To Be Argued By:
JEFFREY S. BOXER
Time Requested: 15 Minutes

Ontario County Clerk's Index No. 127393/20

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,

Plaintiffs-Appellants,

—against—

C6 CAPITAL FUNDING LLC,

Defendant-Respondent.

DOCKET NO. CA 22-00220

BRIEF FOR DEFENDANT-RESPONDENT

JEFFREY S. BOXER
JACOB H. NEMON
CARTER LEDYARD & MILBURN LLP
Two Wall Street
New York, New York 10005
(212) 732-3200
boxer@clm.com
nemon@clm.com

Attorneys for Defendant-Respondent

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PRELIMINARY STATEMENT

The Plaintiffs' claims were properly dismissed on statute of limitations grounds. In *Kennard Law P.C. v. High Speed Capital LLC*, 199 A.D.3d 1406 (4th Dept. 2021), *aff'g* 2020 N.Y. Misc. LEXIS 10407 (Erie Co. Sup. Ct. Dec. 10, 2020), this Court unanimously affirmed a trial court decision that dismissed claims by the plaintiffs who – just like Plaintiffs-Appellants here[1] – were seeking to vacate a judgment by confession and merchant cash advance ("MCA") agreement on usury grounds because the claims were barred by a one-year statute of limitation under CPLR § 215(6). *Kennard* is consistent with multiple New York State trial court decisions that rejected similar time-barred efforts by MCA customers ("merchants") to set aside confessed judgments and MCA agreements on identical usury grounds.

Plaintiffs sought summary judgment on their first and second causes of action to vacate the February 28, 2019 Judgment by Confession entered by Defendant-Respondent C6 Capital Funding LLC ("Defendant") against Plaintiffs on February 28, 2019 under Ontario County Index No. 123060/2019 ("Judgment by Confession") and declare the November 1, 2018 Agreement for the Purchase and Sale of Future

[1] Plaintiffs-Appellants AH Wines, Inc. ("AH Wines"), Great Coliseum, L.L.C., The Great Coliseum LLC, Great Coliseum L.L.C., Great Coliseum, L.L.C. d/b/a AH Wines, Lodi City Winery, and Winery Direct Distributors are collectively referred to as "Business Plaintiffs." Business Plaintiffs and Plaintiff-Appellant Jeffrey Hansen are collectively referred to as the "Plaintiffs."

Receipts ("Agreement") void on usury grounds. In its January 18, 2022 decision ("Decision"), the Supreme Court, Ontario County (Odorisi, J.S.C.) ("Lower Court") recognized that *Kennard* was binding law and factually on point.[2] The Lower Court properly concluded that the Plaintiffs' claims first filed on July 2, 2020 – more than one year after entry of the Judgment by Confession and the Agreement – were time-barred, and exercised its power to search the record and grant summary judgment to Defendant.

Pursuant to the Decision, the Lower Court issued the January 26, 2022 order ("Order") from which Plaintiffs appeal granting summary judgment to Defendant and directing the clerk to enter judgment dismissing the action. Unless this appeal is dismissed outright, which it should be,[3] the Order should be affirmed because the Lower Court correctly dismissed the usury claims on statute of limitations grounds.

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[2] The Decision is surprisingly omitted from the Record on Appeal but available on LexisNexis and at Dkt. No. 208 of the Lower Court's docket. *AH Wines, Inc. v. C6 Capital Funding LLC*, 2021 N.Y. Misc. LEXIS 7046 (Ontario Co. Sup. Ct. Jan. 18, 2022) ("*AH Wines III*").

[3] On February 2, 2022, the clerk entered a final judgment in Defendant's favor dismissing the action ("Final Judgment"), notice of which was served on February 7, 2022. R. 8-10. The Lower Court docket (Index No. 127393-2020) reveals that Appellants failed to file a notice of appeal from the Final Judgment within 30 days thereof, and are barred from filing it now. CPLR § 5513(a); *Matter of Henry*, 159 A.D.3d 1393, 1394-95 (4th Dept. 2018).

This is grounds for dismissal of the appeal. Generally, the right of appeal from an intermediate order terminates with the entry of a final judgment. *In re Aho*, 39 N.Y.2d 241, 248 (1976); *City of Syracuse v. Cor Dev. Co., LLC*, 147 A.D.3d 1510, 1510 (4th Dept. 2017); *Scott v. Manilla*, 203 A.D.2d 972, 973 (4th Dept. 1994). In accordance with this rule, this Court has dismissed an appeal from an intermediate order granting summary judgment where no appeal was taken from the

Alternatively, the Court should affirm the Order because the record demonstrates that Plaintiffs have no causes of action for usury. First, criminal usury is solely a defense and cannot be raised as an affirmative claim, including to vacate a judgment by confession or declare void an MCA agreement. Furthermore, corporations and their guarantors like Plaintiffs cannot assert civil usury as either a claim or defense. Plaintiffs simply have no cause of action, and their claims were properly dismissed by the Order.

Second, consistent with dozens of recent decisions, the MCA agreement here is not a loan and not subject to usury laws. It does not guaranty payment absolutely and is a purchase of future receivables since it: (i) contains a reconciliation provision by which Business Plaintiffs could true-up weekly remittances to reflect diminished receivables, (ii) has an indefinite term and does not require delivery of receivables by a date certain, and (iii) does not provide for an event of default if Business

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subsequently entered final judgment. *See Lakeview Loan Servicing, LLC v. Finn*, 176 A.D.3d 1599, 1599 (4th Dept. 2019); *accord Matter of Janette G. (Julie G.)*, 166 A.D.3d 1544, 1545 (4th Dept. 2018). While this Court has held that it may, in its discretion, deem the notice of appeal of an order granting summary judgment to be an appeal of the final judgment (*see Rew v. Cty. of Niagara*, 115 A.D.3d 1316, 1317 (4th Dept. 2014); *McLaughlin v. Midrox Ins. Co.*, 70 A.D.3d 1463, 1464 (4th Dept. 2010)), the equities militate against doing so here where this Court previously dismissed an appeal in this very action because the paper appealed from was not appealable for similar reasons. *AH Wines, Inc. v. C6 Capital Funding LLC*, 199 A.D.3d 1328, 1328 (4th Dept. 2021) (*AH Wines II*") ("[W]e note that the appeal from the decision in appeal No. 1 must be dismissed because it was taken from a mere decision, from which no appeal lies.") (quotation marks omitted).

Plaintiffs cease to do business in bankruptcy. The documentary evidence demonstrates that, since the Agreement is not a loan, Plaintiffs have no cause of action for usury and the action should be dismissed on this ground as well.

If the Court nonetheless is not inclined to affirm the Order granting summary judgment to Defendant, the Court should remand the matter to the Lower Court for consideration *in the first instance* of the other independent procedural and substantive arguments Defendant made in opposition to Plaintiffs' motion for summary judgment. The Court should not, *sua sponte*, grant summary judgment on appeal. Not only are there multiple disputed issues of fact concerning whether Plaintiffs made, and Defendants refused, any requests to reconcile their weekly remittance amounts, but summary judgment cannot be granted in Plaintiffs' favor where they refused to appear for noticed depositions prior to filing their summary judgment motion. Pursuant to CPLR § 3212(f), Plaintiffs' request for summary judgment must be denied where they are exclusively in possession of information at the heart of their allegations that the parties intended to enter into a usurious loan agreement, rather than knowingly entering into a lawful MCA agreement.

QUESTIONS PRESENTED

1. Did the Lower Court correctly conclude that Plaintiffs' causes of action to vacate the Judgment by Confession and Agreement on usury grounds are barred

by the one-year statute of limitations under CPLR § 215(6) where there is no dispute this action was commenced more than one year after entry of the Judgment?

Yes. This Court has already ruled in Kennard that CPLR § 215(6) is applicable in a virtually identical action.

2. Does CPLR § 5015(a)(3)'s judicially-made "reasonable time" limitation for a motion to vacate a judgment rendered by a court apply to a plenary action to vacate a judgment by confession entered by a clerk?

No. The statutory language makes clear that this provision is inapplicable to a cause of action to vacate a clerk-entered judgment, which is subject to CPLR § 215(6), the regular statute of limitations for usury claims.

3. Should the Order dismissing Plaintiff's usury claims be affirmed on the alternate grounds that Plaintiffs, who are corporate entities and their guarantor, have no substantive cause of action to vacate the Judgment by Confession or the Agreement on usury grounds?

Yes. There is no substantive cause of action to vacate a judgment by confession on criminal usury grounds and corporate entities and their guarantor have no cause of action for civil usury.

4. Should the Order dismissing Plaintiffs' usury claims be affirmed on the alternate grounds that the Agreement as a matter of law is a contingent MCA

agreement not subject to usury laws rather than a loan agreement with absolute payment obligations?

Yes. The documentary evidence demonstrates that the Agreement contains a mandatory reconciliation provision, has an indefinite term that can be lengthened based on Plaintiffs' receivables and there is no provision listing bankruptcy as an event of default.

5. If the Court does not affirm the Order, should the Court grant reverse summary judgment in Plaintiffs' favor on their usury claims where there are disputed issues of fact, including with respect to whether Plaintiffs requested or Defendants granted reconciliation requests?

No. This Court should merely remand the action to the Lower Court for consideration of the merits of the summary judgment motion in the first instance, particularly where facts necessary to oppose the summary judgment were exclusively in Plaintiffs' possession and Plaintiffs refused to appear for depositions.

PROCEDURAL HISTORY

As set forth more fully in the Statement of Facts below, Business Plaintiffs and Defendant entered into the Agreement on November 1, 2018. R76. Plaintiffs also executed an Affidavit of Confession of Judgment dated November 5, 2018 (the "COJ"). R31-32.

