IN THE IOWA SUPREME COURT

Supreme Court 18-0950

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

v.

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

and

JASON and ANNIE RETTERATH,
Intervenors / Appellants.

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

FINAL REPLY BRIEF OF APPELLANT STEVE J. RETTERATH

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ARGUMENT

Homeland Energy Solutions, LLC ("HES") seeks to enforce a purported agreement to repurchase Steve Retterath's HES Units—the Membership Unit Repurchase Agreement ("MURA"). HES glosses over its Operating Agreement ("OA")—the rules by which HES must govern itself.

HES asserts no membership vote was required to approve what it characterizes as an above-market insider deal because Retterath's Units, "the only class of *equity* in the Company" per the OA, are somehow not "equity or debt securities." HES asserts the MURA is its only possible avenue to achieving its purported objective of removing Retterath as a Director despite an OA provision that a Director may be removed by membership vote.

HES also asserts that it was ready and able to close the MURA despite the uncontested fact if HES paid funds from any source to purchase Retterath's Units it would violate its loan covenants and, in turn, its OA.

If HES were to enforce the MURA against Retterath, it would make him a party to breaches of the OA, to which Retterath and all other HES members are party. For these reasons, and others, HES's specific performance claim fails.

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

HES's pursuit of specific performance is contrary to the facts and the law. Unsurprisingly, HES incorrectly frames specific performance as a loose remedy available whenever a court believes it is equitable. Iowa precedent imposes requirements a party must prove to be granted this extraordinary relief, which is reserved for "unusual cases" and is not issued "as a matter of grace." *Breitbach v. Christenson*, 541 N.W. 2d 840, 843 (1995). HES's burden of proof is clear, satisfactory, and convincing evidence. *McCarter v. Uban*, 166 N.W.2d 910, 912 (Iowa 1969).

HES makes many allegations regarding Retterath's motivation for resisting specific performance. Motive to rescind is irrelevant. *See Binkholder v. Carpenter*, 152 N.W.2d 593, 600 (Iowa 1967) ("motive for exercising a legal right to rescind is immaterial"); *see also* HES Br. at 21-22.

Finally, HES asserts that Retterath did not cite any legal authority regarding the required elements for specific performance. (*See* HES Br. at 27.) That assertion is baffling. Not only did Retterath cite Iowa precedent for all elements discussed (*see generally* Retterath Br. at 30-47), HES's brief responded to Retterath based on the same cases, albeit for different propositions, glossing over elements addressed by Retterath that HES prefers to overlook.

A. Retterath's Units Are Not Unique

HES admits the property at issue is Retterath's Units. (HES Br. at 29.) HES incorrectly asserts, without authority, that uniqueness is not a required element of its claim. (*See* HES Br. at 29; *see also Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988) ("[S]pecific performance is only available for 'unique' property.") HES nonetheless asserts that Units are unique because "[t]hey are evidenced by unique Unit Certificate Numbers 36, 824, 1459 and 1530" that are not duplicated and retired after redemption. (HES Br. at 29.) This argument fails.

The purported MURA sought to repurchase 25,860 Units from Retterath. (Appendix ("App.") (vol. VII), p. 132.) On average, each of the four certificates represents over 6,000 Units. There is no evidence that the actual *Units* are numbered or specifically identified. HES's argument is akin to arguing that Units are unique because the name of their holder is unique. This argument is contrary to Iowa statutes and case law. Quite simply, the numbering of certificates is a perfunctory act that does not make the Units themselves "unique" as a matter of law.

No Iowa appellate case holds a unit of a limited liability company is unique property. The Iowa legislature defines an LLC ownership interest as "personal property." Iowa Code §§ 489.102(24) & 489.501. Furthermore,

while "[a] contract for sale of stock of a closely held corporation which is not procurable in any market is a proper subject for specific performance," HES does not even argue that units in a large LLC like HES meet these requirements, which they do not. *See Lyon v. Willie*, 288 N. W.2d 884, 894 (Iowa 1980); s*ee also* Retterath Br. 32-33 (demonstrating HES is not closely held.)

While HES cites language from *Gingerich v. Protein Blenders, Inc.*, 95 N.W.2d 522 (1959), that stock may be a proper subject of specific performance where "stock represents control of the company," HES admits "Retterath's Units do not constitute a controlling HES membership block," dooming any argument based upon this language. (HES Br. at 28; *accord* App.(VI), p. 131.) HES's fuzzy assertion that Retterath's Units "are accompanied by control rights that do not accompany other HES membership units, including the right to appoint two Directors to the HES Board," is unproven, false, and irrelevant. (*See id.*)

No "control rights" accompany Retterath's Units. They are of the same class, and bear the same rights, as all other Units. (App.(VII), p. 42 § 6.1.) Retterath's ability to appoint two Directors is not a feature of his *Units*. It is a contractual right he acquired due to the size of his investment during HES's initial public offering. (*Id.* p. 36 § 5.3(f).) Furthermore, these

contractual appointment rights do not survive any sale or transfer of the Units. (*Id.*)

In any event, HES acknowledges there were eleven Directors on its Board and alleges they were split against positions that Retterath took. (HES Br. at 16.) HES thus admits that Retterath's appointment rights did not give him control of the Board. Indeed, HES asserts Retterath was *seeking* to gain Board control, meaning he did not control the Board, much less HES as an entity. (*See* HES Br. at 16, 17, 29.)

