IN THE SUPREME COURT OF IOWA

No. 18-1199

(Polk County No. LACL140490)

ROY KARON and PEDDLER LLC
Plaintiffs-Appellants,

vs.

ELLIOTT AVIATION, JAMES MITCHELL, WYNN ELLIOTT, ELLIOTT AVIATION AIRCRAFT SALES, INC., and ELLIOTT JETS
Defendants-Appellees

Appeal from the Iowa District Court in and for Polk County
The Honorable David May

DEFENDANTS-APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101 (3) (a) and (b) because it does not present a fundamental and urgent issue of broad public importance requiring prompt determination by the Iowa Supreme Court.

STATEMENT OF THE CASE

This case arises out of a transaction which took place in 2014 between Plaintiff-Appellant Peddler, LLC ("Peddler") and Defendant-Appellee Elliott Aviation Aircraft Sales, Inc. ("Elliott"). The transaction involved, among other things, the purchase by Peddler of a used, 2000 Citation X jet aircraft (the "Aircraft") from Elliott, the trade-in of a Bravo aircraft by Peddler to Elliott, the lease-back of the Bravo by Peddler from Elliott, and the provision of other services and upgrades by Elliott to Peddler. The transaction was fully documented in a nineteen (19) page written Purchase Agreement signed by Peddler on May 30, 2014. In Paragraph 9 of that Purchase Agreement the parties explicitly agreed that any dispute related in any way to (1) the purchase of the Aircraft; (2) the legal relationship between the parties; or (3) the transaction that was the subject of the agreement, would be governed and construed "under the laws of the State of Kansas, USA, exclusive of conflicts of laws," and would be adjudicated "solely and exclusively" in either federal or state court in Kansas.

Peddler and Plaintiff-Appellant Roy Karon ("Karon") filed their Petition in Polk County on February 13, 2018, claiming that Elliott, along with Defendants-Appellees James Mitchell ("Mitchell"), Wynn Elliott ("Wynn Elliott"), and Elliott Aviation, Inc. ("EAI") (collectively, the "Defendants"), induced them to sign the Purchase Agreement "based upon a fraudulent and false acquisition price." (Petition, ¶23 (b); Appx. 10). On April 13, 2018 Defendants filed a motion to dismiss before the Honorable David May, requesting that the case be dismissed on grounds that (a) under Kansas' statute of limitations, all of the claims in the action are time barred as a matter of law and must therefore be dismissed with prejudice; and (b) even if the claims are not dismissed on statute of limitations grounds, the case must nevertheless be dismissed since it has been filed in the wrong jurisdiction. Plaintiffs responded by arguing that, since their Petition claimed the Purchase Agreement was "procured by fraud," the venue and choice-of-law provisions in Paragraph 9 were unenforceable.

On June 13, 2018, the District Court issued its Order (the "June 13 Order"; Appx. 287-294) granting the Defendants' motion and dismissing the case without prejudice pursuant to the mandatory venue provision in Paragraph 9. The District Court based its decision on this Court's holding in *Dacres v. John Deere Ins. Co*., 548 N.W.2d 567 (Iowa 1996), and the United States Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395 (1967),

both of which held that mandatory arbitration clauses in contracts are enforceable, even if the plaintiff claimed the contracts containing the arbitration clauses were induced by fraud, unless the fraud claim was "directed at the arbitration clause itself." In its June 13 Order, the District Court reasoned that, although *Dacres* and *Prima Paint* concerned arbitration clauses, the rule announced in those cases should apply with equal force to venue and choice-of-law provisions, and since the Plaintiffs' fraudulent inducement claim here related to the transaction *as a whole*, the exclusive venue/forum selection provision in the Purchase Agreement was valid and enforceable, and required that this case be venued exclusively in Kansas federal or state court.

The June 13 Order is consistent with long-standing Iowa case law regarding fraudulent inducement cases, and is based on sound reasoning. It also correctly follows in the well-established path of numerous other authorities which have applied the rule adopted in *Dacres* and *Prima Paint* to venue/forum selection and choice-of-law provisions. As such, this Court should affirm the District Court's dismissal of the Petition without prejudice.

STATEMENT OF FACTS

A. THE PARTIES.

Elliott and EAI are specialized businesses that provide aircraft sales and aviation services. (Petition at ¶ 8; Appx. 6). According to the Petition, Mitchell is

a Vice President with Elliott, in charge of turbine aircraft sales. (*Id.* at ¶ 7; Appx. 6). Wynn Elliott is alleged to be the "owne[r] and operat[or]" of EAI and Elliott.[1] (*Id.* at ¶ 6).

Peddler is a limited liability company that operates as an aircraft leasing company. (*Id.* at ¶ 1; Appx. 5). Karon is the sole member and owner of Peddler, as well as another company called BVS Solutions ("BVS"), and has over thirty (30) years' experience in the aircraft industry. (*Id. at* ¶¶ 1, 2, and 9; Appx. 5-6). Prior to the transaction involved in this case, Karon, either individually or through his companies, owned a number of aircraft, including a 1999 Cessna Citation Bravo (the "Bravo"). (*Id.* at ¶¶ 3-4; Appx. 5). The Bravo was used for the business of BVS to provide transportation to the business. (*Id.* at ¶ 4; Appx. 5).

