20-118

In the
United States Court of Appeals
For the Second Circuit

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

Plaintiff-Appellant,

– v. –

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

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

This case is about preserving law and order, maintaining the integrity of the Courts and preventing chaos from abuse of judgment enforcement procedures and the Briefs of GTR[1] and Marshal Biegel do not state otherwise. GTR obtained a state court Judgment against FutureNet. Rather than follow New York law and use lawful process to enforce that Judgment, GTR misrepresented the jurisdiction of New York courts to restrain bank accounts and then directed Marshal Biegel to exceed the territorial limitations of his execution authority to reach across state lines and levy funds located in a Michigan bank account. In bringing suit on behalf of FutureNet, the Receiver did not ask the district court to in any way overturn or modify the Judgment. Rather, the Receiver asked the district court to enforce well-settled legal principles: that a judgment can only be enforced through means permitted by law; that any enforcement action outside the bounds of the law is void; and that a void action is a legal nullity *ab initio*. To put it more starkly: a judgment creditor is no more entitled to have a New York City marshal levy a judgment debtor's funds located outside the marshal's geographic jurisdiction than it would be to have that

[1] Unless otherwise specified, capitalized terms shall have the meaning ascribed to them in the Receiver's Brief filed on May 1, 2020. A motion to substitute Plymouth Partners II, L.P. and Plymouth Management Company, assignees of the Receiver, as the Appellants of record is pending before the Court. [App. Doc. No. 76]. While GTR purportedly cross-moved to dismiss [App. Doc. No. 90], it failed to make the appropriate forms, thereby preventing the Appellants from filing a response under Fed. R. Civ. 27(3)(A). [App. Doc. Nos. 105 and 107]. Appellants have been advised by the case manager that no motion to dismiss is pending in this action.

same marshal throw a rock through the window of a judgment debtor's home, hoping to secure a safe inside. Both acts are fundamentally lawless, and undermine public confidence in the orderly functioning of the judicial system and the administrative of creditor's rights that New York's judgment enforcement laws are aimed to protect.

GTR and Marshall Biegel insist that the district court was correct in relying upon a single New York trial court decision to conclude that FutureNet did not suffer any damages by reason of the Appellant's unlawful conduct. Like the district court, GTR and Marshal Biegel ignore the fact that this trial court decision is directly at odds with precedent from the New York Court of Appeals and other appellate courts concerning (i) execution, (ii) levies, (iii) public official liability, (v) damages and (vi) setoff. Indeed, Marshal Biegel does not even cite, let alone attempt to distinguish, *Day, Fischer, Snell, Hilfer* and the other Court of Appeals authority cited in the Receiver's Brief at Point I and GTR attempts only to distinguish *Day* by disingenuously citing parts of the decision that are inapposite to the facts and claims at issue here.

The Appellee's omissions are telling. New York law simply does not permit judgement creditors and marshals to reach across state lines and seize funds maintained in a sister-state bank. In order to protect state sovereignty and promote order in the enforcement of judgments and the administration of competing claims

to a debtor's assets, New York's judgment enforcement statutes and the controlling case law cited by the Receiver, but ignored by GTR and Marshal Biegel, territorially limit the execution authority of New York City marshals to the boundaries of New York City. When a marshal exceeds that authority at the direction of creditor, as in this case, the law holds that his actions are void from the outset and he and the creditor are obligated to return any improperly obtained funds.

Ignoring these statutes and controlling law and adopting the district court's Order will give potentially thousands, if not tens of thousands, of judgment creditors unbridled authority to reach across state lines and seize assets located in sister states without fear of consequences. This would render the limitations on collection set by the New York legislature and courts a dead letter and inject chaos into a system that these laws are intended to avoid. Reversing the district court's decision, on the other hand, will not result in a windfall or cause undue harm to the Appellees as they claim. The territorial limitations on a marshal's execution authority are clearly spelled out in the statutes and law that is ignored by GTR and Marshal Biegel in practice and in their Briefs. Creditors and marshals can avoid liability by simply complying with these laws. At time when order is increasingly necessary amidst growing chaos, GTR and Marshal Biegel should not be reward for violating them. Accordingly, this Court should reverse the Opinion of the district court and grant summary judgment to the Receiver.

