IN THE SUPREME COURT OF IOWA
NO. 19-1994

APPEAL FROM THE
POLK COUNTY DISTRICT COURT
HON. COLEMAN McALLISTER, JUDGE PRESIDING
Case Number CVCV051446

COMMERCE BANK, Plaintiff/Appellee

vs.

ROBERT R. McGOWEN, Defendant/Appellant

PLAINTIFF/APPELLEE COMMERCE BANK'S FINAL BRIEF

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STATEMENT OF ISSUES FOR REVIEW

I. Did the Polk County District Court correctly determine payments due to Robert McGowen under the "McGowen, Hurst, Clark & Smith, P.C. Deferred Compensation Plan" are not exempt from garnishment under *Iowa Code* § 627.6(8)(e)?

District Court Disposition:
The Polk County District Court determined the payments were not made under a "pension, annuity, or similar plan or contract," and, therefore, were not exempt under *Iowa Code* § 627.6(8)(e), finding "no evidence" the payments served as a wage substitute after retirement, were intended to fill a wage or salary void, or otherwise displayed the required characteristics of an exempt asset.

Suggested Appellate Disposition:
Affirm.

Cited Authorities:

Cases

Booth v. Propp, 242 N.W. 60 (Iowa 1932)

Eilbert v. Pelican, 212 B.R. 954 (B.A.P. 8th Cir. 1997)

Evans v. Benson, 731 N.W.2d 395 (Iowa 2007)

First Nat. Bank v. Larson, 239 N.W.2d 134 (Iowa 1931)

In re Andersen, 259 B.R. 687 (B.A.P. 8th Cir. 2001)

In re Bramlette, 333 B.R. 911 (Bankr. N.D. Ga. 2005)

In re Delaney, 268 B.R. 57 (D. Vt. 2001)

In re Eilbert, 162 F.3d 523 (8th Cir. 1998)

In re Huebner, 986 F.2d 1222 (8th Cir. 1992)

In re Huscher, No. 04-02200S, 2004 WL 2671705 (N.D. Iowa Nov. 19, 2004)

In re Hutton, 893 F.2d 1010 (8th Cir. 1990)

In re Michel, 332 B.R. 557 (Bankr. N.D. Ohio 2005)

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In re Pettit, 57 B.R. 362 (S.D. Iowa 1985)

In re Rousey, 283 B.R. 265 (B.A.P. 8th Cir. 2002)

In re Sims, 241 B.R. 467 (Bankr. N.D. Okla. 1999)

In re Skipper, 274 B.R. 807 (Bankr. W.D. Ark. 2002)

In re Vickers, 408 B.R. 131 (Bankr. E.D. Tenn. 2009)

In re Weidman, 284 B.R. 837 (Bankr. E.D. Mich. 2002)

In re Wilson, 305 B.R. 4 (N.D. Iowa 2004)

Iowa Methodist Hosp. v. Long, 12 N.W.2d 171 (Iowa 1943)

Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W.2d 338 (Iowa 2013)

Matter of Pettit, 55 B.R. 394 (Bankr. S.D. Iowa 1985)

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

Office of Citizens' Aid/Ombudsman v. Edwards, 825 N.W.2d 8 (Iowa 2012)

Rousey v. Jacoway, 544 U.S. 320 (2005)

Tindell v. Apple Lines, Inc., 478 N.W.2d 428 (Iowa 1991)

Statutes

Iowa Code § 627.6(8)(e)

Other Authorities

Fed. R. Bankr. P. 4003(c)

Iowa R. App. P. 6.903(2)(g)(3)

ROUTING STATEMENT

Commerce Bank agrees with Robert McGowen that the Iowa Supreme Court should retain this case because it presents a substantial issue of first impression for the Iowa appellate courts. Iowa R. App. P. 6.1101(2)(c). Neither party, nor the Polk County District Court, cited any authority from the Iowa Appellate Courts that discussed the application of *Iowa Code* §627.6(8)(e), and Commerce Bank's additional research has not uncovered a controlling decision from this Court. As this statute has implications for Iowa residents in both bankruptcy and collection proceedings, the Iowa Supreme Court should provide guidance on this issue.

STATEMENT OF THE CASE

In 2015, Plaintiff/Appellee Commerce Bank ("Commerce Bank") secured a $1.5 million judgment against Defendant/Appellant Robert McGowen ("McGowen"). (App. 38.) McGowen never repaid this debt, which is now several years past due, necessitating collection efforts through the Polk County District Court.

One of the assets Commerce Bank sought to collect were monthly payments McGowen received (and continues to receive) under a shareholder incentive plan provided by McGowen, Hurst, Clark & Smith, P.C. ("MHCS" or "Firm"), an accounting firm at which McGowen is currently employed and

formerly served as shareholder and Firm President. (App. 39.) According to the plain language of the plan, these payments are intended as a "reward" to former shareholders for promoting "the growth, profitability, and long-term success of the firm." (App. 78, ¶ 1.1.)

On May 30, 2019, McGowen asked the Polk County District Court to order these payments fully exempt from Commerce Bank's collection efforts under *Iowa Code* § 627.6(8)(e). (App. 6-8, ¶¶ 7-13.) Commerce Bank opposed this request. (App. 15-24.)

On October 30, 2019, the district court issued a written decision denying McGowen's exemption claim. After reviewing the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals' "compelling and persuasive" analysis in *In re Eilbert*, 212 B.R. 954 (B.A.P. 8th Cir. 1997), the district court concluded the record contained "no evidence" the incentive payments were intended to serve as a wage substitute after retirement or fill a wage or salary void, minimum requirements for exemption under *Iowa Code* § 627.6(8)(e). (App. 41-42, 47-49.) Rather, the district court held the plan was a mere "paper balance," used by the Firm to distribute its assets to its shareholders. (App. 48.) The court concluded it was "clear" the evidence did not support McGowen's exemption claim, and denied the same in full. (App. 50.)

On November 14, 2019, McGowen filed a motion to amend or enlarge the October 30, 2019 ruling. (App. 53-55.) This motion was summarily denied. (App. 57.) McGowen thereafter filed a notice of appeal. (App. 59-60.)

