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

MASTERS GROUP INTERNATIONAL, INC.,

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

vs.

COMERICA BANK,

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

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

APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWER BRIEF ON CROSS-APPEAL

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INTRODUCTION

Comerica was simply a commercial lender that loaned money to Masters and properly secured the loan with collateral.

Although Masters depicts itself and the Guarantors as "victims," Masters' Guarantors were wealthy investors. Unlike the typical small business loan transaction, these investors gambled on a startup hoping for extraordinary returns. But Masters did not succeed as they hoped. Rather than investing more capital, they turned their backs on Masters when it needed more money. While the venture failed (for lack of sales), that is not the fault of the Bank. Indeed, "fault" is irrelevant. The Bank honored its obligations—legally, in accordance with Michigan law and the documents. The transactions are governed by carefully-drafted contract documents and must be interpreted under Michigan law. Judge Dayton must be reversed because he failed to accept this mandate.

This Court's reversal and remand in *Comerica I*[1] provided clear direction. This is a contract, not a tort, case, and the contract issues are governed by Michigan law. Masters initially alleged contract bad faith, but later withdrew that claim. Tr.823:5-10. Masters' characterization of Comerica's motives is irrelevant. *Corl v. Huron Castings, Inc.*, 544 N.W.2d 278, 281 n.14 (Mich. 1996). It is a

[1] *Masters Grp. Int'l, Inc. v. Comerica Bank*, 2015 MT 192, 380 Mont. 1, 352 P.3d 1101.

"bedrock principle of American contract law that parties are free to contract as they see fit…." *Est. of Farmer by Farmer v. Farmer*, 2018 WL 3672208, at *2 (Mich. App. 2018). Whether the Court agrees with the Bank's actions has no role in deciding legality. Rather, the issue was and remains: Was Comerica's conduct permitted under the documents as reviewed under Michigan law?

ARGUMENT

I. MASTERS BARELY RESPONDS ON THE DISPOSITIVE STATUTE OF FRAUDS ISSUE.

In Michigan, any loan **waiver** or other "**financial accommodation**" must be in writing and signed by the financial institution. MCL § 566.132(2) (App.136).[2]

Comerica carefully addressed the error in Judge Dayton's three reasons for refusing to apply the Michigan statute. ComericaBr.,p.15. Masters attempts to defend only one—that Comerica signed the Forbearance Offer. MastersBr.,pp.31-33.[3]

But even that response is completely inapposite. Yes, Comerica signed the forbearance, but it indisputably did not execute a requisite **written waiver** of Masters' **obligations**:

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[2] Montana has a similar statute, § 31-1-116, MCA.

[3] The abandoned arguments are: (1) Michigan's statute does not apply to claims of waiver; and (2) Judge Dayton felt bound by *Comerica I* under the doctrine of law of the case. ComericaBr.,p.15.

> [I]t did not sign a waiver of performance for: (1) Masters' promise to pay $56,204 upon execution of the agreement; (2) Masters' commitment to have someone inject $250,000 by 12/29/08; or (3) Masters' promise to pay Comerica the closing fee of $52,000.

ComericaBr.,p.18. Masters takes the position these terms were implicitly waived. Its sole argument (that Comerica signed the Offer), however, makes no effort to respond to Comerica's actual argument that for a waiver of **terms** to be valid, it must be signed by the financial institution. In truth, there is no argument to be made. Michigan's "unambiguous" statute "plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision." *Crown Tech. Park v. D&N Bank, FSB*, 619 N.W.2d 66, 72 (Mich. App. 2000).

Masters makes a throwaway argument, not raised below, that Comerica previously signed two forbearance "agreements" and "[did] not question [their] enforceability…." MastersBr.,pp.32-33. The documents are merely unilateral Notices of Default (Ex.127,8/1/2008 and Ex.30,11/25/2008), stating: "Bank is forbearing only from day to day…." They do not provide for or require Masters' signatures and do not purport to be "agreements."[4]

[4] Masters never argued regarding part performance, likely because the doctrine does not apply to Michigan's statute. *See Ennis v. Wells Fargo Bank, N.A.*, 2011 WL 1118669, at *4 (E.D. Mich.); *Saad v. Wayne Cnty. Register of Deed*, 2013 WL 3455628, at *6 (E.D. Mich.).

