IN THE SUPREME COURT OF IOWA

No. 22-1941

NORTHWEST BANK & TRUST COMPANY,
Plaintiff-Appellant,

vs.

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

BRIEF OF DEFENDANTS-APPELLEES

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY, No. LACE128234

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I. ROUTING STATEMENT

Defendants-Appellees agree that transfer to the Court of Appeals is appropriate. The issues raised in this case involve the application of existing legal principles and are appropriate for summary disposition. *See* Iowa R. App. P. 6.1101(3)(a), (b).

II. STATEMENT OF THE CASE

Defendants-Appellees agree with Plaintiff-Appellant's summary of the proceedings.

III. STATEMENT OF THE FACTS

On February 10, 2012, Pershing Hill Lofts, LLC ("Pershing Hill") purchased a building and parking lot located at 511 Pershing Avenue, Davenport, Iowa, with the intention of redeveloping it as apartments (the "Project"). APP 542 (21:14-16), 618 (119:11-13). To assist with the financing of the Project, Pershing Hill applied for several tax credits, including the Iowa Grayfield tax credit.[1] APP 551 (42:20-23).

On or about August 31, 2015, Northwest Bank and Trust Company ("Bank") and Pershing Hill signed a "Financing Proposal" to finance the Project. APP 421-25 (Plaintiff-Appellant's Proposed Exhibit 1 – Proposed

[1] Grayfield tax credits apply to those projects involving "development in areas that are dilapidated and gray." APP 554 (45:7-9).

Financing for Pershing Hill Lofts, LLC Summary of Principal Terms August 31, 2015 – "Proposed Exhibit 1"). The Financing Proposal was drafted solely by Bank and signed by Joe Slavens ("Slavens") as President of Bank, and by John Carroll ("Carroll") and John Ruhl ("Ruhl") as Managers of Pershing Hill. APP 425 (Proposed Exhibit 1).

The Financing Proposal read as follows:

> This is a summary of terms that may lead to a commitment to lend, subject to satisfactory completion of due diligence and a subsequent Commitment Letter. 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 Principal Terms will expire if not signed by September 4, 2015.

APP 425 (Proposed Exhibit 1).

The Financing Proposal and the Bank's obligation to loan money to Pershing Hill were expressly conditioned upon Pershing Hill receiving the Grayfield tax credits in the amount of $800,000:

> 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:
> . . .
> (vii) Grayfield Tax Credit award documentation;

APP 424 (Proposed Exhibit 1).

Through no fault of Pershing Hill, it did not receive the Grayfield tax credits, resulting in a funding gap of $800,000. APP 551 (42:20-25), 556

(63:21-23), 617 (115:2-3); APP 369 (email). Without the Grayfield tax credits, Carroll and Ruhl were notified that one of Bank's participants in the proposed loan, Bankers Trust, required additional equity in the Project equal to the Grayfield tax credits (an additional $800,000). APP 569-60 (82:18-83:6); APP 378, 379-82 (emails).

On or about December 11, 2015, Slavens sent an email to Pershing Hill to address the funding gap. APP 378. The email stated, in part, as follows:

> Without the Grayfield credits, Banker's [Trust] wants $800,000 more in equity. I have devised a plan to alter the current structure so as not to require this equity up front, but it costs Northwest Bank significant dollars. Moreover, it encompasses substantially more work for me. Assuming we can resolve the first three issues, this issue alone presents three options (1) kill the deal, (ii) raise $160,000 cash 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 completed.
>
> 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.

Id. Bank requested additional funding but Carroll and Ruhl never agreed to provide such funding. APP 594 (168:15-18).

Slavens testified his reference to "kill the deal" meant that Pershing Hill would not pursue their development project at all and, instead, would sell the building. Plaintiff-Appellant's Proof Brief p. 18 (citing APP 570); APP 570

(83:10-14) (noting "kill the deal" means the project is abandoned by Pershing Hill Lofts). Slavens also testified that he acknowledged Pershing Hill was not "going to kill the deal;" Pershing Hill "wanted it done." APP 588 (122:13-15).

