IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0362

MASTERS GROUP INTERNATIONAL, INC.,

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

v.

COMERICA BANK,

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

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

Appellee's Answer Brief on Appeal and Opening Brief on Cross-Appeal

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Statutes and Rules[1]

[1] Copies of the Michigan statutes and jury instructions are included in Masters' Appendix at MAPP194-209.

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Other

STATEMENT OF THE ISSUES

Masters Group International, Inc. ("Masters") submits the following issues require resolution:

On Appeal

1. Is Judge Dayton's determination under Michigan law that Comerica Bank ("Comerica") breached the parties' Forbearance Agreement causing Masters to suffer contract damages supported by substantial evidence?

2. Absent any effort by Comerica to plead or prove a claim or defense for setoff or recoupment, is Judge Dayton's rejection of such post-trial argument legally correct?

3. Is Judge Dayton's determination under Michigan law that Masters is entitled to prejudgment interest legally correct and does the amount exceed the bounds of reason?

4. Is Judge Dayton's determination under Montana law that Masters is entitled to attorney fees legally correct and does the amount exceed the bounds of reason?

On Cross-Appeal

1. Was Masters entitled under Michigan law to be made whole for its lost profits or lost value of the U.K. business?

2. Was Masters entitled to recover all costs, not just statutory costs?

STATEMENT OF THE CASE

Masters I describes the case prior to remand. Following remand, Comerica and Masters stipulated to a bench trial in accordance with *Masters I*. Dkt.420,431,432.[2] The case presented to Judge Dayton was Masters' claim for breach of Comerica's Forbearance Agreement. Comerica pled ***no*** claim, counterclaim, or defense based upon Masters' loan, affirmatively represented to Judge Dayton that it was presenting no such claim or defense, and at trial admitted Masters did not owe Comerica anything.

In advance of trial, Judge Dayton determined the Forbearance Agreement satisfied the requirements of Michigan's Statute of Frauds, was a valid and enforceable contract, and "there are triable issues of fact . . . whether Comerica waived conditions precedent thus giving rise to potential liability of Comerica." MAPP35.

Trial commenced January 9 and concluded January 19, 2017. In November 2019, Judge Dayton issued his 37-page Decision, Findings of Fact & Conclusions of Law (APP3-40, the "Decision") determining under Michigan law:

[2] This Brief uses following abbreviations: "Dkt"—Case Register Docket #; "Tr."—trial transcript; "Ex."—trial exhibit; "FOF"—Finding of Fact in the Decision (APP8-24); "COL"—Conclusion of Law in the Decision (APP24-40); "APP"—Comerica's Appendix; "MAPP"—Masters' Appendix; and "AOB"—Appellant's Opening Brief.

(1) the Forbearance Agreement was a valid and enforceable contract;

(2) Comerica's express statements and conduct waived strict performance; and

(3) Comerica materially breached the Forbearance Agreement by failing to forbear.

Judge Dayton found Comerica's breach caused Masters contract damages totaling $10,595,514.16, the amount Comerica had improperly seized from various accounts starting on December 30, 2008. Masters' claims for lost future profits or lost value of the U.K. business were rejected. *Id.*

Following additional briefing and hearings, on June 12, 2020, Judge Dayton issued a 35-page order awarding prejudgment interest totaling $8,067,405.60 and attorney fees of $7,535,593.18. APP41-76. Though the Forbearance Agreement provided for "all costs and expenses," Judge Dayton rejected Masters' contract-based claim for all costs of $512,496.30 (Dkt.606) and allowed only statutory costs totaling $176,063.19. APP63.

On June 17, 2020, Judgment was entered for $26,374,576.13, plus four days of prejudgment interest (after the entry of APP41) and Montana statutory 10% postjudgment interest. APP2.

Following entry of Judgment, Comerica sought to reduce the appeal bond amount by claiming it was entitled to a credit or offset in the amount of its loan to

Masters of $10.5 million. Dkt.634. Judge Dayton rejected Comerica's request, noting that Comerica had never pled any such claim or defense. MAPP59.

Comerica appeals virtually every ruling. Masters cross-appeals the rejection of its claim for lost profits or U.K. business value and contract-based costs.

STATEMENT OF FACTS ON APPEAL

Comerica has only presented the "facts" that fit its view of this case and the decision it hoped to win upon a bench retrial.[3] Since the primary task confronting this Court is to determine whether Judge Dayton's Decision is supported by substantial evidence, Masters here sets forth the facts Judge Dayton found to be true based on the evidence presented to him that are legally relevant to his Decision.

I. The parties.

Comerica is a bank incorporated in Texas. FOF#2. Comerica's VP, Karl Norton ("Norton"), served as Comerica's trial representative. FOF#3;Tr.21:19—22:25.

Masters was an established, award-winning international office products business incorporated in Delaware and headquartered in Grand Rapids, Michigan. At its peak, Masters had 42 employees in Europe and 6-7 employees in the U.S. It

[3] Comerica's Statement of Facts, which dwells upon the debt and how it came about, is largely irrelevant to the legal and factual issues presented to and decided by Judge Dayton.

had a modern warehousing and office facility near Gatwick Airport in U.K., and temporary third-party logistics and warehousing in the U.S. (set up when the planned Butte facility could not be established in time to meet customer demand). Tr.267:13—271:4,273:20—276:2,314:14—343:1,354:18–355:18,368:20-375:19,477:8–514:8,769:9—772:12,1073:16–1092:7,1196:1-20,1205:19—1208:16,1298:10-13. Its trial representative was CEO Curtis Howell ("Howell"). FOF#4;Tr.1065:19—1066:5,1223:4-6.

II. The loan.

By the end of 2007, Comerica loaned Masters $10 million. Ex.112,113. Every dollar loaned was secured by financial assets owned by Masters' guarantors and investors. FOF#5. Specifically, Larry Pratt ("Pratt") guaranteed $9,000,000 (Ex.213), Michael Vlahos ("Vlahos") guaranteed $500,000 (Ex.1254), and Matthew and Lillian Nolan ("Nolans") provided a $500,000 letter of credit (Ex.1249) (collectively, "Guarantors").[4] FOF#6-10. As a consequence of the Great Recession, however, the value of some of the collateral decreased and ultimately fell below the loan's borrowing formula in the second half of 2008. FOF#11.

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[4] The Guarantors, including Gerry Taylor ("Taylor"), who pledged an additional $500,000 letter of credit, assigned their claims against Comerica to Masters. Tr.633:1-19,806:9-11;Ex.925a.

III. Default and Comerica's promises to forbear pending refinancing.

On July 11, 2008, Masters defaulted. Though Comerica refused to renew the loan, it promised, in writing, to forbear from day-to-day. Ex.127;FOF#12,13, 43. Comerica did not ask for signatures from Masters or any Guarantors upon this written promise. Ex.127. To cure the default and bring the loan back within its borrowing formula, the parties entered into a loan extension increasing the loan amount to $10.5 million (Ex.135,136), secured by Pratt's amended secured guaranty (Ex.219,220,221) and an additional $500,000 letter of credit from Gerry Taylor ("Taylor") (Ex.1294). Tr.79:23–87:25,780:19–781:10,1832:22–1833:7,1883:8–1885:11;Ex.59.

In an October 16, 2008, email, Comerica V.P. Schoettley wrote, "... this loan expires November 1, 2008 and I'm not expecting they will have us paid out by then...." Ex.465. On November 24, 2008, Comerica secretly decided ***"[t]he loan group will run with this liquidation***." MAPP64 (emphasis added). At that time, Comerica sent "Notices of Exclusive Control" on the Guarantors' accounts, thereby preventing any transactions involving the collateral without Comerica's consent (FOF#14). Ex.1310,1311,1312;FOF#15,59. Comerica again promised Masters, in writing, that it would forbear collection of the loan from day-to-day. This forbearance was not free. In return, Comerica insisted upon a default interest rate 3% higher than the loan rate. APP90;Ex.862. Again, no signatures from

Masters or any Guarantors were required. APP89-91.

During this time, Masters was working hard to refinance its loan through Wells Fargo ("Wells"). FOF#16;Ex.1305. Wells provided a "Term Sheet" for a $13,000,000 loan. This refinancing was sufficient to pay Comerica's loan in full, plus provide Masters additional working capital. MAPP75-79. Masters sent Comerica a copy of Wells' Term Sheet on December 3, 2008. MAPP73.

All the while, Comerica continued to profit on its loan to Masters as it secretly positioned itself to liquidate the collateral. It held Pratt's guarantee in a Comerica account that paid only 1.6% interest while Comerica continued to charge Masters 6.5% interest. Comerica was so pleased with its position that Norton reported to his superior, "I believe this is lending 101." MAPP81;FOF#17; Tr.124:12—125:24.

IV. Performance and breach of the contract giving rise to Masters' claim against Comerica.

On December 8, 2008, Comerica set about preparing the Forbearance Agreement giving rise to Masters' claims. First, Comerica summarized the terms of its proposal in a "Term Sheet." Howell signed and emailed it back to Norton on December 17. Ex.37,295;FOF#19,20,23,44,45,46. Norton next finalized the Forbearance Agreement and emailed it to Masters. MAPP99,101-111;FOF#47. In it, Comerica promised to forbear collection until February 16, 2009, recognizing

Masters needed the time to complete its refinancing through Wells. MAPP102;FOF#87.

As written, the Forbearance Agreement purported to call for "timely, written acceptance" by Masters, Pratt, and Vlahos, and expressly called for hand-delivery of the signed contract, "… by no later than 12:00 (noon) on December 19, 2008." MAPP106,¶30;FOF#51,58.

Masters and Pratt, who provided nearly 90% of the collateral, executed the Forbearance Agreement and emailed it to Norton on December 22, 2008, three days after the purported deadline. MAPP113;Ex. 44,1001;FOF#23,46,52, 53,87,88;Tr.127:1–130:10,134:5-12,785:6–786:22,1119:16—1120:25. Far from enforcing the terms of the Forbearance Agreement, Norton received the documents and promptly emailed back, "Thanks. Look forward to the rest of the signatures." MAPP113. Norton expressed no concern at all that these signatures were received three days late and by email rather than hand-delivery. MAPP113;FOF#54,55; Tr.130:11—131:18,134:10-21. At trial, Norton admitted he later purposely deleted this email from Comerica's files. FOF#57;Tr.131:19—132:16.

Also, on December 22, Howell—unaware Vlahos was away from home in a location without phone or internet—emailed the Forbearance Agreement to Vlahos but received no response. Ex.1330,FOF#60. On Christmas Eve, with Pratt's and Masters' signatures already in hand, Comerica overnighted a security agreement to

Vlahos in Virginia for signature "in connection with the Masters Group Forbearance Agreement." MAPP119-140;FOF#61. This too was not received because Vlahos was in a location without phone or internet.

On December 29, after the close of business, Vlahos and Howell were finally able to connect by phone. Howell learned Vlahos was on an island and unavailable to print, sign, or fax any of the Forbearance Documents—and completely unable to undertake any financial transactions, including injection of $250,000 equity, until after his return to Virginia on January 2, 2009. FOF#64-67;Tr.1107:10–1111:7,1118:10–1119:3,1122:2–1124:8,1158:22–1160:25,1183:7–1185:9,1329:17–1344:15,1358:5–1359:23,1401:4–1402:25;APP134.

