IN THE IOWA SUPREME COURT

SUPREME COURT NO.
20-0972

BORST BROS. CONST., INC.,
Plaintiff-Appellee**,**
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
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.

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And

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

APPEAL FROM THE DISTRICT COURT FOR LINN COUNTY
THE HONORABLE MARY E. CHICCHELLY

RESISTANCE TO APPLICATION OF THE APPELLEES/CROSS APPELLANTS FOR FURTHER REVIEW
(DATE OF FILING OF COURT OF APPEALS DECISION: AUGUST 18, 2021)

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STATEMENT RESISTING FURTHER REVIEW

At trial, Finance of America Commercial LLC ("**FACo**") established that it made five loans to Thomas Dostal Developers, Inc. ("**Dostal Developers**"), that Dostal Developers defaulted on those loans and that Randy Dostal personally guaranteed each of the loans. Randy Dostal and Dostal Developers (together, the "**Dostal Parties**") have not provided any reason for the Court to revisit the very uncontroversial rulings made by the Iowa Court of Appeals ("**Appellate Court**"). Contrary to the Dostal Parties' assertions, the Appellate Court decision is consistent with decisions of the Iowa Supreme Court. No further review is warranted under Iowa R. App. P. 6.1103(1)(b)(1).

With regard to the five personal guarantys signed by Randy Dostal (the "**Guarantys**"), the Appellate Court correctly held that Mr. Dostal is separate from the borrower, Dostal Developers, and that he executed the Guarantys in his individual capacity. As the district court and Appellate Court both held, FACo provided compelling admissible evidence regarding the debts owed by Dostal Developers. That evidence also established that FACo was not required to provide notice to the Dostal Parties of their defaults or of FACo's intent to foreclose, but did so anyway. The Court therefore should deny the Dostal Parties' Application for Further Review.

BRIEF IN SUPPORT OF RESISTANCE TO APPLICATION FOR FURTHER REVIEW

I. The Appellate Court correctly held that Randy Dostal Signed the Guarantys in his individual capacity.

As FACo established below, the district court did not analyze the language in the Guarantys, and the Dostal Parties likewise tried to avoid that language in their briefing before the Appellate Court. Indeed, the Dostal Parties' Application for Further Review (the "**Application**") still does not address the specific language in the Guarantys. Instead, they rely on extrinsic evidence to bend the meaning of "Guarantor" into something other than the express definition of "Guarantor" in the Guarantys. Moreover, the testimony on which they rely is not what they claim it to be. No one, including Randy Dostal, testified that Randy Dostal signed the Guarantys in a representative capacity.

Guarantys are contracts, and thus the rules concerning contract interpretation and construction apply to guarantys.[1] *Millcreek Shopping Ctr., LLC v. Jenner Enter., Inc.*, No. N13C–11–145, 2016 WL 3752382, at *5 (Del. Super. June 30, 2016); *Bank of the West v. Michael R. Myers Revocable Trust*, 776 N.W.2d 112 (Table), 2009 WL 2960404, at *3 (Iowa Ct. App. 2009). Courts therefore must determine a guarantor's obligations based on the parties' written

[1] The Dostal Parties make a passing suggestion that Delaware law does not apply because FACo did not seek to invoke Delaware law in the district court. The Guarantys specify that they shall be interpreted under Delaware law. Regardless, in order to ensure that the Court is comfortable with the applicable law, FACo has cited both Delaware and Iowa law to demonstrate the similarities between the two. Under either state's law, the Guarantys are enforceable personally against Randy Dostal.

contract. *Shoppes of Mt. Pleasant, LLC v. J.M.L., Inc.*, No. CPU4–14–001415, 2015 WL 3824118, at *5 (Del. Ct. Comm. Pl. May 11, 2015); *Bank of the West*, 2009 WL 2960404, at *3. As with any contract, courts should endeavor to determine the parties' intentions, and those intentions may be determined by examining the language in the guaranty and the circumstances in which the guaranty is given. *Shoppes of Mt. Pleasant*, 2015 WL 3824118, at *5; *Williams v. Clark*, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987). Moreover, the interpretation of a contract that 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. *In re IAC/InterActive Corp.*, 948 A.2d 471, 497 (Del. Ch. 2008); *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 26 (Iowa 1978).

