IN THE SUPREME COURT OF IOWA
NO. 18-0950

HOMELAND ENERGY SOLUTIONS, LLC
Plaintiff-Appellee,

v.

STEVE J. RETTERATH,
Defendant-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

PLAINTIFF-APPELLEE'S BRIEF

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals in accordance with Iowa R. App. P. 6.1101(3) because it involves the application of existing legal principles and is appropriate for summary disposition.

STATEMENT OF THE CASE

Homeland Energy Solutions, LLC ("HES") does not necessarily take issue with Appellants' Statements of the Case, other than to note they are incomplete. As shown by the countless pleadings and transcripts cited in the parties' appellate briefs and contained in the designations of appendix, the procedural history of this matter is long and convoluted. Notwithstanding, separate and further discussion of the procedural history is not necessary here.

STATEMENT OF FACTS

The Appellants' Statements of Facts contain a select and incomplete recitation of the critical facts upon which the district court relied in finding that Retterath breached the contract. Accordingly, a more complete Statement of Facts is by necessity set forth below, which includes Retterath's sophistication as a successful businessman who made his fortune in the South Florida construction industry, his investments of approximately $43 million in three ethanol plants, the details of the negotiations of the Membership Unit Repurchase Agreement ("MURA") between Retterath and HES, the communications between June 20 and August 1, 2013, from Retterath and his counsel repudiating the MURA and repeatedly stating that the MURA was not enforceable and Retterath would not under any circumstances sell his membership units in HES (the "Units") back to HES, and Retterath's admissions that the sole reason for his refusal to honor the MURA was seller's remorse due to the taxes he would have to pay on the sale of his Units, about which he did not ask his or HES's accountants until after the MURA was finalized.

HES is an Iowa-based limited liability company that is in the business of manufacturing ethanol and ethanol by-products in Lawler, Chickasaw County, Iowa. Retterath is a sophisticated businessman who, after growing

up in Iowa and later moving to Florida, made a fortune running a construction crane business in southeast Florida. App. VI, p. 312 (Videotaped Deposition of Steve Retterath ("Retterath Dep.") 10:3-16). He admits he spent 45 years negotiating and executing multimillion dollar contracts on tight deadlines. App. VI, p. 329 (Retterath Dep. 90:6-9).

Beginning in the early 2000s, Retterath invested nearly $43,000,000 in three ethanol plants: Absolute Energy, LLC near Lyle, Minnesota ("Absolute"), Golden Grain Energy, LLC in Mason City, Iowa ("Golden Grain") and HES. App. VI, pp. 330-331 (Retterath Dep. 93:9-94:11). Retterath invested roughly $4,500,000 in Golden Grain App. VI, pp. 313-315; 334 (Retterath Dep. 11:2-13:21; 101:6-9) and $12,500,000 in Absolute. App. VI, pp. 317-318 (Retterath Dep. 15:5-21; 16:22-24). Golden Grain, Absolute and HES had some overlapping ownership and management, and had virtually identical operating agreements. App. V, p. 321 (Ruling After Trial to Court ("Ruling"), p.3). Retterath sat on the boards of Golden Grain and HES, which often scheduled their board meetings in the same week to accommodate Retterath's traveling from Florida to attend. (Id.)

Beginning in 2007, Retterath invested approximately $26,000,000 in HES, receiving 25,860 Units. App. VI, pp. 319; 330-331 (Retterath Dep. 20:5-9; 93:24-94:6). Retterath's large investment in HES gave him the

power to appoint two people to the HES board of directors (collectively, the "Board" and individual directors as "Directors"). App. VI, pp. 72; 321 (Jan. 17 Tr. 71:11-18; Retterath Dep. 47:14-18). Until June 2013, Retterath always occupied one of those Board seats.

In late 2012, Retterath became nervous about the ethanol industry and began efforts to liquidate his interest in all three companies, successfully negotiating for Absolute and Golden Grain to repurchase his units. App. VI, pp. 74-75; 332-333 (Jan. 17 Tr. 76:5-16, 77:18-24; Retterath Dep. 98:5-99:11, 99:12-20).

At HES, upon Retterath's request to explore selling his Units, the Board duly formed, appointed and authorized a Steve Retterath Buyback Committee ("Repurchase Committee") to negotiate the repurchase of his Units. App. VII, pp. 93-97 (Ex. 5); VI, p. 88 (Jan. 17 Tr. 92:9-24).

In late 2012/early 2013, Retterath offered to sell his Units to HES for $2,000 per Unit. App. VI, p. 336 (Retterath Dep. 115:15-20). This was approximately double the $1,000 price at which HES units were selling.[1]

[1] HES is privately owned, so all purchases and sales of HES units take place privately between the selling member and purchaser. There is no public market for the sale of HES Units, such as a stock exchange. Rather, there is a website where interested buyers and sellers can connect to pursue direct sales of units between themselves. The Board must approve all sales of membership units, so the Board was aware of the prices at which HES units were selling. App. VI, pp. 105-106 (Jan. 17 Tr. 132:13-133:9).

App. VI, p. 85 (Jan. 17 Tr. 87:21-23). Retterath knew this because a few months earlier he had purchased additional HES units from fellow Board member Ed Hatten at $850 per unit. App. VI, p. 337 (Retterath Dep. 118:18-25). The Board rejected Retterath's offer.

In February 2013, Retterath lowered his demand to $1,400 per unit. App. VII, pp. 212-214 (Ex. E). The Repurchase Committee met on February 14, 2013, App. VII, pp. 96-97 (Ex.6); VI, pp. 89-90 (Jan. 17 Tr. 97:9-98:4), and counteroffered to repurchase Retterath's Units for $28,000,000 (approximately $1,083 per unit). App. VII, pp. 98-99 (Ex. 7); VI, pp. 90-91 (Jan. 17 Tr. 98:5-99:9). Retterath rejected this offer, and negotiations stalled. App. VI, p. 92; 374 (Jan. 17 Tr. 101:13-18; Videotaped Deposition of Walter Wendland ("Wendland Dep.") 172:5-12).

In the meantime, beginning in January 2013, Retterath undertook a series of actions to try to gain control of the HES Board in order to get the votes needed to approve HES repurchasing his Units at the above-market sale price he wanted. App. VI, p. 93 (Jan. 17 Tr. 105:3-9). First, he nominated a slate of candidates for election to the Board who were friendly to his interests, including a Florida acquaintance and a nephew. App. VI, pp. 93-95 (Jan. 17 Tr. 105:12-106:24; 107:16-22). That effort failed. App. VI, pp. 95-96 (Jan. 17 Tr. 107:23-108:17).

Next, Retterath threatened litigation against HES, then retracted the threat. App. VII, pp. 212-214 (Ex. E); VI, pp. 97-98 (Jan. 17 Tr. 112:10-113:12).

He then unsuccessfully tried to remove Christy Marchand, an HES Director and member of the Repurchase Committee, from the Board. App. VI, p. 99 (Jan. 17 Tr. 118:13-19**).**

Finally, Retterath attempted to bribe Director Chad Kuhlers to vote with Retterath on Board matters. Specifically, Retterath asked Kuhlers to meet at a Perkins restaurant in Clear Lake, Iowa, on May 11, 2013 App. VI, pp. 149-153 (Jan. 18 Tr. 71:12-73:15; 74:14-75:15), and told Kuhlers the 11-Director Board was split against him six to five. App. VI, p. 154 (Jan. 18 Tr. 76:3-15). To gain control, Retterath offered Kuhlers $100,000 per Board meeting to vote with him, a $5,000,000 payment once Retterath's Units were sold App. VI, p. 154 (Jan. 18 Tr. 76:17-22), and a job at HES paying $300,000 per year. App. VI, pp. 156-157 (Jan. 18 Tr. 78:23-79:6). Kuhlers refused and left the restaurant. App. VI, p. 157-158 (Jan. 18 Tr. 79:7-80:9).

After leaving, however, Retterath immediately called Kuhlers and asked him to return because Kuhlers purportedly forgot something. App. VI, p. 158 (Jan. 18 Tr. 80:7-14). Upon returning, Retterath handed Kuhlers a

$100,000 hand-written check. App. VI, p. 158 (Jan. 18 Tr. 80:13-24).[2] Kuhlers told Retterath he did not want it, but Retterath insisted. App. VI, p. 159 (Jan. 18 Tr. 81:4-10). Kuhlers testified he was so scared about what happened that he locked the check in the console of his truck, locked the truck when he parked it in his garage, and locked his garage door, none of which he normally does, and immediately reported the incident to the Board and turned the check over to HES's counsel. App. VI, p. 159-160 (Jan. 18 Tr. 81:11-82:19).

Retterath admitted both in testimony and in a contemporaneous email that he met with Kuhlers and wrote him the check for $100,000. App. VII, pp. 100, 107-110 (Exs. 9, 12); VI, pp. 341-342 (Retterath Dep. 125:14-126:11).

Having failed in all these attempts to gain control of the HES Board, in early June of 2013, Retterath initiated a new round of negotiations by offering to sell his Units to HES for $1,100 per unit ($28,446,000), payable in three equal installments. App. VI, pp. 166-167; 343 (Jan. 18 Tr. 114:19-115:16; Retterath Dep. 128:6-10). Unlike the description of these

[2] Kuhlers testified in great detail and with great credibility about these events, recalling where he was when Retterath started calling him to set up the meeting, what each of them ordered at Perkins, the type of car Retterath was driving, etc. App. VI, pp. 149-151; 153; 158 (Jan. 18 Tr. 71:24-73:5; 75:16-18; 80:16-18).

negotiations in Retterath's appeal brief, which states that Pat Boyle, one of the Repurchase Committee members, sent Retterath a draft MURA on June 11 "proposing" a $28,446,000 payment in three equal installments, it is undisputed that Retterath, not HES, initiated the June negotiations by making this first offer, and to be paid in installments.

