Exhibit I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREATER CHAUTAUQUA FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated,

BOULEVARD FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated, and

GREATER NIAGARA FEDERAL CREDIT UNION, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SHERIFF JAMES B. QUATTRONE, in his official capacity as Sheriff of Chautauqua County, New York,

SHERIFF JOHN C. GARCIA, in his official capacity as Sheriff of Erie County, New York,

SHERIFF MICHAEL J. FILICETTI, in his official capacity as Sheriff of Niagara County, New York, and

LETITIA JAMES, in her official capacity as Attorney General of the State of New York,

Defendants.

Civil Action No. 1:22-cv-02753 (MKV)

EXPERT REPORT OF JAMES A. WILCOX

APRIL 16, 2024

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I. QUALIFICATIONS

1. I have been a Professor of the Graduate School at the Haas School of Business at the University of California, Berkeley, since 2021. From 1978 through 2021, I was a professor at Berkeley's Haas School of Business. At the Haas School of Business, I was Chair of the Finance Group from 1995 to 1997 and Chair of the Economic Analysis and Policy Group from 2012 to 2015. I hold a Ph.D. in Economics from Northwestern University and a B.A. in Economics and History from the State University of New York at Binghamton.

2. I served as a Senior Staff Economist for the President's Council of Economic Advisers from 1990 to 1991, as an Economist for the Division of Monetary Affairs at the Board of Governors of the Federal Reserve System from 1991 to 1992, and as the Chief Economist for the Office of the Comptroller of the Currency at the U.S. Department of the Treasury from 1999 to 2001.

3. I am a member of the Financial Economists Roundtable and a Fellow of the Wharton Financial Institutions Center. I was a founding Fellow of the Filene Research Institute and have served as the President of the International Banking, Economics, and Finance Association. Since 2012, I have been a member of the Board of Directors of the Finance Scholars Group.

4. I was a member of the Board of Directors of Cal State 9 Credit Union, which was a federally insured credit union with over 29,000 members and $435 million in assets[1] based in Concord, California, for most of the years from 1997 through 2007. As a Board member, I served in various capacities, including as Treasurer, Vice Chair, and Chair. I served on the Board of Directors for a tech start-up firm, VirtualBeam, Inc., from 2014 to 2016.

5. My research interests include Federal Reserve policies and interest rates, banks' lending, consumer attitudes and spending, credit unions, Islamic banking, and nonfinancial

[1] Cal State 9 Federal Credit Union. *Call Report Form 5300* (Dec. 31, 2006). <https://mapping.ncua.gov/CreditUnionDetails/64449> (accessed Feb. 29, 2024).

corporations' internal capital markets. I have published over 60 articles on a wide range of topics including monetary policy and interest rates, capital structure of credit unions, determinants of credit union failures, and banking. I have served on the editorial boards of the *Journal of Risk and Financial Management*, the *Journal of Financial Regulation and Compliance*, and the *Journal of African Business*.

6. My Curriculum Vitae, which includes a complete listing of my academic publications over the past ten years and my expert witness testimony over the past four years, is attached as **Appendix A**: *Curriculum Vitae*.

II. CASE BACKGROUND AND ASSIGNMENT

7. Plaintiffs Greater Chautauqua Federal Credit Union ("Greater Chautauqua"), Boulevard Federal Credit Union ("Boulevard"), and Greater Niagara Federal Credit Union ("Greater Niagara") (collectively, "Plaintiffs") are three federally chartered credit unions operating in the State of New York. In this action, Plaintiffs seek to challenge the constitutionality of a state statute that lowers the statutory rate of post-judgment interest on judgments arising from consumer debt from nine percent to two percent per annum (the "Amendment").[2] The Amendment provides for the two percent per annum interest rate to apply both prospectively, to judgments entered in state court after its effective date, and retroactively, to the date of the original entry of judgment for the unpaid portion of any consumer judgments still outstanding.[3] The Amendment provides that no amount of post-judgment interest previously collected is to be recalculated or repaid to the debtor.[4]

8. The Amendment was scheduled to take effect on April 30, 2022, and it did take effect on that date with respect to judgments entered thereafter. I understand that this Court preliminarily enjoined the retroactive application of the Amendment on a statewide basis, but subsequently narrowed the scope of the injunction so that it applies only to the three Plaintiffs. As a result, the two percent rate now applies to accrued post-judgment interest on judgments obtained prior to April 30, 2022 on consumer debt by all other creditors

[2] S.B. 5724A, 244th Leg. Sess., c. 831 (N.Y. 2021).
[3] *Id.*
[4] *Id.*

statewide. I understand that Plaintiffs are challenging the retroactive application of the Amendment for themselves and on behalf of a putative statewide class of creditors.[5]

9. In support of their claims, Plaintiffs allege that the retroactive application of the Amendment will substantially harm them financially[6] and interfere with their reasonable investment-backed expectations.[7]

10. Plaintiffs' counsel retained Mr. John Tonetti to "provide [his] opinion on the economic impact of the [Amendment] on the plaintiffs [and] other affected industry participants and consumers in New York State," particularly the "impact on their reasonable investment-backed expectations[.]"[8] Mr. Tonetti served his report on February 26, 2024 (the "Tonetti Report") and a supplemental report on March 8, 2024.[9]

11. Plaintiffs' counsel also retained Professor Todd J. Zywicki of the George Mason University Antonin Scalia School of Law to "opine on the [Amendment] and its impact on the named Plaintiffs and the consumer finance industry."[10] Professor Zywicki served his report on February 26, 2024 (the "Zywicki Report").

12. I have been retained as an expert witness by the Office of the New York State Attorney General on behalf of Attorney General Letitia James, named as a defendant in her official capacity. My assignment is to analyze and opine on whether the retroactive application of the Amendment would result in substantial financial harm to Plaintiffs and other creditors and would interfere with their reasonable investment-backed expectations. I was also assigned to respond to certain opinions of the Plaintiffs' designated experts, based on the facts, data, and my professional experience.

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[5] Amended Class Action Complaint. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Apr. 21, 2022) ("Amended Complaint") ¶ 11.
[6] *See id.* ¶ 6.
[7] *See id.* ¶ 79.
[8] Expert Report of John Tonetti. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Feb. 26, 2024) ¶ 6.
[9] Supplemental Expert Report of John Tonetti. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Mar. 8, 2024).
[10] Expert Report of Todd. J. Zywicki. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Feb. 26, 2024) ¶ 18.

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13. A complete list of the documents and data that I considered in forming my conclusions in this report is provided in **Appendix B**: *Materials Considered*.

14. The current hourly rate for my work is $775. My compensation is not affected by my findings or the outcome of this litigation. I supervised and directed a team at Vega Economics to assist me in this assignment. Their compensation is not affected by my findings or the outcome of this litigation.

15. I hold the opinions stated in this report with a reasonable degree of professional certainty. I reserve the right to amend or supplement my opinions and report, if appropriate, based on any additional discovery or in response to opinions or reports of other experts in this matter.

III. SUMMARY OF OPINIONS

16. My full opinions are set forth in the body of this report. My primary findings can be summarized as follows:

- Applying the two percent interest rate retroactively to the outstanding portions of consumer debt judgments will have a negligible economic impact on Plaintiffs. *See infra* Section V.
    - The process of judgment recovery can be long and its outcomes uncertain. In practice, as I will show in this report, the percentage of judgment principal and accrued post-judgment interest recovered by creditors is in general very small. *See infra* Sections IV.B and V.A.
    - In economic terms, the value of post-judgment interest that Plaintiffs would lose under the retroactive application of the Amendment is far less than they have claimed and is insignificant compared to their total assets and to their net interest income. *See infra* Section V.B.

- The retroactive application of the two percent post-judgment interest rate could not have materially interfered with reasonable investment-backed expectations held by Plaintiffs. *See infra* Section VI.

  - The testimony of Plaintiffs' corporate executives demonstrates that Plaintiffs did not rely on the prospect of recovering nine percent per annum for purposes of business planning, budgeting, or marketing their services to the public. *See infra* Section VI.A.

  - As a matter of industry practice, post-judgment interest rates are a negligible component of lenders' decisions when making consumer loans. Thus, the application of the Amendment to unpaid judgments that were entered before April 30, 2022 would have had little or no effect on consumer lending decisions, including the interest rates charged on loans to consumers. *See infra* Section VI.B.

  - Plaintiffs do not buy or sell consumer debt judgments. Thus, Plaintiffs' allegations and testimony concerning the Amendment's impact on buyers and sellers of consumer debt, and their experts' extensive discussions of that topic, are not directly pertinent to Plaintiffs. *See infra* Section VI.C.

- The conclusions in the Tonetti Report and the Zywicki Report that the economic impacts of the Amendment on the Plaintiffs are significant are unsupported and are in substantial part contrary to Plaintiffs' financial statements and their executives' testimony. *See infra* Section VII.

  - The Zywicki Report provided neither quantitative analysis nor a specific methodology for assessing the economic impact of the Amendment on the Plaintiffs. *See infra* Section VII.A.

  - Both Mr. Tonetti and Professor Zywicki have failed to show that the Amendment would significantly impact the economic value of uncollected post-judgment interest or materially interfere with reasonable investment-backed expectations held by Plaintiffs. *See infra* Sections VII.B-C.

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- Mr. Tonetti and Professor Zywicki ignore that the various holders of consumer debt in the State of New York differ greatly in material aspects. *See infra* Section VII.D.

IV. CONSUMER CREDIT, JUDGMENT INTEREST, AND THE PROCESS OF JUDGMENT RECOVERY

17. Consumer credit refers to loans made by commercial banks, credit unions, retailers, and other service providers to consumers for the purposes of purchasing goods and services, such as cellphones, vehicles, or homes, without having to pay for them in cash at the time of purchase. Consumer credit in the United States totaled over $4.2 trillion as of January 2020,[11] of which nearly half a trillion dollars were owned by credit unions.[12]

18. Within this broad consumer credit industry lie many different types of parties, including but not limited to credit unions, commercial banks, retailers such as department or furniture stores, auto lenders, and third-party debt buyers. Although all may be holders of consumer debt, each interacts differently with consumers and the consumer credit market.[13]

19. When borrowers fall behind on their loans, creditors often try to remedy the delinquency by contacting borrowers and encouraging them to make payments. Longer periods of loan delinquency may lead creditors to agree to loan modifications and/or other loan workout programs with borrowers. Depositories like credit unions and banks have procedures that they would follow and use their judgment to determine what amounts of delinquent loans they decide to "charge off" when their collection attempts prove unsuccessful.[14] When loans are charged off, credit unions reduce their loan portfolios by

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[11] "Total Consumer Credit Owned and Securitized [TOTALSL]." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/TOTALSL> (accessed Feb. 22, 2024).

[12] "Total Consumer Credit Owned by Credit Unions [TOTALTCU]." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/TOTALTCU> (accessed Feb. 22, 2024).

[13] For instance, credit unions are non-profit lenders while banks are for-profit lenders, and debt buyers do not offer lending services at all. *See* Goldberg, Matthew and René Bennett. "Banks vs. Credit Unions: How to Decide Where to Keep Your Money." *Bankrate* (Feb. 13, 2024). <https://www.bankrate.com/banking/banks-vs-credit-unions> (accessed Mar. 27, 2024); Kagan, Julia. "Debt Buyer: Who They Are and How They Work." *Investopedia* (Mar. 19, 2024). <https://www.investopedia.com/terms/d/debt-buyer.asp> (accessed Mar. 27, 2024).

[14] *See* Heim, Jennifer. 30(b)(6) Deposition (Jan. 11, 2024) ("Heim Dep.") 140:23-141:5, 159:21-162:23; Haaksma, Kelly Jean. 30(b)(6) Deposition (Jan. 23, 2024) ("Haaksma Dep.") 56:22-58:8; Zasucha, Janelle. 30(b)(6) Deposition (Dec. 12, 2023) ("Zasucha Dep.") 69:14-20, 200:22-203:13.

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the amounts charged off. Because they do not expect that all the loans in their portfolios will be repaid in full, credit unions each maintain a type of reserve account (the ACLLL account). In compliance with guidance issued by the National Credit Union Administration ("NCUA"), the federal agency that regulates and oversees credit unions,[15] credit unions simultaneously debit their ACLLL accounts by the amounts that they charge off.[16] This allowance account is an account funded by reserves that are meant to cover loan and lease losses.[17]

20. Charging off a delinquent loan, in whole or in part, in a credit union's financial statements "is simply an accounting procedure"[18] and need not imply that the credit union ceases its attempts to collect the balance of the loan. Credit unions may still pursue recovery of charged-off loans, either internally by their own collection departments, through third-party debt collection agencies, or through collection attorneys.

21. Creditors can also resort to legal action as a recovery measure, suing delinquent borrowers in state courts and obtaining monetary judgments against them. However, the process of attempting to recover judgment amounts is often lengthy and its outcomes uncertain. Even after a creditor obtains a court judgment that instructs a debtor to pay the outstanding principal and accruing interest, a debtor may pay the judgment amount over an extended period of time. Further, the judgment amount may never be paid in full, or never even paid at all.[19]

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[15] "Loan Charge-off Guidance." *National Credit Union Administration* (Jan. 2023). <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/loan-charge-guidance> (accessed Mar. 14, 2024).
[16] "Allowance for Credit Losses and Current Expected Credit Loss Methodology." *National Credit Union Administration*. <https://publishedguides.ncua.gov/examiner/content/examinersguide/AllowanceCreditLoss/ACL-CECL.htm> (accessed Mar. 15, 2024) ("When a loan balance is charged off, the ACLLL account is debited and the loans account is credited.").
[17] *See* "Loan Charge-off Guidance." *National Credit Union Administration* (Jan. 2023). <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/loan-charge-guidance> (accessed Mar. 14, 2024); "Allowance for Credit Losses and Current Expected Credit Loss Methodology." *National Credit Union Administration*. <https://publishedguides.ncua.gov/examiner/content/examinersguide/AllowanceCreditLoss/ACL-CECL.htm> (accessed Mar. 15, 2024).
[18] "Consumer Assistance Center." *MyCreditUnion.gov*. <https://mycreditunion.gov/knowledgebase/my-loan-was-charged-so-why-credit-union-still-requiring-payment> (accessed Mar. 15, 2024).
[19] *See, e.g.*, the plethora of closed judgment records in Plaintiffs' case lists that have not been fully paid. "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal*

22. In recognition of the fact that the plaintiff or creditor will not have the use of the judgment money until it is paid by the defendant, states have enacted statutes that allow for post-judgment interest to accrue on such awards until the plaintiff is fully repaid.[20] States set post-judgment interest rates by statute. Post-judgment interest rates vary according to each state's statutes, with states adopting different fixed interest rates or variable interest rates that are tied to a market benchmark.[21] State legislatures may change the fixed or variable statutory rate from time to time "to keep in line with current economic conditions,"[22] among other factors.