B. HES Has an Adequate Remedy at Law

HES is required to prove that it had no adequate remedy at law. *Gingerich*, 95 N.W.2d at 524 (specific performance not allowed "when the injured party has an adequate remedy at law.") HES asserts that "no remedy at law, monetary or otherwise, could result in: (1) redemption of Retterath's Units; (2) retirement of Retterath's Board appointment powers; and (3) removal of Retterath as Member and Director of HES." Regarding the retirement of Retterath's Units, as detailed above, they were not unique. HES could have purchased Units from any other member.[1]

[1] This assumes HES could secure a waiver of its loan covenants prohibiting repurchasing Units and otherwise comply with Iowa law, neither of which it did in relation to Retterath. (*See supra* section I(D)(2).)

Moreover, HES is asking this Court to grant an extraordinary judicial remedy when HES took none of the available actions under its OA—an existing adequate remedy—to achieve the same results. For example, even if some Board members wanted Retterath removed as a Director, the OA provided a method for doing so. (App.(VII), p. 40 § 5.13.) Further, the OA may be amended upon a majority vote of membership voting interests. (*Id.* p. 23 § 8.1.) Those opposing Retterath's view of company affairs could have utilized either of these means. Both also empower the entire membership, rather than a few Directors, to address the merits of what Retterath was advocating. This input is exactly what HES, through its Board rather than its members, is trying to extinguish by neutering OA section 5.6(b)(v) dealing with acquisition of *any* equity security from a Director.

It is telling that certain Directors who wanted to remove Retterath did not attempt to utilize the procedure in the OA, which would have been subject to a membership vote. Instead, they improperly pushed the purported MURA without a vote. HES should not be granted specific performance where no attempt was made to follow the procedures of the OA, including giving the membership the vote to which it is entitled.

C. HES Failed to Prove It Will Suffer Irreparable Harm In The Absence Of Specific Performance

HES is required to prove irreparable harm in the absence of specific performance. *Breitbach*, 541 N.W. 2d at 843. As detailed in Retterath's opening brief, HES as an entity has no interest in who owns it. (Retterath Br. at 35-36.) HES's cursory response, without citation, that "Retterath's attempt to distinguish between a company's actions, as opposed to its ownership, is meaningless here, where Retterath's Units allowed him to greatly impact, and in some instances control, HES's actions" is internally inconsistent and misses the mark. (HES Br. at 11.)

First, HES does not cite to evidence Retterath "greatly impact[ed]" or "control[ed] HES's actions." (*Id.*) A large portion of HES's brief is premised on assertions Retterath *sought* to take control of HES's Board but did not control it; Retterath's proposals were consistently outvoted six to five. (*See id.* at 16, 17, 29.) HES did not prove irreparable harm to HES as an entity.

Even if Retterath's alleged conduct was relevant to the alleged harm that would be suffered by HES as an *entity*, his conduct is either not wrongful, incorrectly characterized, or by HES's own admission, speculative. HES alleges:

> Retterath's tenure as a Member and Director of HES was toxic, involving plots by Retterath to gain control of the Board to push through the redemption of his Units at an above-market price, including: (1) Retterath's nomination of candidates to the Board who were friendly to his interests, including a Florida acquaintance and a nephew; (2) Retterath's threat of litigation against HES; Retterath's attempt to have Marchand removed as a Director; and (4) most egregiously, Retterath's attempt to bribe Director Kuhlers into voting with him on Board matters.

(HES Br. at 30 (citation omitted).)

1. HES Did Not Prove Retterath Sought to Gain Control to Push Through an Above Market Deal

The record does not support HES's false assertion that Retterath sought to gain control of the Board to redeem his Units at an above-market price. (HES Br. at 15) (citation omitted, emphasis added).

HES's citation for this proposition does not support this claim. The testimony was simply "I'm of the opinion, yes, [Retterath] tried to gain control of the board." (App.(VI), p. 93 (testimony of Marchand).)[2]

In fact, the evidence was there was a division within HES's Board over the issue of distributions. Retterath was in favor of having HES make the highest distributions possible to *all* members. (App.(VII), pp. 168, 405-07.) Other members disagreed. (*Id.*) HES overlooks this conflict, and

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[2] Retterath's counsel objected to the term "control" as vague, which objection was preserved for this Court's de novo review. (App.(VI), p. 93.) The Court should grant the objection or give this vague characterization little weight.

falsely claims Retterath wanted Board control to buy himself out at an above-market rate.

