SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

FOX CAPITAL GROUP, INC., MAIN STREET CAPITAL GROUP, LLC and CAPITAL STACK UT LLC,	:	Index No._____
	:	**COMPLAINT**
Plaintiffs,	:	
vs.	:	
JONATHAN BRAUN, HIGH FIVE GROUP LLC, RICHMOND CAPITAL GROUP LLC, D/B/A VICEROY CAPITAL FUNDING, and DONALD J. PLINER OF FLORIDA, LLC,	:	
Defendants,	:	

Plaintiffs Fox Capital Group, Inc. ("Fox" or "Plaintiff"), Main Street Capital Group, LLC ("Main St."), and Capital Stack UT LLC, ("Capital Stack," and with Fox and Main St., "Plaintiffs"), by their undersigned counsel, Thompson Hine LLP, for their complaint, respectfully allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action against Defendants for tortiously interfering with their third-party contracts and business relationships by inducing those third-parties—through deceptive means and false promises—to breach their contracts with Plaintiffs by overleveraging the third-parties with additional obligations, thereby causing the third-parties to be insolvent, and resulting in the third-parties defaulting on their contracts with Plaintiffs.

2. Plaintiffs are providers of small business financing known as "merchant cash advance" or "MCA" financing ("Funders"). [1] Recipients of Plaintiffs' MCA financing

[1] MCAs are structured as an immediate advance of capital in exchange for the purchase of a percentage of the businesses' future receivables at a discount.

("Merchant(s)") are typically businesses that do not qualify for traditional bank financing or who have an unexpected and expedited need for a short-term capital investment. As such, a critical aspect of Plaintiffs' business is their ability to assess and underwrite the risk of a Merchant's possible default, and to accurately price the cost of that risk into the MCA transaction. Similarly, an essential feature of Plaintiffs' MCA agreements prohibits the Merchants from accepting additional MCA financing ("Stacking"), which would overleverage the Merchant and greatly increase the risk of default.

3. Defendants Jonathan Braun ("Braun"), a convicted criminal scheduled to be incarcerated on October 28, 2019[2] for ten years, Richmond Capital Group LLC, D/B/A Viceroy Capital Funding ("Viceroy"), and High Five Group LLC ("High Five," with Braun and Viceroy, the "Braun Defendants"), two of Braun's numerous entities, operate as Funders in the MCA industry. Defendant Braun and his entities are the subjects of numerous lawsuits and news articles alleging his wide-ranging fraudulent, predatory, and abusive practices in the MCA industry.

4. The Braun Defendants have repeatedly—and again now—engaged in the following scheme ("Stacking Scheme"): they locate Merchants who have received MCAs from reputable Funders, such as Plaintiffs; they piggy-back on Plaintiffs' due diligence and underwriting by inducing those Merchants to accept short-term MCA financing; they induce the Merchants by promising a much larger and cheaper MCA financing in the future that will enable the Merchant to refinance all of their outstanding obligations (which never materialize), all the while concealing Braun's identity and criminal history; they invariably either fail to disburse the full amount of the contracted MCA funding, over-collect from the Merchants' business bank accounts, and/or charge

[2] Braun's initial surrender date was August 25, 2019, which was extended upon his request to "attend important religious services and holidays." *See United States v. Jonathan Braun*, 10-CR-433 (KAM), EDNY, Dkt. Nos. 166-167.

bogus fees and penalties; they ultimately drive the Merchants into insolvency, refusing to provide the additional promised MCA financing, and taking any and all steps to collect on their MCA obligations, including filing confessions of judgment, freezing bank accounts, and restraining accounts receivable—incapacitating the Merchants' ability to operate their business and often driving them into shuttering the business. As a result, the Merchants default on their MCA contracts with Plaintiffs.

5. As alleged herein, the Braun Defendants have previously engaged in this Stacking Scheme at least twice against Plaintiff Fox (in connection with the Dual Diagnosis and Marne Construction MCA transactions), causing financial harm to Fox.

6. The Braun Defendants are at it again now. During July and August of 2019, Plaintiffs have provided over 2 million dollars of MCA financing to Defendant Donald J. Pliner of Florida, Inc. ("Pliner"). Plaintiffs coordinated and obtained each other's mutual consent – pursuant to the respective governing MCA contracts – to jointly provide the MCA financing such that it was consistent with their risk models and pricing of the MCA transactions.

7. The Braun Defendants, knowing of the Plaintiffs' MCA agreements with Pliner and their prohibition against Stacking, nevertheless induced Pliner into accepting additional MCA financing by promising additional cheaper financing in the future and concealing Braun's identity. On September 3, 2019, the Braun Defendants provided Pliner with approximately $250,000 of MCA financing ***on condition that the Braun Defendants withdraw $9,999 from Pliner's bank account every business day*** for 35 days.

8. As a result, Plaintiffs have been harmed in that their security interest in Pliner's receivables has been diminished and will be potentially lost, and their MCA position is at a significantly increased risk of default. Pliner's financial condition is such that it does not have the

assets and projected income to satisfy its continuing operational obligations when combined with its new MCA daily remittance to High Five.

9. Further, the precise amount of the harm to Plaintiffs of the increased risk of Pliner's default is extremely difficult, if not impossible, to quantify, giving rise to this Court's authority to grant equitable relief.

10. Additionally, should the Braun Defendants actions drive Pliner into insolvency and a demise of its business (as is likely), Plaintiffs would suffer irreparable harm from their inability to recover the specific funds, in form of receivables, they have purchased from Pliner.

11. By this action, Plaintiffs seek to recover damages from the Braun Defendants with respect to the Marne Construction and Dual Diagnosis MCA transactions, and for specific performance in connection with the Pliner MCA transaction, by asserting causes of action for breach of contract and tortious interference with contract.

