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.
_____/

Reply 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

David H. Charlip
CHARLIP LAW GROUP, LC
999 Brickell Ave. Ste. 840
Miami, FL 33131
T: 305-354-9313
F: 305-354-9314
dcharlip@charliplawgroup.com
Attorneys for Appellants

Matthew L. Preston
BRADY PRESTON GRONLUND PC
2735 1st Ave. S.E.
Cedar Rapids, IA 52402
T: (319)200-8811
F: (319)866-9280
mpreston@BPGLegal.com
Attorneys for Appellants

Table of Contents

Table of Authorities 5

Issues Presented for Review 7

Reply Argument 14

Issue 1: THE DISTRICT COURT ERRED IN FINDING THAT IT HAD JURISDICTION OVER THE DOCTORS 14

A. Reply Argument on Issue 1 14

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 15

A. How Issue Was Preserved for Appellate Review 15

B. Reply Argument on Issue 2 17

1. Under the Iowa Code the interest rate is clearly a necessary material term 17

2. *Wolfe*: Two acceptable methods of interest rate disclosure.....20

3. "Price" and "total price of the contract" are 2 different things.....22

4. Regardless of the litigation history under IOWA CODE § 535.17, the statute protects both lenders and borrowers.....26

5. Violation of IOWA CODE § 535.17 renders the Financing Agreements unenforceable.....27

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. Reply *Argument on Issue 3*.....29

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

A. Reply Argument on Issue 4.....30

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

A. Reply Argument on Issue 5.....31

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

A. Reply Argument on Issue 6.....34

Conclusion.....38

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation.....39

Certificate of Service.....40

Table of Authorities

Cases:

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011).....18

Embden State Bank v. Boyle, 50 N.D. 573, 196 N.W. 820.....23

Employers Mutual Casualty Co. v. Van Haften, 815 N.W.2d 17 (Iowa 2012).....16, 17

Fausel v. JRJ Enters., Inc., 603 N.W.2d 612 (Iowa 1999).....32, 33

GE Money Bank v. Morales, 773 N.W.2d 533 (Iowa 2009).....34

Herb v. Hallowell, 304 Pa. 128, 154 A. 582.....23

Hibernia Bank & Trust Co. v. McCall Bros. Planting & Mfg. Co., 140 La. 763, 73 So. 857.....23

Kneppe v. Huismann, 223 Iowa 569, 272 N.W. 602 (1937).....28

Midland Mut. Life Ins. v. Mercy Clinics, Inc., 579 N.W.2d 823 (Iowa 1998).....35

R.P. Andreas & Son v. Hempy, 276 N.W. 791 (Iowa 1937).....32, 33

Smith v. Fort Madison Community Sch. Dist., 334 N.W.2d 701 (Iowa 1983).....32

United States v. Straker, 800 F.3d 570 (D.C. Cir. 2015).....15, 30, 31

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996).....34

Weinrich v. Hawley, 236 Iowa 652, 19 N.W.2d 665 (1945).....20

Statutes:

IOWA CODE § 525.2.....22

IOWA CODE § 535.17.....16, 17, 21, 22, 26, 27, 28

IOWA CODE § 535.17(1).....19, 20, 22, 28

IOWA CODE § 535.17(2)(West Supp. 1991).....27

IOWA CODE § 535.17(3)(West Supp. 1991).....28

IOWA CODE § 535.17(6).....26, 28

IOWA CODE § 535.2.....17, 18

IOWA CODE § 535.2(1).....18

IOWA CODE § 535.2(2)(a).....19, 20

IOWA CODE § 535.2(2)(a)(5).....18, 19

IOWA CODE § 535.4.....18

IOWA CODE § 535.5.....29

Rules:

Iowa R. App. P. 6.903(1)(d).....40

Iowa R. App. P. 6.903(1)(g)(1).....40

Other Authorities:

17A AM.JUR.2d *Contracts* § 479, at 497 (1991).....32

BLACK'S LAW DICTIONARY 1353 (4th Ed. Rev.1968).....23

Person, Todd. C., *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes* (1991).....27

Statement of Issues Presented

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

Authorities Cited in Argument of this Issue:

Cases:

Aqua-Care Mktg. LLC. v. Hydro Sys., Inc., 99 F. Supp. 3d 959 (S.D. Iowa 2015)

Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49 (2013)

Boswell's Lessee v. Otis, 9 How. 336, 13 L.Ed. 164 (1850)

Bowser v. Collins, Y.B. Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482)

Burkhardt v. Bates, 191 F. Supp. 149 (N.D. Iowa 1961), aff'd, 296 F.2d 315 (8th Cir. 1961)

Burnham v. Superior Court of California, County of Marin, 495 U.S. 604 (1990)

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

Case of the Marshalsea, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027 (K.B. 1612)

Davis v. Rudolph, 242 Iowa 589, 45 N.W.2d 886 (1951)

*Dunn v. Dunn, 4 Paige 425 (N.Y.Ch. 1834)*180 L.Ed.2d at 773 [(2011)]

Evans v. Instine, 7 Ohio 273 (1835);

Grumon v. Raymond, 1 Conn. 40 (1814)

J.L.S. v. R.J.L., 708 So. 2d 293 (Fla. 2d DCA 1998)

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975)

Laddie Nachazel Family Living Tr. v. JKLM, Inc., 913 N.W.2d 273 (Iowa Ct. App. 2018)

Matsui v. King, 547 N.W.2d 228 (Iowa Ct. App. 1996)

Kansas City S. Ry. Co. v. Great Lakes Carbon Corp., 624 F.2d 822 (8th Cir. 1980)

Land-Cellular Corp. v. Zokaites, 2006 WL 3039964, at *6 (S.D. Fla. Sep. 26, 2006)

Liberty Bank, F.S.B. v. Best Litho, Inc., 737 N.W.2d 312 (Iowa Ct. App. 2007)

Lubben v. Selective Service System, 453 F.2d 645 (1st Cir. 1972)

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907 (1972)

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878)

Picquet v. Swan, 19 F.Cas. 609 (No. 11,134) (CC Mass.1828)

Saccoccio v. JP Morgan Chase Bank, N.A., 13-21107-CIV, 2015 WL 3822315, at *4 (S.D. Fla. June 9, 2015)

Shams v. Hassan, 829 N.W.2d 848 (Iowa 2013)

Smith v. J. C. Penney Co., 260 Iowa 573, 149 N.W.2d 794 (1967)

Steel v. Smith, 7 Watts & Serg. 447 (Pa.1844)

Thomas v. Blue Cross & Blue Shield Ass'n, 333 Fed. Appx. 414 (11th Cir. 2009)

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

U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487 (8th Cir.1990)

Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577

(1945)

WINBCO Tank Co., Inc. v. Palmer & Cay of Minn., L.L.C., 435 F. Supp. 2d 945 (S.D. Iowa 2006)

Statutes:

IOWA CODE ANN. 3300.2

Rules:

FED. R. CIV. P. 13

Other Authorities:

1 FLETCHER CYC. CORP. § 41.33

7 Moore's, supra P 60.25(2).

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. Wolfe, 795 N.W.2d 65 (Iowa 2011)

Embden State Bank v. Boyle, 50 N.D. 573, 196 N.W. 820

Employers Mutual Casualty Co. v. Van Haften, 815 N.W.2d 17 (Iowa 2012)

Herb v. Hallowell, 304 Pa. 128, 154 A. 582

Hibernia Bank & Trust Co. v. McCall Bros. Planting & Mfg. Co., 140 La. 763, 73 So. 857

Kneppe v. Huismann, 223 Iowa 569, 272 N.W. 602 (1937)

Weinrich v. Hawley, 236 Iowa 652, 19 N.W.2d 665 (1945)

Statutes:

IOWA CODE § 535.17

IOWA CODE § 535.17

Iowa Code Section 535.17(1)

IOWA CODE § 535.17(2) (West Supp. 1991)

IOWA CODE § 535.17(3) (West Supp. 1991)

IOWA CODE § 535.17(6)

IOWA CODE § 535.17(1)

IOWA CODE § 535.2(1)

IOWA CODE § 535.2(2)(a)

IOWA CODE § 535.2(2)(a)(5)

IOWA CODE § 535.2(2)(1)

IOWA CODE § 535.4

IOWA CODE § 535.5

Other Authorities:

BLACK'S LAW DICTIONARY 1353 (4th Ed. Rev.1968).

