IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1199

ROY KARON, an individual, and,
PEDDLER LLC, an Iowa Corporation,

Plaintiffs-Appellants,

v.

JAMES MITCHELL, an individual,
WYNN ELLIOTT, an individual,
ELLIOTT AVIATION, a corporation,
ELLIOTT AVIATION AIRCRAFT SALES, INC., a corporation,
d/b/a ELLIOTTJETS,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE DAVID N. MAY

PLAINTIFFS-APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because:

A. This appeal presents substantial issues of first impression concerning the enforceability of contract provisions when the validity of the contract is questioned due to allegations of fraud.

B. This appeal presents substantial issues in which there appears to be a conflict between published decisions of the Iowa Supreme Court and the Iowa Court of Appeals.

C. This appeal presents substantial questions of enunciating or changing legal principles. (Iowa R. App. P. 6.1101 (2), (c), (b), (f)).

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the Polk County District Court's grant of a motion to dismiss on the plaintiff's claims for breach of an oral contract, fraudulent misrepresentation, and breach of fiduciary duty against James Mitchell (hereinafter "Mitchell"), Wynn Elliott (hereinafter "Elliott"), Elliott Aviation, Inc. (hereinafter "EAI"), and Elliott Aviation Aircraft Sales, Inc. (hereinafter "Elliott Aviation"). Plaintiff will refer to Mitchell, Elliott, EAI, and Elliott Aviation collectively as "the Elliott defendants" throughout this brief. (App.5-13)

B. Relevant Proceedings.

This dispute was originally filed in the Iowa District Court in and for Linn County-designated No. LACV082608. (App.149-171) Discovery proceeded and the matter was set for jury trial. (App.273-274) On April 7 2016, Judge Chad Kepros issued a twenty-two-page decision on a variety of motions including defendants' motion for summary judgement. (App.149-171) After an exhaustive review of the evidence in the record, Judge Kepros ruled on any issues, including a finding that plaintiffs had established a genuine issue of material fact whether or not the "Purchase Agreement" (Exhibit AA to the Motion to Dismiss in this litigation)(App.41-59) proffered by defendants in support of their defense was a fully integrated contract (App.156-159, particularly App.159 last paragraph) Shortly before trial, plaintiffs asked for a continuance which was denied by the trial court. Plaintiff voluntarily dismissed LACV082608 without prejudice on or about December 29, 2016. (App.280)

The plaintiff refiled their claims in Polk County District Court via a petition alleging breach of an oral brokerage contract, fraudulent misrepresentation, and breach of fiduciary duty on February 23, 2018. (App.5-13) The Elliott defendants filed a motion to dismiss on April 13, 2018, (App.60-61) together with supporting brief (App.24-59) with attached

exhibits including Exhibit AA to the brief (App.41-59) a written agreement entitled "Purchase Agreement".

Defendants Motion to Dismiss alleged that the plaintiffs 1) failed to state a claim upon which relief could be granted, and 2) in the alternative, that the plaintiffs brought suit in an improper venue. (App.60-61)

Defendants allegation that the case had been brought in the improper venue was predicated on defendant's assertion that paragraph 9 of Exhibit AA (Choice of Law and Jurisdiction- App.48-49) was part of a valid, enforceable written contract which governed the rights and liabilities of the parties, regardless of the plaintiff's s allegations in the petition. Paragraph 9 provided that Kansas law applied to any disputes and that Kansas was the sole forum in which disputes could be litigated. (App.48-49).

The Elliott Defendants argued that paragraph 9 was severable and enforceable under the *"Prima Paint"* rule applied by the Iowa Supreme Court in the context of an arbitration clause in *Dacres v. John Deere Ins. Co.*, 548 *N.W.2d 576 (Iowa 1996)*. (App.24-59)

The plaintiffs filed their resistance to the motion to dismiss on May 7, 2018 (App.252-258) as well as a memorandum and brief in resistance, with various exhibits (App.138-251). The Elliott defendants responded with their reply brief on May 16, 2018 (App.259-272).

Oral arguments were held on the motion to dismiss before the Honorable Judge David N. May on June 7, 2018, and he took the matter under advisement. (App.307-343) *Dacres, id* involved an arbitration clause. The parties and the Court acknowledged that the District Court was faced with a question of first impression, whether Iowa Court should apply the *Dacres* holding to choose of law and choice of forum provisions under these circumstances. (App. 317 Line 4-p.314, line 15)

Judge May issued a written order on June 13, 2018, granting in part and denying in part the motion to dismiss. (App.287-293). The order denied the motion on the grounds that the petition failed to state a claim upon which relief could be granted.

However, on issue 2, the Court found that paragraph 9 was severable, and enforceable based on the District Court's application of *Dacres, id.* and dismissed plaintiffs' claims without prejudice. The District Court found that if plaintiffs refile their case, they must do so in Kansas. (App.293) Defendants asserted that the Kansas statute of limitations on fraud (two years after discovery) had already run. (App.36-37)

Plaintiffs filed a Motion to Reconsider and to Enlarge Findings on or about June 28, 2018. (App.295-296). The Elliott defendants resisted the motion (App.297-301). On July 11, 2018, the District Court denied the

motion to reverse its previous order, but granted the motion to enlarge stating that the Court had "considered all of the arguments mentioned in the Plaintiffs Motion dated July 9, 2018", and left the ruling intact. (App.302) Since the Kansas statute of limitations had run, the effect was identical to summary judgment in defendants favor.

C. Disposition in the District Court.

Judge May, denied the motion to dismiss on the grounds that the plaintiff had failed to state a claim upon which relief could be granted; however, he granted the motion to dismiss on the grounds that the plaintiff brought suit in an improper venue. (App.287-293) In making the determination that Iowa was an improper venue for this case, Judge May applied the choice of law and forum selection clauses contained in a written agreement between the parties (hereinafter "Exhibit AA-the Purchase Agreement."). (App.41; App.287-293)

Judge May denied the plaintiffs motion to reconsider and reverse his earlier ruling. (App.302)

STATEMENT OF THE FACTS

Plaintiffs' petition sets out the following allegations of fact. This case arises out of a transaction which took place in 2014 between Peddler, LLC (hereinafter "Peddler") and the Elliott Defendants. (App.5-13)

At all times material to this case, Roy Karon (hereinafter "Karon") was the sole shareholder of Peddler. Peddler's primary function is owning a general aviation aircraft and providing transportation via lease to Karon for the operation of his business: providing training and information to customers throughout the United States and Canada. (App.5)

In April of 2014, Peddler/Karon owned a 1999 Cessna Citation Bravo Jet aircraft (hereinafter the "Bravo jet"). In late April of 2014, Peddler/Karon determined he wanted to trade the Bravo jet for a larger, faster jet known as a Cessna Citation X (hereinafter the Citation X"). (App.5-6)

At all times material to this case, Elliott owned and operated Elliott Aviation and EAI; Mitchell was employed at Elliott Aviation as Vice-President of turbine aircraft sales. The Elliott defendants' primary business function was the buying, selling, brokering and otherwise exchanging of various aircrafts. Therefore, at all times material hereto, the Elliott defendants were sophisticated aircraft dealer's familiar with the difference between outright sales, trade-ins, and exchanges of aircrafts under IRS Code 1031 to minimize tax consequences. (App.6)

