

ORIGINAL

# THE SUPREME COURT OF OHIO

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Case No. 11-1392

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**JNT PROPERTIES, LLC**

Plaintiff-Appellee

v.

**KEYBANK NATIONAL ASSOCIATION**

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE JNT PROPERTIES, LLC**

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

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## INTRODUCTION

This case involves a loan by Defendant-Appellant KeyBank National Association (“KeyBank”) to Plaintiff-Appellee JNT Properties, LLC (“JNT”). The interest rate stated on JNT’s Promissory Note, which is variable and subject to adjustment every five years, is “8.93% per annum.” KeyBank, however, concedes that it has been charging JNT interest at a rate “slightly higher” than 8.93% per annum by using a so-called “365/360 method” of interest computation. (See Br. at 1.) 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 interest at a rate of 8.93% *per every 360 days* — not per year.<sup>1</sup>

As it turns out, KeyBank is not alone. As Amici<sup>2</sup> point out, other banks also use this method of interest computation to charge all of their commercial borrowers “slightly more interest.” As unseemly as this might sound, however, this case is not about whether KeyBank — or any other bank in Ohio — may draft its promissory notes to employ such a mechanism for computing interest. (They may.) Rather, this case is about whether KeyBank actually did so here. (It did not.)

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<sup>1</sup> Although in asking this Court to accept jurisdiction KeyBank purported to seek “guidance on the correct interpretation of the term ‘per annum’” (KeyBank Mem. in Supp. Jurisdiction at 3-4), the truth is that KeyBank repeatedly has acknowledged that the term “per annum” means “by the year” and that “a year may consist of 365 or 366 days” (Answer, ¶ 21, Appellee’s Supp. at 4; *accord* App. Op. at 4 n.2, Appellant’s Appx. at 10 n.2; *see also* Br. at 3). KeyBank attempts to obfuscate this point by stating that “per annum” merely stands for the fact that a rate is “annual” as opposed to “monthly or semi-annual” (Br. at 3), but the fact remains that KeyBank is not actually charging JNT interest at an annual rate of 8.93%. (See Venkataramany Aff., ¶ 8, Appellee’s Supp. at 16 (calculating JNT’s effective annual interest rate as 9.054%).)

<sup>2</sup> The American Bankers Association (“ABA”) and the Ohio Bankers League (“OBL”) (collectively, “Amici”) submitted a joint amicus brief in support of KeyBank.

KeyBank seeks to avoid liability in this case merely by contending that it *meant* to include language in the Note that allowed it to charge more. But KeyBank's alleged intent — which is not reflected in the Note itself — is not dispositive. The question is what the Note says, and KeyBank concedes that the Note does not say what KeyBank wants. In this regard, KeyBank has a problem of its own making because KeyBank drafted the form promissory note at issue. KeyBank's solution is to ask this Court to resolve this case in its favor by *rewriting* the language set forth in the parties' Note so that the Note would reflect what KeyBank claims that it meant to accomplish when KeyBank drafted it.

As set forth below, KeyBank's invitation to this Court to engage in judicial activism by rewriting the parties' agreement should be rejected. So, too, should the Court reject KeyBank's invitation to disregard well-settled principles of contract law. The decision of the Court of Appeals should be affirmed.

## **BACKGROUND**

### **I. The Trial Court's Order Granting Summary Judgment**

During discovery, KeyBank moved for summary judgment. The trial court granted this motion on September 8, 2010. (9/08/10 JE, Appellant's Appx. at 19.) The 3-0 decision of the Court of Appeals that reversed the trial court's order is the subject of this appeal.<sup>3</sup>

In its Order, the trial court acknowledged that the language upon which KeyBank relied as the basis for its summary judgment was defective. As the trial court put it, the "words used [in the Note] do not correctly describe" the calculation KeyBank claims it was authorized to carry out, and which supposedly authorized KeyBank to charge more than the agreed per annum

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<sup>3</sup> The Court of Appeals' June 30, 2011 Journal Entry and Opinion appears at pages 5-18 of Appellant's Appendix and is cited to herein as "App. Op." Its web citation is *JNT Properties, L.L.C. v. Keybank Nat'l Ass'n*, 8th Dist. No. 95822, 2011-Ohio-3260.

interest rate. (9/08/10 JE, Appellant's Appx. at 19.) The trial court called this same language relied upon by KeyBank "unintelligible." (*Id.*)

Despite recognizing the defect in the language relied upon by KeyBank, the trial court nevertheless granted summary judgment. It did so by violating at least two cardinal rules of contract interpretation.