Dictionary.com

Person, Todd. C., *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, (1991). MINN. L. REV. 2447:

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:

Automobile Sales Co. v. Bowles, 58 F.Supp. 469 (N.D. Ohio 1944)

Geneva v. Thompson, 200 Iowa 1173, 206 N.W. 132 (1925)

Harvey v. Platter, 495 N.W.2d 350 (Iowa Ct. App. 1992)

Hickman v. Hygrade Packing Co., 185 N.W.2d 801 (Iowa 1971)

In re L.B.-A.D., 801 N.W.2d 628 (Iowa Ct. App. 2011)

In re Custody of C.C.M., 202 P.3d 971 (Wash. Ct. App. 2009)

McClure v. United States, 48 F.Supp. 531, 98 Ct.Cl. 381 (1943)

Rincon v. HSBC Bank USA, Nat. Ass'n, 196 So. 3d 417 (Fla. 5th DCA 2016)
Spinner by & through Spinner v. Wainer, 430 So. 2d 595 (Fla. 4th DCA 1983)

State v. Mattingly, 220 N.W.2d 865 (Iowa 1974)

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

United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955)

Vendetti v. United States, 45 F.2d 543 (9th Cir. 1930)

Vonherberg v. City of Seattle, 20 F.2d 247 (W.D. Wash. 1927)

Webb v. Ferkins, 227 Iowa 1157, 290 N.W. 112 (1940)

Statutes:

§ 621.12(2)(b), FLA. STAT.

Rules:

IOWA R. CIV. P. 1.981

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:

4040 IBIS Circle, LLC v. JP Morgan Chase Bank, 193 So. 3d 957 (Fla. 4th DCA 2016)

AFSCME/IOWA Council 61 v. State, 537 N.W.2d 712 (Iowa 1995)

Davis–Eisenhart Marketing Co., Inc. v. Baysden, 539 N.W.2d 140 (Iowa 1995)

Iowa v. Ziegeldorf, 554 N.W.2d 884 (Iowa 1996)

Keller v. Harrison, 129 N.W. 57 (Iowa 1910)

Loudon v. Hill, 286 N.W.2d 189 (Iowa 1979)

Mills v. Martinez, 909 So. 2d 340 (Fla. 5th DCA 2005)

Nero v. Cont'l Country Club R.O., Inc., 979 So.2d 263 (Fla. 5th DCA 2007)

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

State v. Bullock, 638 N.W.2d 728 (Iowa 2002)

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

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

Welch v. Resolution Tr. Corp., 590 So.2d 1098 (Fla. 5th DCA 1991)).

Worthington v. Kenkel, 684 N.W.2d 228 (Iowa 2004)

Statutes:

IOWA CODE § 625.22

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

Authorities Cited in Argument of this Issue:

Cases:

Fausel v. JRJ Enters., Inc., 603 N.W.2d 612 (Iowa 1999)

GE Money Bank v. Morales, 773 N.W.2d 533 (Iowa 2009)

R.P. Andreas & Son v. Hempy, 276 N.W. 791 (Iowa 1937)

Smith v. Fort Madison Community Sch. Dist., 334 N.W.2d 701 (Iowa 1983)

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

Other Authorities:

17A AM.JUR.2d Contracts § 479, at 497 (1991)

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:

Midland Mut. Life Ins. v. Mercy Clinics, Inc., 579 N.W.2d 823 (Iowa 1998)

Argument

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

A. Reply Argument on Issue 1.

The Charlip Defendants adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Reply Brief on this issue. [Gossett Defendants' Reply Brief (Issue 1), pp. 16-27]. 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.

PSFS 3 argues that this issue was waived by the Doctors by their failure to raise it as a "common issue" in the Florida Federal District Court litigation resulting in issue preclusion citing *Employers Mutual Casualty Co. v. Van Haften*, 815 N.W.2d 17, 22-23 (Iowa 2012). [Appellee's Proof Brief (hereinafter "APB") at pp. 33-34].

Issue preclusion is to be raised as a claim or defense before a district court. It is not a species of error preservation. PSFS 3 cited no authority to suggest an appellee being the beneficiary of issue preclusion then means the appellant has failed to preserve error on the supposedly precluded issue. Error preservation and issue preclusion are distinct concepts.