B. THE TRANSACTION.

As noted above, the transaction which gives rise to this lawsuit occurred in 2014, and involved a number of interrelated components. Specifically, in addition to the purchase and sale of the Aircraft, the transaction also involved (a) the trade-in of the Bravo by Peddler to Elliott; (b) the lease-back of the Bravo by Peddler

[1] Although named as a defendant in the Petition, EAI is not specifically identified in the Petition, nor is its relation to the events outlined. In fact, the only specific reference to EAI at all is in Paragraphs 6 and 8 wherein Plaintiffs describe EAI as a company that is "owned and operated" by Wynn Elliott, and a company that is in the business of "buying, selling, brokering and otherwise exchanging aircraft." (*Id.* at ¶¶ 6, 8; Appx. 6).

from Elliott; and (c) the provision of other services and upgrades by Elliott to Peddler, including pilot training, avionics subscriptions for the operation of the Aircraft, and the installation of expensive "winglets" on the Aircraft. (*Id.* at ¶¶ 10, 18; Appx. 6-7, 9).[2] Prior to the transaction, the Aircraft was actually owned by Cessna Aircraft Company ("Cessna"). (*Id.* at ¶ 17; Appx. 8). To consummate the transaction, Elliott was required to purchase and take title to the Aircraft from Cessna. (*Id*). Elliott then sold the Aircraft to Peddler. (*Id*).

The chief negotiator for Peddler in this transaction was Karon. (*Id.* at ¶¶ 10-15; Appx. 6-8). For Elliott, negotiations were handled by Mitchell. (*Id*). The negotiations began in April 2014 when Karon made an offer to Mitchell and Elliott, and culminated with Peddler and Elliott signing a nineteen (19) page written purchase agreement on May 30, 2014 and June 2, 2014, respectively (the "Purchase Agreement"; Appx. 41-59) (*Id.* at ¶¶ 10, 18, 23; Appx. 6-7, 9-10). A true and accurate copy of the Purchase Agreement is attached to Defendants' Memorandum of Authorities in Support of Motion to Dismiss.[3] (Appx. 24-59).

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[2] The lease-back of the Bravo by Peddler from Elliott is referenced in the Purchase Agreement, discussed below. (See Purchase Agreement, p. 3, ¶ 13; Appx. 43).

[3] The Purchase Agreement is not identified by name in the Petition, but it is clearly incorporated by reference. For example, in Paragraph 18 of the Petition, Plaintiffs allege that the "final transaction" was "documented in written documents." (Petition, ¶ 18; Appx. 9). Similarly, in Paragraph 23 of the Petition,

C. THE PURCHASE AGREEMENT.

In its final form the Purchase Agreement contained a number of provisions relevant to this appeal. First, the Purchase Agreement contained an explicit and broadly worded choice-of-law provision, which reads as follows:

> Seller and Purchaser agree this Agreement will be deemed made and entered into and will be performed wholly within the State of Kansas, and *any dispute arising under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement will be governed and construed under the laws of the State of Kansas, USA, exclusive of conflicts of laws*.

(Purchase Agreement, pp. 8-9, ¶ 9; Appx. 48-49) (emphasis added).

Second, the Purchase Agreement included an exclusive venue/forum-selection provision, reading:

> Any dispute arising under, out of, or related in any way to this Agreement, *the legal relationship between Seller and Purchaser or the transaction that is the subject of this Agreement* will be adjudicated *solely and exclusively in the United States District Court for the State of Kansas*, in Wichita, Kansas, or, if that court lacks jurisdiction, Kansas state courts of the 18th Judicial District.

(Purchase Agreement, p. 8-9, ¶ 9; Appx. 48-49) (emphasis added).

Plaintiffs assert that "Karon/Peddler … sign[ed] *written documents to finalize the sale*…." (Id. ¶ 23 b; Appx. 10) (emphasis added). As such, and for the reasons stated herein, it was appropriate and proper for the District Court to consider the Purchase Agreement in connection with the Motion to Dismiss.

Third, the Purchase Agreement included an agreement of the parties to submit to jurisdiction in Kansas:

> Each of the parties consents to the exclusive, personal jurisdiction of these courts and, by signing this Agreement, waives any objection to venue of the Kansas courts.

(Purchase Agreement, p. 9, ¶ 9; Appx. 49).

Finally, the Purchase Agreement designated Wichita, Kansas as the place of delivery of the Aircraft, and the place for the pre-purchase inspection. (Purchase Agreement, p. 1, p. 2, ¶ 2; Appx. 41-42). Following execution of the Purchase Agreement, Peddler took delivery of and began using the Aircraft in June 2014. (Petition at ¶ 20; Appx. 9-10).