On February 28, 2019, following Business Plaintiffs' default under the Agreement, Defendant filed the COJ and the Clerk entered the Judgment by Confession against Plaintiffs under Ontario County Index No. 123060/2019 in the amount of $401,207.31, which included prejudgment interest, costs and disbursements and reasonable attorneys' fees. R29-30.

Plaintiffs commenced this plenary action against Defendant more than one year later on July 2, 2020. R14-26. On July 9, 2020, Plaintiffs filed an Amended Complaint with causes of action for (i) vacatur of the Judgment by Confession on usury grounds and (ii) a declaratory judgment that the underlying November 1, 2018 Agreement is void on usury grounds.[4]

On August 19, 2020, the Lower Court granted Plaintiffs' application for a preliminary injunction enjoining Defendant from taking further action to enforce the Judgment. R220-233; *AH Wines, Inc. v. C6 Capital Funding LLC*, 2020 N.Y. Slip Op. 32699(U), ¶ 13 (Ontario Co. Sup. Ct. Aug. 19, 2020) ("*AH Wines I*"). On September 11, 2020, the Lower Court entered a preliminary injunction order in favor of Plaintiffs (R234-236) ("Preliminary Injunction Order"). The Defendant appealed from that order.

[4] As the Court noted in the Order, Plaintiffs asserted two other causes of action in the Amended Complaint, but they subsequently waived those causes of action. R. 6-7.

On October 23, 2020, Defendant filed an Answer to Plaintiffs' Amended Complaint, which asserted as one of its affirmative defenses that "[t]he Complaint should be dismissed because the claims are untimely and barred by the applicable statutes of limitations." R64-74 ¶ 78.

On July 19, 2021, Plaintiffs filed a motion for summary judgment seeking, *inter alia*, "summary judgment in favor of Plaintiffs on each of the causes of action complained of in their Amended Complaint" and "striking each of Defendant's affirmative defenses." R94-95.

On November 12, 2021, this Court entered an order reversing and vacating the Preliminary Injunction Order. R435-436; *AH Wines II*, 199 A.D.3d at 1329.

On November 18, 2021, the Plaintiffs filed a new application for injunctive relief and the Lower Court granted a temporary restraining order restraining Defendant from enforcing the Judgment. R475-476.

On January 18, 2022, the Lower Court entered the Decision, which ruled in relevant part:

> In opposing Plaintiffs' motion for summary judgment, one of Defendant's arguments asserts that the Complaint is barred by the one-year statute of limitations, citing to CPLR §215(6) and various case law. Recently, the Fourth Department affirmed the dismissal of a complaint filed in a similar factoring agreement action. [*See Kennard*, 199 A.D.3d at 1406]. The underlying order of the Supreme Court, Erie County dismissed a plenary action to vacate a judgment entered by confession

in which the merchant cash advance funder made claims identical to those made in the case at bar. In Kennard, the Erie County Supreme Court determined that:

> 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.
>
> *The Fourth Department's recent authority on this issue is determinative of the claims pending before the Court in the matter at bar.* Here, the Agreement and Confession of Judgment were signed on November 1 and 5, 2018. *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 III, 2021 N.Y. Misc. LEXIS 7046, at *6-7 (emphases supplied; citation omitted).

On January 26, 2022, the Lower Court entered the Order granting summary judgment in Defendant's favor, vacating the temporary restraining order and directing the clerk to enter judgment. R5-7. On January 26, 2022, Plaintiffs filed the notice of appeal from the Order. R1-2. On February 2, 2022, the Lower Court

clerk entered the Final Judgment in Defendant's favor dismissing the action. R9-10. The Plaintiffs have not appealed from the Final Judgment.

STATEMENT OF FACTS

I. The Agreement, Guaranty and COJ

The Agreement was a standard MCA transaction in which Defendant purchased a merchant's future receipts for an agreed up-front purchase price (the "Purchase Price"), and was to receive the purchased future receipts (the "Purchased Amount") from the merchant's daily or weekly deposits of receipts at an agreed-upon percentage (the "Specified Percentage") debited from the merchant's bank account. R76, 257. For efficiency, the parties agree to a specified daily or weekly amount to be remitted, reflecting an estimate of the Specified Percentage of the merchant's daily or weekly receivables ("Daily Remittance" or "Weekly Remittance"). R257-258.

Pursuant to the Agreement, Defendant purchased $426,000.00 of the Business Plaintiffs' future receivables (the Purchased Amount) for $300,000.00 (the Purchase Price). R76. Plaintiff-Appellant Jeffrey Hansen, a principal of Business Plaintiffs, signed a Personal Guaranty of Performance (the "Guaranty") guarantying "complete performance of all of Seller's obligations under the Purchase Agreement" (R87-89), as well as the COJ that authorized Defendant to enter judgment against all Plaintiffs

upon a default by Business Plaintiffs. R31-32. The Guaranty acknowledged that the Agreement "is a purchase of the Purchased Amount and is not intended to be treated as a loan", and that Defendant "is not a lender" and "has not offered any loans to" Business Plaintiffs. R87-88.

The Agreement provided that Defendant would deliver the purchase price to Business Plaintiffs in exchange for a specified percentage of Business Plaintiffs' future receivables up to an agreed-upon amount:

> Seller, identified above, hereby sells, assigns and transfers to C6 CAPITAL, LLC … ("Buyer"), without recourse, the Specified Percentage of the proceeds of each future sale made by Seller (collectively "Future Receipts") until Buyer has received the Purchased Amount. "Future Receipts" includes all payments made by cash, check, ACH or other electronic transfer, credit card, debit card, bank card, charge card (each such card shall be referred to herein as a "Payment Card") or other form of monetary payment in the ordinary course of Seller's business. As payment for the Purchased Amount, Buyer will deliver to Seller the Purchase Price, shown above, minus any Origination Fee shown above….

R76. The receivables were to be remitted to Defendant at the rate of 15% of each receipt (the Specified Percentage), but, as a matter of expedience the Agreement called for a Daily Remittance of $2,838.00 (calculated as the "Average Monthly Sales x Specified Percentage/ Average Business Days in a Calendar Month)." *Id.*

The parties entered into a Weekly Deliveries Addendum dated November 1, 2018 (the "Addendum"), pursuant to which they modified the Agreement and agreed

to a Weekly Remittance in place of the Daily Remittance specified in the Agreement. R86. Specifically, the Addendum provides that Business Plaintiffs will remit "$17,750.00, which represents 5.25 times the [Daily Remittance], from Seller's Account on a weekly basis, every Wednesday, until the Purchased Amount is delivered." *Id.*

The Agreement allowed Business Plaintiffs to request an adjustment of the recurring remittance:

> **Seller May Request Changes to the Daily Amount:** The initial Daily Amount is intended to represent the Specified Percentage of Seller's daily Future Receipts. For as long as no Event of Default has occurred, once each calendar month, Seller may request that Buyer adjust the Daily Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Seller agrees to provide Buyer any information requested by Buyer to assist in this reconciliation. No more often than once a month, Buyer may adjust the Daily Amount on a going-forward basis to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Buyer will give Seller notice five business days prior to any such adjustment. After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Daily Amount until any subsequent adjustment.

R77 ¶ 2. Under this provision, Defendant was contractually required to adjust downward the Weekly Remittance if Business Plaintiffs actually submitted such a request and demonstrated a material decrease in their receivables. R261-262. However, Defendant was not required to automatically issue a reconciliation each month without a formal request from Business Plaintiffs. *Id.* Separately, this

provision allows – but does not require – Defendant to adjust the Weekly Remittance upward upon five days' notice to Business Plaintiffs if Business Plaintiffs' receivables materially increased. *Id.*

The Agreement does not provide Defendant with recourse against Business Plaintiffs in the event of business failure or slow down. To the contrary, the Agreement specifies:

> **Sale of Future Receipts (THIS IS NOT A LOAN):** Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer. *If Future Receipts are remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, or if the full Purchased Amount is never remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement, Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement. Buyer is buying the Purchased Amount of Future Receipts knowing the risks that Seller's business may slow down or fail,* and Buyer assumes these risks based on Seller's representations, warranties and covenants in this Agreement that are designed to give Buyer a reasonable and fair opportunity to receive the benefit of its bargain. By this Agreement, Seller transfers to Buyer full and complete ownership of the Purchased Amount of Future Receipts and Seller retains no legal or equitable interest therein. Seller agrees that it will treat Purchase Price and Purchased Amount in a manner consistent with a sale in its accounting records and tax returns….

R77 ¶ 4 (emphasis supplied). This provision must be read in conjunction with the reconciliation provision in paragraph 2 of the Agreement, which provides the

mechanism by which Business Plaintiffs could ensure the Weekly Remittances are slowed or shut down, as necessitated by the circumstances. R262.

The Agreement provides that only the following events constitute "Events of Default," which do not include Business Plaintiffs filing for bankruptcy:

> (a) Seller interferes with Buyer's right to collect the Weekly Amount; (b) Seller violates any term or covenant in this Agreement; (c) Seller uses multiple depository accounts without the prior written consent of Buyer; (d) Seller changes its depositing account or its payment card processor without the prior written consent of Buyer; (e) Seller defaults under any of the terms, covenants and conditions of any other agreement with Buyer; or (f) Seller fails to provide timely notice to Buyer such that: (i) within any 30 day period four or more ACH transactions attempted by Buyer are rejected by Seller's bank and/or; (ii) four or more consecutive ACH transactions attempted by Buyer are rejected by Seller's bank.

R80 ¶ 15. As set forth in paragraph 4 of the Agreement, Business Plaintiffs' closure as a result of a bankruptcy could absolutely absolve Business Plaintiffs of any obligation to remit further amounts if there were no further receivables. R77. Under such a circumstance, Defendant would not be able to collect further amounts from Mr. Hansen under the Guaranty or file the COJ against the Plaintiffs since there would be no breach of the Agreement. R263.

II. Plaintiffs' Allegations Concerning the Performance of the Agreement

Plaintiffs conceded that Business Plaintiffs received the Purchase Price after executing the Agreement, Addendum, Guaranty and COJ in November 2018. R242.

