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THE MURKY PROCESS OF CHARACTERIZING MERCHANT CASH ADVANCE AGREEMENTS

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INTRODUCTION

When times get tough, businesses and individuals turn to increasingly risky financing sources to make ends meet. A source of funding popular among cash-strapped small businesses is the merchant cash advance ("MCA").[1] An MCA is styled as a sale of future receivables. As stated on one financier's website:

> A merchant cash advance empowers your business to trade tomorrow's earnings for cash today. You receive a lump sum of cash upfront, and then you pay back the advance with a percentage of your daily sales. You're essentially selling your future sales at a discount.[2]

MCAs started growing in popularity when credit was tight in the years following the financial crisis, and they continue to be marketed to companies that cannot qualify for more traditional sources of financing.[3] As one financier advertises:

> Since MCAs aren't *technically* loans, they don't require the same strict eligibility standards that loans do—so you can score capital with low credit and zero collateral in no time.[4]

In 2019, MCA companies provided an estimated $19 billion in financing, mostly to small businesses.[5] Yet far from being the infusion of cash to right a sinking ship, these high-cost financing transactions often exacerbate an already perilous financial position. And, when the business is unable to keep up with payments, MCA financiers have been accused of "mafia-style" collection activity.[6] Predictably, some small businesses that have received MCA financing have quickly found their way to bankruptcy court.

Consider *In re GMI Group*, a chapter 11 case filed by a janitorial services company based in Lawrenceville, Georgia.[7] Over the latter part of 2018, GMI entered into at least three high-cost financing transactions, including two MCA agreements.[8] GMI received its first MCA from Reliable Fast Cash, Inc. ("Reliable") on August 10, 2018.[9] The "Purchase and Sale of Accounts" provided that GMI would receive $150,000 in immediate cash in exchange for the sale of $210,000 in future receivables, payable in daily ACH withdrawals of

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$1,400.[10] This amount was estimated to be 5% of the debtor's daily receipts. GMI granted Reliable a backup security interest in the debtor's collateral, and the CEO of the company signed both an Affidavit of Confession of Judgment[11] and a personal guaranty for the obligations.[12]

A few months later, on October 3, 2018, the debtor entered into a similar transaction with Unique Funding Solutions, LLC ("Unique"). There, in exchange for $75,000, the debtor agreed to transfer $111,750 in future receivables, payable in daily withdrawals of $1,117.[13] This number was estimated to be 17% of the debtor's daily receipts.[14] Unique also obtained a security interest in the debtor's collateral and a personal guarantee from the company's CEO.[15]

Note the high rates of return that the MCA financier enjoys in these transactions. In addition to origination and financing fees of $3,000 and $6,700, respectively,[16] the effective interest rates on these transactions—based on the total amount owed to the financier in excess of the advanced funds—were extraordinarily high. Indeed, the GMI court estimated the effective interest rate of the Unique transaction to be $115%.[17] Applying a similar formula to the Reliable transaction generates an effective interest rate of 69.5%.[18] Such high effective interest rates are commonplace in the MCA industry.

GMI was unable to keep up with the daily withdrawal obligations to avoid default on the MCAs. It appears that GMI defaulted on the Unique transaction *eight days* after the MCA took place.[19] By the middle of November, both Reliable and Unique had obtained confessed judgments against GMI and garnished GMI's bank accounts. The Reliable judgment, obtained 96 days after the MCA funding was provided, was entered in the amount of $177,000. This amount reflected credited payments of $77,000 on an initial advance of $150,000, plus attorney's fees in the amount of $44,289.[20] The Unique judgment, entered two days after the Reliable judgment and 44 days after the Unique transaction closed, was entered in the amount of $136,967.62. This amount reflected credited payments of $8,936 on an initial advance of $75,000, plus attorney's fees of $33,928.62 and other miscellaneous costs totaling $225.[21]

When merchants like GMI find themselves on the wrong side of a confessed judgment,[22] or in bankruptcy,[23] or otherwise in litigation with their MCA financiers,[24] their attorneys may look to usury laws for a solution. Usury does not apply to sale transactions. As such, to benefit from a usury defense, the merchants must demonstrate that the transaction they entered into was a secured loan in disguise. This requires litigants and courts to wade into the case law involving recharacterization of sales—a body of law that is "remarkable for its incoherence."[25]

This *Law Letter* considers the challenging pros-

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pect of determining whether an MCA transaction is a sale or a loan. It profiles the prevailing approaches to drawing this difficult distinction and examines how courts have grafted existing case law, which arose largely in the context of factoring and securitization transactions, onto MCAs. In so doing, this *Law Letter* highlights several features of MCA agreements that are particularly relevant to the analysis—features which courts do not always consider with adequate depth. These features tend to support recharacterization of these purported sales as secured loans.

INTRODUCING THE MERCHANT CASH ADVANCE

As noted, a Merchant Cash Advance transaction is structured as the sale of a percentage of future receivables.[26] In exchange for an immediate infusion of cash, the merchant pays its financier a specified percentage of its daily receipts.[27] Sometimes payment is accomplished by the merchant directing its credit card companies to allocate a portion of the receivables for transfer to the financier.[28] In other transactions, the financier makes regular ACH withdrawals from the merchant's bank accounts.[29] Daily payments are a hallmark of these transactions.

The daily payment is initially set as a specified percentage of the merchant's average daily receipts. For example, the daily amounts in the GMI transactions were calculated "by multiplying the Debtor's average monthly sales . . . by the Specified Percentage [to be paid to the MCA financier] and then dividing that figure by the average number of business days in a calendar month."[30] While this daily payment rate is fixed at the outset of the transaction, many of these transactions feature some sort of "true-up" or "reconciliation" provision that purports to adjust the amount based on changes to the merchant's business.[31] But regardless of whether the daily payment can be or is adjusted to reflect actual receipts, the financier is entitled to receive a specified total amount. Thus, if the merchant generates lower daily receipts and the daily amount is reduced, that will effectively reduce the financier's rate of return (interest) but not the total amount received.

