

THE SUPREME COURT OF OHIO

Case No. 11-1392

JNT PROPERTIES, LLC

Plaintiff-Appellee

v.

KEYBANK NATIONAL ASSOCIATION

Defendant-Appellant

APPELLEE'S RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION

On Appeal from the Cuyahoga County Court of Appeals,
Eighth Appellate District, Case No. 10-95822

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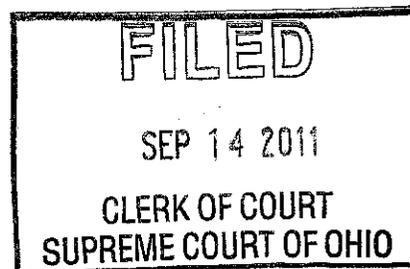
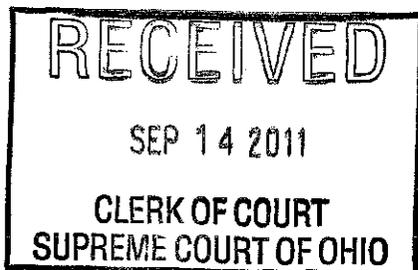
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STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee JNT Properties, LLC (“JNT”) is a small Ohio business that borrowed money from Defendant-Appellant KeyBank National Association (“KeyBank”) to finance the purchase of a Dairy Queen franchise. KeyBank drafted the variable rate promissory note (“Note”), which is a fully integrated agreement. The stated rate on the Note is “8.93% per annum,” subject to adjustment every five years. (App. Ct. Op. at 3, Appx. at 5.) KeyBank agrees that the term “per annum” means “by the year” and that “a year may consist of 365 or 366 days.” (Answer, ¶ 21; *accord* App. Ct. Op. at 4 n.2, Appx. at 6 n.2.) And KeyBank has conceded that the parties did not intend to alter this meaning. (Opp. Brf. of Appellee at 9 (8th Dist. Jan. 4, 2011).)

Notwithstanding the Note’s unambiguous language setting the interest rate at 8.93% per annum, KeyBank actually is charging JNT interest at a rate in excess of 8.93% per annum. (See App. Ct. Op. at 10, Appx. at 12.) Specifically, KeyBank is using 8.93% to calculate the amount of daily interest on a 360-day basis, which it then charges each day of the 365-day year (or 366 in a leap year). Thus, KeyBank is charging JNT 8.93%, not *per year*, but rather *per every 360 days*. As a result, JNT is paying interest at an effective rate of 9.052% per annum.¹

Calculating daily interest on a 360-day basis but charging it each day of the year is a “365/360 method” of interest calculation. (App. Ct. Op. at 1, Appx. at 3.) *But JNT’s breach of contract claim does not challenge the general use of such a 365/360 method.* Rather, JNT’s claim is simply that, in this case, the specific contract language of the Note at issue does not

¹ This effective interest rate can be expressed as the following equation: $(8.93\% \div 360) \times 365 = 9.052\%$. Tellingly, it is inconsistent with the payment schedule set forth in the Note. Specifically, the Note provides for one interest-only payment followed by 239 monthly payments in the initial amount of \$3,315.48 each (App. Ct. Op. at 2, Appx. at 4), which would result in principal and interest being paid in full upon the final payment of a 20-year loan with an interest rate of 8.93% per year, not 9.052%.

entitle KeyBank to charge JNT interest in excess of 8.93% per year, irrespective of the method by which KeyBank calculates interest. The Court of Appeals for the Eighth Appellate District agreed, finding that “the 365/360 formula used to calculate interest in the instant case cannot be read as clearly evidencing an intent of the parties to alter the ordinary meaning of the term ‘per annum,’ or as creating an annual interest rate other than the stated rate of 8.93 percent.” (App. Ct. Op. at 11-12, Appx. at 13-14 (internal quotation marks omitted).)

