

20-0118-CV

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 FOR DEFENDANT-APPELLEE
STEPHEN W. BIEGEL, IN HIS CAPACITY
AS NEW YORK CITY MARSHAL, BADGE NO. 27

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CORPORATE DISCLOSURE STATEMENT

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

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ISSUE PRESENTED

1. Whether a judgment debtor can assert a private right of action against a New York City Marshal to hold the Marshal liable for the judgment debtor's debt, where the underlying judgment is valid, a bank levy resulted in the judgment debtor's debt being satisfied as to a judgment creditor (thereby benefitting the judgment debtor), and the judgment debtor suffered no injury and no damages?

The District Court properly answered no and properly determined that summary judgment dismissing the action was warranted.

STATEMENT OF THE CASE

Appellee Stephen W. Biegel, in his capacity as New York City Marshal, Badge No. 27 (“Appellee” or the “Marshal”), respectfully submits this brief opposing the appeal of the District Court’s December 26, 2019 Order (the “Order”).

The Statement of Facts beginning on page 9 of Appellant’s Brief largely mirrors Appellant’s Rule 56.1 Statement below and were substantively responded to by the Marshal beginning at JA-260, such that to the extent the Court deems any of Appellant’s Statement material, the Court is respectfully referred to that portion of the record for the Marshal’s response.

As relevant to the District Court’s Order, the Marshal relies upon the following material facts:

On February 14, 2018, co-Appellee GTR Source, LLC (“GTR”) obtained a judgment against FutureNet in *GTR Source, LLC v. FutureNet Group, Inc.*, (Sup. Ct. Orange Cty, Index No. EF001776-2018 (the “State Court Action”). JA-243 ¶¶ 8-9.

Upon obtaining the judgment, GTR provided Marshal Biegel with a property execution along with directions to levy on funds belonging to FutureNet in the possession of third-party garnishee Comerica Bank (“Comerica”). JA-245 ¶ 23; JA-55-60; JA-72.

The judgment against FutureNet was satisfied in full following Marshal Biegel's levy on Comerica and as a result FutureNet no longer owes a debt to GTR under the judgment. JA-247 ¶ 42; JA-194.

Appellant did not contest the validity of the judgment in this action below. JA-274 ¶ 4 (*quoting* Appellant's moving brief below: "Thus, the relief requested here would have no impact upon the Judgment itself or any of the rulings of the state court").

In connection with this action, Appellant explained it was seeking relief which "would simply restore the rights of the senior-secured creditors as a result of Defendants' [alleged] unlawful actions, and would not prevent GTR from taking lawful actions to enforce the judgment." JA-273 (*quoting* Appellant's moving brief).

By Notice of Motion dated August 24, 2018, Appellant moved the New York court to vacate the judgment pursuant to CPLR §§ 5015 and 3218, which motion to vacate was denied. JA-248 ¶ 51.

In denying the Receiver's Motion to vacate, the New York Supreme Court held: "Here, the Michigan Court's order appointing Basil Simon as Receiver makes it perfectly clear that he is the Receiver for the Receivership Entities (including judgment debtor FutureNet Group) and not for the creditors who secured his

appointment...Therefore, the Receiver can press only those claims that the judgment debtor FutureNet itself could assert.” JA-238 (emphasis in original).

The judgment-debtor FutureNet (and the Receiver) has twice sought to vacate the judgment in state court (the debt for which is uncontested) and twice has been denied that relief. JA-275 ¶ 8 (*citing* Appellant’s moving brief below and to Affidavit of Jay Mehta at Exs. 7, 14, and 15 (JA-190, 220, 222)).

FutureNet and its principal, not Marshal Biegel, incurred the debt that gave rise to the judgment against it in favor of GTR. JA-275 (*citing* Appellant’s moving brief and Mehta Affidavit Exs. 3, 4 (JA-183-85, 38-40)).

SUMMARY OF THE ARGUMENT

The basis for affirmance is simple and rooted in a basic principle of law. To sustain a tort claim, a plaintiff must establish liability and an injury giving rise to damages. The District Court properly found these elements were not satisfied, so Appellant's claims fail. Appellant owed a judgment debt. That debt was satisfied as to Appellee GTR by virtue of the Marshal's bank account levy, and Appellant received the benefit (the opposite of an injury) of having that debt satisfied, with one less creditor to worry about. The Marshal's actions caused the judgment debtor (in whose shoes Appellant stands) no injury, so there is no case.

