STATE OF MICHIGAN
IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

RESPONSE BRIEF OF PLAINTIFF/COUNTER-DEFENDANT/APPELLEE/ CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC TO SUPPLEMENTAL BRIEF OF DEFENDANTS/ COUNTER-PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

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INTRODUCTION

Defendants' Supplemental Brief mis-states the facts and law. The Loan in this case is not facially usurious. It provides for 20% interest per annum which is beneath the 25% rate the lower courts deemed applicable under the Criminal Usury Statute. If the $25,000 commitment fee is deemed pure interest, the rate becomes 22.5%. One must look to extraneous documents to support a claim that the rate exceeds 25%. Indeed, the Loan is categorically exempt from any usury limit under MCL 438.31c(11) which allows "any rate of interest" for a loan of $100,000.00 or more secured by "a lien against real property other than a single family residence," which is the case here. There is no usury as a matter of law if this argument is preserved.

Defendants' assertion of 36.5% interest was not accepted by the Court of Appeals. Instead, the Court concluded that the Loan carries a minimum effective interest rate of 25.28% because it uses a 360-day calendar year and because the single $25,000 commitment fee specified in the Loan was charged twice and should be treated as pure interest equal to an extra 5%. The claim that commercial loan charges such as commitment fees, origination fees, title insurance premiums, title examination fees, and recording fees are "disguised" interest is not supported by any authority. Michigan courts have long held that charges "for services rendered" do not constitute interest, and therefore the Loan charges do not make the Loan usurious. Defendants bear the burden of proof on the affirmative defense of usury and presented no evidence that these charges were not for services rendered.

Defendants claim that all jurisdictions decline to enforce usury savings clauses for loans that are usurious on their face. Even if the Loan could be characterized as usurious on its face, this assertion is inaccurate. Two cases cited by the Court of Appeals permit enforcement when a loan is facially usurious, as do cases in other jurisdictions. While the Loan in this case is not facially

usurious, the savings clause should be enforced even if it is. The purpose of usury law "is to protect the necessitous borrower from extortion," not sophisticated borrowers. Defendants had equal bargaining power and should be held to the terms of the contract that they actively negotiated and signed, including the usury savings clause.

The Court of Appeals drew a distinction between facial usury and attempts to collect usurious interest. The Court found that the Loan is not usurious on its face due to the savings clause, but that Plaintiff's filing of a collection lawsuit constituted an attempt to collect usurious interest. Contrary to Defendants' claim in their Brief, the complaint does not seek a specific sum and instead leaves that determination to the Trial Court. If a charge were deemed interest in excess of a usury limit, Defendants have the remedy of not paying and applying any past payment to principal. One U.S. Court of Appeals has held that demands in a complaint or a collection letter do not make a loan usurious when it contains a usury savings clause.

Any claim that the Defendants were entitled to a determination as a matter of law that Plaintiff violated the criminal usury statute fails because Defendants did not prove criminal intent. The limited evidence presented in the motions filed in the Trial Court is that Plaintiff believed the Loan was legal and lacked the requisite intent for a violation of the Criminal Usury Statute. This is a fact issue on which Defendants bear the burden of proof and it should not have been resolved on summary disposition. If this Honorable Court concludes that Defendants committed a crime as a matter of law and are not entitled to a trial, the remedy has already been spelled out in published Michigan decisions – forfeiture of interest, not principal. There is virtually no support in Michigan law or other jurisdictions for voiding principal for an alleged usurious loan under the common-law wrongful conduct rule. Defendants received a $1,000,000 loan based on false pretenses and are not entitled to a windfall.

RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF

A. The Loan Is Not Usurious.

(i) The Loan Is Not Usurious on Its Face.

Defendants claim throughout their Supplemental Brief that the Loan is facially usurious. (Def. Brief, pp. 2, 4, 21, 24, 26, 32). This is not true. The Loan provides for 20% interest per annum (Note, APX 17) which is beneath the 25% rate the lower courts deemed applicable under the Criminal Usury Statute, MCL 438.41. If the $25,000 commitment fee (Loan, ¶ 1.6, APX 24) is deemed pure interest, the rate becomes 22.5%. The amounts of all other alleged charges referenced by Defendants are not specified on the face of the Loan. (APX 17-62). Rather, one must look to extraneous documents to support these claims, which Defendants do on page 7 of their Brief.

The commercial loan charges which Defendants call "disguised" interest are contained in an amortization schedule, closing statements, and a document called "Detroit Land Bank Opportunity Projections." (Def. Brief, p. 7). These charges are not contained in the Loan Documents. Defendants did not object to any charges at closing and presumably agreed that such charges were for "services rendered" or otherwise permissible. *Tierney v Collen*, 272 Mich 200, 203; 261 NW 298 (1935). The charges identified by Defendants as "disguised" interest include "capitalized interest" of $5,642.81, 20% simple interest of $11,506.85 accrued between the first and second closing, loan commitment fees of $25,000 at the first closing and again at the second closing, "success fees" calculated at $1,000 per house sold (Loan Agreement¶ 9.2, APX 37) for a projected total of $70,000 (never due because no houses were sold), legal fees of $14,000, and $14,701.90 for Equity National Title fees for "title insurance, abstract title searches and examination, recording fees." (Def. Brief, p. 7).

