Court of Appeals No. 2021-00001

To be Argued by:
SHANE R. HESKIN, ESQ.
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Second Circuit Dkt. No. 20-118

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH MANAGEMENT COMPANY IN THEIR CAPACITIES AS RECEIVERS FOR FUTURENET GROUP, INC,

Plaintiffs-Appellants,

-v-

GTR SOURCE, LLC, STEPHEN W. BIEGEL, IN HIS CAPACITY AS NEW YORK CITY MARSHAL, BADGE NO. 27,

Defendants-Respondents.

(See inside cover for complete caption)

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Second Circuit Dkt. No. 20-850

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH MANAGEMENT COMPANY IN THEIR CAPACITIES AS RECEIVERS FOR FUTURENET GROUP, INC,

Plaintiffs-Appellants,

-v-

CAPITAL MERCHANT SERVICES, LLC,

Defendant-Respondent.

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INTRODUCTION

The Respondents' arguments, some of which have never been raised before and go beyond the scope of the certified questions, all have a common and untenable theme—the ends justify the means. According to Respondents, judgment creditors and marshals can literally lie, cheat and steal so long as they apply the fruits of their unlawful actions to reduce a valid judgment. According to Respondents, judgment debtors effectively have no rights and judgment creditors and marshals are not bound by the law. They are free to misrepresent the scope of their authority to act and the jurisdiction of the very courts that entrusted them with their authority. If adopted by this Court, the rule of law advocated by the Respondents will give tens of thousands of judgment creditors unbridled authority to reach across state lines and seize assets located in sister states without fear of consequences, thereby interfering with the rights of sister states to protect their citizens, undermining the integrity of the New York Court System and rendering the limitations on collection set by the New York Legislature a dead letter.

Many of these judgment creditors, including Respondents CMS and GTR,[1] are merchant cash advance ("MCA") companies that, for years, have brazenly abused New York's judgment enforcement laws to enrich themselves at the expense of struggling small businesses throughout the United States and senior secured

[1] Capitalized terms used herein shall have the meaning ascribed to them in the opening brief.

lenders, like Plymouth here, whose priority liens are routinely bypassed by the very actions at issue in this case.

Well-settled principles of law, largely ignored in Respondents' briefs, refute the contention that those who break the law cannot be held liable for their actions under common law principals. First, New York has long recognized that public officials and officers of the court, such as marshals, can be held liable at common law for ministerial acts, such as levies, that are performed without authority and that judgment creditors can be held liable when they ask marshals or sheriffs to exceed their authority. Nothing in Article 52 of the CPLR abrogates this common law right.

Second, more than one hundred years ago, in *Day v. Bach,* 87 N.Y. 56, 60-1 (1881), this Court recognized a judgment debtor need not vacate a void execution process, let alone the underlying judgment, before maintaining a cause of action. This is so because an execution or levy issued without authority, as here, is "an absolute nullity from the beginning" and offers no protection to the issuing party. If the process is void, "the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action." *Fischer v. Langbein*, 103 N.Y. 84, 89-90 (1886). Once again, nothing in Article 52 abrogates this settled law or imposes an obligation upon a judgment debtor to first invalidate an already void process before maintaining a cause of action.

Third, the law of New York—and every other jurisdiction—has always been that a void act is "a legal nullity at its inception," has no legal effect, and the remedy is to restore the parties to the position they were in before the act occurred. As alleged in the underlying actions, on April 26, 2018, the judgment debtor had substantial funds in its Michigan bank accounts; the next day, its accounts were empty because the funds had been seized and turned over to Respondents pursuant to Executions and Levies that exceeded the execution authority of the marshal and sheriff, which were void from inception. The loss of those funds plainly constitutes damages for which FutureNet is entitled to recover.

Fourth, New York law has never allowed a tortfeasor to profit from its abuse of the court system or other wrongs. Well-settled principles of equity and law, once again ignored by Respondents and frequently flaunted by MCA companies, prohibit a party from converting funds and then avoiding liability by offsetting their liability against a liability owed by the debtor. This rule of law is particularly applicable here because the rights of an innocent, first-lien, priority lender have been prejudiced by Respondents' misuse of the judgment enforcement process. Under New York law, these rights should be vindicated by holding Respondents responsible for their unlawful conduct and bringing the Funds back to FutureNet's estate for distribution to the senior lender—who chose not to violate the law and has now prejudiced by those that flouted it.