23. From 1981 to 2022, New York statute set the post-judgment interest rate for outstanding judgments at an annual rate of nine percent.[23] The Amendment lowered that rate, as applied to judgments against consumers, to two percent, effective April 30, 2022.[24]

A. A Nine Percent Post-Judgment Interest Rate Was Comparable to the Average Federal Funds Rate Before About 1990, but Has Remained Above It Ever Since.

24. In the State of New York, post-judgment interest rates were occasionally changed, usually after these interest rates diverged from other interest rates in the economy. The New York statutory post-judgment interest rate was fixed at six percent until 1969, when

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Credit Union (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).

[20] *See* Miller, Brian P. "Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction." *BYU Law Review* (1994): 601-632 at 601.

[21] *See id.* at 618-631; Abely, Christine. "Adjusting Pre- and Post-Judgment Interest Rates for Consumer Debt Collection Actions." *Tennessee Law Review* 88.1 (2020): 219-276 at 267-276.

[22] Miller, Brian P. "Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction." *BYU Law Review* (1994): 601-632 at 601.

[23] Patel, Karuna. "Dismantling Unjust Interest Rates for Debt Collection Judgments." *The Regulatory Review* (Mar. 30, 2022). <https://www.theregreview.org/2022/03/30/patel-dismantling-unjust-interest-rates-for-debt-collection-judgments> (accessed Jan. 16, 2024).

[24] Ballard CFS Group. "New York Reduces Judgment Rate on Consumer Debts to 2%." *Consumer Finance Monitor* (Jan. 6, 2022). <https://www.consumerfinancemonitor.com/2022/01/06/new-york-reduces-judgment-rate-on-consumer-debts-to-2> (accessed Jan. 16, 2024).

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it was raised to 7.5 percent.[25] In 1972, the fixed rate was reduced to six percent.[26] These changes in post-judgment interest rates generally tracked (though with a lag) the movements in market interest rates. For example, the federal funds rate nearly doubled from 4.08 percent in 1965 to 8.20 percent in 1969, before declining to 4.43 percent in 1972.[27]

25. In 1981, the New York State Legislature raised the fixed post-judgment interest rate to nine percent.[28] By then, the federal funds rate had been rising for a few years, averaging 8.2 percent from 1977 through 1979, 13.4 percent in 1980, and 16.4 percent in 1981.[29]

26. In addition, in the early 1980s, the U.S. economy suffered a severe economic downturn, with high inflation and high unemployment.[30] Back-to-back recessions starting in 1980 and in 1981 raised the national unemployment rate to an average of 8.5 percent during 1980 through 1983.[31] The rate of personal bankruptcies was also higher. The number of personal bankruptcy filings was 1.3 per 1,000 people for the period of 1980-1983, compared with 0.9 per 1,000 people over the four years before 1980.[32] Thus, the personal bankruptcy filing rate was more than 40 percent higher in that latter period. The higher unemployment rates and bankruptcy rates would likely signal to creditors that they faced

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[25] "CPLR 5004: Amendment of the Legal Rate of Interest Applied Prospectively." *St. John's Law Review* 48.1 (1973): 184-185 at 184, n. 127 ("Prior to 1968, the CPLR provided for interest upon judgment, verdict or accrual of an action at the legal rate of six percent, as stated in General Obligations Law § 5-501. In 1968 that statute was amended to confer upon the Banking Board the power to prescribe the legal rate of interest at from five percent to seven and one-half percent. The Board subsequently raised the rate to the maximum permitted by statute.") (noting the date of the Banking Board rate increase at 1969).

[26] *Id.* at 184 ("Confusion as to what, if any, effect a change by the Board was meant to have on litigation-related interest was laid to rest by the amendment to CPLR 5004, effective September 1, 1972, providing a fixed rate of six percent, independent of the provisions of § 5-501.").

[27] "Federal Funds Effective Rate." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/FEDFUNDS#> (accessed Jan. 19, 2024).

[28] S.B. 5724A, 244th Leg. Sess., c. 831 (N.Y. 2021) (noting the bill was amending "Section 5004 of the civil practice law and rules, as amended by chapter 258 of the laws of 1981" wherein the post-judgment interest rate was "nine per centum").

[29] "Federal Funds Effective Rate." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/FEDFUNDS#> (accessed Jan. 19, 2024).

[30] *See* Sablik, Tim. "Recession of 1981-82." *Federal Reserve History* (Nov. 22, 2013). <https://www.federalreservehistory.org/essays/recession-of-1981-82> (accessed Jan. 19, 2024).

[31] "U.S. Bureau of Labor Statistics, Unemployment Rate." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/UNRATE> (accessed Jan. 29, 2024).

[32] Data for Garrett, Thomas A. "The Rise in Personal Bankruptcies: The Eighth Federal Reserve District and Beyond." *Federal Reserve Bank of St. Louis Review* 89.1 (2007), at "Figure 2 - U.S. Personal Bankruptcies Per 1,000 Persons: 1900 to 2005." < https://research.stlouisfed.org/publications/review/2007/01/01/the-rise-in-personal-bankruptcies-the-eighth-federal-reserve-district-and-beyond/> (accessed Mar. 15, 2024).

increased risks of not being repaid wholly or on time. If so, one would expect creditors to raise the interest rates they charged relative to risk-free rates, such as those on U.S. Treasury bills, notes, and bonds. Conversely, one would expect that creditors would charge and receive lower interest rates when conditions signaled that risks were lower.

27. It was against the backdrop of these significantly higher interest rates and unemployment rates that New York raised its statutory post-judgment interest rate from six to nine percent in 1981. At a prior time when interest rates had risen relative to the post-judgment interest rate, "the court took cognizance of the current rise in interest rates and concluded that the lower [post-judgment interest] rate of 6 percent might encourage a debtor to delay payment as long as possible. Consequently, the higher rate was adopted."[33] **Figure 1**: *Federal Funds Rate Versus New York's Post-Judgment Interest Rate, 1963-2020* shows that New York's statutory post-judgment interest rate and the federal funds rate averaged similar amounts in the three decades before about 1990.

28. In general, interest rates fell from the late 1980s until the mid-2010s. After the 2008-2009 financial crisis, interest rates remained at very low levels for more than a decade.[34] Despite interest rates being much lower on average over the four decades from the early 1980s to the early 2020s, New York's statutory post-judgment interest rate remained at its prior, record-high level of nine percent until 2022. The similar averages of New York's statutory post-judgment interest rate and the federal funds rate before about 1990 contrast markedly with the three decades after about 1990, when their averages were very different. Figure 1 shows that, in the three decades since about 1990, New York's statutory nine percent fixed post-judgment interest rate remained markedly above the federal funds rate.

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[33] "CPLR 5004: Interest on Judgments Fixed at 6%." *St. John's Law Review* 47.1 (1972): 174-175 at 175; "CPLR 5004: Conflict Over Legal Rate of Interest Continues." *St. John's Law Review* 45.1 (1970): 163-165 at 164.

[34] Although interest rates have risen recently, they remain well below nine percent and the Federal Reserve's recent economic predictions projected rate cuts over the next three years. *See* "Summary of Economic Projections." *Federal Reserve* (Dec. 13, 2023). <https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20231213.pdf> (accessed Jan. 23, 2024) at 4.

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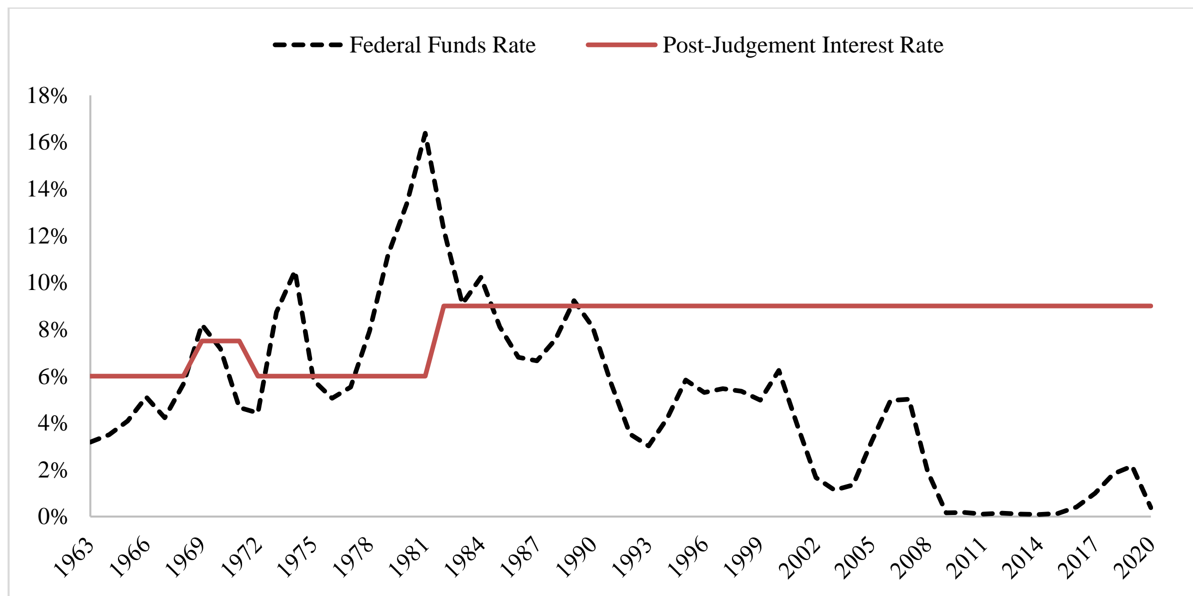
Figure 1: Federal Funds Rate Versus New York's Post-Judgment Interest Rate, 1963-2020[35]



29. **Table 1**: *Interest Rate by Loan Type for Plaintiffs, December 2022* lists interest rates charged by Plaintiffs on their loans to members as of December 2022. It shows that outside of unsecured consumer loans, Plaintiffs' interest rates were generally below nine percent. In other words, the opportunity cost of Plaintiffs' funds being tied up in outstanding consumer judgments is typically much lower than nine percent. Thus, any post-judgment interest paid to Plaintiffs at the rate of nine percent compensated the credit unions above and beyond the opportunity cost of being denied the use of their funds, at a direct cost to the consumer debtor who paid that interest.

[35] "Federal Funds Effective Rate." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/FEDFUNDS#> (accessed Jan. 19, 2024).

Table 1: Interest Rate by Loan Type for Plaintiffs, December 2022[36]

Loan Type	Greater Niagara	Boulevard	Greater Chautauqua
Unsecured Credit Card Loans	8.90	10.00	N/A
All Other Unsecured Loans/Lines of Credit	12.04	12.73	7.95
New Vehicle Loans	3.26	4.00	4.15
Used Vehicle Loans	4.92	5.00	4.15
First Lien Mortgage	4.30	6.25	5.60

B. The Process of Judgment Collection Can Be Lengthy and Its Outcomes Highly Uncertain.

30. Creditors extend credit to those consumers that creditors deem very likely not to default. Consumer debt can become delinquent for various reasons such as unexpected job loss or medical expenses, divorce, or death. Even when consumers who have defaulted expend their best efforts, it can be difficult or even impossible for them to pay off a court judgment completely.[37] Sometimes, for example, continuously accruing post-judgment interest raises the remaining judgment amount (of principal and accrued interest) faster than a wage garnishment can pay it off.[38]

[36] Greater Niagara Federal Credit Union. *Call Report Form 5300* (Dec. 31, 2022). <https://mapping.ncua.gov/CreditUnionDetails/9537> (accessed Mar. 15, 2024) at 6; Greater Chautauqua Federal Credit Union. *Call Report Form 5300* (Dec. 31, 2022). <https://mapping.ncua.gov/CreditUnionDetails/3759> (accessed Mar. 15, 2024) at 6; Boulevard Federal Credit Union. *Call Report Form 5300* (Dec. 31, 2022). <https://mapping.ncua.gov/CreditUnionDetails/11640> (accessed Mar. 15, 2024) at 6.

[37] Wilner, Claudia and Nasoan Sheftel-Gomes. "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers." *The Urban Justice Center* (May 2010) at 1 ("Virtually all (95%) of people with default judgments entered against them by debt buyers resided in low-or moderate-income neighborhoods[.]"); Patel, Karuna. "Dismantling Unjust Interest Rates for Debt Collection Judgments." *The Regulatory Review* (Mar. 30, 2022). <https://www.theregreview.org/2022/03/30/patel-dismantling-unjust-interest-rates-for-debt-collection-judgments> (accessed Jan. 16, 2024) ("Most people who are sued for consumer debt and have judgments against them have low to no income and little to no wealth. Most consumers who are sued in these contexts expected to continue making payments on their debts but, for one reason or another, were not able to do so. They are not holding on to large sums of money and avoiding payment of judgments. The argument that a low judgment interest rate will encourage investment in the market in lieu of paying off a judgment is not rational when applied to people who often struggle to pay for basic necessities."); Ondersma, Chrystin. "Small Debts, Big Burdens." *Minnesota Law Review* 103 (2019): 2211-2253 at 2215-16 (noting that "[a]lthough these amounts are relatively small, for individuals living below the poverty line, small amounts of debt can cause severe hardship," and finding that there were twice as many debt collection lawsuits in black communities than in white communities, controlling for income, and further noting that black and Latinx individuals were more likely to be poor, have significantly less household wealth, be targeted for risky financial products such as payday loans, and lack available savings for emergencies).