MCA transactions bear similarities to factoring arrangements. But unlike traditional factoring relationships, which typically involve the assignment of identified receivables, MCAs allocate to the finance company an undivided share of the bulk of receivables generated by the merchant each day. In addition, while a factor typically "is responsible for collection [of purchased receivables] directly from the customer or through a lockbox," merchants typically collect their own receivables and deliver the daily payment to the MCA financier.[32]

MCAs are supported by aggressive remedial provisions.[33] First, MCAs are typically supported by security interests in a large pool of the merchant's collateral—not just the assigned receivables—and one or more personal guaranties. Moreover, these transactions are commonly accompanied by confessions of judgment,[34] which allow the financier to obtain judgment upon the counterparty's default without the formalities of bringing suit. The aggressive marketing and enforcement of MCA obligations has drawn the attention of news media,[35] state attorneys general,[36] the Federal Trade Commission,[37] and Congress.[38]

A LOAN IN SALE'S CLOTHING?

As might be clear from the foregoing description, there is little to distinguish an MCA transaction from a loan secured by the merchant's receivables. In both cases, the merchant receives an amount of money up front and grants the financier a property right in its accounts receivable. The financier is paid back on an ongoing basis, and the merchant's "default" triggers acceleration and additional remedies.

In many respects, the distinction between sales of receivables and secured loans is of little import. Article 9 of the U.C.C. applies to both sales and security interests in receivables, minimizing the need to make distinctions in form. This both encourages public notice of the transactions and addresses the difficulty of distinguishing between sales and loans.[39] But there are a handful of circumstances under Article 9—such as certain automatic perfection rules, enforcement duties, and the collectability of surpluses and deficiency—where the distinction can become relevant.[40] There are also a variety of

regulatory, accounting, and taxation implications that flow from these characterizations.[41]

Most notably for our purposes, the characterization of an MCA transaction as a sale of receivables, rather than a loan, limits the application of usury laws.[42] New York law, which governs most MCAs,[43] prohibits lenders from knowingly charging interest at a rate above 25% per annum.[44] Corporations cannot assert an affirmative claim for criminal usury, but they can raise usury as a defense to payment.[45] And, if a contract is found to be usurious, it is void.[46]

Whether a transaction is categorized as a sale or a loan might have additional implications for merchants in bankruptcy. Most notably, the characterization of a loan versus a sale determines the extent to which the rights to payment are property of the debtor's estate, which affects, among other things, whether the debtor may use the proceeds of receivables during the bankruptcy process.[47] Likewise, if a transaction is recharacterized as a secured loan, section 552 of the Bankruptcy Code would prevent the MCA financier's security interest from attaching to receivables the debtor acquires after bankruptcy (unless they are proceeds of collateral that existed prepetition).[48] Characterization also might have implications on a financier's preference liability[49] or liability to suppliers under the Perishable Agricultural Commodities Act.[50] All told, bankruptcy courts have had ample opportunity to consider whether MCA transactions ought to be recharacterized as loans.[51]

THE MURKY DISTINCTION

Neither the UCC nor the Bankruptcy Code determine when a transaction should be classified as a sale versus a loan,[52] and courts have long struggled to create a workable framework for evaluating these transactions.[53] Most courts muddle through a totality-of-the-circumstances approach, relying on various multi-factor tests to determine whether "the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale."[54] The analysis is complicated by a number of factors, including the fact that commercial actors often bifurcate the traditional indicia of ownership, transferring some of the benefits and burdens, and retaining others. As such, it is the rare case in which each of the factors points in the same direction. Courts must therefore decide how to balance competing factors and determine the point at which the scale tips toward recharacterization. More cynically, the legal implications discussed above might cause parties to purposefully add layers of complexity to a transaction that cast it in a favorable light.

But while the path courts take through this recharacterization analysis is unpredictable, the goal is generally clear: to assess which party—buyer or seller—holds the risks, benefits, obligations, and other attributes we typically associate with ownership.[55] A core distinction between selling a piece of property and lending against it is that, when property is sold, the buyer takes on the upside and downside risk of that item's future performance. With a secured loan, in contrast, the lender's contractual entitlement to payment does not change as the collateral value waxes and wanes. Further, in a typical sale transaction, the buyer controls the asset and must take on the obligations associated with ownership. If the property is a cow, it must be sheltered, fed, and milked. If the property is an account, it must be serviced. With these distinctions in mind, courts often look to some combination of the following factors in their efforts to distinguish sales from secured loans:

A Buyer's Risk of Loss. A dominant consideration is whether the transaction allocates the risk that the receivables will not be collected on the seller, rather than the buyer.[56] A variety of terms such as chargebacks, price adjustments, collectability guaranties, and indemnification provisions can allocate the risk of non-collection to the seller, supporting recharacterization as a loan.

Seller's Right to Excess Collections, Including Repurchase Rights. Closely related to the risk of non-collectability is whether the seller retains any upside benefits of the receivables. Transactions in which the seller maintains residual rights in the property, such as the right to retain collections over a determined amount or the right to repurchase the receivables, are more likely to be recharacterized as secured loans.[57] Some courts have even found that an *option* to repurchase the accounts also suggests a secured loan.[58]

Pre-Transaction Credit Inquiries. Courts expect that in cases of a true sale, the buyer of receivables has an interest in the credit worthiness of the account debtors. As such, the extent to which the purported buyer investigates the credit of the accounts debtors has been relevant in some cases.[59]

Servicing Obligations. Similarly, when sellers continue to service the accounts after transfer, this residual relationship with the receivables weighs in favor of a secured loan. When the seller also commingles the proceeds with other general operating funds, the case for recharacterization is often thought to be stronger.[60]

Other Indicia of Seller Control: Courts may consider other contractual provisions that suggest the seller retains some degree of authority over the receivables as evidence in favor of recharacterizing a purported sale as a secured loan. For example, courts have found the seller's ability to modify or compromise the terms of the receivables and collateral backing them to strongly suggest a secured loan.[61]

The language of the agreement. Finally, courts look to the language used by the parties to assist with the characterization analysis, although they differ significantly as to how much weight this factor should receive. Most courts treat the parties' characterizations with skepticism.[62] As one court stated:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance. . . .[63]

Yet some courts give the language used great weight, even when other factors support recharacterization.[64]

On this point, it is worth observing that the weight courts give to the parties' language should vary depending on whether the language used *supports* or *contradicts* the parties' chosen form. For instance, when a document styled as a "sale" has substantive trappings of a loan, the use of debtor-creditor language, which is inconsistent with the document's form, may well support recharacterization.[65] If that same so-called "sale" transaction contained a clause that read, "this is not a loan," this self-serving framing should not overcome a finding that the transaction is, in substance, a loan. Conversely, if the documents refer to the transaction as a loan, there would rarely be any reason or need to recharacterize it as a sale.

