

To be Argued by:
ANDREW P. SCHRIEVER
(Time Requested: 30 Minutes)

Appeal No. CTQ-2021-00001
Second Circuit Docket Nos. 20-118 and 20-850

Court of Appeals
of the
State of New York

Second Circuit Docket No. 20-118

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH
MANAGEMENT COMPANY in their Capacities as
Receivers for Futurenet Group, Inc,

Plaintiffs-Appellants,

– against –

GTR SOURCE, LLC, STEPHEN W. BEIGEL, in his Capacity
as New York City Marshall, Badge No. 27,

Defendants-Respondents.

(For Continuation of Caption See Inside Cover)

**BRIEF FOR DEFENDANT-RESPONDENT
STEPHEN W. BIEGEL**

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Second Circuit Docket No. 20-850

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH
MANAGEMENT COMPANY in their Capacities as
Receivers for Futurenet Group, Inc,

Plaintiffs-Appellants,

– against –

CAPITAL MERCHANT SERVICES, LLC,

Defendant-Respondent.

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

No disclosure is required because Respondent Stephen W. Biegel, in his capacity as New York City Marshal Badge No. 27 is not a nongovernmental corporation.

STATEMENT OF RELATED LITIGATION

There are no related pending cases or litigation.

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CERTIFIED QUESTIONS PRESENTED FOR REVIEW

Respondent Stephen W. Biegel, in his capacity as New York City Marshal, Badge No. 27 (“Respondent” or the “Marshal,” or “Marshal Biegel”), respectfully submits this brief in response to the following questions certified by the United States Court of Appeals for the Second Circuit by Order dated February 23, 2021 (A. 726-48)¹ and accepted by this Court on March 25, 2021 (A. 749):

- (1) whether a judgment debtor suffers cognizable damages in tort when its property is seized pursuant to a levy by service of execution that does not comply with the procedural requirements of CPLR 5232(a), even though the seized property is applied to a valid money judgment;

Answer to Certified Question #1: No. Where a levy by service of a property execution is made on a judgment debtor’s bank and that bank institution voluntarily complies by turning over the debtor’s funds, which are then applied to satisfy an uncontested and undisputed New York judgment debt held by a judgment debtor, that debtor does not suffer cognizable tort damages even if service of the execution does not strictly conform to the procedural requirements of CPLR § 5232(a).

- (2) whether the judgment debtor can, under these circumstances, bring a tort claim against either the judgment creditor or the marshal without first seeking relief under CPLR 5240?

¹ References to the Record Appendix are set forth as (A. (page number)).

Answer to Certified Question # 2: No. Based on this Court's ruling in *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 78, 2 N.E.3d 221, 232 (2013), CPLR article 52 provides judgment debtors with exclusive statutory mechanisms for obtaining relief from alleged violations of the procedural requirements of CPLR article 52, including those pertaining to the manner of service of executions on garnishees under CPLR § 5232(a). Therefore, a judgment debtor such as FutureNet is barred from bringing a private right of action for damages against the marshal for alleged violations of the procedural requirements of CPLR § 5232(a). A judgment debtor's recourse against alleged violations of New York's judgment enforcement laws (CPLR article 52) is exclusively limited to the statutory mechanisms provided in CPLR article 52, including commencement of special proceedings under CPLR § 5240.

Furthermore, even if a judgment debtor such as FutureNet was able to demonstrate that it was injured by the alleged violations of the procedural requirements of CPLR § 5232(a), a judgment debtor is barred from bringing common law tort claims such as conversion, trespass or wrongful execution against a judgment enforcement officer based on alleged procedural violations of CPLR article 52 since this would constitute an improper backdoor attempt to enforce a private right of action for damages under CPLR article 52. All of this is in addition to the fact that the judgment debtor here has no cognizable claim under any theory, because it cannot prove any injury or damages.

STATEMENT OF THE CASE

The basis for this case is simple: No injury, no damages, no claim.

In the complaint filed in the United States District Court for the Southern District of New York (the “District Court”), Appellants Plymouth Venture Partners, II, L.P. and Plymouth Management Company, in their capacities as Receivers for FutureNet Group, Inc. (collectively referred to herein as “FutureNet” or “Appellants”),² seek tort damages against Marshal Biegel (and judgment creditor GTR Source LLC (“GTR”)) for allegedly violating the procedural requirements of CPLR article 52 and the New York City Civil Court Act (“NYCCCA”) article 16 while enforcing GTR’s New York State Supreme Court judgment against FutureNet in the amount of \$120,154.42 (the “Judgment”).

Specifically, FutureNet alleges the Marshal committed conversion, trespass and wrongful execution by initially serving an execution and levy in Rockland County where Comerica Bank (“Comerica”) had a registered agent instead of within the five boroughs of New York City, and because service of the execution and levy was not personally effectuated on Comerica. Based on this, FutureNet seeks to hold Marshal Biegel liable in tort for the *full* amount of the funds Comerica turned over

² The District Court complaint was originally filed by Basil Simon, in his capacity as receiver for FutureNet and its related entities. The claims asserted in the District Court complaint were thereafter assigned to Plymouth Venture Partners, II, L.P. and Plymouth Management Company, who were substituted as Appellants during proceedings before the Second Circuit. *See* Appellants’ Brief (“Br.”) at pg. 3, n.1.

in response to Marshal Biegel's levy (\$127,082.29) even though: (i) FutureNet suffered no injury or damages because those funds were applied to satisfy a valid judgment debt that FutureNet owed to GTR (so FutureNet *benefited* from the levy by having its debt reduced); and (ii) the Marshal's stake here has always been limited to his 5% poundage fee on the Judgment (approximately \$6,000), with the remainder of the seized funds having been turned over to GTR to satisfy its Judgment, so any attempt to hold the Marshal liable for the full Judgment amount defies logic or common sense, as well as any sense of fairness or justice (imagine the impact on judgment enforcement if marshals could be on the hook for the very judgments they are enforcing based on an alleged procedural error, even where their actions satisfy the debtor's debt).

FutureNet does not dispute that GTR held a valid Judgment against it which gave GTR the right to enforce that Judgment against FutureNet's assets. After all, in the eyes of New York law, FutureNet became a judgment debtor, whose assets were for the benefit of its judgment creditor, once the Orange County Supreme Court entered judgment against it, and that Judgment was never vacated despite FutureNet's numerous unsuccessful attempts to do so.

Despite its uncontested status as a New York judgment debtor and admitted liability to GTR under the Judgment, FutureNet seeks to avoid responsibility for the Judgment by arguing that since the Marshal allegedly did not comply with technical

procedural requirements of CPLR § 5232(a) by personally serving a property execution on Comerica within New York City, then he is liable to FutureNet for tort damages in the full amount of FutureNet’s Judgment debt.

