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

APPELLANTS FINAL REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT ERRED BY APPLYING THE *DACRES/PRIMA PAINT* ANALYSIS BECAUSE IT IGNORED PRELIMINARY ISSUES ALLEGED IN THE PETITION.

The main thrust of Peddler/Karon's argument, which is conveniently ignored by the Elliot Defendants, is the dispute between the parties should be analyzed through the lens of tort law before a *Dacres/Prima Paint* analysis can logically occur. (Appellant's Brief, at 30—41). The Elliot Defendants follow the District Court's ruling lockstep and ignore basic, foundational concerns including contract formation and interpretation issues, which are discussed in Peddler/Karon's Proof Brief in detail. (Appellant's Brief, at 30–41 (discussing these concerns in more detail)).

By assuming the Purchase Agreement, and thus contract law, governed this dispute, the District Court quite simply failed to examine the importance of tort law in this case and chose to view everything through the rigidity of pure contract law. In their roughly twenty-three pages of argument, the Elliot Defendants only address tort law briefly in a hodge-podge compilation of rules and unsupported conclusions of law. (Appellees' Brief, at 37–40).

A. The facts of this case make this dispute a tort issue rather than a contract issue.

The overall purpose of tort law is to articulate societal norms, or expectations, and provide redress when those norms are not met. *See*

Eichenwald v. Rivello, 318 F. Supp. 3d 766, 773 (U.S.D.C. Maryland 2018) ("So far as there is one central idea [in tort law], it would seem that it is . . . that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others. . . The civil tort is a mechanism by which courts aid in the maintenance of a civil society."); *Landstar Inlay Inc. v. Samrow, 325 P.3d 327, 339 (Wash. App. 2014)* ("Tort law serves 'society's interests in freedom from harm.'"); *McCarrell v. Hoffmann–La Roche, Inc., 153 A.3d 207, 220 (N.J. 2017)* ("The essential purpose of substantive tort law is to provide a remedy to a party who has been wronged."); *Blanks v. Fluor Corp., 450 S.W.3d 308, 373 (Mo. App. 2014)* ("The traditional and foremost policy of the tort law is to deter harmful conduct and to ensure that innocent victims of that conduct will have redress."); *Ritchie v. Rupe, 443 S.W.3d 856, 889 (Tex. 2014)* ("The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."). The root and purpose of tort law differs from that of pure contract law.

While tort law governs societal expectations, "[c]ontract claims seek to redress the *private interests* and *individual promises* of the parties." *Ackerman v. State, 913 N.W.2d 610, 617 (Iowa 2018)* (emphasis added). The distinction

[between breach of contract and tort] thus becomes the source of the expectation that was breached. *See* *Travelers Indemnity Co. of Connecticut v. Richard McKenzie & Sons, Inc., 326 F. Supp. 3d 1332, 1345 (U.S.D.C., M.D. Fla. 2018)* ("The distinction between a breach of contract and a tort is the source of the duty breached by the defendant. If a contract imposes a duty and the defendant breached that duty, the plaintiff must sue for breach of contract. If society imposes the duty, the plaintiff must sue in tort."). *See e.g., Ackerman, 913 N.W.2d at 617* ("Where a duty recognized by the law of torts exists between the plaintiff and defendant distinct from a duty imposed by the contract[,] a tort action will lie [even] for conduct [considered] breach of the contract.").

The Elliot Defendants allege that, because Peddler/Karon signed a contract, they have the freedom to act in whatever nefarious way benefits them and the *contract always controls*. Peddler/Karon seek to remind the Elliot Defendants that, despite their attempt to avoid castigation for their conduct by use of clever contractual clauses, they cannot separate themselves from societal obligations to refrain from harmful conduct *such as fraud*. There was no promise by the parties to the subject transaction to refrain from defrauding or betraying one another but Peddler/Karon had a societal right and expectation to be free from fraud, betrayal by a trusted advisor (i.e., a

fiduciary), and violations of good faith and fair dealing. These are societal expectations placed on all citizens, not just the parties to this contract. The behavior of the Elliot Defendants clearly makes this a tort issue, and that is proven by the facts of this case.

