

IN THE SUPREME COURT OF IOWA

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NO. 22-1941

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NORTHWEST BANK & TRUST COMPANY  
Plaintiff/Appellant

v.

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

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APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT  
COUNTY

CASE NUMBER: LACE128234

THE HONORABLE MEGHAN CORBIN  
THE HONORABLE TOM REIDEL

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APPELLANT'S FINAL REPLY

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Dated: June 11, 2023

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## STATEMENT OF THE ISSUES

### **I. Whether the district court erred in granting summary judgment in Pershing Hill’s favor on the Bank’s breach of contract claim**

#### Cases

<i>Fausel v. JRJ Enters., Inc.</i> , 603 N.W.2d 612 (Iowa 1999) . . . . .	14
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### **II. Whether the district court abused its discretion in by excluding the Financing Agreement and any reference to the document or its terms.**

#### Cases

<i>Pexa v. Auto Owners Ins. Co.</i> , 686 N.W.2d 150 (Iowa 2004). . . . .	14
<i>State v. Hanes</i> , 790 N.W.2d 545 (Iowa 2010). . . . .	14
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## **INTRODUCTION**

The Bank's initial brief in this matter was comprehensive, and with this Reply, the Bank will focus on the most salient points of disagreement between the parties.

## **ARGUMENT**

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

#### **A. The Financing Agreement's "Exclusivity Clause" created a binding contract between the Parties.**

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). Thus, all the elements of contract formation are present.

*See, e.g., Taggart v. Drake Univ.*, 549 N.W.2d 796, 800 (Iowa 1996).

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. (App. 425). 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. 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.

**B. An actual award of the Grayfield Tax Credit was not a condition precedent to Pershing Hill's obligation to give the Bank "exclusive consideration" as lender on the Project.**

Contrary to Pershing Hills argument (and as held by the district court), the Financing Agreement did not state that "Pershing Hill would have to obtain the Grayfield Tax Credit award" in order for the proposed financing to proceed. (Appellees' Br. at 20). 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. The Financing Agreement says nothing about the amount of any award.

The Grayfield Tax Credit provision 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 v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) (quoting Restatement (Second) of Contracts § 212, cmt. b). “A determination that a condition precedent exists depends not on the particular form of words used, but upon the intention of the parties gathered from the language of the entire instrument.” *Mosebach v. Blythe*, 282 N.W.2d 755, 759 (Iowa Ct. App. 1979).

As set forth in the Bank’s initial brief, the issue of whether an actual award of the Grayfield Tax Credit was intended to be a condition precedent to Pershing Hill’s continued performance under the Exclusivity Clause is, at best, ambiguous. Indeed, this tax credit had already been denied once before, during the Spring 2015 cycle, and—as the parties anticipated—was ultimately awarded during the



2016 cycle, albeit for a much lesser amount. (App. 562–63 [73:19–74:19]; App. 635 [233:1–233:11]). As a result, that issue “is reserved for the trier of fact.” *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). The district court erred in holding that an award of the Grayfield tax credit was a condition precedent that vitiated the contract.

**C. The hypothetical questions posed by Pershing Hill are not relevant to the issues before the Court.**

In its brief, Pershing Hill criticizes the Bank by raising several hypothetical questions:

- (1) How long does the exclusivity run?
- (2) Is Pershing Hill bound to accept any changes to the financing proposed by Bank no matter the cost?
- (3) Are there any limitations on the cost of the financing that Bank will provide or the fees and interest it will charge?

(Appellees’ Br. at 18). The only marginally relevant question is the first one; however, that was not an issue before the district court.

Rather, the only issue presented was whether the contract created by

the Exclusivity Clause was vitiated when the Grayfield Tax Credit was not awarded in the Fall 2015 cycle.<sup>1</sup> As discussed above, that question required resolution by the factfinder.

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. The Financing Agreement, its terms, and the circumstances surrounding its execution were relevant regardless of whether it was an enforceable contract.**

Defendants argue—correctly—that “[e]xclusivity was not required to be proven” under the district court’s marshalling

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<sup>1</sup> In fact, as set forth in the Bank’s initial brief, the parties continued to work together after the Grayfield Tax credit was denied in the Fall 2015, and there was general agreement amongst the parties that it would ultimately be awarded in the next cycle. (App. 562–63 [73:19–74:19]). And as it turns out, just as the parties expected, Defendants were awarded the Grayfield Tax Credit in the 2016; albeit, in an amount lesser than applied for and expected. (App. 635 [233:1–233:11]).

instruction. They also argue—correctly—that any representations made in the Financing Agreement were not those at issue in the district court’s marshalling instruction. These arguments, however, attack a straw man. The Financing Agreement, its terms, and the circumstances surrounding its execution were relevant to the Bank’s reliance on the later representations that were at issue in the district court’s marshalling instructions, and whether such reliance was justifiable. Nowhere did the Bank argue or suggest that the misrepresentations at issue in this lawsuit came from the Financing Agreement, or that the “exclusivity” contemplated therein was actionable.

