IN THE SUPREME COURT OF IOWA

NO. 19-0514

PSFS 3 CORPORATION,
Plaintiff/Appellee

v.

MICHAEL P. SEIDMAN, D.D.S., P.C., et al.,
Defendants/Appellants

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
CONSOLIDATED CASE NUMBER: LACL114226

THE HONORABLE MICHAEL D. HUPPERT AND
THE HONORABLE SCOTT D. ROSENBERG

APPELLEE'S FINAL BRIEF

Benjamin P. Roach AT0006588
Randall D. Armentrout AT0000543
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: bproach@nyemaster.com
rdarmentrout@nyemaster.com

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES 9

ROUTING STATEMENT 15

STATEMENT OF THE CASE 16

STATEMENT OF THE FACTS 20

I. THE DISTRICT COURT CORRECTLY HELD THAT THE FINANCE AGREEMENTS ARE ENFORCEABLE UNDER IOWA LAW. 34
- A. Lessees failed to preserve error. 34
- B. Standard of review. 35
- C. Based on *Wolfe*, the Finance Agreements are valid under Iowa Code Chapter 535. 35
  1. Section 535.2 does not require disclosure of an "interest rate." 38
  2. Section 535.17(1) does not require disclosure of the amount NCMIC paid to Brican for the Equipment. 39
  3. Even if the Finance Agreements were required to disclose an interest rate, the Finance Agreements remain enforceable. 45

II. THE DISTRICT COURT CORRECTLY CALCULATED DAMAGES AND ENTERED EACH JUDGMENT. 46
- A. Lessees failed to preserve error on misnomers in some Lessees' names. 46
- B. Standard of review. 48
- C. The contract damages for each Lessee was and is undisputed. 48
- D. The district court's entry of monetary judgments did not deprive Lessees of due process. 49
- E. The district court properly found Lessees in breach of the Finance Agreements and the evidence submitted to the district court is sufficient to support the damage awards. 54
- F. PSFS 3 was allowed to charge default interest on the accelerated amount owed upon default and the 18% default interest rate is not unconscionable. 59

G. Because the Judgments do not involve future unpaid payments, reducing damages to present value is not appropriate. 62

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT POSSESSED PERSONAL JURISDICTION OVER LESSEES. 63
A. Preservation of error. 63
B. Standard of review. 64
C. The Iowa district court had personal jurisdiction over Lessees based on the forum selection clauses. 65
1. PSFS 3 met its burden to establish a prima facie case of personal jurisdiction. 65
2. Lessees did not meet their burden to establish that exercise of personal jurisdiction against them in Iowa would be unreasonable and unjust. 67
D. The district court's finding that NCMIC's assignments to PSFS 3 were valid is supported by substantial evidence. 69
E. Lessees' attempt to "pierce the corporate veil" is misplaced. . 71
F. The district court correctly concluded that res judicata principles do not foreclose exercise of jurisdiction over Lessees by Iowa courts. 76

IV. AS THE DISTRICT COURT HAS NOT YET AWARDED ATTORNEY FEES, THIS ISSUE IS PREMATURE. 78

V. CONCLUSION. 79

REQUEST FOR ORAL ARGUMENT 80

CERTIFICATE OF FILING AND SERVICE 81

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS 82

TABLE OF AUTHORITIES

Cases

Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C., 734 N.W.2d 473 (Iowa 2007) 65

Agricredit Acceptance Co., LLC v. Goforth Tractor, Inc., No. 00-1694, 2002 WL 1973195 (Iowa Ct. App. Aug. 28, 2002) 64

Aurora Business Park Assoc., L.P. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa 1996) 56, 59, 60

Beck v. Equine Estates Dev. Co., 537 N.W.2d 798 (Iowa Ct. App. 1995) .. 74

Beckman v. Kitchen, 594 N.W.2d 699 (Iowa 1999) 79

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019) 49

Boddie v. Connecticut, 401 U.S. 371 (1971) 49

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805 (Iowa 1978) 72

C&J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011) . 15, 35, 36, 37, 38, 39, 40, 41, 57, 58, 62

C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc., 412 N.W.2d 593 (Iowa 1987) 71, 72

Capital Promotions L.L.C. v. Don King Prods., Inc., 756 N.W.2d 828 (Iowa 2008) 64

Carson Grain & Implement, Inc. v. Dirks, 460 N.W.2d 483 (Iowa Ct. App. 1990) 63

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 50

Clinton Nat. Bank v. Saucier, 580 N.W.2d 717 (Iowa 1998) 42

Duck Creek Tire Serv., Inc. v. Goodyear Corners, LC, No. 11-1930, 2012 WL 4513807 (Iowa Ct. App. Oct. 3, 2012) 55

EFCO Corp. v. Norman Hwy. Constructors, Inc., 606 N.W.2d 297 (Iowa 2000) 65

Employers Mutual Casualty Co. v. Van Haften, 815 N.W.2d 17 (Iowa 2012) 34, 76

Fairfield Six/Hidden Valley Partnership v. Resolution Trust Corp., 860 F.Supp. 1085 (D. Md. 1994) 42

Fed. Land Bank of Omaha v. Wilmarth, 252 N.W. 507 (Iowa 1934) 61

First American Bank v. Urbandale Laser Wash, LLC, 874 N.W.2d 650 (Iowa Ct. App. 2015)..... 42

First Midwest Corp. v. Corporate Fin. Assoc., 663 N.W.2d 888 (Iowa 2003) 78

Flom v. Stahly, 569 N.W.2d 135 (Iowa 1997)..... 48

Frontier Leasing Corp. v. Bowlers Country Club, Inc., No. 07-1161, 2008 WL 4725183 (Iowa Ct. App. Oct. 29, 2008) 79

Frontier Leasing Corp. v. Waterford Golf Assocs., LLC, No. 10-0019, 2010 WL 4484390 (Iowa Ct. App. Nov. 10, 2010) 38

Geiger v. Peoples Trust and Savings Bank, No. 18-1428, 2019 WL 4678179 (Iowa Ct. App., Sept. 25, 2019) 42

GreatAmerica Leasing Corp. v. Star Photo Lab, Inc., 672 N.W.2d 502 (Iowa Ct. App. 2003)..... 15

GreatAmerica Leasing Corp. v. Wahoo Prods. of Fla., Inc., No. 09-CV-137-LRR, 2011 WL 1559935 (N.D. Iowa Apr. 21, 2011)..... 56, 57

Hammond v. Fla. Asset Fin. Corp., 695 N.W.2d 1 (Iowa 2005)..... 65

In re Johnston, No. 03-03495S, 2004 WL 3019472 (Bankr. N.D. Iowa Dec. 20, 2004)..... 61

In re Marriage of Ballstaedt, 606 N.W.2d 345 (Iowa 2000) 72

In re Marriage of Seyler, 559 N.W.2d 7 (Iowa 1997)..... 49, 50, 51

In re O.P.M. Leasing Servs., Inc., 21 B.R. 993 (Bankr. S.D.N.Y. 1982)..... 58

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 65

Interco Inc. v. Nat'l Sur. Co., 900 F.2d 1264 (8th Cir. 1990) 50

Iowa Supreme Court Commission on Unauthorized Practice of Law v. A-1 Associates, Ltd., 623 N.W.2d 803 (Iowa 2001) 74, 75

Johnson v. Mitchell, 489 N.W.2d 411 (Iowa Ct. App. 1992)..... 50, 54

Karon v. Elliott Aviation, 937 N.W.2d 334 (Iowa 2020) 66

King v. Wilson, No. 13-2018, 2014 WL 6681609 (Iowa Ct. App. Nov. 26, 2014)..... 74

Lett v. Grumauer, 300 N.W.2d 147 (Iowa 1981) 59

Liberty Bank, F.S.B. v. Best Litho, Inc., 737 N.W.2d 312 (Iowa Ct. App. 2007)..... 15, 65, 66, 67, 68

M/S Bremen v. Zapata Off–Shore Co., 407 U.S. 1 (1972) 66, 67

McErlean v. Union Nat'l Bank of Chicago, 414 N.E.2d 128 (Ill. App. 1980) 43

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002) 47

Minger Const., Inc. v. Clark Farms, Ltd., No. 14-1404, 2015 WL 7019046 (Iowa Ct. App. Nov. 12, 2015)..... 71

MuchMore Equip., Inc. v. Grover, 315 N.W.2d 92 (Iowa 1982)..... 45

National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)..... 65

Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa 1973)..... 56

Peterson Development Co., Inc. v. Torrey Pines Bank, et al., 284 Cal. Rptr. 367 (Cal. App. 1991)..... 43

Picray v. City of Des Moines, No. 97-0241, 1999 WL 1136455 (Iowa Ct. App. Dec. 13, 1999) 51

Power Equipment, Inc. v. Tschiggfrie, 460 N.W.2d 861 (Iowa 1990)... 45, 46

Prudential Ins. Co. of America v. Rand & Reed Powers Partnership, 972 F.Supp. 1194 (N.D. Iowa 1997) 59

Rolfe State Bank v. Gunderson, 794 N.W.2d 561 (Iowa 2011)..... 35

Sec. State Bank v. Soults Farms, Inc., No. 03-0494, 2004 WL 792673 (Iowa Ct. App. April 14, 2004) 62

Shams v. Hassan, 829 N.W.2d 848 (Iowa 2013)..... 64, 71

Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 104 (Iowa 2011) 77

State Central Bank v. Berzanskis, 149 F.Supp.3d 1121 (S.D. Iowa 2015) .. 64

State v. Bullock, 638 N.W.2d 728 (Iowa 2002)..... 78

Stotts v. Eveleth, 688 N.W.2d 803 (Iowa 2004) 53

Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006)..... 47

Torstenson v. Birchwood Estate, L.L.C., No. 16-0118, 2017 WL 1086222 (Iowa Ct. App. 2017)..... 71

United States v. Raddatz, 447 U.S. 667 (1980) 50

Worthington v. Kenkel, 684 N.W.2d 228 (Iowa 2004)..... 78

Statutes

15 U.S.C. § 1632..... 37

28 U.S.C. § 1404..... 76

Indiana Statute Sec. 26-2-9-4..... 44

Iowa Code Chapter 535 ..... 29, 35

Iowa Code Section 535.17 ..... 15, 34, 36, 37, 38, 39, 41, 42, 44

Iowa Code Section 535.2 ..... 34, 36, 38, 46

Iowa Code Section 554.13000..... 39

Iowa Code Section 554.13108..... 62

Iowa Code Section 554.2719 58

Iowa Code Section 554.9601(1) 58

Iowa Code Section 668.13(2) 63

Other Authorities

9 Williston on Contracts § 21:4 42

Restatement (Second) of Conflict of Laws § 80) 66

Rules

Iowa R. App. P. 6.103(2) 78

Iowa R. App. P. 6.1101(3) 15

Iowa R. App. P. 6.904(3)(1) 48

STATEMENT OF ISSUES

I. DID THE DISTRICT COURT CORRECTLY HOLD THE FINANCE AGREEMENTS ARE ENFORCEABLE UNDER IOWA LAW?

Cases

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

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

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

Fairfield Six/Hidden Valley Partnership v. Resolution Trust Corp., 860 F.Supp. 1085 (D. Md. 1994)

First American Bank v. Urbandale Laser Wash, LLC, 874 N.W.2d 650 (Iowa Ct. App. 2015)

Frontier Leasing Corp. v. Waterford Golf Assocs., LLC, No. 10-0019, 2010 WL 4484390 (Iowa Ct. App. Nov. 10, 2010

Geiger v. Peoples Trust and Savings Bank, No. 18-1428, 2019 WL 4678179 (Iowa Ct. App., Sept. 25, 2019)

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

MuchMore Equip., Inc. v. Grover, 315 N.W.2d 92 (Iowa 1982)

Peterson Development Co., Inc. v. Torrey Pines Bank, et al., 284 Cal. Rptr. 367 (Cal. App. 1991)

Power Equipment, Inc. v. Tschiggfrie, 460 N.W.2d 861 (Iowa 1990)

Rolfe State Bank v. Gunderson, 794 N.W.2d 561 (Iowa 2011)

Statutes

15 U.S.C. § 1632

Indiana Statute Sec. 26-2-9-4

Iowa Code Section 535

Iowa Code Section 535.17

Iowa Code Section 535.17(1)

Iowa Code Section 535.2

Iowa Code Section 535.2(2)(a)(5)

Iowa Code Section 554.13000

Other Authorities

9 Williston on Contracts § 21:4

II. DID THE DISTRICT COURT CORRECTLY CALCULATE DAMAGES AND ENTER JUDGMENTS AGAINST LESSEES?

Cases

Aurora Business Park Assoc., L.P. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa 1996)

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019)

Boddie v. Connecticut, 401 U.S. 371 (1971)

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

Carson Grain & Implement, Inc. v. Dirks, 460 N.W.2d 483 (Iowa Ct. App. 1990)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Duck Creek Tire Serv., Inc. v. Goodyear Corners, LC, No. 11-1930, 2012 WL 4513807 (Iowa Ct. App. Oct. 3, 2012)