The provision of the Note at issue² — which KeyBank dismisses as a mere “error[] in expression” (*see* Appellant’s Mem. in Supp. of Jurisdiction (“KeyBank Mem.”) at 5) and Amici minimize as at most creating a “technical semantic conflict” (*see* Jurisdictional Mem. of Amici Curiae Ohio Bankers League and Am. Bankers Assoc. (“Amici Mem.”) at 7) — originated in a form note drafted by Harland Financial Services (“Harland”) (*see* Amici Mem. at 3-5). Harland amended this provision in 2008, and counsel for KeyBank advised the trial court in chambers that KeyBank no longer uses it.

THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

This case seeks to enforce the unambiguous and unaltered meaning of the term “per annum” in a discrete, historical cohort of promissory notes that contain now-discontinued language from one software vendor. It does not affect banks’ current practices or put uncertainty

² Specifically, KeyBank relies upon the following provision in the Note for the proposition that it may use a 365/360 method to charge JNT interest at a rate in excess of 8.93% per year:

The annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

(*See* App. Ct. Op. at 2, Appx. at 4.) As both the Eighth District and the trial court noted, it is not possible for a calculation that is supposed to result in an “annual interest rate” to start with the “annual interest rate.” (App. Ct. Op. at 11, Appx. at 13.) Simply stated, the basis for computing the annual interest rate of 8.93% per annum cannot result in an annual interest rate other than 8.93% per annum.

into the marketplace. Nevertheless, the principal ground advanced by KeyBank for the proposition that this case involves “a question of public or great general interest” is that “the rule of law applied by the court below places at issue the enforceability of . . . the ‘365/360 method’” (Appellant’s Mem. in Supp. of Jurisdiction (“KeyBank Mem.”) at 1.) Again, however, *JNT is not challenging the legality of using a 365/360 method*. Nor did the Eighth District consider such a method’s propriety, let alone bar it.

Instead, the Eighth District adhered to its 2010 decision in *Ely Enters., Inc. v. FirstMerit Bank, N.A.*, 8th Dist. No. 93345, 2010-Ohio-80, *appeal not allowed*, 125 Ohio St.3d 1415, 2010-Ohio-1893, 925 N.E.2d 1003. (See App. Ct. Op. at 7-10, Appx. at 9-12.) In *Ely*, the Eighth District held that: (1) the ordinary meaning of the term “per annum” is ““by the year,”” which “consists of 365 days, or 366 in a leap year,” 2010-Ohio-80, at ¶ 10 (quoting Black’s Law Dictionary (8th ed. 2004)); and (2) the term “per annum” should be given this ordinary meaning ““unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument,”” *id.* at ¶ 11 (quoting *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 564, 2004-Ohio-7102, 820 N.E.2d 910). Examining a promissory note provision identical to the one at issue in this case, the court in *Ely* concluded that its language did not “clearly[] evidenc[e] an intent of the parties to alter the ordinary meaning of the term ‘per annum’” *Id.* at ¶ 11. There are no conflicting cases from other Ohio appellate courts or this Court on this issue. Indeed, to the contrary, this Court unanimously has held that summary judgment is inappropriate in a breach of contract claim where “[t]he record is contradictory” as to whether a 365/360 method was properly disclosed. *Hamilton v. Ohio Sav. Bank*, 70 Ohio St.3d 137, 140, 1994-Ohio-526, 637 N.E.2d 887.

Under *Ely*, lenders and borrowers are free to agree to alter the ordinary meaning of the term “per annum” — namely, by a year of 365 days (or 366 in a leap year) — to mean by a period of 360 days. *Ely*, 2010-Ohio-80, at ¶ 11. In the present case, however, KeyBank concedes that the parties did *not* agree to alter the ordinary meaning of “per annum.” (See Opp. Brf. of Appellee at 9 (8th Dist. Jan. 4, 2011).) And both the trial court and the Eighth District found unintelligible the language upon which KeyBank relies for the proposition that it may charge JNT interest at a rate in excess of 8.93% per annum. (App. Ct. Op. at 11, Appx. at 13.)

