IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0599

WELLS FARGO EQUIPMENT FINANCE, INC.

Plaintiff/Respondent/Appellee,

v.

JASON RETTERATH AND ANALIA RETTERATH,

Petitioners/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT FOR CHICKASAW COUNTY

THE HONORABLE RICHARD D. STOCHL, JUDGE

APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised in this appeal involve questions of applying existing legal principles. Iowa R. App. P. 6.1101(3)(a) (2017).

STATEMENT OF THE CASE

Pursuant to Iowa Rule of Appellate Procedure 6.903(3), Wells Fargo Equipment Finance, Inc. ("**WFEFI**") states that it is satisfied with the Retteraths' Statement of the Case, and does not repeat it in this brief.

STATEMENT OF FACTS

Jason Retterath and Analia Retterath were married on February 13, 1999, and remain married. They are Florida citizens residing in Palm Beach County, Florida. (Jason Retterath Resp. to WFEFI's RFA ¶ 9; Analia Retterath Resp. to WFEFI's RFA ¶ 9)(Amd. App. 145; 149).

WFEFI is a Minnesota corporation, with its principal office in Minneapolis, Minnesota. (WFEFI Stmt. Undisp. Facts 3/03/2017, ¶ 1; Retterath Resist. MSJ at 2)(Amd. App. 54; 350). WFEFI is the owner and holder of two Florida judgments against Jason Retterath arising from WFEFI's suit brought against Jason Retterath in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, captioned *Wells Fargo Equipment Finance, Inc. v. Gulfstream Crane, LLC, Steven*

Retterath, Jason Retterath and James Robertson aka Jim Robertson, Case No. CA-09-060647 ("**Florida Case**"). (Amd. App. 8-12; 13-16). On November 17, 2009, Jason Retterath was served the Complaint in the Florida case. (WFEFI MSJ Ex. O, p. 1)(Amd. App. 440). The Florida state court entered the two judgments on August 22, 2011 and January 23, 2012, respectively. (Foreign Judgment 12/22/2015 at 3-5, 8-9)(Amd. App. 10-12, 15-17). Almost three years later, WFEFI caused these judgments to be filed in the Iowa District Court for Chickasaw County on December 22, 2015 ("**District Court**"), together with an Affidavit in Support of Foreign Judgment. (Foreign Judgment 12/22/2015; Affidavit Sppt. Foreign Judgment 12/22/2015)(Amd. App. 8-16; 17-18). As Analia Retterath was not a party to the Florida Case, she is not a judgment debtor of WFEFI. (Foreign Judgment 12/22/2015 at 3, 8)(Amd. App. 10, 15).

On January 6, 2016, WFEFI filed its Application for Charging Order pursuant to Iowa Code § 489.503 with the Iowa District Court for Chickasaw County, alleging that it was entitled to a charging order against Jason Retterath's nonexempt interest in Homeland Energy Solutions, LLC (HES), an Iowa limited liability company ("**Application**"). (App. Charging Order 01/06/2016)(Amd. App. 19-20). This Application, WFEFI counsel certified,

was mailed to Jason Retterath postage pre-paid, in conjunction with its filing. (App. Charging Order 01/06/2016 at 2)(Amd. App. 20).

Thereafter, on January 8, 2016, WFEFI filed an Affidavit Regarding Amounts due on the Judgments that was also served on Jason Retterath at his correct address. (Affidavit Amounts Due 01/08/2016)(Amd. App. 21-23). On January 12, 2016, the District Court entered the following order:

> **IT IS, THEREFORE, ORDERED** that WFEFI is hereby granted a charging order against the entire membership of Retterath in Homeland pursuant to Iowa Code § 489.503. Any amount to be distributed to Retterath up to and including the amount to fully satisfy WFEFI shall be remitted payable to Wells Fargo Equipment Finance, Inc. . . . Any Amount so received by WFEFI shall be satisfied, and WFEFI shall submit a partial or full satisfaction as appropriate to indicate the status of the Charging Order. In the event of full satisfaction, any surplus shall be paid to Retterath.

(Charging Order 01/12/2016 at 1)(Amd. App. 24). The Charging Order was also served on Jason Retterath via U.S. Mail at his correct address. (Charging Order 01/12/2016 at 2)(Amd. App. 25). Approximately six months later, on July 13, 2016, Jason Retterath and Analia Retterath ("**Retteraths**") filed their Petition to Vacate the January 12, 2016 Charging Order ("**Petition**"). (Petition 07/13/2016)(Amd. App. 27-34). In their Petition, the Retteraths falsely pleaded that they took possession of HES membership units simultaneously. (Petition, ¶ 9; Ruling 02/09/2018 at 3-4)(Amd. App. 29; 542-543). Analia Retterath falsely testified by affidavit to the same fact.

(Petition Ex. A, ¶¶ 3 and 4; Ruling 02/09/2018 at 2-3)(Amd. App. 35; 542-543).

HES is an Iowa limited liability company; its home offices are located in the city of Lawler, Iowa. (WFEFI MSJ Ex. B - HES Operating Agreement ("**Op. Agr**."), ¶¶ 1.1 and 1.4)(Amd. App. 77). HES owns and/or operates ethanol production and by-product production facilities, processes feedstock into ethanol and related by-products, and markets ethanol and related by-products. (WFEFI MSJ Ex. B - Op. Agr., ¶ 1.3)(Amd. App. 77). The affairs of HES are governed by its Operating Agreement. (WFEFI MSJ Ex. B, p. 7)(Amd. App. 77). The parties to the HES Operating Agreement are HES and "each of the Persons identified as Members on the Company's Unit Holder Register and any other Persons that may from time-to-time be admitted as Members of the Company in accordance with the terms of this Agreement." *Id*. Further, the HES Operating Agreement states, in relevant part: "The laws of the State of Iowa shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties arising thereunder." (WFEFI MSJ Ex. B - Op. Agr., ¶ 11.8)(Amd. App. 129).