Karon had purchased aircraft fuel, parts, maintenance, and other aircraft services from the Elliott defendants for over thirty years before 2014, and therefore, when Peddler/Karon determined he wanted to acquire the Citation

X, he approached the Elliott defendants to assist him in the acquisition. (App.6)

In late April of 2014, Karon contacted the Elliott defendants and was referred to Mitchell. In a telephone conversation between the parties, Karon expressed to Mitchell that he wanted to sell the Bravo jet and purchase a Citation X, but wanted to legitimately avoid a taxable event (recapture of deprecation) that would occur if Peddler/Karon sold the Bravo outright and then bought the Citation X as two separate transactions. In other words, Karon desired to acquire the Citation X through a 1031 exchange. (App.6-7)

Karon made the following oral offer to the Elliott defendants:

A. Karon proposed the Elliott defendants act as a broker to accomplish a 1031 exchange, in which the Elliot defendants would acquire the Citation X chosen by Karon, and Peddler/Karon would trade their Bravo jet to the Elliott defendants and immediately take delivery of the Citation X.

B. Peddler/Karon would search for and find a Citation X Aircraft suitable for their needs.

C. Peddler/Karon would negotiate a price with the seller of the Citation X they determined suitable.

D. Once Peddler/Karon found the Citation X they desired to purchase, they would notify the Elliott defendants.

E. Peddler/Karon advised Mitchell that, in addition to the trade-in value of the Bravo jet, Peddler/Karon would also pay the Elliott Defendants a transaction fee of $100,000, plus whatever profit they made on the Citation Bravo for lease or re-sale. (App.6-7)

Mitchell accepted the offer on behalf of the Elliott defendants, and expressed this acceptance to Peddler/Karon. (App.7, para 11)

By late April of 2014, both Peddler/Karon and Mitchell had researched the jet market and found a used 2000 Citation X which appeared to fit Peddler/Karon's specifications. As of early May of 2014, the 2000 Citation X was being sold by Cessna Aircraft Company's jet brokerage/sales division (hereinafter "Cessna"). (App.7, para 12)

Peddler/Karon contacted Mitchell and informed him that, as they had agreed, he would contact Cessna to discuss the condition and details of the Citation X, and negotiate the acquisition price. Mitchell then offered to modify their previous agreement by negotiating the acquisition price of the Citation X *himself* on behalf of Peddler/Karon. Mitchell then told Karon that based upon his history and experience in the jet turbine market, particularly his previous employment at Cessna, *he* should let Mitchell negotiate for Peddler/Karon as he (Mitchell) would be able to negotiate a lower acquisition

price than Peddler/Karon. Based upon Mitchell's representations, Karon accepted this modification. (App.7 para 12 through App. 8, para 14)

Peddler/Karon subsequently received a false communication from Mitchell alleging that Cessna wanted "almost $6 million dollars" for the Cessna Aircraft. Karon then disclosed to Mitchell that plaintiffs would not pay more than $5.8 million dollars as the acquisition price for the specific Citation X under consideration. Mitchell told Karon he would return to Cessna and continue negotiations on behalf of Peddler/Karon. (App.8 para 15 & 16)

Thus, acting simultaneously on behalf of Peddler/Karon and the Elliott defendants, Mitchell ultimately negotiated an acquisition price for the Citation X. Mitchell advised Peddler/Karon that the *acquisition price* to transfer the Cessna Aircraft and complete the 1031 exchange previously agreed upon was $5.8 million dollars; however, unbeknownst to Peddler/Karon at that time, Mitchell had actually acquired the Citation X from Cessna for an acquisition price of $5.4 million dollars. (App.8 para 16 & 17)

Pursuant to their oral agreement, plans to complete the 1031 exchange progressed. Believing the Elliott defendants' representations that $5.8 million dollars was the *acquisition price* of the Cessna Aircraft, Peddler/Karon negotiated additional details to consummate the transaction, including subscriptions for avionics, as well as crew training required to operate the

Citation X. These details were eventually compiled in the written Purchase Agreement, which was still based upon the false, $5.8 acquisition price of the Citation X. (App.9 para 18)

Throughout the negotiation and documentation of the details of the transfer, the Elliott defendants continued to represent that their *acquisition price* of the Cessna Aircraft was $5.8 million dollars, rather than $5.4 million dollars. Thus, as the Purchase Agreement was drafted and finalized, the Elliott defendants had actual knowledge that Peddler/Karon accepted the Elliott defendants' misrepresentation. (App.9 para 18)

On or about June 26, 2014, title to the Citation X was transferred from Cessna to Elliott Aviation, and, immediately from Elliott Aviation to Peddler/Karon. (App.9 para 19)

Pursuant to the terms of their oral agreement, Peddler/Karon paid the Elliott defendants the $100,000 brokerage fee. However, due to the Elliott defendants' misrepresentation, Peddler/Karon also paid an additional $400,000 fee hidden in the 'acquisition price,' which had never been agreed upon by Peddler/Karon. (App.9, para 19 through App.10 para 20)

It was not until February of 2015 that Karon learned, from an outside source, that the Elliott defendant's *actual* acquisition price of the Citation X was likely far less than $5.8 million. Karon promptly contacted the Elliott

defendants and requested documentation of the acquisition price; however, the Elliott defendants continued to attempt to avoid disclosure of the true acquisition price of the Cessna Aircraft. (App.10 para 21)

Ultimately, after February of 2015, Peddler/Karon discovered the misrepresentation via a separate and independent source and demanded to be reimbursed the $400,000 overcharge. The Elliott defendants have refused to refund the overpayment caused by their misrepresentation, which resulted in these proceedings. (App.10, para 22)

Plaintiff's petition made claims for breach of an oral contract (App.10), fraudulent misrepresentation and nondisclosure, (App.11) as well as breach of fiduciary duty (App.8).

ARGUMENT

I. DECIDING A QUESTION OF FIRST IMPRESSION, THE DISTRICT COURT ERRED DUE TO ITS INDISCRIMINATE APPLICATION OF THE COURT'S DECISION IN *DACRES V. JOHN DEERE INS. CO. 548 N.W.2d. 576 (IOWA 1996).*

A. Preservation of Error on Appeal.

Plaintiff filed a timely motion to reconsider the Court's initial order granting in part and denying in part the Elliott Defendant's motion to dismiss, dated June 13, 2018. Plaintiff filed a timely notice of appeal (App.304) from

the District Court's final ruling on the motion to reconsider dated July 11, 2018 (App.302).

B. Scope and Standard of Review.

Iowa courts review motions to dismiss for corrections of error at law. *See U.S. Bank v. Barbour, 770 N.W.2d 350, 353 (Iowa 2009)*.