Carroll viewed the email as an "ultimatum," that unless Pershing Hill accepted the terms and paid $800,000 in cash for collateral and a $75,000 personal fee to Slavens, the Bank would "pull out" of the deal/"kill the deal." APP 619-20 (125:23-126:10), 621 (132:20-22) (Carroll testified he perceived the language as that Bank "was going to kill the deal if [Pershing Hill] did not meet their new loan terms"); APP 628 (193:19-24), 629 (196:11-17) (Carroll felt "pressured" and "coerced," that Bank was going to pull out of the deal if Pershing Hill did not agree to the new terms within a 72 hour window); *see also* APP 633 (219:23) (Ruhl testified the bank "kill[ed] the deal"). It was apparent to Pershing Hill that the "deal" to be "killed" was the Financing Proposal.

On December 15, 2015, Pershing Hill sent an email to Jim Beal (Pershing Hill's accountant) instructing him to begin looking for an alternative lender to fund the Project. APP 404; APP 625 (161:20-22). Slavens testified he was concerned the deal was being "shopped" in January or February and knew for certain in March that Pershing Hill's financial information was being provided to other banks. APP 600-01 (9:22-10:1), 601-

02 (10:20-11:8).

Following Slaven's email about "killing" the deal, the Bank never proposed agreeable loan terms, let alone an actual loan agreement. APP 627 (188:18-22). Though concerned Pershing Hill was "shopping" the loan, Bank never communicated a revised offer. APP 602-03 (11:20-12:2). Even after Bank was made aware that Pershing Hill was obtaining the loan elsewhere, Bank still did not make an offer of agreeable terms (or attempt to make an offer of any terms at that time). APP 631-32 (213:24-214:8).

Though the deal had been "killed," Bank commenced its lawsuit on November 1, 2016, claiming it is entitled to be the exclusive lender to Pershing Hill despite the fact that the Grayfield tax credits were not received, and that Bank proposed entirely different financing terms from the Financing Proposal. As to those claims that survived Pershing Hill's Motion for Summary Judgment, following a 5-day trial, the jury returned a verdict for Pershing Hill.

IV. ARGUMENT

1. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN PERSHING HILL'S FAVOR ON BANK'S BREACH OF CONTRACT CLAIM

On September 27, 2018, the District Court granted Pershing Hill's Motion for Summary Judgment, finding no valid contract existed to support a

breach of contract claim. APP 246 (Ruling on Defendants' Motion for Summary Judgment). The document in question was the Proposed Financing for Pershing Hills Lofts, LLC Summary of Principal Terms August 31, 2015. APP 421-25 (Proposed Exhibit 1).

A. PRESERVATION OF ERROR

Pershing Hill agrees error was preserved on this matter.

B. STANDARD OF REVIEW

This Court reviews grants of summary judgment for errors at law. *Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 726 (Iowa 2014). "If substantial evidence in the record supports a district court's finding of fact, [the Court is] bound by its finding." *Ryan Cos. US, Inc. v. FDP WTC, LLC*, 2022 WL 469336, at *2 (Iowa Ct. App. 2022) (citing *Iowa Mortg. Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 110 (Iowa 2013)). "However, a district court's conclusions of law or its application of legal principles do not bind [the Court]." *Id.*; *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016) (noting the Court's "review is limited to the questions of whether a genuine dispute concerning a material fact exists and, if not, whether the district court correctly applied the law").

C. ARGUMENT

(1) Bank Failed to Establish the Financing Proposal was a Contract

Construction of a contract is a matter of law for a court. *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008) (holding construction of a contract is always a legal issue); *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("[W]hen no relevant extrinsic evidence exists, the resolution of any ambiguity in a written contract is a matter of law for the court."). A court may resolve a matter by summary judgment when the record shows the dispute involves only the legal consequences of undisputed facts. *Homan*, 887 N.W.2d at 164; *Galloway v. State*, 790 N.W.2d 252, 254 (Iowa 2010) (noting summary judgment is proper if the only issue is the legal consequences flowing from the contract).

A contract requires an offer, acceptance, and sufficiently definite terms. *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 475 (Iowa 2009). For a contract to be enforceable, its "terms must be sufficiently definite for the court to determine the duty of each party and the conditions of performance." *Royal Indem. Co. v. Factory Mut. Ins.*, 786 N.W.2d 839, 846 (Iowa 2010); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 286 (Iowa 1995) (noting the Court looks for "terms with precise meaning that provide certainty of performance").

A writing that clearly contemplates the subsequent execution of formal agreements implies that the parties did not intend to be bound until the subsequent formal agreements were finalized. *First Am. Bank v. Urbandale Laser Wash, LLC*, 874 N.W.2d 650, 656-57 (Iowa Ct. App. 2015) (citing *Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990)). There must be a definite intent to be bound and it must be certain as to the terms and requirements.