Fed. Land Bank of Omaha v. Wilmarth, 252 N.W. 507 (Iowa 1934)

Flom v. Stahly, 569 N.W.2d 135 (Iowa 1997)

GreatAmerica Leasing Corp. v. Wahoo Prods. of Fla., Inc., No. 09-CV-137-LRR, 2011 WL 1559935 (N.D. Iowa Apr. 21, 2011)

In re Johnston, No. 03-03495S, 2004 WL 3019472 (Bankr. N.D. Iowa Dec. 20, 2004)

In re Marriage of Seyler, 559 N.W.2d 7 (Iowa 1997)

In re O.P.M. Leasing Servs., Inc., 21 B.R. 993 (Bankr. S.D.N.Y. 1982)

Interco Inc. v. Nat'l Sur. Co., 900 F.2d 1264 (8th Cir. 1990)

Johnson v. Mitchell, 489 N.W.2d 411 (Iowa Ct. App. 1992)

Lett v. Grumauer, 300 N.W.2d 147 (Iowa 1981)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa 1973)

Picray v. City of Des Moines, No. 97-0241, 1999 WL 1136455 (Iowa Ct. App. Dec. 13, 1999)

Prudential Ins. Co. of America v. Rand & Reed Powers Partnership, 972 F.Supp. 1194 (N.D. Iowa 1997)

Sec. State Bank v. Soults Farms, Inc., No. 03-0494, 2004 WL 792673 (Iowa Ct. App. April 14, 2004)

Stotts v. Eveleth, 688 N.W.2d 803 (Iowa 2004)

Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006)

United States v. Raddatz, 447 U.S. 667 (1980)

Statutes

Iowa Code Section 535.9

Iowa Code Section 554.13108

Iowa Code Section 554.2719

Iowa Code Section 9601(1)

Iowa Code Section 668.13(2)

Rules

Iowa R. App. P. 6.904(3)(1)

III. DID THE DISTRICT COURT CORRECTLY EXERCISE PERSONAL JURISDICTION OVER LESSEES BY VIRTUE OF THE IOWA FORUM SELECTION CLAUSES IN EACH FINANCE AGREEMENT?

Cases

Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C., 734 N.W.2d 473 (Iowa 2007)

Agricredit Acceptance Co., LLC v. Goforth Tractor, Inc., No. 00-1694, 2002 WL 1973195 (Iowa Ct. App. Aug. 28, 2002)

Beck v. Equine Estates Dev. Co., 537 N.W.2d 798 (Iowa Ct. App. 1995)

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805 (Iowa 1978)

C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc., 412 N.W.2d 593 (Iowa 1987)

Capital Promotions L.L.C. v. Don King Prods., Inc., 756 N.W.2d 828 (Iowa 2008)

EFCO Corp. v. Norman Hwy. Constructors, Inc., 606 N.W.2d 297 (Iowa 2000)

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

First Midwest Corp. v. Corporate Fin. Assoc., 663 N.W.2d 888 (Iowa 2003)

Hammond v. Fla. Asset Fin. Corp., 695 N.W.2d 1 (Iowa 2005)

In re Marriage of Ballstaedt, 606 N.W.2d 345 (Iowa 2000)

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)

Iowa Supreme Court Commission on Unauthorized Practice of Law v. A-1 Associates, Ltd., 623 N.W.2d 803 (Iowa 2001)

Karon v. Elliott Aviation, 937 N.W.2d 334 (Iowa 2020)

King v. Wilson, No. 13-2018, 2014 WL 6681609 (Iowa Ct. App. Nov. 26, 2014)

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

M/S Bremen v. Zapata Off–Shore Co., 407 U.S. 1 (1972)

Minger Const., Inc. v. Clark Farms, Ltd., No. 14-1404, 2015 WL 7019046 (Iowa Ct. App. Nov. 12, 2015)

National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)

Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 104 (Iowa 2011)

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

State Central Bank v. Berzanskis, 149 F.Supp.3d 1121 (S.D. Iowa 2015)

Torstenson v. Birchwood Estate, L.L.C., No. 16-0118, 2017 WL 1086222 (Iowa Ct. App. 2017)

Statutes

28 U.S.C. § 1404

Other Authorities

Restatement (Second) of Conflict of Laws § 80)

IV. AS THE DISTRICT COURT HAS NOT YET AWARDED ATTORNEY FEES TO LESSEES, IS THIS ISSUE BEFORE THE APPELLATE COURT?

Cases

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

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

Rules

Iowa R. App. P. 6.103(2)

ROUTING STATEMENT

This appeal involves enforcement of commercial equipment finance agreements that contain "hell-or-high-water clauses," rendering the contracts non-cancellable after the commercial lessee accepts the equipment. Iowa appellate courts have regularly enforced such hell-or-high-water clauses in finance leases and installment sales agreements with security interests. *See C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 76-78 (Iowa 2011); *GreatAmerica Leasing Corp. v. Star Photo Lab, Inc.*, 672 N.W.2d 502, 505-06 (Iowa Ct. App. 2003). Further, the Iowa Supreme Court has held that an interest rate does not need to be included in such an agreement under Iowa Code Section 535.17. *Wolfe*, 795 N.W.2d at 82. Finally, Iowa appellate courts have regularly enforced forum selection clauses in commercial finance agreements. *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 314-318 (Iowa Ct. App. 2007).

As this appeal presents the application of existing legal principles, it is appropriate for the Iowa Supreme Court to transfer the case to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Appellee, PSFS 3 Corporation ("PSFS 3"), is dissatisfied with Appellants' ("Lessees") statements of the case in their separately filed briefs, and thus, files its own as follows:

Nature of the Case

From 2005 through 2008, Lessees agreed to finance business equipment supplied by Brican America, LLC, and Brican America, Inc. (collectively "Brican"), a Florida equipment vendor. Lessees signed equipment lease agreements ("Finance Agreements") with NCMIC Finance Corporation doing business as Professional Solutions Financial Services ("NCMIC") of Clive, Iowa, to provide the financing. The Finance Agreements contain hell-or-high-water clauses and forum selection clauses. Lessees received the equipment, used it, and began making the monthly payments under the Finance Agreements. Lessees stopped making the monthly payments, and NCMIC then filed collection actions against each Lessee in Iowa district court.

Lessees filed declaratory judgment class actions against Brican and NCMIC in Florida state and federal court. After nearly six years of litigation, a Florida federal court held the Finance Agreements as to these Lessees were enforceable. In December 2017, the Iowa district court held

two bellwether trials among the group of about 380 Lessees. In April 2018, the district court held the Finance Agreements in the two cases were enforceable and the court entered judgment against the defendants in those cases. From February to April 2019, the district court enforced the Finance Agreements against the remaining Lessees, calculating damages based on the remaining number of monthly payments owed under each Agreement. The district court entered judgments (hereinafter "Judgments") against each Lessee. Lessees now appeal.

Disposition of the Case in the District Court

After Lessees began defaulting on their Finance Agreements, NCMIC began filing debt collection actions against individual Lessees in Polk County. On March 30, 2010, NCMIC formed PSFS 3, a wholly-owned subsidiary also located in Clive, and assigned the Finance Agreements with Lessees involved in this appeal to PSFS 3. PSFS 3 continued to file collection actions in Polk County in 2010 and 2011.

Appellants' attorney Ronald Gossett (of Hollywood, Florida) put together a group of Lessees for joint representation; and attorney David Charlip (of Miami, Florida) put together a separate group of Lessees for joint representation. On March 3, 2010, and March 16, 2010, Lessees filed declaratory judgment class actions in Florida state and federal court against

NCMIC and Brican, ostensibly seeking an order from the Florida courts that the Finance Agreements were not enforceable.

On July 22, 2010, the Iowa District Court for Polk County consolidated the Iowa cases.[1] (App. Vol. 5, pp. 295-301). On March 3, 2011, the district court stayed all Iowa actions against these Lessees pending the Florida declaratory judgment challenge. (App. Vol. 5, p. 743).

On January 22, 2014, the Florida court handling the consolidated cases granted summary judgment in favor of NCMIC with regard to Lessees involved in this appeal,[2] rejecting all defenses raised to the enforcement of the Finance Agreements. (App. Vol. 1, pp. 766-789). On November 22, 2016, the Eleventh Circuit affirmed the decision. (App. Vol. 1, pp. 1089-1095). On January 3, 2017, the Iowa district court lifted the stay for the cases originally filed in Iowa to permit them to proceed. (App. Vol. 12, p. 42). At this point, there were approximately 380 Lessees with "Three-Column" Finance Agreements.

[1] The original consolidated docket number for the majority of cases is CL 114226.

[2] The Florida court labeled the group of Lessees involved in this appeal as those with "Three-Column" Finance Agreements. *See* copy of Finance Agreement, *infra* at 22-23.

On December 11-12, 2017, the district court tried two bellwether cases.[3] The parties stipulated that the district court's rulings and orders from those two trials would be binding as to all other Lessees. (App. Vol. 6, p. 373). On April 9, 2018, the district court held the Finance Agreements in the two tried cases were enforceable and entered judgments, calculating damages based on the remaining number of payments owed multiplied by the contracts' monthly payment amounts. (App. Vol. 7, pp. 624-636; App. Vol. 8, pp. 41-46).

On May 21, 2018, PSFS 3 moved the court to enforce the stipulation against all remaining Lessees and enter judgments. (App. Vol. 7, pp. 637-652). At the December 14, 2018, hearing on PSFS 3's motion to enforce stipulation, the district court ordered PSFS 3 to submit proposed judgment entries for all the remaining Lessees. (App. Vol. 8, pp. 140-141). From January 11 to 29, 2019, PSFS 3 submitted proposed judgment entries for each Lessee using the same formula for contract damages approved by the district court in the bellwether trials: number of remaining payments owed multiplied by the payment amount. (App. Vol. 12, pp. 92-97). Lessees did not respond to the proposed judgments. Beginning February 26, 2019, the district court began entering Judgments against Lessees, and by April 8,

[3] Edward B. Busch, DMD ("Busch") and Michael D. Insoft, DMD ("Insoft").

2019, had entered Judgments against each remaining Lessee. Lessees now appeal.

STATEMENT OF THE FACTS

A. The Parties.

The facts of this case present the classic equipment finance triangle:

> **Lessees:** mostly dentists and optometrists located throughout the United States; in a typical transaction, Lessee was a business entity and the dentist or optometrist who owned the business personally guaranteed the same Finance Agreement;
>
> **Equipment supplier:** Brican America, LLC and Brican America, Inc. located in Florida;
>
> **Finance company:** NCMIC Finance Corporation and its assignee, PSFS 3 Corporation, both located in Iowa.

B. The Equipment.

Lessees ordered "Exhibeo Systems," which were multimedia display systems consisting of a computer, TV/monitor, and software, from Brican. (App. Vol. 12, p. 73). Brican delivered the Exhibeo Systems to Lessees, who displayed them primarily in Lessees' waiting rooms.

C. The Finance Agreements.

Brican arranged for Lessees to obtain financing from NCMIC. (App. Vol. 6, pp. 636-637). If a potential Lessee signed a Finance Agreement,

NCMIC paid Brican for the Exhibeo Systems on behalf of that Lessee. The typical Finance Agreement is below.

BRICAN AMERICA LLC

(2) 50077750-1

Equipment Lease Application and Agreement

Lessor	Address	City	State	Zip Code	Phone
Professional Solutions Financial Services	14001 University Ave.	Clive	Iowa	50325	(877) 770-7244

Legal Name of Lessee (Please Print)	Applicant Name (Please Print) See section 14 for Application terms and conditions
Edward B. Busch DMD	Edward B. Busch DMD

PRACTICE Address	City	State	Zip Code	County
10170 Seminole Blvd.	Seminole	FL	33772	Pinellas

HOME Address	City	State	Zip Code	County
8413 Hermitage Blvd	Largo	FL		Pinellas

PRACTICE Phone No.	PRACTICE Fax No.	HOME Phone No.	Professional License Number	Year Licensed
(727) 395-9330	(727) 395-9115	(727) 395-4300-0626	DN14830	

Social Security No.	E Mail Address	Specialty
	doc@brikerbitesbybusch.com	dentistry

TERMS AND CONDITIONS - PLEASE READ CAREFULLY BEFORE SIGNING

To Our Customer: When we use the words "you" and "your" in this Agreement, we mean you, the customer, who is the Lessee indicated above. When we use the words "we," "us," and "our" in this Agreement, we mean the Lessor, Professional Solutions Financial Services. By signing this Agreement: (i) You acknowledge that you have read and understand the terms and conditions on the front and back of this agreement, (ii) You agree that this Agreement is a fixed term financing agreement that you cannot terminate or cancel (however you may pre-pay your obligation in full at any time), you have an unconditional obligation to make all payments due under this agreement, and you cannot withhold, set off or reduce such payments for any reason, even for lack of performance or defects in the equipment.

