ELECTRONICALLY FILED SEP 23, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 22-0259

BRIAN HORA AND GREGG HORA, AS SHAREHOLDERS OF HORA FARMS, INC. AND AS BENEFICIARIES OF THE CELESTE N. HORA TRUST,
Plaintiffs-Appellants/Cross-Appellees,

vs.

KEITH HORA, INDIVIDUALLY, AS DIRECTOR AND OFFICER OF HORA FARMS, INC., AS A SHAREHOLDER OF HORA FARMS, INC., AND AS TRUSTEE OF THE CELESTE N. HORA TRUST; KURT HORA, HEATHER HORA, HK FARMS, INC., AND HORA FARMS, INC.,
Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WASHINGTON COUNTY
THE HONORABLE SEAN MCPARTLAND,
WASHINGTON COUNTY NO. EQEQ006366

APPELLANTS' FINAL REPLY / CROSS-APPELLEES' FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Are Kurt, as operations manager of Hora Farm, Inc. ("HFI"), his wife Heather, and their business, HK Farms, liable for Kurt breaching his fiduciary duty of loyalty, when Kurt, assisted by Heather, took more than 200,000 bushels of HFI's corn, which was fed to their pigs, and which also caused HFI to pay more than $220,000 of his and HK Farms' expenses?**

Authorities

Abodeely v. Cavras, 221 N.W.2d 494 (Iowa 1974)

Baber v. First Republic Grp., L.L.C., No. C06-3076-MWB, 2008 WL 2356868 (N.D. Iowa June 6, 2008)

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Life Invs. Ins. Co. of Am. v. Est. of Corrado, 838 N.W.2d 640 (Iowa 2013)

Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946)

Matter of Mt. Pleasant Bank & Tr. Co., 455 N.W.2d 680 (Iowa 1990)

Nelson v. Agro Globe Eng'g, Inc., 578 N.W.2d 659 (Iowa 1998)

Outing v. Plum, 235 N.W 559 (Iowa 1931)

Rieff v. Evans, 630 N.W.2d 278 (Iowa 2001)

Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639 (Iowa 1979)

State v. Zacarias, 958 N.W.2d 573 (Iowa 2021)

Iowa R. App. P. 6.903

Iowa R. App. P. 6.904

II. **Is Keith liable for breaching his fiduciary duties of care and loyalty owed to HFI when, as an officer and a director, Keith for years: failed to properly oversee HFI's business; engaged in conflicting interest transactions; failed to deal fairly with HFI; failed to act in good faith with HFI; lacked objectivity in allowing his son Kurt to underreport by more than 200,000 bushels the amount of corn he used in his personal hog business; ignored tax reporting laws; allowed HFI to pay more than $220,000 of Kurt's personal expenses, used HFI's funds to pay more than $190,000 of his own personal expenses; and caused HFI to suffer millions of dollars in**

losses, which resulted in HFI incurring substantial long-term debt to pay for those losses?

Authorities

Bowen v. Kaplan, 237 N.W.2d 799 (Iowa 1976)

Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc., 430 N.W.2d 447 (Iowa 1988)

Heidecker Farms, Inc. v. Heidecker, Case No. 09-1541, 791 N.W.2d 429, 2010 WL 3894199 (Iowa Ct. App. 2010)

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012).

Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52 (Iowa 1983)

Midwest Mgmt. Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984)

Putman v. Walther, 973 N.W.2d 857 (Iowa 2022)

State v. Zacarias, 958 N.W.2d 573 (Iowa 2021)

Iowa R. App. P. 6.904

Iowa Code § 490.830

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Iowa Code § 490.842

III. **Is HFI time barred from recovering damages suffered before August 2012, when no independent director had actual or imputed knowledge of the elements of the claims until 2015?**

Authorities

Des Moines Bank & Tr. Co. v. George M. Bechtel & Co., 51 N.W.2d 174 (Iowa 1952)

Earl v. Clark, 219 N.W.2d 487 (Iowa 1974)

Franzen v. Deere & Co., 334 N.W.2d 730 (Iowa 1983)

*Hart v. Mt Pleasant Park Stock Co.,*66 N.W.2 190 (Iowa 1896)

Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)

Kelly v. Englehart Corp., No. 1-241, 2001 WL 855600 (Iowa Ct. App. 2001)

Rieff v. Evans, 630 N.W.2d 278 (Iowa 2001)

Struve v. Struve, 930 N.W.2d 368 (Iowa 2019)

Iowa R. App. P. 6.903

3A Fletcher Cyc. Corp. § 1306.20

IV. **Should a neutral custodian be appointed for HFI, and should Keith, Kurt, and Heather be prohibited from serving as fiduciaries for HFI and the Celeste N. Hora Trust, which is a shareholder in HFI, when Keith and Kurt have improperly taken HFI's property for themselves, acted fraudulently with respect to**

HFI's tax filings, and failed to exercise reasonable care in management of HFI and administration of the Trust?

Authorities

Bowen v. Kaplan, 237 N.W.2d 799 (Iowa 1976)

Heidecker Farms, Inc. v. Heidecker, Case No. 09-1541, 791 N.W.2d 429, 2010 WL 3894199 (Iowa Ct. App. 2010)

Ney v. Ney, 891 N.W.2d 446, 451 (Iowa 2017)

Schildberg v. Schildberg, 461 N.W.2d 186 (Iowa 1990)

State v. Zacarias, 958 N.W.2d 573 (Iowa 2021)

Iowa Code § 490.748

Iowa Code § 490.809

V. **Should Keith be required to repay the attorney fees and expenses he caused HFI to pay on his behalf for this litigation, without satisfying the requirements of Iowa Code Section 490.853;**
Should HFI pay Gregg and Brian's legal fees and expenses, in the trial court and on appeal, when this proceeding has substantially benefited the corporation and the derivative claims are meritorious?

Authorities

Aubin v. Susi, 149 N.C. App. 320, 326, 560 S.E.2d 875 (N.C. Ct. App. 2002)

Berger v. Amana Soc., 135 N.W.2d 618, 621 (Iowa 1965)

Goche v. WMG, L.C., 970 N.W.2d 860 (Iowa 2022), *reh'g denied* (Mar. 11, 2022)

In re Marriage of Erpelding, 917 N.W.2d 235, 238 (Iowa 2018)

Matter of Guardianship of Radda, 955 N.W.2d 203, 208 (Iowa 2021)

In re Tr. No. T-1 of Trimble, 826 N.W.2d 474, 482 (Iowa 2013)

Iowa Code § 490.746

Iowa Code § 490.853

Iowa Code § 490.854

Iowa Code § 490.858

VI. **Do the doctrines of laches and estoppel by acquiescence provide a defense when: no independent director remained active in the management of the corporation after having knowledge of the claims; no independent director intentionally relinquished any rights; Brian and Gregg filed within the statute of limitation period; there was no unreasonable delay; the timing of the lawsuit is not unfairly prejudicial; Keith, Kurt, Heather, and HK Farms have engaged in misleading**

tactics and concealments; and, allowing these defenses would be contrary to justice?

Authorities

Chadek v. Alberhasky, 111 N.W.2d 297 (Iowa 1961)

Daloisio v. Peninsula Land Co., 127 A.2d 885 (N.J. App. Div. 1956).

Des Moines Bank & Tr. Co. v. George M. Bechtel & Co., 51 N.W.2d 174 (Iowa 1952)

In re Est. of Warrington, 686 N.W.2d 198 (Iowa 2004)

Godfrey v. State, 962 N.W.2d 84 (Iowa 2021)

Holden v. Constr. Mach. Co.,, 202 N.W.2d 348, 356 (Iowa 1972)

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs, 918 N.W.2d 487 (Iowa 2018)

Life Invs. Ins. Co. of Am. v. Est. of Corrado, 838 N.W.2d 640 (Iowa 2013)

Lovlie v. Plumb, 250 N.W.2d 56 (Iowa 1977)

Markey v. Carney, 705 N.W.2d 13 (Iowa 2005)

Moser v. Thorp Sales Corp., 256 N.W.2d 900 (Iowa 1977).

Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639 (Iowa 1979)

Iowa R. App. P. 6.903

VII. **Does the doctrine of unclean hands provide a defense when Brian and Gregg did not engage in any wrongful conduct?**

Authorities

Anita Valley, Inc. v. Bingley, 279 N.W.2d 37 (Iowa 1979)

Benson v. Sawyer, 249 N.W. 424 (1933)

Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc., 178 N.W.2d 343 (Iowa 1970)

Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996)

Matter of Herm's Est., 284 N.W.2d 191 (Iowa 1979)

Midwest Mgmt. Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984)

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002)

Tope on behalf of Peripheral Sols., Inc. v. Greiner, Case No. 15-1571, 912 N.W.2d 499, 2017 WL 6033871 (Iowa Ct. App. 2017)

VIII. **Do Brian and Gregg have derivative standing when they fairly represent the interests of HFI and have commenced and maintained this lawsuit in the interests of HFI and its shareholders?**

Authorities

Betty Andrews Revocable Tr. v. Vrakas/Blum, S.C., 779 N.W.2d 723 (Wisc. Ct. App. 2010).

Bragoni v. Francalangia, 2017 WL 5642275 (Conn. Super. Ct. Oct. 25, 2017)

Brandon v. Brandon Const. Co. Inc., 776 S.W.2d 349, 353 (Ark. 1989).

Cattano v. Bragg, 727 S.E.2d 625 (Va. 2012)

Homan v. Branstad, 864 N.W.2d 321, 327 (Iowa 2015)

Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 787 (Iowa 2021), *as amended* (Aug. 26, 2021), *reh'g denied* (Aug. 26, 2021)

Trondheim Cap. Partners LP v. Life Ins. Co. of Alabama, 2022 WL 893542 (N.D. Ala. Mar. 25, 2022)

Iowa Code § 490.741

Iowa Code § 490.748

13 Fletcher Cyc. Corp. § 5975

13 Fletcher Cyc. Corp. § 5981.42

IX. **Are Keith, Kurt, Heather and HK Farms entitled to fee awards when Keith has not paid any attorney fees, Brian and Gregg have reasonable cause and a proper purpose for commencing and maintaining this proceeding, and justice and equity do not support Keith, Kurt, Heather, and HK Farms' requests?**

Authorities

Berger v. Amana Soc., 135 N.W.2d 618 (Iowa 1965)

Flanagan v. Baltimore & O. Ry. Co., 50 N.W. 60 (Iowa 1891)

Frank v. LoVetere, 2005 WL 3608862 (D. Conn. 2005)

Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363 (Iowa 1969)

Highland Select Equity Fund, L.P. v. Motient Corp., 2007 WL 907650 (Del. Ch. 2007)

Int. of E.H. III, 578 N.W.2d 243, 246 (Iowa 1998)

Kelly v. Englehart Corp., No. 1-241, 2001 WL 855600 (Iowa Ct. App. 2001)

In re Marriage of Erpelding, 917 N.W.2d 235, 238 (Iowa 2018)

Matter of Guardianship of Radda, 955 N.W.2d 203, 208 (Iowa 2021)

Moody v. National Western Life Ins. Co., 634 S.W.3d 256, 284 (Tex. Ct. App. 2021)

Schwartzberg v. CRITEF, 685 A.2d 365 (Del. Ch. 1996)

Swartz v. Ballou, 47 Iowa 188 (Iowa 1877)

In re Tr. No. T-1 of Trimble, 826 N.W.2d 474 (Iowa 2013)

Winner v. Cataldo, 559 So. 2d 696 (Fla. Dist. Ct. App. 1990)

Iowa Code § 490.746

Iowa Code § 633A.4507

ARGUMENT

I. KURT DAMAGED HFI BY BREACHING HIS DUTY OF LOYALTY, FOR WHICH HE, HEATHER, AND HK FARMS ARE JOINTLY LIABLE.

A. Kurt Owes the Burden of Proof.

Kurt owes a fiduciary duty of loyalty, as he has previously admitted. (APP.VOL.I pp.404,492). It is improper for Kurt to criticize Brian and Gregg for "wrap[ping] their theft allegations in a fiduciary duty claim …." (Kurt Brief p.15).[1]

Kurt does not need to be a "real estate broker" or "trustee" or "officer or director" to bear the burden of proof regarding his fiduciary duty. (Kurt Brief pp.14-15). As HFI's operations manager, Kurt's responsibilities include management of corn storage. (Ex.304). Kurt used corn from HFI's inventory for his personal business. (APP.VOL.II pp.85); (APP.VOL.IV p.23); (Ex.213);(Ex.248). These undisputed facts prove Kurt had superior access to the facts and was in a position to take advantage of HFI. Kurt owes the burden of proof. *See Matter of Mt. Pleasant Bank & Tr. Co.*, 455 N.W.2d 680, 685 (Iowa 1990) ("Where a fiduciary is in a position to take advantage over a principal, especially when the fiduciary has closer access

[1] The appellee-cross appellant brief of Kurt, Heather, and HK Farms is referred to herein as Kurt Brief.

to the facts, the burden 'shifts to the fiduciary to show fair dealing in all matters within the fiduciary obligation'").