Obviously, the issue of what defenses remained viable before the Iowa district court was not an issue that was litigated in the Florida action. That issue was however specifically litigated in the Iowa district court, with that Court expressly finding that defenses raising IOWA CODE § 535.2 and IOWA CODE § 535.17 were the type of defenses that remained justiciable in the Iowa litigation. [App. Vol. 6, pp. 271 - 274]. PSFS 3 did not seek a 1.904 motion or appeal that issue. As such, the only parties who can claim to be benefited by issue preclusion on the issue of whether defenses arising under IOWA CODE § 535.2 and IOWA CODE § 535.17 remained justiciable before the Iowa district court, are the doctors. See *Employers Mutual Casualty Co. v. Van Haften*, 815 N.W.2d 17, 22-23 (Iowa 2012) "(The party invoking issue preclusion must establish four elements: (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment. [citations omitted].")

The Iowa district court is the only court that can properly decide what defenses it contemplated were of the type that would remain viable after the

conclusion of the Florida litigation. Its decision in that regard must be granted deference.

B. Reply Argument on Issue 2.

1. Under the Iowa Code the interest rate is clearly a necessary material term.

Before addressing the holding in *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), it is important to examine the nature of the defense the doctors are asserting here, as it then relates to the holding of *Wolfe*. The question of whether the interest rate is a material term needed in a business credit agreement such as the financing agreements at issue here, is answered by the Iowa Code. Under the Iowa Code the interest rate is clearly a necessary material term. Under Iowa statutory law, except in limited circumstances, a person borrowing money cannot agree to pay a rate of interest beyond five percent. IOWA CODE § 535.2(1). Charging a rate of interest beyond five percent, without conforming to certain limited exceptions found in IOWA CODE § 535.2, is prohibited and illegal. IOWA CODE § 535.4. One such exception is that a person borrowing money or obtaining credit for business purposes may agree in writing to pay any rate of interest. IOWA CODE § 535.2(2)(a)(5).

Chapter 535 goes on in Section 17 to provide "[a] credit agreement is not enforceable in contract law by way of action or defense by any party unless a writing exists which contains all of the material terms of the agreement and is signed by the party against whom enforcement is sought." IOWA CODE § 535.17(1). The necessity of making written disclosure of an interest rate beyond five percent in a business loan to avoid having the credit agreement found prohibited and illegal, is per se demonstrative that such written disclosure of an interest rate is "material".

That Section 535.2(2)(a) requires written agreement to any rate of interest beyond five percent, must compel the conclusion that (1) written disclosure of; and (2) agreement to such rate of interest is a material term as used later in the same Chapter (Section 535.17(1)). Limits on rates of interest and finance charges, the parameters of what is usurious interest, the consequences of usurious interest, and methods to avoid an agreement being deemed to charge a usurious rates of interest[1] are not just a part of Chapter 535 but rather represent the *sine qua non* of the entire Chapter. A written

[1] Such as by written agreement to any rate of interest in a business loan as provided for by Section 535.2(2)(a)(5).

agreement to pay a rate of interest beyond 5% must therefore be deemed a "material term" of a business loan credit agreement under Section 535.17(1).

The question then must turn to what it means to agree to a rate of interest. It is vital to recognize that Section 535.2(2)(a) allows written agreement to any rate of interest beyond 5%. It does not permit an agreement just to charge any amount of interest that would be beyond 5%. If all the borrower knows is the amount to be paid over the life of the loan, then the borrower does not know the rate of interest charged and thus cannot have agreed in writing to a "rate of interest".

Chapter 535 does not define interest. However, the Iowa Supreme Court has defined it in a manner logically applicable in interpreting Chapter 535. See *Weinrich v. Hawley*, 236 Iowa 652, 659, 19 N.W.2d 665, 669 (1945) ("Interest, at a named rate in its accepted meaning, is the compensation for the use of money for annual or other stipulated periods. This has long been the accepted understanding in connection with the compensation for the use of money and we hold that such a construction and interpretation must be made in the instant case."); see also Dictionary.com defining Interest Rate as "[t]he usual way of calculating interest – as a percentage of the sum borrowed."

A simple understanding of math demonstrates that a creditor may disclose a rate of interest in two ways. First, the creditor may give a number followed by the word interest or sign %. Examples would be "you agree to pay an annual rate of interest of 12% or twelve percent". That clear and simple disclosure may be expected in a consumer credit transaction. For more presumably sophisticated parties such a business borrower, the rate of interest may be disclosed (and thus agreed to as a rate of interest), by revealing the price of the thing financed, the total amount to be repaid, and the amount of time for repayment. With that information the borrower can conduct their own math and determine the rate of interest to which they are agreeing.