LEGAL ARGUMENT

I. APPELLEES IGNORE CLEAR NEW YORK COURT OF APPEALS PRECEDENT IN ARGUING THAT THE RECEIVER LACKS DAMAGES.

A. GTR and the Marshal's attempts to enforce the Judgment were clearly void, and void process is a legal nullity, necessitating the return of all funds taken thereunder.

The Receiver has suffered damages. In levying upon FutureNet's funds located in Michigan, GTR and the Marshal committed a void act, and the remedy for a void act is to restore its victim to the position it was in before the act's commission. *See* Receiver's Brief at Point I. GTR and the Marshal's acts were void because a marshal's power to levy is purely a creature of statute. *Ioris v. N.Y.*, 96 Misc. 2d 955, 958-59 (N.Y. Sup. Ct. 1978). When a marshal acts beyond the scope of his statutory authority, his acts are void. *Ettinger v. Wilke*, 79 Misc. 2d 387, 388 (N.Y. Civ. Ct. 1974); *Yeh v. Seakan*, 119 Misc. 2d 681, 684-85 (N.Y. Sup. Ct. 1983); *Schleimer v. Gross*, 46 Misc.2d 931, 933 (N.Y. Sup. Ct. 1965). A marshal's jurisdiction is limited to the territorial limits of the New York City. CCA §§ 1609(1)(a),(b). Further, a marshal may only levy funds through personal service. CPLR § 5232(a).

It was undisputed below that, acting at GTR's direction, Marshal Biegel failed to comply with CCA §§ 1609(1)(a) and (b) and CPLR § 5232 by serving the Levies on Comerica (1) outside the geographic boundaries of New York City, (2) by mail and fax, and (3) through an individual other than the Marshal. (JA 53, 61-77.) For

these reasons, the Levies were void. *See People ex. rel. v. Snell*, 216 N.Y. 527, 534 (1916) ("[C]ompliance with the commands of a mandatory statute" such as CPLR § 5232(a), "is a condition precedent to the validity of any act or determination under it.").

The New York Court of Appeals has made clear that a void act is a legal nullity, and that the remedy for the taking of funds through void process is return of those funds. As explained at length in the Receiver's Brief at Point I, process that is issued without jurisdiction or authority is "an absolute nullity from the beginning." *Day v. Bach*, 87 N.Y. 56, 60 (1881). Void process "furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that [the process] should be set aside before bringing the action." *Id.*; *see also People ex. rel. v. Snell*, 216 N.Y. 527, 534 (1916) ("[C]ompliance with the commands of a mandatory statute" such as CPLR § 5232(a), "is a condition precedent to the validity of any act or determination under it."); *Hilfer v. Board of Regents*, 283 N.Y. 304, 308 (1940) (same); *Fischer v. Langbein*, 103 N.Y. 84, 89-90 (1886) ("In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action."); *Silberstein v. Presbyterian Hospital in New York*, 96 A.D.2d 1096, 1096-7, 463 N.Y.S.2d 254, 256 (2d Dep't 1983) (citing *Day*) .

Marshal Biegel ignores the *Day* decision and GTR flagrantly misrepresents it by misleadingly citing language that addresses *regularly issued* process for the proposition that a judgment debtor must first void the underlying judgment before it recover seized funds. GTR Brief at 15. When process is irregular and void, as in the case here, a suit may be maintained *immediately* for return of funds taken thereunder without the need to first vacate the process by which it was obtained or the underling judgment. *Day*, 87 N.Y., at 60; *Fischer*, 103 N.Y., at 89-90.

B. The district court erred in relying on *Pagnotta*.

The district court erred in relying on the state trial court decision in *Bam Entm't LLC v. Pagnotta*, 2018 N.Y. Slip. Op. 28109, 59 Misc. D 906, 75 N.Y.S.3d 804 (Sup. Ct. Kings Cty. April 11, 2018) because that decision is inconsistent with clear Court of Appeals precedent. *Levin v. Tiber Holding Corp.,* 277 F.3d 243, 253 (2d Cir. 2002) (federal courts are not bound by decisions of state trial courts); *Connecticut State Federation of Teachers v. Board of Education*, 538 F.2d 471, 475 (2d Cir. 1976) ("[A]s definitive exposition of state law, these two unreported decisions by trial courts of general jurisdiction are not binding on us."); *see also Rodland v. Judlau Contr., Inc.*, 844 F. Supp. 2d 359, 363 (S.D.N.Y. 2012) ("A federal district court may give serious consideration to the opinion of an intermediate appellate court in the absence of a decision by the state's highest court. Indeed, such an opinion may be deemed to be presumptive evidence of state law. No such

