ONTARIO COUNTY CLERK'S INDEX NO. 127393/2020
APPELLATE DIVISION–FOURTH DEPARTMENT CASE NO. 22-00220
COURT OF APPEALS MO. NO. 2022-783

COURT OF APPEALS
of the
STATE OF NEW YORK

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

Plaintiffs-Appellants,

- against -

C6 CAPITAL FUNDING LLC,

Defendant-Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
OF THE STATE OF NEW YORK

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AH WINES, INC/GREAT COLISEUM, L.L.C., THE GREAT COLISEUM, L.L.C. / GREAT COLISEUM, L.L.C. d/b/a AH WINES / LODI CITY WINERY / LODI WINE COMPANY / WINERY DIRECT DISTRIBUTORS and JEFFREY WAYNE HANSEN,	Ontario Co. Index No. 127393-2020 4th Dept. Case No. CA 22-00220 Ct. App. Mo. No. 2022-783
Plaintiffs-Appellants, -against- C6 CAPITAL FUNDING LLC, Defendant-Respondent.	**CORPORATE DISCLOSURE STATEMENT**

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Defendant-Respondent C6 Capital Funding LLC, for its Corporate Disclosure Statement pursuant to Rule 500.1(f) of the Rules of this Court, states that its sole member is David Rubin, 8791 South Redwood Road Suite 200, West Jordan, UT 84088.

Dated: November 11, 2022

CARTER LEDYARD & MILBURN LLP

By: _____

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Plaintiffs-Appellants,

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DEFENDANT-RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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INTRODUCTION

Defendant-Respondent C6 Capital Funding LLC ("Defendant") respectfully submits this Memorandum of Law in opposition to Plaintiffs-Appellants' ("Plaintiffs") motion for leave to appeal to this Court (the "Motion")[1] from the Decision and Order of the Appellate Division, Fourth Department dated September 30, 2022 (Exh. 5) ("AD Decision"), which affirmed the Judgment of the Supreme Court, Ontario County, dated February 1, 2022 (Exhs. 1 and 20) ("Final Judgment"). The Judgment was entered upon the Decision entered in the Supreme Court on January 18, 2022 (Exh. 18) ("SC Decision"), and Order entered in the Supreme Court on January 26, 2022 (Exh. 19) ("SC Order").

The Final Judgment and Order granted summary judgment dismissing Plaintiffs' Amended Complaint dated July 1, 2020 (Exh. 2) ("Complaint") which sought to vacate the February 28, 2019 Judgment by Confession entered by 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 Receipts ("Agreement") void on usury grounds.[2] The Supreme Court concluded that the action was time-barred by

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[1] The Motion is supported by the Memorandum of Law in Support of Plaintiffs-Appellants' Motion for Leave to Appeal dated October 31, 2022 ("MOL Supp."), and Exhibits. All "Exh. __" references are to Exhibits to the Motion.

[2] Copies of the Judgment by Confession and Agreement were not attached to the Motion.

the one-year statute of limitations in CPLR § 215(6), and the Appellate Division unanimously affirmed that decision. *See* Exh. 5.

PRELIMINARY STATEMENT

As set forth below, the Court should deny the Motion because the Fourth Department's unanimous decision followed and properly applied longstanding precedent from the Appellate Divisions in affirming the Final Judgment dismissing this action on statute of limitations grounds. The Appellate Divisions, including the Fourth Department itself, have consistently interpreted the one-year statute of limitations under CPLR § 215(6) as applying to *any* affirmative claims based upon usury (including in an action to vacate a judgment by confession or for a declaratory relief to set aside an agreement) regardless of whether the plaintiff is seeking to recover interest it paid.

Moreover, the *dictum* in the AD Decision stating Plaintiffs would have no affirmative right to bring a cause of action based on criminal usury to vacate the Judgment by Confession should not be grounds for an appeal to this Court since that *dictum* was not the basis of the Fourth Department's decision. A contrary determination by this Court on this issue would not impact the result in the Final Judgment because it dismissed the Complaint on statute of limitations grounds. Furthermore, the *dictum* was a proper statement of existing law in both the Second and Fourth Departments, and is not contradicted by any decision in any other

department. Therefore, there is no basis for review of this issue by this Court in connection with the AD Decision.