In addition to their false statements regarding purchasing membership interest in HES simultaneously in the Petition and Analia Retterath's false affidavit, Jason Retterath also falsely testified that he and Analia Retterath

purchased their 2,000 unit interest in HES in 2005 or 2006, and then an additional 250 units in 2008 or 2009, together. (WFEFI MSJ Ex. H – Jason Retterath Depo. 14:11-16:20)(Amd. App. 168-170). In fact, Jason Retterath became a member of HES **in his individual capacity**, by purchasing 2,000 units which were issued on October 29, 2007. (WFEFI MSJ Ex. K – 12/7/2006 HES Subscription Agmt.)(Amd. App. 393-400). Then, on May 14, 2010, **after** WFEFI's Florida action against Jason Retterath had commenced, he acquired an additional 250 membership units, again in his individual capacity, by transfer. (WFEFI MSJ Ex. L – 5/14/2010 HES Transfer Agmt.)(Amd. App. 401-417). The consideration for transfer of these 250 membership units did not come from the Retterath's joint bank account but was effected by means of corporate transfer of assets agreement. *Id*. at 13-15 (Amd. App. 413-415).

Over four years later, after being sued by WFEFI in the Florida case, Jason Retterath proceeded to transfer all his individually-owned units in HES to himself and his wife, Analia, by Transfer Applications dated December 15, 2010. (WFEFI MSJ Exs. M and N – 12/15/2010 HES Unit Transfer Applications)(Amd. App. 418-428 and 429-439). Analia Retterath did not use any funds from any joint bank account for her share in interest in the subject HES Units; she was a mere transferee from her husband and took without

consideration. (WFEFI MSJ Exs. M and N, p. 3 – 12/15/2010 HES Unit Transfer Applications)(Amd. App. 420 and 431).

Accordingly, as of December 15, 2010, Jason Retterath and Analia Retterath became members of HES by virtue of their ownership of 2,250 Class Membership Units. (WFEFI MSJ Exs. M and N – 12/15/2010 HES Unit Transfer Applications)(Amd. App. 418-428 and 429-439). Jason and Analia Retterath file tax returns in the state of Iowa for the purpose of, among other things, reporting income received from HES. (WFEFI Stmt. Undisp. Facts 3/03/2017, ¶¶ 12, 13, n.1 and n.2; WFEFI MSJ Ex. I – Retteraths Iowa returns 2013 - 2015)(Amd. App. 56-57; 186-192).

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY DISMISSED RETTERATHS' PETITION TO VACATE THE CHARGING ORDER BASED ON THE CHOICE OF LAW.

A. Preservation of Error

WFEFI agrees that the Retteraths have preserved the choice of law issue raised on appeal from the underlying district court proceeding.

B. Standard of Review

WFEFI generally agrees that the Retteraths have correctly set out the proper scope and standard of review on appeal, but would add that review of summary judgment rulings is for correction of errors at law. *C & J Vantage*

Leasing Co. v. Outlook Farm Golf Club, LLC, 784 N.W.2d 753, 756 (Iowa 2010). Still, "[a] proceeding for the vacation of a judgment is on assigned errors and is not triable de novo." *Stoner v. Kilen,* 528 N.W.2d 648, 650 (Iowa Ct. App. 1995). A district court possesses "wide discretion in ruling on such petitions, and an abuse of discretion is needed for reversal." *See Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 109 (Iowa 2011) (but more reluctant where a court has vacated its judgment). "The trial court's findings of fact have the effect of a jury verdict, and those findings are binding on us if there is substantial evidence to support them." *In re Trust of Killian*, 494 N.W.2d 672, 675 (Iowa 1993) (citing *Mishler v. Stouwie*, 301 N.W.2d 744, 747 (Iowa 1981)).

C. Argument.

Plainly speaking, in the course of this case, the District Court found that the Retteraths filed a falsified pleading predicated on untrue sworn affidavits and testimony regarding the transfer of Jason Retterath's interest in HES membership shares to his wife, Analia Retterath, in an effort to avoid collection on WFEFI's Florida judgments in Iowa. (Ruling 02/09/2018 at 2-4)(Amd. App. 541-543). While the Court's decision, on the merits, involved deciding choice of law and constitutional issues, the attempt by the Retteraths

to protect themselves under the shield of Florida law by use of false statements in an Iowa court should not go unnoticed by this Court or in the record.

On the choice of law question, the District Court correctly decided that the location of the membership interest in HES is in Iowa, and that Iowa law should control the scope and nature of the interest in HES owned by the Retteraths. (Ruling 02/09/2018 at 5-6)(Amd. App. 544-545). Accordingly, the District Court committed no error in dismissing the Petition to Vacate the January 12, 2016 Charging Order obtained by WFEFI. (Ruling 02/09/2018 at 7)(Amd. App. 546). Alternatively, the District Court properly evaluated the undisputed facts to conclude that even if Florida law were applied, the Retteraths did not fulfill the unities required under Florida law to trigger protections under ownership by tenancy in the entireties. (Ruling 02/09/2018 at 4-6)(Amd. App. 543-545).

i. The District Court Correctly Decided that Ownership Interest in a Limited Liability Company is Located in the State of Where the Limited Liability Company was Formed.

