**IN THE IOWA SUPREME COURT**

Supreme Court No. 22-0038

District Court No. 01311 LACV109349

**WILLIAM L. PITZ and LYNN S. PITZ,**

Appellants/Cross-Appellees,

vs.

**UNITED STATES CELLULAR OPERATING COMPANY OF DUBUQUE, an Iowa Corporation,**

Appellee/Cross-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT, JUDGE

# APPELLEE/CROSS-APPELLANT'S FINAL BRIEF

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## ROUTING STATEMENT

This case should be routed to the Court of Appeals because it may be decided by applying existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

## STATEMENT OF THE CASE

On the merits, this is primarily an interpretive dispute involving an option in a lease. Fundamentally, "[a]n option is merely an offer that cannot be revoked until a certain date." *SDG Macerich Props., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 585 (Iowa 2002). In an option, the option holder—here, U.S. Cellular—"has the power of acceptance." *Id.* And once accepted (or exercised), "the option becomes a complete bilateral contract" binding both parties. 92 C.J.S. *Vendor and Purchaser* § 176.

Under the lease here, U.S. Cellular could "exercise such option by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement." (App. 7, art. 3.2). A separate provision, under a different heading, in a distinct article, on another page of the lease required U.S. Cellular to pay a prescribed amount "payable in a lump sum in advance at the exercise of the option." (App. 8, art. 4.2). The precise interpretive question is whether the lease option required U.S. Cellular to provide notice and payment to validly exercise its option to renew the lease or whether notice alone was enough.

Following a one-day bench trial, the District Court found that U.S. Cellular validly exercised its option by providing timely written notice alone. (App. 167). Because the lease's plain terms don't clearly and expressly

require payment to exercise the option, that interpretation was correct and should be affirmed.

## I. The pre-trial proceedings.

William and Lynn Pitz filed their Petition at Law against United States Cellular Operating Company of Dubuque on June 19, 2019. (App. 131). The Pitzes sought among other things a declaration that U.S. Cellular had failed to validly exercise its option to the renew the lease between the parties for a second thirty-year term and an award for the fair-market rent for the period after the first lease term's expiration. (App. 133–134). U.S. Cellular answered on July 15. (Def.'s Answer and Affirmative Defenses).

The parties filed cross-motions for summary judgment on June 26, 2020. (Def.'s Mot. for Summ. J.; Pl.'s Mot. for Partial Summ. J.). In November 2020, the District Court denied both motions. (Ruling Re: Pl.'s Mot. for Partial Summ. J. and Def.'s Mot for Summ. J. (Nov. 10, 2021)). The case proceeded to a bench trial on August 6, 2021.

## II. The trial.

At the one-day trial, the parties presented documentary evidence and testimony. Lynn Pitz didn't testify, but William did. Over U.S. Cellular's motion to exclude the Pitzes' valuation expert, (App. 149), the Pitzes also presented testimony from Thomas F. Howe, who opined on rent valuation.

U.S. Cellular presented the testimony of one employee, real estate analyst Jaideep Dudani, who testified remotely. (App. 222–223, Tr. 97:8–98:9).

On October 29, 2021, the District Court issued its Findings of Fact, Conclusions of Law, Decision. In a thorough ruling, the District Court found that U.S. Cellular wasn't required to tender payment with its to notice to exercise its option, that it had validly exercised its option by providing written notice alone, and that U.S. Cellular's written notice wasn't defective. (App. 164–168). The District Court accordingly denied the declarations sought by the Pitzes and dismissed the case. (App. 168).

**III. Post-trial proceedings.**

U.S. Cellular afterward timely moved to enlarge the District Court's findings, urging the District Court to address an alternative argument that U.S. Cellular had raised but the District Court didn't address. (App. 170). The Pitzes resisted, and the District Court denied U.S. Cellular's motion on December 17, 2021. (App. 172).

U.S. Cellular also requested its costs and attorney's fees. (Def.'s Mot. for Costs and Attorney's Fees (Dec. 1, 2021)). The Pitzes resisted this request, too, (Pl.'s Res. to Def.'s Mot. for Costs and Attorney's Fees (Dec. 13, 2021)), and U.S. Cellular replied, (Def.'s Reply in Supp. of Mot. for Costs and Attorney's Fees (Dec. 14, 2021)). On December 17, 2021, the District Court

awarded U.S. Cellular its costs but denied attorney's fees, reasoning that the relevant provision in the lease between the parties did not entitle U.S. Cellular to its fees. (App. 174).

The Pitzes timely noticed their appeal on January 5, 2022. U.S. Cellular timely noticed its cross-appeal six days later.

## STATEMENT OF THE FACTS

The basic facts underlying this dispute are straightforward. William and Lynn Pitz are husband and wife. (App. 105, Pitz Dep. 5:7–8). Nonparties Robert and Dorothy Pitz are William's parents. (App. 105, Pitz Dep. 5:16–19). In 1988, Robert and Dorothy agreed to a 30-year lease permitting U.S. Cellular to build a cellphone tower on their property, in exchange primarily for an upfront payment of $20,000. (App. 8, art. 4.1). Following a series of real-estate transactions, William and Lynn purchased Robert and Dorothy's property in 2009. (App. 21–24; App. 25–27; App. 28–30).

As relevant to this dispute, the lease provided U.S. Cellular an option to renew the lease for an additional 30-year term. (App. 7, art. 3.2). Under the lease, U.S. Cellular could "exercise such option by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement." (App. 7, art. 3.2). A separate provision, captioned "Option Term Rent," prescribed the procedure for calculating and paying the

option-term rent. (App. 8, art. 4.2). The first lease term expired on November 13, 2018. (App. 17).

Well before the initial lease term expired in November 2018, U.S. Cellular on September 1, 2017, sent a letter to Robert and Dorothy's address in the lease. (App. 6; App. 31). That letter provided "notice that Dubuque Cellular Telephone, L.P. is exercising its option to renew the Lease Agreement dated November 14th, 1988 for the first of one renewal terms (Option 1) of thirty years." (App. 31). Enclosing forms, the letter also requested the return of completed tax and banking documents needed to transmit the option-rent payment. (App. 32–33; App. 226, Tr. 101:4–10).

U.S. Cellular received no response until September 6, 2018, when William Pitz notified U.S. Cellular by phone that he'd bought his parents' property. (App. 36; App. 226, Tr. 101:15–23). Five days after that call, U.S. Cellular sent another letter, this one indicating that the lease had been renewed. (App. 36). It also requested tax, banking, and real estate documents, explaining that once they were returned "we will be able to disburse the option renewal payment to you." (App. 36). Despite their counsel's communications in October 2018, the Pitzes have undisputedly not returned these documents to U.S. Cellular. (App. 111, Pitz Dep. 29:16–30:10; App. 204, Tr. 53:15–19; App. 226, Tr. 101:11–14).

