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STATE OF MONTANA
Case Number: DA 20-0362

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 20-0362

MASTERS GROUP INTERNATIONAL, INC.,

Third-Party Plaintiff, Appellee,
and Cross-Appellant,

vs.

COMERICA BANK,

Third-Party Defendant, Appellant,
and Cross-Appellee.

On Appeal from Montana Second Judicial District Court,
Silver Bow County, Cause No. DV-2011-372
Hon. Ray Dayton

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES

Whether the court erred in:

1. Determining a contract had been formed even in the absence of execution by one of the Guarantors;

2. Not dismissing claims barred by the Michigan statute of frauds;

3. Finding that Comerica had waived each meaningful contractual provision without finding clear and convincing evidence supporting each;

4. Awarding so-called "seizure damages," a concept not found in Michigan law, and in failing to deduct net benefits;

5. Applying Montana law to the attorney's fees issue and allowing attorney's fees on a contingency fee basis;

6. Misapplying the Michigan prejudgment interest statute.

STATEMENT OF THE CASE

In 2006, Comerica Bank loaned Masters $9,000,000, in Michigan, to enable Masters to purchase a British company. After two years of attempting to launch a U.S. company, Masters had no success with its marketing plan. After several defaults and extensions, Comerica drew on letters of credit and recovered the debt from its collateral, Masters' and its guarantors' accounts, in December 2008.

Although this is a wholly Michigan dispute, Masters maneuvered the suit to Montana and ultimately was awarded over $52 million by a Butte jury.

This Court reversed in *Masters Group International, Inc. v. Comerica Bank*, 2015 MT 192, 380 Mont. 1, 352 P.3d 1101 ("*Comerica I*"), determining that the court had improperly applied Montana rather than Michigan law, dismissing the tort claims, and remanding for a new trial on the claim of breach of contract.

On remand, Comerica filed a number of motions for summary judgment, including motions on contract formation, statute of frauds. and damages, all denied. After a January 2016 11-day bench trial, Judge Dayton entered his decision on 11/8/19. He denied Masters' claims seeking loss of ongoing business and profits as too speculative, but he awarded $10,595,514.16 as so-called "seizure damages." App.23,Dkt.602,p.20,¶103[1]. This figure was derived from the amount of collateral taken by Comerica in late 2008 and early 2009. The court refused any adjustment for the loan balance amount Masters owed Comerica.

Substantial attorney's fees and interest were later awarded. App.42,Dkt.629.

STATEMENT OF FACTS

A. The initial loan and its extensions.

A U.S. group of sophisticated executives and investors formed Masters Group International, Inc., to purchase Masters U.K., an overseas business supplying office furniture and equipment.

Masters borrowed $9,000,000 from Comerica, evidenced by a 7/11/06 written agreement and promissory note. Both Masters and Comerica were located in Michigan. They contracted in Michigan and stipulated to Michigan law.

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[1] "App." refers to Comerica's accompanying appendix. "Dkt." refers to the district court's docket sheet.

Id.,p.6;Ex.109,pp.1,15,¶11; Ex.391,p.22. Masters was represented by counsel. Ex.1209. Comerica made it clear to Masters the loan was for the purchase of Masters U.K and Comerica would not be a source of working capital. Ex.120a;Tr.1838:1-10.

The loan agreement had a two-year term, with no commitment for either an extension or additional credit. Ex.108. Masters was just beginning to do business in the U.S. and had no collateral or value of its own to secure the loan. Ex.3,p.8. Because the purchased assets were in the U.K., Comerica required a U.S. security. Larry Pratt, a wealthy, sophisticated banker with a net worth of $140 million, collateralized the debt with his marketable securities. Ex.210;Tr.1846:19.

Almost immediately, Masters experienced financial difficulties. Ex.1236. Masters' problem was described by Masters' Mark Farnham at the trial as a "failure to launch." Tr.1959:10-11. Essentially, Masters was undercapitalized and had not located a source of working capital. It hoped to fund its ongoing operations through sales receipts, but those did not materialize. Its own projections of receipts from business activities were widely off the mark. For example, in FY 2007, Masters projected $7,000,000 income, but actually received only $13,000. In FY 2008, Masters projected $28,000,000, but its receipts were only $600,000. Ex.3,p.14;Tr.1477:1;Ex.391,pp.5,42.

By October 2007, Masters requested an additional $500,000 loan from Comerica. Although that Comerica had not previously committed to provide working capital, Comerica consented to the increase. The parties executed a new promissory note and amended loan agreement. Exs.110-111. Larry Pratt renewed his guaranty (Ex.213). Another sophisticated investor, Matthew Nolan, provided a letter of credit and loan, effectively charging Masters 20% interest. Ex.1249;Tr.625:15-23. A third investor, Gerry Taylor, pledged $1,000,000, but ultimately provided a letter of credit for only $500,000. Tr.1236:18-25.

By December 19, 2007, Masters needed more money. Again, working with Masters, Comerica agreed to provide a small loan increase, but only when Pratt affirmed his guaranty and a new guarantor (Vlahos) provided a $500,000 guaranty. Ex.112-113,216. The July 2008 maturity date remained unchanged.

One month later, Masters was "already out of money." Ex.486 (Dkt.479,p.6). By spring 2008, Pratt's guaranty was out of formula[2], and Comerica sent a default letter. Exs.1272,120a. Although the severe economic downturn of 2008 added to Masters' financial problems, these problems were there before that downturn.

On July 11, 2008, the Loan matured and was payable in full. After the loan had matured, on July 30, 2008, with Pratt's guaranty fund chronically non-

[2] Securities account collateral requires the guarantor to maintain securities at a designated value above the indebtedness, e.g., 125% of guaranty.

compliant, Comerica served a notice of default. Exs.17,22,125. On August 1, 2008, Comerica rejected Masters' request for renewal and advised Masters to seek alternate financing. Exs.26,127.

Nonetheless, on August 27, 2008, based on Masters' alleged efforts to refinance, Comerica again agreed to increase the loan by $500,000 and extend the maturity date to November 1, 2008, giving Masters a negotiated ninety days to obtain alternate financing. Comerica, Masters, and all guarantors executed new documents. Exs.135-136.

B. By November 2008, Masters' financial situation was critical.

Masters failed to meet the November 1 repayment deadline. App.89-91,Ex.30. Nonetheless, Comerica refrained from immediately calling the loan and continued to forbear.

An 11/20/08 Masters' cash flow sounded the alarm:

> [W]e will not have the required funds to run the business starting next week. The bank is going to look to take interest on 12/1 and if the funds are not available they will consider us to be in default at that time.

App.94,Ex.292,p.2. The few remaining employees had not been paid since October. Ex.1340.

In an internal email of 11/20/08, Masters' CFO (Yaklin) described Masters' "cash crises," stating: "It seems to me that the time of reckoning is drawing very close." Yaklin indicated that Masters needed to put pressure on its guarantors because they stood to “lose their investment and/or their collateral used to guarantee our Comerica loans…[w]e must also ask them, point blank if they will add funds to help us” avoid such a catastrophe. App.98,Ex.489.

On **11/24/08**, Masters’ CEO informed Masters’ Board that Pratt declined to inject further capital and was out of compliance on the loan. App.93-94,Ex.292. Additionally:

> 4. Per the Cash flow attached, Masters is not able to cover interest and payroll, among other commitments, due over the next few days which will also trigger a default with Comerica.
>
> 5. If the default is executed, guarantors’ assets will be seized and Masters accounts in the U.S. will be frozen, which will effectively close the U.S. business.

Id.

On **11/25/08,** Comerica sent another default notice “forbearing only from day to day” and giving Masters until 12/5/08 to pay or suffer the note being called. App.89,Ex.30,p.1. Throughout November and December, Comerica advised Masters it could not further forbear with the formula out of compliance and unpaid obligations. App.98,Ex.489;App.101-106,Ex.491(Dkt.479,p.9);Exs.146,240,246.

In an internal December 5 email, Masters’ CFO noted that Masters had been in constant contact with Comerica “over these past couple weeks” and “Comerica has agreed to forbear today. They have also agreed to send us a term sheet specifying items they need to see us achieve…. If we can continue to comply with the forbearance terms, they will forbear through January 31….” App.113,Ex.863.

C. The December 17, 2008 Forbearance Offer.

Rather than immediately calling the note on the 11/1/08 default, Comerica agreed to work with Masters in one final effort, “[b]ecause we were working with Masters to try to help find them alternate financing.” (Norton) Tr.205:5-6.

Comerica prepared one last written offer to forbear dated December 17, 2008, signed it, and submitted it for execution by both Masters and Guarantors Pratt and Vlahos. The Forbearance Offer contained terms requiring injection of new money. App.116-126,Ex.45.

Internally, Masters acknowledged the consequences of default: “[Our CFO] has pulled several rabbits out of the hat, but we are in agreement, if the money doesn’t show up by the 29th, the gig is up.” App.109,Ex.509,p.2.

Masters signed the Forbearance Offer on December 19 and Pratt on December 21, but Guarantor Vlahos never signed it. Masters later claimed he was unavailable until January 2, 2009, but, as the court found, “[f]rom December 17, 2008, to December 29, 2008, [Masters’ CEO] Howell did not have any conversations with Vlahos. Tr. 1331:6-1331:17.” App.18,Decision,p.15,¶64.[3]

[3] The references to “Decision” in this brief are to the main district court decision of 11/8/2019, App.4-40.

D. The Wells train never even left the station

While already in default, Masters located only one potentially willing lender, Wells Fargo. Exs.146,1305. When Wells Fargo sent Masters a term sheet on 12/17/2008, it required an additional $1,200,000 of "new capital and/or collateral support" for a requested $13,000,000 loan, Ex. 509. Masters' CFO immediately observed:

> [T]his will not happen. There is no way we are going to get $1.2 million in additional capital either from the shareholders or elsewhere in time to satisfy them to close.

App.96,Ex.148.

Ironically, Masters' CFO groused about Wells' terms, saying "they may be even worse to deal with than Comerica has been," but, he admitted, "[t]hey [Wells] just don't want to fund into another dead end company." App.109,Ex.509.

Masters **did not sign** the term sheet, nor did it pay the $5,000 required with the return of the signed term sheet, nor did it pay the later $25,000 processing fee. Tr.212:22-213:5;214:7-16;1158:17-18. As such, Wells never engaged in due diligence and never agreed to proceed with a loan for Masters. Tr.2048:9-19.

E. Masters' investors, shareholders, and guarantors refused to make any further financial commitments.

Three critical terms in Comerica's Forbearance Offer (App.116-126,Ex.45) required additional money: (1) $56,204 "upon execution," ¶4; (2) $250,000 "in the form of equity" by December 29, ¶5; and (3) payment of a $52,500 closing fee to Comerica by December 31, ¶ 7. Between December 17 and 31, 2008, none of these terms was met—no new money was injected. Tr.222:4-224:3.