FACTS

The only facts truly relevant to the issues in the Motion were succinctly stated by the Fourth Department: "The confession of judgment was signed on November 5, 2018, and it was entered in the court on February 28, 2019. Plaintiffs commenced this action on July 2, 2020." AD Decision at 2. In other words, even if *arguendo* the Agreement were a criminally usurious loan or Defendant treated it as a loan rather than a merchant cash advance ("MCA") agreement by failing to provide reconciliations, which it did not[3], the only factual issues relevant on this Motion are

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[3] Consistent with dozens of recent New York State court decisions, the MCA Agreement here is *not* a loan and not subject to usury laws. *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); *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. 2020); *Champion Auto Sales, LLC v. Pearl Beta Funding LLC*, 159 A.D.3d 507 (1st Dept. 2018). The Agreement here (which is not attached to the motion) is a valid MCA agreement and not a loan since, *inter alia*, it contains a mandatory reconciliation clause in paragraph 2, had no definite term, and stated explicitly in paragraph 4 that bankruptcy was not an event of default. *See Glob. Merch. Cash, Inc. v. Mainland Ins. Agency Inc.*, 2022 N.Y. Misc. LEXIS 1473, at *7-8 (Kings Co. Sup. Ct. 2022) (ruling that a contract in a form *identical* to the Agreement here in which the funder's "percentage of receivables is a flat rate per week, the percentage amount could be adjusted under paragraph 2 of the Agreement by either party if it elects to do so in accordance with [the merchant's] actual future receipts ... *is a merchant agreement, rather than a loan*") (emphasis supplied).

Plaintiffs concede that an MCA agreement can be "used legally" to "sell a portion of [a merchant's] specified future receipts" provided that "the issuer of the MCA company *must* lower payments if the merchant experiences a downturn." MOL Supp. at 2-3 fn. 3. That is precisely what occurred here. Evidence submitted by Defendant in opposition to Plaintiffs' summary judgment motion demonstrated that Defendant suspended weekly remittances and provided refunds of weekly

the dates of the Agreement (which coincided with the execution of the affidavit of confession of judgment), the date of entry of the Judgment by Confession, and the date on which Plaintiffs commenced this plenary action to vacate the Judgment by Confession.[4]

STANDARD FOR MOTION

The Motion should be denied because it does not meet the criteria this Court considers in granting motions for leave to appeal. CPLR § 5602(a)(1)(i) provides, in relevant part:

> Permission by the court of appeals ... may be taken:
> 1. in an action originating in the supreme court ...
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right[.]

Questions may merit review by this Court where "the issues are novel or of public importance, present a conflict with prior decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4); *see also* 12-5602 NEW YORK CIVIL PRACTICE: CPLR § 5602.05 (citing

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payments despite never receiving formal reconciliation requests from Plaintiffs. *See generally* Exh. 9 (Brief for Defendant-Respondent) at 15-18.

Although Supreme Court initially granted a preliminary injunction (prior to discovery or hearing the full argument on the merits), the injunction was vacated by the Fourth Department (Exh. 17), and Supreme Court recognized in the SC Decision that "the previous determinations made by the Court on the preliminary injunction application are not binding at this juncture." SC Decision, at 5.

[4] For purposes of opposing this Motion only, Defendant generally does not challenge the facts or procedural history as alleged at MOL Supp. at 8-12, but reserves the right to provide a counter-statement of facts in its merits brief if this Court grants leave to appeal.

1990 Annual Report of the Clerk of the Court to the Judges of the New York State Court of Appeals at 6) (leave to appeal generally granted to "address an issue of statewide importance and to articulate a principle of law in need of clarification, refinement or development").

Here, none of these criteria are satisfied by Plaintiffs' motion: the AD Decision is not novel and is an application of settled law, the AD Decision does not conflict with prior decisions by this Court, and there is no split of authority among the Appellate Division departments on the issues presented.

