20-118

In the
United States Court of Appeals
For the Second Circuit

BASIL SIMON, in his capacity as receiver for FutureNet Group, Inc.,

Plaintiff-Appellant,

– v. –

GTR SOURCE, LLC and STEPHEN W. BIEGEL,
in his capacity as New York City Marshal, Badge No. 27,

Defendants-Appellees.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plymouth Venture Partners, II, L.P. and Plymouth Management Company (together, "Plymouth"), as the assignees of the claims of Appellant Basil Simon, in his capacity as Receiver for FutureNet Group, Inc. ("FutureNet"), state that there is no parent or publicly held corporation of either Plymouth or FutureNet that requires disclosure under Rule 26.1.

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INTRODUCTION

FutureNet is a Michigan corporation with a principal place of business located in Detroit, Michigan. GTR Source, LLC ("GTR") is a New Jersey limited liability company. On November 13, 2017, FutureNet entered into a purported sale of future receivables agreement with GTR, wherein it was advanced $200,000 and was required to pay back $291,800 through fixed daily payments of $3,999 per day. The effective interest rate was in excess of 200%. Despite having no connection whatsoever to New York, the agreement contained a New York choice of law and venue provision. The maximum interest rate permitted under New York criminal law is 25%. In order to evade the criminal laws of New York, GTR labeled the transaction a sale of future receivables. The critical distinction between a lawful sale of receivables and a criminally usurious loan is the transfer of risk. On its face, and in practice, the agreement was a loan as a matter of law because GTR assumed no transfer of risk. Instead, the transaction was an absolutely repayable loan with fixed daily payments of $3,999 per day.

To be sure, on February 14, 2018, when FutureNet failed to generate sufficient receivables to make the fixed daily payments of $3,999 per day, GTR used its full recourse protections by confessing judgment against FutureNet for the full amount of the unpaid balance due under the agreement. In addition to confessing judgment

for the balance due and owing, GTR also confessed judgment for more than $24,000 in attorney's fees and costs for the ministerial task of filing a confession of judgment.

After obtaining the New York confession of judgment, GTR knowingly and intentionally violated every aspect of New York judgment enforcement laws to collect upon the confessed judgment. That is the nub of this appeal.

First, GTR sent a restraining notice to FutureNet's out-of-state bank, Comerica Bank, falsely representing that if Comerica did not comply with the New York restraining notice that it may be subject to fines and imprisonment. The restraining notice, however, was sent in violation of New York's longstanding separate entity rule, holding that New York courts have no jurisdiction over bank accounts opened and maintained in another state. It also violated well-settled United States Supreme Court precedent holding that a corporation is not subject to general personal jurisdiction merely because it does business in that state.

Second, GTR doubled down on its unlawful collection efforts by directing a New York City Marshal to levy a bank account located and maintained in Michigan. Even worse, GTR directed the marshal to levy the bank account—even after being advised that the marshal's jurisdictional territory was limited to the five boroughs of New York City. In the face of these known limitations on his authority, Marshall Steven Biegel, knowingly exceeded the scope of his authority by directing—a *non-marshal* to serve the levy at issue—*by fax*.

Third, in addition to exceeding his jurisdictional territory, Marshal Biegel knowingly violated the most basic regulations and laws pertaining to marshals. It is undisputed that a marshal must execute upon a levy by personally serving the levy by hand. Marshal Biegel served it here by fax. It is also a most cardinal rule that the marshal must serve the levy *himself* and cannot delegate his duties. Here, it is undisputed that levy was served—by fax—by some person named "Alona."

Immediately upon learning of these unlawful collection tactics, FutureNet expressly informed GTR that the restraining notice and levy violated New York law, and that if GTR did not immediately withdraw its illegal restraining notice and levy, FutureNet would not be able to make payroll. FutureNet also informed GTR that it was tortiously interfering with the UCC rights of its senior secured lenders. GTR refused to retract its unlawful restraining notice and levy. As a direct result, FutureNet failed to make payroll, its senior secured lenders declared a default, and a receiver was appointed to liquidate FutureNet's assets. FutureNet was also assessed poundage fees by Marshal Biegel in the amount of $6,051.53.

The appointed receiver, Appellant Basil Simon, then brought this action seeking to recover the $127,082.29 that was unlawfully levied (which included poundage fees) so those funds can be distributed in accordance to the rights of FutureNet's senior secured creditors. Two of those senior secured creditors are Plymouth Venture Partners, II, L.P. and Plymouth Management Company.

Plymouth is nonprofit that redevelops properties for local communities in Detroit, Michigan. Plymouth is the current assignee of the Receiver's rights in this action.

By Memorandum Order and Opinion (JA 486-508),[1] the district court held that a judgment creditor and a New York City Marshal can misrepresent the jurisdiction of New York courts over non-New York entities, and violate the territorial limitations of New York's judgment enforcement laws to reach across state lines and seize a judgment debtor's out-of-state bank accounts without consequence. In other words, the district court held that a judgment creditor is free to collect upon a judgment through illegal means and reap the fruits of its unlawful activity—even at the expense of other legitimate, senior secured creditors.

The Opinion has far-reaching ramifications for interstate commerce. The predatory collection tactics used here sparked a national outrage and swift legislative action by the people of New York, outright banning confessions of judgment against out-of-state small businesses. Despite this public backlash, Merchant cash advance ("MCA") companies and New York City Marshals continue to abuse the New York Court System in enforcing more than 30,000 New York judgments by confession

[1] As you used herein, "JA" shall refer to the Joint Appendix. A copy of the Opinion and Judgment are also included in the attached Special Appendix required by Local Rule 32.1(c).

against small businesses located throughout the United States, most of which have no connection to New York.[2]

Recent statutory amendments to preclude the entry of confessed judgments against non-New York entities have only made the situation worse. Not only do the 30,000 confessed judgments remain, but MCA companies are now serving complaints through the mail and obtaining default judgments against foreign entities.[3] These defaults are then turned over to New York City Marshals to levy upon the debtor's out-of-state bank accounts under the guise of New York law rather than through domestication and execution in the debtor's home state.

This judgment enforcement scheme has made MCA companies and marshals rich. In 2018, alone, Marshal Biegel reportedly earned "poundage fees" of $1.4 million,[4] but it is destroying small businesses throughout the United States at a time when small businesses are most vulnerable due to the current pandemic.[5]

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[2] Zachary R. Mider and Zeke Faux, *Sign Here to Lose Everything: How an Obscure Legal Document Turned New York's Court System into a Debt-Collection Machine that's Chewing Up Small Business Across America*, Bloomberg, Nov. 28, 2018. https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?sref=FcmhwfUA.

[3] *See, e.g., GTR Source LLC v. Bachson Academy, LLC, et. al.*, Supreme Court of New York, County of Kings, Index No. 523668/2019 (GTR obtained default judgment against a children's school in Massachusetts where service of the Complaint was by mail).

[4] Zach R. Mider and Zeke Faux, *New York Officials are Still Reaping Millions From Predatory Lenders*, Bloomberg, April 30, 2019. https://www.bloomberg.com/news/articles/2019-04-30/new-york-officials-still-reaping-millions-from-predatory-lenders?sref=FcmhwfUA.

[5] Gretchen Mortgenson, FTC official: Legal 'loan sharks' may be exploiting coronavirus to squeeze small businesses, April 3, 2020, NBC News.

New York's judgment enforcement laws were never intended to have such far-reaching and devastating effects on the residents and commerce of other states. Applicable statutes and more than 100 years of controlling precedent from the New York Court of Appeals and other appellate courts, limit the reach of New York's judgment enforcement laws to the territorial boundaries of New York and in the case of a city marshal, to the territorial boundaries of New York City. Further, settled law holds that when a marshal exceeds his authority, his actions are void and both he and the creditor at whose direction he acts, are liable for any wrongfully seized property under the very claims of wrongful execution, conversion and trespass dismissed by the Opinion and Judgment.

Adherence to these well-settled principles is necessary to maintain order in financial transactions and to preserve public confidence in the judicial system. Long ago, New York recognized that each branch of a bank was a "separate entity" and required that to be effective, restraining notices, attachments and levies must be served upon the particular branch where a debtor maintains his accounts. Among other reasons, this was deemed necessary to provide one forum for the resolution of creditor disputes involving a debtor's assets. Creditors who do business with a Michigan debtor as here should expect to be hailed into Michigan courts to resolve

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https://www.nbcnews.com/business/economy/ftc-official-legal-loan-sharks-may-be-exploiting-coronavirus-squeeze-n1173346.

competing creditor claims to the debtor's assets; not compelled to submit to the jurisdiction of New York based upon a judgment creditor's choice of venue. Permitting collection attorneys and marshals to violate the separate entity rule without consequence, as the Opinion does, injects the very chaos and uncertainty into financial transactions that the separate entity rule was intended to prevent.

It also undermines the public in the judicial system. Restraining notices, executions and levies are all forms of injunctive relief issued by collection attorneys and marshals in their capacities as officers of the court. Each of these enforcement devices states that New York courts have jurisdiction over the recipient and that failure to comply with their terms will result in the imposition of fines and possible imprisonment. These jurisdictional assertions simply are not true in the case of out-of-state banks and accounts. Permitting judgment creditors and marshals to benefit from these false representations contaminates the judicial system and undermines the integrity of the very courts whose judgments they seek to enforce.

JURISDICTIONAL STATEMENT

The underlying action was commenced by Basil Simon (the "Receiver"), in his capacity as the court-appointed receiver for FutureNet Group, Inc. ("FutureNet"), a Michigan corporation based in Detroit. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because the Receiver and FutureNet were not citizens of the same state as GTR or Marshal Biegel and the amount in

controversy, exclusive of interests and costs, exceeded the sum of $75,000. On December 26, 2019, the district court issued a final decision granting the separate motions for summary judgment filed by GTR and Marshal Biegel and denying the Receiver's motion for summary judgment. A judgment was entered on December 27, 2019 and a timely notice of appeal was filed on January 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. By statute, New York City marshals are only empowered to levy property located within the five boroughs of New York City. Under longstanding New York law, if a marshal exceeds the scope of his authority, the levy is void. May the marshal keep the proceeds of a void levy?

2. Under New York's long-settled separate entity rule, New York does not have jurisdiction over funds located in an out-of-state bank. May a party violate New York law and keep the fruits of its unlawful conduct at the expense of other legitimate senior secured lenders?

3. It is undisputed that a New York City marshal's jurisdiction is limited to the five boroughs of New York, and that he must personally serve a levy himself. Is a marshal entitled to a presumption of regularity where the execution order requires the marshal to serve the levy outside of his jurisdictional territory and where he delegates service to a non-marshal by fax?

4. As a direct result of the marshal's unlawful levy, the debtor was not able to make payroll, defaulted on its senior secured loans, and was forced into a receivership. The debtor was also assed poundage fees by the marshal in excess of $6,000. Does the debtor have no recourse because it supposedly has no damages?