presumption applies to state trial court opinions" (quoting *White v. Johnson & Johnson Prods., Inc.* 712 F. Supp. 33, 37 (D.N.J. 1989)). Indeed, this Court and the district court are bound to *disagree* with a state trial court decision where that decision is inconsistent with the opinion of the state's highest court. "[T]his Court, siting in diversity, must follow the holdings of New York Court of Appeals and must reject inconsistent rulings from its lower courts." *Levin,* 277 F.3d at 253. The district court's failure to do so below is precisely why its Opinion must be overturned.

Like the district court, GTR and Biegel's extensive discussions of *Pagnotta,* ignore that that *Pagnotta* runs afoul of long standing precedent from the New York Court of Appeals and other appellate courts concerning execution, levies and damages. *See* Point I A., *supra*, and App. Op. Br. at Point I. These cases make clear that when a marshal fails to act as required by statute, his actions are void and he and the creditor for whom he acts can be held liable to return the funds without vacating the process or the underlying judgment. *Day*, 87 N.Y., at 60; *Fischer*, 103 N.Y., at 89-90. By ignoring this precedent, the district court gave effect to a process that was void *ab initio* which is exactly what the New York Court of Appeals has held for more than 100 years is not permitted. *Day*, 87 N.Y. at 60; *Fischer*, 103 N.Y., at 89-90; *See also Vil. of Ft. Edward v. Fish*, 156 N.Y. 363, 374 (1989) ("[a]

void act is no act, and a void payment is no payment.").[2] Accordingly, Appellees' reliance on *Pagnotta*, like that of the district court, is unjustified. It is thus clear that the Receiver is entitled to damages for GTR and the Marshal's void acts.

C. GTR and the Marshal are not entitled to set-off.

While GTR and Marshal Biegel ignore or misleadingly cite controlling law concerning liability for a void execution process, *supra,* they dismissively address the district courts misapplication of the law of set-off. *See* GTR Brief at 19; Biegel Brief at 21, n. 1). By claiming that FutureNet sustained no damages because the wrongfully seized funds were applied to the Judgment, the district court, like the *Pagnotta* court, applied one debt (liability arising out of the wrongful execution) against another (the debt arising out of the Judgment), which, by definition is a set-off or offset. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (Explaining that set-off "allows entities that owe each other money to apply their

[2] Contrary to Marshal Biegel's contentions (Biegel Br. at 17-20), the Receiver is not trying to create a new private right of action under New York statutes. New York law has always recognized a common law cause of action when a marshal or sheriff exceeds his authority. *See e.g., Day,* 87 N.Y, at 60; *Fischer,* 103 N.Y., at 89-90. The Receiver cites the CCA, CPLR and Marshal Handbook for the limitations of that authority, not for the proposition that they create a statutory cause of action. *See App. Op. Br.,* Point I. Like the *Pagnotta* court, Marshal Biegel's contentions ignore the settled law concerning the consequences of a void act by a public official. *See Snell*, 216 N.Y., at 534 ("[t]he mode or way in which an act shall be done or the determination reached prescribed by it must be strictly pursued otherwise the act or the determination will be *void*." (emphasis added)); *see also City of New York v. 10-12 Cooper Sq. Inc.,*7 Misc. 3d 253, 255, 793 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. 2004) (a public official is immune from liability only when he does not "do anything contrary to his official duty, or omit anything which his official duty requires to be done.") (citing *Matter of Whitman,* 225 NY. 1, 121 N.E. 479 (1918)).

mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A." (internal quotations and citations omitted)). As set for in the Receiver's Brief at pp. 36-40, liabilities arising from the wrongful taking of funds are not mutual and cannot be offset against liabilities arising out of a judgment. *Lines v. Bank of America Nat'l Trust & Sav. Ass'n,* 743 F.Supp. 176, 183 (S.D.N.Y. 1990) (internal citations omitted).

