# 18-3023-cv

## United States Court of Appeals

*for the*

## Second Circuit

ADAR BAYS, LLC,

*Plaintiff-Appellee,*

– v. –

GENESYS ID, INC., FKA RX Sales, Inc.,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR DEFENDANT-APPELLANT**

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**INTRODUCTION**

Defendant-Appellant GeneSYS ID, Inc. ("GeneSYS") was in a dire financial position and needed to borrow immediately to obtain a loan to make payment of its payroll and certain expenses which were necessary for it to maintain its public OTC listing (A226). Plaintiff-Appellee Adar Bays, LLC ("Adar Bays") is a "vulture" lender specializing in financing negative cash flow or insolvent OTC companies, structuring its loans to take advantage of the corporate borrower's fiscal distress to tack onto nominal interest rates unreasonable expenses, penalties and, ultimately, equity conversion rights designed to allow Adar Bays to circle, swoop in and nab parts of the company in the likely event of its default (A227).

In this case, GeneSYS issued a $35,000 Convertible Redeemable Note (the "Note") at a stated 8% rate of interest to Adar Bays in order to secure a short-term loan to meet its exigent payroll and expense obligations and to keep its public listing (A284-A292). Only $33,000 of that amount was actually paid to GeneSYS, and the remaining $2,000 was paid upfront to Adar Bays' attorneys for unspecified legal services (A401, A467).

With inevitable default looming given its struggling finances, GeneSYS terminated its transfer agent on September 6, 2016 and sought a settlement with Adar Bays on the payment of the balance on the Note to avoid an election for conversion to stock (A343, A406-A412). Adar Bays, though, elected on November

28, 2016 to convert $5,000.00 of the principal amount of the Note into 439,560 shares of GeneSYS common stock at a conversion price of $0.011375 per share (A42).

Adar Bays has sued GeneSYS for a default under paragraph 8(k) of the Note for refusing to transfer the shares and demanding that GeneSYS transfer the 439,560 shares and pay default interest at 24% per annum and liquidated damages. GeneSYS has interposed the defense of criminal usury under N.Y. Penal Law § 190.40, together with N.Y. Gen. Oblig. Law §§ 5-511 and 5-501, and to have the void Note and its usurious hidden interest cancelled. The District Court granted summary judgment to Adar Bays, based on a rote regurgitation of other trial court opinions upholding such "vulture" financing as nonusurious.

So, in its Appellee's brief, Adar Bays unsurprisingly reiterates that the Note is not usurious and cannot be cancelled, in accordance with the circular-citing District Court decisions (Appellee's Brief at pp. 11-16). Specifically, Adar Bays argues that a corporation may not seek the invalidation of a criminally-usurious loan under § 190.40, the Note's stated interest rate is a nonusurious 8% and the Note's strategically imbedded and unreasonable expenses, penalties, share conversion rights and share reservation requirements do not constitute "interest" for the purposes of §190.40.

However, the District Court's order below, with its uncritical acceptance of prior *dicta*, repeats the error of ignoring Appellate Division cases where the courts have read §§ 190.40 , 5-501 and 5-511 together and specifically determined that a corporation may have a criminally-usurious loan voided. Such a cavalier disregard of the *Erie* Doctrine is not a proper basis for a federal court to announce its reading of applicable New York law.

In addition, Adar Bays overemphasizes that GeneSYS, as the party claiming usury as a defense, bears the ultimate burden of proving each of its elements (Appellee's Brief at pp. 17-19). The District Court granted Adar Bays summary judgment on its claims against GeneSYS, but it is clearly incumbent on the movant Adar Bays to meet its burden of production and prove a *prima facie* case that the $2,000 in attorney's fees, which paid off the top of the loan, were reasonable and legitimately incurred in the transaction in exchange for valuable services rendered. Adar Bays presented *no* evidence of the actual services provided, and there is a question of fact about whether the fees constitute reasonable expenses associated with the loan.