Were this Court to accept that result, it would be letting FutureNet off completely after it defaulted on a six-figure obligation, resulting in a windfall to FutureNet and a legal ruling being interjected into New York law – for the first time ever – that would hold a marshal liable for damages in the full amount of a judgment debtor’s debt where there has been no actual damage to the debtor by the marshal’s actions even if those actions were not procedurally proper.

It is a fundamental principle of New York law that to sustain a tort claim (and most claims), a plaintiff must establish liability and an injury giving rise to damages. Absent an injury or damages, there is no case to be heard. In their Brief, Appellants frame the first certified question to this Court as follows:

- i. whether a judgment debtor can sustain an action for damages when a judgment creditor breaks the law.

Br. at pg. 3.

To sustain an action for damages, it has never been sufficient under New York law for a plaintiff to demonstrate solely that a law has been broken or a duty of care violated. A plaintiff must show injury or damages proximately caused by the violation of that law. Thus, the answer to FutureNet’s own question is a resounding “no.”

To illustrate this fundamental legal principle, consider this scenario: a property owner with legal responsibility for maintaining the sidewalk adjacent to its property knowingly fails to do so causing the sidewalk to crack and fall into a state of disrepair. In that case, a passerby who safely walks across that dangerous sidewalk was certainly exposed to the owner's clear breach of his or her duty of care and can likely establish liability on the owner's part for negligently breaching a duty to safely maintain the sidewalk. But if the passerby sued, the lawsuit would be thrown out because all the elements of a *prima facie* tort claim would not be satisfied. There is no tort claim against the property owner for violating the sidewalk maintenance law in the absence of an injury or damages proximately caused by the unrepaired sidewalk.

So too, here, FutureNet has no tort claims against Marshal Biegel for alleged violations of the procedural requirements of CPLR § 5232(a) in the absence of an injury or damages to FutureNet proximately caused by the Marshal's conduct. As the District Court already held, there are no such injuries or damages to FutureNet in this case.

In addressing the Certified Questions to this Court, FutureNet asks this Court to remove a threshold legal requirement that a plaintiff must have standing – an actual injury in fact – to pursue tort damages by showing actual damages. The District Court could not have been more explicit in recognizing the obvious when it

found FutureNet had no case under New York law and dismissed FutureNet's claims for (i) wrongful restraint and execution (First and Second Causes of Action); (ii) conversion (Third Cause of Action) and (iii) trespass (Fourth Cause of Action). (A. 496-99).

Far from the Marshal stealing FutureNet's funds (whether the claim is couched as wrongful execution, conversion or trespass to chattels), the Marshal's levy resulted in the payment of a validly owed Judgment and the satisfaction of that Judgment in FutureNet's favor:

In this case, GTR sought and obtained an executed and levy from the New York State Supreme Court, Orange County and directed the Marshal to executed on the funds belonging to FutureNet possessed by Comerica. The gravamen of the plaintiff's Complaint is that the Marshal exceeded his jurisdictional authority by serving an execution and levy beyond the bounds of New York City and that the entity upon which the Marshal served the execution and levy, Comerica, was not subject to personal jurisdiction in New York. However, there is no dispute that the funds recovered by the Marshal were used to extinguish the debtor's valid debt owed under the valid court judgment. Therefore, the Receiver, who stood in the shoes of the debtor, *suffered no damages in this case*. The debt owed by FutureNet to GTR, which the Receiver does not dispute is a valid debt, has now been satisfied as a result of the Marshal's execution and a satisfaction of judgment has been entered.

(A. 497) (emphasis added).

The District Court then analyzed the specific elements as to each claim pled against both the Marshal and GTR, and properly concluded these claims cannot

stand because: “the Receiver has failed to establish that the Receiver suffered any damages in this case.” (A. 498). FutureNet owed a Judgment debt. That debt was satisfied as to GTR by virtue of the Marshal’s levy on Comerica, and FutureNet received the benefit (the opposite of an injury) of having that debt satisfied, with one less creditor to worry about. The Marshal’s actions in this case caused FutureNet (in whose shoes the Appellants-Receiver stand) no injury, so there is no case.

FutureNet tries to shift attention from this point—which is precisely why the District Court dismissed its claims in the first place—by suggesting that the Court’s answers to the Certified Questions will assist “in putting an end to the abuse of the New York Court System by the merchant cash advance (“MCA”) industry.” (Br. at pg. 1). But the Certified Questions have nothing to do with the merchant cash advance industry or the Marshal’s conduct and there is no reason for this Court to step in and create new remedies where ones already exist – the Marshal’s office is already regulated and overseen by the Department of Investigations and the Appellate Divisions of the First and Second Departments, and relief from any alleged judgment enforcement issues is already available to judgment debtors through the CPLR, as noted below.

In short, this is a simple case of whether a litigant gets to stay in court when all elements of a claim have not been satisfied. The Court’s resolution of these questions should thus turn on the mere reaffirmance of the plain vanilla law as it has

always existed in New York – to sustain a tort claim (and most claims), a plaintiff must demonstrate both liability *and* proximate causation of injury or damages. FutureNet is not absolved from having to satisfy the threshold legal requirement of satisfying *all prima facie* elements of its claim, irrespective of its feelings about the MCA industry or MCA lenders such as GTR who FutureNet voluntarily contracted with for a loan which it failed to pay resulting in a Judgment against it.

While FutureNet claims that resolution of the Certified Questions is necessary to protect against alleged abuses of New York’s judgment enforcement laws, FutureNet ignores that New York’s judgment enforcement statute, CPLR article 52, already contains numerous statutory mechanisms for protecting debtors against alleged violations of the judgment enforcement laws, including the right to commence special proceedings under CPLR §§ 5239 and 5240, both of which grant courts oversight of judgment enforcement including the ability to, *inter alia*, modify, vacate or void judgment enforcement devices.

FutureNet failed to avail itself of those exclusive remedies here, and in specific, CPLR § 5240 which “grants the courts-broad discretionary power to control and regulate the enforcement of money judgments under article 52 to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.” *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 519, 392 N.E.2d 1240, 1242 (1979). Along those same lines, the NYCCCA contains

provisions that deter against alleged abuses of the judgment enforcement laws, including NYCCCA §§ 1609 and 1610 which grants oversight and disciplinary authority over the New York City marshals to the Appellate Divisions of the First and Second Departments.

Given that the New York Legislature in CPLR Article 52 and NYCCCA Article 16 already provides for statutory mechanisms to remedy alleged abuses of the judgment enforcement laws and to discipline judgment enforcement officers for their conduct, it is unnecessary for this Court to create a new judicial remedy in favor of judgment debtors. Yet, FutureNet would have this Court ignore that it had remedies available to it, and instead sought to impose liability by creating a new claim in tort against New York marshals, even in the absence of damages to the judgment debtor thereby subjecting judgment enforcement officers to extreme potential liability for carrying out their duties.