Even so, on October 29, 2018, U.S. Cellular mailed the Pitzes a check for $31,494.02, reflecting the option-term rent, less tax withholdings. (App. 40). Because the Pitzes had failed to return a completed W-9, U.S. Cellular was required to deduct back-up withholdings under Internal Revenue Service rules. (App. 227, Tr. 102:19–24). Otherwise, the Pitzes would have received a larger check. (App. 228, Tr. 103:10–13).

Less than two weeks later, the Pitzes' counsel returned the check, claiming that U.S. Cellular had failed to validly exercise its option to renew the lease. (App. 42). In that letter, the Pitzes' counsel also conveyed the Pitzes' willingness "to explore whether mutually agreeable terms can be reached for a new lease." (App. 43).

Near November's end, U.S. Cellular wrote back, reiterating that the option had been exercised and again requesting a W-9 needed to "issue a new rent check." (App. 46). The Pitzes have never provided the W-9. (App. 204, Tr. 53:15–19; App. 226, Tr. 101:11–14).

## ARGUMENT

### I. The District Court's ruling under the lease that U.S. Cellular validly exercised its option by providing timely written notice alone should be affirmed.

#### A. Error preservation.

Although the Pitzes are incorrect that an appeal notice preserves error, they did preserve error on this issue. *See State v. Lange*, 831 N.W.2d 844, 846 (Iowa Ct. App. 2013) ("'While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation.'" (citation omitted)).

#### B. Standard of review.

In a case like this one tried to the district court, review is for correction of errors at law. *See* Iowa R. App. P. 6.907. Contract interpretation is a legal question where, as here, it does not turn on extrinsic evidence. *See Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 726 (Iowa 2014). And when, as here, the material facts are undisputed, this Court merely determines whether the District Court correctly applied the law. *See Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000) ("When the facts are not in dispute, we will simply decide whether the district court correctly applied the law to the undisputed facts before us."). It did so here.

### C. Argument.

The question whether the lease required U.S. Cellular to tender payment to exercise its option is an interpretive question. Ordinary interpretive rules govern both options, *SDG Macerich Props.*, 648 N.W.2d at 586, and leases, *Alta Vista Props.*, 855 N.W.2d at 727. The "cardinal rule" of contract interpretation is to determine the parties' intent "at the time they entered into the contract." *C&J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 77 (Iowa 2011). To that end, "the most important evidence" of the parties' intent is the contract's language, *id.*, with that language ascribed its "'plain and ordinary meaning,'" *Fed. Land Bank of Omaha v. Bollin*, 408 N.W.2d 56, 60 (Iowa 1987) (citation omitted). And when "the intent of the parties is expressed in clear and unambiguous language," this Court "enforce[s] the contract as written." *Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 554 (Iowa 1995). The lease terms here are unambiguous.

Applying those clear terms, the District Court found that U.S. Cellular was not required to tender payment of the option-term rent to exercise its option to renew the parties' lease. (App. 167). As a result, the District Court concluded that U.S. Cellular successfully exercised its option by timely notifying the Pitzes that it was exercising the option in September 2017. (App. 167). That was correct, and this Court should affirm.

### 1. Under the lease's unambiguous terms, U.S. Cellular exercised the option by providing timely written notice.

No dispute exists here about what the lease says. In Article 3.2, notably captioned "Option to Renew," the lease in clear terms instructed U.S. Cellular how to exercise its option:

> 3.2 Option to Renew. Lessee shall have the option to renew this Lease Agreement for one (1) additional term of thirty (30) years, at the rental rate set forth in Article Four and upon all the other terms and conditions hereof. *Lessee may exercise such option by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement.*

(App. 7, art. 3.2 (emphasis added)). As the italicized terms make plain, to exercise its option U.S. Cellular needed only to (1) give written notice to the Pitzes (2) at least 60 days before the lease's initial term expired. The undisputed evidence at trial showed that U.S. Cellular did just that.

In September 2017, over a year before the lease's November 13, 2018 expiration, U.S. Cellular undisputedly notified the Pitzes by letter that it was exercising its option to renew the lease for 30 years. (App. 31). Applying the lease's unambiguous terms to those undisputed facts, the District Court found that U.S. Cellular validly exercised its option under the lease. (App. 167); *see Figge v. Clark*, 174 N.W.2d 432, 435 (Iowa 1970) ("Generally, then, in this jurisdiction anything amounting to an unqualified manifestation of an optionee's determination to accept is sufficient."); *Steele v. Northup*, 143

N.W.2d 302, 306 (Iowa 1966) ("No particular form of notice is required in the absence of a provision to the contrary in the instrument granting the option.").[1] That was correct.

### 2. The lease does not clearly and expressly require payment as a condition to exercising the option.

The Pitzes remain undeterred by the lease's plain terms. A separate provision, under a different heading, in a distinct article, on another page of the lease, says that "Lessee shall pay to Lessor as full consideration for use of the Leased Premises during the option term" a prescribed amount "payable in a lump sum in advance at the exercise of the option." (App. 8, art. 4.2). Bent on avoiding the deal that was struck, the Pitzes insist that U.S. Cellular failed to validly exercise its option because it failed to pay the option-term rent with its notice. The District Court rejected that argument. And this Court should too for four reasons.

First, the Iowa Supreme Court has long distinguished between payment as a performance term and payment as a condition precedent to exercising an

[1] Although Iowa law does not appear to impose such an obligation to exercise an option, U.S. Cellular was ready and willing at all relevant times to pay the option-term rent. (App. 228, Tr. 103:14–18); *see Foard v. Snider*, 109 A.2d 101, 106 (Md. 1954) ("Generally, there is contemplated only a notice of acceptance of, and a readiness and willingness to perform, the irrevocable offer which is an option."); *Welsh v. Jakstas*, 82 N.E.2d 53, 59 (Ill. 1948) (finding that party was "ready, able, willing and offering to make the payments required by the option").

option. Heeding that distinction, the District Court correctly found that the option-term payment here was a performance term, not a condition of acceptance. Second, payment is a condition of acceptance of an option only when a lease clearly and expressly requires it. *See Lyon v Willlie*, 288 N.W.2d 884, 888 (Iowa 1980); *Matter of Est. of Claussen*, 482 N.W.2d 381, 384 (Iowa 1992). Under *Lyon*, the District Court's interpretation of the lease was correct. Third, in a case featuring materially identical lease terms and structure, the Illinois Supreme Court held that payment was not a condition to accepting the option. *See Welsh v. Jakstas*, 82 N.E.2d 53, 59 (Ill. 1948). As the District Court observed, *Welsh* is indistinguishable. Finally, well-settled interpretive principles reinforce the District Court's reading of the lease. Because payment was unnecessary to exercise the option, this Court should affirm.

