IN THE NEBRASKA COURT OF APPEALS

CASE NO. 22-0892

ADAM R. HERINK
Appellee
v.

BLUESTEM ENERGY SOLUTIONS, LLC
Appellant

Appeal from the District Court of Douglas County, Nebraska

Honorable Timothy P. Burns

BRIEF OF APPELLANT BLUESTEM ENERGY SOLUTIONS, LLC

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to Neb. Rev. Stat. §25-1911. Appellant Bluestem Energy Solutions, LLC ("Bluestem") appeals from a judgment entered by the Douglas County District Court (the "District Court") on December 2, 2022. (T409) Bluestem's notice of appeal was filed the same day. (T412) Bluestem seeks review of the District Court's denial of its motion for directed verdict, which was made at the end of the case-in-chief presented by Appellee Adam R. Herink ("Herink") and renewed at the close of all evidence. In addition, Bluestem appeals from the grant of summary judgment in favor of Herink on Bluestem's counterclaim.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case arises out of Bluestem's purchase of 12,150 membership units of Bluestem that were owned by Herink at the time of the termination of his employment with Bluestem. Pursuant to Bluestem's Second Amended and Restated Operating Agreement (the "Operating Agreement"), upon termination of Herink's employment, with or without cause, Herink was obligated to sell and Bluestem was obligated to purchase all of Herink's membership units at "a purchase price equal to the fair market value per Unit as determined by the Manager in his sole discretion, exercised in a commercially reasonable manner." (E63, p. 17). Bluestem's Manager—Jon Crane—determined the purchase price to be $410,350 and tendered that amount to Herink in the form of a promissory note, as allowed under the Operating Agreement. (E125). The parties stipulated that Bluestem tendered to Herink the payments due under the promissory note as of trial and that Herink refused to accept those payments. (206:2-22).

Herink alleged that Bluestem failed to pay Herink the amount owed to him under the Operating Agreement. (T1). Bluestem

counterclaimed seeking a declaration of rights and specific performance of Herink's obligation to transfer his membership units to Bluestem for the tendered payment. (T226).

The case was tried to a jury on October 31 through November 3, 2022. Herink presented evidence during his case in chief regarding the "fair market value" of his Bluestem units. This evidence consisted of Herink's testimony that, in his opinion, his units were worth $25 million and the testimony of his valuation expert—John Agogliati—who testified that the units were worth between roughly $7 million to $10 million. Both opinions were received over Bluestem's objections. Herink's valuation expert admitted on cross-examination that his initial calculation of Herink's interest was in the range of roughly $1.7 million to $3 million. He later revised his calculation based on what he claimed was new information provided to him. He also admitted that he did not attempt to incorporate into his valuation any discretion by Bluestem's Manager and didn't even know how he would do that.

At the end of Herink's case in chief, Bluestem moved for a directed verdict on the ground that Herink had failed to present any competent evidence of a purchase price per Bluestem unit that incorporated Bluestem's Manager's sole discretion, as mandated by the parties' agreed upon pricing formula. (626:1-24). The District Court denied Bluestem's motion, both at the close of Herink's case in chief and when renewed at the close of all the evidence. (627:4-5; 710:21-711:2).

II. ISSUES SUBMITTED TO THE DISTRICT COURT

The jury was asked to decide whether Bluestem breached the terms of the Operating Agreement by failing to offer Herink after his termination a "purchase price equal to the fair market value per Unit as determined by the Manager in his sole discretion, exercised in a commercially reasonable manner" and, if the purchase price was less

than the required amount, the jury was instructed to determine the fair market of Herink's units determined in accordance with the above-quoted language. (T329). After the jury returned a verdict in Herink's favor (T353), Herink moved for summary judgment on Bluestem's counterclaim for declaratory judgment and specific performance. (T362).