While the foregoing factors are commonly invoked by courts analyzing a purported sale, the case law varies greatly in how to apply them. The case law has been described as "confusing, inconsistent, and sometimes incoherent."[66] And, while legal scholars have attempted to craft various unifying theories to reconcile the divergent case law,[67] no theoretical approach has taken hold. Thus, with no "discernible rule of law or analytical approach," to follow, courts "could flip a coin and find support in the case law for a decision either way."[68]

CHARACTERIZING MCA TRANSACTIONS

MCA financiers typically take great pains to establish their transactions as sales. The loan documents, which the financiers write, include overt representations of this character, commonly using language such as the following:

> [Merchant] is selling a portion of a future revenue stream to [Finance Company] at a discount, not borrowing money from [Finance Company]. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [Finance Company].[69]

MCA agreements also commonly include language that emphasizes the risks taken on by the financier, similar to the following:

> If Future Receipts are remitted more slowly than [Finance Company] may have anticipated or projected because [Merchant's] business has slowed down, or if the full Purchased Amount is never remitted because [Merchant's] business went bankrupt or otherwise ceased operations in the ordinary course of business, and [Merchant] has not breached this Agreement, [Merchant] would not owe anything to [Finance Company] and would not be in breach of or default under this Agreement.[70]

Most of these transactions also feature a reconciliation provision, which purports to adjust the

daily payment according to the debtor's actual receipts:

> The Initial Daily Amount is intended to represent the Specified Percentage of [Merchant's] daily Future Receipts. For as long as no Event of Default has occurred, once each calendar month, [Merchant] may request that [Finance Company] adjust the Daily Amount to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . No more often than once a month, [Finance Company] may adjust the Daily Amount on a going-forward basis to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Daily Amount until any subsequent adjustment.[71]

These types of provisions are commonplace in MCA documents, and many courts have found them to be persuasive. Indeed, most courts have concluded that MCAs are true sales, relying primarily on the finding that the merchant's obligation to pay for the advance is dependent on the collection of the underlying accounts.[72] Because the payment owed to the financier is not absolute, courts reason, the financier has taken on the risks of a true sale. Courts tend to mention one or more of the following factors to bolster their conclusion:

— New York Law, which governs most MCAs, is predisposed against finding usury, particularly in commercial contracts.[73]

— The terms of the agreement, as to do otherwise would require "unwarranted speculation and contradict express terms of the agreement."[74]

— The growing body of New York cases that characterizes MCA agreements as sales.[75]

Other factors, such as which party retains the upside benefits of the receivables, the merchant's continued servicing duties, and the apparent absence of pre-transaction credit inquiries of the subject receivables, have seen relatively little emphasis in case decisions.

EXAMINING THE REALITIES OF RISK ALLOCATION IN MCA TRANSACTIONS

While courts' approach to characterizing MCA agreements as true sales finds safety in numbers, it is problematic for a few reasons. First, although MCA transactions *appear* to place the risk of the accounts' non-collection on the financier, the following transactional realities tell a different story.

TOOTHLESS RECONCILIATION PROVISIONS

As noted above, MCAs commonly feature a reconciliation provision that sets out a procedure for adjusting the daily payment obligation to reflect the merchant's actual receipts. Courts often point to this provision as evidence that the transaction is a true sale. "Focusing on the reconciliation provision in a given merchant agreement is appropriate," courts reason, "because it often determines the risk to the funding company."[76] Although this statement may have merit in the abstract, reconciliation provisions can be drafted in a manner that makes reconciliation discretionary or illusory.

For example, in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, the court examined a reconciliation clause that provided that the financier could adjust the amounts due "at [its] *sole discretion* and as it deems appropriate."[77] The fact that the financier retained discretion over any payment adjustments led the court to conclude that the financier did not assume any risk that the merchant would generate lower revenues than expected.[78]

The court in *GMI Group* likewise determined that the Unique MCA agreement "does not in fact subject Defendant to any risk that the Debtor will fail to make the required payments."[79] The reason appeared in the events of default, which required the debtor to maintain a bank account balance of twice its daily payment amount at all times.[80] Considering that the debtor was subject to withdrawals of 17% on a daily basis, the need to maintain a continual account balance with an *additional* 34% of its daily collections would be "virtually impossible for any business."[81] Concluding that the agreement created "a certainty or near certainty" of default from the very outset of the transaction, the reconciliation provision would never realistically be invoked. Not only that provision, but the debtor's default also triggered acceleration that made the uncollected amounts immediately payable in full. Because of the inevitability and

implications of default, the contract "provided for absolute repayment" and "thereby constitute[d] a loan subject to New York's criminal usury law."[82]

A BOTTOMLESS FONT OF RECEIVABLES

Even if an MCA agreement has a functioning reconciliation provision, a more fundamental economic reality strongly supports recharacterization. As noted above, MCA agreements allocate to the financier a percentage of receivables, rather than identified receivables. This structure fundamentally changes the risk profile of the financier. When a buyer buys an identifiable pool of specific receivables, as in a traditional factoring arrangement, the buyer typically bears the loss when any one of those accounts is not repaid. In the MCA context, in contrast, the "buyer's" recovery is not tied to the performance of any individual account. Instead, the buyer receives a set daily payment (perhaps subject to periodic reconciliation), and this payment is satisfied from whatever moneys the merchant has available.[83] In a recent Transactional Lawyer article, John Hilson and Stephen Sepinuck observed that this structure places the risk of loss as to any individual account on the seller, and strongly indicates that an MCA transaction should be characterized as a secured loan.[84]

To be sure, an MCA transaction is not a zero-risk endeavor. After all, the financier would not recover if the merchant ceased to generate receivables entirely. On this point, Hilson and Sepinuck correctly observe that secured lenders also take on the risk of business failure or bankruptcy, and that type of risk is one that an interest rate is designed to address. Some courts have also observed that MCA financiers take on the risk that an investment will generate a lower annual return if the transaction is paid back more slowly than anticipated.[85] But this exposure is much more limited than the risk of the receivables' non-collectability, and it must be considered in light of the concern, discussed above, that daily MCA payments might not be as easily reconciled as they purport to be.