**a) Applying the longstanding distinction between payment as a term of performance and as a condition of acceptance, the District Court correctly found that the option-term payment here was not a condition of acceptance.**

Nothing about including separate option-notice and rent-payment terms in a lease is unique. After all, "an option is merely an offer that cannot be revoked until a certain date." *SDG Macerich Props.*, 648 N.W.2d at 585. So once accepted (or exercised) the option becomes like any other bilateral contract binding the parties to perform. *See, e.g.*, 92 C.J.S. *Vendor and*

*Purchaser* § 176 ("When an option has been accepted, or the election to exercise it has been made, the option becomes a complete bilateral contract, with mutuality of obligation and remedy, and binds both parties." (footnotes omitted)); *Matrix Props. Corp. v. TAG Invs.*, 609 N.W.2d 737, 742–43 (N.D. 2000) ("'[W]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option.'" (citation omitted)). An ordinary contract must typically be accepted and then performed. So too an option.

That is precisely why for over a century the Iowa Supreme Court and others have distinguished between "that which pertains to the performance of a contract from that which pertains to its making." *Breen v. Mayne*, 118 N.W. 441, 443 (Iowa 1908). To be sure, an option may require payment or tender of the purchase price. *Id.* But in other cases, an option may be exercised by notice only, with payment a "subsequent matter[] in performance of a binding contract." *Id.* *Breen* showed that specifying an option rent payment does not mean that payment is a condition to acceptance, holding that the payment term there "did not go to the formation of the contract but to its performance." *Id.*; *see also Killam v. Tenney*, 366 P.2d 739, 747–48 (Or. 1961) ("The distinction

to be observed is between provisions in the option contract which make tender of the price one of the acts necessary to constitute an election and those in which such tender is performance of the contract arising from the act of acceptance."); *Horgan v. Russell*, 140 N.W. 99, 101 (N.D. 1913) ("In option contracts, as in all contracts, acceptance is one thing, performance another and different thing . . . .").

To take another example, *Matter of Estate of Claussen* applied that distinction to a real-estate purchase option. *See* 482 N.W.2d at 384. As relevant, the contract provided an option to purchase land "'for the sum of Eight Hundred ($800.00) Dollars per acre, payable Five Thousand ($5,000.00) *at time of closing*.'" *Id.* (emphasis added). The Supreme Court held that provision did not require payment to exercise the option, reasoning that it "does not in any way require that payment of five thousand dollars is a condition to proper exercise of the option." *Id.* Likewise here.

The District Court correctly found that the option-term rent payment here was a term of performance, not a condition of acceptance. (App. 165). The District Court observed that although the lease "states that rent is payable at the time the option is exercised," that requirement "is merely chronological." (App. 166). After all, the option-term payment is "entirely separate" from the notice provision in Article 3.2. (App. 166). Because the

option-term rent payment was unnecessary to exercise the option, the District Court reasoned that "[t]he failure to pay the correct amount or failure to pay it in a timely manner would give right to a breach action that could entitle [the Pitzes] to a monetary recovery, but it would not negate the existence of a contract by invalidating the properly exercised option." (App. 166).[2] Under the longstanding distinction between payment as a term of performance and a condition of acceptance, the District Court should be affirmed.

**b) Under the unchallenged Iowa Supreme Court precedent applying here, the District Court correctly found that payment was not required to exercise the option because the lease did not clearly and expressly show such an intent.**

The Pitzes appear to concede that under Iowa law—and that of other jurisdictions—payment is unnecessary to accept an option unless the lease clearly and expressly requires it. *See Lyon*, 288 N.W.2d at 888; *see also Pet. of Hilltop Dev.*, 342 N.W.2d 344, 346 (Minn. 1984); *Acme Inv., Inc. v. Sw. Tracor, Inc.*, 105 F.3d 412, 415 (8th Cir. 1997); *III Lounge, Inc. v. Gaines*, 348 N.W.2d 903, 906 (Neb. 1984); *Nw. Bell Tel. Co. v. Cowger*, 303 N.W.2d 791, 795 (N.D. 1981); *Ford v. Lord*, 586 P.2d 270, 274 (Idaho 1978); *Foard v. Snider*, 109 A.2d 101, 106 (Md. 1954) ("Generally, there is contemplated

[2] The Pitzes have never asserted a contract claim based on an alleged failure to timely pay the option-term rent and have never presented any evidence of resulting damages in any event.

only a notice of acceptance of, and a readiness and willingness to perform, the irrevocable offer which is an option."); *N. Ill. Coal Corp. v. Cryder*, 197 N.E. 750, 755–56 (Ill. 1935); 92 C.J.S. *Vendor and Purchaser* § 176 ("Payment or tender is not essential to acceptance unless the option instrument makes it a condition precedent to, or a part of, or necessary to, the acceptance or the exercise of the option." (footnotes omitted)); 1 *Williston on Contracts* § 5:18 (4th ed.) ("Ordinarily, the option holder has no duty to tender performance upon exercising the option unless the contract creating the option so provides."); 77 Am. Jur. 2d *Vendor and Purchaser* § 46; *Necessity for payment or tender of purchase money within option period in order to exercise option, in absence of specific time requirement for payment*, 71 A.L.R.3d 1201 (1976).

To show clear and express intent, the Iowa Supreme Court has insisted on a close textual and structural linkage between payment and notice terms. *See Lyon*, 288 N.W.2d at 888. In *Lyon*, decided eight years before the parties entered the lease here, the option clause required notification by "the negotiating party in writing within sixty days from the date of [a notice of intent to sell] and by making full payment in cash of the . . . purchase price within one hundred twenty (120) days from" from the notice of intent. *Id.*

The same clause added a consequence if a party "fail[ed] to exercise the option." *Id.* at 888–89.

Identifying two factors, the Supreme Court held that the provision there required both timely notice and tender of payment to exercise the option. *See id.* First, using a single sentence, the parties joined the notice and payment requirements used with the conjunctive "and." *See id.* Second, both requirements "immediately preceded 'if said party or parties fail to exercise the option,'" suggesting both payment and notice were conditions to acceptance. *See id.* at 888–89.

Distinguishing *Lyon*, the District Court here reasoned that payment wasn't required by U.S. Cellular to exercise the option because "[t]here is no conjunctive clause linking manner of exercising the option to language concerning payment." (App. 166). In other words, the District Court explained, in *Lyon* "the optionee was expressly required to give notice and make payment, whereas in this case [U.S. Cellular] was merely required to give notice." (App. 166). That was correct.

In fact, to a reasonable reader, the lease here might seem like an all-out effort to avoid *Lyon*'s reasoning. To start, it excludes as the District Court observed both factors found relevant there. But it goes further. As a matter of wording, the very provision the Pitzes rely on says that the option rent is

"payable in a lump sum in advance *at the exercise of the option*." (App. 8, art. 4.2 (emphasis added)). Read naturally, this phrasing compels the conclusion that exercise is a separate event from payment and that exercise is accomplished by notice alone. *See Matter of Est. of Claussen*, 482 N.W.2d at 384 ("[T]his phrase specifically recites that the five thousand dollars is payable 'at time of closing;' it does not in any way require that payment of five thousand dollars is a condition to proper exercise of the option.")