Thus, contrary to the positions of KeyBank and Amici, the holding *in this case* that the stated interest rate of 8.93% “per annum” means 8.93% per year neither “places at issue the enforceability of . . . the ‘365/360 method’” (KeyBank Mem. at 1) nor “unsettle[s]” the 365/360 method as an “agreed-upon method of interest computation” (Amici Mem. at 1). Borrowers and lenders remain free expressly to alter the meaning of “per annum” to mean “by a period of 360 days,” but KeyBank concedes that this did not occur here. Because, therefore, the Eighth District’s opinion bars the parties neither from creating an alternative definition for the term “per annum” nor from using an intelligible 365/360 interest calculation provision, it did not create a “‘conflict’ between contractual terms specifying a ‘per annum’ interest rate and the 365/360 method.” (KeyBank Mem. at 1; *see also id.* at 2; *accord* Amici Mem. at 3.)

In unsuccessfully seeking review by this Court, the defendant in *Ely* — like KeyBank here — disingenuously and hyperbolically maintained that the plaintiff was attacking the use of a 365/360 method itself, not to mention “every Ohioan’s freedom of contract.” *FirstMerit Bank, N.A. v. Ely Enterprises*, No. 10-0249, KeyBank Mem. in Supp. of Jurisdiction at 2-3 (Ohio Feb. 8, 2010). Pointing to this case and one other, *DK&D Properties v. National City Corp.*, No. 08-cv-680078 (Ct. Com. Pl. Cuyahoga County), the defendant in *Ely* also predicted a flood of

litigation.³ *Id.* at 3. Experience has refuted the conclusory assertion that the *Ely* decision would wreak havoc. Over eighteen months later, KeyBank relies upon the same three cases to make the same prediction, unable to provide evidence to support the claim of impending dire consequences. (KeyBank Mem. at 2 n.1.)

In this regard, the notion that the Eighth District's decision "discourages commercial lending in Ohio by imposing significant legal risks to the [365/360 method]" (KeyBank Mem. at 1) is fantasy. In reality, this case involves nothing more than basic rules of contract construction, which have been employed by Ohio courts for decades. This fact is demonstrated by the absence of any reference to this case in the filings of KeyBank's parent company, KeyCorp, with the U.S. Securities Exchange Commission⁴ — including the quarterly report filed after the Eighth District's decision below. (KeyCorp SEC Form 10-Q, Aug. 4, 2011 Quarterly Report, at 48-49 (describing litigation against KeyBank under "Legal Proceedings" but omitting any reference to this case); *see also* KeyCorp 2010 SEC Form 10-K, Annual Report, at 147-48 (same); KeyCorp 2009 SEC Form 10-K, Annual Report, at 148 (same).) Either this case is not a "material pending legal proceeding[], *other than ordinary routine litigation incidental to the business,*" or KeyCorp is violating its disclosure obligations under SEC Regulation S-K. *See* 17 C.F.R. § 229.103 (emphasis added).

Moreover, as Amici recognize, the only promissory notes directly affected by this case are those that share the same, unintelligible language, which originated in form notes drafted by Harland Financial Services. (*See* Amici Mem. at 3-5.) What neither KeyBank nor Amici disclose, however, is the fact that Harland amended this language in 2008. Commercial lenders

³ It bears noting that Amici are represented by the same law firm that represents the defendants in *Ely* and *DK&D*.

⁴ KeyCorp's SEC filings are available at <https://www.snl.com/irweblinkx/docs.aspx?iid=100334>.

have not been discouraged from lending. They have been prompted to use intelligible language and, when applicable, to “clearly evidence” their intent to alter the meaning of the term “per annum.”

