No. _____

In The
Supreme Court of the United States

MAKO ONE CORPORATION, *ET.AL*,
Petitioners,

v.

CEDAR RAPIDS BANK AND TRUST, *ET AL.*,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jack Duran, Jr
4010 Foothills Blvd
S-103, #98
Roseville, California 95747
916-779-3316
duranlaw@yahoo.com

QUESTIONS PRESENTED

1. When a Circuit Court finds opposing counsel has an actual and serious conflict of interest in a civil case, should the Court view the conflict as a "structural error" and be required to reverse, remand, and restart all proceedings? The Circuits are widely split on the proper remedy when a conflict is found; cases from multiple Circuits are cited herein attempting to address this issue, and the decisions are about equally split on the proper remedy. Furthermore, there is little guidance on how federal courts should deal with conflict of interest issues in civil cases.

2. Is there a violation of constitutional due process if a Petitioner is not provided an opportunity to prove harm by way of an evidentiary hearing once a Circuit Court finds a conflict of interest by opposing counsel?

PARTIES TO THE PROCEEDING

The corporate transaction and the parties involved in this case are somewhat complex but typical of this type of transaction.

- There are four pass-through corporate entities in this transaction all owned, in whole or in part, and all were controlled by Petitioner Bruce DeBolt, an equity investor (Celick Trust) and Chevron, Inc. (the Federal Historic Tax Credit investor).
- The purpose of these entities was to create a corporate vehicle for the qualifying renovation expenses (QRE's) and by extension the historic tax credits that would be migrated to an entity that could actually benefit from them.
- Here, we have several entities under which qualifying renovation expenditures were made. Petitioner Mako One, Inc. ("Mako") purchased the building, was the fee simple owner, and spent approximately $8 million in the early stages of the renovation. Badgerow Jackson,

> LLC who leased the building from Mako One, Inc. then invested another $9 million ($6,000,000 of which came from the Respondent Bank) finalizing the data center and associated infrastructure.

All parties named in the District Court proceedings were included in the appeal to the Eighth Circuit.

Bruce DeBolt, who is filing *pro se*, is the personal Guarantor of both the Respondent Bank and The Chevron agreements.

The Respondent/Defendant is CEDAR RAPIDS BANK and TRUST COMPANY.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Named Petitioner is Bruce DeBolt represented by Jack Duran, Jr.; other corporate Petitioners named in the lower courts are Mako One Corporation, Badgerow Jackson LLC, and Badgerow Jackson MT, LLC, which is 99% owned by Chevron, Inc. A disclosure statement has been submitted, as required by Rule 29.6.

/s/Jack Duran, Jr.

Jack Duran, Jr.
4010 Foothills Blvd
S-103, #98
Roseville California 95747
916-779-3316
duranlaw@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Bruce DeBolt, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. District Court for the Northern District of Iowa - Sioux City appear at Appendix A to the petition and are published. The order of the Eighth Circuit Court of Appeals and the order denying a petition for rehearing *en panel* and *en banc* appears at Appendix B and Appendix C to the petition and are published.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 2019. A Petition for Rehearing was denied on July 5, 2019. The jurisdiction of the Court is invoked pursuant to 28 USCS § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition raises issues related to the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV.

STATUTORY PROVISIONS INVOLVED

None.

I. STATEMENT OF THE CASE

As the following petition will further detail, this case raises serious implications about the rights of persons to fair proceedings and potential violations of constitutional due process under the Fourteenth Amendment. The Eighth Circuit found Respondent's counsel, who had formerly represented Petitioners, had an actual conflict of interest. And yet, the Eighth Circuit refused to reverse the lower court's judgment against Petitioners by stating Petitioners "made no showing of harm" without affording Petitioners an opportunity or evidentiary hearing to prove or argue the extent to which they were prejudiced by conflicted counsel.

The Eighth Circuit essentially determined the conflict of interest did not amount to a "structural error" that requires a restart of proceedings. This decision creates procedural uncertainty for future litigants and raises considerable questions as to whether Petitioners' constitutional due process rights under the Fourteenth Amendment were violated.

Further grounds for certiorari exist as the Circuits are widely split on the proper remedy once a conflict of interest is found with opposing counsel; we believe a different Circuit would have arrived at a different decision. The Eighth Circuit standard would require a litigant to "prove" harm when a conflict is found, which, among other problematic issues, puts future litigants in a position where they are required to disclose confidential information decimating the concept of attorney-client privilege.

For the above reasons, and as further explained below, Petitioner Bruce DeBolt, *pro se*, prays this Court to grant certiorari.

A. **The Badgerow Building and the Broken Transaction**.

In looking for a new business opportunity in 2006-2007, Petitioners Mako and Bruce DeBolt discovered the Badgerow Building.

The building had been condemned, was a blight on the central business district of Sioux City Iowa and was extensively contaminated with asbestos. However, it was named one of the fifty

most important historic structures in the State to save.

In the lead up to the purchase, Mako was provided local government support and the availability of various government incentives to renovate the property as a data center. The incentives included both state and federal historic tax credits (HTC"), 25% and 20% respectively, New Markets Tax Credits 39%, Tax Increment Financing, and SBA Opportunity Zone benefits.

At the time, the Iowa State HTC program was being expanded from a $2.5 million a year program with a decade long backlog of projects to a $20 million per year program. Mako's purchase was contingent on that legislation passing.

This was an extremely good business venture for the community and for Mako because of four critical facts:

a) The commercial real estate market in Sioux City is, and has been for several decades,

comatose - depressing commercial real estate values.

b) Electric costs in Sioux City are some of the lowest in the nation. The cost of power is to a data center what water is to a farm. It is the single largest line item cost for a data center to manage and can comprise up to 45% of the total cost of operations. Cheap power bestows a competitive advantage on the operator. The cheaper the power, the greater the advantage.

c) The building sits atop a self-refreshing aquifer that for the computer data center provided an unlimited source of 55-degree water for cooling purposes. Cooling can comprise as much as half of the total power required to operate a data center.

d) It appeared various government incentives could be combined to pay for as much as 75% or more of the needed renovation.

Accordingly, Petitioner Mako purchased this condemned 112,000 sq ft commercial office building

listed in the National Historic Register. Petitioner invested more than $18 million in the project, only $6 million of which was borrowed from Respondent Bank and to be repaid from the monetization of state and federal tax credits. The Petitioner renovated the property as a data center. Third-party tenants occupied the property and commenced commercial operations in March 2015.

When the State of Iowa failed to timely pay the state tax credits as statutorily required, suffering from its own cash flow constraints, it set off a waterfall of catastrophic events leading to, among other things, the default of the loan.

B. The Conflict of Interest

Importantly, the law firm of Winthrop & Weinstine ("Winthrop") represented Petitioners in the structure and set up of the financing and later represented Respondent Bank Cedar Rapids Bank and Trust Company ("Respondent" or "the Bank") in the subsequent foreclosure. Winthrop continued to represent Respondent until they were forced to withdraw after the negative decision by the Eighth

Circuit. Appendix B at 11 ("We conclude that the district court erred in failing to disqualify Winthrop as counsel for CRBT").

In representing both parties, Winthrop knew all of the confidential details and proprietary approaches of both sides. They later picked sides and chose to represent the Bank alone, then foreclosing on the property and stripping Petitioners of all their assets. Winthrop had Petitioner's playbook, and the law firm used it against Petitioner in the foreclosure.

Winthrop represented Petitioner from 2011 to 2012, and then concurrently represented both the Petitioner and the Respondent Bank from 2013 to 2016, and finally it represented the Bank only in concert with the Receiver in stripping Petitioner of its assets through foreclosure means during the period 2016 to 2019. We cannot imagine a more gross and offensive conflict of interest – to the legal profession and the institution of justice. Yet Winthrop barged right into it.

As can be seen from the initial statement by the Eighth Circuit, the Court was appalled at these

actions by the Winthrop law firm and found a conflict of interest that warranted disqualification from all issues by Winthrop. In its decision, the Court stated, "Winthrop undertook to represent another person in a matter 'substantially related' to the matter of the Mako representation." Appendix B at 9.

C. **The Eighth Circuit's Finding of "Harmless Erro r".**

After finding a gross conflict of interest on the Winthrop firm's part and chastising them in the decision for allowing it to occur, the Eighth Circuit goes on to find that that the conflict was "harmless error." *See* Appendix B. In finding Winthrop's conduct disturbing, the Court states:

> [T]the problem the Winthrop firm confronts is that no informed consent was ever obtained from Mako. Mako was never informed that its counsel would represent CRBT in a suit related to the very same bonds that it drafted on Mako's behalf. Winthrop did not inform Mako that it was remotely possible that Winthrop would go so far as to call one of its own partners to testify against Mako in an action related to its representation of Mako. Under these circumstances, we conclude that informed consent was not obtained and Mako did not validly waive the conflict of interest.

Appendix B at 11. However, despite finding a conflict existed, the Eighth Circuit applies a harmless error analysis analogizing to a First Circuit (*Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) case, and the Court states:

> [The] First Circuit concluded that the trial court had allowed a lawyer to continue representation despite an apparent conflict. The court than considered whether the court's abuse of its discretion resulted in an adverse impact on the rights of the opposing party. Concluding that there was none, the court found the error harmless. We find this analysis persuasive.

Appendix B at 12 (citations omitted). Essentially, the Court justifies its decision by finding it could not see any proof that the conflict of interest had affected parts of the transaction or would have made a difference in the Petitioners' "settlement posture", by stating:

> Winthrop had no compromised ability to settle with Mako, nor has Mako pointed to any change in its settlement posture because of the improper representation. Given the combative procedural history of this case, it appears the parties were unlikely to settle, regardless of representation.

Id. Besides the problematic stance that the court seems to take by suggesting that the issue of settlement was somehow important to the finding of

harmless error in this case, it cites no basis for that conclusion other than not finding proof of harm in the record. The Circuit Court goes on to justify its decision by suggesting despite an obvious conflict, there is no reason to doubt Winthrop violated its duty of confidentiality or that the litigation would have proceeded any differently with different non-conflicted counsel.