This should be the end of the case—there was no written waiver.

II. WITH NO ACCEPTANCE, NO CONTRACT WAS FORMED.

Masters incorrectly argues contract formation is a question of fact. "Whether those facts result in the creation of a contract is an issue of law, to be reviewed de novo." *Bracco v. Mich. Tech. Univ.*, 588 N.W.2d 467, 470 (Mich. App. 1998); *see also Larson v. Greentree Fin. Corp.*, 1999 MT 157, ¶17, 295 Mont. 110, 983 P.2d 357 ("The existence of a valid express contract is a question of law to be determined by the court.").[5]

A. The conclusion of law that a contract was formed was erroneous.

Ignoring the Offer's requirement that the Guarantors sign, Judge Dayton concluded a valid, enforceable contract exists "between Comerica **and Masters**…." App.27,Decision,p.24,¶17 (emphasis added). It was clear error to ignore the Guarantors. *See* Farnsworth on Contracts, §3.13, p.259 (2d ed.) ("If the offer requires that the acceptance bear the signatures of a number of persons, it must be signed by all of them."). Masters does not respond to this point.

B. "Substantial performance" was not raised below.

Comerica previously cited numerous Michigan contract-formation cases,

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[5] Masters argues contract formation is listed as an issue of fact in the pretrial order (MastersBr.,p.34), but only because Comerica's pre-trial motion raising it as a legal issue was denied, leaving for trial the question of whether the "facts" satisfy Michigan's legal standard for contract formation. Dkts.479,553.

showing no contract was formed. ComericaBr.,pp23-25. In an anemic attempt to counter these cases, Masters baldly argues, without citing legal authority, "Judge Dayton concluded Comerica waived strict performance." MastersBr.,p.53. Masters then tries to slide the Court past this threshold question, theorizing that Judge Dayton "could just as easily have applied Michigan's doctrine of substantial performance…." MastersBr.,p.53. Not legally: First, Masters did not raise this doctrine, it expressly disclaimed reliance on it: "Masters is <u>not</u> arguing it 'substantially performed' the conditions precedent…" Dkt.519,p.20. Second, without Vlahos' signature, "substantial performance" is inapplicable "because the express conditions precedent to the formation of the contract were not fulfilled, the contract **never came into existence** and is consequently not enforceable." *Rodgers v. JPMorgan Chase Bank NA*, 890 N.W.2d 381, 386 (Mich. App. 2016) (emphasis added).

C. Masters' admission is fatal to its contract argument.

Masters, referring to section 6 of the Forbearance Offer, argues:

> 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…as of "***close of business*** on December 29, 2008…."

MastersBr.,p.23 (emphasis in original).[6]

[6] This is misleading in that it suggests these were new obligations. Section 6

This admission is stunning—Vlahos "**could not have known**" of his proposed contractual obligation—i.e., he agreed to a contract but was wholly unaware of its existence or contents. If true, Vlahos "could not have known" he was expected to inject an additional $250,000 by the same date. Put another way, Masters negotiated a proposed Forbearance Agreement knowing Comerica required Vlahos' participation, yet never checked to see if Vlahos was agreeable to the terms. *See also* Tr.1334:13-15. This is borne out by Howell's later statement that Vlahos "challenged me quite a bit that he had ever committed to do that [contribute the $250,000]." App.134,Ex.153,p.2.

