COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	EFILED Document CO Court of Appeals 12CA1130 Filing Date: Dec 21 2012 02:12PM MST Transaction ID: 48558463
District Court, City and County of Denver Hon. EDWARD D. BRONFIN, Judge Hon. BRIAN WHITNEY, Judge Case No. 2010CV8380	▲ **COURT USE ONLY** ▲
OASIS LEGAL FINANCE GROUP, LLC; OASIS LEGAL FINANCE, LLC; OASIS LEGAL FINANCE OPERATING COMPANY, LLC; and PLAINTIFF FUNDING HOLDING, INC., d/b/a LAWCASH, Plaintiffs-Appellants, v. JOHN W. SUTHERS, in his capacity as Attorney General of the State of Colorado, and LAURA E. UDIS, in her capacity as the Administrator, Uniform Consumer Credit Code, Defendants-Appellees.	Case No. 2012CA1130
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APPELLEES' ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p. _____), not to an entire document, where the issue was raised and ruled on.

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s/ Paul Chessin

Signature of attorney or party

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INTRODUCTION

> "[W]here the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute [of usury]." *Floyer v. Edwards*, 1 Cowp. 112, 114-115, 98 Eng. Rep. 995, 996 (K.B. 1774) (Mansfield, L.).

For centuries, some money lenders, intent on exacting excessive interest from needy borrowers, have disguised their loans so as not to "look" like loans. One oft-used device involves disguising the loan as the "purchase" of the borrower's asset. This device has taken many forms, including: salary buying and wage assignments, *see Martin v. Pacific Mills*, 158 S.E. 831 (S.C. 1931); *Jackson v. Bloodworth*, 152 S.E. 289 (Ga. Ct. App. 1930); sale/leasebacks, *see Reitze v. Humphreys*, 53 Colo. 177, 125 P. 518 (1912); *Browner v. Dist. of Columbia*, 549 A.2d 1107 (D.C. 1988); pawns, *see Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261 (9th Cir. 1993); *Wiley v. Earl's Pawn & Jewelry, Inc.*, 950 F.Supp. 1108 (S.D. Ala. 1997); and myriad other artifices limited only by the lender's ingenuity, *see Crosby v. Gateway Motel, Inc.*, 163 Colo. 384, 431 P.2d 23 (1967) (stock "sale"); *Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co.*, 37 Colo. 96, 86 P. 94 (1906) ("absolute deed").

The courts, vigilant to such schemes, pierce the veils of form to

give effect to substance:

> "The cupidity of lenders . . . have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered."

Hurt v. Crystal Ice & Cold Storage Co., 286 S.W. 1055, 1056-1057 (Ky. 1926).

Involved here is a recent variant on this age-old theme: disguising the loan as the "purchase" of anticipated proceeds from a consumer's personal injury claim. Commonly called litigation advances, or "lawsuit lending," this industry "arose over the last decade," Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. Times, January 17, 2011, at A1 (http://www.nytimes.com/2011/01/17/business/17lawsuit.html?_r=1&emc=eta1); and now lends over $1 billion. *See* N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, *Formal Op. 2011-2* (2011).

A decade ago, in *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161 (Colo. 2001), the supreme court considered a substantively identical transaction. There, the lender purportedly "purchased"

consumers' anticipated income tax refunds. Despite the transactions' form, the court held they were loans under Colorado's Uniform Consumer Credit Code, § 5-1-101, *et seq.*, C.R.S. 2012 (Code).

Cash Now controls.

STATEMENT OF THE CASE

Course of Proceedings

In July 2010, the Administrator, through her investigation of an unrelated company, learned that appellants – Oasis Legal Finance Group, LLC, Oasis Legal Finance, LLC, Oasis Legal Finance Operating Company, LLC (collectively Oasis), and Plaintiff Funding Holding, Inc., d/b/a LawCash (LawCash) – made litigation advances in Colorado (ID36528910, Affidavit of Laura E. Udis (Udis Aff. I), CD p. 181 ¶3; ID38275135, Affidavit of Laura E. Udis (Udis Aff. II), CD p. 616 ¶2). She began investigating appellants' Colorado activities (Udis Aff. I, CD p. 181 ¶3; Udis Aff. II, CD pp. 616-617 ¶¶2-4, Exs. 1-4, CD pp. 618-623).

From the information she obtained, the Administrator concluded and advised appellants that they made loans in violation of the Code (Udis Aff. II, CD p. 617 ¶¶5, 6, Exs. 5, 6, CD pp. 624-645). Appellants then sued her and the Attorney General (collectively the State). As

here pertinent, they brought a claim to declare that their transactions were not "loans" under the Code (ID33949582, Complaint for Declaratory Judgment (Complaint), CD pp. 6-7 ¶31; ID 35035161, Amended and Supplemental Complaint for Declaratory Judgment (Amended Complaint), CD p. 74 ¶34).

The State moved for summary judgment dismissing this claim (ID36528910, Defs.' Mot. for Partial Summ. J., CD p. 176 ¶1). It argued that the transactions were loans as a matter of law (*id.*, Defs.' Mem. of Law (Mem.), CD pp. 273-300).

The district court agreed. It held that "under the [Code's] plain language" and "according to *Cash Now* and the [Code's] official comment . . . the transactions are 'loans' governed by the [Code]" (ID40076863, Order, CD p. 696). Via a successor judge, it certified and entered final judgment dismissing the claim, with prejudice (ID43647630, Order for Entry of Final Judgment, CD p. 1295 ¶5; *see also* ID40464224, Defs.' Mot. for Rule 54(b) Certification, CD pp. 703-709; ID40701165, Plaintiffs' Response in Opposition, CD pp. 735-741; ID41172251, Order, CD pp. 1405, 1412 (denying certification); April 2, 2012, transcript, pp. 186 l.13 – 192 l.19; April 3, 2012, transcript, pp.

331 l.5 – 347 l.5 (successor judge *sua sponte* revisiting certification), April 12, 2012, transcript, pp. 1 l.20 – 6 l.21 (appellants' acquiescence)).

This appeal followed.

Statement of Facts

Appellants provide "non-recourse pre-settlement funding" to individuals with "pending personal injury claims" (Complaint, CD p. 3 ¶7; *see* Udis Aff. I, Ex. 3, CD p. 236 (Oasis website terming transactions "Pre-Settlement Funding"); Udis Aff. I, Ex. 4, ID36531865, CD p. 319 (LawCash website stating LawCash provides "non-recourse pre-settlement funding" (emphasis omitted)); *id.*, CD pp. 339-342 (describing various pre-settlement funding types). They engage in the "non-recourse purchase of a right to a portion of the proceeds of a potential future case award or settlement" (Complaint, CD p. 3 ¶8; *see* Udis Aff. I, Ex. 3, CD p. 233 (Oasis website describing transaction as "non-recourse purchase of a portion of the proceeds of a potential future case award or settlement"); *id.*, Ex. 4, CD p. 311 (LawCash "places a lien on a portion of the future proceeds of the lawsuit")).

As they said below, they "purchase" the "right to receive a portion of the proceeds of a chose in action" (ID37407971, Plaintiffs' Response

in Opposition (Response), CD p. 355; *id.*, CD pp. 357, 362-365, 377, 380-390 (they "purchase" "choses in action")). Now, they say they buy "interests in the potential proceeds of a [consumer's] pending litigation" (Appellants' Opening Brief (O.Br.), p. 1).[1]

Once the consumer's claim settles, appellants are repaid their advance plus additional amounts. These additional amounts include "multipliers" of the amount advanced (Complaint, CD p. 3 ¶10). Oasis's multiplier "increases with the length of time it takes [the consumer's] case to settle" (Udis Aff. I, Ex. 3, Oasis website, CD p. 236). LawCash's "multiplier" is a "monthly use fee" of 3.5% of the amount advanced, compounded monthly (Amended Complaint, Ex. B (LawCash contract),

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[1] Appellants below attempted to redefine their transactions. *See* Mem., CD p. 278 n.3 (comparing Complaint and Amended Complaint and latter's deleting "funding" from and adding "contingent" to allegations). They seek to do so again by using "investment" (*see*, *e.g.*, O.Br. pp. 8, 12, 13, 20, 23, 25, 29). Their changing characterizations do not alter their transactions' substance. Further: although amended, the Complaint remains of record, *see*, *e.g.*, *Penn. R.R. Co. v. City of Girard*, 210 F.2d 437, 440 (6th Cir. 1954) (although superseded by amendment, original pleadings remain in record and are judicially-noticeable admissions); *Cancino v. Yamaha Motor Corp., U.S.A.*, 494 F.Supp.2d 664, 667 (S.D. Ohio 2005) (same); *see also*, *e.g.*, *Raulie v. United States*, 400 F.2d 487, 526 (10th Cir. 1968) (pleading superseded by amendment nevertheless remains competent evidence); and because below they never argued their transactions were "investments," they may not do so now, *see*, *e.g.*, *Hotaling v. Hickenlooper*, 275 P.3d 723, 724 n.1 (Colo. App. 2011) (not considering argument first raised on appeal).

CD p. 97 § 2.1). Its total repayment includes "the application fee, the amount of the advance, and any accrued monthly usage fees" (Udis Aff. I, Ex. 4, LawCash website, CD p. 327).

Expressed as annual percentage rates, the transactions bear interest rates of from 60% to over 200% (Udis Aff. I, CD p. 181 ¶3).[2]

SUMMARY OF ARGUMENT

Appellants advance money. They are repaid their advances, plus additional amounts, at a later date. This is a loan under the Code's and *Cash Now's* plain language. The Administrator, whose conclusions are entitled deference, also so held, as have other courts and regulators. A disguised-loan analysis confirms this conclusion. Although the loans may be nonrecourse, nonrecourse loans are common. Appellants' arguments do not compel a contrary result.

ARGUMENT

Standard of Review

[2] Without record citation, appellants improperly reference their asserted post-summary judgment escrow practices, *see* O.Br. p. 6 and n.3. The Court should strike these references. *See* Order, dated July 30, 2012 (limiting record to summary judgment and Rule 54(b) matters); Joint Stipulated Designation of Record, dated August 8, 2012 (designating only such matters); *see also* Order, dated October 31, 2012 (court will only consider relevant record portions).

The State partially agrees with appellants' review standard (O.Br. p. 10): the contract and statutory interpretation issues involved here are reviewed de novo. *See Cash Now*, 31 P.3d at 164; *see also*, *e.g.*, *Condo v. Conners*, 266 P.3d 1110, 1114 (Colo. 2011) (summary judgment reviewed de novo). The State addresses the deference due the Administrator's interpretations *infra*, pp. 13-17.

I. LITIGATION ADVANCES ARE LOANS UNDER THE CODE; *CASH NOW* CONTROLS

The Code, a remedial consumer protection statute, "shall be liberally construed and applied to promote its underlying purposes and policies." Code § 5-1-102(1). Among these is the protection of consumers "against unfair practices by some suppliers of consumer credit." Code § 5-1-102(2)(d); *see Cash Now*, at 166 (reciting Code's liberal construction, purposes, and policies); *Dikeou v. Dikeou*, 928 P.2d 1286, 1293 (Colo. 1996) (Code protects unsophisticated borrowers from sophisticated lenders).