ARGUMENT

POINT I
THE AD DECISION CORRECTLY AFFIRMED DISMISSAL OF THE COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS

A. The AD Decision Was Consistent With Prior Appellate Division Precedent

The AD Decision affirmed Supreme Court's grant of summary judgment dismissing the Complaint on statute of limitations grounds since the Complaint was filed more than one year after Plaintiffs' claims began to accrue:

> With respect to the other two causes of action, which are based on usury, we conclude that, contrary to plaintiffs' contention, Supreme Court properly granted summary judgment in favor of defendant on the ground that those causes of action are time-barred under CPLR 215(6). The confession of judgment was signed on November 5, 2018, and it was entered in the court on February 28, 2019. Plaintiffs commenced this action on July 2, 2020. Consequently ... we conclude that plaintiffs may not assert a cause of action based on usury since the one-year statute of limitations has expired.

Exh. 5 (quotation marks omitted) (citing *Glassman v. Zoref*, 291 A.D.2d 430, 431 (2nd Dept. 2002); *Mill St. Realty, Inc. v. Reineke*, 159 A.D.2d 494 (2d Dept. 1990); and *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820 (2nd Dept. 1994)).

CPLR § 215(6) 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*, 208 A.D.2d at 820.

Contrary to Plaintiffs' arguments (MOL Supp. at 20-21), New York appellate 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 specifically to recover monies paid. *See Glassman*, 291 A.D.2d at 431 (in action seeking to vacate loan and mortgage, plaintiff "may not assert a cause of action *based on usury* since the one-year statute of limitations has

expired ....") (emphasis supplied); *Mill St. Realty*, 159 A.D.2d at 494 ("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.") (emphasis supplied); *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)).

Just under a year ago, in a virtually *identical* plenary action, the Fourth Department itself, in *Kennard Law*, 199 A.D.3d at 1406, *aff'g* 2020 N.Y. Misc. LEXIS 10407,[5] unanimously affirmed a trial court decision that dismissed claims by the plaintiffs who were seeking to vacate a judgment by confession and MCA agreement on usury grounds because the claims were barred by a one-year statute of limitation under CPLR § 215(6). Moreover, a slew of trial court decisions, both before and after *Kennard Law*, came to the same conclusion that claims for a declaratory judgment that a purported MCA agreement, or judgment by confession entered thereupon, is void for usury are subject to the one-year statute of limitations

[5] 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," because *inter alia* "Plaintiffs' claim of usury is barred by the one-year statute of limitations applicable to usury based claims." *Kennard*, 2020 N.Y. Misc. LEXIS 10407 at *1.

in CPLR § 215(6). *American Water Restoration, Inc. v. AKF Inc.*, 2022 N.Y. Slip Op. 50030(U), at *12 (Ontario Co. Sup. Ct. 2022); *OriginClear Inc. v. GTR Source, LLC*, 2021 U.S. Dist. LEXIS 239013, at *19 (W.D.N.Y. 2021); *A&A Fabrication & Polishing Corp. v. Funding Metrics*, 2021 N.Y. Misc. LEXIS 2317, at *7 (Westchester Co. Sup. Ct. 2021); *American Res. Corp. v. C6 Capital, LLC*, 2021 N.Y. Misc. LEXIS 1440, at *2-3 (Kings. Co. Sup. Ct. 2021); *Progressive Water Treatment, Inc. v. Yellowstone Capital LLC*, 2021 N.Y. Misc. LEXIS 5, at *9 (Erie Co. Sup. Ct. 2021); *NRO Boston LLC v. CapCall LLC,* 2020 N.Y. Misc. LEXIS 4064 at *5 (Westchester Co. Sup. Ct. 2020). Neither *Kennard Law* nor any of these trial court decisions are addressed in the Motion.

Thus, the AD Decision correctly followed the law and affirmed the dismissal of the Complaint on statute of limitations grounds, and there is no basis to grant Plaintiffs' leave to appeal.

