

**Exhibit 1**

***March 18, 2022 Order Granting CLBD's Motion for Partial Summary Judgment and Denying  
in Part Appellant's and Sutlive's Motion for Partial Summary Judgment***



This matter came before the Court on November 17, 2021 on Defendant CLBD Real Estate Holdings, LLC's ("CLBD") Motion for Partial Summary Judgment on Priority of Liens and Usury; Plaintiffs'<sup>1</sup> Motion for Partial Summary Judgment on Usury; and, Defendant, Sutlive Aviation, LLC's ("Sutlive), Motion for Summary Judgment as to Plaintiffs' and CLBD's claims.<sup>2</sup>

Having reviewed the parties' submissions and heard oral arguments, the Court finds that:

1. CLBD is entitled to summary judgment as to lien priority because it is undisputed that CLBD's purchase money security interest in the Airplane was timely perfected within 20 days after it was executed, was the first Security Agreement filed and recorded with FAA, and therefore, it is the superior interest as a matter of law;
2. CLBD is entitled to summary judgment as to usury because Ga. Code Ann. § 7-4-18(a) ("Statute" or "Usury Statute") does not apply to loans that are over \$250,000; or, alternatively, there is a conflict among Georgia Courts as to whether the Usury Statute applies to loans over \$250,000, and therefore, the Statute must be construed in CLBD's favor as a matter of law;
3. Alternatively, even if the Usury Statute could be construed as applicable, CLBD is still entitled to summary judgment as to usury because Sutlive and Plaintiffs are procedurally and substantively barred from raising usury as a defense because they are not privies of Ascension LLC; and even if they were, Ascension LLC's default bars its privies from raising usury, and Ascension LLC (and its privies) are estopped from challenging the very terms that Ascension LLC proposed; and,
4. Alternatively, even if the Usury Statute could be construed as applicable, Plaintiffs and Sutlive are not entitled to summary judgment as to usury because CLBD did not charge more than 5% per month and the only evidence is that CLBD did not intend to practice usury; and, with no proof of intent, there is no usury.

Accordingly, the Court **GRANTS** CLBD's Motion for Partial Summary Judgment on Priority of Liens and Usury; **DENIES** Plaintiffs' Motion for Partial Summary Judgment on Usury; and **DENIES** Sutlive's Motion for Summary Judgment as to Plaintiffs and CLBD.

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<sup>1</sup> "Plaintiffs" collectively refer to MMT, LLC ("MMT") and The Holland Family Trust ("HFT"). Both these entities are controlled by Mason Holland ("Holland") with the assistance of Holland's accountant and controller, Peter Cuneo ("Cuneo").

<sup>2</sup> At the November 17<sup>th</sup> hearing, Justin Lucey and Dabny Lynn with the Lucey Law Firm appeared on behalf of CLBD; Ellis Lesemann with Lesemann & Associates, LLC appeared on behalf of Plaintiffs; and Robert Mangum with the Turner Padgett Law Firm appeared on behalf of Sutlive.

## BACKGROUND

This foreclosure action addresses the priority of security and ownership interests in “The Airplane” or “Aircraft”.<sup>3</sup> The Airplane was purchased by one of Jamail Larkins’ (“Larkins”) entities. Larkins operated several “Ascension companies” (collectively referred to as “Ascension”), each of which were the signatories of one or more agreements that purported to provide the active parties in this case, CLBD, Plaintiffs, and Sutlive, interests in the Airplane.

Ascension Aircraft, LLC (“Ascension LLC”) was the company that provided CLBD and Eclipse, the Airplane’s manufacturer, a security interest in 2015 whereas Ascension Management, Inc. (“Ascension Inc.”) was the company that provided HFT a security interest and Sutlive an 8.33% ownership interest in 2016. *Compare* Ex. 19, CLBD Security Agreement *with* Exs. 42, 43 & 44, HFT Security Agreements *and* Ex. 38, Sutlive Interest Agreement.

CLBD’s security interest was the first filed and recorded with the FAA; Eclipse’s security interest was the second filed and recorded with the FAA, but it was later released; HFT’s original security interest was the third filed with the FAA, but it was released before it was recorded; HFT’s modified security interest was the fourth filed and recorded with the FAA; and, Sutlive’s ownership interest was the fifth filed and recorded with the FAA. Of these interests, CLBD’s security interest was the only interest properly filed and recorded within 20 days of execution. The foregoing recording information is undisputed. Exs. 7, 38, 43-44, 74-75, 97, Other Agreements and Releases; *see also* Holland Depo. 74:1-9; 111:3-20 (admitting that CLBD’s Security Agreement was filed before other alleged interests); Sutlive Amended Answer, para. 47 (“[T]he CLBD lien [was] made, executed and delivered prior to the making and recording of the Eclipse Bill of Sale, and the . . . CLBD lien [was] recorded on December 9, 2015”).

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<sup>3</sup> “The Airplane” or “aircraft” is an Eclipse EA 500 with tail number N826ES.

Ascension LLC defaulted on its obligations to CLBD *prior* to the origination of HFT's "loan" to Ascension Inc.<sup>4</sup> Ascension Inc. subsequently defaulted on its purported note with HFT.

Holland knew that Larkins and Ascension were having financial problems and were not going to be able to pay their respective debts in full, so Holland crafted an Airplane repossession plan to try to gain advantage over other interest holders, including CLBD who Holland knew had the senior interest in Airplane. *See, e.g.*, Ex. 136, 2/9/20 Holland Email to CLBD re superior lien interest; Ex. 90, 9/6/19 Larkins Email to Owners (cc: Holland) re Proposed Deal or Chapter 7; Ex. 96, 12/5/19 Cuneo Email to Morgan re Repossession Plans.

In furtherance of this plan, Holland had Larkins move the Airplane to Charleston in June 2019 without informing CLBD, Sutlive, or any other interest holder that he was taking possession. *See, e.g.*, Ex. 79, 5/30/19 Email from Cuneo to Insured Title re: Plane Delivery; Ex. 81, June 2019 Emails between Holland and Larkins re Plane Delivery; Ex. 90 Email to Cuneo to Insured Title Thereafter, Holland tried to convince CLBD and the fractional owners to sell their interest in the Airplane to him by misrepresenting that he was the "Senior Secured Noteholder" on the Airplane. Exs. 136, 142.

Interestingly, as part of Plaintiffs' efforts to encourage the fractional share owners to relinquish their interests cheaply, Plaintiffs pointed out to the fractional share owners that had they

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<sup>4</sup> It appears that HFT never actually provided Ascension with any funds; rather, HFT claims to have bought a note that Ascension had granted to Eclipse. Ex. 112, Holland Aff. The "new" note purportedly underlying HFT's loan to Ascension Inc. states that its principal balance is \$2,217,436; however, HFT concedes that it only provided \$1,500,000 in funds and has not proved that the \$1,500,000 it did provide was solely for the purchase of Ascension's Inc.'s debt. Holland Depo. 119:3-22. This note also provides a "May 17, 2016" execution date but references a "Note Purchase Agreement" supposedly executed the next day on "May 18, 2016". *Id.* The "Agreement" which presumably would evidence the agreed upon consideration has never been produced. HFT had many other transactions with Eclipse; it cannot be presumed that the wiring of this \$1,500,000 was solely for the acquisition of the Ascension note. Nor has any assignment or satisfaction of this note ever been produced.

simply checked the title on the Airplane, they would have seen HFT's superior interest and prudently avoided the situation in which they find themselves now:

**[H]ad [the owners] done their homework they would have seen all the security interests on the plane.**

Ex. 96, 12/5/19 Cuneo Email to Morgan (emphasis added).

Had Plaintiffs followed their own advice, they would have seen CLBD's superior interest. The recording statutes are intended to prevent situations such as the current case; and there are no equities favoring the junior interests in this matter as CLBD's recorded interest was always evident to anyone who *bothered* to check. The recklessness of Plaintiffs' failure to check the public records for superior interests prior to allegedly paying off Ascension LLC's note to Eclipse is compounded by Plaintiffs' undisputed concession that it *knew* of the CLBD debt prior to advancing monies. *See* below.<sup>5</sup>

On February 10, 2020, Ascension Inc. filed for bankruptcy, and Plaintiffs brought this action four days later on February 14, 2020. After this case was stayed for a few months, the parties informed the Court that the automatic stay was lifted for purposes of this action going to judgment, but that collection activities against Ascension Inc. remain stayed. Thereafter, CLBD and Sutlive filed their respective Answers, crossclaims, and counterclaims, a few junior lienholders were dismissed, and the Ascension defendants were moved into default, leaving only Plaintiffs, CLBD, and Sutlive in this action, who thereafter agreed to refer the case to the Master in Equity.

The case was so transferred to the Master in Equity on September 21, 2021; and shortly thereafter, Plaintiffs, CLBD, and Sutlive all filed partial summary judgment motions asking the Court to rule on two questions:

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<sup>5</sup> While CLBD ultimately rejected Holland's offer, one of the alleged fractional owners, Birdies Fly, LLC ("Birdies"), accepted. *See* Birdies' discussion below.

1. Whose interest in the Airplane is the superior interest;<sup>6</sup> and,
2. Does CLBD's Note violate Georgia's Usury Statute?

CLBD maintains that its interest in the Airplane is superior as a matter of Federal and State law because it was the first to file and record its interest with the FAA and did so within 20 days of execution. Neither Sutlive nor Plaintiffs dispute these facts. Rather, Sutlive and Plaintiffs argue that CLBD's Note is invalidated by the Usury Statute and that, as a result, CLBD's interest in the Airplane is mooted because CLBD must forfeit the money it still claims it is owed.

In response, CLBD points out:

1. That CLBD's Note does not violate the Usury Statute because the Statute does not apply to loans over \$250,000; or, alternatively,
2. The Statute cannot be construed otherwise.

CLBD further argues that as additional, sustaining grounds:

3. Even if the Statute could apply, Plaintiffs and Sutlive are procedurally and substantively precluded from raising usury as a defense because they are not privies of CLBD's debtor, Ascension, LLC;
4. Even if Plaintiffs and Sutlive qualified as privies, Ascension LLC's default bars its privies from raising usury, and Ascension LLC (and its privies) are estopped from challenging the very terms that Ascension LLC proposed; and,
5. CLBD did not intend to, and agreed and contracted not to, charge usurious interest.

### **LIEN PRIORITY FACTS**

The relevant facts for the Court's purposes as to lien priority are these:

#### **A.) CLBD's Security Agreement was the First Filed and Recorded with the FAA & Was Recorded Within 20 Days of Execution**

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<sup>6</sup> Only CLBD and Sutlive, both of whose interest agreements are controlled by Georgia law, seek this determination in their Partial Summary Judgment Motions. *See* CLBD and Sutlive Motions. Plaintiffs' Partial Summary Judgment Motion relates only to usury. *See* Plaintiffs' Motion.

It is undisputed that the Security Agreement between CLBD and Ascension LLC was the first purchase money security interest filed and recorded with the FAA and that it was filed within 20 days of execution. The following evidence confirms this:

CLBD's Security Agreement shows that it executed on December 3, 2015, and then filed and recorded with the FAA less than 20 days later on December 9, 2015 (filed), and December 12, 2015 (recorded). Ex. 19, CLBD Security Agreement (lower right-hand corner and right margin recording information).

Escrow records show that the \$1,000,000 CLBD loaned to Ascension LLC in 2015 was used to purchase the Airplane such that CLBD's Security Agreement qualifies as a true purchase money security interest. *See* Ex. 6, 11/25/15 CLBD Wire Confirmation; *see also* Ex. 10, 11/30/15 Ascension LLC Email to Title Company re: Purchase Price.

Multiple emails also show that Eclipse Aerospace, Inc. ("Eclipse"),<sup>7</sup> the Airplane's manufacturer, was "aware" that CLBD was providing Ascension LLC these purchase money funds. *See, e.g.*, Ex. 12, 12/1/15 Ascension LLC Email to Title Company; Ex. 20, 12/3/15 Lundeen<sup>8</sup> Email to Ascension LLC and CLBD. Importantly, Eclipse's only restriction on the escrow agent breaking trust on the title documents was that it be wired \$825,000; **there was no requirement by Eclipse that a security interest be recorded first** (or at all !). Ex. 23, Email by Ed Lundeen to escrow agent authorizing completion of the transaction upon the wiring of \$825,000.00 to Eclipse (emphasis added).