PARTIES

12. Plaintiff Fox Capital Group, Inc. is a corporation organized and existing under the laws of the State of Florida, with an office located in Brooklyn, New York.

13. Plaintiff Main Street Capital Group, LLC is a company organized and existing under the laws of the State of Florida, with an office located in Brooklyn, New York.

14. Plaintiff Capital Stack UT LLC is a company organized and existing under the laws of the State of Utah, having an office in New York, New York.

15. Upon information and belief, defendant Jonathan Braun ("Braun") is an individual residing in the State of New York. At all relevant times, Braun was a manager and/or owner, directly or indirectly, of High Five and Viceroy. Braun is a convicted felon who is scheduled to surrender on October 28, 2019 to serve a 10-year prison sentence for conspiracy to import 1,000

kilograms or more of marijuana and money laundering.[3] Since his guilty plea, and while on bail, Mr. Braun—in the course of conducting business for and though High Five, Viceroy and other entities—is alleged, in numerous civil lawsuits, to have engaged in shocking, fraudulent and abusive business conduct, including outright stealing from numerous businesses, fraudulently filed confessions of judgment, and threatened numerous individuals with physical violence.[4] His conduct has reached the national news.[5]

16. Upon information and belief, defendant High Five is a company organized and existing under the laws of the State of New York, with a listed address of 1279 49th Street, Suite 197, Brooklyn, New York, 11219.

17. Upon information and belief, defendant Viceroy is a company organized and existing under the laws of the State of New York with listed address of 8212 Third Avenue Brooklyn, New York, 11209.

18. Upon information and belief, defendant Pliner is a company organized and existing under the laws of the State of Florida with a principal place of business listed as 1 N. Lexington Avenue, White Plains, NY 10601.

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[3] *See U.S. v. Jonathan Braun*, 10-CR-433-KAM (E.D.N.Y.); *see also* N.Y. Daily News, Staten Island drug king can leave house arrest to visit Lubavitcher rebbe tomb (Dec. 23, 2013), available at http://www.nydailynews.com/new-york/nyc-crime/staten-island-drug-king-leave-house-arrest-visit-lubavitcher-rebbe-tomb-article-1.1556955.

[4] For example, Braun is alleged to have threatened a business counterparty to "break your jaw" to fabricate rights to file and enforce a confession of judgment, *Evelar, Inc. et al., v. Richmond Capital Group LLC et al.*, Index No. 652251/2018, Complaint ¶ 32, (N.Y. Sup. N.Y. Cty. May 5, 2018); Braun is alleged to have stated that he was "going to beat the shit out of you" to the former president of a synagogue and, to an adversary's attorney, to "shoot out her window." *Richmond Capital Group LLC v. Congregation Shule, Inc. d/b/a/ Congregation Shule et al.*, Index No. 2018-51838 Affirmation of Avrahm Lesches, pp. 8, 9, & 11, (N.Y. Sup. Dut. Cty. June 25, 2018); that Mr. Braun incessantly called the merchant, verbally accosted the principal of the merchant for not returning calls and berating the principal as "dumb-shit, f**khead" and then filing a confession of judgment against the merchant, *Ram Capital Funding LLC v. Texas Mills LLC*, Richmond Co. Index No. 151456/2017; and recently this Court vacated a fraudulent confession of judgment filed by Viceroy because of, *inter alia*, the fraudulent and false statements Braun submitted to the court. *Richmond Capital vs. Orian Megivern et al.*

[5] *See* Bethany McLean, *Merchant cash advances — salvation for small businesses or payday lending reincarnate?*, Yahoo Finance (Nov. 20, 2018), https://finance.yahoo.com/news/merchant-cash-advances-salvation-small-businesses-payday-lending-reincarnate-161835117.html; Zachary, R. Mider, *How an obscure legal document turned New York's court system into a debt-collection machine that's chewing up small businesses across America*, Bloomberg (Nov. 20, 2018), https://www.bloomberg.com/graphics/2018-confessions-of-judgment/.

NON-PARTIES

19. Marne Construction Inc. ("Marne") is a company organized under the laws of California with its principal office located at 749 N. Poplar Street, Orange, California, 92868.

20. Dual Diagnosis Treatment Center Inc. ("Dual" or "Dual Diagnosis") is a company organized under the laws of California having offices located California.

JURISDICTION AND VENUE

21. The Court possesses original jurisdiction over this civil action, and venue lies in this Court pursuant to CPLR § 503.

22. Upon information and belief, Defendant Braun is a resident of New York, subjecting him to personal jurisdiction under CPLR § 301.

23. Upon information and belief, each of the Defendants High Five and Viceroy transact business within New York on continuous and systematic basis, and Plaintiffs' claims in this proceeding arise from Defendants' transaction of business in New York, further subjecting Defendants to personal jurisdiction under CPLR §§ 301 & 302(a)(1).

24. Further, Defendant Pliner entered a forum selection clause whereby it consented to jurisdiction in "any court sitting in New York State."

25. Plaintiffs Fox and Main St. and Defendants High Five and Viceroy are a residents of Kings County, New York, and therefore venue lies in Kings County pursuant to CPLR 503(a).

FACTUAL ALLEGATIONS

I. Background – The Merchant Cash Advance (MCA) Business

26. Plaintiffs are providers of merchant cash advance financing. A merchant cash advance is a transaction whereby an investor ("Funder") agrees to advance funds to small business

entities (or Merchants) in transactions that are structured as purchases of future receivables in order to provide a short-term source of capital.

