To be Argued by:
ERIC J. BENZENBERG
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

AH WINES, INC/GREAT COLISEUM, L.L.C., THE/THE GREAT COLISEUM, L.L.C./GREAT COLISEUM, L.L.C. d/b/a Ah Wines/ LODI CITY WINERY/LODI WINE COMPANY/WINERY DIRECTION DISTRIBUTORS and JEFFREY WAYNE HANSEN,

Docket No.: CA 22-00220

Plaintiffs-Appellants,

– against –

C6 CAPITAL FUNDING LLC,

Defendant-Respondent.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants (i) AH Wines, Inc. ("AH Wines"), (ii) Great Coliseum, L.L.C., The, (iii) The Great Coliseum, L.L.C., (iv) Great Coliseum, L.L.C. *d/b/a* AH Wines, (v) Lodi City Winery, (vi) Lodi Wine Company, (vii) Winery Direct Distributors (collectively referred to with AH Wines as the "Business Plaintiffs"), and (viii) Jeffrey Wayne Hansen ("Hansen", and collectively with the Business Plaintiffs, "Plaintiffs" or "Appellants") respectfully submit this memorandum of law in support of their appeal from the order entered by the Supreme Court, Ontario County (Odorisi, J. Scott) (the "Trial Court") on January 18, 2022 (the "Order") (R-4-8), denying Plaintiffs' Motion for Summary Judgment ("Motion") (R-94-310) against Defendant-Respondent C6 Capital Funding LLC ("Defendant") and granting summary judgment to Defendant.

PRELIMINARY STATEMENT

This appeal is the result of an improperly applied statute of limitations, and the Trial Court' resulting failure to reach, and conduct, the proper analysis of a challenged merchant cash advance ("MCA") transaction, sometimes referred to as a "purchases of receivables" or "factoring agreement," arising from the MCA Contract (defined below).

With respect to the first issue—the statute of limitations applicable to the instant action—the action is not be governed by the one year limitations under CPLR

215(6) applicable to claims "seeking to recover any overcharge of interest"[1] because Plaintiffs did not pay any interest, nor sought to "recover any overcharge of interest," or seek to enforce a penalty for such an overcharge. *See* CPLR 215(6). Indeed, Plaintiffs, as a corporate borrower, cannot even assert a claim to recover any excess interest paid, but even if they could, the total amount Plaintiffs repaid to Defendant ($106,669.94) does not even satisfy the principal amount loaned by Defendant ($297,000.00). Thus, there is no *per se* overcharge to even collect. Moreover, the relief sought here is not subject to CPLR 215(6) given the Court of Appeals' holding that "a legal determination that a transaction governed by Section 5-511 is void *is not a penalty*." *Szerdahelyi v. Harris*, 67 N.Y.2d 42, 48 (1986) (emphasis added). Thus, *neither* triggering event for CPLR 215(6)'s application is present.

Although the usury affirmative defense is not subject to *any* statute of limitations, *see, e.g., Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820 (2d Dept. 1994) (distinguishing claims brought under usury claims and affirming that while claims seeking to recovery any overcharge of interest are subject to a 1-year statute of limitations [*see* CPLR 215(6)], the usury affirmative defense [*see* General

[1] CPLR 215(6) provides, in relevant part: "The following actions shall be commenced within one year:

[…]

6. An action to recover any overcharge of interest or to enforce a penalty for such overcharge…"

Obligations Law 5-511], "*are not subject to the Statute of Limitations*") (emphasis added),[2] should this Court find it necessary to apply a statute of limitations to the relief Plaintiffs' seek under CPLR 5015(a)(3), Plaintiffs respectfully contend that this issue has already been resolved by the Court of Appeals, and the standard is relief must be sought in a reasonable time, which is easily met here. *See Nash v. Port Auth. of N.Y. & N.J.*, 22 N.Y.3d 220, 226 (2013) (analyzing CPLR 5015(a), and finding that that while relief sought under subdivision (1) is subject to a 1-year requirement, subdivisions (2), (3) and (5) must only be brought within a "reasonable" time).

Having demonstrated that Plaintiffs' claims are, in fact, timely, and the Trial Court erred in failing to evaluate the true character of the at-issue MCA transaction to ascertain whether it is a loan subject to New York's usury laws, or a legitimate purchase of a business's receivables, exempt from the usury laws' interest rate limitations. With respect to that second issue, it is important to note that the Court

[2] *See also Clark v. Daby*, 225 A.D.2d 974 (3rd Dept. 1996) (distinguishing usury-based claims for monetary relief [*i.e.*, to recover any overcharge of interest] from the usury defense, and holding that CPLR 215(6) barred the non-corporate borrower's claim to recover excess interest paid more than 1-year before the action was commenced, but the lender's claim that borrower's "usury defense is barred by the Statute of Limitations is *meritless*") (emphasis added); *Murlar Equities P'ship v. Jimanez*, 2016 NY Misc LEXIS 3541 (Bronx Sup. Ct. Sept. 01, 2016) (citing *Szerdahelyi v. Harris*, 67 N.Y.2d 42, 50-51 (1986), when awarding summary judgment in favor of the borrower after finding the transaction imposed a criminally usurious interest rate and voiding a judgment *more than 7 years old* when the borrower did not seek recovery of any excess interest).

of Appeals has never confirmed, endorsed, or articulated a test or exhaustive list of factors to be applied or considered in such a determination:

> *First,* is there a valid and mandatory reconciliation provision that empowers the merchant to mandate an adjustment to repayment obligations based on its receivables? If the merchant-borrower has access to mandatory right to reconciliation, it weighs in favor of finding a valid MCA transaction. However, if the merchant cannot compel a reconciliation or the MCA company-lender can refuse the require or obstruct the reconciliation process, it weighs in favor of finding a loan.
>
> *Second,* does the transaction impose finite terms. Finite terms signal that the transaction is actually a loan because the MCA company's ability to collect is not actually contingent on the merchant's ability to generate and collect receivables. Indefinite terms, meanwhile, indicate that the transaction is actually contingent on the merchant's business—the essence of a valid MCA transaction.
>
> *Third,* does the MCA company have recourse should the merchant declare bankruptcy? If the MCA company has access to means to recover all monies owed under the transaction, even in the event the merchant declares bankruptcy, this signals the transaction is absolutely repayable and, therefore, a loan.

See, e.g., K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc. 3d 807, 816-17 (Westchester Sup. Ct. 2017) (discussing the three commonly applied factors); *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665-66 (2d Dept. 2020) (same); *but see Plymouth Venture Partners, II, LP v. GTR Source, LLC*, No. 73, 2021 NY LEXIS 2577, at *11 n.14 (December 16, 2021) (Wilson, J. dissenting) (noting that the transaction appears "less like [a MCA transaction] and more like a high-interest loan[] that might trigger usury concerns" when it did "not bear several of the hallmarks of traditional" purchases of receivables, similar to the transaction in dispute here).

Although the Court of Appeals has not affirmed a test or strict factors to guide such an analysis, it has *repeatedly* confirmed that when a transaction is challenged for being a usurious loan under New York law, courts *must* undertake a comprehensive analysis of the transaction. *See Bardwell v. Howe*, Cl. Ch. 281 (N.Y. Ch. Ct. Jan. 1, 1840); *Dry Dock Bank v. Am. life Ins. & Trust Co.*, 3 N.Y. 344, 359 (1850) (noting the court must look "at the whole transaction" when undertaking usury analysis); *Quackenbos v. Sayer*, 62 N.Y. 344 (1875) (holding when a court conducts a usury analysis, "[t]he transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it," as usurers will employ devices to evade the usury statutes); *Hartley v. Eagle Ins. Co.*, 222 N.Y. 178, 185 (1918) (holding that limiting a usury analysis to the form of the contract

would render New York's usury statutes "unenforceable," and that is why it is "the duty of the court in each case presented to examine into the substance of the transaction between the parties"). That holistic analysis does not stop at the four corners of the underlying contract for good reason: Usurers have an incentive to evade statutory prohibitions, and that limiting the analysis to the form of the contract will render such statutes "a dead letter." *Scott v. Lloyd*, 34 U.S. 418, 419 (1835); *see also Del Rubio v. Duchesne*, 284 A.D. 89, 92 (1st Dept. 1954) ("Devices of some ingenuity, as might have been expected, have been created in avoidance of [New York's usury laws], but when the devices have been seen beneath the color and shape of legal form to be truly usurious in function and purpose, the court has not withheld appropriate relief.") (collecting cases). Thus, courts must consider the transaction "in its totality and judge[] by its real character, rather than by the name, color, or form which the parties have seen fit to give it." *LG Funding*, 181 A.D.3d at 666; *see also Adar Bays, LLC v. GeneSYS ID, Inc*., 37 N.Y.3d 320, 334 (2021) ("When determining whether a transaction is a loan, *substance—not form—controls*.") (emphasis added); *Stockwell v. Richardson*, 101 N.Y. 643 (1886); *Qualis Care v. Everglades Regional Med. Ctr.*, 232 A.D.2d 323, 324 (1st Dept. 1996) (reasoning that a purchase of receivables may actually be a usurious loan due to evidence that the "defendant always treated the transaction like a loan"); *Silverstein v. Taubenkimmel*, 209 A.D. 710 (3d Dept. 1924) (holding that when evaluating claims

of usury, "[c]ourts always look to the actual nature of the transaction and not to the form which the parties may have given it"). To properly evaluate the substance and totality of the transaction, the alleged userer's dealings and acts, as well as the parties' dealings, must all be considered. *See Adar Bays*, 37 N.Y.3d 320; *Dry Dock*, 3 N.Y. at 359; *Quackenbos*, 62 N.Y. at 346; *Stockwell*, 101 N.Y. 643.

The MCA Contract's language, as well as the Parties' dealings here, demonstrate that the transaction is a usurious loan. The transaction *sub judice* bears the hallmarks of a loan subject to New York's usury laws, not a mere MCA; Defendant and its agents *treated the transaction like a loan*. The MCA Contract provided Defendant with the ability to control its risk of non-payment because the transaction documents specifically made the reconciliation provision permissive, instead of mandatory. For instance, Defendant imposed a fixed payment schedule onto Plaintiffs, rejecting a reconciliation request by Plaintiffs that was properly made and supported by financial documents demonstrating an entitlement to a reduced payment schedule. This, consequently, imposed a definite maturity date and interest rate, which annualized, exceeded New York's criminal usury statute. When Defendant refused to honor the reconciliation request, like a loan, Defendant treated Plaintiffs' inability to pay as a default, and promptly moved to enforce the confession of judgment to ensure complete recovery if AH Wines did ultimately declare bankruptcy. *See Merch. Funding Servs., LLC v. Volunteer Pharmacy Inc.*, 55 Misc.

3d 316 (Westchester Sup. Ct. 2016) (finding the true nature of a transaction was an usurious loan when the underlying agreement did not forgive the loan if the borrower was unable to collect receivables, the loan charged an annual interest of 167% with fixed payments over a defined period of time, and the agreement eliminated the risk of nonpayment and contingency), *rev'd on other grounds*, 179 A.D.3d 1051 (2d Dept. 2020) (holding that the proper procedure to vacate the judgment is by commencement of a plenary action). Further, the record contains evidence, including affidavits submitted by Defendant's President Brian Stulman, Director of Underwriting Bharat Gurdin, and Underwriter Paul Vega, demonstrating Defendant viewed and treated the transaction as a loan that imposes an annualized interest rate of 94.11% (*see e.g.*, R-178-181 [Affidavit of Brian Stulman] ["Stulman Aff."]; R-256-273 [Affidavit of Bharat Gurdin] ["Gurdin Aff."]; R-310-312 [Affidavit of Paul Vega] ["Vega Aff."]), in violation of New York's criminal usury law. *See* Penal Law 190.40.

Plaintiffs respectfully contend that it was reversible error for the Trial Court to: (i) apply CPLR 215(6)'s one year limitations period to the entirety of Plaintiffs' plenary action, including Plaintiffs' attempt to seek redress under CPLR 5015(a)(3); and (ii) fail to grant the Motion in Plaintiffs' favor on the ground that the transaction is a criminally usurious loan and thus void, requiring setting aside of the judgment of confession Defendant obtained against Plaintiffs. Indeed, Plaintiffs' claims are

timely, and no genuine issue of fact or law exists that would preclude finding the MCA transaction's true character a criminally usurious loan. Consequently, without reversal, the door for creative usurers to victimize businesses and other borrowers, such as Plaintiffs, will have been opened even wider.

In light of the foregoing and the reasons explained further below, the Trial Court's denial of the Motion should be reversed, and this Court should grant summary judgment to Plaintiffs or, in the alternative, remand the matter to the Trial Court to reach the remainder of the Motion.

QUESTION PRESENTED

Question 1: Did the Trial Court err when it applied the 1-year statute of limitations imposed by CPLR 215(6) to Plaintiffs' plenary action, including its seeking of relief under CPLR 5015(a)(3) predicated on the underlying MCA transaction being criminally usurious and void *ab initio* under New York law?

Answer: Yes, the Trial Court incorrectly held that CPLR 215(6)'s 1-year statute of limitations barred Plaintiffs' plenary-action, because the plenary action did not seek to "recover any overcharge of interest or to enforce a penalty for such overcharge." CPLR 215(6). Furthermore, relief under CPLR 5015(a)(3) must only be sought within a reasonable time, and Plaintiffs did commence the plenary action to vacate a judgment they had no prior knowledge of and had not yet been enforced in a reasonable time therefrom.

Question 2: Did Plaintiffs demonstrate that there was no question of material fact that the true character of the MCA transaction by and between Plaintiffs and Defendant was a criminally usurious loan?

Answer: The Trial Court did not reach this question, but Plaintiffs answer that "yes," the evidence presented to the Trial Court is sufficient to support a grant of the Motion and finding that the MCA Contract is a criminally usurious loan transaction under New York law. The record on appeal consists of the MCA Contract, Defendant's conduct, and Parties' dealings, and when together demonstrate the transaction is, in fact, a criminally usurious loan.