Ironically, HES seeks to use its unsupported assertion about Retterath's intentions to establish alleged irreparable harm, while concurrently admitting that the MURA HES drafted, and seeks to enforce, provides an above-market payment for Retterath's Units. (App.(VI), pp. 100, 102-03, 124-25.) Worse, HES's position is that no membership vote was required to approve this above-market attempt to purchase. HES's apparent "remedy" for Retterath purportedly trying to obtain an above-market insider deal is to enforce an above-market insider deal without a membership vote.

HES's assertion that the MURA was above-market demonstrates that HES cannot prove irreparable harm: it is illogical to conclude *any* harm arises from HES paying an above-market price to acquire one of its members' Units in a transaction it seeks to specifically enforce against Retterath.

2. Retterath Nominating Candidates to the Board Is Not Wrongful

Next, HES tries to argue that Retterath following the proper procedure to nominate candidates for the Board was somehow wrongful. HES asserts "[Retterath] nominated a slate of candidates for election to the Board who

were friendly to his interests." (HES Br. at 15.) There is no evidence in the record establishing that these nominees were "friendly to Retterath" or what this vague characterization means.

Initially, the Retterath deposition testimony HES cites is not part of the record because it was not designated for trial and therefore was not part of the record at trial or for appeal. (*See* HES Br. at 15, citing Retterath Dep. 121:12-16.) HES thus draws its speculative characterization solely from its own leading direct examination of its acting chief financial officer, Marchand:

> Q. Did Mr. Retterath in the spring of 2013 make any effort to try to get people who were friendly to him elected to the Homeland board at the annual meeting?
>
> A. In my opinion, yes, he did.

(App.(VI), p. 96.)

Retterath's counsel objected to this testimony. (*Id.*) The district court admitted the answer subject to objection, preserving it for this Court's de novo review. (*Id.*) This Court should disregard Marchand's "opinion" for which no personal knowledge or foundation was established.

More fundamentally, there is nothing improper about nominees favoring certain positions Retterath supported, such as paying more distributions to all members. Retterath was entitled to participate in HES's

corporate governance process. HES cites no authority that this was wrongful behavior even if certain other Directors disagreed with it.

At most, HES's cited testimony establishes Retterath did exactly what the law required: he followed HES's protocols to attempt to nominate two Directors. While the nominating committee rejected them, and Retterath was upset about this decision (*Id.*), that does not establish he acted wrongfully. At most, it establishes he was an active member who disagreed with the committee's decision.

3. Retterath's Threat of Litigation Was Not Wrongful

In early 2013, Retterath was negotiating with the Board regarding a potential due diligence visit to HES's facility by Flint Hills Resources in connection with a potential sale of Retterath's Units. (App.(VI), pp. 141-48; App.(VII), p. 223.) Retterath disagreed with the limitations the Board wanted to place on this visit. He threatened litigation "[i]n order to have the board of directors reconsider" the limitations. (App.(VI), p. 97.) Retterath and the Board worked out this disagreement; Retterath did not pursue litigation. (App.(VII), p. 223.)

HES does not explain how merely threatening litigation in pursuit of Retterath's rights under the OA, is "toxic" or wrongful. It is not.

4. The Attempted Removal of Marchand Was Not Wrongful

HES cites Marchand's testimony that Retterath sent a letter addressed to her, with multiple pages of member signatures, seeking her resignation from the Board. (App.(VI), p. 99.) HES does not cite any evidence as to the nature of this dispute, but given the interest of many members in the subject matter, it can inferred that it involved the amount of distributions. There is nothing improper about one Director believing another has acted in a manner warranting resignation and seeking the support of the membership.

5. HES's "Bribery" Assertion Should Not Be Considered

Finally, HES asserts Retterath engaged in "bribery," but admits it never completed its "investigation" if "bribery" had occurred when the parties negotiated the MURA. (App.(I), pp. 22-23; App.(VII), p. 101.) Since HES never fully investigated and determined "bribery" occurred, this cannot be a basis for a showing of irreparable harm.

There is ample evidence in the record Retterath offered the purported bribe to Kuhlers not to cause him to vote a certain way, but as a finder's fee for helping broker a sale of Retterath's Units to Flint Hills. (App.(VI), pp. 322-24, 338-40.) Retterath knew Kuhlers was previously employed at Flint Hills's owner, which Retterath believed might be the only entity other than

HES that would have the ability to purchase his Units. (*Id.* pp. 162-63; 340.) Prior to the meeting where Retterath allegedly engaged in "bribery," he approached Kuhlers to help him sell his Units to Flint Hills, and Kuhlers said he would help where he could. (*Id.* p. 163.)

