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, 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 GTR SOURCE, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(a), Defendant-Appellee GTR Source, LLC, states that it has no corporate parents, affiliates or subsidiaries that are publicly held and there is no publicly held corporation that owns 10% or more of GTR's stock.

SUMMARY OF ARGUMENT

This appeal arises out of a Memorandum Order and Opinion (the "Order") wherein the District Court awarded summary judgment to Defendant-Appellee GTR Source, LLC ("GTR") and its co-defendant, New York Marshal Stephen W. Biegel. The District Court held that Plaintiff-Appellant Basil Simon's ("Simon's")[1] failure to substantiate and prove any damages proximately caused by Defendants-Appellees' allegedly tortious conduct necessitated dismissal of his claims under New York law. Reduced to its essence, the District Court correctly held that, even if Simon's allegations of improper collection by the Marshal were true, Simon still had no damages because the improper collection was used to satisfy a judgment that was properly obtained against the debtor, on whose behalf Simon was prosecuting the case. In other words, Simon was not harmed by the allegedly tortious conduct. It is hornbook law in New York that in order to have a

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[1] There is a pending motion to dismiss this appeal because, apparently, Basil Simon assigned his rights in this litigation to two investment companies (Plymouth Venture Partners, II, L.P., and Plymouth Management Company) in September 2019, but those investment companies were never substituted in place of Basil Simon as the Plaintiffs or Appellants. The Notice of Appeal and initial appellant's brief was filed on behalf of those investment companies, not Basil Simon. On July 9, 2020, appellants filed a belated motion to substitute in the investment companies. That motion remains pending.

viable tort claim, a plaintiff must be able to demonstrate damages proximately caused by the allegedly tortious conduct. Simon has not, and cannot, satisfy his burden on that element of his claims and, therefore, the District Court's decision was proper and should be affirmed.

Despite Simon devoting nearly half of his brief to railing against the merchant cash advance industry generally,[2] and implying that the underlying judgment is somehow improper—even though he failed on two separate occasions to have the judgment invalided, his appeal is limited to one issue: Did Simon, acting as Receiver for FutureNet Group, Inc. ("FutureNet"), have a valid claim for tort damages against Defendants-Appellees where the funds executed upon by the New York City Marshall were owed by FutureNet to GTR pursuant to a valid New York State judgment? The District Court properly concluded that Defendants-Appellants' actions in enforcing a valid New York State judgment did not proximately cause any damages to Simon.

In the alternative, the District Court's decision should be affirmed because Simon's complaint is subject to dismissal based on the *Rooker-Feldman*

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[2] There is also a pending motion by GTR to strike the improper references in Simon's brief to newspaper articles that have no evidentiary value, are irrelevant, and do not even mentioned GTR.

doctrine. He is trying to pursue a collateral attack on the New York State Court judgments upholding GTR's judgment and denying his request to strike the judgment enforcement devices.

JURISDICTIONAL STATEMENT

Simon has alleged causes of action for wrongful execution and restraint, conversion, and trespass to chattel against GTR and New York City Marshal Stephen W. Biegel. The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1332, based on the diversity of the parties. FutureNet was a Michigan Corporation with its principal place of business in Detroit, Michigan, and Simon was appointed by a Michigan court to act as the receiver on behalf of FutureNet. GTR is a New Jersey limited liability company with its principal place of business in New York, with none of its members being residents of Michigan. Mr. Biegel is an individual who is not a resident of Michigan. As such, there is complete diversity between the parties.

COUNTERSTATEMENT OF THE ISSUES

1. Under New York law, does a judgment-debtor sustain damages proximately caused by a judgment-creditor's tortious conduct when post-judgment enforcement devices served on a non-party garnishee were allegedly improper, but

where the executed upon funds were applied to satisfy a valid judgment owed by the judgment-debtor?

Answer: No. The District Court properly concluded that where a judgment-debtor is required to pay judgment-creditors pursuant to a valid state court judgment, there can be no cognizable claim for damages based on an allegedly improper collection, if the collected funds are used to satisfy that judgment.

2. In the alternative, does the *Rooker-Feldman* doctrine bar a party from pursuing a claim in federal court challenging the collection efforts of a judgment-creditor when a state court has held on two different occasions that the underlying judgment is proper and valid and refused to strike such enforcement devices?

Answer: Yes. The District Court held that the *Rooker-Feldman* doctrine did not bar the claims because the state court proceedings addressed the validity of the GTR judgment against FutureNet, not the subsequent collection efforts against FutureNet. However, in Simon's initial motion before the New York State Supreme Court, he asked for all enforcement devices to be struck and the court denied his request.

COUNTERSTATEMENT OF FACTS

The factual background for this appeal is straightforward and largely undisputed.

A. Judgment is entered in favor of GTR and against FutureNet.

On November 13, 2017, FutureNet sold $291,800.00 of its future receivables to GTR pursuant to a Purchase and Sale of Future Receivables Agreement (the "Agreement") for a Purchase Price of $200,000.00. (JA-172 – JA-182). Pursuant to the Agreement, FutureNet agreed that proceeds of the future receivables it sold to GTR were to be direct deposited into FutureNet's banking account with Comerica Bank, from where GTR would be able to ACH debit the proceeds of the future receivables it had purchased *via* daily ACH payments. (JA-179). FutureNet received the $200,000 from GTR.

On or about February 8, 2018, FutureNet blocked GTR's access to the Comerica banking account, preventing GTR from collecting its purchased future receivables despite the fact that FutureNet was still operating and generating receivables. (JA-386 – JA-388). As of February 31, 2018, $95,849.00 of the future receivables FutureNet sold to GTR had not been delivered. (JA-387). Pursuant to N.Y. C.P.L.R. § 3218, and based upon a sworn affidavit of confession of judgment executed by FutureNet and its principal, Parimal D. Mehta, a

judgment was entered in favor of GTR and against FutureNet and its principal, Mehta, on February 14, 2018 in the amount of $120,154.42. (JA-38 – JA-40).

