In the Supreme Court of Iowa

Case No. 19-0514

PSFS 3 Corporation,

Plaintiff/Appellee,

vs.

Michael P. Seidman, D.D.S., P.C. d/b/a Dental Associates of Cape Cod, Michael P. Seidman, *et al.*

Defendants/Appellants.
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Initial Brief of Appellants (Charlip Defendants)

On Appeal from the Iowa District Court in and for Polk County,
Iowa Consolidated Case Number: LACL114226
Judge Scott D. Rosenberg

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Issue 1: THE DISTRICT COURT ERRED IN FINDING THAT IT HAD JURISDICTION OVER THE DOCTORS.

Authorities Cited in Argument of this Issue:

Cases:

Anderson v. Abbott, 321 U.S. 349, 362, 64 S.Ct. 531, 538 (1944)

Book v. Doublestar Dongfeng Tyre Co., Ltd., 860 N.W.2d 576, 583 (Iowa 2015)

Briggs Transp. Co., Inc. v. Starr Sales Co., Inc., 262 N.W.2d 805, 810 (Iowa 1978)

Capital Promotions, L.L.C. v. Don King Prods., Inc., 756 N.W.2d 828, 833 (Iowa 2008)

Carter v. Pub. Fin. Corp., 73 F.R.D. 488 (N.D. Ala. 1977)

Evans v. Ober, 256 Iowa 708, 711, 129 N.W.2d 78, 80 (1964)

First Midwest Corp. v. Corporate Finance Assocs., 663 N.W.2d 888 (Iowa 2003)

Garcia v. Eidal Intern. Corp., 808 F.2d 717, 722 (10th Cir. 1986)

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. [915, 922], 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796, 805 (2011).

Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684 fn. 4 (Iowa 2001)

Inn Operations, Inc. v. River Hills Motor Inn Co., 261 Iowa 72, 84, 152 N.W.2d 808, 815 (1967)

Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945)

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180 L.Ed.2d at 773 [(2011)]

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State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 514 P.2d 40, 49 (1973)

United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997)

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Other Authorities:

1 FLETCHER CYC. CORP. § 41.33.

5 IA. PRAC., *Business Organizations* § 15:4 (Nov. 2017)

61A AM. JUR. 2D *Pleading* § 71

71 C.J.S. *Pleading* § 530

Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815, 824-28 (1987)

BLACK'S LAW DICTIONARY (10th ed. 2014) defining "sham"

BLACK'S LAW DICTIONARY (11th ed. 2019) defining "forum shopping"

Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974)

Henry W. Ballantine, BALLANTINE ON CORPORATIONS, § 129, pp. 302-303 (rev. ed. 1946)

Joyce Colson, *Upstream, Midstream, Downstream-the Valuation of Royalties on Federal Oil and Gas Leases*, 70 U. COLO. L. REV. 563, 569 (1999)

Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

Robert Kenneth Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567, 1610 (1991).

Issue 2: **THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF LAW THAT THE FINANCING AGREEMENTS (ENTITLED "EQUIPMENT LEASE APPLICATION AND AGREEMENT") WERE NOT CREDIT AGREEMENTS AS DEFINED IN IOWA CODE § 535.17; THAT THE ORIGINAL PRINCIPAL AMOUNT OF THE CREDIT AGREEMENT WAS NOT A MATERIAL TERM UNDER IOWA CODE § 535.17; AND, THAT THE RATE OF INTEREST OF THE CREDIT**

AGREEMENT, WHICH COULD NOT OTHERWISE BE CALCULATED, WAS NOT A MATERIAL TERM UNDER IOWA CODE § 535.17.

Authorities Cited in Argument of this Issue:

Cases:

C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC, 784 N.W.2d 753 (Iowa 2010)

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011)

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Fairfield Six/Hidden Valley P'ship v. Resolution Trust Corp., 860 F. Supp. 1085, 1089 (D. Md. 1994)

Fees v. Mut. Fire & Auto. Ins. Co., 490 N.W.2d 55, 57 (Iowa 1992)

Fleming v. Parkview Colonial Manor Investment Co. (1975), 31 Ill.App.3d 6, 8, 333 N.E.2d 587.)

Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553, 614–15 (Iowa, 2017)

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UE Local 893/IUP v. State, 928 N.W.2d 51, 59 (Iowa 2019)

Wheeler v. White, 398 S.W.2d 93, 95 (Tex.1965)

Statutes:

IOWA CODE Section 535.17

IOWA CODE Section 535.2(1)

Issue 3: **THE DISTRICT COURT DEPRIVED THE DOCTORS OF THEIR DUE PROCESS RIGHTS UNDER THE U.S. AND IOWA CONSTITUTIONS BY ENTERING FINAL JUDGMENTS WITHOUT PERMITTING THEM TO PRESENT A DEFENSE, WITHOUT A TRIAL, AND WITHOUT EVIDENCE (AND NOT AS A RESULT OF A MOTION FOR DISMISSAL, SUMMARY JUDGMENT OR JUDGMENT ON THE PLEADINGS).**

Authorities Cited in Argument of this Issue:

Cases:

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 n.7 (1972)

Boddie v. Connecticut, 401 U.S. 371, 377–79 (1971)

Bonilla v. Iowa Bd. of Parole, 18-0477, 2019 WL 2710742, at *20 (Iowa June 28, 2019)

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)

Danner v. Hass, 257 Iowa 654, 667, 134 N.W.2d 534, 543 (1965), *overruled in part by Needles v. Kelley,* 261 Iowa 815, 156 N.W.2d 276 (1968)

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State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012)

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Iowa R. Civ. P. Rule 1.901

Other Authorities:

16 AM.JUR.2D, *Constitutional Law*, pages 966-969

16A C.J.S. *Constitutional Law* § 628, pages 861-867

18A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE

§ 4449(2d ed. 2002)

Charles W. Joiner, *Determination of Controversies Without a Factual Trial*, 32 IOWA L. R. 417 (Vol. 3 March 1947).

David E. Benz, *Is Less Ever More? Does the Due Process Clause Ever Require Fewer Procedures?* 65 DRAKE L. REV. 1, 2-3 (2017).

Davis, ADMINISTRATIVE LAW (one volume edition) pages 162-164 (1972)

Issue 4: THE DISTRICT COURT ERRED IN AWARDING ENTITLEMENT TO ATTORNEYS' FEES TO PSFS 3.

Authorities Cited in Argument of this Issue:

Cases:

Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982)

Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 862 (Iowa 1991)

Johnson v. Baum, 788 N.W.2d 397 (Iowa Ct. App. 2010)

Kinseth v. Weil-McLain, No. 15-0943, 2018 WL 2455300 at *12 (Iowa June 1, 2018)

Security State Bank v. Ziegeldorf, 554 N.W.2d 884, 893 (Iowa 1996)

Swartz v. Ballou, 47 Iowa 188, 195 (1877)

United States v. Straker, 800 F.3d 570, 594 n.5 (D.C. Cir. 2015)

Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987)

Statutes:

IOWA CODE Section 625.15

IOWA CODE Section 625.22 (1981)

Issue 5: PSFS 3 FAILED TO PROVE BREACH OF CONTRACT.

Authorities Cited in Argument of this Issue:

Cases:

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 85 (Iowa 2011)

Carter v. Bair, 208 N.W. 283, 283 (Iowa 1926)

Data Documents, Inc. v. Pottawattamie Cty., 604 N.W.2d 611, 616 (Iowa 2000)

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Duck Creek Tire Serv. Inc. v. Goodyear Corners, L.C., 822 N.W.2d 745 (Iowa Ct. App. 2012)

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Iowa Mortg. Ctr., L.L.C., v. Baccam, 841 N.W.2d 107, 110 (Iowa 2013)

Kuehl v. Freeman Bros. Agency, Inc., 521 N.W.2d 714, 718 (Iowa 1994)

Modern Heat & Power Co. v. Paul, 261 Iowa 1319, 1323, 158 N.W.2d 8, 10 (1968)

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998)

Nationwide Agribusiness Insurance Company v. PGI International, 882 N.W.2d 512 (Iowa Ct. App. 2016)

Natkin & Co. v. R.F. Ball Constr. Co., 123 N.W.2d 415, 422 (Iowa 1963)

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Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 846 (Iowa 2010)

Whalen v. Connelly, 545 N.W.2d 284, 290 (Iowa 1996)

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Other Authorities:

25A C.J.S. Damages § 308

Restatement (Second) of Contracts § 351, at 135 (1981)

RESTATEMENT OF CONTRACTS § 331

Issue 6: THE DEFAULT INTEREST DAMAGE PROVISION OF THE FINANCING AGREEMENT IS UNCONSCIONABLE UNDER IOWA CODE SECTION 554.13108 (1).

Authorities Cited in Argument of this Issue:

Cases:

Carson Grain & Implement, Inc. v. Dirks, 460 N.W.2d 483, 486 (Iowa Ct. App. 1990)

Citicorp Vendor Finance, Inc. v. WIS Sheetmetal, Inc., 206 F.Supp.2d 962, 965-66 (S.D. Ind. 2002)

Data Documents, Inc. v. Pottawattamie Cty., 604 N.W.2d 611, 616 (Iowa 2000)

In re Johnston, 2004 WL 3019472, at *4 (Bankr. N.D. Iowa Dec. 20, 2004)

Iowa Mortg. Ctr., L.L.C., v. Baccam, 841 N.W.2d 107, 110 (Iowa 2013)

Natkin & Co. v. R.F. Ball Constr. Co., 123 N.W.2d 415, 422 (Iowa 1963)

Outlook Farm Golf Club, LLC, 784 N.W.2d at 758

Statutes:

IOWA CODE Chapter 551A

IOWA CODE Section 535.17

IOWA CODE Section 554.13108 (1)

Other Authorities:

Nelson and Whitman, REAL ESTATE FINANCE LAW, (5th ed. 2007) at 535

Routing Statement

Appellants believe that this Court should retain the appeal because it presents substantial issues of first impression:

- Whether the assignment to a newly formed corporation, which has no real business purpose other than to be the assignee for contracts simply to shop the forum for litigation concerning those cases, should result in successful forum shopping?
- Issues not directly addressed by this Court in *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 73-75 (Iowa 2011):
  - Whether the principal amount of a Credit Agreement is a material term of the credit agreement?
  - Whether the rate of interest of a Credit Agreement, where not otherwise able to be calculated, is a material term of the credit agreement?

In addition, this case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. Rule 6.1101(2)(d) as it also presents fundamental and urgent issues of broad public importance which will impact future relationships between the equipment finance industry and its vendors and customers.

STATEMENT OF THE CASE

I. Overview.

This case arises out of a Ponzi scheme of a type that is familiar to Iowa courts. Essentially, the Ponzi-scheming vendor sells some type of advertising system to the customer, financed by an equipment finance agreement disguised as a lease, with corresponding advertising revenue represented to offset the "lease payments", essentially rendering the display system virtually "free". See, e.g., *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753 (Iowa 2010); *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772 (Iowa 2010); *Frontier Leasing Corp. v. Waterford Golf Associates, L.L.C.*, 791 N.W.2d 710 (2010).[1]

In this case, this Court will be asked to consider how far a finance company will be allowed to go, consistent with Iowa statutory and case law, to facilitate Ponzi-fraud by utilizing a financing agreement that is disguised as a lease and fails to disclose the interest rate or the price/amount financed, and

[1] In fact, the same executive who was CFO, President and 20% owner of Frontier Leasing Corp. cases when it financed what came to be known as the "Beverage Caddy Express Program", later became employed by the financing company in this matter and was centrally involved with financing the very similar advertising scheme at issue herein. [App. Vol. 7, pp. 226 – 286, ¶22]

includes default interest and late fees that compute to per annum interest of over 139%. Although liability issues associated with these transactions were previously resolved, discrete issues of contract formation and enforcement remain, particularly related to the contemplation of the parties as to damages[2]. From a procedural standpoint, this Court will also be asked to consider whether finance companies will be allowed to engage in procedural manipulations such as forum shopping to acquire Iowa Court jurisdiction and denial of Due Process to defendants objecting to the damages being sought by the plaintiff.

