IN THE SUPREME COURT OF IOWA

NO. 22-1941

NORTHWEST BANK & TRUST COMPANY
Plaintiff/Appellant

v.

PERSHING HILL LOFTS, INC, JOHN M. CARROLL, and JOHN G. RUHL
Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY
CASE NUMBER: LACE128234

THE HONORABLE MEGHAN CORBIN
THE HONORABLE TOM REIDEL

APPELLANT'S FINAL BRIEF

Dated: June 11, 2023

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ROUTING STATEMENT

The Iowa Supreme Court should transfer this case to the court of appeals pursuant to Iowa Rule of Appellate Procedure 6.1101. This case involves the application of existing legal principles.

STATEMENT OF THE CASE

I. Nature of the Case.

Plaintiff/Appellant Northwest Bank & Trust Company (***"the Bank"***) filed the present lawsuit on November 1, 2016, asserting multiple claims against Defendant/Appellees Pershing Hill Lofts, L.L.C. (***"Pershing Hill"***), John Carroll (***"Carroll"***), and John Ruhl (***"Ruhl"***). Those claims were as follows:

1) Breach of Contract (Pershing Hill)
2) Guaranty (Carroll)
3) Guaranty (Ruhl)
4) Negligent Misrepresentation (Carroll)
5) Negligent Misrepresentation (Ruhl)
6) Common Law Fraud (Carroll)
7) Common Law Fraud (Ruhl)

(App. 8–20).

On September 27, 2018, the district court entered a ruling granting summary judgment in Pershing Hill's favor on the Bank's breach of contract claim (Count I). (App. 236–247). On October 12, 2018, the Bank filed a motion to reconsider, enlarge, or amend that ruling, (App. 248–258), which was denied by the district court on

November 19, 2018. (App. 259–260). On August 18, 2019, the district court entered a ruling granting summary judgment in Carroll' and Ruhl's favor on the Bank's negligent misrepresentation claims (Counts IV, V), but denied their motion with respect to the Bank's fraud claims (Counts VI, and VII).

Trial by jury on the Bank's fraud claims began on July 18, 2022, and lasted until July 22, 2022. The claims proceeded to verdict, which the jury returned in Carroll's and Ruhl's favor. (App. 307–311). An Order of Judgment was entered by the district court on July 25, 2022. (App. 312–313).

On August 5, 2022, the Bank filed a motion for a new trial. (App. 314–322). Carroll and Ruhl filed a resistance on August 25, 2022. The district court denied the motion for new trial on October 24, 2022 by written ruling. (App. 323–326). The Bank filed a notice of appeal on November 22, 2022. (App. 327).

STATEMENT OF THE FACTS

1. The Parties.

Plaintiff/Appellant Northwest Bank & Trust Company (***"the Bank"***) is an Iowa banking corporation with its principal place of business in Davenport, Iowa. (App. 1 [¶ 1]; App. 38 [¶ 1]). The Bank was formed in 1941, and presently employees approximately 75 people. (App. 541–42 [20:7-21:1]). Joe Slavens (***"Slavens"***)is the Bank's President & CEO.

Defendant/Appellee Pershing Hill Lofts, L.L.C. (***"Pershing Hill"***) is an Iowa limited liability company with its principal place of business in Davenport, Iowa. (App. 8 [¶ 2]; App. 38 [¶ 2]). Pershing Hill has five members, including John Carroll, John Ruhl, Tom Roederer, the Bush family, and Matt Slavens. (App. 614 [103:14-25]).

Defendants/Appellees John Carroll and John Ruhl (collectively ***"Defendants"***) are managing members of Pershing Hill. (App. 8 [¶¶ 3-4]; App. 38 [¶¶ 3-4]).

2. The Parties' Relationship.

A. The 2013 Promissory Note.

In 2012, Pershing Hill purchased the Crescent Building located in Davenport at 5th and Pershing for redevelopment (hereinafter ***"the Project"***). (App. 615–16 [105:15–106:13]). The acquisition was financed initially by Quad City Bank & Trust. (App. 616 [106:14–17]). However, in 2013 this loan was moved to the Bank pursuant to a $975,000 promissory note (***"the Note"***) signed by Defendants, along with others. (App. 542–543 [21:2–22:2]; App. 329–330). The Note was secured by certain Open-End Real Estate Mortgages recorded in the Scott County Recorder's Office, and also by various guarantees, including the unlimited commercial guarantees of Defendants Carroll and Ruhl. (App. 9 [¶¶ 8-9; App. 38 [¶¶ 8-9]). Over the course of time, Pershing Hill, Carroll, and Ruhl determined they would rehabilitate and redevelop the Property to operate as "The Lofts at Pershing Hill." (App. 9 [¶ 11]; App. 39 [¶ 11]).

B. The parties discuss additional financing from the Bank for redevelopment of the Project.

The parties began discussions about a construction loan and mini-perm loan for the Project in the summer of 2014. (App. 544–45 [33:1–34:11]). The Bank offered Defendants financing terms in a July 17, 2014 letter. (App. 476–480; App. 544–49 [33:16–38:23]). Defendants and Bank, along with other lenders and participants continued to work toward a targeted closing of May 2015. (App. 355–368; App. 552 [43:21–43:25]). At this time, the Bank was involved as construction lender, and Central State Bank was the bridge loan lender. (App. 355–368). The financing contemplated included the award of various tax credits, one of which is known as the "Grayfield Tax Credit". (App. 551 [42:15–42:25; 553–54 [44:22–45:17]). Bankers Trust was lined up as a tax credit investor which purchases tax credits from the recipient at a discount, thereby allowing the recipient (here, Pershing Hill) to obtain additional funding. (Tr. Tran. Vol. I, 52). The Grayfield Tax Credit, however, was not awarded to

Defendants in the spring of 2015, and as a result, the deal did not close in May 2015. (App. 551–54 [42:15–45:17]).