As a matter of contract structure, there are few (if any) conceivable ways parties could make clearer that payment is not required to exercise an option. Unlike the conjoined notice and payment terms in *Lyon*, the notice and payment terms here were placed in different paragraphs, assigned different captions, and then segregated in different lease articles. *See Gaines*, 348 N.W.2d at 906 (holding that payment was not a condition to exercising option where "the condition precedent for the option, simply requiring notice, is set apart in an indented paragraph from the following terms of payment"); *Alta Vista Props.*, 855 N.W.2d at 728 (reinforcing interpretation of lease paragraph's language with its heading); *Matrix Props.*, 609 N.W.2d at 743 (consulting contract headings and text and holding that option required only notice, without tender of payment). And to even examine both provisions, a reader must flip between different pages. Indeed, because all conditions

precedent to an option must be fulfilled, *see SDG Macerich Props.*, 648 N.W.2d at 586, it would make little drafting sense to isolate two clear conditions together while burying a third allegedly necessary payment condition in a lengthy paragraph elsewhere. That would invite catastrophe, like undetonated ordnance. *See Wolfe*, 795 N.W.2d at 77 (expressing preference for reasonable interpretations).[3]

**c) Interpreting a lease with a similar structure and undisputedly synonymous terms, the Illinois Supreme Court has held that a lease requiring payment "immediately" was validly exercised merely by written notice.**

In a strikingly similar case invoked by the District Court, the Illinois Supreme Court held that a lease with a similar structure and terms undisputedly synonymous to those here did not require payment to exercise a lease option. (App. 166). The lease provided an "'option to be exercised by Lessees at any time during the term of this lease upon thirty (30) days' notice in writing given to Lessor by Lessees.'" *Welsh*, 82 N.E.2d at 55. Like the lease here, a separate clause said that "'[u]pon the exercise of the option to purchase by Lessees, Lessees shall immediately pay to Lessor Twelve Thousand Dollars ($12,000.00) in cash.'" *Id.* The lessor, like the Pitzes,

[3] Even the Pitzes' expert distinguished two of the leases on which he relied in forming his opinion based on the absence of a payment term in the lease between the Pitzes and U.S. Cellular. (App. 216–221, Tr. 91:6–96:10).

claimed that by failing to tender payment "immediately" with its timely written notice, the lessee had failed to exercise its option. *See id.* at 57, 59. But that argument was rejected.

Applying the same well-settled distinction between accepting an option and performing it recognized by the Iowa Supreme Court, *Breen*, 118 N.W. at 443, the Illinois Supreme Court held that "[t]here is nothing in the option which requires the payment of any money to be made or tendered when the option right is exercised in order to constitute an acceptance," *Welsh*, 82 N.E.2d at 59. Consistent with the general rule, the court recognized that parties may make payment a condition to the exercise of an option. *Id.* Even though the lease in *Welsh* required the option payment "immediately," however, the court reasoned that the payment "was a matter pertaining to the performance of the contract and not to its creation." *Id.* Instead, timely written notice exercised the option: "Acceptance in writing was the only thing necessary." *Id.* The same is true here.

Likening this case to *Welsh*, the District Court observed that here the lease's option-renewal term "is a simple, declarative sentence," allowing U.S. Cellular to exercise its option merely "'by giving written notice to Lessor at least sixty (60) days before the expiration of the initial term of this Lease Agreement.'" (App. 166). The Pitzes do not—indeed, cannot—offer any

meaningful distinction between this case and *Welsh*. Because the parties here did not clearly and expressly require payment to exercise the option, payment was a performance term. *See Welsh*, 82 N.E.2d at 59; *see also Matter of Est. of Claussen*, 482 N.W.2d at 384 ("[T]here is no indication anywhere in the option clause or anywhere else in the real estate contract that Evelyn was to pay five thousand dollars in order to exercise the option . . . ."); *Matrix Props.*, 609 N.W.2d at 743 ("Nothing in the contract requires Wylie to tender the purchase price in order to exercise the option. Thus, tender of the purchase price is an incident of performance, not a condition precedent to the exercise of the option."); *Ford*, 586 P.2d at 274 (holding that tender of payment was not a condition to acceptance even though lease provided an "'option to purchase the said premises and farm equipment during the term of this lease, for the sum of $50,000.00'").

**d) Additional interpretive principles reinforce the District Court's conclusion.**

Although the District Court didn't expressly invoke them, other well-settled interpretive principles reinforce its reading of the lease. First, the lease suggests that had the parties intended to make payment a condition to exercising the option, they knew exactly how to do so. Courts ordinarily infer that incorporating some specific provisions shows that parties knew how to incorporate other provisions if they wished. *See Clarke Cnty. Reservoir*

*Comm'n v. Robins*, 862 N.W.2d 166, 177 (Iowa 2015). In prescribing the option-term rent, Article 3.2 expressly cross-references "the rental rate set forth in Article Four." (App. 7, art. 3.2). Yet the very next sentence in Article 3.2—clearly prescribing two conditions to exercise the option—contains no such reference to Article 4's payment requirement. The Court should not insert such a reference into the lease. *See Smith v. Stowell*, 125 N.W.2d 795, 799 (Iowa 1964) ("'The court may not rewrite the contract . . . .'" (citation omitted)).

Another related and basic interpretive rule also confirms the parties' intent. Article 3.2 of the lease in clear terms says that U.S. Cellular "may exercise" the option simply by "giving written notice" to the Pitzes "60 days before" the initial term expired. (App. 7, art. 3.2). The express mention of just these two conditions to exercising the option implies the parties intended no others—such as payment. *See Peak v. Adams*, 799 N.W.2d 535, 548 (Iowa 2011) (applying *expressio unius est exclusio alterius* rule and reasoning that "[p]erhaps the best evidence of the parties' intent" was the contract's mention of one person's name while omitting another). In the end, the District Court's interpretation was correct. This Court should affirm.[4]

[4] In an argument debuted for the first time on appeal, the Pitzes invoke "policy reasons" as grounds to reject the District Court's proper interpretation. (Appellant's Proof Br. pp. 34–35). Branding U.S. Cellular a "large

### 3. Even if the District Court's interpretation of the lease were incorrect, U.S. Cellular's failure to tender payment should be excused because tender would have been futile.

Because the District Court properly rejected the Pitzes' misguided reading of the lease, it declined to address U.S. Cellular's alternative contention that its failure to timely pay the option-term rent should be excused because any such payment would have been futile. But U.S. Cellular preserved that argument for appeal. (App. 170; App. 172). And this Court may affirm on any basis in the record. *See In re M.W.*, 876 N.W.2d 212, 221 (Iowa 2016) ("Under our general rules of appellate review, we are obliged to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding." (cleaned up)). So even if the District Court misinterpreted the lease, this Court should affirm.

