

**IN THE IOWA SUPREME COURT  
SUPREME COURT No. 17-1169**

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**WINGER CONTRACTING COMPANY,**  
Plaintiff-Appellant

v.

**CARGILL, INCORPORATED,**  
Defendant-Appellee.

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**TRACER CONSTRUCTION, LLC,**  
Plaintiff-Appellant,

v.

**CARGILL, INCORPORATED,**  
Defendant-Appellee,  
and

**WINGER CONTRACTING COMPANY, PETERSON  
CONTRACTORS, INC., AMERICAN PIPING GROUP, TRI-  
CITY ELECTRIC COMPANY, TAI SPECIALTY  
CONSTRUCTION, INC.,**  
Defendants-Appellants,

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**APPEAL FROM IOWA DISTRICT COURT MONROE COUNTY  
THE HONORABLE JOHN TELLEN, JUDGE**

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**TRACER CONSTRUCTION, LLC – JOINDER AND APPELLANT  
FINAL BRIEF**

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I. TRACER HEREBY JOINS THOSE ARGUMENTS RAISED BY WINGER IN ITS APPELLATE BRIEF, POINT HEADINGS I THROUGH V INCLUSIVE, AS APPLIED TO TRACER, AND AS IF SET FORTH FULLY HEREIN.**

Tracer joins in authorities cited in Winger Contracting Company's Appellate Brief and Argument.

**II. ABSENT EXPRESS STATEMENT OF LEGISLATIVE INTENTION OTHERWISE, THE MINOR CHANGES TO IOWA CODE CHAPTER 572 DID NOT ABROGATE THE COMMON LAW PRINCIPLES OF AGENCY, JOINT VENTURE, AND FRAUD RELIED UPON BY THE LIEN CLAIMANTS.**

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

*In re Estate of Workman*, 903 N.W.2d 170 (Iowa 2017)

*Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep't of Transp.*, 891 N.W.2d 220 (Iowa 2017)

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*Walker v. Gribble*, 689 N.W.2d 104 (Iowa 2004)

*Lloyd v. Drake Univ.*, 686 N.W.2d 225 (Iowa 2004)

*Mason v. Vision Iowa Bd.*, 700 N.W.2d 349 (Iowa 2005)

*Norwest Credit, Inc. v. City of Davenport*, 626 N.W.2d 153 (Iowa 2001)

IOWA CODE ch. 572 (2017)

*Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014),  
*cert. denied* 135 S. Ct. 712 (2014)

IOWA CODE § 572.1(8) (2017)

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**III. EVEN IF THE DISTRICT COURT’S RULING THAT THE AMENDMENTS TO CHAPTER 572 ABROGATED THE ESTABLISHED COMMON LAW OF AGENCY, THE LIEN CLAIMANTS’ LIENS WOULD STILL ATTACH TO THE LEASEHOLD INTEREST IN THE SUBJECT PROPERTY AND THE DISTRICT COURT WOULD HAVE AUTHORITY TO ORDER A SEPARATE SALE FOR THE IMPROVEMENTS AND THE LAND.**

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

*Coen & Conway v. Scott Cnty. Sav. Bank*, 218 N.W. 325 (1928)

IOWA CODE § 572.6 (2017)

*Lane-Moore Lumber Co. v. Koppenburg*, 215 N.W. 637 (Iowa 1927)

IOWA CODE § 572.21 (2017)

IOWA CODE § 572.21(1) (2017)

IOWA CODE § 572.1 (2017)

**IV. THE DISTRICT COURT ERRED WHEN IT RULED PREMATURELY AND BEYOND THE SCOPE OF THE CASE MANAGEMENT ORDER THAT NO PARTY HAD SUBMITTED THE ISSUE OF WHETHER IT “OTHERWISE IMPROVED” THE REAL ESTATE PURSUANT TO IOWA CODE SECTION 572.2(1).**

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

IOWA CODE § 572.2 (2017)

Iowa R. Civ. P. 1.981(8) (2017)

IOWA CODE ch. 572

IOWA CODE § 572.2(1) (2017)



## **ROUTING STATEMENT**

Because this case presents substantial issues of first impression, fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court, and substantial questions of enunciating or changing legal principles, Appellant, Tracer Construction, LLC, (“Tracer”) maintains it should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c), (d), and (f).

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This case involves an interlocutory appeal of the Iowa District Court for Monroe County, Iowa Specialty Business Court’s (“District Court”) ruling on combined partial motions for summary judgment (“PMSJ Ruling”). (PMSJ Ruling 04/20/2017)(App. 1618-1659). There were two mechanic’s lien foreclosure actions consolidated at least for purposes of discovery and administration by the District Court. (Order 07/28/2016)(App. 201-206). The District Court found that “both of these pending actions are for foreclosure pertaining to all or part of the property in question, result from all or part of the same contractual relationship between the parties, and concern the alleged failure to pay on or more of the labor and material providers. *Id.* at 2 (App. 202). Subsequent to the consolidation, Winger Construction Company

(“Winger”) filed a motion for partial summary judgment with regard to the specific issue of the priority of the mechanic’s liens over rights of the lease-mortgage that Cargill, Incorporated (“Cargill”) purchased from HF Clor-Alkali, LLC (“HFCA”)/US Bank. (Winger MPSJ filings 02/08/2017)(App. 684-994). Thereafter, the various mechanic’s lienholders<sup>1</sup>, including Tracer, made their own filings with regard to the same issue and/or joined in Winger’s filings, including replies and joinders. (Tracer Joinder Winger MPSJ 02/13/2017; Tracer’s Reply 03/27/2017)(App. 995-1022; 1549-1552). In addition to resisting the motions for partial summary judgment, Cargill filed a cross-motion for summary judgment. (Cargill’s Cross MSJ 03/15/2017)(App. 1266-1548). The District Court held that none of the mechanic’s lienholders liens, including Appellant Lienholders liens, attached to Cargill’s fee interest in the land identified in the liens. (PMSJ Ruling at 41)(App. 1658). Subsequent motions to reconsider filed by the mechanic’s lienholders, including Tracer, were denied. (Tracer’s Mot. Reconsider

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<sup>1</sup> As used herein Appellant Lienholders refers to Winger, Tracer, and Peterson Contractors, Inc. (“PCI”), American Piping Group (“APG”), Ameritrack Rail (“Ameritrack”), TAI Specialty Construction Company (“TAI”), and Tri-City Electric Company (“Tri-City”). Miller Insulation, Gethmann Construction Company, Inc., and Carl A. Nelson & Company have dismissed their respective appeals in this matter.

05/22/2017; Comb. Order re Motions to Reconsider 06/30/2017)(App. 1705-1708; 1781-1807). This appeal follows.

