CASE NO. 12-3491

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWNER OPERATOR
INDEPENDENT DRIVERS ASSOCIATION, INC., et al.,

Plaintiffs-Appellees

v.

COMERICA BANK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF OF DEFENDANT-APPELLANT COMERICA BANK

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DISCLOSURE OF
CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, COMERICA BANK makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Yes. Comerica Bank is a wholly owned subsidiary of Comerica Incorporated.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Yes. See above.

If the answer is YES, list below the identity of such corporation and the nature of the financial interest.

Yes, Comerica Incorporated.

s/ Alycia N. Broz
Alycia N. Broz June 10, 2013

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant-Appellant Comerica Bank respectfully submits that the Court would derive value from oral argument as a means to probe the following important appellate issues affecting not only this case, but others: (1) commencement of a limitations period under federal procedural law; (2) the acceptability of deliberate indifference as a substitute for diligent inquiry after one becomes aware of an injury; (3) the District Court's extraordinary recognition of a retroactive private right of action under the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995); (4) the District Court's refusal of the District Court to allow a defendant to litigate the substantial amount of damages awarded against it; (5) the open and obvious errors in the resulting damages award; and (6) the assessment of excessive prejudgment interest.

JURISDICTIONAL STATEMENT

This appeal is properly before this Court pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment and order entered by the United States District Court for the Southern District of Ohio.

Plaintiffs-Appellees alleged subject matter jurisdiction in the District Court pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution, laws, or treaties of the United States. Defendant-Appellant Comerica Bank contested subject matter jurisdiction in its Motion to Dismiss, ECF No. 10.

STATEMENT OF THE ISSUES

1. Whether the limitations period began when the plaintiffs had contemporaneous knowledge that they had sustained an injury.

2. Whether the statute of limitations ran against the plaintiffs during the time in which they had decided not to conduct any diligent inquiry into the source of their alleged injury.

3. Whether the District Court erred when it became the only court in the nation to have recognized a retroactive private right of action under the Interstate Commerce Commission Termination Act of 1995 for truck drivers whose lease agreements predate the effective date of the statute.

4. Whether the District Court erroneously interpreted this Court's instructions in the prior appeal by imposing upon Comerica Bank the amount of damages collusively determined by plaintiffs and a third party, without affording Comerica Bank any opportunity to litigate the damages amount.

5. Whether it is improper and unjust to enforce a damages award that is replete with inconsistencies and errors.

6. Whether the District Court abused its discretion in requiring a secondary defendant to pay prejudgment interest in an amount higher than the plaintiff would have received from the primary defendant.

STATEMENT OF THE CASE

A. Introduction

This is the second appeal of this action. The judgment entered by the District Court following remand from the first appeal is inconsistent with this Court's opinion and incompatible with other governing law.

The Court ruled in the prior appeal that: (1) the Truth-in-Leasing regulations promulgated pursuant to the Motor Carrier Act, 49 U.S.C. §§ 14101–02, 14704; 49 C.F.R. § 376.12, "implicitly create[] a statutory trust for the benefit of owner-operator" independent truck drivers over maintenance escrow funds owed to the owner-operators; (2) Arctic Express, Inc. ("Arctic"), had "breached its trust obligations to plaintiffs by encumbering the escrow funds . . . through its lending relationship with Comerica"; and (3) Comerica, at which Arctic had maintained several accounts and a revolving line of credit, "must therefore disgorge the trust property received in breach of trust unless it can establish a viable defense." *In re Arctic Express, Inc. (OOIDA v. Comerica Bank)*, 636 F.3d 781, 795, 801–03 (6th Cir. 2011).

After a bench trial on remand, the District Court entered a final judgment that is beset with five fundamental errors. The trial court erroneously: (1) concluded that the statute of limitations does not bar the claim against Comerica; (2) awarded damages based on a retroactive private right of action under the

Interstate Commerce Commission Termination Act that no other court in the nation has recognized; (3) refused to allow Comerica to litigate or in any way challenge the amount of damages for which it has now been held liable; (4) adopted a damages compilation that includes material inconsistencies and errors; and (5) made an excessive award of prejudgment interest.

Comerica respectfully urges the Court either to: (1) reverse the judgment of the District Court altogether on statute of limitations grounds; or (2) vacate and remand with instructions to correct the material errors that the final judgment incorporates.

B. The Arctic Litigation and Settlement

Comerica respectfully refers the Court to the Opinion filed in the prior appeal for a comprehensive statement of the procedural history and facts of this litigation. *See In re Arctic Express (OOIDA v. Comerica Bank)*, 636 F.3d at 785–91. Set forth below is a recitation of events pertinent to the issues that Comerica presents in this appeal.

This litigation originated when Plaintiffs-Appellees Carl Harp, Michael Weise, and the Owner-Operator Independent Drivers Association, Inc. (collectively the "Owner-Operators") sued Arctic Express, Inc., the trucking company for which they had hauled freight, and its affiliate, D&A Associates Ltd. ("D&A"), to recover maintenance escrow funds that Arctic and D&A illegally had retained. As this

Court noted, each owner-operator had "agreed to have Arctic deduct a flat fee of nine cents-per mile from his or her compensation on a weekly basis for the purpose of repairing and maintaining the leased trucking equipment." *Id.* at 786.

The Owner-Operators filed their suit, entitled *Owner-Operator Independent Drivers Ass'n, Inc., et al. v. Arctic Express, Inc., et al.*, No. 2:97-cv-750, in the United States District Court for the Southern District of Ohio on June 30, 1997. They sought return of the maintenance escrow funds that Arctic and D&A had withheld from their compensation and an order preventing Arctic and D&A from transferring the maintenance escrow funds to others. (This brief will refer to the original lawsuit as the "Arctic Litigation.") On September 4, 2011, the District Court certified a class comprised of "[a]ll independent truck owner-operators who have (1) entered agreements with Defendant D&A Associates, Ltd., which purport to lease, with the option to purchase, trucking equipment under the terms of D&A's equipment lease/purchase agreement, and (2) leased that equipment to defendant Arctic Express, Inc. under the terms of Arctic's federally-regulated motor carrier lease agreement." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, No. 2:97-cv-750, 2001 U.S. Dist. LEXIS 24963, at *16 (S.D. Ohio Sept. 4, 2001).

The Owner-Operators claimed in the Arctic Litigation that the failure of Arctic and D&A to return the maintenance escrow funds violated the Truth-in-

Leasing Regulations, 49 C.F.R. § 376, *et seq.*, promulgated under the Motor Carrier Act, 49 U.S.C. § 14101, *et seq*. The District Court agreed, ruling that Arctic's and D&A's "transformation of the maintenance fund into 'non-refundable' monies is unrelated to the cost of maintenance of the Plaintiff's vehicles, and therefore is in violation of § 376.12(k)." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 159 F. Supp. 2d 1067, 1076 (S.D. Ohio 2001). In a later decision, however, the District Court denied the Owner-Operators' motion for summary judgment, finding that there were genuine issues of material fact as to the amounts that Arctic had failed to return. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 288 F. Supp. 2d 895, 905–08 (S.D. Ohio 2003).

On October 31, 2003, on the eve of trial of the Arctic Litigation, Arctic and D&A filed bankruptcy petitions in the United States Bankruptcy Court for the Southern District of Ohio, which were jointly administered as *In re Arctic Express, Inc.*, Case No. 03-66797 (S.D. Ohio Bankr.). On December 15, 2003, the Bankruptcy Court lifted the automatic stay of the Arctic Litigation to enable the District Court to complete the Arctic Litigation and liquidate the class claims.

The Owner-Operators, Arctic and D&A commenced settlement negotiations in the reopened Arctic Litigation. Comerica, which was not a party to the Arctic Litigation, had no involvement or representation in the settlement negotiations. The Owner-Operators and Arctic and D&A agreed among themselves that the

amount of the maintenance escrow funds improperly retained by Arctic and D&A was $5,583,084 (the "Stipulated Amount"). The settlement, reached on May 18, 2004, reflected no compromise and was devoid of any specification as to what, if any, portion of the settlement amount was attributable to alleged acts of Arctic, D&A or Comerica Bank. At the same time, the settling parties agreed that the Owner-Operators would seek to recover no more than $900,000 of the Stipulated Amount from Arctic and D&A, and would not pursue any recovery from the bank (Textron) with which Arctic then had a lending relationship. The District Court approved the settlement agreement between the Owner-Operators, Arctic and D&A on July 16, 2004, in the Arctic Litigation. (Final Judgment, ECF No. 155, PageID#7507.)

In the meantime, on January 16, 2004, the Owner-Operators had filed an adversary proceeding against Comerica Bank in the Bankruptcy Court. *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, D&A Assocs. and Comerica, Inc.*, Adversary Proceeding No. 04-2022 (S.D. Ohio Bankr.). That adversary proceeding remained pending in the Bankruptcy Court until, after reaching their settlement with Arctic and D&A in the Arctic Litigation and obtaining District Court approval, the Owner-Operators filed an unopposed motion to withdraw the bankruptcy reference and assign the adversary proceeding as related to the Arctic Litigation. (Mot. to Withdraw Bankr. Ref., ECF No. 4, PageID#34.) The Court

granted the motion to withdraw the bankruptcy reference on March 28, 2005. (Order, ECF No. 5, PageID#53.)

Nearly eight years after the fact, although Comerica had been neither a party to the Arctic Litigation nor an indemnitor of Arctic, Comerica faced the imposition of a settlement without due process protections or representation.

C. The Action Below

Although the Owner-Operators had known since at least June 30, 1997, that they had been injured by the detention of their maintenance escrow funds and that the checks that they received for their net compensation (along with an itemized accounting that included the escrow deduction) were written on a Comerica account, they waited more than six years to bring suit against Comerica, allowing time to pass, documents to be destroyed by the Owner-Operators, and witnesses to be lost. As set forth above, it was not until January 16, 2004, that the Owner-Operators instituted the adversary proceeding against Comerica in the *In re Arctic* bankruptcy case.

After the bankruptcy reference was later withdrawn to the same District Judge who was handling the Arctic Litigation (Order, ECF No. 5, PageID#53), the Owner-Operators filed a Second Amended Complaint against Comerica, in which they asserted a single claim for "Return of Maintenance Escrow Funds Subject to Statutory Trust." (Second Am. Compl., ECF No. 26, PageID#194.) Comerica

moved to dismiss the Second Amended Complaint on several grounds, including the expiration of the applicable statute of limitations period. (Op. & Order, ECF No. 46, PageID#327–28.) The District Court denied the motion. (*Id.* at PageID#337.)