STATEMENT OF FACTS

I. The Judgment

On December 18, 2015, Commerce Bank obtained and secured entry of judgment against McGowen in the District Court for Hennepin County, Minnesota. (App. 38.) On March 3, 2016, this judgment was recorded and docketed as a foreign judgment in the District Court for Polk County, Iowa. (App. 38.) Commerce Bank thereafter commenced collection efforts in Iowa, including securing a General Execution and serving garnishment paperwork on MHCS. (App. 38-39.)

II. McGowen's Exemption Claim

On May 30, 2019, McGowen filed a motion to partially exempt funds from garnishment and/or execution. (App. 39.) McGowen argued payments due to him under the "McGowen, Hurst, Clark & Smith, P.C. Deferred Compensation Plan" (the "Incentive Plan") were exempt from garnishment under *Iowa Code* § 627.6(8)(e) because the Incentive Plan was a "pension, annuity, or similar plan or contract" that paid benefits "on account of illness, disability, death, age, or length of service." (App. 6, ¶ 7.)

III. The MHCS Incentive Plan

A. Compensation

According to its plain language, the Incentive Plan is "intended to provide incentive to shareholders of the [Firm] to promote the growth, profitability, and long-term success of the [Firm]." (App. 78, ¶ 1.1.) The Incentive Plan pays McGowen two types of income: Type 1 and Type 2A (collectively, the "Incentive Payments"). (App. 78-81, ¶¶ 2.1-2.3.)

Type 1 income is "intended to approximate the realizable value of the Company's receivables and unbilled work in process," and is awarded at a flat rate of $22,000 for every year the employee is a shareholder of the Firm. (App. 78, ¶ 2.1; App. 88, Sch. I.) Neither the shareholders nor the Firm fund a Type 1 account or otherwise pay into the Incentive Plan. (*See* App. 78, ¶ 2.1.) Rather, MHCS maintains a carryforward schedule that "documents the balance of each shareholder's Type 1" account. (App. 78-79, ¶ 2.2.) This balance is paid to qualifying shareholders upon relinquishment of their Firm shares. (App. 43; App. 78-79, ¶ 2.2.)

Type 2A income approximates the "pro-rata portion of the intangible value of the Company's professional practice." (App. 79, ¶ 2.2(B).) Once again, neither the Firm shareholders nor the Firm itself fund a Type 2A account or otherwise pay into the Incentive Plan. (App. 78-81, ¶¶ 2.1-2.3.)

Rather, Type 2A compensation is calculated by formula and credited to the shareholders' Type 2A account. (App. 79, ¶ 2.2(B).) This account is maintained on a "balance forward basis," meaning the account is credited up or down each year based on that year's calculation until the shareholder relinquishes his or her shares, freezing the account balance and triggering payment. (App. 43; App. 79, ¶ 2.2(B).)

B. Vesting

The Incentive Plan includes a vesting schedule for Type 1 and Type 2A income. (App. 81, ¶¶ 3.1 and 3.2.) Type 1 income "is 100% vested when earned" and is "not subject to forfeiture other than as provided in Section VI."[1] (App. 81, ¶ 3.1.) Type 2A income typically vests pursuant to the following schedule:

Years as Shareholder	Percentage Vested
0-9 Years	0%
10 Years	50%
11-20 Years	5% per year until 100% at Year 20

(App. 81, ¶ 3.2.)

[1] Section VI incorporates a non-compete agreement that voids the Incentive Payments in their entirety if violated. (App. 84, ¶ 6.1.) Section VI also includes a professional negligence provision that reduces a shareholder's Incentive Payments equal to the amount of any loss sustained by the Firm because of the shareholder's professional negligence or malpractice. (App. 84, ¶ 6.2.)

While the above table sets the general vesting rules, vesting can be accelerated in certain scenarios. For example, an asset sale automatically accelerates a shareholder's Type 2A account to 100% vested regardless of the number of years of service. (App. 81, ¶ 3.3.) A shareholder's Type 2A income vesting is also accelerated to 100% if the shareholder dies while employed, even if that shareholder was 0% vested at the time of death. (App. 82, ¶ 3.4.)

IV. The District Court Ruling

On October 30, 2019, the district court, the Honorable Coleman McAllister presiding, issued a written decision rejecting McGowen's exemption claim.[2] (App. 50.)

The district court began with a review of the general principles underlying Section 627.6(8)(e). (App. 44-46.) The district court held exemption claims under Section 627.6(8)(e) require the court to engage in a "two-step analysis," first examining if the asset qualifies as a "pension, annuity, or similar plan or contract," and, if so, asking if asset payments are

[2] The district court also reviewed and rejected McGowen's motion to strike Commerce Bank's opposition as untimely. (App. 39-41.) McGowen's proof brief did not address this decision or list it among the issues for review. It has, therefore, been waived on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3); *see also Midwest Auto. III, L.L.C. v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 431 n.2 (Iowa 2002) (holding the failure to offer any analysis, argument, or authority in support an issue fails to preserve that issue for appellate review).

"on account of illness, disability, death, age, or length of service." (App. 44-46.)

Applying the first part of the exemption test, the district court determined the Eighth Circuit Bankruptcy Appellate Panel's decision *In re Eilbert*, 212 B.R. 954 (B.A.P. 8th Cir. 1997), *aff'd*, 162 F.3d 523 (8th Cir. 1998) provided "an instructive and thorough legal analysis of when a particular asset satisfies the term 'similar plan or contract.'" (App. 45.) This analysis required the district court to "examine and weigh" four factors: (1) contributions over time; (2) contributions by others; (3) return on investment; and (4) control over the asset. (App. 45-46) (citing *Eilbert*, 212 B.R. at 958). Finding *Eilbert*'s "legally reasoning … compelling and persuasive," the district court "analyze[d] the facts of this case using the same legal test." (App. 45.)

The district court's analysis began and ended with "the only evidence before it," the Incentive Plan agreement. (App. 41.) The district court found "no evidence" shareholders "made any actual contributions to the [Incentive] Plan, over time or otherwise." (App. 47.) Rather, the value of the Incentive Plan "consists of nothing more than a 'paper balance' which the company utilizes to make payments from its assets to its shareholders." (App. 47-48.) The Incentive Plan is controlled by the shareholders, for the exclusive benefit

of the shareholders, and is not managed by a third-party administrator or other disinterested party. (App. 41-42.)