None of these charges are in the Loan Documents and therefore the Loan is not facially usurious. Defendants' assertion that these charges constitute "disguised" interest resulting in an effective 36.5% interest was rejected by the Court of Appeals. Instead, the Court of Appeals concluded that the Loan carries a minimum effective interest rate of 25.28% because it uses a 360-day calendar year and because the single $25,000 commitment fee specified in the Loan was charged twice and constitutes pure interest equal to 5% on a $1,000,000 loan, despite the lack of evidence that no portion of the commitment fee constitutes fees "for services rendered" within the meaning of *Tierney,* 272 Mich at 203 (Decision, p. 10; APX 770).[1]

The Court of Appeals deemed the Loan non-usurious due to the presence of the usury savings clause. (Decision, pp. 5-8; APX 765-68). Even without this clause, the Loan is non-usurious on its face under the Court of Appeals' analysis. The commitment fee specified in the Loan is $25,000. (Loan, ¶ 1.6, APX 24). The $50,000 commitment fee cited by the Court of Appeals comes from two closing statements which each show the fee.[2] Defendants cite a handful of cases from other jurisdictions which suggest that usury savings clauses are not effective for loans that are usurious on their face. See, e.g., *First State Bank v. Dorst*, 843 SW2d 790 (Tex App 1992), writ denied (June 3, 1993) (APX 791). Because the Loan in this case is not usurious on its face, such cases are inapposite. As discussed below, many cases have enforced usury savings clauses even for a facially usurious loan. There is no bright-line rule.

[1] The number 25.28% is based on applying an adjustment of 365/360 to the stated interest rate of 20% resulting in an interest rate of 20.28% for a 365-day calendar, and a rate of 25.28% if 5% is added for the commitment fee.

[2] Defendants' Appendix 250a-254a.

(ii) Commercial Loan Charges For Services Rendered Do Not Make the Loan Usurious.

Defendants bear the burden of establishing that the Loan is usurious. *Minnesota Mutual Life Ins. Co. v Schlanger*, 284 Mich 207, 215; 278 NW 821 (1938). "The defense of usury is an affirmative defense which is waived if not raised." *Shaw Inv. Co. v. Rollert*, 159 Mich App 575, 580; 407 NW2d 40 (1987). Usury statutes are "in derogation of the common law and must be strictly construed." *Taines v Munson*, 19 Mich App 29, 42; 172 NW2d 217 (1969); *Marion v City of Detroit*, 284 Mich 476, 484; 280 NW 26 (1938); *Straus v Elless Co*, 245 Mich 558, 562; 222 NW 752 (1929). Defendants provide no evidence to support their contention that standard commercial loan charges such title insurance premiums, title examination fees, and recording fees are "disguised" interest for purposes of the Criminal Usury Statute. In the absence of such proof, the Loan cannot be deemed usurious.

"Interest is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, 'a charge for the loan or forbearance of money,' or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge, Inc. v. Department of Treasury*, 420 Mich 226, 242; 362 NW2d 618 (1984). Commercial loan charges for services rendered are not interest. "If the sum so paid is for services rendered, or for profits earned upon a transaction other than the making of the loan, then the transaction is free from usury." *Tierney*, 272 Mich at 203 (internal citations omitted).

Defendants purport to rely upon the Affidavit of John Fioritto, CPA for their assertion that the Loan charges identified on page 7 of their Brief constitute "disguised" interest.[3] In fact, this Affidavit does *not* opine that the charges are interest. Instead, it merely assumes that they are

[3] Defendants' Appendix 268a-270a.

interest. Mr. Fioritto describes the scope of his assignment in Paragraph 3 of his Affidavit: "To assist the court, I was asked to calculate the total interest, fees, and expenses charged to the borrower by Soaring Pine under the loan documents."[4] He was not asked for an opinion on whether the commercial loan charges at issue actually constitute interest as that term is defined under Michigan law. See *Town & Country Dodge,* 420 Mich at 242. He concludes in Paragraph 6: "The effective annual interest rate of the loan *if all interest, fees, and expenses are included as interest*, exceeds 25% at simple interest per annum" (emphasis added). He does not determine the "effective annual interest rate of the loan" if any fees or expenses are excluded.

Mr. Fioritto merely added up numbers rather than determine whether each charge actually constitutes interest. His analysis is useless unless one accepts the premise that all commercial loan charges constitute interest, which is contrary to Michigan law holding that charges "for services rendered" are not interest. *Tierney,* 272 Mich at 203. A holding that any commercial loan charge whatsoever constitutes interest under the Criminal Usury Statute, including standard out-of-pocket charges such as title insurance premiums, would significantly reduce the actual interest that can be charged – defined as "a charge for the loan or forbearance of money," *Town & Country Dodge,* 420 Mich at 242 – to an indeterminate amount well below 25%. Defendants cite no authority for this proposition which would radically upend customary lending practice.

(a) Capitalized Interest

Despite having the burden of proof, Defendants fail to support their claim that every charge identified on page 7 of their Brief constitutes interest for purposes of criminal usury. A review of the alleged charges does not support the conclusion that they render the Loan usurious. The first charge identified on page 7 of Defendants' Brief is "Interest and 'Capitalized" Interest of

[4] Defendants' Appendix 269a.

$205,642.81. Of this amount, $200,000 is based on the 20% interest rate per annum specified in the Loan. (Note, APX 17). The additional $5,642.81 is based on the parties' deferral of the first two monthly payments as shown in the Amortization Schedule relied on by Defendants.[5] In effect, Defendants argue that a lender cannot treat deferred interest as loan principal without increasing the effective interest rate for purposes of criminal usury.

