

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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

Dated: January 10, 2025

/s/ David T. Bower, AT0009246
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: dbower@nyemaster.com

/s/ Candy K. Pastrnak,
AT0006034
PASTRAK LAW FIRM, P.C
313 West Third Street
Davenport, IA 52801
Telephone: 563-323-7737
Facsimile: 563-323-7739
Email: ckpastrnak@pastrnak.com

ATTORNEYS FOR APPELLANT

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**RESPONSE TO APPELLEES' STATEMENT SUPPORTING
FURTHER REVIEW**

The Court of Appeals' ruling ("the Ruling") does not conflict with this Court's decisions in *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384 (Iowa 2016) and *Shelby Cnty. Cookers, L.L.C. v. Util. Consultants Int'l, Inc.*, 857 N.W.2d 186, 191 (Iowa 2014), or any other decisions from this Court. To the contrary, the Ruling expressly followed the direction in *Shelby Cnty.* that "[w]hen a contract lacks an express duration, a court will imply one 'from the nature and circumstances of the contract,' if possible." (Ruling, at 11 (quoting *Shelby Cnty.*, 857 N.W.2d at 191)). The same is true of the Court's holdings that the Exclusivity Clause is a standalone, enforceable contract, not an unenforceable agreement to agree, and it not subject to a condition precedent. (*Id.*, at 12). The Court should deny Pershing Hill's Application for Further Review.

ARGUMENT

I. THE RULING IS NOT CONTRARY TO PRINCIPLES OF CONTRACT CONSTRUCTION AND INTERPRETATION, AND DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT.

A. The holding that Exclusivity Clause contains sufficiently definite terms to be enforceable is not in conflict with any decision from this Court.

Pershing Hill primarily takes issue with the Court of Appeals' holding that the Exclusivity Clause contains sufficiently definite terms to be an enforceable contract. Its argument proceeds in several ways, none of which conflict with prior decisions from this Court.

First, Pershing Hill contends that the Exclusivity Clause contains no durational period for its obligation to give sole consideration to the Bank as lender. The Court of Appeals recognized that there was no express durational provision. (Ruling, at 11). However, relying on *Shelby Cnty.*, it recognized that that "[w]hen a contract lacks an express duration, a court will imply one 'from the nature and circumstances of the contract,' if possible." (Ruling, at 11 (quoting *Shelby Cnty.*, 857 N.W.2d at 191)). As held by the Court of

Appeals, “[t]he exclusivity clause binds the parties to act during the due-diligence phase”, which provides an appropriate durational term under Iowa law. (Ruling, at 12). Further, the due diligence at issue is expressly set forth in the Financing Proposal. (Ruling, at 3; App. 424–425). The Court of Appeals correctly rejected Pershing Hill’s argument that there is no way to determine the “actual conditions of either party’s performance”. (Appellees’ Br. at 12). This holding is not in conflict with any decision from this Court.

Second, Pershing Hill challenges the Court of Appeals’ holding that the standalone Exclusivity Clause constitutes a valid, enforceable contract. As opposed to the Financing Agreement’s other terms, the Court of Appeals held that the Exclusivity Clause “is not an agreement to agree”. (Ruling, at 9). Rather, “[i]t prohibits Pershing Hill from seeking financing from other lenders while the parties are engaged in due diligence.” (Id.). Citing *Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm’n*, 464 N.W.2d 450, 453 (Iowa 1990), the Court of Appeals held 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, at 8), and that the standalone Exclusivity Clause was a valid contract with joint promises as consideration. (Id., at 10 (“Pershing Hill promised to give Northwest Bank its “exclusive consideration as ‘Lender.’ And ‘in exchange,’ Northwest Bank would spend its ‘time and travel’ engaged in ‘the proposed due diligence.’ This promise to spend its resources on due diligence also provides the consideration for the contract.”)). This holding is not in conflict with any decision from this Court.

The Court of Appeals’ holding that the Exclusivity Clause contains sufficiently definite terms to be enforceable is not in conflict with any decision from this Court. Pershing Hill’s Application for Further Review should be denied for that reason.

B. The Court of Appeals’ holding that the Grayfield Tax Credit is not a condition precedent is not in conflict with any decision from this Court.