II. Genesis of the Dispute.

Between 2005 and 2009, the doctors and dentists who are the Charlip Defendants[3] below (hereinafter "the Doctors"), purchased Display Systems

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[2] Accordingly, the Doctors have opted to include greater detail concerning the evolution of the case and facts than the contractual issues presented by this appeal might have otherwise warranted, not in an attempt to relitigate liability issues, but instead because they deem that history and those facts important for this Court to determine "the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011).

[3] The totality of the Appellants are represented by two separate groups of lawyers. During the course of the litigation, depending upon the Court, these Appellants have been variously referred to as the "Wigdor", "Seidman", "Busch" or "Charlip" group of parties. For purposes of this appeal and to keep the nomenclature uniform between all Appellants' Briefs, they will generally be referred to as "the Doctors" and, where necessary, will be distinguished by

from Brican America, Inc. ("Brican, Inc.") and Brican America, LLC ("Brican, LLC") (collectively "Brican") and financed the purchase through installment sales or loan agreements labeled as a "financing lease" (the "Financing Agreement"). Brican represented that the Doctors could purchase the systems for effectively no cost. Brican proposed that it - or a company related to Brican known as Viso Lasik Medspas, LLC – would pay the Doctors, under a simultaneously-executed marketing agreement (the "Marketing Agreement"), a sum of money to offset the monthly financing payments the Doctors had to pay under Financing Agreements for advertising the services offered either by Brican or Viso Lasik on the Display Systems. [App. Vol. 1, pp. 481 – 519].

In 2005, Brican entered into a Vendor Agreement with NCMIC (doing business as Professional Solutions Financial Services ("PSFS")). As a result of this agreement, NCMIC became the lender under the Financing Agreement in return for making a variable lump sum payment to Brican for each Display System.

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the attorney representing them. Appellants represented by the undersigned will be referred to as the "Charlip Defendants" which now consists of 21 doctors and their practices, which were generally consolidated into CL 116236. The other group will be referred to as the "Gossett Defendants." The Equipment Finance Agreements entitled "Equipment Lease Application and Agreement" at issue herein will be referred to as the "Financing Agreements".

The Financing Agreement includes a "hell or high water" clause generally providing that the Doctors' obligation to pay is non-cancellable. Each of the Marketing Agreements, however, contains a clause – labeled "Cancellation"- which generally provides that if Brican (or, in later versions of the agreement, "Viso Lasik") fails to pay the amounts due for advertising services, a customer may be relieved of its obligations under the Financing Agreement. [App. Vol. 1, pp. 481 – 519].

On April 15, 2009, NCMIC stopped funding the Brican leases. That cessation in funding caused Brican's Ponzi scheme to unravel. With no new funds to pay marketing payments, those payments to the Doctors stopped. The Doctors, then forced to utilize their own funds to make the financing payments, and based upon the cancellation language in their Marketing Agreements, ceased making their financing payments and requested Brican to assume their Financing Agreements.

Nevertheless, because of the method and manner in which they were induced into entering into this Ponzi scheme and because of uncertainty concerning the legal validity and interpretation of the two agreements, the Doctors sought judicial clarification. The central issue concerned the interaction of the two agreements and the legal significance of NCMIC's knowledge of a cancellation clause in the marketing agreement.

On March 3, 2010, the Charlip Defendants filed a putative class action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida seeking to void the financing agreements that required them to make monthly payments to NCMIC. On May 18, 2010, that action was removed to the United States District Court for the Southern District of Florida. On June 15, 2010, the removed case was internally transferred, within the Southern District of Florida to the Honorable Patricia A. Seitz. By order of the Judicial Panel on Multidistrict Litigation dated August 12, 2010, the case was further assigned to Judge Seitz for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 as MDL- 2183 (In re: Brican America LLC Equipment Lease Litigation).

On March 30, 2010, NCMIC formed PSFS 3, a wholly-owned subsidiary of NCMIC, and transferred all of the Financing Agreements to this subsidiary. The Financing Agreements contain a forum selection clause which requires that, in the event the Agreement is assigned, proper venue will 1ie in the state where the assignee's corporate headquarters is located - in this case, Iowa. Six weeks earlier, on February 10, 2010, NCMIC had resolved its lawsuit against Brican in the federal district court for the Southern District of Florida. See *NCMIC Finance Corp. v. Brican America, Inc.*, Case No. 1 :09-cv-21 192-PCH. By assigning the Financing Agreements to PSFS 3, NCMIC

sought to avoid issues regarding proper venue and proceeded to file individual lawsuits in Iowa seeking to enforce these Financing Agreements. [App. Vol. 1, pp. 481 – 519, ftn. 5].

III. Initial Battle Over Forum.

After NCMIC created PSFS 3, PSFS 3 filed original actions in Polk County District Court. [App. Vol. 2, pp. 94-113]. The Doctors moved to dismiss those actions on jurisdictional and other grounds. [App. Vol. 5, pp. 56-58]; [App. Vol. 5, pp. 95 – 98]; [20100419-Affidavit of Attorney Matthew L. Preston in Support of Defendants' Motion to Dismiss]. The district court denied the Doctor's motion to dismiss for lack of jurisdiction. [App. Vol. 5, pp. 99 – 115].

NCMIC and PSFS 3 also filed a motion to dismiss the Federal District Court action, or to transfer the cases to the Polk County District Court. [App. Vol. 1, pp. 120 – 138]. The Federal District Court refused and the order concerning such transfer or dismissal was not made a part of the ultimate, plenary appeal. [App. Vol. 1, pp. 281 – 291]. Thus, the order of the Federal District Court became law of the case on the issue of personal jurisdiction as more fully explored in Issue 1. While the Federal District Court action was pending, the actions filed by PSFS 3 in Polk County District Court were stayed pending resolution of the Federal District Court action. [App. Vol. 5, pp. 739 - 743].

IV. Federal District Court/Eleventh Circuit.

The Federal District Court solicited and considered proposed alternative procedures for accomplishing the goals of class certification without certifying a class. The Court agreed with the Doctors that their injunctive relief count presented the jugular issue - as a matter of fact and as a matter of law - that applied to all parties. The Federal District Court also observed that NCMIC's knowledge of the existence of the Marketing Agreements was part of case dispositive "jugular" issue. Particularly, the Court noted that:

> the injunctive relief count presents the jugular issue — as a matter of fact and a matter of law — that applies to all parties. Resolving whether NCMIC had knowledge in 2006 that the Brican business model allowed lessees to cancel the financing agreements with no further liability could be a case dispositive issue.

Because counsel for NCMIC agreed that it and PSFS 3 will be bound by a ruling on that issue, which would have preclusive effect on all possible parties, the Court denied class certification and the case proceeded as a mass action under 28 U.S.C. § 1332(11)(B)(I). The Federal District Court asked the parties to focus upon the 'jugular issue" in their discovery and to ultimately seek cross-motions for summary judgment on that issue.

On August 1, 2013, the Federal District Court issued its Omnibus Order on Cross Motions for Summary Judgment on the "jugular" issue. [App. Vol.

1, pp. 481 – 519]. Therein, the Court concluded that NCMIC was entitled to a summary judgment establishing that, for the approximately 900 transactions involving certain versions of the Marketing Agreement, the "Cancellation" provision did not invalidate the "hell or high water" clauses in the Financing Agreements. However, as to the remaining transactions involving different versions 1-4 of the Marketing Agreement – which numbered approximately 400 - there remained an issue of fact regarding NCMIC's knowledge of Brican's implementation of the "cancellation" provision. The District Court, at that time also concluded that an issue of fact also remained as to whether Brican acted as NCMIC'S apparent agent in the presentation of the Marketing Agreements to Doctors, which could potentially have an impact on all of the Financing Agreements.

The Doctors were then given the opportunity to amend their respective complaints in light of the then current factual record and the Court's rulings on the cross-motions for summary judgment. NCMIC and PSFS 3 were directed to file an answer and motion for summary judgment.

On January 22, 2014, the Federal District Court ruled on PSFS 3's Motion for Summary Judgment, granting it in part and denying it in part. [App. Vol. 1, pp. 766 – 789].

PSFS 3 sought summary judgment on the grounds that the record

evidence was insufficient to permit a reasonable fact-finder to conclude that (1) Brican's sales personnel were the apparent agents of NCMIC, and (2) that Brican actually made the alleged misrepresentations that the Doctors seek to impute to NCMIC.

The Federal District Court ruled that first, on the Doctors' claim that they could cancel the Financing Agreements if they stopped receiving monthly advertising fees, summary judgment would be granted because the language of the Marketing Agreement's "Cancellation" provision could be reconciled with the "hell-or-high-water" clause in the Financing Agreements. As such, any oral statements to the contrary could not invalidate the Financing Agreements. Second, as to Brican's remaining alleged misrepresentations including that it would "buy back "repurchase" or "assume assignment" of the Financing Agreement — the District Court granted summary judgment. The Federal District Court further ruled that to the extent that Brican, Inc. was NCMIC'S apparent agent, the scope of this agency relationship did not extend to statements concerning matters unrelated to the Financing Agreements, and therefore these statements could not be imputed to NCMIC.

On May 7, 2015, final judgments were entered by the Federal District Court. [App. Vol. 1, pp. 926 – 929]. The final judgments were appealed to the Circuit Court of Appeals for the Eleventh Circuit which affirmed the final

judgments on November 22, 2016. [App. Vol. 1, pp. 1089 - 1095].

V. Polk County District Court.

A. Pleadings.

Once the Eleventh Circuit ruled, PSFS 3 returned to the Polk County District Court to continue the stayed cases. On March 07, 2017, the Charlip Defendants amended their answer and affirmative defenses. [App. Vol. 6, pp. 105 – 113].

B. Motions for Summary Judgment.

On August 4, 2017, the district court denied PSFS 3's initial motion for summary judgment, finding that there were genuine issues of material fact remaining. [App. Vol. 6, pp. 271 – 274]. Therein the district court outlined the issues remaining as:

> [T]here are genuine issues of material fact that preclude summary judgment. Namely, whether all material terms of the financing agreement were included; whether the financing agreement violated Iowa usury law by not including a rate of interest; whether NCMIC is entitled to default interest on future amounts due to accelerating the amount owed; and whether NCMIC is entitled to recover attorneys' fees in the Iowa court for fees incurred in the Florida litigation.
>
> The Court considers these claims to be within the spectrum of defenses contemplated by the Florida court and described as "unique to the individual plaintiff that could not have been asserted within the scope of the common questions of law or fact presented in the action." Therefore, Plaintiffs' claim that res judicata mandates summary judgment must fail.

[App. Vol. 6, pp. 271 – 274].

On October 12, 2017, the Charlip Defendants filed a motion for summary judgment on their affirmative defenses. [App. Vol. 6, pp. 275 – 302]; [App. Vol. 6, pp. 303 – 305]. On the same date, PSFS 3 filed its renewed motion for summary judgment. [App. Vol. 6, pp. 318 – 328].