On June 10, 2013, the Repurchase Committee agreed to Retterath's offer of $1,100 per unit ($28,446,000), payable in three equal installments. App. VII, p. 101 (Ex. 10). Boyle, who was also Chairman of the HES Board at the time, emailed a draft MURA to Retterath on June 11 containing the terms Retterath had offered. App. VII, pp. 102-106 (Ex. 11); VI, pp. 194-195 (Jan. 19 Tr. 44:17-45:19).

The next day, June 12, Retterath sent an email to Boyle attaching a written "statement" in which he admitted he wrote Kuhlers a $100,000 check, but claimed that he had done nothing wrong (asserting he was simply offering to pay Kuhlers for "services rendered," that "compensation for services rendered is the American way," and "**that's my story and I'm sticking to it**."), repeated his criticism of HES's management, and made clear that it was his intent to part ways with HES, stating: "I will retire either way and let you know my replacement." App. VII, pp. 107-110 (Ex. 12) (emphasis added). In a separate attachment to this email, Retterath stated

that, despite his initial offer, he now wanted to be paid in one lump sum. App. VII, pp. 107-110 (Ex. 12); VI, pp. 196-197 (Jan. 19 Tr. 48:6-49:2).

The Repurchase Committee agreed to Retterath's counteroffer to sell his Units for the same price ($28,446,000), payable in one lump sum. On June 13, at 9:47 a.m., Boyle emailed a revised draft MURA to Retterath incorporating these terms. App. VII, pp. 111-117 (Ex. 13); VI, pp. 197-198 (Jan. 19 Tr. 49:3-50:17).

In response, one hour later, at 10:46 a.m., Retterath emailed Boyle the revised draft MURA with his handwritten changes, having crossed out the $28,446,000 purchase price, handwritten a new price of $30,000,000 (approximately $1,160 per Unit), initialed that change, initialed each page of the revised MURA (four pages total), and signed on the signature line on the back page. App. VII, p. 118-124 (Ex. 14); VI, pp. 198-201; 344-346 (Jan. 19 Tr. 50:18-51:3; 52:8-53:9; Retterath Dep. 134:22-136:7). Boyle did not instruct Retterath how to make this counteroffer; rather, Retterath made his counteroffer and initialed all changes and pages based on his years of experience negotiating and signing multimillion dollar contracts. App. VI, pp. 201-202; 347-348 (Jan. 19 Tr. 53:10-54:13; Retterath Dep. 90:6-9; 138:4-139:6).

The Repurchase Committee immediately met and agreed to the $30,000,000 purchase price, but wanted it paid in two installments. App. VII, p. 125 (Ex. 15); VI, pp. 202-204 (Jan. 19 Tr. 54:14-56:17, 56:18-19). Boyle called Retterath and offered that the payment be made in two installments, one at closing and the second within one year, to which Retterath agreed. App. VI, pp. 204-205 (Jan. 19 Tr. 56:20-57:16).

Boyle immediately prepared a revised MURA with the $30,000,000 repurchase price payable in two equal installments, signed it and emailed it to Retterath. App. VII, pp. 126-130 (Ex. 16); VI, pp. 205-207 (Jan. 19 Tr. 57:19-58:23, 59:6-12). Retterath then signed and emailed it back to Boyle at 1:58 p.m., still on June 13. App. VII, pp. 131-135 (Ex. 17); VI, pp. 207-209 (Jan. 19 Tr. 59:13-61:7). It is undisputed that the MURA was the result of arms-length negotiations between Retterath and HES, in which Retterath actually negotiated a higher sale price for himself than he initially offered on June 10, 2013.

Later that day, Boyle emailed the MURA to the HES Board (copying Retterath), "for your review to be voted on at the next board meeting." App. VII, pp. 136-140 (Ex. 18); VI, pp. 209-211 (Jan. 19 Tr. 61:8-20; 62:5-63:6). The critical provisions of the MURA are set forth in greater detail in the Argument section of this brief, but some of those provisions include

requirements that the HES Board must approve the MURA for it to be enforceable, "Closing" is a capitalized term of the MURA defined as "on or before August 1, 2013," HES shall pay the first installment of $15 million "by check or wire transfer at the direction of [Retterath]," and Retterath represents he is relying on his legal and financial advisors regarding "tax" and other considerations involved in the transaction. App. VII, pp. 131-135 (Ex. 17).

Four days later, on June 17, 2013, Retterath submitted his immediate resignation from the Board and named Ed Hatten as his replacement, stating, in part, "I retire from HES Board and Ed Hatten will replace me." App. VII, p. 141 (Ex. 20); VI, p. 104 (Jan. 17 Tr. 131:4-14).

At the next Board meeting, on June 19, 2013, the Board approved the MURA by an 8-3 vote. App. VII, p. 149 (Ex. 27); VI, pp. 106-107 (Jan. 17 Tr. 133:10-134:9). Consistent with Retterath's resignation from the Board two days earlier, he did not attend or attempt to attend that Board meeting or any Board meeting thereafter. App. VII, pp. 146-148 (Ex. 26); VI, pp. 104-105 (Jan. 17 Tr. 131:21-132:8). Clearly, Retterath was not a member of the HES Board on June 19, 2013. App. VI, p. 105 (Jan. 17 Tr. 132:9-12). Hatten attended the Board meeting that day and voted to approve the

MURA. App. VII, pp. 146-149 (Ex. 26 and 27); VI, pp. 104, 107 (Jan. 17 Tr. 131:4-6; 134:10-19).

The following day, June 20, 2013, at 9:00 a.m., Retterath's attorney, Allen Libow, had a telephone conversation with Dustin Petersen, who was HES's accountant, located in the Des Moines office of RSM McGladrey ("RSM"), about the tax ramifications to Retterath from the sale of his Units. App. VII, pp. 150-151 (Ex. 28); VI, pp. 172-173 (Jan. 18 Tr. 130:4-131:16). Importantly, Libow initially contacted Petersen on June 18, the day before the HES Board meeting to approve the MURA, to schedule this call. App. VII, p. 145 (Ex. 22); VI, pp. 170-171 (Jan. 18 Tr. 128:10-129:22). Clearly, Libow was aware of the MURA before the Board approved it on June 19, and did not make any objections, including that the Operating Agreement required a member vote to approve the MURA. The objections were only made later, after learning the amount of taxes Retterath would owe. During the June 20 call, Petersen explained that Retterath's gain from the sale of his Units would be taxed as ordinary income (i.e. at 40%, rather than as capital gains, which are taxed at 20%). VI, p. 173 (Jan. 18 Tr. 131:1-12). He stated that Retterath's basis in his Units was approximately $16,000,000, meaning his taxable gain would be approximately $14,000,000, 40% of which is $5,600,000, which he concluded would be the amount of taxes Retterath

would owe from the sale of his Units. App. VII, pp. 182-183 (Ex. 39); VI, pp. 176-177 (Jan. 18 Tr. 137:1-138:8).

The next morning, June 21, 2013, Retterath spoke with Robert Sieracki, an HES Director who is married to Retterath's cousin, and told Sieracki that he was now unhappy about the MURA because he found out he would have to pay 40% tax. App. VII. p. 20 (Ex. 1-1); VI pp. 446-450 (Deposition of Robert Sieracki 12:17-16:4). Sieracki immediately sent an email to HES CEO Walt Wendland informing him what Retterath said. App. VII, p. 20 (Ex. 1-1). About two weeks later, on July 3, 2013, Retterath's accountant in Florida, Annette Berens, sent an email to Petersen saying that Retterath was still making his decision about whether or not to close on the MURA and wanted her to do an independent calculation of the taxes he would owe so he could compare to Petersen's calculation. App. VII, pp. 182-183 (Ex. 39); VI, pp. 174-175 (Jan. 18 Tr. 133:9-134:9). Berens reached the same conclusion as Petersen, that Retterath would owe approximately $5,600,000 in taxes. App. VII, pp. 182-183 (Ex. 39); VI, pp. 176-177 (Jan. 18 Tr. 137:1-138:8).

Beginning on June 20, 2013, shortly after Libow's telephone call with Petersen, Libow began a series of communications with HES's counsel, Joseph Leo, that would continue for the next 5-6 weeks, until the August 1,

2013 MURA closing date, stating variously that Retterath was "revoking" his offer, that there was no binding agreement and there would be no closing. Indeed, the district court correctly found that these were "**specious objections, questions and threats**." App. V, p. 326 (Ruling, p.8) (emphasis added). These communications clearly establish that Retterath repudiated/anticipatorily breached the MURA.

For example, on June 20, 2013 at 6:45 p.m., the same day as his meeting with Petersen, Libow emailed Leo stating Retterath's "offer" to sell his Units to HES expired "*ab initio*" upon delivery of Libow's email to Leo and that the "offer" was "hereby revoked." App. VII, pp. 152-156 (Ex. 31); VI, pp. 235-236 (Jan. 19 Tr. 169:2-170:23). Of course, there was no "offer" pending at the time, but a fully executed and approved contract that was the result of arms-length negotiations between Retterath and HES. Even if one were to review the negotiations to determine the sequence of offers and counteroffers, HES made the final "offer," which Retterath accepted ($30,000,000 payable in two installments).

On June 21 at 3:44 p.m., Libow sent another email referring to the MURA as a "proposed offer," threatening litigation and stating: "[o]nce again, and if there were any question regarding my correspondence on behalf of my client last night, Mr. Steve Retterath hereby and heretofore

confirms his revocation of his offer to sell his shares back to HES." App. VII, pp. 152-156 (Ex. 31); VI, pp. 237-239 (Jan. 19 Tr. 172:3-174:24).

On July 22, 2013, Libow and Retterath called Leo and continued to assert there was no agreement. App. VI, p. 238 (Jan. 19 Tr. 183:6-13). Neither Retterath nor Libow refuted Leo's testimony about what they said during this call.

On July 29, 2013, three days before the August 1, 2013 scheduled closing on the repurchase of Retterath's Units, Libow sent Leo another email reiterating "our position is that there is NO AGREEMENT," that the MURA "was never agreed to *ab initio* (the offer was revoked prior to it being capable of being accepted)" and "[a]s stated previously, my client has already revoked his offer." App. VII, pp. 202-203 (Ex. 53); VI, pp. 254-258 (Jan. 19 Tr. 192:21-196:8) (emphasis in original).

