IN THE SUPREME COURT OF IOWA

No. 15-0471
No. 15-0780

WESTCO AGRONOMY COMPANY, LLC,
Plaintiff-Counterclaim Defendant
Appellant-Cross-Appellee

vs.

WILLIAM S. WOLLESEN a/k/a BILL WOLLESEN; KRISTI J. WOLLESEN; WILLIAM S. AND KRISTI J. WOLLESEN REVOCABLE TRUST; JOHN W. WOLLESEN; IOWA PLAINS FARMS; and CHAD A. HARTZLER,
Defendants
Appellees

IOWA PLAINS FARMS,
Counterclaim Plaintiff-Third-Party Plaintiff
Cross-Appellant,

vs.

WEST CENTRAL COOPERATIVE,
Third-Party Defendant
Appellant-Cross-Appellee

On Appeal from the District Court for Story County
Honorable Michael J. Moon
Story County No. LACV046817

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ROUTING STATEMENT

The Supreme Court should retain this appeal. Historically, "[b]reach of fiduciary duty is an equitable claim." *Weltzin v. Nail*, 618 N.W.2d 293, 299 (Iowa 2000). However, "breach of fiduciary duty has been recognized as an independent tort in other jurisdictions but [this court] had never been called upon to recognize the recovery in Iowa." *Clinton Land Co. v. M/S Assoc., Inc.*, 340 N.W.2d 232, 234 n.1 (Iowa 1983); *see also Condon Auto Sales & Serv., Inc. v. Crick,* 604 N.W.2d 587, 598 (Iowa 1999);

Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980). Over the objections of plaintiff, Westco Agronomy Company, LLC ("Westco"), the district court held that Westco's breach of fiduciary duty claim and related conspiracy claims were "torts" and triable to a jury. The open question in *Clinton Land Co.*, *Condon Auto Sales*, and *Linge* is presented by this case.

It is also undecided whether a claim under Iowa Code Chapter 706A should be tried by equitable proceedings when the underlying ongoing criminal conduct is commercial bribery, the relief sought is traditionally equitable, and the related common law claims are equitable. The resolution of these issues will determine whether Westco's claims should have been tried to a jury or by equitable proceedings. *See* Iowa Code § 611.10; Iowa R. Civ. P. 1.903(1).

STATEMENT OF THE CASE

On May 12, 2011, Westco filed a petition alleging that defendant Chad Hartzler ("Hartzler"), Westco's former agronomy manager, was bribed by the other defendants (collectively the "Wollesens") to enter into unfavorable deals for the sale of

Westco's products. (APP. 0001) On April 2, 2012, Westco filed a second amended petition, which included counts for: (1) bribery; (2) theft; (3) conversion; (4) breach of fiduciary duty; (5) breach of duty of loyalty; (6) ongoing criminal conduct under Iowa Code Chapter 706A; (7) unjust enrichment; (8) foreclosure of an agricultural lien; and (9) breach of contract. (APP. 0062)

On May 7, 2012, the Wollesens filed an answer to the second amended petition. (APP. 0078) In addition, defendant Iowa Plains Farms ("IPF") asserted counterclaims and a third-party petition against Westco and West Central Cooperative for breach of contract, fraud, negligent retention, breach of fiduciary duty, and accounting.[1] (*Id.*)

On May 6, 2013, the Wollesens moved for summary judgment on each of Westco's claims. (APP. 0111) Additionally, IPF moved for summary judgment on its conversion counterclaim. (*Id.*). On May 25, 2013, Westco filed a resistance. (APP. 0162)

On June 17, 2013, the district court dismissed Westco's claims for bribery, theft, conversion, breach of the duty of loyalty,

[1] Westco is a wholly-owned subsidiary of West Central Cooperative. They will collectively be referred to as "Westco."

unjust enrichment, and foreclosure of an agricultural lien. (APP. 0168) The court also dismissed Westco's unjust enrichment claim because: "[Westco] has pled in the second amended petition express contract which vitiates the claim for unjust enrichment." (*Id.*). The court denied summary judgment on Westco's remaining claims. (*Id.*)

On June 17, 2014, Westco filed a motion for equitable issues to be tried in equity. (APP. 0276) Westco argued that any alleged contracts between Westco and the Wollesens were induced by breaches of fiduciary duty, and Westco was entitled to equitable remedies. (*Id.*) On June 23, 2014, the Wollesens filed a Resistance. (APP. 0289)

On July 1, 2014, the district court entered an order denying Westco's motion for equitable issues to be tried in equity. (APP. 0445) The court held that Westco's "equitable causes of action were dismissed" on summary judgment, and that Westco was "attempting to resurrect those actions." (*Id.*) The court also held that Westco's chapter 706A claim "has been pled in tort and . . . seeks legal remedies." (*Id.*)

On July 2, 2014, Westco filed a motion to enlarge or amend or, in the alternative, to voluntarily dismiss Westco's breach of contract claim. (APP. 0452) On July 7, 2014, the district court entered an order noting Westco's voluntary dismissal of its breach of contract claim. (APP. 0455)

Trial began on July 8, 2014. Before jury selection, Westco renewed its motion to try equitable issues by equitable proceedings. (APP. 0778-APP. 0779:1-15.) The district court denied the motion. (APP. 0780:25–APP. 0781:1-5.)

At the close of the evidence, on August 3, 2014, Westco filed a motion for directed verdict. (APP. 0458) On August 4, 2014, Westco again renewed its motion that equitable issues be tried by equitable proceedings. (APP. 1080:23–APP.1081:24.) The district court did not rule on the motion for directed verdict, and denied the motion for trial by equitable proceedings. (APP. 1081:25-APP. 1082:1.)

On August 7, 2014, the jury returned its verdict. (APP. 0573) The jury found that Hartzler breached his fiduciary duties with Westco and engaged in ongoing wrongful conduct with one or

more of the Wollesens. *Id.* The jury awarded Westco damages of $485,315 against Hartzler, which equals the amount of the checks the Wollesens paid to Hartzler. *Id.* The jury found for the Wollesens on Westco's claims for conspiracy to breach fiduciary duties and that none of the Wollesens engaged in ongoing unlawful conduct with Hartzler. *Id.* The jury found Westco did not engage in ongoing unlawful conduct. *Id.* The jury found in favor of IPF on its claims against Westco for breach of contract and fraud and awarded $576,189 in damages. *Id.* The court entered judgment on the sealed verdict. (APP. 0592)

On September 22, 2014, Westco filed a combined motion to renew its motion for directed verdict, for J.N.O.V., and for a new trial. (APP. 0595) Westco claimed the district court erred by denying Westco's motion to try equitable issues by equitable proceedings. (Brief.) In addition to other objections, Westco argued the jury's verdict—which found that Hartzler but none of the Wollesens engaged in ongoing commercial bribery—was inconsistent and there was insufficient evidence of fraud or breach

of contract. *Id.* On March 3, 2015, the district court entered an order denying Westco's post-trial motions. (APP. 0614)

STATEMENT OF FACTS [2]

I. PARTIES

West Central Cooperative is a farmer-owned, for-profit agricultural cooperative. (APP. 0797–APP. 0798.) Westco Agronomy Company, L.L.C. is a wholly-owned subsidiary of West Central. (APP. 0799–APP. 0800) Westco's business includes the sale and delivery of agronomy products such as fertilizer, corn and soybean seed, and various chemicals. (*Id.*)

Westco hired Hartzler in 2002, and he became a manager at the director level for Westco's agronomy sales. (APP. 0800) He was responsible for seed sales and later for chemical sales. (APP. 0800–APP. 0801)

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[2] Many of the facts are described in a light favorable to Westco's claims, rather than the judgment. On appeal, the court should view the evidence in a light most favorable to the party denied the right to an equity trial in determining whether denial of the right was prejudicial error. *See Conrad v. Dorweiler*, 189 N.W.2d 537, 540 (Iowa 1971). (Brief Point I.C.1.) Facts favorable to Westco's claims are also used to show the circumstances of the case and the inconsistent jury verdicts. (Brief Point II.)

IPF is a general partnership among defendants William Wollesen ("Bill"), Kristi Wollesen ("Kristi"), and John Wollesen. (APP. 0959:6-25; APP. 0960:1-3; APP. 1030; APP. 2635; APP. 2642; APP. 2652; APP. 2684; APP. 2685) IPF and Bill were customers of Westco. (APP. 0802) They farmed approximately 6,000 acres in the Lakeview, Iowa area. (APP. 1024:12-20.) IPF did not begin purchasing large volumes of Westco's product until approximately 2005, when Hartzler started to work with Bill as Westco's sales representative. (APP. 1087; APP. 2682) The Wollesens also own and operate ByRite Farm Supply, a retailer of agricultural inputs. (APP. 0632:8-25; APP. 0633:1-21.)

Kristi had been employed for fifteen years as a cashier and operations officer with the Wall Lake Savings Bank. (APP. 0625:16-25; APP. 0626:1-4; APP. 0626:22-25; APP. 0627:1-25; APP. 0628:1-24; APP. 0629:1-7; APP. 0630:21-25; APP. 0631:1-14; APP. 1088) Kristi handled much of the bookkeeping for the Wollesens' farming and business operations. (*Id.*; APP. 0629:23-25; APP. 0630; APP. 0631:1-2.) From 2005 to 2010, Westco billed

IPF approximately $6.1 million for Westco's product. (APP. 0924:12-25; APP. 2682)

II. THE BRIBERY SCHEME

On April 30, 2011, Hartzler unexpectedly delivered a resignation letter to Westco. (APP. 0811; APP. 2666) The following Monday, Hartzler told Westco to stop making product deliveries to IPF. (APP. 691; APP. 0714; APP. 2664) Westco later learned Hartzler had received $487,315 in personal payments from the Wollesens between June 2005 and March 2011 in exchange for lower prices on Westco's seed, chemicals, and fertilizer. (APP. 0823:15-25; APP. 0824:1-22.) Hartzler's take home pay from Westco for the same period was about $5,000.00 less than the amount he received from the Wollesens. (APP. 0921-APP. 0922:1-2; APP. 1087)

As a result of his participation in the bribery scheme with the Wollesens, Hartzler pled guilty to federal wire fraud charges. (APP. 0664:1-10; APP. 0715:7-25; APP. 0716:1-2; APP. 0717:1-12; APP. 0718:14-18; APP. 2542, APP. 2548) Hartzler testified at trial by videotape because he was incarcerated at a federal prison

in Yankton, South Dakota. Hartzler received no benefit from federal prosecutors or Westco in exchange for his testimony. (APP. 0719:19-25; APP. 0720:4-14.)

