IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BANKERS TRUST COMPANY, **Plaintiff,** **vs.** **5TH AND WALNUT PARKING LLC,** **JUSTIN MANDELBAUM,** **SEAN MANDELBAUM,** **CITY OF DES MOINES,** **Defendants.**	**Case No. EQCE086198** **ORDER RE: CROSS-DEFENDANT'S MOTION TO DISMISS**
5TH AND WALNUT PARKING LLC, **5TH AND WALNUT TOWER LLC,** **5TH AND COURT LLC,** **JUSTIN MANDELBAUM,** **SEAN MANDELBAUM,** **Cross-Claimants,** **vs.** **CITY OF DES MOINES,** **Cross-Defendant.**	

I. INTRODUCTION

Before the court is a motion to dismiss filed by cross-defendant City of Des Moines ("the City") on October 7, 2020 seeking dismissal of the cross-claims filed by cross-claimants 5th and Walnut Parking LLC ("Parking LLC"), 5th and Walnut Tower LLC ("Tower LLC"), 5th and Court LLC ("Court LLC"), Justin Mandelbaum, and Sean Mandelbaum on September 23, 2020. Cross-claimants filed their resistance to the City's motion on October 20, 2020. The court heard the

parties' arguments at a videoconference hearing on December 4, 2020. The court now enters its order on the motion.

II. BACKGROUND FACTS

For the last six years, the Mandelbaums worked to build a development project in downtown Des Moines known as The Fifth.[1] The Fifth had three anticipated components: a parking garage, a tower containing an art museum, a hotel, and residential units, and a commercial building containing a dine-in movie theater and ground retail space on Court Avenue.[2] The Mandelbaums formed three entities for The Fifth: Parking LLC, Tower LLC, and Court LLC.[3] The developers were to build the components of The Fifth on adjacent but distinct parcels of land—the garage parcel, the tower parcel, and the theater parcel—owned by Parking LLC, Tower LLC, and Court LLC, respectively.[4]

In February 2017, after a public competition period and lengthy negotiations, the developers reached an agreement with the City to build the development.[5] The parties shortened the deadlines for construction in March 2017.[6] The agreement required the developers to construct the garage by October 31, 2019, and then commence construction of the tower and theater upon completion of the garage.[7]

Parking LLC and the City executed an original development agreement in April 2017.[8] Pursuant to that agreement, Parking LLC purchased the three parcels from the City for $4 million.[9]

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[1] Cross-Petition, at 4, ¶ 15 (Polk Cnty. Dist. Ct. Sept. 23, 2020).
[2] *Id.* at 4–5, ¶ 16.
[3] *Id.* at 5, ¶ 18.
[4] *Id.* at 5, ¶ 19.
[5] *Id.* at 6, ¶ 21–22.
[6] *Id.* at 6, ¶ 23.
[7] *Id.* at 6, ¶¶ 22–23.
[8] Cross-Pet., at 7, ¶ 25.
[9] Cross-Pet., at 7, ¶ 26; Cross-Pet. Ex. A, Amended Development Agreement, § 2.1.

The purchase was funded by a $4 million forgivable loan from the City to Parking LLC that would be forgiven (1) in full upon completion of the tower or (2) in full or on a pro rata basis upon the return of all or a portion of the land to the City in the event of default.[10] The developers granted a mortgage in the garage parcel to the City.[11] The original development agreement required Parking LLC to construct the garage for a stipulated price, which included a developer fee payable to Parking LLC.[12] If the actual cost of the garage exceeded the stipulated price, Parking LLC would be responsible for cost overruns.[13] If the actual costs were below the stipulated price, Parking LLC would realize the savings.[14]

Parking LLC and the City amended the development agreement three times.[15] The amendments increased the number of parking spaces, increased the stipulated price based on a price-per-stall adjustment formula, and extended the deadline for completion of the garage to August 16, 2020.[16] The deadline for completing the garage construction was subject to a 12-month grace period for minor delays.[17] By separate agreements, Tower LLC and Court LLC assumed the rights and obligations of Parking LLC under the amended development agreement with respect to the tower parcel and theater parcel.[18]

Parking LLC took out a short-term construction loan for $48,050,235.00 from Bankers Trust Company ("Bankers Trust") to finance the cost of building the garage.[19] The Mandelbaums

[10] Cross-Pet., at 7, ¶ 26; Cross-Pet. Ex. A, Amended Development Agreement, §§ 2.2(D), 9.3.
[11] Petition, at 5, ¶ 28 (Polk Cnty. Dist. Ct. Sept. 14, 2020); Cross-Pet. Ex. A, Amended Development Agreement, § 2.2(D).
[12] Cross-Pet., at 7, ¶ 27; Cross-Pet. Ex. A, Amended Development Agreement, § 8.2(D).
[13] Cross-Pet., at 7, ¶ 27; Cross-Pet. Ex. A, Amended Development Agreement, § 8.2(E).
[14] *Id.*
[15] Cross-Pet., at 7, ¶ 29.
[16] *Id.* at 7–8, ¶ 30; Cross-Pet. Ex. A, Amended Development Agreement, §§ 1.1(B), 6.2, 8.2(D).
[17] Cross-Pet., at 7–8, ¶ 30; Cross-Pet. Ex. A, Amended Development Agreement, § 10.2(F).
[18] Cross-Pet., at 8, ¶ 32; Cross-Pet. Ex. A, Amended Development Agreement, § 4.1.
[19] Cross-Pet., at 8, ¶ 33; Pet. Ex. A, Construction Loan Agreement; Pet. Ex. B, Construction Promissory Note.

