounds are that radio defendants failed to file a statement of material facts.
38. The court enters an order of summary judgment Dec. 5, 2022, stating "defendants executed a future receivables sale and purchase agreement with plaintiff. Plaintiff advanced future receivables to defendants. Defendants failed to pay as promised. *** Defendants detain plaintiff's collateral and have declined to turn over possession of collateral to plaintiff." The court describes the relationship between lender and borrower in terms of a loan with repayment an absolute obligation. "The amount due plaintiff by defendants was \$21,061.38 as of August 5, 2020."
39. The Tennessee court of appeals in Knoxville hears written and oral appeal and on Jan. 5, 2024, refuses to consider merits of appellant's subject matter jurisdiction defense — usury, fraud, unconscionability, lack of standing, voidness under Tenn. R.Civ. Proc. 60.02, fraud on the court. Grounds are that appellant's notice of appeal is 20 days late.
40. The Tennessee supreme court refuses to hear the case by order dated April 11, 2024, though appellant cites Tenn. R.Civ. Proc. 60.02 demanding its recognition of a void case.
41. Flexibility parties impose ongoing injuries to plaintiff to collect an unlawful debt in a corrupt enterprise.

42. Flexibility obtains order releasing funds April 10, 2024, from Hamilton County circuit court for \$1,625.24 garnisheed from two plaintiff Tennessee Valley Federal Credit Union accounts, one an *intervivos* trust serving a niece. The parties impose on plaintiff an April 22, 2024, deadline for “post-judgment interrogatories and production of documents” in their vexatious litigation, to which plaintiff complies.
43. **LENDINI CASE.** In a contract signed Oct. 31, 2019, radio receives \$11,660.08 as the “net purchase price” in its checking account Nov. 5, 2019, and begins immediately making payments by automatic withdrawal of \$215.16 each weekday.
44. The balance owed was \$28,400. According to Lendini documents, radio pays \$17,428 on the loan, with Lendini earning a profit of \$5,767 before radio runs out of product (receipts) March 3, 2020, that Lendini purchased at discount in advance.
45. The so-called Covid-19 pandemic economic collapse halts radio sales and interrupts all radio financial obligations. Radio balance due when ad receipt cash flow halts and no receipts are available from which to share with Lendini is \$10,972, according to Lendini claims. That entire amount due is usury.
46. Ten percent legal interest on \$11,660.08 would be \$1,660. Any amount paid back after \$13,320 is illegal interest under Tennessee, and a harm.
47. Lendini parties sued plaintiff in county sessions court March 15, 2024, for an alleged \$20,371 due, according to the TBF summons, which states as follows:

\$16,297.04 due by contract, plus contractual attorney fees, which are requested to be \$4,074.26,

48. Radio repaid 100 percent of the principal on the loan. The Lendini state lawsuit seeks unpaid balance of contracted profit, with a 593.44 percent per annum rate of interest.
49. In a motions hearing July 22, 2024, Knight Hooper attorney Tim Millirons “nonsuited” the case, maintaining a right, according to general sessions Judge Alex McVeigh, to file a fresh suit for a year.
50. Lendini parties in combination in an ongoing enterprise impose continuing injury against plaintiff by suing him to enforce usury in a fraudulent unlawful debt contract and maintaining the right to file vexatious litigation for a year.
51. Instant lawsuit filed for redress of harm and in the public interest intends to halt violation of the Tennessee usury law at § 47-14-103 by defendants and others in like station by injunction.
52. The statute of limitations on a usury claim is three years if “[n]o action shall be brought on any claim for usury after three (3) years from the date of last payment of the same or foreclosure or court action, whichever ensues first.” Tenn. Code Ann. § 47-14-118. Usury or excessive loan charges; limitation of actions.
53. The last usury payment made to Flexibility was March 12, 2020. The last to Lendini was March 2, 2020, each more than four years ago. By law “the term ‘last payment’ in Tenn. Code Ann. § 47–14–118(a) means the final payment of the loan.” Pac. E. Corp. v. Gulf Life Holding Co., 902 S.W.2d 946, 958 (Tenn. Ct. App. 1995). Neither radio nor personal guarantor plaintiff has made a final payment to either lender.