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<sup>7</sup> Holland acquired Eclipse in 2009. Holland served as Eclipse's Chief Executive Officer until shortly after Eclipse merged with another aviation firm to form a new company called ONE Aviation in 2015. Holland Depo 166:19-167:25. Holland served as Chairman of the Board of ONE Aviation for a short period of time. ONE Aviation filed for Chapter 11 Bankruptcy in 2018 and was acquired by another company in 2020. Holland Depo.

<sup>8</sup> Ed Lundeen served as an Executive Vice President of Eclipse.

Plaintiffs and Sutlive admit that CLBD's Security Agreement was the first filed and recorded with the FAA. *See, e.g.*, Holland Depo. 74:1-9; 111:3-20; 114:15-115:2 (admitting that CLBD's Security Agreement was filed before other alleged interests); Cuneo Depo. 100:19-21; 131:13-18; 146:9-17 (admitting same); Sutlive Amended Answer, para. 47 (“[T]he CLBD lien [was] made, executed and delivered prior to the making and recording of the Eclipse Bill of Sale, and the . . . CLBD lien [was] recorded on December 9, 2015”).

Seven, different FAA title searches performed for CLBD, Plaintiffs, and Sutlive between 2016 and 2020 all show that CLBD is the first-in-line lien holder. *See* Exs., 3, 33, 66, 78, 95, 100, 101, 106, Title Searches<sup>9</sup> (all showing CLBD's first-in-line position).

Jacinda Janko, who performed three of these searches for CLBD, testified that “CLBD is the ‘priority lien holder’”. *See* Janko Aff., para. 7; *see also* Title Searches, *supra*.

Bill Morgan, who performed three of these searches for Plaintiffs, emailed Plaintiffs in 2019 and informed them that “for [Plaintiffs] to have 100% security interest all that would be needed is **an assignment of security agreement JDO10020 from CLBD**. Ex. 96, Morgan 12/5/19 Email to Cuneo (emphasis added).<sup>10</sup>

**B.) Plaintiffs’ and Sutlive Alleged Interests Were Not Perfected Before CLBD’s Interest**

The other agreements that Plaintiffs and Sutlive claim give them an interest in the Airplane were either never filed, filed then released, or filed after CLBD's Security Agreement and more than twenty days after their execution. The following evidence supports this:

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<sup>9</sup> Three of the seven title searches are attached to the Affidavit of Jacinda Janko previously filed on January 8, 2021 in support of CLBD's motion to take possession of and repair the plane; the others are marked and submitted separately.

<sup>10</sup> Plaintiffs could not have a 100% security interest without the assignment as CLBD held the first position.

### 1. Eclipse's Security Agreement

To the extent that Plaintiffs mistakenly argue that the released Eclipse security agreement is relevant, Ascension LLC and Eclipse entered an "Aircraft Loan and Security Agreement" on November 25, 2015, that was filed, refiled, and recorded with the FAA after CLBD's Security Agreement on December 11, 2015 (first filing but no recording), January 6, 2016 (second filing), and February 1, 2016 (finally recorded). Ex. 9, Eclipse Security Agreement.<sup>11</sup> The Eclipse Security Agreement *was released* five months later on May 16, 2016. Ex. 38, Eclipse Release.<sup>12</sup>

### 2. HFT's Security Agreements

Ascension Inc. and HFT entered two, different "Aircraft Loan and Security Agreements" both purporting to be dated May 16, 2016. Exs. 43 and 44, HFT Security Agreements. HFT's First Security Agreement was filed with the FAA on May 17, 2016 and *released* on July 8, 2016. *See* Ex. 43, HFT's First Security Agreement; Ex. 52, 7/8/16 HFT Release. Plaintiffs admittedly do not rely on this Agreement. Pl. Complaint, para. 2 ("[Plaintiffs] hold [their] interest in the Aircraft based on the terms of an Aircraft Loan and Security Agreement dated May 16, 2016 and filed with the [FAA] on July 7, 2016").

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<sup>11</sup> As will be shown later, HFT's effort to back into the Eclipse, non-existent priority fails for many reasons.

<sup>12</sup> The reason this Eclipse security interest "bounced" on the first attempt to record it is abundantly clear. Eclipse and Larkins concealed the existence of the prior Eclipse security agreement from CLBD's closing agent. When Ascension and CLBD decided to do their deal in the name of Ascension LLC, the Eclipse security agreement became incorrectly titled in the name of Ascension Inc. When the then undisclosed Eclipse title company attempted to record the Eclipse security agreement, it was not accepted by the FAA as the plane was held in a different name. Hence, the later recording of the Eclipse agreement with the handwritten change to the LLC debtor name. The subterfuge regarding the Eclipse security agreement is an additional reason why the Eclipse lien would be unenforceable. Recall that Holland still controlled Eclipse when the decision to extend credit to Larkins was considered and decided. *See, e.g.,* Holland Depo. 174:1-184:25.

Rather, Plaintiffs rely on HFT's Second Security Agreement which was filed with the FAA on July 7, 2016 and recognized as recorded by the FAA on August 24, 2016. Ex. 44, HFT Second Security Agreement. Notwithstanding that the evidence shows that HFT's Second Security Agreement was unilaterally modified by Plaintiffs after its stated May 16, 2016 date of execution, this Agreement was filed and recorded over a year after CLBD's Security Agreement and was not filed within 20 days of its purported execution. *Id.*; *see also* Exs. 3, 33, 66, 78, 95, 100, 101, 106, Title Searches.

### 3. MMT's Bill of Sale

Prior to Plaintiffs filing suit, Holland tried to convince CLBD and some fractional owners to sell him their interests in the Airplane. *See, e.g.*, Ex. 142, 9/6/19 Holland Email to Taylor; Ex. 136 Holland Email to CLBD. While CLBD ultimately rejected Holland's offer, one fractional owner, Birdie's Fly ("Birdie's"), agreed to sell its purported interest in the Airplane (5.667%) to Holland, allegedly for \$34,000, in 2019. Ex. 143, HFT-Birdies Purchase Agreement. This purchase agreement was never filed or recorded with the FAA. *Id.* Notwithstanding the fact that it was HFT who entered this purchase agreement with Birdies Fly, MMT is the purchaser listed on the bill of sale, and this bill of sale was filed years after CLBD's Security Agreement, and it remains unrecorded by the FAA due to missing registration paperwork. *See* Ex. 143; Ex. 97; *see also* Ex. 99, 1/21/20 FAA Notice to MMT re Missing Registration.

### 4. Sutlive's Ownership Agreement

Ascension Inc. and Sutlive executed a "Fractional Interest Agreement" that purportedly granted Sutlive an 8.33% ownership interest in the Airplane on May 18, 2016; however, this Agreement was also never filed or recorded with the FAA. Instead, a bill of sale referencing Sutlive was filed and recorded with the FAA three years later on March 18, 2019, and April 18, 2019.

Compare Ex. 38, Sutlive Fractional Interest Agreement *with* Exs. 74 and 75, Sutlive FAA Registration Application and Bill of Sale.

**C.) Plaintiffs Knew of CLBD’s Interest Before Attempting to Obtain Their Alleged Interest**

It is undisputed that Plaintiffs knew about CLBD’s interest in the Airplane months before HFT (and years before MMT) attempted to acquire an interest in the Airplane. The following evidence confirms this:

Holland and Cuneo both concede that they learned of CLBD’s loan to Ascension LLC in late 2015/early 2016 when they “were doing due diligence on whether we wanted to invest in Ascension.” Cuneo Depo. 41:18-44:11; 47:10-24; Holland Depo. 11:10-16; 32:4-20; *see also* Ex. 29, 12/7-8/2015 Emails between Larkin and Cuneo re Financial Info; Ex. 30, 12/9-10/2015 Emails between Larkin and Holland re meetings to lay out details with Cuneo.

Plaintiffs’ pre-existing knowledge of the CLBD debt is further confirmed by multiple emails and documents exchanged between March and May 16, 2016 – the day before HFT wired money to Eclipse and filed its First Security Agreement. For example:

On March 15, 2016, Cuneo emails Larkins about the “wrongly recorded Eclipse note” and asks Larkins for “the other loan agreement for the \$1m note” Ex. 126, 3/15/16 Cuneo Email to Larkins and Holland re: Other 1M Note (emphasis added).<sup>13</sup>

On March 21, 2016, Larkins emails Cuneo specifically about paying down “CLBD”:

I get from a cashflow statement, that if we get cash in, we should use the profit to pay down Eclipse and CLBD. But, that shouldn’t change the cash generated from operations on a cashflow basis. Correct?

Ex. 125, 3/21/16 Larkins Email to Cuneo re Paying Down CLBD’s Note (emphasis added).

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<sup>13</sup> Cuneo forwards this email chain to Holland on May 15, 2016. Ex. 126.

On March 24, 2016, Cuneo emails Holland with an Ascension update and attaches an excel spreadsheet entitled Ascension “Liabilities Summary”. Ex. 139. The Summary notes Ascensions’ “Total Potential Liabilities” on the first page, one of which is:

<u>Debt – CLB</u>	<u>\$1,000,000</u>
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Ex. 40, 3/15/16 Ascension Liability Summary prepared by Cuneo (emphasis added). This same Exhibit shows the CLBD debt as relating to the Airplane, causing Ascension to be upside down financially on the Airplane by \$730,000 (seven hundred and thirty thousand dollars). *See* below.

On April 15, 2016, Cuneo emails Larkins “re: CLBD” and asks Larkins to “please send [Cuneo] the CLBD Note” to which Larkins’ staff responds with an e-signed copy. Ex. 128, 4/15/16 Cuneo Email to Larkins re CLBD and CLBD Note (emphasis added).

On May 2, 2016, Larkins emails Cuneo asking for a short-term loan so that Cliff Kennedy (CLBD’s Owner) can cash a check for CLBD’s Note:

Pete,

Question. . .

If we have a signed contract with a contracted payment date from Barry **Sutlive** for his cash share, do you think Mason, will consider doing a short-term loan so I can give Cliff permission to cash the check?

Ex. 133, 5/2/16 Emails between Larkins and CLBD re Cuneo responding directly (both emphasis added).

Also on May 2, 2016, Larkins emails with Kennedy about paying down CLBD’s Note and indicates that he is waiting on Cuneo – Holland’s controller and now Ascension’s new CFO – who he copied on the email to approve payment:

Cliff,

I’m going to be in and out of the office until Thursday, but available by cell if you need me. However, as we ALL know you have been waiting patiently for

confirmation the funds are in the account so you can deposit the check and I didn't want to be the delay in getting the message to you. PETE IS CC'D ON THIS EMAIL AND IS THE NEW CFO FOR ASCENSION. AS SOON AS FUNDS HIT THE ACCOUNT, HE OR I WILL ADVISE THAT IT'S OKAY TO DEPOSIT THE CHECK.

Ex. 133 (emphasis added).<sup>14</sup> Cuneo then forwards this email to Holland because he “just wanted to show [Holland] how [Larkins] is presenting [Cuneo] currently [to CLBD]”. *Id.*

On May 16, 2016 Holland, Cuneo, and Larkins had a meeting where they discussed the amount owed to CLBD and came up with the following proposal:

Good morning Cliff,

Hope you are doing well!

Pete (our finance guy), has asked me to find out what the additional cost of capital would be, if we paid \$50,000 a month for the next two months (June and July), and one last \$250K check, plus all interest due in August?

Ex. 135, 5/18/16 Larkins Email to CLBD re Cuneo's proposed pay off terms (emphasis added); *see also* Ex. 130, 4/27/16-5/17/16 Emails between Larkins and Kennedy re Update and Holland Meeting and Ex. 134, 5/11/16 Larkins Email to CLBD re Meeting with Holland.

Plaintiffs do not refute any of this evidence which shows that Plaintiffs understood that Ascension LLC owed CLBD money *before* HFT filed its First Security Agreement; and Plaintiffs *concede* that they knew of CLBD's superior lien position before HFT filed its Second Security Agreement. Holland Depo. 127:21-25; *see also* Ex. 48, 7/7/16 Morgan Email to Cuneo:

I assume you are aware of a security agreement outstanding dated December 3, 2015, recorded December 12, 2015, conveyance JDO10020 between [Ascension] and [CLBD]?

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<sup>14</sup> After sending this email in the group thread, Larkins separately emails Kennedy that “[Kennedy] will not have to wait till [Thursday for payment]. That's why [Larkins] asked Pete to tell [Kennedy] directly as soon as the funds are there.”) Ex. 132 (emphasis added).

