Ontario County Clerk's Index No. 127393/20
Appellate Division– Fourth Department Docket No. CA 22-00220

Court of Appeals

of the

State of New York

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.

MOTION FOR LEAVE TO APPEAL

THE BASILE LAW FIRM P.C.
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NOTICE OF PLAINTIFFS-APPELLANTS AH WINES' MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed supporting memorandum of law, the record on appeal and briefs filed in the Fourth Department of the Appellate Division, and all other papers filed herein, Plaintiffs-Appellants 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 (collectively, "AH Wines" or the "AH Wines Parties") will move this Court at a Motion Part at the Courthouse located at 20 Eagle Street, Albany, New York 12207, on Monday, November 14, 2022 for an Order:

A. Pursuant to N.Y. CPLR § 5602(a)(1)(i) and 22 N.Y. CRR § 500.22, granting AH Wines leave to appeal to the Court of Appeals from the final Decision and Order of the Appellate Division, Fourth Department, dated and entered on September 30, 2022, which affirmed the final Decision and Order of the Supreme Court of the State of New York, Ontario County, dated January 18, 2022, and the corresponding judgment dated February 1, 2022 and entered on February 7, 2022, granting summary judgment to Respondent and dismissing AH Wines' complaint; and

B. For such other and further relief as this Court deems just and proper.

Dated: October 31, 2022
Jericho, New York

THE BASILE LAW FIRM, P.C.

By: */s/ Marjorie Santelli*
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Plaintiffs-Appellants,

– against –

C6 CAPITAL FUNDING LLC,

Defendant-Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.l[f]

AH Wines, Inc., is a California C-Corp. and has no parents or subsidiaries. Plaintiff Jeffery Wayne Hansen is the President and CEO of AH Wines, Inc.

Great Coliseum, L.L.C., The Great Coliseum, L.L.C., and Great Coliseum, L.L.C. d/b/a AH Wines, are variations in the name of the entity The Great Coliseum, LLC. Lodi City Winery, Lodi Wine Company, and Winery Direct Distributors are d/b/a/'s of Hansen's Wines, LLC. These are entities in which Plaintiff Jeffrey Wayne Hansen has an interest.

Other than the above, Plaintiffs-Appellants have no parents, subsidiaries, or affiliates.

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Plaintiffs-Appellants AH Wines, Inc., *et al.,* ("AH Wines" or "AH") seek leave from this Court to appeal the final Order issued by the Appellate Division, Fourth Department on September 30, 2022. *AH Wines, Inc. v. C6 Capital Funding LLC*, 2022 NY Slip Op 05437 (App. Div. 4th Dept.) ("*AH Wines IV*"). In that Order, the Appellate Division affirmed the lower court's grant of summary judgment in favor of the lender, C6 Capital Funding, LLC ("C6"), and held that AH Wines' claims were either (1) barred by NY G.O.L. § 5-521 or (2) barred by the one-year statute of limitations period set forth in CPLR § 215(6).

PRELIMINARY STATEMENT AND REASONS THAT LEAVE TO APPEAL SHOULD BE GRANTED

In 1965, the New York Legislature reformed the state's usury laws. The reform added § 190.40 to the Penal Code, which makes it a class E felony to charge interest in excess of 25% a.p.r. Further, the Legislature restored the right of corporations to plead criminal usury as an affirmative defense in civil cases. *See* NY G.O.L. § 5-521(3).

In 2022, New York courts are using a procedural rule to divest corporations of the statutory right guaranteed to them by the Legislature in 1965. The New York court system now enables predatory lenders, via the "confession of judgment" ("COJ") process, to enforce criminally usurious loans disguised as "merchant cash

advance" ("MCA") agreements. As things stand, the borrowers have no way to fight back.

> **"Rather than breaking legs, these lenders have co-opted the New York court system and turned it into a high-speed debt collection machine."**[1]

On November 20, 2018, *Bloomberg News* published the first in a five-part series of articles exposing the abuses of the predatory MCA industry. Those articles provided a vivid and disturbing description of how modern-day loan sharks have used New York's confession of judgment process to enforce so-called MCA agreements that were simply high-interest loans.[2] *Id*.