Early the next day, December 30, Howell called Norton to relay the fact that he had spoken with Vlahos about signing the Forbearance Agreement and the required financial undertakings, and that Vlahos committed to handle such matters but was unable to do so until after he returned on January 2, 2009. FOF#68-69;Tr.1108:7–1111:7,1118:10–1119:3,1122:2–1124:8,1183:7–1185:9,1329:17–1344:15,1358:5–1359:23,1401:4–1403:23;Ex.329A. Howell testified unequivocally Norton responded, "[t]hat's fine." FOF#70,91;Tr.1123:2-19. Apparently knowing the truth of the matter, Comerica did not call Norton to deny that he made that statement to Howell. Norton admitted he knew Vlahos could not sign the Forbearance Agreement until January 2, 2009, and that he passed that

information to his superior, Zarb.[5] FOF#71,90;Tr.134:1-4,143:7-24.

Despite the late, emailed signatures by Masters and Pratt, and the lack of a signature from Vlahos, Masters and its Guarantors began performing the conditions of the Forbearance Agreement, and Comerica began accepting those performances, manifesting mutual assent to the Forbearance Agreement.

A. Vlahos.

Before Vlahos spoke with Howell in the evening of December 29, he could not have known the Forbearance Agreement called upon him to create a "collateral account" at Comerica funded with $500,000 from liquidated Wachovia security accounts as of "***close of business*** on December 29, 2008," or to sign a security agreement giving Comerica a lien on that account. FOF#58 (emphasis added).

On December 29—***without*** Vlahos' signature and ***before*** Comerica's "close of business" deadline that day—Comerica issued an "Entitlement Order" directing Wachovia to liquidate Vlahos' holdings totaling $475,000 and transfer those funds to a Comerica account. MAPP115-117;FOF#26,27,62,63,89;Tr.1125:14—1125:23. Hours later, when Howell spoke with Vlahos, neither had the slightest idea Norton had sent that Entitlement Order.

[5] Though Comerica listed Zarb as a trial witness (Dkt.577.1,p.33), Comerica did not bring him to testify or be cross-examined at trial.

Without mentioning that it had sent that Entitlement Order, Comerica called Masters early the next day, December 30, stating Vlahos' signature on the Forbearance Agreement would be required that day or Comerica would not forbear any longer. FOF#68;Ex.329A. Later, at 11:22 a.m., Norton emailed Masters, requesting Vlahos' signed Security Agreement and the Forbearance Agreement. MAPP119;FOF#72. Unlike the preceding phone conversation, however, Norton's email and the attached attorney letter do ***not*** set any deadline for Vlahos' signature. MAPP119,121.

At 3:08 p.m. on December 30, Norton gave written instructions to Vlahos' stockbroker to liquidate $150,000 of Vlahos' shares, with the cash remaining under Comerica's control. MAPP142-144;FOF#93. The following day, Norton ordered the transfer of $31,704.77 of that cash to be added to the $475,000 he had ordered on December 29. MAPP161-163;FOF#74,94; Tr.139:21—141:21. As before, Comerica did not notify Masters or Vlahos of this second Entitlement Order for additional transfer of cash that was part of the forbearance consideration. FOF#94;Ex.1533.

B. Masters.

On New Years' Eve, Comerica turned its attention to Masters' money. The Forbearance Agreement—which Masters and Pratt had done everything in their power to perform (FOF#28,86)— required Masters to deposit $56,204 "[u]pon

execution[,]" to cover interest payments coming due in January and February 2009. MAPP102,¶4. This condition was met because, when Comerica seized the funds on December 31, Masters had $96,033.85 on deposit. MAPP146-156,158-159;Tr.147:15–148:17,151:1–155:4;Ex.883.

C. Pratt.

The Forbearance Agreement gave Pratt until January 16, 2009, to bring his collateral account to $9,000,000. MAPP103,¶8;FOF#79.

By December 24, 2008, Pratt had $8,052,249.57 in cash on deposit at Comerica. MAPP167;FOF#82. Pratt also sold a hedge fund, the proceeds of which ($900,000 plus) Comerica knew would not be received by it until later in January 2009. MAPP66,81;Ex.32;FOF#80-81;Tr.119:10—120:11. (Comerica received nearly $940,000 from the sale of this hedge fund on January 26, 2009. MAPP165;FOF#85.) Pratt also transferred $60,000 in cash from unencumbered sources into his Comerica cash account. FOF#81;Ex.32. Based upon this evidence, Judge Dayton found that from the time the parties started negotiating the Forbearance Agreement through December 31, 2008, "Pratt took every possible step to meet his obligations under the loan and the Forbearance Agreement." FOF#86.

Nonetheless, at the same moment Comerica was emptying Masters' deposit account, it also swept Pratt's cash deposits, then totalling $8,000,742.31.

MAPP146-156,158-159;FOF#84. As with Comerica's seizure of Masters' account, Pratt's account was seized without notice. FOF#96. Norton's sole justification to seize Pratt's funds on December 31, 2008, was: "it is $8MM+." MAPP146;FOF#83. Norton's supervisor, Zarb wrote, "Karl Norton has done a wonderful job here for the Bank!!" MAPP165. Zarb's superior responded, "Terrific news!! Congratulations Karl and Ernie [Zarb]!" *Id.*

Unaware Comerica had stopped forbearing on New Years' Eve, Masters continued to rely upon the Forbearance Agreement it was performing and believed Comerica would continue to perform. Masters was stunned to discover what Comerica had done when its employee payroll and bonus checks bounced after the New Year. On January 2, 2009, Norton finally wrote and notified Masters that Comerica had seized Masters' and Pratt's accounts, no longer forbearing. FOF#28,29,76-78,94,98;Ex.883,1533.

Masters asked Comerica to return the money it had seized from Masters' and Pratt's accounts in breach of the Forbearance Agreement. Comerica refused. Tr.1128:7-16. Rather than holding Vlahos' cash transferred to Comerica on deposit as required by the Forbearance Agreement, Comerica seized Vlahos' accounts on January 2 ($31,704.77) and January 6, 2009 ($475,000). MAPP191;Ex.52,892. Comerica continued to seize collateral until March 3, 2009. In total, Comerica seized $10,595,514.16. MAPP191;Ex.52;FOF#30,102-104.

STATEMENT OF FACTS ON CROSS-APPEAL

I. Collapse of Masters worldwide.

Masters' directors and officers provided substantial evidence of the direct consequences of Comerica's actions, including Wells refusing to refinance Masters' loan (FOF#31); Masters' European lender, Fortis Bank reducing Masters' U.K. line of credit two weeks later; and losing wholesale orders in January and February 2009 because customers lost confidence in Masters' ability to perform. Masters' business operations collapsed completely, first in North America, then in Europe. Tr.376:1–381:2,514:9—515:21,632:12-25,805:20–806:8,1028:12–1031:16,1088:13–1089:4,1106:14–1107:9,1125:24–1131:4,1394:8–1398:13,1484:5—1485:15,1609:7—1614:8.

II. Lost future profits.

Masters' expert witness Robert Storey testified regarding the adverse financial impact Masters suffered. Storey's analysis was grounded upon financial reports, tax returns, projections, testimony, sales records, and other business records. Masters' actual historical financial information was uncontested. MAPP183-186;Tr.374:4-23,1085:1–1092:3. Relying upon this documentation, Storey testified Masters suffered future losses from its North American operation in the amount of $4,009,727 and from its European operations totaling $10,610,779. MAPP173-189.

STANDARDS OF REVIEW

The predominant standard of review controlling the issues presented here—which Comerica entirely neglects to mention (*Cf.* AOB11-12)—is that this Court reviews findings of fact entered after a civil bench trial to determine if they are supported by substantial credible evidence. *Only a Mile, LLP v. State*, 2010 MT 99, ¶ 10, 356 Mont. 213, 233 P.3d 320. This Court reviews "this evidence in a light most favorable to the prevailing party and leave[s] the credibility of witnesses and weight assigned to their testimony to the determination of the District Court." *Only a Mile*, *supra*. The Court does not reweigh the evidence, judge the credibility of the witnesses, or review the evidence to determine if it supports a different decision. *Only a Mile*, ¶ 11.

The question of "whether a party materially breached a contract is a question of fact"—not a question of law as Comerica asserts. *CNJ Distributing Corp. v. D & F Farms, Inc.*, 2013 MT 267, ¶ 37, 372 Mont. 28, 309 P.3d 1002.

Conclusions of law are reviewed for correctness. *CNJ*, ¶ 34.

The Court reviews a district court's grant or denial of prejudgment interest and whether to award attorney fees to determine if the district court's interpretation of the law is correct. *Fitterer Sales Montana, Inc. v. Mullin*, 2015 MT 272, ¶ 16, 381 Mont. 107, 358 P.3d 885. The amount fixed as attorney fees and costs is largely discretionary with the district court, not to be disturbed absent an abuse of

discretion. *Alan D. Nicholson, Inc. v. Cannon*, 207 Mont. 476, 480, 674 P.2d 506, 508 (1984). This Court's review under the abuse of discretion standard is limited to whether the district court "'acted arbitrarily without conscientious judgment or exceeded the bounds of reason.'" *Rolan v. New West Health Services*, 2013 MT 220, ¶ 13, 371 Mont. 228, 307 P.3d 291.

SUMMARY OF ARGUMENT

Judge Dayton's Findings of Fact are supported by substantial credible evidence. The primary legal issues are controlled by settled Michigan law, and his legal conclusions are correct. The Forbearance Agreement was a valid and enforceable contract. Comerica's express statements and conduct waived strict performance. Comerica breached the Forbearance Agreement by failing to forbear until February 16, 2009 and seizing collateral totaling $10,595,514.16. The Judgment amount is supported by substantial credible evidence.

If Comerica had wished to seek a credit, recoupment, or offset for $10.5 million, as it now does, the Rules of Civil Procedure required Comerica to plead a claim or defense below. Comerica did not to do that. Quite the opposite. It affirmatively pled it was bringing ***no*** such claim or defense. MAPP26-27. That was Comerica's ***choice***—made with the advice of a multitude of lawyers over many years. Allowing any such credit to be considered now would mean Rules

and pleadings do not matter, prejudice to Masters does not matter, and there is no consequence to Comerica's deliberate, strategic choice.

This Court consistently refuses to grant relief based on a claim not pled before the trial court. Any other rule of appellate review "does not encourage compliance with the judicial process." *Essex Ins. Co. v. Jaycie, Inc.*, 2004 MT 278, ¶ 29, 323 Mont. 231, 99 P.3d 651 (Rice, J. concurring). That rule applies with all the greater force here because of the affirmative representations Comerica made to Judge Dayton. This Court works on the record, not in the "unhealthy situation of speculation." *See, e.g., In re Marriage of Caprice*, 178 Mont. 455, 461, 585 P.2d 641, 645 (1978).

Judge Dayton correctly awarded prejudgment interest under Michigan law. He correctly analyzed choice-of-law principles in deciding Masters was entitled to attorney fees and the amount fixed does not exceed the bounds of reason. Comerica's failure to provide any argument or support for its appeal of costs and postjudgment interest in the AOB precludes review of those issues.

Judge Dayton erred in concluding Comerica is not liable to Masters for lost profits or lost value of the U.K. business due to uncertainty as to the amount of such damage after finding damage occurred. Under well-established Michigan law, it is only uncertainty as to the ***fact*** of damages, not uncertainty as to the ***amount***, that is fatal to recovery. Michigan requires doubts as to the ***amount*** of

damages to be resolved against the wrongdoer. Judge Dayton found Comerica's actions harmed Masters, but that the dollar value of that harm was "unascertainable." In short, contrary to Michigan law, he resolved that doubt against Masters. Accordingly, the case should be remanded for an award of lost profits or lost value of the U.K. business and prejudgment interest as mandated by Michigan law.