First, the trial court rewrote the parties' Note to conform with what KeyBank asserted the agreement should have said. The trial court admittedly ignored the language that is actually in the Note, and then concluded that (1) KeyBank must have "intended to use the 365/360 method to calculate interest" and (2) there is no evidence that JNT "didn't consent." (*Id.*) The trial court did so despite the fact that there is no reference in the Note to a "365/360 method" or any other method or formula for calculating "*interest.*" Instead, the Note states that the "365/360 basis" is used to compute the "annual [yearly] interest *rate,*" a critical distinction. (*Id.* (emphasis added).)

The trial court's second significant error was as follows. Given that the provision referring to a "365/360 basis" in the Note does not state what KeyBank says it does, the trial court purported to cure the defective provision by taking a small portion of the actual 365/360 formula language in the Note, severing the balance, and then concluding that the fragment it did not sever "is accepted shorthand for a commonly used formula." (9/08/10 JE, Appellant's Appx. at 19.) But the trial court cited no record authority for its conclusion that "365/360 method" — a phrase that does not even appear in the Note — is "accepted shorthand." (*Id.*)

## **II. The Eighth District's Decision Reversing the Grant of Summary Judgment**

In reviewing the trial court Order, the Court of Appeals applied well-established principles of contract interpretation.

First, the Court of Appeals recognized the proper focus is on the Note itself — not upon unsupported suppositions about what constitutes “accepted shorthand for a commonly used formula.” Focusing on the actual language agreed to by the parties, the Court correctly found that the language upon which KeyBank relies as its purported authority to increase JNT’s annual interest rate “does not indicate an actual stated interest rate.” (App. Op. at 9, Appellant’s Appx. at 15.)

Second, although it agreed with the trial court that the provision in the Note referring to “365/360” is “unintelligible” (*id.* at 11, Appellant’s Appx. at 17), the Court of Appeals concluded that the trial court erred when it “rewrote” the Note to replace its actual words (*id.* at 11-12, Appellant’s Appx. at 17-18).<sup>4</sup> Instead, the Court of Appeals held that “the 365/360 formula used to calculate interest in the instant case cannot be read ‘as clearly evidencing an intent of the *parties*’” — not just KeyBank — “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% per annum.” (*Id.* (emphasis added) (quoting *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).)

### **LEGAL STANDARDS**

As the party seeking summary judgment, KeyBank “bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of

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<sup>4</sup> KeyBank incorrectly describes the trial court’s decision when it says that the trial court “declared that the Note’s ‘reference to the 365/360 method [for *computing interest*] . . . [will be] retained and enforced.” (Br. at 11 (emphasis added) (quoting 9/08/10 JE, Appellant’s Appx. at 19).) The trial court never stated that the 365/360 language in the Note was for computing *interest*. To the contrary, the trial court stated that “the fact that the words used to describe the formula for calculating the interest *rate* . . . do not correctly describe the 365/360 calculation does not change the parties’ agreement that ‘the annual interest *rate* for this Note is computed on a 365/360 basis.’” (9/08/10 JE, Appellant’s Appx. at 19 (emphases added).)

[JNT's] case.” *Dresher v. Burt* (1996), 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); *see also Dresher*, 75 Ohio St.3d at 293 (requiring movant to show that nonmovant has no evidence to support nonmovant’s claims). 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.

## ARGUMENT

### **I. KeyBank Improperly Seeks to Have This Court Re-Write the Parties’ Agreement**

KeyBank repeatedly misrepresents the actual language of the Note, pretending that the “365/360” language addresses a method for “computing *interest*,” while ignoring the fact that it actually purports to create a formula for computing the “annual interest rate.”<sup>5</sup> KeyBank even goes so far as to identify the 365/360 language as an “*Interest Computation Clause*” (emphasis added) — a phrase that appears nowhere in the Note itself. *See supra* note 5. In fact, the Note