LOAN-LIKE REMEDIES

As noted earlier, many MCA agreements are supported by broad collateral packages extending far beyond the receivables subject to the transaction.[86] And, most MCA agreements give the buyer the right to accelerate payment upon the occurrence of certain conditions.[87] Hilson and Sepinuck observe that in a sale context, "there should be no concept of making the uncollected portion of the Purchased Amount becoming due and payable; it would simply be collected (or not) from the receivables."[88] Further, the idea that, through acceleration, "the buyer could unilaterally increase the property 'sold' - is inconsistent with a true sale."[89] These remedies are, of course, essential components of all secured loans.

EVALUATING OTHER ATTRIBUTES OF OWNERSHIP

All told, the foregoing factors suggest that the risk of the underlying receivable's non-collection, a core attribute of ownership, remains largely with the merchant-seller in many MCA transactions. But also recall that the risk of non-collectability is only one of many signals of ownership. Courts also should consider which party enjoys the benefits of ownership and what other attributes of ownership are borne by the seller.

Here, courts may find further support for characterizing MCA agreements as secured loans. First, considering that only a *percentage* of the debtor's receipts are assigned as part of an MCA, the merchant maintains ownership and control over the balance. The merchant is free (subject to the terms of the MCA) to do what it wants with the underlying accounts. The merchant also continues to service the underlying accounts, retaining a burden we typically associate with ownership. And finally, if the debtor's collections are higher than anticipated, most of the upside benefit remains with the merchant.[90]

Taken together, the substance of MCA transactions may belie the contracts' careful descriptions of risk allocation. As such, MCA agreements' bold statements that the transactions are "not a loan," seem to be rather unreliable *ipse dixit*.

CONCLUSION

The analysis in this *Law Letter* goes against the

grain of much of the existing MCA case law. This *Law Letter* stops just short, however, of arguing that all MCA agreements are secured loans in disguise. How a court ultimately characterizes an MCA agreement depends not only on how closely the terms of that specific agreement match those profiled above, but also on how courts select and balance the factors relevant to the determination.[91]

No matter what path a court takes through the murky recharacterization analysis, a few points about MCAs should carry through. First, the assignment of a percentage of receivables, rather than the receivables themselves, has critical bearing on the allocation of risks and benefits of ownership. Courts must think deeply about that structure when analyzing the matter and must be careful when applying precedent from transactions that do not have this novel structure. Second, courts should not take the contract's representations about risk allocation at face value and must instead consider them in light of the broader transactional realities of the agreement.[92]

Bankruptcy courts are accustomed to this type of skeptical analysis and have generated some of the more thoughtful decisions on these matters to date. Bankruptcy courts' future opinions on these matters, so long as they are published or publicly available, could bring welcome coherence to this corner of recharacterization doctrine.[93]

ENDNOTES:

[1]These financing arrangements have risen in popularity since the Great Recession, but they have been around in some form for close to two decades, if not longer. See, e.g., Ideas v. 999 Restaurant Corp., 2007 WL 3234747 (N.Y. Sup 2007) (involving an "advanced meal sales" agreement in which a restaurant was advanced $22,000 in return for a portion of its credit card receivables).

[2]Merchant Cash Advance Guide for Small Businesses, Funding Circle https://www.fundingcircle.com/us/resources/merchant-cash-advance/ (last accessed February 26, 2022).

[3]Recent news reporting about MCA transactions suggests that they are aggressively marketed to small businesses. Zachary R. Mider & Zeke Faux, Sign Here to Lose Everything Part 1: I hereby Confess Judgment, Bloomberg Businessweek November 20, 2018, https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment; United Capital Source, LLC v. Benisvy, 48 Misc. 3d 1203(A), 18 N.Y.S.3d 582 (Sup 2015) (describing the advertising practices of MCA brokers); see also Doyle v. JTT Funding, Inc., 2019 WL 13037025, at *1 (C.D. Cal. 2019) (alleging that MCA company engaged in robocalling and repeated telephone solicitations).

[4]Merchant Cash Advance Guide for Small Businesses, Funding Circle https://www.fundingcircle.com/us/resources/merchant-cash-advance/ (last accessed February 26, 2022).

[5]Gretchen Morgenson, FTC Official: Legal 'loan sharks' may be exploiting coronavirus to squeeze small businesses, NBC News, April 3, 2020.

[6]Erin Arvelund & Jeremy Roebuck, Par Funding Threatened Violence, Trashed Reputations After Businesses Took out Loans at Brutal Interest Rates, Borrowers Say, Philadelphia Inquirer, Aug. 30, 2020, https://www.inquirer.com/business/par-funding-sec-joseph-laforte-fraud-merchant-cash-advance-fbi-20200830.html; see also Morgenson, supra note 5 (displaying threatening text messages allegedly received by merchants who fell behind on payments, as well as a photo of a disemboweled rat apparently left on the mailbox of an attorney representing troubled merchants).

[7]In re GMI Grp., Inc., No. 19-52577 (PMB) (Bankr. N.D. Ga. 2019).