2. *Wolfe*: Two acceptable methods of interest rate disclosure.

The Iowa Supreme Court wrote in *Wolfe* "Lake MacBride has failed to show the agreement is unenforceable because it fails to contain 'all of the material terms of the agreement,' by not explicitly listing an interest rate. The agreement laid out the subject matter, price, payment terms, and duration." 795 N.W.2d at 82. The *Wolfe* decision stands only for the proposition that it is not necessary to use the first method of interest rate disclosure (*i.e.* explicitly listing the rate such as 12% or twelve percent) to meet Section

535.17, but that the second method of disclosure of price, payment terms, and duration, is sufficient to effectively disclose a rate of interest in satisfaction of Sections 525.2 and 535.17.

Wolfe however does not stand for the proposition that the rate of interest is not a required material term under Section 535.17. The Court instead merely clarified that where the interest rate was not explicitly listed, disclosure of price, payment terms, and duration (allowing the borrower to calculate the interest rate) would suffice. That interpretation reconciles the *Wolfe* decision with the statutory interpretation that a rate of interest must be deemed a material term under Chapter 535. Because the Financing Agreements gave neither form of interest rate disclosure, they cannot satisfy the requirements of Section 535.17 and are not saved by *Wolfe* for the reasons cited above.

Wolfe demonstrates that "price" is one such term needed to comply with Section 535.17(1). In that the price of the financed display systems was undisputedly not disclosed to the Doctors in the Financing Agreements or otherwise, PSFS 3 seeks to redefine the meaning of the word "price" to being equivalent to "the total amount paid under an agreement". APB 40-41.

3. "Price" and "total price of the contract" are 2 different things.

As such, PSFS 3 has conceded that the only way for *Wolfe* to be read as validating the enforceability of the Finance Agreements at issue herein would be if "price" held the same meaning as "the total amount to be paid under the agreement." Such contention however defies both precedent and logic. Black's Law Dictionary defines "price" as follows:

> PRICE. Something which one ordinarily accepts voluntarily in exchange for something else. Herb v. Hallowell, 304 Pa. 128, 154 A. 582, 584. The consideration given for the purchase of a thing; Hibernia Bank & Trust Co. v. McCall Bros. Planting & Mfg. Co., 140 La. 763, 73 So. 857, 858; -usually in money; Embden State Bank v. Boyle, 50 N.D. 573, 196 N.W. 820, 821.

BLACK'S LAW DICTIONARY 1353 (4th Ed. Rev.1968).

Here, the Financing Agreements pertained to the sale of a good – the display system. That sale was between the Doctors and Brican. The Financing Agreement was a credit agreement between the Doctors and NCMIC to finance each Doctor's acquisition of the display system. The Financing Agreements were but one piece in a larger interconnected puzzle (purchase contract, marketing agreement and financing agreement), which must be construed together. [2]

---

[2] The Florida federal district court has already ruled that the agreements, when construed together, could be reconciled as being not inconsistent. [2013.08.01

As part of such construction, this Court certainly can and must acknowledge and recognize that the financing transaction did not occur in a vacuum – that in this matter as in most matters where a sale of goods is financed, there is a seller; a buyer and a finance company. The purchase consideration between the seller and the buyer – what is exchanged between the two for the buyer's acquisition of the good sold, is universally understood and defined to be the "price".

Logically, a buyer would need to understand the price before he or she could make any type of reasoned decision about the reasonableness of whether to accept the financing offered by the finance company. The "price" of the financing logically must be separate and different from the price of the goods sold. The price of the financing would be how much over and above the price of the goods sold it will cost the buyer for the consideration necessary to pay the seller for the good. Whether you call the price of the financing "interest rate", "finance rate" or anything else amounts to nothing more than irrelevant semantics because the fundamental nature of these relationships are integral concepts of commerce.

Omnibus Order on Cross-Motion for SJ DE413 at p. 28]. As such holding would constitute "law of the case", this Court would be bound to follow same.