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<sup>5</sup> KeyBank’s brief is replete with examples of its effort to recast the 365/360 language in the Note in this case as a method for computing *interest*, even though the provision clearly purports to be a basis for computing the *annual interest rate*. (*See* Br. at 2 (“separate contract clauses . . . address the distinct issues of the method of computing *interest* and the annual interest rate” (emphasis added)); *id.* at 2 (“[t]he Interest Computation Clause . . . specifies that *interest* is computed on a 365/360 basis” (emphasis added)); *id.* at 8 (“two separate clauses . . . address the distinct subjects of: 1) the manner in which the variable rate of interest rate [sic] is set . . . and 2) the method for computing *the dollar amount of interest* due on an annual basis using that rate”); *id.* at 15 (“the Interest Computation Clause . . . provides the following method for computing the *dollar amount of interest* due” (emphasis added)); *id.* at 16 (“the parties intended to use . . . the contract clause that directly addresses the subject of computing *interest*” (emphasis added)); *id.* at 17 (“there is no conflict between a ‘per annum’ interest rate and a clause specifying the 365/360 method for computing annual *interest*”); *id.* at 20 (“the Interest Computation Clause, however imperfectly worded, plainly refers to a single method for computing annual *interest*” (emphasis added)); *id.* at 25 (“the Interest Computation Clause references and describes a single method for computing annual *interest*” (emphasis added)).)

does not even contain a clause that purports to compute “*interest*.” The language referencing “365/360” states it is for computing an “annual interest *rate*.” KeyBank’s creativity in labeling the 365/360 provision as an “Interest Computation Clause” cannot supplant the language that KeyBank actually employed in the Note.

KeyBank’s desire to rewrite the Note is rooted in the fact that the 365/360 language is unintelligible as a matter of both mathematics and logic because the term “annual interest rate” appears on both sides of the purported 365/360 formula — a point about which the trial court and the Court of Appeals agreed. (*See* App. Op. at 11, Appellant’s Appx. at 17; 9/25/09 JE, Appellant’s Appx. at 24.)

Indeed, KeyBank effectively concedes the language upon which it relies is defective.

For instance:

- KeyBank acknowledges that the 365/360 language is “awkward” (Br. at 3), “imperfectly worded” (*id.* 20), “clumsy” (*see id.* at 25 (internal quotation marks omitted)); “poorly constructed” (*id.*), “unquestionably could have been better drafted” (*id.* at 3), could “have been clearer” (*id.* at 23 (internal quotation marks omitted)), and was an “error[] in expression” (KeyBank Mem. in Supp. of Jurisdiction at 5); and
- KeyBank does not dispute the Court of Appeals’ conclusion that the Note’s provision referencing “365/360” is “unintelligible,” but rather KeyBank claims that the Court of Appeals should be reversed because it “read literally” the words in the Note (Br. at 24).

Indeed, given KeyBank’s recognition that the language it relies on is defective, KeyBank actually has asserted a counterclaim seeking reformation of its “unilateral mistake” in drafting the language (Def.’s Counterclaim for Reformation, ¶ 11, Appellee’s Supp. at 10-11.) But rather than litigate this counterclaim on its merits, KeyBank would have this Court afford it a shortcut by rewriting KeyBank’s so-called “error in expression.”

The Court of Appeals properly held that the ambiguous, unintelligible language upon which KeyBank relies cannot alter the plain and ordinary meaning of the term “per annum” in

the Note. So, too, should this Court reject KeyBank's invitation to rewrite the parties' agreement, and instead enforce the clear and unambiguous provision in the Note, namely, JNT's agreement to pay interest at a rate of "8.93% per annum." See *Dugan & Meyers Constr. Co., Inc. v. Ohio Dep't of Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶ 39 ("the court will not rewrite the contract to achieve a more equitable result"); *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210, ¶ 20 ("courts should not rewrite contracts"). "Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract." *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 18; see also *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 2004-Ohio-7102, 820 N.E.2d 910, ¶ 23 ("common undefined words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or some other meaning is clearly evidenced from the face or overall contents of the instrument" (internal quotation marks omitted)); Restatement of the Law 2d, Contracts (1981) § 203(3)(a) ("where language has a generally prevailing meaning, it is interpreted in accordance with that meaning"). Consistent with this rule, neither ambiguous language nor extrinsic evidence can alter the meaning of an unambiguous term — e.g., "per annum." See *NetworkTwo Communs. Group v. Spring Valley Mktg. Group* (C.A.6, 2004), 372 F.3d 842, 847; *Bds. of Trs. of the Ohio Laborers' Fringe Benefit Programs v. Blaze Constr., Inc.* (S.D. Ohio Dec. 11, 2002), No. 2:01-CV-1068, 2002 U.S. Dist. LEXIS 26629, at \*14.

