KRUNCHCASH, LLC	*	IN THE
	*	
Plaintiff/Counter-Defendant,	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
AMERICAN WELLNESS AND HEALTH CENTERS, INC.	*	BALTIMORE COUNTY
	*	
	*	
Defendant/Counter-Plaintiff.	*	CASE NO.: C-03-CV-19-004423
	*	

* * * * * * * * * * * * * *

AMERICAN WELLNESS AND HEALTH CENTERS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF <u>ITS SECOND MOTION FOR SUMMARY JUDGMENT</u>

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Defendant/Counter-Plaintiff, American Wellness and Health Centers, Inc. ("American Wellness" or "Defendant"), by and through undersigned counsel, hereby moves this court for entry of Summary Judgment against Plaintiff/Counter-Defendant, KrunchCash, LLC ("KrunchCash" or "Plaintiff"), on KrunchCash's Complaint for Judgment by Confession and on Count III – Violation of the Florida Usury Statute – damages in the amount of $1,219,320.00 in American Wellness' Counterclaim against KrunchCash, and for cause states:

I. PROCEDURAL HISTORY

KrunchCash has filed Motions for Summary Judgment dated September 1, 2010, February 26, 2021, and October 30, 2021. American Wellness filed a Motion for Summary Judgment dated February 4, 2021. At the conclusion of the last barrage of Motions for Summary Judgment, this Court held, on November 29, 2021, that "**There are genuine disputes of material fact**." (**Exhibit 1**, Order of the Circuit Court for Baltimore County November 29, 2021 (emphasis in original)). **Nevertheless, there has been a significant development in this matter**. On May 20, 2022, the United States Court of Appeals for the Eleventh Circuit issued a published opinion in the appeal of Plaintiffs Jonthan S. Resnick, Diane Resnick, Perry A. Resnick, The Law Offices of Jonathan Resnick and American Wellness Health Centers ("American Wellness Parties") appeal of the District Court's dismissal of their constitutional and state law claims against KrunchCash, LLC and Jeffrey Hackman ("KrunchCash Parties") in Case No. 20-14504. (**Exhibit 2**, Opinion of the Court of Appeals for the Eleventh Circuit, *Resnick, et. al. v. KrunchCash, LLC, et. al.*, No. 20-14504, published May 20, 2022).

The Honorable Stanley Marcus, Senior United States Circuit Court Judge, writing for the Eleventh Circuit Court of Appeals, reversed and remanded to the finding that the District Court lacked subject matter jurisdiction over the American Wellness Parties claims against the

KrunchCash Parties. **Ex. 2** at 22. On appeal, the Court of Appeals held that the District Court erred when it found that the District Court lacked subject matter jurisdiction because the American Wellness Parties claims were "so utterly frivolous that it robbed the court of federal question jurisdiction." **Ex. 2** at 3. In reversing the District Court and remanding the claims back to the District Court for further proceedings in accordance with their opinion, the Court of Appeals made several significant factual findings. Critically, the Court of Appeals found that the KrunchCash "use fee" was simply an interest rate. Then, the Court of Appeals found, pursuant to the Funding Agreements, that the interest charged to American Wellnes by KrunchCash required "American Wellness to pay at least five months (20 percent of the loan)." **Ex. 2** at 4. The Court of Appeals then found that the Funding Agreement between KrunchCash and American Wellness "charged a maximum of 48 percent per annum." *Id.*

This Motion seeks resolution of pure questions of law based on the findings of the Court of Appeals for the Eleventh Circuit and the undisputed facts before the Court. In light of the clear findings of the Eleventh Circuit, there is simply no material fact issue for a jury to resolve at trial. Accordingly, summary judgment in favor of American Wellness on KrunchCash's Complaint for Judgment by Confession and on American Wellness's usury claim – Count III - in its Counterclaim should be granted.

II. STANDARD OF REVIEW

Under Rule 2-501, a motion for summary judgment should be granted "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f); *see also Murphy v. Mertzbacher,* 346 Md. 525, 531 (1997) ("[S]ummary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as matter of law."). "The purpose of the summary judgment procedure is not to try the case or to resolve factual disputes; rather it is to decide whether there is an issue of fact sufficiently material to be tried."

Gross v. Sussex, Inc., 332 Md. 247, 256 (1993). "Thus, in considering a motion for summary judgment, the trial court determines issues of law and resolves no disputed issues of fact." *Fick v. Perpetual Title Co.*, 115 Md. App. 524, 533 (1997).