Code § 5-1-301(25)(a)(I) defines "loan" to include "[t]he creation of debt by the lender's payment of or agreement to pay money to the consumer." The Code's official comment explains that "a creditor creates debt by advancing money to the debtor." 7 Part III *Uniform*

Laws Annot. 410 (2002 Master ed.); *see Cash Now*, at 166 (citing official comment).[3]

The Code's definitions are illustrative. *See Cash Now*, at 166 (Code's "plain language" "indicates that the definition of 'loan' merely includes, but is not limited to," listed examples); *see also*, *e.g.*, *Lyman v. Town of Bow Mar*, 188 Colo. 216, 222, 533 P.2d 1129, 1133 (1975) ("include" ordinarily is "a word of extension or enlargement").

Here, appellants "advance money." *See*, *e.g.*, Amended Complaint Ex. B, CD p. 92 (LawCash contract stating LawCash provides "Non-recourse cash advances"); *id.*, CD p. 96 Recital C ("proceeds advanced to me"); *id.*, CD p. 97 § 2(3) ("funds that you advance to me"); Udis Aff. I, Ex. 3, CD p. 233 (Oasis website stating it gets consumers "the cash [they] need right now" and helps people "get the cash they needed right when they needed it – before their lawsuit settled"); *id.*, Ex. 4, CD pp. 313, 317 (LawCash website describing product as "pre- and post-settlement litigation financing advances"), 323 (web page devoted to

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[3] The Code's 2000 revision moved, without substantive change, the "loan" definitional section from pre-2000 Code § 5-3-106 to current Code § 5-1-301(25). *See* Colo. Sess. Laws 2000, ch. 265. Contrary to appellants' contention that the "official comments . . . do not exist" (O.Br. 17), they do; for reasons unknown the revisor of statutes did not reprint them with the Code's 2000 revision.

"Plaintiff Lawsuit Funding and Lawsuit Cash Advance").

By advancing money, appellants create debt. They thus make loans under the Code's "plain language." Order, CD p. 696.

Cash Now is dispositive. There, Cash Now advanced consumers "an immediate sum of money in return for an assignment of the [consumers'] rights to receive" their anticipated income tax refunds. *Id.* at 163. The district court concluded that these transactions were "purchases of choses in action rather than 'consumer loans' subject to the [Code]." *Id.* at 164.

The court of appeals affirmed. Reasoning that a "loan" required an "unconditional obligation to repay," it held that Cash Now's transactions "involved the sale and assignment of the [consumers'] rights to receive a tax refund." *Id.* at 163, 164; *see State ex rel. Salazar v. Cash Now Store, Inc.*, 12 P.3d 321, 326 (Colo. App. 2000) (*Cash Now I*) (loan must create debt that the consumer "is unconditionally obligated to repay"), *rev'd*, 31 P.3d 161 (Colo. 2001).

The supreme court unanimously reversed. It rejected the court of appeals' "narrow ['loan'] interpretation" – one which "requires an unconditional obligation to repay not mentioned in the statute" – in

favor of a "broad reading." *Id.* at 166; *see id.* at 165 (Code's "loan" definition "does not require repayment"), 166 n.2 (definition "does not include the requirement of repayment"). Citing the Code's official comment, it stated that "a loan is made when a creditor creates debt by advancing money to the debtor." *Id.* at 166. Because Cash Now advanced "money to taxpayers in exchange for the right to collect a payment from . . . the taxpayer's anticipated tax refund," it held that "the transaction is more properly characterized as a loan, rather than the sale of a chose in action." *Id.* at 166-167.

Here, too, under *Cash Now*, appellants' "chose in action" "purchases" in "exchange for . . . payment" from their consumers' personal injury claims are "properly characterized" as loans. *Accord*, *Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*, 144 P.3d 706, 710 (Kan. 2006) (advances to real estate agents repaid from expected commissions were loans under Kansas's Uniform Consumer Credit Code; company "creates debt by paying money to the real estate agents before their commissions become available"); *Aple Auto Cash Express, Inc. v. Okla. ex rel. Okla. Dep't of Consumer Credit*, 78 P.3d 1231, 1237 (Okla. 2003) (sale/leasebacks were not "*bona fide* sales" but disguised

usurious loans under Oklahoma's Code);[4] *see also MedFinManager, LLC v. Kruse*, Case No. 2010CV3708 (Jefferson Cnty. Dist. Ct., Aug. 16, 2011) (ID39608821, Defs.' Notice of Supplemental Authority, CD pp. 682-686) (advances to medical providers on consumers' behalves repaid from consumers' tort claims' proceeds were loans under Code).

Appellants complain that this analysis makes "every gift of money and purchase of any product" a loan (O.Br. p. 16). But: a gift-giver expects no repayment; and a simultaneous money-for-goods exchange is not advancing money in return for more money later.

II. DEFERENCE IS DUE THE ADMINISTRATOR'S INTERPRETATION

In *In Re Pre-settlement Lender Licensing* (Adm'r U.C.C.C. Apr. 29, 2010), the Administrator similarly concluded that litigation advances are loans (Udis Aff. I, Ex. 1, CD pp. 180 ¶2, 182-185). There, an inquirer requested "'an opinion . . . whether a pre-settlement lender'"

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[4] Because Kansas and Oklahoma are Code states (*see* O.Br. p. 10 n.4), and the Code should be construed uniformly "among the various jurisdictions," Code § 5-1-102(2)(g); *see In Re Marriage of Hunt*, 909 P.2d 525, 538 (Colo. 1995) (uniform laws should be construed uniformly); these cases are especially noteworthy. Appellants, in stating *Cash Now* is "the only court to address the definition of 'loan' under a UCCC statute" (O.Br. 11), overlook these cases and *Income Tax Buyers, Inc. v. Hamm*, No. 91-CP-40-3193 (S.C. Ct. Com. Pl. Jan. 14, 1992) (which they themselves cite, *see* O.Br. p. 15).

that made "'non-recourse . . . advance[s] to individuals involved in pending litigation based upon [the business's] evaluation of the likely settlement amount of the case'" "'needs to obtain any special license or registration to engage in that business'" in Colorado.

The Administrator concluded that this was lending under and subject to the Code:

> Although the loan may be non-recourse, nowhere does the Code or *Cash Now* require the borrower's personal recourse for an advance to be a loan. Rather, your client's transactions are garden variety, non-recourse secured loans, with the consumer's lawsuit (or its proceeds) as security. The lender looks to this collateral – *e.g.*, the settlement or judgment – for repayment.

Id., CD p. 183.

The Administrator's Code interpretations are entitled to deference. *See, e.g., Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998) (courts "traditionally give deference to the interpretation of a statute adopted by the officer or agency charged with its administration"); *Udis v. Universal Commc'ns Co.*, 56 P.3d 1177, 1179 (Colo. App. 2002) (Administrator's interpretation of statute she enforces is given deference). Her interpretation is entitled to "great weight," *Mile High Greyhound Park, Inc. v. Colo. Racing Comm'n*, 12

P.3d 351, 353 (Colo. App. 2000); "must be given deference," *In Stitches, Inc. v. Denver Cnty. Bd. of Comm'rs*, 62 P.3d 1080, 1082 (Colo. App. 2002); and should be upheld unless "clearly in error," *E.R. Southtech, Ltd. v. Arapahoe Cnty. Bd. of Equal.*, 972 P.2d 1057, 1059 (Colo. App. 1998).[5]

Further, a court's de novo review and agency deference are not inconsistent; the latter informs the former:

> [courts] consult and take into account the implementing agency's guidance, rules, and determinations . . .. In reviewing the proper construction of a statute de novo, we may accord deference to the agency's interpretation of its statute, but we are not bound by that interpretation.

Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs, 199 P.3d 718, 731 (Colo. 2009).

Appellants may argue (*see* Response, CD p. 368) that the Administrator's opinion letter is a "litigation position" and "not the product of formal [agency] rule making." However:

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[5] Because *Bostron v. Colo. Dep't of Pers.*, 860 P.2d 595 (Colo. App. 1993) (*see* O.Br. p. 10), did not involve the agency's organic act interpretation, it is inapposite. Appellants misplace reliance on *Cash Now I* (O.Br. p. 10): there, "the State correctly assert[ed]" the agency deference doctrine, 12 P.3d at 326; and in reversing, the supreme court validated the Administrator's interpretation.

- Code § 5-6-104(4) authorizes the Administrator to issue "interpretation[s and] written response[s] to a person pursuant to a written request," and provides "safe harbor" to those who "in good faith" act in conformity with these interpretations.
- The U.S. Supreme Court relied upon the federal Truth in Lending Act's (TILA, the Code's federal analog) similar "safe harbor" provision, 15 U.S.C. § 1640(f) (2006), to hold that, "[u]nless demonstrably irrational, Federal Reserve Board [the Administrator's federal counterpart] staff opinions construing [TILA] should be dispositive." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 567 (1980). It stated that TILA's "safe harbor" provision "signals an unmistakable congressional decision to treat administrative rulemaking *and interpretation* under TILA as authoritative." *Id.* at 567-568 (emphasis added); *see also Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365, 372 (1973) (because Congress entrusted TILA's "construction to an agency with the necessary experience and resources to monitor its operation," Court would "defer to the [agency's] informed experience and judgment" in effectuating

TILA's purposes).

- Section 24-4-103(1) of the State Administrative Procedure Act, § 24-4-101, *et seq.*, C.R.S. 2012 (APA), exempts from formal rulemaking requirements "interpretative rules or general statements of policy." *See*, *e.g.*, *Regular Route Common Carrier Conference v. P.U.C.*, 761 P.2d 737, 748-749 (Colo. 1988) (APA-exempt "interpretative" rule "serves the advisory function of explaining the meaning of a word or phrase in a statute or other rule"); *Schlapp v. Colo. Dep't of Health Care Policy*, 284 P.3d 177, 185 (Colo. App. 2012) (APA inapplicable to agency's interpretations and enforcement policies).
- Courts often defer to agency interpretations despite lack of rulemaking. *See*, *e.g.*, *State Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1286, 1288 (Colo. App. 2001) (deferring to agency's *unwritten* enforcement policy; rejecting contention that policy should have been promulgated as "'rule, regulation, or policy statement'"); *see also*, *e.g.*, *Gen. Motors Corp. v. City and County of Denver*, 990 P.2d 59, 74 n.15 (Colo. 1999) (deferring to agency's unwritten interpretation); *State Pers. Bd. v. Dep't of*

Corr., 988 P.2d 1147, 1150 (Colo. 1999) (deferring to agency's policy view of statute); *Orth*, *supra*, 965 P.2d at 1254 (same).

Here, as Congress did in TILA § 1640(f), the General Assembly in Code § 5-6-104(4) "deci[ded] to treat [the Administrator's Code] interpretation[s] . . . as authoritative." *Milhollin*, *supra*, 444 U.S. at 567-568. Her opinion letter, which "express[es] the Administrator's interpretation of the Code and enforcement policy regarding 'litigation funding'" (Udis Aff. I, Ex. 1, CD p. 185), is an APA-exempt interpretative policy statement entitled to the Court's deference "[u]nless demonstrably irrational." *Milhollin*, 444 U.S. at 565.

III. OTHER COURTS AND REGULATORS CONSIDER LITIGATION ADVANCES LOANS

Courts elsewhere hold that litigation advances are loans.

Illustrative is *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008). There, as here: the lender advanced monies "to borrowers who are expecting to recover in pending tort claims, but who need money for personal expenses before their claims go to trial or settle;" the advance was repaid "with interest" – time-dependent multiples of the amount advanced – "out of the proceeds of [the borrower's] recovery;" the borrower purportedly "transfer[red] and convey[ed]" to

the lender a portion of her claim's proceeds; and the contract purportedly was "contingent, speculative and without recourse." *Id.* at 770-771. The lender contended its advances were not usurious because the borrowers had no "absolute obligation to repay the money lent or advanced;" instead, their obligation "was contingent upon [their] recovery in [their] personal injury claim." *Id.* at 776.