personally guaranteed Parking LLC's obligations under the construction loan.[20] The developers granted a mortgage in the garage parcel to Bankers Trust.[21] The City's mortgage on the property was subordinated to Bankers Trust's mortgage.[22] The developers also granted security interests in a partial collateral assignment of development agreement, assignment of construction contract, and assignment of design contract.[23] The partial collateral assignment of development agreement covers the garage and garage parcel.[24] In the event of default, Bankers Trust is entitled to step into the shoes of Parking LLC to make any claims or defenses under the development agreement.[25]

Upon completion of the garage, Parking LLC would refinance its debt with a 20-year fully amortizing permanent loan in the amount equal to the stipulated price.[26] Recognizing the annual debt service for the permanent loan would be greater than the annual net operating income from the garage, the City agreed to loan Parking LLC the difference for the 20 years of the permanent loan in a parking shortfall loan.[27] Beginning in year 21, Parking LLC would repay the outstanding parking shortfall loan balance, minus any loan forgiveness, to the City by allocating 80% of the net operating income from the garage each year until the loan was repaid.[28] Thereafter, Parking LLC would own the garage free and clear.[29]

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[20] Cross-Pet., at 9, ¶ 34; Pet. Ex. C, Commercial Guaranty.
[21] Pet., at 4, ¶¶ 20–22; Pet. Ex. D, Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Financing Statement, § 1.01; Pet. Ex. E, Legal Description.
[22] Pet., at 6, ¶¶ 29–30.
[23] *Id.* at 7–12, ¶¶ 34–45; Pet. Ex. F, Partial Collateral Assignment of Development Agreement, § 2; Pet. Ex. G, Assignment of Construction Contract, § 1; Pet. Ex. H, Assignment of Design Contract, § 1.
[24] Pet. Ex. F, Partial Collateral Assignment of Development Agreement, § 2.
[25] *Id.* at §§ 4–5.
[26] Cross-Pet., at 9, ¶ 35.
[27] Cross-Pet., at 9, ¶ 37; Cross-Pet. Ex. A, Amended Development Agreement, § 8.6.
[28] Cross-Pet., at 9, ¶ 37; Cross-Pet. Ex. A, Amended Development Agreement, § 8.3(B)(1)(b).
[29] Cross-Pet., at 9, ¶ 37.

Parking LLC commenced construction of the garage in fall 2018.[30] The developers believe the garage will reach substantial completion in December 2020.[31] In May 2019, the developers advised the City that the original deadline of October 2019 for commencing construction was likely not feasible for the tower or the theater.[32] The deadline passed and the City did not declare a default.[33] Throughout 2019 and early 2020, the developers remained confident in the viability of the tower, based on third-party market experts.[34]

In March 2020, the developers provided the City with formal notice of enforced delay pursuant to section 10.4 of the amended development agreement, which states:

> Sec. 10.4. Enforced Delay in Performance. Except for an obligation to pay money to the other pursuant to this Agreement, neither City nor Developer shall be considered in breach of, or in default of, its obligations with respect to this Agreement, or any portion thereof, including redevelopment, or the beginning and completion of construction of the Improvements, in the event of an enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault of negligence, including, but not restricted to, temporary injunctions, acts of God, acts of the public enemy, war or terrorism, acts of government (provided the City may not rely upon its own acts as reason for delay), acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes or other labor disruptions, freight embargoes, economic or financial market collapse causing a national loss of available financing upon commercially reasonable terms, and unusually severe weather or delays of subcontractors due to such causes; it being the purpose and intent of this provision that in the event of the occurrence of any such enforced delay, the time or times for performance of the obligations of City or of Developer, as the case may be, shall be extended for the period of the enforced delay: Provided, that the party seeking the benefit of the provisions of this article shall: i) within twenty (20) days after the beginning of any such enforced delay, have notified the other party thereof in writing, and of the cause or causes thereof, and setting forth the anticipated extension required as a result of the enforced delay; and, ii) exercise reasonable diligence to mitigate the event and the impact thereof.[35]

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[30] *Id.* at 10, ¶ 39.
[31] *Id.* at 10, ¶ 40.
[32] *Id.* at 10, ¶ 41.
[33] *Id.* at 10, ¶ 43.
[34] *Id.* at 10–11, ¶ 44.
[35] *Id.* at 11, ¶ 45; Cross-Pet. Ex. A, Amended Development Agreement, § 10.4.