"A valid contract needs an offer, acceptance, and mutual agreement to be bound, also known as a meeting of the minds." *Yaldo v. Toyota Motor Sales USA, Inc.*, 2014 WL 61129, at *4 (Mich. App. 2014). "[M]utuality of agreement and mutuality of obligation" are required. *Mallory v. Detroit*, 449 N.W.2d 115, 118 (Mich. App. 1989). Now Masters admits Vlahos, until the evening of December 29, 2008, "could not have known" what was in the proposed contract, including its most essential terms.

Vlahos never testified, and no documents support his alleged commitment. Masters, in arguing waiver, argues Vlahos said he would sign later. How does

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simply memorialized previous agreements. *See, e.g.*, App.113,Ex.863, 12/5/08 email ("We are working on a proposal for Dr. Vlahos to move his $500K control account portfolio into a cash position within Comerica….").

anyone know his signature would be coming later? Masters' only answer is, **Howell claimed Vlahos told him so**. This is rank hearsay. Put another way, if Comerica sued Vlahos for failure to perform, imagine his response: "I never signed any contract. I never even talked to Comerica about this. There was no meeting of the minds."

Finally, in trying to fend off Comerica's point that Masters failed to deposit $56,204 "upon execution," Masters argues "Judge Dayton found that 'upon execution' included Vlahos' signature, which Comerica knew would be forthcoming on January 2." MastersBr.,p.43. Comerica remains mystified that **it** can be held to have breached an unexecuted contract, but Masters' failure to deposit $56,204 "on execution" is excused because the contract was not yet executed.

In short, there was no meeting of the minds. No contract was formed.

D. Lacking an executed contract, Comerica had the right to revoke its offer.

At most, as of 12/31/08, the Forbearance Offer was just that, an outstanding offer. Comerica was free to forbear or to revoke. "A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to the acceptance by the offeree." *Bd. of Control of E. Mich. Univ. v. Burgess*, 206 N.W.2d 256, 259 (Mich. App. 1973); *see* Corbin on Contracts, §38 (1952).

In *In re Te-Kon Travel Court, Inc.*, 424 B.R. 775 (Bankr. W.D. Mich. 2010), a mortgage lender executed on collateral after an agreement in writing to a short extension. *Id.* at 779. The debtor argued the payment deadline was again orally extended, despite a contractual bar on oral modification. Although initially acknowledging debtor's argument that a written forbearance may be varied by a subsequent parol agreement,[7] the court noted, **with respect to financial institutions**, a "'financial accommodation' is not enforceable unless '[it] is in writing and signed…." *Id*. at 784 (quoting MCL § 566.132(2)). Temporary forbearance creates no legal obligation:

> Of course, a lender may forbear from exercising its collection rights with or without an agreement, but without an agreement that complies with the statute of frauds, each forbearance **is a matter of grace or inattention**, **not a binding contract**…. Although the parties settled into an uneasy and informal détente for a few more months, the Lenders had no obligation to forbear beyond the Amended Payoff Deadline.

Id. at 789 (emphasis added).

The same is true here. Lacking acceptance, Comerica's forbearance was unilateral and not legally required.

[7] Citing *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251 (Mich. 2003).

III. MASTERS' WAIVER AND PREVENTION ARGUMENTS DO NOT MEET MICHIGAN'S "CLEAR AND CONVINCING" STANDARD.

Masters argues waiver is a fact question. Even if Masters can avoid the signature requirement of Michigan law—a **legal** question—the court must evaluate the facts under Michigan's high "clear and convincing" **legal** standard for waiver. This is a mixed question of fact and law and "whether those facts satisfy the legal standard" is reviewed de novo. *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶8, 381 Mont. 292, 358 P.3d 913.

A. Masters' proofs do not come close to meeting Michigan's "clear and convincing" standard.

To establish waiver of a contractual condition, there must be "clear and convincing evidence," and the waiver must be "mutually intended." *Quality Prods.*, 666 N.W.2d at 258. Neither Masters nor Judge Dayton mentions this standard. Masters' proofs are extremely weak. Masters' argument is based on Howell's eleventh-hour claim that Norton responded "that's fine" to Howell's hearsay statement[8] that Vlahos would be unavailable to sign until January 2, 2009.