On July 31, 2013, the day before closing, Libow called Leo and continued to take the position there was no agreement and there would be no closing. App. VI, pp. 259-260 (Jan. 19 Tr. 197:23-198:8). Libow followed up with another email that afternoon stating, "[f]irst, however, and sorry to reiterate, but this is our position, and that is that there is no contract," requested a number of additional contract terms, and, in closing, again noted

that "my client will not concede that a completed contract exists." App. VII, p. 204 (Ex. 54); VI, pp. 259-261 (Jan. 19 Tr. 197:1-199:25).

During these weeks, HES, on the other hand, continued to act in good faith to try to close on the MURA by August 1, 2013. On July 9, 2013, Leo sent Libow an email with an attached draft mutual release agreement for Libow's review. App. VII, pp. 184-186 (Ex. 42); VI, pp. 240-241 (Jan. 19 Tr. 175:12-176:3). Libow, however, never provided a response, nor did he ever suggest any revisions or edits to the draft mutual release agreement. App. VI, p. 241 (Jan. 19 Tr. 176:4-10). Contrast this with Retterath's one sentence statement in his appeal brief that "[n]either HES nor Retterath signed a mutual release," (Retterath Brief, p.28), which Retterath offers for the proposition that HES failed to comply with a condition precedent to closing the MURA on August 1, 2013. Obviously, this statement utterly ignores that it was Retterath and his counsel who refused to respond to, comment upon or execute the release HES sent them.

On July 16, 18, 22, 24, and 26, and August 1, 2013, Leo sent a series of emails/letter to Libow stating that HES was ready, willing and able to close on the MURA and: (1) stating the mutual release agreement needs to be completed and requesting any proposed revisions; (2) requesting Retterath's wiring instructions for HES to pay Retterath on August 1, 2013;

(3) requesting copies of Retterath's Unit Certificates and confirmation that the originals will be provided at closing as required by the MURA; and (4) asking about the status of the written resignation of Retterath's Board appointees, and even offering to draft the resignations. App. VII, pp. 191-194, 199-201, 210-211 (Exs. 47, 48, 49, 50, 52 and 58); VI, pp. 241-247, 251-254, 262-264 (Jan. 19 Tr. 176:11-178:25; 179:25-182:24; 189:20-192:20; 203:2-205:16). Retterath never provided any of this information, including wiring instructions for the first $15,000,000 payment. The district court correctly determined HES tendered its performance under the MURA and was ready, willing and able to perform.

Finally, further exemplifying Retterath's decision that he was not closing on the MURA, Retterath filed suit on August 1, 2013, in Florida, against HES, certain HES Directors, Leo and the BrownWinick Law Firm. App. VI, pp. 264-265 (Jan. 19 Tr. 205:17-206:18). HES filed the present lawsuit on August 14, 2013, seeking specific performance of the MURA. App. VI, p. 265 (Jan. 19 Tr. 206:19-23).

HES remains ready, willing and able to close on the MURA and comply with the district court's Ruling, and has $30,000,000 available in a segregated fund for immediate payment to Retterath. App. VI, pp. 108-109 (Jan. 17 Tr. 147:22-148:20).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT HES IS ENTITLED TO SPECIFIC PERFORMANCE OF THE MURA.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review is de novo.

B. Preservation of Error

HES agrees that Appellants[3] preserved error on this issue.

C. Argument

Retterath sets forth five purported "elements" of specific performance (including uniqueness, no adequate remedy at law, irreparable harm, satisfaction of conditions precedent and tender) without citation to any supporting legal authority. (Retterath Brief, p. 31). Retterath's purported "elements" are incorrect.

[3] There are two groups of appellants in these proceedings, Retterath (the defendant) and Jason and Annie Retterath (Retterath's son and daughter-in-law who are the intervenors) (the "Intervenors"). Intervenors were dismissed from the case as a result of the summary judgment order. Intervenors' allegations of error (except for the final allegation of error related to bifurcation) hinge exclusively on Retterath's and Intervenors' argument that the district court incorrectly granted summary judgment that Section 5.6(b)(v) of the Operating Agreement did not require a vote of the HES membership to approve the MURA. HES's position on that argument is addressed at length herein and applies equally to Retterath's and Intervenors' appellate briefs. As such, this appellate brief responds to both Retterath's and Intervenors' appellate briefs.

The remedy of specific performance rests in the equitable discretion of the district court. Berryhill v. Hatt, 428 N.W.2d 647, 657 (Iowa 1988) ("Specific performance of a contract is a remedy resting in the equitable discretion of the court"); McCarty v. Jeffers, 154 N.W.2d 718, 473 (Iowa 1967) ("Action for specific performance of a contract is cognizable in equity"). "The object of specific performance is to best effectuate the purpose for which a contract is made," and "[i]t should be granted upon such terms and conditions as justice requires." Lange v. Lange, 520 N.W.2d 113, 118 (Iowa 1994). For stock purchase agreements, specific performance is allowed where "damages at law are clearly incomplete and inadequate" or where the "stock represents control of the company." Gingerich v. Protein Blenders, Inc., 95 N.W.2d 522, 524 (Iowa 1959).

Here, the MURA served three purposes: (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. There is no remedy at law, monetary or otherwise, that could accomplish those three purposes. As a result, specific performance was the appropriate remedy.[4]

[4] Also, while Retterath's Units do not constitute a controlling HES membership block, those 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. App. VI, p. 72 (Jan. 17 Tr. 71:11-18).

1. Uniqueness Need Not Be Shown; However, Retterath's Units are Unique

As discussed in the preceding section, "uniqueness" is not a required element for HES's claim for specific performance of the MURA. Nevertheless, Retterath's Units are unique. They are evidenced by unique Unit Certificate Numbers 36, 824, 1459 and 1530. App. VII, pp. 131-135 (Ex. 17). HES does not duplicate unit certificate numbers, and, in situations like this, retires the unit certificate numbers of all redeemed stock. App. VI, pp. 254, 266-268 (Jan. 19 Tr. 192:2-20; 207:21-208:22; 209:5-22). It is not possible, therefore, for any two unit certificates to have the same number. Retterath's Units are further unique as a result of the Board appointment powers that accompany them. App. VI, p. 72 (Jan. 17 Tr. 71:11-18).

2. HES Has No Adequate Remedy At Law and Has Shown Irreparable Harm

As discussed above in Section I(C), 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. Moreover, accomplishing those three ends was essential to shield HES from irreparable harm.

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, App. VI, pp. 93-95; (Jan. 17 Tr. 105:12-106:24; 107:16-22); (2) Retterath's threat of litigation against HES, App. VII, pp. 212-214 (Ex. E); VI, pp. 97-98 (Jan. 17 Tr. 112:10-113:12); (3) Retterath's attempt to have Marchand removed as a Director, App. VI, p. 99 (Jan. 17 Tr. 118:13-19); and (4) most egregiously, Retterath's attempt to bribe Director Kuhlers into voting with him on Board matters, App. VI, pp. 149-160 (Jan. 18 Tr. 71:12-82:19). 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.

3. HES Was Excused From, Waived and/or Satisfied All Conditions Precedent in the MURA

Retterath devotes the majority of the specific performance argument in his brief to his claim that HES was not ready, willing and able to close and had not otherwise satisfied the conditions precedent for closing set forth in the MURA. (Retterath Brief, pp. 36-45). Specifically, Retterath argues that: (1) HES did not have financing or available funds to make the first or second $15,000,000 installment payment; (2) the parties did not enter into a

mutual release; and (3) Eastman (one of his Board appointees) did not resign from the Board.

This argument fails because: (1) Retterath immediately and repeatedly repudiated the MURA after it was executed and approved by the HES Board on June 19, 2013, through the closing date of August 1, 2013, thereby relieving HES of further performing any aspect of the MURA; (2) even if Retterath had not repudiated the MURA, the conditions set forth in Section 5 of the MURA are for HES's benefit, not Retterath's, and Retterath cannot, as a matter of law, use HES's purported failure to meet its own conditions precedent as an excuse for his refusal to perform; and (3) as a matter of fact, HES either met or waived these conditions, or Retterath made their performance impossible.

a. Retterath's express repudiation of the MURA excused HES from its performance obligations

Retterath repudiated the MURA, which absolved HES of any obligation to perform the conditions in Section 5, or any other provisions, of the MURA, even though the evidence clearly establishes that HES continued to try to get Retterath to close on the transaction until the August 1, 2013 closing date. Beginning on June 20, 2013, and continuing through August 1, 2013, Retterath, primarily through his counsel, repeatedly, expressly and unequivocally stated that the MURA was void, that he had revoked it, that it

was not a binding agreement, and that he would not close. App. VII, pp. 152-156, 202-209 (E.g., Exs. 31, 53, 54). Under Iowa law, that is anticipatory breach. See Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 241 (Iowa 2001) ("Normally, repudiation consists of a statement that the repudiating party cannot or will not perform."); Williams v. Clark, 417 N.W.2d 247, 250 (Iowa 1987) ("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.").

Once repudiation has occurred, Iowa law is clear, "[w]here one party to a contract repudiates the contract before the time for performance has arrived, the other party is relieved from its performance." Conrad Bros., 640 N.W.2d at 241. In essence, "[a] repudiation of a contract is accorded the same effect as a breach by nonperformance." Id.

> The rationale behind the rule that a repudiation of a contract by one party will excuse the other party from the duty to perform contractual obligations and conditions, is the prevention of economic waste, in the sense that, following a clear repudiation, the other party should not be required to perform the formal, economically wasteful, and useless act of further performing. It would seem to be reasonable and just, upon the repudiation of the contract by one party, that the other be held justified in ceasing performance, stopping expenditure, and thus curtailing the damages which the other party would be ultimately liable to pay. To further comply with the contract requirements where

> the other party has repudiated the contract would be a useless act, and the law does not require the doing of a useless act.