Although Masters had "repeatedly" assured Comerica that its participants were on board (Tr.190:12-14), pre-trial discovery later revealed Masters signed the Forbearance Offer knowing that it had no ability to fund its obligations. Only two days after Comerica submitted its Forbearance Offer to Masters, Masters' CFO (Yaklin) raised with Pratt the issue of "any potential contribution you might have decided to resolve our liquidity issue." Pratt refused, responding on December 22, 2008: "I don't have any interest in increasing my exposure…." App.128,Ex.248,p.1. Yaklin further indicated that Masters' shareholders (as opposed to the Guarantors): "[D]o not have the 'dry powder' to put money in right now…."). *Id*. Vlahos, Masters' last hope for a $250,000 injection, on December 29, 2008, also balked at committing to any new investment. In an email, Howell said: "He [Vlahos] challenged me quite a bit that he had ever committed to do that [contribute the $250,000]." App.134,Ex.153,p.2. Masters' CFO said the next day: "Based on Bill's [Smith, Vlahos' broker] comments on the phone today as well as the comments you had from Dr Vlahos, am getting concerned that we are not going to have an easy time getting these funds." *Id*.,p.1.

After being informed that the loan would be called, Masters composed a December 31 letter to Comerica arguing that Comerica should not call the note, pleading for "one more week to ensure all the pieces would fall into place…." Thus, Masters admitted it did not have the money prior to December 31. App.192,Ex.34a;Tr.190:5-11.

On 12/31, lacking an executed contract and after none of the terms of the Offer requiring new money had been met, Comerica called the note and drew on its collateral, realizing approximately $9.1 million. Ex.885,pp.1-2.[4]

F. Masters admitted it was "in a better financial situation" after Comerica exercised its rights."

The net result of Comerica's draw on the Guarantors' accounts was that the Guarantors became Masters' creditors. Masters was relieved of the $30,000 to $45,000 monthly interest payment to Comerica. Tr.240:4-5;Tr.400:8-17. Masters later admitted it was "in a better financial situation" after Comerica exercised its rights because, rather than Masters owing Comerica approximately $10.5 million, Masters now owed the Guarantors that amount. App.178,Ex.382,p.2;Tr.1363:13-25.

The Comerica loan (originally for $9 million) was for the purpose of purchasing Masters U.K., an ongoing business. Masters got what it bargained for.

[4] During 2009, Comerica recovered the additional balance. Exs.885,900-003,Tr.176:2-6.

Even after Comerica collected on the debt, Masters still owned Masters U.K., which continued its operations into 2010.

Unrelated to Comerica, Masters U.K. ran into trouble with its U.K. bank in July 2010, ceased operations and filed a U.K. bankruptcy petition, known as an administration. App.182-184,Ex.252;Ex.1511,pp.269,271;Tr.430:1-18.

STANDARD OF REVIEW

The existence of a contract is a question of law reviewed for correctness. *Lockhead v. Weinstein*, 2003 MT 360, ¶7, 319 Mont. 62, 81 P.3d 1284. Grant or denial of summary judgment is reviewed *de novo*, *Cole v. Valley Ice Garden, LLC*, 2005 MT 115, ¶4, 327 Mont. 99, 113 P.3d 275, as is a district court's interpretation of a statutory provision, *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶19, 365 Mont. 92, 278 P.3d 455.

Evidentiary rulings, including admission of oral testimony, are reviewed for abuse of discretion, but the court conducts plenary review to the extent the lower court bases its discretionary ruling upon a conclusion of law. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶26, 351 Mont. 464, 215 P.3d 649. Issues of law, including a district court's decisions on choice of law, are reviewed *de novo*. *Tucker v. Farmers Ins. Exchange*, 2009 MT 247, ¶ 23, 351 Mont. 448, 215 P.3d 1. On mixed questions of fact and law, factual determinations are reviewed for clear error, but "whether those facts satisfy the legal standard" is reviewed *de novo*. *Mlekush v. Farmers Ins. Exchange*, 2015 MT 302, ¶8, 381 Mont. 292, 358 P.3d 913.

SUMMARY OF ARGUMENT

Masters did not perform **any** of the terms of the Forbearance Offer, including the three most important ones requiring injection of new capital. Masters concedes nonperformance, and the court so found. The court erred in finding that each of the terms had been waived, despite the fact that Masters never found the cash required to survive, and the asserted "waivers" were not in writing as required by Michigan law.

The whole issue of waiver may be resolved on the law. The Michigan statute of frauds requires such waivers to be in writing and signed by the financial institution. None of the asserted waivers was. There is no law-of-the-case issue on the statute of frauds because that issue was not addressed by this Court in *Comerica I*.

Comerica's Forbearance Offer was simply that—an **offer**. It required execution by not only Masters, but, significantly, the two Guarantors, Pratt and Vlahos, whose collateral covered more than 99% of the debt. Vlahos never signed. Under basic law of offer and acceptance, no contract was ever formed. Accordingly, no breach by Comerica occurred.

Apart from the statute of frauds, Michigan law requires mutual agreement and “clear and convincing evidence” to establish waiver, particularly where, as here, there is a contractual anti-waiver provision. The flimsy evidence of waiver the district court relied on does not meet the Michigan standard.

The court correctly found that Masters was unable to prove its asserted breach of contract damages, lost profits. The court, however, disregarded Michigan black-letter law and awarded what it called “seizure damages” of $10,595,514.16. There is no such concept as “seizure damages” under Michigan law. Moreover, Masters failed to establish the required causal link between Comerica’s action and the purported damages. The court also erred by not deducting, as Michigan law requires, any benefits received as a result of the asserted breach.

The court’s award of attorney’s fees was replete with error. It ignored this Court’s choice-of-law ruling in *Comerica I*, applicable to all issues. The award of contingency fees was barred by the law-of-the-case. In *Comerica I*, Masters filed, and subsequently dismissed, a cross-appeal of the district court’s denial of contingency fees in favor of hourly fees. Under Montana law-of-the-case doctrine, that issue is foreclosed.

In awarding prejudgment interest under Michigan law, the court applied the wrong Michigan statutory provision.

ARGUMENT

By December 17, 2008, when Comerica made the Forbearance Offer, Masters was fully aware that its serial defaults had pressed Comerica to its limits. On that day, Masters' VP, Yaklin, emailed: "It is getting close to being out of time for this…. There is certainly no more moving the Bank and I was quite surprised they gave us until 12/29." App.108,Ex.509,p.1.

Despite this urgency, Masters/Guarantors were remarkably cavalier. Vlahos never signed the proposed agreement. "On December 22, 2008, Howell emailed the Forbearance Agreement to Vlahos, but received no response. Ex. 1330." App.18,Decision,p.15,¶60. The required injection of $56,204 due "upon execution of this agreement" never happened. In fact, **not a single penny** of additional money was injected into Masters, as required to effect the forbearance.

Masters conceded nonperformance. Judge Dayton found: "Masters, while **acknowledging** that it had **not performed** all of the conditions required of Masters, asserts that its obligation to perform…was effectively waived by Comerica." App.5,Decision,p.2 (emphasis added). Thus, the critical issue is whether Comerica waived Masters' failures to perform.

As made clear below, no contract was **formed** because Vlahos never signed. However, because Michigan's statute of frauds is easily dispositive, it is addressed first.

I. THE COURT ERRED IN ALLOWING CLAIMS BARRED BY THE MICHIGAN STATUTE OF FRAUDS.

The record is clear that **none of the asserted events of waiver was accompanied by a written modification** signed by Comerica.

Judge Dayton sought to avoid the Michigan statute of frauds through three arguments: (1) the Michigan statute of frauds was inapplicable because Comerica had signed the Forbearance Offer; (2) Michigan's statute did not apply to claims of waiver; and (3) he felt bound by the previous decision of this Court under the doctrine of law of the case.

These issues can be swiftly resolved as a matter of law.[5] The Michigan statute of frauds regarding financial institutions (MCL §566.132(2)) (App.136) provides:

> An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution **unless** the promise or commitment is **in writing and signed** with an authorized signature **by the financial institution**.
>
> * * *
>
> (b) a promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) a promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

[5] Comerica raised, but was denied, summary judgment on this issue. App.78-84,Dkt.553.

(emphasis added).[6]

The court in *Crown Technology Park v. D&N Bank, FSB*, 619 N.W.2d 66, 72 (Mich. App. 2000), stated:

> MCL 566.132(2); MSA 26.922(2) expressly states that "[a]n action *shall not be brought against a financial institution* to enforce [a promise or commitment to waive a provision of a loan] unless the promise or commitment is in writing and signed with an authorized signature by the financial institution" (emphasis supplied). This language is unambiguous. It plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision.

Huntington Nat. Bank v. Aronoff Living Trust, 853 N.W.2d 481, 488 (Mich. App. 2014), held, in the absence of a modification signed by the lending institution, there was no legally enforceable agreement. Discussing the underlying purpose, the court said:

> In 1992, Michigan's Legislature decided to provide greater protection to financial institutions from potentially fraudulent or spurious claims by disgruntled borrowers. *See* 1992 PA 245. To that end, the Legislature provided that no one may bring an "action" against "a financial institution" if the action seeks to "enforce" a promise or commitment by the financial institution "unless the promise or commitment is in writing and signed with an

[6] This statute is not unique to Michigan. *See, e.g.*, Colo. Rev. Stat. §38-10-124; Conn. Gen. Stat. §52-550(a) (loans greater than $50,000); Kan. Stat. Ann. §16-118(a); La. Stat. Ann. §6:1122; Md. Code Ann., Cts. & Jud. Proc. §5-408; Minn. Stat. §513.33; Ohio Rev. Code Ann. §1335.02; Okla. Stat. tit. 15, §140; Tex. Bus. & Com. Code Ann. §26.02; Wash. Rev. Code §19.36.110.

> authorized signature by the financial institution." MCL 566.132(2)(a).

Id. at 488-89; *see also Rodgers v. JPMorgan Chase Bank NA*, 890 N.W.2d 381, 386 (Mich. App. 2016). Although Judge Dayton may not like the policy, it is not his prerogative to overrule Michigan's legislature.

Addressing this policy question in his *Comerica I* dissent, Justice Rice discussed the practical difficulty "…for commercial banks to work with a commercial borrower in a default position, such as Masters', without running a high risk of subjecting itself to a waiver argument." *Comerica I,* ¶132. This is vividly true in this case. In retrospect, Comerica should have simply called the note when Masters defaulted in July 2008 (or on the next default on 11/1/08). Instead, Comerica tried to work with Masters. Comerica got sued for its willingness to cooperate. As Justice Rice observed, this is not a good result from a policy standpoint because banks would be discouraged from trying to work out problem loans.

Judge Dayton attempted to avoid the Michigan statute on three bases, none of them persuasive.

A. The fact that Comerica signed its Forbearance Offer does not constitute a signed, executed waiver of terms of performance.

Judge Dayton found Michigan's statute of frauds is satisfied because Comerica signed the Forbearance Offer. App.83,Dkt.553,p.6. He misses the point.

A waiver of Masters' performance required written waivers from Comerica. Although Comerica did sign the Forbearance Offer, it did not sign a waiver of performance for: (1) Masters' promise to pay $56,204 upon execution of the agreement; (2) Masters' commitment to have someone inject $250,000 by 12/29/08; or (3) Masters' promise to pay Comerica the closing fee of $52,500.

B. The Michigan statute of frauds applies to claims of waiver.

Judge Dayton also found, somewhat obliquely, the statute does not apply to this action:

> The Court concludes Masters did not bring an action to enforce a promise or a commitment to waive under Michigan's statute of frauds for financial institutions. Mich. Comp. Laws Serv. § 566.132(2)(c)

App.25,Decision,p.22,¶6.

This is wrong. Comerica agreed to forbear only if certain terms requiring additional cash were met. The entire thrust of Judge Dayton's decision is that Comerica waived these terms, but Michigan's statute requires that each such waiver be in writing and signed by the bank.

The Michigan statute of frauds requires a writing, signed by a financial institution, for any "action against a financial institution to enforce…(b) a promise or commitment to…modify, or permit a delay in repayment or performance of the loan…or other financial accommodation." This language is squarely on point. Masters brought an action to enforce a commitment to "modify, or permit a delay in…performance of a loan." Also, a signed waiver is required in any action involving: "(c) A…commitment to waive a provision of a…financial accommodation." MCL 566.132(2) (App.136). This is also squarely on point, Masters' lawsuit was for the purpose of enforcing a "commitment to waive a provision of a loan, extension of credit, or other financial accommodation."

Judge Dayton's logic appears to be that Masters did not "bring an action" under Michigan's statute to enforce a promise to waive. The court in *Aronoff, supra*, faced a similarly contorted argument made by the borrower whom the bank was suing to collect on a defaulted loan. The borrower sought to avoid the statute because the bank, rather than the borrower, initiated the lawsuit. The court rejected the borrower's argument, stating:

> [T]he Legislature's use of the term "action" was meant to provide an "unqualified and broad ban" to protect financial institutions from any action to enforce a covered promise or commitment, **however labelled**[.]

853 N.W.2d at 489 (emphasis added) (citing *Crown Technology*, *supra*).

C. There is no "law-of-the-case" issue. The statute of frauds issue was not addressed in *Comerica I.*

Judge Dayton's last basis is that he felt bound by this Court's decision in *Comerica I*. "The Montana Supreme Court has determined that there are triable issues of fact on the issue of whether Comerica waived conditions precedent….This Court…is bound by the Supreme Court's determination."

App.83,Dkt.553,p.6. But the *Comerica I* plurality opinion **did not address** the Michigan statute of frauds, much less whether a **statute** can be "waived."

The *Comerica I* plurality opinion addressed *sua sponte* the Michigan law of waiver, citing *Quality Products and Concepts Co. v. Nagel Precision Inc.*, 666 N.W.2d 251 (Mich. 2003). *Comerica I*, ¶¶84-85,91-92.[7] Justice Baker, relying on *Quality Products,* found that an anti-waiver clause, like the one in the Forbearance Offer, is itself subject to waiver. The Court did not reach the merits on the waiver question because of potential factual issues. It addressed only the question of contractual waiver regarding contract formation. *Comerica I*, ¶108. Neither the Michigan statute of frauds, §566.312(2), nor *Crown Technology* was addressed. Both were addressed, albeit briefly, in Comerica's opening brief in *Comerica I*, p.37.

Quality Products applies only to **contractual** anti-waiver provisions. It says nothing about the Michigan statute of frauds regarding financial institutions. *Quality Products* itself makes this distinction:

> It is well established that a written contract may be varied by a subsequent parol agreement **unless forbidden by the statute of frauds**; and that this rule obtains though the parties to the original contract stipulate therein that it is not to be changed except by agreement in writing.

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[7] Neither party cited *Quality Products* in *Comerica I*. Commendably, Justice Baker went beyond the parties' briefing. Noting the word limitation, she did not fault the parties for failure to brief the Michigan waiver issues. *Comerica I*, ¶60.

666 N.W.2d at 257 (emphasis added).

Two recent cases reinforce that *Quality Products* applies only to contractual waiver issues. In *Bourdow v. Lake Huron Credit Union*, 2016 WL 555924 (Mich. App. Feb. 11, 2016) (per curiam) (unpublished), the court held:

> Under Michigan law, it is well established that the freedom to contract includes the right to waive the terms of a given contract and mutually agree to new contract terms. See *Quality Products and Concepts Co.*…Although a party can generally prove waiver through evidence of an oral agreement or course of conduct, in cases involving **financial institutions**, a subsequent waiver of a contract must be **in writing and properly signed**. MCL 566.132.

(emphasis added); *see also Comerica Bank v. Maniaci*, 2015 WL 5488252 (Mich. App. Sept. 17, 2015) (per curiam) (unpublished).[8]

There is no law-of-the-case problem here because the Michigan statute of frauds was not addressed and certainly was not rejected in *Comerica I*. "The law-of-the-case doctrine applies only to issues actually decided…in the prior appeal." *Bronlow v. McCall Enterprises Inc.*, 888 N.W.2d 295, 303 (Mich. App. 2016); *see also Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn*, 2020 MT 179, ¶22, 400 Mont. 408, 469 P.3d 111. Even if the statute of frauds issue had been decided,

[8] The Michigan Court Rules allow citation of an unpublished opinion for a rule of law not addressed in a published opinion, although such citation does not have *stare decisis* effect. MCR 7.215(C)(1). *Attorney Gen. v. Merck Sharp & Dohme Corp.*, 807 N.W.2d 343, 348 n.6 (Mich. App. 2011) (unpublished cases are not binding on the appellate court, but may be viewed as persuasive).

plurality opinions are not binding precedent because they did not garner a majority of the Court. *Dean v. Chrysler Corp.*, 455 N.W.2d 699, 701 (Mich. 1990).[9]

D. Conclusion—end of discussion.

In short, under Michigan's statute of frauds, "[a]n action shall not be brought to enforce a 'promise or commitment to waive' unless in writing and signed by a financial institution." The undisputed evidence is that there were no written and signed waivers by Comerica.

This should be the **end of the discussion**. Judge Dayton's legal error on the waiver issue is determinative. The following arguments on contract formation, waiver, damages, attorney's fees, and interest, provide additional, independent grounds for reversal.

II. NO CONTRACT WAS FORMED—COMERICA'S OFFER WAS NOT ACCEPTED.

A. There was an offer, but no acceptance.

Comerica's Forbearance Offer was an **offer**,

> **Subject to** timely, **written acceptance** by Borrowers **and Guarantors** of the following conditions, Bank is willing to forbear until February 16, 2009…from further action to collect the Liabilities.

[9] Finding Michigan law applies in this case but failing to apply its statute of frauds (essentially ignoring a fundamental aspect of Michigan law) would be so arbitrary and unfair to Comerica that it would violate the 14th Amendment Due Process Clause and the Full Faith and Credit Clause of the United States Constitution. *See Allstate v. Hague*, 449 U.S. 302, 309 (1981).

App.117,Ex.45,p.2 (emphasis added). The Offer required "Borrowers **and Guarantors** shall properly execute this agreement…" and deliver it by noon on December 19, 2000." and "**when properly executed** and delivered by the signing deadline, will constitute a fully executed complete agreement." *Id.*,¶30 (emphasis added).

Under basic contract law, Comerica's December 17 proposal was an **offer**. No contract would be formed unless that offer was **accepted**. "An offer is a unilateral declaration of intention, and is not a contract." *Kamalnath v. Mercy Memorial. Hosp. Corp.*, 487 N.W.2d 499, 503 (Mich. App. 1992). Comerica's offer was clear. Acceptance could be accomplished only by "written acceptance by Borrowers and Guarantors…." "Guarantors" included both guarantors, Larry Pratt and Dr. Vlahos.

But Vlahos never signed. Therefore, no contract was ever formed. "A contract is made when both parties have executed or accepted it, and not before." *Kamalnath,* 487 N.W.2d at 503 (quoting *Brown v. Considine,* 310 N.W.2d 441 (Mich. App. 1981)); *see generally* Rice/McKinnon dissent/concurrence, *Comerica I*, ¶120.[10]

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[10] *See Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 2008 MT 175, ¶ 22, 343 Mont. 392, 185 P.3d 332.

"Unless an acceptance is unambiguous and in **strict conformance with the offer**, no contract is formed." *DaimlerChrysler Corp. v. Wesco Distribution, Inc.*, 760 N.W.2d 828, 832 (Mich. App. 2008) (emphasis added) (quoting *Kloian v. Domino's Pizza, LLC*, 733 N.W.2d 766 (Mich. App. 2006)); *Moore v. Moore*, 2019 WL 3315360, at *6 (Mich. App. Jul. 23, 2019) (unpublished) ("An unambiguous acceptance in strict conformance with this particular offer would have required son to sign the contract. However, son admittedly never signed the 'purchase agreement.'… Accordingly, without acceptance, this 'purchase agreement' serves only as an offer….") *appeal denied*, 940 N.W.2d 95 (Mich. 2020); *Pakideh v. Franklin Comm. Mortg. Grp., Inc.*, 540 N.W.2d 777, 780–81 (Mich. App. 1995) (holding that there was no acceptance where party did not sign contract and contract's method of acceptance required, among other things, a signature). "An offer is not a contract." *Bd. of Control of E. Mich. Univ. v. Burgess*, 206 N.W.2d 256 (Mich. App. 1973). In *Brophy v. Idaho Produce & Provision Co.*, 31 Mont. 279, 78 P. 493, 494 (1904), this Court approvingly quoted a Michigan case (*Eggleston v. Wagner*, 10 N.W 37, 42 (Mich. 1881)):

> In order to convert a proposal into a promise, the constituents of the acceptance tendered must comply with and conform to the conditions and exigencies of the proposal. The acceptance must be of that which is proposed, and nothing else, and must be absolute and unconditional.

See also Restatement (Second) on Contracts §58 ("An acceptance must comply with the requirements of the offer…") and Cmt. a ("[T]he offeror is the master of his offer."); *Independence Tp. v. Reliance Bldg. Co.*, 437 N.W.2d 22, 24 (Mich. App. 1989) ("Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed.").[11] *See also Harbor Park Market, Inc. v. Gronda*, 743 N.W.2d 585, 590 (Mich. App. 2007); *Rodgers,* 890 N.W.2d at 386 (noting that the plaintiffs never signed the "balloon-payment disclosure, which was an integral part of the agreement….[B]ecause the conditions precedent to the formation of the contract were not satisfied, there is no agreement to enforce."); *Ayar v. Baymont Inns, Inc.*, 2004 WL842502 (Mich. App. Apr. 20, 2004) (unpublished) (the court, noting specific language that parties were not to be bound until the agreement was executed and that the agreement was not signed, said: "Accordingly, no contract was formed.").[12]

With no acceptance and, therefore, no contractual commitment to forbear, Comerica was unilaterally free to continue to forbear day-to-day (which it did for

[11] Montana law is the same: "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless the conditions are conformed to." §28-2-501(2), MCA.

[12] This law of offer and acceptance is universal. *See, e.g., A.T. Klemens & Son v. Reber Plumbing & Heating Co.*, 139 Mont. 115, 119, 360 P.2d 1005, 1007 (1961) ("Where parties to a contract verbally agree upon all of its terms but stipulate that it will not be binding until it is reduced to writing, it is not binding upon the parties until it is reduced to writing and signed.")

fourteen more days) or to pursue other courses. Comerica ultimately exercised its right to call the note under the preexisting contract.

B. The court erred in disregarding the required participation of the two Guarantors and focusing only on Masters.

On the contract formation issue, Judge Dayton inexplicably focused solely on Masters. Noting that Masters returned the signed Forbearance Offer on 11/22/08, he stated: "The Court concludes a valid, enforceable contract exists **between Comerica and Masters** known as the Forbearance Agreement," App.27,Decision,p.24,¶17 (emphasis added), and "The December 19, 2008 Forbearance Agreement is a valid and enforceable contract existed (sic) **between Masters** and Comerica." *Id.*,p.37 (emphasis added).

It was clear error to effectively delete the terms of the offer requiring signature by the Guarantors. Courts "must give 'effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.'" *Woodington v. Shokoohi*, 792 N.W.2d 63, 78 (Mich. App. 2010) (citation omitted); *see* Farnsworth on Contracts §3.13, p. 259 (2d ed.) ("If the offer requires that the acceptance bear the signatures of a number of persons, it must be signed by all of them.").

> It is held in numerous cases that, **where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it**.…

Palman v. Reynolds, 16 N.W.2d 657, 658 (Mich. 1944) (emphasis added) (quoting 17 C.J.S. Contracts §62, p. 411).

The requirement of Vlahos' execution of the Forbearance Offer is unambiguous and the Court must enforce the term as written. *In re Smith Trust*, 745 N.W.2d 754, 758 (Mich. 2008).

C. The court erred in finding waiver on contract formation.

Ironically, Judge Dayton, on this issue, twice quotes the same passage from Justice Rice's *Comerica I* dissent. Judge Dayton argues it supports his "analytical framework." App.6,27,Decision,p.3;p.24,¶23. There is nothing unclear about Justice Rice's dissent/concurrence. It states unequivocally that "the District Court erred by failing to enter summary judgment in favor of Comerica **on the issue of contract formation**…." *Comerica I*, ¶¶ 114, 116 (emphasis added).[13]

Judge Dayton found waiver of the terms of acceptance based on inferences he draws about two events. Comerica's Norton sent an email, after receiving Masters' signature, that he "[l]ook[ed] forward to the rest of the signatures." Ex.43. The court also makes a loose finding that Norton was told on December 30, 2008

[13] Justice Baker's plurality opinion does not reach the merits on contract formation, holding only factual development was necessary, given the high bar for summary judgment. *Comerica I*, ¶¶ 89-92.

that Vlahos was unavailable to sign until January 2, 2009. Norton supposedly orally responded "that's fine." Tr.1123:18-19.[14]

Significantly, Howell's oral claim that Norton, on **December 29**, acceded to Vlahos' delay by saying "that's fine" is directly contradicted by two documents. *See* email of Yaklin to Howell, 8:32 am, **December 30**, 2008 ("Also, they told me that the signed Forbearance Agreement was required to be received from Dr Vlahos today or they would not forbear any longer…." App.140,Ex.329,p.1); and internal email of Masters at 3:13 pm the same day ("[T]hey just called us and said they had decided to seek rights and remedies beginning tomorrow morning." App.144,Ex.380).[15]

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[14] Howell's testimony that Norton said "that's fine" was predicated on inadmissible hearsay (Howell's claim of what Vlahos told him, but Vlahos did not testify). Judge Dayton agreed, but admitted it "not for the truth of what Dr. Vlahos may have said," but for the asserted effect it had on Comerica's Norton. Tr. 1123:7-19. However, he ultimately ascribed and relied on a substantive meaning to the "that's fine" comment. App.19,22,Decision,p.16,¶70;p.19,¶91. Despite efforts by Comerica, Dr. Vlahos was not deposed due to illness and then death. Tr.1345:23-1346:23.

Hearsay aside, there are strong reasons to question Howell's present claim of the "that's fine" comment. This is the first time Howell said it. The comment did not appear in Howell's testimony in the first trial, in his deposition, in the record before this Court in *Comerica I*, in the Final Pretrial Order (Dkt. 577 pp. 2-10), or in Masters' "Brief in Opposition to Comerica's Motion for Summary Judgment [Contract Formation]," where Masters' attorneys tick off six events they argue amount to waiver. Dkt.519,p.18.

[15] These documents also belie Masters' suggestion of surprise over Comerica's actions of December 31.

Lest there be any question that there was no acceptance or mutual assent, Masters prepared a lengthy letter on December 31, 2008, noting that they had been told "last evening" that Comerica had decided to call the loan. In that letter, Masters actually confessed that it did not have the money but claimed it needed "one more week" to assemble it. It also argued that some of the terms of the Forbearance Agreement **were not acceptable** and requested that Comerica "eliminate the additional fees and penalties" and "reduce our interest rates." In other words, there was no acceptance of the offer on its terms. App.193-195,Ex.34a. At best, there was an unaccepted counteroffer. *DaimlerChrysler Corp.*, 760 N.W.2d 828 at 832 ("Chrysler's purchase order constituted a rejection of Wesco's offer, and instead was a counteroffer.").

Finally, if Comerica acceded to a delay in signature, this only means that no contract was **yet** formed, but one **may** be formed when Vlahos signed. After all, "[A] contract requires mutual assent or a meeting of the minds on all essential terms." *Kloian,* 733 N.W.2d at 770. As Corbin cogently puts it:

> Even though the offeror states when he makes the offer that the offeree shall have a definitely stated time in which to accept, or states that the offer will remain open for a definite time, the offer is nevertheless revocable at the will of the offeror.

Corbin on Contracts, §38 (1952). "A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to the acceptance by the offeree." *Burgess*, 206 N.W.2d 256 at 259.

Absent a clear acceptance of the offer, Comerica was free to forbear unilaterally from day to day but also was free to modify or withdraw its pending offer.

In sum, no contract was formed.

III. EVEN SETTING ASIDE MICHIGAN'S WRITING/SIGNATURE REQUIREMENT, THE COURT FAILED TO APPLY MICHIGAN'S TEST FOR FINDING WAIVER.

Even if a contract were formed and even if the statute of frauds issue is set aside, Michigan law requires much more compelling evidence than that relied on by Judge Dayton to find waiver, particularly as here where there is a contractual non-waiver clause:

> **[A]bsent an express written waiver by Bank**, Bank will not be bound by an agreement on any individual issues unless and until an agreement is reached on all issues and such agreement is **reduced to writing and signed** by Borrower and Guarantors and Bank.

App.119-120,Ex.45,pp.4-5,¶20 (emphasis added).

A. Michigan's stringent test for waivers

Judge Dayton found that under Michigan law, contracting parties may modify a non-waiver clause by mutual agreement, citing *Quality Products, supra*.

While true, the standard in Michigan is very high. The court held in *Quality Products* that any waiver must be "**mutually intended**" and established by "**clear and convincing evidence**." 666 N.W.2d at 258. The court found no waiver under its facts, stating that plaintiff's proofs establish "at best, knowledge and silence…." *Id.* at 259. There is "a strong reluctance by Michigan courts to find waiver or estoppel except under the most compelling circumstances." *Formall, Inc. v. Community Nat. Bank of Pontiac*, 360 N.W.2d 902, 906 (Mich. App. 1984).

The "clear and convincing evidence" standard is "the highest, most demanding, level of proof in civil cases." *In re Martin*, 538 N.W.2d 399, 410 (Mich. 1995). The evidence must be "so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Id.*[16]

Judge Dayton did not follow the high bar set forth in *Quality Products*; rather, he articulated a different high standard. App.32,Decision,p.29,¶45. However, he paid it only lip service. He proceeded to find waiver of **every single term** in the Forbearance Offer without citing any evidence of a clear, unequivocal, and decisive act by Comerica, so consistent with an intent to waive that no other

[16] Because this is substantive, Michigan law applies. *Greer v. Alexander*, 639 N.W.2d 39, 43 (Mich. App. 2001) ("[W]e construe the 'clear and convincing evidence' standard to be a substantive standard rather than just an evidentiary standard.").

reasonable explanation is possible. Nothing here meets the "clear and convincing evidence standard" of Michigan law.

B. The asserted events of "waiver" are too vague and weak to meet Michigan's "clear and convincing" test.

Comerica made it clear it would not loan additional money. Realizing that Masters could not survive, even for a short time, without additional cash, Comerica agreed to make the Forbearance Offer, but only if Masters could come up with additional capital. An internal December 17, 2008 Masters email stated, "Comerica has given the company until Monday the 29th to get the **new cash** from Dr. Vlahos and Matt Nolan (and Larry?)…" and the Forbearance Offer "requires our **fresh capital**." App.109,Ex.509,p.2 (emphasis added). Without new cash, there would be no forbearance.

Given this recognition of the need for new money, it is inconceivable that Comerica would, within a matter of days, waive every single term requiring "new cash."

1. <u>Comerica did not waive the requirement for injection of $250,000.</u>

The Forbearance Offer required an injection of $250,000 equity on or before December 29. App.117,Ex.45,p.2,¶5. Although the court recognized there was no injection of $250,000, it found that Comerica somehow waived this term by saying "that's fine." App.36,Decision,p.33,¶63. But, assuming Norton actually said "that's fine," this statement, at most, might be a waiver of the **signature deadline**. The specific testimony was:

> A: I told him I'd finally been able to contact Dr. Vlahos and…he was unable to **sign** it until January 2nd when he returned.
>
> Q: And what was Mr. Norton's response?
>
> A: That's fine.

Tr.1123:15-19 (emphasis added). Even if made, this comment says nothing about waiver of the $250,000. Further, Norton was allegedly told of Dr. Vlahos' comment on December 30. Tr.1333:5-20. By that time, Masters had already "blown the" December 29 deadline for the injection of $250,000. *Id.*

Setting aside that any such waiver must be in writing, signed by the bank, this claim of waiver of the $250,000 payment does not come close to meeting the Michigan clear and convincing standard.[17]

2. <u>The court hedged its bets on finding waiver of the injection of $56,204.</u>

With respect to the requirement that Masters deposit $56,204 "[u]pon execution[,]" App.117,Ex.45,p.2,¶4, the court concluded that Masters **either** met this condition by having more than that amount on deposit, **or** Comerica waived

[17] In *Aronoff*, 853 N.W.2d at 490, the court discussed documentary evidence tending to show a waiver, finding it insufficient to establish essential terms of an agreement, stating under the Michigan statute of frauds: "[T]he proponent's written evidence must still be sufficient to establish the terms without the need to fill in gaps with oral testimony[.]"

this condition pending Vlahos' execution. Which is it? Clearly, Masters did not **meet** this condition, even though it had the sum of $96,033.85 in its account on December 31.[18] The Forbearance Offer obviously required the **additional** injection of funds: "Borrower will deposit…."[19]

Moreover, the court's loose alternative finding that Comerica may have waived this condition "pending Vlahos' execution" is mystifying. There is no evidence that Vlahos was going to be the source of the capital injection of $56,204, as opposed to the $250,000 injection. There is no connection between the requirement of $56,204 and the supposed waiver pending Vlahos' execution.

Even more tenuous is the court's discussion of the requirement that the $56,204 be deposited "upon execution." The court argues "[t]he Forbearance Agreement is **vague** regarding the '[upon] execution of this Agreement, [Masters] will deposit.'" He states if the condition "upon execution" means "Masters' Pratt's, and Vlahos' execution, then Comerica expressly waived the deadline for this

[18] The court noted that Masters had $96,033.85 in its account on 12/31/08 (App.20,Decision,p.17,¶76), but the date for payment of the $56,204 was not 12/31/08, it was "upon execution." The court argued that the "upon execution" date was "vague," *id.*,¶61, but whatever that date was, it was certainly prior to 12/31/08. Notably, on 12/29/08, Masters had only $27,000. Tr.1889;Ex.1531,p.1.

[19] Moreover, the $96,033.85 was pegged for ongoing operations if Masters was to survive until February 16, 2009, particularly payroll and delinquent interest (over $110,000). Ex.1531,p.1;App.192,Ex.34a;Tr.1127:20-25,1128:10-12,20-23. Also, the $96,033.85, even if it had been available to pay Comerica, was less than the total of the two sums ($56,204 and $52,500) required under the Forbearance Offer.

condition pending Vlahos' execution of the Forbearance Agreement." App.35,Decision,p.32,¶61 (emphasis added).

This is a "catch-22" for Comerica. The sum of $56,204 was to be deposited "upon execution of the contract," but under the court's logic, $56,204 never became due because Vlahos never executed the contract. Yet, according to the court, when Comerica ceased forbearing and called the note, it breached the (otherwise unexecuted) contract.

3. <u>The court erred in its application of estoppel to the failure to inject $52,500.</u>

The Forbearance Offer also required that Comerica be paid $52,500 on or before December 31, 2008. App.118,Ex.45,p.3,¶7. On this unfulfilled term, Judge Dayton ruled Comerica was "estopped." App.36,Decision,p.33,¶64. The only utility of an estoppel argument here is that it dispenses with the mutual intent requirement, i.e., the court is saying that Comerica's acts, even if unintentional, induced inaction by Masters.[20]

Under Michigan law, to effect a waiver by a financial institution, such waiver must be in writing and signed by the financial institution. *See* Arg. I, above. Thus, with respect to financial institutions, there is no room for estoppel. By

[20] Strangely, in fashioning his lengthy estoppel argument, Judge Dayton disregarded *Quality Products*' central **holding**—there must be mutual intent to waive. Instead, he relied three times on the **dissent**. *See* App.33,Decision,p30.

definition, if the financial institution signs the waiver, it indicates "mutual intent," obviating the need for an estoppel claim.

Crown Technology squarely rejected an estoppel argument, holding that the Michigan statute of frauds applies to claims of promissory estoppel. *See also Rodgers*, 890 N.W.2d at 385 ("This [statute of frauds] bar covers plaintiff's claims based on any theory, including their theories of breach of contract…and estoppel.").

4. <u>There is no evidence that Comerica "prevented" performance.</u>

Judge Dayton found that Comerica **prevented** Vlahos' performance. App.22,Decision,p.19,¶92. On this, Judge Dayton improperly conflated two terms of the Forbearance Offer, ¶¶5-6. Judge Dayton found Comerica's actions under ¶6 somehow prevented Vlahos from making the $250,000 injection. *Id.*,¶92. He apparently thought that Vlahos' $500,000 guaranty account would be the source of the $250,000. This is wrong.[21]

Paragraph 5 only requires **someone** to inject $250,000 "in the form of equity." App.117,Ex.45,p.2,¶5. That is independent of ¶6, which required Vlahos to maintain his existing guaranty of $500,000, which he proposed to accomplish by converting the securities account to cash.

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[21] This is a legal issue subject to *de novo* review because it involves the court's interpretation of provisions of an asserted contract. Factual determinations are reviewed for clear error, but "whether those facts satisfy the legal standard is reviewed *de novo*." *Mlekush, supra,* 2015 MT 302, ¶8.

a. <u>¶5, requiring the injection of $250,000 by 12/29</u>

Paragraph 5's $250,000 was **in addition to Vlahos' $500,000 guaranty** addressed in ¶6. Masters clearly understood this, as evidenced in Masters' CFO's December 5 internal email:

> We are working on a proposal for Dr. Vlahos to move his $500K control account portfolio into a cash position with Comerica and also to move **an additional $250K** to the Masters group operating checking account to cover current obligations.

App.113,Ex.863 (emphasis added). Howell added: "Dr. V. needs to liquidate the equity account and **top it up to $750k** so the transfers can be made." *Id.* (emphasis added). In a separate email the same day, Howell reiterated:

> [Comerica's] continued forbearance is very much based on getting $250k from Dr. V into Masters' Comerica account next week **as well as** the $500k into a Comerica money market account….

App.138,Ex.1321 (emphasis added).

In short, the requirement for injection of $250,000 was separate from ¶6 of the Forbearance Offer. There is nothing in ¶6 that relates to, much less **prevents**, Vlahos from injecting an additional $250,000.

b. <u>¶ 6, requiring conversion of Vlahos' securities to cash and maintenance of the guaranty account at $500,000</u>

Vlahos provided his $500,000 guaranty on 12/17/2007 (*Comerica I*, ¶9), a full year before the Forbearance Offer. Paragraph 6 of the Forbearance Offer imposed no new terms. It merely required that he **continue** his guaranty at that level.

Paragraph 6 also stated Vlahos would convert those securities to cash. This also simply memorialized agreements put in place well before the Forbearance Offer. App.113,Ex.863, 12/5/08 email ("We are working on a proposal for Dr. Vlahos to move his $500K control account portfolio into a cash position with Comerica…."). *See also* Tr.202:16-19 ("Q: Can you confirm that all this activity was going on before the December 17, 2008 Forbearance Agreement? [Norton] A: Yeah.").

Vlahos and his broker (Smith) informed the bank that certain bank stocks Vlahos held were "thinly traded." He worried they would lose value if converted to cash. Tr.224-225.[22] Therefore, Vlahos' broker requested Comerica's permission to substitute collateral.[23] Tr.224-225. Masters' CEO confirmed that Comerica worked with Vlahos' broker as an **accommodation to Vlahos** with respect to the bank

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[22] Judge Dayton's finding that Vlahos was kept in the dark on this is unsupported—Comerica worked carefully with Vlahos' broker, with Vlahos' knowledge and blessing. Tr.224:4-225:17.

[23] Comerica's cooperation was necessary because it had exercised its right to place an "exclusive control" order on that account. The exclusive control and entitlement orders were **not pursuant to** the Forbearance Offer, they existed well before the December 17, 2008 Offer. Judge Dayton recognized the exclusive control document did not stem from the Forbearance Offer. "On November 25, 2008, **prior to the Forbearance Agreement**, Comerica issued a Notice of Exclusive Control to Vlahos regarding his collateral in his Wachovia securities account. Ex. 1310-01." App.17,Decision,p.14,¶59 (emphasis added). *See also* Tr.231:15-16.

stocks. Tr. 1342:1-8, App.133-134,Ex.153. As stated, these efforts to substitute collateral started well before the Forbearance Offer.[24]

Masters, in a summary judgment brief, accurately described Comerica's actions as being "**consistent with**," rather than "pursuant to," the Forbearance Offer ("On December 29, 2008, consistent with ¶ 6 of the Forbearance Agreement, Mr. Norton began sending entitlement orders to Wachovia….") (Dkt.519,p.6) (emphasis added). Masters did the same thing in its proposed findings of fact. Dkt.599,p.44,¶63(c).

As the possibility of Comerica drawing on the guaranties heightened, Vlahos' need to convert his bank stock to cash became more urgent. In a 12/30/08 internal email exchange, Masters admitted both that Comerica was cooperating with Vlahos and that the maintenance of the guaranty account at $500,000 was no impediment to Vlahos getting the $250,000 elsewhere. The email noted Comerica's cooperation with Vlahos' broker, and said once the $500,000 guaranty is converted to cash, "the bank stocks that are in it will no longer be an issue. **Dr. Vlahos can get the $250 wherever he desires at that point. He does not have to sell the bank stocks**." App.133,Ex.153 (emphasis added). Thus, there was no prevention of performance by Comerica.

[24] Masters did not argue that Comerica's actions were partial steps in implementing the contract. Such argument would be wrong. *See McDaniels v. Schroeder*, 157 N.W.2d 491, 493 (Mich. App. 1968), which requires "acts of part performance unequivocally referring to and resulting from the agreement."

Nevertheless, there remained a problem, not because of the Forbearance Offer, but because of Vlahos' reluctance. In the same email exchange, Yaklin said to Howell:

> The other $250 was for us to resolve outside of that. Based on Bill's comments on the phone today as well as the comments you had from Dr Vlahos, I'm getting concerned that we are not going to have an easy time getting these funds.

Id.

In short, Comerica did not prevent performance. Vlahos, like the others, was simply reluctant to risk another $250,000.[25] He had certainly not committed, let alone attempted, to inject the $250,000.

IV. THE SO-CALLED "SEIZURE DAMAGES" ARE NOT RECOVERABLE FOR BREACH OF CONTRACT UNDER MICHIGAN LAW.

Under Michigan law, the purpose of damages for breach of contract is to give the promisee the benefit of the bargain by putting it in as good a financial

[25] Regarding Guarantor Pratt, Judge Dayton said: "The Court finds Pratt took every possible step to meet his obligations under the loan and the Forbearance Agreement." App.21,Decision,p.18,¶86. This is gratuitous and inconsistent with the record. The Forbearance Offer imposed no new obligations on Pratt between 12/17/08 and 12/31/08. Pratt's only obligation under the Forbearance Offer was to deposit money into the "Pratt Comerica account on or before **January 16, 2009**" (App.118,Ex.45,p.3,¶8) (emphasis added). That date was in place before the Forbearance Offer. On November 24, 2008, well before the Forbearance Offer, Pratt began converting stocks in his guaranty account to cash. App.186-192,Ex.29;Tr.103:5—106:1-3;App.102,Ex.491,p.2. "The one Hedge fund has been sold but they will not get the funds for approximately 2 months (sometime in late January 2009)." App.186,Ex.29,p.1;Tr.1348:19-24.

position as if the promisor had performed the contract, but not better. *Goodwin, Inc. v. Coe*, 233 N.W.2d 598 (Mich. App. 1975).

An appropriate damages model would have accounted for lost profits (if any) occasioned by the breach, or lost value of the business. Restatement (Second) of Contracts, §§347, 349. Masters failed to do the former and made no effort to do the latter. The court so specifically found:

> The Court is unpersuaded by Masters' arguments for lost profits or the lost value of U.K. Masters due to the inability to prove these amounts with reasonable certainty. Masters' admitted challenging cashflow and the causal connection with the downfall of U.K. Masters is unsubstantiated.

App.38,Decision,p.35,¶78.

This is correct. "Before lost profits are recoverable, they must be proven with a reasonable degree of certainty as opposed to being based on mere conjecture or speculation." *Body Rustproofing, Inc. v. Michigan Bell Tel. Co.*, 385 N.W.2d 797, 800 (Mich. App. 1986); *Joerger v. Gordon Food Serv., Inc.*, 568 N.W.2d 365, 369-70 (Mich. App. 1997).

Despite Masters' failure to prove damages under the established measure for contract breaches, Judge Dayton awarded what he called "seizure damages":

> The Court…concludes…that the financial track record prior to the breach by Comerica of the Forbearance Agreement is such that a determination of damages for lost profits could not be made with sufficient certainty to

> be other than speculation. **Seizure damages will be awarded.**

App.8,Decision,p.5 (emphasis added). It is left to the reader to supply the transition between the first and second sentences. Without explaining any legal or evidentiary basis supporting such claim, the court later cryptically stated: "Damages are awarded to Masters in the amount of $10,595,514.16." App.38,Decision,p.35,¶79.[26]

A. There is no such thing as "seizure damages" under Michigan law.

In Michigan, there is no concept known as "seizure damages."[27] This is an invention, apparently pulled out of Masters' expert's derrière.

B. The court erred in ignoring the requirement of damage causation.

The rule in Michigan on contract damages, universal everywhere, is that a plaintiff is entitled only to damages which are **caused by** the breach. *See, e.g.*, Michigan Pattern Jury Instruction: "The injured party should receive those damages **naturally arising from** the breach." App.148, M.Civ.JI §142.31 (emphasis added) "This is, of course, a fundamental requirement that the breach of contract be the cause in fact of the loss." Farnsworth, *supra*, §12.1, p.148.

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[26] The damage award is based on the court's finding that "the breach on December 29, 2008 and the subsequent seizure of Masters', Pratt's, Vlahos', Nolan's, and Taylor's collateral on December 31, 2008 through March 2, 2009 totaled $10,595,514.16." App.38,Decision,p.35,¶77.

[27] *See* Westlaw search under Michigan law, search term "Seizure Damages," and result: "No Documents Found." App.146.

Judge Dayton acknowledged that a plaintiff may only recover for damages that "are the direct, natural, and proximate results of the breach." App.38,Decision,p.35,¶75. However, in awarding "seizure damages," whatever that term means, he improperly eschewed any causation analysis.

Under the Forbearance Offer, Comerica proposed to forbear only to February 16, 2009—to allow Masters to obtain substitute financing supposedly from Wells Fargo. Thus, for assessment of damages, only a brief forty-five-day period is in question. Moreover, the Wells Fargo loan was a pipe dream. Masters never came close to securing the (hoped-for) Wells Fargo loan. App.96,Ex.148. Even if the loan were viable, there is no evidence to support Judge Dayton's finding that "due to the confiscation of Masters' and its Guarantors' funds, Wells Fargo refused to refinance the Masters loan"—indeed, the evidence is to the contrary. App.11,Decision,p8, ¶31.[28] Mark Debniak, Wells Fargo's loan officer responsible for dealing with Masters, gave uncontroverted testimony that Wells Fargo made a decision that it did not want to participate in this loan. He added "…I don't think it [Comerica's exercise of its rights] had anything to do with it." Tr.2048:18-19.

[28] The use of the word "confiscation" should raise eyebrows. Comerica, a bank, exercised its rights under the loan documents to call the defaulted loan and draw on the Guarantors.

On February 1, 2009, Masters principals Brian McNamara and Derek Rogers reflected on what actually caused the company's collapse and stated: "[I]t now transpires the business was under funded from day one…." App.159,Ex.1523,p.7. The same email stresses various concerns over the management and spending of CEO Howell. *Id.* There was no mention of Comerica or its loan.

But even if causation were established, the award of over $10 million was wrong. Masters U.S. was worth virtually nothing as of mid-December 2008—evidenced by the fact that it could not even come up with the added cash necessary to continue to operate and required by the Forbearance Offer.

In sum, the evidence never varied: Masters U.S., with crushing cashflow struggles from its inception, had long been gasping for air. It certainly was not surviving on annual receipts of $13,000 (FY 2007) or even $600,000 (FY 2008). Ex.3,p.14;Tr.1477:1;Ex.391,pp.5,42.

C. The court erred when it did not reduce the damages by the indebtedness, holding that Comerica had not pled recoupment or setoff.

Judge Dayton awarded Masters $10,595,514.16, but refused to deduct the $10.5 million Comerica had loaned to Masters. He summarily rejected any downward adjustment, finding such adjustment not properly pled as an affirmative defense. App.39-40,Decision,pp.36-37. Comerica raised the issue, however, in the pretrial order, which supersedes the pleadings. Dkt.577.1,p.40. "Masters' alleged seizure damages are improper because they do not account for the fact that the loan would have had to be repaid at some point in time." *Id.*,¶60,p.27. *See also id.*, ¶¶42-43,47, and issues 5,7.

Regardless, judges and juries must make damage awards based on **net** damages. That is, they deduct from any award costs saved. *See* Farnsworth, *supra*, §4.90 ("[D]amages compensate the injured parties for the loss it will suffer…minus the amount of savings that resulted from the injured party not having to render any remaining performance of its own."). This is particularly implicit in the concept of "lost profits," which is the normal measure of contract damages. "Profits" are a **net** concept (i.e., gross receipts less costs). *See Benfield v. HK Porter Co.*, 137 N.W.2d 273 (Mich. App. 1965) (because plaintiff had failed to prove any offset for expenses, he had failed to prove lost profits); *see also* Farnsworth, *supra*, §12.10, p.209; *A.T. Klemens*, 139 Mont. at 126 ("[P]rofits as an element of damages are measured by the difference between the contract price and the cost of performance after deducting the benefit that has accrued to the plaintiff for being relieved from performing the contract….").

Because of this rule, it is not uncommon to find no damages, even where there may have been a breach. *See, e.g., Tel-Ex Plaza, Inc. v. Hardees Rests, Inc.*, 255 N.W.2d 794, 797 (Mich. App. 1977): "[A]ny benefit to the plaintiff arising from or as a result of the breach must reduce the damages otherwise payable." The court concluded that, despite the breach, after deducting the savings, "Tel-Ex has suffered no loss. We thus find…that no damages were shown." *Id.*

In *Kolton v. Nassar*, 358 Mich. 154, 158 n. 2, 99 N.W.2d 362 (1959), the court noted that a breach sometimes occurs "without causing any harm." The court explained the "measure of damages, if any was suffered, was the **net difference** in his favor between the end balance of the contract price and the amount it cost Plaintiff to finish performance had he been permitted to do so." *Id*. at 157 (emphasis added). The court affirmed that no money could be recovered because plaintiff received a "benefit rather than a detriment from Defendants' termination of performance." *Id*. at 157-158.

The *Goodwin* court was unequivocal:

> The injured party is not…entitled to be placed in a better position than he would have been if the contract had not been broken, i.e., the measure of damages is the actual loss sustained by reason of the breach…. **Thus, deduction of any saving to the injured party must be made.** (Authorities omitted).

Goodwin, 233 N.W.2d at 603 (emphasis added). This requirement for netting damages is universal in contract damage law.

> Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and the gains prevented by the defendant's breach, in excess of savings made possible, as established in accordance with the rule stated in §§ 330-346.

Restatement (First) of Contracts §329; *see also* §335 ("[T]he amount of this saving is deducted from the damages that would otherwise be recoverable."); *AARP v. National Sur. Corp.*, 2001 WL 1530353, *15-16 (Mich. App. Feb. 23, 2001) (unpublished) ("Plaintiff must show net injury over the life of the contract…." and "Plaintiffs' damages must be calculated on a net basis….").

Even Masters' counsel in *Comerica I* commented approvingly on the propriety of the jury's deduction of the loan amount:

> Moreover, on a simple appeal to fairness made by Comerica's counsel at closing ([2015] TR1737, 1.14-18), the jury deducted $10.5 million from Masters' economic damages, representing the exact amount of the Comerica loan.

Appellee's Petition for Rehearing, 7/14/15, p.8.[29]

Masters was obligated to repay the sum of $10.5 million it had borrowed from Comerica. As the Court said in *Ursery v. Option Mortgage Corp.*, 2007 WL2192657, *1 (Mich. App. Jul. 31, 2007) (unpublished): "First and foremost, Ursery promised to repay the loan." Justice was not done when Masters was allowed to worm out of its repayment obligation.

Similarly, justice is not served by a myopic application of the pleading rules.[30] This flies in the face of the requirement that the Civil Rules "should be

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[29] Notably, in *Comerica I*, Masters' counsel did not object to the jury's downward adjustment but, instead, praised it as a "simple appeal to fairness," even though no offset or recoupment claim was pled as an affirmative defense.

construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *See Comerica I* (rejecting Masters' argument that choice of law was not pled as an affirmative defense: "Masters cannot fairly argue that it was taken by surprise by Comerica's motion to apply Michigan law." ¶¶48-49.); *see also Yarborough v. Glacier Co.*, 285 Mont. 494, 497, 948 P.2d 1181, 1183 (1987) ("Yarborough complied with the substance and the literal purpose of Rule 41(e), M.R.Civ.P. We conclude that to require more would exalt form over substance.").[31]

In sum, it makes no sense, mathematically or otherwise, to award Masters over $10 million in damages without accounting for the debt owed Comerica.

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[30] The concepts of offset/recoupment do not even apply because Masters did not owe Comerica money once the sweep occurred. Until Judge Dayton's damage award, the loan had been satisfied. Setoff becomes available "when two entities that owe money to each other apply their mutual debts against each other." *Walker v. Farmers Ins. Exchange*, 572 N.W.2d 17, 19 (Mich. App. 1997). Similarly, recoupment is based on a "cross-obligation of the contract on which the plaintiff sues." *Minority Earth Movers v. Walter Toebe Const. Co.*, 649 N.W.2d 397, 402 n.5 (Mich. App. 2002).

In *Dew v. Dower*, 258 Mont. 114, 852 P.2d 549 (1993), this Court approved an offset against a tort award of damages based on an underlying contract: "The power to allow a set-off of debts by a court of equity exists independent of statute where grounds for equitable interposition are shown…." *Id.* at 558.

[31] Where an issue is in fact tried, even over the objection of a party, this Court will set aside technical pleadings requirements. *Watters v. City of Billings*, 2019 MT 255, ¶¶ 32, 33, 397 Mont. 428, 451 P.3d 60 (2019). *See also Minority Earth Movers, supra*.

D. The award of Guarantors' damages was improper, they suffered no breach.

The bulk of the damages awarded were based on "assigned" claims, purportedly assigned to Masters by Vlahos, Pratt, Nolan, and Taylor. App.38,Decision,p.35,¶77.[32]

1. <u>An assignment does not eliminate the assignor's obligations.</u>

Having avoided paying its debt, it appears Masters now thinks it can avoid the **obligations** of the Guarantors through the device of assignments. Expert Storey, when questioned about his damage calculations, testified that "the offset money…of roughly 10 million, the collateral money was taken from the investors, it was their loss, which was assigned to Masters, so it's a loss." Dkt.481,Ex.C-7,p.223:9-13. But, of course, these guaranty accounts were for the purpose of ensuring repayment of Masters' loan—a loan that was never repaid. When asked whether he accounted for the obligation to repay the loan in his damage calculations, Storey dissembled. Tr.1596-98.

The assignors may not escape their **obligations** to Comerica merely by assigning claims to Masters. *Burkhardt v. Bailey*, 680 N.W.2d 453, 462 (Mich. App. 2004) ("An assignee stands in the position of the assignor, possessing the

[32] Nolan and Taylor posted letters of credit which, technically, are not guaranties, but are labeled as such here for convenience. *See*, *generally*, White and Summers, Uniform Commercial Code 6th ed., §26:8, for a discussion of the difference between guaranties and letters of credit. *See also Wichita Eagle and Beacon Publishing Co. v. Pacific National Bank*, 493 F.2d 1285 (9th Cir. 1974).

same rights and being subject to the same defenses." (quoting *Nichols v. Lee*, 10 Mich. 526, 528-529 (1862))); *Weatherwax Inv. Co. v. PPG Ind.'s*, 204 N.W.2d 353, 354 (Mich. App. 1972) ("The assignment of the lease interest…invested the assignee of all the obligations and rights of the former lessee…").

2. <u>The Guarantors had no breach of contract claim to assign.</u>

It is undisputed that, as of November 1, 2008, Masters was in default and Comerica had the right to collect on these guaranties. Masters' only defense is that Comerica contracted to forbear by the December 17 offer. Because Vlahos never signed, however, the offer never became an enforceable contract. Thus, Guarantors had no claim to assign.

The error in the damage award is even more pronounced regarding the unconditional, irrevocable standby letters of credit posted by Nolan and Taylor, each for $500,000. Ex.1249 (Nolan) and Ex.1294 (Taylor). Even if the Forbearance Offer was considered an enforceable contract, Nolan and Taylor were not parties to it.

Like Pratt and Vlahos, Nolan and Taylor were sophisticated investors who looked to make a significant profit. Tr.757:6-758:13.[33] Nolan understood what he was getting into when he posted the LOC. He described a standby LOC as "an

[33] Nolan initially invested $100,000 equity in Masters in May 2007. Nolan also made a $200,000 "bridge loan"—a zero-interest loan for three months, but with a usurious fee of $10,000. Tr.625:15-24.

absolute, ironclad guarantee of payment…. You can't get any stronger collateral than, than a standby LC….” Tr. 681:2-5,692:16-18.

Unconditional LOCs (often referred to as “standby” letters of credit) “are payable to beneficiaries upon demand and without any additional documentation or proof required.” *APV Baker, Inc. v. Harris Trust & Sav. Bank*, 761 F.Supp. 1293, 1295 (W.D. Mich. 1991). In other words, the “issuer” unilaterally consents to pay the face amount on presentation. There is no bilateral relationship (i.e., no contract between the issuer and the beneficiary).

Under the Michigan UCC, the LOCs are independent of the underlying contract (“rights and obligations of an issuer to a beneficiary…under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it….”). App.202,MCL§440.5103(4). *Osten Meat Co. v. First America Bank-Southeast Michigan, N.A.*, 517 N.W.2d 742, 744-45 (Mich. App. 1994). Thus, the applicant (i.e., Nolan/Taylor) has no cause of action against the beneficiary (Comerica). *Hamelberg v. Boundary Waters Banks*, 862 F.Supp.2d, 852, 858 (C.D. Ill. 2012); *Alhadeff v. Meridian on Bainbridge Island LLC*, 220 P.3d 1214, 1222 (Wash. 2009).

Thus, there was nothing to assign. The damages award for the draws on the LOCs was erroneous.

V. THE COURT ERRED IN APPLYING MONTANA LAW AND AWARDING ATTORNEY'S FEES.

As permitted under Michigan law, the Forbearance Offer provides that the lender, but not the borrower, may recover attorney's fees for enforcement. In contrast, §28-3-704, M.C.A, provides for reciprocal attorney's fees.

Judge Dayton awarded attorney's fees to Masters, applying Montana law. He spent twenty pages on general choice-of-law analysis as if writing on a clean slate. App.42-62,Dkt.629,pp.1-21. He mixes and matches various Restatement sections, Montana statutes, and numerous cases, many involving tort, worker's compensation, and insurance issues. The result is a confusing hodgepodge that is unhelpful. This results-driven analysis ignores that this Court has spent considerable intellectual capital over the last twenty-five years in clarifying choice-of-law in complex cases. *See, e.g., Tidyman's Management Services v. Davis*, 2014 MT 205, ¶19, 376 Mont. 80, 330 P.3d 1139.

This Court has, over recent years, applied a definite analytical rubric in cases where the contract (as here) specifies choice-of-law. Specifically, this Court follows §187 of the Restatement (Second) of Conflicts. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶¶53-54, 345 Mont. 262, 191 P.3d 389. That issue, although addressed below in subsection B, need not be addressed because *Comerica I* resolved the choice-of-law issue.

A. This choice-of-law issue was resolved in *Comerica I*.

Relying on the choice-of-law provisions in the Forbearance Offer[34], this Court unanimously ruled in *Comerica I* that Michigan law applies to all claims on the very document here in question. *Id.*, ¶56. Judge Dayton, unhappy with Michigan law, sought to avoid *Comerica I*'s holding, arguing there should be a separate conflicts analysis for each issue that might arise under the contract. *Id*. at 2-4. That is flatly inconsistent with *Comerica I*:

> [W]e conclude that Michigan law should have governed **all of Masters' claims** pursuant to the Forbearance Agreement's effective choice-of-law provision.

Id., ¶64 (emphasis added). Even Masters' tort claims were dismissed under Michigan law. *Id.*, ¶61. *A fortiori*, Michigan law governs the contractual attorney's fees provision. This Court observed:

> This case involves a large-scale financial transaction negotiated between two sophisticated and counseled entities that had an ongoing business relationship over two years. It is reasonable under these circumstances to infer that Masters and Comerica intended the choice-of-law provision to apply **to all disputes** arising out of their dealings.

Id., ¶63 (emphasis added).

Judge Dayton may not like this Court's determination in *Comerica I*, but he is not free to ignore the clear breadth of its holding:

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[34] App.119,Ex.45,p.4,¶17.

> *Nedlloyd Lines B.V. v. Super. Court of San Mateo Cnty.*, 834 P.2d 1148, 1153 (Cal. 1992) ("When two sophisticated, commercial entities agree to a choice-of-law clause…the most reasonable interpretation of their actions is that they intended for the clause to apply **to all causes of action** arising from or related to their **contract**."); *see also Zaklit v. Global Linguist Solutions, LLC*, No. 1:14cv314, 2014 WL 3109804, *11, 2014 U.S. Dist. LEXIS 92523, at *34, (E.D.Va. July 8, 2014) ("The only reasonable inference is that the parties intended to provide for an efficient and businesslike resolution of possible future disputes by choosing a single forum and a single body of law to govern all claims, irrespective of where the events giving rise to those claims occurred."); *Pyott-Boone Elecs. Inc. v. IRR Trust for Donald L. Fetterolf Dated Dec. 98, 1997*, 918 F.Supp.2d 532, 544 (W.D.Va.2013) ("We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.") (citing *Nedlloyd*, 11 Cal.Rptr.2d 330, 834 P.2d at 1154).

Comerica I, ¶ 63 (emphasis added).

In sum, *Comerica I* resolved this issue. Masters is not entitled to attorney's fees.

B. The court additionally erred in its choice-of-law analysis.

Where the parties' contract has a choice-of-law provision, Montana follows §187 Restatement (Second) of Conflict of Laws. *Comerica I*, ¶55.

This analysis led to a result of which Judge Dayton did not approve, so he tried to get around it. He found it necessary to resolve the choice-of-law question "under two separate analyses." App.66,Dkt.629,p.25. In his "first" approach, rather than starting with *Modroo/Comerica I* and Restatement §187, he wandered over to Restatement §6, stating that: "[A]ny conflict-of-law analysis…must begin with § 6(1)…." *Id*. at 16. He found the paramount, indeed, virtually the sole, factor is the place where the "contract" is to be performed. *Id.* at 26-27. Indeed, he swept aside four important decisions of this Court as **deviations**. *Id*. at 18 ("The recent line of cases from *Modroo*, *Tenas*, *Tucker*, and *Tidyman's*[35] deviated from applying §6(1) first."). Following his "first approach," Judge Dayton then used *Kemp v. Allstate Ins. Co.*, 483 Mont 526, 601 P.2d 20 (1979), to reach the conclusion that the contract's "performance" can mean the judgment, which occurred in Montana. This analysis is incorrect. The contract was not intended to be "performed" by a trial in Montana. Although Judge Dayton may disagree with the decisions in *Modroo*,[36] *Tidymans*, and *Comerica I*, they are the supreme law of Montana. It is not his place to overturn them.

Judge Dayton's second analysis addressed Restatement (Second) §187, but the analysis is again flawed. Under §187, a court will honor a contractual provision providing for choice-of-law, **unless all three** specified factors militate against

[35] He left out *Comerica I*.

[36] Judge Dayton's decision relies heavily on Justice Cotter's **dissent** in *Modroo*. App.16-17,Decision,pp.13-14. The **majority** opinion carefully considered and rejected that dissent. *Modroo*, ¶¶64-66.

application of the choice-of-law provision. Citing *Modroo, supra*, this Court said in *Comerica I*:

> In *Modroo*, we also reiterated our reliance on Restatement (Second) Conflict of Laws for determining "whether to give effect to parties' contractual choice-of-law provisions." *Modroo,* ¶ 53. **Section 187 provides that we will apply the "law of the state chosen by the parties to govern their contractual rights" unless** the following three factors, restated by this Court, are met:
>
>> (1) But for the choice of law provision, Montana law would apply under § 188 of the Restatement; (2) Montana has a materially greater interest in the particular issue than the parties['] chosen state; **and** (3) application of the chosen state's law would contravene a Montana fundamental policy.

Comerica I, ¶55 (emphasis added).

Judge Dayton, in applying Montana law, found all three factors are met. But, he had to strain mightily to reach that conclusion.

On the third point above, Montana fundamental public policy, he again strayed from this Court's *Comerica I* ruling:

> We conclude that Masters and Comerica negotiated a clear and unambiguous choice-of-law provision that is **neither against Montana public policy** nor **against public morals**. This being so, the District Court should have applied the contractual choice-of-law provision.

Comerica I, ¶58 (emphasis added).

Because there is no contravention of Montana public policy, there is no need to examine the other two factors:

> **All three conditions must be met.** *Tenas*, ¶34. If a clear choice-of-law provision does not violate Montana public policy, **there is no reason to analyze factors (1) and (2)** under § 187(2)(b).

Id., ¶55 (emphasis added).

Even if questions (1) and (2) above are examined, they strongly militate in support of application of Michigan law, contrary to Judge Dayton's findings.