C. Standards Governing Consideration of a Motion to Dismiss.

"A motion to dismiss tests the legal sufficiency of a plaintiff's petition . . .At issue is petitioner's right of access to the district court, not the merits of his allegations." *Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001)*. Thus, the motion to dismiss should be granted "only if the petition shows no right of recovery under any state of facts." [1] *Rieff, 630 N.W.2d at 284*. *See e.g.*, *Cincinnati Ins. Companies v. Kirk, 801 N.W.2d 856, 858 (Iowa Ct. App. 2011).*

When considering a motion to dismiss, the court must make its determination based on the *face* of the petition. *See e.g.*, *Riediger v. Marrland Development Corp., 253 N.W.2d 915, 916 (Iowa 1977*) ("A motion to dismiss must stand or fall on the matter alleged in the petition."); *Hawkeye*

[1] A statute of limitations defense may be raised by a motion to dismiss "when it is obvious from the uncontroverted facts shown on the face of the challenged petition that the claim for relief was barred when the action was commenced." *Davis v. State, 443 N.W.2d 707, 708 (Iowa 1989)*.

Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 604 (Iowa 2012).

The court must "review the petition in its most favorable light," and resolve all ambiguities in favor of the petition. *Rieff, 630 N.W.2d at 284*. Further, the court must accept all well-plead allegations in the petition as true. *See Rieff, 630 N.W.2d at 284*. However, "facts not alleged cannot be relied on to aid a motion to dismiss nor may evidence be taken to support it." *Rieff, 630 N.W.2d at 284.*

D. Argument

a. The District Court ignored contradictory and controlling Iowa law when it decided to enforce paragraph 9 of Exhibit AA attached to defendant's motion to dismiss.

In ruling on the defendant's motion to dismiss, the District Court ignored crucial Iowa contract law, tort law and choice of law decisions which should have prevented the Court's wholesale, illogical and overzealous application of the so-called "Prima Paint" rule from the *Dacres, id* opinion) to paragraph 9 of defendants Exhibit AA as controlling the rights of the plaintiffs. (App.287-293)

Paragraph 9 of Exhibit AA to defendant's motion to dismiss contained two key provisions; 1) a choice of law provision which provided that Kansas law controlled all disputes between the parties, and 2) a forum clause which

provided that any litigation arising out of Exhibit AA had to filed in a Kansas Court (Federal or State). (App.288)

The District Court and the defendants candidly admitted during oral argument that there was no Iowa Supreme Court decision which held that the choice of law provision and the choice of forum provision could be severed under the circumstances of this litigation and enforced, even if the contract was void ab initio due to fraudulent inducement. (Emphasis mine) (App.317, lines 4-12)

In summary, Plaintiffs assert that the District Court committed error because:

1) The Court ignored fundamental principles of Iowa contract law which demonstrated (on the face of plaintiff's petition) that even without consideration of the tort claims, there was no meeting of the minds as to a material and crucial aspect of the parties.
2) The District Court ignored well-established principles of Iowa tort law. Plaintiffs well pled facts created a genuine issue of material fact that the entire writing (The purchase agreement) had been procured by fraud and hence, was unenforceable in law or equity.
3) The District Court ignored Iowa Choice of Law principles as Iowa was the only state with any significant interest in the litigation.

4) The District Court selectively considered facts outside the record and ignored others which controlled the decision.

b. The District Court ignored basic Iowa contract law.

In order to be bound by a contract, the parties must manifest a mutual assent to the terms of the contract. *First American Bank v. Urbandale Laser Wash, LLC 874 N.W. 2d. 650, 654 (Iowa 2015)*. This assent usually is given through the offer and acceptance and it is the party who makes the offer who is the master of the offer. *Id.* A binding contract requires the acceptance of an offer, and the acceptance must conform strictly to the offer in all its conditions, without deviation or condition whatsoever. Otherwise, there is no mutual assent and therefore no contract. *Id.* (Citations omitted).

Before consideration of the tort claims, the District Court should have at least addressed the issue of whether or not there was a genuine issue of material fact whether Exhibit AA was a binding contract. (App.41-59) Given the fact that Karon alleges he agreed to pay Elliott $100,000 plus any profit on the Bravo, and he ended up paying $500,000 plus the profit on the Bravo, it is clear the parties had no meeting of the minds on fundamental aspects of the contract.

Plaintiff's petition clearly sets out an offer and acceptance. (App. 6-7) Plaintiff Karon offered the Elliott defendants a $100,000 brokerage fee plus

whatever profit they could make on the Bravo Jet to "broker" a 1031 exchange. Karon would find the Citation X aircraft he wanted to buy. Karon would negotiate the price for the Citation X (the acquisition price). Then, Elliott would simultaneously purchase the Citation X from Cessna, and immediately sell it to Karon/Peddler for the acquisition price minus the agreed trade in value of the Bravo Jet. For handling the paperwork and the transaction, Elliott was to receive $100,000 cash for selling a jet it owned for less than half an hour. Defendant Mitchell accepted on behalf of Elliott and later, convinced Karon to let him (Mitchell) become his fiduciary agent for purposes of negotiating the best price for the Citation X. (App. pp. 5-8)

An agreement that is absent essential details and terms is not usually recognized as a binding contract between the parties. *First American Bank, id. 656.*

There is no dispute that the purchase agreement attached to the defendant's motion to dismiss contains no provision concerning what Elliott was to be paid for brokering the exchange of the Bravo and Citation X aircraft. Elliott's compensation is simply not specified anywhere in the four corners of the document simply entitled "Purchase Agreement". (App.41)

The existence of a contract requires a "meeting of the minds" as to the material terms of the contract. *Royal Indemnity Co. v. Factory Mutual Ins.*

Co. 786 N.W. 2d. 839, 846 (Iowa 2010) Clearly, even before one considers any allegations of fraudulent inducement, there was no "meeting of the minds" of the parties concerning what Elliott was entitled to collect as compensation for handling what Karon clearly believed was a pure brokerage deal.

If, for example, the $400,000 excess compensation hidden in the "acquisition price" was purely an innocent mutual mistake, and Karon found out about it before the exchange took place, Karon/Peddler could have reformed or rescinded the contract asserting that there was no "meeting of the minds" on the material terms of the deal he offered and which as accepted by Mitchell. *See Gouge v. McNamara 586 N.W. 2d. 710, 713, (Iowa Ct of Appeals 1998)* (Citations omitted)

This is precisely why Judge Kepros (the Linn County litigation) found that the Purchase agreement was not a fully integrated contract, and hence, did not exclusively govern the rights of the plaintiffs. (App.158-159 at last paragraph)

An agreement is fully integrated when the parties involved adopt a writing or writings as the final and complete expression of the agreement. *Whalen v. Connelly 545 NW 2nd 284 (Iowa 1996).* Whether a written

agreement is integrated is a question of fact to be determined by the totality of the evidence. *Id.*

Defendants offered no factual support in the record from which the Court could have found that Exhibit AA was an integrated, and hence, a binding contract under Iowa law. Instead, counsel merely argued (without any affidavits or depositions) that paragraph 9 was the product of separate and distinct negotiations between the parties, and the Court should support and enforce the provisions based solely on counsel representations as established fact. Apparently, the Court accepted defense counsel's arguments as fact instead of argument.

