FILED: APPELLATE DIVISION - 2ND DEPT 04/14/2022 03:09 PM 2021-05912
NYSCEF DOC. NO. 23 RECEIVED NYSCEF: 04/14/2022

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, LEONORA GANGI,

Plaintiffs,

JOSEPHINE THEISEN,

Plaintiff-Appellant,

—against—

WORLD BUSINESS LENDERS and AXOS BANK f/k/a BOFI FEDERAL BANK,

Defendants-Respondents,

NEW YORK TRIBECA GROUP and LARRY SCHUSTER,

Defendants.

DOCKET NO. 2021-05912

RECORD ON APPEAL

JACOB H. NEMON
ALEXANDER G. MALYSHEV
CARTER LEDYARD & MILBURN LLP
Two Wall Street
New York, New York 10005
(212) 732-3200
nemon@clm.com
malyshev@clm.com

Attorneys for Defendants-Respondents

SCOTT L. LANIN
LANIN LAW, P.C.
505 Eighth Avenue, Suite 1402
New York, New York 10018
(212) 764-7250
scott@laninlaw.com

Attorney for Plaintiff-Appellant

Kings County Clerk's Index No. 500481/21

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. D/B/A GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, LEONORA GANGI,

Plaintiffs,

JOSEPHINE THEISEN,

Plaintiff-Appellant,

—against—

WORLD BUSINESS LENDERS and AXOS BANK f/k/a BOFI FEDERAL BANK,

Defendants-Respondents,

NEW YORK TRIBECA GROUP and LARRY SCHUSTER,

Defendants.

Kings County Clerk's Index No. 500481/21

Appellate Division Docket No. 2021-05912

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1. The index number of the case is 500481/21.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, Kings County.

4. The action was commenced on January 7, 2021 by filing of Summons and Complaint; the answer of Defendants was served on February 12, 2021 by Notice of Motion to Dismiss Complaint. This action is referred to as the "Second Action." A related foreclosure action was filed and is entitled *Axos Bank f/k/a BOFI Federal Bank against Michael Gangi Plumbing and Heating Contractors, Inc et al*; Index No. 502392/2020 (the "First Action"). A related appeal is pending arising from the First Action under Docket No. 2021-05911.

5. The nature and object of this second action is fraud and a violation of NY GLB § 349.

6. This appeal is from a decision and order of the Honorable Lawrence Knipel, entered in favor of Defendants World Business Lenders and Axos Bank f/k/a BOFI Frederal Bank, against Plaintiff Josephine Theisen on June 8, 2021, which granted Defendants' Motion to Dismiss Complaint.

7. The appeal is on a full reproduced record.

Plaintiff's Notice of Appeal, dated July 7, 2021

FILED: KINGS COUNTY CLERK 08/12/2021 11:22 AM INDEX NO. 500481/2021
NYSCEF DOC. NO. 44 RECEIVED NYSCEF: 08/12/2021

Supreme Court of the State of New York

County of Kings

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, et al.

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER

NOTICE OF APPEAL

Index No.: 500481/2021

PLEASE TAKE NOTICE that *(insert your name)* Adam J. Roth hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a *(insert judgment, order, decree, etc.)* Order of the Supreme Court, Kings County, dated June 8, 2021.

Dated: New York, New York
July 7, 2021

Yours, etc.,

Signature

(Print Name) Adam Roth
(Address) 112 Madison Ave 6th Floor
(Telephone Number) NY, NY 10016
212-722-3741

To: *(Insert below the name and address of the clerk of the trial court and the names and addresses of all opponents)*

Averell Golub
Kings County Commercial Division
Courtroom 774
360 Adams Street
Brooklyn, NY 11201

CARTER LEDYARD & MILBURN LLP
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005

Decision and Order of the Honorable Lawrence Knipel Appealed From, dated May 28, 2021, with Notice of Entry [pp. 3 - 12]

FILED: KINGS COUNTY CLERK 06/08/2021 05:49 AM INDEX NO. 500481/2021
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 06/07/2021

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

- against -

Index No. 500481/21

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	4-16
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Upon the foregoing papers, defendants Axos Bank f/k/a BOFI Federal Bank (Axios) and World Business Lenders, LLC (WBL) (collectively, defendants) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint filed by plaintiffs Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors (MGPHC or borrower), Rosario Gangi (Rosario or guarantor), Josephine Theisen (Theisen) and Leonora Gangi (collectively,

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plaintiffs).

Background

On January 7, 2021, plaintiffs commenced this action alleging that they "were pressured by a group of felons to take a loan, underwritten by an unscrupulous lender . . ." (complaint at ¶ 1). The complaint asserts the following two causes of action: (1) violation of New York General Business Law (GBL) § 349 (h) because defendants allegedly engaged in consumer-oriented conduct that was materially misleading by charging plaintiffs a prepayment penalty, and (2) fraud asserted by plaintiff Theisen based on the allegation that the HUD-1 statement falsely represented that there was no prepayment penalty (*id.* at ¶¶ 121-132 and 134-142).

Defendants' Dismissal Motion

Defendants now move to dismiss the complaint. Regarding the first cause of action, defendants assert that "GBL § 349 is facially inapplicable because it applies only to 'consumer-oriented' conduct, not individually negotiated business loans like the ones in this case." Defendants also contend that the claim is "deficient" because "no deceptive consumer-oriented conduct, or in fact any materially deceptive conduct, is actually alleged with respect to Axos and WBL." Defendants assert that "[t]he loan documents fully disclosed the APR, the total repayment amount, and the requirement of a prepayment premium."

Defendants assert that the loan documents were reviewed by Arthur L. Aidala, MGPHC's counsel, in connection with the issuance of the July 5, 2018 loan, and that MGPHC's counsel issued a July 3, 2018 attorney opinion letter (Opinion Letter), in

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which he specifically opined that:

> "The execution, delivery, and performance by the Borrower and each Guarantor of the Loan Documents to which each is a party, and the consummation of the transaction contemplated herein, will not: . . . (d) contravene or conflict with or result in any violation of any New York state statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and each Guarantor [and] will not contravene or conflict with or result in violation of any federal statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and Guarantors . . ."

Regarding the second cause of action for fraud, defendants argue that "[t]he terms of the loan were fully disclosed to the Borrower and Rosario in the First Loan Agreement . . . which was reviewed by the Borrower's counsel, as well as in the business loan summary and pre-payment disclosure executed by Rosario." Defendants argue that plaintiffs "do not, and cannot, plead an actionable misstatement, or scienter, by Axos and WBL, or reasonable reliance as to themselves." To the extent that plaintiffs rely on the HUD-1 statement, which "erroneously stated that the First Loan had no prepayment premium[,]" defendants assert that it "was not prepared by Axos, but by a third-party title company, WWLT-NY, LLC ('WWLT'), as is evident from the face of the document . . ."

Plaintiffs' Opposition

Plaintiffs, in opposition, assert that GBL § 349 is applicable here because "the conduct charged in the instant matter is conduct that will heavily affect consumers

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applying for a loan with Defendants." While plaintiffs concede that the underlying loans "were provided to a business[,]" they argue that "that alone is not determinative on the issue of whether the Defendants were engaged in consumer-oriented activity." Plaintiffs contend that "[p]roviding loans and attempting to collect on said loans is a consumer-oriented activity." Plaintiffs further argue that "[t]he deceptive acts alleged herein will have a broad impact on consumers at large" because "[d]efendants send targeted communications to potential customers and provide loans that are available to every resident in New York state." Plaintiffs also assert that "Defendants' overall business practices in connection with the pre-payment penalty are deceptive" because the HUD-1 statement failed to disclose the prepayment penalty and "Theisen and Leonora Gangi were never given copies of the notes or disclosures for review . . ." In addition, plaintiffs argue that "WBL and AXOS, by offering loans that were doomed to fail, used materially deceptive practices that violate [GBL] 349."

Plaintiffs argue that the second cause of action asserted by Theisen for fraud is sufficiently pled. Plaintiffs submit an affidavit from Theisen, who attests that she executed the mortgage (on behalf of MGPHC) on July 5, 2018. Theisen attests that "[p]rior to signing, I asked Anne Rougier, [WBL's] agent, if there would be any pre-payment penalties" and, in response, Rougier told her "since the HUD-1 says there is no pre-payment penalty, there cannot be one." Notably, plaintiffs also submit an affidavit from Ann T. Rougier (Rougier), the notary for the mortgage closing, who attests that "I never directly worked for World Business Lenders of Axos Bank" and "I work for a third

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party who assigns me to notarize signatures for transactions." Rougier further attests that she has "no specific memory of this transaction[,]" "[i]f someone asked me a question at the closing about a document, I would first tell them to speak to their representative" and "[i]f there is no representative present, I customarily tell them to review the documents."

Theisen attests that "I was never sent completed loan documents" and "[p]rior to the July 5, 2018 closing, I never spoke to Arthur Aidala, Esq. No one from his firm ever sent me any documentation or discussed the terms of the loan with me prior to the transaction." Plaintiffs also submit an affirmation from Aidala who affirms that "[m]y firm was requested by . . . ROSARIO GANGI . . . to represent [MGPHC] and him in a loan transaction with AXOS . . ." and he and his law firm never represented Rosario's sister, Theisen, in the loan transaction.

Defendants' Reply

Defendants, in reply, argue that the first cause of action for violation of GBL § 349 should be dismissed because the loan was made to MGPHC, "a corporation, strictly for business (and not personal, household or family) purposes" and "[i]t is undisputed that the loan proceeds were disbursed into a business account, not a personal account." Defendants argue that plaintiffs are not "consumers" within the meaning of the statute and that there is no allegation that they engaged in a consumer-oriented marketing campaign. Defendants contend that plaintiffs' claim fails because plaintiffs, who were advised by counsel, entered into two related loans to MGPHC that were negotiated between Axos and plaintiffs. Defendants assert that plaintiffs "were represented by Mr.

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Aidala, who furnished an Opinion Letter that confirmed he reviewed the First Note, Mortgage and Guaranty for compliance with applicable state and federal laws and opined as to their enforceability." Defendants argue that "this is a private contract dispute, unique to the parties, that falls outside the ambit of GBL § 349."

Defendants assert that Theisen's fraud claim based on the assertion that "Ann Rougier, Defendant WBL's agent, explicitly told Plaintiff there would be no pre-payment penalty" is subject to dismissal. Defendants note that this allegation "is contradicted by Ms. Rougier's actual affidavit, which states she has no recollection of the loan whatsoever, but would have told [Theisen] to consult the lender with any questions at the closing." Defendants further note that Rougier's affidavit testimony is "consistent with the direction in the HUD-1, which directed [Theisen] to 'contact [her] lender' if she had 'any questions about the Settlement Charges and Loan Terms listed on this form[ ].'" Defendants argue that Theisen cannot salvage her fraud claim by arguing that Rougier was defendants' agent, since "Rougier herself disclaims any agency, stating she 'never directly worked for [WBL] or Axos Bank,' but instead for a 'third party.'" Defendants also assert that Theisen's allegation of "justifiable reliance" based on a "relationship of trust and confidence" is demonstrably false, since "[t]he Loan Documents disclaim any such relationship."[1] Defendants argue that Theisen should have reviewed the First

[1] The First Mortgage expressly provides that "[t]he relationship between Borrower and Grantor and Lender created by this Mortgage is strictly a debtor and creditor relationship and not fiduciary in nature."

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Mortgage and the documents referenced therein and cannot avoid the terms of those documents on the ground that she did not read them.

Discussion

A dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*id.* at 1182).

GBL § 349 declares as unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" and is directed at wrongs against the consuming public (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24 [1995]). To assert a viable claim under GBL § 349, a party must plead that: (1) the challenged conduct was consumer-oriented; (2) the conduct or statement was materially misleading; and (3) damages (*Lum v New Century Mortgage Corp.*, 19 AD3d 558, 559 [2005], *lv. denied* 6 NY3d 706 [2005]).

For conduct to be consumer-oriented it is necessary to demonstrate that the conduct had "a broader impact on consumers at large" (*see Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [2000]). Under New York law, "the term 'consumer' is consistently associated with an individual

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or natural person who purchases goods, services or property primarily for personal, family or household purposes" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 289 [2000] [citing GBL §§ 399-c, 399-p (1) (c); General Obligations Law § 5-327 (1) (a); CPLR 105 (f); Uniform Commercial Code § 9-109 (1)]). Thus, private contract disputes that are unique, private in nature, or involve a so-called "single-shot" transaction do not fall within the statute's ambit (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26).

While certain services performed in conjunction with the sale and mortgaging of residential property may fit within the ambits of the statute, the alleged deceptive acts in the transaction at issue here are more akin to a private contract dispute. Significantly, the alleged deceptive acts were not directed toward a "consumer" such as a homebuyer, but rather toward a company receiving funding in furtherance of a business purpose. Consequently, since the transaction at issue here was not consumer-oriented, GBL § 349 is inapplicable, and plaintiffs' first cause of action for violation of GBL § 349 is dismissed.

Thiesen's second cause of action for fraud based on the representation in the HUD-1 statement that there would be no prepayment penalty is similarly subject to dismissal. The HUD-1 statement, which was *not* prepared by Axos or WBL, specifically directed Theisen to read the terms of the mortgage in the loan documents, which disclosed that there was a prepayment penalty. Theisen's testimony that Rougier, Axos' and/or WBL's agent, expressly represented that there would be no prepayment penalty is

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demonstrably false. Rougier, a notary retained by a third party, confirmed in her affidavit that she is *not* an agent of Axos or WBL, she has no recollection of the transaction at issue here, but that she would have directed Theisen to contact her lender if she had any questions about the terms of the loan. Thus, the evidence reflects that Axos and WBL did not make a false representation of material fact that Theisen reasonably relied upon. Accordingly, it is hereby

ORDERED that defendants' dismissal motion (in mot. seq. one) is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

Index No.: 500481/2021
(Knipel, J.S.C.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE of the attached Decision and Order by the Court (Knipel, J.S.C.), dated June 7, 2021 and entered in the Office of the Kings County Clerk on June 8, 2021.

Dated: June 8, 2021

CARTER LEDYARD & MILBURN LLP

By: */s/ Jacob H. Nemon*
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

Attorneys for Defendants Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

9872438.1

Summons and Complaint, dated January 6, 2021
[pp. 13 - 29]

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NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 01/07/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiff,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendant.
----------X

Date filed:

Index No.:

SUMMONS

Basis for Venue:
Accident location

To the above- named Defendants:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
January 6, 2021

By:_____/s/_____
ADAM J. ROTH
THE LAW OFFICES OF ADAM J. ROTH P.C.
Attorney for Plaintiffs Defendants
112 Madison Avenue, 6th Floor
New York, New York 10016
(212) 922-3741

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TO:

World Business Lenders
P.O. Box 479
Elmsford, New York 10523

Larry Shuster
c/o New York Tribeca Group
1120 73rd Road 12G
Forest Hills, New York, 11375

Axos Bank
c/o Carter Ledyard & Milburn
2 Wall Street
New York, New York 10005

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiff,

VERIFIED COMPLAINT

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER

Defendant.
----------X

COMPLAINT AND DEMAND FOR TRIAL BY JURY

1. MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS (hereinafter MGPH), ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI plaintiffs here, were pressured by a group of felons to take a loan, underwritten by an unscrupulous lender who has rented a federal bank regulated by HOLA, that was doomed to fail.
2. In July of 2018, Plaintiff Rosario Gangi's business, Michael Gangi Plumbing and Heating Contractors, Inc., was having some cashflow problems.
3. Mr. Gangi received a fax telling him MGPH was pre-approved for a loan.
4. After calling the number on the fax, Mr. Gangi was directed to Defendant Larry Shuster of New York Tribeca Group.
5. After Mr. Shuster spoke to Mr. Gangi, he repeatedly called and pressured him using boiler room like pressure tactics.
6. Mr. Shuster is familiar with boiler room like pressure tactics because he spent his twenties working in a boiler room, then in a federal prison after pleading guilty to both mail and wire fraud.

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7. Mr. Shuster then presented the lending opportunity to World Business Lenders.

8. Mr. Gangi was then contacted by World Business Lenders to discuss his assets that could be used to secure the collateral.

9. During this process, Mr. Shuster would repeatedly call Mr. Gangi and threaten him that his company would go bankrupt and he would be a failure if he did not take the loan.

10. After determining that Mr. Gangi owned the building where Michael Gangi Plumbing and Heating Contractors, Inc. operated, WBL offered MGPH a loan for $450,000.

11. WBL required the loan be guaranteed by the commercial property which was co-owned by Rosario Gangi and Josephine Theisen.

12. The business loan itself was for $450,000 at a short-term high interest (86.95% APR) loan requiring daily payments, with automatic withdrawals.

13. Mr. Shuster was paid a commission of over $40,000 for placing the loan.

14. Less than four months later, in October 2018, after defaulting on the first loan, the defendants then gave Rosario Gangi a second loan.

15. This loan was labeled as a business loan and was guaranteed by Mr. Gangi's personal residential property that he co-owns with his wife Leonora Gangi.

16. The second loan itself was for $160,000 at a short-term high interest (103.05% APR) loan requiring daily payments, with automatic withdrawals.

17. This case stands at the intersection of two dangerous trends in the marketing of financial products: (1) placing a home at risk by issuing a financial product doomed to fail; and (2) "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

18. First, since the subprime mortgage crisis fifteen years ago, courts have been dealing

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with the fallout of mortgages on homes backing loans that were inadequately underwritten and doomed to fail. Regulations have been adopted to protect residential mortgagors, but those regulations can be avoiding by where a loan is designated a business loan.

19. But framing the loan as a "business loan" cannot exempt these lenders from the scope of New York General Business Law 349(h).

20. It is an unfair and deceptive practice to offer New York residents, such as the plaintiffs, the opportunity to get capital to build their businesses if the loans have an unreasonable risk of failure. It is an unfair and deceptive practice to ask New York residents to put up their homes as collateral for a financial product that the lenders have not adequately underwritten.

21. New York General Business Law 349(h) makes it unlawful to engage in any unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce New York.

22. Loans that are doomed to fail violate New York General Business Law 349(h).

23. Loans with inadequate underwriting violate New York General Business Law 349(h).

24. These principles continue to apply when the borrower is a small business whose owner backs the loan with a mortgage on her home.

25. The second trend is what courts around the country have begun to address "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

26. The loans here, on their face, business loans, requiring substantial daily payments that the documents acknowledged to be equivalent to (86% and 103% APR respectively), backed by a personal guaranty and a mortgage on real estate.

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27. Transactions of this structure have been a proprietary part of the business of World Business Lenders, LLC - an alternative finance company that provides short term high interest loans backed by personal guarantees and using real estate as collateral - since its inception.

28. All the forms used for this transaction are demonstrably World Business Lender forms.

29. Although plaintiffs were presented with this loan by World Business Lenders (WBL), the transaction documents all attempt to position AXOS as the lender.

30. AXOS is a federal bank organized under the laws of Nevada - a state that has no usury laws.

31. Structuring a loan in the name of a federal bank based out of Nevada is a common scheme that alternative lenders use to take advantage of the legal exemptions for federally chartered banks that otherwise would not be applicable to the alternative lender. Such a scheme is referred to as a "rent-a-bank" or "rent-a-charter" scheme because the alternative finance company is the true lender while the bank receives a fee for the use of its name and charter, but bears no real risk.

32. Plaintiffs seek damages for violations of the New York General Business Law 349(h), fraud and related claims arising out of the transaction.

PARTIES

33. Rosario Gangi resides at 983 76th Street, Brooklyn, New York 11228.

34. Leonora Gangi resides at 983 76th Street, Brooklyn, New York 11228.

35. Josephine Theisen co-owns the property located at 1002 Bay Ridge Avenue and is a resident of the State of New York.

36. Michael Gangi Plumbing and Heating Contractors, Inc. is a corporation with its principal place of business located at 1002 Bay Ridge Avenue.

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37. World Business Lenders, LLC is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 101 Hudson Street, 33rd Floor, Jersey City, NJ, 07302.

38. It now lists its official address as P.O. Box 479, Elmsford, New York 10523.

39. On information and belief, WBL specializes in the product at issue in this case- a business loan backed by a personal guaranty and a mortgage on real estate.

40. In May 2018, World Business Lenders announced a $30MM multi-draw credit facility from a Cayman Islands fund established by a consortium of Asian banks and investors.

41. In connection with that announcement, Robert Pardes, Chief Operating Officer of World Business Lenders stated that "this reaffirms increasingly broad institutional acceptance of our proprietary product and market leading servicing platform."

42. In connection with the same announcement, Matthew Yoon (Managing Director and Head of Asia at Pi Capital International LLC, which advised World Business Lenders with respect to the $30MM facility) said, "This transaction demonstrates desirability, even with cross-border investors of WBL's well-structured proprietary business loan product. WBL's veteran management and underwriting team has created an exciting new secured asset class for investors."

43. On information and belief, the July 5, 2018 and October 12, 2018 loans are an example of the "proprietary product" Pardes and Yoon were describing.

44. Axos Bank ("BOFI") is an FDIC insured institution organized and existing under the laws of Nevada, with a claimed address of 9205 West Russell Road, Suite 400, Las Vegas, NV 89148.

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45. The claimed address is nothing more than a front.

46. Axos actual corporate headquarters is located at 4350 La Jolla Village Drive, Suite 140, San Diego, CA 92122

47. Axos Bank was formerly known as BOFI Federal Bank.

48. New York Tribeca Group, LLC (NYTG) is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 1120 73rd Road 12G, Forest Hills, New York, 11375.

49. Larry Shuster is a convicted felon employed by New York Tribeca Group, his business address is 1120 73rd Road 12G, Forest Hills, New York, 11375.

JURISDICTION AND VENUE

50. World Business Lenders, LLC does business throughout the United States, including in New York.

51. AXOS does business throughout the United States, including in New York.

52. New York Tribeca Group does business throughout the United States, including in New York.

53. Larry Shuster is a New York resident who is an employee of NYTG.

54. Defendants have engaged in tortious conduct in New York.

55. Venue in Kings County is proper because the case involves the rights to real property located in Brooklyn, and thus venue is proper in Kings County.

56. Venue in Kings County is also proper because Plaintiffs entered into this transaction in Kings County.

57. Venue in Kings County is also proper because Plaintiffs are Kings County residents.

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THE JULY 2018 LOAN AND TRANSACTION

58. In 2018, Mr. Gangi's business was losing money.

59. He had a line of credit with M & T Bank that was almost fully drawn.

60. In June of 2018, Mr. Gangi received a fax for a pre-approved business loan.

61. He called the number and was put in touch with Larry Shuster, a broker New York Tribeca Group, LLC.

62. Larry Shuster pleaded guilty to conspiracy to commit mail and wire fraud in SDNY case #06-cr-857 and served time in a federal prison.

63. On June 14, 2018 Mr. Gangi filled out a one-page loan application to NYTG.

64. NYTG then prepared a pitch deck for a proposed loan to Rosario Gangi

65. Larry Shuster and New York Tribeca Group, LLC contacted World Business Lenders seeking to place the loan.

66. On June 20, 2018, NYTG sent WBL a pitch deck which included three months of bank statements and a detailed analysis of the sale-ability of 1002 Bay Ridge Avenue.

67. NYTG Group initially pitched a $300,000 loan to WBL with weekly payments.

68. On June 22, 2018, WBL emailed Larry Shuster and NYTG telling him it was expediting title.

69. At some point thereafter, Mr. Rosario was approved for a loan in the amount of $450,000.

70. The loan required the building, 1002 Bay Ridge Avenue as collateral.

71. The loan terms required daily business payments of $2,131.96 from July 9, 2018 through January 8, 2020 and a final payment of $2,127.64 on January 9, 2020.

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72. The mortgage states the interest rate is .2367% per day.

73. The APR of the loan was approximately 86%.

74. On July 5, 2018, WBL e-mailed Rosario Gangi with a copy of disclosures and was told to sign via Docusign.

75. Josephine Theisen was never provided with any disclosures.

76. Certain documents were scheduled by WBL to be signed at 1002 Bay Ridge Avenue on July 5, 2018.

77. On July 5, 2018, WBL sent Anne Rougier to 1002 Bay Ridge Avenue as a notary republic.

78. While at the closing, Ms. Rougier called WBL and asked when a representative from WBL would arrive.

79. Upon information and belief, a WBL representative told Ms. Rougier to act as WBL'S agent at the closing.

80. At the closing, Josephine Theisen asked Anne Rougier if there were any pre-payment penalties on the loan.

81. Anne Rougier showed Ms. Theisen the HUD-1 which stated that the loan did not have a prepayment penalty.

82. Ms. Rougier then said, "since the HUD-1 says there is no pre-payment penalty, there cannot be one."

83. Based on Ms. Rougier's representation, who was acting as an agent of WBL, Ms. Theisen signed the mortgage, addendum to mortgage, escrow and deposit agreement, a judgment affidavit, owner's affidavit, and the HUD-1.

84. Ms. Theisen was never provided, nor did she sign, the note.

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85. Neither Mr. Rosario nor Ms. Theisen ever spoke with or communicated with anyone from Axos Bank.

86. After Ms, Rougier obtained and notarized the signatures, she forwarded the documents to WBL.

87. WBL then recorded the mortgage on July 10, 2018 on behalf of Axos.

88. Axos then transferred title to WBL on April 25, 2019

89. On November 19, 2019 WBL transferred title back to Axos.

90. As a result of "brokering" the transaction, Larry Shuster and NYTG was paid $40,500.

THE OCTOBER 2018 LOAN AND TRANSACTION

91. By October 2018, Mr. Rosario was unable to make the daily payments.

92. Mr. Rosario contacted Larry Shuster and NYTG again about the possibility of another loan.

93. Mr. Rosario advised Mr. Shuster his personal residence had equity available to secure an additional loan.

94. Mr. Shuster again pitched WBL on another loan.

95. WBL then began its underwriting.

96. WBL determined that Mr. Gangi, if approved for the second loan, would have a loan to debt service ratio of 44% on day one.

97. WBL also noted that Mr. Gangi's business had lost over $10,000 per month for the preceding four months prior to the second loan and his business account was overdrawn by $110,000.

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98. There were several phone calls with WBL where they advised him he could lose his personal residence if he defaulted on the second loan.

99. At the time he requested the second loan, Mr. Gangi was already in default on his first loan.

100. Notwithstanding the fact that WBL knew Mr. Gangi could not make payments on his first loan, they issued a second loan for $160,000 secured by his residence, 983 76th Street, Brooklyn, New York.

101. Mr. Gangi never had a lawyer review any of the second loan documents.

102. On October 12, 2018, Mr. Rosario was e-mailed the note and disclosures which he signed via Docusign.

103. Leonora Gangi was never shown the note nor the disclosures at any time prior to, during or after the closing.

104. On October 12, 2018, WBL sent a notary public named Eugenio Enrique Madeam to witness the documents.

105. WBL did not send any other employees or agents to the closing.

106. At the closing, Leonora Gangi was presented with and signed the mortgage, guaranty and other documents, but was never shown the note or advised about the pre-payment penalty.

107. Had Ms. Gangi been advised about the pre-payment penalty, she would not have signed the mortgage.

108. Thereafter, the loan was funded by WBL.

DEFAULT AND THE ASSESSMENT OF PRE-PAYMENT PENALTIES

109. Shortly after receiving the second loan, Mr. Gangi and MGPH went into default.

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110. In April of 2019, Josephine Theisen and Rosario Gangi contacted WBL to request a pay-off amount.

111. On April 4, 2019, WBL sent a pay-off letter demanding payment in full and assessing a pre-payment penalty on both loans.

112. On April 4, 2019, Mr. Gangi and Ms. Theisen offered to pay both loans in full less the prepayment penalty.

113. WBL refused to accept any amount less than the full amount due along with the pre-payment penalties.

114. An offer was made to purchase 1002 Bay Ridge Avenue in May of 2019.

115. Notwithstanding the guarantee of full re-payment of the loan amount including the interest, in June of 2019, WBL refused to take any amount less than the total amount due along with the pre-payment penalties.

116. Gangi, Theisen and MGPH would have paid the loans off in full (including all principal and interest) starting in April 2019 but WBL refused insisting that the pre-payment penalty also be paid.

117. WBL sent pay-off letters demanding pre-payment penalty on April 4, 2019, June 6, 2019, October 4, 2019 and in early January 2020.

118. Under WBL's proposed payment plan, the plaintiffs would have had to sell 1002 Bay Ridge Avenue and still owed tens of thousands of dollars to defendants.

119. On January 30, 2020, Axos Bank filed for foreclosure on both 1002 Bay Ridge Avenue and 983 76th Street.

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AS AND FOR A FIRST CAUSE OF ACTION BY ALL PLAINTIFFS UNDER NEW YORK GENERAL BUSINESS LAW 349(H)

120. The plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

121. The defendants each violated New York General Business Law 349(h).

122. Specifically, Defendants Axos, WBL, NYTG and Larry Shuster engaged in (1) consumer-oriented conduct (2) that was materially misleading (3) that caused plaintiffs' injury.

123. Specifically, placing loans that are available to every resident in New York state is consumer-oriented conduct. Sending targeted communications to potential customers is consumer-oriented conduct. *Plavin v. Group Health, Inc.*, 35 NY3d 1 (NY 2020).

124. The conduct was materially misleading because the apparent representative of WBL and AXOS told Josephine Theisen there was no pre-payment penalty. *See Hud-1* attached as Exhibit 1.

125. Furthermore, the conduct was materially misleading because WBL, AXOS and NYTG never provided a copy of the note or disclosures to Leonora Gangi or Josephine Theisen.

126. Additionally, the conduct was materially misleading as to Rosario Gangi and MGPH because WBL, AXOS and NYTG knew when the loans were written that they were doomed to fail. *See Kaur et. al. v. World Business Lenders, LLC et. al.* 19-cv-11364 (USDC Mass. February 24, 2020) [denying motion to dismiss by World Business Lenders and Axos because they knowingly wrote loans that were doomed to fail].

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127. Plaintiffs MGPH suffered damage as a result because it has been rendered economically unviable due to WBL, AXOS and NYTG writing the loans that were doomed to fail.

128. Plaintiffs Rosario Gangi and Josephine Theisen suffered damage as a result of WBL, AXOS and NYTG writing loans that were doomed to fail because her interest in 1002 Bay Ridge Avenue is in foreclosure.

129. Plaintiff Leonora Gangi suffered damage because her primary residence 973 76th Street is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

130. Plaintiff Josephine Theisen suffered damage because her interest in 1002 Bay Ridge Avenue is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

131. Plaintiffs are entitled to treble damages.

132. Plaintiffs are entitled to attorneys' fees.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF JOSEPHINE THEISEN FOR FRAUD AGAINST WBL AND AXOS

133. The plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

134. The defendants' WBL and AXOS made (1) a material misrepresentation of fact (2) knowing it was false (3) with the intent to induce reliance (4) justifiable reliance by Jospehine Theisen and (5) causing damage to the plaintiff.

135. Specifically, the HUD-1 statement represented that there was no pre-payment penalty.

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136. AXOS and WBL knew this was false because WBL sent Mr. Gangi disclosures on the day of the closing of the first loan giving him notice that the note included a pre-payment penalty.

137. AXOS and WBL intended for Josephine to rely on the HUD-1 because WBL agent, Anne Rougier, told her that since the HUD-1 stated there was no pre-payment penalty there was not one.

138. It was reasonable for Josephine Theisen to rely on the HUD-1 because the agent of WBL told her to rely on the HUD-1.

139. Had Josephine Theisen been told there was a pre-payment penalty, she would not have signed the mortgage.

140. As a result of Josephine Theisen signing the mortgage, she has suffered damages, namely the pending foreclosure and possible loss of her equity in the property located at 1002 Bay Ridge Avenue.

141. Plaintiffs are entitled to punitive damages.

142. The plaintiffs hereby demand trial by jury.

WHEREFORE, Plaintiffs demand judgment in their favor against all Defendants, jointly and severally, and seek an order from the Court:

a) Awarding Plaintiffs, threefold, their direct and consequential damages, including prejudgment interest, in an amount to be determined at trial;

b) Awarding punitive damages;

c) Awarding Plaintiffs attorneys' fees and costs incurred in this action;

d) Granting such other and further relief as this Court deems just and proper.

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Dated: New York, New York
January 6, 2021

/s/

Adam J. Roth
Law Offices of Adam J. Roth
Attorney for Plaintiffs MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI
112 Madison Avenue, 6th Floor
New York, New York 10016
212-922-3741
212-253-4157
ajr@loajr.com

Defendants Axos Bank f/k/a BofI Federal Bank and World Business Lenders LLC's Notice of Motion to Dismiss Complaint, dated February 12, 2021 [pp. 30 - 32]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

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Index No.: 500481/2021
(Knipel, J.S.C.)

NOTICE OF MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE that upon the Affirmation of Alexander G. Malyshev, Esq., dated February 12, 2020, and the Exhibits thereto, and the Memorandum of Law in Support of Plaintiff/Counterclaim-Defendant's Motion to Dismiss by Axos Bank f/k/a BofI Federal Bank and World Business Lenders, LLC, Defendants Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC, by their undersigned counsel, will move this Court in the Motion Support Office of the Courthouse, located at 360 Adams Street, Room 227, Brooklyn, New York 11230, on the 12th day of March 2021, at 9:30 AM, or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR § 3211(a)(7), dismissing the complaint by Plaintiffs Michael Gangi Plumbing and Heating Contractors, Inc d/b/a Gangi Plumbing and Heating Contractors, Rosario Gangi, Josephine Theisen and Leonora Gangi, together with granting Defendants all such other and further relief is as just and equitable.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 2214(b), answering papers, if any, must be served so as to be received by the undersigned no less than seven days prior to the return date of this motion.

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Dated: February 12, 2021

CARTER LEDYARD & MILBURN LLP

By: */s/ Alexander G. Malyshev*
Alexander G. Malyshev
Jacob H. Nemon

2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

Attorneys for Defendants Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants

X

Index No.: 500481/2021
(Knipel, J.S.C.)

NOTICE OF MOTION TO DISMISS COMPLAINT

32

CARTER LEDYARD & MILBURN LLP
COUNSELORS AT LAW
2 WALL STREET
NEW YORK, NY 10005 212) 732-3200

Affirmation of Alexander G. Malyshev, Defendants Axos Bank f/k/a BofI Federal Bank and World Business Lenders LLC, in Support of Motion to Dismiss Complaint, dated February 12, 2021 [pp. 33 - 36]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants

----------X

Index No.: 502392/2020
Index No.: 500481/2021
(Knipel, J.S.C.)

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS OF AXOS BANK F/K/A BOFI FEDERAL BANK, AND WORLD BUSINES LENDERS, LLC

ALEXANDER G. MALYSHEV, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following to be true and correct, under penalty of perjury:

1. I am a Partner at Carter Ledyard & Milburn LLP, counsel for Axos Bank f/k/a BofI Federal Bank ("Axos") and World Business Lenders LLC ("WBL").

2. I respectfully submit this Affirmation in support of Axos's and WBL's motion to dismiss in two related actions, *Axos v. Michael Gangi Plumbing and Heating Contractors, Inc. et*

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al., Index No. 502392/2020 (Kings Co. 2020) (the "First Action") and *Michael Gangi Plumbing and Heating Contractors, Inc. et al., v. World Business Lenders et al.,* Index No. 500481/2021 (Kings Co. 2021) (the "Second Action"). The motion seeks dismissal of pleadings by the Gangi Parties.[1]

3. A true and correct copy of Plaintiff's Verified Complaint filed in the First Action on January 30, 2020 ("First Complaint"), together with Exhibits A through F (Dkt. Nos. 2-8), is annexed as **Exhibit 1**. The Exhibits attached to the Complaint included the:

A. Business Promissory Note and Security Agreement between Plaintiff and Gangi Plumbing dated July 5, 2018 and accompanying loan documentation (including without limitation the Business Loan Summary, Business Loan Purpose Affidavit and Prepayment Disclosure);

B. Continuing Guaranty, Personal (Unlimited) executed by Rosario, dated July 5, 2018;

C. Recorded Mortgage from Rosario and Josephine to Plaintiff, dated July 5, 2018, for the property located at 1002 Bay Ridge Avenue, Brooklyn, New York 11219;

D. Business Promissory Note and Security Agreement between Plaintiff and Gangi Plumbing dated October 12, 2018 and accompanying loan documentation (including without limitation the Business Loan Summary, Business Loan Purpose Affidavit and Prepayment Disclosure);

[1] Defendants / Third Party Plaintiffs in the First Action, and Plaintiffs in the Second Action, Michael Gangi Plumbing and Heating Contractors, Inc. ("Borrower" or "Plumbing"), Rosario Gangi ("Rosario"), Josephine Theisen ("Josephine") and Leonora Gangi ("Leonora") (collectively, "Defendants" or "Gangi Parties").

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E. Continuing Guaranty, Personal (Unlimited) executed by Rosario, dated October 12, 2018; and

F. Recorded Mortgage from Rosario and Josephine to Plaintiff, dated October 12, 2018, for the property located at 983 76th Street, Brooklyn, New York 11228.

4. A true and correct copy of the Gangi Parties' Amended Answer with Counterclaims, filed in the First Action on November 4, 2020 (Dkt. No. 30), with Exhibit 1, is annexed as **Exhibit 2**.

5. A true and correct copy of the Gangi Parties' Notice of Impleader, Third Party Summons and Third Party Complaint, filed in the First Action on November 3, 2020 (Dkt. No. 27) ("TPC"), is annexed as **Exhibit 3**.

6. A true and correct copy of the Summons and Complaint filed by the Gangi Parties in the Second Action on January 7, 2021 ("Second Complaint"), is annexed as **Exhibit 4**.

7. A true and correct copy of the Stipulation dated January 20, 2021, between Axos and WBL and the Gangi Parties, discontinuing the TPC in favor of the Second Action and merging the Counterclaims into the Second Action, is annexed as **Exhibit 5**.

8. A screenshot of the listing on the Federal Deposit Insurance Corporation's website for Axos Bank, showing its status as a federally-chartered savings association, is annexed as **Exhibit 6**.

9. An opinion letter dated July 3, 2018 from Arthur L. Aidala, Esq. of the Law Offices of Aidala, Bertuna & Kamins, P.C., addressed to "Bofi Federal Bank, its successors and/or assigns" on behalf of Michael Gangi Plumbing and Heating Contractors, Inc., is annexed as **Exhibit 7**.

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10. A true and correct copy of a Stipulation entered into between counsel for Axos and the Gangi Parties dated October 21, 2020, which withdrew and resolved Axos's prior motion to dismiss the Gangi Parties' prior counterclaims and sixth affirmative defenses (Dkt. No. 26) is annexed as **Exhibit 8**.

11. A true and correct copy of the Memorandum of Law in Support of Plaintiff/Counterclaim-Defendant's Motion to Dismiss the Counterclaims and Sixth Affirmative defense, filed July 21, 2020 (Dkt. No. 23) is annexed as **Exhibit 9**.

12. A true and correct copy of Summons with Notice dated April 17, 2019 in the action, *Michael Gangi Plumbing & Heating Contractors, Inc. et al. v. BofI Federal Bank n/k/a Axos Bank and World Business Lenders LLC.*, Kings Co. Index No. 508823/2019, is annexed as **Exhibit 10**.

13. A true and correct copy of Stipulation of Dismiss dated April 17, 2019 in the removed action, *Michael Gangi Plumbing & Heating Contractors, Inc. et al. v. BofI Federal Bank n/k/a Axos Bank and World Business Lenders LLC.*, E.D.N.Y. Case No. 19-cv-3409, is annexed as **Exhibit 11**.

WHEREFORE, for the reasons set forth in the accompanying Memorandum of Law, Plaintiff respectfully requests that this Honorable Court dismiss the Counterclaims together with granting Plaintiff all such other and further relief as is just and equitable.

Dated: February 12, 2021

/s/ Alexander G. Malyshev
ALEXANDER G. MALYSHEV

**Exhibit 1 to Malyshev Affirmation-
Plaintiff's Summons and Verified Complaint, dated January 29, 2020, with
Exhibits for the First Action; Index No. 502392/2020
[pp. 37 - 160]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE GANGI a/k/a JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

Index No.:

Filed:

Plaintiff designates KINGS County as the Place of trial

SUMMONS

The basis of the venue is the Defendants' place of business/residence

TO THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: Huntington, New York
January 29, 2020

THE MAGNOZZI LAW FIRM, P.C.
Attorneys for Plaintiff

By: _____

Mark F. Magnozzi, Esq.
23 Green Street, Suite 302
Huntington, New York 11743
(T) (631) 923-2858
(F) (631) 923-2860

DEFENDANTS' ADDRESSES:

Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors
6901 10th Avenue
Brooklyn, NY 11228

Rosario Gangi
983 76th Street
Brooklyn, NY 11228

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Josephine Gangi
a/k/a Josephine Theisen
983 76th Street
Brooklyn, NY 11228

Leonora Gangi
983 76th Street
Brooklyn, NY 11228

NYS Department of Taxation and Finance
W A Harriman Campus
Albany, NY 12227

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK, Index No.:

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE GANGI a/k/a JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

VERIFIED COMPLAINT

Defendants.

----------X

Plaintiff, AXOS BANK f/k/a BOFI FEDERAL BANK, ("Bofi" or "Plaintiff"), by its attorneys, The Magnozzi Law Firm, P.C., as and for its Verified Complaint against, Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors ("MGPHC"), Rosario Gangi ("Rosario"), Josephine Gangi a/k/a Josephine Theisen ("Josephine"), Leonora Gangi ("Leonora"), New York State Department of Taxation and Finance ("NYS Taxation") and John Doe One through John Doe Ten (collectively "Defendants"), alleges as follows:

NATURE OF THE ACTION

1. Plaintiff brings this action due to a default under certain: (1) Business Promissory Note and Security Agreements, (2) Mortgages; and (3) Guarantees in order to foreclose all rights, claims, liens and equity of redemption, other than its own security interests in the properties commonly known as 1002 Bay Ridge Avenue, Brooklyn, New York 11219 a/k/a Block 5880 and Lot 7 and 983 76th Street, Brooklyn, New York 11228 a/k/a Block 5945 and Lot 55, County of Kings, State of New York (the "Mortgaged Premises").

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2. The Business Promissory Note and Security Agreements and Guarantees were secured by Mortgages ("the Mortgages"), (all documents referenced herein collectively referred to as the "Loan Documents") on the Mortgaged Premises entered into by and between MGPHC and BOFI Federal Bank.

3. Plaintiff is the current owner of the signed Notes, and is in possession of the authoritative copy of the Notes.

THE PARTIES, JURISDICTION AND VENUE

4. At all times hereinafter mentioned, Plaintiff was and still is a federally chartered savings association organized and existing pursuant to the laws of the United States of America with its principal place of business at 9205 West Russell Road, Suite 400, Las Vegas, NV, 89148. Plaintiff is the current holder and owner of each of the Business Promissory Note and Security Agreements, the Guarantees and the Mortgages executed and delivered to Plaintiff and is the Mortgagee under the Mortgages that were pledged as security for the obligations under the Business Promissory Note and Security Agreements.

5. Upon information and belief, defendant MGPHC is a corporation maintaining a principal place of business at 6901 10th Avenue, Brooklyn, New York 11228 and is the Borrower under the Business Promissory Notes, as described more fully below.

6. Upon information and belief, defendant Rosario is an individual who currently resides at 983 76th Street, Brooklyn, New York 11228 and is a Guarantor of the Business Promissory Notes, as described more fully below.

7. Defendant Josephine is an individual who currently resides at 983 76th Street, Brooklyn, New York 11228 and is named as a party Defendant in order to foreclose her interest in the mortgaged premises as a tenant.

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8. Defendant Leonora is an individual who currently resides at 983 76th Street, Brooklyn, New York 11228 and is named as a party Defendant in order to foreclose her interest in the mortgaged premises as a tenant.

9. Defendant NYS Taxation maintains a place of business at W A Harriman Campus, Albany, New York 12227 and is named as a party Defendant in order to foreclose its interest in the mortgaged premises as a possible subordinate lienor.

10. Upon information and belief, there are unknown Defendants who have or claim to have or may claim to have some interest in or lien upon the Mortgaged Premises or some part thereof, which interest or lien, if any, has accrued subsequent to and is subject and subordinate to the lien of the Mortgages.

11. The Court has personal jurisdiction over defendant MGPHC as they conduct business in the State of New York.

12. The Court has personal jurisdiction over defendant Rosario, Josephine and Leonora as they are residents of the State of New York.

13. Venue is proper in the County of Kings pursuant to CPLR § 507 since it is the county where the Mortgaged Premises at issue are situated.

FACTUAL BACKGROUND

Loan#27964

The Business Promissory Note and Security Agreement and Mortgage Note

14. On or about July 5, 2018, BOFI and MGPHC entered into a Business Promissory Note and Security Agreement in the amount of Four Hundred Fifty Thousand ($450,000.00) dollars, pursuant to which BOFI loaned monies to MGPHC to be used for their business.

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(hereinafter referred to as "Note #1") A copy of the Note #1 is annexed hereto as **Exhibit "A"** and incorporated herein by reference.

15. In order to further secure MGPHC's obligation to BOFI under Note #1, on or about July 5, 2018, defendant Rosario duly executed, acknowledged and delivered an Unlimited Guaranty (the "Continuing Guaranty #1") to BOFI. Through the execution and delivery of Continuing Guaranty #1, defendant Rosario personally guaranteed the payment and performance of MGPHC's obligations under Note #1. A copy of Continuing Guaranty #1 is annexed hereto as **Exhibit "B"** and incorporated herein by reference.

Mortgage

16. On or about July 5, 2018, Rosario and Josephine gave BOFI a Mortgage on real property commonly known as 1002 Bay Ridge Avenue, Brooklyn, New York 11219 (hereinafter referred to as the "Mortgaged Premises #1") as security for the obligations under Note #1 in the amount of $450,000.00. Said Mortgage was duly recorded with the Office of the City Register of the City of New York on July 13, 2018, under CRFN No. 2018000231710 ("Mortgage #1"). The Mortgage recording tax was duly paid as part of this recording. A copy of Mortgage #1 is annexed hereto as **Exhibit "C"**.

Default

17. The terms of Note #1, provide, among other things, for daily payments of $2,131.96, with a daily interest rate of .236712328767% with a final payment of $2,127.64 on January 9, 2020.

18. MGPHC and Rosario failed to make payment under Note #1 and Continuing Guaranty #1 beginning on or about March 28, 2019 and continuing each day thereafter (the "Default"). By writing dated March 28, 2019, MGPHC and Rosario were notified of the

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Default, and that Plaintiff accelerated the balance due under Note #1, in accordance with the terms set forth therein.

19. Despite Plaintiff's notice to defendants MGPHC and Rosario of the Default under Note #1, MGPHC and Rosario have failed to cure the Default to date.

20. The accelerated balance due under Note #1 and Continuing Guaranty #1, as of January 15, 2020 is the amount of $711,952.77, plus daily accruing interest in the sum of $776.79 per diem, late fees, plus attorneys' and other related fees and costs, due and owing on Note #1, Mortgage #1 and Continuing Guaranty #1. The exact amounts due and owing will be computed by a Referee or other court appointed representative.

Loan#28367

The Business Promissory Note and Security Agreement and Mortgage Note

21. On or about October 15, 2018, BOFI and MGPHC entered into a Business Promissory Note and Security Agreement in the amount of One Hundred Sixty Thousand ($160,000.00) dollars, pursuant to which BOFI loaned monies to MGPHC to be used for their business. (hereinafter referred to as "Note #2") A copy of Note #2 is annexed hereto as **Exhibit "D"** and incorporated herein by reference.

22. In order to further secure MGPHC's obligation to BOFI under Note #2, on or about October 15, 2018, defendant Rosario duly executed, acknowledged and delivered an Unlimited Guaranty (the "Continuing Guaranty #2") to BOFI. Through the execution and delivery of Continuing Guaranty #2, defendant Rosario personally guaranteed the payment and performance of MGPHC's obligations under Note #2. A copy of Continuing Guaranty #2 is annexed hereto as **Exhibit "E"** and incorporated herein by reference.

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Mortgage

23. On or about October 12, 2018, Rosario and Leonora gave BOFI a Mortgage on real property commonly known as 983 76th Street, Brooklyn, New York 11228 (hereinafter referred to as the "Mortgaged Premises #2") as security for the obligations under Note #2 in the amount of $160,000.00. Said Mortgage was duly recorded with the Office of the City Register of the City of New York on October 24, 2018, under CRFN No. 2018000354592 ("Mortgage #2"). The Mortgage recording tax was duly paid as part of this recording. A copy of Mortgage #2 is annexed hereto as **Exhibit "F"**.

Default

24. The terms of Note #2, provide, among other things, for weekly payments of $4,245.55, with a daily interest rate of .279452054795% with a final payment of $4,244.76 on February 11, 2020.

25. MGPHC and Rosario failed to make payment under Note #2 and Continuing Guaranty #2 beginning on or about October 12, 2018 and continuing each day thereafter (the "Default"). By writing dated April 3, 2019, MGPHC and Rosario were notified of the Default, and that Plaintiff accelerated the balance due under Note #2, in accordance with the terms set forth therein.

26. Despite Plaintiff's notice to defendants MGPHC and Rosario of the Default under Note #2, MGPHC and Rosario have failed to cure the Default to date.

27. The accelerated balance due under Note #2 and Continuing Guaranty #2, as of January 15, 2020 is the amount of $368,052.68, plus daily accruing interest in the sum of $393.97 per diem, late fees, plus attorneys' and other related fees and costs, due and owing on Note #2, Mortgage #2 and Continuing Guaranty #2. The exact amounts due and owing will be computed by a Referee or other court appointed representative.

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28. Accordingly, by virtue of the Default under Note #1 and Note #2, Plaintiff has elected to foreclose on the Mortgaged Premises, in order to recoup all or part of the indebtedness owing under the Notes.

AS AND FOR THE FIRST CAUSE OF ACTION
(Breach of Contract)

29. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs of this complaint marked "1" through "28" as fully set forth herein.

30. Pursuant to the express terms and provisions of Note #1 & #2, Continuing Guaranty #1 & #2, and Mortgage #1 & #2 (as defined *supra*) (together, "Loan Documents"), MGPHC was to pay the payments of principal and interest pursuant to Note #1 & #2, when due, and its failure to do so constitutes an event of default entitling Plaintiff to exercise its rights and remedies under the Loan Documents, which includes *inter alia* acceleration of the loan balance as of the date of default.

31. On or about March 28, 2019, MGPHC failed to make payment under Note #1 when due, and Rosario failed to pay and honor their obligations under the Continuing Guaranty #1, which failure constituted an event of default under the terms of Note #1 and Continuing Guaranty #1. The amount owed under Note #1 and Continuing Guarantee #1 as of January 15, 2020 is the amount of $711,952.77, plus daily accruing interest in the sum of $776.79 per diem, late fees, plus attorneys' and other related fees and costs, due and owing.

32. On or about October 12, 2018, MGPHC failed to make payment under Note #2 when due, and Rosario failed to pay and honor their obligations under Continuing Guaranty #2, which failure constituted an event of default under the terms of Note #2 and Continuing Guaranty #2. The amount owed under Note #2 and Continuing Guarantee #2 as of January 15,

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2020 is the amount of $368,052.68, plus daily accruing interest in the sum of $393.97 per diem, late fees, plus attorneys' and other related fees and costs, due and owing.

33. Plaintiff has elected and hereby elects to foreclose on the collateral security.

34. Plaintiff requests that this action proceed to Judgment of Foreclosure and Sale and said Mortgaged Premises be sold subject to the following:

a. Any state of facts that an inspection of the Mortgaged Premises would disclose;

b. Any state of facts that an accurate survey of the Mortgaged Premises would show;

c. Covenants, restrictions, easements and public utility agreements of record, if any;

d. Building and zoning ordinances of the municipality in which the mortgaged premises are located and possible violations of same; and

e. Unpaid taxes and assessments, if any.

35. In the event that there are any other liens against said Mortgaged Premises either by way of judgment, junior mortgage or otherwise, Plaintiff requests that such other liens shall not be merged in Plaintiff's cause of action set forth in this Complaint but that Plaintiff shall enforce said other lien(s) and/or seek determination of priority thereof in any independent action(s) or proceeding(s), including, without limitation, any surplus money proceedings.

36. Plaintiff shall not be deemed to have waived, altered, released or changed the election hereinbefore made, by reason of any payment after the date of the commencement of this action on any or all of the defaults mentioned herein, and such election shall continue and remain effective.

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37. No other action has been commenced at law or otherwise for the recovery of the sum or any part thereof secured by Note #1 & #2, Continuing Guaranty #1 & #2 or Mortgage #1 & #2.

38. The Mortgages being foreclosed are not a "high-cost home loans" or "subprime home loans" and as such terms are defined in § 6(l)l and 6(m) of the N.Y. Banking Law and is not a "home loan" for purposes of section 1304 of the N.Y. Real Property Actions and Proceedings Law ("RPAPL"). Accordingly, the requirements of CPLR § 3408, and RPAPL §§ 1302 and 1304 are not applicable to this action.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST
DEFENDANT MGPHC
(UCC Foreclosure/Possession)

39. Plaintiff repeats, reiterates and realleges each and every allegation of this complaint numbered "1" through "38" with the same force and effect as if more fully set forth herein at length.

40. The subject documents including but not limited to the Business Promissory Note and Security Agreements provide that in the event of default, Plaintiff may take possession of and/or foreclose upon any Collateral; or sell, lease or otherwise dispose of any Collateral at public or private sale, with or without advertisement.

41. By reason of the continuing defaults of defendant MGPHC, under the terms and conditions of the Business Promissory Note and Security Agreements and Mortgages, Plaintiff seeks to foreclose upon the subject Collateral:

a. All equipment and machinery, including power-driven machinery and equipment, furniture and fixtures now owned or hereafter acquired, together with all replacements thereof,

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all attachments, accessories, parts and tools belonging thereto or for use in connection wherewith;

b. All inventory, raw materials, work in process and supplies now owned or hereinafter acquired;

c. All accounts receivables now outstanding or hereafter arising;

d. All contract rights and general intangibles now in force or hereafter acquired;

e. All other accounts, instruments and chattel paper now outstanding or owned or hereafter acquired; and seeks a judgment of foreclosure for the subject Collateral and a judgment of possession as well.

AS AND FOR A THIRD CAUSE OF ACTION
(Attorneys' Fees)

42. Plaintiff repeats, reiterates and realleges each and every of the allegations contained in paragraphs of this complaint marked "1" through "41" as if fully set forth herein.

43. The Notes and Continuing Guarantees provide that in the event of a default, each of the defendants would be obligated, jointly and severally, to pay plaintiff's reasonable attorneys' fees and costs in the pursuit of and enforcement of plaintiff's rights under the Loan Documents.

44. As a result of the default of defendant MGPHC, as well as the defaults of the Guarantor Rosario, there is due and owing, the sum of at least $20,000.00, representing reasonable attorneys' fees and costs incurred in the prosecution of this action.

WHEREFORE, Plaintiff demands judgment over and against Defendants as follows:

On the First Cause of Action against All Defendants:

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a. That Defendants, subsequent to the filing of the Notice of Pendency of this action in the Office of the Clerk of the County of Kings, in which said Mortgaged Premises are situated, and every person whose conveyance or encumbrance is recorded subsequent to the filing of a Notice of Pendency of Action in the Office of the Clerk of the County of Kings, be forever barred and foreclosed of all right, claim, lien and equity of redemption in the said Mortgaged Premises;

b. That said Mortgaged Premises may be decreed to be sold according to law;

c. That the amount due to Plaintiff on its Mortgages may be adjudged;

d. That the moneys arising from the sale(s) may be brought into court;

e. That Plaintiff may be paid the amount adjudged to be due to Plaintiff with daily interest to the time of such payment, the expenses of sale plus, reasonable attorneys' fees, together with the costs, allowances and disbursements of this action, and any sums which may be paid by the Plaintiff pursuant to any terms of Note #1 & #2 and Mortgage #1 & #2 set forth in this Complaint or to protect the lien of Plaintiff's Mortgages, together with the taxes, water and sewer charges, insurance premiums (if applicable) and all other charges and liens thereon to be paid, with interest upon those amounts from the date of the respective payments and advances thereof, so far as the amount of such money properly applicable thereto will pay the same;

f. That in the event that Plaintiff possesses any other lien(s) against said Mortgaged Premises either by way of Judgment, junior mortgage or otherwise, Plaintiff requests that such lien(s) shall not be merged into Plaintiff's cause(s) of action set forth in this Complaint but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any independent action(s) or proceeding(s).

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g. That if the proceeds of said sale of the Mortgaged Premises aforesaid be insufficient to pay the amount due the Plaintiff, with interest and costs, the referee making the sale be required by the judgment of sale herein, to specify the amount of such deficiency in his report of sale, so the application may be made by the Plaintiff to this Court, pursuant to section 1371 of the Real Property Actions and Proceedings Law, for a judgment against the Defendants, for any deficiency which may remain after applying all of such monies so applicable thereto, and in the event that Plaintiff possesses any other lien(s) against said Mortgaged Premises either by way of Judgment, junior mortgage or otherwise, Plaintiff requests that such lien(s) shall not be merged into Plaintiff's cause(s) of action set forth in this Complaint but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any independent action(s), and that the Plaintiff may have such other and further relief, or both in the premises, as may be just and equitable

h. That the Plaintiff shall not be deemed to have waived, altered, released or changed its right to enforce the Note Guaranty, each of which, *inter alia*, guaranteed the payment and performance of the borrower's obligation as a primary obligor; and,

On the Second Cause of Action against Defendant MGPHC, foreclose upon the subject Collateral:

a. All equipment and machinery, including power-driven machinery and equipment, furniture and fixtures now owned or hereafter acquired, together with all replacements thereof, all attachments, accessories, parts and tools belonging thereto or for use in connection wherewith;

b. All inventory, raw materials, work in process and supplies now owned or hereinafter acquired;

c. All accounts receivables now outstanding or hereafter arising;

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d. All contract rights and general intangibles now in force or hereafter acquired;

e. All other accounts, instruments and chattel paper now outstanding or owned or hereafter acquired; and seeks a judgment of foreclosure for the subject Collateral and a judgment of possession as well; and,

On the Third Cause of Action against all Defendants, jointly and severally:

a. For attorneys' fees in an amount to be determined but not less than $20,000.00 and that the Plaintiff may have such other and further relief, or both in the premises, as may be just and equitable.

Dated: January 29, 2020

THE MAGNOZZI LAW FIRM, P.C.
Attorneys for Plaintiff

By: _____
Mark F. Magnozzi, Esq.
23 Green Street, Suite 300
Huntington, NY 11743
T - (631) 923-2858
F - (631) 923-2860

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VERIFICATION

STATE OF NEW JERSEY)
)ss
COUNTY OF HUDSON)

John A. Murphy, being duly sworn deposes and says that I am a Vice President of World Business Lenders LLC, as servicer for AXOS BANK f/k/a BOFI FEDERAL BANK the plaintiff named in the within action.

I have read the annexed complaint and know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters, I believe them to be true. My belief as to those matters therein not stated upon knowledge is based upon my review of records.

On the day of January 15 in the year 2020 before me, the undersigned, personally appeared John Murphy, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that she executed the same in her capacity and that by her signature on the instrument, the individual, or the person upon behalf of which the individual(s) acted, executed the instrument.

NOTARY PUBLIC
(Signature and office of individual taking acknowledgement)

JOSELINE HELENA
Commission # 50113207
Notary Public, State of New Jersey
My Commission Expires
September 20, 2024

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EXHIBIT A (Legal Description)

Mortgaged Premises #1

ALL that certain, plot, piece or parcel of land, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, being bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southwesterly side of Bay Ridge Avenue and the southeasterly side of 10th Avenue;

RUNNING THENCE southwesterly along the southeasterly side of 10th Avenue, 80 feet;

RUNNING THENCE southeasterly parallel with Bay Ridge Avenue, 22 feet;

RUNNING THENCE northeasterly parallel with 10th Avenue and part of the distance through a party wall 80 feet to the southwesterly side of Bay Ridge Avenue;

RUNNING THENCE northwesterly along the southwesterly side of Bay Ridge Avenue 22 feet to the point or place of **BEGINNING.**

TOGETHER with a right of way or easement as long as said wall shall stand to the use of the part of the wall between these premises and the premises adjoining on the southeast encroaching on the said premises adjoining on the southeast and extending from the rear line of the building on the premises adjoining on the southeast to approximately the rear of the said premises adjoining on the southeast.

FOR INFORMATION ONLY:
SAID premises also being known as Block 5880, Lot 7 on the Official Tax Map of the City of New York in the County of Kings.
SAID premises being intended to be the same premises as conveyed in Deed recorded in CRFN 2006000382359.

Commonly Known As: 1002 Bay Ridge Avenue, Brooklyn, New York 11219

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Mortgaged Premises #2

ALL that certain plot, piece or parcel of land, with the buildings and Improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

BEGINNING at a point on the northeasterly side of 76th Street, distant 111 feet 8 inches northwesterly from the corner formed by the intersection of the northeasterly side of 76th Street with the northwesterly side of 10th Avenue;

running thence NORTHEASTERLY parallel with 10th Avenue and part of the distance through a garage party wall
built or intended to be built, 100 feet;

thence NORTHWESTERLY parallel with 76th Street 17 feet 10 inches;
thence SOUTHWESTERLY again parallel with 10th Avenue and part of the distance through a party wall, 100 feet to the northeasterly side of 76th Street; and

thence SOUTHEASTERLY along said northeasterly side of 76th Street 17 feet 10 inches to the point or place of BEGINNING.

TOGETHER with an easement or right of way in favor of the owner of the above described premises over the most northwesterly 3 feet 6 inches of the premises adjoining on the southeast for the purpose of ingress and egress for pleasure automobiles to and from a garage built or intended to be built in the rear of the premises herein described.

Commonly Known As: 983 76th Street, Brooklyn, New York 11228

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EXHIBIT A

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NYSCEF DOC. NO. 8 DocuSign Envelope ID: 6FECA9FA-D750-4EDB-A7D0-6800FE1423F1 THIS IS A COPY RECEIVED NYSCEF: 02/10/2020
The Authoritative Copy of this record is held at na2.docusign.ne

BOFI FEDERAL BANK

Conditional Closing Agreement

7/5/2018

We, Bofl Federal Bank, are pleased to inform you, Applicant, that you have been approved for a business loan in the principal amount of $450,000.00 with an anticipated funding date of 7/6/2018. The undersigned understands and acknowledges that we will not fund a loan for you until such time as all closing conditions (including, but not limited to, the additional conditions set forth below) are met:

- the title company has received any and all relevant documentation needed to satisfy the requirements listed on the title search
- the title company is able to provide a clear and acceptable final title policy to us in accordance with and satisfaction of our guidelines
- we have reviewed and approved the fully executed loan documents
- a due diligence call is conducted completed and to our satisfaction
- a Skype call, or other video conference call we deem acceptable, is conducted and completed to our satisfaction

Nothing herein shall be construed as an obligation by us to provide funds to you, it being expressly understood that the obligations of the parties shall be established pursuant to the terms of a Business Promissory Note and Security Agreement to be made by you in favor of us, as well other documents required by us, and only upon actual funding of the loan.

COPY VIEW

APPLICANT: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
By: Rosario Gangi
26CDF0[illegible]

Printed Name: Rosario Gangi

Title: President

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BUSINESS LOAN SUMMARY*

Borrower: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors 6901 10th Avenue, Brooklyn, New York, 11228	**Lender:** Bofl Federal Bank 9205 West Russell Road, Suite 400 Las Vegas, NV 89148

Disbursement Amount: **$428,739.07** This amount is to be disbursed on **7/6/2018**
Processing Fees: **$13,806.64** See Itemization on attached Page 2
Adjustments: **$7,454.29** See Itemization on attached Page 2
Loan Amount: **$450,000.00** See Itemization on attached Page 2
Interest Rate: **0.236712328767%**
Interest Charge: **$355,876.56** See Itemization on attached Page 2
APR: **86.9516%**
Total Repayment Amount: **$805,876.56** See Itemization on attached Page 2

Payment Schedule: **377** payments of **$2,131.96** due each "Business Day" commencing on **7/9/2018** until **1/8/2020**, followed by a final payment of **$2,127.64** on **1/9/2020** when any remaining outstanding Principal, interest, and other unpaid charges shall be due and payable in full. **"Business Day" means any Monday through Friday, except Federal Reserve holidays.** The period commencing on **7/9/2018** and ending on **1/9/2020** is referred to as the "Repayment Period."

Prepayment: Borrower may make a full prepayment of unpaid Principal at any time accompanied by a prepayment premium. The prepayment premium will be equal to the greater of (a) fifteen percent (15%) of the amount of the unpaid Principal and (b) the aggregate amount required to be repaid by Borrower to Lender during the Repayment Period reduced by the sum of (i) the aggregate amount of any payments made by Borrower to Lender prior to the date of such prepayment and (ii) the amount of the unpaid Principal.

Charges: Returned (NSF/ACH) Payment Charge: $35.00.

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If there is any conflict between the terms of this Business Loan Summary and the related Business Promissory Note and Security Agreement entered into by Borrower, then the terms of the Business Promissory Note and Security Agreement shall govern. **The business loan summarized in this Business Loan Summary and represented by the related Business Promissory Note and Security Agreement is a higher cost loan than business loans which may be available through other sources. Before signing the Business Promissory Note and Security Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan.**

Borrower hereby acknowledge(s) reading and understanding all of the information disclosed above, and receiving a completed copy of this Business Loan Summary on the date indicated below.

Read, acknowledged and accepted.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
By: Rosario Gangi
26CDF084ED34441...

Title: President

Printed Name: Rosario Gangi

Date: 7/5/2018

Revision Date: February 2018

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BUSINESS LOAN SUMMARY ITEMIZATION

FEES	Description	Net Out	Capitalized
Processing Fee	Fee for loan processing	$795.00	$0.00
Notary Fee	Fee for notary to travel to mortgage signing	$0.00	$0.00
Courier & Wire	Fee to deliver documents and wire fund	$30.00	$0.00
Settlement Fee	Fee for settlement or closing fee	$600.00	$0.00
Title Exam Fee	Fee for title examination	$0.00	$0.00
Business Inspection	Fee for inspection of business	$0.00	$0.00
Residential Title Search	Fee for residential property lien search report(s)	$0.00	$0.00
Lender's Residential Title Insurance Policy	Fee for residential property insurance	$0.00	$0.00
Commercial Title Search	Fee for commercial property lien search report(s)	$350.00	$0.00
Lender's Commercial Title Insurance Policy	Fee for commercial property insurance	$1,928.00	$0.00
Closing Protection Letter	Fee for Closing Protection Letter	$0.00	$0.00
Recording Fee	Fee for title agency to record mortgage(s)	$481.50	$0.00
Endorsement	Fee for change(s) in title insurance coverage	$242.83	$0.00
Mortgage State Tax Stamps	Fee for state tax stamps	$0.00	$0.00
Tax Certification	Fee for confirming if property tax is current	$0.00	$0.00
Certificate of Good Standing	Fee for Certificate of Good Standing	$0.00	$0.00
Broker Price Opinion Fee	Fee for evaluating the property	$1,200.00	$0.00
Prepaid Fees	Borrower prepaid fee credit	($1,565.00)	$.00
Abstract Title Search Fee	Abstract Title Search Fee	$0.00	$0.00
Escrow Fee	Fee for Escrow to Title Company	$125.00	$0.00
Doc Prep Fee	Doc Prep Fee to Title Company	$150.00	$0.00
Mortgage Tax		$9,225.00	
Searches and Title update		$113.81	
Termination of Assignment of L & R		$75.00	
Satisfaction of Mortgage		$55.50	
	TOTAL FEES	**$13,806.64**	
ADJUSTMENTS			
Principal Balance (Refi Only)	Unpaid principal balance on previous loan	$0.00	
Remaining Interest (Refi Only)	Unpaid interest due on previous loan	$0.00	
Interest Due	Current daily interest charge	$0.00	
Funds Held in Escrow	Funds to be released upon satisfaction of escrow condition(s)	$0.00	
Third Party 1 Payoff	Payoff for water	$234.49	
Third Party 2 Payoff	Payoff for RPIE 2010 & 2011	$2,279.00	
Third Party 3 Payoff	Payoff for 2018 Taxes April & July	$4,190.80	
Third Party 4 Payoff	Payoff for Insurance Binder	$750.00	
Payment Holdback	Holdback of 1 daily payment	$0.00	
	TOTAL ADJUSTMENTS	**$7,454.29**	
BEGINNING PRINCIPAL			
Loan Amount Before Fees & Costs		$450,000.00	
Total Fees (only if capitalized)	Sum of above itemized fees	$0.00	
	TOTAL BEGINNING PRINCIPAL	**$450,000.00**	
DISBURSEMENT AMOUNT			
Loan Amount Before Fees & Costs		$450,000.00	
Total Fees (Only if net out)	Sum of above itemized fees	$13,806.64	
Total Adjustments	Sum of above itemized adjustments	$7,454.29	
	TOTAL DISBURSEMENT	**$428,739.07**	
INTEREST CHARGES			
Interest Charges	Total interest to be paid over the term of the loan	$355,876.56	
	TOTAL INTEREST CHARGES	**$355,876.56**	
TOTAL REPAYMENT			
Loan Amount Before Fees & Costs		$450,000.00	
Total Fees (only if capitalized)	Sum of above itemized fees	$0.00	
Interest Charges	Total interest to be paid over the term of the loan	$355,876.56	
	TOTAL REPAYMENT	**$805,876.56**	

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BUSINESS LOAN AUTHORIZATION AGREEMENT FOR DIRECT DEPOSIT (ACH CREDIT) AND DIRECT PAYMENTS (ACH DEBITS)

Date: 07-05-2018

DISBURSEMENT OF BUSINESS LOAN PROCEEDS. By signing below, Borrower authorizes Lender to disburse the business loan proceeds, as evidenced by the Business Promissory Note and Security Agreement executed by Borrower of even date herewith, less the amount of any applicable fees, (a) by issuing (i) a check to Borrower or (ii) a check or bank wire to Borrower's checking account indicated below (or a substitute checking account Borrower later identifies and is acceptable to Lender) (hereinafter referred to as the "Designated Checking Account") or (b) by initiating an Automated Clearing House ("ACH") credit entry to the Designated Checking Account. This authorization is to remain in full force and effect until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it.

AUTOMATIC PAYMENT PLAN. Enrollment in Lender's Automatic Payment Plan is required for approval of the business loan. By signing below, Borrower agrees to enroll in the Automatic Payment Plan and authorizes Lender to collect payments required under the terms of the Business Promissory Note and Security Agreement by initiating ACH debit entries to the Designated Checking Account in the amounts and on the dates provided in the Payment Schedule set forth in the Business Promissory Note and Security Agreement. Borrower authorizes Lender to increase the amount of any scheduled ACH debit entry or assess multiple ACH debits for the amount of any previously scheduled payment(s) that was not paid as provided in the Payment Schedule and any unpaid charges. This authorization is to remain in full force and effect until the loan is paid in full or until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it. Lender may suspend or terminate Borrower's enrollment in the Automatic Payment Plan immediately if Borrower fails to keep Borrower's Designated Checking Account in good standing or if there are insufficient funds in Borrower's Designated Checking Account to process any payment. If Borrower terminates this authorization or Lender suspends or terminates Borrower's enrollment in the Automatic Payment Plan, Borrower still will be responsible for making timely payments pursuant to the alternative payment method prescribed by Lender.

BUSINESS PURPOSE ACCOUNT. By signing below, Borrower attests that the Designated Checking Account was established by Borrower, and the loan proceeds will be used for business purposes only and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.

ACCOUNT CHANGES. Borrower agrees to notify Lender promptly if there are any changes to the Designated Checking Account, including routing numbers.

NOTICE OF RECEIPT OF ENTRY. Under the operating rules of the National Automated Clearing House Association ("NACHA") which are applicable to ACH transactions involving your Designated Checking Account, we are not required to give next day notice to you of receipt of an ACH item and we will not do so. However, we will continue to notify you of the receipt of payments in the periodic statement we provide to you.

GOVERNING LAW. We may accept on your behalf payments to your Designated Checking Account which have been transmitted through one or more Automated Clearing Houses and which are not subject to the Electronic Fund Transfer Act and your rights and obligations with respect to such payments shall be construed in accordance with, and governed by, the laws of the State of Nevada, except to the extent required by federal law.

MISCELLANEOUS. Lender is not responsible for any fees charged by Borrower's depository bank as the result of credits or debits initiated under this Authorization Agreement. The origination of ACH transactions to Borrower's Designated Checking Account must comply with the provisions of U.S. law.

Depository Bank Name: M&T Bank
Branch: Brooklyn, NY
Branch Address: 7807 5th Ave, Brooklyn, NY 11209
Account Name: M Gangi Plumbing & Heating Contractors
Account #: 9845893735
Routing #: 022000046
Customer Federal Tax ID (EIN): 11-2344115

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BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

Signature: Rosario Gangi DocuSigned by: 084ED34441... Name/Title: Rosario Gangi President

Date: 7/5/2018

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BUSINESS LOAN PURPOSE AFFIDAVIT

STATE/COMMONWEALTH OF New York)
) ss.
COUNTY OF _____)

In connection with the business loan to Borrower evidenced by the Business Promissory Note and Security Agreement of even date herewith ("Loan Agreement"), Borrower being first duly sworn on oath deposes and states:

That the proceeds of the Loan Agreement of FOUR HUNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS ($450,000.00), being furnished to Borrower will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.

Subscribed and sworn to by Borrower, under penalty of perjury, this _____ day of _____, in the year ____.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
By: Rosario Gangi
26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Subscribed and sworn to me this ____ day of _____, in the year ____

_____
Notary Public

My commission expires: _____

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BOFI FEDERAL BANK

BUSINESS PROMISSORY NOTE AND SECURITY AGREEMENT

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

PRINCIPAL (including processing fees): $450,000.00

DATE: 7/5/2018

1. **PROMISE TO PAY: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors** ("Borrower"), a(n) New York Corporation, with its principal place of business located at 6901 10th Avenue, Brooklyn, New York, 11228, does hereby promise to pay to the order of **BofI Federal Bank, its successors and/or assigns** ("Lender") at its offices located at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148, or at such other location or in such other manner as designated by Lender, the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS ($450,000.00) ("Principal") plus interest at the daily interest rate set forth below in Section 2 in accordance with the payment schedule set forth below in Section 3. This Business Promissory Note and Security Agreement ("Loan Agreement") is approved, and the proceeds are disbursed, by Lender in **Nevada. The business loan represented by this Loan Agreement is a higher cost loan than business loans which may be available through other sources. Before signing this Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan.**

2. **INTEREST RATE:** The unpaid Principal shall bear interest at the rate of **0.236712328767%** per day until paid in full.

3. **PAYMENT SCHEDULE/APPLICATION OF PAYMENTS:** Borrower shall repay the Principal and interest commencing on 7/9/2018 and on each Business Day thereafter until 1/8/2020 with each daily payment equaling $2,151.96 followed by a final payment of $2,127.64 on 1/9/2020, when any remaining outstanding Principal, interest and other unpaid charges shall be due and payable in full. **"Business Day" means any Monday through Friday, except Federal Reserve holidays.** The period commencing on 7/9/2018 and ending on 1/9/2020 is referred to as the "Repayment Period."

   All payments shall be made by automatic ACH debit from the "Designated Checking Account" set forth in the Business Loan Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits) given by Borrower to Lender or pursuant to an alternative payment method prescribed by Lender, and Borrower shall maintain balances in the Designated Checking Account sufficient to make each daily payment due under this Loan Agreement.

   Payments shall be applied on the date received first to late charges and other charges due under this Loan Agreement, then to unpaid accrued interest, and then to Principal.

4. **VOLUNTARY PREPAYMENT AND PREPAYMENT PREMIUM:** Borrower may prepay the unpaid Principal in full at any time, but may not make partial prepayments (except as permitted by applicable law). Any such prepayment of the unpaid Principal shall be accompanied by a prepayment premium equal to the greater of **(a)** fifteen percent (15%) of the amount of the unpaid Principal as of the date of such prepayment and **(b)** the aggregate amount required to be repaid by Borrower to Lender during the Repayment Period reduced by the sum of **(i)** the aggregate amount of any payments made by Borrower to Lender pursuant to Section 3 above before such prepayment and **(ii)** the amount of the unpaid Principal as of the date of such prepayment. This prepayment premium is in addition to any and all interest calculated and accrued on the unpaid Principal as of the date of such prepayment in accordance with Section 2 above together with all other amounts then due and payable under this Loan Agreement. No prepayment is permitted unless all outstanding charges are paid in full as of the date of prepayment. If Borrower desires to prepay, Borrower shall send a written request to **WBLPayoff@wbl.com.** In addition, Borrower may contact Lender's Servicing Agent at **101 Hudson St., 33rd Floor, Jersey City, NJ 07302** or at **1-800-432-9359** and Lender's Servicing Agent shall provide Borrower with the amount of the unpaid Principal, prepayment premium, and any other amounts due under the terms of the Loan Agreement as of a date designated by Borrower. For the avoidance of doubt, as permitted under applicable law, if the Obligations (as defined below) have been accelerated on the happening of an Event of Default (as defined below), payment of Principal and interest shall be deemed a prepayment for purposes of this Section 4 and shall be accompanied by a prepayment premium.

5. **RETURNED PAYMENT CHARGE:** Borrower will pay a charge of **thirty-five dollars ($35.00)** ("NSF Charge") in connection with any payment by check or electronic transfer that is returned unpaid because of an insufficient balance in the Designated Checking Account or otherwise.

6. **SECURITY INTEREST:** Borrower grants to Lender a security interest in and to any and all property as described below in this Section 6 to secure payment of all debts, obligations and liabilities of Borrower to Lender evidenced by this Loan Agreement or any other financing agreement with Lender with respect to which the Lender's servicing agent is the same as the Servicing Agent hereunder (including, but not limited to, Principal, interest and collection costs incurred in connection

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with this Loan Agreement and/or any other documents or instruments now or hereafter executed in connection with this Loan Agreement or any other financing arrangement with Lender with respect to which the Lender's servicing agent is the same as the Servicing Agent hereunder, the "Obligations"). This is a continuing security interest and will continue in effect as long as any Obligations remain outstanding. The collateral includes the property purchased with the proceeds of this Loan Agreement described on Schedule A attached to and made a part of this Loan Agreement ("Purchase Money Collateral"), the vehicles and other personal property described on Schedule B attached to and made a part of this Loan Agreement ("Specific Collateral") and all other personal property now owned or hereafter acquired by Borrower (which, along with Purchase Money Collateral and Specific Collateral, is collectively referred to as "Collateral"), including, but not limited to, all goods (except consumer goods), farm products, inventory, equipment, furniture, money, instruments, accounts, accounts receivable, contract rights, documents, chattel paper, general intangibles, including, but not limited to, all products and proceeds of Collateral and all additions and accessions to, replacements of, insurance proceeds of, and documents covering Collateral, all property received wholly or partly in trade or exchange for Collateral, all leases of Collateral and all rents, revenues, issues, profits and proceeds arising from the sale, lease encumbrance, collection, or any other temporary or permanent disposition, of the Collateral or any interest therein. Borrower agrees that Lender may file any financing statement, lien entry form or other document Lender requires in order to perfect, amend or continue Lender's security interest in the Collateral and Borrower agrees to cooperate with Lender as may be necessary to accomplish said filing and to do whatever Lender deems necessary to protect Lender's security interest in the Collateral. Borrower shall ensure that Lender is named as the only lien holder on the titles to the motor vehicles listed on Schedule B to this Loan Agreement as of the date of this Loan Agreement (or the nearest subsequent date as permitted under applicable law, rule or regulation).

Borrower shall maintain the Collateral in good condition and repair and not permit its value to be impaired; keep the Collateral free from all liens, encumbrances and security interests (other than those created or expressly permitted by this Loan Agreement); defend the Collateral against all claims and legal proceedings by persons other than Lender; pay and discharge when due all taxes, license fees, levies and other charges upon the Collateral; not sell, lease or otherwise dispose of the Collateral or permit it to become a fixture or an accession to other goods, except as specifically authorized by Lender in writing; and not permit the Collateral to be used in violation of any applicable law, rule, regulation or policy of insurance.

Borrower shall pay all expenses and, upon request, take any action reasonably deemed advisable by Lender to preserve the Collateral or to establish, determine priority of, perfect, continue perfected, terminate and/or enforce Lender's interest in the Collateral or rights under this Loan Agreement and, further, Borrower authorizes Lender, with full power of substitution, to execute in Borrower's name any documents necessary to perfect, amend or to continue Lender's interest in the Collateral or rights under this Loan Agreement or to demand termination of filings of other secured parties. Lender has no duty to protect, insure or realize upon the Collateral. Loss of or damage to the Collateral shall not release Borrower from any of the Obligations.

7. **FOR BORROWERS OR COLLATERAL IN LOUISIANA ONLY:**

(a) Foreclosure. If Borrower is domiciled in, or Collateral is located in, Louisiana, on the happening of an Event of Default, Lender shall have the right to commence appropriate foreclosure proceedings against the Collateral and against Borrower.

(b) Seizure and Sale of Collateral. If Lender elects to commence appropriate Louisiana foreclosure proceedings under the Loan Agreement, Lender may cause the Collateral, or any part or parts thereof, to be immediately seized and sold, whether in term of court or in vacation, under ordinary or executory process, in accordance with applicable Louisiana law, to the highest bidder for cash, with or without appraisement, and without the necessity of making additional demand upon or notifying Borrower or placing Borrower in default, all of which are expressly waived.

(c) Executory Process. For purposes of foreclosure under Louisiana executory process procedures, Borrower confesses judgment and acknowledges to be indebted to Lender, up to the full amount of the Obligations, in Principal, interest, prepayment charges, NSF Charges, and any other unpaid costs and charges authorized by the Loan Agreement, reasonable attorneys' fees and all costs of collection. Borrower further confesses judgment and acknowledges to be indebted unto and in favor of Lender in the amount of any additional advances that Lender may make on Borrower's behalf pursuant to the Loan Agreement, together with interest thereon. To the extent permitted under applicable Louisiana law, Borrower additionally waives the following:

(i) the benefit of appraisal as provided in Articles 2332, 2336, 2723, and 2724 of the Louisiana Code of Civil Procedure, and all other laws with regard to appraisal upon judicial sale;

(ii) the demand and three (3) days' delay as provided under Articles 2639 and 2721 of the Louisiana Code of Civil Procedure;

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(iii) the notice of seizure as provided under Articles 2293 and 2721 of the Louisiana Code of Civil Procedure;

(iv) the three (3) days' delay provided under Articles 2331 and 2722 of the Louisiana Code of Civil Procedure; and

(v) all other benefits provided under Articles 2331, 2722 and 2723 of the Louisiana Code of Civil Procedure and all other Articles not specifically mentioned above.

(d) Keeper. Should any or all of the Collateral be seized as an incident to an action for the recognition or enforcement of this Loan Agreement, by executory process, sequestration, attachment, writ of *fieri facias* or otherwise, Borrower hereby agrees that the court issuing any such order shall, if requested by Lender, appoint Lender, or any agent designated by Lender or any person or entity named by Lender at the time such seizure is requested, or any time thereafter, as "Keeper" of the Collateral as provided under La. R.S. 9:5136, *et seq.* Such a Keeper shall be entitled to reasonable compensation. Borrower agrees to pay the reasonable fees of such Keeper, which compensation to the Keeper shall also be secured by this Loan Agreement.

8. **REPRESENTATIONS:** As of the date hereof, the Borrower hereby represents to the Lender that:

(a) Borrower is the owner of or is acquiring the Purchase Money Collateral free of all liens, encumbrances and security interests (except Lender's security interest), and is the owner of all other Collateral free of all liens, encumbrances and security interests, except Lender's security interest and any security interests listed on Schedule C attached and made a part of this Loan Agreement;

(b) **the proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. Borrower understands Lender is relying on the accuracy of this representation in disbursing the loan proceeds and that Borrower's agreement not to use the proceeds of this Loan Agreement for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods means that certain important duties imposed upon entities making loans for consumer/personal purposes, and certain important rights conferred upon consumers, pursuant to federal or state law will not apply to this Loan Agreement, or any other document or instrument given to Lender in connection with or related to this Loan Agreement. Borrower also understands that Lender will be unable to confirm whether the proceeds of this Loan Agreement will be used for business purposes only. Borrower acknowledges and agrees that a breach by Borrower of the provisions of this subsection 8(b) will not affect Lender's right to**

(i) enforce Borrower's promise to pay for all amounts owed under this Loan Agreement, regardless of the purpose for which the proceeds of this Loan Agreement are in fact obtained or

(ii) use any remedy legally available to Lender, even if that remedy would not have been available had the proceeds of this Loan Agreement been used for consumer purposes;

(c) the proceeds of this Loan Agreement will not, directly or indirectly, be used for any purposes which would violate any applicable law, rule or regulation;

(d) the Collateral will be kept at Borrower's address set forth above in Section 1 or as indicated on Schedule D attached to and made a part of this Loan Agreement;

(e) Borrower's name in Section 1 above is its exact name on its organizing and/or registered documents, if any, and Section 1 above accurately identifies Borrower's jurisdiction of organization and principal place of business. Borrower shall immediately advise Lender in writing of any change in Borrower's name or address as set forth above in Section 1;

(f) Borrower is duly organized, validly existing, in good standing under the law of the jurisdiction in which it is organized, is in compliance with all applicable laws, rules and regulations, and has all licenses and authorizations necessary to carry on its business as now being conducted; Borrower has the full power and authority to execute, deliver and perform all transactions contemplated by this Loan Agreement and the performance of and compliance with the terms of this Loan Agreement will not violate the Borrower's organizational documents or constitute a default of any contract, agreement or other instrument to which Borrower is a party;

(g) Borrower has duly authorized the execution, delivery and performance of this Loan Agreement and has duly executed and delivered this Loan Agreement, and this Loan Agreement constitutes a legal, valid and binding obligation of the Borrower, enforceable against it in accordance with its terms;

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(h) there is no action, suit, proceeding or investigation pending or, to Borrower's knowledge, threatened against or affecting it or any of its assets before or by any court or other governmental authority which, if determined adversely to it, would have a material adverse effect on its financial condition, business or prospects, or the value of the Collateral (any of the foregoing, a "Litigation Event");

(i) except to the extent Borrower has advised Lender in writing, Borrower has not been notified by any of its lenders that it is in default under the terms of any of its credit agreements, nor has Borrower done, caused to be done, or failed to do any act or omission that would result in a default under any credit agreement; and

(j) no third party source of financing for Borrower's customers has discontinued, or threatened to discontinue providing financing to Borrower's customers.

9. **COVENANTS:** Borrower hereby agrees that as long as any Obligations remain outstanding (whether Principal, interest or otherwise):

(a) Borrower shall promptly provide any financial information on request or permit an examination of its books and records to permit Lender to confirm Borrower's ability to pay its Obligations and all other financial obligations and Borrower shall maintain proper books and records in conformity with applicable law, rules and regulations;

(b) Borrower shall file all federal, state and local tax returns, and pay all related taxes when due;

(c) Borrower shall renew and maintain in full force and effect its legal existence and good standing under the laws of the jurisdiction of its organization;

(d) Borrower shall maintain insurance in at least such amounts and against at least such risks as are customary in the same general area in which Borrower conducts its business by entities engaged in similar businesses;

(e) Borrower shall promptly notify Lender in writing of any Litigation Event, Event of Default or any other event which could reasonably be anticipated to materially and adversely affect the Borrower's ability to repay its Obligations or materially affects the value of the Collateral; and

(f) Borrower shall **not** (i) merge or consolidate with another entity, which merger or consolidation results in less than fifty percent (50%) of the outstanding voting securities of the resulting entity being owned by the then existing holders of securities of the Borrower or (ii) transfer, assign, license, sell, lease or otherwise dispose of all or substantially all of its assets to a person that is not a wholly-owned subsidiary of the Borrower; provided, that the Borrower shall cause any such subsidiary to comply with the provisions of this clause (f).

10. **DEFAULT:** On the happening of any of the following events (each an "Event of Default"):

(a) failure by Borrower to pay any payment required by this Loan Agreement when due;

(b) failure by Borrower to observe, perform, keep or abide by any term, covenant or condition contained in this Loan Agreement or any other document or instrument given to Lender in connection with or related to this Loan Agreement, including any real estate mortgage, security agreement or other agreement or document now or hereafter evidencing or creating any security for the payment of this Loan Agreement;

(c) the filing of a bankruptcy proceeding, assignment for the benefit of creditors, issuance of a judgment execution, garnishment or levy against, or the appointment of a representative of any kind for the commencement of any proceeding for relief from indebtedness by or against Borrower, or the Borrower shall not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

(d) the happening of any event, which, in the reasonable judgment of Lender, adversely affects Borrower's ability or the ability of any guarantor of Borrower's Obligations under this Loan Agreement ("Guarantor") to repay Borrower's Obligations, or materially affects the value of the Collateral;

(e) any written representation, statement or warranty made to Lender by Borrower or any Guarantor is untrue when made;

(f) the occurrence of

(i) a default under any guaranty of Borrower's Obligations ("Guaranty"), or any other document or instrument given to Lender in connection with or related to this Loan Agreement, or

(ii) a default or an event of default under any other loan agreement or financing arrangement that Borrower may have with Lender or any other lender or financing source;

(g) any Guaranty is revoked or becomes unenforceable for any reason;

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(h) Lender, upon examination of Borrower's financial information during the term of this Loan Agreement, becomes insecure in Borrower's ability to pay the Obligations,

then (A) in connection with an Event of Default pursuant to clause (c) above, the Obligations under this Loan Agreement or other agreements shall immediately become due and payable and Lender shall have the right to proceed to collect such Obligations under applicable law and enforce its rights under any Guaranty, and (B) in connection with any Event of Default other than pursuant to clause (c) above, Lender may, at its option declare the entire unpaid balance of all Obligations under this Loan Agreement or other agreements immediately due and payable, and shall have the right to proceed to collect such Obligations under applicable law and enforce its rights under any Guaranty. In addition, Lender may, in connection with the events described in clause (A) and (B) above, proceed against the Collateral and any other collateral securing any obligation to Lender as if said collateral secured the Obligations, as permitted under the applicable Uniform Commercial Code or any other applicable law. As permitted under the Uniform Commercial Code, Lender may take possession of Collateral without notice or hearing, which Borrower waives, and upon demand, Borrower shall assemble the Collateral and make it available to Lender at any convenient place designated by Lender. Lender's receipt of any payment after the occurrence of an Event of Default, whether or not the Obligations have been accelerated, shall not constitute a waiver of the default or of Lender's rights or remedies upon such default, including Lender's right to accelerate the unpaid balance of the Obligations and pursue collection thereof. Election by Lender to pursue or waive any remedy shall not exclude pursuit of any other remedy.

11. **INSPECTION OF COLLATERAL AND PLACE OF BUSINESS**: Lender and Lender's representatives and agents shall have the right at any reasonable time or times to inspect the Collateral wherever located and the interior and exterior of any Borrower place of business, and Borrower shall assist Lender and its representatives and agents in making any such inspection. During an inspection of any Borrower place of business, Lender or Lender's representatives and agents may examine, among other things, whether Borrower (i) has a place of business that is separate from any personal residence, (ii) is open for business, (iii) has sufficient inventory and/or staff to conduct Borrower's business and (iv) has one or more credit card terminals or point of sale systems if Borrower processes credit card transactions. When performing an inspection, Lender or Lender's representatives and agents may photograph the interior and exterior of any Borrower place of business, including any signage. Any photograph will become and remain the sole property of Lender and will be shared with Lender's employees, representatives and agents. Borrower grants Lender the irrevocable and permanent right to display and share any photograph in all forms, including composite and modified representations, for all purposes, with Lender's employees, representatives and agents. Borrower agrees to reimburse Lender for the cost of the inspections described in this Section 11.

12. **EVALUATION OF CREDIT**: Borrower authorizes Lender to obtain business and personal credit bureau reports in Borrower's name, at any time and from time to time for purposes of deciding whether to approve the requested business loan or for any update, renewal, extension of credit or other lawful purpose. Upon Borrower's request, Lender will advise Borrower if Lender obtained a credit report and Lender will give Borrower the credit bureau's name and address. Borrower agrees to submit current financial information, a new credit application, or both, in Borrower's name at any time promptly upon Lender's request.

13. **ATTORNEYS' FEES, COLLECTION COSTS AND POST-JUDGMENT RATE OF INTEREST:** In the event Lender retains counsel with respect to enforcement of its rights under this Loan Agreement or any other document or instrument given to Lender, Borrower agrees to pay all expenses of Lender in enforcing its rights to collect the Obligations or in taking possession, holding, preparing for disposition, and disposing of the Collateral, including Lender's reasonable attorneys' fees (whether or not an action is commenced and whether or not in the court of original jurisdiction, appellate court, bankruptcy court or otherwise) and all costs of collection of any judgment and any costs of appeal. In the event this Loan Agreement is brought to a judgment, interest shall accrue at the interest rate set forth in Section 2 above until the judgment is satisfied, except as prohibited by applicable law.

14. **SALE OF LOAN AGREEMENT:** This Loan Agreement, or an interest in this Loan Agreement, together with the rights to the Collateral, may be sold, assigned, transferred or conveyed by Lender one or more times.

15. **INDEMNIFICATION:** Except for Lender's willful misconduct, Borrower will indemnify and save Lender harmless from all loss, costs, damage, liability or expenses (including, without limitation, court costs and reasonable attorneys' fees) that Lender may sustain or incur by reason of defending or protecting Lender's security interest or the priority thereof or enforcing its rights to collect the Obligations, or in the prosecution or defense of any action or proceeding concerning any matter growing out of or in connection with this Loan Agreement and/or any other documents or instruments now or hereafter executed in connection with this Loan Agreement and/or the Obligations and/or the Collateral. This indemnity shall survive the repayment of the Obligations and the termination of this Loan Agreement.

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16. **MISCELLANEOUS:**

(a) Delay or failure of Lender to exercise any of its rights under this Loan Agreement shall not be deemed a waiver thereof. No waiver of any condition or requirement shall operate as a waiver of any other or subsequent condition or requirement.

(b) This Loan Agreement may not be modified orally, and may be modified only upon written agreement signed by Lender and Borrower.

(c) Lender is an FDIC insured, federal savings association and this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada. CONSEQUENTLY, THIS LOAN AGREEMENT WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES. The legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and reserved under this Loan Agreement will be governed by such laws.

(d) Borrower and Lender agree that any action or proceeding to enforce any rights or obligations arising out of this Loan Agreement shall be commenced in the state (or commonwealth, as the case may be) of Borrower's address set forth in Section 1 above ("Borrower's State") and Borrower waives personal service of process, and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and confer personal jurisdiction if served by registered or certified mail to Borrower at the address specified by Borrower above in Section 1, or as otherwise provided by the laws of the Borrower's State or the United States of America. Borrower and Lender agree that venue is proper in such courts and each party hereto waives, to the full extent permitted by applicable law, any defense of an inconvenient forum to the extent any action or proceeding is brought in such courts.

(e) Without affecting the liability of Borrower or any Guarantor, Lender may accept partial payments marked "in full" or otherwise, release or impair any Collateral or agree not to sue any party liable on this Loan Agreement without waiving any of its rights hereunder.

(f) Presentment, protest, demand and notice of dishonor are waived.

(g) Without affecting the liability of any Guarantor, Lender may from time to time, without notice, renew or extend the time for payment.

