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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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In response to Respondent C6 Capital LLC's ("Respondent") Brief in Opposition, Plaintiff-Appellants AH Wines, Inc. ("Appellant") state the following:

PRELIMINARY STATEMENT ON RESPONDENT'S FOOTNOTE 3

In footnote 3 of its brief, Respondent contends that Appellant failed to file a notice of appeal within 30 days the Supreme Court's entry of judgment, which is "grounds for dismissal of the appeal." This contention is meritless. The Court issued a decision granting summary judgment on January 2, 2022, and issued its final Order disposing of the case on January 26, 2022. Appellant filed its Notice of Appeal in that court on that same date, attaching a copy of the Court's January 26, 2022 Order. The clerk entered final judgment six days later on February 1, 2022.

N.Y. C.P.L.R. § 5501 provides that "[t]he notice of appeal from an order directing summary judgment … shall be deemed to specify a judgment upon said order entered after service of the notice of appeal…" Accordingly, the Appellant requests that the Court exercise its discretion to treat the appeal as valid and taken from the judgment, *see Gray v. Williams,* 108 A.D. 3d 1085, 1086 (4th Dept. 2013). Respondent's assertion that the "equities militate against doing so here" is similarly without merit: the Court's previous dismissal was simply ministerial and necessary because Respondent filed two Notices of Appeal (on the lower court's Preliminary

Injunction) for both the decision and the Order, thereby docketing two appeals for the same case.

ARGUMENT

I. CPLR SECTION 215(6) DOES NOT APPLY TO CLAIMS SEEKING A DECLARATORY JUDGMENT THAT A CONTRACT IS USURIOUS AND VOID *AB INITIO*

Any reasonable examination of the one-year statute of limitations set forth in CPLR § 215(6) leads to the conclusion that this subsection does not apply to claims seeking declaratory relief for unlawful contracts, as Appellant brought in this case. This conclusion is obvious for several reasons:

First, the plain language of section of 215(6) refers only to recovery *overcharges and penalties* and makes no reference whatsoever to declaratory judgments, based on usury or otherwise.

Second, the original, historical placement of the one-year limitations period was actually "built in" to the same section that provided the right to recover excess interest payments, leaving no question that the one-year limitations period only pertained to the claims contained in that section.

Third, the only courts applying 215(6) to claims for declaratory judgment (that are *not* claims for the collection of overcharges) are the recent MCA cases. All of these cases purport to rely on caselaw that does not support such a holding. Moreover, the courts that apply 215(6) to claims for declaratory judgment do so only

with some difficulty; since the plaintiff never made excess interest payments, the courts are unable to determine which date triggers the statute of limitations.

Finally, usury cases before the New York Court of Appeals involving plaintiffs seeking a declaratory judgment (such as *Hartley v. Eagle Insurance*) (discussed below) strongly indicate that usury claims are not subject to a statute of limitations.

A. The Plain Language of Section 215(6) Refers Only to Overcharges and Penalties, Neither of Which Were Claimed in this Case.

Article 2 of the CPLR, which attempted to consolidate statutes of limitation, provides the one-year statute of limitations in actions to recover an interest overcharge in § 215(6), which provides:

> "[a]n action to recover any overcharge of interest or to enforce a penalty for such overcharge" shall be commenced within one year.

Id. Formerly, the statute of limitations for recovery of overcharges of interest was codified in the civil usury statutes (N.Y. G.O.L. §§ 5-501, 5-511, 5-521) as subsection (1) of § 5-513 ("Recovery of Excess). Section 5-513 in turn, was originally set forth in New York General Bus. Law § 372[1] where it had existed since

[1] N.Y. Gen. Bus. Law § 372, which provided in part:

> 372. Recovery of excess. Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or

1909. The "built-in: statute of limitations was removed from § 5-513 in 1970, and now appears in CPLR § 215(6). *See McNellis v. Raymond*, 329 F. Supp. 1038, 1043 n.30 (N.D.N.Y. 1971). *See also Curtiss v. Teller*, 157 A.D. 804, 808, 143 N.Y.S. 188, 191 (App. Div. 4th Dept. 1913) (providing an excellent discussion on the development and history of the relevant sections).

