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.

APPLICATION FOR FURTHER REVIEW AND SUPPORTING BRIEF BY DEFENDANTS-APPELLEES FROM A DECEMBER 4, 2024, DECISION BY THE COURT OF APPEALS

Scott County District Court Case No. LACE128234
On Appeal from the District Court for Scott County
The Honorable Tom Reidel

Ian J. Russell AT0006813
LANE & WATERMAN LLP
220 N. Main Street, Suite 600
Davenport, IA 52801
Phone: 563.324.3246
Fax: 563.324.1616
Email: irussell@l-wlaw.com

ATTORNEY FOR DEFENDANTS-APPELLEES

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in reversing the District Court's summary judgment order in favor of Defendant-Appellee Pershing Hill Lofts, LLC, John M. Carroll, and John G. Ruhl, by finding a one sentence Exclusivity Clause, contained within an unenforceable Financing Proposal, was an "entirely valid, albeit limited, agreement," though such finding contradicts standard contract principles, prior case law, and leaves Pershing Hill completely at the mercy of Plaintiff-Appellant Northwest Bank & Trust Company?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals, in its Reversal and Remand, ignored existing contract law that will have significant ramifications on contracting moving forward. *See* Iowa R. App. P 6.1103(1)(b)(1) (noting further review is appropriate when the Court of Appeals has entered a decision in conflict with a decision of the Supreme Court). The Court of Appeals ruled a contract can bind parties to exclusivity when no other clause within such contract is enforceable and, thus, there are no terms as to the parameters of such exclusivity *See* Iowa R. App. P. 6.1103(1)(b)(4) (noting further review is appropriate in cases that present an issue of broad public importance).

The Court of Appeals ruling is in direct conflict with *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384 (Iowa 2016) and *Shelby County Cookers, L.L.C. v. Utility Consultants International Inc.*, 857 N.W.2d 186 (Iowa 2014). In *Shelby County*, this Court held that if a contract lacks a durational term, the Court must determine whether the duration can be implied from the language of the contract. *Id.* at 190. The Court of Appeals stated that the duration of the exclusivity period in the agreement lasted only "while the parties are engaged in due diligence," but failed to apply such "durational term." Court of Appeals Ruling ("Ruling") p. 9. The Court failed to recognize that the "due diligence" had ended because of the failure to obtain the Grayfield tax credits.

In *Associated Milk*, this Court held an at-will contract is terminated by one party's unilateral modification of the contract. *Johnson*, 886 N.W.2d at 391. The undisputed facts establish Bank unilaterally modified the contract, terminating any exclusivity provision.

BRIEF IN SUPPORT OF FURTHER REVIEW

I. BACKGROUND

On February 10, 2012, Pershing Hill Lofts, LLC ("Pershing Hill") purchased a building and parking lot 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 financing the Project, Pershing Hill applied for several tax credits, including Iowa Grayfield tax credits.[1] APP 551 (42:20-23).

On August 31, 2015, Northwest Bank and Trust Company ("Bank") and Pershing Hill signed a "Financing Proposal" to potentially finance the Project. APP 421-25 (Proposed Financing for Pershing Hill Lofts, LLC Summary of Principal Terms August 31, 2015). 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. *Id.*

The Financing Proposal and the Bank's obligation to loan money to Pershing

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

Hill were expressly conditioned upon Pershing Hill receiving 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 425.

The Financing Proposal also included 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 [Bank] of [Pershing Hill's] exclusive consideration as "Lender" in exchange for the expense, time and travel of the proposed due diligence*.

Id. (emphasis added) (referenced as the "Exclusivity Clause.")

The Project 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. Without the Grayfield tax credits, the Bank advised Pershing Hill that its participant bank, Bankers Trust, required additional equity (cash) put in the Project equal to the Grayfield tax credits (an additional $800,000). APP 569-60 (82:18-83:6); APP 378, 379-82.

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

> 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 (i) 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.

Id.

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; 625 (161:20-22). Bank required the additional equity from Pershing Hill, which Pershing Hill did not agree to provide. App 594 (168:15-18). Nor did Pershing Hill agree to "alter[ing] the current structure." APP 378 (Slavens' email noting a plan to alter the Financing Proposal). The only option remaining was to "kill the deal."