STATEMENT OF THE CASE

A. Plaintiffs and Defendant Enter Into the MCA Contract

Beginning in November 2018, Plaintiffs and Defendants entered into a series of agreements that together comprise the MCA Contract. First, on November 1, 2018, AH Wines and Defendant entered into what Defendant titled an "Agreement for the Purchase and Sale of Future Receipts" with Defendant, pursuant to which Defendant agreed to provide AH Wines with $300,000 (the "Purchase Price"), minus a $3,000 Origination Fee (resulting in a net financing of $297,000), in exchange for $426,000 (the "Purchased Amount") of AH Wines' future receipts received in "the ordinary course of [AH Wines'] business." *See* R-75-85, 90-92 [Agreement] ("Agreement"). Pursuant to the Agreement, the Purchased Amount would be repaid

through withdrawals on each and every business day from AH Wines' bank account in an amount equal to 15% of AH Wines' daily receivables (the "Specified Percentage"). Defendant estimated the initial amount to be $3,380.95 (the "Daily Amount") following a review of AH Wines' prior receivables generated in the ordinary courses of its business. In addition to acknowledging that Defendant was purchasing AH Wines' receivables, the Agreement also stated Defendant knowingly agreed to assume the risk of a downturn in AH Wines' business and, thus, the possibility that (i) payments could be "remitted more slowly than [C6] may have anticipated or projected," Agreement (R-75-85, 90-92) at ¶ 4, or (ii) that the full Purchased Amount would never be remitted if AH Wines' went bankrupt or otherwise ceased operations in its ordinary course of business. *Id.*

The Agreement also: (i) set forth a mutual right to reconciliation, providing Plaintiffs with the right to request once a month an adjustment to the Daily Amount so it would correspond with the Specified Percentage of Plaintiffs' eligible receivables, and that once a reconciliation was performed, the new daily payment amount would remain in effect until a subsequent reconciliation was performed (*id.* at ¶ 2) *and* that Defendant could adjust the Daily Amount, provided that Defendant first gave Plaintiffs' five business days notice before making such adjustment (*id.* at ¶ 2); (ii) granted Defendant a UCC security interest in AH Wines' "accounts" or "payments intangibles", as defined in the Uniform Commercial Code (*see id.* at

¶ 14.1); and (iii) detailed numerous Events of Default (*id.* at ¶ 15), and the remedies Defendant would be entitled to upon such a default, which included (1) demanding the full uncollected Purchased Amount, plus all fees and charges (including legal fees) due and payable in full immediately; (2) enforcement of the Personal Guaranty (defined below); (3) enforcement of all legal rights and remedies by lawsuit or arbitration, including filing of the Affidavit of Confession (defined below); and (4) enforcement of Defendant's rights as a secured party under the UCC. *Id.* at ¶ 16.

At the direction and request of Defendant, Plaintiffs and Defendant entered into three additional documents that complement and modified certain terms set forth in the Agreement. *First,* a Weekly Deliveries Addendum (*see* R-86 [Addendum]) ("Addendum"), which modified the repayment terms, from the Daily Amount (*i.e.*, 15% of AH Wines' daily receivables) to a fixed installment payment of $17,750 per week ("Weekly Installment"); *second,* a Personal Guaranty of Performance (*see* R-87-89 [Guaranty]) ("Guaranty"), which personally bound Hansen to "irrevocably, absolutely and unconditionally" guarantee AH Wines' performance (*id.* at B); and *third,* an Affidavit of Confession of Judgment (*see* R-28-33 [Confession]) ("Confession," and together with the Agreement, Addendum, and Guaranty, the "MCA Contract"), wherein each of the Plaintiffs "jointly and severally" confessed to entry of a judgment in the event Defendant, in its sole

discretion, deemed Plaintiffs were in default of the MCA Contract. *See generally* Confession.

On November 6, 2018, after the fully executed MCA Contract was delivered to Defendant, Defendant issued to AH Wines $297,000.

B. Defendant's Withdrawals Financially Cripple AH Wines

Starting on November 6, 2018 and continuing until January 23, 2019, Defendant made six withdrawals from AH Wines' bank account, with each withdrawal in the same amount of $17,749.99. *See* Gurdin Aff. (R-256-273) at ¶¶ 27, 33, and 43 and Exhibits 1 and 2 thereto. Accordingly, the total amount Defendant withdrew from AH Wines' bank account is equal to $106,994.94. *Id.* During December 2018 and January 2019, Defendant made the withdrawals in the fixed amount despite knowing that AH Wines' was experiencing financial difficulties and less than projected receivables. *See* Stulman Aff. (R-178-181) at ¶ 5; Gurdin Aff. (R-256-273) at ¶ 28.

Defendants' withdrawals of the fixed amounts (*i.e.*, the Weekly Installment), which had no relation to 15% of AH Wines' true receivables, imposed substantial financial difficulties onto AH Wines. Indeed, the monies withdrawn during (i) November 2018 equaled more than 19% of AH Wines' monthly receivables, and (ii) December 2018 equaled more than 27%—almost *double* the Specified Percentage. *See* Agreement (R-75-85, 90-92) at 1.

Plaintiffs communicated their financial hardship to Defendant on or about Dedcember 28, 2018. *See* Stulman Aff. (R-178-181) at ¶ 5. In response, Defendant—without conducting any review of AH Wines' receivables—arbitrarily reduced the Weekly Amount to a one-third withdrawal. *Id.*

AH Wines continued to experience financial difficulties in February 2019. On February 1, 2019, AH Wines communicated its request for a reconciliation and provided Defendant with supporting documentation—AH Wines' bank statements for January and February 2019. *Id.* at ¶ 8. Defendant did not request additional documents; however, Defendant did not reconcile the repayment amount. *Id.* Instead, Defendant attempted to withdraw the full Weekly Installment from AH Wines' bank account on (i) February 6, 2019, (ii) February 13, 2019, and (iii) February 20, 2019. *See* Gurdin Aff. (R-256-273) at ¶ 43-44 and Exhibit 1 thereto. The financial records AH Wines produced demonstrated AH Wines' entitlement to a severe downward reconciliation because AH Wines' receivables had severely decreased and, therefore, there were insufficient monies available to satisfy Defendant's withdrawals. *Id.* at ¶ 30; R-279-288 (Affidavit of Richard Gerlach, dated May 14, 2021 ["Gerlach May. Aff."] at Exhibits 1 and 2). Consequently, Defendant's attempted withdrawals of $17,749.999 on February 13th and 20th were both declined because of insufficient funds. *See* Gurdin Aff. (R-256-273) at ¶ 43.

C. Defendant Refuses to Reconcile, Claims AH Wines is in Breach, and Files the Confession

After refusing to reconcile the repayment obligation for the month of February, despite Defendant being obligated to do so (*see* Agreement [R-75-85, 90-92] at ¶ 4), on February 26, 2019, Defendant instructed legal counsel to file the Confession along with the supporting Affidavit of Paul Vega (*see generally* Vega Aff. [R-310-312]), an underwriter for Defendant, who claimed that AH Wines "defaulted on the terms of the Agreement" and that AH Wines "is still conducting *regular* business operations and still in receipt of accounts receivable," *id.* at ¶ 6 (emphasis added). No notice was given to Plaintiffs that Defendant filed the Confession.

On February 28, 2019, the Clerk for the Supreme Court of Ontario County entered a judgment by confession in favor of Defendant and against each of the Plaintiffs for $401,207.31, consisting of: (i) an outstanding balance of $319,330.06; (ii) $1,819.74 in interest accruing from February 13, 2019; (iii) statutory and filing fees of $15 and $210, respectively; (iv) and legal fees of $79,832.51. *See* R-154-158 [Judgment by Confession, dated February 28, 2019]) ("Judgment"). No notice was given to Plaintiffs that the Judgment was granted.

On October 11, 2019, Defendant attempted to domesticate the Judgment in California, the state in which Plaintiffs are located. *See* R-171-172 (Sister State Judgment).

D. Plaintiffs Commence the Plenary Action

On July 2, 2020, Plaintiffs commenced this plenary action by the filing of the Summons & Complaint. *See* R-15-27 (Complaint). On July 9, 2020, Plaintiffs filed an Amended Complaint (*see* R-50-63 [Amended Complaint]), which like the prior Complaint, generally alleged that (i) the transaction imposed by the MCA Contract renders it a criminally usurious loan that violates Penal Law 190.40 and General Obligations Law 5-521 and, therefore, should be declared void *ab initio*; and (ii) the Judgment was obtained as a result of criminal usury and accordingly should be vacated for the misrepresentation and misconduct of Defendant, pursuant to CPLR 5015(a)(3). Plaintiffs, however, did not assert a cause of action for damages to recover an overcharge of interest payments.

On July 9, 2020, Plaintiffs filed an Order to Show Cause to enjoin Defendant from enforcing the Judgment. *See* R-160-177 (Order to Show Cause) ("OTSC"). On July 13, 2020, the Trial Court granted Plaintiffs' request for a temporary restraining order and set forth the briefing schedule for Plaintiffs' request for an injunction. *See* R-176-177 (OTSC). Subsequently, on August 4, 2020, Defendant filed its memorandum in opposition, and on August 11, 2020, Plaintiffs filed their reply memorandum.

On August 18, 2020, the Trial Court issued its decision and awarded an injunction in Plaintiffs' favor. *See* R-220-233 (Decision) ("PI Decision"); *see also*

R-234-236 (Order). In the PI Decision, the Trial Court articulated that Plaintiffs demonstrated a likelihood of success on its claim for relief pursuant to CPLR 5015(a)(3) and, thus, a likelihood of success that the transaction underlying the MCA Contract is a criminally usurious loan, in addition to demonstrating that Plaintiffs faced irreparable harm and the equities lied in their favor. *See* PI Decision (R-220-233). That decision contained findings of fact indicating the loan is usurious.

September 17, 2020, Defendant appealed the PI Decision. Defendant's appeal was perfected on February 16, 2021. On March 18, 2021, Plaintiffs, as Respondents, filed their memorandum in opposition, and on March 29, 2021, Defendant filed its reply memorandum. On November 12, 2021, this Court rendered its decision on Defendant's appeal of the PI Decision, and vacated the injunction after concluding that Plaintiffs' failed to demonstrate irreparable harm. *See* R-435-436 (Appeal Decision).

Contemporaneously to the aforesaid appeal, on January 8, 2021, Plaintiffs filed their first motion for summary judgment. *See* R-238-239 (Plaintiffs' First Motion for Summary Judgment). Following briefing by both parties (*see* R-240-302), on June 15, 2021, the Trial Court rendered its decision, denying Plaintiffs' initial motion for summary judgment for procedural deficiencies. *See* R-303-307 (Decision on Plaintiffs' First Motion for Summary Judgment); *see also* R-308-309 (Order Denying Plaintffs' First Motion for Summary Judgment).

In response thereto, on July 19, 2021, Plaintiffs filed their second motion for summary judgment (*i.e.*, the Motion). On September 3, 2021, Defendant filed its opposition (*see* R-365-399 [Defendant's Memorandum of Law in Opposition]) (the "Defendant's Opposition Brief"), and on September 21, 2021, Plaintiffs filed their reply. *See* R-400-424 (Plaintiffs' Memorandum of Law in Reply)].

On January 18, 2022, the Trial Court issued its decision, denying the Motion and granting reverse summary judgment in favor of Defendant on the grounds that the plenary action was time-barred by CPLR 215(6). *See* R-5-7 (Decision on Plaintiffs' Second Motion for Summary Judgment) ("Decision").

On January 26, 2022, Plaintiffs filed their Notice of Appeal to the Decision. *See* R-1-2 (Notice of Appeal).

STANDARD OF REVIEW

A. Statutory Interpretation

An appellate court applies a *de novo* standard in answering a question of pure statutory interpretation. *Jones v. Bill*, 10 N.Y.3d 550, 553 (2008).

As a general proposition, courts need not look further than the unambiguous language of the statute to discern the statute at issue's meaning. *Id.* at 554 (citing *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000)).

B. Review of Summary Judgment

An appellate court applies a *de novo* standard in reviewing the grant or denial of summary judgment. *See Rothouse v. Assn. of Lake Mohegan Park Prop. Owners, Inc.*, 15 A.D.2d 739, 739 (1st Dept. 1962).

It is well-settled that summary judgment is a drastic remedy which should not be granted lightly. It should be denied where "there is doubt as to the existence of a triable issue or when the issue is arguable since issue-finding, rather than issue-determination, is the key to the procedure." *Falk v. Goodman*, 7 N.Y.2d 87, 91 (1959) (internal citations omitted). "This drastic remedy should not be granted where there is any doubt as to the existence of [material and triable] issues, or where the issue is arguable." *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 (1968).

The moving party bears the burden to dispel such doubts and to prevail it must "tender[] sufficient evidence to eliminate any material issues of fact from the case" and show that the undisputed facts mandate judgment in its favor. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). The movant must present evidence that would be admissible at trial, such as affidavits based on personal knowledge and may not include hearsay or other incompetent evidence. *See, e.g., Hernandez v. New York City Transit Auth.*, 210 A.D.2d 95 (1st Dept. 1994) ("evidence given by the Transit Authority employees, based upon unsubmitted,

unidentified Transit Authority records rather than personal knowledge, was legally insufficient"); *accord Mack v. Arnold Gregory Mem. Hosp.*, 456 N.Y.S.2d 560, 560-61 (4th Dept. 1982).

ARGUMENT

I. CPLR 215(6) IS INAPPLICABLE TO PLAINTIFFS' PLENARY ACTION WHERE THE AFFIRMATIVE DEFENSE OF CRIMINAL USURY, WHEN USED AS A PREDICATE VIOLATION IN A PLENARY ACTION, IS RAISED

Plaintiffs' plenary action is neither governed nor time-barred by the one-year limitations period under CPLR 215(6). This Court should reverse the Trial Court's erroneous application of the 1-year statute of limitations imposed by CPLR 215(6) to this plenary action—commenced pursuant to what some consider to be an outdated, judicially-created requirement[3] that abrogates the statutorily provided means of vacating judgments by motion (*see* CPLR 5015(a)) and deprives the judgment-party from interposing affirmative defenses—seeking to vacate a confession of judgment obtained pursuant to a criminally usurious loan issued to a corporate borrower. *See Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 588-89 (1981) (analyzing New York's criminal usury law, the amendment to General Obligations Law 5-521(3) that provided corporation with a defense "vital

[3] *See Smith v. Kent*, 259 A.D. 117 (1st Dept. 1940) (mandating that a plenary action be commenced to vacate a judgment *20 years before* the enactment of CPLR 5015(a), which the Legislature enacted so a party seeking to vacate a judgment to do so *by motion*, where an affirmative defense [*e.g.*, the criminal usury defense] could be properly raised as an affirmative defense).

in curbing the loan-shark racket as a complement to the basic proposal creating the crime of criminal usury," and concluding with that "*it would be most inappropriate to permit a usurer to recover on a loan for which he could be prosecuted*") (emphasis in original); *accord Norman Goldstein Assoc. v. Bank of N.Y.*, 204 A.D.2d 288, 289 (1994) ("[T]he laws against usury are designed to give protection to the borrower against the overreaching of the lender…"). Correcting this misunderstanding is necessary to prevent the victimization of Plaintiffs, and other corporate borrowers, who merely seek to invoke an affirmative defense that has been neutered by decisions Plaintiffs respectfully contend were misapplied, incorrectly decided, or both, as the Court of Appeals recently did in *Adar Bays*. *See id.* at 37 N.Y.3d at 343 (answering certified question by rejecting numerous incorrect rulings made by state and federal courts and holding that a bargained-for right to convert debt at a discounted price pursuant to a convertible loan transaction is, in fact, interest and must be accounted for in a usury analysis).

