2020 WL 4744342 (Fla.App. 3 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Third District.

CRATON ENTERTAINMENT, LLC and Charles T. Craton, Appellants,
v.
MERCHANT CAPITAL GROUP, LLC and Jordan Fein, Appellees.

No. 3D19-1643.
July 6, 2020.

L.T. Case No.: 16-30985 CA 30
Appeal from the Circuit Court of Florida Eleventh Judicial Circuit
(To Fix Formatting Error)

Appellants' Initial Brief (Corrected)

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***i** TABLE OF CONTENTS

***ii** TABLE OF CITATIONS

Cases

Statutes

V *PREFACE

In Appellants' Initial Brief, the following symbols will be used:

A = Appendix to Appellants' Motion to Supplement the Record on Appeal docketed on December 19, 2019

("A" will be followed by a number corresponding to the page number of the referenced document in the Appendix)

R = Record on Appeal

("R" will be followed by a number corresponding to the page number of the referenced document in the Record on Appeal)

vi *ISSUES ON APPEAL

1. Whether the two Purchase and Sale Agreements are in fact disguised loans of money.

2. If yes, whether these two loans at 132% interest per annum violate the civil usury and criminal usury laws of the State of Florida.

3. If yes, whether Appellee Merchant Capital Group, LLC and its CEO Jordan Fein are both liable on the usury counts and the counts derived therefrom.

4. Whether the trial court erred in entering summary judgments (a) for Appellee/Plaintiff Merchant Capital Group, LLC on its Amended Complaint and (b) for Appellees/Counterdefendants Merchant Capital and its CEO Jordan Fein on all counts of Appellant's Amended Counterclaim, based on an erroneous ruling that the Purchase and Sale Agreements were not disguised usurious loans.

5. Whether the trial court erred in *denying* Appellants' motions for summary judgment on the Amended Complaint and on the Amended Counterclaim (which motion excluded only the FDUTPA claims (Counts V and XI)), based on an erroneous ruling that the Purchase and Sale Agreements were not disguised usurious loans.

***1** STATEMENT OF THE CASE

Craton Entertainment, LLC ("Craton") is a Georgia company with its principal office in Rome, Georgia. (R 51) Charles Craton is the President of Craton. (R 523) Merchant Capital Group, LLC ("Merchant Capital") is a Florida company with its principal office in Miami-Dade County. (A 10) Jordan Fein is and was at all relevant times chief executive officer and managing member of Merchant Capital. (R 1296)

Merchant Capital is in the business of making loans of money to small businesses, which loans it calls "cash advances". Merchant Capital made a $45,000 loan to Craton that Merchant Capital divided into two loans of $22,000 and $23,000 - one for each of Craton's two retail stores. Merchant Capital documented the two loans with contracts that it called "Purchase and Sale Agreements" (which disclaim their being loans). In this action, Merchant Capital sued for nonpayment of the two loans, with Craton as principal debtor and Charles Craton as guarantor. Both Appellants, as defendants below, asserted affirmative defenses of usury and criminal usury. Craton brought an Amended Counterclaim, (R 162, 166), which contained the following causes of action:

COUNT I - Usury under § 687.03, Fla. Stat. (Loan #1)

COUNT II - Criminal Usury (Loan #1)

COUNT III - Usury under § 687.03, Fla. Stat. against Jordan Fein (Loan #1)

COUNT IV - Criminal Usury against Jordan Fein (Loan #1)

***2** COUNT V - Violation of Florida Deceptive and Unfair Trade Practices Act (Chapter 501, Fla. Stat.) (Loan #1)

COUNT VI - Declaratory Judgment (Loan #1)

COUNT VII - Usury under § 687.03, Fla. Stat. (Loan #2)

COUNT VIII - Criminal Usury (Loan #2)

COUNT IX - Usury under § 687.03, Fla. Stat. against Jordan Fein (Loan # 2)

COUNT X - Criminal Usury against Jordan Fein (Loan #2)

COUNT XI - Violation of Florida Deceptive and Unfair Trade Practices Act (Loan #2)

COUNT XII - Declaratory Judgment (Loan #2)

The trial court dismissed Counts V and XI (both FDUTPA claims), (R 266), but later reinstated them upon reconsideration. (R 901)

Appellants filed a Motion for Summary Judgment on Amended Complaint and on Amended Counterclaim. (R 645) Appellees filed the following motions for summary judgment:

1. Motion for Final Summary Judgment (R 996),

2. Motion for Summary Judgment on Counts I, II, III, IV, VI, VII, VIII, IX, X, and XII of Craton's Amended Counterclaim (R 594) and

3. Motion for Summary Judgment on Counts V and XI of Craton Entertainment, LLC's Amended Counterclaim (R 1158).

***3** The trial court, J. Reemberto Diaz, entered (1) its Order Denying Defendants' and Counterplaintiff's Motion for Summary Judgment on Amended Complaint and on Amended Counterclaim (i.e., Appellants' motions denied) and (2) its Order Granting Counter-Defendants' Motion for Summary Judgment on the Amended Counterclaim (i.e., Merchant Capital's and Jordan Fein's motion granted). (R 1717 and 1719) After these orders, only Counts V and XI remained in Craton's Counterclaim. (R 1098, 1100) Subsequently, the trial court entered its Order Granting Plaintiffs/Counter-Defendants' Motion for Summary Judgment on Counts V and XI of Craton Entertainment, LLC's Amended Counterclaim (Merchant Capital's and Jordan Fein's motion granted). (R 1721) Shortly thereafter, the trial court entered its order granting summary judgment in favor of Merchant Capital on the Amended Complaint. (R 1723) Thus, all issues in the case were disposed of by summary judgment. On August 3, 2019, the trial court entered an Amended Final Judgment. (R 1714) This appeal followed.

Prior to the hearing on Appellees' motion for summary judgment dismissing the Amended Counterclaim, Appellant Craton had filed an Amended Motion for Leave to File Second Amended Counterclaim in order to add new counts under a separate statute that provides additional civil remedies for criminal usury (§ § 772.103 and 772.104, Fla. Stat.). (R 740) Due to the granting of Appellees' motion for summary judgment, (R 1719), the motion to amend was never heard.

4** ***STATEMENT OF THE FACTS

1. Merchant Capital Group, LLC ("Merchant Capital") is in the business of making "cash advances" to merchants that must be repaid to Merchant Capital with a profit in accordance with the terms of its "Purchase and Sale Agreements". (A 24, 134, 135) During or about July, 2016, "Pauline" of Advance Funds Network solicited Charles Craton, President of Craton Enterprises LLC, a small retail business. (R 523) She told him that her company could arrange a business loan for his company if it qualified. (R 523) (For a fee paid by the lender, Advance Funds Network puts borrowers and lenders such as Merchant Capital together.) (A 61, 62) Over the following days, Charles Craton provided the financial and credit information that Pauline and personnel from Merchant Capital requested concerning both Craton and him personally. (R 523; A 345, 384) (12/15/2017 Dep. of Jordan Fein 48/16-23 and Exhibit 23 thereto ["Correspondence Log"]) Ultimately, either Pauline or someone on behalf of Merchant Capital sent him the two loan agreements, called "Purchase and Sale Agreements", with attachments to sign. (R 523) He signed and returned the papers. (R 523) The loan funds, less fees, were deposited in Craton's bank account. (R 523, 524) These Purchase and Sale Agreements are the two loan agreements that are the subject of this lawsuit. (R 523, 524)

2. Merchant Capital did an extensive credit check on Craton and Charles Craton prior to agreeing to make these loans (or "fund these cash advances", to use ***5** Merchant Capital's terminology). (A 59, 60, 304-355 and 378-392) (7/13/2017 Dep. of Jordan Fein, 56/25 - 57/13; 12/15/2017 Dep. of Jordan Fein, pages 7-58, with Exhibits 18-29 thereto; 131/3 - 132/2) To secure full repayment, Merchant Capital required Craton to grant it a security interest or lien on all of Craton's assets as collateral. (R 197, 198, 212, 213) Additionally, Merchant Capital required Charles Craton to personally guarantee Craton's performance, representations and warranties under the Purchase and Sale Agreements. (A 97; R 201, 202, 216, 217)