**B. Course of Proceedings**

Winger filed Monroe County Case No. EQEQ009184 on September 8, 2015; and Tracer filed Monroe County Case No. EQEQ009228 on May 12, 2016. (Winger Petition 09/08/2015; Tracer Petition 05/12/2016)(App. 215-420; 17-65). Tracer intervened in EQEQ009184 and filed a cross-claim to foreclose mechanic's lien. (Tracer Mot. Intervene/Cross-Claim 05/11/2016; Order 06/01/2016)(App. 421-453; 454-455). Cargill answered Tracer's cross-claim to foreclose Tracer's mechanic's lien generally denying the allegations and asserted affirmative defenses. (Cargill's Answer 07/11/2016)(App. 536-584). Subsequently the cases were consolidated in the District Court's "Ruling and Order on Winger Contracting Company's Motion for Consolidation and Transfer," dated July 28, 2016. (Order 07/28/2016)(App. 662-667). The two cases were consolidated into EQEQ009184 (Superv. Order 9/8/2016)(App. 677-679).

In an effort to streamline disposition of the various claims, on September 12, 2016, the District Court entered a Case Management Order ("CMO") providing as follows:

**3. Early Adjudication:** The parties agreed and the court concurs that an early determination of the priority of the lienholders Iowa Code Chapter 572 mechanics liens in relation to any claimed mortgage or security interest held by Cargill, Inc. is a core threshold issue and should be adjudicated as soon as practical.

(CMO 09/12/2016 at 2)(App. 681). In furtherance of this goal, the District Court directed the parties to use the following procedure to bring the issue before the District Court:

**(b) Limited Discovery:** Counsel for plaintiffs Winger and Tracer, in consultation with counsel for all lienholders, will conduct discovery limited to the facts surrounding the collateral held by Cargill originating from US Bank's Security Agreement and line of credit with HFCA, the contractual relationship between Cargill and HFCA, and the contractual relationship between HFCA and US Bank to provide an evidentiary basis for a motion for summary judgment regarding the primary and superiority of the rights granted the mechanics lienholders by Iowa Code Chapter 572 in relation to the security interest or mortgage assigned to Cargill, Inc. by US Bank.

**(c) Motion for Partial Summary Judgment:** By February 15, 2017, counsel for Winger and Tracer, in consultation with counsel for all lienholders will prepare and move for partial summary judgment on the issue of the priority of the parties mechanics liens in relation to the collateral held by Cargill as described above. Notwithstanding the above, each party may, at its option, file a separate motion for summary judgment.

*Id.* at 2-3 (App. 681-682)

Consistent with the schedule set forth in the CMO, Winger filed a Motion for Partial Summary Judgment on February 8, 2017, seeking a

judgment from the District Court that the general contractor and subcontractor mechanic's liens attached to Cargill's fee interest in its real property and such liens were also superior to Cargill's mortgage liens in the improvements on the real property. (Winger's MPSJ filings 02/08/2017)(App. 689-994). Tracer filed its supplemental motion for partial summary judgment on February 13, 2017, in which it joined in Winger's Motion for Partial Summary Judgment and brief, and pursuant to the CMA provided additional undisputed facts and supporting exhibit. (Tracer Joinder PMSJ filings 02/13/2017)(App. 995-1022). On February 24, 2017, Lemartec joined Winger's Motion for Partial Summary Judgment and further moved for partial summary judgment on the basis that Lemartec commenced work on the project before the U.S. Bank construction mortgage lien (which was subsequently assigned to Cargill) was filed. (Lemartec Joinder & MPSJ filings 02/24/2017)(App. 1064-1230).<sup>2</sup>

On March 15, 2017, Cargill filed a joint Resistance to Winger's Motion for Partial Summary Judgment and Lemartec's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment Against Winger

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<sup>2</sup> The appellant mechanic's lienholders joined in Winger's Motion for Partial Summary Judgment. Although not mentioned individually herein, the joinders are included in the Appendix. (App. 1023-1073, 1237-1265).

and Cross-Motion for Partial Summary Judgment Against Lemartec with a Memorandum and Statement of Additional Facts in Response to Winger's Motion for Partial Summary Judgment and Statement of Additional Facts in Response to Lemartec's Motion for Partial Summary Judgment on March 15, 2017 (hereafter collectively referred to as "Resistance and Cross-Motion"). (Cargill's Resistance & Cross MSJ filings 03/15/2017)(App. 1266-1548).

On March 27, 2017, Tracer filed a Reply to Cargill's Resistance and Cross Motion. (Tracer's Reply 03/27/2017)(App. 1549-1552). On March 29, 2017, Winger filed a Reply Brief to Cargill's Resistance and Cross-Motion. (Winger's Reply w/ Exhs. 03/29/2017)(App. 1558-1590). Cargill filed a Sur-Reply to the Winger and Tracer Reply Briefs on April 7, 2017. (Cargill Sur-Reply 04/07/2017)(App. 1610-1617).

The District Court entered a Combined Ruling on Motions for Summary Judgment on April 20, 2017. (PMSJ Ruling)(App. 1618-1659). The District Court denied the combined motions for summary judgment as to the mechanic's lienholders, except Lemartec, finding Cargill was entitled to summary judgment that "its Leasehold Mortgage takes priority over all mechanic's liens premised on work commenced after August 29, 2013." *Id.* at 38, 40-41 (App. 1655, 1657-1658). The District Court held in part that "the subsequent revisions to Iowa Code chapter 572 supersede a mechanic's lien

attaching to a lessor's fee interest under the agency principles enunciated in *Romp and Stroh*. *Id.* at 25 (App. 1642). Winger filed a Motion to Reconsider on May 5, 2017, requesting the District Court reconsider and find the mechanic's lienholders' liens superior to the leasehold mortgage of Cargill. (Winger Mot. Reconsider 05/05/2017)(App. 1660-1676).

Tracer filed its Motion to Reconsider on May 22, 2017. (Tracer Mot. Reconsider 05/22/2017)(App. 1705-1708).<sup>3</sup> Tracer filed the motion to reconsider as the District Court did not rule on the issue of the lien claimants' rights to the lien attaching to the leasehold as set forth in Iowa Code sections 572.6 and/or 572.21(1). *Id.* at 2-3 (App. 1706-1707). Further, that the District Court failed to rule on the issue of priority of the mechanic's lienholders regardless of the superiority of Cargill's leasehold mortgage such that they could maintain their foreclosure actions on improvements to be sold at sheriff sale. *Id.* at 2 (App. 1706). Ameritrack, APG, TAI, Tri-City, Peterson, and Miller also filed motions to reconsider on May 22, 2017. (App. 1677-1700). On June 5, 2017, Cargill filed a "Combined Response to Motions to Reconsider." (Cargill's Comb. Resp. Mot. Reconsider 06/05/2017)(App. 1712-1743).

