IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ECOCHEM AUSTRALIA PTY LTD., Plaintiff and Counterclaim-Defendant, v. CST SYSTEMS, INC., Defendant, Counterclaim- Plaintiff, and Third-Party Plaintiff, v. CLEAN PRINT USA LLC and DICAR INC., Third-Party Defendants.	)))))))))))))))))	Case No: 1:22-CV-4908-TWT

COUNTERCLAIM DEFENDANT ECOCHEM'S REPLY BRIEF OF ITS MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO STRIKE AFFIRMATIVE DEFENSES

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Plaintiff Ecochem Australia Pty. Ltd. ("Ecochem") submits this Reply Brief in Support of its Motion to Dismiss Defendant CST Systems, Inc.'s ("CST") Affirmative Defenses and Counterclaims (Dkt. 12).

I. CST'S CLAIMS REGARDING HARPER LOVE (COUNTS I-IV) SHOULD BE DISMISSED WITH PREJUDICE

Realizing the error of its ways, CST argues that it "has not asserted specific claims involving Harper Love." (Opp., Dkt. 39 at 15 ("CST has not asserted fraudulent inducement or negligent misrepresentation claims against Ecochem for conduct involving Harper Love . . ."), 5 ("CST does not bring any breach of contract claims for conduct involving Harper Love").)

However, the plain language of CST's four counterclaims refutes its assertions. Paragraphs 33-37 and 39 of CST's complaint specifically reference Harper Love by name. (Counterclaims, Dkt. 12.) Moreover, all four counterclaims "incorporate[] allegations set forth in paragraphs" regarding Harper Love "as if fully restated herein." (*Id.* ¶¶ 33-37, 39, 84, 91, 99, 106.) In addition, Counts III and IV ***specifically identify Harper Love.*** (*Id.* at ¶¶ 100, 107.)

CST brought barred claims that it now seeks to back out of the case. CST should not be allowed to reframe its counterclaims to avoid dismissal, or improperly expand discovery beyond its reasonable and just limits. Fed. R. Civ. P. 1. Accordingly, these counterclaims should be dismissed.

A. The Statute of Limitations from the UCC Applies

Georgia's statute of limitations is clear: claims are barred after four years for contracts involving the sale of goods. O.C.G.A. § 11-2-725. CST argues that its agreements with Ecochem are not contracts for sale of goods, but for services. CST cites *Iler Group, Inc. v. Discrete Wireless, Inc.* as supporting its position. 90 F. Supp. 3d 1329, 1335 (N.D. Ga. 2015). However, *Iler Group* supports Ecochem's position in granting a motion to dismiss on the basis that the contract was predominately for the sale of goods, even where the defendant provided installation and customer service. *Id.* Specifically, "[t]he Court notes that dealer or distributor agreements are normally governed by the UCC even though such agreements are often more than simple sales contracts." *Id.* at 1335, n.5 (emphasis added) (*citing Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385–86 (7th Cir.1995); *Intercorp, Inc. v. Pennzoil Co.*, 877 F.2d 1524, 1528 (11th Cir.1989); *PCS Joint Venture, Ltd. v. Davis*, 219 Ga.App. 519, 520 (1995)).

In *Iler*:

> The contract between [Distributor] and [Supplier] involved both the sale of goods and the rendition of services. [Distributor], in the first instance, purchased GPS tracking devices, or "Units," from [Supplier] and then resold them to Customers. The first service [Distributor] provided was the actual resale of [Supplier]'s Units. [Distributor] then provided another service by procuring Service Orders from the Customers to whom it resold the goods. Under the agreement, [Distributor] could not resell the tracking devices to a Customer

> unless the Customer executed a Service Order with [Supplier]. Once [Distributor] made the resale and secured the Service Order, it then installed the devices on behalf of [Supplier]. Finally, [Distributor] provided First Level Support for Customers who purchased [Supplier]'s products from [Distributor].

Iler, 90 F. Supp. 3d at 1335. Though the contract included services, the Court found, like here, that "***the predominant purpose of the contract was the sale of goods***." *Id.* (emphasis added.)

> But for the purchase and resale of [Supplier's] products, however, all of [Distributor's] services would be worthless. Regarding installation services, Georgia courts have found that installation of the goods sold does not amount to a predominantly service-based contract. D.N. Garner Co., Inc. v. Ga. Palm Beach Aluminum Window Corp., 233 Ga. App. 255-56, 504 S.E.2d 70, 73-74 (1998); S. Tank Equip. Co. v. Zartic, Inc., 221 Ga. App. 503, 504, 471 S.E.2d 587, 589 (1996). The First Level Support provided by Plaintiff was limited to telephone support, Customer training, managing returns of the devices, maintaining Customer account records, and providing service calls. Doc. No. [9-2], p. 15. Every service encompassed within First Level Support related directly to Defendant's products that Plaintiff purchased from Defendant and then resold to Customers.