Under the Forbearance Agreement, "all costs and expenses" are to be reimbursed, not just statutory costs. The Judgment should be amended to include non-statutory costs of $336,433.11.

ARGUMENT ON APPEAL

At the retrial, each party presented evidence upon the questions of fact this Court remanded for resolution surrounding the existence and breach of the Forbearance Agreement. Judge Dayton resolved those questions, as he was directed to do. Comerica argues as if its evidence was undisputed. It was not.

This Court has been crystal clear that it does not review the evidence to determine if it supports a different decision than that reached by the trial court, or to substitute its view of the facts. The function of this Court is to determine whether Judge Dayton's factual findings are supported by substantial evidence, which they are. *Only a Mile*, *supra*.

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I. Judge Dayton's determination under Michigan law that Comerica breached the Forbearance Agreement causing Masters to suffer contract damages is legally correct and supported by substantial evidence.

A. Judge Dayton correctly determined the Forbearance Agreement satisfied all applicable requirements of Michigan's Statute of Frauds.

In Michigan, a promise or commitment by a financial institution to forbear is enforceable, provided it is "in writing and signed with an authorized signature ***by the financial institution***." Mich. Comp. Laws (MCL) §566.132(2) (emphasis added)(MAPP195). Michigan's Statute of Frauds specifically protects financial institutions from actions brought by disgruntled borrowers claiming, based upon a mere oral representation, that they "had a deal." *See, e.g., Crown Tech. Park v. D&N Bank, FSB*, 619 N.W.2d 66, 72 (Mich. App. 2000).

The plain language of §566.132(2) makes clear a bank's promise is actionable once put in a writing bearing an authorized signature on behalf of the bank. If the promise is not in writing, or if written but not signed by the bank, the promise is not actionable against the bank. *See, e.g., Huntington Nat. Bank v. Daniel J. Aronoff Living Tr*., 853 N.W.2d 481, 489 (Mich. App. 2014); *Rodgers v. JP Morgan Chase Bank*, 890 N.W.2d 381, 386 (Mich. App. 2016).

Comerica actually proposed, wrote, and signed three agreements to forbear. Comerica does not question the enforceability of the first two of these agreements,

both of which were signed ***only*** by Comerica. Ex.127;APP89-91. The Forbearance Agreement Comerica breached, giving rise to this contract action, was its third such agreement. Just like the first two agreements, the Forbearance Agreement is in writing and bears the signature of Comerica's authorized signatory, Norton. MAPP107. Thus, it is in strict compliance with §566.132(2) and consistent with Comerica's conduct, pattern, and practice in this case. Judge Dayton correctly held that "[t]he express terms of Michigan's statute of frauds [are] satisfied" by these uncontested facts. MAPP35.

B. Judge Dayton correctly found the Forbearance Agreement was an enforceable contract.

In *Masters I*, this Court noted that whether there was an enforceable agreement was a fact issue:

> Comerica knew that Vlahos was unavailable to sign the Forbearance Agreement (a supposed precondition to formation of the contract) until the new year, yet—with the deadline to receive that signature already having passed—coordinated with Masters and the guarantors to accept their performance under the Forbearance Agreement. * * * Under similar circumstances, we have determined that when a question regarding waiver of contractual rights is presented, "[i]t is for the trier of fact to determine whether an act is voluntary and the actor's intent." *Mont. Mining Props., Inc. v. ASARCO,* 270 Mont. 458, 466, 893 P.2d 325, 330.

Masters I, ¶ 89.[6]

[6] In the Final Pretrial Order, Comerica and Masters also presented the issue of compliance with the signature requirements as a fact question of waiver, forfeiture, or estoppel, not a legal issue regarding contract formation. Dkt.577.1,p.34. Judge Dayton accordingly analyzed Vlahos'

Michigan also views contract formation as a question of fact. *In re Costs and Attorney Fees*, 645 N.W.2d 697, 703 (Mich. App. 2002) ("Whether an offer has been accepted and a contract formed involves a factual determination.") Michigan's benchmark decision is *Ludowici-Celadon Co. v. McKinley*, 11 N.W.2d 839 (Mich. 1943), where the Michigan Supreme Court held:

> 'an acceptance of an offer to contract may be implied from the acts and circumstances of the parties.' This same rule is expressed in the Restatement of the Law of Contracts, § 21, as follows: 'The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct.'

11 N.W.2d at 840. "Decisions regarding the legitimacy of an offer and acceptance revolve around the particular facts pertaining to a specific transaction...." *In re Costs and Attorney Fees*, 645 N.W.2d at 703.

Accordingly, in the Final Pretrial Order, the parties stipulated that the issue "Whether Comerica had an enforceable agreement with Masters to forbear until February 16, 2009" was an ***issue of fact***. Dkt.577.1,p.33. Having presented the issue to Judge Dayton as one of fact, Comerica may not now argue it is one of law. *See, e.g., Burke v. Regalado*, 935 F.3d 960, 1041 (10th Cir. 2019) ("An order entered pursuant to [Federal Rule of Civil Procedure] 16(e) supersedes the

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signature from the standpoint of waiver. *See* Section I.C. below. However, his conclusion that there was an enforceable contract also comports with Michigan law on contract formation.

pleadings and controls the subsequent course of litigation.... [T]he pretrial order measures the dimensions of the lawsuit, both in the trial court and on appeal."); *Seymour v. Coughlin Co.*, 609 F.2d 346, 348–49 (9th Cir.1979), cert. denied, 446 U.S. 957 (1980) (failure to include an issue in pretrial order or to raise it until after trial court entered proposed findings of facts and conclusions of law precluded appellate review).

In *Masters I*, this Court noted there were acts and circumstances of the parties manifesting mutual assent, despite late and missing signatures:

> Despite the late signatures by Masters and Pratt, and the lack of a signature from Vlahos—who was out of the country and unavailable, as Comerica was aware—Masters and its guarantors began performing the conditions of the Forbearance Agreement, and Comerica began accepting those performances.

Masters I, ¶ 84.

On remand, the evidence compelled Judge Dayton to agree, supporting his finding that the Forbearance Agreement was a valid, enforceable contract, despite Masters' and Pratt's emailed, late signatures and Vlahos' missing signature. FOF#51-74,87-95;COL#17.

Viewed in a light most favorable to Masters, there is substantial credible evidence supporting Judge Dayton's finding:

- **December 22, 2008.** Norton accepted the signatures of both Masters and Pratt, without hesitation or objection, even though these signatures arrived three days late and only by email. MAPP113;Ex.44;FOF#54,55; Tr.130:11—131:18,134:10-21. Norton later purposely deleted his acceptance email (MAPP113)("Thanks. Look forward to the rest of the signatures.")) from Comerica's computers. FOF#57;Tr.131:19—132:16.
- **December 29.** Norton began performing the Forbearance Agreement by sending the first Entitlement Order for the liquidation of Vlahos' Wachovia account and transfer of cash to Vlahos' Comerica account. MAPP115-117;FOF#26,27,62,63,89;Tr.1125:14—1125:23. Outside the Forbearance Agreement, Comerica had no right to liquidate securities and transfer cash to itself. Even though Vlahos had not yet signed the Forbearance Agreement, Norton's Order was in furtherance of ¶6 of the Forbearance Agreement, which required Vlahos' Wachovia securities to be liquidated and the cash transferred to Vlahos' Comerica account. MAPP102-103.
- **December 30 at 8:52 a.m.** Yaklin informed Masters' directors via email: Comerica called and "told me that the signed forbearance agreement was required to be received from Dr[.] Vlahos today or they would not forbear any longer. This is in addition to all the other being resolved by tomorrow."

Ex.329a;Tr.1359:1-23.

- **December 30, after Yaklin's email.** Howell called Norton to relay that he had spoken with Vlahos about signing the Forbearance Agreement and the required financial conditions, and that Vlahos committed to signing and the financial undertakings but was unable to do so until he returned on January 2, 2009. Howell's sworn testimony was that, when informed there would be a slight, unavoidable delay providing Vlahos' performance, Norton said, "[t]hat's fine." FOF#68-71,90-91;Tr.1108:7–1111:7,1118:10–1119:3,1122:2–1124:8,1183:7–1185:9,1329:17–1344:15,1358:5–1359:23,1401:4–1403:23;Ex.329A.[7] Norton admitted Howell told him Vlahos was unable to sign until January 2, and that he reported that much to his supervisor. Norton was strangely unable to recall, however, when he spoke with Howell or any other details of the conversation. Tr.133:21–134:4,143:7-24. Thus, Norton did not dispute Howell's testimony that this

[7] Comerica and *amici* ascribe error to Judge Dayton's admission of Norton's statement ("That's fine") to Howell as admitting it for the truth of the matter even though it was hearsay. Not so. The Decision clearly states: "Both Norton and Howell's statements, during the conversation on December 30, 2008, occurred in the course and scope of their employment. Norton acted as an authorized agent for Comerica and Howell acted as an authorized agent for Masters. Norton and Howell's statements made in the course of their employment ***are admissions under M. R. Evid. 801[(d)(2)]***." APP.25,COL#10 (emphasis added). Comerica then challenges the weight to be given to this testimony, again disregarding the standard of review requiring this Court to defer to the trial court on credibility and weight questions.

conversation occurred ***after*** Yaklin's December 30, 8:52 a.m. email. Comerica could have re-called Norton to rebut Howell's testimony on this issue but did not. Thus, without contradiction, the evidence supports Judge Dayton's finding the conversation between Howell and Norton occurred ***after*** Yaklin's email (Ex.329a).

- **December 30 at 10:57 a.m.** Yaklin wrote to Norton to inquire about the status of documents Norton had told him the day before he would be sending for Dr. Vlahos' signature. MAPP119.
- **December 30 at 11:22 a.m.** In prompt response to Yaklin's email, and without objection, reservation, or condition, Norton emailed back the documents, stating:

> We need the attached security agreement signed and the Forbearance signed. As far as Dr. Vlahos' Wachovia account, this letter will be forthcoming and does not require his signature. Although it will require him to fax something to his Wachovia broker.

MAPP119;Tr.141:22—145:10,1124:9–1125:23,1403:1-23. ***Neither*** Norton's email nor the attached December 24, 2008 attorney letter ***set a deadline*** for Vlahos' signature or instructions to his broker. MAPP119-121. The fact that Norton and Comerica's attorneys set no such deadlines corroborates Howell's testimony that Norton was "fine" with the arrangement for Vlahos to sign documents and handle other affairs upon his

return on January 2.

- **December 30 at 3:08 p.m.** Taking full advantage of power granted by the Forbearance Agreement, Norton faxed a letter to Vlahos and his broker at Wachovia providing Comerica's release of its lien on Vlahos' bank stock and instructing the broker to withdraw the shares from the account in exchange for $150,000 in cash, which would be held in Vlahos' Wachovia account under Comerica's control. In that letter, Norton refers to "the Forbearance ***Agreement***[8] dated December 17, 2008, executed by Bank, executed by Masters Group and Larry Pratt, individually and as trustee of his trust, but as yet [not] executed by you [Vlahos] (Emphasis added)." MAPP144;Tr.145:11–147:14. This letter also ***does not set any deadline for Vlahos' signature***. MAPP144. Thus, MAPP144 redundantly demonstrates Norton was "fine" with the arrangement for Vlahos to handle matters upon his return.[9] The following events establish the parties continued to move forward with performance.