To support their proposition that a transferable interest in a LLC must follow them to their Florida domicile, the Retteraths make imperfect equivalencies to various forms of personal property. Specifically, the Retteraths rely on common law precedent predating Iowa's adoption of the Revised Uniform Limited Liabilities Act ("**RULLCA**") to analogize their

units in HES to that of corporate stock, a bank account, and a vehicle. IOWA CODE Ch. 489 (2017). As such, this argument fails to recognize the distinct nature of the LLC property interests in play, as well as the significance of the state law that gave rise to them. *See JPMorgan Chase Bank, N.A. v. McClure*, 393 P.3d 955, 959 (Colo. 2017) (concluding that a member's interest is located in the state in which the LLC was created and questioning whether a foreign charging order could usurp the home state's authority) (hereinafter, "*McClure*").[1] The old common law rule regarding the location of intangible personal property is inapposite to charging orders—both the statutory procedures for levying on an individual's interest in a LLC and the unique nature of the ownership interest make a simple personal property analogy inappropriate.

Significantly, the remedies available to creditors in those contexts do not apply: unlike corporate stock or money in a bank account, a creditor cannot utilize typical levying procedures on an ownership interest in a limited liability company. *See* IOWA CODE §§ 626.1, .9 (2017). Instead, Iowa law provides that a charging order is "the **exclusive remedy** by which a person seeking to enforce a judgment against a member or transferee may, in the

[1] Given that RULLCA is a uniform act, cases in other jurisdictions regarding the uniform act are valuable for this Court's consideration.

capacity of judgment creditor, satisfy the judgment from the judgment debtor's transferable interest." IOWA CODE § 489.503(7) (2017) (emphasis added). The charging order provisions of RULLCA represent a special remedy that enables a creditor to realize the value of its judgment against the debtor's distributional interest, while at the same time protecting both the company's ability to operate and the interests of its other members. *First Mid-Illinois Bank and Trust, N.A. v. Parker*, 403 Ill. App. 3d 784, 793, 933 N.E.2d 1215, 1222 (2010). Charging orders are not available for stock, bank accounts, or other personal property.

The charging order remedy derives from the unique characteristics of an interest in an LLC, which is distinguishable from other forms of personal property. In particular, a charging order is premised upon the distinct ability under RULLCA to divide a membership interest, separating the economic interest from the interest in control, management, and governance. *See* IOWA CODE §§ 489.102; .503 (2017). This bifurcation is inherent in the transferable interest in a LLC.

Iowa law characterizes a "transferable interest" as "the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance with the operating agreement, **whether or not the person remains a member or**

continues to own any part of the right." IOWA CODE § 489.102(25) (2017) (emphasis added). This feature is not found in bank accounts or other such forms of personal property. Thus, courts have distinguished LLC membership interests from the owner domicile rule of traditional intangible personal property. *See, e.g.*, *McClure*, 393 P.3d at 959 ("[W]e deem it more appropriate to place the membership interest in the state in which the LLC, and thus the membership interest, was created, as opposed to in whatever state the debtor-member happens to be domiciled at a given time." (citations omitted)).

Contrary to the national trend, Retteraths want this Court to apply turn-of-the-20th-century case law to site LLC membership interests in the domicile of each individual member. The jurisdictions and commentators that have analyzed this issue have consistently emphasized the LLC's home state as the correct location of its membership interests, and the applicable law by which to govern them. *See, e.g.*, *id.* ("[T]he proper location is the state whose LLC act created the entity (and thereby gave rise to the interest)."); *In re Blixseth*, 484 B.R. 360, 369 (B.A.P. 9th Cir. 2012) ("[W]e are persuaded that because [the debtor's] interests in the LLC and [LLLP] were created and exist under, and his creditor's remedies are limited by Nevada state law, that is sufficient reason to deem [the debtor's] interests to be located in Nevada."); *see also*

Carter G. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, J. Bus. Entities, May–June 2010, at 14, 16–17, *available at* 2010 WL 2594393 (emphasizing the importance of the state where charging order is issued for its enforceability and the challenges for LLCs); Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Act*, 62 Bus. Law. 515, 534 (2007) ("The charging order is a venerable part of the law of unincorporated business organizations and is an essential buttress to the 'pick your partner' principle that is central to the law of limited liability companies."); *cf. Koh v. Inno-Pac. Holdings, Ltd.*, 54 P.3d 1270, 1272 (Wash. App. 2002) ("[W]here a partnership organizes under the laws of a state, the partnership interest is located within that state.").

In *McClure*, for example, the Colorado Supreme Court was asked to evaluate the location of the membership interests of an Arizona debtor in several Colorado LLCs. 393 P.3d 955. While Chase Bank obtained an Arizona charging order to enforce its Arizona judgment, a second creditor obtained an Arizona judgment and a **Colorado** charging order. *Id.* at 956–57. In the ensuing battle for priority, the court ultimately determined that the Colorado charging order, though technically the second-in-time collection effort, had priority over Chase's attempts to collect on distributions from the LLCs with an Arizona charging order. *Id.* at 961–62.

Centering its decision in justice, convenience, and practical application of law, the Colorado Supreme Court held that because the companies were located in Colorado, Colorado law governed the membership interests. *Id.* at 959. Accordingly, Chase's Arizona charging order was not effective against the Colorado LLCs. *Id*. The court expressed skepticism as to whether a state has authority to issue a charging order on a foreign LLC, and queried whether Chase's attempt to domesticate its foreign charging order would be enough to render it enforceable under Colorado law. *Id.* at 961.