PSFS 3's renewed motion for summary judgment sought a summary judgment on liability contending that "[b]ecause all that is left of this case with regard to liability is for the Court to apply Iowa law to the plain language of a contract, this case is ripe for summary judgment. See *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435-36 (Iowa 2008) (the construction of a contract is always a legal issue)." The motion further contended that 1. all material terms required by Iowa law were contained in the Agreements.; and 2. as a matter of law, neither the finance rate (8.99%) nor the stated default interest rate (1.5% per month) is usurious in a commercial financing agreement. [App. Vol. 6, pp. 318 – 328]. The motions were argued to the court on November 21, 2017, but no ruling was issued until after the bench trials on December 11 (Insoft) and 12 (Busch), 2017. [App. Vol. 7, pp. 624 – 636].

C. Bellwether Trials.

On November 21, 2017, the parties entered into a stipulation to try two

bellwether cases. While the stipulation regarding the hearing was reported, neither the parties nor the district court have been able to locate the transcript and/or court reporter. The parties disagree about the terms of the stipulation, described by the court as:

> The parties agree that the two trials on December 11 and 12, 2017 and the rulings and orders therefrom shall be binding as to all other remaining cases filed with similar issues and parties and shall constitute issue preclusion.

[App. Vol. 6, pp. 373 – 375].

The bench trials of December 11 and 12, 2017, referred to in the above-quoted order, were on the petitions of PSFS 3 against two of the Gossett Defendants, Michael D. Insoft, DMD, P.A., and Michael D. Insoft, (LACL118285), and against one of the Charlip Defendants, Edward Busch, (LACL117747)[4]. The parties filed post-trial briefs. [App. Vol. 7, pp. 530–581].

D. Summary Judgment Ruling.

On April 9, 2018, the district court issued its Ruling and Order on PSFS 3's Renewed Motion for Summary Judgment and the Doctor's pending Motion

[4]The Insoft and Busch Defendants have satisfied the judgments against them and have filed notices of dismissal of their part of this appeal. The appeals from the final judgments awarding PSFS 3 attorneys' fees against the same parties were likewise dismissed. The common issues presented in their trials, and the rulings therefrom, are involved in this appeal because they formed a part of the basis of the final judgments entered against the Doctors.

for Summary Judgment [App. Vol. 7, pp. 624 – 636]. Therein, the district court determined that the Financing Agreements were enforceable and valid because:

1. the Financing Agreements were a sale with a security interest and not a lease or a finance lease, citing *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 73-75 (Iowa 2011).

2. that consistent with *Wolfe*, the Financing Agreements comply with IOWA CODE Section 535.17, because in reviewing *Wolfe* there appears to be no requirement by the Iowa Supreme Court that the cost of the underlying equipment be disclosed.

3. that the Iowa Supreme Court held in *Wolfe* that the interest rate is not a material term required to be contained in a credit agreement. See *C&J Advantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 82 (Iowa 2011).

4. that there was no requirement in IOWA CODE Section 535.17(1) that requires that the interest rate must be listed separate from the total payment required under the agreement.

5. that the Financing Agreements between the parties in this case were for a "business purpose," which invoked the business purpose exception in IOWA CODE Section 535.2(2)(a)(5), permitting any rate of interest to be charged by the finance company.

The Summary Judgment Ruling goes on to state that "that the Defendants failed to pay according to the finance agreements, and, therefore, the Defendants are in default....In addition, the Court finds that the evidence adduced at trial in these matters further demonstrates that the Defendants breached the agreements at issue and are liable for the damages sustained by the Plaintiff."

The district court thereby delineated that its decision on the contract's enforceability was reached through the granting of PSFS 3's Renewed Motion for Summary Judgment, while its ruling on whether the agreements were breached was based upon evidence adduced at trial. Although the Ruling concluded that "[t]he Defendants [were] liable for the damages sustained by the Plaintiff," the method of calculating such damages, which was both disputed at trial, and not even clear to PSFS 3's own damage witness [App. Vol. 6, pp. 520 – 521, 145:9–146:16], as well as the amount of such damages attributable to each Doctor, was otherwise left unaddressed. Moreover, the district court's ruling failed to address the affirmative defenses related to damages raised by the Doctors, which were otherwise factually unrefuted by PSFS 3.

E. Busch Final Judgment.

On June 15, 2018, the district court issued its Judgment Entry and

Order. [App. Vol 8, pp. 44 – 46]. The final judgment ultimately entered against the Busch Defendants enforced the Financing Agreement, and determined money damages, including the remaining unpaid "lease" payments required by the Financing Agreement but not paid by those Defendants, plus default interest of 18% per annum from the filing of the suit, late fees, taxes and awarded entitlement to attorneys' fees. [App. Vol 8, pp. 44 – 46].

On June 25, 2018, the Busch Defendants filed their Motion to Reconsider, Enlarge, or Modify the Amended Final Judgment. [App. Vol. 8, pp. 58 – 70]. The motion was summarily denied on July 1, 2019. [App. Vol. 10, pp. 622 – 627]. The Busch Defendants appealed from this Final Judgment. [App. Vol. 10, pp. 555 – 600] but have since settled and dismissed their appeal. [20200427-Voluntary Dismissal with Prejudice of Appeal].

F. Final Judgments Against Remaining Defendants.

The Doctors never waived their right to trial on the non-common issues. Yet, once the district court ruled on the two cases which were tried, PSFS 3 filed a motion to "enforce the stipulation," arguing that the district court was in a position to enter final judgments against all the other Doctors without affording them a trial. [App. Vol. 7, App. 637 – 686]. The Doctors unsuccessfully resisted the motion. [App. Vol. 7, pp. 687 – 695]; [App. Vol.

7, pp. 696 – 701].

At the hearing on the motion to enforce the stipulation by entering judgments without a trial, the Doctors argued that their Due Process rights would be violated by entering the final judgments without a trial because the individual final judgments necessarily determined an issue which was not a "similar issue" common to all and which could not be governed by issue preclusion; specifically, the damages contemplated by the specific parties to each individual Financing Agreement flowing from a default in payments as that damage calculation is set forth in the contract. [App. Vol. 8, pp. 93 – 95, 10:9-12:14].

Without ruling on the motion, the district court directed PSFS 3's counsel to prepare proposed orders, advising that he would not rule on the "final order judgment" until the court sees "what you present and give the [Doctors] an opportunity to respond." [App. Vol. 8, pp. 140 – 142, 57:22-59:6].

PSFS 3 uploaded proposed final judgments from January 11 to 29, 2019. The district court began entering the proposed final judgments on February 26, 2019, without giving the Doctors the opportunity to respond contrary to his statement at the hearing.

G. Doctors' Rule 1.904(2) Motions for Rehearing.

On March 13, 2019, the Doctors filed motions for rehearing under Iowa R. Civ. P. Rule 1.904(2), raising both procedural and substantive rehearing arguments [App. Vol. 10, pp. 197 – 253]. Therein, the Doctors argued, *inter alia*, that because damages calculations, consisting of the number of payments made and amounts due, differ for each and every Doctor, the damages established in Insoft and Busch were therefore not a common issue which could be subject to issue preclusion. Moreover, Insoft and Busch raised a number of affirmative defenses and arguments which addressed the manner in which PSFS 3 sought to calculate and prove its alleged damages. The district court's entry of its summary judgment ruling and Orders for Judgment fail to address any of these damages issues such that it could be argued that any issue preclusion as to damages has occurred. Therefore, the Orders for Judgment are procedurally flawed because the Doctors have been deprived of Due Process by the procedure employed by the district court for entry of the Orders for Judgment and accordingly, such Orders for Judgment must be vacated.

The Doctors also raised the arguments that the district court lacked jurisdiction; that PSFS 3 failed to prove breach of contract; that the mere proof of missing contractual payments do not amount to *prima facie* proof of

damages; that the Financing Agreements are unenforceable because they violate IOWA CODE Section 535.2 and 535.17 and because they are unconscionable under IOWA CODE Section 554.13108 (1) and that the 18% default interest rate is an unenforceable penalty.

The Doctors' motions for rehearing under Iowa R. Civ. P. 1.904(2) were ultimately perfunctorily denied by the district court. [App. Vol. 10, pp. 254 - 257].

This appeal now ensues. The Doctors seek a reversal of the final judgments with directions upon remand to dismiss the cases for lack of personal jurisdiction and/or due to the unenforceability of the Financing Agreements and/or failure of proof of awardable damages. Alternatively, due to procedural flaws, the Doctors seek a reversal of the final judgments with directions upon remand to conduct individual trials on awardable damages.

STATEMENT OF THE FACTS

I. *Res Judicata* From Federal District Court.[5]:

The Doctors are dentists and optometrists who bought multimedia systems for their waiting rooms ("Exhibeos") and ***financed these*** purchases through "financing agreements" initially held by NCMIC and now by PSFS 3 (together, "NCMIC"). The Exhibeo vendor, initially Brican, Inc. and later Brican, LLC (together, "Brican"), sold these systems as being effectively free, promising in a "Marketing Agreement" executed with each purchase that a "medspa" named Viso Lasik would buy enough advertising on the Exhibeos to offset the Doctor's monthly payments and that Brican would buy back the agreements if the advertising payments stopped. If that sounds too good to be true, that's because it was. When the advertising payments stopped, NCMIC expected the Doctors to continue making their monthly payments and the Doctors refused, asserting fraud.

The detailed factual history of this fraud, labeled as a Ponzi scheme by the Federal District Court may be gleaned from its following Orders, admitted as plaintiff's exhibits in the bellwether trials:

[App. Vol. 1, pp. 481 – 519];

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[5] Most of the operative facts about the Ponzi scheme and NCMIC's knowledge of and role in the scheme were tried, adjudicated, and affirmed on appeal, in the Federal District Court action in Florida.

[App. Vol. 7, pp. 162 – 225];

[App. Vol. 7, pp. 226 - 286];

[App. Vol. 7, pp. 287 – 307].[6]

See *In re Brican Am. LLC Equip. Lease Litig.,* 10-MD-02183, 2015 WL 235409, at *1 (S.D. Fla. Jan. 16, 2015), *supplemented sub nom. In re: Brican Am. LLC,* 10-MD-02183, 2015 WL 11681185 (S.D. Fla. Apr. 23, 2015), *aff'd sub nom. Blank v. NCMIC Fin. Corp.,* 671 Fed. Appx. 734 (11th Cir. 2016) (emphasis added). [App. Vol. 1, pp. 1089 - 1095].

II. Uncontested Material Facts Raised in Response to PSFS 3's Motions for Summary Judgment.[7]

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[6]This Court is directed to where those facts may be found, not because they are directly relevant to the specific issues raised by this appeal, but because the situation and relations of the parties as well as the context within which the Financing Agreements were executed should be considered by this Court in interpreting those Agreements. *Peak v. Adams,* 799 N.W.2d 535, 544 (Iowa 2011) (Interpreting contracts, courts may look to extrinsic evidence, including "the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.").

[7] The facts set forth in this section are derived from the assertions of material fact contained in the briefing of the parties' cross motions for summary judgment and PSFS 3's Renewed Motion for Summary Judgment. [App. Vol 6 pp. 250 – 270]; [20170530-Blauzvern Defendants' Response to PSFS 3 Corp.'s Statement of Material Undisputed Facts and Defendants' Statement of Disputed Facts in Resistance to PSFS 3 Corp.'s Motion for Summary Judgment]; [20170530-Blauzvern Defendants' Appendix in Support of their Resistance to PSFS 3' Corp.'s Motion for Summary Judgment]; [20170612-Blauzvern Defendants' Supplemental Appendix in Support of their Resistance to PSFS 3 Corp.'s Motion for Summary Judgment] [App. Vol. 6, pp. 303 –

The Doctors are either individual dentists or optometrists, or the business entities under which these individuals operated. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 5). NCMIC Finance Corporation is a part of NCMIC Group, Inc., an Iowa holding company consisting of six businesses providing malpractice, personal, and business insurance; equipment loans; merchant processing; business credit cards; and other forms of financing. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 5).