B. GTR Executes Upon its Judgment.

On February 14, 2018, an information subpoena with restraining notice and accompanying documents were served on non-party garnishee Comerica Bank. (JA-27 – JA-37). Instead of filing a motion challenging the information subpoena with restraining notice under N.Y. C.P.L.R. § 5240, or serving an exemption claim under N.Y. C.P.L.R. § 5222-A, FutureNet's counsel sent GTR's counsel a threatening and inflammatory email and letter communications. (JA-41 – JA-52).

On February 26, 2018, the New York City Marshal, Stephen W. Biegel, served a property execution with notice to garnishee upon Comerica Bank, care of Corporate Creations Network Inc. in Nyack, New York, its designated agent for service of process. (JA-54). On February 28, 2018, FutureNet moved in the New York State Supreme Court for Orange County to vacate the February 14, 2018 judgment and to strike all enforcement devices that GTR may have issued. *GTR Source, LLC v. FutureNet Grp., Inc.*, 58 Misc.3d 1229(A), 98 N.Y.S.3d 500(Table), at *6 (Sup. Ct. Mar. 13, 2018). On March 13, 2018, Judge Catherine Bartlett 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." *Id.*

An additional demand for funds was served by the Marshal upon Comerica Bank on March 14, 2018. (JA-61; JA-72). Comerica Bank issued a bank check payable to Marshal Biegel in the amount of $127,082.29, inclusive of accrued interest and the Marshal's poundage fees, on or about March 21, 2018 without objection. (JA-393). Accordingly, on March 22, 2018, GTR filed a Satisfaction of Judgment in the Orange County Clerk's Office. (JA-194).

C. Basil Simon is appointed Receiver of FutureNet and files suit against GTR.

On or about April 27, 2018, Detroit Investment Fund, L.P. and Chase Invest Detroit Fund, LLC moved the Circuit Court for the State of Michigan, Wayne County, for an emergency appointment of Basil Simon as Receiver. (JA-217 – JA-218). Thereafter, on August 24, 2018, Basil Simon, as Receiver for FutureNet, moved to vacate the underlying Judgment and for restitution in the amount of $127,082.29 (the amount of money lawfully obtained by the Marshal), in the New York State Supreme Court for Orange County. (JA-220 – JA-221). Judge Bartlett again denied Simon's motion on November 26, 2018. (JA-222 –

JA-240); *see also Simon v. GTR Source, LLC,* 62 Misc.3d 794, 89 N.Y.S.3d 528 (Sup. Ct. Nov. 26, 2018).

Thereafter, on February 15, 2019, Simon filed the present action in the United States District Court for the Southern District of New York, asserting three duplicative tort claims for wrongful restraint and execution, conversion, and trespass to chattel. (JA-10 – JA-26). Each of Simon's claims purported to request damages arising in tort from the improper restraint and execution of funds held by Comerica Bank that were applied to a valid New York State court judgment in favor of GTR and against FutureNet. (JA-10 – JA-26).

D. The Receiver and GTR move for summary judgment.

On May 17, 2019, Simon filed his notice for summary judgment on each of his four causes of action. (JA-122 – JA-123). Defendant-Appellees opposed and cross-moved for summary judgment on June 18, 2019. (JA-276 – JA-277). The United States District Court for the Southern District of New York heard oral argument on the parties' respective motions for summary judgment on December 19, 2019. (JA-436 – JA-485). On December 26, 2019, Honorable John G. Koeltl, issued the Order denying Simon's motion for summary judgment and granting Defendant-Appellees' motion for summary judgment on the grounds that

the "funds recovered by the Marshal were used to extinguish the debtor's valid debt owed under the valid court judgment." (JA-497).

E. Non-party Investment Firms file the Notice of Appeal.

On January 10, 2020, Plymouth Venture Partners II, L.P. and Plymouth Management Company, filed a Notice of Appeal. (JA-519). As discussed in the pending motion to substitute Plaintiffs-Appellants, and the corresponding motion to dismiss, neither Simon nor his alleged assignees moved to be substituted in or out, respectively, of the pending appeal before this Court, as required by FED. R. APP. P. 43(b) until July 9, 2020. Dkt. No. 76. Which was after the assignees, but not Simon, filed their initial brief on this appeal. The time for Simon to file a Notice of Appeal or brief has long since passed.

STANDARD OF REVIEW

The Second Circuit reviews a District Court's Order granting summary judgment *de novo*. *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 96 (2d Cir. 1999) (affirming District Court's granting of summary judgment). "Under this standard, [the Court of Appeals] affirm[s] a district court's grant of summary judgment [] if, viewing the evidence most favorably to the plaintiffs, there are no genuine issues as to any material fact." *Id.* Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where, as

here, the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

LEGAL ARGUMENT

This Court should affirm the District Court's Order awarding summary judgment in favor of GTR and dismissing Simon's tort claims against GTR for the reason set forth by the District Court: Simon's lack of recoverable tort damages. It is undisputed that there was a valid, enforceable New York State judgment in favor of GTR and against FutureNet, and that the funds that were executed upon were used to wholly satisfy FutureNet's obligation to pay GTR pursuant to that judgment. Simon, as the Receiver for FutureNet, stands in its shoes and has no greater rights than FutureNet had. Stated another way, Simon cannot rely upon the alleged damages to other FutureNet creditors to establish his standing to pursue these claims. Accordingly, as was the case at both the New York State Court and District Court levels, Simon cannot demonstrate to this Court that he (or FutureNet) sustained any damages as a result of the complained of activities.