54. The act that “ensues first” is the filing of Flexibility’s lawsuit Aug. 4, 2021, with TBF’s suit filed March 15, 2024.

Contracts as fraudulent instruments

55. The loan contracts are disguised as purchases of future receipts coming to merchant radio station and plaintiff from sales of broadcast ads. Each contains account purchase transaction elements. However, the true nature of each is not for the sale of an asset (receivables), but for a loan.

56. The usury agreements are knocked out of action by the March 2020 “Covid-19” government shutdown of the economy, a crisis that involves two legal impossibilities. One is supervening. One is internal. The Covid-19 meltdown creates a supervening impossibility in radio’s fulfilling the contract. The internal impossibility is a rebuttable presumption, that being that the small business operators own or control, suspended outside of view, a “total purchased amount” cash pot of \$24,140 (Flexibility) or \$28,400 (Lendini) that radio partners bank so that they can become customers of either lender. Neither Flexibility nor Lendini parties care about the source or location of this magic pool of capital. It exists in the sales contract as a legal fiction; its creation constitutes the absolute certainty of repayment for Lendini, an essential element of a loan.

Flexibility contract EXHIBIT No. 1

57. Flexibility funded radio \$16,320 by direct deposit (the so-called “purchase price” of \$17,000 minus an “origination fee” of \$680). The agreement requires radio to pay \$164.22 every weekday. The total balance due is \$24,140, or \$7,820 more than the loan amount received. It was to have taken 147 weekdays to pay off the loan, or 29.4 weeks.

58. The Flexibility contract says the choice of venue for litigation is New York. (contract p. 9). 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)

59. Flexibility sued plaintiff and his radio business partner in Hamilton County general sessions court summons dated Aug. 4, 2021.

60. “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.” Id. Lake Hiwassee at 325. 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).

61. The Feb. 6, 2020, contract is facially fraudulent and self-contradictory because it speaks the language of purchasing receipts and also provides lender absolute certainty of repayment via personal guaranty provisions. It is enforced as if it were

a loan, absolutely repayable, regardless of merchant receipts or lack thereof.

62. The alleged usury is hidden under disguise of the application's being for a purchase of receipts.

63. Flexibility defendants admit on Page 1 of their state court complaint that Flexibility is a purveyor of loans. As stated in their motion for summary judgment filed in in Hamilton County general sessions court:

Plaintiff is entitled to a judgment as a matter of law. This is a suit to recover the balance due on a future receivables sale and purchase agreement. 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**. Defendants do not offer any specific factual or legal defense to this suit for the recovery of **the loan** made by plaintiff to defendants. Plaintiff **loaned defendants money**. Defendants failed to pay the money back. The obligation is past due and payable.

Defendants' motion for summary judgment, Flexibility Motion summary judgment circuit court

64. Pages 1-10 present Flexibility as a partner offering to purchase advertising cash flow in advance for a deep discount, with Flexibility bearing risk.¹ Pages 11-13 are a personal guaranty in which radio partners are personally and absolutely bound to repay the total balance due, regardless of the receivables flowing into the business. Page 14 is Appendix A, fee structure. The parts constitute a single document and agreement.

¹ "[O]r if the full Purchased Amount is not remitted because Merchant's business went bankrupt or otherwise ceased operations in the ordinary course of 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." ¶ 14(a)(v) (TR p. 28)

65. Each of the agreement's two sections require signatures of plaintiff and partner. No one at Flexibility signs either section, meaning either (1) lack of meeting of the minds, or (2) an unwillingness by Flexibility actors to be implicated in a misdemeanor in Tennessee or a felony in New York (knowingly and intentionally extending loans beyond the two states' respective loan interest-rate limits).