[38] *See, e.g.*, Mullen, Faith. "Another Day Older and Deeper in Debt: Mitigating the Deleterious Effect of Wage Garnishments on Appalachia's Low-Wage Workers." *West Virginia Law Review* 120.3 (2018): 973-1000 at 974-76; Berman, Jillian. "'I Was Barely Making Ends Meet Already and Worrying About Garnishment from your Check—

31. When a consumer loan becomes delinquent, there are steps creditors, such as Plaintiffs, can pursue to cure or modify the loan, or otherwise resolve the matter with a borrower.[39] Typically, creditors do not resort to legal action until most or all other avenues prove to be unsuccessful in reaching an agreement with a borrower. For example, Kelly J. Haaksma, the CEO of Greater Chautauqua, testified that when members have trouble making loan payments, the credit union "will typically work with the members and accept reduced payments or allow members to skip payments."[40] By the time the credit union resorts to civil litigation, it means that it "has exhausted its efforts to collect[.]"[41] Similarly, in an internal document produced by Greater Niagara that details the collection process, legal action is listed as the last step.[42]

32. Plaintiffs also testified that they refer delinquent loans to a collection attorney for recovery of payment.[43] The collection attorney's office has produced documents showing charged-off loans that Plaintiffs referred for enforcement and legal action. The data shown includes the identity of the debtor, the status of legal proceedings, the total amount owed, the principal amount outstanding, and the amounts, if any, recovered.[44]

33. A judgment alone does not guarantee payment. Creditors often take further actions in their attempts to collect their judgment amounts. The process of attempting to collect

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It's Scary.' How Post-Judgment Interest Became the New Debt Collection Battleground." *MarketWatch* (Dec. 18, 2021). <https://www.marketwatch.com/story/i-was-barely-making-ends-meet-already-and-worrying-about-garnishment-from-your-checkits-scary-how-post-judgment-interest-became-the-new-debt-collection-battleground-11639575950> (accessed Jan. 17, 2024).

[39] *See, e.g.*, Declaration of Kelly J. Haaksma. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Doc. 12-1) (Apr. 4, 2022) ("Haaksma Declaration") ¶¶ 18-22; Declaration of Janelle Zasucha. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Doc. 12-2) (Apr. 4, 2022) ("Zasucha Declaration") ¶¶ 18-22; Declaration of Jennifer Heim. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Doc. 12-3) (Apr. 4, 2022) ("Heim Declaration") ¶¶ 18-21.

[40] Haaksma Declaration ¶ 18.

[41] *Id.* ¶ 23.

[42] Zasucha, Janelle. Deposition Exhibit 10 (June 4, 2019) (FCU0001305 at FCU0001308) ("In general, legal action against a member will only occur after all other avenues of collection have been explored, and the potential for counterclaims has been examined.").

[43] Haaksma Declaration ¶ 22; Zasucha Declaration ¶ 22; Heim Declaration ¶ 21.

[44] I understand that Plaintiffs have produced two sets of data, one as of March 2022 and another one as of August 2023; I rely on the August 2023 data in my analyses. "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal Credit Union* (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).

payments after judgments is often lengthy: It can span years or even decades. My analysis of the lists of outstanding judgments for the Plaintiffs shows that their judgments that have not been fully repaid are, on average, more than six years old (75 months).[45] More than 15 percent of their judgments have been outstanding for over 10 years, and some for nearly two decades.[46] Many judgments never get paid off. For example, in 2022, Greater Niagara received only $1,661.98 in interest from fully paid-off judgments,[47] despite having been owed "at least $360,000 in post-judgment interest" as of February 2022.[48]

34. When consumers pay some or all of their judgment amounts, they can incur other financial or non-financial costs. For example, consumers may forego medical care or reduce expenses on other important matters so that they can make post-judgment payments, or they may resort to even-higher-interest, emergency loans.[49] Some debtors, lacking the assets or credit to pay a judgment and not having sufficient assets to be seized or incomes to be garnisheed by creditors, may simply refuse to pay judgments in what is termed "informal bankruptcy."[50] In such cases, judgments against these debtors do not lead to payments to creditors; these debtors are essentially judgment proof.[51] That is, the chance of collecting judgments from these debtors is practically zero.

[45] "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal Credit Union* (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).
[46] "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal Credit Union* (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).
[47] *See* Zasucha Dep. 216:6-217:22.
[48] Amended Complaint ¶ 18.
[49] *See* Berman, Jillian. "'I Was Barely Making Ends Meet Already and Worrying About Garnishment from your Check—It's Scary.' How Post-Judgment Interest Became the New Debt Collection Battleground." *MarketWatch* (Dec. 18, 2021). <https://www.marketwatch.com/story/i-was-barely-making-ends-meet-already-and-worrying-about-garnishment-from-your-checkits-scary-how-post-judgment-interest-became-the-new-debt-collection-battleground-11639575950> (accessed Jan. 17, 2024) (describing how a debtor died before her debt was resolved because she was afraid to seek medical treatment that would add to her debt); Kiel, Paul and Annie Waldman. "The Color of Debt: How Collection Suits Squeeze Black Neighborhoods." *ProPublica* (Oct. 8, 2015). <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> (accessed Jan. 16, 2024).
[50] *See* Hynes, Richard M. "Broke but not Bankrupt: Consumer Debt Collection in State Courts." *Florida Law Review* 60.1 (2008): 1-62 at 14-18.
[51] *See id.*

35. For these reasons, the success, amounts, and timing of collection of consumer debt judgments is highly uncertain. At the time judgments are entered and afterwards, it is typically far from certain how much and when creditors can collect on those judgments (inclusive of the principal amount and the accrued post-judgment interest). Research has shown that judgment collection typically has a low success rate.[52] A study from the Federal Reserve found that in a sample of consumer credit reports from 1999, only 11.3 percent of civil judgments owed to a banking institution, large retailer, or finance company had been paid or dismissed.[53] Recent research, which was not restricted to post-judgment debts, reported that the "average recovery rate on charged-off unsecured credit card loans [was] 15.88 [percent]" for sampled credit unions from 2000 to 2014.[54]

C. Loan Delinquency and Charge-Off Rates Have Generally Been Very Low for Credit Unions.

36. Credit unions are nonprofit financial institutions that are "owned and operated entirely by their members."[55] Credit unions fund their investments through deposits by their members and essentially pay interest on their members' deposits via "share dividends."[56] This cooperative organization structure means that the members of a credit union are its owners. Thus, unlike banks and other corporations, which typically have not members but investors, credit unions do not have non-member investors who would own some or all of the credit union.

37. While there are some similarities between credit unions and commercial banks—for example, both take deposits and make loans—there are important differences. Credit

[52] *See, e.g.*, "Study of Third-Party Debt Collection Operations." *Consumer Financial Protection Bureau* (July 2016). <https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf> (accessed Jan. 16, 2024) at 35 ("Note, however, that in a significant share of cases collectors are ultimately unable to recover on judgments.").
[53] Avery, Robert B., et al. "An Overview of Consumer Data and Credit Reporting." *Federal Reserve Bulletin* 89 (2003): 47-73 at 67, Table 10. *See also* Hynes, Richard M. "Broke but not Bankrupt: Consumer Debt Collection in State Courts." *Florida Law Review* 60.1 (2008): 1-62 at 26 ("The Federal Reserve results are largely consistent with the analysis in Part I: a large number of civil judgments, a low rate of satisfaction, low judgment values relative to the likely costs of filing for bankruptcy, and a significant share of the judgments in favor of non-financial creditors.").
[54] Fedaseyeu, Viktar. "Debt Collection Agencies and the Supply of Consumer Credit." *Journal of Financial Economics* 138.1 (2020): 193-221 at Table 2.
[55] Getter, Darryl E. "The Credit Union System: Developments in Lending and Prudential Risk Management." *Congressional Research Service* (Nov. 29, 2021) at 1.
[56] *Id*.

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unions have their own regulator and their own deposit insurance program. Compared with commercial banks, credit unions are more limited in the assets that they can hold, their investment authorities being limited by statute to loans, government securities, deposits in other financial institutions, and certain other limited investments.[57] And, unlike commercial banks, credit unions are restricted in the amounts of business loans that they can hold.[58]

38. Credit unions also face additional regulatory constraints when making loans. For example, credit unions can make loans only to their members, other credit unions, and credit union organizations, while such restrictions do not apply to commercial banks.[59] Federally insured credit union loans face a statutory interest rate cap and are generally limited to maturities of 15 years or less (except for residential mortgages).[60] In addition, credit unions have restrictions on how many business loans they can make. In contrast, commercial banks, as their name implies, are much more heavily involved in business lending.

39. Loan delinquency rates for credit unions have historically been very low. The NCUA estimated that between the third quarter of 2014 and the third quarter of 2019, the loan delinquency rate for its credit unions never exceeded one percent.[61] By comparison, the delinquency rate on consumer loans for commercial banks was generally more than twice as high (up to 2.36 percent) for the same period, though still low overall.[62] Given the particularly low rate of delinquency on credit unions' loans, their loan charge-offs, provisions for loan and leases losses, and loan losses have generally been very low as well. From 2014 to 2022, the credit unions' federal regulator, the NCUA, reported that,

[57] *Id*. at 3.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] "Financial Trends in Federally Insured Credit Unions." *National Credit Union Administration* (Dec. 2023). <https://ncua.gov/analysis/credit-union-corporate-call-report-data/financial-trends-federally-insured-credit-unions> (accessed Mar. 15, 2024) at 6.
[62] "Delinquency Rate on Consumer Loans, All Commercial Banks [DRCLACBS]." *FRED, Federal Reserve Bank of St. Louis*. <https://fred.stlouisfed.org/series/DRCLACBS> (accessed Mar. 18, 2024).

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nationally, net charge-offs were generally below 0.6 percent of credit unions' assets[63] and provisions for loan and lease losses never exceeded 0.5 percent.[64]

V. APPLYING THE LOWER POST-JUDGMENT INTEREST RATE RETROACTIVELY HAS NEGLIGIBLE ECONOMIC IMPACT ON PLAINTIFFS' OUTSTANDING JUDGMENTS.

40. In economic terms, loans represent a stream of uncertain future cash flows to creditors. That is, it is not known with certainty whether the debtor may repay the loan, when payments may take place, or how much will be paid. For some loans, creditors may collect the full principal amount plus all promised interest over the duration of the loan. Some loans may become delinquent. Among delinquent loans, creditors may decide to litigate some in hopes of securing a judgment against the debtor, but success in court is not guaranteed. Even after securing a successful judgment, the process of collecting judgment, as I explain earlier in this report,[65] is itself another lengthy process with no promise of success.

41. Therefore, when post-judgment interest begins to accrue on consumer debt judgments, it is at a stage of a loan's life cycle that is far removed from the initial loan origination. Reaching the post-judgment stage requires travelling a path consisting of many different intermediate steps (delinquency, loan workout attempts, default, litigation, judgment collection), each highly uncertain. These uncertainties must therefore be considered when discussing the economic impact of a change in the rate of post-judgment interest.

42. Thus, when considering the economic impact of the Amendment on an outstanding judgment, one must consider not only the judgment amount including the remaining principal and the remaining accrued interest (i.e., the nominal amount), but also the uncertainty with respect to collecting amounts in the future.

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[63] "Financial Trends in Federally Insured Credit Unions." *National Credit Union Administration* (Dec. 2023). <https://ncua.gov/analysis/credit-union-corporate-call-report-data/financial-trends-federally-insured-credit-unions> (accessed Mar. 15, 2024) at 6.
[64] *Id.* at 3.
[65] *See supra* Section IV.B.

A. The Economic Value of a Judgment Is Less Than Its Nominal Amount.

43. Once a creditor has obtained a judgment against a debtor, it does not know when or how much, if any, the debtor will pay toward the judgment and any accrued post-judgment interest. The timing and payment amounts, if any, from debtors after judgments are highly uncertain. That is, these possible future cash flows to creditors may or not ever occur.

44. Indeed, creditors are very likely to assess that any payments and their timing are far more uncertain after judgments than they were assessed to be when the consumer loans were initially made. By the time judgments are entered, debtors have already demonstrated their inability and/or unwillingness to pay those debts. In many cases through no fault of their own, life events may have led to delinquencies and ultimately to judgments against the debtors. Events like unemployment, divorce, and medical costs often have large, negative, unpredicted effects on consumers' abilities to repay loans. For example, even if a creditor manages to garnish wages after securing a judgment against a debtor, that stream of payments is likely contingent on the debtor maintaining employment, which in part depends on macroeconomic conditions that neither the debtor nor the creditor control.[66]

45. It is well understood in economics and finance that the economic value of a stream of uncertain future payments is less than its nominal amount.[67] First, that payment stream is less valuable than an immediate payment, or simply put, "a dollar today is worth more than a dollar tomorrow."[68] This is the effect that is informally referred to as the time value of money. Second, in the case of payments here, there is uncertainty both about the time and the amounts, if any, that the debtor might pay to the creditor. As demonstrated by Plaintiffs' data, debtors sometimes declare bankruptcy, lack attachable assets, die

[66] One study using data from Missouri courts found that, of the sampled cases where the plaintiff won a judgment, garnishment was only able to recover on average 25 percent of the judgment amount. *See* Cheng, Ing-Haw, et al. "Do Consumers Strike Bad Deals with Debt Collectors? Evidence from Out-of-Court Settlements." *UNC/Duke Corporate Finance Conference* (2019): 1-38 at 21.
[67] *See* Pindyck, Robert S. and Daniel L. Rubinfeld. *Microeconomics, 8th ed*. Upper Saddle River, New Jersey: Pearson (2013) at 159-161.
[68] Brealey, Richard A., Stewart C. Myers, and Franklin Allen. *Principles of Corporate Finance, 13th ed*. New York, NY: McGraw-Hill Education (2020) at 20.

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without assets, or cease all contact with the creditor, each of which would eliminate (or severely reduce) the possibility of any more payments.[69] As another fundamental principle in finance holds, "a safe dollar is worth more than a risky dollar."[70]

46. These uncertainties about the timing and amount that will be repaid have the effect of reducing the economic value to a creditor of this uncertain payment stream to an amount lower than the nominal amount of the judgment, including the principal amount and the accrued post-judgment interest.

47. These uncertainties manifest themselves in the prices at which creditors are willing to sell post-judgment debts. Typically, the price of such post-judgment debts in the open market is a few cents per dollar of nominal amount. According to a report published by the Federal Trade Commission ("FTC") analyzing nearly 90 million consumer accounts, debt sellers (i.e., creditors) on average received 4 cents per dollar of debt nominal amount from third-party debt buyers.[71] Moreover, older debts sold for a significantly lower price than newer debts. For example, buyers paid, and thus creditors received (minus any transactions costs that they might bear) virtually zero for debts older than 15 years.[72] Such low prices indicate that creditors expect to net relatively little from their judgments. Otherwise, the market price would not be discounted so sharply.