> With regard to the merits, Mako has not claimed that Winthrop used confidential information gained from preparing Mako's bond during its representation of CRBT in this suit. **The record reflects no actual breach of confidentiality nor any reason to doubt that Winthrop upheld its duty of confidentiality to its former client.**

The Court found it egregious that Winthrop would call one of its own partners to testify against Mako in an action related to its representation of Mako, but then in a different cadence, concludes that could not cast doubt on whether Winthrop upheld its duty of confidentiality to Mako. The Court continues by taking the position that there is no indication litigation would have proceeded any differently with different non-conflicted counsel.:

> Finally, it was Mako's counsel—not Winthrop—who failed to oppose CRBT's motion for default judgment, or in the alternative, summary judgment. Thus, Mako's loss is more directly attributable to its own counsel's failure to act than anything the Winthrop firm did or did not do. **There is no reason to believe that Mako's lawyers would have acted any differently had CRBT been represented by a different firm.**

Id. Of course, to arrive at these conclusions, the Court had to speculate conflicted counsel never disclosed confidential information or used it against Petitioners, and also had to assume the *entire procedural history of the litigation would have played out exactly the same if conflicted counsel had not represented Respondent.*

Perhaps most importantly, the Court reached this decision despite the fact Petitioners never had an opportunity or hearing to prove harm vis-à-vis the prejudicial impact of the conflict at either the District Court or the Eighth Circuit.[1] And the Court

---

[1] Petitioners did attempt via their briefing to show the impact of the conflict of interest. *See* Section 5 of the Petition for Rehearing (Denied) by which time harm was more clearly manifesting itself, that the Eighth Circuit seemingly ignored.

did not consider whether there was "structural error" requiring a full reset of proceedings.

Petitioner will argue, once the gross conflict of interest by the Winthrop firm was found, this should have caused an immediate remand and reversal on all issues as a conflict of interest amounts to structural error. No consideration of harmless error was appropriate. And as we discuss below in the Argument Section IV, there is significant jurisprudence for the position: when an actual conflict of interest is found, no inquiry about the extent of the harm is made; the conflict is presumed to be impactful and warrants automatic reversal and remand. The legal profession is rooted in ethics, truth and an uncompromising oath to protect clients' confidentiality. Any demonstrable conflict of interest should automatically cast doubt on the conduct and integrity of the lawyer and its professional responsibility to maintain its client's confidentiality, especially where this conflict occurs during the course of legal proceedings.

D. **Proof of the Conflict's Harm**

If given the opportunity, Petitioners would be able to show how Winthrop's dual representation and conflict of interests harmed Petitioners. First, we would show Winthrop's interference and adverse objectives precipitated a chain of events resulting in the commencement of the foreclosure proceedings. In short, Winthrop and Respondent Bank worked together to dismantle the very financial foundation upon which the transaction was based and the loan to be repaid.

Petitioners would also show Winthrop had and used confidential information for its Bank client's benefit against Petitioners in these proceedings. Minimally, Petitioner would show Winthrop was in possession of highly useful, confidential attorney-client privileged information, including but not limited to:

a) Petitioners' appetite for litigation, which would be helpful to the opposing party as they would know exactly what Petitioners were willing and able to do.

b) Information regarding capacity for litigation. They knew what Petitioners had in terms of reserves and ability to expend to set matters right if things went wrong in litigation.

c) Confidential marketing strategies and potential clients – – all of this would be helpful to Respondent once they took over the project by utilizing the Receiver, and Respondent did use it.

d) Tax returns, advice and positions - This was a roadmap for Winthrop as to how to best navigate the upcoming scene for its preferred and long-time client, the Bank.

II. PROCEDURAL HISTORY

On January 11, 2018, the Northern District of Iowa granted summary judgment in Respondent's favor. And prior to reaching its decision, the lower court denied Petitioners' Motion to Disqualify Counsel for a conflict of interests. On March 21, 2019, some 13 months after the Appeal was timely filed, the United States Court of Appeals for the Eighth Circuit issued a decision affirming the lower court's judgment for money damages against Petitioners,

reversed the District Court's denial to disqualify Plaintiff-Appellee's counsel, and remanded for further proceedings. After the decision, Petitioner Bruce DeBolt filed a Petition for Rehearing *En Banc/En Panel pro se* that was denied on July 5, 2019 without comment.

III. RELIEF REQUESTED

Because there is a clear structural error, the Eighth Circuit's affirmation of the judgment awarding damages and property rights to Respondent against Petitioners should be reversed and remanded for further proceedings. And to be clear, Petitioners challenge the Eighth's Circuit's requirement to prove harm, but we do not contest the Eighth Circuit's reversal of the lower court's finding regarding the Motion to Disqualify Counsel due to the conflict of interest.

IV. ARGUMENT

A. The Eighth Circuit Court of Appeals has ruled Winthrop's actions were infected by actual conflicts of interest. That should end this matter and inquiry, and there should be a grant of the Petition and remand to restart the proceedings without the conflict because

the conflict amounts to a "structural error".

1. **A conflict of interest by counsel is a structural error requiring complete reversal.**

In criminal cases invoking the right to Sixth Amendment protection of fair trials and effective assistance of counsel, the Supreme Court has weighed in on the difference between errors that are "harmless" and errors that are "structural." *See e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–50, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409 (2006) (citations omitted). ("The second class of constitutional error we called 'structural defects.' These 'defy analysis by 'harmless-error' standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'). Structural errors "require automatic reversal, despite the effect of the error on the trial's outcome." *United States v. Stewart*, 306 F.3d 295, 321 (6th Cir. 2002); *see also Becht v. United States*, 403 F.3d 541, 547 (8th Cir. 2005).

This Court has already considered whether conflicts of interests in criminal proceedings are "harmless" or "structural errors" and have found that they are never harmless.

> [U]nconstitutional **multiple representation is never harmless error**. Once the Court concluded that [the party's] lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.

Cuyler v. Sullivan, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980) (citations omitted) (emphasis added). When an actual conflict is found, prejudice against the client is presumed.

> **[T]he Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.** Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), **it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.** Even so, the

> rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. **Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."**

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). The reason for the presumption is because:

> [I]t would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway v. Arkansas, 435 U.S. 475, 490–91, 98 S. Ct. 1173, 1182, 55 L. Ed. 2d 426 (1978).

While it is true that the Supreme Court's decisions and dicta cited above are in criminal cases that rely on the Sixth Amendment for the basis of their decisions, the reasoning behind why a conflict of interest can be so damaging equally apply in civil cases. Further, while most of these cases deal with scenarios where a conflict was found by a defendant's own counsel, we believe the danger or prejudice when

the conflict arises from opposing counsel is even more severe.

We posit that despite this being a civil case regarding the conflict of opposing counsel, the Eighth Circuit should not have applied a "harmless error" analysis but rather determined there was a structural error where a presumption of prejudice exists. Winthrop clearly "breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties . . . [and] it is difficult to measure the precise effect . . . of representation corrupted by conflicting interests." *See Strickland*, 466 U.S. at 692. And as the *Holloway* case stated, using a harmless error analysis to "assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible . . . , an inquiry into a claim of harmless error here would require . . . unguided speculation." *See Holloway*, 435 U.S. at 490–91.

2. The Eighth Circuit application of harmless error was erroneous.

In the case of *Arizona v. Fulminante,* 499 U.S. 279, 310, (1991), this Court states, "a structural error

de[fies] analysis by harmless error standards" and is therefore exempt from harmless error analysis. *See id.* at 309. This has been echoed by the lower Circuit Courts. *See United States v. Navarro*, 608 F3d 529, 538 9th Cir (2010) ("[S]tructural error" is a term of art for error requiring reversal regardless of whether it is prejudicial or harmless".); *United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008) (defining structural errors as constitutional errors that deprive the defendant of a fundamentally fair trial that may not be found harmless.)

Here, because the Eighth Circuit clearly found a conflict of interest, it erred in examining whether the error was harmless. Courts across multiple jurisdictions, including this one, have agreed that once a conflict is found, the proper remedy is to vacate and remand any judicial decisions tainted by the presence of conflicted counsel. *See e.g.*, *Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987); United States v. Edelmann*, 458 F.3d 791 (8th Cir. 2006); *Fred Weber, Inc. v. Shell Oil Co.,* 556 F.2d 602 (8th Cir. 1977), *cert. den.* 436 U.S. 905 (1978); *T.C. Theater Corp. v. Warner Bros. Pictures, Inc.,* 113 F.

Supp. 265 (S.D.N.Y. 1953); *In re: Davenport Communications Limited Partnership,* 109 B.R. 362 (1990); *Pound v. DeMera Cameron, 135Cal App. 4th 70.36 Cal. Rptr. 3rd 922 (2005); Harris v, Firemans Fund Ins. Co.* 119 Cal. App. 4th 671, 14 Cal. Rptr.3rd 618 (2004).

3. The Supreme Court's guidance is needed to clarify between the Circuits what is the proper remedy when a conflict of interest is found.

However, there is still uncertainty among some the Circuits as to how to deal procedurally when structural errors or "trial errors" are found. Many of the Circuit Courts hold that once a structural error is established there is a presumption that confidences were violated and nothing more is required to show harm; *see supra* [section above]; other courts require some showing of prejudice the error created before vacating a judgment. *See e.g.*, *Hollis v. Davis*, 941 F.2d 1471, 1473 (11th Cir. 1991); *Jackson v. Herring*, 42 F.3d
1350, 1354 (11th Cir. 1995); *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717 (7th Cir. 1982); *Cedar Rapids Bank & Tr. Co. v. Mako One Corp.*, 919 F.3d 529, 532 (8th Cir. 2019).