Removing the financing transaction a bit further out of the vacuum that PSFS 3, would have this Court conduct its analysis in, it is also relevant to consider that PSFS 3's Financing Agreements provided the lynch-pin which allowed Brican to defraud the Doctors by its Ponzi scheme. That is because Brican's Ponzi scheme was based upon the fallacious contention that the display systems were virtually free.[3] The fact that the Financing Agreements failed to disclose the price of the goods being financed as well as the cost of the financing allowed Brican to perpetuate the illusion that the systems were virtually free.

The point being that this Court must evaluate the materiality of the terms necessary to enforce the Financing Agreements against the backdrop of certain uncontested, yet very relevant facts:

1. The Doctors are Brican Ponzi-fraud scheme victims.

2. NCMIC permitted Brican to directly present the Financing Agreements as part of its salesperson's sales transaction with each Doctor.

---

[3] "To maximize sales of the Exhibeo and the reach of its advertising, the Vendor set advertising payments so that they nearly matched customers' obligations under the Financing Agreements. It then marketed the Exhibeo to customers as being "free."" [A. Def. Exhibit H.H. Amended Findings of Fact and Conclusions of Law (DE 596), p. 14, ¶41]

3. The Financing Agreements were "private-labeled" with Brican's logo prominently displayed.

4. The Agreements were titled "Equipment Lease Application and Agreement".

5. The only places for potential variation in the Financing Agreements were the payment terms, which as a practical matter were always the same for each Doctor.

6. The display systems were marketed to the Doctors as being "free.";

7. Because of NCMIC's failure to disclose the price of the display system or the cost of the financing, there was no way for any of the Doctors to evaluate or understand the cost of the financing.

This Court should consider the above facts with the understanding that the general goal behind credit agreement statutes such as IOWA CODE § 535.17 is to increase certainty in contractual liability and to protect against fraud.[4] It is therefore no coincidence that the subject Finance Agreements,

[4] IOWA CODE § 535.17(6) states that its purpose is "to ensure that contract actions and defenses on credit agreements are supported by clear and certain written proof of the terms of such agreements to protect against fraud and to enhance the clear and predictable understanding of rights and duties under

providing the necessary lynch-pin to Brican to perpetrate its fraud upon the Doctors, was drafted by NCMIC to shield both the cost of the display systems and the cost of the financing from the Doctors. It was just such opaqueness facilitating fraud that IOWA CODE § 535.17 was designed to prevent.

4. Regardless of the litigation history under IOWA CODE § 535.17, the statute protects both lenders and borrowers.

PSFS 3 argues that Iowa cases decided under as IOWA CODE § 535.17 all deal with a lender using the statute as a shield against borrowers trying to claim oral or unsigned agreements to avoid payments under a credit agreement or lend money and that out-of-state cases similarly involve creditors challenging alleged credit agreements. APB at 41-42. Nevertheless, it is not the random history of litigation under a statute that defines the measure of its protection but the language of the statute itself.

As explained by Person, Todd. C., *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, (1991). MINN. L. REV. 2447:

> 2. Protections for Borrowers
> Several features of the credit agreement statutes provide protection for borrowers.40 Some states require the lender to provide special notice 41 informing borrowers of the writing requirement in or with the agreement, 42 in separate brochures,43 or in a conspicuous public posting within the

---

credit agreements."

lending institution.44 These provisions protect the borrower by requiring the lender to share information about the statute.45

41. See, e.g., IOWA CODE ANN. § 535.17(2) (West Supp. 1991);....

...

45. The Iowa statute's recommended notice attempts to alert unwary borrowers. It reads:

> IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.

IOWA CODE ANN. § 535.17(3) (West Supp. 1991).

Accordingly, the Doctors can and should seek and be entitled to the statute's protections against fraud and this Court should apply the statute to limit the enforceability of the Financing Agreements.

5. Violation of IOWA CODE § 535.17 renders the Financing Agreements unenforceable.

A violation of IOWA CODE § 535.17(1) renders the contract unenforceable. There is no middle ground. Nor is there any forfeiture or reduction of interest charged. In fact IOWA CODE § 535.17(6) recites *interalia*; "This section entirely displaces principles of common law and equity that would make or recognize exceptions to or otherwise limit or dilute the force and effect of its provisions concerning the enforcement in contract

law of credit agreements or modifications of credit agreements." Although such a result may seem harsh, when interpreting a statute, this Court may not mitigate the hardships either party presumes will flow from its enforcement, nor impose its personal opinions as to its wisdom. *Kneppe v. Huismann*, 223 Iowa 569, 571, 272 N.W. 602, 603 (1937).

