IN THE SUPREME COURT OF IOWA

No. 21-0014

DOLLY INVESTMENTS, LLC,
Plaintiff-Appellant,

vs.
MMG SIOUX CITY, LLC, DALE MAXFIELD and MAXFIELD MANAGEMENT GROUP, LLC,
Defendant-Appellees.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT

THE HONORABLE JEFFREY A. NEARY
PRESIDING JUDGE

PLAINTIFF-APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred by granting Defendant-Appellee's Motion to Reconsider and amending its ruling to find that Plaintiff-Appellant was the first party to breach the lease agreement.

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Restatement (Second) of Contracts § 250 (1981)

Restatement (Second) of Contracts § 253(1981)

Restatement (Second) of Contracts § 241 (1981)

ROUTING STATEMENT

Because this case presents the application of existing legal principles, the Supreme Court should appropriately transfer it to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

On August 23, 2019, Plaintiff-Appellant, Dolly Investments, LLC (hereinafter "Dolly"), filed its petition against Defendant-Appellees, MMG Sioux City, LLC, Dale Maxfield, and Maxfield Management Group, LLC (hereinafter collectively referred to as "MMG"), alleging that MMG breached the lease contract between the parties. App. 4. The relevant property was the Golden Corral location at 5230 Sergeant Road, Sioux City, Iowa. App. 2. MMG brought a counterclaim, alleging that it was Dolly that first breached the lease and claimed that Dolly had wrongfully retained fixtures, furniture, and equipment in the Golden Corral restaurant which was property of MMG. App. 42. Both Dolly's claim and MMG's counterclaim were tried in a bench trial before the Honorable Jeffrey A. Neary on September 1, 2020. App. 284.

On October 14, 2020, Judge Neary entered a ruling finding that MMG breached the lease agreement and entered judgment in favor of Dolly in the amount of $290,625.00. App. 78. The amount represented fifteen and one-half (15 ½) months of lease payments from June 2019 through the month of trial, September

2020, as MMG's last rent payment had been a half payment for June 2019 before MMG vacated the premise that same month. App. 78. The District Court also awarded Dolly its attorney fees. App. 79. The District Court awarded MMG judgment in its favor on its counterclaim, finding it was entitled to $108,828,75, representing the value of MMG's furniture, fixtures, and equipment retained by Dolly after MMG had abandoned the Golden Corral property. App. 78.

On October 28, 2020, MMG filed a Rule 1.904(2) motion, asking the District Court to reconsider its judgment. App. 92–97. MMG requested a finding that Dolly materially breached the lease when it reentered the property on June 25, 2019, even though both communications between MMG and Dolly and media reports made clear that MMG had ceased operating the Golden Corral restaurant prior to Dolly's reentry. App. 94–95. MMG argued that, because Dolly reentered the property before it had sent MMG a notice to cure default for MMG's rent payment which was in arrears, MMG was excused from making any future rent payments after June 25, 2019. App. 95–96. Dolly resisted this motion, arguing that MMG's actions in failing to make timely rent payments and otherwise indicating that it would not perform under the lease agreement made it the first party to breach the contract. Pl's Resistance to App. 98–99.

On December 7, 2020, the District Court granted MMG's motion to reconsider. App. 104–105. The District Court found that Dolly, by reentering the

property, was the first to materially breach the lease. App. 103–104. Accordingly, Dolly's award for MMG's failure to pay rent was reduced to $9,375.00, which equaled the half of the rent still owed for June 2019. App. 103–104. Judge Neary left undisturbed the remainder of his ruling, meaning that Dolly remains liable to MMG for the $108,828,75 judgment in MMG's favor for the restaurant equipment retained by Dolly, and MMG remains liable to Dolly for its attorney fees. App. 104–105. Dolly filed a timely notice of appeal on January 4, 2021. App. 107.

STATEMENT OF THE FACTS

In December 2016, Leon and Marina Reingold purchased the Golden Corral restaurant located at 5230 Sergeant Road, Sioux City, Iowa. App. 2. The Reingolds subsequently transferred the property to Dolly Investments, LLC on June 28, 2019. App. 3. Leon and Marina Reingold each own a 50% stake in Dolly. App 185:25–186:5.

When the Reingolds purchased the property, it was subject to an existing lease. App. 2. The property was leased to MMG, which operated the Golden Corral restaurant. App. 3. The lease, dated March 1, 2016, was for a fifteen (15)-year term, with two (2) consecutive five (5) year tenant renewal options to follow. App. 9 at ¶ 2.1. The lease provided that MMG was responsible for, in addition to monthly rent payments, insurance, taxes and assessments, utilities, and repairs, making it a triple net lease. App. 22 at ¶ 25.23.

The issues between Dolly and MMG first arose in late 2018, when MMG became delinquent in payment of taxes due for the real estate. Dolly sent MMG the property tax bill on September 4, 2018. Dolly was forced to follow up on November 6, 2018 when late fees were assessed because MMG failed to make timely payment. Nevertheless, MMG still failed to make payment on the property taxes that were due for 2018. App. 328. The property tax delinquency, coupled with prior delayed rent payments from MMG, led to growing concerns by Dolly regarding MMG's ability to perform under the lease.

