IN THE SUPREME COURT OF IOWA
Nos. 22-0259

BRIAN HORA and GREGG HORA, Individually and On Behalf Of Hora Farms, Inc.,

Plaintiffs-Appellants/Cross-Appellees,

vs.

KEITH HORA Individually and In His Capacity As A Shareholder, Director, and Officer 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.

On Appeal from the Iowa District Court for Washington County,
Business Court Case No. EQEQ006366,
The Honorable Sean McPartland

FINAL BRIEF OF APPELLEE/CROSS-APPELLANT KEITH HORA

(Oral Submission Requested)

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Soults Farms, Inc. v. Schafer, 797 N.W.2d 92 (Iowa 2011)

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

Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621 (Iowa 1996)

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ROUTING STATEMENT

Defendant Keith Hora ("Keith") agrees that a transfer to the court of appeals is appropriate. The majority of the issues involve the application of existing legal principles.

STATEMENT OF THE CASE

This is a case about an Iowa farmer's consistent approach to family and farm management, and his eldest sons' attempts to preempt control of the operation their father built. Hora Farms Inc. ("Hora Farms") is a family farm company that Keith founded with his father, George Hora, after the 1974 harvest. Father and son divided ownership of the farm with their wives Marie and Celeste Hora, and have kept all of that ownership, through gifts and succession, within the Hora family.

Keith raised his six children with benefits that Hora Farms provided, some of which continue to this day. His leadership guided the company through the farm crisis of the 1980's, and through grief that followed the untimely death of his wife Celeste in 1989, George in 1995, and mother Marie in 2015. During this time period, Keith's decision-

making expanded Hora Farms' Washington County land ownership from 400 to nearly 1,200 acres, built a strong reputation in the local and Iowa farming communities, and successfully exposed and rooted the next Hora generation to the family's Iowa farming legacy.

Plaintiffs Brian and Gregg Hora ("Brian" and "Gregg") are Keith's two oldest sons, and older brothers of Defendant Kurt Hora ("Kurt"). As one might expect in a family farm company, each brother has worked for their father at some point in their farming career. Gregg, the oldest, worked for Hora Farms for several years in the early 1980's. When Gregg departed for the Ft. Dodge area and an independent farming operation, brother Brian filled his vacant boots. For the next fifteen years Brian used his employment at Hora Farms to learn, take on increasing responsibilities, and construct his individual farming operation—Precision Partners Corp. Brian left active employment with Hora Farms in 2000, creating a void that Kurt filled. Like his brothers before him, Kurt learned from opportunities that the family farm provided and now has a successful, independent farming operation of his own—Defendant HK Farms, Inc. Kurt currently manages that farm in addition to his duties as Hora Farm's custom farm operator.

The tough feelings and motivations harbored by Brian and Gregg

are at their core not really about the business of a family farm corporation. The benefits Keith has personally withdrawn from Hora Farms, and the practice of trading in-kind and comingling grain, have not materially changed for forty-five years. These practices were the subject of a family meeting in the 1990's. Gregg and Brian personally observed and received these (and other) benefits during their employment. Their lawsuit and appeal claims Keith's decisions amount to fraud and fiduciary mismanagement, but conveniently overlooks their nearly twenty years of direct participation in those same alleged wrongs.

Instead, this lawsuit represents, unsurprisingly, a younger generation's attempt to control today what they otherwise would not receive until Keith passes. After going silent for fifteen years, Brian and Gregg renewed their interest in dad's farm company when Grandmother Marie died in 2015. Brian began to attend Keith's estate planning meetings. Voting shareholders of Hora Farms (Keith and his two siblings) elected Gregg to fill the board seat created by Marie's death. Gregg then used that position to subvert established corporate lending relationships, and worked with Brian to theorize that their small fraction of non-voting Hora Farms' shares experienced financial loss because brother Kurt stole hundreds of thousands of bushels of grain.

Brian and Gregg claimed pre-trial their father's "sloppy at best" records do not accurately record grain inventory, but then post-trial utilized these same records to argue that corn inventory gaps must be due to Kurt's grain theft and conversion. In so doing they stubbornly overlook rational explanations for the so-called "missing" grain. Plaintiffs watched the evidence at trial showing calibration issues with combine yield monitors, damage and corn loss at the drying and storage facility, and shrink. Yet, despite the reasons for "missing" corn (which they left largely uncontradicted), Brian and Gregg continue to argue against the integrity and representations of their family. None of Hora Farms' other family shareholders, who own 95% of its stock, support Brian and Gregg's course of action.

In the end Plaintiffs disagree with the outcome that Keith's consistent management and family opportunity—from Gregg, to Brian, to now Kurt—have had on Hora Farms over its nearly fifty-year history. Plaintiffs speculate that if they controlled Hora Farms those results would be different, and any inheritance following their father's anticipated death would be worth more money. Kurt would assuredly be fired, and the benefits that Keith and re-married wife LoRee Hora rely upon would cease. Brian could re-take control of everyday farming operations for

1,200 acres for his benefit and for his farming son, and Gregg could pitch himself into a court-appointed director's seat, this time as Hora Farms' chairman and CEO. Alternatively, Brian and Gregg believe the whole farm should be independently managed (for a steep fee) by a court-appointed custodian, contrary to ballots cast by Hora Farms' voting shareholders and to the detriment of its important mission of starting and keeping family members engaged in farming.