5. Under controlling United States Supreme Court precedent, a corporation is not subject to general jurisdiction merely because it does business in a state. Consistent with this constitutional requirement, New York City marshals are only permitted to levy property within New York City. May a marshal compel the turnover of out-of-state property by misrepresenting the scope of his authority?

STATEMENT OF FACTS

A. FutureNet and GTR

FutureNet is a Michigan corporation with its principal place of business located at 12801 Auburn Street, Detroit, Michigan. (JA 169, ¶ 3). At all times material hereto, it provided infrastructure services in construction, technology, perimeter security, and energy/environment to government and commercial customers. (JA 169, ¶ 4). It did not maintain any offices or regularly conduct any business in New York, and, at all relevant times, it opened and maintained its bank accounts (the "Comerica Accounts") at a branch of Comerica Bank ("Comerica") located in Redford, Michigan. (JA 169, ¶ 5).

GTR is a New Jersey limited liability company. (JA 172). Like other MCA companies, it provides hard-money lending to small businesses in desperate need of cash under so-called "Purchase and Sale of Future Receivables Agreements." The agreement here is unquestionably a disguised loan.

On November 13, 2017 (the "Agreement"), GTR agreed to advance $200,000 to FutureNet purportedly in exchange for the purchase of $291,800 in future receivables. The purchased receivables were to be repaid in just eighteen weeks through fixed daily payments of $3,999.00. This translates into an effective interest rate in excess of 200% per annum. (JA 172).

FutureNet made the daily payments due under the Agreement until February 2018. By that time, FutureNet had paid GTR over $195,000 in less than three months. (JA 186-88).

In early February 2018, FutureNet had insufficient funds to make the daily payments due to the lack of receivables. As a result, GTR declared a default and filed an Affidavit of Confession (the "Confession Affidavit"). On February 14, 2018, GTR obtained a judgment (the "Judgment") against FutureNet in the amount of $120,154.92, which consisted of the unpaid balance of the loan ($95,849.00), attorney's fees ($23,962.25) and interest/costs ($118.87). (JA 38-9). The Judgment was entered in an action titled *GTR Source, LLC v. FutureNet Group, Inc., et. ano.*,

Supreme Court of the State of New York, County of Orange, Index No. EF001776-2018 (the "State Court Action"). (JA 38-9).

B. GTR begins improper collection efforts

Armed with the Judgment, on February 14, 2018, GTR, through its attorney, Ariel Bouskila, Esq., served an Information Subpoena with Restraining Notice (the "Restraining Notice") addressed to Comerica Bank at 500 Woodward Avenue, MC 3391, Detroit, Michigan 48226. (JA 27-8).

Among other things, the Restraining Notice represented that Comerica was (i) subject to the jurisdiction of the courts of the State of New York; (ii) bound by the provisions of the CPLR; and (iii) required by CPLR § 5222 to restrain FutureNet's accounts. (JA 27-8). Further, in bold and capitalized letters, the Restraining Notice emphatically stated that Comerica *could* be subject to fines and imprisonment for contempt of court and *would* be subject to fines for violating a judicial subpoena under CPLR § 2308(a) if it did not comply:

> TAKE NOTICE THAT DISOBEDIENCE OF THIS RESTRAINING NOTICE OR FALSE SWEARING OR FAILURE TO COMPLY WITH THIS SUBPOENA MAY SUBJECT YOU TO FINE AND IMPRISONMENT FOR CONTEMPT OF COURT. NON-COMPLIANCE WITH THE INFORMATION SUBPOENA SHALL FIRST SUBJECT YOU TO THE PENALTIES UNDER CPLR 2308(b).

(JA 28) (emphasis in original).

Upon receipt of the Restraining Notice, Comerica restrained the Comerica Accounts and thereby prevented FutureNet from withdrawing the Funds. (JA 170, ¶ 10). By emails dated February 22, 2018, GTR was advised that its Restraining Notice was unlawful because (i) Comerica maintained no branches in New York; (ii) Comerica was not subject to the general jurisdiction of New York; (iii) FutureNet's bank accounts were opened and maintained in Michigan; and (iv) the Restraining Notice was tortuously interfering with the superior UCC rights of FutureNet's senior secured lenders. (JA 41, 45, 47). As a direct result of GTR's failure to withdraw its improper Restraining Notice, FutureNet was unable to make payroll and defaulted on its obligations to its senior secured lenders. (JA 41).

Despite knowing that the Comerica Accounts were opened and maintained by FutureNet at a bank branch in Michigan and that New York did not have jurisdiction over the Funds, GTR doubled down on its improper conduct.

On February 26, 2018, GTR issued an Execution with Notice to Garnishee (the "Execution") that named Comerica as the garnishee and directed New York City Marshal Biegel to issue and to serve a Notice and Levy and Demand on Comerica (the "First Levy") c/o Corporate Creations Network, Inc. ("Corporate Creations"), 15 North Mill Street, Nyack, New York. (JA JA 55-9).

The Execution, like the Restraining Notice, represented that the courts of the State of New York had jurisdiction over Comerica. In fact, the Notice to Garnishee,

claimed that Comerica was subject to the CPLR and obligated by CPLR § 5232(a) to turn over the Funds to Marshal Biegel and enjoined from otherwise transferring them. (JA 56).

Upon his receipt of the Execution, Marshal Biegel issued the First Levy and, by certified mail, delivered the First Levy to Comerica c/o Corporate Creations in Rockland County, which is outside the five boroughs of New York. (JA 53-9).

Once again, the First Levy, like the Restraining Notice and Execution, represented that Comerica was subject to the jurisdiction of the courts of the State of New York and required by the CPLR to turn over the Funds to Marshal Biegel:

> Attached is a Property Execution with Notice to Garnishee. As directed under *CPLR § 5232(a)*, you are required to immediately turn over to me all property of the judgment debtor currently in your possession or custody . . .

(JA 54) (emphasis in original).

C. The Initial Motion to Vacate and GTR's continued collection efforts

By Order to Show Cause dated February 28, 2018 (the "First Motion to Vacate"), pursuant to CPLR §§ 5015 and 3218, FutureNet moved in the State Court Action to vacate the Judgment based upon procedural and jurisdictional defects in the Affidavit of Confession and the resulting Judgment, and upon, vacatur, to strike all enforcement devices. (JA 190-91).

By Decision and Order dated March 13, 2018 (the "March 2018 Decision"), the State Court denied FutureNet's application on the grounds that FutureNet lacked standing to assert its procedural and jurisdictional defects. (JA 69). Such denial was "without prejudice to their seeking relief by way of plenary action." (JA 71)

Immediately thereafter, on March 14, 2018, an amended levy and demand (the "Second Levy" and, together with the First Levy, the "Levies") was delivered to Comerica via fax. (JA 71). The fax cover sheet and sending fax header indicated that it was sent from Marshal Biegel's New York City Office to Comerica's office in Detroit, Michigan. The fax cover sheet stated that, rather than Marshal Biegel, the fax and Second Levy were sent from "Alona." (JA 61). Indeed, the fax cover sheet contained a personal note from Alona confirming that she, not Marshal Biegel, was the one sending the fax:

> At this point we are proceeding with the collection of the full judgment amount, attached is also an **AMENDED** Levy with the balance dues as of today together with the execution, exemption notice, claim forms, information subpoena and a restraining notice. Kindly contact our office (212) 627-7425 and confirm receipt of all documents, and remit accordingly.
>
> Thank you.
>
> Alona

(JA 61) (emphasis in original).

On or about March 21, 2018, Comerica issued a bank check (the "Bank Check") to "NYC Marshal Biegel" in the amount of $127,082.29, inclusive of accrued interest and Marshal Biegel's poundage fees. (JA 91-8, 133-5).

The Bank Check was sent to Marshal Biegel's attention at his New York City Marshal's Office via Federal Express for delivery on March 21, 2018. (JA 97-8). By email dated March 21, 2018 at 9:37 a.m., FutureNet advised Marshal Biegel that Comerica had sent him the Bank Check and demanded that he restrain from distributing the proceeds thereof because the Levies were improperly issued and violated the territorial limits of his authority to execute. (JA 97-8).

Marshal Biegel ignored FutureNet's warnings and upon receipt of the Bank Check, Marshal Biegel deducted poundage in the amount of $6,051.53 from the Funds and remitted the balance to GTR.[6]

On March 21, 2018, GTR's attorneys filed a Satisfaction of Judgment in the State Court Action. (JA 194).

D. Basil Simon is appointed Receiver

On or about April 27, 2018, FutureNet's senior creditors, Detroit Investment Fund, L.P. and Chase Invest Detroit Fund, LLC (as partners in a non-profit community redevelopment project), commenced an action against FutureNet and

[6] Pursuant to CPLR § 8012(b), for collecting upon a judgment, a sheriff or marshal is entitled to five percent (5%) of any collected amount as "poundage."

others in the Circuit Court for the County of Wayne. Among other things, this action sought the appointment of a receiver over the assets of FutureNet and its affiliates. (JA 195-216).

On May 7, 2018, Basil Simon was appointed as the Receiver for FutureNet Group, Inc., and FutureNet Security Solutions, LLC (the "Receivership Entities"). (JA 81-94). The primary purpose of the Receiver was "to achieve the highest return to secured creditors, unsecured creditors, and equity holders (i.e., owners)." (JA 85, ¶ p). The Receiver was appointed to protect the first-priority secured interests of Invest Detroit, a certified Community Development Financial Institution (and a non-profit 501(c)(3) organization), as well as the interest of second-lien priority holders Plymouth Venture Partners II, LP and Plymouth Management Company. (JA 85, ¶ r). Together, as of April 26, 2018, the secured creditors held a claim against the Receivership Entities in the principal amount of not less than $2,499,317.58. (JA 83, ¶ f). The Receiver was also appointed to protect the secured creditors against various judgments and enforcement actions taken by the unsecured creditors of the Receivership Entities, including the Judgment obtained by GTR. (JA 88, ¶ e).

To achieve these goals, the Receiver, among other things, was empowered to defend and/or institute suits including, without limitation, actions challenging the garnishment of funds from the Receivership Entities by GTR. (JA 88, ¶ e).

On June 29, 2018, the Michigan Court issued an order authorizing the Receiver to employ White and Williams LLP as Special Counsel for the Receivership. (JA 95-6).

E. The Receiver's Motion to Vacate

Relying upon case law holding that a receiver has standing to raise procedural defects in affidavits of confessions, by Notice of Motion dated August 24, 2018, the Receiver moved to vacate (the "Second Motion to Vacate") the Judgment pursuant to CPLR §§ 5015 and 3218. Upon vacatur of the Judgment, the Receiver also sought payment of restitution. (JA 220-21).