When used legally, the MCA[3] is a device that enables a merchant to sell a certain portion of its specified future receipts for an up-front payment. When used

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[1] Zachary R. Mider, Zeke Faux, *et al.*, "Sign Here to Lose Everything, Part 1: I Hereby Confess Judgment" BLOOMBERG, Nov. 20, 2018. This article is part one of a five-part series of articles on the merchant cash advance industry published in Bloomberg. "Part 2: The $1.7 Million Man" (Nov. 27, 2018); "Part 3: Rubber-Stamp Justice" (Nov. 29, 2018); "Part 4: Marijuana Smuggler Turns Business-Loan Kingpin While out on Bail" (Dec. 3, 2018); "Part 5: Fall Behind on These Loans? You Might Get a Visit from Gino" (Dec. 20, 2018). Each article is available at https://www.bloomberg.com/confessions-of-judgment (last accessed Oct. 31, 2022).

[2] Statistics show that, in 2014, a total of 14 judgments by confession in favor of MCA companies were entered in New York State; by the end of 2018, that number had ballooned to more than 3,500. *See Bloomberg*, n.1, *supra*. In Ontario County, "cash advance filings make up about three-quarters of the civil caseload . . .[n]o matter how abusive the filings might be, clerks have no choice but to continue processing them, says Kelly Eskew, a deputy clerk in Orange county." *Id*.

[3] An MCA is an agreement for the purchase of a merchant's future revenue

illegally, an MCA contract is simply a criminally usurious loan in disguise. As New York courts have recognized, subtle changes in the transaction can turn a MCA agreement into a *absolutely payable* loan, charging triple-digit interest rates. This is sometimes described as "payday lending for merchants."

MCA companies are, *with the blessing of the New York Courts*, using the "confession of judgment" process as a "high speed debt collection machine"—even where the *court agrees that an MCA is actually a criminally usurious loan*.

The "confession of judgment" is essentially a contractual waiver that gives a creditor the benefits of a court judgment against the debtor, but without having to file suit. Unfortunately, even where MCA agreements are recognized as criminally usurious loans, several New York courts—including the Appellate Division in this case—have concluded that where the MCA lender files a confession of judgment, the corporate borrower has essentially *waived* the criminal usury defense.

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stream. In theory, the issuer of a merchant cash advance provides a merchant with a lump sum payment in exchange for payments equal to a share of the merchant's future sales proceeds, or "receipts." Unlike a loan, an MCA does not guarantee the lender a regular payment or a fixed, finite term because the periodic MCA repayments are based on a percentage of the merchant's actual sales proceeds. This is the primary reason that an MCA is not considered a loan—the issuer of the MCA company *must* lower the payments if the merchant experiences a downturn. If the MCA company refuses to lower the payments as in this case, demands the same amount be "payable absolutely," that fact weighs heavily in favor of the agreement being a loan.

The process works as follows. Where MCAs are disguised usurious loans, the weekly payment amounts are not tied to actual receipts. As a result, the unrelenting extraction of payments on a daily or weekly basis forces many merchants into default. Within days of the default, the MCA lender quietly files a confession of judgment with the local court and obtains a judgment; if the borrower then wishes to challenge the confession of judgment for reasons such as fraud or usury, prevailing case law holds that a borrower's *only avenue of redress* is a plenary action, and that the confession of judgment cannot be challenged directly by motion under CPLR § 5103(a). *An affirmative, plenary action seeking vacatur of the confession of judgment must be brought by the borrower even when the confession of judgment enforces an MCA known to be a criminally usurious loan.*

Once the plenary action is filed, however, the presiding court observes that a plenary action is *affirmative*—and, because the merchant is a corporation which by statute may only plead criminal usury as an affirmative *defense*, the merchant's claim fails. As a result, a merchant corporation that signs a COJ has, for all intents and purposes, waived its right to challenge a criminally usurious contract.

This outcome is intolerable and must be remedied. The New York courts are allowing a procedural tripwire to slam the door on the statutory right given to corporations by the New York Legislature.