Finally, strong public policy concerns, dismissed by Respondents in their respective briefs, mandate answering the Certified Questions in favor of FutureNet. Permitting a marshal or sheriff to misrepresent the scope of a his jurisdiction and authority to reach across state lines and seize assets in a sister state for the benefit of a judgment creditor undermines public confidence in the judicial system, jeopardizes individual state's rights to protect property within their borders and throws chaos and uncertainty into financial transactions that New York's judgment enforcement laws and doctrines were intended to protect. Contrary to Respondents' self-serving contentions, the ends of judgment debt collection do not justify the means of violating a sister state's sovereignty and long-established New York law.

ARGUMENT

POINT I

CERTIFIED QUESTION 1: A JUDGMENT DEBTOR SUFFERS COGNIZABLE DAMAGES IN TORT WHEN ITS PROPERTY IS SEIZED PURSUANT TO A NULL AND VOID EXECUTION AND LEVY

Respondents contend that the First Certified Question should be answered in the negative because (i) FutureNet cannot maintain a cause of action for Respondents' failure to serve the Executions and Levies in accordance with CPLR § 5232(a) and (ii) FurtureNet has not sustained damages. *See* GTR Br. at 10-19; Biegel 17-23; CMS Br. at pp. 24-26. Tellingly, Respondents fail to address the very case law relied upon by FutureNet in its opening brief to establish the basis for its

claims and damages, relying instead upon irrelevant arguments and cases that do not address or refute the long-standing legal precedent supporting FutureNet's claims and demonstrating that the First Certified Question should be answered affirmatively in favor of FutureNet.

A. FutureNet has asserted a well-settled common law cause of action for wrongful execution.

As set forth in the opening brief (Op. Br. at pp. 20-21), New York courts have long recognized a common-law claim for wrongful execution or conversion when the "process" is irregular or unauthorized. *See Silberstein v. Presbyterian Hospital in New York,* 96 A.D.2d 1096, 1097, 463 N.Y.S.2d 254, 256 (2d Dep't 1983) (citing *Day v. Bach*, 87 N.Y. 56, 61 (1881)). "Process" is not limited to the judgment itself, but rather, it includes the restraining notice, execution, levy or other mechanism used to collect upon the judgment. *See Williams v. Williams*, 23 N.Y.2d 592, 596 n. 1, 298 N.Y.S.2d 473 (1969) (noting that examples of process include "attachment, execution, garnishment or even such infrequent cases as the use of a subpoena for the collection of debt."). While Respondents attempt to distinguish *Silberstein* and *Williams* on the facts, they do not and cannot dispute the principles of law for which they are cited. *See* GTR Br. at 15-16. Indeed, none of the Respondents disputes the existence of a claim for wrongful execution, its elements or that executions and levies are forms of "process" that may be the subject of a wrongful execution claim.

Instead, Respondents contend that their failure to serve the Executions and Levies in accordance with the CPLR 5232(a) are merely "technicalities" that can be waived or overlooked by a court and do not rise to level of being "wrongful." *See* GTR Br. at pp. 10-13; Biegel Br. 10, 20-21; CMS Br. at p. 24-26. In so asserting, Respondents utterly ignore the venerable authority, cited by FutureNet in its opening brief (Op. Br. at pp. 20-30), that plainly establishes the service requirements of CPLR 5232(a) are for more than mere technical requirements and go to the very existence and validity of the Executions and Levies in this case.

"Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Patrolmen's Benevolent Assn. of the City of N.Y.*, 41 N.Y.2d 205, 208, 359 N.E.2d 1338 (1976). CPLR § 5232(a) could not be any clearer by its terms. CPLR § 5232 (a) defines a "levy" as the service of an execution "in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318." CPLR § 5232(a). Thus, under the plain language of the statute, absent proper service of an execution, a levy simply does not exist, and, absent valid levies, Respondents had no right to reach across state lines and seize the Funds maintained in the Comerica Accounts.

