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district court's order and remand the cause with directions to the district court to grant Parmar a new trial. Because we have instructed the court to grant Parmar a new trial, we do not address his argument that the State's loss of evidence warrants a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

HERITAGE BANK, A STATE BANKING CORPORATION, APPELLEE, V. JEROME J. BRUHA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND PRIME TRADING COMPANY, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

812 N.W.2d 260

Filed February 10, 2012. No. S-10-1219.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Uniform Commercial Code: Interest.** Although the Uniform Commercial Code allows notes to have a variable interest rate, under Neb. U.C.C. § 3-104(a) (Cum. Supp. 2010), the principal amount must be fixed.
4. **Promissory Notes: Negotiable Instruments.** A fixed principal amount is an absolute requisite to negotiability.
5. ____: ____. To meet the fixed principal amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. If reference to a separate instrument or extrinsic facts is needed to ascertain the principal due, the sum is not "certain" or fixed.
6. ____: ____. A note given to secure a line of credit under which the amount of the obligation varies, depending on the extent to which the line of credit is used, is not negotiable.
7. **Negotiable Instruments.** For a person to be a holder in due course, the instrument must be negotiable.
8. **Contracts: Fraud.** Fraud in the execution goes to the very existence of the contract, such as where a contract is misread to a party or where one paper is

surreptitiously substituted for another, or where the party is tricked into signing an instrument he or she did not mean to execute. Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations.

9. **Banks and Banking: Contracts.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), generally applies to bar defenses or claims against federal regulators in those instances where a financial institution enters into an oral or secret agreement that alters the terms of an existing unqualified obligation.
10. **Negotiable Instruments.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), is separate from the doctrine of holder of due course; so, whether a document is negotiable is irrelevant.
11. **Banks and Banking: Assignments: Federal Acts.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and its statutory codification at 12 U.S.C. § 1823(e) (2006) protect assignees of the Federal Deposit Insurance Corporation.
12. **Federal Acts: Contracts: Warranty: Fraud: Words and Phrases.** The word "agreement" in 12 U.S.C. § 1823(e) (2006) encompasses warranties made to induce a party to the contract, even if such warranties are made fraudulently.
13. **Federal Acts: Fraud.** Under 12 U.S.C § 1823(e) (2006), the defense of fraud in the inducement is barred unless the defense meets the requirements of the statute.
14. **Judgments: Interest.** Neb. Rev. Stat. § 45-103 (Reissue 2010) provides for a default interest rate but allows for the parties to contract otherwise. Neb. Rev. Stat. § 45-103.01 (Reissue 2010) states that that rate shall accrue on the judgment.
15. ____: ____. Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed in part, and in part reversed and remanded.

Barry D. Geweke, of Stowell, Kruml & Geweke, P.C., L.L.O., for appellant.

Kent E. Rauert, of Svehla, Thomas, Rauert & Grafton, P.C., for appellee Heritage Bank.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Heritage Bank (Heritage) sued Jerome J. Bruha on promissory notes that it had purchased from the Federal Deposit Insurance Corporation (FDIC). The FDIC had obtained the notes after it became a receiver for the failed bank that had initially lent the money to Bruha. The notes secured lines of credit for Bruha's benefit. The district court granted summary judgment to Heritage and awarded it $61,384.67 on one of the notes. Bruha appeals. The primary issues are whether either the holder-in-due-course rule of Nebraska's Uniform Commercial Code or federal banking law bars Bruha's defenses to the enforcement of the note. We conclude that federal law bars Bruha's defenses, and thus, we affirm in part. But because of a minor error in the court's calculation of interest, we reverse in part, and remand for correction.

I. BACKGROUND

1. PROMISSORY NOTES

On four different occasions in 2008, Bruha signed promissory notes with Sherman County Bank. Although the district court ultimately granted summary judgment to Heritage on all four notes, Bruha's arguments relate only to the fourth and final note. So we will limit our discussion to the facts regarding this note. We will, however, provide some background to put the note in context.

The notes secured lines of credit under which Bruha could borrow money from Sherman County Bank. Bruha then apparently invested the money in accounts with a trading company, which allegedly shared management with Sherman County Bank. In brief, Bruha claims that Sherman County Bank misled him into borrowing money that, in turn, he invested with a trading company that generated trade commissions through risky and speculative commodity trading.