B. Plaintiffs' Remaining Arguments Concerning the Statute of Limitations Are Unavailing

Because the AD Decision properly applied prior Appellate Division precedent concerning the applicability of CPLR § 215(6) to claims based on usury and there is no conflict with decisions of this Court or of any other Appellate Division, Plaintiffs' remaining arguments are easily dispatched.

First, Plaintiffs point to no case from this Court or any Appellate Division holding that CPLR § 215(6) applies only if a plaintiff actually seeks to recover a

monetary award for payment of an "overcharge" to support their "plain language" argument. *See* MOL Supp. at 19. One case specifically rejected this very argument, and it is not addressed in the Motion. *See CapCall,* 2020 N.Y. Misc. LEXIS 4064 at *5 ("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.") (citing *Glassman* and *Rebeil*) (quotation marks omitted). Plaintiffs simply cannot overcome that the AD Decision was consistent with all prior judicial interpretations of the statute.

The Court should note Plaintiffs' misleading argument that "CPLR § 215(6) does not apply because AH's suit never sought to recoup overcharges. No overcharges were paid[,]" and "the Complaint seeks only a declaratory judgment that the MCA is usurious and void, and vacatur of the COJ." MOL Supp. at 6 fn. 4. In fact, the "Prayer for Relief" in the Complaint actually sought the following: "Returning plaintiff's monies of $106,669.94 that was used as payments made to Defendant arising from the Agreement." Exh. 2 at 11. Thus, even if Plaintiffs' "plain language" argument were consistent with applicable law (which it is not), that argument still fails because Plaintiffs did, in fact, seek to recover an alleged "overcharge."

Second, Plaintiffs' argument that the AD Decision did not specify whether the statute of limitations began to run on the date the Agreement and Judgment by Confession were executed or on the date the Judgment by Confession was filed with the court (MOL Supp. at 20) is irrelevant. The AD Decision did not need to specify on which date the cause of action accrued and the limitations period began to run because the claims are time-barred regardless of whether the statute of limitations began to run at execution of the Agreement or at filing of the Judgment by Confession. *See* AD Decision at 2 ("The confession of judgment was signed on November 5, 2018, and it was entered in the court on February 28, 2019. Plaintiffs commenced this action on July 2, 2020."). "That dispute is immaterial, however, because either way the action was brought far more than one year after the accrual date." *Chassman v. Shipley*, 2016 U.S. Dist. LEXIS 49022, at *7 (S.D.N.Y. 2016). Indeed, the Motion itself concedes that "the date the confession of judgment was executed and the date it was filed by C6 both occurred more than a year prior to AH Wine's filing suit." MOL Supp. at 20.[6]

Finally, Plaintiffs' argument that two of this Court's century-old decisions did not apply a one-year statute of limitations to usury claims (MOL Supp. at 21-22) is

[6] In any case, some of the lower court decisions have ruled that the one-year limitations period begins to accrue from entry into the MCA agreement or affidavit of confession of judgment. *See, e.g., CapCall,* 2020 N.Y. Misc. LEXIS 4064, at *5; *American Res. Corp.*, 2021 N.Y. Misc. LEXIS 1440, at *2-3.

absurd because those cases *do not even discuss the statute of limitations for usury claims*. *See Hartley v. Eagle Ins. Co.*, 222 N.Y. 178 (1918); *Westchester Mortg. Co. v. Grand R. & I. R. Co.*, 246 N.Y. 194 (1927). Tellingly, Plaintiffs themselves admit that in those cases, "none of the parties, or the several courts[']] ruling on the case[s], ever raised a statute of limitations question." MOL Supp. at 22. The mere fact that no one raised a particular statute of limitations issue in those two cases does not mean that the statute of limitations is not a viable defense in this case, especially since statute of limitations defenses are waivable. *See Augenblick v. Town of Cortlandt*, 66 N.Y.2d 775, 777 (1985). Plaintiffs' argument is based on sheer conjecture about why defenses might not have been raised in cases from 100 years ago. There is nothing to glean from the fact that the statute of limitations was not addressed in those cases that supports granting leave to appeal here.

Accordingly, the Court should deny the Motion for leave to appeal from the AD Decision in its entirety.