48. The low prices at which creditors are willing to sell post-judgment debts are what we would expect based on the time value of money and the low, probability-adjusted payments and uncertain timing that both creditors and purchasers of these loans perceive. In part due to the uncertainties of getting payments from debtors and due to the collectors' costs of getting those payments, the FTC reported that debt buyers expect to

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[69] *See* the descriptions in the "Posture" and "Action" sections of Plaintiffs' case lists. "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal Credit Union* (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).

[70] Brealey, Richard A., Stewart C. Myers, and Franklin Allen. *Principles of Corporate Finance, 13th ed.* New York, NY: McGraw-Hill Education (2020) at 25.

[71] "The Structure and Practices of the Debt Buying Industry." *Federal Trade Commission* (Jan. 2013). <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (accessed Jan. 16, 2024) at ii, 23.

[72] *Id.* at ii.

only "recover 2.5 times what they paid to acquire accounts over a period of five years."[73] That is, given a market price of four cents per dollar of debt nominal amount, purchasers on average expected to recover roughly 10 percent (10 cents per dollar) of the nominal amount of debts purchased within five years of their purchasing such debts.

B. A Hypothetical Recalculation of Plaintiffs' Outstanding Post-Judgment Interest Shows Economic Impact that Is Insignificant Compared to Their Assets or Net Interest Income.

49. Because judgment collection is highly uncertain, when evaluating the impact of the Amendment on outstanding judgments, including the principal amount and the accrued post-judgment interest, one must consider the realistic prospects of post-judgment amounts being collected. In this section, I present an analysis showing that the economic impact of the retroactive application of the Amendment on Plaintiffs' outstanding judgments would in fact be insignificant in magnitude and negligible compared to Plaintiffs' assets or income.[74]

50. Based on my review of the Amendment and the record in this case, my understanding is that any retroactive recalculation of post-judgment interest under the Amendment requires no recalculation of the principal amount.[75] Nor does it require recalculation of any interest that has already been paid. Therefore, any change to the nominal amount of a judgment comes solely from changes to the nominal amount of the accrued and unpaid post-judgment interest, which in turn results solely from applying a two percent rate of interest instead of nine percent.[76]

51. To calculate the economic impact of the retroactive application of the two percent interest rate under the Amendment on any outstanding judgment involves multiple steps.

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[73] *Id.* at 23, n. 99.

[74] I understand that no amended executions have been implemented to outstanding judgments for the Plaintiffs due to a preliminary injunction granted by the court.

[75] Plaintiffs have stated that "[t]he Amendment does not require creditors to refund interest that has been collected prior to the effective date." Amended Complaint ¶ 48. *See also* S.B. 5724A, 244th Leg. Sess., c. 831 (N.Y. 2021) § 5004(c); "CPLR 5004 Calculation Materials" (NYAG-G-00000016) at 2 ("In terms of computation, the distribution of any payments between interest, fees, and principal (if any) will remain the same. Thus, this recalculation will not reduce the principal. Instead, the judgment creditor will apply a 2% rate to principal balances as calculated under the prior law over the life of the judgment.").

[76] "CPLR 5004 Calculation Materials" (NYAG-G-00000016) at 2 ("The recalculation may change the outstanding balance—only because it will change the amount of interest.").

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52. The first step is to calculate the nominal amount of the accrued post-judgment interest under a nine percent interest rate and the expected recovery amount. The expected recovery amount indicates the amount creditors can realistically expect to recover from the outstanding post-judgment interest, which is typically less, if not much less, than the nominal amount.

53. The second step is to calculate the nominal amount of the accrued post-judgment interest under a two percent interest rate and the expected recovery amount.

54. The final step is to take the difference between the two expected recovery amounts, which reflects the economic impact of the retroactive application of the two percent interest rate under the Amendment.

55. In the State of New York, simple interest is applied when calculating post-judgment interest.[77] With a post-judgment interest rate of nine percent, the amount of accrued post-judgment interest can be calculated as the product of three components: (i) the principal amount; (ii) the daily interest rate (9 percent / 365); and (3) the number of days accruing interest.[78] As an example, consider a judgment with a principal of $10,000 that has accrued interest for exactly 365 days. Under a nine percent interest rate, the accrued post-judgment interest amount would be $10,000 * (9 percent / 365) * 365 = $900. I note that in Plaintiffs' complaint, this simple nominal accrual is the only method used for quantifying interest.[79]

56. There are two methods to calculate the nominal amount of accrued post-judgment interest under a two percent interest rate, which yield identical results. The first method is to replace the nine percent interest rate with a two percent interest rate in calculating the daily interest rate. The second method is to scale the accrued post-judgment interest under a nine percent interest rate to reflect the ratio between the two interest rates.

[77] *See, e.g.*, *Long Playing Sessions, Inc. v. Deluxe Labs., Inc*., 129 A.D.2d 539, 540 (N.Y. App. Div. 1987) (holding that trial court erred by awarding compound, rather than simple, 9% post-judgment interest) (citing CPLR §§ 5001, 5004).
[78] "Entering Civil Judgments." *New York City Civil Court*. <https://www.nycourts.gov/courts/nyc/civil/judgments_atty.shtml> (accessed Apr. 1, 2024).
[79] *See, e.g.*, Amended Complaint ¶¶ 49, 53, 78.

57. To consider the same example using the first method, the accrued post-judgment interest under a two percent interest rate for the same principal amount of $10,000 is $200 (i.e., $10,000 * (2 percent / 365) * 365). This method requires information about the principal amount. Using the second method, the recalculated accrued post-judgment interest under a two percent interest rate is also $200 (i.e., $900 * (2 percent / 9 percent)). This method does not require information about the principal amount, as long as the accrued post-judgment interest under a nine percent rate is known. Mathematically, both methods yield identical results.

58. I applied an expected recovery rate of 7.5 percent in my analysis. This is based on an FTC report, noted above, establishing that the industry-average recovery ratio is ten percent[80] and the fact that Plaintiffs pay an additional 25 percent of amounts collected as fees to their collection attorney (i.e., 10% * (1 – 25%) = 7.5%).[81] Plaintiffs' representatives testified that they do not project or track the amounts of post-judgment interest they actually recover.[82]

59. Using the same example and a recovery rate of 7.5 percent, the creditor that, under prior law, calculated that it was entitled to recover $900 in post-judgment interest had a realistic prospect of recovering, on average, $67.50 ($900 * 7.5% = $67.50).

60. Applying the Amendment's two percent post-judgment interest rate to the same example would result in an expected recovery of $15. That figure may be calculated by either applying the 7.5% recovery rate to the $200 nominal amount (i.e., $200 * 7.5% = $15) or by taking 2/9 of the expected recovered amount calculated at the nine percent rate ((2/9) * $67.50 = $15).

61. The difference between the two expected recovery amounts at nine percent and two percent interest rates reflects the economic impact of the retroactive application of the two percent interest rate under the Amendment. In the example above, the economic

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[80] "The Structure and Practices of the Debt Buying Industry." *Federal Trade Commission* (Jan. 2013). <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (accessed Jan. 16, 2024) at 23, n. 99.
[81] Haaksma Declaration ¶ 25; Zasucha Declaration ¶ 25; Heim Declaration ¶ 24.
[82] *See* Haaksma Dep. 75:15-77:15; Zasucha Dep. 225:8-13; Heim Dep. 91:19-93:21, 126:2-10.

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impact is $52.50 (i.e., $67.50 – $15 = $52.50). Note that the economic impact in this example ($52.50) is far less than the reduction in the nominal amount of accrued post-judgment interest under the two interest rate schemes (i.e., $900 - $200 = $700), the latter being the only method discussed by Plaintiffs in their complaint.[83]

62. The calculation for each Plaintiff proceeds as follows.[84] First, using the Plaintiff's data (as of August 2023),[85] I calculate the nominal amount of total accrued post-judgment interest on pending judgments as the difference between the total judgment payoff amount and the total judgment principal amount.[86] I then calculate the expected recovery amount by applying a recovery rate of 7.5 percent.

63. Second, I recalculate the nominal amount of post-judgment interest under a two percent interest rate. To do so, I multiply the nominal amount of accrued post-judgment interest by the ratio of 2/9. To calculate the expected recovery amount, I again apply a recovery rate of 7.5 percent.

64. Lastly, I calculate the economic impact by taking the difference of the two expected recovery amounts.

65. The results of my calculation are summarized in **Table 2**: *Economic Impact of the Amendment on Plaintiffs' Outstanding Post-Judgment Interest*. I find that retroactively applying the Amendment would have the effect of reducing the economic value of the Plaintiffs' outstanding post-judgment interest by $30,164 for Greater Chautauqua, $29,079 for Boulevard, and $19,122 for Greater Niagara.

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[83] *See, e.g.*, Amended Complaint ¶¶ 49, 53, 78.

[84] This calculation is for illustrative purposes only and does not constitute my affirmative opinion on how post-judgment interest should be recalculated under the Amendment.

[85] "FCU0000011_CONFIDENTIAL_boulevard.caselist." *Boulevard Federal Credit Union* (Aug. 24, 2023) (FCU0000011); "FCU0000013_CONFIDENTIAL_greaterchautauqua.caselist." *Greater Chautauqua Federal Credit Union* (Aug. 24, 2023) (FCU0000013); "FCU0000015_CONFIDENTIAL_greaterniagara.caselist." *Greater Niagara Federal Credit Union* (Aug. 24, 2023) (FCU0000015).

[86] This method of calculating post-judgment interest is consistent with deposition testimony of the CEO of Greater Niagara. *See* Zasucha Dep. 137:18-140:13 ("Q: Instead of -- okay. Would we be able to calculate post-judgment interest by taking the total of the 'Judgment Payoff' amounts in Column I and subtracting from it the total of the 'Judgment Principal Balance' in Column N? A: Yes. But it'd still be an estimate just based on the payments. Q: But at least it would be an estimate based on the right columns? A: Yes.").

Table 2: Economic Impact of the Amendment on Plaintiffs' Outstanding Post-Judgment Interest

	Nominal Amount		Expected Recovery		Economic Impact
	9% interest	2% interest	9% interest	2% interest	
Boulevard	$498,498	$110,777	$37,387	$8,308	$29,079
Greater Niagara	$327,798	$72,844	$24,585	$5,463	$19,122
Greater Chautauqua	$517,102	$114,912	$38,783	$8,618	$30,164
Total	**$1,343,398**	**$298,533**	**$100,755**	**$22,390**	**$78,365**

66. My analysis shows that the economic impact of the retroactive application of the Amendment would indeed be negligible. The analysis refutes Plaintiffs' claim that the Amendment will "destroy [] millions of dollars in the vested property rights of judgment creditors."[87] Plaintiffs' claim relies on the nominal amount of interest accrued at nine percent versus two percent but fails to take into account the realistic probability of actually recovering post-judgment interest from delinquent consumer debtors, nor does it consider the 25 percent retained by Plaintiffs' collection attorney as his fee.

67. The economic impact of the retroactive application of the Amendment also pales in comparison to the Plaintiffs' total assets or even net interest income. As shown in **Table 3**: *Economic Impact Compared to Total Assets and Net Interest Income*, the economic impact of the retroactive application of the Amendment for the Plaintiffs would amount to 0.04 percent of their total assets in 2022.

68. The economic impact is also negligible even when compared against the Plaintiffs' net interest income from all loans in a single year (2022), representing only 1.41 percent of the net interest income for that year. Note that my analysis of economic impact includes *all* of the outstanding judgments that have been entered since the early 2000s, thus encompassing nearly two decades of judgments held by the Plaintiffs. Even so, the analysis shows that the economic impact on two decades worth of uncollected judgments is extremely small compared to a single year of net interest income for the Plaintiffs, indicating that the economic impact is indeed negligible from a business perspective.

[87] Amended Complaint ¶ 56.

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Table 3: Economic Impact Compared to Total Assets and Net Interest Income

Credit Union	Economic Impact	Total Assets (2022)	Net Interest Income (2022)	Ratio of Economic Impact to Total Assets	Ratio of Economic Impact to Net Interest Income
Boulevard	$29,079	$44,766,608	$1,109,824	0.06%	2.62%
Greater Niagara	$19,122	$73,253,428	$2,096,808	0.03%	0.91%
Greater Chautauqua	$30,164	$91,154,450	$2,347,247	0.03%	1.29%
Total	**$78,365**	**$209,174,486**	**$5,553,879**	**0.04%**	**1.41%**

VI. The Retroactive Application of the Amendment Could Not Have Materially Interfered with Reasonable Investment-Backed Expectations Held by the Plaintiffs, Their Members, or Creditors Generally.

69. Plaintiffs claim that they have been expecting consumer judgments to accrue post-judgment interest at nine percent since 1981 and, based on these expectations, they have "made decisions about loan criteria and acceptable credit risks" and that "the Amendment will interfere with [their] investment-backed expectations."[88] I find these claims to be speculative, contradictory to testimony of Plaintiffs' corporate executives, and unsupported by the business model of credit unions in general and the facts of this case in particular.

A. The Testimony of Plaintiffs' Executives Contradicts Plaintiffs' Claims.

70. Plaintiffs claim that they have made investment decisions based on the continuation of the nine percent post-judgment interest rate. These claims, however, run contrary to the deposition testimony of their corporate representatives that I have reviewed. Janelle Zasucha, CEO of Greater Niagara, stated in her deposition that Greater Niagara did not base any financial projection or estimates on the continuation of the nine percent post-judgment interest rate.[89] Jennifer Heim, manager of Boulevard, similarly stated that the credit union did not base financial projections on the continuation of the nine percent

[88] Amended Complaint ¶ 79.
[89] Zasucha Dep. 151:5-8.

post-judgment interest.[90] Kelly J. Haaksma, CEO of Greater Chautauqua, also testified that the credit union does not specifically base any financial projections on the continuation of the nine percent post-judgment interest rate.[91]

71. In evaluating the Amendment's alleged effects on Plaintiffs' investment-backed expectations, it is important to recognize that credit unions do not have investors in the same way that many commercial banks and other business entities do.[92] Credit unions are organized as cooperatives owned entirely by their members. Investments by credit unions are made on behalf of their members as investors. If the reliance on the nine percent post-judgment interest is material to a credit union's investment decisions, one would reasonably expect that information to be disclosed to credit unions' member-investors. Plaintiffs' executives, however, testified to no such communication.

