IN THE IOWA SUPREME COURT

Supreme Court 18-0950

HOMELAND ENERGY SOLUTIONS, LLC,
an Iowa Limited Liability Company,
Plaintiff / Appellee

v.

STEVE J. RETTERATH,
Defendant and Third Party Plaintiff / Appellant,

and

JASON and ANNIE RETTERATH,
Intervenors / Appellants.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY
HON. CARLA SCHEMMEL, PAUL D. SCOTT,
ROBERT J. BLINK, and JEFFREY D. FARRELL

FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT OF APPELLANT STEVE J. RETTERATH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. HES FAILED TO PRESENT SUFFICIENT EVIDENCE TO SHOW ENTITLEMENT TO SPECIFIC PERFORMANCE

Authorities

Cases

Acme Inv., Inc. v. Sw. Tracor, Inc., 105 F.3d 412 (8th Cir. 1997)
Am. Tower, L.P. v. Local TV Iowa, L.L.C., 809 N.W.2d 546 (Iowa Ct. App. 2011)
Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)
Breitbach v. Christenson, 541 N.W.2d 840 (1995)
Century 21-Birdsell Realty, Inc. v. Hiebel, 379 N.W.2d 201 (Minn. Ct. App. 1985)
Condo v. Conners, 266 P.3d 1110 (Col. 2011)
Conner v. Hayes (In re Estate of Conner), 2003 Iowa App. LEXIS 308 (Mar. 26, 2003)
Conrad Brothers v. John Deere Ins. Co., 640 N.W. 2d 231 (Iowa 2001)
Corporate Exp. Office Products, Inc. v. Phillips, 847 So.2d 406 (Fla. 2003)
Dickson v. Hubbell Realty Co., 567 N.W.2d 427 (Iowa 1997). (Tr. 4.)
Gingerich v. Protein Blenders, Inc., 250 Iowa 654, 95 N.W.2d 522 (1959)
State ex rel. Goettsch v. Diacide Distributors, Inc., 561 N.W.2d 369 (Iowa 1997)
Lyon v. Willie, 288 N. W.2d 884 (Iowa 1980)
McCarter v. Uban, 166 N.W.2d 910 (Iowa 1969)
Mincks Agri Center v. Bell Farms, 611 N.W.2d 270 (Iowa 2000)
Mission of Saudi Arabia to the United Nations v. Kirkwood Ltd., 30 A.D.3d 1133, 817 N.Y.S.2d 226 (N.Y. App. Div. 2006)
Peterson v. Rankin, 161 Iowa 431, 143 N.W. 418 (1913)
Redeker v. Litt, No. 5-076, 2005 Iowa App. LEXIS 415 (Iowa Ct. App. Feb. 11, 2015)
Roberts v. Clark, 188 S.W.3d 204 (Tex. App. 2002)
Rodgers v. Baughman, 342 N.W.2d 801 (Iowa 1983)
Saint George Society v. Sawyer, 204 Iowa 103 (1927)
SDG Macerich Properties, L.P. v. Stanek Inc., 648 N.W.2d 581 (Iowa 2002)
Shell Oil Co. v. Kelinson, 158 N.W.2d 724 (Iowa 1968)
Tenney v. Atlantic Assocs., 594 N.W.2d 11 (Iowa 1999)

TIC Holdings v HR Software Acquisition Group, 194 Misc.2d 106 (N.Y. Sup. Ct. 2002)
Williams v. Clark, 417 N.W.2d 247 (Iowa Ct. App. 1987)

Statutes

Iowa Code § 489.102(24)
Iowa Code § 489.104(1)
Iowa Code § 489.407(3)(d)(3)
Iowa Code §§ 489.501

Other Authorities

18 AM. JUR. 2d Corporations § 38
Black's Law Dictionary (10th ed. 2014)
Fletcher Cyclopedia of the Law of Corporations § 13 (2012)
Iowa Civ. Jury Instr. 2400.7
Iowa R. App. P. 6.907
Iowa R. App. P. 6.1101(2)
Iowa R. App. P. 6.904
Kleinberger, Daniel S., *The LLC As Recombinant Entity: Revisiting Fundamental Questions Through the LLC Lens*, 14 FORDHAM J. CORP. & FIN. 473 (2008).
Spulber, Daniel F., *Discovering the Role of the Firm: The Separation Criterion and Corporate Law*, 6 Berkeley Bus. L. J. 298 (2009)

II. DISTRICT COURT ERRED GRANTING SUMMARY JUDGMENT THAT HES' OPERATING AGREEMENT DID NOT REQUIRE MEMBERSHIP APPROVAL OF THE PURPORTED AGREEMENT

Authorities

Cases

Atlas Coal Co. v. Jones, 61 N.W.2d 663 (Iowa 1953)
Condo v. Conners, 266 P.3d 1110 (Col. 2011)
DuVall v. Moore, 276 F. Supp. 674 (N.D. Iowa 1967)
Huntington Min. Holdings, Inc. v. Cottontail Plaza, Inc., 459 N.E.2d 492 (N.Y. 1983)

Iowa Fuel & Minerals v. Iowa State Bd. of Regents, 471 N.W.2d 859 (Iowa 1991)
Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994)
Peak v. Adams, 799 N.W.2d 535 (Iowa 2011)

Statutes

Iowa Code § 502.102(28)(e)

Other Authorities

Black's Law Dictionary (10th ed. 2014)

III. DISTRICT COURT ERRED IN DENYING RETTERATH'S AFFIRMATIVE DEFENSES

Authorities

Cases

Binkholder v. Carpenter, 152 N.W.2d 593 (Iowa 1967)
Binz v. Einarsen, 723 N.W.2d 449 (Iowa Ct. App. 2006)
C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011)
Davenport Bank & Trust Co. v. State Cent. Bank, 485 N.W.2d 476 (Iowa 1992)
Hillview Associates v. Bloomquist, 440 N.W.2d 867 (1989)
Inc. v. Fargo Water Equip. Co., 446 N.W.2d 237
Johnson v. Johnson, 301 N.W.2d 750 (Iowa 1981)
In re Marriage of Shanks, 758 N.W.2d 506 (Iowa 2008)
Miller v. AMF Harley-Davidson Motor Co., 328 N.W.2d 348 (Iowa Ct. App. 1982)
State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001)
Postscript Enter. v. City of Bridgeton, 905 F.2d 223 (8th Cir. 1990)
Purgess v. Sharrock, 33 F.3d 134 (2d Cir.1994)
Sille v. Shaffer, 297 N.W.2d 379 (Iowa 1980)
State v. Teeters, 487 N.W.2d 346 (Iowa 1992)
TIC Holdings v HR Software Acquisition Group, 194 Misc.2d 106 (N.Y. Sup.Ct. 2002)
Weber v. Weber, 589 N.W.2d 358 (N.D. 1999)

Statutes

Iowa Code § 554.2302(1)49

Other Authorities

Iowa R. App. P. 6.907
Restatement (Second) of Contracts § 152 (1981)

IV. DISTRICT COURT ERRED GRANTING HES' POST-TRIAL MOTION TO SUPPLEMENT RECORD

Authorities

Cases

First Trust Joint Stock Land Bank v. Resh, 285 N.W. 192 (Iowa 1939)

V. DISTRICT COURT ERRED IN AWARDING HES ATTORNEYS' FEES AND DENYING RETTERATH ATTORNEYS' FEES

Authorities

Cases

Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.,728 N.W.2d 832 (Iowa 2007)
First Am. Bank & C.J. Land, LLC v. Fobian Farms, Inc., 906 N.W.2d 736 (Iowa 2018)
FNBC Iowa, Inc. v. Jennessey Grp., L.L.C., 759 N.W.2d 808 (Iowa Ct. App. 2008)
Maxim Technologies, Inc. v. City of Dubuque, 690 N.W.2d 896 (Iowa 2005)
NevadaCare, Inc. v. Dep't of Human Servs., 783 N.W.2d 459 (Iowa 2010)
Estate of Pearson v. Interstate Power & Light Co., 700 N.W.2d 333 (Iowa 2005)
Standard Water Control Sys., Inc. v. Jones, 888 N.W.2d 673 (Iowa Ct. App. 2016)

Statutes

Iowa Code § 625.22

Other Authorities

Iowa R. Civ. P. 1.413(1)

VI. DISTRICT COURT ERRED IN DENYING RETTERATH'S MOTION FOR EVIDENTIARY SANCTIONS OR CONTINUANCE

Authorities

Cases

Barnhill v. Iowa Dist. Court of Polk County, No. 7-573, 2007 Iowa App. LEXIS 1134 (Iowa Ct. App. Oct. 24, 2007)
Jensen v. Sattler, 696 N.W.2d 582 (Iowa 2005)

VII. THE DISTRICT COURT ERRED IN DENYING RETTERATH'S MOTION FOR NEW TRIAL AND STRIKING RETTERATH'S JURY DEMAND

Authorities

Cases

Hansen v. Cent. Iowa Hosp. Corp., 686 N.W.2d 476 (Iowa 2004)
Meyer v. Des Moines, 475 N.W.2d 181 (1991)
Ramirez v. Iowa DOT, 546 N.W.2d 629 (Iowa Ct. App. 1996)
Sullivan v. Chicago & Nw. Transp. Co., 326 N.W.2d 320 (Iowa 1982)
Weltzin v. Nail, 618 N.W.2d 293 (Iowa 2000)
White v. Citizens Nat. Bank of Boone, 262 N.W.2d 812 (Iowa 1978)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case so it can address substantial first-impression issues relating to limited liability companies under Iowa Code Chapter 489, which has received minimal court attention. Iowa R. App. P. 6.1101(2)(c). This case presents "substantial questions of enunciating…legal principles." *Id.* 6.1101(2)(f). It concerns an eight-figure monetary investment, and claims involving insider trading and Iowa's biofuels industry, which affect most Iowans directly or indirectly. *Id.* 6.1101(2)(d). The significant issues, and underlying errors, in this case must be addressed by the supreme court. *Id.* 6.1101(2), (3).

STATEMENT OF THE CASE

Nature of the Case

Homeland Energy Solutions LLC ("HES") seeks specific performance of a purported agreement. (Appendix ("App.") (vol. I), p. 20.)

Course of Proceedings

Iowa proceedings began August 14, 2013, when HES filed its "Petition in Equity" in Polk County seeking specific performance.

August 27, 2014, Defendant Steve Retterath answered. (Answer.) November 14, 2014, district court struck his jury demand. (App.(I), p. 149.) July 21, 2016 Retterath moved to file an amended Answer. (App.(III), pp.

191 et. seq.) November 6, 2016, district court permitted the Amended Answer. In the same Order, the court required:

> Number one, the trial on [HES'] original petition shall proceed on January 17, 2017 as ordered. It shall be limited to the issues raised in that [HES'] pleading and answers thereto. Number two, no discovery relating to the now amended pleadings of [Retterath] and Intervenor[s Jason Retterath and Annie Retterath], or the issues raised therein, shall take place prior to the trial court's ruling relating to [HES'] original petition. It is the court's intent to try this matter in January, limited to evidence related the claims raised originally by [HES], in the reasonable hope that this would provide global resolution.
>
> The court concludes it is in the best interests of judicial economy, and the parties, to keep all their related claims in one case. Likewise, it is in the parties' and the court's best interest to try the initial claims first, undelayed by ancillary discovery and proceedings attributable to the now amended pleadings of [Retterath] and [Intervenors], as that trial may well be dispositive of the entire dispute.