Following discovery, Comerica and the Owner-Operators filed cross-motions for summary judgment. (ECF Nos. 54–56, PageID#357, 627, 645.) The District Court granted Comerica's motion for summary judgment and denied the Owner-Operators' motion. (Op. & Order, ECF No. 64, PageID#1928.) The District Court found that there was no breach of trust inherent in the alleged handling of the maintenance escrow funds by Comerica. (*Id.* at PageID#1952–53.)

The Owner-Operators appealed to this Court in *In re Arctic Express, Inc. (OOIDA v. Comerica Bank)*, Case No. 09-3463. On March 3, 2011, this Court issued its Opinion in which it found that the Truth-in-Leasing regulations did, in fact, create a statutory trust (a "novel issue," as this Court noted, *see* 636 F.3d at 791), and reversed the District Court's judgment. *Id.* at 801–02. This Court agreed with the District Court, however, that material questions of fact existed with respect to Comerica's statute-of-limitations defense and remanded for "further proceedings consistent with this opinion." 636 F.3d at 802–03.

On August 19, 2011, the District Court sharply curtailed those proceedings when it issued a pretrial ruling that "[t]he question of the amount of damages that

the Defendant owes to the Plaintiffs has therefore already been determined, and the only question remaining for trial is the Defendant's statute of limitations defense." (Order, ECF No. 84, Page ID#2247.) The bench trial began on October 3, 2011. After an extraordinary recess for the purpose of obtaining discovery as to information that the Owner-Operators had previously withheld from production, the trial resumed and concluded on October 31, 2011.

On March 20, 2012, the District Court entered final judgment in favor of the Owner-Operators. (Final Judgment, ECF No. 155, PageID#7507.) The court amended its judgment to include an award of prejudgment interest on March 27, 2013. (ECF No. 171, PageID#7744.) Comerica timely appealed. (*See* Notice of Appeal, ECF No. 159, PageID#7597; Am. Notice of Appeal, ECF No. 172, PageID#7757.)

STATEMENT OF FACTS

A. The Owner-Operators' Underlying Dispute with Arctic and D&A

Plaintiffs-Appellees Carl Harp, Michael Weise, and the Owner-Operator Independent Drivers Association, Inc., brought suit on behalf of a group of independent owner-operator truck drivers who had entered into arrangements with Arctic and D&A to lease tractor-trailer trucks and perform hauling services. (Final Judgment, ECF No. 155, PageID#7515–16.) Each owner-operator had entered into two agreements with Arctic and D&A that established a nine-cents-per mile

maintenance escrow fund to cover repairs for items not covered by warranty. (*Id.*) The escrow funds would not be returned if the driver's relationship with Arctic ended before the full term of the agreement. (*Id.* at PageID#7517.)

The Owner-Operators sued Arctic and D&A on June 30, 1997, arguing that the failure to return the escrow funds to the drivers who prematurely terminated their contracts violated the Truth-in-Leasing regulations, 49 C.F.R. § 376, *et seq.*, promulgated under the Motor Carrier Act, 49 U.S.C. §§ 14101–02 (*Id.* at PageID#7508, 7520.) The Owner-Operators sought an accounting of all transactions relating to the maintenance escrow funds and specifically requested an order "enjoining and restraining Defendants [Arctic and D&A] from transferring, diverting, or otherwise concealing the class members' funds at issue . . . ." (*Id.* at PageID#7520.)

B. Arctic's Relationship with Comerica

Comerica and Arctic maintained a lending relationship from 1991 through 1998. (*Id.* at PageID#7513.) As part of that relationship, Arctic granted Comerica a security interest in its accounts receivable and inventory as collateral for the revolving loan. (*Id.*) Comerica perfected that security interest through publicly filed financing statements as required by the Uniform Commercial Code. (*Id.* at PageID#7514.) Comerica's relationship with Arctic ended in December 1998,

when Arctic entered into a lending relationship with Congress Financial. (*Id.* at PageID#7515.)

C. OOIDA and The Cullen Law Firm Understood That the Trust Funds Could Be Deposited Anywhere and Spent on Anything

Based on their experience in motor carrier litigation generally—and with the Truth-in-Leasing regulations specifically—OOIDA and The Cullen Law Firm both knew that Arctic was not required to segregate or set aside the disputed trust funds. (*Id.* at PageID#7520.) Indeed, they knew that Arctic could lawfully commingle the maintenance escrow funds with other funds and understood that it was common practice for carriers to do so. (*Id.*) They knew that Arctic could use those disputed trust funds to purchase equipment or trucks or to pay general operating expenses. (*Id.*) They knew that motor carriers often spent drivers' money on impermissible items and often overcharged their drivers for repairs. (*Id.*) Paul Cullen, the firm's namesake, knew that "there was nothing in the applicable regulations that would have restricted the method by which Arctic and D&A enjoyed custody of the maintenance escrow funds"—including using driver money as a personal "piggy bank." (*Id.* at PageID#7520–21.)

The complaint against Arctic and D&A contained a specific request to enjoin Arctic and D&A from transferring the escrow funds to a third party: "Plaintiffs . . . request this Court to enter judgment . . . enjoining Defendants from transferring, diverting or otherwise concealing the class members' escrow and other funds[.]"

(*Id.* at PageID#7520) (hereinafter the "Arctic Complaint"). Despite their knowledge of the risk that the funds could be used or transferred by Arctic and D&A, the Owner-Operators made a conscious decision not to take steps to freeze the escrow funds because they decided not to try to "solve all of [their] problems . . . in one suit[.]" (*Id.* at PageID#7521.) The Owner-Operators chose instead to focus their diligence on establishing a private right of action under the Interstate Commerce Commission Termination Act. (*Id.* at PageID#7526.)

At the time that they made this tactical choice, the Owner-Operators had documentary evidence sufficient to identify Comerica as the financial institution that was handling Arctic's banking needs. For example, as early as 1995, nine years before filing suit against Comerica, the Owner-Operators routinely received net compensation checks drawn on Comerica accounts that evidenced the banking relationship between Comerica and Arctic. (*Id.* at PageID#7521.) Importantly, the stub attached to those checks contained a detailed accounting that included, among other debits, the deductions of the maintenance escrow fund. (Final Judgment, ECF No. 155, Page ID#7525) (*see also, e.g.*, Trial Ex. D190, ECF No. 177-4, PageID#7949–51; 7963–65; 7967–69.)

The Owner-Operators also had the experience and ability to conduct public records searches for UCC filings that would have evinced the lending relationship between Comerica and Arctic and Comerica's security interest. (*Id.* at

PageID#7515, 7521.) The Owner-Operators also could have hired an asset investigator to perform an investigation into Arctic's financial arrangements, which the District Court found was within their knowledge. (*Id.* at PageID#7522.) Or they could have asked Arctic directly.

When they started down the path of asking Arctic directly on several occasions, the Owner-Operators made the repeated strategic decision to pull back and not to obtain the information that was available to them. On February 2, 1998, for example, the Owner-Operators served discovery requests on Arctic and D&A that asked where the trust funds were deposited (information, of course, that a UCC public-records search would have shown). (*Id.* at PageID#7523.) Specifically, the Owner-Operators sought:

> 8. All records of account and other documents generated in connection with or relating to the collection, maintenance, deposit, transfer, and/or disposition of any funds deducted by Arctic from its lessors' settlement, escrow funds, or other compensation, including, but not limited to, documents generated in connection with or relating to funds deducted pursuant to the provisions of the Lease Agreement or pursuant to any similar provisions of any similar agreement. . . .
>
> 11. All records of account and other documents generated in connection with or relating to financial institution or other account(s) in which funds deducted from the settlements, escrow funds, or other compensation of Arctic lessors are held or deposited.
>
> 12. All records of account and other documents generated in connection with or relating to the disposition of the balance of funds remaining in any person's "escrow fund" account . . . .

(*Id.* at PageID#7523) (emphasis added).

In earlier drafts of those requests, the Owner-Operators showed their appreciation of the significance of such information and demonstrated their own ability to ask even more pointed questions about how Arctic maintained the escrow funds:

> 25. Identify all financial institution account(s) in which all monies deducted from the compensation of all persons who are acting or have acted in the capacity of lessor under a lease relationship with Arctic are held or deposited, ~~including the account number(s) and the name(s), address(es), and telephone number(s) of the financial institution with which each account is kept.~~

(Trial Ex. D166, ECF No. 177-3, PageID#7904.) Inexplicably, the Owner-Operators decided not to serve the questions as originally drafted.

Six months later, in August 1998, the Owner-Operators' counsel traveled to Columbus, Ohio, to review documents that Arctic had made available for inspection. (Final Judgment, ECF No. 155, PageID#7525.) The Owner-Operators selected to be shipped back to their counsel's offices in Washington, D.C. four boxes of documents. (*Id.*) Those boxes contained thirty-three checks drawn on a Comerica Bank account, attached to owner-operator settlement sheets, which specifically identified the actual deductions for the maintenance escrow funds that Arctic was retaining from the drivers. (*Id.* at PageID#7525–26.)

D. The Owner-Operators Stumble onto Comerica's Identity

At a bankruptcy hearing on December 2, 2003, shortly after Arctic had filed its voluntary petition for bankruptcy on October 31, 2003, an Arctic representative

testified that from 1991 to 2003 Arctic had had lending relationships with three different financial institutions, including one with Comerica from 1991 to 1998. (*Id.* at PageID#7530.) The Owner-Operators' counsel subsequently testified that it was this evidence that finally caused the Owner-Operators to sue Comerica. (*Id.*) The Owner-Operators brought this action on January 15, 2004, over six-and-one-half years after they indisputably had knowledge of their alleged injury (as reflected by their filing of the Complaint against Arctic and D&A) and over two-and-one-half years after expiration of the pertinent limitations period.

E. The Owner-Operators' Settlement of the Arctic Litigation

On May 18, 2004, the Owner-Operators entered into their $5,583,084 settlement agreement with Arctic and D&A in the Arctic Litigation. (Def.'s Mot. for Summ. J., ECF No. 54, Ex. 6, Morrison Aff. & Aff. Ex. A, Agnt. for Compromise of Controversies, at 6 ¶ 3.a., PageID#608, 615.) Despite the contemplated consideration of $5.5 million, the settlement agreement further provided that "[i]n no event shall [Owner-Operators] recover or seek to recover more than $900,000 from Arctic." (*Id.* at 8 ¶ 3.c, PageID#617.) Arctic thus walked away owing only $900,000 of the $5.6 million amount for which it had settled. In the settlement agreement, the Owner-Operators also agreed not to bring suit against Arctic's then-lender, Textron. (*Id.* at 10 ¶4.b, PageID#617.) The

District Court approved the settlement on July 16, 2004. (Final Judgment, ECF No. 155, PageID#7507.)