GTR's reliance upon *Salkey v. State Farm Life Ins. Co.*, 2019 N.Y. Misc. LEXIS 2222 (N.Y. Broome Cty. Sup. Ct. May 7, 2019) for a contrary position is misplaced. *Salkey* is easily distinguishable from this case, in that it (1) did not involve void process, as it involved a family court garnishment order and there were no allegations that the garnishment process was unauthorized, and (2) involved a suit against a bank that had complied with the garnishment order, not a public official who had acted *ultra vires* to serve process beyond his jurisdiction. Accordingly, *Salkey*, the only New York case cited by GTR, does not provide support for the proposition that, under New York law, any conduct, however void, can be forgiven if it is in pursuit of the collection of a valid debt. *Id.*

D. The Receiver has standing to bring a claim, because it suffered damages.

Marshal Biegel argues (1) that the Receiver lacked standing to bring this action, and (2) that the consequence of ruling in the Receiver's favor would be "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 consequence of its own actions." (Biegel Brief at 27).

Biegel's first argument is, once again, largely a retread of *Pagnotta*—Biegel claims that the Receiver lacks standing because he did not suffer injury, an argument shown above to be erroneous. As discussed above, the Receiver, stepping into the shoes of FutureNet, has suffered injury, in that the process used to enforcement the Judgment was void, irregular, and illegal. This Court has repeatedly held that "there is a low threshold" for establishing an injury in fact sufficient to give a plaintiff standing to sue. *Ross v. Bank of Am. N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2006) (citations omitted); *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 735 (2d Cir. 2017) (citations omitted). This threshold is satisfied by a "loss of even a small amount of money." *Czyweski v. Jervic Holding Corp.*, 137 S.Ct. 973, 983 (2017). Because Appellees' actions resulted in FutureNet's loss of over a hundred thousand dollars, the Receiver, stepping into the shoes of FutureNet, clearly has standing.[3]

Second, Biegel is incorrect in characterizing this action as an attempt to make Appellees liable for FutureNet's debt. Rather, the Receiver simply wishes to obtain the funds that unlawfully taken. The remedy for a void act, such as the ones

[3] Additionally, Biegel's arguments regarding FutureNet's secured creditors are simply an attempt to muddy the water, as the Receiver explicitly *does not* attempt to assert the injuries of FutureNet's creditors, but only the injuries of FutureNet. While the Receiver may seek to protect the *interests* of the secured creditors, the *rights* he asserts are clearly FutureNet's.

undertaken here, is to return the parties to their respective positions prior to the commission of the act. With respect to improperly obtained monies, "[a] void act is no act, and a void payment is no payment." *Fish*, 156 N.Y., at 374 (1898); *see also Faison v. Lewis*, 25 N.Y.3d 220, 222 (N.Y. 2015) (holding that an act found to be "void *ab initio*" is "a legal nullity at its inception" and has no legal effect). Thus, rather than making the Marshal liable for FurtureNet's debts, the Receiver is merely seeking to hold the debtor liable for his unauthorized and tortious acts.[4]

II. The *Rooker-Feldman* Doctrine does not apply to this case.

The district court was correct in finding that the *Rooker-Feldman* doctrine does not bar this action, as the Receiver complains of injuries caused by Appellee's illegal attempts to *enforce* the Judgment, not of injuries caused by the underlying Judgment. As this Court has recognized, "[i]n *Exxon Mobil*, the Supreme Court pared back the *Rooker Feldman* doctrine to its core holding that 'it is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544

[4] Similarly, the fact that GTR took affirmative actions that prejudiced its own position—applying the illegitimately taken funds to the Judgment, and having it marked satisfied—cannot turn a void act into a licit one. If this Court reverses the district court's ruling and grants the relief the Receiver seeks, GTR could seek to vacate the satisfaction.

U.S. 280, 283 (2005). This Court went on to recognize the four requirements for the application of *Rooker-Feldman*:

> 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.

Hoblock, 422 F.3d at 85. The *Rooker-Feldman* doctrine is inapplicable if even one of these conditions is unsatisfied. *See, e.g., McCrobie v. Palisades Acquisition XVI, LLC,* 664 Fed. Appx. 81, 83 (2d Cir. 2016) (failure to satisfy third requirement rendered doctrine inapplicable). The district court was correct in finding that the Receiver's action was not barred by *Rooker-Feldman* because the Receiver did not complain of injuries caused by the Judgment.