D. THE ALLEGED FRAUD.

Plaintiffs filed their Petition in this action on February 23, 2018. In it, Plaintiffs do not claim that there was anything wrong with the Aircraft or the work done on the Aircraft by Elliott in connection with the transaction. In addition, they do not claim that Elliott or any of the Defendants breached a term or provision of the Purchase Agreement or violated any of their rights in connection with the lease-back of the Bravo. Instead, Plaintiffs claim that during the negotiations leading to the purchase of the Aircraft, Mitchell violated his purported fiduciary duty and falsely represented to Karon that it would cost Elliott $5.8 million to acquire the Aircraft from Cessna. (Petition at ¶ 17; Appx. 8). Plaintiffs claim that

in February 2015, Karon discovered "from an outside source" that it "may not have" cost Elliott $5.8 million to acquire the Aircraft, and as a result, the Defendants breached their contact with Peddler and defrauded the Plaintiffs because they understood Elliott was paying $5.8 million for the Aircraft. (Petition at ¶ 21; Appx. 10).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION WITHOUT PREJUDICE PURSUANT TO THE MANDATORY FORUM/VENUE SELECTION CLAUSE IN THE PURCHASE AGREEMENT.

A. Standard for Review.

Generally, this Court will apply a "correction of errors at law" standard of review for motions to dismiss. *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). A motion to dismiss should be granted "if the allegations in the petition, taken as true, could not entitle the plaintiff to any relief." *Sanchez v. State*, 692 N.W.2d 812, 816 (Iowa 2005) (citation omitted); *see also* Iowa R. Civ. P. 1.421(1)(f). "A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions." *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 8 (Iowa 2006). In ruling on a motion to dismiss, courts "must ordinarily consider documents incorporated into the complaint by reference." *King v. State*, 818 N.W.2d 1, 6, n. 1 (Iowa 2012) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also Hallett Constr. Co. v. Iowa State*

Highway Comm'n, 261 Iowa 290, 295, 154 N.W.2d 71, 74 (1967) (highway specifications that were incorporated in the petition by reference were deemed part of the petition and could be considered in a default proceeding). In addition, on a motion to dismiss for improper venue, the court is "permitted to consider evidence outside of the pleadings." *Catipovic v. Turley*, No. 11-3074, 2012 LEXIS 79824, at *47 (N.D. Iowa June 8, 2012) (*citing Aggarao v. MOL Ship Mgmt., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012); *Faulkenberg v. CB Tax Franchise Sys., L.P.*, 637 F.3d 801, 809-10 (7th Cir. 2011)*; Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242, 1244 n.5 (11th Cir. 2011); *Doe 1 v. AOL, L.L.C.*, 552 F.3d 1077, 1081 (9th Cir. 2009).

B. Argument.

1. The District Court Properly Applied The *Prima Paint* Rule, as Formally Adopted in *Dacres*, and Correctly Found That The Mandatory Venue/Forum Selection Clause in Paragraph 9 of the Purchase Agreement Was Valid and Enforceable.

As noted above in his June 13 Order, Judge May found that the exclusive venue/forum selection and choice-of-law provisions in Paragraph 9 of the Purchase Agreement were valid and enforceable, and required this case to be venued in Kansas federal or state court. (Order, at 4; Appx. 290). In support of this decision the Court relied directly on *Dacres v. John Deere Ins. Co.*, 548 N.W.2d at 567 (Iowa 1996).

Dacres involved a plaintiff who claimed an arbitration provision in his employment agreement was not enforceable, and therefore the arbitration decision obtained by the company should be vacated, as a result of misrepresentations which allegedly induced him to enter into the agreement. *Id*. at 578. In assessing the plaintiff's fraudulent inducement argument, the *Dacres* Court held 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 contract includes an agreement for arbitration of disputes with respect 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*. *Id. at 404, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277*. We approve that rule and apply it in the present case. Because Dacres' allegations of fraud in the inducement go to the entire agreement, they were properly determined by the arbitrators.

Dacres, 548 N.W.2d at 578 (emphasis added).

The centerpiece of the *Prima Paint* decision is the concept of "severability." Under this concept, an arbitration clause is considered "severable" from the contract in which it is embedded if there is no allegation of fraud with respect to that specific provision. *Prima Paint*, 388 U.S. at 402-07. In this way, provisions in contracts dealing with up-front procedural questions on which there is no specific allegation of fraud (such as arbitration clauses), are considered "separable"

or "severed" from the overall contract, while substantive issues (such as whether the contract was procured by fraud), are left to the arbitrator.

The strength of the *Prima Paint* rule is that it allows the court and the parties to enforce those procedural provisions on which there is no dispute, while "leaving issues of meeting of the minds, fraud in the inducement and negligent misrepresentation to the arbitrator." *Local Union 1253, IBEW v. S/L Constr., Inc*., 217 F. Supp. 2d 125, 134 (D. Maine 2002). As one court stated: "The teaching of *Prima Paint* is that a federal court must not remove from the arbitrator[] consideration of a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself." *Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985).

Here, Plaintiffs have not alleged that Paragraph 9 of the Purchase Agreement was in any way the subject of a specific fraudulent misrepresentation. Instead, they claim that "*the entire writing (The purchase agreement*) [was] procured by fraud and hence, was unenforceable…." (Appellants' Brief, at 27). As a result, the only question that remained for the District Court was to determine whether the *Prima Paint* rule should be applied with equal force to venue/forum and choice-of-law provisions. (June 13 Order, at 4-5; Appx. 290-291). In that regard, Judge May found that it does. His analysis is sound and should be followed by this Court.