Here, the Financing Proposal by its very terms was a *proposal* for financing, not a binding *agreement*. It states in part that it is "a summary of terms that *may* lead to a commitment to lend, subject to satisfactory completion of due diligence, and a subsequent Commitment Letter." APP 425 (Proposed Exhibit 1). Slavens testified the Financing Proposal remained "fluid;" there was" "no final structure" agreed to as to the financing and no loan documents in writing. APP 593 (158:6-8), 603 (12:16-18), 604 (13:21-22); *see also* APP 601 (10:2-5) (Slavens testified that Bank was under no obligation to work with Pershing Hill), 592 (157:9-10), 601 (10:9-13) (Bank had no legal obligation to make the loan. There were no final documents executed whatsoever. APP 603 (12:9-10).[2]

[2] Similarly, in the July 2014 letter from Bank regarding the Pershing Hill project, it notes, in part: "proposal is preliminary and should not be construed as a commitment to make the loan;" "proposal is subject to further

The language involved in the Financing Proposal was not sufficiently definite or certain as to be enforceable. The contract was not valid as a matter of law. APP 244 (Ruling on MSJ).

(2) The Exclusivity Clause was Part of a Financing Proposal that Does Not Fulfill the Requirements to be a Binding Contract Between the Parties

In its Ruling on Defendants' Motion for Summary Judgment, the Court noted Bank's argument implied that the *only* binding term in the Financing Proposal was the Exclusivity Clause and all other terms were fluid and subject to further negotiation. APP 242 (Ruling on MSJ). First, the exclusivity clause itself could not be enforced because it lacked definite terms. For example:

(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?

In addition, fluid terms fail because it is impossible for the Court to discern the party's present obligations. *Id.* (citing *Royal Indem. Co*, 786 N.W.2d at 846). Bank's argument the terms were fluid and subject to further

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underwriting and due diligence by Northwest Bank & Trust;" "proposal is neither a contract nor an offer to enter into a contract;" "nor a commitment to make any loan and does not obligate us to issue any commitment or obligate us in any other way;" and "any commitment of Northwest Bank to make the loan will only be made in writing." APP 591-93 (156:7-158:8); APP 476.

negotiation established the contract "fail[ed] for lack of present intent to be bound." *Id.* (citing Restatement (Second) of Contracts § 21 (1981)).

Because every other term in the Financing Proposal failed, the exclusivity clause contained in the proposal is merely an agreement to negotiate further terms in good faith. *Id.* at p. 8. According to Iowa law, agreements to negotiate in good faith toward an ultimate agreement are not enforceable." *Id.* (citing *Rucker v. Taylor*, 828 N.W.2d 595, 602 (Iowa 2013)). A contract is not found where the parties agree to a contract on a basis to be settled in the future. *Niday v. Roehl Trans., Inc.*, 2019 WL 1486603, at *9 (Iowa Ct. App. 2019) (citing *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm'n*, 464 N.W.2d 450, 452–53 (Iowa 1990) (finding no enforceable contract where terms were indefinite, stating "It is axiomatic that understandable or ascertainable terms are necessary ingredients for an enforceable contract."); *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) (quoting *Crow-Thomas Consulting Group v. Fresh Pack Candy Co.*, 494 N.W.2d 442, 445 (Iowa Ct. App. 1992) (an agreement to agree is of no effect "unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations")).

(3) The Exclusivity Clause was Terminated because the Condition Precedent of Receiving the Grayfield Tax Credits Failed, and the Terms of the Financing Proposal Changed

Although the Court was correct in its ruling that the Financing Proposal was not a valid contract, assuming it is a contract, the Financing Proposal was subject to numerous conditions precedent that were never fulfilled. Conditions precedent are "'those facts and events, occurring subsequently 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, before the usual judicial remedies are available*.'" *Khabbaz v. Swartz*, 319 N.W.2d 279, 283 (Iowa 1982) (quoting *Mosebach v. Blythe*, 282 N.W.2d 755, 759 (Iowa Ct. App. 1979)) (emphasis added). Where a condition precedent cannot be met to satisfy the terms of a contract, *the contract is void*. *Id.* at 284 ("Nonperformance of a condition precedent vitiates a contract or a proposed contract.") (emphasis added).