C. The Parties continue to discuss additional financing and reduce their plans and commitments to writing.

Despite the deal not closing in May 2015, the parties continued to work through available financing mechanisms for the Project. On or about August 31, 2015, the parties reduced their plans and commitments to writing by executing an agreement, labeled "Proposed Financing for Pershing Hill Lofts, LLC Summary of Principal Terms August 31, 2015" (hereinafter "the ***Financing Agreement***"). (App. 421–425). The Financing Agreement provides, in part:

> This is a summary of terms that may lead to a commitment to lend, subject to satisfactory complete of due diligence, and a subsequent Commitment Letter. Acceptance below assures Lender of Borrower's exclusive consideration as "Lender" in exchange for the expense in time and travel of the proposed due diligence.

(App. 425). One section of the Financing Agreement, titled "Due Diligence", lists various items the Lender "will need as part of necessary due diligence, and a condition of making the Interim Loans

available". (App. 424). One item listed is "Grayfield Tax Credit award documentation". (App. 424).

D. After the Grayfield Tax Credit is denied for the fall cycle, the parties continue to discuss financing.

In October 2015, the parties learned that the Grayfield Tax Credit had, again, been denied for the new, fall cycle. (App. 556 [63:9–63:13]); App. 369). On October 20, 2015, the parties met to discuss the implications of the denial of the Grayfield Tax Credit for the financing. (App. 556–57 [63:9–64:11]; App. 369). Carroll and Ruhl indicated that they did not want to abandon the Project, and that each Pershing Hill partner would find a way to make up the difference in the funding gap created by the denial of the Grayfield Tax Credit. (App. 558–59 [65:3–66:22]). As a result, Slavens spent the next several weeks with the partners, individually, addressing different potential solutions. (Id.; App. 370).

On November 25, 2015, Slavens sent an email which set forth solutions for each partner. (App. 372–373). The proposal included loans to some partners based on collateral, and others agreeing to

defer withdrawal of funds at closing unless and until the Grayfield Tax Credit was awarded. (App. 372; App. 562–63 [73:19–74:19]). There was general agreement amongst the parties that the Grayfield Tax Credit would ultimately be awarded in the next spring cycle.[1] (App. 562–63 [73:19–74:19]). The response from Defendants was positive, along the lines of "let's get this closed". (App. 560–61 [68:22–69:1]).

In early December 2015, the parties learned that the tax credit investor, Bankers Trust, needed additional documentation including liquidity statement and tax returns from the partners. (App. 565–67 [78:15–80:22]; App. 379–382). Slavens assigned a junior loan officer at the Bank to work with the partners to obtain and deliver the requested information. (App. 567 [80:8–80:23]). On December 8, 2015, Carroll implored the partners to provide the necessary information as: "If we do not get this ASAP, we will not make our 12/23 closing." (App. 379).

[1] And as discussed below, that is actually what occurred.

On December 10, 2015, Carroll notified Slavens that Bankers Trust was concerned about the proposed equity contributions from the partners. (App. 376–377). He requested Slavens have a "banker to banker" discussion with Bankers Trust. (App. 376). Slavens responded that he would "go to bat", and spoke with Bankers Trust the following day. (App. 376; App. 564 [77:2–77:17]).

Slavens memorialized issues identified by Bankers Trust in a December 11, 2015 email to Carroll and Ruhl, which included a minor accounting reconciliation, designation of someone to track qualified expenditures, and given a government backlog on the award of tax credits, additional funds allocated to interest payments. (App. 378; App. 568–69 [81:2–82:25]). Most relevant here, Bankers Trust also wanted an additional $800,000 in equity rather than additional collateral from the partners, as Slavens previously proposed. (App. 378).

E. Carroll and Ruhl continue to represent that the Bank was the lender on the Project, while at the same time soliciting and ultimately securing financing from another lender.

Given Bankers Trust's concerns, Slavens' December 11, 2015 email to Carroll and Ruhl outlined options to move forward:

> (i) kill the deal, (ii) raise $160,000 in case per partner or (iii) implement my solution at a cost of about $75,000. I know that is a lot of money, but if I am paid 1/3 at closing, I will defer the other 2/3 until construction is complete.
>
> Would you like to meet? I think we can fix these things, but it will take my time and partnership money. Either way, it is now obvious there is no way we will close this year. Please let me know.

(App. 378).[2] Slavens advised Carroll and Ruhl that he had a plan that would "alter the current structure so as not to require this equity up front, but it costs Northwest Bank significant dollars" and would "encompass substantially more work for me." (App. 378).

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[2] Slavens' reference to "killing the deal" meant that Defendants would not pursue their development project, and "just go sell the building and get out of it." (App. 570 [83:1–83:25]). It did not refer to killing the Financing Agreement, as the district court implied.

Slavens followed that email, with an email dated December 14, 2015 which advised the managing members of potential solutions. (App. 224). Carroll communicated with Ruhl that same day, advising him to reply. (App. 224). On December 15, 2015, Ruhl responded to Slavens stating that he needed "to better understand the issue so I can work on a solution" and requested a meeting. (App. 386).

In response to Ruhl's request for a meeting, the parties met on December 22, 2015. (App. 573 [98:4–99:3]). Given the present unavailability of the Grayfield Tax Credit, the parties knew the transaction would not close by December 23, 2015, and there was general agreement that Carroll and Ruhl would advise Slavens whether they intended to proceed with the Project at all. (Id.). They did not, however, inform the Bank (or even suggest) that they would be considering other lenders. However, despite the pretense of a meeting work on a solution, on December 15, 2015—and unbeknownst to Slavens—Carroll circulated an email to Ruhl and others stating:

> Is it possible to get new numbers stripping out NWBT and CSB fees? Assuming we can't meet Joe Slavens demands we need to start shopping this around ASAP. If we can get those taken out, we can negotiate with other lenders on a level playing field. Let me know. Thanks.
>
> Obviously keep this between us.