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<sup>3</sup> Other mechanic's lienholders also filed Motions to Reconsider. (App. 1701-1704, 1709-1711).

Winger filed a Reply to Cargill's resistance to the motion to reconsider on June 11, 2017. (Winger Reply to Resist. Mot. Reconsider 06/11/2017)(App. 1744-1750). Ameritrack, APG, TAI, Tri-City, Peterson, and Tracer each filed a Reply to Cargill's resistance to the motion to reconsider on June 16, 2016. (Replies to Resist. Mot. Reconsider)(App. 1751-1771). Tracer's Reply included joinders to the mechanic's lienholders' motions to reconsider and replies to Cargill's resistance. (App. 1768-1771). Although Cargill filed a Sur-Reply to the Reply Briefs filed in Support of Motions to Reconsider on June 20, 2017, upon motion by PCI, the Sur-Reply was stricken by the District Court as improper. (Order re Mot. Strike Sur-Reply 06/30/2017)(App. 1812-1814).

On June 30 2017, the District Court filed its combined ruling denying all the motions to reconsider ("Ruling on Motions to Reconsider"). (Ruling on Motions to Reconsider 06/30/2017)(App. 1781-1807). Winger filed its Notice of Appeal on July 19, 2017. (Winger Notice of Appeal)(App. 1815-1821). Tracer filed its Notice of Appeal on July 28, 2017.<sup>4</sup> (Tracer Notice of Appeal)(App. 1827-1833).

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<sup>4</sup> The other appellant mechanic's lienholders also filed notices of appeal. (App. 1822-1826, 1834-1839).



## STATEMENT OF FACTS

The following facts were undisputed in the record before the District Court. Chiefly, the record shows that Cargill and HFCA entered into a long-term (at least 10 year) business arrangement punctuated by myriad purportedly arms' length transactions, with an expectation of ongoing mutual benefit. (Winger PMSJ - Exs.1, 3, 4, 5, 6, 7, & 9; Cargill Appendix – Ex. E) (App. 695-747, 774-813, 814-821, 822-835, 836-868, 869-878, 926-931; 1528-1540). Cargill owns certain real property in Eddyville, Iowa. (Cargill Answer 07/11/2016 at 2-4; PMSJ Ruling at 3)(App. 537-539; 1620). HFCA is in the business of chemical production and manufacturing. *See, e.g.* Winger PMSJ - Ex.1 at 2, Ex. 3 at 2, Ex. 4 at 2, Ex. 5 at 2, Ex. 6 at 2, Ex. 7 at 2, & Ex. 9 at 3 (App. 696, 775, 815, 823, 837, 870, 928).

Pertinent to the instant matter, Cargill entered into a Lease Agreement dated June 24, 2013, with HFCA to allow HFCA to construct a chlor-alkali manufacturing facility (hereinafter “the Facility”) on the Eddyville property. (Winger PMSJ Ex. 1)(App. 695-747). The Lease Agreement granted HFCA a leasehold interest in the land for a period of fifty years at a rent of \$12,000 per year, and, as additional rent, all other sums of money required to be paid by HFCA to Cargill under the terms of the Lease. (Ex. 1, §3.01, §4.01)(App. 702, 703).

On July 23, 2013, a Memorandum of Lease was duly recorded with the Monroe County, Iowa Recorder in Book 2013, Page 1084. (Cargill Resistance and Cross MSJ - Ex. A)(App. 1319-1326). The Memorandum of Lease was a seven-page document that referenced only the lease term of 50 years, but made only general reference to another, much more detailed “Lease Agreement” (the “Unrecorded Lease Agreement”) that was not filed of record. *Id.* None of the other substantive terms of the lease, or the various “Ancillary Agreements” (discussed in detail below) were recorded or otherwise provided notice to third parties of the intimate details of the Cargill/HFCA joint venture.

The Unrecorded Lease Agreement defined “Land” as the legal description of the Cargill-owned parcels on which HFCA held the leasehold interest to build a Facility. (Winger PMSJ - Ex. 1, §1.01(V))(App. 699). The Unrecorded Lease Agreement defined “all other sums of money” HFCA was required to pay Cargill as rent were for reimbursement of Cargill’s costs for the following:

(1) under Section 2.03, for security services for the Facility (*see also* Site Security Services Agreement (Winger PMSJ – Ex. 7)(App. 869-878));

(2) under Article VII, reimbursement for property taxes, use taxes and assessments levied on the Land or Facility; and

(3) under §12.04, if HFCA failed to get insurance and Cargill was forced to, Cargill's costs for insurance.

(Winger PMSJ – Ex. 1, §2.03, Art. VII, §12.04)(App. 702, 707-708, 710).

Under the Unrecorded Lease Agreement, HFCA had an unrestricted right to “encumber, hypothecate, assign, or mortgage Lessee's Estate to a Secured Creditor...” (Winger PMSJ - Ex. 1, §23.06)(App. 725). Section 23.05 prohibited HFCA from allowing mechanic's liens to be filed against the Premises. (Winger PMSJ - Ex. 1, §23.05)(App. 725). If liens were filed, and Cargill incurred expenses in discharging them, HFCA was required to reimburse Cargill for these costs. *Id.*

No labor or material were furnished by Tracer or any of the lienholders prior to the date the Memorandum of Lease was recorded. (Tracer Mot. Intervene – Ex. 1)(App. 423-446). Tracer furnished material beginning September 15, 2015. *Id.* at 3 (App. 425).

Under the Unrecorded Lease Agreement: “All additions, alterations and improvements to the Land made from time to time over the Term, including, without limitation, the Facility, the Improvements and all of Lessee's Property located therein, shall be the property of Lessee and Lessee shall have title to all such additional, alterations and improvements, subject to the provisions of Article XIX herein.” (Winger PMSJ – Ex. 1, §10.01)(App. 709).

Article XIX of the Unrecorded Lease Agreement, provides, in part:

At the termination of this Lease or expiration of the Term, Lessee shall surrender possession of the Land to Cargill in good order and in safe condition and repair, except for ordinary wear and tear. Unless otherwise approved by Cargill in writing, Lessee shall have the obligation, as soon as commercially practicable after the expiration or earlier termination of this Lease, to remove any and all Improvements and Lessee's Property or other improvements of any nature and kind from the Land, and provided that the portion of the Land to which such items may have been affixed shall be restored by Lessee to substantially the condition existing on the Effective Date.

(Winger PMSJ - Ex. 1, §19.01)(App. 717-718).

Under the Unrecorded Lease Agreement, Cargill and HFCA expressly disclaimed any partnership, joint venture or association between them.

(Winger PMSJ - Ex. 1, §22.14)(App. 722).