In the alternative, this Court should affirm the District Court's Order granting summary judgment in favor of GTR and dismissing Simon's tort claims because the *Rooker-Feldman* Doctrine bars the claims.

POINT I.
THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE SIMON HAS NO DAMAGES PROXIMATELY CAUSED BY THE ALLEGED TORTS

The District Court's analysis was, and remains, on point. Each of Simon's causes of action requires a showing of actual damages — something woefully missing from Simon's complaints to the New York State Supreme Court and to the District Court. *See Simon v. GTR Source, LLC*, 2019 WL 7283279, at *4-8 (S.D.N.Y. Dec. 26, 2019).

Dismissal of such causes of action is appropriate where, as here, a complaining party has "incurred no cognizable damages under New York State law." *Piluso v. Siemens Information and Comm'n Networks, Inc.*, 149 Fed.Appx. 44, 44 (2d Cir. 2005) (affirming district court's granting of summary judgment dismissing plaintiff's claims for failure to allege cognizable damages); *Commercial Union Assur. Co., plc v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994) (dismissing a "claim lack[ing] that most fundamental of legal elements necessary to support a viable cause of action — any demonstrable damages"). Indeed, where a party has

failed to adequately plead cognizable damages to sustain his claims, the problem "is substantive" and "better pleading will not [and cannot] cure it." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). As discussed in the District Court's Order, there is New York state court authority directly on point which holds that in this scenario—where a Marshal allegedly improperly issued a levy to enforce a valid state court judgment and any monies received in response to that levy were applied to satisfy the judgment—the judgment-debtor had sustained no damages and, therefore, has not viable tort claim. *See Bam Bam Entm't LLC v. Pagnotta*, 2018 N.Y. Slip. Op. 28109, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (Sup. Ct. Kings Cty. 2018).

Notwithstanding the foregoing, Simon insists, *via* footnote, that "Federal courts sitting in diversity are not bound by state trial court decisions" such that the District Court's reliance on New York State Court case law was inappropriate. Dkt. No. 53 at p. 34, fn. 7. Simon is incorrect. Because the parties are citizens of different states, Federal courts sitting in diversity are required to first "determine whether there is an actual conflict between the laws of the jurisdictions involved." *AHW Inv. V. Partnership v. Citigroup Inc.*, 980 F. Supp. 2d 510, 518 (S.D.N.Y. 2013) (citing *In re Allstate Ins. Co.*, 81 N.Y.2d 219, 223 (1993)). Here, in applying New York State substantive law (*see* Dkt. No. 2 at pp.

14-20), the District Court determined that "New York's greater interest in regulating the conduct at issue entail[ed] the application of its [own] law." *Id.* (citing *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999) (citations omitted)). Once that has been determined, the federal courts apply the applicable state court rules of decision. *Liberty Synergistics Inc. v Microflo Ltd.*, 718 F3d 138, 151-52 (2d Cir. 2013) ("after using state conflict-of-laws principles to ascertain the rules of decision that would apply in the state courts of the federal forum, federal courts apply those state rules of decision that are "substantive" under *Erie,* and are consistent with federal law.") There was no dispute befor the District Court regarding the applicable state law—it was New York—so the District Court's reliance on *Bam Bam Entm't LLC v. Pagnotta*, 2018 N.Y. Slip. Op. 28109, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (Sup. Ct. Kings Cty. 2018) was entirely appropriate, and remains applicable for purposes of this appeal.

Accordingly, and as reiterated by the District Court, where, as here, a judgment-creditor's execution on a judgment is alleged to have been improper or void, the judgment-debtor will not, and cannot, have a claim for tort damages if the funds collected are applied to the judgment-debtor's balance due and owing under a valid state court judgment. *Id.* at 808-11. Notably, FutureNet and Simon, on FutureNet's behalf, moved to have GTR's judgment vacated two times. (JA-190;

JA-285). Both times, Honorable Catherine Bartlett, Supreme Court Justice for the State of New York, Orange County, denied FutureNet's and Simon's motions to vacate the judgment. (JA-259; JA-288). Hence, there is no dispute that GTR's judgment against FutureNet was valid and thus enforceable. Indeed, as the District Court held, it is undisputed that the underlying judgment is valid: "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." *Simon v GTR Source, LLC*, 19CV1471 (JGK), 2019 WL 7283279, at *8 (SDNY Dec. 26, 2019).

Simon attempts to argue around this dispositive issue by claiming that a "claim for wrongful execution or conversion is established when the 'process' [defined as attachment, execution, garnishment] is irregular or unauthorized." Dkt. No. 53 at p. 35 (citing *Day v. Bach*, 87 N.Y. 56, 61 (1881)). Remarkably, Simon does not address the key analysis in *Day*—that the judgment must be invalid in order for the process to be irregular or unauthorized. "[I]f the process was regularly issued" pursuant to a valid judgment "in a case where the Court had jurisdiction, the party may justify what has been done under it" and thus not held liable. *Day*, 87 N.Y. at 61. Critically, "process" is irregular or unauthorized only if it is applied for and obtained by way of a void judgment. *Id.* In other words,

absent a void judgment, there can be no irregularity. *Id.* at 62. Thus, a judgment-debtor such as Simon is left with one option — moving to vacate the levy obtained by way of a regularly issued "process." *Id.*

As discussed above, it is undisputed that GTR possessed a valid judgment against FutureNet—it has been upheld twice by the New York State Supreme Court and is not attacked directly in this action. Furthermore, the record on appeal is clear that Simon, though made aware of the numerous procedural vehicles in New York State Court for vacating the judgment enforcement mechanisms initiated by GTR, never proceeded to make such an application. Instead, Simon filed duplicative actions in the Supreme Court for the State of New York, Orange County — both which were denied. Again, rather than filing the proper state court motion seeking to vacate the enforcement device, Simon proceeded to file this action, which is duplicative to those already denied in the New York State Supreme Court. One could speculate that Simon was shopping for a more favorable forum, but such speculation is unnecessary as the legal elements for his claims are still wanting.