(App. 404). This followed an email the previous day, in which Carroll specifically informed Ruhl that he wanted to "shitcan Slavens if possible." (App. 224). At no point did Defendants, or anyone else, inform the Bank that they were "killing the deal". (App. 572 [93:2–93:5; App. 621 [132:14–132:6]). To the contrary, Defendants continued to string the Bank along, knowing *full well* that Slavens understood the Bank was the lender on the Project. Ruhl, in fact, admitted that the Defendants were keeping the Bank's "nose to the grindstone." (App. 636–39 [239:1–242:24]).

Shortly after the December 22, 2015 meeting, Bankers Trust backed out as a potential tax credit investor altogether. (App. 575 [100:3–100:22]). Nonetheless, the parties continued to discuss ways to finalize and close the deal. In the interim, however, Defendants

retained a representative from Saratoga Capital, Sam Estep ("Estep"), whom Defendants told the Bank had been brought to help secure a new tax credit investor. However, Defendants deliberately did not inform the Bank that Estep was also assisting them to find a new lender on the Project to replace the Bank altogether. (App. 405; App. 622–23 [139:7–140:7]). Indeed, in a January 5, 2016 email, Carroll advised Estep and Ruhl that this change of course "will be a late rejection of the road we were on with Northwest Bank", and also that time was of the essence in securing financing from another lender as "[w]e will not be able to hold off of Northwest for too long before we jeopardize our position." (App. 405)

On January 8, 2016, Ruhl sent an email to Slavens referencing a proposal from Estep, which he described as having "a lot of merit". (App. 389). He also stated that "[w]e are negotiating a couple of points" and "[w]e should have a direction on Monday."[3] (App. 389). However, Slavens was unaware that Estep's proposal included

[3] Needless to say, no direction was provided as represented.

throwing the Bank off the deal, as Carroll and Ruhl informed him that Estep's only role was to find a new tax credit investor to replace Bankers Trust. (App. 575–76 [100:3–101:5]).

After weeks of sharing very little to nothing with the Bank (and while receiving a financing proposal from at least one other lender (App. 409–411), Carroll, Ruhl, and Estep met with Slavens on February 19, 2016, ostensibly to discuss information about a new tax credit investor. (App. 578–79 [105:1–106:6]; App. 390–91). Slavens urged Estep to step into the shoes of the prior tax credit investor, Bankers Trust, and utilize their counsel and work product to-date. (App. 579–80 [106:7–107:12]; App. 393). He also requested information regarding the new proposed tax credit investor to ensure it had the means to provide the financing. (App. 393). This information, however, was never provided.[4]

[4] In the interim weeks before the meeting, Carroll expressed concern in an email to Ruhl that Slavens was calling other partners "wanting to know about Pershing financing". (App. 408). Further, on February 4, 2016, Carroll circulated an internal comparison of the

Slavens followed up with Carroll, Ruhl, and Estep on March 2, 2016 asking when the requested information would be provided. (App. 393). Carroll responded on March 3, 2016, advising: "I will get with Sam to get that to you ASAP." (App. 395–96). After again receiving no additional response, Slavens emailed another member of Pershing Hills, Matt Slavens ("Matt"),[5] on March 10, 2016, asking whether Defendants were "looking to replace us", and asking whether he had "been asked to provide financial information to any other lenders?". (App. 396–97). In response, Matt called Slavens and advised that "he had indeed been asked to provide financial information to another financial institution." (App. 397).

That same day, Slavens sent an email to Carroll and Ruhl requesting that they "cease pursuing other lenders and provide the reasonably requested due diligence materials as soon as possible."

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deal proposed by the Bank v. a deal proposed by another lender, Dubuque Bank & Trust. (App. 409–411).

[5] Joe Slavens and Matt Slavens are cousins.

(App. 397). Based on the parties' prior dealing, and Defendants' representations, Slavens believed that Defendants were working exclusively with the Bank on their financing for the deal. (App. 581–82 [114:23–115:3]). Ruhl responded to Slavens later that day and requested the parties meet to discuss the issue, to which Slavens agree. (App. 412–14). Notably, *nowhere* did Defendants take issue with Slavens' stated understanding of exclusivity.[6]

The following day, Slavens met with Ruhl and Matt at the Bank's offices. (App. 584–86 [118:16–120:19]). Ruhl informed Slavens that Defendants were, in fact, having discussions with other lenders. However, he told Slavens "that they were only having these

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[6] The district court required the Bank to redact the middle paragraph from what became Exhibit 48, which provided:

> I would respectfully remind you that the LOI you signed provides in part that "Acceptance below assures Lender of Borrower's exclusive consideration as "Lender" in exchange for the expense in time and travel of the proposed due diligence. In full disclosure, Matt indicated to me that he was not previously aware of this obligation.

(App. 443).

discussions as a backup plan in the event we were not able to do the deal, to fund the loan." (App. 586 [120:11–120:22]). Again, based on the parties' prior dealing, and Defendants' representations, Slavens understood it "was our deal to lose, that we were the primary party that they were going to deal with and that they were only speaking with other lenders in the event we could not do the deal." (App. 587 [121:1–121:9]). Following this meeting, Ruhl sent an email to Estep confirming this communication, and also expressly stating that "*Joe feels we have a commitment to work with him*." (App. 415 (emphasis added)).

On March 25, 2016, still not receiving any due diligence information from Eslep, Slavens emailed Defendants stating:

> I remain perplexed why we have yet to receive the due diligence materials offered at our meeting last month. Can you shed any light on this?

(App. 398). Carroll responded stating that he would "emphasize to Sam that he needs to send that to you pronto!" (App. 398). However, by this time, a deal with another lender was all but done. Indeed, on

March 28, 2016, Carroll advised Ruhl that a loan commitment had been secured with another lender—Bank of Springfield. (App. 417). Ruhl responded: "We need to communicate with Slavens or he will get goosey again." (App. 417).