By Decision and Order dated November 26, 2018 (the "November 2018 Decision"), the State Court denied the Receiver's motion to vacate the Judgment on jurisdictional and procedural grounds. In so doing, the State Court specifically held that it "need not reach the remaining issues briefed by the parties," including an issues pertaining to the Defendants' collection practices that are the subject of the underlying action. (JA 240).

F. Proceedings Below

1. The Complaint

On or about February 25, 2019, the Receiver commenced the underlying action by filing a Complaint 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). (JA 10-26). More specifically,

the Receiver alleged that the Appellees' issuance of the Restraining Notice, the Execution and the Levies (collectively, the "Enforcement Devices") were improper because they violated (i) the territorial limitations of Marshal Biegel's authority to execute upon the Judgment; (ii) the territorial limitations of judgment executions imposed by the CPLR on all parties; (iii) New York's separate entity rule; and (iv) the Appellees' duties, as officers of the court, to uphold the dignity and integrity of the court and to refrain from deceptive and misleading conduct that undermines the public's confidence in the judicial system. (JA 10-26). By reason of this conduct, the Receiver sought damages in an amount equal to the Funds wrongfully seized from the Comerica Accounts. (JA 26).

At an initial case conference, counsel for the Receiver, GTR and Marshal Biegel, each agreed that the case presented questions of law to be decided by the district court and jointly agreed to move directly for summary judgment, rather than engage in protracted litigation. (JA 120).

2. The Opinion

By the Opinion, the district court denied the Receiver's motion for summary judgment on his claims for wrongful execution, conversion and trespass and granted the cross-motions for summary judgment by GTR and Marshal Biegel to dismiss the Receiver's claims on the grounds that they failed to state a cause of action. (JA 486-507).

The district court concluded that FutureNet and its assignee, the Receiver, could not maintain a cause of action against GTR and Marshal Biegel without first vacating the Judgment. (JA 487). Even though, at GTR's direction, Marshal Biegel knowingly exceeded the territorial limits of his enforcement authority to levy upon Comerica's agent for service in Rockland County, the court found that he was entitled to a presumption of regularity that attaches to a valid judgment. (JA 502-503). According to the district court, as long as the seized funds were applied to pay the Judgment, neither FutureNet nor the Receiver could be harmed. (JA 487)

In the words of the district court, "as a matter of New York law, a judgment debtor plaintiff cannot state a cause of action against a judgment creditor or a New York City Marshal when the Marshal executes on an admittedly valid judgment outside his jurisdictional boundaries of New York City and there is no showing of negligence on the part of the Marshal of damages to the judgment debtor [stemming from that negligence]." (JA 499). This appeal followed.

SUMMARY OF THE ARGUMENT

1. Claims for wrongful execution, conversion and trespass rest upon the wrongfulness of the process to collect upon a judgment; not necessarily the validity on invalidity of the judgment itself. Restraining notices, executions and levies are all forms of process that can be abused regardless of whether or not the judgment stands valid. Processed issued without authority is null and void from inception.

More than 100 years ago, the New York Court of Appeals recognized that an action based upon a null and void execution may be commenced at any time and without first vacating the execution, let alone the underlying judgment. This is so because a void process affords no protection to the one who issued it. The Opinion wholly ignored this precedent.

2. The New York City Civil Courts Act (the "CCA") and the New York Civil Practice Law and Rules (the "CPLR") territorially limit the execution authority of a marshal to the geographical boundaries of the five boroughs of New York City and require service of executions and levies to be made in a particular manner to be effective. There is no question that Marshal Biegel, acting at the direction of GTR, exceeded his authority by serving the Levies in Rockland County and in a manner specifically prohibited by, CPLR § 5232(a). Well-settled law, ignored by the district court, holds that when a public official exceeds his authority, the actions are void *ab initio* and he is liable for his actions. Hence, the district court should have granted the Receiver summary judgment rather than the Appellees.

3. Regularity is the presumption that a public official performs his duties as he is required under the law. With respect to execution, the presumption can be overcome if the order being acted upon is facially invalid or the marshal fails to do what he is supposed to under the law. There is no dispute that, on its face, the Execution was facially invalid because it directed Marshal Biegel to issue and serve

the Levies upon Comerica c/o of Corporate Creations in Rockland County which is beyond the marshal's authority. Further, there is no dispute that Marshal Biegel failed to serve the Execution and Levies in accordance with the personal service requirements of CPLR 5232(a). Accordingly, the presumption of regularity was not available to Marshal Biegel and the district court erred by relying upon to absolve Marshal Biegel and GTR from liability.

4. FutureNet and by extension, the Receiver, plainly suffered damages by reason of the Appellees' wrongful conduct. On March 21, 2018, FutureNet had $127,082.29 in the Comerica Accounts and the next day it did not. Those funds were seized and turned over to Marshal Biegel. The loss of more than $100,000 has always constituted damages under the law. At a minimum, FutureNet suffered damages for the poundage fees of $6,051.53, which has nothing to do with the validity of the judgment and instead is directly caused by the unlawful levy.

Whether the Funds were used to pay the Judgment is of no moment. In applying them to the Judgment, the district court impermissibly conflated damages with the affirmative defense of off set. Off set or setoff is the application of one debt to satisfy another. Courts have long recognized that a converter cannot offset his conversion liability against a valid debt because the debts are not mutual and it would be inequitable to reward someone who stole money by expunging his theft liability

against a valid debt owe by the victim. Nevertheless, that is exactly what was done by the district court.

5. The Restraining Notice, Execution and Levies all misrepresented the breadth of New York's jurisdiction to Comerica in order to compel the bank to surrender the Funds to Marshal Biegel.

New York had no jurisdiction over the bank. Comerica was organized under the laws of Texas, maintained its principal place of business in Texas, did not maintain any branches in the State of New York or otherwise engage in so "continuous and systematic" affiliations with New York as to render it essentially at home in New York under the principles of general jurisdiction established by the Supreme Court in *Goodyear Dunlap Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) and *Damiler AG v. Bauman*, 571 U.S. 117, 137-38 (2014).

Further, the seized accounts were opened and maintained at a Comerica branch in Michigan. Under New York's separate entity rule, in order for a court to have jurisdiction over a garnishee bank, the restraining notice, execution or levy must be served upon the garnishee's main office or the branch at which the debtor's accounts were opened and maintained.

It is well settled that a party cannot profit from its misuse of the judicial system. As officers of the court, marshals and collection attorneys have a duty to uphold the integrity of the judicial process "in order to maintain respect for law; in

order to promote confidence in the administration of justice, [and] in order to preserve the judicial process from contamination." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (J. Brandies, dissent). By misrepresenting the scope of New York's jurisdiction, GTR and Marshal Biegel contaminated the execution process and in order to restore the Court's integrity, the Opinion should be reversed.

STANDARD OF REVIEW

An order granting summary judgment is reviewed *de novo*. *Hicks v. Baines,* 593 F.3d 159, 166 (2d Cir. 2010). Where "the issues have been fully developed, the opponent has had a full and fair and full opportunity to litigate the question, and no new facts would be developed on remand," this Court may grant summary judgment to the party who lost below. *Potenze v. New York Shipping Assoc.*, 804 F.2d 235, 239 (2d Cir. 1986).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE RECEIVER SUMMARY JUDGMENT AND IN GRANTING SUMMARY JUDGMENT TO GTR AND MARSHAL BIEGEL.

The Opinion, like the *Pagnotta* trial court decision upon which it largely relies, is wholly inconsistent with and, indeed, utterly ignored, controlling precedent from the New York Court of Appeals and other appellate courts concerning (i) execution; (ii) levies; (iii) regularity and (v) damages.[7] Application of the

[7] Federal courts sitting in diversity are not bound by state trial court decisions. *See Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 399 (2d Cir. 2001). Precisely because its rulings are

controlling precedent makes plain that the Receiver, not the Appellees, was entitled to summary judgment below.

A. The Receiver was not required to vacate the Judgment before commencing a wrongful execution claim based on void process.

The district court, again mistakenly relying upon *Pagnotta*, erred by concluding that the Receiver was required to vacate the Judgment before he could maintain an action for wrongful execution or conversion. (JA 499). A claim for wrongful execution or conversion is established when the "process" is irregular or unauthorized. *Silberstein v. Presbyterian Hospital in New York*, 96 A.D.2d, 1096, 1096-7, 463 N.Y.S.2d 254, 256 (2d Dep't 1983) (citing *Day v. Bach*, 87 N.Y. 56, 61 (1881)). "Process" is not the judgment itself, but rather the restraining notice, execution, levy or other mechanism used to collect upon the judgment. *See Williams v. Williams*, 23 N.Y.2d 592, 596 at n. 1, 298 N.Y.S.2d 473 (1969) (Examples of process include "attachment, execution, garnishment or even such infrequent cases as the use of a subpoena for the collection of debt.").

A process that is issued without jurisdiction or authority, is "an absolute nullity for the beginning" and "an action for what has been done under it [may be brought] at any time, and it is not necessary that [the process] be set aside before

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inconsistent with high court holdings on many critical issues, *Bam Bam Entertainment LLC v. Pagnotta*, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (N.Y. Sup. Ct. 2018), is not even persuasive authority. *See Levin v. Tiber Holding Corp.*, 277 F.3d 243, 253 (2d Cir. 2002) (internal citations omitted).

bringing the action." *Day v. Bach*, 87 N.Y. 56, 60-1 (1881). This is so because a void process offers no protection to a party as it is the party's "own fault that it was irregular and void at first." *Id; 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)).

Contrary to the district court's ruling, the Receiver was not required to first vacate the Execution or Levies, let alone the Judgment, to prevail on his wrongful execution and conversion claims. The indisputable facts established that the Executions and Levies were void from inception.

B. The Execution and Levies were void because they were issued beyond the territorial limits of Marshal Biegel's authority.