NCMIC Insurance Company, NCMIC Group's flagship company, was formed in 1945 as National Chiropractic Mutual Insurance Company. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 6). According to the NCMIC Group's website, NCMIC Insurance Company "insures more than 50% of doctors of chiropractic and chiropractic colleges and universities" across the United States, and is licensed in all fifty states. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 6).

305]; [20171012-Blauzvern Three-Column Defendants' Statement of Uncontested Material Facts Supporting their Motion for Summary Judgment on Affirmative Defenses of Statute of Frauds and Usury]; [App. Vol. 6, pp. 351 – 363].

NCMIC Finance Corporation was created to provide a payment plan for NCMIC Insurance Company's policyholders. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 6). Beginning in the mid–1990s, NCMIC expanded this business to include "equipment financing, business credit cards, and other financing needs of health care professionals." (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 6).

About July 16, 2005, Brican, Inc., and NCMIC entered into a Vendor Agreement. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 6). Pursuant to this agreement, if a Brican, Inc., customer wanted to purchase an Exhibeo System from Brican, Inc., NCMIC agreed to loan the money to the customer for the purchase, to be repaid by the customer with interest, over a term of five years. To effectuate this loan, NCMIC would pay the purchase price for the Exhibeo System directly to Brican, Inc., and take title to the equipment, but the equipment would be delivered to the customer. The customer would sign an agreement, designated by NCMIC as an equipment "lease" agreeing to repay the loan over a five-year term. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 173).

A typical financing payment was $508 per month over the life of the lease, resulting in a total $30,480 obligation. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 173). In practice, each customer who wanted to finance the Exhibeo filled out a credit application and signed a Financing Agreement, typically for a five-year term. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 122). After each sale, the salesperson would transmit the sales order, credit application, and Financing Agreement to NCMIC, who would conduct a credit check. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 122). If the credit check was satisfactory, Brican, Inc., would issue a purchase order to NCMIC for the equipment. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 122). Upon proof of delivery, Brican, Inc., would submit that proof to NCMIC with an invoice for the purchase price of the equipment, and NCMIC would pay the loan amount (the purchase price of the equipment) to Brican, Inc. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 122).

NCMIC would then set up the loan internally in certain computer software (T-value) to solve for the percentage yield to be earned by NCMIC

on the loan. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 349, 397, 607-614 and 719). Neither the purchase price, the loan amount, the nominal annual interest rate, or the percentage yield, were disclosed to the Doctors. The T-value software generated amortization schedules which showed the annual interest NCMIC would earn on the loan. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 349, 397 and 719).

NCMIC began financing Exhibeo sales in the summer of 2005 and ultimately provided financing for the vast majority of Exhibeo sales. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 121). The Financing Agreements include a "hell or high water" clause generally providing that the Doctors' obligation to repay the loan is non-cancellable. (App. 10). Each Financing Agreement contains a provision which allows the Doctor to purchase the equipment at the end of the term of the Financing Agreement for $1.00. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 85, fn. 35; p. 147, fn. 22). The Financing Agreements only disclosed the customer's monthly payments. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 173).

Each of the respective Financing Agreements had identical written terms, aside from varying payment amounts and number of payments required. None of the Financing Agreements contained a "finance rate", an interest rate or any other rate of interest which would allow the Doctors to calculate the total finance or interest charges. NCMIC used a finance or interest rate which it determined internally, which rate was not disclosed to the Doctors. The only way any of the Doctors could have determined the interest rate was to call NCMIC and ask. (20171012-Blauzvern Defendants' Appendix in Support of their Motion for Summary Judgment, p. 277, l. 8-24).

The Doctors were all provided with the financing requested in each of their Financing Agreements. Each of The Doctors' Financing Agreements were placed in default by PSFS 3 when they ceased making monthly payments before the end of the Agreements' term.

III. Uncontested Material Facts Proved at the Busch/Insoft Bellwether Trial.

The bulk of the Brican business was done between 2006 and 2009 by Brican, LLC and not Brican, Inc. NCMIC had no General Vendor Agreement with Brican, LLC. NCMIC's complaint alleges that it made a demand to Brican, Inc. to repurchase the leases but that Brican, Inc. refused to do so. [App. Vol. 6, p. 462, 87:1-22].

No demand was ever made to the Doctors for the return of the Exhibeo equipment by NCMIC or PSFS 3 [App. Vol. 6, pp. 463 – 464, 88:22-89:6].

The email from Jean Thompson, the account manager for these accounts at NCMIC, to the vendor, stated that NCMIC was reducing the rates (that would be the interest rates charged on these Financing Agreements), which resulted in NCMIC increasing the amount paid to the vendor on each contract. [Insoft Defendants' Trial Exhibit DD – Email from Jean Thompson to Jacques Lemacon dated April 10, 2008, regarding management "dropping rates again," authenticated in Thompson's deposition]. Thompson confirmed that the interest rates applicable to the Brican contracts had changed. [App. Vol. 6, p. 583, 88:22-89:6].[8]

The former CEO of PSFS 3, and of NCMIC Group, Inc., Patrick McNerney, testified that the account contained on the general ledger trial balance of PSFS 3, entitled "Finance Charge Income," was this same differential which the T-value amortization schedules identified as interest.

[8] She also asked if Brican wanted to decrease the payment or increase the funding amount. Brican and NCMIC chose to increase the funding amount. Discovery did not reveal a purchase price or loan amount that was standard because of the way NCMIC calculated it. Perhaps there was no disclosure of the purchase price or loan amount because there really wasn't one until after the financing agreement was signed.

[App. Vol. 6, p. 610, 36:11-24; Insoft Defendants' Trial Exhibit P – Depo Exhibit 16 to Deposition of Patrick McNerney of January 12, 2011].

With the Brican Program, the interest rate and payment amount remained the same. NCMIC computed the rate or yield factor on every contract. The monthly payment remained the same – in fact Brican customers were "sold a payment" of $508 over 60 months to be paid to NCMIC. [App. Vol. 6, pp. 564 – 566, 189:9-191:6].

Even where NCMIC's interest rates decreased, NCMIC elected to keep the monthly payment amount unchanged and instead increase the purchase payment made to Brican for the equipment because the customer was being sold a payment as opposed to being sold an interest rate. [Insoft Defendants' Trial Exhibit DD – Email from Jean Thompson to Jacques Lemacon dated April 10, 2008, regarding management "dropped rates again," authenticated in Thompson's deposition; App. Vol. 6, pp. 580 – 584, 6:6-10:4].

The testimony of NCMIC's former employee, Paula Barkely, was that NCMIC had a "base rate" (that would be a base interest rate) of 8.99% it desired to earn on these loans. [App. Vol. 6, p. 570, 195:3-7, 11-15].

PSFS 3 incurred no expense in connection with late payments. The Administration and Servicing Agreement between NCMIC and PSFS 3 reveals that NCMIC agreed to undertake all collection activities "at its sole

cost and expense." [App. Vol. 7, pp. 94 – 118]. Thus, all the collection activities about which Greg Cole testified were paid for by NCMIC, not PSFS 3. [App. Vol. 6, pp. 411 – 414, 418, 36:20-39:3, 43:9-16].

PSFS 3 has no obligation to pay attorneys' fees. The Administration and Servicing Agreement [App. Vol. 6, p. 417, 42:11-19; App. Vol. 7, pp. 94 – 118], provides that NCMIC Finance Corp. will, at its sole cost and expense, act as collecting agent for PSFS 3, and will be responsible for exercising all reasonable remedies available under the Financing Agreements in order to collect all defaulted payments. NCMIC did all the work as PSFS 3 has no employees. [App. Vol. 6, pp. 395 – 397, 20:9-22:6].

PSFS 3 has not paid pay attorneys' fees. This suit was filed in June 2010. The bank statements of PSFS 3 show that between May 4, 2010, and November 30, 2010, no payments were made by PSFS 3 for attorneys' fees. [App. Vol. 7, pp. 80 – 93]. Further, the General Ledger Trial Balance of PSFS 3, for all transactions between March 31, 2010, and December 30, 2010, reveals that no payment for attorneys' fees was made by PSFS 3. Insoft Defendants' Trial Exhibit P – Depo Exhibit 16 to Deposition of Patrick McNerney of January 12, 2011].

As drafted, the Financing Agreement requires, and at the Busch trial PFSF 3 was seeking, 11 ½ percent interest on each monthly payment that was not made. [App. Vol. 6, pp. 466 – 467, 91:22-92:8].

An 11 ½ percent charge per month mathematically amounts to a 138 percent per annum charge. [Busch requested the District Court to take judicial notice of this mathematical calculation pursuant to Iowa Rule of Evidence Rule 5.201

NCMIC originated the Financing Agreement as a lease, treated it as a lease, called it a lease, accepted it as a lease, and booked it on its lease software as a lease. [App. Vol. 6, pp. 468 – 469, 93:16-94:16].

PSFS 3 acknowledges that you cannot equate a lease payment to a loan payment. It's like apples to oranges. [App. Vol. 6, p. 469, 94:17-20].

The Financing Agreements fail to disclose the 8.99% finance rate or yield. [App. Vol. 6, p. 470, 95:21-95:5].

PSFS 3's damages witness, Tami Frischmeyer was asked by her employer to compute the damages owed by Busch. She read the Financing Agreement and came up with three different interpretations for computing damages. [App. Vol. 6, pp. 520 – 521, 145:9-146:16].

Damages were calculated by Frischmeyer utilizing Leasewave software which tracks lease payments and not finance contract payments on a month-

to-month basis. The LeaseWave software does not show a full account history showing the beginning balance, payments and ending balance. The system only keeps track of the payments that are due. It doesn't keep track of principal and interest. The LeaseWave reports don't keep a running total of the balance of the different categories due such as taxes, monthly payments or late fees, nor are those accrued internally on a monthly basis. [App. Vol. 6, pp. 523 - 524, 148:4-149:6; pp. 536 -537, 161:17-162:1].

T-Value software was utilized by NCMIC to figure amortization for the life of the lease. A T-value report was prepared for substantially all of the Brican Financing Agreements. [App. Vol. 7, pp. 41 – 73; App. Vol. 6, p. 547, 172:6-21].

PSFS 3 claimed the following sums as damages from Bush:

a. $20,828.00 contract monthly payment past-due balance;

b. $28,230.77 default interest;

c. $2,032.00 late fees;

d. $1,249.68 sales tax;

For a total amount of damages claimed by PSFS 3 to be $52,340.452. [App. Vol. 6, pp. 491 – 501, 116:24-126:18].

Nevertheless, where future amounts owed for the unexpired term, were discounted at the rate 6% per annum, the total amount of damages claimed by PSFS 3 comes out to be $47,539.07. [App. Vol. 6, p. 503, 128:19-23]. Where the total amount calculated as due from Busch if default interest is calculated on each payment as it became past due is computed as damages, that calculation yields a total damage amount of $42,744.27. [App. Vol. 6, pp. 504 – 505, 129:4-130:10].

The contract monthly payment past-due balance which is the cumulative total of the outstanding payments includes PSFS 3's yield and so when PSFS 3 charges default interest, it is charging that on the overdue payments which includes that yield. [App. Vol. 6, pp. 524 – 526, 149:24-151:23].