By April 11, 2016, however, Defendants continued to string the Bank along. They had provided no additional communication, nor had any additional due diligence material been provided to Slavens. This prompted another, understandable email from Slavens to Defendants asking: "Where are we heading with this?". (App. 399). Less than one hour later, Carroll emailed Estep stating: "Can you send Joe Slavens some due diligence items so he gets off our back please." (App. 419). Eslep finally sent Slavens an email on April 12, 2016, however, he did not respond to the multiple previous inquiries made by the Bank. (App. 401–02; App. 589–90 [128:4–129:23]).

F. After representing that the Bank was the lender on the Project for months, Defendants entered into a loan agreement with another lender.

Defendants agreed to financing terms with the Bank of Springfield in late April/early May 2016. (App. 630 [209:7–209:25]). An agreement was executed, and the transaction closed in late August 2016. (Id.). When this agreement with the new lender was in place, Carroll emailed Matt Slavens stating:

> Matt, please don't share with Joe. After we meet, John and I, and you if you want as well, will go meet with Joe to smooth things over.
> As I detailed, this is the (much) better deal.

(App. 420). Matt responded by requesting that Defendants give "give [the Bank] 24hrs to match". (App. 420). This, however, never took place. (App. 627 [188:8–188:10]). Instead, Carroll notified Slavens that another lender has been identified, and the Bank was out. (App. 589–90 [128:4–129:23]). As it turns out, just as the parties expected, Defendants *were* awarded the Grayfield Tax Credit in the fall 2016; albeit, in an amount lesser than applied for and expected. (App. 635 [233:1–233:11]).

ARGUMENT

I. The district court erred in granting summary judgment in Pershing Hill's favor on the Bank's breach of contract claim

A. Preservation of Error.

The Bank preserved error by resisting Pershing Hills' motion for summary judgment. *See Frasier v. State*, No. 12-1957, 2014 WL 69671, at *1 (Iowa Ct. App. 2014) ("Frasier's resistance to the motion for summary judgment preserved all errors in the district court ruling."). The Bank also filed a motion to reconsider, enlarge, or amend the district court's ruling, pursuant to Iowa Rule of Civil Procedure 1.904(2), (App. 248–59), which was denied. (App. 259–60).

B. Standard of Review.

Appellate courts review a district court's grant of summary judgment for corrections of errors at law. *DeSousa v. Iowa Realty Co.*, 975 N.W.2d 416 (Iowa 2022). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). "On motion for summary judgment, the court must: (1) view the facts

in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record." *Morris v. Legends Fieldhouse Bar & Grill, LLC*, 958 N.W.2d 817, 821 (Iowa 2021) (quotation omitted). "Interpretation of a contract is a legal issue unless the interpretation of the contract depends on extrinsic evidence." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008).

C. Argument.

In its ruling, the district court first rejected the Bank's interpretation of the Exclusivity Clause as a binding contractual term, and ultimately held the Grayfield Tax Credit was "in fact a condition precedent to the other terms of the Financing Proposal." (App. 245). As the Grayfield Tax Credit was not awarded to Pershing Hill in the fall 2015 cycle, the district court concluded that "no valid contract existed at the time Defendants walked away from negotiations." (App. 246). The district court's ruling was erroneous for several reasons.

1. The district court erred in holding that "no valid contract" existed.

"Conditions precedent are those facts and events, occurring subsequent to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, and before the usual judicial remedies are available." *Khabbaz v. Swartz,* 319 N.W.2d 279, 283 (Iowa 1982). Thus, "[t]he insertion of a condition precedent in a contract *does not render the same void* but only delays the enforceability of the contract until the condition precedent has taken place." *H.L. Munn Lumber Co. v. City of Ames*, 176 N.W.2d 813, 816 (Iowa 1970) (emphasis added). The district court overlooked the distinction between the *formation* and *enforceability* of a contract. *See, e.g., Niday v. Roehl Transport, Inc.*, No. 18-0712, 2019 WL 1486603, *9 (Iowa Ct. App. 2019) (recognizing the difference in analysis). As a result, the district court erred in holding that "no valid contract existed".

2. The district court erred in holding that the Bank's proposed interpretation of the Financing Agreement's "Exclusivity Clause" is not reasonably possible.

The contractual duty at issue here is Pershing Hill's agreement in the Exclusivity Clause to give the Bank "exclusive consideration" as lender on the Project:

> Acceptance below assures Lender of Borrower's exclusive consideration as "Lender" in exchange for the expense, time and travel of the proposed due diligence. This Summary of Principle Terms will expire if not signed by September 4, 2015.

(App. 425). The Bank's interpretation of this language is simple and straight-forward, and comports with the plain language of the contract: Pershing Hill was contractually bound to give the Bank "exclusive consideration" as lender on the Project, in exchange for its time and expense of the proposed due diligence. The district court confused the enforceable contract created by the Exclusivity Clause with a hypothetical future agreement on the final financial terms for the Project, if the Project were to proceed.

The hallmarks of contract formation are an offer, acceptance and consideration. *See, e.g.*, *Taggart v. Drake Univ.*, 549 N.W.2d 796, 800 (Iowa 1996). Whether there is an offer is based on "whether [the words or conduct] induce[] a reasonable belief in the recipient that he can, by accepting, bind the seller." *Rucker v. Taylor*, 828 N.W.2d 595, 602 (Iowa 2013) (*quotation omitted*). Consideration exists when any bargained-for performance occurs and such performance was "sought by the promisor in exchange for his or her promise and is given by the promisee in exchange for that promise." *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). "Either a benefit to a promisor or a detriment to a promisee constitutes consideration." *Doggett v. Heritage Concepts, Inc.*, 298 N.W.2d 310, 311 (Iowa 1980). "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." *Pillsbury Co.*, 752 N.W.2d at 436.