First, contrary to the suggestion of the Plaintiffs, applying the *Prima Paint* rule to cases involving venue and choice-of-law provisions is not "illogical and overzealous," and hardly involves a "quantum leap." (Appellant's brief, at 24, 26). Arbitration clauses are actually "specialized kind[s] of forum-selection clause[s] that posit[] not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (observing that arbitration provisions are a subset of forum-selection clauses); *In re AIU Ins. Co.*, 148 S.W.3d 109, 115 (Tex. 2004 (recognizing an arbitration clause as a type of forum-selection clause)). As a result, the decision in *Dacres*, by applying the *Prima Paint* rule, in effect *already impliedly endorsed* use of the rule for venue/forum selection provisions.

Second, *not* applying the *Prima Paint* rule to venue/forum selection clauses would create significant practical issues for the courts and for parties. For one thing, not applying the *Prima Paint* rule would render such clauses "practically unenforceable [since] they could be avoided simply by an allegation of fraud in the inducement." *Morris v. McFarland Clinic P.C.*, No. 4:03-CV-30439, 2004 LEXIS 26639 (S.D. Iowa, Jan. 29, 2004). A party could "plead [its] way out of a forum-selection clause to which [it] agreed by merely asserting, without offering any

evidence, fraud in the inducement." *Republic Credit Corp I v. Rance*, 172 F. Supp. 1179, 1183 (S.D. Iowa 2001).

In addition, not applying the *Prima Paint* rule in venue/forum selection cases can also lead to absurd and wasteful litigation. Simply put, an Iowa court could be forced to engage in a full fact-finding analysis (including, in all likelihood, a trial) to determine if a contract was procured by fraud, only to be required to dismiss the case without prejudice if it finds no fraud so it can be refiled in another jurisdiction *on the exact same issue*. As one court recently described it:

> [T]he logical conclusion of the argument [against applying the *Prima Paint* Rule] would be that the … courts ... would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. *An absurdity would arise if [this] court [in Maine] determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to [Texas]—for what? A determination as to whether the contracts are void?*

Williams v. Aire Serv, LLC, No. 1:18-cv-099-NT, 2018 LEXIS 175947, at *7 (D. Maine October 12, 2018) (emphasis added) (quoting *Autoridad de Energía Eléctrica de Puerto Rico v. Vitol S.A.*, 859 F.3d 140, 147 (1st Cir. 2017).

For these reasons, the vast majority of courts examining this issue have followed the *Prima Paint* rule used by Judge May in fraudulent inducement cases involving venue/forum selection and choice-of-law provisions. *See, e.g., Scherk*,

417 U.S. at 519 ("Rather, it means that an arbitration *or forum-selection clause* in a contract is not enforceable if the inclusion *of that clause* in the contract was the product of fraud or coercion.") (emphasis added); *Q Holding Co. v. Repco, Inc*., No. 5:17-CV-445, 2017 LEXIS 77365, at *6, n. 26 (N.D. Ohio May 22, 2017) ("[A]rbitration …, forum-selection and choice-of-law [provisions] are severable."); *CIC Grp., Inc. v. Mitchell*, No. 5:10- CV-02885, 2013 LEXIS 26878, 2013 WL 774175, at *4 (N.D. Ohio Feb. 27, 2013) ("Plaintiff's general allegations that misrepresentations induced its entry into the contract do not invalidate the clause: A choice-of-law provision is valid unless the choice-of-law provision, itself, was induced by fraud. General allegations of fraud in the inducement do not invalidate a choice-of law clause."); *Liafail, Inc. v. Learning 2000, Inc.*, No. CIV.A. 3:01CV-336-H, 2001 LEXIS 13330, 2001 WL 1555308, at *2 (W.D. Ky. Aug. 29, 2001) (citing *Hansworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997)) ("[f]raud and overreaching must be specific to a forum selection clause in order to invalidate it."); *Stamm v. Barclays Bank of New York*, 960 F. Supp. at 729 (S.D.N.Y. 1997) (citing *Prima Paint* and other authorities for the proposition that a "claim of fraud in the inducement of a contract is insufficient to invalidate a forum selection or choice-of-law clause found in that contract.").

2. Appellants' Attack on the District Court's Order Is without Basis.

In the face of this analysis, Plaintiffs attack the District Court's ruling based primarily on the suggestion that Judge May "ignored fundamental principles of Iowa contract law." (Appellants' Brief, at 27). Plaintiffs use this argument to then suggest that this Court should adopt a "modified *Prima Paint* rule," including a new, eight (8) part "methodology" to "help guide future District Courts." (Appellants' Brief, at 44-47). Plaintiffs contend that such an approach is necessary to "protect[] Iowa residents who are victims of fraud." (Appellants' Brief, at 45). Even a cursory review of this argument, however, reveals it is completely ill-advised.