Appellant tries to shift attention from this point by focusing primarily on the argument that the levy on the judgment debtor's Comerica bank account was wrong because the Marshal initially served the levy in Rockland County where Comerica had a registered agent instead of within the five boroughs, and because service was not personally effectuated. Putting aside the District Court's finding that these allegations alone do not prove the requisite negligence to establish liability (JA-499), the determinative fact remains that the alleged acts by the Marshal caused no injury and no damages to Appellant.

Twice in its Brief, Appellant reminds us that “[d]amages are intended to compensate a party for the injuries *caused* by the tortious conduct.” (Emphasis added.) We agree.

Appellant’s problem, as laid bare by the District Court’s well-reasoned Order and its application of New York’s *Pagnotta* decision which the District Court said was “on all fours,” (JA-504), is that Appellant cannot establish “injuries caused by the tortious conduct.” Thus, it has no claim.

The District Court could not have been more explicit in recognizing the obvious when it found Appellant had no case – far from the Marshal stealing Appellant’s funds (whether the claim is couched as wrongful execution, conversion or trespass to chattels), the levy resulted in the payment of a validly owed judgment and the satisfaction of that judgment in Appellant’s favor:

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.

JA-497 (emphasis added). The District Court then analyzed the specific elements as to each claim pled against both Appellees, and properly concluded these claims cannot stand because “the Receiver has failed to establish that the Receiver suffered any damages in this case.” JA-498.

Appellant knows it cannot claim damages with a straight face, which is likely why it does not even address this dispositive issue until page 35 of its Brief. There, Appellant says it was damaged because one day, it had funds in its bank account, and the next day the funds were gone such that it could not meet payroll. But neither the Marshal nor GTR were the cause of Appellant's loss of those funds or Appellant's inability to meet payroll. Rather, the cause of the loss of those funds was Appellant's uncontested failure to pay a debt it contracted to pay, which resulted in entry of a judgment that Appellant consented to, following which the creditor holding that judgment had every right to levy on the funds in Appellant's account, which levy Comerica complied with. It was Appellant's failure to honor its debts to GTR which resulted in a valid judgment that caused the account to be depleted.

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

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

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

The Order recognizes that whether the account was depleted based on the levy being issued outside of New York City is of no import, because the Marshal did not *cause* Appellant to owe funds to GTR. Appellant caused those funds to be owed and Appellant's failure to honor its debt legally allowed GTR to reach those funds.

To illustrate the absurdity of trying to hold the Marshal liable for Appellant's uncontested judgment debt, consider this scenario: Assume the judgment had been domesticated by a Michigan state court and a Michigan marshal levied on the same Comerica account on the same day in accordance with proper Michigan procedure. In that case, Appellant could never argue with a straight face that such a levy "caused" Appellant's injury or damages, even though the result would be exactly the same – the funds would be gone and Appellant would not be able to make its payroll because Appellant was subject to a judgment whose creditor had a legal right to reach that bank account. Appellant is not injured by the loss of those account funds because Appellant no longer had a right to those funds – they were subject to confiscation by a judgment creditor – be it GTR or any other judgment creditor.

Also consider the consequences of the outcome Appellant seeks. Appellant borrows six figures, fails to pay it back, gets a judgment issued against it that it consented to (which the New York State courts twice declined to vacate) (JA-505) (this case is a third attempt to find a back door to evade the consequences of the judgment), and then, if Appellant gets its way, GTR and the Marshal will become

jointly and severally liable for paying for Appellant's debt – thereby injuring GTR *twice* – once when it did not get paid back, and now again when by some ridiculous logic GTR now has to pay the amount *it* is owed back to Appellant, and injuring the Marshal by saddling it with that same debt even though the Marshal turned over the funds to a judgment creditor who was owed the money. The Marshal's stake here is his 5% poundage fee of approximately \$6,000, yet the Appellant seeks to hold the Marshal liable for the full amount of GTR's judgment that was satisfied by the Marshal's levy.

The District Court implicitly recognized the absurdity of such an outcome when it found “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.” JA-505. As to GTR, the Court continued, 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.” *Id.*

Again, this all turns on a simple proposition – no injury, no damages, no case.