The District Court understood that Simon's tactics were without merit. Applying *Pagnotta*, the District Court opined 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." (JA-2 (citing *Pagnotta*, 59 Misc. 3d at 912-13)). Critically, holding a Marshal liable to evaluate the underlying judgment that he seeks to enforce "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.* Moreover, to connect the dots, in a case in which damages could not be established because there is 'simply no dispute that the Judgment Debtor [] owe[s] 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.* Indeed, "[t]o hold otherwise would result in a windfall for the judgment debtor at the expense of the public official." *Id.*

The District Court was spot on. Undeniably, there are "no cases that hold that a private entity can be liable for causing a bank account to be levied when the judgment is valid and there are no damages alleged." (JA-2 at p. 20). Moreover, "[i]n 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 the valid debt." *Id.*; *see also United States v. Marshall*, 339 F.3d 990 (9th Cir. 2003) (claims for wrongful

seizure or forfeiture of property fail for lack of damages where, as here, the money received is used to pay a valid debt). There can be no other interpretation of the facts before this Court.

Finally, it is well established that a complaining party suffers no damages, even if fraudulently induced to perform in accordance with her legal obligations (*i.e.*, paying an outstanding debt). *See Marc Dev. v. Wolin*, 904 F. Supp. 777, 793 (N.D. Ill. 1995); *Williams v. Seterus, Inc.*, 2020 WL 362874, * 3 (N.D. Ala. Jan. 22, 2020). Anchored in well-settled law, an unauthorized check paid by a banking institution will not cause the account holder to be damaged where the check was used to discharge a debt owed by the account holder. *Indus. Sav. Bank v. People's Funeral Serv. Corp.*, 296 F. 1006, 1007 (D.C. Cir. 1924) (a "consequential injury" is the "gravamen of any charge"). In other words, tort damages are unavailable where, as here, the money is used to pay an existing obligation. *See Salkey v. State Farm Life Ins. Co.*, 2019 N.Y. Slip. Op. 31240(U), at *9 (Sup. Ct. 2019).

The foregoing clearly resonated with the District Court, which applied *Pagnotta* in clear terms:

> [T]he 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 . . . results from a straightforward application of the usual principles of tort damages.

(JA-2 at fn. 2). As the District Court held, *Pagnotta* is on all "all fours" with this case and sets the stage for why, in fact, GTR is entitled to keep the funds restrained and delivered by the Marshal, exclusive of the Marshal's poundage fees. Again, Simon cites to no cases pertaining to whether a judgment-debtor has suffered tort damages under the same fact pattern as the present case.

Rather, Simon spends six pages of his brief discussing the law of set-offs, as he was, and remains, unable to demonstrate any cognizable damages. This is patently Simon's last ditch attempt to persuade this Court that his sole means of challenging an execution and its accompanying enforcement mechanisms lay in a tort claim. That is, and always was, inaccurate. If FutureNet or Simon believed that an execution and its accompanying enforcement mechanisms had been improper or defective, or that funds should not have been collected, the proper procedural mechanism was not, and is not, to assert tort damages.

Instead, as discussed, *supra*, the proper procedural mechanisms are found in N.Y. C.P.L.R. §§ 5240 (upon motion of any interested person, the court

can deny, limit, condition, regulate, extend, or modify any enforcement procedure) and 5222-a (detailing the process for claim of exemption). Neither FutureNet nor Simon ever attempted to utilize either of the procedural mechanisms afforded them by the N.Y. C.P.L.R.; rather, they sought the sympathy of the New York State Supreme Court and the District Court. Neither court, however, fell for FutureNet's or Simon's goal of upending settled law in an effort to expand tort liability for judgment-creditors across New York State. This Court should reject those ill-founded efforts as well and affirm the District Court's decision granting summary judgment in favor of GTR.

POINT II.
THE *ROOKER-FELDMAN* DOCTRINE ALSO BARS THE RECEIVER'S CLAIMS

In the alternative, Simon's claims are barred by the *Rooker-Feldman* doctrine. As the District Court set forth, "[t]here are four requirements that must be met in order for the *Rooker-Feldman* Doctrine" to apply:

> 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 state-court litigation.

(JA-2 at p. 7 (citing *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (quotation marks and alternations omitted))). "The first and fourth of these requirements may be loosely termed procedural; the second and third may be termed substantive." *Id.*

While the District Court correctly determined that the procedural requirements of the *Rooker-Feldman* doctrine were met (*see id.* at p. 8), the District Court erred in determining that GTR could not "'satisfy the second requirement, which is 'the core requirement from which the others drive[.]'" *Id.* (citing *Hoblock*, 422 F.3d at 87). The second requirement, or "causal requirement," requires the federal court plaintiff to complain of injuries caused by the state-court judgment. *Id.* at 85. This is especially the case when "at a minimum, . . . a federal plaintiff had an opportunity to litigate a claim in a state court proceeding." *Kropelnicki v. Siegel*, 290 F.3d 118, 128-129 (2d Cir. 2002) (applying *Rooker-Feldman* in federal court action where federal plaintiff had opportunity to litigate claim asserted in federal action in prior state court proceeding). In other words, where the claims presented in the state court proceeding(s) are inextricably intertwined to those in the federal court proceeding, they are barred by *Rooker-Feldman*.