A material fact is a fact "the resolution of which will somehow affect the outcome of the case." *Lynx, Inc. v. Ordinance Products, Inc.*, 273 Md. 1, 8 (1974). "A dispute as to a fact relating to grounds upon which the decision is not rested is not a dispute with respect to a material fact and such dispute does not prevent the entry of summary judgment." *Bradley v. Fisher*, 113 Md. App. 603, 609-110 (1997) (internal quotations and citation omitted). In other words, "a dispute over a non-material fact will not preclude summary judgment." *King v. Bankerd*, 303 Md. 98, 111 (1985). Moreover, conclusory denials or bald allegations will not defeat a motion for summary judgment, *see Bond v. NIBCO*, 96 Md. App. 127, 135 (1992), nor will a mere "scintilla of evidence" in support of the non-moving party's position. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-38 (1992) ("[T]he mere existence of a scintilla of evidence in support of the plaintiffs' claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.").

Summary judgment is a particularly favored "mechanism to secure just, speedy and inexpensive determination of a case, where its proper use can avoid the cost of trial." *JKC HOLDING Co. v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Thus, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment should be entered. *Celotex Corp v. Catrett,* 477 U.S. 317, 322 (1986). As more fully set forth below, summary judgment should be granted in favor of American Wellness on

KrunchCash's Complaint for Judgment by Confession and on Count III of American Wellness' Counterclaim.

III. ARGUMENT

The undisputed fact, as found by the Court of Appeals, is that KrunchCash charged illegal and criminally usurious rates of interest under Florida law, rendering the MPFA and the Amended MPFA void and unenforceable.

A. Florida Usury Statute

Florida's usury laws are set forth in Chapter 687, Florida Statutes. Under Section 687.02(1):

> All contracts for the payment of interest upon any loan, advance of money, line of credit or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of *18 percent per annum simple interest* are hereby declared usurious. However, if such loan, advance of money . . . or obligation exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071.

FLA. STAT. § 687.02(1) (emphasis added). For loans exceeding $500,000, the operative statute is section 687.071, which provides that loans with effective interest rates of **25%** or more are ***criminally*** usurious. *See id.* § 687.071(2) & (3).

Contracts providing for criminally usurious rates are **unenforceable**. *See id.* § 687.071(7). Indeed,

> [i]n the case of a loan which rises to the level of criminal usury under Fla. Stat. § 687.071, the entire loan obligation is unenforceable and the borrower is entitled to seek forfeiture from the lender of any and all principal and interest actually paid by the borrower to the lender under the usurious loan.

In re Omni Capital Grp. Ltd., 157 B.R. 712, 717 (Bankr. S.D. Fla. 1993); *see also* FLA. STAT. § 687.071(7). Moreover, Florida law imposes severe penalties on persons engaged in criminally usurious practices, otherwise known as "loan sharks." *See id.* § 687.071(1)(f). A person who

— *directly or indirectly* — willfully and knowingly charges, takes, or receives interest at rates of 25% or more, but less than 45%, commits a second-degree misdemeanor. *See id.* § 687.071(2). If the interest rate exceeds 45%, it is a third-degree felony. *See id.* § 687.071(3).[1] Here, as the findings of the Court of Appeals confirm, KrunchCash's Funding Agreements with American Wellness charge 48% interest per year, in excess of the third-degree felony rate under Florida law. FLA. STAT. § 687.071(3).

B. Elements of Usury

To prevail on a usury claim, the borrower must establish: (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and (4) that there exists a corrupt intent to take more than the legal rate for the use of the money loaned. *Dixon v. Sharp*, 276 So. 2d 817, 819 (Fla. 1973); *see also US Connect, LLC v. Capital Sols. Bancorp LLC*, No. 2:12-CV-615-FTM-29, 2013 WL 4401840, at *2 (M.D. Fla. Aug. 14, 2013).

(i) The MPFA expressly provided for a series of loans.

The factual findings of the Court of Appeals illustrate that KrunchCash made a series of individual loans to American Wellness. **Exhibit 3,** Funding Agreements beween Krunch Cash and American Wellness. KrunchCash **concedes** in documents filed that KrunchCash filed with this Court, that these loans were often in excess of one year. **Exhibit 4,** KrunchCash Ledger, **Exhibit 5,** American Wellness Bank Statements.