Appellant also makes much of the argument that one seeking equity must do so with clean hands, although it is unclear how the Marshal seeking to avoid paying for someone else's judgment is akin to the Marshal asking the Court for equitable relief. But to the extent the “unclean hands” argument has any bearing, it certainly

would be a two-way street. In that regard, Appellant fails to explain how, having caused its own problems by failing to pay a six figure debt and contracting to agree to a judgment against it when it failed to pay on time, Appellant had clean hands when it defaulted to GTR, then twice tried to evade the consequences of its actions by seeking vacatur (which the state court twice denied), or why it should get a free pass to evade its own debt, while simultaneously encumbering the Marshal with full liability for such debt based on an allegation that a levy was served in the wrong place – Rockland County where Comerica had a registered agent.

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

Here, we are talking about imposing a sanction on the Marshal of approximately \$127,000, which, to be sure, is no small amount. But consider the larger implications of this Court adopting the approach Appellant advocates where a marshal can be liable based on the facts here. Should the Court so hold, what marshal in his or her right mind would be willing to assume the risk of the draconian penalty of being suddenly on the hook for the judgment debtor’s obligation?

Consider also that judgments in New York are frequently in the million-to-multi-million dollar range, and that under Appellant's theory, those debtors subject to such judgments get the equivalent of winning the lottery by evading their seven, eight, nine or even ten-figure obligations because something was wrong with service of the levy, such that the marshal must then be the one to account for those obligations.

And if Appellant really wants to talk about equity, consider that the levy not only resulted in no injury or damages to Appellant, but the levy actually *benefitted* the judgment debtor because its debt was satisfied as a result of the levy and Appellant (whose claims are the only ones the Appellant-Receiver can bring) therefore no longer has GTR's judgment looming over the judgment debtor's head.

Yet, the ending Appellant is going for is: (1) somehow its judgment stays satisfied as to GTR; and (2) GTR/Marshal Biegel pick up the cost of Appellant's full debt, thereby letting Appellant off completely after it defaulted on a six-figure obligation, resulting in a windfall to Appellant and a legal ruling being interjected into New York law – for the first time ever and contrary to the only New York court that has ruled on this issue – that would hold a marshal liable for a judgment debtor's debt.

Assuming no marshal in their right mind would ever assume the risk of levying on bank accounts with such a threat hanging over his or her head, what

would be the implication for honest judgment creditors looking for a marshal – specifically one that would be willing to risk such extreme potential liability exposure in order to enforce a judgment?

The result Appellant is going for not only would work an injustice by awarding Appellant damages where none exists, but it would chill (if not completely freeze) enforcement in New York of any judgment of any significance.

This is why courts are rightfully loath to create a judicial remedy of the type sought here where there has been no actual damage caused to the judgment debtor. The District Court quoted with favor *Pagnotta's* reasoning that “[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.” JA-503 (*quoting Pagnotta*, 75 N.Y.S.3d at 810-811).

Ultimately, while these policy considerations may be substantial, the analysis really must end where it begins, with the basic principle of tort jurisprudence that to sustain a claim a plaintiff must establish liability and injury/damages. If any element is missing, there is no claim. Such is this case. Appellant has no claim.

ARGUMENT

I.

THERE WAS NO INJURY, NO DAMAGES AND THUS NO CLAIM

A. Appellant Cannot Establish Standing

“Standing is the threshold question in every federal case, determining the power of the court to entertain the suit.” *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424, 431 (S.D.N.Y. 2015), *aff'd*, 680 F. App'x 41 (2d Cir. 2017) *citing* *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir.2008) (internal quotation marks omitted).

To have standing, Appellant had to demonstrate that “(1) he or she has suffered an injury; (2) the injury is traceable to the defendants' conduct; and (3) a federal court decision is likely to redress the injury.” *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 159–60 (S.D.N.Y.), *on reconsideration in part*, 191 F.R.D. 52 (S.D.N.Y. 1999) (*citations omitted*).

An “injury” for standing purposes, “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.) (*citations omitted*), *aff'd* *sub nom. Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017).

Moreover, “A concrete injury must be *de facto*, which means it must actually exist, and it must be real rather than abstract.” *Id.* (*citations and quotations omitted*).

