IN THE SUPREME COURT OF IOWA

NO. 19-1302

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MIDWESTONE BANK,

Plaintiff/Counterclaim Defendant/Appellee,

v.

HEARTLAND CO-OP,

Defendant/Counterclaimant/Appellant.

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**APPEAL FROM THE DISTRICT COURT FOR STORY COUNTY**

**THE HONORABLE ANGELA L. DOYLE**

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# AMICUS CURIAE BRIEF OF THE IOWA BANKERS ASSOCIATION

# IN SUPPORT OF MIDWESTONE BANK

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## TABLE OF CONTENTS

**PAGE**

TABLE OF AUTHORITIES .....3

IDENTITY AND INTEREST OF AMICUS CURIAE ..... ..5

RULE 6.906(4)(D) STATEMENT OF AUTHORSHIP .....5

ARGUMENT

I. UNJUST ENRICHMENT IS NOT A PROPER EQUITABLE REMEDY WHEN OTHER REMEDIES AT LAW ARE AVAILABLE. .....6

II. THE TREATMENT AND PRIORITY OF CREDITORS IS WELL ESTABLISHED ACCORDING TO THE IOWA UNIFORM COMMERCIAL CODE. .....9

III. A DECISION ALLOWING AN UNSECURED CREDITOR TO PREVAIL OVER A PRIOR PERFECTED SECURITY INTEREST WOULD HAVE FAR REACHING NEGATIVE IMPLICATIONS FOR AGRICULTURAL LENDING IN IOWA. ..... 15

CONCLUSION..... 18

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE VOLUME LIMITATION..... 19

PROOF OF SERVICE AND CERTIFICATE OF FILING..... 20

## TABLE OF AUTHORITIES

**PAGE**

**Cases**

*CMI Roadbuilding, Inc. v. Iowa Parts Inc.*, 920 F.3d 560, 566 (8th Cir. 2019) .....8
*Daniels-Sheridan Fed. Credit Union v. Bellanger*, 36 P.3d 397, 404 (Mont. 2001) ..... 13
*First State Bank v. Shirley Ag Services*, Inc., 417 N.W.2d 448 (Iowa 1987) ..... 12
*Iowa Network Services, Inc. v. Qwest Corp*., 385 F.Supp.2d 850, 905 (S.D. Iowa 2005); *aff'd* 461 F.3d 1091 (8th Cir. 2006). ..... 14
*Iowa Waste Systems v. Buchannan County*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000) .....8
*Lakeside Feeders, Inc. v. Producers Livestock Marketing Assn*, 666 F.3d 1099, 1113 (8th Cir. 2012) ……8
*Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011) ..... 17
*Peerless Packing Co. v. Malone & Hyde, Inc.*, 376 S.E.2d 161, 164 (W.Va. 1988) ..... 13
*Production Credit Ass'n of Midlands v. Farm & Town Industries, Inc.*, 518 N.W.2d 339, 346 (Iowa 1994) ..... 12
*State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001) .....7
*Union Pacific R. Co. v. Cedar Rapids & Iowa City R. Co.*, 477 F. Supp. 2d 980, 1003 (N.D. Iowa 2007) .....8

**Statutes**

Iowa Code § 537.1301(16) .....9
Iowa Code § 554.1102 ..... 13
Iowa Code § 554.1103 ..... 12, 13
Iowa Code § 554.1103(2) ..... 13
Iowa Code § 554.1201(2)(i) ..... 12
Iowa Code § 554.7209 ..... 8, 9, 10, 11, 13, 14, 17
Iowa Code § 554.7209(3) .....8
Iowa Code § 554.7210 ..... 10, 11
Iowa Code § 554.9102(1)(e) ..... 17

**PAGE**

Iowa Code § 554.9315(1) ..... 12
Iowa Code § 554.9333 ..... 10, 14, 17
Iowa Code Chapter 570 .....9
Iowa Code Chapter 570A .....9
Iowa Code Chapter 571 .....9
Iowa Code Chapter 579A ..... 9, 10
Iowa Code Chapter 579B ..... 10
Iowa Code Chapter 581 ..... 9, 11
NE Code § 9-320(f) ..... 16
Nebraska Laws 1999, LB 550 § 113 ..... 16

**Other Authorities**

Division IX, SSB 1251, 2019 Iowa Legislative Session .....9
Jacob Bunge and Kirk Maltais, *Farmers in Crisis Turn to High-Interest Loans as Banks Pull Back,* The Wall Street Journal (Nov. 10, 2019)..... 16
*The New Article 9, Uniform Commercial Code, 2nd Edition,* THE AMERICAN BAR ASSOCIATION, p. 20 (2000). .....9
*UCC 2007 Edition (Official Text with Comments),* THE AMERICAN LAW INSTITUTE (2007).....9

**Rules**

Iowa R. App. P. 6.906(4)(d) .....5

## IDENTITY AND INTEREST OF AMICUS CURIAE

The Iowa Bankers Association ("IBA") was established in 1887 and its primary purpose is to support the banking industry in Iowa, in large part by advocating the industry's public policy initiatives through the legal system, the Iowa Legislature and Congress. IBA is the largest financial trade association in Iowa representing nearly 300 state and federally chartered financial institutions across the state.