Id.

Retterath first repudiated the MURA on June 20, 2013, and repeatedly maintained that position through the August 1, 2013 closing date, legally absolving HES of any obligation to perform under the MURA, including Section 5.

b. The conditions precedent in Section 5 of the MURA are for HES's benefit, not Retterath's, and do not excuse Retterath's refusal to perform his obligations in the MURA

The conditions precedent in Section 5 of the MURA are for HES's benefit, not Retterath's, so even if HES did not or could not satisfy any of those conditions precedent, Retterath cannot, as a matter of law, use that failure to excuse his performance. See Rodgers v. Baughman, 342 N.W.2d 801, 806 (Iowa 1983) (quoting H.L. Munn Lumber Co. v. City of Ames, 176 N.W.2d 813, 816 (Iowa 1970) ("It is well established that a party may waive a condition precedent to his own performance of a contractual duty, when such condition precedent exists for his sole benefit and protection, and compel performance by the other party who has no interest in the performance or nonperformance of the condition.")). Also, "a party to a contract who is entitled to the performance of a condition precedent may

waive it either expressly or by conduct indicating waiver." Matter of Estate of Clark, 447 N.W.2d 549, 552 (Iowa 1989) (quoting Mosebach v. Blythe, 282 N.W.2d 755, 760 (Iowa 1979)).

The conditions precedent in Section 5 of the MURA are conditions to "the Company's obligation to conclude this transaction" and are waivable by HES. Section 5 of the MURA expressly notes that "[i]n the event any such conditions shall not have been satisfied on or prior to the Closing or waived in writing by the Company, the Company **may** (in addition to any other remedies available hereunder, at law or in equity, all of which shall be cumulative), terminate this Agreement." App. VII, pp. 131-135 (Ex. 17) (emphasis added). Accordingly, Section 5 sets forth conditions solely for HES's benefit that HES can waive, and the nonperformance of which render the MURA voidable at HES's option.

HES is entitled to demand Retterath's performance under the MURA regardless of whether any such conditions precedent were satisfied. Rodgers, 342 N.W.2d at 806. There is no basis in law for Retterath to refuse to perform his obligations in the MURA because he claims HES failed to perform conditions precedent that are solely for HES's benefit.

c. As a matter of fact, HES satisfied and/or waived all conditions precedent in Section 5 of the MURA, or Retterath made performance thereof impossible

The evidence establishes that HES either satisfied or waived all conditions precedent in Section 5 of the MURA, or that Retterath caused certain conditions not to be performed.

i. HES had lender approval and funds available to repurchase Retterath's Units

Retterath goes to great lengths to argue that HES did not satisfy the condition precedent in Section 5(d) of the MURA that HES receive approval from its primary lender to purchase Retterath's Units and secure financing to do so. Despite Retterath having repeatedly repudiated the MURA and the conditions in Section 5 being for HES's benefit and not for Retterath to use as a pretext to refuse to perform his obligations, HES nevertheless had approval and funding from its bank to pay Retterath and proceed with the closing. Retterath devotes an inordinate number of pages in his appeal brief to this funding issue, unfairly omitting important testimony and exhibits that support the district court's conclusion that HES "could and would have performed on the closing date." App. V, p. 326 (Ruling, p.8). Although the undersigned suggest it is unnecessary, should this Court deem it necessary to

delve into the factual details of this funding issue, a more complete record of the facts is set forth immediately below.

Home Federal Saving Bank ("HFSB") has been HES's primary lender since it funded HES's roughly $90,000,000 construction loan in 2006. App. VI, pp. 377-378 (Wendland Dep. 186:16-187:8). When the MURA was executed, HES had an available $20,000,000 revolving term loan (a/k/a line of credit) through HFSB, App. VI, pp. 378-379 (Id. at 187:9-188:11). HES's line of credit was governed by a Master Loan Agreement ("MLA"), which contained provisions preventing HES from drawing on the line of credit to repurchase membership units. App. VI, pp. 380-381 (Id. at 189:22-190:7).

As early as June 14, 2013, the day after Retterath agreed to and signed the MURA, Wendland reached out to Eric Oftedahl at HFSB about using the line of credit to partially fund the first $15,000,000 installment payment to Retterath on August 1, 2013. App. VII, pp. 142-144 (Ex. 21); VI, pp. 380-381; 421-423 (Wendland Dep. 190:21-191:11; Videotaped Deposition of Eric Oftedahl ("Oftedahl Dep.") 131:2-133:7). Oftedahl responded right away with an email that the MLA would need to be amended in the same manner as Absolute's MLA was amended when Absolute repurchased Retterath's shares earlier that year. App. VII, pp. 142-144 (Ex. 21); VI, pp.

382-387; 419-421 (Wendland Dep. 191:12-196:1; Oftedahl Dep. 129:2-131:1). On June 21, Oftedahl emailed draft documents modifying the line of credit and MLA to allow HES to repurchase Retterath's Units. App. VII, pp. 157-173 (Ex. 32); VI, pp. 387-388; 424-425 (Wendland Dep. 196:11-197:5; Oftedahl Dep. 134:22-135:24). Included in these documents was the Seventh Amendment to Master Loan Agreement, section two of which stated:

> "**Limited Waiver.** Lender [HFSB] waives any and all covenant violations or Events of Default that have occurred or could be deemed to have occurred under the Loan Agreement, (including under Sections 5.02(b), (i) or (k) of the Loan Agreement) as a result of Borrower [HES] **entering into the transactions set forth in that certain Membership Unit Repurchase Agreement dated as of June 13, 2013 between Borrower and Steven J. Retterath**."

App. VII, pp. 157-173 (Ex. 32 (emphasis added); VI, pp. 388-389; 425-426 (Wendland Dep. 197:6-198:8; Oftedahl Dep. 135:20-136:24).

On July 12, 2013, HFSB provided HES with a Term Sheet containing the following relevant terms:

> This commitment supersedes all agreements previously made between Borrower and Lender relating to its subject matter. **The lender's commitment is not subject to participant bank approvals. All banks have agreed to the credit terms in the body of the document**.
>
> ***
>
> The Credit Documents shall be entered into not later than 9-15-13, after which date the commitment of the Lender thereunder shall expire. If the foregoing is acceptable, please indicate your

> agreement and acceptance by signing and returning this letter **along with a $60,000 non-refundable fee**.

App. VII, pp. 187-190 (Ex. 43 (emphasis in original); VI, pp. 390-391; 434-437 (Wendland Dep. 199:3-200:11; Oftedahl Dep. 149:14-150:19; 151:3-152:6). HFSB and HES signed the Term Sheet. App. VII, pp. 187-190 (Ex. 43); VI, pp. 390; 435-436 (Wendland Dep. 199:6-11; Oftedahl Dep. 150:20-151:1).[5] In sum, HFSB approved a plan whereby HES would use the line of credit to pay Retterath the first $15,000,000 installment on or before August 1, 2013, and sometime thereafter convert the amount drawn from the line of credit into a five-year term loan (the referenced "Term Note"). App. VII, pp. 176-181, 187-190 (Exs. 35, 36, 43); VI, pp. 393-398, 427-433, 437-438 (Wendland Dep. 205:11-210:2; Oftedahl Dep. 142:21-145:11; 145:22-148:19; 152:16-153:17). Oftedahl testified unequivocally that HES had received approval from HFSB to purchase Retterath's Units, and had secured the necessary financing from HFSB to do so. App. VI, p. 440 (Oftedahl Dep. 156:7-22).

[5] The Term Sheet included a Summary of Terms and Conditions that allowed a "New $15,000,000 Term Note to pay existing shareholder [Retterath] and extension of the existing $20,000,000 Term Revolver [line of credit]." App. VII, pp. 187-190 (Ex. 43); VI, pp. 391-392; 437-438 (Wendland Dep. 200:12-201:6; Oftedahl Dep. 152:16-153:17). Further, under the heading "Loan Covenants," it stated "Permitted uses of the Term Revolving Note [line of credit] will be amended to include the redemption of membership units of the Borrower." App. VII, pp. 187-190 (Ex. 43); VI, p. 392 (Wendland Dep. 201:7-24).

Retterath argues that the Term Sheet and draft loan modifications were not signed, and the loan did not close on or before August 1, 2013.[6] By its own terms, however, the Credit Documents did not need to be signed until September 15, 2013, App. VII, pp. 187-190 (Ex. 43), and it is customary for such amendments to be signed and appraisals to take place after the funds are borrowed. For example, the necessary loan documents and modifications were not approved by Golden Grain's lender until nearly three months after Golden Grain closed on its MURA with Retterath. App. VI, pp. 83-85, 421-423 (Jan. 17 Tr. 85:9-87:4).[7]

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[6] Retterath also highlights that the appraisal required by the Term Sheet was not scheduled until after August 1, 2013. The appraisal, however, was not required for the line of credit, but for the new Term Note to which the line of credit payment to Retterath would be converted sometime after August 1, 2013. Therefore, because Retterath was to be paid on or before August 1, 2013 from the line of credit, the subsequent conversion to a term note and the accompanying appraisal have no impact on the MURA closing date or availability of funds to pay Retterath. App. VII, pp. 178-181, 187-190 (Exs. 36, 43); VI, pp. 430-433, 439 (Oftedahl Dep. 145:22-148:10; 154:7-16).