Moreover, KeyBank's invitation to have this Court rewrite the Note is not only inconsistent with these rules of contract construction, but it is also inconsistent with the agreement between the parties as set forth in the Note, which provides:

**THIS WRITING . . . IS THE COMPLETE AND EXCLUSIVE  
STATEMENT OF THE AGREEMENT BETWEEN US,  
EXCEPT AS WE MAY LATER AGREE IN WRITING TO  
MODIFY IT.**

(Note at 5, Appellant's Supp. at 15.)

Given that the Note is a fully integrated agreement, the Court should reject KeyBank's attempt — embodied in its third proposition of law<sup>6</sup> — to use extrinsic evidence to alter the meaning of the term “per annum.”<sup>7</sup> (See Br. at 25-28.) “[A] writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.” *Bellman v. Am. Int'l Group*, 113 Ohio St.3d 323, 325-26, 2007-Ohio-2071, 865 N.E.2d 853, ¶ 7 (internal quotation marks omitted).

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<sup>6</sup> As its third proposition of law, KeyBank maintains that the Court of Appeals erred in concluding that the Note should be construed against KeyBank without having analyzed extrinsic evidence. (Br. at 25.) This argument is futile, however, given KeyBank's admission that the Court only should reach KeyBank's third proposition of law if the Court concludes that the Note's 365/360 language is ambiguous (*see id.* at 25) — in which case summary judgment is inappropriate. *See, e.g., Walsh v. Marsh Bldg. Prods.*, 12th Dist. No. CA2009-10-130, 2010 Ohio 729, at ¶ 11 (“where a contract is ambiguous summary judgment should not be granted”); *see also Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 104, 519 N.E.2d 363 (“[s]ince the contract is ambiguous . . . summary judgment was improperly granted”).

Regardless, KeyBank is wrong on the merits. *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.* (N.D. Ohio May 4, 2009), No. 1:08-cv-605, 2009 U.S. Dist. LEXIS 37599, at \*18-\*19 (“Under Ohio law . . . in certain circumstances, before a court resorts to extrinsic evidence to deduce the intent of the parties, courts will construe ambiguous contract language against one of the parties.”). Here, the Court of Appeals properly followed *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, in which this Court held 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. Op. at 11, Appellant's Appx. at 17 (quoting *Westfield*, 100 Ohio St.3d at 220).)

<sup>7</sup> In this regard, it bears noting that KeyBank's desire to charge “slightly higher interest” is inconsistent with the payment schedule set forth in JNT's Note. (*See Venkataramany Aff.*, ¶ 9, Appellee's Supp. at 16.)

Likewise, KeyBank's second proposition of law — namely, that “[e]rrors in expression do not render contractual language ambiguous or unenforceable where that language can be given a definite legal meaning” (Br. at 20) — is inapposite.<sup>8</sup> KeyBank would have this Court rewrite the 365/360 provision precisely because it is not “clear enough to be plainly understood.” See *Dominish v. Nationwide Ins. Co.*, 129 Ohio St.3d 466, 2011-Ohio-4102, 953 N.E.2d 820, ¶ 8. Specifically, contract terms are not clear enough to be plainly understood unless “the ordinary person exercising ordinary common sense can sufficiently understand and comply with” them. See *Dominish*, 2011-Ohio-4102, ¶ 8 (internal quotation marks omitted). Notwithstanding KeyBank's attempt to impose talismanic, “industry” meaning upon the mere appearance of the phrase “365/360 basis” in the Note in this case, it cannot be said that the “the ordinary person exercising ordinary common sense” would have a clue that KeyBank meant for this otherwise unintelligible provision to impose interest at an “effective” interest rate greater than the plain and unambiguous stated interest rate of 8.93% per annum.