A good example of the confusion caused by the multiple approaches in dealing with presumed versus proven prejudice is the Eleventh Circuit's analysis in *Jackson v. Herring*, 42 F.3d 1350, 1361 (11th Cir. 1995). In *Jackson*, the Eleventh Circuit contemplates the competing varying standards of prejudice in attempting to correctly choose and apply the standard set in *Strickland v. Washington*, 466 U.S. 668, 692. (Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance.") The Eleventh Circuit states:

> That the **prejudice prong of *Strickland*** is not co-terminous with the **more general prejudice requirement of *Wainwright v. Sykes*,** under which a federal habeas petitioner must demonstrate that the errors "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." **Neither is it akin to the "harmless error" standard of *Brecht v. Abrahamson*,** under which certain types of "structural" errors are *per se* prejudicial.
>
> Rather, the *Strickland* test asks whether there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome," but "a defendant need not show that

> counsel's deficient conduct more likely than not altered the outcome in the case."

Id. (emphases added). The complexity in defining the contours of "structural errors" verses the "trial error" analysis is evident by the diversity of the above decisions. The Court is understandably reluctant to go too far in establishing absolute mandates of "grant", "vacate" and "remand". The Court appears to be attempting to allow the lower courts a level of fact-based discretion in reconciling these two categories of error. Some errors defy a fact-based analysis. Often, as is the case here, no record can be procedurally created. Fundamental fairness of the judicial process and the broader interests of society in maintaining the integrity of this process should take precedence.

Greater clarity from this Court is required to achieve better consistency across the Circuits in their rulings and for the fair administration of justice.

4. **This Court should provide guidance to lower courts that when a conflict exists, an analysis into the degree of harm is impractical, inappropriate, and against public policy.**

    a) **Accurately determining the degree of harm caused by conflicted counsel is nearly impossible and requires the harmed party**

and court to speculate how counsel used her position against the party.

As we have previously argued, the jurisprudence of this Court and others is that in a criminal context, a conflict of interest by counsel creates the type of structural error (as opposed to a "trial error") that so flagrantly poisons the legal proceedings that a total reset is required.

If on the other hand, more courts were to adopt the standard that the Eighth Circuit applied here and attempted to determine the degree of harm, it would proliferate a standard fraught with potential issues. To truly determine how much a party was harmed by conflicted counsel, an accurate calculation would require knowing specifically how, what, when, and where conflicted counsel used confidential information, strategy, or any other benefit counsel would have derived and understood from its previous representation. Of course, because no person can read a lawyer's mind, an accurate calculation would be impossible, and the harmed party and court would be left with little choice but to speculate as to what and how the conflicted lawyer thought.

b) Speculating or proving harm by conflicted counsel asks the harmed party to potentially divulge information protected by attorney-client privilege.

As if a party was not harmed enough by conflicted counsel's involvement in a case, the lower court's requirement that harm be proved asks the party to divulge information that should be protected by attorney-client privilege. To fully demonstrate how conflicted counsel could, or did, use privileged information against the Petitioner, the Petitioner would have to divulge the contents of the protected information to the court (and potentially to the adverse party). From a policy standpoint, this is most problematic as the effect is that it creates negative incentives for clients to be forthcoming with their lawyers.

The Iowa Code of Professional Conduct Rule 32.1(9) comment 3 and the ABA Model Rules 1:9 state in part: *"A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter."*

The interest of these rules is, of course, to preserve the sanctity of attorney-client privilege as the ability to freely and honestly communicate with one's lawyer is the bedrock of our judicial system. Yet the Eighth Circuit's decision requiring Petitioner to prove harm by way of disclosing privileged information seeks the opposite. This is a destructive position the Court has taken with widespread implications that affect the judicial system as a whole; the Supreme Court should act now and nip this problem in the bud by reversing the decision and prescribing guidance with a better remedy for dealing with conflicted counsel.

c) The burden to identify and remedy conflicts is on the attorney, not the client.

The requirement that a party must prove harm by conflict also shifts the ethical obligations that all lawyers are required to abide by from the lawyer to the client. We believe every jurisdiction of this country (including the ABA Model Rules of Professional Conduct) has codified rules governing attorney conflicts of interest; and in not a single one would the burden be on the client to identify the

conflict or to determine how much they would be harmed by conflicted counsel.[2] The Iowa Code of Professional Conduct states:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . . **A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.**

Iowa CPC Rule 32. These laws explicitly prohibit what Winthrop did, but in its ruling, the Eighth Circuit condones more than five years of conflicted representation, a decision that is contrary to the Iowa Professional Conduct Code because Winthrop represented adverse parties in the same transaction without obtaining informed consent from the Petitioner.

---

[2] Courts too have often weighed in on this burden shifting. *See e.g.*, W*estinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311, 1978 U.S. App. LEXIS 9970, 1978-2 Trade Cas. (CCH) P62, 169 (7th Cir. Ill. July 25, 1978) ("[Law firm's] duty to keep the [clients] advised of actual or potential conflicts of interest, not the [clients'] burden to divine those conflicts.").

d) Not all of the harmful effects of the conflicted representation can be realized at the time of the decision.

The Court incorrectly presumes that all the "harmful effects" will have occurred and be presentable by the time of final judgment. As an example, Receivers selected by conflicted counsel, as in this case, are brought before the lower court, appointed and authorized under expansive rights created by same conflicted counsel. The Receiver then continues to act long after the final judgment is entered, the case is closed, and a timely appeal filed.

e) The ruling creates perverse monetary incentives for attorneys to engage in conflicts of interest.

From a public policy perspective, allowing law firms to retain fees earned out of conflicted representation incentivizes and promotes the very conduct the Model Rules of Professional Conduct is attempting to prevent. The Eighth Circuit's decision, despite its removal of Winthrop in further representation of Respondent, permits the retention of its fees.

The lower courts ignore how these rulings sanction the violation of Iowa State law. It allows the products of Winthrop's unlawful representation to stand as well as allowing Winthrop to retain all fees and earnings, which thereby incentivizes the commission of unlawful conduct. If the current holding stands, the odds that "harm" can ever be met for reversal are slim. And as there is no obligation to disgorge fees, law firms like Winthrop are incentivized to barge through obvious conflict of interests and ingratiate themselves on fees from multiple parties.

f) Harm extends from the Petitioners to society as a whole.

The Eighth Circuit decision has clearly harmed Petitioners, but the arms of bad precedents are far-reaching. As we have argued above, an extension of the Eighth Circuit's decision has deleterious effects on attorney-client privilege, creates perverse incentives for attorneys to take advantage of their clients, but also creates further confusion as to how future courts and litigants should deal with civil conflicts of interests. Without a proper evidentiary hearing to prove harm or a grant of full remand, future courts will be forced to speculate as to what

potential harm the conflict creates, and to do this well would require the ability to both see into the conflicted attorney's mind and to see into the future to determine the consequential effects of the conflict that are yet to happen. Simply put, the Eighth Circuit standard is impossible to comply with.

By granting cert, the Supreme Court has the opportunity now to stamp out this bad precedent and advise on an area of law that is largely barren - what must courts do procedurally when they discover a serious attorney conflict of interest in the middle of ongoing litigation? What is the solution that best protects the interests of both the litigant and society as a whole?

B. An appellate court that finds a conflict of interest by counsel but denies the party the opportunity to later prove harm violates the due process clause of the Fourteenth Amendment.

It is textbook constitutional law that the Fourteenth Amendment "due process guarantees require that the courts shall be open to every person with a right to a remedy for injury to his person, property, or reputation, with the opportunity for such

remedy being granted at a meaningful time and in a meaningful manner." 16D C.J.S. Constitutional Law § 1912. And the Supreme Court has determined that court actions may not infringe on an individual's right of access to the courts.

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense-whether it has had an opportunity to present its case and be heard in its support . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 681, 50 S. Ct. 451, 454-455; *see also Richards v. Jefferson Cty., Ala., 517 U.S. 793, 803–04, 116 S. Ct. 1761, 1768–69, 135 L. Ed. 2d 76 (1996).*

Accordingly, the Eighth Circuit decision, which found a conflict of interest but refused to remand to all proceedings or provide an opportunity for Petitioners to prove the harm suffered, deprived Petitioners of their Fourteenth Amendment due process rights. After the judicial system agreed with

Petitioners that there was in fact a serious conflict of interest, it provided them no opportunity to remedy the harm at a "meaningful time" or in a "meaningful manner;" nor does the decision grant Petitioners an "opportunity to present [their] case and be heard in its support." *See* 16D C.J.S. Constitutional Law § 1912; *Brinkerhoff-Faris*, 281 U.S. at 681.

As the Eighth Circuit decision violates due process guarantees, this Court should remand all proceedings and give Petitioners the opportunity to be heard on how the conflict of interest harmed them.

V. CONCLUSION

By granting cert, the Supreme Court has an opportunity to correct several errors and provide clear guidance on important legal issues that lower courts desperately need. Attorney conflict of interest as it pertains to civil cases is a largely unestablished area of law, but this Court can adopt and apply established principles already set forth in related criminal law precedents.

Factually, our petition focuses largely on a bad Circuit decision that found a clear conflict of interest

by opposing counsel but still afforded the harmed party no remedy. But the legal and practical implications of this decision extend much further than simply correcting the wrongs of an aggrieved litigant; this case has widespread implications for constitutional due process rights and the attorney-client relationship. Moreover, there is much uncertainty in the lower courts as to how to properly analyze the harm done by conflicted counsel and what the proper remedy may be when a conflict is found.

Petitioner has provided the Court with two main avenues for granting certiorari and correcting the Eighth Circuit's faulty decision: 1) the Court can determine that a conflict of interest in a civil case is a structural error worthy of total remand as is already established in similar criminal cases; and 2) the Court can find that not allowing a litigant to prove harm via a hearing when a conflict is found mid-litigation is a violation of due process. Petitioner acknowledges that the two avenues are somewhat incongruent; there are serious dangers to forcing a litigant to prove harm done by previous conflicted

counsel in a hearing because it opens up the litigant to divulge sensitive, privileged information and forces both the litigant and court to speculate as to what the actual harm was. But at the same time, denying the litigant a hearing on the issue raises the constitutional problem of lack of due process. These considerations underscore the importance of the issues. We trust this Court to wisely weigh the balance between the importance of the right of due process and the sanctity of the attorney-client relationship. We proffer, however, that the relief requested - a total remand of all proceedings while preserving the court's finding of a conflict is the best practical solution.