Kurt's unsupported allegation that Keith had the "same access" to information should be disregarded. *See* Iowa R. App. P. 6.904(4). The allegation is contrary to the evidence. The documents created before 2015 that purport to reflect some of Kurt's usage of HFI's corn are Kurt's settlement sheets. (APP.VOL.III p.188). These documents do not disclose Kurt's taking of 85,000 bushels of HFI's corn, which he admits taking. *Id.* Moreover, Keith did not understand Kurt's settlement sheets. (APP.VOL.II pp.405-406-TR.VOL.IV 82:7-83:2).

B. Kurt Breached His Fiduciary Duty By Wrongfully Taking HFI's Corn.

1. The Corn Kurt Stole Was Not Compensation, and Kurt Was Not Entitled to It.

Kurt and Keith both characterize the corn Kurt took from HFI as compensation by HFI. *See e.g.*(Kurt's Brief p.21); (Keith's Brief pp.21,24).[2] This is contrary to Kurt's written employment agreement, which provides

[2] During this litigation, Keith and Kurt entered into a "common interest agreement." (Keith's Application Ex.C pp.11,18). They and their counsel have conferred regarding issues such as "employee compensation" and "grain accountings and reconciliation." *Id.*

compensation of $34,000. (Ex.304). In addition, if Kurt had truly received HFI's corn as compensation, both HFI and Kurt/HK Farms would have been required to report the corn transactions to the IRS - which they did not do. (Ex.198);(Ex.200-203);(APP.VOL.II p.60). The district court made this point during trial, asking questions regarding the 145,777 figure (labeled "purchased from HFI corn") on page 20 of Exhibit 190:

> THE COURT: Hold on one second. So the 145,777 number represents a running total of total bushels that you purchased from Hora Farms, but it was really just compensation?
> THE WITNESS [KURT HORA]: Yes.
> ….
>
> Q. Kurt, was it compensation to you that you then used in your hog operation?
> A. Yes.
> THE COURT: But this is why I'm having confusion, because if it's compensation to Kurt Hora, then it should show as income to Kurt Hora on some tax documents. If it's compensation to HK Farms, then it should show as compensation -- or income to HK Farms on some tax document. Am I missing something, Mr. Younker?
> MR. YOUNKER: I don't know if the tax treatment is --
> THE COURT: Well, I'm not here to decide a tax thing. I'm just saying that would be the way that a corporation would report it having received some compensation from another corporation.

(APP.VOL.II pp.716,719-TR.VOL.IX 17:21-20:19).

Kurt emphasizes Keith testified at trial that Kurt was worth even more than all of the corn he took from HFI. That testimony stands in stark contrast to what Keith admitted before this litigation. In 2015, Keith admitted that if consultant John McNutt determined Kurt had taken the missing corn, this would make Keith a "terrible manager" and Keith would "seek outside help in managing Hora Farms." (APP.VOL.III p.106). McNutt did advise Keith in 2015 that Kurt had "too sweet of a deal" and Kurt's settle-up method needed to "go to the museum." (APP.VOL.III pp.138); (APP.VOL.II pp.345,347,355,361-363-TR.VOL.III 146:24-148:4;157:16-22;181:11-182:15;189:7-18).

2. No Evidence Justifies Kurt's Taking of HFI's Corn.

a. Exhibits.

Keith suggests the documents "which actually explain what happened to the so-called 'missing corn'" "begin with typed summaries that Keith created from business records." (Keith Brief p.21). The one document Keith cites is Exhibit 60, which shows hundreds of thousands of HFI's unsold bushels of corn. Exhibit 60 does not begin to explain what happened to the missing corn, much less justify Kurt's taking of the corn.

Exhibits 190 and 245 also do not justify Kurt's taking of the missing corn. They are flawed in numerous respects, as discussed in detail in Brian and Gregg's opening brief. (Brian Brief pp.41-47). [3]

Keith and Kurt both contend Exhibit 190 "substantiates" Kurt's taking of 85,000 bushels of corn. It does not. Kurt created Exhibit 190 in 2015, trying to justify his taking of 84,902 bushels at some time from 2008 to 2013. The premise of Exhibit 190 is a "corn debt" of 84,902 bushels allegedly owed from HFI to Kurt created from 2001 to 2008. (APP.VOL.II pp.732-733,756,804-806-TR.VOL.IX 33:16-34:14;58:10-19;129:24-131:4). There is no evidence HFI ever "borrowed" any corn from Kurt; and HFI had no reason to borrow corn. (Brian and Gregg's Brief pp.43-46); (APP.VOL.III pp.240-241);(APP.VOL.II pp.807-811-TR.VOL.IX 132:7-136:2);(APP.VOL.II pp.411-412-TR.VOL.IV 89:20-90:7);(APP.VOL.II. pp.805-806-TR.VOL.IX 130:19-131:8). And, significantly, Kurt did not have 84,902 bushels to "lend." *Id.*

Nor does Exhibit 245 justify Kurt's taking of HFI's corn. Exhibit 245 assumes Kurt was entitled to take 84,902 bushels under a "corn debt" theory that is illogical and unsupported. Exhibit 245 is flawed in additional respects. It attributes 55,629 bushels as lost to grain cleaning and 40,108

[3] Brian and Gregg's appellant brief is referred to herein as "Brian Brief."

bushels as lost to monitor error, which are unrealistically high. (Exhibit 245 p.2);(APP.VOL.IV p.129);(APP.VOL.II pp.386-387-TR.VOL.IV 56:10-57:4);(APP.VOL.II p.815-TR.VOL.IX 140:4-7). It is wrong for Keith to suggest these figures are based on Kurt's "separate farm accounting information" (Keith's Brief p.22); the figures are simply Kurt's math. Kurt has not offered any documentation supporting these figures. Moreover, even if damaged corn or monitor error had caused HFI to "overstate[] its yields" (Keith Brief p.22), the same would have been true of Kurt's yields and, therefore, have caused Kurt to overstate his use of his own grain to feed his hogs. Thus, damaged corn and monitor error do not begin to explain the hundreds of thousands of bushels of discrepancy between HFI's production and HFI's sales, and they do not reduce the amount of HFI corn taken by Kurt. (APP.VOL.II p.85); (APP.VOL.IV p.23);(Ex. 213);(Ex 248).

b. Trial testimony.

Kurt claims he "testified at length" explaining the difference between HFI's production and sales. (Kurt's Brief p.16). While lengthy, his testimony did not prove he was entitled to take HFI's corn. The district court found: "Kurt testified extensively, if not always with great clarity, regarding the procedures he followed between 2001 and 2015." (APP.VOL.I p.548).

As one example of the vagueness of Kurt's testimony, Kurt testified as follows regarding the alleged "corn debt":

> Q. And I believe you testified or your counsel suggested that this was because of a corn debt; is that right?
> A. Because of what?
> Q. A corn debt.
> A. Yes.
> Q. Had you loaned those 84,902 bushels to Hora Farms?
> A. No.
> Q. Had you sold those 84,902 bushels to Hora Farms?
> A. No.
> Q. Did they steal it from you?
> A. No.

(APP.VOL.II pp.804-805-TR.VOL.IX 129:24-130:10).

Kurt suggests "consultants" found no concerns. (Kurt Brief p.26). To be clear, the consultant retained before this lawsuit to provide advice regarding Hora Farms was John McNutt. In 2015, McNutt had many concerns regarding Kurt's relationship with HFI, including Kurt's settle-up process. (APP.VOLIII p.138).

Kurt tries to rely on testimony by Mark Goehring (who works for Big Gain selling supplements) to justify his reliance on the 9-bushel estimate. This is baseless for several reasons.[4] First, because Kurt and Keith failed to include statements of fact in their briefs, they have admitted they are

[4] Exhibit 359, which Goehring created, is also not credible. Goehring admitted he created Exhibit 359 approximately one week before his deposition and only after meeting with Kurt. (TR.VOL.VIII 100:12-104:1).

satisfied with (i.e. concede) Brian and Gregg's factual statement: "The 9-bushel estimate and Kurt's calculations are inaccurate and significantly underreported Kurt usage of HFI's corn, detailed below." (Brian Brief p.25). *See* Iowa R. App. P. 6.903(3). Second, Goehring admitted he didn't know how much corn Kurt's hogs used at any time. (APP.VOL.II p.664-TR.VOL.VIII 104:2-105:8). Goehring admitted he does not know what percentage of Kurt's hogs are in hoop barns, which affects feed efficiency, and admitted he does not know the death loss of Kurt's hogs, which affects the amount of corn used. *Id.* Third, when Kurt began weighing HFI's corn in 2016, the scales showed he was actually feeding 10.5 bushels per hog – approximately 14% more than the 9-bushel estimate. (APP.VOL.II pp.827-828-TR.VOL.IX 153:12-154:3);(APP.VOL.II p.749-TR.VOL.XI 51:5-18). Fourth, ISU documentation proves the 9-bushel estimate is inaccurate. (APP.VOL.III p.165).[5] Fifth, Kurt ignores the fact that in addition to using an inaccurate 9-bushel estimate, he applied the estimate to an inaccurately low number of hogs. (Brian Brief p.37).

[5] Exhibit 124 shows, for instance, if a farmer is not using DDG (which substitutes for .6 bushels of corn), he or she would need 11.9 bushels to take a 10-pound pig to 280 pounds, assuming normal production practices. (APP.VOL.III p.165).

Kurt cites the testimony of Gregg Griffin (an agronomy salesman) for the proposition that 3 to 4 percent monitor error is acceptable. (Kurt Brief p.22). However, Griffin admitted that a monitor should be calibrated annually, contradicting Kurt's claim of substantial error from 2008 to 2014. (APP.VOL.II pp.667-668-TR.VOL.VIII 122:17-123:16). Griffin also admitted Kurt never complained to him about monitor error, undermining the notion of a sustained error. (APP.VOL.II p.672-TR.VOL.VIII 129:17-20).

Kurt and Keith both cite the testimony Darren Hora (their brother and son) that shrink and monitor error allegedly caused a 12% difference between HFI's sales and production. Darren is not an expert, nor was he disclosed as an expert. (Ex.237);(Ex.238). And, Darren, who lives hours away and stopped working on HFI's farm in 1989, has no personal knowledge regarding HFI's operations before Keith appointed him to the board in 2017. (APP.VOL.II pp.994-995,998-999,1017-1019-TR.VOL.XI 62:3-4,72:21-73:7,77:7-78:24,122:8-125:5).

Kurt asks this Court to defer to the district court's credibility finding regarding Alan Buckert. (Kurt's Proof Brief p. 26). Buckert's testimony does not help Kurt's case either. Buckert testified that in 2015, Keith believed the

corn Kurt had taken from HFI was excessive. (TR.VOL.II 112:10-117:21);(APP.VOL.III pp.77-79).