Furthermore, Adar Bays claims the 35% discount rate on its share conversion right is not usurious because it could not exercise it for 180 days, or it was within GeneSYS' control not to default on the loan (Appellee's Brief at pp. 20-26). Of course, Adar Bays is in the business of making "vulture" loans like this

and then awaiting the debtor's default in order to take a chunk of the company. At the time the Note was made and regardless of GeneSYS' future financial condition, GeneSYS could not pay off the Note without invoking large prepayment penalties, far beyond the 180-day conversion date. Instead, GeneSYS was wholly subject to Adar Bays' unilateral election to convert any part or all of the balance of the debt into equity, to the tune of 439,560 shares of GeneSYS common stock.

The Note's 24% interest rate upon default, in conjunction with the existing penalties, expenses, share conversion rights and share reservation requirements, puts the Note over the criminal usury limits. This Court has not addressed whether, under New York law, the criminal usury statute should apply to default rates of interest, but there are a number of New York cases holding that usury laws apply to defaulted debt interest.

Finally, the Note's mandated reservation of GeneSYS common stock, with up to five times the principal due subject to it, was criminally usurious because the value of the 278,000 shares on the date of the loan was $144,560, or 400% of its value. Adar Bays, in addition to reiterating past arguments, further contends that the share reservation was in GeneSYS' control and nonusurious because GeneSYS' transfer agent was in legal possession of the shares and would give them to Adar Bays only upon GeneSYS' direction, which has not occurred (Appellee's Brief at pp. 30-31).

However, as the existence is suit attests, upon Adar Bays' unilateral exercise of its share conversion rights, GeneSYS became legally obligated under the nominal terms of the Note to effect the transfer of the reserved shares, and, as with its "right" to avoid a default, GeneSYS' alleged "control" of the reserved shares was illusory.

## ARGUMENT IN REPLY

### 1. A CRIMINALLY USURIOUS LOAN TO A CORPORATION, LIKE THE LOAN HERE TO GENESYS, IS VOID *AB INITIO* IN ACCORDANCE WITH APPELLATE DEPARTMENT DECISIONS, PURSUANT TO THE *ERIE* DOCTRINE

Adar Bays repeats the *dictum* from *In re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 90, at n.4 (2d Cir. 2002), in contending that a criminally-usurious loan should not be considered void under N.Y. Gen. Oblig. Law § 5-511. This Court in *Venture Mortgage Fund* did not actually decide that issue, and the Court also noted that "it may be expected (as the parties to this appeal evidently assume) that one who commits criminal usury should not be preferred (and be able to collect) over the usurer who charges a rate of interest that is not criminal." *Id*. at 189.

The different treatments of individual persons and of corporations under the civil usury laws in New York might stem from a general impetus for usury laws "to protect desperately poor people from the consequences of their own desperation." *Seidel v. 18 East 17th Street Owners, Inc.*, 79 N.Y.2d 735, 586

N.Y.S.2d 240, 598 N.E.2d 7, 9 (1992) (quoting *Schneider v. Phelps*, 41 N.Y.2d 238, 243, 391 N.Y.S.2d 568, 359 N.E.2d 1361 (1977)).

However, with N.Y. Gen. Oblig. Law § 5-521(3) allowing a corporation to raise a criminal usury defense under § 190.40, the New York Legislature obviously recognizes that a small business or corporation with a "desperate" or immediate need for cash-flow financing might be, for example, vulnerable to "vulture" lenders, such as Adar Bays. While GeneSYS is a publicly-traded OTC company, the position Adar Bays and the District Court take in refusing to read §§ 190.40, 5-501 and 5-511 together would also subject a private, closely-held or sole shareholder corporation to the same limitations. Section 5-501(6)(b) also places a ceiling of $2.5 million, an amount not reached here, on any loan subject to the usury restrictions under § 190.40. This upper figure and the similar ceiling of $250,000 in § 5-501 codify the true legislative distinction between civil and criminal usury in New York.

On the other hand, "[s]tatutes that relate to the same subject are in *pari materia* and should be construed together unless a contrary intent is clearly expressed by the Legislature." *Albany Law School v. New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 120, 968 N.E.2d 967, 975, 945 N.Y.S.2d 613, 621(2012). Sections 190.40, 5-501 and 5-511 govern the same or similar subject matter, and each has been enacted to combat

"loan sharks" (or "vulture" lenders) who would otherwise get away with targeting "desperate" borrowers, whether corporate or individual.

