**IN THE SUPREME COURT OF IOWA**
**No. 15-0471**
**No. 15-0780**

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**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*

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

**vs.**

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

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

# APPELLEES-CROSS APPELLANT'S REPLY BRIEF

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## CASES CITED

## STATUTES



## OTHER AUTHORITIES

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Claims Of Westco Were Not Exclusively Triable In Equity.

*Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587 (Iowa 1999)
*Daugherty v. Daugherty*, 116 Iowa 245, 90 N.W. 65 (1902)
*Fry v. Blauvelt*, 818 N.W.2d 123 (Iowa 2012)
*Hansen v. Seabee Corp*., 688 N.W.2d 234 (Iowa 2004)
*Key Pontiac, Inc. v. Blue Grass Sav. Bank*, 265 N.W.2d 906 (Iowa 1978)
*Kreamer v. Coll. of Osteopathic Med. & Surgery*, 301 N.W.2d 698 (Iowa 1981)
*Powell v. City of Berwyn*, 68 F. Supp. 3d 929 (N.D. Ill. 2014)
*Shannon v. Gaar*, 6 N.W.2d 304 (Iowa 1942)
Iowa Code § 611.10
Iowa Civil Jury Instructions 3200.1 & 3200.2

II. The District Court Properly Exercised Its Discretion In Trying Legal Issues First

*Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724 (Iowa 1981)
*Morningstar v. Myers*, 255 N.W.2d 159 (Iowa 1977)
*Vlieger v. Farm for Profit*, 705 N.W.2d 339, 2005 WL 1963002 (Iowa Ct. App. Aug. 17, 2005)
Iowa R. Civ. P. 1.903

III. Westco Has Failed To Establish That The Verdict Was Inconsistent

*Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc*., 714 N.W.2d 603 (Iowa 2006)
*Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015)
*Johnson v. Sioux City*, 114 Iowa 137, 86 N.W. 212 (1901)

IV. West Central's Motion For Judgment Notwithstanding The Verdict Is Not Well-Founded

*Capital One Bank (USA), N.A. v. Denboer*, 791 N.W.2d 264 (Iowa Ct. App. 2010)

## ARGUMENT

### I. The Claims Of Westco Were Not Exclusively Triable In Equity.

Westco asserts that its motion to try issues in equity was not untimely, and that the district court did not deny its motion on grounds of untimeliness. The District Court certainly did note the untimeliness of the motion, stating, "Defendants have aptly described plaintiff's motion as an attempt to take a 'mulligan' at this late stage of the round. Mulligans are more freely given on the first tee rather than on missed short putts on the 18th green." (7/1/2014 Order, App. 446, at fn. 2.) Even if the District Court did not deny the motion to try issues in equity as untimely, the District Court may be affirmed on any ground that was raised before it. *Hansen v. Seabee Corp*., 688 N.W.2d 234, 238 (Iowa 2004).

The motion to try issues in equity was untimely. The District Court's trial scheduling motion set a deadline of May 10, 2014 for all motions, other than motions in limine. (5/11/2012 Order, App. 109.) While Westco incorrectly asserts that "there is no deadline by statute or rule for a motion under Iowa Code section 611.10", Iowa Rule of Civil Procedure 1.602(2) mandates the entry of scheduling orders. The motion deadline set in the District Court's scheduling order applied to all motions, and was enforceable. *Fry v. Blauvelt*, 818 N.W.2d 123, 130 (Iowa 2012) (noting that

the Iowa Supreme Court has "recognized the inherent power of the district court to enforce pretrial orders.").

While Westco asserts that it had claims which could be tried in equity, Westco was required to prove that its claims were *exclusively* triable in equity. Iowa Code §611.10. None of the claims of Westco were exclusively triable in equity.

### A. Westco's Claim Against Hartzler For Breach Of Duty Of Loyalty Was Not Exclusively Triable In Equity.

In dismissing Westco's duty of loyalty claim, the District Court found that breach of loyalty is "a subset of the overall fiduciary duty and should not be a separate cause of action." (6/17/2013 Order, App. 171.) The District Court did not reject the claim that Hartzler had a duty of loyalty to Westco. It simply found that Westco could not fracture its cause of action to assert counts for both (a) a breach of fiduciary duty based on a duty of loyalty and (b) an independent claim for duty of loyalty. Westco had a duty of loyalty claim.

The claim against Hartzler for breach of duty of loyalty could be tried at law. *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 598 (Iowa 1999); *see also* Iowa Civil Jury Instructions 3200.1 & 3200.2. It is flabbergasting for Westco to assert that "[p]attern jury instructions on breach of fiduciary duty cited by the Wollesens mean nothing to the outcome of this

case." (Appellant's Reply Br., at 12.) The inquiry under Iowa Code §611.10 is whether the breach of duty of loyalty was *exclusively* cognizable in equity. The existence of pattern jury instructions and prior Iowa precedent amply demonstrates that it was not.