In determining the parties' intentions in a guaranty, courts should adhere to the basic precept that a guaranty is an obligation by one party to answer for the debts of another party – not for its own debts. *Falco v. Alpha Affiliates*, No. Civ.A. 97–4941997, 1997 WL 782011, at *5 (D. Del. Dec. 10, 1997); *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 86-87 (Iowa 2004). Thus, the primary obligor, not being a third person, cannot be a guarantor. *Falco*, 1997 WL 782001, at *5; *Millcreek Shopping*, 2016 WL 3752382, at *5; *City of Davenport*, 674 N.W.2d at 86. Rather, the primary obligor is already obligated under its separate agreement, and the separate guarantor owes an obligation distinct from that of the primary obligor. *Falco*, 1997 WL 782011, at *5; *Millcreek Shopping*, 2016 WL

2752382, at *5; *City of Davenport*, 674 N.W.2d at 86; *Bank of the West*, 2009 WL 2960404, at *3. Where the dispute centers on whether an individual signs a guaranty in their individual capacity as opposed to their corporate capacity, the signature of a company's representative is made in that person's personal capacity unless the language of the agreement states otherwise. *Falco*, 1997 WL 782011, at *1; *TMC Consulting Serv., L.L.C. v. Wright*, No. N15C–11–132, 2017 WL 374750, at *9 (Del. Super. Jan. 26, 2017); *Builders Kitchen & Supply Co. v. Moyer*, 776 N.W.2d 112 (Table), 2009 WL 2951295, at *3-4 (Iowa Ct. App. 2009); *City of Davenport*, 674 N.W.2d at 86-87.[2]

The Guarantys in this case clearly are separate personal guarantys by Randy Dostal for loans received by a separate business entity. Dostal Developers executed 5 promissory notes, all of which have the following signature block:

> IN WITNESS WHEREOF, the undersigned have caused this Note to be executed as of the day and year first written above.
>
> **Thomas Dostal Developers Inc., an Iowa Corporation**
> By: [Written Signature of Randy Dostal]
> Name: Randy T. Dostal
> Its: President

[2] Likewise, in *Kuehl v. Freeman Bros. Agency*, 521 N.W.2d 714, 719 (Iowa 1994), the court held that a corporation's president and sole owner who signed a contract both in his corporate capacity and in his individual capacity was personally liable under the contract.

(Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, F.29.21.) Dostal Developers also executed five mortgages with the same signature block. (Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17, F.29.22.)

In connection with each of the Loans, Randy Dostal executed and delivered a Guaranty to FACo. (Tr. Trans. 20:15 – 25:19; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18, F.29.23.) Each of the Guarantys states:

> WHEREAS, the undersigned, **Randy T. Dostal** called "Guarantor" is substantially financially or otherwise interested in **Thomas Dostal Developers, Inc., an Iowa Corporation** (herein called "Borrower"), the maker of the Borrower's Note in the principal amount of [amount of loan] payable to **Finance of America Commercial LLC** and its successors and assigns (herein called the "Note"), and it will be of substantial economic benefit to the Guarantors, and each of them, for the Borrower to execute and deliver the Note and borrow the principal sum evidenced thereby and secured by the Mortgage therein described (herein called the "Mortgage").
>
> NOW, THEREFORE, in consideration of the premises and of Ten Dollars ($10.00) in hand paid by the Borrower to the Guarantors … the Guarantors … hereby jointly and severally agree as follows:
>
> 1. The Guarantors, and each of them, hereby jointly and severally, unconditionally, absolutely and irrevocably guarantee, for the benefit of each and every present and future holder or holders of the Note (all herein called the "Obligees"), the full and prompt payment to the Obligees at maturity (whether at the stated maturities thereof, or by acceleration or otherwise) of the indebtedness of the Borrower evidenced by the Note, together with all other obligations and liabilities of the Borrower ….