F. Litigation of This Case: The Owner-Operators v. Comerica

On March 28, 2005, the bankruptcy reference was withdrawn, bringing this case before the District Court. (Order, ECF No. 5, PageID#53.) (granting Mot. to Withdraw Reference). After the close of discovery, the parties filed cross-motions for summary judgment. (*See* ECF Nos. 54–58, PageID#357, 627, 645.) On March 16, 2009, the District Court issued an Opinion and Order granting summary judgment to Comerica. (Op. & Order, ECF No. 64, PageID#1928.)

The District Court rejected most of the other grounds on which Comerica had based its summary judgment motion. Relevant to this appeal, the District Court ruled that it was lawful to apply the Interstate Commerce Commission Termination Act retroactively to recognize private rights of action by drivers whose leases pre-dated the January 1, 1996, effective date of the Act (*id.* at PageID#1943–45) ("[T]his Court now decides in this action that application of the ICCTA to pre-1996 leases carries no impermissible retroactive effect."). Notwithstanding the factual dispute pertaining to the claimed damages that the Owner-Operators sought to collect from Comerica, the District Court also declined to rule that the Owner-Operators needed to present evidence of damages (*id.* at PageID#1945–46).

The Owner-Operators appealed to this Court in *In re Arctic Express, Inc. (OOIDA v. Comerica Bank)*, Case No. 09-3463. This Court found that the Truth-in-Leasing regulations did, in fact, create a statutory trust (a "novel issue," said this Court, 636 F.3d at 791) and reversed the District Court. *Id.* at 796–98. This Court agreed with the District Court that material questions of fact existed with respect to Comerica's statute-of-limitations defense and remanded the case for "further proceedings consistent with this opinion." *Id.* at 803.

Following remand, the parties engaged in discovery to determine what the Owner-Operators knew about Comerica and when they were able to know it. (Order, ECF No. 84, PageID#2241–45.)

Before trial, Comerica renewed its attempt to litigate the damages issue, by specifically asking that the District Court require the Owner-Operators to present evidence of damages at trial. (Pre-Trial Brief, ECF No. 80, PageID#2097–99.) The District Court rejected Comerica's request and, relying on its prior opinion, held that:

> The Arctic Litigation resolved issues regarding the rights and obligations relating to the maintenance escrows as between Arctic and the Class. . . . This suit is an action to collect property that this Court previously awarded to the Arctic Class. . . . This Court has already determined in this action that the maintenance escrows are trust property. The entire amount of trust property was determined in the Arctic Litigation to be $5,583,084, which is the amount of maintenance escrows plus interest that Arctic owed to the Class. If this Court determines that the maintenance escrows were included in an Arctic account with Comerica, and if this Court determines that

> Comerica withdrew funds from that account in breach of trust, then Comerica would be liable for the entire amount of trust property . . . .

(Order, ECF No. 84, PageID#2241.) The District Court incorrectly found that this Court had summarily addressed and foreclosed the question of the amount of damages "as a matter of law," and ruled that "[t]he question of the amount of damages that the Defendant owes to the Plaintiffs has therefore already been determined, and the only question remaining for trial is the Defendant's statute of limitations defense." (*Id.* at PageID#2247.)

The bench trial opened on October 3, 2011. (Final Judgment, ECF No. 155, PageID#7534.) On the second day, the District Court and Comerica learned that the Owner-Operators had not produced any documents from OOIDA. (Order, ECF No. 132, PageID#4635.) The District Court recessed the trial (Final Judgment, ECF No. 155, PageID#7531), imposed a financial sanction on counsel for the Owner-Operators for their failure to comply with the Court's discovery order (Order, ECF No. 132, PageID#4636), and scheduled the trial to continue on October 31, 2011. (Final Judgment, ECF No. 155, PageID#7512.)

It was during this interim discovery period that Comerica learned that, in 2009, OOIDA had destroyed "most of its documents related to the Arctic Litigation . . . because they needed storage space." (*Id.* at PageID#7532.) The destroyed "[d]ocuments related to the Arctic Litigation, the 2001 D&A bankruptcy, the 2003 Arctic bankruptcy, and the 2004 Comerica case . . . ." (*Id.* at PageID#7533.)

During trial, Comerica made an offer of proof to show that the Owner-Operators had not established the amounts they claimed Comerica received, as their alleged damages. (ECF No. 145, PageID#6956.) Once again, the District Court refused. (Op. & Order, ECF No. 152, PageID#7433–45.)

The District Court entered final judgment on March 20, 2012. (ECF No. 155, PageID#7507.) The court found that the Owner-Operators and their counsel were aware of numerous facts that could have made them aware of Arctic's lending relationship with Comerica and of Arctic's deposit of the escrow funds with Comerica. (*Id.* at PageID#7512–34.)

The court also found that the Owner-Operators and their counsel had spoliated evidence (*id* at PageID#7532–34) and adopted two adverse inferences against the Owner-Operators: "(1) As of September 29, 1997, Plaintiffs and their counsel were aware that OOIDA's members were investigating Arctic's maintenance fund retention practices; and (2) diligent counsel would have been prompted to obtain knowledge, to the extent possible, of Arctic's maintenance fund retention practices." (*Id.* at PageID#7542.) "The [district court's] adverse inference findings, in other words, effectively places [Owner-Operators] on inquiry notice of the need to investigate Arctic's treatment of the maintenance escrow funds as of . . . September 1997." (*Id.* at PageID#7561.)

Notwithstanding these adverse inferences, the District Court found that the statute of limitations did not bar the Owner-Operators' claim against Comerica. (*Id.* at PageID#7564.)

As a result of the District Court's ruling, financial intermediaries like Comerica now are subject to being sued decades after the end of a financial relationship over long-closed accounts. All that sophisticated plaintiffs like the Owner-Operators, represented by experienced attorneys such as The Cullen Law Firm, need to do is decide that it is not the best "strategy" to search for the repository of such trust funds, collectively shrug their shoulders, and somehow claim that they "just didn't know." That result would be dysfunctional as the law of this Circuit.

SUMMARY OF THE ARGUMENT

This Court should vacate and reverse the judgment of the District Court because, as a matter of law, the District Court erred in failing to enforce the statute of limitations, which completely bars the claim of the Owner-Operators against Comerica. Moreover, even if the Owner-Operators had timely filed that claim, they would not have been entitled to judgment in the amount erroneously set by the District Court.

ARGUMENT

A. Standard of Review

On appeal from judgment entered after a bench trial, this Court reviews "the district court's findings of fact for clear error and its conclusions of law de novo." *MACTEC, Inc. v. Bechtel Jacobs Co., LLC*, 346 F. App'x 59, 68 (6th Cir. 2009) (citing *Pressman v. Franklin Nat'l Bank*, 384 F.3d 182, 185 (6th Cir. 2004)). "[M]ixed questions of law and fact [are reviewed] de novo." *Id.*

Comerica does not dispute the District Court's factual findings, which were taken almost entirely from the Findings of Fact (ECF No. 149) and Memorandum in Support (ECF No. 150) that Comerica submitted at the close of the bench trial. (*Compare* Comerica Findings of Fact & Mem. Supp., ECF Nos. 149 & 150, *with* Final Judgment, ECF No. 155.) Comerica believes that the District Court improperly applied the governing law to those facts. Thus, these mixed questions of law and fact should be reviewed de novo. *MACTEC*, 346 F. App'x at 68.

B. The Statute of Limitations Bars the Owner-Operators' Claim

This Court recognized in its previous opinion that the Owner-Operators' claim is governed by the four-year statute of limitations set forth in Ohio Revised Code § 2305.09, and that federal law determines when the limitations period began to run. 636 F.3d at 802. Under federal law, a statute of limitations period starts when the plaintiff "knows or has reason to know of the injury which is the basis of his action.'" (Op. & Order, ECF No. 155, PageID#7547) (citing *Kennedy v. City of*

Zanesville, 505 F. Supp. 2d 456, 489 (S.D. Ohio 2007) (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)); *see also Shannon v. Recording Indus. Ass'n*, 661 F. Supp. 205, 210 (S.D. Ohio 1987) ("[T]o commence the running of the limitations period, it is only required that plaintiff know or have reason to know of the injury which is the basis of his action . . . ."). That is, the "limitations clock starts ticking 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation.'" (Final Judgment, ECF No. 155, PageID#7544) (citing *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 409 (6th Cir. 2010)).

The evidence at trial demonstrated that the Owner-Operators decided not to exercise any diligence to locate their trust funds. Counsel for the Owner-Operators testified that they made a strategic decision not to look for the funds. The District Court's Final Judgment ignored these admissions and established in this Circuit a new rule that a party may bring suit against a bank for a failure to return money almost ten years after the party learns of the loss and more than six years after it sues a co-defendant for the same loss. The District Court ruled that, despite the Owner-Operators' knowledge of their injury, despite the fact that the Owner-Operators knew that their funds were held in a financial institution whose identity was imprinted on their compensation checks, and despite the fact that the Owner-Operators argued forcefully throughout this case that the maintenance funds were

trust funds, the Owner-Operators were under no obligation whatsoever to try to track the whereabouts of those funds. The District Court concluded that the Owner-Operators' action against Comerica—seeking restitution of the escrow monies—accrued at a different point in time than its claim against Arctic—which sought restitution of the same monies.

The District Court erred in this ruling. The Owner-Operators "discovered" the acts (i.e., the detention of the maintenance escrow funds) when they learned that Arctic would not disburse those monies to them. In the words of their Second Amended Complaint, "[u]pon termination of their Agreements with Arctic, Class members knew that their maintenance escrow funds had been forfeited." (*See* Second Am. Compl. ¶ 26, ECF No. 26, PageID#192–93.) They chose not to exercise reasonable diligence to pursue their claims. If they had exercised reasonable diligence (or any diligence at all), they would have "discovered" their alleged claim against Comerica well within the four-year period for assertion of that claim.