It is context that matters in determining whether reliance was justifiable. See *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 737 (Iowa 2009) (“the entire context of the transaction is considered to determine if the justifiable-reliance element has been met.”). Here, that context undisputedly included the Financing Agreement—which was the material evidence upon which the Bank’s reliance on

Defendants' later representations was based, and which respectfully, the district court erred in excluding. That Defendants had expressly "assured" the Bank its "exclusive consideration" as the Project's lender, (App. 425 ), is a fact "of consequence" that makes it "more probable" that the Bank's reliance on Defendants' later representations—those set forth in the marshalling instruction—was justified. Iowa R. Evid. 5.401.

**B. Evidence of the Financing Agreement, its terms, and the circumstances surrounding its execution would not have allowed the Bank to "enforce a proposal that had already been found to be unenforceable".**

Claiming evidence of the Financing Agreement, its terms, and the circumstances surrounding its execution would have result in unfair prejudice, Defendants again attack a straw man:

If the District Court would have allowed such a document to be presented to the jury, it would have necessitated a "trial within a trial". Bank would have argued reliance on a contract and Pershing Hill would have been forced to present evidence why the Financing Proposal was not enforceable as a contract. This would have required the trial of an issue that had already been decided on summary judgment, thus, removing the entire

purpose of summary judgment—and avoiding unnecessary trials.

(Appellees’ Br. at 29). The problem with this argument is that it is simply wrong.

The Bank would not—and could not—have argued that the Financing Agreement was a contract (whether enforceable or not). Defendants would not have been required to present evidence why it “was not enforceable as a contract”, and there would have been no “trial within a trial”. That is because—as Defendants recognize—that issue had already been decided by the district court. The Bank made clear it would not present evidence, argument, or suggestion to the contrary, and in fact, agreed to enter a stipulation that the Financing Agreement was not a contract. (App. 497–98 [17:4–18:7]).

Further, the district court’s marshalling instruction was 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).

Courts presume that the jury will follow its instructions, and any

potential prejudice can be mitigated with a limiting instruction. *See, e.g., State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010).

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

The trial court has discretion to exclude relevant evidence when “its probative value is substantially outweighed by the danger of *unfair* prejudice.” *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158–59 (Iowa 2004) (emphasis in original). “Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis, often an emotional one.” *Id.* (quotation omitted). “The adverse effect of relevant evidence due to its probative value is not unfair prejudice.” *Id.* (citation omitted) (emphasis added). While the district court’s discretion is broad, it is not unbounded.

The district court—like Defendants—appeared to believe that the jury was not capable of considering the Financing Agreement, its terms, and the circumstances surrounding its execution without concluding the document was an “active agreement”. (App. 499

[19:8–19:20])). This, despite the fact there would be no evidence, argument, or suggestion to that effect, the Bank’s proffered stipulation, and the clear marshalling instruction to the contrary. Respectfully, the district court erred in finding this evidence may prompt to the jury to make its decision on an improper basis. The Financing Agreement and reference to the document or its terms was relevant and highly probative to the Bank’s claims, and the district court abused its discretion by excluding such evidence from consideration by the jury. *See* Iowa R. Evid. 5.401–5.402.

**D. The district court’s exclusion of the Financing Agreement and any reference to the document or its terms affected the Bank’s substantial rights.**

Defendants argue that exclusion of the disputed evidence did not affect the Bank’s substantial rights because it was cumulative. *See, e.g., State v. Skahill*, 966 N.W.2d 1, 15 (Iowa 2021) (prejudice can be overcome by showing the disputed evidence was merely cumulative). This, according to Defendants, is because the Bank because it presented other evidence “to establish Bank had a

relationship with Pershing Hill and believed Pershing Hill was exclusively dealing with Bank.” (Appellees’ Br. at 30). The evidence cited by Defendants, however, is almost exclusively Joe Slavens’ testimony about his belief that the Bank was the Project’s exclusive lender. Such testimony says nothing about why Slavens had that belief in the first place, and why—when the Defendants made later representations—the Bank’s reliance on those representations was justifiable. The excluded evidence was highly probative and not unfairly prejudicial to Defendants. To the contrary, the prejudice was to the Bank. Again, the Financing Agreement was material and, in fact, essential for the Bank to show that its reliance on Defendants’ representations was justifiable. The district court’s improper exclusion of this evidence affected the Bank’s substantial rights.

### **CONCLUSION**

Appellant respectfully requests that this Court reverse the judgment of the district court entered in favor of Appellees Pershing



Hill, 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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**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies a copy of this Reply Proof 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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