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 Court should refer this appeal to the Iowa Court of Appeals. The District Court properly concluded that Westco Agronomy Co. LLC's ("Westco") motion to amend its petition to seek restitution and rescission, and its corresponding motion to try its newly-requested relief in equity before the scheduled jury trial were untimely and prejudicial. Therefore, resolution of Westco's appeal can be accomplished by applying existing principles of Iowa law. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF PROCEEDINGS

On May 12, 2011, Westco filed its *Petition and Jury Demand*. The action was filed at law, and Westco demanded a jury. Westco sought damages at law for each count. (Petition, App. 1.) For its 706A claim, Westco sought treble damages and attorneys' fees. (*Id.*) Westco did not seek rescission or restitution. (*Id.*) Westco did not plead accounting as a count or seek accounting as a remedy. (*Id.*)

On May 25, 2011, Westco amended its petition to add a claim for breach of contract. (Amended Petition, App. 14.)

On November 14, 2011, the Wollesens answered the petition, and Iowa Plains Farms ("IPF") asserted third-party claims against West Central

Cooperative ("WCC" and together with Westco, "West Central") for: (1) breach of contract, (2) fraud, (3) and other claims. (Answer, App. 28.)

On April 2, 2012, Westco filed its *Second Amended Petition and Jury Demand*. Westco's ten claims remained the same. (Second Amended Petition, App. 62.)

On May 28, 2013, the Wollesens filed their *Amended Answer to Westco's Second Amended Petition and its Amended Counterclaims*. IPF asserted counts against WCC for: (1) breach of contract, (2) fraud, (3) ongoing criminal conduct (I.C.A § 706A.1, I.C.A. §706A.2.5, and 706A.2(1)(a)), and (4) other claims. (Amended Answer, App. 115.)

On June 11, 2013, the District Court scheduled trial for July 8, 2014. (6/11/2013 Order, App. 166.)

By summary judgment, the District Court dismissed Westco's equitable claims on June 17, 2013. (6/17/2013 Order, App. 168.) For Westco's unjust enrichment claim, the District Court concluded that Westco failed to plead the necessary requirements, and concluded that Westco "has pled in the second amended petition express contract which vitiates the claim for unjust enrichment." (*Id.*) Westco's remaining claims were: (1) breach of fiduciary duty, (2) ongoing criminal conduct (I.C.A. §706A.1 and A.2(1)), and (3) breach of contract. (*Id.*)

On December 31, 2013, the District Court granted WCC's motion for summary judgment on IPF's claim for I.C.A. §706A.2.5 and certain other claims. The District Court ruled that I.C.A. §706A.2.5's limited burden-shifting provision is unconstitutional. (12/31/2013 Order, App. 175.) At trial, IPF's remaining counterclaims were: (1) breach of contract; (2) fraudulent misrepresentation; and (3) ongoing unlawful conduct (I.C.A. §706A.1 and 706A.2(1)(a)). (*Id.*)

On May 10, 2014, the Scheduling Order's deadline to file pleadings or motions lapsed. (5/11/2012 Order, App. 107.)

Less than three weeks before trial, on June 17, 2014, Westco moved to amend its petition to: (1) seek restitution and rescission, and (2) "demand a trial by jury [only] of all issues properly tried to a jury." (Motion, App. 253); (Proposed Third Amended Petition, App. 258.) Westco simultaneously moved pursuant to Iowa Code §611.10 to "have the equitable issues of rescission and restitution tried in equity." (Motion, App. 276.) Westco provided no explanation for its untimely requests. (*Id.*) The Wollesens opposed both motions. (Responses, App. 280.)

On June 24, 2014, the Wollesens submitted their proposed jury instructions. IPF's proposed instruction for its 706A claim contained the language of the statute. (Proposed Instructions, App. 370.)

On July 1, 2014, the District Court denied Westco's motions to amend its petition and sever, finding that Westco's motion to amend was untimely and would unfairly prejudice the Wollesens. (7/1/2014 Order, App. 445.) The District Court determined that Westco was "attempting to resurrect" its previously dismissed equitable causes of action. (*Id*.) The District Court determined that Westco's breach of contract, 706A, and breach of fiduciary duty claims were pled as legal actions. (*Id*.) The District Court also determined that each of IPF's counterclaims was pled at law. (*Id*.)

A jury trial commenced on July 8, 2014. West Central presented its evidence concerning the prices reflected on its records through monthly statements generated from its accounting system. While disputing that the statements were issued or received, the Wollesens did not dispute the quantities and descriptions of products in the accounting system. West Central presented evidence concerning its alleged damages through two expert witnesses.

On the afternoon of August 4, 2014, following the completion of evidence, the District Court presented its jury instructions. The instructions included West Central's proposed instruction for IPF's 706A claim, which provided that IPF was required to prove: "Chad Hartzler committed [specified unlawful activity in violation of Iowa Code 706A] as defined in

Instructions No ___..." (*Id*., App. 1288) That night, the Wollesens submitted written objections to "each omission of any proposed jury instructions submitted by the Wollesen Parties." (Objections.)

On the morning of August 5, 2014, the District Court provided its final jury instructions. For IPF's 706A.1 claim, the District Court revised the bracketed language in West Central's proposed instruction to say "commercial bribery." (*Id*., App. 543.) Thus, the Jury was instructed that IPF was required to establish the Wollesens bribed Hartzler to prevail on its claim. Following closing arguments, the Wollesens renewed their objections to "any instructions that [the Wollesens] provided that were not used." (Tr. 3317:21-3318:6, App. 1085-6.)

On August 7, 2014, the Jury returned the *Verdict Form and Special Interrogatories*. (Verdict, App. 573.) The Jury concluded that Hartzler "breached his duties owed to Westco" and engaged in ongoing unlawful conduct against Westco. (*Id.*) The Jury did not conclude that Hartzler engaged in commercial bribery or received the proceeds of commercial bribery. (*Id*., App. 574.) The Jury ordered Hartzler to pay $485,315 in damages to Westco. (Verdict, App. 575.) The Jury concluded that each of the Wollesens did not engage in ongoing unlawful conduct or conspire with Hartzler to breach any duties he owed to Westco. (*Id*.)

The Jury concluded that WCC breached its contracts with IPF and engaged in fraud, and it awarded $576,189 in damages in favor of IPF against WCC. (Verdict, App. 590.) The Jury concluded that WCC did not engage in ongoing unlawful conduct against IPF. (*Id*.)

On August 7, 2014, the District Court entered an order of judgment. As subsequently amended on August 28, 2014, the order dismissed Westco's claims against the Wollesens and entered judgment in favor of: (1) Westco against Hartzler for $485,315 and (2) IPF against WCC for $576,189. (8/7/2014 Order, App. 592.)

On September 22, 2014, IPF moved for a new trial on its 706A claim, arguing that the Jury Instruction was legally incorrect and required it to prove that it engaged in unlawful conduct with Hartzler, and that it was entitled to additur. (Motion, App. 598.) On March 3, 2015, the District Court entered an order denying IPF's post-trial motions. (Order, App. 614.)

On March 26, 2015, IPF filed its notice of cross-appeal of the District Court's December 13, 2013, August 7, 2014, and March 3, 2015 orders. (Notice, App. 620.)

STATEMENT OF FACTS

I. Introduction

At its heart, this case is quite simple. The Wollesens purchased agronomy products for several years from and through Hartzler, the West Central agronomy representative that had been specifically assigned to their account. Hartzler directed the Wollesens to pay him directly for some of the purchases, representing that they were special deals that he had authority to make.

The Jury was required to decide two seminal questions: (1) Did Bill Wollesen give a cash bribe to Chad Hartzler in 2005 to lower the price of an outstanding bill, and (2) did the Wollesens know or have reason to know that the direct payments Hartzler solicited from them were for improper purposes or, as they testified, for products Hartzler represented as possessing to sell for his own benefit and commissions he represented that he was entitled to receive directly?

Following five weeks of trial, during which extensive competing evidence was presented, the Jury answered each of these questions in the negative. Having done so, the Jury's remaining decisions concerning its enforcement of the contracts at issue and the fraudulent application of IPF's funds flowed as a natural consequence.

II. Parties

WCC is one of the largest grain companies in the United States; for fiscal-year 2014, it had revenues in excess of $645 million. (Ex. W594, App. 2811.) WCC historically did not emphasize its agronomy department. (Hartzler 3/28/13 Dep. at 38:1-16, App. 642.) In July 2002, WCC hired Hartzler as its Seed Department Manager, because it "wanted to compete wholeheartedly with the other retailers in [its] area." (Hartzler 3/28/2013 Dep. at 35:6-13, App. 641; Ex. W2.) Those retailers include cooperatives and other companies. (Tr. at 1991:9-18, App. 998.) The distinction between cooperative and other retailers concerns ownership, not how a company operates. (Tr. at 1991:19–23, App. 998.)

WCC advertised that "[c]reating coordinated marketing programs and developing specialized product programs to area farmers are Chad's focus." (Ex. W385, App. 2757.) Hartzler referred to himself as "the dealmaker" when calling on customers, stating that if the customer purchased more than $1 million, then the deals "really started." (Tr. at 2625:25-2626:6; 2626:17-23, App. 1056-7.) Hartzler's compensation was based heavily on bonuses that were tied to sales growth. (Ex. W572, App. 2792.)

Westco is a Delaware limited liability company, which was formed in January 2005, as a joint venture between WCC and Agrilliance LLC.

(Ex. P433, App. 2688.) WCC purchased Agilliance's interest in 2008. (Tr. at 33-34, App. 799-800.)

Bill, Kris, and John Wollesen are farmers who reside in Lake View, Iowa; they are the general partners of IPF. (App. Br. at 14-15.) Bill and Kris Wollesen also brokered and sold agronomy products through IPF and Byrite Supply. (Tr. at 2200:9-14, App. 1029; 2236:4-13, App. 1031.)

On September 25, 2001, IPF established an account at WCC. (Ex. W366, App. 2751.) IPF began making agronomy purchases from WCC on a prepay basis. (*Id*.) In the spring of 2002, WCC's Credit Manager asked Bill Wollesen to complete a credit application. (*Id*.) Bill Wollesen declined any credit privileges, and he notified WCC's Credit and Marketing Managers that IPF would prepay for its purchases. (*Id*.)