[8] Masters criticizes Comerica for not recalling Norton to address the hearsay statement. MastersBr.,p.38. But, **at the time**, Judge Dayton allowed the hearsay testimony **only** for Norton's state of mind. Comerica could not have predicted, long after the trial, these statements would somehow assume a substantive status to prove the truth of the matter asserted.

Masters embellishes the asserted “that’s fine” comment, claiming it also applied to the requirement for the injection of $250,000. MastersBr.,p.44. That is made up. Howell testified only about the signature deadline:

> I told him I’d finally been able to contact Dr. Vlahos and…he was unable to sign it until January 2 when he returned.

Tr.1123:15-19. Even if the comment were made and applied to the $250,000 injection, it purportedly was made on December 30. The deadline for the injection was December 29. App.117,Ex.45,p.2,¶5. Masters had already blown the deadline.

A critical fact undercutting Masters’ attempt to establish waiver of Vlahos’ signature deadline is an email sent at 8:52 a.m., December 30. There, Masters’ CFO admitted Comerica “told me that the **signed forbearance agreement** was required to be received from Dr Vlahos **today** or they would not forbear any longer….” Ex.329(a),p.1;Tr.1359:1-23 (emphasis added). Masters seeks to defuse this by claiming Norton said “that’s fine” later the same day.

Whatever gloss Masters tries to put on the events of **December 30**, there are several **undeniable facts** that make clear there was no waiver.[9] At 3:13 p.m. that

[9] Masters’ factual imbroglio demonstrates the very reason the Michigan legislature adopted its financial institutions statute of frauds: “to provide…protection to financial institutions from potentially fraudulent or spurious claims from disgruntled borrowers.” *Huntington Nat’l Bank v. Aronoff Living Tr.*, 853 N.W.2d 481, 488 (Mich. App. 2014). If the Court applies the unambiguous law requiring any “financial accommodation” to be **in writing and signed**, this contested legislatively-prohibited circumstantial evidence is irrelevant.

day, Howell emailed: “[Comerica] just called us and said they had decided to seek rights and remedies beginning tomorrow morning.”App.144,Ex.380.

The very next day, December 31, Howell penned a letter to Comerica, stating: “We were surprised to learn at 5 PM last evening that Comerica…rejected the workout plan that [Masters] presented….” App.193,Ex.34a.[10] Rather than claiming waiver, that letter admits Masters did not have the money and pleads for “one more week to ensure all the pieces fall into place….” *Id.* It even tried to negotiate **new terms**:

> So, in summary, we would ask that you extend our loan until it can be moved to another bank, at least 45 days; eliminate the additional fees and penalties…; and reduce our interest rates so that we may proceed with our exit from your bank and continue to operate the business.

App.195.

Masters’ failure to establish waiver is the “dog that didn’t bark.” As discussed above, waiver is a matter of mutual intent, not a later legal construct. The letter **does not say**: (1) we have a contract in place because you waived the time for Vlahos’ signature; (2) you waived injection of $250,000; (3) you waived injection of $56,204 on execution; or (4) you waived injection of $52,000. Had Masters truly believed these terms were waived, it surely would have forcefully

[10] This belies Masters’ claim it was “stunned” to discover shortly after New Year’s Comerica had drawn on the collateral. MastersBr.,p.26.

protested. Instead, the entire thrust of the December 31 letter is: "We understand you have the right to default us, but please don't." The waiver argument was invented later, as a litigation device.

B. Masters' own evidence establishes that Comerica did not prevent performance.

Judge Dayton conflated several events in reaching his conclusion that Masters' performance was prevented. ComericaBr.,pp.36-40. He actively ignored Masters' admission that all Comerica's actions concerning the Vlahos account were taken pursuant to a **pre-existing** exclusive control agreement (dated 11/25/08,Ex.1310). Thus, the actions were not "pursuant to" the Forbearance Offer, which only re-stated Vlahos' obligation to maintain his existing $500,000 collateral account. Masters' briefing acknowledged Comerica already had authority to do what it was doing, describing these actions as "consistent with" (not "pursuant to") the Forbearance Offer. Dkt.519,p.6. "Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v. AAA*, 610 N.W.2d 542, 546 (Mich. 2000).