Plaintiffs alleged that, in accordance with the Agreement and Addendum, Defendant made six weekly withdrawals, each in the amount of $17,750 and totaling $106,000.00 between November 6, 2018 and January 23, 2019. R139.

Plaintiffs previously alleged in a January 8, 2021 affidavit in support of a prior motion that "[d]uring the [] repayment period, the parties did not exchange more recent, updated copies of AH Wines' receivables," but that they had "communicated with [Defendant] during which AH Wines communicated that it was financially struggling and unable to remit the weekly payment of $17,750.00." R242. Plaintiffs later changed their testimony in the subsequent summary judgment motion, claiming "C6 had direct access to AH Wines' bank account" and that "AH Wines complied, and provided C6 with its January and February 2019 financial statements." R139. Plaintiffs did not submit copies of any written communications, such as any formal reconciliation requests.

III. Defendant's Allegations Concerning the Performance of the Agreement

Defendant disputed Plaintiffs' allegations, other than the facts that (i) Defendant performed its obligation to deposit the Purchase Price in the Business Plaintiffs' bank account in November 2018, and (ii) Plaintiffs breached the Agreement in February 2019 by blocking their account. R32. In actuality, Business Plaintiffs remitted Weekly Remittances of $17,749.99 on November 7, 2018,

November 21, 2018, November 28, 2018, December 5, 2018, and December 12, 2018. R32, 270-272.

The December 20, 2018 Weekly Remittance bounced because Business Plaintiffs advised their bank that the transaction was not authorized, per the R29 return code received by Defendant. R265. On December 28, 2018, Business Plaintiffs contacted their broker, Justin Cooper of a separate entity called C6 Capital LLC, to explain the immediate cash flow issues experienced by Business Plaintiffs. R265, 276-277. Business Plaintiffs did not submit bank statements or ask Mr. Cooper to submit a formal reconciliation request, but instead asked solely for (1) payment relief "over the next 7-10 days," (2) making "some small partial payments" for "the next couple weeks thereafter," (3) "work[ing] toward getting back to the scheduled weekly draw from our account" at some point in January 2019, and (4) making some additional "catch up" payments while seeking "a modification in our payments over the next few weeks" *Id.* Business Plaintiffs did not contend that the cash flow issues were caused by diminished receivables alone but instead highlighted a number of factors affecting Business Plaintiffs, including an immediate payment due on an SBA loan, the need to make payroll, refinancing the SBA loan and credit line expansion through Chase Bank, major purchase contracts for 2019, capital raise/private placement to purchase new vineyards and wine brands,

and awaiting payment on a settlement of a lawsuit, in addition to some slowed receivable due to customers making late payments around the holidays. *Id.* As a result of this request, no Weekly Remittances debits were attempted by Defendant until January 23, 2019, and Defendant did not default Business Plaintiffs. R266.

On January 23, 2019, two debits of $8,874.00 each were made, but two days later each debit bounced, with a return code of R01 for insufficient funds. *Id.* Thereafter, Business Plaintiffs offered to send a small wire to make up the bounced debit and committed to make a payment of up to $20,000 if cash flow allowed it. *Id.* On or about January 29, 2019, Business Plaintiffs sent a wire of $2,200.00, which was received on January 30, 2019. *Id.* On January 30, 2019, the scheduled remittance of purchased receivables bounced due to insufficient funds. *Id.* On or about February 1, 2019, Business Plaintiffs offered to send in small wires to resolve the bounced debit. *Id.* Defendant received the following wires from Business Plaintiffs:

- 2/4/19 - $3,000.00
- 2/5/19 - $715.00
- 2/8/19 - $3,130.00

Id. On February 6, 2019, a weekly debit in the initial amount of $17,749.99 cleared, but on February 12, 2019, Defendant refunded half of that amount ($8,875.00) to Business Plaintiffs at their request due to their alleged continued financial

difficulties. *Id.* Thereafter, both the February 13, 2019 and February 20, 2019 debits of Weekly Remittances bounced due to insufficient funds. *Id.* No prior notice was given to Defendant of the insufficient funds and there was no request by Business Plaintiffs not to debit the Weekly Remittances. *Id.*

Defendant attempted to contact Plaintiffs to discuss the bounced debits and determine their financial condition. R267. However, Defendant did not receive a response or further clarification from Plaintiffs. *Id.* To date, Defendant received $106,669.94 in purchased receivables from Business Plaintiffs. *Id.*

Business Plaintiffs defaulted under paragraph 15(a) and (d) of the Agreement because they blocked their designated bank account from which Defendant withdrew the Weekly Remittance without following required reconciliation procedures and did not give notice that the account would have insufficient funds or otherwise communicate with Defendant about their financial condition. *Id.*

STANDARD OF REVIEW

> On a motion for summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action.

Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015) (citations and quotations omitted) (citing CPLR § 3212(a)). "Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established fact." *Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039, 1043 (2016).

CPLR § 3212(b) provides that a court may search the record and grant summary judgment for a non-moving party: "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Courts may do so where the record demonstrates that a cause of action is time barred. *See Matter of Weikel v. Town of W. Turin*, 162 A.D.3d 1706, 1708 (4th Dept. 2018).

ARGUMENT

POINT I
THE LOWER COURT PROPERLY APPLIED CPLR § 215(6) AND KENNARD IN DISMISSING THE COMPLAINT AS TIME-BARRED

A. CPLR § 215(6) Applies to a Cause of Action to Vacate a Judgment by Confession on Usury Grounds

CPLR § 215(6), the statute of limitations applied in *Kennard* and by the Lower Court, provides that "[a]n action to recover any overcharge of interest or to enforce a penalty for such overcharge" shall be commenced within one year. *Hawkins v. Eaves*, 134 A.D.3d 1221, 1222 (3d Dept. 2015); *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 (2nd Dept. 1994).

Contrary to Plaintiffs' arguments (App. Br. 23-26), 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. *See, e.g.*, *Mill St. Realty, Inc. v. Reineke*, 159 A.D.2d 494 (2d Dept. 1990) ("The record reveals that the plaintiffs commenced this action in or about May 1986 to have certain deeds which they delivered to the defendants on February 2, 1981 declared void as part of a usurious loan agreement. The one-year limitations period set forth in CPLR 215(6) is applicable to this action."); *Glassman v. Zoref*, 291 A.D.2d 430, 431 (2nd Dept. 2002) (plaintiff "may not assert a cause of action based on usury since the one-year statute of limitations has expired, even though she may assert usury as a defense in

a separate foreclosure action."); *Cullen v. Margiotta*, 811 F.2d 698, 717 (2d Cir. 1987) (RICO claim predicated upon alleged violation of New York State usury laws subject to the one-year limitations period under CPLR § 215(6)).

With respect to MCA agreements, a line of New York trial courts prior to *Kennard* ruled that a plenary action to vacate a judgment by confession on the ground that the MCA agreement is usurious must be commenced within one year pursuant to CPLR § 215(6). In *NRO Boston LLC v. CapCall LLC,* 2020 N.Y. Misc. LEXIS 4064 at *5 (Westchester Co. Sup. Ct. 2020) ("*CapCall*"), the court ruled that "[a]s more than one year passed between the last of the agreements and the commencement of this action [to vacate a judgment by confession on usury grounds], the Court dismisses the Third Cause of Action." The court found usury claims accrue, and the one-year statute of limitation begins to run, from the date of the MCA agreement. *CapCall,* 2020 N.Y. Misc. LEXIS 4064 at *5. *CapCall* specifically rejected the argument made by Plaintiffs here that the statute only applies where the merchant plaintiff seeks a monetary recovery of overcharged interest:

> 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.

Id. (citing cases; quotation marks omitted).

In *Progressive Water Treatment, Inc. v. Yellowstone Capital LLC*, 2021 N.Y. Misc. LEXIS 5, at *9 (Erie Co. Sup. Ct. 2021) – in which the merchant was represented by the same counsel as Plaintiffs – the court found that the plaintiffs' attempt to re-cast their claims as "affirmative defenses" to take advantage of the rule that affirmative defenses of usury are not subject to CPLR § 215(6) did not nullify the one-year statute of limitations when seeking to vacate a judgment by confession based on an MCA agreement. That is because no matter how they framed it, "Plaintiffs have asserted usury as claims, not affirmative defenses." *Id.* Notably, Plaintiffs' counsel stipulated to withdraw the appeal to this Court from the *Progressive Water* decision. *See* 4th Dept. Case No. CA 21-00256.

American Res. Corp. v. C6 Capital, LLC, 2021 N.Y. Misc. LEXIS 1440, at *2-3 (Kings. Co. Sup. Ct. 2021), dismissed a usury claim seeking to vacate a judgment by confession where the MCA agreement was executed more than one year prior to filing the complaint: "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 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." *Id.*

Finally, *A&A Fabrication & Polishing Corp. v. Funding Metrics*, 2021 N.Y. Misc. LEXIS 2317, at *7 (Westchester Co. Sup. Ct. 2021), ruled that "plaintiffs' individual claims based on usury are therefore time-barred, since the allegedly usurious Merchant Agreement was entered into over four years ago, and the default was declared and judgment based on that default was entered almost four years ago."

While Plaintiffs' motion for summary judgment was pending, this Court issued its *Kennard* decision, which put to rest any question about the applicability of a one-year statute of limitation in plenary actions seeking to vacate judgments by confession or MCA agreements. The trial court dismissed "[t]he Complaint dated June 10, 2020, in this action [to] challenge [] a judgment by confession entered against Plaintiffs on October 25, 2017." *Kennard*, 2020 N.Y. Misc. LEXIS 10407 at *1. One ground for dismissal was that "Plaintiffs' claim of usury is barred by the one-year statute of limitations applicable to usury based claims." *Id*. This Court unanimously affirmed the ruling, in effect endorsing each of its holdings. *Kennard*, 199 A.D.3d at 1406. *Kennard* is *stare decisis* and is not subject to further challenge on this appeal. *Dufel v. Green*, 198 A.D.2d 640, 640 (3rd Dept. 1993), *aff'd* 84 N.Y.2d 795, 799 (1995) ("Once this court has decided a legal issue, subsequent

appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented."), *cited in Matter of Phila. Ins. Co. (Utica Nat'l Ins. Grp.)*, 97 A.D.3d 1153, 1155 (4th Dept. 2012).