The court disagreed. It observed that North Carolina's usury statute (like the Code) includes "advances;" an "advance" does *not* "require unconditional repayment," but instead merely a repayment "expectation;" and the lender "certainly made the advance 'in expectation of reimbursement.'" *Id.* at 777. It therefore concluded that the transactions were usurious loans that violated North Carolina's lender licensing and unfair and deceptive trade practices laws. *See id.* at 778-781;[6] *accord*, *e.g.*, *Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487, **1-4 (Ohio Ct. App. 2001) (litigation advances secured by "the possible settlement [the plaintiff] would receive from her pending litigation regarding the accident" were not "contingent cash advances" but usurious loans (with 180% to 280% interest rates)

[6] Appellants, too, certainly "'expect[] repayment;'" their attempt to distinguish *Odell* (O.Br. pp. 24-25) fails.

violative of Ohio's small loan law), *aff'd*, 789 N.E.2d 217 (Ohio 2003);[7] *Echeverria v. Estate of Lindner*, 801 N.Y.S.2d 233, 2005 WL 1083704, **2, 5 n.1, 8 (N.Y. Sup. Ct. 2005) (LawCash's advances that bore 3.85% monthly interest were usurious loans; despite contract's terming transaction "investment and not a loan," "most investors do not get to set the amount of [their] return. . . . Banks set the return they expect from their loans, through interest rates, which is more comparable to what we have here;" because "'a lawsuit is not an investment vehicle,'" court held "it is ludicrous to consider this transaction anything else but a loan unless the court was to consider it legalized gambling;" quoting *Rancman*);[8] *see also Namoko v. Cognisa Sec. Inc.*, 2007 WL 2990524, *1 (D. Colo. 2007) (involving a lien "in favor of Oasis Legal Finance for funds borrowed by Plaintiff against his settlement proceeds"); *cf. Wilson v. Harris*, 688 So.2d 265, 266-267, 270 (Ala. Civ. App. 1996) (litigation funding agreement violated public policy as illegal gambling contract).

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[7] Appellants notwithstanding, the Ohio Supreme Court did not "reverse[]" or "reject[]" the intermediate court's holding (O.Br. pp. 23, 24); it instead disregarded the lender's "investments" claim and held that, whether "investments" or loans, the transactions were void as "champerty and maintenance." 789 N.E.2d at 219.

[8] Because whether LawCash's advances were usurious was essential to the court's damages award, *see Echeverria* at **4-8; its holding was not "pure dicta" "musing[s]" (O.Br. p. 25).

So, too, state regulators conclude that litigation funding is lending. Significant because it construes Kansas's Code (*see* p. 12 n.4, *supra*) is *In Re Cambridge Mgmt. Group* (Kan. Office of State Bank Comm'r July 7, 2009). Citing *Decision Point*, the regulator rejected the company's "characterization of the contracts as a purchase agreement." Instead, because the company "create[d] debt by paying money to plaintiffs before their settlements or judgments are realized," it made "loans under the UCCC." *Id.* at 3; *see*, *e.g.*, *La. Atty. Gen. Op. No. 01-160*, 2001 WL 1398739, **1-2 (La. Atty. Gen. 2001) (citing *Cash Now*, attorney general rejected argument that, because "repayment of the funds is contingent upon the plaintiff's receipt of money from the claim," litigation advances were not loans); *Md. Atty. Gen. Op. Letter* (Md. Atty. Gen. Nov. 12, 2009) (because Maryland Consumer Loan Law included "advances," litigation advances were loans); *In the Matter of Am. Legal Funding, LLC*, No. CFR-FY2010-341 (Md. Comm'r of Fin. Regulation Feb. 4, 2011) (Udis Aff. I, Ex. 5, CD pp. 246, 256-264) (Maryland regulator ordered litigation funder to cease and desist from engaging in "usurious and unlicensed lending"); *see also Formal Op. 2011-2*, *supra*

(describing litigation funding as "non-recourse loans").[9]

Commentators also refer to litigation funding as "non-recourse loans." Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns* (Rand Corp. 2010) 1, 9 (http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf) (noted in report appellants cite, *see* O.Br. pp. 17-18, Ex. A p. 1); *see*, *e.g.*, James R. Maxeiner, *Supplement: Article: Section II.C: Civil Procedure: Cost and Fee Allocation in Civil Procedure*, 58 Am. J. Comp. L. 195, 209 (2010) (litigation finance industry "does not buy claims; it lends money at high rates in non-recourse loans with the expectation of recovering the loan plus interest"); Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 Rev. Litig. 707, 708 (2007) (litigation funders "loan plaintiffs money to cover their personal expenses"); *see also* Susan Lorde Martin, *The Litigation Financing Industry: The Wild*

[9] The Kansas and Maryland letters, which the Court may judicially notice, *see* C.R.E. 201(f) (notice may be taken at any stage, including appeal); *Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo. 1980) (same); are appended hereto, as is the Maryland/Oasis settlement (*In the Matter of Oasis Legal Finance, LLC*, No. DFR-EU-2008-241 (Md. Comm'r of Fin. Regulation Aug. 6, 2009)) (http://dllr.maryland.gov/finance/consumers/pdf/oasislegalfin.pdf) the Maryland letter references.

West of Finance Should Be Tamed Not Outlawed, 10 Fordham J. Corp. & Fin. L. 55, 67 (2004) (litigation financing "is certainly within the category of subprime lending"); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 Vill. L. Rev. 83, 95 (2008) (litigation financing "is related to a widespread subprime lending industry") (both which appellants cite, *see* O.Br. pp. 13, 23, 26).

IV. LITIGATION ADVANCES ARE DISGUISED LOANS

A disguised-loan analysis reinforces that litigation advances are asset-based secured loans.

This analysis starts with the rule that substance prevails over form:

> [I]f the true nature is that of security the transaction will be given that effect, no matter how many papers may have been executed that cover up the real purpose and give to the transaction an appearance other than the true one.

Rocky Mountain Gold Mines v. Gold, Silver & Tungsten, Inc., 104 Colo. 478, 498, 93 P.2d 973, 982 (1939), citing *Blackstock v. Robertson*, 42 Colo. 472, 479, 94 P. 336, 338 (1908); *accord, e.g., Crosby*, *supra*, 163 Colo. at 387-388, 431 P.2d at 25-26 (disregarding form).

Especially with consumer credit, courts are sensitive to the "fertility of the minds of those who would devise schemes to circumvent remedial consumer protection laws[;] these laws must be interpreted with a flexibility necessary to preserve their spirit." *In Re Brown*, 134 B.R. 134, 143 (Bankr. E.D. Pa. 1991); *see, e.g., Glaire v. La Lanne-Paris Health Spa, Inc.*, 528 P.2d 357, 365 (Cal. 1974) ("lenders, intent on collecting compensation for the use of money in excess of the lawful rate, seek to avoid transacting their business in the form of loans. The courts have been alert to pierce the veil of any plan designed to evade the usury law and in doing so to disregard the form and consider the substance"); *Wilcox v. Moore*, 93 N.W.2d 288, 291 (Mich. 1958) (to "protect the necessitous borrower from extortion . . . a court must look squarely at the real nature of the transaction, thus avoiding . . . the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty").

Various indicia distinguish an asset-based loan from a true sale. "'No one . . . factor[] is conclusive, but a combination of several will go a long way in showing that an absolute conveyance was actually a security arrangement.'" *SAL Leasing, Inc. v. Ariz. ex rel. Napolitano*, 10

P.3d 1221, 1226 (Ariz. Ct. App. 2000), quoting *Merryweather v. Pendleton*, 372 P.2d 335 (Ariz. 1962); *accord*, *e.g.*, *Aple*, *supra*, 78 P.3d at 1236 (transaction should be looked at "as a whole"). Any doubt should be "construed in favor" of holding the transaction a loan. *James v. Ragin,* 432 F.Supp. 887, 893 (W.D.N.C. 1977).

Here, several "loan" indicia exist.

A. Appellants' Borrowers Are Necessitous

Perhaps the most telling disguised loan characteristic is the borrower's necessitousness. *See, e.g., Burnett, supra*, 3 F.3d at 1262 (borrower's "need for cash" rather than property's fair market value supported conclusion that pawn was loan); *James*, *supra*, 432 F.Supp. at 893 (sale/leaseback was loan; examining "seller's" distress and need for money); *Merryweather, supra*, 372 P.2d at 342 ("grantor" was "financially distressed"); *SAL Leasing*, *supra*, 10 P.3d at 1226-1227 ("lease-purchase" was disguised loan; lender's customers "had a financial 'emergency'" and "'needed cash quickly'"); *McElroy v. Grisham*, 810 S.W.2d 933, 937 (Ark. 1991) (sale/leaseback was usurious loan; "seller" had "obvious financial troubles"); *Browner*, *supra*, 549 A.2d at 1114-1116 (home sales with repurchase options were disguised loans;

homeowners "faced imminent foreclosure"); *Aple*, *supra*, 78 P.3d at 1237 & n.24 ("grantor" was distressed); *Long v. Storms*, 622 P.2d 731, 737-738 (sale/leaseback was mortgage loan; borrowers were "financially distressed"), *modified on other grounds*, 629 P.2d 827 (Or. Ct. App. 1981); *Johnson v. Cherry*, 726 S.W.2d 4, 5, 7 (Tex. 1987) ("sale" was mortgage; consumer experienced "financial difficulties"); *see also Echeverria, supra*, 2005 WL 1083704 at **2, 3 (plaintiff needed money for medical expenses; relegated to "lender of last resort"); *Odell, supra*, 665 S.E.2d at 770 (borrower had "financial difficulties"); *Van Jackson v. Check 'N Go, Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000) (borrower would not seek triple-digit-rate loan unless "necessitous").

Here, appellants admit their borrowers' distress: they need money "to avoid imminent foreclosure on their homes or eviction" (O.Br. p. 4); *see*, *e.g.*, Complaint, CD p. 2 Introduction (consumers are in "financial need," "may not be able to work to pay their personal expenses," and face "cash constraints"); *id.*, CD p. 4 ¶¶14, 15 (consumers have "trouble paying their bills," "immediate financial needs," and "cash constraints;" may "be foreclosed upon," "evicted," "lose their vehicles," "unable to pay their bills," or "suffer" other "financial

problems" that "impact their ability to live and support their families"); Amended Complaint, CD pp. 69 Introduction, 71 ¶¶15, 16 (same); Udis Aff. I Ex. 3, CD pp. 233, 237-238 (Oasis advertises to consumers who "need cash now," stating funding "can alleviate the stress;" consumer "testimonials" illustrating same); *id.*, Ex. 4, CD pp. 311, 312, 316, 332-333 (LawCash markets to consumers having "trouble paying" bills; LawCash can "relieve financial stress;" consumer "testimonials" and examples illustrating same); Response, CD p. 382 (conceding their consumers "often need money quickly"); Appelbaum, *supra* (LawCash and Oasis stating consumers face "'terrible situation'").