Finally, KeyBank’s argument that the Eighth District’s decision constitutes “an unwarranted judicial reexamination” of the parties’ transaction (*see* KeyBank Mem. at 2) is as ironic as it is specious. KeyBank is the party seeking the Note’s reformation in the trial court, while JNT wishes to enforce the Note as written. (*See* App. Ct. Op. at 3, Appx. at 5; *see also* KeyBank Mem. at 5 (conceding that relevant provision of Note did not even describe 365/360 method but arguing that *KeyBank’s* intent was clear).) Indeed, in order to grant summary judgment in favor of KeyBank, which the Eighth District reversed, the trial court first needed to rewrite the unintelligible provision of the Note.⁵ (App. Ct. Op. at 11, Appx. at 3.) Yet, as Amici note, “the Ohio General Assembly has adopted, as the policy of this state, the proposition that ‘a bank may contract for and receive interest or finance charges at any rate or rates *agreed upon or consented to* by the parties to the loan contract’” (Amici Mem. at 5 (quoting Ohio Rev. Code § 1109.20) (emphasis added).)

APPELLEE’S POSITIONS REGARDING APPELLANT’S PROPOSITIONS OF LAW

As an initial matter, because KeyBank is seeking ultimately to affirm the trial court’s decision granting summary judgment in its favor, KeyBank’s burden bears consideration. As the moving party, KeyBank “bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of [JNT’s] case.” *Dresher v. Burt* (1996),

⁵ Compounding this problem, KeyBank, in turn, attempts to rewrite the trial court’s decision when it says that the trial court declared “the Note’s ‘reference to the 365/360 method [*for computing interest*] . . . [will be] retained and enforced.” (KeyBank Mem. at 9 (emphasis added) (quoting Appx. at 15, Sept. 8, 2010 Journal Entry).) The trial court never stated that the provision at issue was for computing *interest*. (Appx. at 15, Sept. 8, 2010 Journal Entry.)

75 Ohio St.3d 280, 292, 662 N.E.2d 264. Specifically, KeyBank must show “that reasonable minds can come to but one conclusion and that conclusion is adverse” to JNT. *See* Ohio R. Civ. P. 56(C). If KeyBank fails to satisfy this burden then summary judgment must be denied. *Dresher*, 75 Ohio St.3d at 293. The standard of review is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 319, 2002-Ohio-2220, 767 N.E.2d 707.

KeyBank raises three propositions of law. With the foregoing legal standard in mind, each is addressed in turn.

First Proposition of Law

Despite agreeing that “per annum” means “by the year” or “per year,” KeyBank purports to seek “guidance on the correct interpretation of the term ‘per annum.’” (KeyBank Mem. at 3-4.) Specifically, KeyBank posits that the question presented by this appeal is whether the phrase “per annum” means something *more* than “by the year” — namely, “that the lender will use a particular method for computing the amount of interest due.” (KeyBank Mem. at 4.) Yet, the reality is that KeyBank cannot prevail in this case unless “per annum” means something *less* than “by the year” — namely, “by a period of 360 days.”

Unless this definition “is clearly evidenced from the face or overall contents of the instrument,” the Eighth District has held that per annum should be given its ordinary meaning: “by the year” (i.e., 365 days or 366 in a leap year). *See Ely*, 2010-Ohio-80, at ¶¶ 10-11. Contrary to KeyBank’s suggestion, this rule of law does not “obligate the lender to use any particular method of computation.” (See KeyBank Mem. at 10 (quoting *Kleiner v. First Nat’l Bank of Atlanta* (N.D. Ga. 1984), 581 F.Supp. 955, 962-63).) In *Kleiner*, the court found that the parties had agreed *to alter* the meaning of the term “per annum.” *See Kleiner*, 581 F.Supp. at 963 (“when the period of a ‘year’ is named [in a contract], a *calendar year* is generally

intended,” but “the subject-matter or context . . . in which the term is found or to which it relates may *alter its meaning*” (emphases added) (internal quotation marks omitted)). In the present case, in contrast, “[b]oth parties agree that the term ‘per annum’ means ‘per year’” (App. Ct. Op. at 4 n.2, Appx. at 6 n.2) and KeyBank has conceded that the parties did not intend to alter this meaning (Opp. Brf. of Appellee at 9 (8th Dist. Jan. 4, 2011)).