Just days before issuing the Decision, the Lower Court examined *Kennard* in a thorough analysis in a decision dismissing an identical merchant-action and holding that *Kennard* required applying CPLR § 215(6)'s one year statute of limitations to claims seeking to vacate judgments by confession on usury grounds:

> Defendant invokes the 1-year time-frame per CPLR 215 (6) – "[a]n action to recover any overcharge of interest . . ." - to say that the imitations period lapsed in February 2020. This exact statute of limitations position was adopted and affirmed in Kennard Law P.C., so this Court is bound to adhere to the same. Consequently, this matter - which was commenced on August 2, 2021 - is time-barred. See e.g. Stamp v. Schenk, 267 AD2d 1017, 700 N.Y.S.2d 901 (4th Dept 1999) (affirming statute of limitations dismissal).

American Water Restoration, Inc. v. AKF Inc., 2022 N.Y. Slip Op. 50030(U), at *12 (Ontario Co. Sup. Ct. Jan. 7, 2022). In another recent decision (where the merchant was represented by Plaintiffs' counsel), the court dismissed claims to vacate a confessed judgment because:

> Even if Plaintiffs successfully pled that the agreements here were loans and subject to usury laws, the claim for relief would still fail. Usury

> claims are subject to a one-year statute of limitations. Such a claim accrues on the date that the overpayment is made.

OriginClear Inc. v. GTR Source, LLC, 2021 U.S. Dist. LEXIS 239013, at *19 (W.D.N.Y. Dec. 14, 2021) (citations and quotations omitted).

Plaintiffs do not, because they cannot, dispute that (i) the Agreement and COJ were signed November 1 and 5, 2018, (ii) Plaintiffs do not allege that they made any payments after January 23, 2019, and (iii) the Judgment by Confession was entered on February 28, 2019. *See* App. Br. 12, 15. As the Decision correctly found, each date is more than one year prior to the commencement of this action on July 9, 2020, and the action thus is time-barred under CPLR § 215(6) and *Kennard*. *AH Wines III*, 2021 N.Y. Misc. LEXIS 7046, at *6-7. Therefore, the Order granting summary judgment dismissing the usury claims should be affirmed.[5]

[5] Plaintiffs cite *Rockefeller v. Jeckel*, 161 A.D.2d 1090, 1091 (3rd Dept. 1990) and *Blue Wolf Capital Fund II, LP v. Am. Stevedoring Inc.*, 105 A.D.3d 178, 184 (1st Dept 2013) for the proposition that "a finding of usury by itself implicates sufficient public policy considerations to justify vacatur in the interest of justice." App. Br. at 36 (quotation marks omitted). However, *Rockefeller* involved a motion to vacate a default judgment, to which CPLR § 5015(a)(3) applied, and *Blue Wolf* was a cross-motion for summary judgment on the defendants' affirmative defense of usury. Similarly, the cases cited by Plaintiffs in footnote 3 of their brief are inapposite because they either involved an affirmative defense, to which it is undisputed the statute of limitations is inapplicable (*see Clark v. Daby*, 225 A.D.2d 974, 975 (3d Dept. 1996)), or do not indicate whether the statute of limitations was raised to an affirmative claim, let alone whether and when it applies (*see Murlar Equities P'ship v. Jimanez*, 2016 N.Y. Slip Op. 31833(U), ¶¶ 8-10 (Bronx Co. Sup. Ct. 2016)). None of Plaintiff's cases involved a plenary action to vacate a judgment by confession – and none were decided after *Kennard*.

B. CPLR § 5015(a)(3)'s Reasonable Time Limitation Was Not Raised Below and Is Inapplicable to a Plenary Action to Vacate a Judgment by Confession

The Court should reject Plaintiffs' argument that the one year statute of limitations in CPLR § 215(6) does not apply because they styled their causes of action as seeking vacatur under CPLR § 5015(a)(3) – based on their allegation that the Judgment by Confession was entered based upon fraud, misrepresentation, or other misconduct – and CPLR § 5015(a)(3) provides that a motion to vacate a judgment under CPLR 5015(a)(3) must be brought within a "reasonable time." App. Br. 33-35. A motion under CPLR 5015(a)(3) need only be made "within a reasonable time" since "there is no express time limit for seeking relief from a judgment pursuant to CPLR 5015(a)(3)." *Shah v. N.Y. State Office of Mental Health*, 199 A.D.3d 955, 956 (2d Dept. 2021). In other words, Plaintiffs claim their action was timely because, even though it was not filed within one-year, in their estimation it was filed within a reasonable time after the Judgment by Confession was entered.

As an initial matter, Plaintiffs' argument cannot be considered because it is being raised for the first time on appeal and was not made in the statute of limitations sections of Plaintiffs' briefs in the Lower Court (R121-122, 401-408). *See Williams v. Philips Med. Sys. (Cleveland), Inc.*, 152 A.D.3d 1199, 1200 (4th Dept. 2017). Similarly, the Court should disregard Plaintiffs' arguments, made for the first time

on appeal (as evidenced by Plaintiffs' failure to cite to any place in the record), that the statute of limitations should be extended because they allegedly "never had any knowledge or awareness of the Judgment." App. Br. 34. No such allegation is made in Plaintiffs' affidavits in support of their summary judgment motion or even in either of their preliminary injunction applications in the Lower Court. *See* R140-141, 164-168, 470-471.

Even if the arguments were preserved, CPLR § 5015(a)(3), by its own terms, applies to a *motion* to vacate a judgment *rendered by a court* in an action; it *does not* apply to Plaintiffs' plenary action to vacate a confessed judgment *entered by a clerk*. *Id.* ("The court which *rendered a judgment* or order may relieve a party from it upon such terms as may be just, *on motion* … upon the ground of … fraud, misrepresentation, or other misconduct of an adverse party[.]"). CPLR § 5015(a)(3) does not apply because a confessed judgment is not "rendered" by a court but instead entered by a clerk:

> Under CPLR 5015(a)(3) a court which "rendered" a judgment may vacate it upon motion based on fraud or misrepresentation. However, the words "render judgment" refer generally to the pronouncement of the court's judgment on a given state of facts and are "not used with reference to judgments by confession" (Black's Law Dictionary, 4th ed, p. 1460).

Scheckter v. Ryan, 161 A.D.2d 344, 345 (1st Dept. 1990); *see also Lipp v. Port Auth. of N.Y. & N.J.*, 17 Misc. 3d 667, 670 (Queens Co. Sup. Ct. 2007) ("rendering" judgment is not "not synonymous with 'entering', 'docketing' or 'recoding' the judgment") (citations omitted). Hence, New York courts have repeatedly held that a party seeking to vacate a confessed judgment must commence a plenary action and cannot proceed under CPLR § 5015(a)(3). *See id.*; *Midtown Acquisitions L.P. v. Essar Glob. Fund Ltd.*, 162 A.D.3d 583, 583 (1st Dept. 2018). A line of appellate decisions has denied motions to vacate confessed judgments where merchants were claiming the underlying MCA agreements were usurious. *See Funding Metrics, LLC v. D & V Hosp., Inc.*, 197 A.D.3d 1150, 1151-52 (2d Dept. 2021) (citing cases).

Plaintiffs argue that, out of fairness, the Court should apply the "reasonable time" limitation under CPLR § 5015(a)(3) because they were deprived from being able to assert usury as an affirmative defense since they had to proceed by plenary action instead of a motion to vacate. App. Br. 20. This premise is mistaken. The obligation to proceed by plenary action is *not* a "judicially-created requirement that abrogates the statutorily provided means of vacating judgments by motion (*see* CPLR 5015(a))." *Id.* Rather, CPLR § 5015(a)(3) is a legislative creation that specifically limits its application to "rendered" judgments and does not include confessed judgments. *Scheckter*, 161 A.D.2d at 345. As Plaintiffs themselves urge,

"[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. A court should not turn to extrinsic matters …." App. Br. 23 (citations and quotation marks omitted). Indeed, the Court lacks discretion to extend a statute of limitations. CPLR § 201 ("No court shall extend the time limited by law for the commencement of an action."); *Matter of Heffernan v. N.Y.C. Mayor's Office of Hous. Recovery Operations*, 196 A.D.3d 426, 426 (1st Dept. 2021).

Many courts have rejected similar arguments. *CapCall,* 2020 N.Y. Misc. LEXIS 4064 at *4-5, rejected a merchant's argument that CPLR § 215(6) was inapplicable because their plenary action was supposedly brought pursuant to CPLR § 5015(a)(3), which requires an application for vacatur of a default judgment on fraud grounds to be made within a "reasonable time." The court held a plenary cause of action to vacate a judgment was not an application under CPLR § 5015(a)(3): "That simply does not apply in this action, where the only default was in making payments; there was no default involved in entering the judgments against plaintiffs." *Id.* at *5. In *American Res.*, 2021 N.Y. Misc. LEXIS 1440, at *2-3, the court rejected a merchant's argument that the court should apply the outlier ruling in *McNider Marine, LLC v. Yellowstone Capital, LLC*, 2019 N.Y. Slip Op. 33418(U), ¶ 15 (Erie Co. Sup. Ct. Nov. 19, 2019), which held that CPLR §

5015(a)(3) applies to causes of action to vacate confessed judgments.[6] Furthermore, *A&A Fabrication*, 2021 N.Y. Misc. LEXIS 2317, at *7, held:

> The rule that a party seeking to challenge a judgment by confession is generally restricted to commencement of a plenary action, does not alter the fact that plaintiffs are seeking affirmative relief, both monetary and declaratory, based on a claim of usury. As such they remain limited by the one-year statute of limitations. Notably, the previous plenary action was commenced within that time frame.