In an affidavit, Bruha claimed that representatives of Sherman County Bank repeatedly advised him against taking money out of his trading account, stating that he would lose more money if he did so than he would by leaving it in. Bruha claimed that the representatives often understated the potential losses he would suffer by staying in the account. Also, Bruha claims

he was told that the existing collateral would cover the credit he later took. Further, although he admittedly knew he was increasing his debt burden, he thought it was under one note as opposed to four. The record, however, contains no internal records or documents of Sherman County Bank evidencing any of the representations regarding his account that Bruha claims Sherman County Bank made.

Bruha signed the fourth note, No. 1723, on December 16, 2008. The note evidenced a promise to pay "the principal amount of Seventy-five Thousand & 00/100 ($75,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance." The note stated that it "evidence[d] a revolving line of credit."

The note contained a variable interest rate. The rate was subject to change every month and calculated on an index maintained by Sherman County Bank. The interest rate on Bruha's note was 1 percentage point under the percentage on the index at any given time. The initial rate was 7.25 percent, and was later adjusted to 6.75 percent. On default, this interest rate would increase by 5 percentage points.

There are admittedly a few typographical errors on the note. Because Bruha claims these errors affect the validity of the note, we recount the details. For one, the maturity date on the note is February 1, 2008, which, read literally, means that the note would have matured about 10 months before Bruha signed it. We note that the three other notes had maturity dates of February 1, *2009*. In fact, when Bruha later extended the life of the notes with Sherman County Bank to August 1, 2009, the extension agreement listed an original maturity date for all notes, including note No. 1723, of February 1, 2009.

There are two other typographical errors on note No. 1723. They are both in a section titled "COLLATERAL." It reads: "Borrower acknowledges this Note is secured by an assignment of hedge account from Jerome Bruah [sic] to Sherman County Bank dated DATE [sic]." Thus, Bruha's name is misspelled and a line for a date is unfilled.

On note No. 1723, Bruha received the following advancements: He received $10,000 on December 16, 2008; $40,000 on December 17; and $1,000 on January 30, 2009. This

totaled $51,000. There is no dispute that Bruha received all of this money.

An affidavit also established the interest rate on the notes. It shows that the initial rate was 7.25 percent. This rate was adjusted to 6.75 percent on February 1, 2009. Then, on August 2, after Bruha defaulted, the rate increased to 11.75 percent.

Sherman County Bank eventually failed, and the FDIC was appointed as receiver. The FDIC then sold and assigned some of Sherman County Bank's assets to Heritage. These assets included the notes signed by Bruha.

Heritage sued Bruha to enforce the notes. The complaint alleged that Bruha owed Heritage on the four notes and that Heritage had received the notes from the FDIC after Sherman County Bank had been placed into receivership. But as mentioned, only note No. 1723 is the subject of this appeal. As to note No. 1723, Heritage claimed that the principal was $75,000 and that the initial interest rate was 8.25 percent. Heritage also alleged that the interest rate was to jump 5 percentage points upon default. Heritage alleged that it was a holder in due course and entitled to enforce the note.

In his amended answer, Bruha admitted that he signed note No. 1723 but claims that he did not do it voluntarily. He claimed that Sherman County Bank had procured his signature "by fraud and/or misrepresentation." Bruha admitted that he had not paid the note but denied that he was obligated to do so.

2. The District Court's Orders

Heritage moved for summary judgment, which the district court granted. The court began by discussing 12 U.S.C. § 1823(e) (2006), the text of which we reproduce below in our analysis. The gist of § 1823(e) is that for certain defenses to be asserted against the FDIC or its assignees, such a defense must comply with criteria set out in that statute. According to the district court, one of these criteria is that the defense be evidenced in writing. The court found that there was no evidence in writing of a defense that would invalidate the note. Apparently conflating § 1823(e) with the holder-in-due-course doctrine, the court concluded that because there were

no defenses that met the requirements of § 1823(e), the FDIC became a holder in due course.

The district court then cited an Eighth Circuit case, *Federal Deposit Ins. Corp. v. Newhart*,[1] for the proposition that the FDIC transfers its protected status to its assignees. In sum, because Bruha could not show anything in writing that would invalidate the note, Heritage was entitled to enforce them.

The court then recounted the interest rates on note No. 1723. The court recognized the variable interest rate and that the rate would increase by 5 percentage points upon default. The court noted that the interest rate was 7.75 percent from the day it was signed (this, as we later explain, was error), December 16, 2008, until February 1, 2009. From February 1 until August 2, the interest rate was 6.75 percent. Then from August 2 onward, the note had an interest rate of 11.75 percent.