“If [a] plaintiff[] lack[s] Article III standing, a court has no subject matter jurisdiction to hear [his or her] claim” (*Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (quotation omitted)) requiring that it be dismissed.

Appellant, as Receiver for the judgment debtor FutureNet, stands in the shoes of FutureNet and therefore “can only assert those claims which [FutureNet] could have asserted.” *See Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983). This is true under the laws of both New York and Michigan where the Receiver was originally appointed on behalf of FutureNet. *See e.g., Coppola v. Manning*, No. 323994, 2015 WL 7288050, at *4 (Mich. Ct. App. Nov. 17, 2015) (holding that, “The general rule is that a receiver takes the rights, causes, and remedies which were in the individual or estate whose receiver he or she is or which were available to those whose interests he or she was appointed to represent. A receiver stands in the shoes of such person or estate and can enforce only such rights and contracts or maintain only such action or defense as could be enforced or maintained by such person or estate.”).

Accordingly, whether the Receiver has standing to maintain this action is entirely dependent on and derivative of FutureNet’s own standing to maintain this action against the Marshal. *See e.g., GTR Source, LLC v. FutureNet Grp., Inc.*, 62 Misc. 3d 794, 801, 89 N.Y.S.3d 528, 534 (N.Y. Sup. Ct. 2018) (holding that, “... a receiver’s authority is derivative and dependent upon the rights of the entity whose

representative he is...)" (citing *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972); *SEC v. Shiv*, 379 F.Supp.2d 609, 617-618 (S.D.N.Y. 2005)). Because FutureNet, the entity which the Receiver was appointed to represent, was not injured by the Marshal's actions, Appellant Receiver is without standing to sue the Marshal on FutureNet's behalf.

B. The District Court Correctly Relied On *Pagnotta*

The issue in the dispositive *Pagnotta* case was "whether a New York City Marshal can be liable for levying on Plaintiff's bank account located outside of New York City to satisfy a valid confession of judgment entered into against Plaintiff." *Pagnotta*, 75 N.Y.S.3d 804, 806. The court answered no, recognizing that a judgment debtor lacks standing to sue a marshal for damages based on the allegation that the marshal exceeded his jurisdiction by levying out of state where such levy results in the satisfaction of an undisputed judgment.

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

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

Pursuant to the judgment, that Marshal sent a levy to garnishee Fifth Third Bank located in Cincinnati, Ohio. The Ohio bank honored the levy and issued a check to Marshal Pagnotta in the amount of \$10,668.25. *Id.* After Marshal Pagnotta's levy on the Ohio bank, the judgment debtor sued Marshal Pagnotta in New York Supreme Court (Kings County) for wrongful execution, conversion and trespass—the same claims being asserted against Marshal Biegel herein by the Receiver. On summary judgment, the plaintiff judgment debtor argued that “the Marshal should be personally liable for executing on property located outside of New York to satisfy the Plaintiff's valid debt because ... the Marshal's levy authority is limited to New York City.” *Id.* at 807.

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

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

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

Id. at 810-11.

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

As below, Appellant wants this Court to ignore the only New York authority directly on point, and judicially create a new field of liability against New York marshals based on the procedures established by the New York City Marshal's Handbook (the "Handbook") and the New York City Civil Court Act. However, neither the Handbook nor that Act provide for a private cause of action against a New York City marshal, and it is inappropriate for Appellant to try to get this Court to effectively legislate such a claim into existence from the bench, especially where Appellant has sustained no injury.

The New York court rejected that exact argument. As noted in *Pagnotta*:

The legislature enacted the NY City Civil Court Act vesting authority in the Appellate Divisions for the oversight and appropriate sanction and removal of New York City Marshals...It is simply not for this Court to create a private remedy where one was never intended by

the legislature, where both a forum and a mechanism for addressing alleged abuse of authority already exists and certainly not in a case where the Marshal has executed on a facially valid confession of judgment.

Id. at 811.

The District Court recognized that in *Pagnotta* (like here), ““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 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 not one recognized in over 170 years of established jurisprudence.’” JA-502 (*quoting Pagnotta*, at 808 & n.1).

The District Court then echoed *Pagnotta*’s recognition that “Marshals are governed by statute and subject to oversight and discipline from the Appellate Division,” and that if Appellant prevailed, it would be an “inappropriate” sanction of the Marshal, at which point the District Court quoted favorably the excerpted language above that it is not for the Court to create a private remedy where one was not intended by the legislature. JA-502-03 (*citing Pagnotta*, at 810, 811).