## II. **KeyBank Inaccurately Claims the Agreed-to “Per Annum” Rate Cannot Be Enforced Without Reference to a So-Called “Interest Calculation Method”**

KeyBank's plea to have this Court rewrite this parties' agreement is itself predicated on the representation to this Court that “it is necessary to know *both* the interest rate and the method

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<sup>8</sup> As set forth in its Memorandum of Jurisdiction — but curiously absent from its merits brief — KeyBank would like the Court to remove the word “rate” in the following sentence contained in the Note: “The annual interest rate for this Note is computed on a 365/360 basis . . . .” (See KeyBank Mem. in Supp. Jurisdiction at 5, 11-12.) This claim of error is unpreserved, however, given that KeyBank urged the Court of Appeals 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. Op. at 11, Appellant's Appx. at 17.) “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.” See *State v. Cornely* (1978), 56 Ohio St.2d 1, 4, 381 N.E.2d 186; accord *State ex rel. Degroot v. Tilsley*, 128 Ohio St.3d 311, 313, 2011-Ohio-231, 943 N.E.2d 1018.

for computing interest to calculate the dollar amount of interest that accrues on a loan” (Br. at 2 (emphasis added).) *This contention is essential for KeyBank*, because it provides an alleged rationale for looking beyond the unambiguous language in the Note where the parties agreed on a “per annum” interest rate. Like many of KeyBank’s assertions, however, this one is unsupported by citations to appropriate authorities. More important, the statement is demonstrably false.

The term “per annum” has a definite meaning: “by the year,” with a year being 365 or 366 days. *See Cleveland Collateral Loan Co. v. Bell* (C.P. 1915), 17 Ohio N.P. (n.s.) 385 (“[P]er annum means by the year.” (emphases in original)); *State ex rel. Gareau v. Stillman* (1969), 18 Ohio St.2d 63, 65, 247 N.E.2d 461 (a “year . . . means a period of 365 days”); *see also Mayer v. Medancic*, 124 Ohio St.3d 101, 2009-Ohio-6190, 919 N.E.2d 721, ¶ 17 (citing observation that “interest calculated ‘per annum’ generally means ‘at a simple rate per annum until paid’”). Knowledge of a “per annum” rate, and the amount of money to which the rate is applied, is all that is necessary to compute the amount of interest owed for that year. KeyBank’s claim to the contrary cannot withstand scrutiny.

For example, like many statutes, the Ohio Revised Code uses a “per annum” rate for calculating statutory interest. No special “interest calculation method” is required to give effect to the per annum rate. *See R.C. 5703.47* (requiring Tax Commissioner to compute the “interest rate per annum”); *In the Matter of Determination of the Interest Rate Pursuant to R.C. 5703.47* (Ohio Dep’t of Taxation Oct. 14, 2011) (setting “the applicable per annum interest rate”); *see also R.C. 1343.03* (providing for the payment of “per annum” prejudgment interest). If KeyBank were correct that knowing the per annum rate is never sufficient to calculate interest,

no court or parties could ever calculate the amount of statutory interest owed in Ohio.

Obviously, that is not the case.

This Court, too, frequently has issued orders in which it addressed the amount of interest owed by setting forth a “per annum” interest rate *without* any need to specify an “interest computation method.” *See, e.g., Disciplinary Counsel v. Oglesby*, 102 Ohio St.3d 1219, 2004-Ohio-2541; 808 N.E.2d 882, ¶ 3 (“interest at the rate of 10 percent *per annum* will accrue until costs are paid in full” (emphasis added)); *Columbus Bar Ass’n v. Downey*, 131 Ohio St.3d 1201, 2011-Ohio-6947, 959 N.E.2d 1050, ¶ 3 (same). If KeyBank were correct that an “interest computation method” must be specified in order to calculate interest owed, this Court’s own orders would make no sense.<sup>9</sup> Of course, it is KeyBank’s argument — not the meaning of “per annum” — that makes no sense. *See also Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 10 (describing “\$5 million plus eight percent interest *per annum*” as a “definite sum” (emphasis added)). In fact, numerous courts actually have carried out interest computations based upon a “per annum” rate without the need for, or reference to, any so-called “interest computation method.” *See, e.g., Trans-Pro Logistic Inc. v. Coby Electronics Corp.* (E.D.N.Y. Feb. 16, 2012), No. 05 CV 1759(CLP), 2012 WL 526764 at \*14 n.28 (using “per annum” rate to derive daily interest rate); *Alston v. Northstar La Guardia LLC* (S.D.N.Y. Sept. 2, 2010), No. 10 Civ. 3611(LAK)(GWG), 2010 WL 3432307, at \*4 (using “per annum” rate to derive daily interest amount); *In re Mortgage Lenders Network USA, Inc. v. Wells*