In calculating the amount Bruha owed, the principal on the note was $10,000 from December 16 until December 17, 2008. On December 17, Bruha received an additional $40,000, which brought the principal to $50,000. On January 30, 2009, Bruha received a $1,000 advance, which brought the principal to $51,000. The court calculated the total accumulated interest on the note at $10,384.67. Adding this to the principal, the court concluded that Bruha owed Heritage $61,384.67 on note No. 1723. The court then ruled that postjudgment interest would be computed on this amount at 11.75 percent per annum.

II. ASSIGNMENTS OF ERROR

Bruha assigns, restated and renumbered, that the district court erred in:

(1) granting summary judgment to Heritage;

(2) concluding that the FDIC and, in turn, Heritage were holders in due course of the notes;

(3) finding that there was no written documentation that would call the validity of note No. 1723 into question;

(4) applying the *D'Oench* doctrine[2] to this case; and

(5) calculating postjudgment interest on $61,384.67.

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[1] *Federal Deposit Ins. Corp. v. Newhart*, 892 F.2d 47 (8th Cir. 1989).

[2] *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942).

III. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

IV. ANALYSIS

1. Because Note No. 1723 Was Not Negotiable, Heritage Is Not a Holder in Due Course

Bruha argues that Heritage is not a holder in due course. Similarly, he argues that the FDIC was not a holder in due course when it held the note. A holder in due course is, with some exceptions, "immune to defenses, claims in recoupment, and claims of title that prior parties to commercial paper might assert. The holder in due course always enjoys certain pleading and proof advantages."[5] So if Heritage were a holder in due course, it would enjoy an advantageous position in litigation with Bruha.

We conclude, however, that Heritage is not a holder in due course because the note was not "negotiable" and article 3 of the Uniform Commercial Code does not apply to this case.

Neb. U.C.C. § 3-104(a) (Cum. Supp. 2010) provides: "Except as provided in subsections (c) and (d), 'negotiable instrument' means an unconditional promise or order to pay *a fixed amount of money*, with or without interest or other charges described in the promise or order . . . ." (Emphasis supplied.) Here, the note fails to meet the definition of a

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[3] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[4] *Id.*

[5] 2 James J. White & Robert S. Summers, Uniform Commercial Code § 17-1 at 168-69 (5th ed. 2008).

"negotiable instrument" because it was not a promise "to pay a fixed amount of money."

[3,4] Although the Uniform Commercial Code allows notes to have a variable interest rate,[6] under § 3-104(a), the principal amount must be fixed.[7] "A fixed amount is an absolute requisite to negotiability."[8] This is because unless a purchaser can determine how much it will be paid under the instrument, it will be unable to determine a fair price to pay for it, which defeats the basic purpose for negotiable instruments.[9]

[5] We applied this principle in *Rodehorst v. Gartner*,[10] in which we stated that "[a] guaranty is not an agreement to pay a fixed amount and is therefore not a negotiable instrument subject to article 3 of the Nebraska Uniform Commercial Code." To meet the fixed amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source.[11] If reference to a separate instrument or extrinsic facts is needed to ascertain the principal due, the sum is not "'certain'" or fixed.[12]

[6] Here, the text of the note states that Bruha "promises to pay . . . the principal amount of Seventy-five Thousand & 00/100 Dollars ($75,000.00) *or so much as may be outstanding* . . . ." (Emphasis supplied.) Further, the note states that it "evidences a revolving line of credit" and that Bruha could request advances under the obligation up to $75,000. This fails the "fixed amount of money" requirement of § 3-104(a); one looking at the instrument itself cannot tell how much Bruha has been advanced at any given time. So, the note is

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[6] See Neb. U.C.C. § 3-112 (Reissue 2001).

[7] See *id.*, comment 1. See, also, 6 William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series § 3-104:7 (rev. 1999).

[8] 6 Hawkland & Lawrence, *supra* note 7 at 3-45.

[9] *Id.*

[10] *Rodehorst v. Gartner*, 266 Neb. 842, 848, 669 N.W.2d 679, 684 (2003).

[11] 4 William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series § 3-106:2 (rev. 1999).