3. In the "Purchase and Sale Agreements", Merchant Capital loaned $23,000 ("Loan No. 1") and $22,000 ("Loan No. 2"), respectively, to Craton to be repaid on a daily basis and fully amortized over the ensuing six months. (R 191, 192, 206, 207)

4. In accordance with the terms of these two Purchase and Sale Agreements (hereinafter, "the Agreements"), Merchant Capital intended for each of these loans to produce a profit of 37% of the loaned amounts by the end of the six months loan term. (A 337, 383)

5. The amount to be repaid on Loan No. 1, the $23,000 loan, was $31,510, in order to produce the intended profit to Merchant Capital of $8,510. From the date of the funding of Loan No. 1, the Agreement required a payment of $250 to be made every business day by ACH debit from Craton's bank account until $31,510 had been paid. (R 191, 192) Because the principal was being repaid daily with interest, this produced a rate of interest on this loan of **132.82% per *6 annum.**[1] A schedule of payments and the amortization were prepared as summary judgment evidence. (R 529-531, 533-545)

6. The amount to be repaid on the $22,000 loan was $30,140, in order to produce the intended profit to Merchant Capital of $8,140. From the date of the funding of Loan No. 2, the Agreement required a payment of $239 to be made every business day by ACH debit from Craton's bank account until $30,140 had been paid. (R 206, 207) Likewise, because the principal was being paid down daily, this produced a rate of interest on this loan of **132.74% per annum.**[2] A schedule of payments and the amortization were prepared as summary judgment evidence. (R 531, 532, 552-564)

7. Thus, between the two simultaneous loans, Craton borrowed $45,000 (less the loan charges) and was obligated to repay a fixed $61,650. Merchant Capital was to withdraw an aggregate amount of $489 from Craton's bank account every business day for six months (126 or 127 payments on each loan). (A 340, 341, 383)

***7** 8. In an effort to avoid the appearances of usurious loans, Merchant Capital fashioned the transaction as its purchase of a product from Craton. However, in reality there was no product. For immediate cash, Merchant Capital obtained the right to withdraw an agreed amount of funds from Craton's bank account every business day for six months until Merchant Capital

had been repaid the loan principal and the pre-fixed 37% profit. Merchant Capital named its loan agreement "Purchase and Sale Agreement" and characterized its loans as the "purchase of future receivables", which was nothing other than its obtaining the contractual right to withdraw funds from Craton's revenues on a daily basis. Merchant Capital called the loan principal the "Purchase Price" (e.g., $23,000 on Loan No. 1), and the amount that it would extract from Craton's bank account it called the "Purchased Amount" ($31,510) of Craton's "Future Receivables". (R 191, 206)

9. Upon any default under the Purchase and Sale Agreements, Craton must immediately pay to Merchant Capital the remaining unpaid portion of the "Purchased Amount" of the "Future Receivables", that is, the remaining unpaid principal and the 37% profit (interest). (Paragraphs 4 and 5.a.) (A 207, 208, 225, 226) Additionally, Craton must pay a "Default Fee" equal to 15% of the total "Purchased Amount" (aggregately, another $9,000+). (R 195, 210) This acceleration of repayment of the loan principal and the full 37% profit (and the ***8** Default Fee) upon default was without regard to the limited number of days that the principal had been borrowed.

10. Characteristic of a loan, Craton's obligation to pay the full "Purchased Amount" was absolute. The Agreements, the security interest in Craton's assets and the guaranties by Charles Craton would not terminate under any circumstances until Craton has fully performed its obligations. (See Paragraphs 1.a., 7.d., 8.f. and 8.v. of the Agreements.) (R 191, 196, 197, 201; 206, 211, 212, 216)

11. The Purchase and Sale Agreements were made under the laws of Florida, where Merchant Capital is located. (R 198, 213) However, in Ohio, which has no usury on loans to corporations, Merchant Capital was making these same "cash advance" loans to businesses using promissory notes and loan agreements denominated as such. (A 406-412, 414-417, 448, 460, 464, 484, 496) Merchant Capital's Ohio promissory notes and loan agreements used the identical format and structure that it used in its Florida "Purchase and Sale Agreements". (A 496, R 191, 206) Just as in its Florida Agreements with Appellants, Merchant Capital's Ohio loans required repayment of the loan principal and interest by daily ACH withdrawals of a fixed amount from the borrower's bank account until the total pre-fixed amount of principal and interest (at a similar rate of interest) had been paid. (A 460, 464, 496, 527, 530, 532) In one of these loans, for example, the borrower borrowed $1,500 and agreed to pay Merchant Capital $16,330 via daily ACH withdrawals of $141 for six months. (A 527)

***9** 12. The Agreements required Merchant Capital to make its daily withdrawals only from Craton's revenues from its retail sales to customers. Nevertheless, Jordan Fein admitted in deposition that, contrary to the Agreements, it was Merchant Capital's invariable practice to take its daily payments from Craton's and its other "Purchase and Sale" borrowers' bank accounts without regard to the source of the money - even if they were derived from the loan funds themselves or from another source. (A 89) (7/13/2017 Dep. of Jordan Fein, 86/2-14)

Q. (By Mr. Gammill) All right. Now, your money - and I'm talking about your initial funding or your funding in this case of $23,000 - is put in the customer's bank account. Is that correct?

A. (By Mr. Fein) The 23,000, yes.

Q. In other words, it is some type of a direct deposit?

A. They choose wire or ACH, yes.

Q. All right, and what was chosen in this case?

A. Don't know.

Q. Okay, now. And then you immediately, beginning the next day, draw out your $690 setup fee and your $250 a day repayment or payment; correct?

A. If our process was followed, correct.

Q. And you do anything to verify each day that the customer has money from his customers coming into that bank account before you draw out $250 of receivables?

A. No, the technology doesn't exist.

Q. So you're just drawing out $250 a day from whatever money is in that bank account; correct?

A. Correct. Yes.

Q. So if all the money that is in that bank account is the money that Merchant Capital Funding (sic) put in, it's just drawing back its own money at $250 a day; correct?

Ms. Puopolo: Object to form.

A. Yeah, I mean in some random case. Who knows?

(A 88, line 13 - A 89, line 14)

***10** In other words, contrary to the central feature of the Agreements, Merchant Capital does not even limit itself to "future receivables" (post-loan revenues from the customer's business operation) as the initial source of its repayments. The customer's bank account is simply Merchant Capital's initial source of repayment of its loaned money.

SUMMARY OF ARGUMENT

Payments of money that must be paid back are loans. The Purchase and Sale Agreements are disguised loans at a criminally usurious rate of interest. Using clever verbiage, Merchant Capital attempts to disguise these loans as business agreements in order to avoid the application of Florida's usury statutes.

The usury statutes in Florida provide that loans with an annual interest rate above 18% per year are usurious, and loans with an annual interest rate over 45% per year are criminally usurious. For civil usury, the creditor forfeits the entire interest and double the interest already paid. § 687.04, Fla. Stat. For criminal usury, the entire debt is void and unenforceable. § 687.071(7), Fla. Stat.

The Florida courts have had considerable familiarity with usurious loans disguised as "purchase and sale agreements". The courts will look to the substance of the transaction rather than its form in holding these business transactions to be disguised usurious loans. The lender cannot circumvent usury laws by the use of a contract provision that the parties agree that the contract is not a loan. Likewise, ***11** the liability of the lender is absolute even if the borrower was a knowing participant in the usury transaction. The premium or profit to be paid on the funds borrowed does not have to be called "interest" for there to be usury. The usurious character of a contract must be determined as of the date of its inception and, if usurious at that time, no subsequent transaction will purge it of the usury.

Merchant Capital claims that it made an "investment" in Craton's "future receivables", purchasing at a 37% discount the immediate right to start withdrawing money from Craton's bank account until it had withdrawn the "Purchased Amount" of Craton's revenues. These are simply creative euphemisms for Merchant Capital's loaning Craton a fixed amount of money and immediately began repaying itself plus interest at a criminally usurious rate. The Purchase and Sale Agreements bear all the characteristics of a loan. Merchant Capital did an extensive credit check on Craton and Charles Craton before making the two "cash advances". Craton's obligation to repay the "Purchased Amount", the principal and the interest, is absolute. There is no

provision in the Agreements that provides or allows for any forgiveness or voiding of the debt. The Agreements, the security interests in all of Craton's assets and the personal guaranty of Charles Craton remain in full force until Merchant Capital has fully collected the "Purchased Amount".