(App.(V), p. 222.)

After filing pre-trial motions, July 14, 2017, Retterath filed a post-trial emergency motion to stay and extend the time for the closing of the purported agreement at issue. (*See id.* p. 375.) July 26, 2017, HES sought to require that "Retterath post a bond in an amount sufficient to save HES harmless from the consequences of the stay." (*Id.* p. 336.)

July 28, 2017, district court granted stay of closing without bond, "until all pending or presently anticipated post-trial motions have been ruled upon." (*Id.* p. 375.)

Disposition in the District Court

District court ordered specific performance. (*Id.* p. 319.)

HES and Retterath both filed post-trial motions. In post-trial rulings, district court granted HES attorney fees, determination of amount after full trial of other issues. (*Id.* p. 395.)

Other HES post-trial requests were granted. Specific performance was still ordered; nearly all of Retterath's post-trial motions were denied. (*Id.*)

STATEMENT OF FACTS

HES is an Iowa Limited Liability Company. Its principal place of business is Lawler, Iowa. HES has about 1200 members. (App.(VI), pp. 93-94.) Its ordinary business activities are producing ethanol at its facility and selling it. (App.(VII), p. 24, § 1.3.)

Intervenors own about 4% of HES' outstanding Units. At all relevant times, they were voting members of HES. (App.(V), p. 2 ¶ 4.)

Retterath, a 76-year-old stroke survivor, resides in Florida. (App.(VI), pp. 311, 316.) He purchased 25,860 HES Units for roughly $26 million during its initial offering. (*Id.* p. 320; App.(VI), p. 71.) He is HES' largest unitholder (28.59%). (App.(VI), p. 131.) His initial offering investment size

entitled him to appoint two directors under HES' Operating Agreement. (*Id.* p. 321.)

At December 19, 2012, HES Board meeting, Retterath notified the Board of a potential offer for his Units from Flint Hills Resources. Retterath wanted HES to have first chance to buy his Units. HES had never purchased a Director's Units. (*Id.* pp. 112-15.)

The Board, in Retterath's absence, formed a committee to negotiate acquisition of Retterath's Units ("Buyback Committee"). The Buyback Committee initially included then HES Directors Christy Marchand, Leslie Hansen, Chad Kuhlers, Maurice Hyde, and Jim Boeding. It also included HES CEO/President Walt Wendland, who was not a Director. (App.(VI), pp. 14-15; App.(VII), p. 94.) In April 2013, Pat Boyle became chair of HES' Board, and replaced Boeding on the Buyback Committee. (App.(VI), pp. 192-93, 357-58.)

Retterath knew Kuhlers previously worked for Flint Hills' owner. (*Id.* pp. 141-48, 163.) Retterath asked Kuhlers to assist a potential sale to Flint Hills. (*Id.* p. 163.) Kuhlers said he would where he could. (*Id.*)

May 2013, meeting, HES' Board discussed alleged "bribery" of Kuhlers. (*Id.* p. 160.) HES started an investigation. (App.(VII), p. 101.) Retterath denied the "bribery." (App.(VI), p. 340.)

In reference to "bribery," May 14, 2013, Director Hansen emailed chair Boyle, stating Retterath "is going to continue digging a hole until he is buried...." (App.(VI), p. 322; App.(VII), p. 322.) Boyle replied "Yes. Unbelievable but it is just what we needed to happen in order to start filling the hole back up." (App.(VI), p. 223; App.(VII), p. 321.)

May 29, 2013, Retterath's attorney, Allen Libow, emailed HES outside counsel Mike Dee (with copy to Joe Leo of the same firm), identifying himself as Retterath's counsel, and instructing Dee not to contact Retterath directly. (App.(VII), pp. 216-17.)

HES' Board discussed that if HES reacquired Retterath's Units, it would end its "bribery" investigation. (*Id.* p. 101; App.(VI), p. 186.) June 10, 2013, the Buyback Committee authorized attorney Leo to draft a letter of intent to be signed by Retterath within 48 hours. (App.(VII), p. 101.)

June 11, 2013, Boyle emailed a draft Membership Unit Repurchase Agreement ("MURA") directly to Retterath, without copying Libow. (*Id*. p. 102.) Leo prepared the draft Boyle sent. (App.(VI), pp. 225, 282-84.) It proposed $28,446,000 payment in equal installments July 1, 2013, 2014, and 2015. (App.(VII), p. 102.)

June 13, 2013, Boyle emailed Retterath another draft with $28,446,000 at closing. (*Id.* p. 111.) Retterath then emailed a handwritten

markup to Boyle, changing payment to $30,000,000. (*Id.* p. 118.) Boyle then emailed Retterath a draft Boyle pre-signed, with $30,000,000 split into two $15,000,000 payments, one at closing, one due July 1, 2014. (*Id.* p. 126.)

Retterath reviewed the document alone. (App.(VI), p. 126.) He signed the purported agreement the same day. (App.(VII), p. 131.)

HES' Board had not authorized Boyle to sign the purported agreement when he did. (App.(VI), pp. 116-19, 185, 354-56, 359, 402; App.(VII), p. 93.) June 19, 2013, HES' Board "ratified" the purported agreement, and "approved" Boyle's signature. (App.(VI), pp. 130, 191, 218.) The MURA could not bind HES until its Board approved it. (*Id.* p. 285.)

Retterath was a Director throughout negotiation and signing of the purported agreement. (*Id.* p. 217.) HES reported to the SEC that Retterath resigned from HES' Board, and HES named Ed Hatten as his replacement effective June 19, 2013. (App.(VII), p. 175.) Under the purported agreement, Retterath's special board appointment rights would evaporate on transfer of his Units at closing. (App.(VI), p. 87; App.(VII), p. 36, § 5.3(f).) Retterath retained appointment rights through at least August 1, 2013, and could have reappointed himself as a Director. (App.(VI), pp. 212, 286.)

According to Marchand, the purported agreement's price for Retterath's Units was above market value. (*Id.* pp. 100, 102-03, 124-25.) Allegedly part of the reason the Buyback Committee offered above-market pricing was it felt Retterath engaged in "disruptive behavior." (*Id.* p. 100.)

June 20, 2013, Libow emailed Leo expressing concern over the purported agreement's enforceability. (App.(VII), p. 155-56.) Leo's same-day response stated that the MURA was signed and HES "expects to close by the August 1 closing date provided it can clear or waive its contingences." (*Id.* p. 155.)

Libow responded June 21, 2013, concerned about HES not following its Operating Agreement. He indicated Retterath "wants no part of a deal that is violative of the individual members' rights." (*Id.* pp. 154-55.) In response, Leo reasserted the purported agreement was binding, and Retterath was obligated to close. (*Id.* p. 153.)

July 9, 2013 Leo sent Libow a proposed mutual release in connection with the purported agreement. (*Id.* pp. 184-87.)

July 16, 2013, Leo claimed to Libow "[w]e have all of the approvals that we require to close," and requested Retterath take certain actions to facilitate closing. (*Id.* p. 191.) In subsequent emails, Leo repeated

conclusory language that HES was ready, willing, and able to close. (*Id.* pp. 192-98.)

On or about July 24, 2013, Leo spoke with Libow and Retterath; Retterath expressed concern about HES not making the second $15 million payment due by July 1, 2014 under the purported agreement. (App.(VI), p. 248.)

July 25, 2013, in email to Leo, Libow again questioned the enforceability of the proposed agreement, including the authority of Boyle to sign on HES' behalf. (App.(VII), p. 197.) Leo responded the "agreement" was valid, and HES was ready to close. (*Id.* p. 196.) Libow replied the next day, stating membership approval was required under section 5.6(b)(v) of the Operating Agreement. (*Id.*) Leo replied section 5.6(b)(v) did not apply. (*Id.* pp. 199-201.)

July 31, 2013, Libow reiterated on Retterath's behalf that membership approval is required. Libow proposed a closing deadline extension. (*Id.* pp. 204-05.) On August 1, 2013, the closing deadline, Leo wrote Libow that HES had closing funds, had received necessary approvals, and was ready, willing, and able. (*Id.* pp. 210-11.) Leo stated HES was willing to waive mutual release if the parties could not agree on terms. (*Id.*) Leo requested Retterath take certain actions to close that day. (*Id.*)

Between June 13 and August 1, 2013, Retterath never asked for more than $30 million as a base purchase price. (App.(VI), p. 215.)

HES' only available cash was $5-6 million between July 31 and August 1, 2013. (*Id.* pp. 184, 271, 375; App.(VII), p. 309.)

July and August 2013, HES had a $20 million credit line from Home Federal Savings Bank ("Home Federal"), governed by Master Loan Agreement ("MLA"). (App.(VI), pp. 361-64, 366; App.(VII), p. 220.)

MLA section 4.01(g): "[n]o proceeds of the Loans will be used to acquire any security in any transaction." (App.(VII), p. 248.)

MLA section 5.02, titled "Negative Covenants:" "[HES] will not, without the prior written consent of [Home Federal]...purchase or otherwise acquire for value any of its membership interests (units) now or hereafter outstanding...." (*Id.* p. 261.)

Section 7 of Second Supplement to Credit Agreement between HES and Home Federal ("Second Supplement") also governed the line of credit (also called the Term Revolving Note): "[l]ender's obligation to make each advance under the Term Revolving Note shall be subject to the terms, conditions and covenants set forth in the MLA." (*Id.* p. 302.) Section 4 of Second Supplement limited HES' use of funds borrowed from the line of

credit to "Project Costs and cash and inventory management purposes of [HES]...." (*Id.* p. 301.)

Home Federal and HES did not amend this loan documentation prior to August 1, 2013. (App.(VI), pp. 364, 121, 365-67, 414-16.) HES had no funding sources in June, July, or August 2013, other than cash and line of credit funds. (*Id.* pp. 367, 399.)

HES did not discuss internally or with Home Federal how HES would finance the second $15 million payment (due to Retterath on or before July 1, 2014). (*Id.* pp. 368-70.)

Paragraph five of purported agreement contained conditions to closing, in relevant part:

> Conditions To the Company's Obligations. Unless waived by the Company in writing, the Company's obligation to conclude this transaction as provided herein is subject to the following conditions...
>
> b. The Company's Board of Directors shall have approved this Agreement and the repurchase contemplated herein in accordance with the Company's Operating Agreement;...
>
> d. The Company receives approval from its primary lender to repurchase the Units and the Company secures the financing necessary to repurchase the Units....;
>
> e. Steven Retterath and Stephen Eastman shall each submit a written resignation from the Company's Board of Directors... which resignations shall be effective as of the Closing; and
>
> f. Member and the Company shall enter into a mutual release agreement releasing any and all claims between the parties.

(App.(VII), p. 133.)