A marshal is an officer of the court "whose position is created by statute" and "whose powers and duties are proscribed statute." *Iorio v. N.Y.*, 96 Misc.2d 955, 958-59 410 N.Y.S.2d 195, 198 (Sup. Ct., 1978). When a marshal acts beyond those powers, his actions are null and void as a matter of law. *See, e.g, Ettinger v. Wilke*, 79 Misc.2d 387, 388, 358 N.Y.S.2d 597, 598 (N.Y. Civ. Ct. 1974) (finding a marshal's levy and enforcement of a judgment was null and void where issued without authority under CCA); *Yeh v. Seakan*, 119 Misc.2d 681, 684-85 (N.Y. Sup. Ct. 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. 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).[8]

Below it was undisputed question that Marshal Biegel, upon instructions from GTR in the Execution, exceeded his authority by issuing Levies directed to a non-New York bank with no branches in New York and serving the Levies outside the City of New York. Pursuant to the CCA §§ 1609(1)(a) and 1609(b), a marshal's authority to execute upon a judgment cannot exceed that of a sheriff and is territorially limited to the boundaries of the City of New York:

> a. *The authority of a marshal extends throughout the city of New York* and all provisions of law relating to the powers, duties and liabilities of sheriffs in like cases and in respect to the taking and restitution of property, shall apply to marshals.
>
> * * * * *
>
> b. Notwithstanding any inconsistent provision of this act or of any other general, special or local law, code, charter, or ordinance, all provisions of law relating to the powers, duties and liabilities of the city sheriff in like cases in respect *to the enforcement within the city of money judgments* rendered by any family court or money

[8] The territorial limitations imposed upon a sheriff are akin to the subject matter limitations imposed on New York State Courts by BCL §1314 in that they restrict the instance in which a sheriff can lawfully carry out a levy. The subject matter restrictions of BCL §1314 cannot be consented to or waived. *See Farrell v. Piedmont Aviation Inc.*, 411 F.2d 812, 815 at n. 4 (2d Cir. 1969) (holding that the limitations of BCL 1314 cannot be waived). Similarly, a party or garnishee cannot expand the authority of the sheriff and confer jurisdiction upon him to levy upon funds located beyond the statutory limits of his authority. *See e.g.*, *Graham v. New York City Hous. Auth.*, 224 A.D.2d 248, 249 (1st Dep't 1996) ("[S]ubject matter jurisdiction cannot be conferred by consent and a defect in subject matter jurisdiction cannot be waived.")

> judgments entered in any supreme court or docketed with the clerk of any county, shall apply to marshals, except that city marshals shall have no power to levy upon or sell real property and city marshals shall have no power of arrest.

CCA §§ 1609(1)(a) and (b) (emphasis added).

Consistent with these limitations, the New York City Marshals Handbook of Regulations (the "Marshals Handbook") specifically states that a city marshal's power to levy does not extend beyond the borders of the City of New York:

> Moreover, a marshal's jurisdiction and authority to serve executions against personal property, as well as all other mandates and processes, extends through and ***is limited to geographical boundaries of the City of New York***. (emphasis added).

(JA 147).[9]

Indeed, the marshals' supervising agency, the Department of Investigation (the "DOI"), recently reiterated the express territorial limitations on a marshal's authority in a memorandum (the "DOI Memorandum") directed to Marshal Biegel and all other city marshals:

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[9] Pursuant to Section §1609(2) of the CCA, the appellate division is empowered to promulgate rules and regulations concerning performance of official duties of City marshals, but Section 1612 authorizes them to delegate such authority. Under Joint Administrative Order No. 453 of the First and Second Departments (NYCRR § 635.9), the New York City Commissioner of Investigation has been delegated the task of supervising City marshals and issuing regulations thereto, which regulations are subject to approval by the Appellate Divisions. Pursuant to this authority, such commissioner has issued a handbook of regulations with respect to the authority of the City Marshals, which current version was approved on March 25, 2013 and became effective on April 24, 2013. *See generally, Marcado v. Weinheim*, 108 Misc.2d 81, 436 N.Y.S.2d 973 (N.Y. Civ. Ct. 1981) (providing general explanation of City marshals' authority and relation to handbook) and *Marshal's Handbook* at p. i.

> A marshal's jurisdiction and authority to serve executions against personal property, as well as other mandates and processes, extends through and is limited to the geographical boundaries of the City of New York.

(JA 157).

On their face, the Execution and the Levies plainly exceeded the territorial limits of Marshal Biegel's authority. Most importantly, they were directed to Comerica c/o of Corporate Creations in Rockland County. (JA 54-6, 72-4). Marshal Biegel did not have the authority to execute in Rockland County. Pursuant to CCA §§ 1609(1)(a) and (b) and the guidelines set forth in the Marshals Handbook, Marshal Biegel's authority is territorially limited to the five boroughs of New York City. Having knowingly undertaken to issue and serve a facially defective levy and execution, Marshal Biegel and GTR should not have been heard to complain that they are liable for wrongful execution, conversion or trespass.

In this regard, the Appellate Term decisions in *Tausend v. Handlear*, 33 Misc. 587 (N.Y. Sup. Ct. App. Term Jan. 1901) and *V. Loewer's Gambrinus Brewing Co. v. Lithauer*, 36 Misc. 539 (N.Y. Sup. Ct. App. Term Dec. 1901) are instructive, if not directly on point. Both cases involved executions on municipal court judgments by marshals outside the county of their appointment. The law then, like the law now, granted marshals the power to execute and collect upon judgments, but territorially limited their authority. In 1901, such authority was limited to the county of their appointment. *See Tausend*, 33 Misc. at 589-90. Today, a New York City marshal's

authority is limited to the five boroughs making up New York City. *See* CCA § 1609. In both *Tausend* and *Lithauer,* the Appellate Term found that executions served by New York County marshals in Kings County were void because they were served beyond the marshal's authority. *Tausend*, 33 Misc. at 590; *Lithauer*, 36 Misc. at 541. As succinctly stated by the *Lithauer* court, service of the "[l]evy accomplished nothing" because "if the marshal has no power to act in Kings County, property not within his jurisdiction is clearly not bound by it." *Lithauer*, 36 Misc. at 541. Here, the Execution and Levies similarly "accomplished nothing" because Marshal Biegel had no power to act in Rockland County.

C. The Levies were void because they were served improperly.

To ensure that a marshal (or a sheriff) does not exceed the territorial limitations of his/her authority, CPLR § 5232(a) specifically requires *personal service* of a levy and execution by the marshal (or sheriff) upon an *officer* of the garnishee or an agent for service under CPLR § 318, but not a general agent under CPLR § 308 (3):

> Levy by service of execution. The sheriff [or marshal] shall levy upon any interest of the judgment debtor . . . by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authority to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.
>
> * * * * *

CPLR § 5232(a) (emphasis added).

The service provisions of CPLR § 5232(a) are mandatory. *See Mulligan v. Murphy*, 19 A.D.2d 218, 223, 241 N.Y.S.2d 529, 535 (4th Dep't 1963), *rev'd on other grounds*, 14 N.Y.2d 223 (1964) (The use of the word "shall" is deemed mandatory "in the absence of ameliorating or qualifying language or showing of another purpose."); *Patrolmen's Benevolent Ass'n v. City of Buffalo*, 50 A.D.2d 101, 104, 376 N.Y.S.2d 291, 294 (4th Dep't 1975) (same); *People v. Ricken*, 29 A.D.2d 192, 193, 287 N.Y.S.2d 118, 119 (3d Dep't 1968) (same).

Under settled principles of New York law, mandatory statutory provisions such as CPLR 5232(a), go to the jurisdiction of the person acting, and "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). "Custom, 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. 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).

CPLR § 5232(a) could not be more clear and unambiguous on its face. The statute requires that a levy be served in the same manner as a summons and it *expressly prohibits* substituted service on a general designated agent for service of process such as the secretary of state or, in this case, Corporate Creations. *See Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 142 (1986) ("It is well established that service on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an agent designated under CPLR 318").

Once again, to further ensure compliance with the provisions of CPLR § 5232(a) and enforce the territorial limitations of a marshal's authority to execute, the Marshals Handbook states, in plain and unambiguous terms, that service on a corporation must be done in-person, by hand delivery, to an officer of the corporation:

> Service [of a levy] on a corporation must be according to the provisions of § 311 of the CPLR; that is, by personally serving (in-hand) an officer or other agent of the corporation. *Under no circumstances may service by made by mailing a copy of the execution to the corporate garnishee.*

(JA 19) (emphasis added).

Notwithstanding the express provisions of the CPLR and the Marshals Handbook, city marshals such as Marshal Biegel frequently disregard their obligations causing the DOI to again issue a stern reminder of the territorial limits

of a marshal's authority and the requirements of personal service within the geographical boundaries of the State of New York:

> You are hereby reminded that City marshals are responsible for following all regulations as promulgated in the New York City Marshals Handbook of Regulations (Handbook). As some have already been reminded, in person or by telephone, be advised that property executions are to be served by personal service, within the geographical boundaries of the City of New York.

(JA 157).

It was undisputed that Marshal Biegel failed to comply with the service requirements of CPLR § 5232(a). The Levies were not personally served upon an officer of Comerica within New York County. The First Levy was served, by certified mail, upon Comerica c/o Corporate Creations in Rockland County. (JA 53). CPLR § 5232(a) requires in-hand deliver of the levy and does not permit service by mail. *See Premier Staffing Servs. of N.Y., Inc. v. RIDI Enters., Inc.*, 39 Misc.3d 978, 962 N.Y.S.2d 891, 980 (N.Y. Sup. Ct. 2013) (finding that service of complaint solely by overnight mail was insufficient because under CPLR § 311, "[d]elivery does, in fact, require that the summons and complaint be handed to an actual officer, director or other person set forth in the statute.") (citing *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 142 (1986)).

The Second Levy was not even served in New York, let alone personally within New York City. Instead, it was *faxed* directly to Comerica in Detroit,

Michigan. (JA 61-77) Indeed, the Second Levy was not even faxed by Marshal Biegel. Rather, the fax cover page states that the fax was from "Alona." (JA 61). Pursuant to CCA § 1603, "it shall be unlawful for any person, other than a marshal . . . to perform the duties of a marshal." *CCA § 1603*. Furthermore, CCA § 1603 also states that "it shall be unlawful for any city marshal to permit any person, other than a city marshal, to perform any act in his name, or to sign or to use his name in the performance of any act which must be personally performed by a city marshal." *Id*. Indeed, the Marshals Handbook specifically advises marshals that "neither their employees nor any person other than marshals may perform functions which can only be performed by marshals." (JA 144, § 1-12). This is because anyone performing the functions of a city marshal is guilty of a misdemeanor. CCA § 1603. Hence, the Second Levy, the very one to which Comerica respond, was not only unauthorized and void, but illegal.

D. The Receiver rebutted the presumption of regularity.

The district court erroneously applied the presumption of regularity to insulate Marshal Biegel from liability. The presumption of regularity "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. 2004) (citing *Matter of Whitman*, 225 N.Y. 1, 121 N.E. 479 (1918)).

The presumption attaches to every "facially valid" court order and a marshal may rely upon such presumption when carrying out his duties. *See Korsinsky v. Rose*, 120 A.D.3d 1307, 1309, 993 N.Y.S.2d 92 (2d Dep't 2014). 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.

Both the district court and the trial court in *Pagnotta*, erred in applying the presumption to a valid judgment rather than the executions actually acted upon by the marshals.[10] In executing upon a judgment, a marshal does not act upon the judgment itself, but rather, he acts upon the execution delivered to the marshal by the judgment creditor pursuant to CPLR § 5232(a). Hence, the operative "order" for regularity purposes is not the judgment itself as the both the district court and the *Pagnotta* court found, but the Execution delivered to Marshal Biegel by GTR's attorneys.