It is also telling that §§ 5-501 and 5-521(3) cross-reference § 190.40 and specifically provide that criminal usury is a defense a corporation may raise to a suit on a note payable. "[A] statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted[.]" *Jam v. International Finance Corporation*, __ U.S. __, 139 S. Ct. 759, 769 (2019).

The Appellate Division has read the relevant statutes together and expressly held that a corporation or an LLC may successfully defend the enforcement of a note based on the criminal usury statute, which would also render the note void pursuant to N.Y. Gen. Oblig. Law § 5-511(1). *See, e.g., Blue Wolf Capital Fund II, L.P. v. American Stevedoring Inc.*, 105 A.D.3d 178, 183-84, 961 N.Y.S.2d 86, 90 (1st Dep't 2013); *Fred Schutzman Co. v. Park Slope Advanced Medical, PLLC*, 128 A.D.3d 1007, 9 N.Y.S.3d 682 (2d Dep't 2015); *Fareri v. Rain's International Ltd.*, 187 A.D.2d 481, 589 N.Y.S.2d 579 (2d Dep't 1992).

Under the *Erie* doctrine, as applicable in the case here, in determining a state's law this Court and the District Courts below are obligated to follow "the state's decisional law, as well as its Constitution and statutes. Where state law is unsettled, [the courts] are obligated to carefully predict how the state's highest

court would resolve the uncertainty or ambiguity. Where... a state's highest court has not spoken on an issue, [the courts] give proper regard to the relevant rulings of a state's lower courts." *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013). ["The Court] is bound... to apply the law as interpreted by New York's intermediate appellate courts[,] unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc*., 170 F.3d 125, 134 (2d Cir. 1999).

Here, the District Court (and the courts it cited) have totally disregarded or ignored the Appellate Division's holdings in *Blue Wolf*, *Fred Schutzman Co*. and *Fareri* allowing a corporation to avoid a criminally-usurious loan pursuant to §§ 190.40, 5-501 and 5-511, read in *para materia*. There is no case or opinion from the New York Court of Appeals indicating that a contrary conclusion would be likely.

Adar Bays raises its own rule of statutory construction to argue that the Legislature's failing to expressly state that criminal usury is void under § 5-511 excludes that result under the maxim of "*expressio unius est exclusio alterius*" (Appellee's Brief at p. 13).

However, the language of these statutes must be read together in their entirety and construed in a manner so as to give effect to each of its provisions. Section 190.40 sets a criminal usury rate of 25%, which is higher than the civil

usury rate of 16%. While § 5-521(1) provides that "[n]o corporation shall hereafter interpose the defense of usury in any action," § 5-521(3) then states that this provision "shall not apply to any action in which a corporation interposes a defense of criminal usury as described in § 190.40[.]" Section 5-511(1) provides, without any distinction, "*[a]ll* bonds, bills, notes, assurances, conveyances, all other contracts or securities *whatsoever*... whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, *any greater* sum, or *greater* value, for the loan or forbearance of any money, goods or other things in action, *than* is prescribed in § 5-501, shall be void." (Emphasis added).

The plain import of this subsection is that *all* loans at a usurious rate of interest greater than the 16% stated in § 5-501 are void. The only pertinent distinction arising overall, regarding a loan made in violation of the civil usury threshold versus a loan in violation of the criminal one, is that a corporation, such as GeneSYS, cannot seek to avoid a note until the usurious rate reaches as high as 25%, per § 190.40. *See Blue Wolf, supra; Fred Schutzman Co.*, *supra*; *Fareri, supra.*

Adar Bays' reliance on "*expressio unius est exclusio alterius*" is misplaced because § 5-511(1) does *not* state that "loans found to violate '§ 5-501 shall be void.'" Rather, § 5-511(1) provides that all loans, which require a repayment of "any greater sum, or greater value, for the loan or forbearance of any money, goods

or other things in action, than is prescribed in § 5-501, shall be void." (*Contra* Appellee's Brief at p. 13).