The Exclusivity Clause was an offer from the Bank that invited Pershing Hill's acceptance. By executing the Financing Agreement,

Pershing Hill accepted the Bank's bargained-for performance of conducting due diligence and proceeding with the Project, in exchange for the detriment to the Bank of its time and expenses. (App. 425). The district court erred in finding that "the Exclusivity Clause places a burden only on Defendants," when the Bank was clearly burdened by having to conduct due diligence at its own expense. (App. 424). Indeed, the Exclusivity Clause did not "place[] one party at the mercy of another," as the district court held. Rather, it guaranteed the Bank would serve as exclusive lender, binding *both* the Bank and Pershing Hill to proceed with the deal.

Ultimately, the district court concluded that the Bank's interpretation of the contract was not "reasonably possible", implicitly finding no ambiguity. (App. 241). *See Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001) (the first step of contract interpretation requires the court to determine "what meanings are reasonably possible"). It held that "[t]he implication of Plaintiff's argument is that the Exclusivity Clause is the only binding term in the entire

Financing Proposal." (App. 242). Respectfully, this was based on a misunderstanding of the Bank's argument regarding the "fluidity" of the financial terms of the Financing Agreement as a whole.

First, the district court confused the contract created the Exclusivity Clause with a hypothetical future agreement on the final terms of the financing of the Project. Indeed, when the Financing Agreement was executed, it was not certain the Project would even proceed. (App. 421 ("The Borrower is proposing to rehabilitate, redevelop, and operate . . . buildings known as the Lofts at Pershing Hill").

Second, the district court misunderstood the Bank's arguments relating to the "fluidity" of the financing terms, given the uncertain nature of the Project and the multiple potential sources of funding. The district court found that if the loan terms were fluid "then so was every other term" of the contract, including the Exclusivity Clause. (App. 242–43 (holding that if every other term of the Financing Agreement is fluid, then "the Exclusivity Clause is merely an

agreement to negotiate further terms in good faith."). However, this analysis improperly conflated the contract created by the Exclusivity Clause with the final financing terms if the Project proceeded.

The terms of the Exclusivity Clause are *not* "fluid," as they expressly require Pershing Hill to give the Bank "exclusive consideration" as lender on the Project. These types of "exclusive lender" arrangement are common, provide benefits to both parties, and are commonly upheld as an enforceable contract, even within the context of a term sheet or financing proposal. *See, e.g., Duran v. Marathon Asset Mgmt.*, No. 13-CV-403 MCA/KBM, 2014 WL 11429063, at *1–2 (D.N.M. Mar. 31, 2014), *aff'd sub nom. Duran v. Marathon Asset Mgmt., LP*, 621 F. App'x 553 (10th Cir. 2015) (capital emphasis omitted) (enforcing an exclusivity provision even though the underlying document states the term sheet was "prepared for the sole purpose of discussing with the borrower an opportunity to enter into a transaction" and was "not a commitment by Lender to provide any financing.").

That the parties continued to negotiate the ultimate financing of the Project does not negate the contract formed by the Exclusivity Clause when Pershing Hill elected to execute the Financing Agreement. The district court erred in holding that the Bank's proposed interpretation of the Exclusivity Clause is not "reasonably possible". To the contrary, it is supported by the plain language of the Financing Agreement. *See Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) (the words of the contract are "the most important evidence of intention"). As a result, this Court should reverse the district court's summary judgment ruling and remand the Bank's breach of contract claim for trial on the merits.

3. The district court erred in holding that an award of the Grayfield Tax Credit was a condition precedent to Pershing Hill's obligation to give the Bank "exclusive consideration" as lender on the Project.

The district court also erred in finding, as a matter of law, that an award of the Grayfield Tax Credit was a condition precedent on which Pershing Hill's future performance under the Financing

Agreement was premised. That holding was based on a single line item appearing the Financing Agreement, notably under a section entitled "Due Diligence". (App. 245). That provision provides:

> The Lender will need as part of necessary due diligence, and as a condition to making the Interim Loans available, the following, but not limited to:
>
> . . . . . .
>
> (viii) Grayfield Tax Credit award documentation.

(App. 424). The district court inferred that this language required that the Grayfield Tax Credit be *awarded* for Pershing Hill's future performance under the Exclusivity Clause to be due.

However, that is not what the language provides. To the contrary, it requires the provision of due diligence "documentation" regarding the Grayfield Tax Credit award—which by its very terms, may encompass $500,000, $1,000,000, or no award at all. Indeed, the Financing Agreement says nothing about the amount of any award.

Further, disputed language must be interpreted "in the light of all the circumstances", regardless of whether the language is

ambiguous, including "the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." *See Fausel*, 603 N.W.2d at 618 (quoting Restatement (Second) of Contracts § 212, cmt. b). And summary judgment is improper where "reasonable minds can differ on how an issue should be resolved", viewing all facts in the light most favorable to the non-moving party. *Est. of Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 584 (Iowa 2017) (quotation omitted). Here, Pershing Hill's application for the credit was denied during the spring 2015 cycle, so the parties knew its later award was uncertain yet continued to work together on financing the Project. (App. 551–54 [42:15–45:12]). In fact, when the Financing Agreement was executed, Pershing Hill's application was in process, and the parties *did not know* whether or not it would be awarded, or importantly, if it was awarded, in what amount.

Further, the fall 2015 denial of the Grayfield Tax Credit was not, by any means, the end of the story. Even when the credit was denied

(for the second time), there was general agreement amongst the parties that it ultimately be awarded in the next spring cycle—here, spring 2016. (App. 562–63 [73:19–74:19]). And that is *exactly* what actually happened, albeit in a lesser amount and for the benefit of Defendants' new lender. (App. 635 [233:1–233:11]). And finally (and for the reasons already discussed above), as Joe Slavens testified, the Bank never understood or intended that its obligations under the Exclusivity Clause were conditioned on the award of the Grayfield Tax Credit (and, in fact, the Bank continued to perform after the award did not materialize). (App. 85 [¶¶ 8-9]).