Neither the defendants nor the Court cited any Iowa authority for the proposition that a writing which was not integrated, and hence not a binding contract, could contain a choice of law provision and a choice of forum provision that were nevertheless binding.

c. The District Court ignored the fact that plaintiffs sought tort damages and breach of an oral contract which preceded Exhibit AA.

A contract procured by fraud is void ab initio and is not enforceable in law or equity in Iowa Courts. *Randolph v. State Farm Mutual Auto. Ins. Co. 250 N.W. 639, 641 (Iowa 1993).* Plaintiff's petition unequivocally sets out facts which, if proven, would demonstrate that Exhibit AA- the purchase

agreement, was procured by fraud, including a breach of fiduciary duty on the part of Mitchell. Again, how can an agreement which is ultimately found unenforceable in law or equity bind the parties as to choice of law or choice of forum? The District Court never addressed this crucial question.

In stark contrast to the Elliot defendants, plaintiffs attached depositions, emails, and documentation to their brief in resistance that supported the allegation that the Elliott defendants perpetrated fraud throughout the formation of Exhibit AA and even after the exchange of the aircraft as they lied about the true acquisition price, they paid for an airplane they owned for less than half an hour. (Emphasis mine)

Fraud gives rise to a tort claim for damages, *Hyler, Id. at 870* and *871-Cititng McGough v. Gabus, 526 NW 2nd 328, 331 (Iowa 1995)*. The elements of a tort claim for misrepresentation are well established. They are 1) Representation, 2) Falsity, 3) Materiality, 4) Scienter, 5) Intent, 6) Justifiable Reliance, 7) Resulting Injury of Damage, *Id.-871*. The Court made no distinction as to the difference between misrepresentation, breach of an oral agreement, fraudulent inducement, and breach of fiduciary duty. (App.287-294)

The existence of a fiduciary relationship necessarily assumes one of the parties had a duty to act for or to give advice for the benefit of the other upon

matters within the scope of the fiduciary relationship. *Shivvers v. Hertz Farm Management Inc. 595 N.W. 2d. 476, 479 (Iowa 1999)* *(See also Kurth v. Van Horn 380 N.W. 2d. 693, 695 (Iowa 1986)* Plaintiffs pled that Mitchell asked Karon to negotiate for him as the purchasing agent for Karon to get the best and lowest acquisition price for the Citation X aircraft, and convinced Karon to trust him (Mitchell) with the top dollar Peddler was willing to pay to acquire the Citation X. (App.5-13) Karon and Peddler's "top dollar" limit of $5.8 million dollars (what Karon disclosed to Mitchell in confidence as his purchase agent) is exactly the number Mitchell and Elliott told Karon and Peddler they paid to acquire the Citation X, instead of the $5.4 million actually paid.

A party induced by fraud to enter into a written agreement may elect their remedy between rescission of the agreement (if they find out in time) and an independent action for damages against the opposing party after they discover they have been defrauded. *Phipps v. Winneshiek County 593 N.W. 2d. 143 (Iowa 1999) at 146*.

Without discussing any of the unique facts and Iowa law which should have precluded granting the defendants motion to dismiss, the District Court simply analogized this entire case to the facts in *Dacres v. John Deere Ins. Co. 548 N.W. 2d. 576 (Iowa 1996)*-adopting the US Supreme Court's ruling

in *Prima Paint Corp v Flood & Conklin Manufacturing co 388 US 395 (1967)* and granted the motion. (App.288-291)

Prima Paint, id. a Federal case, involved the severability and enforceability of an arbitration clause under the Federal Arbitration Act. This litigation involves no arbitration clause, but forum and choice of law provisions. *Prima paint* also involved a Federal Statute concerning alternative dispute resolution or arbitration clauses in certain contracts. No such Federal legislation is involved here.

Citing only one 1997 New York case, the District Court then made the quantum leap from *Dacres* (also an arbitration clause) to find that the Iowa Supreme Court would likely apply the exact same logic and holding to the instant case, and enforce the choice of forum and choice of law provisions in paragraph 9 of Exhibit AA without regard to any other facts or law relevant to the decision. (Emphasis mine)

d. The District Court failed to consider Iowa choice of law principles and important public policy considerations.

Iowa has adopted the choice of law rules articulated by the Restatement (Second) Conflicts of Laws section 145(1) (1971), which provides in pertinent part:

> "Rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which,

with respect to that issue, has the most significant relationship to the occurrence and the parties."

Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

a) The place where the injury occurred.

b) The place where the conduct causing the injury occurred.

c) The domicile, residence, nationality, place of incorporation, and place of business of the parties, and

d) The place where the relationship, if any, between the parties is centered.

Judge v. Clark 725, N.W. 2d. 658, 662 (Iowa Court of Appeals 2006), Citing Veasley v. CRST Intern. Inc 553 N.W. 2d. 896, 897 (Iowa 1996) Restatement (Second) Conflict of Laws, section 145 (2).

Employing the Restatement analysis, Iowa is the only state with any significant interest in this litigation.

There is no dispute that the injury (fraudulently overcharging an Iowa business resident $400,000) occurred in Iowa to an Iowa business/employer based in Cedar Rapids.

None of the parties are based in Kansas. None of the parties negotiated this transaction in or through Kansas. (App.240-251) All of the fraud was

perpetrated by communications from Iowa, and back to Iowa in one form or another. (Phone calls emails etc)

Plaintiff Roy Karon and his company, BVS, as well as Peddler the LLC which owned the Bravo jet and now owns the Citation X aircraft have, at all times material to this litigation, been residents of the state of Iowa. The primary place of business is Cedar Rapids Iowa. (App.5-9)

The Elliott defendants are based in Iowa. (App.41) While Elliott's have facilities (FBOs-fixed base operations) in Des Moines, Moline Illinois, and Minneapolis, Minnesota, there principle place of business is in Iowa. (App. p. 41) Wynn Elliott lives in Des Moines, Iowa (App.179 and App.183) Elliott's is incorporated in Iowa. Roy Karon had been doing business with Elliott's, in Iowa, buying fuel, maintenance and related aircraft needs from Elliott for over thirty years before this transaction materialized. (App.6, paragraph 9)

Iowa has a significant interest in preventing fraud in contracts negotiated and performed in Iowa, and protecting its citizens from fraud by giving them a remedy when it occurs.