Similarly, in the case of *In re Blixseth*, bankruptcy creditors challenged the venue in proceedings over a Washington state debtor whose only appreciable assets were membership interests in Nevada LLCs. 484 B.R. 360. In evaluating the location of the LLC membership interests, the court emphasized that a simple debtor-domicile analysis was insufficient. Instead, the court advocated "a 'context-specific' analysis that employs a 'common sense appraisal of the requirements of justice and convenience in particular conditions.'" *Id.* at 367 (citation omitted). In concluding that the LLCs location controlled, the court highlighted the authority of the state to govern and define the membership interests of domestic LLCs. *Id.* at 368. Further, the court flatly rejected the debtor's contention that he had not availed himself

of the benefits of Nevada law—his attempts to backtrack on venue when creditors came knocking was transparently "disingenuous." *Id.* at 370.

As Iowa law gave rise to the interests of all of HES members, and expressly dictates and limits the remedies available to their creditors, it is only logical that these interests be co-located with the company itself. A charging order allows a judgment creditor to "enforce a lien on the 'economic value that flows from membership in an LLC.'" *McClure*, 393 P.3d at 958 (quoting 51 Am. Jur. 2d Limited Liability Companies § 23, at 859 (2011)). As such, it is fundamental that a charging order must be directed at, and binding upon, the limited liability company itself. *Id.* at 961; *see also DuTrac Comm. Credit Union v. Hefel*, 893 N.W.2d 282 (Iowa 2017). Application of Iowa law to an Iowa LLC recognizes this state's authority over those companies organized and operating under its statutory framework. IOWA CODE § 489.106 (2017).

This approach is grounded in practical considerations that promotes consistency for the limited liability company to have its membership interests subject to the same controlling law as the company itself. *See Parker,* 403 Ill. App. 3d at 793, 933 N.E.2d at 1222 (a limited liability company statute "creates a special remedy that enables the creditor to realize the value of the judgment debtor's distributional interest, while at the same time protecting both the limited liability company's ability to continue to operate and the

interests of the other members.") (citations omitted). This bolsters the Iowa legislature's intent in its adoption of RULLCA to promote predictability and uniformity, including the expectation that state law would control. IOWA CODE Ch. 489 (2017). *See* Matthew G. Dore, *Available Entity Choices—the Limited Liability Company (LLC)*, 5 Iowa Prac., Business Organizations § 1.6 (2016) (contextualizing Iowa's adoption of RULLCA in the broader legislative movement to afford state business entities greater certainty in business and tax issues).

By contrast, taking the Retteraths' argument to its natural conclusion, if HES has unit holders in fifty states, then there would be fifty ways to interpret these property interests, and fifty different state-specific charging orders to which HES could be subject. This represents an administrative and logistical quagmire for the company, especially if it should become subject to several competing charging orders from various foreign jurisdictions. *See, e.g.*, *McClure*, 393 P.3d at 959 ("[J]ustice and convenience militate in favor of locating the membership interest in the state in which the LLC was formed.").

Locating the membership interests with the company similarly promotes consistency for creditors, allowing them to pursue charging orders in a fixed jurisdiction, as opposed to that of its individual members, which

may not be. *McClure*, 393 P.3d at 959. This certainty and clarity recognizes the judicial system's interest in equity and efficient redress of grievances, and demonstrates respect for enforcing duly obtained judgments.

As for the Retteraths, they continue to own their HES units—the income is just redirected while the Charging Order is in place. IOWA CODE § 489.503(1) (2017); *see also DuTrac Comm. Credit Union*, 893 N.W.2d at 293 ("[T]he charging order is not a transfer of [the judgment debtor]'s interest."). Having availed themselves of membership units in an Iowa limited liability company, application of Iowa law to those units cannot come as a complete surprise.

At the end of the day, this equitable approach balances the interests, rights, and expectations of all parties. In applying Iowa law to the HES membership units, the District Court followed suit with every other jurisdiction that has reached this question. The court gave due consideration to the Retteraths' argument, but it had no obligation to apply Florida law in order to give effect to the Retteraths' fraudulent intent.

ii. The District Court Correctly Analyzed the Broader Choice of Law Question.

In disputing the District Court's conflicts of law analysis, the Retteraths understate their ongoing relationship with HES, and with the laws of Iowa. In particular, Retteraths challenge the District Court's application of

Restatement (Second) of Conflict of Laws § 222 (1971) (detailing the means for determining governing law over immovable and movable things in dispute). Instead, they assert that the District Court ought to have looked at more general conflicts principles under Restatement (Second) of Conflict of Laws § 188 (1971) (determining governing law in the absence of an effective choice by the parties). While both of these analyses look to the jurisdiction with "the most significant relationship" as controlling, Iowa has the most significant relationship to the location of the HES membership interests.

The Retteraths offer little support for Florida law under either Restatement analysis. They argue that the mere fact that WFEFI's judgments were obtained in Florida somehow favors application of Florida law to their HES membership interests. They fail to offer any explanation how the jurisdiction where a judgment is obtained against an individual has any bearing whatsoever on the location of that individual's property interests. Further, relying upon the common law analogies refuted above, they incorrectly point to the purchase of their membership interests in Florida as conclusive evidence of location. This argument fails to acknowledge the significance of the LLC's home state in creating and interpreting the membership interests as previously discussed, and ignores the ongoing relationship between Retteraths and HES. Specifically:

a. The Retteraths are owners of a company that was formed in Iowa and maintains its principal place of business in the state of Iowa. (*See* WFEFI MSJ Ex. B - Opr. Agr., §§ 1.1 and 1.4, p. 7)(Amd. App. 77);

b. The Retteraths agreed to be bound by the terms of the Operating Agreement when they acquired their Units. (*See* WFEFI MSJ Ex. B - Opr. Agr., § 6.3, p. 41)(Amd. App. 111);

c. The Retteraths agreed to certain restrictions on the transfer of their Units. (*See* WFEFI MSJ Ex. B - Opr. Agr., § 9.1, pp. 47-48)(Amd. App. 117-118);

d. The Retteraths agreed to certain requirements with regard to distributions and allocations if Units are transferred. (*See* WFEFI MSJ Ex. B - Opr. Agr., § 9.10, p. 53)(Amd. App. 123); and

e. The District Court found that the Retteraths have income generated from their ownership of HES units that requires them to file an Iowa state income tax return. (Ruling 02/09/2018 at 5; WFEFI MSJ Ex. I – Retteraths Iowa Tax Returns)(Amd. App. 544; 186-192).