[8]The first transaction, entered into in July 2018, was structured as a "business loan" in the amount of $100,000. In exchange, GMI agreed to pay $133,000 in a series of 180 daily payments. GMI estimated the effective interest rate to reflect an APR of 66%. GMI v. Group, Inc. v. Expansion Capital Group, LLC (In re GMI Grp., Inc.), Adv. Pro. No. 19-05140-pmb (Bankr. N.D. Ga. Mar. 8, 2019) (Doc. 1-1). The transaction included a South Dakota choice of law clause, likely because South Dakota does not limit the legal rate of interest that can be charged on a loan. S.D. Codified Laws § 54-3-1.1. Because this transaction is not structured as a sale of future receivables, it is not addressed further in this writing.

[9]Exhibit to Proof of Claim filed by Reliable Fast Cash, LLC, In re GMI Grp., Inc., No. 19-52577 (Bankr. N.D. Ga. Aug. 10, 2018) [Claim No. 2, Ex. 4]; In re GMI Group, Inc., 2019 WL 3774117, *1 (Bankr. N.D. Ga. 2019) [hereinafter GMI v. Reliable].

[10]The debtor also paid a financing fee of $6,750. GMI v. Reliable, 2019 WL 3774117, at *3.

[11]An affidavit of confession of judgment, discussed further below, is a document in which one party, at the outset of a transaction, admits to liability and consents to the entry of a judgment in a quantified amount upon the occurrence of a stated condition. If the condition (such as non-payment of amounts owing) occurs, the other party can use the

affidavit to enter judgment without filing a lawsuit. See infra note 33.

[12]GMI v. Reliable, 2019 WL 3774117, at *3.

[13]In re GMI Group, Inc., 606 B.R. 467, 473 (Bankr. N.D. Ga. 2019) [hereinafter GMI v. Unique].

[14]It is difficult to reconcile the estimated daily receipts in the Reliable transaction, which appears to contemplate that GMI collects a daily average of $28,000, with the Unique transaction, which appears to contemplate that GMI collects a daily average of $6,570.59. Perhaps the debtor's business had deteriorated that dramatically in the months between the transactions. An alternative explanation appears in Congressional testimony submitted by an attorney who represents merchants in litigation with MCA financiers: "In my experience, the estimated daily payment has no relationship to the merchant's actual estimated receivables as purported on the face of the agreement. Instead, the purported estimated daily payment is tied to the size of the loan and the time period in which the MCA company wants to be repaid." Statement of Shane R. Heskin before the U.S. House of Representatives Small Business Committee, "Crushed by Confessions of Judgment: The Small Business Story," Hearing Held on June 26, 2019, available at https://smallbusiness.house.gov/uploadedfiles/06-26-19_mr._heskin_testimony.pdf [hereinafter Heskin Statement].

[15]GMI v. Unique, 606 B.R. at 473.

[16]See Verified Complaint (1) Seeking Injunction; (2) Objecting to Claim; (3) Recovering Prepetition Transfers; and (4) Seeking Other Relief, GMI Grp. v. Unique Funding Solutions, LLC (In re GMI Grp.), Adv. Pro No. 19-05138 -PMB (Bankr. N.D. Ga. Mar. 6, 2019) [Doc. No. 32] (discussing transaction details); Verified Complaint (1) Seeking Injunction; (2) Objecting to Claim; (3) Recovering Prepetition Transfers; and (4) Seeking Other Relief, GMI Grp. v. Reliable Fast Cash, LLC (In re GMI Grp.), Adv. Pro No. 19-52577-PMB (Bankr. N.D. Ga. Mar. 6, 2019) (same).

[17]GMI v. Unique, 606 B.R. at 488-89 ("These amounts are calculated by first estimating the time period in which provides for an advanced principal amount (the Purchase Price) of $75,000.00 in exchange for a repayment price of $111,750.00 (the Purchased Amount) to be made by daily debits in the amount of $1,117.00 (the Daily Amount) until the full Purchased Amount is collected. Based upon this payment schedule, Defendant would receive the Purchased Amount within approximately 150 days (101 business days on which payments could occur). Such a payment structure results in interest accruing at approximately 115 percent per annum, which far exceeds the 25 percent annual threshold for criminal usury under New York law.").

[18]These amounts are calculated as simple interest. Compound interest on such a transaction could be as high as 125% in the Reliable transaction and 227% in the Unique transaction.

[19]GMI v. Unique, 606 B.R. at 487 (noting that based on the payment history, "it appears that the Debtor was only able to withstand eight (8) days of debits by Defendant before it defaulted under the Agreement by, according to Defendant, switching bank accounts and made a total of only fifteen (15) payments").

[20]GMI v. Reliable, 2019 WL 3774117, at *4.

[21]GMI v. Unique, 606 B.R. at 475.

[22]See, e.g., Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (action to vacate confessed judgment on the basis of usury, among other things).

[23]See, e.g., Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131 (Bankr. D. Neb. 2018) (usury issues arise in the context of a preference action); In re A Goodnight Sleepstore, Inc., 2019 WL 342577 (Bankr. E.D. N.C. 2019) (usury issues arise in the context of bankruptcy litigation).

[24]See, e.g., Business Credit & Capital II LLC v. Neuronexus, Inc., 2019 WL 1426609, *2 (S.D. N.Y. 2019) (raising usury as a defense to a breach of contract action filed by MCA financier); Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc., 252 F. Supp. 3d 274 (S.D. N.Y. 2017) (same).

[25]Kenneth C. Kettering, True Sale of Receivables: A Purposive Analysis, 16 Am. Bankr. Inst. L. Rev. 511, 512 (2008).

[26]This characterization is a bit of a head-scratcher. See John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Disguising A Secured Loan as a Purchase of Hope, 9 Transactional Law. 14, 15-16 (2019) (suggesting it is both legally and metaphysically impossible to transfer property before it exists, and concluding that an MCA transaction could amount to either "a future sale of receivables" or a loan that would become secured by after-acquired receivables).

[27]See In re Hill, 589 B.R. 614, 619, 66 Bankr. Ct. Dec. (CRR) 65 (Bankr. N.D. Ill. 2018).