The Appellate Division's position is also utterly contrary to precedential decisions of this Court:

- Contrary to this Court's holding in *Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320, 179 N.E.3d 612 (2021): *Adar Bays* definitively established that a criminally usurious loan is void *ab initio*; a confession of judgment to enforce a voided instrument is a nullity.
- Contrary to this Court's holding in *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 446 N.Y.S.2d 917, 431 N.E.2d 278 (1981): criminal usury cannot be waived as a matter of law in this situation as one cannot consent to be the victim of a crime. Because a COJ is essentially a contractual waiver of rights that the MCA lender obtains from the borrower, the COJ is legally ineffective for the purpose of waiving criminal usury.
- Fails to examine the factors necessary for a valid waiver of due process rights, addressed in *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (finding a contractual waiver of due process rights must be "voluntarily, intelligently, and knowingly" made); *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 581 (1991) (discussing *Overmyer*).

As to the second question presented, the Appellate Division's parallel holding—that AH Wines' claims are time-barred by the one-year limitations period in CPLR § 215(6) (pertaining to claims seeking to recoup overcharges of funds (for usury or otherwise)—is clearly wrong.

CPLR § 215(6) does not apply because AH's suit never sought to recoup overcharges. No overcharges were paid.[4] The Appellate Division elides this fact, and further ignores that some of the most widely-known usury cases issued by this Court involved plaintiffs seeking a declaratory judgment on usury—and *no statute of limitations*. *See, e.g., Hartley v Eagle Ins. Co. of London, England*, 222 NY 178 (1918) (plaintiff seeking to void a contract eight years after execution).

[4] Consistent with this, the Complaint seeks only a declaratory judgment that the MCA is usurious and void, and a vacatur of the COJ.

QUESTIONS PRESENTED

(1) Where a corporate borrower is the victim of a criminally usurious loan as to which the lender has filed a confession of judgment, is it erroneous for New York courts to effectively deprive the borrower of a remedy by limiting the borrower's avenue of legal redress to the judicially-created plenary action where the usurious nature of the loan cannot be challenged?

Short Answer: Yes. The confession of judgment cannot be used to waive criminal usury. The Appellate Division's holding is inconsistent with this Court's decisions in *Adar Bays* and *Hammelburger*, and contrary to the intent of the New York Legislature.

(2) Did the lower courts err in applying the one-year limitations period in CPLR § 215(6) to a corporate borrower's plenary action seeking to vacate a confession of judgment based on usury?

Short Answer: Yes. This Court has never applied CPLR § 215(6)—or its predecessor—to actions seeking declaratory judgment under usury laws. *See Hartley*, *supra.*

FACTS

On November 1, 2018, AH Wines, Inc. and C6 Capital Funding LLC entered into an "Agreement for the Purchase and Sale of Future Receipts" ("Agreement"), pursuant to which C6 Capital advanced $300,000 to AH Wines, Inc. in exchange for $426,000 ("Purchase Amount") of AH Wines, Inc's future sales. The Agreement specified that C6 would take 15% of AH's receipts—"estimated" in the Agreement as $17,750 per week—each week until it reached the Purchase Amount. After execution, however, it became clear that C6 had no intention of ever reducing the weekly debit amount; C6 maintained that it was due $17,750 for 24 weeks of fixed payments *regardless of actual receipts*—a primary indicator that the arrangement was a loan, not a purchase.

Further showing that the loan was "payable absolutely" was (i) that the CEO was required to personally guarantee performance of all representations, warranties, and covenants under the Agreement and (ii) that all the AH Wines Parties were required by C6 to confess to the entry of a judgment against them, jointly and severally, in the repayment amount, *minus* any amounts paid, *plus* interest at a rate of 16% per annum, *plus* all costs and disbursements—absent any proof of same—*plus* legal fees calculated *arbitrarily* at 25% of the total aforementioned amount. *See* Exh. 4 at 4-11.

When annualized, the transaction imposes an effective interest rate of a *minimum* of 90% a.p.r. Considering, however, that payments commenced *one week after the loan was made*, the actual rate is much higher. Regardless, even the minimum rate charged is well in excess of the maximum 25% a.p.r. permitted by NY Penal Law § 190.40.