Ex. 48.<sup>15</sup> HFT not only knew of the \$1,000,000 debt to CLBD relating to the Airplane by its Spring 2016 audit, this July 7, 2016 title company email is irrefutable evidence that HFT knew of CLBD's superior position when HFT filed its Second Security Agreement on July 7, 2016 (which was recognized as recorded by the FAA on August 24, 2016.)

**D.) Plaintiffs Knew of Ascension's Financial Problems Before Attempting to Obtain Their Alleged Interest – and that the Airplane was Upside Down**

It is undisputed that Plaintiffs knew about Ascension's financial troubles before they attempted to acquire an interest in the Airplane. The deposition testimony of Cuneo confirms this:

Q: So . . .the plane is \$730,000 upside down as you were analyzing it on March 15, 2016?

A: That's correct. . .

Q: [S]ince Ascension only had 18,000 in cash on hand, you determined that it appeared that Ascension was \$2.2 million underwater on March 15, 2016?

A: That's correct.

Q: And that's what led you-all to decide that you were not going to go into business with Jamail Larkins or Ascension?

A: That was not my decision. That was my recommendation was to Mason was this is the liabilities, and then it was his decision as to whether to invest or not. I gave him this spreadsheet. We discussed it. And then he ultimately made the call for this and many other reasons he discussed yesterday.

Q: So you made sure he understood this spreadsheet, Exhibit 40, at least as well as you and I just went over it?

A: We discussed it. . .

Q: Now, the "2015 Payroll Taxes, \$250,000," I take it, if you have this liability on those books, then those payroll taxes were not deposited in escrow?

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<sup>15</sup> Morgan was a representative of the title company Eclipse was discretely using prior to the CLBD loan, who was advising HFT before HFT's lien was recorded that they could not get a first position on the plane because of the pre-existing CLBD security interest. Note, Morgan also advised Plaintiffs of the option of procuring an assignment of the Eclipse line dated prior to the Eclipse release – which option Plaintiffs knowingly failed to achieve.

A: He did not pay those. In 2015, they were not -- they were remitting payroll to employees at the office and not remitting the taxes because they were having cash-flow issues. So it was a building liability. That was an estimate of his payroll taxes due.

Q: That's serious stuff, right?

A: It was not good.

Q: Those are trust funds?

A: That's correct.

Q: And so before you-all wired 1.5 million to Eclipse, you knew that Jamail Larkins had failed to honor the trust funds that belonged to his employees?

A: We wired money to Eclipse, Mason did it, not me, and that was for a first position in the aircraft, not for this business.

Q: Right, but you knew Jamail Larkins had abused trust funds before y'all wired 1.5 million to Eclipse Aerospace?

A: Yes, and we were not taking his business as any of the collateral.

Cuneo Depo. 61:7-62:18; 66:5-67:3 (emphasis added).

**E.) Plaintiffs Knew That Eclipse's Security Agreement Had Been Released and That They Did Not Have A Valid Assignment from Eclipse Before HFT Filed its Second Security Agreement**

Plaintiffs knew that Eclipse's Security Agreement had been released before HFT filed its Second Security Agreement. The following evidence confirms this:

Emails between Morgan and Cuneo show that Morgan informed Cuneo before HFT filed its Second Security Agreement that there "some issues with [HFT's] new security agreement" including the fact that Eclipse's Security Agreement "cannot be assigned because it had been released per release dated May 17, 2016". Ex. 48 (emphasis added).

In reference to these emails, Cuneo admitted in his deposition that:

[Morgan is] saying [Eclipse’s Security Agreement] cannot be assigned because the original one that Eclipse filed was released. So he can’t do the assignment that I probably asked him to do for us.

Cuneo Depo. 123:2-124:14 (emphasis added); *see also* Holland Depo. 125:25-127:15 (Holland admitting that he is “sure” that Cuneo informed him about Morgan’s email).<sup>16</sup>

The filed version of HFT’s Second Security Agreement expressly references Eclipse’s “released” lien and does not include any “assignment” language. HFT Second Security Agreement.

**F.) Plaintiffs Attempted to Wrongfully Manufacture a Better Priority Position and Unilaterally Modified Their Second Security Agreement and the Note Purportedly Underlying This Agreement After the Fact**

With Plaintiffs’ pre-existing knowledge of CLBD’s debt, that Ascension Inc. was “underwater”, and that Eclipse’s lien was released, Plaintiffs tried to fraudulently back into Eclipse’s position due to Eclipse’s manufacturer status. The following evidence supports this:

Plaintiffs prepared multiple Security Agreements that attempted to assume Eclipse’s released Security Agreement. Ex. 42, HFT Draft Security Agreement; Ex. 43, HFT First Security Agreement; Ex. 44, HFT Second Security Agreement; Ex. 48, 7/7/16 Email from Morgan to Cuneo.

HFT’s First Security Agreement (which makes no reference to Eclipse) and HFT’s Second Security Agreement (which references Eclipse’s release Security Agreement) were purportedly entered on the same day – May 16, 2016 – by the same parties, but contain entirely different terms.

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<sup>16</sup> Its readily apparent that Plaintiffs are sophisticated entities, and are owned and or controlled by Mason Holland, a sophisticated businessperson who was the Chairman of the Board for locally successful BenefitFocus.com for years. Holland Depo. 202:1-13. Additional latitude for Plaintiffs’ failure to utilize the service of a competent attorney in these transactions would not be appropriate.

HFT's Second Security Agreement was unilaterally modified by Morgan at the direction of Plaintiffs before it was filed on July 7, 2016, and two months after it was purportedly entered on May 16, 2016:

Would you be able to be to slip sheet the first page of the attached with the original document you have there? Hopefully this address[es] the issues. Go ahead and write in the 94% thing. . .<sup>17</sup>

Ex. 48, 7/7/16 Cuneo Email to Morgan (emphasis added). The after-the-fact alteration of this Agreement is also proven by the Agreement itself. The Agreement is dated “the 16<sup>th</sup> day May, 2016” but references the Eclipse lien that was filed and “then released on May 17, 2016” – the day after the parties purportedly signed this Agreement. (Ex. 44, HFT Second Security Agreement) (emphasis added).

HFT's Note purportedly underlying HFT's Second Security Agreement also appears to have been modified after the fact. Ex. 148, Signed HFT Note. The Note, dated May 17, 2016, references a “Note Purchase Agreement” dated May 18, 2016 – that did not exist on May 17<sup>th</sup>. *Id.* This May 18, 2016 “Note Purchase Agreement” *has never been produced*; and, HFT's Second Security Agreement is dated two days prior to the existence of the Note Purchase Agreement.

**G.) HFT's Second Security Agreement Is An Entirely New Security Agreement Because it is With a Different Debtor, Contains Different Terms, and Different Loan Balances than the Eclipse Agreement**

In addition to the fact that Eclipse's Security Agreement has been released, HFT's Second Security Agreement cannot be a replacement of Eclipse's Security Agreement because these Agreement contain entirely different terms. The following evidence supports this:

- Eclipse Security Agreement and HFT's Second Security Agreement are with different debtors.

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<sup>17</sup> The handwritten “94% thing” in Plaintiff's First Security Agreement has an additional word, “interest”, that is missing from the handwritten “94% thing” Morgan later inserted in HFT's Second Security Agreement which further proves Plaintiffs' after-the-fact modification. *Compare* Ex. 43, HFT First Security Agreement *with* Ex. 44, HFT Second Security Agreement.

- Eclipse's debtor is Ascension LLC whereas HFT's debtor is Ascension, Inc.
- Eclipse's loan to Ascension LLC had an actual balance of \$2,217,436 whereas HFT's loan to Ascension Inc. had an actual balance of \$1,500,000 because this is the amount HFT paid to Eclipse.
- Eclipse Security Agreement has an 8% interest rate whereas HFT's Second Security Agreement has a 9% interest rate.
- Eclipse's Security Agreement does not include a staggered payment schedule where interest rate varies whereas HFT's Second Security Agreement does.
- Eclipse Security Agreement includes different prepayment and attorneys' fees' provisions and does not have a "saving" clause like HFT's Second Security Agreement.
- Eclipse's Security Agreement is governed by New Mexico law whereas HFT's Second Security Agreement is governed by South Carolina law.

There can be no doubt that the HFT security interest is a completely different and new obligation than the original Eclipse security agreement.

### **USURY FACTS**

To understand the missing underpinnings in the usury legal arguments, it is important to understand the different roles played by the different Ascension entities. The original purchase contract for the Airplane was in the name of Ascension Inc. Ex. 119, 7/23/15 Eclipse 550 Aircraft Purchase Order. The closing attorneys decided that Ascension LLC was a better vehicle to use for this transaction; so, on December 3, 2015, Ascension Inc. transferred the Airplane to Ascension LLC for the execution of the security interest by Ascension LLC in favor of CLBD.<sup>18</sup> Ex. 17. The Ascension Inc. to Ascension LLC bill of sale was also filed with the FAA on December 3, 2015,

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<sup>18</sup> Although the principal CLBD documents were in Ascension LLC's name, CLBD had Ascension Inc. cosign one or more closing documents as a precaution.

along with CLBD's Security Agreement. *Id.*<sup>19</sup> Later, Ascension LLC would transfer the Airplane's title back to Ascension Inc. for its transactions with Sutlive, HFT, and others.

In this suit, Plaintiffs and Sutlive have brought claims against Ascension Inc. CLBD has brought claims against *both* Ascension LLC, its original obligor, and Ascension, Inc., whose lien needs to be cleared to quiet title.

The other relevant facts as to usury are as follows:

**H.) CLBD's Debtor is Not the Same as Plaintiffs' and Sutlive's Debtor**

It is undisputed that CLBD's debtor, Ascension LLC, is different from the debtor common to Plaintiffs and Sutlive, Ascension Inc., and that Plaintiffs and Sutlive assert no claims against Ascension LLC. The following evidence confirms this:

CLBD's Security Agreement states that Ascension LLC is the "borrower"; HFTS' Security Agreements state that Ascension Inc. is the "borrower"; and Sutlive's Fractional Interest Agreement state that Ascension Inc. is the "seller". *See* Exs. 19, 38, 42-44, CLBD, HFT, and Sutlive Agreements.

FAA title searches performed for CLBD, Plaintiffs, and Sutlive show that Ascension LLC is the "debtor" as it relates to CLBD's Security Agreement; Ascension Inc. is the "debtor" as it relates to HFT's Security Agreements; and Ascension Inc. is the "previous owner" who sold Sutlive an 8.33% interest in the Airplane. Exs., 3, 33, 66, 78, 95, 100, 101, 106, Title Searches.

CLBD's, Plaintiffs' and Sutlive's pleadings show that CLBD is the only party with *any* claim against Ascension LLC. *See* Pleadings.

**I.) Ascension LLC is in Default**

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<sup>19</sup> Shortly thereafter, "Ascension LLC" received a certificate of plane registration from the FAA. Ex. 31, 12/15/15 FAA Certificate of Registration. The FAA has *never, never* issued Ascension Inc. a registration based on the documents produced by the FAA in response to CLBD's request for all Airplane-related documents.

It is undisputed that Ascension LLC was placed into default by Order dated September 10, 2021. *See* Default Order.

**J.) Larkins Proposed the Terms of CLBD's Note**

The unrefuted evidence is that Larkins proposed the terms of CLBD's Note with Ascension LLC.

Multiple emails show that it was Larkins who proposed that CLBD provide Ascension LLC a short-term, \$1,000,000 loan for a \$50,000 fee, both of which Ascension LLC would pay in full by January 1, 2016. *See, e.g.*, Exs. 122, 124, and 131, Emails from Larkins to Kennedy.

Kennedy also testified in his deposition that CLBD had never entered a similar note with similar terms and only entered this Note because it was what Ascension LLC wanted. Kennedy Depo. 28:25-29:19; 45:8-12; 49:1-52:2; *see also* Kennedy Aff., paras. 5.

**K.) CLBD's Notes Terms**

It is undisputed that the Note that CLBD and Ascension LLC entered on December 3, 2015,<sup>20</sup> provides, similar to Ascension LLC's proposal, that Ascension LLC's was to pay CLBD \$1,050,000 by a Maturity Date of January 1, 2016:

**4. Payment Terms.** On the Maturity Date, Borrower shall pay to Lender the outstanding principal of this Note [\$1,000,000], together with a payment of interest in the amount of the Primary Interest Payment [\$50,0000], which Primary Interest Payment represents all **earned**, accrued and unpaid interest on the unpaid principal balance on this Note through and for the Term based on a 30-day accrual basis.

Ex. 18, CLBD Note.