(h) Borrower expressly agrees that the interest rate set forth above in Section 2 is appropriate under the circumstances and shall be the applicable rate at which unpaid Principal (and Costs, as defined below) shall bear interest under this Loan Agreement, notwithstanding any rate of interest prescribed by statute from time to time; provided, however, if fulfillment of any provisions of this Loan Agreement or any other instrument securing the Obligations is subject to a law that sets maximum interest rates or other charges, and that law is finally interpreted so that the interest or other fees collected or to be collected in connection with this Loan Agreement exceed the permitted limits, then

(i) any such charge will be reduced by the amount necessary to reduce the charge to the permitted limit;

(ii) any sums already collected from Borrower that exceed the permitted limits will be refunded or credited to Borrower; and

(iii) the obligations created by this Loan Agreement shall be fulfilled to the limit of such validity as is permitted by law.

(i) Borrower shall keep the Collateral and Lender's interest in it insured under policies with such provisions, for such amounts and by such insurers as shall be satisfactory to Lender from time to time, and shall furnish evidence of such insurance satisfactory to Lender upon request. Borrower assigns (and directs any insurer to pay) to Lender the proceeds of all such insurance and any premium refund and authorizes Lender to endorse in the name of Borrower any instrument for such proceeds or refunds and, at the option of Lender, to apply such proceeds and refunds to any unpaid balance of the Obligations, whether or not due, and/or to restoration of the Collateral, returning any excess to Borrower. Lender is authorized, in the name of Borrower or otherwise, to make, adjust and/or settle claims under any insurance on the Collateral, or cancel the same after the occurrence of an Event of Default.

(j) If Borrower fails to perform any of Borrower's duties set forth in this Loan Agreement or in any evidence of or document relating to the Obligations, Lender is authorized, in Borrower's name or otherwise, to take any such action, including, without limitation, signing Borrower's name or paying any amount so required, and the cost

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("Cost") shall be one of the Obligations secured by this Loan Agreement and shall be payable by Borrower upon Lender's demand with interest at the interest rate set forth above in Section 2 from the date of payment by Lender.

(k) Borrower releases Lender from any liability for any act or omission relating to the Obligations, the Collateral or this Loan Agreement, except Lender's willful misconduct.

(l) Invalidity or unenforceability of any provision of this Loan Agreement shall not affect the validity or enforceability of any other provision.

(m) The terms of this Loan Agreement shall be binding upon Borrower and its permitted successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

(n) Borrower acknowledges that a broker may have received compensation in connection with this Loan Agreement.

(o) Any of the Borrower, Lender or a Guarantor may choose to arbitrate any or all disputes and claims arising out of or relating to this Loan Agreement, the Guaranty or any other related document. A claim includes matters arising as an initial claim, counter-claim, cross-claim, third-party claim, or otherwise. If the Borrower, Lender or a Guarantor chooses to litigate any dispute or claim arising out of or relating to this Loan Agreement, the Guaranty or any related document through a judicial action, the decision to litigate shall not be deemed a waiver of arbitration, and if such judicial action is contested, any party may thereafter invoke its arbitration rights at any time before any discovery is taken in the judicial action. If the Borrower, Lender or a Guarantor seeks to have a dispute resolved by arbitration, that party must first send to the other party(ies) by certified mail, a written Notice of Intent to Arbitrate. If Borrower, Lender or a Guarantor do not reach an agreement to resolve the claim within 10 days after the Notice is received, any party may commence an arbitration proceeding with the American Arbitration Association ("AAA"). Lender will promptly reimburse Borrower or the Guarantor any arbitration filing fee, however, if both the Borrower and the Guarantor must pay arbitration filing fees, Lender will only reimburse the Borrower's arbitration filing fee and, except as provided in the next sentence, the Lender will pay all arbitration administration and arbitrator fees. If the arbitrator finds that either the substance of any claim raised by Borrower or a Guarantor or the relief sought by Borrower or a Guarantor is improper or not warranted, as measured by the standards set forth in Federal Rule of Procedure 11(b), then Lender will pay the administration or arbitrator fees only if required by the AAA Rules. If the arbitrator grants relief to the Borrower or a Guarantor that is equal to or greater than the value of the relief requested by the Borrower or a Guarantor in the arbitration, Lender shall reimburse Borrower or the Guarantor, as applicable, for that party's reasonable attorneys' fees and expenses incurred for the arbitration. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, BORROWER AND LENDER AGREE THAT BY ENTERING INTO THIS LOAN AGREEMENT, EACH IS WAIVING THEIR RIGHT TO A TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION BASED UPON, ARISING OUT OF OR RELATED TO THIS LOAN AGREEMENT AND ALL OTHER DOCUMENTATION EVIDENCING THE OBLIGATIONS, IN ANY LEGAL ACTION OR PROCEEDING. BORROWER AND LENDER MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF REPRESENTATIVE OR CLASS MEMBER IN ANY PURPORTED REPRESENTATIVE OR CLASS PROCEEDING; PROVIDED, THAT, BORROWER MAY BRING A CLAIM FOR PUBLIC INJUNCTIVE RELIEF TO THE EXTENT REQUIRED BY APPLICABLE LAW. Further, Borrower and Lender agree that the arbitrator may not consolidate proceedings for more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific provision is found unenforceable, then the entirety of this arbitration clause shall be null and void. Any award by the individual arbitrator shall be final and binding, except for any appeal right under the Federal Arbitration Act ("FAA"), and may be entered and enforceable as a judgment in any court of competent jurisdiction, including as a judgment that permits Lender to initiate or complete the exercise of its remedies against, or its realization or foreclosure upon, any collateral or security provided for the benefit of Lender. This arbitration provision is made pursuant to a transaction in interstate commerce, and shall be governed by the FAA at 9 U.S.C. section 1 *et seq.*

(p) In order to ensure a high quality of service for Lender's customers, Lender may monitor and/or record telephone calls between Borrower and Lender's employees. Borrower acknowledges that Lender may do so and agrees in advance to any such monitoring or recording of telephone calls.

(q) Borrower authorizes Lender and Lender's affiliates, agents and independent contractors, including any loan servicers or collateral agents to contact Borrower at any telephone number Borrower provides to Lender or from which Borrower places a call to Lender, or any telephone number where Lender believes it may reach Borrower, using any means of communication, including, but not limited to, calls or text messages to mobile, cellular, wireless or similar devices or calls or text messages using an automated telephone dialing system and/or artificial voices or

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prerecorded messages, even if Borrower incurs charges for receiving such communications. Lender and Lender's affiliates, agents and independent contractors, including, but not limited to, any loan servicers or collateral agents, may use any other medium not prohibited by law, including, but not limited to, mail, e-mail and facsimile, to contact Borrower. Borrower expressly consents to conduct business by electronic means.

(r) [reserved].

(s) This Loan Agreement may be executed in one or more counterparts, each of which counterparts shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument. For purposes of the execution of this Loan Agreement, electronic or fax signatures shall be treated in all respects as original signatures.

[Remainder of page is blank. Signature page follows.]

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BEFORE SIGNING THIS LOAN AGREEMENT, BORROWER READ AND UNDERSTOOD ALL OF THE PROVISIONS HEREOF. AFTER DUE CONSIDERATION AND THE OPPORTUNITY TO CONSULT WITH OTHER LENDERS (OR OTHER FINANCING SOURCES) AND WITH AN ATTORNEY, ACCOUNTANT OR OTHER COMPETENT PROFESSIONAL OF ITS CHOICE, BORROWER KNOWINGLY, WILLFULLY AND VOLUNTARILY AGREES TO THE TERMS OF THIS LOAN AGREEMENT.

BORROWER ACKNOWLEDGES RECEIPT OF A FULLY COMPLETED AND EXECUTED VERSION OF THIS LOAN AGREEMENT.

BORROWER: **Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors**

Signature: DocuSigned by: Rosario Gangi 26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Date: 7/5/2018

Notary Acknowledgement

STATE/COMMONWEALTH OF _____)
) ss.
COUNTY OF _____)

On the _____ day of _____, in the year _____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Business Promissory Note and Security Agreement and acknowledged to me that she/he executed the same in her/his capacity as _____ of Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors and that by her/his signature on the Business Promissory Note and Security Agreement, the individual, or the person upon behalf of which the individual acted, executed the Business Promissory Note and Security Agreement.

_____
Notary Public

My commission expires: _____.

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SCHEDULE A

PURCHASE MONEY COLLATERAL

NONE

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SCHEDULE B

SPECIFIC COLLATERAL

[NONE]

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SCHEDULE C

PERMITTED LIENS

[NONE]

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SCHEDULE D

ADDRESS OTHER THAN BORROWER'S ADDRESS AT WHICH COLLATERAL IS KEPT

Property Address
1002 Bay Ridge Avenue, Brooklyn, NY 11228

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COOPERATION AGREEMENT

DATE: 7/5/2018

In connection with the business loan to Borrower evidenced by the Business Promissory Note and Security Agreement of even date herewith, Borrower hereby agrees:

In the event any further documentation is required by Lender in connection with the loan, Borrower hereby agrees to execute such documentation, including, but not limited to, any amendments, corrections, deletions or additions to the loan documents being executed on even date herewith.

In the event Borrower is required to furnish such necessary documentation and fails to do so within 10 days from receipt of written demand, then such failure shall be an event of default under the terms of the loan and Lender or its successors and assigns shall have the right to demand payment in full under the loan documents and enforce all other rights against Borrower.

The terms "Borrower" and "Lender" have the same meanings as set forth in the Business Promissory Note and Security Agreement.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

Signature: DocuSigned by: Rosario Gangi 26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Date: 7/5/2018

Notary Acknowledgement

STATE/COMMONWEALTH OF _____)
) ss
COUNTY OF _____)

On the _____ day of _____ in the year _____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Cooperation Agreement and acknowledged to me that she/he executed the same in her/his capacity as _____ of _____, and that by her/his signature on the Cooperation Agreement, the individual, or the person upon behalf of which the individual acted, executed the Cooperation Agreement.

_____
Notary Public

My commission expires: _____.

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SERVICING DISCLOSURE NOTICE

LOAN INFORMATION

Date of Loan:	7/6/2018
Loan Number:	27964
Lender:	Bofl Federal Bank
Borrower:	Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors
Servicer:	World Business Lenders, LLC
Servicer's Address:	101 Hudson Street, 33rd Floor, Jersey City, NJ 07302

NOTICE OF LOAN SERVICING RIGHTS

The purpose of this notice is to inform you that, as of the date of the funding of your loan, World Business Lenders, LLC, will be servicing your loan and will have the right to collect payments on behalf of the Lender. ("Servicing" refers to the right to collect your principal and interest payments and to otherwise administer the rights and obligations associated with the loan.) This notice provides you with information on how to contact the Servicer.

The servicing of the loan does not affect any term or condition of the loan, and nothing related to your loan terms or conditions will change; this notice requires no action on your part. We recommend that you keep a copy of this notice with your other loan documents.

YOUR SERVICER AS OF CLOSING

Below is the information on how to contact World Business Lenders, LLC.

Toll-free Number

The toll-free telephone number for World Business Lenders is 800-432-9359. If you have any questions regarding the servicing of your loan, call World Business Lenders toll-free at 800-432-9359 between 9 a.m. and 6 p.m. Eastern Standard Time, Monday through Friday.

Address for Correspondence (other than payments)

The address to send written correspondence to World Business Lenders, LLC, (other than payments) is:

World Business Lenders, LLC
101 Hudson Street, 33rd Floor
Jersey City, NJ 07302

Revision Date February 2018

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PREPAYMENT DISCLOSURE

LOAN INFORMATION

Date of Loan:	7/6/2018
Loan Maturity Date:	1/9/2020
Loan Number:	27964
Business Name:	Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors
Loan Amount:	$450,000.00

PREPAYMENT DISCLOSURE SUMMARY

Your loan does not permit partial prepayments (i.e., any amount less than the full outstanding principal), and you must meet other conditions in order to prepay.

If you elect to prepay your loan, your loan requires a **Prepayment Premium**, in addition to the principal, interest, and other charges due at the time of pay off.

The Prepayment Premium is calculated based on one of the following two scenarios:

Required Prepayment Premium:

The Prepayment Premium is calculated by comparing the **greater of**:

A. 15% of the **unpaid principal** on the date of the prepayment.

- *For example, if you still have $200,000 in unpaid principal on your loan, 15% of that would be $30,000.*

B. Or, if greater, the **remaining interest** you would have paid on the loan through the loan maturity date [or earlier date, provided Borrower has not missed any payments/had any ACHs returned prior to such date (such date, an "Approved Earlier Date").]

- *For example, if you still have remaining interest payments of $50,000 through the maturity date of the loan [or an Approved Earlier Date, as applicable], then the prepayment premium would be $50,000.*

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Borrower: Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

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BOFI FEDERAL BANK

By: DocuSigned by: Rosario Gangi
26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Read, acknowledged and accepted on: This Day 05 of Month 07 of Year 2018.

COPY VIEW

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Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors 6901 10 Avenue, Brooklyn, New York, 11228

07-05-2018

Bofl Federal Bank
9205 West Russell Road, Suite 400
Las Vegas, NV 89148

Re: Payoff

Ladies and Gentlemen:

In connection with the business purpose loan made by Bofl Federal Bank ("Lender") to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors ("Borrower") pursuant to that certain Business Promissory Note and Security Agreement dated as of 07-05-2018 made by Borrower in favor of Lender (the "Loan Agreement"), and all agreements related thereto, Borrower hereby authorizes Lender to disburse to Kings County the amount of $4190.8, which represents the balance owed by Borrower to Kings County for 2018 taxes.

Sincerely,

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

Signature: DocuSigned by: Rosario Gangi
Name: Rosario Gangi
Title: President

COPY VIEW

WBL Initials_____ Date_____

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Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors 6901 1(Avenue, Brooklyn, New York, 11228

07-05-2018

Bofl Federal Bank
9205 West Russell Road, Suite 400
Las Vegas, NV 89148

Re: Payoff

Ladies and Gentlemen:

In connection with the business purpose loan made by Bofl Federal Bank ("Lender") to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors ("Borrower") pursuant to that certain Business Promissory Note and Security Agreement dated as of 07-05-2018 made by Borrower in favor of Lender (the "Loan Agreement"), and all agreements related thereto, Borrower hereby authorizes Lender to disburse to New York City Department of Finance the amount of $2279, which represents the balance owed by Borrower to New York City Department of Finance for RPIE.

Sincerely,

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
Signature: Rosario Gangi
Name: Rosario Gangi
26CDF[illegible]4ED34441...
Title: President

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Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors 6901 1C Avenue, Brooklyn, New York, 11228

07-05-2018

Bofl Federal Bank
9205 West Russell Road, Suite 400
Las Vegas, NV 89148

Re: Payoff

Ladies and Gentlemen:

In connection with the business purpose loan made by Bofl Federal Bank ("Lender") to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors ("Borrower") pursuant to that certain Business Promissory Note and Security Agreement dated as of 07-05-2018 made by Borrower in favor of Lender (the "Loan Agreement"), and all agreements related thereto, Borrower hereby authorizes Lender to disburse to New York department of Environmental Protection the amount of $234.49, which represents the balance owed by Borrower to New York department of Environmental Protection for water Account 200398737001.

Sincerely,

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
Signature: Rosario Gangi
Name: Rosario Gangi
Title: President

COPY VIEW

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**Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors 6901 1(
Avenue, Brooklyn, New York, 11228**

07-05-2018

Bofl Federal Bank
9205 West Russell Road, Suite 400
Las Vegas, NV 89148

Re: Payoff

Ladies and Gentlemen:

In connection with the business purpose loan made by Bofl Federal Bank ("Lender") to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors ("Borrower") pursuant to that certain Business Promissory Note and Security Agreement dated as of 07-05-2018 made by Borrower in favor of Lender (the "Loan Agreement"), and all agreements related thereto, Borrower hereby authorizes Lender to disburse to Fairmont Insurance the amount of $750, which represents the balance owed by Borrower to Fairmont Insurance for insurance binder.

Sincerely,

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors

DocuSigned by:
Signature: Rosario Gangi
Name: Rosario Gangi
26CDF0AED34441...
Title: President

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CERTIFICATION REGARDING BENEFICIAL OWNERS OF LEGAL ENTITY CUSTOMERS

I. GENERAL INSTRUCTIONS

What is this form?

To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.

Who has to complete this form?

This form must be completed by the person opening a new account on behalf of a legal entity with any of the following U.S. financial institutions: (i) a bank or credit union; (ii) a broker or dealer in securities; (iii) a mutual fund; (iv) a futures commission merchant; or (v) an introducing broker in commodities.

For the purposes of this form, a **legal entity** includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country. **Legal entity** does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

What information do I have to provide?

This form requires you to provide the name, address, date of birth and Social Security number (or passport number or other similar information, in the case of foreign persons) for the following individuals (*i.e.*, the **beneficial owners**):

(i) Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (*e.g.*, each natural person that

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owns 25 percent or more of the shares of a corporation); **and**

(ii) An individual with significant responsibility for managing the legal entity customer (*e.g.*, a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of "beneficial owner" may vary. Under section (i), depending on the factual circumstances, up to four individuals (but as few as zero) may need to be identified. Regardless of the number of individuals identified under section (i), you must provide the identifying information of one individual under section (ii). It is possible that in some circumstances the same individual might be identified under both sections (*e.g.*, the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one individual (under section (ii)), and up to five individuals (*i.e.*, one individual under section (ii) and four 25 percent equity holders under section (i)).

The financial institution may also ask to see a copy of a driver's license or other identifying document for each beneficial owner listed on this form.

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II. CERTIFICATION OF BENEFICIAL OWNER(S)

Persons opening an account on behalf of a legal entity must provide the following information:

a. Name and Title of Natural Person Opening Account:

Rosario Gangi, Owner

b. Name and Address of Legal Entity for Which the Account is Being Opened:

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors
6901 10th Avenue, Brooklyn, NY 11228

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c. *The following information for <u>each</u> individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the legal entity listed above:*

Section C

Name	Date of Birth	Address (Residential or Business Street Address)	*For U.S. Persons:* Social Security Number	*For Non-U.S. Persons:* Social Security Number, Passport Number and Country of Issuance, or other similar identification number[1]	*Percentage of Ownership*: For each person party to the transaction
Rosario Gangi	3/28/1942	986 76th street, Brooklyn, NY11228	347-728-7661		100%

(If no individual meets this definition, please write "Not Applicable.")

[1] In lieu of a passport number, foreign persons may also provide an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

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d. *The following information for <u>one</u> individual with significant responsibility for managing the legal entity listed above, such as:*

☒ *An executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or*

☐ *Any other individual who regularly performs similar functions.*

(If appropriate, an individual listed under section (c) above may also be listed in this section (d)).

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EXHIBIT B

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BOFI FEDERAL BANK

CONTINUING GUARANTY, PERSONAL (Unlimited) ("Guaranty")

Dated: 7/5/2018

GUARANTY. For value received, and to induce **Bofl Federal Bank**, its successors and/or assigns ("Lender"), with offices at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148 to extend credit or grant or continue other credit accommodations to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors ("Borrower"), the undersigned ("Guarantor," whether one or more) jointly and severally guarantees payment of the Obligations (defined below) when due or at the time any Borrower becomes the subject of bankruptcy or other insolvency proceedings. Except as provided below, "Obligations" means all debts, obligations and liabilities of Borrower to Lender arising out of credit previously granted, credit contemporaneously granted or credit granted in the future by Lender to Borrower. Obligations include (a) interest, (b) charges, (c) the amount of payments made either to Lender or to another for Lender's benefit, either by or on behalf of Borrower which are recovered from Lender by any party (including, but not limited to, a trustee, receiver or creditor) pursuant to applicable federal or state law, and (d) all costs, expenses and attorneys' fees ("Collection Expenses") at any time paid or incurred (whether before or after judgment) in endeavoring to collect all or part of the Obligations, or to realize upon (i) this Guaranty, (ii) any other guaranty of the Obligations, or (iii) any collateral securing any of the Obligations, including those Collection Expenses which are either (v) incurred in a successful defense or settlement of any counterclaim brought by Borrower or Guarantor or (w) incident to any action or proceeding involving Borrower or Guarantor brought pursuant to the United States Bankruptcy Code. Obligations do not include amounts owed in satisfaction of money loaned for the purpose of funding personal, consumer, family or household transactions. Guarantor grants to Lender a security interest and lien in any credit balance and other money now owing or hereafter owed Guarantor by Lender. Lender may, at any time after the occurrence of an event of default with respect to any Obligation, without prior notice or demand, set off against any such credit balance or other money any amount owing upon the Obligations. This Guaranty also is secured by all existing and future security agreements between Lender and Guarantor, and the titles to the motor vehicles listed on Exhibit 1 to this Guaranty, with respect to which, Guarantor shall ensure that Lender is named as the only lien holder on each such motor vehicle title as of the date of this Guaranty (or the nearest subsequent date as permitted under applicable law).

WAIVER. Guarantor expressly waives (a) notice of the acceptance of this Guaranty, the creation of any present or future Obligation, default under any Obligation, proceedings to collect from the Borrower or anyone else, (b) all diligence of collection and presentment, demand, notice and protest, (c) any right to disclosures from Lender regarding the financial condition of the Borrower or the enforceability of the Obligations, and (d) all other legal and equitable defenses of suretyship and impairment of collateral. No claim, including a claim for reimbursement, subrogation, contribution or indemnification which Guarantor may, as a guarantor of the Obligations, have against a co-guarantor of any of the Obligations or against the Borrower shall be enforced or any payment accepted until the Obligations are paid in full and no payments to or collections by Lender are subject to any right of recovery.

CONSENT. With respect to any of the Obligations, Lender may from time to time before or after revocation of this Guaranty without notice to Guarantor and without affecting the liability of Guarantor (a) surrender, release, impair, sell or otherwise dispose of any security or collateral for the Obligations, (b) release or agree not to sue any guarantor or surety, (c) fail to perfect its security interest in or realize upon any security or collateral, (d) fail to realize upon any of the Obligations or to proceed against any Borrower or any guarantor or surety, (e) renew or extend the time of payment, (f) increase or decrease the rate of interest or the amount of the Obligations, (g) accept additional security or collateral, (h) determine the allocation and application of payments and credits and accept partial payments, (i) apply the proceeds of disposition of any collateral for the Obligations to any obligation of Borrower secured by such collateral in such order and amounts as it elects, (j) determine what, if anything, may at any time be done with reference to any security or collateral, and (k) settle or compromise the amount due or owing or claimed to be due or owing from the Borrower, which settlement or compromise shall not affect Guarantor's liability for the full amount of the unpaid Obligations. Guarantor expressly consents to and waives notice of all of the above. Guarantor consents to and authorizes Lender to obtain business and personal credit bureau reports in Guarantor's name, at any time and from time to time for purposes of deciding whether to approve the business loan requested by Borrower or for any update, renewal, extension of credit to Borrower or other lawful purpose. Guarantor expressly authorizes Lender, agents or designees to report the payment history and loan performance to any national credit bureau for the purpose of inclusion of the related data in Guarantor's consumer credit report. Nothing contained in this Guaranty shall require Lender to first seek or exhaust any remedy against Borrower or to first proceed against any collateral or security for any of the Obligations or this Guaranty.

PERSONS BOUND. This Guaranty benefits and is enforceable by Lender, and its successors and assigns (collectively called "successors" and each a "successor"), and binds Guarantor, and Guarantor's heirs, personal representatives, successors and assigns. This Guaranty shall continue in full force and effect notwithstanding any change in structure or status of Borrower or Lender, whether by merger, consolidation, reorganization or otherwise, or assignment of this Guaranty to a successor Lender.

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ENTIRE AGREEMENT. This Guaranty is intended by Guarantor and Lender as a final expression of this Guaranty and as a complete and exclusive statement of its terms, there being no conditions to the full effectiveness of this Guaranty. This Guaranty may not be supplemented or modified, except in writing by Lender.

REPRESENTATIONS. Guarantor acknowledges and agrees that Lender (a) has not made any representations or warranties with respect to, (b) does not assume any responsibility to Guarantor for, and (c) has no duty to provide information to Guarantor regarding, the enforceability of any of the Obligations or the financial condition of the Borrower. **Guarantor has independently determined the creditworthiness of Borrower and the enforceability of the Obligations and until the Obligations are paid in full will independently and without reliance on Lender continue to make such determinations.**

REVOCATION. This is a continuing guaranty and shall remain in full force and effect until Lender receives written notice of its revocation signed by Guarantor or actual notice of the death of Guarantor. Upon revocation by written notice or actual notice of death, this Guaranty shall continue in full force and effect as to all Obligations contracted for or incurred before revocation and, as to them, Lender shall have the rights provided by this Guaranty as if no revocation had occurred. Any renewal, extension or increase in the interest rate of any such Obligation, whether made before or after revocation, shall constitute an Obligation contracted for or incurred before revocation. Obligations contracted for or incurred before revocation shall also include credit extended after revocation pursuant to commitments made before revocation. Revocation by one Guarantor shall not affect any of the liabilities or obligations of any other Guarantor and this Guaranty shall continue in full force and effect with respect to them.

ARBITRATION. Any of the Borrower, Lender or a Guarantor may choose to arbitrate any or all disputes and claims arising out of or relating to this Guaranty or any other related document. A claim includes matters arising as an initial claim, counter-claim, cross-claim, third-party claim, or otherwise. If the Borrower, Lender or a Guarantor chooses to litigate any dispute or claim arising out of or relating to this Guaranty or any related document through a judicial action, the decision to litigate shall not be deemed a waiver of arbitration, and if such judicial action is contested, any party may thereafter invoke its arbitration rights at any time before any discovery is taken in the judicial action. If the Borrower, Lender or a Guarantor seeks to have a dispute resolved by arbitration, that party must first send to the other party or parties by certified mail, a written Notice of Intent to Arbitrate. If Borrower, Lender or Guarantor do not reach an agreement to resolve the claim within 10 days after the Notice is received, any party may commence an arbitration proceeding with the American Arbitration Association ("AAA"). Lender will promptly reimburse Borrower or the Guarantor any arbitration filing fee, however, in the event that both the Borrower and the Guarantor must pay arbitration filing fees, Lender will only reimburse the Borrower's arbitration filing fee and, except as provided in the next sentence, the Lender will pay all arbitration administration and arbitrator fees. If the arbitrator finds that either the substance of any claim raised by Borrower or a Guarantor or the relief sought by Borrower or a Guarantor is improper or not warranted, as measured by the standards set forth in Federal Rule of Procedure 11(b), then Lender will pay the administration and arbitrator fees only if required by the AAA Rules. If the arbitrator grants relief to the Borrower or a Guarantor that is equal to or greater than the value of the relief requested by the Borrower or a Guarantor in the arbitration, Lender shall reimburse Borrower or the Guarantor, as applicable, for that party's reasonable attorneys' fees and expenses incurred for the arbitration. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, GUARANTOR AND LENDER AGREE THAT BY ENTERING INTO THIS GUARANTY, EACH IS WAIVING THEIR RIGHT TO TRIAL BY JURY. GUARANTOR AND LENDER MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF REPRESENTATIVE OR CLASS MEMBER IN ANY PURPORTED REPRESENTATIVE OR CLASS PROCEEDING. Further, Guarantor and Lender agree that the arbitrator may not consolidate proceedings for more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific provision is found unenforceable, then the entirety of this arbitration clause shall be null and void. Any award by the individual arbitrator shall be final and binding, except for any appeal right under the Federal Arbitration Act ("FAA"), and may be entered and enforceable as a judgment in any court of competent jurisdiction, including as a judgment that permits Lender to initiate or complete the exercise of its remedies against, or its realization or foreclosure upon, the Collateral. This arbitration provision is made pursuant to a transaction in interstate commerce, and shall be governed by the FAA at 9 U.S.C. section 1 *et seq.*

INTERPRETATION. Lender is an FDIC insured federal savings association. CONSEQUENTLY, THIS GUARANTY WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES. The legality, enforceability and interpretation of this Guaranty and the amounts guaranteed will be governed by such laws.

JURISDICTION. Guarantor irrevocably consents with respect to any suit, action or proceeding relating to this Guaranty or any of the other loan documents relating to the Obligations, that venue shall be in the state (or commonwealth, as the case may be) of Borrower's principal place of business ("Borrower's State") and Guarantor waives personal service of process and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and confer personal jurisdiction if served by registered or certified mail to Guarantor at the address specified by Guarantor above, or as otherwise provided by the laws of the Borrower's State or the United States of America. Guarantor agrees that venue is proper in such courts and waives, to the full extent

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permitted by applicable law, any defense of an inconvenient forum to the extent any suit, action or proceeding is brought in such courts.

VALIDITY. This Guaranty is valid and enforceable against Guarantor even if any Obligation is determined to be invalid or unenforceable against the Borrower.

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JURY WAIVER

GUARANTOR KNOWINGLY AND VOLUNTARILY WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM BASED UPON, ARISING OUT OF OR IN ANY WAY RELATING TO THIS GUARANTY, THE OBLIGATIONS GUARANTEED BY THIS GUARANTY OR ANY CONDUCT, ACT OR OMISSION OF LENDER, AND AGREES AND CONSENTS THAT ANY SUCH ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY. GUARANTOR ACKNOWLEDGES AND UNDERSTANDS THAT THIS WAIVER AND CONSENT CONSTITUTES A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THE TRANSACTION WITH THE BORROWER.

Guarantor Rosario Gangi

DocuSigned by:
Rosario Gangi
26CDF084ED34441...

[Remainder of page is blank. Signature page(s) follow(s).]

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Signature Page of Rosario Gangi for Continuing Guaranty, Personal (Unlimited)

NOTICE TO GUARANTOR

You are being asked to guarantee the past, present and future Obligations of Borrower. If Borrower does not pay, you will have to. You may also have to pay collection costs. Lender can collect the Obligations from you without first trying to collect from Borrower or another guarantor or proceeding against any collateral or other security for the Obligations.

(Guarantor Name) Rosario Gangi

(Guarantor Signature) DocuSigned by: Rosario Gangi 26CDF084ED34441...

ACKNOWLEDGEMENT

STATE/COMMONWEALTH OF _____)
) ss.
COUNTY OF _____)

On the _____ day of _____, in the year ____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared Rosario Gangi, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Continuing Guaranty (Unlimited) and acknowledged to me that she/he executed the same in her/his capacity, and that by her/his signature on the Continuing Guaranty (Unlimited), the individual, or the person upon behalf of which the individual acted, executed the Continuing Guaranty (Unlimited).

_____
Notary Public

My Commission expires:

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EXHIBIT 1

[NONE]

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EXHIBIT C

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NYC DEPARTMENT OF FINANCE
OFFICE OF THE CITY REGISTER

This page is part of the instrument. The City Register will rely on the information provided by you on this page for purposes of indexing this instrument. The information on this page will control for indexing purposes in the event of any conflict with the rest of the document.

2018071000565001001E512C

RECORDING AND ENDORSEMENT COVER PAGE **PAGE 1 OF 17**

Document ID: 2018071000565001 Document Date: 07-05-2018 Preparation Date: 07-10-2018
Document Type: MORTGAGE
Document Page Count: 15

PRESENTER:
WORLD WIDE LAND TRANSFER
8 NESHAMINY INTERPLEX DRIVE
SUITE 117(LT-2586-NY)
TREVOSE, PA 19053
215-245-5650
ORDERS@WORLDWIDELANDTRANSFER.COM

RETURN TO:
WORLD WIDE LAND TRANSFER
8 NESHAMINY INTERPLEX DRIVE
SUITE 117(LT-2586-NY)
TREVOSE, PA 19053
215-245-5650
ORDERS@WORLDWIDELANDTRANSFER.COM

PROPERTY DATA

Borough	Block	Lot	Unit	Address
BROOKLYN	5880	7	Entire Lot	1002 BAY RIDGE AVENUE

Property Type: COMMERCIAL REAL ESTATE

CROSS REFERENCE DATA

CRFN_____ *or* DocumentID_____ *or* _____ Year____ Reel____ Page____ *or* File Number_____

PARTIES

MORTGAGOR/BORROWER:
ROSARIO GANGI
983 76TH STREET
BROOKLYN, NY 11228

☒ Additional Parties Listed on Continuation Page

MORTGAGEE/LENDER:
BOFI FEDERAL BANK
9205 WEST RUSSELL ROAD, SUITE 400
LAS VEGAS, NV 89148

FEES AND TAXES

Mortgage :		
Mortgage Amount:	$	450,000.00
Taxable Mortgage Amount:	$	450,000.00
Exemption:		
TAXES: County (Basic):	$	2,250.00
City (Additional):	$	4,500.00
Spec (Additional):	$	1,125.00
TASF:	$	0.00
MTA:	$	1,350.00
NYCTA:	$	0.00
Additional MRT:	$	0.00
TOTAL:	$	9,225.00
Recording Fee:	$	112.00
Affidavit Fee:	$	0.00

Filing Fee: $ 0.00
NYC Real Property Transfer Tax: $ 0.00
NYS Real Estate Transfer Tax: $ 0.00

RECORDED OR FILED IN THE OFFICE OF THE CITY REGISTER OF THE CITY OF NEW YORK
Recorded/Filed 07-13-2018 11:01
City Register File No.(CRFN): **2018000231710**

City Register Official Signature

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RECORDATION REQUESTED BY:

World Business Lenders, LLC

WHEN RECORDED MAIL TO:

World Business Lenders, LLC
101 Hudson Street, 33rd Floor
Jersey City, NJ 07302

SEND TAX NOTICES TO:

World Business Lenders, LLC
101 Hudson Street, 33rd Floor
Jersey City, NJ 07302

LT-2586-NY

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

MORTGAGE

THIS MORTGAGE dated July 5th, 2018, is made and executed between Rosario Gangi and Josephine Gangi aka Josephine Theisen, as tenants in common, whose address is 983 76th Street, Brooklyn, NY 11228 (referred to below as "Grantor") and BOFI Federal Bank, its Successors and or Assigns, whose address is 9205 West Russell Road, Suite 400, Las Vegas, NV 89148 (referred to below as "Lender").

GRANT OF MORTGAGE. For valuable consideration, Grantor mortgages and conveys to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights, watercourses and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, **(the "Real Property") located in Kings County, State of New York:**

See Exhibit A, which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.

The Real Property or its address is commonly known as **1002 Bay Ridge Avenue, Brooklyn, NY 11219.**

Grantor presently assigns to Lender all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

GRANTOR'S WAIVERS. Grantor waives all rights or defenses arising by reason of any "one action" or "anti-deficiency" law, or any other law which may prevent Lender from bringing any action against Grantor, including a claim for deficiency to the extent Lender is otherwise entitled to a claim for deficiency, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale.

GRANTOR'S REPRESENTATIONS AND WARRANTIES. Grantor warrants that: (a) this Mortgage is executed at Borrower's request and not at the request of Lender; (b) Grantor has the full power, right, and authority to enter into this Mortgage and to hypothecate the Property; (c) the provisions of this Mortgage do not conflict with, or result in a default under any agreement or other instrument binding upon Grantor and do not result in a violation of any law, regulation, court decree or order applicable to Grantor; (d) Grantor has established adequate means of obtaining from Borrower on a continuing basis information about Borrower's financial condition; and (e) Lender has made no representation to Grantor about Borrower (including without limitation the creditworthiness of Borrower).

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PAYMENT AND PERFORMANCE. Except as otherwise provided in this Mortgage, Borrower shall pay to Lender all Indebtedness secured by this Mortgage as it becomes due, and Borrower and Grantor shall strictly perform all Borrower's and Grantor's obligations under this Mortgage.

POSSESSION AND MAINTENANCE OF THE PROPERTY. Borrower and Grantor agree that Borrower's and Grantor's possession and use of the Property shall be governed by the following provisions:

Possession and Use. Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property.

Duty to Maintain. Grantor shall maintain the Property in tenantable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

Compliance With Environmental Laws. Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Mortgage, including the obligation to indemnify and defend, shall survive the payment of the Indebtedness and the satisfaction and reconveyance of the lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

Nuisance, Waste. Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

Removal of Improvements. Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such Improvements with Improvements of at least equal value.

Lender's Right to Enter. Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Mortgage.

Compliance with Governmental Requirements. Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

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Duty to Protect. Grantor agrees neither to abandon the Property nor to leave the Property unattended. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

DUE ON SALE - CONSENT BY LENDER. Lender may, at Lender's option, declare immediately due and payable all sums secured by this Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by New York law.

TAXES AND LIENS. The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

Payment. Grantor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.

Right to Contest. Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

Evidence of Payment. Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

Notice of Construction. Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

No Claim for Credit for Taxes. Borrower or Grantor shall not make deduction from or claim credit on the Indebtedness by reason of any governmental taxes, assessments or charges. Borrower or Grantor shall not claim any deduction from the taxable value of the Property by reason of this Mortgage.

PROPERTY DAMAGE INSURANCE. The following provisions relating to insuring the Property are a part of this Mortgage:

Maintenance of Insurance. Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all Improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption and boiler insurance as Lender may require. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Grantor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be cancelled or diminished without a minimum of thirty (30) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property

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be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

Application of Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the Indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed Improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the Indebtedness. If Lender holds any proceeds after payment in full of the Indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Mortgage or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Mortgage or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenditures incurred or paid by Lender for such purposes will become a part of the Indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the payments due under the Note and the Related Documents and be apportioned among and be payable to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable on the Final Rental Payment Date. The Mortgage also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

WARRANTY; DEFENSE OF TITLE. The following provisions relating to ownership of the Property are a part of this Mortgage:

Title. Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage, and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

Defense of Title. Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

Compliance With Laws. Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature, and shall remain in full force and effect until such time as Borrower's Indebtedness shall be paid in full.

CONDEMNATION. The following provisions relating to condemnation proceedings are a part of this Mortgage:

Proceedings. If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented

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in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

Application of Net Proceeds. If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the Indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES. The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

Current Taxes, Fees and Charges. Upon request by Lender, Grantor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

Taxes. The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the Indebtedness secured by this Mortgage; (2) a specific tax on Borrower which Borrower is authorized or required to deduct from payments on the Indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the Indebtedness or on payments of principal and interest made by Borrower.

Subsequent Taxes. If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

SECURITY AGREEMENT; FINANCING STATEMENTS. The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

Security Agreement. This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

Security Interest. Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Rents and Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Mortgage as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

Addresses. The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Mortgage may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

FURTHER ASSURANCES; ATTORNEY-IN-FACT. The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

Further Assurances. At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Borrower's and Grantor's obligations under the Note, this Mortgage, and the Related Documents, and (2) the liens and security interests created by this Mortgage as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in

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writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

Attorney-in-Fact. If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

FULL PERFORMANCE. If Borrower and Grantor pay all the Indebtedness when due, and Grantor otherwise performs all the obligations imposed upon Grantor under this Mortgage, Lender shall execute and deliver to Grantor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property. Grantor will pay, if permitted by applicable law, any reasonable termination fee as determined by Lender from time to time.

EVENTS OF DEFAULT. "Events of Default" has the meaning set forth in the Note and each of the following, at Lender's option, shall constitute an Event of Default under this Mortgage:

Payment Default. Borrower fails to make any payment when due under the Indebtedness.

Default on Other Payments. Failure of Grantor within the time required by this Mortgage to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

Other Defaults. Borrower or Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Mortgage or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower or Grantor.

False Statements. Any warranty, representation or statement made or furnished to Lender by Borrower or Grantor or on Borrower's or Grantor's behalf under this Mortgage or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Mortgage or any of the Related Documents ceases to be in full force and effect (including failure of any Related Documents to create a valid and perfected security interest or lien) at any time and for any reason.

Death or Insolvency. The death of Borrower or Grantor, the insolvency of Borrower or Grantor, the appointment of a receiver for any part of Borrower's or Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower or Grantor.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or Grantor or by any governmental agency against any property securing the Indebtedness. This includes a garnishment of any of Borrower's or Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower or Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower or Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Breach of Other Agreement. Any breach by Borrower or Grantor under the terms of any other agreement between Borrower or Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Borrower or Grantor to Lender, whether existing now or later.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the Indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

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RIGHTS AND REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law and in addition to any rights or remedies as provided for in Section 8 of the Note:

Accelerate Indebtedness. Lender shall have the right at its option without notice to Borrower or Grantor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty that Borrower would be required to pay.

UCC Remedies. With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code. If notice to Grantor of the intended disposition of the Personal Property is required by law in a particular instance, such notice shall be deemed commercially reasonable if given to Grantor at least ten (10) calendar days prior to the date of intended disposition. Grantor shall pay on demand all costs and expenses, including but not limited to reasonable attorneys' fees and legal expenses, incurred by Lender in exercising these rights and remedies.

Appoint Receiver. To the maximum extent permitted by law, (1) Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness; (2) the receiver may serve without bond; (3) Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount; and (4) employment by Lender shall not disqualify a person from serving as a receiver.

Foreclosure and Sale. Lender may, and is hereby authorized and empowered to, foreclose this Mortgage by action or advertisement pursuant to the statutes of the State of New York providing for such foreclosure. Power is expressly granted to Lender (1) to sell the Property at public auction and to convey the Property, in fee simple, to the purchasers at such sale, and (2) to pay, out of the proceeds of the sale, all of the Indebtedness secured by this Mortgage, with interest, and all legal costs and charges of the foreclosure including the maximum attorneys' fees permitted by law and Grantor agrees to pay all such costs, and charges and fees.

Other Remedies. Lender shall have all other rights and remedies provided in this Mortgage or the Note or available at law or in equity.

Sale of the Property. To the extent permitted by applicable law, Borrower and Grantor hereby waive any and all right to have the Property marshalled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

Notice of Sale. Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

Election of Remedies. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Mortgage, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies. Nothing under this Mortgage or otherwise shall be construed so as to limit or restrict the rights and remedies available to Lender following an Event of Default, or in any way to limit or restrict the rights and ability of Lender to proceed directly against Grantor and/or Borrower and/or against any other co-maker, guarantor, surety or endorser and/or to proceed against any other collateral directly or indirectly securing the Indebtedness.

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports),

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surveyors' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

NOTICES. Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. All copies of notices of foreclosure from the holder of any lien which has priority over this Mortgage shall be sent to Lender's address, as shown near the beginning of this Mortgage. Any party may change its address for notices under this Mortgage by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Mortgage:

Amendments. This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Annual Reports. If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

Caption Headings. Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

Governing Law. The creation, perfection, priority and enforcement of the security interest created pursuant to this Mortgage shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York ("Property Jurisdiction") without regard to the conflict of laws provisions of the Property Jurisdiction. The provisions of this Security Instrument relating to the obligations secured hereby or to any agreement, instrument or document giving rise to the obligations secured hereby shall be governed by and construed and interpreted in accordance with, the governing law of the Note. Nothing in this Mortgage shall be construed or interpreted to provide that any other agreement, instrument or document shall be governed by the laws of the Property Jurisdiction. Grantor (a) agrees that any suit, action or proceeding arising out of or relating to this Mortgage may be brought in a state court of record or a federal court of record in the county of Kings, New York, (b) consents to the jurisdiction of each such court in any such suit, action or proceeding, (c) waives any objection to the laying of venue of any such suit, action or proceeding in any such court, (d) waives any claim that any such suit, action or proceeding has been brought in an inconvenient forum, (e) waives any other venue to which it might be entitled for any such suit, action or proceeding by virtue of citizenship, domicile, habitual residence or otherwise, (f) consents to the service of any process in any such suit, action or proceeding at its address provided herein, and (g) agrees that nothing in this Mortgage waives the Lender's choice of venue under any other agreement, instrument or document. Nothing in this Mortgage shall prevent Lender from bringing any suit, action or proceeding, enforcing any award or judgment, or exercising any right or remedy against Borrower, or against any security or collateral for the obligations of Borrower to Lender, within any other county or state, or any other foreign or domestic jurisdiction. This Mortgage has been accepted by Lender in the State of New York.

Joint and Several Liability. All obligations of Borrower and Grantor under this Mortgage shall be joint and several, and all references to Grantor shall mean each and every Grantor, and all references to Borrower shall mean each and every Borrower. This means that each Grantor signing below is responsible for all obligations in this Mortgage.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Mortgage unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Mortgage shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Mortgage. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions.

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Whenever the consent of Lender is required under this Mortgage, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Severability. If a court of competent jurisdiction finds any provision of this Mortgage to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Mortgage. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Mortgage shall not affect the legality, validity or enforceability of any other provision of this Mortgage.

Non-Liability of Lender. The relationship between Borrower and Grantor and Lender created by this Mortgage is strictly a debtor and creditor relationship and not fiduciary in nature, nor is the relationship to be construed as creating any partnership or joint venture between Lender and Borrower and Grantor.

Merger. There shall be no merger of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

Successors and Assigns. Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage and the Indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Mortgage or liability under the Indebtedness.

Time is of the Essence. Time is of the essence in the performance of this Mortgage.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Mortgage. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Mortgage shall have the meanings attributed to such terms in the Uniform Commercial Code:

Borrower. The word "Borrower" means **Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors** and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Default. The word "Default" means the Default set forth in this Mortgage in the section titled "Default".

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto, or common law, and shall also include pollutants, contaminants, polychlorinated biphenyls, asbestos, urea formaldehyde, petroleum and petroleum products, and agricultural chemicals.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Mortgage in the events of default section of this Mortgage.

Grantor. The word "Grantor" means **Rosario Gangi and Josephine Gangi aka Josephine Theisen, as tenants in common.**

Guarantor. The word "Guarantor" means **Rosario Gangi**.

Guaranty. The word "Guaranty" means the guaranty from guarantor, endorser, surety, or accommodation party to Lender, including without limitation a guaranty of all or part of the Note dated **July 5th, 2018**.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under

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the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

Indebtedness. The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Lender to enforce Grantor's obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage.

Lender. The word "Lender" means **BOFI Federal Bank**, its successors and or assigns.

Mortgage. The word "Mortgage" means this Mortgage between Grantor and Lender.

Note. The word "Note" means the Business Promissory Note and Security Agreement dated **July 5th, 2018**, in the original principal amount of **$450,000.00** from Borrower to Lender, together with all renewals, extensions, modifications, refinancings, consolidations, and substitutions thereof. The interest rate on the Note is **0.472328767123%** per day. The Note is payable commencing on **July 9th, 2018** and on each Business Day thereafter until **April 8th, 2019** with each daily payment equaling **$4,263.30**, followed by a final payment of **$4,263.23** on **April 9th, 2019**, when any remaining outstanding Principal, interest and other unpaid charges shall be due and payable in full. The maturity date of the Note is **April 9th, 2019**.

Personal Property. The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

Property. The word "Property" means collectively the Real Property and the Personal Property.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

Related Documents. The words "Related Documents" mean the Guaranty, any and all other guaranties, all promissory notes, credit agreements, loan agreements, environmental agreements, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

Rents. The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK; SIGNATURE PAGE TO FOLLOW.]

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Borrower's Statement Regarding the Property [check box as applicable].

☐ This Security Instrument covers real property improved, or to be improved, by a one or two family dwelling only.

☒ This Security Instrument covers real property principally improved, or to be improved, by one or more structures containing, in the aggregate, not more than six residential dwelling units with each dwelling unit having its own separate cooking facilities.

☐ This Security Instrument does not cover real property improved as described above.

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND GRANTOR AGREES TO ITS TERMS. GRANTOR ACKNOWLEDGES RECEIPT, WITHOUT CHARGE, OF A TRUE AND CORRECT COPY OF THIS MORTGAGE.

GRANTOR: Rosario Gangi

x _____

INDIVIDUAL ACKNOWLEDGMENT

State of: New York)
) **SS.:**
County of: Kings)

I, the undersigned authority, a Notary Public in and for said county in said state, hereby certify that Rosario Gangi, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said Mortgage, he or she executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 5th **day of** July, **20**18.

_____
Notary Public Ann Rougier

My commission expires Apr 20, 2019

ANN ROUGIER
Notary Public - State of New York
NO. 01RO6323387
Qualified in Kings County
My Commission Expires Apr 20, 2019

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GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND GRANTOR AGREES TO ITS TERMS. GRANTOR ACKNOWLEDGES RECEIPT, WITHOUT CHARGE, OF A TRUE AND CORRECT COPY OF THIS MORTGAGE.

GRANTOR: Josephine Gangi aka Josephine Theisen

x Josephine Gangi AKA Josephine Theisen

INDIVIDUAL ACKNOWLEDGMENT

State of: New York)
) **SS.:**
County of: Kings)

I, the undersigned authority, a Notary Public in and for said county in said state, hereby certify that Josephine Gangi AKA Josephine Theisen, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said Mortgage, he or she executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 5th day of July, 2018.

Notary Public Ann Rougier

My commission expires Apr 20, 2019

ANN ROUGIER
Notary Public - State of New York
NO. 01R06323387
Qualified in Kings County
My Commission Expires Apr 20, 2019

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EXHIBIT A

Legal Description

ALL that certain, plot, piece or parcel of land, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, being bounded and described as follows:
BEGINNING at the corner formed by the intersection of the southwesterly side of Bay Ridge Avenue and the southeasterly side of 10th Avenue;
RUNNING THENCE southwesterly along the southeasterly side of 10th Avenue, 80 feet;
RUNNING THENCE southeasterly parallel with Bay Ridge Avenue, 22 feet;
RUNNING THENCE northeasterly parallel with 10th Avenue and part of the distance through a party wall 80 feet to the southwesterly side of Bay Ridge Avenue;
RUNNING THENCE northwesterly along the southwesterly side of Bay Ridge Avenue 22 feet to the point or place of **BEGINNING.**
TOGETHER with a right of way or easement as long as said wall shall stand to the use of the part of the wall between these premises and the premises adjoining on the southeast encroaching on the said premises adjoining on the southeast and extending from the rear line of the building on the premises adjoining on the southeast to approximately the rear of the said premises adjoining on the southeast.
FOR INFORMATION ONLY:
SAID premises also being known as Block 5880, Lot 7 on the Official Tax Map of the City of New York in the County of Kings.
SAID premises being intended to be the same premises as conveyed in Deed recorded in CRFN 2006000382359.

Commonly Known As: **1002 Bay Ridge Avenue, Brooklyn, NY 11219**

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Exhibit "B"

ADDENDUM TO MORTGAGE From
JOSEPHINE GANGI, TO
BoFi FEDERAL BANK, ITS SUCCESSORS AND/OR ASSIGNS
BENEFICIARY

This Mortgage is given in the form of hypothecated security in that it is given to secure the debt of another, to wit: the indebtedness evidenced by the Promissory Note dated July 5th, 2018, in the amount of $450,000.00 which is made and delivered by Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors. (hereby referred to as "Borrower") to and for the benefit of Beneficiary. Josephine Gangi (hereinafter referred to as "Owner") will derive a material and direct benefit from the loan evidenced by the Note, and in accordance therewith, Owner agrees that such interest and benefit are sufficient consideration to support the Mortgage. In the event of a default by Borrower under the Note, Owner expressly acknowledges, covenants, and agrees that Beneficiary shall have all rights and remedies hereunder as set forth for default just as if Owner had executed the Note. Further, in the event of default under the Note, it shall likewise be deemed an event of default hereunder giving rise to all rights and remedies as set forth herein for default. Owner expressly agrees that, upon such default, Beneficiary may elect to enforce any rights and remedies which it may have under this Mortgage. The foregoing provisions are set forth and made by Owner as an inducement to Beneficiary to enter into the loan transaction secured hereby.

GRANTOR : Josephine Gangi

By: Josephine Gangi
AKA Josephine Theisen

Individual Acknowledgment

STATE OF New York
COUNTY OF Kings

This instrument was acknowledged before me on this 5th day of July, 2018

by Josephine Gangi AKA Josephine Theisen

Notary Public for NY

My commission expires: April 20, 2019

ANN ROUGIER
Notary Public - State of New York
NO. 01R06323387
Qualified in Kings County
My Commission Expires Apr 20, 2019

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BEGINNING at the corner formed by the intersection of the southwesterly side of Bay Ridge Avenue and the southeasterly side of 10th Avenue;
RUNNING THENCE southwesterly along the southeasterly side of 10th Avenue, 80 feet;
RUNNING THENCE southeasterly parallel with Bay Ridge Avenue, 22 feet;
RUNNING THENCE northeasterly parallel with 10th Avenue and part of the distance through a party wall 80 feet to the southwesterly side of Bay Ridge Avenue;
RUNNING THENCE northwesterly along the southwesterly side of Bay Ridge Avenue 22 feet to the point or place of **BEGINNING.**
TOGETHER with a right of way or easement as long as said wall shall stand to the use of the part of the wall between these premises and the premises adjoining on the southeast encroaching on the said premises adjoining on the southeast and extending from the rear line of the building on the premises adjoining on the southeast to approximately the rear of the said premises adjoining on the southeast.
FOR INFORMATION ONLY:
SAID premises also being known as Block 5880, Lot 7 on the Official Tax Map of the City of New York in the County of Kings.
SAID premises being intended to be the same premises as conveyed in Deed recorded in CRFN 2006000382359.

Commonly Knoan As: **1002 Bay Ridge Avenue, Brooklyn, NY 11219**

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EXHIBIT D

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The Authoritative Copy of this record is held at na2.docusign.net

axos™
BANK

Conditional Closing Agreement

10/12/2018

We, Axos Bank ™, are pleased to inform you, Applicant, that you have been approved for a business loan in the principal amount of $160,000.00 with an anticipated funding date of 10/16/2018. The undersigned understands and acknowledges that we will not fund a loan for you until such time as all closing conditions (including, but not limited to, the additional conditions set forth below) are met:

- the title company has received any and all relevant documentation needed to satisfy the requirements listed on the title search
- the title company is able to provide a clear and acceptable final title policy to us in accordance with and satisfaction of our guidelines
- we have reviewed and approved the fully executed loan documents
- a due diligence call is conducted completed and to our satisfaction
- a Skype call, or other video conference call we deem acceptable, is conducted and completed to our satisfaction

Nothing herein shall be construed as an obligation by us to provide funds to you, it being expressly understood that the obligations of the parties shall be established pursuant to the terms of a Business Promissory Note and Security Agreement to be made by you in favor of us, as well other documents required by us, and only upon actual funding of the loan.

COPY VIEW

APPLICANT: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

DocuSigned by:
By: Rosario Gangi
26CDF[illegible]ED34441

Printed Name: Rosario Gangi

Title: President

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THIS IS A COPY
The Authoritative Copy of this record is held at na2.docusign.net

AXOS BANK

BUSINESS LOAN SUMMARY*

Borrower: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors 6901 10th Avenue, Brooklyn, New York, 11228	**Lender:** Axos Bank 9205 West Russell Road, Suite 400 Las Vegas, NV 89148

Disbursement Amount:
$154,027.82
This amount is to be disbursed on **10/16/2018**

Processing Fees:
$5,772.18
See Itemization on attached Page 2

Adjustments:
$200.00
See Itemization on attached Page 2

Loan Amount:
$160,000.00
See Itemization on attached Page 2

Interest Rate:
0.279452054795%

Interest Charge:
$132,942.16
See Itemization on attached Page 2

APR:
103.0535%

Total Repayment Amount:
$292,942.16
See Itemization on attached Page 2

Payment Schedule: 68 payments of **$4,245.55** due each "Business Week" commencing on **10/23/2018** until **2/4/2020**, followed by a final payment of **$4,244.76** on **2/11/2020** when any remaining outstanding Principal, interest, and other unpaid charges shall be due and payable in full. **"Business Week" means the first Business Day on or after the Tuesday of each week. "Business Day" means any Monday through Friday, except Federal Reserve holidays.** The period commencing on **10/23/2018** and ending on **2/11/2020** is referred to as the "Repayment Period."

Prepayment: Borrower may make a full prepayment of unpaid Principal at any time accompanied by a prepayment premium. The prepayment premium will be equal to the greater of (a) fifteen percent (15%) of the amount of the unpaid Principal or (b) the aggregate amount required to be repaid by Borrower to Lender during the Repayment Period reduced by the sum of (i) the aggregate amount of any payments made by Borrower to Lender prior to the date of such prepayment and (ii) the amount of the unpaid Principal.

Charges: Returned (NSF/ACH) Payment Charge: $35.00.

COPY VIEW

If there is any conflict between the terms of this Business Loan Summary and the related Business Promissory Note and Security Agreement entered into by Borrower, then the terms of the Business Promissory Note and Security Agreement shall govern. **The business loan summarized in this Business Loan Summary and represented by the related Business Promissory Note and Security Agreement is a higher cost loan than business loans which may be available through other sources. Before signing the Business Promissory Note and Security Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan.**

Borrower hereby acknowledge(s) reading and understanding all of the information disclosed above, and receiving a completed copy of this Business Loan Summary on the date indicated below.

Read, acknowledged and accepted.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

DocuSigned by:
By: Rosario Gangi
26CDF084ED34441...
Title: President

Printed Name: Rosario Gangi
Date: 10/15/2018

SBStPP
Revision Date: August 2018.a

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BANK

BUSINESS LOAN SUMMARY ITEMIZATION

FEES	Description	Net Out	Capitalized
Processing Fee	Fee for loan processing	$795.00	$0.00
Notary Fee	Fee for notary to travel to mortgage signing	$0.00	$0.00
Courier & Wire	Fee to deliver documents and wire fund	$50.00	$0.00
Settlement Fee	Fee for settlement or closing fee	$600.00	$0.00
Title Exam Fee	Fee for title examination	$0.00	$0.00
Business Inspection	Fee for inspection of business	$0.00	$0.00
Residential Title Search	Fee for residential property lien search report(s)	$873.00	$0.00
Lender's Residential Title Insurance Policy	Fee for residential property insurance	$0.00	$0.00
Commercial Title Search	Fee for commercial property lien search report(s)	$0.00	$0.00
Lender's Commercial Title Insurance Policy	Fee for commercial property insurance	$0.00	$0.00
Closing Protection Letter	Fee for Closing Protection Letter	$0.00	$0.00
Recording Fee	Fee for title agency to record mortgage(s)	$100.00	$0.00
Endorsement	Fee for change(s) in title insurance coverage	$137.00	$0.00
Mortgage State Tax Stamps	Fee for state tax stamps	$0.00	$0.00
Tax Certification	Fee for confirming if property tax is current	$0.00	$0.00
Certificate of Good Standing	Fee for Certificate of Good Standing	$0.00	$0.00
Broker Price Opinion Fee	Fee for evaluating the property	$300.00	$0.00
Prepaid Fees	Borrower prepaid fee credit	($590.00)	$.00
Abstract Title Search Fee	Abstract Title Search Fee	$0.00	$0.00
Escrow Fee	Fee for Escrow to Title Company	$50.00	$0.00
Doc Prep Fee	Doc Prep Fee to Title Company	$17.18	$0.00
Mortgage Tax		$2,850.00	
mortgage recording fees		$390.00	
Municipal, Patriot and Bankruptcy Search		$200.00	
	TOTAL FEES	**$5,772.18**	
ADJUSTMENTS			
Principal Balance (Refi Only)	Unpaid principal balance on previous loan	$0.00	
Remaining Interest (Refi Only)	Unpaid interest due on previous loan	$0.00	
Interest Due	Current daily interest charge	$0.00	
Funds Held in Escrow	Funds to be released upon satisfaction of escrow condition(s)	$0.00	
Third Party 1 Payoff	Payoff for water	$200.00	
Third Party 2 Payoff		$0.00	
Third Party 3 Payoff		$0.00	
Third Party 4 Payoff		$0.00	
Payment Holdback	Holdback of 1 week payment	$0.00	
	TOTAL ADJUSTMENTS	**$200.00**	
BEGINNING PRINCIPAL			
Loan Amount Before Fees & Costs		$160,000.00	
Total Fees (only if capitalized)	Sum of above itemized fees	$0.00	
	TOTAL BEGINNING PRINCIPAL	**$160,000.00**	
DISBURSEMENT AMOUNT			
Loan Amount Before Fees & Costs		$160,000.00	
Total Fees (Only if net out)	Sum of above itemized fees	$5,772.18	
Total Adjustments	Sum of above itemized adjustments	$200.00	
	TOTAL DISBURSEMENT	**$154,027.82**	
INTEREST CHARGES			
Interest Charges	Total interest to be paid over the term of the loan	$132,942.16	
	TOTAL INTEREST CHARGES	**$132,942.16**	
TOTAL REPAYMENT			
Loan Amount Before Fees & Costs		$160,000.00	
Total Fees (only if capitalized)	Sum of above itemized fees	$0.00	
Interest Charges	Total interest to be paid over the term of the loan	$132,942.16	
	TOTAL REPAYMENT	**$292,942.16**	

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BUSINESS LOAN AUTHORIZATION AGREEMENT FOR DIRECT DEPOSIT (ACH CREDIT) AND DIRECT PAYMENTS (ACH DEBITS)

Date: 10-12-2018

DISBURSEMENT OF BUSINESS LOAN PROCEEDS. By signing below, Borrower authorizes Lender to disburse the business loan proceeds, as evidenced by the Business Promissory Note and Security Agreement executed by Borrower of even date herewith, less the amount of any applicable fees, (a) by issuing (i) a check to Borrower or (ii) a check or bank wire to Borrower's checking account indicated below (or a substitute checking account Borrower later identifies and is acceptable to Lender) (hereinafter referred to as the "Designated Checking Account") or (b) by initiating an Automated Clearing House ("ACH") credit entry to the Designated Checking Account. This authorization is to remain in full force and effect until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it.

AUTOMATIC PAYMENT PLAN. Enrollment in Lender's Automatic Payment Plan is required for approval of the business loan. By signing below, Borrower agrees to enroll in the Automatic Payment Plan and authorizes Lender to collect payments required under the terms of the Business Promissory Note and Security Agreement by initiating ACH debit entries to the Designated Checking Account in the amounts and on the dates provided in the Payment Schedule set forth in the Business Promissory Note and Security Agreement. Borrower authorizes Lender to increase the amount of any scheduled ACH debit entry or assess multiple ACH debits for the amount of any previously scheduled payment(s) that was not paid as provided in the Payment Schedule and any unpaid charges. This authorization is to remain in full force and effect until the loan is paid in full or until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it. Lender may suspend or terminate Borrower's enrollment in the Automatic Payment Plan immediately if Borrower fails to keep Borrower's Designated Checking Account in good standing or if there are insufficient funds in Borrower's Designated Checking Account to process any payment. If Borrower terminates this authorization or Lender suspends or terminates Borrower's enrollment in the Automatic Payment Plan, Borrower still will be responsible for making timely payments pursuant to the alternative payment method prescribed by Lender.

BUSINESS PURPOSE ACCOUNT. By signing below, Borrower attests that the Designated Checking Account was established by Borrower, and the loan proceeds will be used for business purposes only and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.

ACCOUNT CHANGES. Borrower agrees to notify Lender promptly if there are any changes to the Designated Checking Account, including routing numbers.

NOTICE OF RECEIPT OF ENTRY. Under the operating rules of the National Automated Clearing House Association ("NACHA") which are applicable to ACH transactions involving your Designated Checking Account, we are not required to give next day notice to you of receipt of an ACH item and we will not do so. However, we will continue to notify you of the receipt of payments in the periodic statement we provide to you.

GOVERNING LAW. We may accept on your behalf payments to your Designated Checking Account which have been transmitted through one or more Automated Clearing Houses and which are not subject to the Electronic Fund Transfer Act and your rights and obligations with respect to such payments shall be construed in accordance with, and governed by, the laws of the State of Nevada, except to the extent required by federal law.

MISCELLANEOUS. Lender is not responsible for any fees charged by Borrower's depository bank as the result of credits or debits initiated under this Authorization Agreement. The origination of ACH transactions to Borrower's Designated Checking Account must comply with the provisions of U.S. law.

Depository Bank Name: M & T Bank
Branch: Brooklyn, NY
Branch Address: 7807 5th Ave, Brooklyn, NY 11209

Account Name: M Gangi Plumbing & Heating Contractors
Account #: 9845893735
Routing #: 022000046
Customer Federal Tax ID (EIN): 11-2344115

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

Signature: DocuSigned by: Rosario Gangi Name/Title: Rosario Gangi President

Date: 10/15/2018

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BUSINESS LOAN AUTHORIZATION AGREEMENT FOR DIRECT DEPOSIT (ACH CREDIT) AND DIRECT PAYMENTS (ACH DEBITS)

Date: 10-12-2018

DISBURSEMENT OF BUSINESS LOAN PROCEEDS. By signing below, Borrower authorizes Lender to disburse the business loan proceeds, as evidenced by the Business Promissory Note and Security Agreement executed by Borrower of even date herewith, less the amount of any applicable fees, (a) by issuing (i) a check to Borrower or (ii) a check or bank wire to Borrower's checking account indicated below (or a substitute checking account Borrower later identifies and is acceptable to Lender) (hereinafter referred to as the "Designated Checking Account") or (b) by initiating an Automated Clearing House ("ACH") credit entry to the Designated Checking Account. This authorization is to remain in full force and effect until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it.

AUTOMATIC PAYMENT PLAN. Enrollment in Lender's Automatic Payment Plan is required for approval of the business loan. By signing below, Borrower agrees to enroll in the Automatic Payment Plan and authorizes Lender to collect payments required under the terms of the Business Promissory Note and Security Agreement by initiating ACH debit entries to the Designated Checking Account in the amounts and on the dates provided in the Payment Schedule set forth in the Business Promissory Note and Security Agreement. Borrower authorizes Lender to increase the amount of any scheduled ACH debit entry or assess multiple ACH debits for the amount of any previously scheduled payment(s) that was not paid as provided in the Payment Schedule and any unpaid charges. This authorization is to remain in full force and effect until the loan is paid in full or until Lender has received written notification from Borrower of its termination in such time and in such manner as to afford Lender and Borrower's depository bank a reasonable opportunity to act on it. Lender may suspend or terminate Borrower's enrollment in the Automatic Payment Plan immediately if Borrower fails to keep Borrower's Designated Checking Account in good standing or if there are insufficient funds in Borrower's Designated Checking Account to process any payment. If Borrower terminates this authorization or Lender suspends or terminates Borrower's enrollment in the Automatic Payment Plan, Borrower still will be responsible for making timely payments pursuant to the alternative payment method prescribed by Lender.

BUSINESS PURPOSE ACCOUNT. By signing below, Borrower attests that the Designated Checking Account was established by Borrower, and the loan proceeds will be used for business purposes only and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.

ACCOUNT CHANGES. Borrower agrees to notify Lender promptly if there are any changes to the Designated Checking Account, including routing numbers.

NOTICE OF RECEIPT OF ENTRY. Under the operating rules of the National Automated Clearing House Association ("NACHA") which are applicable to ACH transactions involving your Designated Checking Account, we are not required to give next day notice to you of receipt of an ACH item and we will not do so. However, we will continue to notify you of the receipt of payments in the periodic statement we provide to you.

GOVERNING LAW. We may accept on your behalf payments to your Designated Checking Account which have been transmitted through one or more Automated Clearing Houses and which are not subject to the Electronic Fund Transfer Act and your rights and obligations with respect to such payments shall be construed in accordance with, and governed by, the laws of the State of Nevada, except to the extent required by federal law.

MISCELLANEOUS. Lender is not responsible for any fees charged by Borrower's depository bank as the result of credits or debits initiated under this Authorization Agreement. The origination of ACH transactions to Borrower's Designated Checking Account must comply with the provisions of U.S. law.

Depository Bank Name: Signature Bank
Branch: Brooklyn, NY
Branch Address: 6321 New Utrecht Ave, Brooklyn, NY 11219

Account Name: MICHAEL GANGI PLUMBING & HEATING CONTRACTORS INC
Account #: 1502730262
Routing #: 026013576
Customer Federal Tax ID (EIN): 11-2344115

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

Signature: DocuSigned by: Rosario Gangi Name/Title: Rosario Gangi President

Date: 10/15/2018

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BUSINESS LOAN PURPOSE AFFIDAVIT

STATE/COMMONWEALTH OF New York)

) ss.

COUNTY OF _____)

In connection with the business loan to Borrower evidenced by the Business Promissory Note and Security Agreement of even date herewith ("Loan Agreement"), Borrower being first duly sworn on oath deposes and states:

That the proceeds of the Loan Agreement of ONE HUNDRED SIXTY THOUSAND DOLLARS AND ZERO CENTS ($160,000.00), being furnished to Borrower will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.

Subscribed and sworn to by Borrower, under penalty of perjury, this _____ day of _____, in the year ____.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

By: DocuSigned by: Rosario Gangi 26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Subscribed and sworn to me this ____ day of _____, in the year ____.

_____
Notary Public

My commission expires: _____

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BUSINESS PROMISSORY NOTE AND SECURITY AGREEMENT

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

PRINCIPAL (including processing fees): $160,000.00

DATE: 10/12/2018

1. **PROMISE TO PAY: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors** ("Borrower"), a(n) New York corporation, with its principal place of business located at 6901 10th Avenue, Brooklyn, New York, 11228, does hereby promise to pay to the order of **Axos Bank, its successors and/or assigns** ("Lender") at its offices located at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148, or at such other location or in such other manner as designated by Lender, the sum of ONE HUNDRED SIXTY THOUSAND DOLLARS AND ZERO CENTS ($160,000.00) ("Principal") plus interest at the daily interest rate set forth below in Section 2 in accordance with the payment schedule set forth below in Section 3. This Business Promissory Note and Security Agreement ("Loan Agreement") is approved, and the proceeds are disbursed, by Lender in **Nevada. The business loan represented by this Loan Agreement is a higher cost loan than business loans which may be available through other sources. Before signing this Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan.**

2. **INTEREST RATE:** The unpaid Principal shall bear interest at the rate of **0.279452054795%** per day until paid in full.

3. **PAYMENT SCHEDULE/APPLICATION OF PAYMENTS:** Borrower shall repay the Principal and interest commencing on 10/23/2018 and on each Business Week thereafter until 2/4/2020 with each weekly payment equaling $4,245.55 followed by a final payment of $4,244.76 on 2/11/2020, when any remaining outstanding Principal, interest and other unpaid charges shall be due and payable in full. **"Business Week" means the first Business Day on or after the Tuesday of each week. "Business Day" means any Monday through Friday, except Federal Reserve holidays.** The period commencing on 10/23/2018 and ending on 2/11/2020 is referred to as the "Repayment Period."

   All payments shall be made by automatic ACH debit from the "Designated Checking Account" set forth in the Business Loan Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits) given by Borrower to Lender or pursuant to an alternative payment method prescribed by Lender, and Borrower shall maintain balances in the Designated Checking Account sufficient to make each weekly payment due under this Loan Agreement.

   Payments shall be applied on the date received first to late charges and other charges due under this Loan Agreement, then to unpaid accrued interest, and then to Principal.

4. **VOLUNTARY PREPAYMENT AND PREPAYMENT PREMIUM:** Borrower may prepay the unpaid Principal in full at any time, but may not make partial prepayments (except as permitted by applicable law). Any such prepayment of the unpaid Principal shall be accompanied by a prepayment premium equal to the greater of **(a)** fifteen percent (15%) of the amount of the unpaid Principal as of the date of such prepayment and **(b)** the aggregate amount required to be repaid by Borrower to Lender during the Repayment Period reduced by the sum of **(i)** the aggregate amount of any payments made by Borrower to Lender pursuant to Section 3 above before such prepayment and **(ii)** the amount of the unpaid Principal as of the date of such prepayment. This prepayment premium is in addition to any and all interest calculated and accrued on the unpaid Principal as of the date of such prepayment in accordance with Section 2 above together with all other amounts then due and payable under this Loan Agreement. No prepayment is permitted unless all outstanding charges are paid in full as of the date of prepayment. If Borrower desires to prepay, Borrower shall send a written request to **WBLPayoff@wbl.com**. In addition, Borrower may contact Lender's Servicing Agent at **101 Hudson St., 33rd Floor, Jersey City, NJ 07302** or at **1-800-432-9359** and Lender's Servicing Agent shall provide Borrower with the amount of the unpaid Principal, prepayment premium, and any other amounts due under the terms of the Loan Agreement as of a date designated by Borrower. For the avoidance of doubt, as permitted under applicable law, if the Obligations (as defined below) have been accelerated on the happening of an Event of Default (as defined below), payment of Principal and interest shall be deemed a prepayment for purposes of this Section 4 and shall be accompanied by a prepayment premium.

5. **RETURNED PAYMENT CHARGE:** Borrower will pay a charge of **thirty-five dollars ($35.00)** ("NSF Charge") in connection with any payment by check or electronic transfer that is returned unpaid because of an insufficient balance in the Designated Checking Account or otherwise.

6. **SECURITY INTEREST:** Borrower grants to Lender a security interest in and to any and all property as described below in this Section 6 to secure payment of all debts, obligations and liabilities of Borrower to Lender evidenced by this Loan Agreement or any other financing agreement with Lender with respect to which the Lender's servicing agent is the same as

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the Servicing Agent hereunder (including, but not limited to, Principal, interest and collection costs incurred in connection with this Loan Agreement and/or any other documents or instruments now or hereafter executed in connection with this Loan Agreement or any other financing arrangement with Lender with respect to which the Lender's servicing agent is the same as the Servicing Agent hereunder, the "Obligations"). This is a continuing security interest and will continue in effect as long as any Obligations remain outstanding. The collateral includes the property purchased with the proceeds of this Loan Agreement described on Schedule A attached to and made a part of this Loan Agreement ("Purchase Money Collateral"), the vehicles and other personal property described on Schedule B attached to and made a part of this Loan Agreement ("Specific Collateral") and all other personal property now owned or hereafter acquired by Borrower (which, along with Purchase Money Collateral and Specific Collateral, is collectively referred to as "Collateral"), including, but not limited to, all goods (except consumer goods), farm products, inventory, equipment, furniture, money, instruments, accounts, accounts receivable, contract rights, documents, chattel paper, general intangibles, including, but not limited to, all products and proceeds of Collateral and all additions and accessions to, replacements of, insurance proceeds of, and documents covering Collateral, all property received wholly or partly in trade or exchange for Collateral, all leases of Collateral and all rents, revenues, issues, profits and proceeds arising from the sale, lease encumbrance, collection, or any other temporary or permanent disposition, of the Collateral or any interest therein. Borrower agrees that Lender may file any financing statement, lien entry form or other document Lender requires in order to perfect, amend or continue Lender's security interest in the Collateral and Borrower agrees to cooperate with Lender as may be necessary to accomplish said filing and to do whatever Lender deems necessary to protect Lender's security interest in the Collateral. Borrower shall ensure that Lender is named as the only lien holder on the titles to the motor vehicles listed on Schedule B to this Loan Agreement as of the date of this Loan Agreement (or the nearest subsequent date as permitted under applicable law, rule or regulation).

Borrower shall maintain the Collateral in good condition and repair and not permit its value to be impaired; keep the Collateral free from all liens, encumbrances and security interests (other than those created or expressly permitted by this Loan Agreement); defend the Collateral against all claims and legal proceedings by persons other than Lender; pay and discharge when due all taxes, license fees, levies and other charges upon the Collateral; not sell, lease or otherwise dispose of the Collateral or permit it to become a fixture or an accession to other goods, except as specifically authorized by Lender in writing; and not permit the Collateral to be used in violation of any applicable law, rule, regulation or policy of insurance.

Borrower shall pay all expenses and, upon request, take any action reasonably deemed advisable by Lender to preserve the Collateral or to establish, determine priority of, perfect, continue perfected, terminate and/or enforce Lender's interest in the Collateral or rights under this Loan Agreement and, further, Borrower authorizes Lender, with full power of substitution, to execute in Borrower's name any documents necessary to perfect, amend or to continue Lender's interest in the Collateral or rights under this Loan Agreement or to demand termination of filings of other secured parties. Lender has no duty to protect, insure or realize upon the Collateral. Loss of or damage to the Collateral shall not release Borrower from any of the Obligations.

7. **FOR BORROWERS OR COLLATERAL IN LOUISIANA ONLY:**

(a) Foreclosure. If Borrower is domiciled in, or Collateral is located in, Louisiana, on the happening of an Event of Default, Lender shall have the right to commence appropriate foreclosure proceedings against the Collateral and against Borrower.

(b) Seizure and Sale of Collateral. If Lender elects to commence appropriate Louisiana foreclosure proceedings under the Loan Agreement, Lender may cause the Collateral, or any part or parts thereof, to be immediately seized and sold, whether in term of court or in vacation, under ordinary or executory process, in accordance with applicable Louisiana law, to the highest bidder for cash, with or without appraisement, and without the necessity of making additional demand upon or notifying Borrower or placing Borrower in default, all of which are expressly waived.

(c) Executory Process. For purposes of foreclosure under Louisiana executory process procedures, Borrower confesses judgment and acknowledges to be indebted to Lender, up to the full amount of the Obligations, in Principal, interest, prepayment charges, NSF Charges, and any other unpaid costs and charges authorized by the Loan Agreement, reasonable attorneys' fees and all costs of collection. Borrower further confesses judgment and acknowledges to be indebted unto and in favor of Lender in the amount of any additional advances that Lender may make on Borrower's behalf pursuant to the Loan Agreement, together with interest thereon. To the extent permitted under applicable Louisiana law, Borrower additionally waives the following:

(i) the benefit of appraisal as provided in Articles 2332, 2336, 2723, and 2724 of the Louisiana Code of Civil Procedure, and all other laws with regard to appraisal upon judicial sale;

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(ii) the demand and three (3) days' delay as provided under Articles 2639 and 2721 of the Louisiana Code of Civil Procedure;

(iii) the notice of seizure as provided under Articles 2293 and 2721 of the Louisiana Code of Civil Procedure;

(iv) the three (3) days' delay provided under Articles 2331 and 2722 of the Louisiana Code of Civil Procedure; and

(v) all other benefits provided under Articles 2331, 2722 and 2723 of the Louisiana Code of Civil Procedure and all other Articles not specifically mentioned above.

(d) Keeper. Should any or all of the Collateral be seized as an incident to an action for the recognition or enforcement of this Loan Agreement, by executory process, sequestration, attachment, writ of *fieri facias* or otherwise, Borrower hereby agrees that the court issuing any such order shall, if requested by Lender, appoint Lender, or any agent designated by Lender or any person or entity named by Lender at the time such seizure is requested, or any time thereafter, as "Keeper" of the Collateral as provided under La. R.S. 9:5136, *et seq.* Such a Keeper shall be entitled to reasonable compensation. Borrower agrees to pay the reasonable fees of such Keeper, which compensation to the Keeper shall also be secured by this Loan Agreement.

8. **REPRESENTATIONS:** As of the date hereof, the Borrower hereby represents to the Lender that:

(a) Borrower is the owner of or is acquiring the Purchase Money Collateral free of all liens, encumbrances and security interests (except Lender's security interest), and is the owner of all other Collateral free of all liens, encumbrances and security interests, except Lender's security interest and any security interests listed on Schedule C attached and made a part of this Loan Agreement;

(b) **the proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. Borrower understands Lender is relying on the accuracy of this representation in disbursing the loan proceeds and that Borrower's agreement not to use the proceeds of this Loan Agreement for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods means that certain important duties imposed upon entities making loans for consumer/personal purposes, and certain important rights conferred upon consumers, pursuant to federal or state law will not apply to this Loan Agreement, or any other document or instrument given to Lender in connection with or related to this Loan Agreement. Borrower also understands that Lender will be unable to confirm whether the proceeds of this Loan Agreement will be used for business purposes only. Borrower acknowledges and agrees that a breach by Borrower of the provisions of this subsection 8(b) will not affect Lender's right to**

(i) enforce Borrower's promise to pay for all amounts owed under this Loan Agreement, regardless of the purpose for which the proceeds of this Loan Agreement are in fact obtained or

(ii) use any remedy legally available to Lender, even if that remedy would not have been available had the proceeds of this Loan Agreement been used for consumer purposes;

(c) the proceeds of this Loan Agreement will not, directly or indirectly, be used for any purposes which would violate any applicable law, rule or regulation;

(d) the Collateral will be kept at Borrower's address set forth above in Section 1 or as indicated on Schedule D attached to and made a part of this Loan Agreement;

(e) Borrower's name in Section 1 above is its exact name on its organizing and/or registered documents, if any, and Section 1 above accurately identifies Borrower's jurisdiction of organization and principal place of business. Borrower shall immediately advise Lender in writing of any change in Borrower's name or address as set forth above in Section 1;

(f) Borrower is duly organized, validly existing, in good standing under the law of the jurisdiction in which it is organized, is in compliance with all applicable laws, rules and regulations, and has all licenses and authorizations necessary to carry on its business as now being conducted; Borrower has the full power and authority to execute, deliver and perform all transactions contemplated by this Loan Agreement and the performance of and compliance with the terms of this Loan Agreement will not violate the Borrower's organizational documents or constitute a default of any contract, agreement or other instrument to which Borrower is a party;

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(g) Borrower has duly authorized the execution, delivery and performance of this Loan Agreement and has duly executed and delivered this Loan Agreement, and this Loan Agreement constitutes a legal, valid and binding obligation of the Borrower, enforceable against it in accordance with its terms;

(h) there is no action, suit, proceeding or investigation pending or, to Borrower's knowledge, threatened against or affecting it or any of its assets before or by any court or other governmental authority which, if determined adversely to it, would have a material adverse effect on its financial condition, business or prospects, or the value of the Collateral (any of the foregoing, a "Litigation Event");

(i) except to the extent Borrower has advised Lender in writing, Borrower has not been notified by any of its lenders that it is in default under the terms of any of its credit agreements, nor has Borrower done, caused to be done, or failed to do any act or omission that would result in a default under any credit agreement; and

(j) no third party source of financing for Borrower's customers has discontinued, or threatened to discontinue providing financing to Borrower's customers.

(k) Borrower does not engage in the business of manufacturing, distributing or dispensing Cannabinoid, Marijuana Accessories or Marijuana Products (each as defined below in this subsection 8(k)), nor shall any property owned by Borrower (whether or not securing the business loan represented by this Loan Agreement) be utilized by Borrower, or any third party, for the purpose of manufacturing, distributing or dispensing any of the foregoing. As used in this Loan Agreement, (i) "Cannabinoid" means any of several compounds produced by marijuana plants that have medical and psychotropic effects; (ii) "Marijuana Accessories" means equipment, products, devices or materials of any kind that are intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling or otherwise introducing marijuana into the human body; and (iii) "Marijuana Products" means products that have been manufactured and contain marijuana or an extract from marijuana, including, without limitation, concentrated forms of marijuana and products composed of marijuana and other ingredients that are intended for use or consumption, including, without limitation, edible products, beverages, topical products, ointments, oils and tinctures.

9. **COVENANTS:** Borrower hereby agrees that as long as any Obligations remain outstanding (whether Principal, interest or otherwise):

(a) Borrower shall promptly provide any financial information on request or permit an examination of its books and records to permit Lender to confirm Borrower's ability to pay its Obligations and all other financial obligations and Borrower shall maintain proper books and records in conformity with applicable law, rules and regulations;

(b) Borrower shall file all federal, state and local tax returns, and pay all related taxes when due;

(c) Borrower shall renew and maintain in full force and effect its legal existence and good standing under the laws of the jurisdiction of its organization;

(d) Borrower shall maintain insurance in at least such amounts and against at least such risks as are customary in the same general area in which Borrower conducts its business by entities engaged in similar businesses;

(e) Borrower shall promptly notify Lender in writing of any Litigation Event, Event of Default or any other event which could reasonably be anticipated to materially and adversely affect the Borrower's ability to repay its Obligations or materially affects the value of the Collateral; and

(f) Borrower shall **not** (i) merge or consolidate with another entity, which merger or consolidation results in less than fifty percent (50%) of the outstanding voting securities of the resulting entity being owned by the then existing holders of securities of the Borrower or (ii) transfer, assign, license, sell, lease or otherwise dispose of all or substantially all of its assets to a person that is not a wholly-owned subsidiary of the Borrower; provided, that the Borrower shall cause any such subsidiary to comply with the provisions of this clause (f); and

(g) Borrower shall not engage in the business of manufacturing, distributing or dispensing Cannabinoid, Marijuana Accessories or Marijuana Products, nor shall any property owned by Borrower (whether or not securing the business loan represented by this Loan Agreement) be utilized by Borrower, or any third party, for the purpose of manufacturing, distributing or dispensing any of the foregoing.

10. **DEFAULT:** On the happening of any of the following events (each an "Event of Default"):

(a) failure by Borrower to pay any payment required by this Loan Agreement when due;

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(b) failure by Borrower to observe, perform, keep or abide by any term, covenant or condition contained in this Loan Agreement or any other document or instrument given to Lender in connection with or related to this Loan Agreement, including any real estate mortgage, security agreement or other agreement or document now or hereafter evidencing or creating any security for the payment of this Loan Agreement;

(c) the filing of a bankruptcy proceeding, assignment for the benefit of creditors, issuance of a judgment execution, garnishment or levy against, or the appointment of a representative of any kind for the commencement of any proceeding for relief from indebtedness by or against Borrower, or the Borrower shall not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

(d) the happening of any event, which, in the reasonable judgment of Lender, adversely affects Borrower's ability or the ability of any guarantor of Borrower's Obligations under this Loan Agreement ("Guarantor") to repay Borrower's Obligations, or materially affects the value of the Collateral;

(e) any written representation, statement or warranty made to Lender by Borrower or any Guarantor is untrue when made;

(f) the occurrence of

(i) a default under any guaranty of Borrower's Obligations ("Guaranty"), or any other document or instrument given to Lender in connection with or related to this Loan Agreement, or

(ii) a default or an event of default under any other loan agreement or financing arrangement that Borrower may have with Lender or any other lender or financing source;

(g) any Guaranty is revoked or becomes unenforceable for any reason;

(h) Lender, upon examination of Borrower's financial information during the term of this Loan Agreement, becomes insecure in Borrower's ability to pay the Obligations;

then (A) in connection with an Event of Default pursuant to clause (c) above, the Obligations under this Loan Agreement or other agreements shall immediately become due and payable and Lender shall have the right to proceed to collect such Obligations under applicable law and enforce its rights under any Guaranty; and (B) in connection with any Event of Default other than pursuant to clause (c) above, Lender may, at its option declare the entire unpaid balance of all Obligations under this Loan Agreement or other agreements immediately due and payable, and shall have the right to proceed to collect such Obligations under applicable law and enforce its rights under any Guaranty. In addition, Lender may, in connection with the events described in clause (A) and (B) above, proceed against the Collateral and any other collateral securing any obligation to Lender as if said collateral secured the Obligations, as permitted under the applicable Uniform Commercial Code or any other applicable law. As permitted under the Uniform Commercial Code, Lender may take possession of Collateral without notice or hearing, which Borrower waives, and upon demand, Borrower shall assemble the Collateral and make it available to Lender at any convenient place designated by Lender. Lender's receipt of any payment after the occurrence of an Event of Default, whether or not the Obligations have been accelerated, shall not constitute a waiver of the default or of Lender's rights or remedies upon such default, including Lender's right to accelerate the unpaid balance of the Obligations and pursue collection thereof. Election by Lender to pursue or waive any remedy shall not exclude pursuit of any other remedy.

11. **INSPECTION OF COLLATERAL AND PLACE OF BUSINESS**: Lender and Lender's representatives and agents shall have the right at any reasonable time or times to inspect the Collateral wherever located and the interior and exterior of any Borrower place of business, and Borrower shall assist Lender and its representatives and agents in making any such inspection. During an inspection of any Borrower place of business, Lender or Lender's representatives and agents may examine, among other things, whether Borrower (i) has a place of business that is separate from any personal residence, (ii) is open for business, (iii) has sufficient inventory and/or staff to conduct Borrower's business and (iv) has one or more credit card terminals or point of sale systems if Borrower processes credit card transactions. When performing an inspection, Lender or Lender's representatives and agents may photograph the interior and exterior of any Borrower place of business, including any signage. Any photograph will become and remain the sole property of Lender and will be shared with Lender's employees, representatives and agents. Borrower grants Lender the irrevocable and permanent right to display and share any photograph in all forms, including composite and modified representations, for all purposes, with Lender's employees, representatives and agents. Borrower agrees to reimburse Lender for the cost of the inspections described in this Section 11.

12. **EVALUATION OF CREDIT**: Borrower authorizes Lender to obtain business and personal credit bureau reports in Borrower's name, at any time and from time to time for purposes of deciding whether to approve the requested business loan or for any update, renewal, extension of credit or other lawful purpose. Upon Borrower's request, Lender will advise

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Borrower if Lender obtained a credit report and Lender will give Borrower the credit bureau's name and address. Borrower agrees to submit current financial information, a new credit application, or both, in Borrower's name at any time promptly upon Lender's request.

13. **ATTORNEYS' FEES, COLLECTION COSTS AND POST-JUDGMENT RATE OF INTEREST:** In the event Lender retains counsel with respect to enforcement of its rights under this Loan Agreement or any other document or instrument given to Lender, Borrower agrees to pay all expenses of Lender in enforcing its rights to collect the Obligations or in taking possession, holding, preparing for disposition, and disposing of the Collateral, including Lender's reasonable attorneys' fees (whether or not an action is commenced and whether or not in the court of original jurisdiction, appellate court, bankruptcy court or otherwise) and all costs of collection of any judgment and any costs of appeal. In the event this Loan Agreement is brought to a judgment, interest shall accrue at the interest rate set forth in Section 2 above until the judgment is satisfied, except as prohibited by applicable law.

14. **SALE OF LOAN AGREEMENT:** This Loan Agreement, or an interest in this Loan Agreement, together with the rights to the Collateral, may be sold, assigned, transferred or conveyed by Lender one or more times.

15. **INDEMNIFICATION:** Except for Lender's willful misconduct, Borrower will indemnify and save Lender harmless from all loss, costs, damage, liability or expenses (including, without limitation, court costs and reasonable attorneys' fees) that Lender may sustain or incur by reason of defending or protecting Lender's security interest or the priority thereof or enforcing its rights to collect the Obligations, or in the prosecution or defense of any action or proceeding concerning any matter growing out of or in connection with this Loan Agreement and/or any other documents or instruments now or hereafter executed in connection with this Loan Agreement and/or the Obligations and/or the Collateral. This indemnity shall survive the repayment of the Obligations and the termination of this Loan Agreement.

16. **MISCELLANEOUS:**

(a) Delay or failure of Lender to exercise any of its rights under this Loan Agreement shall not be deemed a waiver thereof. No waiver of any condition or requirement shall operate as a waiver of any other or subsequent condition or requirement.

(b) This Loan Agreement may not be modified orally, and may be modified only upon written agreement signed by Lender and Borrower.

(c) Lender is an FDIC insured federal savings association and this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada. CONSEQUENTLY, THIS LOAN AGREEMENT WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES. The legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and reserved under this Loan Agreement will be governed by such laws.

(d) Borrower and Lender agree that any action or proceeding to enforce any rights or obligations arising out of this Loan Agreement shall be commenced in the state (or commonwealth, as the case may be) of Borrower's address set forth in Section 1 above ("Borrower's State") and Borrower waives personal service of process and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and confer personal jurisdiction if served by registered or certified mail to Borrower at the address specified by Borrower above in Section 1, or as otherwise provided by the laws of the Borrower's State or the United States of America. Borrower and Lender agree that venue is proper in such courts and each party hereto waives, to the full extent permitted by applicable law, any defense of an inconvenient forum to the extent any action or proceeding is brought in such courts.

(e) Without affecting the liability of Borrower or any Guarantor, Lender may accept partial payments marked "in full" or otherwise, release or impair any Collateral or agree not to sue any party liable on this Loan Agreement without waiving any of its rights hereunder.

(f) Presentment, protest, demand and notice of dishonor are waived.

(g) Without affecting the liability of any Guarantor, Lender may from time to time, without notice, renew or extend the time for payment.

(h) Borrower expressly agrees that the interest rate set forth above in Section 2 is appropriate under the circumstances and shall be the applicable rate at which unpaid Principal (and Costs, as defined below) shall bear interest under this Loan Agreement, notwithstanding any rate of interest prescribed by statute from time to time; provided, however, if fulfillment of any provisions of this Loan Agreement or any other instrument securing the Obligations is subject to a

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law that sets maximum interest rates or other charges, and that law is finally interpreted so that the interest or other fees collected or to be collected in connection with this Loan Agreement exceed the permitted limits, then

(i) any such charge will be reduced by the amount necessary to reduce the charge to the permitted limit;

(ii) any sums already collected from Borrower that exceed the permitted limits will be refunded or credited to Borrower; and

(iii) the obligations created by this Loan Agreement shall be fulfilled to the limit of such validity as is permitted by law.

(i) Borrower shall keep the Collateral and Lender's interest in it insured under policies with such provisions, for such amounts and by such insurers as shall be satisfactory to Lender from time to time, and shall furnish evidence of such insurance satisfactory to Lender upon request. Borrower assigns (and directs any insurer to pay) to Lender the proceeds of all such insurance and any premium refund and authorizes Lender to endorse in the name of Borrower any instrument for such proceeds or refunds and, at the option of Lender, to apply such proceeds and refunds to any unpaid balance of the Obligations, whether or not due, and/or to restoration of the Collateral, returning any excess to Borrower. Lender is authorized, in the name of Borrower or otherwise, to make, adjust and/or settle claims under any insurance on the Collateral, or cancel the same after the occurrence of an Event of Default.

(j) If Borrower fails to perform any of Borrower's duties set forth in this Loan Agreement or in any evidence of or document relating to the Obligations, Lender is authorized, in Borrower's name or otherwise, to take any such action, including, without limitation, signing Borrower's name or paying any amount so required, and the cost ("Cost") shall be one of the Obligations secured by this Loan Agreement and shall be payable by Borrower upon Lender's demand with interest at the interest rate set forth above in Section 2 from the date of payment by Lender.

(k) Borrower releases Lender from any liability for any act or omission relating to the Obligations, the Collateral or this Loan Agreement, except Lender's willful misconduct.

(l) Invalidity or unenforceability of any provision of this Loan Agreement shall not affect the validity or enforceability of any other provision.

(m) The terms of this Loan Agreement shall be binding upon Borrower and its permitted successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

(n) Borrower acknowledges that a broker may have received compensation in connection with this Loan Agreement.

(o) Any of the Borrower, Lender or a Guarantor may choose to arbitrate any or all disputes and claims arising out of or relating to this Loan Agreement, the Guaranty or any other related document. A claim includes matters arising as an initial claim, counter-claim, cross-claim, third-party claim, or otherwise. If the Borrower, Lender or a Guarantor chooses to litigate any dispute or claim arising out of or relating to this Loan Agreement, the Guaranty or any related document through a judicial action, the decision to litigate shall not be deemed a waiver of arbitration, and if such judicial action is contested, any party may thereafter invoke its arbitration rights at any time before any discovery is taken in the judicial action. If the Borrower, Lender or a Guarantor seeks to have a dispute resolved by arbitration, that party must first send to the other party(ies) by certified mail, a written Notice of Intent to Arbitrate. If Borrower, Lender or a Guarantor do not reach an agreement to resolve the claim within 10 days after the Notice is received, any party may commence an arbitration proceeding with the American Arbitration Association ("AAA"). Lender will promptly reimburse Borrower or the Guarantor any arbitration filing fee, however, if both the Borrower and the Guarantor must pay arbitration filing fees, Lender will only reimburse the Borrower's arbitration filing fee and, except as provided in the next sentence, the Lender will pay all arbitration administration and arbitrator fees. If the arbitrator finds that either the substance of any claim raised by Borrower or a Guarantor or the relief sought by Borrower or a Guarantor is improper or not warranted, as measured by the standards set forth in Federal Rule of Procedure 11(b), then Lender will pay the administration or arbitrator fees only if required by the AAA Rules. If the arbitrator grants relief to the Borrower or a Guarantor that is equal to or greater than the value of the relief requested by the Borrower or a Guarantor in the arbitration, Lender shall reimburse Borrower or the Guarantor, as applicable, for that party's reasonable attorneys' fees and expenses incurred for the arbitration. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, BORROWER AND LENDER AGREE THAT BY ENTERING INTO THIS LOAN AGREEMENT, EACH IS WAIVING THEIR RIGHT TO A TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION BASED UPON, ARISING OUT OF OR RELATED TO THIS LOAN AGREEMENT AND ALL OTHER DOCUMENTATION EVIDENCING THE OBLIGATIONS, IN ANY LEGAL ACTION OR PROCEEDING. BORROWER AND LENDER MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF REPRESENTATIVE OR CLASS MEMBER

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IN ANY PURPORTED REPRESENTATIVE OR CLASS PROCEEDING; PROVIDED, THAT, BORROWER MAY BRING A CLAIM FOR PUBLIC INJUNCTIVE RELIEF TO THE EXTENT REQUIRED BY APPLICABLE LAW. Further, Borrower and Lender agree that the arbitrator may not consolidate proceedings for more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific provision is found unenforceable, then the entirety of this arbitration clause shall be null and void. Any award by the individual arbitrator shall be final and binding, except for any appeal right under the Federal Arbitration Act ("FAA"), and may be entered and enforceable as a judgment in any court of competent jurisdiction, including as a judgment that permits Lender to initiate or complete the exercise of its remedies against, or its realization or foreclosure upon, any collateral or security provided for the benefit of Lender. This arbitration provision is made pursuant to a transaction in interstate commerce, and shall be governed by the FAA at 9 U.S.C. section 1 *et seq.*

(p) In order to ensure a high quality of service for Lender's customers, Lender may monitor and/or record telephone calls between Borrower and Lender's employees. Borrower acknowledges that Lender may do so and agrees in advance to any such monitoring or recording of telephone calls.

