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

David Jonathan Tulis In *persona propria* % 10520 Brickhill Lane Soddy-Daisy, TN 37379 davidtuliseditor@gmail.com (423) 316-2680	*Plaintiff*	Case No. 1:24-CV-00240 **Judge Travis McDonough** **Magistrate Judge Dumitru**
V. Flexibility Capital Suite 1511 1501 Broadway New York, NY 10036-5505 *Et al*	*Defendants*	**Jury trial requested**

Amended brief in support of motion for summary judgment

[I]t matters not what devices may be resorted to for the purpose of concealing [usury notes'] true character, the law will strip from it these devices, and adjudge it by what it is in fact, rather than by what it may in its terms appear to be.

– Fossett v. Gray, 173 S.W.3d 742, 749–50 (Tenn. Ct. App. 2004)

Plaintiff sues for usury, fraud and misuse of legal process by which defendants enforce illegal contracts under Tennessee law in a diversity case. Usury is in view as to substance, and as to its consequence and efforts to profit indirectly from usury by fraud against plaintiff and intrinsic fraud on the Tennessee courts. Defendants are using the courts to enrich themselves upon agreements that are fraudulent and usurious, contriving for gain past 10 percent APR.

Defendants Flexibility and Lendini sold loans to plaintiff's radio station business ("Radio," "NoogaRadio" or "Hot News Talk Radio"). Flexibility sued plaintiff in state courts and

deflected his appeal for relief, with the state court of appeals refusing to reach the merits of plaintiff's usury, fraud, lack of subject matter jurisdiction claims by dismissing his appeal on untimely filed notice of appeal grounds.

The case by Flexibility rising out of Hamilton County circuit court, plaintiff contends, was void under Tenn. R.Civ. Proc. 60.02.

Flexibility admits that its contract is for loan (Doc. 16, PageID ## 131-141, **EXHIBIT Nos. 5, 6**) (Doc. 16 page ID # 131-143). Plaintiff filed motion for estoppel, and amended motion for estoppel premised on these admissions.

This motion focuses on the Lendini loan (**EXHIBIT No. 2,** Doc. 1-1, PageID # 47ff).

MCA industry background

Receivables financing involves one company's purchasing a percentage of another business's future accounts receivable in exchange for an upfront purchase price. Rsrv. Funding Grp. LLC v. California Organic Fertilizers, Inc., No. 24CV1112ARRLB, 2024 WL 1604195, at *1 (E.D.N.Y. Apr. 12, 2024).

The applications for funding ("contracts") in this case create an absolute obligation for repayment and no funder exposure to market forces. But that's not how MCAs sell themselves.

They indicate they share market risk and that no absolute repayment requirement exists. They explicitly deny they are loans or credit and deny the merchant is paying interest; they indicate the merchant may not have to pay in business failure and create provisions whereby the merchant can cut daily debit payment as receipts fall. By reconciliation provisions they attempt to show themselves risk-sharing co-adventurers in the business, investors, allies and patient co-operators who are buying slices of incoming daily receipts, the agreement to conclude on some unforeseeable date contingent on market circumstances, and not a guaranteed fixed daily loan repayment with a certain terminus.

MCA companies structure their transactions as "purchases" of future receivables as a way to protect their interests in the event that the debtor seeks bankruptcy protection. To further insulate itself, an MCA company will typically also require a personal guarantee from the business's principal and may insist on the signing of a confession of judgment or similar device by both the business and its principal. An MCA agreement may also entail a waiver of objections to prejudgment remedies, such as the MCA company seeking a temporary restraining order upon

breach of the agreement that may be placed upon the account into which the receivables are deposited. The funds provided by an MCA company to a business — in comparison to the MCA company's return — characteristically appear to so drastically discount the value of future receivables that if the transaction were viewed as a secured loan, it would easily run afoul of prohibitions on usury. Scott J. Bogucki, Mca Transactions: True Sale or Disguised Loan?, Am. Bankr. Inst. J., December 2022, at 26

"Revenue-based financing" agreements bend over backwards to give the impression they are cash advances based on anticipated receipts, paid for at steep discount, and that the transaction is a buyer-seller relationship, not a lender-debtor relationship. Insofar as the substance of the disputed relationships peeks through the form, plaintiff asks the court to determine if the case can be decided on what's contained within the four corners of the two applications. By determination of the deals being loans as a legal fact, usury is determinable by an operation of law, and the lenders' hounding of plaintiff in state courts put into proper light.

The Uniform Commercial Code is not definitive as to whether a transaction is a loan or a sale at Article 9 and the commentary says the "issue is left to the courts." The determination of whether the contracts are loans is fact-intensive, and the court may need fact evidence of the dealings among the parties to make the determination sought by this motion.

A notable banking industry article catalogs factors often considered:

> (1) whether the buyer has a right of recourse against the seller;
> (2) whether the seller continues to service the accounts and commingles receipts with its operating funds;
> (3) whether there was an independent investigation by the buyer of the account debtor;
> (4) whether the seller has a right to excess collections;
> (5) whether the seller retains an option to repurchase accounts;
> (6) whether the buyer can unilaterally alter the pricing terms;
> (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and
> (8) the language of the agreement and the conduct of the parties.

> As with many multi-factor legal tests, no individual factor or combination of factors is determinative in a given case. 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."

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

In re Shoot the Moon, LLC, No. 2:15-BK-60979-WLH, 2020 WL 6588407, at *3–4 (Bankr. D. Mont. Nov. 6, 2020) (emphasis original) [1]

In instant case, market risk remains with the "seller." The personal guaranty is backstop for default hair-triggers, any of which can be made to kick in and make the receipts buyer whole.

Tennessee's usury law has a moral purpose. "From the Mosaic laws to the present, every civilized society has recognized that the necessitous borrower was likely to become the victim of the avaricious lender, and the weight of every law on the subject has fallen on the possibility of the receipt by the lender of more than the law allowed and whatever the borrower might be required to pay to another in connection with the loan was not banned unless the lender by agreement, trick, or device could obtain an illegal exaction." Jenkins v. Dugger, 96 F.2d 727, 729 (6th Cir. 1938)

Much MCA litigation is in New York. That state protects, after the fashion of the Old Testament, the weak, ignorant and desperate. [2] "Although the ancient laws relating to usury had

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[1] The Shoot the Moon court, making this eight-point list, cites authority in a footnote.