Iler, 90 F. Supp. 3d at 1335. The same is true here. CST cannot identify a single service it provides under the parties' contract that does not stem from the sale of Ecochem's products. Accordingly, the four-year statute of limitations under Georgia law applies. O.C.G.A. § 11-2-725.

B. CST's Tolling Argument is a Misdirected Hail Mary

CST's counterclaims admit that it learned of any alleged "fraud" in 2018. (Opp. Dkt. 12 at ¶¶ 33-39.) CST does not plead any alleged fact surrounding the alleged fraud involving "[s]ome trick or artifice … employed to prevent inquiry, elude investigation, or mislead and hinder [CST] from obtaining information necessary to reveal the existence of a cause of action." *Charter Peachford Behavioral Health Sys. v. Kohout*, 233 Ga. App. 452, 458 (1998). In fact, CST admits in its complaint it had all facts regarding Harper Love in 2018. No tolling applies.

II. CST'S BREACH OF CONTRACT CLAIMS FAIL TO INTERPRET THE CONTRACT AS A WHOLE

A. CST's Customer Protection Argument Is Inconsistent and Belied by the Contract As a Whole

CST's Opposition reminds the Court of the obligation to "ascertain the intention of the parties" in construing the contract, and to not look towards "technical or arbitrary rules of construction." O.C.G.A. § 13-2-3. (Dkt. 39, Opp. at 8.)

Yet, CST cherry-picks portions of the contract to shoehorn in its narrative instead of looking at the contract as a whole to determine the intention of the parties as required by law. The contracts are clear: in exchange for monthly

customer lists, Ecochem would protect CST's interests in its customers. (Agreement at ¶¶ 3.4, 11.2.1, Schedule E.) CST admits that it willfully "stopped providing access to the Current and Potential Customer lists in or around October 2020." (Dkt. 29-2, R. Brettschneider Decl. at ¶ 6.) CST's argument ignores the reality that without such customer lists, protection cannot be provided.

Reading the parties' contracts as a whole shows that the failure to provide customer lists is a material breach to prevent the exact argument CST is making. Therefore, CST's speculation of facts regarding customer protection are without merit – if anything, it caused its own harm.

B. CST's Claims for Breach of Contract Regarding Pricing Protection Fail Based on the Terms of the Contract

CST complains in its Opposition that "Ecochem misunderstands CST's claim" before again reframing its case to suit its new narrative. (Dkt. 39, Opp. at 11.)

The facts are clear: The 2016 Agreement did not require Ecochem to give CST its best pricing. Accordingly, such a provision was sought by CST and added to the 2018 Agreement:

> "CST Systems to be offered the lowest available purchase price for all Ecochem Products[:] a. Other distributors may pay a lower price based on actual purchase volumes[;] b. If price discounts are available based on purchase volume, those same discounts will be available to CST if CST purchases at same volume."

(Dkt. 12-2, 2018 Agreement at 2.)

Ecochem provided CST with its best pricing and has not given preferential pricing to another distributor. While CST characterizes Ecochem's pricing as "opaque," it could have negotiated for audit rights – it did not. Tellingly, CST's Counterclaims and its Opposition both fail to identify a single instance where lower pricing was provided to another distributor.

Instead, the six paragraphs of CST's counterclaims regarding pricing (Dkt. 12, Counterclaims ¶¶ 77-83), even taken as true, do not support a cognizable breach by Ecochem**.** CST's complaint does not identify a single sale or opportunity that it lost due to alleged pricing differentials.

Accordingly, its pricing counterclaims should be dismissed.

C. <u>CST's Consultation Argument is Disingenuous and Ignores the Allegations it Makes in its Complaint – It Also Pleads No Harm Stemming for Alleged Lack of Consultation</u>

CST's Opposition admits that there is no timing limitation on the "consultation," which can occur before or after a new distributor is introduced. (Dkt. 12-1, 2016 Agreement at ¶ 4.2; Dkt. 39, Opp. at 13 (admitting that there is an "absence of a term setting a specific time for consultation").)

CST also admits that Ecochem first consulted with CST regarding Ecochem in 2019, when it furnished its intent to expand its distribution network in the US

due in part to CST's lackluster sales. (Dkt. 12, Counterclaims ¶ 38.) The parties continued to discuss what became CleanPrint USA in the following years until CleanPrint opened in February 2022: CST's own counterclaims make allegations regarding "written assurances" provided by Ecochem's Geoff Literski. (*Id.* ¶¶ 39-41.) The counterclaims then detail the relationship between Ecochem and CleanPrint, which was fully disclosed to and discussed with CST prior to February 2022. (*Id.* ¶¶ 44-52.)