The District Court determined that the injuries Simon complained of at the federal level "were not caused by the state court decisions" denying FutureNet's and Simon's motion(s) to vacate the underlying judgment. (JA-2 at p. 9). Specifically, the District Court noted that FutureNet's and the Receiver's "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." *Id.* at pp. 9-10. In support of its position, the District Court cited to *McKithen v. Brown*, 491 F.3d 89, 98 (2d Cir. 2007) ("[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 <u>prior</u> in time to the state-court proceedings, and so could not have been 'caused by' those proceedings.") (JA-2 at p. 10).

The District Court's analysis is misplaced for two reasons. First, the very complaint in the present appeal is that the execution and collection of funds associated with the judgment was wrongful and thus void—indeed, Simon's brief reads as if he is seeking vacatur, yet again, of the State Court judgment. For *Rooker-Feldman* not to apply, the previous state court proceedings therefore could not have sought relief based upon the execution and collection of funds associated with the judgment. Yet both state court proceedings did, in fact, seek relief based upon the collection activities of GTR and the Marshal. (JA-285; JA-339). Judge

Bartlett's March 13, 2018 decision specifically notes that FutureNet sought to strike all enforcement devices and such relief was denied. *See GTR Source, LLC v. FutureNet Grp., Inc.*, 58 Misc.3d 1229(A), 98 N.Y.S.3d 500(Table), at *6 (Sup. Ct. Mar. 13, 2018). This appeal involves the enforcement devices.

The District Court focused its analysis on the language of the complaints, but the very relief sought by way of this appeal is restitution for an alleged wrongful collection on a valid state court judgment. If the state court motions ultimately vacated the underlying judgment, Simon would have no claim in this Court because there would have never been collection activities to begin with, as the judgment serving as the basis for any application for execution would have been null and void. But by denying both of Simon's applications for vacatur at the state level, the Supreme Court for the State of New York, Orange County, essentially and effectively permitted the collection activities Simon now seeks to condemn. There cannot be any other interpretation of the factual situation before this Court. Simon complained, and is still complaining, of alleged injuries caused by the state court judgment.

Second, the District Court's citation to *McKithen* is improper, as Simon undeniably complains of injuries caused by the New York State Supreme

Court's first denial of FutureNet's motion to vacate the underlying judgment. (JA-2 at p. 10, fn. 1). The only reason that there was a second Decision and Order denying Simon's motion to vacate at the state court level was that the Receiver was appointed and sought to, once again, vacate the underlying judgment as a newly interested party. Simply because the collection activity occurred between the two denials is of no merit and should not dissuade this Court from applying *Rooker-Feldman*.

POINT III.
THIS COURT SHOULD DECLINE TO CONSIDER SIMON'S REMAINING ARGUMENTS BECAUSE THEY WERE NOT REACHED BY THE DISTRICT COURT

Simon's brief merely touches upon the District Court's Order and does not even attempt to contend with why the District Court may have gotten it wrong — which GTR vehemently contends it did not. Yet Simon's brief devotes more than three-quarters of its volume to analyzing issues never reached by the District Court, as well as new arguments, in what can only be seen as an attempt to conflate the record and confuse this Court.

The standard refrain from this Court is that it does not consider arguments raised for the first time on appeal. *In re Gaston & Snow*, 234 F.3d 599, 608 (2d Cir. 2001) (citing *Diesel v. Town of Lewisboro*, 232 F.3d 92, 107-08 (2d

Cir. 2000) ("an appellate court will not consider an issue raised for the first time on appeal")). Nor does the Court typically consider arguments on appeal not reached by the District Court where, as here, the District Court determined that the record was insufficient to opine on such arguments. *See, e.g., Genger v. Genger*, 771 Fed. Appx. 99 (Mem.) at *101 (2d Cir. 2019) (considering additional grounds not reached by the District Court only where there is a sufficient record to permit additional conclusions of law outside of what the District Court opined). Still, however, should this Court consider Simon's additional arguments — which GTR argues this Court should not — the additional arguments each fail as a matter of well-settled law.

A. Public Policy Does Not Favor Reversal.

GTR agrees with Simon that "it is well established that an attorney is an officer of the court." *Soto v. Cty. Of Westchester*, 2018 WL 527977, at *3 (S.D.N.Y. Jan. 22, 2018) (citing *Maracich v. Spears*, 133 S. Ct. 2191, 2202 (2013) (noting that an attorney acts within his capacity as an officer of the court when representing a client in litigation)). On appeal, however, Simon paints a picture depicting GTR's counsel as fraudulent and deceptive. Nothing could be further from the truth. GTR's counsel worked well within the bounds of its authority, as both a counselor and advisor, in effectuating proper process and eventual execution

and restraint of the judgment funds lawfully owed to GTR. Likely knowing that his name-calling campaign is without merit, Simon further alleges that GTR's counsel's fraudulent behavior coincided with a lack of jurisdiction over Comerica Bank. Dkt. No. 53 at p. 53.

Simon simply throws mud at the wall to see what sticks. It is as if the Simon included this entire analysis (already presented to the District Court) to circumvent the real issue before this Court — whether GTR had personal jurisdiction over Comerica Bank. But rather than proffer any evidentiary proof for this Court, Simon merely alleges that "[GTR] could not even make a *prima facie* showing that the courts of the State of New York had jurisdiction over Comerica [Bank] when the Restraining Notice, Execution and Levies were issued because, as a matter of law, New York did not have such jurisdiction" — which is simply *not* true. *Id.* at p. 54. As more fully discussed below, GTR *can* make, and has already made, a *prima facie* showing that the courts of the State of New York have jurisdiction over Comerica Bank and, in fact, have at least one decision directly on point.

