

Supreme Court No. 91116-9  
Court of Appeals No. 71042-7-I  
King County Superior Court No. 12-2-07861-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

FILED  
NOV 19 2014

RADIANCE CAPITAL, LLC, *E* CLERK OF THE SUPREME COURT  
RESPONDENT, STATE OF WASHINGTON *DS*

v.

NICHOLAS W. BARTZ,  
PETITIONER.

PETITION FOR REVIEW (RAP 13.4)

2014 NOV 18 AM 11:22  
COURT OF APPEALS  
STATE OF WASHINGTON

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## **I. IDENTITY OF PETITIONER**

Nicholas W. Bartz (Bartz) is the Petitioner and is a resident of the State of Michigan, at 1405 N West Avenue, Suite 152, Jackson, Michigan 49202.

## **II. CITATION TO COURT OF APPEALS DECISION**

The Unpublished Opinion of the Court of Appeals, Division I, that Bartz requests this Court to review was filed on October 20, 2014. *See* APPENDIX, at APP-1.

## **III. ISSUES PRESENTED FOR REVIEW**

The issues Bartz presents to this Court for review are:

1. Whether a non-resident Personal Guarantor as defendant is bound by the same rules applicable to a contract assignee as plaintiff with respect to submission to a foreign court's personal jurisdiction and venue of an action?
2. Whether this Court's well-established rules of construction regarding a Personal Guarantee are still applicable and preclude non-resident Bartz from being subject to the personal jurisdiction of the State of Washington and venue in the King County Superior Court?
3. Whether the abject and total absence of constitutionally required significant minimum contacts with the State of Washington preclude statutory long arm personal jurisdiction over non-resident Bartz?
4. Whether the trial court erred by issuing its Judgment Summary And Order Granting Summary Judgment And Denying Defendants' CR 12(b) Motion To Dismiss dated September 20, 2013 (Clerk's Papers [CP] at 161); and erred by issuing its Amended Final Judgment Summary And Order Granting Summary Judgment And Denying Defendants' CR 12(b) Motion To Dismiss dated October 4, 2013 (CP at 164)?
5. Whether Bartz is entitled to an award of his reasonable attorney fees and costs under RCW 4.28.185; and Radiance Capital should be denied its requested/award of attorney fees and costs based on its contract with sole named Debtor Health Pro Solutions LLC, as to which no judgment was entered by the Superior Court?

#### IV. STATEMENT OF THE CASE

For a period of time Bartz was the Managing Member of Health Pro Solutions, LLC (HPS LLC), a now defunct Nevada limited liability company. While doing business in the State of Arizona, HPS LLC sought financing for an equipment purchase through an independent broker also located in the State of Arizona. That independent broker found financing available through Radiance Capital, LLC (Radiance Capital), a limited liability company located in the City of Tacoma, County of Pierce, State of Washington. The independent broker presented an Equipment Financing Agreement (Agreement, *see* APPENDIX, at APP-9) to HPS LLC which was signed in the State of Arizona by Bartz in his official corporate capacity as Managing Member. Bartz never had any personal contact with or dealings with anyone from Radiance Capital. Bartz signed a Personal Guarantee included with the Agreement. The sole Debtor was expressly named and identified in the Agreement as HPS LLC. One of the terms of the Agreement required HPS LLC to waive objections to personal jurisdiction and submit to venue in the courts of King County, Washington. The Personal Guarantee signed by Bartz had no such express waiver or voluntary submission to jurisdiction and venue. The ultimate question presented is whether Bartz, an out-of-state resident, is subject to the jurisdiction of the King County Superior Court under either Washington's long-arm statute, RCW 4.28.185, or the terms of the Personal Guarantee he signed in his individual capacity?

## A. FACTUAL BACKGROUND

### *Out-of-State Residency*

Bartz is an unmarried individual<sup>1</sup> who resided in the State of Arizona generally from 1999 through February 2012 but with a brief residency in the State of California in 2011. He has resided in the State of Michigan since March 2012, and his present mailing address is 1405 N West Avenue, Suite 152, Jackson, Michigan 49202. CP at 121-22, ¶ 3.<sup>2</sup> Bartz was the former Managing Member of Health Pro Solutions, LLC (HPS LLC), a Nevada Limited Liability Company that was formed July 3, 2001 (Nevada Secretary of State Public Records, Domestic Limited Liability Company No. LLC-7075-2001; Nevada Business ID# NV20011072244). CP at 122, ¶ 4. After Bartz suffered a permanent disability with his eyesight, HPS LLC went out of business; its Nevada Business License expired July 31, 2011, and was administratively terminated by the Nevada Secretary of State's Office effective November 15, 2011 (Nevada Secretary of State Public Records, Administrative Status Change, Document No. 2011-079721848), and its present status is "Revoked" according to the Nevada Secretary of State Public Records. CP at 122, ¶ 5. The Registered Agent for HPS LLC is listed as John D. Lee, 2830 S. Jones Blvd, Suite 1, Las Vegas, Nevada 89146.

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<sup>1</sup> Bartz was divorced prior to May 2008 and was then remarried in October 2011 but had that marriage annulled in January 2012. CP at 121, ¶ 2.

<sup>2</sup> Prior to 2009 Bartz owned a house at 4535 Eagle Drive, Jackson, Michigan. In 2009 that house was foreclosed on and resold to persons Bartz does not know and with whom he has no relationship. CP at 121-22, ¶ 3.

(Nevada Secretary of State Public Records). CP at 122, ¶ 6. Bartz' business address at the time HPS LLC was formed as a Nevada Limited Liability Company was 8912 E Pinnacle Peak Rd, #430, Scottsdale, Arizona 85255. (Nevada Secretary of State Public Records). CP at 122, ¶ 7.

***Absence of Recent Personal Contacts***

For only that period of time from April 15, 1983 through June 25, 1992 Bartz was licensed by the State of Washington through reciprocity as an Osteopathic Physician and Surgeon, License # OP00000978 (Washington State Department of Health Provider Credential Public Records); however, Bartz never practiced as an Osteopathic Physician in the State of Washington. CP at 122-23, ¶ 8. Bartz was originally licensed as an Osteopathic Physician by the State of Michigan in 1982, and was further licensed as an Osteopathic Physician by the State of Arizona in 1986. CP at 122-23, ¶ 8. Bartz is not presently licensed in any State and is retired due to medical disability. CP at 122-23, ¶ 8.

***Absence of Business Contacts***

Bartz has never resided in nor conducted any business in, and since June 25, 1992 he has not been licensed as an Osteopathic Physician to practice in, the State of Washington. CP at 123, ¶ 9. At no time since its formation in 2001 through its termination in 2011 did HPS LLC conduct or operate any business in the State of Washington. CP at 123, ¶ 10. HPS LLC was never registered as a foreign or any form of limited liability company or other business entity with any office or agency of the State of Washington. CP at 123,

¶ 10.

***Equipment Financing Agreement***

In May 2008, HPS LLC was conducting its business in the State of Arizona and was referred to an independent lease broker, also operating in the State of Arizona, to recommend a possible lease or financing source for acquisition of equipment. CP at 123, ¶11. By and through the broker and not subject to negotiation, an Equipment Financing Agreement was arranged through Radiance Capital, LLC (as Creditor) with HPS LLC as the sole Debtor. CP at 123, ¶ 12. All papers associated with the financing agreement from Radiance Capital were delivered and signed through the broker in the State of Arizona, with no direct contact made between HPS LLC and Bartz with Radiance Capital, LLC. CP at 123, ¶ 12. The equipment that was financed by the Agreement with Radiance Capital, LLC was in fact initially delivered to an address in the State of Michigan. CP at 123, ¶ 13.

In 2011 the equipment was moved to the State of Arizona and was stored and temporarily used by Fred Goldblatt, a family physician in Arizona. At that time, Dr Goldblatt agreed to assume the Agreement payments to Radiance Capital, LLC in exchange for his use of the equipment. Dr Goldblatt shortly thereafter filed for bankruptcy and the equipment went missing. CP at 124, ¶ 14. Subsequently, HPS LLC made several attempts to locate the whereabouts of the equipment and reacquire it, but its attorney was unsuccessful and failed to locate the equipment. CP at 124, ¶ 15. Presently, the whereabouts of the equipment that HPS LLC financed through

Radiance Capital, LLC is unknown. CP at 124, ¶ 16.