In the notice of enforced delay, the developers pointed to the spread of COVID-19 and resulting mitigation efforts as an unforeseeable event that extended the developers' obligations under the amended development agreement, including the deadlines for commencing construction of the tower and theater.[36] The developers alerted the City to the detrimental impact they believed the pandemic had on the market for financing of new hotel construction.[37]

The City rejected the notice of enforced delay based on the pandemic by pointing to low interest rates.[38] In April 2020, the City proposed an amendment to the amended development agreement.[39] The proposed amendment called for Parking LLC to escrow an amount that was significantly more than the development fee and projected savings on the garage construction.[40] The developers would have forfeited the escrow to the City if Tower LLC did not commence construction on the tower by April 2022.[41] The proposal would have created an exception for the tower commencement deadline from the enforced delay provision.[42] The developers rejected the amendment.[43]

On June 24, 2020, the City delivered a notice of default to Parking LLC, Tower LLC, and Court LLC.[44] The City sent copies of the default notices to Bankers Trust.[45] The default notices stated that Tower LLC and Court LLC were in default of the amended development agreement by

[36] Cross-Pet., at 11, ¶ 46.
[37] *Id.*
[38] *Id.* at 12, ¶ 47.
[39] *Id.* at 12, ¶ 51.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 12–13, ¶ 51.
[43] *Id.* at 13, ¶ 53.
[44] *Id.* at 13–14, ¶ 55; Cross-Pet. Ex. D, Parking LLC Notice of Default; Cross-Pet. Ex. E, Court LLC Notice of Default; Cross-Pet. Ex. F, Tower LLC Notice of Default.
[45] *Id.*

failing to cause construction of the tower and theater to commence by October 31, 2019.[46] The City elected a remedy under section 10.2(C) of the amended development agreement. The City believed section 10.2(C) entitled it to take back the entire property during construction of the garage without taking on any of the developers' obligations or forgiving the forgivable loan.[47] The developers demanded that the City rescind the default notices and the City did not grant their request.[48] After the City delivered the default notices, Bankers Trust declared Parking LLC to be in default on its construction loan.[49]

Section 10.1(B) of the amended development agreement gives a party the opportunity to cure an alleged default:

> B. Except as otherwise specifically provided in this Agreement, in the event of a default by either party under this Agreement, the aggrieved party may by written Notice of Default to the party in default, demand that it proceed immediately to cure or remedy such default, and, in any event, complete such cure or remedy within forty-five (45) days (or such other time as may be specifically provided herein) after receipt of such notice. Any default on an obligation to pay money shall be cured within five (5) business days after receipt of such notice. Notwithstanding the foregoing, if any non-monetary default reasonably requires more than forty-five (45) days to cure, such default shall not constitute a breach of this Agreement if the defaulting party commences to cure the default promptly upon receipt of the notice of default and with due diligence thereafter continuously prosecutes such cure to completion.[50]

According to the developers, the City had two remedies to choose from in the event of a default. Under sections 10.2(D) and (E), the City could take back the tower parcel or theater parcel in exchange for reducing the forgivable loan by the value of those parcels:

> D. *Failure to Timely Commence Construction of South Building.*

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[46] Cross-Pet., at 14, ¶ 56; Cross-Pet. Ex. D, Parking LLC Notice of Default; Cross-Pet. Ex. E, Court LLC Notice of Default; Cross-Pet. Ex. F, Tower LLC Notice of Default.
[47] Cross-Pet., at 16, ¶ 58; Cross-Pet. Ex. D, Parking LLC Notice of Default; Cross-Pet. Ex. E, Court LLC Notice of Default; Cross-Pet. Ex. F, Tower LLC Notice of Default.
[48] Cross-Pet., at 18, ¶¶ 60–61.
[49] *Id.* at 18, ¶ 64.
[50] *Id.* at 14–15, ¶ 56; Cross-Pet. Ex. A, Amended Development Agreement, § 10.1(B).

> 1) If the Owner of the South Parcel is determined to be in breach of this agreement for failure to timely close on financing for the construction of the South Building, or for failure to timely commence construction of the South Building, the Owner shall promptly convey the South Parcel to the City by Special Warranty Deed . . . .
> 2) Upon Conveyance to City of title to the South Parcel, City shall forgive a portion of the Forgivable Loan equal to the South Parcel Land Value, reduced by all out-of-pocket expenses reasonably incurred by City to extinguish, pay or otherwise obtain the release of the South Parcel from the lawful claims of all persons whomsoever claiming by, through and under the Developer and the Developer's successors and assigns.
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> E. *Failure to Timely Commence Construction of Residential Building.*
> 1) If the Owner of the Residential Parcel is determined to be in breach of this agreement for failure to timely close on financing for the construction of the Residential Building, or for failure to timely commence construction of the Residential Building, the Owner shall promptly convey the Residential Parcel to the City by Special Warranty Deed . . . .
> 2) Upon Conveyance to City of title to the Residential Parcel, City shall forgive a portion of the Forgivable Loan equal to the Residential Parcel Land Value, reduced by all out-of-pocket expenses reasonably incurred by City to extinguish, pay or otherwise obtain the release of the Residential Parcel from the lawful claims of all persons whomsoever claiming by, through and under the Developer and the Developer's successors and assigns.[51]

Alternatively, under section 10.2(C), the developers believe the City could take back all three parcels in exchange for assuming the developers' obligations under the permanent loan and fully forgiving the forgivable loan:

> C. *Failure to Timely Close on financing for both the South Building and the Residential Building.* If the owners of the South Parcel and Residential Parcel are both determined to be in breach of their individual obligation to cause construction of their respective Buildings to be timely commenced pursuant to Section 6.2, then as an alternative to the remedies set forth in paragraphs D and E below, the City may elect, in its sole discretion, to acquire the Property and all improvements thereon upon the following terms and conditions:
> 2) The Developer and the Owner of each of the Residential Parcel and South Parcel shall promptly convey their respective Parcel to the City by Special Warranty Deed . . . .
> 3) In consideration for the conveyance of the Property, City shall in form reasonably acceptable to the Developer, i) assume Developer's obligations under the Permanent Loan and Permanent Mortgage, including but not limited to the obligation to timely pay all installments on the Permanent Loan, and ii) agree to defend and indemnify the Developer from all claims by the Permanent Loan lender

[51] Cross-Pet., at 15, ¶ 57; Cross-Pet. Ex. A, Amended Development Agreement, § 10.2(D).