III. Hartzler Is Given Broad Authority.

Hartzler was the second-highest ranking employee in West Central's agronomy division. (Ex. P433, App. 2688.) West Central authorized Hartzler to: (1) set retail prices for seed & chemicals; (2) approve and account for "free seed" given to customers for marketing purposes; (3) make sales; (4) enter into prepayment contracts with customers; (5) enter prepayment contracts into West Central's systems; (6) approve price exceptions for seed and chemicals; (7) make sales entries into West

Central's accounting systems; (8) collect payments from customers; (9) personally hold checks from customers for prolonged periods; (10) apply payments from customers to accounts; (11) negotiate rebate programs with suppliers; (12) meet with customers annually to review their accounts through spreadsheet accountings; and (13) determine the amount of money that West Central accrued each year for rebates that had not been paid. (Hartzler 6/30/14 Dep. at 6:21-7:4; 8:16-25; 30:21-32:1; 33:2-5; 66:15-24; 116:22-117:8; 156:17-157:5; 188:25-189:9; 248:18-250:3; 328:18-330:8; 331:2-5; Tr. at 2033:11-20, App. 655, 657, 673-6, 694, 712-3, 725-6, 739-40, 749-51, 765-768.)

Hartzler repeatedly used this broad delegation of responsibility to steal from WCC.[1] Hartzler sold WCC products as his own, or represented that he was entitled to direct payment of commissions on the sale of WCC products. He then used his authority to make entries in WCC's accounting system to conceal this theft.

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1. The first known instance of theft took place in 2003. In February 2003, Hartzler was contacted by Dale Carlson, an Iowa farmer. (Hartzler 6/30/14 Dep. 216:21-24, App. 745.) Mr. Carlson informed Hartzler that Hartzler's brother owed money to him. (*Id*.) Hartzler stole seedcorn from WCC and provided it to Mr. Carlson in exchange for forgiveness of the debt. (*Id*. at 216:3-8.) Thereafter, Hartzler repeatedly stole seedcorn from WCC and sold it to Mr. Carlson in exchange for personal payment. (*Id*. at 218:9-19, App. 747.) WCC has never accused Mr. Carlson of improper conduct. (Tr. at 185:2-7, App. 833.)

IV. West Central Introduced Hartzler to the Wollesens as "Doing Things Differently."

For crop year 2005, Jay Sturtz was the West Central agronomist assigned to IPF's account. (Hartzler 6/30/14 Dep. at 15:11-19, App. 6; *id*. at 61:22-62:2, App. 692; Tr. at 1878:13-23, App. 973.) Bill Wollesen first met Hartzler in the fall of 2005, when Mr. Sturtz informed Bill Wollesen that Hartzler would be taking over the account. (Tr. at 1925-1927, App. 983-5.) Mr. Sturtz told Bill Wollesen that Hartzler had been hired to handle a few large accounts, and he was empowered to do things differently. (*Id*. at 1926:2-15, App. 984; 1931:2-8, App. 987.)

During their first meeting, Hartzler told Bill Wollesen that he was empowered to make deals and do things differently. (*Id*. at 1927:18-1928:5, App. 985-6.) Hartzler also said that from time to time, he would have product to sell for his own benefit. (*Id*.) Bill Wollesen purchased $5,000 in product from Hartzler, paying with a check payable to "Chad Hartzler." (*Id.* at 1928:6-17, App. 986; Ex. P1a, App. 1396.) Thereafter, Hartzler told the Wollesens that for certain sales, he was entitled to receive a commission and to collect it directly from IPF. (Tr. at 1931:11-14, App. 987.)

From December 2005-2010, IPF made sixty-two payments for products via check from and through Chad Hartzler. (Ex. P4; Ex. P5; Ex. P6a; Ex. P7; Ex. P8a; Ex. P9, App. 1438-73.) When selling for himself,

Hartzler would contact Bill Wollesen and say that he had "a special deal." (Hartzler 6/30/2014 Dep. at p. 255:12-17, App. 752.) Hartzler refused to describe the payments from the Wollesens as "bribes". (Hartzler 3/28/13 Dep. at 292:24-293:4.) All amounts that IPF paid to Hartzler were for specific products. (Ex. W496, App. 2772; Tr. at 1931:9-14, App. 987.)

At the end of each year, Hartzler met with the Wollesens and presented an Excel spreadsheet or similar document, which identified their purchases during the year and compared those purchases to IPF's payments. (Ex. P5; Ex. P6a; Ex. P7; Ex. P8a; Ex. P9, App. 1438-73.) The Wollesens would then provide prepayment for the following year. (Tr. at 1933:4-1934:4, App. 988-9.) The accountings Hartzler provided to the Wollesens often were sent via fax from West Central, with a "West Central Cooperative" fax header and cover-page. (Ex. W76a, App. 2695; Hartzler 6/30/14 Dep. at 265:18-266:11, App. 754-5.) They were intended to and did look "official." (*Id*. at 265:18-266:11.) The Wollesens previously had met annually to review their purchases with other salespeople. (Tr. 2005:1-2006:8, App. 1001-2.)

V. Salespeople Often Represent Multiple Parties.

Hartzler's explanation for the direct payments seemed reasonable to the Wollesens. (Tr. at 1879:14-19, App. 974; 1931:21-25, App. 987;

2000:9-2001:3, App. 999-1000; 2310:22-2311:17, App. 1035-6; 2347:10-14; 2368:2-13.) Representatives of agronomy retailers often represent multiple parties. Three of WCC's board members sell seedcorn in competition with WCC.[2] (Hartzler 6/30/14 Dep. at 168:9-13, App. 728.) The Chairperson of WCC's board even uses her Pioneer seed email account to conduct West Central business. (Ex. W72, App. 2694.) For several years, Jay Sturtz sold products and collected payments for WCC and also "Farm Depot," leading the Wollesens to inadvertently write at least one check to the wrong party. (Tr. at 1416:13-25, 1420:15-19, App. 955-6; Ex. W422, App. 2758.) When Hartzler's West Central employment began, he also served as the district manager for Croplan Genetics, a seed company. (6/30/14 Dep. at 162:1-14, App. 727.)

VI. Direct Payments are Common in the Agronomy Industry.

Before meeting Hartzler, the Wollesens purchased agronomy products from at least six individuals, knowing their employers also sold the same products, without anyone claiming they had "bribed" the employees. (Tr. at

2. The Wollesens were not provided or aware of the contents of WCC's confidential employee handbook, but that handbook allows employees to hold outside positions and compete with WCC after they have disclosed their conflicting position. (Tr. at 2075:24 – 2076:13, App. 1018-9; 2300:2–7, App. 1034;) (Ex. P37 at p. 23, App. 2505.)

1880:15-20, App. 975; 1885:13-1886:2, App. 976-7; 2000:9-2001:3, App. 999-100; Ex. W491, App. 2771.) They were not alone.

For more than fifteen years, the Wollesens and hundreds of others, including cooperatives and other retailers, purchased agronomy products from Tom Brincks, knowing he sold the same products on behalf of his employer, Van Diest Supply Co., a competitor of West Central. (Tr. at 2513:25-2514:15, 2516:6-18, App. 1050-2; 2524:4-11, 2524:17-2525:2, App. 1053-4; W427, App. 2769.) It was common knowledge within the community that Brincks sold the same products for himself and his employer. (Tr. at 1967:24-1968:23; Tr. 1971:19-22, App. 993-97.)

One of Mr. Brincks' customers was New Cooperative, a competitor of WCC. (Tr. at 1942:25-1943:2; *id*. at 1967:24-1968:1, App. 991-4; Ex. W427, App. 2769.) According to New Cooperative's CEO, Dan Dix, he purchased more than $470k in chemicals from Mr. Brincks, because Mr. Brincks offered a lower price from himself than his employer. (Tr. at 1968:24-1970:4, App. 994-6; Ex. W52, App. 2693.) Mr. Dix did not believe there was anything wrong with his purchase. (Tr. at 1968:19-23, App. 994.) At least three other Van Diest sales representatives also sold products for themselves in competition with Van Diest. (Tr. at 2545:13-23, App. 1055; Ex. Dx 13, App. 1395.)

The Wollesens' payments to Hartzler were virtually identical to their payments to Mr. Brincks. In both situations, the payments were: (1) to the employee of an agronomy retailer; (2) where the employer and employee sold the same products; (3) the payments were for specific seed or chemicals; (4) the employer's truck delivered the products purchased from the employee; (5) they performed accounting at the end of the year, using Excel spreadsheets; and (6) the purchases continued for years, without incident. (Ex. P5; Ex. P6a; Ex. P7; Ex. P8a; Ex. P9; Ex. P78, App. 1438-73.)

According to Hartzler, "it's probably common" to make direct payments to sales representatives in the agronomy industry. (Hartzler 6/30/14 Dep. at 170:16-21, App. 729.)[3] According to Mr. Dix, direct payments "happen" and are "not off the radar." (Tr. at 1971:8-18, App. 997.) Neither of West Central's purported industry experts ever met Hartzler or conducted any business with him, Mr. Brinks or anyone else similarly situated. (Tr. at 259:20–24, App. 848; 273:18–19, App. 850; 1330:9–23, App. 945; 1361:7–9, App. 950.) They simply purchased products from their

3. Mr. Carlson and other farmers purchased products directly from Hartzler without any allegation of "bribery." (Ex. W590B, App. 2810); (Hartzler 6/30/14 Dep. 22:1-15, App. 669); (W72, App. 2694.)

local cooperative, without taking any steps to find the lowest price. (Tr. at 265:7–22, App. 849; 1342:12 – 1343:17, App. 946-7.)

VII. Hartzler's "Ponzi-Like" Scheme.

Unbeknownst to the Wollesens, Hartzler applied IPF's payments differently than he told the Wollesens. (Hartzler 6/30/2014 Dep. at 189:5-9, App. 736.) Hartzler concealed his theft from IPF through what he described as a "Ponzi-like" scheme. (*Id*. at 192:12-20, App. 741.) When Hartzler sold products to IPF for his personal benefit, he also entered those same sales in IPF's WCC account. (Hartzler 6/30/14 Dep. at 188:16-189:9, App. 739-40; 264:13-20, App. 753.) Hartzler also entered different prices into the WCC system than he had quoted to the Wollesens.[4] IPF was billed twice, at different rates. (Hartzler 6/30/14 Dep. at 264:23-265:1, App. 753-54.) Because IPF only paid once, at the price Hartzler quoted, an ever-growing deficit was created. (*Id*. at 189:15-22, App. 740.) Each successive year, Hartzler needed to make larger sales to IPF to fill his cumulative deficit. (*Id*. at 194:14-196:6, App. 742-4.)