AH began to experience a downturn in business in November through December 2018, shortly after the funds were transmitted. Throughout this period, AH repeatedly told C6 that the payment amount needed to be adjusted to be in line with actual receipts, but C6 refused. Between November 7, 2018 and December 12, 2018, C6 continued to collect its *fixed* weekly payments of $17,750—totaling $106,500.[5] As a result, AH eventually defaulted, and C6 filed the confession of judgment.

PROCEDURAL HISTORY

This matter originated in the Ontario County Supreme Court, where, on February 26, 2019, C6 filed a confession of judgment against AH Wines in the amount of $401,207.31. The clerk of courts entered the judgment on February 28, 2019. The judgment shows that none of the defendants—all of whom are residents of California—were given notice of the judgment, in spite of the fact that C6

[5] Notably, the amounts paid to C6 Capital were not from AH's sales receipts, but instead came directly from the monies C6 had deposited under the Agreement. .

obviously had in its possession the information needed to provide notice. AH Wines was not notified that the confession of judgment had been filed until October 11, 2019, when C6 registered the judgment in the San Joaquin Superior Court in California.[6]

On June 2, 2020, AH Wines filed suit against C6 Capital in the Ontario County Supreme Court. In accord with Fourth Department precedent, *e.g. Bufkor, Inc. v. Watson & Fried, Inc.*, 33 A.D.2d 636, 637 (4th Dept. 1969), the proceeding was a plenary action to vacate the judgment.[7] In its Complaint, AH Wines specifically sought: (i) vacatur pursuant to CPLR § 5015(3), alleging that the judgment was obtained by "fraud, misrepresentation, or other misconduct," since it was based upon a criminally usurious loan, and (ii) a declaratory judgment that the Agreement—and the usurious loan imposed thereby—were void based on criminal usury. Am. Compl. Exh. 2.

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[6] CPLR § 3218 was amended in 2019 to prohibit the filing of a confession of judgment against out-of-state creditors like AH Wines. However, the Amendment became effective in August 2019 and does not affect the COJ in this case.

[7] The plenary action requirement is the rule in every Department. *See also Merch. Funding Servs., LLC v. Volunteer Pharm., Inc.*, 179 A.D.3d 1051 (2d Dept. 2020) ("[A] person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief.") (collecting cases); *L.R. Dean, Inc. v. Int'l. Energy Resources, Inc.*, 213 A.D.2d 455, 456 (2d Dept. 1995) ("The general rule is that a party seeking to set aside an affidavit of confession of judgment and to vacate a judgment entered thereon must commence a plenary action for that relief."); *Smith v. Kent*, 259 A.D. 117 (1st Dept. 1940); *Engster v. Passonno*, 202 A.D.2d 769 (3rd Dept. 1994).

One week later, AH Wines moved for a preliminary injunction to prevent C6 from making further attempts to enforce the February 2019 confessed judgment. *In addressing the motion, the trial court recognized that the MCA contract bore all the hallmarks of a criminally usurious loan; it went on to grant the preliminary injunction, finding that AH Wines was likely to succeed on the merits of its claims. See Matter of AH Wines, Inc. v. C6 Capital Funding LLC*, 2020 NY Slip Op 32699(U) (Ont. Sup. Ct.) ("*AH Wines I*").

On November 12, 2021, the Appellate Division vacated the preliminary injunction, holding that the trial court had not properly assessed whether AH Wines had demonstrated irreparable harm. *AH Wines, Inc. v. C6 Capital Funding LLC*, 154 N.Y.S.3d 526 (App. Div. 4th Dept.) ("*AH Wines II*"). On the same day, the Appellate Division issued its decision in *Kennard Law P.C. v. High Speed Capital LLC*, 154 N.Y.S.3d 522 (App. Div. 4th Dept.), affirming the dismissal of a similar claim based on untimeliness under CPLR § 215(6).

Shortly thereafter, the Ontario County Supreme Court granted summary judgment to defendant C6 Capital based on the decision in *Kennard*, and holding that AH Wines's claims were time-barred by CPLR § 215(6). *AH Wines, Inc. v. C6 Capital Funding LLC*, No. 127393-2020, 2021 N.Y. Misc. LEXIS 7046 (Sup. Ct. Nov. 23, 2021) ("*AH Wines III*"). The clerk of the court entered judgment on February 1, 2022, which was noticed on February 7, 2022.