Merchant Capital and its CEO Jordan Fein had the requisite corrupt intent to charge more profit on the loans than the law allows. Jordan Fein admits that ***12** Merchant Capital deliberately intended to take a profit of $8,510 on the $23,000 loan and $8,140 on the $22,000 loan within six months by repayments of $250 and $239, respectively, every business day, beginning immediately upon the funding. These were the terms of the Purchase and Sale Agreements. The annual rate of interest produced by these Agreements is over 132%, making them criminally usurious. The legal test for the "corrupt intent to commit usury" is not whether the lender knowingly intends to violate the usury laws, but simply whether the lender intended to collect payments for the loan which exceed the maximum allowable rate of interest. It does not matter that the Purchase and Sale Agreements did not state an actual interest rate. The interest rate is readily calculable when the amount borrowed, the amount to be repaid, and the starting and ending date of fully amortizing payments are all "givens", as is the case here.

Despite the Agreements having all the requisite characteristics of a usurious loan, the trial court agreed with Merchant Capital that the "reconciliation clause" in the Agreements rendered them business agreements and not usurious loans. This was error. This clause, when applicable, could permit temporary adjustment of the daily withdrawals if Craton's revenues should diminish during the prior month. As a matter of law, however, an adjustment provision would not remedy the usury inherent in these two agreements. Florida law is very clear and adamant that, whether a loan is usurious is determined as of the date of its inception, based on the ***13** assumption that the loan will be repaid in accordance with its original terms, regardless of whether the repayments could be modified.

Regardless, no reasonable, foreseeable application of the reconciliation clause could bring the interest rate out of usury. If Craton had been able to continue paying for an entire month until the reconciliation clause became operative, the adjusted Daily Retrievables under all reasonably foreseeable circumstances would *still* have been usurious. If Craton's revenues had fallen to one half during the first month and remained at that level, and if the revised daily withdrawals were reduced to one half, the interest rate would still be a criminally usurious 66%.

Contrary to the trial court's implied conclusion, the reconciliation clause does not infuse a "risk of substantial loss" of the money loaned in the Purchase and Sale Agreements. This clause is merely a mechanism for short-term adjustments in the daily withdrawals. Only the most extreme example - Craton's failure to receive *any* revenues - would create some risk of nonpayment of the debt. But the risk of nonpayment is not the type of substantial "risk of loss" on a contingency or an equity-participation interest that will render a contract non-usurious. The risk of nonpayment is the normal risk that a lender takes on its loans. Additionally, this reconciliation clause, intended merely for adjustments in daily withdrawals, only kicks in after the first month of daily withdrawals. This clause would have no application to, and would not be available to, the "Seller"/borrower (such as ***14** Craton) who had defaulted in its revenues before it had reached a month of withdrawals. Moreover, nothing in the Agreements allows for any forgiveness or voiding of Craton's indebtedness; the obligation remains alive until the entire Purchased Amount has been paid. Craton's obligation to repay is absolute. The fact that Merchant Capital's initial source of repayment may dry up or even disappear, albeit very small, is a risk of non-payment that all lenders face. Moreover, Merchant Capital has protected itself with a security interest in all of Craton's assets and a guaranty from its owner Charles Craton. The security interest and the guaranty continue in force until the entire debt, the Purchased Amount, has been fully paid. This absolute obligation to pay, as well as the protections of a security agreement and a guaranty characterize a loan, not an investment. Additionally, should a "Seller"/borrower have followed every term and procedure under the Agreements but cease to have any revenues, the non-existence of revenues will almost automatically trigger specified events of default under the Agreements.

Apart from the other usury infirmities in the Purchase and Sale Agreements, they specifically provide for the acceleration of the indebtedness upon a default, such that Merchant Capital would, upon Craton's default, be immediately entitled to recover the full amount of the "Purchased Amount", which would include the unearned interest and the "Default Fee" of over $9,000

on the two Agreements. Merchant Capital's right to recover the unearned interest and the Default Fee in the ***15** acceleration clause of the two Agreements render them criminally usurious at their inception.

Merchant Capital's CEO Jordan Fein, as an active participant in the creation of the sham Purchase and Sale Agreements and the making of these criminally usurious loans, is individually liable both under the usury statute and common law.

ARGUMENT

Jurisdiction and standard of review

The standard of review of a trial court's decision to grant or deny final summary judgment is de novo. *Major League Baseball v. Morsani,* 790 So.2d 1071, 1074 (Fla. 2001); Valdes v. Optimist Club of Suniland, Inc., 27 So.3d 689, 690 (Fla. 3d DCA 2009). The Appellants' burden of proof of usury is by "clear and satisfactory evidence". Diversified Enterprises, Inc. v. West, 141 So.2d 27, 29 (Fla. 2d DCA 1962); *River Hills, Inc. v. Edwards,* 190 So.2d 415, 424 (Fla. 2d DCA 1966). The determination of whether a transaction is a usurious loan is appropriate for summary judgment. *Levin v. Fisher,* 150 So.2d 730 (Fla. 3d DCA 1963); *Saralegui v. Sacher, Zelman, Van Sant, Paul, Beiley, Hartman & Waldman, P.A.,* 19 So. 3d 1048, 1050-1051,1053 (Fla. 3d DCA 2009).

There is no genuine issue of material fact where the transactions sued on are on their face disguised loans, where the lender intended to exact more profit than the law allows, and where those loans are civilly and criminally usurious. *Saralegui,* 19 So. 3d at 1050-1051.

***16** *. The Purchase and Sale Agreements are disguised loans*

Merchant Capital is in the business of making "cash advances" to merchants that must be repaid with a profit in accordance with the terms of its "Purchase and Sale Agreements". (A 24, 134, 135) (7/13/2017 Dep. of Jordan Fein 21/1-9; 131/3-132/2) A "cash advance" that must be repaid is a loan of money. *Estate of Mixon v. United States,* 464 F.2d 394 (5th Cir. (Ala.) 1972). The profit on the "cash advance" is interest.

Despite Merchant Capital's creative use of language, it made loans to Craton which had to be paid back in full, and Merchant Capital secured the payment of the full amount demanded both by a personal guaranty of Charles Craton and by a security interest in Craton's assets. The repayment schedule dictated by the terms of the Agreements required the payment of profit (interest) to Merchant Capital at the criminally usurious rate of over 132% per year.

***17** Merchant Capital fashioned its loan documents on each of its loans to create the fiction of a "purchase" of "future receivables". This transaction was not a purchase of any product or asset, and was not a purchase of "accounts receivable" (which Craton did not have). [3] (A 43, 44) (7/13/2017 Dep. of Jordan Fein, 40/22 - 41/11) In exchange for the loan of money, Merchant Capital simply obtained the right to draw money out of Craton's bank account (the "future receivables") on a daily basis until a fixed higher amount had been drawn out (the money loaned plus a 37% profit). Merchant Capital, by and through its chief executive officer and principal owner Jordan Fein, devised this disguised-loan scheme in order to charge an exorbitant rate of interest on their loan of money. Merchant Capital and its CEO Jordan Fein specifically intended to make a 37% profit on these loans in six months. (A 337, 383) (Exhibit 3 (offer sheet)) Jordan Fein personally signed off on the offer sheet showing the rapidly amortizing terms of payment and the 37% profit (interest), such that the profit would amount to an annual rate of interest in excess of 132%. (A 337, 383) (12/15/2017 Dep. of Jordan Fein, 40/9-14); Exhibit 3 (offer sheet))

In General Capital Corp. v. Tel Serv. Co., 212 So.2d 369, 376 (Fla. 2d DCA), aff'd in all relevant parts, 227 So.2d 667 (Fla. 1969), the Court held that a transaction that was labeled a "sale of commercial paper" to the buyer/lender was in fact a disguised usurious loan. General Capital "purchased" commercial paper at a discount from the amount owed, obtaining the right to receive

the money owed by the makers of the commercial paper - but with full recourse against the "seller" for the full amount still owed on the commercial paper if the makers failed to pay. The appellate court held that this limited risk of loss confirmed the scheme as a disguised loan of money:

***18** In addition to the personal written guaranties of the stockholder-officers of TS for performance of the agreement, Mr. Grass and his wife were required to further secure such performance by executing and delivering to GC mortgages on valuable real property personally owned by them. Referring to such provisions of the contract and the conditions attendant to its execution, the Chancellor found that

'(i)n the light of these facts, the conclusion is inescapable that (GC) intended to insure the return of all money advanced to (TS) at all events, and that the return of the advance was secured rather than being put in hazard, except, of course, those hazards that are incident to any loan of money'.