Appellant tried below to get around this analysis by arguing that *Pagnotta* is inapplicable because *Pagnotta* focused on whether breaches of the NYC Marshal’s Handbook gave rise to a statutory claim, without getting into whether a common law

claim can be brought. This ignored that *Pagnotta did* address whether a marshal may be subject to potential common law claims such as wrongful execution based on allegations that he acted beyond his jurisdiction (the same claims brought here).

In answering that question, the court held:

[T]he claim in the case...is that the Marshal lacked the authority to perform this execution, not that execution pursuant to the Judgment itself is improper (i.e., a wrongful execution) or that the Judgment Debtor and the Plaintiff do not in fact owe the monies levied.

Put another way, in a blatant attempt to avoid having to pay its bill (i.e., having the Marshal pay the money that Plaintiff owes the Judgment Creditor) and under the transparent guise of this action against the Marshal (which would in effect amount to a sanction of the Marshal), Plaintiff conflates an action for wrongful execution, which this is not, with a complaint that the Marshal did not faithfully execute the duties of his office by exceeding the reach of his levy authority.

Pagnotta, 75 N.Y.S.3d 804 at 808.

Just like in *Pagnotta*, the Appellant Receiver in this case did not challenge the validity of the judgment and the sole allegation against the Marshal is that he lacked authority to execute on funds outside of New York City. So too here, Appellant “conflates an action for wrongful execution, which this is not, with a complaint that the Marshal did not faithfully execute the duties of his office by exceeding the reach of his levy authority.” *Id.* Appellant failed to cite any case to support the argument

that the Marshal should have to cough up funds from his own pocket to satisfy an undisputed judgment. That's because no such case exists.

By seeking to hold the Marshal liable for damages under these facts, Appellant wants the Court to reward a judgment debtor under a scenario where the debtor: (1) borrows money from a lender; (2) fails to pay it back resulting in a valid judgment against that debtor which is then satisfied out of the debtor's own funds; and (3) sues the marshal for doing his job by acting on a valid judgment even though the result of the marshal's actions is the judgment debtor's debt is then satisfied. And somehow, under these facts, Appellant asks this Court to force the Marshal to pay the judgment debtor the amount of the judgment against it, on the theory that this is the judgment debtor's "damages." This twisted, nonsensical result is exactly what *Pagnotta* said would and could not lie where, as here, the end result of a marshal's action is that the debtor's judgment is satisfied.

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

FutureNet (and thus the Receiver) from that judgment debt, summary judgment dismissing the case was appropriate.¹

C. The Receiver Cannot Impute Alleged Injuries to Third-Parties to FutureNet to Establish Standing in This Action

What this case has always really been about is not recouping funds for judgment debtor FutureNet's benefit, as it was always clear from the pleadings in this action that Appellant-Receiver's interest was to try to get the levied funds back to satisfy claims of FutureNet's other secured creditors. Appellant's moving brief below made clear that the Receiver is seeking relief which "would simply restore the rights of the senior secured creditors as a result of Defendant's [alleged] unlawful actions . . ." JA-420 ¶ 5 (brackets added). *See also* JA-14 ¶ 21 (Complaint protests

¹ Despite *Pagnotta* being virtually identical on the facts and legal analysis, Appellant argues it should be ignored because the *Pagnotta* court should have applied the law of set-offs when it concluded that the plaintiff there suffered no damages. The District Court appropriately disposed of this argument in a long footnote, finding "the law of set-offs has no applicability to this case . . . not because there was alleged wrongful conduct by the Marshal," but rather because a "key requirement for a set-off is mutuality of debts between the parties, which is absent in this case" because "at no point did GTR owe a mutual debt to FutureNet just as FutureNet owed to GTR." JA 504, n. 1. It goes without saying that the off-set argument is even more tenuous regarding the Marshal, who had no dealings with the judgment debtor whatsoever, such that there was no debt between the Marshal and FutureNet, let alone a mutual debt. The Marshal incorporates by reference that portion of the Order and the well-supported caselaw cited therein. Appellant also argued below that *Pagnotta* is distinguishable because there the plaintiff-judgment debtor sued "only the Marshal," whereas here Appellant sued both the Marshal and GTR. There is no law as to why the number of defendants is relevant to the court's holding in *Pagnotta*.