1. The Owner-Operators Knew That They Were Injured When Their Money Was Gone.

The Owner-Operators knew they were injured on the day that money belonging to them was taken. Plaintiff-Appellee Carl Harp knew in 1994 that his maintenance escrow funds had been taken. (Final Judgment, ECF No. 155, PageID#7516.) In March 1995, within a few weeks of learning that his trust funds

were gone, Mr. Harp contacted OOIDA about taking legal action. (*Id*. at PageID#7517.) Similarly, in December 1996, Plaintiff-Appellee Michael Wiese wrote to OOIDA that he was aware that he would not get his maintenance funds back from Arctic, and that he believed such action would be in violation of federal law. (*Id*. at PageID#7518; Trial Ex. P39, ECF No. 177, PageID#7779–80.) And in the mid-1990s, Plaintiff-Appellee OOIDA began receiving numerous complaints from its members that Arctic was withholding trust funds from drivers when their leases were terminated. (*Id*. at PageID#7515.) OOIDA's president believed early on that Arctic and D&A were "crooks." (Trial Tr. at PageID#4999.) OOIDA concluded that Arctic and D&A "had no intention of returning the escrow accounts[.]" (Final Judgment, ECF No. 155, PageID#7519.)

At the very latest, the Owner-Operators knew of their injury on June 30, 1997, the day that they sued Arctic and D&A. (Final Judgment, ECF No. 155, PageID#7519.) In the Arctic Complaint, the Owner-Operators brought a claim for "Unauthorized Deduction and Non-Return of Escrow Funds" (Arctic Compl. at 19) (emphasis added); they sought the equitable return of those funds and an order preventing their transfer. (Final Judgment, ECF No. 155, PageID#7520 & Trial Ex. D81, ECF No. 177-1, PageID#7783).

Even if the Owner-Operators were not aware of Comerica's involvement in June 1997 (which they were), under well-settled Sixth Circuit law, that is of no

import. The statute of limitations is not tolled while a plaintiff attempts to determine the identity of the alleged wrongdoer. *Dowdy v. Prison Health Svcs.*, 21 F. App'x 433, 434 (6th Cir. 2001) ("The statute of limitations is not tolled while a plaintiff attempts to identify the correct defendants . . . ."); *Schultz v. Davis*, 495 F.3d 289, 292–93 (6th Cir. 2007) (holding that discovery rule stops tolling the statute of limitations where plaintiff "knew or was put on notice . . . that she was injured as a result of allegedly wrongful or tortious conduct, although she may not have known the specific tortfeasors") (emphasis added); *Neff v. Std. Fed. Bank*, 2007 U.S. Dist. LEXIS 71976, at *14 (S.D. Ohio Sept. 27, 2007) (rejecting argument that statute of limitations is tolled until the plaintiff discovers the identity of the alleged tortfeasor because "the statute of limitations for fraud claims is tolled until the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained-of injury") (emphasis in original, internal quotations omitted); *Bell v. Hall*, 2007 U.S. Dist. LEXIS 54001, at *4-5 (W.D. Ky. July 23, 2007) ("The statute of limitations began to run on the day [plaintiff] became aware of her injury . . . . Because [the plaintiff] was clearly aware that a wrong had occurred, it was her duty to identify the proper defendants within the statute of limitations period.").

The Owner-Operators knew that their money was gone and they asked the court to order its return and to block any further transfers of those funds to third

parties (like Comerica) in the meantime. Just because they may not have sued all the potential defendants, their decision to delay bringing Arctic's financial institution, Comerica, into the original action (which would have allowed Comerica to challenge the evidence and the damages claims and, if it had been filed prior to the end of the lending relationship, to take steps to protect its own interests vis-à-vis the borrower) does not toll the statue of limitations. The District Court erred in finding otherwise.

2. The Owner-Operators Failed to Act with Diligence to Discover the "Acts" That Constitute the Violation.

Even assuming that the Owner-Operators were unaware of their injury by the time they filed the Arctic Complaint in June 1997, the overwhelming evidence presented at trial was that the Owner-Operators failed to exercise reasonable diligence in discovering "the acts that constituted the alleged violation." *Winnett*, 609 F.3d at 409.

a. What Are the "Acts" Constituting the Violation?

The District Court recognized that there was disagreement between the parties as to what "acts" constituted the violation. (Final Judgment, ECF No. 155, PageID#7547.) This Court should review this mixed question of law and fact de novo. *MACTEC*, 346 F. App'x at 68.

In answering this question, the District Court incorrectly reasoned that because the Owner-Operators had brought separate and different causes of action

against Arctic and Comerica, the two defendants had participated in different "acts." The District Court also incorrectly concluded that the "two causes of action arose from slightly different facts," and that the Owner-Operators were not aware of their claim against Comerica until they "had reason to know[] that the escrow funds had been transferred into Comerica's control in breach of the statutory trust." (Final Judgment, ECF No. 155, PageID#7548.)

The District Court erred in finding that the claims arise from different acts. That finding squarely disregarded this Court's determination prior to remand that that the "acts" giving rise to Arctic's and Comerica's liability were one and the same: "Arctic breached its trust obligations to plaintiffs by encumbering the escrow funds, and dissipating trust assets, through its lending relationship with Comerica." *Arctic Express*, 636 F.3d at 801 (emphasis added). Moreover, the Owner-Operators' pleadings in each case make clear that they believed—and alleged—the acts giving rise to each lawsuit to be the same. In their original Complaint against Arctic, the Owner-Operators brought suit for "Non-Return of Escrow Funds." (Arctic Litig. Compl., Count II, ECF No. 56-21, PageID#1181.) The Owner-Operators brought suit against Comerica for the same thing—"Recovery of Maintenance Escrow Funds . . . ." (Compl., Count III, ECF No. 58-3, PageID#1783.) The claims plainly arose out of the same "acts," the non-return

of maintenance escrow funds. The District Court erred when it concluded otherwise.

The District Court further erred when it determined that the Owner-Operators had asserted different claims against Arctic and Comerica and that these claims somehow gave rise to different statute of limitations triggers. Specifically, the court found that the Owner-Operators brought suit against Comerica "to recover under a federal common law trust theory," and against Arctic for failure to return the "maintenance escrows within the mandated time period in violation of 49 C.F.R. § 376.12(k)." (Final Judgment, ECF No. 155, PageID#7547–48.) But the discovery rule is not tolled for different types of causes of action. What matters is what were the underlying acts that caused the injury, and here, the acts themselves were the same—the (alleged) taking of the Owner-Operators' money. The Owner-Operators had knowledge of the acts (essentially, the taking of the money and dissipation of the trust assets) in 1997 when they filed the Arctic Litigation.

It is irrelevant whether the Owner-Operators were aware of the precise nature of the relationship between Arctic and Comerica. When a plaintiff becomes aware of an injury, the statute of limitations will not be tolled even if the plaintiff is unaware of all of the facts underlying the claim. "This inquiry focuses on the harm incurred, rather than the plaintiff's knowledge of the underlying facts which gave

rise to the harm." *Friedman v. Estate of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991); *see also Shannon*, 661 F. Supp. at 210 ("[T]o commence the running of the limitations period, it is only required that plaintiff know or have reason to know of the injury which is the basis of his action. It is not required that plaintiffs know the facts . . . ."). The District Court failed to observe this well-settled law.

Indeed, when they finally brought suit against Comerica, the Owner-Operators relied on general facts alone and did not spell out the details of Arctic's lending relationship with Comerica or allege that Arctic had transferred the funds in breach of trust. (Compl., Count III, ECF No. 58-3, PageID#1783.) Instead, in their filing in 2004, the Owner-Operators alleged only: "Upon information and belief, [Arctic and D&A] deposited or caused to be deposited maintenance escrow funds deducted from [Owner-Operators'] compensation into accounts maintained with Comerica . . . ." (*Id.*) The Owner-Operators themselves viewed this simple fact—a fact they had known for years (having in hand Mr. Harp's Comerica check and the boxes of driver settlement sheets, attached to Comerica checks, that specifically identified the escrow withholdings)—as a sufficient basis upon which to sue Comerica.

The District Court found that the Comerica checks in the Owner-Operators' possession only would have "awakened [the Owner-Operators] to the fact that Arctic was banking with Comerica[.]" (Final Judgment, ECF No. 155,

PageID#7556.) But, that is all that the Owner-Operators alleged in their original complaint against Comerica filed in 2004. The Owner-Operators themselves believed that this general information was sufficient for the Owner-Operators to state a claim.

Finally, but just as importantly, the District Court's finding in this case of what "acts" constitute the alleged violation directly contradicted its earlier holding in the Arctic Litigation. After D&A filed for bankruptcy in 2001, the Owner-Operators sought to amend the Arctic Complaint to bring claims against Arctic's officers, arguing that the discovery rule applied and that the new claims did not accrue until Arctic became insolvent. *Owner-Operator Indep. Drivers Ass'n v. Arctic Express Inc.*, No. 2:97-cv-750, 2003 U.S. Dist. LEXIS 4217, at *17 (S.D. Ohio Jan. 28, 2003) ("[T]he Plaintiffs argue that their claims for breach of fiduciary duty did not accrue until the Defendants allowed the escrow funds to be dissipated."). Contrary to the present decision on appeal, the District Court held in the Arctic Litigation that the Owner-Operators had suffered immediate injury at the time that the maintenance funds were wrongly withheld, thus starting the statute of limitations clock. *Id.* at *19 ("[T]he Plaintiffs suffered actual harm as soon as the Defendants failed to return their escrow maintenance funds within the mandated forty-five-day period"). The District Court dismissed the claims against Arctic's officers. *Id.* at *21. Yet the District Court offered no rationale as to why a

different result should obtain here. (Final Judgment, ECF No. 155, PageID#7545.) It should not.

b. The Owner-Operators Chose Not to Exercise Any Diligence After Becoming Aware of Their Injuries.

Even if there had been distinct acts involved giving rise to the claims against Arctic and Comerica, the only evidence before the District Court was that the Owner-Operators chose not to conduct any diligence to uncover the acts that gave rise to their injury, despite being on inquiry notice as of September 29, 1997. (Final Judgment, ECF No. 155, PageID#7527.)

"In defining the concept of due diligence, this court has 'looked to what event should have alerted the typical lay person to protect his or her rights.'" *See Michigan United Food & Commercial Workers Unions v. Muir*, 992 F.2d 594, 600 (6th Cir. 1993) (quoting *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991)). Upon the knowledge of the possibility of wrongdoing itself, a plaintiff becomes subject to an affirmative duty to investigate. *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.*, 755 F.2d 1231, 1237 (6th Cir. 1985) ("[I]nformation sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence.") (emphasis added).

The District Court answered the question of "what event should have alerted the typical lay person to protect his or her rights" when it announced its adverse inference arising out of the Owner-Operators' spoliation of documents: "As of

September 29, 1997, . . . diligent counsel would have been prompted to obtain knowledge, to the extent possible, of Arctic's maintenance fund retention practices." (Final Judgment, ECF No. 155, PageID#7527.) "The [District Court's] adverse inference findings, in other words, effectively place[d] [the Owner-Operators] on inquiry notice of the need to investigate Arctic's treatment of the maintenance escrow funds as of . . . September 1997." (*Id.* at PageID#7561.) That is, as of September 29, 1997, the Owner-Operators were on inquiry notice that they needed to protect their rights.