Moreover, as set forth in the opening brief (Op. Br. at pp. 26-28) the service requirements of CPLR 5232(a) are mandatory and go to the jurisdiction of the person acting, and a garnishee's "compliance with the commands of an act or determination under it." *People ex. rel. v. Snell*, 216 N.Y. 527, 534, 111 N.E. 50, 53 (1916). In other words, since CPLR 5232(a) requires a marshal or sheriff to serve the levy in a particular way, it must do so because it does not have the jurisdiction to act in any other way. *Id.*

Further, "[c]ustom, usage and practice may not waive, or in effect avoid, a mandatory statute which is clear and unambiguous on its face." *Zimmer v. Chemung Cty. Performing Arts, Inc.*, 65 N.Y.2d 513, 524, 482 N.E.2d 898, 903 (1985) (internal quotation and citation omitted). To the contrary, "[t]he mode or way in which the act shall be done or the determination reached prescribed by it must be strictly pursued, otherwise the act or the determination will be *void*." *Snell,* 216 N.Y. at 534 (emphasis added); *Hilfer v. Board of Regents*, 283 N.Y. 304, 308, 28 N.E.2d 848, 849-50 (1940) (same). In other words, the service requirements of CPLR § 5232(a) must be strictly complied with and cannot be waived, modified or expanded upon by Respondents, Comerica or FutureNet, thereby demonstrating that they are more than the mere "technicalities" claimed by Respondents. *Zimmer*, 65 N.Y.2d at 524.

Tellingly, Respondents' briefs do not cite *Snell*, *Hilfer, Zimmer* or otherwise address the fact that the service provisions of CPLR 5232(a) are mandatory, cannot be waived, and go to the jurisdiction of the person acting thereunder.

In this regard, this case differs materially from the personal jurisdiction cases underpinning CMS' arguments in response to the First Certified Question. *See* CMS Br. at pp. 12-17. Whether or not a New York State Court may obtain personal jurisdiction over a bank served with a levy is immaterial to determining whether the levy was valid and enforceable in the first instance. As set forth above, the validity, indeed the very existence, of a levy turns on strict compliance with CPLR § 5232(a), and, unlike statutory procedures governing personal service, those provisions cannot be waived, modified or amended. *Zimmer*, 65 N.Y.2d at 524. Accordingly, whether or not Comerica consented to service of the Levies in its deposit agreement or by turning over the Funds in response to the Levies, is simply not germane to resolution of the First Certified Question.[2] Indeed, any other ruling would turn New York's judgment enforcement scheme on its head by allowing parties to vary the terms of a mandatory statute, CPLR § 5232(a), *and* expand the statutory enforcement authority of marshals and sheriffs.

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[2]To be clear, banks do not waive service requirements or personal jurisdiction in their accountholder contracts. They merely reserve the right to honor any judicial process served upon them in order to avoid the cost of litigation required to test or challenge their validity. In other words, banks do not want to exhaust resources fighting judicial process so they reserve the right to honor them regardless of validity. That agreement with its account holder can, in no way, bestow unfettered consent to jurisdiction on third parties who knowingly violate the law.

Equally unavailing is CMS' reliance upon *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009) for the sweeping proposition that Article 52 is intended to have extraterritorial reach and, therefore, entitles the Respondents to levy upon accounts located in a Michigan branch of Comerica through Comerica's general agent for service of process in Rockland County. Again, CMS' argument misses the point. While Article 52 contains no express territorial limitation barring entry of a turnover order requiring the transfer of out-of-state funds and specifically allows the securing of out-of-state materials by in-state service of a subpoena, the service requirements of CPLR § 5232(a) are plainly limiting and intended to ensure that sheriffs and marshals *do not* exceed the territorial limits of their authority by requiring in-person service of a levy upon an officer of a bank or an agent designated under CPLR 318.[3] *See* NYCL § 650 ("[A] sheriff shall perform the duties prescribed by law as an officer of the court and conservator of the peace *within the county.*"); New York Civil Court Act §§ 1609(1)(a) and 1609(b) (a marshal's authority to levy is limited to the city of New York). If neither the officer nor the designated agent is located within boundaries of New York County or, in the case of a marshal, New York City, then neither a New York County sheriff nor a New York City marshal has the authority to levy upon the bank.

[3] The extra-territorial reach of Article 52 also presumes that New York has general or specific jurisdiction over the entity served. In *Koehler*, the bank expressly consented to personal jurisdiction in the litigation. Here, Comerica is subject to neither general nor specific jurisdiction.

GTR's reliance on *Gaines v. Gaines*, 109 A.D.2d 866 (2d Dep't 1985) and *Lieberman v. Pobiner, Londson*, *Bashian & Bounami*, 190 A.D.2d 716 (2d Dep't 1993) is similarly misplaced. *Gaines* and *Lieberman* involved abuse of process claims grounded upon establishing that defendants used *regular* process for an improper motive, not wrongful execution claims based upon *irregular* or *unauthorized* process to collect upon a judgment. The *Gaines* and *Lieberman* courts dismissed the judgment debtors' abuse of process claims because the debtors failed to allege an improper motive, not, as GTR contends, because courts or parties may forgive service that is irregular or unauthorized. The *Gaines* and *Lieberman* courts were simply not asked to pass upon the type of wrongful execution claims asserted here and, thus, are inapplicable.