The Unrecorded Lease Agreement references and incorporates six "Ancillary Agreements," none of which were recorded or otherwise provided notice to any third parties of the Cargill/HFCA joint venture. The Unrecorded Ancillary Agreements are the Site Security Services Agreement, the Easement Agreements, the Chemical Purchase and Supply Agreement, the Product Supply Agreement (between Cargill and Harris & Ford, LLC), the Process Water Service Agreement, and the Process Waste Water Service Agreement."

(Winger PMSJ - Ex. 1, §1.01(B)(App. 696); *see also* Winger PMSJ – Exs. 3, 4, 5, 6 and 7 (App. 774-814, 814-821, 822-835, 836-868, 869-878). Section

3.02(g) of the Unrecorded Lease Agreement states that a condition precedent to the Lease was that “the parties will have entered into all of the [Unrecorded] Ancillary Agreements satisfactory to each, in its sole discretion.” (Winger PMSJ - Ex. 1, §3.02(g))(App. 703). The Unrecorded Lease Agreement provides for termination upon breach of any obligation, breach of any Unrecorded “Ancillary Agreement,” or in the event a party becomes insolvent. (Winger PMSJ - Ex. 1, §20.01)(App. 718).

In the event of a default and a successor lessee succeeds HFCA’s obligations, the proposed successor is required to have “assumed, paid, and agreed to perform all obligations of Lessee under the Chemical Purchase and Supply Agreement and the [Unrecorded] Ancillary Agreements...” (Winger PMSJ - Ex. 1, §23.07(e))(App. 727). Further, the Unrecorded Lease Agreement may only be assigned to a Secured Creditor in lieu of foreclosure of a Lessee Mortgage if the “assignee assumes the Lessee’s obligations under this Lease (including, without limitation, the payment of all rent and other charges as they become due and the requirements that any assignment be approved by Cargill, and provided that any assignee assumes and agrees to pay and perform all obligations of Lessee under the [Unrecorded] Ancillary Agreements)...” (Winger PMSJ - Ex. 1, §23.07(i))(App. 728).

Under the first Unrecorded Ancillary Agreement, the “Chemical Purchase and Supply Agreement,” Cargill agrees to purchase and HFCA agrees to supply a “long-term stable supply of sodium hydroxide and hydrochloric acid for use at its [Cargill’s] processing facilities.” (Winger PMSJ - Ex. 3 at 2)(App. 775). Cargill further agrees to buy and HFCA agrees to sell sodium hydroxide and hydrochloric acid at an agreed specification, price, and quantity for an Initial Term of ten years. (Winger PMSJ - Ex. 3, III(A))(App. 776). The agreement recognizes that Cargill and HFCA are parties to the Unrecorded Lease Agreement and that HFCA leased property from Cargill “in order to construct and operate a facility capable of supplying the Products to Buyer [Cargill]...” (Winger PMSJ - Ex. 3 at 2)(App. 775).

Conditions precedent to the Chemical Purchase and Supply Agreement were “(i) execution and commencement of the [Unrecorded] Ancillary Agreements and (ii) Seller’s completion of the Chlor-Alkali Facility.” (Winger PMSJ - Ex. 3, II(A))(App. 775).

A second Unrecorded Ancillary Agreement is the “Product Supply Agreement” by and between Cargill and HFCA affiliate, Harris & Ford, L.L.C. Under section 2 of the agreement, Cargill agrees to sell and Harris & Ford, L.L.C., agrees to buy quantities of sodium hydroxide and hydrochloric acid at the same price identified in the Chemical Purchase and Supply

Agreement, for an Initial Term of ten years. (Winger PMSJ - Ex. 4 §2)(App. 815).

A third Unrecorded Ancillary Agreement is the “Process Water Service Agreement,” wherein Cargill agrees to supply water, which HFCA needs to produce hydrochloric acid, caustic soda, and sodium hydroxide. (Winger PMSJ – Ex. 5)(App.822-835). Pursuant to the Process Water Service Agreement, Cargill agreed to supply and HFCA agreed to purchase “Process Water at a rate not to exceed 450 gallons per minute and 610,000 gallons per day” at a monthly cost of \$27,000 and a monthly usage fee (“Usage Fee”) of \$0.60/1,000 gallons. (Winger PMSJ - Ex. 5, §§2, 4 & Ex B)(App. 823-824, 835). Section 2 of the Process Water Service Agreement states: “Cargill acknowledges and agrees that this Agreement is not an exclusive arrangement for the supply of Process Water...” *Id.* (App. 823).

A fourth Unrecorded Ancillary Agreement is the “Process Waste Water Treatment Services Agreement,” wherein Cargill agrees to treat HFCA’s Process Waste Water up to a specified maximum amount at a set price. (Winger PMSJ - Ex. 6)(App. 836-868). The Process Waste Water Treatment Services Agreement requires HFCA to pay a connection fee of \$500 per month and a surcharge if the “Process Waste Water” generated by HFCA

exceeded the specified maximum amount. (Winger PMSJ - Ex. 6, §§7, 8)(App. 840).

A fifth Unrecorded Ancillary Agreement is the “Site Security Services Agreement,” wherein Cargill agrees to engage a security services vendor for the Facility. (Winger PMSJ - Ex. 7 at 2)(App. 870). Under the Site Security Services Agreement, HFCA agrees to reimburse Cargill for its ratable portion of the amounts actually charged to Cargill by the third party supplier for security-related services. (Winger PMSJ - Ex. 7, §2)(App. 871).

The sixth and final Unrecorded Ancillary Agreement, the “Easement Agreement,” permits HFCA additional access to Cargill property. (Winger PMSJ – Ex. 1, Ex. D)(App. 735-742).

To finance construction of the Facility, Cargill assisted HFCA in obtaining \$80 million in bond financing through the Iowa Finance Authority. (Winger PMSJ - Ex. 9)(App. 926-931). To secure the bond financing agreement, U.S. Bank issued a letter of credit guaranteeing payment to the bond trustee, and HFCA agreed to reimburse U.S. Bank for payments made under the letter of credit (“Reimbursement Agreement”). (Cargill Appendix, Ex. D)(App. 1446-1527). Under the Reimbursement Agreement, HFCA covenanted to U.S. Bank that it would execute and deliver a Leasehold Mortgage, Assignment of Rents and Leases, Security Agreement and Fixture



Filing (the Leasehold Mortgage). (Cargill Appendix, Ex. D, §5.8)(App. 1475-1476). In the Leasehold Mortgage, HFCA granted a first priority leasehold mortgage lien and security interest to U.S. Bank, which encumbered all of HFCA's right, title and interest to the Leasehold and the Facility. (Winger PMSJ - Ex. 10, §1.1)(App. 1203-1204). The Leasehold Mortgage was recorded with the Monroe County, Iowa Recorder on August 29, 2013, in Book 2013, Page 1283. (App. 1201). Again, it is noteworthy that none of the various terms incorporated into the Leasehold Mortgage by virtue of the myriad unrecorded agreements, or the mechanism by which Cargill would ultimately take assignment of the Leasehold Mortgage, were recorded or otherwise provided as notice to third parties.