27. The MCA transaction is structured such that the Funder purchases a portion of the Merchant's future receivables, at a discounted price.[6] Then, the Funder debits the Merchant's bank account in an agreed-upon amount, either daily or weekly, until the Funder collects the full "purchased amount" of receivables ("Daily"). The Daily payments are generally debited by the Funder via ACH transfer.

28. The typical MCA process begins with the Merchant completing an application. In applying for the MCA financing, the Merchant typically submits various business information and documentation, including 12 months of bank statements, to the Funders for review and determination as to whether to approve the Merchant for the MCA financing.

29. Plaintiffs' due diligence process ("Underwriting") is crucial to its business and plays a vital role in Plaintiffs' ultimate success as it stands to lose significant sums of money—without recourse—in the event of a Merchant's default.

30. Plaintiffs' due diligence review and analysis considers the Merchant's overall financial health and position, existing and potential future cash flows, and, importantly, existing debt, including other outstanding MCA obligations.

31. Plaintiffs avoid approving and funding Merchants that are overleveraged and have multiple other outstanding advances, because these Merchants may have a higher likelihood of defaulting on their MCA obligations.

[6] Most jurisdictions, including New York, consider MCA transactions to be a purchase of receivables, and not a loan, and therefore not subject to usury restrictions. *See, e.g.*, *IBIS Capital Group, LLC v. Four Paws Orlando LLC*, 2017 N.Y. Misc. LEXIS 884, *4-7 (Nassau Co. Sup. Ct. March 10, 2017) (analyzing cases); *see also Womack v. Capital Stack*, 2019 U.S. Dist. LEXIS 148644, at *8-17 (S.D.N.Y. Aug. 30, 2019).

32. For this reason, Plaintiffs' MCA contracts include strict prohibition against accepting additional MCA financings during the duration of Plaintiffs' MCA financing, known as Stacking. Stacking occurs when a Merchant takes out multiple cash advances from different MCAs at the same time, thereby making it less likely for the Merchant to be able to pay back any of them.

33. Stacking is strictly prohibited in all of Plaintiffs' MCA agreements—and in virtually every MCA agreement in the industry—because Plaintiffs rely on the current financial status of the Merchant and determines whether Plaintiffs can tolerate the risk of purchasing that Merchant's receivables.

34. When a Merchant engages in Stacking, its risk of default increases beyond what Plaintiffs would have been willing to accept and initially approve, and therefore, Plaintiffs would likely not have funded the Merchant from the outset.

II. The Braun Defendants' Historical Stacking

a. Dual Diagnosis Transactions

35. On or about January 19, 2018, Fox and Dual entered into an MCA Agreement ("Fox-Dual MCA Agreement"), whereby Fox provided Dual with an MCA advance of $170,000. Attached as **Exhibit A** is a copy of the Fox-Dual MCA Agreement. Pursuant to the Fox-Dual MCA Agreement, Dual agreed to make daily remittances to Fox in the amount of $3,089.

36. The Fox-Dual MCA Agreement expressly provided that the transaction constituted a true and absolute sale of Dual's receivables to Fox.

37. Specifically, Fox-Dual MCA Agreement provided that:

> Merchant hereby sells, assigns and transfers to [Fox] (making [Fox] the absolute owner) in consideration of the "Purchase Price" specified above, the Purchased Percentage of all of [Dual's] future accounts, contract rights and other entitlements arising from or relating to the payment of monies from Merchant's customers'

> and/or other third party payors (the "Receipts" defined as all payments made by cash, cheek, electronic transfer or other form of monetary payment in the ordinary course of [Dual's] business), for the payments due to [Dual] as a result of [Dual's] sale of goods and/or services (the "Transactions") until the "Purchased Amount" has been delivered by or on behalf of [Dual] to [Fox].
>
> Fox has purchased and shall own all the Receipts [defined as all payments made by cash, check, electronic transfer or other form of monetary payment in the order course of [Dual's] business for the described in this Agreement up to the full Purchased Amount as the Receipts are created.

Ex. A, pp. 1-2 ("True Purchase Provision").

38. The Fox-Dual MCA Agreement prohibited Dual from Stacking without first obtaining the joint consent of Fox and Dual's other MCA Funders, if any.

39. Specifically, Section 2.15 of the Fox-Dual MCA Agreement provided that:

> [Dual] shall not enter into any merchant cash advance, factoring or loan agreement that relates to or involves its future Receipts with any party other than [Fox] for the duration of this Agreement without (i) written consent of [Fox]and (ii) the written agreement of any purchaser or transferee to the assumption of all of [Dual's] obligations under this Agreement pursuant to documentation satisfactory to [Fox].

Ex. A, p. 3 ("Anti-Stacking Provision").

40. The Fox-Dual MCA Agreement also granted Fox a security interest and lien upon all Dual's accounts, proceeds, and funds in order to secure Dual's obligations to Fox.

41. Specifically, the Fox-Dual MCA Agreement provided:

> This Agreement will constitute a security agreement under the Uniform Commercial Code. [Dual] grants to [Fox] a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory as those terms are each defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by [Dual] (b) all proceeds, as that term is defined in Article 9 of the UCC, (c) all funds at any time in [Dual] Account, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e) any amount which may be due to [Fox] under this Agreement, including but not limited to all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets")….These security interests and liens will secure all of [Fox's] entitlements

> under this Agreement …. [Fox] is authorized to file any and all notices or filings it deems necessary or appropriate to enforce its entitlements hereunder.

Ex. A, p. 5 ("Security Agreement").

42. Shortly thereafter, Braun and Viceroy began soliciting Dual to accept MCA financing. Upon information and belief, Braun and Viceroy induced Dual into accepting an MCA financing on extreme and draconian terms by promising additional future, larger MCA financings at better rates.