> arising from any default by the City in timely performing the Developer's obligations under the Permanent Loan and Permanent Mortgage.
> 4) . . . Developer shall deposit into the Sinking Fund the sum of all Net Operating Income for the period between the calendar year covered by the last Annual Report and the date of conveyance of the Garage Parcel to the City, together all funds held in the Repayment fund and any Reserves (collectively the "Final Payment").
> 5) . . . Upon receipt of the Final Payment, Developers obligation under this Agreement to make any further payments to the City, the Repayment Fund, and the Sinking Fund shall terminate.[52]

On September 14, 2020, Bankers Trust filed its petition for money judgment, foreclosure of real estate mortgage, partial collateral assignment of development agreement, assignment of construction contract, and assignment of design contract. Bankers Trust alleges that Parking LLC defaulted on the construction loan agreement by failing to make payments. On the same day, Bankers Trust filed a motion for appointment of receiver.

On September 23, 2020, cross-claimants filed their cross-petition against the City. The cross-petition alleges the City engaged in a scheme to force cross-claimants into default under the construction loan agreement so that the City could purchase the property from Bankers Trust at a forced sale below market value. Cross-claimants seek relief in seven counts, which include (1) breach of written contract, (2) tortious interference with existing contract, (3) indemnity, (3) declaratory relief, (4) interference with existing and prospective economic advantage, (5) injunctive relief from default notices, and (6) injunctive relief preventing the conveyance of the property to the City. On the same day, cross-claimants also filed a motion for permissive intervention, wherein Tower LLC and Court LLC sought to intervene.

On September 29, 2020, the court held a hearing on Bankers Trust's motion to appoint a receiver. The court granted the City's request to continue the hearing on cross-claimants' motion for permissive intervention, because the City had time remaining to submit a responsive pleading.

[52] Cross-Pet., at 15–16, ¶ 57; Cross-Pet. Ex. A, Amended Development Agreement, § 10.2(E).

On October 1, 2020, the court granted Bankers Trust's motion to appoint a receiver and appointed Christensen Development 1, LLC, d/b/a Christensen Development, as receiver.

The City filed its motion to dismiss the cross-petition on October 7, 2020. The City believes Iowa R. Civ. P. 1.245 does not permit the cross-claims and the cross-claimants must pursue their claims in a separate action. The City argues Bankers Trust's claims and the cross-claims do not arise out of the same transaction or occurrence because they relate to two entirely separate contractual relationships. The City further argues the cross-claims do not relate to property that is the subject matter of the underlying action, because that part of rule 1.245 can only be used by a secondary lienholder to join a foreclosure action, not by another party to bring in separate claims arising out of contract. Additionally, the City contends cross-claimants do not have authority to pursue the cross-claims, because they assigned their interest in the development agreement to Bankers Trust upon default under the construction loan agreement.

Cross-claimants filed a resistance to the motion to dismiss on October 20, 2020. Cross-claimants believe the City reads rule 1.245 too narrowly. According to cross-claimants, claims arise out of the same transaction or occurrence when they have a logical connection and claims relate to the same property when they come from the same real estate development. Cross-claimants also argue they have contractual authority to pursue their claims for four reasons: (1) the City does not have authority to enforce the partial assignment; (2) Bankers Trust has not asserted its rights under the partial assignment; (3) the partial assignment does not reach the bulk of the cross-claims; and (4) an assignment of contract rights for security purposes leaves contract rights in the hands of the assignor.

The City did not file an objection to the motion for permissive intervention by the deadline. On October 30, 2020, the court granted the motion for permissive intervention, adding Tower LLC and Court LLC as cross-claimants.

The court now enters its order on the City's motion to dismiss the cross-claims.