These concerns were further exacerbated in April 2019 when MMG informed Dolly of the Golden Corral's decreased sales performance and requested a reduction in rent. Email from Dale Maxfield to Reingold, April 16, 2019. "As you can see after reviewing the financial performance of this restaurant, there is a serious problem and changes must occur." App. 327. Maxfield warned "unless we can figure out how to improve sales, decrease rent dollars, or both the Sioux City Golden Corral will not survive." App. 327. Maxfield also represented that other Golden Corral franchisees in the Midwest may be interested in sub-leasing the Sioux City location. App. 327.

Issues also arose in 2019 with MMG's delayed payment of property taxes due to Woodbury County. App. 326. MMG ultimately paid these overdue property taxes on May 31, 2019, two months after they became delinquent. App. 324.

In June 2019, MMG failed to pay the full rent which was due. App. 3. Pursuant to the lease, MMG's monthly rent payment to Dolly was $18,750.00. MMG tendered half of this amount, $9,375.00, and informed Dolly that it did not have the remaining half of June 2019's rent. App. 322. On June 9, 2019, MMG contacted Dolly about the possibility of finding another franchisee to take its place and assume the lease. App. 331. "[W]e are considering the sale of the Golden Corral in Sioux City. I have some medical conditions that are making the five hour drive very difficult to make and need to look at other options." App. 331.

On June 17, 2019, MMG ceased operating the Golden Corral restaurant. App. 318–321. While a sign on the door read "closed for remodel," Dale Maxfield, President of MMG, confirmed in a June 17, 2019 article in the Sioux City Journal that the Golden Corral would not be reopening. App. 319–320. "According to a former employee, it was previously believed that the restaurant would reopen following the remodel. But on Monday night, Dale Maxfield, Maxfield Management Group LLC president, confirmed that the restaurant would not open again. Maxfield Management Group LLC was the owner of the Sioux City restaurant." App. 320.

MMG did not communicate its intentions to cease operations to Dolly. Dolly only learned that the Golden Corral was closing through its bank, which was located nearby the Golden Corral, when a bank employee observed the Golden Corral was closed and read the article in the Sioux City Journal. App. 129:10–130:1. On June

19, 2019, Dolly contacted MMG, demanding timely payment on the delinquent rent or legal action would follow. App. 322. MMG informed Dolly that it still did not have the rent at that time. App. 322. "We do not have the rent at this time." App. 322.

Given his increasing concern over the situation and the status of his now-abandoned property, Leon Reingold came to Sioux City on June 25, 2019 to inspect the property. App. 171:10–13. Upon arriving, Mr. Reingold found the property in disarray. App. 203:23–204:6. Due to the state in which the Golden Corral had been left and his concerns that the property may be further damaged, Mr. Reingold changed the locks on the restaurant's doors on June 25. App. 203:23–204:6. Dolly subsequently sent MMG a notice to cure default on July 3, 2019. App. 314–315. When MMG's default went uncured, Dolly sent a notice terminating the lease on August 22, 2019 and filed a petition initiating this action on August 26, 2019. App. 316–317; App. 1.

Dolly has subsequently attempted to re-lease the property. App. 143:23–144:2. However, Dolly's ability to do so was severely hampered by the COVID-19 pandemic, which broke out in March 2020, during the pendency of this action. App. 144:4–10. To the date of trial, Dolly had received no offers from any potential replacement tenants to lease the property. App. 146:6–9. At trial, Dolly sought recovery for the balance of unpaid rent and property taxes for the life of the lease,

assuming no change in the tax rate. App. 64. Pursuant to the terms of the lease, Dolly also sought to recover its attorney fees. MMG counterclaimed, alleging that Dolly improperly retained furniture, fixtures, and equipment ("FFE") which MMG had left behind at the Golden Corral premises. App. 42. According to MMG, the value of the FFE is $108,828.75. App. 239:4–21.

ARGUMENT

I. The District Court Erred in Finding That Dolly Was the First to Breach the Lease Because MMG's Actions Constituted a Repudiation.

MMG repudiated the lease, no later than June 19, 2019 by taking actions which indicated its inability to perform under the contract. MMG's repudiation excused Dolly from its duty to perform pursuant to the lease. The appropriate measure of damages for the non-repudiating party are damages for total breach. This means Dolly is entitled to $3,921,369.00, consisting of $2,945,625.00 in unpaid rent and $975,744.00 in unpaid property taxes over the remaining term of the lease. Alternatively, if the Court determines that future damages for the life of the lease are too speculative, as the District Court did in its Original Ruling, Dolly requests that the award entered by the District Court in favor of Dolly in its Original Ruling be reinstated. App. 78.

A. Preservation of Error

Error was preserved here by Plaintiff filling a notice of appeal from the District Court's ruling on Defendant's Motion to Reconsider.

