

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 Reply Brief on Cross-Appeal

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INTRODUCTION

On its cross-appeal, Masters Group International, Inc. (“Masters”) asks the Court to reverse Judge Dayton’s decision not to award Masters future lost profits or lost value of the U.K. business. Masters asks the Court to remand for an award of such damages and prejudgment interest as mandated by Michigan law. Masters also asks the Court to reverse Judge Dayton’s decision rejecting Masters’ contract-based claim for all costs. Masters requests the Court to amend the Judgment to include non-statutory, contractual costs.

In response, Comerica Bank (“Comerica”) does not dispute the material facts or controlling law needed to decide these questions. Comerica simply ignores Judge Dayton’s legal error under controlling Michigan law in rejecting future lost profits because of some uncertainty as to the amount of such damage despite certainty as to the fact that damage occurred. Instead, Comerica argues easily debunked theories based on factual and legal distortions regarding Masters’ loss of income derived from its European operations, which form most of the future lost profits claim. Regarding costs, Comerica misstates the record to make an improper timeliness argument and misapplies Montana law regarding contract-based costs.

Accordingly, Masters respectfully asks the Court to grant Masters’ cross-appeal.

ARGUMENT

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

At pages 76-81 of its Opening Brief on the Cross-Appeal, Masters explains that Judge Dayton erroneously rejected Masters' future lost profit/lost business value claim based on some uncertainty regarding the *amount* of damages despite having found that Comerica's misconduct led to Masters' demise and made it impossible to be certain as to Masters' future profitability. Contrary to Michigan law, having made such findings, Judge Dayton resolved doubt as to the amount of damages against Masters and held such doubt was legally fatal to the claim. In response, Comerica does not even address that legal error. Instead, Comerica argues the well-established profits of Masters' European operations cannot be recovered based on Masters' status as a parent corporation, and that a credit for the loan amount Comerica never pleaded and expressly disclaimed would "swallow" those lost profits anyway. Comerica's position is not supported by the record or Michigan law.

A. There is substantial evidence supporting Judge Dayton's finding that Comerica's actions made the collapse of Masters unavoidable.

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 made a similar determination: “Comerica’s actions caused a detriment to Masters by rendering the collapse of the company unavoidable.” COL#57.¹ There is substantial evidence to support that determination.

Beginning December 31, 2008, Comerica eventually seized all the assets and collateral of Masters and its Guarantors, totaling \$10,595,514.16. APP191;Ex.52; FOF#30,102-104. Judge Dayton held, “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.

As a result of Comerica’s actions, Comerica prevented Masters from pursuing or obtaining any replacement financing or working capital, which put Masters out of business, first in North America and then in Europe. Judge Dayton found, “Due to the confiscation of Masters’ and its guarantors’ funds, Wells Fargo refused to refinance Masters’ loan.” FOF#31. Substantial evidence supports that finding. Tr.1105:4–1107:9,1409:14-22,1610:5–1613:13,2030:7–2033:8.

There is further substantial evidence of an unbroken chain of events triggered by Comerica’s actions in late December 2008, including: the seizure of

¹ This Brief uses the following abbreviations: “APP”—Comerica’s Appendix; “MAPP”—Masters’ Appendix; “AAB”—Appellant’s Answer Brief; “COL”—Conclusion of Law in the Decision (APP24-40); “FOF”—Finding of Fact in the Decision (APP8-24); “Dkt.”—Case Register Docket #; “Ex.”—trial exhibit; and “Tr.”—trial transcript.

funds, making it impossible for Masters to refinance; notice of Comerica's actions to Masters' U.K. lender, Fortis Bank, resulting in its reduction in the U.K. line of credit two weeks later in January 2009; loss of orders at Masters' product line reviews both in North America and Europe in January and February 2009 based on customer concern as to Masters' loss of financing; inability to pursue product development or new business in both North America and Europe due to loss of financing; and, ultimately, insufficient cash to refinance in Europe, which resulted in the European operations ceasing as of June 21, 2010, when Masters U.K. was placed in administration (the U.K. equivalent of bankruptcy). 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;Ex.1509.

Thus, Masters suffered damages that arose naturally from Comerica's breach of its express obligations under the Forbearance Agreement, including the demise of the profitable European operations. As Judge Dayton held, that collapse was "unavoidable" once Comerica stopped forbearing and seized assets in breach of the Forbearance Agreement. As explained in Section I.C. below, that meets Michigan's test for causation of lost profits.