Following Slaven's email to "kill the deal," the Bank never proposed agreeable loan terms, let alone an actual loan agreement. App 627 (188:18-22). The Bank was aware Pershing Hill was looking for an alternative lender by March 2016 (at the very latest), but never made a revised loan offer. APP 600-01 (9:22-10:1), 601-02 (10:20-11:8), 602-03 (11:20-12:2). Even after Bank was made aware that Pershing Hill was obtaining the loan elsewhere, Bank still did not attempt to offer new loan terms. APP 631-32 (213:24-214:8).

Even though the deal had been "killed," Bank commenced its lawsuit on November 1, 2016, claiming breach of contract, negligent misrepresentation, fraud, and to enforce Pershing Hills' guarantees. The Bank argued it was entitled to be the exclusive lender to Pershing Hill despite the Grayfield tax credits not having been received, and the Bank proposing entirely different financing terms from the Financing Proposal in December 2015.

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 District Court held that the Exclusivity Clause was unenforceable as part of a single invalid agreement to agree. "[B]ecause no valid contract existed at the time Defendants walked away from negotiations, Defendants did not, as a matter of law, commit breach." *Id.*

On appeal, the Court of Appeals acknowledged that the "parties agree that the proposed financing terms that make up the first four pages of the accepted financing proposal are not enforceable." Ruling p. 9. The Court of Appeals, however, reversed the District Court's ruling on Defendants' Motion for Summary Judgment, ruling one single sentence is a separate contract and is "separately enforceable." *Id.*

Based on such ruling, the Court of Appeals remanded the matter for a new trial, finding the District Court's exclusion of the Financing Proposal from trial

evidence was "untenable." Ruling p. 14. The Court ruled that, the "written promise of exclusivity" was highly probative, and its exclusion affected Bank's substantial rights. *Id.*

II. ARGUMENT

A. THE COURT OF APPEALS DECISION IS CONTRARY TO THE PRINCIPLES OF CONTRACT CONSTRUCTION AND INTERPRETATION

This Court has repeatedly set forth basic rules of contract construction and interpretation. Here, the Court of Appeals erred in failing to follow such rules.

The Court of Appeals speculates that a "bare bones," one sentence contract exists that "prohibits Pershing Hill from seeking financing terms from other lenders while the parties are engaged in due diligence" even though no such terms are set forth in the one sentence contract. Ruling p. 9. Not only does this ruling contradict multiple principles of contract construction, it leaves Pershing Hill completely at the mercy of Bank, which is under no obligation to provide any financing whatsoever.

Construction of a contract is a matter of law for the court. *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008). 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). The "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").

The Court of Appeals determined one sentence of the Exclusivity Clause contained sufficiently definite terms to be enforceable, finding that Pershing Hill "promised to give Northwest Bank its exclusive consideration as Lender" and Northwest Bank would "spend its time and travel engaged in the proposed due diligence." *Id.* The Court noted it was "enforcing the main provision of an entirely valid, albeit limited, agreement." *Id.*

Firstly, the one sentence "agreement" standing alone does not provide any definite terms as to what is the "proposed due diligence." The Court acknowledges that the Exclusivity Clause contains "no durational period for the obligation" but the "court will imply one 'from the nature and circumstances of the contract.'" Ruling p. 11 (citing *Shelby Cnty. Cookers, L.L.C.*, 857 N.W.2d at 191). However, there is no way to determine from the Exclusivity Clause, standing alone, the actual conditions of either party's performance. There are no terms within the "limited agreement" (the Exclusivity Clause) to define due diligence—there is no indication of when, where, how, or what the Bank was obligated to do, if anything, nor is there any time limit. The Exclusivity Clause is too indefinite to be a contract.

In addition, the Court of Appeals' determination that the Exclusivity Clause somehow stands alone ignores the express language of the Exclusivity Clause and the entire four-page Financing Proposal. The parties reference "*proposed* due diligence." Use of the word "proposed" reflects that the parties have memorialized the "necessary due diligence." In fact, the Financing Proposal has a "Due Diligence" heading, which includes twenty items that constitute what the "Lender will need as part of necessary due diligence." APP 424-25.

To ignore the agreed to list of Due Diligence would render the term "proposed" superfluous. "Because an agreement is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Berryhill v. Hatt*, 428 N.W.2d 647, 654-55 (Iowa 1988) (citing *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.,* 266 N.W.2d 22, 26 (Iowa 1978)).

In addition, when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling. *Mopper v. Circle Key Life Ins. Co.,* 172 N.W.2d 118, 126 (Iowa 1969). The Financing Proposal in this case contains specific and unambiguous provisions defining the proposed due diligence. This specific list of "necessary due diligence" controls.