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[8] Norton acknowledges the existence of Comerica's "Forbearance ***Agreement***," ***not*** a mere "Forbearance ***Offer*****,"** as the Bank now characterizes the contract.

[9] Even though certain emails in late December indicate the parties gave thought to requiring another Letter of Credit from Taylor (MAPP144), no such condition became part of the Forbearance Agreement (MAPP101-111).

- **December 31.** Howell wrote to Comerica:

> In addition, we have successfully reached agreement with investors for commitment of $850,000 in additional capital infusion with a view towards making this move to a new bank which was contingent upon our being able to work out extended terms with Comerica in the interim. We have presented our workout solution that brings in $350,000 of immediate liquidity as well as expected collections of receivables of nearly $450,000 over the next two months, which is more than enough cash to resolve the entire short term liquidity problem at Masters. The only remaining contingency is that our investors require waiting until early next week on the approval of the other $500,000 investor [in]fusion by Letter of Credit before they commit the initial $350,000. We even have the funds to pay the majority of the outstanding interest…. All of the other funds and their availability should be resolved next week.

APP193-194;Tr.1379:19–1380:21.

- **December 31 at 5:08 p.m.** Norton faxed another Entitlement Order to Wachovia for the transfer of an additional $31,704.77 in cash from Vlahos' Wachovia account to Vlahos' Comerica account. MAPP161. Norton's fax states, "this is in addition to instructions sent on 12-29-08." MAPP162; Tr.139:21–141:21. As with the December 29th Entitlement Order (MAPP117-119), this second Order constitutes performance of Forbearance Agreement ¶6, despite the lack of Vlahos' signature.

Applicable standards of review wisely leave the credibility of witnesses, the weight assigned to their testimony, and factual determinations to the trier-of-fact, who is in position to gather a vastly superior understanding of the evidence

presented. *Only a Mile*, ¶ 12. Judge Dayton saw and heard the evidence over the course of an eleven-day bench trial. Comerica wishes Judge Dayton, as the trier-of-fact, had decided the disputed issues differently, but wishful thinking never has been, is not, and should never be, grounds for reversal where, as here, the trial court's findings are supported by substantial credible evidence. *Only a Mile*, *supra*.

C. Substantial evidence supports Judge Dayton's finding that Masters' and the Guarantors' remaining performance was completed, waived, rendered impossible by Comerica, or had not yet come due.

The retrial before Judge Dayton was governed by this Court's observation, "parties to a contract are free to mutually waive or modify their contract," and "a course of affirmative conduct, particularly when coupled with oral or written representations, can amount to a waiver." *Masters I*, ¶ 91. This Court also directed Judge Dayton to decide whether implied waivers of particular performance requirements arose, even though the contract contained a "no implied waiver" provision. *Masters I*, ¶ 92. As explained in *Masters I*, "... when a question regarding waiver of contractual rights is presented, '[i]t is for the trier of fact to determine whether an act is voluntary and the actor's intent.'" *Id.*, ¶ 89. This Court expressly held, "Comerica's course of conduct following the supposed December 19 deadline to perform conditions precedent to the Forbearance

Agreement provided a reasonable basis for a jury to determine that question of fact in favor of Masters." *Id.*, ¶ 91.

Judge Dayton was required to follow this Court's determination that triable issues of fact existed whether Comerica waived certain conditions precedent. After hearing the evidence, Judge Dayton resolved those issues in favor of Masters, as *Masters I* predicted a jury could well do. *Id.* MAPP35.

Comerica argues the evidence it presented could also support a decision different from Judge Dayton's. AOB28-29. The obvious flaw with Comerica's argument is that it asks this Court to substitute its judgment for that of the trier-of-fact. The proper question is, does substantial credible evidence support Judge Dayton's findings as to waiver or estoppel? *Only a Mile*, *supra*.

The AOB also conflates this Court's standard of review on appeal with Masters' burden of proof below. This Court reviews the record for substantial evidence, *Only a Mile*, *supra*, even though Masters had the burden of proving waiver by clear and convincing evidence. *See, e.g., Czapranski v. Czapranski*, 2003 MT 14, ¶¶ 18-19, 314 Mont. 55, 63 P.3d 499.

At the retrial, Judge Dayton actually required Masters to prove waiver beyond a reasonable doubt—a burden that exceeds Michigan's applicable "clear and convincing" standard. *Compare* M.Civ.JI 142.19 (MAPP203) and M.Civ.JI 8.01 (MAPP200) (requiring evidence producing "a clear and firm belief") with

COL#45 (requiring a "clear, unequivocal, decisive act ... [so consistent with waiver] that no other reasonable explanation is possible.")

Judge Dayton found that "by the time Comerica breached its duty to forbear, each of Masters' conditions had either been performed, waived, rendered impossible by Comerica, or had not yet come due." FOF#65. Contrary to the picture Comerica paints, substantial evidence supports this finding as to each condition the Forbearance Agreement imposed on Masters and its Guarantors.

(1) Masters' $56,204.

The Forbearance Agreement required Masters to deposit $56,204 "[u]pon execution[,]" to cover interest payments coming due in January and February 2009. MAPP102,¶4.[10] Judge Dayton found that "upon execution" included Vlahos' signature, which Comerica knew would be forthcoming on January 2. FOF#69-72,75-77. On December 31, Masters had $96,033.85 on deposit at Comerica. Ex.883;Tr.147:15–148:17. Thus, this condition was met. Even so, at 4:50 p.m. that evening, Comerica swept Masters' accounts. MAPP146-156,158-159;Tr.151:1–155:4.

[10] At AOB34,n.19, Comerica incorrectly claims the Forbearance Agreement imposed this condition ***and*** the requirement to pay a $52,000 closing fee on ***Masters***. The closing fee was to come out of the cash transferred by ***Vlahos***. See Item #(4), below.

(2) $250,000 equity injection.

The Forbearance Agreement required Masters on or before December 29, 2008, to cause "Vlahos or another investor to inject $250,000 in Borrower in the form or equity" and the cash deposited at Comerica. MAPP102,¶5. Howell's testimony about the compliance with this condition and the fact that the injection could not happen until after Vlahos returned on January 2, 2009 was uncontradicted. Tr.1107:10–1111:7,1118:10–1119:3,1122:2–1124:8,1158:22–1160:25,1183:7–1185:9,1329:17–1344:15,1358:5–1359:23,1401:4–1402:25.[11] Howell's email dated December 29 at 9:16 p.m. corroborates his testimony, including the fact that "Comerica needed to give [Vlahos] permission to move out [his bank] stock so he could replace it with cash before he could do anything about the [$250,000 cash injection]." APP134. Norton waived the December 29 deadline, accepted those arrangements and, on December 30, sent a letter to Vlahos' broker to permit Vlahos to sell the bank stock for cash and facilitate Vlahos' ability to inject the additional capital contribution upon his return. MAPP142-144;Tr.1108:7–1111:7,1118:10–1119:3,1122:2–1124:8,1183:7–1185:9,1329:17–1344:15,1358:5–1359:23,1401:4–1403:23,145:11–147:14. By doing so, Comerica intentionally and voluntarily relinquished its right to demand

[11] In reply, Comerica cannot object on grounds of hearsay because it first solicited this information from Howell.

strict adherence with this condition. Comerica cites nothing to support its statement, "Vlahos . . . was simply reluctant to risk another $250,000." *Cf.* AOB40.

(3) Liquidation of $500,000 Vlahos' securities.

The Forbearance Agreement required Vlahos on or before December 29, 2008, to liquidate all non-cash assets in his Wachovia account into cash and transfer such cash to a Comerica cash collateral account of at least $500,000. MAPP102-103,¶6. On December 29 and 31, Norton sent Entitlement Orders to Wachovia, instructing it to liquidate a total of $506,704.77 of Vlahos' securities and wire the cash into Vlahos' Comerica account. MAPP115-117,161-163;Tr.136:16–137:19,139:19-20–141:21. Comerica took that action without prior notice to Vlahos and with knowledge Vlahos had not yet signed the Forbearance Agreement or the new Security Agreement. MAPP115-117,161-63;Ex.1533; FOF#26,27,62,63,74,89,94;Tr.139:21—141:21,1125:14—1125:23. By doing so, this condition was met.

(4) $52,000 closing fee.

The Forbearance Agreement required a $52,500 "Closing Fee" to be paid on December 31, 2008. MAPP103,¶7. Vlahos' $250,000 cash injection would cover that fee. MAPP102,¶5 ("Bank shall be authorized to debit the [$250,000] account from time to time and apply the proceeds thereof to . . . the fee described in

paragraph 7.") As noted above, Norton accepted the delay until January 2, 2009 and, on December 30, sent a letter to Vlahos' broker to facilitate Vlahos' ability to inject the additional money upon his return in January. By doing so, Comerica intentionally and voluntarily relinquished its right to demand strict adherence with this condition.

(5) Pratt's $9 million.

The Forbearance Agreement required Pratt to deposit, by January 16, 2009, at least $9,000,000 in cash in his Comerica account. MAPP103,¶8. Pratt took all the necessary steps to accomplish that and Comerica accepted those steps. By December 24, Pratt had $8,052,249.57 in cash on deposit at Comerica. MAPP167;FOF#82. Pratt also sold a hedge fund, the proceeds of which ($900,000 plus) Comerica knew would not be received until late January 2009. MAPP66,81;Ex.32;FOF#80-81;Tr.119:10—120:11. Pratt also transferred $60,000 in cash from unencumbered sources into his Comerica cash account. FOF#81;Ex.32. By doing so, this condition was met.

(6) Best efforts to procure alternative financing.

The Forbearance Agreement required Masters "to use its best efforts to procure alternative financing to repay the Liabilities in full by February 16, 2009," with a written confirmation letter on or before January 23. MAPP105,¶23. Implying this Court should supplant its view of the evidence for Judge Dayton's,

Comerica baldly asserts "the Wells Fargo loan was a pipe dream." AOB43. However, the evidence viewed in a light most favorable to Masters fully supports Judge Dayton's finding that, "[d]ue to the confiscation of Masters' and its guarantors' funds, Wells Fargo refused to refinance Masters' loan." FOF#31.

Based on the ongoing discussions with Comerica about the potential terms of a forbearance agreement and with Wells about potential terms for its loan, Masters worked with the Guarantors to obtain commitments for additional collateral and/or capital injection to meet the proposed terms for the Wells loan commitment. On December 4, Masters provided Comerica an update on those efforts. Ex.35;Tr.1107:10–1111:7,1118:10–1119:3,1158:6–1160:25,1183:7–1184:10,1329:17–1344:15.

By December, Wells had completed its due diligence and Masters had obtained a Wells term sheet indicating its willingness to negotiate a $13,000,000 loan, at a lower interest rate than Comerica's. MAPP73-79;Ex.1305;Tr.114:23–115:6,123:5-11,212:13–216:6,246:23–249:15,1102:15-19,1104:19–107:9,2007:2–2008:7,2012:16–2013:19,2037:1–2038:5,2040:11–2041:1. Wells sent that term sheet (MAPP75-79) only after conducting due diligence, having good discussions with Masters and its financing consultant, and seeing Masters "as a good long-term partnership." Ex.1305;Tr.1102:20–1103:3,2020:19–2032:4. On December 3,

2008, Masters gave Comerica the Wells term sheet. MAPP73.

