In the Supreme Court of Iowa

Case No. 19-0514

PSFS 3 Corporation,

Plaintiff/Appellee,

vs.

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

Defendants/Appellants.
_____/

Brief of Appellants (Gossett Defendants)

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

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Issue 3: **The District Court deprived Appellants of their Due Process Rights under the U.S. and Iowa Constitutions by entering Final Judgments in 320 cases without permitting them to present a defense, without a trial, and without evidence (and not as a result of a motion for dismissal, summary judgment or for judgment on the pleadings).**

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Issue 4: The District Court erred in awarding entitlement to attorneys' fees to PSFS 3 without evidence that PSFS 3 was obligated to pay any attorneys' fees (*i.e.*, had "incurred" those fees)

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Routing Statement

Appellants[1] believe that this Court should retain the appeal because it presents substantial issues of first impression:

- Whether the assignment to a newly formed corporation, which has no real business purpose other than to be the assignee for contracts simply to shop the forum for litigation concerning those contracts, should result in successful forum shopping.

- Whether the principal amount of a Credit Agreement is a material term of the credit agreement.

- Whether the rate of interest of a Credit Agreement, where not otherwise able to be calculated, is a material term of the credit agreement

- Whether the Iowa state court has authority to award attorneys' fees for legal services performed in a federal district court where the rules of that court require the timely filing of a motion for attorneys' fees in that court, where no such motion was filed, and where that court has held that the failure to timely file a motion for attorneys' fees results in a waiver of those fees.

- Whether the Iowa state court has authority to award attorneys' fees for legal services performed in the Eleventh Circuit Court of Appeals where that court has expressly held that only it has the authority to award fees for legal services performed in that court.

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[1]The totality of the Appellants are represented by two separate groups of lawyers. They will be distinguished by the attorney representing them. Appellants represented by the undersigned will be referred to as the "Gossett Defendants" which consist of about 265 doctors and their practices, and are generally consolidated into CL114226. The other group will be referred to as the "Charlip Defendants."

Statement of the Case

I. Overview

Two hundred sixty-five doctors and their professional organizations ("the Gossett Defendants") appeal from final money judgments entered against them in favor of PSFS 3 Corp. ("PSFS 3") for breaches of written contracts without a trial, without evidence, without permitting those Defendants to present a defense to the amounts PSFS 3 claimed to be owed, and over the objection of those Defendants. (App. Vol. 10 pp. 549, 552, 555; Vol. 7 pp. 624, 687; Vol. 8 pp. 144-471; Vol. 9 pp. 41-404; Vol. 10 pp. 41-194.) Seventy-three of the Appellants were neither a party to, nor a guarantor of, the contracts sued upon; yet, final money judgments were entered against them. (App. Vol. 2 pp. 47- Vol. 4 pp. 295; Vol. 8 pp. 144-471; Vol. 9 pp. 41-104; Vol. 10 pp. 41-194, 636.)

These cases began[2] as part of a putative class action filed by the Gossett Defendants (who were Plaintiffs in the action) in the United States District Court for the Southern District of Florida ("Federal District Court") on March

[2]Only one of the cases in the Polk County District Court was filed earlier than the Federal District Court action—Defendant Lomboy. Five cases were filed in the Polk County District Court on the same date as the Federal District Court action was filed—Defendants Centi, Mansfield, Veys, Kircher-Carbone, and Kalange.

16, 2010, against NCMIC Finance Corp. ("NCMIC"). (App. Vol. 1 pp. 41.) PSFS 3 did not exist at the time and was created by NCMIC on March 30, 2010, to facilitate NCMIC shopping these cases to its preferred forum—the Polk County, Iowa, District Court, ("Polk County District Court") as more fully explored in Argument Issue 1. (App. Vol. 1 p. 284.)

Although the putative class action was filed on behalf of all doctors who signed a contract with NCMIC ("Doctors"), NCMIC did not file compulsory counterclaims in the Federal District Court to enforce the contracts against those Doctors (*see* FED. R. CIV. P. 13(a)(1)), but continued to file original collection actions in the Polk County District Court. (App. Vol. 2 p. 57 for example.)

After NCMIC created PSFS 3, and ostensibly assigned the contracts to it, PSFS 3 filed original actions in Polk County District Court. (App. Vol. 2 pp. 47 through Vol. 4 pp. 295 for example.) NCMIC and PSFS 3 filed a motion to dismiss the Federal District Court action, or to transfer the cases to the Polk County District Court. (App. Vol. 1 p. 120.) The Federal District Court refused and neither NCMIC nor PSFS 3 appealed the order when it became appealable. (App. Vol. 1 p. 281; p. 1089.) Thus, the order of the Federal District Court became law of the case on the issue of personal jurisdiction as more fully

explored in Issue 1.

After similar federal district court actions were filed in other districts, the Charlip Defendants filed, and the Gossett Defendants joined, a motion in the Judicial Panel on Multi-District Litigation for transfer of all similar actions to the Southern District of Florida. (App. Vol. 1 pp. 958 and 969.) NCMIC and PSFS 3 responded to the MDL motion, arguing that Florida was an improper venue "because the leases at issue contain forum selection clauses requiring claims to be litigated in Iowa." (App. Vol. 1 pp. 998-99.) The MDL Panel disagreed and granted the motion to transfer all cases to the Southern District of Florida, stating:

> Defendants NCMIC Finance Corp. and PSFS 3 Corp. (collectively NCMIC) support centralization but propose the Northern District of Iowa or the Southern District of Iowa as the transferee district. In the alternative, these defendants ask the Panel to defer its decision until the district courts have ruled upon the pending motions to dismiss.
>
> * * *
>
> We are persuaded that the Southern District of Florida is an appropriate transferee forum for this litigation.

(App. Vol. 1 pp. 1086-87.)

The actions filed by PSFS 3 in Polk County District Court were stayed pending resolution of the Federal District Court action. (App. Vol. 5 pp. 302

and 740.) The Federal District Court denied class certification and the case proceeded as a mass action under 28 U.S.C. § 1332(11)(B)(I). (App. Vol. 1 pp. 401.) These cases were litigated in the Federal District Court until the entry of final judgments on May 7, 2015, against the Gossett Defendants on the sole issue of whether the fraud of the vendor invalidated the Financing Agreement held by PSFS 3. (App. Vol. 1 p. 930.) The final judgments were appealed to the Circuit Court of Appeals for the Eleventh Circuit which affirmed the final judgments on November 22, 2016. (App. Vol. 1 p. 1089.)

Once the Eleventh Circuit ruled, PSFS 3 returned to the Polk County District Court to continue the stayed cases. On March 7, 2017, the Gossett Defendants amended their answer and affirmative defenses, including three specific affirmative defenses—(1) the lack of personal jurisdiction; (2) the violation of the Iowa Credit Agreement Statute of Frauds, IOWA CODE § 535.17; and, a violation of the Iowa usury statute, IOWA CODE § 535.2. (App. Vol. 6 p. 41.) The Gossett Defendants also counterclaimed for a declaratory judgment finding that PSFS 3 waived its right to attorneys' fees for legal services performed in the federal courts by failing to timely file motions therefore in those courts as required by the rules of those courts. (App. Vol. 6 pp. 52-81.) FED. R. CIV. P. 54(d)(2); 11TH CIR. R. 39-2; and *Common*

Cause/Georgia v. Billups, 554 F.3d 1340, 1356 (11th Cir. 2009).

On August 4, 2017, the trial court denied a motion for summary judgment filed by PSFS 3, finding that there were genuine issues of material fact remaining. (App. Vol. 6 pp. 271-74.)

On October 12, 2017, the Gossett Defendants filed a motion for summary judgment on their affirmative defenses. (App. Vol. 6 p. 275.) On the same date, PSFS 3 filed its renewed motion for summary judgment. (App. Vol. 6 p. 318.) The motions were argued on November 21, 2017, but no ruling was issued until after the bench trials on December 11 (Insoft) and 12 (Busch), 2017. (App. Vol. 7 p. 624.)

Also on November 21, 2017, the parties entered into a stipulation to try two bellwether cases:

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

(App. Vol. 6 p. 373.)

There were several "similar issues" which were common to all cases, such as the affirmative defenses of lack of personal jurisdiction, *res judicata* on the issue of personal jurisdiction, improper venue, violation of the Iowa

Credit Agreement Statute of Frauds, and violation of the Iowa Usury Statute. (App. Vol. 6 p. 41.) These issues were determined against the Insoft Defendants, (App. Vol. 7 p. 624) and then applied to all other Defendants. (App. Vol. 8 pp. 144 through Vol. 10 p. 194.)

However, the individual final judgments necessarily determined issues which were not "similar issue[s]" common to all and which could not be governed by issue preclusion; specifically, the identity of the proper parties and the amount of money paid, and remaining to be paid, by each individual Defendant under that individual's contract. (App. Vol. 2 pp. 41 through Vol. 4 p. 295; App. Vol. 8 pp. 144 through Vol. 10 p. 194.) The Defendants were entitled to a trial on those issues and the Iowa District Court violated their state and federal Due Process rights by entering a final judgment against the Defendants without affording them a trial.

A. Bellwether Trials

The bench trials of December 11 and 12, 2017, referred to in the above-quoted order, were on the petitions of PSFS 3 against two of the Gossett Defendants, Michael D. Insoft, DMD, P.A., and Michael D. Insoft, (LACL118285), and against one of the Defendants, Edward Busch,

(LACL117747)[3] represented by attorney Charlip. (App. Vol. 6 pp. 376-575.) The parties filed post-trial briefs. (App. Vol. 7 pp. 453 to 582.) On April 9, 2019, the court issued its Ruling and Order on Plaintiff and Defendants' Motions for Summary Judgment. (App. Vol. 7 p. 624, "Ruling".) The Ruling went beyond the cross-motions for summary judgment and resolved some of the issues which were tried. (App. Vol. 7 p. 624, *e.g.,* p. 629.) There was no express ruling on the cross-claim, but by implication, it was denied. (App. Vol. 7 p. 624.)

On June 15, 2018, the trial court issued is Judgment Entry and Order. (App. Vol. 8 pp. 41 and 44.) On June 25, 2018, the Insoft Defendants filed their Motion to Reconsider, Enlarge, or Modify the Amended Final Judgment. (App. Vol. 8 p. 47.) The motion was resolved on July 1, 2019. (App. Vol. 10 p. 622.) The Insoft Defendants appealed from this Final Judgment. (App. Vol. 10 pp. 549-555.) In the interim, the trial court entered over 300 final money judgments against the remaining Gossett Defendants without a trial. (App. Vol.

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

8 pp. 144 through Vol. 10 p. 194.) The judgments have been appealed and have been consolidated for briefing and argument purposes. (App. Vol. 10 pp. 549-555, 618-621.)

The final judgment entered against the Insoft Defendants enforced two Financing Agreements, and determined money damages, including payments of $42,672 required by the Financing Agreements but not paid by the Insoft Defendants, plus default interest of 18% per annum from the filing of the suit, and awarded entitlement to attorneys' fees. (App. Vol. 7 p. 624 and Vol. 8 p. 41.) The final judgment also rejected all of the affirmative defenses, including lack of personal jurisdiction and *res judicata* on the issue of personal jurisdiction. (App. Vol. 7 p. 624.)

B. Final Judgment Against Remaining Defendants

After the entry of the Ruling and Order on Plaintiff's and Defendants' Motions for Summary Judgment, PSFS 3 sought to "enforce" the stipulation by motion requesting that the court enter final judgments against the remaining Defendants without a trial, without evidence, and without affording the Defendants the opportunity to defend. (App. Vol. 7 p. 637.) The Defendants unsuccessfully resisted the motion. (App. Vol. 7 p. 687; App. Vol. 8 pp. 144 through Vol. 10 p. 194.)