At most, the district court's interpretation of this due diligence provision was a "reasonably possible" meaning. The Bank's interpretation—that the parties' obligations under the Exclusivity Clause were not conditioned on any specific award of the Grayfield Tax Credit—is another. Resolution of ambiguous language, when based on extrinsic evidence, "is reserved for the trier of fact." *Walsh*, 622 N.W.2d at 503. For this additional reason, this Court should

reverse the district court's summary judgment ruling and remand the Bank's breach of contract claim for trial on the merits.

II. The district court abused its discretion by excluding the Financing Agreement and any reference to the document or its terms.

A. Preservation of Error.

The Bank preserved error by resisting Defendants' Motion in Limine to exclude any reference, discussion, or other mention of the Financing Agreement. (App. 272–77; App. 482–518]). The district court granted Defendants' motion, ruling that the Financing Agreement and any references thereto are not admissible. (App. 507–08 [27:8–28:8]). The district court's ruling "reache[d] the ultimate issue and declare[d] the evidence admissible or inadmissible", and as a result, it was "a final ruling and need not be questioned again during trial." *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979). Further, the Bank filed a timely motion for new trial based on the district court's evidentiary ruling on August 5, 2022, (App. 314–322),

which was denied on October 24, 2022 by written ruling. (App. 323–326).

B. Standard of Review.

The Court reviews evidentiary issues for an abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535 (Iowa 2018). "A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable." *Id.* (citations omitted). A ground is unreasonable or untenable when it is 'based on an erroneous application of the law.' *Id.* (citations omitted). Reversal is required for the erroneous admission or exclusion of evidence if prejudice results. *State v. Rodriquez*, 636 N.W.2d 234, 244 (Iowa 2001); *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008).

C. The Financing Agreement and its terms are relevant to the Bank's fraudulent misrepresentation claim.

The district court dismissed the Bank's breach of contract claim on September 27, 2018, and granted summary judgment in favor of Pershing Hills. (App. 236–247). When the Bank's fraudulent misrepresentation claim proceeded to trial, however, the district

court excluded *any* reference to the Financing Agreement and its terms. Rather than accept the Bank's stipulation that the Financing Agreement is *not* a contract, and instruct the jury accordingly, the district court made the document and its terms off-limit for the jury—effectively ruling that it never happened. This was error. The Financing Agreement—whether a contract of not—was highly probative on the issue of the Bank's reliance on Defendants' representations, and whether that reliance was justifiable.[7]

1. Fraudulent misrepresentation requires proof of justifiable reliance.

Justifiable reliance is an essential element of a claim for any claim of fraud. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 736 (Iowa 2009). "Thus, the plaintiff must not only act in reliance on the misrepresentation, but the reliance must be justified." *Id.* (quotation omitted). As this requirement states, reliance must be "justified, not

[7] In fact, the Financing Agreement was so significant to the issues in this case that the district court, on the first date of trial, required the Bank to redact *any* reference to the Financing Agreement and/or "exclusivity" from numerous trial exhibits. (App. 507–08 [27:8–28:8]).

reasonable." *Id.* Such reliance "does not necessarily need to conform to the standard of a reasonably prudent person, but depends on the qualities and characteristics of the particular plaintiff and the specific surrounding circumstances." *Id.* (noting that as an intentional tort, recovery for fraudulent misrepresentation "is not necessarily barred by the fault of the plaintiff that contributed to the damage.").

Here, the elements of the Bank's fraudulent misrepresentation claim were set forth in Jury Instruction No. 16. To prevail, the Bank was required to prove, among other elements, that it "acted in reliance on the truth of the false representation(s) and was/were justified in relying on the representation(s)." (App. __; Jury Instruction No. 16). Further, concerning reliance, the jury was instructed:

> Concerning proposition No. 6 of Instruction No. 16, the plaintiff must rely on the representation and the reliance must be justified.
>
> It is not necessary that the representation be the only reason for the plaintiff's action. It is enough if the representation was a substantial factor in bringing about the action.

> Whether reliance is justified depends on what the plaintiff can reasonably be expected to do in light of their own information and intelligence. Reliance is not justified if the representation is of an unimportant fact or is obviously false. A person is not justified in relying on puffing, sales talk, or other general opinion.

(App. __ [Jury Instruction No. 23]).

2. Justifiable reliance requires consideration of the entire context of the transaction between the Parties, of which the Financing Agreement was a material part.

The three representations at issue are as follows, as set forth in the district court's jury instructions:

> 1. That either John Ruhl, John Carroll or both, between December 11, 2015 through April of 2016, made one or more of the following representations:
>
> (a) That defendants recognized Plaintiffs status as lender on the Project.
> (b) That the defendants' communications with other lenders were only for back up purposes.
> (c) The defendants misrepresented the role of Sam Estep.

(App. __ [Jury Instruction No. 16]). As instructed, a "representation" is "any word or conduct asserting the existence of a fact." (App. __

[Jury Instruction No. 18]). Notwithstanding Defendants' arguments to the contrary, these representations did not occur in a vacuum. Rather, the representations and conduct occurred made over the course of a lengthy history between the Parties, including the 2013 Note, the August 31, 2015 Financing Agreement, and then further discussions about the Project between December 11, 2015 and April 2016.

The Iowa Supreme Court has instructed that "the *entire context of the transaction* is considered to determine if the justifiable-reliance element has been met." *Spreitzer*, 779 N.W.2d at 737 (emphasis added). *See also* Jury Instruction No. 23 ("Whether reliance is justified depends on what the plaintiff can reasonably be expected to do in light of their own information and intelligence."). Indeed, it is the "specific surrounding circumstances" that form the basis of any such evaluation. *Id. See also In Re Carpenter's Estate*, 232 Iowa 919, 5 N.W.2d 175 (1942) (fraud "may be shown by circumstances and legitimate inferences reasonably drawn from surrounding conditions or the

relationship of those involved."). In other words: context matters, context which undisputedly included the Financing Agreement.

3. The Financing Agreement and its terms are relevant evidence demonstrating that the Bank's reliance on Defendants' later representations was justifiable.