By misconstruing Comerica's actions as pursuant to the Forbearance Offer, Judge Dayton also implied Comerica, by cooperating, accepted performance. But as Masters admits, Comerica was merely **accommodating Dr. Vlahos'** broker by allowing him to remove certain bank stocks and replace them with cash. This cooperation was at the behest of Vlahos' broker and the decision to remove certain bank stocks was made well before the Forbearance Offer. App.113,Ex.863;Tr. 202:16-19;1342:4-8.[11]

As Masters fully understood, the source of the $250,000 injection could not be Vlahos' collateral account. ComericaBr.,p.36. Nothing prevented Vlahos from injecting additional monies. Nothing prevented Pratt, worth $141 million, from injecting new monies. Both declined to do so, for good reason. Neither wanted to dump more money into a sinking ship.[12]

In sum, reversal is required because: (1) no contract was formed; (2) even if a contract were formed, Masters breached by failing to perform its obligations; and (3) Masters' claims of waiver fail because they: (a) lack Comerica's signature; and (b) do not meet Michigan's "clear and convincing" standard. Michigan's "first breach doctrine" bars Masters from maintaining an action against Comerica for a

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[11] In arguing the facts, Masters cites several passages from the plurality opinion in *Comerica I* extracted from this Court's preliminary statements of fact. The statements are *dicta*; they were not central to the decision and were without benefit of the record evidence.

[12] Masters argues that Pratt only refused to put up an additional guaranty, as opposed to otherwise investing new money. MastersBr.,p.49. That is contradicted by Pratt's testimony. Tr.911-912. Also, in November 2008, Masters' CFO Yaklin reached out to Pratt and told him that Masters needed an additional $300,000 and $600,000, to which Pratt responded: "**It won't be from me.**" Ex.243,p.1 (emphasis added).

purported later breach. *Flamm v. Scherer*, 198 N.W.2d 702, 706 (Mich. App. 1972).

IV. MASTERS' CLAIM OF "SEIZURE DAMAGES" FAILS, AS DOES ITS ARGUMENT ON FAILURE TO ACCOUNT FOR THE REQUIREMENT OF LOAN REPAYMENT.

Conceding there is no such thing as "seizure damages," Masters brushes this off as a mere labeling problem. MastersBr.,p.60 ("The ***label*** used is not a basis to overturn [Dayton's] carefully considered damages award."). Masters shifts blame, citing "the particular words **used by Judge Dayton**…" and calling them "**Judge Dayton's descriptor**." *Id.*,pp.57-60 (emphasis added). In fact, the term "seizure damages" was Masters' invention, not the court's. Tr.1468-69;1596(Storey); Dkt.599(proposed FOF-COL),pp.2,91. Regardless, the term has no provenance in the law.

Judge Dayton did not explain his rationale for awarding "seizure damages." But the bigger problem is his failure to articulate the causation link between his award and Comerica's alleged breach. None exists. Masters tries to repair Judge Dayton's failure, arguing Masters would have obtained the Wells Fargo loan but for Comerica's actions. It argues, vaguely, the damages were within the "contemplation of the parties." MastersBr.,p.59.

Focusing on the prospect of the Wells loan, however, does not answer the damage causation question. The true question is: What are the damages caused by the breach? ("The injured party should receive those damages naturally arising from the breach." App.148,MI.Civ.JI.§142.31.)