B. Due to the facts of this case, this dispute should be governed by tort law.

In their brief discussion of the topic, the Elliot Defendants state a variety of rules without clearly defining how the court is meant to proceed. (Appellees' Brief, at 37—40). This confusion can be easily clarified by examining the relevant case law. The preeminent case on this issue is *Terra International, Inc. v. Mississippi Chemical Corporation*. *See generally*, *119 F.3d 688 (8th Cir. 1997)*. (note that the *Terra* test dealt with here was used and thereby adopted in *High Plains Const., Inc. v. Gay, 831 F.Supp.2d 1089 (S.D. Iowa 2011))*.

In their analysis the *Terra* court examined this *exact* issue: whether a forum selection clause applied to tort claims. [1] The court held that "whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties [1] reflected in the wording of particular clauses and [2] the facts of each case." *Id*. at 693. The *Terra* court stated that basic

[1] It appears this is also an issue of first impression for the Iowa Supreme Court.

language interpretation assists with analysis of the first factor and focused primarily on a balancing test for the second factor.

As far as the first factor is concerned, there is nothing in this case to reflect that the parties intended that egregious fraud, predating the execution of the agreement with the venue/forum selection clause (App.41-59, hereinafter referred to as "Exhibit AA"), be litigated in Kansas. However, even if a Court were to somehow find the wording of the venue/forum selection clause contained in Exhibit AA evidenced the parties' intent to cover the claims presented in this litigation,[2] the facts of this case clearly indicate the opposite.

The second factor is where the *Terra* court delved deep into their analysis and adopted a type of balancing test. The balancing test was broken down into three parts: (1) whether the claims 'ultimately depend on the existence of a contractual relationship' between the parties"; (2) "whether resolution of the claims relates to interpretation of the contract", and (3) whether the claim "involv[es] the same operative facts as a parallel claim for breach of contract." *Id*. at 694. The court found that these tests covered the

[2] This is not an admission on the part of Plaintiffs that the language of the venue/forum selection clause in the Purchase Agreement covers these claims; however, that analysis is unnecessary based upon the facts of this case.

generally adopted "circumstances in which a forum selection clause will apply to tort claims." *Id*.

These claims, as previously discussed, arise from violations of societal expectations, and therefore do not "ultimately depend on the existence of a contractual relationship." *Terra*, 119 F.3d. at 694. Prior to the execution of Exhibit AA *the fraudulent acts had been committed already.* Even if you were to remove Exhibit AA from the equation entirely, the foundation and allegations of fraud in this case *do not change* ***at all***.

In regard to the second factor, the resolution of Peddler/Karon's claims do not "relate[] to [an] interpretation of the contract." *Id*. These claims in no way relate to an interpretation of the language used in Exhibit AA. Peddler/Karon is not alleging that the Elliot Defendants did not provide a required inspection or purchased the wrong brand of turbine. The allegations are that the Elliot Defendants used their position as a fiduciary to deceive someone who trusted them about the price of the services they offered and, after the fraud had been committed, executed Exhibit AA, which contained an incidental and tangential forum selection clause. The interpretation of the contract in this light gives further weight to Peddler/Karon's position that this matter should be covered by tort law.

Finally, these claims do not "involv[e] the same operative facts as a

parallel claim for breach of contract." *Id*. These claims involve facts that would be irrelevant to a breach of contract claim *under contract law*. Again, the parties never expressly promised in Exhibit AA or the preceding oral and written agreements to refrain from defrauding or betraying one another.

It is ludicrous to suggest that Peddler would have intended to limit his right of redress for injuries that occurred *prior to his knowledge of the injuries* based on the facts of this case. The tests adopted by the *Terra* court support this conclusion: although the Elliot Defendants may have attempted to cause the venue/forum selection clause in the Purchase Agreement to apply to these claims, *both parties* did not share this intent. (App.41)

C. Significant preliminary issues should have been explored before the District Court engaged in a *Dacres/Prima Paint* analysis, and a modified *Prima Paint* rule is required if these preliminary issues are to be ignored.