PSFS 3 has conceded that its "software has the ability to retroactively treat the Financing Agreements as loans and apply the payments to principal and interest accordingly, and calculate the remaining amounts due as principal and interest. [20170609-Supplemental Appendix in Support of Plaintiffs' Motion for Summary Judgment in Three-Column Cases, Exhibit 16, Supplemental Declaration of Gregory Cole, p. 361, ¶ 4]; [App. Vol. 6, pp. 217 – 249, ftn. 10].

Argument

Issue 1: THE DISTRICT COURT ERRED IN FINDING THAT IT HAD JURISDICTION OVER THE DOCTORS.

A. How Issue Was Preserved for Appellate Review.

This issue was preserved for appellate review by the Charlip Defendants' initial motion to dismiss for lack of personal jurisdiction [App. Vol. 5, pp. 56 – 58]; [App. Vol. 5 pp. 59 – 94]; [App. Vol. 5, pp. 95 – 98]; [2010.04.19-Affidavit of Attorney Matthew L. Preston in Support of Defendants' Motion to Dismiss], denied by the District Court on August 12, 2010 [App. Vol. 5, pp. 302 – 322]; their First Amended Affirmative Defense [App. Vol. 6, pp. 105 – 113]; the evidence presented at trial [App. Vol. 6, pp. 135-136]; their post-trial briefing [App. Vol. 7, pp. 530 – 581]; [App. Vol. 7, pp. 611 – 623] and their Rule 1.904 Motions [App. Vol. 10, pp. 197 – 253] and [20190405-Seidman Defendants' Rule 1.90 Motion to Reconsider, Amend or Enlarge, p. 5], denied by the district court on March 29, 2019 [App. Vol. 10, pp. 254 – 257].

B. Standard of Review.

> "We review a district court's decision on a motion to dismiss for lack of personal jurisdiction for correction of errors at law." *Shams v. Hassan,* 829 N.W.2d 848, 853 (Iowa 2013). When deciding whether it has personal jurisdiction over a defendant, the district court must make factual findings. *Id.* If those findings of fact are

> supported by substantial evidence, they are binding on appeal. *Capital Promotions, L.L.C. v. Don King Prods., Inc.*, 756 N.W.2d 828, 833 (Iowa 2008). We are not bound, however, by the district court's application of legal principles or conclusions of law. *Rucker v. Taylor,* 828 N.W.2d 595, 599 (Iowa 2013).

Ostrem v. Prideco Secure Loan Fund, LP, 841 N.W.2d 882, 890-91 (Iowa 2014).

C. Argument on Issue 1.

The Iowa courts were without personal jurisdiction over the Doctors, none of whom (with the exception of Dr. Colwell) are Iowa residents, because the original party to the Financing Agreements - NCMIC Finance Corp.'s creation of a newly-formed, wholly-owned Iowa corporation, and assignment of the contracts to the new corporation to trigger a forum selection clause, occurred after the Federal District Court denied NCMIC and PSFS 3's motion to dismiss the Federal District Court action for lack of personal jurisdiction, finding that "it would be inequitable to allow Defendants [NCMIC and PSFS 3] to shop the actions to another forum simply by assigning the Leases after the lawsuit [was] filed." [App. Vol. 1, pp. 281 – 291]. This finding was not appealed by NCMIC or PSFS 3 and became law of the case when the Eleventh Circuit affirmed the final judgments entered by the Federal District Court. As such, the assignments were done solely to

facilitate universally condemned, including condemned by Iowa, forum shopping and thus fail to support the Iowa District Court's determination of personal jurisdiction.

The Charlip Defendants otherwise adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Brief on this issue. [Gossett Defendants' Brief (Issue 1), pp. 38-76]. Such arguments are transferable from the Gossett Defendants' case to the Charlip Defendants' case because each appellant was similarly situated, raised the same arguments and preserved those arguments in a similar fashion for appellate review. As such, this Court can readily apply the proponent's arguments to the adopter's case." *United States v. Straker*, 800 F.3d 570, 594 n.5 (D.C. Cir. 2015).

Issue 2: **THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF LAW THAT THE FINANCING AGREEMENTS (ENTITLED "EQUIPMENT LEASE APPLICATION AND AGREEMENT") WERE NOT CREDIT AGREEMENTS AS DEFINED IN IOWA CODE § 535.17; THAT THE ORIGINAL PRINCIPAL AMOUNT OF THE CREDIT AGREEMENT WAS NOT A MATERIAL TERM UNDER IOWA CODE § 535.17; AND, THAT THE RATE OF INTEREST OF THE CREDIT AGREEMENT, WHICH COULD NOT OTHERWISE BE CALCULATED, WAS NOT A MATERIAL TERM UNDER IOWA CODE § 535.17.**

A. How Issue Was Preserved for Appellate Review.

This issue was preserved for appellate review by the Charlip Defendants through their Twentieth (20) Affirmative Defense in their Amended Answer and Affirmative Defenses [App. Vol. 6, pp. 105 -113]; their motion for summary judgment on the same issue [App. Vol. 6, pp. 303 – 305]; [App. Vol. 6, pp. 275 – 302]; which was denied by the District Court on April 9, 2018 [App. Vol. 7, pp. 624 - 636]; the evidence presented at trial [App. Vol. 6, pp. 135-136]; their post-trial briefing [App. Vol. 7, pp. 530 – 581]; [App. Vol. 7, pp. 611 – 623] and their Rule 1.904 Motions [App. Vol. 10, pp. 197 – 253] and [20190405-Seidman Defendants' Rule 1.90 Motion to Reconsider, Amend or Enlarge, pp. 9-16], denied by the district court on

March 29, 2019 [App. Vol. 10, pp. 254 – 257].

B. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. *In re Estate of Workman*, 903 N.W.2d 170, 175 (Iowa 2017). Summary judgment is proper when the moving party has shown there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Homan v. Branstad*, 887 N.W.2d 153, 163 (Iowa 2016).

A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). "We view the evidence in the light most favorable to the nonmoving party." *UE Local 893/IUP v. State*, 928 N.W.2d 51, 59 (Iowa 2019) (citation omitted). "On review, 'we examine the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law.'" *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016) (*quoting J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999)).

C. Argument on Issue 2.

1. The Agreements are "Credit Agreements".

As sales with a security interest, the Financing Agreements

unquestionably constitute "credit agreements" governed by IOWA CODE Section 535.17(5)(c) and therefore require all material terms be contained within the Agreements in order to be enforceable. *Stephen G. Blank, P.A. v. NCMIC Finance Corp.*, 2016 WL 6871879 (unpublished) (11th Cir.); *Clarke Cnty. Reservoir Comm'n v. Robins,* 862 N.W.2d 166, 178 (Iowa 2015). The ruling is consistent with *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC,* 784 N.W.2d 753 (Iowa 2010) and *C & J Vantage Leasing Co. v. Wolfe,* 795 N.W.2d 65 (Iowa 2011).

2. The Original Principal Amount (Price) and Interest or Finance Rate are Material Terms of a Credit Agreement.

Consistent with the weight of legal authority that holds that the material terms of a loan usually include the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms, this Court's decision in *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), should have been read by the district court as standing for the proposition that: (1) subject matter, (2) price, (3) payment terms and (4) duration are <u>each</u> required material terms.

The weight of legal authority from other jurisdictions hold that the material terms of a loan usually include the amount to be loaned, maturity date

of the loan, the interest rate, and the repayment terms. *Wheeler v. White,* 398 S.W.2d 93, 95 (Tex.1965); *Pine v. Gibraltar Savings Assn.,* 519 S.W.2d 238, 243–44 (Tex.Civ.App.—Houston [1st Dist.] 1974, writ *ref'd n.r.e.*); *accord Stansel v. American Sec. Bank,* 547 A.2d 990, 993 (D.C.App.1988), *cert. denied,* 490 U.S. 1021, 109 S.Ct. 1746, 104 L.Ed.2d 183 (1989); *Champaign Nat'l Bank v. Landers Seed Co., Inc.,* 165 Ill.App.3d 1090, 116 Ill.Dec. 742, 745, 519 N.E.2d 957, 960 (1988), *cert. denied,* 489 U.S. 1019, 109 S.Ct. 1138, 103 L.Ed.2d 199 (1989); *McErlean v. Union Nat'l Bank of Chicago,* 90 Ill.App.3d 1141, 46 Ill.Dec. 406, 410, 414 N.E.2d 128, 132 (1980); *Fairfield Six/Hidden Valley P'ship v. Resolution Trust Corp.,* 860 F. Supp. 1085, 1089 (D. Md. 1994)(citing cases from Texas, Nebraska, North Dakota, Georgia, and Missouri); *Fleming v. Parkview Colonial Manor Investment Co.* (1975), 31 Ill.App.3d 6, 8, 333 N.E.2d 587.) *Lee Shell Co. v. Model Food Center, Inc.* (1969), 111 Ill.App.2d 235, 250 N.E.2d 666, *McErlean v. Union Nat. Bank of Chicago,* 414 N.E.2d 128, 132 (Ill. App. Ct. 1980), *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 891, 893 [131 Cal.Rptr. 836]; *Peterson Dev. Co. v. Torrey Pines Bank,* 284 Cal. Rptr. 367 (Ct. App. 1991).

In *Wolfe*, the defendant argued its agreement, which did not "explicitly

list an interest rate," lacked all material terms of the agreement and was therefore unenforceable. *Id.* This Court noted that "[a]lthough the agreement did not expressly list an interest rate," "[t]he agreement laid out the subject matter, price, payment terms and duration." *Id.* The *Wolfe* Court held even absent an expressed interest rate; the terms contained within the agreement were sufficient to satisfy the material terms requirements set forth in Iowa Code section 535.17(1). *Id.*

Nevertheless, *Wolfe* can be read as standing for the proposition that: (1) subject matter, (2) price, (3) payment terms and (4) duration are each required material terms. Unlike the agreement in *Wolfe*, the Financing Agreements at issue here not only failed to explicitly list an interest rate but also failed to express the price.

The defendant in *Wolfe* made no argument contending that the price was undisclosed. On appeal, this Court found the price was included in the parties' agreement and therefore the absence of an interest rate, in light the inclusion of all other material terms, was of little consequence. Although PSFS 3 here contends that the *Wolfe* court equated "price" with the concept of "total payments due under the contract," *Wolfe* expressly states, "Section 535.17(1) contains no requirement that the interest rate must be listed separate

from the total payment required under the agreement." By separately referring to price and total payment required, this Court distinguished these two terms of art.

It is indeed significant that the discussion in *Wolfe*, concerning the enforceability of the agreements under IOWA CODE Section 535.17(1) was raised in the context of an analysis of whether the agreements violated IOWA CODE Sections 535.2(1) and 535.17(1) which provide that the parties to a business finance transaction may agree in writing to pay any rate of interest. That is because for the parties to agree to pay any rate of interest, the rate to be agreed upon must be either disclosed or calculable from the agreement. It is only logical to conclude that if an Iowa statute requires the parties to an agreement to agree to "any rate of interest," that the interest rate must be a "material term" of such an agreement. To read *Wolfe* any other way defies both logic and common sense. Therefore, because the interest rate in *Wolfe* was not disclosed in the agreement but the *Wolfe* court stated that the price was disclosed, the only logical conclusion that can be reached is that the parties implicitly agreed to the interest rate because it could be calculated from the price, payments and duration.

There is no language contained within *Wolfe* that supports the district

court's holding that all agreements lacking an interest rate are enforceable even when other material terms are missing. *Wolfe* does not directly address that holding and therefore does not support the district court's interpretation of that opinion.