The trial court entered final judgments in amounts which were impossible to calculate. While all of the Financing Agreements except one (that with Cedar Park Vision Center, P.A., guaranteed by Dr. Jeff Wineinger, which will be referred to hereafter as the "Wineinger Contract"–App. Vol. 4 pp. 293-294) were written by NCMIC as leases requiring monthly payments which included both principal balance reduction and interest calculated for the life of the loan, the Federal District Court found, and the 11th Circuit affirmed, that they were not leases, but rather, were "installment sales or loan agreement[s]." (App. Vol. 7 pp. 122, 124.) This was consistent with this Court's ruling in *C & J Vantage Leasing Co. v. Wolfe,* 795 N.W.2d 65 (Iowa 2011) which involved similarly mislabeled financing documents.

Interestingly, NCMIC Finance Corp. (the author of the mislabeled equipment lease agreement) had created a correct document which it used for, but only for, the Wineinger Contract. (App. Vol. 4 pp. 293-94.) It was labeled an Equipment Financing Agreement. It disclosed the amount of the loan, the monthly payment required, and the number of months. With those amounts, Dr. Wineinger would be able to calculate the interest rate. However, the Wineinger Contract did not contain a forum selection clause and both Defendants were Texas residents. (App. Vol. 4 pp. 285, ¶¶ 2 and 3; pp. 293-94.) Thus, the Iowa

courts had no personal jurisdiction. The Wineinger Contract did not contain a contractual obligation to pay 18% interest upon default. (App. Vol. 4 pp. 293-94.) Notwithstanding these infirmities, the trial court entered a final judgment against the Wineinger Defendants by adding to the full amount of the unpaid payments (which by very definition included contractual interest throughout the life of the loan) 18% default interest. (App. Vol. 10 p. 185.)

When a Financing Agreement was breached by non-payment, there would be a principal balance remaining to be paid; however, because the principal balance of the loan was never disclosed in the Financing Agreement (except the Wineinger Contract), there would be no way for the trial court to calculate the principal balance and add thereto interest at the default rate.

Instead of calculating damages incurred by a breach of a loan agreement, the trial court incorrectly awarded damages based on the amount of unpaid principal and interest (at the undisclosed loan rate throughout of the life of the loan) and added thereto default interest at the rate of 18% per annum, thereby impermissibly awarding interest-on-interest.

This case comes to this court after being through four courts in ten years, at times moving forward in three courts at once: Polk County District Court, Federal District Court, Judicial Panel on Multi-District Litigation, and the

United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). The Gossett Defendants seek a reversal of the final judgments, a decision that the Polk County District Court lacks personal jurisdiction over the Gossett Defendants, and a direction that upon remand the cases should be dismissed for lack of personal jurisdiction. Absent such direction, the Gossett Defendants request reversal with a remand to dismiss the cases for failure of PSFS 3 to satisfy the applicable Iowa statutes and to prove damages.

Statement of the Facts

I. *Res Judicata* From Federal District Courts

Most of the operative facts were tried, adjudicated, and affirmed on appeal, in the Federal District Court action in Florida[4]:

> [Defendants[5]] are dentists and optometrists who bought multimedia systems for their waiting rooms ("Exhibeos") and ***financed these*** purchases through "financing leases" now held by [Plaintiffs] NCMIC

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[4]While the findings of fact come from a trial of the 1-column Financing Agreements, because NCMIC, PSFS 3, and the Doctors who have 3-column Financing Agreements "had a full and fair opportunity to litigate the relevant issue effectively in the action resulting in the judgment" through the 1-column Defendants, *res judicata* would apply to prevent relitigation of all of those issues. *Goolsby v. Derby,* 189 N.W.2d 909, 916 (Iowa 1971).

[5]The positions of the parties were reversed in the federal district court. Plaintiffs in that court are Defendants in this Court, so the identification of each party has been changed in the quoted portion of the Order to reflect that party's position in this Court.

> Finance Corporation and PSFS 3 Corporation (together, "NCMIC"). The Exhibeo vendor, initially Brican America, Inc. and later Brican America, LLC (together, "Brican"), sold these systems as being effectively free, promising in a "Marketing Agreement" executed with each purchase that a "medspa" named Viso Lasik would buy enough advertising on the Exhibeos to offset [Defendants'] lease payments and that the vendor would buy back the leases if the advertising payments stopped. If that sounds too good to be true, that's because it was. When the advertising payments stopped, NCMIC expected [Defendants] to continue making their lease payments and [Defendants] refused, asserting fraud.

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

Once the Federal District Court action was completed, the cases proceeded in Iowa. The Gossett Defendants amended their affirmative defenses with the permission of the trial court. (App. Vol. 6 p. 41.) They asserted that the Financing Agreements violated certain Iowa statutes and they renewed their assertion that the Polk County District Court was without personal jurisdiction over them. (App. Vol. 6 pp. 76-78.) The Gossett Defendants lost on those issues. (App. Vol. 7 p. 624.)

A. Stipulation of November 21, 2017

PSFS 3 Corp. v. Insoft (LACL118285) and *NCMIC Finance Corp. v. Busch,* (LACL117747) were selected by the parties as bellwether cases, out of a total of 381 similar cases, to try to completion and bring before this Court for resolution of disputed common issues of law, to create *res judicata* applicable to all other cases. (App. Vol. 6 p. 373.) The 381 cases were consolidated into three cases:

- *NCMIC Finance Corp. v. Larry D. Burnside, D.D.S., P.A.,* case number CL 114226 (Polk County District Court), principally being those cases against the Gossett Defendants;
- *NCMIC Finance Corp. v. Michael P. Seidman, D.D.S., P.C.,* case number CL 116236 (Polk County District Court), principally being those cases against the Charlip Defendants; and,
- *NCMIC Finance Corp. v. Krupaker Yeturu, DDS,* case number CL 117211 (Polk County District Court), principally being those cases against Defendants represented solely by Matthew Preston.

On November 17, 2017, counsel were preparing for a November 21, 2017, pre-trial conference for the first 20 cases scheduled to be tried (preparing to upload 39 exhibits for each of the 20 trials, for a total of 780 exhibits, by the Gossett Defendants) and preparing for a hearing on cross-motions for summary judgment in the Polk County District Court. The undersigned suggested to Plaintiff's counsel by telephone that they employ the same scheme for trial as

was used in the Federal District Court: try one or two bellwether cases while staying all others, obtain final judgments, have those final judgments reviewed on appeal, and apply the rulings made from the appeal to all stayed cases, leaving only the trial of non-common issues for later if needed. If Defendants prevailed on appeal there would be no further judicial labor required. If Plaintiff prevailed on appeal, the rulings of this Court would be applied to all of the stayed cases and only non-common issues would need to be resolved.

The stipulation in the Iowa cases, as outlined by Defendants above, did not reinvent the wheel, but rather, utilized the same system that had worked successfully in the Federal District Court action, and which was agreed between the parties after much effort in briefing the matter and in discussing the matter with the federal district judge.

The stipulation for use of bellwether cases with all others stayed until the appeal was completed was presented to the trial court on November 21, 2017. Without a transcript of the hearing or agreement of PSFS 3, the parties have to rely on the order entered by Judge Rosenberg after the hearing:

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

(App. Vol. 6 p. 373.)

The "ruling and orders" which are to be binding on all remaining cases concern only the common issues of fact and law. Which were proper Defendants and how much each Defendant paid on his or her individual contract are not common issues of fact and necessitate an individual trial on those issues, just as the stayed 1-column cases required individual trials on the non-common issue of reliance on the fraud of the vendor.

Defendants never waived their right to trial on the non-common issues. Yet, once the trial court ruled on the two cases which were tried, PSFS 3 filed a motion to "enforce the stipulation," arguing that the trial court was in a position to enter final judgments against all other Defendants without affording them a trial. (App. Vol. 7 p. 637.) Defendants unsuccessfully resisted the motion. (App. Vol. 7 pp. 687 and 696; App. Vol. 8 pp. 144 through Vol. 10 p. 194.)

At the hearing on the motion to enforce the stipulation by entering judgments without a trial, Defendants argued that their Due Process rights would be violated by entering the final judgments without a trial. (App. Vol. 8 pp. 93:9 through 95:14.)

Without ruling on the motion, the trial court directed Plaintiff's counsel

to prepare proposed orders, advising that he would not rule on the "final order judgment" until the court sees "what you present and give the Defendants an opportunity to respond." (App. Vol. 8 pp. 140:22 through 142:6.)

Plaintiff uploaded proposed final judgments from January 11 to 29, 2019. The court began entering the proposed final judgments on February 26, 2019, without giving the Defendants the opportunity to respond contrary to his statement at the hearing. Defendants filed motions for rehearing under IOWA R. CIV. P. 1.904(2) which were ultimately denied by the trial court.

This appeal ensues. Defendants seek a reversal of the final judgments with directions upon remand to dismiss the cases for lack of personal jurisdiction, for violation of the Iowa statutes at issue, and for failure of PSFS 3 to prove damages.

Argument

Issue 1: The District Court erred in finding that it had jurisdiction over the Defendants.

A. How Issue Was Preserved for Appellate Review

This issue was preserved for appellate review by the initial motion to dismiss for lack of personal jurisdiction (App. Vol. 5 pp. 41 through 116 and 205); the initial affirmative defense of the same (App. Vol. 5 p. 532); the renewed motion to dismiss for lack of personal jurisdiction (App. Vol. 5 p. 706 and 713); the motion for summary judgment on the same issue (App. Vol. 6 p. 275); the amended affirmative defense of the same (App. Vol. 6 p. 41); the evidence presented at trial (App. Vol. 6 pp. 376 through Vol. 7 p. 369); the post-trial briefing (App. Vol. 7 p. 465); and, the motion to reconsider, enlarge or modify the final judgment (App. Vol. 8 p. 47; Vol. 10 pp. 197, 263, 428 and 487.)

B. Standard of Review

> "We review a district court's decision on a motion to dismiss for lack of personal jurisdiction for correction of errors at law." *Shams v. Hassan,* 829 N.W.2d 848, 853 (Iowa 2013). When deciding whether it has personal jurisdiction over a defendant, the district court must make factual findings. *Id*. If those findings of fact are supported by substantial evidence, they are binding on appeal. *Capital Promotions, L.L.C. v. Don King Prods., Inc.,* 756 N.W.2d 828, 833 (Iowa 2008). We are not bound, however, by the district court's application of legal principles or

> conclusions of law. *Rucker v. Taylor,* 828 N.W.2d 595, 599 (Iowa 2013).

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

C. Contentions

The Iowa courts were without personal jurisdiction over the Defendants when suits were first filed by NCMIC, and thus, the defective petitions were void. Because they were void, they were incapable of being effectively amended by the substitution of the party-Plaintiff. Thus, the final judgments against Drs. Archibald (App. Vol. 8 p. 165), Centi (App. Vol. 8 p. 270), Estelle (App. Vol. 8 p. 357), Kalange (App. Vol. 9 p. 77), Kircher-Carbone (App. Vol. 9 p. 105), Lomboy (App. Vol. 9 p. 165), Mansfield (App. Vol. 9 p. 198), Margolies (App. Vol. 9 p. 201), McMurtry (App. Vol. 9 p. 237), Veys (App. Vol. 10 p. 167), and McDowell (App. Vol. 9 p. 228) cannot stand. They must be reversed.

The Iowa courts lacked personal jurisdiction over Cedar Park Vision Center, P.A., and Jeff Wineinger. The Petition falsely alleged that:

> [E]ach agreed to personal jurisdiction and venue in any State or Federal Court located where the Lessor's or Assignee's principal corporate headquarters is located. The corporate headquarters of the Plaintiff is located in Clive, Polk County, Iowa. The Iowa District Court in Polk

> County is therefore the proper court in which to bring this action under the floating forum selection clause contained in the lease agreement.

(App. Vol. 4 p. 285, ¶4.)

The Wineinger Contract clearly lacks any forum selection or personal jurisdiction clause. (App. Vol. 4 pp. 293-94.) Thus, the above quoted allegation was contradicted by the attachment to the petition, which attachment controls. The final judgment against Wineinger was entered without personal jurisdiction and cannot stand. (App. Vol. 10 p. 185.) It must be reversed.

