Court of Appeals No. 2021-00001

To be Argued by:
SHANE R. HESKIN, ESQ.
(Time Requested: 30 Minutes)

Court of Appeals
of the
State of New York

Second Circuit Dkt. No. 20-118

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH MANAGEMENT COMPANY IN THEIR CAPACITIES AS RECEIVERS FOR FUTURENET GROUP, INC,

Plaintiffs-Appellants,

-v-

GTR SOURCE, LLC, STEPHEN W. BIEGEL, IN HIS CAPACITY AS NEW YORK CITY MARSHAL, BADGE NO. 27,

Defendants-Respondents.

(See inside cover for complete caption)

BRIEF FOR PLAINTIFFS-APPELLANTS

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Second Circuit Docket Nos.: 20-118 and 20-850

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Second Circuit Dkt. No. 20-850

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH MANAGEMENT COMPANY IN THEIR CAPACITIES AS RECEIVERS FOR FUTURENET GROUP, INC,

Plaintiffs-Appellants,

-v-

CAPITAL MERCHANT SERVICES, LLC,

Defendant-Respondent.

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCCR 500.1(f), Plymouth Venture Partners, II, L.P. and Plymouth Management Company (together, "Plymouth"), as the assignees of the claims of Basil Simon, in his capacity as Receiver for FutureNet Group, Inc. ("FutureNet"), state that there are no parents, subsidiaries, or affiliates of either Plymouth or FutureNet.

STATEMENT OF RELATED CASES

There are no related pending cases.

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INTRODUCTION

The certified questions afford the highest court of this State an opportunity to join its Attorney General, Legislature and Governor in putting an end to the abuse of the New York Court System by the merchant cash advance ("MCA") industry. For far too long, the MCA industry together with New York City Marshals have taken advantage of our court system to reach across state lines and unlawfully seize bank accounts under the pretense of New York law. Despite intentionally violating the reach of their jurisdictional territory, New York City marshals have made many millions of dollars off the backs of hard working, small businesses and their individual owners by unlawfully "serving" levy demands across state lines—threatening fines and imprisonment if the out-of-state bank does not comply. The conduct is beyond outrageous and will only proliferate if allowed to persist without consequence.

The case now before this Court is emblematic of the brazen disregard of the law that is unfortunately all too commonplace in the MCA industry. The violations of New York law are too numerous to list. Among these myriad unlawful tactics, Respondents GTR Source LLC ("GTR") and Capital Merchant Services LLC ("CMS") restrained a Michigan bank account in violation of this State's longstanding separate entity rule.

GTR then used New York City Marshal Stephen W. Biegel ("Marshal Biegel") to serve a levy on Corporate Network Creations, Inc. ("Corporate Creations"), a corporate service company in Rockland County. That is problematic for two at least two reasons: (1) Marshal Biegel does not have authority to execute upon judgments in Rockland County; and (2) Corporate Creations was not authorized to accept service on behalf of the out-of-state bank Comerica Bank, N.A. ("Comerica") under CPLR §§ 318 and 5232(a). CMS similarly violated CPLR §§ 318 and 5232(a) by directing the Rockland County Sheriff to also serve a levy and demand upon Corporate Creations.

But perhaps the most brazen conduct of all was by the one holding out a badge, Marshal Biegel. In addition to seizing property located in another state, Marshal Biegel had an amended levy and demand served in Michigan, which is knowingly beyond his jurisdictional territory of New York City. Even worse, Marshal Biegel did not even personally serve the levy and demand as required by New York law. Instead, he had it faxed to an out-of-state bank by his administrative assistant. That constitutes three violations in one shot: (1) it was not delivered within New York City; (2) it was not delivered by hand; and (3) it was not delivered by the Marshal.

Unsurprisingly, the consequences of these unlawful acts were severe and far reaching. FutureNet Group Inc. ("FutureNet"), a private government contractor

located in Michigan, had more than $440,000 frozen without any notice whatsoever.[1] As a direct result, FutureNet was not able to make payroll, its senior lenders called defaults under the loan agreements and a receiver was ultimately appointed to sell FutureNet's assets for the benefit of its senior secured creditors.

Thereafter, the receiver commenced two separate actions in federal court to obtain repayment of the more than $440,000 that was unlawfully taken by Respondents. Both actions were ultimately dismissed, holding, in effect, that Respondents may violate New York judgment collection laws and keep the money—at the expense of the judgment debtor and its senior secured creditors who chose not to break the law. On appeal, the Second Circuit recognized that only two New York trial courts had addressed the issue, each with divergent results. Given the public importance of the issue, the Second Circuit certified two questions to this Court: (i) whether a judgment debtor can sustain an action for damages when a judgment creditor breaks the law, and (ii) if so, whether a judgment debtor must first obtain preliminary relief under CPLR 5240 before commencing a separate plenary action.

Resolution of these questions has far-reaching ramifications. MCA companies and New York City Marshals continue to employ these tactics to enforce more than

[1] FutureNet is the judgment debtor in this case, but through the receivership, the claims asserted herein were eventually assigned to Plymouth. During the course of the proceedings before the Second Circuit, Plymouth was substituted as the appellant. For simplicity, the FutureNet-related parties will be referred to herein as "FutureNet."

30,000 New York judgments by confession against small businesses located throughout the United States, most of which have no connection to New York.[2] Recent statutory amendments to preclude the entry of confessed judgments against non-New York entities have only made the situation worse. Not only do the 30,000 confessed judgments remain, but MCA companies are now serving complaints through the mail and obtaining default judgments against foreign entities.[3] These defaults are then turned over to New York City marshals like Marshal Biegel to levy upon the debtor's out-of-state bank accounts under the color of New York law rather than through domestication and execution in the debtor's home state.

This judgment enforcement scheme has made MCA companies and marshals rich. In 2018, alone, Marshal Biegel reportedly earned "poundage fees" of $1.4 million,[4] but it is destroying small businesses throughout the United States at a time when small businesses are just beginning to recover from the pandemic.

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[2] Zachary R. Mider and Zeke Faux, *Sign Here to Lose Everything: How an Obscure Legal Document Turned New York's Court System into a Debt-Collection Machine that's Chewing Up Small Business Across America*, Bloomberg, Nov. 28, 2018. https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?sref=FcmhwfUA.

[3] *See e.g., GTR Source LLC v. Bachson Academy, LLC, et. al.*, Supreme Court of New York, County of Kings, Index No. 523668/2019 (GTR obtained default judgment against a children's school in Massachusetts where service of the Complaint was by mail).

[4] Zach R. Mider and Zeke Faux, *New York Officials are Still Reaping Millions From Predatory Lenders*, Bloomberg, April 30, 2019. https://www.bloomberg.com/news/articles/2019-04-30/new-york-officials-still-reaping-millions-from-predatory-lenders?sref=FcmhwfUA.

New York's judgment enforcement laws were never intended to have such far-reaching and devastating effects on the residents and commerce of other states. Applicable statutes and more than 100 years of controlling precedent from this Court and other appellate courts, limit the reach of New York's judgment enforcement laws to the territorial boundaries of New York, and in the case of a New York City marshal, to the territorial boundaries of New York City. Further, settled law holds that when a marshal or sheriff exceeds his authority, their actions are void and both he and the creditor at whose direction he acts, are liable for any wrongfully seized property for wrongful execution, conversion and trespass.