The Iowa legislature has expressed the importance of this policy in part, by passing a statute of limitations for fraud which provides the victims of fraud in unwritten agreements with five years from the date of discovery to

bring an action. *See Iowa Code Section 614.1(4), and Hallett Const. Co. v. Meister 713 N.W. 2d. 225, 230 (Iowa 2006).*

In their brief and during oral argument before the District Court, the defendants admitted they filed their motion to dismiss hoping that the Court would apply Kansas law precisely because Kansas provides only two years from the date of discovery to bring an action for fraud in this oral brokerage contract. (App.309-310) (*"That the result is all of the claims should be dismissed."* -App.310, line 5)

e. The District Court misinterpreted the holding of *Dacres id.*

Having failed to appreciate that the Purchase Agreement was probably unenforceable or void, based on Iowa contract and tort law, the District Court forged ahead, and treated the choice of forum and choice of law's provisions enforceable the same as if they were merely arbitration clauses substantially similar to the arbitration clauses in *Dacres* and *Prima Paint.*

The Court focused on the part of *Dacres* which discussed the fact that the plaintiff had alleged generally that the contract had been fraudulently induced. Specifically, the Iowa Supreme Court explained its rationale as follows:

> "We are convinced that the decision of the Supreme Court in *Prima Paint Corp v. Flood & Conklin Manufacturing Co.., 388 U.S. 395, 87 S. Ct. 1801 18 L. Ed. 2d. 1270 (1967)* interpreting the Federal Arbitration Act should be applied to

> claims made under Iowa contract law involving alleged fraud in the inducement. The Court held in that case that, if a claim of fraud in the inducement is aimed at the entire contract and that the contract includes an agreement for arbitration of disputes thereto, the fraud claim is properly to be determined by the arbitrators. Only if the fraud in the inducement claim is specifically directed at the arbitration clause itself is it subject to litigation in a court." *Dacres, id. at 577.*

But the Court explained the holding more fully in the preceding paragraph on page 577.

> "Dacres contention that the arbitration agreement was procured by fraud is based on claims that misrepresentations were made that induced him to enter into the contract in which the arbitration clause was contained. These alleged misrepresentations go to issues involving JDIC's proposed product lines and Dacres role with respect to those lines under the insurance agency agreement. They had no specific application to the arbitration clause as such." *Dacres, id. at 577.*

Thus, the Iowa Supreme Court held that the *Dacres* written agreement was severable and the arbitration clause enforceable in part because the alleged fraud did not involve material terms of the agreement itself, but Mr. Dacres prospective expectations about new product lines and his role in selling them in the future when they materialized. The contract at issue in *Dacres* was not going to be found unenforceable as a whole based on the allegations of fraud in the plaintiff's petition. (Emphasis mine)

The District Court sought support for its ruling by reference to a decision by US Magistrate Walters in *Morris v. McFarland Clinic 2004*

Westlaw 306110 (US Dist Ct. S. District of Iowa). (App.291) In *Morris*, a physician from California entered into an agreement to come to Iowa and work for the defendant. A requirement was that she become licensed to practice medicine in Iowa. When she sold her California practice and could not get licensed in Iowa, she sued the clinic claiming that someone in the clinic claimed he had influence with the licensing Board and would help her get licensed. Magistrate Walters applied the "*Prima Paint*" rule. Once again, the fraud alleged in *Morris* did not go to the material aspects of the entire contract, but only as a response to the clinic's defense that the plaintiff breached the agreement because she had not become licensed to practice medicine in Iowa.

The District Court erred when, on pages 2-5 of the June 13th decision, (App. pp. 288-291) the court equated the facts and fraud allegations in this case to the facts and fraud allegations in *Dacres* and *Morris.* *("Plaintiffs' claims of fraud are about the transaction as a whole." App.291)*

The allegations of the petition, as well as the plaintiff's resistance papers to the motion to dismiss (including the exhibits to the brief) make several things abundantly clear concerning the instant litigation.

1. Plaintiff sued on the breach of an oral contract for Elliott's to broker a 1031 exchange for the Bravo and the Citation X in which he agreed

to trade the Bravo and pay $100,000 in compensation for the brokerage services.

2. Plaintiff sued on an oral agreement in which Elliott Vice President Mitchell solicited Karon to be the purchasing agent for Karon/Peddler to get the best acquisition price from Cessna for the Citation X. Karon then, trusting Elliott's and Mitchell informed Mitchel of the highest price Karon Mitchell would pay.

3. The alleged fraud and breach of fiduciary duty continued into the purchase agreement due to the ongoing misrepresentation that Elliott had to pay $5.8 million instead of the $5.4 million actually paid.

4. The Elliott defendants defense was that they believed the agreement (allegedly reflected in Exhibit AA) was a pure sale/resale situation in which they were free to price the Citation X anyway they wanted.

5. Based on the parties own claims, each signed a completely different type of writing (brokerage agreement or sale resale contract) which fails to address how much compensation Karon would pay, and Elliott's would accept for handling the sale and owning the Citation X for less than an hour while papers were signed.

6. Before consideration of the fraud allegations, Iowa contract law would support a finding that there was no meeting of the minds and the purchase agreement was not enforceable as written.

7. Unlike *Prima Paint id, Dacres, id. and Morris, id.* Karon/Peddler's allegations of fraud, if accepted by the jury, went to the very heart of the entire transaction (compensation for goods and services) and would render the entire written agreement (including paragraph 9) unenforceable at law or equity in Iowa if found to have been procured by ongoing fraud concerning the acquisition price.

8. Plaintiffs argued these points to the District Court, pointing out the differences between the facts and allegations of this litigation versus those the Court cited in finding as it did. Whether the purchase agreement is void due to a failure of the meeting of the minds (as virtually admitted), or because it was procured by fraud, or both, a writing entirely void from the outset is not severable because it is not integrated and has no ability to govern the rights and liabilities of the parties. (App.252-258)

9. Plaintiffs not only pled allegations of fraud which affected the most material aspects of the exchange, (compensation due and payable for services rendered), they demonstrated in exhibits to their brief documents which directly proved the existence of an oral brokerage agreement offered

by Karon (App.240) and the ongoing fraud by Elliott's to misrepresent the acquisition price. (App.138-258-especially pp. 236, note "commission", and compare with 241.)

10. Roy Karon had no knowledge that he was being defrauded to the tune of $400,000 in the purchase price of the Citation X by defendants "burying" a $400,000 mark up in the acquisition price they quoted Karon until after the purchase agreement was negotiated, signed and the aircraft were exchanged. (App.8-10)

f. This Court should reverse the District Court, remand the case for trial, and articulate more specifically, the appropriate criteria for applying the Prima Paint Rule in similar situations.

In *Prima Paint*, the United States Supreme Court held that if allegations of fraud are directed generally at the total contract rather than the specific arbitration clause, then the arbitration clause should be enforced. *See generally Prima Paint Corp. v. Flood & Conklin Mfg. Co., S. 395 (1967)*. The *Prima Paint* rule has since been expanded by some courts to include not only arbitration clauses, but also venue and choice of law provisions. See *Stamm v. Barclays Bank of New York, 960 F.Supp. 724, 729 (S.D.N.Y. 1997)*.[2]

[2] Although the *Prima Paint* rule was adopted by the Iowa Supreme Court in *Dacres v. John Deere Ins. Co.*, the Iowa Supreme Court has never expanded the rule to apply to venue and choice of law provisions. *548 N.W.2d 576 (Iowa 1996).*

However, it is extremely important to note that some courts have created exceptions to the *Prima Paint* rule. In *Hoffman v. Minuteman Press Intern., Inc.*, the court examined a similar case in which there were allegations of fraud in the inducement and a forum selection clause. *See generally 747 F.Supp. 552 (W.D. Mo. 1990)*. The court held that because "[i]t is . . . common sense that allegations of fraud in the inducement put into question the validity of the entire contract . . . [t]he only sensible solution is not to enforce forum selection clauses in legitimate fraudulent inducement cases." *Hoffman, 747 F.Supp. at 558.*