After this Maturity Date, interest accrued at a default rate of 60%:

**3. Interest Rate.**

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<sup>20</sup> Note that the CLBD funds were wired on November 25, 2015, and the original term would have been just over one month. Exs. 5, 6. Closing delays resulted in a nominal twenty-nine-day loan period before the first modification.

(a) From and after the date hereof through the end of the Term, interest shall accrue on a 30-day basis, payable in arrears, from the entirety of the Term in a fixed amount equal to Fifty Thousand and 00/100 Dollars (\$50,000) (“the Primary Interest Payment”), and which interest represented by the Primary Interest Payment shall be fully earned by Lender as of the First (1<sup>st</sup>) day of the Term.

(b) **After the Maturity Date and the expiration of the Term**, interest shall accrue daily, payable in arrears, at the rate equal to the Default Rate [60%] and shall be calculated on the basis of a 365-day year by multiplying the outstanding principal amount by the applicable per annum rate, multiplying the product thereof by the actual number of days elapsed, and dividing the product so obtained by 365.

*Id.* (emphasis added).

The Note also provided interest could not exceed the maximum legal interest rate allowed by Georgia law:

**9. Usury. In no event shall the amount of interest due or payable hereunder exceed the maximum rate of interest allowed by applicable law**, and in the event any such payment is inadvertently paid by Borrower or inadvertently received by Lender, **then such excess sum shall be credited as a payment of principal**, unless Lender elects to have such excess sum refunded to Borrower forthwith, or the principal amount hereunder has been paid in full, in which events the excess sum shall be refunded to Borrower and Borrower hereby agrees to accept same. **It is the express intent hereof that Borrower not pay, and Lender not receive, directly or indirectly, interest in excess of that which may be legally paid by Borrower under applicable law.**

*Id.* (emphasis added).

The Note further provided that, so long as the law allowed, a 5% late fee for “payments in default for more than five days” and a 15% attorneys’ fee when “th[e] Note, or any part thereof, is collected by or through an attorney at law” also applied:

**5. Late Charges; Interest on Overdue Installments; Collection Costs.** Borrower will pay to Lender a late charge equal to five percent (5%) of the amount of any payment which is default for more than five (5) days, **but in no case** less than fifty cents (\$.50) or **more than the maximum amount allowed by application law.** Collection or acceptance by Lender of such late charge shall not constitute a waiver of any rights or remedies of Lender provided herein or in any other Loan Document. Upon the occurrence of any Event of Default hereunder, Borrower agrees to pay interest to Lender on the aggregate indebtedness represented hereby, including interest earned after the Maturity Date until such aggregate indebtedness is paid in

full, at a pre annum rate equal to the Default Rate. Lending shall be entitled to recover all costs and expenses of collecting, securing, or attempting to collect or secure this Note, for defendant any action seeking the avoidance or rescission of any payment of or security for this Note, including, without limitation, court costs and attorneys' fees for the services of counsel employed to collect this Note; provided, that, in the event this Note, or any part thereof, is collected by or through an attorney at law, Borrower agrees to pay all costs and expenses of collection, including, but not limited to, attorneys' fees in the amount of fifteen percent (15%) of all principal and interest owing hereunder.

*Id.* (emphasis added).

**L.) The Note's Subsequent Modification**

It is undisputed that in February 2016 Ascension LLC and CLBD agreed to retroactively modify the Note's initial term to 86 days (approximately 2 2/3 months) in exchange for increasing the "Primary Interest Payment" by \$50,000. On February 11, 2016, the parties signed a "First Modification of Promissory Note" that provides:

**WHEREAS**, Borrower has executed [the Note] in the principal amount of . . . \$1,000,000 dated [12/3/15];

**WHEREAS**, as of the Effective Date [2/11/16], Borrower has made a total of . . . \$150,000 in payments toward the satisfaction of the Note (the "Payment"). . . \$50,000 of the Payment satisfied the Primary Interest Payment. . . and the remaining . . . \$100,000 was applied to the principal of the Note; and,<sup>21</sup>

**WHEREAS**, Borrower has requested and Lender has agreed [to] extend the final payment date of the Note for an increase in the amount of the Primary Interest Payment;

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<sup>21</sup> The Note provided that CLBD may apply payments at its "option and sole direction":

**5. Application of Payments.** All payments made under this Note. . . **shall, at the option and sole discretion of Lender,** be applied in the following order: (i) to all costs and expenses incurred by Lender arising out of this Note and other Loan Documents; (ii) to accrued and unpaid interest; [iii] to all other charges assessed by the Lender against the Borrower pursuant to this Note and the Loan Documents; and (iv) to the unpaid and outstanding principal of this Note and apply any such amount in accordance with the terms and provisions of this Note.

Ex. 18, CLBD Note (emphasis added).

**NOW, THEREFORE.** . .[the parties agree]:

1. **PRIMARY INTEREST PAYMENT.** . .The amended Primary Interest Payment due under the Note is. . .\$100,000. Lender acknowledges that. . .\$50,000 of the Primary Interest Payment has already been paid by Borrower.
2. **EXTENSION OF DUE DATE.** . .From and after the Effective Date, the paragraph of the Note entitled “Maturity Date” shall be [replaced with] “February 26, 2016”.
3. **AMENDMENT TO LOAN DOCUMENTS.** Borrower acknowledges and consents that the Note and all previous loan documents securing the Note shall remain in full force and effect except as specifically modified herein. . .

Ex. 34, Modification (emphasis in original). Note that, by its express terms, the February 2016 modification was not an extension; it was an express, retroactive modification of CLBD Note’s original terms.

**M.) Ascension LLC’s Failure to Pay**

Ascension LLC did not pay off CLBD’s loan in full by its modified maturity date of February 26, 2016. Rather Ascension LLC continued to make partial payments until early 2017.

It is also undisputed that Ascension LLC paid CLBD a total of \$1,300,000 during 2016 and 2017. However, Ascension LLC never paid off the principal balance. Interest and fees have continued to accrue for four years. Kennedy’s deposition testimony as well as CLBD’s Statement of Accounts and Allocation Chart support this and there is no evidence otherwise. *See, e.g.*, Ex. 117, 146.

**LOAN BALANCE FACTS**

The relevant facts for the Court’s purposes as to the balance due on loans provided to Ascension are these:

**N.) CLBD's Loan Allocation**

CLBD asserts that, as of September 1, 2021, it is owed \$1,505,450 from Ascension LLC. Ex. 117, 9/1/2021 Statement of Account and Allocation. Further, if and to the extent that any other party proves that this balance contains a shred of usurious interest, the terms of the CLBD loan automatically reduce the interest by that amount and apply any previously paid potential usurious interest to the principal balance.

Neither Plaintiffs nor Sutlive have challenged CLBD's September 21, 2021 allocation; rather, they simply compare CLBD's September 1, 2021 allocation to CLBD's former June 23, 2021 allocation<sup>22</sup> or rely "on the face" of CLBD's original Note without considering the Note's modification in support of their usury arguments.

Further, neither Plaintiffs nor Sutlive have provided the Court anything showing the amount they claim they are owed to date from Ascension Inc. as it relates to their respective security and/or ownership interests.

**O.) The Airplane Will Cost Between \$400,000-\$600,000+ to Repair**

It is undisputed that Holland moved the Airplane to Charleston in June 2019 without informing CLBD or any other interest holders that he was taking possession of the Airplane, and since then, the Airplane has sat outside, all its registrations have since lapsed, and no maintenance, repairs (other than a pitot tube replacement), or work (other than Al Campbell's inspection paid for by CLBD) have been performed on the Airplane.

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<sup>22</sup>On March 1, 2021, CLBD produced a \$2,193,292 Statement of Account reflecting the full amount owed to CLBD, and CLBD updated this number in their discovery responses with interest through June 1, 2021 to \$2,298,208.36. Since then, CLBD voluntarily agreed to waive (as its Note and Georgia law allows) approximately \$800,000 of this amount despite its procedural and substantive arguments as to why its Note is not usurious.

It is undisputed that it will cost between \$400,000 to over \$600,000 to make the Airplane airworthy again. Campbell Estimate. It is undisputed that there is no net remaining equity in the Airplane if both CLBD and HFT's interests are vitiated. And, its also undisputed that there is likely no net remaining equity in the Airplane if either CLBD's or HFT's position is vitiated. It is undisputed that CLBD moved to take possession of the plane, repair it, sell it, and escrow the proceeds in 2021; and Plaintiffs blocked this effort. *See* prior motions and oppositions.

### **STANDARD**

Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. The moving party bears the initial burden of demonstrating that summary judgment is appropriate; if the moving party meets their burden, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Ellis v. Davidson*, 358 S.C. 509, 518-19, 595 S.E.2d 817, 821-22 (Ct. App. 2004). The Court must construe the facts and any inferences that can be drawn from them in favor of the non-moving party. *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). However, if these facts and inferences show that the non-moving party cannot prove an essential element of their claim “[t]he plain language of Rule 56(c) mandates the entry of summary judgment.” *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) *quoting* *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991); *see also* *Ellis*, 358 S.C. at 518, 595 S.E.2d at 822 (“[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.”).

## ANALYSIS

### **A.) CLBD is Entitled to Summary Judgment as to its Superior Lien Priority**

This Court finds that CLBD is entitled to summary judgment as to lien priority because (1) CLBD's Security Agreement is federally recorded; (2) CLBD's Security Agreement is the first purchase money security interest timely perfected on the Airplane; (3) HFT's Second Security Agreement with Ascension Inc. cannot replace Eclipse's released Security Agreement with Ascension LLC; and even if it could, (4) CLBD's Security Agreement was filed and recorded before Eclipse's Security Agreement; and (5) Plaintiffs and Sutlive are unable to negate CLBD's proof of priority with their usury arguments.

#### **1. This Court Finds that CLBD's Lien was Federally Recorded as Required by *Philko***

Anyone with an interest in an airplane must record that interest with the FAA for it to be valid and capable of having any priority under state law. *Philko Aviation, Inc. v. Shackel*, 462 U.S. 406 (1983) ("Although state law determines priorities, all interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law. . .").

Here, there is no dispute that CLBD filed and recorded its Security Agreement with the FAA, Georgia law applies to this Agreement,<sup>23</sup> and therefore the Court may proceed with determining its priority based on state law.

#### **2. This Court Finds that CLBD's Security Agreement is the Superior Interest Because it was Timely Perfected Within 20 Days of Execution, and it was the First Filed and Recorded with the FAA.**

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<sup>23</sup> Sutlive's Fractional Interest Agreement with Ascension Inc. is also governed by Georgia law whereas HFT's Second Security Agreement with Ascension, Inc. and HFT's Purchase Agreement with Birdies Fly provide that they are governed by South Carolina law. There is no difference between South Carolina's lien priority statutes, S.C. Code Ann. §§ 36-9-322 and 36-9-324, and Georgia's lien priority statutes, Ga. Code Ann. §§ 11-9-322 and 11-9-324, and thus, no need for this Court to engage in a choice of law discussion. The same result is reached regardless of which state's lien priority statutes applies to these Agreements.

According to Georgia law, a creditor that perfects a Security Agreement within 20 days after the debtor signs it gains priority over other security interests:

A perfected purchase-money security interest in goods. . .has priority over a conflicting security interest in the same goods. . .if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

Ga. Code Ann. §11-9-324(a) (emphasis added); *see also* S.C. Code Ann. § 36-9-324(a).

Where there are competing Security Agreements perfected in this 20-day window, priority is determined by the first to file rule. Ga. Code Ann. §11-9-324(g) (“If more than one security interest qualifies for priority in the same collateral. . .[11-9-322(a)] applies to the qualifying security interests”); Ga. Code Ann. §11-9-322(a) (“[C]onflicting perfected security interests. . .rank according to priority in time of filing or perfection. . .”); *see also* S.C. Code Ann. §§ 36-9-324(g) and 36-9-322(a) (noting same).

Here, the evidence shows that CLBD’s Security Agreement with Ascension LLC was executed on December 3, 2015, filed on December 9<sup>th</sup>, and recorded on December 12<sup>th</sup>, and thus, was perfected within the 20-day priority window. Ex. 19, CLBD Security Agreement.

HFT’s Second Security Agreement with Ascension Inc. (which is the Agreement that HFT relies on according to its Complaint) was not perfected within this window– it was allegedly executed on May 16, 2016, filed on July 7<sup>th</sup> (52 days later) and recorded on August 24<sup>th</sup> (100 days later). Ex. 44, HFT’s Second Security Agreement.