Hartzler testified that in approximately June of 2005, Bill paid him $2,000 in cash to discount the price of a seed product. (APP. 0695:18-25; APP. 0696:13-17; APP. 0696:24-25; APP. 0697:1-5.) Thereafter, the Wollesens made payments to Hartzler personally by checks, totaling $485,315. (APP. 0658:21-25; APP. 0659:9-24; APP. 1396; APP. 1435) Hartzler testified the payments were in exchange for IPF getting better prices on Westco's seed, chemicals, and fertilizer. (APP. 0656:13-17.) Hartzler sold Westco's products to IPF for less than Westco's costs for those products, particularly seed. (APP. 0656:18-24.) Westco lost money on Hartzler's sale of products to IPF. (APP. 0657:3-7.) Hartzler concealed from Westco the lower prices at which he agreed to sell products to IPF by recording false higher prices in Westco's accounting system. (APP. 0657:21-25; APP. 0658:1-4; APP. 0667:10-21; APP. 0668:4-14.)

Hartzler kept two sets of books for his transactions with the Wollesens. (APP. 0665:20-25; APP. 0666:1-13.) One set was the false higher prices he entered into Westco's accounting system. However, these records accurately reflected the type and quantity of product delivered. (APP. 0686:18-25; APP. 0687:1-26.) The other set he maintained on secret Excel spreadsheets that showed the lower prices he had quoted Bill. (APP. 0669:16-25; APP. 1440-APP. 1474) On at least two occasions, Hartzler had a conversation with Bill to the effect that what they were doing was not "on the up and up" and that "we'll both get in a lot of trouble over this deal." (APP. 0671:8-25; APP. 0672:1-25.) Hartzler admitted his conduct was wrong and violated Westco's conflict of interest policies. (APP. 659:25; APP. 0660:1-25; APP. 0661:1-25; APP. 0662:1-25; APP. 0663:1-25; APP. 0664:7-25; APP. 0665:1-7.)

When Bill and Hartzler discussed a possible price for a product, Bill would ask him, "What's the price if I paid you direct?" (APP. 0698:19-25; APP. 0699:1-5.) Hartzler understood that to mean Bill was going to pay him directly "for a better deal." (APP. 0699:6-9.) On occasion, Bill offered to personally pay

Hartzler $5.00 per bag for corn in exchange for a price of $120-$125 per bag. (APP. 0699:21-25; APP. 0700:1-5.) Bill was particularly interested in buying Dekalb brand seed corn. (APP. 0701:14-20.) The market price for larger farmers was approximately $190-$200 per bag for the same Dekalb seed corn. Hartzler was selling it to Bill for $125-$130 per bag. (APP. 0701:14-25; APP. 0702:1-2; APP. 1435.) In 2006, the Wollesens' obtained all of their seed corn from Westco by paying Hartzler $82,500 personally. (APP. 0703:23-25; APP. 0704:1-2; APP. 0893-0897; APP. 1435) Further, the Wollesens' claimed they paid nothing for the seed beans they obtained from Westco in 2006, totaling 5,600 bags or 5 semi-loads; this was enough seed to plant 4,500 acres. (APP. 0769-APP. 0772; APP. 1506) The Wollesens' claimed all of the payments made to Westco in late 2006 were "pre-payment" on the 2007 crop. (APP. 0888:17-25; APP. 0889; APP. 0890:17-24; APP. 0891:3-5; APP. 1506)

After Hartzler received checks from the Wollesens, he altered them to conceal the true payee and purpose. Kristi reviewed the cancelled checks written to Hartzler as part of her

bookkeeping duties with IPF. (APP. 1042:14-25; APP. 1043:1-13.) She saw that Hartzler had altered IPF's checks, changing the payee in some cases to "Hartzler Trucking" or indicating the purpose of the check on the memo line was for "consulting." (APP. 1043:14-25; APP. 1044:1-8; APP. 1044:20-25; APP. 1045:1-25; APP. 1046:9-24.) Kristi admitted she should have "questioned more" why Hartzler was altering their checks, concealing the true payee and purpose. (APP. 1047:1-25.) She admitted she felt "like I could have stopped it . . . if I would have questioned the notations" Hartzler made on the checks. (APP. 1048:25; APP. 1049:1-43.) "I would have been looking for fraud a little bit more, maybe," she testified. *Id.*

Bill claimed the checks he gave to Hartzler were for "product and also commission that he was owed." (APP. 0974:3-8.) He claimed Hartzler also told him that he had "product he could sell or [an] agreement he had with Westco on some items he was to receive a commission." (APP. 0974:9-13.) Bill admitted he had never paid a cooperative's sales person commissions directly before. (APP. 1016:2-17, 25; APP. 1017) He testified he was "a

little stunned" when Hartzler asked him to do so. (APP. 0977:14-25, APP. 0978:1-11.) When Hartzler allegedly offered product as his own for sale to Bill, Bill testified that "at first it kind of stunned me." (APP. 1020:22-25, APP. 1021:1-12.) But Bill never confirmed Hartzler's "stunning" representations with anyone else at Westco. (APP. 1022:25; APP. 1023:1-10.)

Hartzler denied telling Bill he had products to sell on his own personally. (APP. 0688:12-25; APP. 0689:1-9.) He also denied telling Bill he should pay him a commission directly on products he sold to him. (*Id*; APP. 0691:12-20.) Hartzler never gave the Wollesens an invoice, delivery ticket or similar document indicating that any of the product delivered came from him personally. (APP. 0690:1-25; APP. 0691:1-11).

John Alfonsi, an accountant and certified fraud examiner, testified the arrangements between Hartzler (APP. 0903:25; APP. 0904:1-4,) and the Wollesens had several hallmarks of a bribery scheme. He testified the preferred method to conduct a bribery scheme is to use checks. (APP. 0913:1-13.) The bribes are commonly described as "commissions" to disguise their true

purpose. (APP. 0914:2-11.) He also provided a detailed overview of the manner in which the bribery scheme worked. (APP. 0914:16-25; APP. 0914-APP. 0921:1-4; APP, 0916:9-25; APP. 0917-APP. 0919:1; APP. 2683.)

III. EMPLOYMENT RULES AND INDUSTRY CUSTOM

Hartzler's conduct with the Wollesens violated Westco's employment rules and industry custom and practice among farmers and cooperatives. Westco's conflict of interest policy, acknowledged by Hartzler, (APP. 0660:4-20; APP. 2539), prohibited employees from seeking any gifts, favors, entertainment, or payments. (APP. 0803-0810) The policy further provides: "It is never permissible for an employee to accept a gift in cash or cash equivalent." (APP. 0807; APP. 2482) Westco never knowingly allowed an employee to take cash payments from a customer. (APP. 0809) Agricultural cooperative sales people are never paid personally by a customer of the cooperative. (APP. 0809-APP. 0810) Sales people for agricultural cooperatives like Westco never receive product in lieu of wages. (APP. 0810) Sales people for agricultural cooperatives like Westco are never given

product to personally sell to customers of the cooperative. (APP. 0810-APP. 0811)

Westco offered testimony from experts regarding the custom and practice in the agricultural cooperative industry. These witnesses had extensive experience in various aspects of the industry involving the buying and selling of inputs, (APP. 0834-APP. 0838; APP. 0937-APP. 0940), and they testified it is not the custom and practice of agricultural cooperatives to allow sales persons to sell on their own account the same products the cooperative sells to its customers. (APP. 0839; APP. 0941) Further, they testified it is not the custom and practice of agricultural cooperatives to have farmers pay commissions to cooperative sales persons. (APP. 0840; APP. 0942) They testified it would be inconsistent with the custom and practice in the business of agricultural cooperatives for a farmer to make any personal payments to a sales person of an agricultural cooperative. (APP. 0841; APP. 0851; APP. 0942-0943) They further testified that the use of account statements would be the customary manner in which an agricultural cooperative would

document transactions with a customer. (APP. 0842-APP. 0847; APP. 0944; APP. 1440, APP. 1441-1474)

Westco also called Jay Sturtz who, while employed by Westco, had been the Wollesens' sales representative. (APP. 0952:2-17) He worked for Westco from around 2000 to 2009. (APP. 0951:4-16.) Sturtz came to know Bill when he was working out of the Westco location in Carroll between 2000 and the fall of 2004. (APP. 0951:2-7) During the time Sturtz worked with Bill, Bill and IPF always paid Westco, not Sturtz personally, for the products he sold to them. (APP. 0953) Sturtz never told the Wollesens he had product of his own he could sell to them. (APP. 0954) He never told the Wollesens they should pay him a commission for a sale to them. (*Id.*) The Wollesens never made a personal payment to him as a sales representative for Westco. (*Id.*)

IV. THE ACCOUNT STATEMENTS

Throughout the time the Wollesens dealt with Hartzler, Westco sent 49 account statements to IPF. (APP. 0868:19-25; APP. 0869; APP. 0870; APP. 1475-1622) Westco followed its

standard office procedure when it mailed each of these statements to IPF. (APP. 0871:14-25; APP. 0872-APP. 0874; APP. 0875:1-20; APP. 0882:16-25; APP. 0883:1-11.) These statements showed the product delivered, the quantity of product delivered, the price per unit, payments made on the account, the amount owed on the account, and any funds held in escrow. (APP. 0678:2-24.) Hartzler had the impression the Wollesens received their statements from Westco. *Id*.