Id., at 375. The risk to the "buyer" General Capital was the normal and usual risk related to the seller's nonpayment of the balance owed on the defaulted commercial paper. Likewise, Merchant Capital made full-recourse, secured, fully guaranteed, disguised loans to Craton. Merchant Capital's risk was only the normal and usual risk related to the borrower's nonpayment of the money owed. All of these same loan characteristics exist in the instant case:

i. Merchant Capital is in the commercial finance and discount business. (A 24, 134, 135)

ii. In one of the transactions, the "buyer" Merchant Capital "purchased" $31,560 of the "seller" Craton's "Future Receivables" (revenues from its retail sales deposited in its bank account) at a discount ($23,000). (R 191) Merchant Capital would then withdraw funds every business day for six months from Craton's bank account until Merchant Capital had extracted ***19** $31,560. (Paragraph 1.a.) (R 191, 192) However, on default on Craton's daily payments (the "Daily Retrievals" from Craton's bank account), Craton was obligated to pay Merchant Capital immediately the unpaid balance of the $31,560 "Purchased Amount", the purchased "Future Receivables". (Paragraph 5.a.) (R 194, 195) On default on Craton's daily payments on the other transaction, Merchant Capital's $22,000 "purchase" of $30,140 of "Future Receivables", Craton was likewise obligated to pay Merchant Capital the unpaid balance of the $30,140. (Paragraphs 1.a. and 5.a.) (R 206, 207, 209, 210) Additionally, Craton was obligated on default to pay a "Default Fee" of 15% of the full Purchased Amount, to wit, $9,000+ on the two contracts. (Paragraph 5.a.) (R 195, 210)

iii. Charles Craton, the owner of Craton, was required to guarantee Craton's full performance, that is, payment of the "Purchased Amount" of the "Future Receivables". (Paragraph 8.v.) (R 201, 202, 216, 217)

iv. The "buyer" Merchant Capital took a security interest in all of Craton's assets as collateral for Craton's full payment of the "purchased future receivables". (Paragraph 8.f.) (R 197, 198, 212, 213)

v. The risks to Merchant Capital were the risks related to Craton's nonpayment of the full $31,560 and the full $30,140 out of its bank account and other resources. These are the normal and usual risks of ***20** nonpayment of a loan, whether due to poverty or to a borrower's own actions.

In *General Capital,* the product purchased was commercial paper - the right to receive money owed by the makers of the commercial paper - but with full recourse against the "seller" for the full unpaid balance of the commercial paper if the makers failed to pay. This obligation of the seller to repurchase the unpaid commercial paper confirmed the scheme as a disguised loan of money. Even more egregious in Merchant Capital's case, it was not even "purchasing" a product: Merchant Capital paid an amount of money for the absolute right immediately to withdraw money out of Craton's bank account daily until Merchant Capital had drawn out a much larger amount of money. This is clearly a disguised loan.

Commenting on fellow courts' analysis of similar transactions, the Second District in *General Capital* stated:

> The modem trend of the reported Florida cases is to take a dim view of transactions where lenders advance money to necessitous debtors and receive back ostensible sales assignments or other legal documents, the net result of which is to return to the lenders profits therefor in excess of 25% per annum, at the same time exacting multiple guaranties, collateral securities, etc., obviously to insure repayment of the initial investment. The Courts seemingly categorize such transactions as loans of money drawing usurious interest, regardless of the linguistic cloak with which they are enshrouded.

Id. at 375. In a similar "purchase and sale" case, the appellate court in *Kay v. Amendola,* 129 So.2d 170, 173 (Fla. 2d DCA 1961), stated that "(o)ur usury ***21** statutes show a clear legislative intent to prevent accomplishment of a usurious scheme by indirection...and subterfuge...."

The fact that the Purchase and Sale Agreements state that they are not loans will not circumvent the usury laws

In its Agreements, Merchant Capital had Craton agree that these advances of money were not loans. (Paragraph 7.a.) (R 195, 210) Stating that a loan is not a loan only confirms Merchant Capital's deliberate intent to circumvent the usury laws. It is also not effective. A lender cannot circumvent usury laws by the use of a provision in the contract that states "the parties agree that this is not a loan." General Capital, 212 So. 2d at 376 (the fact that the borrower agreed to the usurious transaction is of no consequence: "Usury may be invoked by a borrower even though he is a participant or even the instigator in the usurious transaction"). In General Capital, the Court held that a transaction that was labeled a "sale of commercial paper" to the buyer/lender was in fact a disguised usurious loan. The liability of the lender for usury is absolute, regardless of the character or the involvement of the borrower. In Kay, 129 So.2d 170, the appellate court held that a real estate option contract was a cloak to cover up a usurious loan of money. The Second District Court observed that the lender contended:

> ... that the transaction involved here was not a loan and repayment but was simply a sale and purchase transaction. We do not agree. It is well settled in Florida that the law will ***22** look to the substance of the transaction rather than to the form to determine usury.

Id., at 172; *Beausejour Corporation v. Offshore Development Company, Inc.,* 802 F.2d 1319, 1320 (11th Cir. (Fla.) 1986) (the substance of the transaction was a usurious loan rather than a sale of real estate or an investment of "risk capital"). Despite the contrivance of an agreement using a purchase-and-sale format, relying on contrived terms to avoid calling a loan of money a "loan", Merchant Capital's financial arrangement was a loan with automatic daily repayments. Merchant Capital's only obligation was to advance cash to the borrower. In consideration of advancing that cash, Merchant Capital contracted to begin immediately receiving daily payments toward a greater amount of cash in return. "If it swims like a duck, walks like a duck and quacks like a duck, it is a duck."

As stated in *River Hills,* 190 So.2d at 424:
Neither ignorance of the law of usury nor the fact that the suggestion of the usurious rate emanated from the borrower, nor that it was the opinion of counsel that the loan was not violative of the statute, nor the fact that a plan or scheme to circumvent usury was embraced by both parties, where the amount of interest is in fact usurious and known to the lender to be, will absolve him from the penalties involved because of usury.

The two loan agreements are usurious

Under § § 687.02(1) and 687.03 of the Florida Statutes, the usury statute, each of these two loans is usurious, bearing an interest rate in excess of 18% per ***23** annum. The premium to be repaid on the funds borrowed does not have to be called "interest" for there to be usury. *Oregrund Ltd. P'ship v. Sheive,* 873 So. 2d 451, 456-57 (Fla. 5th DCA 2004). Under § 687.071 of the Florida Statutes, each of the two loans is criminally usurious, bearing an interest rate in excess of 45% per annum.

There are four essential elements of a usurious transaction: (a) an express or implied loan; (b) and understanding between the parties that the money lent shall be returned; (c) an agreement to pay interest in excess of the legal rate; and (d) an intent to willfully and knowingly take more money than the legal rate of interest for the money loaned. *Party Yards, Inc. v. Templeton,* 751 So.2d 121, 123 (Fla. 5th DCA 2000); Kraft v. Mason, 668 So.2d 679, 683 (Fla. 4th DCA 1996); *Bermil Corp. v. Sawyer,* 353 So.2d 579 (Fla. 3d DCA 1978).