Sutlive’s Fractional Interest Agreement with Ascension Inc. was also not perfected within this window – it was executed on May 3, 2016, but never filed or recorded. Ex. 38, Sutlive Agreement. Rather, a bill of sale was filed on March 18, 2019 (1049 days later) and recorded on April 18, 2019 (1080 days later). Ex. 45, Sutlive Bill of Sale; Sutlive Amended Answer, para. 56

(Sutlive admitting “notice of [Sutlive’s] fractional ownership” was not filed “until March 18, 2019 and registered by the FAA on April 18, 2019”).

HFT’s Purchase Agreement with Birdies Fly was likewise not perfected within this window – it was executed on December 23, 2019, but never filed or recorded with the FAA. Ex. 143, HFT-Birdies Purchase Agreement. Rather, a “MMT” bill of sale was filed on December 23, 2019, which remains unrecorded due to missing registration paperwork. *See, e.g.*, Ex. 97, December 23, 2019 Bill of Sale; Ex. 99, January 21, 2020 FAA Letter Asking for Airplane Registration; Ex. 7, April 13, 2020 Aerospace Aircraft Title Search (“In file unrecorded appear. . .B) Bill of Sale, dated 12/23/19, filed 12/23/19, from Birdies Fly, LLC (5.667%) to MMT, LLC (“5.667%). . .FAA asks for the Application for Registration.”). Since both the HFT-Birdies Purchase Agreement and MMT Bill of Sale remain unrecorded, neither can have priority under *Philko*.

The foregoing shows that, of the above-listed interests, CLBD’s Security Agreement is the only one that was properly filed and recorded within 20 days of execution. As such, CLBD’s Security Agreement is the superior interest as a matter of Georgia’s (and South Carolina’s) lien priority statutes. Even if Plaintiffs and Sutlive perfected their interests within 20 days of execution, it is also undisputed that CLBD’s Security Agreement was the first filed and recorded with the FAA and therefore it remains the superior interest under these statutes.

### **3. This Court Finds that HFT Cannot Step into Eclipse’s Shoes**

Plaintiffs argue that “it was mutually intended” for HFT to step into Eclipse’s lien position and that HFT’s 2016 Second Security Agreement “replaced” Eclipse’s 2015 Security Agreement.

Holland Aff. This Court disagrees with Plaintiffs, and finds that for all the following reasons that HFT cannot step into the shoes of Eclipse:<sup>24</sup>

*a. HFT's Conflicting Security Agreements Negate Any "Mutuality"*

This Court finds that no "mutual understanding" can tie Eclipse's original and HFT's Second Security Agreement together when HFT purportedly entered two security agreements on the same day that contain different terms. HFT's First Security Agreement, entered on May 16, 2016 and filed with the FAA on May 17 2016, makes no mention of Eclipse's security interest and has a 0% interest rate. Ex. 43, HFT First Security Agreement. HFT's Second Security Agreement, also entered on May 16, 2016, but filed with the FAA on July 7, 2016, references Eclipse's released security interest, has a 9% interest rate, and includes entirely different interest calculation terms. Ex. 44, HFT Second Security Agreement.

During his deposition, Holland conceded to these and other differences between HFT's First and Second Security Agreements:

Q: Now, Pages 7 and 8 of Exhibit 44 are [worded] different than the final two pages of Exhibit 43. Do you see that?

A: No. I see Pages 7 and 8. I have read the differences.

Q: We'll see on Page 7, under 8 Miscellaneous, is Paragraphs a through e. And if we go to Exhibit 43 –

A: Okay. Okay. What do you want to know? I'm looking at it.

Q: They're rather different, are they not?

A: They are different, yes. . .

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<sup>24</sup> Because this Court finds that HFT cannot step into Eclipse's shoes, there is no need for this Court to discuss the application of New Mexico law as it relates to Eclipse's Security Agreement or Plaintiffs' "equitable reinstatement" argument made at the November 17<sup>th</sup> hearing. Separately, the "mutually intended" theory/argument leaves out other interested stakeholders that did not consent to its machinations.

Q: Now, Exhibit 44 sets forth the interest rate at 9 percent, and Exhibit 43 sets forth the interest rate at zero percent, just like in [Eclipse's] e-mail. Do you recall that?

A: I do recall that.

Q: Which one's right, 9 percent or zero percent?

A: I believe, and this is based on the best of my recollection, that we reduced the interest rate to allow Jamail to pay off -- to try to pay off the loan faster. It was a consideration to help him out. That's what I believe.

Q: Well, May 2016 is the words "zero percent," so you actually increased the interest rate to 9 percent in July in the later –

A: Correct.

Q: -- recorded security interest?

A: Correct. . .

Holland Depo. 117:16-118:12; 119:23-120:14 (emphasis added).

Regardless of which HFT Agreement is considered,<sup>25</sup> the fact that there are two, obviously different HFT Agreements with contradictory terms, supposedly entered on the same date, shows there cannot be “a mutual understanding” as to which of these Agreements “was intended” to purportedly replace Eclipse’s Security Agreement.

***b. HFT’s Second Security Agreement Was Modified After the Fact***

It is apparent that Plaintiffs unilaterally modified HFT’s Second Security Agreement after Ascension Inc. purportedly signed it on May 16, 2016. Ex. 44, HFT’s Second Security Agreement.

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<sup>25</sup> Plaintiffs, themselves, have vacillated about which HFT Agreement is “the” Agreement that purportedly replaced Eclipse’s Security Agreement. Plaintiffs’ Complaint characterizes HFT’s Second Security Agreement as the “Replacement Note”; however, Holland testified, under oath, that HFT’s First Security Agreement is the “Replacement Note”. *Compare* Pl. Comp., para 2 (Plaintiffs admitting that they “hold [their] interest in the Aircraft based on the terms of an Aircraft Loan and Security Agreement dated May 16, 2016 and filed with the [FAA] on July 7, 2016”) (emphasis added) *with* Ex. 112, Holland Aff., para. (swearing that HFT’s First Security Agreement, attached as Ex. C, is the “Replacement Note”).

The evidence shows that, before the final version of HFT's Second Security Agreement was filed, Plaintiffs sent their title company another version of this Agreement with recitals that said:

- B. [Eclipse] recorded a lien (Conveyance No. JPO15852) with the FAA on May 17, 2016 (the "FAA Lien")
- C. [Eclipse] has assigned this FAA Lien to Lender.

Ex. 42, HFT Draft Security Agreement. The title company recognized that HFT did not, and could, not have the "assignment" it claimed to have and let Plaintiffs know this:

Hi Pete! Have some issues with the new security instrument. See attached pages.

- 1) Ascension can only mortgage their 94.333% unless Grier is selling his 5.667% back.
- 2) The note and security agreement **should be the same date**, but keep in mind that the note is not required to be attached/filed.
- 3) Lien JP015852 **cannot be assigned** because **it has been released** per release dated May 17, 2016. In order to assign, **the assignment must be dated prior to the date of the release** and an assignment would need to be executed by Eclipse Aerospace Inc. It is a separate document altogether.

**I assume you are aware of a security agreement outstanding dated December 3, 2015, recorded December 12, 2015, conveyance JDO10020 between [Ascension LLC] and [CLBD]?**<sup>26</sup>

Ex. 48 (emphasis added); *see also* Holland Depo. 124:17-128:4 (agreeing that their title company informed Plaintiffs that Eclipse's lien could not be assigned because it was released and that CLBD had a previously filed lien).

After receiving this email, Plaintiffs removed the "assignment" reference from the HFT Second Security Agreement's recitals and replaced it with this reference to Eclipse's released lien:

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<sup>26</sup> Despite his sworn, pre-existing "awareness" of the CLBD debt, Cuneo responds to Morgan that "we were not actually aware of this other lien out there so thanks for letting us know". *See, e.g.*, Ex. 133.

**two months after the Agreement was made**, with both allegedly occurring on “the 16<sup>th</sup> day May, 2016”:

- B. [Eclipse] filed a lien (Conveyance No. JPO15852) with the [FAA] on December 11, 2015 and re-filed a lien on January 6, 2016 that was then released on May 17, 2016 (the “FAA Lien”).

Ex. 44, HFT Second Security Agreement (emphasis added). Plaintiffs’ July 7, 2016 email to their title company proves this point:

**Would you be able to be to slip sheet the first page of the attached with the original document you have there?** Hopefully this address[es] the issues. Go ahead and write in the 94% thing. . .

Ex. 39, 7/7/16 Cuneo Email to Title Co. (emphasis added). Plaintiffs’ after-the-fact alteration of this Agreement is also proven by the Agreement itself. The Agreement is dated “the 16<sup>th</sup> day May, 2016” but references the Eclipse lien that was filed and “then released on May 17, 2016”. Ex. 44, HFT Second Security Agreement (emphasis added). Just to confirm the obvious, May 17<sup>th</sup> is the day after the parties purportedly signed this Agreement on May 16<sup>th</sup>. *Id.* As a matter of law, there can be no “mutual understanding” of an agreement that is unilaterally modified after it was purportedly executed, and which was executed in two different versions with materially different terms.

***c. HFT’s Second Security Agreement Conflicts with Eclipse’s Security Agreement***

This Court also finds that HFT’s Second Security Agreement has different terms than Eclipse’s Security Agreement and therefore is not a true “Replacement Note” as Plaintiffs’ claim. Holland Aff., paras. 9-10. The primary conflict between these Agreements is that they involve different debtors – Eclipse’s debtor is Ascension LLC whereas HFT’s debtor is Ascension Inc. Eclipse’s Security Agreement also has an 8% interest rate whereas HFT’s Second Security Agreement has a 9% interest rate – plus new “interest calculation” paragraphs:

Q: We see that the interest rates in [HFT's First and Second Security Agreements], neither one of them match the interest rate in the Eclipse obligation, which was 8 percent, correct?

A: That's what it appears to say.

Holland Depo. 121:19-22 (emphasis added); *see also* Exs. 8, 44.

Further, HFT's Second Security Agreement also incorrectly claims that it satisfied "[Ascension's] obligation of \$2,217,436 with Eclipse at execution" when, in fact, HFT wired Eclipse only \$1,500,000 two months beforehand:

Q: Now, in 44, the second, later HFT security instrument, in Paragraph 1 for Loan Terms it says, "In consideration of Lender satisfying the obligation of 2.2 million with EAI at execution hereof." Do you see that?

A: This is on 44?

Q: 44, Paragraph 1.

A: Okay.

Q: Do you see that?

A: I do.

Q: And that's false, correct?

A: The intent is not false.

Q: The statement is false. The Trust paid 1.5 million, and it had been paid two months earlier, correct? It is not done contemporaneously with the execution of Exhibit 44?

A: It had been paid previously, that is correct.

Q: And it was 1.5 million?

A: And it was -- I did buy the note at a discount; that is correct.

Holland Depo. 119:3-22 (emphasis added).

Plaintiffs have also failed to prove that the \$1,500,000 HFT wired Eclipse was *solely* for the purchase of Ascension LLC's \$2,217,436 Note. Plaintiffs have not produced one document, assignment, email, or otherwise, confirming the details of this transaction. The only evidence Plaintiffs have provided on this point is the testimony of Holland which suggests that HFT sent Eclipse \$1,500,000 for a different reason – to help Eclipse and its successor, ONE Aviation, because they “need[ed] some financial capital at the end of the year”. Holland Depo. 33:24-34:10.

***d. HFT's Second Security Agreement Acknowledges Eclipse Had No Rights to Replace***

HFT's Second Security Agreement cannot amend and assume rights that do not exist. It is undisputed that Eclipse released – and therefore no longer had – any rights as of May 17, 2016; it is undisputed that HFT did not obtain an assignment from Eclipse prior to this date; and it is undisputed that HFT knew both these things before filing HFT's Second Security Agreement:

Q: So on the day you had Bill Morgan file [HFT's Second Security Agreement] in your behalf, you knew that the EAI lien had been released, correct?

A: Again, it was in favor of my lien. And we could have done it a little cleaner, but the result is the same.

Q: This is real simple. On the date you had Bill Morgan file [HFT's Second Security Agreement] in your behalf, you, Mason Holland, trustee of the Holland Family Trust, knew that the Eclipse lien had been released, correct?

A: Yes.

Q: Thank you. When we go to the back of this document, [HFT's Second Security Agreement], we find your signature, correct?

A: That's it.

Q: And, again, the word "assign" or "assignment" is nowhere found on [HFT's Second Security Agreement], is it?

A: I'll take your word for it.

Holland Depo. 116:24-117:15 (emphasis added); *see also* Ex. 46.