These statements clearly reflected that the products sold to IPF were Westco's products, not Hartzler's, and that the price of the products was more than the price agreed to by Hartzler and Bill. (APP. 0922:22-25; APP. 0923:1-8; APP. 2668) The Wollesens claimed that they were always "prepaid" for the products delivered to them. (APP. 1026:5-11.) But any amount held as prepayment for future deliveries would be reflected in the amount held in escrow on the statements. (APP. 0683:1-9.) Bill understood any prepayments were held in the escrow account by Westco. (APP. 1027:7-25; APP. 1028:1-2.) However, none of the Westco

statements mailed to the Wollesens reflected the "prepayments" they claim.

The Wollesens' admitted to receiving only four of the 49 statements mailed by Westco. (APP. 0634:20-25; APP. 0635:1-13; APP. 0637:4-25; APP. 0638:1-9; APP. 0961:19-25; APP. 0962: 1-15; APP. 1650) They denied receiving any others. The account statements the Wollesens received showed that Westco was charging them *more* for the products sold to them by Hartzler than Hartzler had quoted to Bill. (APP. 0922:22-25; APP. 0923:1-8; APP. 1440-APP. 1471; APP. 2668) They reflected how the Wollesens' payments were applied by Hartzler to their account. (APP. 0678:2-24.) The statements sent by Westco to the Wollesens were completely inconsistent with the deals the Wollesens claimed they made with Hartzler. But the Wollesens never questioned the accuracy of any of Westco's statements. (APP. 0680:8-15; APP. 0681:22-25; APP. 0682:1-6.)

V. THE 2010-2011 TRANSACTIONS

In November 2010, IPF owed Westco approximately $1.4 million for product delivered for the 2010 crop season, as reflected

on Westco's monthly statement. (APP. 0878; APP. 2679) Hartzler's supervisor, Harry Ahrenholtz, asked Hartzler about the significant amount due from IPF. (APP. 0705:1-25.) Hartzler lied about the status of the account and told Ahrenholtz that the Wollesens were going to pay the amount due. (APP. 706:1-25; APP. 707:1-19.) On or about December 21, the Wollesens gave Hartzler three checks totaling approximately $2.1 million. (APP. 0898; APP. 2737) The Wollesens claimed the money was "prepay" for the 2011 crop. (APP. 886:18-25; APP. 0887:1-2; APP. 0888:17-25; APP. 0889-APP. 0890:17-24; APP. 0891:3-5; APP. 1506, APP. 2772) Hartzler used the money to pay off the balance due for product delivered and planted in 2010. (APP. 0713:1-8.)

Westco would typically apply any funds received to an existing account balance before accepting prepayment. (APP. 0881:13-25.) On December 29, 2010, Hartzler told Ahrenholtz he had collected the amount due and owing from the Wollesens and received an additional $650,000 in prepayment for 2011. (APP. 0763:8-25; APP. 0764:1-15; APP. 2746) This was also a lie. Hartzler had yet to bill IPF nearly $650,000 for 2010 inputs. (*Id.*;

APP. 0773:11-25; APP. 0774:1-10; APP. 1603) Hartzler did not tell anyone at Westco that he had agreed with Bill that the three checks totaling $2.1 million were "prepayment" for the 2011 crop year. (APP. 0712:9-25.)

Westco mailed three account statements to IPF that accurately reflected how Hartzler had applied the money provided by the Wollesens in December. (APP. 0682:22-25; APP. 0683:1-25; APP. 0684:1-25; APP. 0685:1-2; APP. 1603) They were as follows:

1) December 31, 2010, statement to IPF showed a balance due of $1.4 million had been paid by application of two of the December 21 payments in the amounts of $650,000 and $867,000. (APP. 0853:3-22; APP. 1603)

2) January 31, 2011, statement showed a third payment of December 21 in the amount of $640,000 had been applied in payment of product invoiced to their account that same month, and there was only $2,232.50 held in escrow as prepay. (APP. 0683:10-25; APP. 0684; APP. 0685:1-2; APP. 1603)

3) February 28, 2011, statement showed there was only $2,232.50 held in escrow as prepay for 2011 crop. (APP. 0853:22-25; APP. 0854:1-8; APP. 1603)

4) March 31, 2011, statement showed for a third time that there was only $2,232.50 held in escrow as prepay for 2011 crop. (APP. 0854:19-25, APP. 0855:1-4; APP. 1603)

The Wollesens never questioned why the January, February or March 2011 statements did not reflect the "prepay" escrow of at least $2 million they claim. (APP. 0684:7-25; APP. 0685; APP. 0686:1-2.) The Wollesens never expressed any concern to anyone at Westco about the balance of their escrow account in early 2011 as reflected in the statements. (*Id.*)

Hartzler had signed three contract forms with IPF on December 21, 2010, so he could cover the balance owed by IPF on the account at Westco. (APP. 0708:15-25; APP. 0709:1-4; APP. 2552-APP. 2557) The purpose of Hartzler's "contracts" with IPF was to continue to conceal from Westco the deals he had made with the Wollesens over the past five years. (APP. 0709:5-8.) Except for fertilizer, the "contracts" signed by Hartzler did not provide a definite description of the product sold, the identity or brand name of the product, the product price, or the product quantity. (APP. 0709:9-25; APP. 0710:1-25; APP. 0711:1-24; APP. 2552-2557) The "contracts" were never entered into Westco's accounting system. (*Id.*; APP. 0713:22-25; APP. 0714:1-9; APP. 2552-2557)

Prior to April 30, 2011, when Hartzler directed Westco to stop deliveries to IPF, (APP. 0856:12-15; APP. 2666), IPF had obtained some product from Westco for the 2011 crop year. Westco claimed IPF owed it $2,171,978.80 for this product based upon current price lists and the standard volume discount. (APP. 0857:1-25; APP. 0858:1-16; APP. 0859:15-25; APP. 0860:1-25; APP. 0861; APP. 0862:16-17; APP. 0863:2-11; APP. 1603; APP. 2686) IPF never paid Westco for this product.

VI. DAMAGES

Westco sustained significant damages as a result of the bribery scheme and sought restitution and a constructive trust based upon evidence of its losses. John Alfonsi, CPA, provided expert testimony in support of Westco's damages claim. (APP. 0901-APP. 0904) These damages included: (1) $2.3 million for improper discounts Hartzler provided the Wollesens, (2) $2.1 million for the fair market value of product delivered to the Wollesens by Westco for the 2011 crop season, and (3) $733,000 for the amount of "free corn" seed allocated by Hartzler to the IPF account. (APP. 0926:9-25, APP. 0927:1-7; APP. 0905; APP. 0906-

APP. 0911:18-25; APP. 0912:1-22; APP. 0969; APP. 2687) Total damages based upon these calculations are $5,234,000.

In addition, Westco sought a constructive trust based upon Alfonsi's testimony that IPF realized $3,776,392 in net profit on the sale of crops grown with inputs acquired from Hartzler at improperly discounted prices. (APP. 908:12-21; APP. 0928:13-16; APP. 0929:2-7.) If the $487,315 paid by the Wollesens to Hartzler is included in the calculation, Westco's total damages are approximately $9.5 million. (APP. 0929:8-15.)

By his own calculations, Hartzler agreed that Westco had been damaged in the amount of at least $2.5 million as a result of the bribery scheme, representing only the amount of the improper discounts. (APP. 0775:8-25; Ex. P39.) Hartzler agreed to the entry of a judgment against him for restitution in the federal criminal proceeding in the amount of $2.5 million. (*Id*; APP. 0718:3-18; APP. 2542)

ARGUMENT

I. WESTCO SHOULD HAVE A NEW TRIAL BY EQUITABLE PROCEEDINGS.

Preservation of Error. Westco preserved error on the issue of trial by equitable proceedings: by resisting a pre-trial motion for summary judgment to dismiss Westco's equitable count of unjust enrichment (APP. 0162) and the order granting the motion (APP. 0162; APP. 0168); by motions to try equitable issues by equitable proceedings made before trial, on the first day of trial, and at the close of evidence (APP. 0276; APP. 0778-APP. 0779:1-15; APP. 1080:23-APP. 1082:1) and the orders denying the motions (APP. 0445); and by timely motion for new trial (APP. 0595) and the order denying the motion (APP. 0614).

Scope of Review and Standard of Review. The scope of review for the dismissal of Westco's unjust enrichment count includes the motion for summary judgment, the resistance, the record on the hearing of the motion, and the court's order granting the motion. The standard of review for an order granting summary judgment is for correction of errors at law. *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015).

The scope of review on the trial of equitable issues by equitable proceedings includes: the Wollesens' motion for

summary judgment; the resistance; the order granting the motion; the grounds raised in Westco's motion for new trial; the resistance; the record on the hearing of the motion for new trial; and the order denying the motion.

Whether Westco had a right to trial of equitable issues by equitable proceedings is a purely legal issue. Iowa Code § 611.10; Iowa R. Civ. P. 1.903(1). The standard of review is for correction of errors at law. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). On appeal, the court should view the evidence in a light most favorable to the party denied the right to an equity trial in determining whether denial of the right was prejudicial error. *See Conrad*, 189 N.W.2d at 540.

Argument.

"The plaintiff may prosecute an action by equitable proceedings in all cases where courts of equity, before the adoption of this Code, had jurisdiction, and *must so proceed* in all cases where such jurisdiction was exclusive." Iowa Code § 611.4 (emphasis added). The Code also provides that "either party *shall*

have the right, by motion, to have any issue *heretofore exclusively cognizable in equity* tried in the manner hereinafter prescribed in cases of equitable proceedings." Iowa Code § 611.10 (emphasis added.); *see also Pickford v. Smith,* 241 N.W. 650, 653 (Iowa 1932). A corollary to these statutes is the rule of civil procedure governing the trial of issues:

> All issues shall be tried to the court except those for which a jury is demanded. Issues for which a jury is demanded shall be tried to a jury *unless the court finds that there is no right thereto* ….

Iowa R. Civ. P. 1.903(1) (emphasis added).