The Iowa Supreme Court has repeatedly excused purportedly failed payment tenders in option cases when—as here—tender would have been futile. *See Lange v. Lange*, 520 N.W.2d 113, 118 (Iowa 1994) ("When a

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corporation," the Pitzes omit that in 1988 the consumer cellphone industry was in its infancy. (Appellant's Proof Br. p. 34). Contrary to its practice then and today of making monthly or annual lease payments, U.S. Cellular agreed to make William's parents an upfront lease payment in 1988. At that time, it was not a given that U.S. Cellular would still be operating 30 years later. (App. 224–226, Tr. 99:24–101:3). Given the risk to U.S. Cellular, the negotiation was far from "lopsided." (Appellant's Proof Br. p. 34).

tender would be of no avail, . . . it may be excused."); *Lyon*, 288 N.W.2d at 891 (holding that option holder "was excused from making a valid tender by the June 25 deadline"); *Figge*, 174 N.W.2d at 437 ("[R]easonable efforts to make that tender proved futile . . . ."); *Steele*, 143 N.W.2d at 306 (excusing failed tender). In *Lange*, the plaintiffs knew of the option holder's desire to purchase company stock "far in advance of the expiration of the option." 520 N.W.2d at 118. Despite that knowledge, they refused the stock sale because they thought it wasn't a "'good deal.'" *Id.* Based on that belief, the Iowa Supreme Court excused the option holder's failure to tender payment. *Id.* This Court should do the same here.

U.S. Cellular undisputedly notified the Pitzes it was exercising its option more than a year before the lease's initial term expired. (App. 31). U.S. Cellular was ready and willing to pay the option rent. (App. 228, Tr. 103:14–18). Indeed, U.S. Cellular undisputedly sent the Pitzes a check for the option-term rent before the lease expired in November 2018. (App. 40). Despite knowing that U.S. Cellular wanted to exercise the option, the Pitzes refused the check, hoping to renegotiate a more lucrative payment. (App. 42; App. 113, Pitz Dep. 38:22–25).

Like the plaintiffs in *Lange*, the Pitzes thought the option William's parents agreed to was a bad deal. Most compelling, William testified at his

deposition that "we would still be here" in a lawsuit to invalidate the option even if U.S. Cellular had sent the option-term rent payment 60 days before the lease's expiration. (App. 121, Pitz Dep. 70:1–3). That is because the Pitzes believe the option rent—agreed to by William's parents in arm's-length negotiation—is "very unfair," not "very favorable," "way undervalued," "extremely" unfair, and "insulting." (App. 109, Pitz Dep. 22:16–18, 22:19–25; App. 113, Pitz Dep. 38:12–17; App. 114, Pitz Dep. 44:17–19; App. 121, Pitz Dep. 70:1–3; App. 200, Tr. 46:5–14).

With that seemingly in mind, they delayed responding to U.S. Cellular's September 2017 notice until a year later, in September 2018. (App. 36). In letters sent in September 2017 and September 2018, U.S. Cellular requested tax, banking, and real estate documents needed to transmit payment to the Pitzes. (App. 31–35; App. 36–39; App. 226, Tr. 101:4–10). But the Pitzes undisputedly spurned those requests, instead consulting counsel and hoping to invalidate the lease so they could renegotiate. (App. 111, Pitz Dep. 29:16–30:10, 30:14–31:21; App. 198, Tr. 40:12–17); *see Steele*, 143 N.W.2d at 451 (finding party's failure to furnish "essential information" supported excuse of payment tender). And unlike an ordinary landlord, the Pitzes undisputedly never demanded the tower be removed before suing. (App. 111, Pitz Dep. 32:14–17). To the contrary, they want the tower on the property, so

long as it's "[a]t a price." (App. 113, Pitz Dep. 38:10–11; App. 117, Pitz Dep. 55:22–25).

Although William Pitz backtracked at trial, (App. 194–195, Tr. 36:9–37:4), his deposition established that the Pitzes believed that their *own expert's* rental valuation of about $203,000 was too low, (App. 113, Pitz Dep. 39:6–20, 40:6–21). Instead, plucking a number right "[o]ut the air," William testified—despite lacking experience valuing real estate—that the option-term rent should be $1,000,000. (App. 114, Pitz Dep. 41:18–42:9; App. 196, Tr. 38:23–25). Not content to stop there, however, Pitz went on to imply even that unfounded figure may not satisfy them. (App. 117, Pitz Dep. 55:23–25; App. 197–198, Tr. 39:13–40:17). If the Pitzes believed their own expert's valuation was too low by a factor of nearly five, as William's deposition unmistakably showed, (App. 113–114, Pitz Dep. 40:25–41:20; App. 118, Pitz Dep. 59:4–60:4), then any payment for the rental amount sent by U.S. Cellular with its notice would surely have been to "no avail," *Lange*, 520 N.W.2d at 118. The Court should thus excuse U.S. Cellular's failure to tender payment and affirm.[5]

[5] If this Court were to reverse the District Court—and it should not—re-trial is unnecessary. That is because the record at the bench trial was fully developed, making a new trial "nothing more than an idle gesture entailing needless additional expense for both parties, with attendant delay." *Houlahan v. Brockmeier*, 141 N.W.2d 545, 550 (Iowa 1966). The District Court should

## II. The District Court correctly found that U.S. Cellular's timely notice exercising its option was not defective.

### A. Error preservation.

The Pitzes preserved error on this issue. *Cf. Lange*, 831 N.W.2d at 846.

### B. Standard of review.

Review is for correction of errors at law. *See* Iowa R. App. P. 6.907. Under that standard, the district court's fact findings "have the effect of a special verdict," binding on this court "if supported by substantial evidence." *Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 839 (Iowa 2019). "'Evidence is substantial if a reasonable mind could accept it as adequate to reach the same findings.'" *Data Documents, Inc. v. Pottawattamie County*, 604 N.W.2d 611, 614 (Iowa 2000) (citation omitted).

In applying that standard, this Court must view the evidence "in the light most favorable to upholding the trial court's judgment." *Pippen v. State*, 854 N.W.2d 1, 8 (Iowa 2014). It must also "construe the district court's findings broadly and liberally," and it may not "weigh[] the evidence or the credibility of the witnesses." *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). In the end, "when a trial court finds the facts against the party having the burden of persuasion, [this Court] reverse[s] on

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instead be "ordered to make new findings of fact and enter judgment accordingly." *Id.*

the facts only if that party proved [her] case as a matter of law." *Matter of Gauch's Estate*, 308 N.W.2d 88, 91 (Iowa 1981). The Pitzes failed to do that here.