Equipment Description:

Quantity	Description of Financed Equipment	Make & Model, Serial Number
1	Bricon Computer System	

Payment Terms:

Term (Number of payments including Advance Payment)	Monthly Payment (plus tax)	Advance Payment (plus tax)	90 Day deferral	End of Term Options:
☐ 36 Months ☐ 48 Months ☑ 60 Months	$ 529	$ 0	☐ Yes ☐ No	☐ $1.00 ☐ ____

1. LEASE AGREEMENT AND FEES: You (the Lessee specified above) want to acquire the above Equipment from the Vendor. You want Us, Professional Solutions Financial Services, to buy the Equipment and then lease it to You. This Lease Agreement (this Lease) will begin on the date the Equipment is delivered to You (or any later date We designate). We may charge You a reasonable fee to cover documentation and investigation costs. This Lease is **NON-CANCELLABLE FOR THE ENTIRE LEASE TERM. YOU UNDERSTAND THAT WE ARE BUYING THE EQUIPMENT BASED ON YOUR UNCONDITIONAL ACCEPTANCE OF THE EQUIPMENT AND YOUR PROMISE TO PAY US UNDER THE TERMS OF THE LEASE, WITHOUT SET-OFFS, EVEN IF THE EQUIPMENT DOES NOT WORK PROPERLY OR IS DAMAGED FOR ANY REASON INCLUDING REASONS THAT ARE NOT YOUR FAULT.** If any amount payable to Us is not paid when due, You will pay Us a "late charge" equal to 1) the greater of ten (10) cents for each dollar overdue or twenty-six ($26.00) dollars; or 2) the highest lawful charge, whichever is less. You authorize us to increase or decrease your payment by not more than fifteen percent (15%) to reflect changes in the final price of the equipment as reflected on the final invoice. We intend to comply with all applicable laws. 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 and interest will be charged at the highest rate allowed by law.

2. NO WARRANTY: We are leasing the Equipment to You **AS IS.** We do not manufacture the Equipment and are not related to the Vendor. You selected the Equipment and the Vendor, based on Your own judgment. You may contact the Vendor for a statement of the warranties, if any, that the Vendor or manufacturer is providing. We hereby assign to You the warranties given to Us, if any. **WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN CONNECTION WITH THIS LEASE.** You agree to settle any dispute You may have regarding performance of the Equipment directly with the manufacturer or Vendor.

3. EQUIPMENT USE AND REPAIR: You agree the Equipment will be used for business purposes only. You are responsible for keeping the Equipment in good working order. Except for normal wear and tear, You are responsible for any damage or losses to the Equipment. We are not responsible for, and You will indemnify Us against, any claims, losses or damages, including attorney fees, related to Your use or possession of Equipment. **IN NO EVENT SHALL WE BE RESPONSIBLE FOR ANY CONSEQUENTIAL OR INDIRECT DAMAGES.**

4. END OF TERM: According to the selection in the End of Term Options section above, If this lease is a $1.00 out, or there is a dollar amount listed in the "Other" section, You agree to pay that amount at Lease termination. If this lease is a Fair Market Value (FMV) lease, you must notify us of your intentions to either return or purchase the equipment prior to lease termination. If You fail to: 1) return the Equipment to Us in Average Saleable Condition, to a location specified by Us at the end of the lease term (or any renewal term); or 2) timely pay the FMV purchase option; then, this Lease will automatically renew on the same terms on a monthly basis. "Average Saleable Condition" means the Equipment is immediately available for use by another lessee without the need of any repair. You also agree to reimburse Us for any repair costs. If You request a purchase option and provided You have not defaulted under the Lease, You may purchase the Equipment from Us "WHERE IS, AS IS."

5. OWNERSHIP, TITLE AND UCC'S: Except for any software covered by this Lease the "Software", We are the owner of the Equipment and have a title to it. You appoint Us as attorney-in-fact to execute and file on Your behalf, and at Your cost, Uniform Commercial Code (UCC) financing statement(s) to show our interest in the Equipment.

6. SOFTWARE: We do not have title to the Software. We are not responsible for the Software or the obligations owed by either You or the licensor under any License Agreement for the Software. If You properly exercise the purchase option if any, for the Equipment, You understand that we do not own the software and cannot transfer it to You. Except as provided in this paragraph, all references to the "Equipment" in this Lease includes the Software.

Initial

ND_036626

7. LOSS AND INSURANCE: You will keep the Equipment fully insured against loss and will obtain a general public liability insurance policy covering the Equipment and its use. You will name Us as loss payee and an additional insured and provide Us with evidence of insurance. If You do not, We may obtain insurance for You and add an insurance fee to the payment amounts due from You.

8. TAXES: You agree that You will pay when due all taxes relating to this Lease and the Equipment. If this Lease includes a $1.00 purchase option, or there is an amount listed in the Other option of the End of Term Options section of this lease, You agree to file any required personal property tax returns.

9. DEFAULT: If You do not pay any sum by its due date, or You breach any other term of this Lease or any other agreement with Us, then You will be in default of this Lease. If You default, We may require that You pay 1) all past due amounts under this Lease, and 2) all future amounts owed for the unexpired term, discounted at the rate 6% per annum. If You default or make late payment We may require that payments under this Lease be made by preauthorized payment from Your checking account. You agree that You will complete any necessary documentation to implement the withdrawals. Upon default, We may choose to repossess the Equipment. If We do not choose to repossess the Equipment, You will also pay to Us our booked residual value for the Equipment. We can also use any and all remedies available to Us under the UCC or any other law. You agree to pay all the costs and expenses, including attorney's fees, We incur in any dispute related to this Lease or the Equipment. 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.

10. ASSIGNMENT: You have no right to sell, transfer, assign or sublease the Equipment or this Lease. We may sell, assign or transfer this Lease and our rights in the Equipment. You agree that if We sell, assign or transfer this Lease, the new owner will not be subject to any claim, defense or set-off that You assert against Us or any other party.

11. WAIVER OF ARTICLE 2A RIGHTS: You agree that this Lease is a "finance lease" as the term is defined in Article 2A of the UCC. You hereby agree to waive any and all rights and remedies granted to You by Sections 2A-508 through 2A-522 of the UCC, including the right to reject or revoke acceptance of the Equipment.

12. MISCELLANEOUS: You agree that this Lease is the entire agreement between You and Us regarding the lease of the Equipment and supersedes any purchase order You issue. Any change must be in writing and signed by each party. You agree that a facsimile copy of this Lease bearing authorized signatures may be treated as an original for all purposes. You authorize us to insert or correct missing or incorrect information on the Lease.

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. EACH PARTY WAIVES ANY RIGHT TO A TRIAL BY JURY.**

14. CREDIT APPLICATION AND INFORMATION. YOU AUTHORIZE US OR ANY OF OUR AFFILIATES TO OBTAIN CREDIT BUREAU REPORTS, BANK AND TRADE REFERENCES, AND MAKE OTHER CREDIT INQUIRES THAT WE DETERMINE ARE APPROPRIATE ON THE PERSON(S) SIGNING BELOW. YOU HEREBY REPRESENT THAT ALL INFORMATION PROVIDED BY YOU IS TRUE, CORRECT AND COMPLETE, AND WE WILL USE THAT INFORMATION TO MAKE A CREDIT DECISION. YOU AGREE TO GIVE US FINANCIAL STATEMENTS AND COPIES OF TAX RETURNS UPON OUR REQUEST. A photo static and/or facsimile copy of this authorization shall be valid as the original. If your application for business credit is denied, you have the right to a written statement of the specific reasons for the denial. To obtain the statement, please contact: Credit Operations, Professional Solutions Financial Services, 14001 University Ave., Des Moines, IA 50325 within 60 days from the date you are notified of our decision. We will send you a written statement of reasons for the denial within 30 days of receiving your request for the statement.

This Lease is non-cancelable. *Lessee: (as stated above)*	*This lease is not binding until we sign below.* *Lessor: Professional Solutions Financial Services*
X _____ Date: 7/25/8 *(Signature)* *Print Name, Title:*	By: Paula Nunez Date 8/8/08 *(Signature)* Its: _____

UNCONDITIONAL GUARANTY

The undersigned unconditionally guarantees that the Lessee will timely perform all obligations under this Agreement. The undersigned also waives any notification if the Lessee is in default and consents to any extensions or modifications granted to the Lessee. In the event of default, the undersigned will immediately pay all sums due under the terms of this Agreement without requiring Lessor to proceed against Lessee, any other party or the Equipment. The undersigned consents to personal jurisdiction, venue, choice of law, and jury trail waiver as stated in the "Governing Law, Consent to Jurisdiction and Venue of Litigation" paragraph above and agrees to pay all costs and expenses, including attorney's fees, incurred by Lessor related to this guaranty. This guarantee is joint and several.

X _____, *Individually* *Name:* _____ *Address:* ____	X _____, *Individually* *Name:* ____ *Address:* ____

ND_036627

This case should not be made more complex simply because there is a large number of Lessees. Nearly every Lessee in this appeal (approximately 300 at this time) signed an identical version of this Finance Agreement.[4] Thus, every Lessee understood from the start that it would pay a total of 60 monthly payments of a known amount (typically $508) to NCMIC for this equipment. The Finance Agreements contain hell-or-high-water clauses, under which the Agreements became non-cancelable after Lessees accepted the equipment. (*Supra* p. 22, ¶ 1). The Finance Agreements also provide:

> 13. **GOVERNING LAW, CONSENT TO JURISDICTION AND VENUE OF LITIGATION**. . . . 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 . . . .

(*Id*. at 23) (emphasis in original). Paragraph 10 authorized NCMIC to assign its rights without notice to Lessee. (*Id*.).

[4] The exception is Lessee Wineinger. (App. Vol. 4, pp. 293-294).

D. Lessee Defaults and Iowa Collection Actions.

Beginning in late 2009, Lessees began to cease making the monthly payments, placing the Finance Agreements in default. NCMIC began to file debt collection actions in Polk County district court. On March 30, 2010, NCMIC formed PSFS 3 as a wholly-owned subsidiary. NCMIC assigned the Finance Agreements to PSFS 3. (App. Vol. 12, pp. 49-72). NCMIC's assignment of the Finance Agreements to PSFS 3 triggered the forum selection clause in those Agreements, under which Lessees consented to jurisdiction in the state where PSFS 3 is headquartered: Iowa. PSFS 3 continued to file collection actions in Polk County.

E. Lessees Challenge Personal Jurisdiction in Iowa.

In 2010, several Lessees moved to dismiss PSFS 3's Petitions based on lack of personal jurisdiction, or in the alternative, to stay the Iowa actions pending the litigation filed in Florida. *See, e.g.*, App. Vol. 5, pp. 41-55; 116-143. Lessees challenged NCMIC's assignment of the Finance Agreements to PSFS 3, arguing PSFS 3 was a "sham" entity. (*Id.*). On July 22, 2010, the district court consolidated the cases. (App. Vol. 5, pp. 295-301). On August 12, 2010, the district court (Judge Huppert) denied Lessees' motion to dismiss in the consolidated cases, holding NCMIC's assignment of the

Finance Agreements to PSFS 3 was valid. (App. Vol. 5, pp. 302-322). The district court held:

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

(*Id*. at 310). Lessees filed an interlocutory appeal, which was denied on December 8, 2010.

Lessees then conducted discovery on NCMIC's assignments to PSFS 3. PSFS 3 produced its financial records and incorporation documents. Lessees deposed Patrick McNerney, president of PSFS 3. On January 24, 2011, Lessees again moved to dismiss alleging lack of personal jurisdiction challenging the assignments of the Finance Agreements or, in the alternative, stay the Iowa cases. (App. Vol. 5, pp. 705-715). On March 3, 2011, the district court again denied Lessees' motion to dismiss. The district court also stayed all Iowa cases, pending the declaratory judgment action in Florida. (App. Vol. 5, pp. 739-743).

F. The Florida Litigation.

In March 2010, Lessees filed declaratory judgment putative class actions in Florida against NCMIC and Brican seeking to have Florida courts declare the Finance Agreements unenforceable. One action was filed in Florida state court: *Steven Wigdor, O.D., P.A. v. NCMIC Finance Corp*, Case No. 10-14399, Miami-Dade County, which was removed to federal court (S.D. Fla. Case No. 1:10-cv-21608-PAS). Another action was filed in Florida federal court: *Peter M. Blauzvern DDS P.C. v. Brican America, Inc*. (S.D. Fla. Case No. 1:10-cv-20782-PAS). These cases were consolidated in Florida federal court and entitled: *In re: Brican America LLC Equipment Lease Litigation* (S.D. Fla. Case No. 10-md-02183-PAS).

Among the many defenses raised by Lessees in the nearly six-year-long Florida litigation was that Lessees had been fraudulently induced by Brican into entering the Finance Agreement by a false promise that another entity would pay each Lessee a monthly fee to advertise on the financed equipment. On January 22, 2014, the Florida court granted summary judgment in PSFS 3's favor regarding the enforceability of all Three-

Column Finance Agreements. (App. Vol. 1, pp. 766-789).[5] The Florida court entered judgments, which state:

> NCMIC [defined to include PSFS 3] may fully enforce the terms of these Finance Agreements against these [Three-Column Lessees], subject only to defenses unique to individual [Lessees] that were not and could not have been asserted within the scope of the common questions of law or fact presented in this action.