43. On or about February 2, 2018, Viceroy and Dual entered into an MCA Agreement ("First Viceroy-Dual MCA Agreement"), whereby Viceroy provided Dual with an MCA advance of $150,000. Attached as **Exhibit B** is a copy of the First Viceroy-Dual MCA Agreement. Pursuant to the First Viceroy-Dual MCA Agreement, Dual agreed to make a daily remittance to Viceroy in the amount of $4,999.

44. Then, on or about April 4, 2018, Viceroy and Dual entered into another MCA Agreement ("Second Viceroy-Dual MCA Agreement"), whereby Viceroy provided Dual with an MCA advance of $200,000. Attached as **Exhibit C** is a copy of the Second Viceroy-Dual MCA Agreement. Pursuant to the Second Viceroy-Dual MCA Agreement, Dual agreed to make a daily remittance to Viceroy in the amount of $9,995.

45. Braun and Viceroy Defendants knew of Dual's outstanding MCA balance to Fox because Braun and Viceroy obtained and reviewed Dual's bank statements, which are reviewed by every Funder before providing an MCA advance, and which reflected Dual's Daily payments to Fox.

46. Yet, critically, Braun and Viceroy did not seek or obtain Fox's consent to provide additional MCA funding in violation of the Fox-Dual MCA Agreements' Anti-Stacking Provisions.

47. Upon information and belief, Viceroy proceeded to underfund Dual, withdraw amounts in excess of the agreed payments, and obtained a falsely inflated confession of judgment against Dual.[7] For example, in the Second Viceroy-Dual MCA Agreement, Viceroy underfunded Dual in the amount of approximately $23,678 by charging fees that exceeded the amount set forth in the MCA Agreement. Then, despite the fact that Dual made timely remittances totaling almost $300,000, including several remittances in the daily amount of over $2,000 more than what was agreed to, on or about April 19, 2018, Viceroy obtained a $313,440.28 judgment (by way of confession) against Dual without any basis to do so, falsely claiming that Dual had only remitted $49,967, and falsely claiming that Dual owed significantly more than Dual had agreed to.

48. Viceroy waited no time in taking all action to enforce on its inflated judgment, including freezing Dual's bank accounts and seizing Dual's accounts receivable.

49. As a result of Viceroy's misconduct and Dual's Daily payment obligations to Viceroy, Dual defaulted and ceased making its contractual daily remittances to Fox.

b. The Marne Transaction

50. On or about February 22, 2019, Fox and Marne entered into an MCA Agreement ("Fox-Marne MCA Agreement"), whereby Fox provided Marne with an MCA advance of $300,000. Attached as **Exhibit D** is a copy of the Fox-Marne MCA Agreement. Marne was required to make a daily payment to Fox in the amount $2,957.14.

51. The Fox-Marne MCA Agreement expressly provided that the transaction constituted a true and absolute sale of Marne's receivables to Fox as reflected in the True Purchase Provision.

[7] Viceroy's misconduct against Dual Diagnosis is the subject of a current lawsuit pending in this Court. *See Dual Diagnosis Treatment Center Inc. et al. v. Yellowstone Capital West LLC, et al.*, Index No. 525443/2018 (N.Y. Sup. Kings. Cty., Dec. 18, 2018).

52. The Fox-Marne MCA Agreement prohibited Marne from Stacking without the joint consent of Fox and Marne's other MCA Funders by including the Anti-Stacking Provision. *See* Ex. D, p. 3.

53. The Fox-Marne MCA Agreement also included a Security Agreement, granting Fox a security interest and lien upon all Marne's accounts, proceeds, and funds in order to secure Marne's obligations to Fox. *See* Ex. D, p. 5.

54. In or around late March 2016, defendants Braun and High Five began soliciting Marne to accept MCA financing.

55. Upon information and belief, defendants Braun and High Five induced Marne into accepting an MCA financing on extreme and draconian terms by promising additional future, larger MCA financings.

56. Then, on or about March 11, 2019, Defendant High Five and Marne entered into an MCA Agreement ("High Five-Marne MCA Agreement"), whereby High Five provided Marne with an MCA advance of $160,000. Attached as **Exhibit E** is a copy of the High Five-Marne MCA Agreement. Pursuant to the High Five-Marne MCA Agreement, Marne agreed to make a daily remittance to High Five in the amount of $4,285.

57. Defendants Braun and High Five knew of Marne's outstanding MCA balance to Fox because the Braun Defendants obtained Marne's bank statements, which are reviewed by every Funder before providing an MCA advance, and which reflected Marne's daily payments to Fox.

58. Yet, critically, defendants Braun and High Five did not seek or obtain Fox's consent to provide additional MCA funding in violation of the Fox-Marne MCA Agreements' Anti-Stacking Provisions.

59. Moreover, upon information and belief, Braun advised and caused Marne to open a new, separate bank account in which to divert receivables purchased by Fox, in order to prevent Fox from discovering High Five's Stacking.

60. As a result of Marne's Daily payment obligations to High Five, Marne had insufficient funds and defaulted and ceased making its contractual daily remittances to Fox.

61. In or around late May 2019, Fox and Marne (and other cooperating MCA Funders) sought to restructure Marne's MCA obligations in an effort to salvage Marne from insolvency and failure. The parties—except High Five—engaged in good faith efforts to reach a compromise on Marne's MCA obligations such that Marne could rehabilitate its balance sheet and survive as a going concern.

62. Upon information and belief, during that time, rather than participate in the collective effort to restructure Marne's MCA obligations, Braun engaged in abusive collections behavior, including threatening physical harm to Marne's principal.