On appeal to the Fourth Department, AH Wines argued, *inter alia*, that the one-year limitations period in CPLR § 215(6) did not apply because it was not seeking recoupment of overcharges;[8] rather it was seeking only a declaratory judgment to vacate the confession of judgment, and to prevent enforcement of C6's criminally usurious loan. In its Response brief, C6 asserted that AH Wines had no right to assert usury *at all* in a plenary action, because, under NY G.O.L. § 5-521, a corporation may only plead usury as an affirmative defense. *See* Resp Br., Exh. 8 at 31 (citing *Paycation Travel*, etc.).

The Appellate Division issued its decision on September 30, 2022, affirming the trial court's decision and siding with C6 on all points.

> [The trial 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, even 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, 141 N.Y.S.3d 319 [2d Dept 2021]; *Intima-Eighteen, Inc. v Schreiber Co.*, 172 AD2d 456, 457, 568 N.Y.S.2d 802 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]), we conclude that plaintiffs "may not assert a cause of action based on usury since the one-year statute of limitations has expired" (*Glassman v Zoref*, 291 AD2d 430, 431, 737 N.Y.S.2d 537 [2d Dept 2002]; *see Mill St. Realty v Reineke*, 159 AD2d 494, 494, 552 N.Y.S.2d 365 [2d Dept 1990]; *see also Rebeil Consulting Corp. v Levine*, 208 AD2d 819, 820, 617 N.Y.S.2d 830 [2d Dept 1994]).

[8]Indeed, AH Wines had paid no overcharges.

AH Wines IV. It is from this decision, entered on September 30, 2022, that AH Wines now seeks leave to appeal.

JURISDICTION

This Court has jurisdiction over this case because it originated in the Supreme Court for the County of Ontario, and the Appellate Division's decision finally determined the action by affirming the Supreme Court's grant of summary judgment in favor of respondent C6 Capital. *See* § CPLR 5602(a)(1)(i).

ARGUMENT

Question One: Where a corporate borrower is the victim of a criminally usurious loan as to which the lender has filed a confession of judgment, is it erroneous for New York courts to effectively deprive the borrower of a remedy by limiting the borrower's avenue of legal redress to the judicially-created plenary action where the usurious nature of the loan cannot be challenged?

Short Answer: Yes. The COJ cannot be used to waive criminal usury. The Appellate Division's holding is inconsistent with *Adar Bays* and *Hammelburger*.

I. THE APPELLATE DIVISION MAY NOT USE A JUDICIALLY-CREATED PROCEDURAL RULE TO DEPRIVE CORPORATE BORROWERS OF THE RIGHT TO DEFEND THEMSELVES AGAINST CRIMINALLY USURY GIVEN TO THEM BY THE NEW YORK LEGISLATURE.

Prior to 1965, corporations were not protected by New York's usury statutes; businesses unable to find conventional financing proved an easy target for predatory lending. Organized criminal groups built large and highly lucrative money-lending

businesses that charged unconscionably high-interest rates. *See generally Hammelburger*, 54 N.Y.2d at 589-590; *Adar Bays*, 37 N.Y. 3d at 330-333.

As described in *Hammelburger* and *Adar Bays*, in 1965 the New York State Commission of Investigation issued a report strongly recommending the creation of a criminal usury statute and the restoration of the rights of corporations to defend against criminally-usurious loans.

> This measure is vital in curbing the loan-shark racket as a complement to the basic proposal creating the crime of criminal usury. As noted above, loan-sharks with full knowledge of the present law, make it a policy to loan to corporations. The investigation also disclosed that individual borrowers were required to incorporate before being granted a usurious loan. This is a purely artificial device used by the loan-shark to evade the law—an evasion which this proposal would prevent.

An Investigation of the Loan-Shark Racket: A Report by the New York State Commission of Investigation 80 (Apr. 1965) (citations omitted). In light of these findings, the New York Legislature made it a felony to lend money at interest in excess of 25% a.p.r. Importantly for this case, the Legislature also restored the defense of criminal usury to corporations. *See* L. 1965, ch 328; Penal Law § 190.40; General Obligations Law § 5-521 (3).

A. The Consequence of Requiring a Plenary Action In the Instant Circumstances is that the Corporate Borrower is Deprived of an Important Statutory Right.