The Owner-Operators failed to do so. The Owner-Operators testified that they affirmatively decided not to locate or secure the Owner-Operators' trust funds. (*Id*. at PageID#7521.) The Owner-Operators admitted that they instead chose to focus their diligence on establishing a private right of action under federal law. (*Id.* at PageID#7526.) "[The Owner-Operators] and their counsel decided they were 'not going to try and solve all of the problems of the owner-operators in one suit . . . .'" (*Id*. at PageID#7521.) The District Court found that the Owner-Operators "never looked" until 2003. (*Id.* at PageID#7531.)

The Owner-Operators' admission establishes that they affirmatively chose not to conduct any diligence, let alone "reasonable diligence." *Winnett*, 609 F.3d at 409. The discovery rule is not a refuge for parties who decide not to protect their rights. The effect of failing to act within the statutory period and the prejudice to

Comerica were real—records were destroyed by the Owner-Operators, memories faded, witnesses were gone, and the collateralized lending relationship had ended with the claim being unbeknownst to Comerica.

A party who is willfully ignorant—and refuses to observe the duty to investigate—cannot invoke the protections of the discovery rule. "[T]he asserted actual knowledge of plaintiffs is not determinative if they did not act as reasonable persons and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue." *Winnett*, 609 F.3d at 409 (quoting *Noble v. Chrysler Motors Corp.*, 32 F.3d 997, 1000 (6th Cir. 1994)); *cf. Sevier*, 742 F.2d at 273 ("To hold that a statute of limitations does not begin to run until a plaintiff happens to consult counsel would extend the limitations period indefinitely, thereby defeating the purpose of the statute of limitations.").

From the mid-1990s through the 2003 bankruptcy, the Owner-Operators were represented by sophisticated, experienced counsel who decided that looking for the maintenance funds was not important. (Final Judgment, ECF No. 155, PageID#7512–13.) Mr. Cullen, who was the supervising attorney, had served as OOIDA's general counsel, had extensive experience in motor carrier transportation and truth-in-leasing law, and had brought a number of class actions on OOIDA's behalf. (*Id*. at PageID#7512–13.) Likewise, OOIDA is a sophisticated plaintiff whose mission is to protect and advocate for its drivers. (*Id*. at PageID#7512.)

The sophisticated nature of the parties heightens their duty to investigate. *See Muir*, 992 F.2d at 600 (the obligation to perform reasonable diligence is heightened when the Plaintiff is a sophisticated entity—noting that plaintiffs "were hardly in the position of a 'typical lay person'"). An informed strategy decision made by a sophisticated party and its counsel not to look for the funds or the recipient of those funds does not toll the statute of limitations.

The only evidence before the District Court was that the Owner-Operators decided not to conduct due diligence after being on inquiry notice starting September 29, 1997. The Owner-Operators continued to refuse to conduct any due diligence despite the following evidence alerting Owner-Operators to issues concerning the funds:

- The July 1996 lawsuit between the two co-founders of Arctic, in which Mr. Durst and his wife were alleged to have misappropriated all of Arctic's corporate property (Final Judgment, ECF No. 155; PageID#7522; Trial Ex. D215, ECF No. 177-7, PageID#9462);
- OOIDA and The Cullen Firm failed to make any efforts to obtain information from Arctic's maintenance fund supervisor (*Id*. at PageID#7527–28);
- The August 1998 review of documents, in which the Owner-Operators located thirty-three settlement packets showing settlement checks drawn on a Comerica account with corresponding settlement sheets (*Id*. at PageID#7525–26; Trial Ex. D190, ECF Nos. 177-4 & 177-5, PageID#7917);
- D&A declared bankruptcy in October 2001, and it was alleged in the bankruptcy proceedings that Arctic was on the brink of insolvency (*Id*. at PageID#7530; Trial Ex. D194, ECF No. 177-6, PageID#9432);

- While D&A was in bankruptcy, the Owner-Operators withdrew a motion that they had filed that asked the court to order Arctic/D&A to set aside the money that was owed to the drivers (*id.*);

- In April 2002, Arctic's counsel informed the Owner-Operators that the trust funds were held in an account and had long since been withdrawn (Final Judgment, ECF No. 155, PageID#7524);[1]

- The January 2001 lawsuit in which OOIDA and The Cullen Firm brought a claim against Huntington Bank for trust funds held on behalf of a trucking company (*id.* at PageID#7528; Trial Ex. D129, ECF No. 177-2, PageID#7843); and

- On November 16, 2001, while in bankruptcy, D&A filed a financing statement in the bankruptcy court and disclosed its financing relationship with Comerica Bank and, in so doing, provided Comerica's address and the name of the lending officer (*id.* at PageID#7530).

In every instance in which the Owner-Operators were given documents or information that should have led them to inquire, they steadfastly proceeded with their predetermined strategy of doing absolutely nothing. The Owner-Operators acknowledged that they chose to do nothing until Arctic filed for bankruptcy in 2003—six years after the Arctic Complaint was filed. (*Id.* at PageID#7528.)

At every turn, from the time that the Owner-Operators first learned that their trust funds were not going to be returned, up until they "discovered" Comerica in 2003, the Owner-Operators repeatedly decided not to conduct any diligence.

[1] Events post-dating the January 2000 statute of limitations cutoff date demonstrate that the Owner-Operators stuck with their decision not to engage in any diligence.

Given this uncontradicted testimony, the District Court erred in concluding that the limitations period had not run.

3. Had They Exercised Diligence, the Owner-Operators Would Have Discovered Comerica.

a. Comerica Was Not Concealed.

Comerica's relationship with Arctic was never "concealed." Had the Owner-Operators conducted any diligence, even the most basic inquiry, they would have found Comerica. Under the circumstances, the Owner-Operators failed to meet their burden of showing that they were entitled to bring an otherwise out-of-time claim through application of the discovery rule. *Hayes v. Norfolk S. Corp.*, 25 F. App'x 308, 313–14 (6th Cir. 2001).

A plaintiff is only entitled to seek relief from the discovery rule if she shows that her ignorance of her injury is (1) the result of fraud or concealment on behalf of the defendant that (2) could not be discovered through diligence. *Sevier*, 742 F.2d at 273 (citing *Briley v. State of Cal.*, 564 F.2d 849 (9th Cir. 1977)); *see also Briley*, 564 F.2d at 855 ("The established rule . . . is that, where a plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin to run until discovery of the injury."); *see also Dowdy*, 21 F. App'x at 434–35 ("The discovery rule can toll the running of the statute of limitations, but only when the plaintiff is

not put on inquiry because she has no knowledge that an injury has occurred."); *Dixon*, 928 F.2d at 215; *Friedman*, 929 F.2d at 1159.

The fact that a financial institution may have in its possession the Owner-Operators' funds was not concealed from the Owner-Operators; unless they truly believed that Arctic was keeping the funds in shoeboxes full of loose cash and coins at the office, they knew from the outset that a financial institution necessarily was involved. On February 2, 1998, the Owner-Operators served discovery requests on Arctic and D&A that asked where the trust funds were deposited. (Final Judgment, ECF No. 155, PageID#7523). In earlier drafts of those requests, the Owner-Operators had planned to ask even more pointed questions about Arctic's account numbers at the financial institution where it kept its accounts. (Final Judgment, ECF No. 155, PageID#7523; Trial Ex. D166, ECF No. 177-3, at PageID#7904.) The Owner-Operators knew that they were looking for a financial institution generally and the account in which the funds were deposited specifically.

Nor was Comerica's identity concealed. In August 1998, the Owner-Operators' counsel traveled to Columbus, Ohio, to review documents the Arctic had made available for inspection, and selected four boxes of documents to be shipped back to Washington D.C. (*Id.* at PageID#7525.) These boxes contained thirty-three checks drawn on a Comerica Bank account, attached to owner-operator

settlement sheets, which showed the actual deductions for the maintenance escrow funds being retained from the drivers. (*Id.* at Page ID#7525–26.) Again, Arctic did nothing to "conceal" Comerica's identity or role.

Likewise, Arctic's lending relationship with Comerica was publicly available information included in UCC financing statements. (*Id*. at PageID#7514.)[2] It was a matter of public record that Arctic had a lending relationship with Comerica, and that Comerica had a lien on Arctic's and D&A's accounts receivable—accounts receivable that the Owner-Operators consistently believed and successfully argued to this Court were impressed with a statutory trust containing their maintenance escrows. (*Id*. at PageID#7515.) The dots were right there, nearly connecting themselves.

It is undisputed that the Owner-Operators knew that they needed to identify Arctic's financial institution, that Arctic's banking relationship was disclosed to the Owner-Operators in the form of nearly three dozen checks, and that Comerica's lending relationship with Arctic was publicly available information. Nothing was

[2] UCC financing statements ensure that parties (and the world) receive notice of a financing arrangement like that between Comerica and Arctic. *Hunter v. Soc'y Bank & Trust*, 149 B.R. 834, 848 (Bankr. N.D. Ohio 1992) ("[T]he purpose of a financing statement is to give notice of the existence of a security interest."); *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274, 1279 (N.D. Ohio 1970) ("This filing of the financing statement gives notice to the world that secured party has a security interest in the collateral.").

being concealed from the Owner-Operators. The statute of limitations had run, and the District Court should have dismissed the Owner-Operators' claim against Comerica with prejudice.

b. The District Court Erred as a Matter of Law in Finding That the Statute of Limitations Had Not Run.

Notwithstanding this overwhelming evidence in favor of Comerica's statute of limitations defense, including the District Court's explicit finding that the Owner-Operators were on inquiry notice as of September 1997, the District Court nonetheless found for the Owner-Operators on the slimmest of grounds. The lower court found that because discovery orders allegedly halted and then stayed the discovery that would have permitted the Owner-Operators to uncover Comerica's identity, the statute of limitations period had not run. (Final Judgment, ECF No. 155, PageID#7561–63.) In reaching that conclusion, the District Court erred.

Well-established law holds that discovery and stay orders do not toll the statute of limitations. *Dowdy*, 21 F. App'x at 434–45; *see also Korody-Colyer Corp. v. Gen. Motors Corp.*, 828 F.2d 1572, 1574 (Fed. Cir. 1987) (rejecting argument that stay of discovery tolled period for party to amend its complaint because the stay was only related to discovery and did not prohibit party from amending its complaint); *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429, 444 (S.D. Ohio 1991) ("The stay order contained no language which would

have precluded plaintiff from seeking to amend its complaint, and plaintiff does not adequately explain its failure to do so.").