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<sup>9</sup> This Court and the lower courts also have, on numerous occasions, described interest owed under a contract by describing the “per annum” rate without reference to any so-called “interest calculation method.” *See, e.g., KeyBank Nat’l Ass’n v. Estate of Wright*, 6th Dist. No. L-06-1015, 2006-Ohio-4643 (describing *KeyBank*’s request for “interest at the rate of 5.95 per annum”).

*Fargo Bank, N.A.* (D.Del. 2009), 406 B.R. 213, 248 n.1 (using “per annum simple interest rate” to calculate daily interest owed).

Here, there is no question the “per annum” rate in the Note is capable of standing alone. Thus, the unintelligible 365/360 language is not necessary either to ascertain the annual rate to which the parties agreed or to determine whether there has been a breach of the “per annum” provision in the Note.

### **III. KeyBank Inaccurately Claims this Case is About the Imposition of Liability “for Using the ‘365/360 Method’ to Compute Interest on Commercial Loans”**

KeyBank claims that JNT seeks to impose liability on it “for using the ‘365/360 method’ to compute interest on commercial loans.” (Br. at 1.) KeyBank repeats this claim through its brief. (*See, e.g.*, Br. at 13 (“the Eighth District wrongly calls into question . . . the 365/360 method”); *id.* at 19 (“the Eighth District’s decision upsets settled lending practice — calling into question both the 365/360 and 360/360 methods for computing interest”).) This claim, however, is incorrect. Rather, JNT merely alleges that the language employed by KeyBank in this particular form promissory note is not sufficient to alter the plain and unambiguous meaning of “per annum” or to permit a method of calculating interest that would impose an effective rate of interest greater than the agreed upon rate of 8.93% per annum. (First Amended Complaint, ¶ 27, Appellant’s Supp. at 6). JNT asserts a simple, single cause of action for breach of contract,<sup>10</sup> predicated upon the (now undisputed) fact that KeyBank charged JNT interest at a rate higher than the “per annum” rate agreed to in the parties’ Note.<sup>11</sup>

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<sup>10</sup> JNT also seeks declaratory and injunctive relief based upon the same breach of contract.

<sup>11</sup> “The 365/360 method results in slightly higher interest.” (Br. at 1; *see also id.* at 8 (the method “results in slightly more interest being paid to KeyBank”); *id.* at 18 n.4 (describing

In this regard, JNT is alleging breach of the “per annum” interest rate of the Note — not anything else. KeyBank, for its own reasons, wants to make this case about another provision in the Note — the unintelligible one that purports to compute the foregoing *rate* “on a 365/360 basis.”<sup>12</sup> Importantly, however, JNT is *not* mounting a general challenge to the inclusion of language — not present here — through which parties may agree to have *interest* calculated by a particular method, including ones that alter the ordinary meaning of “per annum” by charging annual interest at higher rate. *See Ely*, 2010-Ohio-80, ¶ 11 (holding that identical language did not “clearly evidence” intent to alter ordinary meaning of “per annum”).

Although JNT’s breach claim is not predicated upon the provision in the Note referencing a “365/360 basis,” KeyBank’s defense against the breach of contract claim does depend on this provision in the Note. That defense in this case, however, cannot get off the ground, because the language in this particular Note is unquestionably defective and “unintelligible.” This case simply does not present the question some *other* contract — with different, clear language effectively modifying a “per annum” rate — would present a claim for breach of contract.<sup>13</sup>

In this regard, KeyBank’s argument that “there is no conflict between a ‘per annum’ interest rate and a clause specifying a 365/360 method for computing annual interest” (Br.

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“slight increase in annual interest charges” as a “fractional 1/72 increase in the ‘effective’ interest rate”).)