66. The agreement's risk-sharing language is extensive, and allows for "excusable" failures to pay.

Flexibility agrees to purchase the purchased future receipts knowing the risk that merchant's business may slow down or fail, and Flexibility assumes these risks based exclusively upon the information provided to it by merchant ***.

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) [A]dverse business conditions that occurred for reasons outside merchant's control and not due to merchant's willful or negligent mishandling of its business. *** [N]atural disasters or similar occurrences beyond merchant's control.

Contract p. 4, ¶ 14(b)

67. The agreement says it is "not a loan," and "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, or shall it be construed as a loan *** that **requires absolute and unconditional repayment** on a maturity date."

To the contrary, Flexibility's ability to receive the purchased amount *** and the date when the purchased amount is paid in full (if ever) are subject to and conditioned upon performance of merchant's business ***

Contract P. 4, ¶ 14(c) (emphasis added)

68. The personal guaranty says, “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’).” ***

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.

Contract P. 11, ¶¶ C, 2

69. Under double headings, Flexibility extends credit to radio knowing that it risks not getting paid, knowing “disasters or similar occurrences beyond merchant’s control” may pare receipts down to virtually zero in a governor’s “lockdown,” but clawing back certainty of repayment absolutely under the guaranty.

70. The “buyer” Flexibility seemingly takes market risk in the agreement Part A, realizing radio’s stock of receivables may come into a shortage; it eliminates market risk, hazard and uncertainty in Part B, revealing the arrangement in fact to be a personal loan to each merchant radio partner, each responsible for payment of the whole balance.

71. Mitigating contract details in favor of the Flexibility contract’s being a sale are (1) reconciliation provisions and (2) adjustment provisions, the former looking

backward and giving refund for overpayment as receipts fall short, the latter looking forward to lower debt repayments to be more in line with variable receipts. Neither provision is exercised, as if the relationship were not a sale facing supply chain issues of product (receipts), but a loan absolutely repayable daily.

72. Details suggesting the relationship is between lender-debtor are several:

- Expansive collateral claims, starting with personal assets of two radio owners. Other claims include equipment, contracts, lease agreements, management of the business.
- Unilateral power by Flexibility to alter payments if merchant runs into trouble. This power backstops two pressure-relief valves in the contract, the reconciliation and adjustment provisions. Despite last-hour disputatious dealings subject to discovery, lender's daily debits are fixed until date on which a last economic collapse payment is made, lender staff people unaware Flexibility is not collecting on a loan, but buying a product – a percentage of daily receivables. Receivables are shared as a product only if merchant radio has a stock of them.
- Flexibility's absolute entitlement to be repaid, regardless from whom. Personal guarantees show the agreements are, finally, personal loans transacted across the landscape of a business operation.

Lendini contract EXHIBIT No. 2

73. The 17-page contract of Oct. 31, 2019, is between Funding Metrics LLC, dba "Lendini," and Hot News Talk Radio LLC in Chattanooga. First it offers "Merchant agreement" ("agreement") followed by "Merchant security agreement and guaranty" ("guaranty").

