

IN THE COUNTY COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

UCN:
CASE NO: XXXX-XX-XXXXXX
DIVISION: G

XXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXX, XXX,
a corporation,
Plaintiff,

v.

XXXXX XXXXX,
Defendant.

SECOND AMENDED RESPONSE TO COMPLAINT

COME(S) NOW the Defendant(s), Xxxxx X. Xxxxx, (hereafter, "Defendant"), and answer(s) the Complaint as follows:

1. Defendant is without information or knowledge sufficient to form an opinion as to the truth or accuracy of the allegations contained in paragraphs 1 through 6 of the Complaint, and based on that denies generally and specifically each and every allegation contained therein.

AFFIRMATIVE DEFENSES

2. The Complaint fails to allege or prove that Plaintiff is licensed to make and collect loans in accordance with Fla. Stat § 516.02(1).

3. Plaintiff has not proven that Plaintiff is the real party in interest. Defense demands proof of ownership specifically that the alleged account is still the legal property of Plaintiff with all of the Original Creditor's rights and privileges intact.

4. Plaintiff's complaint fails to allege a valid assignment and there are no averments as to the nature of the purported assignment or evidence of valuable consideration; Plaintiff's complaint fails to allege whether or not the purported assignment was partial or complete and there is no evidence that the purported assignment was bona fide.

5. Defendant claims Accord and Satisfaction as Defendant alleges that the Plaintiff accepted payment from a third party for the purported debt, or a portion of the purported debt, or that the Plaintiff received other compensation in the form of monies or credits.

6. Plaintiff's damages are limited to real or actual damages only.

7. Defendant alleges that the granting of the Plaintiff's demand in the Complaint would result in further Unjust Enrichment, as the Plaintiff would receive more money than plaintiff is entitled to receive.

8. Contract refers to riders and attachments that are not provided. Without these documents, contract is not complete and cannot be checked for violations of state and/or federal laws.

9. Plaintiff's damages are the result of acts or omissions committed by Plaintiff or third party vendors, affiliates, associates, or subsidiaries to Plaintiff over whom Defendant has no responsibility or control.

10. Plaintiff's actions are precluded, as Plaintiff's demands are usurious and violate state and federal laws.

11. Defendant reserves the right to plead other affirmative defenses that may become applicable and/or available at a later time.

COUNTERCLAIMS

CAUSE OF ACTION

12. This is an action for damages based on Unjust Enrichment, Usurious Transaction, and various other acts by the Plaintiff.

THE PARTIES

13. Plaintiff has made claims that they operate under Florida Statute § 516. Fla. Stat. § 516.05(3) grants licenses based on a single location. Plaintiff's current location in Virginia Beach, VA is not licensed in the state of Florida, nor has it ever been. Plaintiff's validation letter dated 26 January, 2009, indicates the Plaintiff is the current creditor and is located in Virginia Beach, VA.

14. Florida Office of Financial Regulation web site indicates that Plaintiff was licensed at other locations in and out of the state of Florida but licenses have been terminated since April 2003.

15. Plaintiff's offices have conducted business in this state and therefore this court has personal jurisdiction as established by Fla. Stat. § 48.193.

16. Defendant is a "Consumer finance borrower" as defined by the Fla. Stat § 516.01(1) and owns property in this state, and therefore this court has personal jurisdiction as established by Fla. Stat. § 48.193.

PERSONAL CREDIT LINE ACCOUNT

17. The Defendant entered into a Personal Credit Line Account Agreement with the Plaintiff on the 17th of October, 2000, based on an offer of credit in the form of a "Live Check" that the Defendant received in the mail from Plaintiff.

18. When entering into that agreement, Defendant was offered Single Life, Single Disability, and Single Unemployment Insurance. Defendant declined to complete the Optional Credit Insurance

Disclosure, stating she did not want the insurance. Salesperson informed Defendant that the Optional Credit Insurance Disclosure must be completed whether she wanted the insurance or not, and if she declined the insurance, to leave the checkboxes blank.

19. Defendant, acting on information from the Plaintiff's salesperson, did sign the Optional Credit Insurance Disclosure and did leave the checkboxes blank (affidavit filed 6/30/2009).

20. Defendant does not speculate on how or when the Plaintiff's copy of Optional Credit Insurance Disclosure received the checkmarks but does maintain that the checkboxes were blank when Defendant signed said document.