### C. Argument.

Despite lacking any applicable legal authority, *cf.* Iowa R. App. P. 6.903(2)(g)(3), the Pitzes insist that U.S. Cellular's timely notice exercising its option was defective because of their professed confusion about what entity was exercising the option. (Appellant's Proof Br. pp. 35–37). True enough, the lease between the parties identified the lessor as "United States Cellular Operating Company of Dubuque," (App. 6), while U.S. Cellular's September 2017 notice letter referenced "Dubuque Cellular Telephone, L.P.," (App. 31). But in truth, no confusion existed. Reasoning that "[n]otice requirements exist to put parties on notice," the District Court found that the Pitzes were "clearly" on notice that U.S. Cellular was exercising its option. (App. 168). That finding should be affirmed.

#### 1. Iowa law requires only an unqualified manifestation of a determination to accept an option.

The Pitzes concede that Iowa law specifies no particular form of notice to exercise an option. *See Figge*, 174 N.W.2d at 435. Instead, "anything amounting to an unqualified manifestation of an optionee's determination to accept is sufficient." *Id.* So to take an example, unless a contract specifies

otherwise, even an oral notice to exercise an option will do. *See id.* Under that standard, U.S. Cellular's notice was sufficient.

### 2. Substantial evidence supports the District Court's finding that U.S. Cellular's timely notice was sufficient.

The District Court below observed that nothing in the lease required U.S. Cellular to explain any relationship between U.S. Cellular and the entity supplying the notice. (App. 168). To the contrary, the only contractual requirement was that U.S. Cellular provide written notice. (App. 7, art. 3.2). And U.S. Cellular undisputedly did that. (App. 31).

In fact, the District Court explained that U.S. Cellular actually sent the Pitzes two notices: one in September 2017, (App. 31), and one in September 2018, (App. 36; App. 168). The first was sent to Robert and Dorothy Pitz, William's parents who'd entered the lease in 1988. (App. 31). Both notices were sent more than 60 days before the lease expired. (App. 168; App. 207–208, Tr. 62:19–63:2). Both contained a phone number to contact with "any questions or concerns." (App. 31; App. 36). And both were unmistakably emblazoned "U.S. Cellular." (App. 31; App. 36; App. 204, Tr. 53:5–7).

On top of all that, the District Court noted, William Pitz admitted in both his deposition and trial testimony that he was not confused by the different entities and drew no distinction between them. (App 168; App. 203–204, Tr. 52:18–53:14). "As far as William was concerned, 'they were

all the same.'" (App. 168). Because substantial evidence supports the District Court's finding that the Pitzes received adequate notice, this Court should affirm. *See Metro. Prop. & Cas. Ins. Co.*, 924 N.W.2d at 839.

## III. The District Court correctly declined to award fair-market rent for the alleged "holdover period."

### A. Error preservation.

The Pitzes preserved error on this issue. *Cf. Lange*, 831 N.W.2d at 846.

### B. Standard of review.

Review is for correction of errors at law. *See* Iowa R. App. P. 6.907.

### C. Argument.

Mislabeling the period after U.S. Cellular validly exercised its option to renew the lease as a "holdover period," the Pitzes claim they're entitled to fair-market rent between November 14, 2018, and the indefinite date when U.S. Cellular removes the tower and equipment. Putting aside that the Pitzes never requested removal of the tower and equipment before filing this suit, they are incorrect for three reasons.

#### 1. The Pitzes are entitled only to the rent agreed to in the lease.

First, as the District Court found, U.S. Cellular validly exercised its option and provided sufficient notice. (App. 167, 168). Because exercising the option formed a contract, *see* 92 C.J.S. *Vendor and Purchaser* § 176, the Pitzes are entitled only to the contractual option-term rent agreed to in the

lease, (App. 8, art. 4.2; App. 40). They're not, in other words, entitled to a windfall. *Cf. Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (explaining that contracting parties have no right to be placed in a better position even when a breach occurs).

**2. The District Court improperly admitted the expert's testimony.**

Second, the Pitzes concede the only evidentiary basis supporting their claimed right to fair-market rent is their expert's testimony. But the District Court erred in admitting that testimony. (App. 183–186, Tr. 11:18–14:25; App. 229–230, Tr. 117:1–118:6). Before trial, U.S. Cellular moved to exclude the Pitzes' expert's testimony for two reasons. First, his report lacked all the contents required by Iowa Rule of Civil Procedure 1.500(2)(b). (App. 135–137; App. 150). Second, the Pitzes failed to timely produce documents on which their expert relied. (App. 150–153).

**a) The expert's report lacked the contents required by the procedure rules.**

Iowa Rule of Civil Procedure 1.500(2)(b) specifies what an expert report must contain. *See* Iowa R. Civ. P. 1.500(2)(b). Although the Pitzes' designated expert provided an expert report, that report undisputedly lacked information about whether the expert had authored any publications in the last ten years, about whether he had testified as an expert in the previous four

years, and the compensation he was paid for his testimony. *Cf. id.* r. 1.500(2)(b)(4)–(6); (App. 53). In omitting that information, the report deprived U.S. Cellular of access to information required by Iowa law.

**b) The expert failed to produce all the documents he relied on in forming his opinion.**

Under the procedure rules, a party must also provide copies of all documents it "may use to support its claims," Iowa R. Civ. P. 1.500(1)(a)(2), responses to document requests within 30 days, *id.* r. 1.512(2), and timely supplement any incomplete responses, *id.* r. 1.503(4)(a). A party may obtain discovery of documents from an expert, *id.* r. 1.508(1)(b), and supplementation is specifically required "no later than 30 days before trial," *id.* r. 1.508(3). As the Supreme Court has explained, "the duty to supplement seeks to clarify issues prior to trial, avoid surprise to parties, and allow a complete opportunity to prepare for trial." *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 386 (Iowa 2012). When a party fails to disclose documents or supplement its responses, courts may bar the undisclosed information from trial. *See* Iowa R. Civ. P. 1.517(3)(a); *Kellen v. Pottebaum*, 928 N.W.2d 874 (Table), 2019 WL 2371924, at *2–3 (Iowa Ct. App. 2019); *see also* Iowa R. Civ. P. 1.508(3).

On March 2, 2020, the Pitzes responded to U.S. Cellular's document requests. In request number 6, U.S. Cellular sought "[t]he complete file

relating to this case of any expert you expect to testify at trial, including but not limited to, communications, documents provided to the expert, notes, and invoices." (App. 155). The Pitzes produced no documents responsive to that request at that time.

That same day, the Pitzes designated Thomas F. Howe as their expert and provided his appraisal report. (*See* App. 53). Although Howe's report makes clear that he relied on "[t]hree current market leases" in formulating his valuation opinion, (App. 80), the report lacked those three leases. Indeed, despite U.S. Cellular's repeated demands that the Pitzes supplement their responses with the leases, (App. 157), they in the end provided just two of the leases and then only 9 days before trial, (App. 139 ¶ 3). The Pitzes never produced the third lease, because their expert did not have it. (App. 139 ¶ 3).