The factual bases HES alleges demonstrate Retterath was "toxic" all fail. Regardless, HES has not attempted to explain how these alleged acts were harmful to it as an entity such that it would be irreparably harmed in the absence of specific performance.

D. HES Failed to Prove it Was Ready, Willing, and Able to Close

HES alternately argues it was ready, willing, and able to close the MURA by the closing deadline, and that it was not required to be prepared to perform because Retterath anticipatorily repudiated the purported agreement and HES had the ability to waive all MURA conditions. These arguments fail.

1. HES's Anticipatory Repudiation Theory Fails

i. Anticipatory Repudiation Does Not Excuse a Party Seeking Specific Performance from Proving it Was Ready, Willing, and Able to Close

HES repeatedly cited two *damages* cases to incorrectly assert Retterath's alleged repudiation relieved HES of the requirement to prove it

was ready and able to close by the deadline. While repudiation relieves a party of its further obligations under an agreement, it does not permit a non-repudiating party to obtain specific performance against a repudiating party without proving the non-repudiating party was ready and able to close. (*See* Retterath Br. at 32-33 (analyzing *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W. 2d 231, 235 (Iowa 2001) and *Williams v. Clark*, 417 N.W.2d 247, 249 (Iowa Ct. App. 1987).) HES cannot compel specific performance of an agreement that it was not prepared to perform. Ignoring this basic premise of contract law, HES cites the same two cases and makes the same incorrect assertion that it had no obligation to be ready to perform. (*See id*. at 32-33.) HES's position is wrong as a matter of law and fact. (*See id*.); *accord First Trust Joint Stock Land Bank v. Resh*, 285 N.W. 192, 195 (Iowa 1939) (observing the plaintiff, seeking specific performance, was not ready and able to close where funds were not in the "hands of [plaintiff]" by the closing deadline).

A party's anticipatory breach may relieve the other party of further performance of the agreement before suing *for damages*. As the court explained in *Conrad Brothers*, "once a party repudiates a contractual duty before performance is due, the other party may enforce the obligation by filing a claim for *damages* without fulfilling any conditions precedent." 640

N.W. at 235 (emphasis added.) The rationale behind this rule is mitigation of damages. By not proceeding with its performance, the plaintiff "curtails the damages which the other party would be ultimately liable to pay." *Id.*

If Retterath repudiated the MURA, HES may not have to perform the contract if Retterath later demanded performance, and HES may have been able to sue Retterath for damages (assuming it had any) without being ready and able to perform. But HES's assertion that Retterath's repudiation (assuming it occurred) "relieved [HES] from its performance" is not accurate in the context of specific performance. (HES Br. at 32, quoting *Conrad Bros.*, 640 N.W.2d at 241.)

While it appears there is no Iowa case specifically on point, it is an established principle that "in order to be entitled to specific performance of a contract, a purchaser must demonstrate that it was ready, willing and able to perform its obligations regardless of the seller's anticipatory breach." *Sunrise Assocs. v. Pilot Realty Co.*, 565 N.Y.S.2d 108, 109 (N.Y. App. Div. 1991); *see also Acme Inv., Inc. v. Sw. Tracor, Inc.*, 105 F.3d 412, 416 (8th Cir. 1997) (applying Nebraska law) (same); *Coviello v. Richardson*, 924 N.E.2d 761, 767 (Mass App. Ct. 2010) (same); *Fridman v. Kucher*, 826 N.Y.S.2d 104, 106 (N.Y. App. Div. 2006) (same); *PR Pension Fund v. Nakada*, 809 P.2d 1139, 1145 (Haw. Ct. App. 1991) (same).

These propositions all make sense when considering the requirement that property in issue must be unique to invoke specific performance. If the property is unique, it cannot be replaced. But the buyer must have been "ready, willing and able" to purchase it. If the property is not unique, like units in an LLC, the cost of replacing the units can be quantified as damages.

HES's claim is for specific performance, not damages. The rationale of anticipatory repudiation relieving a plaintiff suing for damages of further performance does not apply to a specific performance claim. Even if Retterath anticipatorily repudiated the MURA (he did not), that repudiation would not relieve HES of its obligation to be prepared to close the MURA by the closing deadline to obtain specific performance.

ii. Retterath Did Not Repudiate the MURA

Retterath's actions did not meet the strict standards for an anticipatory repudiation.

> Anticipatory breach *requires a definite and unequivocal repudiation* of the contract. It is committed before the time for performance and is the outcome of words or acts evincing an intention to refuse performance in the future. It is not established by a negative attitude or one which indicates more negotiations are sought or that the party may finally perform.

Williams, N.W.2d at 250 (emphasis added).

Parties' disagreement about terms does not constitute an anticipatory repudiation:

> When two parties differ as to the interpretation of a contract, the mere demand by one party that the contract be performed according to its interpretation does not in and of itself constitute repudiation. Instead, a demand must be accompanied by a clear expression of intent not to perform under any other interpretation.