As the solely named and identified DEBTOR, *and if otherwise legal*, the standard/boilerplate language of the Equipment Financing Agreement set forth the following stipulation as to jurisdiction and forum/venue selection applicable solely to HPS LLC as the *Debtor*:

**CHOICE OF LAW; WAIVER OF JURY TRIAL.** This Agreement shall be deemed fully executed and performed in the State of Washington<sup>3</sup> and shall be governed by and construed in accordance with the laws thereof without regard to the conflicts of laws rules of such State. **DEBTOR** agrees to submit to the jurisdiction of the State of Washington in King County. Each Creditor and **DEBTOR** hereby waives any right to trial by jury of any action involving this Agreement.

CP at 130, ¶ 26 (emphasis on **DEBTOR** added).

#### ***Jurisdictional and Venue/Forum Issues***

In his signing the Personal Guarantee solely in his individual capacity, Bartz nowhere agreed or otherwise consented to personal jurisdiction over him by the State of Washington nor to any Washington-based forum, venue and choice of law selections that might otherwise, if legal and proper under all the circumstances, be applicable to HPS LLC under the Agreement as a totally separate and distinct legal entity established under Nevada law. CP at 124, ¶ 17. The Personal Guarantee, as drafted by Radiance Capital, contains the following language:

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<sup>3</sup> This standard/boilerplate assertion is patently false, as HPS LLC was at all times in and a resident of the State of Arizona, CP at 122-23, ¶¶ 7 and 11; the Agreement was procured by an independent broker in the State of Arizona and executed by HPS LLC in the State of Arizona, CP at 123, ¶ 12; and the equipment purchased with the financing was in fact delivered to an address in the State of Michigan, CP at 123, ¶ 13.

## PERSONAL GUARANTEE(S)

The undersigned guarantee and promise to make all of the payments and *perform all Debtors' obligations* as specified in this Equipment Financing Agreement. Each of our liabilities is primary and joint and several and shall not be affected by any settlement, extension, renewal or modification of the Agreement, by the discharge of [sic] release of the Debtor obligations or by the taking or release of additional guarantors or security for the performance of the Agreement. The undersigned waive any rights we may have to (a) presentment, demand, protest, notice of protest, notice of dishonor, notice of default under the Agreement [or] any other notices related to this guaranty or the Agreement and (b) the right to require Creditor to proceed against Debtor or to pursue any other remedy in Creditor's power. The undersigned also waive any other rights and defenses available to a guarantor by reason of application [of] case or statutory law. The undersigned agree that we are liable for Creditor's attorney's fees and costs in enforcing this guaranty, whether or not suit is filed. The undersigned acknowledge that this guaranty inures to the benefit of Creditor's assigns.

CP at 132 (emphasis added). This Personal Guarantee was signed by Bartz solely in his personal/individual capacity on May 20, 2008 in the State of Arizona. CP at 123, ¶ 12.

Although the Personal Guarantee requires Bartz to “perform all Debtors’ obligations” such phrase is nowhere expressly defined in the Personal Guarantee. However, this performance language is specifically set forth and described in Paragraph 14 of the Equipment Financing Agreement in the following terms as drafted by Radiance Capital:

**If Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligations, and Debtor shall (a) reimburse Creditor the cost of such performance and related expenses, and (b) pay Creditor the late charge contemplated in Paragraph 21 on the cost and expenses of such performance.**

CP at 129 (Paragraph 14, emphasis added). As Bartz clearly pointed out to

the Court of Appeals, the phrase “*perform any of its [i.e., Debtor’s] obligations hereunder [i.e., the Equipment Financing Agreement]*” in Paragraph 14 defines and describes the intended and express scope of the phrase to “*perform all Debtors’ obligations as specified in this Equipment Financing Agreement*” as set forth in the Personal Guarantee. Thus, in addition to making all the payments thereunder, obligations under the Personal Guarantee can fairly and obviously be read and construed to mean and be limited to the various provisions therein regarding HPS LLC’s obligations relating to keeping the location of the collateral, making alterations or improvements to the collateral, maintaining and repairing the collateral, paying taxes related to the collateral, insuring the collateral, and similar provisions the performance of which may be measured as compliant or noncompliant with the Agreement thus used as metrics giving rise to an action for breach. A boilerplate language standard provision by Radiance Capital under which HPS LLC “*agrees to submit to the jurisdiction of the State of Washington in King County*” is not such a measure of performance to which Bartz is bound simply by signing the Personal Guarantee in his individual capacity. Moreover, Paragraph 14 is totally counter-intuitive to any objective manifestation of mutual intent that Bartz was somehow ***obligated*** to submit himself to the personal jurisdiction of the Washington courts (for to construe in this manner would mean that Radiance Capital could take Bartz’ place in its own lawsuit against him for failure of HPS LLC to perform??) .

Under applicable and relevant rules of *guaranty* contract construction, and construed in favor of Bartz and most strongly against Radiance Capital where reviewed by this Court *de novo*, by signing the Personal Guarantee individually Bartz did not submit himself to the personal jurisdiction of Washington courts. The King County Superior Court therefore did not have personal jurisdiction over Michigan citizen Nicholas W. Bartz under and pursuant to the Personal Guarantee signed by him in his individual capacity.

As for respecting the separate identify and nature of Health Pro Solutions, LLC, Bartz always treated it as a separate, legal entity with its own books and no commingling of finances. CP at 124, ¶ 17. Bartz has not and does not consent to personal jurisdiction of any Washington State Court over him and retains all his rights and privileges as a citizen of the State of Michigan. CP at 124, ¶ 18.<sup>4</sup>

## **B. PROCEDURAL BACKGROUND**

Bartz' counsel filed a Notice of Appearance that expressly preserved all defenses under and pursuant to CR 12(b) (*see* APPENDIX, at APP-18). Radiance Capital filed a Motion for Summary Judgment and Bartz filed a CR 12(b) Motion to Dismiss grounded on CR 12(b)(2) and (3). The trial court heard arguments on these cross-motions and denied Bartz' CR 12(b) Motion to Dismiss and granted Radiance Capital's Motion for Summary Judgment.

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<sup>4</sup> The referenced Declaration and Supplemental Declaration were made by Bartz solely for the purpose to support a Rule 12(b) Motion to Dismiss the above-captioned action as to Bartz personally, and as may also have been applicable under the law to Health Pro Solutions, LLC. CP at 125, ¶ 22; CP at 157, ¶ 8.

An Amended final judgment was entered on Radiance Capital's stipulation that the Judgment entered was solely against Nicholas W. Bartz, all other Defendants were dismissed. Subsequently, a timely appeal to the Court of Appeals, Division I, was filed.

Following briefing and oral argument, the Court of Appeals issued its Unpublished Opinion that was filed on October 20, 2014. In its *de novo* review, the Court of Appeals affirmed the trial court's denial of Bartz' CR 12(b) Motion to Dismiss and the entry of Summary Judgment against Bartz.

## V. ARGUMENT

### SUMMARY

The Court of Appeals' affirmance of the trial court's decision was grounded solely on the Personal Guarantee signed by Bartz in his individual capacity. Not having to reach the issue of long arm jurisdiction,<sup>5</sup> the Court of Appeals rested its decision solely on a 1975 federal 9<sup>th</sup> Circuit Court of Appeals' decision in *Republic International Corporation v. Amco Engineers, Inc.*, 516 F.2d 161, 168 n.11 (9<sup>th</sup> Cir. 1975) (the plaintiff assignee of a contract was *obligated* to "do every act and thing necessary to perform all of the conditions of said contracts" as agreed by the assignor, including "plac[ing] themselves under" and being bound to the original contract's consent to jurisdiction clause). Concluding there is no substantive difference as to the performance of contractual *obligations* by a plaintiff assignee on the one

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<sup>5</sup> See Court of Appeals, Unpublished Opinion, at p. 8 n.3.

hand and a defendant Personal Guarantor on the other hand, and notwithstanding the clear and well established law regarding the construction and enforcement of Personal Guarantees laid down by this Court, the Court of Appeals, Division I, held that Bartz was *obligated* to submit to the personal jurisdiction of the State of Washington and the venue of the King County Superior Court. This Court's review is necessary and is warranted pursuant to RAP 13.4(b)(1); RAP 13.4(b)(2); and RAP 13.4(b)(4).

**A. The Court Of Appeals' Decision Conflicts With This Court's Well Established, Long Standing Rules And Decisions Regarding The Construction And Enforcement Of Personal Guarantees – RAP 13.4(b)(1)**

This Court has well established, long standing, and very clear rules of construction applicable to contracts of guaranty. The Court of Appeals decision grounded solely on a 9<sup>th</sup> Circuit Court of Appeals decision regarding a contract assignee's consent to jurisdiction (as plaintiff) conflicts with this Court's decisions. Stated more bluntly, the Division I decision totally ignores this Court's long standing rules regarding the construction and enforcement of contracts of guaranty.