(q) Borrower authorizes Lender and Lender's affiliates, agents and independent contractors, including any loan servicers or collateral agents to contact Borrower at any telephone number Borrower provides to Lender or from which Borrower places a call to Lender, or any telephone number where Lender believes it may reach Borrower, using any means of communication, including, but not limited to, calls or text messages to mobile, cellular, wireless or similar devices or calls or text messages using an automated telephone dialing system and/or artificial voices or prerecorded messages, even if Borrower incurs charges for receiving such communications. Lender and Lender's affiliates, agents and independent contractors, including, but not limited to, any loan servicers or collateral agents, may use any other medium not prohibited by law, including, but not limited to, mail, e-mail and facsimile, to contact Borrower. Borrower expressly consents to conduct business by electronic means.

(r) [reserved].

(s) This Loan Agreement may be executed in one or more counterparts, each of which counterparts shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument. For purposes of the execution of this Loan Agreement, electronic or fax signatures shall be treated in all respects as original signatures.

(t) This Loan Agreement, including, without limitation, all Schedules attached hereto and together with all related agreements, instruments and other documents, including, without limitation, any Guaranty and any financing and continuation statements, lien entry forms, mortgages, deeds of trust and other documents filed or recorded in order to perfect, amend or continue Lender's security interest in and lien on the Collateral or any other personal property or real property, in each case, approved by Lender in connection with the business loan and other Obligations evidenced by this Loan Agreement (collectively, the "Loan Documents"), constitutes the entire understanding and agreement between or among Borrower, Lender and any Guarantor, as applicable, and supersedes all other prior discussions, negotiations, commitments, agreements and understandings, written or oral, between or among said parties, as applicable, in each case, with respect to the subject matter of this Loan Agreement and the other Loan Documents. For the avoidance of doubt, no promises, representations or obligations exist between or among said parties respecting the subject matter of this Loan Agreement and the other Loan Documents except as provided herein and therein, and Borrower has not entered into this Loan Agreement or the other Loan Documents in reliance upon any representation, warranty or undertaking of Lender or any other person or entity.

[Remainder of page is blank. Signature page follows.]

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BEFORE SIGNING THIS LOAN AGREEMENT, BORROWER READ AND UNDERSTOOD ALL OF THE PROVISIONS HEREOF. AFTER DUE CONSIDERATION AND THE OPPORTUNITY TO CONSULT WITH OTHER LENDERS (OR OTHER FINANCING SOURCES) AND WITH AN ATTORNEY, ACCOUNTANT OR OTHER COMPETENT PROFESSIONAL OF ITS CHOICE, BORROWER KNOWINGLY, WILLFULLY AND VOLUNTARILY AGREES TO THE TERMS OF THIS LOAN AGREEMENT.

BORROWER ACKNOWLEDGES RECEIPT OF A FULLY COMPLETED AND EXECUTED VERSION OF THIS LOAN AGREEMENT.

BORROWER: **Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors**

Signature: DocuSigned by: Rosario Gangi 26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Date: 10/15/2018

Notary Acknowledgement

STATE/COMMONWEALTH OF _____)
) ss.
COUNTY OF _____)

On the _____ day of _____ in the year _____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Business Promissory Note and Security Agreement and acknowledged to me that she/he executed the same in her/his capacity as _____ of Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors and that by her/his signature on the Business Promissory Note and Security Agreement, the individual, or the person upon behalf of which the individual acted, executed the Business Promissory Note and Security Agreement.

_____
Notary Public

My commission expires: _____.

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SCHEDULE A

PURCHASE MONEY COLLATERAL

[NONE]

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SCHEDULE B

SPECIFIC COLLATERAL

[NONE]

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SCHEDULE C

PERMITTED LIENS

[NONE]

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SCHEDULE D

ADDRESS OTHER THAN BORROWER'S ADDRESS AT WHICH COLLATERAL IS KEPT

Property Address
983 76th St, Brooklyn, NY

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COOPERATION AGREEMENT

DATE: 10/12/2018

In connection with the business loan to Borrower evidenced by the Business Promissory Note and Security Agreement of even date herewith, Borrower hereby agrees:

In the event any further documentation is required by Lender in connection with the loan, Borrower hereby agrees to execute such documentation, including, but not limited to, any amendments, corrections, deletions or additions to the loan documents being executed on even date herewith.

In the event Borrower is required to furnish such necessary documentation and fails to do so within 10 days from receipt of written demand, then such failure shall be an event of default under the terms of the loan and Lender or its successors and assigns shall have the right to demand payment in full under the loan documents and enforce all other rights against Borrower.

The terms "Borrower" and "Lender" have the same meanings as set forth in the Business Promissory Note and Security Agreement.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

Signature: DocuSigned by: Rosario Gangi 26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Date: 10/15/2018

Notary Acknowledgement

STATE/COMMONWEALTH OF _____)

) ss

COUNTY OF _____)

On the _____ day of _____ in the year _____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Cooperation Agreement and acknowledged to me that she/he executed the same in her/his capacity as _____ of _____, and that by her/his signature on the Cooperation Agreement, the individual, or the person upon behalf of which the individual acted, executed the Cooperation Agreement.

_____

Notary Public

My commission expires: _____.

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SERVICING DISCLOSURE NOTICE

LOAN INFORMATION

Date of Loan:	10/16/2018
Loan Number:	28367
Lender:	Axos Bank ™, its successors and/or assigns
Borrower:	Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors
Servicer:	World Business Lenders, LLC
Servicer's Address:	101 Hudson Street, 33rd Floor, Jersey City, NJ 07302

NOTICE OF LOAN SERVICING RIGHTS

The purpose of this notice is to inform you that, as of the date of the funding of your loan, World Business Lenders, LLC, will be servicing your loan and will have the right to collect payments on behalf of the Lender. ("Servicing" refers to the right to collect your principal and interest payments and to otherwise administer the rights and obligations associated with the loan.) This notice provides you with information on how to contact the Servicer.

The servicing of the loan does not affect any term or condition of the loan, and nothing related to your loan terms or conditions will change; this notice requires no action on your part. We recommend that you keep a copy of this notice with your other loan documents.

YOUR SERVICER AS OF CLOSING

Below is the information on how to contact World Business Lenders, LLC.

Toll-free Number

The toll-free telephone number for World Business Lenders is 800-432-9359. If you have any questions regarding the servicing of your loan, call World Business Lenders toll-free at 800-432-9359 between 9 a.m. and 6 p.m. Eastern Standard Time, Monday through Friday.

Address for Correspondence (other than payments)

The address to send written correspondence to World Business Lenders, LLC, (other than payments) is:

World Business Lenders, LLC
101 Hudson Street, 33rd Floor
Jersey City, NJ 07302

Revision Date October 1, 2018

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PREPAYMENT DISCLOSURE

LOAN INFORMATION

Date of Loan:	10/16/2018
Loan Maturity Date:	2/11/2020
Loan Number:	28367
Business Name:	Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors
Loan Amount:	$160,000.00

PREPAYMENT DISCLOSURE SUMMARY

Your loan does not permit partial prepayments (i.e., any amount less than the full outstanding principal), and you must meet other conditions in order to prepay.

If you elect to prepay your loan, your loan requires a **Prepayment Premium**, in addition to the principal, interest, and other charges due at the time of pay off.

The Prepayment Premium is calculated based on one of the following two scenarios:

Required Prepayment Premium:

The Prepayment Premium is calculated by comparing the **greater of**:

A. 15% of the **unpaid principal** on the date of the prepayment.

- *For example, if you still have $200,000 in unpaid principal on your loan, 15% of that would be $30,000.*

B. Or, if greater, the **remaining interest** you would have paid on the loan through the loan maturity date [or earlier date, provided Borrower has not missed any payments/had any ACHs returned prior to such date (such date, an "Approved Earlier Date").]

- *For example, if you still have remaining interest payments of $50,000 through the maturity date of the loan [or an Approved Earlier Date, as applicable], then the prepayment premium would be $50,000.*

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Borrower: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

Revision Date October 1, 2018

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By: DocuSigned by: Rosario Gangi
26CDF084ED34441...

Printed Name: Rosario Gangi

Title: President

Read, acknowledged and accepted on: This Day 15 of Month 10 of Year 2018.

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Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors 6901 1(
Avenue, Brooklyn, New York, 11228

10-12-2018

Axos Bank ™
9205 West Russell Road, Suite 400
Las Vegas, NV 89148

Re: Payoff

Ladies and Gentlemen:

In connection with the business purpose loan made by Axos Bank ™ ("Lender") to Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors ("Borrower") pursuant to that certain Business Promissory Note and Security Agreement dated as of 10-12-2018 made by Borrower in favor of Lender (the "Loan Agreement"), and all agreements related thereto, Borrower hereby authorizes Lender to disburse to Kings County the amount of $200, which represents the balance owed by Borrower to Kings County for water.

Sincerely,

Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

DocuSigned by:
Signature: Rosario Gangi
Name: Rosario Gangi
Title: President

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WBL Initials_____ Date_____

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CERTIFICATION REGARDING BENEFICIAL OWNERS OF LEGAL ENTITY CUSTOMERS

I. GENERAL INSTRUCTIONS

What is this form?

To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.

Who has to complete this form?

This form must be completed by the person opening a new account on behalf of a legal entity with any of the following U.S. financial institutions: (i) a bank or credit union; (ii) a broker or dealer in securities; (iii) a mutual fund; (iv) a futures commission merchant; or (v) an introducing broker in commodities.

For the purposes of this form, a **legal entity** includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country. **Legal entity** does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

What information do I have to provide?

This form requires you to provide the name, address, date of birth and Social Security number (or passport number or other similar information, in the case of foreign persons) for the following individuals (*i.e.*, the **beneficial owners**):

(i) Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (*e.g.*, each natural person that owns 25 percent or more of the shares of a corporation); **and**

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(ii) An individual with significant responsibility for managing the legal entity customer (*e.g.*, a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of "beneficial owner" may vary. Under section (i), depending on the factual circumstances, up to four individuals (but as few as zero) may need to be identified. Regardless of the number of individuals identified under section (i), you must provide the identifying information of one individual under section (ii). It is possible that in some circumstances the same individual might be identified under both sections (*e.g.*, the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one individual (under section (ii)), and up to five individuals (*i.e.*, one individual under section (ii) and four 25 percent equity holders under section (i)).

The financial institution may also ask to see a copy of a driver's license or other identifying document for each beneficial owner listed on this form.

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II. CERTIFICATION OF BENEFICIAL OWNER(S)

Persons applying for a business loan on behalf of a legal entity must provide the following information:

a. Name and Title of Natural Person Applying for Business Loan:

Rosario Gangi Title: Owner

b. Name and Address of Legal Entity for Which the Business Loan is Being Opened:

Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors
6901 10th Avenue, Brooklyn, NY 11228

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NYSCEF DOC. NO. 6 RECEIVED NYSCEF: 02/10/2020

EXHIBIT E

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CONTINUING GUARANTY, PERSONAL (Unlimited) ("Guaranty")

Dated: 10/12/2018

GUARANTY. For value received, and to induce **Axos Bank,** its successors and/or assigns ("Lender"), with offices at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148 to extend credit or grant or continue other credit accommodations to Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors ("Borrower"), the undersigned ("Guarantor," whether one or more) jointly and severally guarantees payment of the Obligations (defined below) when due or at the time any Borrower becomes the subject of bankruptcy or other insolvency proceedings. Except as provided below, "Obligations" means all debts, obligations and liabilities of Borrower to Lender arising out of credit previously granted, credit contemporaneously granted or credit granted in the future by Lender to Borrower. Obligations include (a) interest, (b) charges, (c) the amount of payments made either to Lender or to another for Lender's benefit, either by or on behalf of Borrower which are recovered from Lender by any party (including, but not limited to, a trustee, receiver or creditor) pursuant to applicable federal or state law, and (d) all costs, expenses and attorneys' fees ("Collection Expenses") at any time paid or incurred (whether before or after judgment) in endeavoring to collect all or part of the Obligations, or to realize upon (i) this Guaranty, (ii) any other guaranty of the Obligations, or (iii) any collateral securing any of the Obligations, including those Collection Expenses which are either (v) incurred in a successful defense or settlement of any counterclaim brought by Borrower or Guarantor or (w) incident to any action or proceeding involving Borrower or Guarantor brought pursuant to the United States Bankruptcy Code. Obligations do not include amounts owed in satisfaction of money loaned for the purpose of funding personal, consumer, family or household transactions. Guarantor grants to Lender a security interest and lien in any credit balance and other money now owing or hereafter owed Guarantor by Lender. Lender may, at any time after the occurrence of an event of default with respect to any Obligation, without prior notice or demand, set off against any such credit balance or other money any amount owing upon the Obligations. This Guaranty also is secured by all existing and future security agreements between Lender and Guarantor, and the titles to the motor vehicles listed on Exhibit 1 to this Guaranty, with respect to which, Guarantor shall ensure that Lender is named as the only lien holder on each such motor vehicle title as of the date of this Guaranty (or the nearest subsequent date as permitted under applicable law).

WAIVER. Guarantor expressly waives (a) notice of the acceptance of this Guaranty, the creation of any present or future Obligation, default under any Obligation, proceedings to collect from the Borrower or anyone else, (b) all diligence of collection and presentment, demand, notice and protest, (c) any right to disclosures from Lender regarding the financial condition of the Borrower or the enforceability of the Obligations, and (d) all other legal and equitable defenses of suretyship and impairment of collateral. No claim, including a claim for reimbursement, subrogation, contribution or indemnification which Guarantor may, as a guarantor of the Obligations, have against a co-guarantor of any of the Obligations or against the Borrower shall be enforced or any payment accepted until the Obligations are paid in full and no payments to or collections by Lender are subject to any right of recovery.

CONSENT. With respect to any of the Obligations, Lender may from time to time before or after revocation of this Guaranty without notice to Guarantor and without affecting the liability of Guarantor (a) surrender, release, impair, sell or otherwise dispose of any security or collateral for the Obligations, (b) release or agree not to sue any guarantor or surety, (c) fail to perfect its security interest in or realize upon any security or collateral, (d) fail to realize upon any of the Obligations or to proceed against any Borrower or any guarantor or surety, (e) renew or extend the time of payment, (f) increase or decrease the rate of interest or the amount of the Obligations, (g) accept additional security or collateral, (h) determine the allocation and application of payments and credits and accept partial payments, (i) apply the proceeds of disposition of any collateral for the Obligations to any obligation of Borrower secured by such collateral in such order and amounts as it elects, (j) determine what, if anything, may at any time be done with reference to any security or collateral, and (k) settle or compromise the amount due or owing or claimed to be due or owing from the Borrower, which settlement or compromise shall not affect Guarantor's liability for the full amount of the unpaid Obligations. Guarantor expressly consents to and waives notice of all of the above. Guarantor consents to and authorizes Lender to obtain business and personal credit bureau reports in Guarantor's name, at any time and from time to time for purposes of deciding whether to approve the business loan requested by Borrower or for any update, renewal, extension of credit to Borrower or other lawful purpose. Guarantor expressly authorizes Lender, agents or designees to report the payment history and loan performance to any national credit bureau for the purpose of inclusion of the related data in Guarantor's consumer credit report. Nothing contained in this Guaranty shall require Lender to first seek or exhaust any remedy against Borrower or to first proceed against any collateral or security for any of the Obligations or this Guaranty.

PERSONS BOUND. This Guaranty benefits and is enforceable by Lender, and its successors and assigns (collectively called "successors" and each a "successor"), and binds Guarantor, and Guarantor's heirs, personal representatives, successors and assigns. This Guaranty shall continue in full force and effect notwithstanding any change in structure or status of Borrower or Lender, whether by merger, consolidation, reorganization or otherwise, or assignment of this Guaranty to a successor Lender.

ENTIRE AGREEMENT. This Guaranty, together with all agreements, instruments and other documents between Lender and Guarantor or related to this Guaranty (collectively, "Guaranty Documents"), is intended by Guarantor and Lender as a final expression

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of this Guaranty and as a complete and exclusive statement of its terms, there being no condition to the full effectiveness of this Guaranty. For the avoidance of doubt, with respect to the subject matter of this Guaranty, the Guaranty Documents constitute the entire understanding and agreement between Lender and Guarantor and no promises, representations or obligations exist between Guarantor and Lender, except as provided herein, and Guarantor has not entered into this Guaranty in reliance upon any representation, warranty or undertaking of Lender or any other person or entity. This Guaranty may not be supplemented or modified, except in writing by Lender.

REPRESENTATIONS. Guarantor acknowledges and agrees that Lender (a) has not made any representations or warranties with respect to, (b) does not assume any responsibility to Guarantor for, and (c) has no duty to provide information to Guarantor regarding, the enforceability of any of the Obligations or the financial condition of the Borrower. **Guarantor has independently determined the creditworthiness of Borrower and the enforceability of the Obligations and until the Obligations are paid in full will independently and without reliance on Lender continue to make such determinations.**

REVOCATION. This is a continuing guaranty and shall remain in full force and effect until Lender receives written notice of its revocation signed by Guarantor or actual notice of the death of Guarantor. Upon revocation by written notice or actual notice of death, this Guaranty shall continue in full force and effect as to all Obligations contracted for or incurred before revocation and, as to them, Lender shall have the rights provided by this Guaranty as if no revocation had occurred. Any renewal, extension or increase in the interest rate of any such Obligation, whether made before or after revocation, shall constitute an Obligation contracted for or incurred before revocation. Obligations contracted for or incurred before revocation shall also include credit extended after revocation pursuant to commitments made before revocation. Revocation by one Guarantor shall not affect any of the liabilities or obligations of any other Guarantor and this Guaranty shall continue in full force and effect with respect to them.

ARBITRATION. Any of the Borrower, Lender or a Guarantor may choose to arbitrate any or all disputes and claims arising out of or relating to this Guaranty or any other related document. A claim includes matters arising as an initial claim, counter-claim, cross-claim, third-party claim, or otherwise. If the Borrower, Lender or a Guarantor chooses to litigate any dispute or claim arising out of or relating to this Guaranty or any related document through a judicial action, the decision to litigate shall not be deemed a waiver of arbitration, and if such judicial action is contested, any party may thereafter invoke its arbitration rights at any time before any discovery is taken in the judicial action. If the Borrower, Lender or a Guarantor seeks to have a dispute resolved by arbitration, that party must first send to the other party or parties by certified mail, a written Notice of Intent to Arbitrate. If Borrower, Lender or Guarantor do not reach an agreement to resolve the claim within 10 days after the Notice is received, any party may commence an arbitration proceeding with the American Arbitration Association ("AAA"). Lender will promptly reimburse Borrower or the Guarantor any arbitration filing fee, however, in the event that both the Borrower and the Guarantor must pay arbitration filing fees, Lender will only reimburse the Borrower's arbitration filing fee and, except as provided in the next sentence, the Lender will pay all arbitration administration and arbitrator fees. If the arbitrator finds that either the substance of any claim raised by Borrower or a Guarantor or the relief sought by Borrower or a Guarantor is improper or not warranted, as measured by the standards set forth in Federal Rule of Procedure 11(b), then Lender will pay the administration and arbitrator fees only if required by the AAA Rules. If the arbitrator grants relief to the Borrower or a Guarantor that is equal to or greater than the value of the relief requested by the Borrower or a Guarantor in the arbitration, Lender shall reimburse Borrower or the Guarantor, as applicable, for that party's reasonable attorneys' fees and expenses incurred for the arbitration. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, GUARANTOR AND LENDER AGREE THAT BY ENTERING INTO THIS GUARANTY, EACH IS WAIVING THEIR RIGHT TO TRIAL BY JURY. GUARANTOR AND LENDER MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF REPRESENTATIVE OR CLASS MEMBER IN ANY PURPORTED REPRESENTATIVE OR CLASS PROCEEDING. Further, Guarantor and Lender agree that the arbitrator may not consolidate proceedings for more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific provision is found unenforceable, then the entirety of this arbitration clause shall be null and void. Any award by the individual arbitrator shall be final and binding, except for any appeal right under the Federal Arbitration Act ("FAA"), and may be entered and enforceable as a judgment in any court of competent jurisdiction, including as a judgment that permits Lender to initiate or complete the exercise of its remedies against, or its realization or foreclosure upon, the Collateral. This arbitration provision is made pursuant to a transaction in interstate commerce, and shall be governed by the FAA at 9 U.S.C. section 1 *et seq.*

INTERPRETATION. Lender is an FDIC insured federal savings association. CONSEQUENTLY, THIS GUARANTY WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES. The legality, enforceability and interpretation of this Guaranty and the amounts guaranteed will be governed by such laws.

JURISDICTION. Guarantor irrevocably consents with respect to any suit, action or proceeding relating to this Guaranty or any of the other loan documents relating to the Obligations, that venue shall be in the state (or commonwealth, as the case may be) of Borrower's principal place of business ("Borrower's State") and Guarantor waives personal service of process and agrees that a summons and

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complaint commencing an action or proceeding in any such court shall be properly served and confer personal jurisdiction if served by registered or certified mail to Guarantor at the address specified by Guarantor above, or as otherwise provided by the laws of the Borrower's State or the United States of America. Guarantor agrees that venue is proper in such courts and waives, to the full extent permitted by applicable law, any defense of an inconvenient forum to the extent any suit, action or proceeding is brought in such courts.

VALIDITY. This Guaranty is valid and enforceable against Guarantor even if any Obligation is determined to be invalid or unenforceable against the Borrower.

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JURY WAIVER

GUARANTOR KNOWINGLY AND VOLUNTARILY WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM BASED UPON, ARISING OUT OF OR IN ANY WAY RELATING TO THIS GUARANTY, THE OBLIGATIONS GUARANTEED BY THIS GUARANTY OR ANY CONDUCT, ACT OR OMISSION OF LENDER, AND AGREES AND CONSENTS THAT ANY SUCH ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY. GUARANTOR ACKNOWLEDGES AND UNDERSTANDS THAT THIS WAIVER AND CONSENT CONSTITUTES A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THE TRANSACTION WITH THE BORROWER.

Guarantor Rosario Gangi

DocuSigned by:
Rosario Gangi
26CDF084ED34441...

[Remainder of page is blank. Signature page(s) follow(s).]

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Signature Page of Rosario Gangi for Continuing Guaranty, Personal (Unlimited)

NOTICE TO GUARANTOR

You are being asked to guarantee the past, present and future Obligations of Borrower. If Borrower does not pay, you will have to. You may also have to pay collection costs. Lender can collect the Obligations from you without first trying to collect from Borrower or another guarantor or proceeding against any collateral or other security for the Obligations.

(Guarantor Name) Rosario Gangi

(Guarantor Signature) DocuSigned by: Rosario Gangi 26CDF084ED34441...

ACKNOWLEDGEMENT

STATE/COMMONWEALTH OF _____)
) ss.
COUNTY OF _____)

On the _____ day of _____, in the year ____, before me, the undersigned, a notary public in and for said State/Commonwealth, personally appeared Rosario Gangi, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Continuing Guaranty (Unlimited) and acknowledged to me that she/he executed the same in her/his capacity, and that by her/his signature on the Continuing Guaranty (Unlimited), the individual, or the person upon behalf of which the individual acted, executed the Continuing Guaranty (Unlimited).

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_____
Notary Public

My Commission expires:

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EXHIBIT 1

[NONE]

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EXHIBIT F

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NYC DEPARTMENT OF FINANCE
OFFICE OF THE CITY REGISTER

This page is part of the instrument. The City Register will rely on the information provided by you on this page for purposes of indexing this instrument. The information on this page will control for indexing purposes in the event of any conflict with the rest of the document.

2018102301283001001E6FD5

RECORDING AND ENDORSEMENT COVER PAGE **PAGE 1 OF 17**

Document ID: 2018102301283001 Document Date: 10-12-2018 Preparation Date: 10-23-2018
Document Type: MORTGAGE
Document Page Count: 15

PRESENTER:	**RETURN TO:**
WORLD WIDE LAND TRANSFER 8 NESHAMINY INTERPLEX DRIVE SUITE 117 (LT2698-NY) TREVOSE, PA 19053 215-245-5650 ORDERS@WORLDWIDELANDTRANSFER.COM	WORLD WIDE LAND TRANSFER 8 NESHAMINY INTERPLEX DRIVE SUITE 117 (LT2698-NY) TREVOSE, PA 19053 215-245-5650 ORDERS@WORLDWIDELANDTRANSFER.COM

PROPERTY DATA

Borough	Block	Lot	Unit	Address
BROOKLYN	5945	55	Entire Lot	983 76TH STREET

Property Type: DWELLING ONLY - 1 FAMILY

CROSS REFERENCE DATA

CRFN_____ *or* DocumentID_____ *or* _____ Year____ Reel____ Page____ *or* File Number_____

PARTIES

MORTGAGOR/BORROWER:	**MORTGAGEE/LENDER:**
ROSARIO GANGI 983 76TH STREET BROOKLYN, NY 11228	AXOS BANK, ITS SUCCESSORS AND OR ASSIGNS 9205 WEST RUSSELL ROAD, SUITE 400 LAS VEGAS, NV 89148

☒ Additional Parties Listed on Continuation Page

FEES AND TAXES

Mortgage :		
Mortgage Amount:	$	160,000.00
Taxable Mortgage Amount:	$	160,000.00
Exemption:		
TAXES: County (Basic):	$	800.00
City (Additional):	$	1,600.00
Spec (Additional):	$	0.00
TASF:	$	400.00
MTA:	$	450.00
NYCTA:	$	0.00
Additional MRT:	$	0.00
TOTAL:	$	3,250.00
Recording Fee:	$	112.00
Affidavit Fee:	$	0.00

Filing Fee: $ 0.00
NYC Real Property Transfer Tax: $ 0.00
NYS Real Estate Transfer Tax: $ 0.00

RECORDED OR FILED IN THE OFFICE OF THE CITY REGISTER OF THE CITY OF NEW YORK
Recorded/Filed 10-24-2018 14:42
City Register File No.(CRFN): **2018000354592**

City Register Official Signature

FILED: KINGS COUNTY CLERK 02/10/2020 02:50 PM INDEX NO. 500492/2020
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RECORDATION REQUESTED BY:

World Business Lenders, LLC

WHEN RECORDED MAIL TO:

World Business Lenders, LLC
101 Hudson St. 33rd Flr
Jersey City, NJ 07302

SEND TAX NOTICES TO:

World Business Lenders, LLC
101 Hudson St. 33rd Flr
Jersey City, NJ 07302

LT2698-NY

FOR RECORDER'S USE ONLY

MORTGAGE

THIS MORTGAGE dated October 12th, 2018 is made and executed between Rosario Gangi and Leonora Gangi, his wife , whose address is 983 76th Street, Brooklyn, NY 11228 (referred to below as "Mortgagor") and Axos Bank, its Successors and or Assigns whose address is 9205 West Russell Road, Suite 400, Las Vegas, NV 89148(referred to below as "Lender").

GRANT OF MORTGAGE. For valuable consideration, Mortgagor mortgages and conveys to Lender all of Mortgagor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights, watercourses and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, **located in the Town of Brooklyn, County of Kings, State of New York:**

See Exhibit A, which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.

The Real Property or its address is commonly known as 983 76th Street, Brooklyn, NY 11228.

Mortgagor presently assigns to Lender all of Mortgagor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Mortgagor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND

THIS MORTGAGE IS GIVEN TO SECURE THE PAYMENT OF THE INDEBTEDNESS PURSUANT TO THE GUARANTY SECURING THE INDEBTEDNESS EVIDENCED BY THE NOTE.

THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

MORTGAGOR'S WAIVERS. Mortgagor waives all rights or defenses arising by reason of any "one action" or "anti-deficiency" law, or any other law which may prevent Lender from bringing any action against Mortgagor, including a claim for deficiency to the extent Lender is otherwise entitled to a claim for deficiency, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale

MORTGAGOR'S REPRESENTATIONS AND WARRANTIES. Mortgagor warrants that: (a) this Mortgage is executed at Borrower's request and not at the request of Lender; (b) Mortgagor has the full power, right, and authority to enter into this Mortgage and to hypothecate the Property; (c) the provisions of this Mortgage do not conflict with, or result in a default under any agreement or other instrument binding upon Mortgagor and do not result in a violation of any law, regulation, court decree or order applicable to Mortgagor; (d) Mortgagor has established adequate means of obtaining from Borrower on a continuing basis information about Borrower's financial condition; and (e) Lender has made no representation to Mortgagor about Borrower (including without limitation the creditworthiness of Borrower).

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PAYMENT AND PERFORMANCE. Except as otherwise provided in this Mortgage, Mortgagor shall pay to Lender all Indebtedness secured by this Mortgage as it becomes due, and Mortgagor and Mortgagor shall strictly perform all Mortgagor's and Mortgagor's obligations under this Mortgage.

POSSESSION AND MAINTENANCE OF THE PROPERTY. Mortgagor agrees that Mortgagor's possession and use of the Property shall be governed by the following provisions:

Possession and Use. Until the occurrence of an Event of Default, Mortgagor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property.

Duty to Maintain. Mortgagor shall maintain the Property in good condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

Compliance With Environmental Laws. Mortgagor represents and warrants to Lender that: (1) During the period of Mortgagor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Mortgagor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Mortgagor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Mortgagor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Mortgagor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Mortgagor or to any other person. The representations and warranties contained herein are based on Mortgagor's due diligence in investigating the Property for Hazardous Substances. Mortgagor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Mortgagor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Mortgagor's ownership or interest in the Property, whether or not the same was or should have been known to Mortgagor. The provisions of this section of the Mortgage, including the obligation to indemnify and defend, shall survive the payment of the Indebtedness and the satisfaction and reconveyance of the lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

Nuisance, Waste. Mortgagor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Mortgagor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

Removal of Improvements. Mortgagor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Mortgagor to make arrangements satisfactory to Lender to replace such Improvements with Improvements of at least equal value.

Lender's Right to Enter. Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Mortgagor's compliance with the terms and conditions of this Mortgage.

Compliance with Governmental Requirements. Mortgagor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property. Mortgagor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Mortgagor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Mortgagor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

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Duty to Protect. Mortgagor agrees neither to abandon or leave unattended the Property. Mortgagor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

DUE ON SALE - CONSENT BY LENDER. Lender may, at Lender's option, declare immediately due and payable all sums secured by this Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by New York law.

TAXES AND LIENS. The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

Payment. Mortgagor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Mortgagor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.

Right to Contest. Mortgagor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Mortgagor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Mortgagor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Mortgagor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Mortgagor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

Evidence of Payment. Mortgagor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

Notice of Construction. Mortgagor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Mortgagor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Mortgagor can and will pay the cost of such improvements.

PROPERTY DAMAGE INSURANCE. The following provisions relating to insuring the Property are a part of this Mortgage:

Maintenance of Insurance. Mortgagor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all Improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Mortgagor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be cancelled or diminished without a minimum of thirty (30) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Mortgagor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Mortgagor agrees to obtain and maintain Federal Flood Insurance, if available, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

Application of Proceeds. Mortgagor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Mortgagor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's

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security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the Indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Mortgagor shall repair or replace the damaged or destroyed Improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Mortgagor from the proceeds for the reasonable cost of repair or restoration if Mortgagor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the Indebtedness. If Lender holds any proceeds after payment in full of the Indebtedness, such proceeds shall be paid to Mortgagor as Mortgagor's interests may appear.

LENDER'S EXPENDITURES. If Mortgagor fails (A) to keep the Property free of all taxes, liens, security interests, encumbrances, and other claims, (B) to provide any required insurance on the Property, or (C) to make repairs to the Property then Lender may do so. If any action or proceeding is commenced that would materially affect Lender's interests in the Property, then Lender on Mortgagor's behalf may, but is not required to, take any action that Lender believes to be appropriate to protect Lender's interests. All expenses incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Mortgagor. All such expenses will become a part of the Indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Indebtedness secured by the Guaranty and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Mortgage also will secure payment of these amounts. The rights provided for in this paragraph shall be in addition to any other rights or any remedies to which Lender may be entitled on account of any default and shall be exercisable by Lender to the extent permitted by applicable law. Any such action by Lender shall not be construed as curing the default so as to bar Lender from any remedy that it otherwise would have had.

WARRANTY; DEFENSE OF TITLE. The following provisions relating to ownership of the Property are a part of this Mortgage:

Title. Mortgagor warrants that: (a) Mortgagor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender, or have otherwise been previously disclosed to and accepted by Lender in writing in connection with this Mortgage, and (b) Mortgagor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

Defense of Title. Subject to the exception in the paragraph above, Mortgagor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Mortgagor's title or the interest of Lender under this Mortgage, Mortgagor shall defend the action at Mortgagor's expense. Mortgagor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Mortgagor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

Compliance With Laws. Mortgagor warrants that the Property and Mortgagor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

Survival of Promises. All promises, agreements, and statements Mortgagor has made in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature and shall remain in full force and effect until such time as the Indebtedness is paid in full.

CONDEMNATION. The following provisions relating to condemnation proceedings are a part of this Mortgage:

Proceedings. If any proceeding in condemnation is filed, Mortgagor shall promptly notify Lender in writing, and Mortgagor shall promptly take such steps as may be necessary to defend the action and obtain the award. Mortgagor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Mortgagor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

Application of Net Proceeds. If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the Indebtedness or the repair or restoration of the Property. The net

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proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES. The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

Current Taxes, Fees and Charges. Upon request by Lender, Mortgagor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Mortgagor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

Taxes. The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the Indebtedness secured by this Mortgage; (2) a specific tax on Borrower which Borrower is authorized or required to deduct from payments on the Indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the Indebtedness or on payments of principal and interest made by Borrower.

Subsequent Taxes. If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Mortgagor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

SECURITY AGREEMENT; FINANCING STATEMENTS. The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

Security Agreement. This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

Security Interest. Upon request by Lender, Mortgagor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Mortgagor, file executed counterparts, copies or reproductions of this Mortgage as a financing statement. Mortgagor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Mortgagor shall not remove, sever or detach the Personal Property from the Property. Upon default, Mortgagor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Mortgagor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

Addresses. The mailing addresses of Mortgagor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Mortgage may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

FURTHER ASSURANCES; ATTORNEY-IN-FACT. The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

Further Assurances. At any time, and from time to time, upon request of Lender, Mortgagor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Mortgagor's obligations under the Guaranty, this Mortgage, and the Related Documents, and (2) the liens and security interests created by this Mortgage, whether now owned or hereafter acquired by Mortgagor. Unless prohibited by law or Lender agrees to the contrary in writing, Mortgagor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

Attorney-in-Fact. If Mortgagor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Mortgagor and at Mortgagor's expense. For such purposes, Mortgagor hereby irrevocably appoints Lender as Mortgagor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

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FULL PERFORMANCE. If Borrower and Mortgagor pay all the Indebtedness when due, and Mortgagor otherwise performs all the obligations imposed upon Mortgagor under this Mortgage, Lender shall execute and deliver to Mortgagor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property. Mortgagor will pay, if permitted by applicable law, any reasonable termination fee as determined by Lender from time to time.

EVENTS OF DEFAULT. Each of the following and each Event of Default (as defined in the Note) described in Section 8 of the Note, at Lender's option, shall constitute an Event of Default under this Mortgage:

Payment Default. Borrower or Mortgagor fail to make any payment when due under the Indebtedness.

Default on Other Payments. Failure of Mortgagor within the time required by this Mortgage to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

Break Other Promises. Borrower or Mortgagor breaks any promise made to Lender or fails to perform promptly at the time and strictly in the manner provided in this Mortgage or in any agreement related to this Mortgage.

False Statements. Any representation or statement made or furnished to Lender by Borrower or Mortgagor or on Borrower's or Mortgagor's behalf under this Mortgage or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished.

Defective Collateralization. This Mortgage or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Death or Insolvency. The death of Mortgagor, the insolvency of Borrower or Mortgagor, the appointment of a receiver for any part of Borrower's or Mortgagor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower or Mortgagor.

Taking of the Property. Any creditor or governmental agency tries to take any of the Property or any other of Borrower's or Mortgagor's property in which Lender has a lien. This includes taking of, garnishing of or levying on Borrower's or Mortgagor's accounts with Lender. However, if Borrower or Mortgagor disputes in good faith whether the claim on which the taking of the Property is based is valid or reasonable, and if Borrower or Mortgagor gives Lender written notice of the claim and furnishes Lender with monies or a surety bond satisfactory to Lender to satisfy the claim, then this default provision will not apply.

Breach of Other Agreement. Any breach by Mortgagor or Mortgagor under the terms of any other agreement between Mortgagor or Mortgagor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Mortgagor or Mortgagor to Lender, whether existing now or later.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the Indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Debt Service Coverage Ratio. Borrower's failure to maintain a Debt Service Coverage Ratio of not less than 1.50 to 1, measured annually at the end of the fiscal year; the term "**Debt Service Coverage Ratio**" shall mean the ratio of (i) Borrower's operating earnings before interest, taxes, depreciation, and amortization expenses to (ii) the current portion of Borower's debt plus interest expense associated with the current portion of Borrower's long term debt;

RIGHTS AND REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

Accelerate Indebtedness. Lender shall have the right at its option without notice to Borrower or Mortgagor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty that Borrower would be required to pay.

UCC Remedies. With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

Collect Rents. Lender shall have the right, without notice to Mortgagor, to take possession of the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the

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Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Mortgagor irrevocably designates Lender as Mortgagor's attorney-in-fact to endorse instruments received in payment thereof in the name of Mortgagor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Judicial Foreclosure. Lender may obtain a judicial decree foreclosing Mortgagor's interest in all or any part of the Property.

Nonjudicial Sale. If permitted by applicable law, Lender may foreclose Mortgagor's interest in all or in any part of the Personal Property or the Real Property by non-judicial sale.

Deficiency Judgment. If permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section.

Tenancy at Sufferance. If Mortgagor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Borrower or Mortgagor, Mortgagor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

Other Remedies. Lender shall have all other rights and remedies provided in this Mortgage or the Note or available at law or in equity.

Sale of the Property. To the extent permitted by applicable law, Mortgagor hereby waives any and all right to have the Property marshalled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

Notice of Sale. Lender will give Mortgagor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

Insurance Policies. Lender shall have the right upon an Event of Default, but not the obligation, to assign all of Mortgagor's right, title and interest in and to all policies of insurance on the Property and any unearned premiums paid on such insurance to any receiver or any purchaser of the Property at a foreclosure sale, and Mortgagor hereby appoints Lender as attorney in fact to assign and transfer such policies.

Election of Remedies. All of Lender's rights and remedies will be cumulative and may be exercised alone or together. An election by Lender to choose any one remedy will not bar Lender from using any other remedy. If Lender decides to spend money or to perform any of Mortgagor's obligations under this Mortgage, after Mortgagor's failure to do so, that decision by Lender will not affect Lender's right to declare Mortgagor in default and to exercise Lender's remedies.

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment

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collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. However, Mortgagor will only pay attorneys' fees of an attorney not Lender's salaried employee, to whom the matter is referred after Mortgagor's default. Mortgagor also will pay any court costs, in addition to all other sums provided by law.

NOTICES. Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. All copies of notices of foreclosure from the holder of any lien which has priority over this Mortgage shall be sent to Lender's address, as shown near the beginning of this Mortgage. Any person may change his or her address for notices under this Mortgage by giving formal written notice to the other person or persons, specifying that the purpose of the notice is to change the person's address. For notice purposes, Mortgagor agrees to keep Lender informed at all times of Mortgagor's current address. Unless otherwise provided or required by law, if there is more than one Mortgagor, any notice given by Lender to any Mortgagor is deemed to be notice given to all Mortgagors. It will be Mortgagor's responsibility to tell the others of the notice from Lender.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Mortgage:

Amendments. What is written in this Mortgage and in the Related Documents is Mortgagor's entire agreement with Lender concerning the matters covered by this Mortgage. To be effective, any change or amendment to this Mortgage must be in writing and must be signed by whoever will be bound or obligated by the change or amendment.

Caption Headings. Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

Governing Law. The creation, perfection, priority and enforcement of the security interest created pursuant to this Mortgage shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York ("Property Jurisdiction") without regard to the conflict of laws provisions of the Property Jurisdiction. The provisions of this Mortgage relating to the obligations secured hereby or to any agreement, instrument or document giving rise to the obligations secured hereby shall be governed by and construed and interpreted in accordance with, the governing law of the Note. Nothing in this Mortgage shall be construed or interpreted to provide that any other agreement, instrument or document shall be governed by the laws of the Property Jurisdiction. Mortgagor (a) agrees that any suit, action or proceeding arising out of or relating to this Mortgage may be brought in a state court of record or a federal court of record in the county of Kings (b) consents to the jurisdiction of each such court in any such suit, action or proceeding, (c) waives any objection to the laying of venue of any such suit, action or proceeding in any such court, (d) waives any claim that any such suit, action or proceeding has been brought in an inconvenient forum, (e) waives any other venue to which it might be entitled for any such suit, action or proceeding by virtue of citizenship, domicile, habitual residence or otherwise, (f) consents to the service of any process in any such suit, action or proceeding at its address provided herein, and (g) agrees that nothing in this Mortgage waives the Lender's choice of venue under any other agreement, instrument or document. Nothing in this Mortgage shall prevent Lender from bringing any suit, action or proceeding, enforcing any award or judgment, or exercising any right or remedy against Borrower or against any security or collateral for the obligations of Borrower to Lender, within any other county or state, or any other foreign or domestic jurisdiction.

Interpretation. Whenever possible, each provision of this Mortgage shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Mortgage shall be unenforceable or prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such unenforceability, prohibition or invalidity, without invalidating the remaining provisions of this Mortgage.

Joint and Several Liability. All obligations of Mortgagor under this Mortgage shall be joint and several, and all references to Mortgagor shall mean each and every Mortgagor, and all references to Mortgagor shall mean each and every Mortgagor. This means that each Mortgagor signing below is responsible for all obligations in this Mortgage.

No Waiver by Lender. Mortgagor understands Lender will not give up any of Lender's rights under this Mortgage unless Lender does so in writing. The fact that Lender delays or omits to exercise any right will not mean that Lender has given up that right. If Lender does agree in writing to give up one of Lender's rights, that does not

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mean Mortgagor will not have to comply with the other provisions of this Mortgage. Mortgagor also understands that if Lender does consent to a request, that does not mean that Mortgagor will not have to get Lender's consent again if the situation happens again. Mortgagor further understands that just because Lender consents to one or more of Mortgagor's requests, that does not mean Lender will be required to consent to any of Mortgagor's future requests. Mortgagor waives presentment, demand for payment, protest, and notice of dishonor.

Severability. If a court finds that any provision of this Mortgage is not valid or should not be enforced, that fact by itself will not mean that the rest of this Mortgage will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Mortgage even if a provision of this Mortgage may be found to be invalid or unenforceable.

Merger. There shall be no merger of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

Successors and Assigns. Subject to any limitations stated in this Mortgage on transfer of Mortgagor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Mortgagor, Lender, without notice to Mortgagor, may deal with Mortgagor's successors with reference to this Mortgage and the Indebtedness by way of forbearance or extension without releasing Mortgagor from the obligations of this Mortgage or liability under the Indebtedness.

Time is of the Essence. Time is of the essence in the performance of this Mortgage.

Waiver of Homestead Exemption. Mortgagor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of New York as to all Indebtedness secured by this Mortgage.

Changes in Laws Regarding Taxation. In the event of the passage after the date of this Mortgage of any law of the State of New York deducting from the value of real property for the purpose of taxation any lien or encumbrance thereon or changing in any way the laws for the taxation of mortgages or debts secured by mortgages for state or local purposes or the manner of the collection of any such taxes, and imposing a tax, either directly or indirectly, on this Mortgage, the Note or the Indebtedness, Mortgagor shall, if permitted by law, pay any tax imposed as a result of any such law within the statutory period or within fifteen (15) days after demand by Lender, whichever is less, provided, however, that if, in the opinion of the attorneys for Lender, Mortgagor is not permitted by law to pay such taxes, Lender shall have the right, at its option, to declare the Indebtedness due and payable on a date specified in a prior notice to the Mortgagor of not less than thirty (30) days.

Offsets, Counterclaims and Defenses. Any assignee of this Mortgage, the Note and the Guaranty shall take the same free and clear of all offsets, counterclaims or defenses of any nature whatsoever which the Mortgagor may have against any assignor of this Mortgage and the Note, and no such offset, counterclaim or defense shall be interposed or asserted by the Mortgagor in any action or proceeding brought by any such assignee upon this Mortgage, the Note or the Guaranty and any such right to interpose or assert any such offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by the Mortgagor.

Maximum Debt Secured. Notwithstanding anything to the contrary contained in this Mortgage, the maximum amount of the principal indebtedness secured by this Mortgage at execution or which under any contingency may become secured by this Mortgage is **$160,000.00 (One Hundred And Sixty Thousand Dollars)**, plus all amounts expended by Lender after default by the Mortgagor, as hereinabove set forth in this paragraph plus unpaid interest on the obligations secured hereby.

Filing of Mortgage. The Mortgagor forthwith upon the execution and delivery of this Mortgage and thereafter, from time to time, will cause this Mortgage, and any security instrument creating a lien or evidencing the lien hereof upon the Real Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect, preserve and perfect the lien hereof upon, and the interest of the Lender in the Real Property. The Mortgagor will pay all filing, registration and recording fees, and all expenses incident to the preparation, execution and acknowledgment of this Mortgage, any mortgage supplemental hereto, any security instrument with respect to the Real Property, and any instrument of further assurance, and all Federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Mortgage, any mortgage supplemental hereto, any security instrument with respect to the Real Property or any instrument of further assurance. The Mortgagor shall hold harmless and indemnify the Lender, its successors and assigns, against any liability incurred by reason of the imposition of any tax on the making and recording of this Mortgage.

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Usury Laws. This Mortgage and the Note are subject to the express condition that at no time shall the Borrower or Mortgagor be obligated or required to pay interest on the principal balance due under the Note at a rate which could subject the holder of the Note to either civil or criminal liability as a result of being in excess of the maximum interest rate which the Mortgagor is permitted by law to contract or agree to pay. If by the terms of this Mortgage or the Note, the Mortgagor or Borrower is at any time required or obligated to pay interest on the principal balance due under the Note at a rate in excess of such maximum rate, the rate of interest under the Note shall be deemed to be immediately reduced to such maximum rate and the interest payable shall be computed at such maximum rate and all prior interest payments in excess of such maximum rate shall be applied and shall be deemed to have been payments in reduction of the principal balance of the Note.

Absolute and Unconditional Obligation. The Mortgagor acknowledges that the Mortgagor's obligation to pay the Indebtedness in accordance with the provision of the Guaranty and this Mortgage is and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to the Note, Guaranty or this Mortgage, and the Mortgagor absolutely, unconditionally and irrevocably waives any and all right to assert any defense, setoff, counterclaim (except any counterclaim that would be waived if not asserted) or crossclaim of any nature whatsoever with respect to the obligation of the Mortgagor to pay the Debt in accordance with the provisions of the Note, Guaranty.

Trust Fund. Pursuant to Section 13 of the Lien Law of New York, the Mortgagor shall receive the advances secured hereby and shall hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of any improvement and shall apply such advances first to the payment of the cost of any such improvement on the Real Property before using any part of the total of the same for any other purpose.

Waiver of Statutory Rights. The Mortgagor shall not and will not apply for or avail itself of any appraisement, valuation, stay, extension or exemption laws, or any so-called "Moratorium Laws," now existing or hereafter enacted, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, but hereby waives the benefit of such laws to the full extent that the Mortgagor may do so under applicable law. The Mortgagor for itself and all who may claim through or under it waives any and all right to have the property and estates comprising the Real Property marshaled upon any foreclosure of the lien of this Mortgage and agrees that any court having jurisdiction to foreclose such lien may order the Real Property sold as an entirety. The Mortgagor hereby waives for itself and all who may claim through or under it, and to the full extent the Mortgagor may do so under applicable law, any and all rights of redemption from sale under any order of decree of foreclosure of this Mortgage or granted under any statute now existing or hereafter enacted.

DEFINITIONS. The following words shall have the following meanings when used in this Mortgage:

Borrower. The word "Borrower" means **Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors.** and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto, or common law, and shall also include pollutants, contaminants, polychlorinated biphenyls, asbestos, urea formaldehyde, petroleum and petroleum products, and agricultural chemicals.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Mortgage in the events of default section of this Mortgage.

Mortgagor. The word "Mortgagor" means **Rosario Gangi and Leonora Gangi, his wife.**

Guaranty. The word "Guaranty" means the Continuing Guaranty (Unlimited) from Mortgagor to Lender dated **October 12th, 2018.**

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and

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include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

Indebtedness. The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Mortgagor's obligations or expenses incurred by Lender to enforce Mortgagor's obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage.

Lender. The word "Lender" means **Axos Bank**, its successors and or assigns. The words "successors or assigns" mean any person or company that acquires any interest in the Note.

Mortgage. The word "Mortgage" means this Mortgage between Mortgagor and Lender.

Note. The word "Note" means the Business Promissory Note and Security Agreement dated **October 12th, 2018**, in the original principal amount of **$160,000.00** from Mortgagor to Lender, together with all renewals, extensions, modifications, refinancing, consolidations, and substitutions thereof.

Personal Property. The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Mortgagor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

Property. The word "Property" means collectively the Real Property and the Personal Property.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, including the Guaranty, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

Rents. The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

[SIGNATURE PAGE TO FOLLOW; REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

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Borrower's Statement Regarding the Property [check box as applicable].

☒ This Security Instrument covers real property improved, or to be improved, by a one or two family dwelling only.

☐ This Security Instrument covers real property principally improved, or to be improved, by one or more structures containing, in the aggregate, not more than six residential dwelling units with each dwelling unit having its own separate cooking facilities.

☐ This Security Instrument does not cover real property improved as described above.

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MORTGAGOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND MORTGAGOR AGREES TO ITS TERMS.

MORTGAGOR: Rosario Gangi

INDIVIDUAL ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

On the 24 day of OCTOBER, 2019, before me, the undersigned, a notary public in and for said state, personally appeared ROSARIO GANGI, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Eugenio Enrique Madeam
Notary Public - State of New York
No. 01MA6013827
Qualified in Kings County
My Commission Expires January 31,2022

Notary Public

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MORTGAGOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND MORTGAGOR AGREES TO ITS TERMS.

MORTGAGOR: Leonora Gangi

Leonora Gangi

INDIVIDUAL ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

On the 24 day of OCTOBER, 20 19, before me, the undersigned, a notary public in and for said state, personally appeared LEONORA GANGI, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Eugenio Enrique Madeam
Notary Public - State of New York
No. 01MA4613827
Qualified in Kings County
My Commission Expires January 31,2022

Notary Public

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Exhibit A

LEGAL DESCRIPTION

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

BEGINNING at a point on the northeasterly side of 76th Street, distant 111 feet 8 inches northwesterly from the corner formed by the intersection of the northeasterly side of 76th Street with the northwesterly side of 10th Avenue;

running thence NORTHEASTERLY parallel with 10th Avenue and part of the distance through a garage party wall built or intended to be built, 100 feet;

thence NORTHWESTERLY parallel with 76th Street 17 feet 10 inches;
thence SOUTHWESTERLY again parallel with 10th Avenue and part of the distance through a party wall, 100 feet to the northeasterly side of 76th Street; and

thence SOUTHEASTERLY along said northeasterly side of 76th Street 17 feet 10 inches to the point or place of BEGINNING.

TOGETHER with an easement or right of way in favor of the owner of the above described premises over the most northwesterly 3 feet 6 inches of the premises adjoining on the southeast for the purpose of ingress and egress for pleasure automobiles to and from a garage built or intended to be built in the rear of the premises herein described.

Parcel ID: BLOCK: 5945 LOT: 55

Commonly Known As: 983 76th Street, Brooklyn, NY 11228

**Exhibit 2 to Malyshev Affirmation-
Gangi Parties' Amended Answer with Counterclaims, filed
in the First Action on November 4, 2020
[pp. 161 - 167]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

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AMENDED ANSWER

Defendants MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI, by their and its attorneys, Law Offices of Adam J. Roth, answering the Complaint of Plaintiff, upon information and belief, respectfully shows to this Court and alleges:

Answering the First Cause of Action

1. Denies having knowledge or information sufficient to form a belief as to the allegations contained within paragraphs 1, 2, 3, 9, 14, 15, 16, 18, 19, 22, 23, 35 and 37.

2. Denies and begs leave to refer questions of law to the Court contained within paragraphs 11, 12, 13, 20, 25, 26, 27, 28, 30, 33, 34 (a-e), 36 and 38.

3. Denies each and every allegation contained in paragraphs 7, 10, 29, 31, 32

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4. Denies each and every allegation contained in paragraph 4 and states that Axos Bank is based in California, with its headquarters being located at 4350 La Jolla Village Drive, Suite 140, San Diego, California 92122.

5. Admits the allegations contained in paragraphs 5, 6, 8, 17, 21, 24,

Answering the Second Cause of Action

6. In response to paragraph "39", the within defendants repeat and re-allege each admission or denial made herein with the same force and effect herein as to paragraphs "1" through "38" as though the same were more fully set forth herein at length.

7. Denies each and every allegation contained in paragraphs "40" and "41 (a-e)" and respectfully refers all questions of law to the Court.

Answering the Third Cause of Action

8. In response to paragraph "42", the within defendants repeat and re-allege each admission or denial made herein with the same force and effect herein as to paragraphs "1" through "41" as though the same were more fully set forth herein at length.

9. Denies each and every allegation contained in paragraphs "43" and "44" and respectfully refers all questions of law to the Court.

As and for a First Affirmative Defense

10. Failure to properly elect remedies under RPAPL 1301 *et. seq.*

As and for a Second Affirmative Defense

11. From April 3, 2019 through the present plaintiff failed to properly mitigate its damages

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As and for a Third Affirmative Defense

12. The plaintiff's third cause of action fails to state a cause of action from which relief can be granted

As and for a Fourth Affirmative Defense

13. The plaintiff has unclean hands

As and for a Fifth Affirmative Defense

14. Service was improper and plaintiff thus lacks personal jurisdiction

As and for a Sixth Affirmative Defense

15. Both Loan #1 and Loan #2 are void ab initio because they violate the criminal usury statute under New York Penal Law 190.40; and this is permissible as an affirmative defense for Defendant MGPHC, see General Obligations Law 5-521(3).

Counterclaim Against Plaintiff

<u>As and for a First Counterclaim against Plaintiff by Defendants</u>

16. Plaintiff violated NY General Business Law 349(h) because plaintiff engaged in consumer-oriented conduct that was materially misleading and plaintiff suffered an injury as a result.
17. Plaintiff's conduct of providing loans was consumer oriented
18. Plaintiff's conduct of attempting to collect on loans was consumer oriented
19. Plaintiff's attempted assessment of pre-payment penalties was materially misleading
20. On April 3, 2019, June 6, 2019, November 4, 2019 and January 16, 2020, the plaintiff refused to accept payment of the entire amount owed under the notes unless the defendants also paid a prepayment penalty.

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21. As a result, the plaintiffs now claim the defendants owe them several hundreds of thousands of dollars more than they claim were owed to them as of April 3, 2019.
22. Plaintiff's creation of a loan that was doomed to fail was materially misleading
23. Plaintiff's creation of a second loan that was doomed to fail was materially misleading
24. Plaintiff preparing a HUD-1 that states specifically "The loan does not have a prepayment penalty" and showing it to
25. As a result, defendants have lost over $1,000,000 in equity in their properties and are being sued for millions of dollars in unpaid interest payments.
26. Defendants are entitled to treble damages
27. Defendants are entitled to attorneys' fees as a result of the plaintiff's malfeasance.

As and for a Second Counterclaim against Plaintiff by Defendant Josephine Theisen

28. Defendants repeat, reiterate and reallege paragraphs 1 through 15 as though more fully set forth herein.
29. The plaintiff AXOS made (1) a material misrepresentation of fact (2) knowing it was false (3) with the intent to induce reliance (4) justifiable reliance by Jospehine Theisen and (5) causing damage to her.
30. Specifically, on July 5, 2018, the HUD-1 statement represented that there was no pre-payment penalty.

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31. AXOS knew this was false because WBL sent Mr. Gangi disclosures on the day of the closing of the first loan giving him notice that the note included a pre-payment penalty.
32. AXOS intended for Josephine to rely on the HUD-1 because WBL agent, Anne Rougier, told her that since the HUD-1 stated there was no pre-payment penalty there was not one.
33. It was reasonable for Josephine Theisen to rely on the HUD-1 because the agent of WBL told her to rely on the HUD-1.
34. Had Josephine Theisen been told there was a pre-payment penalty, she would not have signed the mortgage.
35. As a result of Josephine Theisen signing the mortgage, she has suffered damages, namely the pending foreclosure and possible loss of her equity in the property located at 1002 Bay Ridge Avenue.
36. Third-party plaintiffs are entitled to punitive damages.
37. Defendants demand trial by jury on the counterclaim.

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WHEREFORE, defendants MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING, AND HEATING CONTRACTORS, ROSARIO, GANGI, JOSEPHINE THEISEN and LEONORA GANGI have been damages in a sum in excess of $75,000.

Dated: November 4, 2020
New York, New York

/s/

Adam J. Roth
Law Offices of Adam J. Roth
Attorney for Defendants
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI
112 Madison Avenue, 6th Floor
New York, New York 10016
212-922-3741
212-253-4157

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Verified Answer

Adam J. Roth, Esq., an attorney admitted to practice in the Courts of this State, and a partner with the Law Offices of Adam J. Roth, P.C., attorney for defendants MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI, states

That your affirmant has read the foregoing Answer and Counterclaims and knows the contents thereof; that the same is true to your affirmant's own knowledge except as to the matters which are stated therein to be alleged on information and belief, and as to those matters your affirmant believes it to be true. The source of your affirmant's information and belief, is an investigation caused to be made with respect to the facts in this action.

The reason this verification is made by affirmant and not by the defendants is because the defendants do not reside within the county where Law Offices of Adam J. Roth, P.C. maintain its primary office.

The undersigned affirms that the foregoing statement is true under the penalties of perjury.

Dated: New York, New York
October 29, 2020

/s
Adam J. Roth

**Exhibit 3 to Malyshev Affirmation-
Gangi Parties' Notice of Impleader, Third Party Summons
and Third Party Complaint, filed in the First Action on
November 3, 2020
[pp. 168 - 194]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Third-Party Plaintiffs,

Index No. 502392/2020

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

NOTICE OF IMPLEADER

----------X

PLEASE TAKE NOTICE, that in the above entitled action pursuant to Rule 3402(b) of the CPLR, the defendants/third-party plaintiffs MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI, by service of a Third Party Summons and Verified Third Party Complaint has impleaded World Business Lenders, New York Tribeca Group, LLC and Larry Shuster as Third-Party defendants and

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that the caption has been changed to read as above entitled. A copy of this statement has been served upon all of the attorneys appearing in this action as of this date. The case has not yet been noticed for trial.

Dated: New York, New York
November 3, 2020

By: _____/s/_____
ADAM J. ROTH
THE LAW OFFICES OF ADAM J. ROTH P.C.
Attorney for Third-Party Plaintiffs Defendants
112 Madison Avenue, 6th Floor
New York, New York 10016
(212) 922-3741

TO:

World Business Lenders
P.O. Box 479
Elmsford, New York 10523

Larry Shuster and New York Tribeca Group
c/o New York Tribeca Group
1120 73rd Road 12G
Forest Hills, New York, 11375

Axos Bank
c/o Carter Ledyard & Milburn
2 Wall Street
New York, New York 10005

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Third-Party Plaintiffs,

Index No. 502392/2020

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

THIRD PARTY SUMMONS

----------X

To the above- named Third-Party Defendants:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not

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personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
November 3, 2020

By: _____/s/_____
ADAM J. ROTH
THE LAW OFFICES OF ADAM J. ROTH P.C.
Attorney for Third-Party Plaintiffs Defendants
112 Madison Avenue, 6th Floor
New York, New York 10016
(212) 922-3741

TO:

World Business Lenders
P.O. Box 479
Elmsford, New York 10523

Larry Shuster
c/o New York Tribeca Group
1120 73rd Road 12G
Forest Hills, New York, 11375

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.
----------X
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Third-Party Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.
----------X

Index No. 502392/2020

THIRD PARTY COMPLAINT

COMPLAINT AND DEMAND FOR TRIAL BY JURY

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1. MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS (hereinafter MGPH), ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI third-party plaintiffs here, were pressured by a group of felons to take a loan, underwritten by an unscrupulous lender who has rented a federal bank regulated by HOLA, that was doomed to fail.
2. In July of 2018, Plaintiff Rosario Gangi's business, Michael Gangi Plumbing and Heating Contractors, Inc., was having some cashflow problems.
3. Mr. Gangi received a fax telling him MGPH was pre-approved for a loan.
4. After calling the number on the fax, Mr. Gangi was directed to Defendant Larry Shuster of New York Tribeca Group.
5. After Mr. Shuster spoke to Mr. Gangi, he repeatedly called and pressured him using boiler room like pressure tactics.
6. Mr. Shuster is familiar with boiler room like pressure tactics because he spent his twenties working in a boiler room, then in a federal prison after pleading guilty to both mail and wire fraud.
7. Mr. Shuster then presented the lending opportunity to World Business Lenders.
8. Mr. Gangi was then contacted by World Business Lenders to discuss his assets that could be used to secure the collateral.
9. During this process, Mr. Shuster would repeatedly call Mr. Gangi and threaten him that his company would go bankrupt and he would be a failure if he did not take the loan.

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10. After determining that Mr. Gangi owned the building where Michael Gangi Plumbing and Heating Contractors, Inc. operated, WBL offered MGPH a loan for $450,000.

11. WBL required the loan be guaranteed by the commercial property which was co-owned by defendants/third-party Rosario Gangi and Josephine Theisen.

12. The business loan itself was for $450,000 at a short-term high interest (86.95% APR) loan requiring daily payments, with automatic withdrawals.

13. Mr. Shuster was paid a commission of over $40,000 for placing the loan.

14. Less than four months later, in October 2018, after defaulting on the first loan, the defendants then gave Rosario Gangi a second loan.

15. This loan was labeled as a business loan and was guaranteed by Mr. Gangi's personal residential property that he co-owns with his wife Leonora Gangi.

16. The second loan itself was for $160,000 at a short-term high interest (103.05% APR) loan requiring daily payments, with automatic withdrawals.

17. This case stands at the intersection of two dangerous trends in the marketing of financial products: (1) placing a home at risk by issuing a financial product doomed to fail; and (2) "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

18. First, since the subprime mortgage crisis fifteen years ago, courts have been dealing with the fallout of mortgages on homes backing loans that were inadequately underwritten and doomed to fail. Regulations have been adopted to protect residential mortgagors, but those regulations can be avoiding by where a loan is designated a business loan.

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19. But framing the loan as a "business loan" cannot exempt these lenders from the scope of New York General Business Law 349(h).

20. It is an unfair and deceptive practice to offer New York residents, such as the plaintiffs, the opportunity to get capital to build their businesses if the loans have an unreasonable risk of failure. It is an unfair and deceptive practice to ask New York residents to put up their homes as collateral for a financial product that the lenders have not adequately underwritten.

21. New York General Business Law 349(h) makes it unlawful to engage in any unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce New York.

22. Loans that are doomed to fail violate New York General Business Law 349(h).

23. Loans with inadequate underwriting violate New York General Business Law 349(h).

24. These principles continue to apply when the borrower is a small business whose owner backs the loan with a mortgage on her home.

25. The second trend is what courts around the country have begun to address "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

26. The loans here, on their face, business loans, requiring substantial daily payments that the documents acknowledged to be equivalent to (86% and 103% APR respectively), backed by a personal guaranty and a mortgage on real estate.

27. Transactions of this structure have been a proprietary part of the business of World Business Lenders, LLC - an alternative finance company that provides short term

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high interest loans backed by personal guarantees and using real estate as collateral - since its inception.

28. All the forms used for this transaction are demonstrably World Business Lender forms.

29. Although plaintiffs were presented with this loan by World Business Lenders (WBL), the transaction documents all attempt to position AXOS as the lender.

30. AXOS is a federal bank organized under the laws of Nevada - a state that has no usury laws.

31. Structuring a loan in the name of a federal bank based out of Nevada is a common scheme that alternative lenders use to take advantage of the legal exemptions for federally chartered banks that otherwise would not be applicable to the alternative lender. Such a scheme is referred to as a "rent-a-bank" or "rent-a-charter" scheme because the alternative finance company is the true lender while the bank receives a fee for the use of its name and charter, but bears no real risk.

32. Plaintiffs seek damages for violations of the New York General Business Law 349(h), fraud and related claims arising out of the transaction.

PARTIES

33. Rosario Gangi resides at 983 76th Street, Brooklyn, New York 11228.

34. Leonora Gangi resides at 983 76th Street, Brooklyn, New York 11228.

35. Josephine Theisen co-owns the property located at 1002 Bay Ridge Avenue and is a resident of the State of New York.

36. Michael Gangi Plumbing and Heating Contractors, Inc. is a corporation with its principal place of business located at 1002 Bay Ridge Avenue.

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37. World Business Lenders, LLC is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 101 Hudson Street, 33rd Floor, Jersey City, NJ, 07302.

38. It now lists its official address as P.O. Box 479, Elmsford, New York 10523.

39. On information and belief, WBL specializes in the product at issue in this case- a business loan backed by a personal guaranty and a mortgage on real estate.

40. In May 2018, World Business Lenders announced a $30MM multi-draw credit facility from a Cayman Islands fund established by a consortium of Asian banks and investors.

41. In connection with that announcement, Robert Pardes, Chief Operating Officer of World Business Lenders stated that "this reaffirms increasingly broad institutional acceptance of our proprietary product and market leading servicing platform."

42. In connection with the same announcement, Matthew Yoon (Managing Director and Head of Asia at Pi Capital International LLC, which advised World Business Lenders with respect to the $30MM facility) said, "This transaction demonstrates desirability, even with cross-border investors of WBL's well-structured proprietary business loan product. WBL's veteran management and underwriting team has created an exciting new secured asset class for investors."

43. On information and belief, the July 5, 2018 and October 12, 2018 loans are an example of the "proprietary product" Pardes and Yoon were describing.

44. Axos Bank ("BOFI") is an FDIC insured institution organized and existing under the laws of Nevada, with a claimed address of 9205 West Russell Road, Suite 400, Las Vegas, NV 89148.

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45. The claimed address is nothing more than a front.

46. Axos actual corporate headquarters is located at 4350 La Jolla Village Drive, Suite 140, San Diego, CA 92122

47. Axos Bank was formerly known as BOFI Federal Bank.

48. New York Tribeca Group, LLC (NYTG) is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 1120 73rd Road 12G, Forest Hills, New York, 11375.

49. Larry Shuster is a convicted felon employed by New York Tribeca Group, his business address is 1120 73rd Road 12G, Forest Hills, New York, 11375.

JURISDICTION AND VENUE

50. World Business Lenders, LLC does business throughout the United States, including in New York.

51. AXOS does business throughout the United States, including in New York.

52. New York Tribeca Group does business throughout the United States, including in New York.

53. Larry Shuster is a New York resident who is an employee of NYTG.

54. Defendants have engaged in tortious conduct in New York.

55. Venue in Kings County is proper because the case involves the rights to real property located in Brooklyn, and thus venue is proper in Kings County.

56. Venue in Kings County is also proper because Plaintiffs entered into this transaction in Kings County.

57. Venue in Kings County is also proper because Plaintiffs are Kings County residents.

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The July 2018 Loan and Transaction

58. In 2018, Mr. Gangi's business was losing money.

59. He had a line of credit with M & T Bank that was almost fully drawn.

60. In June of 2018, Mr. Gangi received a fax for a pre-approved business loan.

61. He called the number and was put in touch with Larry Shuster, a broker New York Tribeca Group, LLC.

62. Larry Shuster pleaded guilty to conspiracy to commit mail and wire fraud in SDNY case #06-cr-857 and served time in a federal prison.

63. On June 14, 2018 Mr. Gangi filled out a one-page loan application to NYTG.

64. NYTG then prepared a pitch deck for a proposed loan to Rosario Gangi

65. Larry Shuster and New York Tribeca Group, LLC contacted World Business Lenders seeking to place the loan.

66. On June 20, 2018, NYTG sent WBL a pitch deck which included three months of bank statements and a detailed analysis of the sale-ability of 1002 Bay Ridge Avenue.

67. NYTG Group initially pitched a $300,000 loan to WBL with weekly payments.

68. On June 22, 2018, WBL emailed Larry Shuster and NYTG telling him it was expediting title.

69. At some point thereafter, Mr. Rosario was approved for a loan in the amount of $450,000.

70. The loan required the building, 1002 Bay Ridge Avenue as collateral.

71. The loan terms required daily business payments of $2,131.96 from July 9, 2018 through January 8, 2020 and a final payment of $2,127.64 on January 9, 2020.

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72. The mortgage states the interest rate is .2367% per day.

73. The APR of the loan was approximately 86%.

74. On July 5, 2018, WBL e-mailed Rosario Gangi with a copy of disclosures and was told to sign via Docusign.

75. Josephine Theisen was never provided with any disclosures.

76. Certain documents were scheduled by WBL to be signed at 1002 Bay Ridge Avenue on July 5, 2018.

77. On July 5, 2018, WBL sent Anne Rougier to 1002 Bay Ridge Avenue as a notary republic.

78. While at the closing, Ms. Rougier called WBL and asked when a representative from WBL would arrive.

79. Upon information and belief, a WBL representative told Ms. Rougier to act as WBL'S agent at the closing.

80. At the closing, Josephine Theisen asked Anne Rougier if there were any pre-payment penalties on the loan.

81. Anne Rougier showed Ms. Theisen the HUD-1 which stated that the loan did not have a prepayment penalty.

82. Ms. Rougier then said, "since the HUD-1 says there is no pre-payment penalty, there cannot be one."

83. Based on Ms. Rougier's representation, who was acting as an agent of WBL, Ms. Theisen signed the mortgage, addendum to mortgage, escrow and deposit agreement, a judgment affidavit, owner's affidavit, and the HUD-1.

84. Ms. Theisen was never provided, nor did she sign, the note.

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85. Neither Mr. Rosario nor Ms. Theisen ever spoke with or communicated with anyone from Axos Bank.

86. After Ms, Rougier obtained and notarized the signatures, she forwarded the documents to WBL.

87. WBL then recorded the mortgage on July 10, 2018 on behalf of Axos.

88. Axos then transferred title to WBL on April 25, 2019

89. On November 19, 2019 WBL transferred title back to Axos.

90. As a result of "brokering" the transaction, Larry Shuster and NYTG was paid $40,500.

The October 2018 Loan and Transaction

91. By October 2018, Mr. Rosario was unable to make the daily payments.

92. Mr. Rosario contacted Larry Shuster and NYTG again about the possibility of another loan.

93. Mr. Rosario advised Mr. Shuster his personal residence had equity available to secure an additional loan.

94. Mr. Shuster again pitched WBL on another loan.

95. WBL then began its underwriting.

96. WBL determined that Mr. Gangi, if approved for the second loan, would have a loan to debt service ratio of 44% on day one.

97. WBL also noted that Mr. Gangi's business had lost over $10,000 per month for the preceding four months prior to the second loan and his business account was overdrawn by $110,000.

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98. There were several phone calls with WBL where they advised him he could lose his personal residence if he defaulted on the second loan.

99. At the time he requested the second loan, Mr. Gangi was already in default on his first loan.

100. Notwithstanding the fact that WBL knew Mr. Gangi could not make payments on his first loan, they issued a second loan for $160,000 secured by his residence, 983 76th Street, Brooklyn, New York.

101. Mr. Gangi never had a lawyer review any of the second loan documents.

102. On October 12, 2018, Mr. Rosario was e-mailed the note and disclosures which he signed via Docusign.

103. Leonora Gangi was never shown the note nor the disclosures at any time prior to, during or after the closing.

104. On October 12, 2018, WBL sent a notary public named Eugenio Enrique Madeam to witness the documents.

105. WBL did not send any other employees or agents to the closing.

106. At the closing, Leonora Gangi was presented with and signed the mortgage, guaranty and other documents, but was never shown the note or advised about the pre-payment penalty.

107. Had Ms. Gangi been advised about the pre-payment penalty, she would not have signed the mortgage.

108. Thereafter, the loan was funded by WBL.

Default and The Assessment of Pre-Payment Penalties

109. Shortly after receiving the second loan, Mr. Gangi and MGPH went into default.

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110. In April of 2019, Josephine Theisen and Rosario Gangi contacted WBL to request a pay-off amount.

111. On April 4, 2019, WBL sent a pay-off letter demanding payment in full and assessing a pre-payment penalty on both loans.

112. On April 4, 2019, Mr. Gangi and Ms. Theisen offered to pay both loans in full less the prepayment penalty.

113. WBL refused to accept any amount less than the full amount due along with the pre-payment penalties.

114. An offer was made to purchase 1002 Bay Ridge Avenue in May of 2019.

115. Notwithstanding the guarantee of full re-payment of the loan amount including the interest, in June of 2019, WBL refused to take any amount less than the total amount due along with the pre-payment penalties.

116. Gangi, Theisen and MGPH would have paid the loans off in full (including all principal and interest) starting in April 2019 but WBL refused insisting that the pre-payment penalty also be paid.

117. WBL sent pay-off letters demanding pre-payment penalty on April 4, 2019, June 6, 2019, October 4, 2019 and in early January 2020.

118. Under WBL's proposed payment plan, the plaintiffs would have had to sell 1002 Bay Ridge Avenue and still owed tens of thousands of dollars to defendants.

119. On January 30, 2020, Axos Bank filed for foreclosure on both 1002 Bay Ridge Avenue and 983 76th Street.

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AS AND FOR A FIRST CAUSE OF ACTION BY ALL THIRD-PARTY PLAINTIFFS UNDER NEW YOK GENERAL BUSINESS LAW 349(H)

120. The third-party plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

121. The defendants each violated New York General Business Law 349(h).

122. Specifically, Defendants Axos, WBL, NYTG and Larry Shuster engaged in (1) consumer-oriented conduct (2) that was materially misleading (3) that caused third-party plaintiffs' injury.

123. Specifically, placing loans that are available to every resident in New York state is consumer-oriented conduct. Sending targeted communications to potential customers is consumer-oriented conduct. *Plavin v. Group Health, Inc.*, 35 NY3d 1 (NY 2020).

124. The conduct was materially misleading because the apparent representative of WBL and AXOS told Josephine Theisen there was no pre-payment penalty. *See Hud-1* attached as Exhibit 1.

125. Furthermore, the conduct was materially misleading because WBL, AXOS and NYTG never provided a copy of the note or disclosures to Leonora Gangi or Josephine Theisen.

126. Additionally, the conduct was materially misleading as to Rosario Gangi and MGPH because WBL, AXOS and NYTG knew when the loans were written that they were doomed to fail. *See Kaur et. al. v. World Business Lenders, LLC et. al.* 19-cv-11364 (USDC Mass. February 24, 2020) [denying motion to dismiss by World Business Lenders and Axos because they knowingly wrote loans that were doomed to fail].

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127. Plaintiffs MGPH suffered damage as a result because it has been rendered economically unviable due to WBL, AXOS and NYTG writing the loans that were doomed to fail.

128. Plaintiffs Rosario Gangi and Josephine Theisen suffered damage as a result of WBL, AXOS and NYTG writing loans that were doomed to fail because her interest in 1002 Bay Ridge Avenue is in foreclosure.

129. Plaintiff Leonora Gangi suffered damage because her primary residence 973 76th Street is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

130. Plaintiff Josephine Theisen suffered damage because her interest in 1002 Bay Ridge Avenue is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

131. Third-party plaintiffs are entitled to treble damages.

132. Third-party plaintiffs are entitled to attorneys' fees.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF THIRD-PARTY PLAINTIFF JOSEPHINE THEISEN FOR FRAUD AGAINST WBL AND AXOS

133. The third-party plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

134. The defendants' WBL and AXOS made (1) a material misrepresentation of fact (2) knowing it was false (3) with the intent to induce reliance (4) justifiable reliance by Jospehine Theisen and (5) causing damage to the plaintiff.

135. Specifically, the HUD-1 statement represented that there was no pre-payment penalty.

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136. AXOS and WBL knew this was false because WBL sent Mr. Gangi disclosures on the day of the closing of the first loan giving him notice that the note included a pre-payment penalty.

137. AXOS and WBL intended for Josephine to rely on the HUD-1 because WBL agent, Anne Rougier, told her that since the HUD-1 stated there was no pre-payment penalty there was not one.

138. It was reasonable for Josephine Theisen to rely on the HUD-1 because the agent of WBL told her to rely on the HUD-1.

139. Had Josephine Theisen been told there was a pre-payment penalty, she would not have signed the mortgage.

140. As a result of Josephine Theisen signing the mortgage, she has suffered damages, namely the pending foreclosure and possible loss of her equity in the property located at 1002 Bay Ridge Avenue.

141. Third-party plaintiffs are entitled to punitive damages.

142. The Third-party plaintiffs hereby demand trial by jury.

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WHEREFORE, Plaintiffs demand judgment in their favor against all Defendants, jointly and severally, and seek an order from the Court:

a) Awarding Plaintiffs, threefold, their direct and consequential damages, including prejudgment interest, in an amount to be determined at trial;

b) Awarding punitive damages;

c) Awarding Plaintiffs attorneys' fees and costs incurred in this action;

d) Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 3, 2020

/s/

Adam J. Roth
Law Offices of Adam J. Roth
Attorney for Defendants/Third-Party Plaintiffs
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI
112 Madison Avenue, 6th Floor
New York, New York 10016
212-922-3741
212-253-4157
ajr@loajr.com

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Verification

Josephine Theisen, being duly sworn, deposes and says that I am one of the named Defendants/Third Party Plaintiffs in the instant action.

I have read the annexed complaint and know the contents thereof and the same are true to my knowledge, except those matters herein which are stated to be alleged upon information and belief, and as to those matters, I believe them to be true. My belief as to those matters therein not stated upon knowledge is based upon my review of the records.

Josephine Theisen

Josephine Theisen

State of New York
County of New York

On this 30 days of November, 2020, personally known to be or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his capacity, and that by his/her signature on the instrument, the individual made such appearance before me at

Robert L. Greener
Notary Public State of New York
No. 02GR6360410
Qualified in New York
Commission Expires ~~05/09/20~~ 6/19/21

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OMB Approval No. 2502-0265

A. Settlement Statement (HUD-1)

B. Type of Loan

1. ☐ FHA 2. ☐ RHS 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	6. File Number: LT-2586-NY	7. Loan Number: 27964-M Gangi Plumbing and Heating Contractors, Inc dba	8. Mortgage Insurance Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agents are shown. Items marked "(p.o.c)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:
Rosario Gangi, Josephine Gangi		Bofi Federal Bank 9205 West Russell Road, Suite 400, Las Vegas, NV 89148
G. Property Location: 1002 Bay Ridge Avenue Brooklyn, NY 11219	H. Settlement Agent: WWLT-NY, LLC 1204 Broadway, 4th Floor, NY, NY 10001	I. Settlement Date: Disbursement Date:
	Place of Settlement: 1204 Broadway, 4th Floor, NY, NY 10001	TitleExpress

J. Summary of Borrower's Transaction

100.	**Gross Amount Due from Borrower**	
101.	Contract sales price	
102.	Personal property	
103.	Settlement charges to borrower (line 1400)	20,080.93
104.		
105.		
	Adjustments for items paid by seller in advance	
106.	City/town taxes to	
107.	County taxes to	
108.	Assessments to	
109.		
110.		
111.		
112.		
120.	**Gross Amount Due from Borrower**	20,080.93
200.	**Amounts Paid by or in Behalf of Borrower**	
201.	Deposit or earnest money	
202.	Principal amount of new loan(s)	450,000.00
203.	Existing loan(s) taken subject to	
204.		
205.	Buyer's Check	
206.		
207.		
208.		
209.		
	Adjustments for items unpaid by seller	
210.	City/town taxes to	
211.	County taxes to	
212.	Assessments to	
213.		
214.		
215.		
216.		
217.		
218.		
219.		
220.		

K. Summary of Seller's Transaction

400.	**Gross Amount Due to Seller**	
401.	Contract sales price	
402.	Personal property	
403.		
404.		
405.		
	Adjustments for items paid by seller in advance	
406.	City/town taxes to	
407.	County taxes to	
408.	Assessments to	
409.		
410.		
411.		
412.		
420.	**Gross Amount Due to Seller**	
500.	**Reductions In Amount Due to Seller**	
501.	Excess deposit (see instructions)	
502.	Settlement charges to seller (line 1400)	
503.	Existing loan(s) taken subject to	
504.	Payoff of first mortgage loan	
505.	Payoff of second mortgage loan	
506.		
507.		
508.		
509.		
	Adjustments for items unpaid by seller	
510.	City/town taxes to	
511.	County taxes to	
512.	Assessments to	
513.		
514.		
515.		
516.		
517.		
518.		
519.		
520.		

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L. Settlement Charges

					Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700.	**Total Real Estate Broker Fees**					
	Division of commission (line 700) as follows:					
701.	$0.00	to				
702.	$0.00	to				
703.	Commission paid at settlement					
800.	**Items Payable in Connection with Loan**					
801.	Our origination charge (includes Origination Point 0.000% or $0.00)		$	(from GFE #1)		
802.	Your credit or charge (points) for the specific interest rate chosen		$	(from GFE #2)		
803.	Your adjusted origination charges			(from GFE A)		
804.	Appraisal fee	to		(from GFE #3)		
805.	Credit report	to		(from GFE #3)		
806.	Tax service	to		(from GFE #3)		
807.	Flood certification	to		(from GFE #3)		
808.		to				
900.	**Items Required by Lender to be Paid in Advance**					
901.	Daily interest charges from	from 07/05/2018 to 08/01/2018 @ $0.00/day		(from GFE #10)		
902.	Mortgage Ins. Premium	for months to		(from GFE #3)		
903.	Homeowner's insurance	for months to		(from GFE #11)		
904.		months to		(from GFE #11)		
1000.	**Reserves Deposited with Lender**					
1001.	Initial deposit for your escrow account			(from GFE #9)		
1002.	Homeowner's insurance	months @ $ 0.00/month	$	to		
1003.	Mortgage Insurance	months @ $ 0.00/month	$	to		
1004.	City Property Taxes	months @ $ 0.00/month	$	to		
1005.	County Property Taxes	months @ $ 0.00/month	$	to		
1006.	Assessments	months @ $ 0.00/month	$	to		
1007.	Aggregate Adjustment		$	to		
1100.	**Title Charges**					
1101.	Title services and lender's title insurance		$	(from GFE #4)	3,651.83	
1102.	Settlement or closing fee	to World Wide Land Transfer, Inc.	$			
1103.	Owner's title insurance - Stewart Title Insurance Company		$	(from GFE #5)		
1104.	Lender's title insurance - Stewart Title Insurance Company		$1,928.00			
1105.	Lender's title policy limit $450,000.00 Lender's Policy					
1106.	Owner's title policy limit $0.00 Owner's Policy					
1107.	Agent's portion of the total title insurance premium to WWLT-NY, LLC		$1,638.80			
1108.	Underwriter's portion of the total title insurance premium to Stewart Title Insurance Company		$289.20			
1109.						
1200.	**Government Recording and Transfer Charges**					
1201.	Government recording charges		$	(from GFE #7)	387.00	
1202.	Deed $	Mortgage $165.00	Release $55.50	to New York City Department of Fin		
1203.	Transfer taxes		$	(from GFE #8)	9,225.00	
1204.	Real Estate Transfer Tax	Deed $	Mortgage $	to New York City Department of Fin		
1205.	Mortgage Tax	Deed $	Mortgage $9,225.00	to New York City Department of Fin		
1206.	Mortgage Tax	Deed $	Mortgage $	to New York City Department of Fin		
1207.	Tax Lien Satisfactons (x3)		$166.50	to New York City Departm		
1208.	Termination of ALR			to New York City Departm	75.00	
1300.	**Additional Settlement Charges**					
1301.	Required services that you can shop for			(from GFE #6)		
1302.	Water Acct# 200398737001	to NYC Department of Environmental Protection			234.49	
1303.	Sales Tax	to The New York State Department of Taxation			37.81	
1304.	2018 Taxes-April *PAST DUE	to NYC Department of Finance			2,162.48	
1305.	2018 Taxes-July	to NYC Department of Finance			2,028.32	
1306.	RPIE 2010	to NYC Department of Finance			200.00	
1307.	RPIE 2011	to NYC Department of Finance			2,079.00	

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L. Settlement Charges

					Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700.	**Total Real Estate Broker Fees**					
	Division of commission (line 700) as follows:					
701.	$0.00	to				
702.	$0.00	to				
703.	Commission paid at settlement					
800.	**Items Payable in Connection with Loan**					
801.	Our origination charge (Includes Origination Point 0.000% or $0.00)		$	(from GFE #1)		
802.	Your credit or charge (points) for the specific interest rate chosen		$	(from GFE #2)		
803.	Your adjusted origination charges			(from GFE A)		
804.	Appraisal fee	to		(from GFE #3)		
805.	Credit report	to		(from GFE #3)		
806.	Tax service	to		(from GFE #3)		
807.	Flood certification	to		(from GFE #3)		
808.		to				
900.	**Items Required by Lender to be Paid in Advance**					
901.	Daily interest charges from	from 07/05/2018 to 08/01/2018 @ $0.00/day		(from GFE #10)		
902.	Mortgage Ins. Premium	for months to		(from GFE #3)		
903.	Homeowner's insurance	for months to		(from GFE #11)		
904.		months to		(from GFE #11)		
1000.	**Reserves Deposited with Lender**					
1001.	Initial deposit for your escrow account			(from GFE #9)		
1002.	Homeowner's insurance	months @ $ 0.00/month	$	to		
1003.	Mortgage Insurance	months @ $ 0.00/month	$	to		
1004.	City Property Taxes	months @ $ 0.00/month	$	to		
1005.	County Property Taxes	months @ $ 0.00/month	$	to		
1006.	Assessments	months @ $ 0.00/month	$	to		
1007.	Aggregate Adjustment		$	to		
1100.	**Title Charges**					
1101.	Title services and lender's title insurance		$	(from GFE #4)	3,651.83	
1102.	Settlement or closing fee	to World Wide Land Transfer, Inc.	$			
1103.	Owner's title insurance - Stewart Title Insurance Company		$	(from GFE #5)		
1104.	Lender's title insurance - Stewart Title Insurance Company		$1,928.00			
1105.	Lender's title policy limit $450,000.00 Lender's Policy					
1106.	Owner's title policy limit $0.00 Owner's Policy					
1107.	Agent's portion of the total title insurance premium to WWLT-NY, LLC		$1,638.80			
1108.	Underwriter's portion of the total title insurance premium to Stewart Title Insurance Company		$289.20			
1109.						
1200.	**Government Recording and Transfer Charges**					
1201.	Government recording charges		$	(from GFE #7)	387.00	
1202.	Deed $	Mortgage $165.00	Release $55.50	to New York City Department of Fin		
1203.	Transfer taxes		$	(from GFE #8)	9,225.00	
1204.	Real Estate Transfer Tax	Deed $	Mortgage $	to New York City Department of Fin		
1205.	Mortgage Tax	Deed $	Mortgage $9,225.00	to New York City Department of Fin		
1206.	Mortgage Tax	Deed $	Mortgage $	to New York City Department of Fin		
1207.	Tax Lien Satisfactons (x3)		$166.50	to New York City Departm		
1208.	Termination of ALR			to New York City Departm	75.00	
1300.	**Additional Settlement Charges**					
1301.	Required services that you can shop for			(from GFE #6)		
1302.	Water Acct# 200398737001	to NYC Department of Environmental Protection			234.49	
1303.	Sales Tax	to The New York State Department of Taxation			37.81	
1304.	2018 Taxes-April *PAST DUE	to NYC Department of Finance			2,162.48	
1305.	2018 Taxes-July	to NYC Department of Finance			2,028.32	
1306.	RPIE 2010	to NYC Department of Finance			200.00	
1307.	RPIE 2011	to NYC Department of Finance			2,079.00	

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Itemization of Section 200 Credits

Name of Borrower:	Name of Seller:	File Number:

Note: This page displays an itemization of the credits shown in section 200 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

Credits	Credit

Itemization of Your Loan Origination Charges

Name of Borrower:	Name of Seller:	File Number:
Rosario Gangi Josephine Gangi		LT-2586-NY

Note: This page displays an itemization of the adjusted origination charges shown in section 800 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

Your Loan Origination Charges			Borrower	Seller
801. Our origination charge (Includes Origination Point 0.000% or $0.00)				
Our origination charge (Includes Origination Poi	to	$ 0.00		
802. Your credit or charge (points) for the specific interest rate chosen				
Your credit or charge (points) for the specific inte	to	$ 0.00		
803. Your adjusted origination charges			0.00	0.00

Itemization of Line 1101

Name of Borrower:	Name of Seller:	File Number:
Rosario Gangi Josephine Gangi		LT-2586-NY

Note: This page displays an itemization of the charges shown on line 1101 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

1100. Title Charges		Total Charge		Borrower	Seller
1101. Title services and lender's title insurance	to				
Escrow	to WWLT-NY, LLC	$ 125.00		125.00	
Recording Service Fee	to WWLT-NY, LLC	$ 150.00		150.00	
title search	to WWLT-NY, LLC	$ 350.00		350.00	
Contin	to WWLT-NY, LLC	$ 36.00		36.00	
Overnight	to WWLT-NY, LLC	$ 30.00		30.00	
Patriot & Pacer	to WWLT-NY, LLC	$ 40.00		40.00	
TIRSA 9 REM401	to WWLT-NY, LLC	$ 192.83		192.83	
EPL End429	to WWLT-NY, LLC	$ 50.00		50.00	
Closing Fee	to WWLT-NY, LLC	$ 600.00		600.00	
Document Collection	to WWLT-NY, LLC	$ 150.00		150.00	
1102. Settlement or closing fee	to World Wide Land Transfer, Inc.	$ 0.00			
1104. Lender's title insurance - Stewart Title Insurance	to WWLT-NY, LLC	$ 1,928.00		1,928.00	
	Totals:	$ 3,651.83	0.00	3,651.83	0.00

Seller/Lender credits shown on page 1 POC = Paid Outside Closing CB = Lender Credit

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Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	HUD-1 Line Number		
Our origination charge	# 801	0.00	0.00
Your credit or charge (points) for the specific interest rate chosen	# 802	0.00	0.00
Your adjusted origination charges	# 803	0.00	0.00
Transfer taxes	# 1203	0.00	9,225.00

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201	0.00	387.00
Appraisal fee	# 804	0.00	0.00
Credit report	# 805	0.00	0.00
Title services and lender's title insurance	# 1101	0.00	3,651.83
Owner's title insurance	# 1103	0.00	0.00
	#		
	#		
	#		
	Total	0.00	4,038.83
	Increase between GFE and HUD-1 Charges	$ 4,038.83 or	999.9999%

Charges That Can Change			Good Faith Estimate	HUD-1
Initial deposit for your escrow account	# 1001		0.00	0.00
Daily interest charges from	# 901	$ /day	0.00	0.00
Homeowner's insurance	# 903		0.00	0.00
	#			
	#			
	#			

Loan Terms

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ includes ☐ Principal ☐ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☒ No. ☐ Yes, it can rise to a maximum of %. The first change will be on / / and can change again every years after / / . Every change date, your interest rate can increase or decrease by %. Over the life of the loan, your interest rate is guaranteed to never be lower than % or higher than %.
Even if you make payments on time, can your loan balance rise?	☒ No. ☐ Yes, it can rise to a maximum of $.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☒ No. ☐ Yes, the first increase can be on / / and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☒ No. ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☒ No. ☐ Yes, you have a balloon payment of $ due in years on / / .
Total monthly amount owed including escrow account payments	☒ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of $ that results in a total initial monthly amount owed of $. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

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Signature Page

HUD CERTIFICATION OF BUYER AND SELLER

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Buyers

Rosario Gangi

Josephine Gangi AKA Josephine Theisen

Sellers

Settlement Agent

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

SETTLEMENT AGENT

DATE

**Exhibit 4 to Malyshev Affirmation-
Summons and Complaint filed by the Gangi Parties in the
Second Action on January 6, 2021
[pp. 195 - 211]**

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NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 02/02/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiff,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendant.

----------X

Date filed:

Index No.:

SUMMONS

Basis for Venue:
Accident location

To the above- named Defendants:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
January 6, 2021

By:_____/s/_____
ADAM J. ROTH
THE LAW OFFICES OF ADAM J. ROTH P.C.
Attorney for Plaintiffs Defendants
112 Madison Avenue, 6th Floor
New York, New York 10016
(212) 922-3741

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TO:

World Business Lenders
P.O. Box 479
Elmsford, New York 10523

Larry Shuster
c/o New York Tribeca Group
1120 73rd Road 12G
Forest Hills, New York, 11375

Axos Bank
c/o Carter Ledyard & Milburn
2 Wall Street
New York, New York 10005

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiff,

VERIFIED COMPLAINT

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER

Defendant.
----------X

COMPLAINT AND DEMAND FOR TRIAL BY JURY

1. MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS (hereinafter MGPH), ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI plaintiffs here, were pressured by a group of felons to take a loan, underwritten by an unscrupulous lender who has rented a federal bank regulated by HOLA, that was doomed to fail.
2. In July of 2018, Plaintiff Rosario Gangi's business, Michael Gangi Plumbing and Heating Contractors, Inc., was having some cashflow problems.
3. Mr. Gangi received a fax telling him MGPH was pre-approved for a loan.
4. After calling the number on the fax, Mr. Gangi was directed to Defendant Larry Shuster of New York Tribeca Group.
5. After Mr. Shuster spoke to Mr. Gangi, he repeatedly called and pressured him using boiler room like pressure tactics.
6. Mr. Shuster is familiar with boiler room like pressure tactics because he spent his twenties working in a boiler room, then in a federal prison after pleading guilty to both mail and wire fraud.