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4. For example, in March 2010, Hartzler forged "Bill Wolleson" in the signature line on a WCC prepayment contract, which provided for the purchase of fertilizer from WCC at $468/ton and $440/ton. (Ex. W172, App. 2725.) In the year-end accounting, Hartzler then falsely represented to the Wollesens that IPF paid $400/ton for that fertilizer. (Ex. W222, App. 2748.)

The prices Hartzler quoted were not indicative of bribery. Hartzler acknowledged that Bill Wollesen was "probably the best" at finding low prices and could get wholesale prices elsewhere. (Hartzler 6/30/2014 Dep. at 139:18-140:1; 141:4-6, App. 722-4.) Hartzler had to match those prices to entice the Wollesens to keep purchasing products. (*Id*.) The prices that the Wollesens paid to WCC and Hartzler were consistent with the prices they paid for the same products elsewhere during the same period. (Ex. W559, App. 2787.) The Wollesens did not know WCC's costs for its seed or chemical products. (Tr. at 1908:24 – 1909:13, App. 981-2.)

VIII. Hartzler Was Allowed to Misuse Consignment to Conceal his Theft from the Wollesens.

When a product is delivered from West Central and placed in consignment, the item is not billed. (Hartzler 6/30/14 Dep. at 48:1-17, App. 686.) Hartzler concealed his scheme from the Wollesens by placing items in consignment for prolonged periods. (Hartzler 6/30/14 Dep. at 278:11-14; 279:1-6, App. 756-7.) Hartzler's use of consignment prevented statements being generated, until Hartzler solicited prepayment monies for the following year. (*Id*. at 279:1-23, App. 757.)

WCC's policies required consignment balances to be billed within thirty days. (Ex. W129, App. 2707.) In 2009, WCC's internal auditor, Dawn Thielen, was "policing" consignment accounts, yet she allowed

Hartzler to keep large balances in consignment for IPF for months. (Ex. W122; Ex. W124; Ex. W127; Ex. W128; Ex. W139; Ex. W143; Ex. W527, App. 27012-2722, 2786.) Ms. Thielen made light of Hartzler's abuses, describing her emails to him as her "weekly reminder :)" [sic] to bill IPF's delinquent consignment balance. (Ex. W148, App. 2723.)

Despite Hartzler's efforts, statements occasionally were generated for IPF. West Central's employee in charge of mailing monthly statements testified that when statements are printed, they sit in her open cubicle for hours, at times unattended. (Tr. at 674:8–11; 675:7–23, App. 879-80.) Hartzler testified that he "very well could have" pulled IPF statements out of the process. (Hartzler 3/29/13 Dep. at 463:3-7, App. 652.) Hartzler prevented statements from being mailed to IPF by directing accounting employees to not send them. (Hartzler 6/30/14 Dep. at 36:11-20; 264:7-9, App. 677, 753.) Hartzler also directed those individuals to give him IPF statements that were supposed to be mailed; the extent of this practice is unknown. (Ex. W524, App. 2783.)

The Wollesens did not expect or review monthly statements. Hartzler told the Wollesens that as long as they had a prepay balance, they would not receive statements. (Tr. 2006: 10-18, App. 1002.) The Wollesens intended to prepay for all of their purchases, and they met with their assigned sales

manager each year to review their account. (Ex. W366, App. 2751). The Wollesens spent their winters in Florida, and their mail was not forwarded. (*Id.* at 1892:23-1893:4, App. 979-80; 2350:14-2351:7.) West Central and Hartzler knew this. (Ex. W119) ("He is gone a lot. He has a home in Florida.").

In those few instances where the Wollesens received and reviewed monthly statements, Bill Wollesen contacted Hartzler, and Hartzler provided what he describes as "persuasive explanations that weren't true." (Hartzler 6/30/2014 Dep. 287:1-10, App. 758; Tr. at 2291:24-2292:11, App. 1032-3; 2370:25-2371:7, App. 1039-40.) The Wollesens did not receive West Central statements for November 2010– January 2011. (K. Wollesen Dep. at 88:13-19, App. 636; Ex. P22b, App. 1623; Ex. P 23, App. 1637.)

There would have been no reason for Hartzler to take any steps to lie or conceal his actions from the Wollesens if they were complicit. According to Hartzler, "the way I can always sum it up is, he [Bill Wollesen] didn't know what I was doing…." (Hartzler 3/28/13 Dep. at p. 370:4-5, App. 650) (Hartzler 6/30/14 Dep. at 287:15-19, App. 758.)

The Wollesens' actions were inconsistent with knowing participation. John Wollesen personally delivered a check payable to Hartzler to West Central. (Tr. at 2008:19-2009:10, App. 1003-4.) In 2009, the Wollesens

demanded that WCC repurchase $505,000 of product from IPF and issue a check to IPF in that amount. (*Id.* at 2020:17-2021:1, App. 1005-6; Ex. P8, App. 1451.) The Wollesens reported their payments to Hartzler in their taxes and other governmental filings. (Tr. at 2312:23-2313:14, App. 2312-3.) The Wollesens' damages expert, Marc Vianello, certified in financial forensics, testified that the events did not suggest bribery, but rather a situation where Hartzler created an account deficit, and then needed to continue soliciting ever-growing payments to hide that deficit. (Tr. at 2877:10-24; 2881:2–2884:17, App. 1070-4; Ex. W571, App. 2794.)

IX. West Central Stole From the Wollesens.

On or about February 6, 2007, Hartzler solicited a $46,500 check from IPF, which was made payable to "West Central Cooperative" and intended by the Wollesens to be applied to IPF's WCC account. (Hartzler 6/30/14 Dep. at 248:13-22, App. 749.) Unbeknownst to the Wollesens, Hartzler instead applied the check to Danny Newell's West Central account. (*Id.* at 248:23-250:3, App. 749-51.) Hartzler owed personal gambling debt to Mr. Newell, whom Hartzler described as his "bookie." (Id. at 243:22-244:1, App. 747-8.) When Bill and Kris Wollesen met with Hartzler later that year, Hartzler falsely represented that he had applied the payment to IPF's WCC account. (Ex. P6a, App. 1441.)

X. West Central Learned of Hartzler's Fraud and Promoted Him.

Unbeknownst to the Wollesens, in December 2007, West Central's audit committee reported to West Central's outside auditor, Mark Gardiner CPA, that it had received complaints that Hartzler was delivering products and services from West Central, for which it did not receive payment. (Tr. at 2711:9-2712:20, App. 1059-60; Ex. W72, App. 2694.) Mr. Gardiner informed West Central that he suspected Hartzler was engaging in fraud. (Tr. at 2733:1-19, App. 1068.)

Mr. Gardiner began a fraud examination. (*Id.* at 2725:6-13, App. 1061.)

By January 2009, Mr. Gardiner confirmed that Hartzler had engaged in several acts of fraud. (Tr. at 2725:14-2729:9, App. 1061-5; Ex. W115, App. 2700.) Paul Mears, a customer Hartzler used as a strawman in 2004 to indirectly sell thousands of bags of seedcorn to a customer that Hartzler was precluded from selling to himself, was given credit for the return of products that he did not purchase from West Central. (*Id*; Tr. at 2728:20-2729:9; 2729:16-2730:17, App. 1065-6.) Another Hartzler customer, Hunter Farms, was not charged for $24,000 of fertilizer application. (*Id.* at 2727:13-27:28:1, App. 1063-4.) There also were several instances where Hartzler had entered into prepayment contracts on behalf of WCC with

Hunter Farms, but the contracts were never recorded on West Central's books and records. (Ex. W115, App. 2700.)

Mark Gardiner wanted to continue his investigation, and he expressed his desire to West Central. (Tr. at 2731:7-15, App. 1067.) WCC's Chief Information Officer told Mr. Gardiner to stop, and Mr. Gardiner was not allowed to conduct any further analysis. (*Id*. at 2731:5-22, App. 1067.)

Hartzler was not terminated or reprimanded. In February 2010, Hartzler was promoted to Director of Seed and Chemical. (Ex. W165, App. 2724.)

XI. West Central Learned of the Hartzler Deficit.

On November 16, 2010, Harry Ahrenholtz, the General Manager of Westco and Hartzler's direct supervisor (Ex. P433, App. 2688), was presented with a consignment report, which showed that IPF was "still on the consignment list for seed." (Ex. W207, App. 2728.) According to Mr. Ahrenholtz, he:

> [T]hought we were going to get that cleared [up] last month. I also thought there was a considerable amount of prepay remaining with these particular accounts. It was suggested to me this amount to over $2 million which I confirmed with Cassie [Fiedler]. She also confirmed that there is only a total of $9,500 prepay to go against that. What is the circumstance that has caused these to remain on the list so long? If we are out of prepay we have in essence extended $2 million credit it appears to me. Do we have that kind of line approved here? Correct me if I am misunderstanding something.

(*Id*.) WCC knew that IPF had refused any credit privileges. (Ex. W366, App. 2751.)

By December 8, 2010, West Central confirmed that Hartzler had made sales to IPF and others at a loss. (Tr. at 1689:9-12, App. 970; Ex. W211, App. 2729.) West Central did not terminate Hartzler, remove him from IPF's account, or contact the Wollesens. (Hartzler 6/30/14 Dep. at 298:8-12, App. 762; Tr. at 1689:2-8, App. 970.)

Instead, on December 21, 2010, Hartzler met with the Wollesens and solicited $2.16 million in prepayments—almost the exact amount of his cumulative deficit. (Tr. at 2026:23-2028:22, App. 1007-9.) Hartzler solicited the prepayments through three checks, each of which corresponded in amount with a written agreement, executed on West Central's standard contract form. (Ex. W216, App. 2731); (Ex. W217, App. 2737.) Hartzler also prepared and signed a separate document, wherein he confirmed IPF had a prepayment balance of $105,936 before application of the prepayment checks, and he identified the products and quantities that would be provided. (Ex. P9, App. 1471.) Hartzler did not solicit any personal payment during the December 21, 2010 meeting. (Ex. P1a, App. 1396.)