Kurt also tries to rely on the fact that the district court found banker Sue Basten to be credible. (Kurt Proof Brief pp 27-28). The court believed Basten's testimony related to financial information she received from Keith or Kurt. (APP.VOL.I pp.555). Basten's testimony regarding a banking relationship with HFI does not begin to prove Kurt was justified in taking 212,877 bushels of HFI's corn without payment.

3. The Critiques of Brian and Gregg's Evidence are Without Merit.

Kurt may not fairly criticize Brian and Gregg for "not offering" testimony by a "hog producer." (Kurt Brief p.18). Gregg has significant experience as a hog producer, including having served as president of the Iowa Pork Producers Association. (APP.VOL.II p.461-TR.VOL.V 48:16-23;87:13-88:18). Gregg testified regarding the ISU document designated as Exhibit 124. Gregg explained Exhibit 124 contains reasonable projections regarding usage of grain to raise hogs. (TR.VOL.V 87:13-88:18). Exhibit 124 proves Kurt's estimate of 9 bushel/hog to market weight is not accurate. (APP.VOL.III p.165). Brian also has experience in producing hogs. (TR.VOL.IV 145:20-157:4). For twenty years, Brian did "closeouts" of his

hogs. *Id.*[6] Based on Brian's experience, 9 bushels is not an accurate estimate of Kurt's usage of HFI's corn. *Id.* Brian also testified that Exhibit 124 contains reasonable estimates regarding usage of grain, proving Kurt's 9-bushel estimate was not accurate. (APP.VOL.II pp.433-440-TR.VOL.IV 148:8-157:4);(APP.VOL.III p.165).

Kurt characterizes the analysis of Kerry Bolt, certified fraud examiner, as "picking nits." (Kurt Brief p.20). Keith calls the missing corn a "discrepancy at the outer margin of Hora Farms' yield…." (Keith's Brief p.24). In actuality, Bolt performed an extensive forensic analysis and determined Kurt had taken 212,877 bushels of HFI's corn without payment. (APP.VOL.IV pp.34-35);(Ex. 213 pp.12-13). It is curious for Keith to doubt Bolt's ability to "decipher" the records regarding Kurt's corn usage, given Keith and Kurt's fiduciary duties to maintain accurate records. (Keith's Brief p.24). And, Keith mischaracterizes Bolt's analysis. Bolt used HK Farms' computer records regarding the number of hogs sold (APP.VOL.IV p.33);(Ex. 213 p.11) and Kurt's records regarding the amount of his own corn fed to his hogs (APP.VOL.IV pp.34-35);(Ex. 213 pp.12-13). These figures and ISU data allowed Bolt to compute the amount of HFI's corn Kurt

[6] Kurt does not perform closeouts but admits he should. (APP.VOL.II p.771-TR.VOL.IX 73:9-24).

needed to feed his hogs. *Id.* Bolt compared this computed amount with the amount of HFI corn Kurt claimed to have used. (APP.VOL.II p.85);(APP.VOL.IV p.23);(Ex. 213);(Ex. 248). Such analysis is squarely within Bolt's expertise and qualification.

Keith's attempt to dismiss Bolt as a "partisan" echoing information from Brian and Gregg also ignores the consistency between Bolt's analysis and the other record evidence. The formula Bolt applied (APP.VOL.IV p.33);(Ex. 213 p.11) is consistent with the data Kurt gathered when he started weighing HFI's corn in 2016, which showed Kurt actually used 10.5 bushels. (APP.VOL.II pp.827-828-TR.VOL.IX 153:12-154:3);(APP.VOL.II p.989-TR.VOL.XI 51:5-18). Bolt's analysis explains why Keith's chart shows 248,985 missing bushels from 2008 to 2014. (APP.VOL.III p.51). Bolt's analysis also explains HFI's financial losses and Kurt's improved net worth. *E.g.,* (Ex. 43);(Ex. 204).

4. Kurt Breached his Duty to Disclose and Communicate Accurate Information.

Kurt contends Brian and Gregg's case "distills to an assertion that Kurt stole corn from Hora Farms." (Kurt Brief p.14). Kurt did steal corn, engaging in misappropriation and acting contrary to HFI's interests. *See Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 600 (Iowa 1999), *as amended on denial of reh'g* (Feb. 4, 2000) (duty of loyalty

addresses "misappropriation of profits"); *Nelson v. Agro Globe Eng'g, Inc.*, 578 N.W.2d 659, 662 (Iowa 1998) ("an implied undertaking that [employee] will not engage in any other service or business to the detriment of his employer's interest").

Kurt ignores his breaches of his duty to disclose information and communicate accurate information. *See Mt. Pleasant Bank*, 455 N.W.2d at 684 ("A trustee or fiduciary is under a duty to communicate to the person to whom the duty is owed all known material facts or those material facts which should be known") (footnote omitted).

Brian and Gregg address Kurt's breaches of disclosure and communication in their opening brief. (Brian Brief pp. 48-49). Kurt has failed to respond. *See generally State v. Zacarias*, 958 N.W.2d 573, 587 n.3 (Iowa 2021) ("[T]he State has relied on procedural arguments without responding to the merits of a defendant's claim. We caution against this approach"); *Bowen v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976) ("On the failure of the appellee to file a brief, the appellant is not entitled to a reversal as a matter of right, but the court may, within its discretion, handle the matter in a manner most consonant with justice and its own convenience").

C. Kurt Breached His Fiduciary Duty by Overcharging HFI for Labor.

Kurt contends Bolt did not understand PC Mars Code 481 in Kurt's computer records is a "catch all" code used for labor as well as various expenses on behalf of HFI. (Kurt's Brief pp.24-26). Kurt's argument has no merit. Bolt properly used the labor hours (and not other expenses) from Code 481 in his analysis. For example, for 2010, Kurt's records reflect 764.5 hours as well as $156.86 in expenses. (Ex. 195 pp.4-5). Bolt properly used the 764.5 hours and not the expenses in his analysis. (APP.VOL.IV p.38);(Ex. 213 p.16).

D. Kurt Breached His Fiduciary Duty by Causing HFI to Pay for His Crop Inputs.

Kurt claims Bolt failed to understand that his year-end settlement sheets addressed inputs. (Kurt's Proof Brief pp.25-26). This is not true; Bolt analyzed the settlement sheets. (APP.VOL.II pp.552-553-TR.VOL.VI 60:6-61:12);(APP.VOL.IV pp.27,39);(Ex. 213 pp.5,17). Bolt compared: a) the actual amount of inputs paid by HFI on Kurt's behalf with b) the inputs as reflected on Kurt's settlement sheets. *Id.* Bolt determined that, in his settlement sheets, Kurt understated HFI's payment for crop inputs by $131,534. (APP.VOL.IV p.27);(Ex. 213 p.5).

E. Ratification Is Not A Defense.

1. Failure to Plead This Defense.

Kurt, Heather, and HK Farms are precluded from arguing ratification because they did not plead this affirmative defense. *See Calma on Behalf of Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 586 (Del. Ch. 2015); *Baber v. First Republic Grp., L.L.C.*, No. C06-3076-MWB, 2008 WL 2356868, at *22 (N.D. Iowa June 6, 2008) ("'Ratification' appears to be an affirmative defense to a 'conversion' claim").

2. The Claims Against Are Not Precluded.

Kurt, Heather, and HK Farms are asking this Court to find that Hora Farms, "through" Keith, ratified Kurt's conduct. (Kurt Brief p.29). This position is legally and factually flawed.

Keith and Kurt have, together, acted contrary to the interests of HFI and wrongfully stolen HFI's assets for themselves. Keith cannot excuse Kurt's wrongful conduct against HFI any more than Keith could excuse his own wrongful conduct against HFI. *See Calma*, 114 A.3d at 586 ("One principle is that the affirmative defense of ratification is available only where a majority of informed, uncoerced, and disinterested stockholders vote in favor of a *specific decision* of the board of directors") (footnote omitted); *James Horrabin & Co. v. McCallum*, 182 N.W. 646, 646

(Iowa 1921) ("An agent cannot ratify his own unauthorized act … but an agent may exceed his authority and bind his principal, if the latter appropriates the benefits of the acts of the agent"). *Cf. Life Invs. Ins. Co. of Am. v. Est. of Corrado*, 838 N.W.2d 640, 647 (Iowa 2013) ("A person should not be able to accept the benefits of a contract even if the signer's acts are unauthorized, but deny his or her obligations under the contract because the signer's acts are unauthorized").

The cases Kurt cites do not provide a defense. *Liken* addresses when "a particular stockholder who institutes a stockholder's derivative suit … may have ratified the wrong complained of …." *Liken v. Shaffer*, 64 F. Supp. 432, 442 (N.D. Iowa 1946). *Outing* involves a lodge member's claim that a former officer had improperly obtained $500 intended to be used for expenses. *Outing v. Plum,* 235 N.W 559 (Iowa 1931). The *Outing* Court explained: "Nothing is suggested … to indicate that the officers or members of the Grand Lodge which adopted the resolutions referred to acted in any in bad faith or against the interest of the society, except such as might be implied from a technical breach of a statute of the Grand Lodge." 235 N.W. at 560. By contrast, Keith's and Kurt's conduct was in bad faith and contrary to Hora Farms' interests.

It is true Keith knew about missing corn and failed to supervise Kurt, as discussed on pages 29 and 30 of Kurt's Brief. It is, however, not accurate for Kurt to suggest he and Keith had equal access to information regarding Kurt's usage of HFI's corn. Kurt's records are "woefully lacking," "unclear, disputed or nonexistent." (APP.VOL.I p.558) Keith lacked "full knowledge of the facts," yet another reason a ratification defense is not available to Kurt. *Abodeely v. Cavras*, 221 N.W.2d 494, 502 (Iowa 1974).

Kurt's suggestion that HFI approved all of his alleged compensation is also belied by Keith's admission, in 2015, that he would be a "terrible manager" if Kurt had taken the missing corn. (APP.VOL.III p.106).

F. Heather and HK Farms Are Liable.

Kurt's Brief makes no response to Gregg and Brian's argument regarding HK Farms' liability. *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

Heather is a shareholder of HK Farms and signed tax returns failing to disclose income in the form of hundreds of thousands of bushels of corn. (APP.VOL.II pp.822-823-TR.VOL.IX 148:1-149:14). At a minimum, she "cooperated" in Kurt's breaches of duty and is liable for the resulting damage. *See Rieff v. Evans*, 630 N.W.2d 278, 291 (Iowa 2001); *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 654 (Iowa 1979).

II. KEITH DAMAGED HFI BY BREACHING HIS DUTIES OF LOYALTY AND CARE, AND HE IS LIABLE FOR THESE DAMAGES.

A. Preservation of Error.

Brian and Gregg have fully preserved error.

"If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). *See also Putman v. Walther*, 973 N.W.2d 857, 866 (Iowa 2022) ("We conclude the issue .. was presented to and at least impliedly decided by the district court. … Although terse and sparse, we consider the issue preserved in the district court's ruling"); *Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 61 (Iowa 1983) ("We hold the waiver issue may be determined as an incident to the expressed issue … and inheres in the contentions advanced at all times by the employer and the department, presenting a question of law that should be decided").

The district court's 2021 order indicates it considered and ruled on all claims asserted by Brian and Gregg. It states: "Plaintiffs' briefs, both pretrial and post-trial, contain numerous allegations of conduct constituting breaches of fiduciary duties by Keith and Kurt. The Court has read and considered Plaintiffs' briefs and has reviewed the draft trial transcript and exhibits." *See*

(APP.VOL.I p.570). It also states: "The Court has considered the other arguments and evidence presented in support of Plaintiffs' claims." *Id.* p.573. *See also id.* p.658.