(App. Vol. 1, pp. 926-944). On November 22, 2016, the U.S. Court of Appeals for the Eleventh Circuit affirmed the Florida federal district court.

G. The Remaining Iowa Litigation.

On January 3, 2017, the Iowa district court lifted the stay as to the cases originally filed in Iowa. (App. Vol. 12, p. 42) The district court (Judge Rosenberg) scheduled a bench trial to begin December 11, 2017, for all the remaining Three-Column cases. The district court ordered Lessees to file amended answers to plead any other remaining defenses unique to any of the individual Lessees in Iowa. (App. Vol. 12, pp. 45-46). On March 7, 2017, Lessees, opting to continue as two large groups (one represented by Gossett; the other by Charlip) filed consolidated "Amended Answers and

[5] In the same Ruling, the Florida court held each Lessee who signed a One-Column Finance Agreement would be entitled to raise the defense that it was fraudulently induced into entering the Finance Agreement as a defense against NCMIC, the finance lessor. This holding, and the One-Column Finance Agreements, are not part of this appeal.

Affirmative Defenses." (App. Vol. 6, pp. 41-113). Lessees raised common group defenses, such as whether the Finance Agreements comply with Iowa Code Chapter 535, but no individual Lessee raised any unique personal defenses. *See id*.

On May 5, 2017, PSFS 3 moved for summary judgment, which the court denied. (App. Vol. 6, pp. 271-274). Lessees then conducted discovery in Iowa, including interrogatories asking how PSFS 3 calculated damages for each Lessee. PSFS 3 produced to Lessees the records showing the total number of payments made by each Lessee on their respective Finance Agreement. PSFS calculated damages for each by multiplying the number of remaining payments owed by $508 as stated in each Finance Agreement.

On October 12, 2017, PSFS 3 renewed its motion for summary judgment, and Lessees filed their own motion. (App. Vol. 6, pp. 275-305, 381-333). At the hearing on the Motions, the district court attempted to narrow issues to be tried and ordered Lessees (again) to file any individual defenses that were unique to a particular Lessee. (App. Vol. 6, p. 373). Only three Lessees filed amended answers: Andrea Gentile-Fiori and Gary Goberville, who raised the defense that they should not have been sued personally, but in the name of their business entities; and Jeffrey Mellom,

who raised the defense that the signature on his Finance Agreement was forged.

Because each of the remaining Lessees set for trial had signed identical Finance Agreements[6], the parties agreed to try only two select cases to the district court (Busch and Insoft). This meant the 18 other Lessees who had been set for trial the weeks of December 11 and 18, 2017, and the remaining 350+ Lessees did not have to travel to Iowa for trials. The parties stipulated:

> 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). On December 11-12, 2017, the district court held a bench trial in which counsel for both groups of Appellants/Lessees fully participated. Neither Insoft nor Busch testified at the trial.

On April 9, 2018, the district court held the Finance Agreements in the two tried cases were enforceable and ordered PSFS 3 to submit proposed judgment entries on damages. (App. Vol. 7, pp. 624-636). PSFS 3 submitted proposed judgments that calculated contractual damages based on the remaining payments owed by each Lessee under the Finance Agreements

[6] Lessee Wineinger's Finance Agreement was different, but he did not raise any unique defenses.

multiplied by $508. For example, PSFS 3 requested contractual damages against Busch: 41 remaining payments x $508/month = $20,828. PSFS 3 also requested default interest, late fees, unpaid taxes, and court costs. On June 15, 2018, the district court entered judgments in the two cases using this formula.[7]

H. The District Court Enters Judgments Against Remaining Lessees Using the Same Damages Formula.

On May 17, 2018, PSFS 3 moved the Court to enforce the stipulation against all remaining Lessees and enter judgments using the identical damages formula as in the two cases tried to the bench: remaining number of payments owed multiplied by the monthly payment amount. (App. Vol. 7, pp. 637-641). PSFS 3 filed a sworn declaration with a chart of the remaining payments owed by each Lessee and the contractual amount of each payment (typically $508). (App. Vol. 7, pp. 644-652). This was a compilation of the same information provided to Lessees during discovery in 2017. Lessees filed resistances to PSFS 3's motion, as well as other motions challenging the district court's holdings in the two tried cases. (App. Vol. 7, pp. 687-701; App. Vol. 8, pp. 47-70). Although they argued they would be

[7] On March 29, 2019, following motion by PSFS 3, the district court awarded PSFS 3 $6,254.00 in attorney's fees and costs against Busch; and $6,222.00 in attorney's fees and costs against Insoft. As both Busch and Insoft have since settled, these awards are not on appeal.

deprived of "due process" if denied a full bench trial on damages, Lessees did not dispute the number of remaining payments set forth on PSFS 3's chart.[8] (App. Vol. 7, pp. 687-701).

On June 6, 2018, PSFS 3 filed a Reply and asked the district court to treat the damages issue as a motion for summary judgment:

> A motion that relies on matters outside the pleadings should be treated as a motion for summary judgment. . . . PSFS 3's Motion is supported by an affidavit and supporting records that establish all facts needed to enter judgments in its favor. Unless Defendants resist with admissible evidence that establishes there is a genuine issue of material fact that is disputed, summary judgment is appropriate in favor of PSFS 3. . . . Defendants raise no such evidence and fail to create any genuine issue of material fact in their Resistance.

(App. Vol. 7, pp. 702-707) (citations omitted). Lessees chose not to dispute the number of payments remaining for each Lessee on the chart, nor did Lessees request to depose the declarant.

On December 14, 2018, the district court held a hearing on all pending motions, including PSFS 3's motion to enforce stipulation. PSFS 3 again argued that the district court could treat the motion to enforce stipulation as one for summary judgment and Lessees had decided not to contest damages.

[8] Significantly, neither Busch nor Insoft ever disputed the remaining amount of payments owed on their Finance Agreements, either before, during, or after trial.

(App. Vol. 8, pp. 89-91). Lessees' response was the motion was not "presented to the Court as a summary judgment." (App. Vol. 8, p. 93). Lessees again did not dispute the number of remaining payments owed.

The district court ordered PSFS 3 to submit proposed judgment entries for all the remaining Lessees and gave Lessees one last chance to respond. (App. Vol. 8, p. 141). From January 11 to 29, 2019, PSFS 3 submitted proposed judgment entries for each Lessee using the mathematical formula approved by the district court: number of remaining payments owed multiplied by $508. (App. Vol. 12, pp. 92-97). Lessees did not respond to the proposed judgments. Beginning February 26, 2019, the district court began entering Judgments against Lessees, using the same formula, and by April 8, 2019, had entered Judgments against each remaining Lessee. Lessees filed post-judgment motions,[9] yet again not disputing the number of remaining payments. (App. Vol. 10, pp. 197-253, 372-545). The district court denied the motions. (App. Vol. 10, pp. 254-257, 622-627).

[9] Lessee Wineinger did not raise any of the issues now presented in Lessees' Appellants' Brief.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE FINANCE AGREEMENTS ARE ENFORCEABLE UNDER IOWA LAW.

A. Lessees failed to preserve error.

Lessees waived their arguments that the Finance Agreements are unenforceable pursuant to Iowa Code Sections 535.17 or 535.2. The issue of whether the Finance Agreements complied with Iowa Code Sections 535.17 or 535.2 is common to all debtors and should have been raised and litigated in Florida. However, Lessees failed to do so. The Florida federal court's finding that the finance agreements were enforceable based on all the common issues was sufficient to establish issue preclusion in favor of PSFS 3 in the Iowa action. *See, e.g.*, *Employers Mutual Casualty Co. v. Van Haften*, 815 N.W.2d 17, 22-23 (Iowa 2012).

The only defenses that Lessees could raise in Iowa were those "defenses unique to individual plaintiffs that were not and could not have been asserted within the scope of the common questions of law or fact presented in this action." (App. Vol. 1, pp. 926-944). Lessees raised these issues as "common issues" below and the district court rejected them on the merits. Nevertheless, the district court should also have rejected them based

on res judicata. *See id*. Having waived these "common issues," Lessees should not get another bite at this apple.

B. Standard of review.

To the extent the Court concludes the Iowa Code Chapter 535 issues were not waived and are before the Court, appellate review of issues of statutory interpretation is for correction of errors at law. *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011). The first step of statutory construction is determining whether the language of the statute is ambiguous. *Id*. If the statute is unambiguous, the court looks no further than the statute's express language. *Id*. If the statute is ambiguous, the court inquires further to determine the legislature's intent in promulgating the statute. *Id*. "Courts should be circumspect regarding narrow claims of plain meaning and must strive to make sense of our law as a whole." *Id*. (citations omitted).

C. Based on *Wolfe*, the Finance Agreements are valid under Iowa Code Chapter 535.

Lessees are highly educated medical professionals and the business entities they operate. Each signed a document entitled an "Equipment Lease Application and Agreement" to obtain equipment for their business. Each of these Finance Agreements identify: the equipment being financed; the number of payments requested (60); the frequency of payments (monthly);

and the amount of each payment (typically $508). *See supra* p. 22. It is undisputed that each Lessee obtained the equipment and began making the monthly payments to NCMIC. Years later, following defaults on the Finance Agreements, Lessees' Florida counsel began arguing that the Finance Agreements did not contain "material" terms under Iowa Code Sections 535.17(1) and 535.2.

In *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), the Iowa Supreme Court rejected the same argument by a lessee. The finance agreement at issue in *Wolfe* contains the identical key terms as the Finance Agreements in the present case. *See* (App. Vol. 6, pp. 331-333).[10] The Court concluded:

> Lake MacBride has failed to show the agreement is unenforceable because it fails to contain "all of the material terms of the agreement," by not explicitly listing an interest rate. The agreement laid out the subject matter, price, payment terms, and duration. Although the agreement did not expressly list an interest rate, it did provide Lake MacBride was to make sixty monthly payments of $299 to C&J. Section 535.17(1) contains no requirement that the interest rate must be listed separate from the total

[10] At the district court, Lessees argued that the court could not consider the actual finance agreement underpinning the *Wolfe* decision because it was "outside the record." By this logic, the opinion in *Wolfe* is also "outside the record" because it is not evidence in this case. The actual contract interpreted by the court in *Wolfe* is part and parcel of the legal precedent created by the decision.

> payment required under the agreement. Compare Iowa Code § 535.17(1), with 15 U.S.C. § 1632 (2006) (requiring, among other things, disclosure of interest rates in the agreement). Accordingly, we find the express terms contained within the lease agreement were sufficient to satisfy the requirements of section 535.17(1).

Id. at 82.

Here, Lessees raise no compelling arguments that *Wolfe* should be overturned. Lessees make no legitimate arguments that the Finance Agreements should be treated any differently than the agreement in *Wolfe*. Further, Lessees cite no other persuasive authority for interpreting Section 535.17(1) any differently. Here, as in *Wolfe*, the Finance Agreements lay out the subject matter, total price of the contract, payment terms, and duration. If the legislature wanted to require that interest rates[11] in commercial credit agreements be listed as a "material term," it would have included this requirement in the statute. Indeed, the Supreme Court compared Iowa Code section 535.17(1) with 15 U.S.C. § 1632, which expressly requires the disclosure of "interest rates" in consumer leases and consumer credit transactions. *Wolfe*, 795 N.W.2d at 82. Thus, the Finance

[11] Lessees attempt to sidestep the holding in *Wolfe*, by arguing the "interest rate" is really the "financing rate" being charged by NCMIC. Lessees do not argue how the internal financing rate or how much NCMIC earns on a Finance Agreement is material to *enforcing* terms of the Agreements.

Agreements comply with Section 535.17(1) and the district court's Judgments should be affirmed. *Wolfe*, 795 N.W.2d at 82.

1. Section 535.2 does not require disclosure of an "interest rate."

Similarly, Lessees argue that the Finance Agreements are unenforceable because they violate Iowa's usury statute, Iowa Code Section 535.2, by not disclosing any interest rate. In rejecting the lessee's defense based on Section 535.2 in *Wolfe*, the Iowa Supreme Court stated:

> Lake McBride [borrower] agreed in writing to make 60 monthly payments of $299 to C&J [lender] in exchange for one beverage cart, which it used to sell refreshments to customers at its golf course. The beverage carts were used in connection with the golf course operation and its use came within the goals of the business-purpose exception contained in section 535.2(2)(a)(5). (Citation omitted). Therefore, we find Lake McBride could agree to pay any rate of interest and cannot now assert a usury defense because the lease agreement was for a "business purpose."

Wolfe, 795 N.W.2d at 82; *see also Frontier Leasing Corp. v. Waterford Golf Assocs., LLC*, No. 10-0019, 2010 WL 4484390, at *6 (Iowa Ct. App. Nov. 10, 2010) (written loan agreements for business purposes are generally exempt from the usury limit; because Section 535.2 is not a "disclosure" law, there is no requirement that the interest rate be disclosed).