Finally, in holding that the Grayfield Tax Credit is not a condition precedent, and thus that the Exclusivity Clause was not

made unenforceable by the nonoccurrence of a condition precedent,
the Court of Appeals noted:

True, the due-diligence term of the financing proposal states that Northwest Bank “will need” “Grayfield Tax Credit award documentation” “as part of necessary due diligence, and as a condition to making” its financing available. But by its plain text, this provision does not put any condition on Pershing Hill’s promise to work exclusively with Northwest Bank in return for Northwest Bank’s due-diligence efforts. It merely sets out what Pershing Hill would be expected to provide for completion of due diligence and to obtain the financing. Northwest Bank’s right to enforce the exclusivity clause is not conditioned on receiving the grayfield tax credit award documentation from Pershing Hill.

(Ruling, at 11–12). This holding does not conflict with any decision of this Court.

The due diligence provision of the Financing Proposal provides, relating to the Grayfield Tax Credit:

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). This language does not provide, as Pershing Hill suggests, that the Grayfield Tax Credit be *awarded* for Pershing Hill's future performance under the Exclusivity Clause to be due, as the Court of Appeals correctly noted. 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.

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]).

Finally, 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]). The Court of Appeals’ rejection of Pershing Hill’s argument that “[w]hen Pershing Hill did not obtain the Grayfield tax credit, the proposed due diligence failed and the Exclusivity Clause was then void” is not in conflict with any decision from this Court. Pershing Hill’s Application for Further Review should be denied for that reason.

II. IF THE COURT REACHES THE ISSUE OF WHETHER THE DISTRICT COURT ERRED IN EXCLUDING THE FINANCING AGREEMENT AND ANY REFERENCE TO THE DOCUMENT OR ITS TERMS, THE COURT SHOULD FIND THAT THE DISTRICT COURT ABUSED ITS DISCRETION.

The Court of Appeals did not reach the second issue on appeal, namely the Bank's argument that the district court abused its discretion by excluding the Financing Agreement and any reference to the document or its terms, instead finding because it reversed the district court's ruling granting summary judgment on the Bank's breach of contract claim, "the evidentiary ruling also cannot stand". (Ruling, at 12–14). According to the Court, "[t]he unfair prejudice or confusion [resulting from admission of the Financing Agreement] relied on by the district court cannot outweigh the probative value of the evidence because the jury would not be mistaken in thinking the exclusivity clause is a binding contract." (Id., at 14). However, in the event this Court reaches this issue, the district court's exclusion of the Financing Agreement and its terms was an abuse of discretion.

The Financing Agreement—whether a contract or not—was highly probative on the issue of the Bank’s reliance on Defendants’ representations, and whether that reliance was justifiable. *See Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 736 (Iowa 2009) (justifiable reliance is an essential element of a claim for any claim of fraud). “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 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.”).

“[T]he *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* Iowa Civil 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. The fundamental factual question with respect to the Bank’s fraud claim is whether the Bank’s reliance on Defendants’ *later* representations was justifiable—a central issue at trial.¹ 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.

¹ 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”)).

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]).

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 representations 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.

Further, Defendants were well-aware in the months following the execution of the Financing Agreement 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. 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.

At trial, 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.

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 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.² Iowa R. Evid. 5.401–5.402.

CONCLUSION

The Bank respectfully requests that this Court deny Pershing Hill’s Application for Further Review.

² Although the Court of Appeals did not reach the issue, the Ruling was an implicit endorsement of the Bank’s position. (*Id.* (“And given the highly probative value of a written promise of exclusivity by Pershing Hill to proving whether Northwest Bank justifiably relied on later alleged misrepresentations, excluding the evidence clearly affects Northwest Bank’s substantial rights.” (citing *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 736 (Iowa 2009) (“Justifiable reliance is an essential element of a claim for fraud.”); *Lauer v. Banning*, 118 N.W. 446, 449 (Iowa 1909) (holding that exclusion of a contract that had “bearing upon the issues in the case” was “manifestly prejudicial”))).

Dated: January 10, 2025

Respectfully submitted,

/s/ David T. Bower, AT0009246
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: dbower@nyemaster.com

/s/ Candy K. Pastrnak, AT0006034
PASTRAK LAW FIRM, P.C.
313 West Third Street
Davenport, IA 52801
Telephone: 563-323-7737
Facsimile: 563-323-7739
Email: ckpastrnak@pastrnak.com

ATTORNEYS FOR APPELLANT

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 January 10, 2025:

Ian J. Russell
Lane & Waterman
220 N. Main Street, Suite 600
Davenport, Iowa 52801

/s/ David T. Bower

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