A personal guarantee is a separate and distinct contractual undertaking subject to well-established principles of construction laid down by this Court over 100 years ago and since followed by our courts, except for the drastic departure of Division I in the present case concerning Bartz.

This court . . . has held that . . . guarantors are not to be held liable beyond the express terms of their engagement. This doctrine is well established and has the sanction of the supreme court of the United States. *Union Mut. Life Ins. Co. v. Hanford*, 145 U.S. 187.

*Simpson Logging Company v. American Bonding Company of Baltimore*, 76 Wash. 533, 538, 137 Pac. 127 (1913). See also *W. T. Raleigh Company v. Langeland*, 145 Wash. 525, 529, 261 Pac. 93 (1927) (“The amount of a guarantor’s liability [is] controlled by the terms of the contract of guaranty as construed by the general rules of construction; and where the terms have been ascertained, the contract will be strictly construed for the purpose of confining the amount of the liability of the guarantor to the precise terms.”).<sup>6</sup> Although addressing the monetary amount of a guarantor’s liability, the foregoing decisions of this Court long ago laid down the fundamental principles that Washington courts have uniformly followed where the issue was construing the intent and scope of a contract of guaranty.<sup>7</sup> More recently, this Court applied these same fundamental principles to determine if a guaranty of a commercial lease signed by the president of a corporate tenant was enforceable against the president personally, although he signed the guaranty in a representative capacity. *Wilson Court Limited Partnership v. Tony Maroni’s, Inc.*, 134 Wash.2d 692, 952 P.2d 590 (1998).

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<sup>6</sup> Also a long time rule of construction by this Court fully applicable to contracts of guaranty: “[w]hen the language of a contract is susceptible of two constructions, one favorable and the other unfavorable to the party who has drafted or supplied the instrument [here, Radiance Capital], the court will not ordinarily construe it in such a way as to place one of the parties at the mercy of the other, but will adopt that interpretation which is unfavorable to the one who so drafts or supplies it.” *Clise Investment Company v. Stone*, 168 Wash. 617, 620-21, 13 P.2d 9 (1932).

<sup>7</sup> And the foregoing rules are augmented by the additional long standing principle that “courts, under the guise of construing or interpreting a contract, should not make another or different contract for the parties.” *Poggi v. Tool Research and Engineering Corporation*, 75 Wn.2d 356, 364, 451 P.2d 296 (1969).

Division I greatly strayed from the well established principles of law applicable to contracts of guaranty laid down by this Court to somehow find as persuasive a 9<sup>th</sup> Circuit Court of Appeals case regarding the responsibilities of a plaintiff assignee. The 9<sup>th</sup> Circuit Court of Appeals decision is totally distinguishable from the Bartz case, and the rationale employed by the 9<sup>th</sup> Circuit Court of Appeals is wholly unpersuasive in determining not only the mutual intent of the parties in the Bartz case but the express and strictly construed scope of the separate contract of guaranty Bartz signed in his individual capacity as a citizen of a foreign State. First, general American jurisprudence has long recognized and held (for even longer than Washington has been a State) that contracts of guaranty are separate and distinct from contracts of assignment.

It is also true, that the contract of assignment, and that of guaranty, are not the same, but are two separate and distinct contracts.

*Croskey v. Skinner*, 44 Ill. 321, 323 (1867). Second, the assignee of a contract “steps into the shoes of the assignor . . . and assum[es] the [assignor’s] status” for all purposes under the assigned contract unless otherwise excluded. *Puget Sound National Bank v. Department of Revenue*, 123 Wn.2d 284, 292-93, 868 P.2d 127 (1994). Whereas, the 9<sup>th</sup> Circuit Court of Appeals decision in *Republic International* is fully consistent with the fundamental rules and legal principles applicable to contracts of assignment, it is equally inconsistent with and totally contrary to the fundamental rules and legal principles applicable to contracts of guaranty.

Division I relied on a 9<sup>th</sup> Circuit Court of Appeals decision regarding the responsibility of a plaintiff assignee to bring suit for breach of its assigned contract in a foreign country pursuant to the contract's forum selection clause. However, contracts of assignment are separate and distinct from contracts of guaranty, and the rules of construction are thus separate and distinct. The 9<sup>th</sup> Circuit Court of Appeals decision is thus very clearly distinguishable and inapposite. Division I ignored this Court's very clear and long standing rules for construction and enforcement of contracts of guaranty under which a guaranty is limited in scope to the express terms thereof and such terms are construed most favorably to the guarantor (Bartz) and against the guarantee (Radiance Capital). Under this Court's rules of construction, Bartz, at all times a citizen of a foreign State, did not submit to the personal jurisdiction of the State of Washington or to venue in the Superior Court of King County. The Court of Appeals decision in Bartz thus was in conflict with the decisions of this Court. RAP 13.4(b)(1).

**B. The Division I Decision Conflicts With Other Courts of Appeals' Decisions Regarding The Construction And Enforcement Of Personal Guarantees – RAP 13.4(b)(2)**

The Division I decision to rely on a 9<sup>th</sup> Circuit Court of Appeals case in the distinguishable and inapposite context of contract assignments and the responsibility of a plaintiff assignee thereunder, not only ignores and conflicts with decisions of this Court, but it disregards and conflicts with decisions made by our other Courts of Appeals. As so well summarized by the Court of Appeals, Division III, in *Seattle-First National Bank v. Hawk*, 17 Wn.

App. 251, 562 P.2d 260 (1977):

[P]laintiff has presented no evidence of defendant's intent or understanding of what loans were covered by the guaranty. . . . ***The role of the court is to ascertain the mutual intention of the contracting parties, and the burden of proving such mutual intention rests upon the plaintiff.*** . . . Here, plaintiff is urging that we infer defendant's intent and thus, the mutual intent of both parties, from the evidence that only establishes plaintiff's intent -- an intent that was never communicated to defendant. This we cannot do. The unexpressed understanding of one of the contracting parties as to the meaning of language is generally of no legal significance. . . . Therefore, the subjective intent of Mr Helm as to the scope of the guaranty, unexpressed and uncommunicated to defendant, does not satisfy plaintiff's burden of proof of the parties' mutual intent.

Therefore, the court properly looked to contract law in reaching its final determination. ***It is a fundamental rule that guarantors can be held only upon the strict terms of their contract, as a contract to answer for the debt of another must be explicit and is strictly construed. . . . If a contract is equally susceptible of two or more constructions, it should be construed against the party using the language. . . . In other words, where language is ambiguous, the party selecting, drafting, and presenting the contract of guaranty containing such misleading language should suffer any consequences.***

*Hawk*, 17 Wn. App. at 255-56 (citations omitted; emphasis added).<sup>8</sup> The foregoing summarizes and embodies the long standing, well established rules governing the construction of contracts of guaranty in this State. Not only did the Court of Appeals, Division I, totally ignore this Bartz-cited decision and its basis for authority in this Court's uninterrupted and long line of decisions, but Division I instead went far afield to find and rely on a 9<sup>th</sup> Circuit Court of Appeals decision that dealt only with the fortuitous-court

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<sup>8</sup> This Court cited with favor this excellent summary of the rules for construction of contracts of guaranty in its *Wilson Court LLC* decision. 134 Wn.2d at 701-05.

used word as to the *obligation* of a plaintiff assignee under a contract of assignment to bring an action for breach of contract in the foreign location designated under the basic contract (it must be noted that the assigned contract in the 9<sup>th</sup> Circuit case did not use or employ the word *obligation* therein).

In finding persuasive and relying on a 9<sup>th</sup> Circuit decision addressing in dicta a secondary ground for concluding there was a lack of jurisdiction over that suit stemming from the responsibility of the contract assignee as plaintiff to commence a lawsuit on breach of the underlying contract in a foreign country as expressly agreed by the assignor, Division I finds itself in conflict with Division III of our Courts of Appeals in addition to finding itself in conflict with this Court's long standing principles regarding the construction and enforcement of contracts of guaranty. This Court should grant review and state very clearly for all lower courts that contracts of guaranty are unique contracts to be construed and applied under only those rules and principles held applicable to guarantees and not to assignments. RAP 13.4(b)(2).

**C. Contracts Of Guaranty Are Commonplace In Most Commercial and Financial Transactions Affecting A Large Segment Of The Public And The Rules Determining Whether A Signatory To A Personal Guarantee Submits Thereby To Personal Jurisdiction Of Some Foreign Tribunal Presents An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court – RAP 13.4(b)(4)**

This Court will grant review of a Court of Appeals decision if it “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). Generally, an issue that is of substan-

tial public interest arises where the legal rights and/or liabilities, or commercial and/or financial interests, of a substantial segment of the population are potentially affected or at risk. *State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005).