NCMIC Finance Corp.'s creation of a newly-formed, wholly-owned Iowa corporation, and assignment of the contracts to the new corporation to trigger a forum selection clause, occurred too late—the Doctors (Defendants in this Court) had already filed suit contesting the enforcement of the contracts in a forum which they properly selected–the Federal District Court. The Federal District Court denied NCMIC and PSFS 3's motion to dismiss the Federal District Court action for lack of personal jurisdiction, with a finding by the Federal District Court that "it would be inequitable to allow Defendants [NCMIC and PSFS 3] to shop the actions to another forum simply by assigning the Leases after the lawsuit [was] filed." (App. Vol. 1 p. 286.) This finding was not appealed by NCMIC or PSFS 3 and became law of the case when the

Eleventh Circuit affirmed the final judgments entered by the Federal District Court.

The assignments were done solely to facilitate universally condemned, including condemned by Iowa, forum shopping.

D. Argument on Issue 1.

> Forum shopping has been almost universally condemned. *See, e.g.,* Baird, [*Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1987)], *supra* note 80, at 824-28; Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974). For an argument that forum shopping may be unobjectionable under certain circumstances, *see* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

Robert Kenneth Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567, 1610 (1991). *See also First Midwest Corp. v. Corporate Finance Assocs.*, 663 N.W.2d 888 (Iowa 2003); and, *United States v. Luros,* 243 F. Supp. 160, 176 (N.D. Iowa 1965)(forum shopping is "against public policy.")

All Iowa orders which addressed personal jurisdiction, after the first such order, simply relied on the earlier findings of fact. (App. Vol. 5 p. 302, and 740; Vol. 7 p. 627.) Those facts are:

> [T]he defendant[s] argue that the creation of PSFS 3 as the purported assignee of the leases entered into between PSFS and the applicable defendants is nothing more than a sham which should not be upheld by

the court. The defendants go to great length outlining the interrelated nature of PSFS and PSFS 3, along with what is claimed to be no indicia that PSFS 3 exists as a separate viable entity. Counsel for PSFS 3 counter with the affidavit of Patrick McNerney, the president of PSFS 3, which incorporates the master documents generated at the time of the assignment. *These documents* persuasively make the case that PSFS 3 is a separate corporate entity, properly capitalized and which receives the benefit of the monthly lease payments called for under the assignments in question.

(App. Vol. 5 pp. 309-10; emphasis added.)

1. Benefit of Monthly Lease Payments

The documents attached to the affidavit of Patrick McNerney are:

- Assignments of Lessor's Interest in Leases and Assumption of Liability under Leases from PSFS to PSFS 3, an Iowa Corporation ("PSFS 3") (Exhibit 2-A[6]) [App. Vol. 5 pp. 188-89];

- Administration and Servicing Agreement between PSFS and PSFS 3(Exhibit 2-B) [App. Vol. 5 pp. 190-91];

- Articles of Incorporation of PSFS 3 Corporation (Exhibit 2-C) [App. Vol. 5 pp. 192-95];

- Security Agreement between PSFS 3 and Wells Fargo Capital Finance, LLC (Exhibit 2-D) [App. Vol. 5 pp. 196-97];

- Omnibus Officer's Certificate (Exhibit 2-E) [App. Vol. 5 pp. 198-200];

- Consent of Wells Fargo Capital Finance, LLC dated March 31,

[6]The exhibit numbers here and in the following list refer to those exhibits attached to the affidavit of Patrick McNerney, App. Vol. 5 pp. 184-187.

2010 (Exhibit 2-F) [App. Vol. 5 pp. 201-203];

- Sample Notice of Assignment of Lease to PSFS 3 (Exhibit 2-G) [App. Vol. 5 p. 204, which is Exhibit 2-G, is not the document referenced in the order]

(App. Vol. 5 pp. 188-204.)

These documents establish only that:

- Articles of Incorporation of PSFS 3 Corporation were filed with the Secretary of State of Iowa on March 30, 2010, authorizing the issuance of 10,000,000 shares of common stock having a $1 per share par value, and naming three initial directors (2-C) [App. Vol. 5 pp. 192-95];

- A Security Agreement[7] was entered into between PSFS 3 and Wells Fargo Capital Finance, LLC, in its capacity as administrative agent for a lender group providing financing to NCMIC Finance Corporation, on March 31, 2010, whereby Wells Fargo would consent to the assignment of certain contracts which were previously pledged by NCMIC to Wells Fargo as security for certain loan accommodations, to PSFS 3 by NCMIC

    - provided those contracts [the Financing Agreements] remained subject to the security pledge made by NCMIC to stand as collateral for the repayment of NCMIC's debt to Wells Fargo. (2-D) [App. Vol. 5 pp. 196-97]

- Having first established that the Financing Agreements would remain subject to a pledge as collateral to stand for the debts of NCMIC Finance Corp., NCMIC then signed an Assignment of Lessor's Interest in Leases and Assumption of Liability Under

[7]Only page 1 and page 25 of the Security Agreement were attached to the affidavit, and the submitted document did not contain any signatures on behalf of Wells Fargo.

Leases to PSFS 3 without attaching the itemization of which Financing Agreements were assigned. (2-A) [App. Vol. 5 pp. 188-89]

- On the same date, PSFS 3 signed an Administration and Servicing Agreement whereby NCMIC would act as collecting agent for the Financing Agreements at the sole cost and expense of NCMIC and would transfer the aggregate monthly receipts collected by NCMIC to an account in Wells Fargo Bank having PSFS 3 as the beneficiary. (2-B.) [App. Vol. 5 pp. 190-91]

    - What was concealed by omission by PSFS 3 through this presentation of an un-cross-examined affidavit was that the exact amount of money transferred into the PSFS 3 account by NCMIC was immediately transferred back out of the account, and back to the account of NCMIC; thus, it was NCMIC and not PSFS 3 which received the benefit of the monthly lease payments. (D. 113.) [App. Vol. 5 pp. 696:12-25.]

On January 12, 2011, Defendants took the deposition of Patrick McNerney, to finally have the opportunity to cross-examine him about his assertions made in his affidavit upon which the trial court relied in making the above findings of fact. (App. Vol. 5 pp. 629-704.) On January 24, 2011, the Gossett Defendants filed their renewed motion to dismiss for lack of personal jurisdiction. (App. Vol. 5 pp. 705 and 712.) In the motion, the Gossett Defendants itemized every indicia that PSFS 3 was a sham corporation formed solely to trigger the forum selection clause. (App. Vol. pp. 707-709, ¶ 10.) Included in the itemized indicia was the following concerning the "benefit of

the monthly lease payments":

> m. No additional money was deposited into the bank account of PSFS 3 Corporation until July 30, 2010, when $608,546.52 was transferred into the account by NCMIC Finance Corporation, and immediately transferred out to NCMIC Finance Corporation;
>
> n. Every month thereafter, an amount of money was transferred into the bank account of PSFS 3 by NCMIC Finance Corporation, and immediately transferred back from PSFS 3 to NCMIC Finance Corporation in the exact, same amount;

(App. Vol. 5 p. 708, ¶¶ 10.m. and n.)

In response, PSFS 3 filed a supplemental affidavit of Patrick McNerney which further explains the rouse:

> *k)* ... PSFS 3 Corporation signed a $13,500,000 note with NCMIC Finance Corporation on April 1, 2010 as compensation for the assignment of all "three column" leases to it, which totaled approximately the same amount. Principal and interest payments on that note are made monthly in arrears based upon actual PSFS 3 Corporation owned lease payments received during the prior month[8]. The balance of the PSFS 3 Corporation note obligation due to NCMIC Finance Corporation on December 31, 2010 was $12,373,927.33. The "Ten Dollars and other value consideration" recited in the Assignment is represented by the above referenced note. The debt is real and the payments are real. (See Exhibit 3B)

(App. Vol. 5 pp. 727 ¶ k.)

This passage asserts that after the overwhelming majority of Doctors

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[8]The trial court was kept uninformed by PSFS 3 of the repayment terms of the note—PSFS 3 never produced the note or offered it into evidence to support the hearsay testimony that "the debt is real and the payments are real."

having 3-column Financing Agreements stopped paying NCMIC, and filed suit to have the court declare that the Financing Agreements were unenforceable, NCMIC sold those leases (which were pledged to Wells Fargo as collateral security for repayment of NCMIC debt) to a newly formed corporation for full face value without removing the security lien (which secured the debt owed by NCMIC to Wells Fargo) from the leases—something which could never be accomplished in an open market, arm's-length transaction. Further, NCMIC made certain that it received the full benefit of the payments made by obligors on the Financing Agreements by having PSFS 3 turn those payments over to NCMIC as ostensible payments on the debt owed by PSFS 3 to NCMIC for the supposed purchase of the Financing Agreement. Add to this mix the Servicing Agreement (App. Vol. 5 pp. 190-91) which provides that NCMIC will collect the Financing Agreements at its sole expense (which it must because PSFS 3 has no employees, no business, and no income), and the rouse is completed: NCMIC has simply assigned bare legal title to the Financing Agreements to PSFS 3 keeping the full beneficial interest (*i.e.*, the full financial benefit) to itself for the sole purpose of forum shopping. This rouse should not be condoned by this Court.

In response to paragraphs m and n quoted above, McNerney stated in his

affidavit:

> *m)* ... PSFS 3 Corporation lease payments received are by necessity transferred to its depository account in arrears and subsequently transferred to NCMIC Finance Corporation for payments on its note obligation.
>
> *n)* ... The transfers occur in order for PSFS 3 Corporation to makes [sic] its payments on its note obligation due to NCMIC Finance Corporation each month. Each transaction is properly and accurately recorded in the appropriate financial records of each corporation.

(App. Vol. 5 p. 727, ¶¶ m and n.)

This proof that PSFS 3 did not receive the "benefit of the monthly lease payments called for under the assignments in question," did not alter the trial court's decision, which denied the motion to dismiss for lack of personal jurisdiction, writing

> [T]he defendants re-urge this court to reconsider its prior ruling that found that the assignment from PSFS to PSFS 3 was valid. The primary basis for this request is the deposition testimony of Patrick McNerney, the president of PSFS 3. The court has carefully considered that testimony, but cannot *at this point* conclude that the assignment was so tainted as to require the PSFS 3 litigation to no longer be active in Iowa.

(App. Vol. 5 p. 741; emphasis added.)

Of course, the question presented to the court was one of personal jurisdiction having Constitutional implications, not whether the litigation should or should not be "active in Iowa."

> "The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. [915, 922], 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796, 805 (2011). "The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power." *J. McIntyre Mach.*, [*Ltd. v. Nicastro*], 564 U.S. [873, 879], 131 S.Ct. at 2786, 180 L.Ed.2d at 773 [(2011)] (plurality opinion). "As a general rule, neither statute nor judicial decree may bind strangers to the State." *Id.* at [880], 131 S.Ct. at 2787, 180 L.Ed.2d at 774. "A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Id*. (*quoting Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945)). We recently reaffirmed that " '[f]airness is the crux of the minimum-contacts analysis.' " *Sioux Pharm, [Inc. v. Summit Nutritionals Int'l, Inc.*, 859 N.W.2d [182,] at 189 [(Iowa 2015)] (quoting *Shams,* 829 N.W.2d at 854).

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

At trial, the Insoft Defendants proved how money was transferred on a monthly basis, between July 2010 and November 2010. First, money was transferred into PSFS 3's account once per month by NCMIC. Next, the same amount of money was immediately transferred out of PSFS 3's account, back to NCMIC. Thus, NCMIC always had the full benefit of the payments received on the Financing Agreements, regardless of the amount, although the money had ostensibly been transferred to PSFS 3. (App. Vol. 6 pp. 445:19 to 447:14;

Vol. 7 pp. 82-93.) Even after the presentation of this evidence, the trial court simply did not rule on the issue, but rather, relied on the trial court's previous order denying the motion to dismiss:

> In an earlier ruling, the Iowa District Court in and for Polk County, Iowa, through the Honorable Judge Michael Huppert ruled that these assignments were valid and it provided Iowa jurisdiction over the agreements. The Defendants' Interlocutory Appeal on this issue was denied[9].

(App. Vol. 7 p. 627.)