(*Id.*) In connection with the Loans for the properties located at 5118 Dostal Drive, 5124 Dostal Drive, 5130 Dostal Drive and 5136 Dostal Drive, each of the Guarantys includes the following signature block:

> IN WITNESS WHEREOF, the Guarantors have signed and sealed this Guaranty as of the day and year first above written.
> [Written Signature of Randy Dostal]
> Randy T. Dostal

(Tr. Trans. 20:15 – 22:14; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18.) Randy Dostal's written signature appeared on each of the signature lines for each of those four Guarantys. (Tr. Trans. 20:15 – 22:14; Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18.)

In connection with the Loan for the property located at 5221 Dostal Drive, the signature block appears as follows:

> IN WITNESS WHEREOF, the Guarantors have signed and sealed this Guaranty as of the day and year first above written.
> [Written Signature of Thomas T. Dostal Dev.]
> Thomas T. Dostal

(Tr. Trans. 22:15 – 23.1; Tr. Exh. 29.23.) Above "Thomas T. Dostal," the written signature of Thomas T. Dostal Dev." appears. (Tr. Trans. 22:15 – 23.1; Tr. Exh. 29.23.) But again, the opening paragraph of the 5221 Guaranty states that Randy T. Dostal is the individual guaranteeing Dostal Developers' obligations. (Tr. Trans. 24:17 – 24:24.) Moreover, there is no evidence in the record of the existence of a company named "Thomas T. Dev." or even "Thomas T. Dostal

Developers." The 5221 Guaranty then was duly notarized by Peg Rahe. (Tr. Trans. 24:17 – 25:11.) The notary block for all five of the Guarantys, including the 5221 Guaranty, states:

> I, the undersigned, a Notary Public for the county and state aforesaid, do certify that Randy T. Dostal as Guarantor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me in person and acknowledged that he signed and sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

(Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; F.29.23.) Thus, Randy Dostal is defined as the Guarantor in each of the notary blocks as well.

None of the Guarantys has a signature block naming Dostal Developers as a signatory to a Guaranty. None of the Guarantys' signature blocks even mentions Dostal Developers. The 5221 Guaranty does contain a typo, with the signature block showing "*Thomas* T. Dostal Dev." rather than "*Randy* T. Dostal." But it does not indicate that Dostal Developers was to sign the document. Moreover, none of the Guarantys includes a designation in the signature block or elsewhere of Randy Dostal's position at Dostal Developers, and there is no language in any of the Guarantys indicating that Randy Dostal signed the Guarantys as the President on behalf of Dostal Developers. Indeed, they all specifically state that Randy Dostal was himself the Guarantor. (Tr. Exhs. F.29.3, F.29.8, F.29.13, F.29.18; F.29.23.) This stands in sharp contrast to the Notes and

Mortgages, all of which indicate that Randy Dostal signed as "President" of Dostal Developers.

Randy Dostal does not mention any of this in his Application. He tries to rely instead on his own testimony at trial. Even if that extrinsic evidence could be considered, which it cannot because the Guarantys are fully integrated, *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa. 1996), Randy Dostal's testimony does not establish that he signed the Guarantys in a corporate capacity. When questioned by his attorney, Randy Dostal carefully distinguished between himself and Dostal Developers:

> Q. So let's get specific. Instead of using the legal term you, who was the owner of the lots at Hawks Points in question, specifically those 5 lots that bring us all in here today, lots 5 through 8 and 10?
>
> A. Thomas Dostal Developers owned those properties.
>
> Q. And who was the contractor with respect -- well I should say, do you contend that Thomas Dostal Developers, Inc. had any kind of contracting role as it respects these 5 lots?
>
> A. Thomas Dostal Developers ordered all work, anything that went with those lots and those homes would go through Thomas Dostal Developers.
>
> Q. And is that why we see other documents that we've gone through today through many witnesses that indicated on some of them the general contractor is developers Dostal Developers?
>
> A. Correct.
>
> Q. And that Dostal Developers was the borrower, owner and general contractor, correct?