Contracts of guaranty are commonplace in everyday commercial and/or financial transactions directly affecting not only a substantial segment of the population, but in essence every person who borrows money, sets up a business, or guarantees a loan for a family member. Standard or boilerplate language that is not subject to negotiation is not only commonplace, it is the norm in such transactions. Where such language forms the basis for a person to be required to defend himself/herself in a far distant tribunal, thus having a direct affect on that individual's legal rights and liabilities, the rules for the construction and enforcement of personal guarantees must not only be clear, but they must be applied uniformly by our courts and consistent with the well established and long standing principles laid down by this Court.

In the Bartz case, the Division I decision that relied on a plaintiff assignee's responsibility (termed by the 9<sup>th</sup> Circuit as an *obligation*) to bring a lawsuit for breach of the underlying assigned contract in a foreign country drastically departs from the rules for the construction and enforcement of contracts of guaranty laid down long ago by this Court and followed by other Court of Appeals Divisions. Equating the so-called *obligation* of a plaintiff assignee to bring a lawsuit in a distant tribunal to the *obligation* of a

defendant guarantor to submit to the personal jurisdiction of and venue in a distant tribunal, where the personal guarantee does not expressly provide for such submission and is silent as to any such requirement, will subject each and every person signing a personal guarantee with no express provisions to the uncertainty and risk that he/she too will be involuntarily hauled into a foreign State to defend a lawsuit on a contract to which he/she was not a party.<sup>9</sup>

Before Bartz, one could safely rely on this Court's established rules and principles regarding contracts of guaranty. After Bartz, one cannot safely rely on anything to protect his/her legal rights and interests. For today it's Division I equating plaintiff assignees to defendant guarantors – and tomorrow, who knows what decision from some other State or federal court based on some inapposite case may be relied on by one of our lower courts to determine a guarantor's legal rights and interests – just because that court decided to use on its own a certain key word but in the wrong context?

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<sup>9</sup> For example, “[a] forum selection clause is not binding on a third party who did not agree to the contract in which the clause is found.” *Oltman v. Holland American Lines USA, Inc.*, 163 Wn.2d 236, 250, 178 P.3d 981 (2008). See also *American Mobile Homes of Washington, Inc. v. Seattle-First National Bank*, 115 Wn.2d 307, 796 P.2d 1276 (1990) (same); *State ex rel. Electrical Products Consolidated v. Superior Court*, 11 Wn.2d 678, 679, 120 P.2d 484 (1941); *State ex rel. Lund v. Superior Court*, 173 Wash. 556, 558, 24 P.2d 79 (1933) (both holding that a wife was not bound by a forum selection agreement signed only by the husband). Based on the foregoing principles of law, the sole Debtor under the Agreement was HPS LLC and Bartz signed the Agreement on behalf of HPS LLC solely in his official corporate capacity as Managing Member of HPS LLC. Bartz signed the Personal Guarantee solely in his individual capacity. The Personal Guarantee did not expressly contain and set forth the same provisions as did the Agreement regarding personal jurisdiction, forum selection, choice of law, and waiver of jury trial. Whereas HPS LLC agreed to such clause and provisions and thus may be bound thereby (if otherwise legal and enforceable), Bartz individually did not and is not bound by any of those provisions.

The law affecting the legal rights and interests of guarantors has a direct and substantial affect on commercial and financial transactions. Because the Bartz decision presents an issue of substantial public interest that should be determined by the Supreme Court,<sup>10</sup> Bartz respectfully requests this Court to grant review and consider the significant issues presented in this Petition. RAP 13.6(b)(4).

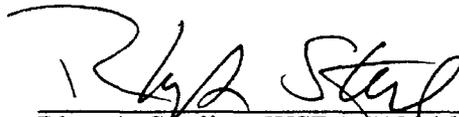
## VI. CONCLUSIONS

Based on the foregoing, and under RAP 13.4(b)(1), RAP 13.4(b)(2), and RAP 13.4(b)(4), this Court should grant Bartz' Petition and review this case to consider the issues presented and to give a firm and final decision as to the legal rules applicable to the construction and enforcement of contracts of guaranty.

Dated this 12<sup>th</sup> day of November, 2014.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



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Rhys A. Sterling, WSBA #13846  
Attorney for Petitioner Nicholas W. Bartz

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<sup>10</sup> The fact that Division I decided not to publish its Bartz Opinion should have no bearing on this Court's decision whether or not to grant Bartz' Petition for Review. Unpublished opinions still have potential for determining the outcome of other cases, as even unpublished opinions are nevertheless published as public record and the basis for decision is widespread information for public (and judicial) consumption.

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**APPENDIX**

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Copy of Court of Appeals, Division I, Unpublished  
    Opinion ..... APP-1

Equipment Financing Agreement ..... APP-9

Notice of Appearance By Counsel For Defendants ..... APP-18

FILED  
COURT OF APPEALS OF  
STATE OF WASHINGTON  
2014 OCT 20 AM 8:20

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

RADIANCE CAPITAL, LLC,	)	
	)	No. 71042-7-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
NICHOLAS W. BARTZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: <u>October 20, 2014</u>

SPEARMAN, C.J. —Nicholas Bartz appeals the trial court’s denial of his motion to dismiss for lack of personal jurisdiction under CR 12(b)(2). Finding no error, we affirm.

**FACTS**

Nicholas Bartz is a resident of Michigan. He was the managing member of Health Pro Solutions, LLC (HPS), a now defunct Nevada LLC. HPS was doing business in Arizona when it sought financing from an Arizona broker to purchase equipment. The broker found financing through Radiance Capital, LLC (Radiance), a Washington limited liability company. In May 2008, HPS and Radiance entered into an Equipment Financing Agreement (Agreement). According to the terms of the Agreement, Radiance advanced \$43,466.18 to HPS for the purchase of office furniture and electronic equipment. HPS was the

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sole debtor; Bartz signed the Agreement on behalf of HPS in his capacity as Managing Member. Bartz also signed a Personal Guarantee (Guarantee) in which he "promise[d] to make all of the payments and perform all Debtors'(sic) obligations as specified" in the Agreement. Clerk's Papers (CP) at 55.

The Agreement contained a clause in which the parties agreed to submit to personal jurisdiction of the King County Superior Court. Paragraph 26 of the Agreement, titled "Choice of Law; Waiver of Jury Trial," reads:

THIS AGREEMENT SHALL BE DEEMED FULLY EXECUTED AND PERFORMED IN THE STATE OF WASHINGTON AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS THEREOF WITHOUT REGARD TO THE CONFLICTS OF LAWS RULES OF SUCH STATE. DEBTOR AGREES TO SUBMIT TO THE JURISDICTION (sic) OF THE STATE OF WASHINGTON IN KING COUNTY. EACH CREDITOR AND DEBTOR HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY ACTION INVOLVING THIS AGREEMENT. CP at 59.

The Agreement also included a "Schedule 'A' to the Equipment Financing Agreement" (Schedule A) that listed payment terms and information about the collateral. The Guarantee was located on the same page as Schedule A, but did not contain any reference to jurisdiction, venue or dispute resolution.

HPS defaulted on the Agreement and Radiance filed suit in King County, Washington against HPS and Bartz under the Agreement and the Guarantee. Radiance filed a motion for summary judgment on the amount owed and Bartz moved to dismiss for lack of personal jurisdiction. The trial court granted Radiance's motion for summary judgment and denied Bartz's motion to dismiss. Bartz appeals.

DISCUSSION

If, as in this case, the trial court has ruled on personal jurisdiction based on the pleadings and the undisputed facts, its determination is a question of law that we review de novo.<sup>1</sup> Outsource Svcs. Mgmt., LLC v. Nooksack Bus. Corp., 172 Wn. App. 799, 807, 292 P.3d 147 (2013) rev. granted, 177 Wn.2d 1019 (2013) aff'd, 2014 WL 4108073, \_\_\_ P.3d\_\_\_ (2014). Similarly, contract interpretation that does not depend on the use of extrinsic evidence is also a question of law reviewed de novo. State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

Consent to Jurisdiction

Bartz contends that the trial court erred in denying his motion to dismiss because he did not personally agree to submit to jurisdiction of the Washington courts. He points out that only the Agreement, which he signed solely in his official capacity as managing member of HPS, contained language agreeing to jurisdiction. The Guarantee, which he signed in his personal capacity, contained no such language. Radiance argues that the Guarantee is part of the Agreement and all of the terms of the Agreement apply to the guarantor.