The decision of the trial court to exercise personal jurisdiction over the Gossett Defendants was not supported by substantial evidence, and thus, is not entitled to deference by this Court. Upon consideration of the underlying evidence, this Court should determine that the assignments were done for improper forum shopping purposes after the Federal District Court action was started, and thus, cannot be given effect. This result is *res judicata*, established by the Eleventh Circuit appeal, which the Iowa state court is bound to follow. IOWA CODE ANN. § 626A.1. Thus, the trial court was without personal jurisdiction, and the final judgment entered by the Iowa state court must be

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[9]There was no interlocutory appeal, and thus, no denial of the interlocutory appeal. There was an "Application for Three-Justice Review Pursuant to IOWA R. APP. P. 6.1002(5)." It was this application for an interlocutory appeal which was denied without explanation. (App. Vol. 5 pp. 431 and 433.)

vacated as being entered without jurisdiction.

2. Properly Capitalized

Another of the scant facts found by the trial court in ruling that it had personal jurisdiction over the Gossett Defendants was that PSFS 3 was "properly capitalized." (App. Vol. 5 p. 310.) The documents upon which the trial court made this ruling did not disclose the business of PSFS 3; did not disclose its debt (the later testimony of Mr. McNerney established that PSFS 3 signed a promissory note to NCMIC for $13,000,000–App. Vol. 6 pp. 606:22 to 607:13); did not disclose how many shares of $1 par value stock were issued; and did not disclose that the initial capitalization of $500,000 was made with a promissory note payable from NCMIC to PSFS 3. (App. Vol. 5 pp. 184-86.)

While the Iowa Jury Instructions provide undercapitalization as a factor in establishing the abuse of the corporate privilege (IOWA CIVIL J. INST. 3300.2), they do not define "undercapitalization." The Supreme Court of the United States provided the measure of proper capitalization:

> An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability.

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

There were no facts before the trial court from which it could determine, based on the nature and magnitude of the corporate undertaking, whether PSFS 3 was adequately, or inadequately, capitalized.

> We also find the district court's finding the corporation was properly capitalized is not supported by substantial evidence. At its formation the corporation had only $3000 in assets. In order to make a down payment for the purchase of the business, JKLM borrowed $12,000 from a related entity. Even before purchasing the business, the corporation had four times as much debt as capital. After purchasing the business, JKLM had forty times as much debt as initial capital contribution. We find the capital contribution was insufficient to consider JKLM properly capitalized.

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

If the debt-to-capital ratio of 4.0 is too high to support a finding of proper capitalization, then so too would be the ratio of PSFS 3's debt ($13,500,000) to capital ($500,000), a ratio of 27.

> "Inadequate capitalization" as would weigh in favor of piercing the corporate veil generally means capitalization very small in relation to the nature of the business of the corporation and the risks attendant to such businesses. Adequacy of capitalization must be measured at the time of incorporation because it reveals whether the corporation was created to avoid liability.

* * *

> Adequate capitalization is a question of fact that turns on the nature of the business of the particular corporation.

1 FLETCHER CYC. CORP. § 41.33. *See also Briggs Transp. Co., Inc. v. Starr Sales Co., Inc.,* 262 N.W.2d 805, 810 (Iowa 1978):

> "It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege." (*Quoting* Henry W. Ballantine, BALLANTINE ON CORPORATIONS, § 129, pp. 302-303 (rev. ed. 1946)*).*

Because there was no evidence of the business to be done by PSFS 3, there was no evidence that the capital was not trifling compared to the business to be done. Likewise, there was no evidence of the risks of loss for such an undisclosed business, and no evidence of the prospective liabilities of PSFS 3 for which the Court could determine whether the unencumbered capital was reasonably adequate to meet.

> **(1) Undercapitalization**. The adequacy of corporate capital, measured by the nature and magnitude of the corporate undertaking, has long been considered relevant to piercing analysis.

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

In short, this finding of fact by the trial court has no evidentiary support.

3. Separate Corporate Entity

The third finding of fact made by the trial court in denying the motion to dismiss was that PSFS 3 is "a separate corporate entity." (App. Vol. 5 p. 310.) It is, in fact, a corporate entity. Therefore, it is legitimate to say that PSFS 3 is an individual legal entity. It is wholly owned by NCMIC, has nothing except an interlocking board of directors and officers, and holds bare legal title to the Financing Agreements (whose benefits remain flowing to NCMIC) for the sole purpose of triggering a floating forum jurisdiction clause. Thus, it would be a stretch beyond the evidence presented to hold that PSFS 3 is a corporate entity separate from NCMIC. Said another way, this finding of fact is not supported by substantial evidence.

The Federal District Court found that "it would be inequitable to allow [NCMIC] to shop the actions to another forum simply by assigning the Leases after the lawsuit was filed." (App. Vol. 1 p. 286.) "When the court has held the parent was not independent of its subsidiary it has done so to prevent the parent from perpetrating a fraud or ***injustice***, evading just responsibility or ***defeating public convenience***." *Inn Operations, Inc. v. River Hills Motor Inn Co.,* 261 Iowa 72, 84, 152 N.W.2d 808, 815 (1967) (emphasis added). *See also Schnoor v. Deitchler,* 482 N.W.2d 913, 916 (Iowa 1992).

The fact that it is a corporate entity having a name different than NCMIC is not sufficient to support a finding that NCMIC successfully pulled off its rouse of shopping these cases to Iowa by assigning the Financing Agreements to a new, Iowa corporation which it wholly-owned.

Each federal court which dealt with the issue found that the floating forum selection clause would not be given effect under these circumstances. The Federal District Court specifically found that "it would be inequitable to allow [NCMIC and PSFS 3] to shop the actions to another forum simply by assigning the [Financing Agreements] after the lawsuit is filed." (App. Vol. 1 p. 286.)

4. Sham Transaction

The assignment of the Financing Agreements to PSFS 3 by NCMIC was a sham. "Sham" means "1. A false pretense or fraudulent show; an imposture. 2. Something that is not what it seems; a counterfeit. 3. Someone who pretends to be something that he or she is not; a faker." BLACK'S LAW DICTIONARY (10th ed. 2014).

Prior to the assignment, NCMIC had approximately 780 3-column Financing Agreements having an amount owing to NCMIC of approximately $13,000,000. (App. Vol. 6 pp. 427:15 to 428:3; App. Vol. 7 p. 120.) Those

Financing Agreements were pledged by NCMIC as collateral security for repaying debt owed by NCMIC to Wells Fargo. (App. Vol. 7 p. 120.) NCMIC's staff would collect the payments, and make certain that the funds were deposited into NCMIC's bank account at Wells Fargo. (App. Vol. 6 pp. 445:19 to 447:14; App. Vol. 7 pp. 82-93.)

After the assignment, the face value of the amount owing on the Financing Agreements was approximately $13,000,000. Those Financing Agreements were pledged by NCMIC and PSFS 3 as collateral security for NCMIC repaying the debt owed by NCMIC to Wells Fargo. (App. Vol. 7 p. 120.) NCMIC's staff would collect the payments at its sole cost and expense, and make certain that the funds were initially deposited into NCMIC's bank account with Wells Fargo. (App. Vol. 7 pp. 116-118.) Then, NCMIC would transfer those funds, in the exact amount received, from NCMIC's account to PSFS 3's account at Wells Fargo, and then immediately transfer the exact amount of those funds from PSFS 3's account back to NCMIC's account, with the result being that the same amount of money which would have been deposited into NCMIC's account before the assignment was deposited into NCMIC's account after the assignment. (App. Vol. 6 pp. 445:19 to 447:14; Vol. 7 pp. 82-93.) The end result remained the same. NCMIC ended up with

the same amount of money with or without the assignment. The assignment was not what it seemed; it was a sham.

This Court has so held under similar circumstances in *Iowa Supreme Court Com'n on Unauthorized Practice of Law v. A-1 Associates, Ltd.,* 623 N.W.2d 803, 808 (Iowa 2001), where a collection company took an assignment of a debt, and pursued the debt in its name, including filing suit *pro se* to enforce the debt. This Court upheld an injunction preventing the unauthorized practice of law by the collection company, looking behind the facial validity of the assignment to what was really happening—the collection company kept a portion of the amount collected as a collection fee, and remitted the balance to the original creditor.

> A–1's claimed status as a bona fide assignee is defeated under this record, however, because the assignment—though absolute in form—is, in fact, a transfer intended primarily to secure payment for services rendered. *See Padzensky,[v. Kinzenbaw,]* 343 N.W.2d [467] at 471 [(Iowa 1984)] (distinguishing assignment from transfer for security). This is demonstrated by the fact that A–1 pays nothing for the purported "assignment." The letter accompanying the "assignment" confirms that the creditor will receive the proceeds of any recovery less a fixed sum representing A–1's commission for its services. In the case of small claims litigation, those services are indisputably legal in nature. Courts throughout the country have condemned this practice as an attempt by collection agencies to accomplish indirectly what the law otherwise prohibits. *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.,* 85 N.M. 521, 514 P.2d 40, 49 (1973) (assignments procured by credit bureau not truly taken to acquire title and ownership but to facilitate

> delivery of legal services for consideration); *State ex rel. Frieson v. Isner,* 168 W.Va. 758, 285 S.E.2d 641, 651–52 (1981) (citing numerous cases to support conclusion that ***assignment taken solely to maintain suit on creditor's claim is sham perpetrated on court to circumvent unauthorized practice laws***);

(Emphasis added.)

Here, the assignment was taken solely to maintain suit in Polk County District Court and is a sham perpetrated on the Court, and the Gossett Defendants, to commit forum shopping. This Court should rule consistently with *A-1 Associates, Ltd.*, find that the assignment is a sham, and thus, that the Polk County District Court was without personal jurisdiction. This Court followed *A-1 Associates, Ltd.*, in *Iowa Supreme Court Comm'n on the Unauthorized Practice of Law v. Sullins*, 893 N.W.2d 864, 871 (Iowa 2017).

This Court does not have to speculate about the real purpose of the assignments. NCMIC was directed by its counsel (Des Moines, New York, and Miami) to assign the Financing Agreements to a newly-formed, wholly-owned entity for forum shopping purposes after the putative class action was already underway in Florida:

> I recommend that all these leases be assigned to another Iowa corporation for the following reasons:
>
> (1) The above mentioned paragraph is very clear that jurisdiction and venue is proper in the home state and county of any assignee. Thus if

these leases are assigned to an Iowa corporation located in Polk County we have a lock on jurisdiction and venue here in Polk County.

(App. Vol. 7 p. 121.)

The assignment was a sham which should not be condoned by this Court.

5. Contractual Floating Forum Selection Clause

NCMIC Finance Corp. sued seven Gossett Defendants for money damages in Iowa for breaches of contracts before a putative class action was filed by the remaining Gossett Defendants in the Federal District Court as discussed in fn. 3. (App. Vol. 1 p. 41; Vol. 2 pp. 41, 202 and 241.) All contracts were written by NCMIC and labeled "Equipment Lease Application and Agreement" ("Financing Agreement"). (App. Vol. 6 pp. 630-31.) As found by the Federal District Court, affirmed on appeal, and now the law of the case, the Financing Agreements financed the acquisition of the Exhibeos used in the waiting rooms of the doctors, from the vendor, Brican. (App. Vol. 1 p. 790.)

The Financing Agreements contained no agreement as to jurisdiction over the original parties to the contract. (App. Vol. 2 p. 46 ¶13.) The floating jurisdiction clause was triggered only upon assignment:

13. GOVERNING LAW, CONSENT TO JURISDICTION AND VENUE OF LITIGATION. This lease and each Schedule shall be

> governed by the internal laws for the state in which Lessor's or Lessor's assignee's principal corporate offices are located. ***IF THIS IS ASSIGNED, YOU AGREE*** THAT ANY DISPUTE ARISING UNDER OR RELATED TO THIS LEASE WILL BE ADJUDICATED IN THE FEDERAL OR STATE COURT WHERE THE ASSIGNEE'S CORPORATE HEADQUARTERS IS LOCATED AND WILL BE GOVERNED BY THE LAW OF THAT STATE. YOU HEREBY CONSENT TO PERSONAL JURISDICTION AND VENUE IN THAT COURT AND WAIVE ANY RIGHT TO TRANSFER VENUE.

(App. Vol. 2 p. 46 ¶13; emphasis added.)