There is no dispute that Lessees signed the Finance Agreements for a business purpose. The Finance Agreements state: "You agree the Equipment will be used for business purposes only." *See* (*supra*, p. 22, ¶ 3). Lessees do not argue that the Finance Agreements had a non-business purpose. A disclosure of the number and dollar amount of monthly payments is all that is required under Iowa law. Therefore, based on the clear controlling precedent, Lessees' arguments fail.

2. Section 535.17(1) does not require disclosure of the amount NCMIC paid to Brican for the Equipment.

There is nothing in Iowa Code Section 535.17(1) or anywhere else in Iowa law that requires a credit agreement to list the price[12] a finance

[12] Lessees also refer to the "purchase price" as the "principal amount" of a "loan." (Charlip Proof Brief at 57). Lessees spend time in their briefs trying to argue there is a meaningful difference between enforcement of a "loan" with a security interest and a lease. As the Iowa Supreme Court has previously held, there is not. *Wolfe*, 795 N.W.2d at 77-78. NCMIC does not dispute for the purpose of this case that the Finance Agreements are not true leases. Further, and to be clear, NCMIC is not attempting to enforce the Finance Agreements as "leases" under Iowa's version of Article 2A of the UCC (Iowa Code § 554.13000, et seq.). Lessees allege nefarious intent on the part of NCMIC by titling the original contracts "Equipment Leases" and by internally tracking the transactions and related payments as leases. These allegations are misguided and fail to acknowledge the transactions occurred from 2005 through 2008. In other words, the Finance Agreements were all signed at least two years before the Supreme Court determined that this type of agreement is not a true "lease" in *Wolfe*.

company pays to an equipment vendor to purchase commercial equipment. Lessees cite no authority in Iowa or elsewhere that contains such a requirement. Lessees provided no evidence at the December 2017 trials or since that they considered the price NCMIC paid to Brican to be material to their decisions to sign the Finance Agreements. Because it is undisputed that Lessees knew the purpose of the Finance Agreements (finance acquisition of an Exhibeo System) and exactly how much they would have to pay for the financing (number, timing, and amount of payments), the Finance Agreements contain all terms material to them. The fact that Lessees signed the Finance Agreements and made payments until there was a dispute with Brican shows that all terms of the Financing Agreements they considered material were present.[13]

Lessees try to avoid the impact of *Wolfe* by claiming the materiality of disclosing the "price" was not decided in that case. Lessees ignore that the actual *Wolfe* finance agreement at issue did not state the price the finance company paid to purchase the equipment. *Id*. at 82; (*see also* App. Vol. 6,

---

Wolfe also makes Lessees' arguments about the Wineinger Finance Agreement meritless. While NCMIC may disclose voluntarily the total amount financed in a Finance Agreement, it was not required to do so. Having done so in a single contract does not render all other Finance Agreements invalid. *See Wolfe*, 795 N.W.2d at 77-78.

[13] Further, materiality is measured objectively by the court in deciding if the written terms are sufficient to *enforce* the agreement. *See infra* pp. 41-43.

pp. 331-333). The finance agreement simply stated that the "lessee" was required to make 60 payments to the finance company in the amount of $299 each month. *Id.* at 71.

Lessees' argument that in *Wolfe*, the Supreme Court meant "cost of equipment" when it referred to "price" is unavailing. *See Wolfe*, 795 N.W.2d at 82. The finance agreement in *Wolfe* did not actually contain that information. (App. Vol. 6, pp. 331-333). Further, the next sentence in *Wolfe* states, "Although the agreement did not expressly list an interest rate, it did provide Lake McBride [lessee] was to make sixty monthly payments of $299 to C&J [lender]." *Id.* In that sentence, the Court identified that providing for 60 monthly payments of a specified amount met the requirements of Iowa Code Section 535.17(1). The "price" referred to in the preceding sentence is the *total amount to be paid under the agreement*.

Finally, Lessees cite no cases, from any jurisdiction, which hold invalid under Iowa Code Section 535.17(1) a signed credit agreement for commercial equipment, which lists the equipment being financed, the total number of payments, and the amount of each payment. Instead, Iowa cases decided under Section 535.17 deal with a lender using the statute as a shield against borrowers trying to claim oral or unsigned agreements to avoid payments under a credit agreement or lend money. *See, e.g., Clinton Nat.*

Bank v. Saucier, 580 N.W.2d 717, 720 (Iowa 1998) (alleged oral forbearance agreement unenforceable under Iowa Code 535.17 because there was no writing signed by the lender); *First American Bank v. Urbandale Laser Wash, LLC*, 874 N.W.2d 650, 656 (Iowa Ct. App. 2015) (alleged forbearance agreement unenforceable when there was no agreement signed by the lender); *see also* 9 WILLISTON ON CONTRACTS § 21:4 at 3 ("Additionally, in recent years, many state legislatures have enacted statutes requiring at least some contracts for the lending of money to be in writing, the goal of the legislation being to limit lender liability suits."). Likewise, the most recent Iowa appellate case discussing Iowa Code Section 535.17 involved a lender using the statute as a defense to claims alleging fraud and tortious interference based on the failure to provide financing under an "agreement" that was never reduced to writing. *See Geiger v. Peoples Trust and Savings Bank*, No. 18-1428, 2019 WL 4678179, **4-6 (Iowa Ct. App., Sept. 25, 2019).

Similarly, the cases outside of Iowa cited by Lessees all involve creditors challenging a putative agreement under which a party was requesting funds. For example, in *Fairfield Six/Hidden Valley Partnership v. Resolution Trust Corp.*, 860 F.Supp. 1085 (D. Md. 1994), the plaintiffs attempted to enforce a letter proposing finance terms as an actual loan

agreement. *Id*. at 1088. The court found the letter too vague to be considered an actual contract and, in fact, held: "The letter is silent with respect to almost every material term of the agreement." *Id*. at 1090.

In *McErlean v. Union Nat'l Bank of Chicago*, 414 N.E.2d 128 (Ill. App. 1980), the plaintiff alleged that the defendant agreed to extend him a $100,000 line of credit. *Id*. at 129. The alleged contract, consisting of several alleged oral representations and documents, did not merely omit a material term; it was so vague that "[n]o elements of a contract cognizable in law or equity as to the essential terms of . . . a contract appear . . . [or] are pleaded." *Id*. at 132.

In *Peterson Development Co., Inc. v. Torrey Pines Bank, et al*., 284 Cal. Rptr. 367 (Cal. App. 1991), the plaintiff contended that, based on a "letter of commitment," the defendant had agreed to provide it with permanent financing for a subdivision. *Id*. at 107-08. The court, while discussing "lender liability," found that the letter of commitment, signed by only the borrower, did not create a contract because it omitted the loan amount, repayment terms, and the potential borrower's identity. *Id*. at 114. Thus, the terms of the alleged agreement did "not appear to be capable of being made certain." *Id*. at 115.

Lessees also twice cite a consumer credit treatise for this same inapplicable proposition. *See* Gossett Final Brief at pp. 81-82 citing Consumer Credit Guide p. 4040 (C.C.H.) ("A debtor may bring an action or a credit agreement only if the agreement is in writing, sets forth all material terms and conditions of the agreement . . .") (emphasis added). That treatise cites to Indiana Statute Sec. 26-2-9-4, which contains different language than Iowa Code Section 535.17(1), and provides no analogous guidance.

All of these cases are further distinguishable because Lessees actually received the financing and it is the creditor, PSFS 3, attempting to collect on the debt created by the Finance Agreements. The Financing Agreements identify the parties, the number and frequency of payments, the amount of each payment, and the duration. The Finance Agreements were clear enough that they were fully performed by NCMIC (delivered financing) and partially performed by Lessees (each made several of the required monthly payments). The fundamental principle underlying *Peterson* and the other cases Lessees cite – that courts will not enforce alleged agreements so vague that the court cannot discern the parties' intent – do not apply here.

3. Even if the Finance Agreements were required to disclose an interest rate, the Finance Agreements remain enforceable.

Lessees argue that if the interest rate was a material term left out of the Finance Agreements, the Agreements are completely unenforceable. Apparently, under Lessees' theory, if the Finance Agreements did not contain even a single term they consider material after the fact, they may keep the financing and simply walk away from the Agreements. Lessees cite no authority for this result.

Under Iowa law, even if the Court holds that the financing rate or the equipment price so that the financing rate could be calculated was required to be disclosed, the Court still must enforce the Finance Agreements, albeit at the lower statutory contract rate of 5%. *See Power Equipment, Inc. v. Tschiggfrie*, 460 N.W.2d 861, 863 (Iowa 1990). In *Tschiggfrie*, the Iowa Supreme Court explained that the Iowa Legislature amended the remedy available to a debtor upon establishing that an interest rate in a business transaction was usurious. *Id.* Prior to 1982, a creditor charging interest at a usurious rate faced forfeiture of the interest. *See MuchMore Equip., Inc. v. Grover*, 315 N.W.2d 92, 99 (Iowa 1982), *superseded by statute on other grounds*, Iowa Code § 535.2(2)(a)(5), *as recognized in Tschiggfrie*, 460 N.W.2d at 863. In 1982, the Iowa Legislature added subparagraph (2)(a)(5)

to Section 535.2, thereby permitting the charging of any rate of interest in commercial transactions. *Tschiggfrie*, 460 N.W.2d at 863. The Iowa Supreme Court has since held that if a creditor fails to establish a written agreement for any rate of interest under Section 535.2(2)(a)(5), the remedy is that interest is awarded based on the applicable statute. *Id*. at 864-65. There is no reason the result should be any different if the missing term is the equipment price, which would disclose the interest or finance rate charged by NCMIC for the transaction.

Thus, even if the Court were to find the Finance Agreements were required to state the finance rate of 8.99%, the appropriate remedy would be to award damages under the contracts by calculating the rate of original financing at 5%, not invalidation of the Finance Agreements as a whole. Iowa Code § 535.2(1); *Tschiggfrie*, 460 N.W.2d at 865.

II. THE DISTRICT COURT CORRECTLY CALCULATED DAMAGES AND ENTERED EACH JUDGMENT.

A. Lessees failed to preserve error on misnomers in some Lessees' names.

PSFS 3 agrees that the Charlip Lessees have preserved error on arguments concerning the measure of damages awarded. PSFS 3 agrees that all Lessees raised the issue of whether each should have had a trial to determine contractual damages in post-judgment motions.

The Gossett Lessees did not preserve error on their due process argument relating to the district court's alleged misnomer of several of Lessees in those judgments. Lessees now claim that "final judgments were entered against 73 entities which were not parties to any contract." (Gossett Final Br. at 95) (emphasis added). These individual issues, however, were not raised in the district court. After filing Notices of Appeal, the Gossett Lessees first mentioned misnomers of parties' names in their supplement to reply in support of their motion to stay enforcement of the final judgments, filed in this Court.[14] (App. Vol. 12, pp. 98-103). Error was not preserved. *See, e.g., Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) (holding error preservation requires that the "nature of the error has been timely brought to the attention of the district court" at a time when corrective action could have been taken by the court).

[14] Indeed, in their supplement to this reply – filed June 14, 2019, and months after their Rule 1.904(2) motions – Lessees acknowledge they had just "completed their review of the final judgments." (*Id.*)

B. Standard of review.

The standard of review for this law action is for correction of errors at law. *Flom v. Stahly*, 569 N.W.2d 135, 139 (Iowa 1997). The factual findings of the district court are binding if supported by substantial evidence. *Id*.; Iowa R. App. P. 6.904(3)(1).

C. The contract damages for each Lessee was and is undisputed.

The Finance Agreements spell out the remedies to which PSFS 3 is entitled upon breach: PSFS 3 shall recover the unpaid balance of the Finance Agreement, with 18% interest on the unpaid balance from the date of default, late fees for each missed payment, and attorney's fees and costs. *See supra* p. 23, ¶ 9. PSFS 3 did not seek late fees or unpaid taxes against these Lessees.

The Finance Agreements required each Lessee to make 60 payments of typically $508. In May 2018, with its motion to enforce stipulation and enter judgments, PSFS 3 provided a spreadsheet showing the number of remaining payments owed by each Lessee. (App. Vol. 7, pp. 644-650). To this day, not one Lessee has disputed the number of remaining payments. Lessees had multiple opportunities to dispute PSFS 3's records of the remaining payments yet failed to do so. The district court used simple multiplication to calculate the undisputed damages for each Lessee. Even on

appeal, Lessees chose to contest the entry of judgments on procedural grounds only. Because there is no dispute on appeal as to the actual amount of damages in each Lessee's Judgment, the district court's entry of the Judgments should be affirmed.

D. The district court's entry of monetary judgments did not deprive Lessees of due process.

Lessees argue the only way to establish contract damages under Iowa law is at trial. According to Lessees, because they did not have 300 separate bench trials on damages, even though lacking any evidence to dispute damages, they were denied due process. The Due Process Clause of the Constitution requires "notice and an opportunity to be heard on the issue." *E.g.*, *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 566 (Iowa 2019). Due process is not implicated, however, where a party elects – strategically – not to participate in the process afforded. That is precisely what Lessees have done.