The claims, liability theories, and damages Keith describes as "new" have long been fighting issues in this case:

The Amended Petition alleges wrongful payment of crop inputs. (APP.VOL.I p.298). Keith's liability for allowing HFI to pay crop inputs for Kurt/HK Farms is addressed in Brian and Gregg's trial and post-trial briefs. (APP.VOL.I pp.422,468,470). Kerry Bolt addresses HFI's payment of HK Farms' inputs in his written reports, which are trial exhibits; and he testified regarding this issue at trial. (APP.VOL.II p.93); (APP.VOL.IV pp.27,39-40);(Ex. 213 pp.5,17-18);(Ex. 248 p.9);(APP.VOL.II pp. 552-553-TR.VOL VI 60:6-61:15). The district court referenced Bolt's report and testimony in its September 2021 ruling. (APP.VOL.I pp.555-556). The district court found "missing or inadequate" "recordkeeping" regarding "use of Hora Farms' assets for personal use of Keith and Kurt." *Id.* p.558. In their Rule 1.904 motion, Brian and Gregg requested findings that Keith had breached his duty of loyalty and his duty of care by allowing HFI to pay for Kurt's inputs. (APP.VOL.I pp.592,594,601).

The Amended Petition alleges HFI has been damaged by breaches of fiduciary duties, including "excess payments for labor." (APP.VOL.I p.298). Keith's liability for allowing HFI to overpay for labor is addressed in Brian and Gregg's trial brief. (APP.VOL.I pp.422-423). Bolt addresses this issue in his written reports, which the district court referenced; and Bolt testified about this issue. (APP.VOL.I pp.555-556);(APP.VOL.II p.92);(APP.VOL.IV pp.26, 37-38);(Ex. 213 pp. 4,15-16);(Ex. 248 p.8);(APP.VOL.II pp. 549-552-TR.VOL.VI 57:8-60:5).

The Amended Petition alleges Keith's liability based on mismanagement, waste of assets, and unreasonable debt levels. (APP.VOL.I pp.296,298). Keith's liability for causing HFI to suffer losses and long-term debt is addressed in Brian and Gregg's trial brief. (APP.VOL.I pp.413,416,419). HFI's losses and debt and Keith's failures are discussed in Thomas Schnurr's expert report, a trial exhibit referenced by the district court; and Schnurr testified regarding these issues at trial. (APP.VOL.I pp.555-556);(APP.VOL.IV p.67);(Ex. 216); (TR.VOL.V 118:14-183:2). HFI's losses because of Keith's poor management are discussed in Brian and Gregg's post-trial brief. (APP.VOL.I pp.453-454,468,470,473-74). In their Rule 1.904 motion, Brian and Gregg requested findings Keith had breached his duty of care, discussing HFI debt and losses. (APP.VOL.I pp.597-98).

Iowa Code Section 490.831(1)(b)(1), regarding "action not in good faith," is not a new theory. The Amended Petition alleges Keith's liability under Iowa Code 490.831 and discusses Keith's duty of good faith. (APP.VOL.I pp.295-296). In their trial brief, Brian and Gregg argued Keith acted in bad faith, quoting Iowa Code Section 490.831(1)(b)(1) and citing Iowa Code 490.831. (APP.VOL.I p.423). The district court ruled on this issue and found Brian and Gregg had not proven "Keith did not act in good faith," citing Iowa Code § 490.830(1). (APP.VOL.I p.571).

Iowa Code Section 490.831(1)(b)(2)(b) imposes liability when a director "was not informed." Whether Keith was adequately informed was preserved. The amended petition alleges Keith's liability under Iowa Code 490.831. (APP.VOL.I p.295). In their trial and post-trial briefs, Brian and Gregg argued the business judgment rule was "rooted in informed decision making" whereas Keith was inattentive and did not know what was happening to HFI's grain. (APP.VOL.I pp.423-424,463-464). The district court found Keith was presumed to be informed and Brian and Gregg had not proven "Keith's actions and decisions were not so informed…." (APP.VOL.I p.569).

Iowa Code Section 490.831(1)(b)(5), imposing liability for "breach of the director's duties to deal fairly with the corporation and its shareholders,"

is not a new theory. The amended petition alleges Keith's liability under Iowa Code 490.831. (APP.VOL.I p.295). Brian and Gregg's trial briefs state: "A director may be held liable for self-dealing if he received a financial benefit to which he was not entitled or otherwise failed to 'deal fairly with the corporation and its shareholders.' Iowa Code § 490.831." (APP.VOL.I pp.382-383,415). The district court found Keith had proven "fairness." (APP.VOL.I p.569). In their post-trial motion, Brian and Gregg argued Keith's failure to act fairly and asked the court to find liability under "490.831(2)(b)(5)," which was obviously a typo; and they clarified in their reply their intent to reference 490.831(1)(b)(5). (APP.VOL.I pp.595,650);(12-23-21 Motion for Extension);(12-27-21 Order).

The damages Brian and Gregg are asking this Court to impose against Keith are not new:

The amended petition alleges Keith wrongfully allowed Kurt, Heather, or HK Farms to take 85,000 bushels of corn worth $435,000 as well as 350,000 bushels of missing corn worth $1.8 million. (APP.VOL.I p.297). Brian and Gregg's post-trial brief alleges that Keith is "jointly and severally liable for the amounts Kurt owes." (APP.VOL.I p.473). *See also* APP.VOL.I p.480 (seeking joint and several judgment of $3.2 million).

Brian and Gregg's post-trial brief alleges Kurt owes $1,415,974 for January 1, 2001 through February 28, 2018 (and $785,597[7] if damages are limited to August 18, 2012 forward). (APP.VOL.I p.473). The $1,415,974 figure includes (but is not limited to) $958,700[8] for taking HFI's corn, $131,534 for crop inputs, and $105,829 for labor overcharges ($97,990 plus $7,839 FICA). (APP.VOL.IV p.46);(Ex. 213 p.24). Brian and Gregg's post-trial reply brief again states: "From Kurt and Keith jointly, they seek a total of $1,415,972 for the period January 1, 2001 through February 28, 2018, including $786,597 for the value of missing corn for the period August 18, 2012 forward." (APP.VOL.I p.528). Brian and Gregg's opening appeal brief requests damages against Keith in these same amounts. (Proof Brief p.71).

The issue of Keith's poor management causing HFI to lose money was preserved. In their post-trial brief, Brian and Gregg argued for damages against Keith based on Tom Schnurr's analysis, arguing Keith should "make Hora Farms whole by paying up to a total of $3.263 million." (APP.VOL.I pp.473-474). *See also* (APP.VOL.I p.528).

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[7] $785,597 includes $501,227 for taking HFI's corn, $57,957 for crop inputs, and $72,689 for labor overcharges. (APP.VOL.II p.95).

[8] Bolt testified regarding his reports and the $958,700 figure. (APP.VOL.II pp. 521-522,561-562,805-816-TR.VOL.VI 11:5-22;27:13-28:1;74:2-75:21).

B. Keith Breached His Duties of Care and Loyalty, and He is Subject to Liability.

1. Keith Breached His Duties of Care and Loyalty.

a. Keith Allowed Kurt and HK Farms to Take HFI's Corn.

i. Kurt Was Not Entitled to the Corn He Took.

Keith tries to defend himself by arguing the missing corn constitutes "in-kind trade due to Hora Farms' relationship with Kurt." The 212,877 bushels Kurt took was not compensation, as proven by his employment agreement and the tax records of Kurt and HFI. (Ex.198);(Ex.200-203);(Ex.304). *See* Section I(B)(1).

By allowing Kurt to take corn to which he was not entitled, Keith breached his duties of care and loyalty. *See Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988).

It is incorrect for Keith to suggest his duty of loyalty only applies to the benefits he personally received from HFI. (Keith Brief p.35). "A director of a corporation owes the corporation complete loyalty, honesty, and good faith. .... That duty is owed the corporation and its shareholders whenever the actions of the director concern matters affecting the general

well being of the corporation." *Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76, 80 (Iowa 1984).

ii. The 9-bushel estimate was inaccurate, and Keith's explanations for missing corn are without merit.

The 9-bushel estimate used by Kurt was not accurate. *See* Section I(B)(2). Kurt's own records prove when he actually weighed HFI's corn he used, he fed approximately 14% more than the 9-bushel estimate. (APP.VOL.II pp.827-828-TR.VOL.IX 153:12-154:3);(APP.VOL.II pp. 989-TR.VOL.XI 51:5-18). Significantly, Keith admits he did not investigate whether the 9-bushel estimate was fair. (APP.VOL.II pp.988-989-TR.VOL.XI 50:14-51:4). And, contrary to Keith's suggestion, Gregg testified the 9-bushel estimate is not accurate. (APP.VOL.II p.461-TR.VOL.V 48:12-15).

Keith ignores the fact that in addition to the inaccuracy of the 9-bushel estimate itself, Kurt applied the estimate to an inaccurately low number of hogs. (Brian Brief p.37). This further caused Kurt to underreport his usage of HFI's corn.

Alleged monitor error, damaged corn, and shrink do not explain the 212,877 bushels of missing corn. Keith's contentions are not "largely uncontradicted" (Keith Brief p.18); they are addressed in detail in Brian and

Gregg's opening brief, in Section I of this brief, and also in Bolt's report. *See* Section I(B)(2). *See* Brian Brief pp.41-43; (APP.VOL.IV p.23);(Ex.213).

b. Keith Ignored Tax Requirements.

Kerry Bolt, who worked for twenty years as an IRS special agent, explained that both Kurt/HK Farms and HFI were required to report the corn transactions to the IRS, which they failed to do. (APP.VOL.II p.62); (APP.VOL.II p.559-TR.VOL.VI 72:8-12). Keith has offered no evidence to the contrary.[9]

c. Keith Allowed HFI to Pay HK Farms' Crop Inputs.

Other than arguing regarding preservation of error, Keith fails to respond to the claims regarding HFI's improper payment of HK Farms' crop inputs. (Brian Brief p.59). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

[9] It is improper for Keith to argue Brian "trusts" Phelps more than Bolt. Keith's argument assumes Phelps is currently Brian's tax preparer, which is not true. It is also inaccurate for Keith to suggest Brian should have amended his tax returns as a result of information learned in this lawsuit. There is no evidence Brian has any employees taking corn as income.

d. Keith Allowed HFI to Overpay for Labor.

Other than arguing regarding preservation of error, Keith fails to respond to the claims regarding HFI's improper overpayment for labor. (Brian Brief p.59). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

e. Keith Caused HFI to Pay His Personal Expenses.

The *Heideker Farms* case does not support Keith's using HFI's money to pay his personal expenses. In *Heideker Farms,* the trustee maintained "accurate records," had "not sold or depleted any corporate assets" and had not "offered to buy" shares "at a low price." *Heidecker Farms, Inc. v. Heidecker*, Case No. 09-1541, 791 N.W.2d 429, 2010 WL 3894199 at * 12 (Iowa Ct. App. 2010). Keith did not keep accurate records, he depleted HFI's assets, and he offered to buy his siblings' shares at an extremely low price. (APP.VOL.II p.85; APP.VOL.III p.51; APP.VOL.IV pp.23,67);(Ex.58);(Ex. 213);(Ex.216);(Ex.248);(TR.VOL.IV 144:19-145:6).

Keith claims the district court found Russ Thompson's testimony regarding his "personal benefits" to be credible and valuable. (Keith's Proof Brief pp.31-3). In fact, the court noted problems with Thompson's opinions. (APP.VOL.I p.557). When considering HFI's management costs, Thompson only considered what Keith received; he did not consider Kurt's salary as

operations manager or the corn Kurt took from HFI. (TR.VOL.X 141:8-143:7).

f. HFI Sustained Significant Losses and Incurred Substantial Long-Term Debt.

Other than arguing regarding preservation of error, Keith fails to respond to the claims regarding HFI's significant losses and substantial long-term debt. (Brian Brief pp.60-61). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

2. Keith Is Liable for His Breaches.

a. Sustained Failure of Oversight, Attention, and Inquiry.

i. Corn.

Overwhelming evidence proves Keith's sustained failure to devote attention to the oversight of HFI, subjecting him to liability under Iowa Code Section 490.831(1)(b)(4). *See e.g.,* APP.VOL.III p.106 (in 2015, Keith admitting Buckert "has been asking for at least 5 years" why HFI "never come[s] close to selling and accounting for the bushels of corn that were produced").