B. Appellants Obtain a Security Interest

A second feature is whether the "purchaser" obtains a security interest in the asset. *See*, *e.g.*, *James, supra*, 432 F.Supp. at 890 (sale/leaseback's deed provided security); *Ky. ex rel. Chandler v. Ky. Title Loan, Inc.*, 16 S.W.3d 312, 313-314 (Ky. Ct. App. 1999) (automobile "title pawn" was loan; lender obtained lien on vehicle's title certificate); *Long*, *supra*, 622 P.2d at 738 (sale/leaseback "purchaser" had "sellers'" house as security).

Here, appellants admit they obtain a "security interest" in the

consumers' claims' proceeds (O.Br. p. 7); *see* Amended Complaint, Ex. B, CD p. 97 § 3.1 (LawCash obtains "Lien and Security Interest in the proceeds of the Lawsuit"); *id.*, Ex. A, CD p. 86 § 8.3 (borrower "irrevocably authorizes" Oasis to file Uniform Commercial Code "financing statements"); *see also Namoko*, *supra*, at *1 (describing Oasis's lien on settlement's proceeds); Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 Roger Williams U.L. Rev. 750, 758 (2012) (litigation lenders hold "a security interest in the" lawsuits' proceeds).[10]

C. Oasis Obtains Credit Reports

Another "common characteristic[]" is evaluating the borrower's credit. *Browner*, *supra*, 549 A.2d at 1114.

Here, Oasis's borrowers execute a "Credit and Information Release" that authorizes Oasis to obtain "a consumer credit report

[10] Appellants may seek no solace in the Uniform Commercial Code, § 4-1-101, *et seq.*, C.R.S. 2012 (UCC) (as they sought below, *see* Response, CD pp. 383-384). Rather, UCC § 4-9-109 Official Comment 4 recognizes the "problems of distinguishing between" secured loans and those in which the securing asset "has been sold outright," stating that "[i]n many commercial financing transactions the distinction is blurred;" it punts the problem "to the courts." Further, appellants' transactions here are *consumer*, not "commercial."

and/or other financial and credit information as part of the proposed transaction." Amended Complaint, Ex. A, CD p. 82.

D. Appellants Maintain a "Disproportionate Reserve"

A disparity between the asset's "sale" price and its value also "'unmistakably mark[s]'" transactions as secured loans. *Burnett, supra*, 3 F.3d at 1262 (amount paid for pawned item "was far less than the property's fair market value"); *see*, *e.g.*, *James*, *supra*, 432 F.Supp. at 890, 893 ("purchase price" of sale/leaseback was between $1,500 and $4,500 less than property's value); *SAL Leasing*, *supra*, 10 P.3d at 1226, 1227 (because consideration paid was approximately 18% of property's value, "sale" was "a security device for a loan"); *Browner*, *supra*, 549 A.2d at 1114 ("sales" price "bore no relation whatever to the value of the [property's] equity"); *Aple*, *supra*, 78 P.3d at 1237 n.24 ("sale" price of under 50% of property's value was evidence transaction was loan); *Long*, *supra*, 622 P.2d at 738 (sale price "was substantially less than" fair market value).

This pricing disparity creates a "disproportionate reserve[]." John F. Hilson, *Asset-Based Lending: A Practical Guide to Secured Financing* § 2:5.3(a)(ii) at 2-18 (6th ed. 2010). An "out of line" reserve

"will be considered to be the equivalent of full recourse," indicating the transaction is a loan. *Id.*

Here, appellants "limit their purchases to no more than ten-percent" of the lawsuit's value (O.Br. p. 4); *see*, *e.g.*, Complaint, CD p. 4 ¶12; Amended Complaint, CD p. 71 ¶13; Udis Aff. I, Ex. 4, CD p. 329 (stating "10% rule"). This buffer provides them a "sufficient margin" – i.e., a disproportionate reserve – to "assure" that "there will be sufficient funds available" for repayment. Response, CD p. 385; *see* Complaint, CD p. 4 ¶12 (10% rule "ensure[s]" funds will be available); *see also* Hashway, *supra*, at 759 (citing 10% rule).

E. Appellants Cannot Collect from the Judgment Debtors

Another distinguishing factor is whether the purchaser can collect directly from the seller's obligor:

> The issue of who does the collecting of the sold accounts has an important bearing on the true sale question because the ability of the buyer to deal with what it bought is an important attribute of ownership.

Hilson, *supra*, § 2:5.3(b) at 2-19.

Here, appellants cannot collect directly from their consumers' judgment debtors. Instead, their contracts expressly disclaim any

interest in or ability to interfere with the lawsuits' conduct. *See*, *e.g.*, Amended Complaint, Ex. B, CD p. 98 § 3.6 (LawCash "shall have no right to and will not make any decisions with respect to the conduct of the underlying civil action"); *id.*, Ex. A, CD p. 84 § 3.2 (Oasis "does not assume or have any responsibility or obligation of any kind whatsoever . . . in connection with the Legal Claim"); *id.*, § 4.1 (Oasis "shall have no right to and will not make any decisions with respect to the conduct of the Legal Claim"); Response, Ex. C, CD p. 460 §§ 3.2, 4.1 (same); Udis Aff. I, Ex. 4, CD p. 329 (LawCash "will not interfere with" and "will not attempt to influence or involve [itself] in" case's handling).

F. Appellants Lack "Up-Side Potential"

In a true sale, the buyer owns the asset's "actual performance" – if the asset performs better than anticipated, the buyer reaps the benefit. However, if "the buyer can only recover its original investment plus an interest increment," this signifies a loan; "the reversion of the up-side [to the seller] will drag the transaction out of true sale treatment and into loan treatment." Hilson, *supra*, § 2:5.3(f) at 2-20 – 2-21.

Here, appellants receive only "an interest increment" over their amounts advanced. *See* Amended Complaint, Ex. A, CD p. 83; Udis Aff.

I, Ex. 3, CD p. 236 (Oasis's repayment "is calculated" using a time-dependent "multiplier"); Amended Complaint, Ex. B, CD p. 97 § 2.1 (LawCash receives the amount advanced plus 3.5% compounded monthly). They are not entitled to the lawsuits' "up-sides;" those revert to the consumers. As they say, they "ensure" that consumers "receive a meaningful share" after they are paid (Complaint, CD p. 4 ¶12).

G. Appellants Have Recourse

Finally, and even though the borrower's personal recourse is not required (*see infra*, pp. 36-38), appellants *have* recourse. This "strongly indicates that the transaction is . . . a loan." Hilson, *supra*, § 2:5.3(a)(i) at 2-18.

Here, LawCash's contract:

- obligates the consumer to repay "all of the funds due under" the contract "as a separate and independent obligation" in the event the "assignment of [the consumer's] interest in the proceeds" is not legally permitted (Amended Complaint, Ex. B, CD pp. 97-98 § 3.2);

- makes the consumer "liable to LAWCASH for all sums advanced, together with outstanding fees and charges without regard to the outcome of [the consumer's] Lawsuit," should the consumer have misrepresented in connection with the transaction (*id.*, CD p. 98 § 5);

- allows LawCash "to take action to pursue" payment in the event it is not repaid pursuant to the contract, and to collect

attorney's fees and costs "in enforcing [its] efforts" (*id.*, CD p. 99 § 7.5); and

- makes the consumer "indebted to" LawCash for funds advanced for unused medical purposes "regardless of the outcome of [the consumer's] Lawsuit" (*id.*, CD p. 97 § 2.3).

Similarly, Oasis's contract:

- allows it to deduct directly from the consumer's bank account amounts necessary "to satisfy outstanding amounts due" Oasis should the consumer receive "any Proceeds" prior to Oasis's "receiving full payment" (Original and Amended Complaints, Ex. A, CD pp. 12, 81, Terms);

- deducts, and has the consumer pay, directly from the "purchase price" a portion of Oasis's fees (the "handling fee," *see id.*, CD pp. 11, 80);

- imposes numerous obligations on the consumer, including: prohibiting any other assignments of the consumer's claim and warranting no such assignment exists (*id.*, CD pp. 15, 84, §§ 3.3, 5.3); requiring the consumer to "use its best efforts to prosecute" and "bring the Legal Claim to good faith settlement or final judgment" (*id.*, CD pp. 16, 85, § 5.4); prohibiting the consumer from receiving the claim's proceeds directly (*id.*, § 6.2); and appointing the consumer as Oasis's "trustee" and requiring the consumer to pay over to Oasis the proceeds in the event the consumer directly receives them (*id.*);

- grants Oasis "all rights, powers, and remedies provided in the [contract] and as allowed by law or in equity" in the event the consumer breaches any of these or other obligations (*id.*, § 7.1);

- allows Oasis its attorney's fees, costs, expenses, and disbursements should it prevail in any "lawsuit, dispute, claim, or controversy" under the contract (*id.*, CD pp. 18, 87, § 8.6); and

- entitles Oasis to "liquidated damages" of "two times" the "ownership amount" if the consumer "fails to disclose a prior sale;" receives "additional fundings without" Oasis's consent; "replaces [the consumer's] attorney without obtaining" an acknowledgement; or "avoids or attempts to avoid" paying Oasis; "regardless of the outcome of the legal claim" (Response, Ex. C, CD p. 462 § 7.2).

As appellants admit, their contracts "grant [them] the basic right to enforce the contract itself and to recoup their purchase price *from the seller*" (O.Br. p. 20; emphasis in original). Even assuming, contrary to their contracts' provisions, that this "basic right" is limited to "fraud or misrepresentation" (*id.*), it is recourse nonetheless. *See Poleson v. Wills*, 998 P.2d 469, 471 (Colo. App. 2000) (note was recourse "under certain circumstances").

Further, despite their assertion that they "have no control over" the consumers' claims and a consumer could "abandon the claim altogether" (Response, CD p. 363), a consumer's failure to "use its best efforts to prosecute" or "replac[ing]" the attorney presumably would be "Event[s] of Default" entitling appellants to "all rights, powers, and remedies . . . as allowed by law or in equity." So, too, their rights "to take action to pursue" payment or appoint the consumer as "trustee" bely their claim the consumer "has no obligation or liability" should,

e.g., the consumer's attorney "abscond[] with" the proceeds (O.Br. p. 21). That LawCash *sued* a borrower to collect "payment of the funds owed" (O.Br. p. 25; *see* Response, Ex. A, CD p. 451 ¶10), demonstrates they have recourse.

H. Summary

Applying these indicia; considering appellants' transactions "as a whole," *Aple*, *supra*, 78 P.3d at 1237; and resolving any doubt "in favor of" a loan, *James*, *supra*, 432 F.Supp. at 893; their advances are loans' "functional equivalent." *Aple*, *supra*. Their so-called "chose in action" "purchases" are "nothing more than a disguised attempt to hold . . . collateral for the loaning of money." *Id.*

As held a century ago:

> What is essential to a loan is that there should be an advance of a sum of money from the lender to the borrower which is to be repaid either by the borrower personally or out of his property . . ..
>
> . . .
>
> While in form there was an assignment of a sum of money which was to be paid out of the plaintiff's property, the substantial effect of the agreement was that out of the plaintiff's property the defendant was to receive a sum of money which would repay it this advance and an additional sum, which sum could only be the profit or interest that the defendant would receive as a condition of making the advance.

Hall v. Eagle Ins. Co., 136 N.Y.S. 774, 780, 783 (N.Y. App. Div. 1912) (estate interest's "sale" was loan), *aff'd*, 105 N.E. 1085 (N.Y. 1914) (per curiam). More pithily:

> "If something walks like a duck, quacks like a duck and swims, covering it with chicken feathers will not make it into a chicken."