A. The Criminal Usury Defense

New York's usury prohibitions, which extend back to 1717, were enacted to protect against "one of the most heinous, virtually bloodsucking criminal activities of all times." *Hammelburger v. Foursome Inn Corp.*, 437 N.Y.S.2d 356, 360 (2d Dept. 1980), *aff'd* 54 N.Y.2d 580 (1981). Over the years, New York's usury laws went through various revisions concerning the interest rate cap and the remedies

provided thereby. *See Adar Bays*, 37 N.Y.3d at 327 (explaining, in connection with providing history of New York's usury prohibition, that in 1787, the Legislature amended the usury laws, making 7% the maximum lawful rate and eliminating a treble damage provision. But most relevant here is the amendment enacted in 1850, when the legislature prohibited corporate borrowers from raising usury (*id.* at 330), which resulted in corporate borrowers remaining unprotected by New York's usury prohibition for the next 115 years. *Id.*

In 1965, the Legislature enacted a new provision of the Penal Law, penalizing the imposition of more than 25% interest per annum as a felony in the second degree. *Id.* at 331. The Legislature also restored the corporate *defense* of usury, but only as to loans or forbearances that imposed interest in excess of the criminal usury rate. *Id.* (*citing* L 1965, ch. 328; Penal Law 190.40; General Obligations Law 5-521(3)).

B. Corporate Borrowers Cannot Seek to Recover Any Overcharge of Interest or Enforce a Penalty for Such Overcharge

Although the Legislature provided corporate borrowers with a much needed shield to protect themselves against toxic, predatory loans that imposed criminally usurious interest rates, it *did not* equip corporate borrowers with the ability to seek monetary damages or enforce penalties against usurers. *Compare* General Obligations Law 5-513 (granting monetary relief only to persons who paid or delivered any sum or value greater than the amount permitted by General Obligations Law 5-501 [*i.e.*, the civil usury statute]), *with* General Obligations Law

5-521(3) (providing corporations with the right to raise the criminal usury defense, set forth in Penal Law 190.40); *accord Adar Bays*, 37 N.Y.3d 320 (interpreting New York's usury laws and confirming that General Obligations Law 5-521(3) provides corporate borrowers with the right to have court's declare criminally usurious loans void *ab initio*); *see also Intima-Eighteen, Inc. v. A.H. Schreiber Co.*, 172 A.D.2d 456, 457-58 (1st Dept. 1991) (holding that the criminal usury statute may be used to prevent enforcement of an unlawful transaction imposing interest exceeding 25% per annum, but may not "be employed as a means to effect recovery by the corporate borrower") (citing *Hammelburger*, 54 N.Y.2d 580, and *Schneider v. Phelps*, 41 N.Y.2d 238, 242 (1977)).

C. Plaintiffs Did Not Even Repay the Principal Amount Loaned And, Therefore, Could Not Assert a Claim For an Overcharge of Interest

"[W]here the statutory language is clear and unambiguous, the court should construe the statute to give effect to the plain meaning of the words used." *Eaton v. New York City Conciliation & Appeals Bd.*, 56 N.Y.2d 340, 345 (1982) (collecting cases). A court should not turn to extrinsic matters when the language is "unambiguous and the meaning unequivocal." *Uniformed Firefighters Assn., Local 94 v. Beekman*, 52 N.Y.2d 463, 474-75 (1981); *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 76.

In *Rubin v. City Natl. Bank & Trust Co. of Gloversville*, 131 A.D.2d 150 (3d Dept. 1987), the Third Department evaluated and interpreted CPLR 215(6), and

found that the statute's language was clear and, consequently, the trial court erred when it turned to extrinsic matters—the statute's legislative history—when reaching its conclusion. *Id.* at 152-53.

In accord with *Rubin*, Plaintiffs do not contend that CPLR 215(6) is inapplicable to any action premised on usury. However, Plaintiffs do contend that CPLR 215(6)'s unambiguous language renders it inapplicable to their plenary action for two reasons.

First, Plaintiffs did not seek to recover any overcharge of interest because Plaintiffs did not even repay the principal amount loaned by Defendants. *Compare* Gurdin Aff. **(**R-256-273) at ¶ 46 ("To date, C6 has received $106,669.94 in purchased receivables from the Business Plaintiffs."), *with id.* at ¶¶ 2, 32 (stating Defendant performed by depositing the Purchase Price of $300,000). Therefore, it is undisputed by the parties that there is no *per se* "overcharge." *See* CPLR 215(6); *Rubin,* 131 A.D.2d at 152-53 (analyzing CPLR 215(6) and quoting Webster's definition of "overcharge," which means "a monetary charge *in excess* of the proper, legal, or agreed rate or amount"). This alone warrants reversal of the Order, as CPLR 215(6) could not have been triggered without Plaintiffs first being overcharged. *See* CPLR 215(6).

Second, the Court of Appeals has held that Plaintiffs' seeking to have the transaction (and accompanying MCA Contract) declared void *ab initio* is not a

"penalty" and, therefore, does not trigger the application of CPLR 215(6). *See Szerdahelyi*, 67 N.Y.2d at 48. More specifically, Plaintiffs' plenary action and its claim to vacate the Judgment does not trigger CPLR 215(6), as corporate-borrowers cannot employ New York's usury laws to recover monies paid[4] (*i.e.*, "recover any overcharge of interest"), and the Court of Appeals has strongly indicated that a claim to have a transaction declared a criminally usurious loan and, thus, void *ab initio* is *not a claim to enforce a penalty* for any overcharge of interest. *See Szerdahelyi*, 67 N.Y.2d at 48 (citing Black's Law Dictionary, noting that "[a] penalty is commonly understood to be the exacting of a sum of money as punishment for performing a prohibited act, or for not performing a required act," and holding that "*[a] legal determination that a transaction governed by section 5-511 is void is not a penalty* or a forfeiture") (emphasis added); *see also Adar Bays*, 37 N.Y.3d at 323-24 (holding that criminally usurious loans or forbearances are void *ab initio* pursuant to New York's usury laws); *Faison v. Lewis*, 25 N.Y.3d 220, 227 (2005) (statute of limitations does not make an agreement that was void at its inception valid by the mere passage of time).

[4] *Compare* General Obligations Law 5-513 (providing monetary relief to victims of civil usury [*see* General Obligations Law 5-501]), *with* General Obligations Law 5-521(3); *see Intima-Eighteen, Inc. v. Schreiber Co.*, 172 A.D.2d 456, 457-458 (1st Dept. 1999), *leave denied* 78 N.Y.2d 856 (1991) (explaining the statutory exemption that permits corporate borrowers to raise the affirmative defense of criminal usury, but the criminal usury defense may not be used by a corporate borrower "as a means to *effect recovery*") (emphasis added); *see also Zoo Holdings, LLC v. Clinton*, 814 N.Y.S.2d 893 (N.Y. Sup. Ct. 2006) (granting dismissal of a corporate-borrower's complaint that sought affirmative monetary relief from a criminally usurious loan).

Consequently, and for the reasons explained below (*see generally* Section I [addressing CPLR 5015(a)(3)]), the Trial Court erred when it misapplied CPLR 215(6)'s plain and unambiguous language and deemed Plaintiffs' claims time-barred by CPLR 215(6), notwithstanding Plaintiffs' reliance on CPLR 5015(a)(3)), denying the Motion, and granting reverse summary judgment in Defendant's favor pursuant to this Court's recent ruling in *Kennard Law P.C. v. High Speed Cap. LLC*, 199 A.D.3d 1406 (4th Dept. 2021) (affirming, without analysis or explanation, the trial court's sparse order and granting a defendant-MCA lender's motion to dismiss a plaintiff-corporate borrower's plenary action complaint as time-barred by CPLR 215(6)'s one-year statute of limitations, and appearing to largely overlook case law supporting the application of a longer limitations period where, as here, Plaintiffs seek redress under CPLR 5015(a)(3)); *cf. Mill St. Realty, Inc. v. Reineke*, 159 A.D.2d 494 (2d Dept. 1990) (finding plaintiff-borrower's action arising from a usurious loan agreement time-barred by CPLR 215(6) when the plaintiff commenced an action for return of real property and, therefore, sought to *recover* any overcharge of interest or to *enforce a penalty* for such overcharge).

D. Cases Applying CPLR 215(6) are Distinguishable, Deviate from the Statute's Clear and Unambiguous Language, or Contravene Court of Appeals Precedent

Because CPLR 215(6)'s application is factually specific, many of the recent decisions applying the 1-year statute of limitation are inappropriate. Moreover, they

are inconsistent with Court of Appeals precedent and purpose of New York's usury prohibition.[5]

In *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819 (2d Dept. 1994)**, the plaintiff-lender commenced an action against the defendant-borrower, an *individual* that, therefore, could assert a claim to recover overcharged interest—unlike a corporate-borrower. *Id.* at 819. The parties, apparently, did not dispute that the defendant was seeking recovery of interest payments over and above the legally allowable rate. *Id.* at 819-20. The court denied the plaintiff-lender's motion for partial summary judgment, noting that "affirmative defenses, such as usury under General Obligations Law 5-511, *are not subject to the Statute of Limitations*." (citing Weinstein-Korn-Miller, NY Civ. Prac. 203.25, at 2-142) (emphasis added). *Id.* at 820. The court, however, dismissed in part, and granted in part the defendant's counterclaim to collect the amount of interest that was collected in excess of the legally permitted rate. *Id.* Specifically, the court properly applied CPLR 215(6) to defendant's counterclaim to "recover any overcharge of interest," and denied defendant's collection of any interest that was paid more than one year before the counterclaim was interposed, but allowed defendant's counterclaim to recover any excess interest paid within one year of the time the counterclaim was interposed to

[5] Cases denoted by "**" are cases that were cited by Defendant in its memorandum of law in opposition to the Motion (*see* Defendant's Opposition Brief at 3-5) (R-365-399).

survive. *Id.* In sum, *Rebeil Consulting* is distinguishable in that the defendant, who was an individual and not a corporation, was permitted to employ New York's usury laws to effect monetary recovery, and the defendant asserted a counterclaim to recover excess interest paid.

In *Hawkins v. Eaves*, 134 A.D.3d 1221 (3d Dept. 2015)**, the plaintiff-borrower—an individual, unlike Plaintiffs—brought an action to recover excess interest paid on four separate loans that each charged a usurious rate. *Id.* at 1222. The court dismissed the plaintiff's action pursuant to CPLR 215(6) because *all* four of the loans were *fully repaid three years* before the commencement of the action. *Id.* Again, *Hawkins* can be distinguished from the instant matter in that plaintiff was an individual who is legally permitted to employ New York's usury laws to effect recovery, and asserted a claim to recover excess interest paid.

In *NRO Boston LLC v. CapCall LLC*, 2020 N.Y. Misc. LEXIS 4064 (Westchester Sup. Ct. 2020)**, the plaintiffs—two corporate-borrower and their owner—commenced a class action, alleging (i) violation of the federal RICO (Racketeer Influenced and Corrupt Organizations) law for collection of an unlawful debt,[6] (ii) conspiracy to violate RICO, (iii) vacatur of a confession of judgment, (iv) violation of Mass. Gen. Law ch. 93A §§ 2 and 11 (the Massachusetts Consumer

[6] Collection of an unlawful debt is a defined act and predicate violation for a RICO cause of action. *See* 18 U.S.C. §§ 1961(6) (defining "unlawful debt"), 1962.

Protection Statute) for engaging in unconscionable and unfair business practices, (v) wrongful execution of levies and demands, in contravention of CPLR 5232(a), and (vi) wrongful execution of a restraining notice. *See id.* at Index No. 037005/2019, Dkt. No. 1 (Summons and Complaint) at 23-42. The court applied CPLR 215(6), citing *Glassman v. Zoref*, 291 A.D.2d 430 (2d Dept. 2002) and *Rebeil*, 208 A.D.2d at 820, and dismissed plaintiffs' claim for vacatur of the judgment. *See* 2020 N.Y. Misc. LEXIS 4064 at *3.

CapCall can easily be distinguished[7] in that it based its application of CPLR 215(6) on authorities that are not even applicable to *CapCall*. As discussed above, *Rebeil* is inapplicable because it concerns an *individual* asserting a claim to recover excess interest and, therefore, CPLR 215(6) was applied in *Rebeil*. *See Rebeil*, 208 A.D.2d at 820. The underlying facts in *Glassman* mirror *Rebeil*. In *Glassman*, the plaintiff—an *individual*—asserted a cause of action to recover damages arising from a usurious loan. *See Glassman*, 291 A.D.2d at 431. The court noted that while the usury defense could be asserted in a separate proceeding, *plaintiff's claim to recover damages* was time-barred by CPLR 215(6). *Id.* Thus, the *Glassman* court applied the 1-year statute of limitations. But for these reasons, the authorities relied upon

[7] Further distinguishable from *CapCall* is that Plaintiffs did not assert RICO claims. Plaintiffs decline to analyze whether CPLR 215(6) can bar a RICO claim—which has its own statute of limitations—simply because it is irrelevant to Plaintiffs' plenary action, which sought to vacate the Judgment pursuant to CPLR 5015(a)(3).

by the *NRO Boston* court do not even support its decision. Indeed, *CapCall*'s application of CPLR 215(6) was rejected shortly thereafter in *NRO Bos. LLC v. Yellowstone Capital LLC*, 72 Misc. 3d 267, 277-78 (Rockland Sup. Ct. 2021) (finding CPLR 215(6) inapplicable to plaintiffs' assertion of the criminal usury defense to vacate a judgment by plenary action, and instead finding, in accord with other courts that "have consistently held" the same, that relief under CPLR 5015(a)(3) must be sought within a "reasonable time"). *Accord Nash*, 22 N.Y.3d at 226.

In *American Res. Corp. v. C6 Capital, LLC,* Index No. 518051/2020 (Kings. Co. Sup. Ct. 2021)**, the plaintiffs—a corporate-borrower and its owner—commenced a plenary action to assert the criminal usury affirmative defense and vacate a confession of judgment obtained via a MCA transaction. Absent any explanation or analysis, the *American Res.* court blindly adhered to the flawed decision made in *CapCall*. The *American Res.* plaintiffs did not assert a claim to recover excess interest paid and, along with the reasons set forth above, the court's flawed reliance on *Rebeil* and *Glassman* demonstrates why *American Res.* is, likewise, flawed and should be disregarded.