For all of the reasons stated, we respectfully request this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

/S/Jack Duran, Jr.

Jack Duran, Jr.
4010 Foothills Blvd
S-103, #98
Roseville, CA 95747
(916) 779-3316 (Office)
duranlaw@yahoo.com

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

CEDAR RAPIDS BANK AND TRUST COMPANY, Plaintiffs vs. MAKO ONE CORPOR ATION, et al., Defendants.	No. C17-4035-LTS **ORDER AND ENTRY OF JUDGMENT**

I. INTRODUCTION

This case is before me on a motion (Doc. No. 75) for default judgment or, in the alternative, summary judgment filed by plaintiff Cedar Rapids Bank and Trust Company (CRBT) on December 11, 2017. Defendants have not filed a resistance. The resistance was due on or before January 2, 2018. *See* Local Rules 1(j) and 56(b) and Fed. R. Civ. P. 6(a). CRBT filed a reply (Doc. No. 78) on

January 3, 2018, requesting that its motion be granted pursuant to Local Rule 56(c). CRBT requested oral argument, but I find that it is not necessary. *See* L.R. 7(c).

II. PROCEDURAL BACKGROUND

This case involves a default on a bond transaction that financed the development and historic renovation of the Badgerow Building in downtown Sioux City, Iowa. Following the default on December 12, 2016, CRBT issued a written notice of default on March 28, 2017. On April 17, 2017, CRBT filed a petition in equity in the Iowa District Court for Woodbury County. Defendants removed the case to this court on May 16, 2017, invoking the court's diversity jurisdiction. The petition includes the following claims:

- Count 1 – Breach of Contract Against Badgerow under the Bond and Indenture
- Count 2 – Breach of Contract Against DeBolt under the DeBolt Guaranty
- Count 3 – Breach of Contract Against Mako under the Mako Guaranty

- Count 4 – Foreclosure of the Fee Mortgage
- Count 5 – Foreclosure of the Leasehold Mortgage
- Count 6 – Appointment of Receiver
- Count 7 – Replevin; Claim of Personal Property; and
- Count 8 – Priority of Liens

On October 30, 2017, I issued an order (Doc. No. 64) granting CRBT's motion to appoint a receiver. The Receiver submitted its oath (Doc. No. 65) and bond (Doc. No. 69) shortly thereafter. On November 2, 2017, I issued an order (Doc. No. 68) denying defendants' motion to dismiss for failure to join a necessary party.

None of the defendants have filed an answer, which was due November 16, 2017. *See* Fed. R. Civ. P. 12(a)(4)(A) ("if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action."). On December 11, 2017, CRBT filed its motion (Doc. No. 75) for default judgment or, in the alternative, summary

judgment. As mentioned above, defendants have not filed a resistance and the time for doing so has passed.

CRBT requests that I grant its motion pursuant to Local Rule 56(c), which states: "If no timely resistance to a motion for summary judgment is filed, the motion may be granted without prior notice from the court." However, before granting such relief I must consider whether CRBT, as the moving party, has met its burden of showing that summary judgment is appropriate. *See Maxwell v. Linn County Correctional Center*, 310 F. App'x 49, 49–50 (8th Cir. 2009) (citing *Johnson v. Boyd–Richardson Co.*, 650 F.2d 147, 149 (8th Cir. 1981) (holding that the court has the "duty to inquire into the merits of [a summary judgment] motion and to grant or deny it, as the case may be, in accordance with law and the relevant facts" when a party fails to comply with local rules deadlines)); Fed. R. Civ. P. 56(e) ("If a

party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may ... consider the fact undisputed for purposes of the motion, ... grant summary judgment if the motion and supporting materials—including facts considered undisputed—show that the movant is entitled to relief ... or ... issue any other appropriate order").

III. LEGAL STANDARDS

A. Default Judgment Standards

Federal Rule of Civil Procedure 55 provides, in pertinent part, as follows:

> **(a) Entering a Default.**
>
> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
>
> **(b) Entering a Default Judgment.**
>
> **(1) By the Clerk.** If the plaintiff's claim is for a

sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals--preserving any

> federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:
>
> (A) conduct an accounting;
>
> (B) determine the amount of damages;
>
> (C) establish the truth of any allegation by evidence; or
>
> (D) investigate any other matter. Fed. R. Civ. P. 55(a)-(b).

B. ***Summary Judgment Standards***

Any party may move for summary judgment regarding all or any part of the claims asserted in a case. Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A material fact is one that "'might affect the outcome of the suit under the governing law.'"

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.*

> An issue of material fact is genuine if it has a real basis in the record, *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp* ., 475 U.S. 574, 586–87 (1986)), or when "'a reasonable jury could return a verdict for the nonmoving party' on the question," *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Evidence that only provides "some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, or evidence that is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249–50, does not make an

issue of material fact genuine.

As such, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248–49. Essentially, a genuine issue of material fact determination, and thus the availability of summary judgment, is a determination of "whether a proper jury question [is] presented." *Id.* at 249. A proper jury question is present if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

The party moving for entry of summary judgment bears "the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323). Once the moving party has met this burden, the nonmoving

party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue for trial. *Mosley v. City of Northwoods*, 415 F.3d 910 (8th Cir. 2005). The nonmovant must show an alleged issue of fact is genuine and material as it relates to the substantive law. If a party fails to make a sufficient showing of an essential element of a claim or defense with respect to which that party has the burden of proof, then the opposing party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322.

In determining if a genuine issue of material fact is present, I must view the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88. Further, I must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id.* However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh

the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376–77 (8th Cir. 1996).

IV. ANALYSIS

A. Undisputed Facts

Due to the lack of a responsive pleading, I deem all facts contained in CRBT's statement of material facts to be undisputed. *See* Local Rule 56(b); Fed. R. Civ. P. 56(e)(2). Those facts are summarized as follows:

On August 30, 2013, CRBT and defendants Badgerow Jackson LLC (Badgerow), Mako One Corporation (Mako) and Bruce DeBolt (DeBolt) entered into a Trust Indenture (Doc. No. 4-1)[1] to evidence a bond-financing transaction for the rehabilitation of the Badgerow building. As part of this transaction, Badgerow and CRBT executed a

Bond (Doc. No. 4-2) in the amount of $6,000,000. Badgerow's obligations were secured with a mortgage, assignment of rents, fixture filing and a security agreement pursuant to which Mako granted CRBT a mortgage lien against and security interest in all of the fee property (Fee Mortgage), consisting of a vacant building designed for a restaurant or retail store on the first floor and a data center on floors 2 through 12. *See* Doc. No. 4-3. If rehabilitated in accordance with certain requirements, the property is expected to generate significant federal historic rehabilitation tax credits as well as state tax credits for certified historic structures. Badgerow's obligations under the Bond and Indenture were further secured by a leasehold mortgage, assignment of rents, fixture filing and security agreement (Leasehold Mortgage). *See* Doc. No. 4-4. Badgerow assigned CRBT all of its interest in the leasehold property including all rights under the Master Lease dated

---

[1] These documents are also provided in CRBT's Appendix to its motion. *See* Doc. Nos. 75-4, 75-5 and 75-6.

March 21, 2012, between Mako (landlord) and Badgerow (tenant of floors 2 through 12).

See Doc. No. 4-5.

Badgerow then entered into a sublease with Badgerow Jackson MT, LLC (MT), leasing floors 2 through 12 to MT. To further secure its obligations, Badgerow executed and delivered to CRBT a pledge agreement in which Badgerow granted CRBT a security interest in identified accounts (Accounts Pledge). *See* Doc. No. 4-6. Badgerow also executed and delivered to CRBT a pledge agreement in which Badgerow and Mako granted CRBT a security interest in the state tax credits (Tax Credits Pledge). *See* Doc. No. 4-7.

Additional security for Badgerow and DeBolt's obligations included a pledge agreement in which

DeBolt granted CRBT a security interest in, among other things, his membership units in Badgerow (Pledge of Badgerow Membership Interests). *See* Doc. No. 4-8. DeBolt and the Arnold Celick, Jr. and Nancy Dauman Celick Revocable Living Trust (the Trust) also executed and delivered to CRBT a stock pledge agreement, pursuant to which DeBolt and the Trust granted CRBT a security interest in their stock in Mako (Pledge of Mako Stock).*See* Doc. No. 4-9. Further security included an assignment of project agreements, permits and contracts (Assignment of Project Agreements), pursuant to which Badgerow assigned to CRBT all of its interest in the agreements, contracts and related documents identified therein. *See* Doc. No. 4-10. MT also executed and delivered to CRBT an Assignment of Capital Contributions, pursuant to which MT assigned to CRBT all of its interest in, among other things, capital contributions paid and to be paid by Chevron U.S.A. Inc. (Chevron), the

99.99% member of MT under an amended and restated operating agreement of MT dated May 31, 2012. *See* Doc. No. 4-11. Mako and DeBolt also issued guaranties regarding their obligations under the Bond and Indenture. *See* Doc. Nos. 4-15 and 4-16. The Mako Guaranty is secured by the Fee Mortgage and fee property and the DeBolt Guaranty is secured by the Pledge of Badgerow Membership Interests.

After multiple extensions of the maturity date, Badgerow, Mako and DeBolt defaulted under the loan documents by, among other things, failing to pay all amounts due under the Bond upon the Bond's last amended maturity date of December 12, 2016. Pursuant to a cross-default provision, this failure to make payments (constituting a default under the Indenture) is also a default under the Assignment of Contributions, putting MT in default as well. CRBT issued a written default notice on

March 28, 2017, and demanded immediate payment in full of all amounts due under the Bond. Pursuant to the terms of the loan documents, interest began accruing under the Bond at the default rate upon maturity. As of November 30, 2017, the following sums (among others) are due and owing to CRBT by Badgerow, Mako and DeBolt under the Bond:

Principal:	$4,227,150.0
Interest:	$245,081.03
Default Interest:	$160,178.35
Release Fee:	$130.00
Winthrop & Weinstine fees	$327,586.47
Moore, Heffernan, Moeller, Johnson, Meis, LLP fees	$24,522,05
Protective advances	$146,283.52
Total:	**$5,222,936.13**

Interest continues to accrue at the contractual rate of 10 percent, or $1,174.21 per day. CRBT is also entitled to recover all collection costs associated with the loan documents, including attorneys' fees and costs, which have accrued and will continue to accrue in connection with the defaults under the

loan documents.