The district court apparently believed that once the Bank's breach of contract claim was dismissed, the Financing Agreement and any discussion thereof was irrelevant, and provided no evidentiary support for the Bank's fraudulent misrespresentation claim. Respectfully, the district court's holding was erroneous. That Defendants previously "assure[d] Lender of Borrower's exclusive consideration as 'Lender'" in the Financing Agreement—whether an enforceable contract or not—was inextricably part of the parties' interactions and thus, the "context of the transaction". And it goes directly to a fundamental factual question: Whether the Bank's reliance on Defendants' *later* representations was justifiable—a

central issue at trial.[8] Stated simply, it is only in the context of the Financing Agreement that the Bank's reliance on Defendants' later representations can be understood, or even have any context.

Here, the parties had a lengthy relationship relating to the Project, spanning a period of several years. Following the 2013 Note, the Bank first presented Defendants with a financing proposal for the redevelopment of the Project in July 2014. (App. 476–480). Then in the spring of 2015, Defendants worked with various parties toward a financing package, including the Bank which at that time occupied the role of construction lender. (App. 355–368]). The transaction was unable to close in May 2015—the targeted date—because the Grayfield Tax Credit was not awarded in that spring cycle. (App. 551–54 [42:15–45:17]).

[8] Indeed, absent the Financing Agreement, the district court itself was concerned about whether the Bank's reliance was justifiable as a matter of law. (App. 640–42 [268:11–269:25] (noting denial of directed verdict was an "extremely difficult call to make")).

After the failed 2015 closing, the parties continued to work diligently together to secure the necessary financing for the Project (with the Bank taking on the additional role of bridge loan lender)—ultimately culminating in the Financing Agreement, executed in August 2015. (App. 421–425. That document—whether an enforceable contract or not—included express respresentations by Carroll and Ruhl that the Bank would be given "exclusive consideration as 'Lender'" on the Project. (Id.). This representation—indisputably part of the "context" of the transaction and all of the parties' later dealings—was in the background, and formed the basis for the Bank's expectations going forward.

On December 11, 2015, after learning that the denial of the Grayfield Tax Credit caused concerns to the tax credit investor, Bankers Trust, Slavens sent an email to Ruhl and Carroll outlining options to move forward:

> (i) kill the deal, (ii) raise $160,000 in case per partner or (iii) implement my solution at a cost of about $75,000. I know that is a lot of money, but if I am paid 1/3 at closing, I will defer the other 2/3 until construction is complete.

> Would you like to meet? I think we can fix these things, but it will take my time and partnership money. Either way, it is now obvious there is no way we will close this year. Please let me know.

(App. 378). Defendants were well-aware then, and throughout the upcoming months, that the Bank *believed* it was the lender on the Project. (App. 415 (Ruhl stating: "Joe feels we have a commitment to work with him.")). And that belief was based, in material part, on Defendants' express representations in the Financing Agreement—a fact which the Bank was precluded from presenting to the jury.[9]

Despite being armed with knowledge of the Bank's belief, Defendants did *nothing* to advise the Bank it was incorrect or that their intention was anything other than proceed—as they had for over a year—with the Bank as lender on the Project. The denial of the Grayfield Tax Credit in the fall 2015 cycle was nothing new—it was

[9] That the district court held the award of the Grayfield Tax Credit was a "condition precedent" to the enforceability of the Financing Agreement as a *contract* in September 2018 is irrelevant to whether—between December 2015 and May 2016—the Bank believed it was still the lender on the Project, and whether that belief rendered its reliance on Defendants' later representations justifiable.

also denied in the spring 2015 cycle, yet Defendants continued with the Bank as the lender on the Project. (App. 551–54 [42:15–45:17). Further, there was general agreement amongst the parties that the Grayfield Tax Credit would be awarded in the 2016 spring cycle, (App. 562–63 [73:19–74;19]), which it ultimately was, although for less than requested. (App. 635 [233:1–233:11]). At no point did Defendants, or anyone else, inform the Bank that they were "killing the deal". (App. 572 [93:2–93:5; App. 621 [132:14–132:6]). And at no point, until Slavens grew concerned and inquired, did Defendants inform the Bank that they were actively pursuing other lenders (and even then, as discussed below, Defendants described these other lenders as "backups"). To the contrary, Defendants continued to communicate and meet with Slavens in the same manner as before—under the guise of ironing out details and closing the deal.

Indeed, on December 8, 2015, Carroll implored Pershing Hill's partners to provide Slavens with necessary due diligent information as: "If we do not get this ASAP, we will not make our 12/23 closing."

(App. 379). Then, throughout January and February, Defendants blatantly misled the Bank into believing that Sam Estep was helping the resolve the tax credit investor issue, never informing the Bank that Estep was, in fact, pursuing other lenders to removed the Bank from the deal altogether. In fact, while telling Slavens things like "[w]e are negotiating a couple of points" and Estep's proposal has "a lot of merit", Defendants were privately discussing ways to "shitcan" the Bank and find a better deal. (App. 224).

On March 11, 2016, Ruhl finally informed Slavens that they were having discussions with other lenders. (App. 584–86 [118:20–120:16]). However, even then he told Slavens "that they were only having these discussions as a backup plan in the event we [the Bank] were not able to do the deal, to fund the loan." (App. 586 [120:11–16]). After that meeting, Ruhl sent an email to Carroll and Estep in which he expressly acknowledged that Slavens "feels like we have a commitment to work with him". (App. 415). Yet at no point, either before or after this meeting, did Defendants inform the Bank its belief

that it was the lender on the Project was mistaken. Even after securing a new financing deal with another lender, Defendants continued to respond to the Bank's inquiries about status and requested diligence information as though nothing had changed—instead responding only to avoid Slavens getting "goosey again", and to get him "off our back". (App. 417; App. 419). To the contrary, in their internal communications discussing ways to "shitcan" the Bank, Defendants were careful to keep their true intentions secret from the Bank. (*See* App. 404 ("Obviously keep this between us.")).