The Retteraths' contentions that the District Court improperly considered HES' Operating Agreement or that it sought to give WFEFI third-party beneficiary status merely distract from the scope of the District Court's

analysis. In determining the location of the Retteraths' interest in distributions from HES, the District Court properly evaluated the "justified expectations" of HES' members, as well as their transferees and creditors. (Ruling 02/09/2018 at 5)(Amd. App. 544). As the company's governing instrument, the provisions of the Operating Agreement are directly relevant to that analysis, and properly within the scope of the District Court's review. Moreover, "[t]he obligations of a limited liability company and its members **to a person in the person's capacity as a transferee** or dissociated member **are governed by the operating agreement**." IOWA CODE § 489.112(2) (2017) (emphasis added). Contrary to the Retteraths' assertions, the District Court properly evaluated Iowa's relationship to the HES membership units.

Particularly, the Retteraths appear to suggest that an operating agreement cannot be looked to for guidance in interpreting the very membership interests it governs. This flies in the face of Iowa law, the terms of the operating agreement, and the basic expectations of HES members and transferees. Moreover, Iowa courts have recognized the significance of the limited liability company's operating agreement in the collections context. In *DuTrac Community Credit Union v. Hefel*, the Iowa Supreme Court analyzed restrictions contained in the LLC's operating agreement for their potential impact on judgment creditor's right to a charging order. 893 N.W.2d 292-93

(2017). In so doing, the court read the operating agreement in conjunction with the Iowa law, highlighting these two sources as the primary authorities respecting interests in an Iowa limited liability company. *Id.* WFEFI is not attempting to argue that it enjoys third-party rights under the Operating Agreement, but that the terms of the Operating Agreement are a significant factor to be weighed in the Court's comprehensive choice of law analysis. The Retteraths agree they were bound by the Operating Agreement. (*See* WFEFI MSJ Ex. B ¶ 11.2, p. 57)(Amd. App. 127).

It is implausible to assert that Florida has a more significant relationship merely because Jason Retterath acquired some of his units in an Iowa company from a sale that may have occurred in Florida. Ultimately, application of either Restatement section results in finding that the Retteraths' purchase of the HES units was only the start of the relationship with HES. Their continued ownership of the units is an integral part of the conflicts analysis, and lead the District Court to conclude, correctly, that Iowa law should apply to the HES membership units.

iii. Even if Florida Law Would Apply, the Retteraths Did Not Fulfill the "Unities" Required to Establish a Tenancy by the Entirety.

As the District Court pointed out, Iowa does not recognize ownership of property by tenancy by the entirety ("TBE"). (Ruling 02/09/2018 at

3)(Amd. App. 542). *Fay v. Smiley*, 207 N.W. 369, 371 (Iowa 1926). Nonetheless, the District Court underwent a TBE analysis under Florida law for the record. (Ruling 02/09/2018 at 4-5)(Amd. App. 543-544). Although the District Court did not need to determine the fraud allegations raised by WFEFI to arrive at its final ruling, the District Court did find that Jason Retterath "took ownership of the units alone and only transferred them to his wife when he was sued." (Ruling 02/09/2018 at 5)(Amd. App. 544). The District Court went on to correctly conclude that Jason Retterath's transfer of his units does not entitle him to a TBE exemption from creditors. *Id.*

"When a married couple holds property as a tenancy by the entireties, each spouse is said to hold it 'per tout,' meaning that each spouse holds the 'whole or the entirety, and not a share, moiety, or divisible part.'" *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001) (citing *Bailey v. Smith,* 89 Fla. 303, 103 So. 833, 834 (1925)) ("Thus, property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole."). When property is held by TBE by the married couple, the property is not divisible and so, absent a judgment against both persons in the marriage, cannot be made available to creditors to satisfy a judgment against just one of the spouses. *Beal Bank*, 780 So. 2d at

53. Thus, the interest the Retteraths were seeking was the District Court's determination that they hold HES shares in TBE.

Despite development of Florida TBE over the years, the constant underlying TBE principle is that, should one of the TBE unities never have existed or be destroyed, there is no entireties estate. *United States v. One Single Family Residence With Out Bldgs*, 894 F.2d 1511, 1514 (11th Cir. 1990) (citing *Andrews v. Andrews*, 155 Fla. 654, 656, 21 So. 2d 205, 206 (1945) and *Bechtel v. Estate of Bechtel*, 330 So.2d 217, 219 (Fla. Dist. Ct. App. 1976)); *Smart v. City of Miami Beach*, 51 F. Supp. 3d 1299, 1303 (S.D. Fla. 2014). One of the unities that must be met is time—the married couple must have received title from the same conveyance. *Smart*, 51 F. Supp. at 1303.