Id. (citation omitted). Finally, *American Water Restoration*, 2022 N.Y. Slip Op. 50030(U) at *12, held that CPLR § 5015(a)(3) does not govern actions to vacate judgments by confession on usury grounds:

> Plaintiffs' effort to expand the statute of limitations via CPLR 5015 (a) (3) is misplaced. To begin, the Complaint does not cite Section 5015 (a) (3) - a motion provision not a substantive legal cause of action. The Section allows a motion to set aside a judgment if it was procured by "fraud, misrepresentation, or other misconduct of an adverse party." CPLR 5015 (a) (3). Besides not mentioning Section 5015 (a) (3), the Complaint also does not plead fraud with specificity as required by CPLR 3016 (b). Due to this, there is no basis to invoke CPLR 213 (8)'s six-year limitations period, or even the more nebulous "reasonable time" as noted in NRO Boston LLC v. Yellowstone Capital LLC, 72 Misc 3d 267, 277, 147 N.Y.S.3d 375 (Rockland Co Sup Ct 2021).

[6] To the extent *McNider Marine* or the other outlier case, *NRO Boston LLC v. Yellowstone Capital LLC*, 2021 N.Y. Slip Op. 21107, ¶¶ 4-5, 72 Misc. 3d 267, 277 (Rockland Co. Sup. Ct. Apr. 9, 2021), may have once had persuasive authority, they have now been rejected by *Kennard*, which affirmed that a one-year statute of limitations applies. The Lower Court applied this binding Fourth Department authority. *See Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dept. 2015) ("It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department …").

(Citations omitted.)

This Court should likewise reject Plaintiffs' entreaty to apply CPLR § 5015(a)(3) in their effort to inappropriately avoid the legislature's one-year statute of limitations for usury claims.

POINT II
THE COURT SHOULD AFFIRM THE ORDER ON THE ALTERNATIVE GROUND THAT PLAINTIFFS HAVE NO COGNIZABLE CAUSE OF ACTION TO VACATE THE JUDGMENT BY CONFESSION ON USURY GROUNDS

Even if this action was not time-barred, summary judgment was properly granted because Plaintiffs have no cognizable cause of action to vacate the Judgment by Confession or Agreement on usury grounds. In *Kennard*, this Court upheld a lower court dismissal of a virtually identical merchant action on the grounds that "Plaintiffs have failed to plead a cognizable cause of action upon which to seek relief." 2020 N.Y. Misc. LEXIS 10407 at *1, *aff'd* 199 A.D.3d at 1406.

Indeed, multiple New York courts prior to *Kennard* held that corporate merchants and their guarantors (like the Plaintiffs here) cannot bring affirmative claims based on criminal usury to vacate a judgment by confession or an MCA agreement. *Paycation Travel v. Global Merch. Cash*, 192 A.D.3d 1040, 1041 (2d Dept. 2021) ("[GOL] § 5-521 bars a corporation such as the plaintiff from asserting usury in any action, except in the case of criminal usury as defined in Penal Law §

190.40, and then only as a defense to an action to recover repayment of a loan, and *not as the basis for a cause of action asserted by the corporation for affirmative relief*" of vacating a confessed judgment) (emphasis supplied); *A&A Fabrication*, 2021 N.Y. Misc. LEXIS 2317, at *8-9 (applying *Paycation* to merchants and guarantors); *MPAK Inc. v. Merch. Funding Servs., LLC*, 2020 N.Y. Misc. LEXIS 7022, *11-13 (Orange Co. Sup. Ct. 2020); *FCI Enters. Inc. v. Richmond Capital Grp., LLC*, 2019 N.Y. Slip Op. 30711(U), ¶¶ 5-6 (Kings Co. Sup. Ct. 2019); *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807, 815 (Westchester Co. Sup. Ct. 2017). Those decisions are in line with the rule that a merchant seeking to set aside an MCA agreement as usurious may not do so as an affirmative claim, only as a defense. *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 667 (2d Dept. 2020).

Additionally, Plaintiffs – corporations and their guarantor – cannot assert civil usury as either an affirmative claim or affirmative defense. GOL § 5-521 provides "[n]o corporation shall hereafter interpose the defense of [civil] usury in any action." *See Paycation Travel*, 192 A.D.3d at 1041. This applies equally to the individual guarantor of a corporation's debt. *72nd Ninth LLC v. 753 Ninth Ave Realty LLC*, 168 A.D.3d 597, 597 (1st Dept. 2019); *Fred Schutzman Co. v. Park Slope Advanced Med., PLLC*, 128 A.D.3d 1007, 1008 (2nd Dept. 2015).

Critically, despite this argument being fully briefed in Defendant's opposition below (R376-378), Plaintiffs fail to address this issue on appeal and therefore have waived the argument. Plaintiffs may try to argue for the first time in reply on appeal that the Court should view their plenary action to vacate the Judgment by Confession as an assertion of an affirmative defense, but (in addition to being waived) this argument has already been considered by another court, and denied:

> [T]he procedural limitation imposed by that line of cases on that particular type of judgment cannot serve to transform an affirmative claim into a defense, even though the practical effect of the rule is to preclude the corporate merchant that provided a confession of judgment from pleading usury as a defense.

A&A Fabrication, 2021 N.Y. Misc. LEXIS 2317, at *9 (applying *Paycation Travel*, 192 A.D.3d at 1041). Just because a plenary action is the correct procedural mechanism does not *ipso facto* create a substantive cause of action.

This outcome is consistent with public policy. Claims and defenses of civil or criminal usury are waived where a party to a usurious contract confesses judgment. *Merch. Funding Servs., LLC v. Realtime Carriers, LLC*, 2017 N.Y. Misc. LEXIS 13503, *6 (Rockland Co. Sup. Ct. 2017) (denying motion to vacate judgment by confession entered under MCA agreement because "[w]hile 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.") (citing cases). That is because "the allegedly usurious [agreement] was merged into the Confession of Judgment" and is a valid waiver akin to giving a consent judgment, which "when given without unlawful inducement … is deemed to have been given consensually and voluntarily." *Higgins v. Erickson (In re Higgins)*, 270 B.R. 147, 156 (Bankr. S.D.N.Y. 2001). Therefore, even if the Plaintiffs' claims are not time-barred, the Order should be affirmed because Plaintiffs cannot, as a matter of law, assert affirmative claims for usury.

POINT III
THE COURT SHOULD AFFIRM THE ORDER ON THE ALTERNATIVE GROUND THAT THE AGREEMENT WAS NOT A LOAN AS A MATTER OF LAW AND NOT SUBJECT TO USURY LAWS

Even if the Court concludes that the Plaintiffs' claims are not time-barred and that the Plaintiffs may assert affirmative claims based on usury, the Order still should be affirmed on the alternative ground that the Agreement was not a loan as a matter of law and thus is not subject to usury laws.

A. A Party Alleging Usury Bears a High Burden

Two well-established principles of New York jurisprudence preclude a finding that the Agreement is usurious: (1) the strong presumption *against* usury, and (2) a transaction cannot be usurious if it is not a loan.

First, there is a strong presumption against a finding of usury, and a party claiming usury bears the heavy burden of proving it by clear and convincing evidence. *Giventer v. Arnow*, 37 N.Y.2d 305, 309 (1975); *Roopchand v. Mohammed*, 154 A.D.3d 986, 988 (2d Dept. 2017). "A usurious agreement will not be presumed from facts equally consistent with a lawful purpose." *Kaufman v. Horowitz*, 178 A.D.2d 632 (2d Dept. 1991). "[W]hen a[n agreement] is not usurious on its face, a court will not presume usury; rather, the party asserting [usury] must

prove all the elements, including usurious intent." *Womack v. Capital Stack, LLC,* 2019 U.S. Dist. LEXIS 148644, *11 (S.D.N.Y. 2019) (quotations omitted).

Second, "[i]f the transaction is not a loan, there can be no usury, however unconscionable the contract may be." *Seidel v. 18 East 17th St. Owners, Inc.*, 79 N.Y.2d 735, 744 (1992); *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665 (2d Dept. 2020). "To constitute a loan, the agreement must provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449 (1st Dept. 2018); *see Womack,* 2019 U.S. Dist. LEXIS 148644, at *9 (the "primary indicia of a loan is the debtor's absolute obligation to repay the principal sum without risk to the creditor of the debtor's business failure.").

Applying these principles, more than four dozen New York decisions concluded that MCA agreements like the one here (including those involving confessions of judgment and personal guaranties) were not loans and therefore were not usurious. *See, e.g., Principis Capital, LLC v. I Do, Inc.*, 201 A.D.3d 752, 754-55 (2d Dept. 2022) (granting summary judgment enforcing MCA agreement and dismissing usury affirmative defense and counterclaims);[7] *Champion Auto Sales,*

[7] The Court must disregard Plaintiffs' principal argument (App. Br. 37-39) that the Agreement is usurious based upon speculation or dicta in a dissenting opinion in a footnote in *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 2021 N.Y. Slip Op. 07055, ¶ 11 fn. 14 (N.Y. Dec. 16, 2021)

LLC v. Pearl Beta Funding LLC, 159 A.D.3d 507 (1st Dept. 2018); *see also* R396-399 (case list). Payment to an MCA funder is contingent, not absolute:

> The repayment was based upon a percentage of daily receipts, and the period over which such payment would take place was indeterminate. Plaintiff took the risk that there could be no daily receipts, and defendants took the risk that, if receipts were substantially greater than anticipated, repayment of the obligation could occur over an abbreviated period, with the sum over and above the amount advanced being more than 25%. The request for the Court to convert the Agreement to a loan, with interest in excess of 25%, would require unwarranted speculation, and would contradict the explicit terms of the sale of future receivables in accordance with the Merchant Agreement.