> The exclusive jurisdiction of equity embraces two classes of cases, first, those in which the plaintiffs' case is founded upon an equitable estate, title, or interest; and, second, those in which the remedy sought is one that only a court of equity can administer.

McAnulty v. Peisen, 226 N.W. 144, 145 (Iowa 1929); *see also Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 496, 499 & n.22 (Del. 1982). Westco's claims fall into both categories for which equity has exclusive jurisdiction, and this requires trial by equitable proceedings.

Westco generally alleged claims for breach of fiduciary duty and related conspiracy and generally sought damages, equitable

relief, and remedies available under Iowa Code Chapter 706A. In pre-trial proceedings, the district court erroneously: (1) dismissed Westco's count for unjust enrichment on the ground that Westco plead, as an alternative count, breach of contract; (2) determined Westco had adequate remedies at law and that there was no other equitable claim made by Westco; and (3) denied Westco's motions to try equitable issues by equitable proceedings. The district court concluded that Westco's remaining counts, for breach of fiduciary duty and violations of Chapter 706A, were "torts" or otherwise legal claims, and ordered that they, along with IPF's claims, be tried to a jury. This was error.

The error was prejudicial. Westco offered sufficient evidence to generate fact questions on its equitable claims. Nevertheless, the district court submitted the entire case to the jury and entered judgment against Hartzler on the jury's verdict in an amount that was substantially less than the damage he admittedly caused. The district court entered judgment on the jury's verdict in favor of the Wollesens. The only remedy on appeal for this error is to reverse the judgment and remand the case with directions for a

new trial by equitable proceedings on all issues. *See McElroy v. State*, 703 N.W.2d 385, 389 (Iowa 2005).

A. CLAIMS FOR BREACH OF THE FIDUCIARY DUTY OF LOYALTY ARISING OUT OF AN AGENT'S SELF-DEALING ARE EXCLUSIVELY EQUITABLE.

"It is the allegations of the cause of action, and not the prayer alone, that determines the forum." *McAnulty*, 226 N.W. at 149. "Even in equity a money judgment may be claimed. The claim for a money judgment does not determine that the cause of action pleaded is at law." *Id.*

1. Westco's Breach of Fiduciary Duty Claim is Equitable.

The claim alleged by Westco is that Hartzler, as Westco's agronomy sales manager, breached his fiduciary duties when he received bribes from the Wollesens in exchange for negotiating and entering into unfair agreements for the sale of Westco's products to IPF.

> An agent usually has greater authority to act for the principal, such as negotiating contracts, while an employee typically renders services at the direction of the employer. … This heightened responsibility of an agent justifies the imposition of a fiduciary relationship. Likewise, employees who assume the

> same type of responsibility can become bound by a fiduciary duty.

Condon Auto Sales, 604 N.W.2d at 599-600. There is no dispute Hartzler acted as a fiduciary of Westco.

There are two primary duties owed by fiduciaries: a duty of care and a duty of loyalty. *See Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013). Westco's claims are based on a breach of the fiduciary duty of loyalty, not the duty of care.

Courts recognize "that the concept of a fiduciary duty is an equitable one." *Kurth v. Van Horn*, 380 N.W.2d 693, 698 (Iowa 1986). Courts of equity have historically exercised exclusive jurisdiction over disputes involving breaches of an agent's fiduciary duty when the fairness of the transaction is at issue and when the agent receives a personal benefit. *Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 357-58 (Iowa 1972). "Equity holds them strictly accountable as trustees." *Id.* at 358.

Before the first Code, and during the time when there was a split bench, "[f]raud in a court of equity properly include[d] all acts, omissions and concealments which involve a breach either of legal or equitable duty, trust or confidence justly reposed, and are

injurious to another, or by which an undue or unconscientious advantage is taken of another." *Arnold v. Grimes*, 2 Greene 77, 80 (Iowa 1849). After the turn of the last century, the court held:

> "The gist of plaintiff's action is fraud committed upon her by her agent . . . . *On account of the fiduciary relations existing between defendant and plaintiff, and the alleged fraud, this action was heretofore solely cognizable in a court of equity*."

Faust v. Hosford, 93 N.W. 58, 59 (Iowa 1903) (emphasis added). The nature of the relationship mandates that when a plaintiff alleges a breach of fiduciary duty, "'courts of equity will assume jurisdiction and grant relief *because of the relations existing between the parties*, such as trust or confidence.'" *In re Sibert's Estate*, 263 N.W. 5, 6-7 (Iowa 1935) (quoting *Dickinson v. Stevenson*, 120 N.W. 324, 325 (Iowa 1909)) (emphasis added).

The district court characterized Westco's claims as legal based in part on Westco's request for damages. This is error. "Demand for a money judgment in suits in equity is frequent. It does not determine that the cause is improperly brought in equity, or that the plaintiff is not entitled to equitable relief." *McAnulty*, 226 N.W. at 149; *see also Weltzin*, 618 N.W.2d at 299; *Carstens v.*

Cent. Nat'l Bank & Trust Co. of Des Moines, 461 N.W.2d 331, 333 (Iowa 1990); *accord Harman,* 442 A.2d at 492.

In reaching their holding in *Harman*, the Delaware Supreme Court drew a distinction between a claim based on the duty of loyalty and a claim based on the duty of due care. Claims for breach of the duty of "utmost good faith and fair dealing" are governed by equitable principles, notwithstanding that the complaint seeks only money damages through an accounting. *Harman*, 442 A.2d at 492. Where fiduciaries are required to answer for wrongful acts by which they have enriched themselves to the injury of their principal:

> A court of conscience will not regard such acts as mere torts, but as serious breaches of trust, and will point the moral and make clear the principle that [agents], while not in strictness trustees, will, in such case, be treated as though they were in fact trustees of an express and subsisting trust. . . .

Bovay v. H. M. Byllesby & Co., 38 A.2d 808, 820 (Del. 1944).

This Court has recognized that an agent's breach of the duty of care may sound in tort and give rise to a negligence claim. *See, e.g., Humiston Grain Co. v. Rowley Interstate Trans. Co.*, 512 N.W.2d 573, 574-75 (Iowa 1994); *see also Annett Holdings, Inc. v.*

Kum & Go, L.C., 801 N.W.2d 499, 503 (Iowa 2011). However, this court has never held that a claim against a fiduciary for breach of the duty of loyalty, arising out of self-dealing, is a mere tort.

In *Condon Auto Sales*, the court recognized that some jurisdictions – but not others – have recognized an independent claim for breach of the duty of loyalty against a mere employee who is not a fiduciary. *Condon Auto Sales*, 604 N.W.2d at 598-601. In the jurisdictions recognizing this type of "loyalty" claim, some characterize it as a tort, others as a breach of contract. But a common law claim for breach of the duty of loyalty in tort or contract is not applicable where, as here, the claim is against a fiduciary.

The claims made by Westco, like those made in *Harman*, are based on a deliberate breach of the fiduciary duty of loyalty, which includes the duties of fairness and full disclosure and which prohibits self-dealing without the principal's informed consent. *See* RESTATEMENT (THIRD) OF AGENCY §§ 8.01, *et. seq*. Westco's claims go to the heart of the relationship of trust and confidence with its agent. The payments made to Hartzler by the Wollesens,

undisputedly made without Westco's knowledge, form the type of insidious acts that undermine the very foundation of the fiduciary relationship. It is this type of claim over which equity historically has exclusive jurisdiction.

Bribery of an agent and fiduciary is undoubtedly a violation of trust which falls under equity's exclusive jurisdiction. *Prodromos v. Everen Sec., Inc.*, 906 N.E.2d 599, 613-15 (Ill. App. Ct. 2009); *Cook Cnty. v. Barrett*, 344 N.E.2d 540, 549 (Ill. App. Ct. 1975). The truly equitable nature of the action is exclusive, original, inherent and plenary. *Cook Cnty.*, 344 N.E.2d at 549. This is the nature of Westco's breach of fiduciary duty claim against Hartzler.

2. Westco's Conspiracy Claims are Equitable.

Westco also alleged that the Wollesens are liable for conspiracy to breach Hartzler's fiduciary duties. Conspiracy is an avenue for imposing vicarious or joint liability on a party for the wrongful conduct of another. *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 172 (Iowa 2002). The conspiracy claims made against the Wollesens are not claims that are severable from

Hartzler's breach of his duty of loyalty. *See Weltzin*, 618 N.W.2d at 302-03. As co-conspirators, the Wollesens should answer in equity for their role in the breach of Hartzler's fiduciary duties.

3. Westco's Chapter 706A Claims are Equitable.[3]

Westco made statutory claims against all of the defendants. They are premised on essentially the same allegations as the claims for breach of fiduciary duty and conspiracy. They rest on the allegations of an ongoing scheme of commercial bribery, which is for the reasons discussed above an equitable claim. *See also Weltzin*, 618 N.W.2d at 296. Westco's statutory claims are therefore equitable in nature and should be tried by equitable proceedings.

4. Whether Remedies at Law are Adequate is Irrelevant.

[3] There are three reasons Westco's 706A claims should have been tried by equitable proceedings. First, the underlying wrongful conduct, *viz.* bribery of a fiduciary, is subject to equity's exclusive jurisdiction at common law. (Brief Point I.A.3.) Second, the relief Westco sought under 706A is traditionally equitable. (Brief Point I.B.5.) Third, once equity assumes jurisdiction of Westco's common law claims, it should exercise jurisdiction to decide the related 706A claims, even if those claims are characterized as legal. (Brief Point I.C.3.)

Because Westco's claims rest on equitable "rights, interests or estates," Westco is entitled to a trial of its claims in equity, regardless of whether the law affords an adequate remedy. *Harman*, 442 A.2d at 499 n.22; *Hull v. Watts*, 27 S.E. 829, 830 (Va. 1897). For these reasons, it was error for the district court to conclude that an adequate remedy at law deprived Westco of its right to a trial by equitable proceedings.