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7. Mr. Shuster then presented the lending opportunity to World Business Lenders.

8. Mr. Gangi was then contacted by World Business Lenders to discuss his assets that could be used to secure the collateral.

9. During this process, Mr. Shuster would repeatedly call Mr. Gangi and threaten him that his company would go bankrupt and he would be a failure if he did not take the loan.

10. After determining that Mr. Gangi owned the building where Michael Gangi Plumbing and Heating Contractors, Inc. operated, WBL offered MGPH a loan for $450,000.

11. WBL required the loan be guaranteed by the commercial property which was co-owned by Rosario Gangi and Josephine Theisen.

12. The business loan itself was for $450,000 at a short-term high interest (86.95% APR) loan requiring daily payments, with automatic withdrawals.

13. Mr. Shuster was paid a commission of over $40,000 for placing the loan.

14. Less than four months later, in October 2018, after defaulting on the first loan, the defendants then gave Rosario Gangi a second loan.

15. This loan was labeled as a business loan and was guaranteed by Mr. Gangi's personal residential property that he co-owns with his wife Leonora Gangi.

16. The second loan itself was for $160,000 at a short-term high interest (103.05% APR) loan requiring daily payments, with automatic withdrawals.

17. This case stands at the intersection of two dangerous trends in the marketing of financial products: (1) placing a home at risk by issuing a financial product doomed to fail; and (2) "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

18. First, since the subprime mortgage crisis fifteen years ago, courts have been dealing

with the fallout of mortgages on homes backing loans that were inadequately underwritten and doomed to fail. Regulations have been adopted to protect residential mortgagors, but those regulations can be avoiding by where a loan is designated a business loan.

19. But framing the loan as a "business loan" cannot exempt these lenders from the scope of New York General Business Law 349(h).

20. It is an unfair and deceptive practice to offer New York residents, such as the plaintiffs, the opportunity to get capital to build their businesses if the loans have an unreasonable risk of failure. It is an unfair and deceptive practice to ask New York residents to put up their homes as collateral for a financial product that the lenders have not adequately underwritten.

21. New York General Business Law 349(h) makes it unlawful to engage in any unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce New York.

22. Loans that are doomed to fail violate New York General Business Law 349(h).

23. Loans with inadequate underwriting violate New York General Business Law 349(h).

24. These principles continue to apply when the borrower is a small business whose owner backs the loan with a mortgage on her home.

25. The second trend is what courts around the country have begun to address "rent-a-bank" or "rent-a-charter" schemes in which the identity of the true lender is obscured, and a loan placed in the name of a federally chartered bank, as a dodge around state usury laws or other state law requirements.

26. The loans here, on their face, business loans, requiring substantial daily payments that the documents acknowledged to be equivalent to (86% and 103% APR respectively), backed by a personal guaranty and a mortgage on real estate.

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27. Transactions of this structure have been a proprietary part of the business of World Business Lenders, LLC - an alternative finance company that provides short term high interest loans backed by personal guarantees and using real estate as collateral - since its inception.

28. All the forms used for this transaction are demonstrably World Business Lender forms.

29. Although plaintiffs were presented with this loan by World Business Lenders (WBL), the transaction documents all attempt to position AXOS as the lender.

30. AXOS is a federal bank organized under the laws of Nevada - a state that has no usury laws.

31. Structuring a loan in the name of a federal bank based out of Nevada is a common scheme that alternative lenders use to take advantage of the legal exemptions for federally chartered banks that otherwise would not be applicable to the alternative lender. Such a scheme is referred to as a "rent-a-bank" or "rent-a-charter" scheme because the alternative finance company is the true lender while the bank receives a fee for the use of its name and charter, but bears no real risk.

32. Plaintiffs seek damages for violations of the New York General Business Law 349(h), fraud and related claims arising out of the transaction.

PARTIES

33. Rosario Gangi resides at 983 76th Street, Brooklyn, New York 11228.

34. Leonora Gangi resides at 983 76th Street, Brooklyn, New York 11228.

35. Josephine Theisen co-owns the property located at 1002 Bay Ridge Avenue and is a resident of the State of New York.

36. Michael Gangi Plumbing and Heating Contractors, Inc. is a corporation with its principal place of business located at 1002 Bay Ridge Avenue.

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37. World Business Lenders, LLC is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 101 Hudson Street, 33rd Floor, Jersey City, NJ, 07302.

38. It now lists its official address as P.O. Box 479, Elmsford, New York 10523.

39. On information and belief, WBL specializes in the product at issue in this case- a business loan backed by a personal guaranty and a mortgage on real estate.

40. In May 2018, World Business Lenders announced a $30MM multi-draw credit facility from a Cayman Islands fund established by a consortium of Asian banks and investors.

41. In connection with that announcement, Robert Pardes, Chief Operating Officer of World Business Lenders stated that "this reaffirms increasingly broad institutional acceptance of our proprietary product and market leading servicing platform."

42. In connection with the same announcement, Matthew Yoon (Managing Director and Head of Asia at Pi Capital International LLC, which advised World Business Lenders with respect to the $30MM facility) said, "This transaction demonstrates desirability, even with cross-border investors of WBL's well-structured proprietary business loan product. WBL's veteran management and underwriting team has created an exciting new secured asset class for investors."

43. On information and belief, the July 5, 2018 and October 12, 2018 loans are an example of the "proprietary product" Pardes and Yoon were describing.

44. Axos Bank ("BOFI") is an FDIC insured institution organized and existing under the laws of Nevada, with a claimed address of 9205 West Russell Road, Suite 400, Las Vegas, NV 89148.

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45. The claimed address is nothing more than a front.

46. Axos actual corporate headquarters is located at 4350 La Jolla Village Drive, Suite 140, San Diego, CA 92122

47. Axos Bank was formerly known as BOFI Federal Bank.

48. New York Tribeca Group, LLC (NYTG) is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business located at 1120 73rd Road 12G, Forest Hills, New York, 11375.

49. Larry Shuster is a convicted felon employed by New York Tribeca Group, his business address is 1120 73rd Road 12G, Forest Hills, New York, 11375.

JURISDICTION AND VENUE

50. World Business Lenders, LLC does business throughout the United States, including in New York.

51. AXOS does business throughout the United States, including in New York.

52. New York Tribeca Group does business throughout the United States, including in New York.

53. Larry Shuster is a New York resident who is an employee of NYTG.

54. Defendants have engaged in tortious conduct in New York.

55. Venue in Kings County is proper because the case involves the rights to real property located in Brooklyn, and thus venue is proper in Kings County.

56. Venue in Kings County is also proper because Plaintiffs entered into this transaction in Kings County.

57. Venue in Kings County is also proper because Plaintiffs are Kings County residents.

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THE JULY 2018 LOAN AND TRANSACTION

58. In 2018, Mr. Gangi's business was losing money.

59. He had a line of credit with M & T Bank that was almost fully drawn.

60. In June of 2018, Mr. Gangi received a fax for a pre-approved business loan.

61. He called the number and was put in touch with Larry Shuster, a broker New York Tribeca Group, LLC.

62. Larry Shuster pleaded guilty to conspiracy to commit mail and wire fraud in SDNY case #06-cr-857 and served time in a federal prison.

63. On June 14, 2018 Mr. Gangi filled out a one-page loan application to NYTG.

64. NYTG then prepared a pitch deck for a proposed loan to Rosario Gangi

65. Larry Shuster and New York Tribeca Group, LLC contacted World Business Lenders seeking to place the loan.

66. On June 20, 2018, NYTG sent WBL a pitch deck which included three months of bank statements and a detailed analysis of the sale-ability of 1002 Bay Ridge Avenue.

67. NYTG Group initially pitched a $300,000 loan to WBL with weekly payments.

68. On June 22, 2018, WBL emailed Larry Shuster and NYTG telling him it was expediting title.

69. At some point thereafter, Mr. Rosario was approved for a loan in the amount of $450,000.

70. The loan required the building, 1002 Bay Ridge Avenue as collateral.

71. The loan terms required daily business payments of $2,131.96 from July 9, 2018 through January 8, 2020 and a final payment of $2,127.64 on January 9, 2020.

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72. The mortgage states the interest rate is .2367% per day.

73. The APR of the loan was approximately 86%.

74. On July 5, 2018, WBL e-mailed Rosario Gangi with a copy of disclosures and was told to sign via Docusign.

75. Josephine Theisen was never provided with any disclosures.

76. Certain documents were scheduled by WBL to be signed at 1002 Bay Ridge Avenue on July 5, 2018.

77. On July 5, 2018, WBL sent Anne Rougier to 1002 Bay Ridge Avenue as a notary republic.

78. While at the closing, Ms. Rougier called WBL and asked when a representative from WBL would arrive.

79. Upon information and belief, a WBL representative told Ms. Rougier to act as WBL'S agent at the closing.

80. At the closing, Josephine Theisen asked Anne Rougier if there were any pre-payment penalties on the loan.

81. Anne Rougier showed Ms. Theisen the HUD-1 which stated that the loan did not have a prepayment penalty.

82. Ms. Rougier then said, "since the HUD-1 says there is no pre-payment penalty, there cannot be one."

83. Based on Ms. Rougier's representation, who was acting as an agent of WBL, Ms. Theisen signed the mortgage, addendum to mortgage, escrow and deposit agreement, a judgment affidavit, owner's affidavit, and the HUD-1.

84. Ms. Theisen was never provided, nor did she sign, the note.

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85. Neither Mr. Rosario nor Ms. Theisen ever spoke with or communicated with anyone from Axos Bank.

86. After Ms, Rougier obtained and notarized the signatures, she forwarded the documents to WBL.

87. WBL then recorded the mortgage on July 10, 2018 on behalf of Axos.

88. Axos then transferred title to WBL on April 25, 2019

89. On November 19, 2019 WBL transferred title back to Axos.

90. As a result of "brokering" the transaction, Larry Shuster and NYTG was paid $40,500.

THE OCTOBER 2018 LOAN AND TRANSACTION

91. By October 2018, Mr. Rosario was unable to make the daily payments.

92. Mr. Rosario contacted Larry Shuster and NYTG again about the possibility of another loan.

93. Mr. Rosario advised Mr. Shuster his personal residence had equity available to secure an additional loan.

94. Mr. Shuster again pitched WBL on another loan.

95. WBL then began its underwriting.

96. WBL determined that Mr. Gangi, if approved for the second loan, would have a loan to debt service ratio of 44% on day one.

97. WBL also noted that Mr. Gangi's business had lost over $10,000 per month for the preceding four months prior to the second loan and his business account was overdrawn by $110,000.

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98. There were several phone calls with WBL where they advised him he could lose his personal residence if he defaulted on the second loan.

99. At the time he requested the second loan, Mr. Gangi was already in default on his first loan.

100. Notwithstanding the fact that WBL knew Mr. Gangi could not make payments on his first loan, they issued a second loan for $160,000 secured by his residence, 983 76th Street, Brooklyn, New York.

101. Mr. Gangi never had a lawyer review any of the second loan documents.

102. On October 12, 2018, Mr. Rosario was e-mailed the note and disclosures which he signed via Docusign.

103. Leonora Gangi was never shown the note nor the disclosures at any time prior to, during or after the closing.

104. On October 12, 2018, WBL sent a notary public named Eugenio Enrique Madeam to witness the documents.

105. WBL did not send any other employees or agents to the closing.

106. At the closing, Leonora Gangi was presented with and signed the mortgage, guaranty and other documents, but was never shown the note or advised about the pre-payment penalty.

107. Had Ms. Gangi been advised about the pre-payment penalty, she would not have signed the mortgage.

108. Thereafter, the loan was funded by WBL.

DEFAULT AND THE ASSESSMENT OF PRE-PAYMENT PENALTIES

109. Shortly after receiving the second loan, Mr. Gangi and MGPH went into default.

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110. In April of 2019, Josephine Theisen and Rosario Gangi contacted WBL to request a pay-off amount.

111. On April 4, 2019, WBL sent a pay-off letter demanding payment in full and assessing a pre-payment penalty on both loans.

112. On April 4, 2019, Mr. Gangi and Ms. Theisen offered to pay both loans in full less the prepayment penalty.

113. WBL refused to accept any amount less than the full amount due along with the pre-payment penalties.

114. An offer was made to purchase 1002 Bay Ridge Avenue in May of 2019.

115. Notwithstanding the guarantee of full re-payment of the loan amount including the interest, in June of 2019, WBL refused to take any amount less than the total amount due along with the pre-payment penalties.

116. Gangi, Theisen and MGPH would have paid the loans off in full (including all principal and interest) starting in April 2019 but WBL refused insisting that the pre-payment penalty also be paid.

117. WBL sent pay-off letters demanding pre-payment penalty on April 4, 2019, June 6, 2019, October 4, 2019 and in early January 2020.

118. Under WBL's proposed payment plan, the plaintiffs would have had to sell 1002 Bay Ridge Avenue and still owed tens of thousands of dollars to defendants.

119. On January 30, 2020, Axos Bank filed for foreclosure on both 1002 Bay Ridge Avenue and 983 76th Street.

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AS AND FOR A FIRST CAUSE OF ACTION BY ALL PLAINTIFFS UNDER NEW YORK GENERAL BUSINESS LAW 349(H)

120. The plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

121. The defendants each violated New York General Business Law 349(h).

122. Specifically, Defendants Axos, WBL, NYTG and Larry Shuster engaged in (1) consumer-oriented conduct (2) that was materially misleading (3) that caused plaintiffs' injury.

123. Specifically, placing loans that are available to every resident in New York state is consumer-oriented conduct. Sending targeted communications to potential customers is consumer-oriented conduct. *Plavin v. Group Health, Inc.*, 35 NY3d 1 (NY 2020).

124. The conduct was materially misleading because the apparent representative of WBL and AXOS told Josephine Theisen there was no pre-payment penalty. *See Hud-1* attached as Exhibit 1.

125. Furthermore, the conduct was materially misleading because WBL, AXOS and NYTG never provided a copy of the note or disclosures to Leonora Gangi or Josephine Theisen.

126. Additionally, the conduct was materially misleading as to Rosario Gangi and MGPH because WBL, AXOS and NYTG knew when the loans were written that they were doomed to fail. *See Kaur et. al. v. World Business Lenders, LLC et. al.* 19-cv-11364 (USDC Mass. February 24, 2020) [denying motion to dismiss by World Business Lenders and Axos because they knowingly wrote loans that were doomed to fail].

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127. Plaintiffs MGPH suffered damage as a result because it has been rendered economically unviable due to WBL, AXOS and NYTG writing the loans that were doomed to fail.

128. Plaintiffs Rosario Gangi and Josephine Theisen suffered damage as a result of WBL, AXOS and NYTG writing loans that were doomed to fail because her interest in 1002 Bay Ridge Avenue is in foreclosure.

129. Plaintiff Leonora Gangi suffered damage because her primary residence 973 76th Street is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

130. Plaintiff Josephine Theisen suffered damage because her interest in 1002 Bay Ridge Avenue is in foreclosure due to the failure to disclose the pre-payment penalty by WBL, AXOS and NYTG.

131. Plaintiffs are entitled to treble damages.

132. Plaintiffs are entitled to attorneys' fees.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF JOSEPHINE THEISEN FOR FRAUD AGAINST WBL AND AXOS

133. The plaintiffs repeat, reiterate and re-allege paragraphs 1 through 119 as though set forth more thoroughly herein.

134. The defendants' WBL and AXOS made (1) a material misrepresentation of fact (2) knowing it was false (3) with the intent to induce reliance (4) justifiable reliance by Jospehine Theisen and (5) causing damage to the plaintiff.

135. Specifically, the HUD-1 statement represented that there was no pre-payment penalty.

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136. AXOS and WBL knew this was false because WBL sent Mr. Gangi disclosures on the day of the closing of the first loan giving him notice that the note included a pre-payment penalty.

137. AXOS and WBL intended for Josephine to rely on the HUD-1 because WBL agent, Anne Rougier, told her that since the HUD-1 stated there was no pre-payment penalty there was not one.

138. It was reasonable for Josephine Theisen to rely on the HUD-1 because the agent of WBL told her to rely on the HUD-1.

139. Had Josephine Theisen been told there was a pre-payment penalty, she would not have signed the mortgage.

140. As a result of Josephine Theisen signing the mortgage, she has suffered damages, namely the pending foreclosure and possible loss of her equity in the property located at 1002 Bay Ridge Avenue.

141. Plaintiffs are entitled to punitive damages.

142. The plaintiffs hereby demand trial by jury.

WHEREFORE, Plaintiffs demand judgment in their favor against all Defendants, jointly and severally, and seek an order from the Court:

a) Awarding Plaintiffs, threefold, their direct and consequential damages, including prejudgment interest, in an amount to be determined at trial;

b) Awarding punitive damages;

c) Awarding Plaintiffs attorneys' fees and costs incurred in this action;

d) Granting such other and further relief as this Court deems just and proper.

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NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 01/12/2021

Dated: New York, New York
January 6, 2021

/s/

Adam J. Roth
Law Offices of Adam J. Roth
Attorney for Plaintiffs MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI
112 Madison Avenue, 6th Floor
New York, New York 10016
212-922-3741
212-253-4157
ajr@loajr.com

**Exhibit 5 to Malyshev Affirmation-
Stipulation, dated January 20, 2021
[pp. 212 - 216]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

Index No.: 502392/2020
(Knipel, J.S.C.)

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Third-Party Plaintiff,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Third-Party Defendants.

STIPULATION AND ORDER

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants

Index No. 500481/2021

----------X

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WHERAS, Axos Bank f/k/a Bofi Federal Bank ("Axos") commenced an action against Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors ("Plumbing"), Rosario Gangi ("Rosario"), Josephine Theisen ("Josephine"), and Lenora Gangi ("Lenora") (collectively the "Gangi Plumbing Parties") under Index No. 502392/2020 (the "First Action") on January 30, 2020;

WHEREAS, the Gangi Plumbing Parties filed an answer with affirmative defenses and counterclaims on February 6, 2020 (Dkt # 10);

WHEREAS, Axos moved to dismiss the counterclaims and affirmative defenses asserted by the Gangi Parties, and the parties entered into a stipulation, dated October 21, 2020, resolving the motion and allowing the Gangi Parties to amend their answer within 15 days;

WHEREAS, the Gangi Parties filed an amended answer and counterclaims against Axos (Dkt # 30), on November 4, 2020, and a separate Third-Party Complaint against Axos, World Business Lenders LLC ("WBL"), New York Tribeca Group LLC ("NYTG"), and Larry Shuster ("Larry") (Dkt #27) on November 3, 2020 (the "TPC");

WHEREAS, Axos is a party to the main action, and the nature of the claims asserted in the TPC against WBL may not fall within the ambit of CPLR 1007;

WHEREAS, the Gangi Parties filed a separate action against Axos, WBL, NYTG, and Larry, on January 7, 2021, under Index No. 500481/2021 ("Second Action") asserting the same claims as the TPC; and

WHEREAS, the undersigned parties wish to merge the TPC in favor of consolidation of the First Action and Second Action, and merge the amended counterclaims into the Second Action, for the purposes of discovery and trial, pursuant to CPLR 602(a) and CPLR 1001(a)

IT IS HEREBY STIPULATED AND AGREED THAT:

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1. The notice of interpleader, third-party summons and third-party complaint filed by the Gangi Parties on November 3, 2020 (Dkt # 27-29) are hereby discontinued without prejudice and without costs to either party.
2. The amended counterclaims contained in the Amended Answer (Dkt. # 30) are severed from the Amended Answer and incorporated and merged into the Second Action.
3. The parties stipulate that this action and the action filed by Defendants under Index No. 500481/2021 have common questions of law and fact, and therefore ought to be consolidated for discovery and trial, pursuant to CPLR 602(a) and CPLR 1001(a).
4. The parties consent to the consolidation of Index No. 502392/2020 and Index No. 500481/2021 for the purposes of discovery and trial, and request that the Court so-order this Stipulation and amend the caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

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Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER

Defendants

----------X

5. Axos and WBL hereby accept service of the Complaint in the Second Action, and their time to answer, move, or otherwise respond to the counterclaims in the First Action, and the claims in the Second Action, is extended to March 17, 2021.

Dated: January 20, 2021

/s/ Alexander G. Malyshev
Alexander G. Malyshev
CARTER LEDYARD & MILBURN, LLP
2 Wall Street
New York, New York 10005
malyshev@clm.com
212-732-3200
Attorneys for Axos and WBL

/s/ Adam J. Roth
Adam J. Roth
LAW OFFICES OF ADAM J. ROTH
112 Madison Ave, 6th Floor
New York, New York 10016
adamjrothesq@gmail.com
212-922-3741
Attorneys for Defendants

IT IS SO-ORDERED

_____
LAWRENCE S. KNIPEL, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE and JOHN DOE ONE through JOHN DOE TEN

Defendants.

Index No.: 502392/2020
(Knipel, J.S.C.)

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING
AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Third-Party Plaintiff,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER

Third-Party Defendants.

STIPULATION AND ORDER

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING
AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY
SHUSTER Defendants

Index No. 500481/2021

----------X

CARTER LEDYARD & MILBURN LLP
COUNSELORS AT LAW
2 WALL STREET
NEW YORK, NY 10005 212) 732-3200

**Exhibit 6 to Malyshev Affirmation-
Screenshot of the listing on the Federal Deposit Insurance Corporation's Website for Axos Bank**

Axos Bank (FDIC # 35546)

Active **Insured Since July 4, 2000**

Data as of: May 27, 2020

Axos Bank is an active bank

FDIC Certificate#:	**35546**
Headquarters:	4350 La Jolla Village Drive, Suite 140 San Diego, CA 92122 San Diego County
Locations:	**3** domestic in **1** states, **0** in territories, and **0** in foreign locations
Established:	July 4, 2000
Insured:	July 4, 2000
Bank Charter Class:	Savings Association
Primary Federal Regulator:	Office of the Comptroller of the Currency
Secondary Federal Regulator:	N/A

Corporate Website:
www.axosbank.com

Consumer Assistance:
http://www.helpwithmybank.gov

Contact the FDIC about:
Axos Bank

Locations | History | Identifications | Financials | Other Names / Websites

Showing 1 to 1 of 1 entries

UNINUM	Number	Name	Address	County	City	State	Zip	Service Type	Established Date	Acquired Date
81655		Axos Bank	4350 La Jolla Village Drive, Suite 140	San Diego	San Diego	CA	92122	Full Service Brick and Mortar Office	07/04/2000	

Exhibit 7 to Malyshev Affirmation-
Opinion Letter, dated July 3, 2018 from Arthur L. Aidala, Esq.
of the Law Offices of Aidala, Bertuna & Kamins, P.C.
[pp. 218 - 221]

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LAW OFFICES OF
Aidala, Bertuna & Kamins, P.C.

ARTHUR L. AIDALA
MARIANNE E. BERTUNA
HON. BARRY KAMINS (RET.)
JOHN S. ESPOSITO
DOMINICK GULLO
MICHAEL T. JACCARINO
IMRAN H. ANSARI
ANDREA M. ARRIGO

SENIOR COUNSEL
LOUIS R. AIDALA
JOSEPH P. BARATTA

546 FIFTH AVENUE
NEW YORK, NY 10036
TELEPHONE: (212) 486-0011
FACSIMILE: (212) 750-8297
WWW.AIDALALAW.COM

8118-13TH AVENUE
BROOKLYN, NEW YORK 11228
TEL: (718) 238-9898
FAX: (718) 921-3292

OF COUNSEL
JOSEPH A. BARATTA
JENNIFER CASSANDRA
PETER W. KOLP
WILLIAM R. SANTO
PETER S. THOMAS

July 3, 2018

Bofi Federal Bank, its successors and/or assigns
9205 West Russell Road, Ste 400
Las Vegas, Nevada 89148

Re:	Borrower:	M. Gangi Plumbing and Heating Contractors, Inc.
	Guarantors:	Rosario Gangi
	Loan Amount:	$450,000.00
	Lender:	Bofi Federal Bank, it successors and/or assigns
	Collateral:	1002 Bay Ridge Avenue, Brooklyn, New York 11219
	Collateral Owner:	Rosario Gangi and Josephine Gangi, as tenants in common.

This firm has been retained by Borrower in connection with the above referenced financing. In connection therewith, the undersigned has reviewed the following documents:

I. Promissory Note dated July 6, 2018 by an among Borrower and Lender in the amount of $450,000.00 (the "Note");

II. Continuing Guaranty Agreement dated July 6, 2018 by and among Guarantors and Lender (the "Guaranty");

III. Mortgage covering the Collateral by an among Guarantors and Lender (the "Security Instrument"); and

IV. Such other documentation and records deemed relevant and necessary to render the opinions set forth herein.

The Notes, Guaranty, Security Instruments, and other documents executed in connection with the closing of the above referenced loans are hereinafter referred to as the Loan Documents.

In connection with the above referenced loan from Lender to Borrower disbursed on or about the above date, it is the legal opinion of the undersigned that,

1. The Borrower has been duly organized and is validly existing as a corporation in good standing under the laws of the State of New York. Borrower has the power and authority to

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conduct its business as it is presently being conducted and to enter into and perform the obligations under the Loan Documents.

2. Borrower and Guarantors are authorized to perform their respective duties and obligations under the Loan Documents, and the Borrower has taken all corporate and trust action necessary to authorize the companies' officers and directors, specifically Rosario Gangi to perform all acts necessary for the execution and delivery of the Loan Documents and to the performance of all obligations of the Borrower herein.

3. Borrower and Guarantors have the power and authority to execute, deliver and perform the Loan Documents to which each is a party. Borrower and Guarantors have duly executed and delivered the Loan Documents to which each is a party. Each Loan Document constitutes of a legal, valid and binding obligation of the Borrower and Guarantors to the extent each is a party thereto, is enforceable against each in accordance with its terms, and in each case complies with the laws of the state of each of its origins.

4. All governmental regulations, consents, waivers, approvals, authorizations, permits, notifications and orders necessary in connection with the execution and delivery by Borrower of the Loan Documents to which it is a party and the performance of the respective obligations hereunder, have been duly and lawfully obtained and are now in effect.

5. To our knowledge, after due inquiry, there is no: (a) outstanding judgment, order, writ, decree, demand, award, stipulation, or injunction of any governmental entity against or affecting the Borrower or Guarantors or their respective properties, assets, or business, (b) action by any governmental entity or before any governmental agency, court or arbitrator, or any appeal from any foregoing, pending or openly or explicitly threatened against or affecting the Borrower or Guarantors or their property assets or business, (c) threatened or pending litigation against Borrower or Guarantors that could adversely impact the ability of Borrower or Guarantors to perform the obligations under the terms of the Loan Documents, or (d) pending or imminent filing for bankruptcy or other protection from creditors on the part of Borrower or Guarantors.

6. The execution, delivery and performance by Borrower and each Guarantor of the Loan Documents to which each is a party, and the consummation of the transaction contemplated herein will not: (a) conflict with or result in a breach or violation of any terms or provisions of, or constitute a default under (with or without notice of passage of time, or both), or otherwise give any person a basis for acceleration or increased rights or termination or non-performance of any of the documents or other agreements entered into by Borrower and Guarantors; (b) result in a violation of any of the provisions of the Certificate of Incorporation or the By-Laws of Borrower, (c) result in a creation or imposition of any lien upon any property or asset of Borrower or any Guarantor, or (d) contravene or conflict with or result in any violation of any New York state statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and each Guarantor, except as may be limited: (i) by bankruptcy, insolvency, or other similar laws affecting the rights of creditors generally, and (ii) general principles of equity regardless of whether considered in a proceeding in equity or at law. The execution, delivery and performance by Borrower and

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Guarantors of the Loan Documents to which each is a party will not contravene or conflict with or result in a violation of any federal statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and Guarantors, except as may be limited by: (i) bankruptcy, insolvency, or other similar laws affecting the rights of creditors generally, and (ii) general principles of equity regardless of whether considered in a proceeding in equity or at law. No opinion is expressed herein pertaining to vocation or violation of federal or state lending laws upon consummation of the Loan contemplated herein.

7. After inquiry by the undersigned, Borrower, Guarantors and Collateral Owner have informed the undersigned that Borrower has the capacity to make all payments required under the terms of the related loan agreements on the basis of existing and projected revenues over the term of the loan evidenced by the Loan Documents.

For the purposes of this opinion, we have assumed:

a. Loan Documents have been delivered for value;

b. The Loan Documents requiring a notary public is acknowledged before a notary public who has completed, signed and sealed the acknowledgment.

c. The Lender is duly organized and validly existing and in good standing under the laws of its respective jurisdiction, and has all necessary powers under its respective organizational documents and all appropriate laws to engage in this transaction contemplated under the Loan Documents.

d. Routine procedural requirements such as service of process will be satisfied by any party seeking to enforce the Loan Documents.

e. The Loan Documents, as and when executed, will confirm in all material respects to the form submitted to and reviewed by us.

Based upon the foregoing, subject to the assumptions, qualifications and limitations herein, we are of the opinion the Security Instrument, upon the filing with the proper Recording Office will create valid and enforceable first lien on the Collateral identified above.

This opinion is furnished to Lenders, its successors and assigns in connection with the consummation of the transaction contemplated in the Loan Documents. It may not be used for any other purpose or relied upon by any other person for any purpose whatsoever. All opinions expressed herein are based upon the review of the Loan Documents, title commitments, and corporate records and such other documents as would be warranted by due inquiry and consideration of federal and/or New York, statutes, laws, regulations, rules, orders, judgments and decrees. We assume no liability for changes in law which occur after the date thereof. This opinion deals only with the specified legal issues expressly addressed herein, and you should not infer any opinion that is not explicitly addressed herein from any other matter stated in this

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opinion. No opinion is expressed as to the effective laws of any jurisdiction other than the state of New York and the federal laws of the United States of America as specified herein.

Sincerely,

Arthur L. Aidala

Exhibit 8 to Malyshev Affirmation-
Stipulation entered into between counsel for Axos and the Gangi Parties, dated October 21, 2020
[pp. 222 - 223]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,
Plaintiff,

Index No. 502392/2020

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,
Defendants.

STIPULATION

----------X

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned counsel for the respective parties to this action, as follows:

1. The Plaintiffs' Motion to Dismiss (Motion #1 NYSECF Docket #16) is resolved as follows:
   a. The defendants' first counter-claim of usury is dismissed with prejudice.
   b. The defendants' second counter-claim is dismissed without prejudice pursuant to CPLR 3217 with leave to re-plead within 15 days.
   c. The defendants' will Amend its Answer within 15 days.
2. In accordance with CPLR 3217(a)(2), no party to this stipulation is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action.

Dated: October 21, 2020
New York, New York

/s/ Alexander G. Malyshev
Alexander G. Malyshev
CARTER LEDYARD & MILBURN, LLP
2 Wall Street
For Plaintiff
New York, New York 10005
malyshev@clm.com
212-732-3200

/s/ Adam J. Roth
Adam J. Roth
LAW OFFICES OF ADAM J. ROTH
112 Madison Ave, 6th Floor
For Defendants
New York, New York 10016
adamjrothesq@gmail.com
212-922-3741

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants,

----------X

Index No. 502392/2020

STIPULATION

223

CARTER LEDYARD & MILBURN LLP
TWO WALL STREET
NEW YORK, NEW YORK 10005
212-732-3200

9649633.1

**Exhibit 9 to Malyshev Affirmation-
Memorandum of Law in Support of Plaintiff/Counterclaim-Defendant's
Motion to Dismiss the Counterclaims and Sixth Affirmative
defense, dated August 7, 2020
[pp. 224 - 252]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK, Index No. 502392/2020

Plaintiff/Counterclaim-Defendant,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants/Counterclaim-Plaintiffs.

----------X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF/COUNTERCLAIM-DEFENDANT'S MOTION TO DISMISS THE COUNTERCLAIMS AND SIXTH AFFIRMATIVE DEFENSE

CARTER LEDYARD & MILBURN LLP
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

THE MAGNOZZI LAW FIRM, P.C.
Mark F. Magnozzi
23 Green Street, Suite 302
Huntington, New York 11743
T. (631) 923-2858
F. (631) 923-2860
E. mmagnozzi@magnozzilaw.com

Attorneys for Plaintiff Axos Bank f/k/a B-of-I Federal Bank

9579550.12

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Am. Express Nat'l Bank v. Evelt, Inc.,
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Katzenellenbogen v. Aaronov,
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Welsbach Elec. Corp. v. MasTec N. Am., Inc.,
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Thrift Superv., Treas. Dept., OPERATING SUBSIDIARIES AND MOST FAVORED LENDER DOCTRINE (July 20, 2006), *available at* https://www.occ.gov/static/ots/legal-opinions/ots-lo-07-20-2006.pdf 11

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Axos Bank f/k/a BofI Federal Bank ("Plaintiff" or "Axos") submits this Memorandum of Law in support of its motion to dismiss the Counterclaims and Sixth Affirmative Defense of Defendants Michael Gangi Plumbing and Heating Contractors, Inc. ("Plumbing"), Rosario Gangi ("Rosario"), Josephine Theisen ("Josephine") and Leonora Gangi ("Leonora") (collectively, "Defendants").[1]

I. PRELIMINARY STATEMENT

Axos, a federally-chartered savings association, extended two business loans to Plumbing, a corporation, out of its Nevada branch office in 2018. Those business loans were guaranteed by Plumbing's president, Rosario, and secured by two mortgages on properties in which Rosario has an ownership interest.[2] The terms of the loans were clearly disclosed during the application process including: (1) the interest rates that would apply, (2) that these were loans to a business, and proceeds of the loans could only be used for business purposes (as confirmed in the Loan Agreements themselves, as well as the separate "Business Loan Purpose Affidavits" executed by Rosario), (3) that Plaintiff is "an FDIC insured, federal savings association, and this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada," and (4) Plaintiff's remedies in case of default.[3] None of these facts are in dispute.[4]

[1] *See* Defendants' Answer with Counterclaims dated February 6, 2020, at ¶¶ 16-28, attached to the accompanying Affirmation of Alexander G. Malyshev, Esq. ("Malyshev Aff.") as Exh. 2. Plaintiff's Verified Complaint, with Exhibits, is attached to the Malyshev Aff. as Exh. 1. Capitalized terms not otherwise defined below are defined in the Complaint and the documents annexed.

[2] The two other individual defendants, Josephine and Leonora (Rosario's wife), co-signed the respective mortgages securing the business loans.

[3] *See* Malyshev Aff., Exhs. A and 4, Section 16(c). Indeed, the agreements specifically advise the borrower that federal law, and to the extent not preempted by federal law, the laws of the State of Nevada, would apply.

[4] Defendants do not contest the validity of the loan documents or the underlying debt. Instead, in Defendants' Answer, Defendants admit entering one of the loan agreements and merely deny having knowledge or information to form a belief with respect to the other one.

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Nevertheless, Defendants assert (i) an affirmative defense and counterclaim seeking to have the loans declared void for violation of New York's criminal usury statute, Pen. L. § 190.40, and (ii) a counterclaim to recover damages for Plaintiff's alleged conduct in violation of New York's consumer fraud statute, GBL § 349. These betray a fundamental misunderstanding of applicable law and, as discussed below, should be dismissed.

First, neither a corporation nor its guarantors may bring an affirmative cause of action or counterclaim for criminal usury under Pen. L. § 190.40. Criminal usury is just a defense to payment of a loan that is subject to New York law.

Second, because Plaintiff is a federally-chartered savings association, and the loans were issued out of Nevada, federal law preempts New York law concerning the maximum rate of interest a federal savings association may charge. Under federal law, the maximum rate is the rate in Nevada, which has no legal limit on rates of interest for parties to a written contract.

Third, even if federal law did not preempt state law, which it clearly does, the loan agreements contained Nevada choice-of-law provisions and the loans are not usurious under Nevada law. The choice-of-law provision should be enforced because Plaintiff, and the transaction, bear a reasonable relation to Nevada and application of Nevada law does not violate a fundamental New York public policy.

Fourth, GBL § 349 is unavailable to Defendants because the loans were made to a business entity solely for business purposes (and not for consumer or household purposes). GBL § 349, which only applies to "consumer-oriented" conduct, is inapplicable. Moreover, Plaintiff's conduct was not materially misleading under GBL § 349 because Plaintiff's loan documents accurately state the terms of the loans, including the APR, the Total Repayment Amount, and the prepayment premium. This is especially true since Plumbing and Rosario were represented by counsel when

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they obtained the initial loan from Axos and their counsel provided an opinion as to enforceability. They cannot now claim any surprise as to the loans' terms and their obligations.

Finally, the federal law Defendants allege Plaintiff violated, by requiring prepayment premiums, only applies to transportable, prefabricated homes, not the Brooklyn buildings that were mortgaged herein. Indeed, that provision is clearly titled "Federally-related residential manufactured housing loans--consumer protection provisions."

In short, the sixth affirmative defense and both counterclaims have no merit and should be dismissed.

II. FACTS[5]

Plaintiff is a federal savings association chartered by the Office of the Comptroller of the Currency ("OCC") under the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1461, *et seq.* Malyshev Aff., Exh. 4 (FDIC listing). Plaintiff maintains a branch office at 9205 West Russel Road, Suite 400, Las Vegas, NV 89148, out of which the loans at issue were originated. Compl. ¶ 4.

A. Loan #27964 – First Loan Agreement

On July 5, 2018, Plaintiff and Plumbing entered into a Business Promissory Note and Security Agreement in the amount of $450,000.00 dollars ("First Loan Agreement"). *See* Compl., Exh. A. The First Loan Agreement provided that Plumbing "promise[d] to pay to the order of [Plaintiff] at its offices located at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148" the amounts due, and that the loan was "approved, and the proceeds are disbursed, by Lender in Nevada." *Id.* ¶ 1. Plumbing was represented by counsel, who provided an opinion letter, in

[5] This factual recitation is based upon (i) the allegations contained in the Complaint, (ii) the undisputed documentary evidence attached to and authenticated in the Complaint, and (iii) the allegations in the Counterclaims, which are presumed to be true solely for this motion to dismiss.

connection with the First Loan Agreement. Among other things, that opinion letter specifically recognized that "consummation of the transaction" would not "contravene or conflict with… any New York law" and performance under the Loan Documents would not "result in violation of any federal statute, law, rule or regulation…" *See* Malyshev Exh. 5, ¶ 6.

The terms of the First Loan Agreement provided for daily payments of $2,131.96, with a daily interest rate of 0.23612387677%, and a final payment of $2,127.64 on January 9, 2020. *Id.* ¶¶ 2-3. The First Loan Agreement required a prepayment premium and provided the formula for its calculation. *Id.* ¶ 4. Additionally, a Business Loan Summary provided together with the First Loan Agreement disclosed, *inter alia*, the interest rate, interest charge, APR, total payment amount and payment schedule, as well as disclosure concerning prepayment premiums in a clear, single-page summary. *See* Compl., Exh. A.

The choice-of-law provision in the First Loan Agreement provides that "this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada" and that as a result the agreement will be "GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES." Compl., Exh. A ¶ 16(a) (emphasis in original). A similar choice-of-law provision is contained in the Guaranty. *See* Compl., Exhs. B and E.

The agreement prominently disclosed, upfront, that **"[t]he business loan represented by this Loan Agreement is a higher cost loan than business loans which may be available through other sources. Before signing this Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan**." Compl., Exh. A ¶ 1 (bold in original). Defendants agreed to only use the proceeds of the loan for Plumbing's business purposes. *Id.* ¶

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8(b) ("[T]he proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. Borrower understands Lender is relying on the accuracy of this representation in disbursing the loan proceeds and that Borrower's agreement not use the proceeds of this Loan Agreement for personal, consumer, family or household purposes …"). This was confirmed in a "Business Loan Purpose Affidavit" executed by Rosario on behalf of Plumbing. *See* Compl., Exh. A (confirming "[t]hat the proceeds of the Loan Agreement … being furnished to Borrower will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods.").

To secure Plumbing's obligations, on July 5, 2018, Rosario executed an Unlimited Guaranty (the "First Guaranty"), by which Rosario personally guaranteed the payment and performance under the First Loan Agreement. Compl., Exh. B. Additionally, on July 5, 2018, both Rosario and Josephine executed a Mortgage in favor of Plaintiff ("First Mortgage"), granting Plaintiff a secured interest on real property located at 1002 Bay Ridge Avenue, Brooklyn, NY 11219 ("First Mortgaged Premises") as security. *See* Compl., Exh. C. As part of the First Mortgage, Josephine executed a hypothecation agreement, recognizing that the First Mortgage was given in the form of a hypothecated security to secure the business debt of Plumbing. *See* First Mortgage, Exhibit B.

B. Loan #28367 – Second Loan Agreement

On October 12, 2018, Plaintiff and Plumbing entered into a second Business Promissory Note and Security Agreement in the amount of $160,000.00 dollars (the "Second Loan Agreement"). *See* Compl., Exh. D. The Second Loan Agreement contained identical provisions to the First Loan Agreement concerning Plaintiff's branch office, entry into the agreement and

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disbursement of funds in Nevada, and governing law. *Id.* ¶¶ 1, 16(c). The Second Loan Agreement also contained identical provision to the First Loan Agreement with respect to Plumbing's use of funds solely for business purposes. *Id.* ¶¶ 1, 8(b). This was confirmed by an additional Business Loan Purpose Affidavit executed by Rosario in connection with the Second Loan Agreement. Compl., Exh. A.

The terms of the Second Loan Agreement provided for daily payments of $4,245.55, with a daily interest rate of 0.27945054795%, and a final payment of $4,244.76 on February 11, 2020. *Id.* ¶¶ 2-3. It also required a prepayment premium and provided the method of calculation. *Id.* ¶ 4. The Business Loan Summary for the Second Loan Agreement disclosed, *inter alia*, the interest rate, interest charge, APR, total payment amount and payment schedule, and the prepayment premium. *See* Compl.; Exh. D.

To secure Plumbing's obligations, on October 12, 2018, Rosario executed an Unlimited Guaranty ("Second Guaranty") to Plaintiff, by which Rosario personally guaranteed the payment and performance under the Second Loan Agreement. *See* Compl., Exh. E. Additionally, on October 12, 2018, Rosario and Leonara executed a Mortgage in favor of Plaintiff ("Second Mortgage"), granting Plaintiff a secured interest on real property located at 983 76th Street, Brooklyn, NY 11228 ("Second Mortgaged Premises") as security under the Second Loan Agreement. *See* Compl., Exh. F.

C. Procedural History

Plumbing defaulted under both loans, and neither the borrower nor Guarantor cured the default. Compl. ¶¶ 18, 25. As a result, Plaintiff accelerated the balances due under the respective notes. *Id.* ¶¶ 20, 27. Plaintiff filed this action seeking to (i) enforce the First and Second Loan

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Agreements against Plumbing, (ii) enforce the First and Second Guaranties against Rosario, and (iii) foreclose on the Mortgaged Premises. *See* Malyshev Aff. Exh 1.

On February 6, 2020, Defendants filed a joint Answer with Counterclaims. Malyshev Aff., Exh. 2. In response to paragraph 14 of the Complaint, which alleged Plumbing's entry into the First Loan Agreement, the Answer avers that Defendants denied "having knowledge or information sufficient to form a belief as to the allegations …." Answer ¶ 1. However, in response to paragraph 21 of the Complaint, which contained allegations concerning the entry into the Second Loan Agreement, the Answer admits the allegations. *Id.* ¶ 5. The sixth affirmative defense in the Answer was that the Loan Agreements are both void as usurious under Pen. L. § 190.40.

The Counterclaims contain two causes of action. For the First Counterclaim, Defendants seek "a declaratory judgment under Article 15[6] that both Loan #1 and Loan #2 are void as usurious because the interest rate charges is [sic] in excess of 25%; the maximum allowed by New York State under [Pen. L. § 190.40]." Counterclaims ¶ 16.

The Second Counterclaim alleges that, notwithstanding the specific acknowledgments that the First and Second Loan Agreements were for business purposes, "Plaintiff violated NY General Business Law 349(h) because plaintiff engaged in consumer-oriented conduct that was materially misleading and plaintiff suffered an injury as a result." *Id.* ¶ 20. Furthermore it alleges that:

> 23. Plaintiff's attempted assessment of pre-payment penalties was materially misleading because assessing pre-payment penalties was impermissible as a Federally Charted Savings Association under FDIC part 590.4(d)[.]
>
> 24. On April 3, 2019, June 6, 2019, November 4, 2019 and January 16, 2020, the plaintiff refused to accept payment of the entire amount owed under the notes unless the defendants also paid a prepayment penalty.
>
> 25. As a result, the plaintiffs now claim the defendants owe them several hundreds of thousands of dollars more than they claim were owed to them as of April 3, 2019.

[6] Defendants do not provide further information concerning under which "Article 15" they are seeking relief.

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Counterclaims, at pg. 4.

On February 25, 2020, Plaintiff filed its Reply, interposing the following affirmative defenses: (i) failure to state a claim, (ii) material breach by Defendants, (iv) no maximum rate of interest under applicable Nevada law, (iv) federal preemption of usury laws, (v) the Loan Agreements are not consumer transactions, (vi) Defendants are bound by the terms and conditions in all loan documents, (vii) failure to plead misrepresentation with particularity, and (vii) documentary evidence. Malyshev Aff., Exh. 3. Plaintiff now moves to dismiss the Counterclaims and the Sixth Affirmative Defense.

III. ARGUMENT

A. Standard for Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept the facts alleged in the pleadings as true, accord the pleading the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). While the inquiry is whether there is a cognizable legal theory contained in the complaint, bare legal conclusions, inherently incredible allegations or allegations flatly contradicted by the record or documentary evidence are not entitled to a favorable inference. *Velez v. Captain Luna's Marina*, 74 A.D.3d 1191, 1192 (2d Dept. 2010); *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept. 1995); *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005). The same standard applies to a motion to dismiss an affirmative defense under CPLR § 3211(b), which may be made "at any time." *Greco v. Christoffersen,* 70 A.D.3d 769, 771 (2d Dept. 2010).

Evidentiary materials may be considered on a CPLR 3211(a)(7) motion where they demonstrate that "a material fact as claimed by the plaintiff is not a fact at all and … no significant

dispute exists regarding it." *Belling v. City of Long Beach*, 168 A.D.3d 900, 901 (2d Dept. 2019). Evidentiary materials may be considered where they establish "conclusively that the plaintiffs have no cause of action." *Id.* at 902. Furthermore, "the court may consider documents referenced in or attached to the complaint." *Katzenellenbogen v. Aaronov*, 2014 N.Y. Slip Op. 33295(U), ¶ 3 (Kings. Co. Sup. Ct. Dec. 9, 2014) (citing *Manchester Equip. Co. v Panasonic Indus. Co*., 141 A.D.2d 616 (2d Dept. 1988)).

B. Defendants' First Counterclaim, and Sixth Affirmative Defense, for Criminal Usury Should be Dismissed

1. There is No Affirmative Claim for Criminal Usury in New York

As a threshold matter, the Court should dismiss Defendants' First Counterclaim seeking a declaration that the Loan Agreements are void under New York State's criminal usury statute. *See* Counterclaims ¶ 16.

It is well-established that there is no cause of action in New York for criminal usury under Pen. L. § 190.40. *See Am. Express Nat'l Bank v. Evelt, Inc.*, 2019 N.Y. Slip Op. 31521(U), ¶ 4 (N.Y. Co. Sup. Ct. May 30, 2019) (quoting *Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc.*, 252 F. Supp. 3d 274, 279-80 (S.D.N.Y. 2017)) ("A corporation can assert criminal usury as a defense, but it cannot bring civil claims under the criminal statute.") (internal quotation marks and alterations omitted); *Wilkinson Floor Covering, Inc. v. Cap Call, LLC*, 2018 N.Y. Slip Op. 50709(U), ¶ 3, 59 Misc. 3d 1226(A) (N.Y. Co. Sup. Ct. May 16, 2018) ("Penal Law § 190.40, for criminal usury, does not state a cause of action for civil liability.") (citing *Scantek Med., Inc v Sabella*, 582 F. Supp. 2d 472, 474 (S.D.N.Y. 2008)).

Instead, in a civil action, criminal usury only can be asserted as an affirmative defense to an action to recover money due under a loan. *Id.*; *see K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 2017 N.Y. Slip Op. 27166, ¶ 4, 56 Misc. 3d 807, 815 (Westchester Co. Sup. Ct. May 4, 2017)

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(citing *Intima-Eighteen, Inc. v. A.H. Schreiber Co.*, 172 A.D.2d 456, 457-58 (1st Dept. 1991) ("It has long been settled in this state that criminal usury may only be asserted as a defense by a corporation, and never as a means to seek affirmative relief.").

In short, the First Counterclaim must be dismissed for failure to state a cognizable cause of action.

2. Defendants Have No Cause of Action or Affirmative Defense Under N.Y. Penal Law § 190.40 Because State Law is Preempted for a Federally-Chartered Savings Association

It is not disputed that Plaintiff is a federally chartered savings association, established under HOLA, which "preempts state usury laws." *Flagg v. Yonkers Savings & Loan Assoc.*, 307 F.Supp.2d 565 (S.D.N.Y. 2004), *see also Yeomalakis v. F.D.I.C.*, 562 F.3d 56, 59 (1st Cir. 2009); *Henderson v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 103657, at *11 , at *4 (N.D. Tex. Jul. 30, 2014) (noting that "usury and interest rate ceilings" are among the "types of state laws that are preempted by HOLA[.]"). As the U.S. Supreme Court recognized nearly thirty years ago, by passing HOLA, Congress "plainly envisioned that federal savings and loans would be governed by what the [Federal Reserve] Board—not any particular State—deemed to be the 'best practices." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 159-61 (1992) (analyzing the legislative history of HOLA).

HOLA, as amended, preempts state law to the same extent as the National Bank Act ("NBA"). *See* 12 U.S.C. 1465(a). Courts have long recognized that New York usury statutes do not apply to national banks governed by the NBA, which "completely preempt[s] analogous state-law usury claims." *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015), *cert. denied,* 136 S. Ct. 2505 (2016). The same reasoning applies to institutions, like Plaintiff, governed by HOLA. *See Cole v. Stephen Einstein & Assocs., P.C.*, 365 F. Supp. 3d 319, 332-33 (W.D.N.Y.

2019) ("[B]ecause the preemption analysis under the HOLA is equivalent to that required under the NBA, there appears to be no reason why *Madden's* holding would not apply equally to federal savings associations.") (citing *Poindexter v. Wachovia Mortg. Corp.*, 851 F. Supp. 2d 121, 128 n.11 (D.D.C. 2012)) (noting that "the same preemption standards that apply to banks, pursuant to the NBA apply to savings institutions under HOLA.").

In short, HOLA permits a federally-chartered savings association to charge interest at the highest rate allowed to competing lenders by the state where the savings association is located (known as the "most favored lender" doctrine) and to export this rate to borrowers in other states, regardless of any other state law purporting to limit the interest permitted on bank loans. *See* 12 U.S.C. § 1463(g)(1) ("Notwithstanding any State law, a savings association may charge interest on any extension of credit … at the rate allowed by the laws of the State in which such savings association is *located*, whichever is greater.") (emphasis supplied).[7]

As noted above, in interpreting this provision, "the same preemption standards that apply to banks, pursuant to the NBA [National Banking Act], apply to savings institutions under HOLA." *Cole*, 365 F. Supp. 3d at 332; *see also* 12 C.F.R. § 7.4010 ("Federal savings associations and their subsidiaries shall be subject to the same laws and legal standards, including regulations of the

[7] The term "'located' apparently refers to or includes branch offices." *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 313-14 (2006) (referencing 12 U.S.C. § 85, the preemption provision of the NBA, which provides that national banks may take "interest at the rate allowed by the laws of the State, Territory, or District *where the bank is located* …") (emphasis supplied); *see also Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 352 (2d Cir. 2008) ("a national bank is 'located' for purposes of § 85 in the State named in its organization certificate, or in a state in which it has its main or branch offices") (emphasis supplied); Ltr. From John E. Bowman, Off. of Thrift Superv., Treas. Dept., OPERATING SUBSIDIARIES AND MOST FAVORED LENDER DOCTRINE (July 20, 2006) at p. 5, *available at* https://www.occ.gov/static/ots/legal-opinions/ots-lo-07-20-2006.pdf ("If an association has a branch office in a state other than its home office state, the association also has the option of using and exporting the most favored lender interest rates of the branch office state when making loans that are booked out of the branch state.").

OCC, as are applicable to national banks and their subsidiaries, regarding the preemption of state law.").[8]

Under *Madden,* where a bank is located outside of New York, in a state "which permits banks to charge interest rates that would be usurious under New York law," the bank's "collection at those rates in New York does not violate the NBA and is not subject to New York's stricter usury laws, which the NBA preempts." *Madden*, 786 F.3d at 250; *see also Llewellyn v. Asset Acceptance, LLC*, 669 F. App'x 66, 68 (2d Cir. 2016) ("[t]he 25.99 percent annual interest rate charged on [an individual borrower's] pre-default debt by a national bank did not violate New York usury law …").

New York State courts recognize this federal preemption rule. On that basis the Court in, *Am. Express Bank, FSB v. Knobel*, 2016 N.Y. Slip Op. 31774(U), ¶¶ 3-4 (N.Y. Co. Sup. Ct. Sep. 23, 2016), enforced a loan agreement under Utah law, which has no maximum rate of interest, reasoning that:

> Pursuant to 12 U.S.C. § 85, plaintiff may charge the highest interest rate allowed by Utah law as plaintiff is a national bank located in Utah. Morales-Arias states in his affidavit that plaintiff is organized under the laws of Utah and has its headquarters in Utah. Under Utah law, "[t]he parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." U.C.A. § 15-1.1. Further, Utah law specifically defines late fees on a credit card account as "interest." U.C.A. § 70C-1-106. Thus, the 2.99% late fee provision of the Cardmember Agreement, amounting to a rate in excess of 35% per annum, is allowed by Utah law.

Id.

[8] "When the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v, Anderson*, 539 U.S. 1, 8 (2003). Because federal law (the NBA and HOLA) provide the exclusive cause of action for usury claims against national banks and federally chartered savings associations, there is effectively "no such thing as a state-law claim of usury" against these institutions. *See id.* at 11.

Therefore, the First Counterclaim and Sixth Affirmative Defense for criminal usury under Penal Law § 190.40 should be dismissed because they are completely preempted by under HOLA. Simply put, Defendants do not (and cannot) allege any violation of 12 U.S.C. § 1463(g)(1), which permits Plaintiff to charge the maximum interest rate of Nevada, the branch of Plaintiff's bank where the loan was originated, and from which the business loan funds disbursed. This was specifically disclosed to Plumbing and Rosario at the time of application. *See* Loan Agreements ¶¶ 1 and 16(c), and is significant because Nevada "has no statute which precludes high interest rates." *Consumers Distrib. Co. v. Hermann*, 812 P.2d 1274, 1278 (1991).

Instead, in Nevada:

> [P]arties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, and for any other charges or fees. The parties shall specify in writing the rate upon which they agree, that interest is to be compounded if so agreed, and any other charges or fees to which they have agreed

Nev. Rev. Stat. Ann. § 99.050; *see EMA Fin., LLC v. NFusz, Inc.*, 2020 U.S. Dist. LEXIS 46483, at *16 (S.D.N.Y. Mar. 16, 2020) (recognizing that § 99.050 "permit[s] contracting parties to agree upon any rate of interest" and refusing to extend New York usury statutes to a contract with a Nevada choice-of-law provision). Here, both the First and Second Loan Agreements clearly set forth the interest rates both in paragraph 2 and accompanying Business Loan Summaries, in compliance with Nevada law. *See* Compl., Exhs. A and D.

Therefore, the First Counterclaim, and Sixth Affirmative Defense, fail to state a claim or affirmative defense for criminal usury.

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3. Even if Not Preempted by Federal Law, N.Y. Penal Law § 190.40 Is Inapplicable Because the Loan Agreements Contain Nevada Choice-of-Law Provisions

Assuming *arguendo* that HOLA did not preempt New York state law, the First and Second Loan Agreements would still be governed by Nevada law, which has no maximum rate of interest. Nev. Rev. Stat. Ann. § 99.050. Paragraph 16(c) of each agreement provides:

> Lender is an FDIC insured, federal savings association and this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada. CONSEQUENTLY, THIS LOAN AGREEMENT WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND **TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES.** The legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and reserved under this Loan Agreement will be governed by such laws.

Compl., Exhs. A and D (emphasis supplied).

"Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction" unless the agreements "are illegal or where the chosen law violates some fundamental principle of justice …" *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 (2006) (internal citations and quotation marks omitted). "If the foreign law does not entail any such violation[,] full effect should be given to the law of our sister State." *Id.* (internal citations, quotation marks and alterations omitted).

Since the choice-of-law clause expressly acknowledges that "this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada" (Loan Agreements ¶ 16(c)), Nevada law bears a reasonable relationship to the parties and transaction. *EMA Fin.*, 2020 U.S. Dist. LEXIS 46483, at *16-17 (Nevada choice-of-law provision governs usury claim because lender was incorporated in Nevada). It is irrelevant that Defendants are in New York because "[t]he relevant inquiry is not … whether the selected state is the state with the greatest number of

connections to the parties or the transaction; rather, it is whether the relationship to the selected state is 'reasonable.'" *Id.* at *17-18 (overruling argument that lender's principal place of business was New York). Here, Plaintiff's branch, through which the business loans were originated, is located in Nevada, establishing that relationship.

Nor would the application of Nevada law to Defendants' usury claim violate a fundamental public policy of the State of New York. *See EMA Fin.*, 2020 U.S. Dist. LEXIS 46483, at *20-21 (finding Nevada maximum interest rate statute does not violate New York fundamental public policy, noting "[c]ourts in this District have thus been reluctant to invalidate choice-of-law clauses in commercial contracts in order to enforce New York's usury laws.") (citing cases).[9] And this is precisely what loans were: commercial contracts to obtain funds to fund business operations. That fact is apparent from the face of the agreements, as well as the affidavits Plumbing's president, and the guarantor of the loans, executed.

The fact that the loans were secured by mortgages on real estate located in New York does not alter this analysis. *See Manhattan Life Ins. Co. v. Johnson*, 188 N.Y. 108, 115 (1907) ("the law of the place where the contract is made is to determine the rate of interest, although the loan is secured by a mortgage of lands in another state; unless there be circumstances to show that the parties had in view the laws of the latter place in regard to interest."). Here, the agreements could

[9] *See also Parry v. Retail Capital LLC*, 2017 N.Y. Slip Op. 30082(U), ¶ 2 (N.Y. Co. Sup. Ct. January 12, 2017) (dismissing action for usury under New York law because agreement contained Utah choice-of-law provision, the defendant was in Utah and the transaction occurred in Utah); *Klein v. On Deck Capital, Inc.*, 2015 N.Y. Slip Op. 50958(U), ¶ 3, 48 Misc. 3d 1204(A) (Westchester Co. Sup. Ct. June 24, 2015) (dismissing action for usury under New York law because "[p]ursuant to their agreement the parties intended Virginia law to apply. Moreover, Virginia law bears a reasonable relationship to the loan and the application of Virginia law is not offensive to New York public policy. Virginia law bears a reasonable relationship to the loan since defendant is headquartered in Virginia and the agreement provides that all payments are not considered made until received in Virginia. In addition, plaintiff failed to meet its heavy burden of proving that application of Virginia law would be offensive to a public policy of the State.") (internal citations and alterations omitted).

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not be clearer that the parties viewed the law of Nevada as applicable on this subject if, for some reason, federal law did not apply.[10]

Accordingly, the Court should dismiss Plaintiff's First Counterclaim, and Sixth Affirmative Defense, for criminal usury.

C. Defendants' Second Counterclaim under GBL § 349 Should be Dismissed

To state "a claim under [GBL] sections 349 or 350, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct, that is (2) materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Plavin v. Grp. Health Inc.*, 2020 N.Y. Slip Op. 02025, ¶ 7 (N.Y. Ct. App. March 24, 2020). Defendants cannot state a claim under GBL § 349 because the transactions at issue were not consumer-oriented and Defendants did not suffer an injury as a result of any deceptive acts by Plaintiff (and indeed *no* deceptive acts are alleged other than a clearly erroneous, and, quite frankly, puzzling, reading of an FDIC regulation). This is a particularly high bar where, as here, the borrower (a corporation) was represented by counsel when entering into the transaction. A finding on either ground is independently dispositive here.

1. GBL § 349 Does Not Apply Because the Loan Agreements Were for Business Purposes and Not "Consumer-Oriented"

The Court of Appeals has made clear that "as a threshold matter, plaintiffs claiming the benefit of section 349 – whether individuals or entities such as the plaintiffs now before us - must charge conduct of the defendant that is consumer-oriented." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank N.A*, 85 N.Y.2d 20, 25 (1995); *see Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) ("A plaintiff under section 349 must prove . . . first, that the challenged act

[10] *See* Loan Agreement ¶ 16(a); Guaranty ("Interpretation"), set forth in full *supra* at fn. 7.

or practice was consumer oriented"). The threshold requirement of consumer-oriented conduct is met by a showing that "the acts or practices have a broader impact on ***consumers*** at large" in that they are "directed to ***consumers***" or "potentially affect similarly situated ***consumers***." *Oswego,* 85 N.Y.2d at 25, 27 (emphasis supplied); *State of N.Y. Workers Comp. Bd. v. 26-28 Maple Ave., Inc.*, 80 A.D.3d 1135, 1137 (3d Dept. 2011) (showing of consumer-oriented conduct is a "threshold requirement").

As used in the statute, consumers are "those who purchase goods and services for personal, family or household use." *Med. Soc'y of State of New York v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st Dept. 2005) (citation omitted); *Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285, 286 (1st Dept. 2000); *Sheth v. N.Y. Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dept. 2000); *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 742-43 (S.D.N.Y. 2012); *see also* GBL §§ 399–c(1)(b) and 399–p(1)(c); GOL § 5–327(1)(a); CPLR § 105(f). Here, there is no dispute that the loan proceeds were advanced to a corporation, Plumbing, for business (and not personal or household or family) purposes. Compl., Exhs. A and D, at ¶¶ 1, 8(b). Indeed, Plumbing's president, and guarantor, executed affidavits to that very effect as a condition of receiving the loan proceeds. *See* Compl., Exhs. A and D.[11] This alone dooms the second counterclaim. *See Matter of People v N. Leasing Sys., Inc*., 169 A.D.3d 527, 528 (1st Dept. 2019) (citing *Cruz*, 263 A.D.2d at 289) (affirming dismissal of petition where "[t]here are no factual allegations that would show that the underlying transactions involve goods or services for 'personal, family or household purposes.'").

[11] The representations and promises are conclusive as to the nature of the transaction. *See generally Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, 34 N.Y.3d 327 (2019) ("[t]he best evidence of what parties to a written agreement intend is what they say in their writing.") (internal citations and quotation marks omitted); *Manchester Equip.*, 141 A.D.2d at 618 ("The provisions of the written contract which directly contradict the allegations of oral representations must be taken into account in evaluating a fraud claim …") (internal citations and quotations marks omitted).

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Defendants' bare allegation that the acts of "providing" and attempting to "collect on" loans is in and of itself "consumer oriented" is meritless. *See* Counterclaims ¶¶ 21-22. This would basically expand the reach of GBL § 349 to every conceivable transaction. New York appellate authority is directly to the contrary, as illustrated by the First Department in *Cruz*, 263 A.D.2d at 286. The Appellate Division held that the publisher of the "Yellow Pages" did not violate the GBL in its dealings with the plaintiffs, noting that the word "consumer" as used in the Article 22-A of the GBL (which includes section 349) "is consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes.'" *Cruz,* 263 A.D.2d at 289 (citations omitted). Because the allegedly deceptive transactions in *Cruz* involved business advertisements placed in the Yellow Pages, the Court held that they did not implicate consumer-oriented conduct. *Id.* The First Department reached this conclusion even though the "transactions in the matter at bar … are modest in value, are repeated regularly with numerous parties, rely on a form contract, and involve parties with a large disparity in economic power and sophistication." *Id.* at 291 (citations omitted).

Despite these facts, which "at first glance . . . might appear to be within the ambit of GBL Article 22-A", the First Department observed that this analysis did not "take due account of the threshold question noted above – whether the conduct at issue is consumer oriented" and held as follows:

> **Since advertisement space in the Yellow Pages is, by definition, a commodity available to businesses only**, and plaintiffs fail to show how the complained-of conduct might either directly or potentially affect consumers, **such conduct does not fall within the parameters of the statute.**

Cruz, 264 A.D.2d at 291 (emphasis added).

Moreover, conduct is "not consumer-oriented within the meaning of section 349" where "[t]he acts complained of are limited to business rather than consumer [agreements], and the

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conduct complained of cannot carry over to consumer transactions." *Citipostal, Inc. v. Unistar Leasing*, 283 A.D.2d 916, 918 (4th Dept. 2001). Indeed, GBL § 349 is not a "sword to be wielded in business-versus-business disputes ... where the party asserting the claim is not acting in a consumer role." Richard E. Givens, OVERALL SCOPE OF GENERAL BUSINESS LAW §§ 349-350 (McKinney Supp. 1996) (quoted in *S.Q.K.F.C. v. Bell. Atl. TriCon Leasing, Corp.*, 84 F.3d 629, 636 (2d Cir. 1996)).

Specifically, courts regularly dismiss similar allegations with respect to business loans (which are private contract disputes that do not fall within the ambit of the statute). *See NY Univ. v. Cont. Ins. Co*., 87 N.Y.2d 308, 320 (1995) ("Private contract disputes unique to the parties … would not fall within the ambit of the statute"); *Amos Fin., LLC v. H & B & T Corp.*, 2015 N.Y. Slip Op. 50970(U), ¶ 8 (Kings Co. Sup. Ct. June 29, 2015) ("the plaintiff has demonstrated … that the loan at issue was a business loan, making the statute inapplicable because the challenged act or practice is not consumer-oriented" and the "action is based upon a single loan, [which] does not have a broad impact on consumers at large."); *Polish & Slavic Fed. Credit Union v. Saar*, 39 Misc. 3d 850, 855-56 (Kings Co. Sup. Ct. 2013) ("While certain services performed in conjunction with the sale and mortgaging of residential property may fit within the ambits of the statute, the alleged deceptive acts in the transaction here are more akin to a private contract dispute. Significantly, the alleged deceptive acts were not directed toward a 'consumer' such as a home buyer, but rather toward a financial institution receiving services in furtherance of a business purpose.").

Here, sizeable business loans were extended to a corporation, which was represented by counsel during negotiations relating to the first of the two loans (which acted as a template for the second, smaller, loan). Accordingly, notwithstanding Defendant's conclusory allegation that

"plaintiff engaged in consumer-oriented conduct" (Counterclaims ¶ 20), Defendants second counterclaim for violation of GBL § 349 should be dismissed.

2. Plaintiff Also Fails to Allege Conduct that Was "Materially Misleading"

"In addition to showing that the conduct was consumer oriented, 'a prima facie case requires a showing that the defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.'" *Amalfitano v. NBTY, Inc.*, 128 A.D.3d 743, 745 (2nd Dept. 2016), quoting *Oswego*, 85 N.Y.2d at 25. Defendants do not allege that Plaintiff engaged in any deceptive conduct in connection with the issuance of the loan (nor could they, as the loan summaries clearly set out all material terms of the loans, including the interest rate to be charged, and the total payoff amount). Instead, they allege, in conclusory fashion, that "Plaintiff's attempted assessment of pre-payment penalties was materially misleading because assessing pre-payment penalties was impermissible as a Federally Charted Savings Association under FDIC part 590.4(d)." Counterclaims ¶ 23. This argument fails, as a matter of law, for two independent reasons.[12]

First, the First and Second Loan Agreements disclosed – both in paragraph 4 and the accompanying Business Loan Summary – that a prepayment premium would be assessed and how it is calculated. Compl., Exhs. A and D. The assessment of fees is not materially misleading conduct where the fees were clearly disclosed in the loan documentation. *Disa Realty, Inc. v. Rao*, 168 A.D.3d 1037, 1039-40 (2nd Dept. 2019) ("the evidence submitted by the plaintiff in support of its motion demonstrated that Rao was presented with clearly written documents describing the terms of the subject loan, and that there was no materially misleading

[12] The argument also fails because, as noted above, Plumbing and Rosario were represented by counsel who reviewed the documents and provided an enforceability opinion.

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statement. Such evidence established the plaintiff's prima facie entitlement to judgment as a matter of law dismissing the counterclaim."); *Amalfitano*, 128 A.D.3d at 745 ("the defendants demonstrated, prima facie, that the subject promotion was not materially deceptive, in light of the disclaimer language").

Second, "FDIC part 590.4(d)," relied on by Defendants, does not prohibit the assessment of prepayment premiums under the First or Second Loan Agreements. A cursory review of the section, titled "Federally-related residential *manufactured housing loans*--consumer protection provisions," makes clear it is not applicable to the two properties at issue (which are buildings). Rather, it only applies to transportable, prefabricated homes:

> Section 590.4 of the Code of Federal Regulations, entitled "Federally-related residential manufactured housing loans-consumer protection provisions," sets forth a federal preemption scheme that protects certain borrowers from unfair lending and foreclosure practices. *See* 12 C.F.R. § 590.4(b)(1). The regulation applies only to "manufactured homes" as defined in 42 U.S.C. § 5402(6). *See* 12 C.F.R. § 590.2(g); 12 C.F.R. § 590.4(b)(1).

Chinn v. PNC Bank, N.A., 451 F. App'x 859, 860 (11th Cir. 2012).

The term "manufactured homes," is statutorily defined as "a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length …" 42 U.S.C. § 5402. The Mortgaged Premises, on the other hand, include the "plot, piece or parcel of land, with the buildings and Improvements thereon erected, situated, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York…" *See* Compl., Exhs. A and D at their Exhs. A (legal description of premises). More importantly, these were not loans for manufactured housing; rather, these were business loans to a corporation, secured by the Mortgaged Premises.[13]

[13] That is the same reason that the requirements of CPLR § 3408 and RPAPL §§ 1302 and 1304 are not applicable to this action: these loans do not fall within the definition of "home loans." *See* Complaint ¶ 38.

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Therefore, Defendants' second counterclaim for violation of GBL § 349 should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court dismiss the Counterclaims, and Sixth Affirmative Defense, together with granting Plaintiff all such other and further relief as is just and equitable.

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Dated: August 7, 2020

CARTER LEDYARD & MILBURN LLP

By: _____
Alexander G. Malyshev
Jacob H. Nemon

2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

THE MAGNOZZI LAW FIRM, P.C.
Mark F. Magnozzi
23 Green Street, Suite 302
Huntington, New York 11743
T. (631) 923-2858
F. (631) 923-2860
E. mmagnozzi@magnozzilaw.com

Attorneys for Plaintiff Axos Bank f/k/a B-of-I Federal Bank

**Exhibit 10 to Malyshev Affirmation-
Summons with Notice dated April 17, 2019, in the action,
Michael Gangi Plumbing & Heating Contractors, Inc. et al.
v. BofI Federal Bank n/k/a Axos Bank and World Business
Lenders LLC., Kings Co. Index No. 508823/2019
[pp. 253 - 255]**

FILED: KINGS COUNTY CLERK 02/12/2021 02:36 PM INDEX NO. 500481/2021
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 02/12/2021
FILED: KINGS COUNTY CLERK 04/18/2019 05:30 PM INDEX NO. 508823/2019
NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 04/18/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------x

MICHAEL GANGI PLUMBING & HEATING CONTRACTORS INC. d/b/a GANGI PLUMBING & HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE GANGI a/k/a JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiff(s),

-against-

BOFI FEDERAL BANK n/k/a AXOS BANK and WORLD BUSINESS LENDERS, LLC,

Defendant(s).

----------x

Index No. 508823/19
Date Purchased 4/18/19

SUMMONS

Plaintiff(s) designate(s) Kings County as place of trial.

The basis of the venue is Plaintiffs' principal place of business located in Kings County.

To the above named Defendant(s)

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, New York
April 17, 2019

Attorney(s) for Plaintiffs:

SUBIN ASSOCIATES, LLP

Michael Magino, Esq.
150 Broadway
New York, NY 10038
(212)285-3800

Defendants' address:

BOFI Federal Bank (n/k/a Axos Bank)
4350 La Jolla Village Drive, Ste. 140
San Diego, California, 92122-124

World Business Lenders, LLC
101 Hudson Street, 33rd Floor
Jersey City, NY 07302

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NOTICE

THE NATURE OF THIS ACTION is based upon agreements made by and between Plaintiffs, Defendant BOFI Federal Bank ("BOFI") and its agent World Business Lenders, LLC.

THE RELIEF SOUGHT IS AS FOLLOWS:

FIRST CAUSE OF ACTION

Action for a declaratory judgment that the commercial loan made by Defendant BOFI to Plaintiffs were usurious and in violation of both civil and criminal statutes limiting the amount of interest that can be charged to Plaintiffs.

SECOND CAUSE OF ACTION

Fraud and misrepresentation with respect to the misrepresentations made by Defendants to Plaintiffs in connection with the commercial and residential loans made by Defendants to Plaintiffs.

THIRD CAUSE OF ACTION

Action for unjust enrichment by Defendants in that Defendants caused Plaintiffs to pay a usurious rate of interest on loans made by Defendants to Plaintiffs and resulted in Defendants obtaining profits in violation of New York State statutes governing the payment of interest for commercial and residential loans as made by Defendants to Plaintiffs.

FOURTH CAUSE OF ACTION

Action to declare the commercial and residential loans made by Defendants to Plaintiffs in violation of applicable law as made and provided and to declare both of said loans void *ab initio*.

FIFTH CAUSE OF ACTION

To obtain the return to Plaintiffs of all payments made for interest on the commercial and residential loans made by Plaintiffs to Defendants.

SIXTH CAUSE OF ACTION

For the award of all reasonable attorneys' fees incurred by Plaintiffs in this action.

SEVENTH CAUSE OF ACTION

For violation by Defendants of truth in lending statutes and full disclosure of all interest charges for the commercial and residential loans made by Defendants to Plaintiffs.

EIGHTH CAUSE OF ACTION

For punitive damages between four (4) and ten (10) times the amount of said loans for Defendants' intentional violation of New York State usury laws, such damages to be determined at time of trial.

UPON YOUR FAILURE TO APPEAR, judgment will be taken against you by default for the sum of a minimum of $2,400,000, in addition to attorney's fees awarded by the court, and the costs of this action.

VENUE: Plaintiff(s) designate(s) Kings County as place of trial. The basis of the venue is Plaintiff's principal place of business located in Kings County.

FILED: KINGS COUNTY CLERK 02/12/2021 02:36 PM INDEX NO. 500481/2021
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FILED: KINGS COUNTY CLERK 04/18/2019 05:30 PM INDEX NO. 508823/2019
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STATEMENT OF AUTHORIZATION FOR ELECTRONIC FILING (Managing Attorney/Attorney in Charge for Multiple Attorney s, In Firm/ Agency)

I, HERBERT SUBIN, Esq. (Attorney Registration No. 2303295), am the managing attorney of/attorney in charge of e-filing for the law firm/agency or department ("the Firm") SUBIN ASSOCIATES, LLP. I hereby acknowledge that THERESA CARUSO ("the filing agent") has registered as an authorized filing agent user of the New York State Courts Electronic Filing System ("NYSCEF") (User ID tcaruso). Further, I represent that the attorneys in the Firm who are authorized users of the NYSCEF system hereby authorize the filing agent to file documents on their behalf and at their direction in any e-filed matter in which they are counsel of record through NYSCEF, as provided in Section 202.5-b(d)(1) of the Uniform Rules for the Trial Courts.

This authorization extends to any matter in which these attorneys have previously consented to e-filing or may hereafter consent and to any matter in which they authorize the filing agent to record consent in the NYSCEF system. This filing authorization extends to any and all documents these attorneys generate and submit to the filing agent for filing in any such matter. This authorization, posted once on the NYSCEF website as to each matter in which these attorneys are counsel of record, shall be deemed to accompany any document in that matter filed by the filing agent on behalf of these attorneys.

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This authorization shall continue until the Firm or attorney revokes the authorization in writing on a prescribed form delivered to the E-Filing Resource Center.

Dated: September 20, 2010

Signature

Herbert Subin
Print Name

Subin Associates, LLP
Firm/Department

150 Broadway, 23rd Floor
Street Address

New York, NY 10038
City, State and Zip Code

(212) 285-3800
Phone

hs@subinlaw.com
E-Mail Address

7/2/09

**Exhibit 11 to Malyshev Affirmation-
Stipulation of Dismissal dated April 17, 2019, in the removed action, Michael Gangi Plumbing & Heating Contractors, Inc. et al. v. BofI Federal Bank n/k/a Axos Bank and World Business Lenders LLC., E.D.N.Y. Case No. 19-cv-3409
[pp. 256 - 257]**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MICHAEL GANGI PLUMBING & HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING & HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE GANGI a/k/a JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs

-against-

BOFI FEDERAL BANK n/k/a AXOS BANK and WORLD BUSINESS LENDERS, LLC

Defendants.

----------X

Stipulation of Dismissal

19-cv-3409

IT IS AGREED, BY AND BETWEEN THE UNDERSIGNED, that this action is hereby dismissed without prejudice.

Dated: June 26, 2019
New York, New York

Adam J. Roth
Law Offices of Adam J. Roth
112 Madison Avenue, 6th Floor
New York, New York 10016
adamjrothesq@gmail.com
212-922-3741
212-253-4157

Clark Freeman
Sullivan & Worcester LLP
1633 Broadway
New York, New York 10019
cfreeman@sullivanlaw.com
617-338-2965

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants

----------X

Index No.: 502392/2020
Index No.: 500481/2021
(Knipel, J.S.C.)

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS OF AXOS BANK F/K/A BOFI FEDERAL BANK, AND WORLD BUSINES LENDERS, LLC

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CARTER LEDYARD & MILBURN LLP
COUNSELORS AT LAW
2 WALL STREET
NEW YORK, NY 10005 212) 732-3200

Memorandum of Law in Support of Motion to Dismiss by Axos Bank f/k/a BofI Federal Bank, and World Business Lenders, LLC, dated February 12, 2021 [pp. 258 - 300]

FILED: KINGS COUNTY CLERK 02/12/2021 02:36 PM INDEX NO. 500481/2021
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

Index No.: 502392/2020
Index No.: 500481/2021
(Knipel, J.S.C.)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY AXOS BANK F/K/A BOFI FEDERAL BANK, AND WORLD BUSINES LENDERS, LLC

CARTER LEDYARD & MILBURN LLP
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com / nemon@clm.com

Attorneys for Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

THE MAGNOZZI LAW FIRM, P.C.
Mark F. Magnozzi
23 Green Street, Suite 302
Huntington, New York 11743
T. (631) 923-2858
F. (631) 923-2860
E. mmagnozzi@magnozzilaw.com

Attorneys for Axos Bank f/k/a B-of-I Federal Bank

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Axos Bank f/k/a B-of-I Federal Bank ("Axos") and World Business Lenders LLC ("WBL") submit this Memorandum of Law in support of their motion to dismiss in two related actions, *Axos v. Michael Gangi Plumbing and Heating Contractors, Inc. et al*., Index No. 502392/2020 (Kings Co. 2020) (the "First Action") and *Michael Gangi Plumbing and Heating Contractors, Inc. et al., v. World Business Lenders et al.,* Index No. 500481/2021 (Kings Co. 2021) (the "Second Action").

By stipulation and proposed order dated January 20, 2021,[1] Axos, WBL, and the Gangi Parties,[2] agreed that (1) the Gangi Parties were discontinuing the Third Party Complaint ("TPC") against Axos, WBL, and non-appearing parties New York Tribeca Group LLC ("NYTG") and Larry Shuster ("Shuster") without prejudice, and (2) the Amended Counterclaims contained in the Gangi Parties' Amended Answer in the First Action ("Answer") were severed, incorporated, and merged, into the Second Action, and (3) the two actions would be consolidated for the purposes of discovery and trial.

The Complaint in the Second Action ("Gangi Complaint") is, in all material respects, identical to the TPC. However, because the stipulation has not yet been so-ordered, Axos and WBL simultaneously move to dismiss with respect to both the TPC and the Complaint in the Second Action. In the interests of judicial economy, unless otherwise noted, all of the citations are to the expected operative pleading (the Complaint in this Second Action). The various pleadings are attached to the accompanying Affirmation of Alexander G. Malyshev, Esq. ("Malyshev Aff."), as Exhibits 1-4.

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[1] *See* First Action Dkt. No. 36; Second Action Dkt. No. 2.

[2] Defendants / Third Party Plaintiffs in the First Action, and Plaintiffs in the Second Action, Michael Gangi Plumbing and Heating Contractors, Inc. ("Borrower" or "Plumbing"), Rosario Gangi ("Rosario"), Josephine Theisen ("Josephine") and Leonora Gangi ("Leonora") (collectively, "Gangi Parties").

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PRELIMINARY STATEMENT

Axos, a federally chartered savings association, extended two business loans to Borrower, a corporation, out of Axos's Nevada branch office in 2018. WBL is the servicer of the loans. Those business loans were guaranteed by Borrower's president, Rosario, and secured by two mortgages on properties in which Rosario has an ownership interest. The two other individual defendants, Josephine and Leonora (Rosario's wife), co-signed the respective mortgages, and hypothecation agreements, securing the business loans.

The terms of the loans were clearly disclosed during the application process including: (1) the interest rates that would apply, (2) that a prepayment premium would apply, and the formula used for calculating it, (3) that these were loans to a business, and proceeds of the loans could only be used for business purposes (as confirmed in the loan agreements themselves, as well as the separate "Business Loan Purpose Affidavits" executed by Rosario), (4) that Axos is "an FDIC insured, federal savings association, and this Loan Agreement is approved, and the proceeds are disbursed, by [Axos] in Nevada," and (5) Axos's remedies in case of default.[3] None of these facts are in dispute.[4] Indeed, the loans' terms and the legality of such terms were largely confirmed in a July 3, 2018 attorney opinion letter furnished by Borrower's counsel in connection with the issuance of the loan (the "Opinion Letter"). In relevant part, after reciting the various agreements, it opined:

[3] *See* Malyshev Aff., Exhs. 1-A and 4, Section 16(c). Indeed, the agreements specifically advise the Borrower that federal law, and to the extent not preempted by federal law, the laws of the State of Nevada, would apply.

[4] Defendants do not contest the validity of the loan documents or the underlying debt. Instead, Defendants implausibly, deny having "knowledge or information sufficient to form a belief" with respect to the first loan agreement (*see* Answer ¶ 1, responding to Compl. ¶ 14), but admit to the interest rate of the first loan agreement and formation and interest rate of the second loan agreement. *See* Answer ¶ 5 (admitting allegations in Compl. ¶¶ 17, 21 and 24).

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> The execution, delivery, and performance by the Borrower and each Guarantor of the Loan Documents to which each is a party, and the consummation of the transaction contemplated herein, will not: … (d) contravene or conflict with or result in any violation of any New York state statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and each Guarantor … [and] will not contravene or conflict with or result in violation of any federal statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and Guarantors….

This Opinion Letter was previously included in Axos's motion to dismiss the initial counterclaims and affirmative defenses asserted in the First Action (that motion was resolved by stipulation dismissing, *with prejudice*, the usury claims against Axos). Nevertheless, after entering into the stipulation, the Gangi Parties served both Counterclaims and the Gangi Complaint asserting claims for (i) violation of New York's consumer fraud statute, GBL § 349, and (ii) fraud for allegedly misrepresenting, on a HUD-1 statement associated with the First Loan, that there was no prepayment premium. the Gangi Parties also asserted conclusory affirmative defenses for: (1) failure to elect remedies under RPAPL § 1301, (2) failure to mitigate damages, (3) failure to state a claim, (4) unclean hands, (5) improper service of the Complaint, and (6) engaging in criminally and civilly usurious conduct. None of the affirmative claims or defenses are viable.

First, GBL § 349 is facially inapplicable because it applies only to "consumer-oriented" conduct, not individually negotiated business loans like the ones in this case. The claim is also deficient because no deceptive consumer-oriented conduct, or in fact any materially deceptive conduct, is actually alleged with respect to Axos and WBL. The loan documents fully disclosed the APR, the total repayment amount, and the requirement of a prepayment premium. These documents were reviewed by counsel, who provided the Opinion Letter as to enforceability. The Gangi Parties cannot now claim surprise as to the loans' terms and their obligations, and the "doomed to fail" theory has no application to these loans under New York law.

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Second, the fraud claim fails as a matter of law. Even if the HUD-1 statement – which was not prepared by Axos, but by a third-party title company, WWLT-NY, LLC ("WWLT"), as is evident from the face of the document – erroneously stated that the First Loan had no prepayment premium, this is not enough. The terms of the loan were fully disclosed to the Borrower and Rosario in the First Loan Agreement (as defined below), which was reviewed by the Borrower's counsel, as well as in the business loan summary and pre-payment disclosure executed by Rosario. Josephine (Rosario's tenant in common) was at the very least on inquiry notice as to the terms of that loan, and Lenora has no standing to assert such a claim since she was not a party to the First Loan. Simply put, the Gangi Parties do not, and cannot, plead an actionable misstatement, or scienter, by Axos and WBL, or reasonable reliance as to themselves. Because fraud is an intentional tort, and not a strict liability statute for errors on an ancillary loan document, the Gangi Parties fail to state a claim.

Finally, each of the affirmative defenses should be dismissed because they are conclusory, unsupported by sufficient factual allegations, and, in the case of the sixth affirmative defense of usury, barred by the doctrines of collateral estoppel and issue preclusion.

FACTS[5]

Axos, the Lender, is a federal savings association chartered by the Office of the Comptroller of the Currency ("OCC") under the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1461, *et seq.* Malyshev Aff., Exh. 6 (FDIC listing); *see also* Gangi Compl. ¶ 30. Axos maintains a branch office at 9205 West Russel Road, Suite 400, Las Vegas, NV 89148, out of

[5] This factual recitation is based upon (i) the allegations contained in Axos's Complaint in the First Action ("Axos Complaint"), (ii) the undisputed documentary evidence attached to and authenticated in the Axos Complaint, and (iii) the allegations in the Gangi Complaint and Counterclaims, which are presumed to be true solely for this motion to dismiss. *See* Malyshev Aff., Exhs. 1-4 Capitalized terms, not otherwise defined, have the meaning ascribed to them in the Axos Complaint.

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which the loans at issue were originated. Compl. ¶ 4; Gangi Compl. ¶ 44. WBL, the servicer, is a New York limited liability company that had listed its principal place of business at the time the loans were entered at 101 Hudson Street, 33rd Floor, Jersey City, NJ 07302. Gangi Compl. ¶ 37.

A. Loan #27964 – First Note

The Gangi Parties allege that Borrower and Rosario received a "fax for a pre-approved *business loan*" from co-defendants NYTG and Larry Shuster in June 2018, and "filled out a one-page loan application to NYTG" on June 14, 2018. Gangi Compl. ¶ 60-61, 63 (emphasis supplied). "*NYTG* then prepared a pitch deck for a proposed loan to Rosario Gangi" and "*Larry Shuster and [NYTG]* contacted [WBL] seeking to place the loan." *Id.* ¶¶ 64-65 (emphases supplied). Furthermore, "*NYTG Group* initially pitched a $300,000 loan *to* WBL with weekly payments," and "[a]t some point thereafter, Mr. Rosario was approved for a loan in the amount of $450,000." *Id.* ¶¶ 67, 69 (emphasis supplied). The Gangi Parties do not allege any direct solicitation by either WBL or Axos (who are not related to NYTG or Shuster).

This was not a rushed transaction. In fact, it was carefully undertaken by the Gangi Parties after review of the transaction's terms by counsel. Borrower was represented by Arthur L. Aidala, Esq., who provided an Opinion Letter on July 3, 2018, to Axos on behalf of the Borrower and its principal and primary Guarantor (Rosario) in consultation with the Collateral Owner (defined as Rosario and Josephine as "tenants in common"). Malyshev Aff., Exh. 5. Among other things, the Opinion Letter acknowledged counsel's review of the First Note, First Guaranty and First Mortgage (as those terms are defined below). *Id.* ¶¶ I-IV. The Opinion Letter specifically recognized that "consummation of the transaction" would not "contravene or conflict with … any New York law" and performance under the loan documents would not "result in violation of any federal statute, law, rule or regulation…". *Id.* ¶ 6. Furthermore, the Opinion Letter represented

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that "Borrower, Guarantors and Collateral Owner [*i.e.*, Rosario and Josephine] have informed the undersigned that Borrower has the capacity to make all payments required under the terms of the related loan agreements on the basis of existing and projected revenues over the term of the loan evidenced by the Loan Documents." *Id.* ¶ 7. While the Gangi Parties contend "Josephine Theisen was never provided with any disclosures" (Gangi Compl. ¶ 75), it is clear that all loan documents were pre-reviewed by counsel on their behalf, purportedly in consultation with Josephine. It is not surprising that Borrower's counsel would consult the Collateral Owner in connection with the business loan, since the "Collateral" is the commercial property out of which the Borrower operates.

On July 5, 2018, Axos and Borrower entered the Business Promissory Note and Security Agreement in the amount of $450,000.00 dollars ("First Note"). *See* Axos Compl., Exh. A. The First Note provided that Borrower "promise[d] to pay to the order of [Plaintiff] at its offices located at 9205 West Russell Road, Suite 400, Las Vegas, NV 89148" the amounts due, and that the loan was "approved, and the proceeds are disbursed, by Lender in Nevada." *Id.* ¶ 1. The terms of the First Note provided for daily payments of $2,131.96, with a daily interest rate of 0.23612387677%, and a final payment of $2,127.64 on January 9, 2020. *Id.* ¶¶ 2-3. The First Note required a prepayment premium and provided the formula for its calculation. *Id.* ¶ 4.[6] A Business Loan Summary provided, together with the First Note and executed by Rosario disclosed, *inter alia*, the interest rate, interest charge, APR, total payment amount and payment schedule, as well as

[6] The choice-of-law provision in the First Note provides that "this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada" and that, as a result, the agreement will be "GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES." First Compl., Exh. A ¶ 16(a) (emphasis in original). A similar choice-of-law provision is contained in the Guaranty. *See* First Compl., Exhs. B and E.

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disclosure concerning prepayment premiums in a clear, single-page summary. *See* Axos Compl., Exh. A. Additionally, a Prepayment Disclosure executed by Rosario provided that a prepayment premium was required and explained the formula. *Id.*

The agreement prominently disclosed, upfront, that **"[t]he business loan represented by this Loan Agreement is a higher cost loan than business loans which may be available through other sources. Before signing this Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan**." Axos Compl., Exh. A ¶ 1 (bold in original). The Borrower agreed to only use the proceeds of the loan for Borrower's business purposes. *Id*. ¶ 8(b) ("[T]he proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. Borrower understands Lender is relying on the accuracy of this representation in disbursing the loan proceeds and that Borrower's agreement not to use the proceeds of this Loan Agreement for personal, consumer, family or household purposes …"). This was confirmed in a "Business Loan Purpose Affidavit" executed by Rosario on behalf of Borrower. *See* Axos Compl., Exh. A (confirming "[t]hat the proceeds of the Loan Agreement … being furnished to Borrower will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods."). To secure Borrower's obligations, on July 5, 2018, Rosario executed an Unlimited Guaranty (the "First Guaranty"), by which Rosario personally guaranteed the payment and performance under the First Note. Axos Compl., Exh. B.

Additionally, on July 5, 2018, both Rosario and Josephine executed a Mortgage in favor of Axos ("First Mortgage"), granting Axos a secured interest on real property located at 1002 Bay Ridge Avenue, Brooklyn, NY 11219 ("First Mortgaged Premises") as security. *See* Axos Compl.,

Exh. C; *see also* Gangi Compl. ¶ 83 (Josephine acknowledged that she signed the First Mortgage). The Gangi Parties contend that "Josephine Theisen was never provided with any disclosures" or "the note." Gangi Compl. ¶¶ 75, 84. The Gangi Parties do not explain how Borrower's counsel could have affirmatively represented that Josephine, as a "Collateral Owner," had "informed [Borrower's counsel] that Borrower has the capacity to make all payments required under the terms of the related loan agreements … over the term of the loan evidenced by the Loan Documents" if she was never provided with those documents. Malyshev Aff., Exh. 7 at ¶ 7. Nor do they allege that Josephine ever asked either Rosario or Borrower's counsel for a copy of the First Note prior to signing the First Mortgage, despite the First Note featuring heavily in the First Mortgage. Moreover, Josephine separately executed a Hypothecation Agreement, recognizing that the First Mortgage was given in the form of a hypothecated security to secure the business debt of Borrower, stating that Josephine "expressly acknowledges, covenants, and agrees that [Axos] shall have all rights and remedies" under the First Note if Borrower defaults. *See* First Mortgage, Exh. B.

B. Loan #28367 – Second Note

The Gangi Parties allege that in October 2018, despite being unable to make daily payments under the First Note, Rosario contacted *NYTG and Mr. Shuster*, but not WBL or Axos, seeking a second loan for Borrower. Gangi Compl. ¶¶ 91-92. NYTG "again pitched WBL on another loan[.]" *Id.* ¶ 94. No solicitation by Axos or WBL is alleged. The only direct communications alleged are "several phone calls with WBL where [WBL] advised [Rosario] he could lose his personal residence if he defaulted on the second loan." *Id.* ¶ 98. Rosario chose not to have counsel review the loan documents for the Second Loan, despite being advised of the "OPPORTUNITY TO CONSULT WITH OTHER LENDERS (OR OTHER FINANCING SOURCES) AND WITH AN ATTORNEY, ACCOUNTANT OR OTHER COMPETENT PROFESSIONAL OF [HIS]

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CHOICE[.]" *Id.* ¶ 101; Axos Compl., Exh. D. As a businessman, that was his prerogative, especially in light of an attorney reviewing substantially similar documents a few months earlier.

On October 12, 2018, Axos and Borrower entered into a second Business Promissory Note and Security Agreement in the amount of $160,000.00 dollars (the "Second Note"). *See* Axos Compl., Exh. D. The Second Note contained identical provisions to the First Note concerning Axos's branch office, entry into the agreement and disbursement of funds in Nevada, and governing law. *Id.* ¶¶ 1, 16(c). The Second Note also contained identical provision to the First Note with respect to Borrower's use of funds solely for business purposes. *Id.* ¶¶ 1, 8(b). This was confirmed by an additional Business Loan Purpose Affidavit executed by Rosario in connection with the Second Note. Axos Compl., Exh. A. The terms of the Second Note provided for daily payments of $4,245.55, with a daily interest rate of 0.27945054795%, and a final payment of $4,244.76 on February 11, 2020. *Id.* ¶¶ 2-3. It also required a prepayment premium and provided the method of calculation. *Id.* ¶ 4. The Business Loan Summary, executed by Rosario, for the Second Note disclosed, *inter alia*, the interest rate, interest charge, APR, total payment amount and payment schedule, and the prepayment premium. *See* Axos Compl., Exh. D. A Prepayment Disclosure, executed by Rosario, also disclosed the prepayment premium and provided the method of calculation.

To secure Borrower's obligations, on October 12, 2018, Rosario executed an Unlimited Guaranty ("Second Guaranty") to Axos, by which Rosario personally guaranteed the payment and performance under the Second Note. *See* Axos Compl., Exh. 5. Additionally, on October 12, 2018, Rosario and Leonora executed a Mortgage in favor of Axos ("Second Mortgage"), granting Axos a secured interest on real property located at 983 76th Street, Brooklyn, NY 11228 ("Second

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Mortgaged Premises") as security under the Second Note. *See* Axos Compl., Exh. F; Gangi Compl. ¶ 106 (Leonora admitting to executing the Second Mortgage).