There is no indication the Iowa Supreme Court in *Wolfe* directly considered the issues presented in this case – the absence of both price and interest rate. *Wolfe* must be read to either be supportive of the Doctor's position or at most determined to not be controlling on the issue of exactly what terms of a credit agreement are "material". Nevertheless, *Wolfe* supports the Doctor's arguments to the extent that it clearly states that the terms present there, including price, were adequate to satisfy Iowa Code Section 535.17. *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 82 (Iowa 2011).

Even if *Wolfe* is deemed by this Court to not support the Doctors' arguments as to materiality, it certainly cannot be read to support the district court's summary judgment ruling herein. There is no indication that the issue was presented to the Iowa Supreme Court in *Wolfe* of what the Court would find if the contract lacks both an expressed interest rate and price. Because of that, *Wolfe* cannot be read to stand for the proposition that an agreement lacking both an expressed interest rate and price can still satisfy Section

535.17.

Former Chief Justice Cady, in a recent concurrence/dissent gave an excellent summary of how appellate decisions do not have controlling effect under the related concepts of stare decisis, law of the case and dicta, where language used in an opinion was not the product of a specific issue included in adversarial presentation to the Supreme Court. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 614–15 (Iowa, 2017). Consistent with then Chief Justice Cady's analysis in *Haskenhoff, Wolfe* simply cannot be read to suggest that a contract lacking both price and an express interest term can still satisfy IOWA CODE Section 535.17.

3. Because the Agreements Fail to Contain the Original Principal Amount (Price) and Interest Rate, Neither of Which Could Otherwise be Calculated, Iowa Code § 535.17 precludes their Enforcement.

It is undisputed that the Financing Agreements lack any stated or calculable "finance rate" or "interest rate". [Insoft Defendants' Exhibit OO – Impeachment documents, Cole as witness 12:1-20]. It is further both undisputed and mathematically impossible for the Doctors to have calculated the rate of interest they were each being charged from the terms of the

Agreement without the price[9] and only the monthly payment amount and duration and therefore no Doctor could have been said to have even implicitly agreed to pay the rate of interest or financing rate charged by NCMIC.

It is further undisputed that because the interest rate is not disclosed in the Financing Agreement, the parties could not have explicitly agreed to pay that interest rate. Similarly, the Financing Agreements do not disclose the original principal balance, amount financed or purchase price. Because such terms are material to the credit agreement, IOWA CODE § 535.17 precludes the enforcement of such Financing Agreements.

IOWA CODE Section 535.17 focuses upon the contract itself and the elements that the writing requires to be enforceable. As such, the terms of the contract itself are the only evidence required for the Court to determine whether the contract complies with the statute. The Financing Agreements

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[9] Black's Law Dictionary defines "price" as "[t]he amount of money or other consideration asked for or given in exchange for something else; the cost at which something is brought or sold." See Price, Black's Law Dictionary (10th ed. 2014). This definition further clarifies that "price," as a material term of the parties' Agreement, was the original cost of the Exhibeo System, the cost in which the item was bought and sold. The price was the amount the parties were willing to pay for the Exhibeo System itself and was wholly exclusive of any additional amounts the parties agreed to as consideration for financing the sale of the system.

provide, in pertinent part:

> **1. LEASE AGREEMENT AND FEES:** ... If it is determined that your total payments result in an ***interest rate*** higher than allowed by applicable law, then any excess interest collected will be applied to the repayment of principle [sic] and interest will be charged at the highest rate allowed by law.
>
> * * *
>
> **9. DEFAULT:** If You do not pay any sum by the due date, ... You also agree to pay interest on all past due amounts, from the due date until paid, at the lower of one and one-half percent (1.5%) per month or the highest lawful rate.

[App. Vol. 6, pp. 630 - 631].

PSFS 3 has conceded that its software breaks-out interest and principal on each Financing Agreement. [App. Vol. 7, pp. 41 – 73]; [App. Vol. 6, pp. 217 – 249, ftn. 10]; [Insoft Defendants' Trial Exhibit OO – Impeachment documents]; [App. Vol. 6, p. 435]. NCMIC and PSFS 3, although internally possessing the information about the equipment price and the interest rate it was charging for the financing, that the Doctors lacked, failed to disclose either term within the Financing Agreements, or otherwise, causing the Agreements to violate the Iowa Statute of Frauds as well as IOWA CODE Section 535.2, rendering them unenforceable. For that reason, the Doctors request that this Court reverse the final judgments against them and hold that the Financing Agreements are unenforceable.

Issue 3: THE DISTRICT COURT DEPRIVED THE DOCTORS OF THEIR DUE PROCESS RIGHTS UNDER THE U.S. AND IOWA CONSTITUTIONS BY ENTERING FINAL JUDGMENTS WITHOUT PERMITTING THEM TO PRESENT A DEFENSE, WITHOUT A TRIAL, AND WITHOUT EVIDENCE (AND NOT AS A RESULT OF A MOTION FOR DISMISSAL, SUMMARY JUDGMENT OR JUDGMENT ON THE PLEADINGS).

A. How Issue Was Preserved for Appellate Review.

The Charlip Defendants resisted the motion filed by PSFS 3 to enforce the stipulation [App. Vol. 7, pp. 696 – 701]; [App. Vol. 8, pp. 93 – 96, 10:9-13:23], which motion was granted by the District Court on September 18, 2018 [20180918-Order Granting Defendants' Motion to Enforce Settlement]; the evidence presented at trial [App. Vol. 6, pp. 135-136]; and their Rule 1.904 Motions [App. Vol. 10, pp. 197 – 253] and [20190405-Seidman Defendants' Rule 1.90 Motion to Reconsider, Amend or Enlarge, pp. 22-23], denied by the district court on March 29, 2019 [App. Vol. 10, pp. 254 – 257].

B. Standard of Review.

The standard of review of whether the Doctors' Due Process rights were violated is *de novo*. *State v. Clark,* 814 N.W.2d 551, 560 (Iowa 2012).

C. Argument on Issue 3.

Because damages calculations, consisting of the number of payments made and amounts due, differ for each Doctor, the damages established in Insoft and Busch were therefore not a common issue which could be subject to issue preclusion. Moreover, Insoft and Busch raised several affirmative defenses and arguments which addressed the way PSFS 3 sought to calculate and prove its alleged damages. The district court's Judgment Entry and Orders fail to address any of these damages issues such that it could be argued that any issue preclusion as to damages has occurred.

Accordingly, the district court deprived the Doctors of their state and federal due process rights by entering final judgments against them without affording them a trial on the disputed damage issues or the right to present their affirmative defenses to same. U.S. CONST. AMEND. XIV; IOWA CONST. ART. I, § 9. Because of this, the final judgments cannot stand.

The Charlip Defendants otherwise adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Brief on this issue. [Gossett Defendants' Brief (Issue 2), pp. 76-90]. Such arguments are transferable from the Gossett Defendants' case to the Charlip Defendants' case because each appellant was similarly situated, raised the same

arguments and preserved those arguments in a similar fashion for appellate review. As such, this Court can readily apply the proponent's arguments to the adopter's case." *United States v. Straker*, 800 F.3d 570, 594 n.5 (D.C. Cir. 2015).

Issue 4: **THE DISTRICT COURT ERRED IN AWARDING ENTITLEMENT TO ATTORNEYS' FEES TO PSFS 3.**

A. How Issue Was Preserved for Appellate Review.

This issue was preserved for appellate review by the Charlip Defendants through their Twenty-Fifth (25) Affirmative Defense in their Amended Answer and Affirmative Defenses [App. Vol. 6, pp. 105 – 113]; the evidence presented at trial [App. Vol. 6, pp. 135-136]; their post-trial briefing [App. Vol. 7, pp. 530 – 581]; [App. Vol. 7, pp. 611 – 623] and their Rule 1.904 Motions [App. Vol. 10, pp. 197 – 253]; [App. Vol. 8, pp. 58 – 70], hearing on that motion on December 14, 2018 [App. Vol. 8, pp. 117 – 122, 34:25-39:01; p. 36, 53:14-15] and [20190405-Seidman Defendants' Rule 1.90 Motion to Reconsider, Amend or Enlarge, p. 5, ftns. 2 & 3], denied by the district court on March 29, 2019 [App. Vol. 10, pp. 254 – 257].

B. Standard of Review.

> A district court's decision that attorney fees are recoverable in a given case is reviewed for the correction of errors at law. *Security State Bank v. Ziegeldorf,* 554 N.W.2d 884, 893 (Iowa 1996). We are bound by the court's findings if they are supported by substantial evidence. *Id.* We review for an abuse of discretion a district court's decision as to the amount of attorney fees. *Id.* at 894.

Johnson v. Baum, 788 N.W.2d 397 (Iowa Ct. App. 2010).

C. Argument on Issue 4.

1. Proof of payment or obligation to pay fees a predicate for an award of fees.

The Charlip Defendants adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Brief on this issue. [Gossett Defendants' Brief (Issue 4), pp. 96-98]. Such arguments are transferable from the Gossett Defendants' case to the Charlip Defendants' case because each appellant was similarly situated, raised the same arguments and preserved those arguments in a similar fashion for appellate review. As such, this Court can readily apply the proponent's arguments to the adopter's case." *United States v. Straker*, 800 F.3d 570, 594 n.5 (D.C. Cir. 2015).

2. PSFS 3 Is Not Entitled to Attorney Fees Under the Financing Agreement.

The Doctors acknowledge the Financing Agreements contain a blanket attorney fee provision. However, as a contractual provision, the Court can only award attorney fees to the extent they were agreed to by the parties as set forth within the written agreement. Here, the terms of the Financing Agreement expressly limit the recoverability of attorney fees awarded by the district court to NCMIC. The Agreements provide:

> 9. **DEFAULT:** ... You agree to pay all the costs and expenses, including attorney's fees, **We incur** in any dispute related to this Lease or the Equipment.

[App. Vol. 6, pp. 632 – 640, ¶ 9] (emphasis supplied)). "We," as used within this provision, is defined in the terms and conditions portion of the first page of the Financing Agreement, which provides "[w]hen we use the words 'we,' "us,' and 'our' in this Agreement we mean the Lessor, Professional Solutions Financial Services." [App. Vol. 6, pp. 632 - 640]. PSFS 3 does not dispute that Professional Solutions Financial Services, a division of NCMIC, is a separate and distinct entity from PSFS 3. Accordingly, the contractual attorney fee language does not provide PSFS 3 a contractual right to recover its attorney fees. Pursuant to the terms of the Financing Agreement, the Doctors are only obligated to pay the attorney fees incurred by NCMIC and have no obligation, contractual or otherwise, to pay attorney fees incurred by PSFS 3.

PSFS 3 obtained favorable rulings from the district court based on representing the distinct financial existence of PSFS 3 from NCMIC. The district court ruled:

> These documents persuasively make the case that *PSFS 3 is a separate corporate entity*, properly capitalized and which receives the benefit of the monthly lease payments called for under the assignments in question. The plaintiffs do not shy away from the contention that PSFS 3 was created essentially (if not solely) for the purpose of triggering the forum selection clause in those leases assigned to it.

[App. Vol. 5, pp. 302 – 322]. (Emphasis supplied.)

PSFS 3 should not be allowed to contend that it does not really matter which entity paid the fees as it and NCMIC are both really parts of the same blended entity, having received judicial relief by claiming the opposite earlier, to gain jurisdiction in Iowa.