Adherence to these well-settled principles is necessary to maintain order in financial transactions and to preserve public confidence in the judicial system. Long ago, this Court recognized that each branch of a bank was a "separate entity" and required that, to be effective, restraining notices, attachments and levies must be served upon the particular branch where a debtor maintains his accounts. Among other reasons, this was deemed necessary to provide one forum for the resolution of creditor disputes involving a debtor's assets. Creditors who do business with a Michigan debtor as here should expect to be hailed into Michigan to resolve competing creditor claims to the debtor's assets; not compelled to submit to the jurisdiction of New York based upon a judgment creditor's choice of venue. Permitting collection attorneys and marshals to violate the separate entity rule

without consequence injects the very chaos and uncertainty into financial transactions that the separate entity rule was intended to prevent.

It also undermines the public trust in the judicial system. Executions and levies are forms of injunctive relief issued by collection attorneys and marshals in their capacities as officers of the court. Each of these enforcement devices states that New York courts have jurisdiction over the recipient and that failure to comply with their terms will result in the imposition of fines and possible imprisonment. These jurisdictional assertions simply are not true in the case of out-of-state banks and accounts. Permitting judgment creditors and marshals to benefit from these false representations contaminates the judicial system and undermines the integrity of the very courts whose judgments they seek to enforce.

Finally, the law recognizes that judgment enforcement mechanisms do not travel with the judgment.[5] States are free to determine the mechanisms available to enforce judgments within their borders and against their residents, including when and against what property such judgments may be enforced. New York's judgment enforcement laws are no exception. They are designed and intended to ensure that judgment creditors, their attorneys, marshals and sheriffs do not extend their authority to encroach upon the rights of other states and do exactly what was done

[5] *See Baker v. GMC*, 522 U.S. 222, 235 (1998) ("Enforcement measures do not travel with the sister state as preclusive effects do; such measures remain subject to the even-handed control of forum law.")

here – reach across state lines and seize funds maintained in a non-New York bank. Such conduct should not be tolerated and must have consequences.

QUESTIONS CERTIFIED FOR REVIEW

On March 25, 2021 [A-749][6], this Court accepted the following certified questions from the United States Court of Appeals for the Second Circuit:

(1) whether a judgment debtor suffers cognizable damages in tort when its property is seized pursuant to a levy by service of execution that does not comply with the procedural requirements of CPLR § 5232(a), even though the seized property is applied to a valid money judgment; and, if so

(2) whether the judgment debtor can, under these circumstances, bring a tort claim against either the judgment creditor or the marshal without first seeking relief under CPLR § 5240.

Appellant respectfully submits that based upon long-standing case law from this Court, the answer to both certificated questions is "Yes".

STATEMENT OF JURISDICTION

This Court has pursuant to jurisdiction § 500.27 of the Rules of Practice of the New York State Court of Appeals.

[6] References to the Record Appendix are in the form [A-(page number)].

STATEMENT OF FACTS

A. FutureNet

FutureNet was a Michigan corporation with its principal place of business in Detroit, Michigan. It provided infrastructure services in construction, technology, perimeter security, and energy/environment to government and commercial customers. [A-169, ¶ 3-4]. It did not maintain any offices or regularly conduct any business in New York, and, at all relevant times, it opened and maintained its bank accounts (the "Comerica Accounts") at a branch of Comerica Bank ("Comerica") located in Redford, Michigan. [A-169, ¶ 5].

A. The MCA Respondents

GTR and CMS, an affiliate of Yellowstone Capital LLC ("Yellowstone"), are both MCA companies that purport to offer cash in exchange for the businesses' future receivables. In reality, however, the transactions are loans disguised as the purchase of future receivables in order to evade applicable criminally usury loans. Indeed, both Yellowstone and GTR's managing member, Tzvi Reich, are currently the subject of separate deceptive practices claims by the New Jersey Attorney General and the New York Attorney General arising, in part, from their alleged efforts to conceal the true nature of their MCA agreements.[7]

[7] *See Gurbir S. Grewal v. Yellowstone Capital LLC, et. Al.*, New Jersey Superior Court, Chancery Division, Hudson County, Docket No. HUD-C-190-2 and *Letitia James v. Richmond Capital Group LLC*, Supreme Court of the State of New York, County of New York, Index No. 451368/2020.

On November 13, 2017, FutureNet entered into an MCA agreement with GTR (the "GTR Agreement") pursuant to which GTR agreed to advance $200,000 purportedly in exchange for the purchase of $291,800 in future receivables. The purchased receivables were to be repaid in just eighteen weeks through fixed daily payments of $3,999. This translates into an effective interest rate in excess of 200% per annum. [A-172]. Shortly thereafter, in late December 2017, FutureNet entered into a second MC Agreement with CMS (the "CMS Agreement") [A-528, 596] pursuant to which CMS advanced $550,000 purportedly in exchange for the purchase of $780,450 in future receivables, to be repaid in eighteen weeks through fixed daily payments of $8,672. [A-596, 603]. This translates into an effective interest rate in excess 400% per annum. Pursuant to both agreements, the daily payments were to be made by daily ACH withdrawals from a FutureNet account (the "Designated Account") at Comerica.

In February 2018, FutureNet was unable to meet its daily payment obligations, causing both GTR and CMS to declare defaults and file affidavits of confession of judgment pursuant to CPLR § 3218. Later that month, GTR obtained a judgment (the "GTR Judgment") against FutureNet in the amount of $120,154.92, in an action titled *GTR Source, LLC v. FutureNet Group, Inc., et. ano.*, Supreme Court of the State of New York, County of Orange, Index No. EF001776-2018 (the "GTR State Court Action"). [A-389-9]. Meanwhile, CMS obtained a $777,957.39 judgment (the

"CMS Judgment" and collectively, the "Judgments") against FutureNet in a matter titled *Capital Merchant Services LLC v. FutureNet Group, Inc. d/b/a FutureNet Group, et. ano*., Supreme Court of the State of New York, County of Orange, Index No. EF001637-2018 (the "CMS State Court Action"). [A-584-86].

B. The Improper Collection Efforts

Armed with these judgments (collectively, "Judgments"), GTR and CMS proceeded to abuse New York's judgment enforcement laws.

On February 14, 2018, GTR, through its attorney, Ariel Bouskila, Esq., served an Information Subpoena with Restraining Notice (the "GTR Restraining Notice") addressed to Comerica Bank at 500 Woodward Avenue, MC 3391, Detroit, Michigan 48226. [A-27-8]. CMS followed on February 16, 2018, serving an Information Subpoena with Restraining Notice (the "CMS Restraining Notice" and together with the GTR Restraining Notice, the "Restraining Notices") on Comerica by delivering it to Comerica Bank c/o Corporate Creations Network, Inc. in Nyack, New York. [A-541-48].

Both the CMS Restraining Notice and the GTR Restraining Notice represented that Comerica was (i) subject to the jurisdiction of the courts of the State of New York; (ii) bound by the provisions of the CPLR; and (iii) required by CPLR § 5222 to restrain FutureNet's accounts. [A-27-8, 541-42]. Further, in bold and capitalized letters, the Restraining Notice emphatically stated that Comerica *could*

be subject to fines and imprisonment for contempt of court and *would* be subject to fines for violating a judicial subpoena under CPLR § 2308(a) if it did not comply. [A-28, 542].