The district court further found "no evidence to suggest that payments received from the Plan by [McGowen] serve as a wage substitute after retirement" or otherwise fill a salary or wage void. (App. 46-47.) To the contrary, the district court recognized McGowen "continues to receive both Plan funds and his salary." (App. 47.) Thus, the district court concluded, "Plan funds can't replace wages he has not lost and continues to earn." (App. 47.) The Incentive Payments "are not denoted as retirement funds." (App. 47.)

Ultimately, the district court found three of the four *Eilbert* factors favored Commerce Bank and, as a result, held the Incentive Payments did not qualify as a "pension, annuity, or similar plan or contract." (App. 46-50.) Because the Incentive Payments failed the first part of the two-tiered analysis, the district court did not consider if Incentive Payments were "on account of illness, disability, death, age, or length of service." (App. 50.)

V. McGowen's Motion for Reconsideration

On November 14, 2019, McGowen filed a motion to enlarge or amend the district court's findings under Iowa Rule of Civil Procedure 1.904(2). (App. 52-55.) McGowen argued the district court erred by relying on *Eilbert*, and, instead, advocated for application of the factors listed in the Bankruptcy

Court for the Southern District of Iowa's earlier decision in *Matter of Pettit*, 55 B.R. 394 (Bankr. S.D. Iowa 1985), *aff'd sub nom. In re Pettit*, 57 B.R. 362 (S.D. Iowa 1985). (App. 53-55, ¶¶ 1-7.)

On November 19, 2019, the district court entered an order denying McGowen's motion for reconsideration, writing "the court carefully considered the legal arguments raised" when issuing its first order and, "to the extent the Court's prior ruling was unclear, the Court rejects the arguments made by Defendant." (App. 57.) The district court reiterated that it adopted the *Eilbert* test only after concluding its "analysis was legally sound and persuasive." (App. 57.)

ARGUMENT

ISSUE ONE: Did the Polk County District Court Correctly Determine Payments Due to Robert McGowen Under the "McGowen, Hurst, Clark & Smith, P.C. Deferred Compensation Plan" Are Not Exempt From Garnishment Under *Iowa Code* § 627.6(8)(e)?

PRESERVATION FOR APPEAL

Commerce Bank agrees with McGowen's statement of error preservation with respect to Section A of his brief (whether the Incentive Plan is a "pension, annuity, or similar plan or contract"). Commerce Bank disagrees that McGowen properly preserved the issues addressed in Section

B of his brief (whether the Incentive Payments are "on account of illness, death, disability, age, or length of service").

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [an appellate court] will decide them on appeal." *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002). To preserve an issue not reached by the district court, a party must request the district court enlarge its factual findings and legal conclusions. *Strand v. Rasmussen*, 648 N.W.2d 95, 101 (Iowa 2002). Without this request there is no question for review. *National Sur. Co. v. U.S.*, 200 F. 142, 142 (8th Cir. 1912).

While McGowen requested the district court amend or enlarge its findings, this request did not address the district court's failure to determine if the Incentive Payments were "on account of illness, disability, death, age, or length of service." (*See generally* App. 52-56.) McGowen focused exclusively on the first part of the two-tiered analysis. (*See* App. 53-55, ¶¶ 1-7.) Because of this failure, this issue was not preserved for appeal.

STANDARD OF APPELLATE REVIEW

Commerce Bank disagrees with McGowen's presentation of the applicable scope and standard of review.

While McGowen correctly notes the Court reviews the district court's legal conclusions for errors of law, McGowen omits that the district court's factual findings have the effect of a special verdict and, as such, cannot be disturbed on appeal if supported by substantial evidence. Iowa R. App. P. 6.907; *Tindell v. Apple Lines, Inc.*, 478 N.W.2d 428, 430 (Iowa 1991); *Barth Produce Co. v. Kelly*, 235 N.W. 471, 472 (Iowa 1931).

A factual finding is supported by substantial evidence "if the finding may be reasonably inferred from the evidence." *Tindell*, 478 N.W.2d at 430 (quoting *Briggs Transp. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978)). Evidence is not insubstantial merely because it could have supported a different, or even contrary, inference or conclusion. *Id.* (citing *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988)). The evidence need only support the district court's findings when viewed "broadly and liberally" in the light most favorable to sustaining the district court decision. *Id.* (citing cases). In the event of ambiguity or doubt, the Court must "construe the findings to uphold, rather than defeat, the trial court's judgment." *Id.* (citing *Voeltz*, 431 N.W.2d at 785). The Court is prohibited from weighing the evidence, and "need only consider the evidence favorable to the judgment, whether or not it was contradicted." *Id.*

When, as here, the appellant carries the burden of proof, the Court can overturn the trial court's decision "only if the evidence is so overwhelming that the party carried the burden as a matter of law." *Evans v. Benson*, 731 N.W.2d 395, 397 (Iowa 2007) (citing *Pub. Fin. Co. v. Van Blaricome*, 324 N.W.2d 716, 718 (Iowa 1982).

These principles apply to appellate review of exemption claims. *See, e.g. Kelly v. Degelau*, 58 N.W.2d 374, 377 (Iowa 1953) (holding the trial court's factual findings were "binding upon" the Court when reviewing and affirming the trial court's denial of an exemption claim under *Iowa Code* § 627.6(18)).

ARGUMENT

While Commerce Bank agrees with McGowen's identification of the sole issue before this Court, Commerce Bank disagrees with McGowen's requested result.

The district court correctly reviewed the entire factual record, made factual findings, and applied those facts to the relevant statute within the framework established by the Eighth Circuit in *In re Eilbert*. On appeal, McGowen seeks to discard the district court's findings and asks this Court to substitute its own judgment for that of the district court. This goes beyond the controlling standard and scope of review. When the issues are analyzed under

the correct standard, and pursuant to the facts as found by the district court, this Court must affirm the district court's decision. The Incentive Plan simply does not meet the first part of the two-tiered analysis. It is not a "pension, annuity, or similar contract or plan." Accordingly, the Incentive Payments are not exempt under *Iowa Code* § 627.6(8)(e).

I. Analysis of Exemptions Under General Principles of Iowa Law.

Exemptions are creatures of statute and only exist as provided by the legislature. *Booth v. Propp*, 242 N.W. 60, 61 (Iowa 1932). While courts must construe exemptions in a manner that achieves the desired legislative intent, "it is not the province or power of the court to enlarge or extend the provisions of the legislative grant." *Iowa Methodist Hosp. v. Long*, 12 N.W.2d 171, 175 (Iowa 1943).