Defendants do not support this claim with any argument or authority. The interest charged is still simple 20% per annum. It is equivalent to Defendants borrowing the first two payments from another lender and paying 20% interest per annum on that loan. Whether that increases the effective interest rate when the original lender makes the loan is a matter on which Defendants carry the burden of proof. *Minnesota Mutual Life Ins. Co.*, 284 Mich at 215. They have failed to do so. In this case, it is unlikely to make a difference because the $5,642.81 in alleged capitalized interest would add only 0.5643% to the effective interest rate.

(b) Accrued Interest

The next item identified as impermissible interest by Defendants on page 7 of their Brief is $11,506.85 in "accrued interest from August 12, 2016 through September 23, 2016" under the first Mortgage Note dated August 12, 2017 (APX 17). According to the second closing statement, this accrued interest was paid from proceeds at closing on the Amended and Restated Mortgage Note dated September 23, 2017.[6] The $11,506.85 interest charge was calculated at 20% simple interest per annum under the terms of the first Mortgage Note. This was *not* additional interest but merely simple interest already owed.

[5] Defendants' Appendix 246a.
[6] The second closing statement is at Defendants' Appendix 246a.

If Plaintiff had released the $11,506.85 directly to Defendants rather than debit the amount at the second closing, Defendants would have been obligated to pay the same amount back to Plaintiff to cover simple interest under the original Note. Defendants provide no explanation as to why payment of this simple interest from proceeds at the second closing would increase the Loan's effective interest rate. Because this $11,506.85 in interest was paid at the second closing, no further interest accrued on it. If this amount is treated as additional interest – despite it plainly being simple interest under the original Note – it would add 1.150685% to the effective interest rate.

(c) Loan Commitment Fees

Defendants next identify the commitment fee as impermissible interest on page 7 of their Brief. This fee is set at $25,000 under Paragraph 1.6 of the Loan Agreement and was not increased in the Amendment to Loan Agreement. (Loan Agreement, ¶ 1.6, APX 24, 50-53). Nonetheless, the $25,000 commitment fee appears on both closing statements.[7] The Court of Appeals held that the $50,000 in commitment fees shown on the two closing statements constitutes pure interest thereby increasing the Loan's effective interest rate to 25.28%. (Decision, p. 10; APX 770). The Court of Appeals rejected the argument that the commitment fee, or some portion thereof, constitutes "reasonable and necessary" charges permissible under MCL 438.31a or Michigan case law. *Id.*; see also *Tierney*, 272 Mich at 203.

According to the Court of Appeals, the commitment fee is pure interest because "the contract already required PSGRS to pay all of those fees, and plaintiff actually charged them." (Decision, p. 10; APX 770). In so holding, the Court improperly placed the burden of proof on Plaintiff. Whether a commitment fee qualifies as interest requires factual inquiry as to whether the fee serves a function distinct from interest. See *Federal Deposit Ins. Corp. v. Kramer*, 100 Mich

[7] Defendants' Appendix 250a-254a.

App 495, 497; 298 NW2d 755 (1980) (holding that a commitment fee binding the lender to loan before defendants applied did not qualify as interest). Defendants presented no evidence that the commitment fee does not include reasonable and necessary charges.

The Court of Appeals reasoned that the commitment fee must constitute pure interest because Paragraph 8.8 of the Loan Agreement ("Payment of Costs") specifies that the borrower would pay "all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by Lender in connection with the consummation and closing of the Loan." (*Id.,* ¶ 8.8, APX 35). Such costs include "the cost of any inspection by Lender, tax searches, title updates, filing and recording fees, environmental remediation costs, UCC searches and the like," and "charges incurred in any court or bankruptcy proceedings." This section does not purport to cover any and all origination costs.

The Court of Appeals concluded that none of the commitment fee under Paragraph 1.6 could consist of reasonable and necessary commercial loan charges because all such charges were covered under Paragraph 8.8. (Decision, p. 10; APX 770). This holding is not supported by the record. There is no evidence establishing that every commercial loan charge was covered under Paragraph 8.8 only. The charges identified on page 7 of Defendants' Brief do not include, for example, loan origination costs (e.g., credit checks, background checks, verification of borrower information). In the absence of evidence that every permissible cost was charged under Paragraph 8.8 and not Paragraph 1.6, the Court of Appeals erred in holding as a matter of law that the $50,000 commitment fee is pure interest. The burden is on Defendants and they failed to carry it.

(d) Success Fees

Defendants next identify $70,000 in alleged "success fees" as impermissible interest on page 7 of their Brief. The Loan Documents require that the "Borrower shall pay to Lender a success

fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold" upon "sale of any home purchased with the Loan." (*Id.,* ¶ 9.2, APX 37). There is no dispute that success fees were contingent on sale of houses, no houses were sold, and hence no such fees became due. Defendants argue that $70,000 in "success fees" should nonetheless be deemed impermissible interest because Plaintiff prepared an internal analysis labeled "Detroit Land Bank Opportunity Projections" that projected $70,000 in success fees based on projected sale of seventy houses. (Def. Brief, p. 7; Def. APX 253a-254a).