III. STANDARD OF REVIEW

A court may grant a motion to dismiss based on (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) insufficiency of the original notice or its service, or (4) failure to state a claim upon which any relief may be granted.[53] "Under our rules of civil procedure, a party need not conform to technical forms of pleading."[54] "Rather, '[e]ach averment of a pleading shall be simple, concise, and direct.'"[55] "In Iowa, 'notice pleading' is all that is required."[56] "Motions to dismiss are disfavored."[57] "Nearly every case will survive a motion to dismiss under notice pleading."[58] Notice pleading requires the petition "contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition."[59] "The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature."[60] A plaintiff is not required to set forth specific legal theories for recovery in the petition.[61] The only issue when considering a motion to dismiss is the "petitioner's right of access to the district court, not the merits of his allegations."[62] "In determining whether to grant the motion to dismiss, a court views the well-pled facts of the

[53] Iowa R. Civ. P. 1.421(1).
[54] *Cemen Tech, Inc. v. Three D Industries, L.L.C.*, 753 N.W.2d 1, 12 (Iowa 2008).
[55] *Id.* (citing Iowa R. Civ. P. 1.402(2)(a)).
[56] *Id.* at 12.
[57] *Benskin, Inc. v. West Bank,* No. 18-1966, *slip op.,* at 2 (Iowa Dec. 23, 2020)
[58] *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009).
[59] *Id.* at 354 (quoting *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004)).
[60] *Id.* at 354.
[61] *Cemen Tech, Inc.*, 753 N.W.2d at 12.
[62] *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001) (citations omitted).

petition 'in the light most favorable to the plaintiff with doubts resolved in that party's favor.'"[63] "A motion to dismiss admits the allegations of the petition and waives any ambiguity or uncertainty in the petition."[64] "A motion to dismiss is sustainable only when it appears to a certainty that the [the party seeking relief] would not be entitled to relief under *any state of facts that could be proved* in support of the claims asserted."[65]

IV. CONCLUSIONS OF LAW

A. Rule 1.245

The City argues that Iowa R. Civ. P. 1.245 does not permit the cross-claims and the cross-claimants must pursue their claims in a separate action. The City believes the cross-claims would unduly complicate a simple foreclosure action. The cross-claimants believe rule 1.245 encompasses their cross-claims and that the rule permits their cross-claims if those claims relate to the underlying action.

The rule states:

> **Rule 1.245 Cross-claim against coparty.** A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.[66]

There is little case law interpreting rule 1.245. Comparison to the analogous Fed. R. Civ. P. 13(g) is instructive. In the federal courts, "[r]ule 13(g) is to be construed liberally so as to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the

[63] *Geisler v. City Council*, 769 N.W.2d 162, 165 (Iowa 2009) (citing *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994)).
[64] *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 861 (Iowa 1990).
[65] *Penn. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002) (emphasis added) (citation omitted).
[66] Iowa R. Civ. P. 1.245.

court with a minimum of procedural steps in order to settle as many related claims as possible in a single action."[67]

As a preliminary matter, the parties disagree about whether the court has discretion to grant or deny the motion if the cross-claims satisfy rule 1.245. The City argues that the court has broad discretion it could use to grant the motion, even if the cross-claims comply with the rule. Cross-claimants argue that the court must deny the motion if the cross-claims satisfy the rule.

There is no indication in the rule or in case law that the trial court has any discretion. The rule simply states that a party may file a cross-claim if the cross-claim sufficiently relates to the original action. Wright & Miller state, "The decision whether to allow a crossclaim that meets the test of [rule 13(g)] is a matter of judicial discretion."[68] However, Wright & Miller were referring to a court's discretion whether to grant a motion to amend where a party seeks to add a cross-claim long after the case has commenced.[69] Additionally, courts that have exercised discretion to disallow cross-claims had independent discretion under authority granted by a rule other than rule 1.245 or 13(g).[70] These courts had discretion because they were considering whether to grant a motion to amend a complaint or whether to exercise ancillary jurisdiction.[71] Here, the cross-claimants filed their cross-claims in their initial cross-petition and there is no dispute the court would have jurisdiction over the cross-claims if the cross-claimants brought them in an independent action. The court concludes that if the cross-claimants satisfy rule 1.245, the court does not have discretion and must allow the cross-claims.

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[67] *Favors v. Cuomo*, 881 F. Supp. 2d 356, 373 (E.D.N.Y. 2012) (citation omitted).
[68] 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1431 (3d ed. 2020).
[69] *Id.*
[70] *Coleman v. Casey Cnty. Bd. of Educ.*, 686 F.2d 428, 430 (6th Cir. 1982); *U.S. v. Eight Tracts of Land*, 270 F. Supp. 160, 163–65 (E.D.N.Y. 1967); *Norwest Bank Marion v. L T Enterprises*, 387 N.W.2d 359, 364–65 (Iowa Ct. App. 1986).
[71] *Id.*

The first basis under which rule 1.245 permits a party to file a cross-claim is if it is "arising out of the transaction or occurrence that is the subject matter either of the original action or a counterclaim therein."[72] The City argues the claims and the cross-claims do not arise out of the same transaction or occurrence because they relate to two entirely separate contractual relationships: (1) the construction loan agreement between Bankers Trust and cross-claimants and (2) the amended development agreement between cross-claimants and the City. Cross-claimants argue the claims and cross-claims arise out of the same transaction or occurrence because they have a logical connection and arise out of the same development project.