"*Expressio unius est exclusio alterius*," after all, "is a rule of statutory construction and not a rule of law, is subordinate to the primary rule that legislative intent governs the interpretation of a statute, and is, consequently, overcome by a strong indication of contrary legislative intent." 2A *Sutherland Statutory Construction* § 47:23 (7th ed. 2019).

### 2. ADAR BAYS HAS NOT MET ITS BURDEN OF PRODUCTION AT THE SUMMARY JUDGMENT STAGE TO PROVE ITS *PRIMA FACIE* CASE THAT THE ATTORNEY'S FEES CHARGED AT THE CLOSING OF THE LOAN WERE REASONABLE EXPENSES INCURRED IN EXCHANGE FOR VALUABLE SERVICES

Adar Bays claims that the $2,000 skimmed off the top of the loan and paid to its attorneys is not part of the calculation in determining whether the Note is usurious because reasonable expenses "attendant with the loan" can be excluded from consideration (Appellee's Brief at pp. 17-19). Adar Bays argues that the burden of proof remains with GeneSYS to show that the loan is usurious, but Adar Bays has it wrong at the summary judgment stage where it bears the initial burden of production concerning the reasonableness of the fees and the value of the attorney's legal services.

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." One of the principal purposes of summary judgment is to "isolate and dispose of factually unsupported claims or defenses..." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

As an initial matter, "the moving party bears the burden of establishing the absence of any genuine issue." *Grabois v. Jones*, 89 F.3d 97, 99-100 (2d Cir. 1996) (citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144 (1970)); *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (holding that movant for summary judgment must bear burden of production); *see also Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001). Without this showing, a District Court cannot grant summary judgment in favor of a movant, even if the adverse party has not responded. While this showing need not require the movant to introduce evidence negating the opponent's claim, it must "point out to the District Court that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra*, 477 U.S. at 325.

Adar Bays, though, did not present *any* evidence in support of its motion for summary judgment showing that the $2,000 payable to its attorneys was legitimate and reasonable, as shown on the face of the loan documents.

"An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *Greenpoint Mortgage Corp. v. Lamberti*, 155 A.D.3d 100, 106, 466 N.Y.S.3d 32, 34 (2d Dep't 2017). "In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort and skill required; the difficulty of the questions presented; counsel's experience, ability and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation." *Id.*

"[W]hen fee payments do not actually reimburse lenders for expenses associated with the loan, and instead are a disguised loan payment, then such fee expenses can be considered in determining the interest rate." *Hillair Capital Investments, L.P. v. Integrated Freight Corp.*, 963 F. Supp. 2d 336, 339 (S.D.N.Y. 2013). In the absence of some evidence at all that the attorney's fees paid were reasonable expenses of the loan, this $2,000 (or 6% of the face amount of the loan) should be treated as "hidden" interest in conjunction with the 180-day conversion date, making the effective interest rate on the Note at least 28% and criminally usurious. *Cf. Blue Wolf, supra*, 105 A.D.3d at 183-84, 961 N.Y.S.2d at 90.

### 3. THE 35% SHARE CONVERSION DISCOUNT RATE WAS USURIOUS AT THE TIME OF MAKING OF THE LOAN BECAUSE GENESYS WAS SUBJECT TO ADAR BAY'S UNILATERAL ELECTION TO CONVERT SHARES

Usury is measured at the time of making of the loan, and there is no requirement to show that the lender initially intended to make a usurious loan. "A general intent to charge more than the legal rate, as evidenced by the note, is all that is needed. If the lender intends to take and receive a rate in excess of the legal percentage at the time the note is made, the statute condemns the act and mandates its cancellation." *Matter of Dane's Estate*, 55 A.D.2d 224, 226, 390 N.Y.S.2d 249, 250 (3d Dep't 1976).

The 180-day conversion date in the Note allows Adar Bays to elect to convert part or all of the debt into equity at a 35% discount, a criminally-usurious rate. Adar Bays relies on District Court opinions to the effect that the value of the discount is speculative because of the fluctuation in the market price for the shares. Again, anyone making such an analysis is putting his head in the sand to ignore the true economic nature of this type of loan.