The success fees in the Loan Documents are a textbook example of contingent fees which are not interest under Michigan law. Because there was no guarantee of payment, the contingent success fees do not constitute "simple interest per annum." A $1,000 success fee was to be paid by Defendants to Plaintiff only upon sale of each renovated home, if and when a home was sold. (Loan Agreement, ¶ 9.2, APX 37). The contingent nature of the success fees is demonstrated by the fact that none ever came due. The only circumstance in which a $1,000 success fee would become due was the mutually beneficial contingency of Defendants successfully flipping a house.

A 2015 Michigan Attorney General Opinion, No. 7283 (May 4, 2015) (APX 755), addresses contingent payments such as "success fees" in the context of usury law:

> A financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits will not violate usury laws so long as the lender's profit is contingent, and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement.

The Attorney General's Opinion recognizes that excluding contingent fees from interest comports with the recognized exception to usury known as the "interest contingency rule":

> In these instances, courts have determined that, **so long as these payments result from a bona fide contingency—that is, the contingency incorporates a real element of risk and is not a sham devised to avoid the usury laws—these**

payments are not usurious even if they exceed the legal maximum of interest allowed.

Id., APX 757 (internal citations omitted) (emphasis added); *see also*, *Pisciotta v Kardos*, p. 3, unpublished per curiam opinion of the Court of Appeals, issued October 5, 2017 (Docket No. 332300) (APX 739) ("because there were too many uncertainties about the value of the properties if and when [borrower] decided to sell them, the equity-sharing agreements could not be calculated into the interest rates for the properties when determining whether the loans were usurious.").

The interest contingency rule applies to this case. At the time the Loan Documents were entered into, it was impossible to determine how many sales Defendants would make or how long it would take. As stated by the Court of Appeals in *Patrick v Shaw*, 275 Mich App 201, 211; 739 NW2d 365 (2007), "if a transaction or an obligation is free from usury in its origin no subsequent usurious transaction respecting it can affect it with the taint of usury, the theory being that the question whether a contract is usurious or not must be decided with reference to the time when it was entered into" (internal citations omitted). In this case, there existed a "real element of risk" as to whether and when Plaintiff would receive success fees based on the market for rehabilitated homes and Defendants' competence as a house-flipper. (OAG 7283, APX 757). Because the success fees were indeterminable at the time the Loan Documents were entered into, they were contingent and could not be considered interest.

Defendants cite a pre-suit demand letter sent by Plaintiff's attorney on December 27, 2017 which references $70,000 as past due and owing for "Payments Due on Sale of Property." (Def. Brief, p. 37; APX 64-65). At the time, Plaintiff did not know how many houses had been sold and was relying on projections based on information provided by Defendants. The demand for success fees was dropped in the complaint. Specifically, Paragraph 42 (APX 10) lists various types of fees and does not specify success fees. There is no reference to $70,000 in success fees in the complaint,

and any success fees would have been strictly based on the number of houses sold times $1,000, which turns out to have been zero.

To the extent that the earlier attorney letter on December 17, 2017 sought success fees which, when more information was obtained, were not owed because no houses were sold, this is not a basis for a usury claim, even assuming success fees constitute interest. The Fifth Circuit Court of Appeals, applying Texas law, has held that mistakes in a demand letter and complaint allegedly seeking usurious interest may be remedied by a usury savings clause. Under circumstances where all parties are sophisticated, "we treat the erroneous statements in the demand letters and in the Original Complaint as being automatically remedied by virtue of the savings clauses in the underlying documents." *First South Sav. Ass'n v. First Southern Partners*, 957 F2d 174, 178 (5th Cir. 1992) (APX 787). As the court concluded, "The inclusion of savings clauses evidences an express intent to structure the entire transaction so as to avoid usurious interest." *Id.* In short, the parties' dealings should be construed in light of the usury savings clause so as to effectuate their intent.

(e) Simon, PLC – Legal Fees

Defendants next identify $14,000 in attorney's fees as impermissible interest on page 7 of their Brief. They claim Plaintiff committed a crime by passing along these fees to Defendants. (Def. Brief, pp. 36-37). The Court of Appeals did not rule on whether the charge for legal fees constitutes interest for criminal usury purposes. (Decision, p. 10; APX 770). Defendants have made no argument in their Brief and cite no authority for the proposition that a commercial lender cannot pass along attorney's fees to a borrower. Under *Tierney*, 272 Mich at 203, such fees are not interest because they are "for services rendered." Paying an attorney is not interest defined as "'a charge for the loan or forbearance of money,' or a sum paid for the use of money, or for the delay

in payment of money." *Town & Country Dodge*, 420 Mich at 242. It is an out-of-pocket expense. Defendants bear the burden proof on the claim that lender attorney's fees constitute interest under the Criminal Usury Statute. *Minnesota Mutual Life Ins. Co.*, 284 Mich at 215. They have not even attempted to carry their burden.

(f) Equity National Title – Title Insurance, Abstract Title Searches and Examination, Recording Fees

Lastly, Defendants identify $14,701.90 in title company fees as impermissible interest on page 7 of their Brief. They claim Plaintiff committed a crime by passing along these fees to Defendants. (Def. Brief, pp. 36-37). The Court of Appeals did not rule on whether the charge for title company fees constitutes interest for criminal usury purposes. (Decision, p. 10; APX 770). These are out-of-pocket expenses regularly charged by commercial lenders to borrowers. Such fees are "for services rendered," *Tierney,* 272 Mich at 203, and are not interest as that term is defined in *Town & Country Dodge*. Defendants have not even argued, much less cited authority, that Michigan law prohibits a lender from passing along title company fees to a borrower. They simply declare it a crime without analysis. Defendants have not carried their burden on this issue.