The right to a hearing guaranteed by the Due Process Clause is one "appropriate to the nature of the case." *In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)). That is because "[t]he requirements of due process are flexible and consequently, the type of hearing required depends on (a) the private interests implicated; (b) the risk of an erroneous determination by reason of

the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve." *Seyler*, 559 N.W.2d at 9 (quoting *United States v. Raddatz*, 447 U.S. 667, 677 (1980)). Indeed, "procedural irregularities during the course of a civil case, even serious ones, will not [ordinarily] subject the judgment to collateral attack." *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992) (citation omitted).

It is well-settled that courts may enter judgment as a matter of law, *sua sponte*, when there is no genuine issue as to any material fact, so long as the "losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Such authority is consistent with – and one of the primary tools used by the courts to accomplish – expeditious disposition of cases pending on their busy dockets. *See Interco Inc. v. Nat'l Sur. Co.*, 900 F.2d 1264, 1269 (8th Cir. 1990). As it relates to due process, the only question is whether a party – in the context of the proceeding – is provided with constitutionally-sufficient notice and an opportunity to be heard.[15] Here, the Lessees had ample notice

[15] The Gossett Lessees' use of lofty language describing due process (often in the criminal context) ignores the relevant inquiry, which is ultimately based on the process that was actually afforded by the district court. Indeed, "[d]ue process does not, of course, [even] require a hearing on the merits in every civil case". *Picray v. City of Des Moines*, No. 97-0241, 1999 WL

and multiple opportunities to respond prior to the district court's entry of monetary judgments. Their strategic decision not to participate does not implicate due process.

In accord with the district court's order, PSFS 3 submitted proposed judgments in the two bellwether cases on May 17, 2018. (App. Vol. 12, pp. 88-91). There, PSFS 3 set forth a simple mathematical formula for contract damages: the number of monthly payments outstanding multiplied by the monthly payment amount (typically $508). (*Id*.) On this same date, PSFS 3 also filed its motion for enforcement of stipulation and entry of judgments. In support, PSFS 3 submitted a chart supported by sworn declaration listing each Lessee along with the applicable contractual monthly payment amount and number of monthly payments outstanding. (App. Vol. 7, pp. 644-652).

On May 30, 2018, and May 31, 2018, some of Lessees filed a resistance to PSFS 3's motion in which they objected to the entry of monetary judgments without first "having the ability to contest the amounts" set forth in PSFS 3's declaration.[16] (App. Vol. 7, pp. 687-701). However,

---

1136455, at **4, 5 (Iowa Ct. App. Dec. 13, 1999). Nor does it "always require that the ruling judge hear the testimony." *Seyler*, 559 N.W.2d at 9 (citation omitted).

[16] The May 30 filing was on behalf of Gossett Lessees in only three individual cases in which PSFS 3 did not obtain judgments and are not part of this appeal. The May 31 filing was on behalf of Charlip Lessees in 51 individual cases.

Lessees did not actually dispute any of the remaining payments in their Resistances or indicate why they lacked the ability to contest them. Because Lessees did not dispute the total payments remaining, PSFS 3 filed a Reply asking the district court to treat the motion as one for summary judgment. (App. Vol. 7, pp. 702-707).

On June 15, 2018, the district court entered judgments in the bellwether cases. (App. Vol. 8, pp. 41-46). In both cases, it adopted the mathematical formula proposed by PSFS 3, and calculated the contractual damages owed. Despite the district court damage awards in the bellwether cases, Lessees decided not to dispute PSFS 3's proposed damages for all remaining Lessees governed by the Stipulation.

At the December 14, 2018, hearing on all pending motions, Lessees did not challenge PSFS 3's calculation of the remaining payments and made no argument that these calculations were incorrect. (App. Vol. 8, pp. 93-96). As no material facts on damages were in dispute, PSFS 3 again argued that the entry of judgments against the remaining Lessees was appropriate. (App. Vol. 8, pp. 89-91, 95-96). Lessees sidestepped PSFS 3's position and argued its motion to enforce the stipulation was not styled a "motion for summary judgment." (App. Vol. 8, pp. 93, 96).

At the conclusion of the December 14, 2018, hearing, the district court directed PSFS 3 to submit proposed judgments for the remaining Lessees and offered Lessees yet another opportunity to contest the number of remaining payments. (App. Vol. 8, pp. 140-141). From January 11 to 29, 2019, PSFS 3 submitted proposed judgment entries for each Lessee using the same mathematical formula for contract damages adopted by the district court. (App. Vol. 12, pp. 92-97). Although Lessees had PSFS 3's records of payments made and missed for each individual Lessee since 2017, Lessees did not respond to any of the proposed judgments, let alone present evidence or argue that these calculations were incorrect.

The district court entered its Judgments on February 26, 2019, and between March 27, 2019 and April 8, 2019. The district court was empowered to treat PSFS 3's motion as one for summary judgment and consider matters outside the pleadings. *See Stotts v. Eveleth*, 688 N.W.2d 803, 811-12 (Iowa 2004) (treating motion to dismiss as motion for summary judgment and refusing to remand to district court to conserve judicial resources). Lessees' strategy of misdirection continued in their Rule 1.904(2) motions. Nowhere in those lengthy motions do they dispute the accuracy of PSFS 3's calculations of each individual Lessees' remaining

payments.[17] That remains true even in their current appellate brief in this Court.[18]

Although they had *notice* of PSFS 3's requests for judgments since May 17, 2018, including PSFS 3's evidence relating to the outstanding payments owed by each Lessee, and numerous *opportunities to be heard* to dispute the amounts claimed, Lessees elected to say nothing. Thus, the district court's entry of Judgments against Lessees comported with due process. *See Johnson*, 489 N.W.2d at 414.

E. The district court properly found Lessees in breach of the Finance Agreements and the evidence submitted to the district court is sufficient to support the damage awards.

The Charlip Lessees challenge not only the measure of damages that should be awarded to PSFS 3, but they argue that PSFS 3 is entitled to no damages because they have not proven a breach of contract with "reasonable certainty."[19] Lessees' argument goes against well-established Iowa law. In

---

[17] The only specific "mistake" alleged by Lessees at the district court relates to the judgments from two of the consolidated cases, which Lessees argue inaccurately recite a "monthly payment amount plus tax". (App. Vol. 10, p. 203 ¶ 20).

[18] Lessees' discussion of the parties' stipulation is a red herring. They do not dispute that all of the Finance Agreements are materially identical. Any dispute Lessees have with the mathematical formula adopted by the district court to calculate damages does not implicate due process.

[19] That Lessees breached the Finance Agreements by failing to make all payments has never been disputed, and is also subject to the Stipulation.

an Iowa Court of Appeals case cited by the Charlip Lessees in their Brief, the court correctly recited Iowa law as follows:

> Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. *DeWaay v. Muhr*, 160 N.W.2d 454, 460 (Iowa 1968), *cited by Dopheide*, 163 N.W.2d at 366; *see also Kanzmeier v. McCoppin*, 398 N.W.2d 826, 833 (Iowa 1987) (identifying distinction between proof of damage, and proof of amount of damage).

Duck Creek Tire Serv., Inc. v. Goodyear Corners, LC, No. 11-1930, 2012 WL 4513807, at **4-5 (Iowa Ct. App. Oct. 3, 2012).

It cannot be legitimately disputed that PSFS 3 suffered damages in some amount. Lessees all failed to make the 60 payments required by their respective Finance Agreements. Thus, PSFS 3 suffered damages in at least the amount of the unpaid contractual payments.[20] *See Aurora Business Park*

The evidence supporting that all Lessees breached the Finance Agreements also includes the Finance Agreements (setting forth the payment schedule and remedies for breach attached to each Petition filed), each Lessee's failure to file an individualized defense by December 1, 2017, NCMIC's records of payments received and not made, and the testimony at the bellwether trials.

[20] Lessees' claim that PSFS 3 did not even know its damages in the bellwether cases because three methods were presented is disingenuous.

Assoc., L.P. v. Michael Albert, Inc., 548 N.W.2d 153, 157 (Iowa 1996) ("In general, the purpose behind the allowance of damages for breach of a contract is to place the injured party in the position he or she would have occupied if the contract had been performed.") (citation omitted).

Once evidence is presented of the number and amount of payments required and the number and amount of payments actually made (and thus the number and amount of payments not made), the remainder of the damage calculation is just a mathematical computation based on the language of the Finance Agreements and the amount of time that has passed. *See GreatAmerica Leasing Corp. v. Wahoo Prods. of Fla., Inc.*, No. 09-CV-137-LRR, 2011 WL 1559935, at *13 (N.D. Iowa Apr. 21, 2011) ("GreatAmerica offered proof of the amounts paid and amounts still owed under the Lease Agreement. This evidence, coupled with the term of the Lease Agreement, is sufficient 'proof of a reasonable basis from which the amount can be inferred or approximated.'") (quoting *Northrup v. Miles Homes, Inc. of Iowa*, 204 N.W.2d 850, 857 (Iowa 1973)).

The *Wahoo* case provides good guidance. In that case, at trial, the finance company witness testified as to the number and amount of payments

---

The methods were only slight variations to address specific calculation arguments made by the Charlip Lessees concerning acceleration and present value because the results would set the formula for over 300 other cases.

made and missed. 2011 WL 1559935, at **11, 13. The witness then attempted to testify from a damage calculation sheet that the witness had not prepared and was not certain how it had been calculated. *Id.* at *11 n.7. While the court did not admit the damage calculation sheet into evidence, it found the finance company met its burden of proof for damages by simply entering into evidence the lease agreement and the number of remaining payments owed. *Id.* at **11 n.7, 13. The court simply calculated contract damages using math. *Id.* at 13.

In the present case, PSFS 3 offered the same evidence found sufficient in the *Wahoo* case: the Finance Agreements and the number of remaining payments owed. This is sufficient evidence of damages to support all the Judgments. *See id.*

Finally, among the myriad attacks Lessees make on damages, Lessees again argue because the transactions were "loans," not "leases," NCMIC has not proven the amount of "principal" remaining and cannot recover the damages it seeks. In *Wolfe*, the Supreme Court stated that, "Contracting parties have wide latitude to fashion their own remedies for a breach of contract and to deny full effect to such express contractual provisions is ordinarily impermissible because it would 'effectively reconstruct the contract contrary to the intent of the parties.'" 795 N.W.2d at 77 (quoting *In*

re O.P.M. Leasing Servs., Inc., 21 B.R. 993, 1006 (Bankr. S.D.N.Y. 1982)). As further stated in *Wolfe*, the freedom to contract for remedies applies whether or not the transaction technically qualifies as a lease. *Wolfe*, 795 N.W.2d at 77. Other sections of Iowa's version of the UCC contain similar provisions granting the parties the freedom to contract for remedies. *See* Iowa Code §§ 554.2719 (applicable to sales) and 554.9601(1) (applicable to secured transactions). Thus, because all the remedies sought by PSFS 3 are set forth expressly in the written Finance Agreements, the distinction between a lease, a finance lease, installment sale, or a sale with security interest transaction is irrelevant, and PSFS 3 is entitled to the remedies agreed upon in the Finance Agreements.[21]

Lessees' argument that damages cannot be awarded because the "principal balance" of the Finance Agreements was not proven is also contrary to Iowa law. The Finance Agreements calculate damages based on the remaining payment stream, and do not allow prepayment in a lesser amount. Iowa long ago adopted the "perfect tender in time" rule that allows contracts to forbid a prepayment. *See Prudential Ins. Co. of America v.*

[21] Lessees' arguments based on the Wineinger Finance Agreement are irrelevant to the calculation of the contract damages. The Wineinger Finance Agreement contains an acceleration clause and measures damages based on the remaining payments, just like the rest of the Finance Agreements.

Rand & Reed Powers Partnership, 972 F.Supp. 1194, 1205-06 (N.D. Iowa 1997) (citing *Lett v. Grumauer*, 300 N.W.2d 147, 150 (Iowa 1981)). The only exception to this rule has been statutorily created and only applies to agricultural real estate contracts. *See* Iowa Code § 535.9. Thus, because Iowa law clearly allows finance contracts to forbid prepayment in the absence of an express contractual right, there is no need to calculate the "principal balance" of the Finance Agreements that expressly calculate damages based on the number and amount of remaining payments.

F. PSFS 3 was allowed to charge default interest on the accelerated amount owed upon default and the 18% default interest rate is not unconscionable.

The plain language of the Finance Agreements accelerates the future payments upon default. In Section 9, titled "Default," the following language appears:

> If you do not pay any sum by its due date . . . then you will be in default of this lease. If you default, we may require that you pay (1) all past due amounts under this lease, and (2) all future amounts for the unexpired term, discounted at the rate of six percent per annum.