Upon receipt of the Restraining Notices, Comerica restrained the Comerica Accounts and thereby prevented FutureNet from withdrawing the Funds. [A-170, ¶ 10). By emails and letters dated February 22, 2018, both GTR and CMS were separately advised that each Restraining Notice was unlawful because (i) Comerica maintained no branches in New York; (ii) Comerica was not subject to the general jurisdiction of New York; (iii) FutureNet's bank accounts were opened and maintained in Michigan; and (iv) the Restraining Notice was tortiously interfering with the superior UCC rights of FutureNet's senior secured lenders. [A-41-7, 550-52]. Neither GTR nor CMS withdrew their Restraining Notices. As GTR and CMS had been expressly warned, FutureNet was unable to make payroll and defaulted on its obligations to its senior secured lenders. [A-14, ¶¶ 21-23, 530-32, ¶¶ 22-23]

On February 26, 2018, GTR issued an Execution with Notice to Garnishee (the "GTR Execution") naming Comerica as the garnishee and directing New York City Marshal Biegel to issue and to serve a Notice and Levy and Demand on Comerica (the "First GTR Levy") c/o Corporate Creations Network, Inc. ("Corporate Creations"), 15 North Mill Street, Nyack, New York. [A-55-9].

The GTR Execution, like the GTR Restraining Notice, represented that the courts of the State of New York had jurisdiction over Comerica. In fact, the Notice to Garnishee claimed that Comerica was subject to the CPLR and obligated by CPLR § 5232(a) to turn over the Funds to Marshal Biegel and enjoined from otherwise transferring them. [A-56]. Upon his receipt of the GTR Execution, Marshal Biegel issued a levy (the "First GTR Levy") and, by certified mail, delivered the First GTR Levy to Comerica c/o Corporate Creations in Rockland County, which is outside the five boroughs of New York. [A-53-9]. The First GTR Levy, like the GTR Restraining Notice and GTR Execution, represented that Comerica was subject to the jurisdiction of the courts of the State of New York and required by the CPLR to turn over the Funds to Marshal Biegel. [A-54].

On March 14, 2018, Marshal Biegel's office delivered an amended levy (the "Second GTR Levy" and, together with the First GTR Levy, the "GTR Levies") to Comerica via fax. [A-71]. The fax cover sheet and sending fax header indicated that it was sent by someone named "Alona," not the Marshal. [A-GTR 61]. A week later, Comerica issued a bank check to "NYC Marshal Biegel" in the amount of $127,082.29, inclusive of accrued interest and Marshal Biegel's poundage fees, which the Marshal then distributed to GTR. [A-91-8, 133-5]. With that money in hand, GTR filed a satisfaction of judgment in the GTR State Court Action. [A- 194].

The following month, CMS pursued a similar collections approach. On April 17, 2018, CMS issued an "execution with notice to garnishee" to the Rockland County Sheriff (the "CMS Execution"), directing him to levy (the "CMS Levy") upon FutureNet's Comerica Accounts by serving the execution on Corporate Creations. [A-558-66]. Once the Sheriff served the execution as directed, Comerica turned over a bank check for around $322,000 to the Sheriff, which the Sheriff then remitted to CMS less poundage. [A-522 ¶¶ 34-35].

PROCEDURAL HISTORY

After GTR and CMS seized funds (collectively the "Seized Funds") from FutureNet's Comerica Accounts, FutureNet's secured creditors commenced a Michigan state court action, seeking to appoint a receiver to oversee FutureNet's assets. Basil Simon (the "Receiver") was appointed as receiver over certain intangibles. [A-81-94].

A. The GTR Federal Action

On February 25, 2019, the Receiver commenced an action against GTR and Marshal Biegel in the Southern District of New York captioned *Basil Simon v. GTR Source LLC, et. ano.*, United States District Court for the Southern District of New York, Case No. 19-cv-01471(JGK). [A-10-26]. This action (the "GTR Federal Action") did not seek to invalidate the GTR judgment. Rather, it sought to hold GTR

and Marshal Biegel liable for tort damages that were caused as a result of an improper execution and levy. [A-263].

In short, the Receiver alleged that the GTR Execution and GTR Levies were improper because the Marshal served the execution on Corporate Creations, which is based in Rockland County, and the Marshal's jurisdiction is limited to New York City. *See* N.Y.C. Civ. Ct. Act § 1609(1)(a) (explaining that "[t]he authority of a marshal extends throughout the city of New York"). [A-24; ¶¶ 89-90]. The Receiver argued that because the execution issued by GTR directed the Marshal to act outside of his jurisdiction, and because the Marshal did, in fact, act outside his jurisdiction, the GTR Execution and GTR Levies were null and void from inception. [A-24, ¶ 90]. According to the Receiver, this meant that GTR Source and the Marshal took possession of FutureNet's property without authority, which rendered both defendants liable under state tort law for wrongful execution, conversion, and trespass to chattels. On each claim against each defendant, Simon asserted direct damages of just over $127,000, the total amount collected pursuant to the allegedly unlawful GTR Levies, plus additional consequential damages flowing from unlawful restraints that caused FutureNet to miss payroll and default upon its obligations to its senior lenders. [A-263].

On December 26, 2019, the district court entered summary judgment in favor of both GTR and Marshal Biegel on all of the Receiver's claims. *See generally Simon*

v. GTR Source, LLC, No. 19-cv-1471 (JGK), 2019 WL 7283279 (S.D.N.Y. Dec. 26, 2019). The district court concluded that, regardless of whether the execution and levy were valid, FutureNet had suffered no damages. Specifically, the district court found that "[t]he debt owed by FutureNet to GTR [Source], which [Simon] does not dispute is a valid debt, has now been satisfied as a result of the Marshal's execution and a satisfaction of judgment has been entered," meaning that FutureNet was not harmed. *Id.* at *4.

B. The CMS Federal Action

Separately, on January 25, 2019, Simon initiated a similar suit against CMS in the Southern District of New York captioned *Simon v. Capital Merchant Services, LLC*, United States District Court for the Southern District of New York, Case No. 19-cv-00904 (KPF). [A-527-39]. Similarly, the Receiver alleged that the CMS Execution and CMS Levy were invalid because Corporate Creations is not a proper agent for service within the meaning of CPLR 318 and 5232(a). [A-63-6].

Following the decision in *GTR Source*, CMS sought to dismiss the suit based on issue preclusion. The district court agreed, finding that the Receiver's claims hinged on the same question of law at the heart of *GTR Source*: whether a judgment debtor is damaged by an improper execution and levy when the seized property is used to satisfy a valid money judgment. *See generally Simon v. Cap. Merch. Servs., LLC*, No. 19-cv-904 (KPF), 2020 WL 615091 (S.D.N.Y. Feb. 10, 2020). Because *GTR*

Source had already answered that question in the negative, the district court concluded that it would be improper to permit the Receiver to have another bite at the apple. *See id.* at *8–11. Nevertheless, the district court went on to state that had the Receiver been free to relitigate the issue, the court would have arrived at the same conclusion as the *GTR Source* court, namely, that FutureNet suffered no damages because the alleged conversion resulted in the property being used to satisfy a valid money judgment. *See id.* at *11–12.

C. The Second Circuit Appeal

On appeal, the Second Circuit (Walker, Sack, Sullivan, JJ.) determined that in *GTR Source,* the district court had misapplied collateral estoppel to preclude relitigation of pure questions of law. [A-740]. The Second Circuit then went on to address the core issue of whether a judgment debtor can sustain damages from an improper execution and levy when the property seized pursuant to that improper execution and levy was used to satisfy a valid money judgment. Noting that this Court has not yet addressed the issue, the Second Circuit discussed two trial court decisions that reached different results concerning the issue. [A-742].

In *Silver Cup Funding LLC v. Horizon Health Ctr. Inc.* 2020 NY Slip Op 51529(U), 2020 N.Y. Misc. LEXIS 10739, Index No. 123057-2019 (Sup. Ct. Ont. Cty. Dec. 18, 2019), the Supreme Court for Ontario County held a judgment creditor was required to pay restitution to a judgment debtor for an improper execution and

levy, and indicating that, although that motion was instituted under CPLR 5240, the judgment creditor "may have a cause of action for damages" in a separate plenary action. [A-745]. But the Supreme Court for New York County reached the opposite result in *Bam Bam Entertainment LLC v. Pagnotta*, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (N.Y. Sup. Ct. Kings Cty. 2018), holding that a judgment debtor cannot sustain damages from an improper levy so long as the improperly seized funds were used to pay a valid judgment. [A-745]. In other words, the *Bam Bam* court held, in effect, that MCA companies and New York City Marshals can break the law with impunity.