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Defendants' many claims of usury do not withstand scrutiny. This was a typical commercial loan for a risky redevelopment venture. Defendants knew exactly what they were doing. They represented during the negotiations on the Loan that they had already flipped 1,500 houses since 2008. (June 9, 2016 email, APX 301-302). They claimed they would make a profit under the terms of the Loan after payment of interest and commercial loan charges, and they convinced Plaintiff that the reward was worth the risk, much to Plaintiff's detriment. Defendants provide no argument or case law in support of their claim that the charges identified on page 7 of their Brief constitute interest for purposes of criminal usury.

This is already an uphill battle for Defendants due to the rule of strict construction for usury statutes, *Marion,* 284 Mich at 484, and Michigan's "strong public policy interest in enforcing contracts as written and interpreting usury restrictions narrowly, especially in the context of commercial transactions between business entities." *Midwest Business Credit, L.L.C. v. TTOD Liquidation, Inc.*, unpublished opinion of the Court of Appeals, issued November 27, 2012 (Docket No. 305569), p. 4 (APX 838). Defendants simply expect this Court to assume that any commercial loan charge equals interest for purposes of criminal usury without analysis and without regard to whether the charge is reasonable, necessary, and for services rendered.

This "all charges equal usury" approach was roundly rejected by the United States District Court for the Eastern District of Michigan in *MoneyForLawsuits V LP v Rowe*, unpublished opinion issued January 23, 2012 (Case No. 4:10-cv-11537) (APX 730). The Court specifically rejected defendants' argument that "the Michigan usury statute prohibits any 'charges, whatever their specific character or label, that aggregate in excess of [usury laws].'" As the Court observed, "Michigan law, however, does not support this argument," and defendants' argument "reads out of the statute the word 'interest,' replacing it with the word 'charge.'" Defendants have committed the same error in this case by conflating the word "interest" with the word "charge." If they believe specific charges are disguised interest subjecting a lender to criminal sanctions, it was incumbent on them to prove it. They have not even tried.

(iii) *The Loan Is Exempt from Usury Limits Under MCL 438.31c(11).*

This Court's Order dated March 18, 2022 directs the parties to brief whether Plaintiff committed a crime by trying to collect usurious interest. Plaintiff could not have committed a crime because the Loan in this case is categorically exempt from usury limits under MCL 438.31c(11) which allows "any rate of interest" for a loan of $100,000.00 or more secured by "a lien against

real property other than a single family residence." The Court of Appeals held that this argument was not preserved for appeal. (Decision, p. 4, APX 764).[8] Plaintiff will address it here because it is material to the allegation of criminal conduct.

Section 1c(11) is a critical provision of the Civil Usury Statute. It encompasses an immense breadth of commercial loans – all such loans over $100,000 secured by a mortgage on property "other than a single family residence." It expressly exempts such loans from *any* usury limit. The State of Michigan currently advises the public that there is "no ceiling" on interest for these loans. (Michigan Statutory Interest Rate Ceilings, APX 673). This is an important statute that should be clarified. If this Honorable Court issues a decision failing to address the exemption, it will leave a question mark over its enforceability since the Loan plainly falls within its ambit. If commercial loans meeting the criteria of §1c(11) are subject to a 25% criminal usury limit even though the State of Michigan publicly declares there is "no ceiling" and the statute itself states that "any rate of interest is allowed," the public should be warned.

The Attorney General has opined that loans made under this exemption "are not subject to the 25 percent criminal usury ceiling." OAG No. 5740 (July 17, 1980) (APX 619). The Court of Appeals has held that loans meeting the criteria of this exemption are not subject to other usury restrictions. *See*, *e.g.*, *Manufacturers Nat. Bank v Pink*, 128 Mich App 696; 341 NW2d 181 (1983) ("interest rate charged was not usurious" because prohibition on increasing rates in different usury statute did not apply to loans made under this exemption); *Kansas City Life v Durant*, 99 Mich App 754; 298 NW2d 630 (1980) (same). The Sixth Circuit Court of Appeals cited MCL §1c(11) in finding a loan non-usurious, noting that usury protections "do not pertain to sophisticated

[8] Even if this argument was not preserved in the Court of Appeals, this Court has the authority to review "basic and controlling issues in a case" which it has agreed to hear. See *Riddle v McLouth Steel Production Corp*, 440 Mich 85, 101 n. 15; 485 NW2d 676 (1992).

borrowers taking out million-dollar business loans." *Lindsay v. Covenant Management Group, LLC*, 561 F.3d 601, 604 (6th Cir. 2009). To date, all authorities addressing the exemption agree that such loans are not subject to a usury limit.

(a) The statute was not repealed by implication.

If the Loan in this case falls within the exemption, it cannot violate the Criminal Usury Statute as a matter of law. Defendants addressed the exemption in a motion for summary disposition in the Trial Court and argued that it was implicitly repealed by later statutes. (Motion, pp. 6-8, APX 181-83). The Trial Court did not rule on this issue. "As a general rule, repeals by implication are disfavored." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491; 618 NW2d 1 (2000). Courts presume that "if the Legislature intended to repeal a statute or a statutory provision, it would have expressly done so." *Id*. If there exists any other reasonable interpretation of statutory provisions, an argument alleging repeal by implication will not be indulged. *Id*. at 491-492. Nonetheless, "a repeal by implication may be found when there is a clear conflict between the two statutes" such that they may not be read harmoniously. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996); *Knauff*, *supra* at 492.