By applying contract law—stemming from Exhibit AA—to tortious acts that occurred prior to the formation of Exhibit AA, the District Court had to utilize circular reasoning: it assumed that Exhibit AA was valid and contract law applied to this dispute. However, the District Court's analysis should have begun with the assumption Exhibit AA was flawed.

These preliminary issues also highlight the Elliot Defendants utter confusion with regard to Plaintiff's central argument: Plaintiffs are not implying that a modified *Prima Paint* rule was <u>*always*</u> necessary. *Prima Paint*

is useful *if applied in conjunction with and compliant to* tort law. However, if the Courts are willing to stretch the *Dacres/Prima Paint* rule so far as to apply to cases entirely outside the realm of contract law and into other areas of law, the *Prima Paint* rule must be modified to a narrower, case-by-case analysis to ensure justice and proper application.

D. This case is distinct from the various cases Defendants rely on in their argument, and therefore those cases are not directly applicable.

The Elliot Defendants attempt to support their argument that the venue/forum selection clause should be applied in this case by citing a variety of cases, notably including *Liberty Bank, F.S.B. v. Best Litho, Inc. 737 N.W.2d 312 (Iowa Ct. App. 2007)*. However, these cases are cited in passing and without any serious analysis.

In *Liberty Bank*, the court examined leases containing a forum selection clause. *Liberty Bank, 737 N.W.2d at 317*. The Elliot Defendants failed to point out that, in the execution of the subject leases, *the forum selection clauses were a consideration in their* formation which was shown in their assignment/sale to a third party. It was evident the parties factored the forum selection clause into their negotiations. *Id*. Peddler/Karon and the Elliot Defendants in this case did not factor in the forum selection clause for any reason, it was incidental and tangential to Exhibit AA.

The Elliot Defendants go on to cite other cases that do not involve fraud in the inducement and ignore the significant timing issue that exists in this case. *See* *High Plains Const., Inc. v. Gay, 831 F.Supp. 2d 1089 (S.D. Iowa 2011)* (discussing a claim for tortious interference with a contractual relationship); *Terra, 119 F.3d. at 694* (discussing a tort that occurred *after* the contract was signed).

The Elliot Defendants also attack Plaintiffs' case citations (*see* Appellees' Brief, at 25); however, their own case citations have also been subject to negative treatment by other courts. *See Tuxedo Intern. Inc. v. Rosenberg, 127 Nev. 11, 25 (Nev. 2011)* (discussing *Cheney v. IPD Analytics, LLC, 583 F. Supp. 2d 108 (D.D.C. 2008))*. *See also Cf. Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988)*. The Elliot Defendants' portrayal of their argument as 'obvious and settled contract law' is debunked by a simple search of Westlaw or Google Scholar.

II. UNLIKE THE CASE-SPECIFIC ANALYSIS EMPLOYED BY THE MODIFIED *PRIMA PAINT* TEST, A STRICT *PRIMA PAINT* RULE ELEVATES PERIPHERAL AND TANGENTIAL CLAUSES ABOVE THE BEDROCK OBJECTIVE OF THE CONTRACT, WHICH DOES NOT SUPPORT JUSTICE AND FAIR-DEALING.

The Elliot Defendants allege that Peddler/Karon's "methodology" for a modified *Prima Paint* rule is "utterly unworkable." (Appellees' Brief, at 24). Remaining true to form, the Elliot Defendants' miss the mark as

Peddler/Karon does not allege that a modified *Prima Paint* rule must necessarily be made up of the various factors listed in Plaintiffs' brief.

Peddler/Karon's argument is, in order to uphold justice, courts should make a brief inquiry into the facts of cases involving fraud in the inducement claims to determine if a strict *Prima Paint* analysis is appropriate. In 'legitimate fraudulent inducement cases,' where the fraud goes to the very heart of the contract, it does not promote justice or fair-dealing to allow peripheral and tangential clauses to dictate "how", "where", and "if" the parties can receive remedy. The factors listed in Peddler/Karon's brief are simply examples of some factors for Courts to consider what constitutes 'legitimate fraudulent inducement cases.'

A. 'Legitimate fraudulent inducement cases' are those cases in which the fraud goes to the bedrock objective of the contract.