Conrad Bros. Inc., 640 N.W.2d at 241–42.

Retterath, through attorney Libow, did not express a clear intent "not to perform under any interpretation." Instead, Libow consistently expressed concern about the enforceability of the MURA and whether HES had complied with conditions of the MURA and the OA. (App.(VII), pp. 155-56.) In response, HES counsel Leo did not provide Libow any documentation to alleviate the Retterath concerns. Leo simply took the position that HES's interpretation of the MURA and the OA was correct, and Retterath's concerns were "misplaced." (*Id.* p. 201.) This is an example of "two parties differ[ing] as to the interpretation of a contract." *Conrad Bros.* 640 N.W.2d at 241–42.

Libow's insistence on Retterath's interpretation of the MURA and the OA does not constitute repudiation, especially where Leo refused to provide Libow documentation. Leo told Libow "I do not need to answer any of your questions" and insisted that only his interpretation could possibly be correct. (*Id.* p. 218.) It is undisputable that Libow was telling Leo that a membership vote was needed. (*Id.* p. 201.) Libow offered to extend the closing deadline

to permit the vote. (*Id.* p. 205.) These are comments or actions seeking to ensure a proper closing, not indicia of a refusal to close.

Indeed, HES did not act at the time as if it believed Retterath's conduct amounted to an anticipatory repudiation. Throughout the parties' June-August 2013 correspondence, Leo repeatedly (albeit incorrectly) stated HES "h[ad] the approvals it require[d] to close the transaction and [wa]s ready, willing and able to close." (*Id.* pp. 192-201, 210-11.) HES knew at the time that it was required to be ready, willing, and able to close. This is the *opposite* of its current position, which is that it did not need to be prepared to close by the deadline to be entitled to force a closing now via specific performance. HES is incorrectly trying to use the doctrine of anticipatory repudiation as a post-hoc means to excuse its failure to be ready and able to perform by the closing deadline.

iii. It was HES that Anticipatorily Repudiated the MURA

If anticipatory repudiation occurred, it was by HES repudiating the MURA by stating its intention to refuse to comply with its OA. The MURA requires that HES's "[Board] shall have approved this Agreement and the repurchase contemplated herein *in accordance with the Company's [OA]*." (Ex. 17 (emphasis added.) The OA is HES's rulebook. *In re NextMedia Investors, LLC*, CIV.A. 4067-VCS, 2009 WL 1228665 (Del. Ch. May 6,

2009). HES unequivocally stated that it did not intend to obtain the required member approval for the transaction. (*Id.* p. 201.) That anticipatory repudiation relieved Retterath of all obligations of further performance.

iv. HES Failed to Prove There was a Binding and Valid Agreement to Repudiate

HES does not contest the MURA had a June 13, 2013 time-is-of-the-essence signature deadline. (*See* Retterath Br. at 46.) HES also does not contest Board chair Boyle was not authorized to sign the MURA for HES on that date. (*Id.*)

HES incorrectly argues the signature deadline applied only to Retterath because the deadline states the agreement must be "fully signed by member." (*See* HES Br. at 42.) This overlooks that Boyle already signed the MURA before sending it to Retterath. (App.(VII), pp. 126-30.) Assuming HES had placed a binding signature on the document, only Retterath's signature was needed to make the document "fully signed." The plain meaning of the time-is-of-the-essence clause was a "fully signed" document (i.e., a document with both parties' signatures on it) was needed by June 13, 2013.

HES seems to argue that "fully signed" meant Retterath somehow had to "fully," as opposed to "partially," sign the MURA. That is nonsensical. There is only one signature line for Retterath. The more reasonable

interpretation of the "fully signed" language is Retterath had to sign after Boyle (albeit incorrectly) signed for HES to make the agreement "fully signed." The undisputed fact that Boyle was not authorized to sign means that HES had no authorized signature on the document by the deadline, rendering the purported agreement "null and void." (*Id.* p. 132.)

2. HES Did Not Have Spendable Funds to Close on the MURA or Make the Second Required Payment

The following key points from Retterath's brief, to which HES made *no* response in its brief, demonstrate HES did not have $15 million in funds it could spend to close on the purported MURA:

- The closing deadline was August 1, 2013, meaning HES had to be ready and able to perform by that date in order to be entitled to specific performance. (Retterath Br. at 36-37.)
- HES's loan covenants prohibited HES from using funds from *any source* to purchase Units. (*Id.* at 37-38.)
- HES admitted that it was going to pay for the MURA transaction with "cash on hand." (*Id.* at 39-40.)
- The undisputed evidence at trial was HES only had around $6 million in cash on hand as of August 1, 2013. (*Id.* at 39-40.)