Finally, Marshal Biegel's causation theory is a red hearing. Funds were removed from the Comerica Accounts and delivered to Marshal Biegel to satisfy the GTR Levies issued by Marshal Biegel. But for the GTR Levies, Comerica would never have removed $122,082.29 from the Comerica Accounts. Thus, Marshal Biegel was a proximate cause of FutureNet's loss and no matter how hard he tries, Marshal Biegel cannot escape liability of the damage he caused to FutureNet.

B. FutureNet suffered cognizable damages.

There can be no question that FutureNet has suffered cognizable damages measured, at the very least, by the Funds that were improperly removed from the

Comerica Accounts. The law has long held that "[a] void act is no act, and a void payment is no payment." *Vil. of Ft. Edward v. Fish*, 156 N.Y. 363, 374 (1898). Thus, in *Fish*, this Court held that the defendant was required to return payments he received on account of a contract entered into by a village in excess of its authority to contract. *Id.*

Similarly, when funds are wrongfully converted as alleged here, the lost funds constitute an injury and the plaintiff is entitled to a return of the funds, plus compensation for any further injuries flowing from their conversion. *Silverstein v. Marine Midland Tr. Co. of N.Y.*, 1 A.D.2d 1037, 1038, 152 N.Y.S.2d 30 (2d Dep't 1956); *Bankers Trust Co. v. Rhoades,* 741 F.2d 511, 516 (2d Cir. 1984), *vacated on other grounds*, *Sedima v. Imrex Co.*, 473 U.S. 479, 483 n.5. (1985) ("[The plaintiff] has alleged that it has been deprived of various sums of money by the defendants' activities. There is no question that this constituted 'injury in its business or property.'"); *Newbro v. Freed,* 409 F. Supp. 2d 386 (S.D.N.Y. 2006) (granting plaintiff summary judgment in an amount equal to the amount of the funds misappropriated from its account).

Once again, Respondents' briefs do not cite to any of the above cases or otherwise refute the above rules of law holding that the measure of damages for the void acts of a marshal and sheriff and the conversion of FutureNet's Funds is, at the very least, the return of the Funds.

Relying primarily upon *Bam Bam Entertainment LLC v. Pagnotta*, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (N.Y. Sup. Ct. Kings Cty. 2018), Respondents simply contend that a judgment debtor cannot suffer an injury so long as the wrongfully seized funds are applied to reduce a valid judgement.

As noted by the both the Second Circuit and in FutureNet's opening brief, Respondents' argument and the *Bam Bam* decision run afoul of the longstanding rule that "[o]ne who has wrongfully taken property [ordinarily] cannot mitigate damages by showing that *he has himself* applied the property to the owner's use without his consent." *Higgins v. Whitney*, 24 Wend. 379, 381 (N.Y. Sup. Ct. 1840); *see also Ball v. Liney*, 48 N.Y. 6, 14–15 (1871); *Sam R. Levy Fabrics, Inc. v. Shapiro Bros. Factors Corp.*, 19 N.Y.S.2d 593, 596 (1st Dep't 1940) (explaining that whether damages were mitigated because the converted property was used to pay a valid obligation of the plaintiff "might depend on whether the application was at the instigation of the wrongdoer").

They also offend the long-standing and well-founded principle that "a creditor who obtains a debtor's property wrongfully is not entitled to set off their liability for that wrongful conduct against a claim that the creditor holds against the debtor." *Lines v. Bank of America Nat'l Trust & Sav. Ass'n*, 743 F. Supp. 176, 183 (S.D.N.Y. 1990) (citing *Brunswick Corp. v. Clements*, 424 F.2d 673, 675 (6th Cir. 1970), cert. denied, 400 U.S. 1010, 1013 (1971)), *Fore Improvement Corp. v. Selig*, 278 F.2d

143, 148 (2d Cir. 1960) (Friendly, J. concurring) and *Morris v. Windsor Trust Co.*, 213 N.Y. 27, 30-31, 106 N.E. 753 (1914) (holding wrongdoer not entitled to assert setoff against liability arising from his conversion of debtor's property).