Boyd v. Layher, 427 N.W.2d 593, 596 (Mich. Ct. App. 1988) ("purchase" of right to receive "greater sum of money to be paid in the future" is "not a [purchase] at all, but a [loan]").

V. APPELLANTS' ARGUMENTS DO NOT COMPEL A CONTRARY RESULT

Appellants nevertheless contend that "a 'loan' exists *only* if the borrower has an absolute or contingent obligation to repay the lender;" *Cash Now* is distinguishable; and other courts hold that litigation advances are *not* loans (O.Br. pp. 11, 12-20, 26-29; emphasis in original). Their arguments are unavailing.

A. Recourse Is Not Required

Appellants contend that "absent" "an absolute or contingent obligation to repay the lender" "no loan exists;" because their consumers purportedly have "no obligation of repayment, contingent or otherwise,"

and they have "no right of recourse against" the consumer, their transactions are not loans (O.Br. pp. 11, 13, 15). They are legally and factually incorrect.

Legally, a loan does not require recourse. Even assuming appellants' advances are nonrecourse, they are ordinary secured loans.

A nonrecourse loan is one where the lender

> agree[s] to look solely to the collateral for repayment of the debt with no personal liability on the borrower. Thus, a loan is a nonrecourse loan if a lender has no ability to proceed directly against the debtor.

1C Cathy Stricklin Krendl, *Colorado Methods of Practice* § 52.87 at 538 (5th ed. 2006); *accord*, *e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 438 n.3 (1999) ("A nonrecourse loan requires the [lender] to look only to the Debtor's collateral for payment").

Nonrecourse loans are common. Pawns are typical. *See, e.g.*, *Burnett*, *supra*, 3 F.3d at 1262 (pawn transaction was loan, not "[sale] and transfer" of seller's property, "regardless of whether [seller] was personally liable for the debt"); *Barlow v. Evans*, 992 F.Supp. 1299, 1304-1306 (M.D. Ala. 1997) (rejecting contention pawn was "sale," not

"loan," because pawn did not create debt that consumer was obligated to repay; discussing cases); *Wiley*, *supra*, 950 F.Supp. at 1111-1113 (same).

Other examples abound. *See*, *e.g.*, *Bayou Land Co. v. Talley*, 924 P.2d 136, 152-153 (Colo. 1996) (loan had recourse and nonrecourse debt components); *Poleson*, *supra*, 998 P.2d at 471 (note was nonrecourse except "under certain circumstances"); *Weinstein v. Park Funding Corp.*, 879 P.2d 462, 464 (Colo. App. 1994) (portions of debt were nonrecourse); *First Interstate Bank, N.A. v. Colcott Partners IV*, 833 P.2d 876, 876-877, 878 (Colo. App. 1992) (nonrecourse loan; creditor barred from pursuing deficiency); *Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.*, 831 P.2d 908, 912 (Colo. App. 1991) (nonrecourse loan; debtor not personally liable).

As the U.S. Supreme Court stated long ago:

> If an express stipulation for the repayment of the sum advanced be indispensable to the existence of usury, he must be a bungler indeed, who frames his contract on such terms as to expose himself to the penalties of the law.

Scott v. Lloyd, 34 U.S. (9 Pet.) 418, 448 (1835) ("sale" of annuity was disguised loan); *accord*, *e.g.*, *Merryweather*, *supra*, 372 P.2d at 340 (stock "sale" was secured loan; borrower's personal obligation

unnecessary, "as among other reasons, the pledgee may have agreed to look only to the pledged property as security for his claim"); *Hall*, *supra*, 136 N.Y.S. at 780 (nonrecourse assignment was loan, not purchase; "Certainly the personal obligation of a mortgagor to pay the mortgage indebtedness is not essential to create a valid loan").

Here, appellants admittedly secure their advances with "a security interest in any future litigation proceeds" (O.Br. p. 7). They look to these proceeds for repayment. Recourse is unnecessary.

Regardless, factually appellants *have* recourse. *See supra*, pp. 31-34. And, because their contracts make a consumer *personally* liable for appellants' share of any proceeds (as LawCash's suit against its borrower shows), there is *at least* a "contingent . . . obligation to repay" (O.Br. pp. 13, 25); *see also Black's Law Dictionary* 432 (8th ed. 2004) ("contingent debt" is debt "that may become fixed in the future with the occurrence of some event").[11]

Nevertheless, appellants contend that, because the consumers' claims are "speculative" and "may not bear fruit," there is not even a "contingent" repayment obligation (O.Br. pp. 12, 13). They ignore the

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[11] Thus, here, there exists the personal "obligation *of the debtor* to repay" (O.Br. p. 19; emphasis in original).

contingency that the claims *may* "bear fruit."

Simply, their task is the same as *any* asset-based lender's – to value the asset in their loan underwriting, decision-making process.

Here, appellants do just that:

- they "review" and "pass judgment" on "each individual" claim;
- they use "a realistic basis" to "calculate" and "evaluat[e]" the "chose in action;"
- consumers' injuries must be "severe;"
- defendants' liability, a "key factor," must be "strong;"
- defendants "must have the ability to pay damages;"
- the claim must be "investment grade;" and
- there must be "sufficient funds available" to "secure a settlement or jury award."

Response, CD pp. 381-382, 384-385, 386; *see*, *e.g.*, Udis Aff. I, Ex. 3, CD pp. 235 ("Lawsuit cash funding is subject to approval by our legal and financial professionals, based on the merits of your case;" "Your attorney's cooperation is necessary so we can obtain the necessary documents regarding your case;" "Once we have received all your documentation, we will review your case"); 239 ("Once you've submitted

an application . . . we'll contact your attorney by fax for documentation required to qualify your case for funding;" "Funding is based on the strength of a case. Our team of legal, business and financial professionals carefully reviews the documentation of each lawsuit to assess the probability of a win at trial or an out of court settlement. From that, we determine if your case qualifies for funding"); 243 ("Several key factors make a case 'investment grade' suitable for litigation funding;" "Liability is a key factor in our decision to offer a litigation funding"); *id.*, Ex. 4, CD pp. 315, 328 ("Our underwriting" "team of professionals [with] decades and lifetimes of experience" "will evaluate your case to determine its estimated value. If we believe that your lawsuit will secure a settlement or jury award, we will approve funding").

As LawCash stated, it "'uses strict underwriting screening rules that ensure only about 4% of the cases it advances money on are lost in court.'" Hashway, *supra*, at 759; *see*, *e.g.*, Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 Vt. L. Rev. 615, 617, 621 637 (2007) (litigation lenders "adroitly valu[e] the range of recovery" and "employ stringent lending parameters;" "vet

potential clients to reduce, if not eliminate, the risk of non-recovery;" and "enjoy greater security of repayment" than traditional lenders, all of whom "accept some risk of non-payment"); Barksdale, *supra*, at 713-714, 726-727 (describing underwriting process, including Oasis's); Nicholas Beydler, Comment, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. Rev. 1159, 1170 (2012) (same, including LawCash's); Appelbaum, *supra* (lawsuit lenders "are much better than venture firms at picking winners," "pay lawyers to screen cases," look "for slam-dunks," reject "about 70 percent of applications," and "[t]o further limit losses, . . . lend no more than 10 or 20 percent of the amount they expect the borrower to win").

B. Neither the Code nor *Cash Now* Require Personal Recourse

Next, appellants contend that the Code and *Cash Now* require at least a "contingent obligation to repay" and that, because in *Cash Now* there existed a "contingent right of recourse against the borrower," it is distinguishable (O.Br. pp. 11, 14). They are incorrect.

Here, of course, there *is* a "contingent obligation to repay" – when the consumers' claims "bear fruit" (O.Br. p. 12).

And, appellants seemingly concede that neither the Code nor *Cash*

Now require even a contingent personal recourse obligation: "Colorado's definition of 'loan' does not require repayment *directly from the borrower*" and "does not mandate that repayment must come directly from the borrower" (O.Br. pp. 18, 19; emphasis in original).

Despite this concession, appellants contend that the "typical 'loan' contemplated by the" Code requires the borrower's "*unconditional and absolute* promise to repay," and *Cash Now* applies only where the borrower "agree[s] to make up any shortfall" if the assigned "revenue stream fails to produce [the] agreed upon amount" (O.Br. p. 12).

However:

- Absent from Code § 5-1-301(25) is *any* obligation that the consumer personally repay the loan, whether conditional or otherwise.
- In *Cash Now*, the supreme court repeatedly stated the Code did not require the consumer's obligation to repay. *See, e.g., id.* at 165 (rejecting court of appeals' reliance on *Cullen v. Bragg*, 350 S.E.2d 798 (Ga. App. 1986); unlike Georgia law, the Code's loan definition "does not require repayment"); *id.* at 166 n.2 (Code's definition "does not include the requirement of repayment"); *see*

also id. at 163 (rejecting court of appeals' erroneous conclusion that transactions were not "loans" because they "did not create debt requiring an unconditional obligation to repay"); *id.* at 165 (disagreeing with contention that transactions are not loans because they do not require "an unconditional obligation to repay"); *id.* at 166 (favoring "broad reading" of "loan" over court of appeals' "narrow interpretation [requiring] an unconditional obligation to repay not mentioned in the statute").

Nor, contrary to appellants' reading, did *Cash Now* hold that "debt was 'created' under the facts there of that case *only* because the agreement gave the lender a contingent right of recourse against the borrower" (O.Br. 14; emphasis in original). *Cash Now* is not so narrow; it did not rest on even a "contingent" recourse obligation.

Appellants' narrow view creates a facile circumvention: under their theory, Cash Now (and *any* lender) could escape *Cash Now's* holding by deleting its "contingent" recourse provision.

In fact, Cash Now did precisely that. Early on, it deleted from its form contracts *any* recourse requirement. *See* Udis Aff. I, Ex. 2, CD pp. 190 ll.12-16 (referring to Cash Now's 1998 contract version), 195 ll.7-11

(stating that it stopped using "that form which was found to be troublesome by Nancy Rice for probably three years, if not more"); 196 l.16 – 197 l.23 (reciting Cash Now's decision to delete its 1998 contracts' recourse provision and absence of such provision from its January 1999 and later transactions).

Despite contending that this deletion removed its transactions from *Cash Now's* holding (*see, e.g.*, Udis Aff. I, Ex. 2 CD pp. 202 l.12 – 203 l.10; 207 ll.5-7; 209 ll.1-19; 211 l.8 – 212 l.25; 216 l.12 – 221 l.19; 225 l.12 – 226 l.15 (parties' "recourse" arguments)),[12] the district court disagreed. It enjoined Cash Now and dismissed its declaratory judgment complaint. *See id.*, CD pp. 226 l.16 – 227 l.19.

Appellants also contend that *Cash Now*, by "rely[ing] heavily" on *Hamm*, *supra*, "made clear that it is the borrower's contractual obligation of repayment that 'created debt,' and thus a 'loan'" (O.Br. p. 15). But *Hamm* considered the advances there loans "even in the absence of" conditional recourse. *Id.*, slip op. at 6 (CD p. 586).

Simply, neither the Code nor *Cash Now* require personal recourse,

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[12] In a similar vein, Cash Now argued to the supreme court that it "established a policy" of not enforcing its pre-1999 recourse rights. *See* Answer Brief of Respondent The Cash Now Store, Inc., Case No. 2000SC0489 (Feb. 13, 2001), at 11 n.8, 25 n.22.

contingent or otherwise. They are not concerned with the source from where a lender may expect repayment; their consumer protections are not so easily evaded by the simple expedient of making the loan "nonrecourse." Otherwise, only a "bungler" would "expose himself to the penalties of the law." *Scott*, *supra*, 34 U.S. (9 Pet.) at 448.