Defendants argued in their motion that the Business Entity Statute, MCL 438.61, enacted in 1970 implicitly repealed §1c(11) because the latter was enacted three years earlier in 1967. **(**APX 182). This argument is factually incorrect because §1c(11) was enacted in Act No. 6 of the Public Acts of 1973 which amended the earlier statute. This argument also ignores the specific language of the statute. The Legislature knows how to apply the Criminal Usury Statute to exceptions under §1c. For example, §1c(2) has language identical to §1c(11) stating that parties "may agree in writing for the payment of any rate of interest." However, §1c(4) states: "Subsection

(2) shall not authorize or permit a rate of interest in excess of the rate set forth" in the Criminal Usury Statute.

The Legislature conspicuously did not include a provision applying the Criminal Usury Statute to §1c(11). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993). This fact was found dispositive by the Attorney General in OAG No. 5470 which concluded: "Had the legislature intended to also apply the criminal usury rate to loans made pursuant to 1966 PA 326, Sec. [1c(11)], *supra*, it could have cited subsection [(11)] as well as subsection (2) in 1966 PA 326, Sec. 1c(4), *supra*. The legislature chose not to do so." (APX 619).

Moreover, the language of the Criminal Usury Statute does not support Defendants' position. The Criminal Usury Statute, MCL 438.41, states: "A person is guilty of criminal usury when, *not being authorized or permitted by law to do so*, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period." (Emphasis added.) The plain language of the statute imposes a 25% limit on interest only when the lender is "not authorized or permitted by law" to charge more. In this case, Plaintiff was authorized to charge "any rate of interest" by 1c(11) and therefore the Criminal Usury Statute does not apply.

The Business Entity Statute states in relevant part that it is lawful "for the parties to agree in writing to any rate of interest not exceeding the rate allowed under Act No. 259 of the Public Acts of 1968." The Business Entity Statute does not impose a specific limit on interest but rather allows whatever rate the Criminal Usury Statute permits. Because parties can charge "any rate of

interest" under §1c(11) and because the Criminal Usury Statue exempts from its coverage those situations in which a rate higher than 25% is "permitted by law," neither the Business Entity Statute nor the Criminal Usury Statute alter the plain meaning of §1c(11).

The LLC Interest Rate Statute, MCL 450.4212, parallels the Business Entity Statute. It states that an LLC "may agree in writing to pay any rate of interest as long as that rate of interest is not in excess of the rate set forth in [MCL 438.41]." The "rate set forth" in MCL 438.41 is 25% only when the lender is "not authorized or permitted by law" to charge more. Because §1c(11) authorizes the parties to agree to "any rate of interest," such interest is "permitted by law" under the Criminal Usury Statute. The LLC Interest Rate Statute incorporates the Criminal Usury Statute and therefore does not impose an interest limit in this case.

To the extent there is any conflict between §1c(11) and MCL 438.61 and/or MCL 450.4212, which Plaintiff disputes, the former statute specifically addresses the Loan Documents in this case – a note exceeding $100,000 "the bona fide primary security for which is a lien against real property other than a single family residence" – and therefore governs. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), *citing Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

(b) Forty residences are not "a single-family residence."

The Loan in this case is a commercial loan secured by a mortgage on forty residential properties. (Mortgages, APX 50-62, 68-73). Defendants argued that this lien on forty residences is in fact a lien against "a single family residence" and therefore does not qualify for the exemption under §1c(11). The use of the singular "a" before "single family residence" must be given effect because the clear intent of the Legislature is to protect homeowners from usurious lenders. MCL

8.3 requires that rules of construction specified in MCL 8.3a to 8.3w be applied to Michigan statutes "unless such construction would be inconsistent with the manifest intent of the legislature."

MCL 8.3b states: "Every word importing the singular number only may extend to and embrace the plural number." In *Robinson v. City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court considered whether a singular noun could be construed as plural:

> First, the statute only states that a word importing the singular number "may extend" to the plural. The statute does not say that such an automatic understanding is required. Moreover, M.C.L. § 8.3; MSA 2.212 provides that the rule stated in § 3b shall be observed "unless such construction would be inconsistent with the manifest intent of the Legislature." Second, the Legislature has directed that
>
> > [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language.... [MCL 8.3a; MSA 2.212(1).]
>
> There is no indication that the words "the" and "a" in common usage meant something different at the time this statute was enacted.

Id. at 461 n. 18. State and federal law commonly distinguish between single-family residences and larger structures for purposes of lending, taxation, planning, zoning, municipal finance, renting, housing law, building codes, construction liens, occupational licensing, and consumer protection. In this case, the phrase "a single family residence" cannot reasonably be construed as including forty residences securing a commercial loan. Therefore, the exemption under §1c(11) applies and the Loan cannot be usurious as a matter of law.