[28]In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014) (describing a transaction that required the merchant to enter into an agreement with its credit card processer to allocate a percentage of receivables to the financier).

[29]Hill, 589 B.R. at 619.

[30]GMI v. Unique, 2019 WL 3774117, at *1.

[31]See, e.g., Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019).

[32]In re Steele, 67 Bankr. Ct. Dec. (CRR) 162, 2019 WL 3756368, at *4 (Bankr. E.D. N.C. 2019).

[33]See Hilson & Sepinuck, supra note 26 (discussing this aspect of MCA transactions).

[34]A confession of judgment (cognovits) clause is a debtor's waiver of the constitutional right to due process in a subsequent enforcement action. Under New York, law, which applies to most MCA transactions, a contracting party signs an "Affidavit of Confession" that consents to the entry of a judgment upon a future breach. N.Y. CPLR § 3218. Confession of judgment clauses are barred in consumer credit transactions, and many jurisdictions bar their use entirely. See FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(1). New York law, which governs many MCA transactions, is relatively permissive regarding the use of confessions of judgment. See Heskin Statement, supra note 14.

[35]See Mider & Faux, supra note 3 (a multi-part series on the enforcement of MCA agreements and the ruinous effects on small businesses).

[36]See Nikita Biryukov, State sues eight firms over predatory loans, abusive collection practices, N.J. Globe Dec. 8, 2020, available at https://newjerseyglobe.com/governor/state-sues-eight-firms-over-predatory-loans-abusive-collection-practices/ (discussing suit filed by the Attorney General of New Jersey).

[37]See, e.g., Federal Trade Commission Press Release, available at https://www.ftc.gov/news-events/news/press-releases/2021/04/cash-advance-firm-pay-98m-settle-ftc-complaint-it-overcharged-small-businesses (discussing a settlement reached with Yellowstone Capital relating to deceptive practices and improper collection activity); Federal Trade Commission Press Release, available at https://www.ftc.gov/news-events/news/press-releases/2022/01/merchant-cash-advance-providers-banned-industry-ordered-redress-small-businesses (discussing a permanent injunction obtained by the FTC against MCA financiers, banning them from the industry for deceptive and unfair acts and practices).

[38]See U.S. House of Representatives Small Business Committee, "Crushed by Confessions of Judgment: The Small Business Story," Hearing Held on June 26, 2019, https://www.govinfo.gov/content/pkg/CHRG-116hhrg36816/pdf/CHRG-116hhrg36816.pdf.

[39]See Steven L. Harris & Charles W. Mooney, Jr., When is a Dog's Tail Not a Leg?: A Property-Based Methodology for Distinguishing Sales of Receivables From Security Interests That Secure an Obligation, 82 U. Cin. L. Rev. 1029, 1038 (2014) ("[T]he UCC sponsors' predominant motivation for bringing sales of virtually all types of receivables into Revised Article 9—by expanding the definition of 'accounts' and adding sales of payment intangibles and promissory notes—was to provide for the first time a coherent, accessible, and uniform body of law to govern these transfers as well as to subject most of them to Article 9's public-notice regime."). This treatment of sales of receivables also carried over similar treatment from pre-UCC statutes enacted in the wake of Corn Exchange Nat. Bank & Trust Co., Philadelphia v. Klauder, 318 U.S. 434, 439-40, 63 S. Ct. 679, 87 L. Ed. 884, 144 A.L.R. 1189 (1943). See 1 Grant Gilmore, Security Interests in Personal Property § 10.7, at 315 (1965).

[40]See, e.g., U.C.C. §§ 9-309(3), (4) (providing for automatic perfection of sales of payment intangibles and promissory notes); 9-406(e) (restricting the applicability of section 406(d) to certain sales of receivables); 9-408 (restricting the applicability of section 406(a) to certain sales of receivables); 9-607(c) (providing that a secured party must act in a commercially reasonable manner only when it has a right of recourse against the debtor, typically in a secured-lending arrangement and not a sale); 9-608(b) (providing that when a transaction is a sale of receivables, "the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency" after the proceeds of collection are applied).

[41]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, 183 (1991) (collecting examples).

[42]See, e.g.,Womack v. Capital Stack, LLC, 2019 WL 4142740 (S.D. N.Y. 2019).

[43]Most courts interpreting MCA transactions honor the choice of New York law, but a handful of courts have disregarded the parties' choice of law clauses. See, e.g., Essex Partners Ltd. v. Merchant Cash and Capital, 2011 WL 13123326, at *3 (C.D. Cal. 2011) (applying California law); In re Shoot The Moon, LLC, 635 B.R. 797, 825, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (applying Montana law).

[44]NY Penal Law § 190.40 (McKinney 2018) (providing that one is "guilty of criminal usury in the second degree when, not being authorized for permitted by law to do so, he knowingly charges, takes, or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period"). New York law also has provisions for civil usury that are triggered when interest rates exceed 16%, but they do not apply to corporations. N.Y. Gen. Oblig. Law § 5-521(1).

[45]N.Y. Gen. Oblig. Law § 5-521(3); GMI v. Reliable, 2019 WL 342577, at *7 (collecting authority).

[46]N.Y. Gen. Oblig. Law. § 5-521(1), (3).

[47]See, e.g., In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014) (concluding that because the transaction was a true sale, the funds collected were not cash collateral); Aicher & Fellerhoff, supra note 41, at 184. This issue might not arise with much frequency in the context of MCA transactions, as an MCA typically assigns only a portion of the debtor's receivables, ostensibly leaving the balance with the debtor. See GMI v.

Reliable, 2019 WL 3774117, at *13 n.13 (observing that the MCA financier did not object to the debtor's use of cash collateral); Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131, at *3 (Bankr. D. Neb. 2018) (observing that the financier "never took any action to exclude any portion of Cornerstone's receivables from the bankruptcy estate").