We disagree with Radiance and find that the Guarantee and the Agreement are separate contracts. "[A] guaranty is a separate legal undertaking

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<sup>1</sup> We reject Radiance's contention that the appropriate standard of review is whether the trial court abused its discretion. The argument assumes that the issue before us is the validity of the forum selection clause. This case turns on whether Bartz consented to jurisdiction under the terms of the Agreement and the Guarantee, not whether the forum selection clause is enforceable. Although on appeal, Bartz initially challenged the validity of the forum selection clause, in his reply, he appears to acknowledge that the language of the Guarantee and the Agreement's consent to jurisdiction clause are the dispositive issues.

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from the principal obligor's undertaking on a note." Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 660, 230 P.3d 625 (2010). In Freestone, we found that the out-of-state guarantors were not bound by a choice of law provision contained only in the promissory notes and amendments. Id. at 661. The guarantees did not incorporate any of the terms of the notes, nor did they mention a choice of law. Id. The trial court apparently bound the guarantors to the choice of law provisions based solely on the fact that the guarantees were subjoined to the notes. Id. at 660. This court reversed, indicating that they "ha[d] found no persuasive authority" for extending the terms of the notes to the guarantees, just because they were located on the same page. Id. We held that:

**'The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter, and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral. *The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of the one from the other.*'**

Id., quoting Robey v. Walton Lumber Co., 17 Wn.2d 242, 255, 135 P.2d 95 (1943). The guarantees and the notes were "two separate obligations were undertaken by different parties." Freestone, 155 Wn. App. at 661.

Applying similar reasoning, the Ninth Circuit found a guarantees to be separate from the underlying contract and declined to apply a guarantee's choice

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of law provision to the corporate debtor's underlying note.<sup>2</sup> Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1211 (9th Cir. 2001). The circuit court stated that "a guarantee is a separate undertaking in which the principal obligor does not join, and a guarantee exists independent of the original obligations between the principal obligor and the obligee." Id.

The Guarantee that Bartz signed is located on the bottom of the page containing Schedule A. Schedule A includes terms that apply only to the creditor and the debtor. The Agreement only refers to Schedule A in the sections addressing the debtor's terms of repayment and the collateral. There is no mention of the Guarantee or the existence of any guarantors in the Agreement or in Schedule A.

Radiance cites no authority for its position that either Schedule A or the Agreement includes the Guarantee. The Guarantee happens to be printed on the same page as Schedule A. Bartz, as personal guarantor, "guarantee[d] and promise[d] to make all of the payments and perform all Debtors'(sic) obligations as specified in this Equipment Financing Agreement." CP at 61. The terms of the Agreement are not incorporated into the Guarantee by any reference. Only Schedule A incorporates the terms of the Agreement by reference. Schedule A is part of the Agreement; the Guarantee is a separate legal undertaking from both the Agreement and its appurtenant Schedule A.

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<sup>2</sup> The Shannon-Vail guarantees contained an express provision stating that "[g]uarantor acknowledges that its obligations hereunder are independent of the obligations of the Borrower," and the choice of law provision contained limiting language – "[t]his Guarantee shall be governed by and construed in accordance with the law of the state of Nevada." Id.

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Next, we look to the language of the Guarantee to determine whether Bartz is subject to the Agreement's consent to jurisdiction clause. It is undisputed that Bartz promised to "make all payments and perform all Debtors'(sic) obligations as specified" in the Agreement. CP at 61. The parties disagree about what "obligations" Bartz assumed by signing the Guarantee. The term "obligation" is not defined in either the Agreement or the Guarantee. Bartz argues that his obligations under the Guarantee include only the tasks or debts related to the advance and the collateral. Radiance argues that all of the terms of the Agreement, not just the terms related to payments and collateral, are Bartz's obligations under the language of the Guarantee.

As a matter of law, however, the language of the Guarantee established an affirmative duty and an "obligation" of the debtor to submit to the jurisdiction of King County and the State of Washington. See Republic Int'l. Corp. v. Amco Engineers, Inc., 516 F.2d 161, 168, n.11 (9th Cir. 1975). In that case the ninth circuit found that assignees of a contract, who agreed to "do every act and thing necessary to perform all of the conditions of said contracts," were bound by the original contract's consent-to-jurisdiction clause. Id. The original contract's clause stated that "[f]or the purposes of this contract, the contracting parties place themselves under the jurisdiction and competence of the courts of the Republic of Uruguay." Id., at n.11. The assignees claimed that their assignment contract changed the forum by requiring disputes to be decided under Delaware law. The circuit court disagreed and held that the assignees had "agreed to assume [assignor's] obligations under the contracts; among those obligations was the

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promise to submit to the jurisdiction of the Uruguayan courts." Id. at 169. The assignment contract's Delaware forum selection clause applied only to disputes between the assignor and assignee. Id.

We agree with the Ninth Circuit's reasoning and find that Bartz's guarantee of "all Debtors' obligations" included the duty to submit to jurisdiction. In a stand-alone sentence, without any limiting language, the Agreement states "DEBTOR AGREES TO SUBMIT TO THE JURISDICTION (sic) OF THE STATE OF WASHINGTON IN KING COUNTY." CP at 59. The language of the Guarantee specifically refers to making "all of the payments and perform[ing] all Debtors' obligations" (emphasis added), indicating that the Guarantor is responsible for additional obligations as well as making payments under the Agreement. CP at 59. Among those obligations was the promise to submit to jurisdiction in King County, Washington. By signing the Guarantee, Bartz consented to the jurisdiction of the King County Superior Court.

Bartz directs the court to other language in the Agreement as evidence that his "obligations" do not include submitting to jurisdiction. He cites paragraph 14, which reads "If Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligations . . . ." CP at 58. Based on this provision, Bartz argues consenting to jurisdiction is not an "obligation" he agreed to undertake because it would make no sense for the creditor to consent to jurisdiction on behalf of the debtor. We disagree. Paragraph 14 sets forth the creditor's right to perform any obligations upon the debtor's failure and demand reimbursement and costs. It does not serve to define "obligations" by implication,

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<sup>3</sup> The parties also argued for and against jurisdiction under the Washington long-arm

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nor does it create an inconsistency that would limit the debtor's duties to those tasks that can be performed by the creditor to protect the collateral. Bartz guaranteed all of the debtor's obligations as specified in the agreement, including the promise to consent to jurisdiction.

We affirm the trial court's denial of Bartz's motion to dismiss.<sup>3</sup> As the prevailing party in this appeal, Radiance is entitled to fees and costs under RAP 18.1 and the Guarantee.

Affirmed.

WE CONCUR:

Spectman, C.J.

Trickey, J.

Ullrich, J.

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<sup>3</sup> The parties also argued for and against jurisdiction under the Washington long-arm statute. Because we affirm the trial court's decision based on the contracts, we do not reach the question of statutory jurisdiction.

EQUIPMENT FINANCING AGREEMENT - CONTRACT No. 621-0000164-000

<b>CREDITOR:</b> Radiance Capital LLC	<b>DEBTOR:</b> HEALTH PRO SOLUTIONS, LLC
<b>Address:</b> 820 A Street, Suite 560	<b>Address:</b> 4535 EAGLE DR.
<b>City/State/Zip:</b> JACKSON, WA 98402	<b>City/State/Zip:</b> JACKSON, MI 49201