A condition precedent to U.S. Bank's obligation to issue the letter of credit guaranteeing payment to the bond trustee was that Cargill agreed to purchase the rights and obligations of U.S. Bank under the Reimbursement Agreement if HFCA defaulted (Put Agreement).<sup>5</sup> (Cargill Appendix - Ex. D §3.1(a); Cargill Appendix - Ex. E)(App. 1464; 1528-1540). HFCA also obtained at least \$40 million in financing from Cargill Financial Services International ("CFSI"), a subsidiary of Cargill, which HFCA was required to

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<sup>5</sup> Also unrecorded.

repay with interest (“Prepayment Agreement”). (Winger PMSJ - Ex. 9)(App. 926-931).

To build the Facility, HFCA entered into contracts with Carl A. Nelson & Company (“Nelson & Company”) and Conve & AVS, Inc. (“Conve”), to provide general contracting services (hereafter collectively referred to as the “General Contractor Defendants”). (Winger Petition ¶¶ 8-12)(App. 220-221).

The following entities entered into contracts with one or more of the General Contractor Defendants, under which each was to serve as a subcontractor for the purpose of constructing the Facility: Winger Contracting Company; Southland Process Group, LLC; Lemartec Corporation; FPControl.com. LLC; American Piping Group, Inc.; Tri-County, Inc.; Tri-City Electric Company of Iowa; TAI Specialty Construction, Inc.; Schaus-Vorhies Contracting, Inc.; Prime Construction Services, LLC; Ameritrack Railroad Contractors, Inc.; Gethmann Construction Company, Inc.; Lunt Reliability Service, LLC; Tarsco Bolted Tank Inc.; Peterson Contractors, Inc.; Brace Integrated Services, Inc.; Miller Insulation Co., Inc.; Star Equipment, Ltd.; HR Green Inc.; and Jeff Boitnott Enterprises, Inc. (collectively, the “Subcontractor Parties”). (PMSJ Ruling at 9-10)(App. 1626-1627). At least

Tracer entered into a contract directly with HFCA<sup>6</sup> (together with the Subcontractor Parties and General Contractor Defendants, collectively, the “Mechanics Lienholders”). (Tracer Petition, ¶6)(App. 18). None of the other Mechanics Lienholders entered into any contract with Cargill regarding the construction of the Facility or other improvements to the Land.

When the Mechanics Lienholders were not paid in full for the work in constructing the Facility, they filed various mechanic’s liens. This action involves the Appellant Lienholders efforts to foreclose their liens against the Facility and Cargill’s fee interest in the real property on which the Facility sits. Various Appellant Lienholders intervened in the consolidated cases EQEQ009184 and EQEQ009228. (Tracer App. Intervene; Tri-City Mot. Intervene; TAI App. Intervene; Ameritrack Mot. Intervene;)(App. 421-453; 456-535; 589-614; 634-661).

Meanwhile, on March 1, 2016, HFCA failed to make a bond interest payment. (Winger PMSJ – Ex. 2, ¶37)(App. 754). Under the letter of credit, U.S. Bank made the bond interest payment, but HFCA did not reimburse U.S. Bank. *Id.* at ¶¶37-38 (App. 754). HFCA also failed to pay quarterly fees to

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<sup>6</sup> HFCA cannot credibly deny that such a contract existed as HFCA asserts such a contract in its amended petition filed on July 13, 2017, in a case also consolidated into EQEQ009184. *See e.g.* HFCA’s Amended and Substituted Petition 07/13/2017 at ¶ 66.

U.S. Bank in March 2016 and June 2016. *Id.* at ¶¶39-40 (App. 754-755). Then, on July 19, 2016, U.S. Bank declared a default under the Reimbursement Agreement, which caused the bond trustee to declare the total amount under the bond financing of \$80,051,125.68 due immediately. *Id.* at ¶¶42-44 (App. 755). U.S. Bank paid off the bonds under the letter of credit and on July 21, 2016, exercised the Put Agreement forcing Cargill to pay U.S. Bank \$81,447,000.12 on July 22, 2016. (Winger PMSJ – Ex. 2, ¶¶46-47; Cargill Appendix - Ex. F (Recitals))(App. 755-756; 1541). On July 25, 2016, U.S. Bank assigned and transferred to Cargill all of its right, title and interest in and to the Leasehold Mortgage (Assignment of Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing). (Winger PMSJ – Ex. 2, ¶¶47-48; Cargill Appendix - Ex. F, §2)(App. 756; 1541). The Assignment of Leasehold Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing was recorded with the Recorder of Monroe County, Iowa, on July 28, 2016 in Book 2016, Page 979. (Cargill Appendix - Ex. G)(App. 1545-1548).

Tracer had a contract directly with HFCA through which it commenced its delivery of labor and materials to the Facility on or about September 15, 2015, and continued to work until such work was completed on January 15, 2016. (Tracer Petition, ¶¶6, 7; Tracer Joinder, ¶3)(App. 18-19; 996).

## **ARGUMENT**

### **I. TRACER HEREBY JOINS THOSE ARGUMENTS RAISED BY WINGER IN ITS APPELLATE BRIEF, POINT HEADINGS I THROUGH V INCLUSIVE, AS APPLIED TO TRACER, AND AS IF SET FORTH FULLY HEREIN.**

#### **A. Error Preservation**

Tracer joins that statement regarding error preservation set forth in Winger's Brief, as applied to Tracer, as if set forth fully herein. As to the unique arguments advanced by Tracer, the preservation of those issues are identified below.

#### **B. Standard of Review**

Tracer joins that standard of review set forth in Winger's Brief, as applied to Tracer, as if set forth fully herein.

#### **C. Argument**

In the interest of efficiency and to avoid unnecessary repetition of effort, Tracer joins those arguments set forth in Appellant Winger's Appellate Brief, as applied to Tracer, as if set forth fully herein. As to the unique arguments advanced by Tracer, those arguments are addressed below.

**II. ABSENT EXPRESS STATEMENT OF LEGISLATIVE INTENTION OTHERWISE, THE MINOR CHANGES TO IOWA CODE CHAPTER 572 DID NOT ABROGATE THE COMMON LAW PRINCIPLES OF AGENCY, JOINT VENTURE, AND FRAUD RELIED UPON BY THE LIEN CLAIMANTS.**

**A. Error Preservation**

“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). These issues were preserved for appellate review because they were raised by Tracer in its Reply in Support of Motion for Partial Summary Judgment and ruled upon by the District Court in its April 20, 2017, ruling on motions for summary judgment. (Tracer Reply Sppt. MPSJ at 2-3; PMSJ Ruling at 12, 24-26, 40-41)(App. 1550-1551; 1629, 1641-1643, 1657-1658). Tracer timely filed its Notice of Appeal. (Tracer Notice of Appeal 7/28/2017)(App. 1827-1833).