**B.) Alternatively, This Court Finds That CLBD’S Security Agreement Was Filed Before Eclipse’s Security Agreement**

Even if Plaintiffs could legally tie these Agreements together, this Court finds that CLBD’s Security Agreement was filed earlier than Eclipse’s Security Agreement and the lien priority result is the same. The CLBD Security Agreement was filed with the FAA on December 9, 2015 (two days before the Eclipse Security Agreement) and recorded on December 12, 2015 (two months before the Eclipse Security Agreement). *Compare* Ex. 19, CLBD Security Agreement *with* Ex. 7, Eclipse Security Agreement. Plaintiffs concede these facts:

- Q. You saw a security interest by Eclipse that was filed and recorded after CLBD, correct?
- A. Yes. . .

Cuneo Depo. Trans. 100:19-21. As such, CLBD’s Security Agreement was always superior to Eclipse’s now released Security Agreement under the first-to-file rule.<sup>27</sup> Further, the evidence shows that Eclipse was aware that CLBD provided Ascension purchase money funds for the Airplane prior to filing its Security Agreement; yet, Eclipse never checked the title records in escrow until *after* its Security Agreement was filed. *See, e.g.*, Exs. 12 and 13.

**C.) This Court Finds that Plaintiffs’ and Sutlive’s Usury Arguments Do Not Rescue Their Claims**

Plaintiffs and Sutlive argue that CLBD’s Note is usurious and therefore CLBD must forfeit any money it is still owed which, in effect, moots the superiority of CLBD’s Security Agreement. This Court disagrees with Plaintiffs and Sutlive and finds that CLBD’s Note is not usurious for the reasons outlined below.

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<sup>27</sup> Frankly, it’s difficult to understand how this and some of the other self-evident facts could even be at issue.

**D.) This Court Finds that CLBD’s Note is Not Subject to The Usury Statute or, Alternatively, the Usury Statute Cannot be Construed Otherwise**

Georgia’s usury statute, Ga. Code Ann. § 7–4–18(a) (“Statute” or “Usury Statute”), sets out the criminal penalty for usury and provides that no loan shall charge “any rate of interest greater than 5% per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever. . .”

This Statute “must be read in conjunction with” Georgia’s interest statute, Ga. Code Ann. § 7–4–2 (“The Interest Statute”), which differentiates loans that are less than \$250,000 from loans that are \$250,000 or more. *GMAC Comm’l Mort. Corp. v. Maitland Hotel Assoc., Ltd.*, 218 F. Supp. 2d 1355, 1360 (M.D. Fl. 2002) (applying Georgia law).<sup>28</sup>

Under the Interest Statute, interest rates for loans that are less than \$250,000 are expressly subject to the Usury Statute:

Notwithstanding the provisions of other laws to the contrary, **except Code Section 7-4-18**, the parties may establish by written contract any rate of interest. . .where the principal amount involved is more than \$3,000.00 but less than \$250,000.00. . .

Ga. Code Ann. § 7–4–2(a)(1)(A) (emphasis added). However, interest rates for loans of \$250,000 or more are not expressly subject to the Usury Statute:

Where the principal amount is \$250,000.00 or more. . .the parties may establish by written contract **any** rate of interest. . .

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<sup>28</sup> This Court disagrees with Plaintiffs’ argument that these two statutes must be read independently of each other. Multiple Georgia cases have held that these statutes “must be read in conjunction” with each other or have read these statutes together in rendering their opinions. *See GMAC, supra; see also MMA Capital Corp. v. ALR Oglethorpe, LLC*, 336 Ga. App. 360, 785 S.E.2d 38 (2016); *S&A Industries, Inc. v. Bank Atlanta*, 247 Ga. App. 377, 543 S.E.2d 743 (Ct. App. 2000) (per curiam), *cert. denied*, June 5, 2001 and July 16, 2011; *Fleet Finance Inc. of Georgia v. Jones*, 263 Ga. 228, 231 430 S.E.2d 352, 355 (1993); *Barton v. Marubeni America Corp.*, 204 Ga. App. 346, 347, 419 S.E.2d 342 (1992); *Ellie v. AMF Holdings LLC*, 2016 WL 10520762, at \* 6 (N.D. Ga.) (Feb 9, 2016).

Ga. Code Ann. § 7–4–2(a)(1)(B) (emphasis added); *see also GMAC*, 218 F. Supp. 2d at 1360 (“The language of Ga. Code § 7–4–2(a)(1)(B), however, provides that parties to a loan of \$250,000 or more may establish any rate of interest. Section 7–4–2(a)(1)(B) does not *specifically* invoke the limitations of Georgia’s criminal usury statute. . .”) (emphasis supplied).

Several Georgia opinions are in conflict as to whether the Statute applies to loans of \$250,000 or more because of this difference. *Compare Barton v. Marubeni America Corp.*, 204 Ga. App. 346, 347, 419 S.E.2d 342 (1992) (holding loans where the principal amount is \$250,000 or more are “outside the provisions of the [Statute]”) *with First Alliance Bank v. Westover, Inc.*, 222 Ga. App. 524, 474 S.E.2d 117 (1996) (applying the Statute to loans exceeding \$250,000).

The Georgia Court of Appeals most recently addressed this conflict in *S&A Industries, Inc. v. Bank Atlanta*, but the Court did not resolve the conflict. 247 Ga. App. 377, 543 S.E.2d 743 (Ct. App. 2000) (per curiam), *cert. denied*, June 5, 2001 and July 16, 2011. Six justices found that the Statute does not apply to loans over \$250,000 and six justices found that the Statute does apply to loans over \$250,000.<sup>29</sup>

### **1. This Court Finds the Statute Does Not Apply to Loans Over \$250,000**

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<sup>29</sup> Plaintiffs cited *S&A* once in its briefings and agreed with CLBD that *Fleet* and *S&A* allow usury to be tested over the life of the loan versus the term of the loan. Sutlive conceded in its briefings that it was CLBD who identified the “*per curiam* decision of [S&A], in which six justices concurred specially and found that the [U]sury [S]tatute did not apply to loans over \$250,000, and six justices concurred specially and found that the [U]sury [S]tatute did apply to loans over \$250,000”. Sutlive then goes on to argue that, “in any event, there is no real question that the usury limit. . . applies to all loans, not just loans under \$250,000”. This Court disagrees with Sutlive. **The *S&A* opinion – and the fact that the Georgia Supreme Court twice declined to review it – shows that there is a clear question as to whether the usury limit applies to loans over \$250,000 and that Georgia’s Usury and Interest statutes have been – and still can be – interpreted both ways.** As outlined below, this Court’s interpretation is that loans over \$250,000 are not subject to the Usury Statute. Regardless of whether this is the correct interpretation, the Statute still must be construed in CLBD’s favor because of the unresolved ambiguity existing after *S&A*’s split opinion.

This Court follows the logic of the *S&A* Court of Appeals justices that found that the Statute does not apply to loans over \$250,000 and rules similarly here. According to these justices, there are four, independent reasons that loans over \$250,000 are not subject to the Statute and this Court adopts these same findings:

[A]s stated in *Barton v. Marubeni America Corp.*, 204 Ga. App. 346, 347, 419 S.E.2d 342 (1992), **loans where the principal amount is \$250,000 or more are “outside the provisions of Georgia’s usury statute. . .”**

Presiding Judge Pope's special concurrence argues that we should overrule *Barton*. This argument is unpersuasive for four reasons. First, *Barton* was correct. The drafters of 7-4-2(a)(1)(B) in 1988 **very carefully *did not* reference the existing usury statute. . .as an exception to the language that loans over \$250,000 could specify whatever rate they wanted.** Thus, they did not intend for the existing usury statute to apply, and to the extent the usury statute had applied to such large loans, it was implicitly repealed, despite the language contained in OCGA § 7-4-18(c). This intent is plainly clear, for those same drafters **in OCGA § 7-4-2(a)(1)(A), which concerns smaller loans, expressly referenced OCGA § 7-4-18** as an exception to the language that such loans could specify any interest rate. If the drafters had intended for the usury statute to apply to the larger loans covered by subpart (B), then they would have used the same exception language that they were using in subpart (A). . .

The one later case cited by Presiding Judge Pope's special concurrence as implying otherwise ignores *Barton* and does not address the meaning of the language of OCGA § 7-4-2(a)(1)(B). . .Rather, *First Alliance* simply *assumes* without discussion that the usury statute applies to the large loan at issue and then concludes that the loan was nevertheless not usurious. Since *First Alliance* makes no effort to overrule or even discuss *Barton*, and since *First Alliance* does not even find the loan usurious under the statute, *First Alliance's* implied assumption that the usury statute applies to large loans is dicta, **and *Barton* is still controlling precedent on its earlier express holding to the contrary that was essential to its conclusion.**

Second, the apparent and logical policy behind the drafters making this distinction is that when this much money is involved, then **both parties to the transaction can be presumed to be sophisticated entities with bargaining power that can negotiate whatever interest rate they want to** and that the debtor is not an unsuspecting, powerless consumer that needs the protection of the usury law. . .

**Third, reversing the case law that has been outstanding for eight years would be demoralizing to the lending industry, which has faithfully relied on this clear interpretation in making these large loans.** Now suddenly, without any

warning, Presiding Judge Pope's special concurrence would have lenders blindsided by a reversal of a clearly understood interpretation, and the loans for millions of dollars they have lent using higher interest rates would now come into question. The Supreme Court of Georgia recently reiterated the need to adhere to precedent so as to promote the rule of law and its predictability.

**The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence.** In most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change, even though grave doubt may arise as to the correctness of the interpretation originally given to it.

**Fourth, the doctrine of stare decisis applies even more strongly in matters of statutory construction.** “Even those who regard ‘stare decisis’ with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute.” A reinterpretation of a statute after the General Assembly's implicit acceptance of the original interpretation would constitute a judicial usurpation of the legislative function. . .

The Georgia General Assembly **has been aware of *Barton's* interpretation of the statute for over eight years, and has done nothing to amend the statute** to overrule that interpretation. **In fact, in 1997 the General Assembly amended subsection (c) of this Code section to address some errors and omissions, but did nothing to change the language of subsection (a)(1)(B).** Ga. L. 1997, p. 143, § 7(20). The General Assembly obviously agrees with the long-standing interpretation. “If this Court has been wrong from the beginning, on this subject, let the legislative power be invoked to prescribe a new rule for the future”; otherwise, we must adhere to the rule long applied by our courts and so well known to the legal profession. . .”

*S&A*, 247 Ga. App. at 389-90, 543 S.E.2d at 753-55 (some internal quotations and citations omitted) (emphasis added).<sup>30</sup>

**2. Alternatively, This Court Finds the Statute is Ambiguous and Must Construe it In Favor of CLBD**

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While Plaintiffs and Sutlive cite to competing opinions since *S&A* that have interpreted the statutes in support of their respective positions, only one of these opinions, *MMA Capital Corp. v. ALR Oglethorpe, LLC*, was issued by the Georgia Court of Appeals and it, like the Statutes, can be interpreted multiple ways. 336 Ga. App. 360, 785 S.E.2d 38 (2016).

This Court finds, in the alternative, that the Statute does not clearly apply to CLBD's loan and therefore the Statute must be strictly construed in CLBD's favor as a matter of Georgia law.

As explained by the Georgia Supreme Court:

[W]e first note that [the Statute] is a criminal statute. It thus must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted. . . . This rule applies even though a criminal statute is being construed in a civil context. . . . We conclude that the statute is subject to multiple interpretations and that strictly construing it, we must adopt the one most favorable to [Lender].

*Fleet Finance Inc. of Georgia v. Jones*, 263 Ga. 228, 231 430 S.E.2d 352, 355 (1993) (emphasis added);<sup>31</sup> *see also GMAC Comm'l Mort. Corp. v. Maitland Hotel Assoc., Ltd.*, 218 F. Supp. 2d 1355, 1360 (M.D. Fl. 2002) (applying Georgia law) (noting "the opinions of the Georgia courts are in conflict as to whether the criminal usury statute applies to loans of \$250,000 or more").

In reaching this finding, the *Fleet* Court noted:

Although we do not condone [Lender's] interest-charging practices, which are widely viewed as exorbitant, unethical, and perhaps even immoral, and suggest that further regulation of the lending industry is needed by our General Assembly to insure the economic survival of individuals like the [borrowers], we are constrained to hold that the loans in question are not usurious. . . .

*Fleet*, 263 Ga. at 229, 430 S.E.2d at 354 (emphasis added).