B. Scope of Review

Under Iowa law, interpretation of contractual words is an issue for the court. *Allen v. Highway Equip. Co.*, 239 N.W.2d 135, 139 (Iowa 1976). Accordingly, appellate review of a breach of contract action is for errors at law. *E. Broadway Corp. v. Taco Bell Corp.*, 542 N.W.2d 816, 819 (Iowa 1996) (citing Iowa R. Civ. P. 6.907). This means that while the court must take as true the factual findings of the district court which are supported by substantial evidence, an appellate court will review the legal principles underlying contract law as well as any legal effect of the facts found by the district court de novo. *Emp. Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 153 (Iowa Ct. App. 1995).

C. MMG's actions constituted a repudiation.

The Restatement (Second) of Contracts defines a repudiation as:

> (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or
> (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

Restatement (Second) of Contracts § 250 (1981). "In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Id.* at cmt. b. "[L]anguage that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a

repudiation." *Id.* (internal quotations omitted). When such language "is accompanied by a breach by non-performance," the language "may amount to a repudiation even though, standing alone, it would not be sufficiently positive." *Id.* The party's act "must make it actually or apparently impossible for him to perform." Restatement (Second) of Contracts § 250 cmt. c.

The principles set forth in Restatement (Second) of Contracts Section 250 and its comments are further fleshed out by the illustrations provided in Section 250. "On April 1, A contracts to sell and B to buy land, delivery of the deed and payment of the price to be on July 30. On May 1, A tells B that he will not perform. A's statement is a repudiation." *Id.* at cmt. b, illus. 1. Another illustration considers what amounts to repudiation in the context of a party failing to make progress payments—an apropos analogy to failure to make monthly rent payments. Specifically, the illustration considers a situation where "[w]ithout justification B fails to make a $5,000 progress payment and tells A that because of financial difficulties he will be unable to pay him anything for at least another month." *Id.* at cmt. b, illus. 2. "If, after a month, it would be too late for B to cure his material failure of performance by making the delayed payment, B's statement is a repudiation." *Id.* (illustration based on *Petrangelo v. Pollard*, 255 N.E.2d 342 (Mass. 1970)). Repudiation also occurs when the acts of one of the parties makes their continued performance under

the contract impossible. *See* Restatement (Second) of Contracts § 250 cmt. c, illus. 5–7:

> 5. The facts being otherwise as stated in Illustration 1, A says nothing to B on May 1, but on that date he contracts to sell the land to C. A's making of the contract with C is a repudiation.
>
> 6. The facts being otherwise as stated in Illustration 1, A says nothing to B on May 1, but on that date he mortgages the land to C as security for a $40,000 loan which is not payable until one year later. A's mortgaging the land is a repudiation.
>
> 7. A contracts to employ B, and B to work for A, the employment to last a year beginning in ten days. Three days after making the contract B embarks on a ship for a voyage around the world. B's embarking for the voyage is a repudiation.

The District Court erred in its ruling on reconsideration when it determined that, by reentering the property and changing the locks on June 25, 2019, Plaintiff-Appellant Dolly was the first to materially breach the lease. Ruling on Defs.' Mot. to Reconsider at 4–5. Rather, through its communications with Dolly regarding its inability to pay the rent, and the newspaper article in the Sioux City Journal on June 17, 2019 indicating that the Golden Corral had permanently closed, MMG repudiated the lease agreement contract in advance of June 25, 2019. Such actions, when taken together, were sufficiently positive to show that MMG could not or would not perform under the lease agreement. Thus, the first breach occurred when MMG repudiated the contract and not when Dolly reentered the property.

Comparing the facts at hand with the illustrations provided in the Restatement (Second) proves instructive. MMG's statements unequivocally provided that MMG would not perform under the lease, like the statements in Illustration 1. Just like in Illustration 2, MMG reported that financial difficulties would make it so that Dolly should not expect future payment. In addition to MMG's statements, MMG took actions, such as abandoning the property and discontinuing its operation of the Golden Corral restaurant, which are fundamentally inconsistent with the ability to perform, similar to the actions described in Illustrations 5, 6, and 7.

Consistent with the language of Restatement (Second) of Contracts section 250, Iowa courts have found that, where one party communicates to the other his belief that their contract has been terminated, such communications constitute a repudiation. *See Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 698 (Iowa 2020), *reh'g denied* (Feb. 26, 2020). These statements, when coupled with nonperformance, are sufficiently positive to amount to repudiation. *Id.* (citing *Pavone v. Kirke*, 807 N.W.2d 828, 830–31, 833–34 (Iowa 2011)). Frequently, it is the indication of an intent to refuse future performance and some act consistent with that indication which gives rise to a finding of repudiation in Iowa. *See, e.g.*, *Id.*; *Pavone*, 807 N.W.2d 828; *Shelby County Cookers, L.L.C. v. Utility Consultants Intern., Inc.*, 857 N.W.2d 186 (Iowa 2014); *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *Berryhill v. Hatt*, 428 N.W.2d 647 (Iowa 1988).