- Even if HES had sought, contrary to its admission, to use bank line of credit funds to close on the MURA, doing so would violate its existing loan covenants, as HES's banker admitted.[3] (*Id.* at 40-41.)
- HES violating its loan covenants would also violate its OA. (*Id.* at 38.)
- Actions in violation of the OA are void. (*Id.* at 37-39.)
- HES made no provision for financing or lender approval for the second $15 million payment that would be due to Retterath in 2014. (*Id.* at 43.)

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[3] Home Federal was not required to loan funds to HES for the Retterath repurchase in violation of its loan covenants, and HES could not spend them for that purpose. Therefore, HES was not ready and able to close on August 1, 2013. *See also Acme Inv. Inc.*, 105 F.3d at 417 ("A proposed purchaser is not able to perform when he is depending upon third parties to make the purchase, which funds such persons are in no way bound to furnish.").

Moreover, Retterath's alleged repudiation did not cause HES to be unready and unable to close on August 1, 2013. For example, Retterath's actions did not prevent HES and Home Federal from signing amendments to the loan covenants authorizing HES to use line of credit funds to repurchase Retterath's Units. HES simply failed to do so.

In fact, HES now argues in its brief that HES's intent was always to sign the amendments to its loan covenants permitting HES to purchase Retterath's Units *after* the closing deadline to permit "appraisals to take place after the funds are borrowed." (HES Br. at 38.) HES asserts, without any legal or expert authority and relying on only one alleged example, that this purported practice of Home Federal (or any bank) extending a loan without a preceding appraisal of its collateral "is customary." (*Id.*) This unsupported and farcical assertion is entitled to no weight.

HES's argument on the financing and bank approval issues is based on Retterath's alleged repudiation relieving HES of its obligation to be ready and able to perform on the closing deadline. (*See* HES Br. at 39 ("the reason the loan modifications were not signed and the loan did not close is because Retterath repudiated the MURA.")[4] As detailed above, Retterath did not repudiate the MURA, and, in any event, this would not relieve HES of its obligation to be ready and able to close to be entitled to specific performance. HES's anticipatory repudiation theory is baseless and must be

[4] It is laughable for HES to blame Retterath for its failure to sign the loan modifications. HES never amended its loan covenants and admitted the loan was always intended to close after the closing deadline. Moreover, HES failed to prove the July 12, 2013 term sheet it cites as evidence of it obtaining financing was ever signed by the document's July 19, 2013 signature deadline. (*See* HES Br. at 37, citing App.(VII), pp. 187-90.) The signature date blank is not filled and signatory Wendland had no recollection of when he signed it. (Wendland 107:20-109:1.)

Further, supplemental evidence that Retterath submitted to clarify the record *after* HES was improperly allowed to supplement the record post-trial with cherry-picked documents demonstrates that as late as July 31, 2013, HES's banker Oftedahl was still trying to obtain Wendland's signature on a term sheet. (App.(VIII), pp. 25 et. seq.) The term sheet Oftedahl sent to Wendland to sign at the end of July 2013 was dated July 17, and not July 12, and contained different terms. (*Compare* App.(VII), pp. 187 et seq., *with* App.(VIII), pp. 25 et. seq.) Again, none of this supplemental evidence should have been admitted, and Retterath withdraws citation to this supplemental evidence—although helpful to him—if the Court declines, as it should, to consider HES's improper supplemental evidence.

rejected. HES's failure to take the necessary actions to be ready and able to perform by the closing deadline dooms its specific performance claim.

3. HES Failed to Comply with Its Conditions Precedent

HES argues that all the conditions precedent in the MURA are solely for its benefit and thus waivable in its discretion. (HES Br. at 34.) It glosses over the testimony of its own witnesses, including its lawyer who drafted the MURA, that the conditions were at least partially for Retterath's benefit. (Retterath Br. at 44-45.) Also, as detailed in Retterath's brief, HES *unilaterally* waiving conditions like the parties entering into a *mutual* release would be unconscionable. (Retterath Br. at 66.)

Finally, the contract required HES to waive the conditions "in writing." HES provided no evidence that it did so. Nor did Retterath make HES meeting these conditions impossible. For example, HES could have simply signed and presented a written release in favor of Retterath while waiving any reciprocal requirement that was arguably for its sole benefit.

4. HES Never Tendered

For HES to make a valid tender of the $15 million due at closing, it needed to produce the funds to him. (Retterath Br. at 45-46.) HES admits it did not do this, but only offered to do so. (HES Br. at 42.) It thus failed to tender. While repudiation may excuse the requirement of formal tender (but

not the requirement to be ready, willing, and able by the closing deadline), Retterath did not repudiate the MURA and tender was not excused. (*See* HES Br. at 42.)