The Financing Proposal specifically noted that "as a condition to making the Interim Loan available," Pershing Hill would have to obtain the Grayfield tax credit award. In October 2015, the parties became aware that Pershing Hill would not receive the Grayfield tax credits, leaving a funding gap of approximately $800,000. The Financing Proposal was explicitly subject to a condition precedent – the award of the Grayfield tax credits – which did not occur. APP 424 (Proposed Exhibit 1).

Because of the failure of the condition precedent to obtain the Grayfield tax credits, Bank requested significantly different terms from the original terms of the Financing Proposal. On December 11, 2015, Bank sent an email to Pershing Hill presenting Pershing Hill with three options to cure the funding gap: "(1) kill the deal, (ii) raise $160,000 cash per partner or (iii) implement my solution at a cost of about $75,000." APP 378 (December 11, 2015 email from Joe Slavens). The Bank noted "it is now obvious there [is] no way we will close this year," and a postscript that the delay was "further fallout from not receiving the Grayfields tax credits." *Id.*; *see also* APP 612-13 (30:22-31:2) (noting Bank asked for $800,000 in equity and another $75,000 in fees). Pershing Hill was not agreeable to raising additional equity or paying Bank the additional fee. The only option remaining was to "kill the deal." Pershing Hill sought financing elsewhere.

Bank's interpretation is that when the condition precedent failed (because the Grayfield tax credits were not received), Pershing Hill was still exclusively bound to seek financing from Bank, apparently forever, upon whatever terms Bank offered and regardless of whether the terms were acceptable to Pershing Hill. Conversely, the Bank was not obligated to make the loan. Bank's entire claim is premised on a one-way Exclusivity Clause.

The absurdity of Bank's position can be seen from the Financing

Proposal itself. Bank set out pages of detailed financial terms in the Financing Proposal. APP 421-25 (Proposed Exhibit 1). Bank expressly conditioned its entire performance to Pershing Hill on the receipt of very specific terms outlined in the Financing Proposal. *See Hartig Drug Co.*, 602 N.W.2d at 797-98 (noting contracts are construed as a whole, giving effect to the language of the entire contract according to the commonly accepted and ordinary meanings.[3] The terms never occurred.

Bank argues the condition precent does not render the contract void but delays its enforceability. Plaintiff-Appellant's Proof Brief p. 30. Their citation to *H.L. Munn* is inapposite; the contract terms in *H.L. Munn* were satisfied and/or waived. *H.L. Munn Lumber Co. v. City of Ames*, 176 N.W.2d 813 (Iowa 1970). In this matter, following the failure of the condition precedent, the terms of the Financing Proposal were changed. The parties were no longer awaiting the condition precedent; Bank was contemplating a completely new contract with additional burdens on Pershing Hill.

To the extent the parties continued to negotiate for a new financing

[3] In construing written contracts, the cardinal principle is to determine the intent of the parties at the time they entered into the contract. *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011); *Hoffmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 228 (Iowa 2001). The intent of the parties may be determined from the terms of the contract, what is implied from those terms, and the circumstances surrounding formation and execution of the contract. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997).

agreement, this establishes the parties' understanding the Financing Proposal was no longer valid. As to those negotiations, no exclusivity applied. *See Engstrom*, 461 N.W.2d at 314 (noting the duty of good faith applies to the performance and enforcement of a contract not to the negotiation of a contract); *Williams v. Mid-Iowa Equip., Inc.*, 223 F.Supp.3d 866, 873 (S.D. Iowa 2015) ("As the *Restatement* states, the principle of good faith and fair dealing has to do with the performance of a contract, not its formation. Restatement § 205(c). It does not give rise to new substantive terms that do not otherwise exist in the contract." (internal citation omitted)). As the Court found, the "Plaintiff engaged in efforts to re-negotiate the deal, suggesting it had no intention to honor remaining obligations." APP 246 (Ruling on MSJ).