A lease is a contract and ordinary principles of contract interpretation apply when determining the consequences of provisions in a lease. *See Alta Vista Properties, LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 726 (Iowa 2014) (providing that the standard of review for an appellate court reviewing a commercial lease is that of any other issue of contract interpretation). In the specific context of lease contracts, courts in other jurisdictions have applied the general repudiation principles set forth in Restatement (Second) of Contracts Section 250 to lease contracts. The Supreme Court of Pennsylvania described the rationale behind the doctrine of repudiation in lease contracts as "the prevention of economic waste." *2401 Pennsylvania Ave. Corp. v. Fed'n of Jewish Agencies of Greater Philadelphia*, 489 A.2d 733, 737 (Pa. 1985). "An obligee/plaintiff should not be required to perform a useless act as a condition of his right to recover for a breach when the obligor has demonstrated an absolute and unequivocal refusal to perform." *Id.* (citations omitted).

Where the facts support it, courts have found that repudiation of a lease agreement by the lessee excuses non-performance of the lessor, such that the lessee cannot recover for any alleged breach by the lessor. *See, e.g., W & G Seaford Assocs., L.P. v. E. Shore Markets, Inc.*, 714 F. Supp. 1336 (D. Del. 1989); *Nikole, Inc. v. Klinger*, 603 A.2d 587 (Pa. Super. Ct. 1992). Where one party's actions constitute repudiation of a commercial lease, such repudiation excuses the other

party's performance. *W & G Seaford Assocs., L.P.*, 714 F. Supp. at 1340–41. The non-repudiating party's non-performance does not indicate there was no contract between the parties. *Id.* In *W & G Seaford Assocs., L.P.*, the court found that there had been a repudiation where a commercial lessee of a Safeway grocery store wrote the lessor and stated that they were unwilling to go forward with their plans to rent the premises. *Id.* at 1339. Similarly, when the mortgagor in a lease-purchase agreement fails to pay the mortgage and announces it will make no further payments, the acts of the mortgagor amount to a repudiation of the lease-purchase agreement. *Nikole, Inc.*, 603 A.2d at 592–93.

MMG repudiated the lease with Dolly prior to June 25, 2019. MMG only paid half the rent due for June 2019. On June 9, 2019, after its failure to pay rent, MMG sent an email to Dolly informing Dolly of continued difficulties, further suggesting it could not pay the other half of the rent. App. 332. On June 17, 2019, an article appeared in the Sioux City Journal which indicated that the Golden Corral had "permanently closed." App. 318 – 321. Dolly contacted MMG after receiving word of this news report from its bank, again demanding June's rent on June 19, 2019. App. 322. In response, MMG indicated that it could not pay the rent. App. 322.

Taken alone, any one of these actions could have constituted a repudiation. Considered collectively, MMG's indicated a clear inability to perform. Restatement (Second) of Contracts § 250 (1981). MMG made statements directly to Dolly that it

was unable to meet its rent obligations under the lease. MMG then made public statements to the Sioux City Journal indicating that the Golden Corral had permanently closed. These statements were accompanied by a breach—MMG did not perform its obligations under the lease, failing to pay the full amount of rent due under the lease. Failing to pay the rent due for June 2019 further points towards a finding of repudiation. *See* Restatement (Second) of Contracts § 250 cmt. b ("[l]anguage that is accompanied by a breach by non-performance may amount to a repudiation even though, standing alone, it would not be sufficiently positive").

Thus, the District Court erred in finding that Dolly was the first party to materially breach the lease agreement when it inspected the property and changed the locks on June 25, 2019. MMG's prior actions in the month of June, typified by the Sioux City Journal article and its June 19 renewed refusal to pay the rent that was due, constituted repudiation of the agreement such that MMG repudiated no later than June 19, 2019. Accordingly, MMG and not Dolly was the first party to materially breach the lease agreement.

D. MMG's repudiation discharged Dolly's duty to perform under the lease.

MMG's repudiation, effective no later than June 19, 2019, discharged any duty Dolly had to render performance under the lease contract. Thus, after June 19, 2019, Dolly had no obligation to permit MMG to use and occupy the Golden Corral restaurant. Therefore, Dolly's reentry of the property cannot be said to be a breach.

"Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." Restatement (Second) of Contracts § 253(2) (1981). The Restatement provides the following illustrations:

> On April 1, A and B make a contract under which B is to work for A for three months beginning on June 1. On May 1, A repudiates by telling B he will not employ him. On May 15, B commences an action against A. B's duty to work for A is discharged.
>
> On July 1, A contracts to sell and B to buy a quantity of barrel staves, delivery and payment to be on December 1. On August 1, A repudiates by writing B that he will be unable to deliver staves at the contract price. On September 1, B commences an action against A. B's duty to pay for the staves is discharged.

Id. at cmt. a, illus. 1 and 2. Even if the repudiation predates non-performance, a repudiation nevertheless discharges the other party's duties, as if the repudiating party had not performed. Id. at § 250, cmt. a.

Iowa courts have accepted the position of the Restatement (Second) that the repudiation of the contract by one party excuses the other party from its performance obligations under the contract. *See Homeland Energy Sols., LLC*, 938 N.W.2d at 697. For instance, where an insurer repudiated an insurance contract, the insured was relieved of its obligation to repair and replace the insured property, pursuant to the insurance contract. *Conrad Bros.*, 640 N.W.2d at 242. Upon a finding that the other

party repudiated, the non-repudiating party is entitled to judgment on its claim. *Shelby Cty. Cookers, L.L.C.*, 857 N.W.2d at 195.