Accordingly, KeyBank and Amici are mistaken that the Eighth District’s approach “has been rejected by every other state appellate court and federal court to address the issue.” (See KeyBank Mem. at 4; *accord* Amici Mem. at 4) Indeed, in *Bank of America v. Shelbourne Development Group, Inc.* (N.D. Ill. Aug 18, 2010), 732 F.Supp.2d 809, upon which KeyBank also relies, the court recognized that “there are 365 (or 366) days in a year, *not 360*” but — addressing a different contract with different language than the Note at issue here — found that the parties had “specifie[d] that interest will be calculated based on a *360-day year*.” *See id.* at 823-24 (emphases added). Similarly, in *RBS Citizens, National Association v. TRG-Oak Lawn, LLC* (Ill. App. Ct. 1st Dist. 2011), 943 N.E.2d 198, the court found a different contract with different language “clear in communicating that the interest rate would be ‘computed’ on a *360-day year*, while interest ‘charged’ would be based on the number of actual days that occurred (i.e., based on a *365-day year*.” *Id.* at 206 (emphases added).

Moreover, KeyBank was careful to refer only to “state *appellate* court[s]” (KeyBank Mem. at 4 (emphasis added)), ostensibly in light of several recent state *trial* court decisions that favor JNT. When considering exactly the same unintelligible provision at issue in the present case, for example, the court in *Sterling Savings Bank v. Poleline Self-Storage, Llc* (Idaho Dist. Ct. Kootenai County June 6, 2011), No. CV-09-10872, distinguished *Shelbourne* and *RBS*:

The 365/360 sentence begins by stating that the “annual interest rate” is determined using the 365/360 method. However, the sentence which sets forth the variable interest rate specifically provides that the initial rate of interest is 5.250% per annum. . . . [T]here is no indication that the parties intended or bargained for any meanings to be assigned to these terms, other than the terms’ plain and ordinary meanings. Nor, as was the case in *RBS Citizens* . . . was the term “interest” used at the beginning of the sentence setting forth the 365/360 calculation, such as to potentially repair the error currently in the Notes before the court.

* * *

In *Shelbourne*, the court noted that the loan agreement specifically provided that all *interest* would be computed on the basis of a 360 day year and the actual number of days elapsed, not that the *annual interest rate* would be computed under the 365/360 method. The note also provided that the borrower would “pay accrued interest computed as set forth in Section 2 of the Loan Agreement on the basis of the actual days elapsed over a 360-day year.” Here, however, and as was the case in *Ely*, there was a specific, per annum interest rate provided in the note. The note then provides that the *annual interest rate* (as opposed to *all interest*) is calculated using the 365/360 method. Therefore, here, as in *Ely*, the interest rate that actually resulted from the 365/360 method (the “annual interest rate”) was higher than that specifically and unambiguously provided for in the contract (the “per annum” interest rate).

Mem. Dec. and Order Denying Mot. to Dismiss⁶ at 7-10; *see also First Nat’l Bank of St. Louis v. Kueneke Contracting* (Mo. Cir. Ct. St. Louis County June 30, 2011), No. 10SL-CC01863, Judgment/Order⁷ at 2-3 (denying motion to dismiss breach of contract counterclaim alleging that “annual interest rate . . . is increased by the interest accrual method”); *Scott v. U.S. Bank N.A.* (Idaho Dist. Ct. Bonner County Feb. 18, 2011), No. CV-2009-1258, Dec. Re: Cross Mots. for Sum. J.⁸ at 7-12 (finding similar provision ambiguous and construing same against bank); *Amegy*

⁶ The case docket is available through the Idaho Supreme Court Data Repository, <https://www.idcourts.us/repository/caseNumberSearch.do>. Pursuant to S.Ct. Prac. R. 3(B), a copy of the decision is *not* attached hereto, but JNT will make one available upon the Court’s request.

⁷ The case docket is available through the Missouri Case.net system, <https://www.courts.mo.gov/casenet/base/welcome.do>. Pursuant to S.Ct. Prac. R. 3(B), a copy of the decision is *not* attached hereto, but JNT will make one available upon the Court’s request.