- 1. SECURITY AGREEMENT:** Debtor hereby grants Creditor a security interest under the Uniform Commercial Code in the property (collectively the "Collateral" and individually in "Item" or "Items of Collateral") described in Schedule A attached hereto and incorporated herein. Such security interest is granted to secure performance by Debtor of its obligations hereunder and under any other present or future agreement with Creditor. Debtor shall insure that such security interest is and shall remain a first lien security interest.
- 2. PAYMENTS:** Debtor shall repay Creditor (the "Total Advances" shown in Schedule A together with interest in the number of periodic installments shown in Schedule A. The initial business payment shall be due on the date indicated in Schedule A and subsequent installment payments shall be due on the same day of each month thereafter until paid, whether or not an invoice is received. Advances Payment, if any are shown in Schedule A, will be used for the first payment and any balance will be used for the last payment(s), provided that if there is a default, any payments under this Agreement may be applied to Debtor's obligation to Creditor in such order as Creditor chooses.
- 3. NO AGENCY:** DEBTOR ACKNOWLEDGES THAT NO SUPPLIER OF ANY ITEM OR INTERMEDIARY FOR ANY AGENT OF EITHER THEREOF IS AN AGENT OF CREDITOR AND FURTHER THAT NONE OF SUCH PARTIES IS AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF THIS AGREEMENT. NO REPRESENTATION AS TO ANY MATTER BY ANY SUCH PARTY SHALL BIND CREDITOR OR AFFECT DEBTOR'S DUTY TO PAY THE INSTALLMENT PAYMENTS AND PERFORMANCE OF OTHER OBLIGATIONS HEREUNDER.
- 4. NON-CANCELANBLE AGREEMENT, IRREVOCABILITY, NO CURE:** THIS AGREEMENT IS NON-CANCELANBLE BY DEBTOR FOR ANY REASON WHATSOEVER. DEBTOR MAY REPAY THE INSTALLMENT PAYMENTS ONLY IN ACCORDANCE HERewith. ALL PAYMENTS HEREUNDER ARE TO BE MADE WITHOUT CURE.
- 5. FINANCING:** THIS AGREEMENT IS SOLELY A FINANCING AGREEMENT. CREDITOR HAS HAD NO INVOLVEMENT IN THE SELECTION OR PURCHASE OF AND HAS MADE AND EXPRESSLY MAKES NO AGREEMENT, REPRESENTATION OR WARRANTY AS TO ANY ITEM OF COLLATERAL.
- 6. LOCATION OF COLLATERAL:** Debtor shall keep, or as to an item which is mobile, personally goods and accessories from the United States, an appropriate, each Item of Collateral in Debtor's possession and control at the Collateral Location specified in Schedule A or at such other location to which such Item may have been moved with prior written consent of Creditor. Upon request, Creditor may inspect the Collateral during normal business hours and enter the premises where the Collateral may be located for such purpose. Such Item shall be used solely for commercial or business purposes and applied in a lawful and proper manner in compliance with all applicable governmental regulations and all requirements of business policies credit insurance and all manufacturers' instructions and warranty requirements.
- 7. ALTERATIONS; SECURITY INTEREST COVERAGE:** Without Creditor's prior written consent, Debtor shall not make any alterations, additions or replacements to an Item of Collateral that changes its economic value or functional utility. All alterations and improvements made to an Item shall be deemed maintenance thereon, and shall not be deemed to constitute a replacement or functional utility. Creditor's security interest shall cover all modifications, accessories, additions to and replacements and substitutions for the Collateral. Debtor will not make any replacements or substitutions without Creditor's prior written consent.
- 8. MAINTENANCE:** Debtor shall maintain the Collateral in good repair, condition and working order. Debtor shall cause all repairs required to maintain the Collateral in such condition to be made promptly by qualified parties. Debtor will cause such Item of Collateral for which a service contract is generally available to be covered by such a contract that provides coverage typical as to property of the type involved and is issued by a nonpartisan servicing entity.
- 9. LOSS AND DAMAGE; CREDITOR'S VALUE:** Debtor will bear all risk of loss, theft, destruction or disposition of or damage to any Item. Debtor shall give Creditor prompt notice of a casualty occurrence and shall thereafter place the Item in good repair, condition and working order, provided however, that if such Item is determined by Creditor to be lost, stolen, destroyed or damaged beyond repair or is repossessed or unless a constructive total loss under an insurance policy covered hereunder, Debtor shall pay Creditor all remaining payments of such Item to satisfy the debt.
- 10. TITLING:** If required by Creditor, Debtor shall cause an Item of Collateral subject to title registration laws to be titled as directed by Creditor. Debtor shall advise Creditor promptly as to any necessary titling. Debtor shall cause all documents of title to be furnished to Creditor within sixty (60) days of the date on any titling done by Debtor.
- 11. TAXES:** Unless otherwise directed in writing by Creditor, Debtor shall pay when due and make filings with respect to all taxes, fees, including registrations, fines, penalties, and other governmental assessments with respect to the Collateral and shall pay all other governmental assessments (including gross receipt taxes but exclusive of Federal and State taxes based on Creditor's net income) related to maintain the Collateral or otherwise related hereto.
- 12. LIMITED POWER OF ATTORNEY:** Debtor hereby irrevocably appoints Creditor as Debtor's attorney-in-fact for the following limited purposes: (1) to sign and file or record as Debtor's behalf such in Debtor's name any document Creditor deems necessary to perfect or protect Creditor's interest in the Collateral or payment in the UCC, and (2) to sign, execute and/or register, on Debtor's behalf and in Debtor's name, for Creditor's benefit, any instrument representing proceeds from any policy of insurance covering the Collateral.
- 13. INSURANCE:** Debtor shall maintain and provide Creditor with proof satisfactory to Creditor for the maintenance of all risk insurance against loss of or damage to the Collateral for not less than the full replacement value thereof naming Creditor as Loss Payee. Such insurance shall be in an amount and from and with companies approved by Creditor, shall provide at least thirty (30) days advance written notice to Creditor of any such change or cancellation, shall provide full benefit of vacancy protection, if applicable, and shall provide that coverage is "all-risk." In the event of any assignment of this Agreement of which Debtor receives notice, Debtor shall cause such insurance to provide the same protection to the assignee as its interest may appear. The proceeds of such insurance, at the option of the Creditor, shall be applied toward (a) the repair or replacement of the appropriate Item or Items of Collateral, (b) payment of the remaining balance, or (c) payment of any other amount owed by Debtor to Creditor. Any amount of such proceeds remaining shall belong to Debtor. Debtor shall maintain public liability and property damage coverage in such amounts and in such form as Creditor shall reasonably require. If Debtor does not provide the insurance described in this section, Creditor may, but will not be required to, buy such insurance and add the cost, including any necessary changes or fees associated with the placement, maintenance or service for such insurance, to the installment payment amount due from the Debtor.
- 14. CREDITOR'S PAYMENT:** If Debtor fails to perform any of its obligations hereunder, Creditor may perform such obligation, and Debtor shall (a) reimburse Creditor the cost of such performance and related expense and (b) pay Creditor the late charge contemplated in Paragraph 21 on the cost and expense of such performance.
- 15. INDEMNITY:** Debtor shall indemnify, defend and hold harmless Creditor against any claim, action, liability or expense, including attorney's fees and court costs, incurred by Creditor related to this Agreement.
- 16. WAIVER:** Any of the following constitutes an event of default hereunder: (a) Debtor's failure to pay any amount hereunder, within ten (10) business days of when due; (b) Debtor's default in performing any other obligation hereunder or under any other agreement between Debtor and Creditor; (c) Debtor changes its name, state of incorporation, chief executive officer and/or place of business without providing Creditor with thirty (30) days written notice of such change; (d) death or judicial declaration on incompetency of Debtor, if an individual or partner; (e) the filing by or against Debtor of a petition under the Bankruptcy Code or under any insolvency law or law providing for the relief of debtors, including without limitation, a petition for reorganization, assignment or otherwise; (f) the making of an assignment of a substantial portion of its assets by Debtor for the benefit of creditors, appointment of a receiver or trustee for Debtor or for any Debtor's assets, institution by or against Debtor of any other type of insolvency proceeding or other proceeding contemplating settlement of claims against or winding up of the affairs of Debtor; Debtor's cessation of active business affairs or the making by Debtor of a transfer of a material portion of Debtor's assets or inventory not in the ordinary course of business; (g) the occurrence of an event described in (a), (c), (e) or (f) as to a guarantor or other surety of Debtor's obligations hereunder; (h) any misrepresentation of a material fact in connection herewith by or on behalf of Debtor; (i) Debtor's default under a lease or agreement providing financial accommodations with a third party or (j) Creditor shall in good faith deem itself insecure as a result of a material adverse change in Debtor's financial condition or otherwise.

Initial MWB





SCHEDULE "A" to Equipment Financing Agreement

EQUIPMENT FINANCING AGREEMENT - CONTRACT No. 621-0000164-000  
 DATED: \_\_\_\_\_

CREDITOR: Radiance Capital LLC DEBTOR: HEALTH PRO SOLUTIONS, LLC

CREDITOR AND DEBTOR HAVE ENTERED INTO THE EQUIPMENT FINANCING AGREEMENT DESCRIBED ABOVE (THE "AGREEMENT"), THE TERMS OF WHICH ARE INCORPORATED HEREIN BY THIS REFERENCE. THIS IS A SCHEDULE A TO THE AGREEMENT. ALL WORDS AND TERMS USED HEREIN AND NOT DEFINED HEREIN SHALL HAVE MEANINGS SPECIFIED IN THE AGREEMENT.