B. There is substantial evidence supporting Storey’s future lost profits calculations or, alternatively, the lost value of the U.K. business.

Comerica erroneously implies that Masters relied exclusively on the testimony of its expert, Storey to develop its lost profits claim, as if there was no evidence to support Storey’s opinions. AAB21.

The record, however, shows Masters provided substantial evidence to support its future lost profits claim beyond Storey’s opinions. That includes financial reports, tax returns, projections, corporate records, and testimony of Masters officers and directors. Those demonstrate Masters’ established business relationships and vendor contracts with customers such as Office Depot and Staples; the advantages of its business model, logistics, pricing, product development; and sales, costs of goods, and revenues worldwide. 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 revenues were *uncontested*: 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.

Masters reported the European income on its U.S. tax returns. For example,

in 2007, Masters reported European gross profits of \$12,401,664. Ex.1010-014 (line 3);Tr.1090:13–1092:7,368:20–375:19. Despite such uncontradicted evidence, Comerica would have this Court believe Masters had “no profits.” AAB21.

Based on such facts and data, Storey calculated Masters’ future lost profits over the five-year period 2010-2014. MAPP171-189. Those total \$14,620,506, including \$4,009,727 from North American and \$10,610,779 from European operations.² *Id.*

As a CPA, Storey had the knowledge, skill, experience, training, and education necessary to undertake such computations. Mont. R. Evid. 702. Further, 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. *See, e.g., Jim-Bob, Inc. v. Mehling*, 443 N.W.2d 451, 464 (Mich. App. 1989).

Alternatively, 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 prove the lost value of the business. *See Alexander v. State*, 142 Mont. 93, 108, 381 P.2d

² For the reasons discussed in Masters’ Opening Brief (pages 68-71), if such damages are awarded, prejudgment interest is mandated on that amount in accordance with MCL Section 600.6013(7).

780, 788 (1963) (“the owner of property is a competent witness to estimate its value.”).

In short, for Comerica to imply that there was no evidence supporting Storey’s opinions is contrary to the record.

C. Michigan law entitles Masters to recover future lost profits, including from subsidiaries.

In an attempt to distance itself from liability for any damages it caused to Masters’ European operations, Comerica asserts it “had no relationship with [Masters] U.K.” AAB21. That is false. Comerica’s Loan Documents all identify Masters as including all its affiliates and subsidiaries, including all North America and European operations, and bind the subsidiaries the same as Masters.

Ex.109,pp.1-4 (defines “Affiliate,” “Masters,” “Person,” and “Subsidiaries”), and pp.6-15 (¶5 (representations and warranties include subsidiaries)), (¶6 (covenants and reporting of subsidiaries)), (¶7 (restriction on subsidiaries)), (¶8 (“event of default” includes ¶¶6 and 7)); Ex.111 (*ibid.*); Ex.113 (*ibid.*); Ex.136 (*ibid.*). In turn, the Forbearance Agreement incorporates the Loan Documents and the definitions contained therein. MAPP101.

Comerica next argues Michigan law does not permit Masters as parent corporation to pursue a claim for lost profits on behalf of its subsidiary Masters U.K. That is not Masters’ claim and it is not Michigan law.

Masters did not bring any claim on behalf of its wholly owned subsidiary, Masters' U.K. Masters' claim for business damages was its *own* claim for the damages *Masters* suffered because of Comerica's breach of a duty that was owed *to Masters* under the Forbearance Agreement. Dkt.2;Dkt.477,Tab"D."

Further, even though Masters did not bring any claim on behalf of Masters U.K., the Michigan cases Comerica cites do not even stand for the proposition that a parent corporation may not bring a claim on behalf of a subsidiary. In fact, the Michigan Court of Appeals noted Michigan courts have *not* decided that very issue. In *Pitsch Holding Co., Inc. v. Pitsch Enterprises, Inc.*, 2014 WL 3887186,*6, n.7 (Mich. Ct. App., Aug. 7, 2014), the court agreed with the assertion, "Michigan authority has addressed the issue of parent and subsidiary corporations in the context of an attempt by a plaintiff to enforce a liability of a subsidiary against the parent corporation, *but not in the context of a parent corporation bringing a claim on behalf of a subsidiary.*" *Id.* (emphasis added).