**c) The expert should have been excluded.**

Under Iowa Rule of Civil Procedure 1.517(3)(a), "[i]f a party fails to provide information or identify a witness as required by rule 1.500, 1.503(4), or 1.508(3), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Under that rule, Iowa courts have clear authority to exclude expert witnesses. *See Sullivan v. Chicago & Nw. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982) (affirming exclusion of expert witness

testimony); *Laden & Pearson, P.C. v. McFadden*, 965 N.W.2d 189 (Table), 2021 WL 2448377, at *4 (Iowa Ct. App. 2021); *McConkey on Behalf of B.M. v. Huisman*, 938 N.W.2d 719 (Table), 2019 WL 3317373, at *4 (Iowa Ct. App. 2019); *see also Kellen*, 2019 WL 2371924, at *3.

For example, in *Golden Circle Air, Inc. v. Sperry*, the proponent of an expert witness "never supplemented his answers to interrogatories [about the expert], despite repeated requests by [the other party] that he do so." 543 N.W.2d 629, 633 (Iowa Ct. App. 1995). The Court of Appeals affirmed the expert's exclusion from trial, observing that noncompliance with discovery rules "should not be tolerated." *Id.* That reasoning applies equally where, as here, a party fails to produce documents an expert based his opinion on. *See, e.g.*, *Bizrocket.com, Inc. v. Interland, Inc.*, No. 04-60706-CIV, 2005 WL 6745904, at *1 (S.D. Fla. Aug. 24, 2005) (excluding expert from trial where his report was "based in part upon documents that [the expert's proponent] failed to produce during discovery"). And although no Iowa court appears to have excluded an expert because his report was inadequate under Rule 1.500, federal courts have found that an expert may be excluded where his report fails to include the information specified by the counterpart federal rule. *See, e.g.*, *Barry v. Silver*, No. 609CV1153ORL35GJK, 2011 WL 13298552, at *2 (M.D. Fla. Feb. 28, 2011) ("A party who fails to disclose this information is

precluded from using the witness as evidence 'on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.'" (citation omitted)); *see also Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 70 (Iowa 2015) ("'[C]ases under the federal rule provide guidance in interpreting the Iowa counterpart.'").

In Iowa, four factors inform whether a discovery sanction is appropriate:

> (1) the party's reasons for not providing the challenged evidence during discovery; (2) the importance of the evidence; (3) the time needed for the other side to prepare to meet the evidence; and (4) the propriety of granting a continuance.

*Lawson v. Kurtzhals*, 792 N.W.2d 251, 259 (Iowa 2010) (citation omitted). Each of those factors here favored excluding Howe's testimony from trial.

First, the Pitzes offered no persuasive reason for failing to produce the leases in discovery, despite U.S. Cellular's repeated demands. *See Sperry*, 543 N.W.2d at 633. Howe's report shows on its face that he had them since at least March 2020. (App. 53). Given U.S. Cellular's request for Howe's file in discovery, there is no conceivable reason they could not have been produced when Howe issued his report. Nor is there any reason why the Pitzes could not have supplemented their responses as required in the nearly 15 months between then and the days before trial.

Second, Iowa courts have long recognized that a party is entitled to production of documents relied on by an expert to prepare an effective cross-examination. *See Sullivan*, 326 N.W.2d at 328; *see also Whitley*, 816 N.W.2d at 386 ("The discovery process seeks to make a trial into a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (cleaned up)). In his report, Howe claimed to have relied on an "Income Approach to Value," which he claims depends on "what other similar users are paying." (App. 80). To determine what others were paying, Howe examined "[t]hree current market leases." *Id.* Without those leases in an adequate time before trial, U.S. Cellular could not effectively cross-examine Howe about their rental periods, the rents, and other relevant terms bearing on his opinion. Nor could U.S. Cellular identify the leases as trial exhibits, because the time for identifying exhibits had passed by the time they were produced.

Third, the supplemental production with the leases came well after the 30-day deadline in rule 1.508(3)—in fact, "just days before trial." *Lawson*, 792 N.W.2d at 260; *cf. Hagenow v. Schmidt*, 842 N.W.2d 661, 672 (Iowa 2014) (noting that revised expert opinion was provided "sixty-seven days before trial, well before the requirement in rule 1.508(3) to supplement responses at least thirty days before trial"). That left U.S. Cellular under two

weeks to prepare a cross-examination based on information that the Pitzes had since at least March 2020.

And finally, trial in this case was originally set for trial in August 2020. It was continued twice. *See Lawson*, 792 N.W.2d at 260 ("[I]t is significant that a prior continuance had been granted just months earlier.").

Although the District Court denied U.S. Cellular's motion to exclude the expert witness at trial, (App. 183–186, Tr. 11:18–14:25; App. 229–230, Tr. 117:1–118:6), this Court should hold that Howe should have been excluded, *see In re M.W.*, 876 N.W.2d at 221; *see Hagenow*, 842 N.W.2d at 672 ("Exclusion of an expert is an extreme sanction and is justified only when prejudice would otherwise result." (cleaned up)). Without the expert's testimony, the Pitzes' claim for fair-market rent necessarily fails. This Court should thus affirm.

### 3. Even if the expert was properly admitted, the Pitzes failed to carry their burden to prove the fair-market rent.

Finally, even if this Court were to conclude that the expert was properly allowed to testify, the Pitzes failed to carry their burden to prove the fair-market rent. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996) ("The party seeking damages has the burden to prove them."). To do so, the Pitzes needed to present evidence of a "'reasonable

basis'" for their alleged damages. *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 352 (Iowa 2013) (citation omitted). Although that standard allows for "'some speculation,'" it disallows "overly speculative damages." *Id.* (citation omitted). The Pitzes' expert failed to provide a reasonable basis for their alleged damages.

Although the Pitzes seek the fair-market rent for the period after November 13, 2018, their expert conceded that he had no opinion about the market rent between that date and the date of the tower equipment's removal. (App. 214, Tr. 89:15–18). Instead, their expert's opinion was a snapshot on January 21, 2020. (App, 214–215, Tr. 89:23–90:1). Indeed, he admittedly had no opinion at all about the rental value in 2018 or 2019, leaving the Pitzes with no evidence of the supposed value during that time. (App, 214–215, Tr. 89:19–90:3). After all, he testified that the purpose of his report wasn't to opine as to fair-market rent—it was to renegotiate a new thirty-year lease term. (App. 212, Tr. 87:1–9; App. 214, Tr. 89:10–14). In other words, the expert wasn't asked to offer an opinion about fair-market rent during the "holdover period," didn't offer such an opinion at trial, and didn't intend that his report would be used for that purpose. As a result, the Pitzes failed to carry their burden to prove damages. The District Court should be affirmed.

## IV. The District Court correctly declined to issue the Pitzes a corrected 2018 1099-MISC.

### A. Error preservation.

U.S. Cellular concedes that the Pitzes preserved error on this issue. *Cf. Lange*, 831 N.W.2d at 846.

### B. Standard of review.

Review is for correction of errors at law. *See* Iowa R. App. P. 6.907.