This Court has summarized Iowa's law on judicial estoppel as follows:

> It is a well-settled principle that a party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. The doctrine aims to protect the integrity of the judicial process by preventing intentional inconsistency. Further, it addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another, thereby creating the perception that at least one court has been misled.

See Kinseth v. Weil-McLain, No. 15-0943, 2018 WL 2455300 at *12 (Iowa June 1, 2018). (Internal citations and quotations omitted). It is also necessary for application of judicial estoppel for the court to have accepted the inconsistent position in an earlier decision. *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987) ("Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent, misleading results exists."). PSFS 3 received definite

judicial relief, as described above, and cannot now be the beneficiary of attorney fees taxed in its favor despite those fees having been actually paid by NCMIC.

To the extent PSFS 3 seeks to argue it obtained an interest in the attorney fee provision by virtue of the assignment of the Financing Agreement, such argument again does not comply with the Agreement's express terms. The assignment language of the Agreement provides, in part:

> 10. **ASSIGNMENT:** ... We may sell, assign or transfer ***this Lease*** and ***our rights in the Equipment.*** You agree that if We sell, assign or transfer this Lease, the new owner will not be subject to any claim, defense or set off that You assert against Us or any other party.

[App. Vol. 6, pp. 632 – 640, ¶ 10] (emphasis supplied)). Although NCMIC had the right to assign the Agreement (lease) and their rights in the equipment, this assignment provision does not provide NCMIC the ability to separately assign only certain excerpted rights in the Agreement (lease). As discussed above, one of the rights NCMIC had under the Financing Agreement was its ability to collect attorney fees it incurred. When NCMIC assigned the Agreement (lease) to PSFS 3, PSFS 3 obtained the ability to enforce the Agreement as written and as agreed to between the parties. Nothing contained within the Financing Agreement, or Iowa law, gives

NCMIC or PSFS 3, the power to redraft the Financing Agreement or redefine terms expressly defined and set forth within the four-corners of the document.

As drafted, and as assigned, NCMIC assigned the Financing Agreements and its right in the equipment to PSFS 3. NCMIC did not, and could not, pursuant to the express terms of the Agreements, assign its interest in the Agreements including its contractual ability to recover attorney fees to PSFS 3. When NCMIC wanted the ability to assign its interest or enforceability of specific provisions, it clearly did so. For example, Section 13 of the Financing Agreement provides:

> This Lease and each Schedule shall be governed by the internal laws for the state in which Lessor or Lessor's assignee's principal corporate offices are located. IF THIS IS ASSIGNED, YOU AGREE THAT ANY DISPUTE … WILL BE ADJUDICATED IN THE FEDERAL OR STATE COURT WHERE THE ASSIGNEE'S CORPORATE HEADQUARTERS IS LOCATED …

[App. Vol. 6, pp. 632 – 640, ¶ 13] (emphasis supplied)). This reference to an assignee, or an assignee's ability to collect attorney fees incurred in a dispute related to the Financing Agreement, is notably absent from the attorney fee provision and the assignment provision. Reference to an assignee is also notably absent from the definition of "We," as used in the attorney fee

provision and clearly limited by definition to NCMIC. Accordingly, as drafted and assigned, only NCMIC, and not PSFS 3, has the contractual authority to collect attorney fees incurred related to the Financing Agreement against the Doctors.

The terms of the Financing Agreement are clear, unambiguous and must be enforced as written. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991) (unambiguous contracts will be enforced as written). Moreover, as the Financing Agreements are contracts of adhesion, drafted by NCMIC, to the extent there is any ambiguity contained within the terms of the Agreements, such ambiguity must be construed in the light most favorable to the Doctors and against the drafter. *Id.* (Ambiguities in a contract "are strictly construed against the drafter.") In sum, because the Financing Agreement fails to support any contractual entitlement for PSFS 3 to recover its attorney fees from the Doctors, it was error for the district court to award PSFS 3 entitlement to such fees.

3. PSFS 3 Has Incurred No Attorney Fees.

The record before this Court establishes PSFS 3 has incurred no attorney fees in this matter. PSFS 3's President, Gregory Cole, testified to this fact at the Bellwether trial before the district court on December 11, 2017.

Specifically, on cross-examination, Mr. Cole unequivocally agreed with defense counsel that PSFS 3 "paid absolutely no attorney fees for the litigation." [App. Vol. 6, p. 448, 73:4-20]. No other testimony, and no other evidence in this record, was introduced concerning PSFS 3's attorney fees. The district court's award of attorney fees to PSFS 3, absent its actual payment or obligation to pay such attorney fees, has resulted in a windfall to PSFS 3 at the Doctor's expense and must be reversed by this Court.

Under Iowa's Chapter 625 law, attorney fees are taxed as a cost, and as such they must be paid by the party seeking them and not just "incurred." If it were otherwise, the distinction drawn at IOWA CODE Section 625.15, "In actions in which the cause of action shall, by assignment after the commencement thereof, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if the person were a party" would be unnecessary. Iowa's law on recovery of costs is circumscribed by statute. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). ("Since no party is entitled to costs until a judgment is recovered, IOWA CODE Section 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrues at the termination of the proceedings and this right exists solely by virtue of the statute.").

Issue 5: **PSFS 3 FAILED TO PROVE BREACH OF CONTRACT.**

A. How Issue Was Preserved for Appellate Review.

This issue was preserved for appellate review by the Charlip Defendants through their Twelfth (12) and Thirteenth (13) Affirmative Defenses in their Amended Answer and Affirmative Defenses [App. Vol. 6, pp. 105 – 113]; the evidence presented at trial [App. Vol. 6, pp. 135-136], their post-trial briefing [App. Vol. 7, pp. 530 – 581]; [App. Vol. 7, pp. 611 – 623] and their Rule 1.904 Motion. [App. Vol. 10, pp. 197 – 253], denied by the District Court on March 29, 2019 [App. Vol. 10, pp. 254 - 257].

B. Standard of Review.

> "The standard of review for a breach of contract action is for correction of errors at law." *Iowa Mortg. Ctr., L.L.C., v. Baccam*, 841 N.W.2d 107, 110 (Iowa 2013). "If substantial evidence in the record supports a district court's finding of fact, we are bound by its finding." *Id.* "However, a district court's conclusions of law or its application of legal principles do not bind us." *Id.*

C. Argument on Issue 5.

***Prima Facie* Elements of Proving Breach of Contract.**

A breach of contract occurs when a party, "without legal excuse . . . fails to perform any promise which forms a whole or a part of the contract." *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa

1998). To prevail on such a claim, the party must show: (1) [T]he existence of a contract, (2) the terms and conditions of the contract, (3) that [plaintiff] has performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) that plaintiff has suffered damages as a result of defendant's breach. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010) (citing *Molo Oil*, 758 N.W.2d at 224); see 25A C.J.S. Damages § 308.

Contract Interpretation.

Contract "[i]nterpretation is the process for determining the meaning of the words used by the parties in a contract." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008). Absent consideration of extrinsic evidence, the interpretation of a contract is a legal issue. *Id.* "[C]onstruction of a contract is the process a court uses to determine the legal effect of the words used" and is always reviewed as a legal issue. *Id.* at 436-37. As stated in *Nationwide Agribusiness Insurance Company v. PGI International*, 882 N.W.2d 512 (Iowa Ct. App. 2016):

> "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." Id. at 437; see also *Peak*, 799 N.W.2d at 543 ("In the construction of written contracts, the cardinal principle is that the intent of the parties must control . . . ." (quoting Iowa R. App. P. 6.904(3)(n))). Though "[t]he most important evidence of the

> parties' intentions at the time of contracting is the words of the contract," the court "may look to extrinsic evidence, including 'the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.'" *Peak*, 799 N.W.2d at 544 (citation omitted); see also *Pillsbury*, 752 N.W.2d at 436 ("[A]lthough we allow extrinsic evidence to aid in the process of interpretation, the words of the agreement are still the most important evidence of the party's intentions at the time they entered into the contract."). Further, we interpret a contract as a whole, see *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991), so as to give effect to all provisions, see *Carter v. Bair*, 208 N.W. 283, 283 (Iowa 1926).

When the parties adopt a writing as the final and complete expression of their agreement, that agreement is considered to be "fully integrated." *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa 1996). "When an agreement is deemed fully integrated, the parol evidence rule prevents the receipt of any extrinsic evidence to contradict (or even supplement) the terms of the written agreement." *Id.*; see also *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 85 (Iowa 2011) (observing that if an agreement is fully integrated, the parol evidence rule "forbids the use of extrinsic evidence introduced solely to vary, add to, or subtract from the agreement"). Nevertheless, the rule does not prohibit the consideration of extrinsic evidence for certain limited purposes, such as "to show the situation of the parties, attendant circumstances, and the objects they were striving to attain." *C & J Vantage Leasing Co.*, 795 N.W.2d at 85 (citation, internal quotation marks and alteration omitted).

Breach of Contract Damages.

1. Damages are limited to those that were foreseeable or reasonably contemplated by the parties when they entered into the agreement.

"An essential element of a breach of contract claim is that the breach caused a party to incur damages." *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 468 (Iowa 2010). "The purpose of awarding damages in a breach of contract action is to place the injured party in the position it would have occupied if the contract had been performed." *Portzen Constr. v. Cal-Co Insulation, Inc.*, 2014 WL 2347821, at *6. Damages are limited to those that were foreseeable or reasonably contemplated by the parties when they entered into the agreement. See *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994). The burden of proving damages is on the party seeking them. See *Royal Indem.*, 786 N.W.2d at 847; *Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 616 (Iowa 2000).

For damages to be recoverable, the loss must have resulted from the breach and have been in the contemplation of the parties when they entered into the agreement. See *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 847 (Iowa 2010). "Damages which a reasonable person would expect to follow from a breach of a contract are direct and thus should be awarded." *Kuehl,* 521 N.W.2d at 718. Loss is foreseeable if it follows from

the breach "in the ordinary course of events" or "as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." See *Royal Indem. Co.*, 786 N.W.2d at 847 (quoting Restatement (Second) of Contracts § 351, at 135 (1981)). "The purpose of awarding damages in a breach of contract action is to place the injured party in the position it would have occupied if the contract had been performed." *Portzen Constr., Inc. v. Cal-Co Insulation, Inc.*, No. 13-0758, 2014 WL 2347821, at *6 (Iowa Ct. App. May 29, 2014).

2. Damages must be proved with "reasonable certainty."

Furthermore, damages must be proved with "reasonable certainty." *Dopheide v. Schoeppner,* 163 N.W.2d 360, 367 (Iowa 1968) adopted RESTATEMENT OF CONTRACTS § 331, which "provides: 'Damages are recoverable for losses caused by ... the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.' RESTATEMENT OF CONTRACTS § 331 cmt. b." *Duck Creek Tire Serv. Inc. v. Goodyear Corners, L.C.,* 822 N.W.2d 745 (Iowa Ct. App. 2012). The plaintiff must establish a reasonable basis from which damages can be ascertained; it cannot be too uncertain or speculative. See *Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 616 (Iowa

2000).; *Natkin & Co. v. R.F. Ball Constr. Co.,* 123 N.W.2d 415, 422 (Iowa 1963).

The district court was responsible for interpreting the Finance Agreement to determine what the intent of the parties was in the event a Doctor stopped making his monthly payments. Although PSFS 3 contended that the agreement is clear and unambiguous, none of PSFS 3's witnesses could adequately explain even when a monthly payment came due [App. Vol. 6, p. 529, 154:9-13], much less how damages were required to be calculated upon a default, narrowing it down to three (3) potential "theories". [App. Vol. 6, pp. 520 – 521, 145:21-146:16]. If the plaintiff itself, the party that drafted the contract is confused as to what was intended upon an event of default, how can the district court conclude that each Doctor had a "meeting of the minds" with NCMIC on such a seminal issue?