In this case, McGowen alleges the amounts due to him under the Incentive Plan are exempt from execution under *Iowa Code* Section 627.6(8)(e), which exempts:

> The debtor's rights in: … a payment or portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service[.]

This exemption was primarily designed to protect payments that serve as a wage substitute after retirement or otherwise fill a wage or salary void. *Matter of Pettit*, 55 B.R. at 398-99; *In re Eilbert*, 162 F.3d at 526.

Section 672.6(8)(e) exemption claims require a two-tiered analysis. *Eilbert v. Pelican*, 212 B.R. 954, 958 (B.A.P. 8th Cir. 1997). First, the court must determine if the asset belongs to the class of exempt investments identified in Section 627.6(8)(e), *i.e.*, whether the investment is a "pension, annuity, or similar plan or contract." *Id.* If the asset passes the first test, the court then determines "whether the payments are received '*on account of*' illness, disability, death, age, or length of service." *Id.* (emphasis in original) (citing *In re Huebner*, 986 F.2d 1222, 1225 (8th Cir. 1992)). The asset is exempt only if it passes both parts of the two-tiered analysis. *Eilbert*, 212 B.R. at 958. The burden of proof lies with the debtor.[3] *First Nat'l Bank v. Larson*, 239 N.W. 134, 136 (Iowa 1931).

Under the first part of the two-tiered analysis, McGowen concedes the Incentive Plan is not a "pension" or an "annuity." (*See* Appellant's Proof Br. p. 12-24.) Instead, McGowen argues the Incentive Plan qualifies as a "similar plan or contract." (*See id.*)

The phrase "similar plan or contract" is a "catchall" intended to include within the exemption "other types of retirement plans or investments that are

[3] This is different from the burden of proof in bankruptcy cases, from which most of the cases cited by the parties on appeal arise. In those cases, the burden of proof rests with the party opposing the exemption. Fed. R. Bankr. P. 4003(c).

created to fill or supplement a wage or salary void." *In re Eilbert*, 162 F.3d at 527. The significance that the asset provides retirement benefits or otherwise "fill or supplement a wage or salary void" has been repeatedly affirmed by federal courts.[4] *E.g.*, *id.* at 523; *Matter of Pettit*, 55 B.R. at 397-98 (finding "'pension-annuity' type arrangements are created to fill or supplement a wage or salary void"); *In re Huscher*, No. 04-02200S, 2004 WL 2671705, at *3 (N.D. Iowa Nov. 19, 2004) ("A 'similar plan or contract' must be established for the purpose of providing a benefit that is akin to future earnings of the debtor"); *In re Andersen*, 259 B.R. 687, 690 (B.A.P. 8th Cir. 2001) ("The first issue for the court is whether the annuity contract constitutes a 'pension, annuity, or similar plan or contract,' *i.e.* a 'contract to provide benefits in lieu of earnings after retirement' …"); *In re Pepmeyer*, 273 B.R. 782, 787 (N.D. Iowa 2002) (the purpose behind *Iowa Code* § 627.6(8)(e) "is to secure for the debtor a subsistence level of income in retirement"); *see also In re Hutton*, 893 F.2d 1010, 1011 (8th Cir. 1990) (exempting a plan whose express purpose was "to encourage employees to 'save money for long-range goals, such as retirement'"); *see also In re Vickers*, 408 B.R. 131, 138 (Bankr. E.D. Tenn. 2009) (when construing Tennessee's version of Section 627.6(8)(e), holding

[4] As noted by the district court, it does not appear the Iowa courts have ever spoken on this exemption. (App. 44 n.1.) The federal courts, however, have had several opportunities to do so in the bankruptcy context.

"the purpose of the statute is to allow Tennessee citizens to exempt a portion of payments received as a replacement for lost earnings, with its application limited to retirement-type benefits"); *cf. Rousey v. Jacoway*, 544 U.S. 320, 330-31 (2005) (upon review of the federal counterpart to Section 627.6(8)(e), holding the "common feature" of assets within this exemption is that they all provide "income that substitutes for wages").

II. The District Court Correctly Applied *In re Eilbert* When Determining the Incentive Plan Was Not a "Pension, Annuity, or Similar Plan or Contract."

In determining the Incentive Plan was not a "pension, annuity, or similar plan or contract," the district court relied primarily on the Eighth Circuit Bankruptcy Appellate Panel's decision in *Eilbert v. Pelican*, 212 B.R. 954 (8th Cir. B.A.P. 1997) and its accompanying Eighth Circuit opinion affirming the Bankruptcy Appellate Panel's decision, *In re Eilbert*, 162 F.3d 523 (8th Cir. 1998).[5] (App. 43-50.)

In *Eilbert (B.A.P.)*, the Eighth Circuit Bankruptcy Appellate Panel considered the exempt nature of an annuity purchased by the debtor shortly after liquidating her assets and with the intent to avoid collection of a future tort liability. 212 B.R. at 956. The annuity was purchased shortly before the

[5] For simplicity this brief will refer to the Bankruptcy Appellate Panel's decision as "*Eilbert (B.A.P.)*" and the Eight Circuit opinion as "*Eilbert (8th)*."

debtor declared bankruptcy and provided the debtor unfettered discretion in tailoring its terms. *Id.*

Eilbert (B.A.P.) began with a detailed review of Section 627.6(8)(e), endorsing the two-tiered analysis. *Id.* at 957-58. In considering the first step, *Eilbert (B.A.P.)* identified four factors a court should consider: (i) contributions over time; (ii) contributions by others; (iii) return on investment; and (iv) control over the asset. *Id.* at 958-59. While the court stopped short of calling these factors dispositive, the court was clear these factors were highly relevant to the exemption analysis. *See id.* After comparing the four factors to the annuity at issue, *Eilbert (B.A.P)* concluded the debtor's annuity did not meet any of the four factors and, therefore, was not a "pension, annuity, or similar plan or contract" within the purview of Section 627.6(8)(e) and, therefore, was not exempt. *Id*. This decision was affirmed on appeal by the Eighth Circuit. *See Eilbert (8th)*, 162 F.3d at 526-27.