(*Supra* p. 23). Substantially similar language has been upheld as a valid acceleration clause. *See Aurora Business Park Assocs.*, 548 N.W.2d at 154 ("In the event of termination of this Lease by reason of a violation of its terms by the Lessee, Lessor shall be entitled to prove claim for and obtain

judgment against Lessee for the balance of the rent agreed to be paid for the term herein provided . . .”). There is no requirement that the agreement contain the word “accelerate” or “acceleration.” The *Aurora Business Park* case, in upholding a rent acceleration clause, stated no requirement that a creditor take any action to accelerate the amount due. *Id.*

Here, PSFS 3 accelerated the future payments when PSFS 3 filed the Petition against each Lessee. Each Petition stated an amount that each Lessee owed pursuant to a default. Those dollar amounts were the full accelerated balance, plus late fees, sales tax, and/or property tax as of the date the Petition was filed. Therefore, each Petition filed by PSFS 3 gave notice of the acceleration of the debt, to the extent it was required, by requesting an amount due that included all past due and future remaining payments due in the amount.

In the Finance Agreements, NCMIC and Lessees agreed expressly to an 18% default interest rate.[22] Default interest is a contractual acknowledgement that a creditor is in a more tenuous position and greater risk for non-payment when an event of default occurs. Default interest also

[22] The Wineinger Finance Agreement does not expressly provide for a default interest rate. However, Wineinger never raised this issue with the district court. Even if the issue was not waived, the Court could issue a limited remand to correct the calculation of interest in just the Wineinger judgment while affirming the remaining Judgments.

recognizes the additional burdens and expense incurred by creditors for a defaulted account. Lessees have been in default for more than 10 years. During much of that time PSFS 3, through its service agent NCMIC, had to track the defaulted accounts as impaired assets, monitor the status of the accounts, monitor Lessees, including the potential ability to repay a judgment, through searching public records, and create reports internally for management and externally for auditors and regulators. (App. Vol. 6, pp. 411-414). All of these efforts take time and create burdens and costs that are difficult to quantify.

Despite these undisputed burdens created by their defaults, Lessees allege that the 18% default interest that PSFS 3 seeks to collect constitutes an unenforceable penalty.[23] Lessees' argument misses the mark. Iowa law does not treat default interest as an unenforceable penalty. Iowa courts have long upheld a creditor's right to collect an increased rate of interest upon a default. *See Fed. Land Bank of Omaha v. Wilmarth*, 252 N.W. 507, 510 (Iowa 1934); *see also In re Johnston*, No. 03-03495S, 2004 WL 3019472, at *7 (Bankr. N.D. Iowa Dec. 20, 2004) ("Default interest rates are enforceable in Iowa."). In addition, the default interest provisions in the Finance

[23] Lessees make the misleading argument that PSFS 3 seeks 147% interest on the underlying contractual debt. Lessees later reveal that 120% (10% per month) was their interpretation of the late fees provision, and that PSFS 3 did not even obtain a judgment for late fees.

Agreements are standard terms in the equipment finance industry. Courts have upheld default interest rates of 18%, or even higher. *See, e.g., Sec. State Bank v. Soults Farms, Inc.*, No. 03-0494, 2004 WL 792673, at *4 (Iowa Ct. App. April 14, 2004) (upholding imposition of 21% interest). This is a commercial contract, and the parties are free to agree upon any rate of interest.

To the extent Lessees continue to argue the Finance Agreements are unconscionable, this Court has previously held the substantially similar agreement in *Wolfe* was not unconscionable. *Wolfe*, 795 N.W.2d at 80-81. In the present case, Lessees put on no evidence to support their affirmative defense of unconscionability. PSFS 3 submitted testimony supporting its claimed damages. There is no basis for the Court to reach a different conclusion than the *Wolfe* case. The Finance Agreement default interest rate of 18% is not unconscionable pursuant to Iowa Code Section 554.13108.

G. Because the Judgments do not involve future unpaid payments, reducing damages to present value is not appropriate.

The Charlip Lessees claim the Judgments are improper because they do not discount the unpaid contract balance to present value. The present value discount is not needed because future payment dates for all contract payments was long since passed by the time of the Judgments. If these cases

had been allowed to proceed in 2010 this may have been an issue, but 10 years later, this is no longer the case.

The Charlip Lessees' argument that the Judgments permitted "double" interest is meritless. *Carson Grain & Implement, Inc. v. Dirks*, 460 N.W.2d 483 (Iowa Ct. App. 1990), cited by the Charlip Lessees is easily distinguishable. In that case the district court had awarded interest at the contract default rate plus the statutory post-judgment rate. *Id*. at 486. That is not what happened in this case. The Judgments are accruing interest only at the contract default rate of 18% per year (1.5% per month) set forth in the Finance Agreements, which is clearly authorized by Iowa Code Section 668.13(2). There has been no adding of an additional statutory interest rate, or "double" charging.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT POSSESSED PERSONAL JURISDICTION OVER LESSEES.

A. Preservation of error.

PSFS 3 agrees that Lessees preserved error.[24]

[24] PSFS 3 does not agree that Lessee Wineinger preserved error on his specific argument concerning the lack of a forum selection clause in his specific Finance Agreement. Wineinger never raised this issue in the district court and instead joined Lessees in the consolidated case challenging only the assignment from NCMIC to PSFS 3. (App. Vol. 5, pp. 439-531, pp. 705-715Defendants' September 22, 2010, Motion to Amend Consolidation Order (Third Amendment), Order Granting Motion, and January 24, 2011, Motion to Stay or Dismiss.) This failure to raise the issue prevented PSFS 3

B. Standard of review.

Iowa appellate courts review district court determinations as to personal jurisdiction for correction of errors at law. *Shams v. Hassan*, 829 N.W.2d 848, 853 (Iowa 2013). A motion to dismiss based on a lack of personal jurisdiction is a special proceeding that requires the district court to make factual findings in addition to conclusions of law. *Capital Promotions L.L.C. v. Don King Prods., Inc.*, 756 N.W.2d 828, 823-33 (Iowa 2008). The plaintiff bears the burden to set forth a prima facie case that jurisdiction is appropriate, and the district court "accept[s] as true the allegations of the petition and the contents of uncontroverted affidavits." *Shams*, 829 N.W.2d at 853 (citation omitted). The burden then "shifts to the defendant to rebut that showing." *Id.* The district court's findings of fact with respect to personal jurisdiction are binding upon appeal when supported by substantial evidence. *Id.*

---

from addressing that argument by, for example, arguing that Wineinger had sufficient contact with Iowa to confer jurisdiction. He sought financing from NCMIC, an Iowa corporation, and sent 31 payments to an Iowa company. This contact with Iowa is enough to establish specific jurisdiction of the Iowa courts. *See, e.g., State Central Bank v. Berzanskis*, 149 F.Supp.3d 1121, 1125-28 (S.D. Iowa 2015); *Agricredit Acceptance Co., LLC v. Goforth Tractor, Inc.*, No. 00-1694, 2002 WL 1973195, at *3 (Iowa Ct. App. Aug. 28, 2002).

C. The Iowa district court had personal jurisdiction over Lessees based on the forum selection clauses.

1. PSFS 3 met its burden to establish a prima facie case of personal jurisdiction.

Iowa courts may exercise jurisdiction over nonresident defendants "to the widest due process parameters allowed by the United States Constitution." *Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C.*, 734 N.W.2d 473, 476 (Iowa 2007) (quoting *Hammond v. Fla. Asset Fin. Corp.*, 695 N.W.2d 1, 5 (Iowa 2005)). "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *EFCO Corp. v. Norman Hwy. Constructors, Inc.*, 606 N.W.2d 297, 299-300 (Iowa 2000) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982)). Due process protections inherent in the Fourteenth Amendment do not prohibit parties from agreeing in advance "to submit to the jurisdiction of a given court." *EFCO Corp.*, 606 N.W.2d at 299 (citing *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964)).

Rather than being disfavored by the courts, "forum selection clauses are 'prima facie valid'" and "'should control absent a strong showing that it should be set aside.'" *Liberty Bank*, 737 N.W.2d at 315 (citation and internal quotation marks omitted) (quoting *M/S Bremen v. Zapata Off–Shore*

Co., 407 U.S. 1, 10, 12 (1972)). "A choice of forum made in an 'arm's-length negotiation by experienced and sophisticated businessmen' should be honored by the parties and enforced by the courts 'absent some compelling and countervailing reason.'" *Liberty Bank*, 737 N.W.2d at 315 (quoting *M/S Bremen*, 407 U.S. at 12). The burden rests upon the party challenging the forum selection clause to establish that "'enforcement would be unreasonable and unjust' or that the clause is 'invalid for such reasons as fraud or overreaching.'" *Liberty Bank*, 737 N.W.2d at 315 (quoting *M/S Bremen*, 407 U.S. at 15); *see also Karon v. Elliott Aviation*, 937 N.W.2d 334, 346 (Iowa 2020) ("[T]he Iowa court should ordinarily examine the forum-selection clause first and give it effect 'unless it is unfair or unreasonable.'" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80)).

Here, the Finance Agreements provide:

> 13. **GOVERNING LAW, CONSENT TO JURISDICTION AND VENUE OF LITIGATION**. . . . 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 . . . .

(*Supra* p. 23, ¶ 13) (emphasis in original).

On March 31, 2010, PSFS 3 was formed and then shortly thereafter, NCMIC assigned the Finance Agreements to PSFS 3. (App. Vol. 12, pp. 49-72). PSFS 3, like NCMIC, is located in Clive, Iowa. This assignment triggered the forum selection clause of the Finance Agreements. Accordingly, PSFS 3 met its burden to establish a prima facie case that the Lessees consented to the exercise of jurisdiction in Iowa. *See Liberty Bank*, 737 N.W.2d at 314.

2. Lessees did not meet their burden to establish that exercise of personal jurisdiction against them in Iowa would be unreasonable and unjust.

When the burden shifted to Lessees, they were required to make a "strong showing" that enforcement of the forum selection clauses would be "unreasonable and unjust." *See id.* at 315. Lessees must show "that the trial in the contractual forum will be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court." *Id*. (quoting *M/S Bremen*, 407 U.S. at 18).

From the beginning, Lessees' argument about jurisdiction in Iowa made little sense. When Lessees signed the Finance Agreements, they knew

they were doing business with an Iowa company. The first line of the Finance Agreements identifies the "Lessor" as "Professional Solutions Financial Services" located in Clive, Iowa. (*Supra* p. 22). Lessees further agreed that the Finance Agreements would be governed by Iowa law. (*Id*.). Thus, even in the absence of an assignment, Lessees should have expected to be sued in Iowa if a dispute ensued. Considering that both assignor and assignee are Iowa companies, Lessees' argument that PSFS 3 was nefariously "forum shopping" is turned on its head. This is not the typical "unfairness" argument that an out-of-state lessee makes if a finance contract "floats" to a forum for disputes in a state not identified in the contract. *See Liberty Bank*, 737 N.W.2d at 315-16 (holding Iowa court had personal jurisdiction over lessees located in Florida, Illinois, Georgia, and Pennsylvania, who signed contracts with "floating" forum selection clauses with New Jersey assignor, and contract was assigned to unknown Iowa assignee).

Finally, and significantly, Lessees have never shown nor even attempted to show that trial in Iowa would be "so gravely difficult and inconvenient that. . . for all practical purposes . . . deprived [Lessees of their] day in court." *Liberty Bank*, 737 N.W.2d at 315. To the contrary, by pooling the resources of hundreds of Lessees, they built a considerable war

chest to defend themselves. Lessees' three Florida lawyers were admitted pro hac vice in Iowa, filed numerous motions, and flew to Iowa for every hearing. Lessees had the three Florida lawyers and two Iowa lawyers attend the two bellwether trials in Iowa. Lessees do not allege, nor can they, that Judge Rosenberg conducted an improper or unfair trial. The bottom line is Lessees received their day in court in Iowa. Thus, Lessees failed to meet their burden to show the forum selection clauses were unreasonable or unjust.

D. The district court's finding that NCMIC's assignments to PSFS 3 were valid is supported by substantial evidence.

In 2010, prior to the Iowa trial, and shortly after filing declaratory judgment actions in Florida, Lessees moved to dismiss the Iowa lawsuits entirely based on NCMIC's assignment of the Finance Agreements to PSFS 3. Lessees argued to the district court, and on appeal, that PSFS 3 is a "sham" corporation created only for purposes of Iowa jurisdiction, and thus, the assignments were invalid. On August 12, 2010, the district court denied Lessees' motion to dismiss on this ground, holding:

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

(App. Vol. 5, p. 310).

Undeterred, Lessees conducted discovery on PSFS 3's organizational documents and financial records; and deposed its president. Lessees then filed another motion to stay or dismiss on January 24, 2011. On March 3, 2011, the district court again denied Lessees' renewed motion. The district court indicated that it had carefully read PSFS 3's president's deposition and concluded PSFS 3 was not a sham. (App. Vol. 5, pp. 739-743).