First, the notion that the District Court's decision is inconsistent with, or has ignored, Iowa law, is clearly wrong. As noted above, the District Court's decision is based squarely on this Court's holding in *Dacres*, a ruling which has been part of Iowa law since 1996. In *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). Nothing in *Dacres* even remotely suggests

that a different rule might be needed for fraudulent inducement cases involving venue/forum selection clauses as opposed to arbitration clauses.[4]

Second, to the extent Plaintiffs' attack on the District Court's June 13 Order is actually intended as an attack on *Dacres* and the *Prima Paint* rule, it is equally misguided. Simply put, when properly applied (as it was here) the *Prima Paint* rule *already protects* Iowa residents. It recognizes and enforces their contractual right to decide which law and venue they want in the event of a future dispute, while also allowing for protection in a case in which the venue or choice-of-law provision *itself* is fraudulently induced. It also protects Iowa residents from the prospect of being forced to endure expensive, time-consuming and potentially pointless litigation, as described above, if it is determined that the venue or choice-of-law provisions should be applied.

Third, the "methodology" suggested by Plaintiffs for their "modified *Prima Paint* rule, is utterly unworkable. It includes such nebulous factors as "how serious" the allegations of fraud are, and whether there is a "likelihood that, if

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[4] In their Brief, Plaintiffs attempt to distinguish *Dacres* from the instant case by arguing that the alleged fraud in *Dacres* "did not involve material terms of the agreement itself." (Appellants' Brief, at 38). However, as noted above, the plaintiffs' allegations of fraud in the inducement in *Dacres*—like the Plaintiffs' allegations of fraud here—went "*to the entire agreement*." *Dacres*, 548 N.W.2d at 578 (emphasis added). Consequently, the distinction Plaintiffs attempt to draw between *Dacres* and the instant case fails.

proven, the allegations of fraud legally support a finding that the entire agreement was void ab initio…." It would also require the courts to make a determination as to whether or not the contract as a whole was void *before* it made a determination as to whether the venue/forum selection (or choice-of-law) was proper.

Finally, Plaintiffs' "methodology" approach finds virtually no case law support, either in Iowa or in any other jurisdiction. In fact, the only case Plaintiffs cite to support the approach is *Hoffman v. Minuteman Press Int'l Inc*., 747 F. Supp. 552 (W.D. Mo. 1990), a 1990 Federal District Court case from the Western District of Missouri. However, not even the *Hoffman* decision employed the type of factors test suggested by Plaintiffs in their methodology. Instead, the court in *Hoffman* looked at a wholly different set of factors such as the "unsophisticated business" background of the plaintiffs, the "overweening bargaining power" of the defendants, and "the extreme hardship that litigating in New York [rather than Missouri] would impose on these plaintiffs." *Id*., at 555, 559.[5] As such, the *Hoffman* decision offers no support for the new "modified *Prima Paint* rule" proposed by the Plaintiffs.

In addition, it is also worth noting that since its publication in 1990 the *Hoffman* decision has been sharply criticized, including by the Federal District

[5] Plaintiffs have not cited or relied on any of these factors in the instant case.

Court for the Southern District of Iowa. *See Republic Credit Corp I*, 172 F. Supp. at 1184 (referring to *Hoffman* as a "mistake"). One court even went so far as to state that the outcome in *Hoffman* "would be different if decided today," because the court "considered factors that the [United States] Supreme Court's decision expressly stated not to consider." *Kentwool Co. v. NetSuite, Inc*., No. 6:14-cv-02678, 2014 LEXIS 197531, at *7-8 (D.S.C., Dec. 1, 2014); *Williams*, 2018 LEXIS 175947 at *8 (directly following its discussion of *Hoffman*, stating that "[f]or a district court considering whether to enforce a forum selection clause, '[t]he correct approach [is] to enforce the forum clause specifically unless [a party] could clearly show ... that *the clause* was invalid for such reasons as fraud or overreaching.'").

A review of the Petition shows that the District Court was correct in its analysis. The Plaintiffs do not claim the Defendants engaged in any fraud with respect to the venue/forum selection provision itself. Indeed, the Petition never mentions the venue/forum selection provision at all, but instead focuses on *the entire written agreement* signed by the Plaintiffs:

> Mitchell and the other Elliott defendants continued their misrepresentation of the acquisition price throughout subsequent negotiations and preparation of written documents to induce Karon/Peddler *to sign written documents to finalize the sale* based upon a fraudulent and false acquisition price.

(Petition, ¶ 23 b; Appx. 10) (emphasis added). As such, the District Court properly applied the *Prima Paint* rule, as formally adopted in *Dacres*, and correctly found that the mandatory venue/forum selection clause in Paragraph 9 of the Purchase Agreement was valid and enforceable. For this reason the District Court's June 13 Order should be affirmed.

3. Defendants' Additional Collateral Attacks on the June 13 Order are Meritless and Should be Disregarded.

In addition to the arguments addressed above, the Plaintiffs also offer a hodge-podge of additional arguments in their attack on The District Court's June 13 Order. None of these arguments are persuasive.

a) The Prior Proceedings between These Parties Are Irrelevant to This Appeal.

In their Appeal Brief, as they did before the District Court, Plaintiffs again suggest that the ruling made by Iowa District Court Judge Chad Kepros in a prior lawsuit brought by Peddler against Elliott, entitled *Peddler LLC v. Elliott Aviation Aircraft Sales, Inc.*, Linn County Court No. LACV082608 (the "Linn County Action") has some bearing on or relevance to the instant lawsuit. (Appellants' Brief, at 15, 30). This suggestion is inaccurate and without merit.

b) Procedural Facts Relating to The Linn County Action.