This amicus curiae brief submitted by the IBA will discuss the interplay between the alleged "longstanding industry practice" of offsetting drying and storage charges against future grain sales, as argued by the grain drying and storage industry, and existing commercial law in Iowa which is well founded in both statutory and judicial decisions.

IBA submits this amicus brief as the decision by this Court could have a profound impact on the delivery, availability and cost of agricultural credit, particularly to Iowa producers who need commercial grain drying and storage services.

## RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP

Pursuant to Iowa R. App. P. 6.906(4)(d), the undersigned counsel of the Iowa Bankers Association and the Davis Brown Law Firm authored this brief in whole. No party, party's counsel or other person outside of the Iowa

Bankers Association contributed money to fund the preparation or submission of this brief.

## ARGUMENT

### I. UNJUST ENRICHMENT IS NOT A PROPER EQUITABLE REMEDY WHEN OTHER REMEDIES AT LAW ARE AVAILABLE.

As stated by the parties to this action along with amicus Iowa Institute of Cooperatives ("IIC") and Agriculture Legal Defense Fund ("ALDF"), Justin and Ashley Harker (the "Harkers") were in the business of commercial production of corn and soybeans, and were farm operating customers of MidWestOne Bank ("Bank"). The Bank held a prior perfected security interest on the grain (and proceeds of said grain) produced by the Harkers, where they used Heartland Co-op ("Heartland") for commercial drying and storage services.

The Bank commenced this action for conversion in March of 2018 for $79,895.68 in damages for the drying and storage charges over a four-year period from 2014-2017, plus attorney fees and court costs. On May 31, 2019, the Story County District Court ruled in favor of and granted the Bank's motion for summary judgment on the conversion action and denied Heartland's motion for summary judgment on the affirmative defenses of

unjust enrichment, waiver, bailment lien, quantum meruit, course of dealing, usage of trade, statute of limitations and equitable setoff.

In this appeal, Heartland contends the Bank was "unjustly enriched" as Heartland's services "increased the grain's value for the benefit of the Bank." (Heartland Brief p. 31). Heartland cites that unjust enrichment exists when (1) one party is enriched, (2) at the expense of the other, and (3) it would be unjust, under the circumstances, for the enriched party to retain the benefit. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001). Within the context of this claim, Heartland and both amicus parties in support of Heartland argue that the offset of these costs by grain buyers is an "industry-wide practice" and the Bank was on constructive notice and should have known Heartland would offset these costs. (Heartland Brief p. 33). Both amicus parties also cite a significant amount of secondary authority on the value of grain drying and storage services. (ALDF Brief pp. 9-12, IIC Brief pp. 11-14).

IBA agrees with Heartland, IIC and ALDF that drying and storage services provide value important to the secured creditor community. The same can be said for veterinarians and custom cattle feedlot owners who care for livestock and agricultural supply dealers who provide feed for livestock and crop inputs such as fertilizer and chemicals. Unjust enrichment however is a

proper remedy only when "there is no at-law remedy that can appropriately address the claim." *Iowa Waste Systems v. Buchannan County*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000). See also, *CMI Roadbuilding, Inc. v. Iowa Parts Inc.*, 920 F.3d 560, 566 (8th Cir. 2019), *Union Pacific R. Co. v. Cedar Rapids & Iowa City R. Co.*, 477 F. Supp. 2d 980, 1003 (N.D. Iowa 2007).

Heartland's at-law remedy in this case was the existing warehouse lien set forth in Iowa Code § 554.7209 (2019) entitled "Lien of warehouse" ("Warehouse Lien"). Heartland was free to avail itself of the priority protections of this lien for drying and storage costs, but it failed to do so.[1] Unjust enrichment generally fails as an equitable remedy when claimants fail "to take steps to legally protect itself by way of a lien." *Lakeside Feeders, Inc. v. Producers Livestock Marketing Assn*, 666 F.3d 1099, 1113 (8th Cir. 2012).