Claims based upon collection actions do not involve allegations of injury caused by state court judgments. *See, e.g., Sykes v. Bank of Am.*, 732 F.3d 399, 404 (2d. Cir. 2013) ("[Plaintiff] challenges only Defendants' levying against his SSI assets in his bank account . . . conduct which is wholly separate from the validity of the underlying order"); *Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, 277 F.Supp.3d 337, 355 (E.D.N.Y. 2017) (finding *Rooker-Feldman* inapplicable where Fair Debt Collection Practices Act class action claims were based on actions subsequent to the entry of state court judgments). This is because injuries are "produced" by a state court judgment *only* when they directly arise from "acts under

compulsion of a state-court order." *Johnson v. New York State Office of Child and Family Services*, Case No. 16-cv-1331 (LEK/DEP) U.S. Dist. LEXIS 206976, at * 10-11 (N.D. N.Y. December 18, 2017).

Here, the Receiver's damages were not "produced" by a state court judgment, because Appellees did not act under the compulsion of a state court order. The Judgment did not compel the Appellees to enforce it in any specific manner; rather, it authorized them to attempt its enforcement *in a manner prescribed by law*. If GTR and the Marshal had enforced the Judgment through solely lawful means—that is, if it had only taken actions consistent with the law of the State of New York—FutureNet would have suffered no injury. Rather, FutureNet's injury—and thus, the Receiver's injury—derives from GTR and the Marshal's void enforcement action. Appellees' failure to act lawfully was simply not "produced" by the Judgment. Accordingly, the district court was correct in finding that *Rooker-Feldman* does not bar this case.

Further, the Receiver did not ask the district court to "review and reject" a state court judgment. *Exxon Mobil Corp.*, 544 U.S. at 283. This Court's decision in *McCrobie v. Palisades Acquisition XVI, LLC*, 664 Fed. Appx. 81 (2d Cir. 2016) is directly on point. *McCrobie* involved a judgment debtor who sued a creditor for its post-judgment collection practices. This Court found that *Rooker-Feldman* did not preclude the judgment debtor's claims under the Fair Debt Collection Practices Act,

because "[t]he Plaintiff is not asking the federal courts to overturn the underlying state court judgment. Rather, he is alleging that their attempts to collect on that judgment violated a federal statute." *Id.at 83*. The fact that the state court judgment was "perfectly valid" made no difference to the *Rooker-Feldman* analysis, as the debtor's claims were related only to the collection process, and did not represent an attempt to overturn the judgment itself. Likewise, the Receiver does not, in this federal action, challenge or seek to vacate the underlying Judgment, but rather complains that Appellees used void and unauthorized process to enforce the judgment. Accordingly, the *Rooker-Feldman* doctrine does not apply.

Finally, the Receiver was not a state court loser. Neither the First nor Second Motion to Vacate constituted a final judgment for *Rooker-Feldman* purposes. In the First Motion to Vacate, the State Court found that FutureNet lacked standing to assert the procedural deficiencies raised by the motion and denied FutureNet's application "without prejudice" to the right of FutureNet to commence a plenary action to assert its claims. JA-71. The State Court's denial of FutureNet's application in the First Motion to Vacate thus did not constitute a final dispositive order. Similarly, in the Second Motion, the State Court denied the Receiver's motion to vacate the Judgment on *procedural grounds*, thus negating the need for the State Court to reach the Receiver's assertion that, upon vacatur, GTR should pay restitution to CPLR § 5240 due to its improper collection tactics. JA-240. Because

it had denied the motion to vacate, the State Court simply refused "to reach" the issue of whether the Enforcement Devices were proper. *Id.* Hence, the State Court's decision on the Second Motion did not constitute an order of disposition that could even trigger application of the *Rooker-Feldman* doctrine. *See Hassan v. Marks*, 735 Fed. Appx. 19, 19 (2d. Cir. 2018) (holding, where complaint dismissed for failure to prosecute, the *Rooker Feldman* doctrine was inapplicable).