The Linn County Action was filed by Peddler on February 26, 2015 and involved the same transaction, claims and Purchase Agreement as the instant case.[6] On April 7, 2016, after the parties had completed all fact discovery, Judge Kepros issued a ruling (the "April 7 Ruling"), which dealt with a number of motions in the case, including Elliott's Motion for Summary Judgment. (See Exhibit A to Plaintiffs' Brief and Memorandum in Resistance to Defendants' Motion to Dismiss dated May 7, 2018 ("Plaintiffs' Resistance Brief"); Appx.149-170). Thereafter, on April 21, 2016, an Order was issued scheduling a jury trial for a date certain to commence on January 9, 2017. (See Exhibit A attached hereto; Appx. 273-275). However, on December 29, 2016, one day after Judge Kepros issued his written rulings granting a number of Elliott's Motions in Limine, and *eleven (11) calendar days before the trial on the case was scheduled to commence,* Peddler filed a voluntary dismissal of all claims against Elliott pursuant to Iowa Rule of Civil Procedure 1.943. (See Exhibits B and C attached hereto; Appx. 276-281).[7]

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[6] Karon, Mitchell, Wynn Elliott, and EAI were not parties in the Linn County Action.

[7] The stated reason offered by Peddler for the dismissal was that Peddler's then counsel "had knee replacement surgery on Dec. 14" and, as a result, Peddler (the client) "voiced concerns about [counsel's] ability to recover adequately to represent its interests at trial on Jan. 9." (See Exhibit D attached hereto; Appx. 282-284).

At the time of the dismissal Elliott was fully prepared to proceed to trial on Peddler's claims. Nevertheless, because Rule 1.943 provides a party with a one-time, absolute right to dismiss its action at any time "up until ten days before the trial is scheduled to begin," the court had no alternative but to dismiss Peddler's claims.

c) Judge Kepros' April 7 Ruling.

Iowa R. Civ. P. 1.943 provides in relevant part as follows:

> A party may, without order of court, dismiss that party's own petition … at any time up until ten days before the trial is scheduled to begin…. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

Based on the clear language of this rule, if a party chooses to exercise its right to dismiss under Rule 1.943, the dismissal—unless otherwise stated—is *without prejudice. See Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994) (citing R. Civ. P. 215—the predecessor to Iowa R. Civ. P. 1.943); *Witt Mechanical Contractors, Inc. v. United Bhd. of Carpenters & Joiners*, 237 N.W.2d 450, 451 (Iowa 1976). Because of this, *any dismissal under Rule 1.943 has no res judicata effect whatsoever with respect to the merits of the controversy in a subsequent case*. As the court stated in *Venard*:

> A dismissal without prejudice *is not ordinarily res judicata of the merits of the controversy*. A dismissal without prejudice *leaves the parties as if no action had been instituted*. It ends the particular case but is not such an adjudication itself as to bar a new action between the parties.

Venard, 524 N.W.2d at 167 (emphasis added, citations omitted); *see also Windus v. Great Plains Gas*, 116 N.W.2d 410, 415-16 (Iowa 1962). Moreover, the lack of *res judicata* effect applies not only to claims, but also to issues, even those ruled upon in the case. Indeed, this Court has specifically held that a party may dismiss its lawsuit under Rule 1.943 and refile it at a later date "in order to avoid the consequences of discovery rules *or orders*." *Rasmussen v. Tuhn (Estate of Renwanz)*, 561 N.W.2d 43, 45 (Iowa 1997) (emphasis added). As such, the April 7 Ruling has no bearing whatsoever on the instant matter, and is irrelevant to this appeal.

In addition, even if the April 7 Order is considered by this Court, it is completely inaccurate to claim that Judge Kepros "found the Purchase agreement was not a fully integrated contract, and hence, did not exclusively govern the rights of the plaintiffs." (Appellants' Brief, at 30). Instead, Judge Kepros found that there were "*genuine issues of material fact in dispute* … as to whether the parol evidence rule would apply to exclude the oral statements in this case regarding Peddler's claim for fraudulent inducement.". (April 7 Ruling, at 11; Appx. 159) (emphasis added). In addition, Judge Kepros did not find that the Purchase

Agreement was "void *ab initio*," nor did he enter judgment in favor of Peddler or make any ruling regarding the choice-of-law or forum-selection provisions. He only held that, because the written Purchase Agreement (in his view) did not specifically address the issue of compensation, there were genuine issues of material fact as to whether the Purchase Agreement was fully integrated.

Here, the question before the Court at this juncture does not involve the parol evidence rule and does not require a determination on whether the Purchase Agreement was "fully integrated." *(Id.)* On the contrary, the issue here is solely whether or not the specific and unambiguous forum-selection provision contained in the written Purchase Agreement is effective and enforceable. Nothing in Judge Kepros' April 7 Ruling addressed this issue. As such, even if the Court considered the April 7 Ruling as somehow relevant in the instant matter, it is not relevant to this appeal because it addressed a different issue.

d) Iowa's Choice-of-Law Provisions Have No Bearing on This Appeal Because Plaintiffs Never Raised The Issue before The District Court and, Even If They Had, Kansas Clearly Has A Significant Interest in This Litigation.