<sup>12</sup> KeyBank inaccurately states the Complaint “alleges that KeyBank’s *compliance* with the Interest Computation Clause . . . actually breaches the Note.” (Br. at 9 (emphasis in original).) To the contrary, JNT’s position is that this *unintelligible* provision does not alter the *plain and unambiguous* “per annum” rate of interest to which JNT actually agreed. At any rate, KeyBank’s characterization of JNT’s claim is as ironic as it is specious; KeyBank is the party asking this Court to rewrite the Note, while JNT wishes to enforce it as written.

<sup>13</sup> Indeed, KeyBank ignores the fact that it no longer uses the defective 365/360 language at issue here. The only promissory notes that could be 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’s Mem. in Supp. Jurisdiction* at 3-5), which Harland has retired.

at 17-18) presupposes that such a clause exists in this case. It does not — unless this Court rewrites the Note. For this reason, KeyBank’s first proposition of law — namely, that “[a] description of an interest rate as ‘per annum’ does not require the use of any particular method for computing interest” (Br. at 12) — is a straw man argument. JNT agrees that promissory notes may set forth a method of interest computation that results in a higher effective annual interest rate than the stated “per annum” rate and thereby modifies the meaning of “per annum.” KeyBank is not entitled, however, to use such a method of interest computation where, as here, it not only failed properly to include such a provision in the Note but also concedes that the parties did not intend to alter the meaning of “per annum.”<sup>14</sup>

#### **IV. KeyBank Relies on Unfounded, Extra-Record Assertions**

KeyBank further invites this Court to engage in judicial activism by relying upon KeyBank’s repeated characterizations of its “industry,” which have no basis in the record before this Court and say nothing about to what *JNT* agreed. For instance, without citing any record evidence or other authority properly before Court, KeyBank urges a favorable ruling from this Court merely because a 365/360 method of interest computation is one of “three separate methods of computing annual interest from an annual interest rate used in the lending industry.” (See, e.g., Br. at 12; see also *id.* at 1 (“The lending industry uses three separate methods to

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<sup>14</sup> For this reason, KeyBank’s reliance upon *Kreisler & Kreisler, LLC v. Nat’l City Bank* (C.A.8 2011), 657 F.3d 729, and cases like it (see generally Br. at 16-17) is misplaced. See *Kreisler & Kreisler*, 657 F.3d at 732 (relying upon *Asset Exchange II, LLC v. First Choice Bank* (Ill. App. Ct. 2011), 953 N.E.2d 446, in which court concluded that “per annum was defined in the note as a 360 day year” (emphasis added)).

compute annual interest”); *id.* at 25 (“describing “the historical use of three separate methods for computing interest”).<sup>15</sup>

Leaving aside the procedural impropriety of pressing its arguments based on alleged facts not in the record, *see, e.g., Paulin v. Midland Mut. Life Ins. Co.* (1974), 37 Ohio St.2d 109, 112, 307 N.E.2d 908 (“the Court of Appeals is bound by the record before it and may not consider facts extraneous thereto”), KeyBank’s reliance upon “industry” practice is irrelevant because this case is about a single agreement between KeyBank and JNT — not about “the lending industry” or its purported practices.<sup>16</sup> However apparent it might be now that banks like KeyBank desire to charge commercial borrowers like JNT interest at an “effective” rate in excess their stated rates, the question in this case is whether *the actual language of JNT’s Note* unambiguously reflects JNT’s agreement to pay “slightly higher interest,” which it does not. *See Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 28 (“A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.”); *see also Lackey v. Gentry Oil* (Aug. 23, 1983), 4th Dist. No. 1161, 1983 Ohio App. LEXIS 13511, at \*4 (“the intent of parties is determined from the language of contract and not the subjective intent of any one party”).

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<sup>15</sup> Further relying on extra-record sources to press its arguments, KeyBank cites a law review article written forty years ago as evidence of the “prevalence of the 365/360 method in commercial loans” and for the proposition that the Court should adopt an “inference that this method is intended by the parties even in the absence of a contractual clause mandating its use.” (Br. at 20 & n.5.)

<sup>16</sup> In any event, a usage of trade cannot be interpreted in a manner that is inconsistent with the unambiguous stated rate of 8.93% per annum. *See* Restatement of the Law 2d, Contracts (1981) § 203(b) (“express terms are given greater weight than . . . usage of trade”).

V. **Amici's Arguments are Based Upon Mischaracterizations of the Decision Below and JNT's Cause of Action**

Finally, Amici suffer from fundamental misunderstandings of both the decision of the Court of Appeals and the nature of this case.