On December 17, at 9:55 a.m., Yaklin wrote that he had talked to Wells' loan officer Debniak about a revised Wells term sheet that would require investors' "commitments" for an additional $1,200,000 capital infusion. At that time, Yaklin wrote, "I can tell you this will not happen." APP96;Tr.1175:13–1176:23,1189:1-5. This email was sent ***before*** Masters' receipt at 10:55 a.m. of the Wells revised term sheet (MAPP83-87) and Masters' receipt at 5:11 p.m. of the final Forbearance Agreement signed by Comerica (MAPP99). Tr.1406:6–1409:13.

Subsequently, at 10:55 a.m. on December 17, Wells faxed the revised term sheet. MAPP83-87;Tr.113:12–116:7,251:17–253:22,1105:4–1106:13,2036:21–2039:12. Wells never revoked that term sheet. Indeed, in early January 2009, before knowledge of Comerica's seizure of collateral, Wells continued to inquire with Masters about its interest in the Wells loan. Ex.298;Tr.1106:24–1107:1,1409:14-22,2039:2–2040:10.

Howell testified about the arrangements he had made with Vlahos for Vlahos' commitment to inject an additional $250,000 capital, with Nolan for an additional $100,000, with Taylor for an additional $500,000 Letter of Credit, and with Pratt to make up any shortfall to cover the Wells condition for the "commitment" of $1.2 million, including the creation of an escrow account to hold such funds until closing on the Wells loan. Tr.1107:10–1111:7,1118:10–

1119:3,1122:2–1124:8,1158:22–1160:25,1183:7–1184:10,1329:17–1344:15,1358:5–1359:23,1401:4–1402:25.[12]

Nolan and Pratt each testified that while they were initially unwilling to consider additional capital contributions, they had been asked to commit additional capital and were willing to consider making such a commitment depending upon what Comerica and the other investors would do. Those commitments never had to come to fruition because of Comerica's seizure of the accounts. Tr.628:21–631:24,734:15–736:6,761:10–762:3,790:22–792:9,912:19–917:14;Ex.243,273, 274;APP128. Contrary to Comerica's contention, Pratt had only ruled out putting up an additional guarantee. APP128.

At 12:57 p.m. on December 17, ***after*** reviewing the revised Wells term sheet (MAPP93-97) and revised Comerica term sheet (MAPP91-92), and noting the progress thus far with Masters' investors, Yaklin wrote: "***It is my opinion that we will want to feel pretty good about our prospects*** to both fund the orders if and when they come and also ***to refinance the note with Wells Fargo before we commit the additional funds being contemplated now by Dr. Vlahos, Matt Nolan, Gerry Taylor and Larry Pratt*** (emphasis added)." MAPP89;Tr.1375:11–1377:6. In that email, admitted without objection, Yaklin corroborates Howell's trial

[12] In reply, Comerica cannot object on grounds of hearsay because it first solicited this information from Howell.

testimony about the arrangements Masters had made with the Guarantors to meet the Wells condition for the commitment of $1.2 million, including the creation of an escrow account to hold such funds until closing on the Wells loan. *Id.* Such evidence supports the inference that Yaklin had reconsidered his email (APP96) earlier that morning where he had stated, "I can tell you this will not happen." Contrasting the picture Comerica paints, it is clear that Yaklin's opinions changed as events unfolded.

Later at 5:11 p.m. on December 17, Norton emailed the Forbearance Agreement. MAPP99,101-111;Tr.126:8-23.

While Debniak testified Wells ultimately decided not to move forward with the loan, he could not specify ***when*** that decision was made, specifically whether it was before ***or after*** Comerica's seizure of Masters' and the Guarantors' collateral. Though the Wells term sheet required Masters' signature, a $5,000 deposit upon acceptance, and $25,000 payable upon acceptance of commitment, there was no deadline by which those requirements needed to be satisfied. MAPP94-97. The Forbearance Agreement did not require a commitment letter from Wells until ***January 23, 2009***. MAPP105,¶23;Tr. 246:23–249:15,253:19-22.

When Comerica took the collateral beginning December 31, that action prevented and/or obstructed Masters from obtaining the Wells commitment letter by the January 23 deadline and from closing on the Wells loan by the February 16

deadline. Tr.1105:4–1107:9,1409:14-22,1610:5–1613:13. Wells would not have proceeded with the loan without that collateral. Tr.2030:7–2033:8. Comerica's expert likewise acknowledged if Masters had $10.5 million in cash and put it on deposit, Masters could have certainly received a $10.5 million dollar loan. Tr.1782:22-6.

Comerica's opinion that the Wells loan was a "pipe dream" is irrelevant. What matters is that substantial credible evidence in the record supports Judge Dayton's finding that Comerica's actions prevented and/or obstructed Masters' performance of the refinance condition by the January and February 2009 deadlines in the Forbearance Agreement.

The evidence also demonstrates that as of December 31, when Norton sent the second entitlement order after 5 p.m. (MAPP161-163), Comerica did ***not***: (1) send a default notice; (2) rescind or revoke the Forbearance Agreement; (3) state Comerica required Vlahos' signature before January 2; (4) advise Masters or Pratt they did not need to complete his transfer of $9,000,000 in cash; (5) advise Masters that Norton had already sent two entitlement orders to Wachovia to liquidate more than $506,000; (6) object that the Forbearance Agreement had not been properly or timely executed; (7) advise Masters not to bother with Vlahos' signature or the $250,000 cash injection from Vlahos; (8) advise Masters or Vlahos they did not need to liquidate his Wachovia securities and transfer the cash into a cash collateral

account at Comerica; or (9) advise Masters or Vlahos that he did not need to sell his bank stock. Instead, Comerica had performed as if the Forbearance Agreement were valid. By doing so, Comerica improved its collateral position by replacing outside securities with approximately $10,500,000 in in-house cash accounts, reducing its risk to nearly zero, and ultimately facilitating the seizure that occurred. Comerica provided no evidence that its collateral position deteriorated between December 17 and December 31, 2008, or would have deteriorated prior to the February 16, 2009, forbearance date.

D. In reviewing the evidence regarding performance, Judge Dayton correctly applied Michigan law on waiver.

As directed by this Court, *Masters I*, ¶¶ 81, 92, Judge Dayton analyzed the conduct of the parties in the context of "conditions that were subject to waiver." COL#23. His conclusions comport with Michigan law on waiver.

(1) Masters' and Pratt's performance.

As noted above, Masters met its obligation to deposit $56,204 into its Comerica account. Judge Dayton did not "hedge his bets" in making this finding. Masters had $96,033.85 on deposit at Comerica to pay the interest payments that would come due and be payable in January and February 2009. Comerica seized the funds and applied them on December 31, 2008. By doing so, Comerica accepted Masters' performance of this condition.

Comerica also accepted Pratt's performance, summarized in *Masters I*, ¶ 84 and proved again on re-trial:

> Pratt transferred stock accounts in the form of cash into a Comerica bank account, raising his personal guarantee funds to more than $8 million. In order to meet his required $9 million guarantee, Pratt anticipated transferring additional hedge fund proceeds into the Comerica account—funds that Comerica knew would not be available until January 2009. Per its calculations, Comerica estimated that Pratt's guarantee would still have a $60,000 shortfall. In response, Pratt wired that amount into the Comerica account in December to make up for the expected shortfall.

Based upon evidence of Comerica's multiple, voluntary acts manifesting its intent to be bound by the Forbearance Agreement, Judge Dayton concluded Comerica waived strict performance on the part of Masters and Pratt. He could just as easily have applied Michigan's doctrine of substantial performance, which focuses on whether the contracting parties have substantially met their obligations under the contract. *See, e.g., Gibson v. Group Ins. Co.*, 369 N.W.2d 484, 486 (Mich. App. 1985).

In *Antonoff v. Basso*, 78 N.W.2d 604, 610 (Mich. 1956), the Michigan Supreme Court wrote:

> What amounts to substantial performance? There is no fixed formula. The question is one of degree, its determination involving the resolution of many factors. * * * Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

78 N.W.2d at 610.

Whether analyzed in terms of substantial performance or waiver of strict performance, Michigan law fully supports Judge Dayton's factual findings and conclusion Masters and Pratt satisfactorily performed their obligations under the Forbearance Agreement.

(2) Vlahos' performance.

Judge Dayton concluded strict performance of the Forbearance Agreement by Vlahos was also waived, and in significant respects prevented, by Comerica. FOF#14,59,73, 92;COL#46. Judge Dayton evaluated the evidence in light of the two types of waiver recognized in Michigan—express and implied (including waiver by estoppel). COL#30,31.

(a) Express waiver.

Judge Dayton noted express waiver is found upon an oral statement, an affirmative representation, an affirmative expression of assent, or a written agreement between the parties, relying upon the same Michigan decision as did this Court in *Masters I*, *Quality Prod. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 260-261 (Mich. 2003). COL#32.

It is undisputed Norton was told Vlahos was unavailable until after January 2, 2009. Judge Dayton concluded Norton's response to this information—"that's fine"—constituted "an affirmative representation" or "an affirmative expression of

assent" that expressly waived certain performance requirements applicable to Vlahos until January 2, 2009. COL#37-39.

(b) Implied waiver.

Judge Dayton observed implied waiver may be found based upon "decisive, unequivocal conduct reasonably inferring the intent to waive." COL#40,45. Judge Dayton's analysis addresses the two forms of implied waiver, true waiver and waiver by estoppel.

Regarding true waiver, Judge Dayton took note of Comerica's use of its Notices of Exclusive Control and Entitlement Orders. Judge Dayton found Comerica sent Wachovia a Notice of Exclusive Control that prevented any transactions in furtherance of Vlahos' performance obligations under the Forbearance Agreement. FOF#14,15,59,73,92;COL#46. Comerica followed its Notice with an Entitlement Order to liquidate and transfer Vlahos' Wachovia account, and did so ***prior to*** the deadline for Vlahos' performance in the Forbearance Agreement. FOF#62-63,73.

Based on this evidence, Judge Dayton correctly concluded Comerica "operated to prevent Vlahos from selling his Wachovia Securities stock" and served as a true waiver of performance requirements imposed upon Vlahos. COL#46-47.

Judge Dayton turned next to waiver by estoppel, observing this form of waiver is nearly indistinguishable from true waiver, but still instructive because it places the focus on the natural effect of the conduct of a party that misleads the other "to its prejudice … into the honest and reasonable belief that the other was not insisting on and therefore giving up, some right." COL#48-54.

Judge Dayton's conclusion is succinct and correct:

> Evaluating Comerica's conduct towards Masters through the lens of waiver by estoppel is illuminating. Masters actively worked to meet the conditions of the Forbearance Agreement under the belief that Comerica would forbear, which belief was induced by Comerica's words and conduct. During this time Comerica worked internally to convert Masters' guarantor's collateral into cash so Comerica could liquidate the cash prior to year-end accounting.

COL#55.

Reed Estate v. Reed, 810 N.W.2d 284, 290–91 (Mich. App. 2011), observed, "[t]here are some circumstances ... wherein justice requires that a person be treated *as though* he had waived a right where he has done some act inconsistent with the assertion of such right and without regard to whether he knew he possessed it. This is the doctrine of estoppel." (Emphasis original).