The Board never presented the purported agreement to members for a vote. (App.(VI), p. 279.) Eastman never submitted a written resignation; he remained on HES' Board through trial, along with Retterath's other appointee, Hatten. (*Id.* pp. 213-14, 224, 279.) Neither HES nor Retterath signed a mutual release. (*Id.* p. 241.) HES never transmitted written waivers to Retterath by August 1, 2013.

HES did not attempt to transfer any portion of the money "due" to Retterath on or before August 1, 2013. (*Id.* pp. 372-74.) HES knew Retterath's wiring information. (*Id.* p. 373) HES never placed funds in escrow for payment to Retterath on or before August 1, 2013. (*Id.* p. 372.)

The purported agreement never closed. (App.(I), p. 22-23; App.(V), p. 234; App.(VI), pp. 108, 407.)

There is a market for HES Units. (App.(VI), pp. 119, 186.) There is a service linked from HES' website to pair Unit sellers and buyers on agreed terms. (*Id.* pp. 119, 273.) HES' Board does not place price restrictions on these transactions. (*Id.* p. 119.) HES Units are frequently available for purchase on the online marketplace. (*Id.* p. 120.)

HES Units give all members the same rights. (*Id.* pp. 269-70.) HES did not pay Retterath any distributions since August 1, 2013. (*Id.* p. 133-

36.) HES' position is Retterath is no longer the "equitable owner" of his Units as of August 1, 2013. (*Id.* pp. 132-33; App.(VII), p. 324.) HES paid distributions to all HES members except Retterath since August 1, 2013. (App.(VI), p. 138). For the 2013 tax year, and all subsequent tax years, HES allocated taxable income to Retterath proportionate to his approximately 28% ownership interest in HES. (App.(V), p. 389-90; App.(VI), p. 178-79.) For tax year 2013, HES allocated Retterath $6.24 million taxable income—without any cash distribution to Retterath. (App.(VII), p. 306.)

Retterath's tax year 2013 K-1 reflected HES reduced Retterath's capital account to zero. (*Id.*) For tax year 2014, HES allocated Retterath $19,725,903 in taxable income. (*Id.* p. 307.)

HES provided Retterath no distributions to cover any part of the tax liability. (App.(VI), p. 133-36.) Retterath did not expect to be allocated taxable income after closing without receiving distributions. (*Id.* p. 327-28.)

ARGUMENT

I. HES FAILED TO PRESENT SUFFICIENT EVIDENCE TO SHOW ENTITLEMENT TO SPECIFIC PERFORMANCE

A. Scope and Standard of Review

Because HES' specific performance claim was tried in equity, review is de novo. Iowa R. App. P. 6.907; *see also State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369, 371–72 (Iowa 1997). In equity,

especially when considering witnesses' credibility, this Court gives weight to district court fact-findings, but is not bound by them. Iowa R. App. P. 6.904; *see also Goettsch*, 561 N.W.2d at 372.

B. Preservation of Error

Retterath raised the issue HES failed to present sufficient evidence to show entitlement to specific performance in post-trial briefing, and in his 1.904 motion. The district court ruled in Ruling After Trial (App.(V), pp. 325-26) and Ruling on Post-Trial Motions (*Id.* pp. 395-96).

C. Argument

The burden of proof to obtain specific performance is by clear, satisfactory, and convincing evidence. *McCarter v. Uban*, 166 N.W.2d 910, 912 (Iowa 1969); *see also Conner v. Hayes (In re Estate of Conner)*, 2003 Iowa App. LEXIS 308, *7 (Mar. 26, 2003). Specific performance is reserved for "extraordinary, unusual cases" and is not a remedy courts issue "as a matter of grace." *Breitbach v. Christenson*, 541 N.W. 2d 840, 843 (1995).

Specific performance requirements are different from a breach of contract damages claim. Specific performance is an "unusual remedy"; plaintiff is not entitled to it just by proving the existence of a contract,

breach, and damages. To prove entitlement to specific performance, HES must prove *all* the following by clear and convincing evidence:

- The subject property—Retterath's Units—were "unique" property capable of being the subject of a specific performance claim.
- HES had no adequate remedy at law.
- HES as an entity would be irreparably harmed.
- HES met all conditions precedent under the MURA, and was ready, willing and able to perform the agreement by the August 1, 2013 closing deadline.
- HES tendered performance.

At trial, HES did not present *any* evidence regarding most of these elements. The evidence it did present was contradictory and insufficient. HES' counsel incorrectly characterized the case as "a very straightforward breach of contract case." (App.(VI), p. 57.) The district court took HES' invitation to analyze this case under an erroneous framework that likewise overlooked required elements. HES' failure to prove all elements dooms its sole claim, specific performance. The absence of sufficient proof of all required elements means the district court erred in granting HES specific performance.

1. Retterath's Units Were Not Unique

"The remedy of specific performance is only available for 'unique' property." *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988). The district court assumed HES Units are unique and did not even analyze this element.

In an action for specific performance *of real property*, the uniqueness of the property is assumed. *Id.* No Iowa case holds *an LLC unit* is unique property subject to specific performance. To the contrary, the Iowa legislature defined an ownership interest in a limited liability company as "personal property." Iowa Code §§ 489.102(24) & 489.501.

"A contract for sale of stock of a closely held corporation which is not procurable in any market is a proper subject for specific performance." *Lyon v. Willie,* 288 N. W.2d 884, 894 (Iowa 1980). Black's Law Dictionary defines a "close corporation" as a "corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family)." CORPORATION, Black's Law Dictionary (10th ed. 2014).[1]

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[1] Iowa has no statutory definition of a closely held company. In *Redeker v. Litt*, the court of appeals relied upon the cited Black's Law definition to determine that a company with only four shareholders whose stock was not freely traded was a close corporation. No. 5-076, 2005 Iowa App. LEXIS 415, *16 (Iowa Ct. App. Feb. 11, 2015) (unpublished). One treatise describes a closely held (or close) corporation as having "a small number of stockholders, no ready market for its stock, and all or substantial majority of the stockholders participating in the management direction and

HES is not closely held. It has approximately 1200 members. (App.(VI), pp. 93-94.) All Units of HES are the same. The Operating Agreement states HES is "organized with one (1) class of Membership Interests, designated in Units, which Units are initially the only class of equity in the Company" which "shall be of a single class with identical rights." (App.(VI), p. 269-70; App.(VII), p. 42, § 6.1.) There is also a market for Units. (App.(VI), pp. 119, 186.) HES' outside counsel *admitted* HES is not a closely held company. (*Id.* p. 272.)

There is no evidence in the record, much less clear and convincing evidence, that Retterath's Units are "unique" for specific performance purposes.

2. HES Did Not Establish It Had No Adequate Remedy at Law

This Court held specific performance is not allowed "when the injured party has an adequate remedy at law." *Gingerich v. Protein Blenders, Inc.*, 250 Iowa 654, 657, 95 N.W.2d 522, 524 (1959). HES did not present evidence on this requirement at trial. The district court did not address this deficiency.

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operations of the corporation." 18 AM JUR 2d Corporations § 38. None of these is true for HES.

HES abandoned arguments asserted in its petition regarding this issue. It pled no adequate remedy at law because:

> 15. [1] Retterath's refusal to perform under the Agreement makes him able to participate in HES management through his appointment rights on the Board, [2] dilutes other members' distribution amounts and percentages, and [3] will require that HES conclude its investigation into the $100,000 offer Retterath made to another Board Member and take appropriate action related thereto....

(App.(I), p. 22-23.)

Either HES offered no evidence regarding these points, or the evidence it offered at trial directly contradicted them:

1) HES took the "position" Retterath is not an owner of his Units as of August 1, 2013. (App.(VI), p. 132-33.)

2) HES paid out distributions to all of HES' other members *except* Retterath since August 1, 2013. (App.(VI), p. 138). While not paying him distributions, HES allocated Retterath taxable income proportionate to his approximately 28% ownership interest for all tax years from 2013 on. (App.(V), p. 389-90, App.(VI), p. 178-79.) This proportionally reduced the tax burden of the other members and artificially increased the value of their respective distributions.

3) HES offered no evidence of actions to conclude its investigation or other "appropriate action[s]" it took in relation thereto. Nor did HES offer explanation why this means it has no remedy at law.

HES did not prove it had no adequate remedy at law.[2]

3. HES Failed to Show it Will Be Irreparably Harmed

Specific performance requires a showing of "irreparable harm." *Breitbach*, 541 N.W. 2d at 843. HES did not plead reasons why it would be irreparably harmed absent specific performance. HES did not put in evidence at trial how HES *as an entity* would be irreparably harmed in the absence of specific performance.

A limited liability company is an entity distinct from its members. Iowa Code § 489.104(1); Kleinberger, Daniel S., *The LLC As Recombinant Entity: Revisiting Fundamental Questions Through the LLC Lens*, 14 FORDHAM J. CORP. & FIN. 473, 479 (2008). "The existence of a corporate entity is not affected by changes in its ownership or changes in management." Fletcher Cyclopedia of the Law of Corporations § 13 (2012); *accord Corporate Exp. Office Products, Inc. v. Phillips,* 847 So.2d 406, 411 (Fla. 2003).

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[2] In fact, HES effectively admitted it had an adequate remedy at law by requesting a bond in the event the district court stayed the closing of the purported agreement. (App.(V), p. 368.) HES knew its alleged harm was quantifiable for purposes of a bond; the contrary suggestion it had no remedy at law was demonstrably incorrect, not even pursued at trial, and baseless.

Ownership identity is irrelevant to matters affecting the company because all owners want the same thing—maximized profits. *See* Spulber, Daniel F., *Discovering the Role of the Firm: The Separation Criterion and Corporate Law*, 6 Berkeley Bus. L. J. 298, 303 (2009) ("The only connection between the objectives of the firm and those of its owners is the income generated by the firm's profits.")

Matters involving or affecting a *company* are actions impacting the company's ability to maximize profits, such as managing operation of the business, securing financing, and deciding whether to expand business into new markets. In contrast, expulsion of a member is a matter involving or affecting the *owners* of a company.

HES did not attempt to prove why HES as an *entity* would be irreparably harmed without specific performance. It failed to prove this element.

4. HES Failed to Show It Was Ready, Willing, and Able to Close

HES had to prove it was ready, willing, and able to perform the MURA, and actually performed its part, by the closing deadline of August 1, 2013. *Peterson v. Rankin*, 161 Iowa 431, 143 N.W. 418, 420 (1913) ("Plaintiff must have performed his part of the contract, or tendered performance in a legal manner, before he would be entitled to insist upon a

performance by the other party to it."). Where parties set a specific time for performance in the contract, they make time of the essence. Strict compliance with the deadline is required. *SDG Macerich Properties, L.P. v. Stanek Inc.*, 648 N.W.2d 581, 586 (Iowa 2002).

HES needed to prove, by clear and convincing evidence, it completed all conditions precedent under the MURA, and took all necessary measures to be able to do what it needed to, to timely close. HES failed.

The district court's analysis on this issue was a statement, without citation to the record, that "HES proceeded to obtain the requisite funding through its bank and put the documents necessary for the transaction to take place as agreed in place." (App.(V), p. 325.) That finding is erroneous.

a. HES Could Not Have Closed Without Violating Its Loan Covenants and Operating Agreement

A party is not ready willing and able to perform an agreement when its manner of performance would violate another agreement. *See Mission of Saudi Arabia to the United Nations v. Kirkwood Ltd.*, 30 A.D.3d 1133, 1134, 817 N.Y.S.2d 226 (N.Y. App. Div. 2006) (broker could not enforce commission agreement that violated condominium by-laws). Here, HES' conduct would have violated *two* agreements.

HES' MLA prohibited HES repurchasing Units—regardless of the source of funds. (App.(VII), p. 261.) HES discussed the repurchase with its

bank, Home Federal. Home Federal's outside counsel stated in email June 14, 2013 (later forwarded to HES) that "[t]he Homeland Energy loan agreement will need to be modified in order to permit the Retterath buyback." (*Id.* p. 143).

Home Federal sent HES *draft documents* that would amend MLA section 5.02, as well as certain prohibitions on the use of borrowed funds to purchase Units, to allow the Retterath repurchase. (*Id.* p. 168.) HES never signed these, or any other amendment, to allow HES to repurchase Retterath's Units. (App.(VI), pp. 364, 121, 365-67, 414-16.)

Closing in violation of loan covenants in HES' MLA would violate HES' Operating Agreement, which states distributions to members are "[s]ubject to the terms and conditions of any applicable loan covenants and restrictions." (App.(VII), p. 33.) Where a member of a LLC sells his or her entire interest in the LLC, it is a "liquidating distribution." (App.(VI), p. 278.) The Operating Agreement prohibited HES from making a distribution to Retterath, i.e., the $15 million payment due at closing, in violation of its loan covenants.

Actions on behalf of a limited liability company in contravention of its Operating Agreement are void. *See Condo v. Conners*, 266 P.3d 1110, 1119 (Col. 2011). In *Condo*, a member of an LLC purported to assign his

rights in the LLC to a third party. The Colorado Court of Appeals found that the assignment violated the Operating Agreement's requirement that the membership approve transfers of membership interests. *Id*. at 1112. The Colorado Supreme Court affirmed, holding "the operating agreement's anti-assignment clause rendered [the member] powerless to make the unapproved assignment." *Id*. at 1119; *see also TIC Holdings v HR Software Acquisition Group*, 194 Misc.2d 106, 110 (N.Y. Sup.Ct. 2002) (actions in violation of operating agreement void); *cf. Mincks Agri Center v. Bell Farms*, 611 N.W.2d 270, 273 (Iowa 2000) ("[A]n agreement which cannot be performed without violating a constitutional statute is illegal and void.").

HES would have violated its MLA and Operating Agreement by closing on the MURA. These are independent reasons HES was not ready, willing, and able to close.

b. HES Did Not Have Available Cash to Close

For avoidance of any doubt, HES could not pay a cent of its funds from any source to repurchase Retterath's units without amending its loan covenants, which it undisputedly did not do. But, even if HES' loan covenants did not preclude it from closing, HES had to be able to pay Retterath the first $15 million due at closing. HES admitted "it was not going to utilize...financing [to close the MURA] because it was going to pay

with cash on hand." (App.(V), p. 229 (emphasis added)). HES only had between $5-6 million in available cash August 1, 2013—insufficient funds to close. (App.(VII), p. 309.)

c. HES' Loan Covenants Prohibited Paying Retterath From Its Line of Credit

After trial, HES moved to "supplement" the record with documents concerning an alleged $8 million "draw" that HES requested from its line of credit on August 1, 2013. (App.(V), pp. 275 et seq.) HES offered these documents to prove "on August 1, 2013, HES had the funds sitting in its checking account to make the $15,000,000 payment to Mr. Retterath" and its checking account ranged from "$19,404,350.05 to $17,426,891.00" with these line of credit funds included. (*Id.* pp. 276-77.) As detailed in section IV, HES had no proper basis to introduce these documents into the record after trial, and the district court erred in admitting, and apparently relying on, them.

This purported evidence contradicted HES' admission that it was going to pay Retterath with "cash on hand." (App.(V), p. 229.)

Moreover, MLA prohibitions barred using line of credit funds to repurchase Units. (App.(VII), p. 248, § 4.01(g); p. 302, §§ 4 & 7.) Oftedahl of Home Federal admitted using line of credit funds to repurchase Retterath's Units would have violated HES' loan covenants:

Q. [O]n August 1st of 2013 if HES would have taken $15 million off of the revolver loan [line of credit] and paid it to Mr. Retterath in redemption of his interest in the company, that, in fact, would have violated the then existing and executed loan documents?

A. *Technically, yes.*

(App.(VI), p. 416-17 (emphasis added).)

HES did not prove it could use line of credit funds to repurchase Retterath's Units.

d. HES Did Not Meet the Conditions Precedent

HES also had to prove it satisfied all conditions precedent in the MURA by August 1, 2013. "Substantial performance will not excuse the nonoccurrence of an express condition precedent to a contract."[3] *SDG Macerich Properties, L.P.*, 648 N.W.2d at 586. This is especially true given HES drafted the agreement, and it should be construed against it. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997). (App.(VI), p. 282-84.)

[3] Even in an action for *damages*, a plaintiff can only recover on a substantial performance theory where it acted in good faith, which HES did not. *See* Iowa Civ. Jury Instr. § 2400.7; *see also infra* section III(c); *Am. Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011) ("In Iowa, it is generally recognized that there is an implied covenant of good faith and fair dealing in a contract." (Internal quotation marks omitted.)).

Section 5 of the MURA contained several conditions precedent to closing HES did not meet by closing deadline:

First unmet condition precedent: HES did not obtain required financing and bank approval. Section 5(d) of the MURA required HES obtain "approval from its primary lender to repurchase the Units and...secure[] the financing necessary to repurchase the Units...."

But, HES did not have cash on hand to make the first $15 million payment. And HES's loan covenants were never amended to allow it to use line of credit funds to repurchase Retterath's Units. The draft documents Home Federal provided were not signed. Therefore, HES never obtained financing for the first payment.

HES also did not receive bank approval for the transaction. In the district court, HES relied on *draft* documents for the amendment of HES' loan covenants. (HES Trial Brief at 20; App.(VII), pp. 157 et. seq.) Neither Home Federal nor HES executed these documents. (App.(VI), p. 398; App.(VII), pp. 157 et. seq.) This is strong evidence Home Federal *disapproved* of HES using borrowed funds to repurchase Retterath's Units without HES taking proper steps to timely amend its loan covenants. In any event, amendment was not shown.

HES also offered no evidence of Home Federal approval, or financing, for the second $15 million payment HES would owe July 1, 2014. HES' CEO testified he had no recollection, prior to August 1, 2013, of discussion within HES or with Home Federal regarding financing the second $15 million payment to Retterath. (App.(VI), pp. 369-70.) The bank approval and financing requirement of section 5(d) applied to both payments. *See Century 21-Birdsell Realty, Inc. v. Hiebel*, 379 N.W.2d 201, 204 (Minn. Ct. App. 1985) ("'Able' refers to the purchaser's financial ability not only to make the initial payment required to meet the seller's terms, but also to complete the purchase agreement according to its terms...").

Second unmet condition precedent: MURA section 5(f) required the parties enter a mutual release, which never occurred. (App.(VI), p. 241)

Third unmet condition precedent: MURA section 5(e) required Eastman resign from HES' Board. This never occurred—he served on the Board through trial. (App.(VI), pp. 213-14, 224, 279.)

During trial HES argued Retterath anticipatorily repudiated the MURA "legally absolving HES of any obligation to perform under the MURA, including the obligation to satisfy any conditions precedent under the MURA." (HES Trial Brief at 17-18; *see also* App.(VI), p. 66 (same).) HES' position was wrong as both a matter of law and fact. HES cited two

cases that were *damages* actions at law, not as here, specific performance claims in equity. (HES Trial Brief at 17 (citing *Williams v. Clark*, 417 N.W.2d 247, 249 (Iowa Ct. App. 1987) (plaintiff brought "a petition at law to recover the balance due under the agreement…."); *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W. 2d 231, 235 (Iowa 2001) (plaintiff sought damages based upon an insurance company's failure to provide coverage).

Even if Retterath anticipatorily repudiated the MURA (which he did not), anticipatory repudiation does not "discharge plaintiff's obligation to show that it was ready and able to perform its own contractual undertakings on the closing date, in order to secure specific performance." *Huntington Min. Holdings, Inc. v. Cottontail Plaza, Inc.*, 459 N.E.2d 492, 492 (N.Y. 1983); *see also Acme Inv., Inc. v. Sw. Tracor, Inc.*, 105 F.3d 412, 416 (8th Cir. 1997) (applying Nebraska law) (same). Further, there was no agreement to repudiate in the first place (see section I(C)(6)).

Further, HES could not waive conditions precedent it did not satisfy. A party can only waive a condition precedent where it is solely for that party's benefit. *Rodgers v. Baughman*, 342 N.W.2d 801, 806 (Iowa 1983). Evidence at trial demonstrated the conditions were at least partially for Retterath's benefit. Leo, who drafted the MURA, and HES' CFO both admitted the mutual release provision was for both Retterath's and HES'

benefit. (App.(VI), pp. 110, 279-81.) HES was investigating Retterath for alleged "bribery," and a release would have protected Retterath. (*Id.* p. 186; App.(VII), p. 101.)

HES' CFO admitted that, if HES did not have cash on hand to make the second payment, Retterath would be an unsecured $15 million creditor; demonstrating financing for the second payment was to Retterath's benefit. (App.(VI), p. 111.)

Conditions precedent were not solely for HES' benefit. HES could not waive them. Other than drafting the mutual release, there is no evidence that HES even attempted to waive them in writing. (*Id.* p. 220.) HES' late attempt at ratifying an agreement that purportedly gave it authority to waive conditions precedent could not have been in good faith.

HES did not, and could not, prove it timely satisfied all MURA conditions precedent.

5. HES Never Tendered Performance

HES failed to prove it tendered $15 million to Retterath by the August 1, 2013, closing deadline. HES never wrote a check or wired funds to Retterath, even though it had his wiring information. (*Id.* pp. 372-74.) For HES to make a valid payment tender, it needed to actually produce the money to Retterath, and not just be ready to do so. *Saint George Society v.*

Sawyer, 204 Iowa 103 (1927); *see also Roberts v. Clark*, 188 S.W.3d 204, 211 (Tex. App. 2002) (buyer that undisputedly had the money to purchase property at closing deadline not entitled to specific performance because the buyer failed to tender—actually produce—funds to seller).

6. HES Failed to Establish the MURA Was a Valid and Binding Agreement

To form a binding contract, there must be a binding offer and acceptance. *Shell Oil Co. v. Kelinson,* 158 N.W.2d 724, 728 (Iowa 1968). It was HES' burden to prove the MURA binding. The signed draft HES sent to Retterath to sign on June 13, 2013, was not binding because Boyle was not authorized to sign for HES. (*See supra* section I(C)(6)).) In fact, the Buyback Committee had not even authorized a binding agreement to be drafted. (App.(VII), p. 101.)

The MURA's execution deadline was June 13, 2013, making "time of the essence," requiring it to be "fully signed" on that date. (*Id.* p. 132, § 1.) HES admitted it did not "approve" Boyle's signature until June 19, 2013, (App.(VI), pp. 130, 191), and that the MURA was not "executed" by HES until then. (*Id.* p. 216.) Because the deadline on the face of the document contemplated that a "fully signed" document must be by June 13, 2013, the MURA could not be binding and enforceable.

7. HES Needed Membership Approval Under Iowa LLC Law and the Operating Agreement

Iowa law mandated HES obtain unanimous membership approval for the MURA. Iowa Code § 489.407(3)(d)(3) requires HES, a "manager-managed" LLC, to obtain the consent of all members to "[u]ndertake any other act outside the ordinary course of the company's activities." Iowa Code § 489.407(3)(d)(3).

The facts place the MURA outside HES' ordinary course of business. HES could not close without violating Iowa Code section 489.407(3)(d)(3). An agreement that cannot be performed without violating a statute is illegal and void. *Mincks,* 611 N.W.2d at 273.

As discussed in section II, the district court erred granting summary judgment that no membership vote was required under section 5.6(b)(v) HES' Operating Agreement. Membership vote was also required under section 4.1 of the Operating Agreement. Section 4.1 of the Operating Agreement requires distributions to HES' membership be made "in proportion to the Units held." (App.(VII), p. 33, § 4.1.)

The two $15 million payments from HES to Retterath contemplated by the MURA were "liquidating distributions." (App.(VI), p. 278.) These distributions would be made *solely* to Retterath, and not HES' other members. Therefore, the MURA distributions contemplated violated section

4.1 of HES' Operating Agreement. It could not be breached without unanimous vote of the membership, which did not occur. (App.(VII), p. 38).

D. Conclusion

There was absolutely no basis to award specific performance in this case. The district court's rulings finding the opposite must be reversed, and HES' petition dismissed.

II. DISTRICT COURT ERRED GRANTING SUMMARY JUDGMENT THAT HES' OPERATING AGREEMENT DID NOT REQUIRE MEMBERSHIP APPROVAL OF THE PURPORTED AGREEMENT

A. Scope and Standard of Review

Summary judgment is reviewed for errors at law. *Tenney v. Atlantic Assocs*., 594 N.W.2d 11, 14 (Iowa 1999). The Court "review[s] the [factual] record in the light most favorable to the party opposing the motion." *Id.*

Contract "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect." *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011) (internal quotation marks omitted). "Interpretation is reviewed as a legal issue unless it depended at the trial level on extrinsic evidence." *Id.* "Construction is always reviewed as a law issue." *Id.* District court did not deem it necessary to consider extrinsic evidence in determining the meaning of the Operating Agreement.

(App.(III), p. 70-75.) Therefore, its interpretation and construction should both be reviewed as matters of law.

B. Preservation of Error

Retterath raised the issue HES' Operating Agreement required a membership vote in his motion for summary judgment, at trial (App.(VI), pp. 68-70), in post-trial briefing (15-34), and in his 1.904 motion (App.(V), p. 340). The district court ruled against him in MSJ Ruling (App.(III), p. 75); Ruling after Trial (App.(V), p. 331); and Ruling on Post-Trial Motions (App.(V), p. 396).

C. Argument

The district court's October 16, 2015, Order denying Retterath's summary judgment motion was beset by errors that tainted this case as it moved forward. This Court should correct these errors and confirm judgment should be entered in Retterath's favor.

1. District Court Erred Finding Membership Vote Not Required

The issue was "whether or not a Member vote was required to approve the [MURA]...." (App.(III), p. 70.) Retterath (and the Intervenors) argued that the purported agreement violated section 5.6(b)(v) of HES' Operating Agreement:

> **Restriction of the Authority of Directors.** The Directors shall not have the authority to, and they covenant and agree that they shall not cause [HES] to, without the consent of the majority of the Membership Voting Interests:
>
> * * *
>
> (v) Cause [HES] to acquire any equity or debt securities of any Director or any of its Affiliates, or otherwise make loans to any Director or any of its Affiliates.

(App.(VII), p. 38-39.)

The district court found Units in HES are not "equity securities:"

> The Court finds… that the language in 5.6(b)(v) refers to the acquisition of something different than a Director's Units…. *The Court finds that 'Unit' is not encompassed in the language 'acquire any equity or debt securities'*, as used in Section 5.6(b)(v)…. Further, the Court finds that Section 5.6(b)(v) does not apply to the reacquisition of a Director's Units....

(App.(III), p. 75 (emphasis added).)[4]

2. Units are "Equity Securities"

The district court also determined the phrase "any equity or debt securities" in section 5.6(b)(v) excludes the term "Units," meaning that the provision did not apply to Retterath's Units. (*Id.* p. 74.) This is contrary to law and the plain language of the Operating Agreement.

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[4] The Ruling After Trial rejected Retterath's argument that the summary judgment order should be reconsidered and reversed, stating "[t]his court disagrees with Retterath's interpretation and finds that the Operating Agreement does not apply to situations where HES is repurchasing units...." (App.(III), p. 74.)

The Operating Agreement defines an ownership interest in HES as a "Unit." There is one class of Unit, which is "initially the only class of *equity* in the Company." (App.(VII), p. 29, § 1.10(qq) & p. 42, § 6.1 (emphasis added).) "Each Member who holds five thousand (5,000) or more Units, all of which were purchased...during [HES'] initial public offering *of equity securities* filed with the Securities Exchange Commission, shall be deemed an 'Appointing Member'...." (*Id.* p. 36, § 5.3(f) (emphasis added).)

The prospectus HES used to solicit investors states HES was "offering one class of *securities*," and that ownership rights in HES are "evidenced by units." (App.(VIII), p. 22.). Retterath's Units are both equity and securities.

Units in HES also meet the definition of a "security" under Iowa blue-sky laws, defining a "security" to include "an interest in a limited liability company...." Iowa Code § 502.102(28)(e) (emphasis added). "Equity security" includes "[a] security representing an ownership interest in a corporation (such as a share of stock)...or any security that is convertible into stock...." SECURITY, Black's Law Dictionary (10th ed. 2014).

Common sense dictates Units are included in "any equity or debt securities" in section 5.6(b)(v). Otherwise, a membership vote would be required to determine if HES could buy unrelated property from a Director,

but not on whether HES could buy out (and maybe even overpay) and retire a Director's 28% interest in HES. This is nonsensical.

Membership has direct interest in a transaction that directly affects the value and size of their investments in HES, which is reflected by their Units and protected by section 5.6(b)(v).

3. Section 5.6(b)(v) of the Operating Agreement Applies to All Equity Acquisitions of a Director

District court's Order erroneously found Operating Agreement section 5.16, rather than section 5.6(b)(v), controls the MURA. (*See* App.(III), p. 73-74.) Section 5.16 deals with authority of Directors to create committees:

> 5.16 *Committees; Authority*. The Directors may create such committees ... as the Directors deem appropriate…. Board committees may exercise *only those aspects of the Directors' authority* which are expressly conferred by the Directors by express resolution.... [H]owever, a committee may not...(vii) authorize or approve the *reacquisition of Units*, except according to a formula or method prescribed by the Directors...

(App.(VII), p. 40.) (emphasis added).

District court stated:

> the language in § 5.16 subparagraph (vii) indicates…that in fact the Board does possess the power to reacquire. Section 5.16 clearly contemplates a situation exactly like what happened in this case. A committee was formed and authorized by the Board. The purpose was to negotiate the reacquisition of Retterath's units. The Court finds HES' argument in this respect persuasive and agrees that the language in 5.6(b)(v) refers to the acquisition of something different than a Director's Units.

(App.(III), p. 73-74.)

Section 5.16 authorizes the Board to create committees that "may exercise only those aspects of the Directors' authority" that the Directors may delegate. The analysis starts with what authority the Directors have, then moves to what aspect of that authority the Directors confer to a committee.

Directors cannot confer authority they do not have. Just because HES' Board formed a committee to negotiate the MURA with Retterath does not mean the Board was following the Operating Agreement. Section 5.6(b)(v) limits the applicability of section 5.16(vii).

Section 5.6(b)(v)'s limitation on the Directors' authority to "acquire any equity or debt securities of any Director" is a category broader than the term "Units." Where "a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling." *Iowa Fuel & Minerals v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Section 5.6(b)(v) is the only Operating Agreement section that *specifically* addresses how Directors may cause HES to acquire any equity security of a Director. All other Operating Agreement provisions allowing, for example, Directors to approve transfers or reacquisitions, apply only generally to members. Because no other Operating Agreement provision

addresses transactions between the company and a Director, general provisions cited in the October 2015, Order are inapplicable.

4. "Acquisition" Encompasses "Reacquisitions"

District court appeared to distinguish between "reacquisition" and "acquisition" to rule section 5.6(b)(v) did not require a membership vote. (App.(III), p. 73-74.) The importance of that difference is the opposite. Section 5.6(b)(v) uses the broader word "acquire" because it requires membership approval whenever HES buys any equity from a Director. Membership approval is required whether HES seeks to reacquire a Director's Units or acquire a Director's unrelated property. The Order inappropriately focuses on what is acquired (or reacquired) rather than *from whom* acquired (or reacquired).

5. Public Policy Favors the Plain Language of Section 5.6(b)(v)

Transactions between directors and the corporation should be strictly scrutinized. *Atlas Coal Co. v. Jones*, 61 N.W.2d 663, 667–68 (Iowa 1953). Stockholder voting rights are critical rights that courts should protect. *See DuVall v. Moore*, 276 F. Supp. 674, 679 (N.D. Iowa 1967) ("Deprivation of a stockholder's right to vote takes away an essential attribute of his property."); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) ("Because of the overriding importance of voting rights, this

Court...ha[s] consistently acted to protect stockholders from unwarranted interference with such rights.").

HES' members had the right to vote on whether HES should cash out and retire the interest of a Director who was the largest unitholder. This was underscored when HES took the position it offered "above-market" price because the Buyback Committee felt Retterath engaged in unspecified "disruptive" behavior. (App.(VI), p. 100.) Without a membership vote, HES' Board unilaterally and improperly decided to use company funds (indirectly, member funds) to pay above unit value to get rid of someone a subset of HES' leadership deemed "disruptive."

A source of dispute between Retterath and other Board members was payment of distributions. (*Id.* pp. 405-06.) The Board should not be allowed to skirt unambiguous terms of the Operating Agreement to rid itself of a Board member advocating payments to membership.

Allowing only Directors to vote facilitates insider trading and puts all Iowa limited liability company members at risk. Without a membership vote, nothing stops LLC directors from paying premiums to buy out directors they deem "disruptive" (or simply do not like), to the detriment of LLC members.

6. The MURA Caused HES to Acquire a Director's or Affiliate's Equity

The district court did not reach the issue of whether the purported agreement would "[c]ause [HES] to acquire any equity or debt securities *of any Director or any of its Affiliates*." (App.(III), p. 76.).

The evidence shows Retterath was a Director or Affiliate at the time of the intended repurchase. Retterath was a Director when he signed the MURA on June 13, 2013, and through at least June 19, 2013. If he signed the MURA before June 19, his directorship would have ended. Retterath signing the MURA as a Director triggered the need for membership vote requirement of section 5.6(b)(v).

HES admitted Retterath retained Board appointment rights at least through the purported closing. Even if Retterath ceased to be a Director any time between June 13, 2013 and the August 1, 2013 closing deadline, he could have reappointed himself. (App.(VI), p. 212.)

In any event, Retterath's appointed Directors, Eastman and Hatten, are "Affiliates" of Retterath as defined in Operating Agreement section 1.10(c). (App.(VII), p. 25.) "Affiliate" broadly includes "any Person directly or indirectly controlling, controlled by or under common control with such Person...." Eastman and Hatten served on HES' Board August 1, 2013 through the 2017 trial. (App.(VI), pp. 213-14, 224, 279.)

Boyle, who signed the MURA for HES, testified Eastman and Hatten continued to serve at the pleasure of Retterath. (*Id.* pp. 213-14.) As Retterath appointees, Hatten and Eastman were "Affiliates," meaning that whether Retterath himself was a Director on a certain date is irrelevant because his Affiliates had constant Board membership.

Paragraph 5(e) of the MURA states a condition precedent to the MURA that "Retterath...shall...submit a written resignation from the Company's Board of Directors...which resignation[] shall be effective as of the Closing." (App.(VII), p. 133.) No closing occurred. (App.(I), pp. 22-23; App.(V), p. 234; App.(VI), pp. 108, 407.) Per the MURA, any resignation tendered by Retterath was not effective without closing.

Operating Agreement section 5.6(b)(v) required a membership vote to approve the purported agreement. HES held no membership vote. Therefore, HES could not close the purported agreement without violating its Operating Agreement. Actions taken on behalf of a LLC in contravention of its Operating Agreement are void. *Condo*, 266 P.3d at 1119; *TIC Holdings*, 194 Misc.2d at 106.

D. <u>Conclusion</u>

District Court's failure to grant Retterath summary judgment led to an unnecessary trial on issues of law. Summary judgment should have been

granted to Retterath, and this Court should conclude accordingly and enter judgment in his favor on the issues addressed by his motion.

III. DISTRICT COURT ERRED IN DENYING RETTERATH'S AFFIRMATIVE DEFENSES

A. Scope and Standard of Review

Review of a denial of affirmative defenses is de novo. Iowa R. App. P. 6.907. Retterath had the burden to prove his affirmative defenses by a preponderance of the evidence." *See Hillview Associates v. Bloomquist*, 440 N.W.2d 867, 869 (1989).

B. Preservation of Error

Retterath raised affirmative defenses by Amended Answer; and addressed them in post-trial briefing (pp. 58-66) and the 1.904 motion (App.(V), pp. 343-44). The district court ruled at Ruling After Trial (*id.* pp. 327-32) and Ruling on Post-Trial Motions (*id.* p. 396).

C. Argument

The district court erred denying Retterath's defenses:

1. Estoppel

Elements of equitable estoppel are (1) false representation or concealment of material facts; (2) lack of knowledge of the true facts by the actor; (3) intention that it be acted upon; and (4) reliance thereon, to the actor's prejudice. *Johnson v. Johnson*, 301 N.W.2d 750, 754 (Iowa 1981).

HES admitted its position was *always* that had the purported agreement closed August 1, 2013, HES would continue to allocate taxable income to Retterath through the scheduled second payment on July 1, 2014, but would not provide Retterath with any distributions to cover that tax liability:

> Under Regulation § 1-736.1, *even if Retterath complied with his obligations and closed on the MURA on August 1, 2013*, Retterath still would have been allocated the same amount of income in his 2013 Schedule K-1, because the final installment payment under the MURA was not scheduled to take place until July 1, 2014. It is HES' understanding that, for the 2014 tax year, Retterath also would have been allocated a share of HES income for the first six months of 2014, until the second $15 million was paid on July 1, 2014. However, in paragraph 1 of the MURA, Retterath expressly agreed he would not be entitled to any more distributions from HES after closing on August 1, 2013. *(See* DE 129-3, Homeland App. 081). Thus, *under the deal he negotiated and agreed to, Retterath would get a total of $30 million, but no more distributions after August 1, 2013, plus 11 more months (from August 1, 2013 to July 1, 2014) of his share of HES earnings, along with the effect the additional earnings would have on his taxes, both as to income and basis*.

(App.(VII), p. 328 (emphasis added).)

This admission was made in a brief HES filed in a parallel Iowa federal district court case. HES' statements in its pleadings and briefing are binding admissions. *See Miller v. AMF Harley-Davidson Motor Co*., 328 N.W.2d 348, 352 (Iowa Ct. App. 1982) ("A party cannot take a position contradictory to or inconsistent with his pleadings, and the facts that are

admitted by the pleadings are to be taken as true against the pleader, whether or not they are offered as evidence."); *see also Purgess v. Sharrock,* 33 F.3d 134, 144 (2d Cir.1994) ("counsel's statement of fact [in a legal brief] constituted an admission of a party"); *Postscript Enter. v. City of Bridgeton*, 905 F.2d 223, 227-28 (8th Cir. 1990) (same).

There is no evidence HES communicated to Retterath its intention to allocate taxable income to him without commensurate distributions to cover tax liability. In fact, Director Kuhlers testified that he understood Retterath would no longer be allocated taxable income. (App.(VI), pp. 187-88.) Retterath understood that he would not be allocated taxable income post-closing. (*Id.* pp. 327-28.)

HES' undisclosed allocation scheme effectively reduced Retterath's consideration under the purported agreement by millions of dollars (precise amount was unknowable) while impermissibly conferring the benefit of a lower tax burden to the other members, including the small group of Directors seeking to eliminate Retterath's "disruptive" request for distributions. (*Id.* pp. 188, 287-94, 296.)

The district court misinterpreted key evidence finding Retterath could have conducted his own investigation of "the tax consequences" of the purported agreement. Undisputed expert testimony established HES'

allocation of income to Retterath in this manner is improper under the tax code when there is no corresponding economic effect. (*Id.* p. 291.)

If Retterath had investigated the tax consequences of the MURA, his advisors would have told him HES could not legally allocate taxable income to him without providing the corresponding distributions. It was impossible for Retterath to "discover" HES intended to treat him in a way that violated the tax code. The only way for Retterath to discover HES' scheme was by HES telling him, which it did not.

HES hid its intent in order to close the purported agreement, and then subject Retterath to improper tax treatment, reaping benefits that effectively reduced the purchase price for Retterath's Units. Retterath was injured by signing a purported agreement that hid HES' undisclosed illegal allocation scheme. HES should be estopped from enforcing the purported agreement.

2. Unilateral and Mutual Mistake

A unilateral mistake relieves a party from its obligation under a contract where there is a misrepresentation or other inequitable conduct. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 150 (Iowa 2001). HES concealed its intent to apply improper tax treatment that effectively reduced Retterath's consideration. Retterath could not reasonably have discovered HES' intent.

Even if HES did not originally intend to allocate Retterath taxable income without paying him distributions to cover the liability, the subsequent allocation decision constitutes a mutual mistake and lack of meeting of the minds. Generally, mutual mistake will render a contract voidable when the parties are mistaken on a basic assumption on which the contract was made, unless the adversely affected party bears the risk of mistake. *Davenport Bank & Trust Co. v. State Cent. Bank,* 485 N.W.2d 476, 480 (Iowa 1992); Restatement (Second) of Contracts § 152 (1981).

In *Binkholder v. Carpenter*, both parties were mistaken about the farmable acreage sold when they executed a real estate contract. 152 N.W.2d 593, 598 (Iowa 1967). After execution, purchaser discovered the farmable acreage was significantly less than seller honestly, but mistakenly, represented. *Id.* Rescission was ordered because of mutual mistake. The consideration effectively was less than the parties understood. *Id.*

The underlying assumption of the MURA was Retterath would receive $30 million for his Units. (*See* App.(VII), p. 132.) Unforeseen illegal taxable income allocation to Retterath (without the accompanying distributions) substantially affects consideration in an undeterminable amount (because HES' future income from August 1, 2013 to July 1, 2014

was unknowable at the time of the closing deadline). (App.(VI), pp. 188, 296.)

HES allocation scheme created either a unilateral or a mutual mistake confirming there was no meeting of the minds.

3. Unclean Hands

"The doctrine of unclean hands considers whether the party seeking relief has engaged in inequitable conduct that has harmed the party against whom he seeks relief." *General Car & Truck Leasing Sys. v. Lane & Waterman*, 557 N.W.2d 274, 279 (Iowa 1996). HES inequitable conduct against Retterath included:

- Concealing its intent to apply improper tax treatment to Retterath. (*See* section III(C)(1) *supra.*)

- Unilaterally determining it "equitably acquired" Retterath's Units, still treating him as the "beneficial owner" of units for tax allocation purposes, but not for distribution. (App.(VI), pp. 132-33; App.(VII), p. 324.)

- Negotiating directly with Retterath, and sending an agreement directly to him to sign, when Retterath's counsel instructed HES to communicate through attorneys. (*See* App.(VII), pp. 216-18.)

4. Unconscionability

"[A] contract is unconscionable where no person in his or her right senses would make it...and no honest and fair person would accept it...." *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 80 (Iowa 2011)

(listing five unconscionability factors: assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness). A contract is voidable if some amount of procedural or substantive unconscionability are present.

Relevant factors to procedural unconscionability include:

- Whether both parties were represented by counsel. *See Weber v. Weber,* 589 N.W.2d 358, 359 (N.D. 1999).
- Disparity in bargaining power. *See, e.g.*, *Construction Assocs., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 242 (N.D. 1989) (noting "experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms").
- Whether a party asserting unconscionability attempted to rescind agreement soon after execution. *Weber,* 589 N.W.2d at 358.

Substantive unconscionability is found in agreements with "harsh, oppressive, and one-sided terms." *In re Marriage of Shanks*, 758 N.W. 2d 506, 515 (Iowa 2008). Whether an agreement is unconscionable must be determined at the time it was made. Iowa Code § 554.2302(1). The court may invalidate the unconscionable provision, or the entire contract. *Id*.

Retterath proved procedural and substantive unconscionability concerning the MURA.

The MURA was procedurally unconscionable because HES:

- Negotiated directly with Retterath and not counsel. (*See* App.(VII), p. 102.)

- Demanded Retterath sign the purported agreement by June 13, 2013, while HES did not authorize Boyle's signature on the MURA until June 19, 2013. (*See id.* p. 127; App.(VI), p. 130, 191, 218.)

- Presented the purported agreement as a way to end HES' investigation into Retterath's alleged "bribery." (App.(VII), p. 101.) HES' extortionate intent was confirmed by its own email correspondence stating it used the investigation to "bury" Retterath in a "hole." (App.(VI), p. 221-23; App.(VII), p. 322.)

- Retterath's counsel questioned the enforceability of the purported agreement and demanded assurance HES could perform it in compliance with its Operating Agreement; HES ignored these questions. (App.(VII), p. 155-56.)

The MURA was substantively unconscionable because:

- HES deceitfully intended to apply improper tax treatment to Retterath and effectively reduce his consideration. (*See* App.(VI), pp. 188, 287-94, 296.)

- Section 5 of the MURA purports to entitle HES to "waive" Retterath's release, while it was investigating him for "bribery." (*See* App.(VII), p. 133.) The section also purports to allow HES to waive the condition of financing and bank approval. Without financing, Retterath would be an unsecured creditor of the LLC regarding his second $15 million payment. (App.(VI), p. 111.) Without bank approval, HES would be paying Retterath $30 million in violation of its loan covenants and Operating Agreement, exposing Retterath to potential disgorgement and other actions by HES' membership.

D. Conclusion

Retterath established affirmative defenses any one which should void the district court's ruling. This Court should reverse the district court's denial of these defenses and confirm judgment in favor of Retterath based on each defense.

IV. District Court Erred Granting HES' Post-Trial Motion to Supplement Record

A. Scope and Standard of Review

Whether to reopen the evidentiary record after trial is reviewed for abuse of discretion. *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992).

B. Preservation of Error

Retterath resisted HES' motion and raised the issue again in motion for new trial (App.(V), p. 352-53) and at hearing. The district court granted HES' motion to supplement record. (*Id.* pp. 317, 396).

C. Argument

District Court improperly applied standards for reopening the record after trial, permitting HES to supplement the record with, among other things, *its own bank statement*, which HES (and apparently the court) relied upon as evidence that HES was ready and able to close the MURA on August 1, 2013. The district court admitted the evidence "subject to [Retterath's] objections."

Nearly a month after the close of trial, HES moved to supplement the record with three documents (exhibits 62-64) produced post-trial by HES' bank, Home Federal, in response to a subpoena Retterath served prior to trial. The documents were addressed to HES but not produced by HES, which also refused to authorize its bank to release its bank records prior to trial. (*See* App.(V), pp. 315-16.) HES tardily offered these documents to show that it allegedly would have had the funds to close on August 1, 2013.

Factors applicable to a motion to reopen the record after trial include:

(1) reason for the failure to introduce the evidence;

(2) surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence;

(3) diligence used by the proponent to secure the evidence in a timely fashion;

(4) admissibility and materiality of the evidence;

(5) stage of the trial when the motion is made;

(6) time and effort expended upon the trial; and

(7) inconvenience reopening the case would cause to the proceeding.

Teeters, 487 N.W.2d 346 at 248.

Retterath analyzed these factors in resisting HES' tardy attempt to supplement the trial record, but the district court never mentioned them. (App.(V), p. 317.) While the district court sitting in equity may reserve

ruling on objections *at* trial, *see Sille v. Shaffer*, 297 N.W.2d 379, 380–81 (Iowa 1980), this does not mean that a district court should admit exhibits *after* trial without analyzing the above factors for reopening the record. Otherwise, a party in an equitable trial could hold back key evidence at trial, only to "supplement" the record with it after trial.

Application of the *Teeters* factors demonstrates the impropriety of HES offering the exhibits post-trial:

1. HES Did Not Diligently Pursue the Exhibits and Had No Excuse For Failing to Offer Them at Trial

All four exhibits were documents from HES' bank, readily available to HES by request (formally or informally), or were actually in HES' possession throughout the litigation. It was HES' burden to prove it had the spendable funds to close, and to obtain and timely present the evidence needed to prove its claim. There is no proper excuse for HES' failure to do so pre-trial, and to present this evidence at trial.

2. Retterath Was Unfairly Surprised and Improperly Prejudiced

Retterath propounded discovery regarding HES' financing for the purported agreement. HES did not produce its bank documents. HES admitted pre-trial that it would pay with cash on hand, and the testimony at trial focused on the amount of cash HES had available (at most $6 million).

HES did not present evidence or testimony at trial that it drew on its line of credit. HES' banker, Oftedahl, never testified that HES drew on its line of credit. HES' CEO testified that HES *could* have drawn down on its line of credit, but not that it actually did. (App.(VI), pp. 376-77.)

Whether HES could have, or actually did, draw on its line of credit is a critical distinction because HES needed to actually have the funds on the closing deadline to be ready and able to close (assuming that it *also* had secured amendments to its loan covenants, which it had not). *See First Trust Joint Stock Land Bank v. Resh*, 285 N.W. 192, 195 (Iowa 1939) (plaintiff seeking specific performance was not ready and able to close where funds were not in the "hands of [plaintiff]" by the closing deadline).[5]

Perhaps sensing the fatal flaw in the evidence it presented at trial, HES' tardy supplemental exhibits offered a new theory—that HES actually *did* draw on its line of credit on August 1, 2013 in order to have funds to close. HES completely changed its position post-trial on a key issue that it failed to present sufficient evidence on at trial in order to cover its deficiency. This improperly and unfairly prejudiced Retterath.

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[5] There was no evidence that HES actually had the funds stated on this bank statement available to it. For example, there is no evidence concerning what checks HES had outstanding as of that date, but cross-examination was not permitted.

There are myriad authenticity, identification, and other evidentiary issues surrounding HES' unauthenticated, hearsay documents. HES did not even provide a supporting affidavit for these supplemental exhibits. HES made no proper showing these documents should be admissible. Worse, the district court ignored Retterath's request that the court at least hold a hearing so witnesses could testify regarding the exhibits.

3. Waiting a Month To Supplement the Record

After Retterath timely moved to file an amended pleading earlier in the case, HES insisted on keeping the existing trial date and moved to bifurcate trial. (App.(IV), pp. 297-98.) Trial lasted four days and, in addition to live testimony, involved submission of designated deposition testimony from six witnesses and around 100 exhibits. There was no proper basis for the district court to allow HES to supplement the record after trial in an attempt to cure key deficiencies of the voluminous evidence it put on at trial.

The district court abused its discretion granting HES' motion to supplement. Even if the district court had discretion to admit the exhibits subject to objection, the issue of admissibility is preserved for this Court's de novo review. *Sille*, 297 N.W.2d at 380–81. This Court should hold exhibits 62-64 are not admissible. The admissible evidence in the record

properly established HES had, at most, $6 million of useable cash on August 1, 2013, and indisputably was not ready and able to close.

D. Conclusion

HES failed to offer evidence at trial on critical aspects of its claim. Its late attempt to reopen and supplement the record should have been rejected outright. The district court's use of the crutch that the exhibits would be considered "subject to Retterath's objection" was error. Considering the issues presented on appeal, the Court should disregard all of HES' untimely evidence.

V. District Court Erred in Awarding HES Attorneys' Fees and Denying Retterath Attorneys' Fees

A. Scope and Standard of Review

This Court "review[s] a challenge to a district court's grant of attorney fees for an abuse of discretion [and] will reverse a court's discretionary ruling only when the court rests its ruling on grounds that are clearly unreasonable or untenable." *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010). "When reviewing an attorney fees award for an abuse of discretion, [the Court] will correct erroneous applications of the law." *Id.* Contract interpretation and construction are issues of law. *Peak*, 799 N.W.2d at 543.

Decisions whether to grant sanctions under Iowa Rule of Civil Procedure 1.413(1) are reviewed for abuse of discretion. *First Am. Bank & C.J. Land, LLC v. Fobian Farms, Inc.*, 906 N.W.2d 736, 744 (Iowa 2018).

B. Preservation of Error

Retterath resisted HES' attorney's fees motion and moved for sanctions (Retterath Opposition to HES 1.904 Motion at 5-15). The district court ruled against Retterath in its Ruling on Post-Trial Motions (App.(V), p. 396.)

C. Argument

"As a general rule, unless authorized by statute or contract, an award of attorney fees is not allowed." *NevadaCare, Inc.*, 783 N.W.2d at 469. HES sought, and the district court granted, attorneys' fees under Iowa Code section 625.22. For fees to be available under section 625.22, "[a] written contract must contain an express provision regarding attorney fees and litigation expenses...." *NevadaCare, Inc.*, 783 N.W.2d at 469-70.

HES sought fees under paragraph 4 "Indemnification" of the purported agreement:

> Member agrees to indemnify, defend and hold harmless the Company and its members, managers, officers, directors, employees and representatives from and against any and all claims, suits, losses, liabilities, costs, damages, expenses, including reasonable attorneys' fees and costs, arising, directly or indirectly, out of or resulting from: (1) any breach or material

> inaccuracy of any representation or warranty by Member contained in this Agreement; or (ii) failure by Member to perform his obligations under this Agreement.

(App.(VII), pp. 132-33.)

This clause does not shift attorney fees between the parties. "[A]n indemnification clause [that] uses the terms '*indemnify*' and '*hold harmless*' indicates an intent by the parties *to protect a party from claims made by third parties rather than those brought by a party to the contract*." *NevadaCare, Inc.*, 783 N.W.2d at 471 (emphasis added). "[A] party to a contract cannot use an indemnity clause to shift attorney fees between the parties unless the language of the clause shows an intent to clearly and unambiguously shift the fees." *Id.*

NevadaCare reversed an attorney fees award. It held the indemnification clause at issue was a third-party indemnification clause, not a fee shifting provision between the parties. Counsel for HES was counsel for NevadaCare and successfully obtained *reversal* of the district court's attorney fees award against his client based upon the very argument he *advanced* in this case in an attempt to recover his fees.

Judge Schemmel awarded HES' fees notwithstanding that this Court previously rejected her same reasoning on virtually the same contract language in *NevadaCare*.

The *NevadaCare* indemnification clause stated:

> [NevadaCare] agrees to defend, *indemnify* and *hold* the State of Iowa and the Department [of Human Services], and their officers, agents and employees, *harmless* from any and all liabilities, damages, settlements, judgments, costs and expenses, including reasonable attorney's fees of the Attorney General's Office, and the costs and expenses and attorney fees of other counsel required to defend the State of Iowa, the Department and their officers, agents and employees related to or arising from.... Any breach of this Contract…[and other specified conduct]....

783 N.W.2d at 470.

This Court reversed the district court (Schemmel, J.) because the clause was not a proper basis to shift attorneys' fees:

> The district court found the phrase, "Any breach of this Contract," and similar language contained in the other indemnity provisions allowed the award of attorney fees for the 1999 through 2003 contracts. We do not believe this language or any other language in the 1999 through 2003 contracts shows clearly and unambiguously an intent by the parties to shift the attorney fees incurred in a breach of contract action between the parties.

Id. at 471. This Court contrasted the fee-shifting indemnity-related provision with a traditional attorneys' fees shifting provision in another of the contracts at issue, under which attorneys' fees were proper:

> In the event the state agency should prevail in any legal action arising out of the performance or non-performance of the contract, [NevadaCare] shall pay, *in addition to any damages, all expenses of such action including reasonable attorney's fees and costs....*

Id. at 472 (emphasis added).

NevadaCare demonstrates the difference between third-party indemnification and unambiguous attorneys' fees shifting. 783 N.W.2d at 471-72; *see also Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 841-42 (Iowa 2007) (upholding award of attorney's fees under prevailing party fees shifting provision). Other cases confirm "[a]n indemnification clause does not apply to claims between the parties to the agreement. "Rather it obligates the indemnitor to protect the indemnitee against claims brought by persons not a party to the provision." *FNBC Iowa, Inc. v. Jennessey Grp., L.L.C.*, 759 N.W.2d 808, 811 (Iowa Ct. App. 2008) (internal citations omitted); *accord Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 344 (Iowa 2005); *Std. Water Control Sys. v. Jones*, 2016 Iowa App. LEXIS 899, *12, 886 N.W.2d 616 (Iowa Ct. App. Aug. 31, 2016).

The purported agreement's indemnification provision in this case does not shift HES' attorneys' fees to Retterath. Additionally, the provision should be construed against HES, the agreement's drafter. *Maxim Technologies, Inc. v. City of Dubuque*, 690 N.W.2d 896, 891 (Iowa 2005). Given HES' counsel's involvement in *NevadaCare*, and that the MURA contained a third party

indemnification provision and not an attorneys' fees shifting provision should be unmistakable. HES counsel knew how to shift attorney fees if that was the intent. It was not, and it did not.

HES failed to cite *NevadaCare* (or any other case) in its motion for attorneys' fees. (App.(V), pp. 380-82). Retterath cited *NevadaCare* and respectfully reminded the district court about its prior overruled analysis of the same issue that opposing counsel had previously argued in the opposite fashion. Yet, the district court granted HES attorney fees without analyzing *NevadaCare* or any authority. It simply stated "pursuant to the MURA entered into between the parties, the Plaintiff HES is entitled to attorney fees." (*Id.* p. 396.) That conclusory incorrect "reasoning" is an inexplicable abuse of discretion, and error of law.[6]

The district court denied Retterath's motion for sanctions relating to HES' attorneys' fees motion. HES' motion lacked legal basis, and HES knew it. Retterath was entitled to his expenses pursuant to Iowa Rule of Civil Procedure 1.413. That rule requires every motion, to the best of counsel's knowledge, be warranted by existing law (or a good faith argument for reversal). *See also Barnhill v. Iowa Dist. Court of Polk*

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[6] Additionally, HES is not entitled to specific performance for reasons detailed in section I, *infra*. If HES does not prevail on that claim there can be no attorneys' fees award.

County, No. 7-573, 2007 Iowa App. LEXIS 1134, *25 (Iowa Ct. App. Oct. 24, 2007) (unpublished) (attorney fees sanction where plaintiffs asserted claim which plaintiffs knew lacked legal basis).

What better example of a rule 1.413 violation exists than counsel advancing a position that was rejected in a case he litigated establishing a contrary precedent that conveniently is not cited as relevant to the issue before the district court? Retterath is entitled to recover his fees for defending HES' spurious motion.

D. Conclusion

Retterath was entitled to *his* attorneys' fees because he was forced to defend a motion that should not have been filed much less granted. This Court should reverse the district court's ruling granting HES fees, and remand for an award of Retterath's attorneys' fees for his defense of HES' motion *and* Retterath's fees incurred on this issue on appeal.

VI. DISTRICT COURT ERRED IN DENYING RETTERATH'S MOTION FOR EVIDENTIARY SANCTIONS OR CONTINUANCE

A. Scope and Standard of Review

District court decisions on whether to grant evidentiary sanctions are reviewed for abuse of discretion. *Jensen v. Sattler*, 696 N.W.2d 582, 589 (Iowa 2005). Whether to grant a continuance is also reviewed for abuse of

discretion. *Hawkeye Bank & Trust, Nat'l Ass'n v. Baugh*, 463 N.W.2d 22, 26 (Iowa 1990).

B. Preservation of Error

Retterath filed his motion for evidentiary sanctions or continuance and argued the motion at the pre-trial conference (PT Conf. 3:18-16:18) and renewed objection at trial (App.(VI), p. 298) and in his motion for new trial (2-3). The district court ruled at (App.(V), p. 274).

C. Argument

Less than two weeks before trial, HES produced to Retterath documents it characterized as "bank approvals" or "waivers" from Home Federal concerning the intended buyback of Retterath's Units. Retterath moved to exclude these documents or in the alternative to continue trial to allow for further discovery. The district court denied the motion at pretrial conference, holding, as renumbered and restated: 1) Retterath did not clearly ask for the documents in discovery; 2) he did not show sufficient prejudice; and 3) he unduly delayed taking action on the issue. These reasons were error. The district court abused its discretion.

1. Retterath Clearly Asked for the Documents

HES' alleged proof of bank approval for financing the purported agreement was a key element of its specific performance claim. Retterath

served requests for production on HES on February 19, 2016. Retterath served additional discovery on HES on September 30, 2016. Retterath discovery included many attempts to discover evidence of bank approval. (*See* App.(V), pp. 224-43.)

Notwithstanding, HES produced just one document from Home Federal, dated July 12, 2013, with the subject line "$15,000,000 Term Loan & Extension of Existing Term Revolver." (App.(VII), p. 187.) The undisputed evidence at trial was Home Federal and HES never closed on this proposal. (App.(VI), pp. 121, 364, 366-67, 414-15.) Accordingly, MURA conditions were not met by August 1, 2013. (*Id.* pp. 122-23, 436-37, 441).

On January 4, 2017, *thirteen days before trial*, HES suddenly produced nearly 200 pages of documents relating to HES' unsuccessful efforts in summer 2013 to obtain bank approval and financing required to close the purported agreement. HES introduced certain of these documents at trial (*see* App.(VI), pp. 298-300), and identified them as "lender approvals" during trial. (*Id.* p. 67.)

Retterath clearly asked HES for documents HES was going to rely upon as bank approvals, and HES did not provide them in response to discovery. Instead, it suddenly produced them thirteen days before trial.

2. Retterath Showed Sufficient Prejudice

HES' purported bank approval theory was raised for the first time *at trial*. It was asked for that information months prior. Retterath could not meaningfully share these documents with his expert, a fact that HES cross-examined the expert about in an attempt to undermine his credibility. (*See* App.(VI), p. 297-306.) Retterath was improperly prejudiced.

3. Retterath Did Not Sit on His Rights

The district court found that Retterath somehow sat on his rights regarding the documents. Retterath moved for sanctions *within a week* of receiving the late, suddenly produced documents.

D. Conclusion

The district court should have sanctioned HES for its guerilla tactics. *See Sullivan v. Chicago & Nw. Transp. Co*., 326 N.W.2d 320, 324 (Iowa 1982) (affirming sanction for party's failure to disclose witness until three weeks before trial); *White v. Citizens Nat. Bank of Boone*, 262 N.W.2d 812, 816 (Iowa 1978) (affirming sanction for failing to supplement interrogatory responses before trial). Alternatively, the court should have granted a continuance to attempt to minimize the unfair prejudice to Retterath. *Hawkeye Bank & Trust, Nat'l Ass'n*, 463 N.W.2d at 26.

Retterath was ambushed and robbed of the ability to conduct discovery concerning the late-produced documents. The district court abused its discretion in failing to address the unfairness. This late production should be stricken from the record. If this case is remanded for further proceedings on HES' specific performance claim, HES should lose the ability to offer as evidence any documents it failed to timely produce in response to Retterath's discovery requests.

VII. THE DISTRICT COURT ERRED IN DENYING RETTERATH'S MOTION FOR NEW TRIAL AND STRIKING RETTERATH'S JURY DEMAND

A. Scope and Standard of Review

Where a motion for new trial is based upon a discretionary ground, the standard of review is abuse of discretion. *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 480 (Iowa 2004). Decisions regarding separation of issues or parties for trial are reviewed for abuse of discretion. *Meyer v. Des Moines*, 475 N.W.2d 181, 191 (1991).

This Court reviews the district court's disposition of a motion to strike a jury demand for errors of law. *Ramirez v. Iowa DOT*, 546 N.W.2d 629, 631 (Iowa Ct. App. 1996).

B. Preservation of Error

Retterath moved for a new trial on the below-discussed bases (New Trial Br. at 4-6) and argued them at hearing. Retterath resisted HES'

alternative motion to bifurcate in briefing and at hearing. Retterath resisted HES' motion to strike jury demand. The district court ruled on these issues at Order Striking Jury Demand (App.(I), p. 150) and Order on Post-Trial Motions (App.(V), p. 395).

C. Argument

The district court abused its discretion in bifurcating trial because the order was premised upon an erroneous assumption "that trial [on HES' specific performance claim] may well be dispositive of the entire dispute." (*Id*. pp. 221-22.) While the failure of HES' specific performance claim would have narrowed the issues presented because HES admitted it would then owe Retterath distributions, he also would still have live claims pending, such as his claims against RSM and breach of fiduciary duty claims against HES' Directors and officers. In fact, all the issues in this case seem to intertwine.

HES prevailing on its specific performance claim is not dispositive of any of Retterath's claims. Among other claims, Retterath still has a live declaratory judgment counterclaim that the MURA is unenforceable and that HES has not "equitably acquired" Retterath's Units because the district court did not rule on any of Retterath's claims in the first bifurcated trial. And

Retterath's claim for distributions (currently valued at approximately $45 million) still needs to be decided.

Bifurcation became an excuse for HES to avoid its discovery obligations and for the district court to avoid addressing those deficiencies, effectively deferring such issues in a fashion manifestly unfair to Retterath. After bifurcation, HES pursued its supposed "very straightforward breach of contract case," and was allowed to try it to the bench and not a jury because it sought an equitable remedy. (App.(VI), p. 57.) This was improper. This Court looks at the essential nature of the cause of action, rather than solely at the remedy, to determine if a party is entitled to a jury. *Weltzin v. Nail*, 618 N.W.2d 293, 297 (Iowa 2000). The essential nature of HES' cause of action warranted trial to a jury on all claims presented by all parties. This is particularly true here because repeatedly HES emphasized the "simple" contract nature of its claim, not its equitable nature. Bifurcation and the resulting denial of Retterath's jury demand was clear error.

D. Conclusion

As demonstrated, this Court has several ways to reverse the district court's grant of specific performance to HES, deny HES' claim, and return the case to the district court with instructions to proceed with Retterath's claims.

If the Court is not inclined to do so, given the severe procedural irregularities detailed, and the court's erroneous decision to bifurcate trial and to deny a jury, Retterath requests that this Court reverse the district court's denial of Retterath's motion for new trial and grant him a new, unbifurcated jury trial where both HES and Retterath's claims will be tried concurrently.

CONCLUSION

It was error to proceed in equity to attempt to establish a claim for specific performance of the purported agreement. Retterath has valid defenses and legitimate concerns surrounding irregularities in discovery and how this case was presented for trial. To obtain a just and proper result, the Court should reverse the district court's orders directing specific performance and awarding HES' attorneys' fees. This Court should confirm Retterath's recovery of sanctions against HES, and direct further proceedings so Retterath may litigate his counterclaims and recover his damages.

REQUEST FOR ORAL ARGUMENT

Retterath respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief contains 13,916 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point, Times New Roman font.

/s/ William J. Miller
William J. Miller