21. Plaintiff admits no documents are available to support the insurance charges other than the Optional Credit Insurance Disclosure. The Optional Credit Insurance Disclosure is not an insurance policy; it is not an application; it is not an agreement; it is just as the name infers; a disclosure on the charges and other information on the proposed insurance policy. The Optional Credit Insurance Disclosure can indicate only a desire for insurance. Defendant did not mark checkboxes indicating desire. Plaintiff's Optional Credit Insurance Disclosure refers to an application for insurance. The Application for Insurance was not completed.

22. The Optional Credit Insurance Disclosure does not identify any insurance company. At no time was any insurance company identified to the Defendant. If any insurance company were to be involved in the transaction, that insurance company would be a vendor, affiliate, associate, or subsidiary of the Plaintiff.

23. Plaintiff's Optional Credit Insurance Disclosure states that there will be no coverage until the insurer approves the application. Plaintiff routinely collects for insurance from the application date, regardless of whether there is coverage under the insurance policy. There is no mechanism in place to verify acceptance of the insurance policy by the insurance company. A Consumer Finance Borrower could end up paying for insurance without coverage for a few days or up to the term of the loan without being covered by insurance.

24. Plaintiff admits there is no proof that the insurance policies were delivered to the Defendant within the required 60 day period. Plaintiff admits there is no proof that the insurance policies ever existed. Plaintiff admits no bookkeeping records are available to show payment for insurance to the insurance company.

25. Based on paragraphs 17 through 24 above, Defendant alleges an unlawful act in which the Plaintiff charged and collected additional funds claimed as insurance without providing the applicable coverage. For whatever reason this was done, the results unjustly enrich Plaintiff's profits at the expense of the Defendant. This is an unconscionable act.

STATEMENT OF FACTS

26. In reality, a real insurance company would not issue insurance without an application with at least a minimum of information on health and employment. Things like disclosing pre-existing conditions would be important for credit life and/or disability insurance. A record of employment history would be important for unemployment insurance.

27. In accordance with Fla. Stat § 627.681(4), all credit life and disability insurance sold shall be evidenced by a policy, certificate, or statement of insurance delivered to the insured borrower

within 60 days of the date upon which the indebtedness occurred. No policy, certificate, or statement of insurance was ever received by the Defendant. Plaintiff indicates that they do not receive a copy of the insurance policy so they do not know when or if it is accepted.

28. Defendant questioned the existence of insurance. Plaintiff claims insurance was purchased. When Plaintiff was asked for a copy of policy, certificate, or statement of insurance, no copy was available to justify additional charges.

29. Defendant requested a copy of the original application and all attachments allegedly completed by Defendant for the purposes of acquiring an account. Plaintiff replied they were not in possession of such documents.

30. Defendant has asked on multiple occasions for documents that should contain the name of the insurance company from whom the purported insurance policy was obtained. No documents have been provided nor has the Plaintiff informed Defendant of the name of the insurance company. Because Plaintiff has not identified the insurance company involved, Defendant has no ability to contact the purported but unnamed insurance company.

31. There is no evidence that an insurance policy for the Defendant was ever applied for, or issued by any insurance company. There is no evidence that the monies collected by the Plaintiff as insurance charges were paid to any insurance company. There is evidence that the Plaintiff collected money, claimed it was for insurance, and deducted it from the Defendant's payments.

32. Charges shown by Plaintiff as insurance charges are not insurance charges, since no insurance was written, and cannot be optional since no insurance was selected, but are still charges collected from the Defendant, received for the benefit of the Plaintiff, and not applied to the principle balance of the account.

33. In accordance with Fla. Statute § 516.02(2)(c), a loan for which a greater rate of interest or charge than is allowed by this chapter has been contracted for or received, wherever made, is not enforceable in this state, and each person who in any manner participates therein in this state is subject to this chapter.

34. In accordance with Fla. Statute § 516.031(3)(a), any charges, including interest, in excess of the combined total of all charges authorized and permitted by this chapter constitute a violation of chapter 687 governing interest and usury, and the penalties of that chapter apply. In the event of a bona fide error, the licensee shall refund or credit the borrower with the amount of the overcharge immediately but within 20 days from the discovery of such error. No offer was made to compensate Defendant for overcharges within 20 days of the discovery of the overcharges. Plaintiff's suggestion was that the Defendant should take it up with the court.