Briefly acknowledging, and then disregarding this line of cases, the District Court found that following this well-established precedent would be "unfair." (Final Judgment, ECF No. 155, PageID#7561.) Yet, statutes of limitations are bright-line rules intended to "preclude the presentation of stale claims and encourage diligence on the part of those whose rights have been infringed upon." *Amalgamated Indus. v. Tressa, Inc.*, 69 F. App'x 255, 263 (6th Cir. 2003). What would be "unfair" would be to permit the Owner-Operators to bring and prevail upon an out-of-time claim against Comerica—years after Comerica had ended its collateralized lending relationship with Arctic—and well after Comerica could have done anything to protect itself.

Moreover, the lower court's finding that such a result would be "unfair" arose out of two assumptions unsupported by any evidence. First, the District Court concluded that "[i]t is not reasonable, however, in hindsight to require [the Owner-Operators'] to have prepared such discovery in the two to three months interim . . . [before] the Magistrate's limiting order." (Final Judgment, ECF No. 155, PageID#7561.) The Owner-Operators' understanding that their money had been taken, however, did not start on the date the case was filed. The Owner-Operators knew that their money was gone by the mid-1990s. (*Id*. at

PageID#7515.)[3] The window was not two to three months—it spanned a range of many years.

Second, the District Court ignored the fact that the Owner-Operators could have located Comerica outside the confines of the litigation. Illustratively, outside of discovery, The Cullen Law Firm was able to determine all of Arctic and D&A's corporate affiliations including Arctic Warehouse Services, Limited, EQI Investments, LLC, EQI Transport and Elite Express. (*Id.* at PageID#7522.) (Notably, the law firm's files do not have any additional information about these companies. (*Id.*)) The Cullen Law Firm also has hired and knows how to hire an asset investigator. The Owner-Operators' counsel hired Ross Financial to investigate the assets of Arctic and its officers. (*Id.*) (Those documents, however, are also missing from The Cullen Law Firm's files. (*Id.*)) The Cullen Law Firm also had access to Dun & Bradstreet reports used to identify debtor-creditor relationships. (*Id.* at PageID#7525.) UCC lien searches were available to locate Arctic's lending relationship with Comerica. (*Id.* at PageID#7515.) The Owner-Operators could have, but did not, amend the complaint to bring suit against a

[3] The complaint was in draft form before it was filed in June, 1997. (Arctic Compl.) The discovery requests were served on February 2, 1998 (Final Judgment, ECF No. 155, PageID#7523), although drafted in November of 1997 (Trial Ex. D166, ECF No. 177-3, PageID#7854).

"John Doe" defendant (*id*. at PageID#7524); or, with the lien searches and Mr. Harp's check in hand, sued Comerica "upon information and belief" that the trust funds had been deposited into a Comerica account—as they ultimately ended up doing years later. (*Id*. at PageID#7516.) Formal discovery was not the only means that the Owner-Operators had at their disposal. Indeed, to equate diligence with formal discovery alone would put the cart before the horse. Our legal system does not contemplate first taking formal discovery, then asserting a legal claim.

In the end, the District Court ended up giving the Owner-Operators a pass, reasoning that other "pressing" matters (Final Judgment, ECF No. 155, PageID#7561) allegedly precluded them from looking for Comerica and tolled the statute of limitations. Being too busy does not toll the statute of limitations. *Chasteen v. Mack*, 2013 U.S. Dist. LEXIS 72103, at *17 (S.D. Ohio May 21, 2013) ("The fact that Plaintiff chose to invest his available litigation time as he did does not mean this Court is bound to bless that investment by awarding Plaintiff equitable tolling for his wasted time."). If "pressing" matters were enough to toll the statute of limitations, the exception would neutralize the rule.

The overwhelming evidence leads to one legal conclusion: the limitations period had lapsed long before the Owner-Operators brought their suit against Comerica. This case should have been dismissed on that basis alone.

C. The District Court's Award of Damages Against Comerica Was Erroneous

1. The Court Incorrectly Allowed Plaintiffs to Apply the Interstate Commerce Commission Termination Act Retroactively.

In addition to its erroneous conclusion as to the limitations defense, the District Court also erred by improperly allowing the Owner-Operators to apply retroactively the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995). This is a question of law reviewed de novo. *Singleton v. Smith*, 241 F.3d 534, 538 (6th Cir. 2001); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 550 (6th Cir. 2001). The court below is the only court in the nation to have applied the ICCTA retroactively to recognize a private cause of action for drivers whose contracts predate the statute. This error allowed more than 1,000 owner-operators who have no cognizable cause of action to pursue and obtain judgment against Comerica. The safeguard against retroactive application of new law was breached by the District Court and, if its judgment were to survive review on statute-of-limitations grounds, must be restored through an instruction from this Court to exclude such ineligible claims from the computation of damages.

The Arctic Litigation was part of a series of cases that OOIDA filed around the nation on behalf of owner-operators based upon changes to the Truth-in-Leasing laws that became effective on January 1, 1996, under the ICCTA. *See,*

e.g., *Owner-Operator Indep. Drivers Assoc., Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1006 (8th Cir. 2003). Among the changes enacted by the ICCTA was the creation of a private right of action for violations of the Truth-in-Leasing regulations. *See* 49 U.S.C. § 14704(a); *New Prime*, 339 F.3d at 1006. Before January 1, 1996, only the Interstate Commerce Commission could enforce the Truth-in-Leasing regulations; individual truck drivers, such as the owner-operators in this case, could not sue. *See New Prime*, 339 F.3d at 1006. The Owner-Operators' action against Arctic and D&A (and OOIDA's other litigation around the country) was based upon that change.

There is a "deeply rooted" presumption against retroactive application of statutes. *New Prime*, 339 F.3d at 1006. Because of this presumption, "courts should not construe 'congressional enactments and administrative rules . . . to have retroactive effect unless their language requires this result.'" *BellSouth Telecomms., Inc. v. Southeast Tele., Inc.*, 462 F.3d 650, 657 (6th Cir. 2006) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263–64 (1994)).

The Supreme Court has set forth the proper analysis for courts to follow in examining the retroactive effect of a statute. First, a court must look to the language of the statute to determine whether Congress expressly set forth the intended temporal scope. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

Next, a court must determine whether normal rules of statutory construction reveal the intended scope. *Id.* Finally,

> [i]f that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result.

Id. In other words, the court must ask "'whether the new provision attaches new legal consequences to events completed before its enactment,' such as by 'impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed.'" *BellSouth*, 462 F.3d at 658 (quoting *Landgraf*, 511 U.S. at 268–70, 280) (emphasis added).

Under this analysis, it is clear that the ICCTA cannot be applied retroactively to contracts signed before 1996. Both circuit courts that have considered the issue have appropriately rejected any retroactive application. *See Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079 (9th Cir. 2005); *New Prime*, 339 F.3d at 1007. The District Court erroneously rejected these holdings and ruled that the owner-operators whose contracts predate the enactment of the statute could bring this action against Comerica. (Op. & Order, ECF No. 64, PageID#1944.) ("[T]his Court now decides in this action that application of the ICCTA to pre-1996 leases

carries no impermissible retroactive effect."). This Court should reverse that ruling, and reintegrate the courts within the Sixth Circuit into the sound national consensus that the ICCTA private right of action does not apply retroactively.

In *New Prime*, the Eighth Circuit examined whether the shift in enforcement from the ICC to private individuals created an impermissible retroactive effect. Relying on the Supreme Court case of *Hughes Aircraft Co. v. United States*, 50 U.S. 939 (1997), the Eighth Circuit held that retroactively allowing individuals with pre-1996 contracts to sue was impermissible:

> We find that the application of the ICCTA to the case at bar would result in a retroactive application of the statute, for which there is no evidence of congressional intent. Therefore, we agree with the district court that the ICCTA's private right of action is applicable only to leases executed after the effective date of the ICCTA.

New Prime, 339 F.3d at 1007 (emphasis added). The Ninth Circuit reached the same conclusion in *Rivas*, holding:

> We find persuasive *New Prime*'s conclusion that in this case as in *Hughes*, retroactively expanding the universe of potential plaintiffs would have an impermissible retroactive effect. Because application of the ICCTA to pre-1996 agreements would increase Defendants' potential liability, the statute has a retroactive effect. . . . Because there is no evidence that Congress intended for the ICCTA to apply to pre-1996 contracts, we hold that ICCTA's private right of action for damages applies only to contracts executed after its enactment.

Rivas, 423 F.3d at 1084–85 (emphasis added) (citations omitted).

The retroactive effect on Comerica here has been profound, because it impermissibly has imposed on Comerica retroactive "liabilities and duties." Of the

$5,583,084.10 in base damages awarded by the District Court, a total of $4,381,835.37 is associated with pre-1996 contracts. (*See* Damages Spreadsheet, Case No. 97-cv-750, ECF No. 203-1, App'x at 1.)[4] Only those owner-operators whose contracts are dated after January 1, 1996, could properly pursue claims against Comerica, assuming that their claims were timely. Because the District Court erroneously allowed pre-1996 owner-operators to pursue claims against Comerica, the District Court's decision should be reversed.

2. The Court Awarded Damages against Comerica Bank Without Any Proof: The Owner-Operators' Agreement with Arctic Is Not Binding on Comerica.

The Owner-Operators filed their original complaint against Arctic and D&A on June 30, 1997. At no point during the ensuing sixteen years have they ever been required to prove the amount by which they claim to have been harmed. Consequently, they have never offered any proof of the amount that they claim that Arctic or D&A transferred to Comerica in breach of trust. Instead, the Owner-Operators have used their unchallenged settlement agreement with Arctic and D&A as a substitute for that proof. That agreement is not binding on Comerica,

[4] Pursuant to Federal Rule of Evidence 201, the District Court admitted the docket from the Arctic Litigation and papers filed therein. (Trial Tr., ECF No. 146, PageID#7268–70.) Additionally, this Court may take judicial notice of the documents filed in the Arctic Litigation. *Normand v. McAninch*, 2000 U.S. App. LEXIS 6764, at *20 (6th Cir. Apr. 6, 2000) ("[W]e note that we may take judicial notice of proceedings in other courts of record.").

which was not a party to any proceeding in which the settlement agreement was stipulated or approved, and does not obviate the need for the Owner-Operators to provide actual evidence of their damages against Comerica as a necessary element of their claim.