A. Yes, sir, correct.

Q. Was not you individually?

A. No, it was Thomas Dostal Developers.

(*Id.* 200:6-201:2.) When Randy Dostal testified that he signed documents on behalf of Dostal Developers, he was specifically referencing the Composite Mortgage Affidavit and building permits, not the Guarantys. (*Id.* 199:11-200:5)

Randy Dostal's testimony is completely consistent with him personally guaranteeing the five Loans in this case. The Guarantys' written terms all distinguish between the "Guarantor" and the "Borrower," defining Randy Dostal alone as the "Guarantor" and Dostal Developers as the "Borrower." (Tr. Exhs. F.29.3, F.29.8, F.29.12, F.29.13 and F.29.23.) The Guarantys' separate use of the terms "Guarantor" and "Borrower" thus are consistent with Randy Dostal's own statements that the Borrower—Dostal Developers—has separate obligations from him. And the fact that Randy Dostal explicitly signed other documents on behalf of Dostal Developers provides further evidence that, had he intended to do so for the Guarantys, he certainly could and would have.

Recognizing that they must offer some hook for the Court to consider their Application under Rule 6.1103(1)(b)(1), the Dostal Parties cite *Smith v. State*, 845 N.W.2d 51 (Iowa 2014) and *Fischer v. City of Sioux City*, 695 N.W.2d 31 (Iowa 2005) as being inconsistent with the Appellate Court's application of the substantial evidence standard of review. *Smith* and *Fischer* both are cases in which

the Court applied the substantial evidence standard. But that is the extent of their resemblance to this case. Both cases are so legally and factually different from the case a bar that they cannot even reasonably be grouped with this case to determine whether there are inconsistencies.

From a legal perspective, although the *Smith* Court did apply the substantial evidence standard, it was applying that standard to determine whether the lower court properly applied the clear and convincing evidence standard in a wrongful imprisonment case. *Smith*, 845 N.W.2d at 53. There is no clear and convincing standard at issue in the case at bar. The *Fischer* decision's placement of the burden of proof on the plaintiffs was later abrogated by *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020), making the Court's application of evidentiary standards particularly uninstructive here.

Factually, the *Smith* Court highlighted substantial inconsistencies in Smith's testimony. *Smith*, 845 N.W.2d at 57-58. Those inconsistencies were substantial evidence supporting the lower court's ruling that Smith had failed to provide clear and convincing evidence of her innocence. *Id.* at 58. Likewise the *Fischer* court focused on the fact that there was substantial *conflicting* evidence, and held the lower court was entitled to determine which evidence was more credible. *Fischer*, 695 N.W.2d at 36.

Unlike the *Smith* and *Fischer* cases, the district court in this case failed to consider all of the relevant evidence, and the evidence it did consider did not

support its conclusion. The district court did not analyze the language of the Guarantys even though those Guarantys were introduced at trial. (Tr. Ruling 9, 16, 18.) The Appellate Court did consider the Guarantys, and overruled the district court based on the very clear language. (App. Dec. 11.) And contrary to the district court's ruling, Randy Dostal's testimony further supported the separation between himself, as Guarantor, from Dostal Developers, as Borrower, rather than evidencing an overlap. There was indeed *no* evidence that Randy Dostal signed the Guarantys as Dostal Developers, and thus no "substantial evidence" supporting the district court's ruling.

Randy Dostal's final argument is that the cases cited by FACo below are distinguishable from this case. Although no two cases are exactly alike, the cases FACo cites are instructive, and support FACo's uncontroversial position that the principal of a business can (and often does) personally guaranty repayment of the loans their businesses receive. All of the cases relate to the enforcement of guarantys, sometimes in situations even less clear than this one. Yet, even if every guaranty case published by an Iowa or Delaware court could be meaningfully distinguished from this case, it would not matter. The Guarantys so precisely and explicitly define Randy Dostal as the Guarantor that case law is not necessary to bind Randy Dostal to the Guarantys. Finally, it would be absurd for Dostal Developers to have guaranteed loans it was already obligated to pay under the Notes and Mortgages.