[48]11 U.S.C.A. § 552. Even in a true sale transaction, the buyer-financiers are not necessarily in the clear. While section 552 would appear not to apply to a true sale, the matter isn't entirely free from doubt. See Hilson & Sepinuck, supra note 26, at n.54. Alternatively, considering that a sale of future receivables is likely not effective until the receivables themselves are created, section 549 of the Bankruptcy Code might be invoked to avoid any such transfers of receivables that are deemed to occur post-petition. See id. at *15 (explaining that "[t]he law . . . does not comprehend or countenance a present transfer of future property"); Id. *18 n.54 (observing that section 549 of the Bankruptcy Code might apply to MCAs that are characterized as true sales).

[49]Several interpretive issues have arisen with respect to preference liability for MCA payments. The first is whether an MCA withdrawal amounts to a transfer of interest of a debtor in property. Some MCA financiers have argued that because they purchased the receivables outright, the debtor no longer has an interest in them. This argument seems to be inconsistent with the underlying transaction, which typically assign to the MCA provider a *percentage* of future receivables. Because the seller/debtor retained a residual percentage of the receivables belonged to the debtor, preference liability might arise from the withdrawals. GMI v. Reliable, 2019 WL 3774117, at *13 n.13. MCA financiers have also argued that they are not "creditors" and the repayments of future receivables are not on account of antecedent debts. But courts handling this issue have found that preference liability also may attach if the underlying transaction were a sale, given that the payment obligations under the transactions constitute "debts." See In re Hill, 589 B.R. at 619 (holding that even if the transactions do not qualify as loans, they created a debt owed to the financier); Goodnight Sleepstore, 2019 WL 342577, at *3 ("The right to payment under the Agreements . . . gives rise to a 'claim' under the Bankruptcy Code and provides the foundation for a 'debt' for purposes of the [avoidance] proceeding"). Fraudulent transfer liability has also arisen in these contexts, the argument typically focusing on the fact that the debtor did not receive reasonably equivalent value for the transfer. But this argument does not appear to turn on whether the transaction is a sale or a secured loan. See, e.g., Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019).

[50]Hilson & Sepinuck, supra note 26.

[51]See, e.g., In re Shoot The Moon, LLC, 635 B.R. 797, 807, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021); Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131 (Bankr. D. Neb. 2018); In re GMI Group, Inc., 606 B.R. 467 (Bankr. N.D. Ga. 2019); In re Steele, 67 Bankr. Ct. Dec. (CRR) 162, 2019 WL 3756368, at *1 (Bankr. E.D. N.C. 2019); In re Hill, 589 B.R. 614, 619, 66 Bankr. Ct. Dec. (CRR) 65 (Bankr. N.D. Ill. 2018); In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014).

[52]U.C.C. § 9-109 cmt. 4 ("Although [Article 9] occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of 'security interest' . . . delineates how a particular transaction is to be classified. That issue is left to the courts.").

[53]Heather Hughes, Reforming the True-Sale Doctrine, 36 Yale J. on Reg. Bull. 51, 51-52 (2018) ("Despite the fact that the true-sale doctrine governs transactions that are central to the multi-trillion-dollar securitization market, the doctrine is inconsistent, lacks normative direction, and is under-theorized.").

[54]Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 544, 26 U.C.C. Rep. Serv. 1319 (3d Cir. 1979).

[55]Kenneth N. Klee and Brendt C. Butler, Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues, 35 U.C.C.L.J. 23, 49 (2002) (Courts drawing this distinction are attempting to pinpoint "the extent to which the risks and benefits associated with ownership have either been retained by the [seller] or transferred to the [purchaser].").

[56]Id. at 49 (collecting cases).

[57]Aicher & Fellerhoff, supra note 41, at 192.

[58]Id. at 193.

[59]Mid-Atlantic Supply, Inc. of Virginia v. Three Rivers Aluminum Co., 790 F.2d 1121, 1123, 1 U.C.C. Rep. Serv. 2d 898 (4th Cir. 1986) (buyer's failure to investigate the account debtors supported court's finding that the transaction was a loan); c.f. In re Golden Plan of California, Inc., 829 F.2d 705, 712, 15 Bankr. Ct. Dec. (CRR) 1413, 15 Collier Bankr. Cas. 2d (MB) 1459, Bankr. L. Rep. (CCH) P 71522 (9th Cir. 1986) (indicating the same but concluding based on other factors that the transaction was a sale). But see Harris & Mooney, supra note 39, at 1042 (questioning courts' reliance on this factor because "a buyer might properly rely on a seller's representations and warranties or on recourse against the seller instead of on an independent investigation").

[60]See, e.g., Southern Rock, Inc. v. B & B Auto Supply, 711 F.2d 683, 685, 83-2 U.S. Tax Cas. (CCH) P 9529, 36 U.C.C. Rep. Serv. 1321, 52 A.F.T.R.2d 83-5795 (5th Cir. 1983) (suggesting in dicta that

the seller's retention of the right to receive payments supported recharacterization). In re Major Funding Corp., 82 B.R. 443 (Bankr. S.D. Tex. 1987) (pointing to the commingling of mortgage payments with general funds as evidence that the transaction was a secured loan). But see Harris & Mooney, supra note 39, at 1041 (questioning courts' reliance on this factor because "[p]articularly when the buyer and seller have a continuing relationship and the seller has a stake in maintaining its reputation, it may make good sense for the buyer to delegate such discretion to the seller").

[61]Northern Trust Co. v. Federal Deposit Ins. Corp., 619 F. Supp. 1340, 1342 (W.D. Okla. 1985).

[62]Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 544-45, 26 U.C.C. Rep. Serv. 1319 (3d Cir. 1979) ("[I]t is more important what the parties do than what they say they do.").

[63]Vee Bee Service Co. v. Household Finance Corp., 51 N.Y.S.2d 590, 611 (Sup 1944), order aff'd, 269 A.D. 772, 55 N.Y.S.2d 570 (1st Dep't 1945).

[64]In re Lemons & Associates, Inc., 67 B.R. 198, 209-10, 15 Bankr. Ct. Dec. (CRR) 395, 16 Collier Bankr. Cas. 2d (MB) 356, Bankr. L. Rep. (CCH) P 71624 (Bankr. D. Nev. 1986).