Respondents make no effort to square their lack of damages argument with these venerable rules of law. To the contrary, they literally ignore these rules and attempt to justify their wrongful actions by analogizing this case to non-New York contract cases wherein an obligor was fraudulently induced to perform his contractual obligations. *See Marc Dev. V. Wolin*, 904 F.Supp. 777, 793 (N.D. Ill. 1995); *Williams v. Seterus, Inc.*, 202 WL 362874 (N.D. Ala. Jan. 22, 2020). This case is not a contract case and FutureNet was not fraudulently induced to satisfy the Judgments. This case is about how Respondents' wrongfully obtained the Funds and unilaterally applied them to reduce the Judgments in violation of the tenets regarding setoff and mitigation of damages that the Respondents failed to address in their briefs.[4] Under these long-settled tenets, Respondents cannot evade liability merely by claiming that the Funds were applied to reduce the Judgments.

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[4]GTR's reliance upon *Indus. Sav. Bank v. People's Funeral Serv. Corp.*, 296 1006, 1007 (D.C. 1924) is equally unavailing. In that wrongful check cashing case, the plaintiff corporation sustained no damages because by paying the check, a debt of the corporation was discharged. Here, upon return of the Funds, FutureNet's debts to GTR and CMS will be fully restored rather than remaining extinguished.

C. Marshal Biegel is not entitled to immunity when he knowingly acted outside the scope of his authority merely because he acted upon a valid judgment.

Throughout his brief, Marshal Biegel implies that he cannot be held liable for knowingly violating the scope of his authority so long as he is acting upon a valid judgment. In other words, Marshal Biegel argues he can collect upon a valid judgment by any means possible—lawful or not.

Fortunately, the law regarding public officials holds otherwise. Under the presumption of regularity, the law "presume[s] that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done." *City of New York v. 10-12 Cooper Sq. Inc.*, 7 Misc. 3d 253, 255, 793 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. N.Y. Cty. 2004) (citing *Matter of Whitman*, 225 N.Y. 1, 121 N.E. 479 (1918)).

The presumption is overcome when a marshal acts on a facially invalid order or fails to carry out what his official duty requires to be done. *See Korsinsky v. Rose*, 120 A.D.3d 1307, 1309, 993 N.Y.S.2d 92 (2d Dep't 2014). Here, there is no dispute that the GTR Execution was *facially invalid* because it directed Marshal Biegel to serve the execution *beyond the territorially limits of his jurisdictional authority*.

Marshal Biegel did so in two ways. First, by mailing the First GTR Levy to Corporate Creations in Rockland County and second, by having his assistant fax the Second GTR Levy to Comerica in Michigan. Having acted on a facially invalid

execution and then serving the GTR Execution and Levies beyond New York City, Biegel knowingly exceeded his enforcement authority and is not entitled to the immunity he seeks. *See Tausend v. Handlear*, 68 N.Y.S. 77 (Mem), 33 Misc. 587, 590–91 (App. Term 1901); *V. Loewer's Gambrinus Brewing Co. v. Lithauer*, 73 N.Y.S. 947, 948 (N.Y. App. Term 1901) (holding that "neither marshal had power to perform any official function in Kings county[,] . . . [meaning] that all the defendant did there in the way of taking and retaining possession of the property was *tortiously* done" (emphasis added)), *aff'd*, 80 N.Y.S. 1150 (Mem) (1st Dep't 1903).

Holding Marshal Biegel liable under the present facts will have a beneficial, rather than a chilling effect on the enforcement of judgments under New York law because it will incentivize marshals to abide by the law. So long as marshals act within the territorial limits of their authority, they will be immune from liability under the presumption of regularity. If, however, a marshal acts beyond those limitations, like Marshal Biegel did here, they will be stripped of their immunity (and rightly so) and be held accountable for their actions.

Further the presumption of regularity extends only to public officials, not judgment creditors like CMS. Hence, while the CMS Execution may not have been facially defective because it required the Rockland County Sheriff to levy in Rockland County, the lack of any facial defect does not immunize CMS from liability or make the CMS Levy valid as CMS contends in its brief. CMS was required to research and

determine the proper recipient of the CMS Levy and having failed to do so, it is still liable for the issuance of a void process. *See Velardi v. Consolidated Edison Co. of N.Y.*, 63 Misc.2d 623, 313 N.Y.S.2d 194 (N.Y. Sup. Ct. Sp. Term N.Y. Cty. March 19, 1970) (holding a facially valid process might protect an officer from liability "but this protection, being extended to the officer upon motives of public policy, would not at all aide the party" who put the process in motion.)

POINT II

Certified Question 2: A Judgement Debtor Can Bring a Common Law Tort Claim Without First Seeking Relief Under CPLR § 5240.

Rather than focusing on the certified questions posed by the Second Circuit and accepted by this Court or even issues previously raised before the district courts or the Second Circuit, Respondents, for the first time in their opposition briefs, argue that Article 52 provides the exclusive remedy for FutureNet's claims and that, by its terms, does not provide for a private right of action. *See* GTR BR. at 30-31; Biegel Br. at 29-42; CMS Br. at pp. 24-26. This newfound argument reflects a fundamental misstatement of FutureNet's claims, as well as bedrock principles of New York law.

A. Article 52 did not abrogate common-law claims for wrongful execution.

In the underlying matters, FutureNet is asserting common-law claims for wrongful execution that have existed for more than one-hundred years. *See* Point I A., *infra*. Plainly and simply, under these claims, if a public official exceeds their

authority in enforcing a judgment, the actions are void and the public official and the creditor at whose direction it acts, can be liable at common law for claims of wrongful execution. *Id.* Accordingly, the question is not whether Article 52 provides the exclusive remedy for FutureNet's claims, but whether Article 52 abrogates FutureNet's common law claims. The answer is plainly "no."

It is well-settled that "when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by statute." *Burns Jackson Miller Summit and Spitzer v. Linder*, 59 N.Y.2d 314, 324, 451 N.E.2d 459 (1983). Indeed, this Court has repeatedly emphasized that "a clear and specific legislative intent is required to override the common law" and that such a prerogative must be "unambiguous." *Hechter v. New York Life Ins. Co.*, 46 N.Y.2d 34, 39, 385 N.E.2d 551 (1978). Nothing in Article 52 suggests the legislature intended to abrogate a common law tort for wrongful execution.

Indeed, FutureNet's claims do not even fall within the purview of Article 52. As set forth in Point I A. *infra*, to constitute a levy subject to Article 52, an execution must be served "in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318." CPLR § 5232(a). The Executions and Levies in this case were not served in accordance with CPLR § 5232(a), but rather were served upon a general agent for service of process,

a manner expressly prohibited by CPLR § 5232(a). *See Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y. 138, 142, 501 N.Y.S.2d 8 (1986) ("It is well established that service on a corporation through the Secretary of State is not "personal deliver" to the corporation of an agent designated under CPLR 318.") Absent proper service of an execution in compliance with CPLR § 5232(a), by definition, there can be no levy that brings FutureNet's claims within Article 52.

In this regard, the present matter differs significantly from *Cruz v TD Bank, N.A.*, 22 N.Y.3d 61 (2013). In *Cruz,* both the obligation and the claim arose under Article 52. Unlike the flawed Levies served on Comerica here, the judgment creditor in *Cruz* properly served the bank. This valid process brought the matter within the ambit of Article 52 and triggered the obligation of the bank to take certain procedural steps under Article 52 that were added to the statute by the New York legislature to require that banks protect exempt funds (social security, etc.). The *Cruz* plaintiffs sought to impose civil liability on the bank for their failure to perform the new duties imposed by Article 52. *Id.* at 67. But as these were statutory obligations, any private right of action existed only to the extent intended by the statute.

That is not the case here. FutureNet's wrongful execution claims exist at common law, Point I. A., *infra.*, and are independent of Article 52.

B. A judgment debtor can bring a tort claim without first seeking relief under CPLR 5240.

Respondents' contention that FutureNet was required to seek relief under CPLR § 5240 before commencing a tort claim makes no sense because the Levies were void from inception. As set forth in Point I A., *infra*, failing to comply with the requirements of CPLR § 5232(a) renders the Executions and Levies null and void, and thus, Respondents are "liable to an action for what has been done under it at any time, and it is not necessary that [the Execution, Levy or Judgment] should be set aside before bringing the action." *Day*, 87 N.Y. at 61; *see also Fischer v. Langbein*, 103 N.Y. 84, 89-90 (1886) ("In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action." (internal citations omitted)). In other words, FutureNet was not required to file a post-judgment motion under CPLR § 5240 to vacate the Executions and Levies before commencing actions against GTR, Marshal Biegel and CMS because there was simply nothing to vacate. FutureNet can do exactly what he has done here, namely, commence a new and independent action for damages arising out of a void process. *Day*, 87 N.Y. at 61; *Fischer*, 103 N.Y. at 89-90.

GTR's citation to *Day* for a contrary holding is disingenuous. *See* GTR Br. at p. 25. Nothing in *Day* stands for the proposition that "process" is limited to judgments or that absent a void judgment, there can be no irregularity of process.

See GTR Br. at p. 25. To the contrary, *Day* and the subsequent *Fischer* decision, stand for the proposition that a "process" issued by any judicial officer, be it a judge or marshal, is irregular and void if it is knowingly entered into by the officer without the jurisdiction to do so. *Day,* 87 N.Y. at 62. As explained by this Court in *Fischer*:

> Where the jurisdiction of the court [or marshal]is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises, and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void and afford no justification to the parties instituting them as against parties injuriously affected thereby.

Fischer, 103 N.Y. at 94.

Here, the place of service and the recipient's location were "facts" that determined Marshal Biegel's authority to act upon the GTR Execution. The GTR Execution directed Marshal Biegel to levy upon Comerica in Rockland County, which is beyond the territorial limits of his authority. *See* New York Civil Court Act §§ 1609(1)(a) and 1609(b) (a marshal's authority to levy is limited to the city of New York). Thus, Marshal Biegel had no authority to act in Rockland County, rendering the GTR Levies "irregular" and void from inception and giving rise to Marshal Biegel's liability. *Fischer*, 103 N.Y. at 94; *Day,* 87 N.Y. at 62; *Snell,* 216 N.Y. at 534; *see also, Ettinger v. Wilke,* 79 Misc.2d 387, 388, 358 N.Y.S.2d 597, 598 (Civ. Crt. N.Y. Cty. June 3, 1974) (finding marshal's levy and enforcement of judgment was null and void where issued without authority under CCA); *Yeh v. Seakan*, 119

Misc.2d 681, 684-85 (N.Y. Sup. Ct. Oneida Cty. Apr. 26, 1983) (noting an execution and levy issued by a marshal without authority to levy upon the property is invalid and unenforceable); *Schleimer v. Gross*, 46 Misc.2d 931, 933, 261 N.Y.S.2d 670, 673 (N.Y. Sup. Ct. Nassau Cty. May 24, 1965) (delivery of income execution to New York City marshal was legal nullity where garnishee employer was located outside the City of New York and beyond the authority of a city marshal).

Therefore, the Second Certified Question should be answered yes: 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.

POINT III

PUBLIC POLICY SUPPORTS ANSWERING BOTH CERTIFIED QUESTIONS AFFIRMATIVELY

The law does not permit the Respondents to profit from their misuse of the judicial system. *See Olmstead v. U.S.*, 277 U.S. 438, 484 (1928) (J. Brandies, dissent). This rule of law is necessary "in order to maintain respect for law, in order to promote confidence in the administration of justice, [and] in order to protect the judicial process from contamination." *Id.* Those concerns are defeated if judgment creditors, their attorneys and marshals are given *carte blanche* to disregard the requirements of CPLR § 5232(a) and serve executions and levies upon a bank, anywhere in the United States, by any means necessary, to collect upon a judgment.

Further, collection attorneys and marshals are officers of the court. *See Soto v. Cty. of Westchester*, 2018 U.S. Dist. LEXIS 9822 at * 9 (S.D.N.Y. 2018) ("It is well established that an attorney is an officer of the court."); *Mayes v. UVI Holdings Inc.*, 280 A.D.2d 153, 159, 723 N.Y.S.2d 151 (1st Dep't 2001) (recognizing that a marshal is an officer of the court). As officers of the court, attorneys and marshals have a "special obligation to protect the integrity of the courts . . ." *Amalfitano v. Rosenberg,* 12 N.Y.3d 8, 14 (2009).

Adherence to this duty of integrity and the administration of justice is of the utmost importance with respect to the issuance of executions and levies because they are forms of injunctive relief that are issued by attorneys and marshals as officers of the court, but without intervention or action by the court. *See, e.g.*, *Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, 47 Misc. 746, 747 (N.Y. Sup. Ct. N.Y. Cty. Sept. 8, 1965) (recognizing that enforcement devices are forms of *ex parte* injunctive relief). The CPLR "does not acquiesce in the issuance of an enforcement device by an attorney [or marshal] under CPLR article 52 merely by virtue of his right of passage. Rather, it contemplates a standard of practice encompassed by the phrase 'officer of the court.'" *Save Way Oil Co. v. 284 Eastern Parkway Corp.*, 115 Misc.2d 141, 145 (N.Y. Civ. Ct. Kings Cty. July 7, 1982). This standard requires compliance with the CPLR when issuing an execution and a levy. Allowing judgment creditors, attorneys and marshals to circumvent the CPLR

without consequence only undermines the integrity of the judicial process. Answering the Certified Questions in the affirmative will preserve the integrity of the judicial process by compensating parties when its rules are broken.