In that regard, Marshal Biegel does agree with FutureNet that the Court's decision here will have "far-reaching ramifications" (Br. at pg. 3), but for reasons that are much different and far more significant than those asserted by FutureNet. A determination by this Court that judgment enforcement officers such as New York City marshals or sheriffs are liable in tort for the full amount of debtors' judgments for violating any technical or procedural requirement will undoubtedly chill (if not completely freeze) enforcement in New York of any judgment of any significance.

Imagine the implications to judgment enforcement in New York City – the business capital of the world where people need to depend on the enforceability of commercial judgments – if a marshal risks having to pay for a debtor’s judgment by virtue of a procedural irregularity that does not actually cause a debtor any injury and in fact benefits the debtor who ends up having its judgment satisfied despite the procedural irregularity, with the result being that the debtor gets off scot-free for the judgment, leaving the marshal responsible for it instead.

Also consider the consequences of the outcome FutureNet seeks. FutureNet borrows six figures, fails to pay it back, gets a judgment issued against it that it consented to (which the New York State Courts twice declined to vacate) (*see A. 505*) and then, if FutureNet gets its way, GTR and the Marshal will become jointly and severally liable for paying for FutureNet’s debt – thereby injuring GTR *twice* – once when it did not get paid back, and now again when by some ridiculous logic GTR now has to pay the amount *it* is owed back to FutureNet, while injuring the Marshal by saddling it with that same debt (the full Judgment) even though the Marshal turned over the funds to a judgment creditor who was owed the money.

The Marshal’s stake here is his 5% poundage fee of approximately \$6,000, yet FutureNet seeks to hold the Marshal liable for the full amount of GTR’s Judgment that was satisfied by the Marshal’s levy. The District Court in this action and the New York Supreme Court (Kings County) in *Bam Bam Entm't LLC v.*

Pagnotta, 59 Misc. 3d 906, 907, 75 N.Y.S.3d 804, 810-11 (N.Y. Sup. Ct., Kings Cnty. 2018), properly recognized that such an inequitable outcome is inconsistent with the requirements of New York law which, under CPLR article 52, already provides judgment debtors with exclusive remedies for resolving irregularities in the judgment enforcement process.

Based on the foregoing, it is without question that the Court's resolution of the Certified Questions has "far-reaching ramifications" on judgment enforcement as a whole in New York. Ultimately, while these policy considerations may be substantial, the analysis remains simple and it really must end where it begins, with the basic principle of tort jurisprudence that to sustain a claim a plaintiff must establish liability and injury/damages. If any element is missing, there is no claim. Such is this case. FutureNet has no claim because it had a valid Judgment against it satisfied out of funds recovered by Marshal Biegel. That outcome, irrespective of whether it was accomplished strictly in accordance with the procedures of CPLR article 52 or was procedurally irregular, does not constitute an injury or damages to FutureNet. In the absence of any cognizable case, the proper remedy is judgment dismissing the case.

STATEMENT OF FACTS

The following facts are relevant to the Certified Questions accepted by this Court.

A. The Judgment Against FutureNet

On February 14, 2018, co-Respondent GTR Source, LLC (GTR) obtained a judgment against FutureNet in *GTR Source, LLC v. FutureNet Group, Inc.*, (Sup. Ct. Orange Cty, Index No. EF001776-2018 (the “State Court Action”) in the amount of \$120,154.42 (the Judgment). (A. 38-40).

Upon obtaining the Judgment, GTR served an information subpoena with restraining notice and accompanying documents on non-party garnishee Comerica Bank (Comerica). (A. 27-37). Thereafter, GTR provided Marshal Biegel with a property execution along with directions to levy on funds belonging to FutureNet in the possession of Comerica. (A. 55-60; 72).

The Judgment against FutureNet was satisfied in full following Marshal Biegel’s levy on Comerica, and as a result FutureNet no longer owes a debt to GTR under the judgment. (A. 194).

B. The District Court Action and Decision

On or about February 25, 2019, Basil Simon, the Michigan-appointed receiver for FutureNet, filed a complaint against Marshal Biegel and GTR in the District Court seeking damages for (i) wrongful restraint and execution (First and Second

Causes of Action); (ii) conversion (Third Cause of Action) and (iii) trespass (Fourth Cause of Action). (A. 10-26).

At the parties' initial case conference before Judge Koeltl of the District Court on April 18, 2019, the parties agreed that FutureNet's complaint presented pure questions of law to be decided by the District Court and thus the parties entered into a summary judgment briefing schedule. (A. 120).

By Memorandum Opinion and Order dated December 26, 2019, the District Court denied FutureNet's motion for summary judgment and granted Marshal Biegel and GTR's motions for summary judgment dismissing FutureNet's tort claims. (A. 486-507). In granting Marshal Biegel summary judgment and denying FutureNet's motion for summary judgment, the District Court concluded, *inter alia*, that "there is nothing to suggest that the New York Court of Appeals, were it to take up the direct question presented here, would find that a judgment debtor, as opposed to a judgment creditor, could hold a New York City Marshal personally liable for executing on a valid judgment outside of New York City and where the proceeds of the executed are used to satisfy a valid debt." (A. 501).

In reaching its conclusion, the District Court found the decision of the New York Supreme Court, Kings County, in *Bam Bam Entm't LLC v. Pagnotta*, 59 Misc. 3d 906, 907, 75 N.Y.S.3d 804, 810-11 (N.Y. Sup. Ct., Kings Cnty. 2018) to be on "all fours" because the material facts there are virtually identical to the facts here.

The issue in the dispositive *Pagnotta* case was “whether a New York City Marshal can be liable for levying on Plaintiff’s bank account located outside of New York City to satisfy a valid confession of judgment entered into against Plaintiff.” *Pagnotta*, 75 N.Y.S.3d at 806. The court answered no, recognizing that a judgment debtor lacks standing to sue a marshal for damages based on the allegation that the marshal exceeded his jurisdiction by levying out of state where such levy results in the satisfaction of an undisputed judgment. In discussing the *Pagnotta* decision, the District Court held:

The Receiver has pointed to no material fact that distinguishes this case from Pagnotta, and indeed the facts of juthis [*sic*] case appear to be entirely on all fours with the facts of Pagnotta. In both cases, the undisputed facts are that the plaintiff sought to hold a New York City Marshal personally liable for levying on an out-of-City bank account to satisfy a debt that the plaintiff does not dispute is valid. In both cases, the undisputed facts are that the Marshal acted on the basis of a confession of judgment signed by the plaintiff and a judgment entered by the state court. In this case, as in Pagnotta, the Receiver has not made any showing of damages to the Receiver. Indeed, to hold that the Marshal is personally liable would amount to the Marshal’s paying FutureNet’s otherwise valid debt. The cases are indistinguishable, and therefore the Marshal is entitled to summary judgment.

(A. 504-505).