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[1] In the case of civil usury, Fla. Stat. § 687.04 provides, in relevant part:

> [A person charging usurious interest] shall forfeit the entire interest so charged, or contracted to be charged or reserved . . . and when said usurious interest is taken or reserved, or has been paid, then and in that event the person who has taken or served, or has been paid, either directly or indirectly, such usurious interest shall forfeit to the party from whom such usurious interest has been reserved, taken, or exacted in any way double the amount of interest so reserved, taken, or exacted. . . .

(ii) KrunchCash charged and received illegal rates of interest.

The undisputed facts found by the Court of Appeals also proves that KrunchCash charged and received interest on these loans far in excess of the statutory maximums set forth in Florida's usury statute and rising to the level of a serious criminal offense. *See generally* FLA. STAT. § 687.071; *see also In re Boling*, No. 6:05-BK-16267-KSJ, 2008 WL 5100204, at *7 (Bankr. M.D. Fla. July 24, 2008).

As noted above, contracts for payment of interest on a loan at a higher rate of interest than the equivalent of 25% percent per annum simple interest are criminally usurious. *See* FLA. STAT. § 687.071. The statute expressly states that the interest rate is determined by calculating the equivalent of the annualized rate. *See generally id.* §§ 687.02, 687.071. ("All contracts for the payment of interest upon any loan . . . at a higher rate of interest than **the equivalent of [25%] percent per annum simple interest** are hereby declared usurious.") (alteration and emphasis added). Consistent with this, courts have routinely applied this method to calculate interest when considering a usury claim. *See In re Diagnostic Instrument Grp., Inc.*, 276 B.R. 302, 310 (Bankr. M.D. Fla. 2002) (noting that "the effective interest rate for a transaction in which a borrower agrees to pay a fee of $25,000 in exchange for a loan of $250,000 for a 57–day period is in excess of 60 percent per annum. Such an interest rate is usurious under Florida law."); *see also In re Omni Capital Grp. Ltd.*, 157 B.R. at 716 (where the Court noted that a 5% rate of interest for a loan paid in one month's time extrapolated to annual interest rate is 60%, and determined that "[d]efendant received what could only be characterized as 'interest' on each of the Notes at rates in excess of 25% per annum."). The Court of Appeal applied the same method of calculation and found that the yearly interest rate was 48% *per annum*, which, under Florida law, is criminally usurious.

Thus, KrunchCash was charging (and receiving) far beyond the statutory limit for criminal usury of 25% *per annum* simple interest on **every single loan that was repaid**. Exs. 4 and 5. Such rates are patently usurious, illegal, and criminal. Accordingly, the uncontroverted facts as found by the Court of Appeals and evidence — particularly KrunchCash's own internal ledger — corroborates that there is no genuine issue of fact that KrunchCash was charging and receiving interest on loans at rates that were illegal and subject to criminal penalties under Florida's usury statute. *See* FLA. STAT. §§ 687.02, 687.071.

(iii) KrunchCash had a corrupt intent to take usurious rates of interest.

KrunchCash knowingly and intentionally obtained an outrageous and illegal return on funds loaned to American Wellness. The element of "corrupt intent" is proven by showing that the lender *knowingly charged* or *knowingly received* interest at a rate in excess of the maximum statutory rate. *See In re Omni Capital Grp. Ltd.*, 157 B.R. 712, 718-19 (Bankr. S.D. Fla. 1993); *see also Oregrund Ltd. P'ship v. Sheive*, 873 So. 2d 451, 459 (Fla. 5th DCA 2004). In determining whether the lender knowingly charged or received excessive interest, the Court must consider all of the circumstances surrounding the transaction. *See In re Omni Capital Grp., Ltd.*, 157 B.R. at 719 (citing *Rollins v. Odom*, 519 So. 2d 652, 657 (Fla. 1st DCA 1988)).

"'Corrupt intent' does **not** require knowledge of the usury statutes themselves by the lender and a specific intention to violate them; rather, it requires proof that the lender intended to collect payments for the loan which, when expressed as a simple rate of interest per annum, exceeded the maximum allowable rate." *Saralegui*, 19 So. 3d at 1051. "When the lender has intentionally and purposely done that which amounts to or results in a contract for or the exaction of usurious interest, an argument by the lender that it was not shown the lender intended to violate the usury statute is without merit." *Rollins*, 519 So. 2d at 658 (citations omitted).