III. The Court can consider the Receiver's arguments on the remaining issues.

GTR contends that this Court should not consider the Receiver's public policy and integrity of the court arguments because they were not raised before the district court. GTR Brief at 24-25. GTR is manifestly incorrect. *See* Receiver's Memorandum of Law, pp. 20-27, Doc. No. 28, and Receiver's Reply Memorandum, pp. 22-2, Doc. No. 49, *Simon v. GTR Source,* United States District Court for the Southern District of New York, Case No. 19-cv-01471 (JGK). Indeed, the false representations made by GTR's attorneys and Marshal Biegel in the Enforcement Devices were and remain a crucial component of the Receiver's argument, but were simply not reached by the district court in its Opinion because it incorrectly disposed of the summary judgment motions by finding that the Receiver lacked damages.[5] JA 505. Accordingly, they are not being raised for the first time on appeal.

[5] Nowhere in the Opinion does the district court contend the record is insufficient to opine on the alleged misrepresentations as GTR contends. GTR Brief at 25.

GTR's attempts to justification its actions on appeal are not persuasive. The law does not and, simply cannot, allow attorneys and marshals to misrepresent that New York has jurisdiction over a bank or assets when it does not. The CPLR "does not acquiesce in the issuance of an enforcement device by an attorney under CPLR article 52 merely by virtue of his right to passage. Rather, it contemplates a standard of practice encompassed by the phrase "officer of the court" which comports with both his education attainment and the ethical considerations promulgated by the New York Bar Association." *Save Way Oil Co. v. 284 Eastern Parkway Corp.,* 115 Misc. 2d 141, 145, 453 N.Y.S.2d 554, 557 (N.Y. Civ. Ct. 1982). GTR's attorney breached that standard by representing in the Restraining Notice (JA 27-28) and the Execution (JA 56) that New York had jurisdiction over Comerica when, in fact, it did not. GTR's attempts to now argue those representations were correct ring hollow.

A. The Separate Entity Rule is still good law, and is applicable to this case.

By operation of the separate entity rule, New York did not have jurisdiction to restrain and compel turnover of the Comerica Accounts. *See* Receiver's Brief at 43-45. Citing the dissent in *Motorola* (GTR Brief at 29), GTR misleadingly implies that the separate entity rule is arcane and no longer good law. *Motorola Credit Corporation v. Standard Charted Bank*, 24 N.Y.3d 149, 167-68 (2014).[6] Such is not

[6] GTR's citation to *Tire Engineering and Distribution L.L.C. v. Bank of China Limited*, 740 F.3d 108 (2d Cir. 2014) is similarly confused. This Court in *Tire Engineering* ***did not*** find that the separate entity rule was no longer good law; rather, it certified that question of its applicability to

the case. In *Motorola*, the New York Court of Appeals affirmatively ruled that far from being arcane and archaic, the separate entity rule remains good law. *Id.* at 149. *Motorola Credit Corporation v. Standard Charted Bank*, 24 N.Y.3d 149, 149 (2014).

The rule has been applied been applied to branches of domestic banks in other states and to restraining notices. *See WAG SPV I, LLC v. Fortunate Global Shipping & Logistics, Ltd.*, 2020 U.S. Dist. LEXIS 53864 (S.D.N.Y. Mar. 27, 2020) (rule applies to domestic banks located in other states); *Nat'l Union Fire Ins. Co. v. Advanced Emp't Concepts, Inc.*, 703 N.Y.S.2d 3, 4 (1st Dept. 2000) (applying rule to vacate a restraining notice that restrained a debtor's account in Florida). GTR's attempts to distinguish these cases is disingenuous.

In *WAG*, the court specifically recognized:

> [T]he logic of *Motorola* applies with similar force to domestic banks and their branches. As with international bank branches, branches located in different states are exposed to liability in legally distinct jurisdictions, are subject to different legal and regulatory regimes, and may not necessarily have access to one another's information.

WAG, U.S. Dist. LEXIS 53864, at *23. Similarly, in *Nat'l Union*, the Appellate Division, First Department, specifically vacated a restraining order served upon a

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the New York Court of Appeals, which subsequently answered the question in *Motorola*. *Id.* at 117-18.