The Wollesens did not know that there was a deficit in their account. (Tr. 2028:11-14, App. 1009.) The Wollesens believed they had a

prepayment balance, and they intended for the contracts and payments to be prepayments for 2011. (Tr. at 2026:12-2027:8, App. 1007-8.) Hartzler testified that the contracts indicated that IPF was prepaying for its 2011 inputs; and he understood the Wollesens intended to prepay. (Hartzler 6/30/14 at 295:11-19, App. 761.) However, as with previous years, Hartzler intended to, and did, take the prepayments and applied them to the deficit he had created. (*Id*. at 295:20-24, App. 761.) After application and billing of amounts that Hartzler had been allowed to store in consignment for months, West Central's records indicated that IPF had a prepayment balance of only $2,232.50. (Tr. at 1517:20-1518:8, App. 963-5; 1785:2-5, App. 971.)

In the spring of 2011, West Central delivered some of the prepaid products before Hartzler resigned. (Tr. at 2036:9-15, App. 1011.)

XII. The Evolving and False "Bribe" Stories.

On the morning of Saturday, April 30, 2011, Hartzler resigned from West Central. (Ex. P134, App. 2664.) Hartzler admitted theft and stated that "[t]his is all on my hands and my hands alone." (*Id*.)

That afternoon, Bill and Kris Wollesen learned that WCC would not deliver IPF's products. (Tr. at 2038:1–2039:4, App. 1012-13.) They immediately traveled to West Central and met with its executive team, including its CEO. (*Id*.) The Wollesens brought and presented the

December 2010 prepayment contracts and other materials identifying the purchases they had made from WCC and Hartzler. (Tr. at 2040:14–2041:4, App. 1014-5.) The Wollesens insisted that WCC honor its contracts. (Tr. at 2038:1–2039:4, App. 1012-3.) West Central did not accuse the Wollesens of any wrongdoing. (Tr. at 2038:1–2039:4; 2041:5-9, App. 1012-5.) Later that same day, the CEO of West Central had a private conversation with Hartzler. (Tr. at 49:23–50:2, App. 813-4; Hartzler 6/30/14 Dep. at 174:6-8, App. 730.)

On Monday, May 2, 2011, West Central took Hartzler's sworn statement. (6/30/14 Hartzler Dep. at 131:17-25, App. 721; 176: 23-25, App. 731.) Hartzler testified that he was "sure" that he accepted a $2,000 cash payment from Bill Wollesen in June or July 2006 to lower an outstanding bill for seedbean. (*Id*. at 178:7-22; 181:2-5, App. 732-4.) Hartzler could not explain how he supposedly went about lowering the alleged bill. (*Id*. at 180:13-181:1; 184:23-185:10, App. 733-36.)

In April 2012, when Westco filed its second amended petition, it removed its previous allegation that a $2,000 bribe was given in "June or July 2006." *Compare* (Am. Pet. at ¶39) *with* (2d Am. Pet at ¶42.)

On March 28-29, 2013, Hartzler was deposed. He again testified that Bill Wollesen gave him $2,000 in cash to lower an outstanding bill to West

Central for seedbean. (Hartzler 3/28/14 Dep. at 338:11-23, App. 648.) Unlike his prior testimony, however, Hartzler claimed the payment was made in June or July 2005. (*Id*. at 340:23-25, App. 649.) Hartzler testified that he lowered the price of seedbean from $23 or $24/bag to $16 or $17/bag. (*Id*.) Hartzler's story is demonstrably false. The Wollesens prepaid for their seedbean at $17.50/bag in January 2005, before they ever dealt with Hartzler, and a prepayment balance remained through June 2005. (Ex. W422, App. 2758; Ex. P130, App. 2663.)

Ms. Thielen speculated at trial that Hartzler lowered a June 2005 bill for seedcorn. (Tr. at 1553:23-1554:5; 1556:2-10, App. 965-7; Ex. P130, App. 2663.) However, IPF had prepaid for seedcorn in March 2005, and its account still had a prepayment balance through June 2005. (Ex. P128, App. 2662); (Ex. P130, App. 2663.) While Hartzler claims he must have used "free seed" to lower the bill, the Wollesens received 23% of their seedcorn as free seed in 2005, an amount that is normal for similar customers. (Ex. P130, App. 2663; Hartzler 6/30/2014 Dep. at 186:26-187:5, App. 737-8; Hartzler 3/28/13 Dep. at 340:19-21, App. 649.)

The Jury concluded there was no cash payment. (Ex. P4, App. 1438); (Verdict, App. 573.)

XIII. Damages.

IPF presented two categories of damages through Marc Vianello, CPA, ABV, CFF: (1) After WCC's refusal to deliver products in May 2011, IPF was forced to purchase alternative products in the spot-market at prices that totaled $576,189 more than its contracted prices with WCC. (Ex. W573, App. 2794; *see also* Court's Ex. 6-2 at 33, App. 1266.) (2) Had West Central applied payments from IPF to WCC in accordance with the prices it agreed through Hartzler, IPF would have a prepayment balance of $805,499 remaining in its account, after appropriate, undisputed adjustments were made. (*Id*.) West Central did not dispute these amounts or present any expert or other testimony concerning IPF's damages.

ARGUMENT

I. The District Court Did Not Err In Submitting This Case To A Jury, Rather Than Trying It In Equity.

A. Preservation of Error.

The Wollesens agree that Westco filed motions to add claims for "rescission and restitution" and to try them in equity, and that issue has been preserved. The Wollesen Defendants disagree that error has been preserved on Westco's claim that its claims for breach of fiduciary duty, 706A, and conspiracy were exclusively triable in equity. Westco did not raise these

arguments before the District Court. It demanded, and never withdrew, a jury trial on each of those claims.

B. Scope of Review.

The District Court has discretion to enforce scheduling orders, and its denial of the untimely motions to amend and to try this case in equity is reviewable on an abuse of discretion of standard. *See Holliday v. Rain and Hail L.L.C.*, 690 N.W.2d 59, 65 (Iowa 2004) (quoting *Bennett v. City of Redfield*, 446 N.W.2d 467, 474-75 (Iowa 1989)). Denying an untimely motion to amend that "would have substantially changed the issues of the suit" is not an abuse of discretion. *Id*.

C. The District Court Correctly Denied The Motion To Amend And Motion To Try Issues In Equity As Untimely.

In *Bennett v. City of Redfield*, the Iowa Supreme Court held that a district court did not abuse its discretion in denying an untimely motion to amend. The sequence of events in *Bennett* is instructive:

> [T]he motion was filed approximately sixteen months after the suit was commenced. It was filed approximately twenty days before the date set for trial and after the amendment deadline set by the court in a scheduling order. The court had ordered a scheduling conference be held approximately one year after the suit was commenced. With the written approval of both parties, in April of 1987, the court entered an order setting trial for August 10 and directing all amendments to the pleadings be filed by July 10. The proposed amendment would have substantially changed the issues of the suit. The court did not

> abuse its discretion in denying the motion to amend because it was untimely.

Bennett v. City of Redfield, 446 N.W.2d 467, 475 (Iowa 1989). Here, as in *Bennett*, the subject motions were filed twenty days before the scheduled trial. These motions were filed three years after the lawsuit was commenced and well after the close of discovery. Here, as in *Bennett*, new claims were asserted, which would have substantially changed the issues of the suit. In addition, the motion to try issues in equity would have changed the fact-finder from a jury to the judge. The District Court properly determined that the motions were not timely, and properly overruled them.

D. Westco's Claims Were Not Exclusively Cognizable In Equity.

Iowa Code § 611.10 allows a plaintiff such as Westco that has initiated an ordinary proceeding, upon timely motion, to have any issues that are "exclusively cognizable" in equity resolved through an equitable proceeding. When the District Court denied Westco's motions to amend and to try restitution and rescission issues in equity, Westco was pursuing a breach of contract claim, which is not exclusively cognizable in equity.[5] Even after Westco voluntarily dismissed its breach of contract claim on the

5. An action at law for breach of contract may not be tried as an equitable action for rescission and restitution where the latter is not pled. *Wells v. Lynch*, No. 05 1260, 2007 WL 108349, at *1–2 (Iowa Ct. App. Jan. 18, 2007).

morning of trial, its remaining claims were not exclusively cognizable in equity.

1. Westco's Claim For Breach Of Duty By An Employee Is Legal In Nature.

Westco now argues that its claim against Hartzler for breach of fiduciary duty was cognizable solely in equity. Iowa Courts have long recognized that duty of loyalty cases may be brought at law. Decades of decisions, as well as the Iowa Civil Jury Instructions, demonstrate that it is a claim which can be brought at law.

The Iowa Supreme Court has noted that "[w]e recognize the existence of a common law duty of loyalty which is implied in employment relationships." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 598 (Iowa 1999). For employees, such as Hartzler, breach of this duty may be brought at law and tried to a jury. *Id*. ("The District Court submitted Condon's claim for breach of loyalty under a contract theory.").

Other Iowa cases demonstrate that claims for breach of fiduciary duty are cognizable at law. In *Kurth v. Van Horn,* the breach of fiduciary claim was tried as a law claim. 380 N.W.2d 693, 695 (Iowa 1986) ("We first address the issues raised under the law claim of breach of fiduciary duty."); *see also Clinton Land Co. v. M/S Associates, Inc.*, 340 N.W.2d 232 (Iowa 1983) (breach of fiduciary duty claim against a real estate agent tried at law);

Miller v. Berkoski, 297 N.W.2d 334, 337 (Iowa 1980) (claim for breach of fiduciary duty tried to the court as a law action); *Kabe's Restaurant, Ltd. v. Kintner*, 538 N.W.2d 281, 284 (Iowa 1995) (holding that a claim for breach of fiduciary duty against an employee presented issues of fact that were properly determined by the jury).

Recognizing this well-established principle, Iowa has promulgated a set of civil jury instructions for breach of fiduciary duty claims. *See* Iowa Civil Jury Instructions 3200.1 & 3200.2. Pattern jury instructions would not exist for a claim that cannot be tried to a jury.

Westco asks this Court to apply decisions from the specialized contexts of trust law and shareholder derivative lawsuits. (Appellant's Brief at 36-38.) Such cases do not apply here, since this is not a derivative lawsuit, and Hartzler was not a trustee. This case presented an employee breach of duty of loyalty, which can be pursued at law in Iowa. Because the duty of loyalty issue was not exclusively cognizable in equity, the District Court did not err in submitting Westco's breach of duty claim to the jury.