KrunchCash's corrupt intent, as evidenced in the MPFA and the Amended MPFA drafted solely by KrunchCash, requires KrunchCash to collect usurious interest is apparent in at least three ways: 1) on the very face of the MPFA; 2) in KrunchCash's internal ledger; 3) throughout KrunchCash's extensive litigation to collect on its loans to American Wellness in Maryland, and 4) KrunchCash's history of charging usurious rates on their loans by semantics by terming "interest" a "use fee," or similary misleadinig term.

C. Plaintiff's Intent is Apparent on the Face of the MPFA.

"[I]f the contract on its very face imports usury, by express reservation, the intent is apparent." *In re Mickler*, 50 B.R. 818, 829 (Bankr. M.D. Fla. 1985). "[T]he intent to exact a usurious interest rate is satisfied by the mere fact that the [contract] provides for a [usurious] rate." *Id.* (citations omitted; alterations added). Here, as in *Mickler* and as found by the Court of Appeals, the MPFA charged usurious rates of interest on its face for the money loaned to American Wellness. Ex. 2 at 4. This alone is sufficient to prove KrunchCash had "corrupt intent" to collect interest at criminally usurious rates.

D. KrunchCash's Ledger and Litigation in Maryland Shows Intent to Collect Usurious Interest.

Nevertheless, the circumstances of the transactions provide *further* incontrovertible proof that KrunchCash willfully and knowingly collected interest on these loans at shocking criminal rates. There is no greater evidence of KrunchCash's corrupt intent to collect unlawful interest than KrunchCash's own internal ledger, which itemizes the interest rate charged on each and every loan issued to American Wellness. Ex. 4. As explained *supra,* this ledger clearly proves that KrunchCash charged illegal interest rates on all loans issued to American Wellness. Ex. 4 ¶¶ 12-14, 22–24. Importantly, this ledger was the basis of an entry of confessed judgment, later vacated, against American Wellness in this Court. Further, the MPFA and the Amended MPFA were the

sole basis of the freezing of American Wellness' bank account and other Orders of this Court, including an Order that all PIP payments from an insured, namely, Allstate Insurance, be made payable to both KrunchCash and American Wellness.

The existence of KrunchCash's historic and extensive litigation in Maryland is further evidence of its corrupt intent to collect criminally usurious interest. Before this Court, KrunchCash relentlessly pursued entry of confessed judgment in excess of Three Million (3,000,000.00) Dollars, which caused the freezing of American Wellness' bank account through Maryland's garnishment procedure, and also filed a Motion for Summary Judgment on its Complaint for Judgment by Confession and a Motion to Dismiss American Wellness' Counterclaim against KrunchCash, among other unsuccessful motions — all in an effort to collect on amounts due under the usurious loan transactions at issue here. *See* Court file. There is no question that KrunchCash's deliberate choice to file a lawsuit and numerous motions to collect sums under its lawsuit, and pursue creditor remedies ***specifically designed to collect*** these rates and the factual findings of the Court of Appeals is conclusive proof that it intended to exact payments for criminally usurious loans.

E. The Funding Agreement is Void *Ab Initio*.

In light of the above, the MPFA, as amended, was criminal from its inception and charged interest far beyond the threshold for criminal usury in Florida. *See* FLA. STAT. §§ 687.02, 687.071. In fact, each loan of one year of more **is punishable as a third-degree felony under the statute.** *See* FLA. STAT. § 687.071(3).

Under Florida law, contracts which violate Florida criminal laws and public policy are illegal and void *ab initio* and cannot be enforced. *See Power Fin. Credit Union v. Nat'l Credit Union Admin. Bd.*, 494 F. App'x 982, 986 (11th Cir. 2012) ("[A] contract which violates a

provision of . . . a statute is void and illegal and, will not be enforced in [Florida] courts."); *see also Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001). "The right to contract is subject to the general rule that the agreement must be legal and if either its formation or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal." *Thomas v. Ratiner*, 462 So. 2d 1157, 1159 (Fla. 3d DCA 1984). An agreement that is void *ab initio* is one that was illegitimate from the beginning and never legally valid. *See* Black's Law Dictionary (online 2nd ed.). The usury statute itself unequivocally states that a criminally usurious loan is not an enforceable debt. *See* FLA. STAT. § 687.071(7).