### B. Westco's Claim Of Civil Conspiracy Or Participation In Hartzler's Breach Of Duty Is Triable At Law.

Westco now appears to assert that it may not have had a conspiracy claim, but that it could recover from the Wollesens, "whether there was a conspiracy or not," for the Wollesens' alleged "participation in Hartzler's breach of fiduciary duty." (Appellant's Reply Br. at 14.) Westco appears to argue that any allegation of conspiracy may be regarded as surplusage. (*Id*. at 13.) Westco's new position would render the Wollesens "accidental conspirators," simply because Hartzler victimized them. It is well established that "[t]here is no such thing as accidental, inadvertent or negligent participation in a conspiracy." *Powell v. City of Berwyn*, 68 F. Supp. 3d 929, 950 (N.D. Ill. 2014).

While Westco cites *Shannon v. Gaar*, 6 N.W.2d 304, 308 (Iowa 1942) for the proposition that there can be liability for "participation" which falls short of conspiracy, the *Shannon* case does not state that such a "participation" claim is exclusively triable in equity. In *Shannon*, the Court noted that the "participation" claim was properly tried to a jury. *Id*. ("Even

if there were insufficient proof of a conspiracy between Mr. and Mrs. Gaar, appellants would still be *entitled to have the case submitted to the jury* upon proof that these appellees acted wrongfully and in bad faith to deprive appellants of the benefits of their contract.") (emphasis added).

### C. Westco's 706A Claim Is Most Closely Analogous To A Legal Action and Is Triable At Law.

Westco asserts that its 706A claim most closely resembles a breach of fiduciary duty. (Appellee's Reply Br., at 15.) Westco cites no authority for this proposition. If Westco was correct in this regard, it would only benefit if a breach of fiduciary duty was exclusively triable in equity. Since its duty of loyalty claim was triable at law, its 706A claim was triable at law.

Westco also overlooks the fact that there is a cause of action at law which closely parallels the 706A claim made by Westco. Iowa recognizes a cause of action for *assumpsit*, which is triable at law even when the claim is based upon breach of fiduciary duty by a trustee. *Daugherty v. Daugherty*, 116 Iowa 245, 90 N.W. 65, 65 (1902) (holding that *assumpsit* was triable at law even though defendant was a trustee); *Key Pontiac, Inc. v. Blue Grass Sav. Bank*, 265 N.W.2d 906, 908 (Iowa 1978). The 706A claim was most closely analogous to the legal claim of *assumpsit* existing at common law, and was properly tried to a Jury.

### D. Westco Did Not Plead An Equitable Accounting, And It Did Not Demonstrate That It Was Entitled To An Equitable Accounting.

Westco did not plead a count seeking an accounting. The Wollesens did. Westco actively and successfully opposed the accounting it now claims it was entitled to. (4/10/2012 Order.)

Because Westco never sought an accounting, the District Court did not determine whether Westco had a cause of action for an equitable accounting. Had the District Court been asked by Westco to consider that issue, the transfer of an accounting from the equitable docket to a legal proceeding is reviewed on an abuse of discretion basis. *Kreamer v. Coll. of Osteopathic Med. & Surgery*, 301 N.W.2d 698, 700 (Iowa 1981). The District Court would also have been well within its rights to reject an equitable accounting. *Id*. at 700-01 (noting that length and volume of records alone is not sufficient to require an accounting).

## II. The District Court Properly Exercised Its Discretion In Trying Legal Issues First.

Even if Westco had an issue which was exclusively triable in equity, the District Court was not compelled to try equitable issues first. Westco seeks to dismiss the *Morningstar* case, in which the Iowa Supreme Court reiterated that equitable issues are not required to be tried first. Practical trial administration is a legitimate basis, under *Morningstar*, for the District

Court to try legal claims before equitable ones. *Morningstar v. Myers*, 255 N.W.2d 159,161 (Iowa 1977). The District Court was free to proceed first with the Jury trial Westco demanded and the Wollesens spent three years preparing for.

Westco then asserts that the Iowa Court of Appeals case in *Vlieger v. Farm For Profit*, 705 N.W.2d 339, 2005 WL 1963002 (Iowa Ct. App. 2005) was wrongly decided, because Iowa does not follow the federal 7th Amendment analysis. *Vlieger* was correctly decided, and it was proper for the *Vlieger* Court to examine federal precedent. *See Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 726 (Iowa 1981) ("Because there is a nexus between interpretations of Iowa's Jury provision and the federal provision, we first examine interpretations of the seventh amendment, even though its provisions have no application to state court proceedings.").

While Westco cites the comments to Iowa R. Civ. P. 1.903, the language it quoted actually explains *federal* practice *prior* to the merger of law and equity. After discussing this *prior* practice, the comments to Iowa R. Civ. P. 1.903 go on to explain that the current interpretation of the Seventh Amendment requires that legal issues be tried first in order to preserve the right to a Jury trial. Iowa R. Civ. P. 1.903 Cmt. Federal Practice ("Where, however, issues of fact are common to both the legal and equitable

claims and a jury trial has been demanded as to the legal claim, *a jury must be permitted to determine these issues prior to any action on the equitable claim*.") (emphasis added). This comment to Iowa R. Civ. P. 1.903 is consistent with *Morningstar*. *Morningstar* noted that trial of equitable issues first would improperly eliminate the right to trial by jury. *Morningstar*, 255 N.W.2d at 162 ("Not only will that probably dispose of the whole case, *but the opposite result effectively takes away Morningstar's right to trial by Jury*.") (emphasis added). *Vlieger* was properly decided and should be followed here.