New York branch to restrain a debtor's funds in a Florida branch. *Nat'l Union,* 703 N.Y.S.2d, at 4. In so doing, the court specifically rejected the very arguments raised by GTR. *See id.* ("To the extent that the petitioner requests that we extend the holdings of *Digitex, Inc. v. Johnson*, 491 F. Supp. 66 (S.D.N.Y. 1980) and *Limonium Mar. v. Mizushima Marinera*, 961 F.Supp. 600 (S.D.N.Y. 1997) to encompass all of a bank's branches, notwithstanding their physical location outside of this jurisdiction, we decline to do so and note that such an extension would require, in our view, a pronouncement from the Court of Appeals or an act of the Legislature."). Fourteen years later, the *Mortola* court affirmatively cited *Nat'l Union* in recognizing the validity of the separate entity rule. *Motorola* 24 N.Y.2d, at 158.[7] Hence, the separate entity rule remains good law and specifically provides that New York has no jurisdiction over the Comerica Accounts because they were located in a Michigan branch of a Texas bank.

B. The Receiver does not seek to raise New York's lack of personal jurisdiction over Comerica as a defense; rather, he simply seeks to show that the Marshal and GTR made false statements.

GTR's claim that the Receiver cannot raise New York's lack of personal jurisdiction over Comerica as a defense mischaracterizes the Receiver's argument. GTR Brief at 33-34. The Receiver does not claim that it can step into Comerica's

[7] GTR's reliance upon *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009) is also misplaced. As noted by the *Motorola* court, *Koehler* did not address the separate entity rule. *Motorola*, 24 N.Y.S.2d, at 161 ("Notably absent from our decision in *Koehler* was any discussion of the separate entity rule.")

shoes and raise personal jurisdiction as a defense; rather, it merely argues that, in *representing* that New York had personal jurisdiction over Comerica, the Marshal and GTR made false and misleading statements.[8] That is, the Receiver complains of the *falsity* of the Marshal and GTR's *representations* to Comerica, but it does not actually seek to raise Comerica's personal jurisdiction *See, e.g., Baltazar v. Houslanger & Assocs., PLLC*, 2018 U.S. Dist. LEXIS 139375, at * 3-5 (explaining that judgment debtor can sue, *inter alia*, for serving a restraining notice on a New York branch of Bank of America, when judgment debtor's account was located in New Jersey).

C. Comerica's alleged consent to personal jurisdiction is irrelevant, because the relevant question is whether New York had jurisdiction over Comerica when the Marshal and GTR made their jurisdictional statements.

Comerica's compliance with the Marshal levies and GTR's restraining notice is irrelevant. The question at issue here is not whether New York *ever* acquired jurisdiction over Comerica; rather, it is whether the Marshal and GTR made misrepresentations in their jurisdictional statements. Further, Comerica's alleged subsequent consent to jurisdiction could not ratify the Marshal and GTR's acts, which are alleged to be void *ab initio* due to New York's lack of personal jurisdiction

[8] "The Restraining Notice, Execution and Levies were not served on the Michigan branch where the accounts containing the Funds were opened and maintained. As such, New York did not have jurisdiction over Comerica thereby making the jurisdictional statements in the Restraining Notice, Execution and Levies, false and misleading." Receiver Brief at 45.

over Comerica *at the time* they levied and restrained FutureNet's funds. *See Lipedes v. Liverpool & London & Globe Ins.*, 229 N.Y. 201, 209 (N.Y. 1920) ("A void contract or act, in law, is from its inception null—a nothing—it cannot be ratified or confirmed and it cannot be the subject of disaffirmance or election). For these reasons, Comerica's alleged consent to jurisdiction is simply irrelevant.

D. New York did not have general jurisdiction over Comerica.

In response to the clear Supreme Court precedent that, in the absence of exceptional circumstances, a state only has general jurisdiction over a corporation incorporated or with its principal place of business therein, GTR can marshal only a single unreported New York state trial court order, which contains no actual analysis of *Daimler. Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014); *World Global Capital, LLC v. Children First Home Health Care, Inc.*, 2019 N.Y. Misc. LEXIS 99 (Sup. Ct., Erie. Cnty. Jan. 10, 2019). The *World Global Capital* court—which this Court owes no deference on questions of constitutional law—merely made a conclusory pronouncement "that BB&T's contacts with New York are so continuous and systemic that they render it essentially 'at home' in New York, and therefore, qualify as an exceptional case pursuant to the United State Supreme Court's decision in" *Daimler*. *Id.* at *2. The court's order presents no further analysis of the issue. *Id.* Rather, the court simply adopted the creditor's counsel's proposed order—incidentally, the same counsel that now represents GTR—wholesale. *Id.* It is thus

impossible to know what contacts the Court considered sufficiently continuous and systemic to render BB&T at home in New York. This Court should not be persuaded by the fact that a state trial court, without explanation or analysis, may have aggrandized its own jurisdiction beyond constitutional limits at the bidding of GTR's counsel.[9]