II. FACo submitted reliable and proper evidence regarding the amounts due and Dostal Developers' defaults.

At trial, FACo relied on testimony and payoff statements to establish the amount that remains due and owing on the Loans. Dostal Developers never provided evidence that it made the missed monthly payments or that it paid—or even attempted to pay—the accelerated indebtedness. Instead, Dostal Developers attempts to avoid the consequences of its defaults by arguing that FACo relied on hearsay and by misquoting the Mortgages to suggest that FACo had an obligation to provide Dostal Developers more time to cure its defaults. Both arguments fail.

A. FACo submitted admissible business records to establish its right to foreclose.

The Dostal Parties object to FACo using payoff statements describing Dostal Developers' debts on the grounds that they are hearsay and not subject to the business records hearsay exception. The Appellate Court ruled that, even if the documents were hearsay (which the court did not hold), admitting them was not prejudicial because FACo's witness testified to the same information anyway. (App. Dec. 13-14.) FACo's representative, Mark Thomas, testified regarding the debts owed by Dostal Developers. (*E.g.*, Tr. Trans. 29:12-17.) The Dostal Parties never objected to that testimony. In addition, the documentary evidence also relied upon by FACo was proper.

Hearsay is an out of court statement offered by someone other than the declarant to prove the truth of the matter asserted. *State Farm Ins. v. Warth*, 924 N.W.2d 537 (Table), 2018 WL 4635692, at *3 (Iowa Ct. App. 2018). The purpose of the hearsay rule is to ensure the reliability of out-of-court statements. *Al-Jurf v. Scott-Conner*, 801 N.W.2d 33 (Table), 2011 WL 1584366, at *5 (Iowa Ct. App.). Accordingly, where documents or statements can be shown as reliable, there are many exceptions to the hearsay rule, such as the business records exception. Iowa Code § 622.28; *see also* Iowa R. Evid. 5.803(6). Under that exception, any writing or record, including electronic records, offered to prove the truth therein shall be admissible as evidence if made in the regular course of business at or about the time of the act or condition recorded, the sources of information and the method and circumstances of their preparation indicate their trustworthiness and if they are not otherwise excludable for a non-hearsay reason. Iowa Code § 622.28; *see also* Iowa R. Evid. 5.803(6). The business records exception is to be construed liberally. *Graen's Mens Wear, Inc. v. Stille-Pierce Agency*, 329 N.W.2d 295, 298 (Iowa 1983). "A trial court is accorded 'broad discretion' to determine whether the [business records] statute's requirements are met." *Id.*

The precise issue here—the admission of a payoff statement to calculate a lender's damages—does not appear to have been considered by Iowa courts. But multiple courts across many different jurisdictions have relied upon similar payoff statements to determine amounts due under promissory notes and

guarantys at the summary judgment stage and at trial. *See e.g.*, *Uddin v. Cunningham*, No. 01-18-2, 2019 WL 4065273, at *7 (Tex. Ct. App. Aug. 29, 2019); *HSBC Bank USA, NA v. Gill*, 139 N.E.3d 1277, 1282 (Ohio Ct. App. 2019); *Patch of Land Lending, LLC v. Realty Capital Ventures, LLC*, No. 17-80450-CIV, 2018 WL 3899388, at *6-7 (S.D. Fla. July 12, 2018); *IndyMac Bank, F.S.B. v. Aryana/Olive Grove Land Dev. LLC*, 636 Fed.Appx. 704, 707 (9th Cir. 2016); *RREF II BHB-IL MPP, LLC v. Edrei*, No. 1-15-1793, 2016 WL 7638292, at *10 (Ill. Ct. App. Dec. 30, 2016); *New England Sav. Bank v. Bedford Realty Corp.*, 717 A.2d 713, 605-06 (Conn. 1998).

The circumstances under which courts have accepted such payoff statements into evidence are similar to those here. In *HSBC*, for example, the court noted that the witness relying on a payoff statement to prove damages at trial worked at the lender's parent company, knew which department generated it, and relied on its contents in her role as the administrator of the loan. *HSBC Bank*, 139 N.E.3d at 1282. The court also noted that the defendant had "done nothing to cast doubt on the trustworthiness of this document." *Id.* at 1283. In *Patch of Land*, the court relied on the witness's statement describing who the third party loan servicer was, how the servicer generated the statement and that the document was created at or near the time of the transactions discussed in the statement. *Patch of Land*, 2018 WL 3899388, at *6; *see also RREF II*, 2016 WL 7638292, at *10 (witness relying on third-party loan servicer document). And in

New England Savings, the court specifically held that there is "no requirement that the documents must be prepared by the organization itself to be admissible as that organization's business records." *New England Sav.*, 246 Conn. at 603.

As in the cases above, FACo established that, even if the payoff statements in this case are hearsay, they are business records and are therefore admissible. FACo presented Mark Thomas as a witness, who testified that he is the Vice President of Credit and Implementation and Underwriting at FACo. (Tr. Trans. 14:22–15:2.) Mr. Thomas testified that he is intimately familiar with the Loans at issue. (*Id.* at 16:12-15.) Mr. Thomas testified that FACo's servicer, BSI, prepares statements like those at issue here, that FACo requests such statements in the ordinary course of its business and keeps such statements in the ordinary course of its business. (*Id.* at 33:1 –34:5; 37:1-7.) Mr. Thomas also testified that FACo orders payoff statements like those here for customers when the amount of the loan is in question. (*Id.* at 39:10-12.) Mr. Thomas also testified that it is the standard practice for FACo to request these types of payoffs from BSI when they need to determine the amount due and owing on a loan. (*Id.* at 45:19-21.) Mr. Thomas likewise testified that such payoff statements also are sent to borrowers to inform them of amounts due on their loans. (*Id.* at 45:6-10.) Mr. Thomas also was able to explain the line items on the statements, providing an explanation of the principal amount owed, the negative escrow balances, the amount of interest and the interest rates used, and other line items such as escrow

hold backs and lien release fees. (*Id.* at 34:20 – 36:25.)[3] Finally, the payoff statements are dated as of January 23, 2020, and provide payoff calculations as of February 3, 2020, which was the date of trial. (Tr. Exhs. F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5.) They therefore were created at or about the time of the matters set forth in the statements.

Moreover, like the objecting party in *HSBC*, the Dostal Parties did not offer any evidence suggesting that the payoff statements are not reliable. *HSBC Bank*, 139 N.E.3d at 1283. Neither defendant has, for example, provided alternative payoff figures or provided any evidence that the payoff statements are inaccurate. The payoff statements at issue are the very kind of documents lenders the world over use to determine amounts due, and they have therefore been admitted as evidence in cases across this country. Indeed, if lenders were not allowed to rely on payoff statements created to prove their damages at trial, they would never be able to prove their damages at trial.

The Dostal Parties also argue that any document created in anticipation of litigation cannot fit within the business records rule. Neither the Iowa Code nor the Iowa Rules of Evidence make that generalization. Iowa Code § 622.28; *see also* Iowa R. Evid. 5.803(6). Furthermore, the cases the Dostal Parties cite do not in any way support the assertion that documents created for litigation fall

[3] Mr. Thomas provided these explanations and explained that such records are requested and kept in the ordinary course of business for each loan. (Tr. Trans. 40:24-50:14.)

outside the business records exception. The *Musser* court held that an out of court statement that is testimonial is barred by the Confrontation Clause. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). But the Confrontation Clause only applies in criminal cases. U.S. Const. amend. VI (in all criminal prosecutions, the accused shall enjoy the right to … to be confronted with the witnesses against him"). Contrary to the Dostal Parties' assertion, the *Musser* court found that lab reports did fit within the business records exception to the hearsay rule. *Id.* at 752. The *Norwood* court also focused on the Confrontation Clause, and never considered the business records exception. *U.S. v. Norwood*, 982 F.3d 1032, 1048 (7th Cir. 2020). The same is true of the *Miller* decision. *U.S. v. Miller*, 982 F.3d 412, 435 (6th Cir. 2020).