2. Westco's Claim For Conspiracy Is Triable At Law.

Westco has cited no authority for the proposition that a civil conspiracy claim is equitable. Nor does it cite any Iowa law supporting its bald assertion that civil conspiracy claims against the Wollesens were not

severable from its claims against Hartzler. Civil conspiracy is a tort. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 172 (Iowa 2002). Iowa civil conspiracy cases have been tried as jury trials. *See Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994); *Countryman v. Mt. Pleasant Bank & Trust Co.*, 357 N.W.2d 599 (Iowa 1984); *Shannon v. Gaar*, 6 N.W.2d 304 (Iowa 1942).

Civil conspiracy is not exclusively cognizable in equity, and Iowa has promulgated civil jury instructions for this tort. *See* Iowa Civil Jury Instructions 3500.1 *et seq*. Iowa Code § 611.10 did not give Westco the ability to try civil conspiracy claims in equity.

3. Westco's Chapter 706A Claims Were Legal In Nature.

As with its conspiracy claims, Westco cites no authority for the proposition that its Chapter 706A claims are equitable. Iowa Code Chapter 706A is analogous to the federal civil RICO statute. West Central acknowledged that in its Motions in limine, where it described RICO as "analogous" to 706A. (Motion in Limine at pp. 26-27, App. 234-5.)

Where the plaintiff in a civil RICO claim has sought treble damages (as both Plaintiff and IPF did), courts have held that such claims are legal and properly submitted to a jury. *See, e.g.*, *Maersk, Inc v. Neewra*, Inc., 687 F.Supp.2d 300, 340 (S.D.N.Y. 2009) ("The Remaining Defendants do have a Seventh Amendment right to a jury trial on Maersk's civil RICO claim

seeking damages pursuant to § 1964(c) [the Federal statute providing triple damages and attorneys fees].”); *NSC Int’l Corp. v. Ryan*, 531 F.Supp. 362, 363-4 (N.D. Ill. 1981) (determining that the relief authorized by § 1964(c) is distinctly legal in nature); *Molloy v. Primus Auto. Fin. Servs*., 247 B.R. 804, 809 (C.D. Cal. 2000).

The District Court correctly determined that Westco’s claim for treble damages and costs rendered its 706A claim legal in nature.

E. Westco Had No Right To An Equitable Or Other Accounting

Westco argues that it was entitled to an accounting, because of the alleged complexity of the case.[6] (Appellants' Brief at 47.) Westco did not seek an accounting, and resisted IPF’s request for an accounting on the grounds that “claims for equitable relief of an accounting are barred and/or preempted because of the remedy at law provided by Iowa Code Section 554.9210 and civil discovery in this matter under the Rules of Civil Procedure." (Westco First Amended Answer.) The concept of an "equitable accounting" has never been adopted in Iowa and has long been

6. The Item Sales Report referenced by West Central on page 47 of its Brief was prepared by West Central for its damages expert, to develop hypothetical prices he claims IPF should have been charged. It purportedly identifies every sale by West Central to *other customers* for the products purchased by IPF. (Ex. P29.) It does not identify any transactions with the Wollesens.

abandoned in other jurisdictions. In 1962, the United States Supreme Court noted that "modern" procedural tools had rendered equitable accountings unnecessary. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Following *Dairy Queen*, "courts consistently have refused to accept [the need for an accounting] as a ground for the denial of a jury trial demand." 9 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 2310, at 148.

F. The District Court Properly Tried The Legal Claims To A Jury First.

Iowa Code § 611.10 does not provide that resolution of issues that are "solely cognizable" in equity must occur before the jury trial. *Id*. "To avoid compromising a litigant's right to a jury trial, and based on collateral estoppel principles, where legal issues and equitable issues share common questions of fact in the same lawsuit, a jury should ordinarily determine the legal issues first, and its determination would be binding on the district court when the court considers the equitable claims." *Vlieger v. Farm for Profit*, No. 04-876, 2005 WL 1963002, at *6 (Iowa Ct. App. Aug. 17, 2005). While Appellants cite several old Iowa cases for the proposition that equity issues should be tried first, more recent Iowa cases have clarified that equity does not have priority over law. *Id*.

Rather, if either law or equity is more likely to resolve the whole case, that one should be tried first. *Morningstar v. Myers*, 255 N.W.2d 159, 161 (Iowa 1977) ("Although it has been said that equitable issues should be tried first, this is not an inflexible rule. We have several times expressed the view that the case which is most likely to dispose of the whole controversy should be tried first in order to avoid an unnecessary second trial."). In *Morningstar*, the Iowa Supreme Court ordered that a legal counter-claim be tried first, stating:

> Under these circumstances we are persuaded the trial court erred in ordering the quiet title action tried first. Morningstar should have his jury trial on the fraud issue. Not only will that probably dispose of the whole case, but the opposite result effectively takes away Morningstar's right to trial by jury. We reverse the trial court's order and remand with instructions that the law action be tried before the quiet title action.

Id. at 162. Here, the trial at law resolved all issues pertaining to Westco's claims and IPF's legal third-party claims; under *Morningstar*, the District Court did not err in trying the action at law.

IPF had a right to a jury trial, even if Westco had some claims which are equitable in nature. *See Conrad v. Dorweiler*, 189 N.W.2d 537, 538 (Iowa 1971) ("We consider first defendants' claim they were entitled to a jury trial on the counterclaim. We hold it was error to deny their timely request for such a trial."). In *Conrad*, the plaintiff had filed a petition in

equity to foreclose a mechanics lien, and the defendant pled a counter-claim for breach of contract. The Iowa Supreme Court held that the counter-claim could not be tried in equity, when a timely request for a jury trial had been made, and distinguished the earlier case of *Grandon v. Ellingson*, 144 N.W.2d 898 (Iowa 1966), where the counter-claim asserted defenses of waiver and estoppel which were cognizable either in law or equity. *Id*. at 539 (noting that *Grandon* involved "issues over which law and equity have concurrent jurisdiction. Since equity had already taken jurisdiction, defendant could not properly insist that there be a separate jury trial of them.").

Here, unlike either *Conrad* or *Grandon*, there was an initial jury demand, and the case was filed as a law action. Westco made no attempt to withdraw its jury demand, and it could not have been withdrawn without consent of the Wollesens. Iowa R. Civ. P. 1.902(1). Even if equity jurisdiction had been initially asserted, the presence of IPF's breach of contract claim required that the case be tried to a jury. *See Conrad*, at 539.

G. Westco Is Not Entitled To A New Trial In Equity.

Westco wrongly asserts that it is entitled to a new trial, in equity, because it generated a jury question on its claims. Westco notes that "[w]hen 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." (Appellants Br. at 51.) Westco incorrectly suggests that the converse is also true—that this rule "***should*** also apply to a party who was erroneously denied a right to a trial of equitable issues by equitable proceedings." (*Id*.) (emphasis added.)

In Iowa, the constitutional right to a jury trial receives more protection than the statutory right to an equitable proceeding. Once demanded, a jury trial can only be withdrawn with the consent of all parties not in default. Iowa R. Civ. P. 1.902(1). In contrast, under Iowa Code § 611.10, a trial in equity is compelled, upon timely motion by plaintiff, only if the issue was "exclusively cognizable in equity", and only the defendant has the right to demand that issues which are cognizable in equity, but not exclusively so, be tried by equitable proceedings. Since Westco's jury demand in this case was not withdrawn with the consent of all parties, the case was properly tried to a jury.

A jury is entitled to determine the action first, and if the jury disposes of the entire case, there is nothing left to be tried in equity:

> [I]f the trial of the law issue would, in the event of a verdict for one of the parties, render a trial of the equitable issue unnecessary, in that case the issue at law should be first tried. The issue, either equitable or at law, should be first tried, which may result in rendering a further trial unnecessary. This rule is supported by reasons based upon the economical and speedy

> administration of justice. If a single trial will dispose of a case, the law will not permit another.

Morris v. William H. Merritt & Co., 52 Iowa 496, 3 N.W. 504, 509-10 (1879). There was no error when the dispositive legal issues were tried first, even though the collateral estoppel effect prevented re-litigation of the issues in equity. *Vlieger v. Farm for Profit, Research & Dev., Inc.*, No. 04-876, 2005 WL 1963002, at *6 (Iowa Ct. App. Aug. 17, 2005).

It is irrelevant whether Westco actually established sufficient facts to create a jury issue. The Jury received extensive, competing evidence and decided the case adversely to Westco. Collateral estoppel prevents Westco from receiving a second bite at the apple. *Morris v. William H. Merritt & Co.*, 52 Iowa 496, 3 N.W. 504, 510 (1879).

II. The Jury Verdict Is Not Inconsistent.

A. Preservation of Error.

The Wollesens agree that error has been preserved on this claim.

B. Scope of Review.

This Court reviews "the district court's conclusion as to whether answers are inconsistent 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).

C. The District Court Correctly Denied The Request For A New Trial Because The Jury Verdict Was Not Inconsistent.

"It is fundamental that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so." *Hoffman v. Nat'l Med. Enterprises, Inc*., 442 N.W.2d 123, 126 (Iowa 1989). The 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. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Id*. (citations omitted). Westco claims an inconsistent verdict, because the Jury found Hartzler had committed "ongoing unlawful conduct", but it did not find that he had committed "commercial bribery". (Jury Verdict Interrogatory Nos. 3, 4, App. 574.)[7] For at least two reasons, these aspects of the Jury's verdict are not inconsistent.

1. The Jury Could Have Followed Jury Instruction 18 And Found That Hartzler Committed Other Specified Unlawful Conduct.

The Jury consistently found that neither Hartzler nor the Wollesens committed commercial bribery. Interrogatory No. 3 asked the Jury to

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7. The jury clearly did not find that Hartzler committed commercial bribery. The jury did not check the box that Hartzler "committed commercial bribery for financial gain on a continuing basis" or "knowingly received any proceeds of commercial bribery for financial gain on a continuing basis." (Jury Verdict Interrogatory No. 4, App. 574.)

determine whether "Hartzler engaged in ongoing unlawful conduct." It was undisputed that Hartzler engaged in ongoing unlawful conduct, including theft and fraud upon the Wollesens.