72. Similarly, Ms. Heim also stated that Boulevard did not advertise the nine percent rate to its members[96] and that a discussion of post-judgment interest took place in Board meetings only after the lawsuit was filed.[97] The same is true for Greater Chautauqua, according to the testimony of Ms. Haaksma.[98]

73. Credit unions regularly disclose information such as fees, terms and conditions of loans, and interest rates to members and the public at large, in part for compliance with regulations set by federal regulators who may deem such information important for consumers. I am not aware of federal regulations that require the disclosure of post-

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[90] Heim Dep. 136:14-18.
[91] Haaksma Dep. 152:10-153:6.
[92] *See* Zasucha Dep. 44:18-45:2; Heim Dep. 136:20-137:3; Haaksma Dep. 27:18-20.
[93] Zasucha Dep. 154:4-8.
[94] *Id.* 153:9-10.
[95] *Id.* 156:7-11.
[96] Heim Dep. 146:1-25.
[97] *Id.* 147:8-21.
[98] Haaksma Dep. 186:3-187:22.

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judgement interest rates by credit unions. [redacted]

B. Post-Judgment Interest Is Not a Material Factor in Credit Unions' Lending Decisions.

74. Credit unions consider many factors when making loans to their members. While they consider a member's credit history and the type, length, and interest rate of the loan, there is no evidence that credit unions generally regard the post-judgment interest rate as an important factor in their lending. Neither the literature on post-judgment interest rates, nor Plaintiffs' internal documents, nor the testimony of Plaintiffs' executives points to post-judgment interest rates as being an important factor in consumer lending decisions.[100]

75. As noted above, creditors receive on average a small percentage of the judgment amount, including both principal and post-judgment interest. That is, the amount of accrued interest is irrelevant to the creditor if the amount is ultimately uncollectable. Therefore, the significance of post-judgment interest is greatly diminished by the low probability of judgment recovery.

76. Post-judgment interest only applies to delinquent loans that have been successfully litigated, but delinquent loans only account for a very small fraction of the outstanding consumer credit on financial institutions' balance sheets. One Federal Reserve study showed that only 5.4 percent of all consumer credit amounts are in a degree of delinquency at any given time, and many of these delinquencies are cured, often within the first two months.[101] In New York State specifically, "3.0 [percent] of outstanding debt

[99] Zasucha Dep. 155:6-26, 156:1-11; Heim Dep. 145:16-146:6, 146:13-147:7; Haaksma Dep. 154:10-155:8, 155:9-156:4.

[100] Srinivasan, Aruna and B. Frank King. "Credit Union Issues." *Economic Review, Federal Reserve Bank of Atlanta* 83.3 (1998): 32-41 at 35 ("Credit unions based their lending decisions largely on the reputation of loan applicants in the relevant affinity group.").

[101] Avery, Robert B., et al. "An Overview of Consumer Data and Credit Reporting." *Federal Reserve Bulletin* 89 (2003): 47-73 at Table 7, 62 ("The proportion of accounts experiencing current payment problems is much lower than the proportion of accounts ever having a payment problem[.] … This difference arises because many accounts experiencing payment problems "cure[.]" … Account curing is particularly prevalent among accounts with minor delinquencies[.]").

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was in some state of delinquency" as of September 2023.[102] An even smaller 2.02 percent of the total outstanding consumer debt balance in New York was 90+ days delinquent as of the third quarter of 2023.[103] For credit unions, the delinquency rate historically has been even lower.[104] Of these longer delinquencies, many are not litigated, and even if successfully litigated, the judgment balance may not be recoverable.[105] Thus, it would not be economically reasonable for financial institutions to treat post-judgment interest as more than a negligible consideration in consumer lending decisions.

77. The perceived risks of consumer loans affect loan interest rates offered, collateral requirements, and other credit features, like credit limits.[106] Neither the FDIC nor Plaintiffs' own underwriting policies mention the post-judgment interest rate as a factor when deciding what consumer loan interest rates to offer, whether to make loans, or how

[102] "Quarterly Report on Household Debt and Credit – Data." *Federal Reserve Bank of New York* (Nov. 2023). <https://www.newyorkfed.org/microeconomics/hhdc> (accessed Jan 17, 2024).
[103] *Id.* at sheet "Page 35 Data."
[104] *See supra* ¶ 39.
[105] *See* Hynes, Richard M. "Broke but not Bankrupt: Consumer Debt Collection in State Courts." *Florida Law Review* 60.1 (2008): 1-62 at 18 ("The above analysis suggests that many defaulting debtors who choose informal bankruptcy are effectively judgment proof. Why then do so many creditors bother to sue? In many cases they do not. For example, Virginia's Bureau of Financial Institutions reports that in 2005 payday lenders charged off 76,546 returned checks as uncollectible but sued only 9,039 borrowers.") (citation omitted); "Study of Third-Party Debt Collection Operations." *Consumer Financial Protection Bureau* (July 2016). <https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf> (accessed Jan. 16, 2024) at 35 ("Note, however, that in a significant share of cases collectors are ultimately unable to recover on judgments.").
[106] *See, e.g.*, "Credit Risk: What It Is and How It Works." *Capital One* (July 27, 2023). <https://www.capitalone.com/learn-grow/money-management/credit-risk> (accessed Jan. 23, 2024) (describing factors that determine credit risk, which do not include the post-judgment interest rate, and stating that "[t]he lower risk a borrower is determined to be, the lower the interest rate and more favorable the terms they might be offered on a loan"); Zasucha Dep. 239:9-15 (testifying the Greater Niagara Federal Credit Union uses only credit score to determine the interest rates at which consumer loans are offered).

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much credit to offer.[107] The CEO of Greater Niagara in fact testified that the only determinant of interest rates at her institution was credit score.[108]

78. While Plaintiffs allege that, as a consequence of the Amendment, they "must make lending requirements stricter or increase interest rates to compensate for the loss of accrued interest,"[109] their executives testified that the Amendment has not thus far affected lending and could point to no policy changes or analyses demonstrating it would do so in the future.[110] Nor did they demonstrate or claim that post-judgment interest has ever been a material factor in their consumer lending decisions. To the extent that a lower post-judgment interest rate makes it easier for a consumer to pay down a judgment completely, the retroactive application of the Amendment, as well as its application henceforth, could even make it *easier* for these consumers to borrow at more favorable terms in the future because of the favorable impact on their credit score from eliminating their debt.[111]

79. Taken together, the considerations discussed above make it unlikely that Plaintiffs will materially change their loan-making decisions if the new statutory two percent post-judgment interest rate is applied to their outstanding judgments against consumers. Nor is

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[107] *See* "7115: Credit Underwriting Standards." *Greater Niagara Federal Credit Union* (June 11, 2020) (FCU0001309) (Greater Niagara Federal Credit Union's underwriting standards, which establish factors determining creditworthiness and do not mention the post-judgment interest rate); "Lending Policies & Procedure Manual." *Greater Chautauqua Federal Credit Union* (May 2023) (FCU0000593); "Boulevard Federal CU Risk-Based Lending Policy." *Boulevard Federal Credit Union* (FCU0000702); "VantageScore 4.0 Fact Sheet." *VantageScore* (Aug. 2023). <https://www.vantagescore.com/lenders/why-vantagescore/our-models> (accessed Jan. 23, 2024) (a model for credit scoring, not mentioning the post-judgment interest rate); "VII. Underwriting and Loan Approval Process." *Federal Deposit Insurance Corporation* (Mar. 2007). <https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch7.pdf> (accessed Jan. 23, 2024) (a guide for underwriting considerations in credit card lending, also not mentioning post-judgment interest rates).

[108] *See* Zasucha Dep. 239:9-15.

[109] Amended Complaint ¶ 93.

[110] *See* Heim Dep. 180:24-181:19; Haaksma Dep. 150: 8-151:4. Janelle Zasucha, CEO of Greater Niagara Federal Credit Union, testified that her institution has not reduced any services to members as a result of the enactment of the Amendment on a go-forward basis. She also testified that, while the Amendment "pushed us to revisit the way our rates were," interest rates increased due to other factors, including the rising federal interest rate, the adoption of a new credit tier system that adjusted borrowers' risk scores downwards, and policy changes that required the credit union to set aside more money for loan loss allowance. Ms. Zasucha testified that the Amendment had not at the time of the deposition affected interest rates, and she could not identify any reports or analyses showing that the Amendment would impact the credit union's interest rates in the future. *See* Zasucha Dep. 256:21-264:6.

[111] "7115: Credit Underwriting Standards." *Greater Niagara Federal Credit Union* (June 11, 2020) (FCU0001309) (Greater Niagara Federal Credit Union's underwriting standards, which state that credit may be denied if there are "[u]nsatisfied judgments or collections" on the consumer's credit report).

it likely that Plaintiffs will sustain a non-negligible financial loss if the post-judgment interest rate is retroactively reset to two percent in the way prescribed by the Amendment.

C. Applying a Lower Post-Judgment Interest Rate Retroactively Does Not Harm Creditors to the Extent that They Have Sold Judgments.

80. It is common for financial institutions to sell delinquent debt to third parties, particularly when such debt has been charged off from their balance sheets.[112] Doing so provides the financial institution with additional cash. That cash can then be used to make loans and other investments that will produce interest income, instead of "a delayed and uncertain amount" from recovery efforts.[113]

81. [REDACTED] As such, the whole question of the Amendment's alleged impact on debt sellers and purchasers has no practical bearing on Plaintiffs' claims that the Amendment will harm them financially or undermine their reasonable investment-backed expectations.[115]

82. When a credit union or other financial institution has sold a debt on which it is owed a judgment, it is no longer the owner of that debt. Thus, it is not directly harmed or benefitted thereafter. The selling financial institution thus would not be harmed or benefitted directly by any change in the post-judgment interest rate that would occur after the debt is sold.

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[112] "The Structure and Practices of the Debt Buying Industry." *Federal Trade Commission* (Jan. 2013). <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (accessed Jan. 16, 2024) at 13.
[113] *Id.* at 12-13.
[114] Heim Dep. 198:18-199:2; Haaksma Dep. 168:8-15; Zasucha Dep. 275:10-15.
[115] Despite this, debt sellers and purchasers are discussed in Plaintiffs' experts' reports. *See, e.g.*, Tonetti Report ¶¶ 15, 39, 57, 67, 71; Zywicki Report ¶¶ 36, 63-74.

VII. PLAINTIFFS' EXPERTS FAILED TO SHOW THAT THE ECONOMIC IMPACT OF THE AMENDMENT IS SIGNIFICANT.

A. Summary of the Tonetti Report and of the Zywicki Report

83. Plaintiffs have served reports by Mr. John Tonetti and Professor Todd Zywicki. Upon review of these reports, my conclusions and opinions expressed in Sections III through VI of this report remain unchanged. In addition, for reasons I will explain in greater detail in this section, I find that conclusions set forth in the Tonetti Report and the Zywicki Report are unsupported, highly speculative, and unreliable.

84. Mr. Tonetti states that he was retained to "provide [his] opinion on the economic impact of the [Amendment] on the plaintiffs [and] other affected industry participants and consumers in New York State," particularly to the "impact on their reasonable 'investment-backed expectations'[.]"[116] Other than some calculations of payments for a hypothetical loan under different interest rates,[117] Mr. Tonetti does not present any methodology or quantitative analysis of the Amendment's purported impact on Plaintiffs' finances or their reasonable investment-backed expectations.[118]

85. Mr. Tonetti opines that the retroactive reduction in post-judgment interest not only "results in an immediate devaluation of the loan portfolios" held by creditors, investors, and buyers of debt,[119] but also makes "future lending activities [] likely to be constricted and at a higher cost to consumers than prior to the Act."[120] He also states that current holders of judgments will "experience a loss in income as expected recovery cashflows and portfolio values are reduced" due to the Amendment, and that this constitutes "a material diminution of their reasonable investment-backed expectations."[121]

86. Professor Zywicki states that he was retained to "opine on the [Amendment] and its impact on the named Plaintiffs and the consumer finance industry."[122] He opines that the

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[116] Tonetti Report ¶ 6.
[117] *Id.* ¶¶ 53-56.
[118] Mr. Tonetti's analysis does not support his conclusion of material economic impact. *See infra* Section VII.B.
[119] Tonetti Report ¶¶ 16, 17.
[120] *Id.* ¶ 18.
[121] *Id.*
[122] Zywicki Report ¶ 18.

"difference in post-judgment interest that can be collected" under the Amendment "is, or will be, material to the consumer finance industry[.]"[123] But Professor Zywicki's report neither presents a methodology for assessing whether the Amendment's impact on that industry is "material" or negligible, nor does his report include any quantitative analysis of whether the impact that he alleges is "material" or negligible.

87. Citing several articles, including one of his own, Professor Zywicki also opines that the Amendment will reduce the expected rate of recovery for delinquent and non-delinquent consumer loans such that (i) creditors "will adjust loan terms to offset that reduction;"[124] (ii) the "consideration that would be paid for them" will be lower;[125] and (iii) it will "cause changes in debt collection practices."[126] He also concludes that these impacts will be common to Plaintiffs and other creditors in the State of New York that hold consumer debt.[127] As described below, however, these assertions are unsupported.

88. Professor Zywicki has not presented quantitative analysis of the economic impact of the Amendment, in particular the economic impact of the retroactive application of the two percent post-judgment interest rate. Nor has Professor Zywicki presented any practical methods for performing a quantitative analysis of the economic impact.

89. Mr. Tonetti fails to support his conclusion that the economic impact of the Amendment is significant for the Plaintiffs.

90. Therefore, the conclusions from the Tonetti Report and the Zywicki Report that the Amendment will materially impact the Plaintiffs' finances and interfere with their reasonable investment-backed expectations are conclusory and unsupported by their analysis, facts pertinent to this case, the relevant literature, or relevant industry experience. This renders their opinions unreliable.

[123] *Id.* ¶ 25.
[124] *Id.* Section V.B.
[125] *Id.* Section V.C.
[126] *Id.* Section V.D.
[127] *Id.* Section VI.

B. Plaintiffs' Experts Overstate the Amendment's Economic Impact on Creditors.

91. Mr. Tonetti and Professor Zywicki both generally assert that had Plaintiffs known that post-judgment interest would be two percent instead of nine percent, they would have materially changed their business decisions, such as to whom they would have made loans to and at what interest rates. These claims are baseless. Both Mr. Tonetti and Professor Zywicki assert—but do not show—that the Amendment would have a significant and material economic impact.