The purpose of the criminal usury statute is to impose severe sanctions on the criminally usurious lender. *Richter Jewelry Co. v. Schweinert,* 169 So. 750 (1935). As explained in *Richter,* when a loan is criminally usurious under the Florida statute:

> ... the entire sum of both principal and interest is forfeited, no element of validity remains in the contract. The effect of such a loan contract is to make it wholly void and subject to cancellation by a court of equity. Furthermore, the statute makes the lending of money on such terms a criminal offense, and a contract of that nature is therefore void as against the public policy of the state as established by its Legislature. Therefore when a suit is brought by the borrower to cancel such a contract ***24** and require the surrender of the security, there is no legal or equitable duty resting upon the borrower to offer to return any part of the money loaned. It must be conceded that this statute is a harsh and rigorous statute, but the Legislature was dealing with a harsh and sometimes unscrupulous business, the exaction of more than 25 per cent, per annum for the lending of money, and evidently resorted to these measures to protect unfortunate and necessitous borrowers.

Id. at 758-59. Criminal usury now begins at 45% per annum interest. Merchant Capital, under the direction of its CEO Jordan Fein, charged Craton over 132% per annum under its two loan agreements.

Whether a loan is usurious is determined as of the date of its inception, based on the assumption that the loan will be repaid in accordance with its original terms, regardless of whether the repayments could be modified. *Shorr v. Skafte,* 90 So.2d 604, 606 (Fla. 1956) ("It has been repeatedly held that the usurious character of a contract must be determined as of the date of its inception, and, if usurious at that time, no subsequent transaction will purge it"). Even if a loan agreement has a provision whereby the payments may be reduced if the borrower's situation warrants it, such a provision will not purge the agreement of usury. The loan agreement assumes that the loan will be repaid in accordance with its original intended terms. *Coral Gables First Nat. Bank v. Constructors of Fla., Inc.,* 119 So. 2d 741, 746-47 (Fla. 3d DCA 1960) ("When such contracts are renewed by a new or substituted contract, usury follows and becomes a part of the latter contract, ***25** making it vulnerable to the defense of usury in like manner as the original contract").

These essential elements of a usurious loan are all present in the two Agreements and the surrounding circumstances:
a. Merchant Capital is an experienced, very sophisticated commercial lender whose business is making advances of money for the purpose of receiving it back at a profit. (A 16-20) *See, Lee Construction Corp. v. Newman,* 143 So.2d 222, 224-225 (Fla. 3d DCA 1962) (experienced lenders, who make a business of making loans, know the prescribed rate of interest and know when the amount that they are charging on the loan is more than is allowed under the usury statutes).

b. Merchant Capital did an extensive credit check on Craton and Charles Craton, as it did on all merchants to whom it was looking to make "cash advances". (A 304-355, 378-392) Credit verifications are typical when making loans, not purchasing a product.

c. The Agreements require that Craton give Merchant Capital collateral in the form of a security interest in all of Craton's assets to secure payment of the full repayment amount (the amount of the money loaned plus all of the agreed profit). (Paragraph 8.f.) (R 197, 198, 212, 213) The security interest would continue to encumber Craton's assets until the "Purchased ***26** Amount" has been fully paid to Merchant Capital. (Paragraph 8.f.) (R 197, 198,212,213)

d. The Agreements require that Charles Craton personally guarantee the full performance of Craton. (Paragraph 8.v.) (R 201, 202, 216, 217) These two guaranties would continue to adversely impact Charles Craton's credit until the Purchased Amount has been fully paid to Merchant Capital.

e. The Agreements require that Craton repay the "cash advance" and the profit. (Paragraph 5.a.) (R 195 and 210) The obligation to repay both the loan and the profit is absolute. There is no term or circumstance in the Agreements that provides for any forgiveness or voiding of the debt. The Agreements, including the security interest and the guaranty, remain in full force until Merchant Capital has recovered the full "Purchased Amount". (See Paragraphs 1.a., 7.d., 8.f. and 8.v. of the Agreements.) (R 191, 196, 197, 201, 202; 206, 211, 212, 216, 217)

f. The Agreements provide for repayment terms that give Merchant Capital a rate of return (interest) of over 132% per annum on its "cash advance". (R 529-570)

g. Merchant Capital and Jordan Fein, CEO of Merchant Capital, had the requisite corrupt intent to take more profit on the loans than the law allows. (A 337, 339-341, 383) (12/15/2017 Dep. of Jordan Fein 40/9-14, ***27** 42/4 - 44/9; offer sheet (Exhibit 3)) They expressly intended for Merchant Capital to take a profit of 8,510 and 8,140 on the loaned amounts in such a short period of time as to create an unlawful rate of interest over 132% per annum on their loans. (Paragraph 8.f.) (R 197, 198,212,213)

h. Merchant Capital's CEO Jordan Fein admitted to that, contrary to the Agreements, Merchant Capital did not restrict itself to Craton's customer revenues (the "Future Receivables") deposited in its bank account as the initial source of the repayments. Merchant Capital simply withdrew $489 every business day without regard to the source of Craton's deposits. The central feature of the Purchase and Sale Agreement, that Merchant Capital will only draw daily payments from the "Seller"/borrower's revenues, is a sham, because Merchant Capital knew that it cannot and will not abide by that contract term. (See Page 9 above; A 88, line 13 - 889, line 14)

It is well-settled in Florida that the law will look to the substance of the transaction rather to the form to determine usury. Kay, 129 So.2d at 172.

Merchant Capital intended to charge usurious profit

The usury statutes require only an intent to charge more profit than the law allows for the contract to be usurious. Oregrund Ltd., 873 So. 2d 451, at footnote 5. Usury is largely a matter of intent, which is determined not by whether the ***28** lender actually gets more, but whether there was a purpose in mind to obtain more than legal interest. W. B. Dunn Co., Inc. v. Mercantile Credit Corporation, 275 So.2d 311,314 (Fla. 1st DCA 1973). The important factor is the willingness of the lender. Id. Questions of intent of the parties are always to be gathered from the circumstances surrounding the entire transaction. General Capital Corp. v. Tel Serv. Co., 212 So.2d 369, 374 (Fla 2d DCA 1968). "The intent is not fully determined by whether or not the lender actually gets more or charges more than the law permits but by whether or not there was an improper motive in his mind to get more than the legal interest (citations omitted) at the time the loan agreement is entered and, if usurious at that time, no subsequent transaction will purge it." River Hills, 190 So.2d at 423 (citing Shorr, 90 So.2d at 606).

The Agreements show on their face Merchant Capital's corrupt intent to charge more profit than the law allows. "The element of 'corrupt intent' does not require knowledge of the usury statutes themselves by the lender and a specific intention to violate them; rather, it requires proof that the lender intended to collect payments for the loan which, when expressed as a simple rate of interest per annum, exceeded the maximum allowable rate." Saralegui v. Sacher, Zelman, Van Sant, Paul, Beiley, Hartman & Waldman, P.A., 19 So.3d 1048, 1051 (Fla. 3d DCA 2009). River Hills, 190 So.2d at 424, held:
That the lender willfully and with corrupt intent charged or accepted more than the prohibited interest must be specifically and affirmatively pleaded and established by ***29** clear and satisfactory evidence. (Citations omitted) **The requisite corrupt or purposeful intent, however, is satisfactorily proved if the evidence establishes that the charging or receiving of excessive interest was done with the knowledge of the lender.**

To put the borrower to the task of proving, subjectively, the lender's culpable mental processes at the time the loan contract was entered would place an impossible burden upon the borrower and frustrate the purposes of the statute.

Referring to Merchant Capital's offer sheet (A 383), Jordan Fein testified in his deposition concerning the profit than Merchant Capital intended to make on the two loans to Craton:
Q. Now, then we see the number 23,000. Does that represent one contract for funding?

A. Yes.

Q. And then the factor at 1.37, what does that mean?

A. It's a factor rate. It's the discount rate of which we've purchased the receivables. We're purchasing at a discount of 1.37.

***Q. All right. So to figure out how much the 0 business, the customer, the merchant is to be paying 1 back over time, it would be the 23,000 in the instance 2 of this first loan times 1.37; is that correct?

A. 23,000 times 1.37 is correct to arrive at the purchased amount of receivables.

Q. What parameters do you use in connection with determining a factor rate on a standard transaction?

A. The underlying underwriting risk of the file. There is two things: There is the underlying risk and ***30** then there is the market. Those two things determine the factor rate.

Q. Does that vary from week to week?

A. It varies from file to file based upon the underlying credit worthiness of the business and principal.

Q. Did you approve this factor rate of 1.37?

A. I final approved the file. So, therefore, I approved the factor rate of 1.37.

Q. Right. But what I'm getting at then is when you estimate six months here, you're estimating that it would take six months at $250 per business day for you to reach the total amount that you would be withdrawing; is that correct?