Iowa, as most states, has adopted RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) providing an implied covenant of good faith and fair dealing in every contract. *Harvey v. Care Initiatives, Inc.,* 634 N.W.2d 681, 684 fn. 4 (Iowa 2001). As applied to this contract, and this provision, the implied covenant of good faith and fair dealing would limit the type of assignment of the contract which would trigger the floating forum selection clause to a valid arm's-length transaction and would not permit a sham assignment to a wholly-owned, newly created entity to facilitate forum shopping. *See, Garcia v. Eidal Intern. Corp.,* 808 F.2d 717, 722 (10th Cir. 1986); *Vista Outdoor Inc. v. Reeves Family Tr.,* 725 Fed. Appx. 17, 21 (2d Cir. 2018); and, Joyce Colson, *Upstream, Midstream, Downstream-the Valuation of Royalties on Federal Oil and Gas Leases*, 70 U. COLO. L. REV. 563, 569 (1999).

Defendants challenged the personal jurisdiction of the Iowa court by motion to dismiss pointing out that the alleged floating forum selection clause in the Financing Agreements did not provide a forum selection unless and until the Financing Agreements were assigned, and they had not been assigned. (App. Vol. 5 p. 42.)

After NCMIC's counsel confirmed that the floating forum selection clause was predicated on an assignment of the Financing Agreements, counsel recommended to NCMIC, and NCMIC followed its counsel's recommendation, that NCMIC form a new, wholly-owned Iowa corporation and assign the Financing Agreements to it to trigger the forum selection. (App. Vol. 7 p. 121 second ¶.) In other words, counsel recommended, and NCMIC followed the recommendation, that NCMIC violate the implied covenant of good faith and fair dealing so that NCMIC could shop these cases to its preferred forum.

After the assignment, PSFS 3 amended the petitions which had been filed by NCMIC, interjecting itself as the new Plaintiff, and filed original petitions against the remaining Gossett Defendants. (App. Vol. 3 p. 241 and 265 for examples.) The suits filed before amendment based personal jurisdiction over the Defendants solely on a non-existent forum selection clause. (App. Vol. 2 p. 41 ¶ 4.) Because there was no applicable forum

selection clause, and because personal jurisdiction was based on the sole allegation of a non-existent forum selection clause, the suits were void, and not curable by amendment. *See Evans v. Ober,* 256 Iowa 708, 711, 129 N.W.2d 78, 80 (1964)(decided under former rules).

6. Case Beginnings in Iowa

The first 3-column case filed by NCMIC sought to enforce a Financing Agreement between Dr. Lomboy, a California resident, and NCMIC. (App. Vol. 2 p. 41.) It was filed on December 18, 2009. At that time, PSFS 3 did not exist and there was no contractual agreement to personal jurisdiction. In each petition against the seven Gossett Defendants first sued by NCMIC, the allegation for personal jurisdiction was:

> 4. Pursuant to the written lease agreement and written continuing personal guaranty executed by the parties, each agreed to personal jurisdiction and venue in any State or Federal Court located where the assignees [sic] corporate headquarters is located. The corporate headquarters of the Plaintiff is located in Clive, Polk County, Iowa. The Iowa District Court in Polk County is therefore the proper court in which to bring this action under the floating forum selection clause contained in the lease agreement.

(App. Vol. 2 p. 41 ¶ 4.)

The Financing Agreement was attached to the Petition. (App. Vol. 2 pp. 45-46.) It did not support the jurisdictional allegation. It revealed NCMIC to

be the original party to the contract, not an assignee. Therefore, the floating forum selection clause did not vest the Iowa courts with personal jurisdiction over the Defendants.

The Iowa Rules of Civil Procedure no longer require that a contract which forms the basis of the action be attached to the petition. *Compare* IOWA R. CIV. P. 1.418 with former Rule 91. However, NCMIC chose to attach a copy of the contract to the petition, and based its claim of personal jurisdiction over the Gossett Defendants on a term in the contract. (App. Vol. 2 pp. 45-46.) The attachment to the complaint contradicted the allegation in the complaint; therefore, the attachment controls. *WINBCO Tank Co., Inc. v. Palmer & Cay of Minn., L.L.C.*, 435 F. Supp. 2d 945, 955 (S.D. Iowa 2006) (decided under comparable federal rule). *See also,* 71 C.J.S. *Pleading* § 530; 61A AM. JUR. 2D *Pleading* § 71.

In the absence of an agreement on jurisdiction, personal jurisdiction of the Iowa courts would be governed by the laws of Iowa as constrained by decisions of the Supreme Court of the United States in such cases as *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945) and cases from this Court applying *Int'l Shoe*. However, NCMIC alleged no other basis for personal jurisdiction. Because NCMIC's allegation of jurisdiction failed, the

Iowa courts were without personal jurisdiction over the Gossett Defendants.

7. Personal Jurisdiction in Iowa Challenged by Motion to Dismiss

As each case was filed against a Gossett Defendant, a motion to dismiss challenging the Iowa court's personal jurisdiction was either filed or the Defendant was joined to a previously filed motion. (App. Vol. 5 pp. 41 and 49.) Each such motion was denied. (App. Vol. 5 pp. 302 and 740.) An alternative motion to stay proceedings in deference to the Florida Federal District Court putative class action, on principles of comity, was granted, and the Federal District Court putative class action continued in Florida. (App. Vol. 5 pp. 312-13; App. Vol. 5 pp. 739-43.)

8. Case Beginnings Federal District Court, Southern District of Florida

Before PSFS 3 was formed, all Gossett Defendants (including Lomboy) on behalf of themselves and all similarly situated, filed a putative class action in the Federal District Court on March 16, 2010. (App. Vol. 1 p. 41.) The suit sought a declaratory judgment that the Financing Agreements were unenforceable because they were procured by fraud. (App. Vol. 1 p. 41.)

The choice of forum by the Gossett Defendants (as the Plaintiffs in the federal action) is accorded deference under Iowa and Florida law. *See*

Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725, 728 (Iowa 1981); and, *J.L.S. v. R.J.L.,* 708 So. 2d 293, 295 (Fla. 2d DCA 1998).

Under FED. R. CIV. P. 13, NCMIC and PSFS 3 (once formed) were compelled to file a counterclaim for money damages for breach of the contracts which were the subject of the putative class action. *Carter v. Pub. Fin. Corp.,* 73 F.R.D. 488 (N.D. Ala. 1977). Rather than file compulsory counterclaims, NCMIC continued to file enforcement actions in Iowa erroneously claiming that Defendants submitted themselves to Iowa jurisdiction by the inapplicable and misquoted forum selection clause. (App. Vol. 2 p. 41 through Vol. 4 p. 295 as examples.)

9. Universally Condemned Forum Shopping–Iowa

Shortly after filing the Federal District Court action, counsel for the Doctors wrote to NCMIC's attorney, questioning jurisdiction of the Iowa courts, pointing out that the floating forum selection clause in the Financing Agreements applied only after the agreements had been assigned, and they had not been assigned. (App. Vol. 7 p. 120 third ¶.) The Miami, New York, and Des Moines attorneys for NCMIC recognized the deficiency in the forum selection clause, and wrote to NCMIC:

The governing law, jurisdiction and venue paragraph of the three

> column format leases to which PSFS [NCMIC Finance Corp.] is the original lessor is somewhat unclear as to whether jurisdiction and venue is proper in the home state and county of the PSFS [NCMIC Finance Corp.].

(App. Vol. 7 p. 121 second paragraph.)

The attorneys recommended that NCMIC shop the collection cases to its preferred forum[10]—Iowa, by assigning the Financing Agreements to a newly formed and wholly owned Iowa corporation. (App. Vol. 7 p. 121 second ¶.) The benefit to NCMIC, as expressed by the lawyers, included:

> The Polk County, Iowa courts have handled many leasing cases and a body of law has been developed over the last five years which upholds these leases. If PSFS [NCMIC Finance Corp.] or any assignee had to litigate these leases in jurisdiction all over the United States there is an increased chance of inconsistent ***or adverse verdicts***.

(App. Vol. 7 p. 121 ¶(3); emphasis added.)

Who would have thought that the benefits of forum shopping would have included the Polk County District Court entering judgment in favor of PSFS 3 without affording the Defendants a trial?

The Financing Agreements served as collateral pledged by NCMIC to

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[10] **forum-shopping** (1954) The practice of choosing the most favorable jurisdiction or court in which a claim might be heard.

BLACK'S LAW DICTIONARY (11th ed. 2019).

secure repayment of certain lines of credit extended through Wells Fargo Capital Finance ("Wells Fargo"). (App. Vol. 7 p. 120 first paragraph.) NCMIC needed approval from Wells Fargo to assign the Financing Agreements to a different entity. (App. Vol. 7 p. 120 first paragraph.) On March 26, 2010, NCMIC requested Wells Fargo consent, and added:

> We have been asked to take care of this quickly as responses will soon be due on a couple of suits originated in FL and CA.
>
> * * *
>
> It is important we deal with the possible venue challenge issue immediately in order to thwart the need to potentially litigate defaulted lease contracts outside of Iowa.

(App. Vol. 7 p. 120 first and sixth paragraphs.)

On March 30, 2010, NCMIC created PSFS 3 Corporation "in accordance with advice of counsel," and directed the assignment of the Financing Agreements to PSFS 3 "to conform to the aforementioned advice of counsel." (App. Vol. 7 pp. 74 through 94.)

10. United States Judicial Panel on Multidistrict Litigation

Several cases similar to that filed in the Federal District Court were filed by other doctors in other federal districts, but not Iowa. (App. Vol. 1 p. 1086.) The Charlip Defendants, joined by the Gossett Defendants, filed a petition with

the MDL Panel on June 14, 2010, requesting that the MDL Panel transfer all such cases to the Southern District of Florida. (App. Vol. 1 pp. 958 and 969.) NCMIC agreed that the cases should be consolidated, but argued that the only appropriate forum was Iowa. (App. Vol. 1 p. 998.) After oral argument in Boise, ID, on July 29, 2010, the MDL Panel unanimously transferred all pending federal district court actions to the Southern District of Florida, and by doing so, overruled NCMIC's assertion that the parties had agreed to litigate only in the courts of Iowa. (App. Vol. 1 p. 1086.) NCMIC sought no review of the transfer order.

11. Southern District of Florida

On May 5, 2010, NCMIC filed its motion to dismiss the Federal District Court action for improper venue, claiming that the 3-column Financing Agreements had been assigned to PSFS 3, an Iowa corporation, and therefore, pursuant to the floating forum selection clause, only Iowa had jurisdiction. (App. Vol. 1 p. 126.) The Federal District Court denied the motion to dismiss by order dated Dec. 6, 2010, on several grounds. (App. Vol. 1 p. 281.) First, it found that the forum selection clause was permissive, not mandatory. (App. Vol. 1 p. 284.) Second, the putative class action was filed before the assignment of the Financing Agreements to PSFS 3, and thus, "it would be

inequitable to allow Defendants to shop the actions to another forum simply by assigning the Leases after the lawsuit [was] filed." (App. Vol. 1 p. 286.)

> Finally, NCMIC informed the MDL Panel of the existence of the floating forum-selection clauses, and the MDL Panel still sent the cases to Florida. Because the MDL Panel has already expended resources in deciding where these actions should be litigated and the clauses in the PSFS Agreements are being triggered belatedly for the purposes of forum shopping, the Motion To Transfer will also be denied as to the cases involving PSFS Agreements.

(App. Vol. 1 p. 286.)

This order became law of the case when NCMIC and PSFS 3 failed to appeal the order when it became appealable.

12. *Res Judicata* on Personal Jurisdiction

The final judgment rendered by the Federal District Court concerning the 3-column litigation was appealed by the Gossett Defendants to the Eleventh Circuit Court of Appeals. (App. Vol. 1 p. 1089.) NCMIC did not cross-appeal the order concerning jurisdiction. The final judgment was affirmed on November 22, 2016. (App. Vol. 1 p. 1089.)