B. WESTCO SOUGHT RELIEF FOR WHICH IT HAS NO ADEQUATE REMEDY AT LAW.

Equity will also exercise exclusive jurisdiction in cases "in which the remedy sought is one that only a court of equity can administer." *McAnulty*, 226 N.W. at 145; *see also Wilson v. Shores-Mueller Co.*, 40 F. Supp. 729, 732 (N.D. Iowa 1941). Without equitable remedies, Westco could not receive any relief in this case.

1. Enforcement of the Defendants' Agreements is Inadequate.

Legal remedies in this case are adequate only "[w]here the basic rights of the parties derive from the nonperformance of a contract, where the remedy is monetary, and where the damages

are full and certain." *Van Sloun v. Agans Bros.*, 778 N.W.2d 174, 179 (Iowa 2010). Relief for Westco's claim does not rest on the nonperformance of the agreements made by Hartzler with the Wollesens. Westco necessarily seeks the invalidation of those agreements. This is not monetary relief.

2. Rescission is an Equitable Remedy.

"The reason for exclusive jurisdiction in equity for the cancellation or rescission of contracts is that courts of law cannot grant such relief." *Lambertson v. Nat'l Inv. & Fin. Co.*, 202 N.W. 119, 121 (Iowa 1925). Rescission of contracts with a third party is available as a remedy for breach of fiduciary duty. *Utica Mut. Ins. Co. v. Stockdale Agency*, 892 F. Supp. 1179, 1192 (N.D. Iowa 1995); *see also Television Events & Mktg., Inc. v. Amcon Distrib. Co.*, 526 F. Supp. 2d 1118, 1128 (D. Haw. 2007) ("When an agent breaches the duty of loyalty and acts on behalf of an adverse party, the principal may recover the benefits acquired by the agent through the agent's breach and may rescind the contract entered into with a third party who participated in the agent's

breach."); *Commonwealth S.S. Co. v. Am. Shipbuilding Co.*, 197 F. 780, 792-793 (N.D. Ohio 1912).

Contracts which induce violation of fiduciary duty are void. *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 650 (Iowa 1979). Contracts procured or induced by bribes are void and unenforceable. *See China Trust Bank (U.S.A.) v. Pinter*, No. 04 CV 5331, 2007 WL 922421, at *5 (E.D.N.Y. Mar. 26, 2007); *Sirkin v. Fourteenth St. Store*, 108 N.Y.S. 830, 833-37 (N.Y. App. Div. 1908). Void contracts cannot be ratified, and they may not be enforced. *See Midwest Mgmt. Corp. v. Stephens*, 291 N.W.2d 896, 906 (Iowa 1980).

"Whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case." *Pines Grazing Ass'n, Inc. v. Flying Joseph Ranch, LLC*, 265 P.3d 1136, 1140 (Idaho 2011) (quotation omitted). This is undoubtedly an issue for the equitable power of the court.

3. Restitution and Unjust Enrichment.

In the event a contract is rescinded or void, an obligation implied-in-law provides an appropriate remedy to recover the fair

market value of any property that was the subject of the unenforceable contract. *Irons v. Cmty. State Bank*, 461 N.W.2d 849, 855-56 (Iowa Ct. App. 1990); *Coppock v. Lustgraaf*, No. 09-0655, 2010 WL 2079676, at *5 n.1 (Iowa Ct. App. May 26, 2010).

> The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation. Although it is referred to as a quasi-contract theory, it is equitable in nature, not contractual.

State, Dep't of Human Servs. ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 154 (Iowa 2001) (internal citations omitted).

In dismissing Westco's count for unjust enrichment, the district court reasoned that: "Plaintiff has pled in the second amended petition express contract which vitiates the claim for unjust enrichment." (Order). But the Rules of Civil Procedure allow for pleading in the alternative. Iowa R. Civ. P. 1.402(2). The district court should not have dismissed the unjust enrichment count at the pleadings stage.

Westco made it absolutely clear in resisting the Wollesens' summary judgment motion that Westco had alleged the Wollesens wrongfully obtained agricultural inputs from Westco by bribing

Hartzler and receiving product at below market prices. Westco claimed that the Wollesens are required under the law to pay Westco the reasonable market value of the goods wrongfully acquired. Westco's claim was for breach of an implied-in-law contract. *See Hunter v. Union State Bank*, 505 N.W.2d 172, 177 (Iowa 1993).

Ultimately, Westco could only receive adequate relief under an equitable claim of unjust enrichment: a claim which "rests upon the equitable principle that one shall not be permitted to unjustly enrich himself at the expense of another or to receive property or benefits without making compensation therefore." *Glass v. Minn. Protective Life Ins. Co.*, 314 N.W.2d 393, 397 (Iowa 1982) (quotation omitted); *see also West Branch State Bank v. Gates*, 477 N.W.2d 848, 851-52 (Iowa 1991). These are purely equitable remedies. *See Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 29 (Iowa Ct. App. 2000). They are available to Westco as remedies for the claims made against the Wollesens. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, cmt *g* (2011). These remedies are based on

policies that can only be understood as equitable. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt *b*.

4. An Accounting is Equitable.

The fraudulent agreements were made over a period of approximately seven years and involved thousands of transactions and millions of dollars of seed, fertilizer, and farm chemicals. Westco's item sales report, which describes these transactions, is 822 pages and several inches thick. (APP. 1659) Westco's records and the fraudulent records created by Hartzler and the Wollesens do not match each other. The prices entered in Westco's records are also a product of Hartzler's attempt to deceive Westco rather than the result of honest negotiations engaged in by a trustworthy agent.

The transactions include not only the purchase of Westco's goods but also the sales made by the Wollesens that were facilitated by those goods.

> It is fundamental that a court of equity has jurisdiction to hear and determine an account, when the same consists of mutual items and when it is so complicated as that the machinery of a court of equity, because of

> the complicated nature of the account, is designed to give more adequate relief. This is not because no relief exists at law, but because the relief in equity is more adequate and complete.

Mann v. Wilson & Co., 253 N.W. 506, 507 (Iowa 1934). "Equity *always* has jurisdiction of an accounting proceeding growing out of *fiduciary relations*." *Dickinson v. Stevenson*, 120 N.W. 324, 325 (Iowa 1909) (emphasis added); *see also Harman*, 442 A.2d at 500.

The accounting required in this action is similar to the one in *Mann*. This Court recognized:

> From the claims set forth in plaintiff's petition it is plain that *it would be exceedingly difficult to have an intelligent trial of the issues before a jury*. The length of time involved, to wit, six years, the method of figuring the bonus or commission claimed by plaintiff, to wit, so much a pound on the various items sold, and the terrific number of records that would have to be submitted, are such that *the case should not be submitted to a jury*.

Mann, 253 N.W. at 509 (emphasis added); *see also Berry Seed Co. v. Hutchings*, 74 N.W.2d 233, 237 (Iowa 1956).

There is no dispute that this case is quite complex in its accounting. Its proper resolution requires an understanding of a significant number of transactions over a lengthy period of time. It also involves the examination of several entities' financial and

shipping records and the evaluation of testimony as to market prices, sales practices and manufacturer incentive programs for different types of products. The review of these transactions must be done within the context of a breach of fiduciary duty claim. These circumstances fall within the expertise and jurisdiction of equity.

5. Westco's 706A Claims Sought Equitable Relief.

Westco likewise sought the right to receive equitable relief under Iowa Code Section 706A.3 in the form of rescission, restitution, disgorgement, accounting, and constructive trust. These remedies are equitable and further indicate Westco's 706A claims were equitable, not legal. Though Westco sought money damages, it sought those damages under a theory of restitution, after rescinding or invalidating the Wollesens' agreements with Hartzler, making the damages equitable, not legal. *Weltzin*, 618 N.W.2d at 300. For these reasons, Westco's 706A claims should have been tried by equitable proceedings.

6. Westco's Prayer for Relief Includes all Appropriate Equitable Remedies.

The relief requested by Westco was general. Westco prayed for: "damages, interest and costs as allowed by law and for such other relief as may be just and equitable." (APP. 0001)

> Under Iowa's notice pleading rules, a prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence.

Lee v. State, 844 N.W.2d 668, 679 (Iowa 2014) (quotation omitted); *see also McAnulty*, 226 N.W. at 149.

Westco should therefore have been allowed to seek all appropriate equitable remedies even though the equitable remedies were not expressly and separately listed in the petition. *See Charles Schmitt & Co. v. Barrett*, 670 F.2d 802, 806 (8th Cir. 1982); *see also* 10 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2664 (3d ed.). For these reasons, the district court's denial of Westco's right to try equitable issues by equitable proceedings was error.

C. THE DISTRICT COURT'S DENIAL OF WESTCO'S MOTION TO TRY EQUITABLE ISSUES BY EQUITABLE PROCEEDINGS IS REVERSIBLE ERROR.

Error must be prejudicial to be reversible. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013). In this case, Westco was prejudiced by the erroneous rulings of the district court when: (1) Westco generated fact issues on claims for which the jury returned verdicts that were unfavorable to Westco; (2) equitable principles and standards were not applied to Westco's claims; and (3) the equitable claims were not tried first before any severable legal claims.

1. Westco Presented Sufficient Evidence to Generate Fact Issues on Claims for which the Jury Returned Unfavorable Verdicts to Westco.

When a party is wrongfully denied the right to a jury trial, the error is prejudicial if the district court rules against the party on the merits and that party presented sufficient evidence to raise a jury question. *Conrad v. Dorweiler*, 189 N.W.2d 537, 540 (Iowa 1971). In determining whether there was sufficient evidence to

raise a jury question, the appellate court views the evidence in a light most favorable to the party denied a jury trial. *Id.*

These rules should also apply to a party who was erroneously denied a right to a trial of equitable issues by equitable proceedings.

> The right to the application of the principles of equity to causes exclusively equitable, and the right to a trial by the chancellor and to trial de novo by the appellate bench, are rights as sacred as the right to have causes at common law determined according to the principles of the common law and by the common-law judge, or the judge and jury, whose decision may be revised only for errors of law.

McAnulty, 226 N.W. at 150.