Accordingly, Judge Dayton correctly concluded Comerica's actions gave rise to a waiver of strict performance through estoppel. COL#56-58.

E. Comerica materially breached the Forbearance Agreement, excusing further performance by Masters and the Guarantors.

Acts that adversely affect a substantial or essential part of the contract constitute a material breach of contract. *Holtzlander v. Brownell*, 453 N.W.2d 295, 298 (Mich. App. 1990). To consider whether a material breach occurred, one must evaluate whether the party obtained the benefit it expected to receive. *Id.*

Material breach of contract may also consist of acts that deprive a party of the opportunity to perform:

> Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability.

Mehling v. Evening News Ass'n, 132 N.W.2d 25, 26 (Mich. 1965).

On December 31, 2008, at 4:50 p.m., Comerica stopped forbearing and started seizing the collateral by sweeping Masters' and Pratt's Comerica accounts. MAPP146-156,158-159,191;FOF#84. On January 2 and 6, 2009, Comerica swept Vlahos' Comerica accounts containing the money it ordered transferred on December 29 and 31. MAPP191;Ex.52,892. On January 5, it seized Nolan's Letter of Credit. On January 7, it seized Taylor's. On January 9, it swept the balance of Pratt's account. MAPP191. Based on this evidence, Judge Dayton concluded, "Comerica's seizure of funds deprived Masters of a substantial, if not

the cardinal, benefit of the Forbearance Agreement—to forbear until February 16, 2009." COL#68.

Judge Dayton also determined Comerica's seizure of assets prevented Masters from performing the Forbearance Agreement, including refinancing. FOF#31;COL#57,65,68-70. By seizing the collateral, Judge Dayton concluded Comerica materially breached the Forbearance Agreement, rendering inoperative the contract condition requiring Masters to refinance and excusing performance by Masters and the Guarantors of all subsequent performance obligations. COL#66-70. Each of these conclusions is legally correct and fully supported by the evidence.

F. Judge Dayton correctly awarded $10,595,514.16.

Comerica and *amici* criticize Judge Dayton's damage award on two grounds. The first is that he called it "seizure damages." Second, Comerica argues the value of Masters' collateral should have been reduced by the amount of its loan. Both criticisms are legally incorrect.

(1) Judge Dayton applied the correct measure of damages.

The particular words used by Judge Dayton to describe Masters' award—"seizure damages"—are irrelevant. The question is, was the value of the collateral Comerica seized a proper measure of damage for breach of the Forbearance Agreement? The answer to this question is, "yes."

This was an action for breach of Comerica's agreement to forbear collection of collateral. In determining Masters' entitlement to damages, Judge Dayton relied on *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50 (Mich. 1980). COL#75. There, the Michigan Supreme Court expressed the measure of damage as follows:

> … the damages recoverable for breach of contract are those ... that were ***in the contemplation of the parties at the time the contract was made***…. Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it.

295 N.W.2d at 52-53 (emphasis added).

There is no uncertainty regarding either the values in contemplation of the parties at the time the Forbearance Agreement was made or the monetary value of the contract had Comerica performed. This contract identified the specific collateral pledged as security for Masters' liabilities and promised in pertinent part, "Bank is willing to forbear until February 16, 2009,… from further action to collect the liabilities." MAPP102.

The Forbearance Agreement was valuable to Masters because it preserved the collateral until February 16, 2009. That collateral was essential to Masters' plan to refinance its loans through Wells. Without the collateral, all hope of refinancing was dead. Both Masters and Comerica knew it. The monetary value of the Forbearance Agreement, had Comerica performed under it—***the sum that was in the contemplation of the parties at the time the contract was made***—was

the value of the collateral. Protecting Masters' collateral until February 16, 2009, was the subject and entire goal of the Forbearance Agreement.

Starting on December 31 and continuing through January 9, Comerica collected the bulk of the collateral. MAPP191. Comerica continued to seize collateral until March 3, 2009, when the total collected reached $10,595,514.16. MAPP191;Ex.52;FOF#30,102-104.

Michigan law and the record fully support Judge Dayton's determination the damage in contemplation of the parties at the time the Forbearance Agreement was made was loss of the collateral and the damage caused by Comerica's breach totaled $10,595,514.16. COL#73-79. Judge Dayton's descriptor ("seizure damages") is obviously shorthand for "the damage suffered when Comerica wrongfully seized the collateral in breach of its agreement to forbear doing so." *Cf.* APP8 with APP37-38 (COL#73-79). The ***label*** used is not a basis to overturn his carefully considered damages award.

(2) A "net" measure of damage applies only to claims for lost profits, which Judge Dayton rejected.

The Michigan cases Comerica cites regarding "net damages" relate exclusively to lost profits claims. For example, in *Kolton v. Nassar*, 99 N.W.2d 362, 364 (Mich. 1959), a contractor claimed lost profits following termination of a construction contract. The undisputed testimony showed, however, "it would

have cost him [plaintiff] more to finish the building than he had coming." *See also Tel-Ex Plaza, Inc. v. Hardees Restaurants, Inc.*, 255 N.W.2d 794, 796 (Mich. App. 1977) (lost profits caused by breach of "build-to-suit" lease properly reduced by amount it would have cost to build the building) and *Benfield v. H.K. Porter Co.,* 137 N.W.2d 273, 274-5 (Mich. App. 1965) (claim for lost commissions reduced by expenses saved by not performing the contract).

Judge Dayton did not award lost profits. So, "net damages" are irrelevant.

Hoping this Court will forget that *Masters I* was an appeal from a jury verdict that ***included*** lost profits, Comerica pulls a quote—out of context—from Masters' petition for rehearing, claiming its counsel "commented approvingly on the propriety of the jury's deduction of the loan amount." AOB45. Not only does Comerica misuse the quote, but the statement is also false. After Comerica attempted to depose expert witness Storey about the loan as part of his analysis, Masters filed its motion for summary judgment on Comerica's failure to assert any claim or defense for a credit or setoff of the 10.5 million. Comerica responded that it had ***not*** raised and was ***not*** asserting any such claim or defense. MAPP26-27.

Comerica's "net damages" argument asks this Court to leave Masters with nothing. That is the position Masters would occupy if Judge Dayton had found there was no breach, no seized collateral, no lost refinancing, and no destruction of Masters' business. Comerica is not asking this Court to enforce Michigan law. It

is asking this Court to subvert it through gross misapplication of Michigan's "net damage" rule, applicable exclusively claims for lost profits, in a case where all such claims were rejected.

As explained below, Comerica's "net damages" argument is a thinly disguised end-run around its failure to affirmatively plead or prove offset or recoupment, and directly contravenes Comerica's express representation to Judge Dayton that it sought ***no*** such relief.

II. Absent any effort by Comerica to plead a claim or defense to recover $10.5 million, Judge Dayton correctly refused to deduct that amount.

An attempt to recover a debt must be by an action proving the obligation through evidence. *Sant v. Baril*, 173 Mont. 14, 18, 566 P.2d 48, 50 (1977); *Wilson v. Harris*, 21 Mont. 374, 400-01, 54 P. 46, 54 (1898); Rule 8, Mont. R. Civ. P.

The case remanded to Judge Dayton for retrial was ***Masters'*** claim for contract damages caused by Comerica's breach of the Forbearance Agreement. Comerica did ***not*** bring any claim or defense seeking recovery of a debt.

In order to recover the amount of its loan, Comerica was required to present the issue for resolution through a counterclaim, third-party claim, or, at an absolute minimum, an affirmative defense. Rules 7, 8, 12(b), 13, 14, 15, and 19, Mont. R. Civ. P.

Recoupment and setoff are affirmative defenses that must be timely raised or they are waived. *Nimmick v. Hart*, 248 Mont. 1, 8, 808 P.2d 481, 486 (1991). Affirmative defenses, or any avoidance or compulsory counterclaims, are waived if not timely pled, and a district court can neither waive the requirement nor raise a defense for a defendant. *Estabrook v. Baden*, 284 Mont. 419, 421, 943 P.2d 1334, 1336 (1997). As this Court held in *Nason v. Leistiko*, 1998 MT 217, ¶ 18, 963 P.2d 1279, 290 Mont. 460:

> … where a party fails to raise an issue in the pleadings, does not present argument on the issue during the hearing on the merits of the case, does not move to amend the pleadings to conform to any evidence presented and raises the issue for the first time in a post-hearing memorandum which the district court does not address in its order, the issue has not been timely raised and may not be raised on appeal.

Comerica urges this Court to dispense with the requirements of these Rules and precedent, characterizing the issue as a "myopic application of the pleading rules." AOB47. The truth is, if Comerica had pled a claim or affirmative defense to recover or setoff the loan amount, it would have had the affirmative burden to prove it. Masters, in turn, would have had the right to defend any such claim and rebut any such defense. Most importantly, Judge Dayton would have had the opportunity to decide the issue.

None of this happened because Comerica ***chose*** not to plead any such claim or defense ***ever***. Indeed, Comerica confirmed in a court filing that it was ***not***

asserting any such claim or defense. MAPP26-27. Judge Dayton's application of well-established pleading requirements is not "myopic." It is a clear view of the total record and a solid basis to hold Comerica to the same pleading rules with which every litigant must comply.

Despite its failure to follow the pleading rules, Comerica argues it sufficiently "raised the issue" of a 10.5 million "downward adjustment" of the damages award in the pretrial order. *See* AOB44-45, citing Dkt.577.1,¶¶42-43,47,60, and issues 5,7. The cited contentions do no such thing. Paragraphs 42 and 43 merely recite that the loan was paid in full. Paragraph 47 is a contention relating to the demise of Masters U.K. in 2010. Paragraph 60 expresses nothing more than Comerica's belief that the debt would ultimately have to be repaid "at some point in time." This is tantamount to an admission that repayment was not sought in this action. Issue 5 is whether Masters suffered any damages. Issue 7 is a vague catch-all for "any fact issue" raised by the parties' contentions. And, given the lack of any contention seeking a "downward adjustment" for the loan amount, it is no surprise that at no time in the trial did Comerica attempt to prove such a thing. On the contrary, Norton expressly stated Masters owed nothing. Tr.176,183.

Because Comerica's claim for repayment of $10.5 million is not in the pretrial order, Judge Dayton could disregard it. *Ryan v. City of Bozeman*, 279

Mont. 507, 511, 928 P.2d 228, 230 (1996). That fact also precludes appellate review. *See, e.g., Ahmann v. American Federal Sav. and Loan Assn*, 235 Mont. 184, 766 P.2d 853 (1988), overruled on other grounds by *Allers v. Riley*, 273 Mont. 1, 901 P.2d 600 (1995) (because there was no claim for breach of fiduciary duty in the complaint or pretrial order, "we cannot find that the breach of a fiduciary duty was a claim in the present case.")

The first and only time Comerica filed a district court document requesting any kind of an "adjustment" for $10.5 million was in its postjudgment motion seeking to reduce the appeal bond amount. Dkt.634. Comerica only moved to reduce the bond amount, not to amend the judgment by reducing the damage award. *Id.*

Comerica's claim for a $10.5 million is also barred by the doctrine of judicial admission. During the retrial before Judge Dayton, Comerica expressly confirmed that it was ***not*** pursuing setoff or recoupment. MAPP26-27. Further, Norton testified unequivocally that Masters owed Comerica nothing. These judicial admissions bar Comerica from now arguing otherwise. *See, e.g., Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 2004 MT 144, ¶¶ 33-34, 321 Mont. 432, 92 P.3d 620. "The main characteristic of a judicial admission is the conclusive effect upon the party making the admission; ***no further evidence can be introduced by the party making the admission to prove, disprove, or contradict***

the admitted fact." *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶¶ 10-14, 377 Mont. 58, 338 P.3d 76 (emphasis added).