Badgerow, Mako and DeBolt have had information of and a reasonable opportunity to pay the indebtedness under the Bond prior to this action. The fee and leasehold property are not used for agricultural purposes as defined in Iowa Code § 535.13, are not the residence of any defendant, are not a one-family or two-family dwelling occupied by any defendant and are not the homestead of any defendant.

Badgerow is in default under the Bond and Indenture. Based on Badgerow's default, DeBolt failed to perform under the DeBolt Guaranty and Mako failed to perform under the Mako Guaranty. Both the Fee Mortgage and Leasehold Mortgage provide that upon a default, CRBT is entitled to foreclose on the mortgage. The Fee Mortgage, Leasehold Mortgage, Accounts Pledge, Tax Credits Pledge, Pledge of Badgerow Membership Interests, Pledge of Mako Stock, Assignment of Project

Agreements and Assignment of Contributions (the Security Documents) all provide that upon a default, CRBT is entitled to, among other things, repossess and foreclose on personal property constituting part of the property, the accounts, the tax credits, the Badgerow membership interests, the Mako stock, the project documents and the MT capital contributions (the Collateral). CRBT requests a money judgment on its breach of contract claims, attorneys' fees and costs, a decree of foreclosure and an order for replevin.

B. *Legal Analysis*

1. *Applicable Law*

CRBT argues Iowa law applies to this dispute because this court sits in diversity jurisdiction and Iowa is the forum state of the underlying dispute. I agree. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941). The financial and security documents also state that Iowa law is the applicable law. *See* Doc.

Nos. 4-1 through 4-23.

2. Default Judgment

CRBT argues it is entitled to default judgment due to defendants' failure to file a timely answer. Rule 55 provides that when a defendant fails to "plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Once a defendant's default has been entered, the plaintiff may request the entry of judgment by default. Fed. R. Civ. P. 55(b).

Here, no defendant's default has been entered. Thus, a request for entry of judgment by default is premature. Moreover, despite failing to file a timely answer, defendants have demonstrated an intent to "otherwise defend" by opposing CRBT's motion to appoint receiver. While this does not excuse their failure to file an answer, I find it more appropriate to address CRBT's motion for summary

judgment.

1. Summary Judgment

a. Breach of Contract Claims

CRBT seeks summary judgment on all counts. It argues it is entitled to a money judgment based on the defaults under the terms of the loan documents. Those defaults, as described above, are undisputed. As such, CRBT is entitled to summary judgment on its breach of contract claims (Counts 1 through 3). To prove a breach of contract, CRBT must prove: (1) the existence of a contract, (2) the terms and conditions of the contract, (3) CRBT has performed all the terms and conditions required under the contract, (4) the defendants breached the contract in some way and (5) CRBT has suffered damages as a result of the defendants' breach. *See Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). The breach of contract claims are based on the Bond and

Indenture with Badgerow (Count 1), the DeBolt Guaranty (Count 2) and Mako Guaranty (Count 3). CRBT has established each of the above elements with its unrebutted statement of facts and supporting documents for each count. As the non-breaching party, CRBT is entitled to damages in the amount that will put it in the position it would have been in if the contract had not been breached. *See Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). That amount is supported by the affidavit of David V. Castelluccio, Vice President of QCR Holdings, Inc. (CRBT's parent and holding company) and is undisputed. It is also consistent with the types of damages allowed in a breach of contract claim. I find CRBT is entitled to judgment and damages on its breach of contract claims, which is described in further detail in the conclusion below.

a. Attorney Fees

CRBT also seeks to recover attorney fees and costs pursuant to the loan documents. Section 8.03 of the Indenture provides that moneys received by CRBT resulting from the exercise of remedies following a default shall first be applied to the payment of fees and expenses of CRBT, including attorney fees. *See* Doc. No. 4-1 at 48, 53. The Mako Guaranty states that Mako agrees to pay "all reasonable fees and expenses incurred by [CRBT] in collecting any amount payable under [the Guaranty] or enforcing or protecting its rights under the Guaranty in each case whether or not legal proceedings are commenced." Doc. No. 4-15 at 3. It specifically states that "[s]uch fees and expenses include, without limitation, reasonable fees for attorneys, paralegals and other hired professionals . . . ." *Id.* The DeBolt Guaranty contains the same language. *See* Doc. No. 4-16 at 3. CRBT argues it has taken appropriate and reasonable actions to enforce the loan

documents[2] and is entitled to an award of attorney fees and costs, including attorneys' fees and costs incurred after the entry of judgment.

Based on the contractual language described above, I find that CRBT is entitled to recover its attorney fees and costs. I further find, based on CRBT's supporting materials

---

[2] These actions include the following: filing the Petition, responding to the Notice of Removal, filing and preparing for CRBT's motion for the appointment of a receiver, addressing the bankruptcy filings of Mako and Badgerow, responding to motion for sanctions filed by DeBolt in the Mako and Badgerow bankruptcy cases, responding to motions for continuation of the automatic stay filed by DeBolt in the Mako and Badgerow bankruptcy cases, responding to requests for use of cash collateral from Mako and Badgerow in connection with the bankruptcy cases, participating in motions to dismiss the Mako and Badgerow bankruptcy cases, responding to DeBolt's motion to disqualify counsel for CRBT, responding to DeBolt's motion to dismiss for failure to join a necessary party and filing this motion.

and defendants' failure to resist, that the amounts CRBT requests, as itemized on page 8 of this order,

supra, are reasonable and appropriate.

a. Foreclosure

Next, CRBT argues it is entitled to an order for a decree of foreclosure. It further contends that pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201, it is entitled to a determination of the construction of the contracts and legal relations between the parties with regard to the loan documents, liens, collateral, and a declaration of the rights, status, legal relations, obligations and remedies of the parties. This would include, but is not limited to, a judgment finding that CRBT is entitled to enforce the Fee Mortgage and security interests in the property and the other collateral according to the terms thereof and Iowa law. Due to the undisputed defaults under the loan documents, CRBT seeks to foreclose the Fee Mortgage and Leasehold Mortgage by action as provided in Iowa Code Sections 654.20 through 654.26. The Fee

Mortgage states that upon Mako's failure to perform under the Mako Guaranty, CRBT is entitled to take possession of and sell the property in accordance with applicable Iowa law. *See* Doc. No. 4-3 at 28, 30-31. The Leasehold Mortgage provides the same remedy, among others, for a default under the Indenture. *See* Doc. No. 4-4 at 37. Additionally, the Leasehold Mortgage requires Badgerow to pay real estate taxes. CRBT states Badgerow has failed to do this constituting a default under the Leasehold Mortgage. *Id.* at 26, 34. Based upon the defaults, CRBT requests a decree of foreclosure to foreclose the Fee Mortgage and Leasehold Mortgage. It also requests a final determination regarding the validity, extent and priority of the interests, if any, in the Property and Collateral, claimed by defendants pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201. I find that CRBT is entitled to a foreclosure decree and final determination under the mortgage

documents and pursuant to Iowa Code §§ 654.20-26. Such decree and final determination will be set forth in the conclusion of this order.

a. Commission of United States Marshal

With regard to any commission due to the sale of the property under 28 U.S.C. § 1921, CRBT argues that the United States Marshal is not entitled to a commission because a "seizure or levy" is not required for a judicial foreclosure sale. *See James T. Barnes & Co. v. United States*, 593 F.2d 352, 353 (8th Cir. 1979) (citing in agreement *Travelers Ins. Co. v. Lawrence*, 509 F.2d 83, 90 (9th Cir. 1974)). It further argues that prior to an amendment in 1962, the Marshal would have been entitled to the same fee that a county sheriff would have been entitled had the sheriff conducted the sale. *See Travelers Ins. Co.*, 509 F.2d at 90. It contends this is the more reasonable position and requests that I limit the Marshal's commission accordingly.

The relevant section of 28 U.S.C. § 1921 provides as follows:

> The United States Marshals Service shall collect a commission of 3 percent of the first $1,000 collected and 1 ½ percent on the excess of any sum over $1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of commission shall be within the range set by the Attorney General. [I]f the property is not disposed of by marshal's sale, the commission shall be in such amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than a marshal or deputy marshal, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other party. This subsection applies to any judicially ordered sale or execution sale, without regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law. This subsection shall not apply to any seizure, forfeiture, sale, or other disposition of property pursuant to the applicable provisions of law amended by the Comprehensive Forfeiture Act of 1984 (98 Stat. 2040).

28 U.S.C.A. § 1921(c)(1). The statute outlines three

actions that must occur for the Marshal to be entitled to the statutory commission: (1) seizing or levying on property,

(2) disposing of such property by sale, setoff, or otherwise and (3) receiving and paying over money. *Id.* Because the Eighth Circuit has held that "a seizure or levy is not required for a judicial foreclosure sale of property," the first requirement is not met. I agree with CRBT that the fee a county sheriff would ordinarily be entitled to receive in conducting a foreclosure sale is a reasonable fee and that the Marshal is entitled to such a fee here.

b. Replevin

Finally, CRBT seeks an order for replevin. As mentioned above, the Security Documents all provide that upon a default, CRBT is entitled to, among other things, repossess and foreclose on the Collateral. It is undisputed that defaults under

the Security Documents have occurred. Pursuant to Iowa Code Chapter 643, Iowa Code § 554.9102 *et seq.*, the Loan Documents and other applicable law, CRBT is entitled to an order for claim and delivery of the Collateral.