In Jury Instruction No. 18, the Jury was given definitions which applied to the claim of ongoing criminal conduct. "Specified unlawful conduct" was defined as "any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of Iowa." (Jury Instr. 18(6), App. 515.) Hartzler admitted that he engaged in ongoing unlawful conduct, and West Central introduced evidence that Hartzler pled guilty to wire-fraud for his ongoing theft and fraud upon West Central. (Hartzler 6/30/14 at 14:22-15:3, App. 663-4.); (Ex. P39, App. 2542.)

The Jury could have based its decision on the definition in Jury Instruction No. 18 and found that Hartzler was guilty of ongoing criminal conduct based on his theft or fraud, even though it did not find that he committed commercial bribery. Jury Interrogatory Nos. 3 and 4 did not inform the Jury that the listing of conduct in No. 4 was the exclusive means by which Hartzler could have engaged in ongoing unlawful conduct. Thus, there was ample support for the Jury's finding, even though the Jury did not find Hartzler committed commercial bribery.

2. Even Assuming The Jury Found Hartzler Committed Commercial Bribery, The Jury Could Have Followed Jury Instruction 29 And Found For The Wollesens By Determining That Appellants Had Greater Culpability Than The Wollesens.

If this Court entertains Westco's speculation that the Jury actually found that Hartzler committed commercial bribery, despite the lack of such a finding on Jury Interrogatory No. 4, the Jury still could have followed the instructions and found that the Wollesens were not liable for ongoing criminal conduct. Jury Instruction 29 stated:

> [N]o judgment may be entered against [the Wollesens], and Westco cannot recover against such parties on account of its claims against such parties for ongoing criminal conduct", if: "1. West Central possessed the same or greater knowledge as to the illegality or wrongfulness of the activity giving rise to such unlawful conduct, or 2. West Central was equally or more culpable than the respective party against whom the ongoing criminal conduct claim is asserted.

Even if Hartzler participated in commercial bribery, the Jury could have declined to enter judgment against the Wollesens, because West Central was equally or more culpable than the Wollesens.

This Court need not determine which route the Jury took in concluding that Hartzler, but not the Wollesens, engaged in ongoing unlawful conduct. The District Court could have reconciled the verdict against Chad Hartzler and the negative answer to Interrogatory No. 4 in

multiple ways, and the District Court did not abuse its discretion in declining to grant a new trial.

3. Any Inconsistency Related Solely To Hartzler, And Does Not Provide A Basis For A New Trial Against The Wollesens.

If the Jury misinterpreted the instructions, and erroneously found in favor of Westco, despite finding that Hartzler did not engage in, or receive the proceeds of, commercial bribery, such error does not compel a new trial against the Wollesens. The remedy for any such error would be a retrial of this claim against Hartzler only. *Dailey v. Holiday Distributing Corp*., 151 N.W.2d 477, 489 (Iowa 1967) (limiting retrial to issue of damages against one defendant, and concluding that "[t]o remand the case at hand for another complete trial would be an injustice to plaintiffs and a source of needless cost to defendant Holiday. The ends of justice will far better be served by limiting the issue determinable upon remand to the matter of damages.").

There is no conceivable inconsistency in the Jury's findings as to commercial bribery. The Jury concluded that each of the Wollesens did not engage in any unlawful conduct. (Rog. Nos. 12, 13, 21, 22, 30, 31, 44, 45, 55, 56, App. 573-87). The Jury concluded in Jury Interrogatory No. 4 that Hartzler did not engage in commercial bribery or receive the proceeds of commercial bribery. Therefore, at most, the verdict would be inconsistent

with respect to Hartzler; the Jury's findings with respect to the Wollesens must stand.

III. The District Court Properly Denied Appellants' Motion For Judgment Notwithstanding The Verdict On IPF's Fraud And Breach of Contract Claims.

A. Preservation of Error.

The Wollesens agree that error has been preserved on this claim.

B. Scope of Review.

The standard of review for a district court's denial of a motion for judgment notwithstanding the verdict "is for correction of errors at law. In reviewing rulings on a motion for judgment notwithstanding the verdict, we simply ask whether a fact question was generated. We, like the district court, view the evidence in the light most favorable to the party against whom the motion is intended, the nonmoving party." *Royal Indem. Co. v. Factory Mut. Ins. Co*., 786 N.W.2d 839, 846 (Iowa 2010) (citations omitted).

C. IPF Presented Sufficient Evidence To Support The Jury Findings Of Fraud And Breach Of Contract.

Since the Jury found in favor of IPF on both breach of contract and fraudulent misrepresentation, the jury verdict must stand if a jury question was generated on either theory. *Id*. This Court may not overturn the Jury's verdict, which was reached following nineteen days of trial spanning five weeks, including hundreds of exhibits and over 3,000 pages of trial

testimony, unless the Jury could not possibly have reached its verdict, when all evidence is construed in the manner most favorable to IPF. *Id.*

IPF presented ample evidence that it entered into three contracts with WCC in December 2010, totaling $2.16 million, for the purchase of its 2011 inputs. (Tr. at 2026:23-2028:22, App. 1007-9); (Ex. W216, App. 2731); (Ex. W217, App. 2737); (Ex. P10, App. 1474.) It is undisputed that Westco quit delivering on these contracts after Hartzler's resignation, forcing IPF to purchase its remaining 2011 inputs from other sources at a cost that exceeded the contracts by $576,189. (Ex. W573, App. 2794.) To avoid liability for fraud, Westco asserts that it did not have a present intent not to perform the December 2010 contracts at the time they were entered into. To avoid liability for breach of contract, Westco asserts a lack of apparent authority as a matter of law.

In briefing post-trial motions, Westco correctly conceded that: "It may be possible for a court of law to find that Hartzler breached his fiduciary duty and that Westco breached the agreement Hartzler made. A breach of contract action does not fail simply because an agent breached his fiduciary duty when he entered into the contract." (Westco Br., at 88.) Westco also noted that: "A jury could find that Hartzler acted with Westco's apparent authority and defrauded the Wollesens." (*Id*.)

1. The Jury Could Properly Determine That Westco Never Intended To Treat The December 2010 Payments As Prepayments For 2011 Inputs.

A principal such as West Central is responsible for the fraud of its agent if it puts the agent in a position to perpetrate the fraud complained of, while the agent is executing the transaction within the scope of his employment. *International Milling Co. v. Gisch*, 137 N.W.2d 625, 632 (Iowa 1968); *Turner v. Zip Motors*, 65 N.W.2d 427, 430 (Iowa 1954).

In *Zip Motors*, a third-party went to an automobile dealership sell his car. A dealership employee defrauded the third-party, by deceiving him to sell the car to another, rather than the dealership, and the employee misappropriated the funds. The Iowa Supreme Court determined that the automobile dealership was liable for the fraud of its employee, even though his actions were contrary to his duties and not undertaken to further the employer's interests. *Id*. at 430. The Court noted:

> If he was a salesman for defendant, we think further there was substantial evidence he was acting within the apparent scope of his authority in what he did, including the conversion of plaintiff's car by the fraudulent sale. Of course, no one claims the defendant had authorized O'Brien to attempt to defraud the plaintiff by selling his automobile, pocketing the money and absconding. But he was within the apparent scope of his authority nevertheless.

Id. The Court rejected West Central's argument that the agent must be acting within the scope of his authority in order to bind his principal for his tortious acts. The Court explained:

> [T]he question involved at this point is not so much whether the agent was acting within the scope of his authority in converting the plaintiff's automobile, but whether the principal the defendant was liable for the tortious act of its agent or employee. Masters, or principals, rarely authorize their servants, employees or agents to commit torts; yet if in the scope of his employment the master or principal places his employee or agent in a position to commit a fraud or other tort upon an innocent third party, such master or principal must be held to answer for the damage done, under the maxim of *respondeat superior*.

Id. (internal citations omitted). It is firmly established that "questions of the nature and scope of the agent's authority and whether the acts in controversy were within the scope of such authority are ordinarily for the jury." *Id*. at 1096.

The Jury also could find that the prepayment contracts were binding, due to Hartzler's apparent authority. *Grismore v. Consol. Products Co*., 232 Iowa 328, 335, 5 N.W.2d 646, 651 (1942) ("It is also fundamental law that whatever an agent says or does, within the scope of his actual or apparent authority, is the act of and binds his principal. And this is true even though the agent's act be tortious.") (citations omitted).

The Jury was free to determine, as it did, that Hartzler acted within the scope of his actual or apparent authority in entering the agreements with IPF, and that West Central is bound by the agreements entered, even if such agreements were not authorized by others at West Central, or were inconsistent with his duties to West Central.

The Jury could conclude that Chad Hartzler was an actual agent of WCC when he solicited the 2010 contracts and received $2.16 million in prepayment from IPF. The Jury could conclude that, when Hartzler solicited that prepayment, both he and his superiors were fully aware of the deficit he had created in the IPF account by entering prices that differed from the prices he had quoted to IPF in prior years. (Ex. W207, App. 2728.) On November 16, 2010, Hartzler was questioned about the $2 million balance due that was shown on IPF account. *Id*. The Jury could conclude that Hartzler knew exactly how WCC would apply the $2.16 million he solicited from IPF a few weeks later, and that it would apply those funds to the balance due that he had created on WCC's books. (Hartzler 6/30/14 at 295:11-24, App. 761.) The Jury could conclude that WCC had no intention to apply IPF's December 2010 payments as prepayments. Instead, and contrary to its representations to the Wollesens, WCC intended to and did apply the prepayments to the deficit that Hartzler had created, leaving only a

$2,232.50 prepayment balance. (Tr. at 1517:20-1518:8, App. 963-4; 1785:2-5, App. 971.) A representation regarding future performance is fraudulent if the party making the representation has no intention of performing it at the time it is made. *Int'l Mill. Co. v. Gisch*, 258 Iowa 63, 72, 137 N.W.2d 625, 631 (1965) ("A false promise may constitute fraud when made for the purpose of deceiving the party to whom made and when the latter justifiably relies thereon.").