B. A Claim Seeking a Declaration that A Contract is Illegal and Unenforceable is Fundamentally Different from A Claim Seeking to Recoup Overcharges

A party seeking declaratory judgment that a loan contract is void on the grounds of criminal usury is claiming that the contract is *illegal and cannot be enforced*. That party seeks to enforce a fundamental right, conveyed by statute, that it not be bound by a contract that is criminal, illegal, and void *ab initio*. As the New York Court of Appeals recently clarified in *Adar Bays*, a contract found to be usurious is void *ab initio* under both the civil and criminal usury provisions. *See*

> received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery.

N.Y. Gen. Bus. Law § 372 (1909), observing that § 372 provided for recovery of excess, whereas:

> § 373. Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 333 (N.Y. 2021) (holding that "loans proven to violate the criminal usury statute are subject to the same consequence as any other usurious loans: complete invalidity of the loan instrument.").

As discussed in Appellants opening brief, the New York Court of Appeals holds that a claim seeking a determination that a contract is void on the grounds of usury:

> … is not just "another" penalty or forfeiture contained in sections 5-511 or 5-513 and it should not be confused with the penalties or forfeitures imposed by article 5 of the General Obligations Law. 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 (*see*, Black's Law Dictionary, at 1020 (5th ed 1979)), e.g., the payment of double the amount of excess interest required by section 5-511. A forfeiture is the loss of a right by the commission of a crime or fault *(id*., at 584), e.g., the forfeiture of interest provided in section 5-511. A legal determination that a transaction governed by section 5-511 is void is not a penalty or a forfeiture. It is no more than the implementation of a statutory expression of the familiar rule that illegal contracts, or those contrary to public policy, are unenforceable and that the courts will not recognize rights arising from them…

Szerdahelyi v. Harris, 67 N.Y.2d 42, 48-49 (N.Y. 1986).

C. New York Caselaw Shows that Challenges to Instruments that are Unlawful and Void *Ab Initio* Are Not Subject to Statues of Limitations

1. "A Statute of Limitations 'Does Not Make an Agreement that Was Void at its Inception Valid by the Mere Passage of Time.'"

Faison v. Lewis, 25 N.Y.3d 220, 226-27 (N.Y. 2015). Usurious loans are void at their inception. *Adar Bays*, 37 N.Y.3d at 333. Although there is no caselaw addressing limitations periods for declaratory judgment claims based on usury, the Court of Appeals has found that, for claims seeking voiding in other contexts, no statute of limitations applies. In *Faison v. Lewis*, which concerned a challenge to a forged property deed, the Court of Appeals observed that a document that is void *ab initio* "is without legal capacity," which is a status which does not change with the passage of time. Accordingly, the Court concluded that claims based on forgery are never time barred when challenging enforcement of a potentially void instrument. *Faison,* 25 N.Y.3d at 226-27.

In this case, if the Merchant Cash Advance ("MCA") agreement is criminally usurious, it was void the date it was executed, and the passage of time has done nothing to change that: Respondent has no rights under a criminally usurious agreement, with or without the confession of judgment.

2. Contrary to Respondent's Claims, Major Usury Cases Involving a Plaintiff Affirmatively Seeking Declaratory Relief Based On Usury Demonstrate No Statutes of Limitation.

In footnote 5 of its brief, Respondent rejects Appellants' cases that support the absence of a statute of limitations period for usury claims, asserting that those cases, *inter alia* "do not indicate whether the statute of limitations was raised to an affirmative claim, let alone whether and when it applies." Resp. Br. at n.5. Be that as it may, Respondent's position becomes untenable when certain widely-known cases, with claims long past the one-year mark of § 215(6) make it all the way to the Court of Appeals with no mention of a limitations period.

Eight years after execution of the agreement: *Hartley v Eagle Ins. Co. of London, England*, 222 N.Y. 178 (N.Y. 1918), involved a plaintiff (Walter Hartley) who entered into a loan agreement in 1905. At the time, the one-year limitations period was set forth under section 372 of the General Business Law, a statute that, substantively speaking, is identical to CPLR 215(6). Hartley's challenge to the 1905 agreement on the grounds of usury was commenced in the New York County Supreme Court on May 1, 1913, eight years after the agreement was executed. In spite of the obvious passage of time, none of the parties, or the several court's ruling on the case, ever raised a statute of limitations question.