Here, Jason Retterath became the owner of the 2,250 HES Units himself, individually, only later transferring his interest to a joint interest with Analia Retterath on December 15, 2010. (WFEFI MSJ Exs. M and N)(Amd. App. 418-428 and 429-439). The relevant time for establishing the unities of TBE ownership is when the ownership interest in the subject property or asset begins, not when a subsequent transfer is made in an attempt to create TBE. *See In re Caliri*, 347 B.R. 788, 798 (Bankr. M.D. Fla. 2006) ("The operative

date for establishing ownership of a financial account is the date on which the account is opened or established." (citing *Beal Bank,* 780 So.2d at 58)).

The U.S. Bankruptcy Court for the Southern District of Florida, applying Florida state law in 2011, rejected the debtors' argument that they held a bank account TBE with the subsequent addition of a spouse to the account opened as a single-party account by the transferor spouse. *In re Aranda*, No. 08-26059-BKC-PGH, 2011 WL 87237, at *3 (Bankr. S.D. Fla. Jan. 10, 2011) ("The Debtor opened Account 1 as a single-party account. The subsequent addition of Mrs. Aranda as co-owner was not sufficient to create a tenancy by the entirety. The Florida Supreme Court's decision in *Beal Bank* supports this conclusion. In that case, the court declined to overturn the lower court's unanimous decision that a bank account 'lacked the unities of time and title and thus [was] not held as tenancy by the entirety' when a husband opened the account alone, and later added his wife as co-owner. . . . Similarly, in this case, the Debtor opened Account 1 alone, and later added Mrs. Aranda as co-owner. As such, the unity of time is not present. Therefore, Account 1 cannot be TBE property." (citing *Beal Bank*, 780 So. 2d at 49, 52)); *see Smart*, 51 F. Supp. 3d at 1303 (following the *In re Aranda* decision, and coming to the same conclusion that a subsequently transferred interest initially taken by

only one spouse does not create ownership TBE at the time of the subsequent transfer to both).

Accordingly, the District Court correctly reasoned the TBE protections under Florida law were not available to the Retteraths since they did not receive title in the HES membership units from the same conveyance. (Ruling 02/09/2018 at 5)(Amd. App. 544).

Retteraths argue that the District Court impermissibly shouldered them with the burden of proof of TBE, by citing to the District Court's failure to explicitly recite the scope of a creditor's burden under Florida law. This is a tenuous argument, as well as a selective reading of the District Court's reasoned analysis of the issue. Notably, to the extent Florida recognizes a presumption of TBE, that presumption cannot save an attempted TBE conveyance if otherwise not effectuated "**in accordance with the unities of possession, interest, title, and time and with right of survivorship**." *Beal Bank*, 780 So. 2d at 58 (emphasis added). The District Court found the conveyances by Jason Retterath to his spouse, Analia Retterath in 2010 could not create a tenancy by the entirety as a matter of law, because they failed to satisfy all six of the necessary unities. (Ruling 02/09/2018 at 4-5)(Amd. App. 543-544). Far from shifting a burden to Retteraths, the District Court cited WFEFI's analysis with approval. (Ruling 02/09/2018 at 4-5)(Amd. App. 543-

544). Whether the Retteraths disclaimed TBE ownership is similarly not dispositive: the *Beal Bank* presumption is overcome where a creditor demonstrates that one of the required unities—here, the unity of time—is not present. *See Cacciatore v. Fisherman's Wharf Realty Ltd.*, 821 So. 2d 1251, 1254 (Fla. Dist. Ct. App. 2002). A presumption cannot override fact.

Still, this analyses does not alter the fact that Iowa does not recognize TBE ownership. *Fay*, 207 N.W. at 371. In addition, Florida has recognized that property "is subject to the laws of the state in which it is situated." *Denison v. Denison*, 658 So. 2d 581, 582 (Fla. Dist. Ct. App. 1995) (real property subject to Michigan law); *Lieberman v. Silverstein*, 393 So. 2d 565 n.2 (Fla. Dist. Ct. App. 1981) (bank accounts subject to New York law); *Seng v. Corns*, 58 So. 2d 686 (Fla. 1952) (bank accounts subject to Illinois law).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN UPHOLDING THE VALIDITY OF THE CHARGING ORDER ON JURISDICTIONAL GROUNDS.

A. Preservation of Error

WFEFI agrees that the Retteraths have preserved the issue of the District Court's jurisdiction raised on appeal from the underlying district court proceeding.

B. Standard of Review

WFEFI generally agrees that the Retteraths have correctly set out the proper scope and standard of review on appeal, but would add that review of summary judgment rulings is for correction of errors at law. *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 756 (Iowa 2010). Still, "[a] proceeding for the vacation of a judgment is on assigned errors, not de novo." *Stoner v. Kilen,* 528 N.W.2d 648, 650 (Iowa Ct. App. 1995). A district court possesses "wide discretion in ruling on such petitions, and an abuse of discretion is needed for reversal." *See Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 109 (Iowa 2011) (but more reluctant where a court has vacated its judgment).