Adar Bays is a "vulture" lender which makes loans to distressed companies, such as GeneSYS, and structures the take-it-or-leave-it deal in such a manner so as to take a sizeable share of the company after 180 days. Adar Bays takes advantage of these "desperate" borrowers by adding on large prepayment penalties to

guarantee debtor reticence and preserve its conversion rights, and, regardless of the status of the repayment of the loan, Adar Bays then inevitably elects to convert debt into equity after 180 days for the 35% discount.

Accordingly, Adar Bays' reservation of a 35% discount on the market price of GeneSYS' stock is added interest with a separate value in the usury analysis because, for each $1.00 of principal and interest, GeneSYS is required to pay back $1.35. Regardless of the trading price of the stock on any given day, paragraph 4(a) of the Note guarantees this fixed discount on the lowest trading price from the prior 20 days upon the notice to convert. In other words, there is no risk of loss to Adar Bays upon conversion, which is normally a factor involved in any investment. Under paragraph 4(a), Adar Bays can unilaterally exercise this conversion right at any time and for any amount of the principal balance. *See Blue Wolf, supra*, 105 A.D.3d at 183, 961 N.Y.S.2d at 89 ("If an instrument provides that the creditor will receive additional payment in the event of a contingency beyond the borrower's control, the contingent payment constitutes interest within the meaning of the usury statutes.")

Additionally, the 35% stock option is an original issue discount (OID) and should be treated as such. The option component of the Note includes an OID because GeneSYS is issuing a debt instrument containing a discounted stock option that is clearly reflected at the time the principal balance is due, as in *AWG*

*Leasing Trust v. United States*, 592 F. Supp. 2d 953, 996-97 (N.D. Ohio 2008). Adar Bays will always receive 35% more on each dollar that it converts into stock under the Note because it reserved that 35% discount at the time the loan was closed upon. In turn, Adar Bays has reserved to itself 35% more in actual value at the time the loan was made, insulating itself from all risk, even at the time of conversion.

### 4. THE DEFAULT RATE OF 24% IS SUBJECT TO NEW YORK'S USURY LAWS, AND, TO THE EXTENT THERE IS A CONFLICT IN THE DISTRICT COURT DECISIONS, THIS COURT IS OBLIGED TO RECONCILE IT

Adar Bays seeks to distinguish *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130 (S.D.N.Y. 2017), and its holding that the criminal usury laws apply to interest charged upon default (Appellee's Brief at pp. 28-29). Adar Bays notes that *Madden* dealt with a consumer's claim that a defaulted credit card debt with a 32.24% annual rate was criminally usurious.

The focus of the dispute in *Madden* upon a consumer's debt raises an irrelevant distinction, and the debtor in that case specifically asked the court to determine whether interest on defaulted debts could be considered criminally usurious. The debtor did not claim that the default interest was civilly usurious.

In response, Judge Seibel in *Madden* held that the New York precedent excluding default interest from a usury calculation was limited to civil usury cases.

Judge Seibel noted that a number of New York cases have held that, "where a contract provision allows collection of interest at 'the highest interest permitted under the law,' New York's criminal usury cap applies to prevent a creditor from collecting interest above 25% even in default." These citations were not based on 25% being just a reference point for the debt term of "the highest interest permitted under the law," but were made in answer to the specific question of whether the criminal usury laws apply to interest upon default. *Madden, supra*, 237 F. Supp. 3d at 142 (citing *815 Park Avenue Owners Corp. v. Lapidus*, 227 A.D.2d 353, 643 N.Y.S.2d 89, 90 (1st Dep't 1996); *Stein v. American Mortgage Banking, Ltd*., 216 A.D.2d 458, 628 N.Y.S.2d 162, 164 (2d Dep't 1995); *Emery v. Fishmarket Inn of Granite Springs*, 173 A.D.2d 765, 570 N.Y.S.2d 821, 824 (2d Dep't 1991); *Nextbridge Arc Fund, LLC v. Vadodra Properties, LLC*, 31 Misc. 3d 1202(A), 929 N.Y.S.2d 201, 2011 WL 1124347, at *3 (Sup. Ct., Queens Co., Mar. 11, 2011) (citing *Emery*, *supra*, 570 N.Y.S.2d 821).