[7] The Golden Grain MURA and Operating Agreement are nearly identical to the HES MURA and Operating Agreement, especially with regard to the provisions at issue in this lawsuit. App. VII, pp. 21-92, 131-135 (Exs. 2, 3, 4, 17); VI, pp. 226-227, 232 (Jan. 19 Tr. 150:21-151:18; 158:10-15). Indeed, the Golden Grain MURA was the template for the HES MURA. App. VI, p. 234 (Jan. 19 Tr. 166:16-24). Further showing the contrived nature of Retterath's arguments in relation to the Golden Grain MURA, Retterath: (1) provided wiring instructions to Golden Grain for closing; (2) delivered his unit share certificates at closing; (3) delivered his written resignation from the board at closing and resigned on that day; (4) never asserted or alleged that a member vote was required to approve the Golden Grain MURA; (5) never raised any other Operating Agreement challenges to

Moreover, the reason the loan modifications were not signed and the loan did not close is because Retterath repudiated the MURA. App. VI, pp. 413; 418 (Oftedahl Dep. 88:3-9; 94:5-7). Oftedahl's testimony was clear that HFSB had approved financing HES's repurchase of Retterath's Units and would have worked with HES to close thereon had Retterath not repudiated the MURA. App. VI, pp. 413-415; 417-418 (Oftedahl Dep. 88:10-90:14; 93:22-94:7). This scenario is the quintessential example of why a party is relieved of its performance obligations under an agreement when the opposing party repudiates – HES should not be, and is not, required to pay a non-refundable $60,000 loan *origination fee,* App. VII, pp. 187-190 (Ex. 43); VI, pp. 436-437 (Oftedahl Dep. 151:3-152:6) and incur interest on its line of credit App. VI, p. 427 (e.g. Oftedahl Dep. 142:3-11) when Retterath had repeatedly and clearly stated there was no enforceable contract and he would not close on this transaction.

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the Golden Grain MURA transaction; and (6) did not object to post-closing execution of financing documents/loan modifications between Golden Grain and its bank. App. VI, pp. 76-85; 226, 228-231 (Jan. 17 Tr. 78:23-87:4; Jan. 19 Tr. 150:12-20; 154:4-20; 154:23-155:10; 156:6-22; 157:6-158:4). When asked about why he acted differently and did not make these same objections when closing on the Golden Grain MURA, Retterath testified: "**I didn't need to, because they paid me what I wanted**." App. VI, p. 335 (Retterath Dep. 106:15-20) (emphasis added).

ii. HES drafted a mutual release that Retterath refused to sign

Retterath also complains that HES did not satisfy the condition precedent in Section 5(f) of the MURA requiring the parties to execute a draft mutual release. Retterath fails to acknowledge, however, that Leo, HES's counsel, drafted a mutual release that he sent to Libow, Retterath's counsel, on July 9, 2013, for review and comment. App. VII, pp. 184-186 (Ex. 42); VI, pp. 240-241 (Jan. 19 Tr. 175:12-176:3). Libow never responded, nor did he suggest any revisions or edits to the draft release, App. VI, p. 241 (Jan. 19 Tr. 176:4-10), despite Leo subsequently following up with Libow by email/letter multiple times. App. VII, pp. 191-194, 199-201, 210-211 (Exs. 47, 48, 49, 50, 52 and 58); VI, pp. 240-242, 244-247, 251-254 (Jan. 19 Tr. 175:10-177:12; 179:25-182:24; 189:20-192:20; 203:2-205:16). Retterath cannot refuse to exercise good faith regarding the execution of the mutual release and then claim that HES is not entitled to specific performance of the MURA because a mutual release was never executed. See Conrad Bros., 640 N.W.2d at 240 ("It is widely recognized that a party may not rely on a condition precedent when by its own conduct it has made compliance with that condition impossible."); Kunz v. Kunz, 2016 WL 7403730, *5 (Iowa App. Dec. 21, 2016) (parties to a contract owe a duty of

good faith in performance and enforcement of the contract, including, specifically, making good faith efforts to fulfill conditions precedent).

iii. HES offered to draft Eastman's resignation, to which Retterath did not respond

Similarly, Retterath complains that HES did not satisfy the condition precedent in Section 5(e) of the MURA that Eastman submit a written resignation from the Board. In the same July and August 2013 letters/emails discussed in the preceding section, Leo asked Libow multiple times about the resignation, and even offered to draft it for Eastman. Libow never responded. This, too, cannot be used by Retterath as a basis to object to the district court's granting HES specific performance of the MURA. See Conrad Bros., 640 N.W.2d at 240; Kunz, 2016 WL 7403730 at *5.

d. HES tendered payment multiple times, although tender was not required due to Retterath's repudiation of the MURA

Retterath further argues that HES is not entitled to specific performance because HES did not tender payment of $15,000,000 to him on or before August 1, 2013. Retterath's repudiation of the MURA relieves HES from this obligation as well. Berryhill, 428 N.W.2d at 656 ("[A]s we have stated before, when a tender would be to no avail, it is excused," citing Kuhlman v. Wieben, 105 N.W. 445, 446 (Iowa 1905) for the proposition that "when party to whom tender would be made has repudiated the contract,

tender is a useless act"). Moreover, on multiple occasions HES requested direction from Retterath as to how he wanted to be paid in accordance with Section 2 of the MURA, and Retterath repeatedly refused to provide such direction. App. VII, pp. 191-193, 199-201, 210-211 (Exs. 47, 48, 49, 52 and 58); VI, pp. 241-243, 244-247, 251-254, 262-264; (Jan. 19 Tr. 176:11-178:25; 179:25-182:9; 189:20-192:20; 203:2-205:16).

e. Retterath's argument that the MURA was not signed on time is utterly meritless

On p. 46 of his appeal brief, Retterath argues that the MURA had a June 13, 2013 execution deadline and, because Boyle was purportedly not authorized to sign the MURA and it was not approved by the Board until June 19, 2013, the MURA was not a valid and binding agreement. In making this argument, Retterath disingenuously fails to cite for this Court the actual MURA language, which states:

> **THIS AGREEMENT SHALL NO LONGER BE A BINDING OFFER AND SHALL BE NULL AND VOID AND OF NO FURTHER EFFECT IF IT IS *NOT FULLY SIGNED BY MEMBER* AND DELIVERED TO THE COMPANY PRIOR TO 2:00 P.M. LOCAL TIME ON THURSDAY, JUNE 13, 2013.**

App. VII, p. 132 (Ex. 17, ¶ 1) (emphasis in original, italics added). In other words, the signing deadline in the MURA applies only to Retterath's (i.e.,

the Member's) signature, not HES's. It is undisputed that Retterath timely signed the MURA, rendering this argument meritless.[8]

D. Conclusion

The district court correctly granted HES specific performance of the MURA and should be affirmed in doing so in all regards.

II. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT THAT A MEMBER VOTE WAS NOT REQUIRED TO APPROVE THE MURA.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review is for errors at law.

B. Preservation of Error

HES agrees that Appellants preserved error on this issue.

C. Argument

The district court, Judge Paul Scott, on October 16, 2015, entered a Ruling granting HES's Motion for Summary Judgment and denying Retterath's and the Intervenors' separate Motions for Summary Judgment, finding that Section 5.6(b)(v) of the Operating Agreement does not require a member vote to approve the MURA. App. III, p. 76 (SJ Ruling, p.15). Retterath and the Intervenors both appeal this Ruling.

[8] Retterath's argument on pp. 47-48 of his Brief that a member vote was required to approve the MURA is addressed below.

As the district court correctly found in its thorough SJ Ruling, the clear language of Section 5.6(b)(v), read in conjunction with other relevant provisions of the Operating Agreement, demonstrates that Member consent is not required for the reacquisition of Retterath's Units:

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

App. VII, pp. 21-54 (Ex. 2-2, § 5.6(b)(v)).

Retterath and the Intervenors argued, and continue to argue, that the language "any equity or debt securities" describes a broad classification of investment property which includes Retterath's Units. The district court expressly rejected that interpretation because it ignores basic principles of contract interpretation:

> "When interpreting contracts particular words and phrases are not interpreted in isolation. Instead, they are interpreted in a context in which they are used." [Hartig Drug Co. v. Hartig, 602 N.W.2d 794 (Iowa 1999)] at 797-98. Under Iowa law, the "well-established rule of contract construction provides that when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling." [citations omitted]

App. III, p. 74 (SJ Ruling, p.13).

The term "Units" is defined and used in the Operating Agreement roughly 280 times. App. VII, p. 29 (Ex. 2-2, §1.10(qq)). Section 5.6(b)(v), however, does not contain the term "Units," but the general phrase "equity or debt securities." In contrast, the two immediately preceding subsections use the term "Units" when describing actions the Board is prohibited from taking without Member approval. App. VII, p. 38 (Ex. 2-2, §§5.6(b)(iii) and (iv)). If Section 5.6(b)(v) was intended to cover the "reacquisition of Units" (a phrase which expressly appears in Section 5.16(vii) of the Operating Agreement, as discussed below), it would have utilized that phrase instead of "acquire any equity or debt securities."[9] See C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 77 (Iowa 2011) ("Because an agreement is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); Allen v. Highway Equipment Co.,

[9] The fact that Section 5.6(b)(v) uses the verb "***acquire*** any … securities," as opposed to "***reacquire,***" further demonstrates that this section is not intended to refer to the membership Units; because all such Units previously belonged to HES, the only applicable terminology for the transaction would be "***reacquisition***," which is used in Section 5.16 of the Operating Agreement.

239 N.W.2d 135, 139 (Iowa 1976) ("[A] contract should be read and interpreted as an entirety rather than seriatim by clauses…").

The district court properly relied on Section 5.16(vii) of the Operating Agreement to conclude "the Board does possess the power to reacquire" member Units. App. III, p. 74 (SJ Ruling, p.13). That section gives the Directors the power to create committees, but subject to certain limitations: "Notwithstanding the foregoing, however, a committee may not under any circumstances: . . . (vii) authorize or approve the ***reacquisition of Units***, except according to a formula or method prescribed by the Directors." Judge Scott found that "Section 5.16 clearly contemplates a situation exactly like what happened in this case. A committee was formed and authorized by the Board. The purpose was to negotiate the reacquisition of Retterath's units." (Id.) To interpret the phrase "equity or debt securities" to include "Units" would dilute (if not nullify) Section 5.16 and other clearly applicable provisions of the Operating Agreement involving Units transactions and the term "Units."