**B. Standard of Review**

The standard of review on a district court’s ruling on a motion for summary judgment is “for correction of errors at law.” *In re Estate of Workman*, 903 N.W.2d 170, 175 (Iowa 2017) (citing *Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep’t of Transp.*, 891 N.W.2d 220, 224 (Iowa

2017)). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3) (2017). A question of fact exists “if reasonable minds can differ on how the issue should be resolved.” *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). The party resisting the motion for summary judgment should be afforded every legitimate inference that can reasonably be deduced from the evidence. *Id.* (citing *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004)).

When the Supreme Court’s “review necessarily calls upon [it] to interpret the scope and meaning of statutory provisions, [its] review is also for correction of errors at law.” *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005) (citing *Norwest Credit, Inc. v. City of Davenport*, 626 N.W.2d 153, 155 (Iowa 2001)). The Supreme Court is “not bound by the trial court’s determinations of law.” *Id.* (internal citations omitted).

### **C. Argument**

Most of Cargill’s Resistance to the various motions for summary judgment before the District Court was devoted to changes made to the Iowa mechanic’s lien statute in 2007 and again in 2012. Pursuing this line of

reasoning, Cargill made the bold claim that the changes ushered in “[t]he removal of agency principles from Chapter 572,” and “eliminate[d] agency principles” in the context of mechanic’s liens. (Cargill’s Resist. MSJ/Cross MSJ 3/15/2017 at 11, 14) (App. 1277, 1279). The problem with this argument is that it is wholly unsubstantiated by either the statute or the law.

First, Cargill relied on a few word changes in the statute to claim it explicitly abrogated the recognized and longstanding principles of general agency law. While this argument was suggestive, Cargill failed to meet the high bar required to make it persuasive. The Iowa Supreme Court requires that “absent express statutory language,” a party seeking to demonstrate that a statute impliedly overrides common law must show that this result is “imperatively required.” *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 88 (Iowa 2014), *cert. denied* 135 S. Ct. 712 (2014). Cargill wholly fell short of this heavy burden.

Second, in arguing that the minor revisions to the statute extinguish the common law concept of agency, Cargill ignored that the statute explicitly retained equitable principles in the definition of “owner,” which is defined as “the legal or **equitable** titleholder of record.” IOWA CODE § 572.1(8) (2017). Whether within the text of the statute or through the lens of applicable law, the revisions to Iowa Code chapter 572 simply do not support Cargill’s



arguments, which should have been discarded by the District Court. As such, the District Court's decision must be reversed on this issue and this case remanded for the District Court to determine whether the principles of agency retained under Iowa Code section 572.1 and related sections support the lienholders' lien against the real estate owned by Cargill.

**III. EVEN IF THE DISTRICT COURT'S RULING THAT THE AMENDMENTS TO CHAPTER 572 ABROGATED THE ESTABLISHED COMMON LAW OF AGENCY, THE LIEN CLAIMANTS' LIENS WOULD STILL ATTACH TO THE LEASEHOLD INTEREST IN THE SUBJECT PROPERTY AND THE DISTRICT COURT WOULD HAVE AUTHORITY TO ORDER A SEPARATE SALE FOR THE IMPROVEMENTS AND THE LAND.**

**A. Error Preservation**

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). These issues were preserved for appellate review because they were first raised by Winger in its Brief in Support of Motion for Partial Summary Judgment, filed February 8, 2017, which brief was joined by Tracer in its Joinder of February 13, 2017. (Winger PMSJ Brief 2/8/2017 at 6, 33; Tracer Joinder in Winger PMSJ at 1)(App. 964, 991; 995). These issues were also raised by Tracer in its Reply in Support of Motion for Partial Summary

Judgment and ruled upon by the District Court in its PMSJ Ruling. (Tracer Reply Sppt. MPSJ at 2-3; PMSJ Ruling at 12, 24-26, 40-41)(App. 1550-1551; 1629, 1641-1643, 1657-1658). Finally, they were also raised in Tracer's Motion to Reconsider the SJ Ruling and ruled on by the District Court in its Combined Ruling on Winger Contracting Company's, et al., Motion to Reconsider of June 30, 2017 ("Combined Ruling"). (Tracer Mot. Reconsider 5/22/2017; Tracer's Reply to Resist. Mot. Reconsider 6/16/2017; Combined Ruling at 16-17, 26) (App. 1705-1708; 1768-1771; 1796-1797, 1806). Tracer timely filed its Notice of Appeal. (Tracer Notice of Appeal 7/28/2017)(App. 1827-1833).

### **B. Standard of Review**

As with Brief Point II, and as set forth in section II.B. above, the standard of review on a district court's ruling on a motion for summary judgment is for correction of errors at law. The authorities and principles set forth in Section II.B., and related to the standard of review are incorporated herein for the sake of avoiding repetition.

### **C. Argument**

As Cargill conceded before the District Court, even if the District Court's decision that the mechanic's lien statute was amended to abrogate the recognized common law doctrine of agency, it was error to ignore that the lien

claimants' liens still attached to the leasehold. This is clearly provided for in the statute and settled holdings of the Iowa Supreme Court. *Coen & Conway v. Scott Cnty. Sav. Bank*, 218 N.W. 325, 328 (1928). ("The plaintiff acquired a mechanic's lien against such leasehold for the improvements thereon, subject, however, to the rights of the lessor.").

Specifically, Iowa Code section 572.6 provides the following:

**572.6 In case of leasehold interest.** When the interest of such person is only a leasehold, the forfeiture of the lease for the nonpayment of rent, or for noncompliance with any of the other conditions therein, shall not forfeit or impair the mechanic's lien upon such building or improvement; but the same may be sold to satisfy such lien, and removed by the purchaser within thirty days after the sale thereof.

IOWA CODE § 572.6 (2017). Pursuant to this section, Iowa law provides that the lien claimants' interest in the lien would permit its purchaser at sheriff's sale to remove the improvements from the real estate. *See, e.g., Lane-Moore Lumber Co. v. Koppenburg*, 215 N.W. 637 (Iowa 1927).

This comported with the undisputed facts in the record before the District Court in its Rulings. In Cargill's Statement of Additional Facts, ¶ 10, it stated:

10. Under the Lease Agreement, Cargill granted HFCA a leasehold interest in the Land for a term of 50 years in exchange for \$12,000 in annual rent. All other amounts HFCA was required to pay Cargill under the Lease as rent were for reimbursement of costs actually incurred by Cargill for things

such as property taxes and security services. HFCA, **as the fee owner of the Improvements and the Facility**, was not granted a leasehold interest in the Improvements and Facility by Cargill and was not required to pay, and did not pay, rent for the Improvements or Facility. DUF, ¶¶ 1-9.