CST's counterclaims also admit that Ecochem and CST continued to consult regarding not only CleanPrint, but its sales agents such as Dicar throughout 2022. (*Id.* ¶¶ 58-76.) While Ecochem's complaint frames Dicar as a distributor, it continues to be incorrect, as it is a sales agent for CleanPrint.[1] Ecochem does not have a direct relationship with Dicar.

CST argues that it suffered harm due to an alleged consultation failure. However, CST's arguments for harm do not stem from any lack of consultation. CST's Opposition recognizes this fact, where it repeats its arguments for customer protection and pricing. (Dkt. 39, Opp. at 14-15.) Without an "injury in fact," there can be no claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[1] While CST appears to have accepted this fact regarding Green House Group, whose name is absent in its Opposition, it refuses to do so regarding Dicar.

III. CST'S COUNTERCLAIMS FOR FRAUDULENT INDUCEMENT (COUNT III) AND NEGLIGENT MISREPRESENTATION (COUNT IV)

CST's Opposition fails to identify a duty owed to CST independent of the contractual duties which are the basis for CST's breach of contract claims. While CST identifies Georgia's tort statute for fraud (O.C.G.A. § 51-6-2(a)), it ignores that its tort claims arise from its contractual breaches. In fact, CST's Opposition recognizes that its tort claims stem from its contract – it argues that (1) CST learned of potential customer or pricing protection issues; (2) asked Ecochem to intervene under the parties' contract which "Ecochem promised [to do] to induce CST's continued performance", and (3) such alleged issues under the contract continued. (*See* Dkt. 38, Opp. at 16-17.) In fact, all duties owed, whether these duties were breached, the injury for the breach, and any remedy stem and are defined by CST's and Ecochem's contract. Put another way, CST's tort claims arise from its contract claim and not an independent breach.

CST fails to address the settled case law cited by Ecochem on this point, only a portion of which is recited herein for brevity. *USF Corp. v. Securitas Sec. Services USA, Inc.*, 305 Ga. App. 404, 409 (2010) (negligence counterclaim dismissed where "all issues dealing with the extent of the duties owed, whether the duties were breached, the injury which flowed from the breach, and the remedy for

any such breach [were] controlled by the parties' contract."); *Fielbon Dev. Co., LLC v. Colony Bank of Houston Cty.*, 290 Ga. App. 847, 856 (2008) (dismissal where "[t]he negligent actions or inactions . . . all arise out of the bank's administration of its construction loan, and the damages it claims flow directly therefrom . . . any duty [owed] arose solely out of the parties' contractual relationship."); *Valles v. State Farm Fire & Cas. Co.*, No. 1:19-CV-5593-MLB, 2021 WL 322097, at *3 (N.D. Ga. Feb. 1, 2021) (judgement on the pleadings of fraud and tortious interference claims where plaintiff did not plead facts supporting a finding that State Farm owed him duties arising outside of the written insurance contract).

Because CST has not pled, nor even identified, any legal duties owed by Ecochem to CST arising separately from the parties' contracts, CST has necessarily failed to identify an independent injury "over and above the mere disappointment of plaintiff's hope to receive [the] contracted-for benefit." *Tate v. Aetna Cas. & Sur. Co.*, 149 Ga. App. 123, 124 (1979).

Consequently, CST's tort claims should be dismissed as a matter of law.

IV. CST'S AFFIRMATIVE DEFENSES SHOULD BE STRICKEN AS LEGALLY INSUFFICIENT

CST relies on this Court's decision in *Access Point Financial, LLC v. Katofsky*, No. 1:21-CV-3176-TWT, 2023 WL 1805830, at *6 (Feb. 7, 2023). As an

initial matter, CST misleads the Court by framing its argument to imply that the Affirmative Defenses in *Access Point* survived a motion to dismiss, when the Court decided if an affirmative defense was waived after discovery, at summary judgement. In addition, CST ignores the other Affirmative Defenses in *Access Point*, which are more detailed than any CST itself put forward, including the Seventh Affirmative Defense discussed below. (Ex. A, Affirmative Defenses in *Access Point* at 1-4.)

The Seventh Affirmative Defense recites facts and statutes that provide notice of the affirmative defense:

> SEVENTH DEFENSE: Any nonperformance by the borrowers or Defendants was caused by Plaintiff's conduct in misrepresenting an agreement to enter into loan modifications and later breaching discounted payoff agreements by unreasonably delaying the issuance of payoff statements when Defendants had third-party financing to pay off the loans. Plaintiff's claims are therefore barred under O.C.G.A. § 13-4-23.