The plenary action was intended to develop facts, not extinguish rights. Yet the prevailing rule in all departments is that a party seeking to vacate a judgment by confession generally "must commence a separate plenary action for that relief." *Regency Club at Wallkill, LLC v. Bienish*, 95 A.D.3d 879, 942 N.Y.S.2d 894, 894 (App. Div. 2nd Dept. 2012). Professor David Siegel describes the plenary action as needed in circumstances where motion practice is deemed insufficient, stating:

> [i]f the vacatur is sought by another creditor of the debtor, a mere motion will do. But if the debtor seeks it, she can use the simply motion procedure only if the judgment has been entered in violation of the affidavit's terms, such as where it states a time that has not arrived or a contingency that has not occurred. If the entry is valid on its face and the debtor's objection is based on some extrinsic factor, like fraud or misrepresentation, it has been held that a plenary action is required to do the vacating that a mere motion won't do.

Siegel, *New York Practice* § 302, at 565 (6th ed. 2018). Nothing in caselaw or elsewhere demonstrates that the plenary action requirement was *in any way* intended to bar causes of action entirely; its only purpose was to ensure full development of facts. "Sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action." *Scheckter v. Ryan*, 161 A.D.2d 344, 345, 555 N.Y.S.2d 99, 99 (App. Div. 1st Dept. 1990). Even Prof. Siegel questions whether such proceedings are still necessary under modern pleading rules. *Id.* at n.3 ("it can

be argued that a mere motion should be adequate even in that situation."). *See also Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 54-56, 421 N.Y.S.2d 556, 557-59, 396 N.E.2d 1029, 1030-31 (1979) (questioning the need for a plenary action under modern pleading rules).

B. The Appellate Division's Holding Is Contrary to this Court's *Hammelburger* Decision, Which Held that Criminal Usury Cannot Be Waived.

The Appellate Division's holding in regard to the first question presented stated simply:

> 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, 141 N.Y.S.3d 319 [2d Dept 2021]; *Intima-Eighteen, Inc. v Schreiber Co.*, 172 AD2d 456, 457, 568 N.Y.S.2d 802 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]), we conclude that plaintiffs may not assert a cause of action based on usury since the one-year statute of limitations has expired.

AH Wines IV (quotation marks omitted). In *Paycation Travel* (cited in the block-quoted passage above), the Second Department ordered dismissal of a corporate borrower's plenary action seeking to vacate a confession of judgment based on criminal usury; *Paycation* differs from this case only in that § 215(6) was never cited as an alternative ground for dismissal.

1. A Confession of Judgment is a Waiver.

Similar to a *cognovit*, a judgment by confession is a contractual provision that is employed as a security device "whereby the obligor consents in advance to the

creditor's obtaining a judgment without notice or hearing." *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 575 (1991). Although *Paycation* does not expressly acknowledge the necessary role that waiver plays in its decision, other courts do. *See Merch. Funding Servs., LLC v. Realtime Carriers, LLC*, 2017 N.Y. Misc. LEXIS 13503, *6 (Rockland Co. Sup. Ct. 2017) ("this court finds that the Agreement here was a usurious loan, the Defendants have waived this defense by confessing judgment.").

2. A Confession of Judgment Cannot Waive Criminal Usury

In Hammelburger v. Foursome Inn Corp., 76 A.D.2d 646 (App. Div. 2nd Dept. 1980) *aff'd* 54 N.Y.2d 580 (1981), the court held:

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

Id. *See also Szerdahelyi v Harris*, 67 N.Y.2d 42 (1986); *Fareri v Rain's Intl.*, 187 A.D.2d 481, 482, 589 N.Y.S.2d 579 (1992).

C. The Appellate Division's Holding Conflicts with This Court's Holding in *Adar Bays* that a Criminally Usurious Loan is Void *Ab Initio*.

