

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:

Chapter 11

1 GLOBAL CAPITAL LLC, et al.,

Debtors.

Case No. 18-19121-RBR
(Jointly Administered)

1 WEST CAPITAL LLC,

Plaintiff,

Adv. Case No. 19-01344-RBR

v.

CLARK'S CORNER INVESTMENTS, LLC
and KRAIG CLARK,

Defendants.

**DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO
COMPLAINT FOR BREACH OF CONTRACT AND GUARANTY**

Defendants CLARK'S CORNER INVESTMENTS, LLC ("CCI") and KRAIG CLARK ("CLARK") (collectively, "Defendants"), by their undersigned counsel, hereby file their Answer and Affirmative Defenses to Plaintiff 1 WEST CAPITAL LLC's ("Plaintiff") Complaint for Breach of Contract and Guaranty and state as follows:

ANSWER

JURISDICTION, VENUE AND PARTIES

1. Plaintiff is a Limited Liability Company with its principal place of business in Broward County, Florida.

RESPONSE: Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations.

2. Merchant is a California Limited Liability Company.

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RESPONSE: Admit.

3. Guarantor is a resident of the state of California.

RESPONSE: Admit.

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a non-core proceeding pursuant to 28 U.S.C. § 157(c).

RESPONSE: Admit.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1409. Plaintiff consents to the entry of final orders and judgment by the Bankruptcy Court.

RESPONSE: Admit first sentence. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence.

6. All conditions precedent to the filing of this action have been performed, excused, or otherwise waived.

RESPONSE: Deny.

COUNT I
(Breach of Merchant Agreement against Merchant)

7. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 6 above as if fully set forth herein.

RESPONSE: Defendants repeat the above responses.

8. Plaintiff and Defendants are parties to that certain Merchant Agreement, a true and correct copy of which is attached hereto as Exhibit A (“Merchant Agreement”).

RESPONSE: Admit.

9. Defendants executed and delivered the Merchant Agreement for the sale of Merchant’s future receivables to Plaintiff. In particular, Plaintiff, in exchange for a lump sum payment, would receive over a period of time an agreed amount of the future accounts receivable generated by Merchant (“Specified Amount”).

RESPONSE: Admit.

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10. Plaintiff transferred to Merchant the lump sum under the Merchant Agreement in good faith and with the reasonable expectation that Merchant would deliver the Specified Amount by making periodic payments in accordance with the terms and conditions of the Merchant Agreement.

RESPONSE: Deny.

11. Merchant breached the Merchant Agreement by failing to make payments to Plaintiff.

RESPONSE: Deny.

12. Merchant's failure to pay the Plaintiff the daily payments when due in accordance with the terms of the Merchant Agreement constitutes a default pursuant to terms and conditions of the Merchant Agreement.

RESPONSE: Deny.

13. Accordingly, as a result of Merchant's Breach of the Merchant Agreement, Plaintiff sustained damages in the sum of \$791,909.60.

RESPONSE: Deny.

COUNT II
(Breach of Guaranty against Guarantor)

14. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 6, 8 and 9 above as if fully set forth herein.

RESPONSE: Defendants repeat the above responses.

15. The Merchant Agreement includes Guarantor's personal guaranty of Merchant's performance of all covenants, representations and warranties made by Defendants in the Merchant Agreement.

RESPONSE: Admit.

16. Guarantor executed and delivered the Merchant Agreement, as an endorser and unconditional Guarantor of payment.

RESPONSE: Deny.

17. Plaintiff is the owner and holder of the Merchant Agreement and has performed its obligations and conditions precedent to enforce its terms and conditions.

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RESPONSE: Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations.

18. Merchant has not delivered the Specified Amount.

RESPONSE: Admit.

19. Merchant's failure to pay the Plaintiff the Specified Amount when due constitutes a default and breach of the Merchant Agreement.

RESPONSE: Deny.

19. [sic] Merchant's failure to pay the Plaintiff the Specified Amount when due constitutes a default and breach of the Merchant Agreement.

RESPONSE:

2. [sic] Accordingly, as a result of Merchant's breach, Guarantor owes Plaintiff \$283,314.90 as defined therein, less payments, plus attorneys' fees, pre-judgment interest, costs.

RESPONSE: Deny.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Conditions Precedent)

1. Plaintiff purchased future receivables.
2. Pursuant to the Merchant Agreement, payment was to be debited from an account that was funded by future receivables.
3. Plaintiff agreed that payment would be made as the Receipts are created.
4. Further: "Payments made to [plaintiff] in respect to the full amount of the Receipts shall be conditioned upon Merchant's sale products and services and the payment by Merchant's customers in the manner provided in Section 1.1."

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5. Pursuant to the Merchant Agreement, Plaintiff was entitled to debit the Specified Amount and Merchant was required to ensure that the Specified Amount “remains in the account on the Specified Date of **November 5, 2018** . . .”

6. Based on the foregoing, Plaintiff was only entitled to debit funds from the accounts that were generated through future receivables.

7. The Complaint fails to allege that the Merchant failed to have kept future receivables in the account or that the Merchant failed to let such funds remain in the account on the Specified Date.

8. As Plaintiff’s entitlement to collect future receivables was limited to receivables collected in the account, Plaintiff cannot seek additional funds that were not based on the purchased future receivables or the general funds of the Defendants.

SECOND AFFIRMATIVE DEFENSE
(Usury)

9. The Merchant Agreement constitutes a loan.

10. The purpose of the Merchant Agreement was to exact a usurious interest rate based on an alleged purchase of future receivables.

11. The Merchant Agreement is an express or implied loan.

12. Based on the Complaint filed by the Plaintiff, there is a repayment requirement of the full amount of the Specified Amount.

13. The Merchant Agreement requires full payment by November 5, 2018.

14. Based on the \$900,000.00 loan amount with a repayment amount of \$1,251,000.00 in 11 months, the annual interest rate sought to be extracted by the Plaintiff is 42.55%.

15. A 42.55% interest rate is usurious under Florida law.

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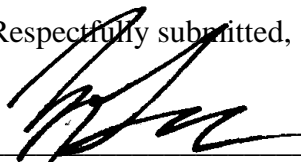
16. Plaintiff had a corrupt intent to take more than the legal rate for the money loaned.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Dated: September 17, 2019
Boca Raton, FL

Respectfully submitted,



Eric Lee (Florida Bar No. 961299)

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KRAIG CLARK

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SERVICE LIST
(ECF)

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1 WEST CAPITAL LLC

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