Unlike the First Note and Mortgage, the Gangi Parties do not allege any misrepresentations were made in the HUD-1 about the applicability of a prepayment premium. Gangi Compl. ¶ 106. Instead, they merely contend that "[h]ad Ms. [Leonora] Gangi been advised about the pre-payment penalty, she would not have signed the mortgage." *Id.* ¶ 107. Evidently, she is contending that she did not ask her husband, Rosario, to see the Second Note or discuss its terms (all of which were clearly disclosed to Rosario) before executing the Second Mortgage.

PROCEDURAL HISTORY

Borrower defaulted under both loans, and neither the Borrower nor Rosario, as Guarantor, cured the default. Compl., ¶¶ 18, 25. As a result, Axos accelerated the balances due under the respective notes. *Id.* ¶¶ 20, 27. On April 17, 2019, the Gangi Parties filed a Summons with Notice in this Court against Axos and WBL under Index No. 508823/2019, which was removed to the United States District Court for the Eastern District of New York under Case No. 19-CV-3409 ("Prior Action"). Malyshev Aff., Exh. 10. The Summons with Notice stated that the Gangi Parties were asserting, *inter alia*, a first cause of action for declaratory judgment that the Notes are civilly and criminally usurious and third cause of action for unjust enrichment of profits on usurious interest payments. *Id.* at 2. On June 26, 2019, the parties stipulated to dismiss the Prior Action without prejudice. Malyshev Aff., Exh. 11.

On January 30, 2020, Axos filed the First Action seeking to (i) enforce the First and Second Notes against Borrower, (ii) enforce the First and Second Guaranties against Rosario, and (iii) foreclose on both of the Mortgaged Premises. *See* Malyshev Aff., Exh A. On February 6, 2020, the Gangi Parties filed a joint Answer with Counterclaims. First Action, Dkt. No. 10. The Gangi

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Parties originally included, *inter alia*, (i) a sixth affirmative defense was that the Loan Agreements are both void as usurious under Pen. L. § 190.40, (ii) a first counterclaim seeking "a declaratory judgment … that both Loan #1 and Loan #2 are void as usurious because the interest rate charges is [sic] in excess of 25%; the maximum allowed by New York State under [Pen. L. § 190.40]," and (iii) a second counterclaim alleging "Plaintiff violated NY General Business Law 349(h) because plaintiff engaged in consumer-oriented conduct that was materially misleading and plaintiff suffered an injury as a result." First Action, Dkt. No. 10 at ¶¶ 16, 20.

On August 7, 2020, Axos filed a motion to dismiss the sixth affirmative defense, first counterclaim and second counterclaim in the Gangi Parties' original answer. Dkt. No. 16; Malyshev Aff., Exh. 9. Axos argued, *inter alia*, that New York criminal and civil usury laws are inapplicable because they are preempted by federal law applicable to a federal savings association and therefore the usury claims must be dismissed. *Id.* The motion also included a copy of the Opinion Letter by the Gangi Parties' counsel. The Gangi Parties did not oppose. Instead, on October 21, 2020, Axos and the Gangi Parties entered into a stipulation resolving the motion as follows:

a. The defendants' first counter-claim of usury is dismissed with prejudice.

b. The defendants' second counter-claim is dismissed without prejudice pursuant to CPLR 3217 with leave to re-plead within 15 days.

c. The defendants will Amend its Answer within 15 days.

Malyshev Aff., Exh. 8.

On November 3, 2020, the Gangi Parties filed the TPC. Dkt. No. 27. On November 4, 2020, the Gangi Parties filed the Amended Answer and Counterclaims. Dkt. No. 30. On February 6, 2020, the Gangi Parties filed the Second Action, and on January 20, 2021, the parties stipulated to merging all of the Gangi Parties' claims into the Second Action, and discontinuing the TPC

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without prejudice. Dkt. No. 36. The Gangi Parties' claims, whether styled as a TPC, a Counterclaim, or a standalone Complaint, are fatally flawed, and Axos and WBL move to dismiss.

ARGUMENT

POINT I
STANDARD FOR MOTION TO DISMISS

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court must accept the facts alleged in the pleadings as true, accord the pleading the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. *JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). While the inquiry is whether there is a cognizable legal theory contained in the complaint, bare legal conclusions, inherently incredible allegations or allegations flatly contradicted by the record or documentary evidence are not entitled to a favorable inference. *Velez v. Captain Luna's Marina*, 74 A.D.3d 1191, 1192 (2d Dept. 2010); *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept. 1995); *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005). The same standard applies to a motion to dismiss an affirmative defense under CPLR § 3211(b), which may be made "at any time." *Greco v. Christoffersen,* 70 A.D.3d 769, 771 (2d Dept. 2010).

However, where fraud is alleged, a claimant must allege "a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" and conclusory assertions and/or "[s]weeping references to acts by all or some of the defendants" will not suffice. *First Cent. Sav. Bank v. Meridian Residential Capital*, 2012 N.Y. Slip Op. 50596(U), *6 (Nassau Co. Sup. Ct. 2012) (collecting authorities); *Niemeyer v. Brenntag N. Am., Inc.*, 2018 N.Y. Slip Op. 32803(U), ¶ 3 (N.Y. Co. Sup. Ct. Nov. 1, 2018) ("Because Plaintiff pled fraud generally, as to 'all defendants,'

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the Amended Complaint does not meet CPLR §3016(b)'s requisite level of specificity, and thus fails to state a claim for fraud.") (internal citation omitted); CPLR § 3016(b). Conclusory allegations of fraud must be dismissed. *Saul v. Cahan*, 153 A.D.3d 947, 950 (2d Dept. 2017).

Evidentiary materials may be considered on a CPLR § 3211(a)(7) motion where they demonstrate that "a material fact as claimed by the plaintiff is not a fact at all and … no significant dispute exists regarding it." *Belling v. City of Long Beach*, 168 A.D.3d 900, 901 (2d Dept. 2019). Evidentiary materials may also be considered where they establish "conclusively that the plaintiffs have no cause of action." *Id.* at 902. Furthermore, "the court may consider documents referenced in or attached to the complaint." *Katzenellenbogen v. Aaronov*, 2014 N.Y. Slip Op. 33295(U), ¶ 3 (Kings. Co. Sup. Ct. Dec. 9, 2014) (citing *Manchester Equip. Co. v. Panasonic Indus. Co.*, 141 A.D.2d 616 (2d Dept. 1988)). "Bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true." *Ciafone v. Jobs for NY, Inc.*, 2020 N.Y. Slip Op. 06743, ¶¶ 1-2 (2d Dept. Nov. 18, 2020) (internal citations, quotation marks and alterations omitted).

POINT II
THE GBL § 349(H) CLAIM IS NOT VIABLE

To state "a claim under [GBL] sections 349 or 350, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct, that is (2) materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 10 (2020). Significantly, "[p]rivate contract disputes, unique to the parties … fall within the ambit of the statute[.]" *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank N.A*, 85 N.Y.2d 20, 24 (1995).

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The Gangi Parties cannot state a GBL § 349 claim because the transactions at issue were not consumer-oriented and their actions were not materially misleading. Instead, the loans were the type of "single shot" transactions excluded from the statute. This is particularly a case where, as here, the Borrower (a corporation) was represented by counsel when entering into the first of the transactions, and that counsel issued an Opinion Letter after reviewing all of the transaction documents stating that "consummation of the transaction" would not "contravene or conflict with … any New York law." Malyshev Aff., Exh. 7 ¶ 6. A finding on any one of these grounds is independently fatal to the Gangi Parties' claims.

A. GBL § 349 Does Not Apply Because the Loans Were Not "Consumer-Oriented"

The Court of Appeals made clear that "as a threshold matter, plaintiffs claiming the benefit of section 349—whether individuals or entities such as the plaintiffs now before us—must charge conduct of the defendant that is consumer-oriented." *Oswego*, 85 N.Y.2d at 25; *see Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) ("A plaintiff under section 349 must prove … first, that the challenged act or practice was consumer oriented."). The threshold requirement of consumer-oriented conduct is met by a showing that "the acts or practices have a broader impact on ***consumers*** at large" in that they are "directed to ***consumers***" or "potentially affect similarly situated ***consumers***." *Oswego,* 85 N.Y.2d at 25, 27 (emphases supplied); *State of N.Y. Workers Comp. Bd. v. 26-28 Maple Ave., Inc.*, 80 A.D.3d 1135, 1137 (3d Dept. 2011) (showing of consumer-oriented conduct is a "threshold requirement").

As used in the statute, consumers are "those who purchase goods and services for personal, family or household use." *Med. Soc'y of State of New York v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st Dept. 2005) (citation omitted); *Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285-86 (1st Dept. 2000); *Sheth v. N.Y. Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dept. 2000); *Tasini v. AOL,*

Inc., 851 F. Supp. 2d 734, 742-43 (S.D.N.Y. 2012); *see* GBL §§ 399–c(1)(b) and 399–p(1)(c); GOL § 5–327(1)(a); CPLR § 105(f). Here, there is no dispute that the loan proceeds were advanced to a corporation, Borrower, for business (and not personal or household or family) purposes.[7] In fact, Borrower's president and Guarantor, executed affidavits to that very effect as a condition of receiving the loan proceeds. *See* Compl., Exhs. A and D.[8] Additionally, the Gangi Parties confirm multiple times in their pleading that the loans were business loans. *See, e.g.*, Gangi Compl. ¶¶ 12, 15, 26, 60, 71. This alone dooms the claims under GBL § 349. *See People v. N. Leasing Sys., Inc.*, 169 A.D.3d 527, 528 (1st Dept. 2019) (citing *Cruz*, 263 A.D.2d at 289) (affirming dismissal of petition where "[t]here are no factual allegations that would show that the underlying transactions involve goods or services for 'personal, family or household purposes'").

Despite documentary evidence demonstrating that the loans at issue were intended to be business loans (to which GBL § 349 in inapplicable), the Gangi Parties make the incredible argument that Axos's acts of "providing" and attempting to "collect on" loans is in and of itself

[7] *See* Compl., Exhs. A and D, ¶¶ 1 ("The business loan represented by this Loan Agreement is a higher cost loan than business loans which may be available through other sources. Before signing this Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan."), and ¶ 8(b) ("[T]he proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. Borrower understands Lender is relying on the accuracy of this representation in disbursing the loan proceeds and that Borrower's agreement not use the proceeds of this Loan Agreement for personal, consumer, family or household purposes …").

[8] The representations and promises in the Loan Agreements and Business Purpose Affidavits are conclusive as to the nature of the transaction. *See generally Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, 34 N.Y.3d 327 (2019) ("[t]he best evidence of what parties to a written agreement intend is what they say in their writing") (internal citations and quotation marks omitted); *Manchester Equip.*, 141 A.D.2d at 618 ("The provisions of the written contract which directly contradict the allegations of oral representations must be taken into account in evaluating a fraud claim …") (internal citations and quotations marks omitted); *see also Comer v. Advanced Capital Inc.*, 2020 N.Y. Misc. LEXIS 9101, at *9 (Queens Co. Sup. Ct. May 25, 2020) (merchant cash advance agreement was not a loan subject to usury laws because "[t]he agreement states that 'THIS IS NOT A LOAN,' but rather it is the sale of a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer,'" and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing") (internal quotation marks and citations omitted).

"consumer oriented". Counterclaims ¶¶ 17-18.[9] These allegations would expand the reach of GBL § 349 to every conceivable transaction, and appellate authority is directly to the contrary.

In *Cruz*, 263 A.D.2d at 286, the Appellate Division, First Department, held that the publisher of the "Yellow Pages" did not violate the GBL in its dealings with the plaintiffs, noting that the word "consumer" as used in the Article 22-A of the GBL (including section 349) "is consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes.'" *Id.* at 289 (citations omitted). Because the allegedly deceptive transactions in *Cruz* involved business advertisements placed in the Yellow Pages, the court held that they did not implicate consumer-oriented conduct. *Id.* The First Department reached this conclusion even though the "transactions in the matter at bar … are modest in value, are repeated regularly with numerous parties, rely on a form contract, and involve parties with a large disparity in economic power and sophistication." *Id.* at 291 (citations omitted). Despite these facts, which "at first glance … might appear to be within the ambit of GBL Article 22-A", the First Department observed that this analysis did not "take due account of the threshold question noted above—whether the conduct at issue is consumer oriented" and held as follows:

> **Since advertisement space in the Yellow Pages is, by definition, a commodity available to businesses only**, and plaintiffs fail to show how the complained-of conduct might either directly or potentially affect consumers, **such conduct does not fall within the parameters of the statute.**

Cruz, 264 A.D.2d at 291 (emphasis added).

[9] Defendants also erroneously contend in the Gangi Complaint that both Axos and WBL engaged in "consumer-oriented" conduct because "placing loans that are available to every resident in New York state" and "[s]ending targeted communications to potential customers" supposedly constituted consumer-oriented conduct. Gangi Complaint ¶¶ 123-124 (citing *Plavin*, 35 N.Y.3d at 10-13). However, the Gangi Complaint fatally *does not allege* mass mailing by either Axos or WBL, or any direct solicitations by either. At most it alleges a direct solicitation for a "pre-approved business loan" from co-Defendant New York Tribeca Group LLC, which then separately "pitched" WBL (both times). Gangi Complaint ¶¶ 60-61.

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Moreover, conduct is "not consumer-oriented within the meaning of section 349" where "[t]he acts complained of are limited to business rather than consumer [agreements], and the conduct complained of cannot carry over to consumer transactions." *Citipostal, Inc. v. Unistar Leasing*, 283 A.D.2d 916, 918 (4th Dept. 2001). Indeed, GBL § 349 is not a "sword to be wielded in business-versus-business disputes ... where the party asserting the claim is not acting in a consumer role." Richard E. Givens, OVERALL SCOPE OF GENERAL BUSINESS LAW §§ 349-350 (McKinney Supp. 1996) (quoted in *S.Q.K.F.C. v. Bell. Atl. TriCon Leasing, Corp.*, 84 F.3d 629, 636 (2d Cir. 1996)).

Courts regularly dismiss similar claims with respect to business loans, which are "[p]rivate contract disputes unique to the parties" and therefore "would not fall within the ambit of the statute[.]" *NY Univ. v. Cont. Ins. Co*., 87 N.Y.2d 308, 320 (1995); *see Silver v. CitiMortgage, Inc.*, 162 A.D.3d 812, 813-14 (2d Dept. 2018) ("In opposition to the defendant's *prima facie* showing that, in connection with the subject loan, it did not engage in consumer-oriented conduct which was deceptive or misleading in a material way, the plaintiff failed to show anything other than a private contract dispute unique to the parties."); *Amos Fin., LLC v. H & B & T Corp.*, 2015 N.Y. Slip Op. 50970(U), ¶ 8 (Kings Co. Sup. Ct. June 29, 2015) ("[T]he plaintiff has demonstrated … that the loan at issue was a business loan, making the statute inapplicable because the challenged act or practice is not consumer-oriented" and the "action is based upon a single loan, [which] does not have a broad impact on consumers at large."); *Polish & Slavic Fed. Credit Union v. Saar*, 39 Misc. 3d 850, 855-56 (Kings Co. Sup. Ct. 2013) ("While certain services performed in conjunction with the sale and mortgaging of residential property may fit within the ambits of the statute, the alleged deceptive acts in the transaction here are more akin to a private contract dispute. Significantly, the alleged deceptive acts were not directed toward a 'consumer'

such as a home buyer, but rather toward a financial institution receiving services in furtherance of a business purpose.").

Here, sizeable business loans were extended to a corporation, which was represented by counsel during negotiations. Therefore, the Gangi Parties have failed to make a threshold showing of consumer-oriented conduct, dooming their claim under GBL § 349.

B. Axos's and WBL's Conduct Was Not "Materially Misleading"

Even if the threshold question of "consumer oriented" conduct were overcome, "a prima facie case requires a showing that the defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." *Amalfitano v. NBTY, Inc.*, 128 A.D.3d 743, 745 (2d Dept. 2016) (quoting *Oswego*, 85 N.Y.2d at 25). "Whether a representation or an omission, the test is whether the allegedly deceptive practice is likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* The Gangi Parties do not allege that either Axos or WBL engaged in any deceptive conduct in connection with the issuance of the loans (nor could they, as the loan summaries clearly set out all material terms of the loans, including the interest rate to be charged, and the total payoff amount). *See* Compl., Exhs. A and D. Nor can they seriously claim to have been misled as to clearly disclosed loan terms when they were represented by counsel. They rely on two theories to advance their claim: (1) that the loans were "doomed to fail" (Counterclaims ¶¶ 22-23; Gangi Compl. ¶¶ 126-128); and (2) that the HUD-1 statement states, "[t]he loan does not have a prepayment penalty" (Counterclaims ¶ 24; Gangi Compl. ¶ 124). However, neither theory is viable.

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1. The "Doomed to Fail" Theory Is Inapplicable to the Loans At Issue Under New York Law

In New York, simply claiming a loan was "doomed to fail" does not state a cause of action under GBL § 349. Caselaw confirms that Banking Law § 6-l is the only New York statute that requires a heightened degree of diligence by the lender. *See HSBC Bank USA, N.A. v. Campos*, 2017 N.Y. Slip Op. 50695(U), ¶¶ 4-6 (Queens Co. Sup. Ct. May 15, 2017) (dismissing a GBL § 349 claim premised on the borrower's doomed to fail theory because Banking Law § 6-l did not apply to the loan at issue, and the court was "unaware of any other statute which requires a lender to take into account the borrower's ability to repay when making a loan, and provides a remedy to the borrower for the lender's failure to meet such requirement").

Banking Law § 6-l, by its own terms, does not apply to the loans because they were not (1) made to a "natural person" for (2) "primarily for personal, family, or household purposes[.]" Banking L. § 6-l(e) (defining "Home loan" for the purposes of the statute); *see John v. Whiteacre Funding, LLC*, 2016 N.Y. Slip Op. 31234(U), ¶ 15 (Kings Co. Sup. Ct. June 17, 2016) ("This statute has no applicability to an application for a commercial loan which the plaintiff had sought on behalf of 461 New Lots Avenue LLC."); *2013 Funding LLC v. Park 91 LLC*, 2013 N.Y. Slip Op. 32941(U), ¶ 5 (N.Y. Co. Sup. Ct. Nov. 6, 2013) ("[I]t is undisputed that the Borrower is Park 91, a limited liability company, which is not a natural person. Moreover, in the Statement of Business Purposes provided by Park 91 at the time it took out the loan it explicitly stated that the loan was to be used for 'business or commercial purposes' and 'the loan proceeds [would] not be used for personal, family, household or agricultural purposes.' Accordingly, the loan at issue herein is not a home loan as a matter of law and any assertion by moving defendants to the contrary is unavailing."). Here, the Borrower is not a "natural person," and the loans were explicitly not

for "personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods[.]" *See* First Note ¶ 8(b); Second Note ¶ 8(b). The Gangi Parties admit as much. *See* Gangi Compl. ¶¶ 2 (alleging that Borrower "was having some cashflow problems"); 12 (alleging that this was a "business loan").

The reliance in the Gangi Complaint on *Kaur v. World Bus. Lenders, LLC*, 440 F. Supp. 3d 111, 124-25 (D. Mass. 2020), an out-of-state decision applying Massachusetts law, is puzzling. As made clear in that decision, that court was applying the Massachusetts consumer protection statute (Mass. Gen. L. ch. 93A), which by its own terms covers certain deceptive conduct in the business-to-business context—*i.e.*, between business entities. *See Kaur*, 440 F. Supp. 3d at 118. Mass. Gen. L. ch. 93A § 11 gives a private right of action to "[a]ny *person who engages in the conduct of any trade or commerce* and who suffers any loss of money or property, real or personal, as a result of the use or employment by *another person who engages in any trade or commerce* of an unfair method of competition or an unfair or deceptive act or practice." "Person" is defined to include "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." Mass. Gen. Laws. ch. 93A § 1(a); *see Graziano v. Crow Point Partners, LLC*, 144 N.E.3d 308 (Mass. App. Ct. 2020) (citing business-to-business cases).

The Massachusetts statute is not comparable to New York's consumer protection statutes, which do not cover business-to-business cases: New York's (i) GBL § 349 applies only to "consumer" and "consumer-oriented conduct" (*see* Point III(A), *supra*), and (ii) N.Y. Banking Law § 6-l applies only to home loans to a "natural person" for "primarily for personal, family, or household purposes." In other words, neither New York statute creates lender liability for granting a commercial loan secured against personal property, even if the loan is allegedly "doomed to fail." *HSBC Bank USA*, 2017 N.Y. Slip Op. 50695(U), at ¶¶ 4-6 ("the allegations of defendant Marta

Campos [that the lender Axiom engaged in poor underwriting practices adversely impacting the public, did not consider the ability of a mortgagor to repay the loan and did not refuse to loan money to a person of marginal financial means or ability] are insufficient to state a cause of action for, or a defense based upon, violation of General Business Law § 349"). Moreover, New York courts have repeatedly held that the Massachusetts statute—which is not even asserted by the Gangi Parties—cannot serve as the basis for liability in New York where, like here, the case has no Massachusetts nexus and the laws of another jurisdiction apply to the transaction. *Obstfeld v. Thermo Niton Analyzers, LLC*, 168 A.D.3d 1080, 1085 (2d Dept. 2019) (plaintiff could not maintain Mass. Gen. L. ch. 93A § 11 claim "as that statutory cause of action is only applicable to activity that 'occurred primarily and substantially within the commonwealth [of Massachusetts],' and to commercial transactions between separate business entities") (internal citation omitted); *OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 123 A.D.3d 222, 229 (1st Dept. 2014) (Mass. Gen. L. ch. 93A § 11 "does not apply when another jurisdiction's laws govern the underlying breach of contract claims.").

2. An Error on a HUD-1 Is Not Enough to Support a Claim Where, as Here, All of the Facts Were Already Disclosed, and the Borrower Was Represented by Counsel

Axos's and WBL's conduct was not materially misleading because the terms of the First Note were disclosed long before the mortgage was executed, including to Borrower's counsel, who reviewed the First Note on or before July 3, 2018 (when he sent the Opinion Letter to Axos).[10] The First Note disclosed—both in paragraph 4 and the accompanying Business Loan Summary—that a prepayment premium would be assessed and how it is calculated. Compl., Exhs.

[10] No similar allegations of misleading conduct are made with respect to the Second Loan.

A and D. The Gangi Parties do not, and cannot, claim that the loan documents, which they were responsible for reading, are materially misleading. *See Oswego*, 85 N.Y.2d at 27 (liability under the statute will depend, in part, on whether plaintiffs "possessed or could reasonably have obtained the relevant information they now claim the Bank failed to provide"); *State of N.Y. Workers' Comp. Bd. v. 26-28 Maple Ave., Inc.*, 80 A.D.3d 1135, 1137 (3d Dept. 2011) (no materially misleading act where the plaintiff "could reasonably have obtained this information from another source").

Borrower and Rosario do not seriously argue otherwise. Putting aside, for the moment, the affirmative statement in the Opinion Letter that Josephine was consulted prior to execution (Malyshev Aff., Exh. 7 ¶ 6), she admits to signing the First Mortgage (Gangi Compl. ¶ 83), which stated in bold capitalized letters on the first page: "**THIS MORTGAGE … IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE.**" Axos Compl., Exh. C. at 1. The First Note is identified on page 10 of the First Mortgage. *Id.* at 10. In executing the First Mortgage, Josephine acknowledged having read all the provisions of the Mortgage, and agreed to its terms. *Id.* at 12. Separately, Josephine executed an addendum, annexed as Exhibit B to the First Mortgage, in which she agreed that in the "event of a default by Borrower under the Note" she "expressly acknowledges, covenants, and agreed that" Axos shall have "all rights and remedies hereunder as set forth for default just as if [Josephine] had executed the Note." *Id.* at last page. Thus, Josephine was on notice of her responsibility—prior to executing the First Mortgage—to review the First Note. *See Valle v. Popular Cmty. Bank*, 2014 N.Y. Slip Op. 32180(U), ¶ 31 (N.Y. Co. Sup. Ct. Aug. 14, 2014) ("since the May 31, 2010 account statement referred to the brochure, BPNAs failure to enclose the

disclosure with the statement does not constitute a deceptive act, as Plaintiffs could have obtained the information by simply requesting the brochure from BPNA").

Thus, even if, as alleged, the HUD-1 settlement statement—which was prepared by the settlement agent, WWLT, rather than Axos or WBL—contained the mistaken statement that there was no prepayment premium, its actual inclusion cannot be materially misleading in this instance where it was clearly disclosed in the loan documentation. *Disa Realty, Inc. v. Rao*, 168 A.D.3d 1037, 1039-40 (2d Dept. 2019) ("the evidence submitted by the plaintiff in support of its motion demonstrated that Rao was presented with clearly written documents describing the terms of the subject loan, and that there was no materially misleading statement. Such evidence established the plaintiff's prima facie entitlement to judgment as a matter of law dismissing the counterclaim"); *Amalfitano*, 128 A.D.3d at 745 ("the defendants demonstrated, prima facie, that the subject promotion was not materially deceptive, in light of the disclaimer language"); *Emigrant Mortg. Co., Inc. v. Fitzpatrick*, 95 A.D.3d 1169, 1172 (2d Dept. 2012) (dismissing GBL § 349 defense where lender's "evidence established that Fitzpatrick was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income").

Moreover, WWLT's mistake about a substantive term cannot be imputed to Axos or WBL, since the HUD-1 settlement statement was clearly prepared by WWLT and expressly stated that "[i]f you have any questions about the Settlement Charges and Loan Terms listed on this form, *please contact your lender*." Gangi Compl., Exh. 1, at second-to-last page (emphasis supplied). To the extent Josephine had questions about the terms of the First Note, the HUD-1 expressly told her that the lender (*i.e.,* Axos), not the settlement agent, was the correct person to contact. There is no allegation she did so.

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POINT III
THE FRAUD CLAIM IS NOT VIABLE

To plead fraud, the Gangi Parties must establish "a misrepresentation or a material omission of fact which was false and known to be false by [Axos and WBL], made for the purpose of inducing the [them] to rely upon it, justifiable reliance of the [the Gangi Parties] on the misrepresentation or material omission, and injury." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578-79 (2018). An isolated allegation that the HUD-1 statement for the First Loan contained an error is not enough, where the prepayment premium is prominently disclosed in paragraph 4 of the First Note reviewed, *inter alia*, by Borrower's counsel.

As an initial matter, the Gangi Parties' theory defies logic. The fraud claims are captioned as being asserted by Josephine, but make common allegations as to, and demands damages on behalf of, all the Gangi Parties. *See* Gangi Compl. ¶¶ 133, 142; Counterclaims ¶¶ 36-37. Yet, Rosario (Borrower's principal) affirmatively pleads, as part of the very same claim, that he in fact received the correct disclosure. Gangi Compl. ¶ 136 ("AXOS and WBL knew [the HUD-1 disclosure] was false because WBL sent Mr. Gangi disclosures on the day of the closing of the first loan giving him notice that the note included a prepayment penalty."). This admission is not surprising since the First Note was reviewed by counsel, who represented that he consulted Josephine (the Collateral Owner).

In executing the First Mortgage and accompanying Hypothecation Agreement, Josephine also acknowledged the existence of the First Note, and affirmatively acknowledged that (1) the benefits being derived from the $450,000 loan to Borrower "were sufficient consideration to support the Mortgage"; (2) in the event of default by Borrower she expressly acknowledged that Axos would have "all rights and remedies as set forth" in the First Note; and (3) that these

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representations were an inducement to Axos to make the loan. *See Lewis v. Wells Fargo Bank, N.A.*, 134 A.D.3d 777, 778 (2d Dept. 2015) (dismissing fraudulent misrepresentation claim against lender where "[t]he loan application, which was signed by the plaintiff, set forth the terms of the mortgage …"). Axos and WBL are not in a position to opine as to what unpleaded claims Josephine may have against Rosario, Borrower, or Borrower's counsel, but the details of that loan were fully disclosed by Axos.

No fraud is alleged in connection with the Second Loan. Lenore is not party to the First Loan or any of the ancillary documentation, so it is unclear how she could plead a fraud claim.

A. No Actionable Misstatements by Axos or WBL

To state a claim for fraud, the Gangi Parties must allege that Axos and WBL "made a representation as to a material fact." *Ross v. Louise Wise Servs*., Inc., 8 N.Y.3d 478, 488 (2007) (quotations omitted). The pleading must specifically allege a misrepresentation by each defendant or why each defendant is chargeable with a representation by another defendant. *See Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dept. 2006) ("It is not alleged that Minella made any misrepresentations to plaintiff, nor is there any basis to conclude that Minella may be chargeable with other parties' claimed misrepresentations …"); *Parsons Constr. v. Wifi Constr. LLC*, 2020 N.Y. Misc. LEXIS 4401, at *4 (Queens Co. Sup. Ct. June 22, 2020) ("A claim involving multiple defendants must make specific and separate allegations against each defendant.").

Here, no material misrepresentation by Axos, the lender, or WBL, the servicer, is alleged. In fact, the Gangi Parties affirmatively allege that no statements were made by anyone from Axos. *See* Gangi Compl. ¶ 85. Nor are any misstatements actually attributed to WBL. Instead, giving the allegations their most generous read, the following "statements" were made to the Gangi Parties: (1) independent broker NYTG (and its principal Shuster) made representations to Rosario

and Borrower in soliciting Rosario to submit an application for business funding that was then separately "pitched" to WBL by NYTG (Gangi Compl. ¶¶ 2-5, 60-66); (2) non-party Anne Rogier, a notary public, responded to a question by Josephine about whether there was a prepayment premium by pointing Josephine to the HUD-1 and stating that "since the HUD-1 says there is no pre-payment penalty, there cannot be one" (Gangi Compl. ¶¶ 80-81; Counterclaims 32-33); and (3) the HUD-1 itself, prepared by non-party WWLT, did not reflect a prepayment premium (Gangi Compl., Exh. 1). None of these "representations" are actionable as to Axos (or WBL) as the representations Axos did make, in the loan documents, are entirely truthful.

As an initial matter, the Gangi Parties do not sufficiently allege that any of these third-parties were agents, acting within the scope of their agency on behalf of the lender, Axos, or the servicer, WBL, in making these "misrepresentations."[11] The Gangi Parties allege no facts to support an inference that NYTG and Shuster had any authority on behalf of Axos or WBL (and indeed the allegations make clear that they were acting independently, first pitching The Gangi Parties and *then* pitching WBL on each of the loans). Ms. Rougier, by The Gangi Parties' own admissions, was not an employee or agent of WBL. *See* Gangi Compl. ¶ 78 (alleging that she "called WBL and asked when a representative from WBL would arrive"). Instead, the Gangi Parties allege solely "[u]pon information and belief" that a WBL representative told Ms. Rougier to act as "WBL'[s] agent at the closing." Gangi Compl. ¶ 79. However, this allegation is insufficient because it does not state the basis for the Gangi Parties' belief that Ms. Rougier was actually authorized as an agent of Axos, the lender they were directed to contact in the event of a

[11] It is well-established that a principal cannot be liable for the loss caused by a misrepresentation of a putative agent to a third party unless it gave specific authorization to the putative agent, through "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority." *Bowers v. Merchs. Mut. Ins. Co.*, 248 A.D.2d 1005, 1006 (4th Dept. 1998).

question, to make representations that contradict the written terms of the First Note. *See Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dept. 2015) ("Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud."). The Gangi Parties' pleadings contain no specific allegations of any words or conduct of Axos or WBL *that were communicated to the Gangi Parties* that might be construed to give the Gangi Parties the belief that they could rely on Ms. Rougier to alter the terms of the loan documents.

The form HUD-1 statement was the representation of the settlement agent, WWLT, and not Axos or WBL, and specifically advised the signor to "contact [their] lender" if they have "any questions about the Settlement Charges and Loan Terms listed on this form[.]" Gangi Compl., Exh. 1. It is not alleged that Josephine contacted Axos (the Lender), in connection with the erroneous disclosure that was contradicted by the loan documents previously reviewed by Borrower's counsel on behalf of the Gangi Parties and later executed to obtain the loan proceeds. *See* Gangi Compl. ¶¶ 79-83.[12] Indeed, the Gangi Parties do not even try to explain how they can rely on the HUD-1 to support their claim in light of this review and the affirmative allegation that WBL e-mailed Rosario, one of the individual Defendants and a principal of the Borrower, a copy of the disclosures, which included disclosures of the prepayment premium, on July 5, 2018. Gangi Compl. ¶¶ 74, 136; *see* Axos Compl., Exh. A (which includes the Business Loan Summary and Prepayment Disclosure, both executed by Rosario).

Finally, to the extent any alleged misrepresentations were pre-contractual, they are barred

[12] The Opinion Letter affirmatively states that Borrower's counsel reviewed the First Note, which in turn disclosed the prepayment premium at paragraph 4. *See* Malyshev Aff., Exh. 7 ¶ 1; First Compl., Exh. A ¶ 4 ("Voluntary Prepayment and Prepayment Premium").

by the merger clause contained in the loan documents. *See Chappo & Co. v. Ion Geophysical Corp*., 83 A.D.3d 499, 500 (1st Dept. 2011) ("The cause of action alleging fraud in the inducement is barred by the merger clause"); *Kremer v. Sinopia LLC*, 104 A.D.3d 479, 480 (1st Dept. 2013). Specifically, paragraph 16(t) of the First Note provides that it "supersedes all other prior discussions, negotiations, commitments, agreements and understandings, written or oral, between or among" the Borrower, the Lender, and the Guarantors. Such specific disclaimers destroy any allegations "that the agreement was executed in reliance upon contrary oral misrepresentations." *See Oseff v. Scotti*, 130 A.D.3d 797, 799 (2d Dept. 2015); *see also Bridge Group Invs. v. V.*, 2017 Nev. Dist. LEXIS 101, *45-46 (Nev. Dist. Ct. Mar. 13, 2017). This separately bars any reliance on the representations of New York Tribeca Group and Ms. Rougier.

B. No Scienter

Even if the Gangi Parties were able to allege a material misrepresentation by Axos and WBL, they do not and cannot allege scienter on their part. To state a claim for fraud, the Gangi Parties must plead facts that demonstrate each of Axos and WBL knew the alleged misrepresentations were false and intended to deceive the Gangi Parties. *See Friedman v. Anderson*, 23 A.D.3d 163, 167 (1st Dept. 2005). Conclusory allegations of scienter lacking specificity are insufficient as a matter of law. *Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, 156 A.D.3d 464, 465 (1st Dept. 2017) ("The allegations of scienter here were not pleaded with the requisite particularity, but are conclusory, and scienter may not reasonably be inferred from the circumstantial evidence relied on by plaintiffs.").

Here, no motivation is articulated for the statement in the HUD-1, especially where the First Note was both reviewed by the Gangi Parties' counsel ahead of time in draft form, and the final document containing the contrary disclosure were sent to the Borrower and its principal. A

wholly implausible theory of scienter—and here, no theory at all is articulated—is simply not enough. *See, e.g., ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 203 (2d Cir. 2009) (holding that allegations that one has "both an intent to earn excessive fees for the corporation and also an intent to defraud . . . by losing vast sums of money" is implausible); *Kalnit v. Eichler*, 264 F.3d 131, 141–42 (2d Cir. 2001) (holding that "[w]here plaintiff's view of the facts defies economic reason . . . [it] does not yield a reasonable inference of fraudulent intent" (quotation omitted)). This is crucial because fraud is an intentional tort, not a strict liability cause of action where a technical error might be enough.

C. No Reasonable Reliance

"An essential element of any fraud claim is that there must be reasonable reliance, to a party's detriment, upon the representations made." *Nabatkhorian v. Nabatkhorian*, 127 A.D.3d 1043, 1044 (2d Dept. 2015). There is little dispute that neither Borrower, nor Rosario, can show justifiable reliance on the line entry in the HUD-1 statement, where they, and their counsel, (i) reviewed the First Note containing the prepayment premium disclosure; (ii) provided an Opinion Letter as to its enforceability to Axos in consultation with Josephine; and (iii) were given the Business Loan Summary and Prepayment Premium. *See* Axos Compl., Exh. A.

Nor can Josephine—even if the statement in the Opinion Letter that she was consulted (Malyshev Aff., Exh. 7 ¶ 6) was fraudulently made to Axos—show justifiable reliance in view of the entire transaction, including the disclosures in the First Mortgage and the Hypothecation Agreement. *See Miller v. Icon Grp. LLC*, 77 A.D.3d 586, 587-88 (1st Dept. 2010) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on the other party's misrepresentations[.]"). Josephine was under an obligation to read the First Mortgage, and the

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documents referenced therein (including the First Note) before she signed the First Mortgage, "and cannot generally avoid the effect of the document on the ground that … she did not read it or know its contents." *Financial Servs. Veh. Trust v. Saad*, 98 A.D.3d 1077, 1078 (2d Dept. 2012); *see Stortini v. Pollis*, 138 A.D.3d 977, 978 (2d Dept. 2016) ("A party who signs a document without any valid excuse for not having read it is conclusively bound by its terms.") (internal citation and quotations omitted). A defense that the signor did not understand what he or she read "only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written." *Ackerman v. Ackerman*, 120 A.D.3d 1279, 1280 (2d Dept. 2014); *see Cash v. Titan Fin. Servs., Inc.*, 58 A.D.3d 785, 788 (2d Dept. 2009) (dismissing plaintiff's claim of fraud where she claimed she was told the documents she signed at a real estate closing were for a refinancing when in fact they were for a sale of the property, since the plaintiff read English, was under no physical or mental disability at the time, and was not prevented by the defendants from reading the documents, yet she signed the documents without reading them).

As discussed at length, *supra*, the First Mortgage and Hypothecation Agreement Josephine executed, in connection with a business loan secured by the property from which the business operated, specifically stated that the obligations in the First Note were binding upon Josephine (the property's co-owner as tenant in common), and it was incumbent upon her to review them. *See* Axos Compl., Exh. C.

POINT IV
THE AFFIRMATIVE DEFENSES SHOULD BE STRICKEN

The Court should strike each of the Gangi Parties' affirmative defenses pursuant to CPLR § 3211(b), as they are conclusions of law without any supporting allegations. *See Moran Enters., Inc. v. Hurst*, 96 A.D.3d 914, 917 (2d Dept. 2012) ("The Supreme Court should have granted those

branches of MEI's motion which were to dismiss Hurst's affirmative defenses numbered 2, 3, 5, 7, 10, 12, 13, 14, and 15, since they merely pleaded conclusions of law without any supporting facts."); *170 W. Vill. Assocs. v. G & E Realty, Inc.*, 56 A.D.3d 372, 372-73 (1st Dept. 2008) ("The commercial tenant's challenged affirmative defenses, which pleaded conclusions of law without supporting facts, were properly stricken as insufficient."); *GE Bus. Fin. Servs. Inc. v. 166 W. 75th St., LLC*, 2010 N.Y. Slip Op. 31259(U), ¶ 12 (N.Y. Sup. Ct. May 20, 2010) ("affirmative defenses alleging bad faith, unclean hands, estoppel, plaintiff's own culpable conduct and unconscionability must be stricken, as they are no more than vague legal conclusions"). The Gangi Parties asserted conclusory affirmative defenses of Axos's alleged (1) failure to properly elect remedies under RPAPL § 1301, (2) failure to properly mitigate damages, (3) failure to state a claim, (4) unclean hands, (5) improper service, and (6) engaging in criminally and civilly usurious conduct. These, as pled, are insufficient to withstand a motion to dismiss.

Additionally, some of these affirmative defenses should be dismissed for the specific reasons that follow.

The *first affirmative defense* of failure to elect remedies under RPAPL § 1301 is defective. RPAPL § 1301(1), the "single action" or "election of remedies" rule, provides in relevant part that "[w]here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage." However, the Gangi Parties do not allege that there is any other action that has been commenced to collect any part the mortgage debts. To the extent Axos sued in the Complaint to foreclose on the First Mortgage and Second Mortgage, Axos is entitled to seek a deficiency judgment under the First Note, the Second Note, the First Guaranty, and the Second Guaranty in the same action. *See* RPAPL § 1371(1) ("If a person who is liable to the plaintiff for the payment of the debt secured

by the mortgage is made a defendant in the action … the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds ….”). Therefore, the first affirmative defense should be dismissed.

The *fourth affirmative defense* of unclean hands, inasmuch as it may be predicated on the alleged violations of GBL § 349 or fraud in the Gangi Complaint and Counterclaims, should be dismissed because each of those claims are not viable for the reasons set forth above. *See Agility Funding, LLC v. Wholey*, 119 A.D.3d 1168, 1170 (3d Dept. 2014) (“[A]ssuming, without deciding, that the defense of unclean hands is applicable to a mortgage foreclosure action, defendants failed to present evidence of immoral or unconscionable conduct by plaintiff ….”).

The *fifth affirmative defense* of improper service was waived by Defendant’s failure to make a motion to dismiss the First Action within 60 days of their original answer, filed February 6, 2020. *See* Dkt. No. 10. “[A]n objection that the summons and complaint … was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.” CPLR § 3211(e); *JP Morgan Chase Bank, Nat’l Ass’n v. Venture*, 148 A.D.3d 1269, 1271 (3d Dept. 2011). Since the Gangi Parties raised an identical fifth affirmative defense of lack of service in their original answer but failed to make a timely motion to dismiss on that ground, the defense is now waived. Therefore, the fifth affirmative defense should be dismissed.

The *sixth affirmative defense* alleges “[b]oth Loan #1 and Loan #2 are *void ab initio* because they violate the criminal usury statute under New York Penal Law 190.40; and this is

permissible as an affirmative defense for Defendant MGPHC, *see* General Obligations Law 5-521(3)." Answer ¶ 15.

However, any usury claim or defense is barred by the doctrines of claim and issue preclusion because the Gangi Parties have discontinued such claims *twice*, and did so for the second time "with prejudice." "[A] discontinuance by means of notice operates *as an adjudication on the merits* if the party has once before discontinued by any method an action based on or including the same cause of action …" CPLR § 3217(c) (emphasis supplied); *see Haber v. Raso*, 130 A.D.3d 781, 782 (2d Dept. 2015). Under New York's transactional approach to the doctrine of *res judicata*, "a disposition on the merits bars litigation between the same parties, or those in privity with them, *of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding*." *DeSouza v. LSREF2 Apex 2, LLC*, 171 A.D.3d 702, 702 (2d Dept. 2019) (emphasis supplied); *see Nottenberg v. Walber 985 Co.*, 160 A.D.2d 574, 575 (1st Dept. 1990) (discontinuance of claims with prejudice will have *res judicata* effect on raising the same as an affirmative defense since "*res judicata* bars both claims that were actually litigated and those relevant issues that could have been litigated"). Res judicata will bar further usury claims that were or could have been brought in a prior action. *Flushing Nat'l Bank v. Durante Bros. & Sons, Inc.*, 148 A.D.2d 415, 416 (2d Dept. 1989); *Cent. Funding Co. v. Deglin*, 67 A.D.2d 673, 674 (2d Dept. 1979), *aff'd* 48 N.Y.2d 964 (1979); *In re Merhi*, 518 B.R. 705, 713 (Bankr. E.D.N.Y. 2014); *In re Bocker*, 123 B.R. 164, 165 (E.D.N.Y. 1991).

Here, on June 19, 2019, the Gangi Parties stipulated to discontinue the Prior Action, in which they asserted claims against Axos and WBL based upon the Notes allegedly being civilly and criminally usurious, without prejudice. *See* Malyshev Aff., Exhs. 10 and 11. Second, on

October 21, 2020, the Gangi Parties stipulated in the First Action that "[t]he defendants' first counter-claim of usury is dismissed with prejudice," thereby dismissing their usury claims for the second time. Malyshev Aff., Exh. 8 (referencing usury claim made in prior version of the Counterclaims). The second voluntary discontinuance alone – even if it had not been with prejudice – bars the Gangi Parties from raising any usury once again as an affirmative defense.

Furthermore, "[a] stipulation of discontinuance with prejudice without reservation of right or limitation of the claims disposed of is entitled to preclusive effect under the doctrine of res judicata." *Wells Fargo Bank, Nat'l Ass'n v. Enbar*, 173 A.D.3d 938, 940 (2d Dept. 2019). The Gangi Parties' dismissal "with prejudice" of their usury affirmative claim in their second discontinuance has *res judicata* preclusive effect as to any affirmative defense of usury since the identical defense necessarily arose out of the same transaction and both were and could have been raised in the original pleading, from which usury claims were dismissed. *See Nottenberg*, 160 A.D.2d at 575. Therefore, the Sixth Affirmative Defense should be dismissed.[13]

[13] To the extent the Court believes the *res judicata* alone does not bar the usury defenses, Axos and WBL incorporate the substantive arguments made in support of dismissal in Memorandum of Law in Support of Plaintiff/Counterclaim-Defendant's Motion to Dismiss the Counterclaims and Sixth Affirmative defense, filed July 21, 2020 (Malyshev Aff., Exh. 9), at 10-16, as if fully set forth at length herein.

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CONCLUSION

For the foregoing reasons, Axos and WBL respectfully request that this Court dismiss the Gangi Complaint, Counterclaims and Affirmative Defenses, together with granting Axos and WBL all such other and further relief as is just and equitable.

Dated: February 12, 2021

CARTER LEDYARD & MILBURN LLP

By: /s/ Alexander G. Malyshev
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

Attorneys Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

THE MAGNOZZI LAW FIRM, P.C.
Mark F. Magnozzi
23 Green Street, Suite 302
Huntington, New York 11743
T. (631) 923-2858
F. (631) 923-2860
E. mmagnozzi@magnozzilaw.com

Attorneys forAxos Bank f/k/a B-of-I Federal Bank

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Affirmation of Adam J. Roth, for Plaintiffs Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors, Rosario Gangi, Josephine Theisen and Leonora Gangi, in Opposition to Motion to Dismiss Complaint, dated April 15, 2021 [pp. 301 - 303]

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 04/15/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

AFFIRMATION IN OPPOSITION

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Plaintiffs,

Index No. 500481/2021

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

Adam J. Roth, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. That I am the principal at the Law Offices of Adam J. Roth, attorneys for MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE

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THEISEN and LEONORA GANGI, and am fully familiar with the circumstances of the instant action by virtue of my own investigations and the file maintained by my office.

2. That I submit the instant affirmation in opposition to AXOS BANK F/K/I BOFI FEDERAL BANK and WORLD BUSINESS LENDERS motion to dismiss the counterclaims and affirmative defenses of MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI.
3. Attached hereto as Exhibit 1 is the HUD-1 from the July 5, 2018 closing stating that the loan has no prepayment penalty.
4. Attached hereto as Exhibit 2 is an affidavit from Anne Rougier, a notary and the only agent of World Business Lenders present at the closing.
5. Attached hereto as Exhibit 3 is an affidavit from Josephine Thiesen, detailing the facts circumstances surrounding the closing and subsequent actions of World Business Lenders.
6. Attached hereto as Exhibit 4 is an affidavit from Arthur Aidala, Esq. detailing his understanding of the opinion letter and clarifying who his client's were in July of 2018.
7. Attached hereto as Exhibit 5 is an affidavit from Anthony Ferraro, III, a broker who can attest to the fact that the building could have been sold as early as May of 2019.
8. Attached as Exhibit 6 is the purchase agreement referenced in Anthony Ferraro III's affidavit.

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9. Attached as Exhibit 7 are internal documents from World Business Lenders showing they knew Mr. Gangi had exhausted his $100,000 of overdraft protection and was over $300,000 in arrears on the July 5, 2018 loan.
10. Attached as Exhibit 8 is an affidavit of plaintiff Leonora Gangi.
11. Attached as Exhibit 9 are redacted medical records confirming the diagnosis of Progressive Bulbar Palsy (a specific form of ALS).
12. Attached as Exhibit 10 is a copy of the Attorneys' General Complaint to the FDIC referencing, *inter alia*, World Business Lenders conduct.
13. Attached as Exhibit 11 is the Memorandum of Law in Opposition.
14. **Wherefore**, MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI respectfully request AXOS BANK F/K/I BOFI FEDERAL BANK and WORLD BUSINESS LENDERS motion to dismiss the complaint, counterclaims and affirmative defenses be denied.

Dated: April 15, 2021
New York, New York

/s/Adam J. Roth
Adam J. Roth

Exhibit 1 to Roth Affirmation-
Settlement Statement (HUD-1)
[pp. 304 - 309]

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OMB Approval No. 2502-0265

A. Settlement Statement (HUD-1)

B. Type of Loan

1. ☐ FHA 2. ☐ RHS 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	6. File Number: LT-2586-NY	7. Loan Number: 27964-M Gangi Plumbing and Heating Contractors, Inc dba	8. Mortgage Insurance Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agents are shown. Items marked "(p.o.c)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:
Rosario Gangi, Josephine Gangi		BofI Federal Bank 9205 West Russell Road, Suite 400, Las Vegas, NV 89148
G. Property Location: 1002 Bay Ridge Avenue Brooklyn, NY 11219	H. Settlement Agent: WWLT-NY, LLC 1204 Broadway, 4th Floor, NY, NY 10001	I. Settlement Date: Disbursement Date:
	Place of Settlement: 1204 Broadway, 4th Floor, NY, NY 10001	TitleExpress

J. Summary of Borrower's Transaction

100.	**Gross Amount Due from Borrower**	
101.	Contract sales price	
102.	Personal property	
103.	Settlement charges to borrower (line 1400)	20,080.93
104.		
105.		
	Adjustments for items paid by seller in advance	
106.	City/town taxes to	
107.	County taxes to	
108.	Assessments to	
109.		
110.		
111.		
112.		
120.	**Gross Amount Due from Borrower**	20,080.93
200.	**Amounts Paid by or in Behalf of Borrower**	
201.	Deposit or earnest money	
202.	Principal amount of new loan(s)	450,000.00
203.	Existing loan(s) taken subject to	
204.		
205.	Buyer's Check	
206.		
207.		
208.		
209.		
	Adjustments for items unpaid by seller	
210.	City/town taxes to	
211.	County taxes to	
212.	Assessments to	
213.		
214.		
215.		
216.		
217.		
218.		
219.		

K. Summary of Seller's Transaction

400.	**Gross Amount Due to Seller**	
401.	Contract sales price	
402.	Personal property	
403.		
404.		
405.		
	Adjustments for items paid by seller in advance	
406.	City/town taxes to	
407.	County taxes to	
408.	Assessments to	
409.		
410.		
411.		
412.		
420.	**Gross Amount Due to Seller**	
500.	**Reductions In Amount Due to Seller**	
501.	Excess deposit (see instructions)	
502.	Settlement charges to seller (line 1400)	
503.	Existing loan(s) taken subject to	
504.	Payoff of first mortgage loan	
505.	Payoff of second mortgage loan	
506.		
507.		
508.		
509.		
	Adjustments for items unpaid by seller	
510.	City/town taxes to	
511.	County taxes to	
512.	Assessments to	
513.		
514.		
515.		
516.		
517.		
518.		
519.		

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L. Settlement Charges

					Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700.	**Total Real Estate Broker Fees**					
	Division of commission (line 700) as follows:					
701.	$0.00	to				
702.	$0.00	to				
703.	Commission paid at settlement					
800.	**Items Payable in Connection with Loan**					
801.	Our origination charge (includes Origination Point 0.000% or $0.00)		$	(from GFE #1)		
802.	Your credit or charge (points) for the specific interest rate chosen		$	(from GFE #2)		
803.	Your adjusted origination charges			(from GFE A)		
804.	Appraisal fee	to		(from GFE #3)		
805.	Credit report	to		(from GFE #3)		
806.	Tax service	to		(from GFE #3)		
807.	Flood certification	to		(from GFE #3)		
808.		to				
900.	**Items Required by Lender to be Paid in Advance**					
901.	Daily interest charges from	from 07/05/2018 to 08/01/2018 @ $0.00/day		(from GFE #10)		
902.	Mortgage Ins. Premium	for months to		(from GFE #3)		
903.	Homeowner's insurance	for months to		(from GFE #11)		
904.		months to		(from GFE #11)		
1000.	**Reserves Deposited with Lender**					
1001.	Initial deposit for your escrow account			(from GFE #9)		
1002.	Homeowner's insurance	months @ $ 0.00/month	$	to		
1003.	Mortgage Insurance	months @ $ 0.00/month	$	to		
1004.	City Property Taxes	months @ $ 0.00/month	$	to		
1005.	County Property Taxes	months @ $ 0.00/month	$	to		
1006.	Assessments	months @ $ 0.00/month	$	to		
1007.	Aggregate Adjustment		$	to		
1100.	**Title Charges**					
1101.	Title services and lender's title insurance		$	(from GFE #4)	3,651.83	
1102.	Settlement or closing fee	to World Wide Land Transfer, Inc.	$			
1103.	Owner's title insurance - Stewart Title Insurance Company		$	(from GFE #5)		
1104.	Lender's title insurance - Stewart Title Insurance Company		$1,928.00			
1105.	Lender's title policy limit $450,000.00 Lender's Policy					
1106.	Owner's title policy limit $0.00 Owner's Policy					
1107.	Agent's portion of the total title insurance premium to WWLT-NY, LLC		$1,638.80			
1108.	Underwriter's portion of the total title insurance premium to Stewart Title Insurance Company		$289.20			
1109.						
1200.	**Government Recording and Transfer Charges**					
1201.	Government recording charges		$	(from GFE #7)	387.00	
1202.	Deed $	Mortgage $165.00	Release $55.50	to New York City Department of Fin		
1203.	Transfer taxes		$	(from GFE #8)	9,225.00	
1204.	Real Estate Transfer Tax	Deed $	Mortgage $	to New York City Department of Fin		
1205.	Mortgage Tax	Deed $	Mortgage $9,225.00	to New York City Department of Fin		
1206.	Mortgage Tax	Deed $	Mortgage $	to New York City Department of Fin		
1207.	Tax Lien Satisfactons (x3)		$166.50	to New York City Departm		
1208.	Termination of ALR			to New York City Departm	75.00	
1300.	**Additional Settlement Charges**					
1301.	Required services that you can shop for			(from GFE #6)		
1302.	Water Acct# 200398737001	to NYC Department of Environmental Protection			234.49	
1303.	Sales Tax	to The New York State Department of Taxation			37.81	
1304.	2018 Taxes-April *PAST DUE	to NYC Department of Finance			2,162.48	
1305.	2018 Taxes-July	to NYC Department of Finance			2,028.32	
1306.	RPIE 2010	to NYC Department of Finance			200.00	
1307.	RPIE 2011	to NYC Department of Finance			2,079.00	

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L. Settlement Charges

					Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700.	**Total Real Estate Broker Fees**					
	Division of commission (line 700) as follows:					
701.	$0.00	to				
702.	$0.00	to				
703.	Commission paid at settlement					
800.	**Items Payable in Connection with Loan**					
801.	Our origination charge (Includes Origination Point 0.000% or $0.00)		$	(from GFE #1)		
802.	Your credit or charge (points) for the specific interest rate chosen		$	(from GFE #2)		
803.	Your adjusted origination charges			(from GFE A)		
804.	Appraisal fee	to		(from GFE #3)		
805.	Credit report	to		(from GFE #3)		
806.	Tax service	to		(from GFE #3)		
807.	Flood certification	to		(from GFE #3)		
808.		to				
900.	**Items Required by Lender to be Paid in Advance**					
901.	Daily interest charges from	from 07/05/2018 to 08/01/2018 @ $0.00/day		(from GFE #10)		
902.	Mortgage Ins. Premium	for months to		(from GFE #3)		
903.	Homeowner's insurance	for months to		(from GFE #11)		
904.		months to		(from GFE #11)		
1000.	**Reserves Deposited with Lender**					
1001.	Initial deposit for your escrow account			(from GFE #9)		
1002.	Homeowner's insurance	months @ $ 0.00/month	$	to		
1003.	Mortgage Insurance	months @ $ 0.00/month	$	to		
1004.	City Property Taxes	months @ $ 0.00/month	$	to		
1005.	County Property Taxes	months @ $ 0.00/month	$	to		
1006.	Assessments	months @ $ 0.00/month	$	to		
1007.	Aggregate Adjustment		$	to		
1100.	**Title Charges**					
1101.	Title services and lender's title insurance		$	(from GFE #4)	3,651.83	
1102.	Settlement or closing fee	to World Wide Land Transfer, Inc.	$			
1103.	Owner's title insurance - Stewart Title Insurance Company		$	(from GFE #5)		
1104.	Lender's title insurance - Stewart Title Insurance Company		$1,928.00			
1105.	Lender's title policy limit $450,000.00 Lender's Policy					
1106.	Owner's title policy limit $0.00 Owner's Policy					
1107.	Agent's portion of the total title insurance premium to WWLT-NY, LLC		$1,638.80			
1108.	Underwriter's portion of the total title insurance premium to Stewart Title Insurance Company		$289.20			
1109.						
1200.	**Government Recording and Transfer Charges**					
1201.	Government recording charges		$	(from GFE #7)	387.00	
1202.	Deed $	Mortgage $165.00	Release $55.50	to New York City Department of Fin		
1203.	Transfer taxes		$	(from GFE #8)	9,225.00	
1204.	Real Estate Transfer Tax	Deed $	Mortgage $	to New York City Department of Fin		
1205.	Mortgage Tax	Deed $	Mortgage $9,225.00	to New York City Department of Fin		
1206.	Mortgage Tax	Deed $	Mortgage $	to New York City Department of Fin		
1207.	Tax Lien Satisfactons (x3)		$166.50	to New York City Departm		
1208.	Termination of ALR			to New York City Departm	75.00	
1300.	**Additional Settlement Charges**					
1301.	Required services that you can shop for			(from GFE #6)		
1302.	Water Acct# 200398737001	to NYC Department of Environmental Protection			234.49	
1303.	Sales Tax	to The New York State Department of Taxation			37.81	
1304.	2018 Taxes-April *PAST DUE	to NYC Department of Finance			2,162.48	
1305.	2018 Taxes-July	to NYC Department of Finance			2,028.32	
1306.	RPIE 2010	to NYC Department of Finance			200.00	
1307.	RPIE 2011	to NYC Department of Finance			2,079.00	

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Itemization of Section 200 Credits

Name of Borrower:	Name of Seller:	File Number:

Note: This page displays an itemization of the credits shown in section 200 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

Credits	Credit

Itemization of Your Loan Origination Charges

Name of Borrower:	Name of Seller:	File Number:
Rosario Gangi Josephine Gangi		LT-2586-NY

Note: This page displays an itemization of the adjusted origination charges shown in section 800 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

Your Loan Origination Charges			Borrower	Seller
801. Our origination charge (Includes Origination Point 0.000% or $0.00)				
Our origination charge (Includes Origination Poi	to	$ 0.00		
802. Your credit or charge (points) for the specific interest rate chosen				
Your credit or charge (points) for the specific inte	to	$ 0.00		
803. Your adjusted origination charges			0.00	0.00

Itemization of Line 1101

Name of Borrower:	Name of Seller:	File Number:
Rosario Gangi Josephine Gangi		LT-2586-NY

Note: This page displays an itemization of the charges shown on line 1101 of the HUD-1 Settlement Statement. This page accompanies but is not a part of the HUD-1 Settlement Statement. If a discrepancy exists, the information on the HUD-1 Settlement Statement applies.

1100. Title Charges		Total Charge		Borrower	Seller
1101. Title services and lender's title insurance	to				
Escrow	to WWLT-NY, LLC	$ 125.00		125.00	
Recording Service Fee	to WWLT-NY, LLC	$ 150.00		150.00	
title search	to WWLT-NY, LLC	$ 350.00		350.00	
Contin	to WWLT-NY, LLC	$ 36.00		36.00	
Overnight	to WWLT-NY, LLC	$ 30.00		30.00	
Patriot & Pacer	to WWLT-NY, LLC	$ 40.00		40.00	
TIRSA 9 REM/401	to WWLT-NY, LLC	$ 192.83		192.83	
EPL End/429	to WWLT-NY, LLC	$ 50.00		50.00	
Closing Fee	to WWLT-NY, LLC	$ 600.00		600.00	
Document Collection	to WWLT-NY, LLC	$ 150.00		150.00	
1102. Settlement or closing fee	to World Wide Land Transfer, Inc.	$ 0.00			
1104. Lender's title insurance - Stewart Title Insurance	to WWLT-NY, LLC	$ 1,928.00		1,928.00	
	Totals:	$ 3,651.83	0.00	3,651.83	0.00

Seller/Lender credits shown on page 1 POC = Paid Outside Closing CR = Lender Credit

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Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	HUD-1 Line Number		
Our origination charge	# 801	0.00	0.00
Your credit or charge (points) for the specific interest rate chosen	# 802	0.00	0.00
Your adjusted origination charges	# 803	0.00	0.00
Transfer taxes	# 1203	0.00	9,225.00

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201	0.00	387.00
Appraisal fee	# 804	0.00	0.00
Credit report	# 805	0.00	0.00
Title services and lender's title insurance	# 1101	0.00	3,651.83
Owner's title insurance	# 1103	0.00	0.00
	#		
	#		
	#		
	Total	0.00	4,038.83
	Increase between GFE and HUD-1 Charges	$ 4,038.83 or	999.9999%

Charges That Can Change			Good Faith Estimate	HUD-1
Initial deposit for your escrow account	# 1001		0.00	0.00
Daily interest charges from	# 901	$ /day	0.00	0.00
Homeowner's insurance	# 903		0.00	0.00
	#			
	#			
	#			

Loan Terms

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ includes ☐ Principal ☐ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☒ No. ☐ Yes, it can rise to a maximum of %. The first change will be on / / and can change again every years after / / . Every change date, your interest rate can increase or decrease by %. Over the life of the loan, your interest rate is guaranteed to never be lower than % or higher than %.
Even if you make payments on time, can your loan balance rise?	☒ No. ☐ Yes, it can rise to a maximum of $.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☒ No. ☐ Yes, the first increase can be on / / and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☒ No. ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☒ No. ☐ Yes, you have a balloon payment of $ due in years on / / .
Total monthly amount owed including escrow account payments	☒ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of $ that results in a total initial monthly amount owed of $. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

FILED: KINGS COUNTY CLERK 04/05/2021 06:56 PM INDEX NO. 502492/2021
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Signature Page

HUD CERTIFICATION OF BUYER AND SELLER

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Buyers

Rosario Gangi

Josephine Gangi AKA Josephine Theisen

Sellers

Settlement Agent

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

SETTLEMENT AGENT

DATE

Exhibit 2 to Roth Affirmation-
Affidavit of Ann T. Rougier, sworn to November 12, 2020
[pp. 310 - 311]

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
NYSCEF DOC. NO. 24 RECEIVED NYSCEF: 04/15/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

Index No. 502392/2020

AFFIDAVIT

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

Ann T. Rougier, being duly sworn, deposes and swears to the truth of the following under the penalties of perjury:

1. That I never directly worked for World Business Lenders of Axos Bank.
2. I work for a third party who assigns me to notarize signatures for transactions.
3. I have reviewed the documents I notarized on July 5, 2018.
4. That is my notary stamp and my signature.
5. I receive a lot of assignments and have no specific memory of this transaction.
6. If someone asked me a question at the closing about a document, I would first tell them to speak to their representatives.
7. If there is no representative present, I customarily tell them to review the documents.
8. Documents such as the HUD-1 speak for themselves. If the client has questions that are answered by the documents, I will customarily show them where in the documents the answer is, but I do not have enough knowledge of the underlying transactions to provide advice other than telling a signor to read the documents, like the HUD-1.

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
NYSCEF DOC. NO. 24 RECEIVED NYSCEF: 04/15/2021

Dated:

November , 2020

Ann T. Rougier

State of TEXAS

County of WILLIAMSON

On this 12 days of NOVEMBER, 2020, personally known to be or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that ~~he/~~she executed the same in his capacity, ~~and that by his/~~her signature on the instrument, the individual made such appearance before me at

ALEXANDER HERNANDEZ
Notary ID #130446418
My Commission Expires
December 18, 2023

Exhibit 3 to Roth Affirmation-
Affidavit from Josephine Thiesen, sworn to April 14, 2021
[pp. 312 - 324]

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 04/15/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Index No. 500481/2021

Plaintiffs,

-against-

AFFIDAVIT

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

JOSEPHINE THEISEN, a plaintiff in the above-referenced matter, being duly sworn, deposes and says the following under the penalty of perjury:

1. I am a plaintiff in this matter.

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2. Prior to the July 5, 2018 closing, I never spoke to Arthur Aidala, Esq. No one from his firm ever sent me any documentation or discussed the terms of the loan with me prior to the transaction.
3. I spoke to Arthur Aidala in August 2019 for the first time in over a decade after I was told about the default by Rosario Gangi in May of 2019.
4. Prior to the closing, I was never sent any documents to review by World Business Lenders or Axos Bank.
5. On July 5, 2018, I signed several documents, including a mortgage, addendum to mortgage, escrow and deposit agreement, a judgment affidavit, owner's affidavit and HUD-1.
6. Prior to signing, I asked Anne Rougier, World Business Lenders agent, if there would be any pre-payment penalties.
7. Anne Rougier showed me the HUD-1 document which said there is no pre-payment penalty.
8. Anne Rougier told me "since the HUD-1 says there is no pre-payment penalty, there cannot be one."
9. Based on Anne Rougier's representation as an agent of World Business Lender, I signed the aforementioned documents.
10. Had I known of the pre-payment penalty, I never would have signed the documents.
11. I was neither given nor did I sign the note for loan #27964.
12. I was never sent completed loan documents.
13. I was never given a copy of the disclosures for loan #27964.

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14. I never spoke to or otherwise communicated with anyone from Axos Bank regarding loan #27964.
15. I have suffered damage as a result of defendants' actions, specifically, my interest in 1002 Bay Ridge Avenue is in foreclosure.
16. In May of 2019, after I was informed of the default on the loan, I promptly contacted World Business Lenders and asked for a pay-off letter.
17. On April 3, 2019, for the first time World Business Lenders disclosed the prepayment penalty and demanded almost one million dollars to repay the loan. Pay-off letter is attached.
18. I discussed the issue with Rosario Gangi and we decided to listed the property for sale.
19. I spoke to Anthony Ferraro of Four Season Realty, Co. and he agreed to act as our broker.
20. In June of 2019, we attempted to negotiate to pay off the amount due on the loan, but World Business lenders insist that we had to pay the pre-payment penalty and would not accept a penny less. Pay-off letters from June 2019 are attached.
21. Every time I called for a pay-off, they insisted that I was responsible for both of the loans.
22. I was never advised of, nor made a party to, the second loan.
23. In October 2019 we had an all cash offer to sell the property at 1002 Bay Ridge Avenue for $865,000.
24. We again offered to pay off the loan in full in November of 2019 but again, World Business Lenders would not take a penny less than the entire amount due. Pay-off letters from November 2019 are attached.

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25. I personally called World Business Lenders, many times, and explained the situation and offered to give them all of interest due up to the date of the sale of the building and then finally, as timed moved on, since they had previously refused all my offers, I offered to give them all the interest up to the date that the loan was due. Each time the offer was made it was less the pre-payment penalty.
26. World Business Lenders insisted that we pay every dollar, plus pre-payment penalty, in addition to per diem interest penalty, the lawyer's fees as well as the principal of the loan.
27. In January of 2020, Axos Bank sued us for foreclosure.
28. I still do not understand why World Business Lenders refused to negotiate.

Dated: April 14, 2021

Brooklyn, New York

Josephine Theisen
JOSEPHINE THEISEN

Sworn to before me this
14th day of April, 2021

NOTARY PUBLIC

DEYVONNE MURRAY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6237786
Qualified in Kings County
My Commission Expires 3-28-23

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World Business Lenders
WE LEND. YOU GROW.

Donald Jackson – Senior Vice President
212-293-8237
djackson@WBL.com

VIA UPS & MAIL

April 3, 2019

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors
6901 10th Avenue
Brooklyn, New York, 11228

Re: Demand for Payment

Dear Sir or Madam:

I am writing as the Lender's Servicing Agent regarding the Business Promissory Note and Security Agreement dated on or around October 12, 2018 (the "Note") executed by Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors, a New York entity, (the "Borrower") in favor of Axos Bank, a Nevada entity ("Lender").

This letter is to notify Borrower that Lender has declared an Event of Default (as defined in the Note) on October 12, 2018, (the "Date of Default") in accordance with the Note. The entire unpaid balance of all of Borrower's obligations under the Note or other agreements is immediately due and payable, and Lender reserves the right to collect such obligations under applicable law and enforce its rights under any guaranty. Lender's receipt of any payments after the Date of Default shall not constitute a waiver of the Event of Default or of Lender's rights or remedies upon this Event of Default. As stated in the Note, payment of principal and interest after such Event of Default shall be deemed a prepayment as of the Date of Default.

The aggregate amount of all of Borrower's outstanding obligations to Lender is currently **$255,377.77.** For your information, a statement of account and informal payoff letter is attached hereto. Lender will only accept payment by bank check made payable to "World Business Lenders, LLC" or wire transfer of immediately available funds in accordance with the following instructions: Bank: IDB Bank; Account Name: WBL SPO I, LLC; Routing Number: 026009768; Account Number: 1312583.

If payment is not received as demanded 10 days from the receipt of this demand to either cure or correct the challenged action, or inform me of your desire to do so, Lender will exercise all rights and remedies under the Note and applicable law, including but not limited to the filing of a lawsuit. If Lender chooses to file a lawsuit, Borrower may be held responsible for any legal fees incurred thereby.

Sincerely,

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World Business Lenders
WE LEND. YOU GROW.

Donald Jackson – Senior Vice President
212-293-8237
djackson@WBL.com

VIA UPS & MAIL

April 3, 2019

Rosario Gangi
983 76th Street
Brooklyn, NY 11228

Re: Demand for Payment

Dear Rosario Gangi:

I am writing as the Lender's Servicing Agent regarding the Continuing Guaranty (Unlimited) dated on or around October 12, 2018 ("Guaranty") executed by you (the "Guarantor(s)" or "you") in favor of Axos Bank, a Nevada entity ("Lender").

This letter is to notify you that Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating Contractors., a New York entity, ("Borrower") has not met its obligations under the Business Promissory Note and Security Agreement by and between Borrower and Lender (the "Note"). Since you jointly and severally guaranteed payment of all debts, obligations and liabilities of Borrower to Lender arising out of the Note, when due, Lender demands from you the payment of the aggregate amount of all of Borrower's outstanding obligations to Lender in accordance with the Guaranty. The aggregate amount of all of Borrower's outstanding obligations to Lender is currently **$255,377.77**. For your information, a statement of account and informal payoff letter is attached hereto. Lender will only accept payment by bank check made payable to "World Business Lenders, LLC" or wire transfer of immediately available funds in accordance with the following instructions: Bank: IDB Bank; Account Name: WBL SPO I, LLC; Routing Number: 026009768; Account Number: 1312583.

If payment is not received as demanded 10 days from the receipt of this demand to either cure or correct the challenged action, or inform me of your desire to do so, Lender will exercise all rights and remedies under the Note and applicable law, including but not limited to the filing of a lawsuit. If Lender chooses to file a lawsuit, Borrower may be held responsible for any legal fees incurred thereby.

Sincerely,

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
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World Business Lenders
WE LEND. YOU GROW.

04/03/2019

Account ID: 28367
Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gang
6901 10th Avenue
Brooklyn, NY 11228

As of 4/4/2019 the payoff amount for Account 28367 is as follows:

Principal	$140,978.83
Interest	$25,803.86
NSF Fees	$315.00
Prepayment Penalty	$88,280.08
Collection Fees	$0.00
Total Due	$255,377.77

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World Business Lenders
WE LEND. YOU GROW.

ACCOUNT NO: 28367
STATEMENT DATE: 3/29/2019

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plu
6901 10th Avenue
Brooklyn, NY 11228

STATEMENT PERIOD
10/16/2018 To 3/29/2019

LOAN TERMS AND BALANCES

MATURITY:	2/11/2020
NEXT PAYMENT:	4/9/2019
REGULAR PAYMENT:	$4,245.55
PAYMENT:	Weekly
DAILY APR:	0.2794520548%

PRINCIPAL BALANCE:	$140,978.83
PRINCIPAL PAID:	$19,021.17
INTEREST PAID:	$44,662.08
TOTAL PAID:	$63,683.25
UNPAID NSF FEES:	$315.00
UNPAID PENALTY:	$0.00

LOAN ACTIVITY

EFFECTIVE DATE	REFERENCE	TOTAL RECEIVED	INTEREST	DISTRIBUTION PRINCIPAL	NSF	OTHER	PRINCIPAL BALANCE
10/16/2018	New Loan Draw	($160,000.00)	$0.00	($160,000.00)	$0.00	$0.00	$160,000.00
10/16/2018	New Loan RC	$0.00	$0.00	$0.00	$0.00	$0.00	$160,000.00
10/16/2018	Service Fee Charge	$0.00	$0.00	$0.00	$0.00	$0.00	$160,000.00
10/19/2018	New Part Loan Draw	$0.00	$0.00	$0.00	$0.00	$0.00	$160,000.00
10/19/2018	New Loan RC	$0.00	$0.00	$0.00	$0.00	$0.00	$160,000.00
10/23/2018	Loan Payment	$4,245.55	$3,129.86	$1,115.69	$0.00	$0.00	$158,884.31
10/30/2018	Loan Payment	$4,245.55	$3,108.04	$1,137.51	$0.00	$0.00	$157,746.80
11/6/2018	Loan Payment	$4,245.55	$3,085.79	$1,159.76	$0.00	$0.00	$156,587.04
11/13/2018	Loan Payment	$4,245.55	$3,063.10	$1,182.45	$0.00	$0.00	$155,404.59
11/13/2018	Service Fee Payment	$0.00	$0.00	$0.00	$0.00	$0.00	$155,404.59
11/20/2018	Loan Payment	$4,245.55	$3,039.97	$1,205.58	$0.00	$0.00	$154,199.01
11/27/2018	Loan Payment	$4,245.55	$3,016.39	$1,229.16	$0.00	$0.00	$152,969.85
12/4/2018	Loan Payment	$4,245.55	$2,992.34	$1,253.21	$0.00	$0.00	$151,716.64
12/11/2018	Loan Payment	$4,245.55	$2,967.83	$1,277.72	$0.00	$0.00	$150,438.92
12/18/2018	Loan Payment	$4,245.55	$2,942.83	$1,302.72	$0.00	$0.00	$149,136.20
12/26/2018	Loan Payment	$4,245.55	$3,334.11	$911.44	$0.00	$0.00	$148,224.76
1/2/2019	Loan Payment	$4,245.55	$2,899.52	$1,346.03	$0.00	$0.00	$146,878.73
1/8/2019	Loan Payment	$4,245.55	$2,462.73	$1,782.82	$0.00	$0.00	$145,095.91
1/8/2019	Loan Payment Revers	($4,245.55)	($2,462.73)	($1,782.82)	$0.00	$0.00	$146,878.73
1/8/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$146,878.73
1/15/2019	Loan Payment	$4,245.55	$2,873.19	$1,372.36	$0.00	$0.00	$145,506.37
1/15/2019	Loan Payment Revers	($4,245.55)	($2,873.19)	($1,372.36)	$0.00	$0.00	$146,878.73
1/15/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$146,878.73
1/22/2019	Loan Payment	$4,245.55	$2,873.19	$1,372.36	$0.00	$0.00	$145,506.37
1/22/2019	Loan Payment Revers	($4,245.55)	($2,873.19)	($1,372.36)	$0.00	$0.00	$146,878.73
1/22/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$146,878.73
1/29/2019	Loan Payment	$4,245.55	$2,873.19	$1,372.36	$0.00	$0.00	$145,506.37

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ACCOUNT NO: 28367
STATEMENT DATE: 3/29/2019
PAGE NO: 2

LOAN ACTIVITY

EFFECTIVE DATE	REFERENCE	TOTAL RECEIVED	INTEREST	DISTRIBUTION PRINCIPAL	NSF	OTHER	PRINCIPAL BALANCE
1/31/2019	Loan Payment	$4,280.55	$4,280.55	$0.00	$0.00	$0.00	$145,506.37
1/31/2019	Loan Payment Revers	($4,280.55)	($4,280.55)	$0.00	$0.00	$0.00	$145,506.37
1/31/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$145,506.37
2/5/2019	Loan Payment	$4,245.55	$1,090.37	$3,155.18	$0.00	$0.00	$142,351.19
2/12/2019	Loan Payment	$4,245.55	$4,245.55	$0.00	$0.00	$0.00	$142,351.19
2/12/2019	Loan Payment Revers	($4,245.55)	($4,245.55)	$0.00	$0.00	$0.00	$142,351.19
2/12/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$142,351.19
2/13/2019	Loan Payment	$4,245.55	$4,245.55	$0.00	$0.00	$0.00	$142,351.19
2/13/2019	Loan Payment Revers	($4,245.55)	($4,245.55)	$0.00	$0.00	$0.00	$142,351.19
2/19/2019	Loan Payment	$4,245.55	$4,245.55	$0.00	$0.00	$0.00	$142,351.19
2/19/2019	Loan Payment Revers	($4,245.55)	($4,245.55)	$0.00	$0.00	$0.00	$142,351.19
2/19/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$142,351.19
2/26/2019	Loan Payment	$4,245.55	$4,245.55	$0.00	$0.00	$0.00	$142,351.19
3/5/2019	Loan Payment	$4,245.55	$2,873.19	$1,372.36	$0.00	$0.00	$140,978.83
3/12/2019	Loan Payment	$4,245.55	$2,846.34	$1,399.21	$0.00	$0.00	$139,579.62
3/12/2019	Loan Payment Revers	($4,245.55)	($2,846.34)	($1,399.21)	$0.00	$0.00	$140,978.83
3/12/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$140,978.83
3/19/2019	Loan Payment	$4,245.55	$2,846.34	$1,399.21	$0.00	$0.00	$139,579.62
3/19/2019	Loan Payment Revers	($4,245.55)	($2,846.34)	($1,399.21)	$0.00	$0.00	$140,978.83
3/19/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$140,978.83
3/26/2019	Loan Payment	$4,245.55	$2,846.34	$1,399.21	$0.00	$0.00	$139,579.62
3/26/2019	Loan Payment Revers	($4,245.55)	($2,846.34)	($1,399.21)	$0.00	$0.00	$140,978.83
3/26/2019	NSF Fee	($35.00)	$0.00	$0.00	($35.00)	$0.00	$140,978.83
			$44,662.08	**($140,978.83)**	**($315.00)**	**$0.00**	**$140,978.83**

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World Business Lenders
WE LEND. YOU GROW.

06/06/2019

Account ID: 27964
Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi
6901 10th Avenue
Brooklyn, NY 11228

As of 6/6/2019 the payoff amount for Account 27964 is as follows:

Principal	$328,159.55
Interest	$75,466.68
NSF Fees	$665.00
Prepayment Premium	$134,436.45
Collection Fees	$0.00
Total Due	$538,727.68
Per Diem	$776.79

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World Business Lenders
WE LEND. YOU GROW.

06/06/2019

Account ID: 28367
Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi
6901 10th Avenue
Brooklyn, NY 11228

As of 6/6/2019 the payoff amount for Account 28367 is as follows:

Principal	$140,978.83
Interest	$50,623.86
NSF Fees	$315.00
Prepayment Premium	$88,280.08
Collection Fees	$0.00
Total Due	$280,197.77
Per Diem	$393.97

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DocuSign Envelope ID: 4B14F776-8C2D-4900-AA74-4FFD381A3D21
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 04/15/2021
THIS IS A COPY
This is a copy view of the Authoritative Copy held by the designated custodian

World Business Lenders
WE LEND. YOU GROW.

11/04/2019

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating
6901 10th Avenue
Brooklyn, NY 11228

Dear Valued Client,

In connection with the Business Promissory Note and Security Agreement dated 07/05/2018 made by Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating (the "Borrower") to Axos Bank® (formerly known as Bofi Federal Bank), its successors and/or assigns (the "Lender") in the principal sum of $450,000.00 (the "Note"), with the Note first assigned to World Business Lenders, LLC and further assigned to WBL SPE III, LLC (the "Assignee"), you have informed us that it is the Borrower's intention to prepay in full the balance of your loan. The Total Payoff Amount required is indicated below and is based upon the representation that all payments required to be made under the loan have been and will be made timely and properly. The Payoff Amounts indicated below are valid as of the corresponding payoff dates and assume that all daily payments up to and including the payoff date have been made and are not reversed for insufficient funds or other reasons.

In providing this information, the Assignee is not waiving any of its rights with respect to amounts due pursuant to the terms of the Loan Agreement, and in the case of any conflict (whether due to error or otherwise) between the amounts set forth in this letter and amounts due under the Loan Agreement, the Loan Agreement shall control. This Payoff Amount should be wire-transferred to WBL SPE III, LLC in immediately available funds in accordance with the following wire instructions.

Bank: IDB Bank
Account Name: WBL SPE III, LLC
Routing Number: 026009768
Account Number: 1324779

**** Please note that we do not suspend the collections to your account until your payoff has cleared in our account. Any overpayment will be credited back to your account once all payments have cleared. Please do not put a stop payment in the collections before you pay off your balance. Any stop payments will be assessed $35 fee per occurrence.**

Please contact the undersigned if you need additional information. We greatly appreciate the opportunity to have been of service to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing and Heating

Sincerely,

DocuSigned by:
Robert M. Pardes
380E287AA9EB4DA...

Robert M. Pardes
Managing Director

LOAN PAYOFF AMOUNT

Date	Total
11/08/2019	$662,292.65
Per Diem	$776.79

COPY VIEW

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DocuSign Envelope ID: 26B27396-315D-4640-8829-FD160B542676
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 04/15/2021
THIS IS A COPY
This is a copy view of the Authoritative Copy held by the designated custodian

World Business Lenders
WE LEND. YOU GROW.

11/04/2019

Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing
6901 10th Ave
Brooklyn, NY 11228

Dear Valued Client,

In connection with the Business Promissory Note and Security Agreement dated 10/12/2018 made by Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing (the "Borrower") to Axos Bank® (formerly known as Bofi Federal Bank), its successors and/or assigns (the "Lender") in the principal sum of $160,000.00 (the "Note"), with the Note first assigned to World Business Lenders, LLC and further assigned to WBL SPO I, LLC (the "Assignee"), you have informed us that it is the Borrower's intention to prepay in full the balance of your loan. The Total Payoff Amount required is indicated below and is based upon the representation that all payments required to be made under the loan have been and will be made timely and properly. The Payoff Amounts indicated below are valid as of the corresponding payoff dates and assume that all daily payments up to and including the payoff date have been made and are not reversed for insufficient funds or other reasons.

In providing this information, the Assignee is not waiving any of its rights with respect to amounts due pursuant to the terms of the Loan Agreement, and in the case of any conflict (whether due to error or otherwise) between the amounts set forth in this letter and amounts due under the Loan Agreement, the Loan Agreement shall control. This Payoff Amount should be wire-transferred to WBL SPO I, LLC in immediately available funds in accordance with the following wire instructions.

Bank: IDB Bank
Account Name: WBL SPO I, LLC
Routing Number: 026009768
Account Number: 1312583

**** Please note that we do not suspend the collections to your account until your payoff has cleared in our account. Any overpayment will be credited back to your account once all payments have cleared. Please do not put a stop payment in the collections before you pay off your balance. Any stop payments will be assessed $35 fee per occurrence.**

Please contact the undersigned if you need additional information. We greatly appreciate the opportunity to have been of service to Michael Gangi Plumbing & Heating Contractors, Inc. DBA Gangi Plumbing.

Sincerely,

DocuSigned by:
Robert M. Pardes
380E287AA9EB4DA...

Robert M. Pardes
Managing Director

LOAN PAYOFF AMOUNT

Date	Total
11/08/2019	$341,262.85
Per Diem	$393.97

COPY VIEW

Exhibit 4 to Roth Affirmation-
Affirmation from Arthur Aidala, dated April 15, 2021
[pp. 325 - 333]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

- against -

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.
----------X

Index NO.: 502392/2020

AFFIRMATION

Hon. Lawrence Knipel

ARTHUR AIDALA, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury:

1. The within affirmation is in support of permitting Defendant's counterclaims.

2. My firm was requested by defendant ROSARIO GANGI ("R GANGI") to represent defendant MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS ("GANGI PLUMBING") and him in a loan transaction with AXOS BANK f/k/a/ BOFI FEDERAL BANK ("AXOS")(First Loan Transaction.) Neither my firm nor I was requested to represent JOSEPHINE THEISEN ("THEISEN") or LEONORA GANGI ("L GANGI") in the loan transaction with AXOS. In the point of fact, your affiant had not seen or talked to THEISEN in approximately ten years before the loan transaction. THEISEN did not request any legal representation, and there was no retainer agreement, engagement letter or any other oral arrangement to represent her.

3. R GANGI is the sole stockholder of GANGI PLUMBING and advised me that GANGI PLUMBING needed the AXOS loan proceeds to continue to operate his business and that

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he was concerned that if he did not obtain the loan that he would lose his business.

4. R GANGI also informed me that he received a copy of the form documents from AXOS and that the AXOS documents would only be acceptable to AXOS if all of the documents were signed, as is, without any modifications, and that he had no choice but to sign the loan documents in order to obtain the loan.

5. We did not discuss the business terms of the loan as R GANGI reiterated that he had no choice but to accept the AXOS terms or the loan would not be granted.

6. As part of the transaction, AXOS required a legal opinion letter and provided a form of opinion which was prepared by AXOS, and/or its counsel, in order for AXOS to go forward with the transaction. Annexed hereto and marked as **EXHIBIT 1** is a copy of the opinion letter that was signed at the request of R GANGI. R GANGI advised that he was the sole stock holder of the borrower as well as a guarantor.

7. R GANGI further advised that as far as any collateral that was pledged for the loan, that both he and his sister THEISEN owned the property located at 1002 Bay Ridge Avenue, Brooklyn, NY 11219 and that both were agreeable to pledge the collateral for the AXOS loan.

8. In reviewing the opinion letter, it must be noted that there are two specific exceptions that question the binding affect and legality of the loan transaction:

Section Six of the opinion letter states:

A. "except as.....general principles of equity regardless of whether considered in a proceeding in equity or at law"; and

B. "except as....vocation or violation of federal or state lending laws upon consummation of the loan contemplated herein."

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The exceptions are related to the counterclaims as alleged by GANGI PLUMBING and R GANGI in this case and are legal issues.

9. The opinion letter was issued on July 3, 2018. I was not requested by GANGI PLUMBING or R GANGI to attend the closing of the transaction on July 6, 2018, nor was I contacted by AXOS or its counsel to discuss any of the documents or attend the closing. My understanding is that all of the documents were signed and notarized at the closing.

10. I later learned that there was a subsequent second loan by AXOS to R GANGI and his wife L GANGI wherein they pledged their residence to AXOS. That loan was never discussed with me and no legal representation was requested or provided to R GANGI or L GANGI.

11. I have been informed by counsel for R GANGI and THEISEN in this case that there are material, legal and factual issues with respect to the interest charged by AXOS and that the same is alleged to be in violation of New York State law as made and provided, as the interest rate is both unconscionable and burdensome (interest at the rate of 86% per annum) and that with respect to the counterclaims against AXOS interposed in this action, that discovery of AXOS and its representatives is essential in order to obtain material information to further support the allegations recited in the counterclaims.

WHEREFORE, the within is respectfully submitted in support of permitting the Defendants' counterclaims, and a denial of Plaintiff's Motion to Dismiss the Counterclaims. In the interests of justice, it is respectfully requested that the court deny Plaintiff's Motion to Dismiss and for such

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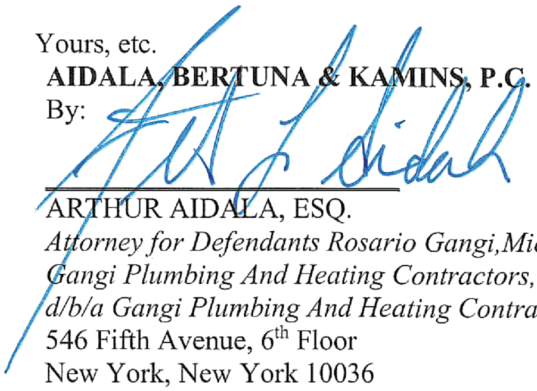
other and further relief as this Court deems just and proper.

Dated: New York, New York
April 15, 2021

Yours, etc.
AIDALA, BERTUNA & KAMINS, P.C.
By:



ARTHUR AIDALA, ESQ.
Attorney for Defendants Rosario Gangi,Michael Gangi Plumbing And Heating Contractors, Inc. d/b/a Gangi Plumbing And Heating Contractors
546 Fifth Avenue, 6th Floor
New York, New York 10036
(212) 486-0011
arthur@aidalalaw.com

CC: *All Counsel of Record via NYSCEF*

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EXHIBIT 1

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FILED: KINGS COUNTY CLERK 08/07/2020 11:50 AM INDEX NO. 500481/2021
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RECEIVED NYSCEF: 08/07/2020

LAW OFFICES OF
Aidala, Bertuna & Kamins, P.C.

ARTHUR L. AIDALA
MARIANNE E. BERTUNA
HON. BARRY KAMINS (RET.)
JOHN S. ESPOSITO
DOMINICK GULLO
MICHAEL T. JACCARINO
IMRAN H. ANSARI
ANDREA M. ARRIGO

SENIOR COUNSEL
LOUIS R. AIDALA
JOSEPH P. BARATTA

546 FIFTH AVENUE
NEW YORK, NY 10036
TELEPHONE: (212) 486-0011
FACSIMILE: (212) 750-9297
WWW.AIDALALAW.COM

8116-13TH AVENUE
BROOKLYN, NEW YORK 11228
TEL: (718) 238-9898
FAX: (718) 921-3292

OF COUNSEL
JOSEPH A. BARATTA
JENNIFER CASSANDRA
PETER W. KOLP
WILLIAM R. SANTO
PETER S. THOMAS

July 3, 2018

Bofi Federal Bank, its successors and/or assigns
9205 West Russell Road, Ste 400
Las Vegas, Nevada 89148

Re:		
	Borrower:	M. Gangi Plumbing and Heating Contractors, Inc.
	Guarantors:	Rosario Gangi
	Loan Amount:	$450,000.00
	Lender:	Bofi Federal Bank, it successors and/or assigns
	Collateral:	1002 Bay Ridge Avenue, Brooklyn, New York 11219
	Collateral Owner:	Rosario Gangi and Josephine Gangi, as tenants in common.

This firm has been retained by Borrower in connection with the above referenced financing. In connection therewith, the undersigned has reviewed the following documents:

I. Promissory Note dated July 6, 2018 by an among Borrower and Lender in the amount of $450,000.00 (the "Note");

II. Continuing Guaranty Agreement dated July 6, 2018 by and among Guarantors and Lender (the "Guaranty");

III. Mortgage covering the Collateral by an among Guarantors and Lender (the "Security Instrument"); and

IV. Such other documentation and records deemed relevant and necessary to render the opinions set forth herein.

The Notes, Guaranty, Security Instruments, and other documents executed in connection with the closing of the above referenced loans are hereinafter referred to as the Loan Documents.

In connection with the above referenced loan from Lender to Borrower disbursed on or about the above date, it is the legal opinion of the undersigned that,

1. The Borrower has been duly organized and is validly existing as a corporation in good standing under the laws of the State of New York. Borrower has the power and authority to

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conduct its business as it is presently being conducted and to enter into and perform the obligations under the Loan Documents.

2. Borrower and Guarantors are authorized to perform their respective duties and obligations under the Loan Documents, and the Borrower has taken all corporate and trust action necessary to authorize the companies' officers and directors, specifically Rosario Gangi to perform all acts necessary for the execution and delivery of the Loan Documents and to the performance of all obligations of the Borrower herein.

3. Borrower and Guarantors have the power and authority to execute, deliver and perform the Loan Documents to which each is a party. Borrower and Guarantors have duly executed and delivered the Loan Documents to which each is a party. Each Loan Document constitutes of a legal, valid and binding obligation of the Borrower and Guarantors to the extent each is a party thereto, is enforceable against each in accordance with its terms, and in each case complies with the laws of the state of each of its origins.

4. All governmental regulations, consents, waivers, approvals, authorizations, permits, notifications and orders necessary in connection with the execution and delivery by Borrower of the Loan Documents to which it is a party and the performance of the respective obligations hereunder, have been duly and lawfully obtained and are now in effect.

5. To our knowledge, after due inquiry, there is no: (a) outstanding judgment, order, writ, decree, demand, award, stipulation, or injunction of any governmental entity against or affecting the Borrower or Guarantors or their respective properties, assets, or business, (b) action by any governmental entity or before any governmental agency, court or arbitrator, or any appeal from any foregoing, pending or openly or explicitly threatened against or affecting the Borrower or Guarantors or their property assets or business, (c) threatened or pending litigation against Borrower or Guarantors that could adversely impact the ability of Borrower or Guarantors to perform the obligations under the terms of the Loan Documents, or (d) pending or imminent filing for bankruptcy or other protection from creditors on the part of Borrower or Guarantors.

6. The execution, delivery and performance by Borrower and each Guarantor of the Loan Documents to which each is a party, and the consummation of the transaction contemplated herein will not: (a) conflict with or result in a breach or violation of any terms or provisions of, or constitute a default under (with or without notice of passage of time, or both), or otherwise give any person a basis for acceleration or increased rights or termination or non-performance of any of the documents or other agreements entered into by Borrower and Guarantors; (b) result in a violation of any of the provisions of the Certificate of Incorporation or the By-Laws of Borrower, (c) result in a creation or imposition of any lien upon any property or asset of Borrower or any Guarantor, or (d) contravene or conflict with or result in any violation of any New York state statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and each Guarantor, except as may be limited: (i) by bankruptcy, insolvency, or other similar laws affecting the rights of creditors generally, and (ii) general principles of equity regardless of whether considered in a proceeding in equity or at law. The execution, delivery and performance by Borrower and

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Guarantors of the Loan Documents to which each is a party will not contravene or conflict with or result in a violation of any federal statute, law, rule or regulation, order, judgment, or decree of any court or governmental authority binding upon or applicable to Borrower and Guarantors, except as may be limited by: (i) bankruptcy, insolvency, or other similar laws affecting the rights of creditors generally, and (ii) general principles of equity regardless of whether considered in a proceeding in equity or at law. No opinion is expressed herein pertaining to vocation or violation of federal or state lending laws upon consummation of the Loan contemplated herein.

7. After inquiry by the undersigned, Borrower, Guarantors and Collateral Owner have informed the undersigned that Borrower has the capacity to make all payments required under the terms of the related loan agreements on the basis of existing and projected revenues over the term of the loan evidenced by the Loan Documents.

For the purposes of this opinion, we have assumed:

a. Loan Documents have been delivered for value;

b. The Loan Documents requiring a notary public is acknowledged before a notary public who has completed, signed and sealed the acknowledgment.

c. The Lender is duly organized and validly existing and in good standing under the laws of its respective jurisdiction, and has all necessary powers under its respective organizational documents and all appropriate laws to engage in this transaction contemplated under the Loan Documents.

d. Routine procedural requirements such as service of process will be satisfied by any party seeking to enforce the Loan Documents.

e. The Loan Documents, as and when executed, will confirm in all material respects to the form submitted to and reviewed by us.

Based upon the foregoing, subject to the assumptions, qualifications and limitations herein, we are of the opinion the Security Instrument, upon the filing with the proper Recording Office will create valid and enforceable first lien on the Collateral identified above.