[12] See *id.* at 3-100. See, also, *Resolution Trust v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992); *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980).

not negotiable. Stated simply, "[a] note given to secure a line of credit under which the amount of the obligation varies, depending on the extent to which the line of credit is used, is not negotiable . . . ."[13]

[7] For a person to be a holder in due course, the instrument must be negotiable.[14] Because the note was not a negotiable instrument, neither the FDIC nor Heritage could ever become a holder in due course of it under Nebraska law. And further, because this note is not a negotiable instrument, article 3 does not apply.[15]

2. Bruha's Alleged Defenses

Having determined that the holder-in-due-course doctrine does not apply, we consider the defenses Bruha asserts against the enforcement of the note. We also point out that federal law, namely the *D'Oench* doctrine and § 1823(e), may still bar these defenses. We discuss this question later in our opinion.

Bruha argues that the note is invalid and unenforceable. He points to minor irregularities on the face of the note. He also asserts that he signed the note because he was the victim of fraud. There is no dispute that Bruha actually received every dollar that Heritage is claiming he owes on the principal.

(a) The Typographical Errors

Although the notes do contain a few minor irregularities, these appear to be the result of sloppy clerical work. The date on the note contains a typographical error that, taken literally, would mean that the loan had matured before Bruha had signed the note. Bruha's name is also misspelled as "Bruah" in one place. Finally, a line for a date is left blank.

Bruha, however, does not attempt to tie these mistakes to any sort of contract defense, such as mistake or fraud. He cites no case, statute, or regulation that would show how these

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[13] 11 Am. Jur. 2d *Bills and Notes* § 84 at 463-64 (2009). See, also, *Yin v. Society National Bank Indiana*, 665 N.E.2d 58 (Ind. App. 1996); *Farmers Production Credit Assoc. v. Arena*, 145 Vt. 20, 481 A.2d 1064 (1984).

[14] See Neb. U.C.C. § 3-302 (Reissue 2001).

[15] See Neb. U.C.C. § 3-102 (Reissue 2001).

minor irregularities invalidated the note. Similarly, Bruha does not explain what remedy he would be entitled to. Apparently, Bruha thinks that these minor errors on the face of the note have somehow transformed otherwise valid obligations into a winning lottery ticket—the proceeds of which are his to keep. Without any citation to any source of law whatsoever, we are unprepared to accept such a proposition.

(b) Allegations of Fraud

Bruha's brief also makes glancing, undeveloped references to fraud. Bruha's fraud allegations are sketchy at best.

[8] We begin by noting that there are potentially two different types of fraud at issue: fraud in the execution and fraud in the inducement.

> Fraud in the execution goes to the very existence of the contract, such as where a [contract] is misread to the [party] or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument he or she did not mean to execute. . . . Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations . . . .[16]

In liberally construing his complaint, it appears that Bruha has alleged fraud in the inducement. Bruha submitted his own affidavit. The gist of the affidavit is that officials at Sherman County Bank repeatedly told Bruha he would be better off if he maintained his trading account rather than closing it. They allegedly induced Bruha into taking additional loans by misrepresenting the profitability of the trading accounts. But nowhere does Bruha claim that he was unaware that he was incurring additional debt in his negotiations with the bank, although he might have thought it was under one note instead of four notes. In sum, Bruha knew the character of the transactions he was entering, although he might have been led there

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[16] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 66, 803 N.W.2d 424, 442 (2011).

by false pretenses. This sounds in fraud in the inducement, not fraud in the execution.

3. § 1823(e) Bars Bruha's Fraud in the Inducement Defense

Having concluded that if Bruha has stated any defense, he has stated a defense of fraud in the inducement, we move on to Bruha's next argument. For this purpose, we assume, but do not decide, that Bruha could prove the elements of his fraud-in-the-inducement defense.

Bruha argues that the district court erred in applying the *D'Oench* doctrine and its codification at 12 U.S.C. § 1823(e). We begin our discussion of this issue with the U.S. Supreme Court case that gave rise to these rules.

In *D'Oench, Duhme & Co. v. F. D. I. C.*,[17] the U.S. Supreme Court recognized a common-law rule that barred the invocation of secret agreements to defeat a claim of the FDIC. The case involved the FDIC's efforts to enforce notes it had acquired from a failed bank. The signer of the notes and the bank, however, had secretly agreed that the bank would never seek to enforce the notes; the bank had taken the notes to make it appear in better financial shape than it actually was. The FDIC did not learn of this secret agreement until after it had demanded payment on the notes. When the FDIC sought to enforce one of the notes, the defendant pointed to the secret agreement, arguing that the parties had never intended the notes to be enforced and that the notes lacked consideration. Citing "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks [that the FDIC] insures or to which it makes loans,"[18] the Court ruled that the defendant could not rely on the secret agreements in its defense.