It is undisputed Keith did not investigate whether the 9-bushel estimate used by Kurt was fair. (APP.VOL.II pp.988-989-TR.VOL.XI 50:14-51:4). The estimate was not fair. (APP.VOL.IV p.23);(Ex.213).

Contrary to Keith's suggestion, HFI's documents do not prove he paid attention to Kurt's usage of corn. Proposed exhibit 521 cited by Keith is not in evidence. The scale tickets and computer entries regarding "grain financials" do not address Kurt's usage of corn. (APP.VOL.III p.398); (APP.VOL.V p.15). Nor do Kurt's settlement sheets prove Keith was paying attention or exercising due care. Keith did not understand the documents. (APP.VOL.II pp.405-406-TR.VOL.IV 82:7-83:2). And, Kurt's settlement sheets purport to reflect only some of Kurt's usage of corn; they do not disclose Kurt's admitted taking of 85,000 bushels because of an alleged (nonsensical) "corn debt." (APP.VOL.III p.188). Third, the settlement sheets use a 9-bushel estimate, which has proven to be inaccurate. *Id. See* Section I(B)(2).

The testimony of Delaney does not prove that Keith met his duty of care. Keith's suggestion that Delaney's audit addressed records regarding Kurt's use of HFI's corn is completely misleading. Delaney's certification of HFI only addressed the production of soybeans, not corn. The certification did not audit the accuracy of HFI's finances. Delaney did not audit how HFI paid Kurt. (APP.VOL.II pp.797-798-TR.VOL.IX 116:14-118:15).

It is wrong for Keith to suggest Brian and Gregg failed to present expert testimony regarding reasonable attentiveness. Expert Bolt opined:

Keith "had, and continues to have, a fiduciary duty as the Financial manager of HFI to know what is going on financially within HFI. Keith Hora's fiduciary duties include monitoring and approving all transactions conducted by HFI with related parties, and that they are done at arms-length"; Keith "failed to implement changes to rectify the recordkeeping problems"; and Keith allowed Kurt to "operate" "unchecked." (APP.VOL.IV pp.28-30);(Ex.213 pp.6-8). Expert Schnurr opined regarding Keith's improper acceptance of information from Kurt without investigation or verification. (APP.VOL.IV p.72);(Ex.216 p.6).[10]

Keith summarily alleges he acted as a reasonably attentive director "by considering known relationships, existing grain problems, and third-party statements…" (Keith Brief pp.37-38). This allegation, which is contrary to fact, should be disregarded. *See* Iowa R. App. P. 6.904(4).

ii. Inputs and labor expenses.

Keith fails to address his liability, under Iowa Code Section 490.831(1)(b)(4), for sustained failure to devote attention with respect to HFI's payment, over multiple years, of $131,534 HK Farms' crop inputs and

[10] The district court "did not disagree with all" of Bolt's and Schnurr's opinions. (APP.VOL.I p.556).

HFI's payment of $97,900 of HK Farms' labor expenses. *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

b. Not Reasonably Informed.

Other than arguing regarding error preservation, Keith does not address his liability under Iowa Code 490.831(1)(b)(2)(b) for not being informed to an extent reasonably believed appropriate. (Brian Brief p.63). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

c. Failure to Act in Good Faith.

Other than arguing regarding error preservation, Keith does not address his liability under Iowa Code 490.831(1)(b)(1) for failing to act in good faith. (Brian Brief p.64). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

d. Failure to Deal Fairly and Improper Receipt of Benefits.

Other than arguing regarding error preservation, Keith does not address his liability under Iowa Code 490.831(1)(b)(5) for unfairly using HFI's money to pay HK Farms' expenses. (Brian Brief pp.64-65). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

e. Lack of Objectivity.

i. Corn

Objectivity under Iowa Code 490.831(1)(b)(3) raises the question of Keith's trusting Kurt with respect to his corn transactions with HFI simply because Kurt is Keith's son. (APP.VOL.II pp.985-991-TR.VOL.XI 47:25-53:8);(APP.VOL.II p.85; APP.VOL.IV p.23);(Ex.213);(Ex.248). *See* Iowa Code § 490.831(1)(b)(3) (lack of objectivity due to familial relationship).

Keith's claims he "treated everyone the same" and did not "play[] favorites" is not true. (Keith Brief p.42). There is no evidence Brian or Gregg received any asset from HFI to which they were not entitled. (TR.VOL.II 68:21-70:7);(APP.VOL.II p.292). There is no claim HFI suffered any loss because of its relationship with Brian or Gregg more than 20 years ago. In the 1980s, Gregg purchased 21 hogs and began a small hog business. (TR.VOL.V 26:11-27:11);(APP.VOL.II p.455). Any usage of HFI's corn by Gregg to feed the hogs was treated as a business arrangement; there is no evidence of any improper accounting by Gregg. (APP.VOL.II pp.456-458-TR.VOL.V 28:23-30:3). When working for HFI, Brian was not paid in corn. (TR.VOL.II 68:23-70:7);(APP.VOL.II p.292).

Section 490.831(1)(b)(3) requires Keith to prove he reasonably believed the challenged conduct was in HFI's best interests. Keith did not

prove he reasonably believed it was in HFI's best interests to allow Kurt to steal hundreds of thousands of bushels of corn. Keith knew this was not in HFI's best interests. Keith told Buckert in 2015 that Kurt was taking excessive grain. (TR.VOL.II 112:10-117:21);(APP.VOL.III pp.77-79). In 2015, Keith also admitted he would be a "terrible manager" if Kurt had taken the missing corn, which is what happened. (APP.VOL.III p.106).

Keith's suggestion that his conduct is excused because "Brian oversaw Kurt for over a decade" is false. (Keith's Brief p.42). Brian left HFI in 2000; Kurt started using the 9-bushel estimate in 2003 or 2004. (APP.VOL.II p.270-TR.VOL.I 201:11-16). *See* Kurt Brief p.18.

ii. Inputs and labor expenses

Keith does not address the claim he lacked objectivity in paying for Kurt's inputs and labor expenses. (Brian Brief p.65). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

3. Keith Has No Defense.

a. Keith Cannot Rely on Any Business Judgment Rule.

Brian and Gregg's opening brief explains that if Iowa still recognizes a "business judgment rule," Keith cannot rely on it because he did not engage in any strategic business decision. (Brian Brief pp.67-69). Keith fails

to respond to this argument. Brian and Gregg's opening brief also explains Keith cannot rely on a "business judgment rule" because he failed to monitor and oversee Kurt. *Id.* Keith fails to respond to this argument, too.

b. Keith's Purported Reliance on A Tax Preparer Is Not a Defense.

To rely on Iowa Code 490.842(3) or 490.830(6), Keith would have needed to prove that he relied on "information, opinions, reports, or statements" by a professional such as a public accountant. There is no evidence that Keith obtained – much less relied upon –any professional advice regarding HFI's failure to report to the IRS the corn Kurt now alleges constituted compensation. While Keith emphasizes the reliability of tax preparer Dean Phelps, the fact is that Keith did not obtain any advice from Phelps regarding the corn transactions. (APP.VOL.II p.60). Keith did not provide Mr. Phelps with accurate information about Kurt's corn transactions with HFI. *Id.*

All of Keith's testimony regarding an alleged audit in the 1970s should have been excluded on several grounds, including hearsay and failure to disclose. (APP.VOL.II pp.879-882-TR.VOL.X 52:8-11;52:25-55:8). The district court allowed some of this testimony but prohibited Keith from offering testimony "about anything that might have been concluded in IRS

documents." *Id.* Thus, Keith should not characterize his testimony as proving the IRS ever approved any of HFI's methods.

Keith testified that if HFI were fined for tax issues, he would not require HFI to pay the penalty and instead he would "take less rent" from HFI. (APP.VOL.II p.887-TR.VOL.X 60:3-15). This is not a defense. To the contrary, it is further proof of Keith's lack of appreciation and respect for HFI's corporation structure.

C. Damages.

The damages claimed in Brian and Gregg's opening brief are not "new math." (Keith Brief p.46). As detailed in the above discussion of preservation of error, the damages are set forth in expert reports (which are trial exhibits) and were requested from the district court. (APP.VOL.II p.85); (APP.VOL.IV pp.23, 67);(Ex.213); (Ex.248); (Ex.216). Brian and Gregg's post-trial briefs allege that Keith is jointly and severally liable for the amounts Kurt owes: $1,415.972. (APP.VOL.I pp.473,480,528). It is also unfair for Keith to suggest Brian and Gregg did not disclose their damages claims in discovery. Brian and Gregg provided detailed damages information in answers to interrogatories. *See e.g.,* APP.VOL.II pp.139-147.

III. THE CLAIMS WERE TIMELY ASSERTED, AND HFI IS NOT BARRED FROM RECOVERING DAMAGES SUFFERED BEFORE AUGUST 2012.

A. Brian and Gregg Have Properly Raised Statute of Limitations In Their Appeal.

Brian and Gregg have addressed statute of limitations because it affects damages calculations. The "prejudicial error" cases cited by Keith and Kurt are not on point. *See Struve v. Struve*, 930 N.W.2d 368, 377 (Iowa 2019) (motion for leave to amend); *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013) (discovery ruling).

B. Keith, Kurt, Heather, and HK Farms Have the Burden of Proof.

Brian and Gregg do not have the burden of proof regarding statute of limitations. The party asserting a statute of limitations defense has the burden of proof; only if the defense were proven would Brian and Gregg have a burden to prove an exception. *Franzen v. Deere & Co.*, 334 N.W.2d 730, 732 (Iowa 1983).

C. Accrual Depends on Knowledge of a Disinterested Director.

The claims against Keith, Kurt, Heather, and HK Farms accrued when a disinterested director obtained the requisite knowledge. *See Des Moines Bank & Tr. Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 1086, 51

N.W.2d 174, 219 (Iowa 1952) (receipt of letter was not notice to "independent directors").

Keith's mother Marie was not an independent director, and she did not have notice. The nature of Marie's knowledge was asking which fields were being worked. (APP.VOL.II p.904-TR.VOL X 79:12-21). Marie did not know about the missing corn or Keith's arrangement with Kurt. (APP.VOL.II pp.978-982-TR.VOL.XI 37:23-39:7;39:15-41:21;43:9-17). Keith has not identified any document indicating Marie had notice of the claims. HFI's board minutes do not indicate Keith disclosed Kurt's taking of corn or HFI's payment of Kurt's inputs or labor expenses. (Ex.243).

D. Even If Shareholders' Knowledge Is Considered, They Learned of the Missing Corn in 2015.

The *Kelly* court explained: "The 'party aggrieved' within the meaning of Iowa Code § 614.4 is not the minority shareholder but the corporation, and the statute of limitations does not begin to run until the corporation discovered the fraud." *Kelly v. Englehart Corp.*, No. 1-241, 2001 WL 855600, at *6 (Iowa Ct. App. 2001). Keith's quotation from the *Fletcher* treatise is taken from a discussion of the "'complete domination' test," which is not Iowa law. *See* 3A Fletcher Cyc. Corp. § 1306.20.

But see Rieff, 630 N.W.2d at 287 (in case involving derivative and class claims, addressing whether fraud and the discovery rule preclude application of the statute of limitations).

Furthermore, HFI's shareholders were not on notice of the claims more than five years before suit was filed. Keith and Kurt are satisfied with the statement: "HFI's shareholders were not provided with financial information." (Brian Brief p.27). *See* Iowa R. App. P. 6.903(3). For example, before Buckert could discuss HFI's finances with Brian in 2015, Keith needed to give permission. (APP.VOL.II pp.193-195-TR.VOL.I 46:8-48:9). Even in 2018, Keith and Darren refused Dana's request for HFI's year-to-date financials. (Ex.170);(Ex.171). One meeting in 1994 does not prove any shareholders other than Keith and Kurt knew or had notice of the claims in this case. *See Des Moines Bank*, 51 N.W.2d at 222 (notice must be of "such full and definite character as to reasonably inform and warn… of the wrongful act against the corporation").