[1] Although the defense of a Warehouse Lien was waived by Heartland in the District Court as it was not plead as an affirmative defense, the District Court discussed the issue in its opinion and ruled in favor of the Bank as Heartland did not show evidence of a properly completed warehouse receipt or other storage agreement, or any evidence that such a lien was superior to the Bank's existing prior perfected security interest. If Heartland could have shown evidence the Bank gave the Harkers actual or apparent authority to store the grain within the requirements of Iowa Code § 554.7209(3), Heartland would have likely prevailed on the attachment and priority of such lien.

Therefore, the District Court's summary judgment ruling in favor of the Bank on the issue of unjust enrichment should be affirmed.[2]

## II. THE TREATMENT AND PRIORITY OF CREDITORS IS WELL ESTABLISHED ACCORDING TO THE IOWA UNIFORM COMMERCIAL CODE.

"Credit" under Iowa law has been defined to defer payment of debt….or to purchase property or services and defer payment therefore. Iowa Code § 537.1301(16) (2019). The Iowa Uniform Commercial Code ("IUCC") is set out in Chapter 554 of the Iowa Code in thirteen (13) Articles. Article 9 of the IUCC governs secured transactions where security interests are taken in personal property and has been part of Iowa commercial law for over 50 years. *UCC 2007 Edition (Official Text with Comments)*, The American Law Institute (2007). Article 9 of the IUCC also includes agricultural liens and possessory liens within its coverage.[3] *The New Article 9, Uniform*

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[2] Various grain buyer trade associations, including IIC and ALDF, were concerned with the tenuous reliance on equitable remedies for such liens in future situations and such associations went to great efforts at the end of the 2019 Iowa Legislative Session to overhaul Iowa Code § 554.7209 and give grain warehouses an "automatic" priority lien "notwithstanding" many of the procedural requirements under existing law. See Division IX of SSB 1251 that passed by the Senate Appropriations Committee, but was taken out later in the Session pending the outcome of this lawsuit.

[3] Article 9 of the IUCC was substantially revised by the Iowa Legislature in 2001 to include agricultural liens, such as the Agricultural Supply Dealer Lien in Ch. 570A, Landlord's Lien in Ch. 570, Harvester's Lien in Ch. 571,

*Commercial Code, 2nd Edition*, The American Bar Association, p. 20 (2000); Iowa Code 554.9333 (2019). As stated in Argument I above, Article 7 of the IUCC, specifically §§ 554.7209 and 554.7210, sets out how a grain warehouse obtains and enforces a possessory Warehouse Lien.

Under the current IUCC, whether you are a bank loaning operating money to a grain operation, a custom cattle feeder deferring yardage fee payments to a cattle owner, a veterinarian billing a swine producer for treating feeder pigs, or a grain buyer deferring payment on open account for grain drying and storage charges – in all cases you are considered a "creditor" according to the perfection and priority rules of the IUCC. See Iowa Code § 554.9333[4]; Iowa Code Chapter 579A (Custom Cattle Feedlot Lien); Iowa

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Veterinarian's Lien in Ch. 581, Custom Cattle Feedlot Lien in Ch. 579A, and Commodity Production Contract Lien in Ch. 579B. Agricultural liens were added by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in the 2001 revision to bring greater certainty and transparency to financing transactions by requiring all who "extend credit" to comply with the same notice system of perfection as any other security interest holder. Possessory lienholders (such as grain buyers commercially storing grain for producers for subsequent sale) have consistently been covered through application of Iowa Code § 554.9333 of the IUCC.

[4] A "possessory lien" means an interest…(a) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business; (b) which is created by statute or rule of law in favor of the person; and (c) whose effectiveness depends on the person's possession of the goods. Official Comment #2 to this section states "this section provides a rule of interpretation

Code Chapter 581 (Veterinarian's Lien); Iowa Code § 554.7209 (Warehouse Lien).

All of these potential lien claimants "add value" to the Bank's collateral, but they must comply with the "at-law" provisions of their respective agricultural lien and possessory lien statutes, which in most cases give these parties a priority lien over an existing security interest such as the Bank in this case. A ruling allowing "unjust enrichment" to prevail just because Heartland chose not to comply with the existing Warehouse Lien statute would not only frustrate the purpose of the IUCC, but would also reject over 50 years of consistent Iowa case law governing the orderly treatment of lien rights among security interest holders and other lien claimants and contravene decades of legislative intent as to why all of these agricultural lien and possessory lien statutes were enacted. Grain buyers who properly comply with the existing Warehouse Lien law also have enforcement rights in Iowa Code § 554.7210 and need not resort to dumping grain in the producer's driveway for failure to pay or transport the grain to the lender's parking lot as suggested by IIC. (IIC Brief p. 18).