This opinion is furnished to Lenders, its successors and assigns in connection with the consummation of the transaction contemplated in the Loan Documents. It may not be used for any other purpose or relied upon by any other person for any purpose whatsoever. All opinions expressed herein are based upon the review of the Loan Documents, title commitments, and corporate records and such other documents as would be warranted by due inquiry and consideration of federal and/or New York, statutes, laws, regulations, rules, orders, judgments and decrees. We assume no liability for changes in law which occur after the date thereof. This opinion deals only with the specified legal issues expressly addressed herein, and you should not infer any opinion that is not explicitly addressed herein from any other matter stated in this

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opinion. No opinion is expressed as to the effective laws of any jurisdiction other than the state of New York and the federal laws of the United States of America as specified herein.

Sincerely,

Arthur L. Aidala

Exhibit 5 to Roth Affirmation-
Affidavit from Anthony Ferraro, II, sworn to April 14, 2021
[pp. 334 - 335]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Index No. 500481/2021

Plaintiffs,

-against-

AFFIDAVIT

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

ANTHONY FERRARO, a non-party to the above-referenced matter, being duly sworn, deposes and says the following under the penalty of perjury:

1. I am a licensed real estate broker with 4 Season Realty Co. located at 8010 13th Ave. Brooklyn, New York.

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2. I specialize in residential, commercial and mixed use properties.
3. In April of 2019 I was contacted by Josephine Thiesen and Rosario Gangi for the purposes of selling the property located at 6901 10th Avenue, Brooklyn, New York 11228
4. After several conversations beginning in May of 2019, we received an offer of sale in October in of 2019, and entered into a purchase agreement for the property on December 11, 2019 for $865,000.
5. A copy of the purchase agreement is attached.
6. The prospective purchasers were prepared to offer all cash and the deal could have closed on or about thirty days.

Dated: April 14, 2021
Brooklyn, New York

AF 4/14/2021
/
Anthony Ferraro, II

DEYVONNE MURRAY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6237786
Qualified in Kings County
My Commission Expires 3.28.23

via virtual Notary
w/ NYSID #885487151
Dated 4.14.21

Exhibit 6 to Roth Affirmation-
Purchase Agreement, dated December 11, 2019

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4 Seasons REALTY CO.
Licensed Real Estate Broker
8010 13th Ave. Brooklyn NY,11228
Office (718) 238-8222 Fax (718) 238-9607

PURCHASE AGREEMENT

Received from- Stephen Ferdinando - LLC to be formed SI NY **Date-** 12-11-19

Residing at- 318 Clove Rd. 10310 **Phone-** 347-723-9183

Subject property- 6901 10th Ave Brooklyn, NY 11228

Due on contract - 10% - $86,500

subject to ① clear title ② accurate survey and ③ clear phase I environmental

Balance of down payment- $ 778,500
Loan Amount- N/A **% $** N/A
***Purchase Price*- $865,000**

The following to be included in the sale:

After sale, Space will be lease to Gangi Plumbing for $5,000/m paid 3 months in advance. Attorney to draft agreement - 3 months security needed.

Buyers Agent: Anthony Ferraro Jr. **Phone: 646-919-0910**

Buyers Attorney Jared Berschel **Phone:** 516-733-1810

Listing Agent: _____"_____"_____ **Phone:** _____

Sellers Attorney: Arthur Adiello **Phone: 917-763-0111**

Owner recognizes Four Seasons Realty as the broker and who brought about the sale. Agreement to be paid said commision per separate agreement.

X _____ X _____

Exhibit 7 to Roth Affirmation-
Internal Documents from World Business Lender
[pp. 337 - 343]

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The Authoritative Copy of this record is held at na2.docusign.net

AXOS BANK

BUSINESS LOAN SUMMARY*

Borrower: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors 6901 10th Avenue, Brooklyn, New York, 11228	**Lender:** Axos Bank 9205 West Russell Road, Suite 400 Las Vegas, NV 89148

Disbursement Amount:
$154,027.82 ✓
This amount is to be disbursed on 10/16/2018

Processing Fees:
$5,772.18 ✓
See Itemization on attached Page 2

Adjustments:
$200.00 ✓
See Itemization on attached Page 2

Loan Amount:
$160,000.00 ✓
See Itemization on attached Page 2

Interest Rate:
0.279452054795% ✓

Interest Charge:
$132,942.16 ✓
See Itemization on attached Page 2

APR:
103.0535%

Total Repayment Amount:
$292,942.16 ✓
See Itemization on attached Page 2

Payment Schedule: 68 payments of $4,245.55 due each "Business Week" commencing on 10/23/2018 until 2/4/2020, followed by a final payment of $4,244.76 on 2/11/2020 when any remaining outstanding Principal, interest, and other unpaid charges shall be due and payable in full. "Business Week" means the first Business Day on or after the Tuesday of each week. "Business Day" means any Monday through Friday, except Federal Reserve holidays. The period commencing on 10/23/2018 and ending on 2/11/2020 is referred to as the "Repayment Period." ✓

Prepayment: Borrower may make a full prepayment of unpaid Principal at any time accompanied by a prepayment premium. The prepayment premium will be equal to the greater of (a) fifteen percent (15%) of the amount of the unpaid Principal or (b) the aggregate amount required to be repaid by Borrower to Lender during the Repayment Period reduced by the sum of (i) the aggregate amount of any payments made by Borrower to Lender prior to the date of such prepayment and (ii) the amount of the unpaid Principal.

Charges: Returned (NSF/ACH) Payment Charge: $35.00.

If there is any conflict between the terms of this Business Loan Summary and the related Business Promissory Note and Security Agreement entered into by Borrower, then the terms of the Business Promissory Note and Security Agreement shall govern. The business loan summarized in this Business Loan Summary and represented by the related Business Promissory Note and Security Agreement is a higher cost loan than business loans which may be available through other sources. Before signing the Business Promissory Note and Security Loan Agreement, Borrower should fully consider all costs and fees associated with this business loan.

Borrower hereby acknowledge(s) reading and understanding all of the information disclosed above, and receiving a completed copy of this Business Loan Summary on the date indicated below.

Read, acknowledged and accepted.

BORROWER: Michael Gangi Plumbing & Heating Contractors, Inc. dba Gangi Plumbing and Heating Contractors

By: DocuSigned by: Rosario Gangi 28CDF084ED34441... Title: President

Printed Name: Rosario Gangi Date: 10/15/2018

✓

SBStPP
Revision Date: August 2018.a

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Lelys Pena

From: Yasemin Fakioglu
Sent: Friday, October 12, 2018 3:05 PM
To: Lelys Pena
Cc: Alvin Jaquez
Subject: Gangi terms

16months.
1.72base
1.83 final
Weekly
160k

Yasemin Fakıoğlu
Portfolio Management

World Business Lenders
WBL California, LLC, a Licensed California Finance Lender and Broker
#60DBO-41841

101 Hudson Street, 33rd Floor
Jersey City, NJ 07302

Direct: (212) 220-3893
Cell: (973) 864-4612
Fax: (646) 588-1916
Email: yasemin@wbl.com

www.wbl.com

World Business Lenders
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World Business Lenders

UNDERWRITING REVIEW FORM 10/11/2018

LOAN DECISION | RESUBMISSION | APPEAL | UNDERWRITER GUIDANCE

Date of UW: 10/11/2018 Assigned Underwriter: Jon Pezzino

LoanID: 28367 CustomerID: 25035 Assigned CA: Christian Emerson

Business Name: M Gangi Plumbing and Heating Contractors, Inc. dba Gangi Plumbing

ISO/Referral Source: New York Tribeca Group , LLC

Financial Specialist /AE: John O'Donaghue Renewal Rep: Yasemin Faklogiu Branch: Wholesale 2.0

Rational / Investment Thesis

Recommending $160k, 90% Base IR (1.67), 15 months, 11 points to broker, weekly payments. This will be a second outstanding loan with LID 27964. A new collateral property is being pledged so no origination fee is being collected. LID 27964 has a prepaid balance of $410k, YM of $272k, and AOC of $68k.

Lending to a 46-year-old business that focuses on plumbing of residential and commercial properties located in the New York City area. The business will handle basic plumbing needs and repairs and does bathroom alterations.

Use of proceeds: Hire new employees, and inventory.

The business deposits $132k/month on average and maintains negative balances. The business has an outstanding WBL loan.
At $160k over 15 months, PDR = 14%, BPR = -67x, CPDR = 48%, and CBPR = -20. BPR is not within guidelines. Commercial clients are slow to make payments making it difficult to maintain balances. The merchant claimed he has approximately $75-80k in overdraft protection with Signature Bank, he has been working with them for 20+ years and has a great relationship with them. This allows the borrower to work in the negative without many returned items.
The merchant said affordability would not be an issue as the Fall and Winter months generate more revenue than Summer. The past few months have been lower than usual and has seen no issue in repayment with the current outstanding loan.

WBL is securing an SFR primary located in Brooklyn, New York. Final value = $850k, CL = 1, LV = $596k, foreclosure time = 15 months, and marketing time = 6 months. There are 2 mortgages on the property Ocwen with a balance of $331k and HELOC from Bank of America with a balance of $99k now in the repayment phase. The subject property is 1,288 SF. CLTV is 69.4%.
WBL secured a commercial business location in Brooklyn, New York. Final Value = $750k. CL = 2, LV = $485k. CLTV was 60% with a $450k loan. An additional behavioral lien will be placed on this property.

Risks: 1) Operates in the negative 2) Volatility of deposits 3) High utilization of revolvers 4) Lending above CPDR guidelines 5) Pass due on credit accounts

Mitigants: 1) High frequency of deposits 2) No history of taking cash advances 3) 46 years in business 4) High overdraft protection from the bank ($75-80k)

Subject to: 1) 1 guarantor, 1 borrower 2) Third position lien on property at 983 76th St, Brooklyn, NY 11228 with insurance 3) VOD 4) VOM on both mortgages and pay off any past due 5) Removal of IRS liens on title, merchant to sign an affidavit 6) PRAD call 7) Payoff past due taxes 7) Behavioral lien on business location 8) Long form AOL

Prequalification to Offer - Did the Offer change / If yes, why? -What was the basis of the prequalification?	Yes, recommending $30k more than requested due to available equity in the property.
PDR/ CPDR Analysis - How can the Borrower afford high PDR/ CPDR ?	At $160k over 15 months, PDR = 14%, BPR = -67x, CPDR = 48%, and CBPR = -20x. The merchant said affordability would not be an issue as the Fall and Winter months generate more revenue than Summer. The past few months have been lower than usual and has seen no issue in repayment with the current outstanding loan.
Underwriter's Web Search Comments	No adverse information.

Loan Terms and Conditions

Loan Amount	$ 160,000.00
Base MF/APR	1.67
Term	15 months
Loan Type	2nd Loan
ISO Points	11 points

Structure

# Borrower(s)	1
# Guarantor(s)	1
# Real Estate	1
# Vehicles	0
Equipment	0

APPROVED AS REQUESTED?

YES		NO

LV Analysis

	LID 28367	LID 27964		
MV	$ 850,000	$ 750,000		
MV* (92%)	$ 782,000	$ 690,000		
Liq. Time	21	27		
RE Tax	$6,180.00	$7,756.02		
LV	$ 596,247	$ 485,626	$ -	$ -

Jon Pezzino
(Assigned Underwriter Name/Date)

Cem Oztreves
(Assigned Sr. Underwriter Name/Date)

Borrower is looking for less, Approval is amended to 120k over the same terms.
10/12/18

Revised back to $120k
10/15/18

CEM OZTREVES

10/11/18

10/11/18

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World Business Lenders WE LEND. YOU GROW. **INVESTMENT COMMITTEE APPROVAL FORM**

Loan ID: 28367

Business Name: M Gangi Plumbing and Heating Contractors, Inc. dba Gangi Plumbing

Real Estate Collateral

RE Type	Owner(s)	Debt & Encumb.	Lien Position	Address	Title Insurance	Assigned (C)LTV
Residential SFR	Rosario Gangi and Leonora Gangi, his wife	$429,942	Third	983 76th St, Brooklyn, NY 11228	Yes	69.4%
Commercial Office	Rosario Gangi and Josephine Gangi, as tenants in common	401,985	2nd	1002 Bay Ridge Avenue, Brooklyn, NY 11219	No	0%

PTC Conditions***	Completed	Waived	
1) Broker Compensation Form to be completed	(OK)		
2) Proof of Ownership of M Gangi Plumbing and Heating Contractors, Inc. dba Gangi Plumbing - to Underwriter's satisfaction	W		
3) VOD 1. Signature Bank #0262 ✓ 2. M&T Bank #3735 ✓ x		W	- Done on last loan
4) Copy of a Void Check for the following account(s): 1. Signature Bank #0262 2. M&T Bank #3735	(OK)		
5) VOL 1002 Bay Ridge Avenue, Brooklyn, NY 11219 Waived: Property owned by business owner.		CO	
6) Final title invoice on all the collateral properties - to SVP of Operation's satisfaction	(OK)		
7) VOM on mortgage from Ocwen stating a balance no higher than $331,246 and is in good standing to the Underwriter's satisfaction	W		
8) VOM on mortgage from Bank of America stating a balance no higher than $98,696, is a HELOC currently in the repayment phase and is in good standing to the Underwriter's satisfaction - [illegible]	W		- Underwrite to look High credit Past due 30d
9) ID for Leonora Gangi Paying past due	(OK)		
10) Mortgage statement for mortgage from Bank of America to the Underwriter's satisfaction		W	

*** To be completed prior to closing

Credibly Check Completed	N/A
Loans to Be Paid Off?	

Flood Cert Completed?	Yes - Insurance is not required

Flood Cert Signoff [signature] C. A [signature] (Signature / Date)

Details:

N/A

Credibly Check Signoff N/A (Signature / Date)

[signature] 10/11/18 (Assigned Underwriter / Date)

[signature] 10/11/18 (Assigned SVP Underwriter / Date)

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Approval Number: 41

...usiness Lenders WE LEND. YOU GROW. **INVESTMENT COMMITTEE APPROVAL FORM**

...ecision: 10/12/2018 Anticipated Funding Date:
...of Expiration: 11/12/2018 Branch: Wholesale 2.0

Approved for 1 month after expiration? Yes/No
Assigned Underwriter/Date

Business Name: M Gangi Plumbing and Heating Contractors, Inc. dba Gangi Plumbing

LoanID: 28367 CustomerID: 25035 Assigned CA: Christian Emerson

SR/AE: John O'Donaghue Renewal Rep: Yasemin Fakioglu Assigned UW: Jon Pezzino

ISO/Referral Source: New York Tribeca Group, LLC ISO/Referral ID: 2627

Loan Terms and Conditions		Structure		Fee Schedule	
Loan Amount	$160,000	# Borrower(s)	1	Processing	$795.00
Base MF/IR	90%	# Guarantor(s)	1	Cap/Net out	Net out
Payments (Weekly/Daily)	Weekly	# Real Estate	2	Points to ISO	11
Approved Term (in months)	15-18 months	# Vehicles	0	State of Business	New York
Loan Type	2nd Amortizing Loan	Program	Bronze	State of Collateral	New York
Prepayment Term	None	Brand	Axos	Points to REMAINCO	N/A
SOS Status	Active	Verified EIN (Federal Tax ID)		11-2344115	
				Final MF/IR	

15 mo
1.67
+11
1.78

18 mo
1.82
+11
1.93

Guarantor(s)	
Guarantor 1	Rosario Gangi
Guarantor 2	

Borrower(s)	
Borrower 1	M Gangi Plumbing and Heating Contractors, Inc. dba Gangi Plumbing

Amendments	Initials/Date	Amended Loan Terms and Conditions		Initials/Date
1)		Loan Amount		
2)		Base MF/IR	/	
3)		Payments (Weekly/Daily)		
4)		Approved Term		
5)		Loan Type		

Closing Conditions	Completed	Waived
1) 1 Guarantor, 1 Borrower	OBU	
2) Axos to be added as the loss payee on the hazard insurance policies for all collateral properties	OBU	
3) Confirmation that all PTC conditions have been met - to Underwriter's satisfaction		
4) Third position lien on property at 983 76th St, Brooklyn, NY 11228 with title insurance	OBU	
5) Behavioral lien on property at 1002 Bay Ridge Avenue, Brooklyn, NY 11219 without title insurance		OBU
6) PRAD call with Rosario Gangi to the Senior Investment Officer's satisfaction	CO	
7) Leonora Gangi to sign WBL's mortgage and hypothecation agreement to the SVP of Operations' satisfaction	OBU	
8) This is a second outstanding loan with LID 27964	OBU	
9) Rosario Gangi to sign affidavit to remove IRS liens from the collateral property to Title's satisfaction	OBU	
10) Long form AOL to the COO's satisfaction		Need to discuss
11) Payoff any delinquent taxes to the SVP of Operations' satisfaction	OBU	
12) Cross default rider/cross collateralization with this loan and LID 27964 to the COO's satisfaction		→ loan does
13) Josephine Gangi to sign WBL's mortgage and hypothecation agreement to the SVP of Operations' satisfaction		OBU

Initials (Assigned Underwriter) / Date 10/12/18

Initials (Assigned Sr. Underwriter) / Date 10/12/18

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Target Payment

New Loan Input (Not Rounded)

Approved Loan Amount	[redacted]
Funding Date	
Borrower Business State	New York
APR	[redacted]
Loan Term (month)	
Daily Pmt	$4,245.54
Final Pmt	$175.00

Loan Fees

Funds Disbursement Cost	$795.00
~~Title Fees~~	$0.00
~~Administrative~~ Title Fees	$5,267.18
DPO Fee	$300.00
Vantage Title	$0.00
Notary Fee	$0.00
Total Processing Fees	$6,362.18
Prepaid Fee	($590.00)
Fee 2	$0.00
Fee 3	$0.00
Fee 4	$0.00
Fee 5	$0.00
Fee 6	$0.00
Fee 7	$0.00
Underwriting Fee ($)	$0.00
Origination Fee (%)	0.00%
Total Additional Fees	$5,772.18
Payment Frequency	[redacted]
nth Business Day of the month	

☐ Fix Final Pmt

◉ Net Out

○ Gross Up

Please Excecute Amortization Calculation

New Loan Output (Rounded)

Beginning Principal	$160,000.00
68 Weekly Payments	[redacted]
1 Final Payment	
Total Number of Payments	69
APR	102.0000000%
Amount Financed	$160,000.00
Total Interest Paid	$132,942.16
Total Repayment	[redacted]
Date of First Payment	10/23/2018
Date Before Final Pmt	02/04/2020
Date of Final Payment	02/11/2020
Daily Interest Rate	0.27945205479%
Money Factor	83.09%

Funding Summary

Disbursement Amou	$154,027.82
Processing Fees	$5,772.18
Total New Adjustme	-$200.00
Total Principal	$160,000.00
Interest Charges	$132,942.16
Total Repayment	$292,942.16

M Gangi Plumbing and Heating, Inc dba Gangi 10/12/2018

Refinancing Calculations

Approved Amount	$	160,000.00 ✓
+Loan Fee on New Loan		$0.00
Interest Bearing Principal	$	160,000.00
- Loan Fee on New Loan		(5,772.18)
water	$	(200.00)
		✓
Disbursement Amount	$	154,027.82

ok

Refinanced Loan Information

Payment Starting Date	
Original Principal	
APR	
Term	
Payment	
Prepaid Balance	
Penalty Fee	

103.0535%

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Date	Payment Number	Beginning Balance	Additional Principal Payment	Accrued Interest	Payment	Payment towards Interest	Payment towards Principal	Interest Balance	Principal Balance	Total Payments Remaining	Remaining Interest
10/16/2018	Funding Date	$160,000.00		$0.00	$0.00	$0.00	-$160,000.00	$0.00	$160,000.00	$192,942.16	$137,942.16
10/23/2018	1	$160,000.00		$3,129.86	$4,245.55	$3,129.86	$1,115.69	$0.00	$158,884.31	$188,696.61	$129,812.30
10/30/2018	2	$158,884.31		$3,108.04	$4,245.55	$3,108.04	$1,137.51	$0.00	$157,746.80	$184,451.06	$126,704.26
11/6/2018	3	$157,746.80		$3,085.79	$4,245.55	$3,085.79	$1,159.76	$0.00	$156,587.04	$180,205.51	$123,618.47
11/13/2018	4	$156,587.04		$3,063.10	$4,245.55	$3,063.10	$1,182.45	$0.00	$155,404.59	$175,959.96	$120,555.37
11/20/2018	5	$155,404.59		$3,039.97	$4,245.55	$3,039.97	$1,205.58	$0.00	$154,199.01	$171,714.41	$117,515.40
11/27/2018	6	$154,199.01		$3,016.39	$4,245.55	$3,016.39	$1,229.16	$0.00	$152,969.85	$167,468.86	$114,499.01
12/4/2018	7	$152,969.85		$2,992.34	$4,245.55	$2,992.34	$1,253.21	$0.00	$151,716.64	$163,223.31	$111,506.67
12/11/2018	8	$151,716.64		$2,967.83	$4,245.55	$2,967.83	$1,277.72	$0.00	$150,438.92	$158,977.76	$108,538.84
12/18/2018	9	$150,438.92		$2,942.83	$4,245.55	$2,942.83	$1,302.72	$0.00	$149,136.20	$154,732.21	$105,596.01
12/26/2018	10	$149,136.20		$2,917.34	$4,245.55	$3,334.11	$911.44	$0.00	$148,224.76	$150,486.66	$102,261.90
1/2/2019	11	$148,224.76		$2,899.52	$4,245.55	$2,899.52	$1,346.03	$0.00	$146,878.73	$246,241.11	$99,362.38
1/8/2019	12	$146,878.73		$2,873.21	$4,245.55	$2,462.73	$1,782.82	$0.00	$145,095.91	$241,995.56	$96,899.65
1/15/2019	13	$145,095.91		$2,838.31	$4,245.55	$2,838.31	$1,407.24	$0.00	$143,688.67	$237,750.01	$94,061.34
1/22/2019	14	$143,688.67		$2,810.79	$4,245.55	$2,810.79	$1,434.76	$0.00	$142,253.91	$233,504.46	$91,250.55
1/29/2019	15	$142,253.91		$2,782.72	$4,245.55	$2,782.72	$1,462.83	$0.00	$140,791.08	$229,258.91	$88,467.83
2/5/2019	16	$140,791.08		$2,754.10	$4,245.55	$2,754.10	$1,491.45	$0.00	$139,299.63	$225,013.36	$85,713.73
2/12/2019	17	$139,299.63		$2,724.93	$4,245.55	$2,724.93	$1,520.62	$0.00	$137,779.01	$220,767.81	$82,988.80
2/19/2019	18	$137,779.01		$2,695.18	$4,245.55	$2,695.18	$1,550.37	$0.00	$136,228.64	$216,522.26	$80,293.62
2/26/2019	19	$136,228.64		$2,664.86	$4,245.55	$2,664.86	$1,580.69	$0.00	$134,647.95	$212,276.71	$77,628.76
3/5/2019	20	$134,647.95		$2,633.94	$4,245.55	$2,633.94	$1,611.61	$0.00	$133,036.34	$208,031.16	$74,994.82
3/12/2019	21	$133,036.34		$2,602.41	$4,245.55	$2,602.41	$1,643.14	$0.00	$131,393.20	$203,785.61	$72,392.41
3/19/2019	22	$131,393.20		$2,570.27	$4,245.55	$2,570.27	$1,675.28	$0.00	$129,717.92	$199,540.06	$69,822.14
3/26/2019	23	$129,717.92		$2,537.50	$4,245.55	$2,537.50	$1,708.05	$0.00	$128,009.87	$195,294.51	$67,284.64
4/2/2019	24	$128,009.87		$2,504.09	$4,245.55	$2,504.09	$1,741.47	$0.00	$126,268.40	$191,048.96	$64,780.56
4/9/2019	25	$126,268.40		$2,470.02	$4,245.55	$2,470.02	$1,775.53	$0.00	$124,492.87	$186,803.41	$62,310.54
4/16/2019	26	$124,492.87		$2,435.29	$4,245.55	$2,435.29	$1,810.26	$0.00	$122,682.61	$182,557.86	$59,875.25
4/23/2019	27	$122,682.61		$2,399.87	$4,245.55	$2,399.87	$1,845.68	$0.00	$120,836.93	$178,312.31	$57,475.38
4/30/2019	28	$120,836.93		$2,363.77	$4,245.55	$2,363.77	$1,881.78	$0.00	$118,955.15	$174,066.76	$55,111.61
5/7/2019	29	$118,955.15		$2,326.96	$4,245.55	$2,326.96	$1,918.59	$0.00	$117,036.56	$169,821.23	$52,784.65
5/14/2019	30	$117,036.56		$2,289.43	$4,245.55	$2,289.43	$1,956.12	$0.00	$115,080.44	$165,575.68	$50,495.22
5/21/2019	31	$115,080.44		$2,251.16	$4,245.55	$2,251.16	$1,994.39	$0.00	$113,086.05	$161,330.11	$48,244.06
5/28/2019	32	$113,086.05		$2,212.15	$4,245.55	$2,212.15	$2,033.40	$0.00	$111,052.65	$157,084.56	$46,031.91
6/4/2019	33	$111,052.65		$2,172.37	$4,245.55	$2,172.37	$2,073.18	$0.00	$108,979.47	$152,839.01	$43,859.54
6/11/2019	34	$108,979.47		$2,131.82	$4,245.55	$2,131.82	$2,113.73	$0.00	$106,865.74	$148,593.46	$41,727.72
6/18/2019	35	$106,865.74		$2,090.47	$4,245.55	$2,090.47	$2,155.08	$0.00	$104,710.66	$144,347.91	$39,637.25
6/25/2019	36	$104,710.66		$2,048.31	$4,245.55	$2,048.31	$2,197.24	$0.00	$102,513.42	$140,102.36	$37,588.94
7/2/2019	37	$102,513.42		$2,005.33	$4,245.55	$2,005.33	$2,240.22	$0.00	$100,273.20	$135,856.81	$35,583.61
7/9/2019	38	$100,273.20		$1,961.51	$4,245.55	$1,961.51	$2,284.04	$0.00	$97,989.16	$131,611.26	$33,622.10
7/16/2019	39	$97,989.16		$1,916.83	$4,245.55	$1,916.83	$2,328.72	$0.00	$95,660.44	$127,365.71	$31,705.27
7/23/2019	40	$95,660.44		$1,871.28	$4,245.55	$1,871.28	$2,374.27	$0.00	$93,286.17	$123,120.16	$29,833.99
7/30/2019	41	$93,286.17		$1,824.83	$4,245.55	$1,824.83	$2,420.72	$0.00	$90,865.45	$118,874.61	$28,009.16
8/6/2019	42	$90,865.45		$1,777.48	$4,245.55	$1,777.48	$2,468.07	$0.00	$88,397.38	$114,629.06	$26,231.68
8/13/2019	43	$88,397.38		$1,729.20	$4,245.55	$1,729.20	$2,516.35	$0.00	$85,881.03	$110,383.51	$24,502.48
8/20/2019	44	$85,881.03		$1,679.97	$4,245.55	$1,679.97	$2,565.58	$0.00	$83,315.45	$106,137.96	$22,822.51
8/27/2019	45	$83,315.45		$1,629.79	$4,245.55	$1,629.79	$2,615.76	$0.00	$80,699.69	$101,892.41	$21,192.72
9/3/2019	46	$80,699.69		$1,578.62	$4,245.55	$1,578.62	$2,666.93	$0.00	$78,032.76	$97,646.86	$19,614.10
9/10/2019	47	$78,032.76		$1,526.45	$4,245.55	$1,526.45	$2,719.10	$0.00	$75,313.66	$93,401.31	$18,087.65
9/17/2019	48	$75,313.66		$1,473.26	$4,245.55	$1,473.26	$2,772.29	$0.00	$72,541.37	$89,155.76	$16,614.39
9/24/2019	49	$72,541.37		$1,419.03	$4,245.55	$1,419.03	$2,826.52	$0.00	$69,714.85	$84,910.21	$15,195.36
10/1/2019	50	$69,714.85		$1,363.74	$4,245.55	$1,363.74	$2,881.81	$0.00	$66,833.04	$80,664.66	$13,831.62
10/8/2019	51	$66,833.04		$1,307.36	$4,245.55	$1,307.36	$2,938.19	$0.00	$63,894.85	$76,419.11	$12,524.26
10/15/2019	52	$63,894.85		$1,249.89	$4,245.55	$1,249.89	$2,995.66	$0.00	$60,899.19	$72,173.56	$11,274.37
10/22/2019	53	$60,899.19		$1,191.29	$4,245.55	$1,191.29	$3,054.26	$0.00	$57,844.93	$67,928.01	$10,083.08
10/29/2019	54	$57,844.93		$1,131.54	$4,245.55	$1,131.54	$3,114.01	$0.00	$54,730.92	$63,682.46	$8,951.54
11/5/2019	55	$54,730.92		$1,070.63	$4,245.55	$1,070.63	$3,174.92	$0.00	$51,556.00	$59,436.91	$7,880.91
11/12/2019	56	$51,556.00		$1,008.52	$4,245.55	$1,008.52	$3,237.03	$0.00	$48,318.97	$55,191.36	$6,872.39
11/19/2019	57	$48,318.97		$945.20	$4,245.55	$945.20	$3,300.35	$0.00	$45,018.62	$50,945.81	$5,927.19
11/26/2019	58	$45,018.62		$880.64	$4,245.55	$880.64	$3,364.91	$0.00	$41,653.71	$46,700.26	$5,046.55
12/3/2019	59	$41,653.71		$814.82	$4,245.55	$814.82	$3,430.73	$0.00	$38,222.98	$42,454.71	$4,231.73
12/10/2019	60	$38,222.98		$747.70	$4,245.55	$747.70	$3,497.85	$0.00	$34,725.13	$38,209.16	$3,484.03
12/17/2019	61	$34,725.13		$679.28	$4,245.55	$679.28	$3,566.27	$0.00	$31,158.86	$33,963.61	$2,804.75
12/24/2019	62	$31,158.86		$609.52	$4,245.55	$609.52	$3,636.03	$0.00	$27,522.83	$29,718.06	$2,195.23

**Exhibit 8 to Roth Affirmation-
Affidavit of Plaintiff Leonora Gangi,
sworn to April 15, 2021
[pp. 344 - 345]**

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NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 04/15/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

AFFIDAVIT

----------X

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Plaintiffs,

Index No. 500481/2021

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

LEONORA GANGI, a plaintiff in the above-referenced matter, being duly sworn, deposes and says the following under the penalty of perjury:

1. I am a plaintiff in this matter.

2. I am married to Rosario Gangi.

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3. Around the end of 2019, he was diagnosed with a form of ALS, Progressive Bulbar Palsy.
4. He started have speech problems in the summer of 2018.
5. I signed the October 15, 2018 loan documents without reading them.
6. We did not have any legal representation for that transaction.
7. At the time I signed the loan documents, I was not aware that Rosario's Company had used its entire overdraft protection.
8. At the time I signed the loan documents, I was not aware that Rosario's Company and Josephine had signed a loan on the commercial property.
9. I believe that World Business Lenders and Axos Bank took advantage of Rosario Gangi in the summer of 2018.
10. As his wife, I believe he had started having problems that have now been diagnosed as ALS in the early summer of 2018.

Dated: April 15, 2021

Brooklyn, New York

Leonora Gangi

DEYVONNE MURRAY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6237786
Qualified in Kings County
My Commission Expires 3-28-23

Dated April 15, 2021

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Gangi, Rosario J

MRN: 11025388

Office Visit 10/7/2019
NYU HJD CLINICAL NEUROPHYSIOLOGY ASSOCIATES

Provider: Kiril Kiprovski, MD (Neurology, Clinical Neurophysiology)
Primary diagnosis: Progressive bulbar palsy
Reason for Visit: Speech Problem

Additional Documentation

Vitals:	BP 120/80 Pulse 78 Ht 1.727 m (5' 8") Wt 79.4 kg (175 lb) BMI 26.61 kg/m² BSA 1.95 m²
	More Vitals
Flowsheets:	Communicable Diseases Screening, Anthropometrics
Encounter Info:	Billing Info, History, Allergies, Detailed Report

Progress Notes

Kiril Kiprovski, MD (Physician) • Neurology, Clinical Neurophysiology

INITIAL CONSULTATION

Date: 10/7/2019

Patient name: Rosario J Gangi
Referring physician: Andre Strizhak V, MD

Chief Complaint:
Chief Complaint
Patient presents with
- Speech Problem

History of Present Illness: Mr. Gangi is a 77-year-old right-handed gentleman who is referred in consultation for further evaluation and characterization and management of speech difficulties. Mr. Gangi reports that he has been having speech difficulties for at least a year. The onset was insidious and there might be some progression. He has difficulties expressing his words. His speech has become slower and sometimes difficult to understand. He reports sort of slurred speech. He has no chewing or swallowing difficulties. He does not choke when he swallows or coughs. He has no respiratory difficulties. He has also longstanding history that sometimes he will mispronounce his words. He has a chronic history of knee pain and consequent walking difficulties. His memory has also somewhat declined, but he is still working. Otherwise, he has no change in the special senses including smell, taste, vision and hearing. He has no headache. He has no weakness in the upper and lower extremities. He denies any involuntary muscle twitching. He has no numbness or tingling sensation. He has no change in the bladder or bowel habits. He was evaluated by Dr. Strizhak and progressive bulbar palsy was considered. He was also scheduled for speech and swallowing evaluation at NYU. For this visit the patient has completed and I have reviewed the new patient questionnaire which contains details of the past history, social history, family history, and review of systems. Outside records and prior workup has been reviewed including the Media section and Care Everywhere in EPIC.

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Previous Medical History:

Past Medical History:

Diagnosis	Date
• Cancer of prostate	2017
• Hypertension	
• Memory deficit	

Previous Surgical History:

Past Surgical History:

Procedure	Laterality	Date
• HAND SURGERY *ganglion cyst removed*	Right	03/2016
• KNEE SURGERY		2017
• PROSTATECTOMY		
• QUADRACEPS TENDON REPAIR	Left	03/30/2015
• STENT PLACEMENT *coronary artery*		

Allergies:

Allergies

Allergen	Reactions
• Hay Fever [Environmental]	Rhinitis (Runny Nose, Stuffy Nose, Sneezing)
• Penicillins *During childhood*	Other (See Comments)

Current Medications:

Current Outpatient Medications

Medication	Sig
• diazePAM (VALIUM) 5 mg tablet	
• losartan (COZAAR) 100 mg tablet	
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.
• atorvastatin (LIPITOR) 40 mg tablet	
• escitalopram oxalate (LEXAPRO) 20 mg tablet	
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet	
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.
• zolpidem (AMBIEN) 10 mg tablet	
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.
• Isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.

No current facility-administered medications for this visit.

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Family History:
Family History
Family history unknown: Yes
No family status information on file.

Social History: He reports that he has never smoked. He has never used smokeless tobacco. He reports current alcohol use. He reports that he does not use drugs.

Occupation: He is a master plumber.

Review of Systems:

Positives are marked in Bold . All other systems were reviewed and negative.
General: fever / chills / sweats / excessive fatigue / malaise / weight loss/change in appetite
Eye blurred vision / double vision / visual loss / eye pain / light sensitivity
ENT: ear pain / ringing in ears / decreased hearing / sore throat / trouble swallowing
Cardiovascular chest pain / palpitations / fainting / shortness of breath / circulatory problems in arms or legs
Respiratory: coughing / wheezing / bloody sputum
GI: nausea / vomiting / diarrhea / constipation / abdominal pain
GU/GYN urinary incontinence / urinary retention / kidney stones / prostate problems / menstrual irregularities
Musculoskeletal spine pain / joint pain / muscle cramps /
Skin: rash / itching / dryness
Mood: depression / anxiety / difficulty sleeping / hallucinations
Glandular: cold or heat intolerance / excessive thirst or drinking
Hematological: abnormal bruising / bleeding / enlarged lymph nodes

Previous Investigations: On 06/27/19, MRA of the brain is normal and the MRI of the brain shows age-appropriate cortical involuntary changes, several small benign appearances within the horizontal fissures of the cerebellar hemispheres bilaterally, probably representing small arachnoid cyst. No abnormal enhancement. MUSK antibodies negative on 09/26/19.

Orders Only on 09/26/2019

Component	Date	Value
• ACETYLCHOLINE BINDING Ab	09/26/2019	0.0

Office Visit on 09/26/2019

Component	Date	Value
• ACETYLCHOLINE RECPT BLOC*	09/26/2019	0
• TEST NAME	09/26/2019	MUSK Ab
• RESULT	09/26/2019	See Notes
• ACETYLCHOLINE RECEPT MOD*	09/26/2019	0

Physical Examination: Patient appears well and is not in apparent distress. He is an attentive, pleasant and cooperative. Conjunctivae are pink and sclerae are anicteric. Oropharynx is clear. There are no skin rashes. Neck is supple with full range of movement. Extremities are without cyanosis, clubbing or edema. Lumbar spine has fair ROM. He has multiple bruises on his body related to bumping into things while working.

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Visit Vitals

BP	120/80
Pulse	78
Ht	1.727 m (5' 8")
Wt	79.4 kg (175 lb)
BMI	26.61 kg/m²

Neurological Examination: Mr. Gangi has normal cognitive assessment. Patient is alert, answers questions and follows commands appropriately. Oriented in all directions. Naming, repetition, comprehension and other language functions are normal. Mood and affect are normal. Recent and remote memory are normal. Attention is normal. Abstraction, judgment and fund of knowledge is appropriate. There is no apraxia. There is no neglect. **Cranial nerve examination** reveals full eye movements in all directions without nystagmus or diplopia. Fundus is benign bilaterally. Visual fields are full on confrontation. Pupils are 3 mm and equally reactive to light. The face has normal strength and is symmetrical and patient is able to fully close the eyes and pucker the lips. Facial sensation is normal. Masticatory muscles are unremarkable. There is dysarthria with nasal component. The tongue protrudes in the midline and the soft palate elevates bilaterally symmetrical. There is no palate or tongue weakness or atrophy. Tongue movements are with normal speed. Hearing is normal. Sternocleidomastoid and trapezius muscles are with normal bulk and strength. There is no jaw jerk.

Motor examination reveals normal bulk and tone in both upper and lower extremities. There are no involuntary movements noted. Muscle strength testing is normal throughout including the upper and lower extremities and the functional testing of the lower extremities. **Sensory examination** is normal to primary and secondary modalities including light touch, pinprick, temperature, position, and vibration sense. There are no skin trophic changes. Nerve tension signs are negative. Romberg sign is negative. **Muscle stretch reflexes** are 2+ in the upper extremities. Knee jerks are 3+ and ankle jerks are 2+. Plantar responses are flexor. **Cerebellar examination** reveals no presence of ataxia. There is no dysdiadochokinesis or dysmetria. The gait is cautious and antalgic including heel and toe walking.

Impression: Mr. Gangi is experiencing chronic dysarthria with insidious onset. He has no associated chewing or swallowing difficulties or respiratory symptoms and he has no systemic weakness or fasciculations. His exam showed mild hyperreflexia. The symptoms certainly could be due to progressive bulbar palsy in context of motor neuron disease. He is already scheduled for speech and swallow evaluation. Myasthenia gravis is also possibility, but less likely. To further evaluate the symptoms, electrodiagnostic studies might be helpful. At this point I have no specific therapeutic suggestions but perhaps the test results will lead to one.

Thank you for referring Mr. Gangi in consultation.

I will follow up Mr. Gangi after the above study and I will discuss further management based on the results.

All questions were satisfactorily answered.

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Kiril Kiprovski M.D.
Department of Neurology

Quality Assessment Questions :

For patients with polyneuropathy, has the patient been asked about falls since last visit? Yes_____ No_____ N/A __X___

For patients with painful polyneuropathy, was pain control discussed? Yes_____ No_____ N/A __X___

Instructions

After Visit Summary (Automatic SnapShot taken 11/18/2019)

BSA Data

Body Surface Area: 1.95 m^2

Created by

Encounter creation information not available

Orders Placed

EMG (Resulted 11/20/2019)

Medication Changes

As of 10/7/2019 10:11 PM

None

Visit Diagnoses

Progressive bulbar palsy G12.22
Dysarthria R47.1

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MRI BRAIN WITHOUT IV CONTRAST [IMG269]

Status: Final result

Result Information

Status: Final result (Exam End: 11/22/2019 19:51)

Provider Status: Reviewed

Imaging Links

PACS Images

Virtual Consult

Show images for MRI BRAIN WITHOUT IV CONTRAST

Result History

Order 325930027

Patient Recommendations

Signed By

Signed	Date/Time	Phone	Pager
MITNICK, ROBIN J	Nov 23, 2019 2:39 PM	212-263-5219	

Impression

IMPRESSION:

Small focus of susceptibility in the left frontal lobe may represent a small cavernous malformation versus a focus of microhemorrhage.

Mild chronic microvascular ischemic changes.

No evidence of acute infarction.

Findings

CLINICAL INDICATION: Dysarthria.

TECHNIQUE: Multi-planar multi-sequential MR imaging of the brain was performed without intravenous contrast.

COMPARISON: None

FINDINGS:
There is a small focus of susceptibility in the left frontal lobe likely representing cavernoma versus microhemorrhage.

There are patchy areas of white matter T2/FLAIR hyperintensity, likely represent mild chronic microvascular ischemic changes.

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No acute infarction or mass.

No hydrocephalus. No extra-axial fluid collections. The skull base flow voids are present.

The visualized intraorbital contents are normal. The imaged portions of the paranasal sinuses are clear. The mastoid air cells are clear

Electronic Signature: I personally reviewed the images and agree with this report. Final Report: Dictated by Fellow James Bai MD and Signed by Attending Robin Mitnick MD 11/23/2019 2:39 PM

All Reviewers List

Kiril Kiprovski, MD on 7/9/2020 14:52

External Result Report

External Result Report

Indications

Dysarthria [R47.1 (ICD-10-CM)]

Order Report

Order Details

Weight/Height

Weight: 79.4 kg (175 lb)
Height: 1.727 m (5' 8")

BMI and BSA Data

Body Mass Index: 25.09 kg/m^2 Body Surface Area: 1.89 m^2

Printable Result Report

Result Report

Begin Exam Questions

	Answer	Comment
How did you verify patient name and DOB?	Verbal and Armband	
Did you confirm the exam(s) and protocol(s) with a valid Epic order or prescription?	Yes	
Anatomic site(s) to be imaged:	brain	
MR safety form completed?	Yes	
What are the patient's symptoms?	pt. states no symptoms and checking the nerves in the brain	
Laterality:	N/A	

End Exam Questions

	Answer	Comment
Images checked for QA?	Yes	

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NYU Langone Health

AANEM Accredited Laboratory

ELECTROMYOGRAPHY AND NERVE CONDUCTION STUDY

NYU Langone Orthopedic Hospital
Neuromuscular and Electrodiagnostic Medicine

Mary-Lynn Chu, M.D.
Cristina Drafta, M.D.
Kiril Kiprovski, M.D.
Athena Lolis, M.D.
Anna Shor, M.D.
Suying Song, M.D.

301 East 17th Street, Suite 1534
New York, NY 10003-3804
Tel: (212) 598-6185 Fax: (212) 598-6706

Patient: GANGI, Rosario, J.
Age: M77 [redacted]
Date: November 20, 2019
Referring Physician: Dr. Kiril Kiprovski
Epic No.: 11025388

OBJECTIVE: Mr. Gangi is a 77-year-old right-handed man who is referred in consultation for further evaluation and characterization of dysarthria. On history of present illness, the patient has been having problems with his speech for about one year. The symptoms have been insidious in onset and progressive. He describes the symptoms as difficulty getting the words out and noticed that his speech is overall slower. Additionally, he tends to repeat himself and very rarely will make paraphasic errors. He denies any double vision. He denies any droopiness to his eyelids. He denies difficulties with chewing or swallowing although he does note for the past a month and a half, he will occasionally have episodes of drooling. He denies any weakness in his lower extremities but believes his upper body strength is less than it once was. However there were no functional activities that he used to be able to do that he can no longer do nor is there a time course to his reported weakness, for example the symptoms worse later in the day. He reports his gait has been slightly affected by difficulties in his right knee. He has not suffered any falls. He and his wife reports some mild difficulties with short-term memory that manifest with him repeating phrases or questions he recently asked and has influenced his work somewhat with him forgetting to call people back despite being reminded. He denies any bowel or bladder incontinence or significant personality changes. He denies any numbness or tingling in the upper or lower extremities. He also denies headaches. He has been evaluated by a speech therapist and reports this may have helped his speech somewhat. Past medical history is notable for prostate cancer, coronary artery disease, memory complaints, and hypertension. Past surgical history is notable for right hand ganglion cyst removal, prostatectomy, left quadriceps tendon repair, coronary artery stent placement, and knee surgery. Current medications include Valium, losartan, aspirin, Lipitor, Lexapro, Benicar, potassium chloride, Ambien, Plavix, Imdur, and Avapro. The patient has allergies to penicillin. Family history is reviewed and is noncontributory. On social history, the patient denies history of smoking. He reports occasional alcohol use. He denies illicit drug use. He currently works as a plumber and manages his business. Review of systems is otherwise negative including general review, ophthalmological, ENT, cardiovascular, respiratory,

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gastrointestinal, skin, mood, endocrinological, reproductive and hematological are all negative, other than as mentioned in the history of present illness. On 06/27/19, MRA of the brain is normal and the MRI of the brain shows age-appropriate cortical involuntary changes, several small benign appearances within the horizontal fissures of the cerebellar hemispheres bilaterally, probably representing small arachnoid cyst. No abnormal enhancement. AChRAb and MUSK antibodies negative on 09/26/19.

On physical examination, the patient appears well and is in no apparent distress. The patient is attentive, pleasant, and cooperative and is able to provide appropriate medical history. The patient is 5'8" tall and weighs 165 lbs. Conjunctivae are pink and sclerae are anicteric. Oropharynx is clear. The head is normocephalic atraumatic. Neck is supple with full ROM. Breathing is nonlabored. Abdomen is non-guarding. Extremities are without cyanosis, clubbing, or edema. Lumbar spine has fair ROM. He has multiple bruises across his lower extremity shins. Patient is alert, answers questions and follows commands appropriately. The patient is able to in detail described how he would drive his car from his current location to his office in Brooklyn. Oriented in all directions. Naming, repetition, comprehension and other language functions are normal. Mood and affect are normal. Recent and remote memory are normal. He is able to recall 2 out of 3 words at five minutes; 3 out of 3 with prompting. Attention is normal. Abstraction, judgment and fund of knowledge is appropriate. There is no apraxia. There is no neglect. Cranial nerve examination reveals full eye movements in all directions without nystagmus or diplopia. Fundus is benign bilaterally. Visual fields are full on confrontation. Pupils are 3 mm and equally reactive to light. The face has normal strength and is symmetrical and patient is able to fully close the eyes and pucker the lips. Facial sensation is normal. Masticatory muscles are unremarkable. There is dysarthria with nasal component. Additionally the prosody of his speech is altered with more frequent and more prolonged pauses in between words than normal prosody. The tongue protrudes in the midline and the soft palate elevates bilaterally symmetrical. There is no palate or tongue weakness or atrophy. Tongue movements are with normal speed and agile movements from side to side. Hearing is normal. Sternocleidomastoid and trapezius muscles are with normal bulk and strength. There is no jaw jerk. Motor examination reveals normal bulk and tone in both upper and lower extremities. There are no involuntary movements noted. Muscle strength testing is normal throughout including the upper and lower extremities and the functional testing of the lower extremities. Sensory examination is normal to primary and secondary modalities including light touch, pinprick, temperature, position, and vibration sense. There are no skin trophic changes. Nerve tension signs are negative. Romberg sign is negative. Muscle stretch reflexes are 2+ in the upper extremities. Knee jerks are 3+ and ankle jerks are 2+. Plantar responses are flexor. Cerebellar examination reveals no presence of ataxia. There is no dysdiadochokinesis or dysmetria. The gait is cautious with decreased arm swing on the right and antalgic including heel and toe walking. The limb temperature was above 32° C throughout the study.

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EMG/NCV STUDY
RE: GANGI, Rosario, J.
November 20, 2019

Motor Nerve Conduction

Nerve / Sites	Latency ms	Amplitude mV	Segments	Lat Diff ms	Distance mm	Velocity m/s
R Peroneal - EDB						
Ankle	4.3	7.1	Ankle - EDB			
Fib head	11.6	5.8	Fib head - Ankle	7.3	350	48
R Peroneal - Tib Ant						
Fib Head	6.7	5.2	Fib Head - Tib Ant			
R Tibial - AH						
Ankle	5.5	5.0	Ankle - AH			
Pop fossa	15.3	3.5	Pop fossa - Ankle	9.8	445	45
R Median - APB						
Wrist	3.2	7.8	Wrist - APB			
Elbow	9.0	7.3	Elbow - Wrist	5.8	300	52
R Ulnar - ADM						
Wrist	2.6	8.7	Wrist - ADM			
B.Elbow	7.2	8.2	B.Elbow - Wrist	4.7	250	53
A.Elbow	8.8	7.8	A.Elbow - B.Elbow	1.6	80	51

F Wave

Nerve	F Lat ms
	Right
Peroneal - EDB	50.3
Tibial - AH	57.9
Median - APB	30.3
Ulnar - ADM	30.9

Sensory Nerve Conduction

Nerve / Sites	Latency ms	Amplitude µV	Segments	Distance mm	Velocity m/s
R Sural - Ankle (Calf)					
Calf	2.2	11.5	Calf - Ankle	100	46
R Superficial peroneal - Ankle					
Lat leg	2.2	10.7	Lat leg - Ankle	95	43
R Median - Digit II (Antidromic)					
Wrist	3.3	19.0	Wrist - Dig II	140	43
R Ulnar - Digit V (Antidromic)					
Wrist	2.8	15.1	Wrist - Dig V	125	45
R Radial - Anatomical snuff box (Forearm)					
Forearm	1.5	17.7	Forearm - Wrist	95	65

EMG

Needle EMG Examination

	Spontaneous				Volitional MUAPs			Recruitment	
Muscle	Insertional	Fib	PSW	Fasc	Dur.	Amp	Poly.	Pattern	Effort
R. Deltoid	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Triceps brachii	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Biceps brachii	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Extensor digitorum communis	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. First dorsal interosseous	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Tibialis anterior	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Peroneus longus	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Gastrocnemius (Medial head)	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Vastus medialis	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Rectus femoris	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Tongue	Normal	None	None	None	Normal	Normal	Few	Full	Max
L. Tongue	Normal	None	None	None	Normal	Normal	Few	Full	Max
R. Cervical paraspinals (low)	Normal	None	None	None					
R. Thoracic paraspinals (low)	Normal	None	None	None					

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Needle EMG Examination

	Spontaneous				Volitional MUAPs			Recruitment	
Muscle	**Insertional**	**Fib**	**PSW**	**Fasc**	**Dur.**	**Amp**	**Poly.**	**Pattern**	**Effort**
R. Trapezius (upper)	Normal	None	None	None	Normal	Normal	Few	Full	Max

SUMMARY: The right peroneal nerve CMAP from the EDB demonstrates normal distal latency, normal amplitude, and normal conduction velocity. The right tibial nerve CMAP demonstrate normal distal latency, and normal amplitude. The right median nerve and right ulnar nerve CMAPs demonstrate normal distal latencies, normal amplitude, and normal conduction velocities.

The right peroneal, tibial, median, and ulnar nerve F wave latencies are within normal limits.

The right sural nerve, superficial peroneal nerve, ulnar nerve and radial nerve SNAPs demonstrate normal amplitude and normal conduction velocities. The right median nerve SNAP demonstrate normal amplitude with decreased conduction velocity.

The needle EMG examination of the muscles listed above showed normal findings.

IMPRESSION: This EMG and nerve conduction study is only notable for mild right median neuropathy at the wrist which is of doubtful clinical significance. Otherwise there is no electrophysiologic evidence neuropathic or myopathic process. Updated closed MRI of the brain is suggested ad necessary arrangements will be made. Patient will continue with speech therapy and will be also referred for swallowing study. The results of this study were discussed with the patient and all questions were answered.

Kiril Kiprovski, M.D.

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NYU Langone Health

AANEM Accredited Laboratory

NYU Langone Orthopedic Hospital
Neuromuscular and Electrodiagnostic Medicine

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Athena Lolis, M.D.
Anna Shor, M.D.
Suying Song, M.D.

301 East 17th Street, Suite 1534
New York, NY 10003-3804
Tel: (212) 598-6185 Fax: (212) 598-6706

REPETITIVE NERVE STIMULATION STUDY

Patient: GANGI, Rosario, J.
Age: M77 ([redacted]
Date: November 20, 2019
Referring Physician: Dr. Kiril Kiprovski
Epic No.: 11025388

TECHNIQUE: Repetitive stimulation was performed with the stimulating electrode attached to the skin over the facial nerve and recording surface electrodes placed over the nasalis muscle. Repetitive stimulation was performed with 3 Hz prior to volitional exercise and then with 3Hz immediately after exercise of the muscle, followed by 1, 3, and 5 minutes postexercise stimulations. Nicolet Viking Select was used for the recording. The decrement or increment of peak to peak amplitude, as well as the area under the curve was calculated. An abnormal decrement was considered if the change was more than 10% of the baseline values.

SUMMARY: Repetitive nerve stimulation with 3 Hz of the right facial nerve and recording from the right nasalis muscle showed normal CMAP amplitude and area and no decrement at rest, or post-exercise facilitation, or post-exercise exhaustion.

IMPRESSION: This is a normal repetitive nerve stimulation study of the right facial- nasalis complex.

Kiril Kiprovski, M.D.

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NYU Langone Health System

Gangi, Rosario J
MRN: 11025388, DOB: [redacted] Sex: M

Patient Demographics

Name	Patient ID	SSN	Gender Identity	Birth Date
Gangi, Rosario J	11025388	[redacted]	Male	[redacted] (78 yrs)

Address	Phone	Email
[redacted]	[redacted] (M) (H) (W)	—

Reg Status	PCP	Date Last Verified	Next Review Date
ELAPSED	Joseph John Derose, MD718-492-5518	07/23/20	08/22/20

Emergency Contact 1	Emergency Contact 2
Leonora Gangi (SPOUSE) [redacted]	Uto Uto

All Notes

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM

Author: Andre Strizhak V, MD
Filed: 9/26/2019 11:04 AM
Editor: Andre Strizhak V, MD (Physician)
Service: —
Encounter Date: 9/26/2019
Author Type: Physician
Status: Signed

Subjective:
Nine months history of progressive slurring of speech. He denies any significant swallowing difficulties.
No weakness or muscle twitching.
He is very anxious about his business and is concerned that his speech is caused by anxiety.

Rosario J Gangi is a 77 y.o. male who presents with a chief complaint of No chief complaint on file.

HPI

Past Medical History:

Diagnosis	Date
• Cancer of prostate	2017
• Hypertension	
• Memory deficit	

Patient Active Problem List

Diagnosis	Date Noted
• Right-sided low back pain without sciatica	03/03/2016
• Right ankle pain	03/03/2016

Past Surgical History:

Procedure	Laterality	Date
• HAND SURGERY *ganglion cyst removed*	Right	03/2016
• KNEE SURGERY		2017
• PROSTATECTOMY		
• QUADRACEPS TENDON REPAIR	Left	03/30/2015

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

- STENT PLACEMENT
  coronary artery

Family History
Family history unknown: Yes

Social History
Socioeconomic History
Marital status: Married
Spouse name: None
Number of children: None
Years of education: None
Highest education level: None
Occupational History
None
Social Needs
Financial resource strain: None
Food insecurity:
Worry: None
Inability: None
Transportation needs:
Medical: None
Non-medical: None
Tobacco Use
Smoking status: Never Smoker
Smokeless tobacco: Never Used
Substance and Sexual Activity
Alcohol use: Yes
Comment: 1 glass a night with dinner
Drug use: No
Sexual activity: None
Lifestyle
Physical activity:
Days per week: None
Minutes per session: None
Stress: None
Relationships
Social connections:
Talks on phone: None
Gets together: None
Attends religious service: None
Active member of club or organization: None
Attends meetings of clubs or organizations: None
Relationship status: None
Intimate partner violence:
Fear of current or ex partner: None
Emotionally abused: None
Physically abused: None
Forced sexual activity: None

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Other Topics
Concerns:
None
Social History Narrative
None

Current Outpatient Medications

Medication	Sig	Dispense	Refill
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		
• zolpidem (AMBIEN) 10 mg tablet			
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.		
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.		
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.		
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.		

No current facility-administered medications for this visit.

Current Outpatient Medications on File Prior to Visit

Medication	Sig	Dispense	Refill
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

• zolpidem (AMBIEN) 10 mg tablet	
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.

No current facility-administered medications on file prior to visit.

Allergies

Allergen	Reactions
• Hay Fever [Environmental]	Rhinitis (Runny Nose, Stuffy Nose, Sneezing)
• Penicillins *During childhood*	Other (See Comments)

Review of Systems
HENT: Negative for trouble swallowing.
Musculoskeletal: Positive for arthralgias. Negative for gait problem.
Neurological: Positive for speech difficulty. Negative for weakness.
Psychiatric/Behavioral: The patient is nervous/anxious.
All other systems reviewed and are negative.

Objective:

Visit Vitals

BP	160/90
Pulse	(!) 56
Resp	14
Ht	1.727 m (5' 8")
Wt	73.9 kg (163 lb)
SpO2	97%
BMI	24.78 kg/m²

Physical Exam

General Appearance: Well nourished, in no acute distress
Head: Normocephalic, No tenderness/TA normal to palpation
Otoscopic: No discharge, No EAC rash
Neck: Supple, no tenderness
Skin: No hypo/hyperhydrosis, normal skin temperature to touch
Hematologt/Lymphatic: No bleeding, No abnormal bruising
Respiratory: No chest deformity, SOB: Absent

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

Cardiovascular: Regular Carotid Bruit: Absent
Pulses: NA
Abdomen: Soft, not distended
GU: No incontinence or urine retention
Spinal: Tenderness: Absent, Acceptable ROM
Extremities: Straight leg Raising: Negative

NEUROLOGICAL EXAMINATION

MENTAL STATUS:

Level of consciousness: Alert, Oriented to self, place and time
Mood: Euthymic
Attention: *Normal, based on observation during interview unless described below:*

20to1: , Months Fwd&Bkwd: , Serial 7th :

Comportment: includes memory, executive, language, visiospacial and calculation functions

Normal; based on observation during interview unless described below:

Executive functions: Graphomotor Sequencing Task:
Proverb interpretation: Similarities:
Memory: 3 Words /3 in 5 min, Recent events/Personal info:

Language: Naming: Repetition: 3 Stage command: Fluency:
Word list generation F /min, Animals /min
Reading: Writing: Comprehension:
Paraphasic errors: Prosody:
Visiospatial Function: Copying: Left/Right Discrimination:
Agnosia: Clock face drawing: 10 after11:
Neglect: Spatial: Motor: Sensory:
Calculation:

CRANIAL NERVES:

I (Olphactory) : **PST:**
II (Ophthalmic) Fundi: Poorly seen with nondilated pupil
Visual fields: Full
III(oculomotor), **IV**(Trochlear), **VI**(Abducens) EOM: Full eye ROM
Pupils: PERRLA
V(Trigeminal) Sensation in the face is symmetrical
VII Face is symmetrical, Synkinesia: Absent
VIII(Vestibulocohlear) Hearing: Normal bilaterally
Nystagmus: Absent
IX(Glossopharyngeal), **X**(Vagus) Uvula is midline, Dysarthria pseudobulbar/spastic type, No Dysphagia
No Dysphonia.
XI(Accessory) Head is midline, Trapezius muscle strength is 5/5 bilaterally

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

XII(Hypoglossal) Tongue is midline, No atrophy, No fasciculations

MOTOR EXAMINATION:

Isometric stength

		Right	Left			Right	Left
Neck	Flexion	5/5		Knee	Flexion	5/5	5/5
	Extension	5/5			Extension	5/5	5/5
Shoulder	Flexion	5/5	5/5	Hip	Flexion	5/5	5/5
	Extension	5/5	5 /5		Extension	5/5	5/5
	Abduction	5/5	5/5		Abduction	5/5	5/5
Elbow	Flexion	5/5	5/5	Ankle	Plantarflexion	5/5	5/5
	Extension	5/5	5/5		Dorsiflexion	5/5	5/5
Wrist	Flexion	5/5	5 /5	Foot		5/5	5/5
	Extension	5/5	5 /5	Great Toe dorsiflexion		5/5	5/5
Hand Grip		5/5	5 /5				

Pronator Drift: Absent
Fine Finger Movements: Normal
Tremor: Absent
Myoclonus: Absent.
Fasciculations: Absent
Muscle Tone: Normal.

Muscle Atrophy: Absent

SENSORY EXAMINATION:

Pin Prick/Temperature: Normal
Light Touch: Normal
Vibration: Normal
Position: Normal
Sensory Level: NA
Stockings Pattern Sensory Loss: NA
Gloves Pattern Sensory Loss: NA
Graphesthesia: NA
Stereognosis: NA
Two point discrimination: NA

Romberg: Negative

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

DTRs /Plantar response

	Right	Left		Right	Left
Triceps	3	3	Knee	3	3
Biceps	3	3	Ankle	3	3
Brachioradialis	3	3	Plantar Response	up	up

CEREBELLAR:

Finger to Nose: Normal
Heel to Shin: NA
Rapid Alternating Movements: Normal

GAIT:

Senile. No spasticity

Assessment/Plan:
Progressive bulbar palsy is the most likely etiology of dysarthria
Blood work to r/o MG, which is unlikely
Referred to Speech and swallowing center.
Brain MRI is OK
Reevaluation in 3 months.

Electronically signed by Andre Strizhak V, MD on 9/26/2019 11:04 AM

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM

Author: Andre Strizhak V, MD
Filed: 9/30/2019 11:12 AM
Editor: Andre Strizhak V, MD (Physician)
Service: —
Encounter Date: 9/26/2019
Author Type: Physician
Status: Signed

Results reviewed and patient was notified.

Electronically signed by Andre Strizhak V, MD on 9/30/2019 11:12 AM

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM

Author: Andre Strizhak V, MD
Filed: 9/30/2019 7:57 PM
Editor: Andre Strizhak V, MD (Physician)
Service: —
Encounter Date: 9/26/2019
Author Type: Physician
Status: Signed

Results reviewed and patient was notified.

Electronically signed by Andre Strizhak V, MD on 9/30/2019 7:57 PM

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM

Author: Andre Strizhak V, MD
Filed: 10/6/2019 5:49 PM
Editor: Andre Strizhak V, MD (Physician)
Service: —
Encounter Date: 9/26/2019
Author Type: Physician
Status: Signed

Results reviewed and patient was notified.

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NYU Langone Health System

TH LEVIT DEPT STAFF
1220 Avenue p
BROOKLYN NY 11229-1009
All Notes

Gangi, Rosario J
MRN: 11025388, DOB: [redacted] Sex: M
Visit date: 9/26/2019

All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 9/26/2019 10:15 AM (continued)

Electronically signed by Andre Strizhak V, MD on 10/6/2019 5:49 PM

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 525481/2021
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NYU Langone Health System

TH LEVIT DEPT STAFF
1220 Avenue p
BROOKLYN NY 11229-1009
All Notes

Gangi, Rosario J
MRN: 11025388, DOB: [redacted], Sex: M
Visit date: 1/9/2020

All Notes

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM

Author: Andre Strizhak V, MD
Filed: 1/9/2020 11:57 AM
Editor: Andre Strizhak V, MD (Physician)

Service: —
Encounter Date: 1/9/2020

Author Type: Physician
Status: Signed

Subjective:
One year history of slurred speech w/o swallowing problems.
No weakness in extremities and no worsening since last appointment.
Seen by Dr. Kiprovsky and EMG did not reveal any findings consistent with motoneuron disease.

Patient ID: Rosario J Gangi is a 77 y.o. male who presents with Speech Problem

HPI

Past Medical History:

Diagnosis	Date
• Cancer of prostate	2017
• Hypertension	
• Memory deficit	

Patient Active Problem List

Diagnosis	Date Noted
• Neuromuscular junction disorder	
• Bulbar palsy	10/07/2019
• Dysarthria	10/07/2019
• Right-sided low back pain without sciatica	03/03/2016
• Right ankle pain	03/03/2016

Past Surgical History:

Procedure	Laterality	Date
• HAND SURGERY *ganglion cyst removed*	Right	03/2016
• KNEE SURGERY		2017
• PROSTATECTOMY		
• QUADRACEPS TENDON REPAIR	Left	03/30/2015
• STENT PLACEMENT *coronary artery*		

Family History
Family history unknown: Yes

Social History
Socioeconomic History
Marital status: Married

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM (continued)

Spouse name: None
Number of children: None
Years of education: None
Highest education level: None
Occupational History
None
Social Needs
Financial resource strain: None
Food Insecurity:
Worry: None
Inability: None
Transportation needs:
Medical: None
Non-medical: None
Tobacco Use
Smoking status: Never Smoker
Smokeless tobacco: Never Used
Substance and Sexual Activity
Alcohol use: Yes
Comment: 1 glass a night with dinner
Drug use: No
Sexual activity: None
Lifestyle
Physical activity:
Days per week: None
Minutes per session: None
Stress: None
Relationships
Social connections:
Talks on phone: None
Gets together: None
Attends religious service: None
Active member of club or organization: None
Attends meetings of clubs or organizations: None
Relationship status: None
Intimate partner violence:
Fear of current or ex partner: None
Emotionally abused: None
Physically abused: None
Forced sexual activity: None
Other Topics
Concerns:
None
Social History Narrative
None

Current Outpatient Medications

Medication	Sig	Dispense	Refill
• losartan (COZAAR) 100 mg			

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM (continued)

tablet			
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		
• zolpidem (AMBIEN) 10 mg tablet			
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.		
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.		
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.		
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.		
• diazePAM (VALIUM) 5 mg tablet	Take 1-2 about 30 min prior to MRI (Patient not taking: Reported on 1/9/2020)	2 tablet	0
• diazePAM (VALIUM) 5 mg tablet			

No current facility-administered medications for this visit.

Current Outpatient Medications on File Prior to Visit

Medication	Sig	Dispense	Refill
• losartan (COZAAR) 100 mg tablet			
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM (continued)

• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		
• zolpidem (AMBIEN) 10 mg tablet			
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.		
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.		
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.		
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.		
• diazePAM (VALIUM) 5 mg tablet	Take 1-2 about 30 min prior to MRI (Patient not taking: Reported on 1/9/2020)	2 tablet	0
• diazePAM (VALIUM) 5 mg tablet			

No current facility-administered medications on file prior to visit.

Allergies

Allergen	Reactions
• Hay Fever [Environmental]	Rhinitis (Runny Nose, Stuffy Nose, Sneezing)
• Penicillins *During childhood*	Other (See Comments)

Review of Systems

Objective:

Physical Exam

Neurologic Exam

General Appearance: Well nourished, in no acute distress
Head: Normocephalic, No tenderness/TA normal to palpation
Otoscopic: No discharge, No EAC rash
Neck: Supple, no tenderness
Skin: No hypo/hyperhydrosis, normal skin temperature to touch
Hematologt/Lymphatlc: No bleeding, No abnormal bruising
Respiratory: No chest deformity, SOB: Absent
Cardiovascular: Regular Carotid Bruit: Absent
Pulses: NA
Abdomen: Soft, not distended
GU: No incontinence or urine retention
Spinal: Tenderness: Absent, Acceptable ROM

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM (continued)

Extremities: Straight leg Raising: Negative

NEUROLOGICAL EXAMINATION

MENTAL STATUS:

Level of consciousness: Alert, Oriented to self, place and time
Mood: Euthymic
Attention: *Normal; based on observation during interview unless described below:*

20to1: , Months Fwd&Bkwd: , Serial 7th :

Comportment: includes memory, executive, language, visiospacial and calculation functions

Normal; based on observation during interview unless described below:

Executive functions: Graphomotor Sequencing Task:
Proverb Interpretation: Similarities:
Memory: 3 Words /3 in 5 min, Recent events/Personal info:

Language: Naming: Repetition: 3 Stage command: Fluency:
Word list generation F /min, Animals /min
Reading: Writing: Comprehension:
Paraphasic errors: Prosody:
Visiospatial Function: Copying: Left/Right Discrimination:
Agnosia: Clock face drawing: 10 after11:
Neglect: Spatial: Motor: Sensory:
Calculation:

CRANIAL NERVES:

I (Olphactory) : **PST:**
II (Ophthalmic) Fundi: Poorly seen with nondilated pupil
Visual fields: Full
III(oculomotor), **IV**(Trochlear), **VI**(Abducens) EOM: Full eye ROM
Pupils: PERRLA
V(Trigeminal) Sensation in the face is symmetrical
VII Face is symmetrical, Synkinesia: Absent
VIII(Vestibulocohlear) Hearing: Normal bilaterally
Nystagmus: Absent
IX(Glossopharyngeal), **X**(Vagus) Uvula is midline, Dysarthria pseudobulbar/spastic type, No Dysphagia
No Dysphonia.
XI(Accessory) Head is midline, Trapezius muscle strength is 5/5 bilaterally
XII(Hypoglossal) Tongue is midline, No atrophy, No fasciculations

MOTOR EXAMINATION:

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Isometric stength

		Right	Left			Right	Left
Neck	Flexion	5/5		Knee	Flexion	5/5	5/5
	Extension	5/5			Extension	5/5	5/5
Shoulder	Flexion	5/5	5/5	Hip	Flexion	5/5	5/5
	Extension	5/5	5 /5		Extension	5/5	5/5
	Abduction	5/5	5/5		Abduction	5/5	5/5
Elbow	Flexion	5/5	5/5	Ankle	Plantarflexion	5/5	5/5
	Extension	5/5	5/5		Dorsiflexion	5/5	5/5
Wrist	Flexion	5/5	5 /5	Foot		5/5	5/5
	Extension	5/5	5 /5	Great Toe dorsiflexion		5/5	5/5
Hand Grip		5/5	5 /5				

Pronator Drift: Absent
Fine Finger Movements: Normal
Tremor: Absent
Myoclonus: Absent.
Fasciculations: Absent
Muscle Tone: Normal.

Muscle Atrophy: Absent

SENSORY EXAMINATION:

Pin Prick/Temperature: Normal
Light Touch: Normal
Vibration: Normal
Position: Normal
Sensory Level: NA
Stockings Pattern Sensory Loss: NA
Gloves Pattern Sensory Loss: NA
Graphesthesia: NA
Stereognosis: NA
Two point discrimination: NA

Romberg: Negative

DTRs /Plantar response

	Right	Left		Right	Left
Triceps	3	3	Knee	3	3
Biceps	3	3	Ankle	2	2
Brachioradialis	3	3	Plantar Response	up	up

CEREBELLAR:

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 1/9/2020 10:45 AM (continued)

Finger to Nose: Normal
Heel to Shin: NA
Rapid Alternating Movements: Normal

GAIT:

Senile. No spasticity

Assessment/Plan:

Progressive bulbar palsy is the most likely etiology of dysarthria
No evidence of disease spread to other muscle groups so far.
Reevaluation in 6 months.

Electronically signed by Andre Strizhak V, MD on 1/9/2020 11:57 AM

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NYU Langone Health System

TH LEVIT DEPT STAFF
1220 Avenue p
BROOKLYN NY 11229-1009
All Notes

Gangi, Rosario J
MRN: 11025388, DOB: [redacted], Sex: M
Visit date: 7/23/2020

All Notes

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM

Author: Andre Strizhak V, MD
Filed: 7/23/2020 12:08 PM
Editor: Andre Strizhak V, MD (Physician)

Service: —
Encounter Date: 7/23/2020

Author Type: Physician
Status: Signed

Subjective:
About 18 months history of slurred speech w/o swallowing problems.
No weakness in extremities and no worsening since last appointment.
Seen by Dr. Kiprovsky and EMG did not reveal any findings consistent with motoneuron disease.
He reports some degree of worsening speech since last appointment . Thee are no additional symptoms besides episodic drooling.
No difficulty swallowing or choking.
C/o forgetfulness but he pretty much functions well. He is able to manage finances and take care of his routines.

Patient ID: Rosario J Gangi is a 78 y.o. male who presents with Memory Loss

HPI

Past Medical History:

Diagnosis	Date
• Cancer of prostate	2017
• Hypertension	
• Memory deficit	

Patient Active Problem List

Diagnosis	Date Noted
• Neuromuscular junction disorder	
• Bulbar palsy	10/07/2019
• Dysarthria	10/07/2019
• Right-sided low back pain without sciatica	03/03/2016
• Right ankle pain	03/03/2016

Past Surgical History:

Procedure	Laterality	Date
• HAND SURGERY *ganglion cyst removed*	Right	03/2016
• KNEE SURGERY		2017
• PROSTATECTOMY		
• QUADRACEPS TENDON REPAIR	Left	03/30/2015
• STENT PLACEMENT *coronary artery*		

Family History
Family history unknown: Yes

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

Social History
- Socioeconomic History
  - Marital status: Married
  - Spouse name: None
  - Number of children: None
  - Years of education: None
  - Highest education level: None
- Occupational History
  - None
- Social Needs
  - Financial resource strain: None
  - Food insecurity
    - Worry: None
    - Inability: None
  - Transportation needs
    - Medical: None
    - Non-medical: None
- Tobacco Use
  - Smoking status: Never Smoker
  - Smokeless tobacco: Never Used
- Substance and Sexual Activity
  - Alcohol use: Yes
    - Comment: 1 glass a night with dinner
  - Drug use: No
  - Sexual activity: None
- Lifestyle
  - Physical activity
    - Days per week: None
    - Minutes per session: None
  - Stress: None
- Relationships
  - Social connections
    - Talks on phone: None
    - Gets together: None
    - Attends religious service: None
    - Active member of club or organization: None
    - Attends meetings of clubs or organizations: None
    - Relationship status: None
  - Intimate partner violence
    - Fear of current or ex partner: None
    - Emotionally abused: None
    - Physically abused: None
    - Forced sexual activity: None
- Other Topics
  - Concerns:
    - None
- Social History Narrative
  - None

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

Current Outpatient Medications

Medication	Sig	Dispense	Refill
• diazePAM (VALIUM) 5 mg tablet			
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		
• zolpidem (AMBIEN) 10 mg tablet			
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.		
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.		
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.		
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.		

No current facility-administered medications for this visit.

Current Outpatient Medications on File Prior to Visit

Medication	Sig	Dispense	Refill
• diazePAM (VALIUM) 5 mg tablet			
• aspirin (BAYER) 81 mg chewable tablet	Take 81 mg by mouth daily.		
• atorvastatin (LIPITOR) 40 mg tablet			
• olmesartan-hydroCHLOROthiazide (BENICAR HCT) 40-12.5 mg per tablet			
• potassium chloride (KLOR-CON/25 ORAL)	Take by mouth.		
• zolpidem (AMBIEN) 10 mg tablet			
• isosorbide mononitrate (IMDUR) 30 mg ER tablet	Take 30 mg by mouth daily.		

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

• [DISCONTINUED] diazePAM (VALIUM) 5 mg tablet	Take 1-2 about 30 min prior to MRI (Patient not taking: Reported on 1/9/2020)	2 tablet	0
• [DISCONTINUED] losartan (COZAAR) 100 mg tablet			
• escitalopram oxalate (LEXAPRO) 20 mg tablet			
• clopidogrel bisulfate (PLAVIX ORAL)	Take by mouth.		
• AVAPRO 300 mg tablet	Take 300 mg by mouth daily.		
• hydrochlorothiazide (HYDRODIURIL) 50 mg tablet	Take 50 mg by mouth daily.		

No current facility-administered medications on file prior to visit.

Allergies

Allergen	Reactions
• Hay Fever [Environmental]	Rhinitis (Runny Nose, Stuffy Nose, Sneezing)
• Penicillins *During childhood*	Other (See Comments)

Review of Systems
HENT: Positive for drooling and voice change. Negative for trouble swallowing.
Neurological: Positive for speech difficulty.
Psychiatric/Behavioral: Positive for decreased concentration.

Objective:
Physical Exam

Neurologic Exam
General Appearance: Well nourished, in no acute distress
Head: Normocephalic, No tenderness/TA normal to palpation
Otoscopic: No discharge, No EAC rash
Neck: Supple, no tenderness
Skin: No hypo/hyperhydrosis, normal skin temperature to touch
Hematologt/Lymphatic: No bleeding, No abnormal bruising
Respiratory: No chest deformity, SOB; Absent
Cardiovascular: Regular Carotid Bruit: Absent
Pulses: NA
Abdomen: Soft, not distended
GU: No incontinence or urine retention
Spinal: Tenderness: Absent, Acceptable ROM

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

Extremities: Straight leg Raising: Negative

NEUROLOGICAL EXAMINATION

MENTAL STATUS:

Level of consciousness: Alert, Oriented to self, place and time
Mood: Euthymic
Attention: *Normal; based on observation during interview unless described below:*

20to1: , Months Fwd&Bkwd: , Serial 7th :

Comportment: includes memory, executive, language, visiospacial and calculation functions

Normal; based on observation during interview unless described below:

Executive functions: Graphomotor Sequencing Task:
Proverb interpretation: Similarities:
Memory: 3 Words /3 in 5 min, Recent events/Personal info:

Language: Naming: Repetition: 3 Stage command: Fluency:
Word list generation F /min, Animals /min
Reading: Writing: Comprehension:
Paraphasic errors: Prosody:
Visiospatial Function: Copying: Left/Right Discrimination:
Agnosia: Clock face drawing: 10 after11:
Neglect: Spatial: Motor: Sensory:
Calculation:

CRANIAL NERVES:

I (Olphactory) **: PST**:
II (Ophthalmic) **Fundi**: Poorly seen with nondilated pupil
Visual fields: Full
III(oculomotor), **IV**(Trochlear), **VI**(Abducens) EOM: Full eye ROM
Pupils: PERRLA
V(Trigeminal) Sensation in the face is symmetrical
VII Face is symmetrical, Synkinesia: Absent
VIII(Vestibulocohlear) Hearing: Normal bilaterally
Nystagmus: Absent
IX(Glossopharyngeal), **X**(Vagus) Uvula is midline, Dysarthria pseudobulbar/spastic type, No Dysphagia
No Dysphonia.
XI(Accessory) Head is midline, Trapezius muscle strength is 5/5 bilaterally
XII(Hypoglossal) Tongue is midline, No atrophy, No fasciculations

MOTOR EXAMINATION:

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

Isometric stength

		Right	Left			Right	Left
Neck	Flexion	5/5		Knee	Flexion	5/5	5/5
	Extension	5/5			Extension	5/5	5/5
Shoulder	Flexion	5/5	5/5	Hip	Flexion	5/5	5/5
	Extension	5/5	5 /5		Extension	5/5	5/5
	Abduction	5/5	5/5		Abduction	5/5	5/5
Elbow	Flexion	5/5	5/5	Ankle	Plantarflexion	5/5	5/5
	Extension	5/5	5/5		Dorsiflexion	5/5	5/5
Wrist	Flexion	5/5	5 /5	Foot		5/5	5/5
	Extension	5/5	5 /5	Great Toe dorsiflexion		5/5	5/5
Hand Grip		5/5	5 /5				

Pronator Drift: Absent
Fine Finger Movements: Normal
Tremor: Absent
Myoclonus: Absent.
Fasciculations: Absent
Muscle Tone: Normal.

Muscle Atrophy: Absent

SENSORY EXAMINATION:

Pin Prick/Temperature: Normal
Light Touch: Normal
Vibration: Normal
Position: Normal
Sensory Level: NA
Stockings Pattern Sensory Loss: NA
Gloves Pattern Sensory Loss: NA
Graphesthesia: NA
Stereognosis: NA
Two point discrimination: NA

Romberg: Negative

DTRs /Plantar response

	Right	Left		Right	Left
Triceps	3	3	Knee	3	3
Biceps	3	3	Ankle	2	2
Brachioradialis	3	3	Plantar Response	up	up

CEREBELLAR:

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All Notes (continued)

Progress Notes by Andre Strizhak V, MD at 7/23/2020 11:15 AM (continued)

Finger to Nose: Normal
Heel to Shin: NA
Rapid Alternating Movements: Normal

GAIT:

Senile. No spasticity

Assessment/Plan:

Progressive bulbar palsy is the most likely etiology of dysarthria
No evidence of disease spread to other muscle groups so far.
Reevaluation in 6 months.
There is no evidence of dementia and slow processing speed is likely related to aging and complicated by mood disorder.

Electronically signed by Andre Strizhak V, MD on 7/23/2020 12:08 PM

ACETYLCHOLINE RECEPTOR BLOCKING ANTIBODY [325930009]

Electronically signed by: **Andre Strizhak V, MD on 09/26/19 1044**
Status: **Completed**
Ordering user: Andre Strizhak V, MD 09/26/19 1044
Authorized by: Andre Strizhak V, MD
Frequency: 09/26/19 -
Diagnoses
Progressive bulbar palsy [G12.22]

Received by:

Recieved by Date: 9/27/2019
Received by Time: 02:31

Result date and time is equivalent to report date and time.

Resulted: 09/28/19 1513, Result status: Edited Result - FINAL

ACETYLCHOLINE RECEPTOR BLOCKING ANTIBODY [325930009]

Resulting lab: SUNRISE
Narrative:
All tests are performed at Sunrise Medical Laboratories unless otherwise indicated

Specimen Information

Type	Source	Collected On
blood	Peripheral vein	09/26/19 1057

Components

Component	Value	Reference Range	Flag	Lab
ACETYLCHOLINE RECPT BLOCKING ABS	0	0 - 26 %	—	SUNRISE

Comment:
INTERPRETIVE INFORMATION: Acetylcholine Blocking Ab
Negative ..... 0-26 percent blocking
Indeterminate ..... 27-41 percent blocking
Positive ..... 42 percent or greater blocking
Approximately 85-90 percent of patients with myasthenia gravis (MG) express antibodies to the acetylcholine receptor (AChR), which can be divided into binding, blocking, and modulating antibodies. Binding antibody can activate complement and lead to loss of AChR. Blocking antibody may impair binding of acetylcholine to the

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receptor, leading to poor muscle contraction. Modulating antibody causes receptor endocytosis resulting in loss of AChR expression, which correlates most closely with clinical severity of disease. Approximately 10-15 percent of individuals with confirmed myasthenia gravis have no measurable binding, blocking, or modulating antibodies. Test developed and characteristics determined by ARUP Laboratories. See Compliance Statement B: aruplab.com/CS
Performed by ARUP Laboratories,
500 Chipeta Way, SLC,UT 84108 800-522-2787
www.aruplab.com, Julio Delgado, MD, Lab. Director

Testing Performed By

Lab - Abbreviation	Name	Director	Address	Valid Date Range
150 - SUNRISE	SUNRISE	Unknown	Unknown	08/17/15 1542 - 03/11/20 1614

MISCELLANEOUS LAB TEST [325930011]

Status: **Completed**

Electronically signed by: **Andre Strizhak V, MD on 09/26/19 1044**
Ordering user: Andre Strizhak V, MD 09/26/19 1044
Authorized by: Andre Strizhak V, MD
Frequency: 09/26/19 -
Diagnoses
Progressive bulbar palsy [G12.22]

Questionnaire

Question	Answer
Test Name	Muscle-Specific Kinase (MuSK) Antibody by RIA ARUP 2012420

Received by:

Recieved by Date:	Received by Time:
9/27/2019	02:28

Result date and time is equivalent to report date and time.

MISCELLANEOUS LAB TEST [325930011] Resulted: 10/04/19 1603, Result status: Final result

Resulting lab: SUNRISE
Narrative:
All tests are performed at Sunrise Medical Laboratories unless otherwise indicated

Specimen Information

Type	Source	Collected On
blood	Peripheral vein	09/26/19 1057

Components

Component	Value	Reference Range	Flag	Lab
TEST NAME	MUSK Ab	—	—	SUNRISE
RESULT	See Notes	—	—	SUNRISE

Comment:

TEST	RESULTS	UNITS	REF RANGE
MUSCLE SPECIFIC KINASE(MUSK) ANTIBODY, IgG	0.00	nmol/L	0.00-0.03

INTERPRETIVE INFORMATION: Muscle-Specific Kinase (MuSK) Ab, IgG
Negative . . . . . 0.00-0.03 nmol/L
Positive . . . . . 0.04 nmol/L or greater

Muscle-specific kinase (MuSK) antibody is found in a subset of patients with myasthenia gravis, primarily those seronegative for muscle acetylcholine receptor (AChR) antibody. Decreasing antibody levels may be associated with therapeutic response; therefore, clinical correlation must be strongly considered. A negative test result does not rule out a diagnosis of myasthenia gravis.

Test developed and characteristics determined by ARUP

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NYU Langone Health System

TH LEVIT DEPT STAFF
1220 Avenue p
BROOKLYN NY 11229-1009

Gangi, Rosario J
MRN: 11025388, DOB: [redacted], Sex: M
Visit date: 9/26/2019

Laboratories. See Compliance Statement A: aruplab.com/CS
Test Performed at:
ARUP Laboratories
500 Chipeta Way

Salt Lake City, UT 84108-1221
1-800-242-2787
CLIA No: 46D0523979

Testing Performed By

Lab - Abbreviation	Name	Director	Address	Valid Date Range
150 - SUNRISE	SUNRISE	Unknown	Unknown	08/17/15 1542 - 03/11/20 1614

ACETYLCHOLINE RECEPTOR BINDING ANTIBODY [325930013]

Electronically signed by: **Interface, Sunrise In on 09/28/19 1514**
Status: **Completed**
Ordering user: Interface, Sunrise In 09/28/19 1514
Authorized by: Andre Strizhak V, MD
Frequency: 09/28/19 1514 -

Received by:

Recieved by Date: 9/27/2019
Received by Time: 02:31

Result date and time is equivalent to report date and time.

Resulted: 09/28/19 1512, Result status: Edited Result - FINAL

ACETYLCHOLINE RECEPTOR BINDING ANTIBODY [325930013]
Resulting lab: SUNRISE
Narrative:
All tests are performed at Sunrise Medical Laboratories unless otherwise indicated

Specimen Information

Type	Source	Collected On
—	—	09/28/19 1057

Components

Component	Value	Reference Range	Flag	Lab
ACETYLCHOLINE BINDING Ab	0.0	0.0 - 0.4 nmol/L	—	SUNRISE

Comment:
INTERPRETIVE INFORMATION: Acetylcholine Binding Ab
Negative ..... 0.0 - 0.4 nmol/L
Positive ..... 0.5 nmol/L or greater
Approximately 85-90 percent of patients with myasthenia gravis (MG) express antibodies to the acetylcholine receptor (AChR), which can be divided into binding, blocking, and modulating antibodies. Binding antibody can activate complement and lead to loss of AChR. Blocking antibody may impair binding of acetylcholine to the receptor, leading to poor muscle contraction. Modulating antibody causes receptor endocytosis resulting in loss of AChR expression, which correlates most closely with clinical severity of disease. Approximately 10-15 percent of individuals with confirmed myasthenia gravis have no measurable binding, blocking, or modulating antibodies.
Test developed and characteristics determined by ARUP Laboratories. See Compliance Statement B: aruplab.com/CS
Performed by ARUP Laboratories,
500 Chipeta Way, SLC,UT 84108 800-522
-2787
www.aruplab.com, Julio Delgado, MD, Lab. Director

Testing Performed By

Lab - Abbreviation	Name	Director	Address	Valid Date Range
150 - SUNRISE	SUNRISE	Unknown	Unknown	08/17/15 1542 - 03/11/20 1614

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NYU Langone Health System

TH LEVIT DEPT STAFF
1220 Avenue p
BROOKLYN NY 11229-1009

Gangi, Rosario J
MRN: 11025388, DOB: [redacted], Sex: M
Visit date: 9/26/2019

ACETYLCHOLINE RECEPTOR MODULATING ANTIBODY [325930014]

Status: **Completed**

Order placed as a reflex to ACETYLCHOLINE RECEPTOR BLOCKING ANTIBODY [325930009] ordered on 09/26/19 at 1044
Ordering user: Interface, Sunrise In 09/30/19 1911 Authorized by: Andre Strizhak V, MD
Frequency: 09/30/19 1911 -

Received by:

Received by Date:	Received by Time:
9/27/2019	02:31

Result date and time is equivalent to report date and time.

ACETYLCHOLINE RECEPTOR MODULATING ANTIBODY [325930014] Resulted: 09/30/19 1911, Result status: Final result

Resulting lab: SUNRISE
Narrative:
All tests are performed at Sunrise Medical Laboratories unless otherwise indicated

Specimen Information

Type	Source	Collected On
—	—	09/26/19 1057

Components

Component	Value	Reference Range	Flag	Lab
ACETYLCHOLINE RECEPT MOD AB	0	<=45 %	—	SUNRISE

Comment:
INTERPRETIVE INFORMATION: Acetylcholine Modulating Ab
Negative ..... 0-45 percent modulating
Positive ..... 46 percent or greater modulating
Approximately 85-90 percent of patients with myasthenia gravis (MG) express antibodies to the acetylcholine receptor (AChR), which can be divided into binding, blocking, and modulating antibodies. Binding antibody can activate complement and lead to loss of AChR. Blocking antibody may impair binding of acetylcholine to the receptor, leading to poor muscle contraction. Modulating antibody causes receptor endocytosis resulting in loss of AChR expression, which correlates most closely with clinical severity of disease. Approximately 10-15 percent of individuals with confirmed myasthenia gravis have no measurable binding, blocking, or modulating antibodies. Test developed and characteristics determined by ARUP Laboratories. See Compliance Statement B: aruplab.com/CS
Performed by ARUP Laboratories,
500 Chip
ela Way, SLC,UT 84108 800-522-2787
www.aruplab.com, Julio Delgado, MD, Lab. Director

Testing Performed By

Lab - Abbreviation	Name	Director	Address	Valid Date Range
150 - SUNRISE	SUNRISE	Unknown	Unknown	08/17/15 1542 - 03/11/20 1614

END OF REPORT

Exhibit 10 to Roth Affirmation-
California Attorneys General's Complaint to the FDIC referencing, inter alia, World Business Lenders Conduct
[pp. 383 - 457]

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XAVIER BECERRA
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General
MICHELE VAN GELDEREN (SBN 171931)
Supervising Deputy Attorney General
TINA CHAROENPONG (SBN 242024)
DEVIN W. MAUNEY (SBN 294634)
Deputy Attorneys General
1515 Clay St., 20th Floor
Oakland, CA 94612
Tel: (510) 879-0814
Fax: (510) 622-2270
Email: devin.mauney@doj.ca.gov

Attorneys for Plaintiff the People of the State of California

[See signature page for the complete list of parties represented. Civ. L.R. 3-4(a)(1).]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* Xavier Becerra, Attorney General of California; **DISTRICT OF COLUMBIA**, by its Attorney General Karl A. Racine; **PEOPLE OF THE STATE OF ILLINOIS** *ex rel.* Kwame Raoul, Attorney General of Illinois; **COMMONWEALTH OF MASSACHUSETTS** *ex rel.* Maurey Healey, Attorney General of Massachusetts; **STATE OF MINNESOTA**, by its Attorney General Keith Ellison; **STATE OF NEW JERSEY**, by its Attorney General Gurbir S. Grewal; **PEOPLE OF THE STATE OF NEW YORK** *ex rel.* Letitia James, Attorney General of New York; and **STATE OF NORTH CAROLINA** *ex rel.* Joshua H. Stein, Attorney General of North Carolina,

Plaintiffs,

v.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Case No. 20-5860

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

ADMINISTRATIVE PROCEDURE ACT CASE

FILED: KINGS COUNTY CLERK 04/15/2021 10:56 PM INDEX NO. 500481/2021
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INTRODUCTION

1. This is a case about federal overreach. States have long used interest-rate caps to protect consumers, business owners, and scrupulous creditors from the harms of predatory lending. The Federal Deposit Insurance Act ("FDIA") exempts federally insured, state-chartered banks and insured branches of foreign banks ("FDIC Banks") from these caps. The Federal Deposit Insurance Corporation ("FDIC"), a federal bank regulator, has issued a rule, after a divided vote of its Board of Directors, that would dramatically expand preemption of state interest-rate caps, allowing not just FDIC Banks but *any* entity that buys their loans to charge interest in excess of rates permitted by state law. This provision of the rule is beyond the FDIC's power to issue, is contrary to statute, and would facilitate predatory lending through sham "rent-a-bank" partnerships designed to evade state law. Additionally, in undertaking this rulemaking, the FDIC failed to follow the procedures set forth by Congress, ignored the potential for regulatory evasion, and failed to explain its rejection of evidence contrary to its proposal.

2. To protect consumers and business owners from the debt traps posed by high-interest loans, many states, including California, the District of Columbia, Illinois, Massachusetts, Minnesota, New Jersey, New York, and North Carolina (together, the "States"), rely on maximum interest-rate caps (also known as "usury laws," "usury caps," or simply "rate caps"). These caps are necessary to prevent lenders from charging excessive interest rates that make it difficult or impossible for many borrowers to repay their loans in full, which in turn causes borrowers to fall deeper into debt. Moreover, predatory lenders that trap consumers in a cycle of debt impose significant costs on states because these consumers are more likely to require government assistance to meet their basic needs. For example, according to one study, the high interest rates associated with payday loans can cause individuals to be more likely to require food assistance and less likely to meet their child-support obligations.[1] These are real, concrete costs

[1] Brian T. Melzer, *Spillovers from Costly Credit* 4-6 (U.S. Census Bureau Ctr. for Econ. Stud., Working Paper No. CES-WP-11, Dec. 2016), https://brianmelzer.com/wp-content/uploads/2016/12/Spillovers_final_wp.pdf. Other studies show a relationship between consumer debt and physical and mental health problems. *E.g.*, Elizabeth Sweet *et al.*, *Short-Term Lending: Payday Loans As Risk Factors for Anxiety, Inflammation and Poor Health* 1, 5 SSM-

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imposed on states and ultimately borne by taxpayers.

3. To prevent predatory lending and thereby protect consumers and taxpayers, states like the plaintiff States prohibit lenders from charging excessive rates on consumer loans. For example, California has a graduated rate cap on most consumer loans under $2,500 and prohibits charging interest greater than 36% plus the Federal Funds Rate on most consumer loans between $2,500 and $10,000.[2] New York law prohibits charging interest in excess of 16% for most consumer loans and criminalizes charging interest above 25%.[3] Similarly, North Carolina law has a graduated rate cap on consumer loans of $15,000 or less and prohibits charging interest in excess of 30% on loans made by licensed lenders and in excess of 16% on loans by unlicensed lenders.[4] Massachusetts criminalizes charging interest above 20% per year on any loan and limits interest to 12% per year on loans of $6,000 or less.[5] Interest-rate caps also protect other creditors (like landlords, suppliers, and mortgage or auto lenders) who face the threat of non-payment if their debtors take on high-interest loans and become insolvent.

4. Under the FDIA, FDIC Banks are exempt from state interest-rate caps and are subject only to the limits Congress established, as set forth in 12 U.S.C. § 1831d (often referred to as "Section 27 of the FDIA"). A number of motives explain this special treatment—the comprehensive regulatory regime to which FDIC Banks must submit; Congress's desire to achieve parity between state-chartered banks and federally chartered national banks, which under federal law are exempt from state interest-rate caps; and the role of federal regulation and

---

Population Health (2018), https://doi.org/10.1016/j.ssmph.2018.05.009 (noting that "studies are increasingly finding links between debt and poor health across a range of outcomes, including depression and depressive symptoms, anxiety, poor psychological well-being, and other mental disorders, poor self-rated health, high blood pressure, obesity, child behavior problems, lower life expectancy, and foregone medical care or care non-adherence") (internal citations omitted).