(Ex. A, Affirmative Defenses in *Access Point* at 3.)

In contrast, CST's affirmative defenses each fail to meet the minimal standard under Rule 8(c), with many be threadbare conclusions that provide no notice whatsoever:

Affirmative Defense	Fails to Identify
First - Ecochem's Complaint, in whole or in part, fails to state a claim upon which relief can be granted and should be dismissed.	Facts
Second - CST specifically denies that Ecochem has incurred any damages. Reserving this defense, CST hereby asserts that any alleged damages to Ecochem are not the result of the acts or omissions of CST.	Facts, Law
Third - Ecochem's Complaint is barred, in whole or in part, by the doctrine of laches, acquiescence, or estoppel.	Facts
Fourth - Ecochem's Complaint is barred, in whole or in part, by the doctrine of waiver.	Facts
Fifth - Ecochem's Complaint is barred, in whole or in part, by the doctrine of ratification.	Facts
Sixth - Ecochem's Complaint is barred, in whole or in part, by the doctrine of accord and satisfaction.	Facts
Seventh - Ecochem's Complaint is barred, in whole or in part, by the doctrine of unjust enrichment.	Facts
Eighth - Ecochem's Complaint is barred, in whole or in part, because of Ecochem's failure of consideration.	Facts
Ninth - Ecochem is barred from obtaining any recovery on the allegations in the Complaint because Ecochem has failed to reasonably mitigate its alleged damages.	Facts
Tenth - CST asserts all applicable statutes of limitations that bar Ecochem's purported claims for relief against CST	Statutes
Eleventh - At all relevant times, CST complied with its contractual obligations to Ecochem under the 2012 Agreement, May 24, 2016 Agreement, and January 6, 2018 renewal between Ecochem and CST.	Facts, Law
Twelfth - To the extent that CST did not comply with any contractual obligation to Ecochem, such non-performance resulted from or was necessitated by Ecochem's prior breach of the applicable contract or agreement	Law
Thirteenth - All restrictive covenants, including non-competition agreements, that Ecochem relies on in this	Facts, Law

action to purport to show any contractual breach by CST, are unenforceable under applicable law.	

Ecochem is not arguing that the *Iqbal* and *Twombly* standards apply to Affirmative defenses – these cases are not even mentioned in Ecochem's brief for this point. Instead, CST's affirmative defenses are insufficient under Rule 8(c). The case law cited by Ecochem in its Opening Brief is applicable, and comes years after CST's cited case of *Vann* v. *Institute of Nuclear Power Operations, Inc.* No. 1:09-CV-1169-CC-LTW, 2011 WL 13272741, *5 (N.D. Ga. Oct. 6, 2011). CST all but admits its defenses are insufficient by distinguishing *Luxottica* solely by that Court providing leave to amend for some of the affirmative defenses, but not all. *Luxottica Grp., S.P.A. v. Airport Mini Mall, L.L.C.,* 186 F. Supp. 3d 1370, 1381 (N.D. Ga. 2016).

Furthermore, CST fails to rebut the proposition that its affirmative defenses fail to provide notice because they do not identify the claims to which they apply. Legally insufficient affirmative defenses do not provide notice and should be stricken. *See Luxottica,* 186 F. Supp. 3d at 1375-76, 1379-80.

In addition, CST argues that because its Affirmative Defenses are "separately numbered," they do not take a shotgun approach as identified in *Willis v. Arp*, 165 F. Supp. 3d 1357, 1365 (N.D. Ga. 2016). This is a form over substance argument and should be denied.

Finally, affirmative defenses that are pure denials should be stricken as such. *See Luxottica,* 186 F. Supp. 3d at 1375-76, 1379, 1380; *Aidone v. Nationwide Auto Guard, L.L.C.*, 295 F.R.D. 658, 661 (S.D. Fla. 2013) ("The Court agrees with Plaintiff that these purported defenses are reiterations of Defendants' denials."); *see Will v. Richardson—Merrell, Inc.*, 647 F. Supp. 544, 547 (S.D. Ga. 1986) ("An affirmative defense is established only when a defendant admits the essential facts of a complaint and sets up other facts in justification or avoidance.")

V. CONCLUSION

For the foregoing reasons, Ecochem's Motion should be granted, CST's Counterclaims I-V should be dismissed and Affirmative Defenses struck.

Respectfully submitted this 3rd day of March, 2023,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Civil Local Rules of Practice for the United States District Court for the Northern District of Georgia, this is to certify that the **COUNTERCLAIM DEFENDANT ECOCHEM'S REPLY BRIEF OF ITS MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO STRIKE AFFIRMATIVE DEFENSES** complies with the font and point selections approved by the Court in Local Rule 5.1C. The foregoing was prepared on computer using Times New Roman font (14 point).