Brian and Gregg learned of HFI's missing corn in 2015, and they objected. In no manner did they "acquiesce[] in what was done," unlike the 1896 *Hart* case cited by Keith. *Hart v. Mt Pleasant Park Stock Co.,*66 N.W.2 190, 192 (Iowa 1896). Contrary to Keith's allegation of a "long-brewing family conflict" (Keith Brief p.19), Keith previously admitted

"conflict arose" upon Marie's death in 2015. (APP.VOL.I p.335).

While Kurt suggests Brian and Gregg were on notice during their employment with Hora Farms, the undisputed facts are to the contrary. Gregg has not worked for HFI since 1985; and Brian has not worked for HFI since 2000. (APP.VOL.II p.245-TR.VOL.I 140:18-24);(APP.VOL.II. p.374-TR.VOL.IV 43:15-21);(APP.VOL.II p.270-TR.VOL.I 201:11-16). Kurt did not begin using the inaccurate 9-bushel estimate until 2003 or 2004. (Kurt Brief p.18).

Keith contends Brian and Gregg "knew" of the "gap" in "Keith's summaries" caused by Kurt's taking of corn. (Keith's Brief p.21). The only evidence cited by Keith is Kurt's testimony regarding a conversation in 2015. *Id.* This does not support barring any claims filed in 2017.

E. Claims Regarding the 84,902 Bushels Kurt Admits Taking Are Timely.

Kurt argues the claims regarding his taking of the 84,902 bushels "pre-date 2012." (Kurt Proof Brief p.21 n.2). That is untrue. Kurt admits taking 31,650 of the bushels in 2015. (APP.VOL.II pp.772-773-TR.VOL.IX 84:2-14;90:8-25);(APP.VOL.IV p.181);(Ex.328). He failed to prove when he took the remainder; thus, all damages related to the 84,902 bushels are recoverable. *See Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974) ("If the defense is partial only, barring only a part of the damage, defendant has the

burden of proving what part of the damage occurred before the running of the limitation period").

IV. A CUSTODIAN SHOULD BE APPOINTED, AND KEITH, KURT, AND HEATHER SHOULD NOT BE ALLOWED TO SERVE AS FIDUCIARIES OF HFI OR THE CELESTE HORA TRUST.

A. HFI Needs a Neutral Custodian, and Keith, Kurt, and Heather Should Not Be Fiduciaries.

Kurt and Heather have not responded to Brian and Gregg's argument they should not be fiduciaries of HFI. (Brian Brief p.75). *See generally Zacarias*, 958 N.W.2d at 587 n.3; *Bowen*, 237 N.W.2d at 801.

Keith ignores the breadth of Iowa Code 490.809 and Iowa Code 490.748 as well as this Court's expansive equitable powers to fashion appropriate relief. *See* Iowa Code 490.809; *Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017). Keith has grossly abused his position as director and intentionally harmed HFI by allowing Kurt and himself to wrongfully take HFI's assets, while allowing HFI to suffer substantial losses. Iowa Code § 490.809. (APP.VOL.II p.85); (APP.VOL.IV p.23);(Ex.213);(Ex.248). It was also not in HFI's best interest to fail to comply with tax laws. *Id.* (APP.VOL.II p.63). Keith's removal would be in HFI's best interest. *Id.*

Keith suggests he should remain a fiduciary because of an alleged 29.3% return on equity. That figure simply reflects a change in net worth from 1975 to 2018, without distinguishing between the effect of land acquisition and the effect of management. (TR.VOL.X 149:17-153:16). Return on equity also fails to address HFI's unprofitability over many years. *Id. See e.g,* Ex. 43.

While Keith claims "the sky is not falling at Hora Farms" (Keith Brief p.53), he and Kurt have wrongfully taken over $1 million of HFI's assets. (APP.VOL.II p.85); (APP.VOL.IV p.23);(Ex.213);(Ex.248). The district court found "there clearly were substantial, and remain some, problems in the operation of Hora Farms" and "certain procedures and methods of operating HFI by Keith in the past were outdated and must be modified." (APP.VOL.I pp.558,571). A neutral custodian is needed.

B. Keith Should Not Be Trustee.

The fact a trustee is nominated by a settlor does not mean he or she can simply ignore duties. *See Schildberg v. Schildberg*, 461 N.W.2d 186, 191 (Iowa 1990) (court is "less likely to remove a trustee named by a settlor"). Keith has not only failed to fulfill his duties as trustee; he has been unaware of them. Keith was asked "You know that as a trustee of Celeste Trust you have certain fiduciary duties, don't you?" (APP.VOL.II pp.972-

973-TR.VOL.XI 22:24-23:1). Keith responded: "I'm finding out real quick." *Id.*[11]

The Trust requires the trustee to manage the trust assets, which includes a stake in HFI. (APP.VOL.II pp.59, 116). Keith has grossly mismanaged Hora Farms. (APP.VOL.II pp.59, 85); (APP.VOL.IV pp.23, 67);(Ex.213);(Ex.216);(Ex.248). The objects of the Trust are jeopardized, warranting the removal of Keith as Trustee. *See Heidecker Farms,* 2010 WL 3894199 at * 5.

V. HFI SHOULD PAY GREGG AND BRIAN'S ATTORNEY FEES AND EXPENSES, AND KEITH SHOULD REPAY WHAT HAS BEEN IMPROPERLY PAID ON HIS BEHALF.

A. Scope and Standard of Review.

The parties agree this Court should review de novo the district court's decision to deny Brian and Gregg's requests for fees. (Keith Brief p.56). *See Matter of Guardianship of Radda*, 955 N.W.2d 203, 208 (Iowa 2021); *Berger v. Amana Soc.*, 135 N.W.2d 618, 621 (Iowa 1965). *But see In re Marriage of Erpelding*, 917 N.W.2d 235, 238 (Iowa 2018) ("We review the denial of attorney fees for an abuse of discretion"); *In re Tr. No. T-1 of Trimble*, 826 N.W.2d 474, 482 (Iowa 2013).

[11] Keith has failed to prepare income tax returns for the Trust. (Ex. 207 p.4). He does not have bank account statements for the Trust. *Id.* p.5.

B. Brian and Gregg Are Entitled to Recover Fees.

Brian and Gregg seek findings of liability and recovery of assets wrongfully taken from HFI. These would impart a substantial benefit to the corporation. Iowa Code § 490.746.

HFI has already benefitted from Brian and Gregg's efforts. *See Aubin v. Susi*, 560 S.E.2d 875, 880 (N.C. Ct. App. 2002) (derivative proceeding may confer substantial benefit even if plaintiff is not prevailing party). Kurt contends "positive changes" have occurred at HFI. (Kurt Brief pp.45-46). Any changes resulted from Brian and Gregg's efforts. HFI's historic resistance to change is reflected in the fact that in 2015, Keith fired consultant McNutt when he gave advice Keith did not want to hear. (APP.VOL.II p.414-TR.VOL.IV 100:4-11). Kurt's 2017 work agreement was signed after Brian and Gregg's attorney sent a demand letter. (APP.VOL.III p.174); (Ex. 306 p.1). Keith filled the vacant second director position after the demand letter. (Ex. 243 p.57). The 2017 fall-harvest agreement was signed after Brian and Gregg filed suit. (Ex. 306 p.3); (APP.VOL.I p.194).

The district court found "the credible and undisputed evidence establishes that there clearly were substantial, and remain some, problems in the operation of Hora Farms." (APP.VOL.I p.558). The court emphasized it

"in no way endorses Keith's past management style or practices in all respects …." *Id.* p.571. The court's refusal to award fees to Brian and Gregg is not supported by substantial evidence and should be reversed.

C. HFI Improperly Advanced Keith's Expenses.

Hora Farms has paid all of Keith's attorney fees in this litigation. (APP.VOL.II p.968-TR.VOL.XI 17:10-15). *See e.g.,* APP.VOL.III pp.314-315. This is improper and should remedied.

Article III Section 14 of HFI's bylaws does not allow the advancement of fees before final disposition of a proceeding. Instead, it addresses "indemnification" of "expenses incurred" in litigation, unless the director has been "adjudged" "to be liable for negligence or misconduct." (APP.VOL.II p.24). Thus, the director must pay the fees himself or herself during the litigation; and any right to recover the fees from HFI depends on the outcome. *See generally* Iowa Code § 490.854 (distinguishing "indemnification" from "advance for expenses"); *Goche v. WMG, L.C.*, 970 N.W.2d 860 (Iowa 2022), *reh'g denied* (Mar. 11, 2022).

To advance Keith's expenses during the litigation, HFI was required to comply with Iowa Code Section 490.853. This requires: a) the director to deliver a "signed written understanding" promising repayment under certain circumstances and b) authorization as detailed in 490.853(3). Keith did not

sign a written understanding. (APP.VOL.II pp.968-970-TR.VOL.XI 17:21-19:18). When asked, his response was: "Why would I do that?" *Id.* Nor was advancement of expenses authorized per 490.853(3). (Ex. 243).

Iowa Code 490.858 does not provide a defense. Section 490.858(1) applies when a corporation is obligated to advance fees, which HFI is not. (APP.VOL.II p.24). Even when 490.858(1) does apply, it only negates the requirements of 490.853(3). Section 490.858(1) does not excuse a director from giving the required written understanding, which Keith did not give. Iowa Code § 490.858.

VI. THE DOCTRINES OF LACHES AND ESTOPPEL BY ACQUIESCENCE DO NOT PROVIDE A DEFENSE.

A. Preservation of Error.

Brian and Gregg agree error was preserved.

B. Scope and Standard of Review.

Brian and Gregg agree review is de novo.

C. Laches Does Not Apply.

Laches requires clear and convincing evidence. *See Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 908 (Iowa 1977). Keith, Kurt, Heather, and HK Farms did not prove this defense.

1. Brian and Gregg Filed Within the Statute of Limitations.

It is uncontested Brian and Gregg filed within the statute of limitation period. For this reason, laches does not apply. *See Life Invs. Ins. Co. of Am. v. Est. of Corrado*, 838 N.W.2d 640, 645 (Iowa 2013) ("Ordinarily the doctrine of laches does not apply within the statute of limitations unless there is a showing of a special detriment to another"); *Rowen*, 282 N.W.2d at 647. Keith, Kurt, Heather, and HK Farms have not proven any special detriment because of the timing of the lawsuit. *Id.*

2. No Prejudice.

Laches require clear and convincing evidence of prejudice. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Mathahs*, 918 N.W.2d 487, 492 (Iowa 2018). The district court found it "clear that there was no delay or harm to the material prejudice of Defendants by consideration of the claims within the period of limitations." (APP.VOL.I p.563). Tellingly, Keith does not attempt to argue prejudice. Kurt contends he is prejudiced because he would "surely have negotiated a different contract" "had [he] known in 2002" that he would later be sued for "performance" of his contract. (Kurt Brief p.33). This argument has no merit. Kurt's contract with HFI does not allow him to

steal HFI's corn or wrongfully use HFI's funds for personal expenses. (Ex. 304).

3. No Unreasonable Delay.

A laches defense would need to be proven against an independent director of HFI. *See Des Moines Bank*, 51 N.W.2d at 219. *Cf. Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 356 (Iowa 1972). HFI did not have an independent director until 2015; and this lawsuit was filed just two years later, which is not unreasonable. (APP.VOL.I p.194).

Alternatively, every shareholder of HFI would need to be shown subject to this defense. *See Daloisio v. Peninsula Land Co.*, 127 A.2d 885, 892 (N.J. App. Div. 1956). The shareholders did not unreasonably delay. See *Markey v. Carney*, 705 N.W.2d 13, 22 (Iowa 2005). "Conflict arose" upon Marie's death in March 2015. (APP.VOL.I p.335). Gregg and Brian learned about HFI's financial problems and the missing corn in 2015. (APP.VOL.II pp.188-189, 202-07-TR.VOL.I 34:25-35:4;59:17-64:11);(APP.VOL.II pp. 375-376-TR.VOL.IV 44:17-20;46:15-25);(APP.VOL.II. pp.470-471-TR.VOL.V 95:13-96:1). Kurt and Keith conceded that "Prior to 2015, Brian and Gregg were unaware of HFI's financial problems." (Brian Brief p.27). *See* Iowa R. App. P. 6.903(3).