1. ***Simon Has Failed to Establish that the Separate Entity Rule is Applicable to the Present Matter before this Court.***

On appeal, Simon again devotes significant ink explain for this Court its own application of the "separate entity rule," which is an arcane common law doctrine that treats separate branches of a bank as separate entities for the purpose of pre-judgment attachment and post-judgment enforcement in the context of international banking. The New York Court of Appeals endorsed the rule in *Motorola Credit Corporation v. Standard Charted Bank*, 24 N.Y.3d 149 (2014) insofar as it precluded the ability of a judgment creditor to restrain property of a judgment debtor held in a foreign branch of an international bank by the service of a restraining notice or execution upon a branch of the international bank located in New York. *Id.* at 149 (emphasis added). In fact, the *Motorola* court expressly stated that:

> In this case, we have no occasion to address whether the separate entity rule has any application to domestic bank branches in New York or elsewhere in the United States. The narrow question before us is whether the rule prevents the restraint of assets held in foreign branch accounts, and we limit our analysis to that inquiry.

Id. at fn. 2. Accordingly, the ruling in *Motorola* is not even applicable to the dispute before this Court.

Many courts have argued that the advancements in technology have rendered this rule completely obsolete. The rule has never been extended by the

New York Court of Appeals, or any New York Appellate Division, to apply to sister-state branches of domestic banks. The cases cited by Simon are wholly inapplicable to the present matter before the Court because they either involve, or discuss, international branches unrelated to domestic banks or decisions which have been superseded by the New York courts' application of *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009).

In *Koehler*, the New York Court of Appeals ruled that, as long as a New York court has jurisdiction over a garnishee bank, it can order that bank to deliver property of the judgment debtor to the judgment creditor in New York, even if the property is located out of state or even out of the country: "The United States Court of Appeals for the Second Circuit, by certified question, asks us to decide whether a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to CPLR article 52, when those stock certificates are located outside New York. We answer the certified question in the affirmative." *Id.* at 536.

As is undisputed, Comerica Bank is authorized to do business in New York and has identified an authorized agent for services of process in New York:

Ralph W. Babb, Jr., at Corporate Creations Network Inc., 600 Mamaroneck Avenue, Suite 400, Harrison, New York 10528. The funds at issue were not held in some international branch of Comerica, but rather a domestic arm of the bank. As such, the *Koehler* decision should govern.

2. *This Court Has Held That the Separate Entity Rule is Arcane and No Longer Applicable Due to Modern Technology.*

The separate entity rule is a common law doctrine, unsupported by any act of the New York State Legislature, that was formulated during a time when, due to the lack of technology that has developed over the last fifty years, individual bank branches were, as a practical matter, separate entities. In those times, deposits were held at individual branches and the individual branches could not readily communicate with each other. That is not the case today. Bank deposits exist in "cyberspace" — they are merely a number in computer system that can be accessed in seconds by *any* branch of a bank. As supported by the case law cited below, the advent of modern technology has rendered the rule obsolete.

In fact, the New York Court of Appeals recognized this in its dissenting opinion in *Motorola*, which cited to this Court's ruling in *Digitrex, Inc. v. Johnson*, 491 F.Supp. 66 (S.D.N.Y. 1980):

> In this day of centralized banking and advanced technology, bank branches can communicate with each other in a matter of seconds.

> Banks are no longer faced with this "intolerable burden" when served with a restraining notice. That the separate entity rule no longer made practical sense was recognized over 30 years ago by the United States District Court for the Southern District of New York, when it noted in *Digitrex, Inc. v Johnson* (491 F.Supp. 66, 68 [S.D.N.Y. 1980]) that "operations at most if not all New York City commercial banks . . . have become largely computerized" and concluded that "it is clear that the argument in favor of the rule set forth in 1950 in *Cronan* . . . is no longer persuasive." The First Department agreed in *S & S Mach. Corp. v Manufacturers Hanover Trust Co.* (219 A.D.2d 249 [1st Dep't 1996]), when it applied the *Digitrex* rule to a post-judgment restraining notice and information subpoena:
>
> > "The *Digitrex* court argued persuasively that the old New York rule, requiring that the judgment creditor serve his post-judgment process on the particular branch of the bank where the judgment debtor's assets were located, was obsolete in an era when large commercial banks use centralized computer databases to handle their accounts (219 A.D.2d at 252)."

See Motorola, 24 N.Y.3d at 167-168 (Dissenting Opinion).

It speaks volumes that the District Court, which rendered its opinion in *Digitrex* approximately 40 years ago, ruled that the separate entity rule was obsolete in light of advancements in technology that existed at that time (the internet did not even exist when that decision was rendered). Since the 1980 decision in *Digitrex*, technology has advanced exponentially — which poses the question of why this primitive rule is even being considered by courts in 2020. The answer to that question remains — it should not be. The time has passed (or

never was) for application of the separate entity, especially in the context of national domestic banks.

This reasoning was also recognized by this Court in *Tire Engineering and Distribution L.L.C. v. Bank of China Limited*, 740 F.3d 108 (2d Cir. 2014):

> On the other hand, as plaintiff's argue, the original basis for the separate entity rule may have weakened or even disappeared over time. Further, as plaintiffs' experiences show, the applicability of the rule may facilitate efforts of judgment debtors to frustrate and evade the collection of judgments. … Moreover, the rule may permit banks operating branches in New York to avoid the consequences of choosing to do business in New York and provide a competitive advantage to foreign banks. Indeed, courts in New York have suggested that the risk of double liability is 'assumed as part of the business of a bank.' *JP Morgan Chase Bank v. Motorola, Inc.*, 47 A.D.3d 293, 846 N.Y.S.2d 171, 184 (1st Dep't 2007) (quoting *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of N.Y.*, 253 N.Y. 23, 40, 170 N.E. 479 (1930).