The Jury received extensive evidence that Hartzler prevented statements from being generated and, when generated, took steps to intercept them from the process and otherwise took steps to prevent them from being mailed. (Tr. at 674:8–11; 675:7–23, App. 878-9); (Hartzler 3/29/13 Dep. at 463:3-7, App. 652); (Hartzler 6/30/14 Dep. at 36:11-20, App. 677; 264:7-9, App. 753); (Ex. W524, App. 2783.) In those few instances where statements were mailed and received, the Wollesens called Hartzler, and he provided persuasive, yet untrue, explanations for why the statements reflected balances owed. (Hartzler 6/30/2014 Dep. 287:1-10, App. 758.) Therefore, the Jury was free to conclude the Wollesens did not receive and/or review statements. Such a finding was based upon extensive evidence, rather than "bare denials", as West Central claims in its Brief. (Appellants' Br. at p. 76.)

2. The December 2010 Contracts Were Valid, And Were Breached By Westco.

WCC's attack on the verdict is premised on its theory that Hartzler did not have actual authority to enter into contracts "intended to conceal his acceptance of bribes." (Appellant's Br., at 78.) West Central did not prove that the Wollesens bribed Hartzler or had reason to know their payments to him violated any duties to West Central. WCC's argument depends on this unproven strawman. The jury was not compelled to conclude that the contract prices obtained by IPF were due to bribery.

While arguing the "accounts stated" doctrine, WCC overlooks the fact that it did not attempt to prove that its monthly statements represented the actual amount owed by IPF.[8] The jury heard and received Westco's testimony on damages, which was not based upon the West Central invoices or the prices actually offered by Hartzler and accepted by IPF, but rather hypothetical prices that Westco's damages expert developed and proffered. (Tr. at 1117:20 –1118:21, App. 930-1; 1143:10–1144:11, App. 932-3; 1241:13–1242:9, App. 934-5; 3053:3–17, App. 1078; 3072:8–15, App. 1079). Those hypothetical prices were rejected by the Jury, which awarded damages against Hartzler based solely on the amount of Hartzler's theft from

8. Such amounts only would have allowed Westco to claim $1.75 million in damages for increased, rather than the $5.23 million its expert requested. (Tr. at 1108:8–15, App. 929).

Westco. The Jury apparently found that any Westco invoices allegedly generated or mailed to IPF did not reflect amounts actually owing by IPF.

The Jury could have found that Bill Wollesen had the ability to find and obtain wholesale prices, and that the prices he negotiated with Hartzler were based upon his research and knowledge of the market. (Ex. W559, App. 2787.) The Jury could find that the Wollesens reasonably relied on the annual reconciliation of their account that were provided by Hartzler, and that they did not have reason to believe that they had a balance owing on their account as of December 2010. Thus, the Jury could find that when IPF entered into the prepayment contracts in 2010, it reasonably expected that the contracts would be honored. Hartzler was the Westco representative assigned to the Wollesens at the time the prepayment contracts were entered into, and IPF had no reason to doubt his authority to bind Westco to the prices that he had quoted. The District Court properly denied WCC's JNOV motion.

CROSS-APPEAL

I. IPF Is Entitled To A New Trial On Its 706A Claim.

A. Preservation of Error.

IPF preserved error regarding the 706A instruction given by the District Court by proffering its own instruction on the elements of 706A and

by objecting to the District Court's use of this instruction, rather than the one that IPF submitted.

B. Scope of Review.

Error in submission of jury instructions is reviewed for correction of errors at law. "Iowa law requires that a court give a requested instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in the other instructions." *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989).

C. The District Court Erred In Requiring IPF To Prove Commercial Bribery As Part Of Its 706A claim.

The District Court erred in its formulation of the IPF 706A jury instruction. When IPF submitted its proposed jury instructions, it requested the following instruction:

> For one party to be liable for ongoing criminal conduct, the opposing party must prove the following propositions with respect to the party against whom or which the claim is made:
>
> 1. The party or an agent thereof committed one or more of the following acts or omissions:
>
> > a. knowingly received proceeds (as defined in Instruction No. _____) of a specified unlawful activity (as defined in Instruction No. _____) and used or invested, directly or indirectly, any part of such proceeds in the acquisition, establishment, or operation of an enterprise (as defined in Instruction No. _____);
> >
> > . . .

> e. committed specified unlawful activity (as defined in Instruction No. _____);
> . . .
>
> 2. Damages to the harmed party occurred as a result of one of the above-noted acts or omissions by the defendants.
>
> If a party has failed to prove either of these propositions against a defendant or third-party defendant, then you must find the party against whom such claim is brought is not liable.

(Wollesen Proposed Jury Instructions, at 40-41, App. 409-10.)

The District Court rejected IPF's instruction. On the afternoon of August 4, 2014, following the completion of evidence, the District Court presented its jury instructions. For IPF's 706A.1 claim, the instructions stated that IPF was required to prove: "Chad Hartzler committed [specified unlawful activity in violation of Iowa Code 706A] as defined in Instructions No ___..." (*Id*., App. 1288.) The District Court's proposed instruction on August 4, 2014 did not state that IPF would have to prove Chad Hartzler committed commercial bribery. IPF objected in writing to the use of this instruction, rather than the instruction it had submitted.

On the morning of August 5, 2014, the District Court provided its final jury instructions. For IPF's 706A.1 claim, the District Court replaced the bracketed language with "commercial bribery." (*Id*., App. 543.)

Thus, the District Court submitted an instruction which erroneously required IPF to prove that Chad Hartzler had committed commercial bribery. This instruction was factually incorrect, as the Wollesens and IPF adamantly testified that Hartzler had not been bribed. It also was legally incorrect, as it improperly omitted a number of other offenses (such as theft or fraud) that constitute specified unlawful activity within the meaning of the statute. Following closing arguments, the Wollesens renewed their objections to "any instructions that [the Wollesens] provided that were not used...and any that we did not provide that ultimately were used…" (Tr. 3317:21-3318:6, App. 1085-6.)

The District Court correctly noted elsewhere that theft was the basis of IPF' claim on the Jury Verdict. *See* Jury Interrogatory No. 64, App. 589 (identifying "Knowingly received proceeds of theft on a continuing basis" as the basis of the IPF 706A claim against West Central). The District Court erred in inserting "commercial bribery" into the Jury Instruction rather than either "theft", the term that the District Court used in the verdict form, or "specified unlawful activity", as had been requested by IPF. The inconsistency between Jury Instruction No. 46 and Verdict Interrogatory No. 64 necessarily confused the Jury as to the unlawful conduct that IPF had to prove. There is no logical way to reconcile this inconsistency.

The jury instruction requested by IPF followed the statute, and imposed liability if Hartzler committed "specified unlawful activity." Specified unlawful activity is broader than commercial bribery, and encompasses the theft and fraud that IPF asserted that Hartzler, as a West Central agent, committed. This instruction was supported by the requested instruction containing the statutory definition of "specified unlawful activity." (Wollesen Proposed Jury Instructions, at 40, App. 409.) The District Court erred by inserting "commercial bribery" in place of "specified unlawful activity", as was requested by IPF.

Ample evidence was presented at trial concerning West Central's knowledge of Hartzler's illegal conduct before the December 21, 2010 meeting, so the Jury certainly could have concluded that WCC engaged in concerted, known theft of IPF's money during the December 21, 2010 meeting, and with the treatment of amounts received during that meeting and otherwise. The Jury likewise could have determined that WCC, through its agent Hartzler, knowingly stole the February 2007 check for $46,500 from IPF to West Central that Hartzler misapplied to Danny Newell's account. IPF was prejudiced because its 706A claim, unlike the claims for breach of contract or fraud, would have automatically provided treble damages and attorneys' fees.

Because it was incorrectly instructed that IPF was required to prove that it engaged in unlawful conduct with Hartzler (which was firmly disproven at trial), the Jury was not allowed to return a verdict in IPF's favor on its 706A claim. Thus, IPF is entitled to a new trial on its claim for ongoing criminal conduct under Iowa Code 706A.

II. The District Court Improperly Granted Summary Judgment On The IPF Chapter 706A.2(5) Claim.

A. Preservation of Error.

IPF preserved error regarding its 706A.2(5) claim by resisting West Central's summary judgment motion, which was granted by the District Court.

B. Scope of Review.

Summary judgments are reviewed for errors of law. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001).

C. The District Court Incorrectly Determined That Iowa Code § 706A.2(5) Is Unconstitutional.

On December 31, 2013, the District Court granted summary judgment on IPF's third-party claim against WCC under Iowa Code Section 706A.2(5). That statute provides, in relevant part, that:

> [I]t is unlawful for a person to negligently allow property owned or controlled by the person or services provided by the person, other than legal services, to be used to facilitate

> specified unlawful activity, whether by entrustment, loan, rent, lease, bailment, or otherwise.

Iowa Code §706A.2(5)(a). The District Court granted summary judgment on this claim on a constitutional law basis, finding that the limited burden shifting in Iowa Code § 706A.2(5)(b)(4) created an unconstitutional presumption of negligence. (Summary Judgment Ruling, at 20, App. 194.) Iowa Code Section 706A.2(5)(b)(4) reads as follows:

> The plaintiff shall carry the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred and was facilitated by the property or services. The defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages in this subsection.

The District Court based its finding upon the Supreme Court's ruling in *Hensler v. City of Davenport*, 790 N.W.2d 569, 589 (Iowa 2010). (*Id*.)

The District Court erred in doing so. *Hensler* struck down a city ordinance that created a criminal presumption of failure to exercise reasonable control of a minor child upon the occurrence of a second delinquent act. *Id*. While *Hensler* partially overturned that municipal infraction ordinance based upon an unconstitutional presumption, that does not mean that all statutes creating a rebuttable presumption of negligence are unconstitutional. *Adam v. T.I.P. Rural Elec. Co-op*., 271 N.W.2d 896 (Iowa 1978).

In *Adam*, the Supreme Court upheld a statute which stated that "[i]n case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line in causing said injury, but this presumption may be rebutted by proof." *Id*. The *Adams* defendant asserted that the statute was unconstitutional on due process grounds. Rejecting that assertion, the Supreme Court stated that "[a] presumption of this kind does not abridge due process under the federal or state constitutions. It is not irrational for a legislature to require a utility to prove its due care when defending against claims for injury to person or property caused by the escape of electricity from its transmission lines." *Id*. at 899 (citations omitted).