Progressive Water Treatment, Inc. v. Yellowstone Capital LLC, 2021 BL 2577 (Erie Co. Sup. Ct. 2021)** continued this process of relying upon unsupportive authorities and misapplying CPLR 215(6). To explain, in *Progressive Water*, the

plaintiffs—a corporate-borrower, an affiliated entity, and its owner—commenced a plenary action to vacate a confession of judgment obtained pursuant to a MCA transaction. The *Progressive Water* court dismissed the plenary action solely relying upon *Rebeil*. In a perplexing manner, when making its flawed decision, the court acknowledged the distinguishing aspect between the two cases—that in *Rebeil*, the "plaintiff's claim … *to recover the interest they paid* in excess of the legal rate is barred by the one-year statute of limitations," 2021 BL 2577 at *4 (citing *Rebeil*, 208 A.D.2d at 820), whereas the *Progressive Water* plaintiffs made a claim for relief pursuant to CPLR 5015(a)(3). Thus, CPLR 215(6) was erroneously applied to the corporate-borrower's claim for equitable relief—vacatur of the judgment obtained by confession pursuant to CPLR 5015(a)(3).

In *A&A Fabrication & Polishing Corp. v. Funding Metrics*, 2021 N.Y. Misc. LEXIS 2317 (Westchester Co. Sup. Ct. 2021)**, the plaintiffs—a corporate-borrower and its owner—commenced a class action, alleging violation of the federal RICO law for collection of an unlawful debt and vacatur of a confession of judgment. *See* Index No. 50486/2021, Dkt. No. 1 (Summons and Complaint) at 22-27. Unlike the aforesaid authorities, *A&A Fabrication* was preceded by a *prior plenary action* brought by the plaintiffs that ended with entry into a stipulation of settlement with the defendant-MCA lenders two and half years earlier. *See* 2021 N.Y. Misc. LEXIS 2317 at *2. The court then cited *Rebeil* and *Mill St.* in support of finding that the

plaintiffs' claims were time-barred by CPLR 215(6). But as discussed above, *Rebeil* does not support this conclusion (*see Rebeil*, 208 A.D.2d at 820) [finding an individual's claim for collection of excessive interest paid on a civilly usurious loan barred by CPLR 215(6)]), nor does *Mill St.*, where the Second Department affirmed the trial court finding that the plaintiffs' claim for return of real property due to the underlying loan being a usurious transaction (*i.e.*, "to recover any overcharge of interest or to enforce a penalty for such overcharge" [CPLR 215(6)]) was time-barred by CPLR 215(6). *See* 159 A.D.2d at 494; *see also Szerdahelyi*, 67 N.Y.2d at 48 (holding "a legal determination that a transaction governed by Section 5-511 is void is not a penalty"). Again, the trial court's finding that CPLR 215(6) bars *all* usury based-claims, including those not brought within one-year is grossly flawed and absent support.

In the recently decided *Kennard Law P.C. v. High Speed Cap. LLC*, 199 A.D.3d 1406 (4th Dept. 2021),[8] the plaintiffs—a corporate-borrower and its owner—commenced a plenary action to raise the affirmative defense of criminal usury and have a confession of judgment the corresponding MCA transaction declared void *ab initio*. *See* Index No. 805626/2020, Dkt. No. 1 (Summons and Complaint). The Fourth Department affirmed, in an order without any explanation

[8] Defendant cited *Kennard Law* as supplemental authority to the Trial Court. *See* R-93.1-93.5 (Defendant's Letter of Supplemental Authority).

of its reasoning, the trial court order that had found, without any analysis, based on arguments focusing on CPLR 215(6) and glossing over CPLR 5015(a)(3), that Plaintiffs claims were subject to and time barred by CPLR 215(6)'s one year limitations period. The Court should now take the opportunity to clarify that *Kennard* is inapplicable to the case here, especially given the import of Plaintiffs' application for relief predicated under CPLR 5015(a)(3) and arguments related thereto that do not appear to have been raised or developed in *Kennard*.

In addition to the flawed application of CPLR 215(6), contrary to its plain and unambiguous language, the aforementioned authorities contradict Court of Appeals precedent. Specifically, in *Nash*, the Court of Appeals comprehensively evaluated CPLR 5015(a) when the Port Authority sought to vacate a judgment. *See* 22 N.Y.3d at 225. The Court systemically parsed through the subdivisions of the statute and found that *only* CPLR 5015(a)*(1)* is subject to a 1-year statute of limitations, whereas subdivisions "(2), (3) and (5) contain *no limitation of time*." *Id.*[9] Instead, relief under the aforesaid sections must only be sought within a "reasonable" time. *Id.* (citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:3).

[9] The Court of Appeal's decision in *Nash* adheres to the criminal usury defense, wherein no statute of limitations bars a corporate borrower from interposing the defense. *See Clark,* 225 A.D.2d at 975 ("Plaintiffs' claim that defendant's usury defense is barred by the Statute of Limitations is meritless."); *Rebeil,* 208 A.D.2d at 820.

In light of the Court of Appeals controlling precedent and the plain and unambiguous language of CPLR 215(6), it cannot be disputed that Plaintiffs commenced their plenary action within a reasonable time when (i) Plaintiffs were never notified or informed that Defendant filed the Confession or obtained the Judgment and (ii) Defendant never undertook any efforts to enforce the Judgment, and, therefore, Plaintiffs never had any knowledge or awareness of the Judgment. Indeed, the earliest point at which Plaintiffs were imputed with knowledge of the Judgment is when Defendant attempted to October 11, 2019, when Defendant attempted to domesticate the Judgment in California. Upon having knowledge of the Judgment, Plaintiffs compiled their financial resources, identified and retained a New York attorney, and commenced the instant plenary action within 1 year thereof. *See* Complaint (filed on July 2, 2020); *Murlar Equities*, 2016 NY Misc LEXIS 3541 (vacating a judgment obtained pursuant to a criminally usurious loan—imposing more than 31% but as much 65% interest per annum—*7 years after* it was granted after finding the movant sought relief under CPLR 5015(a)(3) in a reasonable time); *Wells Fargo Bank NA v. Podeswik*, 115 A.D.3d. 207, 235-36 (4th Dept. 2014) (vacating judgment under CPLR 5015(a)(3) when the movant sought relief in a reasonable time—one and a half years—after the judgment was entered); *cf. Green Point Sav. Bank v. Arnold*, 260 A.D.2d 543 (2d Dept. 1999) (finding the judgment-debtor failed to seek relief under CPLR 5015(a)(3) in a reasonable time when he

waited almost 4 years after he was served with a copy of the judgment). Accordingly, Plaintiffs' plenary action and the relief sought thereunder, including the Motion, are all timely and not barred by any statute of limitations.

II. PLAINTIFFS ARE ENTITLED TO VACATUR OF THE JUDGMENT PURSUANT TO CPLR 5015(a)(3)

A court may relieve a party from a judgment or order when the adverse party has engaged in "fraud, misrepresentation, or other misconduct." CPLR 5015(a)(3). False, untrue, and misleading statements constitute "misrepresentation" or "other misconduct" and warrant vacatur of a judgment. *See, e.g., Peterson v. Melchiona*, 269 A.D.2d 375, 375-76 (2d Dept. 2000) (vacating order pursuant to CPLR 5015(a)(3) when plaintiff made false statements to the court and, thus, engaged in "fraud, misrepresentation, or other misconduct"). Furthermore, courts have found that a judgment obtained through a criminally usurious transaction falls squarely within the meaning of "misconduct of an adverse party." *McNider Marine, LLC v. Yellowstone Capital, LLC,* 2019 N.Y. Misc. LEXIS 6165, at *15 (Erie Sup. Ct. November 19, 2019). As demonstrated below, these circumstances exist here: the true transaction underlying the MCA Contract is a criminally usurious loan.

Here, there is at least one reason—free from any triable issue of fact—evidencing that Plaintiffs' application for vacatur of the Judgment should be granted.

As explained in Section IV below, Defendant engaged in "fraud, misrepresentation, *or* other misconduct" (emphasis added) under CPLR 5015(a)(3)

when it lured Plaintiffs' entry into a criminally usurious loan transaction, pursuant to which the Judgment was obtained. *See NRO Bos. LLC v. Yellowstone Capital LLC*, 68 Misc. 3d 1229(A) (Rockland Sup. Ct. 2020) (denying the MCA issuer's motion to dismiss merchant's claim for vacatur of a judgment by confession when "intentionally misrepresenting the nature of a legally void and unenforceable transaction, in order to obtain relief from the court to collect upon the unenforceable debt, may constitute misconduct under CPLR 5015(a)(3)"); *McNider Marine*, 2019 N.Y. Slip Op. 33418, at *15*; see also Rockefeller v. Jeckel*, 161 A.D.2d 1090, 1091 (3rd Dept. 1990) (noting that a finding of usury by itself "implicates sufficient public policy considerations to justify vacatur … in the interest of justice"); *Blue Wolf Capital Fund II, LP v. Am. Stevedoring Inc.*, 105 A.D.3d 178, 184 (1st Dept 2013) (same). Obtaining a judgment for *more than $400,000* (excluding any additional interest thereon) against a business and its guarantor through a criminal act *unquestionably* constitutes the misconduct CPLR 5015(a)(3) sought to combat.

III. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFFS

Plaintiffs' claims are timely and, therefore, the Trial Court should have reached the merits of the Motion. Although summary judgment is a drastic remedy, it is appropriate when evidence presented shows the absence of factual and legal questions necessary to find the defendant liable for their wrongdoing. *See Andre v.*

Pomeroy, 35 N.Y.S.2d 361 (1974). When there is no genuine issue to be resolved at trial, summary judgment should be granted. *Id.*

A. There Is No Triable Issue of Fact That The Transaction's True Character Is a Criminally Usurious Loan

The MCA Contract's true nature is a criminally usurious loan for two reasons.

First, in *Plymouth Venture Partners, II, LP v. GTR Source, LLC*, No. 73, 2021 NY Lexis 2577 (December 16, 2021), the Court of Appeals evaluated two questions certified from the U.S. Court of Appeals for the Second Circuit. Although the comprehensive usury evaluation of a MCA transaction was not a central issue before the Court of Appeals, Judge Wilson (dissenting) noted that the MCA transaction in dispute did "not bear several of the hallmarks of traditional [MCA] arrangements," in that (i) the merchant did not sell any identifiable receivables to the MCA company, (ii) the MCA company did not actually collect any receivables; (iii) the MCA company received fixed daily withdrawals from the merchant's bank account regardless of whether or how much the merchant collected from or billed to its clients, and (iv) the MCA company did not bear the risk of nonpayment by any specific customer of the merchant. *Id.* at *11 n.14. Consequently, Judge Wilson found the transaction appeared to be less like a valid purchase of the merchant's receivables and, instead, "more like high-interest loans that might trigger usury concerns." *Id.* (citing *Adar Bays*, 37 N.Y. at 320).

The transaction at issue here shares *all* of the aforementioned troubling characteristics identified by Judge Wilson: (i) rather than buying specific, identifiable receivables from AH Wines, Defendant purchased a "Specified Percentage of the proceeds of each future sale made by [AH Wines]," consisting of all payments received "in the ordinary course of [AH Wines'] business," Agreement (R-75-85, 90-92) at 1; (ii) Defendant never actually collected any of AH Wines' receivables but, instead, made withdrawals from AH Wines' bank account of monies from unspecified sources (*see* Gurdin Aff. [R-256-273] at ¶ 6 [describing that Defendant does not actively evaluate and review a merchant's receivables, but, instead, makes fixed ACH withdrawals from the merchant's bank account]); (iii) Defendant never considered AH Wines' actual, current receivables when it made fixed withdrawals of $17,749.99 from AH Wines' bank account (*see* Stulman Aff. [R-178-181] at ¶¶ 5-9 [describing that in January 2019, Stulman arbitrarily approved, absent an review of AH Wines' receivables, one-third reduced withdrawals, and that after Plaintiffs provided Defendant with AH Wines' January and February 2019 receivables, Defendant proceeded to attempt to withdraw $17,749.99 on 3 separate occasions during February 2019 after AH Wines' bank statements were delivered]); and (iv) Defendant did not bear the risk of nonpayment by AH Wines' customers (*id.* at ¶¶ 7-10 [describing that Defendant knew of Plaintiffs' financial difficulties in February 2019, Plaintiffs delivered current bank

statements to Defendant on February 6, 2019, Defendant did not reconcile and, instead, attempted to withdraw the full $17,749.99, and filed the Confession on February 26, 2019]; Judgment [R-28-33]). The foregoing facts parallel Judge Wilson's concern and collectively demonstrate that Defendant guaranteed itself absolute repayment, rendering the transaction a loan that imposed a criminally usurious interest rate. *See Plymouth Venture*, No. 73, 2021 NY Lexis 2577; *see also Adar Bays*, 37 N.Y.at 320.

Second, all three of the factors commonly considered by New York courts—discussed in detail below—weigh in favor of finding the transaction's true character: a criminally usurious loan. *See K9 Bytes*, 56 Misc. 3d 816-17. Accordingly, the Judgment should thus be vacated pursuant to CPLR 5015(a)(3) and this Court's inherent ability to grant relief in the interests of justice. *See Nash*, 22 N.Y.3d at 225-26 (holding that CPLR 5015 works alongside the court's inherent ability "to grant relief from a judgment in the interests of justice"); *Ladd v. Stevenson*, 112 N.Y. 325, 332 (1889) (articulating that the court's power to relief from judgments is not limited to certain statutes, but, instead, the court has the power to exercise control over its judgments "upon the application of anyone for sufficient reason [and] in the furtherance of justice"); *see also Hammelburger*, 54 N.Y.2d. at 589-90 ("[I]t would be most inappropriate to permit a usurer to recover on a loan for which he could be prosecuted.").