As in *Fleet*, this Court is constrained to hold that CLBD's Note is not usurious as a matter of Georgia law despite any concerns it may have about the Note's terms or the \$1,300,000 CLBD has been paid to date.

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<sup>31</sup> *Fleet* involved borrowers who brought a class action against a mortgage lender and asserted the Usury Statute as defense to foreclosures threatened by lender. Borrowers claimed that their loans included usurious front-end fees ranging from 22% to 27% of the principal amount of the loans plus yearly interest rates ranging from 18.9% to 19.9% per year. Lender filed a motion to dismiss the action on the grounds that its loans were not usurious. The trial court denied lender's motion and lender appealed. On appeal, the Georgia Supreme Court reversed the denial of lender's motion to dismiss finding the foregoing.

**E.) This Court Finds that Plaintiffs and Sutlive are Precluded from Asserting Usury as a Defense**

As a separate, sustaining ground, this Court finds that Plaintiffs and Sutlive are procedurally and substantively barred from asserting usury as to CLBD’s Note for two reasons: (1) Plaintiffs and Sutlive are not “privies” of Ascension LLC and (2) Ascension LLC does not have the right to assert usury – so neither do its privies.

**1. The Defense of Usury is Personal to the Debtor**

“The defense of usury is not, in most instances, a bargained-for element of the agreement. It is, rather. . .a privilege that belongs to the remedy, coming into play only when the borrower seeks to assert it as a defense.” *Ward v. Hudco Loan Co.*, 254 Ga. 294, 297, 328 S.E.2d 729 (1985) (citations omitted) (emphasis added); *Clark v. Kaiser Agr. Chemicals*, 156 Ga. App. 251, 274 S.E.2d 648 (1980) (“The defense of usury is personal to the debtor. . .It may not be urged save by the borrower or his privies”); *Long v. Gresham*, 148 Ga. 170, 96 S.E. 211, 212 (1918) (“The defense of usury is a personal one, and cannot be taken advantage of by a stranger to the usurious contract.”); CJS Interest § 290 (“Generally, the courts deny protection from usury to persons who neither pay nor are obligated to pay on a usurious loan. In order to question the validity of a usurious contract, the right must be based on the original debtor’s right.”); *see also Scott v. Cushman & Wakefield of Ga.*, 249 Ga. App. 264, 265, 547 S.E.2d 794 (2001) (“[t]he doctrine of privity of contract requires that only parties to a contract may bring suit to enforce it.”).

**2. Privies are Bound by the Rights They Claim Through**

Plaintiffs and Sutlive rely on three turn of the 19<sup>th</sup> century cases to suggest otherwise; however, these cases show that “only” creditors of “the same common debtor” have privity to assert usury against each other:

The defense of usury is a personal one, and can only be asserted by the defendant, or one in privity with him. . . . This principle does not conflict with the ruling that, where a creditor obtains a junior conveyance prior to the judgment from the common debtor, he can attack the prior security deed of his debtor for usury after it is reduced to judgment.

*Miller v. Parker*, 133 Ga. 187, 65 S.E. 410 (1909) (emphasis added); *see also Ryan v. American Freehold Land Mortg. Co.*, 96 Ga. 322, 23 S.E. 411 (1895); *Jaques v. Stewart*, 81 Ga. 81, 6 S.E. 815 (1888).

Additionally, Georgia law provides that “[o]ne who has an opportunity to set up the defense of usury and fails to do so is concluded by the judgment. . . Failure to plead usury results in an estoppel to rely upon it as a defense.” *Clark v. Kaiser Agr. Chemicals*, 156 Ga. App. 251, 252, 274 S.E.2d 648, 649 (1980) (internal citations and quotations omitted); *see also Ideal Loan & Finance Corp. v. Little*, 217 Ga. App. 385, 457 S.E.2d 274 (1995) (reversing a trial court’s imposition of usury in entering default judgment against the debtor). Thus, the same three cases cited to by Plaintiffs and Sutlive sustain the proposition that privies are bound by the rights they claim through; if the debtor has relinquished his personal right to assert usury, then the privies cannot do otherwise.

Here, Plaintiffs and Sutlive lack standing to assert usury as defense for both these reasons: Plaintiffs and Sutlive are not creditor-privies of CLBD’s debtor, Ascension LLC; and, as a matter of law, Ascension LLC has relinquished its right to assert usury and its creditors are bound thereby.

### **3. Plaintiffs and Sutlive are Not Privies of Ascension LLC**

CLBD’s debtor is different than the debtor common to both Plaintiffs and Sutlive. Ascension LLC is the debtor of CLBD’s Note whereas Ascension Inc. is the debtor referenced in HFT’s May 17, 2016 Note and the seller referenced in Sutlive’s May 3, 2016 Fractional Interest Agreement. Exs. 38, 43, 44, HFT and Sutlive Agreements. As such, Plaintiffs and Sutlive are only

in privity with Ascension Inc. and are not in privity with Ascension LLC. *Id.* Plaintiffs and Sutlive therefore are precluded from asserting usury as to CLBD's Note with Ascension LLC because they have no right to do so. CJS Interest § 290 (“In order to question the validity of a usurious contract, the right must be based on the original debtor's right.”) (emphasis added).<sup>32</sup>

**4. Ascension LLC is in Default and has Relinquished its Right to Assert Usury**

Further, Ascension LLC (by its default) has completely and permanently relinquished its right to assert usury and therefore its privies cannot assert this right that Ascension LLC no longer enjoys. *See, e.g., Miller*, 133 Ga. at 187, 65 S.E. at 411 (“The defense of usury is a personal one, and can only be asserted by the defendant, or one in privity with him. . . .”) (emphasis added).

Here, it is undisputed that Ascension LLC has never raised usury. In fact, Ascension LLC has not answered CLBD's crossclaims (the only claims asserted against Ascension LLC);; and, both Plaintiffs and Sutlive consented to Ascension LLC's entry of default. *See* Default Order. Consequentially, the usury defense is procedurally precluded as to Ascension LLC as well as to Plaintiffs and Sutlive who are not in privity with Ascension LLC, have no claims against Ascension LLC, and therefore cannot assert this defense on behalf of Ascension LLC.

**5. Ascension LLC (and its Privies) are Estopped from Raising Usury as a Defense Since Ascension LLC Proposed the Terms of CLBD's Note**

Even if Ascension LLC was not in default and Plaintiffs and Sutlive qualified as its privies, this Court finds that all would be estopped from asserting usury as defense since it was Ascension LLC who proposed the repayment terms in CLBD's Note. *See, e.g., Eiberger v. West*, 247 Ga.

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<sup>32</sup> While CLBD's Note also lists Ascension Inc. as a borrower the result remains the same. Even if Plaintiffs and Sutlive could assert that CLBD's Note is usurious as to Ascension Inc., they would still be precluded from asserting that CLBD's Note is usurious as to Ascension LLC, and its only Ascension LLC who granted CLBD its senior interest in the Airplane and signed CLBD's Security Agreement.

767, 281 S.E.2d 148 (1981) (“The borrower cannot use the (usury) statute to take advantage of his own wrong. . .[T]he majority of jurisdictions hold that estoppel can lie to bar the defense of usury. . .and Georgia has followed the majority rule. . .”) (internal citations and quotations omitted) (emphasis added).

On November 23, 2015, for example, Ascension LLC emails CLBD the following:

Specifically for this opportunity, we are purchasing a brand new Eclipse 550. The purchase price is \$3,152,800. To complete the transaction, we need a short-term bridge loan of \$1,000,000. We will need the funds for up to 30 days, and in return, can provide \$50,00 in cash on in-kind use of funds. . .

Ex. 122, 11/23/15 Emails from Larkins to Kennedy (emphasis added); *see also* Ex. 124. Kennedy also testified in his deposition that CLBD had never entered a similar note with similar terms and only entered this Note because it was what Ascension LLC wanted. Kennedy Depo. 28:25-29:19; 45:8-12; 49:1-52:2; *see also* Kennedy Aff., paras. 5.

There is no evidence in the record that refutes this evidence showing that Ascension LLC proposed the terms of CLBD’s Note. As such, this Court finds there is no question that Ascension LLC – and its privies – would be estopped from asserting usury as defense as to CLBD’s Note.

#### **F.) Plaintiffs’ and Sutlive’s Other Arguments Do Not Prevail**

Because this Court finds that CLBD’s Note is not usurious as a matter of Georgia law or that Plaintiffs and Sutlive cannot prove otherwise, this Court does not need to conduct an analysis of CLBD’s Note under the usury tests outlined in *S&A*’s split opinion.<sup>33</sup> Nevertheless, this Court

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<sup>33</sup> *S&A* discussed two tests for assessing usury, the Loan Life Test and the Loan Term Test. *S&A*, 247 Ga. App. at 389, 543 S.E.2d at 753 (“[T]he loan could be tested for usury based upon the late charge and the 10.25-10.5% interest paid over the 14-month modified loan term. Alternatively, the late charge could be considered in conjunction with the total interest paid, both pre-maturity and post-maturity, and measured over the entire period during which *S&A* retained use of the bank’s money.”). However, the *S&A* Court found that it was “not necessary to decide what the appropriate term would be” in that case “because testing the interest over any period longer than one month would bring [the note at issue] under the rate prohibited by [the Statute]”. *Id.*

alternatively finds that CLBD's Note is not usurious under the Loan Term Test which both Plaintiffs' and Sutlive mischaracterize as it relates to CLBD.

**1. This Court Finds that the Term of CLBD's Note is Not Less Than a Month**

Plaintiffs' other usury claims are unsustainable.

The "term" of CLBD's Note, "on its face", was "not less than month" – it was 85 days because the Note's original Maturity Date of "January 1, 2016" was retroactively modified to "February 26, 2016".<sup>34</sup>

**EXTENSION OF DUE DATE.** . . From and after the Effective Date, the paragraph of the Note entitled "Maturity Date" shall be [replaced with] "February 26, 2016".

CLBD Modification.

During this two-month, twenty-five-day term, the only interest charged and paid per the Note's language was \$100,000:

**PRIMARY INTEREST PAYMENT.** . . The amended Primary Interest Payment due under the Note is. . . \$.100,000. Lender acknowledges that. . . \$50,000 of the Primary Interest Payment has already been paid by Borrower.

Ex. 34, CLBD Modification.

Applying the Loan Term Test to the \$100,000 in interest charged over the modified term of the loan, results in a 3.5% per month interest rate that is less than the 5% per month interest rate allowed under the Statute:

$$\begin{aligned} &\text{Term of Modified Loan (12/3/15 – 2/26/16): 85 days or 2.8 Months} \\ &\text{Interest Paid: } \$100,000 / 2.8 = \$35,714 \\ &= \quad \mathbf{\$35,714 / \$1,000,000 = 3.5\% \text{ per month}} \end{aligned}$$

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<sup>34</sup> As mentioned earlier, the monies were wired November 25, 2015, and the initial, pre modified term was intended to be a month or more.

Thus, even assuming the Loan Term Test can apply here, CLBD's Note is not usurious based on the non-waived,<sup>35</sup> interest charged and paid over its modified term.

**2. This Court Finds That It May Consider CLBD's "Modified" Term Under S&A**

Sutlive's argument that this Court cannot consider this "modified term" because "usurious contracts can only be tested by the original loan period" is also incorrect. Sutlive Memo Opposing CLBD's Motion, pp. 6-7. As discussed above, *S&A* involved a loan like CLBD's that was "modified" after its original term and the *S&A* Court held that usury could be tested one of two ways – (1) over the loan's "the 14-month modified loan term" or (2) "over the entire period during which S&A retained use of the bank's money.". *S&A*, 247 Ga. App. at 389, 543 S.E.2d at 753 (emphasis added). Neither of these tests are limited to the "original loan term" and both show that Georgia courts can, and have, considered "modified" loan terms as a matter of prevailing Georgia precedent. The cases that Sutlive cites in support of its argument all pre-date *S&A* and therefore are unpersuasive. *Id. citing Duderwicz v. Sweetwater Sav. Asso.*, 595 F.2d 1008, 1014 (5<sup>th</sup> Cir. 1979); *Bank of Lumpkin v. Farmers' State Bank*, 161 Ga. 801, 132 S.E. 221, 225 (1926); *Williams v. Powell*, 214 Ga. App. 216, 219, 447 S.E.2d 45, 49 (1994).