Keith's suggestion that HFI faced the "same subjects" back in the 1990s is disingenuous. Kurt did not begin using the 9-bushel estimate until 2003 or 2004. (Kurt Brief p.18). In years prior to 2003, Kurt weighed HFI's corn he used. (APP.VOL.II pp.647-649-TR.VOL.VIII 74:9-76:23).

While Keith criticizes the district court for applying a "discrete acts" analysis (Keith Brief p.59), this is what Keith asked it to do. (APP.VOL.I p.341). Having prevailed on his motion for partial summary judgment, Keith is precluded from now advancing a contrary position. *See Godfrey v. State*, 962 N.W.2d 84, 100 (Iowa 2021) (discussing judicial estoppel).

4. The conduct of Keith, Kurt, Heather, and HK Farms Precludes Application of Laches.

Someone who engages in "misleading tactics," "concealments," or "misrepresentations" cannot rely on laches. *See Moser*, 256 N.W.2d at 908. Kurt concealed and misrepresented the amount of HFI's corn he used, and he concealed using HFI's money to pay his personal expenses. (APP.VOL.II p.85); (APP.VOL.IV p.23); (Ex.248). Kurt's misleading tactics include the documents he created in 2015 trying to justify his taking of HFI's corn, as well as his improper accounting practices. (APP.VOL.II p.62);(APP.VOL.IV p.23);(Ex.213);(Ex.215 p.3). Heather (who signed tax returns failing to disclose the corn obtained from HFI) and HK Farms (which benefitted from obtaining HFI's corn) are guilty of wrongful behavior. (Ex.198);(Ex.200).

Keith concealed Kurt's usage of HFI's corn and HFI's payment of Kurt's and his own personal expenses. (APP.VOL.IV p.23);(Ex.213). The doctrine of laches is not available to any of them.

5. Applying Laches Would Not Be Just.

The *Chadek* and *Lovlie* cases cited by Keith does not support his position. *Chadek* explains that laches will be applied "only where it is necessary to prevent injustice" and "only where it is clearly demanded in the interest of justice." *Chadek v. Alberhasky*, 111 N.W.2d 297, 301 (Iowa 1961). *Lovlie* explains "laches will be applied only where it would be inequitable to permit recovery or it is clearly demanded in the interest of justice." *Lovlie v. Plumb,* 250 N.W.2d 56 (Iowa 1977).

Prior to this litigation, Keith admitted he would be a "terrible manager" if he had allowed Kurt to take the missing corn. (APP.VOL.III p.106). Keith and Kurt now falsely claim the corn was Kurt's compensation, even though no one reported it to the IRS. (Ex.198);(Ex.200-202). Brian and Gregg learned of the missing corn in 2015 and filed suit two years later. (APP.VOL.I p.194); (APP.VOL.III pp.51, 53);(APP.VOL.II pp.202-207-TR.VOL.I 59:17-64:11). Dismissing the case would be contrary to justice.

D. Estoppel By Acquiescence Does Not Apply.

Estoppel by acquiescence requires clear and convincing evidence. *See generally Markey*, 705 N.W.2d at 21. Keith, Kurt, Heather, and HK Farms did not prove this defense.

1. No Inactivity For a Considerable Time After Full Knowledge.

Estoppel by acquiescence applies only if "a party has full knowledge of his rights and the material facts" and "remains inactive for a considerable time." *Markey*, 705 N.W.2d at 21.

The determinative issue is when an independent director of HFI gained full knowledge. *See generally Des Moines Bank*, 51 N.W.2d at 219. There is no evidence any independent director had full knowledge of Keith and Kurt's conduct but remained inactive for considerable time.

Even if Brian and Gregg's knowledge is relevant, the defense does not apply. Brian and Gregg learned of HFI's missing corn and financial difficulties in 2015, and they filed suit in 2017. (APP.VOL.II pp.188-189,202-207-TR.VOL.I 34:25-35:4;59:17-64:11);(APP.VOL.II pp. 375-376-TR.VOL.IV 44:17-20;46:15-25);(APP.VOL.II pp.470-471-TR.VOL.V 95:13-96:1).

2. No Waiver.

Estoppel by acquiescence also requires proof of action "in a manner that 'leads the other party to believe the act [now complained of] has been approved." *Markey*, 705 N.W.2d at 21. In other words, the defense applies only if a party "neglects enforcement for such a length of time that the law implies its waiver or abandonment." *In re Est. of Warrington*, 686 N.W.2d 198, 204 (Iowa 2004).

There is no evidence an independent director intentionally relinquished any rights. (APP.VOL.II pp.976-983-TR.VOL.XI 34:22-35:18;37:21-41:21;43:9-17).

Nor is there any evidence Brian or Gregg waived any rights. Keith points to an email Brian wrote in 2015, in the context of working with consultant McNutt. (APP.VOL.VI p.64). Brian's email did not cause Keith to believe his management practices were condoned. A few hours after Brian's email, Keith sent an email admitting: "If John McNutt shows that all the unsold bushels of corn were in fact Kurt's to feed, then I AM a terrible Manager and will seek outside help in Managing Hora Farms." (APP.VOL.III p.106). In 2016, after Gregg was appointed to the board, he proposed board resolutions, including: "Loss of money and loss of corn

bushels, to be looked into, and accounted for in reimbursements." (APP.VOL.II p.51).

3. Keith, Kurt, Heather, and HK Farms Are Not Entitled to An Equitable Defense.

The misleading tactics and concealments of Keith, Kurt, Heather, and HK Farms preclude them from relying on the equitable defense of estoppel by acquiescence. (APP.VOL.II pp.60, 85; APP.VOL.IV p.23); (Ex.213);(Ex.215);(Ex.248). *See generally Holden*, 202 N.W.2d at 356.

VII. THE DOCTRINE OF UNCLEAN HANDS DOES NOT PROVIDE A DEFENSE.

A. Preservation of Error.

Brian and Gregg agree error was preserved.

B. Scope and Standard of Review.

Brian and Gregg agree review is de novo.

C. Unclean Hands Does Not Apply.

The doctrine of unclean hands is "not a favored doctrine of the courts" and "is not one to be applied rigorously …." *Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc.*, 178 N.W.2d 343, 353 (Iowa 1970). Keith, Kurt, Heather, and HK Farms failed to prove an unclean hands defense.

1. The Derivative Claims Were Not "Acquired" Through Unclean Hands.

The doctrine of unclean hands "applies to actions by which a party acquires the claim which it presses." *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979). ""What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the rights he now asserts.'" *Id.* (quoting *Republic Molding v. B.W. Photo Utilities*, 319 F.2d 347, 349 (9th Cir. 1963)). There is no allegation, and no possible evidence, Brian and Gregg "acquired" the derivative claims through unclean hands.

2. Not Applicable to Damages Claims.

The doctrine of unclean hands applies with respect to "granting affirmative equitable relief …." *Opperman v. M. & I. Dehy, Inc.*, 644 N.W.2d 1, 6 (Iowa 2002); *Matter of Herm's Est.*, 284 N.W.2d 191, 196–97 (Iowa 1979). The doctrine does not apply to the damages claims asserted on behalf of HFI.

3. No Conduct Connected with the Matter in Controversy or During the Same Time Period.

To support an unclean-hands defense, it is not enough for conduct to be "directly connected with the subject matter of the suit." *Benson v. Sawyer*, 249 N.W. 424, 428 (1933). The conduct must be "connected with the matter in controversy." *Id. Midwest Mgmt.*, 353 N.W.2d at 81. *Cf.*

Opperman, 644 N.W.2d at 6. In *Tope*, the plaintiff's conduct "ar[ose] out of the same set of circumstances and during the same time period as his complaint … on this issue." *Tope on behalf of Peripheral Sols., Inc. v. Greiner*, Case No. 15-1571, 912 N.W.2d 499, 2017 WL 6033871 (Iowa Ct. App. 2017).

Brian or Gregg did not engage in any conduct connected with the matters in controversy. Gregg's employment ended in 1985 and Brian's ended in 2000. (APP.VOL.II p.245-TR.VOL.I 140:18-24);(APP.VOL.II p.374-TR.VOL.IV 43:15-21);(APP.VOL.II p.270-TR.VOL.I 201:11-16). Kurt's allegations regarding their employment do not involve the time period at issue and are irrelevant. Moreover, there is no evidence anything Brian or Gregg did decades ago caused any damage to HFI. In the 1980s, Gregg purchased 21 hogs and began a small hog business. (TR.VOL.V 26:11-27:11). Any usage of HFI's corn by Gregg was treated as a business arrangement; there is no evidence of any improper accounting by Gregg. (APP.VOL.II p.456-458-TR.VOL.V 28:23-30:3). When working for HFI, Brian was not paid in corn. (TR.VOL.II 68:23-70:7); (APP.VOL.II p.292).

Kurt's allegations that Gregg committed defamation and breaches of duty are baseless. In 2014, HFI's reported taxable income was *negative* $720,000. (Ex.66). By 2015, HFI had more than $4 million of debt.

(Ex.61);(Ex.67). Gregg was entirely justified in attempting to address HFI's debt. (APP.VOL.IV p.70);(Ex.216 p.4). After appointment to the board, Gregg did attempt to investigate Kurt's use of corn and address HFI's financial problems. (APP.VOL.II p.51); (APP.VOL.IV p.171);(Ex.125);(Ex.134).

4. Brian and Gregg's Conduct Was Not Harmful.

Conduct supporting an unclean hands defense "must appear to have injured, damaged, or prejudiced" the defendant. *Midwest Mgmt.*, 353 N.W.2d at 81.

There is no allegation, and no evidence, of harm to Keith, Kurt, Heather, or HK Farms (or HFI) by anything Brian and Gregg have done. (TR.VOL.II 68:23-70:7); (APP.VOL.II pp.456-457-TR.VOL.V 28:23-29:25). *See Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 279 (Iowa 1996).

VIII. BRIAN AND GREGG HAVE DERIVIATIVE STANDING.

A. Preservation of Error.

Brian and Gregg agree error was preserved.

B. Scope and Standard of Review

Brian and Gregg disagree with Keith's statement regarding the scope and standard of review.

The district court's decision Brian and Gregg have derivative standing should be reviewed for correction of errors at law. *See Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 787 (Iowa 2021), *as amended* (Aug. 26, 2021), *reh'g denied* (Aug. 26, 2021); *Homan v. Branstad*, 864 N.W.2d 321, 327 (Iowa 2015).

C. Brian and Gregg Fairly and Adequately Represent HFI's Interests.

The party challenging derivative standing has the burden of proof. *See* 13 Fletcher Cyc. Corp. § 5981.42 ("The party challenging the plaintiff's standing has the burden of proving that the plaintiff cannot fairly and adequately represent the interests of other shareholders and the corporation") (footnote omitted). *See generally Brandon v. Brandon Const. Co. Inc.*, 776 S.W.2d 349, 353 (Ark. 1989). Keith, Kurt, Heather, and HK Farms failed to meet this burden.

Brian and Gregg have derivative standing. It is undisputed they have been shareholders at all relevant times. (Keith Brief p.66). They are fairly

and adequately representing the interests of HFI in enforcing the corporation's rights. *See* Iowa Code § 490.741.

Brian and Gregg commenced and maintained this lawsuit in the interest of HFI and its shareholders. (APP.VOL.I p.194). They have established substantial wrongdoing by Keith, Kurt, Heather, and HK Farms. Brian and Gregg have proven Keith's and Kurt's breaches of their fiduciary duties. *See* Sections I and II. Brian and Gregg have proven significant damages, including through forensic analysis. (APP.VOL.II p.85); (APP.VOL.IV pp.23,67);(Ex.213);(Ex.216);(Ex.248).