POINT IV

FUTURENET'S CLAIMS DO NOT RELY UPON THE SEPARATE ENTITY RULE

Application of the separate entity rule is not necessary to resolve the Certified Questions and the Court should reject CMS' invitation to consider the rule in the context of this case. On this appeal, FutureNet cites the separate entity rule solely to demonstrate how affirmatively answering the Certified Questions is consistent with its purpose.[5]

As CMS notes, the separate entity rule is not a statutory requirement or a law, but rather, "a long-standing common-law doctrine" that "functions as a limiting principle of the extraterritorial provisions of Article 52. *See Motorola v. Standard Bank*, 24 N.Y.3d 149, 161 (2014). The reasons for the separate entity rule are two-fold: (i) to promote comity among different banking jurisdictions; and (ii) prevent the burden that would otherwise be placed on banks to monitor and ascertain the status of bank accounts in other branches. *Motorola*, 24 N.Y.3d at 159.

[5]The separate entity rule is not even implicated here because Comerica is not even subject to the general or specific personal jurisdiction of New York, which is a prerequisite of the separate entity rule. In other words, for the separate entity rule to even apply, personal jurisdiction must first be established, which it has not.

These reasons are particularly applicable here because Comerica is a Texas-based bank *with no branches* in New York and, as the underlying facts demonstrate, multiple parties asserted claims against the Funds. These parties transacted business with FutureNet in Michigan, perfected their secured interests in the Funds in Michigan and, under the very rationale for the separate entity rule, they are entitled to have their claims adjudicated in a forum that they chose to do business, not one fortuitously chosen by judgment creditors who have usurped their priority rights to the Funds through void levies. Accordingly, answering "Yes" to the Certified Questions is entirely consistent with purposes of the doctrine that this Court pronounced so long ago.

CONCLUSION

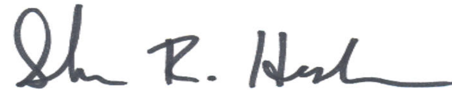
The New York Attorney General, the New York Legislature, Governor Cuomo, and New York lower courts have all taken decisive action to stop the abuse of the New York Court System by the MCA industry since Bloomberg News first exposed these unscrupulous practices in November 2018. Unfortunately, the abuses continue, and will continue unless this Court sends a strong message that breaking the law has consequences. In the middle of a pandemic, Marshal Biegel levied the New Jersey bank account of healthcare facility providing Covid-19 care to the homeless. And he, and other NYC Marshals, are still able to execute out-of-state levies on small businesses based on default judgments obtained by MCAs—their

new form of confession of judgment. Even worse, Marshal Biegel and other NYC Marshals can still exceed their authority and execute anywhere in New York State, according to the arguments he now presents to this Court. The arguments should be rejected, and instead, the Court should join the legion of New Yorkers and other government officials that have fought to put an end these unlawful practices.

For the foregoing reasons, FutureNet respectfully request that the Court answer yes to both certified questions.

Dated: New York, NY
July 26, 2021

Respectfully submitted,
WHITE AND WILLIAMS LLP



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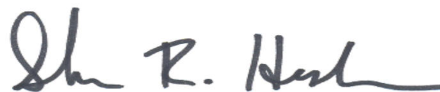
NEW YORK COURT OF APPEALS CERTIFICATE OF COMPLIANCE WITH PRINTING SPECIFICATIONS

Shane R. Heskin, an attorney duly admitted to practice law before the Court of the State of New York, affirms the truth of the following pursuant to CPLR 2106:

1. I am a partner at White and Williams LLP, attorney for Plaintiffs-Appellants.

2. This reply brief is in compliance with 22 N.Y.C.R.R. Part 500.1(j). It is 25 pages long and contains 6220 words, counting all printed text on each page of the body of the brief. It was prepared using Microsoft Word. The typeface is Times New Roman, set in 14-point type, double spaced, throughout the body of the brief and in the headings. Footnotes are set in 12 point type, single spaced.

Dated: July 26, 2021



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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 26th day of July, 2021, deponent served the within:

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

upon designated counsel for the parties indicated herein at the addresses provided below by depositing 3 true copies thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

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