## III. Westco Has Failed To Establish That The Verdict Was Inconsistent.

### A. The Jury Did Not Find That Hartzler Was Bribed By The Wollesens.

The Jury consistently did not find that a cash bribe was ever made. The damage award against Hartzler was $485,315.00, which was limited to the amount of checks written to Hartzler and excluded the alleged $2,000 cash bribe. *Compare* (Jury Interrogatory No. 6, App. 575) *with* (Ex. P3, App. 1435). Consistent with its finding of no bribery, the Jury also answered Interrogatories No. 12, 21, 30, 44, and 55 by finding that none of the Wollesen parties engaged in ongoing unlawful conduct. Thus, the Jury did not find that any of the Wollesen parties engaged in commercial bribery.

The Jury did not find that Hartzler committed commercial bribery or knowingly received proceeds of commercial bribery. (Jury Interrogatory No. 4, App. 574.) Jury Interrogatory No. 4 is problematic for Westco's argument, so Westco asks—for the first time on appeal—for this Court to withdraw the answer to Question No. 4 on the basis that there was a numbering error in the body of the question. (Appellant's Reply Br., at 26-27.) This Court cannot withdraw an interrogatory that was not objected to at trial. Moreover, a numbering error in a jury instruction is not a sufficient basis to reverse a jury verdict. *Johnson v. Sioux City*, 114 Iowa 137, 86 N.W. 212, 213 (1901).

Special interrogatories cannot be withdrawn or ignored in favor of a general verdict. They serve as a means of checking whether the verdict is based upon adequate factual findings. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 611 (Iowa 2006) ("Specifically, special interrogatories are used to test the general verdict against the Jury's conclusions as to the ultimate controlling facts.") (citations omitted). If Westco is correct that the verdict *against Hartzler* is inconsistent, then the verdict *against Hartzler* based on Chapter 706A cannot stand. However, there is *no* inconsistency as to commercial bribery.

The Jury did not find that any defendant committed commercial bribery or knowingly received the proceeds of commercial bribery.

### B. The Jury Could Have Determined, Based Upon Jury Instruction No. 18, That Hartzler Committed Specified Unlawful Conduct Other Than Commercial Bribery.

The Jury could find that Hartzler had committed a 706A violation based upon conduct other than commercial bribery. In Jury Instruction No. 18, the Jury was informed that "[f]or Jury instructions relating to Ongoing Criminal Conduct, the following definitions apply: . . . 6. 'Specified unlawful activity' means 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." The Jury could have understood that each of these definitions was applicable to *all* subsequent instructions relating to Ongoing Criminal Conduct. In so doing, the Jury would not have been disregarding the Jury instructions, it would have been applying a definition that it was given.

Nor did it take any leap of logic for the Jury to determine that the offense for which Hartzler was incarcerated was "committed for financial gain on a continuing basis" and "punishable as an indictable offense under the laws of Iowa." Westco introduced into evidence the criminal judgment against Hartzler in which he received a 51 month prison term for wire fraud

and agreed to restitution in the amount of $2.5 million. (Ex. P39, App. 2542.) The Jury did not have to speculate whether Hartzler defrauded Westco for financial gain; Westco had that evidence submitted to the Jury as part of the record.

### C. The Jury Could Have Determined That The Wollesens Had A Lower Degree of Culpability Than Westco.

The Wollesens admit that their second argument regarding the alleged inconsistent verdict is stated in the alternative. It is possible that, if the Jury found that Hartzler committed commercial bribery, it nonetheless found for the Wollesens, because it found Westco more culpable under Instruction No. 29. Westco initially attempts to dismiss this instruction by arguing that Instruction No. 29 was not raised as a ground for their resistance to the motion for new trial. Westco is quite wrong in asserting that this basis was not argued to the District Court.

The Wollesens requested, and the District Court gave, Instruction No. 29. (Wollesen Proposed Jury Instructions, at 43, App. 412).) The argument was not only raised, the Jury was actually instructed that Westco could not recover if it "possessed the same or greater knowledge as to the illegality or wrongfulness of the activity giving rise to such unlawful conduct" or "was equally or more culpable than the respective party against whom the ongoing

criminal conduct claim is asserted." (Jury Instruction No. 29, App. 526.) The Wollesens are entitled to rely on this instruction on appeal.

Westco then asserts, without citation to any authority, that as a matter of law, the Jury could not have used Instruction No. 29 to answer "no" to Interrogatories 12, 21, 30, 44, and 55. Instruction No. 29 told the jury that: "If you find that Bill Wollesen, Kristi Wollesen, John Wollesen, the Trust, and/or Iowa Plains Farms proved the following propositions, no judgment may be entered against such parties, *and Westco cannot recover against such parties on account of its claims against such parties for ongoing criminal conduct*." (emphasis added). Jury Interrogatories 12, 21, 30, 44 and 55 are where the Jury would indicate that Westco could not recover against the Wollesens.