While noting that the *Bam Bam* decision was "difficult to square with the rule that '[o]ne who has wrongfully taken property [ordinarily] cannot mitigate damages by showing that *he has himself* applied the property to the owner's use without his consent.'" *Higgins v. Whitney*, 24 Wend. 379, 381 (N.Y. Sup. Ct. 1840); *see also Ball v. Liney*, 48 N.Y. 6, 14–15 (1871) (other citations omitted) [A-744], the Second Circuit presented the two certified questions to this Court.

SUMMARY OF ARGUMENT

FutureNet asserts that the Executions and Levies did not comply with the requirements of CPLR § 5232(a) and, in the case of the GTR Execution and Levies, were otherwise served beyond the territorial limitations of Marshal Biegel's authority to execute upon judgments. Settled law holds that when a statute mandates a public official, such as a sheriff or marshal, to perform his functions in a specific

manner, his failure do so renders his actions null and void and potentially subjects him and the judgment creditor to liability in tort for any wrongfully seized property and other damages flowing from the wrongful conversion. That the wrongfully seized funds are applied to a valid judgment is not material to determining whether the judgment debtor has suffered damages. Application of the wrongfully seized funds to a valid judgment is a set-off to liability for tort damages; not a means to measure the existence of actual damages. Set-off is subject to its own law and that law does not permit converters to profit from their wrongful acts and escape liability by applying the proceeds of their theft to a valid debt owing to them.

Here, FutureNet had more than $440,000 improperly taken from its Comerica Accounts and was forced to close its doors by reason of the Respondents' conduct. The loss plainly constitutes cognizable damages that may be recovered by a judgment debtor through an action in tort.

Under these circumstances, a judgment debtor is not obligated to seek any preliminary relief under CPLR § 5240 before commencing a plenary action for wrongful execution of process. The Executions and Levies were issued without authority and, as a matter of law, they are null and void from inception. Hence, there is nothing to vacate, modify, or deny under CPLR § 5240. Under settled law, "a void writ or process, furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be

set aside before bringing the action." *Day v. Bach*, 87 N.Y. 56, 61 (1881). Accordingly, in cases involving void executions and levies, a judgment debtor can maintain a tort action to recover damages for wrongful process without first seeking any preliminary relief under CPLR § 5240.

ARGUMENT

POINT I

A JUDGMENT DEBTOR SUFFERS COGNIZABLE DAMAGES IN TORT WHEN ITS PROPERTY IS SEIZED PURSUANT TO A LEVY BY SERVICE OF EXECUTION THAT DOES NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF CPLR 5232(A), EVEN THOUGH THE SEIZED PROPERTY IS APPLIED TO A VALID MONEY JUDGMENT

The first certified question raises three distinct issues: (i) whether an improperly issued execution and levy can give rise to a tort in favor of the judgment debtor; (ii) whether a judgment debtor suffers damages for any such tort and (iii) whether a judgment debtor is entitled to recover damages even if the seized property is applied to a valid money judgment. In order to ensure compliance with the limitations of New York's judgment enforcement laws and prevent abuses by judgment creditors and their collection attorneys, the answers to each of these issues must be "YES."

A. An improperly issued execution and levy can give rise to a tort for wrongful execution of process in favor of a judgment debtor.

Executions, levies and restraining notices are all powerful judgment enforcements tools that are subject to abuse by judgment creditors, their attorneys, marshals and sheriffs. Accordingly, "[i]t has repeatedly been held by the courts of this and most of the other States of the Union, that a civil action may be maintained to recover damages sustained by the abuse of the process of the court." *Paul v. Fargo,* 84 A.D. 9, 16, 82 N.Y.S. 369, 373 (4th Dep't 1903). Under New York law, a claim for wrongful execution or conversion is established when the "process" is irregular or unauthorized. *See Silberstein v. Presbyterian Hospital in New York*, 96 A.D.2d 1096, 1097, 463 N.Y.S.2d 254, 256 (2d Dep't 1983) (citing *Day v. Bach*, 87 N.Y. 56, 61 (1881)). "Process" is not the judgment itself, but rather the restraining notice, execution, levy or other mechanism used to collect upon the judgment. *See Williams v. Williams*, 23 N.Y.2d 592, 596 at n. 1, 298 N.Y.S.2d 473 (1969) (noting examples of process include "attachment, execution, garnishment or even such infrequent cases as the use of a subpoena for the collection of debt."); *see also Nat'l Bank of N. Amer. V. IBEW, Local No. 3, Pension & Vacation Funds*, 69 A.D.2d 679, 687, 419 N.Y.S.2d 127, 132 (2d Dep't 1979) ("Garnishment, levy and other *legal process* are remedies which generally arise after an adjudication of liability and the exercise of these remedies is subject to judicial oversight" (emphasis added)).

A process that is issued without jurisdiction or authority, is "an absolute nullity for the beginning" and "an action for what has been done under it [may be brought] at any time, and it is not necessary that [the process] be set aside before bringing the action." *Day v. Bach*, 87 N.Y. 56, 60-61 (1881). This is so because a void process offers no protection to a party as it is the party's "own fault that it was irregular and void at first." *Id; see also Fischer v. Langbein*, 103 N.Y. 84, 89-90 (1886) ("In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action." (internal citations omitted)).

In this case, the Executions and Levies were void because they were issued beyond the territorial limits of the officers serving them and/or they were served in a manner that was not compliant with CPLR § 5232(a).

1. The GTR Execution and GTR Levies were void because they were issued beyond the territorial limits of Marshal Biegel's authority.

A marshal or sheriff is an officer of the court "whose position is created by statute" and "whose powers and duties are proscribed statute." *Iorio v. N.Y.*, 96 Misc.2d 955, 958-59, 410 N.Y.S.2d 195, 198 (N.Y. Sup. Ct., Bronx Cty. Sept. 18, 1978). When a marshal or sheriff acts beyond those powers, his actions are null and void as a matter of law. *See, e.g, Ettinger v. Wilke*, 79 Misc.2d 387, 388, 358 N.Y.S.2d 597, 598 (Civ. Ct. N.Y. Cty. June 3, 1974) (finding a marshal's levy and

enforcement of a judgment was null and void where issued without authority under CCA); *Yeh v. Seakan*, 119 Misc.2d 681, 684-85 (N.Y. Sup. Ct. Oneida Cty. Apr. 26, 1983) (noting an execution and levy issued by a marshal without authority to levy upon the property is invalid and unenforceable); *Schleimer v. Gross*, 46 Misc.2d 931, 933, 261 N.Y.S.2d 670, 673 (N.Y. Sup. Ct. Nassau Cty. May 24, 1965) (delivery of income execution to New York City marshal was legal nullity where garnishee employer was located outside the City of New York and beyond the authority of a city marshal).[8]

In this case, it is undisputed that Marshal Biegel, acting upon instructions from GTR in the GTR Execution, exceeded his authority by issuing the GTR Levies directed to a non-New York bank with no branches in New York and serving the GTR Levies outside the City of New York. Pursuant to the CCA §§ 1609(1)(a) and 1609(b), a marshal's authority to execute upon a judgment cannot exceed that of a sheriff and is territorially limited to the boundaries of the City of New York:

> a. *The authority of a marshal extends throughout the city of New York* and all provisions of law relating to the

[8] The territorial limitations imposed upon a sheriff are akin to the subject matter limitations imposed on New York State Courts by BCL §1314 in that they restrict the instance in which a sheriff can lawfully carry out a levy. The subject matter restrictions of BCL §1314 cannot be consented to or waived. *See Farrell v. Piedmont Aviation Inc.*, 411 F.2d 812, 815 (2d Cir. 1969) at n. 4 (holding that the limitations of BCL 1314 cannot be waived). Similarly, a party or garnishee cannot expand the authority of the sheriff and confer jurisdiction upon him to levy upon funds located beyond the statutory limits of his authority. *See, e.g., Graham v. New York City Hous. Auth.*, 224 A.D.2d 248, 249, 637 N.Y.S.2d 701, 701 (1st Dep't 1996) ("[S]ubject matter jurisdiction cannot be conferred by consent and a defect in subject matter jurisdiction cannot be waived." (internal quotation and citation omitted)).