C. Appellants' Cases Are Inapposite

None of appellants' cases (*see* O.Br. pp. 26-28) compel a contrary conclusion; their cases' "one consistent thread" (O.Br. p. 29) is that none involve the Code.

Indeed, *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626 (Fla. Dist. Ct. App. 2005), hurts appellants. Involved there was a litigation lender's arbitration award's confirmation. The court considered the advances "quite similar to any other non-recourse loan secured by an interest in any form of transferable property." But because the consumer did not participate in the underlying arbitration and withdrew her own motion to vacate the award, it had little choice but to affirm the confirmation. *Id.* at 627, 629; *see id.* at 630 (company "loaned money" "secured by high-grade personal injury claims"); McLaughlin, *supra*, at 632, 633 (court "reluctantly enforced" award; "neither the Philadelphia arbitrator

nor any trial court" determined loan's validity).

Further:

- *Dopp v. Yari*, 927 F.Supp. 814 (D.N.J. 1996); *In Re Transcapital Fin. Corp.*, 433 B.R. 900 (Bankr. S.D. Fla. 2010); *Nyquist v. Nyquist*, 841 P.2d 515 (Mont. 1992); *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 2012 N.Y. Misc. LEXIS 1460 (N.Y. Sup. Ct. 2012), and *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App. 2006); all are *commercial* cases;
- *MoneyForLawsuits V LP v. Rowe*, 2012 U.S. Dist. LEXIS 43633 (E.D. Mich. 2012), *Dopp*, *Nyquist*, and *Anglo-Dutch* all rested on state law requiring an "absolute obligation to repay," *see MoneyForLawsuits*, at *14; *Dopp*, at 820; *Nyquist*, at 518 (citing Montana law, which requires an "'absolute' right to repayment," *Firelight Meadows, LLC v. 3 Rivers Tel. Coop., Inc.*, 186 P.3d 869, 874 (Mont. 2008));[13] *Anglo-Dutch*, 193 S.W.3d at 96;
- contrary to appellants, *Kraft v. Mason*, 668 So.2d 679, 683-684

[13] Cash Now, too, cited *Nyquist*. *See* Answer Brief (*supra* p. 44 n.12), at 25 n.21.

(Fla. Dist. Ct. App. 1996), actually deemed the transaction a loan, but because the "unsophisticated lender" lacked a "corrupt intent," it was not usurious under Florida law;

- similarly, in *Transcapital*, *supra*, 433 B.R. at 907, 910; the issue was whether the transaction was *usurious*, not whether it was a loan; because repayment was uncertain, it was nonusurious; and
- *Kelly* relied upon the unpublished *Lynx Strategies, LLC v. Ferreira*, 2010 N.Y. Misc. LEXIS 2835 (N.Y. Sup. Ct. 2010), which, with little analysis, held a "non-recourse advance" was not usurious under New York law.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court.

Dated: Denver, Colorado
December 21, 2012

JOHN W. SUTHERS
Attorney General

s/ Paul Chessin
PAUL CHESSIN, 12695*
Senior Assistant Attorney General

Consumer Credit Unit
Consumer Protection Section
Attorneys for Appellees
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the within Appellees' Answer Brief, dated December 21, 2012, was duly served upon all parties herein this 21st day of December, 2012, by E-Service upon:

Jason R. Dunn, Esq.
Lawrence W. Treece, Esq.
Karl L. Schock, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, Colorado 80202-4432

s/ Ruth Seminara

AG ALPHA: LW UC HZHDO
AG File: P:\FILES\CONSUMER CREDIT\CASES\OASIS\APPEAL\ANSWER BRIEF.DOCX

APPENDIX

1. *In Re Cambridge Mgmt. Group* (Kan. Office of State Bank Comm'r July 7, 2009)

2. *Md. Atty. Gen. Op. Letter* (Md. Atty. Gen. Nov. 12, 2009)

3. *In the Matter of Oasis Legal Finance, LLC*, No. DFR-EU-2008-241 (Md. Comm'r of Fin. Regulation Aug. 6, 2009)

THE STATE OF KANSAS)
COUNTY OF SHAWNEE)

BUSINESS RECORDS AFFIDAVIT

Before me, the undersigned authority, personally appeared Edwin Splichal, the Kansas State Bank Commissioner, who, being by me duly sworn, deposed as follows:

1. I am of sound mind, capable of making this Business Records Affidavit, and personally acquainted with the facts herein stated:

   a. I am the custodian of the records maintained by the Office of the State Bank Commissioner;

   b. the attached 4 pages are records of the Office of the State Bank Commissioner;

   c. the attached records are kept by the Office of the State Bank Commissioner in the regular course of business;

   d. it was the regular course of business of the Office of the State Bank Commissioner for an employee or representative of the Office of the State Bank Commissioner with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and

   e. the record was made at or near the time of the act, event, condition, opinion or diagnosis.

2. The records attached hereto are exact duplicates of the original.

Further affiant sayeth not.

I swear and affirm the foregoing.

Edwin Splichal
Bank Commissioner

NOTARY PUBLIC - State of Kansas
PAM DIEL
My Appt. Expires 12/6/14

Subscribed and sworn before me this 7th day of September, 2012.

Notary Public

KANSAS

KATHLEEN SEBELIUS, Governor

OFFICE OF THE STATE BANK COMMISSIONER
J. THOMAS THULL, Bank Commissioner

July 7, 2009

James N. Giordano
Cambridge Management Group, LLC
266 Harristown Road, Suite 300
Glen Rock, NJ 07452

Re: Cambridge Management Group, LLC's ("CMG") Plaintiff Agreements

Dear Mr. Giordano:

This confirms I have received your letter dated June 26, 2009. I have reviewed and considered the arguments you made therein; however, it is still the position of this agency that CMG's plaintiff agreements appear to constitute loans which are subject to the provisions of the Kansas Uniform Consumer Credit UCCC ("UCCC"), K.S.A. 16a-1-101 *et seq.*

CMG first contends that its plaintiff agreements do not constitute "loans." Since "loan" is defined in the UCCC, we do not need to look to other statutes or other bodies of law. The UCCC defines "loan" in K.S.A. 16a-1-301(27) as follows:

(a) Except as provided in paragraph (b), a "loan" includes:
  (i) The creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of a debtor;
  (ii) The creation of debt either pursuant to a lender credit card or by a cash advance to a debtor pursuant to a credit card other than a lender credit card;
  (iii) The creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately; and
  (iv) The forbearance of debt arising from a loan.
(b) A "loan" does not include the payment or agreement to pay money to a third party for the account of a debtor if the debt of the debtor arises from a sale or lease and results from use of either a credit card issued by a person primarily in the business of selling or leasing goods or services or any other credit card which may be used for the purchase of goods or services and which is not a lender credit card.

The above cited definition does not limit the definition of loan to those instances where repayment is absolute. In fact, the Kansas Supreme Court decision of Hiebert, Ill by and Through Elma F. Hiebert v. Millers' Mutual Insurance Association of Illinois, 212 Kan. 249, 510 P.2d 1203 (1973) is controlling with regard to this issue. This case stemmed from the plaintiff's alleged wrongful death of a friend while the plaintiff was employed as a gas station attendant. Millers' Mutual Insurance had issued the plaintiff's homeowner's liability policy. Miller Mutual denied coverage and refused to defend the plaintiff in the wrongful death action because it stemmed from business pursuits. The gas station had a liability policy with Traveler's Insurance. Travelers did provide the plaintiff with a defense. The wrongful death suit ultimately settled for $25,000 and the court found that the death was not as a result of any negligence and that the plaintiff was not acting in the scope of his employment at the time. The plaintiff and Travelers executed a loan agreement with repayment contingent as follows:

> For Value Received, I hereby promise to pay Travelers Insurance Company, a corporation, of Hartford, Connecticut, the sum of Twenty-Five Thousand Dollars ($25,000.00) with eight percent (8%) interest from March 1, 1971. The payment of said sum shall be payable only out of any recovery had by me against the Millers Mutual Insurance Ass'n of Illinois. In addition, I agree to prosecute my claim against the Millers Mutual Insurance Ass'n of Illinois, with due diligence, in my own name, and agree to appear at all necessary trials, and have my personal attorney cooperate with counsel for The Travelers Insurance Company.

The court characterized the above agreement as a loan receipt transaction. The court noted that loan receipt transactions arose from the insurance industry after shippers began adding a proviso in the bill of lading in an attempt to have any losses during shipment covered by the carrier's insurance policy. The carriers' insurers responded by revising the policies to limit their liability. "In the face of such opposing provisions, a shipper whose cargo had been damaged or destroyed, and who was entitled to prompt settlement of his loss either from the carrier or the insurer, might be out of funds until final adjudication of an action by him against the carrier determining whether the carrier was liable. To avoid depriving the shipper of the use of funds pending such determination, and to keep alive the carrier's liability and prevent the inequitable shifting of a burden which was rightfully the carrier's to the shipper's insurer, the insurers devised the loan receipt." Id. at 253. The issue before the court was whether the agreements constituted true loans or whether the insurer was really subrogated to the insured's interest. The court held that such transactions were valid and true loans.

Similar to the loan receipt transactions in the insurance industry, the purported purpose of CMG's plaintiff agreements is to provide much needed funds to plaintiffs pending final adjudication of their civil actions. Relying on the holding of Hiebert, the plaintiff agreements constitute valid and true loans despite the fact that repayment is contingent.

CMG next contends that its plaintiff agreements do not meet the definition of a "consumer loan" as defined by the UCCC, K.S.A. 16a-1-301(17), because (1) CMG is not in the regular business of making loans and (2) there is no restriction that the plaintiff must use the money for personal, family or household purposes.

First, since the decision of Hiebert makes clear that CMG's plaintiff agreements constitute valid and true loans, one can conclude that CMG is in the regular business of making loans.

Second, I have visited CMG's website at: http://www.cmgcash.com/ which advertises that "CMG can help to relieve the pressure of your growing living expenses while you wait for your case to be properly tried." The testimonials on the website are as follows:

"I would like to thank you for providing the funds I needed to pay delinquent bills acquired while I was out of work due to [a] motor vehicle accident. Your representatives were both courteous and helpful. Thank you."

-Audrey - $7,500.00 Funding

"After injuries from a car accident, I needed money fast, [bills] were piling up and thanks to CMG my money situation was resolved in a matter of a few days. Each CMG representative worked with me and my attorney in a very professional manner and handled my situation with...swiftness. Thank you Cambridge."

-Princess - $2,500.00 Funding

"I would like to extend our gratitude to CMG for all their help with assisting our family [through] these very tough times. We couldn't have done it without your assistance. Thank you from the bottoms of our hearts."

-Michael - $15,000.00 Funding

"I...called CMG and spoke with a customer service representative regarding a cash advance to help me pay my rent. I would like to thank your company so much in being able to help me in the time of need. Thank you so very much again and may God Bless each and every one of you at CMG."

-Angela - $1,600.00 Funding

My life had [taken] a bad financial turn and CMG [saved] the day. When I contacted Cambridge for a cash advance, I received my approval right away. They were prompt, courteous, and very, very helpful. Thanks to CMG now my finances in my life can be straightened out."