The only Michigan case Comerica cites in support of its argument demonstrates the exact point made in *Pitsch, supra. Seasword v. Hilti, Inc.*, 537 N.W.2d 221, 224 (1995), addresses the issue of parent and subsidiary corporations in the context of an attempt by a plaintiff to enforce the liability of a subsidiary *against* the parent corporation by piercing the parent's corporate veil—*not* a parent corporation bringing a claim *on behalf of* a subsidiary. There is no issue of

piercing the corporate veil or Masters' liability as a parent corporation in this case. The issue here is whether Masters may pursue *its claim* for the net income it lost from the shutdown of its European operations based on Comerica's breach of a duty that Comerica owed to Masters.

The other case Comerica cites, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003), is even more irrelevant. That decision holds that a foreign state must itself own a majority of a corporation's shares if the corporation is to be deemed an instrumentality of the state under the Foreign Sovereign Immunities Act of 1976. *Id.*

While Michigan has not decided whether a parent corporation may pursue a claim on behalf of its subsidiary, the United States Supreme Court has held that a parent company *does* have Article III standing arising from injury to a subsidiary. *See, e.g., Franchise Tax Bd. of Calif. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 335-36, (1990). While the case dealt with injury to a parent caused by taxes on its subsidiary, the holding even further erodes Comerica's argument. Masters was injured directly and independently of its U.K. subsidiary by losing the income Masters would have received from the European operations. Like the parent in *Alcan*, Masters has standing to recover actual financial injury caused by Comerica's breach of the Forbearance Agreement, including loss of the European income, which Masters always reported as its own income on its taxes.

Under Michigan law, the fact that Masters is a corporate stockholder (the sole stockholder) in Masters U.K. (as opposed to an individual person) does not divest Masters of the right to seek redress for injury caused by a breach of Comerica's duty owed to *Masters*. The general rule in Michigan is that a suit to redress injury to a corporation must be brought in the name of the corporation and not that of a stockholder. However, where redress is sought for a breach of a duty that is owed *to the shareholder*, the general rule does not apply, and the shareholder may sue in the shareholder's own name. *See, e.g., Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 278–79 (2003); *Mich. Nat'l Bank v. Mudgett*, 444 N.W.2d 534, 536 (1989). Further, there is “no reason why this exception [that a shareholder may seek redress based on a duty to the shareholder] should not apply when the shareholder is a corporation.” *Petroleum Enhancer, LLC v. Woodward*, 690 F.3d 757, 770 (6th Cir. 2012).

In another somewhat analogous situation, courts in other jurisdictions have allowed a parent company to recover the losses incurred by a subsidiary when the subsidiary's and parent's operations are interdependent. *See, e.g., National Union Fire Insurance Co. of Pittsburgh v. Anderson-Prichard Oil Corporation*, 141 F.2d 443, 446 (10th Cir. 1944) (parent and subsidiary refinery and pipeline operations treated as an integrated whole for the purpose of determining the actual loss sustained under an insurance policy); *SEB, S.A. v. Montgomery Ward & Co., Inc.*,

412 F.Supp.2d 336 (S.D.N.Y. 2006) (rejecting the defendants’ argument under patent law that because plaintiff, a holding company, did not manufacture or sell the product at issue but its subsidiary did, the holding company cannot make a claim for lost profit derived from the loss of product sales). As another example, in antitrust cases, the coordinated activity of a parent and its wholly owned subsidiary would mandatorily be viewed as that of a single enterprise. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

The actual test in Michigan as to causation of lost profits is not determined based on the status of a plaintiff as a parent corporation. The test is whether the evidence is “sufficient to allow a jury to infer that at the time the parties entered into the contract, the defendants reasonably knew or should have known that in the event of breach this plaintiff would lose profits.” *Lawrence v. Will Darrah & Assoc., Inc.*, 516 N.W.2d 43, 49 (Mich. 1994). Because Masters as the parent company would have been liable under the Loan Documents to Comerica for any breach by a Masters subsidiary, the reverse should also be true: Comerica should be liable to Masters for any breach that causes Masters to suffer the loss of income derived from its subsidiaries. Under the circumstances, Comerica reasonably knew or should have known that in the event of its breach of the Forbearance Agreement, Masters would lose profits, including the profits derived from its subsidiaries.