1. The Reconciliation Right Is Illusory and Does Not Force Defendant to Reconcile Upon Plaintiffs' Request, As Demonstrated by Defendant's Conduct

The first and most heavily weighted factor considered when evaluating if a purported purchase of receivables is actually a disguised usurious loan is the right to a reconciliation, as a reconciliation provision that fails to empower the merchant to mandate, compel, or force the MCA company to reconcile signals that the transaction is a loan and not contingent on the merchant's receivables. *McNider Marine*, 2019 NY Misc LEXIS 6165, at *3-4 (collecting cases to demonstrate how numerous courts have found usurious loans disguised as MCA transactions when the underlying contract did not provide the merchant with the right to mandate a reconciliation, and finding this comports with the fact that a mandatory reconciliation provision concurs with the widely recognized principle of a true purchase of receivables: that the funding company accepts the risk of a downturn in the merchant's business); *Yellowstone Capital, LLC v. Jevin Inc. et al*, Index No. 802457/2017, Dkt No. 40 (Order) at *5 (Erie Sup. Ct. Oct. 6, 2017) (collecting cases and noting that numerous courts have found a mandatory reconciliation provision "a significant factor in determining whether the agreement should be characterized as a purchase of accounts receivable as opposed to a loan"); *K9 Bytes*, 56 Misc.3d at 811, 817. A legitimate reconciliation provision ensures that the MCA lender only receives the percentage of receivables that was bargained for; if the merchant

produces no revenues, then no payments are required. However, a reconciliation provision that does not empower the merchant to compel a reconciliation gives rise to an absolute right to repayment—*the essence of a loan*—that is immune from risk and secured from being put in hazard. *See Rubenstein v. Small*, 273 App. Div. 102, 104 (1st Dept. 1947); *Volunteer Pharmacy*, 55 Misc. 3d 316 (finding the true nature of a transaction was an usurious loan when the underlying agreement did not forgive the loan if the borrower was unable to collect receivables, the loan charged an annual interest of 167% with fixed payments over a defined period of time, and the agreement eliminated the risk of nonpayment and contingency); *Prof'l Merchant Advance Capital, LLC v. C Care Servs., LLC*, 2015 U.S. Dist LEXIS 92035, at *8 (S.D.N.Y. July 15, 2015) (finding the obligation to make a minimum weekly payment irrespective of the accounts receivable signals that the agreement at issue is a loan).

The MCA Contract does not provide Plaintiffs with a legitimate, mandatory reconciliation right—tipping heavily in favor of finding the transaction a criminally usurious loan—for two reasons. *First*, the Agreement (R-75-85, 90-92) does not impose compulsory language (*e.g.*, "must" or "shall") or require Defendant to perform a reconciliation within a defined period of time (*e.g.*, 48 hours after merchant's request) after Defendant's receipt of Plaintiffs' request. Consequently, while Plaintiffs' can make such a request, Defendant has the sole discretion to

determine when to adjust the Daily Amount. *Second*, the Addendum (R-86)—which modified the Agreement's repayment terms—diminishes (if not eviscerates) Plaintiffs' reconciliation right in that it plainly states that Defendant "*will* ACH Debit $17,750.00 … from [AH Wines'] Account on a weekly basis … *until* the Purchased Amount is delivered," *id*. There can thus be no reasonable dispute that the Addendum effectively neuters Plaintiffs' right to compel an adjustment of the Weekly Installment, rendering it illusory.

Viewing the deficient, illusory contractual language alongside Defendant's conduct—which *must* be considered by this Court as part of the holistic analysis mandated by the Court of Appeals—validates and reinforces this assessment of the transaction: Plaintiffs' could not compel a reconciliation despite informing Defendant of their ongoing financial hardship and providing Defendant's with bank statements demonstrating AH Wines' severely decreased, current receivables. *See* Stulman Aff. (R-178-181) at ¶¶ 7-8; Gurdin Aff. (R-256-273) at ¶ 43. Instead, Defendant's *refused to reconcile* and attempted to forcibly withdraw the full Weekly Amount from AH Wines' bank account, irrespective of AH Wines' receivables. *Compare* Gurdin Aff. (R-256-273) at ¶ 45 (claiming Defendant was unaware when it attempted to withdraw the full Weekly Amount that AH Wines had insufficient funds), *with* Stulman Aff. (R-178-181) at ¶ 8 (stating Plaintiffs delivered its January and February 2019 bank statements to Defendant on February 6, 2019) *and* R-283-

288 (Ex. 1 and 2 to Affidavit of Richard Gerlach, dated May 14, 2021) ("Gerlach May. Aff.") (together, the "Receivables"). Such conduct demonstrates the illusory nature of the reconciliation provision, and that the transaction's true character is a loan, subject to New York's usury laws. *See C Care*, 2015 U.S. Dist LEXIS 92035 at *8 (finding the obligation to make a minimum weekly payment irrespective of the accounts receivable signals that the agreement at issue is a loan); *see also Adar Bays*, 37 N.Y.3d at 334 (noting that "parties who are not directly exposed to market risk in the value of the underlying assets are likely to be lenders," similar to how Defendant was not exposed to the market risk of the underlying asset—AH Wines' receivables and fluctuations thereof—when it refused to reconcile, contrary to the essence of a valid purchase of receivables and in the face of Plaintiffs providing to Defendant bank statements demonstrating a clear entitlement to a substantial downward adjustment in the repayment obligation).

In an effort to explain its lending conduct, the Gurdin Affidavit repeatedly and disingenuously claims that Plaintiffs failed to make a "formal request," *see* Gurdin Aff. (R-256-273) at ¶¶ 8, 23, 28, 36, 44, apparently to suggest that Plaintiffs could have prevented the default had they submitted a "proper" reconciliation request. Notably, however, the MCA Contract does not impose or set forth such a

requirement.[10] *See* Agreement (R-75-85, 90-92) at ¶ 2 (stating that Plaintiffs may request a reconciliation "once a calendar month" and Plaintiffs ("agree[] to provide [Defendant] any information requested by [Defendant] to assist in this reconciliation"). Nor is there any dispute that Defendant had notice of Plaintiffs' prior reconciliation request by no later than December 28, 2018 (*see* Stulman Aff. [R-178-181] at ¶ 5), and thereafter Defendant reduced the payment rate thereafter—without requesting any supporting documentation—in a way that appeared divorced from any relation to Plaintiffs' receivables. *Id.* (approving a one-third reduced remittance absent review of AH Wines' banking statements, receivables, or other financial documents).

The MCA Contract's failure to empower Plaintiffs and Defendant's conduct, including its outright refusal to reconcile despite Plaintiffs' request being supported by current financials (which were not challenged by Defendant, nor was a follow-up request for additional documents made [*see generally* Stulman Aff. (R-178-181); Gurdin Aff. (R-256-273)]), prohibit any dispute that the Plaintiffs were not, in fact,

[10] Tellingly, the Gurdin Affidavit nowhere defines what "formal request" is required, and conveniently omits that no formal reconciliation request was required under the MCA Contract. Indeed, it could not given that the MCA Contract does not define or require a formal request, and Plaintiffs' requests were apparently sufficient to trigger a dialogue between the parties about reconciliation.

The Gurdin Affidavit also takes issue with Plaintiffs' claimed reasons for the decrease in AH Wines' receivables. *See* Gurdin Aff. (R-256-273) at ¶¶ 29, 37. That is a red-herring, however, because the truth here is that Plaintiffs do not need a reason for AH Wines' decreased receivables. Indeed, that is part of the risk that Defendant's accepted when purchasing AH Wines' receivables. *See* Agreement (R-75-85, 90-92) at ¶ 1.

equipped with a legitimate reconciliation right. *See McNider Marine*, 2019 NY Misc Lexis 6165, at *3-4; *Jevin*, Index No. 802457/2017, Dkt No. 40 (Order) at *5. In the absence of Plaintiffs' being equipped with a legitimate, mandatory reconciliation, the first factor heavily tips towards the transaction ultimately being found a loan.

2. The Transaction Imposed Finite Terms

The second factor is whether the transaction imposes a finite or an indefinite term. *See K9 Bytes*, 56 Misc.3d at 817. A true purchase of receivables does not impose an ending data because it cannot; the MCA company's ability to collect is entirely dependent on the contingent nature of the merchant's ability to generate sales and collect receivables from customers. *Id.*; *IBIS Capital Grp., LLC v. Four Paws Orlando LLC*, 2017 NY Misc Lexis 884, at *4 (Nassau Sup. Ct. March 10, 2017). This is a fundamental aspect and requirement of a valid purchase of receivables transaction—if the merchant generates sales and collects from its customers, repayment may be facilitated in an expedited time frame, but if the merchant cannot generate sales or collect from its customers, repayment could take years, if it at all (as the merchant could possibly declare bankruptcy due to the lack of sales or inability to collect its receivables). In contrast, an absolute right to repayment gives rise to definite terms, an identifiable maturity date, and an ascertainable interest rate. *Id.*

Overwhelming, undisputed evidence in the record shows that AH Wines' ability to generate sales and collect receivables from its customers had no bearing whatsoever on Defendant's collection of the Weekly Amount. Indeed, a comparison of AH Wines' receivables (*see* Receivables [showing an approximately *77%* decrease in AH Wines' receivables between November 2018—when the MCA Contracts were executed—and February 2019—when the Judgment was obtained]) and a schedule of Defendant's withdrawals (*see* Exhibit A to Gurdin Aff.] [R-270-271]) during the relevant period shows that Defendant's withdrawals were *never* contingent on AH Wines' ability to collect sales proceeds from its customers. This, however, is not surprising given that the MCA Contract signals Defendant's true intentions. *See* Addendum (R-86) (amending the repayment terms and now mandating that Defendant "*will* ACH Debit $17,750.00 … from [AH Wines'] Account on a weekly basis … *until* the Purchased Amount is delivered") (emphasis added).

The record likewise contradicts Defendant's expected suggestion that the arbitrarily modified repayment amount constitutes a valid reconciliation and, therefore, the transaction does not impose finite terms because its ability to collect was contingent on AH Wines' ability to collect revenues. *See* Defendant's Opposition Brief (R-365-399) at 16-17; *cf.* Stulman Aff (R-178-181) at ¶ 5. However, unlike a reconciliation, Defendant *never* considered and reviewed AH

Wines' receivables so it could modify the repayment obligation to correspond with the Specified Percentage. *See* Stulman Aff. (R-178-181) at ¶ 5 (stating that Plaintiffs contacted Defendant on or about December 28, 2018, to communicate the decreased cash flows, and Defendant approved a reduced one-third remittance not based upon any review of AH Wines' current or recent receivables). The arbitrary adjustment, likewise, was not contingent on AH Wines' ability to generate sales and collect revenues and, therefore, is analogous to a loan forbearance,[11] a common modification to the payment obligation under a loan that "contemplates some sort of deferral of payments or suspension of collection remedies, and the parties are free to define how it works." *In re Singer*, 469 B.R. 293, 298 (W.D.WI 2012).

Defendant's cannot dispute that they collected the Weekly Amount regardless of AH Wines' ability to generate sales and collect revenues therefrom. *See* Exhibit 1 to the Gurdin Aff. (R-270-271) and Gerlach May Aff. and Exhibits 1 and 2 thereto (R-279-288) (showing Defendant collected and subsequently attempted to collect the fixed Weekly Amount, even after AH Wines' bank statements demonstrated $6,586.61—*not $17,749.99*—represented 15% of AH Wines' current receivables).

Accordingly, the second factor further tips the transaction towards being a loan that imposed a 24-week repayment duration, a maturity date of April 18, 2019,

[11] A forbearance is the "act of refraining from enforcing a right, obligation, or debt." Black's Law Dictionary (9th ed. 2009).

and an annualized interest rate of 94.11% per annum—*approximately four times the maximum lawful amount* (Penal Law 190.40)—on Plaintiffs.[12, 13] *See K9 Bytes*, 56 Misc.3d at 801 (noting that a maturity date cannot be ascertained from a valid MCA because repayment is "contingent upon the merchant generating sales and those sales resulting in the collection of revenue."); *Merch. Funding Servs., LLC v. Realtime Carrier, LLC*, Index. No. 033639/16, Dkt. No. 38, at *4 (Rockland Sup. Ct. July 7, 2016) (calculating the maturity date using the repayment and daily payment amounts and explaining that if the challenged transaction were, in fact, a purchase of receivables, there would be no time limit "within which the Purchase Amount had to be paid, the calculation of an annual interest rate, the *sine qua non* for finding usury, *becomes impossible*") (emphasis added).

[12] *Id.* (detailing OID of $3,000).

[13] The 94.11% annualized interest rate is calculated by first deducting the $3,000 OID from the Purchase Price (*see Hammelburger*, 76 A.D.2d at 649 [holding that an original issue discount (OID) *must* be accounted for in a usury analysis]; *Murlar Equities*, 2016 NY Misc LEXIS 3541 at *3-4 [conducting a usury analysis and calculating the true interest rate after first deducting all fees and expenses and, thus, calculating the interest from the net amount loaned]), and then using the following formula:

(1 *divided by* Number of Weeks for Repayment) *multiplied by* ((Purchased Amount *divided by* $297,000 [the Purchase Price minus the $3,000 OID]) *minus* 1) *then multiplied by* 52 Weeks in a Year.

Applied to the facts at hand: (1 *divided by* 24 Weeks) *multiplied by* (($426,000 *divided by* $297,000) *minus* 1) *multiplied by* 52 *equals* 94.11%.

3. The Transaction Was Absolutely Repayable, Even In the Event of AH Wines' Financial Downturn, Failure, or Bankruptcy

The final factor is "whether the defendant has any recourse should the merchant declare bankruptcy." *K9 Bytes*, 56 Misc.3d at 818. When evaluating this third factor, numerous courts have held that the mere existence of a personal guarantee and confession of judgment weigh in favor of finding the transaction a loan, even when bankruptcy is excluded from the events of default. *See, e.g., Pirs Capital, LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 129 N.Y.S.3d 734, 740 (N.Y. Sup. Ct. 2020); *Realtime Carrier, LLC*, Index. No. 033639/2016, Dkt. No. 38 (Decision & Order), at *5 (finding an affidavit of confession of judgment weighed in favor of finding the transaction a loan and asking that if the MCA agreement was not a loan that provided the MCA company with an absolute right of repayment, then what exactly "were the Defendants [merchants] confessing" to); *Clever Ideas, Inc. v. 999 Rest. Corp.*, 2007 NY Misc Lexis 9248 (N.Y. Sup. Ct. October 12, 2007) (declining to dismiss merchant's usury defense when the court found substantially similar MCA transactions in dispute "are *clearly payable absolutely, and thus loans*" when the MCA issuer required the corporate-merchant and its individual owner to execute a personal guarantee and security interest in the merchant's property and any event of a default of the MCA contract would trigger full repayment, resulting

in a transaction with "no reasonable means of non-payment, and accordingly no risk of non-payment").

Courts have also found it troubling (and indicative of a transaction being a loan) when the underlying contract provides the MCA company with the ability to alleviate risk of non-repayment by being empowered, in their sole discretion, to declare a breach when a full payment is not made, and the MCA lender can seek *full and absolute repayment* through a personal guaranty and/or affidavit of confession. *See, e.g.*, *Pearl Capital Rivis Ventures, LLC v. RDN Const., Inc.*, 54 Misc.3d 470, 475 (Westchester Sup. Ct. 2016) (finding the true character of a purported "Merchant Agreement" that contemplated repayment of 15% of the merchant's receivables a usurious loan when the agreement eliminated risk by granting the MCA company the discretion and right to declare a breach and seek full repayment pursuant to the accompanying personal guaranty).