It was undisputed that (1) the Financing Proposal contemplated receipt of the Grayfield tax credits and (2) when the Grayfield tax credits were not received, Bank proposed new financing terms that were never agreed to by Pershing Hill. Under these circumstances, there can be no breach of contract claim because the condition precedent to the Financing Proposal never occurred. *See Khabbaz*, 319 N.W.2d at 284 (failure of a condition precedent invalidates a contract or proposed contract). When Pershing Hill did not receive the Grayfield tax credits, even if the Financing Proposal was a binding contract (which it was not), the condition precedents failed, and the contract

was thereafter void. *Id.*

Bank's interpretation that Pershing Hill was bound to deal exclusively with Bank on any financing for the Project forever must be rejected. *See* APP 597 (178:21-23), 605 (17:21-25) (noting there is a risk to banks that loans will not happen; a bank cannot force someone to take a loan). Pershing Hill was not bound (if it was ever bound) by the exclusivity clause as claimed by Bank after the terms of the Financing Proposal failed.[4]

The District Court held that the Grayfield Tax Credit was "in fact a condition precedent to the other terms of the Financing Proposal." APP 245 (Ruling on MSJ). The District Court rightly concluded "no valid contract existed at the time Defendants walked away from negotiations." APP 246 (Ruling on MSJ).

[4] Bank states "'exclusive lender' arrangements are common . . . ." Plaintiff-Appellant Proof Brief p. 35. Though argued "common," Bank's only citation is to a District of Northern Minnesota case. *Duran v. Marathon Asset Management* did not address an argument related to the claim but dismissed the matter based on a forum selection clause. *Duran v. Marathon Asset Management*, 2014 WL 11429063, at *8 (D.N.M. 2014). The case Bank cites in no way stands for the proposition "exclusive lender" arrangements are common and/or enforceable contracts. In the *Duran* appeal, the plaintiff attempted to argue the forum selection clause could *not* be valid because the parties "never reached a binding agreement of any kind." *Duran v. Marathon Asset Management, LP*, 612 Fed.Appx.553 (10th Cir. 2015). As to the argument, the court noted there were no grounds to reverse the district court's conclusion as to the forum selection clause.

(4) Even if the Failure of the Conditions Precedent Does Not Void the Contract, Interpretation of the Contract Establishes it Terminated When the Grayfield Tax Credits Failed

If the failure of the Grayfields condition precedent does not entirely void the contract, then the Court must determine what Pershing Hill was bound to do vis a vie Bank. The determination of Pershing Hill's contractual obligation is the process of interpretation of the contract.

Interpretation is a process of determining the meaning of words in a contract while construction is a process of determining the legal effect of the words. *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999). Unless the terms of a contract clearly require it, an interpretation will not be given which places one party at the mercy of the other. *Harvey Constr. Co. v. Parmalee*, 113 N.W.2d 760, 766 (Iowa 1962). Here, there is only one reasonable interpretation of the exclusivity clause. Reading the Financing Proposal as a whole, when the conditions precedent failed and the entire deal changed, Pershing Hill was free to seek financing elsewhere.

Because there is only one reasonable interpretation, the Court must apply that interpretation and conclude the Financing Proposal and exclusivity clause ended when the Grayfield credits were not awarded. Any other interpretation would mean Pershing Hill was bound by the exclusivity clause

forever and was required to accept any and all new terms put forth by Bank, even if the new terms materially differed from the Financing Proposal.

(5) The District Court Did Not Err in Granting Summary Judgment

In drafting the Financing Proposal, Bank quite naturally sought to protect itself from risk. It cannot now, however, demand reward. Bank had no legal basis to force a deal that did not go as planned and an agreement that never came to fruition. Slavens may have been "disappointed" or "angry" when he learned that the project was being financed by another bank, but there is no support for Bank's contention it had exclusive lender status. APP 589-90 (128:23-129:3).[5]

Bank was unable to show the document was an enforceable contract. The record did not establish a genuine issue of material fact existed and Pershing Hill was entitled to judgment as a matter of law. *See Pillsbury Co., Inc.*, 752 N.W.2d at 435 (noting "[i]nterpretation of a contract is a legal issue unless the interpretation of the contract depends on extrinsic evidence"). Bank fails to establish how the District Court erred as a matter of law. Bank could not prove its breach of contract claim because it could not show the existence

[5] There were other banks that made proposals to get the loan but were unsuccessful. APP 595-96 (175:18-176:3). Those other banks, presumably recognizing the nature of the banking business, did not sue Pershing Hill.

of a contract. *See Baccam*, 841 N.W.2d at 110–11 (quoting *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998)).

2. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE FINANCING PROPOSAL AND REFERENCE TO SUCH PROPOSAL OR ITS TERMS AT TRIAL

A. PRESERVATION OF ERROR

Pershing Hill agrees error was preserved on this matter.

B. STANDARD OF REVIEW

The Court reviews evidentiary rulings for an abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535 (Iowa 2018) (citing *Stender v. Blessum*, 897 N.W.2d 491, 501 (Iowa 2017)).