The settlement agreement in the underlying Arctic Litigation plainly does not trigger issue preclusion because, as the product of a settlement, the judgment amount was not "actually litigated." The Judgment entered by the District Court on July 16, 2004, in the Arctic Litigation contains no findings of fact. (Final Judgment, Case No. 97-cv-750, ECF No. 209, App'x at 47.) Judgments "unaccompanied by findings . . . [do] not bind the parties on any issue . . . which might arise in connection with another cause of action." *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288–89 (2d Cir. 2002). Further, consent judgments like the settlement with Arctic, while giving rise to claim preclusion, do not generally give rise to issue preclusion, because "the issues underlying a consent judgment generally are neither actually litigated nor essential to the judgment." *La Preferida, Inc. v. Cerveceria Modelo, S.A de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990). Indeed, in the order that approved Arctic's and D&A's plan of reorganization in the Bankruptcy Court, Arctic and D&A specifically stated that they would not challenge the damages calculations. (Plan of Reorg., attached to ECF No. 58-4, PageID#1851) ("The Judgment shall be entered upon application by

[the Owner-Operators] and such application may include a description of the methodology used . . . to calculate that amount. Arctic will not oppose the application or take a position on the calculation methodology described in it.") (emphasis added).

The general rule is particularly applicable in this case, because Comerica—a non-party to the previous action—was not a party to the settlement agreement. *See United States v. City of Chicago*, 978 F.2d 325, 330 (7th Cir. 1992) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.") (citations and internal quotations omitted). Yet that is exactly what occurred in the court below.

The structure of the settlement that the Owner-Operators reached with Arctic and D&A is particularly troubling and demonstrates why parties cannot bind another to their settlement. While the settlement purports to grant judgment to the Owner-Operators in the face amount of $5,583,084, the Owner-Operators at the same time agreed to accept only $900,000 in full and final satisfaction of that judgment from Arctic and D&A. (Notice of Class Action Settlement, Case No. 97-cv-750, ECF No. 205, App'x at 42.) The obvious reason for this is that the Owner-Operators wanted to prevent Comerica from having its day in court. The Owner-Operators' notice of settlement to class members made this tactic clear:

> Class Representatives have agreed not seek [sic] to recover more than $900,000 from Arctic and D&A on the total Judgment Amount . . . .
>
> Class Representatives have not given up the total Judgment Amount. A claim has been filed against Comerica Bank to recover the Judgment Amount in a separate action. Class representatives will actively pursue recovery of the Judgment on behalf of the Class in that action.

(*Id*.) (emphasis added).

Collusive settlements such as the Owner-Operators' compromise agreement with Arctic and D&A do not give rise to issue preclusion. This is the same abhorrent "joint venture" that the Fifth Circuit refused to impose on a similarly situated third party in *Lindsey v. Prive Corp.*, 161 F.3d 886 (5th Cir. 1998):

> [T]he judgment was the product not of adversaries, but of joint venturers. The plain purpose was to agree to an extraordinarily high judgment . . . and impose the liability upon asserted successors in interest—with no opportunity for the true defendants to defend the merit of the judgment.

Id. at 890 (emphasis added). Here, the Owner-Operators agreed to accept $4.7 million less than the agreed-upon judgment against insolvent Arctic and D&A, because their plan all along was to attempt to saddle the solvent bank Comerica with that judgment, while depriving Comerica of the ability to challenge those

figures.[5] Allowing the Owner-Operators to prevail without proof deprived Comerica of its day in court and deprive it of its due process rights.

Recognizing that Comerica cannot be bound by issue preclusion, the Owner-Operators conceded in the court below that issue preclusion does not apply. (Pls.' Opp'n to Def.'s Mot. for Summ. J., ECF No. 58, PageID#1741–48.) But that is the only basis on which Comerica could be bound by the agreement without having the opportunity to itself litigate the damages issues.

A settlement agreement is only binding on the parties to that agreement. Comerica was not such a party. "Settlement agreements are not to be used as a device by which A and B . . . can (just because a judge is willing to give the parties' deal a judicial imprimatur) take away the legal rights of C, a nonparty." *Davis v. Blige*, 505 F.3d 90, 102–03 (2d Cir. 2007) (internal quotation marks omitted) (quoting *Bacon v. City of Richmond*, 475 F.3d 633, 643 (4th Cir. 2007)). Or as the Supreme Court has succinctly stated, "It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

The Owner-Operators, though on the one hand disclaiming reliance on issue preclusion, still argued that their settlement agreement was binding on Comerica

[5] The Owner-Operators' counsel in fact researched whether issue preclusion would allow them to impose the settlement on Comerica. (Offer of Proof, ECF No. 145, PageID#6961.)

because Comerica was aware of the settlement. (Pls' Opp'n to Def.'s Mot. for Summ. J., ECF No. 58, PageID#1741–48.) How this argument differs from issue preclusion is unclear, because the Owner-Operators failed to articulate a legal basis on which Comerica should be bound. (*Id*.) Regardless, mere awareness of an action is insufficient to bind a party to a settlement of that action. Instead, the party must be joined with service of process. *Martin v. Wilks*, 490 U.S. 755, 765 (1989) ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."). Comerica was not a party to the Owner-Operators' action against Arctic and D&A. Thus, Comerica is not bound by the Owner-Operators' agreement to settle that action.

For these reasons, the District Court erred when it refused to require the Owner-Operators to prove their damages against Comerica. (Order, ECF No. 84, PageID#2245–47.)

3. The Owner-Operators' Claimed Damages Are Riddled with Inconsistencies and Errors.

The fact-sensitive nature of a damages determination was more apparent to the District Court in the Arctic Litigation than in the litigation below. When the Owner-Operators sought summary judgment as to damages in the course of the Arctic Litigation, the trial court correctly denied that motion, noting that they are "required to set forth evidence sufficient to allow the Court to make a reasonable

estimate of damages." 288 F. Supp. 2d 895, 907 (S.D. Ohio 2003). Moreover, "[s]ince the proper measure of their damages is the net balance in class members' maintenance escrow funds at the time of termination, the Plaintiffs must adduce evidence at trial sufficient to allow the fact finder to make a just and reasonable estimate of that sum." *Id.* at 908 (emphasis in original). "The unrecovered net balance in the escrow accounts is the amount of damages suffered by the Plaintiffs as a result of the Defendants' wrongdoing," ruled the court. *Id.* And, observed the court, "[t]o allow the Plaintiffs to recover more than that sum would be to impose punitive damages on the Defendants. It would also provide the Plaintiffs with an unjustifiable windfall." *Id.* "In other words," as the court explained in the Arctic Litigation, "they were damaged by the amount actually in the accounts, not by whatever amount the Defendants might have told them was in the accounts." *Id.*[6]

[6] These same principles apply with no less force in this case. In the prior appeal, the Court allowed that "Comerica must therefore disgorge the trust property received in breach of trust unless it can establish a viable defense. *See Nickey Gregory* [*Co., LLC v. AgriCap, LLC*], 597 F.3d [591 (4th Cir. 2010)] at 605." 636 F.3d at 801. The citation of the opinion in *Nickey Gregory* was significant because, as this Court explained, "[t]he rationale of the Fourth Circuit's decision in *Nickey Gregory* is transferable to the case at bar, which involves a similar revolving loan agreement secured by Arctic's accounts receivable." *Id.* at 800.

(Cont'd)

Instead of requiring proof from the Owner-Operators as to their claimed damages in this case, the District Court relied instead on the amount of damages on which they had agreed with Arctic and D&A. Those putative damages are set forth on a spreadsheet that was attached to the Owner-Operators' Motion for an Order approving the settlement in the Arctic Litigation. (Damages Spreadsheet, Case No. 97-cv-750, ECF No. 203-1, App'x at 1.) But those numbers evince several critical flaws that highlight why the District Court should have insisted on proof of damages (including the right of Comerica to cross-examine that proof) in this case.

First, the stipulated figures are internally inconsistent. A cursory review of even the first few entries demonstrates this incompatibility:

Importantly, one of the issues under the Perishable Agricultural Commodities Act ("PACA") in *Nickey Gregory* was whether the district court had erred in determining damages. 597 F.3d at 606. Unlike what happened in this case, AgriCap (the finance company) had an opportunity to litigate the damages issue in the trial court. *Id.*

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CLASS MEMBER DAMAGE CALCULATIONS

DRIVER CODE	UNIT #	DRIVER NAME	FIRST DISP DATE	LAST DISP DATE	MAINT CONT	MAINT CHARGES	NET ESCROW BAL	TOTAL INTEREST	TOTAL DAMAGES
ABRATH	O420	ATHUR C. ABRAMS	4/20/1992	6/21/1994	805.95	793.72	125.08	59.00	184.08
ACOJUA	O661	JUAN M ACOSTA	2/13/1995	6/12/1995	17,342.28	13,186.82	2,808.26	1,117.62	3,925.88
ADAHAR	O581	HAROLD D. ADAMS	6/3/1993	8/25/1994	2,363.40	1,471.47	4,756.70	2,185.62	6,942.32
ADANOR	O526	NORMAN W ADAMS JR	2/9/1994	10/2/1994	3,819.24	823.51	1,738.42	786.09	2,524.51
ADAROB	O920	ROBERT ADAS	5/19/1995	8/21/1995	8,514.36	3,161.14	1,937.70	744.50	2,682.20
ALECHA	O1083	CHARLES W. ALEXANDER	10/3/1996	4/12/2001	32,629.24	29,511.73	98.32	4.28	102.60
ALEXJA	O799	JAMES ALEXANDER	11/23/1994	4/24/1995	14,913.99	4,898.19	1,080.62	440.88	1,521.50
ALEXJA	O950	JAMES ALEXANDER	9/28/1995	1/1/1996	12,588.12	12,569.04	1,476.52	531.01	2,007.53
ALLD	O900	DONALD R. JR ALLEN	10/26/1997	11/6/1998	11,160.00	9,645.53	2,694.11	485.62	3,179.73
ALLDAV	O586	DAVID C ALLMAN	1/26/1993	7/8/1993	3,025.80	1,688.96	1,336.84	695.17	2,032.01
ALLJAM	O865	JAMES H. ALLIN	6/6/1995	12/12/1995	7,390.35	1,252.43	2,039.00	740.39	2,779.39
ALLLIN	O990	LINDA ALLEN	9/25/1995	5/24/1996	6,336.27	1,896.92	3,552.00	1,183.19	4,735.19
ALTJAM	O537	JAMES E ALTMAN	6/25/1993	7/6/1994	1,441.62	-	9,608.94	4,506.73	14,115.67
ALTJAM	O818	JAMES E ALTMAN	7/7/1994	9/27/1995	8,265.42	3,479.02	3,458.44	1,303.99	4,762.43
ANDDAV	O515	DAVID D. ANDERSON	2/26/1993	2/7/1995	5,216.13	1,668.61	19,618.02	8,322.90	27,940.92

(*Id.*)

The first entry shows that owner-operator Arthur Abrams had maintenance escrow contributions of $805.95 and charges of $793.72. This should result in claimed damages of $12.23. Instead, the Owner-Operators and Arctic and D&A agreed to an amount of $125.08 ($184.08 with interest)—nearly ten times what appears to have been the true amount. Similarly, the chart lists two entries for James Altman. The maintenance contributions for him total $9,707.04, and his maintenance charges total $3,479.02. This should result in claimed damages of $6,228.04. Instead, the Owner-Operators claim his damages to be $13,067.38 ($18,878.10 with interest), more than double what would appear to be the true amount. David Anderson is listed as having contributions of $5,216.13 and charges of $1,668.61. Instead of the expected $3,547.52 in claimed damages, the

parties stipulated to an amount of $19,618.02 ($27,940.92 after an additional $8,322.90 in interest), nine times what would appear to be the real amount.