[65]See, e.g., In re Shoot The Moon, LLC, 635 B.R. 797, 814-20, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (finding that continuous use of loan terminology in the negotiations and financing statement, together with economic aspects of the transaction that supported recharacterization, overcame language in the document that styled the transaction as a sale).

[66]Heather Hughes, Property and the True-Sale Doctrine, 19 U. Pa. J. Bus. L. 870, 900 (2017); See also Hilson & Sepinuck, supra note 26 (describing this factors-based approach as "inherently problematic" because it "provides courts with little real guidance and can instead be used to mask decisions based on other considerations").

[67]Heather Hughes, for example, proposes a model linked to concerns of fairness and efficiency, which "focuses on the relevance of price terms and the property concept of rights of exclusion, considering when and why companies should exclude unsecured creditors from securitized assets." Hughes, supra note 53, at 52 n.2; Hughes, supra note 66. The late Steven Harris and Charles Mooney found that considerations of pricing, recourse, and the like distracted from the true question underlying the sale-loan distinction: whether the assignor retains any interest in the assets. As such, they advocate for a methodology akin to the lease-sale distinction. Harris & Mooney, supra note 39. Ken Kettering, meanwhile, suggests that the factors-based approach should give way to a strong presumption in favor of a true sale, recharacterizing only when necessary to prevent a forfeiture. Kettering, supra note 25, at 513. Many other approaches have been advanced.

[68]Aicher & Fellerhoff, supra note 41, at 206-07.

[69]GMI v. Unique, 606 B.R. at 473; see also Hill, 589 B.R. at 619 ("Merchant and LG agree that the Purchase Price under this Agreement . . . is not intended to be, nor shall it be construed as a loan from LG to Merchant.").

[70]GMI v. Unique, 606 B.R. at 473.

[71]In re GMI Group, Inc., 606 B.R. 467, 485 (Bankr. N.D. Ga. 2019); see also Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (describing a monthly reconciliation clause).

[72]See, e.g., Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (looking solely to the fact that "plaintiffs' obligation to repay them [sic] future receivables is conditioned on plaintiffs' receipt of such" to evidence that the agreements were not loans).

[73]Id. (collecting authority).

[74]Merchant Cash and Capital, LLC v. Liberation Land Co., LLC, 2016 WL 7655829, at *1 (N.Y. Sup 2016).

[75]See, e.g., Womack v. Capital Stack, LLC, 2019 WL 4142740 (S.D. N.Y. 2019) (supporting its conclusion with a string cite of 28 recent court decisions characterizing MCA transactions as sales).

[76]McNider Marine, LLC v. Yellowstone Capital, LLC, 2019 WL 6257463, *4 (N.Y. Sup 2019), appeal dismissed, 199 A.D.3d 1301, 154 N.Y.S.3d 508 (4th Dep't 2021).

[77]LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309 (2d Dep't 2020).

[78]LG Funding, LLC, 181 A.D. 3d at 666; AH Wines, Inc. v. ö Capital Funding LLC, 2020 WL 5028672, *8-11 (N.Y. Sup 2020), appeal dismissed, 199 A.D.3d 1327, 154 N.Y.S.3d 510 (4th Dep't 2021) and rev'd on other grounds, 199 A.D.3d 1328, 154 N.Y.S.3d 526 (4th Dep't 2021) (concluding that the reconciliation provision was solely in the discretion of the funder and, as such, is illusory and indicative of a secured loan).

[79]606 B.R. at 486.

[80]606 B.R. at 474.

[81]606 B.R. at 487 ("The Defendant 'purchased' 17 percent of the Debtor's future receivables under the Agreement. Requiring the Debtor to have twice the Daily Amount in its account would require it to maintain as cash the equivalent of at least 34 percent of its daily collections in its account. Assuming that half of that would be taken by Defendant in its daily debit, that would still require the Debtor to keep another 17% of its daily collections permanently unused in its checking account just to satisfy this requirement. Satisfying such a require-

ment continually would be virtually impossible for any business.").

[82]606 B.R. at 487.

[83]Repayment might include funds from the MCA itself. In re AH Wines, Inc, 2020 WL 5028672, at *1-2.

[84]Hilson & Sepinuck, supra note 26; *see also* John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Criminal Usury In Another Form, 9 TRANSACTIONAL LAW. 1 (Aug. 2019).

[85]See Merchant Cash and Capital, LLC v. Transfer Intern. Inc, 2016 WL 7213444 (N.Y. Sup 2016) (determining the agreement was not a loan because "plaintiff assumed the risk that, if the receipts were less than anticipated, the period of repayment would be correspondingly longer, and the investment would yield a correspondingly lower annual return.").

[86]In re Shoot The Moon, LLC, 635 B.R. 797, 814-15, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (observing that the MCA documents "confer[ed] security interests overly generous for a sale").

[87]Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019) (finding the acceleration provision to support the conclusion that the transaction is a secured loan).

[88]Hilson & Sepinuck, supra note 84, at *17.

[89]Hilson & Sepinuck, supra note 84, at *17.

[90]To be sure, if the MCA agreement has a functional reconciliation clause, and that gives the financier discretion to increase payments when business is good, the advance might be paid back more quickly when business is booming. But aside from that adjustment in timeline, the merchant retains all remaining benefits.

[91]Along these lines, various scholars have suggested that courts apply presumptions in favor of sales, and New York Law, as noted above, is predisposed against finding a contract to be usurious. Courts working under such frameworks may reach a decision contrary to one reached above, particularly when the terms of the MCA are distinguishable. C.f. Hilson & Sepinuck, supra note 84, at *4 ("Even if . . . the borrower has the burden of proving that a loan is usurious, courts should not allow a highly unlikely contingency to deprive borrowers of the protection that usury law is intended to provide. A loan that is usurious except when pigs fly, is usurious.").

[92]The *GMI* court's analysis of Unique's reconciliation provision is instructive as to the level of depth required.

[93]For a discussion of the importance of meaningful public access to court decisions, see Elizabeth Y. McCuskey, Submerged Precedent, 16 NEV. L.J. 515 (2016).

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