> A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable. A ground is unreasonable or untenable when it is based on an erroneous application of the law. Therefore, under our abuse-of-discretion standard, we will correct an erroneous application of the law.

Id. at 536 (citations omitted).

The Court will not presume the existence of prejudice when evidence is excluded from trial. *See Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 193 (Iowa 1982) (ruling excluding evidence will not be reversed unless discretion clearly abused to prejudice of complaining party). "[R]eversal is warranted only if exclusion of the evidence affected a party's substantial rights." *Scott v.*

Dutton-Lainson Co., 774 N.W.2d 501, 503 (Iowa 2009) (citing *Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410, 414 (Iowa 1997)); Iowa R. Evid. 5.103.

C. ARGUMENT

(1) The District Court Exercised Proper Discretion in Excluding the Financing Proposal Because it was Not Relevant

The matter for trial was whether Ruhl or Carroll made fraudulent misrepresentations about the exclusivity of Bank's position after the Pershing Hill deal fell through. The representations that formed the basis of the fraud claim were not related to the unenforceable Financing Proposal.

Jury Instruction No. 16 specified the plaintiff must prove "that either John Ruhl, John Carroll, or both, between December 11, 2015 through April of 2016, made one or more of the following representations . . . ." APP 294. The relevant representations were from a set time period, which the August 2015 Financing Proposal was not within.

In addition, exclusivity was not a question presented to the jury. According to Jury Instruction No. 16, the alleged misrepresentations that had to be proven were:

> (a) That defendants recognized Plaintiff's 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 294. Exclusivity was not required to be proven under the instructions. The exclusion of the Financing Proposal was not prejudicial to Bank; the Financing Proposal and exclusivity provision were not relevant to the ultimate issues to be proven.

(2) There was No Error in Excluding the "Exclusivity" Agreement Because to Allow Otherwise would have Allowed Bank to Attempt to Enforce a Proposal that had Already been Found to be Unenforceable

Bank argues that the Financing Proposal was necessary to provide context for Bank's reliance. Though ruled not a contract, Bank wanted to present the Financing Proposal to the jury to establish Bank justifiably relied on a contract. As the District Court noted at the beginning of trial, if the only basis Bank's claim for fraudulent misrepresentation was within breach of contract, Bank could not move forward; the breach of contract claim had already been dismissed. APP 507 (27:21-24).[6]

If the District Court would have allowed such 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

[6] The District Court found "because no valid contract existed at the time Defendants walked away from negotiations, Defendants did not, as a matter of law, commit breach." APP 246 (Ruling on MSJ).

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—avoiding unnecessary trials.

As the District Court ruled, "Allowing Plaintiff to present the Financial Proposal and the Exclusivity Clause to the jury as evidence of an "exclusivity agreement" between the parties would have not only been in direct contradiction to the ruling previously entered by the Court, it would have been more prejudicial than probative." APP 324 (Ruling on Plaintiffs Motion for New Trial). As a matter of law, the Financing Proposal was unenforceable. To allow presentation of a legally unenforceable agreement to the jury would be unduly prejudicial. The jury could easily be confused about what obligations are enforceable.

(3) Reviewing the Record as a Whole Does Not Support that a Substantial Right of Bank was Affected

Finding the Financing Proposal inadmissible, "the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Iowa Rule Evid. 5.103(d). The District Court did so by striking any reference to the Financing Proposal.

Though the Financing Proposal was excluded, Bank provided testimony, documents, and correspondence to establish Bank had a

relationship with Pershing Hill and believed Pershing Hill was exclusively dealing with Bank. *See, e.g.*, APP 329, 331, 341, 351, 353, 355, 476 (promissory note, mortgages, guaranties, correspondence, closing checklist); APP 369, 372, 379, 383, 388, 390 (emails); APP 544 (33:1-4), 550 (39:14-15), 555 (46:11) (Bank was the "lead lender"), 563 (74:15-18) (Bank's suggested restructuring of the financing structure), 571-72 (92:25-93:1) (Bank continued to work on the deal), 576-77 (101:18-102:2) (Bank extended maturity of the note to allow for the deal to continue), 582 (115:2-3) (Slavens thought Pershing Hill was working exclusively with Bank to provide financing), 583 (117:9-18) (Slavens was "under the impression that we were working together exclusively to do the deal" based on three years of course of conduct), 586 (120:11-16) (Slavens was told discussions with other lenders were only a "backup plan"), 590 (129:7-12) (Slavens had been working with Pershing Hill for three years on the deal), 607 (19:23-25) (Slavens testified he believed Bank was the "exclusive lender" and that it was the Bank's "deal to lose"), 608 (21:11-23) (Slavens testified Pershing Hill provided reassurances that requested information was forthcoming and he and took them "at their word"), 609 (22:20-22) (Slavens testified the borrower "lied" to him and "misrepresented what was going on with Bank's involvement in the loan), 610 (23:1-5) (Slavens testified it was conveyed to him that the other banks were