Tire Engineering and Distribution, 740 F.3d at 117.

The only cases cited by Plaintiff are distinguishable or not even applicable. In *WAG SPV I, LLC v. Fortunate Global Shipping & Logistics, Ltd.*, 2020 WL 1489814 (S.D.N.Y. Mar. 27, 2020) the United States District Court for the Southern District of New York determined that, while the separate-entity rule generally only applies to international banking, its application to domestic banking is appropriate where funds are restrained at a sister-state domestic branch with no connection to the underlying litigation. *Id.* at *8. FutureNet's bank account at

Comerica Bank in Michigan is connected to the litigation, it is the same bank from which the daily ACH payments were being made to GTR before FutureNet breached the parties' contract by blocking access to the account. *WAG SPV I, LLC* is inapplicable here.

The remaining case cited by Plaintiff-Appellant — *Nat'l Union Fire Ins. Co. v. Advanced Emp't Concepts, Inc.*, 703 N.Y.S.2d 3 (1st Dept. 2000) — dealt with attachment, a pre-judgment remedy, not post-judgment enforcement, which is subject to an entirely different standard as discussed in *Koehler*.

In *Koehler*, the New York Court of Appeals drew the distinction between attachment and post-judgment enforcement:

> It is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction. "[I]t is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction" (*National Broadway Bank v. Sampson*, 179 N.Y. 213, 223 (1904), quoting *Douglass v. Phenix Ins. Co. of Brooklyn, N. Y.*, 138 N.Y. 209, 219 (1893); *accord Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 273 (1st Dep't 2008); *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 A.D.2d 101 (1st Dep't 2000)). Significantly, "attachment suits partake of the nature of suits *in rem*, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment" (*Douglass*, 138 N.Y. at 218). But it is equally well established that "[h]aving acquired jurisdiction of the person, the court [ ] can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction" *Id.* at 219. The certified question concerns the latter process.

> CPLR article 52 contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country. It would have been an easy matter for the Legislature to have added such a restriction to the reach of article 52 and there is no basis for us to infer it from the broad language presently in the statute. Moreover, we note that the Legislature has recently amended CPLR 5224 so as to facilitate disclosure of materials that would assist judgment creditors in collecting judgments, when those materials are located outside New York. The 2006 amendment adds a subdivision that expressly allows the securing of out-of-state materials by in-state service of a subpoena on the party in control of the materials. Recent legislation thus supports our conclusion that the Legislature intended CPLR article 52 to have extraterritorial reach.

Koehler, 12 N.Y.3d at 538-541. Based upon this analysis, the *Koehler* court determined that "a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 5225(b)." *Id*. at 541.

Accordingly, to the extent that Simon's arguments rely upon the arcane and inapplicable "separate entity rule," and/or standards applying to pre-judgment orders of attachment, those arguments are without merit.

B. New York Has Jurisdiction Over Comerica Bank.

1. *Simon Lacks Standing to Challenge this Court's Jurisdiction Over Comerica Bank.*

As a threshold matter, Comerica Bank is not a party to this action. It has not objected to this Court's jurisdiction over it. And this Court unequivocally

has jurisdiction over the Receiver via FutureNet pursuant to the Merchant Agreement. (JA-385 at § 4.6). It is well settled law that challenging personal jurisdiction is a right exclusive to the person or entity over whom jurisdiction is claimed. *Wells Fargo Bank, N.A. v. Bowie*, 89 A.D.3d 931, 932 (2d Dep't 2011); *Home Sav. of Am., F.A. v. Gkanios*, 233 A.D.2d 422 (2d Dep't 1996) (holding that the only person or entity over whom personal jurisdiction is claimed has standing to object to personal jurisdiction). Accordingly, only non-party Comerica Bank can challenge whether this Court has personal jurisdiction over it. Indeed, Simon fails to attach any guidance providing him with standing to object to personal jurisdiction over Comerica Bank.

2. ***Comerica Bank Expressly Consented to Jurisdiction of this Court.***

As stated by the United States Supreme Court in *Ireland v. Compagnie des Bauxites de Guinee*, "the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). Because it is an individual right, any objection based upon personal jurisdiction must have been raised by Comerica Bank — not the Receiver or FutureNet. And, rather than raise an objection, Comerica Bank consented to the jurisdiction of the State Court by restraining the funds and remitting the funds to the Marshal pursuant to the

Second Levy. *See Subway Intern. B.V. v. Bletas*, 512 Fed.Appx. 82, 83 (2d Cir. 2013) ("It is well settled that lack of personal jurisdiction is a defense that can be waived by failure to assert it seasonably or by submission through conduct."). Accordingly, Comerica Bank has waived its right to object to the enforceability of the Restraining Notice, First Levy, and/or Second Levy based upon personal jurisdiction and Simon has no right to make such an objection on its behalf.

The Receiver and FutureNet cannot simply "overrule" Comerica Bank's consent to jurisdiction of this Court and compliance with the Levies served upon Comerica Bank. Indeed, Simon's only right with respect to personal jurisdiction is to object to the State Court's jurisdiction over himself, and he has no basis to do so. Indeed, FutureNet expressly consented to jurisdiction in New York pursuant to the Merchant Agreement and the underlying confession of judgment, which is binding on the Receiver. But, even if the Receiver had standing to object to personal jurisdiction over Comerica Bank, Comerica Bank's voluntary compliance with the Second Levy months before the complaint was made ended the time during which any objection to jurisdiction could be raised. *See, e.g.*, *Brunswick Hospital Center, Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981) (holding that the time to object to authority of an entity to issue a subpoena, was before the subpoena was complied with and once there was compliance, a motion to vacate or

quash was no longer available). To be clear, if Simon has a complaint, it lies with Comerica's decision to comply with the Levies, not the Defendants-Appellees in this action.