C. Argument

The Retteraths take the position that the Charging Order should be set aside because the District Court clerk failed to docket the notice of mailing of the filing of WFEFI's judgments at least as to Jason Retterath. The mailing and notice provisions cited by the Retteraths are contained in the Uniform Enforcement of Foreign Judgments Act ("**UEFJA**"), Iowa Code Chapter 626A, **not** in the charging order provisions of the Revised Uniform Limited Liability Company Act, Iowa Code Chapter 489. Iowa Code § 489.503. The purpose of the UEFJA is to facilitate the full faith and credit clause and

provide a judgment debtor a very limited set of defenses against its entry in another state (subject matter jurisdiction, personal jurisdiction, judgment has been obtained by fraud or already satisfied, released or discharged, denial of due process in the underlying proceeding. *Doctor's Assocs., Inc. v. Duree*, 319 Ill. App. 3d 1032, 1040, 745 N.E.2d 1270, 1278 (2001). The Retteraths do not allege any of these defenses here. Accordingly, whether Jason Retterath received the notice of filing in Iowa of the Florida judgments is immaterial to the present proceeding, which is only directed at vacating the charging order, not setting aside or otherwise vacating the judgments as contemplated under chapter 626A; *Duree*, 319 Ill. App. 3d at 1040, 745 N.E.2d. at 1278. As to these charging order proceedings, however, the Court may presume, as noted at hearing, that WFEFI's Application for Charging Order (which included notice of the filing of the Florida judgments) was mailed to Jason Retterath as indicated on the proofs of service contained in those documents. (App. Charging Order 01/06/2016)(Amd. App. 19-20). *See Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 870 (Iowa 1987) ("Proof that a document was properly mailed raise[d] a presumption that it was received"). Since the limited protections afforded under the UEFJA to Jason Retterath are not sought by him here, those same notice provisions cannot and

should be used to afford protections under the Revised Uniform Limited Liability Company Act of which they are not a part.

i. The Florida Judgments Were Properly Registered and Retteraths Suffered No Harm Due to the Clerk's Failure to Note Mailing in the Docket

Retteraths have not suffered any harm by the clerk's failure to note mailing of the filing of the foreign judgments to Jason Retterath in the docket. In challenging the registration of the Florida judgments, as set out above, the Retteraths do not attack any aspect of the judgments themselves—subject matter jurisdiction, personal jurisdiction, judgment has been obtained by fraud or already satisfied, released or discharged, denial of due process in the underlying proceeding—the reason for the clerk's notice. Jason Retterath does not dispute WFEFI's Application and the Charging Order itself, was mailed by undersigned counsel and the Court, respectively. (App. Charging Order 01/06/2016; Charging Order 01/12/2016)(Amd. App. 19-20; 24-26). Instead, Retteraths argue for form over substance to effectively contend that the District Court's deficient docket notice regarding entry of the Florida judgments defeats WFEFI and the Court's service of the Charging Order pleadings.

The fact of the matter is that WFEFI properly mailed a copy of the Application for Charging Order on January 6, 2016, which included notice of

filing of the Florida Judgments. *Id.; see also* Ruling Addendum 03/07/2018 at 1-2)(Amd. App. 555-556). WFEFI also mailed Jason Retterath a copy of its Vice President's Affidavit of the Amounts Due on the Judgment on January 8, 2016. (Affidavit re Amounts Due 01/08/2016)(App.21-23). WFEFI properly registered its judgments. In ruling that Retteraths had received sufficient notice, the District Court was entitled to rely upon the proofs of service contained in the court filings, including the Application for Charging Order. *See Montgomery Ward*, 398 N.W.2d at 870 ("Proof that a document was properly mailed raised a presumption that it was received."). Pragmatically, the purpose of the notice of filing foreign judgments is for the purpose of challenging the conclusiveness of the foreign judgment. IOWA CODE § 626A.3(4) (2017) (judgment lien does not attach until the time to challenge the foreign judgment has passed). This principle is further embodied in the concept of obtaining a stay if, for example, an appeal of the foreign judgment is pending in the foreign jurisdiction or there are other grounds to stay enforcement upon requiring security for satisfaction of the judgment. IOWA CODE § 626A.4 (2017). Again, the validity of the Florida judgment has never been challenged by the Retteraths. Their only argument has always been about the Charging Order of which they had actual notice.

The district court possesses "wide discretion" in ruling on petitions to vacate a judgment. *Soults Farms*, 797 N.W.2d at 109. Concluding that Retteraths suffered no prejudice in the mailing of notice was not an abuse of discretion.

ii. Jason Retterath's Interest in the HES Distributions are Available to WFEFI.

As a final salvo, Retteraths assert that a joint tenancy with right of survivorship under Iowa law prevents a creditor of Jason Retterath from reaching the distributions arising from ownership of membership units in HES. In support of this position, the Retteraths draw a mismatched comparison between the membership units in an LLC and the special protections afforded to homestead interests under Iowa law. This state recognizes the intrinsic value of the family home, and accordingly, "protects the homestead interest of spouses through carefully crafted limitations." *In re Estate of Waterman*, 847 N.W.2d 560 (Iowa 2014) (citing Iowa Code chapter 561). The same cannot be said of a membership interest in an LLC. *See* Iowa Code § 489.503(2017).

Contrary to the Retteraths' broad assertions, Iowa law does not limit a creditor's access to property held in joint tenancy with right of survivorship, nor does it recognize ownership by the entirety. *Frederick v. Shorman*, 147 N.W.2d 478, 484 (Iowa 1966) ("The individual interest of one joint tenant is

subject to levy and sale upon execution against him. Such interest may be sold without making the other coparceners parties to the action. The levy and sale operate as a severance of the joint tenancy, and the purchaser at the sale becomes a tenant in common with the other coowners."); *Fay*, 207 N.W. at 371.

It should be noted that the HES Certificates of Membership Units do not indicate a right of survivorship on their face, and the fact-finder in this case concluded that they served to establish a tenancy in common. (Ruling Addendum 03/07/2018 at 2)(Amd. App. 556) However, this point is largely immaterial to rebutting the Retteraths' joint tenancy argument—to the extent Analia Retterath's interest in the HES units is not otherwise avoided as a fraudulent conveyance, a joint tenancy with right of survivorship under Iowa law does not bar WFEFI from obtaining a charging order against Jason's interest. *Frederick*, 147 N.W.2d at 484.