It is the cardinal principle of contract construction that the parties' intent at the time they entered into the contract controls; and except in cases of ambiguity, this is determined by what the contract itself says. *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011). The contract must be construed as an entirety. *Freese v. Town of Alburnett*, 125 N.W.2d 790, 792 (Iowa 1964).

Bank expressly conditioned its potential performance to Pershing Hill on the receipt of very specific terms outlined in the Financing Proposal. The Financing Proposal specifies that the Bank "will need as part of necessary due diligence, and as a condition to making the Interim Loan available," documentation of Pershing Hill having been awarded the Grayfield Tax Credit. APP 425. Pershing Hill could not provide the Grayfield Tax Credit documentation because it was not awarded the tax credits.

The parties' intent was that the Exclusivity Clause would apply to the period of the "proposed due diligence." When such due diligence ended under the terms of the Financing Proposal (and the Bank offered entirely new terms), the Exclusivity Clause no longer applied and Pershing Hill was permitted to seek financing elsewhere.

The Court of Appeals ruled that such tax credit was not a condition precedent for the Exclusivity Clause. The Court noted the requirement of the tax credit "merely sets out what Pershing Hill would be expected to provide for completion of due

diligence and to obtain the financing." Ruling p. 12. This ruling ignores that Pershing Hill had not obtained the Grayfield tax credit and could never fulfill this requirement in order for the Bank to complete its due diligence.

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) (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 Court of Appeals determined the Exclusivity Clause applied to the period of "proposed due diligence." Per the Financing Proposal, due diligence included obtaining the Grayfield tax credit award. When Pershing Hill did not obtain the Grayfield tax credit, the proposed due diligence failed and the Exclusivity Clause was then void.

Bank acknowledged such failure by its subsequent actions. Following the failure of the condition precedent (failure to obtain the Grayfield tax credit), on December 11, 2015, Slavens sent an email to Pershing Hill presenting Pershing Hill with three options to cure the gap resulting from not receiving the Grayfield tax credits: "(i) kill the deal, (ii) raise $160,000 cash per partner or (iii) implement my

solution at a cost of about $75,000." APP 378. The parties were no longer awaiting the condition precedent; Bank was contemplating a completely new contract with additional burdens on Pershing Hill.

Pershing Hill did not agree to raising additional equity or paying Bank the additional fee. The only option remaining was to "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"); *see also* APP 633 (219:23) (Ruhl testified the bank "kill[ed] the deal"). Pershing Hill sought financing elsewhere.[2]

The parties' continued negotiations for a new financing agreement establishes the parties' understanding the Financing Proposal was no longer valid. Bank requested significantly different terms from the original terms of the Financing Proposal. Thus the Exclusivity Clause ended when new terms were proposed by the Bank. *See Johnson*, 886 N.W.2d at 391 (noting a "party that unilaterally modifies an at-will contract effectively terminates the old agreement and offers new terms for

[2] The Court of Appeals seems put off by an email sent by a Pershing Hill managing member noting he wanted to explore other lenders "so we can shitcan [Northwest Bank] if possible." Ruling p. 4. Whatever nefarious connotations the Court attributed to Pershing Hill by such statement, it did not affect the failure of the Exclusivity Clause. It shows recognition (and frustration) that due diligence had failed; Bank expressed to Pershing Hill it would have to come up with $800,000 plus another $75,000 personal fee to Slavens to move forward. It is understandable Pershing Hill would express frustration.

acceptance"). As the District Court found, the "Plaintiff engaged in efforts to re-negotiate the deal, suggesting it had no intention to honor remaining obligations." APP 246.

The Court of Appeal's interpretation is that when the condition precedent failed, Pershing Hill was still exclusively bound to seek financing from Bank, upon whatever terms Bank offered and regardless of whether the terms were acceptable to Pershing Hill. This was not the intent of the parties.

> A principle of contract construction is that in construing a contract,
>
> > an agreement will not be construed so as to give one party an unfair, oppressive, or inequitable advantage over the other, that unless the terms of the contract clearly require it, an interpretation will not be given which places one party at the mercy of the other, that courts will endeavor to give the contract that interpretation most equitable to the parties, and that the contract will be construed most strictly against the one who drew it.

Mopper, 172 N.W.2d at 127 (string cite omitted).