II. A MEMBERSHIP VOTE WAS REQUIRED TO APPROVE THE MURA

Notably, HES does not contest that Retterath was a Director or an Affiliate for purposes of OA section 5.6(b)(v)'s membership vote requirement for insider deals. HES concedes that, if its Units are "equity securities," then a membership vote was required to approve the MURA under section 5.6(b)(v). (HES Br. at 46-47.) As detailed in Retterath's brief, the argument that Units, which are "the only class of *equity* in the Company," are not equity or debt securities flies in the face of the plain language of the OA, canons of construction, public policy, and common sense. (App.(VII), p. 42 § 6.1 (emphasis added); *see also* Retterath Br. at 50-55.)

Retterath's brief anticipated the bulk of HES's argument; further response is hardly necessary. HES's attempt to focus this Court's attention on *what* was being acquired (Units) rather than *from whom* it was being acquired (a Director or Affiliate) does nothing to overcome the deficiencies Retterath pointed out. HES's membership (including Retterath, for his own protection, according to HES) was entitled to vote on this above-market

insider deal. HES's refusal to put it to a vote rendered the MURA unenforceable.

HES does not contest that the MURA was an act outside of HES's normal course of business, and therefore a membership vote was required pursuant to Iowa Code § 489.407(3)(d)(3). (*See* Retterath Br. at 47-48.) It does not present evidence showing the MURA was in the ordinary course of business. HES's claim is doomed.

III. RETTERATH PROVED HIS AFFIRMATIVE DEFENSES

Retterath's affirmative defenses were established in the district court, and HES provides essentially no response on appeal. A key issue is HES applying K-1 taxable income to Retterath in the nearly year between the two $15 million payments due him under the MURA without paying him any corresponding distributions. The *undisputed* expert testimony at trial was this tax treatment violates the tax code. (*See* Retterath Br. at 61; App.(VI), p. 291.)[5] HES has no response to this. This concession mandates Retterath prevail on certain affirmative defenses.

HES admitted it was always its intention that Retterath would be treated in an illegal fashion under the MURA. (Retterath Br. at 59,

[5] HES continued to apply this improper tax treatment to Retterath for all subsequent years, improperly creating millions of dollars of tax liability for Retterath with no corresponding economic benefit. (Retterath Br. at 29.)

App.(VIII), p. 24.) HES drafted the MURA. Either HES consciously drafted an agreement under which, per HES's interpretation, Retterath would receive tax treatment that violated the tax code, or HES later "discovered" that the MURA "required" HES to violate the tax code to Retterath's detriment. Both are untenable. Under either scenario:

- Either unilateral or mutual mistake renders the MURA unenforceable. If HES always intended to tax Retterath in an illegal manner, Retterath's undisputed unilateral mistake that HES would comply with the tax code in its treatment of him excuses him from the MURA. If HES and Retterath were both mistaken that the MURA would be performed in a manner that did not violate the tax code there was a mutual mistake excusing his performance.
- HES is equitably estopped from enforcing the agreement due to its egregious conduct.
- It is unconscionable to force Retterath to perform an agreement that HES interprets as requiring applying tax treatment to Retterath that violates the tax code.

IV. THE DISTRICT COURT ERRED IN ADMITTING HES'S POST-TRIAL SUPPLEMENTAL EVIDENCE

First, HES's loan covenants barred HES from repurchasing Retterath's Units and HES's supplemental evidence cannot save its case.

However, in any event, HES has not provided any legitimate basis why it was proper to use post-trial "supplemental" evidence to fashion a new case theory contradicting HES's prior admission in an attempt to cure a deficiency in the evidence it put on at trial. (Retterath Br. at 66-71.)

HES also failed to analyze the factors for reopening the record after trial to explain, for example, why it could not have introduced its own bank statement as evidence at trial. The fact that HES's bank produced these documents to Retterath in response to a subpoena does not excuse HES of its obligation to justify why this new evidence should be admitted after trial. (*See* HES Br. at 57.) It was *HES*'*s* burden to obtain the evidence it wanted to use at trial, and it cannot cure this failure by shifting the burden on Retterath to timely discover information that *HES* now wants to rely on in its case. HES certainly could have obtained these documents through formal or informal requests to Home Federal at any time. Indeed, Home Federal would have produced all these documents before trial if HES's counsel would have consented to their disclosure, which he did not. (*See* App.(V), pp. 315-16.)

HES incorrectly asserts that this issue is "moot" because the district court did not cite any of this evidence in its Ruling After Trial and order on the parties' post-trial motions. This ignores that the Ruling After Trial does

not cite *any* evidence for the finding "HES proceeded to obtain the requisite funding through its bank and put the documents necessary for the transaction to take place as agreed in place," and the post-trial motions ruling contains no record citations. (*Id.* p. 325.) Moreover, the issue of the admissibility of this evidence was preserved for this Court's de novo review. This evidence should be excluded.