63. Then, during the restructuring discussions, and thwarting same, on May 31, 2019, High Five filed an Affidavit of Judgment and obtained a judgment against Marne for $132,245.03. At that time, High Five had already collected from Marne $194,340 on its $160,000 advance for a $34,340 profit.

64. High Five waited no time in taking all action to enforce on its judgment, including freezing Marne's bank accounts and directing restraint letter's to Marne's customers seeking to retrain Marne's accounts receivable.

65. As a result, Marne's ability to operate its business was severely hampered and, anticipating insolvency and a cessation of the business operations, Marne's other accounts payable moved to assert their rights against Marne's assets.

66. High Five's large daily payments, rushing to obtain a judgment and causing a rush to the courthouse and a collapse of the restructuring efforts, and aggressive enforcement actions, drove Marne into insolvency and caused it to default on its MCA obligations to Fox. Ultimately, with no other choice in light of Marne's pending insolvency, Fox was required to accept a reduced compromise remittance from Marne.

III. Braun Defendants' Current Stacking – Pliner Transaction

67. Starting in or around July 2019, Plaintiffs began providing Pliner with MCA financing to assist with its capital needs.

68. On or about July 23, 2019, Capital Stack and Pliner entered into an MCA Agreement ("Capital Stack-Pliner MCA Agreement"), whereby Capital Stack provided Pliner with MCA funding of $1,300,000 as a discounted purchase of Pliner's future business receivables. Attached as **Exhibit F** is a copy of the Capital Stack-Pliner MCA Agreement. Pursuant to the Capital Stack-Pliner MCA Agreement, Pliner agreed to make daily remittances to Capital Stack in the amount of $10,224.72.

69. The Capital Stack-Pliner MCA Agreement expressly provided that the transaction constituted a true and absolute sale of Marne's receivables to Fox. *See* Ex. F, pp. 1-2.

70. The Capital Stack-Pliner MCA Agreement prohibited Pliner from Stacking without first obtaining the joint consent of Capital Stack and Pliner's other MCA Funders. Specifically, Section 13.2 of the Capital Stack-Pliner MCA Agreement contained provided that:

> **Stacking Prohibited**. Seller shall not enter into any Seller cash advance or any loan agreement that relates to or involves its Future Receipts with any party other than Buyer for the duration of this Agreement. Buyer may share information regarding this Agreement with any third party in order to determine whether Seller is in compliance with this provision.

See Ex. F, p. 4.

71. The Capital Stack-Pliner MCA Agreement also included a Stacking Prohibition Addendum further highlighting the covenant against Stacking. *See* Ex. F, p. 21.

72. The Capital Stack-Pliner MCA Agreement also granted Capital Stack a security interest and lien upon all Pliner's accounts, proceeds, and funds. *See* Ex. H, p. 5.

73. Specifically, Section 14.1 of the Capital Stack-Pliner MCA Agreement provided:

> **Acknowledgment of Security Interest and Security Agreement**. The Future Receipts sold by [Capital Stack] to [Pliner] pursuant to this Agreement are "accounts" or "payment intangibles" as those terms are defined in the Uniform Commercial Code as in effect in the state in which the [Pliner] is located (the "UCC") and such sale shall constitute and shall be construed and treated for all purposes as a true and complete sale, conveying good title to the Future Receipts free and clear of any liens and encumbrances, from [Pliner] to [Capital Stack]. To the extent Future Receipts are "accounts" or "payment intangibles" then (i) the sale of the Future Receipts creates a security interest as defined in the UCC, (ii) this Agreement constitutes a "security agreement" under the UCC, (iii) [Capital Stack] has all the rights of a secured party under the UCC with respect to such Future Receipts. [Pliner] agrees that, with or without an Event of Default, [Capital Stack] may notify account debtors, or other persons obligated on the Future Receipts, of Seller's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of [Capital Stack].

See Ex. H, p. 5.

74. On or about July 25, 2019, Capital Stack filed a UCC-1 Financing Statement, thereby perfecting its security interest in Pliner's Future Receipts, defined as "all payments made to [Pliner] by cash, check, ACH or other electronic transfer, credit card, debit card, bank card, charge card or other form of monetary payment in the ordinary course of [Pliner's] business." Attached as **Exhibit G** is a copy of Capital Stack's UCC-1 Financing Statement.

75. On or about August 8, 2019, upon consultation with and obtaining the consent of Capital Stack, Fox and Pliner entered into an MCA Agreement ("First Fox-Pliner MCA Agreement"), whereby Fox provided Pliner with MCA funding of $750,000 as a discounted purchase of Pliner's future business receivables. Attached as **Exhibit H** is a copy of the First Fox-

Pliner MCA Agreement. Pursuant to the First Fox-Pliner MCA Agreement, Pliner agreed to make a daily remittance to Fox in the amount of $7,392.86.

76. The First Fox-Pliner MCA Agreement expressly provided that the transaction constituted a true and absolute sale of Marne's receivables to Fox by including the True Purchase Provision. *See* Ex. H, pp. 1, 3.

77. The First Fox-Pliner MCA Agreement prohibited Pliner from Stacking without the joint consent of Fox and Pliner's other MCA Funders. Specifically, Section 2.15 of the First Fox-Pliner MCA Agreement contained an Anti-Stacking Provision. *See* Ex. H, p. 6.

78. The First Fox-Pliner MCA Agreement also granted Fox a security interest and lien upon all Pliner's accounts, proceeds, and funds to secure Pliner's obligations to Fox and included a Security Agreement. *See* Ex. H, p. 8.