The reason why courts express concern over the aforementioned mechanisms is obvious. Although certain MCA agreements appear to exclude bankruptcy from their events of default (*see, e.g.,* Agreement [R-75-85, 90-92] at ¶ 4), this exemption is conditioned on the MCA company not declaring, *in their sole discretion*, a breach of the agreement. *See, e.g., id.* Consequently, the absolute repayment obligation survives when the MCA company declares—legitimately or illegitimately—any one of the numerous events of default, *including those that it may have created* (*e.g.*,

declaring the merchant is in breach for failure to remit the daily or weekly payment, when the merchant also submitted a reconciliation request that has not been honored).[14]

Indeed, the foregoing scenario is all too common as such repayment mechanisms (*e.g.*, affidavits of confession, personal guarantees, unbridled ability to declare breach and procure an unopposed judgment) opens the door for the heinous, toxic, loan-shark lending practices that the Legislature sought to curb when enacting the criminally usurious defense (*see Adar Bays*, 37 N.Y.3d at 331) (discussing that before the legislative amendment that permitted corporate borrowers to assert the criminal usury defense, usurious lenders—fully aware of the law—simply required formation of a corporate entity to evade New York's usury laws), as a merchant who is not equipped with the power to force a reconciliation and lacks sufficient receivables to timely remit the full payment amount faces a catch-22: (i) scuttling the borrowing business and immediately declaring bankruptcy to prevent the MCA company from enforcing the UCC security interest or power of attorney granted in the MCA agreement and/or the affidavit of confession and personal guarantee that

[14] Notably in this regard, the Vega Aff. makes no reference whatsoever to Plaintiffs providing Defendant with its bank statements that demonstrated an entitlement to a reconciliation that was never performed. *See* Vega Aff. (R-310-312). Instead, the Vega Aff. states in a conclusory manner that Plaintiffs "defaulted" on or about February 13, 2019—more than a week *after* Plaintiffs made its reconciliation request and provided Defendant with supporting bank statements. *Compare id.* at ¶ 6, *with* Stulman Aff. (R-178-181) at ¶ 8.

hold the merchant's guarantor personally liable; or (ii) preventing the MCA company from making further withdrawals—which often have no relation to the merchant's true and eligible receivables and, instead, are the same amounts initially contemplated—that stand to inflict fatal financial harm to the borrowing-merchant, which is immediately met with the MCA lender declaring an immediate breach and enforcing all mechanisms (*e.g.*, affidavit of confession of judgment, personal guarantee, UCC security interest) to ensure *repayment is absolute*, like a loan.

The MCA Contract possesses *all* of these troubling aspects (*see* Guaranty; Confession), in addition to a UCC security interest, and provides Defendant with the right to unilaterally declare a breach when the full amount is not remitted, regardless if a reconciliation was requested and not honored (as was the case here). *See* Agreement (R-75-85, 90-92) at ¶ 16 (Remedies).

In addition to the incriminating language of the MCA Contract, Defendant's conduct—which *must be considered*—demonstrates that Defendant employed mechanisms to ensure the transaction was absolutely repayable, *like a loan*. Specifically, when AH Wines first communicated to Defendant in January 2019 that it was experiencing financial hardship, Defendant did not perform a reconciliation. *See* Stulman Aff. (R-178-181) at ¶ 5. Instead, Defendant arbitrarily and temporarily reduced the repayment obligation. *Id.* Contrary to the plain terms of the MCA Contract, in February 2019, Defendant not only failed (or refused) to reconcile, but

also *did not* provide Plaintiffs with the *required* 5-business days' notice that it would modifying (*i.e., increasing*) the weekly payment amount from the arbitrarily reduced amount back to the full $17,749.99. *Compare* Agreement (R-75-85, 90-92) at ¶ 2, *with* Stulman Aff. (R-178-181) at ¶ 5 *and* Gurdin Aff. (R-256-273) at Ex. 1 (showing reduced withdrawals in January 2019, and attempted withdrawals of $17,749.99 starting on February 6, 2019—the same date on which Plaintiffs delivered AH Wines' January and February 2019 bank statements to Defendant, demonstrating an entitlement to a reconciliation).

Moreover, Defendant's noncompliance with the terms of the Agreement did not preclude them from declaring Plaintiffs in breach. *See* Vega Aff. (R-310-312) at ¶ 6 (stating on or about February 13, 2019, Plaintiffs defaulted on the Agreement); Stulman Aff. (R-178-181) at ¶¶ 8-10 (detailing how, during February 2019, Plaintiffs delivered bank statements to Defendant demonstrating financial hardship and an entitlement to a reconciliation, no reconciliation being performed, additional attempts by Defendant to withdraw the full Weekly Amount, and Defendant declaring Plaintiffs in default and instructing legal counsel to enforce the Guaranty). To the contrary, after Plaintiffs' bank statements depicted a dire financial situation, including the possibility that Defendant might be forced to wait years for full payment of the Purchased Amount (let alone repayment of the Purchase Price), Defendant undertook certain action to ensure recourse was *immediately* available if

Plaintiffs declared bankruptcy. Specifically, Defendant refused to honor Plaintiffs' reconciliation request and then made *numerous* attempts to improperly withdraw the Weekly Amount. *Compare* Stulman Aff. (R-178-181) at ¶ 8 (confirming that on February 6, 2019, Plaintiffs delivered to Defendant AH Wines' bank statements for January and February 2019 that showed AH Wines' "continued financial difficulties"), *with* Gurdin Aff. (R-256-273) at ¶¶ 43-44 (articulating that on February 6, 2019—the same date on which, per the Stulman Aff., *supra*, Defendant received AH Wines' January and February 2019 bank statements demonstrating an entitlement to a reconciliation and downward adjustment of the payment amount, Defendant attempted to withdraw $17,749.99 from AH Wines' account) and Exhibit 1 thereto (demonstrating that following AH Wines' delivery of its bank statements to Defendant on February 6, 2019, Defendant attempted to withdraw $17,749.99 on three occasions—February 6, February 13, and February 20). Unsurprisingly, Plaintiffs' lack of receivables made it financially impossible for Defendant to withdraw the full Weekly Amount. Defendant, despite having awareness and specific knowledge of AH Wines' financial situation and entitlement to a downward reconciliation, then declared Plaintiffs in default for failing to remit the Weekly Amount. *See* Stulman Aff. (R-178-181) at ¶¶ 9-10. Defendant ensured it would have recourse when it enforced the Confession and obtained the Judgment, ensuring that even if AH Wines' declared bankruptcy, Defendant would then be able to

squeeze the full Purchased Amount (plus default penalties and attorneys' fees) out of the Business Plaintiffs or Hansen, personally.

When viewed in its totality, the MCA Contract and Defendant's conduct make it apparent that, *like a loan*, Defendant never was exposed to the risk of non-payment as recourse—whether through the Confession, Guaranty, or UCC security interest—was available even if AH Wines declared bankruptcy. The third factor thus strongly leans in favor of finding the transaction here a loan, subject to New York's usury laws.

4. The MCA Contract Is A Criminally Usurious Loan

Once an evaluation of the transaction's true character reveals that it is a loan or forbearance of money, the court must then examine the transaction and value of all collateral being exchanged—money or property—in order to determine whether the transaction is usurious. *See Adar Bays*, 37 N.Y.3d at 320. "In determining whether a loan is usurious, 'interest' is construed broadly." *Id.* In order to demonstrate a loan is criminally usurious under New York law, the movant must establish that the lender (i) knowingly charged, took or received (ii) annual interest exceeding 25% (*see* Penal Law 190.40) (iii) on a loan or forbearance. *See id.* (citing Penal Law 190.40).

The Court of Appeals has held that when the transaction documents "show[] a rate of interest higher than the statutory lawful rate, it would be *immaterial whether*

the lender actually intended to violate the law. His *intent would be conclusively presumed*." *Freitas v. Geddes S & L Ass'n*, 63 N.Y.2d 254, 262 (1984) (emphasis added): *Norstar Bank v. Pickard & Anderson*, 155 A.D.2d 911, 911 (4th Dept. 1989) ("A lender will be held to have *knowingly* exacted excess interest if it intentionally charges or receives more than the legal rate for a loan; the lender *need not have the specific intent to violate the usury laws*.") (emphasis added); *see also Clark v. Daby*, 225 A.D.2d 974, 975 (3rd Dept. 1996) (collecting cases and finding intent was not at issue since the loan was usurious on its face); *Crawford v. Carlton*, 73 A.D.2d 530 (1st Dept. 1979) (holding that when a loan reserves an illegal rate of interest, the borrower's burden of proving a usurious loan is satisfied).

The transaction at issue here imposes an interest rate nearly four times the lawful maximum. Specifically, the true interest rate—after withholding all withholdings made by Defendant (*e.g.*, OID, processing fees, etc.)[15]—of the transaction is an annualized interest rate of 94.11%.[16] This *easily* exceeds the lawful maximum amount of 25% per annum, as set forth in Penal Law 190.40.

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[15] *See* n.13, *supra*.

[16] The interest rate is calculated as follows: *first*, all withholdings (*e.g.*, the $3,000 OID [*see* Agreement (R-75-85, 90-92) at 1]) are deducted from the principal (*i.e.*, the Purchase Price [$300,000]) to calculate the net financing ($297,000). The payment duration (24 weeks) is then calculated by dividing the repayment amount (*i.e.*, the Purchase Amount [$426,000]) by the Weekly Installment.

After calculating the net financing and payment duration, the net financing, repayment amount, and repayment duration are all inserted into the following formula to calculate an annualized interest rate:

Thus, Plaintiffs have conclusively established all three elements necessary for this Court to find the MCA Contract imposed a criminally usurious transaction.

CONCLUSION

For all the reasons stated above, the Trial Court improperly applied the CPLR 215(6) 1-year statute of limitations and, therefore, this Court should reverse, grant the Motion in Plaintiffs' favor, and vacate the Judgment.

First, (1 *divided by* Repayment Duration) *multiplied by* ((the Repayment Amount *divided by* the Net Financing) *minus* 1)

Second, the sum of aforementioned calculation is then *multiplied by* 100 to return a Weekly Interest Rate

Third, the Weekly Interest Rate is *then multiplied by* 52 (the Number of Weeks in a Year) to return the Annualized Interest Rate.

Applied to the facts at hand:

(1 *divided by* 24) *multiplied by* (($426,000 *divided by* $297,000) *minus* 1) *equals* 0.01809764

0.01809764 *multiplied by 100 equals* 1.80% (Weekly Interest Rate)

1.80% *multiplied by* 52 *equals* 94.106% interest per annum

Respectfully submitted,

Dated: March 9, 2022

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: March 9, 2022

ADDENDUM OF UNPUBLISHED CASES

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Majority Opinion >

SUPREME COURT OF NEW YORK, KINGS COUNTY

AMERICAN RESOURCES CORPORATION, QUEST ENERGY INC, ERC MINING INDIANA CORP, MCCOY ELKHORN COAL LLC, DEANE MINING LLC, KNOTT COUNTY COAL LLC AND QUEST PROCESSING LLC, Plaintiffs, - against - C6 CAPITAL, LLC, TVT CAPITAL LLC, CANNA BUSINESS RESOURCES LLC, EPRODIGY FINANCIAL, LLC, CAPITAL STACK LLC, ACH CAPITAL LLC, JUSTIN COOPER, DAVID COOPER, DAVID RUBIN, ANDREW FELLUS, BRIAN STULMAN, GREG IKHILOV AND FRAN HICKS, Defendants

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Index No. 518051/20

March 17, 2021, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRESENT: Hon. Leon Ruchelsman, JSC.

Leon Ruchelsman

Decision and order

The defendants have moved pursuant to CPLR §2221 seeking to reargue a portion of a decision and order dated December 16, 2020. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior order the defendants, merchant cash advance funding providers entered into a contract with plaintiffs whereby the defendants purchased $1,662,500 of plaintiff's future receivables for $1, 250,000. The parties further agreed the defendants would be able to obtain a weekly amount of $51,953.12 until the amount of $1,662,500 was fully paid. The court granted the plaintiffs request seeking an injunction to

vacate a confession of judgement on the grounds the loan may have been usurious because the agreement did not provide for an absolute reconciliation provision but rather only stated the funder "may" reconcile with the plaintiffs. The defendants seek to reargue a portion of that decision. Specifically, the defendants argue the court overlooked the fact claims are usury have a one year statute of limitations and the plaintiffs missed that deadline. Thus, there can be no causes of action based on usury in any event.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952 , 96 N.Y.S.3d 617 [2d Dept., 2019]).

Preliminarily, the defendants motion seeking to dismiss all defendants except C6 Capital LLC, Justin Cooper and David Cooper is granted. Furthermore, the defendant's request the plaintiff present an undertaking is granted and will provided in a separate order.

It is well settled that pursuant to CPLR §215(6) usury carries a one year statute of limitations. There really is no dispute the contract was executed on May 29, 2018 and the complaint was filed more than a year after that date. The plaintiffs argue that in the context of a motion to vacate a default any statute of limitations argument does not apply. In NRO Boston LLC v. CapCall LLC, [2020 BL 297924], 2020 N.Y. Misc. LEXIS 4064 [Supreme Court Westchester County 2020] the court dismissed a cause of action for usury where the lawsuit was filed more than one year after the contract was executed. The court specifically rejected the argument raised here that preventing the enforcement **[*2]** of the judgement has nothing to do with usury. In this case, the second cause of action is one for usury, since the events which give rise to that cause of action are barred it cannot proceed. To the extent McNider Marine LLC v. Yellowstone Capital, [2019 BL 451028], 2019 N.Y. Misc. LEXIS 6165 [Supreme Court Erie County 2019] reached a contrary conclusion the court declines to follow that portion of the decision.

Therefore, the motion to reargue is granted and upon reargument the motion seeking to dismiss the second cause of action is granted.

So ordered.

ENTER:

DATED: March 17, 2021

Brooklyn N.Y.

/s/ Leon Ruchelsman

Hon. Leon Ruchelsman

JSC

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Majority Opinion >

SUPREME COURT OF NEW YORK, ROCKLAND COUNTY

MERCHANT FUNDING SERVICES, LLC, Plaintiff, -against- REALTIME CARRIERS, LLC d/b/a REALTIME CARRIERS and ROBERT L. WILLIAMS III, Defendants. Index No.: 033639/16

033639/16

July 7, 2017, Decided

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE PRINTED OFFICIAL REPORTS.

For Plaintiff: VADIM SERABRO, ESQ., New York, NY.