Assuming, *arguendo*, Comerica's "breach" caused the Wells loan to fail and Masters to collapse, the question remains: What are the damages naturally arising from the breach?[13]

The measure of damages should have been lost profits or decline in the value of the business. Masters chose to base its claim on lost profits, but even Judge Dayton rejected Masters' proofs, for good reason. As of January 2009, Masters had essentially no sales (2% of projections), large debt, no working capital, unpaid employees, and zero history of sales or profit. Tr.1683:3-7;Ex.1350. One of Masters' principals described it as Masters' own "failure to launch." Tr.1959:8-11.[14]

Having correctly found that Masters had no lost profits, Judge Dayton unblushingly declares "seizure damages will be awarded." Even if Comerica is found to have killed Masters, could doing so have given it value, let alone the sum of $10.5 million? *See* 24 Williston on Contracts § 64:12 (4th ed.) ("The amount of

[13] Although the amount of damages is a fact question, the appropriate **measure** is a legal question to be decided by the court. 24 Williston on Contracts §64:7 (4th ed.).

[14] In a postmortem analysis, Masters' principals Farnham and McNamara noted Masters was undercapitalized from the beginning. They described Masters' performance as a "debacle." Tellingly, they did not assert Comerica caused the collapse of Masters. Ex.1523,p.8.

damages must correspond to injuries resulting from the breach.”). It makes no sense simply to take the amount **Masters owed Comerica** (in essence, its negative book value) and magically convert that number to positive cash in Masters’ pocket.

If Judge Dayton found Comerica to have caused the collapse of a business by prematurely taking collateral to which it was ultimately entitled, are damages possible if that business had no value? They are, but only as to losses actually sustained. So, for example, if Masters was just about to close a sale that would have generated a $200,000 profit, but that sale was lost, perhaps Masters would have damages. But here, no such claim exists.

As noted, focusing on the Wells loan does not answer the damage-causation question. Even if it did, consummation of the Wells loan was a delusion. ComericaBr.,p.8. Masters states without citation that Wells had “completed its due diligence.” MastersBr.,p.47. This is not true—due diligence had not started because Masters had not even signed the term sheet. Tr.212:22-213. Contradicting any notion that the Wells loan was in hand, Howell’s December 31 letter states: “We are currently in active negotiation with **two area banks** and have already received a term sheet from one of them….” App.193,Ex.34a (emphasis added).[15]

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[15] Masters’ CFO’s reaction to the first Wells term sheet is revealing: “I can tell you this [$1.2 million in investor commitments] will not happen.” App.96,Ex.148. Masters tries to defuse this damaging statement by citing a later email which it claims “supports the inference” that Yaklin “reconsidered” his opinion. MastersBr.,p.50. Such “inference” would be unnecessary had Masters called

Finally, even if some damage had been proven, the amount of Masters' obligation to Comerica must be deducted because "[t]he injured party is not…entitled to be placed in a better position than he would have been if the contract had not been broken…." *Goodwin, Inc. v. Coe*, 233 N.W.2d 598, 603 (Mich. App. 1975). *Goodwin* made clear that a "deduction of any saving to the injured party must be made." *Id. See also Maryott v. First Nat'l Bank of Eden*, 624 N.W.2d 96, 108 (S.D. 2001) (holding the bank, which paid damages for wrongfully dishonoring checks, could reimburse itself from other monies owed by the depositor to the bank because, otherwise, the damage award "would constitute an impermissible double recovery.").

Masters argues this deduction is limited to claims of "lost profits." MastersBr.,p.61. Although lost profits are often subject to net reductions, the rule is much broader and applies to all damage calculations: "[C]ompensatory damages will be given for the net amount of the losses caused…in excess of savings made possible." Restatement (First) of Contracts, §329.

Yaklin to testify. Masters not only did not call Yaklin to testify, its counsel affirmatively prohibited Comerica from contacting Yaklin and opposed Comerica's efforts to take Yaklin's deposition to perpetuate testimony. Dkts.425,pp.14-15;436.pp.13-16;Tr.2003:7-12. More important, Yaklin's own email twelve days later contradicts the inference by noting: "The hurdle then would be getting the loan approved without the $1.2 million required by Wells Fargo. This is then the tougher issue." Ex.1531,p.1.