V. CONCLUSION

For the reasons stated herein, CRBT's motion (Doc. No. 75) for summary judgment is hereby **granted** as follows:[3]

Money Judgment

1. A money judgment shall be, and is hereby, entered in favor of CRBT and against Badgerow, Mako, and DeBolt, jointly and severally, in the amount of $5,222,936.13 (the Judgment). Interest and default interest shall continue to accrue on the Judgment from and after December 1,

2017, at the current daily rate of $1,174.21, until the date that the Judgment is entered, after which,

[3] CRBT's request for default judgment, which was included as an alternative basis for relief in the same motion, is **denied as moot**.

interest shall accrue in accordance with applicable law. Judgment may be enforced as provided by Iowa law.

Foreclosure of the Fee Mortgage

2. CRBT shall have, and is hereby awarded, the usual decree of foreclosure with respect to the Fee Mortgage.

3. The Fee Mortgage secures the debt represented by the Judgment and creates, imposes, and constitutes a mortgage lien upon the Fee Property, of which the real property is legally

described as:

Port of Block 23, Sioux City East Addition, in the County of Woodbury and State of Iowa, described as follows: Beginning at the Northeast corner of Block 23, Sioux City East Addition. County of Woodbury. State of Iowa: thence South 89 degrees 51 minutes 52 seconds West along the North line or said Block 23 for a distance of 64.17 feet thence; South 0 degrees 0 minutes 11 seconds West for 105.41 feet; thence South 89 degrees 44 minutes 11 seconds West for 8.80 feet; thence South 0 degrees 14 minutes 13 seconds West for 2.10 feet; thence South 89 degrees 45 minutes 47 seconds East for 5.10 feet; thence South 0 degrees 14 minutes 13 seconds West for 43.50 feet; thence North 89 degrees 59 minutes 23 seconds East for 68.12 feet to a point on

the East line of said Block 23; thence due North along the the East line of Block East line of said Block 23 for 151.21 feet to the point of beginning.

Note: It is assumed in the foregoing legal description that 23 bears due North.

4. The mortgage lien represented by the Fee Mortgage is senior to any right, title, and interest of the Defendants and the rights of redemption of said Defendants and each of them, if any, shall be forever barred and foreclosed.

5. Upon CRBT's application, the United States Marshal, the Sheriff of Woodbury County, Iowa, or any other entity duly authorized by law (the Seller), shall sell the Fee Property, or any portion thereof, as designated by

CRBT, pursuant to the Fee Mortgage, upon notice, and in the manner prescribed by law.

6. CRBT may purchase the Fee Property, or any portion thereof, at a sale pursuant to the Fee Mortgage and/or by credit bidding all or any portion of the amount secured by the Fee Mortgage (the Fee Mortgage Debt), and in such case, the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash, and shall reduce the amount of the Judgment and the amount of the Fee Mortgage Debt.

7. The Defendants are barred and foreclosed from asserting right, title or interest in the Fee Property.

8. CRBT shall state at the time of the

foreclosure sale whether the foreclosure of the Fee Mortgage is subject to the Master Lease and/or the Sublease. That fact shall then be included on the deed. If the foreclosure sale is not subject to the Master Lease and/or the Sublease, the Master Lease and/or the Sublease shall be extinguished. If the foreclosure sale is subject to the Master Lease and/or the Sublease, the Master Lease and/or the Sublease shall remain as interests in the Fee Property.

9. Issuance of special execution for the foreclosure sale of the Fee Property, or any portion thereof, shall occur at such time as determined by CRBT and in CRBT's discretion.

10. There shall be no redemption period

after such sale, and none of the Defendants shall have any right to redeem after sale, and the provisions of Iowa Code §654.23 shall apply to the sale.

11. The Seller shall without delay issue and deliver a deed to the purchaser under the foreclosure sale, whereupon the rights, titles, interests, liens, claims, and easements, of each and every Defendant shall be extinguished, foreclosed, voided, and forever barred, and whereupon the purchaser shall have clear title to the Fee Property or whatever portion thereof was sold.

12. The purchaser at the sale shall be entitled to immediate possession of the Fee Property, that was sold, and if necessary a Writ of Possession or other appropriate order shall issue

commanding it to put the purchaser under the foreclosure sale in possession thereof.

13. The United States Marshal's commission shall not exceed the commission to which the Sheriff of Woodbury County, Iowa would be entitled to under applicable Iowa law.

Foreclosure of the Leasehold Mortgage

14. CRBT shall have, and is hereby awarded, the usual decree of foreclosure with respect to the Leasehold Mortgage.

15. The Leasehold Mortgage secures the debt represented by the Judgment and creates, imposes, and constitutes a mortgage lien upon the Leasehold Property, of which the real property is legally described as:

Port of Block 23, Sioux City East Addition, in the County of Woodbury and State of Iowa, described as follows: Beginning at the Northeast corner of Block 23, Sioux City East

Addition. County of Woodbury. State of Iowa: thence South 89 degrees 51 minutes 52 seconds West along the North line or said Block 23 for a distance of 64.17 feet thence; South 0 degrees 0 minutes 11 seconds West for 105.41 feet; thence South 89 degrees 44 minutes 11 seconds West for 8.80 feet; thence South 0 degrees 14 minutes 13 seconds West for 2.10 feet; thence South 89 degrees 45 minutes 47 seconds East for 5.10 feet; thence South 0

degrees 14 minutes 13 seconds West for 43.50 feet; thence North 89 degrees 59 minutes 23 seconds East for 68.12 feet to a point on the East line of said Block 23; thence due North along the East line of said Block 23 for 151.21 feet to the point of beginning.

Note: It is assumed in the foregoing legal description

that the East line of Block 23 bears due North.

16. The mortgage lien represented by the Leasehold Mortgage is senior to any right, title, and interest of the Defendants and the rights of redemption of said Defendants and each of them, if any, shall be forever barred and foreclosed.

17. Upon CRBT's application, the United States Marshal, the Sheriff of Woodbury County, Iowa, or any other entity duly authorized by law (the Seller), shall sell the Leasehold Property, or any portion thereof, as designated by CRBT, pursuant to the Leasehold Mortgage, upon notice, and in the manner prescribed by law.

18. CRBT may purchase the Leasehold Property, or any portion thereof, at a

sale pursuant to the Leasehold Mortgage and/or by credit bidding all or any portion of the amount secured by the Leasehold Mortgage (the Leasehold Mortgage Debt), and in such case, the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash, and shall reduce the amount of the Judgment and the amount of the Leasehold Mortgage Debt.

19. The Defendants are barred and foreclosed from asserting right, title or interest in the Leasehold Property that is sold.

20. CRBT shall state at the time of the foreclosure sale whether the foreclosure of the Leasehold Mortgage is subject to the Master

Lease and/or the Sublease. That fact shall then be included on the deed. If the foreclosure sale is not subject to the Master Lease and/or the Sublease, the Master Lease and/or the Sublease shall be extinguished. If the foreclosure sale is subject to the Master Lease and/or the Sublease, the Master Lease and/or the Sublease shall remain as interests in the Leasehold Property.

21. Issuance of special execution for the foreclosure sale of the Leasehold Property, or whatever portion thereof is sold, shall occur at such time as determined by CRBT and in CRBT's discretion.

22. There shall be no redemption period after such sale, and none of the Defendants shall have any right to

redeem after sale, and the provisions of Iowa Code section 654.23 shall apply to the sale.

23. The Seller shall without delay issue and deliver a deed to the purchaser under the foreclosure sale, whereupon the rights, titles, interests, liens, claims, and easements, of each and every Defendant shall be extinguished, foreclosed, voided, and forever barred, and whereupon the purchaser shall have clear title to the Leasehold Property or whatever portion thereof was sold.

24. The purchaser at the sale shall be entitled to immediate possession of the Leasehold Property that was sold, and if necessary a Writ of Possession or other appropriate order shall issue commanding it to put the

purchaser under the foreclosure sale in possession thereof.

25. The United States Marshal's commission shall not exceed the commission to which the Sheriff of Woodbury County, Iowa would be entitled to under applicable Iowa law.

Replevin (Claim and Delivery)

26. Upon CRBT's request, Mako and Badgerow shall: (a) immediately surrender and deliver to CRBT possession, custody and control of all of the Collateral, including without limitation all inventory, cash, chattel paper, accounts, furniture, fixtures, equipment, and general intangibles together with all proceeds of the same; (b) deliver to CRBT originals or true and correct copies of all books,

records, documents or materials relating in any manner whatsoever to the Personal Property; (c) generally provide immediate and full cooperation and assistance to CRBT, including the prompt answering of verbal and written questions directed from CRBT so as to enable CRBT to identify, gather and liquidate the Collateral and proceeds of the Collateral; and (d) advise CRBT and the United States Marshal, the Sheriff of any county in which any of the Collateral or its proceeds may be found, or any entity duly authorized by law (the "Replevin Agent") of the exact whereabouts of the Collateral.

27. Mako and Badgerow shall not damage, secrete, use, sell, lease, transfer, assign, convey, or encumber any of the Collateral.

28. Upon CRBT's request, the Replevin Agent shall seize and without delay deliver to CRBT any of the Collateral or its proceeds found in said county.

29. If the Collateral or any of it or its proceeds is concealed in a building or elsewhere, and a public demand for its delivery is made by the Replevin Agent is refused or there is no response, the Replevin Agent shall cause the building or enclosure to be broken open and shall take the Collateral or any of it or its proceeds therefrom.

30. CRBT and its agents are authorized to accompany the Replevin Agent for purposes of locating, identifying, and arranging for the delivery of the Collateral.

31. After recovering the Collateral, CRBT is authorized to sell or otherwise dispose of

some or all of the Collateral in accordance with under Iowa Code Chapter 643, Iowa Code Section 554.9102 et seq., or other applicable law. If the Collateral, or any portion thereof, is sold by public sale, publishing notice of such sale once a week for four weeks in a local newspaper shall be deemed commercially reasonable.

32. CRBT may, at CRBT's discretion, direct the Replevin Agent not to seize or deliver to CRBT any particular item of Collateral, including without limitation any item of Collateral that may be hazardous waste.