For instance, Amici claim the Court of Appeals generally “conclu[ded] that the 365/360 method of interest computation is unintelligible.” (Amici Br. at 1). But the Court of Appeals did no such thing. Instead, the Eighth District found the *specific* language in *the Note at issue* referencing a “365/360 basis” to be unintelligible — the same conclusion reached by the trial court.<sup>17</sup> There are ways to incorporate the use of a “365/360 method” into a clearly written contract, agreed to by both parties. Amici improperly attempt to transform adjudication of the breach of contract claim predicated upon the specific Note language at issue here into a generalized attack on *any* use of a 365/360 provision. JNT has never advocated this position.

Amici also inexplicably assert that the “cornerstone” of the Court of Appeals’ decision is *Kitson v. Bank of Edwardsville* (12th Cir. Ill. Jan. 24, 2008), No. 02-L-0897. (Amici Br. at 5.) This claim is astonishing because the decision below never mentions the *Kitson* case. Amici’s suggestion that the Court of Appeals did not analyze, discuss or rely on Ohio law in rendering its decision is false. Indeed, both KeyBank and Amici willfully ignore the Court of Appeals’ explanation (App. Op. at 9-10, Appellant’s Appx. 15-16) that it was relying, in part, upon this Court’s unanimous decision in *Hamilton v. Ohio Savings Bank* (1994), 70 Ohio St.3d 137, 637 N.E.2d 887. In *Hamilton*, an earlier case involving another bank’s use of a “365/360 method” to

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<sup>17</sup> Amici’s misreading of the Court of Appeals’ opinion leads them incorrectly to intimate that the court “conclude[d] that use of the 365/360 method to calculate the daily interest *amount* is irreconcilable with use of the phrase ‘per annum’ to describe the interest *rate*.” (Amici Br. at 4 (emphasis in original).)

charge borrowers more interest than permitted by their contracts, this Court reversed summary judgment for the defendant and remanded for further proceedings. *Id.* at 140.

Amici also mischaracterize the nature of JNT's Complaint, claiming "this case arises from a borrower's claim that a promissory note provision for use of the 365/360 method of daily interest computation conflicts with the 'per annum' description of the interest rate used in the calculation." (Amici Br. at 3). However, as explained above, JNT's breach claim is not grounded in a provision in the Note referencing a "365/360 method." Moreover, contrary to Amici's representation, JNT's Note does not contain a "provision for use of the 365/360 method of *daily interest* computation"; the Note states that the "365/360 basis" is to compute the "annual [yearly] interest *rate*." Amici again seemingly want to make this case about something other than the actual Note agreed to by the parties.

In light of Amici's misunderstanding of both the decision below and the nature of JNT's breach of contract claim, it is not surprising that they present this Court with a parade of horrors if this Court does not reverse the Court of Appeals.<sup>18</sup> But when the decision below and the nature of the issues presented are properly understood, it is clear that Amici's claimed fears lack any foundation.

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<sup>18</sup> (See Amici Br. at 1 ("To allow the decision of the Eighth District . . . to stand would unsettle this customary method of interest computation . . . and would subject [Ohio Bankers League] members to a host of unforeseen costly legal threats."); *id.* at 2 (absent reversal, "multi-state competitors alone will benefit"); *id.* at 9 ("The decision below makes Ohio an outlier and puts Ohio in a potentially precarious financial position . . . [and] would place the stability of thousands of commercial lending relationships in Ohio in jeopardy.").)

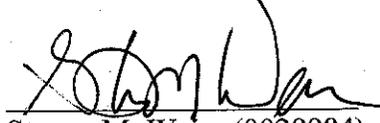
**CONCLUSION**

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: March 12, 2012

Respectfully submitted,

THE PLAINTIFF  
JNT PROPERTIES, LLC,  
BY ITS ATTORNEYS



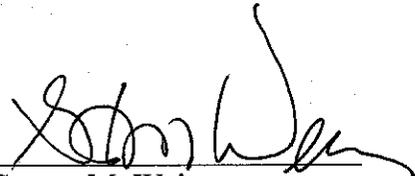
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**CERTIFICATE OF SERVICE**

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 12th day of March, 2012, to the following counsel of record:

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