McGowen's primary contention on appeal is that the district court erred in its reliance on *Eilbert (B.A.P.)* and *Eilbert (8th)*, allegedly at the expense of other, older, cases, including *Matter of Pettit*, 55 B.R. 394. (Appellant's Proof Br. p. 13-24.) Commerce Bank disagrees.

Since the *Eilbert* decisions, the *Pettit* decisions have been cited in only six published cases.[6] In each of those cases, the *Pettit* analysis was sparse and sometimes only included as part of a larger discussion of *Eilbert*.[7] None of the cases discuss or apply the *Pettit* factors, as advanced by McGowen in this appeal. *See id.*

Eilbert, in contrast, has been cited and applied many times, both inside and outside the Eighth Circuit. *See e.g. In re Andersen*, 259 B.R. at 693; *In re Vickers*, 408 B.R. at 141; *In re Sims*, 241 B.R. 467, 471-73 (Bankr. N.D. Okla.

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[6] Commerce Bank's research discovered five published decisions citing *Matter of Pettit*. *In re Wilson*, 305 B.R. 4, 16 (N.D. Iowa 2004); *In re Pepmeyer*, 273 B.R. 782, 787 (N.D. Iowa 2002); *In re Weidman*, 284 B.R. 837, 840 (Bankr. E.D. Mich. 2002); *In re Rousey*, 283 B.R. 265, 270 (B.A.P. 8th Cir. 2002) *rev'd*, 544 U.S. 320 (2005); *In re Michel*, 332 B.R. 557, 560 (Bankr. N.D. Ohio 2005). Commerce Bank discovered one additional published decision citing *In re Pettit*. *In re Delaney*, 268 B.R. 57, 61 (D. Vt. 2001).

[7] *In re Wilson*, 305 B.R. at 16 (for proposition that Section 627.6(8)(e) exists to "protect debtors and their families from the deprivation of those things 'essential for their education, culture, and spiritual upbringing'"); *In re Pepmeyer*, 273 B.R. at 787 (same as *In re Wilson*); *In re Weidman*, 284 B.R. at 840 (cited only as part of larger block quotation of *Eilbert (8th)*); *In re Rousey*, 283 B.R. at 270 (interpreting "similar plan or contract" as a "catchall provision include[ing] within the exemption other types of retirement plans or investments that are 'created to fill or supplement a wage or salary void'"); *In re Michel*, 332 B.R. at 560 (cited as part of a string citation for the since-deleted "reasonably necessary" requirement of the exemption); *In re Delaney*, 268 B.R. at 61 (citing *In re Pettit* for the proposition that the exemption can apply to both present and future income).

1999); *In re Weidman*, 284 B.R. at 839-40. This history supports the district court's reliance on *Eilbert (B.A.P.) and Eilbert (8th)*.

McGowen also questions the relevance of the *Eilbert* decisions, arguing they do not apply because they analyzed the exemption's "annuity" language, not its "similar plan or contract" catchall. (Appellant's Proof Br. p. 14-15.) This argument suffers from the same, overly simplistic, argument expressly considered and rejected in both *Eilbert (B.A.P.)* and *Eilbert (8th)*. In *Eilbert (B.A.P.)*, the debtor argued the asset at issue satisfied the first part of the two-prong test because "her asset is in the form of an annuity." 212 B.R. at 958. This argument was summarily rejected by the court, ruling annuity was "a purely generic term which refers to the method of payment and not to the underlying nature of the asset." *Id.* The court then reviewed the asset under the "'similar plan or contract' language," applying the four factors identified above. *Id.* at 958-59.

The debtor resurrected this argument on appeal. *Eilbert (8th)*, 162 F.3d at 526 ("Eilbert argues that her annuity falls within the plan language of the statute – any annuity, according to Eilbert, is an "annuity" for purposes of § 627.6(8)(e)"). The Eighth Circuit affirmed the Bankruptcy Appellate Panel's rejection of this argument:

> As the Bankruptcy Appellate Panel noted, "annuity" is a purely generic term which refers to the method of payment and not to

> the underlying nature of the asset. When interpreting statutory language, the Iowa courts apply recognized rules of statutory construction to give effect to legislative intent. In this case, because the term "annuity" is broad and generic, we apply the interpretive canons of *noscitur a sociis* (a term is known from its associates) and *ejusdem generis* (general words in an enumeration are construed as similar to more specific words in the enumeration). These canons are employed to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words. Accordingly, we determine the meaning of "annuity" by reference to the words surrounding it in § 627.6(8)(e), "pension … or similar plan or contract."

Id. at 526-27 (internal quotations and citations omitted). The Eighth Circuit then reviewed – and rejected – the debtor's exemption under the statute's "similar plan or contract" language. *Id.* at 527.

Lastly, McGowen argues *Eilbert* should not control because its facts are readily distinguishable from those presented in this case. (Appellant's Proof Br. p. 17-19.) Once again, this argument has already been reviewed – and rejected – by at least one appellate court. *See In re Andersen*, 259 B.R. at 693. *In re Andersen* reviewed the exempt nature of an annuity purchased by the debtor with an inheritance and intended to serve in lieu of a retirement plan. *Id.* at 689. In applying *Eilbert* to the facts of that case, the *Andersen* court noted the "specific, indeed, rather egregious, facts presented in that case." *Id.* at 692. The court nevertheless concluded that while these factual distinctions render the *Eilbert conclusions* distinguishable, it remains "instructive in providing the *factors* for analysis." *Id.* at 693 (emphasis in original).

It is clear the district court correctly applied *Eilbert* to the Incentive Payments at issue in this case. Overruling the district court to apply *Pettit* instead of *Eilbert* would constitute a dramatic shift from the prior jurisprudence of courts reviewing *Iowa Code* § 627.6(8)(e) and similar exemption statutes.

III. The District Court Correctly Held the Incentive Plan Is Not a "Pension, Annuity, or Similar Plan or Contract" Under the *Eilbert* Factors.

After reviewing "the only evidence before it," the district court concluded the Incentive Plan failed the first part of the two-tiered analysis, namely, that the Incentive Plan was not a "pension, annuity, or similar plan or contract" because it failed three of the four *Eilbert* factors. (App. 41-50.) This determination is supported by substantial evidence, and thus, cannot be overturned on appeal.