⁸ The case docket is available through the Idaho Supreme Court Data Repository, <https://www.idcourts.us/repository/caseNumberSearch.do>. Pursuant to S.Ct. Prac. R. 3(B), a

Bank, N.A. v. AJNSP, L.L.C. (Tex. Dist. Ct. Harris County July 1, 2011), No. 2010-57402, Order⁹ at 1 (denying bank's motion for summary judgment on borrower's claim that bank charged interest "'per annum' or 'per year'" in excess of "the agreed interest rate that is clearly stated in the promissory notes").

Finally, KeyBank's argument that the Eighth District "conflate[d] the contractual method for *computing* interest with the annual *rate* of interest" (KeyBank Mem. at 4) is a red herring. Whatever one calls the total amount of interest due on a *yearly* (i.e., 365-day) basis, it cannot depart from the "per annum" interest rate (i.e., 8.93% per annum), unless the parties agree that per annum means something other than "by the year." Under KeyBank's own case law, its concession that the parties here did not agree to alter the ordinary meaning of "per annum" compels the conclusion that KeyBank cannot use any computation method to impose an effective interest rate in excess of 8.93% per year.

Second Proposition of Law

Next, KeyBank urges this Court to rewrite the Note by removing what KeyBank characterizes as a "stray word." (KeyBank Mem. at 5, 11-13.) Specifically, KeyBank relies upon comment d to § 202 of the Restatement (Second) of Contracts¹⁰ for the proposition that the Eighth District should have "disregard[ed]" the word "rate" before the semicolon in the following sentence contained in the Note:

copy of the decision is *not* attached hereto, but JNT will make one available upon the Court's request.

⁹ The docket, order, and related briefing are available through the Harris County District Clerk's website, <http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx>. Pursuant to S.Ct. Prac. R. 3(B), copies are *not* attached hereto, but JNT will make one available upon the Court's request.

¹⁰ Comment d provides, *inter alia*, that "[t]o fit the immediate verbal context or the more remote total context particular words or punctuation may be disregarded or supplied; clerical or grammatical errors may be corrected; singular may be treated as plural or plural as singular." Restatement (Second) of Contracts (1981) § 202 cmt. d.

The annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

(See KeyBank Mem. at 5, 11-12.)

As a threshold matter, this claim of error is unpreserved. See *State v. Cornely* (1978), 56 Ohio St.2d 1, 4, 381 N.E.2d 186 (“This court will not ordinarily consider a claim of error which a defendant has failed to raise before the appellate court and which was not considered by that court.”); accord *State ex rel. Degroot v. Tilsley*, 128 Ohio St.3d 311, 313, 2011-Ohio-231, 943 N.E.2d 1018. Specifically, KeyBank urged the Eighth District to affirm the decision of the trial court in which the trial court rewrote the foregoing provision using the very word that KeyBank now claims should be omitted. (See App. Ct. Op. at 11, Appx. at 13.)

In any event, KeyBank attacks a straw man by arguing that “[b]ecause the Note contains a clause that expressly identifies the manner by which the initial [variable] interest rate was set and through which it will be altered, it is unreasonable . . . to construe the Note’s Interest Computation Clause¹¹ as specifying the manner by which the interest rate is set.” (KeyBank Mem. at 12.) The Eighth District did no such thing. Rather, it recognized that, although the interest rate itself is variable, the term “per annum” is not. (See generally App. Ct. Op. at 10-12, Appx. at 12-14.)

Section 202 itself instructs that “where language has a generally prevailing meaning, it is interpreted in accordance with that meaning.” Restatement (Second) of Contracts (1981) § 202(3)(a). Put another way, where a term is not ambiguous, courts are constrained to apply its plain language. See *St. Marys v. Auglaize Cty. Bd. of Commrs.* (2007), 115 Ohio St.3d 387, 390,

¹¹ The term “Interest Computation Clause” (KeyBank Mem. at 8), does not appear in the Note. Instead, it is a term made up by KeyBank, which reflects the manner in which KeyBank wishes to rewrite this unintelligible provision. See *supra* notes 2, 5.