POINT II
THE FOURTH DEPARTMENT'S *DICTUM* THAT PLAINTIFFS HAVE NO SUBSTANTIVE CAUSE OF ACTION FOR CRIMINAL USURY WAS CORRECT

A. The Court Should Deny the Motion for Leave to Appeal from the AD Decision's *Dictum* Since That Would Not Affect the Final Judgment

Plaintiffs' first argument in support of its Motion (*see* MOL Support at 13-17) is unavailing because it is based entirely on *dicta* in the AD Decision regarding General Obligations Law § 5-521[7] that is irrelevant to the actual holding of the AD Decision. The AD Decision stated that the Plaintiffs' usury claims must be dismissed on statute of limitations grounds (as discussed above):

> [E]ven assuming, arguendo, that plaintiffs' first two causes of action are not barred by General Obligations Law § 5-521 (*cf. Paycation Travel, Inc. v Global Merchant Cash, Inc.*, 192 AD3d 1040, 1041 [2d Dept 2021]; *Intima-Eighteen, Inc. v Schreiber Co.*, 172 AD2d 456, 457 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]), ...

AD Decision at 2. Thus, the court said that assuming the Plaintiffs' claims were not barred by General Obligations Law § 5-521, the claims must be dismissed on statute of limitations grounds. The Fourth Department did not otherwise discuss, analyze, or rely on in any way the question of whether the Plaintiffs could assert usury as a defense or as an affirmative claim in a plenary action, nor did the Fourth Department rely on General Obligations Law § 5-521 for the dismissal of any of Plaintiffs'

[7] General Obligations Law § 5-521 limits a corporation's ability to interpose a defense of usury in a civil action.

claims. All the Fourth Department did was to acknowledge in passing and in *dictum* a potential argument that the Plaintiffs' claims could be barred under the General Obligations Law.

It should go without saying that this dictum in the AD Decision should not serve, independently, as the basis for leave to appeal to this Court because it was not the basis of the Fourth Department's affirmance of the Final Judgment. *See generally Rose Park Place, Inc. v. State of N.Y.*, 120 A.D.3d 8, 11 (4th Dept. 2014) ("If the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment.") (quoting *People v. Taylor*, 9 N.Y.3d 129, 164 (2007) (Read, J., dissenting)).

Here, the affirmance of the Final Judgment was predicated solely upon the Fourth Department's "conclu[sion] that plaintiffs may not assert a cause of action based on usury since the one-year statute of limitations has expired." AD Decision at 2 (quotation marks and citations omitted). Moreover, Supreme Court granted summary judgment dismissing the Complaint solely because the action is time-barred. SC Decision at 6-7.

Consequently, even if the Court granted leave to appeal of this issue, the Final Judgment would remain in place, and the Court would be asked to render what would

be, in effect, an advisory opinion not applicable to the facts of the instant case. Therefore, the Court should reject Plaintiffs' arguments for leave to appeal on this issue.

B. The Fourth Department's *Dictum* Correctly States the Law that Plaintiffs Had No Affirmative Cause of Action to Vacate the Judgment Based on Criminal Usury

Even if the Court considered granting leave to appeal based on the AD Decision's *dictum*, it correctly stated the established law in the Appellate Division Departments that a plaintiff has no affirmative cause of action to vacate a judgment by confession (or otherwise assert affirmative claims to vacate an MCA agreement) based on a criminal usury theory. This is true even though, to Plaintiffs' consternation, the correct procedural remedy is to bring a plenary action to vacate the judgment rather than make a motion to vacate.[8]

In *Paycation Travel v. Global Merch. Cash*, 192 A.D.3d 1040, 1041 (2d Dept. 2021), the Second Department ruled that "[GOL] § 5-521 bars a corporation such as the plaintiff from asserting usury in any action, except in the case of criminal usury

[8] In any case, the policy implications relating to the Appellate Division's *dictum* are minimal since the legislature significantly curbed the use of confessions of judgment in New York courts more than three years ago. 2019 N.Y. SB 6395, effective August 30, 2019, amended the confession of judgment statute, CPLR § 3218, to prohibit filing confessions of judgment against out-of-state debtors. This, at least in part, addressed the concerns raised in the November 2018 series of Bloomberg News articles that are the basis for Plaintiff's policy argument. *See* MOL Supp. at 2. Plaintiffs' policy arguments are outdated because debtors who wished to move to vacate confessed judgments entered against them prior to August 30, 2019, have had more than a reasonable amount of time to do so, and few such new cases will arise in the future as a result of the amendment to CPLR § 3218.