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that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate."

Grain buyers are also not considered "buyers in the ordinary course of business" within the IUCC for transfers to satisfy an antecedent debt. Iowa Code 554.1201(2)(i) (2019). See also *First State Bank v. Shirley Ag Services, Inc.*, 417 N.W.2d 448 (Iowa 1987). If grain buyers were granted buyer in the ordinary course status for offsets of grain drying and storage charges against sale proceeds, the potential would exist "for an unsecured creditor, or a creditor with a lesser priority…to bootstrap himself into priority over a creditor with an otherwise superior security interest." *Id.* at *455*. The Iowa Supreme Court has consistently held buyer in the ordinary course status extends only to those giving new value in exchange for collateral and does not include transfers to the extent they are in satisfaction of an antecedent debt. *Production Credit Ass'n of Midlands v. Farm & Town Industries, Inc.*, 518 N.W.2d 339, 346 (Iowa 1994). As such, in this case, the Bank should prevail as its security interest in the Harkers' crops properly attached to the identifiable proceeds that were offset by Heartland. (App. 436), Iowa Code § 554.9315(1)(a) and (b) (2019).

Heartland and both amicus parties in support of Heartland also misconstrue the general IUCC provision in Iowa Code § 554.1103 for the proposition of allowing the claim of unjust enrichment to go forward as "this chapter must be liberally construed and applied to promote its underlying

purposes and policies which are: …2. *Unless displaced by the particular provisions of this chapter* [554], the principles of law and equity…[shall] supplement its provisions." Iowa Code 554.1103 (2019) (*emphasis added)*; Heartland Brief p. 26; IIC Brief p. 20; ALDF Brief p. 16.

The equitable theory of unjust enrichment clearly *has* been displaced by the Warehouse Lien statute included in Article 7 of Chapter 554, specifically in Iowa Code § 554.7209, as the phrase "unless displaced by the particular provisions of this chapter" in Iowa Code § 554.1103(2) is not limited to provisions *within Article 9* as set forth by Heartland. (*emphasis added*; Heartland Brief p. 26).[5] "The purpose and effectiveness of the UCC would be substantially impaired if interests created in compliance with UCC procedure could be defeated by application of the equitable doctrine of unjust enrichment." (App. 448; *Peerless Packing Co. v. Malone & Hyde, Inc.*, 376 S.E.2d 161, 164 (W.Va. 1988); *Daniels-Sheridan Fed. Credit Union v. Bellanger*, 36 P.3d 397, 404 (Mont. 2001). The same rule of law also applies in the federal or state regulatory scheme as "it is well-settled that a claim for unjust enrichment must be dismissed if applicable federal or state regulation

[5] The scope of the "General Provisions" of Article 1 of the IUCC applies to all of the thirteen (13) Articles included in Iowa Code Chapter 554. Iowa Code § 554.1102.

provides a compensation mechanism to the plaintiff." *Iowa Network Services, Inc. v. Qwest Corp*., 385 F.Supp.2d 850, 905 (S.D. Iowa 2005); *aff'd* 461 F.3d 1091 (8th Cir. 2006).

Heartland's at law remedy in this action is set out in the provision of the Warehouse Lien in Iowa Code § 554.7209 within Article 7 of the IUCC, discussed in footnote 1 in Argument I above. There is adequate legal authority in such cases that unjust enrichment should not be allowed to supplant "at law" remedies as exist in the current Warehouse Lien statute. *Id.*

As a possessory lien, proper compliance with the requirements of this statute would have given Heartland a priority lien over the Bank's prior perfected security interest by application of Iowa Code § 554.9333 (2019) (a possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise). If Heartland finds these requirements under existing law too burdensome and impractical, the resulting course of action would be to ask the Iowa Legislature to amend the statute to match alleged "practices" of offsetting these drying and storage charges against grain sale proceeds as argued by Heartland, ALDF and IIC, rather than argue existing law simply shouldn't apply in this case.

## III. A DECISION ALLOWING AN UNSECURED CREDITOR TO PREVAIL OVER A PRIOR PERFECTED SECURITY INTEREST WOULD HAVE FAR REACHING NEGATIVE IMPLICATIONS FOR AGRICULTURAL LENDING IN IOWA.