Lastly, Comerica cites **no** authority to support its argument that because Masters U.K. was eventually placed in administration, Masters is precluded from seeking recovery of its own business damages as a matter of law. Further, the point Comerica makes about Masters U.K. going bankrupt actually demonstrates the causal chain for the lost profits. Masters U.K. was placed in administration as a result of Comerica's conduct. Had that not occurred, Masters' European income would have continued to flow to Masters, not the "Crown" (of England).

D. The loan amount does not "swallow" anything because Comerica never brought and expressly disclaimed any claim or defense to recover or setoff any debt.

If Comerica had wished to seek a credit, recoupment, or offset for \$10.5 million against any damage award, the Rules of Civil Procedure and case law required Comerica to plead a claim or defense below. Comerica did not do that. Quite the opposite. It affirmatively pled it was bringing **no** such claim or defense. MAPP26-27. Because Comerica made no effort to plead a claim or defense to recover \$10.5 million, it is not entitled to deduct that amount from an award of future lost profits or business value. As authority, Masters incorporates pages 60-67 of its Opening Brief.

II. Masters is entitled to recover all costs.

Pages 82-83 of Masters' Opening Brief explain that because of the way the Forbearance Agreement lumps "any and all" costs, expenses, and attorney fees

together as reimbursable expenses, Montana’s reciprocal attorney fee statute, Mont. Code Ann. § 28-3-704, entitles Masters to recover all costs and expenses, not just taxable statutory costs. In response, Comerica incorrectly argues that Masters did not timely seek an award of all costs, attempts to divert from the express language of the contract, and ignores Section 28-3-704.

A. Masters timely moved for all costs.

Comerica’s first argument is that Masters did not timely seek an award of all costs. Comerica states Judge Dayton “awarded \$176,06319 in costs” and “Masters *later* filed a motion to recover all costs.” AAB22-23 (emphasis added). The record proves otherwise.

On November 8, 2019, Judge Dayton issued his Decision, Findings of Fact & Conclusions of Law (APP3-40, the “Decision”). The Decision did *not* award costs. It expressly ruled that *based on the parties’ stipulation*, “Masters’ claim for interest, attorney fees, and costs will not be tried but will be the subject of a subsequent hearing before the Court.” APP40.

On November 12, though the Decision was not technically a judgment, Masters filed its Bill of Costs within the five days provided under Mont. Code Ann. § 25-10-501. Dkt.604. The Bill of Costs clearly states:

Masters submits this Bill of Costs for taxable costs within the time requirements under Mont. Code Ann. § 25-10-501. Masters contends it has and will request an award of all costs and expenses—both the following

taxable costs as well as all remaining non-taxable legal fees, costs, and expenses incurred in this action—pursuant to the parties’ contract and applicable law. Masters will submit briefing on that issue in accordance with the schedule to be set by the Court pursuant to its Decision, Findings of Fact & Conclusions of Law (Dkt. 602).³

Dkt.604,¶3. The Bill of Costs itemizes \$177,656.56 in total taxable statutory costs. *Id.*,¶4.

On November 22, 2019, though the Decision was not technically a judgment, Masters filed its Motion for an Award of All Costs and supporting brief and declaration within the 14 days provided by Rule 54(d)(2)(B), Mont. R. Civ. P. Dkt.606-608. That Motion requests an award of all costs under the terms of the Forbearance Agreement, including the taxable statutory costs itemized in the Bill of Costs plus non-taxable costs of \$334,839.74, for total costs of \$512,496.30. *Id.*

Judge Dayton did not rule on costs until **June 12, 2020, *more than six months after*** Masters filed the motion for all costs, following additional briefing and hearings. APP41-76. In that order, Judge Dayton rejected Masters’ contract-based claim for all costs of \$512,496.30 and allowed only statutory costs totaling \$176,063.19.⁴ APP63.

³ Masters’ contentions in the Final Pretrial Order include: “In addition to those compensatory damages and interest, Masters also requests an award of attorney fees and costs under the [Forbearance Agreement] provision and Montana’s reciprocal attorney fees statute.” Dkt.577.1,pp.6-7,¶12.

⁴ Judge Dayton disallowed the \$1,593.37 mediator’s fee as a statutory cost. APP64-65. Accordingly, that figure has been added back into the total non-statutory costs Masters currently seeks, \$336,433.11.

Comerica's attempt to mischaracterize Masters' request for all costs and expenses as an afterthought, done "later" after Judge Dayton awarded statutory costs, should be rejected.