-Cynthia - $2,000.00 Funding

It certainly appears from the testimonials posted on CMG's website that plaintiff fundings are often incurred primarily for a personal, family or household purpose. If you have evidence that some of the Kansas residents who have entered into agreements with CMG incurred the debt for other purposes, then we would certainly review and consider how such evidence might affect whether those particular contracts are subject to the UCCC.

The Kansas Supreme Court in the case of Decision Point, Inc. v. Reece & Nichols Realtors, Inc., 282 Kan. 381, 144 P.3d 706 (2006) considered a contract that is analogous to CMG's plaintiff agreements. The plaintiff d/b/a Commission Express advanced money to two realtors who were to repay several advances from their anticipated commissions on pending real estate transactions. The longer it took to repay the advances, the higher the percentage of commission the realtors were to pay Commission Express. The realtors entered into written contracts with the plaintiff in which the realtors agreed that the transactions were "not a loan or a consumer transaction, but the sale of a business account receivable at a discount for commercial purposes." Id. at 383. The court analyzed whether the transactions met the definition of a "consumer loan" as defined by the UCCC. The court held as follows:

> The UCCC imposes five requirements for meeting the definition of a consumer loan. See K.S.A.2005 Supp. 16a-1-301(17). First, the UCCC requires the creditor to be regularly engaged in the business of making loans. K.S.A.2005 Supp. 16a-1-301(17)(a). The UCCC defines a loan as "the creation of debt by the lender's payment of or agreement to pay money to the debtor." K.S.A.2005 Supp. 16a-1-301(27)(a)(i). The UCCC does not give a special definition for debt. However, the common definition is "a specific sum of money due by agreement or otherwise." Black's Law Dictionary 432 (8th ed. 2004). Although Commission Express asserts that it purchases accounts for a discount rather than making loans, it does not dispute that it is in the business of providing money to real estate agents in return for the real estate agents' agreement to repay the money either through the assignment of the commission or the repurchase of the account. Essentially, Commission Express creates debt by paying money to the real estate agents before their commissions become available. This type of transaction qualifies as a loan under the UCCC, making Commission Express "a person regularly engaged in the business of making loans." K.S.A.2005 Supp. 16a-1-301(17(a). Thus, the facts in this case establish the first requirement for a consumer loan.

Relying on the holding of that case, the court will not merely adopt CMG's characterization of the contracts as a purchase agreement. Rather, the court will consider all the relevant facts and if the facts meet the definition of a consumer loan pursuant to the UCCC, then it will be treated as such. Since CMG creates debt by paying money to plaintiffs before their settlements or judgments are realized, the transactions constitute loans under the UCCC.

In support of CMG's arguments, you have cited to two Kansas Supreme Court decisions, neither of which are on-point. With regard to the case of Tomasic v. The Unified Government of

Wyandotte County, 265 Kan. 779, 962 P.2d 543 (1998), I believe you have misinterpreted the court's holding. In that case, the county attorney challenged the proposed public financing of a race track for several reasons, including that the development agreement violated the Cash Basis Law. The opinion explained that the Cash Basis Law prohibits cities from creating an indebtedness in excess of the funds that are actually on hand. In that case, the Unified Government of Wyandotte County ("government") agreed that *if necessary* it would pledge future sales tax revenues to obtain bond insurance for its TIF and STAR bonds; however, the legislature had not appropriated the future sales tax revenues for such purpose. Both parties agreed that in the event of a shortfall whether the government could pledge future sales tax revenues to secure bond insurance would be contingent upon future legislative action. Thus, the court held the agreement to *if necessary* pledge future tax revenues did not create an indebtedness in violation of the Cash Basis Law. The indebtedness would not occur until the pledge actually took place. The court's analysis of indebtedness was in specific regard to the Cash Basis Law. The underlying contract is the government's agreement to repay the bond. That agreement to repay the bond contained no contingency. Where the contingency came into effect is what the government would be able to offer should the other party desire additional assurances that the government could make good on its bonds.

First, the Tomasic opinion did not hold that where repayment on a contract is contingent there is no debt. Second, the Tomasic case is distinguishable from CMG's situation. In Tomasic, the contingencies in the agreement were (1) whether there would be a shortfall necessitating bond insurance, and (2) whether the government would be able to pledge future tax revenues in order to obtain bond insurance. In CMG's plaintiff agreements, if the plaintiff obtains a successful outcome in the civil suit, then the plaintiff's obligation to pay CMG is fixed and certain.

In support of your contention that CMG's plaintiff agreements do not constitute loans, you have also cited to Hekelnkaemper v. German Gld. & Sav. Ass'n, 22 Kan 549 (1879). I believe you have mischaracterized the holding of that case. In considering a constitution of a corporation, the court held, "it speaks of 'loans,' and the very idea of a loan carries with it that of obligation to repay." Id. The court did not hold that there must be an absolute duty to repay as you purport. Further, this case is not helpful to defining a loan since a "loan" is defined in the UCCC.

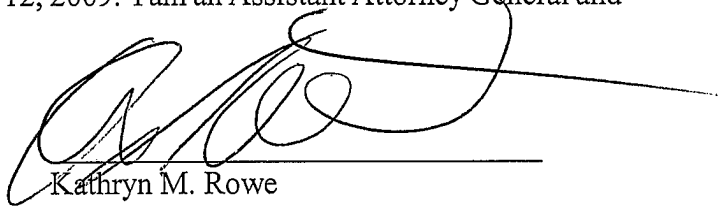
Please provide to the Office of the State Bank Commissioner copies of all plaintiff agreements entered into with Kansas consumers from 2004 through the present date. Please respond to this inquiry within fifteen (15) days of the date of this letter. This inquiry is an official request for information pursuant to K.S.A. 16a-6-106. Failure to respond may result in legal action taken against CMG. If you have any questions, please do not hesitate to contact me at (785) 296-2266 ext. 202 or via e-mail at diane.bellquist@osbckansas.org.

Sincerely,

Diane L. Bellquist
Staff Attorney

CERTIFICATION

I hereby certify that the attached is a true and correct copy of a letter written by me to the Honorable Thomas V. Mike Miller on November 12, 2009. I am an Assistant Attorney General and custodian of this document.



Kathryn M. Rowe

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

November 12, 2009

The Honorable Thomas V. Mike Miller, Jr.
H-107 State House
Annapolis, Maryland 21401-1991

Dear Senator Miller:

You have asked for advice concerning whether a legal funding agreement constitutes a "loan" or "advance" under the Maryland Consumer Loan Law. It is my view that these transactions are covered by the Maryland Consumer Loan Law. It is also at least arguable that, if they are not covered by the Maryland Consumer Loan Law, they have no legal authority to charge interest above the constitutional limit of 6% set by Article III, § 57 of the Maryland Constitution.

Background

As you know, in a Cease and Desist Order issued March 9, 2009, the Commissioner of Financial Regulation ("Commissioner") concluded that Oasis Legal Finance ("Oasis") was making loans, in the form of legal funding agreements, without being licensed as required by the Maryland Consumer Loan Law, and that they were charging interest in excess of that permitted under that law. The transactions in question involved funds advanced to persons engaged as plaintiffs in tort litigation with repayment to be made if and when the plaintiffs received a settlement or judgment. The amount of the repayment depended on the time that the funds were repaid. The Commissioner found coverage under the Maryland Consumer Loan Law because the term "loan" was expressly defined to include advances.

Oasis and the Commissioner reached a settlement on August 6, 2009. Under the settlement, Oasis denied the allegations of the Cease and Desist Order, denied any liability under the Maryland Consumer Loan Law, and continued to assert that its litigation funding agreements were not loans or advances under the law. They agreed, however, not to engage in the litigation funding business in Maryland so long as the current law is in effect unless they first obtain a license. They also agreed to pay a settlement amount of $105,000. The Commissioner agreed to vacate the Cease and Desist Order, to withdraw the hearing that was then scheduled on the allegations in that Order, and permit Oasis to conclude all pending transactions with Maryland consumers.

Typically, a legal funding agreement involves an advance by a non-party to a plaintiff in a personal injury suit in exchange for an assigned share of the litigation proceeds, if any, arising out

of a settlement or judgment and payable at the time of recovery. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 Vt. L. Rev. 615, 618 (2007).[1] The effective interest rates on these advances can be quite high. Commentators have noted that, "[d]epending on the company and the transaction, lenders can triple their investment." Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. Miami L. Rev. 203, 211 (2006). This observation is supported by the cases. In *Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487 (Ohio App. 9 Dist. 2001) (unreported) the lowest possible rate was 280% annually on the first loan and 180% on the second. In *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626, 627 (Fla.App. 2005), "the interest rate on this transaction depended on the date of repayment, but was never less than 200%." And in *Odell v. Legal Bucks*, 665 S.E.2d 767, 770-771 (N.C. App. 2008), *review denied* 676 S.E.2d 905 (N.C. 2009) the contract capped the interest at 325% of the loan amount. At the date of settlement, the debt was very close to this level. *Id.* The rates charged by Oasis that led to the Cease and Desist Order were not significantly different: In one transaction, the amount of repayment was double the amount of the advance at the end of the first year, and triple at the end of the second.

The Maryland Consumer Loan Law

The Maryland Consumer Loan Law prohibits the making of consumer loans without a license issued by the Commissioner of Financial Regulation. Commercial Law Article ("CL") § 12-302; Financial Institutions Article ("FI") § 11-204(a). A "loan" is "any loan or advance of money or credit" made under Title 12, Subtitle 3 of the Commercial Law Article. CL § 12-301(e); FI § 11-201(c). The Maryland Consumer Loan Law also sets limits on the amount of interest that may be charged on consumer loans. CL § 12-306.

It is ordinarily the case, at least under the common law, that the term "loan" applies only where the agreement between the parties is such that repayment is absolute, and not subject to a contingency. Applying this logic, some courts have found that legal funding is not subject to usury limitations. *See Dopp v. Yari*, 927 F.Supp. 814, 821-22 (D.N.J.1996); *Anglo-Dutch Petroleum Intern., Inc. v. Smith*, 243 S.W.3d 776, 782 (Tex.App. 2007); *Anglo-Dutch Petroleum Intern., Inc. v. Haskell*, 193 S.W.3d 87, 95-101 (Tex.App. 2006); *Kraft v. Mason*, 668 So.2d 679, 684 (Fla.Dist.Ct.App.1996); *Nyquist v. Nyquist*, 841 P.2d 515, 518 (Mont. 1992); *Aldrich v. Aldrich*, 260 Ill.App. 333, 1931 WL 1668, at *12-15 (Ill.App.Ct.1931).[2] Despite this, some courts have held that legal funding constitutes a loan where the facts surrounding the contract are such that recovery was

[1] In a letter sent with your request, this arrangement is described as a "non-recourse purchase agreement" that "constitutes a sale and assignment."

[2] *See also,* McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 Vt. L. Rev. 615, 634-635 (2007); Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. Miami L. Rev. 203, 215, 217 (2006); Richmond, *Litigation Funding: Investing, Lending, or Loan Sharking?*, 2005 Prof. Law. 17, 30-31 (2005).

virtually certain. *Echeverria v. Estate of Lindner*, 2005 WL 1083704, *8 (N.Y. Super. Ct. 2005) (advance made in strict liability labor law case where plaintiff was almost guaranteed to recover); *Lawsuit Financial, L.L.C. v. Curry*, 683 N.W.2d 233, 239 (Mich.App. 2004) (advances made after liability had been determined); *Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487 (Ohio App. 9 Dist. 2001) (unreported) (advance made after first settlement offer).