(Cargill's Stmt. Add'l Facts in Resp. Winger's MPSJ 3/15/2017 at ¶ 10) (App 1309-1310). The District Court's Combined Ruling was error when it ruled that Iowa Code sections 572.6 and 572.21 (discussed more fully below) did not impact the priority of the lien claimant's interests vis-à-vis Cargill's interest in the real estate. (Combined Ruling at 16) (App. 1633).

Specifically, the District Court should have held that, even if Cargill's "leasehold mortgage" was superior to the lienholders' lien rights, Iowa law under the statute provides the lienholders' would be permitted to maintain their foreclosure action against and on the improvements to the leasehold, to be sold at Sheriff's sale.

Even though the District Court ignored the impact of section 572.6, Iowa law still permitted the Court discretion to reach a similar result pursuant to Iowa Code section 572.21(1):

In the foreclosure of a mechanic's lien when there is a superior lien, encumbrance, or mortgage upon the land the following regulations shall govern:

**1. Lien on original and independent building or improvement.** If such material was furnished or labor performed in the construction of an original and independent building or improvement commenced after the attaching or

execution of such superior lien, encumbrance, or mortgage, the court may, in its discretion, order such building or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix. If the court shall find that such building or improvement should not be sold separately, it shall take an account of and ascertain the separate values of the land, and the building or improvement, and order the whole sold, and distribute the proceeds of such sale so as to secure to the superior lien, encumbrance, or mortgage priority upon the land, and to the mechanic's lien priority upon the building or improvement.

*Id.* In its Combined Ruling, the District Court ruled that Iowa Code section 572.21(1) had “no effect on priority, but merely provides a mechanism for foreclosing on a lien in an independent building when there is a superior lien in the underlying land. (Combined Ruling at 17)(App. 1634). The District Court took a reductionist approach to Section 572.21(1), stating it only applies “when one party has a superior lien in the land and a different party has a superior interest in the independent building or improvement.” (Combined Ruling at 17)(App. 1634). The plain language of the statute does not support this result. By applying the statute this way, the District Court ignored the inherent balancing of the equities inherent in the mechanic's lien statute under these circumstances.

As additional support, the District Court reasoned that section 572.21 only applies “[i]n the foreclosure of a mechanic's lien when there is a superior lien, encumbrance, or mortgage upon the land...” IOWA CODE § 572.21

(2017). (Combined Ruling at17) (App. 1634). The District Court reasoned that there was “no evidence of any liens on Cargill’s fee interest in the land.” IOWA CODE § 572.21(1) (2017). Holding that, because Cargill’s mortgage lien extended to the HFCA Facility and HFCA’s leasehold interest in the land, the District Court ruled the statute does not permit the lienholders’ lien to attach to the fixtures, equipment, and facilities located on the real estate owned by Cargill. *Id.*

There are two defects in the District Court’s analysis. First, the language of this section is broader than the District Court recognized insofar as it applies “when there is a superior lien, encumbrance, or mortgage upon the land.” IOWA CODE § 572.21(1) (2017). The section doesn’t state that two separate parties are required, as the District Court ruled. Secondly, the section does not distinguish between or among mortgages (whether on a lease or a fee interest in real estate) or among other types of encumbrances (“encumbrance” itself being a term broad enough to include a “claim” or “liability” against the real estate).

Thus, Tracer submits, whether Cargill is the primary mortgage lender for construction of improvements on the real estate or, as here, the assignee of said lender, Cargill still has a “superior lien, encumbrance, or mortgage on the land.” The sections identified above **explicitly recognize** the situation

created by the District Court's ruling here – namely mechanic's lienholders whose lien is subordinate to a mortgage. The statute does not turn, as the District Court ruled, on whether the primary mortgage holder and lessee are the same or different parties, but rather on whether the work by the lienholder was performed “**after** the attaching or execution of such superior lien, encumbrance, or mortgage.” IOWA CODE § 572.21(1) (2017).

Accordingly, Tracer respectfully requests that the District Court's decision on this issue must be reversed and this case remanded for the District Court to determine to permit the principles of agency retained under Iowa Code section 572.1 and related sections support the lienholders' lien against the real estate owned by Cargill by either (a) finding that the lien attaches to the leasehold pursuant to Iowa Code section 572.6 or, (b) in the alternative, that the improvements be sold separately under execution at the conclusion of the foreclosure.

**IV. THE DISTRICT COURT ERRED WHEN IT RULED PREMATURELY AND BEYOND THE SCOPE OF THE CASE MANAGEMENT ORDER THAT NO PARTY HAD SUBMITTED THE ISSUE OF WHETHER IT “OTHERWISE IMPROVED” THE REAL ESTATE PURSUANT TO IOWA CODE SECTION 572.2(1).**

**A. Error Preservation**

“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). These issues were preserved for appellate review because they were first raised by Winger in its Brief in Support of Motion for Partial Summary Judgment, filed February 8, 2017, which brief was joined by Tracer in its Joinder of February 13, 2017. (Winger PMSJ Brief 2/8/2017 at 6, 26-35; Tracer Joinder in Winger PMSJ at 1)(App. 961, 984-993; 995). These issues were also raised by Tracer in its Reply in Support of Motion for Partial Summary Judgment and ruled upon by the District Court in its PMSJ Ruling. (Tracer Reply Sppt. MPSJ at 3; PMSJ Ruling at 3-4, 14-17, 24, 26-34, 40-41)(App. 1551; 1620-1621, 1631-1634, 1641, 1643-1651, 1657-1658). Finally, they were also raised in Tracer’s Motion to Reconsider the PMSJ Ruling, including its reply, and ruled on by the District Court in its Combined Ruling. (Tracer Mot. Reconsider 5/22/2017; Tracer’s Reply to Resist. Mot.



Reconsider 6/16/2017; Combined Ruling at 13-17, 25-26)(App. 1705-1708; 1768-1771; 1793-1797; 1805-1806). Tracer timely filed its Notice of Appeal. (Tracer Notice of Appeal 7/28/2017)(App. 1827-1833).

## **B. Standard of Review**

As with Brief Point II, and as set forth in Section II.B. above, the standard of review on a district court's ruling on a motion for summary judgment is for correction of errors at law. The authorities and principles set forth in Section II.B., and related to the standard of review and incorporated herein for the sake of avoiding repetition.