TERMS

TOTAL ADVANCE \$ 43,466.18	TERM OF LOAN 60 mo.	MONTHLY PAYMENT \$ 1,137.02	ADVANCE PAYMENTS 2	INITIAL AMOUNT DUE \$ 2,624.04
BALLOON PAYMENT \$ 0.00	DUE DATE	TOTAL NUMBER OF PAYMENTS 60	DOC FEE/OTHER FEE \$ 350.00	SECURITY DEPOSIT \$ 0.00

COLLATERAL DESCRIPTION

QUANTITY	SERIAL NO.	DESCRIPTION	TERMINED ADVANCE
SEE	ATTACHED	COLLATERAL DESCRIPTION	EXHIBIT
<small>If collateral description is of length where it would not fit in this section, the term "COLLATERAL DESCRIPTION EXHIBIT" attached hereto as though set forth at length hereto.</small>			TOTAL ADVANCE \$ 43,466.18

SUPPLIER	COLLATERAL LOCATION (# IF DIFFERENT THAN BUSINESS ADDRESS)
SEE ATTACHED COLLATERAL DESCRIPTION EXHIBIT	
<small>This agreement is effective only upon execution by an authorized officer of Creditor following Debtor's execution hereto, and upon execution Creditor shall fund the Total Advance. Debtor hereby authorizes Creditor to disburse the Total Advance as identified in the PAY PROCEEDS DESCRIPTION. Creditor reserves the right to pay the applicable portion of the Total Advance jointly to any party not specified in the preceding sentence with a security interest in an item of collateral.</small>	

PERSONAL GUARANTEE(S)

The undersigned guarantor and guarantor to make all of the payments and perform all Debtor's obligations as specified in this Equipment Financing Agreement. Each of our liabilities is primary and joint and several and shall not be affected by any settlement, extension, renewal or modification of the Agreement, by the discharge of release of the Debtor's obligations or by the taking or release of additional guarantees or security for the performance of the Agreement. The undersigned waive any rights we may have to (a) protest, demand, notice of protest, notice of discharge, notice of default under the Agreement any other notices related to this guaranty or the Agreement and (b) the right to require Creditor to proceed against Debtor or to pursue any other remedy in Creditor's power. The undersigned also waive any other rights and defenses available to a guarantor by reason of application laws or statutory law. The undersigned agree that we are liable for Creditor's attorney's fees and costs in enforcing this guaranty, whether or not suit is filed. The undersigned acknowledge that this guaranty issues to the benefit of Creditor's assigns.

Nicholas W. Bartz	<i>Nicholas W Bartz</i>	5-20-08
Guarantor name (printed)	Guarantor Signature	Date
_____	_____	_____
Guarantor name (printed)	Guarantor Signature	Date
_____	_____	_____
Guarantor name (printed)	Guarantor Signature	Date
_____	_____	_____
Guarantor name (printed)	Guarantor Signature	Date
_____	_____	_____

COLLATERAL DESCRIPTION EXHIBIT

EQUIPMENT FINANCING AGREEMENT - CONTRACT No. 621-0000164-000

CREDITOR: Raffaele Capital LLC		DEBTOR: HEALTH PRO SOLUTIONS, LLC	
QUANTITY	SERIAL NO.	DESCRIPTION	ITEMIZED ADVANCE
	Vendor Ashley Furniture HomeStore 7458 Timberstone Dr. Findlay, OH 45840		
1	ASHLEY 3560038, 38, 2257-1, (2) 6	Bedroom Chaises	1,672.20
1	ASHLEY 3560035	LOVESEAT/ARMCHAIR/CHAIR	
N/O	ASHLEY 3560038	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2257-1	SOFA/ARMCHAIR/CHAIR	
N/O	ASHLEY 2257-1	SOFA/ARMCHAIR/CHAIR	
2	ASHLEY 2257-6	SOFA/ARMCHAIR/CHAIR	
N/O	ASHLEY 2257-6	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2418-27B, -27C	WINDLW 2, Glass Desk	413.40
1	ASHLEY 2418-27B	COLEGE BASK CHERRY STAIN WOOD	
N/O	ASHLEY 2418-27B	COLEGE BASK CHERRY STAIN WOOD	
1	ASHLEY 2418-27B	STONCH DRAPERS CHRY STAIN WOOD	
N/O	ASHLEY 3560060	SOFA/ARMCHAIR/CHAIR	296.02
1	ASHLEY 2257-49	SOFA/ARMCHAIR/CHAIR	300.13
N/O	ASHLEY 2257-49	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2418-27B	LOVESEAT/ARMCHAIR/CHAIR	615.40
N/O	ASHLEY 2418-27B	LOVESEAT/ARMCHAIR/CHAIR	
1	ASHLEY 2754-1	SOFA/ARMCHAIR/CHAIR	645.20
N/O	ASHLEY 2754-1	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2754-1	SOFA/ARMCHAIR/CHAIR	256.58
N/O	ASHLEY 2754-1	SOFA/ARMCHAIR/CHAIR	
2	ASHLEY 2754-3	SOFA/ARMCHAIR/CHAIR	112.77
N/O	ASHLEY 2754-3	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2754-3	SOFA/ARMCHAIR/CHAIR	325.74
N/O	ASHLEY 2754-3	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	201.22
N/O	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	159.20
N/O	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	
4	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	222.40
N/O	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	
1	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	318.31
N/O	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	
6	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	204.12
N/O	ASHLEY 2257-35	SOFA/ARMCHAIR/CHAIR	
		TOTAL ADVANCE	\$ CONTINUED

CREDITOR: Raffaele Capital LLC

By: Christina  
Title: Controller  
Date: 5/28/07

DEBTOR: HEALTH PRO SOLUTIONS, LLC

By: Nicholas W Barty  
Title: Mkt. Manager  
Date: 5-20-08

COLLATERAL DESCRIPTION EXHIBIT

EQUIPMENT FINANCING AGREEMENT - CONTRACT No. 621-0000164-000

CREDITOR: Redstone Capital LLC		DEBTOR: HEALTH PRO SOLUTIONS, LLC	
QUANTITY	SERIAL NO.	DESCRIPTION	ITEMIZED ADVANCE
Vendor: PROTECH COMPUTERS LLC 1524 HOBSON ROAD JACKSON, MI 49203			
1		Intel E850 Core 2 Duo System, 2Gb DDR2-667 Memory, 250Gb SATA Hard Drive, 20X DVD-RW, Windows XP Pro, Office 2007 SP2, Keyboard, Mouse, 19" LCD, 1yr. P&L Wwr	1144.65
1		AMD Athlon Dual Core 4200+ System, 2Gb DDR2-667 Memory, 250Gb SATA Hard Drive, 20x DVD-RW, 19" LCD, Keyboard, Mouse, Spkr, WPr XP Pro, 1yr P&L Wwr	1119.76
2		HP Desktop J4760 All-in-One Printer/Scanner/Copier/Fax, 1yr manufacturer warranty	249.90
2		HP T40L Black / 753L Color Combo Ink Cartridges	141.00
3		6' HDMI Extension Cable	6.95
2		6' USB Extension Type A Cable	13.90
1		6' 16P Mini-Stereo M/F Audio Cable Extension	3.95
1		Quickbooks 2008 Pro Software, No Refunds on Software	198.05
1		Modular Power Cord UL 6	1.99
TOTAL ADVANCE			CONTINUED

CREDITOR: Redstone Capital LLC  
 By: [Signature]  
 Title: Controller  
 Date: 5/28/08

DEBTOR: HEALTH PRO SOLUTIONS, LLC  
 By: [Signature]  
 Title: Mgr. Member  
 Date: 5-20-08