These errors and inconsistencies appear throughout the "stipulated" damages calculations. (Offer of Proof, ECF No. 145, PageID#6958–60.) The Owner-Operators have never been required to explain or correct these inconsistencies—either in this litigation or in the Arctic Litigation. Comerica was not a party to the stipulation. Arctic agreed not to contest the damages. (Plan of Reorg., attached to ECF No. 58-4, PageID#1851) ("The Judgment shall be entered upon application by [the Owner-Operators] and such application may include a description of the methodology used . . . to calculate that amount. Arctic will not oppose the application or take a position on the calculation methodology described in it.") (emphasis added)), because it never intended to pay them—the damages were to be foisted on a third party, Comerica, without its knowledge or participation. Thus, there was no incentive to ensure the claimed damage amount was accurate or supportable, and Arctic and D&A specifically disclaimed any such accuracy. (*Id.*)

In addition, the stipulated damages figures, which the District Court ordered Comerica accountable to pay, contain amounts that could not possibly have been transferred to Comerica. It was undisputed that Comerica's lending relationship with Arctic ended in December 1998. (Final Judgment, ECF No. 155, PageID#7515.) The damages spreadsheet reveals approximately two dozen drivers

whose escrow accounts were withheld after 1998 and thus could not have been transferred to Comerica—for example, the entry for Charles Alexander above, whose last date was April 2001, two-and-a-half years after Comerica's relationship with Arctic had ended.

Comerica was unjustly denied the opportunity to raise these issues below. Instead, the District Court regarded the matter as conclusively decided by virtue of the settlement between the Owner-Operators and Arctic and D&A. (Final Judgment, ECF No. 155, PageID#7564.) As explained in subsection C.2. above, that settlement does not bind Comerica and as a matter of due process cannot preclude Comerica from having its day in court on damages. Because the District Court erred in excusing the Owner-Operators from proving their damages against Comerica, the decision below should be reversed.

D. The District Court Erred in Its Award of Excessive Prejudgment Interest

The District Court compounded these errors by awarding an excessive amount of prejudgment interest. A district court's decision in calculating prejudgment interest is reviewed for abuse of discretion. *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir. 2002). A district court abuses that discretion when it awards an excessive amount of prejudgment interest that would overcompensate the plaintiff. *Id.* at 586 (citing *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 618

(6th Cir. 1998)). The award of prejudgment interest in this case overcompensates the Owner-Operators.

This Court has held that using the methodology for post-judgment interest set forth in 28 U.S.C. § 1961 is appropriate for prejudgment interest. *See*, *e.g.*, *Caffey*, 302 F.3d at 585 n.3 (citing *Ford*, 154 F.3d at 619). This methodology is particularly appropriate here, given the nature of the Owner-Operators' claims against Comerica, which are inextricably tied to their settlement agreement with Arctic and D&A, as approved by the District Court in the July 16, 2004 judgment. (Final Judgment, ECF No. 155, PageID#7507.) As the Owner-Operators have argued on several occasions, they are trying to enforce that judgment against Comerica.[7] The District Court's award of prejudgment interest, however, would allow the Owner-Operators to collect from Comerica approximately $1.5 million more than they could have collected directly from Arctic and D&A—the actual wrongdoers—under 28 U.S.C. § 1961.

[7] The Owner-Operators have inconsistently described the nature of their claims. When it is advantageous to them, they have argued that this is an action to enforce the stipulated judgment, and therefore they should not have to separately prove their damages against Comerica. (Response to Opening Brief, ECF No. 83, PageID#2236–38.) When they try to avoid the statute of limitations, however, they argue that their claims are based on Comerica's **own acts**, and therefore their knowledge of their claims in 1997 should not render their claims time-barred. The Owner-Operators cannot have it both ways.

Section 1961(a) provides that post-judgment interest "shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding . . . the date of the judgment." The judgment approving the settlement was entered on July 16, 2004. (Final Judgment, ECF No. 155, PageID#7507.) The interest rate applicable to that judgment, therefore, is 2.04%.[8] Post-judgment interest in compounded annually. 28 U.S.C. § 1961(b). By statute, therefore, the Owner-Operators' judgment against Arctic and D&A would accrue interest as follows:

Principal	Interest	New principal	Ending Date
$5,583,084.00	$113,894.91	$5,696,978.91	7/16/2005
$5,696,978.91	$116,218.37	$5,813,197.28	7/16/2006
$5,813,197.28	$118,589.22	$5,931,786.51	7/16/2007
$5,931,786.51	$121,008.44	$6,052,794.95	7/16/2008
$6,052,794.95	$123,477.02	$6,176,271.97	7/16/2009
$6,176,271.97	$125,995.95	$6,302,267.92	7/16/2010
$6,302,267.92	$128,566.27	$6,430,834.18	7/16/2011
$6,430,834.18	$131,189.02	$6,562,023.20	7/16/2012
$6,562,023.20	$120,662.12	$6,682,685.32	6/10/2013
Total Interest:	**$1,099,601.32**		

[8] The applicable rate is found at http://www.federalreserve.gov/releases/h15/20040712/ under the category, Treasury Constant Securities, Nominal 10, 1 year, for the week of July 9.

The District Court, however, imposed an interest charge against Comerica in the amount of $2,647,330.62, more than double what the Owner-Operators would have been entitled to collect from Arctic and D&A. (Am. Judgment, ECF No. 171, PageID#7750.) This is because the District Court based its calculations on the prime rate, which, as calculated by the Owner-Operators' counsel, ranged between 3.25% and 8.25%, far in excess of the 2.04% interest rate set by § 1961. (*Id.*; *see also* Pls.' Mot. to Alter Judgment, ECF No. 157, PageID#7581 (calculating rates).)

The rate suggested by the Owner-Operators and approved by the District Court improperly would allow the Owner-Operators to recover more from Comerica than they would have been able to recover from the actual wrongdoers, Arctic and D&A. When an award of prejudgment interest overcompensates the plaintiff, it constitutes an abuse of discretion. *Ford*, 154 F.3d at 618. Because the District Court abused its discretion in calculating the interest against Comerica, this aspect of the judgment below also should be reversed.

CONCLUSION

For these reasons, Comerica Bank respectfully urges the Court either to: (1) reverse the judgment of the District Court altogether on statute of limitations grounds; or (2) vacate and remand with instructions to correct the material errors that beset the final judgment.

Dated: June 10, 2013

Respectfully submitted,

s/ Alycia N. Broz

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,849 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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Dated: June 10, 2013

ADDENDUM

Pursuant to 6 Cir. R. 28(b)(1)(A)(i), Defendant-Appellee Comerica Bank has designated the following docket entries:

ECF No.	Description
ECF No. 4	Plaintiffs' Motion to Withdraw Bankruptcy Reference (PageID#34)
ECF No. 5	March 28, 2005 Order Granting Motion to Withdraw (PageID#54)
ECF No. 26	Second Amended Complaint (PageID#186)
ECF No. 46	March 31, 2008 Order Denying Motion to Dismiss (PageID#324)
ECF No. 54	Defendant's Motion for Summary Judgment (PageID#357)
ECF No. 55	Plaintiffs' Motion for Summary Judgment (PageID#627)
ECF No. 56	Plaintiffs' Supplemental Memorandum Supporting Motion for Summary Judgment (PageID#645)
ECF No. 56-21	Arctic Litigation Complaint (PageID#1163)
ECF No. 57	Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (PageID#1272)
ECF No. 58	Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment (PageID#1710)
ECF No. 58-3	Adversary Complaint (PageID#1775)
ECF No. 58-4	Plan of Reorganization (PageID#1831)
ECF No. 64	March 16, 2009 Order Granting Defendant's Motion for Summary Judgment (PageID#1928)
ECF No. 80	Defendant's Pre-Trial Brief (PageID#2092)
ECF No. 83	Plaintiffs' Response to Defendant's Opening Brief (PageID#2230)
ECF No. 84	Aug. 19, 2011 Order (PageID#2241)

ECF No.	Description
ECF No. 132	October 5, 2011 Order Continuing Trial Date and to Compel (PageID#4635)
ECF No. 145	Defendant's Offer of Proof Related to Damages (PageID#6956)
ECF No. 149	Defendant's Proposed Findings of Fact (PageID#7340)
ECF No. 150	Defendant's Trial Brief (PageID#7375)
ECF No. 152	Dec. 1, 2011 Order Denying Defendants Offer of Proof Related to Damages (PageID#7494)
ECF No. 155	Final Judgment (PageID#7507)
ECF No. 157	Plaintiffs' Motion to Alter Judgment (PageID#7569)
ECF No. 159	Defendant's Notice of Appeal (PageID#7597)
ECF No. 171	Amended Judgment (PageID#7744)
ECF No. 172	Defendant's Amended Notice of Appeal (PageID#7757)
ECF No. 177	Trial Exhibit P39 (PageID#7779)
ECF No. 177-1	Trial Exhibit D81 (PageID#7783)
ECF No. 177-2	Trial Exhibit D129 (PageID#7843)
ECF No. 177-3	Trial Exhibit D166 (PageID#7845)
ECF No. 177-4	Trial Exhibit D190 (PageID#7917)
ECF No. 177-6	Trial Exhibit D194 (PageID#9432)
ECF No. 177-7	Trial Exhibit D215 (PageID#9462)
ECF No. 134	Trial Transcript (PageID#4999)
ECF No. 146	Trial Transcript (PageID#7268-70)

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2013, I filed the foregoing with the Court's electronic filing system, which will serve electronic notice to all parties of record.

s/ Alycia N. Broz
Alycia N. Broz