> powers, duties and liabilities of sheriffs in like cases and in respect to the taking and restitution of property, shall apply to marshals.
>
> * * * * *
>
> b. Notwithstanding any inconsistent provision of this act or of any other general, special or local law, code, charter, or ordinance, all provisions of law relating to the powers, duties and liabilities of the city sheriff in like cases in respect *to the enforcement within the city of money judgment**s*** rendered by any family court or money judgments entered in any supreme court or docketed with the clerk of any county, shall apply to marshals, except that city marshals shall have no power to levy upon or sell real property and city marshals shall have no power of arrest.

CCA §§ 1609(1)(a) and (b) (emphasis added).

Consistent with these limitations, the New York City Marshals Handbook of Regulations (the "Marshals Handbook") [A-137-56] specifically provides that a city marshal's power to levy does not extend beyond the borders of the City of New York:

> Moreover, a marshal's jurisdiction and authority to serve executions against personal property, as well as all other mandates and processes, extends through and *is limited to geographical boundaries of the City of New York.*

[A-147] (emphasis added).

Indeed, in light of ongoing reports that marshals were regularly failing to comply with these provisions, the Department of Investigation (the "DOI"), recently

reiterated the express territorial limitations on a marshal's authority in a memorandum (the "DOI Memorandum") directed to Marshal Biegel and all other city marshals:

> A marshal's jurisdiction and authority to serve executions against personal property, as well as other mandates and processes, extends through and is limited to the geographical boundaries of the City of New York.

[A-157].

On their face, the GTR Execution and the GTR Levies plainly exceed the territorial limits of Marshal Biegel's authority. Most importantly, they were directed to Comerica c/o of Corporate Creations in Rockland County. [A 54-6, 72-4]. Marshal Biegel did not have the authority to execute in Rockland County. Pursuant to CCA §§ 1609(1)(a) and (b) and the guidelines set forth in the Marshals Handbook, Marshal Biegel's authority is territorially limited to the five boroughs of New York City. Having knowingly undertaken to issue and serve a facially defective levy and execution, Marshal Biegel and GTR should not have been heard to complain that they are liable for wrongful execution, conversion or trespass.[9]

[9] Under the presumption of regularity, a sheriff or marshal can escape liability when complying with a facially valid execution. *See City of New York v. 10-12 Cooper Sq. Inc.*, 7 Misc. 3d 253, 255, 793 N.Y.S.2d 688, 689 (N.Y. Sup. Ct. N.Y. Cty. 2004) (citing *Matter of Whitman*, 225 N.Y. 1, 121 N.E. 479 (1918)) (The presumption of regularity "presume[s] that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done."). The presumption does not attach to the GTR Execution because, on its face, the GTR Execution was invalid and instruction him to serve the GTR Levy outside the territorial limits of his authority. *See Korsinsky v. Rose*, 120 A.D.3d 1307, 1309, 993

In this regard, the Appellate Term decisions in *Tausend v. Handlear*, 33 Misc. 587 (N.Y. Sup. Ct. App. Term Jan. 1901) and *V. Loewer's Gambrinus Brewing Co. v. Lithauer*, 36 Misc. 539 (N.Y. Sup. Ct. App. Term Dec. 1901) are instructive, if not dispositive. Both cases involved executions on municipal court judgments by marshals outside the county of their appointment. The law then, like now, granted marshals the power to execute and collect upon judgments, but territorially limited their authority. In 1901, the authority was limited to the county of their appointment. *See Tausend*, 33 Misc. at 589-90. Today, a New York City Marshal's authority is limited to the five boroughs making up New York City. *See* CCA § 1609. In both *Tausend* and *Lithauer*, the Appellate Term found that executions served by New York County Marshals in Kings County were void because they were served beyond the marshal's authority. *See Tausend*, 33 Misc. at 590; *Lithauer*, 36 Misc. at 541. As succinctly stated by the *Lithauer* court, service of the "[l]evy accomplished nothing" because "if the marshal has no power to act in Kings County, property not within his jurisdiction is clearly not bound by it." *Lithauer*, 36 Misc. at 541. Here, the GTR Execution and GTR Levies similarly "accomplished nothing" because Marshal Biegel had no power to act in Rockland County, giving rise to cause of

N.Y.S.2d 92 (2d Dep't 2014) (a marshal is not entitled to protection where "he or she knowingly or negligently executed an invalid order of seizure or similar warrant.")

action for wrongful execution. *See Day v. Bach*, 87 N.Y. at 60-1; *Fischer*, 103 N.Y. at 89-90; *Silberstein*, 96 A.D.2d at 1096-67.

2. The GTR Levies and the CMS Levy were void because they were not served on the proper entity.

To ensure that a marshal (or a sheriff) does not exceed the territorial limitations of their authority, CPLR § 5232(a) specifically requires *personal service* of a levy and execution by the marshal (or sheriff) upon an *officer* of the garnishee or an agent for service under CPLR § 318, but not a general agent under CPLR § 308 (3):

> Levy by service of execution. The sheriff [or marshal] shall levy upon any interest of the judgment debtor . . . by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authority to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.
>
> * * * * *

CPLR § 5232(a) (emphasis added).

Pursuant to CPLR § 318, an entity may designate a person to accept service by filing an executed and acknowledged writing of such designation "in the office of the clerk of the county in which the principal to be served resides or has its principal office." CPLR § 318. FutureNet alleged that Comerica did not file the designation required by CPLR § 318 to make Corporate Creations its designated

agent. [A 16, ¶ 65]. Thus, acting on specific instructions from GTR and CMS, Marshal Biegel and the Rockland Sheriff failed to do what was required of them under CPLR 5232(a) to affect a levy.[10] In essence, there were no levies.

The service provisions of CPLR § 5232(a) are mandatory. *See Mulligan v. Murphy*, 19 A.D.2d 218, 223, 241 N.Y.S.2d 529, 535 (4th Dep't 1963), *rev'd on other grounds*, 14 N.Y.2d 223 (1964) (The use of the word "shall" is deemed mandatory "in the absence of ameliorating or qualifying language or showing of another purpose."); *Patrolmen's Benevolent Ass'n v. City of Buffalo*, 50 A.D.2d 101, 104, 376 N.Y.S.2d 291, 294 (4th Dep't 1975) (same); *People v. Ricken*, 29 A.D.2d 192, 193, 287 N.Y.S.2d 118, 119 (3d Dep't 1968) (same).