As explained in the Statement of Facts, Westco undoubtedly offered evidence generating fact issues on all of its claims against the defendants. The district court entered judgment in favor of the Wollesens based on the jury's answers to some questions on the verdict form. Although the jury found against Hartzler on the issue of liability, the jury's award was far less than Westco's evidence and far less than the losses Hartzler admitted causing. Westco therefore can satisfy both prongs for showing prejudicial error.

2. Equitable Principles and Standards were not Applied.

In addition, trying this case in equity would also have altered the presumptions and elements of the claims, not merely the presentation of evidence. This court has explained that equity must resolve a dispute involving a breach of fiduciary duty because "'[e]quity . . . imposes a higher duty than law with regard to the disclosure of matters of which one party is ignorant.'" *In re Sibert's Estate*, 263 N.W. at 7 (quoting *Dickinson*, 120 N.W. at 325).

> A general rule governing the acts of a fiduciary is that he may not, directly or indirectly, appropriate the funds to himself without the concurrence of the cestuis with full knowledge of the facts.
>
> The policy of the law is to put fiduciaries beyond the reach of temptation, by making it unprofitable for them to yield to it. To that end, an act by a fiduciary in which personal interest and duty conflict, is voidable at the mere option of the beneficiary, regardless of good faith or results.

Boyd v. Boyd & Boyd, Inc., 386 N.W.2d 540, 543 (Iowa Ct. App. 1986) (quotation omitted and internal citation omitted); *see also Arnold v. Grimes,* 2 Greene at 80.

It is undisputed in this case that Westco had no knowledge of the payments made by the Wollesens to Hartzler. This is the critical fact on which a trial in equity would turn.

Significantly, the Wollesens tried this case relying on one predominant theme: Westco neglected to supervise Hartzler properly. This, they claim, allowed Hartzler to engage in the transactions with the Wollesens through Westco's own carelessness, lack of attention, and lack of controls.

Equity comes to the aid of a plaintiff in these circumstances where the law does not:

> Equity will lend its aid, when a person has been induced to act through the inequitable conduct of another, and will relieve him from the consequences of his error, and it is immaterial whether it arises from a mistake of law or of fact.

Klingensmith v. Klingensmith, 185 N.W. 75, 77 (Iowa 1921). Put more pointedly:

> We do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness.

Id. (quotation omitted). A court in equity would not lose sight of the critical fact that Westco had no actual knowledge of the

payments made by the Wollesens to Hartzler, and that mere negligence should have no effect on Westco's right to relief.

The elements of fraud are also different in equity than in law. "[T]he proof required for rescission based on misrepresentation under Iowa law is less demanding than the proof necessary for the tort of misrepresentation. When rescission rather than damages is sought, relief may be obtained without proof of scienter or pecuniary damage." *Hyler v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996) (internal citation omitted); *Utica*, 892 F. Supp. at 1193. Westco's cause of action sought to rescind agreements with the Wollesens and thus implicates these principles. *See Utica*, 892 F. Supp. at 1191.

Westco lost access to the decision-maker that Iowa law dictates resolve this dispute. *Pace v. Mason*, 221 N.W. 455, 459 (Iowa 1928). A court of equity is uniquely able to bring a diverse arsenal of remedies to bear where legal remedies are inadequate:

> Only the discerning eye of equity can search out, and only the supple hand of equity can retrieve the subject which is alleged to have been spirited away. Contracts must be set aside, decrees must be annulled, conveyances must be declared void, and thereafter an accounting of the corporate affairs had, and after the

> discharge of all liabilities of the [defendant], the residue, if any remains, must be apportioned among its rightful shareholders. Courts of law can accomplish none of these acts. Therefore, this case falls within the exclusive equity jurisdiction of the court.

Wilson, 40 F. Supp. at 732-33; *see also Scheldrup v. Gaffney*, 55 N.W.2d 272, 275 (Iowa 1952); *Mann*, 253 N.W. at 509; *McAnulty*, 226 N.W. at 150.

Equally important is the review afforded by an equitable action. Equitable review is *de novo*, which is a right as sacred as the right to a jury trial. *See McAnulty*, 226 N.W. at 150. In a case where the legal system's purpose is for the courts to do equity between the parties, the appellate court needs the freedom to examine all the evidence to ensure justice was done by the district court. This ability is curtailed if review is limited to errors of law, as is the case with an action tried at law. Denial of *de novo* review undoubtedly and unfairly prejudices Westco as the case proceeds on appeal.

Denial of an equitable trial where one is mandated should be deemed to offend due process. *See Weltzin*, 618 N.W.2d at 302. By ordering a trial to a jury, the district court deprived Westco of the

advantages it may have gained from the standards applicable to trial and appellate review provided in equity. This was prejudicial error.

3. The Equitable Claims Should Have Been Tried First.

Ordinarily, when a trial presents legal and equitable issues, the equitable issues should be tried first. *Johnston v. Robuck*, 73 N.W. 1062, 1063 (Iowa 1898); *see also State v. Simmons*, 290 N.W.2d 589, 594 (Iowa 1980). A court should only deviate from this general rule if a trial on the legal issues will dispose of "all matters in controversy." *Johnston*, 73 N.W. at 1063; *Tinker v. Farmers' State Bank of Charter Oak*, 160 N.W. 349, 352 (Iowa 1916). When equity can dispose of the entire matter, the equity suit should be tried first. *Twogood v. Allee*, 99 N.W. 288, 289 (Iowa 1904).

In this case, the general rule, rather than the exception, applies. For the reasons discussed above, the claims Westco makes against Hartzler are exclusively equitable. Significantly, Hartzler makes no counterclaims against Westco, whether legal or equitable. Hartzler sets up no defense that could be characterized

as legal. Equity properly has exclusive jurisdiction of all of Westco's claims against Hartzler. There is nothing that should deprive Westco of its right to try all of the issues raised by those claims, including those related to liability and appropriate equitable relief, entirely by equitable proceedings. Hartzler has no right to a jury trial.

Westco alleges that the Wollesens conspired with Hartzler to breach his fiduciary duties and engaged in commercial bribery with Hartzler over the same time period and in the same transactions at issue in the claims against Hartzler. These claims are inextricably interwoven with the claims Westco brought against Hartzler. And none of the Wollesens pled defenses against Westco that should be tried at law to a jury. The Wollesens have no right to a jury trial concerning these claims.

The only legal issues injected in this case by any party were raised by a single defendant – IPF. The claims made by IPF concern three "contracts" that were part of a single transaction in December 2010. The validity of this single transaction depends entirely on the validity of the many transactions that occurred

over the previous five years and that are the subject of Westco's equitable claims.

Resolving the equitable claims first is more likely to dispose of the entire matter and is more likely to render further proceedings unnecessary. Resolving the legal claims in the 2010 transaction leaves substantial questions about the earlier transactions unanswered and would require further proceedings. If Westco is successful in prosecuting its claims, the agreements between Hartzler and the Wollesens would be rescinded or void. There would be no contract on which IPF could bring an action for breach. The law action would be unnecessary. An equitable issue, which, if tried and determined in favor of one party, leaves the other party without any basis for recovery, should be tried first. *See Tinker,* 160 N.W. at 353.

In addition, once equity has jurisdiction, it has the power to decide all issues necessary for complete relief, including legal issues. *Grandon v. Ellingson*, 144 N.W.2d 898, 901 (Iowa 1966); *Gatch v. Garretson*, 69 N.W. 550, 552 (Iowa 1896). Once an action is filed that raises purely equitable issues, the court must exercise

its equitable jurisdiction to decide all related issues; this is true even if the court's assertion of equitable jurisdiction would preclude a jury trial on counterclaims arising at law. *See, e.g.*, *Weltzin*, 618 N.W.2d at 302-03; *McDowell v. Lloyd*, 22 Iowa 448, 448 (Iowa 1867); *Ryman v. Lynch*, 41 N.W. 320 (Iowa 1889). Postponing a jury trial on legal issues until the resolution of equitable issues does not offend the constitution. *See Olmstead v. Taylor*, 158 N.W. 587, 588 (Iowa 1916).

These reasons also require trial of Westco's 706A claims by equitable proceedings even if the court characterizes those claims as legal. "A right to a jury trial, if it arises only by virtue of statute, is not fundamental." *State ex rel. Bishop v. Travis*, 306 N.W.2d 733, 734 (Iowa 1981).

> [T]here is no right to a jury trial generally in cases brought in equity. Generally, if the cause of action is equitable in character, even in part, and equity jurisdiction once attaches, full and complete adjustment of the rights of all parties will be properly made in the suit.

Weltzin, 618 N.W.2d at 296 (quotation and internal citation omitted). The factual basis of Westco's common law equitable claims and its statutory 706A claims are the same and should not

be severed for separate trial. The rule directing trial courts to exercise equity jurisdiction over related legal claims was developed to address these circumstances.

For these reasons, Westco is entitled to a new trial on the equitable issues by equitable proceedings. It is also entitled to have equity assert jurisdiction over any related legal claims and to have the equitable trial precede the trial on any remaining legal issues.

II. THE JURY'S VERDICTS ARE INCONSISTENT.

Error Preservation.

The parties' consented to a sealed verdict. *See* Iowa R. Civ. P. 1.931(3); *Clinton Physical Therapy*, 714 N.W.2d at 607-12. After six hours of deliberations, the jury notified the judge that seven of the eight jurors had reached a verdict. Judge Moon discharged the jury and entered judgment before notifying the parties. Westco preserved error by a timely motion for new trial which relied in part on inconsistent verdicts. (APP. 0595 and Brief in Support.) *See Clinton Physical Therapy*, 714 N.W.2d at 610.

Scope and Standard of Review.

> The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. … [I]f the motion was 'based on a legal question, our review is on error.

Id at 609 (quotations and internal citations omitted). Whether a verdict is inconsistent and the consequences of a potentially inconsistent jury verdict are questions of law. *State v. Merrett*, 842 N.W.2d 266, 272-73 (Iowa 2014). On appeal, the review standard is *de novo*. *Id*.