### C. Argument.

The District Court correctly declined to issue the Pitzes a corrected 1099-MISC. As the Pitzes appear to acknowledge, that ruling follows necessarily from the District Court's conclusions that U.S. Cellular validly exercised its option under the lease and that U.S. Cellular's undisputedly timely option notice provided adequate notice. (App. 167, 168). And for the reasons earlier mentioned, even if U.S. Cellular failed to validly exercise its option, this Court may affirm because any failed payment tender should be excused. For these reasons, the District Court's decision not to issue the corrected 1099-MISC should be affirmed.

## V. The Pitzes are not entitled to attorney's fees.

### A. Error preservation.

The Pitzes failed to preserve error. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the

district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Although the Pitzes raised their claim for attorney's fees before trial, the District Court rejected their substantive claims. (App. 168). Because it never ruled on whether they were entitled to attorney's fees, the Pitzes didn't preserve error. *See Meier*, 641 N.W.2d at 537; *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 76 (Iowa 2020) ("We are a court of *review*, and we do not generally decide an issue that the district court did not decide first.").

**B. Standard of review.**

A ruling on a party's right to attorney's fees is reviewed for correction of errors at law. *See City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011).

**C. The lease's indemnification provision does not entitle the Pitzes to attorney's fees.**

Even if the Pitzes preserved error, they're not entitled to attorney's fees. Under Iowa law, "an award of attorney fees is not allowed unless authorized by statute or contract." *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 707 (Iowa 2020). Invoking Lease Article 9, notably captioned "Indemnification," the Pitzes claim they are entitled to attorney's fees. Not so.

### 1. If U.S. Cellular failed to exercise its option, as the Pitzes mistakenly claim, no basis exists to award fees.

"An option is merely an offer," *SDG Macerich Props.*, 648 N.W.2d at 585, and "[a]n offer without acceptance is not a contract," *Breen*, 118 N.W. at 443. So if the Pitzes were correct that the U.S. Cellular failed to accept its option, as they incorrectly claim, then no contract exists to award fees under. Conversely, if a contractual basis for fees exists, U.S. Cellular must necessarily have exercised its option. The Pitzes' arguments are at loggerheads—with each other.

### 2. Attorney's fees may not be awarded under the lease's indemnification provision because it does not clearly and unambiguously show an intent to shift fees to U.S. Cellular.

Even putting aside the Pitzes' self-contradictory argument, the Iowa Supreme Court has twice rejected claims mirroring the Pitzes'. *See Retterath*, 938 N.W.2d at 709; *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 472 (Iowa 2010). Where—as here—an indemnification clause uses "indemnify" and "hold harmless," that implies the parties intended to protect against third parties' claims, not against claims between the contracting parties. *NevadaCare*, 783 N.W.2d at 471. As a result, *NevadaCare* held that an indemnification clause does not "shift attorney fees between the parties

unless the language of the clause shows an intent to clearly and unambiguously shift the fees." *Id.*

Applying that holding, the Supreme Court in *NevadaCare* concluded that a clause requiring indemnification for "[a]ny breach of this Contract" did not clearly and unambiguously shift attorney's fees between the parties. *Id.* at 470. Under the contract, one party was required to contract with third parties; breaches of those third-party contracts exposed the indemnified party to third-party suits. *See id.* at 471–72. Because the indemnification provision plausibly covered those third-party claims, the Supreme Court reversed attorney's fees awarded under it. *See id.* at 472. In *Retterath*, the Supreme Court reaffirmed *NevadaCare*, holding that attorney's fees could not be shifted under a provision requiring indemnification for a company member's "failure . . . to perform his obligation under this Agreement." *Retterath*, 938 N.W.2d at 708, 709.

As in those cases, the lease's indemnification provision in Article 9 plausibly covers third-parties' claims against the Pitzes. For example, U.S. Cellular agreed to pay certain taxes, obtain insurance, and to avoid creating public nuisances and violating the law. (App. 9–10, arts. 5, 7, 10). If U.S. Cellular breached these provisions, the Pitzes would be exposed to third-parties' claims. But Article 9 protects them. And for that reason, it does not

clearly and unambiguously shift fees between the parties here. *See, e.g.*, *Retterath*, 938 N.W.2d at 709 ("In that scenario, [member's] breach of the [agreement] could result in a third-party action against [the company], which would be covered by the [agreement's] indemnification provision."). The Pitzes' claim for attorney's fees should be denied.

## VI. The District Court erred in denying U.S. Cellular's request for attorney's fees.

### A. Error preservation.

U.S. Cellular preserved error by requesting attorney's fees, (Def.'s Mot. for Costs and Attorney's Fees pp. 1–3), and receiving a ruling, (App. 174).

### B. Standard of review.

A ruling on a party's right to attorney's fees is reviewed for correction of errors at law. *See Diercks*, 806 N.W.2d at 652.

### C. Argument.

The very reasoning that forecloses the Pitzes' claim for attorney's fees establishes U.S. Cellular's. Under Iowa Code section 625.22, "[w]hen judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court." Article 9 of the lease between the parties entitles U.S. Cellular to its attorney's fees:

> Lessor shall indemnify and hold harmless Lessee herein from any and all costs, claims, damages and suits arising out of or

> resulting from or in connection with Lessor's or Lessor's employees', agents', invitees', sub-lessees', or assignees' occupancy, possession, use or management of the Leased Premises and License areas of the Real Estate or any portion thereof or the exercise or enjoyment of their rights and breach of their obligations under this Lease Agreement, including reasonable attorneys' fees.

(App. 10, art. 9).

Although Article 9 is labeled "Indemnification," it does not plausibly cover any suits by third parties against U.S. Cellular for which it could seek indemnification from the Pitzes. Unlike the Pitzes, U.S. Cellular may accordingly be awarded attorney's fees in this action with the Pitzes. *Cf. Retterath*, 938 N.W.2d at 709; *NevadaCare*, 783 N.W.2d at 472. This Court should thus reverse the District Court's denial of U.S. Cellular's attorney's fees and remand to determine those fees, including appellate attorney's fees.

## CONCLUSION

For the reasons stated, this Court should affirm the District Court's judgment for U.S. Cellular against the Pitzes and tax fees and costs to them. *See* Iowa R. App. P. 6.1207.

This Court should reverse the District Court's ruling denying U.S. Cellular its attorney's fees and remand only to determine those fees, including appellate attorney's fees.

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## REQUEST FOR ORAL SUBMISSION

U.S. Cellular requests oral argument in this appeal.

## CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating necessary copies of this Appellee/Cross-Appellant's Final Brief was $0.

Respectfully submitted this 26th day of May 2022.

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

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

This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010 in Times New Roman, 14-point font and contains 9,640 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

Respectfully submitted this 26th day of May 2022.

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## CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 26th day of May 2022, a copy of Appellee/Cross-Appellant's Final Brief was filed and served on the Clerk of the Supreme Court, which will serve a notice of electronic filing to all registered counsel of record.

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