'Legitimate fraudulent inducement cases' are cases in which fraud goes to the bedrock objective, or primary purpose, of the contract. In order to conceptualize the "heart" or "bedrock objective" of the contract we can take a "fond" journey back to law school and Contracts 101 and examine Restatement (Second) of Contracts Section 1, which states **"**A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Iowa law states that "[u]sually an agreement or contract is arrived at by means of a

proposal or offer, express or implied, from one side, expressly or impliedly accepted on the other, providing that it is the party's intention to assume legal liability. In *Re McKeon's Estate, 289 N.W. 915, 918 (1940); 1 Page Contracts (1st Ed.) § 22 et. Seq.; 13 C.J. 263 et eq.; 6 R.C.L. 585 et. Eq.*

At its heart, the oral and subsequent written contracts between the parties arose out of Peddler/Karon's desire to enlist the Elliot Defendants' help in buying a larger, faster airplane. To achieve that primary purpose (i.e., bedrock objective) Peddler/Karon promised to trade the Citation Bravo in and pay a commission fee of $100,000. None of the incidental or secondary promises or services would have been necessary or negotiated without the bedrock objective of the contract, i.e. "I'll give you $100,000 to help me buy this model of plane". Despite this the parties are now focused on and arguing about the applicability of a peripheral and tangential clause to Exhibit AA rather than the fact that the Elliot Defendants defrauded Peddler/Karon out of $400,000 ($500,000 with their commission) and are now openly trying to escape liability by fleeing to a jurisdiction where the statute of limitations has run.

B. Iowa courts already perform a similar analysis to the modified *Prima Paint* test in other contexts.

Although the Elliot Defendants' attempt to portray Peddler/Karon's modified *Prima Paint* rule as "nebulous" or "unworkable," a similar analysis

is already used in other areas, such as contract interpretation. In those cases, the court seeks to uphold the intent of the parties by analyzing a variety of factors, including "the principal purpose of the parties." *Nevada Care, Inc. v. Department of Human Services*, 783 N.W.2d 459, 466 (Iowa 2010).

Why is it that courts go through such an exhaustive analysis when they could simply apply a strictly textual interpretation? Peddler/Karon argues this analysis is performed because courts have correctly determined that it is necessary to ensure justice. Contracts are formed in a variety of manners, under a variety of situations, and using a variety of terms. This wide range of situations makes it difficult to apply a strict rule that cannot be modified on a case-by-case basis. Although it may require more work or a deeper analysis, it ultimately provides the most just result for each individual case.

The Elliot Defendants also argue that a modified *Prima Paint* rule is unworkable because courts would have to "engage in a full fact-finding analysis (including, in all likelihood, a trial) to determine if a contract was procured by fraud." (Appellees' Brief, at 20). Not only is this assumption inaccurate, it also discredits the analytical ability of Iowa courts.

Iowa courts routinely engage in preliminary analyses of cases in motions for summary judgment. In those cases, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for

the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)*; *Bitner v. Ottumwa Community School Dist., 549 N.W.2d 295, 300 (Iowa 1996)*. Considering the depositions and facts of this case, Peddler/Karon has no doubt that if these were presented to an Iowa Court (even viewed through the light most favorable to the Defendants) the Court would find that there was 'legitimate (and egregious) fraud in the inducement' in Exhibit AA.

III. UPHOLDING THE DISTRICT COURT'S APPLICATION OF THE *DACRES/PRIMA PAINT* RULE IN THIS CASE IS A FLAGRANT DENIAL OF JUSTICE.

The District Court completely ignores the practical effect of a strict application of the *Dacres/Prima Paint* rule in this case: Peddler/Karon is deprived of any remedy for hundreds of thousands of dollars they were defrauded of in Iowa, by an Iowa corporation.