Prior to the December 11, 2017, bellwether trials, Lessees conducted further discovery on PSFS 3, deposing its new president. PSFS 3 produced additional detailed financial records.[25] At the trials, Lessees spent considerable time attacking the structure of PSFS 3, rather than contesting liability or damages. What was presented to the district court was evidence that PSFS was: organized properly under Iowa law, fully capitalized,[26] kept complex separate books, and followed corporate formalities. This evidence is sufficient to support the district court's findings that the assignments were

[25] Indeed, Lessees are using some of PSFS 3's records on appeal to argue they should not be responsible for attorney fees. As no attorney fees have yet been awarded, this argument is premature. *See infra* Section IV.
[26] At the time of the trials, PSFS 3 had approximately $2.5 million in its bank account. (App. Vol. 6, p. 410).

legitimate and it had personal jurisdiction over Lessees. *See Shams*, 829 N.W.2d at 853.

E. Lessees' attempt to "pierce the corporate veil" is misplaced.

In yet another effort to turn a typical creditor legal doctrine into a debtor's affirmative defense, Lessees attempt to pierce PSFS 3's corporate veil.[27] However, Lessees come nowhere close to meeting their burden to

---

[27] The doctrine of piercing the corporate veil relates to the corporate privilege of limited liability, which "is the right of a shareholder of a corporation to avoid personal liability for the debts of the corporation." Iowa Civ. Jury Insts. § 3300.2; *see also Minger Const., Inc. v. Clark Farms, Ltd.*, No. 14-1404, 2015 WL 7019046, at *3 (Iowa Ct. App. Nov. 12, 2015). As then-Judge McDonald has explained:

> The metaphor [of "piercing the corporate veil"] does not capture the truth or spirit of the matter. In a veil piercing case, the "corporate veil" is not actually pierced and the corporate entity is not disregarded; instead, judgment is entered against the corporation, as the judgment entry in this case reflects, and the district court takes the additional step of imposing judgment against a shareholder for the corporation's liability where liability otherwise would not exist.

Minger Const., Inc., 2015 WL 7019046, at *5 (McDonald, J., concurring in part and dissenting in part). In other words, piercing the corporate veil is a doctrine of remedies. *Torstenson v. Birchwood Estate, L.L.C.*, No. 16-0118, 2017 WL 1086222, at *8 (Iowa Ct. App. 2017) ("The doctrine is an equitable remedy to protect creditors."); *C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593, 598 (Iowa 1987) (explaining that piercing the veil is analyzed with respect to "which individuals should suffer personal liability on the corporation's obligations").

Lessees have offered no legal support for the notion that "piercing the corporate veil" may be used by a third-party to invalidate an assignment or to ignore a forum selection clause. *See Torstenson*, 2017 WL 1086222, at *8 ("The problem here is no judgment was awarded against either TL, a

show the elements of a piercing-the-corporate-veil claim. *See Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 810 (Iowa 1978) (citation omitted). A party seeking veil-piercing bears the burden to establish that exceptional circumstances exist warranting this drastic action. *Id.*; *see also C. Mac Chambers*, 412 N.W.2d at 598. Such exceptional circumstances require that "the corporation is a mere shell, serving no legitimate business purpose, and used primarily as an intermediary to perpetrate fraud or promote injustice." *In re Marriage of Ballstaedt*, 606 N.W.2d 345, 349 (Iowa 2000).

PSFS 3 is not undercapitalized. *See supra* p. 70, n. 25. Whether a corporation is properly capitalized is assessed in reference to the nature and magnitude of the corporate undertaking. *See*, *e.g.*, *Briggs*, 262 N.W.2d at 810 ("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."). Lessees argue that the district court lacked support for its findings that PSFS 3 was adequately capitalized because "there was no evidence of the business to be done by PSFS 3." (Gossett Final Br. 52). This argument is both mistaken and factually incorrect. PSFS 3's business consists of monitoring the receipt of payments made pursuant to the

---

nonparty, or the Torstensons, and thus no reason exists to pierce the corporate veil.").

Financing Agreements and, where necessary, enforcing the Financing Agreements in court. (App. Vol. 6, pp. 396-398).

Lessees do not appear to contest that PSFS 3 possesses separate books from NCMIC and has its own bank account. (App. Vol. 7, pp. 80-93). Lessors also do not appear to contest that PSFS 3's finances are kept separate from NCMIC's finances in a separate general ledger. (App. Vol. 12, pp. 74-87). PSFS 3 entered into a formal, written Servicing Agreement memorializing and documenting the fact that NCMIC employees would perform all tracking and collection activities on PSFS 3's behalf as part of the original assignment transaction. (App. Vol. 7, pp. 116-117) PSFS 3 therefore operates like a typical subsidiary corporation, using the office space, employees, and other resources of the parent corporation pursuant to valid formal, written agreements. Signifcantly, Lessees do not contend that PSFS 3 is used to promote fraud or illegality.

PSFS 3 followed appropriate corporate formalities by filing articles of incorporation, enacting bylaws, obtaining an IRS employer identification number, and holding regular board meetings, of which PSFS 3 keeps its own records. (App. Vol. 6, pp. 409-410; App. Vol. 7, p. 94-118). PSFS 3 accounted for payments under the Finance Agreements in its records and made payments to NCMIC on PSFS 3's promissory note. (App. Vol. 6, pp.

410-411; App. Vol. 7, pp. 80-93). This situation is thus no different from the many situations in which Iowa courts have declined to pierce the corporate veil. *See, e.g.*, *King v. Wilson*, No. 13-2018, 2014 WL 6681609, at **2, 3 (Iowa Ct. App. Nov. 26, 2014) (finding no "exceptional circumstances" where corporation with single shareholder and officer operated for 15 years, filed separate tax returns, did not commingle finances, kept separate financial records, and where "there was no competent evidence establishing the corporation was continuously undercapitalized or undercapitalized") (citing *Beck v. Equine Estates Dev. Co.*, 537 N.W.2d 798, 800 (Iowa Ct. App. 1995)).

Finally, Lessees' argument that PSFS 3 and/or the assignments of the Finance Agreements were a "sham" wilts under even cursory scrutiny. The purpose of the assignments from NCMIC to PSFS 3 was to allow PSFS 3, a subsidiary of NCMIC, to enforce the Finance Agreements against defaulting Lessees in a single, convenient forum in Iowa. (App. Vol. 6, p. 396). This was not a hidden subterfuge intended to mislead Lessors or the district court. The district court recognized that PSFS 3 has been open and honest about this fact since its inception. (App. Vol. 5, p. 310).

Iowa Supreme Court Commission on Unauthorized Practice of Law v. A-1 Associates, Ltd., 623 N.W.2d 803 (Iowa 2001), cited by Lessees, is

inapposite. *A-1 Associates* involved a debt collection agency, A-1, that contracted with creditors using letter agreements which provided A-1 with a fixed percentage of any recovery retained as compensation for A-1's services. *Id*. at 804. A-1 would then take an assignment to the claim and pursue collection. *Id*. at 804-05. The Supreme Court found that the assignments, viewed in connection with A-1's retention agreements, were in fact transfers "intended primarily to secure payment for services rendered." *Id*. at 808. Unfortunately for A-1, those services rendered consisted of the unauthorized practice of law, and thus the court held that A-1 had engaged in the unauthorized practice of law. *Id*.

Here, by contrast, PSFS 3 is "maintain[ing] an action on the debt[s] in its own name" pursuant to the valid assignment of the Finance Agreements. *See id*. Rather than circumvent otherwise generally applicable prohibitions on conduct found in state law as in *A-1 Associates*, the assignments here were intended to trigger the forum selection clause in the Finance Agreements. This has allowed PSFS 3 to enforce the Finance Agreements against the defaulting Lessees efficiently in a single forum – Iowa. That PSFS 3's corporate parent, NCMIC, also benefits from such efficiencies realized by its subsidiary does not make the parent-subsidiary relationship a "sham." And as the district court recognized back in 2010, that Lessees do

not like the consequences of the forum selection clause that they consented to does not render the assignments a "sham." (App. Vol. 5, p. 310).

F. The district court correctly concluded that res judicata principles do not foreclose exercise of jurisdiction over Lessees by Iowa courts.

After consolidation of the Florida declaratory judgment actions, the Florida court denied NCMIC's motion to transfer, finding that "The Brican Agreements only provide that Plaintiffs 'consent to personal jurisdiction and venue' in Iowa, not that they must bring an action in Iowa." (App. Vol. 1, pp. 281-286). The Florida court, citing the general federal venue statute, 28 U.S.C. § 1404, declined to transfer venue to Iowa for the declaratory judgment action. (*Id*.). Lessees' argument that this ruling possesses res judicata effect foreclosing the exercise of jurisdiction against them in Iowa is meritless.

Lessees are seeking application of the doctrine of issue preclusion, which is "a form of res judicata" and which "prevents parties from relitigating in a subsequent action issues raised and resolved in [a] previous action." *Van Haften*, 815 N.W.2d at 22 (internal quotation marks and citations omitted). The elements of issue preclusion are well-established:

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior

> case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Id. (quoting *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011)).

Lessees' argument fails for the simple reason that the Florida court never actually determined that Iowa courts lacked jurisdiction. Rather, the Florida court simply rejected NCMIC's argument that the floating forum selection clauses were "mandatory." (App. Vol. 1, pp. 281-286). In doing so, however, the Florida court also noted that Lessees "'consent to personal jurisdiction and venue' in Iowa." (*Id.*). To the extent issue preclusion applies to the Florida court's ruling on NCMIC's motion to transfer, it would apply in PSFS 3's favor on the issue of Lessees' consent to jurisdiction in Iowa.

Here, to not enforce the forum selection clause in this context would be unjust and unreasonable. If the instant Iowa Judgments against Lessees are dismissed for lack of personal jurisdiction more than 10 years after the various cases were initially filed, discovered, and tried, PSFS 3 will be

forced to re-litigate each of these claims in dozens of other forums. In this scenario, it would be Lessees who engaged in forum shopping.[28]

In sum, the district court correctly held that it had personal jurisdiction over Lessees.

IV. AS THE DISTRICT COURT HAS NOT YET AWARDED ATTORNEY FEES, THIS ISSUE IS PREMATURE.

Following the entry of the Judgments, PSFS 3 filed an application for attorney fees against all of the Lessees in the pending appeal. The district court has not entered a ruling.[29] Thus, any appeal on attorney fees yet to be awarded at this point is premature. Iowa's rules of judicial restraint generally preclude appellate review of issues that depend on matters not yet developed. *Worthington v. Kenkel*, 684 N.W.2d 228, 234 (Iowa 2004), citing *State v. Bullock*, 638 N.W.2d 728, 734-35 (Iowa 2002). The district court's eventual ruling on attorney fees is separately appealable. Iowa R. App. P. 6.103(2).

---

[28] This would actually be the second time Lessees forum shopped. They fought hard to stay the Iowa cases in deference to the Florida declaratory judgment action. In Florida, Lessees lost the declaratory judgment action. Lessees have already had one chance in the forum of their choice. *See First Midwest Corp. v. Corporate Fin. Assoc.*, 663 N.W.2d 888, 892 (Iowa 2003) (holding declaratory judgment actions merit more scrutiny to prevent forum-shopping concerns; public policy favors the determination of related matters in a single action).

[29] While the district court did award attorney fees against the two lessees who were defendants in the bellwether trials (Busch and Insoft), those cases have been resolved and their appeals dismissed.

V. CONCLUSION.

This case needs to end. Having litigated multiple contract defenses in Florida for nearly six years, having the opportunity to litigate additional defenses in Iowa for three more years, and having a full trial on the merits for two bellwether cases, Lessees have had all the process they are due. They have had their day in court, and then some. PSFS 3 respectfully requests the Court affirm the district court in all respects.

In addition, PSFS 3 requests an award of attorney fees for this appeal. *See Frontier Leasing Corp. v. Bowlers Country Club, Inc.*, No. 07-1161, 2008 WL 4725183, at *3 (Iowa Ct. App. Oct. 29, 2008) (awarding appellate attorney fees to finance company for successful appeal) (citing *Beckman v. Kitchen*, 594 N.W.2d 699, 702 (Iowa 1999)).

REQUEST FOR ORAL ARGUMENT

PSFS 3 does not believe oral argument is necessary because the issues on appeal involve the application of existing law to the facts of the case. However, if the Court grants oral argument to Lessees, PSFS 3 requests equal time to be heard.

By: /s/ Benjamin P. Roach
Benjamin P. Roach AT0006588
Randall D. Armentrout AT0000543
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: bproach@nyemaster.com
rdarmentrout@nyemaster.com

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Appellee's Proof Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on July 28, 2020:

Matthew L. Preston
Brad J. Brady
Cara Roberts
BRADY PRESTON GRONLUND, PC
2735 1st Avenue, S.E.
Cedar Rapids, IA 52402

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

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

David H. Charlip
CHARLIP LAW GROUP, LLC
11900 Biscayne Boulevard, Suite 200
North Miami, FL 33181

By: /s/ *Benjamin P. Roach*
Benjamin P. Roach

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [X] This brief contains 13,969 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] This brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [X] This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point or

   [ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

By: */s/ Benjamin P. Roach*
Benjamin P. Roach