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<sup>35</sup>Plaintiffs' and Sutlive's argument that CLBD could have charged additional fees during the Note's term is mooted by the fact that CLBD waived any such fee in accordance with the *GMAC* opinion which, applying Georgia law, allowed a lender to waive its claim to an allegedly usurious 1.5% monthly interest charge but still recover its 5% monthly late charge:

In the present case, GMAC originally sought 5% monthly late charge and 1.5% monthly interest rate. The two charges amount to 6.5% in monthly late charges and interest that may *arguably* exceed the 5% limit of 7-4-18. However, this Court need not decide whether the fees and interest charged here are subject to 7-4-18. **On inquiry by the Court at the evidentiary hearing, GMAC waived its claim to the 1.5% interest charge.**

*GMAC*, 218 F.Supp.2d at 1360 (emphasis added and in original). Neither Plaintiffs nor Sutlive refute the *GMAC* opinion.

**G. This Court Finds That Plaintiffs' and Sutlive's Failure to Prove CLBD's Usurious Intent Also Precludes Summary Judgment in Their Favor**

Plaintiffs' and Sutlive's summary judgment burden is to show that CLBD's Note is usurious as a matter of Georgia law. This Court finds that neither Plaintiffs nor Sutlive has met their burden for the foregoing reasons, but also because Plaintiffs and Sutlive have not shown that CLBD undoubtedly intended to violate the Usury Statute.

Plaintiffs' and Sutlive's usury arguments depend upon CLBD's usurious "intent" and the insinuation that CLBD's Note is automatically usurious because Georgia law "presumes an intent to commit usury when a note is facially usurious" if all other "usury elements" are met.<sup>36</sup> Sutlive Memo Opposing CLBD's Motion, p. 8. Plaintiffs' and Sutlive's argument all rely on the same set of cases which stem from the Georgia Supreme Court's opinion in *Bank of Lumpkin v. Farmers' State Bank*, 161 Ga. 801, 132 S.E 221, 225 (1926).<sup>37</sup>

*Bank of Lumpkin*, however, did not say that intent "will" be presumed if all other usury elements are met; rather, the Supreme Court noted that intent "may" be implied and went on to reverse the Court of Appeals for failing to submit the question of intent to the jury because there was "doubt" as to the lender's intentions:

The fourth element essential to constitute usury is an intentional charge of more for the use of money than the highest rate permitted by law. In any case of a loan, where there is **doubt** as to the intent, it is not a matter for the court to decide. All courts, so far as I am aware, and certainly this court, have decided that the circumstances which may bring in question the bona fides of a lender as to usury as well as the intent are to be submitted to the jury. . . in our opinion the pleas in this case, with the amendments offered, were amply sufficient to at least have put in doubt whether the stipulations as to the several charges. . .were usury, and were intended to procure for

<sup>36</sup> The four usury elements are: (1) A loan or forbearance of money, either express or implied; (2) upon an understanding that the principal shall or may be returned; (3) and that for such loan or forbearance a greater profit than is authorized by law shall be paid or is agreed to be paid; (4) that the contract was made **with an intent to violate the law**. *Bank of Lumpkin v. Farmers' State Bank*, 161 Ga. 801, 132 S.E 221, 225 (1926) (emphasis added).

<sup>37</sup> Notably, all three cases involve loans of less than \$250,000. *See* Section F(2), *supra*.

the lender a profit from the use of the money loaned, greater than the law permits. In the circumstances it was the duty of the court to have submitted to the jury. . . under proper instructions, the question whether the stipulations of the contract. . . were designed and intended merely as reasonable compensation for such services, or whether these charges were so unreasonable as to be nothing more than a cover for usury. The Court of Appeals therefore erred. . .

161 Ga. at 801, 132 S.E. at 227; *see also Knight v. First Fed. Saving & Loan Ass'n, Savannah*, 151 Ga. App. 447, 260 S.E.2d 511 (“Had the loan here been made at the maximum rate of interest, as it was in the *Lumpkin* case, then any amount charged over that rate could be attacked as usurious and only the question of the lender’s intent would become a jury question.”)

Here, the Court finds that the only evidence before the Court is that CLBD did not intend to practice usury, and therefore, even if Plaintiffs and Sutlive could get past CLBD’s statutory and procedural arguments (which this Court finds that they cannot), they would still not be entitled to summary judgment because without proof of intent there is no usury.

**1. CLBD’s Note Expressly Waives Payments Exceeding What is Permitted by the Statute**

CLBD’s Note includes a saving clause that shows it was not CLBD’s intent to charge Ascension LLC more than what the law allows:

**6. Late Charges; Interest on Overdue Installments; Collection Costs.** Borrower will pay to Lender a late charge equal to five percent (5%) of the amount of any payment which is default for more than five (5) days, **but in no case** less than fifty cents (\$.50) or **more than the maximum amount allowed by applicable law**

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**9. Usury.** In **no** event shall the amount of interest due or payable hereunder exceed the maximum rate of interest allowed by applicable law, and in the event any such payment is inadvertently paid by Borrower or inadvertently received by Lender, **then such excess sum shall be credited as a payment of principal. . .It is the express intent hereof that Borrower not pay, and Lender not receive, directly or indirectly, interest in excess of that which may be legally paid by Borrower under applicable law.**

Ex. 18, CLBD Note (emphasis added).

**2. The Eisenstein Opinion is a Nullity and the Georgia Court of Appeals Has Since Acknowledged a “Saving Clause”**

While Plaintiffs and Sutlive point to a Georgia Court of Appeals opinion, *Eisenstein v. Diprimio*, to suggest that these “saving clauses” do not preclude this Court from finding that CLBD’s Note is usurious, this opinion was withdrawn and has no precedential value. Pl. Supp. Discovery Responses) (acknowledging that the *Eisenstein* opinion was withdrawn). Further, *Eisenstein* conflicts with the Georgia Court of Appeal’s opinion in *Latimore v. Vatacs Group, Inc.* which acknowledged a similar “saving clause”:

[T]o constitute usury, it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. **The note contains a rider, signed by [Borrower], stating that in no event shall the Lender retain interest charges of more than 5% per month.** Under these circumstances, the trial court did not err by rejecting [Borrower’s heir’s] argument that the Lender’s temporary acceptance of lowered payment without waiving full payment transformed the loan into a usurious transaction.

317 Ga. App. 98, 729 S.E.2d 525 (2012) (emphasis added).<sup>38</sup>

The rationale behind these decisions is that a saving clause evidences an intent **not** to charge usurious interest; and without intent, there is no usury. *Id.* In line with these decisions, CLBD’s Note stated an “express intent” – at the time of its execution – that CLBD neither receive, nor Ascension LLC pay, any interest more than that which may be legally paid under the law. CLBD Note. In fact, the Note automatically converts any excess payments to a reduction of

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<sup>38</sup> *Eisenstein* also conflicts with other jurisdictions; other jurisdictions recognize that a savings clause in a note saves the note from any facial claim of usury, or at least is favored by the law and will be given effect if reasonably possible. *See, e.g., Saypo Cattle Co. v. RMF Deep Creek, LLC*, 901 F. Supp. 2d 1267, 1282 (D. Mont. 2012) (applying Montana law) (“[T]he usury savings clause in the Promissory Note saves the Note from any facial claim of usury. In Montana, usury savings clause have been validated.”); *Woodcrest Associates, LTC v. Commonwealth Mortgage Corp.*, 775 S.W.2d 434, 437-38 (Tex. Ct. App. 1989) (“Texas courts have repeatedly acknowledged the validity of usury savings clauses and enforced such clauses to defeat a violation of the usury laws.”).

principal. CLBD Note (“ . . . [I]n the event any such payment is inadvertently paid by Borrower or inadvertently received by Lender, then such excess sum shall be credited as a payment of principal”).

Given the Georgia courts’ overt failure and refusal to clarify this usury issue, one might argue that savings clauses are prudent, and should not be disfavored.

### **3. Kennedy Testified that it Was Not His Intent to Enter a Usurious Note**

Kennedy also testified that it was not his intent to commit usury or violate the law:

Q: Is there an interest rate, hypothetically, that you would feel personally uncomfortable charging?

A: It would depend on the loan and what the borrower was trying to do. All I tried to do was lend according to terms that the borrower suggested.

Q: So is the answer, no, there is essentially no interest rate that CLBD and Cliff Kennedy would consider to be immoral or just simply too high?

Ms. Lynn: Objection.

A: I would like to follow the law.

Q: But you don’t have any personal issue with charging 100 percent interest if that were legal?

Ms. Lynn: Objection.

A: I think if you think about my real estate deals, I think a lot of my clients approach me because they are making hundreds of thousands of dollars. Therefore, they’re picking that interest rate and paying what the market charges for what they’re asking for for their particular situation. I look at it the same way here. My borrower said many times after he had defaulted on the loan that, if I ended up having to pay a lot more money for this, it’s well worth it because this is how I got into my partnership with Mason Holland. So with the cost of doing business, I have no idea what Ascension Aircraft made or what Mason Holland made or anything else, and I don’t get into that. But a lot of times that fee that you earn or what you’re getting paid is based upon what you’re allowing that client to go do, and that’s why they’re willing to pay that. I think if –so that’s my answer.

Q: I appreciate your answer. It didn’t exactly answer my question, so I’ll just ask it this way: is it true that you have no personal qualm or issue with charging a 60% rate of interest?

Ms. Lynn: Objection.

A: I have no personal qualm with a business coming and borrowing money from me and suggesting a rate that they want to pay and then expecting them to fulfill that obligation. I did not solicit that loan.

Q: So based on your answer do you think it would be immoral to charge an individual consumer a 60% Default Rate of interest?

Ms. Lynn: Objection.

A: It depends on the situation. I would never go out and charge that. Someone may come to me, and say that's what I want to pay you, at which point, I would say okay.

Q: And its your sworn testimony here today that [Ascension] wanted to pay you \$50,000 for 30-day use of \$1,000,000?

A: Yes, sir.

Q: And that rate was his suggestion?

A: Yes, sir.

Kennedy Depo. 49:13-; *see also* Kennedy Aff., paras. 5, 12.

As Ascension LLC's emails substantiate this testimony, and there is no contradictory testimony, it must be accepted at face value. *See e.g.*, Exs. 122 and 124

#### **4. Ascension LLC Proposed the Terms of CLBD's Loan**

As mentioned above, irrefutable evidence also shows that Ascension LLC proposed the terms of CLBD's Note which suggests that – at the time of execution – it was Ascension LLC's intentions, not CLBD's, which controlled. *See, e.g.*, Exs. 122 and 124

#### **H. This Court Finds That it is Not Necessary for it to Rule on Whether CLBD is Entitled to Attorneys' Fees for Purposes of Lien Priority and Usury**

Finally, this Court finds that Sutlive's footnoted assertion that CLBD "did not perfect its claim for attorneys' fees because it did not provide a 10-day notice letter pursuant to O.C.G.A. §

13–1–11” is immaterial to the lien priority and usury issues at hand and need not be decided at this time. Sutlive Memo, p. 8, n. 3.

### CONCLUSION

The Court finds that (1) CLBD’s purchase money security interest in the Airplane is the superior interest because it was timely perfected within 20 days after it was executed and was the first Security Agreement filed and recorded with FAA; (2) the Usury Statute does not apply to CLBD’s loan to Ascension LLC or, alternatively, there is a conflict among Georgia Courts as to whether the Usury Statute applies to loans over \$250,000, and therefore, the Statute must be construed in CLBD’s favor; and (3) Sutlive and Plaintiffs are procedurally and substantively barred from raising usury as a defense because they are not privies of Ascension LLC; and even if they were, Ascension LLC’s default and proposal of CLBD’s Note’s terms bars its privies from raising usury; (4) even if the Usury Statute could be construed as applicable to the CLBD loan, CLBD did not charge more than 5% per month; (5) the only evidence is that CLBD did not intend to practice usury; and, with no proof of intent, there is no usury; and (6) the issue of whether CLBD is entitled to attorneys’ fees is immaterial to the lien priority and usury issues at hand; therefore, this Court,

**GRANTS** CLBD’s Motion for Partial Summary Judgment; and,

**DENIES** both Plaintiffs’ Motion for Partial Summary Judgment on Usury and Sutlive’s Motion for Summary Judgment as to CLBD.

The issue of priority as between Plaintiffs and Sutlive will be addressed by separate order.

Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Mikell Scarborough  
Master-In-Equity



Charleston Common Pleas

**Case Caption:** Mmt Llc , plaintiff, et al VS Ascension Air Management Inc ,  
defendant, et al  
**Case Number:** 2020CP1000825  
**Type:** Order/Summary Judgment

So Ordered

s/Mikell R. Scarborough 3062