B. Judge Dayton erred in rejecting Masters' contract-based claim for all costs.

Judge Dayton determined the Forbearance Agreement is an enforceable contract that Comerica breached. The Agreement provides for recovery of "all costs and expenses." He found that contract provision reciprocal under a choice-of-law analysis. Inexplicably, however, Judge Dayton concluded that non-statutory costs could not be awarded. In effect, he reasoned that since Mont. Code Ann. Section 28-3-704 mentions only attorney fee provisions as being reciprocal, costs must not be.

Masters recognizes that "costs and expenses" generally are distinct from "attorney fees." But that is not necessarily the case where a contract provides for both. Here, the language in the Forbearance Agreement lumps costs, expenses, and attorney fees together. It provides for reimbursement of:

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 the Loan Documents or this Agreement....

MAPP103,¶10. Thus, under the unique language Comerica uses, the right to recover fees is part and parcel of the right to recover costs and expenses.

To excise costs from the award of contractual fees is to ignore a part of the contract the court relied on to award fees. That is not permitted under Montana law, which Judge Dayton correctly ruled—and Comerica does not challenge—controls costs. Mont. Code Ann. § 28-3-202, 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 legal error for a district court to fail to give any meaning to any phrase in a contract. *Whary v. Plum Creek Timberlands, L.P.*, 2014 MT 71, ¶ 15, 374 Mont. 266, 320 P.3d 973. Contrary to Comerica’s argument, Judge Dayton’s failure to give meaning to the provision for costs as part and parcel of attorney fees as phrased in the Forbearance Agreement was not a discretionary function; it was legal error under Montana law.

Further, the language of Montana’s reciprocity statute, Section 28-3-704, is broader than Judge Dayton interpreted it to be. Section 28-3-704 refers to a right to attorney fees “*by virtue of the provisions of any contract.*” Here, the provisions of the contract expressly include attorney fees *as an element of* costs and expenses. As this Court held in *Weinberg v. Farmers State Bank*, 231 Mont. 10, 32, 752 P.2d 719, 733 (1988), superseded on other grounds by *Folsom v. Montana Public Employees Association*, 2017 MT 204, 388 Mont. 307, 400 P.3d 706, when a promissory note provides that a bank is entitled to reasonable attorney fees and costs, the right to fees *and* costs is reciprocal.

In support of its argument, Comerica cites only *Springer v. Becker*, 284 Mont. 267, 269, 943 P.2d 1300, 1301 (1997), in contending all costs incurred are not recoverable. That case is clearly distinguishable because it involved a request for taxable statutory costs only, *not* a request for non-statutory costs and expenses pursuant to a contract provision.

Curiously, out of the roughly 240 costs itemized by Masters in its motion for all costs, Comerica now objects for the first time to four items including certain travel expenses and the costs of Masters' TARP expert who testified at the first trial. AAB23. However, Comerica did not specifically object to those costs below, raising instead only procedural objections to the entirety of Masters' motion for all costs. *Cf.* Dkt.612. Having failed to raise any objection below, Comerica should not be allowed to object now. *See, e.g., Barrett v. Asarco Inc.*, 245 Mont. 196, 205, 799 P.2d 1078, 1083 (1990). Regardless, they are costs Masters incurred and is entitled to recover under the language in the Forbearance Agreement.

Ironically, Comerica was not so selective as to costs and expenses when it was taking Masters' and the Guarantors' funds as reimbursement for its expenses. It demanded and received reimbursement for UCC lien searches, express delivery services, service fees, fax charges, local travel expense, outside copying expenses, photocopies, certificates of good standing, filing fees and costs of professional services, in addition to attorney fees. *See, e.g., Ex.84,85,93,95,894.*

One of the purposes for a statutory or contractual provision for attorney fees is to make the successful party whole. *Weinberg*, 231 Mont. at 36, 752 P.2d at 735. Given the unique language Comerica drafted for costs and expenses including attorney fees within the Forbearance Agreement, absent an award of all costs to Masters, that purpose will be thwarted.

CONCLUSION

For the foregoing reasons and those stated in Masters' Opening Brief, 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.

Dated this 22nd day of January 2021.

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Timothy B. Strauch

-and-

TALEFF & MURPHY, P.C.

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Dated this 22nd day of January 2021.

STRAUCH LAW FIRM, PLLC

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