On its face, the Execution was invalid because it directed the Marshal to make levy upon Comerica in Rockland County which is outside the territorial limitations of the Marshal's authority to execute. *See* Point I. B, *supra*. Just by looking at the Execution, Marshal Biegel would know that it was invalid in that it directed him to

[10] The district court compounded its error by finding that "GTR sought and obtained an execution and levy from the New York State Supreme Court, Orange County." (JA 497). The Execution and Levies were not issued by the State Court. Pursuant to CPLR §§ 5230 and 5232, the Execution and Levies were issued *ex parte* by GTR's attorneys and Marshal Biegel, without any court intervention.

do something he did not have the authority to do. Thus, the presumption of regularity did not attach to his acting upon the Execution. *Korsinsky*, 120 A.D.3d at 1309.

The presumption also did not apply because Marshal Biegel failed to serve the Execution and Levy as required by CPLR § 5232 (a). The service requirements of CPLR § 5232(a). By failing to comply with the requirements of CPR § 5232(a), Marshal Biegel did not do what he was presumed to have done and he is not entitled to a presumption of regularity under the circumstances.

E. FutureNet was damaged

The district court's conclusion that the Receiver "had not made a showing of damages," is contrary to the facts and black letter law. (JA 499). Damages are intended to compensate a party for the injuries caused by the tortious conduct. *See E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 449, 80 N.Y.S3d 162, 168 (2018). To recover damages, the injuries "must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Cruper-Weinmann v. Paris Baguette Am., Inc.*, 235 F. Supp. 3d 570, 573 (S.D.N.Y. 2017) (citations omitted), *aff'd sub. nom.*, *Crupe-Weinmann v. Paris Baguette Am. Inc.*, 861 F.3d 76 (2d Cir. 2017). "A loss of even a small amount of money" is sufficient to sustain a claim. *Czyweski v. Jervic Holding Corp.*, 137 S.Ct. 973, 983, 197 L.Ed 2d 398 (2017). Thus, in *McGowan v. Maryland,* 366 U.S. 420, 430-431 (1961), the United States

Supreme Court found that the appellants had asserte a claim even though their alleged injury was a mere $5 fine.

Here, FutureNet lost $127,082.29 as a direct result of the Appellants' conduct. On March 21, 2018, the Funds were in the Comerica Accounts; the next day they were not. There can be "no question" that such a loss constitutes injury for which the Receiver was entitled to damages. *See 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.'") Indeed, it has always been the law that an account holder may recover damages from a converter equal to the amount of the funds misappropriated from his account. *See, e.g., 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).

That GTR used the Funds to satisfy the Judgment is of no moment. By definition, the application of one debt (the Judgment) to extinguish another (liability for wrongful execution, conversion and/or trespass) is known in every state as set-off or offset. *See Steck v. Colorado Fuel & Iron Co.*, 142 N.Y. 236 (1894) ("[I]n set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but a part or whole of the debt is paid in reason and justice by a distinct and

unconnected debt which the plaintiff owes."); *Malinoswki v. N.Y. State Dep't of Labor (In re Malinoswki),* 156 F. 3d 131, 133 (2d Cir. 1998) (same).

The issue of set-off was not discussed in *Pagnotta* and the district court circumvented its application below by claiming payment of the Funds in satisfaction of the Judgment went to the existence of the Receiver's damages and did not implicate the law of set-off. (JA 504, n.1). The district court's analysis is flawed.

Damages are intended to compensate a party for the injuries caused by the tortious conduct. *See E.J. Brooks*, 31 N.Y.3d at 449, 80 N.Y.S3d at 168. Set-off, on the other hand, "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A." *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 18 (1995) quoting *Studley v. Nat'l Bank*, 229 U.S. 523, 528 (1913). FurtureNet was injured when the Funds were wrongfully removed from the Comerica Accounts. By negating such damages against the Judgment, the district court conflated damages, an element of the Receiver's claim, with set-off, an affirmative defense. In so doing, the district court assumed that the wrongfully obtained Funds could be applied against the Judgment, but the law of set-off says otherwise.

"Debts to be applied against each other, must be mutual." *Beecher v. Peter A. Vogt Mfg. Co.*, 227 N.Y. 468, 473, 125 N.E. 831, 833 (1920) (citations omitted). "To be mutual, they must be due to and from the same person in the same capacity."

Id. (citations omitted); *In re Midland Ins. Co.*, 79 N.Y.2d 253, 259, 582 N.Y.S.2d 58 (1992) ("Under our decisions, debts and credits are mutual when they are 'due to and from the same person in the same capacity.'") (quoting *Beecher; Gen. Elec. Capital Bus. Asset Funding Corp. v. Hakakian*, 6 A.D. 3d 704, 776 N.Y.S.2d 576 (2d Dep't 2004)) ("In order to satisfy the requirement of mutuality, debts 'must be due and to from the same person in the same capacity.'").

"Courts theretofore have uniformly held 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) (wrongdoer not entitled to assert setoff against liability arising from his conversion of debtor's property).

The reason for this bright-line rule is two-fold. "First, because setoff is an equitable principle it must be denied in a situation where it would be inequitable to allow it." *Lines*, 743 F. Supp. at 183 (citing *Brunswick*, 424 F.2d at 675); *see also, Morris*, 213 N.Y. at 30-31 (recognizing that setoff is an equitable principle and failing to apply it where creditor's conduct was inequitable). The conclusion flows

from "the venerable maxim that '[h]e who seeks equity must do equity.'" *Lincoln Life & Annuity Co. v. Caswell*, 31 A.D.3d 1, 9, 813 N.Y.S.2d 385 (1st Dep't 2006) (quoting *Langel v. Betz,* 250 N.Y. 159, 162, 164 N.E. 890 (1928)).

Second, "[m]utuality is not present when the creditor has no debt to off-set against the debtor except the liability for the wrongful conversion." *Lines*, 743 F.Supp. at 20 (citing *In re Windsor Communications Group, Inc.*, 79 B.R. 210, 217 (E.D. Pa. Bankr. 1987)) (Where creditor "had no debt to set off but for the unlawful conversion or property . . . the requirement of mutuality is not met . . ."). In other words, a party cannot steal or otherwise wrongfully obtain funds and then avoid the consequence of their actions by claiming an offset against a judgment or other valid debt owing by the judgment debtor. Simply stated, a wrongful debt cannot be offset against a valid debt.

Here, Marshal Biegel and GTR obtained the funds wrongfully by (i) acting outside the territorial limits of Marshal Biegel's authority, (ii) violating the mandatory provisions of CPLR § 5232(a) and serving the Levies through a method specifically prohibited by the statute, and (iii) misrepresenting the jurisdiction of New York courts in order to secure turnover of the Funds from Comerica. Equity does not reward such conduct. Further, absent the liability from their wrongful actions, Marshal Biegel and GTR did not owe any obligations to FurtureNet. Accordingly, there were "no mutual" debts for the district court to set off against the

Judgment and the district court erred in finding that the Judgment could negate the Appellees' obligation to repay the Funds to the Receiver.

II. PUBLIC POLICY REQUIRES REVERSAL AND THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE RECEIVER.

Strong policy concerns also warrant reversing the Opinion and Judgment and entering summary judgment in favor of the Receiver. "It is well-settled that a wrongdoer should not be allowed to profit from his wrong." *Beaumont v. Am. Can. Co.*, 215 A.D.2d 249, 250, 626 N.Y.S.2d 201, 202 (1st Dep't 1995). In matters involving the judicial system, adherence to this principle is necessary "to maintain respect for law; in order to promote confidence in the administration of justice, [and] in order to preserve the judicial process from contamination." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (J. Brandies, dissent). The Appellees profited by abusing the judicial process, breaching their duties as officers of the court and misrepresenting the jurisdiction of New York's courts in order to restrain and then seize the Funds.

A. GTR's collection attorneys and Marshal Biegel violated their duties as officers of the court by misrepresenting the jurisdiction of the New York courts.

Marshals and attorneys are officers of the court. *See Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 159, 723 N.Y.S.2.d 151, 155 (1st Dep't 2001) (noting that a marshal is an officer of the court); *Soto v. Cty. of Westchester*, Case No. 08-cv-5066, 2018 U.S. Dist. LEXIS 9822 (S.D.N.Y. 2018) ("It is well established that an attorney

is an officer of the court."). As officers of the court, marshals and attorneys have a duty to uphold the integrity of the judicial process and the administration of justice. *See Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14, 874 N.Y.S.2d 868, 871 (2009) (attorneys have a "special obligation to protect the integrity of the courts and foster their truth-seeking function."); *In re Cohen*, 9 A.D.2d 436, 447, 195 N.Y.S.2d 990, 1003 (2d Dep't 1959) (an attorney has a "solemn duty to uphold the integrity of the courts and the Bar and to promote the administration of justice . . ."). In carrying out this duty, marshals and attorneys cannot engage in deceitful conduct toward the Court, litigants or third-parties. This includes refraining from making inaccurate and misleading statements of the law. *See, e.g.*, (JA 144, § 1.1) ("In dealing with courts, public agencies, attorneys, parties to legal actions and proceedings, and the public, marshals must conduct their business honestly.").

Adherence to this duty of integrity and the administration of justice is of the utmost importance with respect to the issuance of restraining notices, executions and levies under Article 52 of the CPLR. These enforcement devices are all 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 Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, 47 Misc.2d 746, 747, 263 N.Y.S.2d 354, 361 (N.Y. Sup. Ct. 1965) ("The restraining notice is not a mere notice but a form of *process issued out of court* intended to have the effect of an injunction. CPLR 5222

significantly provides that it may be issued only by the Clerk of the court or the attorney for the judgment creditor 'as officer of the court.'") (emphasis added), *aff'd*, 15 A.D.2d, 267 N.Y.S.2d 477 (1st Dep't 1966).

The CPLR "does not acquiesce in the issuance of an enforcement device by an attorney 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" which comports with both his education attainment and the ethical considerations promulgated by the New York Bar Association." *Save Way Oil Co. v. 284 Eastern Parkway Corp.*, 115 Misc. 2d 141, 145, 453 N.Y.S.2d 554, 557 (N.Y. Civ. Ct. 1982). Accordingly, the "standard for issuance of a restraining notice by an attorney as an officer of the court is the same or similar to that of an *ex parte* application before the Court. There must be a *prima facie* showing of the right to relief." *Id.*

It is well settled that before a court can issue an injunction, personal jurisdiction over the party must be established. *See Weitzman v. Stein*, 897 F.2d 653, 655 (2d Cir. 1990). Indeed, with respect to a court-ordered injunction, "a *prima facie* showing of jurisdiction will not suffice. A court must have personal jurisdiction over a party before it can validly enter even an interlocutory injunction against him." *Visual Sciences Inc. v. Integrated Communications, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981).