Nineteen years after execution of the agreement: *Westchester Mortg. Co. v. Grand R. & I. R. Co.*, 246 N.Y. 194 (N.Y. 1927) concerned a promissory note

executed in May 1906. In June 1924 the plaintiff filed suit seeking a declaratory judgment that the note was void for usury. The Court of Appeals agreed that the note was usurious but ultimately reversed the lower courts based on its conclusion that the law of Rhode Island must be applied. As in *Hartley*, no party, and none of the court's ruling on the case raised a statute of limitations issue, in spite of the eighteen-year gap between execution of the agreement and commencement of the action for declaratory judgment.

Five years after execution of the agreement*:* *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130 (S.D.N.Y. 2017), the plaintiff filed its claim in 2011 seeking redress for a loan agreement executed in 2006 asserting g violations of: (1) the *Fair Debt Collection Practices Act* based on Defendants' attempt to collect interest on her debt above the rate permitted by New York's usury laws; (2) New York General Business Law ("GBL") *§ 349*, based on Defendants' representations that they were entitled to collect interest at a usurious rate; and (3) New York's civil and criminal usury laws, entitling Plaintiff to a declaration that her debts are void and to disgorgement. No statute of limitations issue was raised.

D. Respondent's Own Authorities Hold that the 215(6) Limitations Period Commences Upon *Payment of the Overcharge*, Not Execution of the Loan Agreement

Strangely, Respondent provides a string of citations in its brief that completely support Appellant's contention that section 215(6) pertains only to overcharges: *Dae Hyuk Kwon v. Santander Consumer USA*, 742 F. App'x 537, 540 (2d Cir. 2018) ("State claims of usury are subject to this statute of limitations and accrue on the date that overpayment was made."). "Overcharge," as used in CPLR § 215(6), means "a monetary charge in excess of the proper, legal, or agreed rate or amount," including usury. *Rubin v. City Nat'l Bank & Tr. Co.*, 131 A.D.2d 150, 152 (3d Dept. 1987). This statute of limitations applies to an affirmative cause of action to recover an overcharge of interest, but not to an affirmative defense of usury. *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820 (2d Dept. 1994). Resp. Br. at 20. Appellant finds none of these statements objectionable.

E. Other than Trial Court Decisions, None of Respondent's Authorities Hold that § 216(6) Applies to Actions Seeking Declaratory Relief Based on Usury

Respondent asserts that New York courts "have repeatedly held that CPLR § 215(6) applies to *any* affirmative claims based upon usury (including declaratory relief to set aside an agreement) even where the plaintiff is not seeking to recover money it already paid." Resp. Br. at 20. As support for this contention, Respondent cites to *Mill St. Realty,Inc. v. Reineke*, 159 A.D.2d 494 (2d Dept. 1990), *Glassman*

v. Zoref, 291 A.D.2d 430, 431 (2d Dept.2002), and *Cullen v. Margiotta*, 811 F.2d 698, 717 (2d Cir.1987). However, none of these cases support this assertion, because none of the cited cases involved a plaintiff seeking only a declaratory judgment on usury.

In *Mill St. v Reineke*, the court applied 215(6) to borrower seeking recovery of property, not declaratory judgment. The plaintiff in *Mill Street* sought to void certain property deeds where the property was alleged to have conveyed as security for a loan. Plaintiff sought to rescind the conveyances five years later because the loan was allegedly usurious. *Mill Street* relied on other cases applying a one year limitations period for recovery of excessive interest: *Palen v. Johnson*, 50 N.Y. 49, 51-52 (N.Y. 1872) (holding that persons who paid excessive interest "may recover *in an action* against the person who shall have taken or received the same … if such action be brought within one year after such payment or delivery"); *Shute v. Stattman*, 254 A.D. 783, 783-84, 4 N.Y.S.2d 746, 746-47 (2d Dept. 1938) (counterclaim for recovery of usurious payments must be commenced "within one year after the payment"), and *Robinson v. Miller*, 210 A.D. 450, 455, 206 N.Y.S. 248, 252 (1st Dept. 1924) (action to recover the same must be brought within one year after payment of such usurious interest).