875 N.E.2d 561. It follows that an ambiguous term cannot alter the meaning of an unambiguous one. See *NetworkTwo Communs. Group v. Spring Valley Mktg. Group* (C.A.6, 2004), 372 F.3d 842, 847 (concluding that contract’s ambiguity as to whether it permitted certain remedies could not alter contract’s unambiguous preclusion of other remedies).

Although Amici insist that “it is manifestly clear that the parties intended to use the 365/360 method of interest computation” (Amici Mem. at 8), what is *undisputed* is that JNT agreed to pay interest at a rate of 8.93% *per year* — *not per every 360 days*. (See, e.g., App. Ct. Op. at 4 n.2, Appx. at 6 n.2.) Given as much, the mechanics of interest computation are beside the point. Irrespective of how the unintelligible 365/360 provision is reconciled with the stated interest rate of 8.93% per annum, there is no room for KeyBank to charge interest at a rate in excess of 8.93% per year.¹² See *Networktwo*, 372 F.3d at 847. Here, the unintelligible provision cannot redefine the ordinary and, unaltered meaning of the term “per annum.”

In this regard, KeyBank and Amici’s reliance upon *Kreisler & Kreisler, LLC v. Nat’l City Bank* (E.D. Mo. Mar. 3, 2011), No. 4:10-cv-956 CDP, 2011 WL 846191, and *Asset Exchange II, LLC v. First Choice Bank* (Ill. App. Ct. July 12, 2011), No. 1-10-3718, 2011 WL 2714225, is unavailing. (See KeyBank Mem. at 12-13; Amici Mem. at 3.) The Eighth District considered

¹² Regardless, it bears noting that it is possible to harmonize the specification of the stated 8.93% annual interest rate and the language “[t]he annual interest rate for this Note is computed on a 365/360 basis.” Specifically, to use the foregoing method to compute interest on a loan with a specified annual interest rate — as here, where the specified annual interest rate is 8.93% — the formula for calculating a 365/360 interest rate that will yield the specified annual rate (“AR%”) by the ratio of 360 days to 365.25 days. (The extra “.25” day is added to 365 days to account for leap years.) Expressed as an equation, the formula is:

$$\text{“365/360” Interest Rate} = \text{AR\%} \times (360 \div 365.25)$$

Applying this equation to the Note at issue here, it is clear that a 365/360 method can be used in a manner consistent with the annual interest rate of 8.93%:

$$\begin{aligned} \text{“365/360” Interest Rate} &= 8.93\% \times (360 \div 365.25) \\ 8.81\% &= 8.93\% \times (360 \div 365.25) \end{aligned}$$

and appropriately distinguished both of these cases. (App. Ct. Op. at 10 n.5, Appx. at 12 n.5.) In *Kreisler*, the court followed *Shelbourne*, see *Kreisler*, 2011 WL 846191, at *3, in which — in contrast to the present case — the parties had altered the meaning of the term “per annum” to specify “that interest will be calculated based on a 360-day year,” *Shelbourne*, 732 F.Supp.2d at 824 (emphasis added). Likewise, in *Asset Exchange*, the court found that “‘per annum’ or ‘by the year’ in this particular Note” — which included different language from that at issue here — “refers to a year of 360 days.” 2011 WL 2714225, at *7 (emphasis added).

Third Proposition of Law

KeyBank maintains that the Eighth District erred in refusing to analyze extrinsic evidence on the ground that a contract may be construed against the drafter only when extrinsic evidence does not resolve the ambiguity. (KeyBank Mem. at 6, 14.) But although KeyBank asserts that the Court only needs to reach this proposition of law if it concludes that the Note’s 365/360 provision is ambiguous (see KeyBank Mem. at 13), “where a contract is ambiguous . . . *summary judgment should not be granted.*” *Walsh v. Marsh Bldg. Prods.*, 12th Dist. No. CA2009-10-130, 2010 Ohio 729, at ¶ 11 (emphasis added); see also *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 104, 519 N.E.2d 363 (“Since the contract is ambiguous on these points, it is clear that summary judgment was improperly granted by the trial court.”). In other words, by urging this proposition of law, KeyBank is conceding that the contract is ambiguous, in which case summary judgment is inappropriate.