A. Correct.

Q. And the amount that you were withdrawing is what you referred to in your purchase and sale agreement as the purchased amount, correct?

A. That's right.

Q. And then after that there is a number, 126. Is that business days?

A. That is the approximate business days, correct.

Q. So to arrive at the purchased amount in the case of this $23,000 purchase price, the purchased amount of $31,510, you have calculated that at $250 per business day. It would take approximately 126 business days to arrive at the $31,510 purchased amount; is that correct?

A. Yep....

(A 335-341, 383) (12/15/2017 Dep. of Jordan Fein 38/25 - 39/7, 40/9-14, 41/19 - 42/6, 43/13 - 44/7; offer sheet (Exhibit 3))

In other words, through daily repayments on 126 consecutive business days, Merchant Capital and Jordan Fein intended for Merchant Capital to collect $8,510 ***31** on a short-term amortizing loan of $23,000 and to collect $8,140 on a short-term amortizing loan of $22,000. These profits, when expressed as a simple rate of interest per annum, exceeded 132% on each loan. This clear intent to charge more profit than the law allows is the requisite intent to make usurious loans. If a Merchant Capital had charged the *maximum* rate of interest allowed under Florida law, 18% per annum, Merchant Capital's repayment terms of $250 per day and $239 per day would have produced profits of $792.14 on the $23,000 loan and $758.13 on the $22,000 loan. (R 531, 532) All amounts that Merchant Capital charged or reserved above these legal limits on profit were usurious.

In *Saralegui,* 19 So. 3d at 1051, the Third District held that, based on the lender's deposition testimony and the terms of the loans, there was no doubt that the lender intended to receive a specified dollar amount of profit on two loans for a short period of time. The Court therefore upheld the entry of summary judgment for criminal usury. There were no issues of fact to be decided. As Judge Salter wrote: "The rest is arithmetic." *Id.* at 1051. Likewise, in the instant case, the depositions of Jordan Fein, the two loan agreements and the offer sheet clearly confirm Merchant Capital's intent to take profits on the two loans in amounts that were criminally usurious. The rest is arithmetic, as set out in the amortization schedules.

32 *The interest rate is calculable from the terms of the loan agreements

Through daily repayments on 126 consecutive business days, Merchant Capital and Jordan Fein intended for Merchant Capital to collect $8,510 on a short-term amortizing loan of $23,000 and to collect $8,140 on a short-term amortizing loan of $22,000. The repayment schedule dictated by the terms of the Purchase and Sale Agreements requires the payment of profit (interest) to Merchant Capital at the criminally usurious rate of over 132% per year. (R 529-570) It does not matter that the Purchase and Sale Agreements did not state an actual interest rate. Oregrund Ltd., 873 So.2d at 457 ("One does not have to specifically charge interest for there to be usury"). The repayment terms themselves establish the effective interest rate.

The "reconciliation clause" does not render the loans non-usurious

Despite the two Purchase and Sale Agreements having all the earmarks of loans, and despite the contracted-for profit at an interest rate of 132% on the loans, the trial court ruled that the two Purchase and Sale Agreements were not usurious loans. Why? Because they contained a "reconciliation clause" that created the possibility of adjusting Craton's loan payments for the previous month. (R 1717, 1719) The "reconciliation clause", Paragraph 7.b., provides that, if Craton can provide adequate

proof that, during the prior full month of Merchant Capital's daily withdrawals from Craton's bank account, Merchant Capital's withdrawals ***33** exceeded the 13% "Purchased Percentage" of Craton's revenues, Merchant Capital will adjust the daily withdrawals for that prior month. (R 196, 211) Merchant Capital asserts that this clause (adjusted payments if Craton's monthly revenues decrease) is a "risk of nonpayment" factor that would take these Agreements out of usury. It does not and cannot turn usurious loans into legitimate business agreements for numerous reasons:

1. As a matter of law, an adjustment provision would not remedy the usury inherent in these two agreements. Florida law is very clear and adamant that, whether a loan is usurious is determined as of the date of its inception, based on the assumption that the loan will be repaid in accordance with its original terms, regardless of whether the repayments could be modified. Shorr, 90 So.2d at 606 ("It has been repeatedly held that the usurious character of a contract must be determined as of the date of its inception, and, if usurious at that time, no subsequent transaction will purge it"). This is the law in Florida for evaluating a transaction for usury. If Craton were to make its daily payments in accordance with the terms of the Purchase and Sale Agreements, as is intended and projected at the inception, it will have paid 132% interest on the borrowed money. The contract is ipso facto criminally usurious. The usury cannot be purged by the possibility of subsequent adjustments, transactions or eventualities. Id.

2. This "reconciliation clause" only kicks in after one month of payments, "at the conclusion of every month" (Paragraph 7.b). (R 196, 211) This ***34** possible adjustment in "Daily Retrievals" is solely retrospective in its application, based on the revenues during the prior month. Craton, however, would not have been entitled to use the reconciliation clause to seek any short-term, one-month reduction in payments. Craton failed during its first month of payments to have the daily revenues sufficient to pay Merchant Capital's aggregate $489 "Daily Retrievals". After 12 daily payments, Craton failed to have sufficient funds in its account, and it thereby defaulted on the Purchase and Sale Agreements. (R 1608) This default prompted Merchant Capital to accelerate the indebtedness: The full balance of the Purchased Amounts ($31,510 and $30,140) became immediately due and payable in full. The "reconciliation clause" would never be available to any borrower who defaults for lack of revenues during the first month.

3. No reasonable, foreseeable application of the reconciliation clause could purge these Agreements of usury, even if the law permitted it. See, Shorr, 90 So.2d at 606. If Craton had been able to continue paying (and had gone through the hoops necessary to use the reconciliation clause, including providing the prior month of banking statements and making a timely written demand each month), the adjusted Daily Retrievables under all reasonably foreseeable circumstances would *still* have been usurious. If Craton's revenues had precipitously dropped to *one half* of the 13% "Purchased Percentage" of its "Future Receivables", its originally projected revenues, and had stayed at that level for the remainder of the two Agreements, this would have reduced the Daily Retrievables to one half of the ***35** aggregate $489 per business day and would thus have extended the daily withdrawals from six months to 12 months. This would have reduced the interest rate by half from over 132% per year to over 66% interest per year. The loans would still have been criminally usurious. In fact, if Craton's revenues had dropped to even one seventh of its originally projected revenues and had stayed at that level for the entire duration of the Agreements (7x126 Daily Retrievals, approximately 882 business day withdrawals) and Merchant Capital's Daily Retrievals were therefore reduced to one seventh from $489 to $69.85, the annual interest rate would still have exceeded the 18% rate for usury! This demonstrates the farcicalness of the reconciliation clause as a purgative for the usury inherent in the Purchase and Sale Agreements.

4. In connection with the summary-judgment motions, Merchant Capital of necessity posited the most extreme example: Under the reconciliation clause, it argued, if Craton failed to earn another dollar of revenue, it would have no obligation to continue to repay Merchant Capital: ergo, the risk of nonpayment! In the first place, the risk of occurrence of this extreme example (zero revenue) is neither a realistic nor substantial. This is a minute risk on a six-month loan. Merchant Capital knew that, as a going business, Craton was going to continue to produce revenues: Merchant Capital verified this in its fact-finding and analysis of Craton's business. Like other lenders, Merchant Capital went to great lengths to establish the creditworthiness of Craton prior to making the two loans sued on. (A ***36** 304-355, 378-392) In order for loans to be exempt from the usury laws, the condition on payment must involve a hazard or risk of loss of the principal and interest that is substantial, not merely imaginable or possible. Diversified Enterprises, 141 So. 2d at 30 ("The risk, however, must be **substantial, for a mere colorable hazard will not preclude excessive interest charges from being usurious").**

Moreover, this risk of nonpayment due to Craton's or any other borrower's changed circumstances is the normal, usual, every-day risk that lenders face with their loans. Risk of nonpayment is not the type of risk of loss that renders a loan or business transaction subject to "contingent repayment", and thus non-usurious. Saralegui, 19 So.3d at 1051. While Merchant Capital claims that its Purchase and Sale Agreements are "investments" in Craton's "future receivables" (R 191 and 206), the Agreements bear all the characteristics of loans of money that must be repaid, subject only to the normal loan risk that Craton (and other borrowers) may fail to repay the loan or be unable to repay it. What "investor" ever receives a security interest in all the assets of the company in which he is investing and a personal guaranty from the owner of the company to protect his investment and the profitable return on that investment? If he does receive such protections, he is not an investor: he is a lender. This Court in *Saralegui,* 19 So.3d at 1051, held that the "investment contracts" were actually disguised loans:

> ***37** In the case of usury, the advance and repayment terms are indicative of a simple loan. No stock, partnership interests, or other indicia of equity were issued to the appellants. The repayment date and repayment amount were absolute and were not made contingent or dependent upon the success of the underlying venture.

The Second District in *Diversified Enterprises,* 141 So. 2d at 30, cited four cases expounding on "contingent repayment or risk of capital". In one, Britz v. Kinsvater, 351 P.2d 986, 990 (Ariz. 1960), the Arizona Supreme Court held that a sales transaction was a disguised loan of money. That court stated that "a loan is 'contingently' repayable only if the lender has - by the terms of the loan -subjected himself to some greater hazard than that the borrower will fail to repay the loan or that the security will depreciate in value". The Arizona court elaborated:

> An example of a debt 'contingently repayable' is posed by this situation: Borrower says to lender: Lend me $10 to bet on a horse race, and if the horse wins, I promise to pay you $15 tomorrow; if the horse loses, you get nothing.

Id. at 991. The Arizona court concluded that "where the lender risks the principal with the chance of getting a greater return than the lawful interest rate or possibly getting nothing (if the contingent event fails to occur), there is no usury." Id. In another case cited in Diversified Enterprises, 141 So. 2d at 30, the Kentucky Supreme Court held in Dublin v. Veal, 341 S.W.2d 776 (Ky 1960) :

> Where, under a contract for the payment or repayment of money, the payment of interest on the principal sum is ***38** subject to a contingency, so that the creditor's entire profit or return is put in hazard, the interest so contingently payable need not be limited to the maximum affixed by the usury statutes, provided the contract is made in good faith and without intention to evade or avoid the usury laws.

Id. at 777-78 (emphasis added).

In the instant case, the entire disguised, contrived form of the Purchase and Sale Agreements, which can be contrasted with Merchant Capital's straightforward Ohio loan format, (A 406-412, 414-417, 448, 460, 464, 484, 496), demonstrate its clear intention to evade or avoid the usury laws of Florida. There is no defined speculative risk of loss in these loan agreements.

The risk of Craton's going out of business and being unable to pay the full "Purchased Amount of Future Receivables" is no different from the normal, accepted risk that every lender runs of having a borrower go out of business and become unable to repay the loan. This "reconciliation" feature, designed to adjust the daily withdrawals, does not qualify as a "speculative risk".

Merchant Capital's defense of its risk argument, that Craton and other borrowers would owe nothing if their revenues went to zero, is hollow for another reason. Not only do the Agreements, including the security agreement and the guaranties, remain in full force until the debt has been fully paid, Merchant Capital has events of default that it can readily assert against the theoretical merchant-borrower ("Seller") who has no revenues (or substantially reduced revenues). If ***39** the Seller closes its business due to its decreased revenues, it will have defaulted on its covenant that it "will not interfere with Buyer's ability to receive the Purchased Amount or Daily Retrievals, until Seller has completed its performance under this Agreement." (Paragraph 3.a. (iii)) (R 193, 208) Similarly, if the Seller with diminished revenue closes its store or loses its lease, it will have defaulted on the covenant that it will not change the location of its business during the term of the Agreement. (Paragraph 3.a.(xii)) (R 193, 208) In other words, Merchant Capital has various ways of declaring a default and enforcing its collection rights under the Agreements to mitigate any risk of nonpayment.

Apart from the fact that these two agreements did not subject Merchant Capital to the type of substantial speculative risk of loss necessary to purge these loans of usury, nothing in these agreements and their reconciliation clauses would under any circumstances forgive or void the debt and the obligation to make the full payments. The repayment obligation is absolute. Paragraph l.a. obligates Craton to allow Merchant Capital to withdraw monies from Craton's bank account until Merchant Capital "has received the Purchased Amount specified below". (R 191, 206) Paragraph 7.d. makes it clear: "This Agreement shall be in full force and effect until Seller has completely satisfied and completed its performance under this Agreement." (R 196, 211) This is reiterated in Paragraph 8.j. (all covenants shall continue in full force and effect until all obligations under this Agreement shall have been fully satisfied). (R 199, 214) The security interest in all ***40** of Craton's assets would remain in force encumbering those assets for many years (until Merchant Capital sold them or foreclosed on them). (Paragraph 8.f.) (R 197, 198, 212, 213, 216, 217) Likewise, the guaranty by Charles Craton remains in effect until Merchant Capital "has received the Purchased Amount", thereby adversely impacting his creditworthiness for the indefinite future. (Paragraph 8.v., page 11). (R201, 202, 216, 217)

The acceleration clause in the Agreements, by itself, renders the Agreements usurious

Even apart from the criminally usurious rate of 132% per annum imposed on Craton Entertainment from the inception of the Agreements, the Agreements (paragraph 5.a.), (R 195, 210), contain an acceleration clause in the event of any default by the "Seller" Craton Entertainment:

> (I) n the event of a Seller Default, Buyer will be entitled to require Seller to purchase the remaining Future Receivables not delivered to Buyer for an amount equal to the amount by which the Purchased Amount of Future Receivables exceeds the amount of Future Receivables that Buyer has previously received under this Agreement.

In other words, if Craton Entertainment should default on the Agreements at any point, Merchant Capital is entitled to accelerate payment of, and to recover, the full amount of the indebtedness of $31,510 on one Agreement and $30,140 on the other, regardless of any prior reconciliation or adjustment of the daily payments. In addition, upon a default, the same Paragraph 5.a. entitles Merchant Capital to a "Default Fee" of an additional 15% of the original "Purchased Amount". (R 195, ***41** 210) This amounts to over $9,000 of additional income to Merchant Capital upon any default by Craton Entertainment. Merchant Capital in fact sued to recover both the accelerated indebtedness and the "Default Fee" in this action. (R 123)

The contract right to these amounts upon a default at any time, whether during the first week or the first month or in any other time following the "cash advances", render the Agreements criminally usurious at their inception. *Gordon v. West Florida Enterprises of Pensacola, Inc.,* 177 So.2d 859, 862 (Fla. 1st DCA 1965) (default acceleration clause in the contract which makes no provision for the elimination of unearned amounts in future installments renders the contract criminally usurious). The First District in Gordon quoted with approval the following language from Home Credit Co. v. Brown, 148 So.2d 257, 260 (Fla. 1963):

> '***we think computations under the usury law must be based on a determination of the scope of acceleration rights which a note or contract purports to give a lender or holder and not upon the sums actually claimed by him. This follows necessarily from the principle that the vice of usury is one which inheres in the parties' agreement itself. When a note upon its face vests in the holder, as in the instant case and in Ayvas, supra, an option upon default to accelerate maturity of the total obligation, including unearned interest, [Cf. Graham v. Fitts, 53 Fla.1946, 43 So. 512. 33 Fla.Jur., Usury Secs. 28, 29.] then the results of its exercise must be evaluated under the literal contract terms whether or not the complaint in fact seeks recovery of all such sums.'

***42** *Gordon,* 177 So. 2d at 862. Even without including Merchant Capital's 15% Default Fee income of $9,000, which is additional profit, the acceleration clause renders the Agreements criminally usurious from their inception.

Jordan Fein is individually liable for the usury and criminal usury

Counterdefendant Jordan Fein was the chief executive officer and agent acting for Merchant Capital in signing the two Agreements. He was the active tortfeasor on behalf of Merchant Capital in perpetrating the usurious loans. Section 687.03(1), Fla. Stat., specifically makes any "agent, officer, or other representative" of the lender individually liable for his participation in the usurious loan. The Amended Counterclaim alleges as follows in Count III:
51. Jordan Fein was at all relevant times the chief executive officer of Merchant. On behalf of Merchant, he directly and personally participated in the making of the Purchase and Sale Agreement (the "loan agreement") with Craton, a copy of which is attached hereto as Exhibit 1.