The issues decided by the Federal District Court in the 3-column litigation included that it had personal jurisdiction over the parties contrary to PSFS 3's claim to Iowa jurisdiction, and that it would be inequitable to allow PSFS 3 to shop the actions to another forum by assigning the Financing

Agreements after the lawsuit was filed. (App. Vol. 1 p. 286.) At the time of the Eleventh Circuit appeal, PSFS 3 knew that (1) the Gossett Defendants contested the exercise of personal jurisdiction over them by the Iowa courts; (2) the Iowa court rejected that contest by interlocutory order; (3) this Court denied the application of the Gossett Defendants for an interlocutory appeal of that order thereby leaving the order interlocutory; (4) the MDL Panel rejected PSFS 3's claim to Iowa jurisdiction; (5) the Southern District of Florida rejected PSFS 3's claim to Iowa jurisdiction; and, (6) resolution of the appeal by the Eleventh Circuit would create law of the case, or claim preclusion, concerning all issues which were actually appealed and all those issues which could have been addressed in the appeal. *United States v. Escobar-Urrego,* 110 F.3d 1556, 1560 (11th Cir. 1997)(*quoting Williamsburg Wax Museum v. Historic Figures,* 810 F.2d 243, 250 (D.C.Cir.1987)); *see also Watkins v. Elmore,* 745 Fed. Appx. 100, 103 (11th Cir. 2018) for claim preclusion or *res judicata*.

PSFS 3 failed to cross-appeal the final judgment which exercised jurisdiction over the Gossett Defendants in denigration of PSFS 3's claim to Iowa jurisdiction. Therefore, as of November 22, 2016, personal jurisdiction of the Iowa state court was determined to be lacking—it would be inequitable

to enforce the floating forum selection clause to facilitate the forum shopping of PSFS 3, especially after the Federal District Court litigation had begun. As a result of the Eleventh Circuit ruling, the absence of personal jurisdiction of the Iowa courts over the Gossett Defendants was *res judicata*. *Matsui v. King*, 547 N.W.2d 228 (Iowa Ct. App. 1996). Under the Full Faith and Credit Clause of the United States Constitution, the Iowa state court was required to afford full faith and credit to the decision of the federal courts and dismiss the Iowa 3-column cases for lack of personal jurisdiction. Failure to do so is reversible error.

Res judicata was raised to no avail in the Insoft Defendants' motion for summary judgment, at trial, and in post-trial briefing. (App. Vol. 6 p. 275, 376, 575, and Vol. 7 p. 465.)

13. Insoft Defendants Sued in Iowa

On June 3, 2010, PSFS 3 sued the Insoft Defendants in the Iowa state court. (App. Vol. 3 p. 93.) On July 7, 2010, the Insoft Defendants filed their motion to dismiss for lack of personal jurisdiction, or in the alternative, to stay. (App. Vol. 5 pp. 49 and 116 as examples.) This motion to dismiss was based on an interpretation of the forum selection clause—permissive or mandatory, and questioned the legitimacy of the assignment of the Financing Agreements

to the newly-created corporation PSFS 3 for purely forum shopping purposes. (App. Vol. 5 pp. 49 and 116 as examples.) The resistance filed by NCMIC and PSFS 3 only seven business days before a hearing on the motion, included an affidavit of the CEO of NCMIC Group, Inc., and PSFS 3, Patrick McNerney. (App. Vol. 5 pp. 144, 184-87.)

Oral arguments were held on the motion to dismiss on July 9, 2010, (App. Vol. 5 p. 214.) The parties had not previously agreed that affidavits could be used to establish whatever facts were necessary to support or oppose the motion. IOWA R. CIV. P. 1.431(6) provides that "[e]vidence to sustain or resist a motion may be made by affidavit or in any other form to which the parties agree or the court directs. The court may require any affiant to appear for cross-examination." At the hearing, the Gossett Defendants requested permission to cross-examine the allegations made in the affidavit should the court intend to rely on it. (App. Vol. 5 p. 248:5-8.) The witness was not present at oral arguments, and thus, was not cross-examined at the hearing. (App. Vol. 5 p. 214.) The court issued an order denying the motion to dismiss on August 12, 2010, in full reliance on the contested affidavit, without first providing Defendants the opportunity to cross-examine the affiant, stating, in part:

Counsel for PSFS 3 counter with the affidavit of Patrick McNerney, the

president of PSFS 3, which incorporates the master documents generated at the time of the assignment. These documents persuasively make the case that PSFS 3 is a separate corporate entity, properly capitalized and which receives the benefit of the monthly lease payments called for under the assignments in question.

(App. Vol. 5 p. 311.)

These findings of fact are not supported by substantial evidence.

The Doctors sought permission from this Court to effectuate an interlocutory appeal from the order denying the motion to dismiss for lack of personal jurisdiction, but this Court denied permission. (App. Vol. 5 pp. 323, 431, 433, and 435.)

14. Renewed Motion to Dismiss Iowa Action for Lack of Personal Jurisdiction After Deposition

The Gossett Defendants' deposed Patrick McNerney. (App. Vol. 5 p. 629.) Based on the facts established during the deposition, the Gossett Defendants filed a new motion to dismiss for lack of personal jurisdiction. (App. Vol. 5 p. 706.) The deposition established:

a. PSFS 3 paid no fees to the State of Iowa for incorporating;
b. PSFS 3 paid no compensation to anybody, whether it be by salary or wages, full-time or part-time;
c. PSFS 3 had no paid employees;
d. PSFS 3 has paid no rental for any offices;
e. PSFS 3 has paid no telephone bills to conduct business;
f. PSFS 3 has paid no electric bills;
g. PSFS 3 has purchased no office supplies;

h. PSFS 3 purchased no paper, whether stationary or plain;
i. PSFS 3 has paid for no business cards;
j. PSFS 3 had made no payment on any promissory notes, other than a note created by NCMIC Finance Corporation when NCMIC Finance Corporation transferred the leases to PSFS 3 Corporation (which "payments" have come by accounting entries, only);
k. PSFS 3 did not pay $10 to NCMIC Finance Corporation as part of the consideration for the purchase of the contracts;
l. Although PSFS 3 Corporation was formed on March 30, 2010, the first money deposited into any bank account of PSFS 3 Corporation was $500,000 used by NCMIC Finance Corporation to capitalize PSFS 3 Corporation, which was deposited on May 14, 2010;
m. No additional money was deposited into the bank account of PSFS 3 until July 30, 2010, when $608,546.52 was transferred into the account by NCMIC Finance Corporation, and immediately transferred out of the PSFS 3 account to NCMIC Finance Corporation;
n. Every month thereafter, an amount of money was transferred into the PSFS 3 bank account by NCMIC Finance Corporation, and immediately transferred back to NCMIC Finance Corporation in the exact, same amount;
o. The only other disbursements from the PSFS 3 bank account were for bank service charges, and one in the amount of $264.94 paid to NCMIC Finance Corporation (and Mr. McNerney does not know why); and,
p. Accordingly, contrary to the findings made by this court solely upon the affidavit of Patrick E. McNerney, which was not cross-examined before such reliance, PSFS 3 Corporation does not receive the benefit of the monthly lease payments called for under the assignments in question.

(App. Vol. 5 pp. 629 as quoted in Vol. 5 pp. 707-08.)

This evidence clearly established the concealment by omission of pertinent information which should have been disclosed in the first affidavit

of Mr. McNerney—that PSFS 3 did not receive any of the funds collected by NCMIC from the contract obligors, but rather, NCMIC caused the transfer of such money to, and from, PSFS 3's bank account, back into the bank account of NCMIC. Thus, the finding of fact made by the trial court in the hearing on the first motion to dismiss—that PSFS 3 "receives the benefit of the monthly lease payments called for under the assignments in question," was not supported by substantial evidence.

On March 3, 2011, the court issued its order denying the motion to dismiss, stating in part:

> The primary basis for this request is the deposition testimony of Patrick McNerney, the president of PSFS 3. The court has carefully considered that testimony, but cannot *at this point* conclude that the assignment was so tainted as to require the PSFS 3 litigation to no longer be active in Iowa. The court's reasoning in this regard has not changed from the time it ruled on the issue when first confronted with it:
>
> > The plaintiffs do not shy away from the contention that PSFS 3 was created essentially (if not solely) for the purpose of triggering the forum selection clause in those leases assigned to it. While the defendants who are lessees under those leases may not like the great lengths to which plans were undertaken to create an assignment which would form the basis for the use of such a clause[11], they

[11]"[T]he great lengths to which plans were undertaken to create an assignment which would form the basis for the use of such a clause" is understood by the Gossett Defendants to be a breach of the implied covenants of good faith and fair dealing. The assignment was not an arm's-length

> have not convinced the court that this underlying assignment is fraudulent or otherwise a "sham."

(App. Vol. 5 p. 741 emphasis added.)

The Iowa court stayed the cases pending further order of the court. (App. Vol. 5 p. 743.)

The skeletal findings of fact made by the trial court in its first order denying the motion to dismiss, which resulted in NCMIC being successful in its forum-shopping efforts, are not supported by substantial evidence, and therefore, are not entitled to deference by this Court. All orders which addressed personal jurisdiction, after the first such order, simply relied on the earlier findings of fact. (App. Vol. 5 p. 741; Vol. 7 p. 627.) Those facts are:

> [T]he defendant[s] argue that the creation of PSFS 3 as the purported assignee of the leases entered into between PSFS and the applicable defendants is nothing more than a sham which should not be upheld by the court. The defendants go to great length outlining the interrelated nature of PSFS and PSFS 3, along with what is claimed to be no indicia that PSFS 3 exists as a separate viable entity. Counsel for PSFS 3 counter with the affidavit of Patrick McNerney, the president of PSFS 3, which incorporates the master documents generated at the time of the assignment. *These documents* persuasively make the case that PSFS 3 is a separate corporate entity, properly capitalized and which receives the benefit of the monthly lease payments called for under the assignments in question.

(App. Vol. 5 p. 309-10; emphasis added.)

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transaction. It was done simply to facilitate forum shopping.

The assignment was a sham which should not be condoned by this Court. Additionally, law of the case precluded exercise of personal jurisdiction by the Iowa courts. Each of these independently support a reversal of the final judgments with directions to dismiss the petitions upon remand.

Issue 2: The District Court erred in finding as a matter of law that the Financing Agreements (entitled "Equipment Lease Application and Agreement") were not Credit Agreements as defined in IOWA CODE § 535.17; that the original principal amount of the Credit Agreement was not a material term under IOWA CODE § 535.17; and, that the rate of interest of the Credit Agreement, which could not otherwise be calculated, was not a material term under IOWA CODE § 535.17.

A. How Issue Was Preserved for Appellate Review

This issue was preserved for appellate review by the Insoft Defendants through their Fourteenth Affirmative Defense in their Amended Answer and Affirmative Defenses (App. Vol. 6 pp. 77-78 ¶ 164.); their motion for summary judgment on the same issue (App. Vol. 6 p. 275); the evidence presented at trial (App. Vol. 6 pp. 376 and 575.); their post-trial briefing (App. Vol. 7 p. 465); and, their motion to reconsider, enlarge or modify (App. Vol. 8 p. 47).

B. Standard of Review

> Our review of a grant or denial of summary judgment is at law. IOWA R. APP. P. 4;

Clinton Nat. Bank v. Saucier, 580 N.W.2d 717, 718 (Iowa 1998).

C. Contentions

1. The Financing Agreements are Credit Agreements

IOWA CODE § 535.17(5)(c) defines "Credit Agreement":

> c. "Credit agreement" means any contract made or acquired by a lender to loan money, finance any transaction, or otherwise extend credit for any purpose, and includes all of the terms of the contract. ...

The federal district court was sitting in diversity and was applying the law chosen by the parties—Iowa law. Under Iowa law, specifically *C & J Vantage Leasing Co. v. Wolfe,* 795 N.W.2d 65 (Iowa 2011), an equipment lease which fails to satisfy the requirements of Article 2A of the UCC was determined by this Court to be a disguised sale with a security interest[12]. In the

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[12]While this Court first used the language of "disguised sale with security interest" in *Wolfe*, the language is much older and included in a law review article published just years after adoption of Article 2A of the UCC:

> Promulgated in 1987, Article 2A is the first new article since the introduction of the entire Code in 1951. ... The drafters of Article 2A were frank in their assessment of the confused state of the opinions dealing with the distinction between leases and *sales involving disguised security interests*. ...

Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of UCC Article 2A,* 25 U. MEM. L. REV. 873, 879, 882 (1995).

case *sub judice*, the Financing Agreements have been determined by the federal district court to be sales with security interests (App. Vol. 7 p. 206, fn. 35; p. 263, fn. 22), which means that they are credit agreements, and not leases, under Iowa law.

The federal district court determined that the Doctors[13] "financed the purchase [of certain equipment] through an installment sales or loan agreement labeled as a financing lease (the 'Financing Agreement')" with NCMIC being the financier. (App. Vol. 7 p. 124; also cited as *In re Brican America, LLC, Equipment Lease Litigation*, 2013 WL 3967920 *1-2 (S.D.Fla.).) Further, the federal district court found that "The Financing Agreements are not true leases; rather, they reflect secured transactions because they allow the customer to purchase the equipment for a nominal price (one dollar) at the end of the term" (App. Vol. 7 p. 206, fn. 35).

These rulings are now law of the case in light of the decision of the Eleventh Circuit Court of Appeals in the plenary appeal, *Stephen G. Blank, P.A. v. NCMIC Finance Corp.,* 2016 WL 6871879 (unpublished) (11th Cir.).

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[13]Because the decisions of the USDC for the Southern District of Florida apply to more than just the Insoft Defendants, the phrase "the Doctors" will be used to identify those, including the Insoft Defendants, to whom the decisions apply.

(D. 21.) *Clarke Cnty. Reservoir Comm'n v. Robins,* 862 N.W.2d 166, 178 (Iowa 2015). The ruling is consistent with *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC,* 784 N.W.2d 753 (Iowa 2010) and *C & J Vantage Leasing Co. v. Wolfe,* 795 N.W.2d 65 (Iowa 2011).

2. The Contracts do not Contain All of the Material Terms of a Credit Agreement

The purpose of the credit agreement was for NCMIC to loan money to the Doctor to purchase equipment. The loan was effectuated by NCMIC sending the loan amount to the vendor (Brican America) and the vendor sending the equipment directly to the Doctor. The loan was secured by NCMIC taking title to the equipment with an agreement to transfer title to the Doctor when the loan was fully repaid. (App. Vol. 6 p. 630.)

IOWA CODE § 535.17(1) does not define, or list, what constitutes material terms. The only case which analyses this term of art found in this statute is *C & J Vantage Leasing Co. v. Wolfe,* 795 N.W.2d 65, 82 (Iowa 2011), which provides a listing of material terms of similar contracts: "The agreement laid out the subject matter, ***price***, payment terms, and duration."

In this case, the trial court found that the only terms which were material were the monthly payment amount and the number of months. (App. Vol. 7 p.

634.) There is no case which supports that holding. The following cases are just a few of a many cases which hold that the material terms of a loan usually include the amount loaned and the interest rate for the loan:

> In a contract to loan money, the material terms will generally be: the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms. *Wheeler v. White,* 398 S.W.2d 93, 95 (Tex.1965); *Pine v. Gibraltar Savings Assn.,* 519 S.W.2d 238, 243–44 (Tex.Civ.App.—Houston [1st Dist.] 1974, writ *ref'd n.r.e.*); *accord Stansel v. American Sec. Bank,* 547 A.2d 990, 993 (D.C.App.1988), *cert. denied,* 490 U.S. 1021, 109 S.Ct. 1746, 104 L.Ed.2d 183 (1989); *Champaign Nat'l Bank v. Landers Seed Co., Inc.,* 165 Ill.App.3d 1090, 116 Ill.Dec. 742, 745, 519 N.E.2d 957, 960 (1988), *cert. denied,* 489 U.S. 1019, 109 S.Ct. 1138, 103 L.Ed.2d 199 (1989); *McErlean v. Union Nat'l Bank of Chicago,* 90 Ill.App.3d 1141, 46 Ill.Dec. 406, 410, 414 N.E.2d 128, 132 (1980).
>
> *T.O. Stanley Boot Co., Inc. v. Bank of El Paso,* 847 S.W.2d 218, 221 (Tex. 1992)[14].
>
> Courts throughout the country have repeatedly refused to enforce loan agreements that are missing terms such as the amount of money to be lent, the interest rate to be charged, the mode of repayment, when the repayments were to commence or end, the amount of periodic payments, and the nature of the security.

Fairfield Six/Hidden Valley P'ship v. Resolution Trust Corp., 860 F. Supp. 1085, 1089 (D. Md. 1994)(citing cases from Texas, Nebraska, North Dakota, Georgia, and Missouri).

> These terms would include, for example, the intended duration of the

[14]42 cases cite this headnote, mostly Texas cases.

> line of credit; the applicable rate of interest to be charged for any loan emanating from such an agreement, or the basis for how such interest would be ascertained; what duration or date or dates were contemplated for maturity of such loans; and what mode or rate of repayment was contemplated, *i.e.*, whether the entire amount would be repayable or if repayment in installments would be acceptable. (*See, e. g., Fleming v. Parkview Colonial Manor Investment Co.* (1975), 31 Ill.App.3d 6, 8, 333 N.E.2d 587.) The absence of such material elements from the allegations of the amended complaint or any of the exhibits attached, as well as the absence of any bases from which inferences with respect to them can be drawn, impel the conclusion that McErlean has failed to allege an enforceable contract. *Lee Shell Co. v. Model Food Center, Inc.* (1969), 111 Ill.App.2d 235, 250 N.E.2d 666.

McErlean v. Union Nat. Bank of Chicago, 414 N.E.2d 128, 132 (Ill. App. Ct. 1980)

> Under the usual principles of lender liability, "[a] loan commitment is not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied. When the commitment does not contain all of the essential terms ... the prospective borrower cannot rely reasonably on the commitment, and the lender is not liable for either a breach of the contract or promissory estoppel." (9 Miller & Starr, *op. cit. supra*, § 28.4, at p. 8, fn. omitted [9 Miller & Starr, CAL. REAL ESTATE (2d ed. 1989) § 28.4.) ***The material terms of a loan include the identity of the lender and borrower, the amount of the loan, and the terms for repayment***. (*Op. cit. supra*; *see Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 891, 893 [131 Cal.Rptr. 836].)

Peterson Dev. Co. v. Torrey Pines Bank, 284 Cal. Rptr. 367 (Ct. App. 1991)

> (2) sets forth all material terms and conditions of the credit agreement, including the loan amount, rate of interest, duration, and security

CONSUMER CRED. GUIDE P 6154 (C.C.H.), 2015 WL 6908635

> Under a separate statute, a debtor may bring an action on a credit agreement only if the agreement is in writing, sets forth all material terms and conditions of the agreement, including the loan amount, rate of interest, duration and security, and is signed by the creditor and the debtor. (Law at ¶ 6154)

CONSUMER CRED. GUIDE P 4040 (C.C.H.), 2015 WL 6907784.

The material terms missing from the Financing Agreements are the loan amount (which is the purchase price) and the rate of interest. Because these terms are missing, the Financing Agreements are unenforceable.

3. Wineinger Contract

The Wineinger Contract is a good example of an equipment Financing Agreement which satisfies IOWA CODE § 535.17(1). (App. Vol. 4 p. 293-94.) It is properly labeled as a Financing Agreement. It does not try to mischaracterize the loan as a lease[15]. It discloses the total amount financed, the

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[15]Documentation disclosed by PSFS 3 in the Federal District Court action relating to the Wineinger Contract contains the following notation:

> 11/2/2007 11:19:06 AM – Paula Nuzum:
> did as finance agreement as taxes were already paid upfront [sic]
> on McCormick's account.

(NC_058118.)

The identity of McCormick is unclear, but the same document further discloses:

> 10/31/2007 2:24:07 PM - Jo Lynn Quick:

monthly payment, and the number of months over which the payments are to be made. From those factors, Dr. Wineinger (and PSFS 3) can calculate the rate of interest (which is 11%).

The existence of the Wineinger Contract evidences that NCMIC had the proper form to use to satisfy IOWA CODE § 535.17(1) but chose not to use it for any other contract. The Wineinger Contract is the only Financing Agreement in this litigation which satisfies IOWA CODE § 535.17(1). All the others should have been found to violate IOWA CODE § 535.17(1).

4. Materiality Decided Under Objective Standard

Materiality is determined by an objective test. *Pauscher v. Iowa Methodist Med. Ctr.,* 408 N.W.2d 355, 361–62 (Iowa 1987).

> "Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class.... The alleged misrepresentations and omissions, whether material or immaterial,

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> Paying off 5006274-3 from John McCormick-59 remaining payments Dr. McCormick only made one payment. Potential start date for new lease would be 11/29/07.jq

(NC_058119.)

The Total Amount Financed of $26,018.72 was paid by NCMIC Finance Corp. to "NCMIC." (NC_058111.) These documents were available as evidence in the Wineinger trial which never occurred because of the entry of a final judgment without a trial.

> would be so equally for all investors composing the class. As vital, the plaintiff class's inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims. As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison."

Freeman v. Grain Processing Corp., 895 N.W.2d 105, 121 (Iowa 2017) *quoting with approval Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds,* 568 U.S. 455, 459–60 (2013).

5. Usury

It is helpful to look at what the usury statute does not say—it does not say that commercial transactions are exempt from the operation of this statute. IOWA CODE § 535.2. Clearly, the Iowa legislature could have employed those words in enacting the statute, and chose not to.

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992)

Here is what the statute says:

> 1. Except as provided in subsection 2, the rate of interest shall be five cents on the hundred by the year in the following cases, ***unless the parties shall agree in writing for the payment of interest at a rate*** not exceeding the rate permitted by subsection 3:

* * *

> 2. a. The following persons may ***agree in writing to pay any rate of interest***, and a person so agreeing in writing shall not plead or interpose the claim or defense of usury in any action or proceeding, and the person agreeing to receive the interest is not subject to any penalty or forfeiture for agreeing to receive or for receiving the interest:
>
> * * *
>
> (5) A person borrowing money or obtaining credit for business ... purposes, ... As used in this paragraph, ... "business purpose" includes but is not limited to a commercial, service, or industrial enterprise carried on for profit and an investment activity.

IOWA CODE § 535.2.

Where, within the Financing Agreements (which is the writing), do the Doctors agree to pay any rate of interest? After ten years of searching, the Doctors still cannot find any such agreement. Certainly the Financing Agreements charge interest. That is seen clearly in the amortization schedules prepared by NCMIC in connection with each loan. (App. Vol. 7 p. 44.) Paragraph 1 of the Financing Agreements provide what is to be done if the interest rate which is charged is too high, and what default rate of interest will be charged if there is a default, but they do not state the contract rate nor do they provide enough information to permit any Doctor, other than Dr. Wineinger, to calculate it. The Financing Agreements provide, in pertinent

part:

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

(D. 137.)

PSFS 3 realized this deficiency, and tried hard at its deposition to refuse to acknowledge that interest was charged on these transactions:

> Q. The default interest is different than the interest that was applied with this contract; right?
> A. Interest was not applied to the contract.
> Q. So it didn't carry any interest at all?
> A. No. It's a lease.
>
> * * *
>
> Q. The $508 a month for 60 months included all of the income that NCMIC hoped to earn over the life of the lease; correct?
> A. Correct.
> Q. That income is interest, is it not?
> A. We earn income over the life of the lease.
> Q. You don't earn interest at all?
> A. We earn income over the life of the lease.
> Q. And you heard my question; right? I understood your answer. Does NCMIC charge interest when it leases equipment?

A. No. We earn income.
Q. And that income is consisted of what?
A. The income is consistent over the life of the lease. You earn for -- and it's -- and it's earned over the entire lease of the -- or entire lease.
Q. But what is it that's earned?
A. It's income from the lease.

* * *

Q. So would you agree with me that the income that NCMIC was going to earn on these contracts was interest?
A. It's unearned income.
Q. It's not unearned when it gets paid. And I'm not asking about categorization of income for tax purposes. I'm asking to identify what it is.