For Defendants: AMOS WEINBERG, Great Neck, NY.

Hon. GERALD E. LOEHR, J.S.C.

GERALD E. LOEHR

DECISION AND ORDER

LOEHR, J.

Upon the foregoing papers, it appears that on August 16, 2016, Plaintiff, apparently an LLC with offices in New York and New Jersey, entered into a Secured *Merchant* Agreement with Defendant RealTime Carriers, a Georgia LLC. The nature of the Agreement is far from clear. On the one hand, it states that it is for the "purchase and sale of future receivables," specifically, the purchase and sale of $31,900 (the "Purchased

Amount") in future receivables for an up front payment of $22,000 (the "Purchase Price"), and that it shall not be construed as a loan, although the Purchase Amount was to be "paid" by the Defendants remitting to Plaintiff 15% (the "Specified Percentage") of its future receivables as received. Simultaneously with the execution of the Secured Merchant Agreement, Defendant executed an Addendum that provided:

> "By signing below, the Merchant hereby requests and acknowledges that the Specified Percentage shall be revised to $398.75 per business day (the "Daily Payment) which the parties agree is a good-faith approximation of the Specified Percentage, based on the Merchant's receipts due to [Plaintiff] pursuant to the Agreement.
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> * * *
>
> "At the Merchant's option, within five (5) business days following the end of a calendar month, the Merchant may request a reconciliation to take place, whereby [Plaintiff] may ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage. However, in order to effectuate this reconciliation, upon submitting the request for reconciliation to [Plaintiff] — but in no event later than five (5) business days following the end of the calendar month — the Merchant must produce any and all evidence and documentation requested by [Plaintiff] in it sole and absolute discretion, necessary to identify the appropriate amount of the Specified Percentage, the foregoing includes without limitation, any and all bank statements, merchant statements or other documents necessary to ascertain the amounts of the Specified Percentage, including login to the Merchant's bankaccout(s).
>
> "The Merchant specifically acknowledges that : (Ii) the Daily Payment and the potential reconciliation discussed above are being provided to the Merchant as a courtesy, and that [Plaintiff] is under no obligation to provide same, and (ii) if the Merchant fails to furnish the requested documentation within five (5) business days following the end of a calendar month, the [Plaintiff] shall not effectuate the reconciliation discussed above."

Defendant Williams, Defendant RealTime's principal, Guaranteed **[*2]** RealTime's performance under the Agreement and executed an Affidavit of Confession of Judgment on behalf of RealTime and himself in the amount of $31,900 (less any payments made), together with attorney's fees calculated to be 25% of such amount, and authorized the filing of same in this County — as well as in other counties.[1] On September 1, 2016, Plaintiff filed the Affidavit of Confession of Judgment in this Court, supported by Plaintiff's Affidavit that the Defendants breached the Secured Merchant Agreement by failing to remit the Specified Percentage of receivables, except one payment of $398.75, although Defendants were still in business and generating receivables. On the next day, the Clerk entered Judgment in the amount of $31,500.75 plus $7,875.31 in attorney's fees, with interest, costs and disbursements totaling $39,725.76. Defendants now move to vacate the Judgment, first and foremost, on the basis that the Secured Merchant Agreement is a usurious loan.[2]

Corporations may not assert a civil usury defense, but rather, may only assert a criminal usury defense (*Professional Merchant advance Capital, LLC v C Care Services, LLC*, [2015 BL 226423], 2015 WL 4392081 [SDNY 2015]). Penal Law § 190 prohibits any entity from knowingly charging interest on a loan at a rate exceeding 25%. Criminal usury can be a defense to a corporation — or to an individual who has guarantied a

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Majority Opinion >

SUPREME COURT OF NEW YORK, ERIE COUNTY

PROGRESSIVE WATER TREATMENT INC. D/B/A ORIGINCLEAR, ORIGINCLEAR INC. D/B/A ORIGINCLAER, and TENER R. ECKELBERRY, JR., Plaintiffs, v. YELLOWSTONE CAPITAL LLC, Defendants. Index No: 814628/2020

814628/2020

January 4, 2021, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

THE BASILE FIRM, P.C., Catherine P. McGovern, Esq., Of Counsel, Attorneys for Plaintiffs.

STEIN ADLER DABAH & ZELKOWITZ, LLP, Christopher R. Murray, Esq., Of Counsel, Attorneys for Defendant.

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice.

TIMOTHY J. WALKER

8TH JUDICIAL DISTRICT COMMERCIAL DIVISION DECISION AND ORDER

WALKER, J.

Plaintiffs, Progressive Water Treatment Inc. d/b/a OriginClear ("Progressive"); OriginClear Inc. d/b/a OriginClear ("OriginClear"); and Tener R. Eckelberry, Jr., have applied, pursuant to, *inter alia*, CPLR §6312(c) ,

for an order preliminarily enjoining Defendant, Yellowstone Capital LLC ("Yellowstone"), and/or its agents from taking any further action to enforce a certain judgment entered in this Court on November 7, 2018 (the "Judgment") (NYSCEF Doc. No. 7).

On December 4, 2020, this Court signed an Order to Show Cause (NYSCEF Doc. No. 21) which, *inter alia*, scheduled the return date of Plaintiffs' application for January 6, 2021 (by submission) and included a Temporary Restraining Order restraining and enjoining Yellowstone and/or its agents from taking any further steps to enforce the Judgment.

The Court (through its Court Clerk) uploaded the Order to Show Cause to the NYSCEF System at 3:34 p.m. on December 4, 2020. Thirty four (34) minutes later (at 4:08 p.m. on December 4, 2020), Yellowstone uploaded a Notice of Motion seeking an order dismissing this matter, which Yellowstone made returnable on December 23, 2020 (NYSCEF Doc. No. 22).

Plaintiffs objected to Yellowstone having made its motion to dismiss returnable prior to January 6, 2021, and sought to adjourn Yellowstone's motion to January 6, 2021, or thereafter. Yellowstone opposed such request. After consulting with the parties' respective counsel, the Court scheduled both applications for December 30, 2020, on submission via NYSCEF.

BACKGROUND

OriginClear and Progressive are in the water treatment business; Progressive is a wholly owned subsidiary of OriginClear; and Mr. Eckelberry is an authorized representative of Progressive and the CEO and Chairman of the Board of OriginClear.

Between 2016 and 2018, OriginClear operated at a deficit. In 2016, OriginClear's operating deficit exceeded $3.5 million, and the following year its operating deficit increased to almost $5.3 million. Consequently, in or about July 2018, OriginClear and Progressive sought out financial assistance to sustain the businesses. They were introduced toYellowstone by a broker for hard money lenders.

On July 19, 2018, Mr. Eckelberry, in his capacity as CEO of OriginClear and an authorized representative of Progressive, executed a Secured Merchant Agreement, pursuant to which Yellowstone would provide OriginClear and Progressive $150,000 in exchange for repayment over time in the amount of $224,850, **[*2]** at a rate of twenty-five percent (25%) of OriginClear and Progressive's receivables generated by the sale of their goods and services (NYSCEF Doc. No. 3).

Prior to, and as a condition of releasing such funds, Yellowstone required the execution of three (3) additional documents, including an Affidavit of Confession of Judgment (NYSCEF Doc. No. 4); a Security Agreement and Guaranty (NYSCEF Doc. No. 5); and an Addendum to the Secured Merchant Agreement (NYSCEF Doc. No. 6). Mr. Eckelberry signed these additional documents on July 19, 2018, in his capacity as CEO of OriginClear, as an authorized representative of Progressive, and in his individual capacity.

The Addendum modified the repayment terms of the Secured Merchant Agreement by replacing the twenty-five percent (25%) provision with a daily fixed withdrawal from OriginClear's bank account payable toYellowstone in the amount of $2,141. Such amount was intended as a good-faith approximation of 25% of

OriginClear and Progressive's eligible daily receivables.

Between July 24, 2018 and October 30, 2018, Yellowstone made sixty-nine (69) withdrawals from OriginClear's bank account, each in the agreed-upon amount of $2,141, resulting in $147,729 being repaid to Yellowstone. However, immediately thereafter OriginClear and Progressive ceased permitting Yellowstone to make the daily withdrawals, because they were experiencing negative cash flow and were unable to fulfill the obligations imposed under the Secured Merchant Agreement and Addendum.

On November 2, 2018, Yellowstone responded by filing with the Court, *inter alia*, the Affidavit of Confession and a supporting affidavit claiming that $145,588 had been repaid (i.e., $2,141 less than what OriginClear and Progressive claim was repaid).

On November 7, 2018, this Court[1] granted the Judgment in Yellowstone's favor, consisting of the purported $79,262 that remained due under the Secured Merchant Agreement, together with $19,815.50 in attorneys' fees, and costs and disbursements (NYSCEF Doc. No. 7).

In order to avoid enforcement of the judgment, on October 16, 2019, Plaintiffs and Yellowstone entered into a Settlement Agreement and Release (NYSCEF Doc. No. 8) which, *inter alia*, obligated Plaintiffs to pay $80,000 to Yellowstone in full satisfaction of all amounts owed under the Secured Merchant Agreement. The Settlement Agreement and Release required Plaintiffs to make an initial payment of $8,000 on or before October 25, 2019 and monthly payments thereafter in the amount of $5,200, made on or before the 25th day of the month.

Thereafter, Plaintiffs made settlement payments in the total amount of $28,000, before deciding to stop making payments due to their contention that the Secured Merchant Agreement is usurious.

DISCUSSION

Plaintiffs seek vacatur of the Judgment, pursuant to CPLR §5015(a)(3) , based on fraud. They also contend that, *inter alia*, the transaction between themselves and Yellowstone are void or otherwise unenforceable, because they violate New York's criminal usury statute (Penal Law §190.40).

However, as this Court stated in a similar matter, Plaintiffs'

> arguments (that the **[*3]** transactions effectuated by the *merchant* agreements at issue are actually loans) have been submitted time and time again to a plethora of New York Courts, and have almost uniformly been rejected. Indeed, as this Court has previously determined in similar matters, the *merchant* agreements are, in fact, business contracts that are entered into between sophisticated business parties, which clearly reflect the purchase of a certain percentage of a *merchant* 's total future accounts receivable, up to a certain amount, for a specified purchase price. The terms of these merchant agreements are abundantly clear and, in most cases, these arrangements allow *merchants* to survive a period of cashflow shortage (*Yellowstone Capital LLC v. Central USA Wireless LLC*, 60 Misc3d 1220[A] , 110 N.Y.S.3d 485 , 2018 NY Slip Op 51179[U] , *1 [Sup Ct, Erie Co 2018]).

Like the transactional documents in *Yellowstone Capital LLC*, the Secured Merchant Agreement, Addendum,

Confession of Judgment, and Settlement Agreement and Release herein all constitute "business contracts . . . entered into between sophisticated business parties" (*Id.*). Indeed, Mr. Eckelberry's affidavit in support of Plaintiffs' application for a preliminary injunction states that "OriginClear's advanced technologies are being adopted to treat tough water problems in East and South Asia, Europe and the Middle East, and North America" (NYSCEF Doc. No. 10, ¶3). Indeed, "[p]rogressive designs and manufactures a complete line of water treatment systems for municipal, industrial and pure water applications . . . and utilizes a wide range of technologies, including chemical injection, media filters, membrane, ion exchange and $SCADA_2$ technology, in turnkey systems" (*Id.*, at ¶4).

Moreover, the terms of each of the Secured Merchant Agreement, Addendum, Confession of Judgment, and Settlement Agreement and Release are unambiguous and facially clear, and served their intended purpose - that is, permitting OriginClear and Progressive "to survive a period of cashflow shortage" (*Yellowstone Capital LLC*, 60 Misc3d 1220[A], *1). Having received the benefits arising out of such agreements since they were executed almost two and a half years ago, it would be inequitable to permit Plaintiffs to now disavow them.

This Court's prior decision in *Yellowstone Capital LLC*, referred to twenty-eight (28) cases across the state where substantially similar motions, involving substantially similar transactional agreements, were denied on the procedural ground that a judgment debtor may not seek, by way of motion, to invalidate a confession of judgment entered against the judgment debtor on the ground that it resulted from a usurious loan (Index No. 811837/2017, Erie County, NYSCEF Doc. No. 30). Rather, a plenary action is required.

Similarly, this Court's prior decision in *Yellowstone Capital LLC*, referred to thirty-eight (38) recent decisions, decided in 2016 and 2017, determining that the merchant agreements at issue therein (which are substantially or exactly the same as the merchant agreement at issue here) do not constitute loans (*Id.* , at NYSCEF Doc. **[*4]** No. 31).

The Court finds no reason to depart from its prior decision in *Yellowstone Capital LLC* , or the numerous cases upon which it is based.

In addition to the reasoning set forth in *Yellowstone Capital LLC*, there are additional bases to deny Plaintiffs the relief they request and otherwise dismiss this matter, which are specific to this matter and discussed below.

First, Plaintiffs' claims grounded in usury are time-barred, pursuant to CPLR §215(6) , which states, in relevant part, that actions to "be commenced within one year [include] [a]n action to recover any overcharge of interest or to enforce a penalty for such overcharge" (*see also, Rebeil Consulting Corp. v. Levine*, 208 AD2d 819 , 820 , 617 N.Y.S.2d 830 [2d Dept 1994] [plaintiff's "claim . . to recover the interest they paid in excess of the legal rate is barred by the one-year statute of limitations"]).

Plaintiffs seek to avoid the limitations bar by characterizing their usury claims as affirmative defenses, because affirmative defenses, such as usury, are not subject to the statute of limitations (*Id.*). However, Plaintiffs have asserted usury as claims, not affirmative defenses.

Second, Plaintiffs' claims are barred by the parties' Settlement Agreement and Release, the terms of which are unambiguous (NYSCEF Doc. No. 8) (*Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17

N.Y.3d 269 , 276 , 952 N.E.2d 995 , 929 N.Y.S.2d 3 [2011] [where a release's language is clear and unambiguous, the release constitutes a "complete bar" to an action on a claim that is the subject of the release]).

Third, Plaintiffs have failed to adequately plead a claim grounded in fraud.

The elements of a fraud claim "are representation of material fact, falsity, scienter, reliance, and injury" (*Eklecco Newco, LLC v. Q of Palisades, LLC*, 93 AD3d 1233 , 1235 , 940 N.Y.S.2d 359 [4th Dept 2012]). Moreover, CPLR §3016(b) requires that "the circumstances constituting the wrong shall be stated in detail."

Plaintiffs have failed to allege a material misrepresentation by Yellowstone and have otherwise failed to plead their fraud claim with the particularity required by CPLR §3016(b) .

To the extent not otherwise stated herein, the Court rejects Plaintiffs' remaining contentions.