"One decision held outright that the interest on a defaulted mortgage above 25% was 'a criminally-usurious rate.'" *See Emigrant Funding Corp. v. 7021 LLC*, 25 Misc. 3d 1220(A), 901 N.Y.S.2d 906, 2009 WL 3530022, at *4 (Sup. Ct., Queens Co., Oct. 26, 2009). These cases are strong indicators that New York's criminal usury cap applies even to defaulted obligations." *Madden, supra*, 237 F.Supp.3d at 142.

This Court has not addressed whether, under New York law, the criminal usury statute should apply to default rates of interest. Given the conflict among the District Courts of this Circuit, it is incumbent on this Court to resolve this dispute, but the conclusion in *Madden*, in following New York courts in holding that interest on defaulted debts may be found criminally usurious, is particularly persuasive.

### 5. THE MANDATED SHARE RESERVATION OF UP TO 400% OF THE LOAN WAS USURIOUS BECAUSE GENESYS HAD A LEGAL OBLIGATION, UNDER THE TERMS OF THE NOTE, TO MAKE THE TRANSFER OF SHARES UPON ADAR BAYS' ELECTION FOR CONVERSION

As discussed above, the Appellate Division has already held that a criminally-usurious loan is void, and this Court is obligated to respect that decision in the absence of any New York Court of Appeal's authority to the contrary. Under §§ 5-501 and 5-511, therefore, GeneSYS may avoid the criminally-usurious reservation of shares mandated pursuant to the terms of the Note.

The required share reservation sequestered the value of the 278,000 shares of GeneSYS stock on the date of the loan, and value of the stock so reserved was $144,560, or 400% of the value of the loan. Adar Bays, though, claims that since GeneSYS placed control of the stock with its own transfer agent and subject to its direction, GeneSYS retained control over the stock and would not have to make the transfer unless Adar Bays made the speculative election to convert the debt into

equity (Appellee's Brief at pp. 30-31). The structure of this "vulture" financing loan penalizing any prepayments made Adar Bays' election to convert at a 35% discount more inevitable, rather than speculative.

Adar Bays' "control" argument is one of "form over substance," at best. At the time of making of the loan, Adar Bays' election to convert the debt into stock after 180 days would legally bind GeneSYS under the terms of the Note to effect the transfer, or GeneSYS would be subject to a lawsuit to enforce the Note. Due to that *prima facie* legal obligation, the parties are now before the Court.

Adar Bays' inevitable subsequent election under the circumstances is not a an event of independent legal significance in calculating usury on the date the Note was executed, given GeneSYS' preexisting and nondiscretionary legal obligation to transfer the shares upon the election. *Cf.* 3 *Williston on Contracts* § 7:36 (4th ed. 2019) (a party subject to a preexisting legal obligation cannot demand any additional compensation or benefit to perform).

Therefore, this Court should recognize that the mandated reservation of shares in paragraph 12 of the Note constitutes interest and, thus, must be computed together with all other interest charges in determining the loan is usurious. *See, generally, Hufnagel v. George,* 135 F. Supp. 2d 406 (S.D.N.Y. 2001) (reservation of an amount payable to the lender equaling a rate higher than the usury rate);

*Funding Group, Inc. v. Water Chef, Inc.*, 19 Misc. 3d 483, 852 N.Y.S.2d 736 (Sup. Ct. 2008) (same).

## CONCLUSION

The Note is criminally usurious under N.Y. Penal Law § 140.90 and is void under N.Y. Gen. Oblig. Law § 5-511(1). This Court should reverse the District Court's grant of summary judgment in favor of Adar Bays and enter judgment in favor of GeneSYS in accordance with its FRCP 12(c) motion to dismiss.

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## CERTIFICATE OF COMPLIANCE

This reply brief of Defendant-Appellant has been prepared in accordance with Fed. R. App. 32(a)(7)(B) using: Microsoft Word, Times New Roman, 14 Point Type Space, with a total word count of 4417, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and the Certificate of Filing and Service.

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