In *Glassman v. Zoref,* the plaintiff sought damages under several causes of action (fraud, truth in lending act, etc.) against a lender based on a mortgage dispute.

The court also observed that the plaintiff "may not assert a cause of action based on usury since the one-year statute of limitations has expired" but nothing in the opinion indicated that the plaintiff sought voiding of the agreement. *Glassman* 737 N.Y.S.2d at 538.

Cullen v. Margiotta contains no holding relevant to this case. Respondent's pinpoint citation to *Cullen* contains that court's approval that the 1-year limitations period in 215(6) should not be applied as analogous to the RICO claim at issue in that case.

F. ***Kennard* Is of Minimal Precedential Authority and Need Not Be Followed by This Court.**

Contrary to Respondent's assertion, an affirmance without opinion like the Fourth Department's ruling in *Kennard does not* "in effect endorse each of [the lower court's] holdings." Resp. Br. at 23. Unsurprisingly, quite the opposite is true: the New York Court of Appeals has held that when it comes to affirmance without opinion, "[t]he precedential value of such a ruling is minimal. An affirmance without opinion constitutes approval of only the result reached and 'does not imply approval of everything contained in the opinion of the court below.'" *People ex rel. Palmer v Travis*, 223 N.Y. 150, 156 (N.Y. 1918). *See also Matter of Clark*, 275 N.Y. 1, 4 (N.Y. 1937); *Rogers v Decker*, 131 N.Y. 490, 493 (N.Y. 1892); *People v. Stan XuHui Li*, 34 N.Y.3d 357, 362 (N.Y. 2019).

This point is particularly relevant in the *Kennard* case, because the lower court ruling in *Kennard had no opinion either.* The entirety of the lower court's decision ((strangely) contained in an email) is stated thusly:

> The Complaint dated June 10, 2020, in this action is a challenge to a judgment by confession entered against Plaintiffs on October 25, 2017. On August 5, 2020, Defendant HSC timely moved to dismiss the Complaint on the basis that: 1) Plaintiffs' claim of usury is barred by the one-year statute of limitations applicable to usury based claims; 2) Plaintiffs have failed to plead a cognizable cause of action upon which to seek relief; 3) Plaintiffs have no recoverable damages; and 4) Plaintiffs' claims are barred by documentary evidence and settled law in New York holding that the parties' underlying agreement was not a usurious loan.
>
> The motion is granted, in its entirety.

Kennard Law P.C. v. High Speed Capital, LLC, No. Index No.: 805626/2020, Dkt. No. 26 (N.Y. Sup. Ct. Dec. 10, 2020). As quoted decision shows, the *Kennard* opinion contained no holdings at all—it simply noted the basis for the Complaint and recited the defendant's four grounds for dismissal. Although the court's apparently deliberate choice to list specific dates raises the betting odds that the statute of limitations issue was determinative, such guessing and speculation is not the stuff of a precedential decision.

1. The Lower Court Was Obviously Unable to Determine the Triggering Event for the Statute of Limitations in Section 215(6)

The lower court's decision in this case is notable only for the fact that, it, like the other courts improperly applying section 215(6), was unable to definitively establish the event that triggers the statute of limitations. As the court held:

> There is no allegation that Plaintiffs made any payments after January 23, 2019, and the judgment was entered February 28, 2019. Each of those dates is more than one year prior to the commencement of this action on July 9, 2020. As such, pursuant to the Fourth Department's holding in *Kennard*, this action is time-barred.

AH Wines, Inc., v. C6 Capital Funding, LLC, 2021 N.Y. Misc. LEXIS (Ontario Co. Sup. Ct. Jan. 18, 2022). The above excerpt demonstrates that the lower courts attempt to apply *Kennard* in this case was not easy—with no overcharges of interest, none of the listed events obviously triggered the limitations under CPLR 215(6). As with the other courts applying this section, the court just looked at all the dates available.