The factors to consider in determining whether an action arises from the same transaction or occurrence are: (1) whether the issues of fact and law raised by the claim and cross-claim will largely be the same; (2) whether substantially the same evidence supports or refutes the underlying claim and the cross-claim; and (3) whether there is any logical relation between the claim and the cross-claim.[73] The relation between the claim and cross-claim does not have to be close. Wright & Miller explain:

> Rule 13(g) does not specify that the claims asserted between the coparties must be of any particular character. As long as the crossclaim arises out of the transaction or occurrence that is the subject matter of the original action, it can be interposed regardless of its nature.
> . . .
> Neither is it relevant that the claim and cross claim are based on radically different legal theories.[74]

[72] Iowa R. Civ. P. 1.245.
[73] *See Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 264 (8th Cir. 1979). The *Cochrane* decision enumerates four considerations for determining a mandatory counterclaim under Fed. R. Civ. P. 13(a), rather than a cross-claim under rule 13(g). The test for allowing a cross-claim is essentially the same, except that courts omit the fourth factor, whether there are any res judicata considerations, because a cross-claim is never compulsory. *Federman v. Empire Fire and Marine Ins. Co.*, 597 F.2d 798, 811–12 (2d Cir. 1979).
[74] Wright & Miller, *supra*, § 1431.

Here, the cross-claims arise out of the same transaction or occurrence as the underlying claims. The disputes between Bankers Trust and cross-claimants and between the City and cross-claimants are logically related. The claims and cross-claims share underlying facts and have interrelated legal issues. Cross-claimants allege that the City's actions caused the construction loan default and Bankers Trust's foreclosure action. Cross-claimants seek to recover damages from the City for any liability in the foreclosure lawsuit. The claims and cross-claims arise out of the same commercial development project.

One of the cross-claims is for indemnity. Cross-claimants contend the City, by virtue of the remedy it elected in its default notices, is obligated to indemnify Parking LLC for the debt owed to Bankers Trust. Rule 1.245 expressly contemplates such a cross-claim for indemnity: "Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."[75] In similar procedural circumstances, the Iowa Supreme Court held that when a defendant in an action to foreclose on a mechanics lien brought a cross-claim against a co-party for indemnity, the cross-claim was properly joined.[76] The allegations in the cross-claims are part of cross-claimants' defense against Bankers Trust. Cross-claimants believe the City obligated itself to pay Parking LLC's debt to Bankers Trust. Cross-claimants argue Bankers Trust should look to the City for payment and to the extent Bankers Trust fails to do so, Bankers Trust fails to mitigate its damages.

The cross-claims seeking injunctive relief are closely related to the foreclosure action. Count VI seeks injunctive relief from the City's default notices, which cross-claimants contend caused the foreclosure action. Section 9.2 of the construction loan agreement provides that breach

[75] Iowa R. Civ. P. 1.245.
[76] *Miller v. Farmers Coop. Co., Lost Nation*, 176 N.W.2d 832, 836 (Iowa 1970).

of the development agreement constitutes an event of default.[77] Section 9.7 states acceleration of or default in other debts greater than $50,000, which includes the $4 million forgivable loan, constitutes an event of default.[78] Injunctive relief from the default notices would remove those grounds for acceleration of the construction loan and foreclosure. Count VII seeks injunctive relief preventing the conveyance of the property from Bankers Trust to the City in a forced sale. This reflects cross-claimants' allegations that the City improperly forced cross-claimants to default on the construction loan so that the City could purchase the property for a steep discount following foreclosure. If Count VII were successful, this may impact the foreclosure proceeding.

Under the partial assignment of the development agreement, Bankers Trust is entitled to step into the shoes of Parking LLC and control the cross-claim litigation with respect to the garage and garage parcel.[79] Because Bankers Trust and cross-claimants each have rights to the cross-claims, Bankers Trust and cross-claimants these rights should be litigated in the same case.

The second basis under which rule 1.245 permits a party to file a cross-claim is if it is "relating to any property that is the subject matter of the original action."[80] The City argues the cross-claims do not relate to property that is the subject matter of the underlying action, because the sole intention for that part of rule 1.245 was to allow a subordinated lienholder to join a foreclosure action. Cross-claimants argue the cross-claims relate to the property that is the subject matter of the underlying action, because the claims and cross-claims relate to the same development project on the same land.

The City bases its interpretation on a 1946 Advisory Committee Note to rule 13(g). However, the modern construction of rule 13(g) is broader. "The property clause of Rule 13(g) is

[77] Pet. Ex. A, Construction Loan Agreement, § 9.2.
[78] *Id.* at § 9.7.
[79] Pet. Ex. F, Partial Collateral Assignment of Development Agreement, §§ 4–5.
[80] Iowa R. Civ. P. 1.245.

not limited solely to foreclosure proceedings but may be applied in other contexts."[81] Federal courts have allowed cross-claims under the property clause of rule 13(g) "in interpleader actions when they are asserted against the common fund or subject of the main action."[82]

The plain language of rule 1.245 does not restrain its property clause to determining priority in foreclosure actions or determining property rights in interpleader actions. The question is whether the cross-claims are "relating to" the property that is the subject matter of the underlying action. Iowa courts interpret rules of civil procedure in the same manner they interpret statutes.[83] "Statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them."[84] Ordinary meaning is determined by looking at the dictionary definition.[85] "Relate" means "to show or establish logical or causal connection between" or "to have relationship or connection."[86]

The definition of "relate" indicates that the property clause of rule 1.245 is broader than the property clause of rule 13(g) as federal courts have interpreted it. There is no indication in the rule that it is limited to certain types of actions to determine ownership of property or priority of security interests. The cross-claims simply must have a logical connection to the property that is the subject of the underlying action.