Under settled principles of New York law, mandatory statutory provisions such as CPLR 5232(a), go to the jurisdiction of the person acting, and "compliance with the commands of an act or determination under it." *People ex. rel. v. Snell*, 216 N.Y. 527, 534, 111 N.E. 50, 53 (1916). In other words, if a statute requires a public

[10] The CMS Execution directed the Rockland County Sheriff to levy within Rockland County and thus, on its face, did not direct him to exceed his authority and expose him to the same liability as Marshal Biegel. Nonetheless, CMS was required to research and determine the proper recipient of the CMS Levy and having fail to do so, it is still liable for the Sheriff's authorized acts. *Velardi v. Consolidated Edison Co. of N.Y.*, 63 Misc.2d 623, 313 N.Y.S.2d 194 (N.Y. Sup. Ct. Sp. Term N.Y. Cty. March 19, 1970) (holding a facially valid process might protect an officer from liability, "but this protection, being extended to the officer, upon motives of policy, would not at all aid the party" who put the process in motion.).

official such as a marshal or sheriff to perform a function in a certain way, then he must do so or he does not have the jurisdiction to act. *Id.*

Further, "[c]ustom, usage and practice may not waive, or in effect avoid, a mandatory statute which is clear and unambiguous on its face." *Zimmer v. Chemung Cty. Performing Arts, Inc.*, 65 N.Y. 513, 524, 482 N.E.2d 898, 903 (1985) (internal quotation and citation omitted). To the contrary, "[t]he mode or way in which the act shall be done or the determination reached prescribed by it must be strictly pursued, otherwise the act or the determination will be *void*." *Snell*, 216 N.Y. at 534 (emphasis added); *Hilfer v. Board of Regents*, 283 N.Y. 304, 308, 28 N.E.2d 848, 849-50 (1940) (same).

CPLR § 5232(a) could not be more clear and unambiguous on its face. To be effective, the statute requires that a levy be served in the same manner as a summons and it *expressly prohibits* substituted service on a general agent for service of process such as the secretary of state or, in this case, Corporate Creations. *See Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 142, 501 N.Y.S.2d 8 (1986) ("It is well established that service on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an agent designated under CPLR 318").

Once again, to further ensure compliance with the provisions of CPLR § 5232(a) and enforce the territorial limitations of a marshal's authority to execute, the

Marshals Handbook states, in plain and unambiguous terms, that service on a corporation must be done in-person, by hand delivery, to an officer of the corporation:

> Service [of a levy] on a corporation must be according to the provisions of § 311 of the CPLR; that is, by personally serving (in-hand) an officer or other agent of the corporation. *Under no circumstances may service by made by mailing a copy of the execution to the corporate garnishee.*

[A-19] (emphasis added).

Notwithstanding the express provisions of the CPLR and the Marshals Handbook, city marshals, like Marshal Biegel, frequently disregard their obligations causing the DOI to again issue a stern reminder of the territorial limits of a marshal's authority and the requirements of personal service within the geographical boundaries of the State of New York:

> You are hereby reminded that City marshals are responsible for following all regulations as promulgated in the New York City Marshals Handbook of Regulations (Handbook). As some have already been reminded, in person or by telephone, be advised that property executions are to be served by personal service, within the geographical boundaries of the City of New York.

[A-157].

It is undisputed that Marshal Biegel failed to comply with the service requirements of CPLR § 5232(a). The GTR Levies were not personally served upon

an officer of Comerica within New York County. The First GTR Levy was served, by certified mail, upon Comerica c/o Corporate Creations in Rockland County. [A-53]. CPLR § 5232(a) requires in-hand deliver of the levy and does not permit service by mail. *See Premier Staffing Servs. of N.Y., Inc. v. RIDI Enters., Inc.*, 39 Misc.3d 978, 962 N.Y.S.2d 891, 980 (N.Y. Sup. Ct. Westchester Cty. April 8, 2013) (finding that service of complaint solely by overnight mail was insufficient because under CPLR § 311, "[d]elivery does, in fact, require that the summons and complaint be handed to an actual officer, director or other person set forth in the statute.") (citing *Eugene Di Lorenzo,* 67 N.Y.2d at 142.

The Second GTR Levy was not even served in New York, let alone personally within New York City. Instead, it was *faxed* directly to Comerica in Detroit, Michigan. [A 61-77]. Indeed, the Second GTR Levy was not even faxed by Marshal Biegel. Rather, the fax cover page states that the fax was from "Alona." [A-61]. Pursuant to CCA § 1603, "it shall be unlawful for any person, other than a marshal . . . to perform the duties of a marshal." *CCA § 1603.* Furthermore, CCA § 1603 also states that "it shall be unlawful for any city marshal to permit any person, other than a city marshal, to perform any act in his name, or to sign or to use his name in the performance of any act which must be personally performed by a city marshal." *Id.* Indeed, the Marshals Handbook specifically advises marshals that "neither their employees nor any person other than marshals may perform functions which can

only be performed by marshals." [A-144, § 1-12]. This is because anyone performing the functions of a city marshal is guilty of a misdemeanor. CCA § 1603. Hence, the Second GTR Levy, the very one to which Comerica respond, was not only unauthorized and void, but criminal.

Similarly, the CMS Levy was served on Corporate Creations and not in compliance with CPLR § 5232(a). [A-556-66]. Accordingly, the CMS Levy similarly accomplished nothing, *Snell*, 216 N.Y. at 534, giving rise to a cause of action for wrongful execution. *See Day v. Bach*, 87 N.Y. at 60-1; *Fischer*, 103 N.Y. at 89-90; *Silberstein*, 96 A.D.2d at 1096-97.

B. FutureNet sustained cognizable damages as result of the Respondents' wrongful execution.

There can be no question that FutureNet has suffered cognizable damages. It is well-settled New York law that when funds are wrongfully converted, a plaintiff is entitled to damages calculated from any "loss flowing from the wrongful withholding" of the funds. *See Silverstein v. Marine Midland Tr. Co. of N.Y.*, 1 A.D.2d 1037, 1038, 152 N.Y.S.2d 30 (2d Dep't 1956). Here, on or about March 21, 2018, $127,082.29[11] was taken out of the Comerica Accounts, transferred to Marshal Biegel, and then transferred to GTR, less Marshal Biegel's poundage fee. On April 26, 2018, FutureNet had $322,592.59 in the Comerica Accounts and the

[11] It is hard to fathom how the ill-gotten poundage fees cannot give rise to a claim for damages.

next day it did not. Plainly, the loss of $449,674.88 from FurtureNet's bank accounts constitutes cognizable damages. *See Bankers Trust Co. v. Rhoades,* 741 F.2d 511, 516 (2d Cir. 1984), *vacated on other grounds, Sedima v. Imrex Co.*, 473 U.S. 479, 483 n.5. (1985) ("[The plaintiff] has alleged that it has been deprived of various sums of money by the defendants' activities. There is no question that this constituted 'injury in its business or property.'"); *Newbro v. Freed,* 409 F. Supp. 2d 386 (S.D.N.Y. 2006) (granting plaintiff summary judgment in an amount equal to the amount of the funds misappropriated from its account).

In addition, directly as a result of the Respondents' conduct, FutureNet was unable to make payroll and defaulted upon obligations to its senior lenders, thereby leading to the appointment of the Receiver and the ultimate fire sale of the business. The measure of damages "flowing from" the improper seizure of the Comerica Accounts is substantial and should be determined after a trial on the issue. *See MacGuire v Elometa*, 189 A.D.2d 708, 708, 592 N.Y.S.2d 730, 731 (1st Dep't 1993) ("While defendants urge that there are no damages since they ultimately satisfied all payment obligations which were secured by the stock certificates, nominal damages may be awarded as a result of the conversion and plaintiffs should be given an opportunity to prove at trial any other damages they sustained as a result of the conversion.").