There was sufficient evidence for the Jury to make this determination. The Jury could have rejected Westco's protestations of ignorance as completely incredible. (Jury Instruction No. 5, App. 502) (noting that the Jury "may believe all, part or none of any witnesses' testimony"). The Jury could conclude that Westco knew that Hartzler was engaging in sales practices that were fraudulent, including free or heavily discounted products and services.

In December 2007, Westco's audit committee reported to Westco's outside auditor, Mark Gardiner, that it had received complaints that Hartzler was delivering products and services from Westco, for which it did not receive payment. (Tr. at 2711:9-2712:20, App. 1059-60; Ex. W72, App. 2694.) Mr. Gardiner understood that a board member was concerned about whether Hartzler was engaging in theft. (Tr. at 2715:4-16.) Mr. Gardiner informed Westco that he suspected Hartzler was engaging in fraud. (Tr. at 2733:1-19, App. 1068.) By January 2009, Mr. Gardiner confirmed that Hartzler had engaged in several acts of fraud. (Tr. at 2725:14-2729:9, App. 1061-65; Ex. W115, App. 2700.) After uncovering this fraud, Mr. Gardiner was ordered to stop further investigation because he was making Westco's staff nervous. (*Id*. at 2731:5-22, App. 1066; 2778:20-24.)

The Jury could conclude that Westco knew Hartzler had been offering Westco customers free or deeply discounted inputs and application in exchange for personal payments. (Tr. at 78:4-79:23; *Tr*. at 2727:13-2728:1, App. 1063-64.) Hartzler also allowed customers to return products or services to Westco that had not been purchased from Westco. (Tr. at 2728:20-2730:1, App. 1064-66.)

The jury could conclude that Westco knew that Hartzler was misusing escrow to conceal deals he made. In 2009, Westco'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, App. 2702; Ex. W124, App. 2703; Ex. W127, App. 2704; Ex. W128, App. 2705; Ex. W139, App. 2721; Ex. W143, App. 2722; Ex. W527, App. 2786.)

The Jury could conclude that Westco knew that Hartzler had a pattern of not entering prepayment contracts into Westco's records, including Hunter Farms contracts. (Ex. W115, App. 2701.) The Jury could conclude that Westco's other agronomists knew that Hartzler was engaging in improper sales, and complained because they were losing customers. (Tr. at 2712:7-11, App. 1060, 2718:9-12, 2719:7-17.)

The Jury could conclude that Westco knew that Hartzler was defrauding it. The Jury could conclude that Westco tolerated this fraudulent and unlawful behavior because he was also aggressively expanding its business.

It was not error for the District Court to give the "in pari delicto" instruction. Iowa Code §706A.3 makes a civil action for ongoing criminal conduct "subject to the in pari delicto defense." Westco complains that Instruction No. 29 did not explicitly advise the Jury of the degree of culpability of Westco. (Appellant's Reply Br., at 32.) However, that concern was addressed by Instruction No. 52, requested by Westco, which

clarified that a higher degree of fault than negligence was required. (Westco Proposed Instructions, App. 354.) Westco's concern was addressed by the language it requested and received in Instruction No. 52. Giving repetitive language in Instruction No. 29 would have unduly emphasized Westco's theory.

### D. Westco's Remedy, If The Verdict Is Inconsistent, Is Properly Limited To A Retrial Against Hartzler.

Westco asserts that a new trial cannot be limited to Hartzler, claiming the Wollesens did not argue below that any inconsistency in the verdict was limited to the 706A claim against Hartzler. (Appellant's Reply Br., at 33). Westco is incorrect.

In the post-trial briefing, the Wollesens asserted that any inconsistency in the 706A claim would have only allowed Hartzler, on a timely motion, to have the 706A judgment against him reversed. The Wollesens further asserted that there was no inconsistency which allowed reversal as to them. (Wollesen Post-Trial Br., at 88-89).

The Wollesens argued to the District Court that any inconsistency was limited to the verdict against Hartzler, and are not precluded from asserting that on appeal. While Westco asserts that a new trial is required on all issues, because its claims against Hartzler and its claims against the Wollesens are "intertwined", the Jury Interrogatories clearly separated out

these claims. (Jury Interrogatory. Nos. 12, 13, 21, 22, 30, 31, 44, 45, 55, 56, App. 576-87.) The alleged inconsistency relates solely to the 706A claim against Hartzler, and any new trial should be limited to the 706A claim against Hartzler. *Jack v. Booth*, 858 N.W.2d 711, 718 (Iowa 2015) (noting that "[i]t is possible for a new trial to be granted as to less than all the defendants involved in a case."). In *Jack*, a new trial was ordered only as to one defendant because the instructions and verdict forms assessed each defendant's fault independently. *Id*. at 720. Because the Jury separately assessed the claims and liability of each other defendant a retrial against the Wollesens is not warranted.