As the Elliot Defendants previously argued, "[u]nder Kansas law, [all of Plaintiffs'] claims must be dismissed" because the Kansas statute of limitations has already run on these claims. (App.36-App.37.). Therefore, while the Elliot Defendants argue that the Courts should uphold Exhibit AA and that Kansas law governs this dispute, their duplicitous objective is to ask this Court deprive Plaintiff of *any* remedy for the harm he suffered. Iowa courts have held that a forum selection clause "is not unreasonable simply

because it would cause inconvenience to a party, ***unless the inconvenience would effectively deprive the party of its fair day in court***." (emphasis mine) *High Plains Const., Inc. v.* Gay, 831 F.Supp.2d 1089, 1101 (S.D. Iowa 2011);*Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 790 (8th Circ.2006).* Furthermore, a forum selection clause may be set aside if it is "unjust, unreasonable, or invalid due to fraud or overreaching". *High Plains Const., Inc., 831 F.Supp.2d at 1101; M.B. Rests, Inc. v. CKE Rests, Inc., 183 F.2d 750, 752 (8th Circ.1999)* (citing *M/S Bremen, 407 U.S. at 15, 92 S.Ct. 1907).* The principle that a forum selection clause may be set aside if it deprives a citizen of their day describes the case at hand *verbatim*. This goes beyond inconvenience and concerns justice itself.

High Plains notes (and adopts) that, in dealing with a mandatory forum selection clause and whether justice is served, that the Eight Circuit Court of Appeals has set forth seven factors to consider: "(1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law. *Id.* at 1103.

It is not necessary here to focus on each factor one by one but Peddler/Karon does draw the Court's attention to (2), (5), and (7). In regard

to factor (2) Peddler/Karon has chosen Iowa (and rightly so) as the appropriate forum. Skipping factor (5) and moving to factor (7) the advantage of having a local court here is monumental due to the myriad of connection factors with Iowa.

In dealing with factor (5), as stated above, to choose Kansas as a venue would be an enormous obstacle to a fair trial as it would remove the possibility of trial entirely and, ultimately, "[Iowa] law's emphasis . . . is on liability, rather than immunity, for wrongdoing." *Haynes v. Presbyterian Hosp. Ass'n, 45 N.W.2d 151, 154 (Iowa 1950)*. The Elliot Defendants motivation here is solely to avoid liability for their wrongdoing by arguing the venue/forum selection clause contained in Exhibit AA should be the forum where this dispute is 'heard.' (*See* the Elliot Defendants' Memorandum of Authorities in Support of Motion to Dismiss, App.31-37). Effectively, the Elliot Defendants are asking this court to deprive Plaintiffs of a remedy based upon an interpretation of case-law that has never previously been accepted by an Iowa court. Simply put, this argument is totally contrary to justice, logic, and the goal of Iowa law.

A. The District Court's holding deprives an Iowa citizen of a remedy for fraud committed in Iowa by an Iowa corporation.

As Peddler/Karon highlights in Appellant's Proof Brief, Iowa has significant interests in this dispute. (Appellant's Brief, at 34–37). By

accepting the District Court's radical interpretation and application of the *Dacres/Prima Paint* rule, the court would effectively deny justice to an Iowa citizen who suffered fraud at the hands of an Iowa corporation that almost entirely occurred in the state of Iowa.[3]

Peddler/Karon did not have a choice in being defrauded. Taking away his choice to recover for this harm only continues to perpetrate injustice, and should not be allowed by a court so significantly related to this dispute.

B. The District Court's holding is contrary to logic, because Peddler would not have entered into the Purchase Agreement if he had knowledge of the fraud committed by Defendants.

The Elliot Defendants claim that "[a] party could 'plead [its] way out of a venue/forum-selection clause to which [it] agreed by merely asserting, without offering any evidence, fraud in the inducement." (Appellees' Brief, at 20). Once again, that is an inaccurate representation of Peddler/Karon's proposed application of a modified *Prima Paint* rule.