D. The Requested Relief Would Benefit HFI.

There is no conflict caused by the remedies sought on behalf of HFI. (Keith Brief p.69). The remedies "would benefit shareholders equally…." (APP.VOL.I pp.559-560).

On HFI's behalf, Brian and Gregg are seeking damages resulting from Kurt and Keith's breaches. (APP.VOL.I p.289). Recovery of this money would benefit the corporation and its shareholders.

Brian and Gregg are not attempting to "takeover control." (Keith Brief p.69). The request is for a neutral custodian, who will protect and further the interests of Hora Farms and its shareholders, consistent with derivative

standing. *See* Iowa Code § 490.748. A neutral custodian would not affect voting rights. Brian and Gregg are not advancing personal interests.

Brian and Gregg did not request dissolution in their post-trial filings, and they are not requesting dissolution in this appeal. (APP.VOL.I p.519). Further, a request for dissolution does not create a conflict precluding derivative standing. Keith relies heavily on *Read* but fails to mention a decision clarifying *Read*. "The *Read* court concluded only that the trial court's determination was not a misuse of its discretion; it did not hold…that no minority shareholder who files a motion to dissolve the corporation can ever fairly and adequately represent the interests of the corporation in a derivative action." *Betty Andrews Revocable Tr. v. Vrakas/Blum, S.C.*, 779 N.W.2d 723 (Wisc. Ct. App. 2010). *See Trondheim Cap. Partners LP v. Life Ins. Co. of Alabama*, 2022 WL 893542, at *7 (N.D. Ala. Mar. 25, 2022) (rejecting the argument the plaintiffs lacked standing because their individual claims sought dissolution); *Bragoni v. Francalangia*, 2017 WL 5642275 at *7 (Conn. Super. Ct. 2017) ("In sum, the court concludes that the plaintiff's direct claim for dissolution does not prevent him from fairly and adequately representing the interests of the corporations with respect to the derivative claims").

E. Keith's Allegations of Ulterior Motivations Are Without Merit.

Accusations of "family bitterness" and "resentment" do not establish lack of standing.

> Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations. … In closely held corporations, we must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation.

Cattano v. Bragg, 727 S.E.2d 625, 629 (Va. 2012).

Keith's allegations of bad motives are also unsubstantiated. In proposing board resolutions in 2016 and in addressing HFI's substantial debt, Gregg was attempting to help HFI. (APP.VOL.II p.51); (APP.VOL.IV p.71);(Ex.125);(Ex.216 p.4).

Neither Brian nor Gregg previously benefited from the conduct at issue in this case. Any usage by Gregg of HFI's corn for his small hog business in the 1980s was treated as a business arrangement; there is no evidence of any improper accounting by Gregg. (TR.VOL.V 26:11-27:11;28:23-30:3);(APP.VOL.II pp.455-458). Brian was not paid in corn by HFI during his employment, which ended in 2000. (TR.VOL.II 68:23-70:7).

F. Keith's Allegations Regarding Lack of Support Are Without Merit.

Keith suggests this derivative lawsuit has "the support of no other Hora Farms shareholder." (Keith Brief p.72). Whether it does is irrelevant. *See* 13 Fletcher Cyc. Corp. § 5975 ("It is not necessary that a shareholder have the support of a majority of shareholders or even the support of all the minority shareholders"); *Brandon*, 776 S.W.2d at 353 ("Although the other minority shareholders have disavowed the action of the appellant and indicated they do not wish to continue the action, she is not prohibited from doing so").

Shareholders in addition to Brian and Gregg have requested change. In 2016, Dana and Heidi asked Keith to step down. (APP.VOL.II p.58). Darren and Kathy also requested changes. *Id.*

IX. KEITH, KURT, HEATHER, AND HK FARMS ARE NOT ENTITLED TO ANY FEE AWARD.

A. Preservation of Error.

Brian and Gregg agree error was preserved.

B. Scope and Standard of Review.

Brian and Gregg disagree with Keith, Kurt, Heather, and HK Farms' statement regarding scope and standard of review.

The district court rejected the applications for fees by Keith, Kurt, Heather, and HK Farms. That decision should be reviewed for abuse of discretion. *See In re Erpelding*, 917 N.W.2d at 238; *In re Trimble*, 826 N.W.2d at 482. *But see Radda*, 955 N.W.2d at 208; *Berger*, 135 N.W.2d at 621. A decision constitutes an abuse of discretion if "clearly unreasonable," "not based on substantial evidence," or "based on an erroneous application of the law." *Int. of E.H. III*, 578 N.W.2d 243, 246 (Iowa 1998).

C. Keith, Kurt, Heather, and HK Farms Are Not Entitled To Fees Under Iowa Code Section 490.746.

1. Brian and Gregg Have Proper Purpose, and The Claims Asserted Have Reasonable Cause.

Under Iowa Code Section 490.746, a court has discretion to require a derivative plaintiff to pay expenses only if "the proceeding was commenced or maintained without reasonable cause or for an improper purpose." Iowa Code § 490.746(2). This is not a "good manners" standard. (Keith's Brief p.74). It is a stringent standard "parallel[ing] Federal Rule of Civil Procedure 11." *See Frank v. LoVetere*, 2005 WL 3608862 at *2 (D. Conn. 2005). It requires the entire proceeding be without reasonable cause or for improper purpose. *See Winner v. Cataldo*, 559 So. 2d 696, 697 (Fla. Dist. Ct. App. 1990).

The *Moody* case involved allegations with "no basis in fact." *Moody v. National Western Life Ins. Co.,* 634 S.W.3d 256, 284 (Tex. Ct. App. 2021). The claims asserted by Brian and Gregg have reasonable cause. No defendant moved to dismiss. In moving for partial summary judgment, Keith acknowledged factual allegations presenting a "fact issue for trial." (APP.VOL.I. p.335). The district court found "the credible and undisputed evidence establishes that there clearly were substantial, and remain some, problems in the operations of Hora Farms." (APP.VOL.I p.558). The court found it "undisputed that certain procedures and methods of operating HFI by Keith in the past were outdated and must be modified." *Id.* p.571. The court emphasized it: "in no way endorses Keith's past management style or practices in all respects…" *Id.* In denying Keith's fee application, the court reiterated the dismissal of claims was not an endorsement of Keith's practices and noted: "Indeed, warning signs with respect to such practices were communicated by independent experts outside the family prior to suit." (APP.VOL.I p.690). *Cf. Highland Select Equity Fund, L.P. v. Motient Corp.*, 2007 WL 907650 at *1 (Del. Ch. 2007) ("failure to fashion a demand in a good faith effort to comply with controlling precedent" with respect to request for records under Delaware law).

In requesting fees, Keith contends "the statute of limitations, laches, and estoppel plainly bar claims." (Keith Brief p.75). Keith has taken the position the statute of limitations only limits the claims to 2012 forward. (10-18-20 Brief p.6). Brian and Gregg proved more than $700,000 in damages even during the limited period. (APP.VOL.II p.87). The district court rejected the laches and estoppel defenses. (APP.VOL.I p.563).

Brian and Gregg have acted with proper purpose, not animus. Brian and Gregg are not trying to gain control of HFI. *Cf. Schwartzberg v.* CRITEF, 685 A.2d 365, 367 (Del. Ch. 1996) ("stated purpose" for request for records was to replace general partners). Kurt selectively quotes from Gregg's resolutions, which also discuss "financial losses," "management unaccountability," and "operational problems" and propose addressing "loss of money" and "loss of corn bushels." (APP.VOL.II p.125). It was appropriate for Gregg to address HFI's substantial debts. *See e.g.,* (Ex.99);(Ex.61);(Ex.67);(APP.VOL.IV p.67);(Ex.216). Gregg properly attempted to address HFI's financial problems. (APP.VOL.III p.171). Gregg did not defame anyone.

Brian and Gregg did not engage in conduct comparable to Keith's and Kurt's when they worked at Hora Farms decades ago. Keith and Kurt have wrongfully taken millions of dollars of HFI's assets. Brian and Gregg did

not steal from HFI; there is no evidence of them harming HFI. (TR.VOL.II 68:23-70:7);(APP.VOL.II pp.456-458-TR.VOL.V 28:23-30:3).

2. Keith Has Not Paid Attorney Fees In This Case.

Because Keith has not paid any attorney fees, he does not have "expenses incurred in defending the proceeding." Iowa Code § 490.746(2). (APP.VOL.II p.968-TR.VOL.XI 17:10-15). *See Hein v. American Family Mut. Ins. Co.,* 166 N.W.2d 363, 367 (Iowa 1969) (definition of incur); *Flanagan v. Baltimore & O. Ry. Co.,* 50 N.W. 60, 61 (Iowa 1891) (definition of incurred); *Swartz v. Ballou*, 47 Iowa 188, 195 (Iowa 1877) (defendant's burden to prove payment or obligation). This prevents Keith from receiving an award of fees.

D. Keith is Not Entitled to An Award of Fees Under Iowa Code Section 633A.4507.

1. Keith Has Paid No Fees.

Keith has no "costs" or "expenses" under Iowa Code Section 633A.4507. Keith has used HFI's funds to pay all of his fees. (APP.VOL.II p.968-TR.VOL.XI 17:10-15). Keith is not entitled to what he describes as a "fee recovery."

2. Justice and Equity Are Not in Keith's Favor.

"Justice and equity" do not support Keith's request for fees. Iowa Code § 633A.4507. The request to replace Keith as Trustee is reasonable and in good faith. *In re Tr. No. T-1 of Trimble*, 826 N.W.2d 474, 491 (Iowa 2013). Keith has failed to protect Trust's primary asset. (APP.VOL.II p.85); (APP.VOL.IV pp.23, 67);(Ex.213);(Ex.216); (Ex.248).

The request to remove Keith as Trustee did not "dissolve[] on basis examination." (Keith Brief p.77). The court denied Keith's motion for partial summary judgment regarding trustee standing. *See Kelly v. Englehart Corp.*, 2001 WL 855600, at *10 (Iowa Ct. App. 2001). The claim regarding the Celeste Trust was denied only after an eleven-day trial. (APP.VOL.I p.539).

CONCLUSION

Judgment should be entered in favor of Hora Farms, Inc. and against Kurt, Heather, HK Farms, and Keith, jointly and severally, in an amount of at least $1,188,224.

Judgment should also be entered in favor of Hora Farms, Inc. and against Keith in the additional amount of $193,223.

In addition, Keith should be ordered to repay to Hora Farms, Inc. the

attorney fees and expenses it has paid on his behalf in this litigation, in an amount of at least $432,939.

Hora Farms, Inc. should be ordered to pay Brian and Gregg's attorney fees and expenses, in the trial court and on appeal. Gregg and Brian request leave to file a fee application with this Court after disposition of this appeal or, alternatively, request remand to the district court to determine the amount of their fees and expenses, in the trial court and on appeal, and to enter judgment against Hora Farms, Inc. in such amount.

A custodian should be appointed to manage the affairs of Hora Farms, Inc. Keith should be removed as director and officer. Keith, Kurt, and Heather should be permanently enjoined from acting as a fiduciary.

Keith should be removed as Trustee of the Trust, and the court on remand should appoint a new trustee.

Keith, Kurt, Heather, and HK Farms' requests for attorney fees should be denied in their entirety.

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CERTIFICATE OF COST

I hereby certify that the actual cost of printing or duplicating this document (exclusive of postage) was $0.00 due to electronic filing.

September 23, 2022 */s/* Sarah Gayer

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) and 6.1601 because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size and contains 12,811 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

September 23, 2022 */s/* Sarah Gayer

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 23, 2022 the foregoing document was electronically filed with the Clerk of the Iowa Supreme Court through EDMS, which provides service to all counsel of record. The undersigned further certifies that the foregoing document was served on Hora Farms, Inc., in an envelope with postage fully paid and deposited in a U.S. Post Office depository.

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