The standard used in a civil case for determining inconsistency is arguably lower than in a criminal case. *State v. Halstead*, 791 N.W.2d 805, 812 (Iowa 2010). In a civil case, "[t]he test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court." *Hoffman v. Nat'l Med. Enters., Inc.*, 442 N.W.2d 123, 126-27 (Iowa 1989). "A new trial may be granted, and the jury verdict set aside, when the verdict is so logically and legally inconsistent it is irreconcilable in the context of the case." *Kalvik v. Seidl*, 595 N.W.2d 136, 139 (Iowa Ct. App. 1999).

Argument.

Question No. 3 on the verdict form asked: "Did Westco prove that Chad Hartzler engaged in ongoing unlawful conduct?" The jury answered "Yes" to the question. In answering question No. 3 affirmatively, the jury necessarily found that Hartzler engaged in commercial bribery, as defined in Instruction No. 23, in a series of business transactions occurring over a period of years, and that one or more of the Wollesens also engaged in those transactions.

Nevertheless, the jury answered "No" to the following questions about each of the Wollesens:

Question No. 12 Did Westco prove that Bill Wollesen engaged in ongoing unlawful conduct?

Yes ____ No _X_

Question No. 21 Did Westco prove that Kristi Wollesen engaged in ongoing unlawful conduct?

Yes ____ No _X_

Question No. 30 Did Westco prove that John Wollesen engaged in ongoing unlawful conduct?

Yes ____ No _X_

These answers are inconsistent and irreconcilable in light of the only jury instruction that set forth the elements of commercial bribery: the predicate act for ongoing wrongful conduct. That instruction required Hartzler and at least one or more of the Wollesens to engage in commercial bribery in a series of business transactions. The jury could not have found Hartzler liable for ongoing wrongful conduct unless they also found at least one of the Wollesens liable for the same wrongful conduct.

The following elements applied to the claims for ongoing wrongful conduct against Hartzler and the Wollesens. To prove Hartzler committed ongoing unlawful conduct, the court instructed the jury that Westco must prove Hartzler:

1. Committed commercial bribery;
2. For financial gain;
3. On a continuing basis;

   or

4. Knowingly received any proceeds of commercial bribery with one or more of the Wollesens being committed for financial gain on a continuing basis.

(APP. 0516) To prove that any of the Wollesens' committed ongoing unlawful conduct, the court instructed the jury that Westco must prove that Bill, Kristi or John:

1. Committed commercial bribery;

2. For financial gain;

3. On a continuing basis.

(APP. 0517)

The definition of commercial bribery is set forth in Jury Instruction No. 23, which requires that Hartzler and at least one or more of the Wollesens participate in the bribery scheme:

JURY INSTRUCTION NO. 23

> Westco claims Bill Wollesen, Kristi Wollesen and John Wollesen engaged in commercial bribery of Chad Hartzler. You should consider the liability of each separately. ***Westco must prove all of the following elements to establish commercial bribery***:
>
> 1. ***Between 2005 and 2011, Bill Wollesen, Kristi Wollesen or John Wollesen engaged in a series of business transactions with Chad Hartzler***.
>
> 2. At that time, Chad Hartzler was an employee of Westco acting on behalf of Westco.

3. At that time, Bill Wollesen, Kristi Wollesen or John Wollesen offered and delivered to Chad Hartzler payments of money.

4. The payments of money were offered and delivered by Bill Wollesen, Kristi Wollesen or John Wollesen in exchange for Chad Hartzler engaging in a series of business transactions which Bill Wollesen, Kristi Wollesen or John Wollesen had reason to know, as defined in Instruction No. 28, were in conflict with Chad Hartzler's employment relation with and duties owed to Westco.

Westco does not need to prove a direct link between any specific payment and any specific business transaction.

(APP. 0520) (emphasis added).

Jury Instruction No. 23 also required the jury to find facts that were necessary to support the two other elements of ongoing wrongful conduct. The transactions Hartzler engaged in with one or more of the Wollesens had to be a series of business transactions over a period of years—in other words, that the payments made to Hartzler were for financial gain on a continuing basis. Under answer to interrogatory No. 6, the jury awarded

Westco $485,315. This verdict equals precisely the total amount of the checks paid by one or more of the Wollesens to Hartzler over a five year period. This evidence was offered by Westco to support its claim of ongoing wrongful conduct against Hartzler. Westco offered the same evidence for its claims of ongoing wrongful conduct against each of the Wollesens.

Legally inconsistent verdicts are invalid. *Halstead*, 791 N.W.2d at 807. It is not legally or logically possible in the context of the instructions and evidence offered in this case for Hartzler to have engaged in ongoing wrongful conduct with one or more of the Wollesens but that not one of the Wollesens engaged in ongoing unlawful conduct with Hartzler. In essence, the jury found that Hartzler was repeatedly bribed by one or more of the Wollesens but that none of the Wollesens bribed him.

The inconsistency of the jury's answers in this case is analogous to *Halstead*. In *Halstead*, the State charged the defendant with four criminal offenses, including assault while participating in a felony: a compound crime. A jury convicted the defendant of assault while participating in a felony but acquitted

the defendant of the felony charge which served as the predicate act of the compound crime. *Id.*

The Supreme Court found the verdicts inconsistent and reversed. "A jury simply could not convict [the defendant] of the compound crime of assault while participating in a felony without finding him also guilty of the predicate felony offense of theft in the first degree." *Id.* at 816.

> [T]he truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury.

Id. at 811 (quotation omitted) (alternation in original). Regardless of the reason, none justify inconsistent verdicts under Iowa law.

When "two answers or findings by the jury would compel the rendition of different judgments, the answers are inconsistent." *Clinton Physical Therapy*, 714 N.W.2d at 613. Iowa courts reject the idea that the judge is free to disregard inconsistent verdicts. *Halterman v. Jackson*, No. 07-0094, 2008 WL 141485, *3-4 (Iowa Ct. App. Jan. 16, 2008). When a sealed special verdict is legally

inconsistent, the only remedy is a new trial. *Clinton Physical Therapy*, 714 N.W.2d at 614; *see also Hoffman*, 442 N.W.2d at 127.

III. WESTCO IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON IPF'S FRAUD AND BREACH OF CONTRACT CLAIMS.

Preservation of Error.

Westco preserved error by moving for directed verdict (APP. 0458; APP. 0871:12-25;) and judgment notwithstanding the verdict. (APP. 0595)

Scope and Standard of Review.

The scope of review for the denial of Westco's motion for judgment notwithstanding the verdict includes the evidence presented at trial, Westco's motions for directed verdict and for judgment notwithstanding the verdict, the resistance, the record on the hearing of the motions, and the court's order denying the motions.

The standard of review for the denial of a motion for judgment notwithstanding the verdict is whether there was sufficient evidence to justify submitting the claim to the jury. *Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 423 (Iowa

1999). To avoid judgment notwithstanding the verdict, the claimant must present substantial evidence to support its claims. *Id.*

A. IPF DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF FRAUD AND BREACH OF CONTRACT.

To prevail on its fraud claim, IPF had to prove each element "by a preponderance of clear, satisfactory, and convincing proof." *Dier v. Peters*, 815 N.W.2d 1, 7 (Iowa 2012) (quotation omitted); *Holliday v. Rain and Hail L.L.C.*, 690 N.W.2d 59, 64 (Iowa 2004). IPF did not to do so.

There is insufficient evidence to support the jury's finding of fraud by Westco. Instruction No. 37 sets forth only *two* specified alleged fraudulent misrepresentations: (a) "that agronomy products . . . *would be* provided to IPF at specified prices," and (b) "that Iowa Plains Farms' payments *would be* applied as prepayments." (APP. 0534) (emphasis added); (see also APP. 1084: 8-20.)

Both specifications of alleged fraud are promises of future performance, not representations of existing fact. Therefore, both

require evidence that Westco, not Hartzler, intended not to perform the promises at the time they were made. *Int'l Milling Co. v. Gisch*, 137 N.W.2d 625, 631 (Iowa 1965). A breach of contract, alone, is no basis for a claim of fraud.[4] *Lamasters v. Springer*, 99 N.W.2d 300, 303 (Iowa 1959); *see also Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 28 (Iowa 1997). There must be substantial evidence of Westco's "existing intention not to perform" the promises at the time the alleged contract was formed. *Magnusson, 560 N.W.2d at 28.*

There is no evidence that Westco had a present intent in December 2010 not to deliver product at the quoted prices because there is no evidence Westco knew of the alleged contracts. Hartzler's knowledge is irrelevant because he was engaged in a scheme to defraud Westco. *Mechanicsville Trust & Sav. Bank v. Hawkeye-Sec. Ins. Co.,* 158 N.W.2d 89, 91-92 (Iowa 1968). Hartzler admitted he had to agree to the deals for the 2011 inputs

[4] Despite this principle, the jury apparently considered Westco's alleged breach of contract to be the same as fraud because it awarded the same damage ($576,189) for both claims, which was the additional expense incurred by IPF to obtain replacement product. (APP. 1075:8-25; APP. 1076:1-14).

to conceal his fraudulent scheme against Westco. (APP. 0708:15-25; APP. 0709:1-4.) And there is no evidence Hartzler ever told any other Westco employee he had entered into the alleged contracts with IPF. The "contracts" were never entered into the Westco accounting system. A party cannot have a present intent not to perform a contract of which the party has no knowledge.

As to the second specification of fraud in Instruction No. 37—that IPF's 2010 payments would be applied as prepayments—IPF cannot prove Westco knew the December payments were made as prepay for 2011 inputs. Once again, there is no evidence Westco knew of the alleged contracts for 2011 inputs or of any representation by Hartzler to IPF that its payments would be held as prepay for 2011 inputs. Westco cannot form a present intent not to honor representations it knows absolutely nothing about. Of course, the lack of evidence of Westco's knowledge of Hartzler's promises means the Wollesens also failed to prove the element of scienter or an intent to deceive by Westco. *See Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.,* 783 N.W.2d 684, 688 (Iowa 2010).

B. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF JUSTIFIABLE OR REASONABLE RELIANCE.

1. Fraud Claim.

IPF's fraud claim also requires proof that it justifiably relied on Hartzler's alleged misrepresentations of future performance. This is an "essential element of a claim for fraud," and it requires that IPF not only relied on the misrepresentation, but that its reliance was justified. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 736 (Iowa 2009). In determining whether reliance is justified, in light of the facts here, the jury could properly consider a number of factors, including: (1) the sophistication and expertise of IPF; (2) the existence of a long-standing business or personal relationship; (3) access to relevant information; (4) concealment of the fraud; (5) the opportunity to detect the fraud; (6) whether IPF initiated the transaction; and (7) the generality or specificity of the fraud. *See id.* at 737.

IPF could not have justifiably relied upon representations by Hartzler because written account statements mailed to IPF contradicted Hartzler's promises. Westco regularly mailed

account statements to IPF throughout the relevant time that told IPF it was being charged more for products than Hartzler had represented, its late-year payments were applied by Hartzler to current amounts due, and that the products sold were Westco's, not Hartzler's. Westco's proof that these statements were properly mailed raises a presumption that IPF received them. *See, e.g., Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 870 (Iowa 1987). The evidence at trial established Westco's mailing procedures and office custom for the sending of statements. This evidence is sufficient to invoke the presumption of receipt. *See id.* at 871; *Jordan v. Second Injury Fund of Iowa*, No. 08-0346, 2008 WL 4570309, at *2 (Iowa Ct. App. Oct. 15, 2008); *Roush v. Kartridge Pak Co.*, 838 F. Supp. 1328, 1335 n.6 (S.D. Iowa 1993). Evidence of office custom alone is sufficient to raise the presumption of receipt, even in the absence of evidence concerning the particular mailing in question. *Public Fin. Co. v. Van Blaricome*, 324 N.W.2d 716, 721 (Iowa 1982); *Montgomery Ward*, 398 N.W.2d at 871.

While the presumption is rebuttable, IPF did not rebut the presumption. The presumption of receipt "is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption." *Iowa Lamb Corp. v. Kalene Indus., Inc.*, 871 F. Supp. 1149, 1153 (N.D. Iowa 1994) (quotation omitted). At trial, the Wollesens simply denied receiving many statements. Under Iowa law, however, a "bare denial of receipt" is insufficient to rebut the presumption. *McDonald v. Sanders*, No. 01-1221, 2002 WL 31114131, at *1 n.2 (Iowa Ct. App. Sept. 25, 2002); *Estate of Van Natta v. Foremost Ins. Co.*, No. 04-0055, 2005 WL 425497, at *3 (Iowa Ct. App. Feb. 24, 2005); *see also Eschavarria v. Nat'l Grange Mut. Ins. Co.,* 880 A.2d 882, 889 (Conn. 2005). The Wollesens admitted that they received four account statements for products. (APP. 0961:19-25; APP. 0962:1-15; APP. 1650). Even the statements the Wollesens admitted receiving showed their late-year payments were being applied to current balances due, not held as prepay. (APP. 0963-APP. 0964:1-8; APP. 1650). A party cannot blindly rely on oral assertions or representations and fail to review written documents

associated with a transaction. *Eley v. Travelers Ins. Co.*, No. 2:09-cv-958, 2011 WL 671681, *12 (M.D. Ala. Feb. 18, 2011); *Nieves v. Bell Indus., Inc.*, 517 N.W.2d 235, 238 (Mich. Ct. App. 1994); *Miller v. CVS Pharmacy, Inc.*, 779 F. Supp. 2d 683, 689 (E.D. Mich. 2011). This also undermines their mere denials that they received all the other statements. *See Montgomery Ward*, 398 N.W.2d at 872 (fact that party had "received the earlier computer-generated mailings" bolstered presumption of receipt).

The Wollesens' bare denials do not come close to the type of evidence deemed sufficient to rebut the presumption, such as an "extraordinary mail receipt recording system employed by the party who was to receive notice." *State v. Williams*, 445 N.W.2d 408, 411 (Iowa Ct. App. 1989) (*citing Liberty Mut. Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 858 (Iowa 1984)); *see also Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1256 (9th Cir. 2006) (Thomas, J., concurring) (noting that a "receiving party must do more than swear that it did not receive a claim" and must "describe in detail its procedures for receiving, sorting, and distributing mail" at the time in question) (quotation omitted).

Of course, if the Wollesens received only four statements from Westco in seven years, this should have raised questions. But the Wollesens never inquired about why they received only four statements, and not others, from Westco during that extended period of time.

This court has made clear that a party cannot "blindly rely on a representation." *Spreitzer*, 779 N.W.2d at 737. A fraud claimant must "utilize their abilities to observe the obvious." *Id.* A party may not recover for fraud if he "blindly relies on a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980) (quotation omitted); *see Spreitzer*, 779 N.W.2d at 737 (citing "*opportunity* to detect the fraud" and "*access* to the relevant information" as weighing against justifiable reliance (emphasis added)); *see also Caraluzzi v. Prudential Sec., Inc.*, 824 F. Supp. 1206, 1212-1214 (N.D. Ill. 1993) (holding no justifiable reliance where monthly statements disclosed true facts contradictory to alleged misrepresentations); *In re WorldCom, Inc.*, 364 B.R. 538,

549 (Bankr. S.D.N.Y. 2007) (account statement that contradicted alleged misrepresentation "clearly demonstrates that [claimant] could have determined the truth of the matter through reasonable diligence and that her reliance was negligent, not reasonable"). Evidence of Hartzler's misrepresentations to the Wollesens was handed to them on a monthly basis by Westco, regardless of whether they ignored it.

2. Contract Claim.

The lack of evidence of justifiable reliance by the Wollesens on Hartzler's promises also requires that the verdict for breach of contract against Westco be overturned. To bind Westco to the alleged December contracts, the Wollesens had to show Hartzler had actual or apparent authority to enter into the contracts. *Mayrath Co. v. Helgeson*, 139 N.W.2d 303, 306 (Iowa 1966). Of course, Hartzler did not and could not have had actual authority to enter into agreements intended to conceal his acceptance of bribes. *See, e.g., Commerce Bank of St. Joseph v. Kansas*, 833 P.2d 996, 1001 (Kan. 1992) ("We agree the question of scope of employment is ordinarily a jury question, but accepting a bribe

cannot be considered within the scope of a state employee's employment."); *Hidden Cove Marina, Inc. v. Newell*, No. 86 C 2742, 1990 WL 43525, at *6 (N.D. Ill. April 6, 1990) (holding bribery "is an illegal act and as such, cannot be within the scope of . . . legitimate employment").

As to apparent authority, as a matter of law, the Wollesens could not and did not prove they reasonably believed Hartzler had the authority to bind Westco to his promises about product prices and how he would handle the IPF payments. *Hibbs v. K-Mart Corp.*, 870 F.2d 435, 442 (8th Cir. 1989) (applying Iowa law); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.05 cmt. d. (party claiming agency by estoppel "must prove a *reasonable* and detrimental change of position" (emphasis added)); *Anderson v. Patten*, 137 N.W. 1050, 1052 (Iowa 1912) (for apparent authority, party "must have dealt with agent in reliance thereon in good faith and in the exercise of reasonable prudence" (quotation omitted)). This is true for the same reason they failed to show justifiable reliance for the fraud claim—because the account statements they either admittedly received or are presumed to

have received undeniably show Hartzler was charging them more for products than he had quoted and using their "prepay" to pay amounts due.

To find the Wollesens reasonably relied on Hartzler's representations in the face of repeated contradictory account statements would ignore the importance of the generally-accepted commercial use of account statements to communicate to customers regarding activity in their accounts. Such a result would render account statements useless in protecting a company from claims of misrepresentations like those here, as long as the customer simply denied receipt. But, adding the contradictory written statements to the unusual conduct of Hartzler and the Wollesens, which was contrary to the custom and practice of the industry, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 300 F. Supp. 2d 606, 619 (N.D. Ill. 2003), Hartzler's alteration of the checks to conceal their true purpose, which was known to Kristi; and Kristi's years of experience as a bank officer, the lack of evidence of reasonable reliance on Hartzler's representations in December 2010 is overwhelming.

Not only did the Wollesens' receipt of regular account statements foreclose any justifiable reliance on Hartzler's contrary representations, their silence actually established their agreement with how Hartzler handled their account. "An account stated may result from the debtor's failure to object to a statement, as assent is implied from a failure to object within a reasonable time." *Capital One Bank (USA), v. Denboer*, 791 N.W.2d 264, 273 (Iowa Ct. App. 2010) (quoting 1A C.J.S. *Account Stated* § 31, at 86 (2005))*; see also Navimex v. S/S/N. Ice*, 617 F. Supp. 103, 106 (S.D.N.Y. 1984).

Westco's account statements informed the Wollesens over and over, month after month, that they were being charged by Westco more for products than Hartzler had agreed to and that some or all of the payments (as in the case of the December 2010 payments) made by them late in the year were used by Hartzler to pay amounts due and payable, not held in escrow as prepayment. At a minimum, the evidence leaves no doubt that the Wollesens utterly failed to "observe the obvious." The district court erred in not giving Westco's account statements the force the law requires

when it denied Westco's motion for directed verdict. Westco is entitled to judgment notwithstanding the verdict on IPF's counterclaims for fraud and breach of contract.

CONCLUSION

For the foregoing reasons, Westco Agronomy Company, LLC and West Central Cooperative respectfully request that the Court reverse the judgment of the district court and remand for a new trial by equitable proceedings on Westco's claims against the defendants. Westco Agronomy Company, LLC and West Central Cooperative respectfully requests that the Court reverse the judgment of the district court in favor of Iowa Plains Farms and direct that the claims made by Iowa Plains Farms against Westco Agronomy Company, LLC and West Central Cooperative be dismissed at its costs.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 13,729 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE AND CERTIFICATE OF FILING

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