COLLATERAL DESCRIPTION EXHIBIT

EQUIPMENT FINANCING AGREEMENT - CONTRACT No. 521-0000164-000

CREDITOR: Redwood Capital LLC		DEBTOR: HEALTH PRO SOLUTIONS, LLC	
QUANTITY	SERIAL NO.	DESCRIPTION	ITEMIZED ADVANCE
	Vendor Integrated Smart Technologies #918 Story Lake Lane Jackson, MI 49201		
	Audio/Video & Integration Control Equipment		
1		Sharp AQUOS LC-37D80U 37" LCD HDTV, 1080p, Titanium Finish	2,300.00
1		Samsung UN-84000D 40" LCD HDTV, 1080p, Black Finish	3,000.00
5		Monitor Audio InCeiling LCR Speaker, 6.5" Driver, Round, White	4,000.00
2		ELAN MANSOCH Flush-mount Speaker, 6.5" Driver, InCeiling or InWall	700.00
14		Control4 Wireless Dimmer for Presentation Room & Office, White	1,750.00
1		Control4 Wireless Switch, White	125.00
2		Control4 Wireless 3-Button Keypad, White w/Custom Labeled Keycaps	185.00
1		Control4 Wireless 8-Button Keypad, White w/Custom Labeled Keycaps	500.00
1		Control4 HC300 Controller w/System Remote v2	1,000.00
2		LinkSys Dual-Band Wireless N Router with 16/100/1000 4-Port Switch	400.00
1		D-Link DGS-2208 10/100/1000 8-Port Fast Ethernet Switch, Unmanaged	400.00
1		Doran AVR-3805CI AV Surround Receiver w/iDNR v1.3	2,000.00
1		ParalMax MAX1500UPS Power Conditioned Back-up UPS System, Blk	1,750.00
1		Control4 Ethernet InWall Mini-Touchscreen, White	900.00
1		Control4 MTS InWall Retrofit Bracket	60.00
1		Control4 PoE Power Over Ethernet Injector	100.00
1		Control4 HC300 Home Controller w/System Remote v2	1,000.00
1		Control4 HC500 Home Controller w/18GB HDD & System Remote v2	2,000.00
1		Control4 Multi-Channel Amplifier/Switch, 16-Ch	3,500.00
1		ParalMax MAX8 Surge Protection Strip	200.00
1		Sony DVP-CK77ES 400-Disc DVD/BD Changer	1,000.00
1		Interconnect Cabling	1,000.00
1		Supplies	500.00
1			1,500.00
<b>TOTAL ADVANCE</b>			<b>\$ 43,466.18</b>

CREDITOR: Redwood Capital LLC

By: [Signature]  
 Title: Controller  
 Date: 5/25/08

DEBTOR: HEALTH PRO SOLUTIONS, LLC

By: [Signature]  
 Title: Mag. Member  
 Date: 5-20-08



**MICHIGAN DEPARTMENT OF STATE**

**Uniform Commercial Code Section**

**P.O. Box 30197**

**Lansing, Michigan 48909-7697**

**www.michigan.gov/sosucc**

**Filing Acknowledgement**

**June 09, 2008**

**Job Number**  
U20080606-0348

**Initial Filing Number**  
2008089764-1

**Filing Description**  
Initial Financing Statement

**Document Filing Number**  
2008089764-1

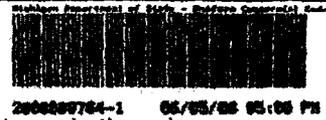
**Date/Time of Filing**  
06/05/2008 05:00 PM

**Debtors**  
HEALTH PRO SOLUTIONS,  
LLC  
4535 EAGLE DR  
JACKSON MI 49201

**Secured Parties**  
RADIANCE CAPITAL LLC  
820 A ST STE 560  
TACOMA WA 98402

The attached document(s) were filed with the Michigan Secretary of State, Uniform Commercial Code Section. The filing date and time have been affixed to each document, indicating the date and time of filing. A filing number is also affixed and can be used to reference this document in the future.

Michigan Department of State  
Jeffrey C. Nickerson  
Filing Officer



UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (read and heed CAREFULLY)

**A. NAME & PHONE OF CONTACT AT FILER (optional)**  
**CSC Diligent, Inc. 1-800-853-5284**

**B. SEND ACKNOWLEDGMENT TO:** (Name and Address)

3408420  
 CSC Diligent, Inc.  
 6500 Harbour Heights Place, Suite 400  
 Mukilteo, WA 98275

Filed in: Michigan (S.O.S.)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

**1. DEBTOR'S EXACT FULL LEGAL NAME - (exact only per filer's version) (See 101-01-001 for details on name)**

**1a. ORGANIZATION'S NAME**  
**HEALTH PRO SOLUTIONS, LLC**

**OR 1b. INDIVIDUAL'S NAME**

**2. MAILING ADDRESS**

4535 EAGLE DR  
 CITY: JACKSON  
 STATE: MI POSTAL CODE: 48201 COUNTRY: USA

**3. SECURED PARTY'S NAME - (exact or TOTAL AGREEMENT if/when applicable) (See 101-01-001 for details on name)**

**3a. ORGANIZATION'S NAME**  
**Radiance Capital LLC**

**OR 3b. INDIVIDUAL'S LAST NAME**

**3c. MAILING ADDRESS**  
 820 A St Ste 500  
 CITY: Tacoma  
 STATE: WA POSTAL CODE: 98402 COUNTRY: USA

See attached for equipment description

**3. ALTERNATIVE DISPOSITION (if applicable)**  **4. COLLATERAL**  **5. COMMERCIAL COLLATERAL**  **6. AGENCY**  **7. BILLING**  **8. ASSET**  **9. NON-UCCLINE**

**1. UCC FINANCING STATEMENT (S.O.S.) (see instructions for details)**  **2. UCC FINANCING STATEMENT (S.O.S.) (see instructions for details)**  **3. UCC FINANCING STATEMENT (S.O.S.) (see instructions for details)**

**1. OFFICIAL FILER RESPONSE DATA** **821-000184-000** **3408420**

FILING OFFICE COPY - UCC FINANCING STATEMENT (FORM UCC1) (REV. 08/22/02)

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY**

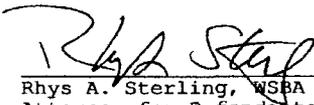
RADIANCE CAPITAL, LLC, a Washington) NO. 12-2-07861-1 KNT  
limited liability company, )  
PLAINTIFF, )  
v. ) NOTICE OF APPEARANCE BY  
NICHOLAS W. BARTZ and "JANE DOE" ) COUNSEL FOR DEFENDANTS  
BARTZ and HEALTH PRO SOLU- )  
TIONS, LLC )  
NICHOLAS W. BARTZ and "JANE DOE" )  
BARTZ, husband and wife; and )  
HEALTH PRO SOLUTIONS, LLC, a for- )  
eign limited liability company, )  
DEFENDANTS. )

TO: CLERK, KING COUNTY SUPERIOR COURT, Maleng Regional  
Justice Center, Kent, WA;  
AND TO: SHANNON R. JONES, WSBA #28300, Attorney for Plain-  
tiff Radiance Capital, LLC; Campbell, Dille, Bar-  
nett & Smith, 317 South Meridian, Puyallup, WA  
98371.

**YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** of the appearance  
by counsel for Defendants NICHOLAS W. BARTZ and "JANE DOE" BARTZ,  
husband and wife ("Bartz"); and HEALTH PRO SOLUTIONS, LLC, a  
foreign limited liability company ("Health Pro"), in the above-

NOTICE OF APPEARANCE BY  
COUNSEL FOR DEFENDANTS  
-- Page 1 of 3

**RHYS A. STERLING, P.E., J.D.**  
**Attorney at Law**  
P.O. Box 218  
Hobart, Washington 98025-0218  
Telephone (425)432-9348  
Facsimile (425)413-2455  
E-mail: RhysHobart@hotmail.com

1 entitled action by the undersigned attorney. You are hereby  
2 directed to serve all future pleadings or papers, except original  
3 process, upon said attorney at the address below stated.  
4 **BY NOTING THEIR APPEARANCE** through the undersigned attorney,  
5 Defendants Bartz and Health Pro do not waive any rights to amend  
6 prior pleadings, if any, and to make counterclaims, cross-claims,  
7 or third party claims and to contest personal or subject matter  
8 jurisdiction or improper service (out-of-State), venue or any other  
9 defenses, whether affirmative or permissive or under CR 12 or  
10 otherwise and including but not limited to failure to state a claim  
11 upon which relief may be granted, available to them pursuant to the  
12 civil rules of procedure, law, and equity.  
13 **ALSO TAKE NOTICE THAT** undersigned attorney requests Plain-  
14 tiff's counsel send him at the earliest convenience copies of any  
15 case schedules, court orders, pleadings, and motion papers not  
16 previously served on Defendants Bartz and Health Pro.  
17 **FURTHERMORE TAKE NOTICE THAT** if not already done, Plaintiff's  
18 counsel is respectfully requested to Opt-In to service via the King  
19 County E-Filing automated system.  
20  
21 DATED this 31<sup>st</sup> day of May, 2013.  
22  
23 RHYS A. STERLING, P.E., J.D.  
24  
25   
26 \_\_\_\_\_  
27 Rhys A. Sterling, WSPA #13846  
28 Attorney for Defendants Bartz and  
29 Health Pro

NOTICE OF APPEARANCE BY  
COUNSEL FOR DEFENDANTS  
-- Page 2 of 3

**RHYS A. STERLING, P.E., J.D.**  
**Attorney at Law**  
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E-mail: RhysHobart@hotmail.com

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NOTICE OF APPEARANCE BY  
COUNSEL FOR DEFENDANTS  
-- Page 3 of 3

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