Merchant Cash & Capital, LLC v. Liberation Land Co., LLC, 2016 N.Y. Misc. LEXIS 4854, *5-6 (Nassau Co. Sup. Ct. 2016). "Under the terms of the subject Agreement, if Seller/Defendant produces no daily revenue, no payments are required, and there is no absolute obligation of repayment." *Id.* at *8.

An MCA agreement is not a loan even if it contains a fixed daily (or weekly) remittance as an estimate of a specified percentage of daily receivables where "the Agreement provided no liability in the event that the seller's business failed because it could not generate sufficient revenue to continue operating." *IBIS Capital Group,*

(Wilson, J., dissenting), that an agreement did not "bear several of the hallmarks of traditional factoring arrangements" without citing applicable law. The Second Department's subsequently entered *Principis Capital* decision is a clear indication that MCA agreements with fixed daily payments subject to reconciliation continue to be lawful contingent purchase agreements not subject to usury laws.

LLC v. Four Paws Orlando LLC, 2017 N.Y. Misc. LEXIS 884, *7 (Nassau Co. Sup. Ct. 2017). The fixed amount can be adjusted through a reconciliation provision, which allows the merchant to request a reduction of the remittance amounts to reflect diminutions of its receivables. *Quicksilver Capital LLC v. Obioha*, 2020 N.Y. Slip Op. 31321(U), ¶¶ 7-8 (N.Y. Co. Sup. Ct. 2020) (MCA agreement contingent where "[t]he agreement contains a reconciliation provision … provid[ing] that plaintiff is to collect future receivables based on amounts collected by defendant during a particular calendar month. If defendant is not in default, she may once each calendar month request that plaintiff reconcile the [monthly amount to be paid by defendant] to more closely reflect defendant's actual future receipts times the purchased percentage."). "If the agreement was not usurious at the outset no subsequent conduct can *ab initio* render the agreement usurious …" *FCI Enters.*, 2019 N.Y. Slip Op. 30711(U), ¶ 5 ("The mere fact the complaint alleges the defendants failed to honor the reconciliation provisions of the agreement does not thereby render the debt as unenforceable under the RICO statute.").

B. As a Matter of Law, the Agreement Is Not a Loan

"[C]ourts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any

recourse should the merchant declare bankruptcy." *Principis Capital*, 201 A.D.3d at 754 (quoting *LG Funding*, 181 A.D.3d at 666). The Agreement meets the criteria for an MCA.

1. The Agreement Has a Mandatory Reconciliation Provision

By its terms, the Agreement is not a loan. R77 ¶ 4 ("Sale of Future Receipts (THIS IS NOT A LOAN)"); *see Colonial Funding Network, Inc. v. Davincitek Corp.*, 2021 N.Y. Slip Op. 30026(U), ¶ 13 (N.Y. Co. Sup. Ct. 2021) (parties' stipulation that MCA agreement was not a loan dispositive); *Comer v. Advanced Capital Inc.*, 2020 N.Y. Misc. LEXIS 9101, *9 (Queens Co. Sup. Ct. 2020) (same); *Four Paws Orlando*, 2017 N.Y. Misc. LEXIS 884, at *5-6 (same). The Agreement clearly is intended to be an MCA, not a loan:

> Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer. … If Future Receipts are remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down … Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement.

R77 ¶ 4.

Rather than requiring immediate remittance of the Purchased Amount as receivables are paid, the Purchased Amount is remitted by a Weekly Remittance based on the 15% Specified Percentage out of "the proceeds of each future sale made

by" Plaintiffs. R77, 49. No provision increases the overall remitted amount if Plaintiffs' business slows and their receivables are remitted over a longer period than initially estimated. Although the Agreement provides an initial Weekly Remittance, it is not a loan in which interest accrues with the passage of time since the Purchased Amount can never increase. *See* App. Br. 40-41 (admitting that "[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."). accounts receivables were $0, then Plaintiff would receive $0 (after the end of month reconciliation).").

i. The Reconciliation Provision Precludes the Agreement from Being a Loan

Critically, the Agreement contains a reconciliation provision to effectuate the merchant's rights in paragraph 4:

> The initial Daily Amount is intended to represent the Specified Percentage of Seller's daily Future Receipts. For as long as no Event of Default has occurred, once each calendar month, Seller may request that Buyer adjust the Daily Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Seller agrees to provide Buyer any information requested by Buyer to assist in this reconciliation. No more often than once a month, Buyer may adjust the Daily Amount on a going-forward basis to more closely reflect the Seller's actual Future Receipts times the Specified Percentage. Buyer will give Seller notice five business days prior to any such adjustment. After each adjustment made pursuant to this paragraph, the new dollar

amount shall be deemed the Daily Amount until any subsequent adjustment.

R77 ¶ 2. A reconciliation provision precludes a finding that an MCA agreement is a loan. *MCA Master Fund (MMF) v. Universal Scrap Motors Inc.*, 2021 N.Y. Slip Op. 30097(U), ¶¶ 3-4 (Nassau Co. Sup. Ct. 2021). Defendant assumed "the risk that, if the receipts were less than anticipated, the period of repayment would be correspondingly longer, and the investment would yield a correspondingly lower annual return." *Merchant Cash & Capital, LLC v. Cramer E. Constr. LLC*, 2016 N.Y. Misc. LEXIS 4647, *7-8 (Nassau Co. Sup. Ct. 2016). The reconciliation provision requires Defendant to reconcile if the merchant makes a request, even if it means Defendant will receive nothing. *Power Up Lending Grp., Ltd. v. Cardinal Energy Grp., Inc.*, 2019 U.S. Dist. LEXIS 57527, *15-17 (E.D.N.Y. 2019) ("The reconciliation clause provides that reconciliation is automatic, mandatory, and that there is no discretion for Plaintiff. There is no minimum payment, so if Defendants' accounts receivables were $0, then Plaintiff would receive $0 (after the end of month reconciliation).").

ii. The Reconciliation Provision Is Not Illusory as a Matter of Law

The reconciliation provision is mandatory, providing Business Plaintiffs with a right of reconciliation if their receivables diminish. Plaintiffs argue

that the lack of the specific words "must" or "shall" in the reconciliation clause renders the reconciliation right discretionary. App. Br. 41-42. However, Plaintiffs' argument does not analyze the specific text of the reconciliation provision, which addresses two distinct reconciliations.

The second and third sentences of the reconciliation provision address a reconciliation requested by the merchant-seller (an adjustment *downward* in favor of Business Plaintiffs if receivables decrease), which "may" be requested "once each calendar month," and which requires the merchant-seller to "to provide Buyer any information requested by Buyer to assist in this reconciliation." R77 ¶ 2. In contrast, the fourth and fifth sentences address a reconciliation by the funder-buyer (an *upward* adjustment in favor of Defendants if receivables increase), which the funder-buyer can implement "[n]o more often than once a month" by giving "Seller notice five business days prior to any such adjustment." *Id.* The second sentence allows (but does not require) the merchant-seller to request a reconciliation once a month. *Id.* Separately, the word "may" in the fourth sentence allows (but does not require) the funder-buyer to adjust the remittance amount once a month. *Id.* "May" in the fourth sentence addressing the funder-buyer's right to reconciliation does not give the funder-buyer discretion over whether to grant a reconciliation request from the

merchant-seller. *Id.*[8] Defendants clearly averred that this reconciliation is mandatory. R258, 261-262.

Moreover, Plaintiffs' arguments that the reconciliation clause is illusory and subject to Defendants' discretion violates the presumption against rendering any contract provision meaningless. *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, N.Y.3d 572, 581 (2017) ("Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases … a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.") (citations and quotations omitted); *Chelsea Piers L.P. v. Colony Ins. Co.*, 176 A.D.3d 506, 507 (1st Dept. 2019) ("To find otherwise renders a portion of the contract meaningless and fails to read all contractual clauses together contextually."). Plaintiffs' argument, if credited, would rip the reconciliation provision out of the context of the full Agreement since it renders ineffectual the mechanism by which the parties agreed Business Plaintiffs could slow down their daily remittances, as promised in paragraph 4 of the Agreement. R77 ("If Future

[8] Plaintiffs' reading does not explain why Buyer would need to give Seller five business days' notice if Seller asked for the reconciliation or why the provision twice mentions that reconciliations can happen once a month.

Receipts are remitted more slowly than Buyer may have anticipated … Seller would not owe anything to Buyer …").

The reconciliation provision must be construed in the context of the full Agreement to effectuate the intent of the parties *that it be an MCA rather than a loan*, and the provision should not be deemed illusory based on the single word "may" taken out of context. The reconciliation provision would serve no purpose (and be rendered meaningless) in the context of paragraph 4 of the Agreement if reconciliation was not mandatory since paragraph 2 is the mechanism by which to stop or slow remittances. *See generally Pirs Capital, LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc. 3d 457, 462 (N.Y. Co. Sup. Ct. 2020) (although reconciliation provision did not, by its express terms, place a burden on the MCA funder to grant a reconciliation, the merchant failed to establish the provision was a sham). Critically, the reconciliation provision does not employ "may" with respect to whether the funder must grant the reconciliation and is devoid of express language making reconciliation discretionary.

Even though paragraph 2 is silent on whether reconciliation is mandatory (R77), that is implied. *See Sheth v. N.Y. Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dept. 2000) ("an obligation of good faith and fair dealing on the part of a party to a contract may be implied" if it "is in aid and furtherance of other terms of the agreement of

the parties.") (quotations and citations omitted). Defendant has no right to refuse a reconciliation request because, even if expressly discretionary (which it is not), "[t]he exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits." *Hirsch v. Food Res., Inc.*, 24 A.D.3d 293, 296 (1st Dept. 2005). Furthermore, reconciliation is mandatory from the commercial context of the MCA transaction painstakingly described in paragraph 4. *See Aetna Cas. & Sur. Co. v. Lumbermens Mut. Cas. Co.*, 152 A.D.2d 1003, 1004 (4th Dept. 1989) ("the commercial context of the transaction supplies the necessary implication of interest").