Finally, *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008), cited by the Dostal Parties, is not instructive. *Reynolds* was a criminal proceeding in which Reynolds was accused of forging money orders. *Id.* at 839. A bank employee testified regarding emails she received from the Federal Reserve and messages she received from another third party stating that the money orders were improper. *Id.* at 840, 841-42. The *Reynolds* Court held that the emails and messages were inadmissible hearsay because the only testimony attempting to establish them as business records came from an unrelated third-party recipient of the documents, not from the creators. *Id.* at 842.

Unlike *Reynolds*, FACo established through Mark Thomas's testimony that FACo is intimately familiar with how the payoff statements at issue are generated by its related loan servicer and that they are regularly generated for the purpose of establishing the amount owed on a loan. The payoff statements were not created by an unrelated third party or received by someone with no prior knowledge of how they are created. Moreover, as established above, such payoff statements are industry standard, are regularly created by loan servicers, and are regularly admitted as evidence in loan enforcement proceedings.

B. Dostal Developers was not entitled to notice of its defaults or of FACo's acceleration of the Loans.

Dostal Developers miscites the mortgages it signed to suggest that FACo was required to provide 15 days-notice to cure its payment defaults. A plain reading of the mortgages belies that argument. FACo was not required to provide any notice or grace period, but did anyway.

Notably, the Loans at issue are commercial loans between business entities for the purpose of building homes for sale rather than to occupy by the builder. (*See* Notes, Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, and F.29.21; Mortgages § 27, Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; Tr. Trans. 185:4-22.) There are therefore no consumer protection concerns. As Dostal Developers correctly asserts, the notes and mortgages must be interpreted under typical contract interpretation rules. Thus, the parties were free to enter into contracts

with whatever terms they chose, and those terms cannot be varied by courts after the fact. *Zaber v. City of Dubuque*, 902 N.W.2d 282, 289 (Iowa Ct. App. 2017). Each term of a contract must be given meaning, and should not be interpreted to be superfluous. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Where an agreement exists providing that a debt shall or may become due upon default at the mortgagee's election, foreclosure is an appropriate remedy. *Collin v. Nagle*, 203 N.W. 702, 703 (Iowa 1925). "A previous notice of the election to declare the principal and interest due under such circumstances is not required, nor is a prior demand of payment…." *Id.*; *see also Moore v. Crandall*, 124 N.W. 812, 814 (Iowa 1910). Courts routinely have found that borrowers are in default under loan documents where there are no notice requirements and thus no notice of the defaults were given. *See e.g.*, *Sorenson v. First Wisconsin Nat. Bank, N.A.*, 931 F.2d 19, 20-21 (8th Cir. 1991); *Moore*, 124 N.W. at 814.

Here, none of the loan documents requires FACo to give any notice regarding Dostal Developers' defaults, acceleration of the loans or a right to cure. Each of the mortgages is identical and provides a separate provision at Section 19.A., describing how the borrower automatically defaults for missing a monthly payment, and states that an "Event of Default" occurs:

> If default is made in the due and punctual payment of the Note or any installment thereof, either principal or interest, as and when the same is due and payable, or if default is made in the making of any

> payment or other monies required to made hereunder or under the Note, and any applicable period of grace specified in the Note shall have elapsed.

(Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17, F.29.22.)