III. HOW THE ISSUES WERE DECIDED

The jury found that Herink met his burden of proof and determined the fair market value of his units in Bluestem to be $2 million. (T353). Thereafter, the District Court granted summary judgment to Herink on Bluestem's counterclaim for specific performance and entered judgment in favor of Herink for $2 million, along with prejudgment and post-judgment interest and court costs. (T406)

IV. SCOPE OF REVIEW

"In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case and the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence." *Armstrong v. Clarkson College,* 297 Neb. 595, 610 (2017). "A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law." (*Id.*)

"An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no

genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence." *Barnes v. Am. Standard Ins. Co. of Wisconsin*, 297 Neb. 331, 335–36 (2017) (internal citations omitted). "The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

ASSIGNMENT OF ERRORS

1. The District Court erred in denying Bluestem's motion for directed verdict at the close of Herink's case in chief and at the close of all of the evidence.

2. The District Court erred in granting summary judgment in favor of Herink on Bluestem's Counterclaim.

PROPOSITIONS OF LAW

1. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed and the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence." *Armstrong v. Clarkson College,* 297 Neb. 595, 610 (2017).

2. "A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law." (*Id.*)

3. "An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence." *Barnes v. Am. Standard Ins. Co. of Wisconsin*, 297 Neb. 331, 335–36, (2017) (internal citations omitted).

4. "The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

5. "When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such a contract is a question of law." *City of Lincoln v. Nebraska Pub. Power Dist.*, 9 Neb. App. 465, 480 (2000) (quoting *Gilbreath v. Ridgeway*, 218 Neb. 822, 826 (1984)) (citations omitted).

6. A contract must receive a reasonable construction and must be construed as a whole and, if possible, effect must be given to every part of the contract. *Kercher v. Bd. of Regents of Univ. of Nebraska*, 290 Neb. 428, 436 (2015).

7. If a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties' intent. *Timberlake v. Douglas Cty.,* 291 Neb. 387, 394 (2015)

8. When the parties to a contract have agreed to a valuation methodology they are bound by that methodology and may not offer evidence of a different valuation method. *Benjamin v. Beirman,* 305 Neb. 879, 892 (2020).

STATEMENT OF FACTS

Bluestem's Business

Bluestem originated as an idea Jon Crane had for expanding the business of Boyd Jones Construction Company ("BJC"), of which he was the sole owner, into renewable energy. (418:20-24). In late 2007 or early 2008, Jon Crane began exploring the possibility of BJC becoming a contractor in the renewable energy space—starting with wind energy. (418: 25-419:2; 419:18-21). In 2009 and early 2010, Jon Crane and Herink (who was employed by BJC at the time) worked to develop a wind turbine project near Springview, Nebraska that was completed in roughly September 2011. (420:15-424:2). That project and a similar project developed thereafter, were owned and operated by a wholly subsidiary of BJC; neither project was owned by Bluestem. (423:23-424:8).

Bluestem was formed as a limited liability company in 2012. Its initial owners were Jon Crane (99%) and his wife Martha (1%). (424:11-21). At its inception, Bluestem had two part-time employees—Jon Crane and Herink—and an idea. (424:22-425:8). Its "office" consisted of a small construction trailer like you would see outside construction projects. (425:23-426:5).

As of the end of 2015, Bluestem had only developed one renewable energy project—a 6.8-megawatt wind turbine project (consisting of four 1.7-megawatt turbines) located near Creston, Nebraska. (426:6-17). Parenthetically, a "megawatt" is a thousand kilowatts and refers to the nameplate or maximum capacity of power that a wind turbine or other power generator can put out in an hour. (426:18-427:24). Bluestem charged its customers based on the amount of megawatt hours used by the customers. (151:6-17)

Herink's Agreements with Bluestem

On December 24, 2015, Bluestem and Herink executed three agreements. The first agreement was an Executive Employment Agreement (the "Employment Agreement"). (E61). Pursuant to the Employment Agreement, Herink took the title of Vice President, reporting to Jon Crane.

The second agreement was a Unit Purchase Agreement (the "UPA"). (E62). Pursuant to the UPA, Herink acquired 10,000 membership units in Bluestem which represented 10% of the outstanding membership units at the time. (*Id.*, p.1). The other 90,000 units were owned by Jon Crane (89,000 units) and his wife Martha (1,000 units). (*Id.*, p.1). Herink paid $30,000 for the 10,000 membership units. (*Id.*, p.1). Pursuant to the UPA, Herink was given an option to purchase up to an additional 5% of the member units of Bluestem in 2016 and an additional 5% of the member units of Bluestem in 2017. (*Id.*, p.1-2).