G. Respondent's Trial Level Cases Are Not Authority for This Court

With respect to the number of lower court decisions purporting to favor Respondent's position, it can only be observed that where those cases provide a reasoned opinion, that reasoning is faulty and unexplainable. In *NRO Boston LLC v. CapCall LLC,* 2020 N.Y. Misc. LEXIS 4064 (Westchester Co. Sup. Ct. 2020) ("*CapCall*"), the court ruled that:

> [t]the Court agrees with defendants that this cause of action is more properly characterized as a claim to set the agreements aside as void because of usury. As such, it is subject to a one year statute of limitations. CPLR § 215(6) (one year statute of limitations applies to "An action to recover any overcharge of interest or to enforce a penalty for such overcharge."). Plaintiffs contend that this statute is irrelevant, because "preventing Defendants from enforcing a judgment does not entail the recovery of any overcharge of interest of [sic] the enforcement of a penalty against them." This literal reading of the statute clashes with well-settled law that holds that this section encompasses claims for usury. *See, e.g., Glassman v. Zoref*, 291 A.D.2d 430, 431, 737 N.Y.S.2d 537, 538 (2d Dept. 2002); *Rebeil Consulting Corp. v. Levine,* 208 A.D.2d 819, 820, 617 N.Y.S.2d 830, 831 (2d Dept. 1994); *Chassman v. Shipley*, 2016 U.S. Dist. LEXIS 49022, 2016 WL 1451585, at *2 (S.D.N.Y. Apr. 12, 2016), *aff'd on other grounds*, 695 F. App'x 630 (2d Cir. 2017). As more than one year passed between the last of the agreements and the commencement of this action, the Court dismisses the Third Cause of Action.

CapCall 2020 N.Y. Misc. LEXIS at *5-6. Respondent quoted this portion of *CapCall* in its brief, but omitted the three citations following the court's statement on 'well settled law.' Resp. Br. at 24. Bizarrely, *none of the cases cited in the above excerpt* support the court's holding that section 215(6) applies to any "claim to set the agreements aside as void because of usury." On the contrary, as discussed below, the cases cited actually support a "literal reading of the statute,"[2] because every case

[2] It is fundamental that if the words of a statute are to have meaning, "they must be read as enacted by the Legislature and "not as the court may think it should or would have been written" (*Lawrence Constr. Corp. v. State of New York*, 293 N.Y. 634, 639 (N.Y. 1944); *Saltser & Weinsier v McGoldrick*, 295 N.Y. 499, 506 (N.Y. 1946)). We are not free to import into a statute a meaning

appears to apply the one-year limitations period to claims to recover overcharges or enforce penalties.

In *Rebeil Consulting*, the borrower alleging usury was the defendant, not the plaintiff, who asserted (1) an affirmative defense of usury and (2) *counterclaimed for overcharge of interest*. The court dismissed the counterclaim as time-barred "insofar as it sought recovery of that amount paid to Rebeil more than one year before the counterclaim was interposed," and allowed the affirmative defense to stand. In *Chassman v. Shipley*, the plaintiff *sued for overcharges* paid on an allegedly usurious Note that she had paid seven off seven years prior to filing suit. Finally, as previously noted above, *Glassman v. Zoref* mentions usury only tangentially, and nothing in the opinion indicates that the plaintiff sought voiding of the agreement in addition to various penalties. *Glassman* 291 A.D.2d at 431.

POINT II: RESPONDENT'S CONTENTION THAT "PLAINTIFF'S HAVE NO COGNIZABLE CAUSE OF ACTION" FOR USURY IS BASED ON THE UNETHICAL USE OF A CONFESSION OF JUDGMENT AS A WAIVER FOR CRIMINAL USURY.

Respondent's Point II reveals the MCA lender's real strategy: to use the confession of judgment ("COJ") in conjunction with usurious loans (disguised as MCA's) so that merchants unknowingly waive all rights to challenge the MCA on the grounds of criminal usury. Under the interpretation Respondent advocates, the

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which it does not have, under the guise of interpretation or construction. *Szerdahelyi v. Harris*, 110 A.D.2d 550, 555-56 (1st Dept. 1985).

COJ does not just waive the Merchant's right to litigate a civil trial, it waives the Merchant's right to vacate the COJ on the ground where the MCA contract is most susceptible to attack—that of criminal usury.