"backups" and that the deal "wasn't being shopped"), (Slavens noted the Bank did not "lose" the deal, it was "taken away"); *see also* 634 (226:11-12) (Ruhl testified to an email in which he noted Slavens "feels that we have a commitment to work with him").

Throughout his testimony, Slavens was clear that Bank thought "we were dealing exclusively with each other" 611 (24:1-5). The exclusion of a non-enforceable Financing Proposal did not affect a substantial right of the Bank.

Bank fails to establish the district court abused its discretion in excluding the Financing Proposal.

> It is clear under our rules of evidence and pertinent case law that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Whether a substantial right is affected can only be determined when the record as a whole is considered. In addition, we should reverse only when justice would not be served by allowing the trial court judgment to stand. *See* Iowa R. Evid. 102.

Stumpf v. Reiss, 502 N.W.2d 620, 623 (Iowa Ct. App. 1993).

(4) Bank Fails to Meet its Burden to Establish Abuse of Discretion

Even if the Financing Proposal was relevant to Bank's underlying claim, it was not an abuse of discretion to exclude such proposal. The District Court has the 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 (Iowa 2004); Iowa R. Evid. 5.403. "'Unfair prejudice' is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one." *Dubuque Injection Serv. Co. v. Kress*, 2017 WL 2666157, at *7 (Iowa Ct. App. 2017) (citing *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997)); *Carter v. Wiese Corp.*, 360 N.W.2d 122, 131 (Iowa Ct. App. 1984) (a trial judge can and should exclude evidence when convinced it would create a danger of prejudice outweighing its probative value); *Carter v. MacMillan Oil Co., Inc.*, 355 N.W.2d 52, 55 (Iowa 1984) (citing *Kalianov v. Darland*, 252 N.W.2d 732, 736 (Iowa 1977) (a trial court has discretion to exclude relevant evidence when its probative value is substantially outweighed by confusion of issues or considerations of waste of time).

The balancing decision is a matter for the trial court's discretion. *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 299 (Iowa Ct. App. 1985) (citing *State v. Williams*, 360 N.W.2d 782, 787 (Iowa 1985)). "The judge has wide discretion in ruling on the admissibility of evidence; his decisions will not be disturbed unless there is a clear and prejudicial abuse of discretion." *Carter v. Wiese*, 360 NW.2d at 131 (citing *Henkel*, 323 N.W.2d at 193).

The District Court excluded a proposal it had already determined was not an enforceable contract. The Bank's contention the Financing Proposal

was crucial to establish Bank's "state of mind," is an attempt to reintroduce the breach of contract claim already dismissed at the time of trial. As argued above, the Financing Proposal would have served solely to confuse the jury and result in Pershing Hill again having to prove the proposal was not a contract. Bank fails to show that the trial court's ruling excluding the Financing Proposal or any reference to such document was an abuse of discretion. *See McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000) (the complaining party has the burden to establish that the district court abused its discretion).

V. CONCLUSION

Defendants-Appellees respectfully request the Court affirm the District Court.

VI. REQUEST FOR ORAL ARGUMENT

Defendants-Appellees request oral argument pursuant to Iowa Appellate Rule 6.903(2)(i).

Date: June 8, 2023

Respectfully submitted,

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ATTORNEY'S CERTIFICATE OF COST

I, the undersigned, hereby certify the cost of printing Defendants-Appellees' Brief was $0.00.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. 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 Times New Roman in 14 point size and contains 5,671 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

June 8, 2023 *<u>/s/ Ian J. Russell</u>*
Ian J. Russell

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2023, the foregoing **Defendants-Appellees' Brief** was filed electronically with the Supreme Court of Iowa. Notice of this filing will be sent through the electronic document management system to all parties who are registered filers.

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