The third agreement was the Operating Agreement. (E63). The Operating Agreement obligates Bluestem to purchase, and Herink to sell, all of Herink's membership units in Bluestem upon the occurrence of a "Mandatory Operative Event," including the termination of his employment, with or without cause. (*Id.*, p.16).The purchase price was to be "a purchase price per Unit equal to the fair market value per unit as determined by the Manager in his sole discretion, exercised in a commercially reasonable manner." (*Id.*, p.17). At all times since its formation, Jon Crane has been the sole Manager of Bluestem. (197:11-21).

As provided by the UPA, Herink was given the option to acquire up to an additional 5% of the membership units of Bluestem in both 2016 and 2017. (192:19-21). He exercised his 2016 option, in part, and acquired an additional 2,150 units of Bluestem. (192:22-24). He declined to exercise any of his option in 2017. (194:6-23). In 2017 he also declined to participate in an effort to raise needed capital for Bluestem, which resulted in Jon Crane acquiring an additional 1,032

membership units. (192:25-193:6). As a result, at the time of the termination of his employment, Herink owned 12,150 out of 103,182 outstanding membership units, or roughly 12% of the total outstanding. (177:20-23).

Bluestem's Operations

From 2016 through 2019, Bluestem tried to develop additional alternative energy projects both in Nebraska and in other states, with limited success. As of the end of 2019, Bluestem was operating a total of seven projects, listed below:

Name	Placed-in-Service Date	Megawatts
Creston Ridge I	12/11/2015	6.8
Creston Ridge II	6/24/2017	6.9
Seward Wind	12/29/2017	1.7
Perennial	7/26/2018	6.9
Polk	12/22/2018	2.5
Cuming	12/17/2019	2.5
Burt County	9/1/2020	1.8592
Total		29.1592

(430:3-432:1). (E128).

At trial, Herink tried to portray Bluestem's business as being poised for huge revenue generation, on the cusp of being acquired by a major company like British Petroleum or as ready to be taken public. (180:10-181:8). But his co-workers who Herink called as witnesses at trial were far less optimistic. Herink's close friend (both were in their respective weddings and were godfathers to one of the other's children) Matt Robinette—who oversaw the development activities for Bluestem—testified that 2019 and the early part of 2020 were years of

"struggle." (357:7-20; 373:12-25) Will Crane—Jon Crane's son who tried without any success to expand Bluestem's business into Colorado and other states—testified that Bluestem didn't make any sales in a geographic areas outside Nebraska from 2016 through the date of Herink's termination. (390:17-21). The reason, according to Will Crane, was that Bluestem's pricing was not competitive: "We were too expensive in almost every instance." (390:22-391:5)

Jon Crane testified that as of late November 2017, he had a planning meeting with Herink in an effort to "get the horse out of the ditch." (438:2-9). In his view, Bluestem had lost momentum, had been losing people and they had to do something or the future for Bluestem was not very bright. (*Id.*) In March of the following year, he made the tough decision to terminate Herink's employment. (448:17-19).

Herink's Termination

By a letter from Jon Crane hand delivered to Herink on March 26, 2020, Herink's employment with Bluestem was terminated, without cause. (E81). The letter also indicated that pursuant to the Operating Agreement, Bluestem would purchase all of Herink's membership units in Bluestem and that Jon Crane "as Manager of the Company, have determined that the fair market value per Unit is $33.77, and the aggregate purchase price for all of your 12,150 Units is therefore equal to $410,350." (*Id.*, p.1).

On April 17, 2020, Jon Crane sent a letter to Herink enclosing a promissory note in the amount of $410,350. Herink received the letter and the promissory note. (205:9-17). (E125). Herink has never returned the original promissory note to Bluestem. (205:18-206:3). After the lawsuit was filed, the parties stipulated that Bluestem was prepared to make the first two installment payments due under the promissory note, but the parties agreed that they could dispense with that formality. (206:4-:17).