Judge Dayton's findings to justify applying Montana rather than Michigan law, applying the five factors under Restatement (Second) §188(2), are not supported by the facts. Each factor favors Michigan:

1. The **place of contracting** was clearly in Michigan. All the underlying loan documents, as well as the Forbearance Offer, were executed in Michigan. App.116,122,Ex.45 (The Forbearance Offer was addressed to Masters Group International, Inc., PO Box 151039, Grand Rapids, MI 49515-1039. It was signed by Comerica at its offices at Detroit, Michigan, 48275-3205);

2. The **place of negotiation** of the contract was in Michigan, between personnel at Comerica's Michigan office and Masters, whose personnel worked in Grand Rapids, Michigan. App.9,Decision,p.6,¶2;Tr.537:1-9;

3. The **place of performance** was Michigan. The loans were made in Michigan, interest payments were made in Michigan, the cash injections required by the Forbearance Offer were to be made in Michigan, Comerica was to forbear in Michigan, and Comerica's ultimate draw on the collateral was made in Michigan. Also, the various default notices were addressed to "Masters Group International, Inc." at its PO Box in Grand Rapids, Michigan. Ex.1272;

4. The **location of the subject matter of the contract** (the initial loan and the Forbearance Offer) is Michigan, where the underlying loans were made as was the Forbearance Offer;

5. The **domicile, residence, and place of business of the parties** are predominantly in Michigan. The Comerica Bank making the loan was in Michigan. So, too, were Masters' CEO (Howell) and Masters itself, which was headquartered in Grand Rapids, Michigan during all relevant times. App.8,Decision,p.5,¶1.;Tr.537:1-9.

Importantly, **none** was in Montana.

The actual language of §187(2)(a) is even more supportive of Michigan law. It provides that the law stipulated in the contract applies unless: "(a) the chosen state has no substantial relationship to the parties…." Whatever else might be said, the "chosen state" (Michigan) clearly has a substantial relationship to the parties.

Judge Dayton strained to avoid the overwhelming weight of these Michigan-formed contacts by focusing solely on attorney's fees and by finding that because the judgment occurred in Montana, Montana law applies. He resorted to citing several insurance cases which equated the place of performance with the place where judgment is entered. *See, e.g.*, *Kemp*, *supra*. But as with most insurance policies, coverage (i.e., place of performance) is throughout the United States. *Id.* at 532. Here, place of performance is clearly Michigan. Insurance cases are *sui generis* and, for that reason, inapposite to this case.

In sum, because of the overwhelming Michigan contacts, Judge Dayton erred by applying Montana law.

C. If Montana public policy is applied, it should be the strong policy against collusive lawsuits.

Even if the public policy question is re-opened, the countervailing public policy against collusive lawsuits outweighs any public concerns of Judge Dayton.

Imposing Montana's reciprocity statute benefits no Montana citizen, nor does it advance any Montana policy. Instead, it would amount to an effort to impose Montana policy on Michigan citizens and result in decisions such as this whereby a Montana judge, to right a perceived wrong, arbitrarily amends and repeals Michigan statutes without the say of Michigan voters, Michigan's legislature or courts. If any Montana public policy should be applied, it should be the strong policy against collusive lawsuits.

Although this suit should have been filed in Michigan, Masters gamed the system to maneuver the case to Montana by using its separate agreement with the Butte Local Development Corporation ("BLDC"), from whom Masters borrowed $200,000 in return for Masters' promise to establish a Butte facility. After Masters abandoned Butte and leased warehouse space in Reno (Ex.391,p.9), and defaulted on the loan, BLDC threatened suit. Ex.1258.

Masters persuaded BLDC that funds for repayment could come only if it prevailed in proposed litigation against Comerica, so they colluded to accomplish that. BLDC initiated a friendly suit in Butte against Masters. Dkt.1.[37] Shortly thereafter, Masters filed a third-party complaint, drawing Comerica into the Montana litigation. Dkt.2.

Masters signed an agreement acknowledging the debt to BLDC. In return, "BLDC agree[d] to cooperate with Masters in the litigation and to support it in connection with the **retention of this litigation in Montana** district court…." App.168,Dkt.197,¶3 (emphasis added). Masters then cemented BLDC's cooperation by securing Pratt's guaranty to assure repayment. App.172-173,Dkt.197. The feigned BLDC/Masters dispute was a sham, transparently calculated to haul Comerica into the Montana litigation.

Montana has a strong public policy against collusive litigation, even warranting dismissal in egregious circumstances. *Carlson v. City of Helena*, 38 Mont. 581, 584, 101 P. 163, 164 (1909) (dismissal of a collusive case is within a District Court's inherent powers); *Abbey/Land, LLC v. Glacier Construction Partners, LLC*, 2019 MT 19, ¶¶56-60, 394 Mont. 135, 433 P.3d 1230 (finding abuse of discretion in refusing to dismiss a collusive action: "Dismissal should occur not for the benefit of the insurer, but to protect the interests of justice and the integrity of the courts.").

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[37] Three days before this, Masters began the process of obtaining a Certificate of Authority from the Montana Secretary of State. Dkt.59.030.

This sham conduct further demonstrates the error in Judge Dayton's finding that, because the case was tried and judgment entered in Montana, Montana's interest outweighs Michigan's. But for the collusive conduct, this case would not have been tried in Montana. Applying Montana's reciprocal attorney's fees provision serves no Montana interests here; rather, it rewards a Michigan plaintiff's sham conduct.

D. The court erred in awarding a contingent fee to Masters.

In the first trial, Judge Krueger denied Masters' request for a contingent fee, but awarded hourly fees. Dkt.329,p.48. Subsequently, the parties reached a stipulation on amounts. Dkt.337. In that stipulation, Masters stated it "reserves its right to appeal the Court's determination not to award fees on the basis of Masters' contingency fee agreement with its attorneys." *Id*.,¶2. Masters cross-appealed that decision, but later voluntarily dismissed its cross-appeal. Dkt.340.[38]

Accordingly, Masters waived its right to an award of contingent fees. It is bound by the law-of-the-case doctrine.

> Under the doctrine of law-of-the-case, a legal decision made at one stage of litigation which is not appealed when the opportunity to do so exists, becomes the law of the case for the future course of that litigation and the party that does not appeal is deemed to have waived the right to attack that decision at future points in the same litigation.

[38] Masters Group International, Inc.'s Motion to Voluntarily Dismiss Cross-Appeal, 7/7/2014.

McCormick v. Brevig, 2007 MT 195, ¶38, 338 Mont. 370, 169 P.3d 352; *see Jonas v. Jonas*, 2013 MT 202, ¶21, 371 Mont. 113, 308 P.3d 333.

VI. THE COURT MISAPPLIED THE MICHIGAN INTEREST STATUTE.

All parties agree: Michigan law governs the prejudgment interest issue and Michigan's prejudgment interest statute, MCL §600.6013 (App.150-151), applies.[39] The parties disagree, however, on which **subsection** of that statute applies.

The difference in the amount of interest calculated between the two subsections is substantial. Judge Dayton awarded $8,067,405.60, agreeing with Masters that subsection (7) of that statute applies. App.76,Dkt.629,p.35. Comerica submits that subsection (8) applies, resulting in interest of $3,294,949. Tr.1/13/20,p.42.

Subsection (8) of the statute, on which Comerica relies, is Michigan's general prejudgment interest provision. It requires that interest be awarded at a rate of interest equal to one percent plus a specified (LIBOR) formula.

Judge Dayton applied subsection (7), which applies where there is a contract rate of interest to be paid by the party against whom judgment is sought. MCL

[39] The court applied Montana law, §25-9-205, MCA, to post-judgment interest. Comerica agrees Montana law applies to this issue, but disagrees with the court's refusal to apply the 2017 amended version. *See* Dkt.651. Space does not permit discussion of that issue.

§600.6013(7). He latched onto a Comerica typo, citing Dkt.618, to state that Comerica's argument is based on subsection (6) of the statute, which applies only to cases filed before July 1, 2002. App.65,Dkt.629,p.24. The court then easily resolved the issue, stating: "Comerica's argument is not on point because Masters filed the third-party complaint on November 16, 2011, which is after 2002." *Id.* at 25.

This is too facile. Comerica corrected the typo. It submitted interest calculations based on subsection (8) of the statute. Dkt.628,¶¶8-9,12,13,15. Even Masters recognized Comerica was relying on subsection (8), not subsection (6). At the hearing of January 17, 2020, its counsel candidly said:

> Comerica, I think, in a typo cites subsection six, and the reason I say I think that's a typo is because that only applies to complaints filed before July 1 in 2002…Masters submits that subsection seven applies and I believe that **Comerica is asserting that subsection eight applies**.

Tr.1/17/20,p.25:3-9 (emphasis added).

Other than focusing on the typo, Judge Dayton only added: "Masters has sufficiently shown that judgment was rendered on a written instrument." App.66,Dkt.629,p.25. He disregards the fact that in 2002, the Michigan Legislature amended the statute, adding subsection (7). That amendment was intended to reverse the overbroad interpretation of "written instrument" by the majority in *Yaldo v. North Pointe Ins. Co.*, 578 N.W.2d 274 (Mich. 1998). *Yaldo* interpreted the term "written instrument" broadly to apply the subsection to an insurance agreement. Importantly, the new subsection (7)[40] added the following bolded language: "[I]f a judgment is rendered on a written instrument **evidencing indebtedness with a specified interest rate**…." (emphasis added).[41]

The only party with **indebtedness** subject to a specified interest rate in the Forbearance Offer is **Masters**. Comerica is **not** a party with indebtedness under the Forbearance and thus there is no applicable interest rate. Accordingly, it is not a written instrument "evidencing indebtedness" of Comerica within the meaning of subsection (7). *See, e.g., Mabuci Motor America Corp. v. Dreisbach*, 2018 WL 4030760 (E.D. Mich. 2018) (unpublished) ("the 'instrument []evidence[d] indebtedness' because the contract bound defendant to pay plaintiff its outstanding debt.").

Even if subsection (7) is the proper subsection, Judge Dayton applied it to the wrong provision of the Forbearance Offer. That Offer specifies three different interest rates, depending on Masters' conduct. App.124-126,Ex.45.

[40] *Yaldo's* holding is based on subsection (5), predecessor to the new subsection (7).

[41] The modification was explicitly made to reverse *Yaldo* and implement the dissent, which had argued that the intent was to apply a higher interest rate "only to interest-bearing instruments so as to preclude **debtors** from defaulting to obtain the lower judgment interest rate." *Id.*, at 358 (emphasis added) *See* House legislative analysis 1902, App.200, MI H.F.A. B. An. H.B. 4448, 1/9/2002, p.3: "This bill will statutorily affirm the dissenting opinion in *Yaldo*…"

Judge Dayton chose the highest rate,[42] a rate that would apply only if Masters defaulted. Judge Dayton's entire premise in finding breach and awarding damages is that Masters' defaults were waived. Thus, he compounds his error by applying an interest rate inconsistent with his ultimate ruling.

CONCLUSION

For the foregoing reasons, the decision of the lower court must be reversed and the case remanded with directions to dismiss.

Respectfully submitted this 13th day of October, 2020.

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[42] 2.5% above "the otherwise applicable interest rate" (App.124,Ex.45, addendum A).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, is 14,846 words, not in excess of the 15,000-word limit allowed by this Court's order of September 15, 2020.

DATED this 13th day of October, 2020.

GOETZ, BALDWIN & GEDDES, P.C.

By: *_/s/ James H. Goetz_*
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CERTIFICATE OF SERVICE

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