Also, the fact that Retterath also introduced documents obtained by this subpoena *after* the district court improperly admitted HES's supplemental exhibits does not render HES's exhibits admissible. (*See* HES Br. at 57.) Retterath noted he offered the evidence only to give the Court a complete picture of the subpoenaed documents because HES's incorrect arguments were premised on cherry-picked documents. Retterath never conceded that HES followed the proper procedure, but was entitled to respond after the door was opened by HES. *Cf. Goodale v. Murray*, 289 N.W. 450, 459 (Iowa 1940). Regardless, the proper procedure was the district court and now this Court not consider the supplemental exhibits that *either* party submitted from the subpoena to Home Federal.

V. THE DISTRICT COURT ERRED IN GRANTING HES ATTORNEY FEES

HES did not show the MURA's indemnification clause "clearly and unambiguously evidence[s] an intent by the parties to shift the attorney fees

between the parties." *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 471 (Iowa 2010). HES ignores the fact that it drafted the clause, and therefore the provision is construed against HES. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997). But even without that presumption, attorneys' fees were not shifted.

HES is incorrect that there is no plausible scenario under which the provision could apply to claims by third parties. (HES Br. at 60.) The indemnity clause applies to claims "resulting from (i) any breach or material inaccuracy of any representation or warranty and [Retterath] contained in this Agreement; or (ii) failure by Member to perform his obligations under this Agreement." (App.(VII), p. 131 ¶ 4.) Just for example, one of the representations and warranties in the agreement is that Retterath's Units are not encumbered. (*Id.* ¶ 3.) If Retterath breached this representation and warranty the third party holding a security interest in Retterath's Units could file a claim against HES.

Additionally, the *Hormel Foods Corp.* case HES cites is readily distinguishable. Hormel sued a warehouse under an indemnification clause in the warehouse agreement stating that:

> [warehouse] shall indemnify and save Hormel harmless from and against any and all claims *for loss or damage to product which results from the negligence of [warehouse]*.

Hormel Foods Corp. v. Crystal Distrib. Servs., 2011 WL 2118718 (N.D. Iowa 2011) (emphasis added). Unlike here, this clause shows a clear intent to shift fees between the parties because it makes clear that it contemplates Hormel directly recovering from the warehouse for a loss from the warehouse's negligent damage to Hormel's product.[6]

VI. THE DISTRICT COURT ERRED IN FAILING TO SANCTION HES FOR ITS LATE PRODUCED EVIDENCE

HES ignores the fact that the documents it produced less than two weeks before trial were responsive to discovery requests Retterath served much earlier. (Retterath Br. at 79-81.) The fact that HES ultimately produced them in response to subpoenas that Retterath issued later does not change the fact that HES was obligated to produce these responsive documents in response to the prior discovery requests. (*See* HES Br. at 64-66.)

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[6] The *Grant Insurance Agency* case HES cites does not cite *NevadaCare* or apply the principle that indemnification clauses such as the one at issue must evidence a clear intent to shift fees between the parties in order to do so. *Grant Ins. Agency v. Clem Ins. Servs., Inc.*, 2014 WL 6680987 at *18-19 (Iowa Ct. App. Nov. 26, 2014). It is unclear in that case whether the party against whom fees were sought challenged whether the indemnification clause in the agreement could shift fees between the parties. *Id.* Therefore, it should be afforded little, if any, weight here.

VII. THE DISTRICT COURT ERRED IN STRIKING RETTERATH'S JURY DEMAND, BIFURCATING TRIAL, AND DENYING A NEW TRIAL

The district court erred in striking Retterath's jury demand because HES tried the case as a breach of contract case. (Retterath Br. at 83.) Also, HES's seeming assertion that Retterath's jury demand on its counterclaims and third-party claims was struck is false. (*See* HES Br. at 67-68.) HES never moved for such relief. There was no order striking HES's jury demand. This is not an issue properly before this court.

Further, HES is incorrect that bifurcation could have resolved all issues in this case. (*See* HES Br. at 68-69.) Retterath does not concede that, if specific performance of the MURA were denied, his claim against RSM, which gave HES advice to his detriment, while concurrently representing him in a personal capacity, would simply evaporate. Bifurcation was not warranted, and as an alternative to denying HES's specific performance claim outright, the severely prejudicial irregularities that occurred in this case warrant a new trial with all claims tried together.

CONCLUSION

HES has continuously sought to avoid its obligations to Retterath while burdening him with tax and other consequences that benefitted other members. This Court must reverse the district court's orders directing specific performance and awarding HES' attorneys' fees to correct the errors

that inadvertently aided and abetted HES's schemes. Further, this Court should confirm Retterath's recovery of sanctions against HES and direct further proceedings so Retterath may litigate his counterclaims and recover the extensive damages occasioned by HES's wrongful and inequitable conduct.

REQUEST FOR ORAL ARGUMENT

Retterath respectfully renews his request for oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief contains 6,974 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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

/s/ William J. Miller
William J. Miller