92. Neither expert defines or sets any particular threshold for what constitutes a significant or material economic impact. Professor Zywicki argues that "a material and/or unanticipated reduction in expected recovery (including, a higher than anticipated risk of loss) will cause businesses in the consumer finance industry to change their business decisions in one or more aspects."[128] There can be an important distinction between the terms material and unanticipated. Something may be the former, or the latter, or both, or neither. Professor Zywicki acknowledges that business would change decisions only when the reduction in expected recovery is material. He simply asserts that the impact of the retroactive application of the Amendment would be both material and unanticipated. He never analyzes, however, whether the Amendment's impact on expected recovery amounts would be material or negligible.

93. Mr. Tonetti similarly claims without support that "post-judgment interest is a significant portion of the profitability equation[.]"[129] At face value, Mr. Tonetti's statement is about the magnitude of post-judgment interest in relation to other components of the "profitability equation." Yet he presents no analysis comparing post-judgment interest with costs or revenues, which determine profits, for the Plaintiffs or any other member of the proposed class, nor does he cite any studies that analyze the impacts of changing post-judgment interest rates. In the absence of any such analysis or of any basis in prior

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[128] *Id.* ¶ 37.
[129] Tonetti Report ¶ 46.

studies, his conclusion that post-judgment interest is “significant” to businesses is unsupported.[130]

94. Mr. Tonetti does discuss an example of how changing the post-judgment interest rate from nine percent to two percent might affect the flow of expected payments from a hypothetical portfolio of loans in judgment with a total principal balance of $1,000,000. As I do, Mr. Tonetti recognizes that payments from debtors are uncertain and that average recovery rates are low. Based on past experience, he applies an expected recovery rate of seven percent[131]—my use of a 7.5 percent net recovery rate for the Plaintiffs in my analysis is therefore more conservative by comparison. Mr. Tonetti concludes that changing the post-judgment interest rate from nine percent to two percent would generate a decrease of $31,000 in the value of the stream of future payments.[132]

95. Mr. Tonetti’s analysis does not support his claim that “post-judgment interest is a significant portion of the profitability equation.”[133] In fact, his analysis demonstrates the opposite. In his example, despite the fact that creditors are owed $1,000,000 in nominal amount, once the probability of recovery (which he assumes to be seven percent) is factored in, changing the interest rate from nine percent to two percent reduces the cumulative expected payments over ten years by $31,000, or a mere 3.1 percent of the nominal amount.[134] Mr. Tonetti’s analysis thus comports with my conclusion that the impact of retroactively lowering the post-judgment interest rate from nine percent to two percent is negligible.

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[130] One fact supporting the notion that post-judgment interest is not a meaningful stream of revenue for Plaintiffs and credit unions in general is the fact that William Mellin, the president of the New York Credit Union Association, was opposed to Plaintiffs bringing this action and thought it would not be in the best interests of the credit union industry. *See* Haaksma Dep. 174:3-176:14; Haaksma, Kelly Jean. Deposition Exhibit 14 (Apr. 7, 2022) (FCU0000185).

[131] Tonetti Report ¶ 53.

[132] *Id.* ¶ 55.

[133] *Id.* ¶ 49.

[134] I further note that Mr. Tonetti ignores the time value of money in his analysis. Specifically, he calculates the value of the hypothetical portfolio by summing annual payments, effectively treating a dollar received today as being equally valuable as a dollar received ten years from now. Allowing for the time value of money, that discounting would reduce the present value of his hypothesized stream of payments relative to the undiscounted sum that he presents.

96. The experts' lack of meaningful analysis as to how the retroactive application of the Amendment would quantitatively impact the expected recovery of outstanding judgments, as I discussed above in Section V.A, renders their analyses hypothetical and unrealistic and undermines their conclusion that the amount that would be affected by the Amendment is "material."[135]

C. Mr. Tonetti's and Professor Zywicki's Claims About the Plaintiffs' Investment-Backed Expectations Fail to Recognize that the Impact of the Amendment Would be Negligible.

97. As described above, Mr. Tonetti and Professor Zywicki argue, without demonstrating, that the impact of the Amendment would be material. However, both fail to recognize that such impact, as I have shown in Section V, is negligible. Specifically, I showed that the economic impact of the retroactive reduction in the post-judgment interest rate to two percent represented an amount of less than three percent of net interest income in a single year for all three Plaintiffs.[136]

98. As I note above, Plaintiffs do not track the amount of post-judgment interest they receive (or expect to receive), strongly suggesting that it is not a material consideration in their business planning and financial modeling.[137] In fact, Mr. Tonetti acknowledges that "post-judgment interest received by a creditor may not be explicitly called out in creditor's financial statements or forecasts."[138] Professor Zywicki similarly notes that "post-judgment accrued interest will not always have been listed as a specific line item in a budget for financial projection[.]"[139] Despite this, Mr. Tonetti and Professor Zywicki state, without support, that post-judgment interest is a significant, or "material" source of income.[140] Contrary to Mr. Tonetti and Professor Zywicki's assertions, it is far more plausible that the reason that Plaintiffs do not quantify or track it is that post-judgment interest is negligible relative to the sizes of their balance sheets and income statements and is not a significant consideration in their finances and business plans.

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[135] *See, e.g.*, Tonetti Report ¶ 18; Zywicki Report ¶ 25.
[136] *See supra* Table 3.
[137] *See* Haaksma Dep. 75:15-77:15; Zasucha Dep. 225:8-13; Heim Dep. 91:19-93:21, 126:2-10.
[138] Tonetti Report ¶ 49.
[139] Zywicki Report ¶ 92.
[140] *See, e.g.*, Tonetti Report ¶ 49; Zywicki Report ¶ 25.

D. Creditors in the State of New York in General, and Plaintiffs in Particular, Did Not Restrict Credit Supply After the Amendment Took Effect.

99. Mr. Tonetti and Professor Zywicki assert that consumer creditors would have raised interest rates or restricted the supply of credit if they had known in advance that the Amendment would reduce the post-judgment interest rate.[141] These assertions are generally unsupported. Moreover, I find that they are inconsistent with facts in this case and the actual data.

100. Plaintiffs' own documents and the testimony of their executives show that the determinants of the loan interest rate offered to a given consumer did not include the post-judgment interest rate.[142] Those rates were primarily based on credit scores with some additional borrower risk factors considered—not the post-judgment interest rate.[143] The Plaintiffs' executives further stated that they had not raised interest rates or restricted any services offered to their members as a result of the Amendment.[144]

101. I examined the call reports that Plaintiffs filed with their regulator,[145] the NCUA, to determine if, and in which direction, loans and their interest rates changed after the Amendment took effect in early 2022. Call reports are the required financial statements that credit unions file quarterly with the NCUA. **Table 4**: *Loans and Interest Rates for Plaintiffs Before and After Amendment* summarizes the number and dollar values of Plaintiffs' outstanding loans for the five quarters before April 2022—when the Amendment took effect—and the five quarters after it took effect. Table 4 also shows the average interest rates that Plaintiffs charged on new loans before and after the

[141] *See, e.g.*, Tonetti Report ¶¶ 49, 63-68; Zywicki Report ¶¶ 43-60.
[142] *See* Zasucha Dep. 239:9-15; "7115: Credit Underwriting Standards." *Greater Niagara Federal Credit Union* (June 11, 2020) (FCU0001309) (Greater Niagara Federal Credit Union's underwriting standards, which establish factors determining creditworthiness and do not mention the post-judgment interest rate); "Lending Policies & Procedure Manual." *Greater Chautauqua Federal Credit Union* (May 2023) (FCU0000593); "Boulevard Federal CU Risk-Based Lending Policy." *Boulevard Federal Credit Union* (FCU0000702).
[143] *See* Zasucha Dep. 239:9-15; "7115: Credit Underwriting Standards." *Greater Niagara Federal Credit Union* (June 11, 2020) (FCU0001309) (Greater Niagara Federal Credit Union's underwriting standards, which establish factors determining creditworthiness and do not mention the post-judgment interest rate); "Lending Policies & Procedure Manual." *Greater Chautauqua Federal Credit Union* (May 2023) (FCU0000593); "Boulevard Federal CU Risk-Based Lending Policy." *Boulevard Federal Credit Union* (FCU0000702).
[144] *See* Heim Dep. 180:24-181:19; Haaksma Dep. 150: 8-151:4; Zasucha Dep. 256:21-264:6.
[145] National Credit Union Administration. *Call Report Quarterly Data* (Mar. 31, 2021 – June 30, 2023). <https://webapps2.ncua.gov/CustomQuery/CUSelect.aspx> (accessed Mar. 20, 2024). Plaintiffs' quarterly call report data was identified by their Federal Charter/Certificate Number.

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Amendment. If the Amendment had the effect of materially reducing credit supply as asserted by Mr. Tonetti and Professor Zywicki, the data might be expected to show a decline in the number and volume of loans after April 2022, compared with the pre-Amendment period shown here.

Table 4: Loans and Interest Rates for Plaintiffs Before and After Amendment[146]

	Q1 2021 - Q1 2022	Q2 2022 - Q2 2023
Post-Judgment Interest Rate (%)	9.00	2.00
Number of Loans	7,902	7,984
Volume of Loans	$65,238,801	$70,388,408
Average Loan Interest Rate (%)	4.81	5.48
Average Federal Funds Rate (%)	0.09	3.22

102. Plaintiffs' call reports document that there was no decline in the number of loans held by the Plaintiffs in the five quarters after the Amendment took effect, compared to the five quarters before. Instead, the volume of loans outstanding was $5 million (or 7.9 percent) higher after the Amendment took effect. Therefore, the data lends no support to the claims by Mr. Tonetti and Professor Zywicki that a lower post-judgment interest rate would reduce the supply of consumer credit.

103. I note that the average loan interest rate charged by Plaintiffs was 0.67 percentage points (67 basis points) higher in the five quarters after the Amendment took effect, compared to the five quarters before. Of course, that loan rates were somewhat higher is hardly surprising because the Federal Reserve increased interest rates several times starting in March of 2022. Table 4 shows that the average federal funds interest rate was more than 3.13 percentage points (313 basis points) higher in the period after the Amendment took effect. The slightly higher average loan interest rate charged by Plaintiffs likely reflects

[146] "Number of Loans" is the quarterly average of the number of loans across the following types of loans: (i) Unsecured Credit Card Loans; (ii) All Other Unsecured Loans/Lines of Credit; (iii) New Vehicle Loans; (iv) Used Vehicle Loans; and (v) First Lien Mortgage. "Volume of Loans" is the quarterly average of the total amount of loans across the types listed above. "Average Loan Interest Rate" is the quarterly-average of the volume-weighted average across the types listed above.

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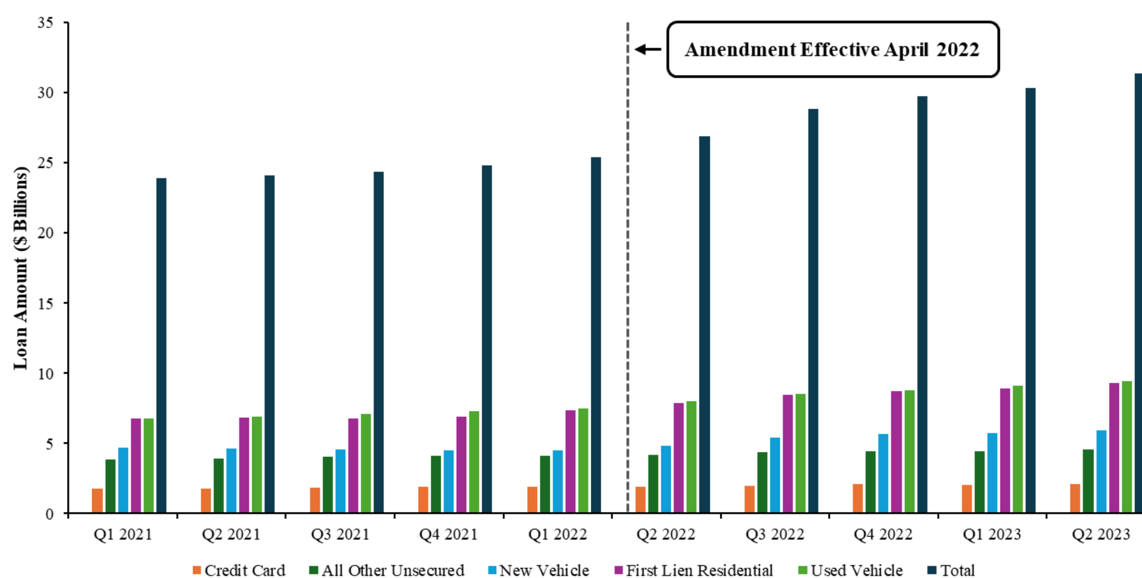
the economy-wide increase in interest rates, rather than the effect of the Amendment.[147] Rather than rising relative to the average federal funds interest rates, the average loan interest rate that Plaintiffs charged fell.

104. I also analyzed loans held by all credit unions in the State of New York and similarly found no pattern of decline in the volume of loans after the Amendment took effect. *See* **Figure 2**: *Loans Owned by Credit Unions in the State of New York, Q1 2021 to Q2 2023*.

Figure 2: Loans Owned by Credit Unions in the State of New York, Q1 2021 to Q2 2023[148]



105. Professor Zywicki argues that because the Amendment took effect in April 2022, "it is too soon to see exactly how each creditor has acted or will act to adjust its lending practice."[149] I find that reasoning unconvincing. Economists generally agree that the

[147] *See, e.g.*, Zasucha Dep. 256:21-264:6 (testifying that interest rates at her institution increased due to multiple factors including the rising federal interest rate, and that as of her testimony, the Amendment had not yet affected interest rates); Heim Dep. 180:24-181:19; Haaksma Dep. 150:8-151:4.

[148] The total loan amount for each credit category is calculated by combining the outstanding balances of loans held by all credit unions in the State of New York for that category. This includes the following credit products: (i) Unsecured Credit Card Loans; (ii) All Other Unsecured Loans/Lines of Credit; (iii) New Vehicle Loans; (iv) First Lien Mortgage; and (v) Used Vehicle Loans. The Total loan amount for each quarter is calculated by aggregating the outstanding loan balance for each of these five credit categories. National Credit Union Administration. *Call Report Quarterly Data* (Mar. 31, 2021 – June 30, 2023). <https://webapps2.ncua.gov/CustomQuery/CUSelect.aspx> (accessed Mar. 20, 2024).