Respectfully submitted this 3rd day of March, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **Counterclaim Defendant Ecochem's Reply Brief of Its Motion to Dismiss Counterclaims and Motion to Strike Affirmative Defenses** was electronically filed via CM/ECF, which will automatically notify counsel of record.

This 3rd day of March, 2023.

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ACCESS POINT FINANCIAL, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION FILE NO:
	)	
JEFF KATOFSKY, individually,	)	1:21-cv-03176-TWT
JEFF KATOFSKY, as Trustee of the	)	
KATOFSKY FAMILY TRUST, and	)	
JYLLIAN KATOFSKY, as Trustee	)	
OF THE KATOFSKY FAMILY	)	
TRUST,	)	
	)	
Defendants/Counter-Plaintiffs.	)	
______________________________	)	

DEFENDANTS' AFFIRMATIVE DEFENSES, ANSWER, AND COUNTERCLAIM

Defendants Jeff Katofsky, individually and as Trustee of the Katofsky Family Trust, and Jyllian Katofsky, as Trustee of the Katofsky Family Trust, assert the following affirmative defenses and answer Plaintiff's complaint as follows.

DEFENSES AND AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff lacks standing to the extent the notes underlying Plaintiff's claims

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were not made out to Plaintiff or to the extent the notes have been assigned to, or are held by, other persons or entities. By way of example, the documents attached to Plaintiff's complaint reflect that the so-called Planet Clair Mortgage Note was assigned to an entity called APF-CRE I, LLC. And, as represented by Plaintiff or its agents, the so-called Hip Hip Huron Note was purportedly assigned to HDDA, LLC.

THIRD DEFENSE

Plaintiff's claims are barred in whole or in part because the parties modified the loans at issue through discounted payoff agreements and Plaintiff subsequently breached the modification agreement and prevented Defendants or the underlying borrowers from paying off the modified loans by unreasonably delaying the issuance of a payoff statement and then later demanding higher amounts that were never agreed to.

FOURTH DEFENSE

Plaintiff has failed to join required parties, including the borrowers in connection with the loans at issue.

FIFTH DEFENSE

Performance of the loan obligations and guarantees at issue have been made impossible or impracticable by the occurrence of the COVID-19 pandemic and its

effect on the hotels for which the underlying loans were taken out. The COVID-19 pandemic is a contingency the nonoccurrence of which was a basic assumption on which the contract was made. The COVID-19 pandemic was also an act of God as that phrase is used in O.C.G.A. § 13-4-21. Accordingly, Plaintiff's claims are barred by the doctrines of impracticability or impossibility.

SIXTH DEFENSE

Plaintiff's claims are barred by the doctrine of frustration of purpose because the COVID-19 pandemic and its effect on the hotels for which the underlying loans were taken out was an unforeseeable event that destroyed or frustrated the parties' expectations.

SEVENTH DEFENSE

Any nonperformance by the borrowers or Defendants was caused by Plaintiff's conduct in misrepresenting an agreement to enter into loan modifications and later breaching discounted payoff agreements by unreasonably delaying the issuance of payoff statements when Defendants had third-party financing to pay off the loans. Plaintiff's claims are therefore barred under O.C.G.A. § 13-4-23.

EIGHTH DEFENSE

Any judgment obtained by Plaintiff is subject to a setoff or recoupment

based on the counterclaims asserted below, which are incorporated herein by reference.

RESPONSE TO ALLEGATIONS IN COMPLAINT

1. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 1 of the complaint.

2. Defendants admit the allegations in paragraph 2 of the complaint.

3. Defendants admit the allegations in paragraph 3 of the complaint

4. Defendants admit the allegations in paragraph 4 of the complaint.

5. Defendants deny the allegations in the first sentence paragraph 5 of the complaint. Defendants admit the allegations in the second sentence of paragraph 5 of the complaint except as it relates to Jyllian Katofsky. As it relates to Jyllian Katofsky, Defendants deny the allegations in the second sentence of paragraph 5 of the complaint.

6. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 6 of the complaint.

7. As to paragraph 7 of the complaint, Defendants deny that any cause of action arose, in the Northern District of Georgia or otherwise, and Defendants deny that Jyllian Katofsky consented to venue in this district.

8. Defendants admit the allegations in paragraph 8 of the complaint.

9. Defendants admit the allegations in paragraph 9 of the complaint.

10. Defendants admit the allegations in paragraph 10 of the complaint.

11. Defendants admit the first sentence of paragraph 11 of the complaint. Defendants deny the second sentence of paragraph 11 of the complaint.

12. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations the allegations in paragraph 12 of the complaint.

13. Defendants admit the allegations in paragraph 13 of the complaint.

14. Defendants admit the allegations in paragraph 14 of the complaint.

15. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations the allegations in paragraph 15 of the complaint.

16. Defendants admit the allegations in paragraph 16 of the complaint.

17. Defendants deny that the document referenced in paragraph 17 of the complaint is executed by all Defendants; namely, it is not executed by Jyllian Katofsky in any capacity. Defendants admit the rest of the allegations in paragraph 17 of the complaint.

18. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations the allegations in paragraph 18 of the complaint.

19. Defendants deny the allegations in paragraph 19 of the complaint.

20. Defendants deny the allegations in paragraph 20 of the complaint.

21. Defendants admit the allegations in the second sentence of paragraph 21 of the complaint. Defendants admit that the letter referenced in the first sentence of paragraph 21 of the complaint was sent to Planet Clair and Katofsky. Defendants deny the rest of the allegations in paragraph 21 of the complaint.

22. Defendants admit the allegations in paragraph 22 of the complaint to the extent that it accurately paraphrases the content of a portion of the referenced letter. Defendants deny any remaining allegations in paragraph 22 of the complaint.

23. Defendants deny the allegations in paragraph 23 of the complaint.

24. Defendants deny the allegations in paragraph 24 of the complaint.

25. Defendants deny the allegations in paragraph 25 of the complaint.

26. Defendants deny the allegations in paragraph 26 of the complaint.

27. Defendants admit the allegations in the second sentence of paragraph 27 of the complaint. Defendants admit that the letter referenced in the first sentence of paragraph 27 of the complaint was sent to Hip Hip Huron and Katofsky. Defendants deny that the letter was sent to all Defendants; namely, it was not sent to Jyllian Katofsky. Defendants deny the rest of the allegations in paragraph 27 of the complaint.

28. Defendants admit the allegations in paragraph 22 of the complaint to

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the extent that it accurately paraphrases the content of a portion of the referenced letter. Defendants deny that the letter notified Jyllian Katofsky of anything. Defendants deny any remaining allegations in paragraph 22 of the complaint.

29. Defendants deny the allegations in paragraph 29 of the complaint.

30. In response to paragraph 30 of the complaint, Defendants incorporate by reference their responses to paragraphs 1 through 15 and 19 through 24 as if fully set forth herein.

31. Defendants deny the allegations in paragraph 31 of the complaint.

32. Defendants deny the allegations in paragraph 32 of the complaint.

33. Defendants deny the allegations in paragraph 33 of the complaint.

34. Defendants deny the allegations in paragraph 34 of the complaint.

35. In response to paragraph 35 of the complaint, Defendants incorporate by reference their responses to paragraphs 1 through 7, 16 through 18, and 25 through 29 as if fully set forth herein.

36. Defendants deny the allegations in paragraph 36 of the complaint.

37. Defendants deny the allegations in paragraph 37 of the complaint.

38. Defendants deny the allegations in paragraph 38 of the complaint.

WHEREFORE, Defendants respectfully request that the Court grant the following relief:

a) That the complaint be dismissed with all costs cast against Plaintiff;

b) That judgment be entered against Plaintiff and in favor of Defendants;

c) That Plaintiff's claim for attorneys' fees be denied;

d) That the Court award Defendants their reasonable attorneys' fees in defending this action; and

e) That the Court award such other and further relief as is just, proper, and equitable under the circumstances.

COUNTERCLAIM

Counter-Plaintiff Jeff Katofsky, individually and as Trustee of the Katofsky Family Trust, sues Counter-Defendant Access Point Financial, LLC ("APF") as follows.

<u>Parties, Jurisdiction, and Venue</u>

1. Counter-Plaintiff Jeff Katofsky is an individual and citizen of California.

2. Based on the representations in its complaint, APF is a limited liability company whose sole member is a Delaware corporation with its principal place of business in New York. Based on APF's representations, APF is deemed to be a citizen of Delaware and New York.

3. The Court has subject-matter jurisdiction over this counterclaim

because it arises from the same transaction or occurrence as APF's claims, and thus no independent basis for subject-matter jurisdiction is necessary. The Court also independently has subject-matter jurisdiction over this counterclaim under 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds $75,000.00 and the parties are diverse.

4. Venue is proper because APF contracted to litigate in this venue and because this is a counterclaim in an action pending in this venue.

Factual Background

5. APF is a direct lender focused on providing capital to the hospitality industry. APF provides financing to hoteliers in connection with acquisition, refinance, construction, renovations, brand-mandated PIPs, and other value-add transactions, such as asset repositioning and/or hotel conversions.