In their Brief, Appellants also argue that the District Court erred by failing to consider Iowa choice-of-law rules as articulated by the Restatement (Second) Conflicts of Laws § 145(1). (Appellants' Brief, at 34-37). In doing so, according to the Plaintiffs, the District Court ignored the fact that "Iowa was the only state

with any significant interest in the litigation." (Appellants' Brief, at 27). Apparently, Plaintiffs present this argument to suggest that, even if the choice-of-law and venue/forum selection provisions in Paragraph 9 apply, Iowa's interest in the case overrides those provisions. However, this argument is without basis.

First, it is important to note that these arguments were never presented by Plaintiffs to the District Court. Nowhere in their briefs or during oral argument before the District Court did Plaintiffs even mention the Restatement (Second), Iowa's "significant interest in the litigation," or Iowa's "important public policy considerations." It is well-established that this Court will not review issues on appeal unless they were properly preserved. *Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) (citing *Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000)).

Second, even if this issue was properly preserved, the June 13 Order did not actually apply Kansas law to the substantive issues before it. Instead, the court dismissed the case on the narrower procedural question of whether venue was proper. Because of this, a full scale analysis of the Restatement (Second) and Iowa's choice-of-law principles is premature and unnecessary. Presumably, if this case is refiled in Kansas that court will address the substantive law to be applied.

Until that time, however, an analysis of whether Iowa's interest in the case overrides an explicit choice-of-law provision is unnecessary.[8]

Finally, even if the issue was preserved and is not premature, the suggestion that Iowa was the only state with any significant interest in the litigation, or that Kansas has no interest, is clearly incorrect. In the Purchase Agreement the parties designated Wichita, Kansas as the place of delivery of the Aircraft and the place for the pre-purchase inspection. (Purchase Agreement, p. 1, p. 2, ¶ 2; Appx.41-42). In addition, the parties agreed that the Purchase Agreement "will be deemed made and entered into and will be performed wholly within the State of Kansas." (Purchase Agreement, pp. 8-9, ¶ 9; Appx. 48-49). Similarly, there is no basis to suggest that Iowa (or any other state) has a materially greater interest in the transaction than Kansas, or that there is any Iowa public policy which would override the parties' choice-of-law. As such, Plaintiffs' argument that the District Court ignored Iowa choice-of-law principles is incorrect and provides no basis for a reversal of the June 13 Order.

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[8] It is also worth noting that the choice-of-law provision in Paragraph 9 specifically states that "any dispute arising under, out of or related in any way to this Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement will be governed and construed under the laws of the State of Kansas, USA, *exclusive of conflicts of laws*." (Purchase Agreement, pp. 8-9, ¶ 9; Appx. 48-49) (emphasis added).

e) Application of The Venue/Forum Selection Clause in Paragraph 9 of The Purchase Agreement by The District Court to Tort Claims Was Proper.

Plaintiffs argue that the District Court also erred in enforcing the venue/forum selection clause in Paragraph 9 of the Purchase Agreement because it ignored the fact that Plaintiffs "sought tort damages and breach of an oral contract which preceded" the Purchase Agreement. (Appellants' Brief, at 31). However, the Iowa courts have long held that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Liberty Bank, F.S.B. v. Best Litho, Inc*., 737 N.W.2d 312 (Iowa Ct. App. 2007) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (footnote omitted). In addition, whether tort or extra-contractual claims are to be governed by choice-of-law provisions or forum-selection provisions in written contracts "depends upon the intention of the parties [as] reflected in the wording of particular clauses and the facts of each case." *Terra Int'l, Inc. v. Mississippi Chem. Corp.,* 119 F.3d 688, 691, 695 (8th Cir. 1997) (quoting *Berrett v. Life Ins. Co. of the Southwest*, 623 F. Supp. 946, 948-49 (D. Utah 1985)); *High Plains Constr., Inc. v. Gay*, 831 F. Supp. 2d 1089 (S.D. Iowa 2011) (finding that a forum selection clause governing "[a]ny dispute arising under or in connection with this agreement or related to any matter which is the subject

of this agreement," was broad enough to encompass plaintiff's tortious interference with contractual relationships claim).

The venue/forum clause in the Purchase Agreement here is extremely broad. It applies to "any dispute arising *under, out of, or related in any way to this Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement."* (Purchase Agreement, p. 8, ¶ 9; Appx. 48) (emphasis added). Use of the term "under" in this context has been construed to evince the intent to encompass extra-contractual claims. *Terra*, 119 F.3d at 693-94 (collecting cases).

Furthermore, courts have indicated that where such claims (1) "ultimately depend on the existence of a contractual relationship," (2) "relate[] to interpretation of the contract," or (3) "involv[e] the same operative facts as a parallel claim for breach of contract," those claims should be heard in the forum selected by the parties. *Id.* at 694 (citations omitted). This analysis applies to quasi-contractual claims as well as tort claims. *See Cheney v. IPD Analytics, LLC*, 583 F. Supp. 2d 108, 124 (D.D.C. 2008) ("[Plaintiff's] labeling of the claims as 'fraudulent inducement' and 'promissory estoppel' does not shield those tort claims from coverage by the forum selection clause. Where the 'contract is the basic source of the defendant's duty to plaintiff, the tort claim 'arises' from the contract."); *Cedars-Sinai Med. Ctr. v. Global Excel Mgmt., Inc.*, No. CV 09-3627, 2010 U.S.