[149] Zywicki Report ¶ 61.

capital markets are informationally efficient.[150] That implies that financial prices react rapidly to new information. For example, a study of interest rate and foreign exchange futures markets in the United States finds that price changes in response to new information "are basically completed within 40 seconds of the release."[151] Loan interest rates might not react that fast, but mortgage and other rates often quickly react to changes in the federal funds interest rate and other pertinent information. If the Amendment were to have a "material" impact on Plaintiffs and other consumer lenders,[152] I would expect them to change their lending and loan interest rates "materially" and rather quickly. In the nearly two years since the Amendment took effect, I have seen little evidence or indication that the Plaintiffs have materially changed their lending terms and conditions to reflect the Amendment.

E. Professor Zywicki Inappropriately Extrapolates from Existing Studies that Are Unrelated to Post-Judgment Interest.

106. Professor Zywicki contends that the Amendment will "reduce the expected rate of recovery for delinquent and non-delinquent consumer loans" such that creditors "will adjust loan terms to offset that reduction,"[153] the "value of the consumer loans and other debts" and the "consideration that would be paid for them" will diminish,[154] and that it will cause "changes in debt collection practices."[155] In reaching his conclusions, Professor Zywicki relies mostly, if not entirely, on a set of existing studies that are unrelated to post-judgment interest and extrapolates conclusions from these studies to the current matter. I find such extrapolation highly unreliable and find his conclusions to be flawed.

107. Professor Zywicki's reasoning is as follows. He argues that in the consumer finance industry, businesses make decisions about consumer credit based on an expected rate of

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[150] For example, the seminal paper by Eugene Fama concludes that results from voluminous tests of the weak form efficient market hypothesis are strongly in support of the proposition that the capital market is efficient. Fama, Eugene F. "Efficient Capital Markets: A Review of Theory and Empirical Work." *Journal of Finance* 25.2 (1970): 383-417 at 414.
[151] Ederington, Louis H., and Jae Ha Lee. "The Short-Run Dynamics of The Price Adjustment to New Information." *Journal of Financial and Quantitative Analysis* 30.1 (1995): 117-134 at 117.
[152] *See, e.g.*, Tonetti Report ¶ 18; Zywicki Report ¶ 25.
[153] Zywicki Report Section V.B.
[154] *Id.* Section V.C.
[155] *Id.* Section V.D.

return. He opines that if the Amendment causes "a material and/or unanticipated reduction in expected recovery," it will "cause businesses in the consumer finance industry to change their business decisions in one or more aspects."[156] But, as noted above, he provides no evidence about whether the size of the impact of the Amendment will be material or negligible, and does not differentiate between a material change versus an unanticipated change. If the impact of the Amendment were negligible, I would expect changes in business decisions to likewise be negligible.

108. Professor Zywicki then discusses a select set of existing studies that analyze various legal or regulatory changes that purportedly affected creditors' expected recovery from consumer debts. The Barth, et al. (1983) study and the follow-up study discuss restrictions on creditor remedies.[157] The Dunkelberg (1978) study focuses on the effects of stricter regulation of creditor remedies in Wisconsin.[158] The Fedaseyeu (2013) study discusses strictness of collection laws across different U.S. states.[159] The Goodman and Levitin (2014) study is about allowing "cramdown" on home mortgages in Chapter 13 bankruptcy proceedings.[160] The Chakrabarti and Pattison (2016) study is similar, but instead focuses on auto loans.[161] Finally, the Honigsberg et al. (2017) study is about usury laws.[162]

109. Professor Zywicki contends that "[e]ach of the above studies confirms that creditors will compensate for restrictions on collections efforts by adjusting other terms of a loan. ***Any*** adjustment in expected recoveries on debts, ***even a marginal one***, will result in a comparable adjustment to loan terms[.]"[163] That does not, however, suggest anything about the size of the impact of the Amendment. What is lacking in Professor Zywicki's report is any evidence that the Amendment, in particular, would have anything other than negligible impact on the Plaintiffs.

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[156] *Id.* ¶ 37.
[157] *Id.* n. 32, 34.
[158] *Id.* ¶ 52, n. 38.
[159] *Id.* ¶ 57, n. 46.
[160] *Id.* ¶ 57, n. 49.
[161] *Id.* ¶ 58.
[162] *Id.* ¶¶ 70-72.
[163] *Id.* ¶ 59 (emphasis added).

110. None of the studies cited by Professor Zywicki address post-judgment interest rates, whether in the State of New York or anywhere else in the United States. Those studies do not in any way suggest the Amendment would have material effects. Professor Zywicki fails to show that the size of effects is similar between the retroactive application of the Amendment and the sort of legal or regulatory changes discussed in the studies he cites. Because some additional collection restrictions were concluded to have had statistically detectable effects does not in any way suggest that the Amendment has anything other than a negligible impact.

111. Presumably, these studies of the various additional restrictions on collection efforts were published because they produced evidence that those particular restrictions had statistically detectable impacts. The absence of any such statistical study about the impacts of changes in a post-judgment interest rate in Professor Zywicki's report fits well with my opinion that the impacts of the retroactive application of the Amendment would be negligible.

112. I do not disagree that reducing the post-judgment interest rate from nine percent to two percent will reduce the expected recovery from outstanding judgments—in fact I show that in Section V of this report. Importantly, however, I show that the effect is quantitatively very small.

113. To see the flaw in Professor Zywicki's analysis, consider the Barth study, which he discusses at length.[164] The study concluded that "either a $10/month increase in the amount of income that could be garnished or assigned or a $1 increase in the monthly late charges lowers the interest rate by about one-half of a percentage point."[165] From there, Professor Zywicki concludes that "even small changes in the amounts that can be collected on judgments over time are still sufficient to cause changes in interest rates set by lenders in the debt collection industry."[166]

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[164] *See id.* ¶¶ 48-52.
[165] Barth, James R., et al. "The Effect of Government Regulations on Personal Loan Markets: A Tobit Estimation of a Microeconomic Model." *The Journal of Finance* 38.4 (1983): 1233-1251 at 1243.
[166] Zywicki Report ¶ 50.

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114. Professor Zywicki fails to recognize that in the context of the Barth study, a $10/month increase in wage garnishment does not represent a "small change[.]" The study analyzed a sample of loans with an average amount financed of $1,350 and an average interest rate of 24 percent.[167] An additional payment of $10 per month through wage garnishment is equivalent to additional total payments of $600 over five years, or 44 percent of the average loan balance. Such a change is by no means small; it is large. That large increase in the amount of wages that could be garnished would have a much larger impact on a lender's decisions than would the Amendment.

115. As this example clearly shows, Professor Zywicki's extrapolation to conclude that the Amendment's impact is "material," is unwarranted.

116. My own review of the literature finds that the set of studies Professor Zywicki cites represent only a small portion of research on the topic. There are, in fact, many studies that cast doubt on the conclusions Professor Zywicki attempted to draw from this literature. For example, George J. Wallace noted that "an increase in the price or a reduction in the volume of credit offered after the elimination of creditor coercion … are not *necessary* and *direct* consequences, given the present state of empirical research."[168] Similarly, David Gray Carlson stated that "one cannot *a priori* state that creditors will respond to legal reform by changing credit prices."[169] He further elaborated that "[l]egal reform must be very major indeed before such disruption is likely to occur, and even then

[167] Barth, James R., et al. "The Effect of Government Regulations on Personal Loan Markets: A Tobit Estimation of a Microeconomic Model." *The Journal of Finance* 38.4 (1983): 1233-1251 at 1246.
[168] Wallace, George J. "The Logic of Consumer Credit Reform." *The Yale Law Journal* 82 (1973): 461-482 at 466 (emphasis in original). *See also id.* at 462 ("The assumption that consumer credit reform will increase the price or reduce the volume of credit rests upon two minor premises: First, that significant reform will be costly to the creditor; and second, that he will respond by either raising the price or reducing the volume of credit offered. While there is some empirical evidence supporting these premises, there is also some to the contrary, and their validity is at best uncertain.").
[169] Carlson, David Gray. "Debt Collection as Rent Seeking." *Minnesota Law Review* 1127 (1995): 817-852 at 822 ("Similarly, one cannot *a priori* state that creditors will respond to legal reform by changing credit prices. This argument presupposes that creditors *care about* or *notice* legal reform, which is often not the case. For instance, where minor legal reform is at stake-let us give as an example that current favorite of law professors: the abolition or reform of Chapter 11-creditors may well be rationally indifferent to the wealth redistribution it creates because the chances of any given borrower defaulting are very small, and the added cost of collection, once default occurs, is not worth the effort to think about at the time the price of the loan is set.") (emphasis in original). While the Plaintiff creditors have certainly noticed the legal reform at issue in this case, whether a given loan officer finds the miniscule chance that the post-judgment interest rate will come into play at the time of offering the loan "worth the effort to think about" is certainly an open question.

disruption is an empirical prediction. In any case, it is *possible* that loan prices are sensitive to major legal reform, and therefore law-and-economics in the debtor-creditor field cannot be entirely ruled out as a discipline-though, to be sure, it will be purely an empirical and never an *a priori* discipline."[170] This stands in contrast to the approach of both Professor Zywicki and Mr. Tonetti, who simply *assume* the change in the post-judgment interest rate would affect credit pricing and availability, yet offer no empirical analysis to support those conclusions.

117. A recent paper by authors Charles Romeo and Ryan Sandler at the Consumer Financial Protection Bureau studied the impact of state debt collection restrictions using "two large administrative datasets" and event study and difference-in-differences models.[171] That study found that, while "tightening debt collection laws reduces access to credit on average," the effect was "very small in magnitude," equivalent to a credit score decrease of three points or less.[172] In subdividing this "near-zero" effect, the authors also found "significant heterogeneity" when "[a]llowing for different effects by bank," with some banks increasing access to credit.[173] For the effect on credit pricing, i.e., interest rate, the authors found that their "regressions largely show[ed] no change in interest rate outcomes."[174]

118. A study by the Center for Responsible Lending evaluated the effect of reforms related to debt collection lawsuits wherein debt buyers in North Carolina and Maryland were held to stricter standards regarding documentation and verification of debts and evidence provided in debt litigation.[175] Just as Professor Zywicki and Plaintiffs[176] attempt to argue here, debt buyers lobbying in those states insisted that the changes "would result in less

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[170] *Id.* (emphasis in original).
[171] Romeo, Charles and Ryan Sandler. "The Effect of Debt Collection Laws on Access to Credit." *Journal of Public Economics* 195 (2021): 1-18 at 2.
[172] *Id.* at 2-3.
[173] *Id.* at 2.
[174] *Id.* at 13.
[175] Parrish, Leslie, et al. "Debt-Collection Reforms that Protect Consumers Not Found to Restrict Credit Availability." *Center for Responsible Lending* (Apr. 2016). <https://consumerist.com/consumermediallc.files.wordpress.com/2016/04/crl_past_due_debt_apr2016.pdf> (accessed Jan. 17, 2024) at 2, 6-7.
[176] *See* Amended Complaint ¶ 35 ("If creditors are unable to rely on sufficient interest to offset the cost of recovering judgment debts, the lending industry will be forced to raise interest rates on loans and reduce the number of loans offered to higher-risk borrowers. The result will be that credit will become less available to borrowers.").

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credit being made available in those states."[177] However, the study by the Center for Responsible Lending found "no evidence that additional protections for consumers ha[d] a negative effect on credit card availability, even for consumers with non-prime credit scores."[178]

119. None of these papers study the impact of a change in the post-judgment interest rate. Professor Zywicki cited findings that support his opinions, but he did not provide a complete review of the relevant literature. Some of the relevant literature does not support his conclusions. Professor Zywicki's failure to fairly review the literature, as well as his failure to provide evidence that the Amendment will have anything other than negligible effects, render his conclusions unreliable.

F. Contrary to Claims by Plaintiffs' Experts, the Various Holders of Consumer Debt in the State of New York Differ Greatly in Material Aspects.

120. Mr. Tonetti and Professor Zywicki both argue that the Amendment will negatively impact all participants in the consumer credit industry, and that such participants will be impacted in a similar negative way.[179] They provide no analysis supporting such assertions. They also ignore significant differences between participants in the consumer credit industry that make it very unlikely for them to be impacted similarly, if at all, by the Amendment.

121. There are very large differences in the sizes, business models, risk tolerances, clienteles, locations, and incentives across and within banks, credit unions, retailers, and other holders of consumer debt. For example, commercial banks, retailers, and other holders of consumer debt are generally for-profit entities, and in some cases public ones whose owners can buy and sell their ownership rights (e.g., via shares of stock), in contrast to

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[177] Parrish, Leslie, et al. "Debt-Collection Reforms that Protect Consumers Not Found to Restrict Credit Availability." *Center for Responsible Lending* (Apr. 2016). <https://consumerist.com/consumermediallc.files.wordpress.com/2016/04/crl_past_due_debt_apr2016.pdf> (accessed Jan. 17, 2024) at 2.
[178] *Id.* at 22.
[179] *See, e.g.*, Tonetti Report ¶ 71; Zywicki Report ¶¶ 90-94.

credit unions, which are non-profit cooperatives.[180] Indeed, at deposition, Plaintiffs' representatives averred that credit unions are member-owned cooperatives whose "goal is not to make money" but to "continue offering better products and services to our membership" in "a different model from commercial banks[.]"[181] The business considerations underpinning consumer lending are thus different for non-profit credit unions than they are for for-profit banks. Plaintiffs' representatives also testified that their institutions are small in comparison to banks,[182] having, for example, $66 million in assets in the case of Greater Niagara.[183] That contrasts sharply with the billions or even trillions of dollars of assets, the global presence, and the tens or hundreds of thousands of employees of the largest banks in the U.S.[184]

122. These differences suggest that the impact of the Amendment, if any, is unlikely to be uniform across different entities in the consumer credit industry. This is because the marked differences in the business contexts of each of these entities would naturally lead to each having different investment-backed expectations and decision-making processes. More to the point, Mr. Tonetti and Professor Zywicki have provided no testimony or data to show that banks, retailers, auto lenders, or other members of the consumer credit industry relied on the post-judgment interest rate to make business decisions. They merely wave away the significant differences between these holders of consumer debt and insist that theory predicts that each will have "materially" relied on the post-

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[180] *See* Goldberg, Matthew and René Bennett. "Banks vs. Credit Unions: How to Decide Where to Keep Your Money." *Bankrate* (Feb. 13, 2024). <https://www.bankrate.com/banking/banks-vs-credit-unions> (accessed Mar. 27, 2024); Kagan, Julia. "Debt Buyer: Who They Are and How They Work." *Investopedia* (Mar. 19, 2024). <https://www.investopedia.com/terms/d/debt-buyer.asp> (accessed Mar. 27, 2024).