In addition to the foregoing, FutureNet consented to Comerica complying with "any writ of attachment, execution, garnishment, tax levy, restraining notice, subpoena, warrant, or other legal process [Comerica] believe[s] (correctly or incorrectly) to be valid. (JA-166). Accordingly, the Receiver, who merely steps into the shoes of FutureNet, cannot now challenge Comerica's compliance with the Restraining Notice and Levies.

3. ***New York Maintains General Jurisdiction Over Comerica Bank.***

Because Comerica Bank expressly consented to the jurisdiction of the New York state courts, no further analysis of this Court's jurisdiction over it is necessary. But for the sake of thoroughness, an analysis of the state court's general jurisdiction over Comerica Bank is provided below. Even if Comerica Bank had not expressly consented to jurisdiction, this Court would still have general jurisdiction over it because Comerica Bank's contacts with New York are so constant and pervasive as to render it essentially at home in this state.

In this case, it is unequivocally clear that the state court (and this Court) had personal jurisdiction over Comerica Bank as it is maintains business

presence in New York, is registered to do business in New York, and is or was a party in numerous cases in New York courts since the implementation of the NYSCEF and PACER systems, such that it systemically conducts business in New York State. *See* CPLR §§ 301 and 302; (JA-366 – JA-372).

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (U.S. 2014), the Supreme Court noted that a court may only exercise general jurisdiction over a foreign corporation where the corporation's ties with the forum are so constant and pervasive "as to render [it] essentially at home in the forum state." The main issue in *Daimler* was whether the contacts of one of Daimler's subsidiaries, Mercedes-Benz USA, LLC, could be imputed upon Daimler for jurisdictional purposes. *Daimler* explicitly provides that:

> We do not foreclose the possibility that in an exceptional case, see, *e.g.*, *Perkins* described *supra*, at 755-757, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that questions, because Daimler's activities in California plainly do not approach that level.

Id. at fn. 19. Accordingly, *Daimler* did not rule out a basis for jurisdiction over a foreign corporation where the corporation was neither incorporated in New York nor maintains its principal place of business in New York.

Daimler was directly interpreted by the Supreme Court for the State of New York, County of Erie (Hon. Timothy J. Walker) in *World Global Capital, LLC d/b/a Direct Capital Source v. Childrens First Home Health Care, Inc. d/b/a Health Calls, Maria L. Radwanski, and Michael Little*, NYSCEF Index No. 814617/2018 (Sup. Ct. Erie County 2018). (JA-373). There, Hon. Timothy J. Walker interpreted an extremely similar factual situation to the matter before this Court. The garnishee bank at issue was BB&T Bank. While it did not maintain any retail branches in New York State, it was registered to do business in New York and was a party to numerous cases in both state and federal courts in New York. The Court held that the evidence presented, which is almost the same evidence as is being presented in this case, demonstrated that "BB&T's contacts with New York are so continuous and systematic that they render it essentially 'at home' in New York, and therefore, qualify it as an exceptional case pursuant to . . . *Daimler*." *Id.* The Court held that Defendants (the judgment debtors) did not have standing to challenge the Court's jurisdiction over the bank restraining funds — BB&T Bank. *Id.*

Further, the Court noted that "BB&T expressly consented to the jurisdiction of this Court by complying with the judgment enforcement devices served by [the judgment creditor], both directly and through the New York City

Marshal Richard J. Pagnotta, upon BB&T, as well as engaging in numerous actions intentionally invoking the jurisdiction of this Court." *Id.* Even more notable, the Court held that guiding precedent did not "extend the application of the 'separate entity rule' to domestic bank branches under the facts and circumstances applicable . . . thus subjecting BB&T to the personal jurisdiction of this Court." *Id.*

Here, even though Comerica Bank does not maintain its principle place of business in New York, its ties with New York are so constant and pervasive — as evidenced by the fact that it registered to do business in New York and is a party to numerous lawsuits in New York since the implementation of the NYSCEF and PACER systems — that it qualifies as an *exceptional* case as set forth in the above analysis.

Analogous to the facts in *World Global Capital, LLC*, *supra*, Comerica Bank is authorized to do business in New York as of February 24, 2009 and may be served through its registered agent, C/O Corporate Creations Network, Ralph W. Babb Jr., 600 Mamaroneck Avenue, Suite 400, Harrison, New York 10528. A simple Google search also reveals other addresses which Comerica Bank occupies in New York City, for example: 466 Lexington Avenue Suite #237, New York, New York. (JA-370 – JA-372).

Again, Simon's reliance upon *Baltazar v. Houslanger & Assocs.* 2018 WL 4781143, at *1 (E.D.N.Y. Sept. 30, 2018), for the assertion that GTR failed to establish general jurisdiction is equally misleading and a red herring. In *Baltazar*, a default judgment was taken against the plaintiff, a consumer, based upon a credit card debt, and much of the analysis concerned the Fair Debt Collection Practices Act, which is not applicable to this case as it pertains only to consumer debt. *Id.*

In any event, *Baltazar* recognized the "exceptional case" doctrine for general jurisdiction prescribed by the Supreme Court in *Daimler*, and GTR has submitted sufficient evidence to demonstrate that the doctrine applies to Comerica Bank, just as the New York State Supreme Court ruled in *World Global Capital*. Moreover, *Baltazar* does not address the issue of jurisdiction by consent or questions of standing.

As such, even if this Court were to address Simon's new arguments, or those left unaddressed by the District Court, they do not support reversal.

CONCLUSION

For the foregoing reasons, GTR respectfully requests that the Court affirm the District Court's decision granting summary judgment to Defendants-Appellees.

Dated: July 29, 2020

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Dated: July 29, 2020

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