Below, the Appellees' could not even make a *prima facie* showing that the courts of the State of New York had jurisdiction over Comerica when the Restraining Notice, Execution and Levies were issued because, as a matter of law, New York did not have such jurisdiction.

1. Under New York's separate entity rule, New York had no jurisdiction over Comerica.

Under New York's separate entity rule, each branch of a bank treated as a separate entity for post-judgment enforcement proceedings. *See Allied Mar., Inc. v. Descatrade SA*, 620 F.3d 70, 74 (2d Cir. 2010); *De Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 53 (2d Cir. 1965); *Mcloskey v. Chase Manhattan Bank*, 11 N.Y.2d 936, 937, 228 N.Y.S.2d 825 (1962). Therefore, to obtain jurisdiction over a garnishee bank, the judgment creditor or marshal must serve the levy, execution or restraining notice upon the branch at which the debtor's accounts were opened and maintained or, at the very least, upon the principal offices of the garnishee bank. *See Therm-X-Chemical & Oil Corp. v. Extebank*, 444 N.Y.S.2d 26, 27 (2d Dep't 1981); *see also Limonium Mar., S.A. v. Mizushima Marinera, S.A.*, 961 F.Supp. 600, 607 (S.D.N.Y. 1997) (noting exception to separate entity rule where writ of attachment is (i) served on bank's main office; (ii) the bank's main office and branches are within the same jurisdiction and (iii) the bank's branch offices and main office are connected by high-speed computers).

The separate entity rule remains good law. In *Motorola v. Standard Bank*, 24 N.Y.3d 149, 163 996 N.Y.S.2d 594, 601 (2014), the New York Court of Appeals refused to abolish the separate entity rule and specifically concluded that "service of a restraining notice on a garnishee bank's New York branch is ineffective under the separate entity rule to freeze assets held in the bank's foreign branches." *Id.*

Further, it applies to domestic banks such as Comerica. "In order to be subject to attachment, property must be within the court's jurisdiction . . . and the mere fact that a bank may have a branch in New York is insufficient to render accounts outside of New York subject to attachment merely by serving a New York branch."). *See Nat'l Union Fire Ins. Co. v. Advanced Emp't Concepts, Inc.*, 703 N.Y.S.2d 3, 4 (1st Dep't 2000). Thus, in *National Union*, the Appellate Division, First Department, vacated a restraining order and an order of attachment that were served upon the New York branch of a bank and froze accounts that were opened and maintained in Florida. *Id.* *See Motorola,* 24 N.Y.3d at p. 162, n. 6 (citing *National Union* approvingly); *see also WAG SPV I, LLC v. Fortune Global Shipping & Logistics,* No. 19-civ-6207, 2020 U.S. Dist. LEXIS 53864 at * (S.D.N.Y. 2020) (relying upon the separate entity rule, court vacated attachment order served upon New York branch of Wells Fargo to restrain funds in accounts opened and maintained in Texas); *Lease Fin. Group, LLC v. Fiske,* 46 Misc.3d 841, 843, 2 N.Y.S.3d 851 (N.Y.

Civ. Ct. 2014) (noting that *National Union* remains controlling law even after *Motorola*).

The Restraining Notice, Execution and Levies were not served on the Michigan branch where the accounts containing the Funds were opened and maintained. As such, New York did not have jurisdiction over Comerica thereby making the jurisdictional statements in the Restraining Notice, Execution and Levies, false and misleading.

2. Under Supreme Court precedent, New York has no general jurisdiction over Comerica.

Even if the Court were to disregard the separate entity rule (which it should not do), the Appellants' jurisdictional assertions in the Enforcement Device were still misleading because New York did not have general jurisdiction over Comerica. It is now well-settled law that "a court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *see also Daimler AG v. Bauman*, 571 U.S. 117, 137-38 (2014). Merely registering to do business or even actually doing substantial business in New York is insufficient to render a company "at home" in New York. *Wilderness USA, Inc. v. Deangelo Bros. LLC,* 265 F.Supp.3d 301, 310-14 (W.D.N.Y. 2017) (registration of a foreign corporation insufficient); *Sonera*

Holding B.V. v. Cukurova Holding A.S., 750 F.3d 220, 226 (2d Cir. 2014) ("[E]ven a company's engagement in a substantial, continuous, and systematic course of business is insufficient to render it at home in a forum." (internal quotations and citations omitted)). Indeed, "[e]xcept in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporate or maintains its principal place of business . . ." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

In *Baltazar v. Houslanger & Assocs., PPL* 2018 U.S. Dist. LEXIS 139375 at *44 (E.D.N.Y. Aug. 26, 2018), *adopted in relevant part, Baltazar v. Houslanger & Assocs., PPL,* 2018 U.S. Dist. LEXIS 171329 (E.D.N.Y. Sept. 30, 2018), the court was asked to consider whether, for purposes of a restraining notice, New York had general jurisdiction over Bank of America. Bank of America is incorporated in Delaware with its principal place of business in North Carolina. Notwithstanding that Bank of America has hundreds of branches and offices in New York (including a 55-story tower in Times Square), the *Baltazar* court found that the bank was not subject to general jurisdiction in New York. *Id.*

Comerica's affiliations with New York were even less compelling. Comerica is organized under the laws of Texas with its principal place of business in Dallas so it could not possibly be deemed to be at home in New York by virtue of its incorporation or location. (JA 159, 161). It also lacks any "continuous and

systematic" affiliations with New York such that it can be deemed one of the "exceptional cases" to find jurisdiction. Comerica maintains branches located in Texas, Arizona, California, Florida and Michigan; but not New York. Although licensed to do business in New York, Comerica does not conduct any retail banking operations in the State of New York. (JA 162). Of its 441 domestic offices, Comerica maintains only 1 office in New York. (JA 163). That office is a limited service loan production office that processes loans, does not accept deposits, and was not established until May 4, 2018, more than two months *after* service of the Restraining Notice and Levies. (JA 164-65). Plainly, Comerica's limited affiliations with New York do not render it essentially "at home" such that it would have been subject to the general jurisdiction of the courts of New York when the Appellants issued the Restraining Notice, Execution and Levies.

B. The Appellants' misrepresentation of New York's jurisdiction were deceitful and cannot be rewarded.

The very issues raised by the Appellants' judgment enforcement practices in this case were recently found to be deceitful by the Eastern District of New York in *Baltazar*. *Id.* at * 27. In *Baltazar*, the judgment creditor served a restraining notice upon Bank of America that sought to restrain accounts that were opened and maintained by the judgment debtor at a New Jersey branch of the bank. Like the enforcement devices at issue below, the restraining notice to Bank of America stated that the bank was subject to the jurisdiction of the state courts of New York and that

its failure to comply with the restraints could subject the bank to fines, damages, or even imprisonment for contempt of court. As noted above, after examining the separate entity rule and the Supreme Court's decision in *Goodyear* (and its progeny), the *Baltazar* court concluded that New York did not have jurisdiction over Bank of America. The judgment creditor's contrary representations to freeze accounts in New Jersey constituted false, deceptive and misleading statements under the consumer Fair Debt Collection Practices Act (15 USC 1692 *et. seq.*). *Id.* The same conclusions as to the deceitfulness of the Appellants' conducted are inescapable here. By breaching their duties and responsibilities as officers of the court, the Appellants have undermined the integrity of the judicial system and contaminated the process.

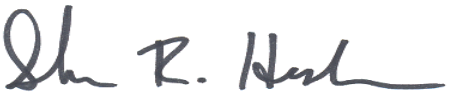
CONCLUSION

The uncontested material facts and relevant law plainly demonstrated that GTR and Marshal Biegel perpetrated a scam to reach into Michigan and seize funds from an account and bank over which New York had no jurisdiction. The scam was accomplished by their misuse of the marshal's statutory authority, material misrepresentations of law and a complete abrogation of the duties and obligations owed to the judicial system by marshals and attorneys as officers of the court. The law does not and cannot tolerate, let alone reward, such conduct. Accordingly, for

the reasons set forth herein, the Opinion should be reversed and summary entered in favor of the Receiver.

Dated: New York, NY
May 1, 2020

Respectfully submitted,
WHITE AND WILLIAMS LLP



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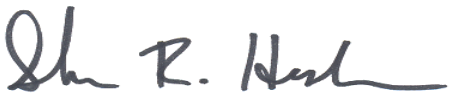
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume of Fed. R. App. R. P. 32(a)(7)(B)(i) because this brief contains 12001 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2, This brief complies with the typeface requirements of Fed. R. App. R. P. 32(a)(5) and the type style requirements of Fed. R. App. R. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 1, 2020

Respectfully submitted,
WHITE AND WILLIAMS LLP



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SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BASIL SIMON, in his capacity as Receiver for FutureNet Group, Inc.

Plaintiff,

- against -

GTR SOURCE, LLC et al.,

Defendants.

19cv1471 (JGK)

MEMORANDUM ORDER & OPINION

JOHN G. KOELTL, District Judge:

The plaintiff Basil Simon, in his capacity as Receiver for judgment debtor FutureNet Group, Inc. ("FutureNet"), has alleged claims for wrongful execution, conversion, and trespass to chattels against judgment creditor GTR Source, LLC ("GTR") and New York City Marshal Stephen Biegel (the "Marshal"), the latter of whom executed a state levy on property belonging to FutureNet. The plaintiff alleges that the Marshal had no jurisdiction to levy on FutureNet's assets outside New York City. Jurisdiction in this case is based on complete diversity of citizenship among the parties pursuant to 28 U.S.C. § 1332.

The Receiver now moves for summary judgment granting its requested relief; the Marshal and GTR cross-move for summary judgment denying the Receiver's requested relief and seeking to dismiss the case. GTR also moves for attorney's fees and costs under a contract entered into between FutureNet and GTR.

SPA-2

I.

The standard for granting summary judgment is well established. "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224. The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The substantive law governing the case will identify those facts which are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable

inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). If the moving party meets its burden, the nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see also Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998). "When there are cross motions for summary judgment, the Court must assess each of the motions and determine whether either party is entitled to judgment as a matter of law." Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 317 (S.D.N.Y. 2019).

II.

The following facts are undisputed unless otherwise noted.