Maryland common law also defines the term "loan" to include only those situations where the obligation to pay is absolute. *See Freedenburg v. Freedenburg*, 123 Md. App. 729 (1998) (money borrowed against insurance policy is a payment not a loan where "the item could never be sued for."). The Maryland Consumer Loan Law, however, expressly defines the term "loan" to also include an "advance." CL § 12-301(e); FI § 11-201(c).

In *Odell v. Legal Bucks*, 665 S.E.2d 767 (N.C. App. 2008) the court held that legal funding agreements fell within the North Carolina consumer finance act, which, like the Maryland Consumer Loan Law, included advances within the definition of loan. In doing so, the court concluded that the parties to an advance, unlike the parties to a loan, may have an expectation to reimbursement, but do not necessarily have an absolute right to repayment. *Id.* at 777. As a result, the law in question did not require a showing of an absolute right to repayment for the transaction to be covered. *Id.* at 778. Similarly, Maryland courts have recognized that while the term "advance" can be used to refer to a loan, it can also cover transactions that do not amount to loans. *McGaw v. Hanway*, 120 Md. 197, 202 (1913) ("The use of the word *advance* at times imports loan rather than payment, but from the context of this agreement it surely was used to mean a partial payment of the price the appellee was to receive."); *Freedenburg v. Freedenburg*, 123 Md. App. 729 (1998) ("While the advance is called a 'loan' and interest is computed in settling the account, the item could never be sued for, and in substance is a payment, not a loan."); *Fisher v. Parr*, 92 Md. 245 (1901) (authority to advance money is not equivalent to the authority to make a loan).[3]

While *Legal Bucks* is the only case I have found that undertakes a legal analysis of whether payment of money under a legal funding agreement is an "advance," it is worthy of note that these transactions are uniformly referred to as advances. *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626, 628 (Fla.App. 2005); *Lawsuit Financial, L.L.C. v. Curry*, 683 N.W.2d 233, 235-236, 240 (Mich.App. 2004); *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003); *Aldrich v. Aldrich*, 260 Ill.App. 333, 1931 WL 1668, *10 (Ill.App.Ct.1931); Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. Miami L. Rev. 203, 210, 232 (2006); Richmond, *Litigation Funding: Investing, Lending, or Loan Sharking?*, 2005 Prof. Law. 17, 31 (2005); *cf.*, *Attorney Grievance Com'n of Maryland v. Harris*, 310 Md. 197 (1987) (relating to attorney who had made personal loans and "advances against the anticipated settlement of the tort claims" to his

[3] The distinction between advances and loans is also discussed in the argument in *Green v. Conkling*, 3 Md. 384, 394, 399-400 (1852). The court itself did not discuss this distinction, but found that the plaintiffs did not have an absolute right to repayment.

client). In 2005, nine companies engaged in legal funding entered an Assurance of Discontinuance with the New York State Attorney General that describes the companies as "in the business of providing cash advance transactions with consumers."[4] The American Legal Finance Association also refers to legal funding as an advance,[5] as has the CEO of Oasis.[6]

For the above reasons, it is my view that legal funding agreements relate to advances that are covered by the Maryland Consumer Loan Law, and thus subject to the licensing requirements and the limits on interest that are contained in that law.

Constitutional Limit on Interest

If legal funding is not covered by the Maryland Consumer Loan Law, then there is no statutory authority to charge any interest in excess of that set in the Constitution. Article III, § 57 of the Maryland Constitution provides that the "Legal Rate of Interest shall be *Six per cent. per annum*; unless otherwise provided by the General Assembly." (Emphasis in original). The failure of the legal funding agreement to call the charges imposed interest does not mean that they are not. Maryland courts have made clear that they will look behind the form of the transaction to the actual effect. *B&S Marketing Enterprises, LLC v. Consumer Protection Div.*, 153 Md.App. 130 (2003) (sham purchase and rental arrangement); *Brenner v. Plitt*, 182 Md. 348, 356 (1943) (charging of commission by lender).

> This Court has held that no device or subterfuge of the lender will be permitted to shield him in taking more than the legal interest on the loan. In whatever part of the transaction usury may lurk, or in whatever form it may take, or under whatever guise the lender may attempt to evade the law, the court will seek to ascertain what the contract actually was between the parties and give the debtor relief. Where a creditor exacts of a debtor, as a condition of the loan, a sum in addition to the lawful interest, whether designated as a bonus, commission or carrying charge, or by any other name, the transaction is tainted with usury, except where the sum so exacted, when added to the stipulated interest, does not exceed interest at the maximum lawful rate on the principal sum of the loan.

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[4] The Assurance of Discontinuance is available on the Internet at http://www.americanlegalfin.com/alfasite2/documents/ALFAAgreementWithAttorneyGeneral.pdf The document does not discuss whether legal funding transactions are loans, but discusses the concerns of the Attorney General with practices in the industry, and reflects the agreement of the parties to operate under restrictions designed to address those concerns.

[5] *See* http://www.americanlegalfin.com/

[6] http://practice.findlaw.com/law-practice-management-articles/0000/000350.html

Plitt v. Kaufman, 188 Md. 606, 611-612 (1947) (internal citations omitted), *see also Andrews v. Poe*, 30 Md. 485, 487- 488 (1869).

The Cease and Desist Order issued by the Commissioner reflects that Oasis was lending money that was to be repaid at the time of a judgment or settlement of the case along with an additional charge dependent on the amount of time between the advance of the funds and the repayment. The Cease and Desist Order refers to this additional charge as interest, and it is clear, under Maryland cases, that it is. The amount of the charge is based on the amount advanced, and it increases based on the amount of time that the advance is out and unpaid. As a result, it is my view that the amounts charged under the agreement must be deemed interest. It is also my view that these charges are subject to the limitations set in the Maryland Consumer Loan Law. Nevertheless, if, *arguendo*, the Maryland Consumer Loan Law does not apply, the amounts charged would instead by subject to the 6% limits in Article III, § 57. *United Cable Television of Baltimore v. Burch*, 354 Md. 658 (1999).

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
miller19.wpd

IN THE MATTER OF:	*	**BEFORE THE MARYLAND**
	*	**COMMISSIONER OF**
OASIS LEGAL FINANCE, LLC	*	**FINANCIAL REGULATION**
Respondent	*	
	*	**DFR-EU-2008-241**
	*	

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SETTLEMENT AGREEMENT AND CONSENT ORDER

This Settlement Agreement and Consent Order ("Agreement") is entered into this **6th** day of **August, 2009**, by and between the Maryland Commissioner of Financial Regulation (the "Commissioner") and Oasis Legal Finance, LLC ("Oasis"), 40 North Skokie Boulevard, Suite 500, Northbrook, Illinois 60062.

WHEREAS, the Commissioner is charged under the Maryland Consumer Loan Law, Commercial Law Article ("CL"), Title 12, Subtitle 3, Annotated Code of Maryland, and Financial Institutions Article ("FI"), Title 11, Subtitle 2, Annotated Code of Maryland, with the responsibility of licensing and regulating consumer loans and advances in this State; and

WHEREAS, as a result of two complaints and an investigation by the Office of the Commissioner, it was alleged that Oasis engaged in the business of making loans or advances to Maryland consumers without the proper licenses under Maryland law; and

WHEREAS, in connection with these allegations, the Commissioner of Financial Regulation issued a Summary Order to Cease and Desist to Oasis on March 9, 2009, in which Oasis was ordered to cease and desist from engaging in the business of making advances to Maryland residents; and

WHEREAS, the Commissioner desires to ensure that Oasis will comply with all applicable licensing requirements and other provisions of Maryland law and regulations applicable to the making of advances in this State, and desires to avoid the cost to the taxpayers of lengthy hearings, court proceedings and appeals resulting from a litigated disposition of these allegations; and

WHEREAS, Oasis denies the allegations in the Summary Order to Cease and Desist issued to Oasis on March 9, 2009, and denies any liability under the Maryland Consumer Loan Law, or any other State laws or regulations applicable to lending in Maryland, and continues to assert that these transactions are non-recourse civil litigation funding transactions, that these are not "loans or advances" under the Commissioner's jurisdiction under current Maryland law, but has voluntarily entered into this Settlement Agreement and also desires to avoid the cost of a hearing and potential court proceedings resulting from a litigated disposition of these allegations; and

WHEREAS, Oasis acknowledges that it has voluntarily entered into this Agreement with full knowledge of its right to a hearing on the allegations set forth herein, pursuant to FI §§ 2-115(a) and 11-215(b), and the Maryland Administrative

Procedures Act (Md. Code Ann., State Gov't Article § 10-201 *et seq.*), and hereby waives its right to a hearing, and Oasis further acknowledges that it had an opportunity to consult with independent counsel in connection with its waiver of rights and negotiation and execution of this Agreement and has, in fact, consulted with its own counsel; and

NOW, THEREFORE, in consideration of the mutual promises contained herein, it is by the Maryland Commissioner of Financial Regulation, on the day and year first above written, hereby ORDERED that:

1. The Recitals set forth above are and shall form a part of this Agreement.

2. The Commissioner hereby vacates the Summary Cease and Desist Order issued to Oasis on March 9, 2009, and will withdraw the currently scheduled hearing from the Office of Administrative Hearings docket.

3. The Commissioner agrees that she will not bring an enforcement action of any kind, civil or administrative, against Oasis or against its officers, Board of Managers, employees, or investors, for any conduct related to the investigation referred to in the Summary Order to Cease and Desist issued to Oasis on March 9, 2009.

4. Oasis acknowledges that, as of the date it received the Summary Order to Cease and Desist, it has not engaged in any new transactions of the type described in the Summary Order to Cease and Desist, and it agrees that it will not

do business in Maryland as long as the current law is in effect in Maryland (or unless it chooses to get licensed as the Commissioner currently alleges that it must do).

5. Oasis will pay a settlement amount of $105,000.00 in full and complete satisfaction of all penalties that could have been assessed in connection with the facts and circumstances that were the subject of the investigation and Summary Order to Cease and Desist.

6. Oasis acknowledges that, in the event it violates any provision of this Agreement, the Maryland Consumer Loan Law, or any other State laws or regulations applicable to lending in Maryland, the Commissioner may, at the Commissioner's discretion, take such enforcement actions as are permitted by, and are in accordance with, applicable law.

7. The Commissioner will permit Oasis to conclude all pending transactions with Maryland consumers [which Oasis characterizes as non-recourse civil litigation funding transactions], including those currently in escrow, by collecting the funded amount plus a rate of return not to exceed the rates set forth in CL §12-306. As defined herein, "Maryland consumers" and "do business in Maryland" shall refer to transactions involving Maryland residents only.

8. This Agreement constitutes the complete resolution of a disputed matter and does not constitute nor shall it be deemed an admission by Oasis, or by its officers, Board of Managers, employees, or investors, of liability or a violation,

willful or otherwise, of Maryland law.

9. Oasis acknowledges that this Agreement is considered a Final Order of the Commissioner for the purposes of any future action by the Commissioner under the appropriate regulatory laws of the State of Maryland.

IN WITNESS WHEREOF, this Agreement is executed on the day and year first above written.

COMMISSIONER OF FINANCIAL REGULATION

By: Mark Kaufman
Deputy Commissioner

OASIS LEGAL FINANCE, LLC

By: Gary D. Chodes
Chief Executive Officer,
Oasis Legal Finance, LLC