Moreover, even where the issue of potential usury is raised under IOWA CODE § 535.5 (Penalty for Usury) that statute provides: "If unlawful interest is contracted for the plaintiff shall not have judgment for more than the principal sum, whether the unlawful interest is incorporated with the principal or not." Here the interest and principal were not separately broken-out in the Financing Agreements; there were no amortization schedules introduced into evidence nor did the District Court make any findings concerning the principal amounts of any of the Doctor's alleged obligations. Thus, while it might have been appropriate on the basis of equity to apply the usury statute to limit the enforceability of the Financing Agreements to only recoupment of the display system cost by PSFS 3, because of the lack of an evidentiary basis to do so, this Court lacks the basis to make any such adjustment as might even have been appropriate under Iowa statutory law.

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).

The Charlip Defendants adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Reply Brief on this issue. [Gossett Defendants' Reply Brief (Issue 3), pp. 33-40]. 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. Reply Argument on Issue 4.

The Charlip Defendants adopt and incorporate by reference those arguments made by the Gossett Defendants in their Proof Reply Brief on this issue. [Gossett Defendants' Reply Brief (Issue 4), pp. 42-45]. 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 5: **PSFS 3 FAILED TO PROVE BREACH OF CONTRACT.**

A. Reply Argument on Issue 5.

PSFS 3 acknowledges that a "default" is defined in the Financing Agreements as the failure to pay "any sum by its due date". APB at 59. To that extent, establishing the due date of payments would be a necessary predicate to PSFS 3's *prima facie* proof of the Doctor's default. Nevertheless, nothing in the Financing Agreements specify a due date for payments. Moreover, during the Busch Bellwether trial, PSFS 3's damage witness, Tami Frischmeyer could not specify a due date for payments. [App. Vol. 6, p. 529, l. 9-13].

Where there is no time set for performance in a contract, the Court must determine what would be a reasonable time within which the party must complete his performance. See *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 619 (Iowa 1999) ("When a contract fails to specify time for performance, the parties must perform within a reasonable time."). *Smith v. Fort Madison Community Sch. Dist.*, 334 N.W.2d 701, 704 (Iowa 1983); 17A AM.JUR.2d *Contracts* § 479, at 497 (1991) ("Where there is no provision as to the time for performance, a reasonable time is implied."). What constitutes "a reasonable time depends upon the nature of the act to be done, the nature of the contract,

and all the circumstances relating to the same." *R.P. Andreas & Son v. Hempy*, 276 N.W. 791, 796 (Iowa 1937).

This was not a situation where the Doctors just failed to make agreed-upon finance payments. Before ceasing payments, the Doctors sought to invoke the cancellation provisions of the marketing agreement by notifying NCMIC and by then filing a Declaratory Judgment action in the Florida Federal District Court. [APB at 16]. At the Bush bellwether trial, the Charlip Appellants contested PSFS 3's allegations that the Financing Agreements had been breached and raised their affirmative defense contending that PSFS 3's damages, if any, were the proximate result of the conduct of parties other than the Doctors. Nevertheless, even though these issues were raised by Bush and the Charlip Appellants, other than to summarily conclude that the Doctors were in breach of the Financing Agreements, the district court failed to address same.

Thus, as in *Fausel*, the district court herein failed to determine what constituted a reasonable time for the Doctor's performance and otherwise failed to address the fact that the Financing Agreements did not specify a due date for payments. If the determination of default is dependent upon a failure to pay by the due date and the due date is unspecified and otherwise without a

sufficient evidentiary basis, then the factual determination of "default" by the district court cannot be sustained. A factual finding by the district court is binding on this court only if substantial evidence supports it. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009). Substantial evidence supports a factual finding only if the fact finder may reasonably infer the finding from the evidence presented. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996).

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

A. Reply Argument on Issue 6.

PSFS 3 also acknowledges that the default interest damage clause of the Financing Agreements is specifically tied to the failure to pay "any sum by its due date". [APB at 59]. Without a specific due date established by PSFS 3 or a finding made by the district court of the date for reasonable performance, the accrual and award of default interest is both premature and speculative.