33. CRBT may, at its option and as an alternative to removing the Collateral, inventory the Collateral and store the Collateral at the premises on which the Collateral was found or any other location and

arrange for a liquidation or sale of the Collateral on such premises or other location under Iowa Code Chapter 643 and Iowa Code Section 554.9102 et seq. CRBT and the Replevin Agent are authorized to remain in possession of and shall have access to said premises or other location until such time as the liquidation of the Collateral is complete.

Related Orders

34. CRBT shall be entitled, at any time, both before and after the foreclosure sale contemplated by this Order, to petition the Court to add to the Judgment, the Fee Mortgage Debt, and the Leasehold Mortgage Debt all costs and expenses that are

recoverable under the Loan Documents, including without limitation, all court costs, expenses, including without limitation, all costs and expenses incurred in improving or maintaining the Property or the Collateral or preventing waste to the Property or the Collateral, and all fees, including attorneys' fees, incurred by CRBT. Such amounts, if incurred before the foreclosure sale, may be included in any bids submitted by CRBT in connection with the foreclosure sale.

35. This Order does not purport to set forth an exhaustive list of CRBT's collateral, nor is this Order intended to limit the cumulative rights and remedies available to CRBT under applicable law, all of which rights

and remedies are preserved and may be exercised as appropriate, with or without further order of this Court.

36. CRBT may seek attorneys' fees and costs to be added to the Fee Mortgage Debt and the Leasehold Mortgage Debt by submitting an affidavit from CRBT or CRBT's counsel identifying such fees and costs. In addition, CRBT may seek to add additional interest to the Judgment or submitting an affidavit from CRBT stating the additional interest to be added.

37. Nothing in this Order, or the entry hereof or the entry of the Judgment, shall cause the lien of the Fee Mortgage, the Leasehold Mortgage, the Security Documents or the terms, rights, and remedies of any

of the other Loan Documents to merge with this Order or the Judgment, or in any manner to otherwise impair the security or priority of CRBT's mortgage lien, the security interests, or CRBT's rights and remedies under the Loan Documents and applicable law. To the contrary, all such liens, security interests, terms, rights, and remedies are expressly preserved for CRBT's benefit.

38. CRBT may add parties to this action, both before and after entry of Judgment, as needed to extinguish any interests held by third parties in the Property or the Collateral or any portion thereof.

IT IS SO ORDERED.

DATED this 11th day of January, 2018.

Leonard T.
Strand, Chief
Judge

APPENDIX B

United States Court of Appeals

For the Eighth Circuit

No. 18-1298

Cedar Rapids Bank and Trust Company

Plaintiff - Appellee

v.

Mako One Corporation, et al.

Defendant - Appellant

Appeal from United States District Court for the Northern District of Iowa

---

Submitted: November 13,

2018

Filed: March 21, 2019

Before BENTON, BEAM, and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge.

In August 2013, Mako One Corporation ("Mako") acquired the historic Badgerow Jackson Building in downtown Sioux City, Iowa, intending to restore it using state and federal historic tax credits. To help finance the $17 million restoration project, Mako prepared a tax credit bond offering of $6 million. Mako retained the law firm of Winthrop & Weinstine ("Winthrop") to draft the tax credit bond. Nine months later, Cedar Rapids Bank and Trust Company ("CRBT") retained Winthrop to represent it in connection with the Badgerow building tax credit project. In April 2017, after Mako and

Badgerow failed to make any payments on the lease, CRBT, through counsel Winthrop, sought to foreclose on the Badgerow Building. Mako retained separate counsel and moved to dismiss for failure to join a necessary party and to disqualify Winthrop as CRBT's counsel. The district court denied both motions and awarded a judgment of $5.2 million in favor of CRBT. Mako appeals the denial of its motions, and additionally appeals the validity of the final judgment. We affirm in part, and reverse in part.

I. Background

In August 2013, Mako acquired the historic Badgerow Jackson Building in downtown Sioux City, Iowa. To help finance the $17 million restoration project, Mako, Badgerow, and Bruce DeBolt (president of Mako) prepared a tax credit bond offering of $6 million, to be repaid within one year, which CRBT purchased in entirety. To secure the bond, Mako and Badgerow executed and

delivered to CRBT mortgages on the building. Mako leased the building to Badgerow, which subleased it to co-defendant Badgerow Jackson MT, LLC ("MT"), of which Chevron USA, Inc. ("Chevron") owns 99.99%. Pursuant to an agreement between the two Badgerow companies, Chevron promised, upon satisfaction of certain conditions, to make capital contributions to MT for payment of the lease in exchange for any federal tax credits generated by the property.

When Mako first became interested in purchasing the property in November 2011, it retained the law firm of Winthrop & Weinstine. Winthrop attorney Jon Peterson provided legal services to Mako from November 2011 to May 2012 "in connection with [the] Badgerow Building tax credit project." Nine months later, in February 2013, CRBT sought to retain Winthrop to represent it in connection with the Badgerow building tax credit project. While foreseeing no conflict, Winthrop, exercising "an

abundance of caution," prepared a conflicts waiver letter for CRBT and Mako.

Addressed to both parties, the letter began by noting that "the interests of [CRBT] and Mako One are or may be adverse" with regard to the Badgerow tax credit project. Winthrop then requested consent from both parties with regard to current and future representation of CRBT and Mako One "on matters unrelated to the Transaction" and to Winthrop's "representation of the bank in connection with the Transaction." In accordance with the rules of professional responsibility, the letter then assured both parties that Winthrop "will not use confidential client information to either client's disadvantage" and "will be able to fully and properly represent [CRBT] and Mako One on their separate matters without representation of either client being affected by [Winthrop's] representation of the other client." The letter then requested that Mako agree to Winthrop's representation of CRBT in the transaction and unrelated matters, and promised that "[Mako] will not use the fact of our representation of the Bank as a basis to claim a conflict of interest on the part of [Winthrop], or to seek disqualification of the Firm, in any matter in which [Winthrop] represent[s] the Bank or may represent Mako One, other than the Transaction . . . ." (emphasis added). The letter similarly requested that CRBT agree to Winthrop's "representation of Mako One now or in the future in matters unrelated to the Transaction," and that CRBT would "not use the fact of our representation of Mako One as a basis to claim a conflict of interest on the part of [Winthrop], or to seek disqualification of the Firm, in any matter in which [Winthrop] represent[s] the Bank or may represent the Bank, including the Transaction . . . ." (emphasis added). Finally, the letter states that "[i]n the event that contentious

disputes or litigation arise regarding the Transaction or if the Firm determines that continued representation may violate applicable Rules of Professional Conduct, the Firm will withdraw from representation of Mako One or the Bank."[1] The letter was then signed by DeBolt on behalf of Mako One and Gary Becker on behalf of CRBT.

Winthrop represented CRBT for the remainder of the transaction, and Mako One retained the Heidman Law Firm. After the transaction closed in 2013, the parties negotiated and amended the bond maturity date six times, ultimately extending it to December 2016. Winthrop represented CRBT in all of these subsequent amendments, and Mako was represented by Kutak Rock LLP.

In April 2017, after Mako and Badgerow failed to make any payments on the lease, CRBT sought to foreclose on the Badgerow Building without redemption in the Iowa state courts. Mako removed the case to the Northern District of Iowa. After suit

was filed, DeBolt wrote to Winthrop:

> I believe Norm [Jones] has serious conflict issues at this point in time as the firm is required to withdraw from representing the bank. I agreed to his representation of the bank for only so long as there was no adversarial conflict between Badgerow's interests and the bank's interests. As that conflict has now occurred I believe Norm, and the firm, should immediately withdraw entirely from the matter. Norm's actions have already damaged our legal position. The firm may be responsible for losses that are incurred as a result.

Winthrop partner Norman Jones responded:

> On your statement about legal conflict, please review with counsel the conflict waiver letter that Mako One signed as a former client of the firm in early 2013. The letter requires us to withdraw from representing both the bank and Mako One in the case of a contentious dispute. Winthrop's

---

[1]The original draft sent to Mako stated that Winthrop "*may* withdraw from the representation of Mako One or the Bank," however Mako demanded that "may" be changed to "will."

> last work for Mako One was approximately 5

years ago and it is not a current client.

Mako claims that this was the first time Winthrop claimed the firm no longer represented Mako.

During the foreclosure proceeding, CRBT moved to have a receiver appointed. The motion was set for hearing on June 21, 2017. The day before the hearing, Mako and Badgerow both filed for bankruptcy in California. As a result, the district court cancelled the hearing and stayed the foreclosure action. The bankruptcy proceeding was ultimately dismissed in November 2017 for failure to prosecute.

The court then held evidentiary hearings and oral arguments on three motions: CRBT's motion to appoint a receiver; Mako's motion to dismiss for failure to join Chevron as a necessary party; and Mako's non-dispositive motion to disqualify Winthrop as CRBT's counsel ("November motions"). At the evidentiary hearing, Mako made an oral motion to exclude the testimony of Winthrop

partner Norman Jones, who did not serve as an advocate during the hearing. During oral argument, Mako represented that it could produce legal authority that the case should be dismissed with prejudice due to Winthrop's conflict of interest. The district court reserved decision on defendant's motions until receipt of the promised legal authority. While awaiting the supplemental filing, the district court granted CRBT's motion to appoint a receiver. Counsel for Mako filed a supplemental list of authorities, which the district court concluded were inapposite. The district court denied all three of Mako's motions in a written order.

In December 2017, CRBT filed a motion for default judgment or, in the alternative, summary judgment. Mako did not oppose the motion, and the court entered judgment in favor of CRBT, including a money judgment of $5.2 million. Mako then filed a motion to set aside judgment pursuant to Federal Rule of Civil Procedure 60(b) and to stay the case,

presenting the court with various assertions regarding CRBT's receipt of state and federal tax credits from construction on the Badgerow Jackson Building. The district court found Mako's assertions internally contradictory and unsupported by evidence, and denied Mako's motion.