Peddler/Karon's position is a more detailed analysis of a modified *Prima Paint* rule should apply only to those cases that clearly evidence fraud in the inducement going to the bedrock of the transaction. It is those cases, when the fraud could "put into question the validity of the entire contract" a

[3] The only connection this dispute has to the state of Kansas is the venue/forum selection clause in controversy and the selection of Kansas as the place of delivery of the aircraft and location of pre-purchase inspection.

deeper analysis is necessary. *Hoffman v. Minuteman Press Intern., Inc., 747 F. Supp. 552, 558 (W.D. Mo. 1990).*

This dispute is a prime example of a bedrock-fraud case: the fraudulent acts are clearly defined and supported, the fraud goes to the primary purpose of the contract (i.e., purchase of an aircraft), and a reasonable person could interpret the fraud to have played a part in inducing the parties to enter into the contract. Peddler clearly states that, if he had known of the fraud, he would not have entered into any agreement with the Elliot Defendants because "[he] would have been able to negotiate a [better] deal with Cessna [him]self." (App.116, p. 206, Ln.3-4).

Again, *this is a case where no contract would have been formed if the fraud had not occurred*. This is a monumental factor, which makes this case dramatically different from *Dacres*, *Prima Paint*, and the other cases cited by the Elliot Defendants in their attempt to avoid liability. Allowing an interpretation of those cases that ignores this critical factor creates terrible precedent in Iowa for all business transactions: In practical terms, it protects fraud–so long as it is well hidden–to be freely perpetrated if the perpetrator can ultimately trick a party into signing an agreement, at any point in a relationship, and that a contract need only be *loosely* related to the fraud. The Elliot Defendants seek to protect the proliferation of fraud loosely related to

any type of contract so long as you can sign a contract with the terms "[a]ny dispute . . . related in any way to [the] [a]greement." (App. 49, p. 9, ¶ 9). To argue or establish such a precedent is, to put it mildly, frightening for Iowa citizens.

IV. *DACRES* AND *PRIMA PAINT* DO NOT APPLY TO VENUE/FORUM-SELECTION CLAUSES IN IOWA.

The District Court's decision and the Elliot Defendants' argument stands on the shaky assumption that this is a pure contract case and removes tort law from their analysis entirely. Even if this were correct, the District Court and the Elliot Defendants' support for the venue/forum selection clause relies entirely upon Iowa courts treatment of arbitration and venue/forum selection clauses as identical. (*See* Appellees' Brief, at 17).

A. Venue/forum selection clauses do not receive equal treatment under federal law.

Venue/forum selection clauses were not intended to, and should not, receive the same treatment as arbitration clauses. The Elliot Defendants state that *Dacres* "in effect already impliedly endorsed use of the rule for venue/forum selection provisions." (Appellees' Brief, at 20). To support this the Elliot Defendants miscite and misquote various cases as there is no precedent that proves this.

Arbitration clauses, while containing a few similarities to venue/forum

selection clauses, hold a unique place under Federal Law. Section 2 of the FAA "declare[s] a national policy favoring arbitration" wherein parties to an arbitration clause agree to settle disputes by arbitration. *Preston v. Ferrer, 552 U.S. 346, 353, 128 S.Ct. 978, 983; Southland Corp. 465 U.S. at 10, 104 S.Ct. 852*. The Court's analysis highlights that arbitration clauses have a national policy favoring them and are being pushed all over the United States. The mere presence of an arbitration clause summons the weight of the federal government in a way the venue/forum selection clauses do not.

Despite what the Elliot Defendants argue, venue/forum-selection clauses lack the ubiquitous enforcement arbitration clauses have received. The United States Supreme Court has carved out exceptions to venue/forum-selection clauses that arbitration clauses lack. *See generally Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. Of Tex., 571 U.S. 49, 63 (2013)*; *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988)*; *Williams v. Aire Serv, LLC, 2018 WL 4955198 (D. Maine October 12, 2018)*.

The United States Supreme Court has stated "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S.Ct. 1907, 1916 (1972)*; *Boyd v. Grand Trunk W.R.*

Co., 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55(1949). These cases and tests by various courts all support the notion that venue/forum-selection clauses are their own category and are inextricably linked to (1) public interest and to (2) the location of the parties themselves. The Elliot Defendants' transitive argument that arbitration clauses and venue/forum selection clauses are the same under any law is misleading and inaccurate.