C. Application of the Seized Funds to the Judgments is not material to determining whether FutureNet suffered cognizable damages.

The Respondents' application of the Seized Funds to the Judgments has nothing to do with determining whether FutureNet sustained any cognizable damages. By definition, the application of one debt (the Judgment) to extinguish another (liability for wrongful execution, conversion and/or trespass), is known in every state as set-off or offset. *See Steck v. Colorado Fuel & Iron Co.*, 142 N.Y. 236 (1894) ("[I]n set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but a part or whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes."); *Malinoswki v. N.Y. State Dep't of Labor (In re Malinoswki),* 156 F. 3d 131, 133 (2d Cir. 1998) (same).

Set-off is an affirmative defense that reduces the amount of damages awarded a party; it is not an element of a tort claim. As explained by the United States Supreme Court, set-off "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 18 (1995) quoting *Studley v. Nat'l Bank*, 229 U.S. 523, 528 (1913). Accordingly, application of the Seized Funds to the Judgments is not material to determining whether FutureNet has suffered any cognizable damages in tort. At best, application of the Seized Funds to the Judgments could go to determining the *amount* of damages that

the Respondents must pay FutureNet; but even then, set-off has no application to FutureNet's claims. That is especially true as to Marshal Biegel because he has no claims to off-set against FutureNet. It is undisputed that FutureNet owed Marshal Biegel nothing.

Moreover, set-off is governed by its own set of rules that show it simply does not apply to the facts of this case or in any circumstance where funds are seized from a judgment debtors' bank accounts without authority. "[T]o be applied against each other," debts "must be mutual." *Beecher v. Peter A. Vogt Mfg. Co.*, 227 N.Y. 468, 473, 125 N.E. 831, 833 (1920) (citations omitted). "To be mutual, they must be due to and from the same person in the same capacity." *Id.* (citations omitted); *In re Midland Ins. Co.*, 79 N.Y.2d 253, 259, 582 N.Y.S.2d 58 (1992) ("Under our decisions, debts and credits are mutual when they are 'due to and from the same person in the same capacity.'") (quoting *Beecher; Gen. Elec. Capital Bus. Asset Funding Corp. v. Hakakian*, 6 A.D. 3d 704, 776 N.Y.S.2d 576 (2d Dep't 2004)) ("In order to satisfy the requirement of mutuality, debts 'must be due and to from the same person in the same capacity.'").

"Courts theretofore have uniformly held that a creditor who obtains a debtor's property wrongfully is not entitled to set off their liability for that wrongful conduct against a claim that the creditor holds against the debtor." *Lines v. Bank of America Nat'l Trust & Sav. Ass'n*, 743 F. Supp. 176, 183 (S.D.N.Y. 1990) (citing *Brunswick*

Corp. v. Clements, 424 F.2d 673, 675 (6th Cir. 1970), cert. denied, 400 U.S. 1010, 1013 (1971)), *Fore Improvement Corp. v. Selig*, 278 F.2d 143, 148 (2d Cir. 1960) (Friendly, J. concurring) and *Morris v. Windsor Trust Co.*, 213 N.Y. 27, 30-31, 106 N.E. 753 (1914) (wrongdoer not entitled to assert setoff against liability arising from his conversion of debtor's property); *see also Higgins v. Whitney*, 24 Wend. 379, 381 (N.Y.Sup. Ct. 1840) ("One who has wrongfully taken property cannot mitigate damages by showing that *he has himself* applied the property to the owner's use without his consent.").

The reason for this bright-line rule is two-fold. "First, because setoff is an equitable principle it must be denied in a situation where it would be inequitable to allow it." *Lines*, 743 F. Supp. at 183 (citing *Brunswick*, 424 F.2d at 675); *see also, Morris*, 213 N.Y. at 30-31 (recognizing setoff is an equitable principle and failing to apply it where creditor's conduct was inequitable). This conclusion flows from "the venerable maxim that '[h]e who seeks equity must do equity.'" *Lincoln Life & Annuity Co. v. Caswell*, 31 A.D.3d 1, 9, 813 N.Y.S.2d 385 (1st Dep't 2006) (quoting *Langel v. Betz*, 250 N.Y. 159, 162, 164 N.E. 890 (1928)).

Second, "[m]utuality is not present when the creditor has no debt to off-set against the debtor except the liability for the wrongful conversion." *Lines*¸ 743 F.Supp. at 20 (citing *In re Windsor Communications Group, Inc.*, 79 B.R. 210, 217 (E.D.P.A. Bankr. 1987)) (Where creditor "had no debt to set off but for the unlawful

conversion or property . . . the requirement of mutuality is not met . . .”). In other words, a party cannot steal or otherwise wrongfully obtain funds and then avoid the consequence of their actions by claiming an offset against a judgment or other valid debt owing by the judgment debtor. Simply stated, a wrongful debt cannot be offset against a valid debt.

Here, Marshal Biegel and GTR obtained the funds wrongfully by (i) acting outside the territorial limits of Marshal Biegel’s authority, (ii) violating the mandatory provisions of CPLR § 5232(a) and serving the GTR Levies through a method specifically prohibited by the statute, and (iii) misrepresenting the jurisdiction of New York courts in order to secure turnover of the Funds from Comerica. Similarly, CMS obtained funds wrongfully by (i) directing the Rockland Sheriff to violate the mandatory provisions of CPLR §5232(a) and serving the CMS Levies through a method that was specifically prohibited by the statute and (iii) misrepresenting the jurisdiction of New York courts in order to secure turnover of the Funds from Comerica. Equity and the law do not reward this conduct.

In this regard, the court’s decision in *Silver Cup Funding LLC v. Horizon Health Ctr. Inc.* 2020 NY Slip Op 51529(U), 2020 N.Y. Misc. LEXIS 10739, Index No. 123057-2019 (Sup. Crt. Ont. Cty. December 18, 2019) is instructive and *Bam Bam Entertainment LLC v. Pagnotta*, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (N.Y. Sup. Crt. Kings Cty. 2018) is plainly erroneous. In *Silver Cup*, the court voided a levy

that had been served on an officer of a bank in a New York branch but seized funds maintained in an account opened and maintained in a New Jersey branch of that bank in violation of New York's separate entity rule. In so doing, the *Silver Cup* court ordered that the judgment creditor return the improperly seized funds even though they would be applied to reduce the amount of a valid judgment and it recognized that the judgment debtor could recover additional damages arising from the judgment creditor's improper actions, including, among other things, attorney's fees.

In *Bam Bam,* the court committed several errors. First, the *Bam Bam* court focused on the validity of the judgment and not the process that was alleged to be wrongful. The levy in *Bam Bam* was mailed by a New York City marshal to a bank in Cincinnati, Ohio, well beyond the marshal's authority and not in compliance with CPLR § 5232(a). However, the *Bam Bam* court never considered whether the levy was therefore void and, if so, the legal consequences of a void process. Second, the *Bam Bam* court mistakenly presumed that the law protected a marshal from knowingly and intentionally serving a levy beyond his jurisdiction. It does not. *See Korsinsky v. Rose*, 120 A.D.3d 1307, 1309, 993 N.Y.S.2d 92 (2d Dep't 2014) (a marshal is not entitled to protection where "he or she knowingly or negligently executed an invalid order of seizure or similar warrant."). Finally, the *Bam Bam* court did not even consider, let alone apply, the law concerning set-off, which, as

demonstrated above, simply does not apply to situations where, as here, the marshal or judgment creditor is guilty of conversion.