The property clause covers the cross-claims in this case. The overarching issues are who will ultimately own the property and who will pay for construction on the property. The claims

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[81] Wright & Miller, *supra*, § 1432.
[82] *Id. See also, e.g., United California Bank v. Fadel*, 482 F.2d 274, 276 (9th Cir. 1973); *Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 87 (4th Cir. 1967); *Priority Records, Inc. v. Bridgeport Music, Inc.*, 907 F. Supp. 725, 732–33 (S.D.N.Y. 1995).
[83] *City of Sioux City v. Freese*, 611 N.W.2d 777, 779 (Iowa 2000).
[84] *State v. Anderson*, 782 N.W.2d 155, 158 (Iowa 2010) (citation omitted).
[85] *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011).
[86] *Relate*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/relate (last visited Dec. 7, 2020).

and cross-claims have a logical connection to the same commercial development project on the same land. The foreclosure action involves Bankers Trust's and cross-claimants' obligations under the construction loan agreement, which financed construction of the development and gave Bankers Trust a mortgage in the property. The cross-petition involves cross-claimants' and the City's obligations under the amended development agreement, which included funding to purchase the land, a construction schedule, shortfall financing, and remedies whereby the City could obtain the land if cross-claimants defaulted. Cross-claimants allege the City gave illegal default notices and tortuously interfered with the construction loan agreement in order to buy the property below market value.

The City contends that the purpose of rule 1.245, to improve judicial economy and resolve closely related claims in the same litigation, should preclude allowance of the cross-claims. The City believes that allowing the cross-claims will overly complicate the foreclosure action, causing judicial economy to suffer. Rule 1.245's text manifests the rule's purpose. If cross-claims comply with the rule's text, the cross-claims also comply with its purpose.[87] Here, the cross-claims arise out of the same transaction or occurrence and are related to the same property. Therefore, resolution of the claims and cross-claims in the same action will improve judicial economy and serve the purpose of rule 1.245. Although adding the cross-claims to the foreclosure action may complicate matters, separating the claims and cross-claims into separate actions would likely complicate the judicial process with duplicative fact-findings and legal conclusions. Rule 1.245 encourages resolution of overlapping issues of fact and law in the same lawsuit.

[87] *Doe v. State*, 943 N.W.2d 608, 613 (Iowa 2020) ("It is certainly true one of the critical aspects of statutory interpretation is to determine the purpose of a statute. The purpose of a statute, however, is primarily determined from the language of the statute itself.").

B. Authority

The City contends cross-claimants do not have authority to pursue the cross-claims, because they assigned their interest in the development agreement to Bankers Trust upon default under the construction loan agreement. The cross-claimants argue the City's challenge cannot be successful because (1) the City does not have authority to enforce the partial assignment, (2) Bankers Trust has not asserted its rights under the partial assignment, (3) the partial assignment does not reach the bulk of the cross-claims, and (4) an assignment of contract rights for security purposes leaves contract rights in the hands of the assignor.

As a threshold issue, the court must determine what the parties mean by a lack of authority. The parties could be disputing whether cross-claimants have standing or whether cross-claimants are the real parties in interest. "A party who has standing and the real party in interest are not one in the same."[88] "Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a lawsuit. . . . A real party in interest, on the other hand, is the person who is the true owner of the right sought to be enforced."[89] The Iowa Supreme Court held the district court was correct to analyze the issue as a real party in interest question where a party assigned the cause of action to another party and no longer owned it.[90]

In this case, the court can perform the same analysis whether the parties intended to dispute standing or real party in interest status. There is no indication that there would be a different outcome. For the cross-claims arising out of contract, standing and real party in interest analysis, rely on whether cross-claimants assigned contract rights and whether cross-claimants retained any contract rights. Whichever party has contract rights will be the owner of those rights for real party

[88] *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008).
[89] *Id.* at 434–35.
[90] *Id.* at 435.

in interest purposes and will suffer injuries under the contract that result in standing. For non-contractual cross-claims, assignment does not affect standing or real party in interest issues. If cross-claimants were injured, they have standing and are the real parties in interest for non-contractual claims.

To have standing, "a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[91] "[A] complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected."[92] Courts employ the standing doctrine to

> refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.[93]

The rules of civil procedure require "[e]very action must be prosecuted in the name of the real party in interest."[94] "[A] party is the real party in interest whenever payment of him would protect the defendant from the claims and harassment of third persons."[95] Courts liberally construe the real party in interest rule.[96] The purpose of the rule "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."[97]

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[91] *Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 863 (Iowa 2005) (citation omitted).
[92] *Id.* at 864.
[93] *Id.* (citation omitted).
[94] Iowa R. Civ. P. 1.201.
[95] *Leasing, Inc. v. Gage*, 199 N.W.2d 43, 44 (Iowa 1972).
[96] *City of Ames v. Schill Builders, Inc.*, 274 N.W.2d 708, 713 (Iowa 1979).
[97] *Id.*

The City is not trying to challenge or enforce the partial assignment. It is arguing the cross-claimants do not have standing and are not the real parties in interest because of the partial assignment. The City can raise this argument as a defense to the cross-claims on a motion to dismiss.[98]