Adam represents the last time that the Iowa Supreme Court was asked to construe Iowa Code § 489.15. The *Hensler* Court relied upon an earlier case, *Calkins v. Adams County Co-Op. Elec. Co*., 144 N.W.2d 124 (Iowa 1966), which held that statute unconstitutional only when the claimed injury was unrelated to the transmission of electricity. *Id*. at 128 ("When electricity has nothing to do with an injury we think the statutory construction sought by plaintiff would create a clear and unconstitutional discrimination.").

The relationship between the *Calkins* and the *Adam* cases demonstrates that presumptions of negligence are not unconstitutional *per se*. Instead, there must be a rational relationship between the presumption and the evil which the statute seeks to address. When the injury was caused by transmission of electricity, the Iowa Supreme Court found the rational relationship to exist and upheld the presumption. *See Adam*. When the injury was not related to the transmission of electricity, the presumption did not bear a rational relationship to the injury and was not sustained on an as applied (rather than facial) challenge. *See Calkins*.

Since *Hensler*, the Supreme Court has decided *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015), which upheld a city automated traffic enforcement ordinance which imposed a civil penalty on the owner of a speeding vehicle against a due process challenge. The Court, in *Jacobsma*, explained that "[i]n *Hensler*, the alleged connection between a parent's supervision and the subsequent commission of juvenile acts was simply too attenuated to meet a rational basis test." *Id*. at 346. That does not mean that all presumptions will be too attenuated; some will be "eminently reasonable." *Id*. at 347. Here, IPF's injuries were directly caused by WCC's employee, rather than a source unrelated to the negligent empowerment.

The District Court erred in finding the statute unconstitutional. Here, the statute fairly divided the burdens of proof between the parties. IPF retained "the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred *and was facilitated by the property or services*." Iowa Code § 706A.2(5)(b)(4) (emphasis added). In other words, causation is not presumed by the statute. The plaintiff is still required to prove that the unlawful activity was facilitated by the negligence of the defendant. The presumption is limited to the underlying facts of negligence, as the defendant is given the burden of proving "the circumstances constituting lack of negligence."

The statute's burden-shifting is rational and constitutional. WCC negligently empowered Hartzler's unlawful conduct by failing to place any controls on Hartzler's handling of checks, failure to record contracts, and misuse of consignment. WCC negligently empowered Hartzler's unlawful conduct by ignoring audit committee concerns and curtailing the investigation of its outside auditor. As with the utility in *Adams*, an employer such as WCC is in a far superior position to possess information and control the subject employee. After the plaintiff demonstrates the causal connection between the empowerment and the plaintiff's damages, the statute simply requires the party in empowering the unlawful conduct to

provide information that rebuts a claim of negligence, should such information exist.

III. The District Court Erred In Denying IPF's Motion For Additur.

A. Preservation of Error.

Error was preserved on the request for additur by timely filing a post-trial motion seeking additur.

B. Scope of Review.

The standard of review for a district court's denial of a motion for additur for abuse of discretion. *McHose v. Physician & Clinic Servs., Inc.*, 548 N.W.2d 158, 162 (Iowa Ct. App. 1996).

C. The District Court Erred In Denying IPF's Motion For Additur.

Defendant and Counterclaim Plaintiff IPF moved, post-trial, for an order granting additur of $805,499 to the Jury's award of $576,189 in favor of IPF for its claims for breach of contract and fraudulent misrepresentation against WCC. While the jury awarded IPF damages for the cost of cover, it failed to award IPF any damages for the remaining balance of the $2.16 million that IPF had prepaid.

On December 21, 2010, Hartzler met with Bill and Kris Wollesen to solicit and collect IPF' prepayment for its 2011 inputs. During that meeting, WCC and IPF entered into three prepayment contracts for approximately

$2.16 million. (*See* Ex. W216, App. 2731, W217, App. 2737, and P00010, App. 1474) (the "Contracts"). WCC delivered some of the purchased inputs, but halted delivery after Hartzler's resignation. As a result of West Central's failure to deliver the remaining products, IPF was required to procure supplies from other sources on the spot market, during the middle of planting season. The cost of those supplies exceeded the Contract prices between IPF and West Central by $576,189. The Jury awarded the undisputed amount of the cost of cover.

West Central delivered some of the agronomy products that IPF had contracted to purchase and prepaid for in December 2010. However, at the time of Hartzler's April 30, 2011, resignation, West Central still possessed prepayment money that it had accepted from IPF, but for which products had not been delivered. (W573, at Slides 32-39, App. 2794). The jury failed to award any damages for the remaining prepayment balance.

During trial, West Central did not present any evidence concerning IPF's damages for its claims. The only evidence of IPF's damages was introduced through the Wollesen Parties' damages expert, Marc Vianello. Mr. Vianello testified that IPF incurred damages of (1) $576,189 for increased prices on the spot market and (2) $805,499, after undisputed adjustments made to the account during litigation and otherwise, for its

remaining prepayment balances. (W573 at Slides 32-39, App. 2794). West Central did not dispute that Mr. Vianello accurately calculated the prepayment balance based upon the spreadsheet prices that Hartzler had quoted to IPF.

The award of $576,189 was grossly inadequate, because it failed to give IPF any recovery for the remaining prepayment that was procured for the Contracts and retained by WCC. While the Jury determined that the Wollesens: did not bribe Hartzler, and they did not know or have reason to know to their interactions with him violated any duties he owed to West Central, and it accordingly concluded that WCC breached the Contracts and made fraudulent misrepresentations, it only awarded IPF one of two categories of damages that IPF is legally entitled to receive for its claims.

The appropriate measure of damages for IPF' breach of contract claim is the amount that would place IPF in as good a position as it would have been, but for West Central's breach. *See, e.g., Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998).

To be put in the same position that IPF would have been, but for West Central's breach of the Contracts, IPF is entitled to receive the prepayment monies that it provided to WCC for the Contracts. If the judgment stands, then IPF will have paid twice for the products that are the subject of the

breached Contracts. That does not place IPF in the position it would have been, but for WCC's breach.

The remedy of additur is appropriate where, as here, the judgment is inadequate and not reasonably aligned with the loss suffered. *See, e.g.*, *Kerndt v. Rolling Hills National Bank*, 558 N.W.2d 410, 417 (Iowa. 1997); *see also McHose v. Physician & Clinic Services, Inc*., 548 N.W.2d 158 (Iowa. App. 1996). Additur is appropriate in contract cases where the jury has failed to award the proper measure of contract damages. The Iowa Supreme Court has noted as follows:

> An inadequate award merits a new trial as much as an excessive one. Whether the damages awarded are inadequate in a particular case depends on the facts of that case. If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate. In such a case, refusal by the district court to grant either an additur or a new trial is an abuse of discretion. In cases involving undisputed or liquidated damages or damages reasonably susceptible to precise calculation, additur is appropriate.

Kerndt, 558 N.W.2d at 417 (internal citations and quotations omitted).

In *Kerndt*, the President of a bank brought a claim for breach of contract after he was improperly terminated. The Plaintiff sought $33,229.51 in damages, comprised of the difference between: (1) what he would have been paid under his contract with the bank, and (2) what he actually earned at a different job. Thus, like here, the amount of damages suffered by the

plaintiff could be identified with specificity, and the amount of losses in such category were not disputed. However, the jury only awarded the plaintiff $14,000. The plaintiff moved for additur, and the district court denied the motion. On appeal the Supreme Court reversed the district court's denial of additur, finding there was:

> [N]o reasonable relationship between the jury's award of $14,000 in damages and the loss suffered by Kerndt. No rationale for the $14,000 amount appears in the evidence. The bank's defense was that it owed Kerndt nothing under the terms of the National Bank Act and the employment contract. The written employment agreement established the compensation to which Kerndt was entitled. Kerndt testified that under the agreement, he would have received $127,291.51 in salary for the remainder of his employment term at Rolling Hills National Bank; however, he actually earned $94,062.00 in salary at a different job during that time period. The difference is $33,229.51. That testimony was not disputed by the bank.

Id. The Supreme Court accordingly concluded that additur was appropriate, and the district court should have denied the plaintiff's motion for a new trial only on the condition that the bank accept additur, raising the award from $14,000 to $33,229.51. *Id*. at 417-18; *see also McHose v. Physician & Clinic Services, Inc*., 548 N.W.2d 158, 162 (Iowa App. 1996) (granting additur when the damages award failed to provide physician with all four categories of damages which were required to place the physician in the same position that he would have been, but for the breach).

Just as in *Kerndt* and *McHose*, the Jury here failed to award an undisputed category of damages that is legally required to make IPF whole for its successful contract claim. The Jury's award is grossly inadequate and should be modified to add the balance of the prepayment monies. *See, e.g.*, *Cowan v. Flannery*, 461 N.W.2d 155, 160 (Iowa 1990).

CONCLUSION

Westco's appeal should be denied in its entirety. Westco failed to timely move the District Court; failed to withdraw its jury request; and did not possess any claims which were exclusively cognizable in equity, so it was not entitled to a trial in equity pursuant to Iowa Code §611.10. The District Court did not err in trying legal issues first, and collateral estoppel effect bars relitigation of the issues decided adversely to Westco. The Jury Verdict was not inconsistent, as the Jury found that no commercial bribery was committed by any defendant. There was ample evidence to support the Jury's verdict that West Central breached its contracts with IPF and that it secured the $2.16 million in prepaid funds by fraudulent misrepresentation. The determination of Hartzler's actual or apparent authority to act on behalf of West Central was a jury question.

On the cross-appeal, the District Court should be directed to increase IPF's damages by $805,499. The 706A instruction erroneously required the

Jury to find that Chad Hartzler had been bribed in order for IPF to prevail. The District Court should have instructed the Jury that theft, or the general statutory definition of "specified unlawful activity", were sufficient bases for 706A liability. The District Court also erred in dismissing IPF's 706A.2(5) claim on summary judgment. Iowa Code § 706A.2(5) is not unconstitutional, as the division of burdens of proof in that statute is reasonable and rational. The District Court erred in denying IPF's motion for additur. IPF should be granted a new trial solely on its 706A claims.

REQUEST FOR ORAL ARGUMENT

Appellant request to be heard by way of oral argument.

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CERTIFICATE OF COMPLIANCE

Appellant pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 13,947 words of a 14 point proportionally spaced Times New Roman font and it complies with the 14,000 word maximum permitted length of the brief.

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Appellees-Cross Appellant's Final Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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I, the undersigned, hereby certify that I did serve the attached Appellees-Cross Appellant's Final Brief on counsel for all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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