The district court's ruling excluding the Financing Agreement, and any reference to the document or its terms, put the Bank in an impossible position. The Bank had to prove it justifiably relied on Defendants' representations (a) that they recognized Plaintiffs status as lender on the Project; (b) that their communications with other lenders were only for back up purposes; and/or (c) that Defendants' misrepresented the role of Sam Estep. (App. 294 [Jury Instruction No. 16]). Absent evidence of the Financing Agreement and its

terms—which along with the parties' course of dealing formed the *very basis* of the Bank's belief that it was the lender on the Project—the jury had no real basis to conclude that the Bank could have justifiably relied on the various representations made by Defendants between December 2015 and May 2016.

One of the final series of questions Defendants' counsel was able to ask Slavens in cross-examination illustrates the problem:

> Q. Okay. Well, that -- we'll talk about that more later too. But for now, you would agree with me that it is a risk that sometimes you work on a loan and a loan doesn't happen; isn't that right?
> A. That's correct.
>
> Q. That's just part of the banking business?
> A. It occurs.
>
> Q. All right. And you would agree with me that customers have the right to shop loans?
> A. Generally speaking, customers have the right to shop loans.

(App. 605–06 [17:21–18:6]). Slavens' responses were, of course, true as far as they go. However, they were woefully incomplete as a result of the district court's ruling. He was not permitted to explain

to the jury why, in this case, the Bank *justifiably* relied on the Defendants' respresentations—*i.e.* because the Financing Agreement provided that the Bank would be given "exclusive consideration" as the lender on the Project.[10]

The rules of evidence favor the admissibility of relevant evidence. *See Williams v. Hedican*, 561 N.W.2d 817, 832 (Iowa 1997) ("Rule [5.403] allows the trier of fact to exclude *relevant* evidence. Because it does so, courts should apply the rule sparingly."). The standard for relevance is broad—evidence is relevant if "it has any tendency to make a fact more or less probable than it would be

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[10] And because of the district court's ruling, during closing argument, Defendants' counsel was able to mislead the jury by stating:

> This was Northwest Bank's potential deal to lose, and they lost it. There was no deal. There was no agreement. There were no signed documents. There weren't even documents from Northwest Bank to say, these are the terms to borrow $13 million, do you agree? Because they hadn't agreed.

(App. 643–44 [331:16–332:1]).

without the evidence; and [t]he fact is of consequence in determining the action." Iowa R. Evid. 5.401. The probative value of relevant evidence "focuses on the strength and force of the tendency of the evidence to make a consequential fact more or less probable." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) (quotation omitted). The Financing Agreement and reference to the document or its terms was relevant and highly probative to the Bank's claim, and the district court abused its discretion by excluding such evidence from consideration by the jury. Iowa R. Evid. 5.401–5.402.

4. To the extent the district court excluded the Financing Agreement and any reference to the document or its terms pursuant to Iowa Rule of Evidence 5.403, its ruling was an abuse of discretion.

In its pretrial ruling excluding the Financing Agreement and any reference to the document or its terms, the district court also discussed potential prejudice to Defendants:

> In addition, I would tend to agree that if you bring in this letter of intent, which the Court has already ruled is not a contract, it is going to prejudice the jury, because the jury is going to think that this was an active agreement and

> the Court has already ruled it was not as soon as the condition precedent was not fulfilled.

(App. 499 [19:14–19:20]). Respectfully, any determination that the excluded evidence would unfairly prejudice the jury was an abuse of discretion.

Iowa Rule of Evidence 5.403 permits a district court to "exclude relevant evidence if its probative value is *substantially outweighed* by a danger of one or more of the following: *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa R. Evid. 5.403 (emphasis added). Thus, the inquiry under 5.403 requires a determination of both the probative value of the disputed evidence and that its introduction would result in prejudice that is *unfair* to the other party.

For the reasons discussed above, the probative value of the disputed evidence was high—and in fact, crucial—to the Bank's claim. As it relates to unfair prejudice, the district court's concern that "the jury is going to think that this was an active agreement and

the Court has already ruled it was not" was, respectfully, unfounded. (App. 499 [19:14–19:20]).

First, the jury instructions were clear that the alleged misrepresentations at issue took place between December 11, 2015 and May 2016, and did not include any representations made in the Financing Agreement. (App. 294). Second, although unnecessary, the Bank offered to stipulate that the Financing Agreement was *not* a contract, and made clear that it would not present evidence, argument, or suggestion to the contrary. (App. 497–98 [17:4–18:7]). *See, e.g., State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017) ("Iowa law permits—but does not require—cautionary instructions that mitigate the danger of unfair prejudice."). To the extent evidence of the Financing Agreement and any reference to the document or its terms was somehow *unfairly* prejudicial to Defendants, that could have been easily remedied with a stipulation or appropriate jury

instruction.[11] The district court abused its discretion by excluding this evidence from consideration by the jury. Iowa R. Evid. 5.401–5.403.

D. A new trial is warranted.

Reversal based on evidentiary ruling is warranted when "a substantial right of the party is affected." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000). Here, the excluded evidence was highly probative and not unfairly prejudicial to Defendants. The Bank's inability to prove its reliance on Defendants' representations was justifiable using this excluded evidence affected its substantial rights. As a result, the Court should reverse the judgment of the district, and remand this case to the district court for a new trial.

[11] In point of fact, the only unfair prejudice was to the Bank. Not only was evidence of highly probative value excluded to the extreme prejudice of the Bank, the logistics imposed by the Court requiring redaction of all documents and exhibits which referenced the Financing Agreement, contract or exclusivity, was extremely prejudicial to the Bank in prosecuting its case.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the district court entered in favor of Appellees John Carroll and John Ruhl, and remand this case to the district court for a new trial.

Dated: June 11, 2023

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Comes now Appellant, by and through the undersigned attorneys, and requests oral argument pursuant to Iowa Appellate Rule 6.903(2)(i).

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Appellant's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on June 11, 2023:

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