## IV. West Central's Motion For Judgment Notwithstanding The Verdict Is Not Well-Founded.

Judgment notwithstanding the verdict cannot be granted unless the evidence, viewed in the light most favorable to the Wollesens, could not possibly have allowed the Jury to conclude as it did. *Hagenow v. Schmidt*, 842 N.W.2d 661, 664 (Iowa 2014). The Jury heard all of the testimony, received all of the exhibits, and rendered a verdict adverse to West Central. Its verdict was amply supported.

West Central argues that Iowa Plains Farms could not rely on Hartzler's representations and reconciliations of the account, because they were inconsistent with the account statements which it allegedly sent. While

West Central mentions the "account stated" doctrine, that legal doctrine is not applicable where neither party accepted the accuracy of the account statements. West Central rejected its own invoices in favor of higher theoretical prices that its damages expert testified to. Iowa Plains Farms denied receipt of invoices, and disputed the prices identified on the invoices, which were inconsistent with the prices that Hartzler gave to Iowa Plains Farms.

When neither party accepts the accuracy of invoices, there is no mutual assent or agreement which can serve as a basis for an account stated. *Capital One Bank (USA), N.A. v. Denboer*, 791 N.W.2d 264, 273 (Iowa Ct. App. 2010). Moreover, the account stated doctrine is not conclusive, creating at most "a prima facie case, which the customer may overcome by proving error in the account." *Id*. at 274. The Wollesens were free to dispute receipt of the invoices and the accuracy of the prices shown thereon, as they did at trial. The Jury was free to conclude that the allegedly delivered invoices did not make Iowa Plains Farms' reliance on Hartzler unreasonable.

West Central's rendition of the facts ignores the testimony of Hartzler regarding the extent to which he intervened to prevent delivery of account statements. In many instances, Hartzler prevented monthly statements from

being generated by placing items that were delivered to Iowa Plains Farms in consignment. (Hartzler 6/30/2014 Tr. at 278:11-14; *id*. at 279:10-12, App. 756-7.) By doing so, Hartzler was able to prevent a statement from being generated. (*Id*. at 279:13-17, App. 757.)

In those instances where he could not prevent statements from being generated, Hartzler admits that he told accounting not to send a statement, or to pull it out because it was inaccurate. (Hartzler 6/30/2014 Tr. at 36:14-16, App. 677; *Id*. at 284:10-16.) Hartzler, admitted to preventing some statements from being sent. (*Id*. at 264:7-9.) West Central admitted that "at least one statement with a balance due was pulled out of the normal statement process. That statement was given to Hartzler and its whereabouts are unknown." (Ex. W524, App. 2783.)

West Central did not present testimony or evidence that any *specific* monthly statement was mailed. Instead, its representative, Hollie Rudy, testified generally about the monthly process through which statements are supposed to be mailed. Ms. Rudy was forced to admit that there was at least one instance where her mailing process did not lead to an Iowa Plains Farms statement being mailed. (Tr. 672:23- 673:1).

Ms. Rudy testified that each month, West Central's monthly statements were printed and organized alphabetically in her open cubicle,

where they sat for three hours, at times unattended. (*Id*. at 674:12 – 675:19, App. 879-80). Hartzler knew where Ms. Rudy's open cubicle was located, and he knew the process through which statements were generated and mailed. (*Id*. at 675:24-676:6, App. 880.) Therefore, it was far from "impossible" for Hartzler to have pulled Iowa Plains Farms' statements from the process. Because Hartzler was engaging in clandestine acts to prevent statements, and West Central does not maintain paper or electronic records of statements that were actually sent, West Central cannot now identify the extent of Hartzler's efforts to prevent statements from being mailed.

The Wollesens presented testimony and written evidence that the only monthly statements that they actually received were the four statements maintained by the Wollesens in their West Central and introduced into evidence at trial. *See* (P00022a); (P00023, App. 1637).

In those few instances where the Wollesens received, reviewed and understood monthly statements that were inconsistent with their understanding of the balance between them and West Central, Bill Wollesen would call Hartzler and was told, "yeah, don't worry about it. We'll take care of it." (Hartzler 6/30/2014 Tr. at 286:4-18). Hartzler admitted that he lied persuasively to conceal his actions. (Hartzler 6/30/2014 Tr. at 287:1-10, App. 758).

Hartzler's testimony of how he intervened to prevent statements from going out created a fact issue for the Jury as to whether West Central actually sent the disputed invoices. The Jury could conclude that the Wollesens did not receive the disputed invoices. This Court is not required to apply either the mailbox rule or the account stated doctrine as a matter of law.

### A. The Jury's Breach of Contract Verdict Is Correct.

In asserting that the December 2010 contracts were not binding, West Central attacks the authority of Hartzler to enter into those contracts. However, there is ample support for a finding of actual or apparent authority on the part of Hartzler to contract with Iowa Plains Farms in December 2010. West Central incorrectly tries to fashion a new rule for apparent agency when the agent is acting in a manner that is disloyal to its principal.