Plaintiffs further claimed that in practice "Defendant *refused to reconcile*,"[9] but this is not itself evidence of the "illusory nature of the reconciliation provision." App. Br. 42-43. As one court recently ruled in another action in which Plaintiffs' counsel herein represented the merchant, this at worst demonstrates a breach of contract, not that the reconciliation itself was illusory or the Agreement usurious. *OriginClear*, 2021 U.S. Dist. LEXIS 239013, at *17 ("Such allegations [that the

[9] Defendant denies that it refused a valid reconciliation request, but Defendant assumes the truth of Plaintiffs' assertion for purposes of the underlying summary judgment motion and this ensuing appeal only.

funder rejected requests for reconciliation] may be sufficient to show that Defendants breached the terms of the agreements, but the Court does not find that such conduct rendered the provisions illusory.").

Finally, Plaintiffs' also claim the Addendum renders the reconciliation clause illusory because it converts the "Daily Amount" into a weekly delivery frequency. App. Br. 42. However, nothing in the Addendum modified any other provisions of the Agreement, including the reconciliation clause. *See Benipal v. Herath*, 251 A.D.2d 933, 934 (3d Dept. 1998) ("where the contract has been materially modified, the modification establishes a new agreement between the parties which supplants the affected provisions of the underlying agreement while leaving the balance of its provisions unchanged."). Thus, Plaintiffs' right to reconcile remained the same, except that the Weekly Amount would be reconciled rather than the Daily Amount.[10]

[10] Even if *arguendo* the reconciliation provision was illusory, that alone is insufficient to demonstrate the Agreement is a loan. *See LG Funding*, 181 A.D.3d at 666 (listing three factors). *LG Funding* found a triable issue of fact as to whether an MCA agreement was a loan where two of the three factors demonstrated an agreement was insufficiently risky. *Id.* In contrast, where only one of the factors is met, a court should find that the MCA agreement is not a loan. *Comer*, 2020 N.Y. Misc. LEXIS 9101, at *10-11 (despite finding reconciliation language illusory, denying application to vacate confession of judgment because "[h]aving weighed all the factors," and finding two of three favor the MCA funder, "the agreement is sufficiently risky such that it cannot be considered a loan."). Plaintiffs have not demonstrated the second and third *LG Funding* factors favor them.

2. The Agreement Has an Indefinite Term

The Agreement is not a loan as a matter of law because there is no finite term for delivery of the Purchased Amount. To the contrary, the Agreement provides "[t]here is … no time period during which the Purchased Amount must be collected by Buyer." R77 ¶ 4; *see Principis Capital*, 201 A.D.3d at 754 ("Concomitantly, as the amount of the monthly payments could change, the term of the agreement was not finite."); *MCA Master Fund*, 2021 N.Y. Slip Op. 30097(U), ¶ 4 (agreement not loan where it provided "an 'indefinite term' and remains in effect until [the merchant's] obligations are 'fully satisfied,'" because "[t]he indefiniteness of the Agreement supports the contention that it is contingency based and not absolute.").

Plaintiffs make all sorts of fact arguments that Defendant did not automatically grant reconciliations of the Weekly Amount to reflect their allegedly diminished receivables in January and February 2019. *See* App. Br. 45-48. But while these alleged failures *might* give Plaintiffs a breach of contract claim (*OriginClear*, 2021 U.S. Dist. LEXIS 239013, at *17), courts have routinely found that contract provisions for similar daily (or weekly) amounts, which are estimates subject to adjustment under the reconciliation provision, are features of a receivables-purchase contract, not a loan, because reconciliation could infinitely extend the duration of the agreement. *Yellowstone Capital LLC v. Cent. USA*

Wireless LLC, 60 Misc. 3d 1220(A) (Erie Co. Sup. Ct. 2018); *Power Up Lending Grp.*, 2019 U.S. Dist. LEXIS 57527, at *15-16; *NY Capital Asset Corp. v. F & B Fuel Oil Co., Inc.*, 58 Misc. 3d 1229(A) (Westchester Co. Sup. Ct. 2018); *Womack*, 2019 U.S. Dist. LEXIS 148644, at *10-11.

The Agreement sets an "Initial Daily Amount," modified to a "Weekly Amount", representing a percentage of the Future Receipts, calculated from C6's review of the Business Plaintiffs' financial records prior to execution of the Agreement, which amount is further subject to reconciliation. R77, 49. Plaintiffs' argument that the Weekly Remittances evidence that the Agreement is a loan is, under well-established New York law, negated by the reconciliation provision which potentially extends the period over which the Purchased Amount is delivered.

3. There Is No Recourse if the Merchant Has No Receipts Due to Bankruptcy

The Agreement is not a loan as a matter of law because bankruptcy is not an event of default. R80 ¶ 15; *Principis Capital*, 201 A.D.3d at 754 ("[N]o contractual provision existed establishing that a declaration of bankruptcy would constitute an event of default."). To the contrary, the Agreement expressly provides that bankruptcy forgives remittance obligations (assuming no other default):

> *If Future Receipts are remitted more slowly than Buyer may have anticipated or projected* because Seller's business has slowed down, *or*

> *if the full Purchased Amount is never remitted* because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement, Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement.

R77 ¶ 4 (emphasis added); *see Womack*, 2019 U.S. Dist. LEXIS 148644, at *6 n.4 (identical language consistent with MCA agreement). Tellingly, Plaintiffs spend pages of their appeal brief making numerous tangential arguments – most for the first time on appeal – that they would have absolute liability in the event of a hypothetical bankruptcy filing, but they do not (because they cannot) point to any express provision in the Agreement making them liable for payment in bankruptcy. *See* App. Br. 49-55. Nor do these arguments raise any issue of fact because Plaintiffs do not allege that they ever filed for bankruptcy.

Instead, Plaintiffs argue that the Guaranty of performance and COJ *ipso facto* render the Agreement a loan. However, numerous decisions holding that an MCA agreement is not a loan did so in the context of requests to vacate judgments by confession against merchants and personal guarantors (including multiple cases Plaintiffs' counsel lost). *See, e.g.*, *Champion Auto*, 159 A.D.3d 507, 507 (1st Dept. 2018) ("The court properly dismissed the complaint seeking to vacate the judgment by confession. The evidence demonstrates that the underlying agreement leading to the judgment by confession was not a usurious transaction."); *OriginClear*, 2021

U.S. Dist. LEXIS 239013, at *18-19 ("despite Plaintiffs' allegations that the execution of the security agreements, guaranties, and affidavits of confessions in connection with each of the agreements rendered repayment absolute"); *Progressive Water*, 2021 N.Y. Misc. LEXIS 5, at *9.

Critically, the Guaranty and COJ imposed obligations no broader than those assumed by Business Plaintiffs in the Agreement; rather, they just provided security for performance of the contractual obligations under the Agreement in the event that there is an enumerated event of default by Business Plaintiffs. R31, 87. Nothing obligated either Business Plaintiffs or the guarantor to make payments or allowed Defendant to file the COJ where Business Plaintiffs were not required to make payments, including if they filed for bankruptcy. *See id.* As a result, the mere presence of these provisions in the Agreement – without some absolute payment obligation language (which is not alleged here) – will not render the Agreement a loan. As *Womack* held when considering a virtually identical agreement, the guaranty "merely guaranteed 'prompt and complete performance of all of Seller's obligations under the Purchase Agreement,' … Thus, [guarantor's] obligations under the Guaranty were no broader than [merchant's] obligations under the Agreement." *Womack,* 2019 U.S. Dist. LEXIS 148644, at *6. "The Guaranty did not alter [funder's] risk of non-payment if [merchant's] business failed." *Id.*; *see*

Colonial Funding, 2021 N.Y. Slip Op. 30026(U), ¶¶ 15-16 ("although the guaranty … guaranteed [merchant's] performance of its obligations under the Agreement, it did not affect the contingent nature of the transaction. Further, [guarantor] did not agree to pay the Purchase Amount if [merchant] was unable to pay because it ceased operations in the ordinary course of business. The Guaranty did not alter [funder's] risk of non-payment if [merchant's] business failed."). The Agreement does not impose any payment obligation on Plaintiffs in the event of bankruptcy and is not a loan as a matter of law.

POINT IV
ALTERNATIVELY, THE COURT SHOULD REMAND TO THE LOWER COURT FOR CONSIDERATION OF THE MERITS OF THE SUMMARY JUDGMENT MOTION

If the Court nonetheless is not inclined to affirm the Order granting summary judgment to Defendant, the Court should remand to the Lower Court for consideration *in the first instance* of the other independent procedural and substantive arguments Defendant made in opposition to Plaintiffs' motion for summary judgment. Where summary judgment dismissal has been granted and a lower court did not reach the merits of the motion, and the ground on which the lower court granted the motion is reversed by an appellate court, the matter should generally be "remanded for the motion court to consider the merits of the summary

judgment motion in the first instance." *Am. Transit Ins. Co. v. Espinal*, 195 A.D.3d 401, 402 (1st Dept. 2021); *see Torres v. Etilee Taxi, Inc.*, 136 A.D.3d 437, 439 (1st Dept. 2016) ("Because the court granted defendants' motions on the threshold question of serious injury, it did not reach the merits of that branch of the motion of defendants Milon and G & H for summary judgment as to liability. Accordingly, we remand the matter for the motion court to consider that branch of the motion in the first instance."). This Court should not grant summary judgment where issues of fact exist in the record that precluded summary judgment at the trial level. *See Weiss v. Zellar Homes, Ltd.*, 169 A.D.3d 1491, 1495 (4th Dept. 2019); *Nero v. Kendrick*, 156 A.D.3d 1390, 1391 (4th Dept. 2017).