79. On or about August 23, 2019, Fox and Pliner entered into another MCA Agreement ("Second Fox-Pliner MCA Agreement"), whereby Fox provided Pliner with MCA funding of $250,000 as a discounted purchase of Pliner's future business receivables. Attached as **Exhibit I** is a copy of the Second Fox-Pliner MCA Agreement. Pursuant to the Second Fox-Pliner MCA Agreement, Pliner agreed to make a daily remittance to Fox in the amount of $3,550.

80. The Second Fox-Pliner MCA Agreement expressly provided that the transaction constituted a true and absolute sale of Marne's receivables to Fox by including the True Purchase Provision. *See* Ex. I, pp. 1, 3.

81. The Second Fox-Pliner MCA Agreement also included an Anti-Stacking Provision. *See* Ex. I, p. 6.

82. The Second Fox-Pliner MCA Agreement also included a Security Agreement, granting Fox a security interest and lien upon all Pliner's accounts, proceeds, and funds to secure Pliner's obligations to Fox. *See* Ex. I, p. 8.

83. On or about September 6, 2019, Fox filed a UCC-1 Financing Statement in connection with its First and Second Pliner MCA Agreements, thereby perfecting its security interest in Pliner's assets, Accounts, credit card receivables, promissory notes, deposit accounts, and proceeds of products of the foregoing. Attached as **Exhibit J** is a copy of Fox's UCC-1 Financing Statement.[8]

84. On or about August 29, 2019, upon consultation with and obtaining the consent of Capital Stack and Fox, Main St. and Pliner entered into a MCA Agreement ("Main St.-Pliner MCA Agreement," together with the Capital Stack-Pliner MCA Agreement, First Fox-Pliner MCA Agreement and Second Fox-Pliner MCA Agreement, the "Plaintiffs' Pliner MCA Agreements"), whereby Main St. provided Pliner with MCA funding of $200,000 as a discounted purchase of Pliner's future business receivables. Attached as **Exhibit K** is a copy of the Main St.-Pliner MCA Agreement. Pursuant to the Main St.-Pliner MCA Agreement, Pliner agreed to make a daily remittance to Main St. in the amount of $4,996.66.

85. The Main St.-Pliner MCA Agreement included the True Purchase Provision, expressly provided that the transaction constituted a true and absolute sale of Marne's receivables to Fox. *See* Ex. K, pp. 1, 3.

[8] Fox's UCC-1 also included the following notice:

> PURSUANT TO AN AGREEMENT BETWEEN DEBTOR AND SECURED PARTY, DEBTOR HAS AGREED NOT TO FURTHER ENCUMBER THE COLLATERAL DESCRIBED HEREIN, THE FURTHER ENCUMBERING OF WHICH MAY CONSTITUTE THE TORTUOUS INTERFERENCE WITH THE SECURED PARTY'S RIGHT BY SUCH ENCUMBRANCE IN THE EVENT THAT ANY ENTITY IS GRANTED A SECURITY INTEREST IN DEBTOR'S ACCOUNTS, CHATTEL, PAPER OR GENERAL INTANGIBLES CONTRARY TO THE ABOVE, THE SECURED PARTY'S ASSERTS A CLAIM TO ANY PROCEEDS THEREOF RECEIVED BY SUCH ENTITY.

86. The Main St.-Pliner MCA Agreement also included an Anti-Stacking Provision. *See* Ex. K, p. 6.

87. The Main St.-Pliner MCA Agreement also included a Security Agreement, granting Main St. a security interest and lien upon all Pliner's accounts, proceeds, and funds to secure Pliner's obligations to Main St. *See* Ex. K, p. 8.

88. Before entering the above three MCA Agreements, Plaintiffs obtained the consent of all other MCA Funders with which Pliner had an outstanding MCA balance and thus coordinated the appropriate levels of MCA obligations and Daily payments Pliner undertook.

89. In or around late August 2019, defendants Braun and High Five began soliciting Pliner to accept MCA financing.

90. Defendants Braun and High Five acted through their agent, Marc Kalter, of Sutton Funding. Mr. Kalter is a former FINRA registered representative who, according to his FINRA Broker Check: (1) four of his previous employers have been expelled by FINRA; (2) was suspended by FINRA for ten days from acting as a registered broker; (3) was denied registration in Georgia because his disciplinary record indicated that he was "not of good business reputation" and did not appear "qualified by training or experience to act as a securities salesman"; (4) was the subject of at least four customer disputes; and (5) was terminated from his most recent broker-dealer employer for soliciting business in states where he was not registered, among other things.[9]

91. In keeping with the Braun Defendants' pattern, defendants Braun and High Five directly and/or through their agent, concealed their true identity—and criminal history and poor reputation—from Pliner.

[9] See https://brokercheck.finra.org/individual/summary/1998911.

92. Defendants Braun and High Five then induced Pliner into accepting MCA financing on extreme and draconian terms by promising additional future, larger MCA financings. Specifically, defendants Braun and High Five promised Pliner "today $250K followed by a 600K funding in 10 days."

93. Then, on or about September 3, 2019, High Five and Pliner entered into a MCA Agreement ("High Five-Pliner MCA Agreement"), whereby High Five provided Pliner with an MCA advance of $250,000. Attached as **Exhibit L** is a copy of the High Five-Pliner MCA Agreement. Pursuant to the High Five-Pliner MCA Agreement, Pliner was agreed to make a daily remittance to High Five in the amount of $9,999.

94. Critically, compared with the similar Second Fox-Pliner MCA Agreement for $250,000, which called for daily remittances in the amount of $3,550, the High Five MCA Agreement called for daily remittances of $9,999.