[2] Cal. Fin. Code §§ 22303, 22304, 22304.5.

[3] N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a; N.Y. Penal Law §§ 190.40, 190.42.

[4] N.C. Gen. Stat. §§ 53-176(a), (b), 24-1.1(a), (c). The 16% maximum interest rate applies to all loans between $15,000 and $25,000 regardless of licensing status. *Id.*

[5] M.G.L. c. 271 § 49 (criminalizing charging interest on a loan in excess of 20% per year in Massachusetts); M.G.L. c. 140 § 96 (criminalizing charging interest in excess of 12% per year on a loan of $6,000 or less in Massachusetts).

oversight over the activities of FDIC Banks. None of these motives apply to non-banks, and for that reason, Congress carefully selected the language of § 1831d to apply exclusively to FDIC Banks.

5. As one federal court recently explained, § 1831d "governs what charges a 'State bank' may impose, but . . . does not on its face regulate interest or charges that may be imposed by a non-bank, including one which later acquires or is assigned a loan made or originated by a state bank."[6]

6. Nevertheless, the FDIC recently issued a final rule, the Federal Interest Rate Authority Rule ("FDIC Rule" or "Rule"),[7] containing a provision that would extend this preemption of state-law rate caps beyond FDIC Banks to *any* entity—including non-banks—that purchases a loan from an FDIC Bank. This key provision (the "Non-bank Interest Provision") provides, in part, that "[i]nterest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act [12 U.S.C. § 1831d] shall not be affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part."[8]

7. The FDIC is a federal agency that manages the federal deposit insurance fund and has regulatory authority over federally insured state-chartered banks, insured branches of foreign banks, and other insured depository institutions.[9] However, the FDIC Rule's Non-bank Interest Provision applies not to these institutions but to entities far beyond the FDIC's jurisdiction—that is, anyone who buys loans from an FDIC Bank. The Rule drastically alters the statutory and regulatory regime that Congress established by unlawfully extending federal law in order to preempt state rate caps that would otherwise apply to those non-bank entities. The Rule is

---

[6] *Meade v. Avant of Colorado, LLC*, 307 F. Supp. 3d 1134, 1145 (D. Colo. 2018).

[7] FDIC, *Federal Interest Rate Authority*, 85 Fed. Reg. 44,146-58 (July 22, 2020) (to be codified at 12 C.F.R. §§ 331.1-331.4).

[8] 85 Fed. Reg. at 44,158 ("(e) *Determination of interest permissible under section 27*. Whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined as of the date the loan was made. Interest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act shall not be affected by a change in State law, a change in the relevant commercial paper rate after the loan was made, or the sale, assignment, or other transfer of the loan, in whole or in part.") (to be codified at 12 C.F.R. § 331.4(e)).

[9] *See* 12 U.S.C. §§ 1811, 1813, 1814, 1820.

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contrary to the plain language of § 1831d and to the statutory scheme Congress enacted. The FDIC fails to account for elements of the statutory scheme that conflict with its interpretation and relies on statutory provisions that offer no support for its view.

8. The Rule also contravenes the judgment of Congress, which limited the preemption of state interest-rate caps to FDIC Banks in § 1831d and declined to extend that preemption to non-banks. The Non-bank Interest Provision impermissibly preempts state law by extending § 1831d's protection against state-law rate caps to *any* entity that purchases a loan from an FDIC Bank. This is contrary to Congress's clear and manifest intent and invades the traditional sovereign authority of state governments to protect consumers, business owners, and the lending marketplace within their borders.

9. The FDIC also lacks authority to promulgate the Non-bank Interest Provision because it does not have jurisdiction over what non-banks may do and because it cannot contravene previous court rulings that federal interest-rate preemption does not extend to non-banks.

10. Expansion of state rate-cap preemption to any non-bank that purchases loans from an FDIC Bank also conflicts with the FDIC's long-held stance that it "view[s] unfavorably entities that partner with [an FDIC Bank] with the sole goal of evading a lower interest rate established under [state law]."[10] Partnerships between FDIC Banks and non-banks for the sole purpose of evading state rate caps are the foreseeable if not intended result of the Non-bank Interest Provision.

11. In practice, the Non-bank Interest Provision's sweeping extension of preemption will facilitate evasion of state law by enabling "rent-a-bank" schemes, in which banks not subject to interest-rate caps act as a mere pass-through for loans that, in substance, are issued by non-bank lenders. "Rent-a-bank" schemes in various forms have long troubled state law-enforcement

[10] 85 Fed. Reg. at 44,146-47; see also *Statement by FDIC Chairman Jelena McWilliams on the Notice of Proposed Rulemaking: Federal Interest Rate Authority*, FDIC Board Meeting (Nov. 19, 2019), https://www.fdic.gov/news/news/speeches/spnov1919.pdf.

efforts, and comments in the administrative record alerted the FDIC to this "important aspect"[11] of the FDIC's then-proposed rule. By extending rate-cap preemption to all purchasers of loans initially made by FDIC Banks, the Rule invites precisely this form of sham arrangement. Yet the FDIC failed to consider this and other important aspects of the Rule.

12. Even with respect to aspects of the Rule the FDIC chose to address, its analysis is incomplete. The agency claims its Non-bank Interest Provision is necessary to reduce market uncertainty and provide FDIC Banks with liquidity, but the FDIC fails to substantiate these claims with evidence. Moreover, significant evidence in the administrative record conflicts with the FDIC's claims, but the agency failed to address that evidence.

13. For all of these reasons, and those that follow below, the Non-bank Interest Provision of the FDIC Rule is arbitrary and capricious, an abuse of discretion, and not in accordance with law; it is in excess of statutory jurisdiction, authority, and limitations, and short of statutory right; and it is taken without observance of procedure required by law.[12]

JURISDICTION AND VENUE

14. This action arises under the Administrative Procedure Act ("APA").[13] Because the FDIC Rule is a final rule issued by an executive agency, the Rule is a final agency action, and is reviewable under 5 U.S.C. § 704.

15. This Court has subject-matter jurisdiction over this action because it is a case arising under federal law.[14]

16. An actual, present, and justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). This Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. §§ 701-706.

17. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1) and 5 U.S.C. § 703 because the People of the State of California reside in this district, no real property is

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[11] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action must be invalidated if the agency "entirely failed to consider an important aspect of the problem").

[12] 5 U.S.C. § 706(2).

[13] 5 U.S.C. §§ 551-559, 701-706.

[14] 28 U.S.C. § 1331.

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involved in this action, and this is a court of competent jurisdiction.

INTRADISTRICT ASSIGNMENT

18. Assignment to the Oakland Division is appropriate because a substantial part of the events or omissions giving rise to the claims in this Complaint occurred in the County of Alameda in that, among other things, the Rule would preempt California law applicable to corporate and natural persons doing business in the County and the People of the State of California maintain an office in the Oakland Division.

PARTIES

19. Plaintiff the People of the State of California ("California") bring this action by and through their Attorney General, Xavier Becerra, California's chief law officer.[15]

20. Plaintiff the District of Columbia (the "District") is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest.[16]

21. Plaintiff the State of Illinois ("Illinois") is represented by its Attorney General, Kwame Raoul, as its chief law-enforcement officer.[17] Attorney General Raoul has broad statutory and common law authority to act in the interests of the State of Illinois and its citizens in matters of public concern, health, and welfare.[18]

22. Plaintiff the Commonwealth of Massachusetts ("Massachusetts"), represented by and through Attorney General Maura Healey, is a sovereign state of the United States of America. Attorney General Healey is the Commonwealth's chief law-enforcement officer and brings this challenge pursuant to her independent constitutional, statutory, and common-law authority.

[15] Cal. Const. art. V, § 13.
[16] D.C. Code. § 1-301.81.
[17] Ill. Const. art. V, § 15.
[18] 15 Ill. Comp. Stat. 205/4.

23. Plaintiff the State of Minnesota ("Minnesota") brings this action by and through its Attorney General, Keith Ellison. Attorney General Ellison is the chief law officer of Minnesota and, pursuant to common law and statutory authority, may institute and maintain all such actions and proceedings as necessary for the enforcement of Minnesota's laws, the preservation of order, and the protection of Minnesota's legal and sovereign rights.[19]

24. Plaintiff the State of New Jersey ("New Jersey") is a sovereign state of the United States of America. This action is brought on behalf of the State of New Jersey by Attorney General Gurbir S. Grewal, the State of New Jersey's chief legal officer.[20]

25. Plaintiff the State of New York ("New York") is a sovereign state of the United States of America. New York is represented by Attorney General Letitia James, New York's chief law-enforcement officer.[21] As a body politic and a sovereign entity, New York brings this action on behalf of itself and as trustee, guardian, and representative of all residents and citizens of New York.

26. Plaintiff the State of North Carolina, represented by and through Attorney General Joshua H. Stein, is a sovereign state of the United States of America. Attorney General Stein is the State of North Carolina's chief law-enforcement officer and brings this challenge pursuant to his independent constitutional, statutory, and common-law authority.

27. Defendant the Federal Deposit Insurance Corporation is an executive agency of the United States government. The FDIC's principal address is 550 17th Street, NW, Washington, D.C. 20429.

ALLEGATIONS

I. FEDERAL BANKING LAW AND STATE-LAW PREEMPTION

28. Since 1864, the United States has had a dual-charter banking system in which both the federal and state governments issue bank charters. Before the Civil War, the chartering and

[19] *Head v. Special School District No. 1*, 182 N.W.2d 887, 892 (Minn. 1970); Minn. Stat. ch. 8.

[20] N.J. Stat. Ann. § 52:17A-4(e), (g).

[21] N.Y. Executive Law § 63.

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regulation of banks was, except for two short-lived experiments in federal banking, the province of the states. However, in the latter part of President Lincoln's first term, Congress passed the National Bank Act ("NBA"), which authorized the creation of federally chartered "national banks" and endowed them with certain statutory privileges, in part to help the Union finance the Civil War.[22] Understandably concerned with preserving the federal financial system during a time of state insurrection,[23] Congress chose to place national banks in the position of most-favored lender, preempting state law to allow these federally chartered entities to charge as much or more interest than the state-chartered banks against which they compete.[24]

29. This imbalance in the prerogatives of state-chartered banks and their national-bank competitors persisted for over a century, but in 1980, Congress amended the Federal Deposit Insurance Act to place all FDIC Banks and national banks on equal footing with respect to permissible interest rates.[25] "In order to prevent discrimination against State-chartered insured depository institutions [FDIC Banks]," Congress "preempted" state law to establish the interest rates chargeable by all FDIC Banks in § 1831d.[26]

30. The FDIC has long taken the position that § 1831d, the provision by which Congress sought to impose parity between national banks and FDIC Banks, must be interpreted "*in pari materia* with [12 U.S.C.] section 85," the Civil War-era NBA provision preempting state-law rate caps for national banks.[27]

31. Under § 1831d, FDIC Banks may charge the greater of a) a floating rate tied to the "discount rate on ninety-day commercial paper" set by the regional Federal Reserve Banks, to which national banks had long had access, or b) the highest rate permitted by the state in which the FDIC Bank is "located":

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[22] Stephen G. Stroup, *Smiley v. Citibank (South Dakota), N.A.: Charging Toward Deregulation in the Credit Card Industry*, 22 Del. J. Corp. L. 601, 603 (1997).

[23] *See id.*

[24] 12 U.S.C. § 85.

[25] Depository Institutional Deregulation and Monetary Control Act of 1980 ("DIDMCA"), Pub. L. No. 96–221 (HR 4986), 94 Stat 132 (1980).

[26] 12 U.S.C. § 1831d.

[27] *E.g.*, 85 Fed. Reg. at 44,147.

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> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks [*i.e.*, FDIC Banks] with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest [1] at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or [2] at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.[28]

32. In recent decades, it is the second option—permitting "the rate allowed by the laws of the State . . . where the bank is located"[29]—that governs in practice.

33. FDIC Banks are generally "located" in the state where they are chartered, and at first blush, it is not obvious why federal preemption is necessary to permit the charging of interest already allowed by the bank's chartering state. However, FDIC Banks can conduct business outside the states where they are "located"; thus, the ability to charge interest at rates permitted in their home states—regardless of the law applicable to other lenders in the state where the borrowers live—is a valuable federal privilege.[30] In our era, a bank's "location" is a strategic asset used to "export" high-cost loans to borrowers in states that cap interest rates.

34. The "exportation" of high-interest-rate loans from states with permissive rate caps to borrowers in more protective states has become increasingly common.

35. The trend started with national banks in the wake of the Supreme Court's 1978 opinion in *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, which held that a national bank could not be "deprived of [its] location merely because it is extending credit to residents of a foreign State."[31] *Marquette*'s holding—that a national bank could offer loans to borrowers outside the state of the bank's "location" that would ordinarily violate the rate caps of

[28] 12 U.S.C. § 1831d(a).
[29] *Id.*
[30] *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992).
[31] *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310 (1978).

the borrowers' state—set off a race to the bottom. National banks were incentivized to "locate" themselves strategically in states without interest-rate caps. For example, banking behemoths Citibank and Wells Fargo Bank are conspicuously "located" in South Dakota,[32] a state that imposes no cap on the interest rates banks may charge.[33] When Citibank and Wells Fargo issue credit cards to consumers across the nation, they rely on federal preemption under § 85 of the NBA (informed by South Dakota's permissive interest-rate law) to charge interest in excess of the rates permitted under otherwise applicable law in the many states where they do business.

36. *Marquette* exacerbated the competitive imbalance between national banks and state-chartered banks, which remained bound by the law of any states where they did business under ordinary choice-of-law rules, regardless of those banks' "location." Congress reacted by passing § 1831d in 1980, which granted the same interest-rate preemption and concomitant rate-exportation powers to FDIC Banks.[34]

37. FDIC Banks have used their interest-rate-exportation powers similarly to their national-bank counterparts. For example, a number of FDIC Banks located in Utah, which imposes no cap on the rates banks may charge when the parties execute a written contract,[35] have business practices aimed at "exporting" loans to borrowers in states that cap interest rates.[36]

38. Pursuant to § 1831d, FDIC Banks may charge interest in excess of rate caps applicable in the states where they do business. However, this right is limited to FDIC Banks and does not extend to *non-banks* that buy loans originated by FDIC Banks.[37] Section 1831d states, a

[32] OCC, *National Banks & Federal Branches and Agencies Active as of 7/31/2020*, https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/national-by-state.pdf.

[33] S.D. Codified Laws §§ 54-3-1.1 (titled "Rate of interest set by written agreement--No maximum or usury restriction"), 54-3-13 (titled "Regulated lenders exempt from interest rate limitations and usury statutes"), 54-3-14 (defining "regulated lenders" to include FDIC Banks).

[34] DIDMCA, Pub. L. No. 96–221 (HR 4986), 94 Stat 132 (1980).

[35] Utah Code Ann. § 15-1-1 (1).

[36] Comment of Center for Responsible Lending 30, 32-33, 35, 38, 41, App'x A. (Feb. 4, 2020); Comment of Adam J. Levitin 15 (Jan. 5, 2020). Citations to comments refer to comments submitted to the FDIC in response to its proposed rulemaking for its Rule and are available at https://www.fdic.gov/regulations/laws/federal/2019/2019-federal-interest-rate-authority-3064-af21.html.

[37] *See Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136

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"*State bank or such insured branch of a foreign bank* [*i.e.*, FDIC Bank] may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan . . . interest" at the allowed rates.[38] Congress has not preempted state interest-rate caps as to non-banks. Non-banks must abide by state interest-rate caps and cannot, by virtue of federal law, charge interest in excess of those caps on loans they purchase from banks.[39]

II. THE FDIC RULE'S NON-BANK INTEREST PROVISION

A. The FDIC's Rulemaking

39. The FDIC issued its notice of proposed rulemaking on December 6, 2019,[40] and its Board of Directors adopted the Final Rule by a divided 3-1 vote on June 25, 2020. FDIC Director Gruenberg issued a dissenting statement.[41]

40. The FDIC published its final Rule in the Federal Register on July 22, 2020, and set August 21, 2020 as the Rule's effective date.[42]

41. The FDIC Rule trails a similar rule (the "OCC Rule") by the Office of the Comptroller of the Currency ("OCC"), which regulates national banks.[43] The OCC Rule is nearly identical in substance to the FDIC Rule's Non-bank Interest Provision except that it applies to purchasers of loans issued by federally chartered national banks and federal savings associations.[44] The OCC recently characterized its rule as a "*Madden*-fix rule."[45]

S. Ct. 2505 (2016) (construing NBA provision, 12 U.S.C. § 85, which FDIC contends must be interpreted *in pari materia* with § 1831d).

[38] 12 U.S.C. § 1831d (emphasis added).

[39] *See Madden*, 786 F.3d at 249-52.

[40] 84 Fed. Reg. 66,845.

[41] Martin J. Gruenberg, Member, FDIC Bd. of Dirs., *Statement on Final Rule on Federal Interest Rate Authority* (June 25, 2020), https://www.fdic.gov/news/speeches/spjun2520e.html.

[42] 85 Fed. Reg. 44,146.

[43] OCC, *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530-36 (June 2, 2020) (to be codified at 12 C.F.R. §§ 7.40001(e) and 160.110(d)).

[44] Several States recently sued the OCC to invalidate the OCC Rule. *California v. OCC*, Case No. 4:20-cv-05200-JSW (N.D. Cal.). Many of the arguments made in that lawsuit apply with equal force to the Non-bank Interest Rate Provision.

[45] *See* OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 44,223, 44,227 (July 22, 2020) (to be codified at 12 C.F.R. § 7.1031).

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42. The FDIC Rule is a "rule" under 5 U.S.C. § 551(4) because, among other reasons, it is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . . [or] prices"[46] chargeable by entities that acquire loans from FDIC Banks.

43. Because the Rule will become effective on August 21, 2020, unless revoked by the FDIC or set aside by the Court, and is neither a "preliminary, procedural, or intermediate agency action" nor a "ruling not directly reviewable,"[47] it is a final agency action reviewable under 5 U.S.C. § 704.

44. The FDIC Rule addresses some topics that are not the direct subject of this challenge, like the application of state law to a branch of a state-chartered bank located in a "host" state outside that bank's "home" state.[48]

45. The Non-bank Interest Provision this suit challenges falls within a provision of the Rule the FDIC has codified at 12 C.F.R. § 331.4(e):

> *Determination of interest permissible under section 27*. Whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act [12 U.S.C. § 1831d] is determined as of the date the loan was made. Interest on a loan that is permissible under section 27 of the Federal Deposit Insurance Act shall not be affected by a change in State law, a change in the relevant commercial paper rate after the loan was made, or the sale, assignment, or other transfer of the loan, in whole or in part.[49]

46. While this provision purports to answer a single question—*when* the "interest on a loan . . . permissible under section 27 [§ 1831d] . . . is determined"—in fact, it elides two distinct questions: First, do changes "in State law" or the "relevant commercial paper rate" retroactively alter the interest rate FDIC Banks may take, receive, reserve, and charge under § 1831d? Second, does preemption of state law under § 1831d extend to *non*-banks to which a "sale, assignment, or other transfer of the loan" is made?[50]

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[46] 5 U.S.C. § 551(4).
[47] 5 U.S.C. § 704.
[48] 85 Fed. Reg. at 44,158.
[49] *Id.*
[50] Put differently, the FDIC treats both issues as a question of "when"—when is the permissible rate under § 1831d fixed? In fact, the second inquiry is a matter of "who"—who benefits from the state-law preemption provided under § 1831d?

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47. The FDIC answers this second question in the affirmative. It is wrong. Section 1831d, by its plain language, preempts otherwise applicable state rate caps *only* as applied to FDIC Banks and no one else.

48. The FDIC's Non-bank Interest Provision would dramatically and unilaterally expand federal preemption of state-law interest-rate caps to *any* entity that purchases a loan from an FDIC Bank. Put differently, the Non-bank Interest Provision would transform the state-law preemption Congress granted specifically to FDIC Banks into a salable asset, available to any buyers willing to pay FDIC Banks for the privilege of charging interest in excess of state law.

B. *Madden v. Midland Funding, LLC*

49. The Non-bank Interest Provision's explicit purpose is to overturn the Second Circuit's holding in *Madden v. Midland Funding, LLC* that the interest-rate exemption in § 85 of the NBA—which the FDIC believes guides the interpretation of § 1831d—applies only to banks.[51]

50. *Madden* concerned a credit-card debt originated by a national bank and subsequently sold to an unaffiliated third-party debt collector. The debt collector sent the plaintiff, a New York resident, a collection notice seeking to recover the debt at an interest rate of 27%, which violates New York's usury cap. The plaintiff sued the debt collector, arguing that its attempt to collect interest that is usurious in New York violated federal and state debt-collection statutes. The debt collector argued that, even though it was not a national bank, the plaintiff's claims were preempted by § 85 because the debt was originated by a national bank.[52]

51. As the Second Circuit explained in rejecting that argument, § 85 extends to

[51] *Madden*, 786 F.3d at 249-52; *see also, e.g.*, 85 Fed. Reg. at 44,146 ("While *Madden* concerned the assignment of a loan by a national bank, the Federal statutory provision governing State banks' authority with respect to interest rates is patterned after and interpreted in the same manner as section 85. *Madden* therefore helped highlight the need to issue clarifying regulations addressing the legal ambiguity in section 27."); *id.* at 44,149 (describing FDIC's policy objections to the "*Madden* decision, as it stands"); *id.* at 44,151 (arguing *Madden* "does not preclude the FDIC from adopting a different interpretation"); *id*. at 44,156 (listing "[t]he Second Circuit's *Madden* decision" and the uncertainty it purportedly created as the primary entry under heading "Reason Why This Action Is Being Considered").

[52] *Madden*, 786 F.3d at 247-48.

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national banks the privilege of charging interest in excess of what is permitted in the states where they do business, in part because national banks have submitted to comprehensive regulatory oversight by federal banking regulators.[53]

52. The Court noted that state laws limiting the interest chargeable by non-banks that buy loans originated by national banks do not significantly interfere with a national bank's own exercise of powers under the NBA.[54] To wit, regulating what non-banks may charge does not inhibit national banks' power to charge and collect interest permitted under § 85, nor does it affect their power to make loans or interfere with the sale of those loans to bank and non-bank buyers. At most, ordinary application of state law to non-banks could reduce the price that non-bank purchasers might be willing to pay national banks for their loans.[55]

53. By contrast, the Court held, "extending those protections [of § 85] to third parties would create an end-run around usury laws for non-national bank entities . . . ."[56]

54. The FDIC purportedly issued its Rule to resolve the "uncertainty" created by the *Madden* decision.[57] But *Madden* did not create any legal uncertainty because no Court of Appeals has ever held that the interest-rate preemption provided in §§ 85 (which applies to national banks) and 1831d (which applies to FDIC Banks) extends to loan purchasers. Indeed, the other Court of Appeals to opine has adopted a view consistent with *Madden*.[58]

55. Nevertheless, the FDIC speculated that the "uncertainty" created by the *Madden*

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[53] *Id.* at 250-52 (also stating that applying state law to non-banks that purchase loans from national banks would only limit the activities of debt buyers "which are otherwise subject to state control . . . and which are not protected by federal banking law or subject to OCC oversight" (internal citation and quotation marks omitted)).

[54] *Id.* at 251.

[55] *See id.* ("Here, however, state usury laws would not prevent consumer debt sales by national banks to third parties. Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (*i.e.*, those with firm usury limits, like New York), such an effect would not 'significantly interfere' with the exercise of a national bank power.").

[56] *Id.* at 252.

[57] 85 Fed. Reg. at 44,149, 44,150, 44,152, 44,155.

[58] *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 296 (3d Cir. 2005) ("Sections 85 and 86 of the NBA and Section 521 of the DIDA [*i.e.*, 12 U.S.C. § 1831d] apply only to national and state chartered banks, not to non-bank purchasers of second mortgage loans . . . .")

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decision could "reduce overall liquidity in loan markets," "chill State banks' willingness to make [certain] types of loans," "reduc[e] . . . the availability of credit," and "discourage the origination and sale of loan products . . . ."[59] These fears about the disruption that would be caused by *Madden* echo the financial industry's dire warnings. The defendants in *Madden* predicted "catastrophic consequences for secondary markets that are essential to the operation of the national banking system and the availability of consumer credit,"[60] and financial-industry trade groups warned that *Madden* "threatens to cause significant harm to [credit] markets, the banking industry, and the millions of families and businesses they serve."[61]

56. Contrary to these predictions, there has been no disruption to lending as a result of *Madden*.

57. The loans at issue in *Madden* were credit-card debt, issued by a national bank and sold to non-bank buyers. But the case's outcome did not affect the profitability of credit-card lending by national banks, which "reported blockbuster 2019 profit[.]"[62]

58. The FDIC's sister regulator, the OCC, testified to Congress in December 2019, nearly five years after *Madden*, that the U.S.'s then-economic expansion was "the longest in U.S. history, which ha[d] benefited banks' overall financial performance and banks ha[d] helped maintain that momentum."[63] "Capital and liquidity," in *Madden*'s wake, were "near historic

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[59] *E.g.*, 85 Fed. Reg. at 44,149, 44,155, 44,156.

[60] Petition for a Writ of Certiorari at 3, *Midland Funding, LLC v. Madden*, 136 S.Ct. 2505 (2016) (No. 15-610), 2015 WL 7008804.

[61] Brief of the Clearing House Association LLC, Financial Services Roundtable, Consumer Bankers Association, and Loan Syndications and Trading Association as Amici Curiae in Support of Rehearing and Rehearing En Banc at 1, *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015) (No. 14-2131-cv), 2015 WL 4153963.

[62] Renae Merle, *Banks Reported Blockbuster 2019 Profit With the Help of Consumers' Credit Card Debt*, Wash. Post, Jan. 15, 2020, https://www.washingtonpost.com/business/2020/01/15/banks-reported-blockbuster-2019-profit-with-help-consumers-credit-card-debt/. The article notes that interest rates on credit cards are at near record highs, despite several interest-rate cuts by the Federal Reserve, bolstering industry profits. *Id.*

[63] *Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 3 (2019) (statement of Joseph M. Otting, Comptroller of the Currency), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-ottingj-20191204.pdf.

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highs."[64]

59. The FDIC itself has similarly admitted that it is "not aware of *any* widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision."[65]

C. The Non-bank Interest Provision Appears To Rely on a "Doctrine" That Is Invalid

60. At the heart of the FDIC Rule's Non-bank Interest Provision is the claim that *Madden*'s holding conflicts with generally accepted banking law and practice, but the FDIC's rulemaking record fails to show *Madden* was anything other than a straightforward application of clear law to common facts. Neither when the Second Circuit issued its decision in *Madden* nor since has any federal Court of Appeals *ever* held that §§ 85 or 1831d's interest-rate preemption applies to entities other than national or state-chartered banks.[66]

61. Nevertheless, federal regulators and the financial industry, since 2015, have steadfastly claimed that *Madden* conflicts with a supposedly longstanding common-law "principle" that they have concocted and named "valid-when-made."

62. According to proponents of the "valid-when-made" theory, including the OCC, loan buyers should be exempt from state usury laws (and may charge any rate authorized by contract) as long as the originator of the loan was itself exempt from state usury laws. Put differently, the theory rests on the idea that preemption of state usury laws is salable—when Congress exempts FDIC Banks from state usury law, those FDIC Banks may sell, by way of

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[64] *Id.*

[65] 85 Fed. Reg. at 44,156 (emphasis added).

[66] *See* Brief for the United States as Amicus Curiae at 13-14, *Midland Funding, LLC v. Madden*, 136 S.Ct. 2505 (2016) (No. 15-610), 2016 WL 2997343; *see also In re Cmty. Bank of N. Va.*, 418 F.3d at 296 (agreeing that §§ 85 and 1831d "apply only to national and state-chartered banks, not to non-bank purchasers"). The only decision to disagree with *Madden*'s interpretation of § 85 was issued by a bankruptcy court in Colorado. *In re Rent-Rite Superkegs W., Ltd.*, 603 B.R. 41, 67 n.57 (Bankr. D. Colo. 2019). On appeal from the Bankruptcy Court, the U.S. District Court stated its agreement with *Madden* and declined to endorse "valid-when-made," but ultimately applied the OCC's Non-bank Interest Rule, which had not been promulgated at the time of the litigants' briefing and so had not been challenged by the litigants before the Court. *In re Rent-Rite Superkegs W., Ltd.*, __ F. Supp. _d. __, __ (D. Colo. 2020).

selling loans they originate, that congressionally conferred right to charge interest in excess of state law to any buyers they wish.

63. The FDIC appears, at times, to rely on this "valid-when-made" theory for its Non-bank Interest Provision. The Chair of the FDIC's Board of Directors, who voted in favor of issuing the FDIC Rule, described the Rule as "reaffirming and codifying in regulation the valid-when-made doctrine" both in her announcement of the agency's proposed rulemaking and announcing the final Rule.[67] The Rule itself states that the Non-bank Interest Provision is "consistent with state banking powers and common law doctrines such as the 'valid when made' and 'stand-in-the shoes' rules"; describes the version of "valid-when-made" described above; and concludes on that basis that "[a] loan that was not usurious under section 27 [§ 1831d] when made would thus not become usurious upon assignment."[68]

64. But in response to a series of critical comments, the FDIC asserts that its interpretation of § 1831d is not "based on Federal common law or the valid-when-made rule, as some comments have argued."[69] And, perhaps attempting to distance itself from the dubious "valid-when-made" theory, the FDIC has also coined a new term, "stand-in-the-shoes rules," to describe the same idea.[70]

65. The FDIC's conflicting statements that alternately adopt then disclaim the "valid-when-made" theory as a basis for the Non-bank Interest Provision render the Rule arbitrary and capricious.

66. The FDIC's statement disclaiming the "valid-when-made" theory as a basis for the Non-bank Interest Provision also conflicts with its longstanding position that § 1831d must be

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[67] *Statement by FDIC Chairman Jelena McWilliams on the Notice of Proposed Rulemaking: Federal Interest Rate Authority*, FDIC Board Meeting (Nov. 19, 2019), https://www.fdic.gov/news/news/speeches/spnov1919.pdf; *Statement by FDIC Chairman Jelena McWilliams on the Final Rule: Federal Interest Rate Authority* (June 25, 2020), https://www.fdic.gov/news/speeches/spjun2520b.html.

[68] 85 Fed. Reg. at 44,149.

[69] *Id.* at 44,151.

[70] *E.g.*, *id.* at 44,149.

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interpreted *in pari materia* with § 85.[71] In issuing the near-identical OCC Rule, the OCC expressly relied on the "valid-when-made" theory in interpreting § 85 to extend rate-cap preemption to buyers of loans originated by federally chartered banks.[72] The FDIC's claim that its interpretation of § 1831d is not based on the "valid-when-made" theory runs counter to the OCC's interpretation of its parallel statute and thus is in conflict with the FDIC's position that the two statutes should be construed *in pari materia*. These conflicting lines of logic further render the Rule arbitrary and capricious.

67. The "valid-when-made" theory of § 1831d cited in the FDIC Rule conflicts with the plain text of § 1831d, which exempts only FDIC Banks from state rate caps.

68. The supposed "valid-when-made" "principle" is also implausible in that it departs markedly from how law ordinarily operates with respect to licensed and highly regulated activities, like banking. In highly regulated fields, the transfer of property does not imply the transfer of all rights that the licensed seller holds relating to that property. For example, Congress has exempted from federal income taxation the interest credit unions earn on their loans,[73] but the *buyer* of a credit union's assets receives no such exemption—*non*-credit unions must pay their taxes. A licensed driver may sell her car, but the buyer must have his own license to drive it.[74] That is to say, property (a loan or a car) may pass from one party to another, but certain rights (to avoid taxation or to drive) are not salable and must be conferred separately by license or statute. The FDIC's supposed "valid-when-made" "principle" ignores this common feature of American law.

69. The FDIC states, "It is well settled that an assignee succeeds to all the assignor's rights in a contract, standing in the shoes of the assignor."[75] But the right to charge interest *in excess of state rate caps* is conferred by statute, not contract. FDIC Banks may sell their loans to non-banks; but without an act of Congress exempting them from state rate-cap laws, non-banks

[71] *Id.* at 44,147.

[72] 85 Fed. Reg. at 33,532 (citing "valid-when-made" as "tenets of common law that inform its . . . interpretation of section 85").

[73] 26 U.S.C. § 501(c)(14)(A).

[74] *E.g.*, Cal. Veh. Code § 12500.

[75] 85 Fed. Reg. at 44,149.

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must charge and collect interest in accordance with state law.

70. Furthermore, "valid-when-made's" historical bona fides are anything but. Case law and historical treatises are devoid of anything resembling the FDIC and OCC's theory; in fact, the first articulation of the "valid-when-made" theory of §§ 85 and 1831d appears in a 2015 brief asking the Second Circuit to reconsider *Madden*.[76]

71. Although a "well-settled" principle of banking law (as the FDIC considers "valid-when-made")[77] should appear in banking and usury treatises predating the financial industry's 2015 *Madden* brief, "valid-when-made" is "entirely unknown to historical treatise writers," according to legal scholar and historian Adam Levitin.[78] "Nothing even approaching the 'valid-when-made' doctrine in which the assignment of a loan from an originator to an assignee subject to a different state usury law appears in any 19th or 20th century usury treatise. No prior reference to 'valid-when-made' can be found in *any* banking or usury treatise."[79]

72. Moreover, none of the cases the FDIC cites regarding the supposed "valid-when-made" "principle" support the proposition that the state-law exemptions conferred on FDIC Banks by § 1831d should pass to non-banks upon the sale of a loan.

73. To support its analysis, the FDIC relies on a misreading of old law. Following the lead of several industry briefs and publications since *Madden*, the FDIC cites Supreme Court cases from the early 1800s for the proposition that "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."[80] The FDIC's reliance on this quote to conclude that non-banks are exempt from state usury laws when

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[76] Comment of Adam J. Levitin (Jan. 5, 2020), Attachment 1, *Amicus Curiae* Brief of Professor Adam J. Levitin in Support of Plaintiff at 12-13, 26-31, *Rent-Rite Super Kegs W., Ltd. v. World Business Lenders, LLC*, No. 19-cv-01552 (D. Colo. Sept. 19, 2019) (describing the paucity of historical evidence for federal regulators' "valid-when-made" theory and distinguishing the few cases that bear any likeness to it).

[77] 85 Fed. Reg. at 44,149.

[78] Comment of Adam J. Levitin (Jan. 5, 2020), Attachment 1, *Amicus Curiae* Brief of Professor Adam J. Levitin in Support of Plaintiff at 26, *Rent-Rite Super Kegs W., Ltd. v. World Business Lenders, LLC*, No. 19-cv-01552 (D. Colo. Sept. 19, 2019).

[79] *Id.* (emphasis in original).

[80] 85 Fed. Reg. at 44,149 n.33 (quoting *Nichols v. Fearson,* 32 U.S. 103, 109 (1833) and citing *Gaither v. Farmers' & Mechs' Bank of Georgetown,* 26 U.S. 37, 43 (1828)).

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they purchase loans from FDIC Banks is misplaced. *Nichols v. Fearson* and *Gaither v. Farmers & Mechanics Bank of Georgetown*, the supercentenarian cases the FDIC cites, concern the now-obsolete law of transferable notes, which were often traded multiple times at discount. None of these cases involved statutes exempting any party from state interest-rate caps, and all were decided before Congress granted national banks or FDIC Banks such privileges in the NBA and the FDIA. Thus, the Court in *Nichols* and *Gaither* could not have contemplated that the usurious nature of a loan could turn on whether the loan was held by an entity statutorily protected from state rate caps or a non-protected assignee, and its holdings in those cases do not have any bearing on "valid-when-made" or the FDIC's Non-bank Interest Provision.[81]

74. These cases merely hold that if a lender originates a loan at an interest rate lower than the relevant rate cap and then sells the loan for less than the original loan amount, the loan does not become usurious just because the total amount owed constitutes a percentage that would exceed the rate cap if calculated based on the discounted-sale price rather than on the original loan amount. In other words, whether the interest rate is usurious is correctly calculated based on the rate the borrower must pay in relation to the principal amount borrowed, not based on the rate of return realized by an assignee in relation to the cost it invests to purchase the loan.

75. This archaic legal issue may be difficult for modern readers to understand. An example makes it concrete: A lender in a state with a 36% rate cap gives a borrower a $100 loan and requires the borrower to repay $110 in one year; this amounts to a 10% interest rate and is permissible under the state rate cap. That original lender, which soon finds itself in need of immediate cash, then sells the loan to a discount buyer for just $55; this means that the buyer can collect the $110 owed by the borrower when the loan is due. From the borrower's perspective, the borrower is still paying a 10% rate on the loan. But from the perspective of the discount buyer, who is getting $110 back from its $55 payment, it may appear as if the "interest" rate is 100%, which would be well over the state rate cap. *Nichols* and *Gaither* hold that in determining whether

[81] *See* Comment of Adam J. Levitin (Jan. 5, 2020), Attachment 1, *Amicus Curiae* Brief of Professor Adam J. Levitin in Support of Plaintiff at 16, *Rent-Rite Super Kegs W., Ltd. v. World Business Lenders, LLC*, No. 19-cv-01552 (D. Colo. Sept. 19, 2019).

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a loan's interest rate is usurious, the effective interest rate should be calculated based on the original loan amount, not on whatever discounted price a buyer paid to the original lender for the loan. The borrower cannot invalidate a loan on the basis that it is usurious simply because the original lender sold the loan at a deep discount. In other words, "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."[82]

76. These cases have nothing to do with the interest rates non-banks may charge when they buy loans issued by FDIC Banks. Nor do these cases hold that a loan buyer has the inalienable right to continue charging the same interest rate as the loan seller.

77. Additionally, the FDIC cannot rely on a "common law" principle of "valid-when-made" to expand the scope of federal law and displace state law because the Supreme Court has made clear since its 1938 decision in *Erie v. Tompkins* that "[t]here is no federal general common law."[83] The statute the FDIC invokes is straightforwardly limited to FDIC Banks; the agency may not rely on "common law" to expand its reach.

D. The FDIC's Non-bank Interest Provision Gives the Financial Industry What It Failed To Wrest from the Courts or Congress

78. The FDIC Rule's Non-bank Interest Provision is a boon to the financial-services industry, which has vigorously lobbied against state-law rate caps.[84]

79. For years, the financial-services industry tried unsuccessfully to achieve preemption of state-law rate caps, first through the courts and then through Congress. Financial-industry trade groups—including the American Bankers Association, the Financial Services

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[82] *Nichols*, 32 U.S. at 109.

[83] *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); *see also* Comment of Arthur E. Wilmarth, Jr. Ex. A at 10-13 (Jan. 17, 2020).

[84] For example, when South Dakota voted on an interest-rate cap applicable to non-banks in 2016, the payday-loan industry spent over a million dollars lobbying against the rate cap, which was ultimately approved by an overwhelming 76% of voters. Bart Pfankuch, *Payday Loans Gone, But Need for Quick Cash Remains*, Capital Journal (Pierre, S.D.), Mar. 23, 2018, https://www.capjournal.com/news/payday-loans-gone-but-need-for-quick-cash-remains/article_4b3b74de-2e5e-11e8-8dc5-c7f64085e760.html.

Roundtable, the Structured Finance Industry Group, the Loan Syndications and Trading Association, and others—launched an *amicus* campaign to convince the federal courts that § 85's (and by extension, § 1831d's) state-law preemption applies not just to national banks, but extends to *all buyers* of national banks' loans.[85] The FDIC (along with the OCC) soon joined in, filing *amicus* briefs in matters ordinarily too mundane to catch the notice of a federal regulator, like a small-business bankruptcy.[86] But that campaign largely failed. The Second Circuit declined to reconsider *Madden*, the Supreme Court denied *certiorari*, a state court recently rejected the FDIC's theory of § 1831d, and no circuit split has emerged.[87]

80. Moreover, Congress recently declined to enact legislation substantively identical to the FDIC's Non-bank Interest Provision. The Protecting Consumers' Access to Credit Act of 2017, a bill introduced following *Madden* but before the FDIC proposed its Rule, would have extended § 1831d's exemption from state rate caps beyond FDIC Banks to third parties that are

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[85] *E.g.,* Brief of the Clearing House Association LLC, Financial Services Roundtable, Consumer Bankers Association, and Loan Syndications and Trading Association as Amici Curiae in Support of Rehearing and Rehearing En Banc at 5-9, *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015) (No. 14-2131-cv), 2015 WL 4153963; Brief of the Structured Finance Industry Group, Inc., and the Securities Industry and Financial Markets Association as Amici Curiae in Support of Defendants-Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc at 8-10, *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015) (No. 14-2131-cv), 2015 WL 4153964; Brief of Amici Curiae The American Bankers Association, The California Bankers Association, and The Utah Bankers Association in Support of Petitioners at 5-7, *Midland Funding, LLC v. Madden*, 136 S.Ct. 2505 (2016) (No. 15-610), 2015 WL 8959419.

[86] *E.g.,* Amicus Brief of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency in Support of Affirmance and Appellee at 9-20, *Rent-Rite Super Kegs West Ltd. v. World Business Lenders, LLC*, No. 19-cv-01552 (D. Colo. Sept. 10, 2019).

[87] *Midland Funding, LLC v. Madden*, 136 S. Ct. 2505 (2016) (denying cert.); Order Denying Petition for Rehearing *En Banc*, *Madden v. Midland Funding, LLC*, 14-2131-cv (2d Cir. Aug. 12, 2015); Order Regarding Plaintiff's Motion for Determination of Law, slip op. at 6-7, *Fulford, Administrator v. Marlette Funding, LLC*, No. 2017-cv-30376 (Denver Dist. Ct. June 9, 2020) (following *Madden*), https://www.nclc.org/images/pdf/unreported/Order_Regarding_Plaintiff_Motion_Determination_Law.pdf. Only a single Bankruptcy Court has accepted the OCC's view. *See In re Rent-Rite Superkegs W., Ltd.*, 603 B.R. at 67 n.57. On appeal from the Bankruptcy Court, the U.S. District Court stated its agreement with *Madden* and declined to endorse "valid-when-made," but ultimately applied the OCC's Non-bank Interest Rule, which had not been promulgated at the time of the litigants' briefing and so had not been challenged by the litigants before the Court. *In re Rent-Rite Superkegs W., Ltd.*, __ F. Supp. _d. __, __ (D. Colo. 2020).

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assigned loans originated by FDIC Banks. The bill used language very similar to that contained in the FDIC Rule's Non-bank Interest Provision:

> A loan that is valid when made as to its maximum rate of interest in accordance with this section [12 U.S.C. § 1831d] shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary.[88]

81. Following the House's passage of the proposed legislation, the Senate took no action, allowing it to expire at the close of the 115th Congress.[89]

82. Congress knows how to preempt state interest rate caps when it wants to. For example, in the same bill as § 1831d, Congress enacted law stating that preemption of state interest-rate caps in the *mortgage* context travels with the loan even after sale of a first-lien mortgage loan.[90] But Congress declined to take similar action with respect to non-mortgage loans.

83. Unsuccessful before Congress and the Judiciary, the industry then turned to the only branch left. In the FDIC (and the OCC, which issued a near-identical rule with respect to national banks and federal savings associations), the financial-services industry found an ally that issued a rule granting precisely what Congress and the courts had denied: preemption of state laws protecting consumers from usurious loans.

III. THE STATES HAVE STANDING TO CHALLENGE THE FDIC RULE

84. The FDIC Rule injures concrete and distinct interests of the plaintiff States, including the States' sovereign, quasi-sovereign, and fiscal interests, any one of which is sufficient to support the States' standing to bring this APA action.

A. The FDIC Rule's Non-bank Interest Provision Harms the States' Sovereign Interests

85. Each of the States has a sovereign interest in the protection and enforcement of its

[88] H.R. 3299, 115th Cong. (2017-2018), https://www.congress.gov/bill/115th-congress/house-bill/3299/text.

[89] *See* S. 1642, 115th Cong. (2017-2018), https://www.congress.gov/bill/115th-congress/senate-bill/1642/actions?q=%7B%22search%22%3A%5B%22S1642%22%5D%7D&r=2&s=1 (only recorded Senate action on bill is introduction on July 27, 2017).

[90] 12 U.S.C. § 1735f-7a; *see also* Comment of Adam J. Levitin 4 (Jan. 5, 2020).

laws that, as discussed below, carefully regulate the interest that may be charged on consumer loans. These sovereign interests are concretely and particularly harmed by the FDIC Rule because its Non-bank Interest Provision would preempt the States' enforcement of their laws against non-banks that buy loans from FDIC Banks. These harms to the States' interests are directly traceable to the FDIC Rule, and an order setting aside the Rule's Non-bank Interest Provision would redress the States' injuries.

86. Among the most significant powers of a state is the "exercise of sovereign power over individuals and entities," which "involves the power to create and enforce a legal code, both civil and criminal."[91] Enforcing state law is one of the "quintessential functions of a State."[92] This interest is unique to sovereign entities, like the States, because they alone are "entitled to create a legal code" and thus they have the most "direct stake . . . in defending the standards embodied in that code."[93] Thus, states "have an interest, as sovereigns, in exercising 'the power to create and enforce a legal code.'"[94] States have standing to sue the federal government where a federal law or federal action with the force of law impairs the states' legitimate, sovereign interest in the continued enforceability of their own statutes.[95]

87. The FDIC Rule invokes the States' sovereign interests because it would allow entities that would otherwise be subject to the States' rate caps or anti-evasion laws to charge interest rates much higher than allowed by the States. By allowing loan purchasers to continue to charge any interest rate chargeable by FDIC Banks under § 1831d, the Rule preempts state law that limits the interest rates that these entities may charge. The Rule would also render ineffective the States' anti-evasion provisions as to those entities.

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[91] *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982).
[92] *Diamond v. Charles*, 476 U.S. 54, 65 (1986).
[93] *Id.* (internal quotations omitted).
[94] *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (quoting *Alfred L. Snapp & Son*, 458 U.S. at 601).
[95] *See, e.g.*, *California v. Trump*, 963 F.3d 926, 936-37 (9th Cir. 2020) (states have standing to challenge federal action to vindicate states' "sovereign interests in enforcing their environmental laws"); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1239-40 (10th Cir. 2008) ("[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact to" demonstrate state standing).

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88. The Rule's Non-bank Interest Provision would also harm the States' sovereign interests in enforcing their laws by facilitating "rent-a-bank" schemes between FDIC Banks "located" outside of the States and lenders that would otherwise be subject to the States' laws. In these "partnerships," the FDIC Bank ostensibly originates all loans so that the loans arguably are not subject to the States' rate caps, and then consistently sells them, by agreement or understanding, to the non-bank lender so that the non-bank lender can charge interest in excess of state law. These "partnerships" are known as "rent-a-bank" schemes because they frequently require little to no financial risk or substantive involvement by the participating FDIC Bank.

89. Some FDIC Banks already engage in these "rent-a-bank" schemes. For example, because Utah imposes no cap on the rates banks may charge when the parties execute a written contract,[96] FinWise Bank, a Utah-chartered bank insured by the FDIC, has made a business practice of partnering with non-banks, including Elevate Credit, Inc. (d/b/a Rise) and OppLoans, to evade the otherwise-applicable rate caps of the borrower's home state.[97] FinWise assists non-banks in evading the laws of 25 jurisdictions, including California, the District of Columbia, and Minnesota.[98] Capital Community Bank, another Utah-chartered bank insured by the FDIC, similarly relies on Utah's permissive interest-rate laws to export high-cost loans to other states, including California, the District of Columbia, and Illinois.[99]

90. The Rule's Non-bank Interest Provision would facilitate "rent-a-bank" schemes by allowing non-bank entities to purchase loans from FDIC Banks and thus charge, collect, and receive interest at rates that exceed the caps set forth in the States' laws.[100] Put differently, the Rule would preempt state-law limitations on the rates of interest non-bank entities may receive when the interest received derives from loans purchased from FDIC Banks.

91. The limited language of § 1831d demonstrates Congress's intent that states may

[96] Utah Code Ann. § 15-1-1 (1).

[97] Comment of Adam J. Levitin 15 (Jan. 5, 2020); Comment of Center for Responsible Lending 30, 32, 35, 38, 41, App'x A (Feb. 4, 2020).

[98] Comment of Center for Responsible Lending 30, 32, 35, 38, 41, App'x A. (Feb. 4, 2020).

[99] *Id.* at 33, 35, 41-42.

[100] *E.g.*, Cal. Fin. Code §§ 22303, 22304, 22304.5.

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vindicate their interests. States are the primary beneficiaries of that section's close tailoring, which exempts only "State bank[s] or insured branch[es] of a foreign bank" from state-law interest rate caps.[101] It does so for the narrow and explicit purpose of "prevent[ing] discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates . . . ."[102] But Congress was careful to preserve the states' authority to regulate the interest rates chargeable by non-banks, demonstrating that protection of their sovereign and quasi-sovereign interests was among Congress's statutory objectives.

1. California's Rate Caps and Anti-Evasion Laws

92. California has two statutory schemes, the California Financing Law ("CFL") and the California Deferred Deposit Transaction Law ("CDDTL"), that, among other things, regulate the interest rate that may be charged on consumer loans.[103]

93. The CFL requires finance lenders and brokers to be licensed by the California Department of Business Oversight ("DBO"),[104] a state agency charged with regulating and overseeing the activities of payday lenders, finance lenders and brokers, state-licensed banks and savings associations, and other entities.[105]

94. The CFL caps the interest rates state-licensed lenders may "contract for" or "receive" on consumers loans under $10,000. For loans under $2,500, the CFL imposes a graduated rate cap.[106] For loans between $2,500 and $9,999, the CFL prohibits interest rates exceeding an annual simple interest rate of 36% per year plus the Federal Funds Rate.[107]

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[101] 12 U.S.C. § 1831d.

[102] *Id.*

[103] In addition to these statutory schemes, the California Supreme Court has held that loans not violating the state's rate caps, but nonetheless charging rates of interest that are excessive under the circumstances, may be deemed "unconscionable" and thus unlawful and actionable under the state's Unfair Competition Law (California Business and Professions Code § 17200). *See generally De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966 (2018). Like the CFL and CDDTL, California's unconscionability jurisprudence could be affected by the FDIC Rule.

[104] Cal. Fin. Code §§ 22009, 22100.

[105] Cal. Fin. Code § 300.

[106] Cal. Fin. Code §§ 22303, 22304, 22306.

[107] Cal. Fin. Code §§ 22304.5, 22306.

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95. Before 2019, the CFL had provided a graduated rate cap only for loans of less than $2,500.[108] However, many lenders evaded this cap by offering high-interest loans just above $2,500.[109] For example, in 2018, less than 3% (fewer than 46,000) of all CFL-covered loans were for between $2,000 and $2,499, while nearly 36% (nearly 600,000) of all CFL-covered loans were for between $2,500 and $4,999.[110] Fifty-five percent of those latter loans charged an annual percentage rate of 100% or more.[111]

96. To protect consumers from high-cost, predatory loans, the California Legislature enacted legislation in October 2019 that limits the interest rate for loans of at least $2,500 and under $10,000.[112]

97. The California Legislature was well-attuned to the potential for scheming by regulated entities to evade the law and sought to prevent evasion. To prevent lenders from evading the CFL's rate caps by artificially increasing the size of a loan, the CFL establishes whether and which rate caps apply based on a loan's "bona fide principal amount."[113] The "bona fide principal amount" excludes loan amounts in excess of what the borrower applies for if the borrower is, "by prearrangement or understanding," to make a substantial repayment to the lender "within a short time after the making of the loan" and specified conditions are met.[114] Thus, for example, lenders may not evade the CFL's rate caps by lending $11,000 to a borrower seeking only $9,000 with the understanding that the borrower will immediately return the excess $2,000.

98. The CDDTL likewise limits the interest chargeable on short-term deferred deposit

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[108] Cal. Fin. Code §§ 22303, 22304.

[109] *See, e.g.*, *De La Torre*, 5 Cal. 5th 966; Cal. Leg. Asm. Comm. On Banking and Finance, Analysis of A.B. 538 (Limón) 3-5, *Legislative Counsel's Digest* (Mar. 28, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB539.

[110] California Department of Business Oversight, *California Department of Business Oversight Annual Report* 9 (June 2018), https://dbo.ca.gov/wp-content/uploads/sites/296/2019/08/CFL-Annual-Report-2018-FINAL-8-8-19.pdf.

[111] *Id.* at 13.

[112] Cal. Leg., A.B. 539 (Oct. 10, 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB539 (chaptered at Cal. Fin. Code § 22304.5).

[113] Cal. Fin. Code §§ 22303, 22304, 22304.5.

[114] Cal. Fin. Code § 22251.

transactions, commonly known as payday loans.[115] The CDDTL also contains several provisions aimed at preventing lenders from evading California law through partnerships with out-of-state entities.[116] For example, it provides that loans made out of state are enforceable in California only "to the extent of but not to exceed the unpaid principal balance and the aggregate amount of interest . . . and all other charges permitted" by California law.[117] That is, non-bank entities seeking to enforce loans in California may not collect interest at rates above what is permitted under California law. The CDDTL applies to "[a]ny person" that seeks to collect, in California, interest and unpaid balances on deferred deposit transactions[118] and "[a]ny person" who arranges, in California, the making of a deferred deposit transaction outside of the state for the purpose of evading the CDDTL.[119]

99. The threat to California's enforcement of its laws posed by the Rule's facilitation of "rent-a-bank" schemes is apparent and immediate. Even before the passage of California's 36% rate cap, several state-licensed lenders publicly announced their intention to evade California's interest-rate restrictions by partnering with FDIC Banks.[120] For example, the CEO of Elevate (which is licensed and does business in California as "Rise") stated on a July 29, 2019 earnings call that in response to California's then-proposed 36% rate cap, the company expected "to be able to continue to serve California consumers via bank sponsors that are not subject to the same proposed state rate limitations."[121] Several other lenders have likewise announced plans to pursue partnerships with banks to evade California's rate caps, including Curo Holdings Corp. (d/b/a Speedy Cash) and Enova (d/b/a NetCredit, CashNetUSA).[122]

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[115] Cal. Fin. Code §§ 23001 *et seq.*, 23036(a).

[116] The CDDTL allows state-licensed lenders to participate in certain partnership arrangements with banks that are not subject to the CDDTL but requires state licensees to comply with all provisions of the CDDTL "not preempted by other state and federal laws." Cal. Fin. Code § 23037(i).

[117] Cal. Fin. Code § 22322; *see also id.* at § 22323.

[118] Cal. Fin. Code § 22323.

[119] Cal. Fin. Code § 22324.

[120] *See, e.g.*, Comment of Sens. Brown et al. 3-4 (Nov. 21, 2019); *see also* Comment of Rep. Porter 1-2 (Dec. 20, 2019).

[121] Comment of Sens. Brown et al. 3-4 (Nov. 21, 2019).

[122] *Id.* at 4.

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100. According to evidence in the administrative record, after the FDIC proposed its Rule, an investor advisor wrote in its investment notes that Enova "received a strong endorsement from banking regulators in support of its bank partnership model, which is a key aspect of its California growth strategy moving forward[.]"[123]

101. FinWise Bank and Community Capital Bank, two FDIC Banks chartered and "located" in Utah, are already engaged in rent-a-bank "partnerships" with OppLoans and LoanMart, respectively, which lend to California borrowers.[124]

102. The FDIC Rule's Non-bank Interest Provision will further incent and enable such state-law evasion. The Rule will facilitate "rent-a-bank" schemes by lending federal support to the claim that non-banks can evade state-law rate caps by entering into purchase agreements with FDIC Banks. As their announcements have already made clear, many non-bank lenders will rely on the Rule to argue they are exempt from otherwise applicable state law.

103. The State of California also has a sovereign interest in licensing and governing the activities of lenders and other financial entities operating in California in order to protect California consumers. However, lenders involved in "rent-a-bank" schemes have claimed that they are not subject to applicable state oversight or licensing requirements.[125] By facilitating such schemes, the Rule will undermine California's licensing regime, which is a fundamental element of the state's lending law.

104. By purporting to exempt entities that purchase loans originated by FDIC Banks from California state rate caps, and by encouraging "rent-a-bank" schemes, the FDIC Rule undermines California's sovereign interests.

2. The District of Columbia's Usury Cap and Accompanying Regulations

105. The District of Columbia (the "District") has strict usury caps in order to prevent sophisticated entities from preying upon the District's most vulnerable residents. The District's

[123] *See* Comment of Center for Responsible Lending 31 (Feb. 4, 2020).
[124] *Id.* at 32-33, 35, 41, App'x A; *see also* Comment of Rep. Porter 1-2 (Dec. 20, 2019).
[125] Comment of the Conference of State Bank Supervisors 5 (Feb. 4, 2020).

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usury cap for most loans in which the interest rate is expressed in the contract is 24%.[126] The District's usury cap for loans without an express interest rate is 6%.[127]

106. Additionally, entities that offer loans in the District at any interest rate are required to obtain a money-lending license.[128]

107. Violations of the usury cap and licensing requirement are enforceable through the Consumer Protection Procedures Act ("CPPA").[129] The Attorney General for the District of Columbia is specifically authorized to bring actions on behalf of the District against such violators "[n]otwithstanding any provision of law to the contrary."[130]

108. Indeed, the District has recently filed exactly such an action against an entity that it accuses of abusing this "rent-a-bank" scheme.[131] There, the District has accused the defendant of violating both the District's usury cap and the District's money-lending license requirement.

3. Illinois' Regulations Governing Low-Dollar, High-Cost Loans

109. The State of Illinois has two statutes that regulate interest rates and other requirements for low-dollar, high-cost loans: the Consumer Installment Loan Act ("CILA")[132] and the Payday Loan Reform Act ("PLRA").[133]

110. Low-dollar, high-cost loans were largely unregulated in Illinois prior to 2005. Most of these loans were offered pursuant to CILA before 2005. In 2005, the Illinois legislature passed the PLRA to protect consumers against long-term cycles of debt associated with low-dollar, high-cost payday loans.

111. The purpose of the PLRA is to "protect consumers who enter into payday loans and to regulate the lenders of payday loans. [The PLRA] shall be construed as a consumer

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[126] D.C. Code § 28–3301(a).
[127] D.C. Code § 28–3302(a).
[128] D.C. Code §§ 26–901, *et seq*.; 16 DCMR § 201.1.
[129] D.C. Code §§ 28–3901, *et seq*.
[130] D.C. Code § 28–3909.
[131] *District of Columbia v. Elevate Credit, Inc.*, No. 1:20-cv-01809-EGS (D.D.C. 2020); Press Release, *AG Racine Sues Predatory Online Lender For Illegal High-Interest Loans To District Consumers*, June 5, 2020, https://oag.dc.gov/release/ag-racine-sues-predatory-online-lender-illegal.
[132] 205 Ill. Comp. Stat. 670/1 *et seq.*
[133] 815 Ill. Comp. Stat. 122/1 *et seq.*

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protection law for all purposes. This Act shall be liberally construed to effectuate its purpose."[134]

112. The PLRA requires any entity acting as a payday lender in Illinois to be licensed by the Department of Financial and Professional Regulation ("IDFPR").[135] The PLRA defines a payday lender as "any person or entity . . . that offers or makes a payday loan, buys a whole or partial interest in a payday loan, arranges a payday loan for a third party, or acts as an agent for a third party in making a payday loan, regardless of whether approval, acceptance, or ratification by the third party is necessary to create a legal obligation for the third party, and includes any other person or entity if the Department determines that the person or entity is engaged in a transaction that is in substance a disguised payday loan or a subterfuge for the purpose of avoiding this Act."[136]

113. Under the PLRA, a lender licensed by the IDFPR cannot charge more than $15.50 per $100 loaned on any payday loan over the term of the loan.[137]

114. In Illinois, the PLRA defines a "payday loan" as a loan with a finance charge exceeding an annual percentage rate of 36% and with a term that does not exceed 120 days.[138]

115. However, after the enactment of the PLRA, many lenders continued to offer low-dollar, high-cost loans under CILA as installment loans. At the time, CILA offered few consumer protections. Therefore, in 2010, the Illinois legislature took action and amended CILA to add further consumer protections.

116. The 2010 amendments to CILA, which took effect in 2011, created a new "small consumer loan" defined as "a loan upon which interest is charged at an annual percentage rate exceeding 36% and with an amount financed of $4,000 or less."[139]

117. Under CILA, small consumer loans must be fully amortizing, payable in equal monthly installments, and, most importantly, have interest rates capped at 99%.[140]

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[134] *Id.* at 122/1-5.
[135] *Id.* at 122/3-3.
[136] *Id.* at 122/1-10.
[137] *Id.* at 122/2-5(e-5).
[138] *Id.* at 122/1-10.
[139] 205 Ill. Comp. Stat. 670/15(b).
[140] *Id.* at 670/17.2, 17.3.

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118. Similar to the PLRA, a lender extending loans under CILA must be licensed by the IDFPR. If a lender is licensed under CILA, it cannot be licensed under the PLRA, and *vice versa*. This limits the debt cycle for Illinois borrowers because it prohibits lenders from flipping borrowers from a CILA small consumer loan to a payday loan or *vice versa*.

119. A CILA-licensed lender can make certain types of loans under the Illinois Financial Services Development Act ("FSDA")[141], which relates to revolving lines of credit products. When the Illinois legislature amended CILA in 2010, it also amended FSDA to cap the interest rate on revolving line of credit products offered by CILA licensees at 36%.[142]

120. These laws in Illinois create a system that protects consumers of high-cost small-dollar loans from an endless cycle of debt and from paying more than the statutorily allowed interest caps.

121. Under section 2Z of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), "Any person who knowingly violates the . . . Payday Loan Reform Act . . . commits an unlawful practice within the meaning of the [Consumer Fraud Act]."[143] Further, the Illinois Attorney General has authority to file enforcement actions for violations of the PLRA as those violations are also violations of the Consumer Fraud Act.[144]

122. What is more, the PLRA explicitly acknowledges how lenders have attempted to avoid Illinois lending laws in the past and states, "The provisions of this Act apply to any person or entity that seeks to evade its applicability by any device, subterfuge, or pretense whatsoever."[145]

123. The FDIC Rule's Non-bank Interest Provision will incentivize evasion of these Illinois consumer-protection laws. The Rule will enable "rent-a-bank" schemes by lending federal support to the claim that non-banks can evade state-law rate caps by entering into purchase

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[141] *Id.* at 670/12(b)(4).
[142] 205 Ill. Comp. Stat. 675/3.
[143] 815 Ill. Comp. Stat. 505/2Z, *see also* PLRA, 815 Ill. Comp. Stat. 122/4-10(b) ("Any material violation of this Act, including the commission of an act prohibited under Section 4-5, constitutes a violation of the [Consumer Fraud Act].").
[144] 815 Ill. Comp. Stat. 505/2Z, 505/7.
[145] 815 Ill. Comp. Stat. 122/1-15(b).

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agreements with FDIC Banks. Many non-bank lenders will rely on the Rule to shield them from otherwise applicable state law.

124. The State of Illinois also has a sovereign interest in licensing and governing the activities of lenders and other financial entities operating in Illinois in order to protect Illinois consumers. However, lenders involved in "rent-a-bank" schemes have claimed that they are not subject to state oversight or licensing requirements.[146] By facilitating such schemes, the Rule will undermine Illinois' licensing regime, which is a fundamental element of the state's lending laws.

125. By purporting to exempt entities that purchase loans originated by FDIC Banks from Illinois state rate caps, and by encouraging "rent-a-bank" schemes, the FDIC Rule undermines Illinois' sovereign interests.

4. Massachusetts' Criminal Usury and Small-Dollar-Loan Laws

126. Mass. Gen. Law c. 271, § 49 establishes that it is unlawful in Massachusetts to hold a loan contract that requires an interest rate in excess of 20% per year, punishable by imprisonment for up to 10 years and fines of up to $10,000.

127. Mass. Gen. Law c. 140, §§ 96 through 114A. inclusive, requires persons or entities to be licensed by the Commissioner of Banks if they are engaged, directly or indirectly, in the business of making loans for primarily personal, family or household purposes of $6,000 or less, and the interest and expenses on the loan exceed 12% in the aggregate per year.

128. Specifically, Mass. Gen. Law c. 140, § 96 states:

> No person shall directly or indirectly engage in the business of making loans of six thousand dollars or less, if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned . . . The buying or endorsing of notes or the furnishing of guarantee or security for compensation shall be considered to be engaging in the business of making small loans within said sections[.]

129. Small loans made without proper license are punishable by a fine of up to $10,000 and void under the law. Specifically, Mass. Gen. Law c. 140, § 110 states, in pertinent part:

> Whoever, not being duly licensed . . . engages in or carries on, directly or indirectly, either separately or in connection with or as a part of any other

[146] Comment of the Conference of State Bank Supervisors 5 (Feb. 4, 2020).

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> business, the business of making loans or buying notes or furnishing endorsements or guarantees, to which sections ninety-six to one hundred and eleven, inclusive, apply, shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years, or by a fine of not more than ten thousand dollar, or by both such fine and imprisonment. Any loan made or note purchased or endorsement or guarantee furnished by an unlicensed person in violation of said sections shall be void.

130. As the chief law-enforcement officer of the Commonwealth, the Attorney General of Massachusetts is authorized to enforce Massachusetts' usury laws by statute and common law.[147]

131. By purporting to exempt entities that purchase loans originated by FDIC Banks from Massachusetts' usury laws, and by encouraging "rent-a-bank" schemes, the FDIC's Rule undermines Massachusetts' sovereign interests.

5. Minnesota's Statutory Scheme for Regulation of Interest Rates and Consumer Lending

132. Since statehood, the Minnesota Legislature has maintained a general usury cap that today generally prohibits the charging and collection of annual interest on written loans above 8% and on non-written loans above 6%.[148]

133. Minnesota's general usury statute does not apply, however, to certain "financial institutions," such as banks, credit unions, and industrial loan and thrift companies.[149] Other entities may be exempt from the general usury law when operating as a licensed lender under the supervision of the Minnesota Department of Commerce.[150] Many loans issued by state-supervised financial institutions are capped at an "annual percentage rate" of 21.75%.[151] Additional exemptions are set forth throughout Minnesota's banking and finance laws.[152]

134. As stated above, nonbanks that wish to engage in the business of making loans

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[147] M.G.L. c. 12, § 10; *see also, e.g.,* M.G.L. c. 93A, § 2.
[148] Minn. Stat. § 334.01, subd. 1.
[149] Minn. Stat. § 334.03; Minn. Stat. § 45.59.
[150] Minn. Stat. ch. 56.
[151] Minn. Stat. § 47.59, subd. 3.
[152] *See, e.g.*, Minn. Stat. § 47.59, subd. 4 (providing rates and charges for credit sales); Minn. Stat. § 47.59, subd. 4a (providing finance charges for motor vehicle retail installment sales); Minn. Stat. § 47.60 (allowing certain service charges for short-term, nonrenewal loans).

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(from $1,000 to $100,000) must obtain a license if they wish to lend above the baseline usury limits set forth in Minnesota's usury statute. The Minnesota Regulated Loan Act provides for examination and supervisory authority of these entities by the Minnesota Department of Commerce, limits fees and interest rates that can be charged by such lenders to that allowed for other state-regulated financial institutions, and prohibits unlicensed lending as a gross misdemeanor.[153]

135. The Minnesota Legislature has also created an important regulatory scheme for "consumer small loans," "consumer short-term loans," and "motor vehicle title loans." Minnesota statutes limit fees and interest on these traditionally high-risk credit products while requiring that lenders obtain a license before they extend such credit to Minnesota consumers.[154]

136. For nonexempt entities that violate Minnesota's usury and lender-licensing laws, Minnesota statutes provide for penalties and remedies that serve important deterrent and remedial interests.[155] Consumer loans in excess of the usury rate can be declared void and unenforceable, with all amounts paid returned to the borrower.[156] Loans made by lenders that do not obtain a required license or comply with regulations governing payday and other high-risk consumer lending are void, with all amounts paid returned to borrowers.[157] Additional civil penalties can also be awarded based on various factors.[158]

137. The FDIC Rule's Non-bank Interest Provision attempts to generally foreclose application of Minnesota's usury laws to non-banks that charge and collect interest on loans purchased from FDIC Banks chartered in other states. In doing so, and by encouraging "rent-a-

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[153] Minn. Stat. ch. 56.

[154] Minn. Stat. §§ 47.60-.602.

[155] *State by Ellison v. Minn. Sch. of Bus., Inc.*, No. A18-1761, 2019 WL 2333921, at *9 (Minn. App. June 3, 2019) (stating that Minnesota's usury and lender-licensing statutes "are remedial statutes and that consumer protection statutes are generally broadly construed to protect consumers and to remediate violations of those laws"), *review denied* (Aug. 20, 2019).

[156] Minn. Stat. §§ 334.03, 334.05; *Midland Loan Finance Co. v. Lorentz*, 296 N.W. 911, 915 (Minn. 1941) ("As we have here a usurious contract, void under the statute, it follows that the one guilty of usurious exaction must bear the legal consequences flowing from such violation. As such he must lose not only the interest on the money risked, but also the principal, including as well all security given to secure performance.").

[157] Minn. Stat. § 56.19, subd. 3; Minn. Stat. § 47.601, subd. 6.

[158] Minn. Stat. § 47.601, subd. 6; Minn. Stat. § 8.31, subd. 3; *Minn. Sch. of Bus.*, 2019 WL 2333921, at *7-10.

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bank" schemes that exist for the purpose of evading state consumer-protection laws, the FDIC Rule undermines Minnesota's sovereign interests in protecting its consumers from exploitative and abusive interest rates and other illegal lending practices.

138. Minnesota also has a sovereign interest in licensing and supervising the activities of lenders operating in Minnesota. Lenders involved in "rent-a-bank" schemes and who purchase loans from exempt entities, however, have claimed that they are not subject to state oversight or lender-licensing requirements. By facilitating such schemes, the Rule will undermine Minnesota's licensing regime, which is a fundamental aspect of state consumer-protection law.

6. New Jersey's Usury Laws

139. New Jersey enforces civil and criminal usury rates. New Jersey's civil usury rate is set at 6% interest per year, or 16% interest per year where a written contract specifies the interest rate.[159] The criminal usury rate is set at 30% interest per year for loans to individuals and 50% interest per year for loans to corporations, limited liability corporations, and limited liability partnerships.[160]

140. New Jersey regulates lenders pursuant to the New Jersey Consumer Finance Licensing Act ("NJCFLA").[161] The NJCFLA governs, among other things, "consumer loans," which are defined as a loan of $50,000 or less made by a consumer lender payable in installments, excluding residential mortgages.[162] Such "consumer loans" are not subject to the civil usury rate, and are subject only to the criminal usury rates set forth in N.J. Stat. Ann. § 2C:21-19.[163] All other loans—that is, all loans above $50,000 made by New Jersey-licensed lenders, as well as all loans made by non-licensed lenders—are subject to the civil usury rate of 6% interest per year (or 16% interest per year where a written contract specifies the interest rate), as well as the criminal usury rates.[164]

141. The FDIC Rule will enable non-banks to evade New Jersey's civil and criminal

[159] N.J. Admin. Code § 3:1-1.1(a); N.J. Stat. Ann. § 31:1-1.
[160] N.J. Stat. Ann. § 2C:21-19.
[161] N.J. Stat. Ann. § 17:11C-1 *et seq.*
[162] N.J. Stat. Ann. § 17:11C-2.
[163] N.J. Stat. Ann. § 17:11C-32(a).
[164] N.J. Admin. Code § 3:1-1.1(a); N.J. Stat. Ann. § 31:1-1; *id.* § 2C:21-19.

usury laws by entering into purchase agreements with FDIC Banks and will undermine New Jersey's enforcement of its usury laws and its ability to protect consumers through those laws. Further, by incentivizing New Jersey-licensed lenders to charge interest rates that would otherwise be considered usurious under New Jersey law, the FDIC Rule may undermine New Jersey's comprehensive lender licensing scheme.

7. New York's Usury Laws

142. New York has both a civil usury rate, set at 16% interest per year, and a criminal usury rate, set at 25% interest per year.[165] With the exception of loans by lenders licensed by New York, loans under $250,000 are considered usurious if the interest rate exceeds 16%, while loans in excess of $250,000 are considered usurious if the interest rate exceeds 25%. Lenders licensed by New York can engage in the business of making personal loans of $25,000 or less to consumers in New York, or loans of $50,000 or less to businesses, and can charge, contract for, or receive a rate of interest above 16%, but in no event can they charge more than 25%.[166]

143. New York has prohibited usurious interest rates for centuries[167] as a fundamental public policy of the State,[168] and state regulators have "aggressively enforced those laws in order to protect desperately poor people from the consequences of their own desperation."[169]

144. New York's status as the nation's financial capital and one of its most populous states has consistently attracted unscrupulous companies eager to increase their profits by lending money to New Yorkers at triple-digit interest rates.

145. The New York Attorney General, as New York's chief law-enforcement officer,

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[165] N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a; N.Y. Penal Law §§ 190.40, 190.42.

[166] *See* N.Y. Banking Law §§ 340, 356.

[167] *See Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 150 (S.D.N.Y. 2017) ("New York's usury prohibition is not a creature of recent statute, but rather one that reflects a deep-rooted tradition of the common weal." (internal citation and quotation marks omitted)).

[168] *See Power Up Lending Grp., Ltd. v. All. Bioenergy Plus, Inc.*, Case No. 18-CV-3601, 2019 WL 1322621, at *5 (E.D.N.Y. Feb. 28, 2019) (gathering cases for the proposition that "New York's usury prohibition constitutes a fundamental public policy").

[169] *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 108 (2d Cir. 2014) (internal citation and quotation marks omitted).

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enforces the usury cap pursuant to its authority under New York Executive Law § 63(12), which prohibits "repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business."

146. The New York Attorney General has repeatedly taken action to enforce the usury cap.[170] In one case, the New York Attorney General obtained a $5.2 million settlement from a Delaware-based bank and non-bank lender that entered into a "rent-a-bank" scheme to offer illegal payday loans to New Yorkers.[171] The New York Attorney General is also aware of potentially usurious loans made to New York borrowers by World Business Lenders, LLC, a California-based participant in an alleged "rent-a-bank" scheme with a savings association called Axos Bank.[172]

147. The usury cap is also enforced by the New York Department of Financial Services ("DFS"), which licenses, regulates, and supervises state and international banks, insurance companies, and non-bank financial services firms with approximately $7 trillion in assets.[173]

148. The non-bank entities supervised by DFS include licensed lenders, real-estate lenders, mortgage servicers, sales and premium finance companies, pre-paid card issuers, money

[170] *See, e.g.*, *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 780 (S.D.N.Y. 2018); *People v. County Bank of Rehoboth Beach, Del.*, 45 A.D.3d 1136, 1137-38 (3d Dep't 2007); *People v. JAG NY, LLC*, 18 A.D.3d 950, 951-53 (3d Dep't 2005).

[171] *See* Press Release, *Attorney General Cuomo Announces Distribution Of $5.2 Million Settlement In "Rent-A-Bank" Payday Lending Scheme*, Nov. 17, 2009, https://ag.ny.gov/press-release/2009/attorney-general-cuomo-announces-distribution-52-million-settlement-rent-bank.

[172] *See* Comment of Center for Responsible Lending 33 (Feb. 4, 2020).

[173] *See* N.Y. Fin. Servs. Law §§ 101 *et seq.*; N.Y. Banking Law § 14-a. DFS is statutorily mandated to, *inter alia*: "establish a modern system of regulation, rule making and adjudication that is responsive to the needs of the banking and insurance industries and to the needs of the state's consumers and residents," "provide for the effective and efficient enforcement of the banking and insurance laws," "provide for the regulation of new financial services products," "promote the prudent and continued availability of credit, insurance and financial products and services at affordable costs to New York citizens, businesses and consumers," "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision," "protect the public interest and the interests of depositors, creditors, policyholders, underwriters, shareholders and stockholders," and "promote the reduction and elimination of fraud, criminal abuse and unethical conduct by, and with respect to, banking, insurance and other financial services institutions and their customers." N.Y. Fin. Servs. Law § 102.

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transmitters, virtual-currency businesses, check cashers, and budget planners.[174]

8. North Carolina's Usury and Small-Dollar-Loan Laws

149. The usury laws of North Carolina unequivocally state that protecting North Carolina borrowers from illegal, usurious loans is a "paramount public policy" of the state.[175]

150. North Carolina's usury laws apply to North Carolina residents "regardless of the situs of the contract."[176] They also cover lenders that make a "solicitation or communication to lend, oral or written, originating outside of" North Carolina when "forwarded to and received in [North Carolina] by a borrower who is a resident."[177]

151. The maximum interest rate that North Carolina's usury laws allow for contract loans of $25,000 or less is 16% per annum unless another law provides for a higher rate.[178]

152. Under the North Carolina Consumer Finance Act ("CFA"), the maximum interest rate that may be charged by a lender licensed by the North Carolina Commissioner of Banks on personal loans of up to $15,000 ranges between 18% and 30% per annum, depending on the size of the loan, plus a fee of between $25 and $40, charged no more than twice per year.[179]

153. Under the CFA, loans made to North Carolina borrowers are governed by North Carolina law—regardless of any language used in the loan documents—when any aspect of the loan transaction occurs within North Carolina; and any such loans made in violation of North Carolina law are unenforceable.[180] Additionally, the prohibitions found in the CFA "apply to any person who seeks to avoid its application by any device, subterfuge, or pretense whatsoever."[181]

154. Lenders that violate North Carolina's usury laws or the CFA face substantial consequences, including losing the right to collect or retain any interest charges on illegal

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[174] *See* N.Y. Fin. Servs. Law §§ 101 *et seq*.

[175] N.C. Gen. Stat. § 24-2.1(g) ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.").

[176] N.C. Gen. Stat. § 24-2.1(a).

[177] N.C. Gen. Stat. § 24-2.1(b).

[178] N.C. Gen. Stat. § 24-1.1(a), (c).

[179] N.C. Gen. Stat. § 53-176(a), (b).

[180] N.C. Gen. Stat. § 53-190(a).

[181] N.C. Gen. Stat. § 53-166(b).

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loans.[182]

155. The North Carolina Attorney General, as North Carolina's chief law-enforcement officer, is authorized to enforce North Carolina's usury laws and the CFA pursuant to his independent constitutional, statutory, and common-law authority.[183]

156. Due to the high interest rates on payday loans, patterns of repeat borrowing, and other potential for abuse, in 2001, North Carolina allowed the authorization for payday lending to sunset, and the state has not subsequently reauthorized any form of payday lending.

157. After the sunset, most payday lenders closed their doors. However, others looked for ways to circumvent North Carolina law through, for example, the "rent-a-bank" model under which the payday lenders claimed that they were not making the loans themselves, but were merely the "marketing, processing, and servicing" agents of national banks and out-of-state state-chartered banks. The North Carolina Attorney General and the North Carolina Office of the Commissioner of Banks brought numerous enforcement actions against these lenders, which ultimately stopped doing business in the state.

158. The FDIC Rule's Non-bank Interest Provision will incentivize a return to these attempts by non-bank lenders to evade North Carolina's usury laws and the CFA. The Rule will enable "rent-a-bank" schemes by lending federal support to the claim that non-banks can evade North Carolina's rate caps by entering into purchase agreements with FDIC Banks. Many non-bank lenders will rely on the Rule to attempt to shield them from otherwise applicable state law.

159. The State of North Carolina also has a sovereign interest in licensing and governing the activities of lenders and other financial entities operating in North Carolina in order to protect North Carolina consumers. However, lenders involved in "rent-a-bank" schemes have claimed that they are not subject to oversight and licensing by the North Carolina Commissioner of Banks as required by the CFA.[184] By facilitating such schemes, the Rule will undermine North

[182] N.C. Gen. Stat. §§ 24-2, 53-166(d).

[183] *See, e.g.*, N.C. Gen. Stat. §§ 75-14, -15.1, -15.2 (authorizing the North Carolina Attorney General to obtain various forms of monetary and injunctive relief against entities that engage in "unfair or deceptive acts or practices in or affecting commerce").

[184] *See, e.g.*, *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002); *In re Advance Am.*, No. 05:008:CF (N.C. Comm'r of Banks Dec. 22, 2005).

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Carolina's licensing regime provided by the CFA, which is a fundamental element of the state's lending laws.

160. By purporting to exempt entities that purchase loans originated by FDIC Banks from North Carolina's usury laws and the CFA, and by encouraging "rent-a-bank" schemes, the FDIC Rule undermines North Carolina's sovereign interests.

B. The FDIC Rule Harms the States' Quasi-Sovereign Interests

161. The Rule's Non-bank Interest Provision also harms the States' quasi-sovereign interests in promoting a fair lending marketplace that ensures borrowers in the States are not overburdened by unsustainable interest rates, that law-abiding lenders in the States are not undercut by competitors who operate in the States but evade their laws, that other creditors (like landlords, suppliers, and mortgage or auto lenders) in the States are not faced with non-payment if their debtors take on high-interest loans and become insolvent, and that taxpayers are not left with the tab for costs the States incur when consumers trapped in a cycle of debt are unable to provide for their basic needs and require assistance from the States to do so.

162. States have historically exercised significant regulatory and enforcement authority in the area of consumer protection. Each State "has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."[185] States have long counted among their "police powers" the authority to cap rates charged to their residents,[186] and courts have repeatedly held that a state's interest in protecting consumers within its borders is itself quasi-sovereign in nature.[187]

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[185] *Alfred L. Snapp & Son*, 458 U.S. at 607; *also, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.").

[186] *Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) ("It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a state for the use of money loaned within the jurisdiction of the state is one within the police power of such state.").

[187] *See, e.g.*, *New York v. Citibank, N.A.*, 537 F. Supp. 1192, 1197 (S.D.N.Y 1982) ("The state has a 'quasi-sovereign' interest in protecting the welfare of its citizens . . . and that interest includes protection of its citizens from fraudulent and deceptive practices" (quotation and citation omitted)).

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163. The Rule's Non-bank Interest Provision harms the States' quasi-sovereign interests by injuring borrowers in the States: as those consumers pay interest not permissible under state law, they will face an increased risk of falling into a vicious and destructive cycle of continuously taking out new high-interest, short-term loans to cover prior ones.[188] As described above, in California, a number of lenders have already announced plans to shift from direct lending in compliance with California law to "rent-a-bank" arrangements to evade California law. This Rule will facilitate that transition.

164. The Rule also harms the States' quasi-sovereign interests by imposing costs on taxpayers in the States who have not taken out usurious loans. Consumers trapped in a cycle of debt are often unable to provide for their basic needs and may need public assistance.[189] Studies have shown, for example, that consumers who take out short-term, high-interest loans are more likely to end up requiring food assistance and less likely to remain current on child support.[190] The costs of providing these services are ultimately borne by taxpayers in the form of higher tax bills.

165. The Rule will also injure lenders in the States that comply with state law. In California, for example, as of 2018, 3,493 entities held CFL licenses.[191] Non-bank lenders that comply with California law (rather than evade it, as the Rule facilitates) will be at a competitive disadvantage to lenders in "rent-a-bank" partnerships that, according to the Rule, are not subject to state rate caps.

166. The States' quasi-sovereign interests are separate and distinct from the interests of individual borrowers and lenders. Lending occurs in a marketplace that the States and federal law jointly facilitate. As the Conference of State Bank Supervisors, which represents the interests of

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[188] *E.g.*, Comment of Center for Responsible Lending 46-60 (Feb. 4, 2020).

[189] *See, e.g.*, Anne Fleming, *The Public Interest in the Private Law of the Poor*, 14 Harv. L. & Pol'y Rev. 159, 178-79 (2019), https://harvardlpr.com/wp-content/uploads/sites/20/2020/03/Fleming.pdf.

[190] *See* Melzer, *supra*, at 4-6.

[191] California Department of Business Oversight, *California Department of Business Oversight Annual Report* 1 (June 2018), https://dbo.ca.gov/wp-content/uploads/sites/296/2019/08/CFL-Annual-Report-2018-FINAL-8-8-19.pdf.

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state bank and financial regulators, noted in its comment on the Rule, retaining the applicability of state rate caps to non-banks is vital because "[a]llowing a nonbank to evade otherwise applicable interest rate caps interferes with the ability of consumers, *as citizens*, to strike the desired balance between credit access and affordability."[192] The States have a quasi-sovereign interest in ensuring that their lending marketplace is fair, is competitive, and supports the state's economy.

167. The States do not dispute that the FDIA applies to their residents. Rather, the States are asserting their rights as *parens patriae* under federal law to vindicate Congress's will that interest-rate preemption under § 1831d extend only to FDIC Banks.[193] Indeed, Congress has recognized this interest through its choice of language limiting preemption under § 1831d to FDIC Banks.

168. The States' quasi-sovereign interest in protecting the economic health of their residents and the strength of their lending marketplace is further injured by the FDIC Rule because it is not clear whether there would remain *any* remedy if a non-bank that purchases a loan issued by an FDIC Bank charges higher interest rates than permitted by federal law. Because § 1831d's interest-rate provision applies only to FDIC Banks, the language of the provision setting forth remedies for its violation explicitly refers only to FDIC Banks that violate federal rate laws.[194] It is unclear whether the FDIC intends this remedial provision to apply to the buyers of loans issued by FDIC Banks, including buyers engaged in "rent-a-bank" arrangements. The FDIC Rule creates uncertainty about what, if any, remedies apply if non-banks violate the terms of § 1831d and thus harms the States' interest in fostering a competitive and fair lending marketplace for the benefit of their residents and economies.

C. The FDIC Rule Harms the States' Fiscal Interests

169. The Rule's Non-bank Interest Provision also causes direct harm to the States

[192] Comment of the Conference of State Bank Supervisors 3 (Feb. 4, 2020) (emphasis added).

[193] *See Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007).

[194] 12 U.S.C. § 1831d(b) (a person who paid an interest rate exceeding that allowed by § 1831d(a) may recover twice the amount of interest paid "from such State bank or such insured branch of a foreign bank taking, receiving, reserving, or charging such interest.").

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because it will injure the States' fiscal interests through the loss of licensing fees and by increasing the cost and difficulty of enforcing the States' laws. The States' laws, as discussed above, provide a comprehensive regime for licensing, regulating, and supervising the activities of non-bank lenders operating in the States. Each of the States—through its primary financial regulator or Attorney General, as the state's chief law-enforcement officer—allocates substantial resources to maintaining compliance with their state lending laws. The Conference of State Bank Supervisors noted in its comment on the Rule that the Rule will likely facilitate attempts to evade licensing requirements, which will result in a loss of licensing fees to the States and impose additional costs on state regulators:

> Along with seeking to evade state usury laws, nonbanks have relied on partnerships with banks in an attempt to avoid applicable state licensing requirements. State regulators devote significant resources to policing unlicensed activity . . . .[195]

170. Even before the FDIC issued the Rule, lenders involved in "rent-a-bank" schemes have claimed that they are not subject to state licensing or oversight. By facilitating these schemes, the Rule will foreseeably decrease licensing fees received by the States and increase the cost and burden of future supervisory, investigative, and law-enforcement efforts by the States.

171. The Rule will also injure the States' fiscal interests because the States will be required to provide financial assistance to consumers who fall into a cycle of debt and are unable to provide for their basic needs.[196] The States will also have to devote money and other resources to assisting these consumers who, as a result of predatory loans, may no longer be able to afford basic necessities such as food, shelter, and medical treatment.

IV. THE FDIC'S NON-BANK INTEREST PROVISION IS LEGALLY, PROCEDURALLY, AND SUBSTANTIVELY UNSOUND

A. The FDIC Rule's Non-bank Interest Provision Is Contrary to the Plain Language of § 1831d

172. Courts have consistently held that the rulemaking authority of federal agencies is

[195] Comment of the Conference of State Bank Supervisors 5 (Feb. 4, 2020).
[196] Melzer, *supra*.

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constrained by the statutory language Congress chose to enact. "An agency's 'power to promulgate legislative regulations is limited to the authority delegated' to it by Congress."[197] An agency has no authority to alter the regulatory landscape if "Congress has supplied a clear and unambiguous answer to the interpretive question at hand."[198] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[199]

173. The FDIC states that it relies solely on § 1831d for the purported authority to extend the interest-rate provisions applicable to FDIC Banks to other entities.[200] Section 1831d is clear and unambiguous. It provides the maximum interest rates chargeable by "State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks" and preempts otherwise applicable state law. That is, it preempts state interest-rate caps as applied to FDIC Banks—and no one else.

174. Section 1831d does not govern the interest rates chargeable by assignees, transferees, or purchasers of loans originated by FDIC Banks. Congress did not preempt state law as to these non-bank entities. As one court recently explained, § 1831d "governs what charges a 'State bank' may impose, but . . . does not on its face regulate interest or charges that may be imposed by a non-bank, including one which later acquires or is assigned a loan made or originated by a state bank."[201]

175. The Rule's Non-bank Interest Provision would effectively amend the statutory

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[197] *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

[198] *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

[199] *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[200] *E.g.*, 85 Fed. Reg. at 44,149 ("The FDIC's proposal, addressing the two statutory gaps in section 27 [§1831d] in a manner that carries out the goals of the Federal statute, is based on Federal law. Specifically, the rule is based on the meaning of the text of the statute"); *id.* at 44,151 ("The FDIC's authority to issue the rule . . . is not based on State law. Rather, it is based on section 27 [§ 1831d]"; "[T]he FDIC's authority to issue the proposed rule arises under section 27 rather than common law."); *id.* at 44,154 ("Section 331.4 of the final rule implements section 27 of the FDI Act").

[201] *Meade*, 307 F. Supp. 3d at 1144-45.

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language Congress chose, essentially adding the following bracketed and italicized terms to § 1831d: "such State bank or such insured branch of a foreign bank [*or the buyer, assignee, or transferee of any loan made by such State bank*] may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan . . . interest at the rate . . . allowed by the laws of the State, territory, or district where the bank is located[.]"[202] As detailed below, this drastically alters the statutory scheme Congress enacted.

176. The FDIC repeats multiple times in its Rule that it "would not regulate non-banks through the proposed rule[.]"[203] It claims, "[t]he proposed rule does not purport to allow State banks to assign the ability to preempt State law interest rate limits under section 27 [§ 1831d]. Instead, the proposed rule would allow State banks to assign loans at their contractual interest rates. This is not the same as assigning the authority to preempt State law interest rate limits."[204]

177. This is a distinction without a difference. If the FDIC Rule permits assignees of loans issued by FDIC Banks to take on the protection of § 1831d and charge interest in excess of state law, as the Rule does, then it regulates the interest chargeable by non-banks. This allows FDIC Banks to assign to non-banks the ability to preempt state-law interest-rate limits through the purchase of their loans.

178. Indeed, in a section of the Rule discussing its benefit for small businesses, the FDIC admits, "The small State-chartered banks that are affected [by the Rule] would benefit from the ability to sell such loans *while assigning to the buyer the right to enforce the contractual loan interest rate,*"[205] meaning the rate authorized by § 1831d, which preempts the interest rate permitted by state law.

179. Elsewhere in its Rule the FDIC reiterates that it really does mean to extend § 1831d to non-banks: The Non-Bank Interest Provision "clarifies that interest on a loan

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[202] 12 U.S.C. § 1831d.

[203] 85 Fed. Reg. at 44,150; *id.* ("The regulation would not become a regulation of assignees simply because it would have an indirect effect on assignees.").

[204] *Id.* at 44,151.

[205] *Id.* at 44,157 (emphasis added).

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permissible under section 27 shall not be affected by . . . the sale, assignment, or other transfer of the loan, in whole or in part. *An assignee can enforce the loan's interest-rate terms to the same extent as the assignor*."[206] That is, a non-bank can charge the same rates as an entity covered by § 1831d if it bought the privilege of doing so from an FDIC Bank through the purchase of loans originated by an FDIC Bank.

180. Administrative agencies have authority to construe statutes only to the extent of any statutory ambiguity. But the FDIC identifies no ambiguity as to whom § 1831d applies. That is because there is none. It applies to FDIC Banks and nobody else.

181. Indeed, Congress went so far as to explain precisely why it chose to preempt state interest rate caps for those banks: "In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates,"[207] which had, until 1980, not benefitted from the state-law preemption traditionally enjoyed by national banks under § 85 of the NBA. As one court lucidly explained, § 1831d "does not, on its face, state any purpose with regard to institutions other than federally-insured banks."[208]

182. The FDIC attempts to create the appearance of ambiguity by conflating two issues: 1) whether subsequent changes in law, such as state rate caps, have retroactive effect (the "retroactivity question") and 2) to whom § 1831d applies if a loan originated by an FDIC Bank is sold (the "identity question"). The FDIC explains:

> Section 27 [§ 1831d] does not state at what point in time the validity of the interest rate should be determined in order to assess whether a State bank is taking or receiving interest in accordance with section 27. Situations may arise when the usury laws of the State where the bank is located change after a loan is made (but before the loan has been paid in full), and a loan's rate may be non-usurious under the old law but usurious under the new law. To fill this statutory gap and carry out the purpose of section 27, the FDIC proposed regulations in November 2019 that would provide that the permissibility of interest under section 27 must be determined when the loan is made, and shall not be affected by a change in State law, a change in the relevant commercial paper rate, or the sale, assignment, or

[206] *Id.* at 44,155 (emphasis added).
[207] 12 U.S.C. § 1831d.
[208] *Meade*, 307 F. Supp. 3d at 1144.

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other transfer of the loan.[209]

183. The FDIC's conflation of the distinct retroactivity and identity questions into a single inquiry about the "point in time the validity of the interest rates should be determined" under § 1831d is an attempt to obscure just how straightforward the answers are.

184. Although it is not the subject of this challenge, the retroactivity question is uncontroversial: changes in state law generally do not retroactively alter contractual obligations.[210] The FDIC fails to show there is actually any ambiguity as to whether permissibility of interest rates under § 1831d would be affected retroactively by subsequent changes in state usury law. It points to no case law holding that there would be a retroactive effect.

185. The identity question is separate and is answered in the statute itself. As described above, the text of § 1831d declares that it applies only to FDIC Banks. Section 1831d does not apply when a loan is sold to a non-bank.

186. No statutory ambiguity exists with respect to either issue, and the FDIC's conflation of the two issues is insufficient to create any ambiguity.

187. In the Rule's Non-bank Interest Provision, the FDIC seeks to rewrite § 1831d to achieve its own, rather than Congress's, policy goals. This is impermissible. As the Supreme Court has reaffirmed as a "core administrative-law principle," an administrative agency "may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[211] Congress

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[209] 85 Fed. Reg. at 44,146.

[210] *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997), *opinion amended on denial of reh'g*, 125 F.3d 1281 (9th Cir. 1997) ("Cases involving settled contract and property rights, for example, require predictability and stability and are generally inappropriate candidates for statutory retroactivity. Similarly, the courts presumptively should not apply statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." (internal citation and quotation marks omitted)); *see also Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *Smith v. Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) ("Ordinarily, an intention to give a statute a retroactive operation will not be inferred. . . . It is especially true that the statute or amendment will be regarded as operating prospectively only, . . . where the effect of giving it a retroactive operation would be to interfere with an existing contract . . . ." (internal citation and quotation marks omitted)).

[211] *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

has "directly spoken to the precise question at issue"[212] and explicitly limited the reach of preemption under § 1831d to FDIC Banks. And as the Supreme Court recently affirmed in *Bostock v. Clayton County*, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[213]

188. Because the Rule's Non-bank Interest Provision is contrary to the language Congress chose, it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, as well as in excess of statutory jurisdiction, authority, and limitations, and short of statutory right, and thus violates the APA.[214]

B. The FDIC's Non-bank Interest Provision Is Contrary to the Statutory Framework Congress Enacted

1. The Rule's Non-bank Interest Provision Ignores Federal Law Showing That § 1831d Applies Only to FDIC Banks

189. An agency's "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"[215]

190. The FDIC's Non-bank Interest Rule fails to account for other federal statutes that demonstrate that preemption of state interest-rate caps under § 1831d applies only to FDIC Banks.