A. Factor One (Contributions Over Time) and Factor Two (Contributions by Others)

McGowen considered factors one and two together. (Appellant's Proof Br. p. 15-16.) Commerce Bank does the same.

The first *Eilbert* factor considers if the debtor contributed to the asset over time. This is because Section 627.6(8)(e) "is primarily designed to protect those payments which serve as wage substitutes after retirement." *Eilbert (B.A.P.)*, 212 B.R. at 958. The statute "targets" payments "which are

the result of periodic payroll deductions or self-directed contributions," and "clearly contemplates an ongoing course of investment and contribution over time." *Id.* The second *Eilbert* factor recognizes Section 627.6(8)(e) "contemplates not merely multiple contributions, but also multiple *contributors.*" *Id.* at 959 (emphasis in original).

The district court found "no evidence" that the Incentive Payments "serve as [a] wage substitute[] after retirement" or that McGowen "made any actual contributions to the [Incentive] Plan, over time or otherwise." (App. 46-47.)[8] The district court also noted McGowen "can and has continued to receive payments from the Plan while he is still employed full-time with the company." (App. 46-47.) As such, the Incentive Payments "can't replace wages he has not lost and continues to earn." (App. 47.) There is "no evidence to suggest the payments received from the [Incentive] Plan by Defendant serve as a wage substitute after retirement," or that there is any "void to be supplemented in McGowen's earnings that [Incentive] Plan funds seek to fill." (App. 46-47.) Thus, "application of this factor to the facts of this case does not favor a finding of exemption." (App. 47.)

[8] The district court reiterated this "no contribution" finding several times. (App. 41-42, 47-49.)

McGowen ignores these findings, arguing "both McGowen and other shareholder employees (the "others") under the [Incentive] Plan give up or otherwise defer income." (Appellant's Proof Br. p. 15.) Not only does this statement lack citation to the record,[9] it directly contradicts the district court's conclusion that the Incentive Plan is merely a "paper balance which the Company utilizes to make payments *from its assets* to its shareholders." (App. 48) (emphasis added).[10] It also conflicts with the district court's repeated finding that neither McGowen nor other shareholders contributed to the Incentive Plan. (App. 41-42, 47-49.) This Court cannot upset these factual findings on appeal. *See Tindell*, 478 N.W.2d at 430 (holding district court factual findings are binding on appellate courts "if the finding may be reasonably inferred from the evidence" when considering only "the evidence favorable to the judgment").

B. Factor Three (Return on Investment)

The third *Eilbert* factor focuses on the return the allegedly exempt investment provides to the debtor:

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[9] This provides a basis for this Court to disregard McGowen's assertion in its entirety. *See* Iowa R. App. P. 6.903(2)(g)(3).

[10] As support, the district court emphasized that McGowen "made no showing that any funds related to the [Incentive Plan] are held in [a] separate or designated account." (App. 48.)

> [A]n investment which returns only the debtor's initial contribution with earned interest or income – no more and no less – is more likely to be a non-exempt investment. By contrast, investments which compute payments based on the participant's estimated life span, but which terminate upon the participant's death or the actual life span, more closely resemble the exempt investments enumerated in *Iowa Code* § 627.6(8)(e).

(App. 48) (quoting *Eilbert (B.A.P.)*, 212 B.R. at 959). Turning to the Incentive Plan, the district court found "no evidence that there is any return on investment, as there is no evidence of any contributions made by the Defendant to the [Incentive] Plan." (App. 49.) Type 1 compensation pays only the principle balance – which is not generated by contributions – plus interest. (App. 83, ¶ 4.2(A).) Type 2A payments – also untethered to actual investment – are principal only. (App. 83, ¶ 4.2(B).)

Nor are the amounts due connected in any way to McGowen's estimated life span. (*See* App. 83, ¶¶ 4.2(A) and (B).) The payments do not terminate – and in some instances *accelerate* – upon McGowen's death. For example, Type 1 payments become immediately payable, in full, as a single lump sum, at death, even if the shareholder was not yet receiving Type 1 benefits at that time. (App. 82-83, ¶ 4.1(D).) Type 2A payments "become 100% vested." (App. 82, ¶ 3.4.) Both Type 1 and Type 2A payments continue after death, payable to a designated beneficiary or the shareholder's estate.

(App. 83, ¶ 4.1(D).) Each of these plan characteristics conflicts with the *Eilbert* analysis of this factor. *See Eilbert (B.A.P.)*, 212 B.R. at 959.

McGowen's appeal does not directly address this factor, but instead encourages the Court to disregard it in its entirety. (Appellant's Proof Br. p. 16-17.) McGowen provides no authority for this argument, other than to suggest its irrelevance based on the Eighth Circuit's failure to discuss this factor in detail upon review. *See Eilbert (8th)*, 162 F.3d at 527. While technically true, this is because *Eilbert (8th)* did not discuss *any* factor in detail. *See id.* Instead, after reviewing the purpose of the exemption, the court summarily affirmed the Eighth Circuit Bankruptcy Appellate Panel's decision in full. *See id.* This affirmation does not support discarding this element, particularly when it was expressly adopted in *Eilbert (B.A.P.)* and regularly applied by subsequent decisions. *E.g. In re Andersen*, 259 B.R. at 691-92 (listing and reviewing six relevant factors, including "return on investment"); *In re Skipper*, 274 B.R. 807, 817 (Bankr. W.D. Ark. 2002) (listing and applying the six *Andersen* factors, including return on investment); *In re Bramlette*, 333 B.R. 911, 921 (Bankr. N.D. Ga. 2005) (same); *In re Vickers*, 408 B.R. at 139-40 (same).[11]

[11] The additional *Andersen* factors are: (i) "were the payments designed or intended to be a wage substitute;" and (ii) "was the investment a prebankruptcy planning measure." *In re Andersen*, 259 B.R. at 691-92. The

C. Factor Four (Control Over the Claimed Exempt Asset)

The fourth factor considers McGowen's control over the claimed exempt asset. *Eilbert (B.A.P.)*, 212 B.R. at 959. Here, the district court concluded that while McGowen had some control over two of the triggering events (separation from service, including retirement, and sale of assets) he does not sufficiently self-direct his interest to conclude this factor against exemption. (App. 49.)