West Central attempts to distinguish the case of *Turner v. Zip Motors*, 65 N.W.2d 427 (Iowa 1954), arguing that *Turner* did not involve disloyalty of an agent to its principal. However, the facts of *Turner* clearly involve disloyalty of an agent to its principal. In *Turner*, the principal was found liable for the acts of its salesman under the doctrine of apparent authority. The salesman in *Turner* claimed to be acting for the defendant, and in the course of his employment stole a vehicle and converted the proceeds for

himself. *Id*. at 429. Thus, West Central's position is simply incorrect. At a minimum, the employee was disloyal by usurping an opportunity of his employer. *Turner* involved disloyalty of an agent to his principal.

*Turner* is consistent with Iowa law that apparent authority binds the principal, whether the act in question is a tort or a contract:

> The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. All such acts and contracts of the agent as are within the apparent scope of the authority conferred on him, are also binding upon the principal. Apparent authority, or ostensible authority to do such acts or to make such contracts, is that which, although not actually granted, has been knowingly permitted by the principal or which he holds the agent out as possessing.

*Mayrath Co. v. Helgeson*, 258 Iowa 543, 548, 139 N.W.2d 303, 306 (1966); *State v. Sellers*, 258 N.W.2d 292, 298 (Iowa 1977); *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).

Hartzler was the most senior salesperson for Westco. It was his job, among other things, to sell agronomy inputs to his assigned customers. Prepayment contracts were a regular feature of how he performed his job.

The 2010 contracts provide a textbook case of Westco being bound due to Hartzler's apparent authority, even though Hartzler had earlier perpetrated a fraud on his principal. *State v. Sellers*, 258 N.W.2d 292, 298 (Iowa 1977) ("A fraud committed on the principal does not relieve it for acts done under the agent's apparent authority, especially when the commission of the fraud was the result of defendant's negligence in supervising its agents."). While Westco argued dual agency and bribery as bases for invalidating the December 2010 contracts, the Jury rejected those theories and found the 2010 contracts binding. (Jury Interrogatory No. 40, App. 583) ("Were the agreements between Hartzler and Iowa Plains Farms the result of Hartzler acting as a dual agent for both Westco and Bill and/or Kristi Wollesen? . . . No X").

**B. The Jury's Finding Of Fraud Is Correct.**

Westco assumes in its reply brief that Hartzler was a dual agent. (Appellant's Reply Br., at 39-40.) However, the Jury rejected the dual agency theory of Westco. (Jury Interrogatory No. 40, App. 583.) Westco misrepresents that Hartzler was a dual agent, because it assumes Hartzler was bribed by one or more of the Wollesen parties. The Jury rejected this bribery theory as well. (Jury Interrogatories No. 12, 13, 21, 22, 30, 31, 44, 45, 55 and 56, App. 573-86.)

The Jury could reject Westco's bribery theory. Hartzler admitted that the Wollesens did not know what he was doing with their account. (Hartzler 3/29/2013 Tr. at 370, App. 650) ("Basically, I guess the way I can always sum it up is, he didn't know what I was doing…"). Hartzler admitted that it would have "hardly ma[d]e sense for Bill Wollesen to agree to a scheme in which he end[ed] up deeper and deeper in the hole every year…" (Hartzler 6/30/2014 Tr. at 197:13-17). The alleged bribery scheme did not make sense, and the prices obtained were plausibly explained as the result of hard price negotiation by Bill Wollesen. The Wollesens believed, based on prior dealings with Tom Brincks and others, that Hartzler was simply another salesman who also had inputs to sell on his own account.

Having rejected the bribery theory, the Jury could also find that Hartzler's fraudulent misrepresentations were binding on Westco. On December 21, 2010, Hartzler met with the Wollesens and solicited more than $2.1 million in prepayments. Hartzler—a management level agent of West Central—testified that he did not intend to apply the Dec. 21, 2010 payments to Iowa Plains Farms' account as prepayments, contrary to (i) their written agreements and payments; (ii) Hartzler's representations to the Wollesens; and (iii) what Hartzler understood them to believe. (Hartzler 6/30/14 Tr. at 295:11-19, App. 761); (Ex. W216, App. 2731); (Ex. W217,

App. 2737). Rather, Hartzler intended to fill the deficit that he had created through his years of fraudulent misrepresentations to the Wollesens. Once Hartzler had applied the fraudulently-induced balance to fill the cumulative deficit that he had created, Iowa Plains Farms' account had only a $2,232.50 prepayment balance. (Ex. P21, App. 1603). There is no question that Hartzler intended for Westco to defraud Iowa Plains by treating the December 2010 payments as payments for the prior debts that he created on the books, rather than as prepayments for 2011 inputs. He represented to the Wollesens that the payments would be applied as prepayments, never intending that they would.

As with the contract claim, the basic assertion of Westco is that the knowledge and actions of Hartzler cannot be imputed to it due to his fraud upon Westco. This contention is addressed and rejected in Iowa. *State v. Sellers*, 258 N.W.2d 292, 298 (Iowa 1977) ("A fraud committed on the principal does not relieve it for acts done under the agent's apparent authority, especially when the commission of the fraud was the result of defendant's negligence in supervising its agents."). Any fraud of Hartzler against Westco does not relieve Westco of liability for acts within the apparent authority of Hartzler.