6. Planet Clair, LLC; Hip Hip, Huron! LLC; and On the Vine, LLC (collectively, the "Borrower Entities") obtained several loans from APF (or its predecessor in interest, Access Point Financial, Inc.) in connection with their purchase of various hotel properties in Michigan and their planned construction on the hotels.

7. Katofsky is the manager of each of the Borrower Entities.

8. Katofsky also guaranteed these loans, either in his individual capacity

or as Trustee of the Katofsky Family Trust, or both.

9. In late 2019 and early 2020, on behalf of himself as guarantor as well as on behalf of the Borrower Entities, Katofsky negotiated loan modifications for several of the loans that would have extended the terms of the loans and increased the amount of principal.

10. APF represented that it would agree to these loan modifications.

11. Katofsky and the Borrower Entities relied on APF's representations and promises to enter into the loan modifications.

12. In reliance on these representations and promises, Katofsky and the Borrower Entities forwent opportunities to seek financing or refinancing elsewhere and also incurred costs for items such as appraisals and time spent negotiating the loan modifications.

13. At the time, the loans were all current and none were in default.

14. In March 2020, the COVID-19 pandemic began to spread throughout the United States and had a significant effect on financial markets.

15. APF, which already was struggling with certain financial issues, suffered further financial issues due to the COVID-19 pandemic.

16. APF knew that hoteliers such as the Borrower Entities were particularly vulnerable to the effects of COVID-19. As APF stated on its website:

"As the world struggles to understand the impact of the Coronavirus (COVID-19) pandemic and its impact on various markets, only one thing is certain; with the ongoing travel restrictions and entire countries and regions closed for business, hospitality has taken a direct blow to the gut and is, without question, one of the hardest hit sectors of the global economy." *How the Hotel Lending Landscape Has Changed in the Advent of COVID-19*, Access Point Financial (Apr. 21, 2020) https://accesspointfinancial.com /how-the-hotel-lending-landscape-has-changed-in-the-advent-of-covid-19. Indeed, APF knew that while the "COVID-19 global pandemic has created an economic crisis in most sectors of the economy . . . few have been impacted greater than the travel and hospitality industries," and that "hoteliers are scrambling to explore their financial options" due to "occupancy and revenues falling to unprecedented levels." *5 Strategies for Working With Your Lender During the Crisis*, Access Point Financial (Apr. 30, 2020) https://accesspointfinancial.com/5-strategies-for-working-with-your-lender-during-the-crisis.

17. The COVID-19 pandemic had a devastating effect on the Borrower Entities as both the pandemic itself and laws imposed by state and local government made it effectively impossible to operate the hotel and serve guests, and thus generate revenue.

18. In light of the effects of COVID-19, and only after the Borrower Entities began to suffer those effects and lose the ability to obtain alternative financing, APF reneged on its promises and representations to enter into loan modifications that would have extended the terms of the loans.

19. The Borrower Entities never stopped making installment payments, but a default allegedly occurred because the loans matured, which would not have occurred had the terms been extended under the modifications agreements.

20. Left with no other choice, and at the request of APF, Katofsky, on behalf of himself as guarantor as well as on behalf of the Borrower Entities, began negotiating discounted payoff agreements with APF (and a subsidiary wholly owned and controlled by APF and to whom APF represented it had assigned some of the loans) for several of the loans.

21. By entering into these discounted payoff agreements, Katofsky and the Borrower Entities again forwent opportunities to seek financing elsewhere and also incurred hard costs for items such as appraisals and time spent negotiating and drafting the agreements.

22. During this period, the Borrower Entities had obtained an agreement from a third party that would have provided the financing to satisfy the discounted payoff agreements in full.

23. Despite requests, APF inexcusably delayed, and at one point refused, to provide written payoff statements for the loans, which were necessary for Katofsky and the Borrower Entities to satisfy the discounted payoff agreements.

24. APF's delays in providing payoff statements caused Katofsky and the Borrower Entities to lose the financing that would have enabled them to satisfy the discounted payoff agreements.

25. All conditions precedent to this action have been performed, waived, or otherwise satisfied.

Count I – Breach of Contract

26. Katofsky incorporates by reference the allegations in paragraphs 1 through 25 above as if fully set forth herein.

27. APF breached the discounted payoff agreements by stalling and failing to timely provide written payoff statements.

28. APF's breach has proximately caused damages to Katofsky, including the inability to satisfy the discounted payoff agreements and to make the necessary payments to extend the terms of the other loans. Katofsky has also suffered damages in the form of costs incurred in reliance on the discounted payoff agreements and loan modifications agreements.