## **C. Argument**

The District Court ruled that no lienholder was entitled to claim they “otherwise improved the land” pursuant to Iowa Code section 572.2 in part, because no lienholder asserted or provided record evidence of, the specific improvements they made, under Iowa Rule of Civil Procedure 1.981(8). (Combined Ruling at 5, 10-11)(App. 1785, 1790-1791). Tracer submits that this holding was in error and in plain derogation of the Case Management Order for this matter, which provided the following:

(a) Form of Issue Submission: Prior to thirty days hereafter, the parties will meet and confer on the most expeditious and inexpensive manner by which to place **the issue of the priority or superiority of any security interest or mortgage held by Cargill, Inc. in relation to the rights**

**granted the mechanics lienholders by Iowa Code Chapter 572.** Winger shall be responsible for facilitating the meeting. Likewise, Winger will take the lead to place the issue before the court and each party may either join therein or proceed independently. That submission should be filed thirty days from this order.

(b) Limited Discovery: Counsel for plaintiffs Winger and Tracer, in consultation with counsel for all lienholders, **will conduct discovery limited to the facts surrounding the collateral held by Cargill originating from US Bank's Security Agreement and line of credit with HFCA, the contractual relationship between Cargill and HFCA, and the contractual relationship between HFCA and US Bank to provide an evidentiary basis for a motion for summary judgment regarding the primary and superiority of the rights granted the mechanics lienholders by Iowa Code Chapter 572 in relation to the security interest or mortgage assigned to Cargill, Inc. by US Bank.**

(c) Motion for Partial Summary Judgment: By February 15, 2017, counsel for Winger and Tracer, in consultation with counsel for all lienholders will prepare and move for partial summary judgment on **the issue of the priority of the parties mechanics liens in relation to the collateral held by Cargill as described above.** Notwithstanding the above, each party may, at its option, file a separate motion for summary judgment.

(CMO 9/12/2016 at 2-3) (App. 681-682) (emphasis added). The District Court's Combined Ruling, insofar as it noted a lack of record "evidence" or specific "facts" that the parties failed to raise puts the cart before the horse. Under the clear strictures of the case management order above, the parties were briefing a very limited legal issue under a very limited scope of discovery. Under the scope of that legal issue and the discovery, the parties were not yet in a position to identify matters that were beyond: (a) the subject

of the legal issue set forth above and (b) the subject of permissible discovery about said issue. In abiding by the phased case management order, the parties were not in a position at that state to possess the information the District Court ruled was lacking to support this claim.

Regardless, Tracer had presented evidence as part of the proceedings before the District Court that supported its claim for damages based on its mechanic's lien filing. Tracer's evidence of its mechanic's lien was first presented as Exhibit 2 to its Petition to Foreclose Mechanic's Lien. (Tracer Petition – Ex. 2)(App. 42-65). In addition, Tracer submitted its mechanic's lien as an exhibit to its Application to Intervene (in EQEQ009184). (Tracer Mot. Intervene – Ex. 1)(App. 423-446). Then, in the context of the motions for summary judgment filings, Tracer filed its Joinder in Winger's Motion for Partial Summary Judgment and again set forth the amounts due under its mechanic's lien and attached its mechanic's lien as an exhibit. (Tracer's Joinder in Winger's PMSJ ¶4 & Ex. 1)(App. 997, 999-1022). Tracer specifically set forth that it was due the principal sum of \$1,170,017.50 along with interest, costs, and attorney fees. (Tracer's Joinder in Winger's PMSJ ¶4)(App. 997).

Accordingly, Tracer maintains that the District Court's decision that the parties failed to submit the issue of whether they "otherwise improved" the

real estate pursuant to Iowa Code section 572.2(1) was premature and beyond the scope of the Case Management Order. Since Tracer had submitted its mechanic's lien claim to the District Court, the District Court erred when it decided all the parties had failed to submit the issue. Tracer requests that the District Court's ruling on this issue be reversed and this case remanded for the District Court to on the issues presented on this appeal.

### **CONCLUSION**

HFCA and Cargill carefully and with much forethought drafted a comprehensive network of master agreements, side agreements, and side-agreements-to-those-side-agreements to govern their business relationship, which was expected to continue for at least ten years. The venture was carried out for the mutual benefit of both HFCA and Cargill and memorialized under the cloak of private arrangements. While the various transactional documents were careful to disclaim principles of "partnership" and "joint venture," they show a clear and complex effort to jointly build a very expensive and complicated facility.

Moreover, the District Court's ruling relies on the apparent perspective that the myriad business arrangements were all a matter of public record. By so holding, the District Court ruled that this form of "notice" was somehow sufficient to put the lienholders on notice of the complicated sequence of put

arrangements, assignable mortgage, and various interconnected business arrangements by which Cargill could pull a newly installed facility completely out of reach of the hands that built it.

Tracer maintains that Iowa law does not support such a result. Instead, Tracer maintains that the minor amendments to Iowa Code chapter 572 did not abrogate the common law principles of agency, joint venture, and fraud relied upon by the lien claimants at the District Court level. Further, the District Court's "alternative basis" in ruling that the facts were insufficient to support a finding that principles of agency, joint venture, and fraud applied is simply not carried out by the record. Tracer maintains that this finding should be reversed.

Next, Tracer maintains that, even if the appellate court affirms on the principle that minor amendments to Iowa Code chapter 572 abrogated established common law principles of agency, the Mechanic's Lienholders liens, including the Appellant Lienholders' liens, would still attach to the leasehold interest in the subject property, and the District Court would be authorized to order a separate sale for the improvements to the real estate and give the lienholders some relief.

Finally, given the clear restrictions set forth in the Case Management Order, Tracer maintains that the District Court erred when it ruled prematurely

and beyond the scope of the case management order that no party had submitted the issue of whether it “otherwise improved” the real estate under Iowa Code section 572.2(1). Because the parties had not waded into the substantive issue of the nature of the work performed, hadn’t conducted discovery on the issue, and were not prepared to submit it to the District Court for summary judgment ruling, Tracer maintains that the ruling on this issue was premature, and the District Court’s ruling on this issue should be vacated with instructions on remand consistent with the issues presented in this appeal. At a minimum, the District Court ruling should be reversed and remanded to the extent Tracer did submit to the District Court evidence of its improvements.

Tracer joins in the conclusion set forth in the Appellate Brief and Argument filed by Winger.

### **REQUEST FOR ORAL ARGUMENT**

Counsel for Tracer respectfully requests to be heard in oral argument upon the submission of this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Tracer Construction, LLC – Appellant Proof Brief was served upon the attorneys of record on this appeal by uploading one copy via EDMS on this 29th day of August, pursuant to Iowa R. App. P. 6.901(8).

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### **CERTIFICATE OF FILING**

The undersigned hereby certifies that the foregoing Tracer Construction, LLC – Appellant Proof Brief was filed with the Iowa Supreme Court by uploading one copy via EDMS on this April 16, 2018, pursuant to Iowa R. App. P.; 6.901(8).

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The undersigned hereby certifies that the cost of printing the foregoing Appellant's Brief is \$ NA.

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