B. Refusing to apply the *Prima Paint* Rule to venue/forum selection clauses does not create problems.

When the Elliot Defendants argue that refusing to apply the *Prima Paint* rule to venue/forum-selection clauses would create significant issues they are jumping to conclusions. The Elliot Defendants cite *Morris v. McFarland Clinic, P.C. 2004 WL 306110 (S.D. Iowa 2004)* and *Republic Credit Corp I v. Rance, 172 F. Supp. 1179, 1183 (S.D. Iowa 2001)* as support for their decision but these cases are vastly different.

Morris v. McFarland Clinic P.C. involves fraud where Dr. Morris, a California resident, agreed to sell her California Clinic and work for MacFarland Clinic, an Iowa corporation. As part of the move Dr. Morris would have to acquire her Iowa license to work in the clinic and McFarland Clinic's medical director, apart from the contract, represented he could help Dr. Morris acquire said license. As it turned out, Dr. Morris, with the assistance of the medical director, who did not have the pull required, was

unable to acquire her license. The Elliot Defendants have unwittingly provided the Court with a perfect example of how a 'legitimate' fraud in the inducement case is distinguishable from other fraud in the inducement cases. In *Morris* the fraud was in respect to a tangential and peripheral representation regarding the contract at issue, not at the bedrock of the contract itself. Combine this with the fact that McFarland Clinic was an Iowa corporation and it becomes apparent that venue in this matter was linked to public policy and the location of the parties.

Republic Credit Corp I v. Rance, 172 F. Supp. 1179, 1183 (S.D. Iowa 2001) similarly deals with a California Citizen, Mr. Rance, and Republic Credit Corp I (RCCI), an Iowa lender that executed three promissory notes in favor of RCCI. This case was a personal jurisdiction battle and involved an Iowa citizen and non-Iowa citizen agreeing to litigate a case in Iowa. The Southern District of Iowa, by ruling in favor of the venue/forum-selection clause, was protecting an Iowa citizen and performed an analysis *specifically* based upon one of the parties being in Iowa. There were important public policy analyses performed in this case and one of the parties was located in the venue in the contract at issue, separate from the matter at hand. The *Republic* court did note their fear was of a party "[vitiating] a forum-selection clause by simply pleading fraud in the inducement, forcing the other party to

litigate in another forum contrary to the agreement, and never offering further evidence of the alleged fraud." *Id.* at 1183. That is what a modified *Prima Paint* rule seeks to solve, i.e. to allow the courts to perform a preliminary analysis so 'legitimate fraud in the inducement cases' are separated from ones without evidence.

The Elliot Defendants first point in their criticism of the modified *Prima Paint* rule involves a misleading quote from *Dacres*. The Elliot Defendants' quote is "[i]n *Dacres*, this Court explicitly stated that 'the decision of the Supreme Court in *Prima Paint* … should be applied *to claims made under Iowa contract law involving alleged fraud in the inducement*.' *Dacres, 548 N.W.2d at 578* (emphasis added)." The full quote is "the decision of the Supreme Court in [*Prima Paint*], ***interpreting the Federal Arbitration Act*** should be applied to claims made under Iowa contract law." (emphasis added) *Dacres, 548 N.W.2d at 578*. To so obviously leave out this *central* part of the quote reveals the Elliot Defendants' argument to be nothing more than a house-of-cards.

However, the Elliot Defendants' most outrageous argument, which undoubtedly "takes the cake", is that their unbridled extension of the *Dacres* ruling would actually *protect* Iowa residents. Therefore, the argument forwarded by the Elliot Defendants in this case, which is presumably made

with a straight face, is that the application of the *Dacres/Prima Paint* rule in the present situation protects Iowa residents. The application in this case would force Iowa citizen who: (1) negotiated and executed a contract that was drafted in Iowa; (2) executed said Iowa contract with another Iowa corporation/citizen; (3) was defrauded by the other Iowa corporation/citizen in Iowa; and (4) was told to bring their action in Kansas where the statute of limitations has already run and thereby functionally eliminates said Iowa citizen's redress for fraud…and the Elliot Defendants actually state the defrauded Iowa citizen is *protected* by this rule. Not only does it eliminate Peddler/Karon's right for redress but it rewards a dishonest Iowa corporation and dishonest individuals, reinforcing the idea that, so long as the Iowa corporation or citizen is clever in their contracting, they can act in whatever deceitful fashion they desire.