III. THE DISTRICT COURT CORRECTLY DECIDED THAT IOWA CODE CHAPTER 626A, THE UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT (UEFJA), IS CONSTITUTIONAL.

A. Preservation of Error

WFEFI agrees that the Retteraths have preserved the issue of constitutionality of Iowa Code Chapter 626A raised on appeal from the underlying district court proceeding.

B. Standard of Review

In their briefing, the Retteraths did not address the scope and standard of review on their constitutional question. Unlike the issues raised above, on appeal the Court reviews "questions involving constitutional issues" de novo. *In re Trust of Killian*, 494 N.W.2d 672, 674 (Iowa 1993)

C. Argument

As set out above, the Retteraths attempt to use Iowa Code chapter 626A, the Uniform Enforcement of Foreign Judgments Act ("**UEFJA"**) to undermine the District Court's entry of the Charging Order without ever identifying any defects in the Florida judgments, themselves. Accordingly, the Retteraths' goal in seeking a determination of the constitutionality of Iowa's UEFJA is beside the point. The Retteraths complain about a process that makes no difference in the procedural integrity of obtaining the Charging Order, itself, of which they received actual notice. The only challenge to the Charging Order the Retteraths bring is based on choice of law considerations and whether they can enjoy ownership of HES shared as TBE under Florida law, not on notice or procedural grounds.

Still, to the extent the issue of the constitutionality of Iowa Code chapter 626A is still germane to this dispute, other states who have looked at the question have agreed the notices provisions of the UEFJA are constitutional.

See, e.g., *Gedeon v. Gedeon*, 630 P.2d 579, 582–83 (Colo. 1981) ("It is not entirely clear what precisely due process requires by way of procedures for post-judgment filings such as this. However, when the creditor's interest in collecting a valid judgment is balanced against the debtor's interest in keeping his property, which has already been protected by prior notice and hearing, in our view, the due process requirements of the United States Constitution, amend. XIV, are satisfied by the procedures of the Act."); *see also* 31 A.L.R.4th 706, § 3 (originally published in 1984) (listing these states that have held the UEFJA constitutional: Arkansas, Illinois, Missouri, Nebraska, New York, and Oregon); *Holley v. Holley*, 568 S.W.2d 487, 489 (Ark. 1978) (citing and agreeing on the constitutionality of the UEFJA with *Sullivan v. Sullivan*, 168 Neb. 850, 97 N.W.2d 348 (1959); *Light v. Light*, 12 Ill. 2d 502,147 N.E.2d 34 (1957); *Willhite v. Willhite*, 546 P.2d 612 (Okla. 1976)).

The Retteraths' argument as to the sufficiency of regular mailing largely conflates this post-judgment collections procedure with original notice of an initial action. *Compare, e.g.*, *War Eagle Vill. Apts. v. Plummer*, 775 N.W.2d 714 (Iowa 2009) (overturning framework for personal service in an original action), *with* Iowa Code section 446.2 (authorizing the county treasurer to notify a taxpayer of tax sale of their property by regular mail, and further providing that failure to receive a mailed notice is not a defense); *see*

also Gedeon, 630 P.2d at 582–83 (emphasizing the protections afforded in the underlying action as to due process claims post-judgment). For instance, its primary case support, *War Eagle*, evaluated regular mail service of the original notice in a Forcible Entry and Detainer action. Another case relied on by the Retteraths, *Fuentes v. Shevin*, struck down Florida's summary process to obtain a writ of replevin for prejudgment seizure of personal property without any factual showing of entitlement to the chattels. 407 U.S. 67, 92 S. Ct. (1972).

The notice procedure the Retteraths complain of is not unique to Iowa. With respect to Analia Retterath's due process rights, the District Court properly concluded that Analia is not a judgment debtor of WFEFI, and is therefore not entitled to notice of the filing of foreign judgment against Jason. *See* IOWA CODE § 626A.3(1) (2017) (Creditor "shall make and file with the clerk of court an affidavit setting forth the name and last known address of the judgment debtor, and the judgment creditor."). The transfer of Jason Retterath's HES units to himself and Analia occurred in December of 2010, subsequent to commencement of the underlying litigation between these parties. As a practical matter, while it maintains that her ownership is the product of fraudulent attempts of Jason Retterath to avoid its judgment,

WFEFI has not attempted to reach her interest by the Charging Order. Only Jason is its judgment debtor, and accordingly, only his interest is affected.

The constitutional concerns raised by the Retteraths either are not germane to these proceedings as they do not challenge the validity of the Florida judgment themselves or the provisions of Iowa Code chapter 626A are, on their face and as applied constitutional as the district court and courts across the country have already determined.

CONCLUSION

HES is an Iowa limited liability company, and the Retterath's HES membership units are located in Iowa. The District Court properly concluded that the Retteraths could not assert Florida property laws to evade WFEFI's valid Charging Order. Furthermore, the Retteraths failed to establish a tenancy by the entirety as a matter of law. No due process grounds exist to vacate the Charging Order. Accordingly, the judgment of the District Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Unless the Court believes that oral argument would assist its work, WFEFI requests the case be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Appellee's Final Brief was the sum of $ N/A.

/s/ G. Mark Rice
G. Mark Rice

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 7,694 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in proportionally spaced typeface using 14 point, Times New Roman.

/s/ G. Mark Rice
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the September 10, 2018, I filed this Appellee's Final Brief electronically via EDMS. The undersigned further certifies that on the September 10, 2018, Appellee's Final Brief was served upon all parties of record to the above cause via EDMS.

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