Just as with what qualifies as a repudiation, numerous courts in other jurisdictions have expressly adopted the Restatement's position with respect to repudiation discharging the duties of the other party in a lease contract. Where one party to a triple-net lease, just like the one between Dolly and MMG, denies that it owes any binding obligation to the other party, such a statement is a repudiation and discharges the remaining duties of performance of the other party with respect to the lease. *See First Nat. Mortg. Co. v. Fed. Realty Inv. Tr.*, 633 F. Supp. 2d 985, 998 (N.D. Cal. 2009), *aff'd*, 631 F.3d 1058 (9th Cir. 2011). Similarly, when the tenant vacates the premises and seeks release from the lease contract, any further duties owed by the landlord to the tenant are discharged by anticipatory repudiation. *Jonnet Dev. Corp. v. Dietrich Indus., Inc.*, 463 A.2d 1026, 1031 (Pa. Super. Ct. 1983).

In this case, a review of the facts demonstrates that MMG's conduct and words amounted to repudiation of its lease agreement with Dolly. As a consequence, Dolly was discharged from rendering further performance under the lease. This means that Dolly had no further obligation to permit MMG to occupy the Golden Corral location. The District Court's finding that Dolly materially breached the lease agreement by changing the locks and reentering the property on June 25, 2019 was therefore reached in error.

E. MMG's repudiation gives rise to a claim for total breach.

1. MMG's repudiation being a total breach makes the appropriate measure of damages the life of the lease.

As set forth in the subsections above, MMG repudiated the lease agreement no later than June 19, 2019. MMG's repudiation constituted a breach of the lease agreement. MMG's breach excused Dolly from performing under the lease after June 19, 2019. As Dolly did not fail to uphold its performance obligations until after MMG's repudiation, Dolly cannot be found to have been in breach. Thus, the only issue left for analysis is the extent of damages Dolly is entitled to for MMG's repudiation and breach.

The appropriate measure of damages is $3,921,369.00, consisting of $2,945,625.00 in unpaid rent and $975,744.00 in unpaid property taxes yet to become due over the life of the lease, which had 138 months remaining on it at the time of MMG's breach. This is the appropriate measure of damages because repudiation gives rise to a claim for damages for total breach of the underlying contract. Restatement (Second) of Contracts § 253(1) (1981). When repudiation is coupled with a breach by non-performance, the non-breaching party may raise a claim for either total or partial breach. *Id.* at cmt. b.

Consistent with the approach espoused in Restatement (Second) of Contracts Section 253, Iowa courts have found that the appropriate measure of compensatory damages when the contract has been repudiated is the amount due under the contract.

Berryhill, 428 N.W.2d at 656; *Shelby Cty. Cookers, L.L.C.*, 857 N.W.2d at 195. Such an award tracks the general principle regarding breach of contract that the damages awarded "should place the nonbreaching party in as good a position as they would have occupied had the contract been performed." *Shelby Cty. Cookers, L.L.C.*, 857 N.W.2d at 195 (quoting *Lane v. Crescent Beach Lodge & Resort, Inc.*, 199 N.W.2d 78, 82 (Iowa 1972)).

Therefore, the damages to which Dolly is entitled are the rent and property taxes due on the Golden Corral property, both of which were the responsibility of MMG pursuant to the lease agreement, for the life of the agreement. Over eleven years remained on the lease agreement when MMG breached it in June 2019. Based on the principles underlying repudiation, as expressed through the binding precedent of the Iowa Supreme Court, Dolly is entitled to $3,921,369.00 in compensatory damages as a result of MMG repudiating the lease. The District Court's ruling on reconsideration should be reversed and an award of the full amount due under the lease should be entered.

2. Alternatively, this Court should reinstate the award of rent to Dolly through the date of trial, as provided in the District Court's original ruling.

If this Court determines that Dolly is not entitled to recover all amounts due for the life of the lease contract, because of MMG's repudiation, this Court should reinstate the District Court's original Ruling, which awarded $290,625.00 in lease

payments, including the half rent still due from June 2019, through the date of trial, which occurred in September 2020. The District Court arrived at that figure by considering a landlord's duty to mitigate damages by exercising reasonable diligence in attempting to re-let the property and finding that the payment of future rent, beyond September 2020, was overly speculative. Ruling on Pet. and Countercls. at 11.

In addition, there is no dispute that property taxes were the responsibility of the tenant, MMG, pursuant to the lease. Lease at ¶ 25.23 ("[property] taxes . . . shall be the sole and exclusive obligation of the tenant). The District Court recognized this as well. "The lease is a triple net lease. This means that the tenant pays insurance, taxes and assessments, utilities, and repairs in addition to the rent due as set forth in the lease." Ruling on Pet. and Countercls. at 2. Nevertheless, the District Court's damages award in favor of Plaintiff failed to include property taxes which became due between MMG's breach and the date of trial. *See id.* at 13.