The Fair Market Value Determined by Jon Crane in his Sole Discretion

The $33.77 per unit that was tendered to Herink for the purchase of his shares was based, in part, on a valuation performed by Jamie Crane. (E128). Jamie Crane was Jon Crane's brother and the director of finance for Bluestem. (573:18-574:14). Jamie Crane graduated from the University of Kansas with a double major in accounting and business administration and a minor in information systems. (572:18-23; 588:18-23). He also obtained an MBA from the University of Phoenix in Arizona. (572:18-573:5). He took and passed the CPA examination administered in Arizona, but never applied for his CPA license. (587:21-588:10). He worked for various accounting firms, formed his own firm with a CPA in 2000 and performed valuations for family partnerships and limited liability companies. (588:24-590:9). At the time he performed the valuation of Bluestem he believed he had done a "couple hundred" discounted cash flow models. (591:8-16).

Jon Crane, without disclosing the purpose therefor, asked Jamie Crane to do a valuation of Bluestem and told him to include in his valuation the seven operating projects discussed above and two other projects that Bluestem was developing that Jon Crane thought had a high likelihood of success. (443:6-12). Although he left the valuation method up to Jamie Crane, Jon Crane presumed that Jamie Crane would use a discounted cash flow method of valuation because that was how they analyzed all of Bluestem's projects. (447:20-24).

Jon Crane believed that Jamie Crane was very qualified to perform the valuation because he had generated all of the financial models for all of the Bluestem projects that were up and running and that had been vetted by tax equity investors, bankers and accountants. (447:25-448:6). As will be discussed below, the projections that Jamie Crane used were also relied upon by Herink's valuation expert in performing his valuations of Bluestem.

Jamie Crane's Calculations

Jamie Crane testified in some detail regarding the methodology he used for his valuation. First, he confirmed that the projects that he included in his projections were those that Jon Crane directed him to include. (580:9-16). He also discussed how he ended up using a 10% discount rate. (581:9-586:6). As will be discussed below, that was a fraction (.5% to be exact) more than the discount rate that Herink's valuation expert used in his valuation using the discounted cash flow method.

After deducting existing and proposed debt and using 15% and 20% discounts for lack of control and lack of marketability, respectively, Jamie Crane calculated a "Net Bluestem Equity Value" of $837,961. (596:13-600:13). (E128). Jamie Crane then added back cash on hand of $1,049,378 (money market) and $1,199,427 (checking) to arrive at a "Net Bluestem Valuation" of $3,086,766. (600:14-16). That would equate to $29.92/unit and Herink's interest would be valued at $363,508—roughly $50,000 less than what he was offered in the March 26, 2020 letter. (E81). Jon Crane decided, in his discretion, to offer Herink that additional amount. (448:7-21)

Jon Crane testified that he believed that the price offered to Herink was the fair market value of Herink's membership units as determined by himself, as the Manager of Bluestem, in his sole discretion, exercised in a commercially reasonable manner. (417:14-19).

Herink's Various Calculations

Herink presented testimony from valuation expert John Agogliati ("Agogliati"). Agogliati leveled a number of criticisms of Jamie Crane's valuation and opined that it was not done in a "commercially reasonable manner" because: 1) Jamie Crane lacked "valuation credentials" or experience in performing valuations; 2) he

lacked "independence"; 3) Jamie Crane failed to include "future projects" in his valuation analysis (as distinguished from what Agogliati characterized as the "installed projects"); 4) Jamie Crane did not consider valuation approaches other than the discounted cash flow method (which Agogliati conceded was a "commercially reasonable" valuation method); and 5) the discount rate used by Jamie Crane was too high and was not calculated in a commercially reasonable manner. (480:12-481:4; 485:13-494:23; 536:23-537:8). Agogliati then opined that based on an independent valuation analysis he performed, the fair market value of between $7,060,000 and $10,080,000. (495:6- 522:1; 523:2-529:6). On cross-examination, however, Agogliati was forced to concede that in his initial report in this case that he calculated a value of Herink's interests at between $1.7 million and $3 million and that his earlier calculation was performed in a commercially reasonable manner. (535:5-536:22; 540:15-544:21). That calculation was based, in part, on a discounted cash flow method incorporating a 9.5% discount rate. (547:17-20). The lion's share of the difference between Agogliati's valuation and what is reflected on Jamie Crane's valuation is due to Agogliati including potential cash flows for projects that were not in existence as of the date of valuation. (550:21-13).

Agogliati conceded that in calculating a value of Herink's interest, he made no effort to—and had no idea how he would—take into consideration the discretion of Jon Crane as the Manager of Bluestem. (537:9-539:18). On the other hand, he did incorporate Jamie Crane's projections of revenue and expenses into his valuation analyses. (544:22-546:8).

SUMMARY OF THE ARGUMENT

This Court has long recognized that a party to a contract is not entitled to parse its provisions and abide by those he or she likes and throw to the side those he or she dislikes. This axiom flows from two fundamental rules of contract interpretation. First, a contract must

receive a reasonable construction and must be construed as a whole and, if possible, effect must be given to every part of the contract. *Kercher v. Bd. of Regents of Univ. of Nebraska*, 290 Neb. 428, 436 (2015). Second, if a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties' intent. *Timberlake v. Douglas Cty.,* 291 Neb. 387, 394 (2015).

These principles were applied—at least implicitly—to an agreed upon valuation provision in *Benjamin v. Bierman*, 305 Neb. 879 (2020). There, like here, the parties had agreed that a party's ownership interest in a closely held company should be determined in a particular matter. *Id.* at 888-89. Based on that provision, the Court upheld the district court's decision to prevent one party to the contract from offering his own expert's opinion in value which was contrary to what the parties had agreed. *Id.* at 891.

In the case at bar, Herink was allowed to introduce evidence of the fair market value of his membership units in Bluestem, assertedly calculated in a commercially reasonable manner. But that only accounts for two of the three agreed-upon components of the valuation method set forth in the operating agreement and ignores the third component, i.e. the "sole discretion" of Bluestem's Manager Jon Crane. Because Herink did not offer any evidence of value that incorporated the requisite discretion of Bluestem's manager, a directed verdict should have been entered in favor of Bluestem at the close of the evidence. For the same reasons, the district court erred in granting judgment in favor of Herink and against Bluestem on Bluestem's counterclaim for declaratory relief and specific performance.

ARGUMENT

"A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence,

where an issue should be decided as a matter of law." *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 787 (1997) (citing to *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261 (1996)). "In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence." *McCune v. Neitzel*, 235 Neb. 754, 762 (1990) (citing to Bray *v. Kate, Inc.*, 235 Neb. 315 (1990); *Ginn v. Lamp,* 234 Neb. 198 (1990)).

Herink is bound by the following provision:

"Upon the occurrence of a Mandatory Operative Event under Section 7.02(a), . . . , the Company shall pay the Member a purchase price per Unit equal to the fair market value per Unit as determined by the Manager in his sole discretion, exercised in a commercially reasonable manner."

(E63, p. 17)

Jon Crane is Bluestem's Manager. He exercised the discretion conferred upon him by the Operating Agreement by choosing to have Jamie Crane perform a valuation of Bluestem and by choosing which existing and future projects should be included for purposes of the fair market value determination. Jamie Crane, in turn, performed a valuation using a discounted cash flow method, which Herink's own expert concedes is a commercially reasonable method for valuing Herink's ownership interest.

By contrast, Herink's evidence of value is based on a re-written version of the agreed-upon valuation provision. According to Herink's proof, the parties' agreement actually reads:

> Upon the occurrence of a Mandatory Operative Event under Section 7.02(a), . . . , the Company shall pay the Member a purchase price Unit equal to the fair market

> value per Unit as determined by the jury ~~Manager in his sole discretion~~, ~~exercised in a commercially reasonable manner~~.

Herink wants the jury to decide the fair market value based upon his or his expert witness's discretion because that may be more favorable to him. Herink's expert witness conceded "that two different valuations even done by the same person can be done in a commercially reasonable manner and still be millions of dollars apart." (549:1-14). The difference "depend[s] on the information that's behind it." (*Id.*) Here, one component of "the information that's behind it" is Mr. Crane's discretion in, for example, deciding which projects are likely to succeed for Bluestem. (444:2-445:25). Any valuation which fails to account for Jon Crane's sole discretion would deprive Bluestem of the benefit of its bargain under the Operating Agreement, i.e., to purchase Herink's units based on a method involving its Manager's sole discretion. *Timberlake v. Douglas Cnty.,* 291 Neb. 387, 394 ("ascertaining the parties' intent in a written integrated contract, a court tries to give meaning to all its parts and avoid an interpretation that renders a material provision meaningless. If a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties' intent.") Without evidence that conforms to the all the terms of the Operating Agreement, including Jon Crane's sole discretion, the jury has no competent evidence from which it can measure Bluestem's performance or find a breach. Each effort by Herink to establish a fair market value per unit of Bluestem failed to include Crane's discretion, and that causes Herink's claims to fail.