74. Lendini parties are using Tennessee courts to enforce a loan that violates the Tennessee usury law at Tenn. Code Ann. § 47-14-103 and Tenn. Code Ann. § 47-14-110 that is unconscionable, unlawful and fraudulent.
75. Radio received \$12,255 as the “net purchase price” of repayment, with repayments beginning Nov. 5, 2019. Ten percent interest on that amount is \$1,225. Under a 10 percent APR loan, radio would owe \$13,480. Hot News Talk Radio paid \$17,428 on the loan, or \$3,948 over the amount of \$12,255 received for business operations.
76. The usury portion of Lendini’s profit — the amount radio partners overpaid in light of the usury law — is \$3,948. The contract stipulates the refund is due if a court finds usury, or \$1,974 for each of the two radio partners.
77. TBF and Knight Hooper reject a June 13, 2024, demand for reimbursement of usury paid to cure plaintiff’s unlawful debt claim.
78. TBF’s pursuit of the loan repayment violates the Illinois predatory loan prevention act effective March 23, 2021, that prohibits loans past 36 percent APR. 815 Ill. Comp. Stat. Ann. 123/15-5-5. It states, “Any loan made in violation of this Act is null and void and no person or entity shall have *any right to collect, attempt to collect, receive, or retain any principal, fee, interest, or charges related to the loan*” 815 Ill. Comp. Stat. Ann. 123/15-5-10 (emphasis added). “No person or entity may engage in any device, subterfuge, or pretense to evade the requirements of this Act,” which such limit could arguably include disguising a personal loan to two out-of-state businessmen as an advance purchase of future receivables or seeking to enforce such loan by lawsuit.

79. TBF Financial's bid to enforce a criminal contract is incapable of giving the Tennessee court subject matter jurisdiction to hear the case. Because defendant is violating Tennessee law and committing misdemeanor crimes, knowingly and intentionally and as a principle of business, debt collector TBF and Knight Hooper have no standing to make a claim for which relief may be granted.
80. The Lendini application contains elements of a sale, and elements of a loan. The elements of what Tenn. Code Ann. § 47-14-102 calls an account purchase transaction are as follows:
81. Lendini buys "the purchased amount knowing the risks that Merchant's business may slow down or fail, and Lendini assumes these risks" based on radio "representations" that give Lendini "a reasonable and fair opportunity to receive the benefit of its bargain" (agreement p. 2). The contract is an "agreement to purchase future receivables" (agreement p. 4).
82. Merchant "has good, complete and marketable title to all Receipts, free and clear of any and all liabilities, liens, claims," etc. (sect. 2.11, guaranty p. 5) that it puts under claim of Lendini.
83. The contract denies it is a loan. "Merchant Not Indebted to Lendini. The Merchant is not a debtor of Lendini as of the date of this Arrangement" (sect. 2.9, guaranty p. 5).
84. The agreement for the "Purchased Amount of accounts receivable *** is not intended to be, nor shall it be construed as, a loan from Lendini to the Merchant. *** There is no interest rate or payment schedule and no time period which the purchased amount must be collected by Lendini. In no event shall the aggregate of

all amounts be deemed as interest hereunder and charged or collected hereunder exceed the highest rate permissible at law.”

85. The contract says borrowers can get a refund for any monies paid in excess of the maximum amount, that being 10 percent in Tennessee (sect. 3.1 guaranty p. 6).
86. The agreement says merchant “knowingly and willingly waives the defense of usury in an action or proceeding” (sect. 3.1 guaranty, p. 6).
87. The contract declares itself an advance sale of business receivables. Receivables by their nature rise and fall. Prior to the so-called Covid-19 pandemic, the mood of the global economy darkened, and radio felt the loss of confidence reflected in sharply declining sales. If the agreement is over sharing a thinning stream of ad receivables, the agreement describes the “funder” riding piggyback on radio and dependent on its fortunes. Funder gets less in lean times — and more in good.
88. Merchant phone calls, emails using instrumentalities of interstate commerce and demands for reduced payments fail as radio cash crisis mounts. Lendini receipts are fixed at \$215.16 daily.
89. Radio’s receivables trend lower toward the March 12, 2020, state of emergency by Gov. Bill Lee. They fail a final time March 3-5, 2020, the merchant account contains dollar amounts less than \$215.16, meaning Lendini demands repayment *more than 100 percent of that day’s receipts or checking account balance* in a relationship in which disproportionate lender demands contributed to virtual business failure.
90. But disputed merchant agreement is not a legal “account purchase transaction” at Tenn. Code Ann. § 47-14-102, but a loan absolutely repayable.

91. The loan (merchant agreement) is 4 pages long, numbered 1-4. The “merchant security agreement and guaranty” (“guaranty”) is 13 pages, numbered 1-13 but integral to the agreement.
92. The security begins with an extensive list of property a business might own. Evidences of the agreement being a loan, absolutely repayable, are as follows:
93. If radio “fails to make a payment when due or otherwise perform under the agreement, Lendini may enforce its rights” without first seeking payment, citing its claim on “any collateral or additional collateral Lendini may hold” (merchant agreement (p. 2)).
94. “In the event that Merchant fails to make a payment when due or otherwise perform,” or “[fails] to pay timely any amount owed,” Lendini “may enforce its rights” on the inferior party.
95. The “[m]erchant’s failure to pay timely any amount owed” is ground for action by the lender. It can “foreclose on any collateral securing the guaranteed obligations” (merchant agreement p. 2).
96. Lendini has right “to enter Merchant’s premises and to take possession of the fixtures and equipment therein for the purpose of protecting and preserving same,” and “assign Merchant’s lease to another qualified Merchant capable of operating a business comparable to Merchant’s at such premises” (merchant agreement p. 2).
97. Security interests reflected in the transaction documents are significantly broader than those associated with a sale. An exhaustive list of business property is in the first paragraph of the personal guarantee including physical items such as “goods;

inventory; on equipment and fixtures” and intangibles such as “trade marks, service marks, copyrights, trade names, trade secrets, customer lists, licenses, all rights *** as seller of goods *** all computer programs, printed output and computer-readable data” and other properties such as insurance proceeds (guaranty p. 1).

98. “Lendini does not have to notify Guarantor of any of the following events and Guarantor will not be released from any of its obligations under this Security Agreement if it is not notified of: (i) Merchant’s failure to pay timely any amount owed under the Agreement; (ii) any material or adverse change in Merchant’s financial condition or business operations; (iii) any sale or other disposition of any collateral securing the Guaranteed” (merchant agreement p. 2).

99. As a lender, Lendini’s contract gives it authority to take over radio’s business and run the station(s), and alter radio customers’ payments to Lendini. Sect. 3.14 in the guaranty tells of its power to alter insurance, “collect monies due,” “receive, endorse and collect any checks, notes, drafts,” “sign merchant’s name on any invoice, bill of lading” and get customers to send money directly to Lendini (guaranty p. 8).

100. The contract gives conflicting choices of venue in a dispute — New York” (merchant agreement p. 2) and Pennsylvania (guaranty p. 12).

101. Plaintiff reserves the right to discover whether lenders are parties in interest. Flexibility sued plaintiff in state court over an agreement generated by Kapitus, a different company, to the best of plaintiff’s knowledge. TBF purchased Lendini’s bad debt and is enforcing its alleged obligations upon plaintiff in state court through defendant Knight Hooper.

102. Plaintiff reserves the right to join other usury lenders into this action, including any who file suit against him over unlawful loans and demand judicial relief in usury and fraud.

Count 1: Usury and unlawful debt

103. Plaintiff incorporates all the foregoing in ¶¶ 1 to 102 in declaring that defendants violate the Tennessee usury law by selling, servicing and collecting on loans with annual percentage rates above 10 percent.

104. Insofar that the harm be only usury in result and consequence, and apart from knowing criminal breach of the usury law, and merely constructive, the injury against plaintiff is no less, and is actionable in the court for claim of relief.

105. Lenders violate the Tennessee usury law at Tenn. Code Ann. § 47-14-102. Flexibility violates the New York by extending loans past that state's 25 percent per annum limit. TBF violates the 2021 Illinois prohibition on usury debt beyond 35 percent. Each lender is involved in a knowing violation of law, with the two predicate acts of each involving (1) the date of payments delivered to radio, and (2) the dates they or their debt resellers filed suit.

106. Flexibility approves the loan application/contract Feb. 6, 2020. Flexibility parties file suit in Hamilton County general sessions court Aug. 4, 2021. These are two related predicate acts constituting a pattern of acts to enforce unlawful debt.

107. Lendini obtains radio signatures on its loan contract Oct. 31, 2019. Buyer of its contract, TBF, files suit against radio and plaintiff on March 15, 2024. These are

two related predicate acts constituting a pattern of illegal efforts to enforce unlawful debt.

108. Plaintiff consent to usury loans from Flexibility, Lendini and TBF in no way cures their criminality nor inherent fraud.

109. Lenders injure plaintiff by breach of the usury law, and plaintiff demands redress therefrom. **EXHIBIT Nos. 3, 4**

110. Defendant law firms are apprised of the usury “debt” for which they are knowing and aware collectors. As lawyers and officers of the court and licensed by the supreme court in Tennessee, they represent the interest of the law. They have actual or putative knowledge of the usury statutes and whether the contracts in dispute are purchase agreements or usury loans in disguise.

111. The attorney defendants, professionals at law and studied in contract issues, promote breaches of equity and prosecute vigorously violations of Tennessee law.

112. Cheadle and Knight Hooper profit via fees and other possible benefits in enforcement of degenerate predatory loans, and are liable to plaintiff for harm, distress, loss of time, distraction and other losses that arise from vexatious litigation.

Count 2: Fraud

113. Plaintiff incorporates the foregoing material in ¶¶ 1 to 102, and in the usury claims in ¶¶ 103 to 112 in Count 1, and cites further harm to him and to the public interest in alleging fraud.

114. MCA parties in this case fail to disclose terms and costs of their contracts; they do not reveal the interest rate of the loan.
115. Chief mechanism for the deceptive and fraudulent practices of defendants is their disguising loans with predatory interest rates and not revealing the rate of interest in the transactions under the deception that the contracts are purchase agreements, not loans absolutely repayable. Flexibility parties and Lendini parties each use legal process to enforce illegal, deceptively drafted and unconscionable contracts against plaintiff and against the public interest.
116. Flexibility Capital engages Mary Cheadle to collect unlawful debt, these two parties working cooperatively to construct a pattern of racketeering activity in the collection of unlawful debt.
117. Lendini sells unlawful debt to TBF Financial, which hires Knight Hooper to sue to collect, which three parties involving themselves in a pattern of racketeering activity in the collection of unlawful debt from plaintiff.
118. The disputed contracts emanate the essential elements for fraud, including material misrepresentation of the terms, misrepresentation of fact, knowledge of its falsity, intent to induce reliance, justifiable reliance by plaintiff, and damages.²
119. Defendant lenders Flexibility and Lendini and debt buyer TBF charge attorney defendants Cheadle and Knight Hooper, respectively, with reviewing disputed contracts before enforcing them in court in attempting to collect debt, and these

² Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237 (S.D.N.Y. 2022), motion to certify appeal denied, No. 22-CV-1245 (JSR), 2022 WL 3677931 (S.D.N.Y. Aug. 25, 2022)

attorneys agree with client moneylenders' claims that the contracts are lawful, legal and able to withstand judicial scrutiny in equity and in light of the Tennessee code annotated and the federal RICO law.

120. Defendant lawyers as officers of the courts of Tennessee have effectively blessed their clients' lines of business and given sanction to their clients.
121. Attorney defendants are bound under Tennessee rules of professional conduct Rule 8, specifically, prohibition of assisting a party in violating a law, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent," Rule 1.2.
122. Law firms describe themselves as collectors of "debt." The contracts they sue over are debt contracts fraudulently disguised as purchases of receipts.
123. Judging by the bitter fruit of law firm labors, plaintiff discerns they have advised neither Flexibility, Lendini nor TBF, respectively, of illegal activity, nor urged them to cease and desist efforts sell usury loans or to sue to collect, and so attorney firm defendants participate in civilly actionable conduct of usury as agents of usury enforcement upon the victim at 208.05 percent per annum and 593.44 percent per annum, respectively.
124. Attorney party defendants aim thus to profit with their masters as self-styled debt collectors and agents in tortmongering, and do so maliciously, in bad faith, knowingly and intentionally as students and practitioners of law who debase its precepts and just operation in Tennessee.

125. Lawyer defendants are involved in the harm of fraud on the court. Fraud on the court elements are outlined by the 6th circuit in a 1993 order.

[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.

Demjaniuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993)

Plaintiff, insofar as fraud on the court harms him, complains of it as an element of the count of fraud.

126. Plaintiff incorporates in his fraud count the harm of barratry — the use of harassing, vexatious, abusive litigation without legal standing. Barratry is “the offense of frequently exciting and sirring up quarrels and suits, either at law or otherwise.” *Black’s Law Dictionary*, rev. 4th ed. Attorney defendants use their legal prowess to generate business for their law practices knowing the contracts they enforce are usurious and fraudulent, and hence an abuse of the legal system and the courts.

127. Whether law firm defendants create the debt, resell the debt or merely for billable hours collect on the debt, they are parties to unlawful debt and fraud against plaintiff, in their contracts and in their use of the courts to enforce usury.

128. The Flexibility case is a continuum of harm. Flexibility and Cheadle win an order May 16, 2024, from Judge Kyle Hedrick of the circuit court directing the

clerk to give to Flexibility and debt collector Cheadle \$1,625.24 seized from two trust checking accounts at Tennessee Valley Federal Credit Union.

129. Plaintiff faces future harm from malicious prosecution if he finds employment, whereupon defendants will seek to garnishee his wages.

Relief sought

130. Plaintiff asks relief as follows:

- a. Finding of fact and law that the Flexibility Capital Inc. v. Cupelli case in Tennessee courts was void from inception, and Hamilton County circuit court's judgment and later order of execution void as a matter of law for usury.
- b. Finding of fact and law that Lendini parties' case against plaintiff in Tennessee courts is void *ab initio* for usury and fraud and cannot be revived after being voluntarily nonsuited.
- c. That defendants' contracts violate the Tennessee usury law and are fraudulent, deceptive and unenforceable as a matter of law.
- d. Setting of a jury trial in which to propose \$500,000 in damages
- e. Award of \$6.5 million in punitive damages, or whatever the jury or the court calls fair.
- f. Plaintiff's legal costs and expenses in bringing this action
- g. Injunction, as follows:

Injunctive relief sought

131. Plaintiff demands injunctive relief by way of an order requiring defendants cease and desist all use of contracts in Tennessee like these in evidence in this

case, an injunction addressed to all defendants and suitable for service upon MCA lenders in similar situation and standing as defendants, to the benefit of all citizens and business people in like station as plaintiff.

132. Plaintiff demands lender parties be enjoined from signing any new contracts in Tennessee whatsoever, whether for loans for purchases of future receivables, for the next two years starting at the date of a jury verdict, a final order or the last date by which an appeal must be filed by defendant, whichever is later.

133. Plaintiff asks leave for time to draft a proposed order to declare the law, edify and warn members of the business public whose members are present or future defendant-intended victims of usurious personal loans dressed up as merchant receivables purchases, and give stern warning to financial actors as to Tennessee's protections of the weak, poor and ordinary from rapacious usury loans.

Further 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 personally appeared before me on the 12th day of August, 2024, and signed this affidavit as his free and voluntary act and deed.

My commission expires
03/16/2027

Doris J. Thompson
Notary Public



Exhibits

The exhibits are incorporated into the complaint by reference:

1. Contract of Flexibility Capital
2. Contract of Lendini
3. Affidavit of usury for Flexibility
4. Affidavit of usury or Lendini