The argument that Iowa courts should apply a modified *Prima Paint* rule similar to the rule applied in *Hoffman* is strengthened by Iowa's long history of holding that fraud in the inducement will void the entire contract. *See Lamasters v. Springer, 99 N.W.2d 300, 304 (Iowa 1959)* ("If plaintiff was induced by fraud and deceit to enter into the contract, he cannot be bound by its terms.").[3]

[3] *See e.g.*, *Beardsley v. Clark, 294 N.W. 887, 890 (Iowa 1940)* ("It is a fundamental proposition that fraud in the procurement of any written instrument vitiates it in the hands of one seeking to benefit thereby."); *Rance v. Gaddis, 284 N.W. 468, 474 (Iowa 1939)* ("The general rule is that fraud in the procurement of any written instrument vitiates it in the hands of one seeking to benefit thereby, and it is a familiar rule that fraud vitiates every transaction in which it enters, and that equity will interpose to prevent that which, if allowed, would work a manifest fraud."); *Randolph v. State Farm*

Ultimately then, this Court should adopt and apply a modified *Prima Paint* rule similar to the rule applied in *Hoffman*: The District Courts should pause before applying the *Prima Paint* rule in order to ascertain if this is a 'legitimate' fraudulent inducement case. If so, the Court should disregard the *Prima Paint* rule and apply Iowa law instead. This modified rule would uphold the reasoning of *Prima Paint,*[4] while also making exceptions for legitimate cases of fraud in the inducement where the validity of the entire contract is in question.

Depending upon this Court's ruling affecting the application of *Prima Paint/Dacres*, the jury may be instructed to answer an interrogatory

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Mut. Auto. Ins. Co., 250 N.W. 639, 641 (Iowa 1933) ("If the contracts are void or unenforceable because of fraud in their procurement, they are not valid in either law or equity."); *Eliason v. Stephens, 246 N.W. 771, 774 (Iowa 1933)* ("[F]raud vitiates every transaction in which it enters."); *Smith v. Waterloo, C.F. & N. Ry. Co., 182 N.W. 890, 896 (Iowa 1921)* ("Written contracts entered into between parties who are dealing at arm's length, where there has been no advantage taken and where the party complaining has reached the age of maturity and has had business experience, are not to be treated lightly or set aside, unless there is such showing of fraud or misrepresentation as calls for the interference of a court of equity."); *Dilenbeck v. Davis, 172 N.W. 184, 189 (Iowa 1919)* ("[One induced to enter a contract by fraud] had the right to rescind the contract or to perform it and recoup his damages for the fraud.").

[4] *See Morris v. McFarland Clinic P.C., No. CIV. 4:03–CV–30439, 2004 WL 306110, at *2 (S.D. Iowa Jan. 29, 2004)* (Holding venue and choice of law provisions "would be practically unenforceable if they could be avoided *simply by an allegation* of fraud in the inducement.") (emphasis added). This result would not occur under the suggested *Prima Paint* modification, because only legitimate cases of fraud in the inducement could avoid the application of the venue and choice of law provisions.

concerning whether or not the writing (The Purchase Agreement-Exhibit AA) was procured by fraud. If the answer is yes, they would then go on to answer standard jury questions concerning the fraud, the breach of fiduciary duty, and damages.

This Court should articulate appropriate criteria and analysis (such as suggested herein) to help guide future District Courts faced with motions predicated on severability and enforceability of contract provisions in the face of allegations of fraud in inducement or similar conduct which might invalidate the agreement.

This Court can and should articulate a methodology to determine if application of the *Prima Paint* rule serves the interests of justice in a specific case, or whether the jury should determine whether the subject contract was "procured by fraud" and hence, void. Suggested criteria which would simultaneously serve the interests of enforcing contract provisions where appropriate, and recognize established Iowa contract and tort law, while protecting Iowa residents who are victims of fraud, might include:

1. Based on the pleadings and facts before the District Court, what type of provision is being advanced under the *Prima Paint* rule and what effect will it have on the parties if severed and enforced?

2. Would severing and enforcing the subject provision result in denying the victim of alleged fraud an opportunity to prove their case?
3. What are the specific allegations of fraud and how do they relate to the disputed agreement? Do they go to material provisions of the contract and if so, how serious are they with respect to whether or not the entire contract may be found void under any applicable law?
4. Is the fraud alleged ongoing during the negotiation and documentation of the writing? In other words, is it continuous or an isolated event?
5. Does the writing directly address the specific subject of the fraud? If not, why not? Would enforcement of the disputed provision of the writing encourage or discourage honesty in contracts?
6. What is the likelihood that, if proven, the allegations of fraud legally support a finding that the entire agreement was void ab initio or at least voidable upon discovery?
7. What competing state law or legal principles are involved which may conflict with enforcement of the provision?
8. If made early in a motion to dismiss, and given the facts and circumstances before the Court, would it be more appropriate to

continue a motion to dismiss pending discovery and provide the proponent and opponent of enforcement of the provision time to conduct discovery and provide the Court with more factual support for their positions?

II. The District Court erred by granting the motion to dismiss because there is a genuine issue of material fact: whether the oral agreement or Purchase Agreement governs this dispute.

A. Preservation of Error on Appeal.

Plaintiff filed a timely motion to reconsider the Court's initial order granting in part and denying in part the Elliott Defendant's motion to dismiss, dated June 13, 2018. Plaintiff filed a timely notice of appeal (App. 304) from the District Court's final ruling on the motion to reconsider dated July 11, 2018 (App.302).

B. Scope and Standard of Review.

Iowa courts review motions to dismiss for corrections of error at law. *See U.S. Bank v. Barbour, 770 N.W.2d 350, 353 (Iowa 2009).*

C. Standards Governing Consideration of a Motion to Dismiss.

"A motion to dismiss tests the legal sufficiency of a plaintiff's petition . . . At issue is petitioner's right of access to the district court, not the merits of his allegations." *Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001).* Thus, the motion to dismiss should be granted "only if the petition shows no right

of recovery under any state of facts."[5] *Rieff, 630 N.W.2d at 284. See e.g., Cincinnati Ins. Companies v. Kirk, 801 N.W.2d 856, 858* (Iowa Ct. App. 2011).

When considering a motion to dismiss, the court must make its determination based on the *face* of the petition. *See e.g.*, *Riediger v. Marrland Development Corp., 253 N.W.2d 915, 916 (Iowa 1977)* ("A motion to dismiss must stand or fall on the matter alleged in the petition."); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 604 (Iowa 2012)*.

The court must "review the petition in its most favorable light," and resolve all ambiguities in favor of the petition. *Rieff, 630 N.W.2d at 284*. Further, the court must accept all well-plead allegations in the petition as true. *See Rieff, 630 N.W.2d at 284*. However, "facts not alleged cannot be relied on to aid a motion to dismiss nor may evidence be taken to support it." *Rieff, 630 N.W.2d at 284*.

D. Argument.

a. Under Iowa law, a motion to dismiss may be treated as a motion for summary judgment when the District Court considers matters outside the petition.