It's not a markup on property that you are reselling as Costco may do; correct? You're not taking a product from somebody, selling it on the open market to somebody else and marking up the price; correct?
A. The lease has a payment, and we -- we earn income on it. ***We do not break out interest or principal on a lease.***

(App. Vol. 7 pp. 393:12-17; 401:19 to 402:17; and, 403:9 to 404:1.)

Breaking out interest and principal on each Financing Agreement was ***exactly*** what NCMIC did before the sham assignment. In each of the Doctors' files, NCMIC printed out an amortization schedule from software which it utilized—TValue. (App. Vol. 7 p. 44 as an example.) The same witness who testified that NCMIC does not break out interest or principal on a lease, acknowledged that the TValue amortization schedule (App. Vol. 7 p. 44) does exactly that:

Q. This document does break out payments by principal and interest; correct?
A. Correct.

(App. Vol. 7 p. 429:20-22.)

Each amortization schedule breaks down the annual amounts paid between principal and interest, but none of the Financing Agreements contain a statement of what the interest rate is, nor do they, other than the Wineinger Contract, provide the Doctors with sufficient other parameters for the Doctors to calculate it. (App. Vol. 6 p. 630-01 as an example.) Therefore, the Financing Agreements violate both the Statute of Frauds and the Usury statute.

PSFS 3 admitted at its corporate deposition that no interest rate was disclosed.

Q. Now, there's no place in the financing agreement where Dr. Abari is disclosed to be paying an interest rate of 8.99 percent, is there?
A. To my knowledge, there's no requirement that it be delineated.

* * *

A. ***No***, because it's a lease. The rental payment is disclosed.

(App. Vol. 7 pp. 320:1-6, 320:19-20; emphasis added.)

But as we have seen, the contract was not a lease—it was, and remains, an "installment sales or loan agreement labeled as a financing lease." (App. Vol. 7 p. 124.) The omission of a principal amount of the loan and a stated rate

of interest prevent the trial court from being able to calculate damages. As Mr. Cole implied in his above-quoted testimony, a rental payment under a lease consists of the principal amount of the loan with interest calculated throughout the life of the lease. That amount is divided by the term of the lease to arrive at the monthly payment. When there is a default under a lease, the measure of damage is the remaining amount of payments unpaid. But that is not true of an installment sales or loan agreement.

An installment sales or loan agreement would have a stated principal amount which would bear interest at the contract rate. As each payment is made, the interest which has been earned to date, at the stated contract rate, is paid and a portion of the principal balance is paid down—just as a mortgage. If there is a default in payment, the principal balance remaining at the time of the breach would bear interest at a contractual, or default, rate until paid. Most contracts increase the contract rate of interest as a consequence of default. Here, the unknown, initial contract rate was increased to the contractually provided default rate of 18%. To determine damages, the court would apply the default rate of 18% to the remaining principal balance. But, because of the absence of disclosure of the original amount of the loan (*i.e.*, the principal) and the contractual rate of interest, default interest of 18% cannot be applied to the

remaining principal—it is unknown and uncalculable.

Because PSFS 3 had the burden of proving its damages, and because PSFS 3 cannot prove damages as a consequence of the failure to disclose the original amount of the loan and the initial contractual rate of interest, this Court should reverse the final judgments and remand them to the trial court with instructions to dismiss the petitions for failure to prove damages.

D. Conclusion

Although NCMIC internally had sufficient information to permit it to calculate an amortization schedule, starting with the amount that it designated as a "Loan," the Nominal Annual Interest Rate, and the number of payments (App. Vol. 7 p. 44), NCMIC failed to disclose either the Loan amount (which would be the purchase price) or the rate of interest in the Financing Agreements. The Financing Agreements other than the Wineinger Contract violate the Iowa Statute of Frauds with the result being that they are unenforceable. They also violate the Iowa Usury statute.

Thus, this Court should reverse the final judgments and remand them to the trial court with instructions to dismiss the petitions for failure to prove damages, for violation of the Iowa Statue of Frauds, and for violation of the Iowa Usury statute.

Issue 3: The District Court deprived Appellants of their Due Process Rights under the U.S. and Iowa Constitutions by entering Final Judgments without permitting them to present a defense, without a trial, and without evidence (and not as a result of a motion for dismissal, summary judgment or judgment on the pleadings).

A. How Issue Was Preserved for Appellate Review

Appellants resisted the motion filed by PSFS 3 to enforce the stipulation (App. Vol. 7 p. 687) and argued against the motion at the oral argument (App. Vol. 8 pp. 93:9 to 96:23), thus preserving the issue for appellate review.

B. Standard of Review

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

C. Contentions

The district court deprived Defendants of their state and federal Due Process Rights by entering final judgments against them without affording them a trial on the disputed issues or the right to present a defense. U.S. CONST. AMEND. XIV; IOWA CONST. ART. I, § 9. Because of this, the final judgments cannot stand.

D. Argument on Issue 3

Due Process is foundational to the rule of law. David E. Benz, *Is Less*

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

> [I]t is the right of the parties to a trial, unless a rule of procedure provides for the court to resolve the matter without a trial, such as through summary judgment, dismissal, striking of pleadings as a sanction, or judgment on the pleadings: ...

Washington-S. Nav. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1924). *See also* Charles W. Joiner, *Determination of Controversies Without a Factual Trial*, 32 IOWA L. R. 417 (Vol. 3 March 1947).

Similarly, a defendant has the right to a trial on the merits. *Boddie v. Connecticut,* 401 U.S. 371, 377–79 (1971).

> The legislature in its discretion may, without denial of due process of law, prescribe changes in the rules of evidence for the trial of civil cases, ... subject in all cases, however, to the limitation that ***it may not preclude a party from presenting the facts supporting his theory of the case***.

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

Boddie has been cited by this Court seventeen times, most recently in *Bonilla v. Iowa Bd. of Parole,* 18-0477, 2019 WL 2710742, at *20 (Iowa June 28, 2019), although in a criminal setting.

> It is clear, however, that when a hearing is afforded, due process demands contestants be given notice thereof sufficient to permit a reasonable opportunity to appear and assert their rights. 16 AM.JUR.2D, *Constitutional Law*, pages 966-969; 16A C.J.S. *Constitutional Law* § 628, pages 861-867; *Eves v. Iowa Employment Security Commission*, Iowa, 211 N.W.2d 324, filed October 17, 1973, and authorities there cited; *cf.* Davis, ADMINISTRATIVE LAW (one volume edition) pages 162-164 (1972).

Smith v. Iowa Employment Sec. Comm'n, 212 N.W.2d 471, 472 (Iowa 1973). *Richards v. Jefferson Cty.,* 517 U.S. 793, 797 n.4 (1996); *see also Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 570 n.7 (1972) ("Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing "); 18A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4449 (2d ed. 2002) (referring to "[o]ur deep-rooted historic tradition that everyone should have his own day in court"); *see, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights cannot be deprived except pursuant to constitutionally adequate procedures."); *see, e.g., Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

IOWA R. CIV. P. 1.901 defines a trial as a "judicial examination of issues in an action, whether of law or fact." IOWA CODE ANN. § 624.1 provides that

"All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law."

As this Court stated in *Fin. Mktg. Services, Inc. v. Hawkeye Bank & Tr. of Des Moines,* 588 N.W.2d 450, 460 (Iowa 1999):

> Also of importance to our analysis is the concept that "[d]ue process mandates that persons who are required to settle disputes through the judicial process 'must be given a meaningful opportunity to be heard.'" *In re Marriage of Seyler,* 559 N.W.2d 7, 9 (Iowa 1997) (*quoting Boddie v. Connecticut,* 401 U.S. 371, 377, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 118 (1971)).

In other words, except (1) when a default for failure to respond to a complaint is entered, or (2) when a litigant fails to comply with the rules of the court, a Defendant is entitled to a trial to resolve disputed issues of fact.

None of the Defendants was afforded the right to be heard on the issue of how much money was paid, and left owing, on that Defendant's contract, or whether that particular Defendant was a proper party. Refusing to provide that right to be heard violated Defendants' Due Process Rights, and the final judgments entered cannot stand.

> The right to present a defense is so fundamental and essential to a fair trial that it is accorded the status of an incorporated right through the Fourteenth Amendment's Due Process Clause. *Osborn v. State,* 573 N.W.2d 917, 921 (Iowa 1998). We have explained the right to present a defense as follows:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."
>
> *Id*. at 921 (*quoting Washington,* 388 U.S. at 19, 87 S.Ct. at 1923, 18 L.Ed.2d at 1023).

State v. Clark, 814 N.W.2d 551, 560–61 (Iowa 2012).

None of the Defendants were afforded the right to offer evidence in their defense on non-common issues, and final judgments were entered on hearsay affidavits not subjected to cross-examination. This cannot stand in a country which holds to the rule of law. The final judgments must be set aside. As a consequence of this violation of due process rights, final judgments were entered against 73 entities which were not parties to any contract, a matter which could have been resolved as each case was called to trial. (App. Vol. 10 pp. 636-37–a spreadsheet showing the contracting party and the different name against which a final judgment was entered.)

Issue 4: The District Court erred in awarding entitlement to attorneys' fees to PSFS 3 without evidence that PSFS 3 was obligated to pay any attorneys' fees (*i.e.*, had "incurred" those fees).

A. How Issue Was Preserved for Appellate Review

This issue was preserved for appellate review by proof at trial that PSFS 3 Corp. paid no attorneys' fees and was never obligated to pay any such fees. (App. Vol. 6 p. 448:11-20; App. Vol. 7 pp. 82-93, 116-118.) The issue was further preserved for review by Defendants' Motion to Reconsider, Enlarge, or Modify Final Judgment and Embedded Memorandum of Law. (App. Vol. 10 pp. 197, 203-04, 220-226, 428, 436, 453-458, 487, 495, 512-517.)

B. Standard of Review

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

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

C. Contentions

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

It has long been the requirement in Iowa, as in most other states, that a

party seeking an award of attorneys' fees prove that it either paid, or was obligated to pay, those fees. *Swartz v. Ballou,* 47 Iowa 188, 195 (1877).

Defendants' Exhibit Q, pp. 22-24 (App. Vol. 7 p. 94) was admitted into evidence. (App. Vol. 6 p. 383:6-10.) Defendants' Exhibit Q, pp. 22-23 was an Administration and Servicing Agreement (App. Vol. 7 pp. 116-18) which provided, in pertinent part, that NCMIC would act as billing and collecting agent for the benefit of PSFS 3 ***at NCMIC's "sole cost and expense.***" The contract does not contain any indemnification provision whereby PSFS 3 would become responsible to reimburse NCMIC for the costs of collection. The contract contains an integration clause.

The contract was amended once, but the amendment (App. Vol. 7 pp. 118) does not address collection costs.

The absence of any payment of fees by PSFS 3, or a requirement of PSFS 3 to reimburse NCMIC for those collection costs, was confirmed by the testimony of the president of PSFS 3 Corp., Greg Cole. (App. Vol. 6 p. 417:11-19.) Mr. Cole also confirmed that PSFS 3 paid no attorneys' fees for the prosecution of its case against Dr. Insoft. (App. Vol. 6 p. 448:1-20.)

The contractual agreement on attorneys' fees provides only for reimbursement of all the costs and attorneys' fees incurred by PSFS 3. (App.

Vol. 6 p. 631 ¶ 9.) This language limits any award of attorneys' fees to those actually incurred by PSFS 3. Because PSFS 3 established that it did not incur or pay any fees, PSFS 3 failed to carry its burden of proof on the issue of fees and thus, it was error for the trial court to award entitlement to attorneys' fees to PSFS 3.

The final judgment awarding entitlement to attorneys' fees must be reversed.

Conclusion

The final judgments under review were entered by the trial court without personal jurisdiction over the Defendants, and thus, must be reversed with instructions to dismiss those actions upon remand.

Incorporation of Arguments of Charlip Defendants

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

Request for Oral Argument

The Defendants request oral argument in this matter.

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because: [X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt. The proof brief contained 17,494 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1); this brief contains 17,873 words excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

Certificate of Service

I hereby certify that on July 20, 2020, I electronically filed the foregoing with the Clerk of the Court using the EDMS system which will send notification of such filing to the following:

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