Under Iowa law, when a contract has been breached the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed." *Midland Mut. Life Ins. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). While this allows the non-breaching party to receive the benefit of the bargain, it does not allow him "to be placed in a better position than he would have been in if the contract had not been broken." *Id.*

Here the final judgments entered against the Doctors would give PSFS 3 massive windfalls amounting to an approximate 280% difference between

what it expected to recover based upon the remaining payments outstanding under the Financing Agreements and what it stands to recover should this Court affirm the Final Judgments. Based upon the testimony of PSFS 3's witnesses, the below chart details and compares what PSFS 3 expected to recover as its income from financing the Financing Agreements and what it will now recover, should the Final Judgments be affirmed:

Appellant	**Final Judgment Amount**	**Total Affirmance Recovery**	**Percentage Difference**
Baribeau	$38,272.44	$107,802.80	281.67%
Barrera	$18,037.76	$51,312.99	284.48%
Brenner	$24,046.88	$69,117.04	287.43%
Colwell,	$22,352.00	$63,476.02	283.98%
Discher, Jr.	$25,139.92	$71,516.89	284.48%
Easton, Jr.	$11,784.00	$33,690.65	285.90%
Gelman	$23,876.00	$68,156.19	285.46%
Hoghooghi	$22,352.00	$60,573.92	271.00%
Josephs	$21,336.00	$60,811.10	285.02%
Khan	$22,352.00	$63,278.15	283.10%
Machiela	$18,796.00	$52,536.36	279.51%

Appellant	Final Judgment Amt.	Total Affirmance Recovery	Percentage Difference
Miffleton	$21,248.37	$58,878.88	277.10%
Morreale	$22,860.00	$65,357.11	285.90%
Peters	$20,828.00	$58,410.59	280.44%
Porch	$20,828.00	$59,250.54	284.48%
Rasbornik	$20,607.40	$57,761.53	280.30%
Schwartz	$10,269.00	$29,389.54	286.20%
Simon	$10,269.00	$29,212.78	284.48%
Smith	$22,234.30	$63,251.12	284.48%
Smurr	$15,748.00	$43,149.52	274.00%
Stephenson	$8,802.00	$24,706.20	280.69%
Thompson	$22,823.60	$61,313.17	268.64%
Van Der Heyden	$21,336.00	$60,758.63	284.77%

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 reply 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 Financing Agreements are unenforceable and the final judgments under review are procedurally flawed, they must be reversed.

/s/ Matthew L. Preston
Matthew L. Preston, AT0006314
Brad J. Brady, AT0001138
Cara L. Roberts, AT0012362
BRADY PRESTON
GRONLUND PC
2735 1st Avenue SE
Cedar Rapids, IA 52402
Phone: 319/866-9277
Fax: 319/866-9280
MPreston@BPGLegal.com
BBrady@BPGLegal.com
CRoberts@BPGLegal.com

David H. Charlip
CHARLIP LAW GROUP, LC
999 Brickell Avenue, Suite 840
Miami, Florida 33131
Phone: 305/354-9313
Fax: 305/354-9314
dcharlip@charliplawgroup.com

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

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 4,475 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

/s/ Matthew L. Preston
Matthew L. Preston, AT0006314
Brad J. Brady, AT0001138
Cara L. Roberts, AT0012362
BRADY PRESTON
GRONLUND PC
2735 1st Avenue SE
Cedar Rapids, IA 52402
Phone: 319/866-9277
Fax: 319/866-9280
MPreston@BPGLegal.com
BBrady@BPGLegal.com
CRoberts@BPGLegal.com

David H. Charlip
CHARLIP LAW GROUP, LC
999 Brickell Avenue, Suite 840
Miami, Florida 33131
Phone: 305/354-9313
Fax: 305/354-9314
dcharlip@charliplawgroup.com

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:

Benjamin P. Roach AT0006588
Randall D. Armentrout AT0000543
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, Iowa 50309-3899
ATTORNEYS FOR PLAINTIFFS

Billy J. Mallory
BRICK GENTRY, P.C.
6701 Westown Parkway, Suite 100
West Des Moines, IA 50266

Ronald P. Gossett
GOSSETT & GOSSETT, P.A.
4700 Sheridan Street, Building I
Hollywood, FL 33021-3416

By: */s/ David H. Charlip*
David H. Charlip, B.C.S.