The Court's interpretation puts Pershing Hill completely at the mercy of the Bank.[3] Pershing Hill would be unable to seek alternate financing presumably forever because of the exclusivity requirement even though Bank would not provide the financing originally agreed to because Pershing Hill failed to obtain the Grayfield

[3] Slavens testified the Financing Proposal remained "fluid," and that Bank had no obligation to work with Pershing Hill or make the loan. APP 592 (157:9-10), 593 (158:6-8), 601 (10:2-5, 9-13), 603 (12:9-10, 16-18), 604 (13:21-22).

Tax Credit. *See Harvey Constr. Co. v. Parmele*, 13 N.W.2d 760 (Iowa 1962) (citing 17A am.Jur.2d *Contracts* § 345 (1991)) (noting when a contract, or a part thereof, limits a party's legal rights, it should be strictly construed")).

The District Court's interpretation was compliant with this stricture. In overruling the District Court, the Court of Appeals fashioned an entirely new contract that places Pershing Hill completely at the mercy of Bank.

The Court of Appeals cites to *Air Host Cedar Rapids, Inc.* to support its contention that "when an unenforceable agreement-to-agree term is part of an otherwise valid contract, other terms in the contract may still be enforced." Ruling p. 8 (citing *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Com'n*, 464 N.W.2d 450 (Iowa 1990)). Air Host involved a lease agreement for a new airport facility. The court found that a lease agreement between the airport commission and a concessionaire at the old airport did not give concessionaire the contractual right of first refusal for a concession lease at the new airport. *Id.* at 453. The lease provision giving concessionaire "first right to lease" was negated by the qualification that "terms and conditions of such lease and license shall be as mutually agreed." *Id.* at 452, 453.

In *Air Host*, the court found the entire contract was void because it was a contract to agree in the future. In ruling on the Pershing Hill matter, the Court of Appeals noted that in *Air Host*, though the contractual right of first refusal was not

a valid contract, a provision under which the concessionaire was provided a $20,000 award for expense incurred in planning the new facility was upheld. Ruling p. 8.

In *Air Host*, however, there was no challenge as to whether the $20,000 award failed for lack of contract. The sole challenge to such award was on the claim that Air Host's expenses were not documented and documentation was a condition precedent for liability under the provision. *Air Host*, 464 N.W.2d at 452. The court found ample documentation for the claim was produced. *Id.*

Similarly, the Court of Appeals reliance on *Miller v. Marshall County* is misplaced. Ruling pp. 8-9 (citing *Miller v. Marshall Cnty.*, 641 N.W.2d 742 (Iowa 2002)). The court in *Miller* ruled a lease agreement was void in its entirety because the Board did not have the authority to enter into the lease agreement with Miller. *Id.* at 750.

The court in *Miller* noted, "Although we sympathize with Miller for the large expenditures he made in reliance on the Board's representations, the law does not grant him a right of action for breach of contract." *Id.* at 751. Because the contract in its entirety was void, the general doctrine of separability did not apply because there was nothing left to sever. *Id.* (citing 10A McQuillen, § 29.95, at 11 (where "good" and "bad" parts of contract are inseparable, the contract as a whole is deemed invalid)).

Relevant to this matter is the court's language in *Miller* noting that it is accurate that "when a portion of an agreement is deemed invalid, the remaining portions of the agreement can be enforced as long as they can be separated from the illegality. For example, if the invalid portion is merely incidental to the primary purpose of the contract, the contract remains in effect." *See id.* at 751-52. However, if the contract would not have been entered into independent of the invalid portion, the entire contract is void. *Id.* at 752.

In this case, the Financing Proposal establishes the conditions under which the parties were operating. Once the Bank revised those conditions, the agreement was void, including the Exclusivity Clause. Pershing Hill would not have contracted for exclusivity to Bank with no parameters or other specifications as to the due diligence and possible finance terms.

The Court of Appeals cites to cases in other jurisdictions to support its contention limited provisions in letters of intent can be binding even when the rest of such document is unenforceable. Ruling p. 10. Each of those cases cited, however, required that for such limited provisions to be enforceable, their terms must be definite and certain. Each of those cases cited contained a exclusivity clause with an express duration. *See Logan v. D.W. Sivers Co.*, 169 P.3d 1255, 1259 (Or. 2007) (noting the "obligations are clearly identified and ascertainable;" while plaintiff reviewed those due diligence the defendant provided, defendant would abide by a

non-solicitation agreement for 60 days); *Feldman v. Allegheny Inter., Inc.,* 850 F.2d 1217 (7th Cir. 1988) (cited in *Logan*, noting the obligations under an exclusive dealings provision were not enforceable when there was no longer a continued commitment to pursue the particular transaction contemplated); *Weigel Broad. Co. v. TV-49, Inc.*, 466 F. Supp. 2d 1011, 1017-19 (N.D. Ill 2006) (noting the duty to negotiate exclusively was governed by the terms set forth in the letter of intent, requiring a definitive agreement to be drafted and executed within 40 days from the date of signing); *Clark v. Nepveu*, 2007 WL 9619427, at *1 (N.H. 2007) (the letter of intent specifically contained a "STAND STILL" provision that the seller was not to negotiate with anyone else for a defined period of time absent a written agreement "to abandon this Letter of Intent;" and the Letter of Intent noted "Notwithstanding the provisions of this paragraph to the contrary, Seller and Buyer agree that the above paragraph entitled 'Stand Still' shall be binding, regardless of whether a binding Purchase Agreement is entered into by the parties." The document unambiguously bound the parties to negotiate exclusively with one another for a period of limited duration.).

In this matter, the Court of Appeals noted the lack of express duration and that such matter need not be resolved other than to note the lack of such term "does not give us a basis to affirm the district court's holding that the exclusivity clause is unenforceable." Ruling p. 11. The Court's recognition of an ambiguity as to duration

—Pershing Hill argues such duration terminates by the nature of the Financing Proposal when it did not receive the Graystone tax credit; Bank believes the duration is perpetual—enlists another rule of contract construction. Ambiguity exists when, after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists concerning which of two reasonable constructions is proper. *Berryhill,* 428 N.W.2d at 654. In this case, it was the Bank that drafted the agreement and it must be construed in favor of Pershing Hill. It is a rule of contract construction that if there are ambiguities in a contract, the writing must be strictly construed against the party who drafted the writing in question. *Village Supply Co. v. Iowa Fund, Inc.,* 312 N.W.2d 551, 555 (Iowa 1981).

The case law the Court of Appeals cited supports Pershing Hills' argument that the Exclusivity Clause was too indefinite standing alone to be enforced and/or that the Exclusivity Clause was subject to the due diligence requirements set forth in the Financing Proposal, which failed.

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, if ever valid, ended when the Grayfield credits were not awarded. Any other interpretation would mean

Pershing Hill was bound by the exclusivity clause potentially 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.

A court may resolve a matter by summary judgment when the record shows the dispute involves only the legal consequences of undisputed facts. *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016); *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). 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. The District Court rightly concluded "no valid contract existed at the time Defendants walked away from negotiations." APP 246. This determination should be upheld.

B. THE EXCLUSIONARY CLAUSE IS NOT A VALID CONTRACT AND THE DISTRICT COURT'S EXCLUSION OF SUCH CONTRACT SHOULD STAND

The Court of Appeals sole argument as to exclusion of the Financing Proposal is that it should be allowed because it is a valid contract. Ruling p. 14. Based on the above, it is not a valid contract. The District Court exercised proper discretion in excluding the Financing Proposal because it was not relevant and to allow otherwise would be more prejudicial than probative.

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.

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.

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 122, 131 (Iowa Ct. App. 1984) (citing *Henkel*, 323 N.W.2d at 193). Bank failed 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).

CONCLUSION

For the reasons argued above, this Court should grant the Application for Further Review, vacate the decision by the Court of Appeals, and affirm the District Court summary judgment ruling.

LANE & WATERMAN LLP

By: */s/ Ian J. Russell*
Ian J. Russell AT0006813

LANE & WATERMAN LLP
220 N. Main Street, Suite 600
Davenport, IA 52801
Phone: 563.324.3246
Fax: 563.324.1616
Email: irussell@l-wlaw.com

ATTORNEY FOR DEFENDANTS-APPELLEES

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g)(1), 6.903(1)(i)(1), and 6.1103(5)(a) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point size and contains 4,698 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1) and 6.1103(5)(a).

December 23, 2024

/s/ Ian J. Russell
Ian J. Russell

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2024, the foregoing **Defendants-Appellees' Application for Further Review** 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.

David T. Bower
Nyemaster Goode, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309

Candy K. Pastrnak
Pastrnak Law Firm, P.C.
313 West Third Street
Davenport, IA 52801

ATTORNEYS FOR PLAINTIFF-APPELLANT

/s/ Ian J. Russell
Ian J. Russell