POINT II

A JUDGMENT DEBTOR CAN BRING A TORT CLAIM AGAINST EITHER THE JUDGMENT CREDITOR OR THE MARSHAL WITHOUT FIRST SEEKING RELIEF UNDER CPLR 5240

A judgment debtor does not need to seek preliminary relief under CPLR § 5240 before pursuing a claim arising from a *void* process because there simply is no preliminary relief that can be granted. In claims arising from a void process, there is nothing for a court to vacate, deny, modify or strike because the process is a nullity from the outset. Only *voidable* process must be vacated before an action arising out of the process will lie. Process that is issued without jurisdiction or authority or which is otherwise void is "an absolute nullity from the beginning" and "an action for what has been done under it [may be brought] at any time, and it is not necessary that [the process] should be set aside before bringing the action." *Day v. Bach*, 87 N.Y. 56, 60-1 (1881).

More than 100 years ago, this Court recognized the "great difference between erroneous process and irregular (that is to say void) process." *Id.* at 60. As explained by this Court: "the first [erroneous process] stands valid and good until it be reversed; the latter [void process] is an absolute nullity from the beginning; the party

may justify [reliance] under the first until it be reversed; but he cannot justify [reliance] under the latter, because it was his own fault that it was irregular and void at first." *Id.*

To illustrate its point, this Court set forth three very instructive examples:

> *First*, that a void writ or process, furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be set aside before bringing the action.
>
> *Second*, if the writ is irregular only, and not absolutely void, as for instance where an execution is issued on a judgment more than a year old, without a *sci. fa.*, no action lies until it has been set aside; but when set aside, it ceases to be a protection for acts done under it while in force.
>
> *Third*, if the process was regularly issued, in a case where the court had jurisdiction, the party may justify what has been done under it, after it has been set aside for error in the judgment or proceeding; and an action for false imprisonment, in case of arrest, or of trespass for property taken under it, will not lie."

Day, 87 N.Y. at 61.

FutureNet's claims fall squarely within the first example set forth in *Day*. Among other things, FutureNet alleges that, at the direction of CMS and GTR, the Levies were served outside the scope of the Sheriff's and the Marshal's authority and not in compliance with CPLR § 5232(a). As set forth in Point I A. and B., *infra*, failing to comply with the requirements of CPLR § 5232(a) renders the Executions and Levies null and void and the Respondents are "liable to an action for what has

been done under it at any time, and it is not necessary that [the Execution, Levy or Judgment] should be set aside before bringing the action." *Day*, 87 N.Y. at 61; *see also Fischer v. Langbein*, 103 N.Y. 84, 89-90 (1886) ("In the case of void process the liability attaches when the wrong is committed and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action." (internal citations omitted)). In other words, FutureNet was not required to file a post-judgment motion under CPLR § 5240 to vacate the Executions and Levies before commencing actions against GTR, Marshal Biegel and CMS because there was simply nothing to vacate. FutureNet can do exactly what it has done here, namely, commence a new and independent action for damages arising out of a void process. *See Day*, 87 N.Y. at 61; *Fischer*, 103 N.Y. 84 at 89-90.

The difference between void and voidable process was recently highlighted by the court's decision *Silver Cup*. In *Silver Cup*, Marshal Biegel—yes the same Marshal Biegel as Respondent here—served a levy upon a bank officer at a New York City branch of TD Bank, N.A. ("TD Bank").[12] *See Silver Cup*, 2020 N.Y. Misc. LEXIS at * 3. Unlike in this case, the was served within the territorial boundaries of Marshal Biegel's authority and in accordance with the provisions of CPLR § 5232(a). Thus, it was not void *ab initio* and before commencing an action

[12] The facts of *Silver Cup* are even more compelling than here. In *Silver Cup*, Marshal Biegel levied a New Jersey bank account on a non-profit healthcare facility that provided Covid-19 shelter and care to the homeless.

for wrongful execution, the judgment debtor was compelled to seek to vacate the levy because it seized funds located in a New Jersey branch of TD Bank and violated the separate entity rule. *Silver Cup*, 2020 N.Y. Misc. LEXIS at * 3. FutureNet does not need to take such preliminary steps here because the Executions and Levies giving rise to FutureNet's claims were null and void from inception and under these circumstance there is simply no process that must be voided under CPLR § 5240 before a judgment debtor can commence a plenary action for wrongful execution. *Id. A* at *3 (noting that upon vacatur of the levy, the judgment debtor could commence a plenary action to recover damages beyond just the seized funds).

Similarly, CPRL § 5240 does not bar FurtureNet's wrongful execution claims. "The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires." *Gottleib v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 465, 605 N.Y.S.2d 213, 218 (1993), quoting *McKinney's Con Laws of NY,* Book 1, Statutes § 301(b). Nothing in CPLR § 5240 explicitly or implicitly, abrogates a common law claim for wrongful abuse of process that has existed for more than 100 years.

CONCLUSION

The certified questions in this case afford this Court the opportunity to put an end to the ongoing abuse of the New York Court System by the MCA industry. For far too long, the MCA industry, collection attorneys and New York City marshals have taken advantage of our court system to reach across state lines and unlawfully seize bank accounts under the pretense of New York law. While such tactics have made MCA companies, collection attorneys and marshals rich, they have destroyed small businesses throughout the United States.

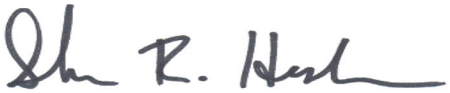
New York's judgment enforcement statutes were never intended to permit this abuse. They simply do not allow judgment creditors, collection attorneys and marshals to reach across state lines and seize funds located in sister-state banks. These statutes impose limits on the use of enforcement devices and the common law imposes liability upon judgment creditors, attorneys and marshals who violate these limitations. The Respondents should not be able to escape liability for their wrongful conduct in this case. More than 100 years of legal precedent demonstrates that under the circumstances of this case, the Respondents' actions were null and void from inception, causing substantial damages that may be recovered by FutureNet in a tort action without the need to first seek any preliminary relief under CPLR § 5240.

Accordingly, for the reasons set forth herein, it is respectfully submitted that the Court find that: (i) a judgment debtor suffers cognizable damages from an

improperly issued levy and demand even though the seized funds are applied to a valid judgment; and (ii) a judgment debtor does not need to seek preliminary relief under CPLR § 5240 before commencing a tort action arising out of a levy and demand that is null and void from inception.

Dated: New York, NY
May 24, 2021

Respectfully submitted,
WHITE AND WILLIAMS LLP



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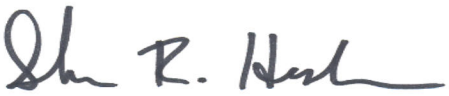
NEW YORK COURT OF APPEALS CERTIFICATE OF COMPLIANCE WITH PRINTING SPECIFICATIONS

Shane R. Heskin, an attorney duly admitted to practice law before the Court of the State of New York, affirms the truth of the following pursuant to CPLR 2106:

1. I am a partner at White and Williams LLP, attorney for Plaintiffs-Appellants.

2. This brief is in compliance with 22 N.Y.C.R.R. Part 500.1(j). It is 43 pages long and contains 10,565 words, counting all printed text on each page of the body of the brief. It was prepared using Microsoft Word. The typeface is Times New Roman, set in 14-point type, double spaced, throughout the body of the brief and in the headings. Footnotes are set in 12 point type, single spaced.

Dated: May 24, 2021



Shane R. Heskin, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 24th day of May, 2021, deponent served the within:

BRIEF FOR PLAINTIFFS-APPELLANTS

upon designated counsel for the parties indicated herein at the addresses provided below by depositing 3 true copies thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

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24th day of May, 2021

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Ivan Diaz

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Commission Expires March 5, 2023

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