In its recent *Adar Bays* decision, this Court clarified definitively that criminally usurious loans—even when made to corporate borrowers—are void *ab*

initio. "Loans proven to violate the criminal usury statute are subject to the same consequence as any other usurious loans: complete invalidity of the loan instrument." *Adar Bays*, 37 N.Y.3d at 333. Accordingly, a confession of judgment purporting to enforce an instrument *void at its inception* is—indeed must itself be—a nullity. *See also Durst v. Abrash*, 22 A.D.2d 39 (App. Div. 1st Dept. 1964) *aff'd* 17 N.Y.2d 445 (1965) (holding that "[i]f the main purpose of the transaction was illegal then the subsidiary agreements, if they are truly subsidiary, are rendered invalid by the invalidity of the principal agreement.") (citing *Manson* v. *Curtis*, 223 N.Y. 313, 324 (1918)).

Question Two: Did the lower courts err in applying the one-year limitations period to a corporate borrower's plenary action to vacate a confession of judgment based on usury?

Short Answer: Yes, the lower court erred.

II. SECTION 215(6) IS NOT THE PROPER LIMITATIONS PERIOD FOR A PARTY SEEKING A DECLARATORY JUDGMENT.

The Appellate Division affirmed the lower court's decision concerning the statute of limitations, holding that the Ontario County 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, even assuming, arguendo, that plaintiffs' first two causes of action are not barred by General Obligations Law § 5-521, we conclude that plaintiffs "may not assert a cause of action based on usury since the one-year statute of limitations has expired" (*Glassman v Zoref*, 291 AD2d 430, 431, 737 N.Y.S.2d

537 [2d Dept 2002]; *see Mill St. Realty v Reineke*, 159 AD2d 494, 494, 552 N.Y.S.2d 365 [2d Dept 1990]; *see also Rebeil Consulting Corp. v Levine*, 208 AD2d 819, 820, 617 N.Y.S.2d 830 [2d Dept 1994]).

AH Wines IV, *supra* (some citations omitted).

A. The Plain Language of § 215(6) Does Not Address Equitable Relief or Actions Seeking to Prevent Enforcement of a Usurious Loan.

1. The Limitations Period in § 215(6) Commences Upon Occurrence of A Distinct Event: When Payment Has Been Made.

The one-year limitations period set forth in CPLR § 215(6) applies to actions "to recover any overcharge of interest or to enforce a penalty for such overcharge." *Id*. "Overcharge," as used in § 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 (App. Div. 3d Dept. 1987); *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."). 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*. *See Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820 (App. Div. 2d Dept. 1994).

B. The Lower Courts Never Determined When the Limitations Period Commenced In this Case Because CPLR § 215(6) Does Not Address Declaratory Relief.

As explained by the Appellate Division, the trial court properly granted summary judgment because the usury cause of action was time-barred under CPLR § 215(6). The court further noted:

> [t]he 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.

AH Wines IV (quotation marks omitted). In the above passage, the Appellate Division notes 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 Wines's filing suit. The court does not state, however, which date commenced the statute of limitations, and does not explain why the signing or filing of the confession of judgment would commence the statute of limitations *for recovery of overcharges* under CPLR § 215(6).

C. None of Authorities Cited by the Appellate Division Apply CPLR § 215(6) to Claims For Declaratory Relief.

The Appellate Division purports to follow *Mill St. Realty, Inc. v. Reineke*, 159 A.D.2d 494 (App. Div. 2d Dept. 1990), *Glassman v. Zoref*, 291 A.D.2d 430, 431 (App. Div. 2d Dept. 2002), and *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820 (App. Div. 2nd Dept. 1994). But *none of these cases* involved the situation in

this case, where the plaintiffs seek only a declaratory judgment that the contract was usurious and void. Although the plaintiff in *Mill Street* sought to "void" certain property deeds given as security for a usurious loan, the voiding would effectively claw back the property and is no different from disgorging payment. Moreover, the *Rebeil* court specifically distinguished that usury claims seeking disgorgement of payments would be governed by CPLR 215(6)), but that usury interposed as an affirmative defense to enforcement has no statute of limitations. *See Rebeil*, 208 A.D.2d 819, 820.

D. The Appellate Division Ignored New York Court of Appeals Cases that Specifically Address Plaintiffs Seeking a Declaratory Judgment on Usury and Apply No Statute of Limitations

Although it appears that this Court has never specifically addressed the statute of limitations for declaratory relief, several well-known cases involve claims well past the one year mark.