D. Conclusion

Upon consideration of all the factors, including the relevant burden of proof, the district court ultimately concluded "on balance the evidence does not favor a finding of exemption." (App. 50.) Having concluded the Incentive Plan failed part one of the two-tiered analysis, the district court did not consider if the Incentive Plan met the second part, *i.e.* whether the Incentive Payments were "on account of illness, disability, death, age, or length of service." (App. 50.)

McGowen has not presented a basis for this Court to overturn the district court's findings regarding the Incentive Plan. *See Tindell*, 478 N.W.2d at 430 (requiring the appellate court to construe the findings to uphold, rather

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first is incorporated and analyzed as part of the first *Eilbert* factor. *See Eilbert (B.A.P.)*, 212 B.R. at 958. The second does not apply to this case because it is not a bankruptcy proceeding.

than defeat, the trial court's judgment). This is particularly true here, where McGowen carries the burden of proof. *Evans*, 731 N.W.2d at 397 (holding that when the appellant carries the burden of proof, the appellate court can overturn a trial court's decision "if the evidence is so overwhelming that the party carried the burden as a matter of law").

IV. The District Court Correctly Considered and Rejected McGowen's Urged Reliance on *Matter of Pettit*.

Assuming, *arguendo*, this Court overrules the district court's reliance on *Eilbert* and instead concludes *Pettit* controls, the Incentive Plan remains non-exempt under Section 627.6(8)(e).

Matter of Pettit reviewed the exempt nature of a profit-sharing plan established by the debtor's employer for the benefit of all employees. 55 B.R. at 395. In construing the exemption's "similar plan or contract" language, the *Pettit* court emphasized the same essential characteristics discussed in *Eilbert*. For example, *Pettit* recognized the Iowa legislature "intended that plans having 'pension' or 'annuity' characteristics should be exempt." *Id.* at 397. These types of arrangements, the court held, "are created to fill or supplement a wage or salary void." *Id.* at 397-98.

The *Pettit* court ultimately identified four factors it considered relevant to this analysis: (1) a formal plan established for the benefit of the debtor, usually as part of an employment relationship; (2) plan benefits "akin to future

earnings … and intended as retirement income or at least income deferred during the debtor's employment to provide future support"; (3) access and control in the hands of someone other than the debtor with strong limitations on withdrawal; and (4) payment "on account of illness, disability, death, age, or length of service." *Id.* at 398. While not explicitly stated, it is clear the first three factors relate to the first part of the two-tiered analysis (*i.e.* whether the plan is a "pension, annuity, or similar plan or contract") and the fourth factor relates to the second part of the test (*i.e.* whether payments are "on account of illness, disability, death, age, or length of service").[12]

In finding the profit-sharing plan exempt, the court made several findings of fact, including that: (i) the plan was intended to "provide retirement and other benefits" to the debtor; (ii) there were annual contributions to the plan during the debtor's employment; (iii) the plan was a qualified ERISA plan; (iv) the debtor's interest in the plan was fully vested; and (v) the plan was managed by a trustee. *Id.* at 395-96.

Each of these characteristics are absent from the Incentive Plan at issue here. Although McGowen argues that "income is deferred for future support" (Appellant's Proof Br. p. 21), this statement is directly contradicted by the

[12] In this respect, McGowen mistakes the three factual findings the court cited in concluding the profit-sharing plan was exempt with the relevant "*Pettit* factors." (*See* Appellant's Proof Br. p. 20.)

district court's findings. There is "no evidence" McGowen, other MHCS shareholders, or the Firm contributed any funds to the Incentive Plan. (App. 41-42, 47-49.) The Incentive Plan is not intended as "a wage substitute after retirement" or otherwise serve to fill an income void or replace wages lost. (App. 46-47.) The Incentive Plan does not have a third-party administrator. (App. 42.) Incentive Payments are subject to a vesting schedule and forfeiture provisions. (App. 81, 84, ¶¶ 3.2, 6.1, and 6.2.) The Incentive Plan is not qualified under ERISA. (*See* App. 85, ¶ 7.2.)

McGowen also cites *Matter of Pedersen* and *In re Hutton* in support of his position. (Appellant's Proof Br. p. 22-23.) These decisions, however, do not advance his case. Rather, they emphasize that the key characteristic of an exempt asset is the intentional deferral of income otherwise immediately payable for the purpose of saving for retirement or otherwise planning to supplement a future income void. *Matter of Pedersen*, 155 B.R. 750, 755 (Bankr. S.D. Iowa 1993) (specifically finding the plan was a "retirement plan"); *In re Hutton*, 893 F.2d at 1011 (the exempt plan's express purpose was to "save money for long-range goals, like retirement"); *see also Matter of Pettit*, 55 B.R. at 397-98 (holding the benefits of an exempt plan "are of a nature akin to future earnings of the debtor and intended as retirement income or at least income deferred during the debtor's employment to provide future

support"); *In re Pepmeyer*, 273 B.R. at 787 (citing *In re Pettit* for the proposition that "[t]he purpose behind exempting pension plans is to secure for the debtor a subsistence level of income in retirement"). It is unclear how this Court can find this purpose satisfied in this case in light of the district court's findings to the contrary. (App. 41-42, 47-49.)

Thus, even if the Court overruled the correct application of the *Eilbert* factors for the *Pettit* factors, the Incentive Plan and Incentive Payments still fail part one of the two-tiered analysis.

V. Whether the Incentive Payments Were "On Account of Age" Is Not Properly Before This Court Because the District Court Did Not Reach This Issue.

The district court did not reach the second part of the two-tiered analysis. (App. 50.) Nevertheless, McGowen urges the Court to review this factor and, further, find in his favor. (Appellant's Proof Br. p. 24-25.) The district court should not entertain this invitation.

Iowa appellate courts generally do not consider or decide issues not reached by the district court. *Office of Citizens' Aid/Ombudsman v. Edwards*, 825 N.W.2d 8, 22 (Iowa 2012). While the appellate courts may *affirm* a district court ruling on alternative grounds urged in the district court, *see St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d

338, 351 n.9 (Iowa 2013) (citing cases), McGowen urges this court to *reverse* the district court based on disputes not actually decided.