35. The example shown in the Motion for Summary Judgment is a sample of one month's charges, does not include the extra charges, and as such does not represent the true cost of the loan to the Defendant. With the additional fees charged and annotated as insurance, the figures submitted by Plaintiff are adjusted using the \$7,067.00 example to include an additional \$49.19 charge per month. This would increase the amount charged by approximately \$590 per year and exceeds the amount allowed in Fla. Stat § 516.031(1) by over \$400 per year. This is equivalent to 29.38% interest rate and as such is usurious and in violation of the initial contract rate of 21.040%, the contracted variable rate of 15.9% plus Prime, and the maximum interest rates set forth in Fla. Stat § 516.031(1).

36. At 29.38%, the contract in question is a usurious contract, unenforceable, and declared unlawful because of its unconscionable nature (by Fla. Stat. § 501.204).

37. The threshold for criminal usury is 25% A.P.R. at which point it is a second degree misdemeanor under Fla. Stat § 687.071(2).

**COUNT I
UNJUST ENRICHMENT**

38. Defendant incorporates by reference paragraphs 12 through 37 above as if fully set forth in Count I herein.

39. Plaintiff has knowledge of payments by Defendant that included charges claimed as Insurance Charges.

40. Plaintiff voluntarily accepted payments without verifying whether the insurance policy(s) existed.

41. The circumstances render Plaintiff's retention of the charges claimed as insurance charges inequitable unless the Plaintiff gives credit to Defendant against the principal the value of the extra charges.

42. Plaintiff has been unjustly enriched at the expense of Defendant.

43. Defendant is entitled to damages as a result of Plaintiff's unjust enrichment, including the disgorgement of all monies unlawfully accepted by Plaintiff from Defendant.

**COUNT II
USURIOUS TRANSACTION PURSUANT TO § 516.031(3)(a) OF FLORIDA
STATUTES**

44. Defendant incorporates by reference paragraphs 12 through 43 above as if fully set forth in Count II herein.

45. Extra charges cannot be considered optional since no insurance was selected.

46. Extra charges cannot be considered insurance charges since no insurance was written.

47. With the extra charges, the costs to the consumer were in excess of the combined total of all charges authorized and permitted by Fla. Stat. § 516.031.

48. When notified of the extra charges, the Plaintiff did not offer a refund or credit the Defendant with the amount of the overcharge immediately or within 20 days from the discovery of the error.

49. Once Plaintiff chose not to correct the error, the error is considered as a willful and intentional violation of Florida lending practices.

COUNT III
CRIMINAL USURY PURSUANT TO § 687.071(2) OF FLORIDA STATUTES

50. Defendant incorporates by reference paragraphs 12 through 49 above as if fully set forth in Count III herein.

51. At 29.38% A.P.R., the interest rate is above the threshold for Criminal usury. The threshold is 25% A.P.R. at which point it is a second degree misdemeanor, Fla. Stat § 687.071(2).

COUNT IV
DECEPTIVE AND UNFAIR TRADE PRACTICES PURSUANT TO § 501.204(1) OF FLORIDA STATUTES

52. Defendant incorporates by reference paragraphs 12 through 51 above as if fully set forth in Count IV herein.

53. The act referred to in paragraph 25 above is an unconscionable, deceptive act.

54. Whether done intentionally or not, the act of unjustly enriching the company at the cost of the customer is unconscionable.

55. The Plaintiff's suggestion to take it up with the court and their reluctance to compensate defendant for overcharges indicates the deception was purposeful.

COUNT V
UNSOLICITED DELIVERY OR MAILING PURSUANT TO § 501.011(2) OF FLORIDA STATUTES

56. Defendant incorporates by reference paragraphs 12 through 55 above as if fully set forth in Count V herein.

57. Plaintiff did deliver an advertisement in the form of a "Live Check" (defined as Credit Card by Fla. Stat. § 501.011(1)) to Defendant in October, 2000.

58. Any violation of Fla. Stat. § 501.011 shall constitute a misdemeanor of the second degree.

DAMAGES

59. Fla. Stat. § 516.031(3)(a) establishes penalties for violations be governed by Fla. Stat. § 687 Fla. Stat. § 687.04 provides for forfeiture of the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person who has taken or reserved, 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.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for monetary damages against Plaintiff for unjust enrichment, and;

relief from the court based on Florida's Lending Practices Act, Chapter § 687.04, Fla. Stat. as follows:

Providing for an award based on double the amount of that shown in Court Exhibits 2 and 3 (filed with original Response to Complaint on 5/19/2009) minus the current value of the unpaid principal of the loan, subject to the jurisdictional limits of the court; and;

an award of attorney's fees to the Plaintiff, and;

for such other and further relief as the court may deem necessary and proper.

1. **Original to Court**
2. **Copy to Attorney for Plaintiff**
3. **Copy for Defendant's files**