A. Fact Questions as to Whether the Reconciliation Provision Is Illusory Would Preclude Summary Judgment for Plaintiffs

At best for Plaintiffs, the reconciliation provision in paragraph 4 of the Agreement raises issues of fact that preclude summary judgment because it is ambiguous and susceptible to several reasonable interpretations. *See Lahey v. Lahey*, 68 A.D.3d 1656, 1658 (4th Dept. 2009) ("[R]esolution by a fact finder is required where, as here, interpretation of an agreement is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words.") (citations, quotations and alterations

omitted). Plaintiffs, as the "party seeking summary judgment ha[ve] the burden of establishing that the construction [they] favor[] is the only construction which can fairly be placed thereon." *One Flint St., LLC v. Exxon Mobil Corp.*, 169 A.D.3d 1392, 1393 (4th Dept. 2019) (citation omitted). Plaintiffs cannot meet this burden.

To ascertain the reconciliation provision's meaning, the Court would need to engage in a fact-intensive analysis of pre-contractual negotiations, the purpose of the provision, the parties' subsequent conduct and industry custom regarding reconciliation provision. *See IFC v. Carrera Holdings Inc.*, 2016 N.Y. Slip Op. 31341(U) (N.Y. Co. Sup. Ct. 2016) (citing cases).[11]

Defendant's intent (as explained at R258, 261-262) and industry custom (evidenced by the caselaw) clearly demonstrate that the reconciliation provision was intended to be mandatory, while *at most*, the parties' course of conduct (as described below) raises issues of fact as to the parties' intent as to whether the reconciliation provision was illusory. *See Pirs Capital.*, 69 Misc. 3d 457 at 462 (merchant failed to demonstrate reconciliation provision was a sham where it failed to "state whether, for example, [it] ever *requested* an adjustment of the amounts being collected in

[11] The Agreement's anti-*contra proferentem* provision precludes construction of ambiguities against Defendant. R81 ¶ 22.

order to account for the actual amount of its daily receivables."); *accord MCA Master Fund*, 2021 N.Y. Slip Op. 30097(U), ¶ 4.

Plaintiffs assert that the course of conduct demonstrates indisputably that they "could not compel a reconciliation despite informing Defendant of their ongoing financial hardship and providing Defendant with bank statements demonstrating AH Wines' severely decreased, current receivables" and interpret allegations in Defendant's affidavits as allegedly demonstrating that "Defendant's [sic] *refused to reconcile* and attempted to forcibly withdraw the full Weekly Amount from AH Wines' bank account, irrespective of AH Wines' receivables." App. Br. 42 (emphasis in the original). However, Plaintiffs not only failed to submit copies of such bank statements in the Lower Court record, but the record includes conflicting testimony from Plaintiffs about whether they ever provided them contemporaneously to Defendant. In a January 8, 2021 affidavit on a prior motion for summary judgment, Plaintiffs averred that "[d]uring the [] repayment period, the parties did not exchange more recent, updated copies of AH Wines' receivables." R242. But, apparently in response to Defendant's opposition to the first motion, they changed their testimony in the second motion, in which their affidavit made the conflicting statement that "AH Wines complied, and provided C6 with its January and February 2019 financial statements." R139. This contradiction concerning a

material fact alone defeats Plaintiffs' request for summary judgment. *See Gemini v. Christ*, 61 A.D.3d 477, 477 (1st Dept. 2009) (rejecting affidavit that "contradicted [prior] testimony" and which "appears to have been tailored to avoid the consequences of that testimony").

Furthermore, Plaintiffs simply cannot meet their summary judgment burden because they failed to submit documentary evidence demonstrating the contemporaneous submission of a written reconciliation request with financial records as legally required. *See Orange ACH v. Soho Sample Sale LLC*, 2018 N.Y. Misc. LEXIS 9613, *1 (N.Y. Co. Sup. Ct. 2018); *Merch. Cash & Capital, LLC v. S. Jersey Speed LLC*, 2018 N.Y. Slip Op. 30395(U) at *5 (Nassau Co. Sup. Ct. 2018)). MCA reconciliation requests require the merchant's provision of its financial information to the funder. *See Rapid Capital Fin., LLC v. Natures Mkt. Corp.,* 57 Misc. 3d 979, 984 (Westchester Co. Sup Ct. 2017) ("Defendants protest that other provisions of the agreement ensured that plaintiff would never adjust down its monthly debited sum, in that the agreement gives plaintiff the ability to investigate the merchant's finances in the event its monthly receipts are low. However, these protective mechanisms do not negate the reconciliation mechanism; they merely protect plaintiff from the types of trickery illustrated by examples offered in defendants' submissions, such as the possibility that the merchant could hide its

receipts by depositing them elsewhere."). Two documents supposedly reflecting the receivables were submitted in the record below (R. 283-288), but neither were alleged to have been contemporaneously provided to Defendant and neither are actual bank account records to back up the self-serving documents. Nor was Defendant afforded an opportunity to probe the veracity of these documents because Plaintiffs repeatedly refused to produce witnesses to be deposed. R. 251-254, 318-322.

To the extent Plaintiffs' summary judgment gambit purports to rely on alleged admissions by Defendants, Plaintiffs misstate what Defendant's affidavits actually say. Defendant alleged that it repeatedly suspended Weekly Remittances upon Plaintiffs' request prior to Plaintiffs' default. R264, 270-272. Weekly Remittances were made from the inception of the Agreement until the December 20, 2018 remittance bounced. R265. At Plaintiffs' request through their broker, Defendant suspended remittances until January 23, 2019 to accommodate the Business Plaintiffs' cashflow needs (which their principal, Mr. Gerlach, had said were mostly the result of meeting other debt obligations, payroll and business expenses, and not mainly as a result of diminished receivables). *Id*. After the January 23, 2019 debit bounced, Plaintiffs sent small wire amounts as they deemed appropriate. R266. The January 30, 2019 remittance bounced, and Plaintiffs again sent small wires as they

deemed appropriate. *Id*. The February 6, 2019 remittance cleared, but at Plaintiffs' request, half that amount was refunded. *Id*. Only after the February 13 and 20, 2019 debits bounced due to insufficient funds, *and* Plaintiffs failed to provide notice as required by the Agreement, *and* Defendant could not obtain a response or explanation from AH Wines was there a default, resulting in entry of Judgment. R266-67. Plaintiffs previously admitted they "ceased allowing Defendant from making withdrawals" without following required reconciliation procedures (but glaringly omitted the admission in their renewed motion or on appeal). Dkt. No. 58 at 13.

None of these allegations, taken together with the conflicting accounts of whether Defendant had access to Plaintiffs' bank records, conclusively demonstrate that a request for a "reconciliation" was ever made by Plaintiff – *i.e.*, a permanent modification of the amount of the weekly payments "to more closely reflect the Seller's actual Future Receipts times the Specified Percentage" (R77 ¶ 2) – as opposed to a temporary suspensions of weekly payments. As such, the record at most creates material issues of fact about whether the reconciliation provision is illusory that preclude granting summary judgment in Plaintiffs' favor.

B. Plaintiffs' Failure to Appear for Depositions Precludes Granting Summary Judgment in Their Favor

Denying the request for reverse summary judgment here is particularly appropriate where outstanding factual issues remained in the Lower Court for which discovery was needed at the time Plaintiffs filed their summary judgment motion. *Grossman v. Pharmhouse Corp.*, 234 A.D.2d 918, 920 (4th Dept. 1996) (court has discretion pursuant to CPLR § 3212(f) to "deny [a] motion [for summary judgment] to permit … disclosure to be had."). On March 11, 2021, the Lower Court entered an order compelling Plaintiffs' responses to Defendant's interrogatories and document requests, but did not decide Defendant's request to compel Plaintiffs to appear for noticed depositions. R316.

Defendant's opposition to the summary judgment motion made clear that depositions were still outstanding and were needed to obtain information exclusively in Plaintiffs' possession concerning their intent and understanding of the Agreement,[12] business slowdown, efforts to obtain reconciliations and blocking Defendant from debiting remittances. R316-22. Plaintiffs refused to appear for depositions, instead twice moving preemptively for summary judgment. *Id.*

[12] *See Womack,* 2019 U.S. Dist. LEXIS 148644, at *11 ("party asserting [usury] must prove all the elements, *including usurious intent*.") (emphasis supplied).

Therefore, if the Court does not affirm the Order, it should deny the request for reverse summary judgment and instead remand the matter to the Lower Court for further proceedings.

CONCLUSION

WHEREFORE, the Court should either:

a. Dismiss the appeal; *or, in the alternative,*

b. Affirm the Order in its entirety; *or, in the alternative,*

c. Deny Plaintiffs' request for this Court to grant summary judgment in its favor on appeal and remand the matter to the Lower Court to decide the merits of Plaintiffs' summary judgment in the first instance; *or, in the alternative,*

d. Grant Defendant all such other and further relief as is just and equitable.

Dated: April 8, 2022

CARTER LEDYARD & MILBURN LLP

By: _____

Jeffrey S. Boxer
Jacob H. Nemon
2 Wall Street
New York, NY 10005
Tel.: (212) 732-3200
Fax: (212) 732-3232
Email: boxer@clm.com / nemon@clm.com
Attorneys for Defendant
C6 Capital Funding, LLC

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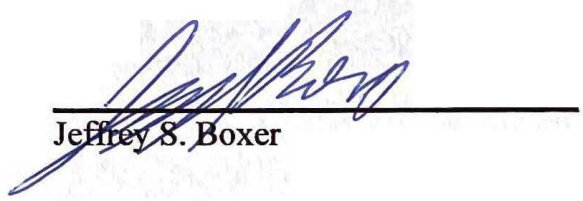

Jeffrey S. Boxer