Masters argues Comerica is barred from making this argument because it did not assert affirmative defenses of offset or recoupment. The requirement of an adjustment for net benefits is universal. It does not require pleading as an affirmative defense. Moreover, Comerica did, in fact, set forth its position on the obligation to repay the loan in the pretrial order, which governs the conduct of the trial. Dkt.577.1,p.27. Further, offset and recoupment are not applicable here because, at the time the lawsuit was filed, there was no money due from Masters.

Masters claims this deduction issue was raised only once (post-judgment) by Comerica. MastersBr.,p.65. Not true. Dkt.599(proposed FOF-COL),pp.92-93;Tr.1598. Deduction of the loan balance has been an issue in this case since the first trial. There, the jury awarded $5,433,910 after deducting the loan amount from Masters' request of $15,922,910. Dkt.272. Masters did not appeal this deduction.

In sum, seizure damages, whatever they are, are improper here. Even if proper, the amount owed Comerica must be deducted—a death knell to the $10.5 million award.

V. MASTERS' ARGUMENT ON ATTORNEY'S FEES, BASED ON MONTANA LAW, IS LEGALLY INCORRECT.

Comerica's opening brief thoroughly addressed attorney's fees (pp.52-61). Masters' response warrants little attention. Comerica stands on the brief.

The contingency-fee issue merits short discussion. Judge Krueger denied contingency fees in the first case, awarding only hourly fees. That was cross-appealed by Masters, but Masters abandoned its cross-appeal, thereby waiving its argument. Thus, contingency fees are barred by law-of-the-case. *McCormick v. Brevig*, 2007 MT 195, ¶38, 338 Mont. 370, 169 P.3d 352.[16]

Masters argues the reversal in *Comerica I* means all decisions of the lower court became a "nullity." This is not so where an issue could have been appealed but was not. "[A] legal decision made at one stage of litigation which is not appealed when the opportunity to do so exists, becomes the law of the case for the future course of that litigation…." *McCormick*, ¶38.

Masters falsely claims this issue was not raised below. MastersBr.,p.75. Comerica did raise this issue, arguing: "Even if the Court Applies the Reciprocal Fee Statute, Masters Has Waived Any Right to Claim Contingent Fees." Dkt.613,pp.22-23.

VI. MASTERS' PREJUDGMENT INTEREST ARGUMENT REPEATS THE COURT'S MISTAKE OF SEIZING ON A TYPO.

Comerica pointed out Judge Dayton based his prejudgment-interest decision on a typo in Comerica's brief. ComericaBr.,pp.62-65. Judge Dayton was aware that Comerica's argument relied on MCL § 600.6013(8), not subsection (6),

[16] Masters quibbles that Comerica's argument means Masters "somehow is precluded from a fee…." MastersBr.,p.75. Not so. Masters is only barred from seeking a **contingency** fee if it prevails.

because even Masters pointed out the typo to the court, stating:

> Comerica, I think in a typo cites subsection six…. Masters submits that subsection seven applies and I believe that **Comerica is asserting that subsection eight applies**.

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

Despite counsel's initial candor, Masters now improperly seeks to capitalize on Comerica's typo. Worse, Masters has the temerity to argue Comerica's subsection (8) argument is raised for the first time on appeal. MastersBr.,pp.69-70. No court should tolerate this perfidy.

On the merits—i.e., the question of whether subsection (7) or subsection (8) applies—subsection (7) applies only to **debtors**. It was amended in 2002 to preclude a debtor whose contractual interest rate is higher than the statutory rate from purposely defaulting to take advantage of the lower statutory rate. ComericaBr., pp.62-65; *see also* App.200.

Comerica has never been a **debtor**. Judge Dayton erred in applying subsection (7).

[17] Also, Comerica submitted interest calculations based on subsection (8) of the statute. Dkt.618,¶¶8-9,12-13,15.