The court does not need to determine whether Bankers Trust elected to exercise its rights under the partial assignment, because even if Bankers Trust asserts its rights, cross-claimants would retain their authority to sue. The partial assignment purports to assign all rights of Parking LLC in the listed documents to Bankers Trust.[99] However, an assignment of contract rights for security purposes leaves contract rights in the hands of the assignor. Such an assignment is necessarily partial and leaves rights with the assignor:

> When an assignor retains no rights to the assigned property, the assignor lacks standing to enforce any agreements regarding that property. . . . However, when an assignment is made for collection or as collateral security, the assignor retains an equitable interest in the thing assigned, and therefore may maintain an action for its recovery.[100]

This is true even if the assignment purports to be an absolute assignment of all rights.[101]

Even if the assignment did not leave contract rights with cross-claimants, cross-claimants would have standing and be the real parties in interest for most of their cross-claims, because the partial assignment does not reach most of the cross-claims.

> When there is an effective assignment, the assignee assumes the rights, remedies, and benefits of the assignor and the assignment transfers the entire rights under a

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[98] Iowa R. Civ. P. 1.421; *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012).
[99] Pet. Ex. F, Partial Collateral Assignment of Development Agreement, § 2.
[100] 6 Am. Jur. 2d *Assignments* § 136 (2020). *See also, e.g., Skaggs Reg'l Med. Ctr. v. Powers*, 419 S.W.3d 920, 922 (Mo. Ct. App. 2014); *Stanislaus Pump, Mach. & Constr. Corp. v. City of Modesto*, 246 Cal. Rptr. 601, 604 (Cal. Ct. App. 1988); *Harambee Enters., Inc. v. State Bd. of Agric.*, 511 P.2d 503, 504 (Colo. App. 1973).
[101] *Id.*

> contract from the assignor to the assignee so that the assignee assumes not only the benefits of the contract, *but also the rights and remedies*.[102]

However, an assignment only extends as far as its terms allow:

> [R]ights or interests not covered by the scope of the assignment or the intention of the parties do not pass to the assignee unless they can pass as incidents to the right or rights expressly assigned. It should be noted that when a particular right or set of rights is defined in an assignment, additional rights not similarly defined or named cannot be considered part of the rights transferred.[103]

Parking LLC assigned the following as security:

> (a) The Development Agreement, with respect to the construction, development, maintenance, use and refinancing of the Garage Parcel and the Parking Garage, as defined, therein, together with all right, title and interest Borrower may have in and to the Parking Grant, Parking Project TIF, Parking Shortfall Loan, the Repayment Fund, and the Sinking Fund.
> (b) All other contracts and subcontracts, together with any and all extensions, modifications, amendments and renewals of them, which are entered into by Borrower and the City in connection with the Project.
> (c) All guarantees, warranties and other undertakings in favor of Borrower and/or the Project covering the quality or the performance of the services required by the City or such other contracts and subcontracts as they may relate to the construction of the Parking Garage.
> (d) For clarity, Bank shall not be granted rights and obligations under the Development Agreement that pertain to the construction and development of the Residential Parcel and the South Parcel, as defined therein.
>
> * * *
>
> This Assignment is made for the purpose of securing (a) the payment of the Construction Loan; (b) the payment of all other sums, with interest on them, becoming due and payable to Bank under the provisions of the Loan Documents; and (c) the performance and discharge of each and every term, obligation, covenant and condition of Borrower contained in this Assignment and the other Loan Documents.[104]

The development agreement relates to all three parcels and all three developer entities. By contrast, the partial assignment only reaches the garage and the garage parcel. The cross-claims allege multiple legal theories pertaining to the tower and theater components of the project. Cross-

[102] *Pillsbury Co., Inc.*, 752 N.W.2d at 435 (citations omitted) (emphasis in original).
[103] 6A C.J.S. *Assignments* § 91 (2020). *See also Heritage Pac. Fin., LLC v. Monroy*, 156 Cal. Rptr. 3d 26, 40–42 (Cal. Ct. App. 2013).
[104] Pet. Ex. F, Partial Collateral Assignment of Development Agreement, § 2.

claimants contend that the City breached the development agreement with its declaration of a default in the commencement of construction of the tower and theater components. The partial assignment also only binds Parking LLC, not the other cross-claimants. Claimants other than Parking LLC have brought cross-claims. The partial assignment does not fully cover every cross-claim.

The partial assignment only assigns rights and obligations under the development agreement. It does not assign non-contractual claims. Several of the cross-claims arise outside of the development agreement, including intentional interference with existing contract, intentional interference with prospective economic advantage, and injunctive relief. Because the partial assignment is limited to claims for breach of the development agreement, Bankers Trust does not have rights to the non-contractual cross-claims.

Cross-claimants have standing and are the real parties in interest for their cross-claims as parties to the amended development agreement and parties that allege the City's tortious actions injured them. The City can challenge cross-claimants' authority pursuant to a motion to dismiss. However, the City's challenge fails because (1) the partial assignment does not reach the bulk of the cross-claims and (2) the assignment leaves contract rights in the hands of cross-claimants.

V. RULING

IT IS THEREFORE ORDERED that the City's motion to dismiss is **DENIED**.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCE086198	BANKERS TRUST V 5TH AND WALNUT PARKING LLC ET AL

So Ordered

L. P. McLellan

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa