IN THE SUPREME COURT OF IOWA

NO. 18-2183

LEMARTEC ENGINEERING & CONSTRUCTION n/k/a LEMARTEC CORPORATION

Third-Party Plaintiff-Appellant,

vs.

ADVANCE CONVEYING TECHNOLOGIES, LLC,

Third-Party Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR MONROE COUNTY
THE HONORABLE JOHN TELLEEN
MONROE COUNTY NO. LALA003789

Third-Party Defendants-Appellee's Advance Conveying Technologies, LLC, Final Brief

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Routing Statement

The Business Court applied well-established Iowa law governing claim preclusion and issue preclusion. The appeal should be transferred to the Court of Appeals. Iowa R.App.P. 6.1101.

Introduction and Summary of Argument

Lemartec's brief fails to inform this Court of significant changes in both cases after the Federal Court dismissed SPG's claims against ACT and Lemartec settled with SPG. Lemartec filed amended pleadings against ACT in both cases one day apart—October 26, 2017 in State Court and October 27, 2017 in Federal Court—bringing nearly identical, *verbatim*, claims for breach of contract, breach of express and implied warranties, and indemnity.

Lemartec's attempt to focus only on claims by third parties against Lemartec ignores the claims and issues actually litigated and decided between Lemartec and ACT in the Federal Case. The Federal Court heard and decided Lemartec's claims for breach of contract, breach of express and implied warranties, and indemnity adversely to Lemartec. It also decided ACT's claim for nonpayment adversely to Lemartec. In deciding these claims, the Federal Court necessarily found ACT performed all of its obligations under the contract, including: ACT's work was "quality construction", it complied with applicable code requirements, the conveyor

system was “100% operable and functional and … compatible in all respects with the other portions of the Work”, and ACT satisfied its 18-month guarantee. These findings removed all of the bases Lemartec has asserted in either case to support its claim that ACT had an obligation to indemnify Lemartec from and against claims of third parties.

These conclusions by the Federal Court preclude Lemartec’s claims here under either claim preclusion or issue preclusion.

Statement of the Case

I. Nature of the case

The underlying case involves disputes among numerous general contractors and subcontractors concerning construction of a Chlor-Alkali facility in Eddyville, Iowa. Third-party plaintiff Lemartec Corporation, a subcontractor to general contractor Conve & AVS, Inc. (“Conve”) hired to design and build the physical plant for the project, subcontracted with Advance Conveying Technologies (“ACT”) to design and manufacture components of the conveyor system for the salt containment building.

Lemartec and ACT are parties to two lawsuits, both addressing ACT’s performance under its contract with Lemartec. Following a bench trial, the United States District Court for the Northern District of Iowa decided all claims between these parties in ACT’s favor. This appeal addresses whether

the Federal Court's judgment precludes Lemartec's claims against ACT in this case under claim and issue preclusion.

II. Relevant prior proceedings.

This part of the complex litigation in the Business Court[1] began with a petition filed on November 22, 2016 by HF Chlor-Alkali, LLC ("HFCA") against Conve, one of the general contractors, and others, seeking recovery for damages related to construction of the Chlor-Alkali Plant for HFCA. Conve brought a third-party petition against its subcontractors, including Lemartec, on January 15, 2017. On May 30, 2017, Lemartec in turn brought a Third-Party Petition against its own subcontractors, including ACT and SPG. Initially, Lemartec's only third-party claim against ACT was Count I for statutory and common law indemnification. (App. 77.)

Lemartec filed an Amended Third-Party Petition on October 26, 2017, greatly expanding its claims against ACT in State Court. (App. 95.) In addition to the common law indemnity claim, Lemartec added substantive counts against ACT for Breach of Contract, Breach of Implied Warranty of Workmanlike Construction, Breach of Implied Warranty of Fitness for a

[1] The Business Court case includes consolidation of four cases with a combined fifteen parties and is subject to an extensive case management order directing staged discovery. (App. 137, 2018-07-27 Third Amendment Case Management Order.) The cases remain in the initial phases of pattern discovery, and a status conference is set for May 20, 2019. (App. 368, 2019-05-01 Order.)

Particular Purpose, and Breach of Express Warranty. (App. 104-07.) Lemartec sought "judgment against [ACT] in an amount which will fully and fairly compensate it for its damages" on each of Counts III through VI. (*Id.*)[2]

ACT filed its Answer on November 6, 2017 and asserted a counterclaim for nonpayment against Lemartec, alleging ACT performed its obligations under the Purchase Order, supplied conforming goods, and Lemartec accepted the goods but failed to pay ACT the balance owing. (App. 130-31.) Lemartec filed an Answer to ACT's Counterclaim for Breach of Contract. (App. 133.)

ACT filed a Motion for Summary Judgment on August 15, 2018, seeking dismissal of all claims brought by Lemartec against ACT based on the May 21, 2018 favorable disposition of the Federal litigation. (App. 146.) Lemartec filed a resistance on September 21, 2018, ACT filed a Reply on October 5, 2018, and the Business Court held a hearing on October 15, 2018. (App. 170, Lemartec Resistance; App. 188, ACT Reply.) ACT made a verbal motion to amend its answer during the October 15, 2018 hearing to include the affirmative defense of *res judicata*, which was followed by a written motion on October 31, 2018. (App. 296.) The deadline for amending

[2] As discussed in greater detail below, Lemartec filed a nearly *verbatim* amended counterclaim against ACT in federal court the next day.

pleadings remained open—indeed still has not been set. (App. 318.) On November 20, 2018, the Business Court granted ACT's Motion to Amend and its Motion for Summary Judgment. (App. 326.)

Lemartec filed interlocutory appeal.

III. Disposition below

In applying claim and issue preclusion, the Court rejected Lemartec's false and misleading characterizations of the Federal case as a "delay case" and the state case as a "defect case". (App. 343.) With respect to claim preclusion, the Court concluded Lemartec took too narrow a view of the "claim" in the federal case: "the matter at issue between Lemartec and ACT in federal court was, fundamentally, the rights and obligations of the parties under the Purchase Order and whether any duties under that written agreement had been breached." (App. 343-44.) The Court applied the "transactional" doctrine: "All aspects of Lemartec's indemnity claim necessarily arise from the same transaction because they are rooted in the same contract and performance: Lemartec's theory that ACT is responsible because it breached the terms of the Purchase Order by designing and fabricating a salt conveyor system that did not conform to specifications is the same in both actions." (App. 346-47.)

The Court also applied issue preclusion: "Throughout litigation between the parties in federal court, the primary contention was whether ACT's design and fabrication of the salt conveyor system breached the terms of the Purchase Order or violated any express, implied, or equitable warranties contained in that agreement." (*Id.* 351.) The Court concluded "the crucial issue of whether ACT breached the duties it owed under the Purchase Order has already been decided against Lemartec." (*Id.* 354.) The Court noted, "Lemartec litigated its claims and lost; it must live with the results." (*Id.* 356.)

Statement of the Facts

Lemartec omits significant events in the discussion of the Federal and State lawsuits. An understanding of the procedural posture of the Federal lawsuit is important for the Court's review of the Business Court's Order dismissing Lemartec's claims under both claim and issue preclusion.

I. The Salt Conveyor System

On May 17, 2013, HFCA contracted with Conve to design and build a facility to manufacture caustic soda, chlorine, hydrochloric acid and sodium hypochlorite. (App. 12, HFCA Petition ¶¶10-11.) On July 17, 2013, Conve in turn contracted with Lemartec to design, construct, and provide construction and erection administration of the Plant. (*Id.*) One aspect of the

Plant includes a salt containment building, which included a material handling system, or conveyor system, for moving the salt to, and within, the salt containment building.

On December 18, 2013, Lemartec entered into a Purchase Order with ACT for the design, engineering, and fabrication of the salt conveyer system. (App. 98, ¶13.) Lemartec provided ACT with a set of conceptual drawings and functional requirements for the conveyor system, from which ACT was to design and fabricate the conveyor system, which was to be constructed by another party (ultimately SPG). (App. 684-86.) Lemartec remained responsible for reviewing and approving ACT's design submittals, verifying field measurements and construction criteria, and coordinating among the various companies working the construction site. (*Id.*)

The Purchase Order did not include a contractual indemnification provision. (App. 100-02, ¶¶10-20.) While Lemartec entered into Subcontracts with most of its other subcontractors that included express indemnity provisions, Lemartec's only written agreement with ACT was the Purchase Order. (*Id.*)

Lemartec subcontracted with SPG to perform on-site assembly and installation of the conveyor system fabricated by ACT. (*Id.*) As noted in Lemartec's Brief, installation of the Salt Conveyor system was completed in

May 2015 and the entire Project was turned over to Conve the following month, on or about June 21, 2015. (Proof Br. 21, 22.)

Construction of the chlor-alkali plant did not go as planned, resulting in the consolidated lawsuits and numerous counterclaims, crossclaims, and third-party claims involved in this state litigation.

II. The Federal Case course of proceedings.

A. Lemartec and ACT's crossclaims began as straightforward indemnity crossclaims.

On October 6, 2015, SPG filed suit in Federal Court against Lemartec and ACT for unpaid sums related to additional work and cost overruns it incurred while constructing the salt conveyor system. (App. 381, ¶44.) SPG brought contract-based claims against Lemartec and tort-based claims against ACT, including negligence, professional negligence, and negligent misrepresentation. (*Id.* 374-81.) As co-defendants, ACT and Lemartec each brought crossclaims for indemnity and contribution against the other. (App. 441-42; App. 458-59.)

B. Lemartec asserted theories of breach of warranty and breach of contract for the first time in response to ACT's Motion for Summary Judgment.

ACT moved for summary judgment on June 30, 2017, seeking dismissal of SPG's claims and Lemartec's indemnity and contribution crossclaim. (App. 464.) In response, Lemartec argued for the first time that

its common law indemnity claim included implied contractual indemnity and equitable indemnity premised on breaches of implied and express warranties and professional negligence. (App. 470-74.) On August 28, 2017, the Federal Court granted ACT's Motion for Summary Judgment against SPG. (App. 488-89.)

The Court asked Lemartec and ACT to brief how the Court should manage the remaining contribution and indemnity crossclaims, given the Court's dismissal of SPG's claims against ACT. (*Id.* 489.) Lemartec filed a supplemental brief on September 8, 2017, arguing its equitable indemnity claims were premised on claims for breach of warranty sounding in contract, not in tort, to avoid the economic loss doctrine. (App. 490-91.) Lemartec argued: "This case does not involve professional negligence—it is a warranty case. This case also involves a contractual relationship between Lemartec and ACT." (*Id.* 492.) Lemartec argued its equitable indemnity claim was supported by "its contractor-subcontractor relationship with ACT", and "genuine issues of material fact exist concerning whether ACT satisfactorily performed under the Lemartec-ACT contract." (*Id.* 493.) Lemartec identified "specifically, the provisions where ACT agreed that its 'work shall be of quality construction' and that the 'Work shall comply with applicable code requirements ... [and] shall be 100% operable and functional

and be compatible in all respects with the other portions of the Work.'" (*Id.* 494.) Lemartec also argued that ACT "'[g]uarantee[d] the work for 18 months after delivery of Equipment or 12 months after Start-up, whichever is sooner'" in the Purchase Order, which supported Lemartec's claim for implied contractual indemnity. (*Id.* 496.)

On September 19, 2017, the Federal Court granted ACT's Motion for Summary Judgment on Lemartec's contribution claim, but denied dismissal of Lemartec's indemnity claim, finding "genuine issues of fact on the several theories of equitable or legal indemnity." (App. 499.)

Lemartec settled its claims with SPG (App. 501.)

C. The Federal claims were amended to add substantive claims, creating a "whole new case".

ACT's crossclaim for contribution and indemnification against Lemartec was mooted because the Court's rulings established ACT owed nothing to SPG. When Lemartec's counsel informed ACT's counsel Lemartec had settled with SPG on September 22, 2017, Lemartec also told ACT it intended to proceed with its indemnity claims against ACT, which were premised on Lemartec's breach of warranties theories. (*Id.*) Faced with theories of breach of contract and breach of warranties raised by Lemartec in resisting summary judgment, on October 6, 2017, ACT moved to amend its crossclaim to assert a claim for nonpayment of the contract.

Against Lemartec's Resistance, the District Court granted ACT's motion on October 23, 2017. (App. 505.)

On October 27, 2017, the day after Lemartec filed a nearly identical Amended Third-Party Claims against ACT in this State case (App. 95), Lemartec filed a Motion to Continue Trial Date and Reset Deadlines (App. 533) as well as a Counterclaim to ACT's Amended Crossclaim (App. 539-45.) Lemartec identified its amended claims as "compulsory counterclaims", asserting "ACT's amended crossclaim and answer to crossclaim, along with Lemartec's counterclaims thereto, create new issues and new theories of recovery, the result of which is essentially the creation of an entirely new case." (App. 534, ¶¶9-10.) Lemartec also sought expanded discovery and designation of additional expert witnesses. (*Id.* ¶12.)

Against ACT's resistance, the Federal Court granted the continuance on November 6, 2017, asking for briefs on whether a jury trial was required. (App. 557.)

In support of its claim for a jury trial, Lemartec argued at the time SPG was dismissed from the case, "the sole claims remaining for trial were Lemartec's and ACT's indemnity cross-claims", but ACT's amended

crossclaim and its own "compulsory counterclaims" inserted new legal claims into the case, entitling it to a jury. (App. 559-60.)

In its Motion to Designate Expert Witness, Lemartec again argued the amended claims "created new issues and new theories of recovery, … essentially the creation of an entirely new case." (App. 566-67, ¶10.) Lemartec argued it was entitled to an expert because the new claims were an "entirely different theory" than previously involved in the SPG suit. (*Id.* 568, ¶¶18-20.)

On January 10, 2018, the Court extended the time to designate experts, concluding: "[e]xpert testimony from both remaining parties will be of assistance to the finder of fact in this case concerning engineering and contractual cross-claims by the parties." (App. 571.) In response to Lemartec's designation of Stephen Burke as its expert, ACT designated George Wandling. (App. 576.)

Lemartec dismissed its request for a jury, and a bench trial was held on April 9 through 16, 2018. The parties jointly filed a proposed pretrial order setting detailing the factual and legal the issues to be tried. (App. 573-93.) Each party introduced 86 exhibits. (*Id.* 588-93.) Following trial, the parties filed Proposed Final Orders. (App. 594-608; App. 609-31.)

The breadth of the issues Lemartec considered to have been litigated and needed to be decided in the Federal Case is revealed by its Proposed Final Order. Lemartec sought the following fact findings:

> 1. ACT's work was not of quality construction as required by the Purchase Order;
> 2. ACT failed to properly include all items described or implied by the Purchase Order;
> …
> 3. ACT's work did not comply with applicable code requirements;
> 4. The conveying system was not 100% operable, functional and compatible in all respects with other portions of the work at the time of delivery;
> ….

(App. 598.) Lemartec also sought the following legal rulings:

> ACT breached the implied warranty of merchantability by delivering component parts of the conveyor system that were not fabricated properly, did not fit together properly and that had to be re-engineered or otherwise modified in the field.
>
> …
>
> ACT breached the implied warranty of fitness for a particular purpose. ACT had reason to know of Lemartec's particular purpose for the conveyor system. Lemartec did not contract with ACT to purchase an ordinary salt conveyor. *Lemartec required a salt conveyor system designed and fabricated in accordance with the specific requirements of the contract documents and the specifications*. Lemartec contracted for a salt conveyor with a particular purpose unique to this chlor alkali production plant. ACT had reason to know that Lemartec relied on its skill and judgment to furnish a suitable salt conveyor system as *Lemartec contracted with ACT to "provide a Design and Manufacture Salt Conveyor System* and provide all Engineering services by a professional Engineer registered in the state of Iowa as required to design the Salt Conveying system *that meets the project specifications*." ACT

> guaranteed its work. ACT's guarantee shows it had reason to know that Lemartec would rely on, and did rely on, ACT's skill and judgment to furnish suitable components for the salt conveyor.
>
> …
>
> ACT expressly promised that its work would be of quality construction and that it would be performed in accordance with the construction drawings and specifications. These express statements were affirmations made by ACT that related to the conveyor and became part of the basis of the bargain. These express statements also concern the quality of ACT's design and manufacture of the components of the conveyor system and are not statements of opinion or praise.
>
> … The Court concludes that ACT breached its express warranties because ACT's work was not of quality construction and it did not fully comply with the construction drawings and specifications.

(App. 605-06 (emphasis added).)

D. The Federal Court determined ACT fully performed its obligations under the Purchase Order and did not breach any express or implied warranties.

Following the four-day federal bench trial, the Federal Court found in favor of ACT on all of Lemartec's claims against ACT and on ACT's claim for non-payment. (App. 683-88.) The Federal Court found: "ACT proved that it had completed the work called for by the purchase order of December 18, 2013; that it did not breach any provision of the contract; and that it had not been paid the amount of $317,467.07 Lemartec owed it under the purchase order …." (App. 686.) With respect to Lemartec's claims against ACT, the Federal Court found: "Lemartec failed to prove that ACT breached

the purchase order. … Moreover, Lemartec failed to prove that ACT breached any implied or express warranty of merchantability or fitness for a particular purpose." (*Id.*)

Argument

I. The District Court properly applied claim preclusion to Lemartec's state law claims.

A. Error Preservation

Lemartec preserved error on this issue.

B. Scope of Review

This Court reviews summary judgment for correction of errors law. *Gardner v. Hartford Ins. Accident & Indemn. Co.*, 659 N.W.2d 198, 201 (Iowa2003).

With respect to the Business Court's order allowing ACT to amend its Answer to assert *res judicata* as an affirmative defense, "[d]istrict courts have considerable discretion to allow amendments any point in the litigation, and [this Court] will only reverse the district court's decision if it has abused that discretion." *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa2015) (affirming amendment following remand from Supreme Court).

C. The transactional approach applied under Iowa law encompasses Lemartec's indemnity claim.

The doctrine of claim preclusion is

> based on the principle that a party may not split or try his claim piecemeal, but must put in issue and try his entire claim or put forth his entire defense in the case on trial. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. A party must litigate all matters growing out of his claim one time and not in separate actions.

Iowa Coal Mining Co. v. Monroe Cty., 555 N.W.2d 418, 441 (Iowa 1996) (quoting *B&B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 268 (Iowa1976). The only element of claim preclusion challenged by Lemartec is the final element: whether "both suits involve the same cause of action." *Pavone v. Kirk*, 807 N.W.2d 828, 832, 836 (Iowa2011).

Iowa courts apply the "more recent transactional approach of the Restatement" in addressing whether the cases involve the same causes of action. While Iowa courts discuss the "older 'same-evidence' test" in discussing claim preclusion, "[w]hat [they] have not done in the past is use the same-evidence test to reach a *different* result from that under the Restatement." *Villarreal v. United Fire&Cas.*, 873 N.W.2d 714, 719 n.3 (Iowa2016).

That transactional approach is defined by the Restatement as:

> (1) … [T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Villarreal, 873 N.W.2d at 720 (quoting Restatement (Second) Judgments §24). The Restatement "comments also make clear that a '[t]ransaction may be single despite different harms, substantive theories, measures or kinds of relief.'" *Id.* 721 (quoting Restatement (Second) Judgments §24, cmt.c).

1. Lemartec's State Court claims arise from the same transaction as its Federal Court claims—the contract between ACT and Lemartec.

Lemartec pled, nearly verbatim, the following causes of action in both cases: Common-law Indemnification, Breach of Contract, Breach of Implied Warranty of Workmanlike Construction, Breach of Implied Warranty of Fitness for a Particular Purpose, and Breach of Express Warranty. Based on Lemartec's own pleadings, Lemartec's allegations against ACT are nearly identical in both cases. (App. 201-06, ACT MSJ Reply, "Table A".)[3]

[3] Table A attached to ACT's Reply Brief provides a side-by-side comparison of Lemartec's October 26, 2017 and October 27, 2017 verbatim amended pleadings against ACT in each case. The Business Court referenced the Table throughout its Ruling. (App. 332, 342, 347.)

There is only one transaction that gives rise to the claims Lemartec has made in both cases, identified in Lemartec's amended pleadings filed in both cases:

> a written purchase order with ACT whereby ACT agreed to "perform and complete all Work required for the proper execution and completion of all Salt Conveyor Systems Supply work for the Project."

(App. 540, ¶5; App. 101, ¶13.) As the bases for Lemartec's claims against ACT, Lemartec also asserted in both actions:

> In the written purchase order, ACT agreed that its "work shall be of quality construction" and further agreed to be responsible for all "supervision, management, Engineering, Design, labor, materials, equipment, tools, hoisting, transportation, permits, licenses, testing, fees, taxes, warranties and all work and services necessary to perform and complete all Salt Conveyor System Supply work" for the Project.

(App. 540, ¶6; App. 101, ¶13.)

That Lemartec's claims include indemnity does not change the analysis, as Iowa cases apply the transactional approach to indemnity claims as well. Recognizing that indemnity claims need not, but may be, brought prior to final adjudication against the party seeking indemnity, the Supreme Court has explained: "[O]nce [the employee] started down the path in the first action seeking indemnification from [her employer], she was required to bring all theories of recovery at that time." *Arnevik v. U. Minn. Bd. Regents*, 642 N.W.2d 315, 320-21 (Iowa2002) (noting that rather than merely demand

a defense by letter, Arnevik filed a cross-petition for indemnification, invoking "the formal adjudicatory process", and all that involves). "The only difference between Arnevik's first and second claim is the ground upon which she asserted entitlement to indemnification." *Id*. 319. The Court held the prior ruling precluded litigating the merits of the new indemnity claim, where "Arnevik does not now allege any new contract or tort theories occurred based on events arising subsequent to the court's grant of the University's motion for summary judgment on the first claim." *Id.* Important to its analysis were the facts that "both of her lawsuits stem from the accident with Johnson" and "[t]he underlying facts in each action are the same." *Id*.

The same is true in this case: no subsequent events have occurred since the Federal Court's ruling to support a new contract or tort basis for indemnity, and both lawsuits stem from the same underlying transaction—ACT's performance under the Purchase Order.

Villarreal is also helpful in examining the preclusion of a differing claim that arises from the same transaction. 873 N.W.2d at 714. The Plaintiff in *Villarreal* brought a successful claim for breach of an insurance contract against its insurer. *Id*. 715. Following the first suit, Plaintiff then brought a claim for bad faith. *Id*. The Supreme Court held the bad faith

claim was precluded by the resolution of the breach of contract claim. *Id*. 731. Both claims were based on the same underlying transaction. *Id*. 721. The latter claim was precluded even though the damages for bad faith were different than the damages for breach of contract. *Id*. 729.

2. Lemartec's State Court indemnity claim is not "materially different" from the claims it raised and litigated in Federal Court.

Lemartec's attempt to assert the indemnity claims are "materially different" because it relies on different evidence also fails. (Proof Br. 48-54.)

That additional evidence may be presented in Lemartec's State Court indemnity claim does not defeat claim preclusion. "Perfect identity of evidence is not the standard in Iowa for whether claim preclusion applies." *Villarreal*, 873 N.W.2d at 729. While "'a substantial overlap' of proofs and witnesses 'ordinarily' leads to claim preclusion,… the absence of such overlap is not fatal to claim preclusion." *Id.* (citing Restatement (Second) Judgments §24 cmt.b). The Restatement further explains: "The rule of §24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action... [t]o present evidence or grounds or theories of the case not presented in the first action...." Restatement (Second) Judgments §25.

The *Villarreal* court explained its application of the Restatement rule: "While a first-party bad-faith claim will always require some additional proof, such a claim nonetheless challenges the same basic conduct as the underlying breach-of-contract claim—namely, the insurer's refusal to pay benefits that were rightly owed." *Villarreal*, 873 N.W.2d 729.

Here, Lemartec's State Court indemnity claim related to HFCA "challenges the same basic conduct as the underlying" Federal Court claims—ACT's performance of its obligations under the Purchase Order. The Lemartec claim against ACT for indemnification of damages arising from HFCA cannot be resolved without re-litigating the underlying transaction between Lemartec and ACT, *i.e.*, ACT's obligations and performance of the Purchase Order. In the Federal Court case, Lemartec identified "specifically, the provisions where ACT agreed that its 'work shall be of quality construction' and that the 'Work shall comply with applicable code requirements . . . [and] shall be 100% operable and functional and be compatible in all respects with the other portions of the Work.'" (App. 494.) Lemartec also argued ACT "'[g]uarantee[d] the work for 18 months after delivery of Equipment or 12 months after Start-up, whichever is sooner'" in the Purchase Order, which supported Lemartec's claim for implied contractual indemnity. (App. 496.) These are the same duties Lemartec

relies on in this State Court case to support its claim that ACT owes it a duty of indemnification. (App. 101-107, ¶13, ¶22, Counts III-VI.) It is not possible for Lemartec to prevail against ACT on its indemnity claim against ACT in the State Court case without obtaining a judgment that is fundamentally inconsistent with the judgment that was previously entered by the Federal Court.

Lemartec's attempt to distinguish between the particular defects identified by SPG in the Federal Court case and the particular defects identified by HFCA in this State Court case relies on its erroneous premise that the HFCA alleged defects were based on "later events". (Proof Br. 42-43 n.10, relying on cases applying the "bright-line rule" that claim preclusion does not apply to events post-dating the first suit.) But Lemartec identifies the same obligations owed by ACT in both cases, critically, obligations ACT completed prior to either lawsuit. Lemartec's reliance on "later event" cases is simply inapposite.

Likewise, Lemartec attempts to minimize the defects issue in the Federal Court case, asserting (with no record support) that "[t]he discovery in the Federal Suit was largely limited to whether the components delivered by ACT to the Project were in accordance with the specifications." (Proof Br. 53 (emphasis added).) This is a misstatement of the record. Lemartec

did not just allege that ACT "improperly aligned bolt holes". (*Id.*) Lemartec litigated, and presented substantial evidence and testimony in the Federal trial, about a significant number of defects, including:

> ACT's deficiencies related to the Salt Conveyor include, but are not limited to: defective handrail on transfer tower, defective stairs on transfer tower, defective hopper rail car unload pit, defective rail car unloading pit, defective skirt boards, defective tripper car, defective festoon, defective gear box and head pulley, defective conveyors, defective air compressor, defective gear box and motor, defective pulleys, defective pan feeder rail car pit, defective stops for tripper car, defective collector chute to bucket elevator, and defective catwalk between transfer tower and salt building. ACT's numerous deficiencies in designing and manufacturing the Salt Conveyor in accordance with the Project specification drawings shows that ACT failed to follow specific plans, which supports Lemartec's implied contractual indemnity claim.

(App. 468-69.) Conversely, ACT alleged and proved that the conveyor system was 100% operational and that ACT satisfied all of its contract and warranty obligations.

Lemartec has abandoned its distinction between the "Delay case" and "Defect case" it urged to the Business Court, now adopting an entirely new distinction between "Pre-Completion vs. post-completion defects". (Proof Br. 57.) Yet, Lemartec did not limit its defect claims in the Federal Court case to the installation, or pre-completion, period. To avoid summary judgment, Lemartec argued: "The Lemartec-ACT agreement further provides: 'ACT shall Guarantee the work for 18 months after delivery of

Equipment or 12 months after Start-up, whichever is sooner.'" (App. 467.) In response, and to support an essential element of its own breach of contract claim (that ACT performed all of its contract obligations), ACT had to put on evidence at trial that the equipment was fully operational after it was installed. (*See*, *e.g.*, App. 758, Trial Tr. 699:4-11.)

ACT identified significant evidence about ACT's alleged defective work in its Reply Brief, including, *inter alia*:

- trial exhibits that related to alleged defects included Exhibits 562 (rail hopper chute); 563 (conveyor legs and piers); 566 (hand rails); 568-70 (bucket elevators); 571 (video of operational system (not in appendix)); 339 (tripper car); 346 (tripper and hopper); 349 (tipper, piers, chute & diverter, discharge, electrical; 351 (listing 30 "action items"); 354 (motors, gears, belts, switches); 362 (electrical).
- The trial testimony included lengthy and detailed examinations about whether the equipment conformed to the contract and warranty requirements.

(App. 195-96.) ACT proved the system was 100% operational after it was installed.

As a factual matter, Lemartec fails to support its claim that the State Court action would rely on "significantly different" evidence. As a legal matter, the claimed differences are immaterial, where they rely on the same transaction, i.e., ACT's performance of the Purchase Order.

Lemartec's discussion of the difference between a claim for partial breach and full breach of contract misapplies that concept to this case.

(Proof Br. 54-57.) The Restatement reveals a partial breach relates to a contract involving ongoing obligations. Restatement (Second) Judgments §26, cmt.g (1982); *id.*, Illus. 7 (addressing employment contract). Similarly, a party's breach of a contract and its subsequent refusal to pay a judgment arising from that breach involve subsequent acts by the alleged wrongdoer. *Geneva Corp. Fin. v. G.B.E. Liquidation Corp.*, 598 N.W.2d 331, 334 (Iowa App.1999)(distinguishing between establishing defendant's liability under the listing contract and subsequent actions of collecting the judgment from that liability).

But here, the actions by ACT that form the basis for Lemartec's indemnity claim in this State Court case involve ACT's performance of the Purchase Order, which was completed by June 2015, the same actions that were litigated in the Federal Court case when the Federal Court tried not only Lemartec's indemnity claim, but also Lemartec's breach of contract and breach of warranties claims as well as ACT's claim for nonpayment. Lemartec has identified no "subsequent acts" of ACT to support its claims in this State Court case. "Whether the cases arise out of a single transaction or a series of transactions turns on whether there is 'a natural grouping or common nucleus of operative facts' and involves 'a determination whether the facts are so woven together as to constitute a single claim....'"

Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858, 861 (Iowa 1990)(quoting Restatement (Second) Judgments §24 cmt.(b)). The "common nucleus of operative facts" involved in both cases is whether ACT performed its obligations under the Purchase Order.

The Business Court properly applied claim preclusion to Lemartec's claims against ACT in this State Court suit.

D. Lemartec misstates the record and misapplies claim preclusion when it argues its State Court claims arose after the Federal Court claims.

Lemartec improperly attempts to set up an "issue of first impression" for this Court by urging it to apply the "bright-line rule" from federal and other state jurisdictions, which hold "that claim preclusion does not bar claims that arise ***after filing of the first complaint***." (Proof Br. 35.)

Lemartec improperly relies on the filing of the first-party claims in each of the underlying cases rather than the filing of the claims as between the parties at issue—the claims between Lemartec and ACT—to support its argument. Lemartec also ignores the fact that both underlying cases as between Lemartec and ACT changed drastically when Lemartec filed nearly identical, *verbatim*, amended claims in both cases one day apart. Previously, the parties had asserted only indemnification and contribution claims against each other. But the claims changed significantly in October 2017 when

Lemartec filed nearly identical pleadings against ACT in both cases, adding for the first time substantive claims for breach of contract, breach of implied warranties, and breach of express warranties. (*See* App. 201, Table A; App. 95; App. 537.)[4] Indeed, Lemartec actually filed the Amended Third-Party Petition in the State Court case on October 26, 2017, BEFORE filing the Amended Cross Claim in the Federal Court case on October 27, 2017.

While "the opportunity to file a supplemental complaint is not an obligation", 18 Fed. Prac. & Proc. Juris. §4409 (3d ed.), where a party takes that opportunity and amends its pleadings to assert new claims, it cannot avoid the preclusive effect of the ensuing judgment. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) (applying the bright-line rule where Plaintiff "had not yet applied for the Finance Director position at the time of her first or second amended complaints, let alone received the July 6, 2011 rejection letter"). Lemartec cannot now sincerely assert that its State Court amended claims against ACT did not even arise until after it filed the same amended claims in the Federal Court case, where it filed the State Court claims first.

Under the "bright-line rule" urged by Lemartec, claim preclusion "does not apply to events post-dating the filing of the initial complaint.'"

[4] These amended pleadings are noticeable absent from Lemartec's "graphic timeline" attached to its Brief and Lemartec's recitation of the pleadings.

Howard, 871 F.3d 1039 (emphasis added)(quoting *Morgan v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011)). In *Howard*, the subsequent "event" was a letter sent by the plaintiff's former employer rejecting her application for a different job just three months prior to the trial in her wrongful discharge case. Here, Lemartec concedes that the Salt Conveyor system was completed in May 2015 and turned over to Conve in June 2015. Lemartec does not rely on anything ACT did, or failed to do, after that time, which was before even the original lawsuit by SPG was filed in the Federal Court case in October 2015.

With respect to claims premised on breach of contract, the rule has been stated as follows: "[a] judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract <u>that consist of failure to render performance due</u> after commencement of the first action." *Baker Group, L.C. v. Burlington N. and Santa Fe Ry. Co*., 228 F.3d 883, 886 (8th Cir.2000) (emphasis added)(quoting Restatement (Second) Judgments §26, cmt.g (1982)); *see also Bank of New York v. First Millennium, Inc*., 607 F.3d 905, 919 (2d Cir. 2010) (where notes did not become due until December 2006, plaintiffs' claims premised on the final maturity were not precluded by earlier cases brought prior to maturity date).

Applying this bright-line rule, the Federal Court's judgment would not prevent Lemartec from bringing subsequent claims premised on ACT's "failure to render performance due", or for an action taken by ACT, after October 27, 2017, the date of its amended counterclaims in Federal Court. But Lemartec is not asserting claims in this State Court case based on ACT's performance (or failure thereof) after that date.

Lemartec misapplies its own bright-line rule when it attempts, with no authority, to rely on discovery responses served by HFCA in June 2018 to support its argument that it could not have known about the purportedly latent defects identified by HFCA and therefore could not have asserted those claims earlier.[5] The rule cited by Lemartec depends not on when discovery is produced in litigation to support a claim, but when the act or event giving rise to the claim, *i.e.*, ACT's breach, occurred. Lemartec's attempt to rely on the discovery responses is also nonsensical given that Lemartec had already filed its initial Third-Party claim against ACT in this State Court case on May 30, 2017 and filed its Amended Third-Party claims against ACT on October 26, 2017, both long before the discovery responses

[5] Its argument is also contrary to Iowa law. *See Arnevik*, 642 N.W.2d 320 ("To hold the conclusive effect of a judgment either as an estoppel or as a merger or bar may be escaped by showing even justifiable ignorance of the existence of facts or evidence which might otherwise have been presented … is a clear violation of the fundamental policy and purpose of the doctrines of res judicata and collateral attack.") (internal citations and citations omitted).

provided by HFCA. The June 2018 HFCA discovery responses are simply irrelevant to the Court's analysis of claim preclusion.

Finally, recent Iowa cases make clear Iowa courts would not follow Lemartec's attempted application of the "bright-line rule" if doing so would be inconsistent with the transactional approach (discussed above) in the context of duties owed under a contract. In *Pavone*, SMG, a casino management company, sued a developer under their casino management contract when the developer was awarded a new gaming license for a casino in Emmetsburg, Iowa, claiming the developer breached its obligation to negotiate a management agreement in good faith. *Pavone v. Kirk*, 807 N.W.2d 828, 830-31 (Iowa 2011). During the course of that lawsuit, the developer was awarded another license for a casino in Clinton, Iowa, and it did not contact SMG to negotiate an agreement for that casino. Rather than amend its pleadings in the pending litigation, SMG brought a second action after it received a favorable judgment in the first lawsuit. *Id*. 838. The Supreme Court rejected "SMG['s] argue[ment that] claim preclusion is not a bar to its Clinton action because the Clinton action developed after the filing of the Emmetsburg claim", concluding "SMG, in a single cause of action and within the statute of limitations, was required to bring all claims for damages based on its remaining rights to performance under the October

agreement." *Id.* 838. Even though the developer was not awarded the Clinton license until after the first action was commenced, claim preclusion applied to the accrual of additional damages stemming from a breach of the original contract. *Id.* 838-39. *See also Villarreal*, 873 N.W.2d 720 (describing with approval this holding from *Pavone*); *Arnevik*, 642 N.W.2d 319 (affirming application of claim preclusion and noting "Arnevik does not now allege any new contract or tort theories occurred based on events arising subsequent to the court's grant of the University's motion for summary judgment on the first claim").

In the same way here, Lemartec does not assert ACT breached any obligations under the Purchase Order after Lemartec filed its claims against ACT. Thus, when Lemartec brought its claims against ACT arising out of ACT's purported breach of the Purchase Order, it was required to bring all damages arising out of ACT's alleged breaches of the same Purchase Order in one case.

E. That claims for indemnity "mature" and are collectible only when the indemnitee is found liable does not prevent claim preclusion from applying to Lemartec's indemnity claim.

Lemartec is correct that some rules apply differently to indemnity claims. For instance, crossclaims for indemnity are not compulsory, so the failure to assert a crossclaim for indemnity in one suit does not prevent a

party from bringing a second suit under the doctrine of claim preclusion. *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146 (Iowa 1983)("Claim preclusion is not applicable to the facts in this case, however, because neither Israel nor FMI filed a cross-claim against the other for indemnity in the first lawsuit. Such a cross-claim was not compulsory but permissive."). The Court explained: "There having been no asserted or required indemnity crossclaim in the first lawsuit, there was no prior adjudication of such a claim and no preclusion of the Israel claim for indemnity against FMI." *Id.* (emphasis added).

Thus, even though indemnity crossclaims are not compulsory, if a crossclaim for indemnity is asserted in the first case, as it was here, claim preclusion applies if the claim is adjudicated in the first suit. *Id.; see also Arnevik*, 642 N.W.2d 320-21 ("[O]nce [the employee] started down the path in the first action seeking indemnification from [her employer], she was required to bring all theories of recovery that time."). Lemartec also ignores the fact that it amended its pleadings in both cases to assert the substantive claims upon which the indemnity claims were necessarily based. Lemartec seemingly ignores those substantive claims throughout its brief[6], discussing only the indemnity portion of the claims in both cases. When Lemartec

[6] Lemartec has waived its appeal of those counts. *See* Section III.

amended its Federal Court counterclaims against ACT to add substantive claims arising from ACT's breach of the Purchase Order and related warranties to its indemnity claim, Lemartec was required to bring all claims arising out of that same transaction—including its claim for indemnification. *Arnevik*, 642 N.W.2d 320-21 (plaintiff's cross-petition for indemnification in first suit precluded subsequent action raising second indemnification claim).

Lemartec's argument that "indemnity 'does not accrue until the indemnitee's liability is fixed by judgment or settlement'" (Proof Br. 39-40 (quoting *Kaydon Acquisition Corp. v. Custom Mfg., Inc*., 301 F. Supp. 2d 945, 959 (N.D. Iowa 2004)), does not support its argument that its indemnity claim "arose" at a later time under its "bright-line rule". In a case cited by Lemartec, *Evjen v. Brooks*, 372 N.W.2d 494 (Iowa 1985), the Court recognized "[i]t is true … an action for indemnity or contribution accrues or becomes enforceable only when the indemnitee's legal liability becomes fixed or certain as in the entry of judgment or a settlement". *Id.* 496. The Court explained, however, that a claim for contribution, like a claim for indemnity, nonetheless "comes into being … the instant" the acts occur that "give to the injured person a cause of action against them". *Id.* at 497.

Lemartec misstates the holding of *In re Lehman Brothers Holdings Inc. ("LBHI")*, 593 B.R. 166, 180–82 (Bankr. S.D.N.Y.2018), when it

argues that case applied the "bright-line rule" in the context of claim preclusion. (Proof Br. 41.) First, *LBHI* addressed issue preclusion, not claim preclusion. 593 B.R. 182 ("[T]he Court finds no basis for collateral estoppel to apply here. For all of the foregoing reasons, the Motion to Dismiss the Complaints on the basis of issue preclusion is denied." (emphasis added)). Further, *LBHI* merely held the statute of limitations on an indemnification claim begins to run when "its liability to a third party was fixed or payment was made." *Id.* 181-82. The issue was not, as Lemartec claims, the same as the issue Lemartec attempts to raise: "whether Lemartec's indemnity claim in the State Suit accrued before or after ACT's federal complaint." (Proof Br. 41.)

The *Arnevik* Court held a plaintiff's subsequent action for indemnification was barred by claim preclusion where she asserted a cross-petition for indemnification in a prior lawsuit, even though her own liability had not yet been determined at the time of the first lawsuit. *Arnevik*, 642 N.W.2d at 317 (after employee was sued for injuries incurred by other driver in car accident, employee brought cross-petition against employer for indemnification). Lemartec's position is not only unsupported by the cases it cites, it is contrary to Iowa law.

F. The Exception to Claim Preclusion when a party acquiesces to claim splitting does not apply to these facts.

Lemartec attempts to avoid the clear application of claim preclusion to its nearly *verbatim* claims brought in this State Court case by arguing that ACT acquiesced in its action of splitting its claim, relying on Section 26 of the Restatement (Second) Judgments. Comment (a) states:

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Restatement (Second) Judgments §26, cmt. a (emphasis added). The rule by its very language applies when one party brings "part of the same claim" in one action while asserting the other part of the claim in another action, thus "splitting [] the plaintiff's claim". The Restatement demonstrates this rule in Illustration 1, describing a car accident plaintiff who pursued his personal injury claim in one case and his property damage claim in another case. *Id.*, Illus. 1.

While the Supreme Court of Iowa has twice applied the Restatement, *see Noel v. Noel*, 334 N.W.2d 146, 149 (Iowa 1983); *Pagel v. Notbohm*, 186 N.W.2d 638, 639–40 (Iowa 1971), as the Business Court aptly explained,

both cases involved prototypical examples of a defendant acquiescing in "claim splitting" such that he waived the right to assert claim preclusion as a defense. In *Pagel*, a father and son were involved in a car accident, and the father brought one suit on behalf of his son's estate for wrongful death damages and brought a second action for his own injuries and for damage to his car. *Pagel*, 186 N.W.2d 639. In *Noel*, a son brought a declaratory judgment action against his father to determine his right to continuous tenancy of the family farm and the right to purchase it on his father's death and, after his father died but before the declaratory judgment action was tried, a second action in his father's estate for his share of the inheritance to purchase the farm, relying on the same oral promise from his father. *Noel*, 334 N.W.2d 147. In both cases, the claim—one arising from a car accident and one arising from an oral promise—was split, where, in the words of the Restatement, the plaintiff "maintain[ed] separate actions based upon parts of the same claim". Restatement (Second) Judgments §26, cmt.a (emphasis added). The father in *Pagel* brought part of his claim for his son's wrongful death in one action and the other part for his personal injuries and property damage in another. The son in *Noel* brought part of his claim for a declaration of his rights in one action and the other part for damages in another.

There can be no acquiescence in claim-splitting if the claims were not split between different actions. This is not a case where the plaintiff brought a personal injury claim in one case and a property damage claim in another. This is a case where the plaintiff articulated exactly the same claims, in a cut-and-paste operation, in two cases. The acquiescence rule avoids the game of "gotcha", where the defendant silently lays in wait for the plaintiff to lose the first case. However, the rule was never intended to create a reverse "gotcha" where the defendant is unaware that the plaintiff intended to split its claims until it was too late to for the defendant to object.

When arguing that it did split its claims, Lemartec again focuses on the initial claims between the parties, ignoring the nearly identical, *verbatim*, amendments it made in both cases on October 26 and 27, 2017. In those amended pleadings, Lemartec did not split its claim, bringing parts of the same claim in one case and parts in another. Rather, it brought all parts of the same claims in both cases, seeking the same full relief in both. This is best seen by the side-by-side comparison of the two amended pleadings Lemartec filed in each case one day apart (App.201, Table A), as well as the identical pleas for relief on each of its substantive claims against ACT (*compare* App. 541-543, U.S.Dkt. 125, 5-7 (identical "Wherefore" clauses

for Counts II through V) *with* App. 104-06, Lemartec Pet. 10-13 (same identical "Wherefore" clauses for Counts III through IV)).

Thus, there was no "splitting of [Lemartec's] claim", Restatement (Second) Judgments §26, cmt. a, to which ACT needed to object. "The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such a right." *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 292 (Iowa 2017), reh'g denied (Mar. 3, 2017)(emphasis added). The defendant cannot waive a right to object to claim splitting if the plaintiff did not split its claim.

To the extent ACT should have objected, it did so. The waiver rule is not absolute and is to be applied based on the facts of each case. *Bickford v. Am. Interinsurance Exch.*, 224 N.W.2d 450, 454 (Iowa 1974) ("We hold under the factual circumstances shown here the defense of res judicata is not available by a motion to dismiss.")(emphasis added).

Cases addressing waiver or acquiescence note that a defendant waives its rights when it sits silently by, content to litigate both actions simultaneously without taking advantage of procedural mechanisms available to avoid the concurrent litigation. *See, e.g., Aguirre v. Albertson's, Inc.*, 117 P.3d 1012, 1022–24 (Or. App. 2005)(noting defendant was "content to defend" both cases where it failed to move under Oregon Rule

21(A)(3), allowing motion to dismiss when "there is another action pending between the same parties for the same cause"). The waiver exception is also important to avoid abuses by the defendant, where "a contrary approach 'would encourage litigants to engage in dishonest (or least less than forthright) behavior' and in 'unsavory tactical maneuvers.'" *Aguirre*, 117 P.3d 1023-24 (quoting *Matter of Super Van Inc*., 92 F.3d 366, 371 (5th Cir.1996)).

In *Aguirre*, the defendant attempted to rely on a prior MDL case, about which the plaintiff was not even aware, to bar a state action. The Court explained: "By the time [defendant] filed its motion for summary judgment raising claim preclusion (and revealing the existence of the MDL action), plaintiff could neither opt out of the Rule 23 class in the MDL action nor recover for her claims in that action. Albertson's silence effectively froze plaintiff out of any remedy on her claims." *Id*. 1024-25.

The same is not true here. The Iowa Rules of Civil Procedure do not allow a motion to dismiss similar to the Oregon rules. *See* Iowa R.Civ.P. 1.421. Further, ACT repeatedly and strenuously objected to Lemartec's attempt to expand the Federal Court case from Lemartec's initial claim for indemnification to the significantly broader and all-encompassing substantive claims asserted in Lemartec's Amended Counterclaims. ACT

was unsuccessful, and Lemartec was allowed to pursue all of its claims—even moving the trial date, engaging in additional discovery, and designating a new expert—in the Federal Court case.

Although this State Court case has been pending for some time, it is also important to note it is still in the initial discovery phases. Indeed, the parties have only exchanged initial documents, primarily contract documents and accounting of amounts claimed unpaid, and only some parties have answered the initial Pattern Interrogatories. The Business Court was well aware of the early stage of this litigation and ACT's limited involvement when it exercised its broad discretion in granting ACT's Motion to Amend to add *res judicata* as a defense. *Rife v. D.T. Corner, Inc*., 641 N.W.2d 761, 765 (Iowa 2002)(affirming district court's exercise of discretion in granting a party leave to add affirmative defense one week prior to trial).

Further, Lemartec was fully aware of the interplay between the two cases as evidenced by its settlement agreement with SPG. When Lemartec settled its claims with SPG in the Federal case, the settlement document expressly included a release of all claims between SPG and Lemartec in the State case as well. (App. 919-22.) It is disingenuous for Lemartec to now claim there was no "commonality" (Proof Br. 24) between the cases.

Finally, as Lemartec concedes, the waiver exception to claim preclusion related to a defendant acquiescing in a plaintiff's splitting of its claims does not apply to issue preclusion. *See, e.g.*, *Noel*, 334 N.W.2d at 150 (affirming application of issue preclusion despite rejecting claim preclusion based on waiver). Thus, this Court may consider the Business Court's Ruling on issue preclusion without addressing the waiver exception to claim preclusion raised by Lemartec.

II. Issue preclusion applies to Lemartec's state-court claims.

A. Error Preservation

Lemartec preserved error on issue preclusion.

B. Scope of Review

This Court reviews summary judgment for correction of errors law. *Gardner*, 659 N.W.2d at 201.

C. Lemartec cannot relitigate issues actually resolved in the Federal Court action.

"Issue preclusion prevents parties 'from relitigating in a subsequent action issues raised and resolved in [a] previous action.'" *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 103 (Iowa 2011)(quoting *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)). Issue preclusion applies to both factual and legal issues raised and resolved in a previous legal action. *See Barker v. Iowa Dept. of Pub. Safety*, 922 N.W.2d 581, 587 (Iowa 2019);

Soults Farms, 797 N.W.2d 103-04; *Grant v. Iowa Dept. of Human Services*, 722 N.W.2d 169, 174 (Iowa 2006)("[I]t is important to observe that it applies to both legal and factual issues."). "[W]here a particular issue or fact is litigated and decided, the judgment estops both parties from later litigating the same issue. The entire premise of issue preclusion is that once an issue has been resolved, there is no further fact-finding function to be performed." *Grant*, 722 N.W.2d 174 (quoting *Colvin v. Story County Bd. of Review*, 653 N.W.2d 345, 348–49 (Iowa 2002)).

The doctrine "serves a dual purpose: to protect litigants from 'the "vexation of relitigating identical issues with identical parties …,"' and to further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.'" *Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 571–72 (Iowa 2006)(quoting *Am. Family Mut. Ins. v. Allied Mut. Ins.*, 562 N.W.2d 159, 163 (Iowa 1997)). Issue preclusion also "'prevent[s] the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question.'" *Employers Mut. Cas. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012)(quoting *Grant*, 722 N.W.2d at 178).

"The party invoking issue preclusion must establish: '(1) the issue in the present case must be identical, (2) the issue must have been raised and

litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.'" *Id.* (quoting *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002)).

D. Lemartec's State Court claims involve identical issues resolved in the Federal Court case.

Lemartec is correct that defining the issues decided in the prior case is critical to proper application of the issue preclusion doctrine. However, Lemartec's characterization is much too narrow, claiming the federal case decided only the issue of whether Lemartec was "entitled to receive indemnification for SPG's claims for alleged pre-completion delays and deficiencies". (Proof Br. 59.) The federal case was not limited to only those issues raised by SPG as the original plaintiff, or Lemartec's claim for indemnity related only to Lemartec's obligations to SPG, as Lemartec attempts to portray it. Lemartec improperly ignores the other claims and issues raised, and litigated, in federal court.

Lemartec greatly expanded its claims against ACT in both cases after Lemartec settled with SPG, adding identical substantive claims for breach of contract and breach of express and implied warranties, all of which were tried to judgment in the Federal Case. Lemartec's nearly identical state-

court and federal-court amended pleadings, filed a day apart, establish the identity of the issues. *Hunter*, 300 N.W.2d at 125 ("Both the Wadle petition and that filed by plaintiffs contained essentially identical allegations regarding the city's purported negligence, arising from a common nucleus of fact", which satisfied the first element of issue preclusion).

With respect to the indemnity claim, the separate substantive claims form the source for Lemartec's indemnity claim, such that ACT's success on the substantive claims necessarily defeats the indemnity claim. Lemartec also ignores ACT's own claim for breach of contract based on nonpayment, which the Federal Court also found in ACT's favor. The issues necessarily found by the Federal Court in deciding ALL claims preclude Lemartec's attempt to relitigate the same issues in this case.

1. The "issues" involved in each case depend on the elements of the litigated claims.

Soults Farms is the leading case on identifying whether the issues raised in both cases are identical. In *Soults Farms*, Bud Soults ("Bud"), the president of Soults Farms, signed two notes with Security State Bank ("SSB") in 1998 on behalf of the corporation and a third note in his personal capacity. Bud also signed two mortgages to secure the corporate and personal notes. *Soults Farms*, 797 N.W.2d at 103.

In 2002, SSB brought a mortgage foreclosure action against both the corporation and Bud. In resisting SSB's summary judgment motion, the corporation argued Bud lacked authority to pledge its property as collateral for his personal note. *Soults Farms*, 797 N.W.2d 103. The court found Bud had actual authority to convey the corporation's property to secure his personal note and granted summary judgment to SSB. *Id.*

Bud had also borrowed money from an individual, Charles Schafer ("Schafer"), beginning in 1999, giving Schafer a mortgage on the corporation's real property in 2000. In 2005, the corporation brought a subsequent action against Schafer to quiet title and remove Schafer's mortgage from its property. *Soults Farms*, 797 N.W.2d 99. The corporation asserted the Schafer mortgages were invalid because the corporation's Articles of Incorporation required two signatures to mortgage its property, and only Bud signed the Schafer mortgages. *Id.* 103. Schafer defended on the basis of issue preclusion, relying on the prior SSB case in which the court found Bud had actual authority to convey the 1998 mortgage to SSB on the corporation's real property to secure his personal note. *Id.*

The Supreme Court rejected the corporation's argument that the validity of the 2000 mortgage to secure the Schafer mortgage was not the same issue as the validity of 1998 mortgage to SSB because they involved

separate transactions and there were factual variations between the two mortgages. *Soults Farms*, 797 N.W.2d 105. In addressing whether the two cases involved "the same issue", the Supreme Court identified the issue presented in both the SSB litigation and the current case as whether Bud had "unilateral authority to mortgage [the corporation's] property". *Soults Farms*, 797 N.W.2d at 104-05. Even though the corporation raised different factual arguments for why Bud lacked authority to grant the separate mortgages—arguing in the SSB case Bud lacked actual authority and arguing in the Schafer case the Articles of Incorporation required two signatures—the Supreme Court found the issue to be the same: whether Bud had "unilateral authority to mortgage [the corporation's] property". *Id*. That the opposing party raised new arguments and presented different evidence challenging the same issue did not make the issues different. *Id.*

Even though the prior case involved a different mortgage, the validity of both mortgages turned on the same legal issue—whether Bud had authority to unilaterally mortgage the corporation's property. *Soults Farms*, 797 N.W.2d 104 ("[T]he same issue is presented 'if the question is one of the legal effect of a document identical in all relevant respects to another document whose effect was adjudicated in a prior action.'" (quoting Restatement (Second) Judgments §27 cmt.c, 253).

Harrison v. State Bank of Bussey, 440 N.W.2d 398, 401-02 (Iowa Ct. App. 1989) also involved identifying "common issues" concerning rights and obligations under a contract. After a father removed his son's name from a certificate of deposit ("CD") and used the proceeds to purchase a second CD, the son sued the bank and the executor of his father's estate for the proceeds of the second CD as representing the proceeds of the first CD. The District Court granted the bank's motion for summary judgment. The son then brought another action against the bank, this time seeking damages for breach of contract based on the first CD. The District Court granted summary judgment under issue preclusion. The appellate court identified the common issue: "[i]n both cases, the plaintiff claimed a legal right to the proceeds of the certificates of deposit." *Harrison*, 440 N.W.2d at 402. Where the issue of entitlement to those proceeds had been decided in the first case, the District Court properly applied issue preclusion. *Id.*

In identifying issues decided in a prior action, the Court must also consider the elements of the adjudicated claims. *See Iowa S. Ct. Bd. of Prof. Ethics and Conduct v. D.J.I.*, 545 N.W.2d 866, 875 (Iowa 1996), as amended on denial of reh'g (Apr. 17, 1996)(considering whether Board of Professional Ethics could rely on offensive issue preclusion to establish attorney violated rules of professional responsibility). In *D.J.I.*, the Court

identified the issues decided in the prior civil action for fraud and legal malpractice based on the elements of those claims. "Having found the respondent committed fraud, the district court necessarily found respondent made misrepresentations to his clients". *D.J.I.*, 545 N.W.2d 875.

2. The Federal Court decided the issues of whether ACT's design and fabrication of the salt conveyor system breached the terms of the Purchase Order or violated any express or implied warranties arising from that agreement.

To prove its claim for nonpayment in Federal Court, ACT was required to establish: "(1) the existence of a contract, (2) the terms and conditions of the contract, (3) that [plaintiff] has performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) that plaintiff has suffered damages as a result of defendant's breach." *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010)(emphasis added)(citing *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998))). "A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Id.* (quoting *Molo Oil*, 578 N.W.2d 224).

When the Federal Court found for ACT on all claims, it necessarily found (1) ACT "performed all the terms and conditions required under the

contract", and (2) Lemartec lacked a "legal excuse" to withhold payment. *See Royal Indem. Co.*, 786 N.W.2d 846. The Business Court properly defined the issue decided by the Federal Court as "whether ACT's design and fabrication of the salt conveyor system breached the terms of the Purchase Order or violated any express, implied, or equitable warranties contained in that agreement." (App.26, 2018-11-20 Ruling 26.)

3. Lemartec's indemnity claim in this case involves the same issue of whether ACT violated any terms of the Purchase Order or any express or implied warranties arising from it.

Lemartec's argument that the Federal Court's "ruling that the indemnity issue raised in that case was specific to the sums that Lemartec had actually paid to SPG" (Proof Br. 60) is a red herring. Before Lemartec is entitled to indemnity from ACT for amounts Lemartec is found liable to anyone, including HFCA, Lemartec must first establish the basis for ACT's indemnity obligation to Lemartec. It is this first element of duty, not the final element of damages focused on by Lemartec, which is the same issue litigated, and therefore precluded, by the Federal Court case.

"Under Iowa law, actions for contribution and indemnity usually require either an underlying tort [including actions under Iowa Code §668] or a contractual or quasi-contractual relationship." *Penford Prod. Co. v. Schneider Structural Eng'g, Inc.*, No. 1:09-CV-00037-JEG, 2010 WL

11469649, *2 (N.D. Iowa Sept. 3, 2010)(citing *Wells Dairy, Inc. v. Am. Indus. Refrig*., Inc., 762 N.W.2d 463, 472 (Iowa 2009)). Lemartec's "vessel" analogy ignores that the duty to indemnify depends on obligations owed between the indemnitee (Lemartec) and the indemnitor (ACT), not the first-party plaintiff and the indemnitor.

It is important to Lemartec's indemnity claims, in both the federal and state cases, that the Purchase Order contains no express indemnity provision, leaving Lemartec to rely on common law, i.e., implied contractual indemnity or equitable indemnity, as the source of ACT's duty to indemnify Lemartec. Under Iowa law, an implied contractual duty to indemnify may arise from a contractual relationship that lacks an express obligation to indemnify where there are "'independent duties' in the contract to justify the implication." *Wells Dairy, Inc.*, 762 N.W.2d at 470 (quoting *McNally & Nimergood v. Neumann–Kiewit Constructors, Inc.*, 648 N.W.2d 564, 573 (Iowa 2002)). Further, U.C.C. warranties have been found to support the independent duty needed to support a claim for equitable indemnity. *Wells Dairy*, 762 N.W.2d at 474. Critical to imposition of indemnity under either theory is that the party breached a duty owed to the party seeking indemnity. *Id.* at 470.

Thus, any indemnity claim Lemartec has against ACT—whether premised on amounts Lemartec paid to SPG in their settlement or amounts it

may be found to owe to Conve and/or HFCA in this State Court action—requires Lemartec to first identify either an "'independent dut[y]' in the contract" between Lemartec and ACT or an express or implied U.C.C. warranty that was breached by ACT before ACT has any obligation to indemnify Lemartec for anything.

In its Amended Third-Party Petition in this State Case, Lemartec identified ACT's obligations giving rise to its common law indemnity claim as:

> ACT agreed to "perform and complete all Work required for the proper execution and completion of all Salt Conveyor Systems Supply work for the Project." In the written purchase order, ACT also agreed that its "work shall be of quality construction" and further agreed to be responsible for all "supervision, management, Engineering, Design, labor, materials, equipment, tools, hoisting, transportation, permits, licenses, testing, fees, taxes, warranties and all work and services necessary to perform and complete all Salt Conveyor System Supply work" for the Project.

(App.101, 2017-10-26 Lemartec Pet. ¶13.) As detailed below, these are the same obligations the Federal Court decided in ACT's favor.

4. The parties litigated, and the Federal Court found, ACT satisfied each of the obligations Lemartec relies on in the State Case as the basis for ACT's common law indemnity obligation.

The source of ACT's duty to indemnify Lemartec was a significant source of litigation in the Federal Court case. (*See* App. 461-76, Lemartec

SJ Br.; App. 493-96, Lemartec Resist. ACT MSJ.) In resisting summary judgment, Lemartec argued "ACT essentially agreed and warranted to design and manufacture the Salt Conveyer for the Project in accordance with specific plans and procedures". (App. 494.) Lemartec identified the following contractual provisions to support its indemnity claim:

- "the provisions where ACT agreed that its 'work shall be of quality construction'" (*Id.*);
- The provision "that the 'Work shall comply with applicable code requirements . . . [and] shall be 100% operable and functional and be compatible in all respects with the other portions of the Work'" (*Id.*); and
- the provision in which ACT "Guarantee[d] the work for 18 months after delivery of Equipment or 12 months after Start-up, whichever is sooner'" (*Id.* 496).

After avoiding summary judgment, Lemartec amended its counterclaims to include substantive claims for breach of contract, breach of implied warranty of workmanlike construction, breach of implied warranty of fitness for a particular purpose, and breach of express warranty (App. 541-45), each of which Lemartec had relied on as providing a basis to support ACT's obligation to indemnify Lemartec. Lemartec litigated each

of these substantive claims in the Federal Trial. (App. 600-08, Lemartec Proposed Ruling.)

With respect to the source of Lemartec's claim for implied contractual indemnity, Lemartec identified the litigated issues as whether ACT breached the independent duty "to provide the conveying system components in accordance with the construction drawings and specifications." (*Id.* 607.) With respect to the source of Lemartec's claim for equitable indemnity, Lemartec identified the litigated issues as whether "ACT breached the implied warranty of merchantability and the implied warranty of fitness for a particular purpose", based on those same substantive claims. (*Id.* 607-08.)

Following trial, the Federal Court expressly found in ACT's favor on each claim. "Lemartec failed to prove that ACT breached the purchase order. … Moreover, Lemartec failed to prove that ACT breached any implied or express warranty of merchantability or fitness for a particular purpose." (App. 686.)

It was within this context that the Business Court concluded that "the issue of indemnity rights arising under the Purchase Order has been raised and litigated in the prior federal action." (App. 351.) The Business Court explained: "Throughout litigation between the parties in federal court, the primary contention was whether ACT's design and fabrication of the salt

conveyor system breached the terms of the Purchase Order or violated any express, implied, or equitable warranties contained in that agreement." (*Id.* (emphasis added).) The Business Court properly concluded that "Lemartec cannot prevail on its indemnity action because the crucial issue of whether ACT breached the duties it owed under the Purchase Order has already been decided against Lemartec." (App. 354 (emphasis added).)

With those issues litigated and decided, Lemartec is unable to identify a source of either implied contractual indemnity or equitable indemnity to support its indemnity claim asserted in this State Court case. Issue preclusion defeats Lemartec's State Court indemnity claim. *See Soults Farms*, 797 N.W.2d at 104; *D.J.I.*, 545 N.W.2d at 875; *Harrison*, 440 N.W.2d at 402.

U.S. Gypsum Co. v. Indiana Gas Co., 350 F.3d 623 (7th Cir. 2003) (cited by Lemartec) supports ACT on this point. While the Fifth Circuit explained the district court's characterization of the issue as "the improper creation and operation of ProLiance" was too broad, *id.* 629, it recognized that a concrete finding "that ProLiance lacks market power" would have defeated USG's antitrust claim, because that claim requires a finding that the party holds market power, *id.* 630. However, the Court was unable to locate that finding in the agency's prior decision. *Id.* Here, the Federal Court did

make concrete findings that defeat Lemartec's indemnity claim by removing any basis to find that ACT owed a duty to indemnify Lemartec under the Purchase Order.

The two cases involve the same issue—whether ACT breached any duty that would give rise to an indemnity claim by Lemartec. The Federal Court ruled in ACT's favor on that issue, and Lemartec's indemnity claim in this case is precluded.

E. Lemartec's attempt to limit the Federal case to "indemnity for alleged pre-completion delays and deficiencies" ignores the breadth of the substantive claims litigated and decide in that case.

In the Business Court, Lemartec attempted to distinguish the cases by characterizing the federal case as the "delay case" and the state case as the "defect case". (App. 179, ¶¶1-2.) The Business Court rejected Lemartec's distinction based on significant evidence of defects actually litigated in the Federal trial. (App. 352-53 (Order); App. 193-97 (ACT MSJ Reply).) Lemartec now attempts to re-characterize the Federal case as involving "pre-completion" defects and the state case as involving "post-completion" defects. (Proof Br. 62.)

Lemartec's assertion on appeal that its State Court action is limited to "post-completion" defects is directly refuted by its State Court breach of

contract claim. In its October 26, 2017 amended pleading, Lemartec claims that ACT:

> a) Failed to deliver the components for the salt conveyor system supply work in a timely fashion;
> b) Failed to provide properly fabricated components for the salt conveyor system supply work;
> c) Failed to properly design and engineer the salt conveyor system supply;
> d) Failed to provide a salt conveyor supply system that was in compliance with applicable code requirements, the reasonable intent of the architect/engineer, that were one hundred percent operable and functional and that complied with the project specifications and drawings;
> e) Breached its guarantee made in conjunction with the purchase order.

(App. 104-05, Lemartec Petition, Count III.) Just like its attempted distinction in the Business Court, Lemartec's new purported distinction between the cases is contrary to the record.

Lemartec attempts to use the new distinction to support its argument that the two cases involve "a distinct set of alleged defects that allegedly arose during a different time period." (Proof Br. 62.) It also argues the "issue" as defined by Lemartec was never raised in Federal Court because "the right to indemnification does not fully mature until the indemnitee's liability is fixed by settlement or judgment." (*Id.* 64.) Neither of these arguments passes scrutiny.

1. The alleged defects in both cases are based on the same work performed by ACT pursuant to the same Purchase Order.

Lemartec relies on the differences between the first-party plaintiffs to argue that this case is analogous to cases holding that issue preclusion does not apply where the second suit involves a later time period and different factual circumstances. (*Id*. 63-64, n.13.) The cases cited by *Lemartec* do not support Lemartec's position.

In *Pfeil v. State St. Bank & Tr.*, 671 F.3d 585, 560-61 (6th Cir.2012), abrogated on other grounds, *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409 (2014), the second case alleged an ERISA Plan Manager breached fiduciary duties by making imprudent investments in General Motors after July 15, 2008, when GM announced a restructuring plan based on significant prior quarter losses. The first suit alleged the Manager breached fiduciary duties by failing to properly diversify funds within the Plan. *See Young v. Gen. Motors Inv. Mgt. Corp*., 325 Fed.Appx. 31, 32–33 (2d Cir.2009) (unpublished). The first case was dismissed on March 24, 2008 because the duty to diversify applies to the Plan as a whole, not individual funds. *Id.* Issue preclusion did not apply because the first case was dismissed before GM's July 15, 2008 announcement, upon which the second case was based. *Pfeil*, 671 F.3d 561.

In *Johnson v. Florida*, 348 F.3d 1334 (11th Cir.2003), the State sought to lift conditions contained in a Consent Decree related to operation of a state-run mental health facility. The district court had previously conducted a bench trial and "concluded that as of September 30, 1999, the State was providing a constitutionally adequate level of care." *Johnson*, 348 F.3d at1339. Three years later, the district court lifted all conditions except those related to placement of former patients in community programs because the state had not shown those violations would not recur. *Id.* The district court refused to apply issue preclusion to the conditions left in place because its observations about the level of care at the bench trial did not conclusively establish the level of care was constitutionally adequate three years later or that violations could not recur. *Id.* 1347. Affirming, the Eleventh Circuit found "[i]n the latter proceeding, the court was properly concerned not merely with whether the State had achieved compliance with constitutional standards at one point, but whether it was presently in compliance." *Id.* 1348.

Here, ACT was not providing ongoing services; its work was complete before either lawsuit was filed. The Federal Court's conclusion that ACT met all of its obligations under the Purchase Order was conclusive as to ACT's work. That HFCA filed its discovery responses identifying

specific alleged defects in June 2018 does not change the fact that ACT had performed all of its obligations when the Federal Court tried Lemartec's breach of contract, breach of warranties, and indemnity claims against ACT.

Illustration 2 to from Restatement (Second) Judgments §27 is applicable here.

> A brings an action against B for failure to deliver goods on January 1, 1972, in accordance with the terms of an installment contract. B defends on the basis that the contract should be rescinded because of A's fraud in obtaining it. After a trial on this issue, there is a verdict and judgment for A. Thereafter, A sues B for failure to deliver goods on June 1, 1972, in accordance with the same contract. B is precluded by the prior judgment from seeking rescission on the basis of fraud.

Restatement (Second) Judgments §27 (1982).

Using this illustration, Lemartec ("A" in the Illustration) brought a claim for indemnity against ACT ("B" in the Illustration) based on claims by SPG against Lemartec, and ACT defended on the basis that ACT owed Lemartec no obligation of indemnity because it satisfied all of its obligations upon which indemnity could be based. The Federal Court tried the issue of whether ACT satisfied all of its obligations and entered judgment for ACT. In Lemartec's second action against ACT for indemnity based on claims by HFCA against Lemartec, Lemartec is precluded from relitigating the issue of whether ACT satisfied its obligations upon which indemnity could be based.

Lemartec's distinction between "pre-completion defects" and "post-completion defects" does not change the fact that the Federal Court rejected the bases Lemartec relies on to claim ACT is subject to indemnity.

2. When an indemnity claim "fully matures" has no bearing on the issue of the source of the right to seek indemnity.

That an indemnity claim does not "fully mature" until liability is fixed does not change the elements of an indemnity claim or the right to bring an action. *Evjen*, 372 N.W.2d at 496-97 (while the right to enforce indemnity does not "accrue" until judgment against the indemnitee, the claim "comes into being … the instant" the acts to support it occur). Further, as this Court held in *Israel*, even if indemnity crossclaims were not compulsory in the first-party claim, precluding application of claim preclusion in a second suit between defendants, issue preclusion still applies if the indemnity claim in the second case involves issues decided in the first case. *Israel*, 339 N.W.2d at 146-47 (affirming use of issue preclusion in indemnity claim where issues of whether the agent's negligence was passive and whether insurance policy should have been reformed were determined in prior claim as part of agent's defense to first-party plaintiff's claims against agent and insurance company).

That different first-party plaintiffs may be involved in the two cases does not change the fact that the indemnitee must identify a basis for its claim against the indemnitor. Lemartec attempts to hold ACT liable for indemnity in this State Court case based on ACT's obligations contained in the Purchase Order and its implied warranty obligations—the same obligations the Federal Court has already decided were satisfied by ACT. These are the issues—ACT's obligations under the Purchase Order and its satisfaction of those obligations—that have been decided and cannot be relitigated.

III. Lemartec waived its appeal of the Business Court's dismissal of Counts III through VI where it fails to argue the Business Court erred in dismissing those claims.

Throughout its brief, Lemartec argues only that its indemnity claims in the two actions involve different issues. Lemartec does not argue that its other claims for breach of contract and breach of various warranties in this State Court case (Counts III, IV, V, and VI) are not the same as the causes of action in the Federal Court case. Indeed, it would be difficult for Lemartec to argue otherwise, given the nearly verbatim allegations Lemartec made in both cases to support each of those other claims. (App. 201, Table A.) Lemartec likewise does not argue that its substantive claims (Counts III-VI) involve different issues than the Federal Court claims for purposes of issue

preclusion, addressing all of its arguments to its indemnification claim in Count I.

Lemartec has waived the issue of whether the Business Court properly found Counts III through VI barred by both claim and issue preclusion. *Genetzky v. Iowa State U.*, 480 N.W.2d 858, 861 (Iowa 1992)("Genetzky cites no authority and makes no argument in his brief as to any claimed error on this count. We hold that he waived error on this issue."); *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 620 (Iowa App. 1998) ("Because we have found the statute of frauds applies, and the [plaintiff] has not raised the doctrine of promissory estoppel on appeal, [defendant]'s oral contract to pay the debt of his daughter may not be enforced. For these reasons, we reverse."); IowaR.App.P. 14(a)(3)("[F]ailure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."). The Business Court's Ruling dismissing Counts III through VI should therefore be affirmed. *Id.*

Query what that does to Lemartec's indemnity claim in this case. If this Court affirms dismissal of Counts III through VI (either for waiver or on the merits) but reverses dismissal of Count I for common law indemnity on the basis that somehow the claims or issues are different than those litigated in Federal Court, the Business Court will still be bound, under the law of the

case doctrine, to this Court's affirmance of the dismissal of Lemartec's substantive claims as precluded by the Federal Court's Ruling. *United Fire & Cas. v. Iowa Dist. Ct.*, 612 N.W.2d 101,103–04 (Iowa2000) (where appellate court reversed district court's finding that Colorado law precluded application of policy exclusion, district court erred on remand in permitting plaintiff to amend petition to relitigate the issue of whether Colorado law could apply, which was law of the case). The "issue" litigated in *United Fire* was whether a policy exclusion applied, and the appellate court reversed the district court's conclusion that it did not apply under Colorado law. *Id.* 104. On remand, the district court erred in allowing an amendment to the pleadings to relitigate the issue—applicability of the exclusion—previously resolved on appeal. *Id.* 104.

Here, even if dismissal of Lemartec's indemnity claim is reversed, the Business Court is still bound by law of the case as to the substantive claims. In other words, the issue decided in Counts III through VI—that ACT satisfied its obligations in the Purchase Order and breached no express or implied warranties owed to Lemartec—is law of this case on remand.

Conclusion

The Federal Court's finding that ACT satisfied all obligations to Lemartec on which an indemnity claim could be based preclude its claims here.

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The undersigned certifies this Brief was electronically filed and served on the 14th day of June, 2019, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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