FutureNet is a Michigan corporation that provides infrastructure services for construction, technology, perimeter security and energy/environment projects to both government and commercial customers. Pl. 56.1 Stmt. ¶¶ 1-2. Around November 13, 2017, FutureNet and GTR entered into an agreement in which GTR would advance FutureNet $200,000 in exchange for $291,800 in

future FutureNet accounts receivable. Id. at ¶¶ 4-5. FutureNet made payments under the agreement until February 2018, at which point FutureNet had paid GTR around $195,000. Id. at ¶ 6. Then, in February 2018, GTR declared a default under the agreement and filed an affidavit of confession of judgment in the New York State Supreme Court, Orange County. Id. at ¶ 7. On February 14, 2018, GTR obtained a judgment in the state court proceeding against FutureNet for $120,154.92, which consisted of the unpaid balance of the agreement, attorney's fees, and costs. Id. at ¶¶ 8-9. On the same day, GTR, through its attorney, served a restraining notice at a branch of Comerica Bank in Detroit, Michigan, a bank at which FutureNet funds were kept. Id. at ¶¶ 10-11. The restraining notice directed that, pursuant to New York law, Comerica, a Texas corporation with its principal place of business in Texas and doing limited business in New York, was forbidden from transferring any property belonging to FutureNet. Id. at ¶¶ 12-13, 15-16, 19. At the time the restraining notice was issued, FutureNet stated in an email to GTR that the restraining notice was unlawful because Comerica had no bank branches in New York, Comerica was not subject to personal jurisdiction in New York, FutureNet's account were maintained entirely in Michigan, and the restraining notice interfered with superior UCC rights of FutureNet's senior secured lenders. Id. at ¶ 22.

On February 26, 2018, GTR issued an Execution with Notice to Garnishee that named Comerica as the garnishee and that directed New York City Marshal Stephen Biegel to serve a Notice and Levy and Demand on Comerica c/o Corporate Creations Network, Inc., a corporation located in Nyack, New York in Rockland County. Id. at ¶ 23. The Levy directed Comerica to turn over to the Marshal all of FutureNet's property in Comerica's control. Id. at ¶ 28.

On February 28, 2018, FutureNet moved in the open state court proceeding in Orange County to vacate the judgment based on alleged procedural and jurisdictional defects in the affidavit of confession and also moved to strike all enforcement devices. Id. at ¶ 29. On March 13, 2018, the state court denied FutureNet's application, holding that FutureNet would need to pursue any requested relief by a separate plenary action, and that "Defendant's remaining contentions [were] without merit." GTR Source, LLC v. FutureNet Grp., Inc., 98 N.Y.S.3d 500(Table), at *6 (Sup. Ct. Mar. 13, 2018). The state court order denying FutureNet's requested relief was "without prejudice to their seeking relief by way of plenary action." Id. The next day, on March 14, 2018, a woman named Alona in the New York City Marshal's office delivered an amended levy by fax to a Comerica office in Detroit for the turnover of $127,082.29 in FutureNet assets. Pl.'s 56.1 Stmt. ¶¶ 32-36. Around March 21, 2018,

Comerica issued a check to Marshal Biegel at his New York office for $127,082.29, satisfying FutureNet's judgment for $120,154.92 and the Marshal's poundage fee, at which point GTR filed a satisfaction of FutureNet's judgment in state court. Id. at ¶¶ 37-42.

On April 27, 2018, FutureNet's senior creditors commenced an action against FutureNet in Michigan state court seeking, among other things, the appointment of a receiver over FutureNet's assets. Id. at ¶¶ 43-44. Basil Simon was appointed receiver over all general intangibles of FutureNet with the purpose of achieving return for secured and unsecured creditors and equity owners of FutureNet. Id. at ¶¶ 45-47. In his role as the Receiver, Simon moved on August 24, 2018 in the New York state court action in Orange County to vacate the judgment against FutureNet; the Receiver also sought restitution of the funds that were collected by the Marshal. Id. at ¶ 51. On November 26, 2018, the state court denied the Receiver's motion on jurisdictional and procedural grounds. GTR Source, LLC v. FutureNet Grp., Inc., 89 N.Y.S.3d 528, 541 (Sup. Ct. 2018).

On February 25, 2019, the Receiver commenced this action by filing a Complaint that asserted causes of action for wrongful execution and restraint against GTR, wrongful execution against the Marshal, conversion against both defendants, and trespass to chattels against both defendants. The Receiver then moved for

summary judgment and the defendants cross-moved for summary judgment and to dismiss the Complaint.

III.

The defendants argue that the Rooker-Feldman doctrine bars this action. Because the Rooker-Feldman doctrine concerns this Court's subject matter jurisdiction, "the Court has an independent obligation to assure itself that it has the subject matter jurisdiction to decide the matter." Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc., 941 F. Supp. 2d 406, 415 (S.D.N.Y. 2013); see Morrison v. City of New York, 591 F.3d 109, 112 (2d Cir. 2010) (Rooker-Feldman is jurisdictional).

There are four requirements that must be met in order for the Rooker-Feldman doctrine to bar the federal court's subject-matter jurisdiction over a suit:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced - i.e. Rooker-Feldman has no application to federal-court suits proceeding in parallel with ongoing state-court litigation.

Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) (quotation marks and alterations omitted). "The first

and fourth of these requirements may be loosely termed procedural; the second and third may be termed substantive." Id.

With respect to the procedural prongs of the Rooker-Feldman analysis, the Receiver clearly lost in state court because, by order dated November 26, 2018, the state court denied the Receiver's motion to vacate the judgment and order restitution and that proceeding took place before the Receiver brought this case in federal court on February 25, 2019. See GTR Source, 89 N.Y.S.3d at 540-41; Compl. ¶¶ 1, 102. The procedural requirements of the Rooker-Feldman doctrine are therefore met. See Hoblock, 422 F.3d at 85, 89.

However, the defendants cannot satisfy the second requirement, which is "the core requirement from which the others derive[.]" Hoblock, 422 F.3d at 87. "[T]he applicability of the Rooker-Feldman doctrine turns not on the similarity between a party's state-court and federal-court claims . . . but rather on the causal relationship between the state-court judgment and the injury of which the party complains in federal court." McKithen v. Brown, 481 F.3d 89, 97-98 (2d Cir. 2007) (emphases in original).

In this case, the Receiver brought a motion in the state court action in Orange County to vacate the judgment by confession on various procedural grounds and to seek restitution in the sum of $127,028.29 for the Marshal's out-of-City

execution on the judgment. Memorandum of Law in Support of Motion to Vacate at 22, GTR Source, LLC v. FutureNet Grp., Inc., Index No. 001776/2018 (Sup. Ct. Aug. 24, 2018). The New York State Supreme Court, Orange County denied the Receiver's requested relief on the grounds that 1) there had been subject-matter jurisdiction to enter the judgment by confession; 2) the Receiver lacked standing to contest the alleged procedural deficiencies with the judgment; and 3) that "[u]nder the circumstances, the Court need not reach the remaining issues briefed by the parties," which included the plea of restitution for the Marshal's execution on the judgment outside New York City. GTR Source, 89 N.Y.S.3d at 534, 540-41.

Although the Receiver did not receive its requested relief in the state court, namely vacatur of the judgment by confession and restitution, the injuries the Receiver complains about in this action were not caused by the state court decisions. In this federal action, the Receiver concedes that the judgment by confession is valid but complains about the manner in which the Marshal executed on the judgment. But the manner in which the Marshal executed on the judgment was in no sense caused by the state court decisions. While the judgment debtor and the Receiver failed to obtain relief in the state court orders of March 13, 2018 and November 26, 2018, their alleged injury was not caused by the failure to obtain relief but rather by the

alleged improper execution by the Marshal which was itself not caused by the state court orders. Indeed, the Marshal's execution on the judgment predated the November 26, 2018 order.[1] Therefore, the second prong of the Rooker-Feldman doctrine is not satisfied. See, e.g., King v. New York City Emps. Ret. Sys., 595 F. App'x 10, 11 (2d Cir. 2014) (finding that a NYCERS decision denying pension benefits predated an Article 78 proceeding and therefore the Article 78 proceeding did not cause the federal court plaintiff's injury); McKithen, 481 F.3d at 98 ("[A] party is not complaining of an injury 'caused by' a state-court judgment when the exact injury of which the party complains in federal court existed prior in time to the state-court proceedings, and so could not have been 'caused by' those proceedings.").

Because the second requirement of the Rooker-Feldman doctrine is not met in this case, the Court does have subject-matter jurisdiction and may proceed to the merits. With respect to the merits, there are cross motions for summary judgment, and therefore the Court will address the plaintiff's and the defendants' motions in turn. See Andy Warhol Found., 382 F. Supp. 3d at 317.

[1] Similarly, the Receiver is not complaining about any injury caused by the earlier state court order on March 13, 2018, in which FutureNet's motion to vacate the judgment on various procedural grounds was denied. See GTR Source, 98 N.Y.S.3d 500(Table), at *1.

III.

The Receiver brings actions for wrongful execution, conversion, and trespass to chattels, and therefore in order to prevail on its motion for summary judgment, the Receiver must show that there is no dispute as to any material fact and that a reasonable jury could find that the plaintiff has proven each element of its claims by a preponderance of the evidence. However, the Receiver has failed to demonstrate that it is entitled to summary judgment because it has failed to demonstrate each element of its four causes of actions: 1) wrongful execution and wrongful restraint against GTR, 2) wrongful execution against the Marshal, 3) conversion against both defendants, and 4) trespass to chattels against both defendants.

A cause of action for wrongful execution arises when someone seeks to execute on the property of another on some authority that the executor knew or should have known was void or unlawful. Underlying this tort is the theory that, where a judgment was void, "[t]he judgment and execution afforded no protection to the defendants because following vacatur they became trespassers ab initio and liable for the consequences of their acts as if the judgment and execution never existed." Silberstein v. Presbyterian Hosp. in N.Y., 463 N.Y.S.2d 254, 256 (App. Div. 1983), recalled and vacated on different grounds,

1983 WL 955177. Where a judgment debtor seeks to recover for wrongful execution on an otherwise valid judgment, the plaintiff judgment debtor may prevail only upon a showing of negligence on the part of the executor and damages to the judgment debtor. See Bam Bam Entertainment LLC v. Pagnotta, 75 N.Y.S.3d 804, 808-11 (Sup. Ct. 2018).

In this case, GTR sought and obtained an execution and levy from the New York State Supreme Court, Orange County and directed the Marshal to execute 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. Moreover, the Receiver has only as much power to bring lawsuits as the entity in receivership. See Eberhard v. Marcu, 530 F.3d 122, 132 (2d

Cir. 2008). Because the Receiver has not made a showing of damages it is not entitled to recover on a theory for wrongful execution as a matter of law at the summary judgment stage. The Receiver's motion for summary judgment on its claims for wrongful execution against GTR and the Marshal is therefore denied.

With respect to the claims for conversion and trespass to chattels against both defendants, the motion for summary judgment as to those two claims can be addressed simultaneously. See DeAngelis v. Corzine, 17 F. Supp. 3d 270, 283 (S.D.N.Y. 2014) ("A claim for trespass to chattels overlaps with a claim for conversion: Where a defendant merely interfered with plaintiff's property then the cause of action is for trespass, while denial of plaintiff's dominion, rights or possession is the basis of an action for conversion.") (quotations and alterations omitted). To recover on a claim for trespass to chattels or conversion, a necessary element is harm to the plaintiff. See id. at 283.