The argument works thusly: First, Respondent contends COJ cannot be directly challenged by motion under CPLR 5103(a), and that a borrower's *only avenue* to challenge a COJ is via a plenary action. According to Respondent the plenary action *must* be brought by the borrower seeking vacatur of the COJ, even when the COJ enforces a patently usurious contract.

Then, Respondent contends that a because a plenary action is *affirmative*—and because the merchant is a corporation that, by statute, may only lodge a criminal usury claim as an affirmative *defense*, the merchant is out of luck. A merchant corporation that signed the COJ has, for all intents and purposes, waived its right to challenge a criminally usurious contract. According to Respondent, such a result is "consistent with public policy," Resp. Br. at 33, but Respondent does not say what policy that is.

Respondent's argument fails for several reasons: *First*, waivers must be knowing, voluntary and intentional to be valid. A confession of judgment containing a hidden waiver that only becomes manifest upon challenge—would negate the knowledge necessary for validity. Waivers must be knowing and intentional, not hidden. *Second*, criminal usury raises important public policy issues in New York,

and cannot be waived in most circumstances. Finally, a usurious contract is void ab initio; New York courts have held consistently that where a contract is void *ab initio*, all subsidiary agreements attached to the contract are likewise void.

A. A Confession of Judgment is Essentially a Contractual Waiver

Essentially, a confession of judgment is nothing more than a contractual provision where one party waives its right to litigate a civil trial; New York courts frequently consider COJ to be an abuse. *See Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 227 (N.Y. 1969) (noting that, "When contrasted with default or consent judgments, the harshness and unjudicial-like procedure of the *cognovit* judgment is exposed as egregious.").

Because a confession of judgment ("COJ") represents a waiver of constitutional due process rights, New York courts permit a plaintiff to challenge a confession of judgment via a "plenary action," *i.e.*, the filing of a new action for a challenge on the merits. *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).

Smith v. Kent suggests that, in terms of challenging confessions of judgment, the plenary action in lieu of motion was deemed necessary in cases where proof

beyond affidavits was necessary to establish the plaintiff's challenge. To wit, the plenary action is not a device intended to deprive a party of rights, it is intended to protect rights.

1. Appellant Did Not Voluntarily Waive its Right to Defend Against Criminal Usury When it Signed the Confession of Judgment

In *D. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174 (1972), the U.S. Supreme Court outlined the considerations relevant to a determination of whether a confession of judgment was valid. Among other considerations, the Court required that for a finding of validity, a contractual waiver of due process rights must be "voluntarily, intelligently, and knowingly" made. *Id*., at 187. *See also Fiore v. Oakwood Plaza Shopping Ctr., Inc*., 78 N.Y.2d 572, 581 (N.Y. 1991).

In this case, Respondent's contention—that the COJ constitutes a waiver of all usury defenses—is a post hoc legal conclusion that could not have been known by the Appellants upon signing the COJ. Accordingly, Respondent's interpretation of the COJ would render it invalid and unenforceable.

2. A COJ Waiving Defenses to Criminal Behavior is Repugnant to New York Public Policy

As the court observed in *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219 (N.Y. 1969), New York will not enforce a confession of judgment deemed to be repugnant to New York's fundamental public policies. The recent decision in *Adar Bays* supports the conclusion that the criminal usury statutes constitute an expression of

New York's fundamental public policy. Even prior to *Adar Bays*, the Court of Appeals viewed usury as a benchmark for "fundamental public policy," against which other policy questions are measured. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d (N.Y. 2019) (observing that question posed was not of the "same magnitude" as illegal contracts or usury); *Welsbach Elec. Corp. v. MasTec N. Am., Inc*., 825 N.Y.S.2d 692, 694-95 (2006) (observing that "[t]he freedom to contract, however, has limits … [c]ourts will not, for example, enforce agreements that are illegal (citing to *Szerdahelyi v. Harris*, 490 N.E. 2d 517 (N.Y. 1986) or where the chosen law violates "some fundamental principle of justice…").