GTR's levy was because it was "tortiously interfering" with "senior, secured lenders"); JA-245 ¶ 22 (same reference in Appellant's 56.1 Statement); JA-417 ¶ 80 (it was those senior secured creditors who had the Receiver appointed). Appellant does not really try to hide that this is its agenda on this appeal. *See* Appellant's Brief at pgs. 3-4, 8 (repeatedly making clear that this action is not really to vindicate any claim held by the actual judgment debtor FutureNet, but rather it is brought for the other creditors' benefit, noting the concern that the levy was "at the expense of other, legitimate, senior secured creditors," and framing that as a key issue on appeal).

In other words, the Appellant-Receiver's motivation for this lawsuit has always been to bring money back into the receivership estate to benefit the senior creditors who appointed the Receiver to pursue this mission and not to compensate FutureNet for any alleged harm caused to it by Appellees' actions. But any claims those senior creditors think they may have had were never properly before this or any other Court because the Receiver does not have the right to sue on their behalf to redress their alleged injuries.

The Receiver only has standing to prosecute claims belonging to FutureNet – the judgment debtor – which suffered no injury and therefore has no claim to begin with. To illustrate, even if the Receiver successfully brought the levied funds back into the estate, the funds would not go to FutureNet, but rather to the other creditors, such that FutureNet would not be redressed in any way at all. To the contrary,

FutureNet would be back in the proverbial soup with GTR because if GTR has to return the funds, GTR would undoubtedly bring a claim that its judgment is no longer satisfied – a result which brings no benefit or redress to FutureNet by any stretch of the imagination.

The law is clear that the Receiver in this position “[c]an assert only those claims which [FutureNet] could have asserted.” *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983). As such, the Receiver is not permitted to impute an alleged injury to the receivership estate to FutureNet solely to confer standing on FutureNet in this action where *FutureNet* has not suffered any injury from the Marshal’s actions. *See generally, Wight v. BankAmerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000) (holding that, “Foremost among the prudential requirements [for standing] is the rule that a party must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”) (quotations omitted).

In other words, while the secured creditors on whose behalf the Appellant Receiver is really trying to act have no actual claim for damages against the Marshal—because he levied on a valid judgment prior to the Receiver even being appointed in the Michigan action (JA-194 (March 2018 Judgment Satisfaction), JA-430 (May 2018 Receiver appointed)) – they attempt to use this action to satisfy their own claims against FutureNet by having the Receiver sue the Marshal for damages

allegedly sustained by FutureNet, asking this Court to ignore the fatal flaw in Appellant's plan which is that FutureNet suffered no damages.

The issue of the Receiver's standing to pursue claims on behalf of FutureNet's secured creditors was also previously raised and decided against the Appellant Receiver and the secured creditors in the New York Supreme Court action where the Appellant-Receiver moved to vacate GTR's judgment. In addressing the issue of the Receiver's standing in the Supreme Court action, the court (Bartlett, J.) held that, "Here, the Michigan Court's order appointing Basil Simon as Receiver makes it perfectly clear that he is the Receiver for the Receivership Entities (including judgment debtor FutureNet Group) and not for the creditors who secured his appointment...Therefore, the Receiver can press only those claims that the judgment debtor FutureNet itself could assert." *GTR Source, LLC v. FutureNet Grp., Inc.*, 62 Misc. 3d 794, 809, 89 N.Y.S.3d 528, 540 (N.Y. Sup. Ct. 2018). JA 239.

By pressing forward with this litigation, the Receiver ran afoul of the New York court's November 2018 decision which clearly defined the extent of the Receiver's right to pursue claims on behalf of FutureNet only, not the other secured creditors.² *See also, Cobalt Multifamily Inv'rs I, LLC v. Arden*, 857 F. Supp. 2d 349,

² It also begs the question that if the Appellant-Receiver is really pursuing this litigation to enhance the assets of the receivership estate, how could the Receiver possibly justify the expense of a full litigation below, followed by this appeal, which almost certainly has to match, if not exceed, the approximately \$127,000 the Receiver seeks to recover in this case?