Thus, the property taxes which became due between June 2019 and the date of trial should be added to Dolly's award if the District Court's original ruling is reinstated. This would include property tax payments of $44,352.00 for March 1, 2020, and September 1, 2020, assuming no change in tax rate. *See* Tax Report from Woodbury County Treasurer (providing amount of payment and that it became due on March 1 and September 1 of each year). This means that $88,704.00 should be

added if this Court wishes to fairly compensate Dolly for the benefit it expected under the lease agreement, through the date of trial, making the total award for damages through trial $379,329.00.

At the very least, when a lease does not contain an acceleration clause, the landlord is entitled to recover rent through the time of trial and is not foreclosed from recovering additional damages if they can show that they made reasonable efforts to re-let the property. *See Bossart v. Cent. Freight Lines, Inc.*, 824 N.W.2d 561 (Iowa Ct. App. 2012). The lease between the parties provides that Dolly is entitled to "all rent and other charges required to be paid by Tenant" under the lease, except Dolly "shall apply" rents collected from re-letting the property "against any amounts due from Tenant." Lease at ¶ 13.1(A).

It was on the basis of the speculative nature of whether and in what amount rent would be collected from Dolly re-letting the property, particularly given the economic impact of the COVID-19 pandemic on a buffet restaurant such as the Golden Corral, that Judge Neary limited Dolly's damages to rent owed through the day of trial. *See* Ruling on Pet. and Countercls. at 12 ("[a]ccordingly, Dolly is entitled to recover the lease payments due which had accrued at the time of trial and no more"). Consistent with the District Court's logic and pursuant to the clear terms of the lease, the District Court should also have awarded property taxes which became due between June 2019 and the date of trial in addition to the lease payments.

Lease at ¶ 25.23. Such payments totaled $133,056.00. *See* Tax Report from Woodbury County Treasurer (providing amount of payment and that it became due on March 1 and September 1 of each year).

Were this Court to find that Dolly is not entitled to rent payments and property taxes which accrued after trial, Dolly requests that the District Court's Ruling on Reconsideration be overturned and that the District Court's original damages award, consisting of rent through September 2020, be reinstated. Dolly should also be awarded property taxes which accrued between June 2019 and the date of trial, September 1, 2020. *See* Lease at ¶ 25.23, Tax Report from Woodbury County Treasurer.

II. Alternatively, MMG's Failure to Pay Full Rent in June 2019 Was a Material Breach That Excused Dolly's Further Performance Under the Lease.

A. Preservation of Error

Error was preserved here by Plaintiff filling a notice of appeal from the District Court's ruling on Defendant's Motion to Reconsider.

B. Scope of Review

Under Iowa law, interpretation of contractual words is an issue for the court. *Allen v. Highway Equip. Co.*, 239 N.W.2d 135, 139 (Iowa 1976). Accordingly, appellate review of a breach of contract action is for errors at law. *E. Broadway Corp. v. Taco Bell Corp.*, 542 N.W.2d 816, 819 (Iowa 1996) (citing Iowa R. Civ. P.

6.907). This means that while the court must take as true the factual findings of the district court which are supported by substantial evidence, an appellate court will review the legal principles underlying contract law as well as any legal effect of the facts found by the district court de novo. *Emp. Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 153 (Iowa Ct. App. 1995).

C. MMG's failure to pay full rent in June 2019 was a material breach which excused Dolly's further performance under the lease.

MMG's failure to pay full rent for June 2019 constituted a material breach of the lease agreement. A material breach, just like a repudiation, excuses the duties of the other party to the contract. *Van Oort Constr. Co. v. Nuckoll's Concrete Serv.*, Inc., 599 N.W.2d 684, 688 (Iowa 1999). Accordingly, Dolly's further performance under the lease was excused prior to Dolly reentering the Golden Corral property and changing the locks on June 25, 2019.

When tasked with determining whether the breach of a contract is "material," Iowa courts with look to five factors: (i) to what extent the non-breaching party will be deprived of the benefit it reasonably expected; (ii) the difficulty the non-breaching party may have proving damages; (iii) the possibility that the breaching party will suffer forfeiture; (iv) the likelihood that the breaching party will cure its failure; and (v) the degree that the breaching party's behavior comported with standards of good faith and fair dealing. *Id.* at 692 (citing Restatement (Second) of Contracts § 241

(1981)). Upon considering the pertinent circumstances, Iowa courts will determine whether a breach is material and, if so, will find that the breach excuses the other party's performance under the contract. *Id.*

The issue of materiality is very fact-dependent and "is necessarily imprecise and flexible." Restatement (Second) of Contracts § 241 cmt. a (1981). The first two factors to consider (the extent of the deprived benefit and difficulty in proving damages) are interrelated, as the difficulty in proving with sufficient certainty the amount of loss necessarily affects the adequacy of compensation. *Id.* at cmt. c. When weighing the possibility of the breaching party suffering forfeiture, a breach is less likely to be considered material if it occurs after substantial performance under the contract and is more likely to be considered material if it occurs prior to substantial performance. *Id.* at cmt. d. The probability that the failure will later be cured, often informed by the financial weakness of the other party suggesting an inability to cure, is also relevant to the determination of materiality. *Id.* at cmt. e.