Comerica tries three last-ditch ploys. First, it seeks a credit against Masters' judgment by characterizing assignment of the Guarantors' claims as a scheme to avoid the Guarantors' obligations. No part of the record supports Comerica's statement. Comerica never sought to recover from any Guarantor or to assert any counterclaim or third-party claims throughout years of litigation, though such claims were compulsory under Rules 13 and 19, Mont. R. Civ. P. Thus, its argument that assignment of the Guarantors' claims was a conspiracy to avoid obligations that have never been asserted is as perplexing as it is baseless.

Contrary to Comerica's argument, the Forbearance Agreement incorporates the Letters of Credit issued by Nolan and Taylor within its definition of "Loan Documents."[13] Nolan and Taylor each lost $500,000 when Comerica took those letters of credit. It is hornbook law that Nolan and Taylor had every right to assign their claims to recover that loss to Masters. *Burkhardt v. Bailey,* 680 N.W.2d 453, 461-462 (Mich. 2004).

[13] "Loan Documents" refers to "any and all documents, instruments and agreements executed in connection with the financing arrangements from Bank to Borrower and Guarantors." MAPP101. Unquestionably, the Letters of Credit from Nolan and Taylor "were executed in connection with the financing arrangements." Otherwise, Comerica had no right to collect the Letters of Credit.

The only witness who was asked by Comerica what would happen if the collateral were returned was Masters' expert witness Storey, and he was asked only if Pratt and Taylor would owe the amounts they pledged. At first, Storey disagreed. Contrary to Comerica's suggestion that Storey "dissembled," he actually declined to answer on the grounds he believed the question involved a legal issue. Tr.1596–1598. There were no further questions on the subject, yet Comerica accuses Storey of concealing the truth instead of acknowledging it failed to attempt to develop any evidentiary support for this argument. It expects this Court to provide an answer to a legal issue Comerica never raised and to a question that was never answered anywhere in the record.

Second, Comerica claims that since Vlahos did not sign the Forbearance Agreement, there was no contract that could be breached. Comerica lost that argument.

Finally, Comerica says the ruling "makes no sense." AOB48. What "makes no sense" is ascribing error to Judge Dayton for not awarding relief Comerica first raised obliquely after judgment, and then asking this Court to guess what might have happened if Comerica had actually followed the Rules.

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III. Judge Dayton's determination under Michigan law regarding prejudgment interest is legally correct, and the amount set is a proper exercise of discretion.

A. Judge Dayton properly applied MCL Section 600.6013(7).

In Michigan, "[i]nterest is allowed on a money judgment recovered in a civil action." MCL §600.6013(1). "[A]n award of interest is mandatory in all cases to which [600.6013] applies." *Everett v. Nickola*, 599 N.W.2d 732, 735 (Mich. App. 1999). The purpose of 600.6013 is to compensate the prevailing party for loss of use of the funds awarded as a money judgment. *Farmers Ins. Exch. v. Titan Ins. Co.*, 651 N.W.2d 428, 432 (Mich. App. 2002). "MCL 600.6013 is remedial in nature and thus should be liberally construed in favor of the prevailing party." *Markley v. Oak Health Care Investors of Coldwater, Inc.*, 660 N.W.2d 344, 350 (Mich. App. 2003).

Section 600.6013(7) specifies that where "a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument...." MCL §600.6013(7).

This case is solely a contract action for damages resulting from Comerica's breach of the Forbearance Agreement. The Judgment entered by Judge Dayton is "rendered on a written instrument," "evidencing indebtedness," and stating "a specified interest rate." Thus, each prerequisite to application of 600.6013(7) is

present. *Wyandotte Elec. Supply Co. v. Elec. Tech. Sys., Inc.*, 881 N.W.2d 95, 107-108 (Mich. 2016).

Comerica's Forbearance Agreement was an integrated document evidencing indebtedness between Masters and Comerica, defined as the "Liabilities." MAPP101. This satisfies the language of MCL §600.6013(7), especially in light of Michigan's requirement that the statute be liberally construed.

According to Meriam's Online Dictionary, a plain meaning of the word "evidences" is to "be or show evidence of." Using the ordinary meaning of the word, the Forbearance Agreement on its face evidences indebtedness, the "Liabilities" defined therein. It is irrelevant that the Forbearance Agreement is not itself a promissory note. Michigan does ***not*** interpret the expression "written instrument that evidences indebtedness" as requiring the document to be a promissory note or negotiable instrument. *Comerica Bank v. Equitable Life Assurance Soc'y of the United States*, 2000 WL 33419388, *4-6 (Mich. App. May 26, 2000).

B. Comerica's argument based on MCL Section 600.6013(8) is without merit.

It is well-established that "[a] party may not raise new arguments or change its legal theory on appeal, because it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State*

v. Adgerson, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850. The policy is to promote "judicial economy and fairness to the trial courts and the parties." *Thibodeau v. Bechtold*, 2008 MT 412, ¶ 29, 347 Mont. 277, 198 P.3d 785.

Judge Dayton ordered the parties to submit simultaneous briefs regarding interest. APP40. In its brief, Comerica argued exclusively that MCL §600.6013(6) controls. Dkt.618,p.32. Subsection 6, however, applies only to complaints "filed on or after January 1, 1987, but before July 1, 2002." It has no application to Masters' Third-Party Complaint filed in 2011. Judge Dayton correctly refused to apply Subsection 6.

As for Comerica's argument raised for the first time in a reply brief below, Section 600.6013(8) provides that interest on money judgments is calculated at six-month intervals, "except as otherwise provided in" Section 600.6013(7). The plain meaning of that language is also well-established in Michigan case law:

> With some limitations, ***generally when the judgment is rendered on a written instrument of indebtedness, and the instrument specified an interest rate, the judgment will accrue interest at the rate specified in the instrument***. Mich. Comp. Laws § 600.6013(7).

VanderKodde v. Mary Jane M. Elliott, P.C., 314 F.Supp.3d 836, 840 (W.D. Mich. 2018) (emphasis added). In other words, Subsection 8 is intended to serve as a "catch-all" provision, applicable only in the event a judgment is not entered on a

written instrument evidencing an indebtedness with a specified interest rate, a circumstance absent here.

C. Judge Dayton properly exercised discretion in setting the amount of prejudgment interest by applying a set of Comerica's calculations.

While Judge Dayton was considering the parties' briefing on prejudgment interest, Comerica filed a Motion for Judicial Notice. MAPP38-56. There, as one of three positions, Comerica urged the court to take judicial notice that, under the Forbearance Agreement, prejudgment interest would be at the London Interbank Offer Rate (LIBOR) plus an 8.5% margin. MAPP44-45. Judge Dayton did exactly as Comerica asked and used the calculations Comerica supplied to determine prejudgment interest totaled $8,067,405.60 (accounting for additional days using the daily interest rate Comerica supplied).

IV. Judge Dayton correctly applied Montana law to Masters' claims for attorney fees and exercised proper discretion in setting the amount.

In *Masters I*, this Court enforced the Forbearance Agreement's choice-of-law provision, stating, "[w]e recognize and enforce a clear and unambiguous contract term, ***unless that term "violates public policy*** . . . ." *Masters I*, ¶ 54, citing *Youngblood v. Am. States Ins. Co.*, 262 Mont. 391, 395, 866 P.2d 203, 205 (1993)(emphasis added). This Court then specifically observed that, in *Youngblood*, it refused to enforce an unambiguous choice-of-law provision

because its med-pay subrogation provision "clearly violated Montana's established public policy." *Id.*

Judge Dayton's close scrutiny of *Masters I* revealed two undeniable truths. First, this Court upheld the choice-of-law provision in the Forbearance Agreement only after expressly concluding that it was ***not "against Montana public policy***" as to the contract and tort claims and, ***"[t]his being so***, the District Court should have applied the contractual choice-of-law provision" as to the substantive issues. *Masters I*, ¶ 58 (emphasis added).

Second, this Court reversed for a new trial of Masters' contract claims without considering—and certainly without deciding—which law applies to the issue of Masters' post-trial attorney fee claim.

Judge Dayton's methodical approach to this legal question—which Comerica calls "a confusing hodgepodge," "flawed," and a "results-driven analysis"—was to look to the decisions of this Court in conjunction with the Restatement:

> Montana precedent and the Restatement (Second) of Conflict of Laws continually refer to a choice of law analysis by 'particular issue,' rather than as a whole. *Restatement (Second) of Conflict of Laws* Sec. 187.

APP45.

Judge Dayton's approach was necessitated by the fact that he was confronted with a conflict in public policy between Michigan and Montana law presented by the Forbearance Agreement's one-sided attorney fee provision. The Forbearance Agreement provides, in part, "Borrower and Guarantors acknowledge and agree ... they shall reimburse for any and all costs and expenses of Bank, including, but not limited to, all inside and outside counsel fees of Bank whether in relation to drafting, negotiating or enforcement or defense ... of this Agreement...." MAPP103,¶10.

Nearly fifty years ago, the Montana legislature established as a matter of public policy that, "whenever, by virtue of the provisions of any contract ... one party to the contract ... has an express right to recover attorney fees from any other party to the contract ... then ... all parties to the contract ... are considered to have the same right to recover attorney fees...." §28-3-704, Mont. Code. Ann. No similar statute, rule, or policy exists in Michigan.

Montana public policy is prescribed by the legislature through enactment of statutes. *U.S. Specialty Ins. Co. v. Estate of Ward,* 2019 MT 72, ¶ 9, 395 Mont. 199, 444 P.3d 381. If the attorney fee provision of the Forbearance Agreement were applied as required by Montana's well-established public policy, the right to recover attorney fees is reciprocal. If that same provision were applied in

accordance with Michigan law, fundamental Montana public policy would be violated.

On this narrow question, Judge Dayton was faced with a circumstance this Court had not considered in *Masters I*. He resolved the issue by applying this Court's choice-of-law precedent. First, he determined both Michigan and Montana have plausible connections to the issue, that their laws are in conflict with regard to reciprocal attorney fees, and that the outcome of Masters' fee claim will be different depending which state's law applies. APP66.

Second, Judge Dayton looked to the place of performance, observing,

> . . . the Court has ruled and will enter judgment in Montana for Masters. The party's attorney fees accumulated while trying the case in Montana. The bulk of the performance occurred in Montana for the prevailing party, Masters. Therefore, Montana law applies based on the state of performance to the issue of attorney fees. Once Montana is determined to be the place of performance, no further analysis under the Restatement is required.

APP68.

Even though the inquiry could have ended there, Judge Dayton went further, evaluating Masters' attorney fee claim based upon consideration of each of the factors itemized in Section 6(2) of the Restatement (Second), Conflicts of Law. APP70-75. This detailed analysis resulted in the same legal conclusion: Montana law was properly applied to Masters' claim for attorney fees, and under Montana

law the Forbearance Agreement's attorney fee provision was to be treated as reciprocal.[14]

Having decided Masters was entitled to its attorney fees, determination of the amount of fees Masters was entitled to receive was easy: Comerica ***stipulated*** Masters' 40% contingent fee was reasonable. Judge Dayton agreed and set Masters' total fee at $7,535,593.18, which represented 40% of $18,838,982.95, the total of the judgment, costs, and prejudgment interest. APP75.