29. APF is liable to Katofsky for damages in an amount to be proven at

trial.

Count II – Negligence

30. Katofsky incorporates by reference the allegations in paragraphs 1 through 25 above as if fully set forth herein.

31. To the extent not required by contract, APF had a duty to timely provide written payoff statements upon request.

32. APF breached its duty to timely provide written payoff statements upon request.

33. APF's breach has proximately caused damages to Katofsky, including the inability to satisfy the discounted payoff agreements and to make the necessary payments to extend the terms of the other loans. Katofsky has also suffered damages in the form of costs incurred in reliance on the discounted payoff agreements and loan modifications agreements.

34. APF is liable to Katofsky for damages in an amount to be proven at trial.

Count III – Fraud

35. Katofsky incorporates by reference the allegations in paragraphs 1 through 25 above as if fully set forth herein.

36. APF misrepresented that it would agree to modify the loans.

37. Katofsky detrimentally relied on APF's misrepresentations that it would agree to modify the loans.

38. Katofsky has suffered damages in an amount to be proven at trial that were proximately caused by his reliance on APF's misrepresentations.

Count IV – Promissory Estoppel

39. Katofsky incorporates by reference the allegations in paragraphs 1 through 25 above as if fully set forth herein.

40. APF promised to modify the loans, including extending the loan terms and providing additional capital.

41. APF should have expected Katofsky to rely on such promises.

42. Katofsky did in fact reasonably rely on APF's promises to his detriment.

43. Injustice can be avoided by enforcement of the promise.

Count V – Declaratory Judgment

44. Katofsky incorporates by reference the allegations in paragraphs 1 through 25 above as if fully set forth herein.

45. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201.

46. An actual, justiciable, and substantial controversy exists between

Katofsky and APF with respect to the parties' rights and obligations under the guarantees executed by Katofsky.

47. Katofsky contends that the guarantees and underlying notes are unenforceable, or no default has occurred, because the COVID-19 pandemic and government response frustrated their purpose or rendered performance impracticable or impossible. Katofsky also contends that the guarantees and underlying notes are unenforceable because, or no default has occurred, because any nonperformance was caused by APF's conduct in reneging on a promise to modify the loans as well as later refusing and delaying the issuance of payoff statements.

48. APF disagrees and contends that the guarantees and underlying notes are enforceable and that there has been a default.

49. Katofsky and APF have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

WHEREFORE, Counter-Plaintiff Jeff Katofsky respectfully requests that the Court enter judgment against APF and in favor of Katofsky for damages in an amount to be proven at trial; enter a declaratory judgment that the loans and guarantees at issue are not enforceable by APF and that there has not been any default; award Katofsky his costs, pre- and post-judgment interest, and reasonable

attorneys' fees; and award such other and further relief as is just, proper, and equitable under the circumstances.

This 30th day of November 2021.

Respectfully submitted,

BERMAN FINK VAN HORN P.C.

By: *<u>/s/ Charles H. Van Horn</u>*
Charles H. Van Horn
Georgia Bar No. 724710

Counsel for Defendant/Counter-Plaintiff Jeff Katofsky, individually and as Trustee of the Katofsky Family Trust, and for Defendant Jyllian Katofsky, as Trustee of the Katofsky Family Trust

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ACCESS POINT FINANCIAL, LLC, Plaintiff, v. JEFF KATOFSKY, individually, JEFF KATOFSKY, as Trustee of the KATOFSKY FAMILY TRUST, and JYLLIAN KATOFSKY, as Trustee OF THE KATOFSKY FAMILY TRUST, Defendants/Counter-Plaintiffs.	)))))))))))))))	CIVIL ACTION FILE NO: 1:21-cv-03176-TWT

This is to certify that the foregoing **DEFENDANTS' AFFIRMATIVE DEFENSES, ANSWER, AND COUNTERCLAIM** was prepared using Times New Roman 14-point font in accordance with Local Rule 5.1(c).

This, the 30th day of November 2021.

Respectfully submitted,

BERMAN FINK VAN HORN P.C.

By: *<u>/s/ Charles H. Van Horn</u>*
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Trustee of the Katofsky Family Trust, and for Defendant Jyllian Katofsky, as Trustee of the Katofsky Family Trust

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANTS' AFFIRMATIVE DEFENSES, ANSWER, AND COUNTERCLAIM** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Brian J. Levy, Esq.
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Atlanta, Georgia 30363
Counsel for Plaintiff Access Point Financial, LLC

This, the 30th day of November, 2021.

Respectfully submitted,

BERMAN FINK VAN HORN P.C.

By: /s/ *Charles H. Van Horn*
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