Moreover, McGowen failed to properly preserve this issue for appeal. The district court did not address or analyze part two of the two-tiered test. (App. 50.) While McGowen filed a motion to amend or enlarge the district court's findings, this request did not ask the district court to remedy its failure to make findings related to this question. (*See generally* App. 52-56.) McGowen focused only on the first part of the two-tiered test. (*See* 53-55, ¶¶ 1-7.) Thus, questions related to the second part of this test were not preserved for appeal. *Meier*, 641 N.W.2d at 537 ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [an appellate court] will decide them on appeal"); *Smart-Way Truckin', Inc.*, 439 N.W.2d at 164 (holding appellate courts "do not have the required fact-finding capacity" but rather "rely on the record as it appears in the trial court").

VI. The Incentive Payments Are Not "On Account of Age," But, Rather, On Account of McGowen's Relinquishment of His Shares.

Should the Court nevertheless consider the second step of the two-tiered analysis, the Court must conclude the Incentive Payments are not "on account of" McGowen's age or length of service to the Firm. Rather, the payments are "on account of" McGowen's relinquishment of his Firm shares.

Courts have determined the phrase "on account of" means "triggered by." *Eilbert (B.A.P.)*, 212 B.R at 958 (quoting *In re Huebner*, 141 B.R. 405, 409 (N.D. Iowa 1992), *aff'd*, 986 F.2d 1222 (8th Cir. 1993)). In other words, the asset must "prevent" the debtor from withdrawing the funds prior to a triggering event enumerated within the statute. *Id.* at 959. If the debtor can receive payments for a reason other than those listed in the statute, the asset does not satisfy this part of the test. *See In re Huebner*, 986 F.2d at 1225 (affirming denial of the exemption because the debtor's "right to receive annuity payments does not depend upon his having reached age sixty-five, nor upon the occurrence of any of the other triggering events enumerated in § 627.6(8)(e)").

Here, the Incentive Plan includes two triggering events – separation from service, including retirement, and the sale of the Firm's assets – that are beyond the scope of Section 627.6(8)(e). (App. 82-83, ¶ 4.1(A) and (E).) As a result, the Incentive Payments do not "depend upon" – and, therefore, are not "triggered by" – illness, disability, death, age, or length of service. *Iowa Code* § 627.6(8)(e).

Rather than being "on account of" age, length of service, or any other event listed in Section 627.6(8)(e), McGowen's receipt of the Incentive Payments was actually triggered by the loss of his status as a Firm shareholder.

Indeed, the district court made this explicit finding. (App. 43) (emphasis added) ("[t]hough McGowen, now 68, continues to work for the Firm, he was *removed as a shareholder* due to his age, *thereby triggering payment* of [the Incentive Payments]") (emphasis added.)

A comparison of the Firm's Shareholder Agreement to the Incentive Plan supports this conclusion. For example, the Incentive Plan explicitly states it was established "for the exclusive benefit of [Firm] shareholders." (App. 78, ¶ 1.1.) When a shareholder "terminates his/her employment for any reason," the shareholder "must" sell his/her shares and Incentive Payments immediately begin. (App. 89, ¶ 3; App. 82, ¶ 4.1(A).) In the event of shareholder disability, "it will be mandatory that [the shareholder] sell his/her stock to" the Firm, (App. 89-90, ¶ 6), triggering payments under the Incentive Plan. (App. 82, ¶ 4.1(C).) On June 30th of the year a shareholder turns 67, the Shareholder Agreement provides "a stock redemption shall occur," (App. 90, ¶ 9), and Incentive Payments "shall become payable." (App. 82, ¶ 4.1(B).) While the Shareholder Agreement does not explicitly address death or sale, it is axiomatic that a shareholder will relinquish his shares upon the happening of either event. At the same time, vesting of the benefits under the Incentive Plan is accelerated, and payment becomes immediately due. (App. 83, ¶ 4.1(D) and (E).)

While McGowen argues – without citation – that he "actually receives the payments at issue on account of his age and/or length of service to the Firm," (Appellant's Proof Br. p. 24), this is not the relevant question. The exemption analysis looks to the "underlying nature of the asset," not how it was applied to a specific debtor in a specific scenario. *Cf. Eilbert (8th)*, 162 F.3d at 526 (rejecting debtor's argument that the asset was exempt simply because it paid benefits at retirement age). Under McGowen's proposed analysis, courts could never determine the exempt nature of a particular asset until payments began. This could be years after a determination is required. Instead, courts must conclude this factor is satisfied only if it is clear from the terms of the asset that the payment "depends on" one of the listed events. *In re Huebner*, 986 F.2d at 1225.

Even if the Court were to accept McGowen's argument that payments were triggered by his age,[13] payment did not "depend on" his age. Receipt of the Incentive Payments could have been triggered by at least two other events beyond the scope of Section 627.6(8)(e), (App. 82-83, ¶ 4.1), and, in this case, actually were triggered by loss of his shareholder status, an event beyond the scope of Section 627.6(8)(e). (App. 43.)

[13] This would require the Court to disregard the district court's finding that the payment was "triggered by" McGowen's removal as a shareholder. (App. 43.)

It is clear McGowen's forfeiture of his shares and receipt of the Incentive Payments are inseparable. It was his removal as a shareholder, not any of the events enumerated in Section 627.6(8)(e), that triggers McGowen's receipt of the Incentive Payments. Thus, the Incentive Plan also fails part two of the two-tiered analysis and the Incentive Payments are not exempt under *Iowa Code* § 627.6(8)(e).

CONCLUSION

For the foregoing reasons, Appellee Commerce Bank respectfully requests this Court affirm the Polk County District Court in all respects and conclude the Incentive Payments are not exempt under *Iowa Code* §627.6(8)(e).

REQUEST FOR ORAL SUBMISSION

Commerce Bank requests this Court grant oral argument for this appeal.

Respectfully submitted,
HKM, P.A.

Date: April 7, 2020

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because this brief has been prepared in a proportionately spaced typeface using Times New Roman in 14 point font and contains 7,816 words, excluding the parts of the brief exempted by Iowa R. App. P 6.903(1)(f)(1).

/s/Michael S. Mather
Signature

April 7, 2020
Date

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The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Final Brief via the Iowa Judicial Branch EDMS system on April 7, 2020.

/s/Michael S. Mather
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of April 2020, a copy of the foregoing Final Brief was served via the Iowa Judicial Branch EDMS system to the attorneys of record for the parties listed below:

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