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

In re Shoot The Moon, LLC, 635 B.R. 797, 814 (Bankr. D. Mont. 2021)

[2] In the Bible, usury or interest is forbidden among the Children of Israel, and lending is spoken of as either (a) interest-free aid for the poor, or (b) a means of subjugating, influencing or regulating other peoples.

religious and moral underpinnings, some of which may have carried into New York's original usury law, the modern conception of our usury laws focuses on the protection of persons in weak bargaining positions from being taken advantage of by those in much stronger bargaining positions" Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 331, 332, 179 N.E.3d 612, 620–22 (2021).

> As we understand the law of this state, on the subject of usury, **no scheme or device to avoid the application of statutes on that subject, however ingenious or intricate same may be, will permit anyone guilty of participating in a usurious transaction to escape** its consequences, when the facts are made to appear; and consent or cooperation of the one paying the usurious interest is immaterial.

Providence A.M.E. Church v. Sauer, 45 Tenn. App. 287, 303, 323 S.W.2d 6, 13 (1958) emphasis added)

Lenders act in "attempted evasion of the general statute against usury" Pers. Fin. Co. v. Hammack, 163 Tenn. 641, 45 S.W.2d 528, 530 (1932), Deception in MCA contracts is noted in a bankruptcy case. "Under New York law, in order for a transaction to constitute a usurious loan, there must be a borrower and a lender, and it must appear that the real purpose of the transaction was, on the one side, to lend money at ***the usurious interest rate reserved in some form by the contract*** and, on the other side, to borrow upon the usurious terms dictated by the lender" In re GMI Grp., Inc., 606 B.R. 467, 484, 485 (Bankr. N.D. Ga. 2019) (emphasis added)

(a)

"After serious thought, I rebuked the nobles and rulers, and said to them, 'Each of you is exacting usury from his brother.' So I called a great assembly against them." Nehemiah 5:7. "Who has withdrawn his hand from the poor And not received usury or increase, But has executed My judgments And walked in My statutes — He shall not die for the iniquity of his father; He shall surely live!" Ezekiel 18:17. "'In you they take bribes to shed blood; you take usury and increase; you have made profit from your neighbors by extortion, and have forgotten Me,' says the Lord God." Ezekiel 22:12. "He who oppresses the poor to increase his riches, And he who gives to the rich, will surely come to poverty." Proverbs 22:16

(b)

Lending is a tool of conquering, regulating or influencing inferiors. "For the LORD your God will bless you just as He promised you; you shall lend to many nations, but you shall not borrow; you shall reign over many nations, but they shall not reign over you." Deuteronomy 15:6. "The LORD will open to you His good treasure, the heavens, to give the rain to your land in its season, and to bless all the work of your hand. You shall lend to many nations, but you shall not borrow." Deuteronomy 28:12

> If contract is in fact loan of money at usurious rates, devices used to conceal its true character are immaterial, and law will adjudge transaction by what it is in fact, rather than by what it may in terms appear to be. T.C.A. § 39–4601.

Adams v. Schwartz, 49 Tenn. App. 523, 356 S.W.2d 597 (1960)

> "The ultimate touchstone of whether a transaction constitutes a loan is if it provides for guaranteed repayment." *** "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."

Id., Bogucki at 26, 79 (parentheses, internal cites omitted)

> "("[W]hen determining *453 whether a transaction was a true sale of receivables or a loan, '[t]he root of [the analysis] is the transfer of risk.' " (quoting *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 1995))). As the New York Court of Appeals recognized just last year, "parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders, not investors." *Adar Bays, LLC*, 179 N.E.3d at 622; *see also OriginClear Inc. v. GTR Source, LLC*, 2021 WL 5907878, at *5 (W.D.N.Y. Dec. 14, 2021) (**"[T]he primary indicator of a loan is the debtor's absolute obligation to repay the principal sum without risk to the creditor of the debtor's business failure."**).

Lateral Recovery, LLC v. Cap. Merch. Servs., LLC, 632 F. Supp. 3d 402, 452–53 (S.D.N.Y. 2022) (bold emphasis supplied)

The *id.* Lateral Recovery court at p. 4 says three tests determine who bears the ultimate risk that radio cannot survive for lack of ad sales.

> (1) whether there is a reconciliation provision;
> (2) whether the agreement has an indefinite term and
> (3) whether the lender has any recourse should the merchant declare bankruptcy.

Reconciliation, lack of fixed term and no recourse for lender in bankruptcy or failure each hint a sale.

Reconciliation provisions — and in one instance in this case an adjustment provision affecting future repayment debits — indicate the funder is making an effort to align payments with receipts. Credit card processors are able to skim off a percentage of card payments forwarded to the funder. It's not clear in any of the cases why actual bank account receipts as deposits in the MCA-controlled merchant's account are not ***measured daily*** and, the next day,

ACH determining a unique payment level that's 10 percent of actual incoming funds (receipts) of the previous day.

The cases talk about a merchant going out of business, being effectively bankrupt or filing for bankruptcy. Other conditions in the realm of insolvency prevail in instant case. And that is: Lack of supply of the product ostensibly sold to MCA defendants. That is, **receipts**. NoogaRadio and Hot News Talk Radio LLC do not "fail," do not file for protection nor "go out of business" in an absolute way.

Radio simply has no stock of the product the MCAs purchased, and no receipts upon which to make payment. Radio, in other words, *suffers supply chain issues*. Lenders used state courts to, effectively, enforce a miracle on radio partners: That they produce a stock of ad proceeds to disburse in satisfaction of the lender's bargain.

Absolute certainty of repayment

Critical features in this dispute relate to the operation of the reconciliation provision, the de facto term of the agreement, and the recourse should the merchant declare bankruptcy. If either the merchant terminates or interrupts its business or the merchant fails to make its fixed daily payments more than twice, the obligation to pay the full unpaid "Purchased Amount" accelerates and the funder is made whole for that amount.

And if the merchant declares bankruptcy, it is still bound by its obligations under the agreement through the guarantor's obligations. "The effect is that the agreement has a 'de facto fixed term,' the lender is absolutely entitled to repayment under all circumstances, and the only risk that the lender takes on is the credit risk of the borrower and the guarantor. There is no transfer of risk." Lateral Recovery, LLC v. Cap. Merch. Servs., LLC, 632 F. Supp. 3d 402, 454–55 (S.D.N.Y. 2022) (internal citation omitted)

Reconciliation and adjustment provisions of the type before the court let funders avoid being decreed lenders. "In theory, the presence of such a provision would suggest that the transaction is not a loan, but rather a purchase" Lateral Recovery LLC v. Queen Funding, LLC, No. 21 CIV. 9607 (LGS), 2022 WL 2829913, at *4–6 (S.D.N.Y. July 20, 2022)

An MCA is viewed as a buyer when it takes on risk.

> The merchant can close without owing the funder anything. In light of this escape route for the merchant and risk accepted by the funder, the Court cannot say that the Form Three agreements are loans.