[5] A statute of limitations defense may be raised by a motion to dismiss "when it is obvious from the uncontroverted facts shown on the face of the challenged petition that the claim for relief was barred when the action was commenced." *Davis v. State, 443 N.W.2d 707, 708 (Iowa 1989)*.

The Iowa Supreme Court has held that "form must give way to substance" and that a motion to dismiss may be treated as a motion for summary judgment when the court bases its analysis on matters outside the petition. *Tigges v. City of Ames, 356 N.W.2d 503, 510 (Iowa 1984). See e.g., Mormann v. Iowa Workforce Development, 913 N.W.2d 554, 565 (Iowa 2018)* ("Where additional matters are considered by the district court outside the pleadings, we may treat a motion to dismiss as a motion for summary judgment."). Therefore, since the District Court's determination was based on facts outside the petition, this motion should also be considered under the standards for a summary judgment motion.

b. Standards Governing Consideration of a Motion for Summary Judgment.

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Honomichl, 914 N.W.2d at 230*. A court's review "is accordingly, 'limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law.'" *Linn v. Montgomery, 903 N.W.2d 337, 342 (Iowa 2017)*.

"An issue [of fact] is 'genuine' if the evidence in the record 'is such that a reasonable jury could return a verdict for the non-moving party.'"

Nelson v. Lindaman, 867 N.W.2d 1, 7 (Iowa 2015). "An issue of fact is 'material' only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law." *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Directors, 754 N.W.2d 854, 857 (Iowa 2008)*. Therefore, "[a] genuine issue of material fact exists when reasonable minds can differ as to how [an outcome determinative] factual question should be resolved." *Linn, 903 N.W.2d at 342*. However, it is important to note that "'[i]n ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does.'" *Banwart v. 50th Street Sports, L.L.C., 910 N.W.2d 540, 551 (Iowa 2018).*

The court must "view the [summary judgment] record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Honomichl, 914 N.W.2d at 230*. The 'summary judgment record' is comprised of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *See Kestel v. Kurzak, 803 N.W.2d 870, 874 (Iowa Ct. App. 2011).*

c. The ultimate issue of fact in this case is whether the oral agreement or Purchase Agreement governs this dispute.

In order to grant the Elliott defendants' motion to dismiss on grounds of improper venue, the District Court was required to find that the Purchase

Agreement governed this dispute; if the Purchase Agreement did not govern, its terms requiring disputes be brought in Kansas would be irrelevant. However, the petition clearly alleged that this dispute arose from the *oral* agreement between the parties.[6] (*See* App.5-13, Petition at ¶ 10–16 Describing "The Contract" as the oral agreement between the parties). Therefore, it is necessary to determine if this issue of fact is 'genuine' and 'material.'

d. The determination of whether the oral agreement or Purchase Agreement governs this dispute is a genuine issue of fact because a reasonable jury could find that the oral agreement governs.

As the Purchase Agreement was signed after the oral agreement, it would need to be inapplicable in some way for the oral agreement to govern.[7] There are various reasons an agreement may be inapplicable,[8] but the plaintiffs most clearly allege in their petition that there was no mutual assent,

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[6] "The existence of an oral contract, as well as its terms and whether it was breached, are ordinarily questions for the trier of fact." *Audus v. Sabre Communications Corp., 554 N.W.2d 868, 871 (Iowa 1996).*

[7] *See Commercial Trust and Sav. Bank of Storm Lake v. Toy Nat. Bank of Sioux City*, 373 N.W.2d 521, 523 (Iowa Ct. App. 1985) ("[W]hen an oral agreement precedes a written agreement on the topic, ordinarily it will be found the oral discussion merged into the written agreement," and the written agreement will govern.).

[8] For example, the plaintiffs also argued in their petition that Iowa law should be expanded to allow severe and blatant fraud in the inducement claims to void agreements in their entirety.

or 'meeting of the minds,' when the Purchase Agreement was signed.[9] (*See* App.5-13) (Stating Karon "never" agreed to the additional $400,000 payment concealed in the acquisition fee).

"A contract requires a meeting of the minds." *Peak v. Adams, 799 N.W.2d 535, 544 (Iowa 2011). See e.g., Schaer v. Webster County, 644 N.W.2d 327, 338 (Iowa 2002)* ("For a contract to be valid, the parties must express mutual assent to the terms of the contract."). If there was no mutual assent to the terms of the Purchase Agreement, particularly the acquisition price of the Cessna Aircraft, it would be *void ab initio* and ultimately, would not govern this dispute.[10]

Thus, if a reasonable jury could find there was no 'meeting of the minds,' the issue of fact is genuine.

The petition clearly alleges that Karon "never" agreed to the additional "$400,000 mark up buried in the acquisition fee." (App.5-13). The very definition of mutual assent is that *both* parties agree to the terms of the

[9] *See Anderson v. State, 872 N.W.2d 410, 2015 WL 6508508 (Iowa Ct. App., Oct. 28, 2015)* ("Iowa is a notice-pleading state. . . . A petition need not allege ultimate facts that support each element of the cause of action; however, a petition must contain factual allegations that give the defendant fair notice of the claim asserted so the defendant can adequately respond to the petition.").

[10] *Void ab initio* is an antiquated term defined as 'void' or 'void from the beginning.' *See* "Ab Initio," MERRIAM-WEBSTER DICTIONARY (Oct. 9, 2018) (Stating 'ab initio' means "from the beginning.").

contract; therefore, it would be simple for a reasonable jury to find the Purchase Agreement lacked a 'meeting of the minds.' This conclusion is further strengthened by Karon's inclusion of the terms of the oral agreement in the petition. *See also Royal Indem. Co., 786 N.W.2d at 846* ("Mutual assent is present when it is clear from the objective evidence that there has been a meeting of the minds. To meet this standard, the contract terms must be sufficiently definite for the [finder of fact] to determine the duty of each party and the conditions of performance.") (internal citations omitted).

e. The issue of fact is 'material' because the governing instrument affects the applicable law, and possibly the outcome, of this case.

The issue of fact must also be 'material.' Again, "[a]n issue of fact is 'material' only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law." *Wallace, 754 N.W.2d at 857.*

In this case, the issue of fact is clearly material: the determination of which agreement governs decides the very law that applies to this dispute. The Elliott defendants argue that if the Purchase Agreement governs, Kansas law will apply. The plaintiff argues that if the oral agreement governs, Iowa law will apply. *See Iowa Code Ann. § 614.1(4) (West 2017)* (Stating actions founded on unwritten contracts may be brought within five years.).

Thus, since there is a genuine issue in this case that is obviously material to the outcome of the dispute, it was not proper for the District Court to grant the Elliott defendants' motion to dismiss. *See Walsh v. Wahlert, 913 N.W.2d 517, 521 (Iowa 2018)* ("'A proper grant of summary judgment depends on the legal consequences flowing from the undisputed facts or from the facts viewed most favorably toward the resisting party.'").

III. The District Court erred by granting the motion to dismiss because the Elliott defendants were not entitled to judgment as a matter of law based upon the summary judgment record.