52. Moreover, Jordan Fein directly and personally participated in and oversaw the development and implementation of the scheme, device and artifice of the Purchase and Sale Agreement in order to disguise the usurious nature of this loan agreement that Merchant made with Craton and with Merchant's other borrowers who signed similar loan agreements.

53. As the active tortfeasor on behalf of Merchant, Jordan Fein is individually and personally liable to Craton for Craton's damages.

(R 172)

***43** The Amended Counterclaim makes the same allegations in paragraphs 119-121 at Count IX. (R 183) These allegations are all incorporated by reference in the other counts against Jordan Fein. (R 184, 185) As the active tortfeasor acting on behalf of the corporation in making usurious loans, Jordan Fein is *by statute* individually liable. § 687.03(1), Fla. Stat.

Even apart from this statutory liability of the corporate officer who participated in the usurious loan, § 687.03(1), Fla. Stat., agents and officers are liable for torts they commit on behalf of a company. *Littman v. Commercial Bank & Trust Co.,* 425 So.2d 636, 640 (Fla. 3d DCA 1983). Individual officers and agents of a corporation are personally liable where they have committed

a tort, even if such acts are performed within the scope of their employment or as corporate officers or agents. Id.; Adams v. Brickell Townhouse, Inc., 388 So.2d 1279, 1280 (Fla. 3d DCA 1980) (corporate officers were liable for the intentional torts committed by them within the scope of their employment); Roth v. Nautical Engineering Corp., 654 So.2d 978, 979-980 (Fla. 4th DCA 1995) (corporate officer was individually liable for the fraud that he committed on behalf of the corporation); First Fin. USA, Inc. v. Steinger, 760 So. 2d 996, 997 (Fla. 4th DCA 2000) (officers and agents may be held personally liable for their tortious acts on behalf of the corporation). This principle of law fully and equally applies to members of limited liability companies. ***44** Cannon v. Fournier, 57 So. 3d 875, 881 (Fla. 2d DCA 2011). They are personally liable where they have committed or participated in a tort, even if such acts are performed within the scope of their employment or as members or managers of the LLC.

Jordan Fein, the CEO of Merchant Capital, apart from implementing this scheme to disguise its usurious loans, was central to the making of these loans to Craton:
a. Jordan Fein created the company and has at all times been its CEO. (A 16-18) It was Jordan Fein's idea to get into the "merchant cash advance" business. He and Merchant Capital's lawyer created the Purchase and Sale Agreement, the disguised loan agreement. (A 23, 24)

b. Jordan Fein prepared and signed the two loan agreements with Craton. (A 65, 106, 107)

c. Jordan Fein reviewed and approved the underwriting files on these loans prior to finalizing the loan agreements. He personally approved the final loan agreements. (A 67, 309-311, 325, 326)

d. Jordan Fein instructed his employees to separate the Craton loan of $45,000 into two loans, one for each of Craton's business locations. (A 107, 108, 311)

e. Jordan Fein gave final approval to the "offer sheet". (A 332, 333 and 383) He approved the "1.37 factor rate" on these loans, confirming that Merchant Capital was intending to derive a 37% profit in a very short ***45** period of time by charging profit of $8,510 and $8,140 on the respective loans. (A 337, 339) (12/15/2017 Dep. of Jordan Fein, 40/9-14 and 42/4-6) The offer sheet also confirmed that the loans were to be repaid by daily withdrawals of $250 and $239, respectively, over six months, approximately 126 business days. (R 338-341, 344, 383) These rapid repayment terms of the principal and the profit created a rate of interest on each loan in excess of 132% per annum.

The foregoing exposition demonstrates Merchant Capital's and Jordan Fein's active participation in the statutory tort of usury. As further evidence of Merchant Capital's and Jordan Fein's actual knowledge of the wrongfulness of their conduct and that this would result in damage to the borrower in the form of usurious interest, Merchant Capital uses its Purchase and Sale Agreement format to make loans to corporations and LLCs in all states except one - Ohio. Jordan Fein stated that Merchant Capital makes loans actually called "loans" in Ohio. (A 133-137) Why? Because there is no usury in Ohio on loans to corporations and limited liability companies! § § 1701.68 and 1705.33, Ohio Statutes. Merchant Capital does not need to use its sham "Purchase and Sale Agreement" in Ohio; it uses its disguised loan documents in Florida and other states in order to make usurious loans disguised as the "purchase" of "future receivables".

***46** *This is a case of first impression in Florida*

Some non-Florida courts have correctly held these sham agreements for the "purchase and sale of future receivables" to be disguised usurious loans. Essex Partners LTD v. Merchant Capital and Cash, 2011 WL13123326 (USDC CD Cal. 2011); *Pearl Capital Rivis Ventures, LLC v. RDN Construction, Inc.,* 41 N.Y.S 3d 397 (N.Y., Sup. Ct., Westchester Cty 2016). Appellees will undoubtedly "string cite" a number of non-Florida lower court cases where the courts have validated versions of the contracts for the "purchase and sale of future receivables" as business transactions and not usurious loans. The common thread in these validating decisions is the weak analysis and scrutiny of these "business agreements" (devoid of a common sense overview of

the usurious purpose of the particular contrived construct), the differences in the provisions of the purchase and sale agreements in each case, and the differences in the usury statutory and case law of the various states. The only known Florida case is a trial-court case involving this Appellee, captioned Merchant Capital Group LLC v. Phoenix E-Commerce, Corp., Case No. 2017-19942 CA 01 in the 11th Judicial Circuit, wherein Judge Thomas J. Rebull found Merchant Capital's purchase and sale agreement to be a civilly and criminally usurious loan. The case is presently on appeal to this Court.

*47 *CONCLUSION*

The trial court erred in ruling that the Purchase and Sale Agreements were not usurious loans. The facts of the case are not in dispute. This Court should:

1. Hold that the two Purchase and Sale Agreements are (a) in fact disguised loans that are both civilly and criminally usurious as a matter of law and (b) null and void by virtue of being criminally usurious, and are hereby canceled, along with the security interest and the guaranty given by Charles Craton.

2. Reverse and vacate the Amended Final Judgment. (R 1714)

3. Reverse and vacate the three orders that granted the three motions for summary judgment. (R 1719, 1721, 1723)

4. Reverse the order that denied the motions for summary judgment brought by Appellants/defendants Craton and Charles Craton on the Amended Complaint (R 1717) and by Craton alone on the Amended Counterclaim, (R 1717) and thereby grant that motion for summary judgment.

5. Remand this action to the trial court (a) for further proceedings on Counts V and XI of the Amended Counterclaim (FDUTPA claims), (R 174, 185) (b) for further proceedings on Craton's Amended Motion for Leave to File Second Amended Counterclaim (R 740, 841-846) (to add new counts under § § 772.103 and 772.104, Fla. Stat.), and (c) for the award of damages and other relief to Appellants on all other counts.

***48** 6. Award Appellants their reasonable attorneys' fees and costs in this appeal pursuant to (a) § 57.105(7), Fla. Stat., under the Purchase and Sale Agreements (Paragraph 8.i) and (b) § 501.2105, FDUTPA.

Footnotes

1 If the terms of the loan had been that Craton could keep and use the $23,000 loan principal for a full six months (rather than daily repayments on an amortizing basis) and then pay Merchant Capital $31,510 in six months, the rate of interest would still have been a criminally usurious 74% per annum.

2 Likewise, if the terms of the loan had been that Craton could keep and use the $22,000 loan principal for a full six months (rather than daily repayments on an amortizing basis) and then pay Merchant Capital $30,140 in six months, the rate of interest would still have been a criminally usurious 74% per annum.

3 In the purchase of accounts receivable, a debt collector buys a merchant's unpaid trade accounts at a discount from the total unpaid balances and attempts to collect payment on those accounts directly from the debtors. He might make a profit, or he might suffer a loss. Regardless, he has *no recourse* against the merchant with respect to the accounts that he cannot collect.

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