Instead, Section 5.6(b)(v) applies to and requires Member approval for situations where HES agrees to invest in equity or debt securities issued by a Director or an Affiliate of a Director. For example, a promissory note issued by a Director to HES would be a debt security covered by Section

5.6(b)(v). Had HES purchased stock in Retterath's construction company while Retterath was a Director, that would be covered by Section 5.6(b)(v). If HES agreed to loan money to Retterath's construction company while Retterath was a Director, it would require Member approval per Section 5.6(b)(v). None of these types of transactions, however, are at issue here.[10] The district court also agreed with this analysis of the scope of Section 5.6(b)(v). App. III, p. 75 (SJ Ruling, p.14).

The Board's authority to make decisions regarding transactions involving HES's Units, and the inapplicability of Section 5.6(b)(v) to the MURA, is further demonstrated by Article 9 of the Operating Agreement, which grants the Board exclusive authority to permit (Section 9.2) and prohibit (Section 9.4) Unit transfers. Conversely, Article 9 also lists certain HES Unit transactions that require Member approval, and reacquisition of Units is not included. Under Iowa law, the "well-established rule of contract construction provides that when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling." Pella Plastics, Inc. v. Engineered Plastic Components, Inc., 2005 WL 974720, *4 (Iowa App. Apr. 28, 2005) (citing Maxim Techs., Inc. v. City of

[10] The examples in this paragraph are the type of transactions that would be subject to a member vote and fall within Retterath's "public policy" argument on pp. 54-55 of his appeal brief.

Dubuque, 690 N.W.2d 896, 902 (Iowa 2005)). Accordingly, the express and specific language of Section 5.16 and Article 9 granting sole authority for the reacquisition of Units to the Board is controlling.

D. Conclusion

In summary, the clear and unambiguous language of the Operating Agreement, as well as well-established, basic principles of contract interpretation, dictate that the Operating Agreement did not require a member vote to approve HES's reacquisition of Retterath's Units, and the district court's SJ Ruling should be affirmed.

III. THE DISTRICT COURT PROPERLY REJECTED RETTERATH'S AFFIRMATIVE DEFENSES.

A. Scope and Standard of Review

HES agrees with Retterath's stated scope and standard of review.

B. Preservation of Error

HES agrees that Retterath preserved error on this issue.

C. Argument

Retterath asserted eight affirmative defenses in the district court, but apparently appeals only five (having combined unilateral and mutual mistake in his appeal brief). For the reasons set forth below, the district court properly rejected all affirmative defenses.

1. Estoppel

Retterath argues that HES should be equitably estopped from enforcing the MURA because HES knowingly concealed its intention to allocate Retterath taxable income between the first and second installment payments under the MURA. There is no evidence in the record to support such an allegation. All relevant HES witnesses testified that HES did not seek tax advice prior to execution of the MURA, nor did HES know what the tax treatment under the MURA would be. App. VI, pp. 139-140; 189 (Jan. 18 Tr. 35:24-36:2; 36:19-24; Jan. 19 Tr. 30:16-22). These witnesses testified that the issue of the tax treatment of Retterath's Units did not arise until 2014 when HES and its accountants began preparing the 2013 tax returns and member K-1s, and that HES was prepared to follow the tax laws in all respects. App. VI, pp. 140; 189-190 (Jan. 18 Tr. 36:19-24; Jan. 19 Tr. 30:16-31:11). Thus, there is no factual basis to assert HES knowingly concealed such information.

Furthermore, the terms of the MURA place the burden on Retterath to determine the tax implications of the MURA. App. VII, p. 132 (Ex. 17, ¶ 3(v)). Retterath's reliance on Exhibit TTTTTT as an "admission" of HES's planned tax treatment is obviously from a filing made more than a year later [November 3, 2014], NOT something that was stated by or known to HES at

or before execution of the MURA in June of 2013. Retterath's estoppel defense is baseless.

2. Unilateral and Mutual Mistake

Here again, Retterath argues that HES intentionally concealed/misrepresented that he would be allocated taxable income between the first and second installment payments. As he concedes, however, unilateral mistake is only actionable where the non-mistaken party (allegedly HES) engages in fraud, misrepresentation, or other misconduct. See State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 150 (Iowa 2001) ("A unilateral mistake by one party will not release that party from its obligation under the contract absent fraud, misrepresentation, or other misconduct."). As noted above, HES was not aware of the post-MURA tax implications until 2014 and could not, therefore, have intentionally defrauded Retterath or misrepresented any related information. App. VI, pp. 139-140; 189 (Jan. 18 Tr. 35:24-36:2; 36:19-24; Jan. 19 Tr. 30:16-22).

As for the defense of mutual mistake, Retterath argues that neither he nor HES expected Retterath would be allocated taxable income between the first and second installment payments. Iowa law does not support this defense.

Under the doctrine of mutual mistake, "[t]he mistake must have been both mutual and material." Gouge v. McNamara, 586 N.W.2d 710, 713 (Iowa 1998). The term "mutual" requires that the mistake be common to both parties. Id.; see also Krieger v. Iowa DHS, 439 N.W.2d 200, 203 (Iowa 1989) ("One party's mistake, coupled with the other's ignorance of it, does not amount to a mutual mistake. To be mutual, a mistake must exist at the time of the contract and must be common to both parties."). There was no commonality of "mistake" because, despite Retterath's testimony that he did not expect taxable income to be allocated to him after August 1, 2013 App. VI, pp. 327-328 (Retterath Dep. 72:25-73:2), HES established that it did not contemplate whether or not taxable income would be allocated to Retterath after August 1, 2013 until many months later. In other words, the alleged "mistake" was not common among the parties because Retterath did not expect taxable income to be allocated to him and HES had no expectation one way or the other.

Mutual mistake also is limited to then-existing or past facts. Pathology Consultants v. Gratton, 343 N.W.2d 428, 437 (Iowa 1984) (a party's failure to anticipate future events or contingencies is not a mistake as to a then existing or past fact). Whether or not Retterath would be allocated

taxable income after the MURA was executed is not a mistake as to a then-existing or past fact.

A mistake of law (including a mistake as to the legal effects or consequences of an agreement) also is insufficient to render the agreement voidable. See Bach v. Interurban Ry. Co., 171 N.W 723, 728-729 (Iowa 1919) ("[A]ll persons of sound and mature mind are presumed to know the law… [ ] If ignorance of the law were generally allowed to be pleaded [as a defense], there would be no security in legal rights, no certainty in judicial investigations, no finality in litigations."). Retterath's claim here is to a "mutual mistake" about how the tax laws would apply, which is not actionable.

Finally, Retterath may not seek to avoid the MURA under the doctrine of mutual mistake where he bears the risk of that mistake. See Nichols v. City of Evansdale, 687 N.W.2d 562, 571 (Iowa 2004) (under the doctrine of mutual mistake… "the contract is voidable by the adversely affected party unless he bears the risk of the mistake."). In making this determination, "[t]he court can allocate the risk of mistake to a party whenever it is reasonable to do so." Pathology Consultants, 343 N.W.2d at 438. Here, Retterath bears the risk of this mistake. He warranted in the MURA that "[i]n making the decision regarding the repurchase of the Units, [Retterath]

is relying solely upon the Company Information and [his] legal and financial advisors and independent investigations and not upon the Company or any of its members, managers, officers, directors, employees or representatives with respect to … tax, business, economic or other considerations involved in this transaction." App. VII, p. 132 (Ex. 17, ¶ 3(v)) (emphasis added).

3. Unclean Hands

Retterath also argues that HES should be equitably prohibited from enforcing the MURA because HES: (1) concealed its intent to apply improper tax treatment to Retterath; (2) declared itself the "equitable owner" or Retterath's Units while still treating Retterath as the "beneficial owner" of those Units for tax allocation purposes; and (3) negotiated the MURA directly with Retterath, not Libow. As with the estoppel defense, there is nothing in the record to support these allegations.

Iowa courts generally disfavor the defense of unclean hands. Iowa Dep't of Transp. v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 15 (Iowa 1978) ("We have stated that the defense of unclean hands is not favored by the courts.").

First, as discussed in the preceding section, it is undisputed that HES did not seek tax advice prior to execution of the MURA, nor did HES know

what the tax treatment under the MURA would be. App. VI, pp. 139-140, 189 (Jan. 18 Tr. 35:24-36:2; 36:19-24; Jan. 19 Tr. 30:16-22).

Second, the post-breach tax treatment of Retterath under the MURA was not decided and did not occur until long after Retterath refused to close on the MURA and this lawsuit was filed. As a result, the same cannot be used as a defense to HES's request for specific performance of the MURA.

Finally, as noted above and incorporated here, Retterath unilaterally commenced MURA negotiations with HES and continued those negotiations without involving his attorney (or HES's attorney). That was his choice. The MURA contains two provisions where Retterath acknowledges he had the right to seek counsel and other professional advice prior to executing the MURA. App. VII, pp. 132, 134 (Ex. 17, ¶¶ 3(v), 10).

4. Unconscionability

Retterath argues the MURA is procedurally and substantively unconscionable for myriad reasons. However, "the doctrine of unconscionability does not exist to rescue parties from bad bargains." Smith v. Harrison, 325 N.W.2d 92, 94 (Iowa 1982).

In response to Retterath's arguments related to procedural unconscionability, Retterath unilaterally initiated, negotiated and executed

the MURA without involving counsel,[11] and succeeded in negotiating a higher buyout amount than he initially demanded (from $28,446,000 to $30,000,000). App. VII, pp. 101-130 (Exs. 10-16). The success of Retterath's negotiation evidences equal bargaining power between HES and Retterath and negates any adverse inference or mal-intent Retterath tries to place on HES due to the temporal proximity between HES's bribe investigation and the execution of the MURA. Finally, Retterath and Boyle both signed on June 13, 2013 – the fact the HES Board did not meet to approve the MURA until June 19, 2013 is a red herring.