A. Preservation of Error on Appeal.

Plaintiff filed a timely motion to reconsider the Court's initial order granting in part and denying in part the Elliott Defendant's motion to dismiss, dated June 13, 2018. Plaintiff filed a timely notice of appeal (App.304) from the District Court's final ruling on the motion to reconsider dated July 11, 2018 (App.302).

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C. Standards Governing Consideration of a Motion to Dismiss.

"A motion to dismiss tests the legal sufficiency of a plaintiff's petition . . . At issue is petitioner's right of access to the district court, not the merits

of his allegations." *Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001)*. Thus, the motion to dismiss should be granted "only if the petition shows no right of recovery under any state of facts."[11] *Rieff, 630 N.W.2d at 284*. *See e.g.*, *Cincinnati Ins. Companies v. Kirk, 801 N.W.2d 856, 858 (Iowa Ct. App. 2011).*

When considering a motion to dismiss, the court must make its determination based on the *face* of the petition. *See e.g.*, *Riediger v. Marrland Development Corp., 253 N.W.2d 915, 916 (Iowa 1977)* ("A motion to dismiss must stand or fall on the matter alleged in the petition."); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 604 (Iowa 2012).*

The court must "review the petition in its most favorable light," and resolve all ambiguities in favor of the petition. *Rieff, 630 N.W.2d at 284*. Further, the court must accept all well-plead allegations in the petition as true. *See Rieff, 630 N.W.2d at 284*. However, "facts not alleged cannot be relied on to aid a motion to dismiss nor may evidence be taken to support it." *Rieff, 630 N.W.2d at 284.*

[11] A statute of limitations defense may be raised by a motion to dismiss "when it is obvious from the uncontroverted facts shown on the face of the challenged petition that the claim for relief was barred when the action was commenced." *Davis v. State, 443 N.W.2d 707, 708 (Iowa 1989).*

D. Argument.

a. Standards Governing Consideration of a Motion for Summary Judgment.

The standards governing consideration of a motion for summary judgment have been set forth above, and will not be repeated at length. However, it is helpful to reiterate that, in analyzing a motion for summary judgment, the court must "view the [summary judgment] record in the light most favorable to the nonmoving party." *Honomichl, 914 N.W.2d at 230*. The 'summary judgment record' is comprised of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *See Iowa Ct. R. 1.981(3) (West 2018)* ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").[12]

b. The District Court considered allegations outside the summary judgment record by utilizing allegations from the Elliott defendants' motion to dismiss and accompanying brief in its analysis.

[12] *See generally Homan v. Branstad, 887 N.W.2d 153, 166 (Iowa 2016)* ("It is an established rule of statutory construction that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing *implies the exclusion of others not so mentioned*.'") (Emphasis added).

It was the Elliott defendants' motion to dismiss that alleged the Purchase Agreement governed this dispute. However, "[t]he motion [to dismiss] may not sustain itself by its own allegations of fact not appearing in the challenged pleading." *Berger v. General United Group, Inc., 268 N.W.2d 630, 634 (Iowa 1978).*

As previously stated, the District Court relied primarily upon the facts alleged in the Elliott defendants' motion to dismiss in making its ruling; specifically, the allegation that the Purchase Agreement governed this dispute and defense counsel's argument that paragraph 9 had been independently and separately negotiated.

However, the motion to dismiss and accompanying memorandum, as well as counsel's argument during oral argument are not within the summary judgment record. *See Kestel v. Kurzak, 803 N.W.2d 870, 874 (Iowa Ct. App. 2011)* ("Summary judgment is appropriate *only* when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits reveal no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.") (Emphasis added). *See also, Berger, 268 N.W.2d at 634* ("[A] motion to dismiss is not a pleading.").

c. The District Court erred by granting the motion to dismiss because the Elliott defendants were not entitled to judgment as a matter of law based upon the summary judgment record.

The Elliott defendants filed their motion to dismiss promptly after the filing of the petition. Therefore, the only document in the summary judgment record is the petition, which clearly alleged the oral contract governed this dispute. (*See* App.5-13 at paragraphs 10–16).

Since the petition provided no grounds for the District Court to hold the Purchase Agreement governed this dispute, the Court erred by granting the motion to dismiss. *See American Title Ins. Co. v. Stoller Fisheries, Inc., 227 N.W.2d 481, 486 (Iowa 1975)* (Affirming the trial court's ruling that it would not consider filings that were not included in the summary judgment record.).

This case is similar to *Harrison v. Allied Mutual Casualty Company 113 N.W.2d*, in which the Iowa Supreme Court considered whether the grant of a motion to dismiss, "based on matters not within the scope of proper inquiry," should be upheld. *113 N.W.2d 701, 702–03 (Iowa 1962).* The Court ultimately concluded that matters outside the proper scope "must be ignored . . . [and] disregarded." *Harrison, 113 N.W.2d at 702*. In closing, the Court aptly observed that:

> "The trial court, in an obvious and ordinarily commendable effort to reach an ultimate decision, went beyond the boundary of the limited problem involved. While we approve of prompt disposition of ultimate issues, we cannot sanction disregard of proper methods in determining controverted facts."

Harrison, 113 N.W.2d at 702–03. As in *Harrison*, the District Court overstepped its bounds. The review utilized by the Court appears to be some combination of a motion for summary judgment and trial on the merits. However, due to the various procedural errors in this analysis, the District Court's order must be overturned.

CONCLUSIONS AND REQUESTED RELIEF

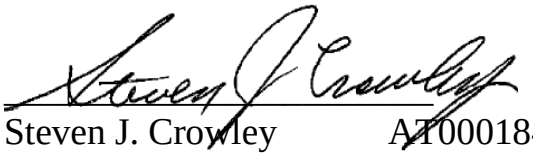
1. Plaintiffs ask this Court to reverse the District Court's dismissal of plaintiff's petition based on improper venue, for the reasons stated, and on the grounds urged in this brief.

2. Plaintiffs ask the Court to remand this case to the District Court for reinstatement on the docket and eventually, trial on the merits of the plaintiffs' claims, with appropriate rulings and instructions to the District Court resolving the legal and factual issues raised herein.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants request to be heard in oral argument.

Respectfully submitted,



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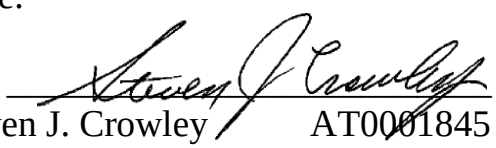
CERTIFICATE OF COST

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was n/a (e-filed), exclusive of sales tax, delivery, and postage.

BY: 
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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 10,137 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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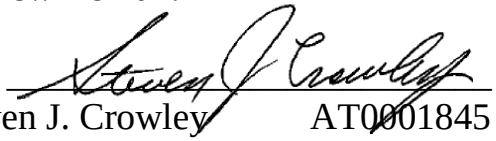
BY: 
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The undersigned certifies a copy of Plaintiff-Appellant's Final Brief was filed with the Clerk of the Iowa Court of Appeals via EDMS and served upon the following persons by EDMS on the 13th day of February 2019:

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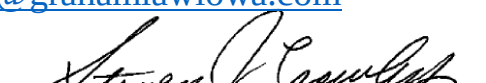
BY: 
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