GTR presents no reason to believe that Comerica's contacts with New York are sufficient to make it fall into the "exceptional case." The example of "exceptional case" that the Supreme Court offered was its previous ruling in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 436, 448 (1952). *Daimler*, 571 U.S. at 129. In *Perkins*, the Court held that Ohio had general jurisdiction over a foreign corporation when "its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities." *Id.* Further, it is far from obvious that *Perkins* represents a genuine exception to the rule that a corporation is subject to general jurisdiction only in its state of incorporation and at its principal place of business. The *Daimler* Court noted that Ohio possessed general jurisdiction over the foreign corporation because "Ohio was the corporation's principal, if temporary, place of business." *Id.* at 130 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S.

[9] It is also worth noting that the *World Global Capital* court mistakenly found that "guiding precedent does not extend the application of the 'separate entity rule' to domestic bank branches under the facts and circumstances applicable here."

770, 780 n. 11 (1984)). The contacts that GTR claims make Comerica subject to New York's general jurisdiction—the fact that it is registered to do business in New York, and has been party to lawsuits in New York Courts—fall far short of the extensive contacts involved in *Perkins.* Further, this Court has previously found that the fact that a corporation provides banking services in New York and is subject to New York regulators does not render the corporation subject to New York's general jurisdiction as an "exceptional case." *Johnson v. UBS AG*, 791 Fed. Appx. 240, 243 (2d Cir. 2019); *see also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 220, 226 (2d Cir. 2014) (finding foreign corporation's "substantial, continuous, and systematic" business in state did not create general jurisdiction); *Wilderness USA, Inc v. DeAngelo Bros. LLC*, 265 F. Supp.3d 301, 310-14 (W.D.N.Y. 2017) (foreign corporation's registration to do business in state is insufficient to establish general jurisdiction).

Finally, GTR's attempts to distinguish *Baltazar* are as flawed as its analysis of *Daimler*. GTR does not attempt to explain why the fact that the judgment debtor in *Baltazar* raised claims under the Fair Debt Collection Practices Act would have any impact on New York's general jurisdiction over the judgment creditor's bank branch. Indeed, the idea that New York's ability to assert general jurisdiction over a bank branch would vary based on the causes of action brought by its judgment creditor is simply nonsensical. *See Herbstein v. Bruetman*, 768 F. Supp. 79, 82

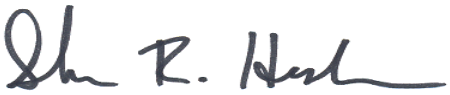
(S.D.N.Y. 1991) (distinguishing between general jurisdiction "where cause of action does not relate to the foreign corporation's activities in the forum state," and 'specific jurisdiction,' where such a relationship exists (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). For all these reasons, New York clearly lacked general jurisdiction over Comerica and the contrary statements contained in the Restraining Notice, Execution and Levies are plainly misrepresentations that should not, indeed, cannot be tolerated. *See Olmstead v. United States*, 277 U.S. 438, 484 (1928) (J. Brandies, dissent) (Adherence to the principal that a wrongdoer cannot provide from his abuse of the judicial system is necessary "to maintain respect for law; in order to promote confidence in the administrative of justice, [and] in order to preserve the judicial process from contamination.").

CONCLUSION

For all the foregoing reasons, the Receiver reiterates its request that the Opinion below be reversed and summary judgment be entered in favor of the Receiver.

Dated: New York, NY
August 19, 2020

Respectfully submitted,
WHITE AND WILLIAMS LLP



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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume of Fed. R. App. R. P. 32(a)(7)(B)(i) because this brief contains 6085 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

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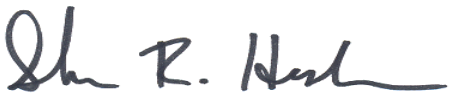
Dated: August 19, 2020

Respectfully submitted,
WHITE AND WILLIAMS LLP



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