In *Hartley v Eagle Ins. Co. of London, England*, 222 N.Y. 178 (1918), the plaintiff Walter Hartley filed a claim seeking a declaration of usury and nullity of the loan, which was executed in 1905. Hartley's challenge to the 1905 agreement on the grounds of usury was commenced in the New York County Supreme Court on May 1, 1913, eight years after the agreement was executed. Although the one-year limitations period was set forth under section 372 of the General Business Law at that time, that provision is essentially identical to CPLR 215(6) in all relevant

respects. In spite of the obvious passage of time, none of the parties, or the several courts ruling on the case, ever raised a statute of limitations question.

Westchester Mortg. Co. v. Grand R. & I. R. Co., 246 N.Y. 194 (1927), concerns a promissory note executed in May 1906. In June 1924 the plaintiff filed suit seeking a declaratory judgment that a note, executed by the parties in May 1906, was void for usury. The Court of Appeals agreed that the note was usurious but ultimately reversed on other grounds. As in *Hartley*, no party, and none of the courts ruling on the case raised a statute of limitations issue, in spite of the eighteen-year gap between execution of the agreement and commencement of the action for declaratory judgment.

III. THE ARGUMENTS HEREIN WERE RAISED BELOW AND PRESERVED FOR REVIEW

The questions presented on this motion were properly preserved below, *viz,*:

FIRST QUESTION

> Where a corporate borrower is the victim of a criminally usurious loan as to which the lender has filed a confession of judgment, is it erroneous for New York courts to effectively deprive the borrower of a remedy by limiting the borrower's avenue of legal redress to the judicially-created plenary action where the usurious nature of the loan cannot be challenged?

This question was presented to the Supreme Court in AH Wines Memorandum Of Law In Support Of Plaintiffs' Motion For Summary Judgment

Seeking Vacatur Of Judgment And To Strike Defendant's Affirmative Defenses Exh. 3, Section II.A. at 18-19, concluding:

> Simply put, Defendant's claim that the Complaint contradicts established precedent, which is further rendered meritless in light of the absurd result it would facilitate. *Indeed, contrary to New York's long-standing, harsh and severe treatment of usurious transactions, a criminal usurer cannot obtain a confessed judgment and leave the victim with no redress whatsoever. As such, this is not, and cannot, be the law.*

Id. at 19 (footnote omitted; emphasis added). *See also* Reply Memorandum Of Law To Plaintiffs' Motion For Summary Judgment at 7-8.

The question was presented to the Appellate Division in the Respondent's opposition brief (Exh. 9 at 31) responded to in Appellant's Reply brief (Exh 10 at 15-18), and served as a basis of the Appellate Division's decision in *AH Wines IV*.

SECOND QUESTION

> Did the lower courts err in applying the one-year limitations period to a corporate borrower's plenary action to vacate a confession of judgment based on usury?

This question was presented to the Supreme Court in AH Wine's Memorandum Of Law In Support Of Plaintiffs' Motion For Summary Judgment Seeking Vacatur Of Judgment And To Strike Defendant's Affirmative Defenses (Exh 3), Section II.B. at 19-20, concluding:

> [Defendants] … suggest that CPLR § 215(6) imposes a 1-year statute of limitation and, thus, bars Plaintiffs' claims. However, CPLR § 215(6) is, by its own text, limited to actions "to recover any overcharge of interest or to enforce a penalty for such overcharge." *Id.* Such an

> action would be predicated on a cause of action under Gen. Oblig. Law § 5-513. Notably absent, however, from the Complaint is a cause of action for monetary damages or a recovery of any overcharge of interest.
> ….
> Accordingly, there is no statute of limitations that bars and renders Plaintiffs' claims as untimely.

Id. at 20 (footnote omitted; emphasis added). *See also* Reply Memorandum Of Law To Plaintiffs' Motion For Summary Judgment at 1-8.

The question was presented to the Appellate Division in Appellant's opening brief (Exh. 8 at 20-26), in its reply brief (Exh. 10 at 2), and served as a basis of the Appellate Division's *AH Wines IV* decision.

CONCLUSION

For the reasons stated herein, it is of paramount importance that the Court grant leave to appeal in this case, and resolve this unjust situation.

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Jericho, New York

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