ANSWER TO CROSS APPEAL

I. MASTERS' CROSS-APPEAL ON DAMAGES FAILS.

Judge Dayton declined to award lost-profits damages or damages for losses allegedly suffered by Masters U.K. ("U.K."). App.8,Decision,p.5. His decision is supported by substantial evidence.

"Lost profits" are particularly inappropriate here because, despite being in business two and a half years, U.S.Masters had **no profits**. Tr.1435;1614. To "support" lost profits, Masters uses the thoroughly-eviscerated trial testimony of its expert, Storey—an evisceration witnessed by Judge Dayton. Tr.1479-1609. In short, rejection of lost profits is based on substantial evidence. *See generally* Conway, Tr.1652-1732.

Significantly, Masters, in responding to Comerica's position that the loan amount must be deducted from any damage award, argues this rule is limited to lost profits. MastersBr.,p.60. Although this is incorrect, at least Masters concedes that such deduction should apply to claims of lost profits. This concession kills its cross-appeal. The amount Masters owed Comerica would swallow any asserted lost profits.

Judge Dayton also correctly denied Masters' attempt to recover U.K. lost profits. Comerica had no relationship with the U.K.[18] U.K. was a subsidiary of a

[18] U.K. was placed in "Administration" (the U.K. equivalent of bankruptcy) on

subsidiary.[19] A parent corporation, as entirely separate from its shareholders, may not sue to enforce a subsidiary's claim. *Seasword v. Hilti, Inc.*, 537 N.W.2d 221, 224 (Mich. App. 1995); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

Judge Dayton determined "the causal connection with the downfall of U.K. Masters is unsubstantiated." App.38,Dkt.602,COL¶78. This is correct. U.K. continued to operate after Comerica's execution on the U.S. collateral. The 2008 recession, however, caused a European debt and currency crisis, resulting in Fortis, U.K.'s bank, withdrawing support and insisting U.K. find a new lender, which U.K. was unable to do. Ex.252. U.K.'s financial problems were exacerbated by devaluation of the pound sterling, which increased U.K.'s cost of sales. Ex.1375. Even before the Recession, U.S.Masters was damaging U.K. by sucking money out of the U.K. operation. Tr.398:24-399:3.

Judge Dayton had ample evidence to reject U.K. damages.

II. JUDGE DAYTON DID NOT ABUSE HIS DISCRETION IN LIMITING THE COST AWARD TO STATUTORY COSTS.

The trial court awarded $176,063.19 in costs. Dkt.629,p.24. Masters later

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June 11, 2010, and ultimately dissolved. Any property, including claims for lost profits, escheats to the Crown. Masters had no authority to pursue this claim. Ex.1511,p.269;Tr.430.

[19] Ex.391,p.24.

filed a motion to recover "all costs," claiming $512,496.30. Dkt.608,Ex.1,p.5. Judge Dayton denied these because this claim has no legal basis. Dkt.629. Montana's reciprocal statute, § 28-3-704, MCA, does not apply to costs.

An award of costs entails broad discretion. *See Springer v. Becker*, 284 Mont. 267, 949 P.2d 640, 645 (1997) ("[N]ot every litigation expense is recoverable…"). Masters' second itemization (Dkt.608,Ex.1) contains numerous improper claims, including "Howell travel costs," Taleff "trial [and travel] expenses," "Strauch…travel Anaconda," and Masters' costs from the first trial (including Barofsky, a $10,000-per-day TARP witness whom this Court held prejudicially infected the first trial. *Comerica I*, ¶¶ 107, 133).

In sum, the claim for "all costs" was correctly denied.

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded for dismissal.

Respectfully submitted on January 8, 2021.

By: */s/ James H. Goetz*
James H. Goetz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, is 4,999 words, not in excess of the 5,000-word limit.

DATED this 8th day of January, 2021.

GOETZ, BALDWIN & GEDDES, P.C.

By: */s/ James H. Goetz*
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