[181] *See* Zasucha Dep. 43:7-45:14.

[182] *Id.* 43:21-44:14; Haaksma Dep. 193:9-194:23.

[183] Zasucha Dep. 44:4-6.

[184] Murray, Christopher. "The Largest Banks in the U.S." *MarketWatch* (Mar. 19, 2024). <https://www.marketwatch.com/guides/banking/largest-banks-in-the-us> (accessed Mar. 27, 2024) (reporting $3.38 trillion in assets for Chase Bank, $2.45 trillion in assets for Bank of America, and $1.7 trillion in assets for Wells Fargo); "Leading Banks in the United States as of December 31, 2022, by Number of Employees." *Statista* (Dec. 31, 2022). <https://www.statista.com/statistics/250220/ranking-of-united-states-banks-by-number-of-employees-in-2012> (accessed Apr. 10, 2024). Even a local New York State bank might have around ten times the assets of Greater Niagara. *See, e.g.*, "ES Bancshares, Inc. Announces Fourth Quarter and Full-Year 2023 Results; Strong Asset Quality Improves Further in Fourth Quarter." *ES Bancshares, Inc.* (Jan. 30, 2024). <https://esbna.com/ContentDocumentHandler.ashx?documentId=78905> (accessed Mar. 27, 2024) at 1, 3 (reporting assets of $639.0 million for Empire State Bank, which is under a New York State commercial bank charter).

judgment interest rate, without ever actually testing or supporting that theory with any facts.[185]

123. I further note that both Mr. Tonetti and Professor Zywicki admit to the dissimilarity across debt holders of their consumer credit transactions, business practices, and the purported magnitude and mechanism of impact of the Amendment's retroactive application.[186] Thus, in addition to their failure to show that different creditors actually did incorporate post-judgment interest rates into their investment-backed expectations, they also admit that there are "differences in the magnitude of the impact on each business"[187] and that any "changes they implement" might "differ in form from one class member to another[.]"[188]

124. Even the retroactive application of the Amendment would not generate a similar impact among different participants in the consumer finance industry. In fact, the Amendment likely would generate opposing impacts on certain participants of the consumer credit industry involved in the same transactions. Consider a creditor that sold its portion of consumer debt before the Amendment took effect. Even if the retroactive application of the Amendment would impact the value of the debt portfolio, such an impact, if any, is born solely by the party that purchased the debt. The original seller, at least for this particular transaction, is unaffected at all by the Amendment. That both the buyer and seller of this common type of transaction are included in Mr. Tonetti and Professor Zywicki's definition of the consumer finance industry[189] shows that the impact of the Amendment cannot possibly be the same throughout the industry.

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[185] *See, e.g.*, Tonetti Report ¶ 18; Zywicki Report ¶ 25.
[186] *See, e.g.*, Tonetti Report ¶ 71 ("[T]he proposed class members might subjectively feel the impact of the loss differently, and [] the exact changes they implement (e.g., increase in fees, increase in interest rates, issuance of less debt, etc.) may differ in form from one class member to another[.]"); Zywicki Report ¶ 30 ("There may be some slight differences in the magnitude of the impact on each business, and thus the specific ways in which those businesses adjust consumer credit transactions or their business practices to mitigate their losses may differ. For example, some businesses that extend credit may increase interest rates, while others may choose to reduce the amount of credit available to certain borrowers or shift their focus to secured rather than unsecured credit.").
[187] Zywicki Report ¶ 30.
[188] Tonetti Report ¶ 71.
[189] *See* Tonetti Report ¶ 20; Zywicki Report ¶¶ 23-24.

125. Professor Zywicki's own research, which he repeatedly cites in his report, also acknowledges the differences in parties who collect debts, noting the distinction between creditors, debt collectors, and debt buyers, and the additional "subdivided" "specializ[ations] among debt buyers."[190] Professor Zywicki further notes the large variance in debt size between collectors of different specialties and states that "[t]he methods used to collect debts with an average size of a few hundred dollars will differ from those used to collect debts with an average size of several thousand dollars."[191] As one illustration of this he discusses retail creditors such as department stores, who "might have been expected to be less intensive in seeking to collect delinquent debts than would other types of consumer creditors" due to "their ongoing relationship with the customer."[192] He states that subsequent research suggested that "retail creditors tended to be less intensive at collecting delinquent debts than were other creditors."[193] In this way, Professor Zywicki's own research emphasizes how differently certain creditors operate in important business areas.

126. Professor Zywicki also ignores research that shows how the impact of a given creditor collection restriction will vary by the type of creditor or even among creditors of the same type. For example, the study from Romeo and Sandler discussed previously found that there was a "significant amount of heterogeneity across banks, with each bank seemingly choosing a different approach to dealing with restrictions on debt collection in the treated states; this is consistent with theory, which indicates that lenders may have different equilibrium responses to these restrictions."[194] That study found that some banks even "increase[d] access to credit along both dimensions" in response to added collection restrictions, and the authors noted that "[a]ltogether, these findings suggest that the small average effects we find reflect somewhat larger opposing responses by firms that end up offsetting each other."[195]

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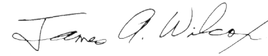
[190] Zywicki, Todd J. "The Law and Economics of Consumer Debt Collection and Its Regulation." *Loyola Consumer Review* 28.2 (2016): 167-237 at 170.
[191] *Id.*
[192] *Id.* at 215.
[193] *Id.*
[194] Romeo, Charles and Ryan Sandler. "The Effect of Debt Collection Laws on Access to Credit." *Journal of Public Economics* 195 (2021): 1-18 at 12.
[195] *Id.*

127. As another example, a study of legal sanctions by economist Douglas F. Greer employed a regression analysis to find the impact of denying a given creditor remedy on the supply of credit. It found that "results varied depending on the type of lender" with commercial banks "not seem[ing] to be overly affected by restrictions in the utilization of garnishment, wage assignment, and confession of judgment," and credit unions being "also insignificantly affected by such sanctions" while finance companies were "apparently the institutions most likely to suffer from restrictions of creditor remedies."[196]

128. Such results support my findings that the participants lumped together in Professor Zywicki's consumer finance industry, if impacted by the Amendment at all, will not be affected in a similar way.

Dated: April 16, 2024



James A. Wilcox

[196] Candilis, Wray O. and Norris A. Lynch. "Consumer Credit: Factors Influencing its Availability and Cost." *U.S. Department of Commerce* (May 1976) at 14-15.

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Appendix A

Curriculum Vitae

JAMES A. WILCOX

Professor of the Graduate School
University of California, Berkeley

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PROFESSIONAL POSITIONS

2021 – Professor of the Graduate School
University of California, Berkeley

1978 – 2021 Professor
Haas School of Business University
of California, Berkeley

2016 – Member
Financial Economists Roundtable

2014 - 2016 Member
Board of Directors
VirtualBeam, Inc.

2012 - Member
Board of Directors Finance
Scholars Group

2012 - 2015 Chair
Economic Analysis and Policy Group
Haas School of Business

2003 - Fellow
Wharton Financial Institutions Center

2012 - 2012 President
International Business, Economics, and Finance Association

2005 - 2011 Research Fellow
Filene Research Institute

1999 - 2001 Chief Economist
Office of the Comptroller of the Currency
U.S. Department of the Treasury

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1997 - 2007 Board of Directors, Cal State 9 Credit Union
Member (1997-1999)
Treasurer (2004-2007)
Chair (1999, 2002-2003)
Vice Chair (1998-1999)

1995 - 1997 Chair
Finance Group
Haas School of Business

1991 - 1992 Economist
Division of Monetary Affairs
Board of Governors of the Federal Reserve System

1990 - 1991 Senior Staff Economist
President's Council of Economic Advisers

1988 - 1990 Member
Asia Foundation Advisory Panel on the Pacific Economic Outlook Project

TEACHING

Financial Institutions and Markets, Macroeconomics, Risk Management.

Distinguished Teaching Fellow (Haas School of Business).

Teacher of the Year, Evening MBA Program, 2019-20. Teacher of the Year, Evening MBA Program, 1996-97. Teacher of the Year, Undergraduate Program, 1994-95. Teacher of the Year, Evening MBA Program, 1986-87.

EDUCATION

Ph.D., Economics Northwestern University, 1980

B.A., Economics S.U.N.Y. Binghamton,
1974 and History

EDITORIAL BOARDS

Journal of Risk and Financial Management (Topics Editorial Board: Banking and Finance)
Journal of Financial Regulation and Compliance
Journal of African Business

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REFEREE

National Science Foundation, American Economic Review, Journal of Political Economy, Journal of Money, Credit, and Banking, Journal of Macroeconomics, Review of Economics and Statistics, Canadian Journal of Economics, Journal of Economics and Business, Quarterly Journal of Economics, Journal of Development Economics, Economic Inquiry, Journal of Housing Economics, Regional Science, Real Estate Economics, Journal of Banking and Finance.

PUBLICATIONS

"Monetarist Interpretations of the Great Depression: An Evaluation and Critique" (with Robert J. Gordon), in K. Brunner (ed.), The Great Depression Revisited (Hingham, MA: Martinus Nijhoff, 1981), pp. 49-107, 165-173.

"Why Real Interest Rates Were So Low in the 1970s," American Economic Review, March 1983, pp. 44-53.

"The Effects of Inflation Uncertainty and Supply Shocks on Real Interest Rates," Economics Letters, 1983 (12), pp. 163-167.

"Disaggregating Data Using Related Series," Journal of Business and Economic Statistics, July 1983, pp. 187-191.

"The Postwar Stability of the Fisher Effect" (with Joe Peek), Journal of Finance, September 1983, pp. 1111-1124.

"The Missing Fisher Effect on Nominal Interest Rates in the 1950's," Review of Economics and Statistics, November 1983, pp. 644-647.

"Automobile Fuel Efficiency: Measurement and Explanation," Economic Inquiry, July 1984, pp. 375-385.

"The Degree of Fiscal Illusion in Interest Rates: Some Direct Estimates" (with Joe Peek), American Economic Review, December 1984, pp. 1061-1066.

"Tax Rates and Interest Rates on Tax-Exempt Securities" (with Joe Peek), New England Economic Review, January/February 1986, pp. 29-41.

"Tax Rate Effects on Interest Rates" (with Joe Peek), Economics Letters, 1986 (20), pp. 183-186.

"Monetary Policy Regimes and the Reduced Form for Interest Rates" (with Joe Peek), Journal of Money, Credit, and Banking, August 1987, pp. 273-291 (reprinted in Monetary Theory, ed. by Thomas Mayer, Brookfield: Edward Elgar, 1990).

"Liquidity Constraints on Consumption: The Real Effects of 'Real' Lending Policies,"

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Federal Reserve Bank of San Francisco Economic Review, Fall 1989, pp. 39-52.

Current Readings on Money, Banking, and Financial Markets, edited, Glenview, IL: Scott, Foresman/Little, Brown, 1989.

"Monetary Policy and the Economic Outlook," in The Economic Outlook for 1990, Ann Arbor: Research Seminar in Quantitative Economics, 1989, pp. 83-109.

"Nominal Interest Rate Effects on Real Consumer Expenditure," Business Economics, October 1990, pp. 31-37.

"A Real, Affordable Mortgage" (with Joe Peek), Federal Reserve Bank of Boston New England Economic Review, January/February 1991, pp. 51-66.

"The Real Neutrality of Inflation: Interest Rates and Output in the Long Run" (with Robert H. Rasche), in Hubert Kempf, ed., Money, Markets, and Financial Activities, Paris: Economica, 1991.

"The Measurement and Determinants of Single-Family House Prices" (with Joe Peek), AREUEA Journal, Fall 1991, pp. 353-382.

"The Baby Boom, 'Pent-Up' Demand, and Future House Prices" (with Joe Peek), Journal of Housing Economics, Fall 1991, pp. 347-367.

"Price-Level Adjusted Mortgages" (with Joe Peek), in John Eatwell, Murray Milgate, and Peter Newman, eds., The New Palgrave Dictionary of Money and Finance, New York: W. W. Norton and Company, 1992.

"Was There A 'Capital Crunch' in Banking? The Effects on Real Estate Lending of Business Conditions and Capital Shortfalls" (with Diana Hancock), Journal of Housing Economics, December 1993, v.3(1), pp. 31-50.

"Bank Capital and the Credit Crunch: The Roles of Risk-Weighted and Unweighted Capital Regulations (with Diana Hancock)," AREUEA Journal, March 1994, pp. 59-93.

"Bank Capital, Loan Delinquencies, and Real Estate Lending" (with Diana Hancock), Journal of Housing Economics, June 1994, v. 3(2), pp. 121-146.

"Bank Capital Shocks: Dynamic Effects on Securities, Loans, and Capital (with Diana Hancock and Andrew J. Laing)," Journal of Banking and Finance, v. 19(2), 1995, pp. 661-677.

"Bank Credit and Economic Activity (with Carl E. Walsh)," in Is Bank Lending Important for the Transmission of Monetary Policy?, Federal Reserve Bank of Boston, 1995, pp. 83-112.

"Intraday Management of Bank Reserves: The Effects of Caps and Fees on Daylight Overdrafts

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(with Diana Hancock)," Journal of Money, Credit and Banking, v. 28(4), November 1996, pp. 870-908.

"Bank Capital, Nonbank Finance, and Real Estate Activity (with Diana Hancock)," Journal of Housing Research, v.8(1), 1997, pp. 75-105.

Macroeconomics, 7th edition, Addison-Wesley-Longman (by Robert J. Gordon; James A. Wilcox is the author of Chapters 13-16 in the 7th edition), 1998.

"The 'Credit Crunch' and the Availability of Credit to Small Business" (with Diana Hancock), Journal of Banking and Finance, v. 22(6-8), 1998, pp. 983-1014. Reprinted in the International Library of Critical Writings in Economics, vol. 133, pp. 438-469.

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August 2023

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Appendix B

Materials Considered

Materials Considered[1]

Legal

Amended Class Action Complaint. *Greater Chautauqua Federal Credit Union, et al. v. Sheriff James B. Quattrone, et al.* (S.D.N.Y. No. 1:22-cv-02753 (MKV)) (Apr. 21, 2022).

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[1] In preparing my report, I considered the documents listed here along with any items cited or referenced in the body and footnotes of my report.

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