B. <u>Criminal Usury Cannot be Waived</u>

Respondent's assertion that "[c]laims and defenses of civil or criminal usury are waived where a party to a usurious contract confesses judgment" is profoundly mistaken. Respondent's assertion is based on a holding from *Merch. Funding Servs., LLC v. Realtime Carriers, LLC*, 2017 N.Y. Misc. LEXIS 13503, *6 (Rockland Co. Sup. Ct. 2017). However that case is contrary to law. *Realtime Carriers* holding is based on several outdated cases[3] decided prior to the overhaul of New York usury

[3] *Realtime Carriers* held:

> 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 N.Y. 73, Seld. Notes 157 [1853]; *Lipedes v Liverpool & London & Globe Ins. Co.*, 184 AD 332, 171 N.Y.S. 484 [4th Dept 1918]; *Barrett v Conley*,

statutes, which added criminal usury to the New York Penal Code. In 1965 the New York legislature enacted a new provision of the Penal Law, which made loans charging more than 25% annual interest a felony in the second degree, and which, to combat the misuse of the corporate exemption from usury, restored the defense of usury to corporations in civil actions if the interest rate charged on the loan exceeded the criminal usury rate (*see* L.1965, ch.328; Penal Law § 190.40; General Obligations Law § 5-521 [3]).

1. <u>Unlike Civil Usury, Criminal Usury is Not a Private Right</u>

Although precedent exists for the knowing and intentional waiver of usury defenses, the New York courts position on criminal law, as opposed to civil law, changes the analysis substantially. As noted by the Court in *Madden v. Midland Funding,* codification of excessive usury in the Penal Code signals that the New York legislature considers criminal usury as implicating a fundamental public policy. *See* 237 F. Supp. 3d at 147. The case of *Hammelburger v. Foursome Inn Corp.*, 76 A.D.2d 646, 437 (2d. Dept. 1980) appears to be the first case addressing the validity of a waiver since the addition of usury to the criminal code under Penal

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35 Misc. 2d 47, 228 N.Y.S.2d 992 [Sup Ct, Erie Co 1962]; *accord Prof'l Merch. Advance Capital, LLC v C Care Services, LLC*, 2015 U.S. Dist. LEXIS 92035, 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.

Law § 190.40-42 in 1965. In *Hammelburger*, the court considered whether criminal usury, as opposed to civil usury, could be waived in an estoppel certificate. The court's answer was a resounding *No*. The court held:

> It is well settled that a party may waive a rule of law, a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right which is involved, and no considerations of public policy come into play… But when a right has been created for the betterment or protection of society as a whole, an individual is incapable of waiving that right; it is not his to waive. [] In the context of criminal statutes, which are invariably created for the good of society in general, there thus exists the principle that one cannot consent to be the victim of a crime."

Id. at 76 A.D. 2d 648. Although the New York Court of Appeals modified the Second Department's in *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580 (N.Y. 1981), it did so only in relationship to estoppel waivers given to an innocent third party. With no such considerations at issue in this case, any waiver of criminal usury implicated by the COJ would not be valid.

C. Where A Criminally Usurious Transaction is Void at its Inception, the COJ Would Also Be Invalid.

Finally, in *Durst v Abrash*, 22 AD2d 39, 44 (1st Dept. 1964), *aff'd* 17 N.Y.2d 445 (N.Y. 1965), the court concluded that a lender who was allegedly exacting a usurious rate of interest could not, as a matter of public policy, protect his transaction from judicial review by including a broad arbitration clause in the "loan" agreement and then demanding that all issues be heard by the arbitrator. The court, recognizing

a tactic similar to the one employed in this case, observed that a lender "desiring to make a usurious agreement impenetrable need only require the necessitous borrower to consent to arbitration and also to arbitrators by name or occupation associated with the lending industry." *Id.*

The issue was resolved however, by the recognition that where the loan agreement was deemed void *ab initio*, subsidiary agreements, such as the COJ in this case, would suffer the same fate. "If the main purpose of the transaction was illegal then the subsidiary agreements, if they are truly subsidiary, are rendered invalid by the invalidity of the principal agreement." *Id.* (*citing Manson v. Curtis*, 223 N. Y. 313, 324 (N.Y. 1918)). The same conclusion is necessary in this case: If the main purpose of the MCA agreement was illegal extraction of usurious interest, the MCA agreement and all subsidiary agreements, including the confession of judgment, is void *ab initio*.

CONCLUSION

For the reasons discussed above and in set forth in Appellant's Opening brief, the trial court must be reversed.

Respectfully submitted,

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