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IN THE SUPREME COURT OF IOWA
No. 20-0972
Linn County Nos. EQCV091488 and LACV091167

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, INC.,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, INC.,
Plaintiff-Appellant/Cross-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Appellees/Cross-Appellants,

and

KELLY CONCRETE COMPANY, INC., AFFORDABLE HEATING AND COOLING, INC.,
5 STAR PLUMBING, INC. and BORST BROTHERS, CONSTRUCTION, INC.,
Defendants-Appellees.

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Defendants-Appellants,

and

KELLY CONCRETE COMPANY, INC., DARNELL HOLDINGS, LLC d/b/a
DARNELL CONSTRUCTION, AFFORDABLE HEATING AND COOLING,

INC., 5 STAR PLUMBING, INC., BORST BROTHERS CONSTRUCTION, INC., and KEN-WAY EXCAVATING SERVICE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY, HONORABLE MARY E. CHICCHELLY, PRESIDING

APPLICATION OF THE APPELLEES/CROSS-APPELLANTS TO THE SUPREME COURT FOR FURTHER REVIEW
(Date of Filing of the Court of Appeals' Decision—August 18, 2021)

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court Of Appeals Erred In Second-Guessing The District Court In Determining That The Individual Defendant-Appellant Dostal Signed In His Personal (As Opposed To His Corporate) Capacity The Guarantees Of The Notes Backed By The Mortgages.

2. Whether The Court Of Appeals Erred In Concluding That The Dostal Parties' Hearsay Objections To The Singular Deficiency Evidence Presented By FAC Was Preserved, And, If So, Whether That Evidence Should Have Been Excluded As Inadmissible Hearsay.

3. Whether The Court Of Appeals Erred In Ruling That FAC's Mortgage Foreclosure Claim—And Corresponding Related Damages Claims—Were Proper Despite Admitted Lack Of Notice Of Default Because The Transactional Documents Supposedly Did Not Require Such Notice.

TABLE OF CONTENTS

Page

Questions Presented for Review ………………………………………….. 3

Table of Authorities ………………………………………………………. 5

Statement Supporting Further Review …………………………………… 7

Brief in Support of the Application ……………………………………… 10

1. Whether the Court Of Appeals Erred In Second-Guessing The District Court In Determining That The Individual Defendant-Appellant Dostal Signed In His Personal (As Opposed To His Corporate) Capacity The Guarantees Of The Notes Backed By The Mortgages ……………….. 10

2. Whether The Court Of Appeals Erred In Concluding That The Dostal Parties' Hearsay Objections To The Singular Deficiency Evidence Presented By FAC Was Preserved, And, If So, Whether That Evidence Should Have Been Excluded As Inadmissible Hearsay …… 15

3. Whether The Court Of Appeals Erred In Ruling That FAC's Mortgage Foreclosure Claim—And Corresponding Related Damages Claims—Were Proper Despite Admitted Lack Of Notice Of Default Because The Transactional Documents Supposedly Did Not Require Such Notice ……………………………………………………………….. 22

Conclusion ……………………………………………………………… 27

Certificate of Compliance ……………………………………………… 28

Certificate of Filing and Service ………………………………………… 28

Court of Appeals' Decision of August 18, 2021 …………………… Attachment

TABLE OF AUTHORITIES

Page

Cases

Beachel v. Long, 420 N.W.2d 482 (Iowa Ct. App. 1988) ……………… 17

Bayless v. Pearson, 15 Iowa 279 (Iowa 1863) …………………………… 14

Builders Kitchen & Supply Co. v. Moyer,
2009 WL 295129 (Iowa Ct. App. 2009) …………………………………. 13

Buser v. Grande Avenue Land Co., 211 Iowa 659, 234 N.W. 241 (1931) … 11

Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 414 (Iowa 2005) ………….. 13

City of Davenport v. Shewry Corp., 674 N.W.2d 79 (Iowa 2004) ……….. 13

Dickson v. Hubbell Realty Co., 567 N.W.2d 427 (Iowa 1997) …………… 22

EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency,
641 N.W.2d 776 (Iowa 2002) ………………………………………….. 13

Fisher v. City of Sioux City, 695 N.W.2d 31 (Iowa 2005) ………………… 10, 13

Golden Sun Feeds, Inc. v. Clark, 258 Iowa 678, 140 N.W.2d 158 (1966) … 22

Karth v. Iowa Dep't of Transp., 628 N.W.2d 1 (Iowa 2011) ……………… 15

Kuehl v. Freeman Bros. Agency, Inc., 521 N.W.2d 714 (Iowa 1994) …….. 14

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) ………………….. 19

Miller v. Geerlings, 256 Iowa 569, 128 N.W.2d 207 (1964) ………………. 11

Molo Oil Co. v. River City Ford Truck Sales, Inc.,
578 N.W.2d 222 (Iowa 1998) ………………………………………………….. 10, 22

Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430 (Iowa 2008) …………… 10, 22

Preferred Investment Co. v. Westbrook, 174 N.W.2d 391(Iowa 1970) ……. 11

Schaffer v. Acklin, 205 Iowa 567, 218 N.W. 286 (1928) ………………….. 11

Smith v. State, 845 N.W.2d 51(Iowa 2014) ………………………………. 10

State v. Boothy, ___ N.W.2d ___, No. 19-0454 (Iowa 2020) ……………. 19

State v. Buelow, ___ N.W.2d ____, No. 18-0733 (Iowa 2020) …………... 16

State v. Long, 628 N.W.2d 440 (Iowa 2001) …………………………….. 16

State v. Miller, 204 N.W.2d 834 (Iowa 1973) …………………………… 16

State v. Musser, 721 N.W.2d 734 (Iowa 2006) …………………………. 18

State v. Paredes, 775 N.W.2d 554 (Iowa 2009) ………………………… 15

State v. Reitenbaugh, 392 N.W.2d 486 (Iowa 1986) ……………………. 16

State v. Reynolds, 746 N.W.2d 837 (Iowa 2008) ………………………… 10, 17

Susan Kizer & Serenity Salon & Spa, Inc. v. Sievers,
859 N.W.2d 658 (Iowa Ct. App. 2015) …………………………………… 11

United States v. Miller, ___ F.3d ___, No. 18-5578 (6th Cir. 2020) ……… 18

Rules

Iowa R. Evid. 5.801(b) ………………………………………………… 16

Iowa R. Evid. 5.801(c) ………………………………………………… 16

Iowa R. Evid. 5.803(6) ………………………………………………… 10, 16

Other Authorities

5A Iowa Rules of Civil Procedure 581 (1984) …………………………… 17

STATEMENT SUPPORTING FURTHER REVIEW

As it respects the appellees/cross appellants Thomas Dostal Developers, Inc. (Developers) and Randy T. Dostal (Dostal)—which parties shall be collectively referred to as the Dostal Parties—the plaintiff Finance of America Commercial, LLC (FAC) in case number EQCV0914888 sued Developers for foreclosure of five residential subdivision lots, and sought on top of that a deficiency judgment against Developers as well as such a judgment against the purported personal guarantor Dostal; in addition, FAC ultimately sought an attorney's fee award against the Dostal Parties as well. (Petition of 11-16-2018; App. 153-184.) The Dostal Parties contested the claims—including foreclosure, deficiency, amount of any such deficiency and attorney's fees. (Answer of 01-28-2019; App. 230-233.)

Bench trial on the consolidated cases was held on February 3, 2020. (Trial Trans. at p. 1.) During the trial, the district ruled on all objections, including objections made by the Dostal Parties to certain of the exhibits offered by FAC (Trial Trans. at, e.g. 23:22-24:11, 29:04-29:11, 32:12-32:20, 38:25-39:16, 46:05-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 68:02-68:06, and etc.)—this importantly included the exhibits FAC submitted to attempt to prove not only loan note defaults but the purported amount owing on the notes (for ultimate deficiency judgment purposes); FAC did not present summaries (backed-up by the underlying supporting records) to establish the amounts for the five notes but instead obtained admission,

under the business records exception to the hearsay rule, of five letter documents prepared by another company (that does loan servicing) and which documents were prepared for the purposes of this litigation—to establish the purported deficiency amount as of the very date of trial. (Exhibits F.35.1 through F.35.5; App. 678-688.)

In addition, FAC attempted to obtain a personal judgment against Dostal individually and based on his purported personal guaranty of the five loan notes—but one of those guaranties expressly was signed only in Dostal's capacity as an officer of Developers and Dostal himself testified that all the actions he undertook and as it respects all aspects of the development project—including execution of the notes, mortgages and guarantees—were done in his capacity as an officer of Developers and not in his personal capacity; Developers alone was the borrower and ultimate developer (general contractor) of the residential subdivision project that included the five lots in question. (Exhibit F.29.23; App. 664-668; Trial Trans. at 199:11-201:02.)

Again, as relevant to this aspect of the overall appeal (the mortgage foreclosure-based claims brought by FAC against the Dostal Parties), the district court entered its ruling on March 18, 2020 that granted FAC foreclosure and judgment relief against Developers but denied FAC's request for a deficiency judgment against Dostal. (Ruling and Judgment of 03-18-2020; App. 804-827.) FAC then filed a post-judgment rule 1.904(2) motion (respecting the district court's

denial of an individual deficiency judgment) and also a motion for an award of attorney's fees; the Dostal Parties resisted each motion, and as it respected the attorney's fee motion on the grounds that FAC should not have prevailed to begin with but, in any case, its request for a full attorney fee and expense award should be significantly discounted as FAC only prevailed on a partial aspect of the claims that were subject to an attorney fee award. (Resistances of 04-13-2020 and 05-08-2020; App. 845-855 and 903-906.) Ultimately, the court denied the post-trial rule 1.904 motion by order entered on June 24, 2020 but granted FAC's fee motion in the entirety (by order entered on August 24, 2020). (Rulings of Indicated Dates; App. 907-912; 974-980.)

The Court of Appeals in its ruling, and as salient here, first reversed the district court's ruling in favor of Dostal on the guaranty claim—despite stating it was applying the substantial evidence test in reversing the district court (which court found the substantial evidence showed Dostal did not sign the guarantees in his individual capacity). Second, the district court found the Dostal Parties did not sufficiently object to FAC's sole evidence of the amount owing on the notes backed by the mortgages—the deficiency claims—despite the Dostal Parties clearly doing just that and FAC in its appeal briefs did not contend otherwise; and FAC's singular evidence was hearsay (it did not establish the business records exception to the hearsay rule). Third, the appeals court erred in affirming the trial court's judgment

that default notices were not a precondition of FAC's ability to accelerate the balances owing on the notes and to foreclose on the mortgages; that was err because the transactional documents expressly required such notice.

For these reasons and based on the arguments set forth below, the Iowa supreme court should grant this application under the criteria set forth in Iowa R. App. P. 6.1103(1)(b)(1)—the appeals court's opinion conflicts with opinions of the Iowa supreme court that involve the application of the substantial evidence rule to the district court's judgment (*Smith v. State*, 845 N.W.2d 51, 54 (Iowa 2014); *Fisher v. City of Sioux City*, 695 N.W.2d 31, 34 (Iowa 2005)); it conflicts with opinions of the Iowa supreme court involving the admission of hearsay based on the business records exception (Iowa R. Evid. 5.803(6); *State v. Reynolds,* 746 N.W.2d 837, 841 (Iowa 2008)); and it conflicts with opinions as to notice of default in mortgage foreclosure cases with requests for deficiency judgment (*Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998); *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008)).

BRIEF IN SUPPORT OF THE APPLICATION

1. Whether the Court Of Appeals Erred In Second-Guessing The District Court In Determining That The Individual Defendant-Appellant Dostal Signed In His Personal (As Opposed To His Corporate) Capacity The Guarantees Of The Notes Backed By The Mortgages.

In general, there are two types of guaranty agreements: absolute guaranties and conditional guaranties. A guaranty is considered to be absolute "unless its terms

import some condition precedent to the liability of the guarantor." *Preferred Investment Co. v. Westbrook*, 174 N.W.2d 391, 395 (Iowa 1970). In an absolute guaranty, liability is imposed upon the guarantor upon default of the principal debtor; not so for a conditional guaranty (the precondition must be satisfied). *Schaffer v. Acklin*, 205 Iowa 567, 570, 218 N.W. 286, 287 (1928). Guaranty contracts are to be construed according to the intention of the parties. *Miller v. Geerlings*, 256 Iowa 569, 576, 128 N.W.2d 207, 211 (1964). This intention may be ascertained by examining the language employed and the circumstances under which the guaranty is given. *Buser v. Grande Avenue Land Co.*, 211 Iowa 659, 664, 234 N.W. 241, 244 (1931). The plaintiff bears the burden to prove by the preponderance of the evidence the breach of the condition(s) that triggers the guaranty, the breach of the guaranty, the provision of appropriate notice, and as well as damages and the amount. *Susan Kizer & Serenity Salon & Spa, Inc. v. Sievers,* 859 N.W.2d 658, 664-65 (Iowa Ct. App. 2015).

FAC in its briefing, and after a lengthy citation of general Delaware contract law (which was not argued as applying at the district court level of the proceedings), conclusory states that there was “no evidence” presented that Dostal executed any of the guaranty documents in other than his individual capacity. But that conclusory assertion is not supported by the evidence actually presented and on which the district court made a finding supported by substantial evidence (or otherwise witness

credibility) that the guaranty documents were not intended to subject Dostal to individual liability in the event Developer's defaulted on any of the loan notes. (Exhibit F.29.3; App. 524-528; Trial Trans. 56:02-56:09, 199:11-201:02.)

First, right after FAC in its brief claims there is "no evidence" Dostal signed any of the guaranties in his capacity as an officer of Developers, FAC turns around and acknowledges—as it must under the record—that Dostal in fact expressly signed one of the notes singularly in that capacity (and not in his individual capacity); and the note was made out by FAC for this to occur. (Exhibit F.29.23; App. 664-668; Trial Trans. at 56:02-56:09, 199:11-201:02). And as for the other four guaranty documents (exhibits F.29.3, F.29.8, F.29.13, and F.29.18; App. 524-528, 559-563, 594-598, 629-633), Dostal indicated the intention was that those documents were to be treated the same way and that at all times—and executing all of the mortgage-based documents—he acted solely in his capacity as an officer of Developers. (Trial Trans. 199:11-201;02.) In contrast, FAC's only witness admitted that all he knew about the transactional documents was what he gleaned from his review of FAC's file (as this witness was not even employed with FAC at the time the transactional documents were prepared and executed); and this witness accordingly agreed that he otherwise had no personal knowledge as to the parties' intention at the time in question. (Trial Trans. at 54:17-55:16.) And in that regard the appeals court facially erred in not following the district court's ruling that substantial evidence supported

that court's finding that Dostal signed the guarantees in his corporate, as opposed to personal, capacity. This is because the district court's findings of fact in an action at law tried to the bench are binding on appeal if supported by substantial evidence; however, the appellate court is not bound by the district court's conclusions of law or its application of legal principles to the facts. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 780-81 (Iowa 2002). Evidence is considered substantial if a reasonable mind would accept it as adequate to reach the same factual conclusion as the district court. *Smith v. State*, 845 N.W.2d 51, 54 (Iowa 2014); *Fisher v. City of Sioux City*, 695 N.W.2d 31, 34 (Iowa 2005). This determination is made in the light most favorable to the district court's judgment. *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 414, 418 (Iowa 2005).

The cases on which FAC relied on in its briefs are easily distinguishable—the cases in fact support Dostal's position—as well as the district court's ultimate findings and conclusions; because those cases focus on the intention of the parties at the time the documents were executed. For instance, in *Builders Kitchen & Supply Co. v. Moyer,* 2009 WL 295129 (Iowa Ct. App. 2009), the body of the guaranty expressly referred to the individual signor and in his personal capacity as the guarantor; such language does not appear in the FAC guarantees (no individual or personal language is used in the definition of the term guarantor). Likewise, in *City of Davenport v. Shewry Corp.,* 674 N.W.2d 79 (Iowa 2004), a corporation and its

officer each signed a separate guaranty that covered the same singular loan note (or debt), one note signed in the corporate capacity and the other in an express individual capacity with matching terms for the same in the body of the guaranty—in the case at bar, a single note was executed to cover each of the five separate loan notes and the intent as set forth above was not to bind Dostal individually. And *Bayless v. Pearson,* 15 Iowa 279 (Iowa 1863) and *Kuehl v. Freedman Bros. Agency,* 521 N.W.2d 714 (Iowa 1994) are not different because the signatory parties for the singular debt involved in those cases expressly executed the document at issue in his individual capacity with the terms of the document indicating such personal responsibility as well.

Under these circumstances, at best a dispute of fact existed over the meaning of the guaranties and under the intent of the parties—and there was substantial evidence to support the district court's factual resolution of this dispute (or otherwise the district court's determination of Dostal's credibility over the admitted lack of personal knowledge of the FAC witness should control). The district court's findings and conclusions on this subject—and under either standard of review (law or equity)—are fully supported. Its decision should not have been disturbed by the court of appeals.

2. Whether The Court Of Appeals Erred In Concluding That The Dostal Parties' Hearsay Objections To The Singular Deficiency Evidence Presented By FAC Was Preserved, And, If So, Whether That Evidence Should Have Been Excluded As Inadmissible Hearsay.

The Dostal Partis objected on hearsay grounds to FAC's submission of the singular evidence it presented to prove the amount of deficiencies on the five notes (and hence the amount of the deficiency judgments that should be entered against Developers as the borrower (signer of the notes) and Dostal as the purported personal guarantor). (Trial Trans. at 38:25-39:16, 43:25-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 62:12-66:11.) This evidence was comprised of five two-page letters, purportedly addressed to Developers (but admittedly never sent to it) that claimed to itemize the deficiencies. (Id.; Exhibits F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5; App. 678-679; 680-682; 683-684; 685-686; 687-688.) These letters were not prepared by FAC but rather were prepared by a servicing company called BSI Financial Services—and the letters were prepared singularly to calculate the purported deficiencies owing as of the exact date the trial was held (February 3, 2020). (Id.) FAC argued, and against the Dostal Parties' hearsay objection, singularly that the letters were admissible under the business records exception to the hearsay rule (and that is what the district court ruled in admitting the letters). (Id.) And where, as here, the objection is grounded in hearsay, then the appellate court reviews the correctness of the ruling for the correction of errors at law. *Karth v. Iowa Dep't of Transp.,* 628 N.W.2d 1, 5 (Iowa 2011); *State v. Paredes,* 775

N.W.2d 554, 560 (Iowa 2009). And unlike for non-hearsay based objections, prejudice to the objecting party is presumed when evidence is admitted that should have been excluded from the fact-finder's consideration by the hearsay rule. *State v. Reitenbaugh,* 392 N.W.2d 486, 489-90 (Iowa 1986).

It must first be noted—and emphasized—that FAC bore the burden of proof by a preponderance of the evidence to establish that the business records exception to the hearsay rule applied to the BSI deficiency letters and given the Dostal Parties' hearsay objection. *State v. Long,* 628 N.W.2d 440, 442-43 (Iowa 2001) (proponent of the evidence bears the burden to prove that an exception to the hearsay rule permits that evidence's admission); *State v. Miller,* 204 N.W.2d 834, 840 (Iowa 1973) (same).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). A "declarant" is defined as "a person who makes a statement." Id. at 5.801(b). "Hearsay is normally inadmissible." *State v. Buelow,* ___ N.W.2d ___, No. 18-0733 at *6 (Iowa 2020) (citing evidence rule 5.802). Where the statement is hearsay, the proponent of the statement must show that one or more of the enumerated exceptions to the hearsay rule apply, and the exception at issue in this appeal is known as the business records exception. *Id.* at 5.803(6).

For evidence to be admissible under this exception to the hearsay rule, the proponent of the evidence must show each and all of the following: (1) the documents in question, and each of them, are business records; (2) the documents were made at or near the time of the act (i.e., the documents were not created for purposes of litigation or in contemplation of possible future litigation but rather in the regular course of the business's mundane and routine affairs); (3) the documents were made by, or from information transmitted by, a person with actual personal knowledge and authorized by his or her employment position to make that record or transmit that information; (4) the documents were kept in the course of a regularly conducted business activity; and (5) it was a regular practice of that business activity to make such a business record. Iowa R. Evid. 5.803(6); *State v. Reynolds,* 746 N.W.2d 837, 841 (Iowa 2008); *Beachel v. Long,* 420 N.W.2d 482, 484 (Iowa Ct. App. 1988). Moreover, the person who provides the testimony to establish that the documents are indeed business records, and as such exempted from the hearsay rule, must himself or herself have personal knowledge of the record keeping system, have access to it, and have personal knowledge to establish each of the five elements to prove the records are admissible under the business records exception to the hearsay rule. *Beachel,* 420 N.W.2d at 484 (quoting 5A Iowa Rules of Civil Procedure 581 (1984)).

In *Beachel,* the Iowa court of appeals ruled that the district court properly excluded clinic records directly involving treatment of the plaintiff (in a personal injury lawsuit) and sought to be admitted into evidence by the defendant tortfeasor party as business records; the *Beachel* court ruled in *id.* at 484-85:

> The foundation elements which must be proved prior to admission of the evidence under the business records exception are as follows:
>
> (1) That it is a business record;
> (2) That it was made at or near the time of an act;
> (3) That it was made by, or from information transmitted by, a person with knowledge;
> (4) That it was kept in the course of a regularly conducted business activity;
> (5) That it was the regular practice of that business activity to make such a business record.
>
> 5A Iowa Rules of Civil Procedure Annotated 581 (1984).

A real indica that a record does not qualify for admission into evidence under the business records exception to the hearsay rule is where that record was created for litigation purposes—that is, to prove some fact (or element) involving a party's claim or defense. *State v. Musser,* 721 N.W.2d 734, 754 (Iowa 2006); *see also United States v. Norwood,* ___ F.3d ___, No. 19-2178 at *15 (7th Cir. 2020) (business records typically are nontestimonial—that is, such records are not created for litigation purposes); *United States v. Miller,* ___ F.3d ___, No. 18-5578 at 28 (6th

Cir. 2020) (bracket in original) ("On the other hand, a report written for a purpose unrelated to creating evidence or proving past events is generally nontestimonial. Business records are the best examples of these reports. Those records are generally admissible without cross-examination of their authors because they are 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[.]'") (quoting *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 309-11 (2009)).[1]

Here, FAC through its singular witness did not establish any of the five foundational elements and in order for FAC to meet its proof burden of showing the documents were admissible under the business records exception to the hearsay rule; in addition, rather than being a business record the documents were created for testimonial (that is, litigation) purposes—to establish the amounts owing on each of the five loan notes (and in order to establish the deficiency amounts for both the individual deficiency claims against Developers (as the borrower and note signer) and Dostal (as the purported guarantor of the notes). First, FAC's sole witness testified that, despite the form of the documents—purported letters addressed to

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[1] It also needs to be noted that FAC did not even go through the motions of attempting to establish the business records exception by submitting a Certificate of Authenticity signed by a BSI officer or employee whom may have been able to establish by self-authentication that the letters were business records. Iowa R. Evid. 5.902(11) (method to self-authenticate a business record); *see also State v. Boothby,* ___ N.W.2d ___, No. 19-0454 at *9-10 (Iowa 2020) (process of how to do so).

Developers to notify it of the deficiency (loan arrearage) amounts and right to cure—the documents were not intended to be sent to Developers and in fact were never so sent; to the contrary, the documents were prepared singularly to establish the arrearage amounts as of the date of the trial and to be submitted at trial to establish (and as FAC's only evidence) of the arrearage amounts (and to establish the deficiency amount on both the note (borrower) and guaranty claims). (Trial Trans. at 62:12-66:11.) Moreover, the documents were created on the cusp of the scheduled trial to do just that. (Exhibits F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5—each dated January 23rd, less than two weeks before the start of trial; App. 678-679; 680-682; 683-684; 685-686; 687-688.) And there was no information presented as to who actually made and transmitted the information contained in the documents (just a generalized statement it had to have been done by someone with BSI Financial). (Trial Trans. 65:07-65:09.) Likewise, such documents could not have been kept in the "regular course of business activity" because the documents were not created for notice purposes (to be sent to the borrower, in this case Developers) but rather were created to be used testimonially to establish facts (and elements of claims) for which FAC bore the burden of proof in this litigation. (Trial Trans. at 62:12-66:11.)

While prejudice is presumed, the Dostal Parties in fact were prejudiced here. The barren admission of the documents left them no way to determine the accuracy of the numbers set forth therein—unlike had a summary been used, where the

underlying documents would have had to have been produced for inspection—and FAC's singular witness himself testified he had no personal knowledge concerning the arrearage numbers appearing on the documents (he could only take—that is assume—the numbers were correct). (Trial Trans. at 62:12-66:11.) And without this erroneously admitted evidence, FAC would have failed to prove the amount of note arrearage and the corresponding deficiency judgment for both its claims of loan note breach and recovery on the guarantees. (Id.)

And the court of appeals' ruling that circumvented all of this—barrenly stating that the Dostal Parties did not object on hearsay grounds when FAC's witness was describing the letters and their contents is unfounded—even FAC did not raise this issue in its briefs. The Dostal Parties did make their hearsay objection to this part of the testimony—what was not objected to was FAC's effort to lay the foundation of the exception to the hearsay rule by its examining its witness to attempt to lay the foundation for the exception (FAC after all bore the proof burden here). The court of appeals mistook the Dostal Parties' voir dire of the FAC witness's testimony (to establish the hearsay objection) with FAC's then response by questioning its witness to attempt to establish the exception as a waiver—but there was no such waiver; the voir dire and objection came up-front. (Trial Trans. at 38:25-39:16, 43:25-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 62:12-66:11.)

3. Whether The Court Of Appeals Erred In Ruling That FAC's Mortgage Foreclosure Claim—And Corresponding Related Damages Claims—Were Proper Despite Admitted Lack Of Notice Of Default Because The Transactional Documents Supposedly Did Not Require Such Notice.

A mortgage foreclosure is a contractual claim—that is, the foreclosing party must prove the elements of a breach of contract claim (here, breach of the note secured by the mortgage and ultimately breach of the mortgage itself). *Golden Sun Feeds, Inc. v. Clark,* 258 Iowa 678, 682 140 N.W.2d 158, 161 (1966). To prove a breach of contract, a party must show: "(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach." *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). "A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Id*. Contract interpretation, that is the meaning of contractual language, is a legal issue for the court to decide unless the interpretation is dependent on extrinsic evidence. *Id*. "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." *Pillsbury Co. v. Wells Dairy, Inc*., 752 N.W.2d 430, 436 (Iowa 2008). The words of the contract are "the most important evidence" in this determination. *Id*. "When there are ambiguities in the contract, they are strictly construed against the drafter." *Dickson v. Hubbell Realty Co*., 567 N.W.2d 427, 430

(Iowa 1997).

The evidence showed that in November 2017, Developers executed separate promissory notes with FAC as it respected each of the five lots in question (exhibits F.29.1, F.29.6, F.29.11, F.29.16 and F.29.14; App. 500-506; 535-541; 570-576; 605-611; 599-601); contemporaneously, Developers executed five separate mortgages to secure the notes (exhibits F29.2, F 29.7, F 29.12, F 29.17 and F 29.22; App. 507-523; 542-558; 577-593; 612-628; 647-663). Nine months later, FAC (purporting to act through the Posinelli Firm) sent to Developers a separate letter for each note and mortgage, and dated August 16, 2018, that purported to notify Developers that the respective note was in default and that if Developers did not pay a specified amount (under $10,000.00 for each note) "on or before August 23, 2018," then FAC would exercise its rights under the notes and mortgages (i.e., it would institute foreclosure or other legal proceedings) (exhibits F29.4, F29.9, F29.14, 29.19 and F 29.24; App. 529-531; 564-566; 599-601; 634-636; 669-671). Thus, even assuming these notices were delivered to Developers as rapidly as but one day after the August 16th letter notice date (the absolute soonest possible), Developers was accorded but six days (including non-business days) to make good on the purported default for non-payment of the respective notes.[2] And given the testimony of FAC's witness (see

[2] And it must be emphasized that this is an assumption—FAC's sole witness on this subject (Mark Thomas) testified that the soonest Developers could have received the default notices was the next business day; however, he went on to concede this

note 2), the record does not establish that Developers was accorded any prior notice time to cure. (Trial Trans. at 56:25-62:11.) This in hindsight is hardly surprising—apparently FAC through the Posinelli Firm was not kidding on providing Developers little-to-no-time to cure any of the notices of defaults; just eleven days after the date of the August 16th first-notices-of-default letters, FAC (again purporting to act through the Posinelli Firm) dated notices to Developers that FAC was immediately accelerating each of the five notes and further that FAC intended to immediately exercise its remedy rights on the notes and mortgages without according Developers any time to cure the accelerated amounts purportedly owing (and whatever those amounts may have been) (exhibits F29.5, F29.10, F29.15, F29.20 and F29.26; App. 532-534; 567-569; 602-604; 637-639; 675-677). Indeed, at the last paragraph of page 2 of the acceleration notices, FAC through Posinelli curtly noted (id.):

> "Nothing set forth in this letter, no delay on the part of the Lender in enforcing its rights with respect to the default, and no discussions between Lender and Borrower, or Lender and Guarantor regarding the matters addressed in this letter, the Loan Documents, or any other subject matter, are intended (and none shall be deemed) to modify, limit, release, reduce or waive any of Lender's rights, remedies or privileges under the Loan Documents, or at law or in equity, all of which are hereby specifically reserved."

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was speculation on his part and the letters could have been received many days after August 16th and may not have been delivered until after the actual default date. (Trial Trans. at 56:25-62:11.)

The manner in which FAC proceeded—providing Developers with in essence no time to cure any purported default (let alone to even respond to the claim of default) and proceeding immediately to accelerate each of the notes (so no default, if any, could actually be cured)—may have comported with FAC's business purposes but it constitutes a facial and material breach of its obligations under the notes and mortgages to Developers. Specifically, paragraph 14 of the notes (identified in the above note exhibits) contains the notice provision that governs defaults; it provides that: "All notices required or permitted to be given hereunder shall be given in the manner and to the place as provided in the Mortgage/Deed of Trust for notices to the party to whom each notice is given." As it respects the mortgages (identified in the mortgage exhibits above), paragraph 19 defines "events of default" (capitalization omitted) which includes at subparagraph A Developers failure to pay a note installment within the grace period (five days after due date, and as set forth in the notes) and then the paragraph at subpart D further defines how long after notice from FAC to Developers does Developers have to cure such a default: "If default shall continue for 15 days after notice thereof by Mortgagee to Mortgagor in the due and punctual performance or observance of any other agreement or condition herein or in the Note contained; [remainder of the provision extends the cure period to 30-days after notice is delivered in the event the default is not otherwise susceptible of cure within the 15-days after notice period]."

FAC failed to accord Developers with adequate—and contractually required—notice of the default (as well as the subsequent acceleration) and let alone accord Developers the required post-notice period to either contest or cure the default; to the contrary, FAC breached the terms of the notes and mortgages by significantly constraining the notice of cure period for the purported default of payment and then providing no notice period at all for the subsequent acceleration. FAC purposefully acted in such a manner as to preclude Developers from even addressing any purported default, let alone actually according Developers the time set forth in the contracts (the cure period in the notes and the default periods in the mortgages) to remedy any such default.

FAC breached the terms of the notes and mortgages in the material manners specified above. It did so knowingly and of its own accord, and its breaches had the intended effect—they caused Developers to be placed into an uncurable default position on the notes and mortgages (and as the result of the abrupt accelerations). Under these established facts, FAC failed to prove its entitlement to a judgment on its mortgage foreclosure claim because it failed to meet the third element of proof of breach—that it performed all the terms and conditions required under the contract.

And FAC's failure impacts its other claims, all based on the foreclosure action (claim). Here, we already have seen that the notes never matured in the required manner—in this case, FAC apparently claims maturity occurred when (through its

apparent agent Posinelli) it accelerated each of the five notes on August 27, 2018; yet we have seen that this acceleration was improper and based on a breach of the default and notice to cure provisions imposed on FAC by the notes and mortgages. FAC under the terms of the guaranty documents cannot self-excuse its breaches by claiming the guarantor(s) nevertheless are personally liable even when the borrower Developers is not—the guarantors' respective liability flows through the liability of the borrower Developers (that is, the guarantors' liability is preconditioned on the liability of the borrower). And in that regard, Developers' showing that FAC has failed to prove damages and the amount to support a deficiency judgment equally applies to FAC's effort to impose a deficiency judgment on the guarantees.

CONCLUSION

For the reasons stated and authorities cited herein, this further review application should be granted.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS FOR APPLICATIONS

This Application complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.1103(4) because this Application has been prepared in a proportionally spaced typeface using Times New Roman in 14 front size and contains 5,258 words, excluding the parts of the Application exempted by the cited rule.

/s/ S.P. DeVolder — September 7, 2021
S.P. DeVolder — Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 7, 20201 this Application for Further Review of the Appellant was filed electronically with the Clerk of the Iowa Supreme Court through EDMS, and which system further will provide access to and service of the Application on that same date to:

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