The outcome of this case has profound safety and soundness implications for Iowa banks. If an unsecured creditor is permitted to exercise a right of offset for drying and storage charges for an undefined time period over a prior perfected security interest of a lender, such result will significantly increase the risk of operating lending for financial institutions doing business with Iowa grain producers. A decision to overturn the ruling of the District Court, thereby increasing the lending risk, will also have the attention of federal and state financial institution regulatory agencies.

Federal bank regulatory agencies such as the Federal Deposit Insurance Corporation or state bank agencies such as the Iowa Division of Banking will likely require operating lenders for customers needing significant commercial storage to increase risk management practices where these storage costs are incurred as a debt of the producer. Regulators will elevate their scrutiny of these operating loans in bank examinations, forcing financial institutions to either increase risk management practices for such higher risk borrowers or simply quit financing these producers. A decision overturning the District Court in favor of Heartland may be the "tipping point" on risk analysis and

underwriting.[6] This "standard practice" of offsetting these costs, as argued by Heartland, IIC and ALDF, have been carefully considered by other neighboring states as a significant risk for operating lenders in protection of secured collateral.[7]

The application of the equitable doctrine of "unjust enrichment" when at law remedies exist would render much of Article 9 of the IUCC moot, as it would create a pathway for other agricultural lienholders to argue their services or products increase collateral value, so they should also be relieved of compliance with their respective lien statutes. As stated in footnote 3 in Argument I above, these liens have been incorporated into Article 9 of the IUCC in order to provide greater transparency and certainty for financing

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[6] Multiple years of tight cash flows and decreased working capital among Midwestern farm operations are leading to an increase in "alternative unregulated lenders" who provide operating credit at much higher costs to the producer. See, Jacob Bunge and Kirk Maltais, *Farmers in Crisis Turn to High-Interest Loans as Banks Pull Back*, The Wall Street Journal, November 10, 2019.

[7] The policy implications of the alleged "industry wide practice" as argued by Heartland and both amicus parties of offsetting drying and storage charges over a prior perfected lien and its impact on operating financing have been carefully considered by other grain producing states in weighing increased risk to agricultural lenders. In Nebraska, grain buyers are specifically prohibited from this practice under the "Buyer of Goods" provision in subsection (f) of § 9-320 of Article 9 of the Nebraska Uniform Commercial Code ("No buyer shall be allowed to take advantage of and apply the right of offset to defeat a priority established by any lien or security interest.") as passed by Nebraska Laws 1999, LB 550 § 113.

transactions. A decision in favor of Heartland would turn this legislative intent on its ear with increased risk and uncertainty for operating lenders, as well as all other agricultural and possessory lienholders.

If Heartland prevailed in this case, it would severely chill operating lending for grain producers needing commercial drying and storage services, as a major purpose of the IUCC would be eroded if lenders extending operating credit are unable to rely upon their prior perfected security interests. This increased risk would almost certainly be reflected in higher operating interest rates for all producers who do not have drying and storage capabilities and would result in fewer borrowing choices for such producers who present increased risk.

The drafters of the UCC, the NCCUSL, recognized this delicate balance between lenders, suppliers and service providers for farm products when state agricultural lien statutes were brought into Revised Article 9 of the UCC beginning July 1, 2001. Iowa Code § 554.9102(1)(e) (2019). Although the Warehouse Lien in Iowa Code § 554.7209 is a "possessory lien", Iowa Code § 554.9333 and such statutes have been construed liberally by the Iowa Supreme Court to protect agricultural input and service providers. See, *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011). If Heartland wishes to make this existing statute more congruent with alleged industry

wide practices of offsetting these costs against future grain sales, then its recourse lies with the Iowa Legislature.

## CONCLUSION

Both IIC and ALDF, as amicus parties in support of Heartland, argue at the conclusion of their respective briefs that grain buyers provide important services critical to the success of farming operations. IBA does not debate this point. Grain buyers, veterinarians, agricultural supply dealers, custom harvesters and custom cattle feedlot operators also provide important services critical to successful farming operations and all of them enhance collateral value. The existing IUCC however provides a structure for the orderly treatment of security interests, agricultural liens, and possessory lienholders in order to maintain an adequate free flow of commerce within the Iowa agricultural economy. Any changes to this system should be carefully considered by the Iowa Legislature as our elected representatives weigh these competing policy interests. IBA respectfully requests that this Court affirm the decision of the Story County District Court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 3,929 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

*/s/ Julie Johnson McLean*
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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 18, 2019, I presented the foregoing document to the Clerk of Court for the Iowa Supreme Court for filing and uploading into the Iowa Electronic Document Management System, which will send notification of such filing to the appropriate parties electronically.

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