Comerica's argument—that because Masters did not pursue a cross-appeal in *Masters I* it somehow is precluded from a fee—is improperly raised for the first time on appeal and without merit. Judge Krueger's earlier decision to award Masters hourly fees was part of the judgment that was reversed and became a nullity.

> Once the judgment of a district court has been reversed, that judgment no longer has any effect. This Court has stated, '[W]hen the judgment is reversed, it is then a nullity, and the matter stands as if no judgment had ever been rendered.'

Sudan Drilling, Inc. v. Anacker, 2014 MT 72, ¶ 13, 374 Mont. 272, 320 P.3d 977. Comerica knows this is the law, which is why it never paid Judge Krueger's fee award.

[14] Comerica's final appeal to "fairness"—calling Masters' lawsuit "collusive"—has been repeated by Comerica multiple times, but never accepted by multiple judges over the past ten years, including Judge Krueger, two federal court judges, this Court, and Judge Dayton.

V. Comerica's failure to present any argument regarding postjudgment interest in its opening brief precludes review.

Despite being granted an overlength opening brief of 15,000 words and arranging for an *amicus* brief of nearly 5,000 words, Comerica's sole discussion of the propriety of Judge Dayton's award of postjudgment interest is a footnote that it "disagrees with" the district court's conclusion and that "Space does not permit discussion on that issue." AOB62,n.39.

Masters cannot respond to an argument not made. The Court cannot decide an issue not briefed. In *State v. Ferguson*, 2005 MT 343, ¶ 40, 330 Mont. 103, 126 P.3d 463, this Court made clear the Rules do not allow for "shortcut tactics." Rule 23(a)(4), Mont. R. App. P., requires the argument portion of a brief to contain the party's contentions with respect to an issue, the reasons for them, and citations to authorities, statutes, and pages of the record being relied on. Comerica did not comply with the Rules. Any issue regarding postjudgment interest is not properly before the Court.

ARGUMENT ON CROSS-APPEAL

I. Masters is entitled to be made whole for lost profits or lost value of the U.K. business under Michigan law.

As this Court understands, "[Comerica's] seizure of assets resulted in a recall of Masters' payroll checks and payments to suppliers, and precipitated the

collapse of the company." *Masters I*, ¶ 25. After hearing the evidence at retrial, Judge Dayton reached the same conclusion. APP5;FOF#29-31.

A. Lost profits.

In Michigan, "[t]he type of uncertainty which will bar recovery of damages is 'uncertainty as to the *fact of the damage* and *not as to its amount* ... [since] where it is certain that damage has resulted, ***mere uncertainty as to the amount will not preclude the right of recovery***.'" *Bonelli v. Volkswagen of Am., Inc.*, 421 N.W.2d 213, 226 (Mich. App. 1988) (emphasis added). *See also Lorenz Supply Co. v. American Standard, Inc.*, 300 N.W.2d 335, 340 (Mich. App. 1980).

Though the factfinder is not permitted to speculate or guess regarding the amount of lost profits, Michigan recognizes the inherent difficulty of measuring lost profits. The boundary is marked by a straightforward rule: the amount of lost profits cannot be based ***solely*** on conjecture and speculation. *See, e.g., Fera v. Village Plaza, Inc.*, 242 N.W.2d 372 (Mich. 1976).

In *Stimac v. Wissman*, 69 N.W.2d 151 (Mich. 1955), a restaurant operator sought damages for lost profits after wrongful conduct on the part of his landlord prevented the restaurant from opening. The restauranteur estimated lost profits by looking at figures from the prior year. On appeal, the Michigan Supreme Court acknowledged that the prior year was "not precisely comparable," but rejected the landlord's argument that the calculation was speculative, stating:

> We do not, however, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable. We do require that the amount of s lost be shown with ***such reasonable degree of certainty as the situation permits.*** (Emphasis added).

69 N.W.2d at 155.

In *Tempo, Inc. v. Rapid Elec. Sales & Service, Inc.*, 347 N.W.2d 728 (Mich. App. 1984), Rapid was an electrical subcontractor claiming it lost its bonding and was unable to bid on other jobs because Tempo failed to pay amounts due for electrical work Rapid had performed. At trial, Rapid presented testimony as to which jobs it would have bid on during that period if it had bonding. Rapid estimated that it would have been awarded contracts on one out of every three to four jobs bid, with a profit margin of three percent. The Court stated:

> We find this evidence sufficient to warrant an award of damages for lost profits. While perhaps to some degree speculative, this method of calculating lost profits had a reasonable degree of certainty and was not based solely on conjecture and speculation.

347 N.W.2d at 733.

Comerica's seizure of collateral put Masters out of business. It does not follow that this fact rendered reasonable calculation of lost profits impossible. This is especially so in Michigan, where it is well-established that, "doubts as to the certainty of damages must be resolved against the wrongdoer." *Lorenz*, 300 N.W.2d at 340. The rule is:

> On the principle that where a litigant can show he has been damaged, but his damages cannot be measured with certainty, that it is better that he recover more than he is entitled to than less, the rule in Michigan is that the risk of the uncertainty is cast upon the wrongdoer, not the injured party.

Id. *See also Fera*, 242 N.W.2d at 376 ("we do the best we can with what we have," particularly where defendant's act has caused the imprecision).

At retrial, Masters presented evidence of precisely the sort Michigan recognizes is acceptable, especially given that Comerica's wrongful conduct rendered greater precision impossible. Masters provided substantial evidence of its established business relationships and vendor contracts with customers such as Office Depot and Staples; the advantages of its business model, logistics, pricing, product development in North America; and prior sales. Tr.267:13—271:4,272:4-24,274:9—278:9,314:14—343:1,347:9—364:19,477:8—514:8,314:14—343:1,347:9—364:19,1077:24—1092:3;Ex. 392,394,395,818,829,833,843,1002-1.

Masters' actual historical financial information was uncontested, showing rounded March 31 fiscal year-end revenues as follows: European operations (2010: $10,922,000; 2009: $21,042,000; 2008: $26,636,000; 2007: $21,882,000, and 2006: $15,432,000); and North American operations (2009: $860,000; 2008: $599,000; and 2007: $13,000). MAPP183-186;Tr.374:4-23,1085:1—1092:3.

Based on these facts, Masters' CPA expert, Robert Storey, calculated the lost profits Masters suffered. MAPP171-189. Storey had the knowledge, skill,

experience, training, and education necessary to undertake such computations. Mont. R. Evid. 702. The facts and data upon which he based his opinions and inferences were of the type reasonably relied upon by experts in his field of expertise, Mont. R. Evid. 703, including financial reports, tax returns, projections, testimony, corporate records, etc. *See, e.g., Jim-Bob, Inc. v. Mehling*, 443 N.W.2d 451, 464 (Mich. App. 1989).

Storey's calculations and reasonable assumptions led with reasonable certainty to the conclusion Masters' lost profits totaled $14,620,506. MAPP171-189. Judge Dayton's refusal to award lost profits was not driven by any determination that Masters' claim was based ***solely*** on conjecture and speculation, as Michigan law required. On the contrary, Judge Dayton rejected Masters' lost profits claim based solely on "the inability to prove ***these amounts*** with reasonable certainty." COL#78 (emphasis added). In short, having found Comerica's actions rendered what may have happened to Masters unascertainable, Judge Dayton improperly transferred to Masters the burden of ***eliminating*** uncertainty in proving the damages amounts caused by Comerica's breach of the Forbearance Agreement.

Michigan law called on Judge Dayton to construe all "doubts as to the certainty of damages" against Comerica, not Masters. His conclusion rejecting Masters' lost profits claim misapprehends the requirements of Michigan law and disregards substantial, credible evidence. It should be reversed and remanded with

directions for an award of lost profits plus mandatory Michigan prejudgment interest.

B. Alternative lost value of the U.K. business.

As an alternative to lost profits, Masters sought to recover the value of the U.K. business it lost in the collapse of operations. Dkt.577.1.p.6.

In addition to any award for damages naturally arising from the breach, Michigan law also permits recovery of amounts to compensate Masters for consequential damages. Consequential damages are those additional damages that were contemplated by both parties at the time they made the contract. M.Civ.JI §142.34 (MAPP209) (citing *Huler v. Nassar*, 33 N.W.2d 637 (Mich. 1948); *Dierickx v. Vulcan Indus.*, 158 N.W.2d 778 (Mich. App. 1968); *Lawrence*, *supra.*)) Comerica reasonably should have foreseen that, if it breached the Forbearance Agreement by seizing all available collateral: (1) Masters and the Guarantors would lose all their cash and collateral; and (2) Masters would have no collateral to offer any takeout lender and could not stay in business.

There was substantial evidence based on the testimony of Masters' directors, Norton, and Comerica's own business records that the value of the U.K. business was $8,666,900. Tr.58:5–21,345:1—346:13,1083:4-5,1227:24—1228:23;Ex.3. Such evidence was competent and sufficient to estimate the lost value of the

business. See *Alexander v. State*, 142 Mont. 93, 108, 381 P.2d 780, 788 (1963) ("the owner of property is a competent witness to estimate its value.").

Thus, the evidence at trial allowed Judge Dayton to calculate the lost value of the U.K. business with reasonable certainty as $8,666,900.

II. Masters is entitled to recover all costs.

The Forbearance Agreement entitles the prevailing party to recover not just attorney fees, but in addition, "***all costs and expenses***." MAPP103,¶10.

By rejecting Masters' request for non-statutory costs, Judge Dayton not only disregarded the words, "all costs and expenses," but also Montana law. The failure to award "all" costs is contrary to § 28-3-202, Mont. Code Ann., which states, "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." It is error for a district court to fail to give any meaning to a phrase in a document. *See, e.g., Whary v. Plum Creek Timberlands, L.P.*, 2014 MT 71, ¶ 15, 374 Mont. 266, 320 P.3d 973. *See also Alan D. Nicholson, Inc.*, *supra* ("all costs" to be awarded is not limited to taxable costs but means the total fees and costs incurred); *Kuhr v. City of Billings*, 2007 MT 201, ¶ 37, 338 Mont. 402, 168 P.3d 615 ("all" costs does not mean simply statutorily allowed costs); *Total Indus. Plant Services, Inc. v. Turner Industries Group, LLC*, 2013 MT 5, 368 Mont. 189, 294 P.3d 363 (parties have the right to contract for costs other than those allowed by statute).

Had Comerica prevailed, it would be demanding every penny of every claimed cost or expense incurred, as it did in pursuing Masters and the Guarantors up to and after the seizure. Masters is entitled to the full amount of its non-statutory costs totaling $336,433.11.

CONCLUSION

For the foregoing reasons, Masters respectfully asks this Court to affirm the district court's Judgment awarding Masters contract damages, prejudgment interest and attorney fees totaling $26,374,576.13, plus daily prejudgment interest of $2,575.80 from June 13, 2020, to the date of the Judgment, and Montana statutory 10% postjudgment interest; and to reverse the district court's refusal to award Masters' lost profits in the amount of $14,620,506 (alternatively, $8,666,900 lost business value), and non-statutory costs totaling $336,433.11, with directions to amend its Judgment accordingly.

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Dated this 9th day of December 2020.

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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 is 14,956 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, not in excess of the 15,000-word limit allowed by this Court's order of October 16, 2020.

Dated this 9th day of December 2020.

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