In light of the foregoing, it is hereby

ORDERED, that Defendant's motion to dismiss is granted, and the Complaint, dated November 16, 2020 (NYSCEF Doc. No. 2) is hereby dismissed; and it is further

ORDERED, that the Temporary Restraining Order issued on December 4, 2020 (NYSCEF Doc. No. 21), is hereby vacated; and it further

ORDERED, that Plaintiffs' motion for a preliminary injunction is denied, as moot.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: January 4, 2021

Buffalo, New York

/s/ TIMOTHY J. WALKER

HON. TIMOTHY J. WALKER, J.C.C.

Acting Supreme Court Justice

Presiding Justice, Commercial Division 8th Judicial District

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fn 1

Yellowstone applied directly to the Erie County Clerk's Office, and the Judgment was signed and filed by said office, not a Justice of the Supreme Court (*see Yellowstone Capital LLC v. Progressive Water Treatment Inc., et al.*; Index No. 817419/2018; NYSCEF Doc. No. 5).

fn 2

While not defined by Plaintiffs, the Court assumes Plaintiffs are referring to supervisory control and data acquisition technology.

corporate debt — in a civil action where the Penal Law has been violated (*id.*). The defense of criminal usury requires proof that the lender (1) knowingly charged, took or received (2) annual interest exceeding 25% (3) on a loan or forbearance (*id.*). There is a strong presumption against a finding of usury under New York law, and the party seeking to assert it as a defense bears a heavy burden as to all three elements (*id.*). However, in assessing the defense, the Court must look to the substance of the transaction and not just to its form (*id.*).

In the last few years, in over 20 cases in the New York metropolitan area, Courts have addressed the issues of whether this specific Agreement, or similar ones, were loans, and if loans, whether they were usurious. While the majority have found them not to be loans, or not usurious (*see, eg, K9 Bytes, Inc. v Arch Capital Funding, LLC*, [2017 BL 170073], 2017 WL 2219916 [Sup Ct, West Co]; *Merchant Cash And Capital, LLC v Welt Plumbing, LLC*, 55 Misc3d 1220 (A) [Sup Ct, Nassau Co 2017]), a significant minority have found them to be loans, and usurious, or possibly so (*see Professional Merchant Advance Capital. LLC v C Care Services, LLC*, [2015 BL 226423], 2015 WL 4392081 [SDNY]; *Merchant Funding Services, LLC v Volunteer Pharmacy*, 55 Misc3d 316 [Sup Ct, West Co 2016]). In deciding whether the transaction was a loan, probably the most significant factor is whether the Defendant is absolutely required to pay the Purchased Amount. Here, while on the surface, it appears that the Defendants only had to remit 15% of their receivables, implying that if they had no receivable, there would be nothing to remit, this suggests that it was not a loan. Moreover, even if it were a loan, since there is no time limit within which the Purchase Amount had to be paid, the calculation of an annual interest rate, **[*3]** the sine qua non for finding usury, becomes impossible. Looking deeper, however, the Secured *Merchant* Agreement, in addition to its name, provided that the Purchased Amount "shall be paid to [Plaintiff] by [Defendant]." Moreover, the Agreement provided that the Specified Percentage shall be revised to $398.75 per business day." At this rate, Defendants were required to pay the Purchased Amount in approximately 10 weeks, resulting in an effective annual interest rate of approximately 40%. And Defendant's principal was required to guaranty the Agreement and to execute an Affidavit of Confession of Judgment. If the Agreement was not a loan with a specified amount which the Defendants were absolutely required to repay, what were the Defendants confessing? (*See Professional Merchant Advance Capital, LLC v C Care Services, LLC*, [2015 BL 226423], 2015 WL 4392081 [SDNY]).

Based thereon, it appears to this Court that this was a secured loan and not a purchase and sale of receivables. Be that as it may, Defendants confessed judgment. While usurious contracts have been declared void by statute since at least 1838, since at least 1853, it has been held that the defense of usury is personal to the defendant and may be waived such as by confessing judgment (*see Murray v Judson and Sands*, 9 NY 73 [1853]; *Lipedes v Liverpool & London & Globe Ins. Co.*, 184 AD 332 [4th Dept 1918]; *Barrett v Conley*, 35 Misced 47 [Sup Ct, Erie Co 1962]; *accord, Professional Merchant Advance capital, LLC v C Care Services, LLC*, [2015 BL 226423], 2015 WL 4392081 [SDNY]). Accordingly, this Court finds that which the Agreement here was a usurious loan, the Defendants have waived this defense by confessing judgment.[3]

That brings us to the issue of the attorney's fee. While the Secured *Merchant* Agreement provided for reasonable attorney's fees on default, the inclusion of a percentage in the Affidavit of Confession of Judgment means a maximum and it is for the Court to determine what is reasonable based on the work actually done (see, eg, Prince v Schacher, 125 AD3d 626 [2d Dept 2015]; *Fleet Credit Corporation v Harvey Huller & Co., Inc.*, 207 AD2d 380 [2d Dept 1994]). Accordingly, the Judgment is vacated as to the attorney's fees and, within 30 days hereof, Plaintiff shall efile proof of its reasonable attorney's fees, which shall include time and billing

records.

This constitutes the decision and order of the Court.

Dated: New City, New York

July 7, 2017

/s/ Gerald E. Loehr

Hon. GERALD E. LOEHR

J.S.C.

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Plaintiff also filed a Financing Statement with respect to the Defendant's receivables. While this might be considered evidence that Plaintiff considered it a secured loan, the Court notes that under the UCC even absolute sales of accounts come under the scope of Article 9 in order to protect third parties (*see* UCC 9-109[a][3]). Therefore the filing of the Financing Statement is not evidence that the transaction here was a loan.

fn 2

As a procedural matter, Plaintiff argues that a confession of judgment can only be vacated by a plenary action, where the defense is usury, and not by a motion. Inasmuch as the Court is denying the motion on the merits, it will not address this procedural issue.

fn 3

During the pendency of this motion, Defendants submitted a proposed Order To Show Cause to also vacate the Judgment, but now because the Affidavit of Confession of Judgment authorized its entry in more than one county. Defendants have provided no authority for that proposition. What they have provided is conjecture that the Plaintiffs have been forum shopping these confessions of judgment. Now, it the Plaintiff had submitted this Judgment to another court which had rejected it before filing it here, that might well provide a basis for vacating this Judgment. But in the absence of any evidence that the Judgment here had been rejected by another court, this Court has decided not to sign the proposed Order To Show Cause.

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Majority Opinion >

SUPREME COURT OF NEW YORK, ERIE COUNTY

YELLOWSTONE CAPITAL LLC, Plaintiff, vs. JEVIN, INC. d/b/a JEVIN and DANIEL E. PTAK, Defendants.

INDEX NO. 802457/2017

October 10, 2017, Filed

October 6, 2017, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

HON. HENRY J. NOWAK, J.S.C.

HENRY J. NOWAK

DECISION

HON. HENRY J. NOWAK, J.S.C.

Justice Presiding

Defendants Jevin, Inc d/b/a Jevin (Jevin) and Daniel E. Ptak move to vacate a February 14, 2017 judgment by confession filed by plaintiff, Yellowstone Capital LLC (Yellowstone) and void an agreement between Jevin and Yellowstone on the ground that it contemplates a criminally usurious loan.

Ptak is the principal owner of Jevin. On May 31, 2016, Jevin entered into a secured merchant agreement with Yellowstone. The agreement provides that Yellowstone would pay Jevin $400,000.00 in exchange for $599, 600.00 of Jevin's accounts receivable. Jevin authorized Yellowstone to debit its bank account 15 % of Jevin accounts-receivable until the purchased amount of receivables was paid in full.

The agreement does not state a specific duration for repayment. It provides that the purchase price "is not intended to be, nor shall it be construed as a loan." Instead Jevin agreed that the purchase price was in exchange for Jevin's receipts from its business, and that payments made to Yellowstone "shall be conditioned upon [Jevin's] sale of products and services and the payment therefore by [Jevin's] customers."

However, in an addendum to the agreement, Jevin agreed to revise the specified percentage of 15 % to a fixed payment of $6,995.00 each business day, which was intended to be a "good faith approximation of the Specified Percentage, based on [Jevin's] receipts due to Yellowstone, pursuant to the Agreement." The addendum further provides that at Jevin's option, "within five (5) business days following the end of a calendar month, [Jevin] may request a reconciliation to take place, whereby Yellowstone may ensure that the cumulative amount remitted for the subject month via the Daily Payment is equal to the amount of the Specified Percentage." If requesting reconciliation, Jevin was obligated to provide bank statements and other documents necessary to identify the appropriate amount owed under the specified percentage.

In addition to signing the agreement and addendum on behalf of Jevin, Ptak also signed an affidavit of confession of judgment. In the affidavit, Ptak confessed judgment and authorized entry of judgment in favor of Yellowstone and against Jevin and himself, jointly and severally, in the sum of $599,600.00, less any payments timely made pursuant to the agreement.

By November 30, 2016, Ptak could not afford to continue to make the $6,995.00 payments each business day. In an e-mail message to Yellowstone's senior funding coordinator, Ptak requested that the debits be stopped until he closed on a small business administration loan, which he anticipated would take ten days. After apparently speaking to a supervisor, the senior funding coordinator responded with an e-mail message the following day indicating **[*2]** that the supervisor refused. However, he invited Ptak to call the supervisor directly the next day, on December 2, 2016, explaining that Ptak could "give him a much better explanation as to why you need to stop payments for a period of time" than he could.

The e-mail message exchange between Ptak and the Yellowstone representative made no reference to the reconciliation provision in the addendum to the agreement. Ptak claims that he eventually did speak to the supervisor, but that the supervisor refused to agree to stop the debits on a temporary basis.

On February 15, 2017, Yellowstone filed an affidavit of nonpayment in support of an entry of a confession of judgment, which indicated that Jevin made payments in the amount totaling $292,741.00 and has stopped remitting payments "on or about February 14, 2017." On February 21, 2017 Yellowstone filed a judgment by confession for the total sum, including attorneys fees provided for in the agreement, of $383,798.75.

Jevin now moves for an order to vacate the judgment on the ground that the May 31, 2016 agreement constituted a criminally usurious loan. Jevin alleges that Yellowstone knowingly charged and received payments at an annual interest at a rate of 109.46 % for the $400,000 loan, exceeding the 25 % interest permitted by Penal Law § 190.40 .

Yellowstone opposes the motion first on the ground that a plenary action is necessary for a judgment debtor to challenge a judgment entered by confession. Second, Yellowstone contends that the Agreement was not a loan but a purchase of accounts receivable.

On the first issue, a "judgment based on a loan agreement that is usurious on its face does not require a plenary action to vacate that judgment" (*Merchant Funding Servs., LLC v. Volunteer Pharmacy Inc.*, 55 Misc 3d 316 , 320 [Sup Ct, Westchester County 2016]). Therefore, the court finds that if defendants can demonstrate that the agreement was actually not a purchase for accounts receivable but a loan with a usurious interest rate, then a plenary action is not required.

A distinguishing factor between a purchase of accounts receivable and a loan is the burden of risk and the contingency of repayment. In a purchase of accounts receivable, repayment is for an indefinite term, contingent on the amount of accounts receivable. Thus, the lender bares the risk that there could be no or low daily receipts (*see Merchant Cash and Capital, LLC v. Liberation Land Co., LLC*, 2016 NY Slip Op. 32589[U] , *3 [Sup Ct, NY County 2016]). However, if the lender holds only a loan, repayment is absolute and the *merchant* bears the risk of non-payment by the account debtor; while the lender only bears the risk that the account debtor's non-payment will leave the *merchant* unable to satisfy the loan (*see Endico Potatoes v. CIT Group/Factoring*, 67 F.3d 1063 , 1069 [1995]).

Yellowstone claims that the agreement also does not expressly state a duration nor a date by which Jevin must pay the $599,600.00 of accounts receivable. However, if Jevin's account is deducted $6,995.00 per business day, then it is simple to calculate that the amount would be paid in 86 business days. Therefore, whether the financial arrangement was for **[*3]** a definite term depends on whether the reconciliation provision could have been reasonably relied upon by Ptak to shift the risk of nonpayment by Jevin's customers from Jevin to Yellowstone. finds that Ptak's request to temporarily stop payments on November 30, 2016 was not a request

Yellowstone claims that nothing prevented Jevin from seeking reconciliation. The court to invoke the reconciliation provision. Ptak gave no indication that 15 % of November 2016's accounts receivable were less than the amount debited from Jevin's account for that month.[1] A request for reconciliation could have been made pursuant to the agreement during the first five days of December 2016, January 2017 or February 2017.

Jevin relies upon two cases in support of its claim that the agreement was a loan disguised as a purchase of accounts receivable; however, both are distinguishable because there was no evidence that the agreements at issue included reconciliation provisions (*see Aferchant Funding Servs., LLC v. Volunteer Pharmacy Inc.*, 55 Misc 3d 316 , 318 [Sup Ct, Westchester County 2016]; *Pearl Capital Rivis Ventures v. RDN Constr.* 54 Misc 3d 470 , 474 [Sup Ct, Westchester County 2016]). Courts have found that the presence of a reconciliation provision such as the one in this matter is a significant factor in determining that the agreement should be characterized as a purchase of accounts receivable as opposed to a loan (*see K9 Bytes, Inc. v Arch Capital Funding, LLC*, 56 Misc 3d 807 , 816-817 [Sup Ct, Westchester County 2017]; *IBIS Capital Group, LLC v. Four Paws Orlando LLC*, 2017 N.Y. Slip Op. 30477[U] [Sup Ct, Nassau County March 10, 2017]; *Retail Capital, LLC v. Spice Intentions Inc.*, 2016 N.Y. Slip Op. 32614[U] , *2 [Sup Ct Queens County 2017]).

On this issue, the court could find it significant that reconciliation in a given case was requested but ignored, or that a reconciliation provision was so unworkable that it could never be used to modify a fixed payment amount. However, those concerns are not present here. Instead, Yellowstone contends that had Jevin requested a reconciliation and provided requested documentation within the specified time frame, Yellowstone would have conducted a reconciliation. Such a reconciliation could have reduced the fixed payments and

extended the time for Jevin to make payment.

In light of the foregoing, defendants have not demonstrated that the agreement is a usurious loan in violation of Penal Law § 190.40 . Defendants' motion is therefore denied. Submit order.

/s/ Henry J. Nowak

HON. HENRY J. NOWAK, J.S.C.

Dated: October 6, 2017

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Indeed, the calculations of the amounts included in the record contradict the notion that Yellowstone immediately enforced the confession of judgment the very first time it was unable to collect the $6,995.00 from Jevin's account.