C. The Second Circuit Appeal

By Notice of Appeal dated January 10, 2020, Appellants appealed the District Court Order to the United States Court of Appeals for the Second Circuit. (A. 519-520). On appeal, the Second Circuit determined that:

These cases present an unresolved question of New York law: whether a judgment debtor suffers cognizable tort damages when a judgment creditor has a marshal or sheriff seize the judgment debtor's property pursuant to a valid money judgment, but the levy by service of execution does not comport with the service requirements of Article 52 of the CPLR.³

(A. 727). Based on, *inter alia*, its determination that “two recent New York Supreme Court decisions have reached differing results on the topic,” the Second Circuit concluded that “certification of the question to the New York Court of Appeals is preferable to resolving it ourselves.” (A. 746).

³ On appeal to the Second Circuit, the District Court Action was consolidated with another case pending before the U.S. District Court for the Southern District of New York captioned *Simon v. Capital Merchant Services, LLC*, Case No. 19-cv-00904 (KPF) which presented the same issue under New York law.

ARGUMENT

I.

IN THE ABSENCE OF ACTUAL DAMAGES, A JUDGMENT DEBTOR DOES NOT SUFFER COGNIZABLE TORT DAMAGES SOLELY BECAUSE A JUDGMENT ENFORCEMENT DEVICE USED TO ENFORCE AN UNDISPUTED, VALID STATE COURT JUDGMENT IS SERVED IN A PROCEDURALLY IRREGULAR MANNER

A. FutureNet did not suffer any damages from the Marshal's levy.

It is well settled law that in the absence of a cognizable injury, a plaintiff is without standing to bring an action for damages. *See, Society of Plastic Indus. v. County of Suffolk*, 77 N.Y.2d 761, 762–773 (1991) (“An analysis of standing begins with a determination of whether the party seeking relief has sustained an injury”); *Campbell v. Barclays Bank PLC*, 24 Misc. 3d 1210(A), 899 N.Y.S.2d 58 (Sup. Ct. 2009) (“A plaintiff, to have standing, ‘must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief’”) (*citing Allen v. Wright*, 468 U.S. 737, 751 (1984)); *Stark v. Goldberg*, 297 A.D.2d 203, 746 N.Y.S.2d 280 (1st Dept. 2002) (“If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action.”). The threshold requirement that a plaintiff demonstrate a cognizable injury, and thus standing to maintain suit, is applicable to all tort claims.

FutureNet's receivers seek to turn this well settled legal principle on its head by suggesting a new standard by which a judgment debtor is deemed to suffer tort

damages *per se* where a judgment enforcement officer fails to strictly comply with the procedural requirements for serving property executions on garnishees under CPLR § 5232(a) or potentially acts beyond the scope of its jurisdiction. There is no basis for Appellants' *per se* theory of damages in this context.

The likely reason Appellants suggest that the Court adopt such an approach here is because Appellants have never been able to demonstrate actual damages to FutureNet as a result of the Marshal's levy—even if it was served in a manner inconsistent with CPLR § 5232(a)—because the levy resulted in the satisfaction of a debt that FutureNet does not dispute it owed to GTR. As to FutureNet (in whose shoes the Appellants-Receivers stand), there is no injury or damages to it because once the funds from Comerica (turned over as a result of the Marshal's levy) were applied to satisfy GTR's Judgment, FutureNet was released from any further liability for GTR's Judgment.

This is precisely what the District Court held when it found that, “There is no dispute that FutureNet owed a valid debt to GTR, that the debt was reflected in a valid state court judgment, and that the funds upon which the Marshal executed were used to satisfy that valid judgment. Therefore, the Receiver has failed to show that it was harmed by the seizure of the funds.” *Simon v. GTR Source, LLC*, No. 19CV1471 (JGK), 2019 WL 7283279, at *5 (S.D.N.Y. Dec. 26, 2019), *aff'd in part*, question certified sub nom. *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*,

988 F.3d 634 (2d Cir. 2021), certified question accepted, 36 N.Y.3d 1077, 166 N.E.3d 1053 (2021); *see also* (A. 498-99).

FutureNet says it was damaged because one day, it had funds in its bank account, and the next day the funds were gone such that it could not meet payroll. (Br. at pg. 32). But the Marshal was not the cause of FutureNet's loss of those funds or FutureNet's inability to meet payroll. Rather, the cause of the loss of those funds was FutureNet's uncontested failure to pay a debt to GTR it contracted to pay, which resulted in entry of a Judgment that FutureNet consented to, following which GTR—the creditor holding that Judgment—had every right to levy on the funds in FutureNet's account, which levy Comerica complied with. Neither GTR's nor the Marshal's conduct exposed FutureNet to liability on the Judgment. It was FutureNet's failure to honor its debts to GTR which resulted in a valid Judgment that caused the account to be levied on.

To get around its lack of any actual injury, FutureNet tries to make one up, by claiming that the Marshal is liable because his levy made him somehow responsible for FutureNet's inability to make payroll. But Appellant ignores that prior to the Marshal's involvement in enforcing the Judgment, GTR served restraining notices on Comerica as it was legally permitted to do based on its Judgment. See Br. at pg. 10 (confirming that GTR served restraining notices on Comerica). Thus, even if the Marshal had not levied on FutureNet's Comerica account, FutureNet's funds would

have still been restrained by virtue of the restraining notices (that FutureNet never vacated) and FutureNet would not have been able to meet its payroll and other payment obligations of its secured creditors. Thus, the claim of any “harm” that FutureNet claims was caused by Marshal Biegel’s subsequent levy is completely unsupported. That payroll was unavailable whether the Marshal acted or not.

As the District Court noted in analyzing the factually indistinguishable New York *Pagnotta* case, the court there:

did note that a Marshal could be held liable for damages ‘caused by negligently executing a valid order of seizure or warrant of eviction,’ but that in a case in which damages could not be established because there ‘simply is no dispute that the Judgment Debtor and Plaintiff owe the money that was levied upon,’ holding the Marshal liable would not be appropriate because it would amount to ‘having the Marshal pay the Plaintiff’s debt.’

(A. 503) (*quoting Bam Bam Entm't LLC v. Pagnotta*, 59 Misc. 3d 906, 907, 75 N.Y.S.3d 804, 810-11 (N.Y. Sup. Ct., Kings Cnty. 2018)).

Thus, whether the levy was issued outside of New York City or whether it was personally served on Comerica is of no import, because the Marshal did not *cause* FutureNet to owe funds to GTR. FutureNet caused those funds to be owed and FutureNet’s failure to honor its debt legally allowed GTR to reach those funds.

To illustrate the absurdity of trying to hold the Marshal liable for FutureNet’s uncontested judgment debt based on technical procedural violations of New York’s judgment enforcement laws, consider this scenario: Assume the Judgment had been

domesticated by a Michigan state court and a Michigan marshal levied on the same Comerica account on the same day in accordance with proper Michigan procedure. In that case, FutureNet could never argue with a straight face that such a levy “caused” FutureNet’s injury or damages, even though the result would be exactly the same – the funds would be gone from FutureNet’s Comerica account and FutureNet would not be able to make its payroll because FutureNet was subject to a Judgment whose creditor had a legal right to reach that bank account. FutureNet is not injured by the loss of those account funds because FutureNet no longer had a right to those funds – they were subject to confiscation by a judgment creditor – be it GTR or any other judgment creditor.

To be sure that FutureNet suffered no damages here, also consider that any award compensating FutureNet for damages it allegedly sustained from the Marshal’s levy would not actually benefit or compensate FutureNet (which is the very purpose of awarding compensatory tort damages). Instead, FutureNet’s secured creditors, the ones responsible for placing FutureNet into receivership, are the parties that stand to benefit from a compensatory damages award against the Marshal and/or GTR.

What this case has always really been about is not recouping damages for FutureNet’s benefit, as it was always clear from the pleadings in this action that Appellants-Receiver’s interest was to try to get the levied funds back to satisfy

claims of FutureNet's other secured creditors. FutureNet's moving brief to the District Court made clear that the Receiver is seeking relief which "would simply restore the rights of the senior secured creditors as a result of Defendant's [alleged] unlawful actions . . ." (A. 420 ¶ 5) (brackets added). *See also* (A. 14 ¶ 21) (Complaint protests GTR's levy was because it was "tortiously interfering" with "senior, secured lenders"); (A. 417 ¶ 80) (it was those senior secured creditors who had the Receiver appointed).

In other words, the Appellants-Receiver's motivation for this lawsuit has always been to bring money back into the receivership estate to benefit the senior creditors who appointed the Receiver to pursue this mission and not to compensate FutureNet for any alleged harm caused to it by the Marshal's actions because no such harm exists as against FutureNet. However, the Receiver only has standing to prosecute claims belonging to FutureNet – the judgment debtor – which suffered no injury and therefore has no claim to begin with.

Ironically, if Appellant gets its way, and the funds are forced to be paid back to the judgment debtor only to then immediately be taken by the Receiver for FutureNet's other creditors, FutureNet would be back in the proverbial soup with GTR because if GTR has to return the funds, GTR would undoubtedly bring a claim that its Judgment is no longer satisfied – a result which brings no benefit or redress

to FutureNet but actually harms FutureNet who as of now no longer owes a debt to GTR.

B. The District Court Decision and the *Pagnotta* case reaffirm the threshold legal requirement under New York law that a plaintiff demonstrate damages to sustain a tort claim.

The issue in the dispositive *Pagnotta* case out of the New York Supreme Court, Kings County, was “whether a New York City Marshal can be liable for levying on Plaintiff’s bank account located outside of New York City to satisfy a valid confession of judgment entered into against Plaintiff.” *Pagnotta*, 75 N.Y.S.3d at 806. The court there answered no, recognizing that a judgment debtor lacks standing to sue a marshal for damages based on the allegation that the marshal exceeded his jurisdiction by levying out of state where such levy results in the satisfaction of an undisputed judgment.

The District Court correctly found *Pagnotta* to be on “all fours” because the material facts are virtually identical. Like here, the plaintiff-judgment debtor in *Pagnotta* received a loan from a judgment creditor in exchange for the judgment creditor’s right to receive plaintiff’s future receivables under a certain merchant agreement. Like here, the plaintiff gave the judgment creditor an affidavit of confession of judgment to be entered in the event of plaintiff’s default under the merchant agreement. Like here, after plaintiff defaulted under the agreement, the

judgment creditor entered judgment against the plaintiff and retained the services of a New York City Marshal (Pagnotta) to enforce the judgment. *Id.* at 806.

Pursuant to the judgment, that marshal sent a levy to garnishee Fifth Third Bank located in Cincinnati, Ohio. The Ohio bank honored the levy and issued a check to Marshal Pagnotta in the amount of \$10,668.25. *Id.* After Marshal Pagnotta's levy on the Ohio bank, the judgment debtor sued Marshal Pagnotta in New York Supreme Court (Kings County) for wrongful execution, conversion and trespass—the same claims being asserted against Marshal Biegel herein by FutureNet.

On summary judgment, the plaintiff judgment debtor argued that “the Marshal should be personally liable for executing on property located outside of New York to satisfy the Plaintiff's valid debt because ... the Marshal's levy authority is limited to New York City.” *Id.* at 807.

In holding that Marshal Pagnotta was not liable the New York Supreme Court reasoned:

In this case, among other deficiencies in the Plaintiff's pleadings, the Plaintiff cannot establish any damages as there simply is no dispute that the Judgment Debtor and the Plaintiff owe the money that was levied upon to pay the monies owed the Judgment Creditor...

Holding the Marshal liable in an action where, as here, the Plaintiff was not damaged by a levy which pays a portion of its debt would amount to (i) with respect to the Plaintiff, having the Marshal pay the Plaintiff's debt and (ii) with

respect to the Marshal, amount to a sanction of the Marshal. Both are inappropriate.

Id. at 810-11.

Here, Appellants' claims against Marshal Biegel are predicated solely on the Marshal's levy on Comerica Bank through its agent located outside of New York City and are identical to the claims dismissed in *Pagnotta*. Just as in *Pagnotta*, Appellants seek to hold the Marshal liable for the judgment debtor's debt to GTR even though Marshal Biegel acted pursuant to a valid judgment. As in *Pagnotta*, FutureNet suffered no injury, but rather benefitted from the Marshal's levy which resulted in the satisfaction of a judgment. (A. 194) (Satisfaction of Judgment).

C. The decision by the New York State Supreme Court, Ontario County, in *Silver Cup Funding* is not at odds with *Pagnotta's* holding or the Kings County Supreme Court's reasoning therein.

Both FutureNet and the Second Circuit suggest that the New York Supreme Court (Ontario County) decision in *Silver Cup Funding LLC v. Horizon Health Ctr., Inc.*, 70 Misc. 3d 1201(A), 135 N.Y.S.3d 631 (N.Y. Sup. Ct. 2020) is inconsistent with *Pagnotta*, thus causing a split between New York's lower state courts on the issue of whether a judgment debtor can sustain a tort claim against a marshal for violating procedural requirements of CPLR article 52. However, the *Silver Cup* decision is entirely distinguishable from *Pagnotta* and does not cast any doubt as to the validity of *Pagnotta's* holding or the reasoning of the Supreme Court, Kings County, which held, consistent with New York law, that a debtor's claim for

damages against the marshal cannot be sustained in the absence of damages to the debtor.

In *Silver Cup*, the Supreme Court ordered restitution of funds to the plaintiff debtor under CPLR § 5240 which, based on this Court's decision in *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 2 N.E.3d 221 (2013), is one of several exclusive remedies available to a debtor under CPLR Article 52 to redress alleged violations of New York's judgment enforcement laws. The *Silver Cup* court did not address the issue in *Pagnotta*, as well as here, of whether a judgment debtor can maintain an action in tort against a judgment enforcement officer for allegedly violating the procedural requirements of CPLR Article 52 in the absence of damages to the judgement debtor. While the Second Circuit Order notes that the *Silver Cup* court determined that a judgment debtor "may have a cause of action for damages" (A. 745), the damages being referred to there are in the form of attorney's fees incurred by the judgment debtor in pursuing relief under CPLR § 5015(a) and CPLR § 5240 to vacate an execution and levy and for restitution of money's executed on and levied. *See, Silver Cup Funding LLC v. Horizon Health Ctr., Inc.*, 70 Misc. 3d 1201(A), 135 N.Y.S.3d 631 (N.Y. Sup. Ct. 2020) ("Horizon also seeks an award of reasonable attorney's fees for bringing this motion. It appears that Horizon may have a cause of action for damages, but also that a plenary action is required."). Unlike the debtor in *Silver Cup*, FutureNet is seeking to hold Marshal Biegel liable for tort damages in the full

amount of the funds seized from Comerica, and not merely for attorneys' fees incurred to vacate process under CPRL Article 52 (which FutureNet failed to do).

Furthermore, while the *Silver Cup* court refers to the judgment creditor having a possible action “in the nature of trespass” (*Id.*), the *Silver Cup* decision is clear that such an action would only be available once “...process is vacated because of irregularity.” Here, FutureNet never took steps under CPLR article 52 to vacate the process it claims was irregular (*i.e.* the Marshal’s levy and execution). Instead, FutureNet pursued tort claims directly against the Marshal and GTR based on alleged procedural irregularities in serving Comerica with a levy and execution to enforce an undisputed valid Judgment. The problem for FutureNet is two-fold: (i) FutureNet was not damaged, and therefore has no tort claims, since the Marshal’s levy still caused FutureNet’s debt to GTR to be satisfied in full; and (ii) FutureNet never sought to have process in this case declared irregular under CPLR § 5240 or to have that process vacated, unlike the debtor in *Silver Cup Funding*.

Simply put, no private cause of action exists in favor of FutureNet against the Marshal because FutureNet (and therefore the Receiver standing in its shoes) has not suffered any injury or damages from the Marshal’s levy, but rather *benefitted* from the levy resulting in satisfaction of GTR’s judgment, thereby relieving FutureNet (and thus the receiver) from that judgment debt.

While Appellant claims that the fact that the seized funds were applied to the Judgment is not material, the fact is that this seizure reduced FutureNet's exposure and therefore benefited (as opposed to damaged) FutureNet. While Appellant tries to shrug this off with the contention that the application of the seized funds to GTR's Judgment is merely a matter of "set-off" (Br. at pgs. 33-36), the District Court appropriately disposed of this argument in a long footnote in its Memorandum Order and Decision finding "the law of set-offs has no applicability to this case . . . not because there was alleged wrongful conduct by the Marshal," but rather because a "key requirement for a set-off is mutuality of debts between the parties, which is absent in this case" because "at no point did GTR owe a mutual debt to FutureNet just as FutureNet owed to GTR." (A 504, n. 1). It goes without saying that the set-off argument is even more tenuous regarding the Marshal, who had no dealings with the judgment debtor whatsoever, such that there was no debt between the Marshal and FutureNet, let alone a mutual debt.

In sum, New York law has never permitted a plaintiff to sustain a tort claim by merely demonstrating that a law has been violated without showing how the violation of that law proximately caused damage to the plaintiff. There is no reason for the Court to now deviate from that most basic legal principle, especially where doing so would reward a judgment debtor under a scenario where the debtor: (1) borrows money from a lender; (2) fails to pay it back resulting in a valid judgment

against that debtor which is then satisfied out of the debtor's own funds; and (3) sues the marshal for doing his job by acting on a valid judgment even though the result of the marshal's actions is the judgment debtor's debt is then satisfied *and* for some reason, the marshal would then be obligated to pay to the judgment debtor the full amount of the debt the debtor itself owed. This twisted, nonsensical result is exactly what *Pagnotta* said could not lie where, as here, the end result of a marshal's action is that the debtor's judgment is satisfied.

II.

NO EXPRESS OR IMPLIED PRIVATE RIGHT OF ACTION FOR DAMAGES EXISTS AGAINST NEW YORK CITY MARSHALS UNDER CPLR ARTICLE 52 OR THE NEW YORK CITY CIVIL COURT ACT

A. This Court's answers to the certified questions presented in *Cruz v. TD Bank, N.A.* confirm that no express or implied private right of action for damages exists against the Marshal under Article 52 of the CPLR for alleged violations of the procedural requirements for serving judgment enforcement devices.

In *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70, 2 N.E.3d 221, 226 (2013), this Court accepted and answered the following certified questions from the Second Circuit:

[F]irst, whether judgment debtors have a private right of action for money damages and injunctive relief against banks that violate EIPA's procedural requirements; and

second, whether judgment debtors can seek money damages and injunctive relief against banks that violate EIPA in special proceedings prescribed by CPLR Article 52 and, if so, whether those special proceedings are the

exclusive mechanism for such relief or whether judgment debtors may also seek relief in a plenary action. 711 F.3d 261, 271 [2d Cir.2013]).

The Court’s answers to those certified questions in *Cruz* are highly relevant to, if not dispositive of, the certified questions in this action.

In *Cruz*, the plaintiffs-judgment debtors in two separate federal lawsuits sought money damages against various banks based on allegations that their accounts at New York branches of the defendant-banks were restrained in violation of the Earned Income Protection Act (“EIPA”) which, *inter alia*, “amended certain existing statutes in CPLR article 52” by “restrict[ing] the scope of the restraint that can be implemented against the bank account of a natural person and created a new procedure aimed at ensuring that this class of judgment debtors is able to retain access to exempt funds.” *Cruz*, 22 N.Y.3d at 66. The EIPA also added a new section to CPLR Article 52, CPLR § 5222–a, which, *inter alia*, “compels banks to mail to judgment debtors (the account holders) copies of the exemption notices and exemption claim forms received from judgment creditors.” *Id.* at 224.

The plaintiffs-debtors in *Cruz* argued that because the banks failed to provide them with copies of the exemption notices and claims forms required under CPLR § 5222-a, their bank accounts were not permitted to be restrained. As a result, the debtors sought money damages against their banks, “... including reimbursement of

funds restrained and disbursed in error as well as any consequential damages caused by the lack of access to funds.” *Cruz*, 22 N.Y.3d at 69.

In answering the first certified question in *Cruz* in the negative, this Court held that the EIPA (which amended existing portions of CPLR Article 52 and also added new statutory provisions) did not provide for an express or implied private right of action for violating the statutory procedural requirements of Article 52 of the CPLR.

For the same reasons that this Court in *Cruz* determined that CPLR Article 52 does not grant debtors a private right of action for damages (in that case, against banks) for violating procedural requirements of the statute, the Court should determine that FutureNet is also barred from pursuing damages against the Marshal for allegedly violating similar statutory procedural requirements of CPLR Article 52, including those under CPLR § 5232(a) pertaining to service of executions on garnishees.

This would include claims for common-law tort damages because allowing FutureNet to sue the Marshal for damages in tort based on alleged violations of the procedural requirements of CPLR article 52 would accomplish through backdoor means what this Court has already determined is not permitted under CPLR Article 52 which already provides exclusive statutory mechanisms for resolving claims and curing any alleged judgment enforcement deficiencies under that statute.

Additionally, based on the Court’s analysis and findings in *Cruz* that the statutory mechanisms in CPLR Article 52 for obtaining relief from alleged violations of that statute are exclusive, the Court should answer the second Certified Question in this case in the negative.

i. FutureNet does not satisfy the factors for implying a private right of action for damages against the Marshal under CPLR Article 52 or the New York City Civil Court Act.

Neither CPLR Article 52 nor NYCCCA Article 16 expressly provide that a judgment enforcement officer is subject to a suit in damages for failing to strictly comply with the procedural requirements of those statutes. Thus, FutureNet can sue the Marshal for damages based on alleged violations of these statutes “only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history.” *Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 667 N.E.2d 328, 329 (1996)(internal citations omitted). As this Court has explained, inquiry into whether a private right of action can be fairly implied in a statute involves three factors:

- (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted;
- (2) whether recognition of a private right of action would promote the legislative purpose; and
- (3) whether creation of such a right would be consistent with the legislative scheme (*Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18, 541 N.E.2d 18 [1989]).

Cruz v. TD Bank, N.A., 22 N.Y.3d 61, 70, 2 N.E.3d 221, 226 (2013).

The third factor—whether creation of such a right would be consistent with the legislative scheme—has repeatedly been recognized by this Court as the most important because:

the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme [citation omitted].

Cruz, 22 N.Y.3d at 70–71 (“We have therefore declined to recognize a private right of action in instances where ‘[t]he Legislature specifically considered and expressly provided for enforcement mechanisms’ in the statute itself”) (citing *Mark G. v. Sabol*, 93 N.Y.2d 710, 720, 695 N.Y.S.2d 730, 717 N.E.2d 1067 (1999)).

a) Whether the plaintiff is one of the class for whose particular benefit the statute was enacted

With respect to the first factor of whether FutureNet is one of the class for whose particular benefit the statutes were enacted, there is nothing to suggest that the requirement of CPLR § 5232(a) that an execution be served on a garnishee in the same manner as a summons is meant to benefit judgment debtors such as FutureNet. In fact, this procedural requirement does not even concern service of judgment enforcement devices on judgment debtors but rather on third-party garnishees.

Nor does it appear that the jurisdictional limitations of the New York City marshals set forth in the NYCCCA were enacted for the benefit of judgment debtors. It should make little difference to a judgment debtor faced with having to pay a valid judgment debt whether a garnishee in possession of the debtors' assets is served by a New York City marshal, a Rockland County sheriff or any other judgment enforcement officer since one way or the other, the debtor is responsible for paying the judgment and a marshal or sheriff in any jurisdiction can access the funds, so the identity of the one who serves the levy here is immaterial insofar as the ultimate impact on the judgment debtor is concerned. Rather, the statute focuses only on the party to be served, and is thus clearly intended to ensure that there is appropriate jurisdiction over the garnishee, which garnishee in this case (a sophisticated bank), had no jurisdictional objection.

b) Whether recognition of a private right of action would promote the legislative purpose.

In considering the second factor of whether recognition of a private right of action would promote the legislative purpose, with respect to CPLR Article 52, the judicial creation of a private right of action here would subvert the purposes of that statute which already provides statutory mechanisms such as special proceedings to enforce rights under that statute. As the Court previously acknowledged in *Cruz*, “The summary proceedings have the advantage of being swift and without procedural complexity—there is no basis to suppose that the legislature expected

that injured judgment debtors would commence complicated and lengthy plenary proceedings to vindicate their rights, such as the federal court actions plaintiffs brought here.” *Cruz*, 22 N.Y.3d at 77.

With respect to private rights of action under NYCCCA Article 16 governing the conduct of the New York City marshals, allowing private rights of action for damages against marshals who allegedly violate the jurisdictional limitations set forth therein would harm, not promote, the legislative purposes of that statute which is the foundation of the New York City marshals program, in conjunction with various Joint Administrative Orders of the Appellate Divisions of the First and Second Departments which already provide detailed procedures for the oversight and discipline of marshals by entities specifically charged for that purpose (such as the Department of Investigations). *See, Pagnotta*, 59 Misc. 3d at 912.

Implying private rights of action for damages against marshals under NYCCCA Article 16, thereby subjecting marshals to a new area of exposure, in which they potentially stand to face personal liability for a judgment debtor’s debts based on procedural irregularities, would bring the marshal program to an end as no marshal in their right mind would ever assume the risk of levying on bank accounts with such a threat hanging over his or her head (particularly in New York, where judgments that could be imposed against marshals could hit the 7-9 figure range).

c) Whether creation of such a right would be consistent with the legislative scheme.

Here, even assuming, *arguendo*, that FutureNet can demonstrate it is within the class that is to be protected by the procedural service requirements of judgment enforcement devices under CPLR § 5232(a) and the jurisdictional limitations of New York City marshals under NYCCCA § 1609(a) (even though the jurisdictional limitations deal with garnishees as opposed to debtors themselves), and that a private right of action for damages against the Marshal for allegedly violating CPLR § 5232(a) and NYCCCA § 1609(a) would promote the legislative purposes of those statutes, reading into CPLR Article 52 or NYCCCA Article 16 an implied private right of action for damages against judgment enforcement officers for alleged procedural violations of these statutes would be inconsistent with their legislative purposes and the existing enforcement mechanisms already built into these statutes. *See e.g., Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 634–35, 541 N.E.2d 18, 21 (1989) (“Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme.”); *see also, Uhr ex rel. Uhr v. E. Greenbush Cent. Sch. Dist.*, 94 N.Y.2d 32, 42, 720 N.E.2d 886, 891 (1999) (holding that, “If we are to imply such a right [to bring a private cause of action under statute], we must have

clear evidence of the Legislature's willingness to expose the governmental entity to liability that it might not otherwise incur.”).

At the outset, had the legislature intended to impose liability on New York City marshals for violating the procedural requirements for service of judgment enforcement devices under CPLR § 5232(a) or the jurisdictional limitations under NYCCCA § 1609(a), it would have said so in these statutes. *See e.g., Cruz*, 22 N.Y.3d at 72. Particularly in light of the harsh consequences sought by Appellant (saddling the Marshal with the underlying full debt of the judgment), the request to legislate such a remedy from the bench should not be taken lightly.

Additionally, implying a private right of action under CPLR Article 52 for damages against the Marshal for allegedly violating the procedural requirements of CPLR Article 52 is inconsistent with “the comprehensive enforcement mechanisms the legislature included elsewhere in CPLR article 52” which were designed “to secure remedies for wrongs arising under the statutory scheme.” *Id.* at 74. As noted by this Court in *Cruz*,

As a result of a CPLR 5239 proceeding, ‘[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded.’ CPLR 5240 permits a court ‘at any time, on its own initiative or the motion of any interested person’ to issue an order ‘denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure’—and therefore grants the court substantial authority to order equitable relief.

Cruz, 22 N.Y.3d at 74–75.

The availability of such remedies to FutureNet under CPLR Article 52—which FutureNet failed to avail itself of—“militates against recognition through implication of a new type of claim against [...] [judgment enforcement officers] falling outside the statutory scheme,” in the same way that this Court in *Cruz* determined that implying a private right of action for damages against banks based on procedural violations of CPLR Article 52 would be inconsistent with the statutory remedies provided in CPLR Article 52.

Just as CPLR Article 52 did not intend to subject banks to liability for their role in acting as conduits for communicating to judgment debtors their exemption rights under CPLR Article 52, there is nothing to suggest that the legislative scheme of CPLR Article 52 intended, expressly or impliedly, to subject judgment enforcement officers to liability for their important role in enforcing facially valid judgments issued from the New York courts.

Just as the special proceedings available to judgment debtors under CPLR Article 52 afford “an avenue for relief” from mistakes by banks in complying with the procedural requirements of CPLR article 52, these same proceedings similarly provide debtors such as FutureNet with “an avenue for relief” from mistakes by judgment enforcement officers in complying with the procedures of CPLR article 52. *Id.* at 76.

With respect to the NYCCCA, implying a private right of action for damages against marshals under that statute would be entirely inconsistent with its legislative scheme. As noted in *Pagnotta*:

The legislature enacted the NY City Civil Court Act vesting authority in the Appellate Divisions for the oversight and appropriate sanction and removal of New York City Marshals...It is simply not for this Court to create a private remedy where one was never intended by the legislature, where both a forum and a mechanism for addressing alleged abuse of authority already exists and certainly not in a case where the Marshal has executed on a facially valid confession of judgment.

Pagnotta, 75 N.Y.S.3d at 811.

In dismissing FutureNet's tort claims against the Marshal, the District Court echoed *Pagnotta*'s recognition that "Marshals are governed by statute and subject to oversight and discipline from the Appellate Division," and that if Appellants prevailed, it would be an "inappropriate" sanction of the Marshal, at which point the District Court quoted favorably the excerpted language above that it is not for the Court to create a private remedy where one was not intended by the legislature. (A 502-03) (*citing Pagnotta*, 75 N.Y.S.3d at 810, 811).

Based on precedent from this Court, implying a private right of action for damages against the Marshal for alleged violations of any of the procedural requirements of CPLR Article 52 or the jurisdictional limitations of NYCCCA Article 16 would be inconsistent with the legislative schemes of these statutes,

including the statutory mechanisms provided therein by the New York Legislature to judgment creditors seeking relief from alleged violations of those statutes.

As such, the Court should find that FutureNet is precluded from pursuing private rights of action for damages against the Marshal based on alleged violations of CPLR Article 52 or NYCCCA Article 16. That FutureNet seeks damages against the Marshal in the form of common-law tort claims does not permit FutureNet to get around the fact that it is precluded from suing the Marshal for damages based on alleged violations of CPLR Article 52 and NYCCCA Article 16 because FutureNet's common-law tort claims are premised on the Marshal's alleged violations of these statutes. *See, Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 78–79, 2 N.E.3d 221, 232 (2013) (“Banks had no obligation under the common law to forward notices of exemption and exemption claim forms to judgment debtors. It therefore follows that any right debtors have to enforce that obligation, among others imposed under CPLR 5222–a, arises from the statute and, since the EIPA does not give rise to a private right of action, the only relief available is that provided in CPLR article 52.”); *see also, Kerusa Co. LLC v. W10Z/515 Real Est. Ltd. P'ship*, 12 N.Y.3d 236, 245, 906 N.E.2d 1049, 1054 (2009) (a pleading for common-law fraud based on a condominium sponsor's failure to disclose various construction and design defects in the offering plan under the Martin Act and the Attorney General's implementing regulations “would invite a backdoor private cause of action to enforce the Martin Act in

contradiction to our holding in *CPC Intl.* that no private right to enforce that statute exists.”).

For the reasons that this Court in *Cruz* found that CPLR Article 52 does not imply a private right of action for damages against banks for violating the procedures of CPLR Article 52, it should similarly conclude that CPLR Article 52 does not imply a private right of action for damages against judgment enforcement officers for violating technical requirements of the judgment enforcement statutes such as the requirement that executions be personally served on garnishees.

B. Since the statutory mechanisms provided to debtors under CPLR Article 52 for obtaining relief from alleged violations of the judgment enforcement laws are exclusive, the Court should answer the second certified question in the negative.

This Court need not consider the second certified question of whether FutureNet can bring a tort claim against either the judgment creditor or the Marshal without first seeking relief under CPLR § 5240 because FutureNet has not demonstrated that it was actually damaged by the Marshal’s levy and therefore it cannot sustain its tort claims against the Marshal or GTR.

However, even if FutureNet sustained actual damages from the Marshal’s levy, based on this Court’s holding in *Cruz*, FutureNet is precluded from suing the Marshal for damages based on alleged violations of the procedural requirements of CPLR Article 52 because CPLR Article 52 provides debtors with exclusive remedies for addressing alleged violations of New York’s judgment enforcement laws. Since

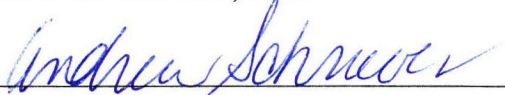
FutureNet's common-law tort claims are similarly based on allegations that FutureNet was harmed by the Marshal's alleged violations of CPLR Article 52, these claims are also barred from being asserted because CPLR Article 52 "does not give rise to a private right of action," and therefore "the only relief available is that provided in CPLR article 52." *Cruz*, 22 N.Y.3d at 79. *See also, Kerusa Co. LLC*, 12 N.Y.3d at 245. Accordingly, since the only relief available to judgment debtors such as FutureNet for alleged violations of the procedures of CPLR Article 52 is that provided in CPLR Article 52, FutureNet, even if it was able to demonstrate all elements of its tort claims, is not permitted to pursue those claims against the Marshal where, as here, such tort claims are premised on the Marshal's alleged violation of the procedural requirements of CPLR Article 52.

CONCLUSION

Based on the foregoing, Defendant-Respondent Stephen W. Biegel respectfully submits that both Certified Questions should be answered in the negative.

Dated: White Plains, New York
July 12, 2021

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**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On July 12, 2021

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