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*" such as vacating a confessed judgment) (emphasis supplied). The Fourth Department itself had recently 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." *Kennard Law*, 2020 N.Y. Misc. LEXIS 10407, at *1, *aff'd* 199 A.D.3d at 1406. 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). Indeed, multiple lower courts have 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. *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).[9]

[9] 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.

Critically, Plaintiffs' argument that the Court should view their plenary action to vacate the Judgment by Confession as an assertion of an affirmative defense and rule that they are somehow being deprived of the right to present such a defense has already been considered and rejected by another court:

> [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. Stated another way, although Plaintiffs may have the procedural *remedy* of bringing an action to vacate a confessed judgment, they do not have the substantive *right* to do so.

Moreover, 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

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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).

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).[10]

Therefore, the Appellate Division correctly recited the law in its *dictum* and there is no basis to grant leave to appeal therefrom.

[10] In any case, Plaintiffs' arguments are waived because they were raised for the first time in reply on appeal (*see* Exh. 10 at 16-21), despite *Paycation* and its holding fatal to Plaintiffs' claims being raised by Defendant below. *JF Capital Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 762 (2015) (argument not properly presented or preserved where "the issue was raised for the first time on reply at the Appellate Division"). Plaintiffs misleadingly state that this argument was set forth at pages 18-19 of their opening brief and at pages 7-8 of their reply brief in Supreme Court, but a review of the cited pages of each of those documents shows that Plaintiffs never substantively raised these arguments or even addressed the *Paycation* decision in Supreme Court. *See* Exh. 3 (note: Plaintiffs' reply brief is not attached to the Motion). Moreover, it was never addressed in Plaintiffs' opening brief on appeal before the Fourth Department. *See* Exh. 8. Instead, these arguments were raised for the first time on reply on appeal. *See* Exh. 11 at 15-21.

CONCLUSION

WHEREFORE, Plaintiffs' Motion for leave to appeal should be denied, and Defendant should be granted all such other and further relief as is just and equitable.

Dated: November 11, 2022

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COURT OF APPEALS

OF THE STATE OF NEW YORK

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AH WINES, INC/GREAT COLISEUM, L.L.C., THE GREAT COLISEUM, L.L.C. / GREAT COLISEUM, L.L.C. d/b/a AH WINES / LODI CITY WINERY / LODI WINE COMPANY / WINERY DIRECT DISTRIBUTORS and JEFFREY WAYNE HANSEN,	Ontario Co. Index No. 127393-2020 4th Dept. Case No. CA 22-00220 **AFFIDAVIT OF SERVICE**

Plaintiffs-Appellants,

-against-

C6 CAPITAL FUNDING LLC,

Defendant-Respondent.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AUDREY GOMES, being duly sworn, deposes and says:

1. I am over the age of eighteen years and am not a party to this action. I am employed by the law firm of Carter, Ledyard & Milburn LLP, attorneys for Defendant-Respondent.

2. On Friday, November 11, 2022, I served a true and correct copy of the Defendant-Respondent Opposition to Motion for Leave to Appeal by placing the same in a Federal Express Overnight envelope addressed:

Mark R. Basile, Esq.
Marjorie Santelli, Esq
The Basile Law Firm, P.C.
390 North Broadway, Suite 140
Jericho, New York 11753

On said day, I deposited said envelope with a clerk at the Federal Express Office located at 75 Broad Street, New York, New York and dispatched same for next business day delivery.

Agomes
Audrey Gomes

Sworn to before me this
11th day of November,2022.

Notary Public
DENNIS MURPHY
Notary Public, State of New York
No. 31-01MU4644752
Qualified in New York County
Commission Expires March 30, 2023