In *Benjamin v. Bierman*, *supra,* this Court recognized that a party to an operating agreement that sets forth a method for valuing his interest in a limited liability company is bound by that methodology. There, the operating agreement in question provided that upon death of a member, that member's interest could be purchased by the limited liability company for "an amount equal to the

fair market value of such interest on the Member's date of death . . .." . 305 Neb. at 888-89. The operating agreement further provided the "fair market value of the Member's interest shall be as agreed in good faith by the Company and the personal representative(s) of the deceased Member's estate . . . : provided that if no such agreement has been reached within (90) days of the date of death . . . , the fair market value shall be determined by an independent and duly qualified appraiser mutually agreeable to the Company and the estate of the deceased Member . . .." Id. The *Benjamin* Court rejected an argument that "fair market value" was a term of art requiring reliance on factors outside the agreements, holding that the plain language of the operating agreements "clearly states that 'the fair market value shall be determined by an independent and duly qualified appraiser mutually agreeable to the Company and the estate of the deceased Member.' We need not rely on anything further to interpret the agreements' definition of 'fair market value.'" 305 Neb. at 889. Since the parties had agreed to the method of valuation and to the appraiser to conduct the valuation, the *Benjamin* Court also affirmed the district's court's refusal to adopt a separate valuation performed by a different valuation expert. 305 Neb. at 892.

The *Benjamin* Court's reasoning is instructive here. If the valuation methodology advanced by Herink is allowed to prevail, then the methodology chosen by the parties is meaningless because according to Herink's expert there is a commercially reasonable range of millions of dollars to value this interest. In the case at bar, Herink sought to circumvent the agreed-upon methodology for valuing his membership units in Bluestem by offering the valuation opinion of an expert who admittedly did not consider the Manager's sole discretion component of the Operating Agreement. That attempt runs afoul of well-settled rules of contract interpretation and this Court's holding in Benjamin, supra, and should have been rejected by the district court. Here, the only evidence of a valuation that was performed in a manner consistent with the Operating Agreement was introduced by Bluestem.

Accordingly the district court erred in failing to enter a directed verdict in favor of Bluestem.

CONCLUSION

Both parties entered into a contract which clearly and unambiguously set forth the manner in which Herink's membership units in Bluestem were to be valued upon termination of his employment. But according to the evidence introduced at trial only one party incorporated all three prongs of the valuation methodology in making that determination, i.e. 1) the fair market value of the units; 2) determined by the Manager of Bluestem in his sole discretion; 3) exercised in a commercially reasonable manner. Since Bluestem's valuation was consistent with the parties' agreement, but Herink's was not, the district court should have directed a verdict in favor of Bluestem at the close of all the evidence. Mr. Henrink was a party to agreement, and a trial is not an opportunity to re-negotiate terms that one party does not like. Bluestem respectfully submits that this Court should reverse the judgment of the district court and remand this matter with instructions to enter judgment in favor of Bluestem.

Dated this ___day of February 2023.

Respectfully submitted,

BLUESTEM ENERGY SOLUTIONS, LLC, Defendant

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief contains 5,390 words. The undersigned relies upon the word-count function of Microsoft Office 365 Word version 2019 applied to all text, including the cover page, headings, and signature block. The undersigned further certifies that the foregoing Brief also complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103.

/s/ *William F. Hargens*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of February 2023, the foregoing was electronically filed with the Clerk of the Nebraska Supreme Court on Nebraska.gov, which sent electronic notification of such filing to the individual listed below.

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Certificate of Service

I hereby certify that on Friday, February 17, 2023 I provided a true and correct copy of this *Brief of Appellant Bluestem Energy, LLC* to the following:

Adam R Herink represented by Adam J Sipple (20557) service method: Electronic Service to **adam@sipple.law**
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