The Jury was fully instructed in the law of agency. (Jury Instructions 47-51, App. 544-48.) It considered the evidence, and did not accept Westco's theory. The Jury could conclude that the 2010 contracts, and the solicitation of $2.16 million in prepaid funds, was in the interest of Westco, and could impute Hartzler's representations and knowledge in those negotiations to Westco.

But even if Hartzler was acting adversely to Westco in negotiating the 2010 contracts, the apparent agency of Hartzler would have served as a basis for imputing his knowledge to Westco. Restatement (Second) of Agency § 282(2)(b) ("The principal is affected by the knowledge of an agent although acting adversely to the principal: . . . (b) if the agent enters into negotiations within the scope of his powers and the person with whom he deals reasonably believes him to be authorized to conduct the transaction"). The District Court did not err in denying the motion for judgment notwithstanding the verdict.

## V. Iowa Plains Farms Is Entitled To A New Trial On Its 706A Claim.

Westco does not try to argue that Jury Instruction No. 46 actually represented Iowa Plains Farms' theory of recovery, or that Iowa Plains Farms was required to prove commercial bribery in order to recover on its 706A claim. Nor does Westco attempt to argue that Jury Instruction No. 46

is consistent with Interrogatory No. 65, which identified "[k]nowingly received proceeds of theft on a continuing basis" as the ongoing unlawful conduct allegation against Westco. The District Court was well aware of Iowa Plains Farms' theory, stating it correctly in Interrogatory No. 65, yet inexplicably got it wrong in Jury Instruction No. 46.

Westco also does not assert that the Jury instruction requested by Iowa Plains Farms was inaccurate, just that it was too general. However, the Jury instruction requested by Iowa Plains Farms was entirely consistent with the statutory definition of "specified unlawful activity." *State v. Olsen*, 618 N.W.2d 346, 349-50 (Iowa 2000) (noting that "Unlike the model code, the definition does not include any further limitation to racketeering offenses or offenses that represent the key components of ongoing criminal networks. Instead, the phrase 'specified unlawful activity' applies to any indictable offense, limited only to those offenses 'committed for financial gain on a continuing basis.'").

The instruction proposed by Iowa Plains Farms was consistent with this broad statutory definition. The Wollesens sought a Jury instruction in which "specified unlawful activity" was defined using the exact statutory language. (Wollesen Proposed Jury Instructions, at 42, App. 411.)

The requested instruction was legally correct. Iowa Plains Farms was not required to be more specific than the statute or model instructions in drafting its 706A instruction. The District Court did not have to craft a more specific Jury instruction than Iowa Plains Farms requested, and could have presented the instruction that Iowa Plains Farms had supplied. *See, e.g.*, *State v. Templeton*, 258 N.W.2d 380, 382 (Iowa 1977) (discussing the related situation where an instruction "is correct as proposed but not as explicit as a party desires"). Rather than giving the correct instruction that Iowa Plains Farms desired, the District Court crafted its own, incorrect instruction. The District Court erred in doing so, and Iowa Plains Farms should have a new trial on its 706A claim.

Westco then asserts that any error was harmless because Iowa Plains Farms could not prove the "continuing basis" element of the statutory definition. Iowa criminal cases have noted that the continuing basis element can be a short period of time. *See, e.g.*, *State v. Russell*, 781 N.W.2d 303, 2010 WL 786206 (Iowa Ct. App. Mar. 10, 2010) (noting that acts which occurred within a period of days were sufficient to form a continuing basis where there was a threat of future violations). Here, there were predicate acts of theft which occurred years apart from each other, the February 2007 theft and misapplication of the $46,500 check written by the Wollesens, and

the December 2010 misappropriation of the prepaid funds for 2011 inputs. There was an ongoing threat of future violations, as Hartzler would have continued the same pattern of defalcation until his scheme could no longer be concealed. Adequate proof of a "continuing basis" was presented.

Finally, Westco asserts that it could not be liable by citing to Iowa Code §703, which address criminal liability of employers and corporations. However, Iowa Code §706A.3 itself allows for *respondeat superior* liability:

> 8. a. If liability of a legal entity is based on the conduct of another, through *respondeat superior* or otherwise, the legal entity shall not be liable for more than actual damages and costs, including a reasonable attorney fee, if the legal entity affirmatively shows by a preponderance of the evidence that both of the following apply:
>
> (1) The conduct was not engaged in, authorized, solicited, commanded, or recklessly tolerated by the legal entity, by the directors of the legal entity, or by a high managerial agent of the legal entity acting within the scope of employment.
>
> (2) The conduct was not engaged in by an agent of the legal entity acting within the scope of employment and in behalf of the legal entity.

Iowa Code §706A.3. The error in Jury Instruction No. 46 was not harmless, and Iowa Plains Farms is entitled to a new trial on its 706A claim.