Because damages are limited to those that were foreseeable or reasonably contemplated by the parties when they entered into the agreement, *See Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994) and because PSFS 3 itself was unable to determine from the Financing Agreement how damages were to be calculated, the district court erred by

awarding any damages to PSFS 3 herein. Accordingly, the final judgments awarding such damages must be reversed by this Court.

3. The mere proof of missing contractual payments does not equate to *prima facie* proof of damages.

An essential element of a plaintiff's *prima facie* case for breach of contract is that the contractual breach caused a party to incur damages. Nevertheless, the mere proof of missed contractual payments do not *per se* amount to *prima facie* proof of a "breach causing a party damage". Instead, proof of the alleged damages that allegedly flowed from the breach, the calculation of which the agreement must have specified, is a critical and necessary *prima facie* element of the breach of contract cause of action. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010) (citing *Molo Oil*, 758 N.W.2d at 224); see 25A C.J.S. Damages § 308. NCMIC, PSFS 3's predecessor in interest, was the author of the Financing Agreement, and thus, all ambiguities in the contract are construed against it. *Modern Heat & Power Co. v. Paul*, 261 Iowa 1319, 1323, 158 N.W.2d 8, 10 (1968).

PSFS 3's supposed proof of damages is fraught with problems and uncertainty, not the least of which is that its damage witness utilized the LeaseWave software program to compute the damages when that program is

designed solely to manage leases and not equipment finance agreements. PSFS 3 has acknowledged that you cannot equate lease payments to loan payments. It's like apples to oranges. [App. Vol. 6, p. 469, 94:17-20]. Although NCMIC utilized T-Value software to prepare amortizations for substantially all of the Brican contracts [App. Vol. 7, pp. 41 – 73; App. Vol. 6, p. 547, 172:6-21], no T-Value calculation was produced for the Doctors' Finance Agreements and such a calculation was not utilized by PSFS 3 to calculate its alleged damages.

The uncontradicted testimony and exhibits evidence that PSFS 3 acknowledged that the Doctors' past-due payments consist of principal and interest. Nevertheless, because NCMIC failed to recite the principal amount (i.e., the amount it was paying to Brican on behalf of each Doctor), or the interest rate, in the Finance Agreement (nor were they otherwise calculable), the damage calculations PSFS 3 submitted lack any evidentiary predicate and present individualized issues incapable of determination in the manner and by the method utilized by the district court.[10]

4. The damages awarded diverge from the default clause of the

[10] Both the undisclosed internal interest rate as well as the payment made to Brican for the Exhibeo System varied from Doctor to Doctor.

Financing Agreements.

The default clause in the Finance Agreement provides:

> If You default, We ***may*** require that You pay 1) all past due amounts under this Lease, and 2) all future amounts owed for the unexpired term, discounted at the rate of 6% per annum.

[App. Vol. 6, pp. 632 – 640, ¶ 9]. (Emphasis added.) Thus, the Finance Agreement specified that damages in the event of a default would be the sum of 1. past due payments plus, 2. amount due for the remainder of the unexpired term. Because the Financing Agreement was a sale and not a lease, the amount due for the remainder of the unexpired term could only be interpreted as referring to the amount of unpaid principal on the loan.

Accordingly, to compute damages upon default, the Agreements require that the past due payments be added to the amount of unpaid principal on the loan which sum first has to be discounted at the rate of 6% per annum from the date of acceleration, which could only have been the date each lawsuit was filed. That however was not the method utilized by PSFS 3 or the district court to calculate damages herein. Instead of the default damage calculation formula set forth in the Financing Agreement, the damage calculation submitted by PSFS 3 and adopted by the district court was merely to sum the total of unmade monthly payments, without otherwise determining

the principal balance due on the loan, discounting that amount by 6% or adding that amount to the past due payments.

Because the Financing Agreement did not contain the price or the interest rate, the principal balance due after default on each Doctors' Financing Agreement as of the date each petition was filed was not calculable from the terms of the Agreement. Without knowing the principal balance, you cannot apply the 6% discount rate. Indeed because PSFS 3 did not introduce any evidence from which the amount of unpaid principal on the loan figure could be calculated, it failed to carry its burden of proof on the issue of damages and the district court was incapable of awarding same pursuant to the default clause of the Financing Agreements. Nevertheless, that didn't seem to be a problem for either PSFS 3 or the district court because both chose to totally ignore that provision of the Financing Agreement. In so doing, the district court erred by awarding any damages to PSFS 3 herein.

Issue 6: **THE DEFAULT INTEREST DAMAGE PROVISION OF THE FINANCING AGREEMENT IS UNCONSCIONABLE UNDER IOWA CODE SECTION 554.13108 (1).**

A. How Issue Was Preserved for Appellate Review.

This issue was preserved for appellate review by the Charlip Defendants through their Twenty-Third (23) Twenty-Fourth (24) and Twenty-Seventh (27) Affirmative Defenses in their Amended Answer and Affirmative Defenses [App. Vol. 6, pp. 105 – 113]; the evidence presented at trial [App. Vol. 6, pp. 135-136]; their post-trial briefing [App. Vol. 7, pp. 530 – 581] and Defendants' Rule 1.904 Motion. [App. Vol. 10, pp. 197 – 253], denied by the District Court on March 29, 2019 [App. Vol. 10, pp. 254 - 257].

B. Standard of Review.

"The standard of review for a breach of contract action is for correction of errors at law." *Iowa Mortg. Ctr., L.L.C., v. Baccam*, 841 N.W.2d 107, 110 (Iowa 2013). "If substantial evidence in the record supports a district court's finding of fact, we are bound by its finding." *Id.* "However, a district court's conclusions of law or its application of legal principles do not bind us." *Id.*

C. Argument on Issue 6.

The default interest damage clause of the Financing Agreements is

both procedurally and substantively unconscionable pursuant to IOWA CODE Section 554.13108 (1) because the Agreements fail disclose an interest rate to the Doctors and seek to charge unconscionable default interest damages. Besides being a material term necessary for contract formation under the IOWA CODE Section 535.17, the hidden interest rate, coupled with NCMIC's knowledge of Brican's "return policy" and the marketing agreements cancellation language render the default interest damage clauses of the Financing Agreements unconscionable pursuant to IOWA CODE Section 554.13108 (1) and this Court should refuse to enforce that clause of the Agreements on that basis. *See, e.g., Outlook Farm Golf Club, LLC,* 784 N.W.2d at 758 (recognizing party may still raise defenses to contract formation despite presence of hell-or-high-water clause) as well as any statutory claims and defenses it has, i.e., failure to disclose an interest rate in violation of IOWA CODE Chapter 535 and violation of Chapter 551A, Iowa's business-opportunity-promotions statute.").

The Financing Agreements disclose an 18% per annum default rate of interest in addition to the 10% monthly late fee on a balance of unmade payments that includes the undisclosed interest already built into the monthly payments which PSFS 3 contends averaged at 8.99%. Thus, as drafted, the

Agreements impose a penalty upon default in making any monthly payment of 12.25% per month (1.5% + 10% + .75%) or an annualized rate of 147%!

Thus, the true approximate interest rate PSFS 3 obtained through the Final Judgments entered by the district court is the approximate 8.99% per annum undisclosed non-default interest plus the 18% per annum stated default interest yielding a total default interest rate of 26.99%[11]. Therefore, the Doctors having affirmatively raised such issue, it was incumbent upon PSFS 3 to have shown that the 26.99% default interest rate was an appropriate liquidated damage and not an unenforceable penalty.

To do so requires a fact inquiry as to the reasonable relationship of such an award to PSFS 3's anticipated damages. See *Citicorp Vendor Finance, Inc. v. WIS Sheetmetal, Inc.*, 206 F.Supp.2d 962, 965-66 (S.D. Ind. 2002) (finding under Indiana law that "In the absence of any evidence that the interest rate is proportionate to the expected damages and therefore reasonable under the circumstances, we cannot say that Citicorp is entitled to 16% interest on the back payments and late fees as a matter of law. Accordingly, Citicorp's motion as to the default interest rate provision is denied.") (Emphasis in original). Nevertheless, no such facts were adduced at the bellwether trials by PSFS 3,

[11] PSFS 3 did not include the 10% per month late fee as part of its damages.

or otherwise nor did the district court otherwise make any factual findings concerning the reasonable relationship of such an award to PSFS 3's anticipated damages. Instead, the district court's only adjudication of such issue was its summary denial of the Charlip Defendants' Rule 1.904 Motion. [App. Vol. 10, pp. 197 – 253], denied by the District Court on March 29, 2019 [App. Vol. 10, pp. 254 - 257].

Iowa law supports such an evaluation of the propriety of awarding default interest. In a case of first impression, the Iowa Court of Appeals, declined to impose a finance charge and statutory interest based on the same underlying debt. *Carson Grain & Implement, Inc. v. Dirks*, 460 N.W.2d 483, 486 (Iowa Ct. App. 1990). The Court reasoned such award would constitute double interest, "duplicative and an unwarranted windfall to judgment creditors." *Id.* Here, PSFS 3 has recovered the non-default interest built-in to the monthly payments of approximately 8.99%, and, claiming it accelerated the total balance due – including that interest, tacked an additional 18% interest onto the allegedly accelerated monthly payments. PSFS 3's collection of double interest has resulted in an unwarranted windfall, which this Court should not permit.

Alternatively, "[d]efault interest may be collectible only after the

lender has accelerated the debt." Nelson and Whitman, REAL ESTATE FINANCE LAW, (5th ed. 2007) at 535; *see also In re Johnston,* 2004 WL 3019472, at *4 (Bankr. N.D. Iowa Dec. 20, 2004). The debts herein were allegedly accelerated by filing suit, so default interest would apply only to the accelerated principal amount due as of the month following the filing of the action, but because of the failure to disclose the principal amount and interest rate in the Financing Agreement, the true amount of default interest cannot and was not calculated with any degree of reasonable certainty nor would have such potential damage amount have properly been in the contemplation of the parties since there was no amortization schedule created or even able to be created based upon the terms of the Agreement. Such failure of proof renders any award of default interest inherently speculative and as such prohibited under Iowa law. See *Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 616 (Iowa 2000).; *Natkin & Co. v. R.F. Ball Constr. Co.*, 123 N.W.2d 415, 422 (Iowa 1963) (plaintiff must establish a reasonable basis from which damages can be ascertained; it cannot be too uncertain or speculative).

Accordingly, even if this Court were to otherwise uphold the underlying enforceability of the Financing Agreements as well as the

damages amounting to the total outstanding payments due to PSFS 3 under the Agreements, it should nevertheless strike the default interest portions of the Final Judgments as an unenforceable penalty under Iowa law.

Incorporation of Arguments of Gossett Defendants

The Charlip Defendants incorporate by reference the arguments made in the proof brief filed by the Gossett Defendants.

Conclusion

The final judgments under review were entered by the trial court without personal jurisdiction over the Doctors and were otherwise unenforceable under Iowa law, and thus, must be reversed with instructions to dismiss those actions upon remand. Alternatively, because the final judgments under review are procedurally flawed, they must be reversed and remanded for individual trials on awardable damages.

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Request for Oral Argument

The Charlip Defendants request oral argument in this matter.

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because: [X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt. and contains 15,403 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

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Certificate of Service

I hereby certify that on July 29, 2020, I electronically filed the foregoing with the Clerk of the Court using the EDMS system which will send notification of such filing to the following:

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