V. THE DISTRICT COURT SHOULD NOT HAVE RELIED ON THE PURCHASE AGREEMENT IN RENDERING ITS RULING ON DEFENDANTS' MOTION TO DISMISS.

The Court made an error in considering Exhibit AA (App.41) in the motion to dismiss (App.60). The Elliot Defendants contend Exhibit AA is properly incorporated into the Petition (App.5) but cite no controlling authority on point as to how it should be incorporated. The focus of the Petition was an oral promise, not Exhibit AA. (App.41)

The first allegedly applicable authority cited by the Elliot Defendants is *Troester v. Sisters of Mercy Health Corp., 328 N.W.2d 308 (Iowa 1982)*. On the second page of this case the court states "The thrust of the motion to dismiss is directed at the pleadings and, consequently, facts not contained in the pleadings will not be considered." *Troester, 328 N.W.2d at 310; Berger v General United Group, Inc., 268 N.W.2d 630, 634 (Iowa 1978)*. *Troester* noted that it was inappropriate for the district court to consider or to take judicial notice of the records of the same court in a different proceeding, without an agreement of the parties. *328 N.W.2d at 311*; *McCarthy v. McCarthy, 162 N.W.2d 444, 447 (Iowa 1968)*; *Bales v. Iowa State highway Commission, 249 Iowa 57, 63, 86 N.W.2d 244, 248 (1957)*. The reasoning the court gave is the parties did not have an opportunity to present their respective positions through an evidentiary hearing on matters that the court had taken judicial notice of. In following this reasoning, the Court should not have considered Exhibit AA without giving Peddler/Karon the opportunity to (1) agree or contest the admission of Exhibit AA or (2) acquire Peddler/Karon's actual position on the validity of Exhibit AA or the clauses contained within.

The Elliot Defendants further cite *George v. D.W. Zinser Co., 762 N.W.2d 865, 867-889 (Iowa 2009)* in saying "[a]s the motion to dismiss in this case relied on matters outside the pleadings and **both parties and the court**

treated it as a motion for summary judgment, we will do so as well." (Appellees Brief at 37, emphasis mine). This quote alone defeats this cite. In this case Peddler/Karon did not wish to treat it as a motion for summary judgment but rather it was forced upon them without agreement or inquiry as to their position.

The Elliot Defendants cite *Stotts v. Eveleth* as treating a motion to dismiss as a motion for summary judgment to conserve judicial resources. *668 N.W.2d 803, 812 (Iowa 2004)*. However, *Stotts* also states that "[b]efore the district court can sustain a motion to dismiss, it must conclude that no state of facts is conceivable under which the plaintiff might show a right of recovery." 668 N.W.2d at 811. *Stotts* dealt with a case wherein a student sued her teacher and multiple other defendants, but all causes of action were based on upon the existence of a fiduciary relationship between the student and teacher. The Court found there was not relationship and, accordingly, allowed multiple motions to dismiss as a motion for summary judgment. The only reason the court permitted this (and quoted the conservation of "judicial resources") is because the factual circumstances supporting the subsequent (and conditional) lawsuits had been removed. Comparing *Stotts* to the case at hand is like comparing apples to airplanes.

CONCLUSIONS AND REQUESTED RELIEF

1. The District Court erred by granting the Elliott defendants' motion to dismiss. The Court should have considered the uncontroverted facts alleged on the face of the petition and denied the motion to dismiss. This Court should reverse the decision of the District Court and remand this case for trial.

2. The District Court erred by granting the Elliott defendants' motion to dismiss. The Court should have found there was a genuine issue of material fact and denied the motion to dismiss. This Court should reverse the decision of the District Court and remand this case for trial.

3. The District Court erred by granting the Elliott defendants' motion to dismiss. The Court should have found the Elliott defendants were not entitled to judgment as matter of law based upon the information contained in the summary judgment record.

4. The District Court erred by granting the Elliott defendants' motion to dismiss. The Court should have applied a modified *Prima Paint* rule and entertained further argument on the allegations of fraud in the inducement.

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.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6006 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of Plaintiff-Appellant's FINAL Reply 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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