Thus, the MPFA, as amended, as the Court of Appeals found, is illegal, void *ab initio*, and clearly unenforceable under the usury statute and basic principles of Florida law. American Wellness is therefore entitled to judgment in its favor and a finding that the MPFA, as amended, is void *ab initio* and unenforceable.

F. American Wellness is Entitled to Forfeiture of all Principal and Interest.

In addition to a finding that the illegal loan agreement is unenforceable, Florida's usury laws entitle a borrower to seek forfeiture from a lender of not just the interest paid by the borrower, but the entire principal amount. *See Taylor v. Certified Legal Funding, Inc.*, No. 8:18-CV-27-EAK-MAP, 2018 WL 3860243, at *4 (M.D. Fla. July 3, 2018); *Inetianbor v. Cashcall, Inc.*, No. 13-60066-CIV, 2016 WL 4250644, at *4 (S.D. Fla. Apr. 5, 2016) ("When a debt has an interest rate of greater than 25%, it is criminally usurious, and the remedy is cancellation of the debt and a return of the amounts paid by the borrower to the lender.") (citation omitted); *see also Velletri v. Dixon*, 44 So. 3d 187, 192 (Fla. 2d DCA 2010) (same). Accordingly, American Wellness is entitled to (1) cancellation of the debt under the MPFA and the Amended MPFA; and (2) forfeiture from KrunchCash of any and all principal and interest paid by American Wellness to

KrunchCash for all of the usurious loans — a total of **$1, 219,320.00**. Ex. 5; *see also In Re Omni Capital Grp., Ltd.*, 157 B.R. at 719 (entering judgment against defendant for amount of interest and principal borrower paid under the usurious transactions).

IV. CONCLUSION

The findings of the Court of Appeals are conclusive and binding on KrunchCash. American Wellness has met its burden of proof and established that there is no factual dispute that the MPFA and the Amended MPFA charged illegal and criminally usurious rates of interest and that KrunchCash had a corrupt intent to charge and collect these illegal rates of interest. As a matter of law, the MPFA and the Amended MPFA are void *ab initio* and unenforceable. Accordingly, American Wellness is entitled to judgment in its favor on KrunchCash's Complaint for Judgment by Confession and on Count III of American Wellness' Counterclaim. American Wellness is also entitled to forfeiture from KrunchCash of any and all principal and interest paid by American Wellness to KrunchCash for the usurious loans, namely, $1,219,320.00.

WHEREFORE, Plaintiff, American Wellness, respectfully requests that this Court: (1) enter summary judgment in its favor on KrunchCash's Complaint for Judgment by Confession and on Count III of American Wellness' Counterclaim; (2) find the Medical Provider Funding Agreement, and the Amended Medical Provider Funding Agreement, are both void *ab initio* and unenforceable; (3) find American Wellness is entitled to forfeiture from KrunchCash of any and all principal and interest paid by American Wellness to KrunchCash under the usurious loans, the Medical Practice Funding Agreement, and the Amended Medical Practice Funding Agreement, namely, the sum of $1,219,320.00; and (4) Order such further relief as the Court deems proper.

Dated: June 8, 2022

Respectfully Submitted,

/s/ Robert B. Schulman, Esq.
Robert B. Schulman
CPF No. 7306010108
RBS@shg-legal.com
Schulman, Hershfield & Gilden, P.A.
One East Pratt Street, Suite 904
Baltimore, Maryland 21202
Tel: (410) 332-0850
Fax: (410) 332-0866

/s/ Leslie D. Hershfield, Esq.
Leslie D. Hershfield
CPF No. 8912180258
lhershfield@shg-legal.com
Schulman, Hershfield & Gilden, P.A.
One East Pratt Street, Suite 904
Baltimore, Maryland 21202
Tel: (410) 332-0850
Fax: (410) 332-0866

Counsel for Defendant/Counter-Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2022, I served a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of American Wellness' Second Motion for Summary Judgment, via MDEC E-Filing to all counsel of record.

/s/ Robert B. Schulman, Esq.

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Index of Exhibits in Support of Defendant/Counter-Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment

Exhibit	Description
1	Order of the Circuit Court for Baltimore County (November 29, 2021)
2	Published Opinion of the Eleventh Circuit Court of Appeals (May 20, 2022)
3	Funding Agreements between American Wellness and KrunchCash
4	KrunchCash Ledger
5	Bank Statements of American Wellness