Mako now appeals the denial of the November motions, and additionally argues that the district court erred (1) in proceeding to the merits before deciding the disqualification motion, and (2) in closing the case while the receiver's obligations are ongoing. The latter argument was not raised below and we will not ordinarily consider an argument raised for the first time on appeal. Gap, Inc. v. GK Development, Inc., 843 F.3d 744, 748 (8th Cir. 2016) (quoting United States v. Hirani, 824 F.3d 741, 751 (8th Cir. 2016)). We have set forth limited exceptions to our general rule. We have exercised discretion to consider an issue raised on appeal for the first time when "the proper resolution is beyond any doubt . . . or when the argument involves a

purely legal issue in which no additional evidence or argument would affect the outcome of the case." Id. at 748-49 (quoting Weitz Co. v. Lloyd's of London, 574 F.3d 885, 891 (8th Cir. 2009)). Mako has set forth no legal authority for its assertion that the district court acted improperly in closing the case. We find the claim without merit.

II. Discussion

A. *Motion to Dismiss for Failure to Join a Necessary Party*

"We review de novo conclusions of law underlying a district court's Rule 19(a) determination." Two Shields v. Wilkinson, 790 F.3d 791, 794-95 (8th Cir. 2015) (citing Gwartz v. Jefferson Mem'l Hosp. Ass'n, 23 F.3d 1426, 1428 (8th Cir. 1994)). Mako argues that the district court erred in denying its motion to dismiss the action for failure to join Chevron as a necessary party pursuant to Federal Rule of Civil Procedure 19(a)(1). Mako claims that Chevron is a necessary party because the judgment impairs

Chevron's ability to protect its interest in the Badgerow Jackson Building federal tax credits. Mako cites only the rule in support of this claim.

> Rule 19(a)(1) states:
>
> > (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise

> inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

Mako has raised a number of issues that are unsupported in the record and will not be considered. Mako's claims that Chevron purchased Mako's contractual rights to $3.2 million in tax credits (which it asserts exposes it to potential but un-asserted claims) and Mako's claims related to a "Super Non-Disturbance Agreement" are simply inadequately developed in this record to provide any ground for relief.

Even if Mako's claims related to Chevron's contractual rights were somehow implicated, it would not make Chevron a necessary party. As the district court correctly pointed out, "[t]he focus [of Rule 19(a)(1)] is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person." LLC Corp. v. Pension Ben. Guar. Corp., 703 F.2d

301, 305 (8th Cir. 1983) (citing Morgan Guaranty Trust Co. v. Martin, 466 F.2d 593, 598-99 (7th Cir. 1972)); see also Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc., 564 F.2d 816, 820 (8th Cir. 1977) (citation omitted) ("[A] person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action."). The district court was able to accord complete relief among existing parties.

B. Damages Award

Mako challenges the damages award in this case. "In a bench trial, ascertaining the plaintiff's damages is a form of fact-finding that can be set aside only if clearly erroneous." Hall v. Gus Construction Co., Inc., 842 F.2d 1010, 1017 (8th Cir. 1988) (citing Webb v. Arresting Officers, 749 F.2d 500, 501-02 (8th Cir. 1984)). We reverse such findings "only in those rare situations where we are

pressed to conclude that there is plain injustice or a monstrous or shocking result." Id. (internal quotation marks omitted) (quoting Occhino v. United States, 686 F.2d 1302, 1305 (8th Cir. 1982)). In other words, it must "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." Kaplan v. Mayo Clinic, 847 F.3d 988, 992 (8th Cir. 2017) (quoting In re Nevel Props. Corp., 765 F.3d 846, 850 (8th Cir. 2014)).

In its Rule 60(b) motion requesting relief from the judgment, Mako asserted that CRBT had received over $5 million in state and federal tax credits. The district court found this assertion to be unsupported in the record and denied the motion. Mako now argues that the district court erred in calculating the money judgment without factoring in CRBT's received tax credits. Here on appeal Mako once again fails to point to any evidence in the record supporting this claim. The district court properly concluded that no evidence in the record supports

this claim.

A. Motion to Disqualify Counsel

"We review the grant of a motion to disqualify a lawyer as trial counsel for an abuse of discretion, but because the potential for abuse by opposing counsel is high, the Court subjects such motions to particularly strict scrutiny." Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 931 (8th Cir. 2014) (quoting Droste v. Julien, 477 F.3d 1030, 1035 (8th Cir. 2007)).

The Northern District of Iowa applies the Iowa Rules of Professional Conduct to members of the District Court's bar. See Northern District of Iowa Local Rule 83(f)(1) (2018). These rules apply to conflicts of interest involving former clients. See Iowa Rules of Professional Conduct 32:1.9 (2012). The parties have spilled much ink in the briefing arguing whether CRBT is a current client of the Winthrop firm. We need not resolve the question as it is undoubtedly true that Mako is a former client

to whom the Winthrop firm owed a duty to avoid conflicts. Rule 32:1.9(a) states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Iowa R. Prof. Conduct 32:1.9 (2012). There is no question that, in representing CRBT in the purchasing of the very bond it had drafted for Mako in 2012, Winthrop undertook to represent another person in a matter "substantially related" to the matter of the Mako representation. See id. cmt. 3 ("Matters are 'substantially related' for purposes of this rule if they involve the same transaction.").

Under Rule 32:1.9, a conflict can be waived only if the former client consents in writing after being fully informed. Under Iowa law informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has

communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Iowa R. Prof. Conduct 32:1.0 (2012). The drafter's comment on this section elaborates on informed consent:

> Ordinarily, [informed consent] will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. . . . [A] lawyer who does not personally inform the client or other person [of facts or implications] assumes the risk that the client or other person is inadequately informed and the consent is invalid.

Id. cmt. 6 (alterations added).

Winthrop's consent waiver letter is inadequate to meet the requirements of this rule. It makes no attempt to explain to Mako the advantages, disadvantages, risks or benefits that Mako would

confront by allowing Winthrop to represent CRBT. Indeed, the letter makes no pretense to elucidate any risk involved, stating only that "the interests of the Bank and Mako One are or may be adverse." This representation hangs in the air unexplained, allowing the reader to pour into it any content he might deem to. Even more troubling, the third paragraph asks Mako to agree that it will not claim a conflict of interest or seek disqualification against Winthrop in any matter *other than the transaction*. This would seem to resolve the conflict question in its entirety, as Mako has timely claimed a conflict in this transaction. Winthrop claims that this "drafting error" was understood to mean something different by Mako. This assertion, too, flutters in the air unsupported and is belied by the record. The record does not contain evidence sufficient to establish a mutual mistake, or any other legal basis for reformation of the language. But in the end, the problem the Winthrop firm confronts is that no

informed consent was ever obtained from Mako. Mako was never informed that its counsel would represent CRBT in a suit related to the very same bonds that it drafted on Mako's behalf. Winthrop did not inform Mako that it was remotely possible that Winthrop would go so far as to call one of its own partners to testify against Mako in an action related to its representation of Mako. Under these circumstances, we conclude that informed consent was not obtained and Mako did not validly waive the conflict of interest.

Mako next argues that the district court erred in proceeding to the merits before deciding the disqualification motion. However, this is a mis-characterization of the procedural history. The district court made only one ruling while awaiting Mako's production of legal authority supporting disqualification of counsel, and that was to approve CRBT's request to appoint a receiver. This was not a ruling on the merits, which came months later

when the court granted an unopposed motion for summary judgment. Mako makes no argument that the appointment of the receiver was a dispositive order; instead it simply cites Bowers v. The Ophthalmology Group, 733 F.3d 647 (6th Cir. 2013), as supporting its position. In Bowers, the Sixth Circuit held that the district court erred by granting summary judgment without ruling on a motion to disqualify counsel and then declaring the disqualification motion moot. Id. at 655. Here, the district court made no such ruling on the merits before deciding the motion to disqualify counsel. Bowers is distinguishable, and does not conflict with the district court's order of procedure.

Because we conclude that the district court erred in failing to disqualify Winthrop as counsel for CRBT, we must consider the appropriate remedy. The question is whether the failure to disqualify Winthrop "indelibly stamped or shaped" the proceedings. Firestone Tire & Rubber Co. v. Risjord,

449 U.S. 368, 376 (1981). In Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987), the First Circuit grappled with a similar issue. Like this case, the First Circuit concluded that the trial court had allowed a lawyer to continue representation despite an apparent conflict. Id. at 831. The court than considered whether the court's abuse of its discretion resulted in an adverse impact on the rights of the opposing party. Concluding that there was none, the court found the error harmless. Id. at 831-32. We find this analysis persuasive. Here Winthrop had no compromised ability to settle with Mako, nor has Mako pointed to any change in its settlement posture because of the improper representation. Given the combative procedural history of this case, it appears the parties were unlikely to settle, regardless of representation.

With regard to the merits, Mako has not claimed that Winthrop used confidential

information gained from preparing Mako's bond during its representation of CRBT in this suit. The record reflects no actual breach of confidentiality nor any reason to doubt that Winthrop upheld its duty of confidentiality to its former client. Finally, it was Mako's counsel—not Winthrop—who failed to oppose CRBT's motion for default judgment, or in the alternative, summary judgment. Thus, Mako's loss is more directly attributable to its own counsel's failure to act than anything the Winthrop firm did or did not do. There is no reason to believe that Mako's lawyers would have acted any differently had CRBT been represented by a different firm. Given the failure to oppose the motion for judgment, there is no reason to believe that the CRBT representation was an important, let alone determinative, fact.

Finally, Mako makes no credible claim that the ultimate outcome in the case was in any way influenced by the conflicted representation. It points

to no evidence that was improperly used or any evidence that it was deprived from using because of the conflict. Mako does not assert that it was deprived of a chance to advance any argument or claim because of the representation. In short, Mako makes no showing of harm by the representation.

III. Conclusion

For the foregoing reasons, we affirm the district court's judgment for money damages, and we reverse the district court's denial to disqualify counsel in any future proceedings. As proceedings continue in the case below and the Winthrop law firm has a conflict of interest necessitating removal as counsel, we remand for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 18-1298

Cedar Rapids Bank and Trust Company

Appellee

v.

Mako One Corporation, et al.

Appellants

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City (5:17-cv-04035-LTS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 05, 2019

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals,

Eighth Circuit.

/s/ Michael E. Gans

1(a)