362 (S.D.N.Y. 2011)(holding that, “The Second Circuit held in *Shearson Lehman Hutton, Inc. v. Wagoner* that a bankruptcy trustee can bring claims on behalf of the bankrupt corporation that she represents, but not on behalf of that entity's creditors...This court has indicated that the Wagoner rule applies to the receiver because he fulfills a role sufficiently analogous to that of a bankruptcy trustee”) (internal quotations omitted).³

D. Appellant’s Jurisdiction Arguments Cannot Save Its Case

Appellant repeatedly emphasizes that its case should stand based solely on its allegation that the Marshal’s service of the levy on the bank was outside the Marshal’s jurisdiction. However, *Pagnotta* and the District Court Order make clear that whether the bank was subject to the Marshal’s jurisdiction is simply not relevant to whether a legal claim by the judgment debtor has been stated, thus rendering Appellant’s focus on the issue of the Marshal’s jurisdiction irrelevant to this case. Appellant’s suggestion that the Marshal misrepresented New York’s jurisdiction to the bank is likewise irrelevant for the same reason, as well as false, given that the Marshal did not (and does not) prepare the restraining notices, execution, notice to

³The appeal also raises numerous arguments having nothing to do with FutureNet’s lack of standing which is the sole legal issue here. Thus, while there is no need for the Marshal to respond to such legally irrelevant arguments as they have no bearing on the disposition of this case, by the Marshal responding to some, but not all of Appellant’s arguments, he is not conceding the validity of any such portion of the appeal, nor does the Marshal concede the validity of those arguments aimed solely at co-Appellee GTR which the Marshal is also not responding to here.

garnishee or exemption claim forms that were provided to the bank. The Marshal's Levy also merely restates Comerica's obligations as garnishee under the execution and is not a misrepresentation of New York law.

Also without merit is Appellant's argument that by acting beyond his territorial limits the Marshal's actions were void. Not only is this argument foreclosed by *Pagnotta* which, in response to this very same argument, affirmatively upheld the marshal's levy on an Ohio bank, but the cases Appellant cites as alleged support for this argument are distinguishable. *See Ettinger v. Wilke*, 79 Misc.2d 387, 388, 358 N.Y.S.2d 597, 598 (Civ. Ct. N.Y. Cty. June 3, 1974) (finding marshal's levy and enforcement of judgment was null and void because it was performed in violation of a pending stay); *Yeh v. Seakan*, 119 Misc.2d 681, 684-85 (Sup. Ct. Oneida Cty. Apr. 26, 1983) (noting that a marshal lacked authority to levy on property where he served an income execution rather than a property execution which was the proper enforcement device to be used); *Schleimer v. Gross*, 46 Misc.2d 931, 933, 261 N.Y.S.2d 670, 673 (Sup. Ct. Nassau Cty. May 24, 1965) (holding that the marshal was without jurisdiction to issue an income execution out of the civil court because once the civil court judgment was docketed with the New York County Clerk, the civil court lost jurisdiction and therefore the marshal, as the enforcement officer of the civil court, was also without jurisdiction).

Thus, none of the cases Appellant relies on stand for the proposition that a judgment debtor may hold a marshal personally liable for acting outside the marshal's territorial limits without having to demonstrate any actual injury from the marshal's actions.

Nor would such an ending make any sense here, as we should not lose sight of the fact that it was FutureNet, the judgment debtor (the only one whose claims the Receiver can prosecute), that: (1) borrowed funds from GTR; (2) failed to repay those funds; (3) consented in advance to the valid judgment that was entered against it as a result of its own conduct (its default); (4) attempted to then evade the very judgment it consented to by twice unsuccessfully seeking its vacatur; (5) and then tried to use the Federal Court as a back-door means to try *again* to evade responsibility for its own debt – this time by trying to foist that obligation onto a New York City Marshal, with the result being that the Marshal and the judgment creditor are somehow liable for the judgment debtor's financial obligations, while letting the judgment debtor completely escape the consequences of its own actions.

From an equitable standpoint, one could not think of a more repugnant result. But the reason for affirmance is even more basic – no injury, no damages, no case.

CONCLUSION

For all of the foregoing reasons, for the reasons stated in the District Court's Order, and based upon the full record herein, the appeal should be denied, and the Order affirmed, with costs and attorneys' fees to the Marshal together with such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
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CERTIFICATE OF COMPLIANCE

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