Moreover, this claim of error also is unpreserved. See *Degroot*, 128 Ohio St.3d at 313; *Cornely*, 56 Ohio St.2d at 4. In its initial brief to the Eighth District, JNT argued, *inter alia*, that because the Note was drafted by KeyBank, its ambiguities must be construed strictly against KeyBank (Brf. of Plf.-Appellant at 9 (App. Ct. Nov. 22, 2010)), and that “[e]xtrinsic

evidence . . . cannot alter the meaning of unambiguous terms” (*id.* at 16 (internal quotation marks omitted)). Nowhere in its 22-page appellee brief, however, did KeyBank challenge these propositions. (*See generally* Opp. Brf. of Appellee at 11-22 (App. Ct. Jan. 4, 2011).)

Regardless, KeyBank is wrong on the merits. Although KeyBank criticizes the Eighth District for failing to follow the decision of the Ninth Appellate District in *Malcuit v. Equity Oil & Gas Funds, Inc.* (1992), 81 Ohio App.3d 236, 610 N.E.2d 1044 — despite the fact that KeyBank never cited *Malcuit* or its progeny below — the Eighth District properly followed *this Court’s* holding, in *Westfield Insurance Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, that where, as here, “the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter in favor of the nondrafting party.” (App. Ct. Op. at 11, Appx. at 13 (quoting *Westfield*, 100 Ohio St.3d at 220).) Notably, the *Westfield* Court identified “limitations to the preceding rule,” but none involved examining extrinsic evidence. 100 Ohio St.3d at 220.

Finally, even if the Eighth District had considered the extrinsic evidence advanced by KeyBank, that evidence does not satisfy KeyBank’s burden in seeking summary judgment to demonstrate affirmatively that there is no extrinsic evidence to support an interpretation of the Agreement contrary to its own. *See Forest Park Pttrs. L.P. v. Dave’s Mkts., Inc.*, 2d Dist. No. 00-CV-0211, 2001-Ohio-1695, at 9 *see also Dresher*, 75 Ohio St.3d at 293 (requiring movant to show that nonmovant has no evidence to support nonmovant’s claims). At most, KeyBank has proffered evidence of its own subjective and secret intent to charge interest at a rate in excess of 8.93% per annum. But “the intent of parties is determined from the language of contract and not the subjective intent of any one party.” *Lackey v. Gentry Oil* (Aug. 23, 1983), 4th Dist. No. 1161, 1983 Ohio App. LEXIS 13511, at *4. Simply stated, KeyBank has advanced

no evidence to support the conclusion that JNT either knew or had reason to know of any usage of the term "365/360 basis" that would alter the plain and unambiguous meaning of the term "per annum." See 12 Richard A. Lord, Williston on Contracts (4th ed. 2010) § 34:15 ("a party is not bound by a usage unless that party knows or has reason to know if it").

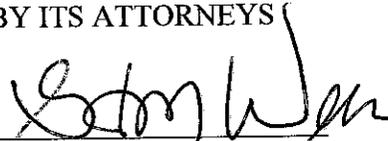
CONCLUSION

For the foregoing reasons, the decision below does not present any issues of public or great general interest, and JNT respectfully requests that the Court decline to accept this appeal.

Dated: September 13, 2010

Respectfully submitted,

THE PLAINTIFF
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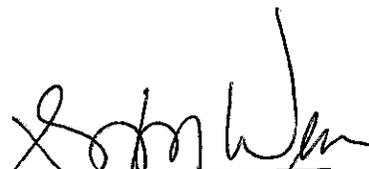
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been sent via electronic mail and first class United States mail, postage prepaid, this 13th day of September, 2011 to the following counsel of record:

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