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

The District Court erred in holding that the rebuttable presumption of negligence in Iowa Code §706A.2(5)is facially unconstitutional. It is not irrational to place the burden of proof on the party that is likely to have "peculiar means of knowledge enabling him to prove the fact." Comment, Model Ongoing Criminal Conduct Act, Section e. West Central would have detailed knowledge of its policies, procedures, and internal controls, and would be well positioned to determine whether it "negligently allow[ed] property owned or controlled by the person or services provided by the person. . . to be used to facilitate specified unlawful activity" Iowa Code § 706A.2(5). The District Court should not have sustained the facial constitutional challenge to this statute. *State v. Neiderbach*, 837 N.W.2d 180, 224 (Iowa 2013), as corrected (Nov. 22, 2013) (noting that "statutes should not be lightly found facially unconstitutional. In order to be unconstitutional on its face, a statute must be 'void for every purpose and cannot be constitutionally applied to any set of facts.'") (citation omitted).

The burden shifting in this statute is very similar to the burden shifting in the Workers' Compensation Statute. In the Workers' Compensation Statute, a presumption of negligence against an employer has been upheld when a non-covered employee is injured in a workplace accident. *Casey v. Hansen*, 238 Iowa 62, 73-74, 26 N.W.2d 50, 57 (1947) ("The presumption

created by section 85.19 is based on the thought that ordinarily a servant does not sustain an injury arising out of and in the course of employment when the master has discharged his legal duty of furnishing a reasonably safe place in which to work and reasonably safe tools and appliances. Thus we have held there is a rational connection between the fact of such an injury to a servant, which must be proven, and the fact which is presumed—that the injury was caused by the master's negligence.") (citation omitted). This employer presumption of negligence is codified in Iowa Code §87.21.

As in the worker's compensation statute, under Iowa Code §706A.2(5), the plaintiff bears the burden of proving the injury. Then, after proof of injury, the burden shifts to the defendant to disprove negligence. The legislature could well have determined in enacting Iowa Code §706A.2(5) that there is a rational connection between the fact of such an injury, which must be proven, and the fact which is presumed—that the injury was caused by the empowering party's negligence. Presuming that an employer is in control of its property and manner of providing services is as rational as presuming it is in control of physical workplace environment.

The District Court erred in finding Iowa Code §706A.2(5) facially unconstitutional. Its decision should be reversed, and Iowa Plains Farms should be granted a trial on its negligent empowerment claim.

## VII. Iowa Plains Farms Should Be Granted Additur In Order To Recover The Remaining Balance of the 2010 Prepaid Contracts.

In December 2010, Iowa Plains Farms entered into three prepaid contracts, and paid Westco over $2.1 million towards its 2011 crop inputs. The Jury accepted testimony that Iowa Plains Farms paid $576,189 in excess of the contracted prices to replace 2011 inputs that Westco did not deliver. In all, Iowa Plains Farms paid $1,866,189 in the spot market to cover the cost of undelivered inputs it had purchased through prepayment contracts from Westco for $1,290,000. While the Jury properly awarded "cover" damages under Iowa Code §554.2712(2), it failed to award any damages for the purchase price already paid by Iowa Plains Farms in December 2010. The measure of damages for a buyer under the Uniform Commercial Code includes "recovering so much of the price as has been paid." Iowa Code §554.2711(1). The Jury failed to award any recovery for the price that had already been paid.

Having determined that the December 2010 contracts were valid, and were breached by Westco, the Jury could not ignore entirely the element of contract damages for recovery of the purchase price that has been paid. *McHose v. Physician & Clinic Services, Inc*., 548 N.W.2d 158 (Iowa App. 1996) (granting additur where the District Court did not award one category of contract damages). Despite having prevailed on its contract and fraud

claims, Iowa Plains Farms paid twice for the products that were the subject of the breached contracts and has been deprived return of the funds that were procured through fraud.

Westco asserts that the trier of fact should have disregarded a number of elements of the analysis performed by Marc Vianello, the damages expert of Iowa Plains Farms. For example, Westco complains about the adjustment for what it calls "phantom" billings. However, there is no mystery as to what those "phantom" billings were. The colloquy between the District Court and counsel prior to Vianello's testimony demonstrates that the adjustment for "phantom" billings simply addressed that Iowa Plains Farms was billed for inputs that it never received. (Tr. 2819:4-2820:16.) The calculations made by Marc Vianello were correct and not disputed by West Central, and additur should have been granted to compensate Iowa Plains Farms by returning the portion of the purchase price that it had prepaid.

## CONCLUSION

For the reasons stated herein, the appeal of Westco should be denied in its entirety. The District Court erred in its formulation of the Iowa Plains Farms' 706A instruction, and erred in granting summary judgment on the Iowa Plains Farms 706A.2(5) negligent empowerment claim. Iowa Plains Farms should be granted a new trial on its 706A and 706A.2(5) claims. The

District Court erred in not granting additur to compensate Iowa Plains Farms for the remaining prepaid balance on the December 2010 contracts, and additur should be awarded to address that category of contract damages.

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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 6,985 words of a 14 point proportionally spaced Times New Roman font and it complies with the 7,000 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 Reply Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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## PROOF OF SERVICE

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

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