Dist. LEXIS 139848, 2010 WL 5572079, at *6 (C.D. Cal. Mar. 19, 2010) (holding that the "breach of implied contract and unjust enrichment claims are also covered by the forum selection clause because, otherwise, any party could simply plead around a forum selection clause by alleging claims under implied contract or quasi-contract theories"); *McAdams v. Mass. Mut. Life Ins. Co*., No. 99-30284, 2007 LEXIS 9944, at *38 (D. Mass. May 15, 2002) ("[A] choice of law provision should apply to non-contract claims where the basic source of any duty owed by defendants to the plaintiff is derived from the contractual relationship structured by the underlying agreement.").

Here, Plaintiffs allege three causes of action—breach of contract, fraud and breach of fiduciary duty. All of these claims concern a dispute relating to the purchase of the Aircraft by Peddler, and the legal relationship between the parties. As such, by the categorical language in the Purchase Agreement, all of Plaintiffs' claims must be venued in Kansas since they all "aris[e] under, out of, or relate[] … to th[e] Agreement, the legal relationship between Seller and Purchaser, or the transaction that is the subject of this Agreement."

f) The District Court Properly Relied on The Purchase Agreement in Rendering Its Ruling on Defendants' Motion to Dismiss.

In their final argument Plaintiffs claim the District Court erred by considering "matters not within the scope of proper inquiry" on a motion to

dismiss. (Appellants' Brief, at 58). Apparently, Plaintiffs believe the District Court "overstepped its bounds" by considering the Purchase Agreement because the Purchase Agreement purportedly was not part of the "record" before the Court. (Appellants' Brief, at 58 ("[T]he only document in the … record is the petition, which clearly alleged the oral contract governed this dispute."). Plaintiffs also suggest the District Court erred by overlooking a material issue in dispute; namely whether there was an oral agreement between the parties that supersedes the written Purchase Agreement. (Appellants' Brief, at 51-54). Plaintiffs' arguments clearly miss the mark.

First, any suggestion that the Purchase Agreement was not part of the "record" before the District Court is simply wrong. Plaintiffs specifically refer to the Purchase Agreement (if not by name, then clearly in substance) in their Petition. For example, in paragraph 18 of the Petition, Plaintiffs state "the discussion and details of the final transaction were discussed and *documented in written documents*…." (Petition, ¶ 18; Appx. 9) (emphasis added). Similarly, in paragraph 23 of the Petition, Plaintiffs state:

> Mitchell and the other Elliott defendants continued their misrepresentation of the acquisition price throughout subsequent negotiations and preparation of written documents to induce Karon/Peddler *to sign written documents to finalize the sale* based upon a fraudulent and false acquisition price.

(Petition, ¶ 23 b; Appx. 10) (emphasis added).

As noted above, courts are permitted to "consider documents incorporated into the complaint by reference." (Supra, at § 1). The fact that Plaintiffs did not use the term Purchase Agreement, or specifically refer to the document by name, is irrelevant. The Petition incorporates the Purchase Agreement by reference and, as such, the District Court was entitled to consider it in response to a motion to dismiss.

Second, even if the Purchase Agreement was not technically part of the record based on the Petition, under Iowa law, if the parties and the court consider evidence outside the record in a motion to dismiss, the proper procedure "is to treat the motion as one for summary judgment." *Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982). *See also George v. D.W. Zinser Co.*, 762 N.W.2d 865, 867-889 (Iowa 2009) ("As 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."); *Stotts v. Eveleth*, 688 N.W.2d 803, 812 (Iowa 2004) (treating a motion to dismiss as a motion for summary judgment to conserve judicial resources).

Here, there is no question that the parties and the Court relied on the Purchase Agreement in connection with the motion to dismiss. Tellingly, Plaintiffs did not request more time for discovery to respond to the motion, nor did they file an affidavit pursuant to Iowa R. Civ. P. 1.981(6) setting forth the reasons why they

could not present facts essential to justify their opposition. As a result, the District Court clearly did not "overstep its bounds" in ruling on Defendants' motion.

Finally, Plaintiffs' suggestion that the District Court overlooked material facts in dispute and committed reversible error by finding that the "Purchase Agreement governed this dispute," is without basis. As noted above, the District Court did not rule that the Purchase Agreement as a whole "governed this dispute," nor did it rule that the alleged oral agreement was irrelevant. Instead, the District Court simply ruled that, because Plaintiffs raised no allegations of fraud *with respect to the procedural provisions in Paragraph 9 of the Purchase Agreement*, based on *Dacres*, the *Prima Paint* rule, and the severability doctrine, those provisions would be given effect to determine the baseline question of what venue/forum would be correct for this dispute. In taking this approach, the District Court followed well-established Iowa precedent and rendered a logical, well-reasoned and fundamentally correct decision. As such, the June 13 Order should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the District Court's dismissal without prejudice of Plaintiffs' Petition, based on the mandatory venue provision in Paragraph 9 of the Purchase Agreement.

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Dated: February 8, 2019

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I, Wesley T. Graham, hereby certify that I electronically filed the foregoing document with Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below on the 8th day of February, 2019.

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