95. Defendants Braun and High Five knew of Pliner's other outstanding MCA balances because defendants Braun and High Five obtained and, upon information and belief, reviewed Pliner's bank statements, which are reviewed by every Funder before providing an MCA advance, and which reflected the daily electronic remittances made to Plaintiffs.

96. Yet, critically, defendants Braun and High Five did not seek or obtain the Plaintiffs' consent to provide additional MCA funding in violation of the MCA Agreements' Anti-Stacking Provisions.

97. Shortly after executing the High Five MCA Agreement, Pliner learned of the Braun Defendants' identities and Braun's criminal conviction and pending incarceration, and that the Braun Defendants failed to obtain the waiver of consent of Plaintiffs' Anti-Stacking Provisions.

98. Upon information and belief, Pliner immediately communicated with Braun seeking to return the $250,000 advance and to cancel the High Five MCA Agreement.

99. Upon information and belief, Braun refused the offer, informing Pliner that he insisted on pursuing the High Five MCA Agreement because he was aware of the identity of Plaintiffs' principal(s) and, in sum and substance, that he sought to provoke them.

IV. Pliner's Financial Condition and Harm to Plaintiffs

100. Pliner's financial condition is such that it is unable to sustain the additional High Five remittances of $9,999 per day. As a result, Plaintiffs have been harmed in that their MCA position is at a significantly increased risk of default.

101. Plaintiffs' diligence of Pliner, in evaluating whether and how much of MCA financing to provide to Pliner, included reviewing Pliner's bank statement and cash flow projections, among other things. Plaintiffs' diligence revealed that Pliner does not have adequate assets, nor are its forecasted revenues sufficient, to satisfy its continuing operational obligations when combined with its additional High Five Daily payments of $9,999. Specifically, Pliner is highly overleveraged and its cash flow revenues reflect negative cash flow balances for September and October of 2019—the period when High Five's Daily payments are due.

102. Given Pliner's precarious financial condition, Pliner's new obligations to High Five cause Pliner's earlier contracts with Plaintiffs to be at a much-increased risk of default. Further, the precise amount of the harm to Plaintiffs of the increased risk of Pliner's default is difficult, if not impossible, to quantify.

103. Additionally, the Braun Defendants' collection of $355,000 from Pliner over the next 35 business days would very likely drive Pliner into insolvency and make it unlikely, if not

impossible, for Pliner to survive as a going concern. Plaintiffs would, therefore, suffer irreparable harm from their inability to recover from Pliner on their earlier contracts with Pliner.

V. High Five and Viceroy – Braun's Shell Companies

104. Braun is the owner and operator and, critically, the alter ego of High Five and Viceroy, which effectively operate as shell companies for Braun's MCA operations. Braun completely dominated High Five and Viceroy, does not treat High Five and Viceroy as separate business entities, and ignores their separate corporate identities.

105. Upon information and belief, High Five and Viceroy fail to adhere to any corporate formalities, they regularly co-mingle funds with each other and Braun, do not keep books or records that documented the operation of the corporation, often utilize the same address and phone numbers, and concurrently employ the same employees and officers.

106. Braun has formed and operated tens of companies, giving them even more DBAs, in order to, upon information and belief, conceal his pure reputation upon MCA recipients and his criminal history, as well as to render himself judgment proof by regularly moving funds and operations between his various companies.

FIRST CAUSE OF ACTION
(**Breach of The Plaintiffs' Pliner MCA Agreements – Against Pliner**)

107. Plaintiffs repeat and reiterate the preceding allegations as if set forth fully herein.

108. The Plaintiffs' Pliner MCA Agreements are valid and binding contracts.

109. The Plaintiffs' Pliner MCA Agreements prohibited Pliner from Stacking without the joint consent of Plaintiffs.

110. Plaintiffs have at all times complied with their obligations under the Plaintiffs' Pliner MCA Agreements and have performed and were willing and able to perform all of their obligations thereunder.

111. Pliner was capable of performing its obligations under the Plaintiffs' Pliner MCA Agreements but, instead, breached the Plaintiffs' Pliner MCA Agreements by entering into the High Five-Pliner MCA Agreement without Plaintiffs' consent.

112. Plaintiffs have no adequate remedy at law. Plaintiffs have been harmed in that their MCA position is at a significantly increased risk of default, and the precise amount of the harm to Plaintiffs of the increased risk of Pliner's default is difficult, if not impossible, to quantify.

113. Based on the foregoing, the Court should issue a preliminary and permanent injunction preventing Pliner from making any remittances with respect to the High Five-Pliner MCA Agreement until and only after such time as the Plaintiffs' Pliner MCA Agreements have been fully satisfied.

SECOND CAUSE OF ACTION

(**Tortious Interference Plaintiffs' Pliner MCA Agreements – Against Braun and High Five**)

114. Plaintiffs repeat and reiterate the preceding allegations as if set forth fully herein

115. Plaintiffs' Pliner MCA Agreements are valid and binding contracts between Plaintiffs and Pliner, and, thus, Plaintiffs have a business relationship with Pliner.

116. Braun and High Five had knowledge of Plaintiffs' Pliner MCA Agreements.

117. Each of the Plaintiffs' Pliner MCA Agreements included prohibitions against Pliner engaging in Stacking.

118. Nearly every MCA agreement in the industry contains an Anti-Stacking Provision in one form or another.

119. Braun and High Five had knowledge of the Anti-Stacking Provisions in Plaintiffs' Pliner MCA Agreements.

120. Nevertheless, on or about September 3, 2019, High Five and Pliner entered into the High Five-Pliner MCA Agreement, without obtaining Plaintiffs' consent, thereby causing Pliner to violate the Anti-Stacking Provisions in Plaintiffs' Pliner MCA Agreements.