[9,10] The *D'Oench* doctrine generally applies to bar defenses or claims against federal regulators in those instances where a financial institution enters into an oral or secret agreement that

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[17] *D'Oench, Duhme & Co., supra* note 2.

[18] *Id.*, 315 U.S. at 457.

alters the terms of an existing unqualified obligation.[19] The doctrine provides well-reasoned, unchallengeable finality to the lender's books and records when used by regulatory agencies to assess the lending institution's solvency. We stress that this doctrine is separate from the doctrine of holder in due course, so whether the document is negotiable is irrelevant.[20]

The *D'Oench* doctrine is codified at 12 U.S.C. § 1823(e), which provides in relevant part:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e)'s most obvious purpose "is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets."[21] These evaluations, which sometimes "must be made 'with great speed,'"[22] would be virtually impossible if "bank records contained seemingly

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[19] *Oaks Apts. Joint Venture, supra* note 12.

[20] See, e.g., *Resolution Trust Corp. v. Kennelly*, 57 F.3d 819 (9th Cir. 1995); *Randolph v. Resolution Trust Corp.*, 995 F.2d 611 (5th Cir. 1993); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991); *Federal Deposit Ins. Corp. v. P.L.M. Intern., Inc.*, 834 F.2d 248 (1st Cir. 1987).

[21] *Langley v. FDIC*, 484 U.S. 86, 91, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).

[22] *Id.*, quoting *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982).

unqualified notes that [were] in fact subject to undisclosed conditions."[23]

[11] All courts agree that § 1823(e) is a codification of the *D'Oench* doctrine.[24] Further, courts agree this doctrine also protects assignees of the FDIC.[25] We note that there is an "open question whether the judicially created doctrine and its statutory counterpart are coterminous."[26] There is also a dispute whether subsequent U.S. Supreme Court case law[27] has effectively disapproved of the common-law rule.[28] But we need not decide these issues because § 1823(e) bars Bruha's defense; so deciding whether a common-law rule would provide greater protection for Heritage is unnecessary.

As mentioned, the only defense that Bruha has alleged is a defense of fraud in the inducement. We now consider whether under § 1823(e), Bruha may assert this defense against Heritage. Our starting point in this analysis is *Langley v. FDIC*,[29] the seminal case interpreting § 1823(e).

In *Langley*, a bank (later received by the FDIC) sued the defendants to collect on promissory notes that the defendants had signed in order to receive money to purchase land. The defendants argued that the bank had procured their signatures

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[23] *Id.*, 484 U.S. at 92.

[24] See, e.g., *Young v. F.D.I.C.*, 103 F.3d 1180 (4th Cir. 1997); *DiVall Insured Income v. Boatmen's First Nat. Bank*, 69 F.3d 1398 (8th Cir. 1995); *Vasapolli v. Rostoff*, 39 F.3d 27 (1st Cir. 1994); *Adams, supra* note 20.

[25] See, e.g., *Beal Bank, SSB v. Pittorino*, 177 F.3d 65 (1st Cir. 1999); *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40 (D. Conn. 2010) (collecting cases); *AAI Recoveries, Inc. v. Pijuan*, 13 F. Supp. 2d 448 (S.D.N.Y. 1998); *Santopadre v. Pelican Homestead and Sav. Ass'n*, 782 F. Supp. 1138 (E.D. La. 1992); *OCI Mortg. Corp. v. Marchese*, 255 Conn. 448, 774 A.2d 940 (2001); *AGI v. Pacific Southwest Bank, F.S.B.*, 972 S.W.2d 866 (Tex. App. 1998).

[26] *Vasapolli, supra* note 24, 39 F.3d at 33 n.3.

[27] See, *Atherton v. FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994).

[28] Compare, e.g., *DiVall Insured Income, supra* note 24, with *Motorcity of Jacksonville v. Southeast Bank N.A.*, 120 F.3d 1140 (11th Cir. 1997).

[29] *Langley, supra* note 21.

by misrepresentation. They claimed that the bank had misrepresented the size of the tract of land, the amount of mineral deposits on the land, and the lack of existing mineral leases on the land. The bank records, the minutes of the board of directors, and the minutes of the bank's loan committee, however, contained no evidence of such misrepresentations.

[12] The Court held that § 1823(e) barred the misrepresentation defense, which the Court characterized as fraud in the inducement. The Court reasoned that generally, the truthfulness of a warranty was a condition of a contract, and that the word "agreement" in § 1823(e) encompassed such warranties, even if such warranties were made fraudulently. So the terms of the agreement were subject to § 1823(e). And fraud in the inducement would not be a defense unless such fraud met the requirements of § 1823(e).