191. The FDIC states that "the Federal statutory provision governing State banks' authority with respect to interest rates [§ 1831d] is patterned after and interpreted in the same

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[212] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J. concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system").

[213] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020).

[214] 5 U.S.C. § 706(2).

[215] *Util. Air Reg. Grp.*, 573 U.S. at 321 (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)).

manner as section 85[,]" which preempts state interest-rate caps for national banks.[216]

192. But the link between § 1831d and § 85 only further demonstrates that preemption flows only to banks. Like § 1831d, § 85 applies only to the interest rates "[a]ny association [*i.e.*, any national bank] may take receive, reserve, and charge . . . ." Like § 1831d, § 85 makes no mention of interest rates chargeable by non-banks. Moreover, Congress has recently reaffirmed that the benefits of federal preemption provided by § 85 accrue *only* to national banks. In provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[217] codified at 12 U.S.C. § 25b, Congress stated—in three separate subsections—that the NBA, which includes § 85, does not preempt state law as to subsidiaries, affiliates, or agents of national banks and that state consumer financial laws apply to those entities.[218] Thus, by Congress's explicit command, subsidiaries, affiliates, and agents of national banks cannot benefit from § 85's preemption of state usury caps.

193. These limitations cast doubt on the proposition (as embodied in the OCC Rule that is parallel to the FDIC's Non-bank Interest Provision) that the benefits of § 85 could extend to non-banks that are unaffiliated with a bank and that merely purchase loans originated by a bank.

194. By the FDIC's own logic, § 1831d likewise must be interpreted to extend no further than FDIC Banks.

195. Section 1831d(b), which provides penalties for FDIC Banks that charge interest in excess of that permitted by § 1831d, further demonstrates that § 1831d preemption applies only to FDIC Banks. Section 1831d(b) focuses exclusively on FDIC Banks that violate § 1831d(a). The

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[216] 85 Fed. Reg. at 44,146; *id.* at 44,147 ("As stated above, section 27(a) of the FDI Act was patterned after section 85. Because section 27 was patterned after section 85 and uses similar language, courts and the FDIC have consistently construed section 27 *in pari materia* with section 85.").

[217] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[218] *See* 12 U.S.C. §§ 25b(b)(2), (e), (h)(2). The Dodd-Frank Act also provides that certain amendments it made to the NBA do not alter "the authority conferred by section 85 of this title for the charging of interest *by a national bank* at the rate allowed by the laws of the State, territory, or district where the bank is located[.]" 12 U.S.C. § 25b(f) (emphasis added). That is, while the Dodd-Frank Act does not alter national banks' exemption from state usury laws, its language reiterates § 85's scope: It applies only to the charging of interest "by a national bank," not by third-party assignees.

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penalty imposed is "twice the amount of the interest . . . from such State bank or such insured branch of a foreign bank [*i.e.*, FDIC Bank] taking, receiving, reserving, or charging such interest."[219]

196. The FDIC fails to account for these statutory provisions that make clear that § 1831d's preemption of state interest-rate caps applies only to FDIC Banks. This not only is unlawful under the APA but also irreconcilable with the statutory scheme, especially the enforcement provisions in § 1831d(b). Because § 1831d applies only to FDIC Banks, there is no obvious statutory provision providing penalties for non-banks that violate § 1831d's rate caps, and the FDIC did not issue any rule stating that § 1831d(b)—despite its clear language—should somehow be read to extend to the buyers of loans issued by FDIC Banks. The FDIC failed to consider this key question.

197. Moreover, Congress knew how to preempt state-law rate-caps for loan purchasers when it wanted to. Indeed, in the very same act that adopted § 1831d, Congress did so with respect to first-lien mortgage loans.[220] Unlike the language of § 1831d, which grants the privilege of preemption specifically to FDIC Banks, that provision preempts state interest-rate caps as to first-lien mortgage loans and specifically contemplates that preemption would travel with a first-lien mortgage loan assigned under § 1735f-7a(a)(1)(C)(v).[221] The contrasting language Congress chose in two sections *of the same act* demonstrates that § 1831d means what it plainly says in preempting state law only as to FDIC Banks.

198. The Non-bank Interest Provision is contrary to the statutory scheme Congress enacted, the FDIC has failed to account for statutory provisions that are contrary to its chosen

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[219] 12 U.S.C. § 1831d(b).

[220] 12 U.S.C. § 1735f-7a, enacted as § 501 of DIDMCA, Pub. L. No. 96–221, 94 Stat 132 (1980).

[221] The text of § 1735f-7a itself demonstrates a different intent than § 1831d, and the legislative history states it as well. *See* 85 Fed. Reg. at 44,151 n.47 (citing Committee Report regarding DIDMCA §501, which was codified as § 1735f-7a, stating "it is the Committee's intent that loans originated under *this* usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under *this* section." (emphases added)). The FDIC cites no similar legislative history regarding § 1831d.

interpretation, and the FDIC has ignored whether remedies for violations of § 1831d extend to non-banks. For these reasons, the FDIC's Non-bank Interest Provision is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, as well as in excess of statutory jurisdiction, authority, and limitations, and short of statutory right, and thus violates the APA.[222]

2. The FDIC's Non-bank Interest Provision Is Unsupported by the Law the FDIC Cites

199. While ignoring statutory provisions that conflict with its Rule's Non-bank Interest Provision, the FDIC reads into § 1831d a variety of suppositions that are unmoored from the reality of banking law.

200. As state-chartered institutions, FDIC Banks rely primarily on state law for their existence and operating authorities, including the powers to make and sell loans.[223] Federal law, like § 1831d, engages in only limited intervention regarding the activities of FDIC Banks, which are chartered and incorporated as creatures of state law.

201. The FDIC's rulemaking powers do not extend to the interpretation of state law and are limited to the statutes the agency administers.[224] Thus, in order to justify its authority to issue the Non-bank Interest Provision, the FDIC must read into some statute it administers (here, § 1831d) *all* of the banking powers it hopes to construe in its Rule.

202. In its Proposed Rule, the FDIC reasoned as follows:

> Banks' power to make loans implicitly carries with it the power to assign loans, and thus, a State bank's [FDIC Bank's] statutory authority under section 27 [§ 1831d] to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee the right to enforce a loan's terms would effectively prohibit assignment and render the power to make the loan at the rate provided by the statute illusory.[225]

The final Rule reprises this argument at several points.[226]

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[222] 5 U.S.C. § 706(2).

[223] 85 Fed. Reg. at 44,149 n.36 (citing N.Y Banking Law § 961(1), which grants FDIC Banks chartered by the State of New York the power to "discount, purchase and negotiate promissory notes" and "lend money on real or personal security," among other things).

[224] 12 U.S.C. §§ 1819(a), 1820(g).

[225] 84 Fed. Reg. at 66,848.

[226] *E.g.*, 85 Fed. Reg. at 44,149, 44,150, 44,151.

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203. But the FDIC's syllogism (state law permits banks to make and assign loans, and federal law permits banks to charge interest at particular rates; therefore, the FDIC may issue a rule allowing *non-banks* to charge interest in excess of state law) simply does not follow. The state-law power of FDIC Banks to issue and assign loans sheds no light on whether the FDIC may exempt new classes of entities from compliance with state law. Indeed, the FDIC has no authority to issue regulations construing powers granted to FDIC Banks under state law.

204. Even if the FDIC had authority to construe FDIC Banks' state-law power of sale, that power has nothing to do with the interest chargeable by non-bank assignees. As the Second Circuit explained in *Madden*, "state usury laws would not prevent consumer debt sales by national banks to third parties."[227] At most, they "might decrease the amount a national bank could charge for its consumer debt in certain states[.]"[228] The same is true for FDIC Banks. State interest-rate caps do not interfere with FDIC Banks' state-law powers to make contracts or lend money. Indeed, more restrictive state interest-rate caps applicable only to non-banks place FDIC Banks in a superior position to make high-interest-rate loans.

205. Nor do state interest-rate caps interfere with FDIC Banks' power to sell loan contracts they have entered. As the administrative record demonstrates,

> Banks may always sell loans to other banks. There are over 5,200 federally insured depositories, so there is a robust market for State bank loans simply from other State banks and national banks, none of which are subject to state usury laws. Nowhere in the Proposed Rule is this enormous market for bank loans ever mentioned.[229]

206. Moreover, the FDIC ignores that state interest-rate caps do not actually prevent the sale of loans issued by FDIC Banks. Non-banks that purchase bank loans carrying rates above the state-law cap must simply follow state law and forgo collection of interest in excess of the cap. Because non-banks are constrained by state law, it is possible that FDIC Banks that choose to sell loans to non-banks may not be able to charge as much for their loans in states with usury limits, but as the Second Circuit held in *Madden*, a mere decrease in sale price does not substantially

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[227] *Madden*, 786 F.3d at 251.
[228] *Id.*
[229] Comment of Adam J. Levitin 8 (Jan. 5, 2020).

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interfere with national banks' power to make and sell loans.[230]

207. The FDIC gestures toward FDIC Banks' powers to contract and make and sell loans as being important to the federal statutory scheme, but "[i]nvoking some brooding federal interest or appealing to a judicial policy preference" is not enough to displace state law like interest-rate caps.[231] Rather, one "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."[232] The only provision of law the FDIC cites as the basis for its Non-bank Interest Provision is § 1831d, and that section simply will not bear the FDIC's construction.

208. Because the FDIC's Non-bank Interest Provision relies on statutory grounds that do not support its decision, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[233]

C. The FDIC's Non-bank Interest Provision Impermissibly Preempts State Law

209. Section 1831d explicitly "preempt[s]" "any State constitution or statute" that would prohibit an FDIC Bank from charging a rate permitted by § 1831d. The Non-bank Interest Provision further preempts state law by extending this interest-rate privilege to non-bank loan assignees, transferees, or purchasers that would otherwise be subject to state interest-rate caps.

210. When addressing preemption, courts start with "the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."[234]

211. Consumer-protection laws like interest-rate caps are among those historic police

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[230] *Madden*, 786 F.3d at 251.

[231] *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

[232] *Id*. (quoting *P.R. Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

[233] 5 U.S.C. § 706(2)(A).

[234] *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (first brackets in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also id.* (presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.").

powers held by the states.[235] Despite the federal government's regulatory involvement with FDIC Banks, state law still provides the background rules for state-chartered depository institutions.[236] There is no indication that Congress intended to preempt state consumer-protection law as to non-banks, and it has explicitly affirmed that even the law governing *federally* chartered banks "does not occupy the field in any area of State law."[237]

212. Moreover, because the Rule's Non-bank Interest Provision applies not to FDIC Banks but to non-bank entities that lack any connection to federal oversight, it is a new incursion into an area in which states have traditionally exercised their police powers. Thus, the strong presumption against preemption applies to the Rule's Non-bank Interest Provision.

213. The FDIC interprets § 1831d to preempt state law as to non-banks. Even if that were one of several reasonable interpretations of § 1831d—which it is not—that interpretation must yield to the reasonable non-preemptive interpretation that those sections apply only to interest chargeable by FDIC Banks. Accordingly, the Non-bank Interest Provision is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, as well as in excess of statutory jurisdiction, authority, and limitations, and short of statutory right, and thus is in violation of the APA.[238]

D. The FDIC Lacks Authority To Issue the Non-bank Interest Provision and Overturn *Madden*

214. Under 12 U.S.C. §§ 1819(a) and 1820(g), the FDIC has authority to issue "regulations to carry out" the provisions of the FDIA. But the FDIA does not regulate non-banks, and for this reason, the Rule's Non-bank Interest Provision is beyond the FDIC's power to promulgate. Moreover, FDIC Banks' "power to sell or transfer loans," on which the Rule's Non-

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[235] *Griffith*, 218 U.S. at 569 ("It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a state for the use of money loaned within the jurisdiction of the state is one within the police power of such state.").

[236] *See* 84 Fed. Reg. at 66,848 (describing state-law grants of power to State Banks); *cf. Atherton v. FDIC*, 519 U.S. 213, 224-25 (1997) (bank management's fiduciary duties are established by state, rather than federal, common law).

[237] 12 U.S.C. § 25b(b)(4).

[238] 5 U.S.C. § 706(2).

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bank Interest Rule is based, emanates from *state*—not *federal*—law,[239] which the FDIC has no power to interpret through binding regulations.

215. Furthermore, judicial construction of a statute trumps a subsequent agency interpretation of that statute when the court's construction "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[240] That is the case here, as the Second Circuit has construed the unambiguous terms of § 85 in *Madden*,[241] and the FDIC insists § 1831d must be given the same interpretation as § 85.[242]

216. There is no ambiguity as to which entities § 1831d applies—the statute lists them: "State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks." Accordingly, the FDIC lacks authority to reverse the Second Circuit's statutory construction.

217. The FDIC Rule's Non-bank Interest Provision purports to regulate the activities of entities beyond the agency's jurisdiction and seeks to overturn the statutory construction of a federal court. For these reasons, it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"[243] and "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[244]

E. The Rule's Non-bank Interest Provision Conflicts with Federal Regulators' Longstanding Interpretations of Federal Law

218. Prior to the FDIC's rulemaking and the OCC's nearly identical proposal, federal regulators had consistently held that the preemptive power of §§ 1831d and 85 accrues only to banks and that extending such power to non-banks would raise safety and soundness concerns.

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[239] *See*, *e.g.*, 85 Fed. Reg. at 44,149 (describing "State banking laws, which typically grant State banks the power to sell or transfer loans" and citing specific New York *state* statutes granting these authorities).

[240] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 447-49 (5th Cir. 2019).

[241] *Madden*, 786 F.3d at 250-51.

[242] *E.g.*, 85 Fed. Reg. at 44,147 ("courts and the FDIC have consistently construed section 27 [§ 1831d] *in pari materia* with section 85").

[243] 5 U.S.C. § 706(2)(C).

[244] 5 U.S.C. § 706(2)(A).

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219. As the OCC explained in 2002,

> The benefit that national banks enjoy by reason of [state-law preemption] cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. Preemption is not like excess space in a bank-owned office building. It is an inalienable right of the bank itself.[245]

The OCC specifically expressed concern about so-called "rent-a-bank" schemes, in which heavily regulated banks enter into relationships with largely unregulated non-bank entities for the sole purpose of allowing non-banks to evade state interest-rate caps. The agency emphasized that such schemes are "an abuse of the national charter" and give rise to "safety and soundness problems at the bank."[246]

220. The FDIC has repeated its commitment to these same policy views—that it "view[s] unfavorably entities that partner with a [FDIC Bank] with the sole goal of evading a lower interest rate established [by state law]"—including in its Notice of Proposed Rulemaking and its final Rule.[247] But the Non-bank Interest Rule conflicts with the agency's view that banks may not rent out their charters to assist non-banks' evasion of state law. The FDIC has failed to explain why it has adopted a Rule that stands at odds with the policy stance that both it and the OCC have long shared. The Rule's Non-bank Interest Provision will facilitate "rent-a-bank" arrangements designed to evade state interest-rate caps. The FDIC has failed to consider the Non-

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[245] John D. Hawke, Jr., Comptroller of the Currency, *Remarks Before the Women in Housing and Finance* 10 (Feb. 12, 2002), https://www.occ.gov/news-issuances/speeches/2002/pub-speech-2002-10.pdf.

[246] *Id.*; *see also* OCC Bulletin 2001-47, *Third-Party Relationships* 3-4 (Nov. 1, 2001), https://ithandbook.ffiec.gov/media/resources/3557/occ-bul_2001_47_third_party_relationships.pdf; OCC Bulletin 2018-14, *Installment Lending: Core Lending Principles for Short-Term, Small-Dollar Installment Lending* at 3-4 (May 23, 2018), https://www.occ.gov/static/rescinded-bulletins/bulletin-2018-14.pdf (rescinded by OCC Bulletin 2020-54, *Small-Dollar Lending: Interagency Lending Principles for Offering Responsible Small-Dollar Loans* (May 20, 2020)).

[247] 85 Fed. Reg. at 44,146-47; 84 Fed. Reg. at 66,846; *Statement by FDIC Chairman Jelena McWilliams on the Notice of Proposed Rulemaking: Federal Interest Rate Authority*, FDIC Board Meeting (Nov. 19, 2019), https://www.fdic.gov/news/news/speeches/spnov1919.pdf; *see also* FDIC, FIL-14-2005 (March 1, 2005), https://www.fdic.gov/news/financial-institution-letters/2005/fil1405.html (imposing stringent limits on acceptable third-party arrangements between FDIC Banks and payday lenders).

bank Interest Provision's facilitation of these arrangements and has not explained why its stance toward such arrangements has changed. When an agency departs from agency precedent without explanation, as the FDIC has here, its action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[248]

F. The FDIC's Statement That States May Avoid the Rule's Negative Effects by Opting Out of § 1831d Coverage Is Misleading Because States Would Still Be Harmed by the FDIC Rule

221. As discussed above, the FDIC's Non-bank Interest Provision would facilitate and encourage rent-a-bank arrangements by extending § 1831d's preemption to nonbanks.

222. The FDIC brushes these concerns aside by noting that states have the right to opt out of § 1831d,[249] but this opt-out right offers no meaningful protection against rent-a-bank schemes.

223. Section 525 of the Depository Institutions Deregulation and Monetary Control Act of 1980 permits states to "override section 27 [§ 1831d]" by enacting a state law "stating explicitly that the State does not want section 27 to apply with respect to loans made in such State."[250] Any relief provided by this opt-out provision is wholly illusory, however, because the opt-out provision only applies to loans deemed to be *made in the state* seeking to opt out.[251] The FDIC has previously held that a loan can be deemed to be "made" by a bank located in one state to a borrower located in another state, and therefore subject to the usury laws of the state where

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[248] 5 U.S.C. § 706(2)(A).

[249] 85 Fed. Reg. at 44,153 ("[I]f States have concerns that nonbank lenders are using partnerships with out-of-State banks to circumvent State law interest rate limits, States are expressly authorized to opt out of section 27.").

[250] *Id.* As the Rule notes, only Iowa and Puerto Rico have opted out in this manner. *See id.* at 44,147-48.

[251] Section 525 provides that the opt-out extends to any state that "adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want this section to apply *with respect to loans made in such State* . . . ." 12 U.S.C. § 1831d (note entitled "Effective Date") (emphasis added). Similarly, the Rule states that "if a State opts out of section 27 [§ 1831d], State banks *making loans in that State* could not charge interest at a rate exceeding the limit set by the State's laws, even if the law of the State where the State bank is located would permit a higher rate." 85 Fed. Reg. at 44,153 (emphasis added).

the bank, not the borrower, is located.[252] For this reason, most banks that regularly "export" high-interest rate loans are located in states with lax or nonexistent usury laws and take the necessary steps outlined by the FDIC to ensure all loans are deemed "made" in that state.

224. Thus, even if a state exercises the right to opt out of § 1831d, that would not prevent a bank located in Utah, South Dakota, or any other state with no interest-rate caps from making a predatory loan to a borrower in the state that opted out. The Non-bank Interest Provision would permit any non-bank buyer of such a loan to charge interest in excess of lower rates caps in states like New York even if that buyer conducted its business *entirely in the state of New York*. Opting out of § 1831d would have no effect on the Non-bank Interest Provision's application to a loan made by an FDIC Bank in a no-rate-cap state like Utah and sold to a non-bank in a low-rate-cap state, like New York. Under the FDIC Rule, the buyer would remain exempt from New York's rate cap regardless of whether New York opted out of § 1831d. The opt-out therefore provides no meaningful relief for States interested in protecting consumers from predatory "rent-a-bank" partnerships between banks and non-bank lenders.

225. Moreover, the FDIC's opt-opt theory puts to states an unwarranted Hobson's choice: accept the FDIC's unreasonable interpretation of § 1831d or deprive home-state FDIC Banks of § 1831d's benefits entirely.

226. The FDIC's erroneous analysis of, and reliance on, the opt-out provision makes the Rule "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[253]

G. The FDIC Failed To Consider the Rule's Facilitation of Predatory "Rent-a-Bank" Schemes and Other Important Aspects of the "Problem"

1. The FDIC's Non-Bank Interest Provision Ignores the Problem of "Rent-a-Bank" Schemes

227. Agency action is lawful only if it rests on "a consideration of the relevant factors"

[252] 85 Fed. Reg. at 44,148. According to the FDIC, a loan is deemed made "where three non-ministerial functions involved in making the loan occur—loan approval, disbursal of the loan proceeds, and communication of the decision to lend." *See id.* If all three of these functions are performed in the bank's home state, then the law of the bank's home state will apply.

[253] 5 U.S.C. § 706(2)(A).

and must be invalidated if the agency "entirely failed to consider an important aspect of the problem . . . ."[254] The core concern the Rule seeks to address is the applicability of state interest-rate caps to non-banks that purchase loans from FDIC Banks.

228. "Rent-a-bank" schemes rely on precisely the type of transaction covered by the Rule: origination of a loan by a bank and sale of that loan to the "partner" non-bank. Whether the Rule will facilitate state-law evasion through "rent-a-bank" schemes is an important aspect of the problem at hand.

229. As discussed above, at least three non-bank lenders operating in California and seeking to evade the state's interest-rate caps have announced plans to seek partnerships with banks, and one savings association located in California has already partnered with a non-bank lender in order to evade interest-rate caps and licensing rules applicable to non-bank lenders.

230. Several comments described the danger that the FDIC Rule poses to consumers. For example,

a. AARP noted that the Non-bank Interest Rule "is likely to permit the growth of high-cost lending practices—such as payday loans, auto title loans, and installment loans—in states where they are presently restricted" and that "AARP is concerned that older borrowers who fall into a cycle of debt from high-cost lending have even fewer options to return to a solid financial footing, such as returning to work or taking on more hours." It also described how the Rule "opens the door more widely for high-interest nonbank lenders to operate in ways that contravene state protections for borrowers," expressed concern that it would facilitate the evasion of interest-rate caps in 33 states and the District of Columbia, and cited the announcements of several lenders planning to use "bank partnerships" to evade state rate caps.[255]

b. George Washington University Law School Professor Arthur E. Wilmarth, Jr.

[254] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[255] Comment of AARP 1, 2 (Jan. 31, 2020).

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cited research stating that the Rule "could encourage 'rent-a-bank' schemes where payday and other high-cost lenders launder their loans through banks in order to make loans up to 160% APR in states where those high rates are illegal."[256]

c. Even a bankers' interest group, the Community Bankers Association of Illinois, acknowledged "some financial institutions and service providers seek to use a 'rent-a-bank' scheme to unjustifiably avoid state usury laws" and, in light of the Rule's facilitation of such schemes, urged the FDIC "to be vigilant, closely examine, and not permit such schemes that abuse financial services, to harm consumers and small businesses."[257]

d. The Center for Responsible Lending's comment extensively detailed the financial situation of borrowers who have been targeted in "rent-a-bank" schemes and are likely to be harmed by the FDIC Rule. As the comment described, "A fundamental, perverse reality drives the high-cost loan market: Borrowers meeting this profile are not likely to have the ability to repay the loans high-cost lenders make to them; lenders know this and depend on it, as the interest rates are so high that they make money anyway." The comment provided numerous specific examples of individuals and families, many from California, Illinois, and North Carolina, harmed by the very lenders who have announced their intentions to evade state law interest-rate caps through the sort of "rent-a-bank" partnerships the Rule's Non-bank Interest Provision will facilitate but the FDIC failed to consider.[258]

231. Despite receiving numerous comments regarding the Rule's facilitation of "rent-a-bank" schemes by predatory lenders, the FDIC failed to give meaningful consideration of this factor in the analysis provided with its Rule. The Rule's Non-bank Interest Provision will

[256] Comment of Arthur E. Wilmarth, Jr., Ex. A at 13 (Jan. 17, 2020) (quoting National Consumer Law Center, "FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending" (Dec. 2019)).

[257] Comment of Community Bankers Association of Illinois 2 (Jan. 31, 2020).

[258] Comment of Center for Responsible Lending 47, 50-60 (Feb. 4, 2020).

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facilitate these schemes by allowing predatory lenders to evade state law by partnering with an FDIC Bank to originate loans exempt from state interest-rate caps and selling those loans to the predatory lender. In the absence of the FDIC Rule, non-bank lenders would remain subject to state interest-rate caps.

2. The Rule Fails To Address the Applicability of the True-Lender Doctrine and Ignores Evidence That It Would Give Rise to a Regulatory Vacuum in the Lending Market

232. In its rulemaking, the FDIC also ignored the "true lender" doctrine and its applicability to schemes designed to take advantage of the Rule's Non-bank Interest Provision to evade state law. The true-lender doctrine asks whether the entity claiming exemption from state interest-rate caps (usually a bank) is merely a pass-through that takes on no substantial financial risk. Under the true-lender doctrine, courts have rejected the applicability of rate-cap exemptions when the primary purpose of a bank's involvement in a lending scheme is the avoidance of state law.

233. The extent to which the true-lender doctrine would apply to transactions designed to take advantage of the Non-bank Interest Provision is an "important aspect of the problem" that the FDIC expressly declined to consider.[259]

234. Several comments suggested the Rule's facilitation of "rent-a-bank" schemes could be mitigated with FDIC guidance aimed at determining when the bank is the true lender.[260] But rather than consider the merits of such a proposal, the FDIC responded only that it "believes" whether a non-bank is the "true lender" and whether preemption under § 1831d extends to non-banks "are not so intertwined that they must be addressed simultaneously by rulemaking."[261] This

[259] *E.g.*, Comment of Adam J. Levitin 10-11 (Jan. 5, 2020); 85 Fed. Reg. at 44,146, 44,152.

[260] *E.g.*, Comment of Arthur E. Wilmarth, Jr. 3 (Jan. 17, 2020); Comment of National Association of Consumer Credit Administrators 2 (Feb. 4, 2020); Comment of Conference of State Bank Supervisors 3-5 (Feb. 4, 2020); *see also* 85 Fed. Reg. at 44,152.

[261] 85 Fed. Reg. at 44,152. On July 22, 2020, the OCC issued a proposed rule regarding the "true lender" doctrine, which courts use to determine which party is the actual lender of a loan. *See* OCC, *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg.

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is no answer. Because section § 1831d applies only to FDIC Banks, determining whether the FDIC Bank is the "true lender" in necessary for determining whether state interest-rate caps apply—the core issue the FDIC Rule seeks to address. In order to avoid issuing an arbitrary and capricious rule, the FDIC must consider the important aspects of the problem; it cannot simply ignore difficult elements of the problems its Rule seeks to address.

235. "True lender" and "rent-a-bank" issues are "important aspect[s] of the problem" of the transferability of rate-cap exemptions, which the FDIC was duty-bound to consider.[262]

236. The FDIC also failed to consider that its Rule would create a regulatory vacuum, leading to an absence of reasonable regulation and enforcement. FDIC Banks are permitted the privilege of interest-rate cap preemption because they are subject to a comprehensive regulatory regime that includes regular reporting requirements as well as supervisory visits by the FDIC and other federal regulators. The Rule's Non-bank Interest Provision, however, would extend that privilege to *any* buyer of loans issued by an FDIC Bank, regulated or not.

237. For example, as noted above, the FDIC has not even considered whether provisions providing penalties for banks that charge interest in excess of that allowed by § 1831d(a) would apply to loan buyers pursuant to the Non-bank Interest Provision. The agency has failed to consider even the most basic aspects of regulation and enforcement implicated by its Rule.

238. Because the FDIC entirely failed to consider important aspects of the problem its Non-bank Interest Provision seeks to address, the Non-bank Interest Provision is "arbitrary,

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44,223, 44,224 n.17, 44,227 (July 22, 2020) (to be codified at 12 C.F.R. § 7.1031). In public remarks, the FDIC Chair stated she expects the FDIC to issue its own "true lender" rule at some point in the future. *See* Manatt, OCC Proposes Rule to Define the 'True Lender' Financial Services Law, https://www.manatt.com/insights/newsletters/financial-services-law/occ-proposes-rule-to-define-the (July 27, 2020) ("Federal Deposit Insurance Corporation Chair Jelena McWilliams stated during the board meeting on June 25, 2020, that the FDIC would address the true lender doctrine in a rulemaking."). Neither the OCC's "true lender" proposal nor the FDIC's apparently anticipated proposal is at issue in this lawsuit, and neither has bearing on whether the FDIC complied with its statutory obligations when it issued its present Rule.

[262] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

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capricious, an abuse of discretion, or otherwise not in accordance with law."[263]

H. The FDIC Considered Matters Congress Did Not Intend It To Consider

239. In its final Rule, the FDIC emphasizes that the Non-bank Interest Provision will enable the FDIC to receive the highest price possible for loans it sells when it takes over the assets of failed banks.[264] The FDIC notes it has a "statutory obligation to maximize the net present value return from the sale or disposition of . . . assets [of failed banks held in FDIC-receivership] and minimize the amount of any loss . . . ."[265] Allowing non-banks to charge interest rates in excess of state law is good policy, the FDIC claims in its final Rule, because it will allow the agency itself to fetch higher prices for the bank loans it sells.

240. However, this justification was entirely absent from the FDIC's Proposed Rule, denying the public the opportunity to comment on it. Indeed, the Proposed Rule never mentions the FDIC's role as receiver of failed banks, the Deposit Insurance Fund, or loan sales made by the FDIC itself.[266] The FDIC's reliance on a *post hoc* justification upon which there was no opportunity to comment alone is enough to render its Rule arbitrary and capricious.[267]

241. Moreover, the FDIC failed to explain the facts that support its *post hoc* justification. Importantly, it never explains whether and to what extent state interest-rate caps actually affect the prices for loans the FDIC acquires from failed banks. These are facts known to the FDIC that undergird its justification, and the FDIC must explain the relationship between them and its decision to issue the Non-bank Interest Provision.

242. Additionally, the FDIC's invocation of the Federal Deposit Insurance Fund as a justification for the Non-bank Interest Provision is not an acceptable basis for its Rule because

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[263] 5 U.S.C. § 706(2)(A).

[264] 85 Fed. Reg. at 44,149; *see also Statement by FDIC Chairman Jelena McWilliams on the Final Rule: Federal Interest Rate Authority* 2 (June 25, 2020), https://www.fdic.gov/news/speeches/spjun2520b.html ("The FDIC cannot maximize the return on sales of failed bank assets if the ability of banks to sell loans on the secondary market is undermined.").

[265] 85 Fed. Reg. at 44,149.

[266] 84 Fed. Reg. at 66,845-46 (setting forth the "Policy Objectives" of the Proposed Rule).

[267] 5 U.S.C. § 706(2)(A).

this is a factor "which Congress has not intended it to consider[.]"[268] Congress explicitly stated its purpose in exempting FDIC Banks from state-law interest rate caps: "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates[.]"[269] Congress did not list among its objectives enabling the FDIC itself to sell loans to non-banks at higher prices. The statute does not describe the sale of loans by FDIC Banks themselves, much less by the FDIC as receiver. This concern, which the FDIC relies upon *post hoc* for the Non-bank Interest Provision, is far afield of the relevant statute and of the matters Congress intended the agency to consider in issuing rules under this statute.

243. The FDIC similarly cites concern for bank "safety and soundness" as a reason underlying its Rule.[270] Like the agency's invocation of the Federal Deposit Insurance Fund, bank safety and soundness is a factor "which Congress has not intended it to consider"[271] in issuing rules under § 1831d. Even if it were, it is difficult to imagine how a rule that facilitates predatory lending and the evasion of state law is a safe and sound practice.

244. The FDIC's *post hoc* reliance on factors Congress did not intend for it to consider render the Rule's Non-bank Interest Provision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[272] and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[273]

I. The FDIC Has Offered an Explanation for Its Decision That Is Counter to the Evidence and Failed To Explain How Evidence Supports Its Decision, To Examine the Relevant Data, and To Explain the Connection Between the Facts Found and the Choice Made

245. To support its Rule, the FDIC repeatedly emphasizes the importance of loan sales from FDIC Banks to non-banks as "central to the stability and liquidity of the domestic loan

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[268] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[269] 12 U.S.C. § 1831d.
[270] 85 Fed. Reg. at 44,152.
[271] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[272] 5 U.S.C. § 706(2)(A).
[273] 5 U.S.C. § 706(2)(C).

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markets."[274] The agency explains that "there is considerable evidence of uncertainty following the *Madden* decision"[275] and that that Rule will "address [this] uncertainty" and "mitigate the potential for future disruption to the markets for loan sales and securitizations . . . and a resulting contraction in availability of consumer credit."[276] But this explanation runs counter to the evidence before the agency, as the FDIC itself elsewhere acknowledges.

246. In another section of its Rule, though, the FDIC affirmed, "While several commenters cited to studies discussing the adverse effects of *Madden* in the Second Circuit, as well as anecdotal evidence of increased difficulty selling loans made to borrowers in the Second Circuit post-*Madden*, the FDIC is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision."[277] Accordingly, it "does not expect immediate widespread effects on credit availability" arising from its Rule.[278]

247. The FDIC cannot have it both ways: it cannot both claim that the Rule will rectify the disruption to credit markets caused by *Madden* and state that it is unaware of any evidence of disruption and expects the Rule to have little effect on credit markets. Its equivocal stance on the facts and predictions underlying its Rule render the Rule arbitrary and capricious.

248. Even ignoring the FDIC's own conflicting positions, its Rule is unsupported by the evidence in the record. As one comment put it, "the FDIC has presented no evidence that the sale of debt obligations with interest rates that exceed state usury caps is a material source of liquidity for any bank, much less for banks in general."[279] Banks primarily obtain liquidity through other means and do not generally rely on sales of non-mortgage loans for liquidity.[280] The FDIC's

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[274] 85 Fed. Reg. at 44,149; *see also id.* at 44,151 ("State banks need the ability to sell loans in order to properly maintain their capital and liquidity.").
[275] *Id.* at 44,152.
[276] *Id.* at 44,155.
[277] *Id.* at 44,156.
[278] *Id.* at 44,155.
[279] Comment of Adam J. Levitin 7 (Jan. 5, 2020).
[280] *Id.*

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explanation for its Rule is, thus, contrary to the evidence before it.[281]

249. FDIC Banks may already sell their loans to any of the more than 5,200 other FDIC-insured banks in the United States, all of which benefit from the state-law preemption provisions of § 1831d or parallel provisions in the NBA, Home Owners' Loan Act, and other federal banking laws.[282]

250. The FDIC has likewise not shown that sales of loans to non-banks have been significantly inhibited by *Madden*. If a non-bank buyer cannot charge the same rate of interest as the selling bank, bank loans may be sold for a discounted purchase price, but the FDIC has not shown that any such discount would materially interfere with any power granted by Congress.

251. The FDIC touts the importance of FDIC Banks' transfer of loans to non-banks, calling "securitizations, loan sales, and sales of participation interests in loans" "crucial to the safety and soundness of these banks' operations."[283] It specifically cites "[s]ecuritizations" as "an example of banks' reliance on the loan sale market to non-banks for liquidity."[284] But the FDIC's claims about the importance of securitization and other loan transfers to non-banks are misleading. As one commenter noted:

> While banks of all sizes engage in residential *mortgage* securitization, most mortgage loans are already exempt from state usury laws. Only a handful of the very largest banks engage in securitization of any other asset class. Other than securitization, banks rarely assign loans to non-banks other than selling charged-off debts (for pennies on the dollar) or as part of rent-a-bank partnerships in which banks originate loans according to a non-bank's specifications for sale to a non-bank.[285]

252. The two empirical studies briefly mentioned in the FDIC Rule do not sufficiently support the sweeping preemption of state usury caps, and the agency has not explained how they

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[281] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[282] Comment of Adam J. Levitin 8, 12 (Jan. 5, 2020); *see also, e.g.*, 12 U.S.C. § 85(a) (preempting state-law interest-rate caps as applied to national banks); *id.* § 1463(g)(1) (same with respect to federal savings associations).

[283] 85 Fed. Reg. at 44,150.

[284] *Id.* at 44,152.

[285] Comment of Adam J. Levitin, Attachment 3 at 8-9 (Jan. 5, 2020) (emphasis in original).

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relate to its conclusions.[286] One of these studies relies on non-public proprietary data from three "marketplace-lending platforms," which are relatively novel players in the lending market and are not likely to be representative of the ordinary bank-loan programs (like credit cards) that were at issue in *Madden* and are directly affected by this Rule.[287]

253. The other study cited in the Rule attempts to create a causal chain between the *Madden* decision and the number of bankruptcies later occurring in the Second Circuit.[288] Contrary evidence in the record demonstrates that consumers and small businesses are harmed by high interest-rate loans, and thus that *Madden* is likely to have been beneficial rather than harmful.[289] The FDIC never explains how or whether it considered the conflict between this study and other evidence in the record.

254. The Rule provides no discussion of the methods used in these two studies, their results, or the substantive role, if any, they played in the FDIC's consideration of its Rule and regulatory comments,[290] rendering the agency's reliance on them arbitrary and capricious.[291]

255. The FDIC repeatedly emphasizes that the "Administrative Procedure Act does not require an agency to produce empirical evidence in rulemaking[.]"[292] It states instead that that empirical evidence is unnecessary where, as here, the "agency's decision is primarily predictive."[293] But whatever the merits of this position, the FDIC "must," at the very least, "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[294] That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned."[295] But

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[286] 85 Fed. Reg. at 44,155.
[287] *See generally* Comment of Colleen Honigsberg (Jan. 14, 2020).
[288] *See generally* Piotr Danisewicz and Ilaf Elard, "The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy" (July 5, 2018), http://dx.doi.org/10.2139/ssrn.3208908.
[289] *E.g.*, Comment of Center for Responsible Lending 50-60 (Feb. 4, 2020).
[290] 85 Fed. Reg. at 44,155.
[291] 5 U.S.C. § 706(2)(A).
[292] 85 Fed. Reg. at 44,152.
[293] *Id.* (quotation and citation omitted).
[294] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation and citation omitted).
[295] *Id.* (internal quotation and citation omitted).

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where an agency "has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."[296] Moreover, an agency may not rely on "an explanation for its decision that runs counter to the evidence before [it]."[297]

256. For the reasons stated above, the FDIC did not carry its burden here, rendering the Non-bank Interest Provision arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.[298]

CLAIM 1

AGENCY ACTION THAT IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND OTHERWISE NOT IN ACCORDANCE WITH LAW

257. The States incorporate by reference the foregoing paragraphs.

258. Under the APA, a reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[299]

259. Among other things, the FDIC Rule

a. is contrary to the plain statutory language of § 1831d that it purports to interpret;

b. ignores elements of the statutory scheme contrary to the FDIC's interpretation;

c. relies on statutory provisions that provide no support to the agency's view;

d. is contrary to the express will of Congress and the presumption against preemption;

e. conflicts with the FDIC and other federal bank regulators' longstanding interpretation of the reach of federal preemption under § 1831d and other equivalently interpreted statutes;

f. exceeds the agency's statutory authority and impermissibly seeks to overturn a federal court's construction of an unambiguous statute;

g. fails to consider important aspects of the problem, including the Rule's facilitation of "rent-a-bank" schemes, the applicability of the true-lender doctrine, and the

[296] *Encino Motorcars*, 136 S. Ct. at 2125.
[297] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[298] 5 U.S.C. § 706(2)(A).
[299] *Id.*

Rule's creation of a regulatory vacuum, effectively exempting some market participants from both state and federal oversight;

h. rests on factors Congress did not intend the FDIC to consider; and

i. is contrary to the evidence that the sales of loans to non-banks are not an important source of liquidity for FDIC Banks and fails to explain whether and how the facts in the administrative record support the FDIC's decision.

260. Thus, for the many reasons stated above, the FDIC Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and the Court should set it aside under 5 U.S.C. § 706(2)(A).

CLAIM 2

AGENCY ACTION IN EXCESS OF STATUTORY JURISDICTION, AUTHORITY, OR LIMITATIONS, OR SHORT OF STATUTORY RIGHT

261. The States incorporate by reference the foregoing paragraphs.

262. Under the APA, a reviewing court shall set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[300]

263. Among other things, the FDIC Rule

a. is contrary to the plain statutory language of § 1831d that it purports to interpret;

b. ignores elements of the statutory scheme contrary to the FDIC's interpretation;

c. is contrary to the express will of Congress and the presumption against preemption; and

d. exceeds the agency's statutory authority and impermissibly seeks to overturn a federal court's construction of an unambiguous statute.

264. Thus, for the many reasons stated above, the FDIC Rule is in excess of statutory jurisdiction, authority, or limitations, and short of statutory right, and the Court should set it aside under 5 U.S.C. § 706(2)(C).

DEMAND FOR RELIEF

265. The States respectfully request that this Court enter a judgment in their favor and

[300] 5 U.S.C. § 706(2)(C).

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grant the following relief:

A. Declare that the FDIC violated the APA because its Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

B. Declare that the FDIC violated the APA because its Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

C. Declare that the FDIC violated the APA because its Rule constitutes agency action taken without procedure required by law;

D. Hold unlawful and set aside the FDIC Rule's Non-bank Interest Provision, codified at 12 C.F.R. § 331.4(e); and

E. Grant other relief as the Court deems just and proper.

Dated: August 20, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General

/s/ Devin W. Mauney
DEVIN W. MAUNEY
Deputy Attorney General

Office of Attorney General
Consumer Protection Section
1515 Clay St., 20th Floor
Oakland, California 94612
Phone: (510) 879-0814
Fax: (510) 622-2270
Email: devin.mauney@doj.ca.gov

Attorneys for Plaintiff
the People of the State of California

KARL A. RACINE
Attorney General

/s/ Benjamin M. Wiseman

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BENJAMIN M. WISEMAN*
Director, Office of Consumer Protection

Attorney General for the District of Columbia
400 6th St. N.W., 10th Floor
Washington, D.C. 20001
Phone: (202) 741-5226
Email: Benjamin.wiseman@dc.gov

Attorneys for Plaintiff the District of Columbia

KWAME RAOUL
Attorney General of Illinois
GREG GRZESKIEWICZ
Bureau Chief

/s/ Erin Grotheer
ERIN GROTHEER*
Assistant Attorney General

Office of the Illinois Attorney General
Consumer Fraud Bureau
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601
Phone: (312) 814-4424
Email: egrotheer@atg.state.il.us

Attorneys for Plaintiff
the People of the State of Illinois

MAURA HEALEY
Attorney General of the
Commonwealth of Massachusetts

/s/ Brendan T. Jarboe
BRENDAN T. JARBOE*
Assistant Attorney General

Consumer Protection Division
Office of Attorney General Maura Healey
One Ashburton Place
Boston, MA 02108
Phone: (617) 727-2200

* Not yet admitted to the Bar of this Court.

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Email: brendan.jarboe@mass.gov

Attorneys for Plaintiff
the Commonwealth of Massachusetts

KEITH ELLISON
Attorney General of Minnesota

/s/ Adam Welle
ADAM WELLE*
Assistant Attorney General

Minnesota Attorney General's Office
Bremer Tower, Suite 1200
445 Minnesota Street
St. Paul, MN 55101
Phone: (651_ 757-1425
Email: adam.welle@ag.state.mn.us

Attorneys for Plaintiff the State of Minnesota

GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Tim Sheehan
TIM SHEEHAN*
Deputy Attorney General
New Jersey Office of the Attorney General
25 Market Street
Trenton, New Jersey 08625
Phone: (609) 815-2604
Email:
tim.sheehan@law.njoag.gov

Attorneys for Plaintiff the State of New Jersey

LETITIA JAMES
Attorney General of New York
JANE M. AZIA
Bureau Chief

/s/ Christopher L. McCall
CHRISTOPHER L. MCCALL*
Assistant Attorney General

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Office of the New York State Attorney General
Consumer Frauds & Protection Bureau
28 Liberty Street
New York, New York 10005
Phone: (212) 416-8303
Email: christopher.mccall@ag.ny.gov

Attorneys for Plaintiff
the People of the State of New York

JOSHUA H. STEIN
Attorney General of North Carolina
KEVIN ANDERSON
Division Director

/s/ Daniel P. Mosteller
DANIEL P. MOSTELLER*
Special Deputy Attorney General

North Carolina Attorney General Office
Consumer Protection Division
114 W. Edenton Street
P.O. Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6000
Email: dmosteller@ncdoj.gov

Attorneys for Plaintiff
the State of North Carolina

Exhibit 11 to Roth Affirmation-
Memorandum of Law in Opposition, dated April 15, 2021
[pp. 458 - 473]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

-against-

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN, LEONORA GANGI NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.
----------X

MEMORANDUM IN OPPOSITION

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI

Plaintiffs,

Index No. 500481/2021

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.
----------X

INTRODUCTION

This is a case about a loan placed by a felon in a boiler room (Larry Shuster) to an unscrupulous Loan Servicer (World Business Lenders hereinafter WBL) who used the charter of a federally chartered Bank (AXOS BANK F/K/A BOFI Federal Bank, hereinafter AXOS). Mr. Shuster was paid $45,000 by World Business Lenders for finding the loan.

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WBL and AXOS wrote two loans to the borrowers (MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS and ROSARIO GANGI). Each loan was secured by real property which was co-owned. The commercial property was co-owned by Josephine Gangi; that loan was for $450,000 at 85% (Loan 1); the residential property was co-owned by Leonora Gangi; that loan was for $160,000 at 103% (Loan 2) interest rates. Both loans required daily payments.

WBL and Larry Shuster took advantage of Mr. Rosario Gangi, who now suffers from ALS, hid documents from Josephine Theisen and mis-represented the terms of the deal to her. Furthermore, WBL and AXOS wrote the second loan, did not provide Leonora Gangi with certain documents and Rosario Gangi was not represented by an attorney. The practices of WBL and AXOS were consumer oriented, deceptive and damaging; thus, the matter should proceed to discovery.

LEGAL STANDARD FOR MOTION TO DISMISS

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory." *Minico Ins. Agency, LLC v. B&M Cleanup Servs.*, 165 A.D.3d 776 (2d Dept. 2018). *See Also CPLR 3013*. Statements in a pleading shall be sufficient to give the Court and parties notice of the transactions intended to be proved and the material elements of each cause of action or defense.

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GANGI AND THEISEN SUFFICIENTLY ALLEGED CLAIMS UNDER GBL § 349(h)

"General Business Law § 349 declares unlawful all deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 A.D.3d 5, 11 (2d Dept. 2012) (internal citations omitted). GBL § 349 was created to halt consumer frauds at their inception, before they developed into persistent frauds. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A*., 85 N.Y.2d 20, 25 (1995). Section 349 applies to "virtually all economic activity." *Plavin*, supra; *Karlin*, supra at 290. Moreover, "the scope of the statute is intentionally broad." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc*., 3 N.Y.3d 200, 205 (NY 2005) (internal citations omitted).

Further, "[t]he strict pleading requirements for causes of action sounding in common-law fraud (see, CPLR 3016) do not apply to causes of action sounding in violation of General Business Law § 349." *Joannou v. Blue Ridge Ins. Co.*, 289 A.D.2d 531, 532 (2d Dept 2001) citing *Scavo v. Allstate Ins. Co.*, 238 A.D.2d 571 (2d Dept 1997); *McGill v GMC*, 231 A.D.2d 449 (1st Dept 1996). See also *Canestaro v. Raymour & Flanigan Furniture Co.*, 984 N.Y.S.2d 630, 630 (Sup. Ct., Erie County 2013); *Farokhi v. Guardian Life Insurance Co. of America*, 2008 N.Y. Misc. LEXIS 9086, *4 (Sup. Ct., NY County 2008).

As a threshold matter, a plaintiff bringing a claim under GBL § 349 (h) must allege that (1) the defendant is engaged in consumer-oriented conduct, (2) that is deceptive or materially misleading, and (3) that he was injured as a result of the deceptive practice. *Plavin v Group Health Inc.*, 35 N.Y.3d 1, 10 (NY 2020); *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 293 (NY 1999).

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A. Plaintiffs Have Sufficiently Pled That Defendants' Conduct Was Consumer Oriented

A plaintiff can satisfy this threshold requirement of alleging consumer-oriented conduct by "showing that 'the acts or practices have a broader impact on consumers at large' in that they are 'directed to consumers' or 'potentially affect similarly situated consumers.'" *Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285, 290 (2000) quoting *Oswego Laborers' Local 214 Pension Fund*, supra. Moreover, GBL § 349 does not require that the conduct be recurring or repetitive. *Oswego Laborers' Local 214 Pension Fund*, supra. Courts have found conduct to be sufficiently consumer-oriented "where it involved an extensive marketing scheme, where it involved the multi-media dissemination of information to the public, and where it constituted a standard or routine practice." *North State Autobahn, Inc.*, supra, at 12 citing *Gaidon v Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330 (1999); *Karlin v IVF Am.*, 93 N.Y.2d 282 (1999); *Oswego Laborers' Local 214 Pension Fund*, supra.

In their underlying motion, Defendants rely on *Cruz*, supra, to argue that GBL § 349 is inapplicable where the conduct at issue is aimed solely at businesses. Defendants' reliance on *Cruz* is misplaced. In that case, the conduct at issue was the alleged false advertisement in the sale of advertising space in the yellow pages. The court there held there was no consumer-oriented conduct "[s]ince the advertisement space in the Yellow Pages is, by definition, a commodity available to businesses only." *Cruz*, supra at 291.

In contrast, the consumer-oriented conduct charged in the instant matter is not "a commodity available to businesses only," rather, the conduct charged in the instant matter is conduct that will heavily affect consumers applying for a loan with Defendants. Certainly, providing loans can "carry over to consumer transactions." *Citipostal, Inc. v. Unistar Leasing*, 283 A.D.2d 916, 918 (4th Dept. 2001).

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While the underlying loans were provided to a business, that alone is not determinative on the issue of whether the Defendants were engaged in consumer-oriented activity. Courts have specifically held that "[t]he statute's consumer orientation does not preclude its application to disputes between businesses," it merely limits the application. *Cruz,* supra. So long as Plaintiffs charge Defendants with having engaged in consumer-oriented conduct, the GBL § 349 claim may proceed. *Freefall Express, Inc. v. Hudson Riv. Park Trust*, 16 Misc. 3d 1135 (A) (Sup. Ct, NY County 2007) ("the mere fact that Freefall is a business is insufficient to defeat a GBL § 349 claim," but it must charge conduct of the defendant that is consumer-oriented).

In *Oswego Laborers' Local 214 Pension Fund*, the Court of Appeals found that defendants were engaged in consumer-oriented conduct even though the issue involved a dispute between two businesses. *Id.* at 26. In that case, the defendant bank provided standard forms and advice to the plaintiffs, two union funds, for the purposes of opening a commercial savings account with defendant. *Id.* The Court there held that the defendant "dealt with [plaintiffs] as any customer entering the bank to open a savings account, furnishing [plaintiffs] with standard documents presented to customers upon the opening of accounts." *Id.* Moreover, in *Hobish v AXA Equit. Life Ins. Co.*, the court held plaintiff adequately pled consumer-oriented conduct even where the transaction at issue did not constitute consumer-oriented conduct. 2018 N.Y. Misc. LEXIS 2874, *10 (Sup. Ct., NY County 2018). The court there based its decision on its finding that defendants were "engaged in a nation-wide scheme" which may potentially affect similarly situated consumers. *Id.* citing *Oswego Laborers' Local 214 Pension Fund*, supra; *Wilner v Allstate Ins. Co.*, 71 A.D.3d 155, 164 (2d Dept 2010) (finding that defendant insurer is engaged in consumer-oriented conduct that has a broad impact on consumers at large). Sending

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targeted communications to potential customers is consumer-oriented conduct. *Plavin v. Group Health, Inc.*, 35 NY3d 1 (NY 2020)

Providing loans and attempting to collect on said loans is a consumer-oriented activity. In the instant matter, Defendants dealt with Plaintiffs as they would any customer applying for a loan. Defendants presented Plaintiffs with standard documents presented to customers upon application for a loan. Defendants required plaintiffs to sign a HUD-1 Settlement Statement, as they would require any customer to sign to receive the loan funds.

Further, the instant action is not based upon a private contract dispute. The deceptive acts alleged herein will have a broad impact on consumers at large. Defendants are engaged in the type of nation-wide scheme that may potentially affect similarly situated consumers. Defendants send targeted communications to potential customers and provide loans that are available to every resident in New York state.

Therefore, Defendants' actions are consumer-oriented in the sense that they have a broad impact on consumers at large and may potentially affect all consumers who apply for a loan with Defendants. In fact, World Business Lenders loans, on remarkably similar terms, have been the subject of litigation nationally. World Business Lenders was specifically mentioned in a Complaint sent by several Attorneys' General, including the Attorney General of New York State, to the FDIC attached as Exhibit 9. *See Also Rent Rite Superkegs West Ltd. v. World Business Lenders, LLC* No.19-cv-1552 (D. Colo. September 10, 2019).

This case is like *Cyphers v. Litton Loan Servicing, LLP,* 503 F. Supp2d 547 (NDNY 2007). In that case, the defendant loan servicer claimed that its conduct was not consumer oriented and that, therefore, GBL 349 could not apply. The District Court disagreed, denied summary judgment and specifically held "Litton is in the business of servicing loans," and there

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was "nothing unique about Litton's relationship to plaintiff or Litton's conduct and practices towards plaintiff. In other words, it can reasonably be inferred from the evidence that Litton's conduct and practice toward plaintiffs reflect its conduct and practices toward consumers generally."

In the instant case, as in *Cyphers,* WBL's conduct towards Gangi and Thesisen mirror its treatment of others they have lent money to, and accordingly, its conduct in the case reflect its conduct and practices towards consumers generally. Therefore, as in *Cyphers,* this Court should find that plaintiff adequately pleaded that WBL and AXOS conduct was consumer oriented.

Plaintiffs have adequately pled consumer-oriented conduct in order to defeat Defendants' motion to dismiss. In *Hobish*, supra at *10, the court held the plaintiffs had "adequately [pled] consumer-oriented conduct in that they allege that defendant engaged in a nation-wide scheme," and, therefore, the plaintiffs had satisfied the threshold test. In the instant matter, Plaintiffs allege that Defendants are engaged in consumer-oriented conduct that has already begun to have grievous affect on business owners across the nation.

B. PLAINTIFFS SUFFICIENTLY PLEAD THAT WBL AND AXOS CONDUCT WAS MATERIALLY MISLEADING

A plaintiff bringing a cause of action under GBL § 349 must also plead that the defendants acts or practices were deceptive or misleading in a material way. *Wilner*, supra at 165. The test here "is whether the allegedly deceptive practice is 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Id.* quoting *Oswego Laborers' Local 214 Pension Fund*, supra. "A deceptive practice, however, need not reach the level of common-law fraud to be actionable under § 349." *Relativity Travel, Ltd. v. JP Morgan Chase Bank,* 13 Misc. 3d 1221[A] (Sup Ct, NY County 2006).

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Whether a deceptive practice is likely to mislead a reasonable consumer may be a question of fact or law, depending on the individual circumstances. *Wilner*, supra at 166. In *Wilner*, the court there found that "the reasonableness of the plaintiff's belief as to their responsibilities under the contract…is a question of fact and should be determined by the factfinder." Similarly, the court in *Hobish*, supra at *12, held that it was a question of fact as to whether the insurance rate increase was materially misleading and, thus, "that issue survive[d] the motion to dismiss."

JOSEPHINE THEISEN PLEADED AXOS AND WBL CONDUCT WAS MATERIALLY MISLEADING BECAUSE ITS AGENTS MADE MISLEADING STATEMENTS AND THE HUD-1 STATED THERE WAS NO PRE-PAYMENT PENALTY

In regard to loan #27964 (Loan #1), Defendants' actions were materially misleading in that they were likely to mislead a reasonable consumer to believe that there would be no prepayment penalty. Prior to signing the mortgage, Defendants' representative explicitly told Plaintiff Josephine Theisen there would be no prepayment penalty (see affidavits of Theisen and the notary).

Moreover, the HUD-1 form stated there would be no prepayment penalty (see HUD). Additionally, Plaintiff Theisen never spoke to Arthur Aidala nor was she advised by any other attorney. Under these circumstances, it was reasonable to believe that there would be no pre-payment penalty. Furthermore, whether Plaintiff Theisen's belief was reasonable is a question of fact that should be determined by the factfinder.

Defendants argue that the mere fact that the pre-payment penalty was disclosed in various other loan documents bars Plaintiff's GBL § 349(h) claim. However, the Court of Appeals held the opposite in *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (2012). The *Koch* case involved the sale of counterfeit wine bottles and the defendant argued that the disclaimers set

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forth in its catalogs barred plaintiff's GBL § 349 claim. The Court disagreed, holding that the plaintiff had sufficiently pled a cause of action under GBL § 349 and "the disclaimers set forth in defendant's catalog [did] not bar plaintiff's claim for deceptive trade practices at this state of the proceedings, as they do not establish a defense as a matter of law." *Id.*

Similarly, the court in *Relativity Travel, Ltd. v JP Morgan Chase Bank*, 13 Misc 3d 1221[A] (Sup Ct, NY County 2006) held that the plaintiff had adequately alleged deceptive practices despite the fact that the alleged misrepresentation was described in the bank agreement. The court there held, "[t]he issue is not simply whether the [agreement] was deceptive, but whether [defendant's] overall business practices in connection with the charge were deceptive." *Id.* "Viewing [defendant's] practices as a whole including the failure to list the surcharge on the Account Statement or on [defendant's] website and the failure to properly inform its representatives about the surcharge are sufficient, if proved, to establish a *prima facie* case." *Id.* The court further found that the plaintiff had sufficiently alleged the deceptive practices were material in that it prevented customers from making informed decisions. *Id.*

In the instant matter, Defendants' overall business practices in connection with the pre-payment penalty are deceptive. Defendants failed to disclose the pre-payment penalty in the HUD-1 and failed to properly inform its agent, Anne Rougier, or the non-party who prepared the HUD-1, about the pre-payment penalty. Moreover, Plaintiffs Theisen and Leonora Gangi were never given copies of the notes or disclosures for review, never communicated with anyone from AXOS bank, and were never represented by counsel.

These deceptive practices prevented the Plaintiff Theisen from making an informed decision in signing the loan documents. As such, AXOS and WBL actions in failing to adequately disclose the pre-payment penalty were materially misleading and would easily

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mislead a reasonable consumer to believe there would be no pre-payment penalty, therefore, Josephine Theisen sufficiently pleaded that AXOS and WBL's conduct was materially misleading.

PLAINTIFFS LEONORA AND ROSARIO GANGI ADEQUATELY PLEADED "DOOMED TO FAIL" AS A VIOLATION OF GENERAL BUSINESS LAW 349

WBL and AXOS were contacted a second time by Rosario Gangi in October of 2018. At that time, according to WBL's own documents, he had depleted his $100,000 of overdraft protection for his business bank account and was over $300,000 in arrears on his prior loan with WBL and AXOS. At this time, he was approved for a second loan, without legal representation, and was expected to begin making daily payments of $4,245.55 for 18 months thereafter. The internal WBL documents make clear that only did they hope Mr. Gangi would default, but that the loan was designed to fail

It has been argued above that WBL and AXOS conduct was consumer oriented. Furthermore, WBL and AXOS, by offering loans that were doomed to fail, used materially deceptive practices that violate General Business Law 349. "Even where the particular attributes of a loan are not subject to a specific prohibition, loans reflecting abusive practices nevertheless can involve unfair and deceptive conduct." *Kaur v. World Business Lenders, LLC,* 19-cv11362, February 24, 2020 [denying World Business Lenders Motion to Dismiss holding that plaintiff adequately pleaded a doomed to fail theory and discovery was appropriate].

In the instant case, as in *Kaur,* the plaintiff has adequately pleaded that the loans in the case, reflected the abusive practice of being "doomed to fail," and thus involved unfair and deceptive conduct. Accordingly, this Court should hold that Gangi and Theisen adequately pleaded violations of the General Business Law 349 and deny the motion of AXOS and WBL.

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JOSEPHINE THEISEN'S CLAIM OF FRAUD HAS BEEN SUFFICIENTLY PLED

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 559 (2009). A claim of fraud must be pleaded with the requisite particularity under CPLR 3016(b), the purpose of which is to inform a defendant of the complained-of incident and should not be confused with unassailable proof of fraud. *Id.; Minico Ins. Agency, LLC*, supra. The requirements of CPLR 3016(b) "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." *Id.* (internal citations omitted). Further, CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged fraud. *Id.* (internal citations omitted); *Epiphany Community Nursery Sch. v. Levey*, 171 A.D.3d 1 (1st Dept. 2019) (finding that plaintiff sufficiently pled fraud even where it failed to allege justifiable reliance). Where the facts are peculiarly within the knowledge of the defendant, it would cause an "unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings." *Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

At the outset, it should be noted that Defendants incorrectly assert that Plaintiff Theisen's claim of fraud is on behalf of all Plaintiffs. The instant claim of fraud is asserted solely by Plaintiff Theisen and, therefore, Defendants' arguments in that respect are inapplicable.

Moreover, Plaintiff has sufficiently pled her claim of fraud against Defendants pursuant to CPLR 3016(b) and Defendants' motion to dismiss must be denied. Furthermore, AXOS and WBL attempts to say that Arthur Aidala, Esq. represented Ms. Theisen are patently absurd. The court is respectfully directed to the affidavits of both Mr. Aidala and Ms. Theisen.

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Plaintiff sufficiently alleged a material misrepresentation of fact. Defendants misrepresented the fact that there would not be a pre-payment penalty. In the Complaint, Plaintiff clearly states that Ann Rougier, Defendant WBL's agent, explicitly told Plaintiff there would be no pre-payment penalty. *See* Complaint, para. 82. "[A] principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority." *News Am. Mktg. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146 (1st Dept. 2005). Defendant WBL hired Ann Rougier to notarize Plaintiff's signature on the HUD-1, mortgage, and other relevant documents. Defendant WBL sent no other agent, aside from Ann Rougier to the signing. As such, Ann Rougier had the apparent authority necessary to bind Defendant WBL and Plaintiff relied on that apparent authority in signing the documents. *Weiszberger v KCM Therapy*, 189 AD3d 1121, 1123 (2d Dept 2020).

Moreover, the Complaint alleges that Defendant WBL provided Plaintiff with the HUD-1, which explicitly stated there was no pre-payment penalty. *See* Complaint, para. 81, 135. The notary then confirmed this fact. Therefore, Defendant WBL, through the provision of the HUD-1 and through the statements of its agent, materially misled Plaintiff to believe there would be no pre-payment penalty and this element has been sufficiently pled to inform Defendants the exact nature of the fraud. Second, Plaintiff has sufficiently pled that Defendants knew the representation on the HUD-1 was false. In the Complaint, Plaintiff alleges that Defendants sent Plaintiff Rosario Gangi disclosures on the day of the closing which included a pre-payment penalty. *See* Complaint, para. 136. "The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is, of course, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof." *Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 98 (1st Dept 2003).

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In the context of a motion to dismiss under CPLR 3211, a plaintiff need only provide "a particularized factual assertion which support the inference of scienter." *Id.* We can certainly infer from the fact that Defendant WBL stated on the HUD-1 there would be no pre-payment penalty, when in fact there would be a pre-payment penalty, that Defendant WBL was aware of the misrepresentation. Therefore, Plaintiff has sufficiently pled that Defendants had knowledge of the misrepresentation in order to defeat the motion to dismiss.

Third, Plaintiff has sufficiently pled that Defendants made the misrepresentation with the intent to induce her reliance on the misrepresentation. In the Complaint, Plaintiff alleged that Defendants intended for her to rely on the HUD-1 because its agent told Plaintiff there was no pre-payment penalty. *See* Complaint, para. 137. Defendants made these representations in order to induce Ms. Thiesen to sign the loan. She specifically states in her affidavit, had she known about the prepayment penalty, she would not have signed the loan. So, the defendants intended reliance in order to close the loan. Had defendants wanted to disclose the prepayment penalty to Ms. Thiesen, they simply could have given her either the disclosures, or a copy of the note.

Fourth, Plaintiff has sufficiently pled her justifiable reliance on Defendants' misrepresentation. In paragraph 138 of the Complaint, Plaintiff alleges that "it was reasonable for [her] to rely on the HUD-1 because WBL agent, Anne Rougier, told her" there would be no pre-payment penalty. In determining whether justifiable reliance is sufficiently alleged, courts consider two factors: "first, the existence of a relationship of trust or confidence and second, the superior knowledge or means of knowledge on the part of the person making the representation." *Epiphany Community Nursery Sch.*, supra at 9-10. However, "whether plaintiff's reliance was justifiable generally raises factual issues inappropriate for resolution on a motion to dismiss." *Id.* at 10 (internal citations omitted).

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In the instant matter, there existed a relationship of trust between Plaintiff and Defendant WBL and its agent. Plaintiff trusted Anne Rougier's statement as an agent of WBL and, further, Plaintiff trusted that the HUD-1 document was correct in stating that there would be no pre-payment penalty. Moreover, Defendant WBL had superior knowledge of the terms of the mortgage documents as it drafted the agreements and had sole control over the terms. As discussed above, Plaintiff was not represented by counsel and was never given a copy of the note or the disclosures for review prior to signing the mortgage documents. Therefore, Defendants' argument that Plaintiff could not have justifiably relied on the HUD-1 when she and her counsel reviewed the note and other documents is wholly incorrect.

Lastly, Plaintiff has sufficiently pled that she suffered damages as a result of Defendants' fraud. She alleges, in the Complaint, that she has suffered damages in the form of a pending foreclosure and possible loss of her equity in the 1002 Bay Ridge Avenue property. *See* Complaint, para. 140. Based on the foregoing, Plaintiff Josephine Theisen has sufficiently pled her claim of fraud to defeat Defendants' instant motion to dismiss pursuant to CPLR 3211(a)(7).

THE MOTIONS TO DISMISS THE AFFIRMATIVE DEFENSES MUST BE DENIED

While a party may move to dismiss an affirmative defense, the party seeking to dismiss the affirmative defense bears the burden of proving that the affirmative defense is without merit as a matter of law. *Galasso, Langione & Botter v. Liotti*, 81 AD3d 880, 882 (2nd Dept. 2011). When determining a motion to dismiss an affirmative defense, the Court must liberally construe the pleadings in favor of the party asserting the defense and give the party the benefit of every reasonable inference. *Courthouse Corporate Ctr. LLC v. Schulman*, 74 AD3d 725, 727 (2nd Dept. 2010). If there is any doubt as to the availability of a defense, it should not be dismissed. *Federici v. Metropolis Night Club*, 48 AD3d 741, 743 (2nd Dept. 2008).

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1. The Dismissal of the Affirmative Defense of Usury is Not Collaterally Estopped by the Dismissal, with Prejudice, of the Counterclaim of Usury

WBL and AXOS alleging that the dismissal of the counterclaim of usury bars the affirmative defense of usury is not in accord with its own arguments made on August 7, 2020. For ease of reference, "It is well-established that there is no cause of action in New York for criminal usury under Pen. L. § 190.40. See *Am. Express Nat'l Bank v. Evelt, Inc*., 2019 N.Y. Slip Op. 31521(U), ¶ 4 (N.Y. Co. Sup. Ct. May 30, 2019) (quoting *Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc*., 252 F. Supp. 3d 274, 279-80 (S.D.N.Y. 2017)) ("A corporation can assert criminal ***usury as a defense***, but it cannot bring civil claims under the criminal statute.") (internal quotation marks and alterations omitted); *Wilkinson Floor Covering, Inc. v. Cap Call, LLC*, 2018 N.Y. Slip Op. 50709(U), ¶ 3, 59 Misc. 3d 1226(A) (N.Y. Co. Sup. Ct. May 16, 2018) ("Penal Law § 190.40, for criminal usury, **does not state a cause of action** for civil liability.") (citing *Scantek Med., Inc v Sabella*, 582 F. Supp. 2d 472, 474 (S.D.N.Y. 2008)). Instead, in a civil action**, criminal usury only can be asserted as an affirmative defense** to an action to recover money due under a loan. Id.; see *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 2017 N.Y. Slip Op. 27166, ¶ 4, 56 Misc. 3d 807, 815 (Westchester Co. Sup. Ct. May 4, 2017) Citing *Intima-Eighteen, Inc. v. A.H. Schreiber Co.*, 172 A.D.2d 456, 457-58 (1st Dept. 1991) ("It has long been settled in this state **that criminal usury may only be asserted as a defense** by a corporation, and never as a means to seek affirmative relief.") Therefore, since the Gangis, Theisen and Gangi Plumbing assert usury as an affirmative defense (not a counterclaim), the prior stipulation regarding usury as a counterclaim, has no collateral estoppel effect on the affirmative defense of usury.

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2. The Affirmative Defense of Failure to Mitigate is Adequately Pleaded

The most troubling aspect of this entire case is that WBL and AXOS refused to be paid in full on the loan; repeatedly. WBL was more interested in assessing a non-disclosed pre-payment penalty and attorneys' fees that did not need to be incurred. For further details about the negotiations, please refer to the affidavits of Josephine Theisen and Anthony Ferrara, III. Even assuming AXOS and WBL met its initial burden on the mitigation issue, the evidence submitted questions fact abound as to why WBL and AXOS were more interested in litigating than making a fair deal.

CONCLUSION

For the foregoing reasons, this Court should deny WBL and AXOS's Motion in its entirety, and issue such other, further and different relief that this Court deems just and proper.

Dated: April 15, 2021
New York, New York

/s/ Adam J. Roth
Law Offices of Adam J. Roth
Attorneys for GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI
112 Madison Avenue, 6th Floor
New York, New York 10016
212-922-3741
212-253-4157
ajr@loajr.com

Defendants' Memorandum of Law in Further Support of Motion to Dismiss, dated May 17, 2021

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC. d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE THEISEN and LEONORA GANGI,

Index No.: 500481/2021
(Knipel, J.S.C.)

Plaintiffs,

-against-

WORLD BUSINESS LENDERS, AXOS BANK f/k/a BOFI FEDERAL BANK, NEW YORK TRIBECA GROUP and LARRY SHUSTER,

Defendants.

----------X

DEFENDANTS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

CARTER LEDYARD & MILBURN LLP
Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com / nemon@clm.com

Attorneys for Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

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Axos has moved to dismiss the Gangi Parties' counterclaims and affirmative defenses in the First Action, and Axos and WBL ("Movants") have moved to dismiss the claims in the Second Action (the "Motion)."[1] The Gangi Parties did not oppose Axos's Motion with respect to the First Action, and their papers with respect to the Second Action merely bolster Axos's and WBL's argument that the Gangi Parties have no claim under GBL § 349 or for fraud in the inducement. As a result, the Court should grant the Motion.[2]

ARGUMENT

POINT I
THE GBL § 349(H) CLAIM SHOULD BE DISMISSED

A. No "Consumer-Oriented" Conduct

1. The Gangi Parties Are Not "Consumers"

Movants demonstrated that the GBL § 349 claim is barred by documentary evidence, which demonstrates they did not engage in consumer-oriented conduct, an essential element of the claim. MOL Supp. 13-18; *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 10 (2020). The Gangi Parties admit that the loan was made to Plumbing, a corporation, strictly for business (and not personal, household or family) purposes. MOL Opp. at 2, 5; Affirmation of Arthur Aidala (DN26) ("Aidala Aff.") (confirming that Rosario advised him that "GANGI PLUMBING needed the AXOS loan proceeds to continue to operate his business …," and "he and his sister [Josephine] owned the property [at 1002 Bay Ridge Avenue] and that both were agreeable to pledge the collateral for the

[1] Capitalized terms not defined herein have the same definition as in the Memorandum of Law in Support (DN17) ("MOL Supp.").

[2] The Court should carefully scrutinize the affidavits submitted by the Gangi Parties (DN24-27), because in many respects they contradict or undermine the Gangi Parties' arguments made in the Memorandum of Law in Opposition (DN 33) ("MOL Opp."). For example, MOL Opp. at 8-9 and 12-14 repeatedly refers to Ann Rougier, the notary who appeared at the closing of the First Mortgage, as Movant's agent, but Ms. Rougier's affidavit states unequivocally that she "never worked for World Business Lenders [or] Axos Bank," but instead for a "third party." Affidavit of Ann Rougier (DN 24) ("Rougier Aff") ¶¶ 1-2.

AXOS loan."). This is consistent with the Loan Documents. Malyshev Aff., Exhs. 1-A and 1-D ¶ 8(b) ("[T]he proceeds of this Loan Agreement will be used for business purposes only, and not for personal, consumer, family or household purposes or to purchase personal, consumer, family or household goods. …"). It is undisputed that the loan proceeds were disbursed into a business account, not a personal account. Consequently, the Gangi Parties are not "consumers" within the meaning of the statute. *See Med. Soc'y of State of New York v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st Dept. 2005) (consumers are "those who purchase goods and services for personal, family or household use.").

2. Movants Did Not Engage in a Consumer-Oriented Marketing Campaign

The Gangi Parties argue conduct may nevertheless be consumer-oriented "where it involved an extensive marketing scheme, where it involved the multi-media dissemination of information to the public, and where it constituted a standard or routine practice[.]" MOL Opp. at 4, *quoting N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 12 (2d Dept. 2012). They omit the portion of the quote that goes on to say that such conduct must be "consumer-oriented in the sense that it potentially affected similarly situated consumers." *Id*. This omission is critical since a key issue is whether consumers, rather than businesses, are the targets of the alleged conduct, as shown in various cases relied on by the Gangi Parties.[3] While the Gangi Parties

[3] *See Plavin*, 35 N.Y.3d at 12-13 (consumer-oriented conduct where claims "arose from the allegedly deceptive marketing materials distributed to plaintiff and the other City employees in order to induce them to select the GHI Plan over the other options …"); *N. State Autobahn*, 102 A.D.3d at 13 ("the Progressive defendants engaged in deceptive conduct which misled customers of the plaintiffs and other independent shops into believing that they must have their vehicles repaired at repair shops that were members of" a direct repair program); *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 164 (2d Dept. 2010) (provision appearing in all homeowners' policies was consumer-oriented); *Hobish v. AXA Equitable Life Ins. Co.*, 2018 N.Y. Slip Op. 31531(U), ¶¶ 8-9 (N.Y. Co. Sup. Ct. 2018) ("nation-wide scheme which targeted and raised the COI rates and premiums for the policies insuring 1,700 elderly persons …" was consumer-oriented); *Cyphers v. Litton Loan Servicing, L.L.P.*, 503 F. Supp. 2d 547, 553 (N.D.N.Y. 2007) (servicing "residential mortgage loans" was consumer-oriented). While one case ruled that "the mere fact that [plaintiff] is a business is insufficient to defeat a GBL § 349 claim," the Gangi Parties omitted the critical point that "as a threshold

argue that the "conduct charged in the instant matter is conduct that will heavily affect consumers applying for a loan with Defendants" (MOL Opp. at 4), the argument is contradicted by the actual allegations in this case.

Simply put, neither Axos (the lender) nor WBL (the servicer) are alleged to have engaged in any consumer-oriented marketing. The only solicitation alleged in the Gangi Complaint was by NYTG, specifically for a business (not consumer) loan. *See* Gangi Compl. ¶¶ 60-61 (Rosario received "a fax for a pre-approved business loan" from NYTG). There is no indication that NYTG sent the fax to consumers rather than business owners, and the fax is not alleged to have been sent or authorized by the Movants. To the contrary, Rosario and NYTG sought to place the loan *with* WBL. *Id.* ¶¶ 63, 65. The Gangi Parties allege no instances in which WBL or Axos solicited "consumers" (let alone accepted applications for consumer loans) or identify a single "consumer" sold a loan that was "doomed to fail."[4]

3. This is a Private Contract Dispute with Parties Advised by Counsel

Separately, the GBL § 349 claim fails because the Gangi Parties, advised by counsel, entered into a negotiated contract with Axos. Here, two related contracts were negotiated between Axos and the Gangi Parties, resulting in two loans to Plumbing. With respect to the First Loan,

matter, [for plaintiff] to claim the benefit of section 349, it must charge conduct of the defendant that is consumer oriented." *Freefall Express, Inc. v. Hudson River Park Tr.*, 16 Misc. 3d 1135(A) (N.Y. Co. Sup. Ct. 2007).

[4] *Citipostal, Inc. v. Unistar Leasing*, 283 A.D.2d 916, 918 (4th Dept. 2001), a case relied on by the Gangi Parties, dismissed a GBL § 349 claim where "[t]he acts complained of are limited to business rather than consumer leases, and the conduct complained of cannot carry over to consumer transactions." Here, Movants are alleged to provide "business loan[s]" and "capital to build [] businesses" (Gangi Compl. ¶ 23, 40), which has no "carry over" to consumer transactions since there is no allegation that such loans are advertised to or can be obtained by non-businesses. Similarly, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995), found consumer-oriented conduct where "Bank dealt with plaintiffs' representative as any customer entering the bank to open a savings account, furnishing the Funds with standard documents presented to customers upon the opening of accounts." In MOL Opp. at 6, the Gangi Parties argue Axos and WBL "dealt with [them] as they would any customer applying for a loan" by providing "standard documents," but allege nowhere that Movants furnished the same standard documents *to consumers*.

the Gangi Parties were represented by Mr. Aidala, who furnished an Opinion Letter that confirmed he reviewed the First Note, Mortgage and Guaranty for compliance with applicable state and federal laws and opined as to their enforceability. Aidala Aff. ¶¶ 6, 9; Exh. 1 at ¶¶ I-IV. The Opinion Letter also confirmed that Mr. Aidala had conferred with both Rosario *and Josephine* (*id.* ¶ 7), and in his affirmation, he states that Rosario informed him that he and his sister Josephine were in agreement. Aidala Aff. ¶ 7.[5]

Therefore, this is a private contract dispute, unique to the parties, that falls outside the ambit of GBL § 349. *See Oswego*, 85 N.Y.2d at 24; *Haygood v. Prince Holdings 2012 LLC*, 186 A.D.3d 1157, 1158 (1st Dept. 2020) (dismissing "a private dispute between one landlord and one tenant [that] does not concern consumer-oriented conduct aimed at the public at large."); *Wells Fargo Bank, N.A. v. Vanderkamp*, 2014 N.Y. Slip Op. 51557(U), ¶¶ 4-5 (Suffolk Co. Sup. Ct. 2014) ("The complaint and the Vanderkamp affidavit clearly and with great factual detail describe a series of events and exchanges solely between the parties, as distinguished from the 'consuming public.").

B. No Materially Misleading Conduct

***1.* The HUD-1 Statement**

The Gangi Parties argue the alleged failure to disclose the prepayment premium in the HUD-1 statement for the First Mortgage (despite no dispute that it was disclosed in First Note ¶ 4 and Prepayment Disclosure) constituted materially misleading conduct. MOL Opp. at 8. As the

[5] Mr. Aidala is a highly-sophisticated attorney with 30 years of experience, who co-lectured with Justice Antonin Scalia and Professor Alan Dershowitz. *See* https://aidalalaw.com/arthur-l-aidala-esq/. His averments that he did not communicate with Josephine, or review the business terms of the loan, despite representing in the Opinion Letter that he had done both, raises questions about how Mr. Aidala could have made false statements intended to be relied on by Axos. *See Remediation Capital Funding LLC v. Noto*, 147 A.D.3d 469, 470 (1st Dept. 2017) (sophisticated lender stated claim for fraud against borrower's attorney who made misrepresentations in opinion letter, even where lender did not make its own inquiries).

Gangi Parties admit, this argument is applicable solely to Josephine. *Id.* No other misleading conduct is alleged.

There was no misrepresentation on the part of the lender, Axos, or the servicer, WBL, because the prepayment premium was disclosed in the First Note and Prepayment Disclosure. Malyshev Aff., Exh. 1-A. Josephine was at least on inquiry notice of the prepayment premium because the First Mortgage and Addendum to Mortgage she admittedly signed referenced and secured all obligations under the First Note. *See* Affidavit of Josephine Theisen (DN25) ("Josephine Aff.") ¶ 5 (admitting she "signed several documents, including a mortgage, addendum to mortgage …"); Malyshev Aff., Exh. 1-C at 9-10 and Addendum to Mortgage. Under well-established contract principles, Josephine was bound by these terms because she was on inquiry notice of them. *See Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 548 (S.D.N.Y. 2018). Similarly, such discoverable contractual terms cannot serve the basis for a GBL § 349 claim. *See Oswego*, 85 N.Y.2d at 27 (no liability where plaintiffs "possessed *or could reasonably have obtained* the relevant information they now claim the Bank failed to provide") (emphasis supplied); *Valle v. Popular Cmty. Bank*, 2014 N.Y. Slip Op. 32180(U), ¶ 31 (N.Y. Co. Sup. Ct. Aug. 14, 2014) ("since the May 31, 2010 account statement referred to the brochure, BPNAs failure to enclose the disclosure with the statement does not constitute a deceptive act, as Plaintiffs could have obtained the information by simply requesting the brochure from BPNA").

Contrary to the Gangi Parties' argument, *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (2012), does not save Josephine's claim. There, a wine auctioneer sold counterfeit wines but claimed it was absolved of liability by "as is" disclaimers in its auction catalogs. *Koch v. Acker, Merrall & Condit Co.*, 73 A.D.3d 661, 661 (1st Dept. 2010). The Court of Appeals found the disclaimers insufficient to defeat the allegations of misrepresentation at the motion to dismiss

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stage. 18 N.Y.3d at 941. Unlike *Koch*, where the plaintiffs could not ascertain in advance whether the wine was authentic and relied on the auctioneer's representations, Josephine knew the First Mortgage secured all liability for the First Note and could have reviewed it in advanced of executing the First Mortgage by asking for it. *See Amalfitano v. NBTY, Inc.*, 128 A.D.3d 743, 745 (2d Dept. 2016) ("the defendants demonstrated, prima facie, that the subject promotion was not materially deceptive, in light of the disclaimer language").

Similarly, *Relativity Travel, Ltd. v. JP Morgan Chase Bank*, 2006 N.Y. Slip Op. 51926(U), ¶¶ 3-4 (N.Y. Co. Sup. Ct. 2006), is inapposite. That case was a consumer credit card dispute, where plaintiffs had alleged that Chase's conduct was misleading where it buried a 3.5% foreign transaction fee in an account agreement but did not disclose the fee on its website or through its customer service agents, which only mentioned a flat $3 charge. Unlike *Relativity Travel*, Josephine's execution of the First Mortgage as part of a one-off business transaction specifically contemplated that she would review and accept the terms of the First Note, in which the prepayment premium was prominently disclosed on the front page. This was not some minor, infrequent fee buried in the document, but part of the essential terms that even Josephine herself claims was material. Josephine Aff. ¶ 10; *see Simmons v. Ambit Energy Holdings, LLC*, 2016 N.Y. Slip Op. 32107(U), ¶¶ 11-12 (Kings Co. Sup. Ct. 2016) (no materially misleading conduct alleged where rate change terms were "unambiguously disclosed").

Moreover, unlike *Relativity Travel*, it cannot be said that not providing this information to mortgagors is part of the Movants' overall business practices (especially since the premium was prominently disclosed in many of the Loan Documents). The alleged failure to disclose the existence of the prepayment premium on the HUD-1 statement for the First Mortgage (Josephine Aff. ¶¶ 6-10) was the mistake of WWLT, a third-party title company. *See* Malyshev Aff., Exh. 4-

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1 (HUD-1 statement indicates its preparation by WWLT). The notary affidavit supplied by the Gangi Parties states that she "never directly worked for [WBL] or Axos Bank," but instead "work[s] for a third party who assigns me to notarize signatures for transactions." Rougier Aff. ¶¶ 1-2. She states it is her practice not to make representations concerning loan terms, but to tell signing parties "to speak to their representatives" (which is what the HUD-1 itself directs them to do) or "review the documents." *Id.* ¶¶ 6-7. As noted above those documents (including the Mortgage and Addendum to Mortgage) pointed to the Note, which specifically disclosed the prepayment premium, and there is no allegation that Josephine ever tried to contact Axos (the lender) or WBL (the servicer).[6]

2. **The "Doomed to Fail" Theory**

The Motion thoroughly debunked the Gangi Parties' "doomed to fail" theory and demonstrated that:

(i) It is not cognizable under GBL § 349. Banking Law § 6-l is the only New York statute that requires a heightened degree of diligence by a lender and does not apply to business loans like the Notes. Banking L. § 6-l(e); *HSBC Bank USA, N.A. v. Campos*, 2017 N.Y. Slip Op. 50695(U), ¶¶ 4-6 (Queens Co. Sup. Ct. May 15, 2017).

(ii) The sole case the Gangi Parties rely on, *Kaur v. World Bus. Lenders, LLC*, 440 F. Supp. 3d 111, 124-25 (D. Mass. 2020), does not apply GBL § 349. Instead, it applies Mass. Gen. L. ch. 93A, a consumer-protection statute that New York courts have repeatedly held does not apply to claims arising in New York. *See, e.g., Obstfeld v. Thermo Niton Analyzers, LLC*, 168 A.D.3d 1080, 1085 (2d Dept. 2019).

[6] The Gangi Parties admit a WBL representative was available by phone during the closing. Gangi Compl. ¶¶ 78-79.

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In opposition, the Gangi Parties frivolously cite the *Kaur* decision, suggesting that it is a case that decided a GBL § 349 claim against WBL, without so much as grappling with the fact that it applied a unique Massachusetts statute that is totally inapposite. MOL Opp. at 10. Accordingly, the GBL § 349 claim should be dismissed.

POINT II
THE FRAUDULENT INDUCEMENT CLAIM SHOULD BE DISMISSED

The Court should dismiss Josephine's fraudulent inducement claim, which is based on the HUD-1 statement provided in connection with the First Mortgage. *See* MOL Supp. 24-30. Movants demonstrated that this claim is not viable, and Josephine's opposition does not save her claim.

First, Josephine argues, "Ann Rougier, *Defendant WBL's agent*, explicitly told Plaintiff there would be no pre-payment penalty." MOL Opp. at 12 (emphasis supplied). This is contradicted by Ms. Rougier's actual affidavit, which states she has no recollection of the loan whatsoever, but would have told Josephine to consult the lender with any questions at the closing. Rougier Aff. ¶¶ 6-7. This is consistent with the direction in the HUD-1, which directed Josephine to "contact [her] lender" if she had "any questions about the Settlement Charges and Loan Terms listed on this form[.]" Roth Aff., Exh. 1. Josephine did not do so. Josephine cannot save that claim by arguing that Rougier was Movants' agent, as she does not identify any "words or conduct of the principal, communicated to a third party [Josephine], that give rise to the appearance and belief that the [Ms. Rougier] possesses authority." *Bowers v. Merchs. Mut. Ins. Co.*, 248 A.D.2d 1005, 1006 (4th Dept. 1998). Mr. Rougier herself disclaims any agency, stating she "never directly worked for [WBL] or Axos Bank," but instead for a "third party." Rougier Aff. ¶¶ 1-2.

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Simply arranging for a notary does not confer apparent authority to make substantive representations chargeable to the Movants.

Second, Josephine argues she pled the element of "justifiable reliance" by claiming a "relationship of trust and confidence" and "superior knowledge" with WBL. MOL Opp. at 13 (quoting *Epiphany Cmty. Nursery Sch. v. Levey*, 171 A.D.3d 1, 9 (1st Dept. 2019)). The Loan Documents disclaim any such relationship. Specifically, the First Mortgage expressly provides, "[t]he relationship between Borrower and Grantor and Lender created by this Mortgage is strictly a debtor and creditor relationship and not fiduciary in nature." Malyshev Aff., Exh. 1-C at 9. Nor does Josephine meet the test she articulates because there is no relationship of trust in an arm's length commercial transaction where a party "with the exercise of ordinary diligence, could have protected itself through due diligence concerning the transaction." *Rapaport v. Strategic Fin. Sols., LLC*, 190 A.D.3d 657, 657-58 (1st Dept. 2021) (no issue of fact concerning justifiable reliance where party did not perform its own due diligence); *see Residential Bd. of Managers of Fifth Ave. TowerCondominium v. Sumner*, 2020 N.Y. Slip Op. 31802(U), ¶ 13 (N.Y. Co. Sup. Ct. 2020) ("a party cannot establish justifiable reliance if, in an arms-length transaction it failed to make use of the means of verification available to it."); *compare Epiphany Cmty. Sch.*, 171 A.D.3d at 6 (justifiable reliance against director based on his fiduciary duties).

Josephine argues she was "was not represented by counsel and was never given a copy of the note or the disclosures for review prior to signing the mortgage documents." MOL Opp. at 14. While this contradicts the Opinion Letter furnished by the Gangi Parties' counsel, even if true, she still failed to plead justifiable reliance where she was clearly on inquiry notice concerning the First Note based on her admitted execution of the First Mortgage and Addendum to Mortgage referencing it. Point I(b)(1), *supra*; *see Miller v. Icon Grp. LLC*, 77 A.D.3d 586, 587-88 (1st Dept.

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2010) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on the other party's misrepresentations[.]"). Josephine was under an obligation to read the First Mortgage and documents referenced therein (including the First Note), "and cannot generally avoid the effect of the document on the ground that … she did not read it or know its contents." *Financial Servs. Veh. Trust v. Saad*, 98 A.D.3d 1077, 1078 (2d Dept. 2012). There is no allegation that she actually requested those documents (let alone that Movants in any way prevented her from obtaining them).

Finally, Josephine argues she "sufficiently pled that Defendants knew the representation on the HUD-1 was false." MOL Opp. at 12. However, there is no specific allegation that Movants ever reviewed the HUD-1 statement, which was prepared by WWLT (Malyshev Aff., Exh. 4-A), before it was presented to Josephine at the closing. Josephine, in fact, claims she was never provided any documents by Movants prior to the closing. Josephine Aff. ¶ 4. More importantly, however, Josephine fails to present any argument for what motive Axos or WBL would have for approving an erroneous HUD-1 statement, where the information was clearly disclosed in other documents Axos, or its servicer, WBL, *actually prepared* and provided to the borrower. The Court need not credit Josephine's incredible argument. *See Kalnit v. Eichler*, 264 F.3d 131, 141–42 (2d Cir. 2001) (holding that "[w]here plaintiff's view of the facts defies economic reason … [it] does not yield a reasonable inference of fraudulent intent") (quotation omitted). In short, Josephine fails to allege "a particularized factual assertion which support[s] the inference of scienter." MOL Opp. at 13 (quoting *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 98 (1st Dept. 2003)).

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POINT III
THE AFFIRMATIVE DEFENSES IN THE FIRST ACTION SHOULD BE DISMISSED

The Gangi Parties' Affirmative Defenses, interposed in the First Action, should be dismissed as unopposed. The parties' stipulation consolidating the actions did not shift the affirmative defenses into the Second Action (*see* Malyshev, Exh. 5 ¶ 2), and the Gangi Parties filed no opposition in the First Action. Those defenses should be dismissed for the reasons set forth at MOL Supp. at 30-34.

In opposition, the Gangi Parties only argue in support of two of their Affirmative Defenses: (1) usury and (2) failure to mitigate. As a result, at the very least, the First, Third, Fourth and Fifth Affirmative Defenses should be dismissed as unopposed. Even with respect to the two defenses for which they do oppose, these arguments fail.

First, the Gangi Parties *twice* stipulated to discontinue their affirmative usury claim, including a second discontinuance with prejudice. Malyshev Aff., Exhs. 8 and 11. While it is generally true that criminal usury can only be asserted as a defense, not as an affirmative claim (*Paycation Travel v. Glob. Merch. Cash*, 2021 N.Y. Slip Op. 01782, ¶ 1 (2d Dept. 2021)), under New York's transactional approach to *res judicata*, the Gangi Parties cannot assert the defense after their affirmative usury claims have been discontinued with prejudice. *See 5512 OEAAJB Corp. v. Hamilton Ins. Co.*, 189 A.D.3d 1136, 1139 (2d Dept. 2020) ("The doctrine of res judicata bars the litigation of a claim *or defense* if, in a former litigation between the parties, or those in privity with them, in which there was a final conclusion, the subject matter and the causes

of action are identical or substantially identical.") (emphasis supplied; quotation marks and citation omitted).[7]

Second, the Gangi Parties' failure to mitigate damages defense fails. They claim "WBL and AXOS refused to be paid in full on the loan" (MOL Opp. at 16), but admit their offer did not include the pre-payment premium. Josephine Aff. ¶ 20. This, at worst, constitutes an inadmissible rejection of a settlement offer since the amount owed was in dispute. CPLR § 4547; *Fontaine v. Matthews*, 25 A.D.3d 477, 478 (1st Dept. 2006) (rejected settlement offer inadmissible). This rule squarely applies to the defense. *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 826-27 (2d Cir. 1992) ("Evidence that demonstrates a failure to mitigate damages goes to the 'amount' of the claim and thus, if the offer was made in the course of compromise negotiations, it is barred under the plain language of Rule 408."). Simply put, Axos cannot be liable for failure to mitigate by insisting on being paid what it is contractually owed. *See generally Wells Fargo Bank, N.A. v. Tellock*, 2019 N.Y. Slip Op. 31642(U), ¶ 4 (N.Y. Co. Sup. Ct. June 3, 2019) ("The Court will not force plaintiff to take less than it is owed simply because Defendant thinks that is a fair agreement.").

[7] In any event, the Gangi Parties do not actually dispute that the affirmative defense is preempted by federal law. It is undisputed that the loan from Axos was given by a federal savings association located in Nevada, and therefore is subject to Nevada law, which has no maximum rate of interest. *See* Malyshev Aff., Exh. 9, at 10-16.

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CONCLUSION

Movants respectfully request that this Court grant the Motion in its entirety.

Dated: May 17, 2021

CARTER LEDYARD & MILBURN LLP

By: *__/s/ Alexander G. Malyshev_____*

Alexander G. Malyshev
Jacob H. Nemon
2 Wall Street
New York, New York 10005
T. (212) 732-3200
F. (212) 732-3232
E. malyshev@clm.com/ nemon@clm.com

Attorneys for Defendants Axos Bank f/k/a B-of-I Federal Bank and World Business Lenders LLC

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RULE 202.8-B CERTIFICATION

I certify that the number of words in this reply memorandum of law comply with the Rule 202.8-b of this Court. This memorandum of law, excluding the caption, tables and signature block, contains 4,041 words.

Dated: May 17, 2021

/s/ *Alexander G. Malyshev*
Alexander G. Malyshev

CERTIFICATION PURSUANT TO CPLR § 2105

I, Scott L. Lanin, a member of the firm of Lanin Law, P.C., attorneys for Plaintiff-Appellant, hereby certify pursuant to § 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the clerk of the Supreme Court, County of Kings.

Dated: April 13, 2022

Lanin Law, P.C.

By:

Scott L. Lanin

Attorneys for Plaintiff-Appellant

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[89594]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS: **AFFIDAVIT OF SERVICE**

Giovanni Feliciano, being duly sworn, deposes and says: I am not a party to the action, and I am over 18 years of age.

On the 14th day of April 2022, I served 1 true copy of the within

RECORD ON APPEAL

upon the attorneys at the addresses indicated below, by the following method(s):

Contact	Firm	Address + Email Address	Delivery Method
Jacob H. Nemon Alexander G. Malyshev	Carter Ledyard & Milburn LLP *Attorneys for Defendants-Respondents World Business Lenders and Axos Bank f/k/a Bofi Federal Bank*	Two Wall Street New York, New York 10005 (212) 732-3200 nemon@clm.com malyshev@clm.com	NYSCEF

Sworn to me this:
April 14, 2022

Nadia R. Oswald-Hamid
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings
Commission Expires November 10, 2023

Giovanni Feliciano

Case Name: Michael Gangi Plumbing v. World Business Lender
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