121. Upon information and belief, the Braun and High Five intentionally interfered with Plaintiffs' contracts and business relationship with Pliner. Braun and High Five's actions were taken without concern, care or consideration as to the effect that such actions would have on Plaintiffs, its contracts, business relationships or financial condition. Upon information and belief, Braun and High Five's actions were solely out of malice and/or Braun and High Five's used improper means such as the torts set forth in the above causes of action.

122. Braun and High Five are aware of the harm being inflicted on Plaintiffs by their actions. Upon information and belief, Braun and High Five's actions are malicious, deliberate and intended to harm Plaintiffs.

123. Plaintiffs have no adequate remedy at law. Plaintiffs have been harmed in that their MCA position is at a significantly increased risk of default, and the precise amount of the harm to Plaintiffs of the increased risk of Pliner's default is difficult, if not impossible, to quantify.

124. Based on the foregoing, the Court should issue a preliminary and permanent injunction preventing Pliner from making any remittances on the High Five-Pliner MCA Agreement until and only after such time as Plaintiffs' Pliner MCA Agreements have been fully satisfied.

THIRD CAUSE OF ACTION
(**Tortious Interference with the Fox-Dual MCA Agreement – Against Braun and Viceroy**)

125. Fox repeats and reiterates the preceding allegations as if set forth fully herein.

126. The Fox-Dual MCA Agreement is a valid and binding contract between Plaintiffs and Pliner, and, thus, Plaintiffs has a business relationship with Pliner.

127. Braun and Viceroy had knowledge of the Fox-Dual MCA Agreement.

128. The Fox-Dual MCA Agreement included a prohibition against Dual engaging in Stacking.

129. Nearly every MCA agreement in the industry contains an Anti-Stacking Provision in one form or another.

130. Braun and Viceroy had knowledge of the Anti-Stacking Provisions in the Fox-Dual MCA Agreement.

131. Nevertheless, on or about February 2, 2018 and April 4, 2018 Viceroy and Dual entered into the First and Second Viceroy-Dual MCA Agreements, without obtaining Plaintiffs' consent, thereby causing Pliner to violate the Anti-Stacking Provisions in the Fox-Dual MCA Agreement.

132. Upon information and belief, the Braun and Viceroy intentionally interfered with Fox's contracts and business relationship with Dual. Braun and Viceroy's actions were taken without concern, care or consideration as to the effect that such actions would have on Fox, its contracts, business relationships or financial condition. Upon information and belief, Braun and Viceroy's actions were solely out of malice and/or Braun and Viceroy used improper means such as the torts set forth in the above causes of action.

133. Braun and Viceroy were aware of the harm being inflicted on Fox by their actions. Upon information and belief, Braun and Viceroy's actions were malicious, deliberate and intended to harm Fox.

134. As a result, Fox was damaged in an amount to be determined at trial, but not less than $42,397.

FOURTH CAUSE OF ACTION

(**Tortious Interference with the Fox-Marne MCA Agreement – Against Braun and High Five**)

135. Fox repeats and reiterates the preceding allegations as if set forth fully herein.

136. The Fox-Marne MCA Agreement is a valid and binding contract between Plaintiffs and Pliner, and, thus, Plaintiffs has a business relationship with Pliner.

137. Braun and Viceroy had knowledge of the Fox-Marne MCA Agreement.

138. The Fox-Marne MCA Agreement included a prohibition against Marne engaging in Stacking.

139. Nearly every MCA agreement in the industry contains an Anti-Stacking Provision in one form or another.

140. Braun and Viceroy had knowledge of the Anti-Stacking Provisions in the Fox-Marne MCA Agreement.

141. Nevertheless, on or about on or about March 11, 2019, High Five and Marne entered into the High Five-Marne MCA Agreement, without obtaining Plaintiffs' consent, thereby causing Pliner to violate the Anti-Stacking Provisions in the Fox-Marne MCA Agreement.

142. Upon information and belief, the Braun and High Five intentionally interfered with Fox's contracts and business relationship with Marne. Braun and High Five's actions were taken without concern, care or consideration as to the effect that such actions would have on Fox, its contracts, business relationships or financial condition. Upon information and belief, Braun and High Five's actions were solely out of malice and/or Braun and High Five used improper means such as the torts set forth in the above causes of action.

143. Braun and High Five were aware of the harm being inflicted on Fox by their actions. Upon information and belief, Braun and High Five's actions were malicious, deliberate and intended to harm Fox.

144. As a result, Fox was damaged in an amount to be determined at trial, but not less than $100,000.

REQUESTED RELIEF

WHEREFORE, Plaintiffs demand judgment as follows:

A. In connection with the First Cause of Action, that Pliner be enjoined from making any remittances to the Braun Defendants in connection with the Hive Five-Pliner MCA Agreement until such time as the Plaintiffs' Pliner MCA Agreements are fully satisfied;

B. In connection with the Second Cause of Action, that the Braun Defendants be enjoined from collecting any remittances from Pliner in connection with the Hive Five-Pliner MCA Agreement until such time as the Plaintiffs' Pliner MCA Agreements are fully satisfied;

C. In connection with the Third Cause of Action, for damages against Braun and High Five in an amount to be determined, but in any event not less than Forty Thousand and 00/100 cents ($40,000.00);

D. In connection with the Fourth Cause of Action, for damages against Braun and Viceroy in an amount to be determined, but in any event not less than One Hundred Thousand and 00/100 cents ($100,00.00);

E. That Plaintiffs be awarded attorney fees and costs;

F. That Plaintiffs be awarded such other and further relief that this Court deems just and proper.

Dated: New York, New York
September11, 2019

THOMPSON HINE LLP

By: /s/Mendy Piekarski

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