[13] Thus, *Langley* holds that § 1823(e) bars the defense of fraud in the inducement unless the defense meets the requirements of the statute. In this case, Bruha has failed to show that his defense does so.

To assert his defense of fraud in the inducement, Bruha must show that the agreement, including the allegedly fraudulent assertions made by Sherman County Bank regarding the profitability of the accounts, has met § 1823(e)'s requirements as follows: The agreement is in writing; was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution; was approved by the board of directors of the depository institution or its loan committee, with such approval reflected in the minutes of said board or committee; and has been, continuously, from the time of its execution, an official record of the depository institution.

Bruha does not point to anything regarding the fraud in any writing. Nor does he explain how the alleged fraudulent misrepresentations satisfy any of the other requirements of § 1823(e). Summed up, his defense does not meet the requirements § 1823(e).

Bruha does point to the minor irregularities in the note. But as we mentioned earlier, he does not explain how these

irregularities fit into any defense. As clearly explained in *Langley*, the "agreement"—which would include potential assertions about the profitability of an investment—would have to be found in writing. Here, it was not. Thus, § 1823(e) bars Bruha from asserting the defense against Heritage. Because Bruha has not alleged any other defense, the district court did not err in granting Heritage summary judgment.

4. Judgment Interest Rate Calculation

Bruha's final argument relates to the manner in which postjudgment interest is accruing on the judgment. As mentioned, the principal due on the note was $51,000. The court, however, determined that there was $10,384.67 of interest due on the note. Taken together, the total judgment was $61,384.67. The court then ruled that this total would accumulate interest at the rate of 11.75 percent per annum. Bruha argues this is error. He argues that the court should calculate postjudgment interest only on the overdue principal, which was $51,000. The parties agree that the interest rate applicable is 11.75 percent per annum. The question is whether this rate is applied to the judgment—which was $61,384.67 and included some accrued interest—or the outstanding principal of $51,000. We conclude that it is the former.

[14,15] Neb. Rev. Stat. § 45-103.01 (Reissue 2010) provides: "Interest as provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." Neb. Rev. Stat. § 45-103 (Reissue 2010) provides for a default interest rate but allows for the parties to contract otherwise. The parties did so contract in this case. But § 45-103.01 states that that rate shall accrue on the judgment. Bruha is essentially claiming that the court should apply the rate to an amount other than the judgment; he is arguing that the court should apply the rate to only a single component of the judgment. But this argument belies the plain language of § 45-103.01, which, again, states that interest shall accrue on the judgment. In fact, the Nebraska Court of Appeals has already rejected Bruha's argument, and we now adopt its reasoning. "Although compound interest generally is not allowable on a judgment, it is established that a

judgment bears interest on the whole amount from its date even though the amount is in part made up of interest."[30]

Further, many courts have held that the interest due before judgment merges into that judgment and thus begins to accrue postjudgment interest.[31] The purpose of interest is to compensate the party for being deprived of the use of its money.[32] In this case, not only was Heritage deprived of its use of the overdue principal, it has also been deprived of the use of interest payments that should have been paid on that principal.

Thus, the district court did not err in stating that postjudgment interest would accrue on the total amount of the judgment owed to Heritage by Bruha. We do note, however, one error by the district court that the parties failed to raise. The district court stated in its order that the initial interest rate on note No. 1723 was 7.75 percent. This is incorrect; the initial rate was 7.25 percent. This interest rate was adjusted, as the district court correctly noted, to 6.75 percent on February 1, 2009. In all other respects, the district court's order appears to be correct. Accordingly, we remand the cause to the district court to calculate interest using the proper initial interest rate.

V. CONCLUSION

We agree with the district court that § 1823(e) bars Bruha's defense. Because the court erred in applying an initial interest rate of 7.75 percent instead of 7.25 percent, we reverse in part, and remand to the district court to recalculate the interest on the judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

WRIGHT and GERRARD, JJ., not participating in the decision.

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[30] *Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank*, 18 Neb. App. 624, 631, 790 N.W.2d 462, 468 (2010). See, also, *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996).

[31] See, e.g., *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576 (6th Cir. 2002); *Air Separation v. Lloyd's of London*, 45 F.3d 288 (9th Cir. 1995); *Quality Engineered Inst. v. Higley South*, 670 So. 2d 929 (Fla. 1996).

[32] See, e.g., *Air Separation, supra* note 31.