In the context of a lease agreement, a delay in payment of rent has frequently been found, in other jurisdictions, to be a material breach. *See, e.g., Rubloff CB Machesney, LLC v. World Novelties, Inc.*, 844 N.E.2d 462 (Ill. App. Ct. 2006); *Camalier & Buckley, Inc. v. Sandoz & Lamberton, Inc.*, 667 A.2d 822 (D.C. 1995); *Elliott v. S. Isle Food Corp.*, 506 A.2d 147 (Conn. App. Ct. 1986); *Matter of Ogden Howard Furniture Co., Inc.*, 35 B.R. 209 (Bankr. D. Del. 1983); *Nat'l Shoes, Inc. v.*

Annex Camera & Elecs., Inc., 452 N.Y.S.2d 537 (Civ. Ct. 1982); *Masters v. Smythe*, 95 N.E.2d 719 (Ill. App. Ct. 1950). Iowa courts have found that where the tenant has previously been delinquent in rent payments and the landlord demands strict compliance going forward, the tenant cannot rely on the landlord's prior forbearances to argue that the breach is not material if he again fails to tender the rent due. *Beck v. Trovato*, 150 N.W.2d 657, 659 (Iowa 1967)

Where the party in breach attempts to cure their default, this demonstrates good faith and points against a finding that the breach is material. *Kiriakides v. United Artists Commc'ns, Inc.*, 440 S.E.2d 364, 367 (S.C. 1994). Conversely, where the tenant to a lease contract has previously been late on the rent and the landlord requested strict compliance with the terms of the lease in the future, another delayed rent payment is more likely to be found to be material. *Rubloff CB Machesney, LLC*, 844 N.E.2d at 466–67. Failure to pay property taxes which the tenant is obliged to pay under the lease, like a failure to pay the rent when due, may alone constitute a material breach. *Bolon v. Pennington*, 432 P.2d 274, 275 (Ariz. App. Ct. 1967).

The relevant factors in the determination of materiality point in favor of a finding that MMG materially breached the lease when it did not make payment in full of the rent due for June 2019. Dolly was deprived of the ultimate benefit it expected when contracting, as over eleven years remained on the lease when MMG was in breach. As correctly pointed out by the District Court in its initial Ruling,

determining future damages in a commercial lease case is difficult, particularly in light of the impact the COVID-19 pandemic has had and promises to continue to have on Dolly's ability to re-lease the property. App. 72. Thus, the possibility of adequate compensation factor points towards a material breach.

As MMG's breach occurred relatively early in the life of the agreement, three years into its fifteen-year lease term, and MMG enjoyed the benefit of occupying the premises, finding that MMG's breach was material would not amount to forfeiture. Furthermore, MMG's financial difficulties and attempts to sub-lease the property, as communicated to Dolly, indicated that MMG was unlikely to cure its failure. Finally, by simply abandoning the property and reporting to the media, and not its landlord, that the Golden Corral would be permanently closing, MMG demonstrated a failure to comport to the standards of good faith and fair dealing.

Weighing the relevant factors as identified by the Restatement (Second) of Contracts and Iowa law shows that MMG materially breached the agreement when it failed to pay the rent due in June 2019. As a consequence of MMG's material breach, Dolly was excused from providing further performance pursuant to the terms of the lease agreement. This means that Dolly did not breach the agreement when it reentered the property on June 25, 2019. Certainly, it was not the first party to materially breach the lease. The District Court erred when it found that Dolly

breached the lease first and its judgment to that effect in its Ruling on MMG's Motion to Reconsider should be reversed.

III. Dolly's Actions in Reentering the Property on June 25, 2019 Did Not Constitute a Breach.

A. Preservation of Error

Error was preserved here by Plaintiff filling a notice of appeal from the District Court's ruling on Defendant's Motion to Reconsider.

B. Scope of Review

Under Iowa law, interpretation of contractual words is an issue for the court. *Allen v. Highway Equip. Co.*, 239 N.W.2d 135, 139 (Iowa 1976). Accordingly, appellate review of a breach of contract action is for errors at law. *E. Broadway Corp. v. Taco Bell Corp.*, 542 N.W.2d 816, 819 (Iowa 1996) (citing Iowa R. Civ. P. 6.907). This means that while the court must take as true the factual findings of the district court which are supported by substantial evidence, an appellate court will review the legal principles underlying contract law as well as any legal effect of the facts found by the district court de novo. *Emp. Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 153 (Iowa Ct. App. 1995).

C. Dolly did not breach the lease by reentering the property on June 25, 2019.

The District Court erred when it found that Dolly breached the lease by inspecting and securing the Golden Corral property on June 19, 2019. App. 103–

104. The actions of Leon Reingold, taken on behalf of Dolly, were fully within Dolly's rights under the lease. Subsequent to Dolly's inspection, MMG never attempted to gain access to the property. As MMG was not excluded from the property until after the fifteen-day notice to cure period had run, Dolly cannot be precluded from recovering for MMG's breach of contract based on the allegation that Dolly did not perform under the agreement. The finding of the District Court to the contrary should be reversed.