B. Courts Regularly Enforce Usury Savings Clauses Even for Facially Usurious Loans.

Defendants mis-state the law applying to usury savings clauses by repeatedly claiming that all jurisdictions refuse to enforce savings clauses that "exceed the legal maximum from the outset." (Def. Brief, pp. 20, 26). Although the Loan in this case is not facially usurious, courts have regularly enforced usury savings clauses even for loans with facial usury. In *Karel v JRCK Corp*, unpublished per curiam opinion issued May 10, 2012 (Docket No. 304415) (APX 697), the Court of Appeals held that the stated 27.5% interest rate, which exceeds the 25% maximum under MCL 438.41, was not facially usurious due to a usury savings clause. *Id*. at 6. As the Court stated:

> The default interest rate was stated as 27.5 percent, but this was qualified by the statement that "if such rate is usurious, the highest legal rate." The plain language of the contract provides that if the default rate is usurious, it is reduced to the "highest legal rate."

Id. at *3. Using Defendants' terminology, the note in *Karel* was facially usurious because it specified 27.5% interest which exceeds the 25% maximum under the Criminal Usury Statute. The conclusion that the note was not facially usurious is based on giving effect to the usury savings clause.

The Florida Supreme Court has opined that a usury savings clause may be enforced when the interest is "'close to the legal rate.'" *Jersey Palm-Gross, Inc. v. Paper*, 658 So 2d 531, 535 (Fla. 1995) (APX 828). The Court held that that "savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances." *Id*. If the interest rate is "close to the legal rate," as the Court of Appeals held in this case in ruling that the effective interest rate "slightly" exceeds 25%,[9] a usury savings clause can be enforced even if the interest rate on its face exceeds the usury limit.

[9] (Decision, pp. 9, 10-11; APX 769, 770-71)

Applying California law, the Ninth Circuit Court of Appeals has held that a loan that "states an interest rate that exceeds the maximum allowable" was not usurious when considered in light of the contract's usury savings clause. *In re Dominguez*, 995 F 2d 883, 886 (9th Cir. 1993) (APX 802). Instead, the court concluded that the parties "intended for the savings clause to limit the rate of interest in effect under the agreement to the maximum non-usurious rate" and therefore the facially usurious rate did not apply. *Id*. at 886-87. The Court concluded that the loan was not usurious on its face even though the stated interest rate exceeded the "maximum allowable."

These cases show that courts interpreting savings clauses have not adopted a bright-line rule barring enforcement if the loan is facially usurious. Instead, these courts consider the savings clause as probative of the parties' intent not to collect usurious interest. Defendants' claim that the Loan in this case is facially usurious is inaccurate as can be confirmed by reviewing the Loan. (APX 17-62). But, even if it were facially usurious, that does not preclude enforcement of the savings clause. Rather, it can be enforced, and should be enforced under Michigan's public policy favoring freedom of contract. See, e.g., *DeFrain v. State Farm Mut. Auto. Ins. Co*., 491 Mich 359, 373; 817 NW2d 504 (2012). The parties agreed to a contract containing a usury savings clause, and that clause should be enforced according to its terms.

C. Virtually No Case Law Supports Voiding Principal.

Defendants' claim of "rapacious" interest falls flat. (Def. Brief, pp. 28, 39). This was a high-risk venture – redeveloping foreclosed houses in blighted areas – with objectively reasonable loan terms. The Loan is not facially usurious and not usurious at all unless reasonable and necessary commercial loan charges are misclassified as interest and MCL 438.31c(11) is ignored. Defendants portrayed themselves as experienced "house flippers" with over 1,500 successful

projects since 2008. (June 9, 2016 email, APX 301-302). They presented the venture as a win-win in which both parties would profit.

The purpose of usury statutes "is to protect the necessitous borrower from extortion." *Wilcox v. Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958). This purpose is not served by declining to enforce a usury savings clause negotiated between sophisticated parties. Usury protections "do not pertain to sophisticated borrowers taking out million-dollar business loans." *Lindsay v. Covenant Management Group,*, 561 F.3d at 604. "It has always been recognized that in the power of the lender to relieve the wants of the borrower lies the germ of oppression…." *Duby v Duby*, 163 Mich App 396, 399; 413 NW2d 807 (1987), quoting 45 Am Jur 2d, Interest & Usury, § 4, pp 18-19. The Loan in this case has nothing to do with "the wants of the borrower" giving rise to "the germ oppression." This was a risky business deal between sophisticated parties.

Nearly every case addressing the common-law wrongful conduct rule in the context of usury has concluded that principal is recoverable. "[T]he borrower/buyer can avail himself of the statute and have all of the interest he previously paid applied against any outstanding principal debt". *Osinski v. Yowell*, 135 MichApp 279, 287; 354 NW2d 318 (1984). The buyer is not relieved of the principal obligation. *Id*. If a loan is usurious, the "plaintiff is barred by statute from recovering any interest, fees, late charges, court costs, or attorney fees" but can still collect principal. *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004).

"Where a loan violates the usury statutes, lenders are only barred from recovering any interest, late fees, court costs, or attorney fees." *Meklir v JC Penney Co*, at *7, unpublished per curiam opinion of the Court of Appeals, issued July 5, 2005 (Docket No. 253089) (APX 712). ""[E]ven if the Loan was in violation of the Michigan usury statute, the Lender would still be

entitled to recover repayment of the full principal amount of its Loan." *In re Skymark Props II, LLC*, 597 BR 363, 390 (APX 806).

The United States District Court for the Eastern District of Michigan reached the same conclusion applying Michigan law in *Heide v Hunter Hamilton Ltd Partnership*, 826 F Supp 224, 229 (ED Mich 1993):

> It would be unjust for a court to say that even though party A loaned money to party B, party B does not have to repay the loan to party A solely because an illegal interest rate was charged by party A. The court would be turning a loan transaction into a gift transaction. As the above authorities make clear, party A's punishment for charging an excessive interest rate is that it forfeits the interest charged to the borrower; party A does not forfeit the entire amount of money it loaned to the borrower.

As the Court observed, usury laws do not turn "a loan transaction into a gift transaction." *Id*. at 229. Defendants' attempt to keep the $1 million loan principal is precisely the type of ill-gotten "gift" rejected by the District Court in *Heide*.

Defendants argue at pages 39-50 of their Supplemental Brief that they are entitled to a $1 million windfall based on Plaintiff's alleged usury. Other than the unpublished *Scalici* and *Wellman* cases, none of the cited cases support forfeiture of principal.[10] These companion decisions were released on the same day (September 20, 2005) and dealt with the notorious "Pupler" Ponzi scheme involving notes with "staggeringly" high interest rates (*Scalici* at *5). These cases are inconsistent with the great weight of authority and should not be given precedential effect. All the remaining cases cited by Defendants do not support forfeiture of principal for an alleged usurious loan.

[10] *Scalici v Bank One, NA*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2005 (Docket Nos. 254632, 254633, 254634) (APX 881); *Wellman v Bank One, NA*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2005 (Docket No. 253996) (APX 894).

The case *Union Guardian Trust Co. v Crawford*, 270 Mich 207, 211; 258 NW 248 (1935), cited throughout Defendants' Brief, states: "'Under our statute the entire interest is forfeited in usurious contracts and the courts apply all payments of interest, though made as such, upon the principal debt.'" The case *Abeloff v Ohio Finance Co.*, 313 Mich 568, 579; 21 NW2d 856 (1946), also cited throughout Defendants' Brief, reduced a usurious rate of interest to "the legal rate of interest of five percent." Neither of these cases voided principal. Defendants cite *McNamara v Gargett*, 68 Mich 454, 461; 361 NW 218 (1888), as holding that "a usurious loan agreement between a lender and farmers was void because it violated public policy." (Def. Brief, p. 41). This was not the Court's holding. The case struck down a pyramid scheme for "Bohemian oats" with no mention of usury. *Id*. As the Court stated: "It is essentially a gambling contract, and one impossible to be performed." *Id*

Defendants cite the ancient case *Orr v Lacey*, 2 Doug 230; 1846 WL 2867 (1846), for the proposition that this Court "barred the courthouse doors to a corporation that had entered into a loan agreement to take illegal interest and voided the loan agreement." (Def. Brief, p. 40). This was not the Court's holding. The Court described Michigan law in 1846 as requiring, for a usurious loan, judgment "for the plaintiff of the whole amount of principal and interest due on the bill, less three times the excessive interest." *Id*. at 234. The Court "barred the courthouse doors" only because the corporation had exceeded its charter granted in New York and Indiana (*not* Michigan) which had harsher penalties for usury. *Id*. at 235, 254.

The cases cited by Defendants almost entirely support Plaintiff's position that the remedy for usury, if proven, is forfeiture of interest. This is consistent with the civil remedy provisions of MCL 438.32 which do not void principal and the criminal penalties of MCL 438.41 which do not provide a private cause of action. *Wilkerson v Seder*, 81 Mich App 726, 728; 265 NW2d 807

(1978). There is no basis under the common law for using the wrongful conduct rule to expand these remedies to include voiding the principal loan obligation when the Legislature has already enacted a comprehensive statutory scheme. If the Legislature intended to prohibit recovery of principal, it would have said so.

D. Fact Issues Preclude Summary Disposition.

If this Honorable Court concludes that the usury savings clause is unenforceable and that the Loan cannot be deemed non-usurious on the current record, this action should be remanded to the Trial Court for a trial on the issue of whether, in fact, Plaintiff committed criminal usury, and on Plaintiff's claims including fraud in the inducement which have not been adjudicated. Defendants bear the burden of establishing that the Loan is usurious. *Minnesota Mutual Life Ins. Co.*, 284 Mich at 215. "The defense of usury is an affirmative defense which is waived if not raised." *Shaw Inv. Co.* 159 Mich App at 580. The lower courts improperly shifted the burden of proof and held that the Loan is usurious without evidence that Plaintiff had the requisite criminal intent under MCL 438.41 or that the commercial loan charges at issue are disguised interest and not reasonable and necessary charges for services rendered. These are fact-intensive inquiries that cannot be resolved with the current thin record.

CONCLUSION

WHEREFORE, Plaintiff/Counter-Defendant/Appellee/Cross-Appellant, Soaring Pine Capital Real Estate and Debt Fund II, LLC, requests that this Honorable Court grant leave to appeal and give full consideration to the legal issues presented in Plaintiff's Cross-Application. In the alternative, Plaintiff requests that this Court reverse in part the Court of Appeals decision issued on June 10, 2021 on grounds that the Loan is not usurious as a matter of law or, alternatively, that Defendants are limited to the parties' agreed contractual remedy prohibiting charging of interest

exceeding the maximum allowed by law, and remand the case to the Oakland County Circuit Court for further proceedings including adjudication of Plaintiff's fraud and other claims.

Respectfully submitted,

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