With regard to Retterath's substantive unconscionability arguments, again, there is absolutely no evidence in the record that HES knew of or had considered Retterath's post-MURA tax treatment, making it impossible for HES to act deceitfully in that regard. App. VI, pp. 139-140; 189 (Jan. 18 Tr. 35:24-36:2; 36:19-24; Jan. 19 Tr. 30:16-22). Also, HES's ability to waive the conditions precedent in Section 5 of the MURA is purely academic. As discussed above, HES did not waive the financing contingency, but in fact was prepared to make both installment payments to Retterath until he repudiated the MURA. As to the mutual release contingency, HES tried on

[11] Retterath's involvement of counsel after the MURA was negotiated has no bearing as to the conscionability of the procedure through which Retterath unilaterally negotiated and approved the MURA.

multiple occasions to get Retterath to sign a mutual release, which Retterath refused to do. App. VII, pp. 184-186, 191-194, 199-201, 210-211 (Exs. 42, 47, 48, 49, 50, 52 and 58); VI, pp. 240-247, 250-254, 262-264; (Jan. 19 Tr. 175:10-176:7; 176:11-179:13; 177:4-12; 179:25-182:20; 185:13-18 189:20-192:20; 203:2-205:16).

D. Conclusion

For the reasons stated above, the district court was correct in denying all of Retterath's affirmative defenses and such denial should be affirmed in all regards.

IV. THE DISTRICT COURT CORRECTLY ALLOWED HES TO SUPPLEMENT THE RECORD AFTER TRIAL WITH DOCUMENTS RECEIVED IN RESPONSE TO RETTERATH'S LAST-MINUTE SUBPOENA TO HFSB.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review is for abuse of discretion.

B. Preservation of Error

HES agrees that Retterath preserved error on this issue.

C. Argument

This issue is moot. Nowhere in the district court's ruling following trial or ruling on post-trial motions did the court reference, cite to or otherwise indicate that it considered or relied upon the evidence at issue.

Retterath does not argue and cannot show otherwise. Without such a showing, no appealable issue is before this Court. Retterath realizes as much, only asking that this Court disregard this evidence in considering the other issues before it on this appeal.

Notwithstanding, ironically, the documents about which Retterath complains were from a subpoena Retterath issued to HFSB on the fourth day of trial, Friday, January 20, 2017 (despite the fact this lawsuit has been on file since August of 2013). In response, on February 8, 2017, HFSB produced 915 pages of documents, most of which corroborated HES's trial testimony and definitively established that HES had lender approval and financing in place to repurchase Retterath's Units on or before August 1, 2013.

Any irregularity or surprise to Retterath was self-inflicted due to his eleventh-hour discovery tactics. Under the adage "be careful what you ask for," Retterath apparently believed when he issued the subpoena the responsive records would support his contention that HES did not have funding available to pay him on August 1, 2013. Indeed, after the district court ruled that the supplemental documents would be admitted, Retterath supplemented the record with other HFSB documents produced in response

to the same subpoena. Interestingly, Retterath does not contend those documents should be stricken from the trial record.

D. Conclusion

For the reasons stated above, the district court was correct in granting HES's Motion to Supplement Record, which should be affirmed.

V. THE DISTRICT COURT CORRECTLY AWARDED HES ITS ATTORNEY FEES UNDER THE MURA.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review is for abuse of discretion.

B. Preservation of Error

HES agrees that Retterath preserved error on this issue.

C. Argument

Retterath incorrectly construes the holding in NevadaCare, Inc. v. Dept. of Human Servs., 783 N.W.2d 459 (Iowa 2010) as a blanket prohibition against awarding attorneys' fees pursuant to an indemnity clause, and in doing so ignores the express language of the NevadaCare holding and subsequent cases construing NevadaCare, as well as the facts from NevadaCare which distinguish it from this case.

In NevadaCare, the plaintiff, NevadaCare, Inc., entered into a series of five contracts with the defendant, the Iowa Department of Human Services

("DHS"), in which DHS set capitation rates payable to NevadaCare, on which NevadaCare based its payments to providers, such as physicians and clinics, as part of Iowa's Medicaid program. Id. at 461. Following a bench trial and judgment in favor of the defendant that the capitation rates had in fact been correctly set by DHS, DHS filed a post-trial application for attorney fees and costs. Id. at 464. The district court found that DHS was entitled to an award of attorney fees pursuant to indemnification provisions in the agreements. Id. The Iowa Supreme Court, however, reversed on three of the five contracts, finding that the language of the indemnification provision in those three contracts did not "clearly and unambiguously [show] an intent by the parties to shift the attorney fees incurred in a breach of contract action between the parties." Id. at 471. The court found there were multiple, plausible scenarios in which third parties, such as physicians and other medical providers who received payments from NevadaCare based on the capitation rates in the NevadaCare-DHS contracts, could sue DHS or the plaintiff if those capitation rates were incorrect, thus finding that there were plausible third party claims to which the indemnification clause would apply. Id. at 471-72. As further evidence of the parties' intent that the indemnification provision in the three contracts applied only to third party claims, the court found that "the addition of an explicit fee-shifting provision

in the contract for fiscal years 2004 and 2005 supports a finding that the parties did not clearly and unambiguously intend the indemnity provisions in the 1999 through 2003 contracts to shift the attorney fees between the parties." Id. at 472.

Here, unlike in NevadaCare where there existed plausible scenarios in which a third party could make a claim against the indemnitee, the only reasonable interpretation of the indemnity clause in the MURA is that it permits HES to recover attorneys' fees from Retterath due to Retterath's failure to perform his obligations under the MURA. Given the subject matter and purpose of the MURA, it is not plausible that a third party would assert a claim against HES based on Retterath's failure to perform. Indeed, in the more than four years since Retterath breached the MURA, there have been no third-party claims filed against HES based on Retterath's breach.[12] To construe the indemnity clause as Retterath argues would render it superfluous, which contradicts basic rules of contract interpretation. See Dickson v. Hubbell Realty Co., 567 N.W.2d 427, 430 (Iowa 1997) ("Because we give effect to the language of the entire contract, it is assumed that no part of it is superfluous and an interpretation that gives a reasonable

[12] Intervenors claimed that HES, not Retterath, breached the MURA.

meaning to all terms is preferred to one that leaves a term superfluous or of no effect.").

The case of Hormel Foods Corp. v. Crystal Distrib. Servs., 2011 WL 2118718 (N.D. Iowa 2011) (unpublished) is illustrative. In that case, the defendant sought summary judgment on certain claims pursuant to a contract's indemnification clause. Id. at *1-2. The relevant provision of the contract, paragraph 12, provided: "[defendant] shall indemnify and save [plaintiff] harmless from and against any and all claims for loss or damage to product which results from the negligence of [defendant]." Id. at *2. The defendant relied on NevadaCare, just as Retterath does here, for the blanket argument that "under Iowa law, an indemnification clause does not apply to claims between parties to an agreement." Id. The court rejected defendant's argument and found, citing NevadaCare, that "where the Agreement expressly and unambiguously provides that [defendant] shall indemnify [plaintiff] against product loss arising from [defendant's] own acts (Agreement, para. 12), i.e., between the parties to the Agreement, the court finds the indemnification provision is not, as urged by defendant, limited to claims brought by persons not a party to the Agreement." Id. at *3.

Further instructive is Grant Ins. Agency v. Clem Ins. Servs., Inc., 2014 WL 6680987 at *7 (Iowa App. Nov. 26, 2014), where the Iowa Court

of Appeals affirmed an award of attorneys' fees, post-NevadaCare, in a case involving breach of contract claims where the indemnification provision in the contract at issue was very similar[13] to the indemnification language in the MURA.

Similarly, here, the MURA expressly and unambiguously provides that Retterath shall indemnify HES for reasonable attorneys' fees and costs arising from Retterath's own acts – Retterath's failure to perform his obligations under the MURA. Thus, the indemnification provision of the MURA is not limited to claims brought by third parties, and HES is entitled to recover reasonable attorneys' fees and costs incurred due to Retterath's failure to perform his obligations under the MURA.

Finally, for the same reasons, the district court was correct in denying Retterath's meritless and insulting request for sanctions under Iowa R. Civ. P. 1.413.

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[13] **INDEMNIFICATION BY BUYER.** Buyer shall defend, indemnify and hold Seller harmless from and against any and all liabilities, losses, damages, claims and expenses, including reasonable attorneys' fees, arising in connection with or resulting from any breach of warranty, misrepresentation or non-fulfillment of any agreement on the part of Buyer under this Agreement.

D. Conclusion

The district court was correct in awarding HES attorney fees under the MURA and in denying Retterath's related request for sanctions.

VI. THE DISTRICT COURT CORRECTLY DENIED RETTERATH'S MOTION FOR EVIDENTIARY SANCTIONS OR CONTINUANCE.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review is for abuse of discretion.

B. Preservation of Error

HES agrees that Retterath preserved error on this issue.

C. Argument

At issue are approximately 200 pages of documents HES produced on January 4 and 6, 2017. While Retterath describes this production as "guerilla tactics" and "sudden," in reality, it was HES's good-faith (and not required) response to untimely and improper subpoenas *duces tecum* served on certain members of HES's Board on December 20, 2016, the night before their depositions and less than 30 days before trial. Retterath's failure to mention or address these subpoenas *duces tecum* in his brief is misleading and lacking of credibility.

Beginning on the evening of December 20, 2016, the night before the first Director's deposition, Retterath served deposition subpoenas *duces tecum* on HES Directors who were being deposed the next day. App. V, pp. 264-268 (Plaintiff's Resistance to Defendant's Motion for Evidentiary Sanctions for Lack of Timely Discovery Responses, Or, in the Alternative, for Continuance of Trial, Exhibit 3). Under "Exhibit A" to the subpoenas, Retterath requested nine categories of documents, including HES bank statements, correspondence between HES and its bank, etc. (Id.). To be clear, the categories of documents contained in these subpoenas *duces tecum* were never requested from HES through written discovery. After all, Retterath would have no reason to issue the eleventh-hour subpoenas to HES Directors if he truly believed that the documents being requested in the subpoena were encompassed in prior written discovery requests propounded on HES. This is further corroborated by the fact that Retterath never requested that HES supplement its prior discovery responses and never filed a motion to compel production of these documents. Instead, Retterath subpoenaed these documents at the last minute following a failed mediation and in the face of a fast-approaching January trial date.