The plain terms of the agreement permitted Dolly to inspect the property, even without prior notice being given to the tenant, in the event of an emergency. App. 21 at ¶ 25.15. While the agreement does not specifically define "emergency," the facts indicate that Dolly reasonably believed in the existence thereof, permitting Dolly to enter the property, with or without notice to MMG. Given the communications between MMG and Dolly, the conflicting reports Dolly had received regarding the future operations of the Golden Corral, and the June 17, 2019 Sioux City Journal article, Dolly's belief that an emergency existed was reasonable and Dolly acted as a prudent landowner would by inspecting the property to ensure its condition and safety. Where a tenant demonstrates that they will be permanently and not merely temporarily absent, "changing of the locks [i]s a permissible peaceful means for the [owner] to take possession of the property" particularly when such

property appears abandoned. *Brown v. State Cent. Bank*, 459 F. Supp. 2d 837, 843 (S.D. Iowa 2006)

MMG is incorrect when it asserts that Dolly placing new locks on the Golden Corral excluded it from the property. Dale Maxfield, on behalf of MMG, never requested access to the property nor did he inquire about operating the Golden Corral out of the relevant property. App. 259:13–23 (Maxfield admitting he never asked for access to the property in the time between when the locks were changed and when Dolly sent a Notice of Termination in late August 2019, nor is he aware of anyone asking on his behalf). As a threshold matter, a party cannot be excluded from property if they are never told of such exclusion and never request access.

A party is similarly not deprived of a contractual benefit if such benefit is not one which the party could have reasonably expected to enjoy. *See Alliant Energy Corp. v. Alltel Corp.*, 344 F.Supp.2d 1176, 1189–91 (S.D. Iowa 2004) (finding that, based on undisputed facts, the party to a contract was not deprived of the benefit it reasonably expected); Restatement (Second) of Contracts § 241 (1981) (discussing requirement for material failure including the injured party being "deprived of the benefit which he reasonably expected"). MMG could not have reasonably expected the continued unrestricted access to the property after abandoning it and leaving it in a state of disarray.

Therefore, Dolly acted within its rights pursuant to the agreement when it reentered the Golden Corral property on June 19, 2019. Dolly did not breach the agreement in so doing. The District Court's finding that Dolly did breach the lease by accessing the property on June 19, 2019 was in error.

D. Consequently, Dolly did not breach the lease prior to MMG defaulting on its rent obligation and failing to cure within fifteen (15) days of receiving written notice from Dolly.

On July 3, 2019, in continuing its compliance with the terms of the lease, Dolly sent a Notice to Cure Default via certified mail to MMG. App. 314–315. Pursuant to the terms of the lease, upon MMG not curing its default within fifteen (15) days of receiving the written notice to cure, Dolly was entitled to terminate the agreement. When MMG failed to cure, Dolly did just that, sending the Notice of Termination on August 22, 2019, in advance of filing this action. App. 316–317. Because Dolly did not breach the lease when it reentered the property, the first breach was that of MMG, in failing to pay the rent due and failing to cure after a notice of default. Accordingly, the District Court's Ruling on reconsideration should be reversed to the extent the Court found that Dolly and not MMG was the first party to materially breach the lease agreement.

CONCLUSION

The District Court erred in determining that the acts of MMG in advance of Dolly's inspection of the Golden Corral property on June 25, 2019 did not amount

to repudiation of the lease agreement. Because MMG's actions did amount to repudiation, Dolly was discharged from any further performance under the lease agreement no later than June 19, 2019.

The proper measure of damages for a repudiated contract is total breach. Thus, Dolly is entitled to receive as damages all rent and property tax payments for the life of the lease, totaling $3,921,369.00. However, if this Court determines that the award of damages for the life of the lease is too speculative for Dolly to recover, then this Court should reinstate the District Court's initial award of rent through the date of trial on in the amount of $290,625.00. In addition, for the District Court to have fairly compensated Dolly through the date of trial for its expected benefit under the lease agreement, it would have had to include the unpaid property taxes which became due between June 2019 and September 2020 and were MMG's responsibility pursuant to the lease. Hence, $88,704.00 should be added to any award through the date of trial with such award totaling $379,329.00.

Even if MMG did not repudiate the lease agreement, the District Court's ruling on reconsideration was incorrect, as the first material breach of the agreement was committed by MMG, not Dolly. MMG materially breached the lease when it failed to pay rent in full for June 2019 and Dolly was acting within its rights and did not breach the agreement by securing the property on June 25, 2019. MMG was the

first party to materially breach the agreement and the District Court's ruling to the contrary was in error.

Therefore, Dolly respectfully requests that this Court either reverse both the District Court's initial Ruling and its Ruling on MMG's Motion to Reconsider, and award damages for total breach for the life of the lease, or, if it finds future damages too speculative, reverse the Ruling on MMG's Motion to Reconsider and reinstate the District Court's initial Ruling.

REQUEST FOR ORAL ARGUMENT

The Appellant-Plaintiff requests that this case be submitted with oral argument.

DATED this ____ day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Plaintiff-Appellant, Dolly Investments, LLC, pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 7,645 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Appellant's Proof Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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I, the undersigned, hereby certify that I did serve the attached Plaintiff-Appellant's Proof Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Plaintiff-Appellant's Proof Brief was the sum of $0.00 exclusive of service tax, postage, and delivery charges.

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