Id., Lateral Recovery, LLC v. Cap. Merch. Servs., LLC at 460

> No single factor is conclusive to the analysis and all the attributes of the transaction must be examined, but the allocation of risk is primary to the determination.

Matter of Cornerstone Tower Servs., Inc., No. A17-4051, 2018 WL 6199131, at *6 (Bankr. D. Neb. Nov. 9, 2018)

It is well settled by our cases that in all transactions of this character the court will disregard the form of the matter, and will look to its real substance. McWhite v. State, 143 Tenn. 222, 226 S.W. 542, 543 (1921).

Now, to the particulars of the funding applications that fix the terms of the loan relationship.

The Lendini contract

> [ABSTRACT – To make its deal resemble a daily purchase of daily receipts, Lendini has a backward-looking reconciliation provision to let debtor get a refund if he "overpays" based on receipts. This is leading feature to keep the contract out of the world of loans. It is not designed to work. The disproportion between daily debits and actual radio cash flow persists until day of default.]

The court, to reach summary judgment, must weigh factors emanating in favor of each of two characteristics — loan or purchase. Elements of the contract are proper to an advance purchase of future receivables. Other elements are proper to a loan.

As noted in complaint, radio in an Oct. 31, 2019, contract received $11,660 as the "net purchase price" of repayment. The total amount of repayment is $28,400. Ten percent interest on the funds received is $1,660. Radio paid $17,428 on the loan, or $5,767 over the amount of $11,660 received for business operations.

The $5,767 profit is vitiated by usury. The usury portion of the profit — the amount the partners overpaid in light of the usury law — is $4,107. The contract stipulates the refund is due if a court finds usury, or $2,053.50 for each of the two radio partners.

Lendini calls the contract a "cash advance application" (guaranty p. 9, 4th line from the bottom, Doc 1-1, PageID # 59). The agreement, arguably, is a contract between equals. But "application" suggests a take-it-or-leave-it relationship, like an application for a grant, with the funding a favor delivered not by negotiation, but with a swift OK after eyeing radio's checking account history, corporate entity status and owners' credit scores. Extravagant interest rates cover MCAs for their cursory borrower review. "Lendini's proprietary technology can approve advances in just a few hours and fund the same business day," defendant Lendini states on its website. https://www.fundingmetrics.com

The application approved Oct. 31, 2019, intends to be understood as a risk-sharing discount purchase of future receivables, the selling of financial assets of future ad revenue for NoogaRadio via Hot News Talk Radio LLC.

1. Lendini reconciliation provision

The strongest aspect of the Lendini contract indicating it is a buyer of fluctuating receivables is its reconciliation provision. Reconciliation lets the lender refund radio if it takes more than the "Specified Percentage" of receipts, or invoice radio for the balance due if Lendini gets less than 10.45 percent of receipts over a month. Radio's application "irrevocably authorizes" Lendini to pull a daily fixed payment at $215.16 based on "all payments made by cash, check, ACH or other electronic transfer, credit card, debit card, bank cad, charge card *** or other form of monetary payment" based on radio "transactions" (guaranty p. 2, Doc. 1-1, Page ID # 48).

Repayment daily amounts are based not on applicant receipts or even daily deposits under ACH review. The MCA application fixes the amount. Applicants accept by stipulation.

Lendini on its website decries fixed daily payments. "Since remittances are based on a percentage of revenue, businesses can avoid the stress of fixed remittances that can be difficult to manage when cash flow is inconsistent." Practice in 2020 is much different.

The reconciliation provision, starting page 2 (Doc. 1-1, PageID # 52), says the daily payment amount "is intended to represent the Specified Percentage" of receipts. Radio "may request that Lendini reconcile Merchant's actual receipts by the crediting or debiting the

difference back to or from the Account" so that the monthly payments equal 10.45% of the monthly receipts.

The process is low tech. Requests must be "in writing" and "include a copy of the Merchant's bank statement" for the month. The petition is sent by the U.S. Postal Service to Lendini "at 884 Town Center Drive, Langhorne, PA 19047" within 30 days of the month's end (Guaranty p. 3, Doc. 1-1, Page ID ## 52, 53). Radio forfeits chance to adjust debits if it doesn't submit its application within 30 days after the month in question. "[U]pon occurrence of an Event of Default *** and/or upon the violation of any provision contained in Section 4 of the MERCHANT AGREEMENT TERMS AND CONDITIONS, the Specified Percentage shall equal 100%" (guaranty p. 3, Doc. 1-1, Page ID # 53). In failure, merchant must pay "100%" **of receipts** that magically appear from guarantors, who'd been hiding them, evidently.

Radio faltered March 3, 2020, under state government's oppression of the marketplace. Had radio gotten a monthly statement for February from its bank March 1, printed it on paper, put it in the U.S. mails addressed to Lendini at Langhorne, Pa., it might have been March 6 or 7 until Lendini would have cut payments retroactively by refund deposit.

That would've been too late. Under contract, radio would've had to have waited until the end of March to attempt to get relief retrospectively.

The federal government declared a national emergency for Covid-19 on March 13, 2020, ("Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," The White House). Gov. Bill Lee signed the Tennessee declaration of emergency March 12, 2020, and "locked down" — as might a warden suppressing affray in a prison — the economy with a "safer at home" emergency decree April 2, 2020. [3]

Radio's March 3-5, 2020, default, under the reconciliation rules, would have had to have waited to reconcile March sometime after April 1.

Leindini's reconciliation give-backs appear designed to be (a) trouble for the merchant or (b) to be unworkable. Reconciliation rules throw up a barrier for the struggling merchant; all the

[3] Executive order No. 14 is titled "An order suspending provisions to certain statutes and rules in order to facilitate the treatment and containment of COVID-19." Gov. Lee's April 2, 2020, order is titled "An order amending executive order No. 22, requiring Tennesseans to stay home unless engaging in essential activity or essential services."

while, Lendini reserves for itself plenary authority to reduce payments ***prospectively*** any day it chooses.

> The specific amount is intended to represent the Specified Percentage of Merchant's Receipts each calendar month. *At any time, Lendini may adjust* the Specific Amount so that the amount received by Lendini's in the future more closely represents the Specified Percentage.

Guaranty, Sect. 3.17 Adjustments to the specific amount, p. 9 (Doc. 1-1, PageID # 59) (emphasis added)

No process is outlined as to how the lender is prompted to decide on a reduction in future debits. No protocol appears in the application apprising borrowers how to take advantage of this "*[a]t any time, Lendini may adjust*" reference. The contract contains no section, like that on Merchant security agreement p. 2, Reconciliation (Doc. 1-1, Page ID # 52), detailing how to adjust future debits.

Discovery may show the lender in March 2020 had a powerful "reconciliation department" operation able to make on the spot adjustments looking backward as well as forward in time. That is a matter for discovery, if indeed this case cannot be decided as a matter of law. Such department's existence, its grants of relief that first quarter of 2020, the suppleness with which its staff handled a national economic disaster, its ability to deal with a flood of nonpayment phone calls, texts and e-mails — if Lendini were a true buyer of receipts, it would be facing an economic nightmare of its own.

In the CV-19 shutdown affecting its bottom line. It would deal with its seller merchants, and accept their word: "There are no receipts to buy this week," a merchant may say. Lendini would reply, "OK. You don't owe us anything."

Lendini sees its customers, in selling their debts and seeing them sued, not as sellers but as overdue borrowers. Lendini sells the "obligation" for receipts to TBF Financial LLC. In view is not a purchase of receipts, but a loan.

Reconciliation right reduces the power of plaintiff's loan claims, allows the repayment term to be indeterminate in the future, and for the debits to fluctuate in quasi-coincidence with cash flow, making the process resemble an advance purchase of receivables.

The application presumes that merchant cash flow pressures are reasonably managed by end-of-the-month lookbacks. Merchant finds payments exceeding receipts. Merchant proves

receipts with a photocopy of bank deposits or credit card receipts, and requests a refund check for overpayments.

Lendini's reconciliation system would not have helped radio get breathing space. It has no provisions for prospective debit cuts except for reference to its plenary powers that it "at any time *** may adjust the Specific Amount." If Lendini can't immediately adjust debits prospectively to align with receipts, its reconciliation rules and this plenary authority statement about future adjustment authority are window dressing covering for a loan. [4]

2. Declarations "Not a loan," shared risk claims

A consideration in Lendini's favor is language denying the transaction is a loan. Radio is

> selling a portion of a future revenue stream to Lendini at a discount, not borrowing money from Lendini. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Lendini. Merchant going bankrupt or going out of business, in and of itself, does not constitute a breach of this agreement. Lendini is entering into this Agreement knowing the risks that Merchant's business may slow down or fail, and Lendini assumes these risks based on Merchant representations, warranties and covenants in this agreement, which are designed to give Lendini a reasonable and fair opportunity to receive the benefit of its bargain.

Guaranty p. 2. Lendini's acknowledgement (Doc.1-1, PageID # 52)

"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, Doc.1-1, PageID #55)

The purchased amount "is not intended to be, nor shall it can be construed as, a loan from Lendini to the Merchant. Merchant agrees that the Purchase Price and the Purchased Amount equals the fair market value of such Receipts. *** There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Lendini. In no event shall the aggregate of all amounts be deemed as interest *** and charged or collected *** exceed the highest rate permissible at law."

What happens if Lendini is found to be collecting usury interest?

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[4] The general "at any time" statement on Lendini ability to adjust payments should, perhaps, be read in context of the specific rules for reconciliation that would limit the scope and operation of the seeming plenary authority of Lendini to adjust "the Specific Amount" of the weekday debit "at any time."

> In the event that a court determines that Lendini charged or received interest hereunder and interest is in excess of the highest applicable rate, the rate in effect *** shall automatically be reduced to the maximum rate permitted by applicable law and Lendini shall promptly refund to Merchant any interest received by Lendini in excess of the maximum lawful rate, it being intended that Merchant not pay or contracts to pay, and that Lendini not receive *** interest in excess of that paid which may be paid by Merchant under applicable law. As a result *** Merchant knowingly and willingly waives the defense of Usury in an action or proceeding.

Sect. 3.1, guaranty p. 6, Doc. 1-1, PageID # 56

The application requires borrower to "knowingly and willingly" not allege usury by bringing up Tennessee law T.C.A. §§ 47-14-103 and 47-14-110.

For a 10-day period prior to suing, plaintiff gave Lendini parties (the now-dismissed TBF Financial, buyer of Lendini's soured loan contract) a chance to refund the usury-polluted part of Lendini's profit on the Hot News Talk Radio loan. Hot News Talk Radio had repaid the principle of the loan, and paid a good deal of the profit. Plaintiff demanded a refund of the excess of the usurious amount of the profit, or $4,107. TBF declined.

These statements declaiming lending and usury are elements suggesting a purchase-sale.

3. Financial, not market, risk primary concern

Lendini, if it bore market risk, would investigate the nature or quality of radio's product or services, whether its operators are winners with strong receipts because of sturdy market standing. The lender's inquiry is limited. It researches "an investigative or consumer report" for the contract, "investigate[s] *** references" about the merchant and pulls credit reports on the owners (guaranty p. 3, Doc.1-1, PageID #53).

Radio agrees to let Lendini agents investigate "processing history" to "determine qualification and/or continuation of this program" (sect. 1.3 p. 4, Doc.1-1, PageID #54). After the $11,660 is deposited, guarantors and radio have an "obligation to advise Lendini of any material adverse change in their financial condition" and the lender "may request statements" to adjust ACH Program payment; merchant must submit them "within five (5) business days" under threat of "material breach" (sect. 2.2, guaranty p. 4, Doc.1-1, PageID #54)

On March 3, 4 and 5 of 2020, the economy in Tennessee is being strangled by global fearmongering over Covid-19. These three days are of default. They punctuate the end of a

"material adverse change in [radio's] financial condition" for which Lendini makes no use of erstwhile unilateral powers to slash daily debit amounts.

Lendini can't say it didn't have warning of "material adverse change in their financial condition" — i.e., pending trouble. A three-day blight in receipts Feb. 19-21, 2020, put radio balance so low the $215.16 weekday debit *was more than 100 percent of checking account balance, more than any receipts.*

The contract grants the lender extensive surveillance authority over the debtor. Lendini may visit the place of business and "[perform] an examination," make photos of "the interior and exterior" of a place of business, signage and "the Owner." Like an overseer inspecting slave hovels in the shade behind the plantation big house, Lendini has "the right to inspect, audit, check and make extracts from any copies of the books, records, journals, orders, receipts, correspondence, that relate to Merchant's accounts" in examining radio's "general financial condition" and it may "remove any of such records temporarily for the purpose of having copies made thereof." Lendini can hire a CPA to make sure it is getting its "specified percentage of receipts" (sect. 3.6, guaranty Page 6, Doc.1-1, PageID #56). Such inspection is not part of the lender's purported *market risk assessment* prior to funding radio.

Lendini is able to collect "damages" from credit card payments "equal to the amount by which the cash attributable to the Purchased Amount *** exceeds the amount of cash received from the credit card receivables" previously, and radio agrees that "Lendini may automatically debit such damages" and may notify the credit card processor to send "any and all" payments to Lendini (contract Sect. 3.15, p. 9 Doc.1-1, PageID #59). Credit card payments may vary daily in a business; Lendini has authority to siphon ***all*** such payments.

The contract exhaustively makes radio subject to Lendini, the language strongly marked by vindictive and suspicious tone as if the lender is certain of it being deceived by the debtor and wants to keep radio operators — the guarantors — in line.

Lendini's concern is *financial risk*, **not market risk**.

4. Control over assets beyond receipts

The application form gives the lender a broad security interest to collateralize radio's payment obligations, indicative of a secured loan.

The application gives security interest in chattel paper, deposit accounts, customer lists, licenses, certificates of deposit, all rights of merchant as seller of goods, goods, inventory,

computer programs, equipment and fixtures; investment property, all books and records pertaining to such property, all income from such property (merchant agreement p. 1, Doc.1-1, PageID #51).

If Lendini were a buyer, sharing risk, it would not perhaps make itself attorney over Hot News Talk Radio. The application gives it "irrevocable power of attorney" and its "attorney in fact" to "take any and all action necessary to recover payment to Lendini" (sect. 3.2. Collections of receivables, guaranty p. 6, Doc.1-1, PageID #56). The claim is repeated, radio naming Lendini "as its agent and attorney-in-fact with full authority to take any action or execute any instrument or document to settle all obligations due to Lendini," including obtaining and adjusting insurance, "collecting monies due or to become due;" receive, endorse and collect checks and other payments; sign radio's name on "any invoice, bill of lading, or assignment directing customers or account debtors to make payment directly to Lendini" (sect. 3.14 Power of attorney, guaranty p. 8, Doc.1-1, PageID #58)

The contract puts assets beyond receipts in view for seizure if radio falls short. "In the event Merchant is served papers *** for summary eviction, Lendini may execute its rights[.]" Its agents may "enter Merchant's premises and *** take possession of the fixtures and equipment therein for the purpose of protecting and preserving same" and assign another "qualified Merchant" to run a business comparable to radio's (merchant agreement p. 2, Doc.1-1, PageID #48).

Lendini makes eight references to "Guaranteed Obligations." Recourse against property other than receivables is a loanlike feature of the deal. The secure property claims are far broader than purchased receipts.

> Although none of these features is dispositive, their collective effect appears to provide [MCA lender] 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.

Id., In re Shoot the Moon, LLC, at 7

5. Personal guarantee

The personal guaranty is a security outside of radio receipts. Radio owners agree to a broad "limited personal guarantee" of their business' absolute requirement to repay and agree to "not direct, or through any omission permit, Merchant to breach this agreement" (guaranty p. 3). (Doc.1-1, PageID #53) "This guarantee shall be the continuing, irrevocable, unconditional and joint and several obligations of the Guarantor(s)," who waive

> demand of payment, notice of presentment, and any and all requirements of notice, defenses, offsets and counterclaims and any other act or omission of Lendini which **changes the scope of** the Guarantors' risk. [emphasis added]

Risk in the contract, ultimately, is upon debtor plaintiff and his radio business partner, and "nothing changes the scope of" this risk. The application requires agreement to not just guarantee collection of receipts, *but guarantee payment*.

This guarantee includes waivers of any such requirement that Lendini "obtain payment from Merchant" (merchant agreement p. 2, "guarantor waivers and debit authorization," Doc.1-1, PageID #48). They agree to let Lendini "proceed directly" against them personally without first proceeding against radio in a suit for "Guaranteed Obligations." "Each Guarantor further guarantees the payment of and agrees to pay all Indemnified Amounts," which obligation "shall survive the termination of this agreement" (guaranty p. 3, Doc.1-1, PageID #49)

The guarantee of the two radio principals indicates the loan is absolutely repayable by security — assets outside the nature of receivables.

Lendini is done worrying about receipts when cash flow falters. It need not rely on receipts, because its security is broad, powerful and personal. The contract is for a "purchased price," but if the economy crashes, "The entire Purchase Price shall become immediately refundable to Lendini," that liquid cash due from the business owners. ("Protection 4," Doc.1-1, PageID #57)

Record shows radio had **two** three-day periods of nonpayment. One hit Feb. 19-21, 2020. The second was March 5, 2020, this being the third day Lendini was unable to debit $215.16 because radio had deposited no receipts sufficient to meet that amount. Lendini attempts to debit more than 100 percent of receipts and more than 100 percent of checking account balance three days straight. That means gross radio cash is less than the demanded payment amount of $215.16. The contract recognizes merchant may cut off ACH access to its funds. Merchant "may

only revoke his ACH Authorization by contacting us directly," the means of communication not specified (guaranty p. 9, Doc.1-1, PageID #59).

The application and agreement are primarily focused on Lendini's financial security. It cares not of market risk to radio if studio lights flicker out, mics are dead and Internet access blinks off because Lendini has right to $215.16 first, plus NSF fees passed down. It admits its personal security guarantee is the main document of the application. The enabling agreement to "purchase future receivables" is "hereby incorporated in and made a part of this security agreement" (merchant agreement p. 4, Doc.1-1, PageID #50).

Security interests reflected in the personal guarantee are significantly broader than those associated with a sale and factor into any conclusion the contract is for a loan.

6. Shared risk claim

Lendini's discussion about the funding application proffering "no interest rate" and "no time period during which the Purchased Amount must be collected by Lendini" (see above, "Not a loan," also guaranty p. 2, Doc.1-1, PageID #56) is intended to convince radio that Lendini bears market risk. "Merchant's business may slow down or fail, and Lendini assumes these risks based on Merchant's representations, warranties and covenants in this Agreement" that, it says, "are designed to give Lendini a reasonable and fair opportunity to receive the benefit of its bargain" (guaranty p. 2, Doc.1-1, PageID #48).

The contract says going bankrupt or going out of business "[do] not constitute a breach of this agreement" (guaranty p. 2, Doc.1-1, PageID #52). Is radio on the verge of "going out of business" in a state-sponsored depression, of which timeframe — March 2020 — the court is asked to take judicial notice, with few ad sales and few receipts?

If radio has no or little money, risk sharing implies that if receipts are $10 a day, Lendini accepts 10 percent of that, or $1, a day as payment. If zero comes in for two or five weeks, Lendini — if it were a purchaser — would accept zero as no fault of merchant as the product it is buying is out of stock.

Radio for many weeks has no receipts and is effectively out of business. It remains, however, on the air. Its owners have a public duty to serve listeners and advertisers, come what may to ruin performance of wages, rents, leases, reimbursements and payments due. Lendini is a buyer by some of its words.

But the application suggests it's a lender with little patience with merchant struggles.

7. Variable term, or fixed term

In a true sale there is no final or fixed consummation date because receipts vary, and Lendini is buying receipts. For Lendini to be a buyer, it might have to accept $1 a day debits, theoretically, if the cupboard of receipts is $10 on the day.

If defendant accepts $1 a day debit based on receipts, that would be a factor in favor of seeing Lendini as a buyer. Purchases are variable or indefinite as to the final date on "total purchased amount" is paid.

Loans generally are fixed as to repayment date, if loans are not called sooner.

The merchant agreement has 13 default triggers, the operation of which shortens the timeline. Sect. 3.13. Events of Default (Doc. 1-1, PageID# 58). One is "[interfering] with Lendini's right to collect the current payment due." Default is an event that "[accelerates]" payment due (merchant agreement p. 2) before the agreed-on final payment date May 22, 2020. These operate short of an agreed final payment date for the total purchased amount (Doc.1-1, PageID #58).

The contract states no fixed final payment date. But here's how it's calculated. "Total purchased amount" is due in 131.99 weekdays ($28,400 "total purchase amount" divided by $215.16 ("daily increment" payments) = 131.99 weekdays). The fixed repayment rate does not account for market conditions.

Altogether radio makes payments on 76 weekdays, and is unable to deliver payments on 13 days.

The ACH provisions on p. 9 speak of failure to pay, and two additional days in which debits are attempted and fees added on "overdue amounts." Nonpayment is a default trigger, as nonpayment "interferes with Lendini's right to collect the current payment due" in sect. 3.13. Events of Default. When radio commits "an omission of that which ought to be done" (DEFAULT, *Black's Law Dictionary*, rev. 4th ed.), not paying three days in a row, the duty to repay the entire balance due kicks in by "acceleration."

The due date is set by Lendini's selection of the daily debit amount.

It is a question of fact as to the contacts between radio and Lendini as radio cash shriveled. The payment report from radio's account shows an occasionally interrupted sequence of $215.16 payments.

Radio's crisis hit at the beginning of the month, March 3, 2020, the first of three days in which it is unable to pay. Under reconciliation, radio would have had to wait 28 days for March 31, then more days to get a bank statement by U.S. Postal Service to Lendini in Pennsylvania.

Without immediate debit changes made after e-mail or phone calls — *methods for reconciliation articulated in the contract* — and without instant grant of relief, Lendini could not follow the contract to give relief by reduction of weekday debit amounts. The contract blocks the lender's ability to play the role of a factor, to adjust payments and save the relationship with radio with its 593.44 percent APR, more than doubling its money 131.99 weekdays.

Does a single day of nonpayment constitute default? Default occurs when "(a) Merchant violates any term or covenant in this Agreement" (sect. 3.13 Events of default, p. 7, Doc. 1-2, PageID #58). However, "For each scheduled payment, whenever a debit entry to your bank account is returned to us for any reason, we may ***initiate a debit entry to your bank account up to two additional times*** after our first presentation for each scheduled payment amount. You also agree that we will initiate a debit entry for any accrued returned payment fees and any interest that accrues on overdue amounts" (4. Automated clearing house (ACH) authorization, guaranty p. 9, Doc. 1-2 PageID # 59) (emphasis added). Default, determined by Lendini, is three days of inability to pay (because receivables are lacking).

Upon "event of default," Lendini has the right to exercise all remedies in connection with the agreement, "whether by acceleration or otherwise" (merchant agreement p. 2 remedies, Doc. 1-2 PageID #48), collecting the entire amount owed, enforcing its security interest in the collateral (i.e., all of radio equipment and property) or enforcing the personal guarantee. The contract's exacting "event of default" provision — making payment due immediately and permitting seizure of the collateral in case of a default and the personal guaranty provision — effectively shields the lender from the risk of loss when the creditor is nearly or actually bankrupt. The lender bears nearly no risk of the receivables' non-performance and would recover the purchased amount even if receivables are uncollectible (language largely borrowed from Lateral Recovery LLC v. Queen Funding, LLC, No. 21 CIV. 9607 (LGS), 2022 WL 2829913, at *6 (S.D.N.Y. July 20, 2022).

8. Automatic payment system

The great power Lendini obtains over the borrower is automatic withdrawal through ACH authorization. "You agree that we will initiate a debit entry to your bank account on each

business day and the payment amount set forth in this agreement. *** You also agree that we will initiate a debit entry for any accrued returned payment fees and any interest that accrues on overdue amounts" (guaranty p. 9, Doc.1-1, PageID #59). Payments are pulled from the account every weekday "until *** Lendini is fully satisfied." Lendini says, "If your payment is returned to us by your financial institution due to insufficient funds, or a closed account, you agree that we may recover court costs and reasonable attorneys fees" under Pennsylvania law (guaranty p. 9, Doc.1-1, PageID #59)

The Lendini application is *not receipts-centric, but payment-centric*. "Events of default" total 13. Among them, as noted in section 3.13, guaranty p. 8, the guaranteed total is due on the spot if "(b) Merchant interferes with Lendini's right to collect the current payment due (and any payment for arrears, if any) in violation of this agreement. *** (d) Merchant admits in writing its inability to pay its debts *** (f) Merchant *** suspends, dissolves or terminates its business[.]"

No external distress or threat to radio, in the end, is excusable. The master has his debtor-servant on a short leash with proviso (a), "[Radio] violates any term or covenant in this Agreement" as grounds to call the loan. Borrower's phoning for payment relief, not in the contract, violates the contract.

A motion for summary judgment makes appeal to the law of contract between the contracting parties and Tennessee law. But given the record and the two instances of default on p. 2 of payments made, it is fair for the court to presume parties talked about radio's "inability to pay its debts" and a bid by radio to lower payments, such phone recordings subject to discovery.

Lendini appears not to share market risk nor feel the market pressures on debtor. Radio, it may be judicially presumed, in the pandemic chopped expenses to the bone, renegotiated everything it could (no pay for owners, no water bottles for show guests), forcing tower owner to accept lower rent. Lack of sales, no cash flow — these are cause for default. Default "[accelerates]" (merchant agreement p. 2) Lendini's claim for absolute right to repayment. If no receipts exist, the owners' "personal guarantee" secures the loan absolutely — and immediately.

The calling of the loan is within the 132-day payment schedule, from the start date to May 22, 2020, final due date for "total purchased amount" of $28,400.

9. No signature contract

Lendini appears not to execute loan contracts so much as to accept applications for funding. The agreements in this case are signed by no liable Lendini employee because,

conveniently, "Lendini's payment of the Purchase Price shall be deemed Lendini's acceptance and performance of this Agreement, notwithstanding Lendini['s] not executing this Agreement." The delivery of funds equals performance even though Lendini is "not executing" this agreement.

Argument

The application for funding, if accepted and signed by radio applicants, becomes the contract, though not signed by any employee of Lendini. As an application, the paperwork is a take-it-or-leave-it proposal, nonnegotiable, a top-down agreement controlled by the superior party upon an inferior. Reconciliation, with one-month blocks of payments put to review and overpayments theoretically refunded, does not alter the payment schedule to ease radio's receivables crunch.

Lendini attempts over three days to draw money from an account containing insufficient funds. In this three-day period of radio distress, the lender is attempting to take *more than receipts* and *more than what is in the account*, however damaging such withdrawals might be for radio's existence. Lendini says the "total purchased amount due is due as a percentage of receipts."

The general thrust of the application is not toward ascertaining the quality and durability of merchant's business. It requires three months of merchant bank statements. The concessions in the application bully the applicant and painstakingly secure cash flow to the funder to block merchant escape via alternative payment methods. The tone is disciplinarian, implying a debtor-lender relationship and not a cooperative risk-sharing proposition of mutual respect in sale of a financial product.

Lendini pays $11,660.08 for $28,400 in receipts in a 593.44 percent APR loan in a contract. The application gives virtually all consideration to Lendini, little to radio.

Loan aspects are visible in security provisions that corral "fixtures and equipment" and other manner of assets *not receipts.* Lendini insists on power of attorney to run the station and deal with advertisers directly so it can collect proceeds in ad sales.

The personal guarantee is a security provision proper to a loan. It is a security device outside the category of receipt. The "merchant agreement" and "merchant security agreement and guaranty" mutually self-incorporate, the guarantee pretending to be external to the

application, said provisions informing the applicant that, whether calamity or gains occur, *there is no market risk for Lendini as repayment is absolutely required* personally by the two radio owners.

The March 2020 Covid-19 crisis 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 pot of $28,400 in cash that they bank so that they can become customers of Lendini. Lendini cares not 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.

The shutdown supervening impossibility shutters the radio sales department, effectively. The seller of receipts suffers supply chain problems in generating product. Radio in March 2020 has no receivables to deliver, *nothing in stock.* Radio suffers a market loss, and Lendini, if it faced market risk, would suffer a market loss, too, and behind that a financial loss of its investment.

Lendini's reconciliation provisions are unworkable because they are solely backward looking. They offer no forward-looking "adjustment." The application for funds has no adjustment mechanism to slash future weekday debits to their real level, which in radio's case might have been $1 a day for long periods, or extended periods of zero debits amid zero receivables.

At best, reconciliation is clunky, at worst a sham. Lendini is seller of personal loans dressed up as purchases of receivables. It's a lender, not a buyer.

***

State law and defendants' application forms for funds recognize the doctrine of supervening impossibility. Lendini accounts for this possibility in "Lendini's acknowledgement" (guaranty p. 2). "Merchant going bankrupt or going out of business, in and of itself, does not constitute breach of this Agreement," Lendini claims. "Lendini's entering into this Agreement knowing the risks that Merchant's business may slow down or fail[.]" (Doc. 1-2 PageID # 48)

This claim of lender's sharing market risk, accepting extreme cases of distress, should be construed as accepting lesser forms of distress, such as lack of cash flow during a state of

emergency declared by state and federal authorities. Unaltered daily debit levels suggest signs of lesser distress are ignored by defendant Lendini.

Judging by the payment reports in evidence, Lendini makes no adjustment in debit levels. Reconciliation and adjustment functions do not operate, and did not in radio's case.

State jurisprudence recognizes two doctrines of impossibility, each invoked in this case. Supervening impossibility is one, the other is original impossibility.

The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts. The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable.

Tennessee courts freed a Chattanooga utility in 1943 from a mandatory renewal provision in the 50-year deal, saying it was unenforceable because population growth on Lookout Mountain had polluted the spring from which the water came. Hinchman v. City Water Co., 179 Tenn. 545, 167 S.W.2d 986 (1943). As a later case explains, "The Water Company alleged that it had contracted for water that was pure and useable for human consumption. The Court in reaching its decision relieving the Water Company of liability, cited the case of *Taylor v. Caldwell,* 3 B.&S. 826, 122 *905 Eng.Rep. 309 (1863), the leading case establishing what is known as the new or modern rule in regard to the defense of impossibility of performance of a contract" N. Am. Cap. Corp. v. McCants, 510 S.W.2d 901, 904–05 (Tenn. 1974).

> "The essence of the modern defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible." Williston on Contracts (Revised Ed.), Vol. 6, p. 5410.

Hinchman v. City Water Co., 179 Tenn. 545, 167 S.W.2d 986, 991 (1943)

The McCants court holds that supervening acts are grounds for a finding of unenforceability, citing Heart v. East Tennessee Brewing Co., 112 Tenn. 69, 113 S.W. 364 (1908)

that holds unenforceable a saloon rental agreement supervened by governmental acts — imposition of state and national alcohol prohibition.

> It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, **this being made unlawful by law, the contract is no longer enforceable.** 112 Tenn. at 74, 113 S.W. at 365. [emphasis added]

Interventions and interruptions that are reasonably foreseeable are not grounds for finding a contract unenforceable. Those beyond the contemplation of the parties are excused from performance.

> The doctrine of frustration of commercial purpose, as expressed in *McCants,* is if the happening of an event, not foreseen by the parties to the contract and neither caused by nor under the control of either party, **has destroyed or nearly destroyed either the value of performance or the object or purpose of the contract**, then the parties are excused from further performance. The *McCants* court stated the **"supervening event" must be "wholly outside the contemplation of the parties"** but, if such frustrating event was reasonably foreseeable, the doctrine is not a defense. *872 The doctrine is predicated on the premise of giving relief where the parties **could not provide themselves**, by the provisions of the contract, against the happening of the supervening event. 17A C.J.S., *Contracts,* § 463(2).

Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (emphasis added)

"Failure to perform a contract is excused if performance becomes impossible due to a cause not attributable to the non-performing party and the impossibility is not among the probable contingencies which a person of ordinary prudence should have foreseen and provided for" St. George Holdings LLC v. Hutcherson, 632 S.W.3d 515 (Tenn. Ct. App. 2020), appeal denied (May 12, 2021)

A party is not relieved under an impossible condition for performance if that party is the origin of the condition. "Party is not relieved of liability for his nonperformance of a contract based upon the defense of impossibility of performance where the impossibility is *caused by the party's own conduct* or where the impossibility is caused by developments which the party *could have prevented or avoided* or remedied by appropriate corrective measures" Jenkins Subway, Inc. v. Jones, 990 S.W.2d 713 (Tenn. Ct. App. 1998) (emphasis added).

If payment is impossible because of government policy's suppressing buying and selling of all manner of goods in a "shutdown," debtor should have been excused — ***if*** the contract were a true advance purchase of future receivables.

The Shoot the Moon court indicates such a determination is very difficult to determine apart from relationship testimony among the parties, that a determination is "fact intensive." But a court in New York in 2022 case is able to discern at the motion for dismissal stage that the contracts are loans. Fleetwood Servs., LLC v. Ram Cap. Funding, LLC, No. 20-CV-5120 (LJL), 2022 WL 1997207, (S.D.N.Y. June 6, 2022)

The funding applications in this case are backed by personal guarantees crafted in language similar to those that back loan repayments, as in the case SecurAmerica Bus. Credit v. Schledwitz, No. W2012-02605-COA-R3CV, 2014 WL 1266121 (Tenn. Ct. App. Mar. 28, 2014). "The Guarantor hereby (a) unconditionally and irrevocably guarantees the punctual payment and performance when due[.] *** Both the Guaranty of Validity of Collateral and the Individual Guaranties were specifically referenced in the Credit Agreement as exhibits." *Id.*, SecurAmerica at 3. The guarantees in instant case absolutely require repayment because the funds extended are part of a loan and not an authentic purchase at discount of future radio receipts.

"A loan is a sale" is *ipsy dixit*. Verbiage of risk-bearing investment by defendants may have some weight in its favor as the court studies the agreement for its real meaning. But "[s]imply calling transactions 'sales' does not make them so. Labels cannot change the true nature of the underlying transactions." In re Woodson Co., 813 F.2d 266, 272 (9th Cir. 1987). To borrow from the Shoot the Moon court in a 2021 ruling, the negative averment the application is not a loan is "a conclusory and self serving label." In re Shoot The Moon, LLC, 635 B.R. 797, 819 (Bankr. D. Mont. 2021)

"When determining whether a transaction is a loan, substance — not form — controls. Several factors help distinguish loans from equity purchases and joint ventures, which are not subject to the usury laws. First, parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders, not investors" *Id.*, Adar Bays, at 334 (internal citation omitted).

Plaintiff moves the court to make this determination based on the internal law of the applications alone. If no material facts are in dispute, and no material facts are needed to help

determine the contracts' true nature, summary judgment is proper as to Lendini pursuant to the foregoing and as to Flexibility capital by its own omission in state court filings.

Relief requested

Plaintiff asks the court to do the following:

1. Issue a summary judgment that the Flexibility Capital contract (by its own admission, pursuant to plaintiff's motion for order of estoppel, **EXHIBIT Nos. 5 and 6**) and Lendini applications/contract are for loans;
2. Declare that as defendant loans exceed 10 percent APR as set at Tenn. Code Ann. § 47-14-103, they are (a) unenforceable, (b) injurious to the peace and tranquility of the state, and (c) a harm to plaintiff, under protection of the law, and (d) that defendants' efforts to enforce them in state court are null and void, a harm to plaintiff;
3. Declare that Flexibility's judgment against plaintiff in Hamilton County circuit court is a nullity, and void, as the lender cannot use the state courts to enforce usury;
4. Declare that any Lendini contract-based claim against plaintiff that might be filed against him in Hamilton County, Tenn., sessions and circuit courts is void from inception, given usury;
5. Set trial date for a jury's determination of damages and compensation.
6. Ordain any other relief appropriate to an order for summary judgment against defendants

Respectfully submitted,

David Jonathan Tulis

David Jonathan Tulis

Illustrations

ILLUSTRATION A

Original Purchase Price: $ 15000.00	**Balance Owed to Date: $** 7744.92
Total Purchase Price: $ 20000.00	**Total Purchased Amount: $** 28400.00
In Daily Increments of: $ 215.16	**Purchase Percentage: %** 10.45%
Net to Merch amt: $ 12255.08	

Origination Fee. An Origination Fee totaling $ 595.00 **shall be deducted from the Purchase Price prior to funding. You will receive a Net Purchase Price in the amount of $** 11660.08 **at funding.**

This screengrab from Lendini's guaranty, p. 2 (Doc. 1-1, PageID # 52), shows radio receives $11,660.08 "at funding" and repays $28,400 "total purchased amount" for an APR of 593.44 percent. The "purchase percentage" of 10.45 percent refers to the supposed level of receipts daily Lendini collects by automatic debit.

ILLUSTRATION B

Section 3.13 Events of Default. The occurrence of any of the following events shall constitute an "event of Default": (a) Merchant violates any term or covenant in this Agreement; (b) Merchant interferes with Lendini's right to collect the current payment due (and any payment for arrears, if any) in violation of this Agreement; (c) Any representation or warranty by Merchant in this Agreement proves to be incorrect, false or misleading in any material respect when made; (d) Merchant admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors; or any proceeding is instituted by or against Merchant seeking to adjudicate it bankrupt or seeking reorganization, arrangement, adjustment or composition of it or its debts; (e) the sending of notice of termination by Guarantor; (f) Merchant transports, moves, interrupts, suspends, dissolves or terminates its business; (g) Merchant transfers or sells all or substantially all of its assets; (h) Merchant makes or sends notice of any intended bulk sale or transfer by Merchant; (i) Merchant uses multiple depository accounts without the prior written consent of Lendini; (j) Merchant changes its depositing account or Credit Card Processor without the written consent of Lendini; (k) Merchant performs any act that reduces the value of any Collateral granted under this Agreement; (l) Merchant defaults under any of the terms, covenants and conditions of any other agreement with Lendini; or (m) Merchant takes any action to discourage the use of electronic check processing that is settled through Processor or permits any event to occur that could have an adverse effect on the use, acceptance, or authorization of checks or other payment or deposits for the purchase of Merchant's services and/or products including but not limited to direct deposit of any checks into a bank account without scanning into Lendini's electronic check processor.

This "Events of Default" screengrab lists Lendini's 13 bases for accelerating instance of full loan repayment – aka calling the loan (guaranty p. 8 sect. 3.13, Doc. 1-1, PageID # 58)

CERTIFICATE OF SERVICE

Plaintiff hereby certifies that he sends defendants listed below by first-class mail, with postage sufficient to secure delivery, this filing on Friday, the 11th day of April, 2025.

/s/ David Jonathan Tulis

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