Further, the deposition subpoenas *duces tecum* were improper because Retterath failed to comply with Iowa R. Civ. P. 1.707(3), which governs

subpoenas *duces tecum* served to party deponents (as opposed to non-party deponents):

> The notice to a party deponent may be accompanied by a request made in compliance with rule 1.512 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 1.512(2) shall apply to the request.

Iowa R. Civ. P. 1.707(3). The rules are clear that a document request accompanying a deposition notice or subpoena to a party deponent is treated identically to a written request for production of documents propounded to a party under Iowa R. Civ. P. 1.512. From a timing standpoint, Iowa R. Civ. P. 1.512(2) allows parties – which the HES Directors are in this case – 30 days to respond to requests for production of documents. Retterath did not and could not comply with Iowa R. Civ. P. 1.707(3) or 1.512(2), as he served these deposition subpoenas beginning the week of December 19, 2016, less than 30 days before trial.

Despite the impropriety of these subpoenas and no obligation whatsoever to produce the requested documents, HES responded in good faith on behalf of its Directors and Officers by producing the documents at issue on January 4 and 6, 2017 (in an extraordinarily short amount of time and during the holidays). Thus, not only did HES comply with its discovery obligations in relation to the documents at issue, it went above and beyond

those obligations, despite Retterath's clear attempt to subvert the normal discovery process.

Interestingly, Retterath argues that he was prejudiced by HES's production because he was unable to meaningfully share the production with his expert in time for trial.[14] 200 pages of documents is a minimal number of documents for an expert to review, and Professor Morse had two weeks or more to review the production prior to testifying at trial. Moreover, less than two weeks before that, Professor Morse was able to draft and submit a 12-page supplement to his expert report in less than one day following his deposition on December 29, 2016. Further, and importantly, these documents did nothing more than corroborate HES's long-standing position that it had secured lender approval and had the funds needed to timely close the transaction set forth in the MURA. Indeed, Retterath deposed the individuals identified on almost every document in the production, former HES CEO Walter Wendland and banker Eric Oftedahl, after these documents were produced. He also marked a number of these documents as deposition exhibits and examined various witnesses thereabout.

[14] As with the issue in the prior section related to the subpoena served by Retterath on HFSB on the fourth day of trial, Retterath alone is responsible for the consequences of his eleventh-hour discovery tactics, and any related harm or prejudice was self-inflicted.

D. Conclusion

The district court was correct in denying Retterath's motion for evidentiary sanctions or continuance.

VII. THE DISTRICT COURT CORRECTLY BIFURCATED THE CLAIMS IN THIS CASE AND STRUCK RETTERATH'S JURY DEMAND.

A. Scope and Standard of Review

HES agrees that the appropriate scope and standard of review for the bifurcation issue is for abuse of discretion and for the jury demand issue is errors of law.

B. Preservation of Error

HES agrees that Appellants preserved error on these issues.

C. Argument

Regarding the district court's decision to strike Retterath's jury demand on HES's claim for specific performance of the MURA, there is no question specific performance is an equitable remedy that may only be tried to and decided by the court. See e.g., Berryhill, 428 N.W.2d at 657 ("[S]pecific performance of a contract is a remedy resting in the equitable discretion of the court."). Regardless of the district court's order bifurcating Retterath's recently filed counterclaims and third-party claims, the district court correctly struck Retterath's jury demand. See In re Marriage of

Stogdill, 428 N.W.2d 667, 670 (Iowa 1988) ("[A] defendant has no right to a trial by jury of law issues raised in an answer to an action properly brought in equity. Once equity has obtained jurisdiction of a controversy, the court will determine all questions material or necessary to accomplish full and complete justice between the parties, even though in doing so the court may be required to pass upon certain matters ordinarily cognizable at law."). In fact, this was Retterath's second attempt at demanding a jury trial for a case filed in equity: he filed a jury demand with his Answer in 2014, which HES successfully moved to strike. App. I, pp. 152-159 (Order of Judge Jeffrey Farrell, November 13, 2014).

Regarding the district court's bifurcation order, Retterath's sole complaint is that the district court incorrectly believed that disposition of HES's specific performance claim "may well be dispositive of the entire dispute." The district court was correct in this regard. Had the MURA been deemed unenforceable, the claims between HES and Retterath would have become moot (as conceded by Retterath at p. 83 of his appeal brief), as all of Retterath's counterclaims against HES relate to the enforceability of the MURA or HES's post-MURA treatment of Retterath. App. IV, pp. 322-332, 334 (Retterath's Amended Answer, Counterclaims, Third Party Petition and Jury Demand, Claims 1-8 and 10).

Additionally, that Retterath may have still had claims against RSM is a red herring. Retterath's two claims against RSM allege RSM incorrectly determined whether and how to allocate Retterath's taxable income and losses after the MURA was executed and before the closing. App. IV, pp. 335-337 (Id. at Claims 11 and 12). However, had the district court ruled that the MURA was unenforceable, these claims against RSM also would be moot because Retterath would be returned to his status as a member of HES as if there was no MURA, and RSM's advice rendered academic.

This Court cannot neglect that the bifurcation arose because of Retterath's procrastination in waiting until August of 2016 to move to amend pleadings and add parties – less than five months before trial and after the lawsuit had been on file for three years – to add 16 new parties (and the related claims against those parties) and nine counterclaims against HES. App. IV, pp. 322-337 (Id. at Claims 1-12). Retterath strategically waited to amend his pleadings, knowing that the new parties and claims would cause the January 2017 trial date to be continued. In response, HES asked the district court to either deny Retterath's motion to amend pleadings or bifurcate the new claims and allow HES's specific performance claim to proceed to trial as scheduled in January 2017. For the reasons discussed above, the district court did not in any way abuse its discretion in bifurcating

the claims for trial and was correct in stopping yet another attempt from Retterath to delay trial in a case that had already been pending for three years.[15]

[15] During the approximately 37 months between HES filing this lawsuit and the trial in January 2017, at least five different Polk County judges and one federal district court judge dealt with this case. Judge Karen Romano initially had the case. Judge Romano held a hearing on Retterath's Motion to Dismiss or Stay the lawsuit on December 20, 2013, and ruled orally from the bench at the end of that hearing denying Retterath's motion in its entirety. Before Judge Romano issued her written ruling on January 2, 2014 App. I, pp. 133-138 (Ruling on Motion to Dismiss or Stay and Amended Motion to Quash), on December 30, 2013, Retterath removed the case to the Southern District of Iowa. App. I, pp. 63-132 (Notice of Removal). Then-Chief Judge James Gritzner granted HES's motion to remand back to Iowa District Court in an order dated May 21, 2014. App. I, pp. 139-148 (Order). Once back in Polk County, Judge Jeffrey Farrell entered an Order dated November 13, 2014, denying Retterath's motion to quash, and granting HES's motion to compel compliance with, a subpoena HES issued to RSM. App. I, pp. 152-159 (Ruling on Plaintiff's Motion to Compel and Defendant's Motion to Quash). Retterath then waited until December 29, 2014, approximately six weeks after Judge Farrell's order, to apply for interlocutory appeal thereof, which this Court denied on January 14, 2015. App. I, pp. 160-161 (Order). As discussed at length herein, Judge Scott granted partial summary judgment on October 19, 2015. App. III, p. 62-78 (SJ Ruling). Retterath applied for interlocutory appeal of that order, too, which this Court also denied on February 25, 2016. App. III, pp. 188-190 (Order). Approximately a year later, Judge Robert Blink entered the November 6, 2016 order bifurcating Retterath's newly-filed counterclaims and third-party claims. App. V, pp. 221-223 (Order Granting Leave to Amend and Bifurcating Trial). Finally, Judge Carla Schemmel was the trial judge. Clearly, Retterath was not shy about filing motions and challenging court orders, but waited approximately three years before filing counterclaims against HES and third-party claims against 16 new parties.

D. Conclusion

The district court was correct in striking Retterath's jury demand and bifurcating HES's specific performance claim from Retterath's newly asserted claims and counterclaims.

CONCLUSION

Despite a laundry list of allegations of error made by Appellants, the district court's rulings in this case have been correct and should be affirmed in all regards.

Judge Scott correctly granted summary judgment finding that neither the Operating Agreement nor Iowa law required a vote of the HES membership to approve the MURA.

Judge Blink appropriately exercised his discretion in bifurcating HES's claim for specific performance of the MURA from Retterath's strategically late move to amend his pleadings to add 16 new parties and nine new counterclaims against HES to this lawsuit (all less than five months before trial and after this lawsuit had been pending for three years).

Judge Schemmel correctly considered and ruled on countless motions, including, without limitation, her denial of Retterath's baseless pretrial motion for evidentiary sanctions or continuance, her grant of HES's post-trial motion to supplement the record with documents subpoenaed by

Retterath from HFSB on the fourth day of trial, her grant of HES's post-trial application for attorney fees, and her denials of Retterath's post-trial motions to reconsider and for new trial.

Most importantly, Judge Schemmel carefully received and considered the evidence presented at trial, which led to her well-reasoned and correct Ruling that HES is entitled to specific performance of the MURA and Retterath's related affirmative defenses are factually and legally baseless.

REQUEST FOR ORAL SUBMISSION

In accordance with Iowa R. App. P. 6.908, Appellee hereby requests Oral Argument in this matter to the extent that oral arguments would assist this Court in resolving this appeal.

CERTIFICATE OF COST

I hereby certify that the amount actually paid for printing or duplicating necessary copies of Plaintiff-Appellee's Proof Brief was $0.00.

/s/ Brant D. Kahler — February 4, 2019

Brant D. Kahler — Date

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 4, 2019, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court by using the Iowa Judicial Branch electronic filing system, which will send notice of electronic filing to all parties and attorneys of record.

/s/ Brant D. Kahler
Brant D. Kahler

February 4, 2019
Date

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WITH TYPE-VOLUME LIMITATION,
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1. The brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because:

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