For similar reasons that summary judgment is denied on the wrongful execution claims, summary judgement is denied for conversion and trespass to chattels because the Receiver has failed to establish that the Receiver sustained any damages in this case. 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.

For these reasons, the Receiver's motion for summary judgment is denied in full.

IV.

Turning next to the defendants' motions for summary judgment, summary judgment is properly granted on the grounds that, as a matter of New York law, a judgment debtor plaintiff cannot state a cause of action against a judgment creditor or a New York City Marshal when the Marshal executes on an admittedly valid judgment outside his jurisdictional boundaries of New York City and there is no showing of negligence on the part of the Marshal or damages to the judgment debtor.

The New York Court of Appeals has not addressed directly the question whether a New York City Marshal may be held personally liable for levying on an out-of-city bank account to satisfy a valid debt. "When the highest state court has not ruled directly on an issue presented, a federal court must make its best estimate as to how the state's highest state court would rule in the case." Joseph v. Deluna, No. 15-cv-5602, 2018 WL 1474398, at *6 (S.D.N.Y. Mar. 23, 2018). "In determining how the highest state court would resolve a particular issue, courts

can consider all of the resources the highest court of the state could use: a forum state's inferior courts, decisions from sister states, federal decisions, and the general weight and trend of authority." Id.

Two principles of New York law are useful in framing the question in this case. First, in New York, under certain circumstances, a judgment creditor, as opposed to a judgment debtor, may be able to hold a Marshal or Sheriff liable if a Marshal or Sheriff fails to fulfill a statutory mandate to satisfy a judgment entered in favor of the plaintiff judgment creditor. See Wang v. Bartel, 624 N.Y.S.2d 735, 736 (App. Term 1994); see also Eckstein v. Mass. Bonding & Ins. Co., 24 N.E.2d 114, 117 (N.Y. 1939) ("If the sale was void for failure of the marshal to comply with statutory requirements, it might have been treated as a nullity and plaintiffs [creditors] might have issued an execution on their judgment and levied on and sold the property to satisfy their claim.").

Second, a Marshal, or the private entity on whose behalf the Marshal acts, is not personally liable for actions within the scope of his authority when directed by a valid court order. See, e.g., Maldonado v. New York Cty. Sheriff, No. 05-cv-8377, 2006 WL 2588911, at *5 (S.D.N.Y. Sept. 6, 2006) ("When a sheriff is presented with a mandate of the court, he is not bound to inquire into the proceeding leading up to the approval and the

granting of the order, and is justified as a ministerial officer, in obeying it according to its terms.") (quotations and alterations omitted); Treiber v. Mouriocourt, 258 N.Y.S. 206, 207 (City Ct. 1932) ("It is well-settled law in this state that where a sheriff or a marshal acts in obedience to the mandate of the court he is not personally responsible, nor is the party at whose instance the mandate was issued responsible for his acts.").

Despite the existence of these well-established principles, 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 execution are used to satisfy a valid debt.

In fact, the New York State Supreme Court, Kings County recently addressed this precise question in a thoughtful and well-reasoned opinion and found that a judgment debtor could not maintain a suit against a New York City Marshal for out-of-City execution absent a showing of actual damages to the judgment debtor and negligence on the part of the Marshal. In Pagnotta, a Florida LLC brought an action against a New York City Marshal alleging that the Marshal should be held personally liable for levying on the LLC's bank account, located outside New York

City, in order to satisfy a valid confession of judgment. 75 N.Y.S.3d at 805. Just as in this case, the Marshal acted pursuant to a valid state court judgment and levied against an out-of-state bank account, which the bank honored. Id. at 806. The plaintiff LLC brought an action for wrongful execution against the Marshal on the grounds that the "Marshal did not have authority to levy on the Plaintiff's bank account located outside of New York City to satisfy the Plaintiff's valid debt because the Plaintiff asserts that the Marshal's levy authority is limited to New York City." Id. at 807.

In Pagnotta, the court first held that "there is simply no factual basis to find that the Marshal knew or should have known that the debt owed by the Judgment Debtor and the Plaintiff is invalid," and that to hold that Marshals would be required to evaluate the validity of a judgment "would be to create an expensive and unmanageable burden not intended or otherwise codified by the legislature and one not recognized in over 170 years of established jurisprudence." Id. at 808 & n.1. Similarly, the court noted that "New York City Marshals are neutral government officers free of any conflict of interests. They act under the direction of the court and may rely on the presumption of regularity that attaches to a court order." Id. at 809. The court noted that, in this regard, Marshals are governed by statute and subject to oversight and discipline from

the Appellate Division. See id. at 810. Thus, if the plaintiff prevailed, it would amount to an "inappropriate" sanction of the Marshal because "[i]t 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." Id. at 811.

The Pagnotta court 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." Id. at 810-11. Implicit in the reasoning of Pagnotta is that the execution on a valid judgment outside of New York City to satisfy the debtor's valid debt, standing alone, does not constitute negligence on the part of the New York City Marshal, but that there must be some other act of negligence in the execution before a judgment debtor may hold the Marshal personally liable. To hold otherwise would result in a windfall for the judgment debtor at the expense of the public official.

The Receiver has pointed to no material fact that distinguishes this case from Pagnotta, and indeed the facts of juthis case appear to be entirely on all fours with the facts of Pagnotta.[2] 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

[2] The Receiver argues that Pagnotta was wrongly decided because Pagnotta failed to apply correctly the law of set-offs when it concluded that the plaintiff in that case suffered no damages. The Receiver argues that the only way the Pagnotta court could have concluded that the plaintiff suffered no damages is by setting off the judgment debtor's debt against the damages allegedly inflicted upon the judgment debtor by the Marshal as a result of the Marshal's out-of-City execution. The Receiver argues, in effect, that reliance on the law of set-offs was the unspoken reasoning of Pagnotta. The Receiver then argues that the law of set-offs could not result in a finding of no damages to the judgment debtor because the Marshal wrongfully executed on the debtor's bank accounts and under the law of set-offs "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 Am. Nat. Trust & Sav. Ass'n, 743 F. Supp. 176, 183 (S.D.N.Y. 1990). The Receiver is correct in one sense, which is that the law of set-offs has no applicability to this case. However, it is inapplicable not because there was alleged wrongful conduct by the Marshal. Rather, a key requirement for a set-off is mutuality of debts between the parties, which is absent in this case, as it was in Pagnotta, because at no point did GTR owe a mutual debt to FutureNet just as FutureNet owed to GTR. See Jordan v. Nat'l Shoe & Leather Bank, 74 N.Y. 467, 474 (1878) ("[N]one but mutual debts could be set-off against one another, and that by mutual debts was meant, those which, on each side, were, at the time, due and payable[.]"); Lines, 743 F. Supp. at 183 ("Mutuality is not present when the creditor has no debt to set-off against the debtor except the liability for the wrongful conversion."). For that reason, the law of set-offs is inapplicable in this case because there was no mutuality of debts between GTR and FutureNet and because the creditor's and the Marshal's alleged wrongful conversion alone cannot satisfy the requirement of mutuality. However, in any event, and contrary to the Receiver's arguments, neither Pagnotta itself nor the defendants' arguments before this Court purported to rest on the proposition that the Receiver sustained no damages because of an application of the law of set-offs. Rather, the reasoning of Pagnotta rested on the principle that a plaintiff has not suffered any tort damages, which is a necessary element of a tort suit, when the plaintiff is a judgment debtor and the alleged converted funds were seized to satisfy a valid judgment against that judgment debtor. For the same reasons, the Receiver suffered no damages in this case because the funds seized were used to satisfy a valid judgment resulting from a valid debt. This conclusion does not depend upon the law of set-offs, but rather results from a straightforward application of the usual principles of tort damages.

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.

Further, with respect to GTR's motion, a private entity on whose behalf a marshal acts is generally liable to the same extent the marshal is liable. See Treiber, 258 N.Y.S. at 207. There are no cases that hold that a private entity can be liable for causing a bank account to be levied upon when the judgment is valid and there are no damages alleged. In this case, the state court twice refused to vacate the judgment, and the Receiver does not point to any damages because the debt FutureNet owed to GTR was valid and the funds that were seized satisfied that valid debt. Therefore, for the same reasons that the Marshal is entitled to summary judgment because the Receiver does not have a valid claim under New York law on the facts of this case, GTR is also entitled to summary judgment.[3]

[3] Because the defendants' motions for summary judgment are granted on the grounds that the Receiver's claims fail as a matter of New York law, the

v.

GTR seeks attorneys' fees from the Receiver because the Merchant Agreement between GTR and FutureNet states that the FutureNet "shall pay to GSL [GTR Source, LLC] all reasonable costs associated with (a) a breach by Merchant of the Covenants in this Agreements and the enforcement thereof, and (b) the enforcement of GSL's remedies set forth herein, including but not limited to court costs and attorneys' fees." Reich Aff., Ex. 1, at 5. In response, the Receiver argues that FutureNet has already agreed to pay attorney's fees in the confession affidavit at a fixed percentage of the principal amount of the judgment, and that the judgment itself awarded GTR attorney's fees in the amount of $23,962.25. Additionally, the Receiver argues that any claims against FutureNet for attorney's fees must be brought in Michigan.

GTR has not carried its burden at summary judgment of demonstrating that this proceeding is a proper venue for the defendants to pursue attorney's fees under the terms of the Merchant Agreement. Additionally, GTR has not carried its burden that this proceeding is one concerning "the enforcement of GSL's remedies set forth herein." See Topps Co., Inc. v. Cadbury Stani S.A.I.C., 526 F.3d 63, 68 (2d Cir. 2008) ("This generally means

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Court need not address whether the Receiver's claims are barred by the res judicata effects of the state court proceedings in Orange County.

that a motion for summary judgment may be granted in a contract dispute only when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning."). Therefore, GTR's motion for attorney's fees under the terms of the Merchant Agreement is denied at this time without prejudice.

CONCLUSION

The Receiver's motion for summary judgment is **denied.** The defendants' motions for summary judgment are **granted** and the Complaint is **dismissed.** GTR's motion for attorney's fees is **denied without prejudice.** The Clerk is directed to close Docket Numbers 27, 34, and 39.

SO ORDERED.

Dated: **New York, New York**
December 26, 2019

/S/ John G. Koeltl
John G. Koeltl
United States District Judge

SPA-23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

BASIL SIMON, in his capacity as Receiver for FutureNet Group, Inc.,

Plaintiff,

-against-

GTR SOURCE, LLC, et al.,

Defendant.

----------X

19 **CIVIL** 1471 (JGK)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Memorandum Order and Opinion dated December 26, 2019, the Receiver's motion for summary judgment is denied; the defendants' motions for summary judgment are granted and the complaint is dismissed; GTR's motion for attorney's fees is denied without prejudice.

Dated: New York, New York
December 27, 2019

RUBY J. KRAJICK
Clerk of Court

BY:
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 12/27/2019