The notes do not include any grace periods for missed payments. Instead, the notes all state that an "Event of Default" occurs "in the event that there shall occur any monetary default hereunder that shall continue after such payment is due hereunder …." (Notes at § 4.A, Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, F.29.21.) Section 11 of the Notes also states that FACo is not required to provide any notice to Dostal Developers before accelerating:

> At the election of Lender and without notice, the principal sum remaining unpaid hereon, tougher with accrued interest, shall become at once due and payable at the place herein provided for payment upon the occurrence of a default hereunder, any Event of Default under the Mortgage/Deed of Trust, or a default under any of the Loan Documents."

(Tr. Exhs. F.29.1, F.29.6, F.29.11, F.29.16, F.29.21.)

The absence of any notice provisions clearly was intentional because other types of defaults described in the Mortgages do require notice. For example, Section 19.D. separately states that an Event of Default occurs "[i]f default shall continue for 15 days after notice thereof by Mortgagee to Mortgagor in the due and punctual performance of any *other* agreement or condition herein or in the Note contained …." (Tr. Exhs. F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22 (emphasis added).) Thus, if a default occurs of a type *other* than those described

in Sections 19.A through 19.C., 19.E. and 19.F., notice and a 15-day cure period would be required. This separate provision for "other" defaults clarifies that a default specified under Section 19.A, unlike "other defaults," does not require notice or opportunity to cure.

Dostal Developers erroneously focuses solely on Section 19.D. to argue that notice and a 15-day grace period was required regarding Dostal Developers' monthly payment defaults. Again, Section 19.D. specifically refers to "other" defaults not included in the specific defaults listed in the other subparagraphs of Section 19, like 19.A. Section 19.D therefore specifically does *not* apply to payment defaults. Likewise, the notice provision in Section 14 of the notes, also cited by the Dostal Parties, merely describes *how* notices are to be given, and not *when or whether* they must be given. Section 19.A. therefore stands alone, and does not have any prior notice requirements.

Although nothing in the Loan Documents required FACo to provide notices of default or acceleration, FACo nevertheless provided notice of both in a showing of good will. Contrary to the Dostal Parties' suggestion that FACo sprung the news on them, FACo waited eight months after the first default to send a separate letter for each loan providing notice of the then-existing payment defaults and providing Dostal Developers seven days to cure the defaults. (Tr. Exhs. F.29.4, F.29.9, F.29.14, F.29.19, F.29.24.) On the 11th day after the defaults had not been cured (and after the 8-month informal grace period), FACo

provided separate notices for each loan that FACo had accelerated the Loans. (Tr. Exhs. F.29.5, F.29.10, F.29.15, F.29.20, F.29.26.)

Finally, Dostal Developers did not introduce any evidence purporting to establish that it was not in default or that the Loans had not been accelerated. And the cases cited by Dostal Developers as supposedly inconsistent with the Appellate Court's ruling are not germane. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222 (Iowa 1998) is a standard breach of contract case regarding the sale of a truck. There were no issues regarding default notice requirements or even much in the way of contract interpretation in that case. The issue was whether the plaintiff or defendant had caused damage to the truck. *Molo Oil Co.* at 225. The other case, *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430 (Iowa 2008), involved an ice cream production contract, whether a *force majeure* clause in the contract applied and whether the plaintiff was a proper party. The court was not called upon to interpret the contract to determine whether notice of breach was required or given.

In light of the clear contractual language in the notes and mortgages establishing that FACo was not required to provide prior notice of the Dostal Parties' defaults, the Court should not revisit the district court or Appellate Court's ruling on this issue – particularly in light of the fact that FACo provided notice it was not even required to provide.

CONCLUSION

For the reasons stated above, the Application of the Appellees/Cross Appellants for Further Review should be denied.

Dated: September 17, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Resistance to Application for Further Review by Appellant/Cross Appellee Finance of America Commercial, LLC was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on September 17, 2021, pursuant to Iowa R. App. P. 6.1103(1).

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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/s/ Joseph E. Schmall
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September 17, 2021
Date

COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Appellant/Cross Appellee Finance of America Commercial, LLC's Resistance to Application for Further Review was $N/A and that the amount has been paid in full by Appellant/Cross Appellee.

By:*/s/Joseph E. Schmall*
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