This is precisely what Trial showed: a long-brewing family conflict that had not much to do with corporate claims or fiduciary breaches. Brian and Gregg knew of and accepted the practices at Hora Farms while they were the beneficiaries and beyond. That Keith continued those practices with Kurt should surprise them least of all, and a lawsuit which claims Keith's consistent management constitutes "breach of fiduciary duties conversion" "fraud" and "fraudulent concealment" during Kurt's tenure, but not during Brian and Gregg's, is incredulous at best. Lacking proof beyond family grief and paid opinions found to be less credible than others, Brian and Gregg's lawsuit was appropriately dismissed and should remain dismissed on appeal.

STATEMENT OF THE FACTS

Pursuant to Appellate Rule 6.903(3), Keith omits a separate statement of the facts and includes his discussion of the evidence within his arguments.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED TO DISMISS PLAINTIFFS' GRAIN THEFT ALLEGATIONS AFTER HEARING ALL THE EVIDENCE—KURT DID NOT STEAL CORN.

A. Preservation of Error.

Keith agrees that Plaintiffs preserved error with respect to their stolen corn claim against Kurt.

B. Scope of Review.

Plaintiffs correctly state that review is *de novo*. Iowa R. App. P. 6.907. While a reviewing court may "examine the whole record, find [its] own facts, and adjudicate rights anew," it is equally true but unmentioned by Plaintiffs that such review also "give[s] respectful consideration to the district court's fact findings." *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 629 (Iowa 1996); *Struve v. Struve*, 930 N.W.2d 368, 371 (Iowa 2019) (deference for institutional and pragmatic reasons). Deference is particularly warranted with respect to findings on witness

credibility, whose testimony a district court observes live but which only exists for a reviewing court on cold paper. *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011).

C. Argument.

To reach the conclusion that Kurt stole Hora Farms' corn, Plaintiffs point to records that Keith and Kurt created pre-suit but which actually explain what happened to the so-called "missing" corn and that Kurt did not do what his brothers claim. These documents begin with typed summaries that Keith created from business records. *E.g.* App. Vol. III 53-54; App. Vol. II 905-06 at 82:24-83:2 (handwritten notes not Keith's). They show Hora Farms' corn in-flows (harvest data from the combine yield monitor) and sales outflows (bushels identified on third-party sale tickets), and "balance" bushels. App. Vol. II 906-08 at 83:3-85:3. They do not account for Kurt's in-kind trades, an existing practice on the farm. *Id.* Plaintiffs both knew this gap in Keith's summaries existed, App. Vol. II 829-831 at 155:6-157:21, and that Kurt traded his services for corn, App. Vol. II 994 at 72:3-20; App. Vol. II at 148.

Kurt's records start where his father's leave off. Over the years Keith has used a settlement process with Gregg, Brian, and Kurt, by which his sons true-up their relationship with Hora Farms every year. App. Vol. II

259 at 173:14-17; App. Vol. II 643-44 at 52:24-53:13; App. Vol. II 888, 890-91 at 61:8-21, 63:4-64:15; App. Vol. IV 182-235. Kurt went through these records and his separate farm accounting information, and conglomerated them into two summary documents. App. Vol. II 707-09, 832 at 8:23-10:2, 158:6-20. One document substantiates receipt of the 85,000 bushels plastered through Plaintiffs' brief. App. Vol. III 349-376; App. Vol. II 708-716, 723-733 at 9:24-17:20, 24:7-34:14 (explanation of Ex. 190). The other ties that and Kurt's trading and other farm factors together, showing what happened to the corn dubbed "missing" from Keith's records. Kurt's figures account for all but three percent of the difference between Hora Farms' yield and sales data. App. Vol. IV 128-130; App. Vol. II 754-59 at 56:10-61:2.

That difference and whatever other discrepancies Brian and Gregg pick at, fit within margins of error explained by yield monitor calibration, damage to corn at Hora Farms' drying and storing facility, and shrink from moisture loss. Gregg Griffin, the Agriland FS employee whom Kurt relied upon to help calibrate the combine yield monitor, testified he "tr[ied] to get it within 3 or 4 percent" of "what it's supposed to be." App. Vol. II 670-71 at 125:24-126:6; *see also* App. Vol. II 1015-18 at 120:22-123:17. Hora Farms overstated its yields as a result.

What corn existed experienced losses from damage and shrink. Kurt explained how a new grain leg and downspouts at Hora Farms' bin facility damaged corn. App. Vol. II 745-53 at 47:18-55:10. The family worked to address these problems but some damage remained, evidenced through a mason jar of corn from the bin site. App. Vol. II 912-13 at 96:6-97:2; App. Vol. II 128. Likewise apparent at trial was shrink. Hora Farms calibrated its yield monitor to 56 lbs, which is the standard measure of one bushel of corn at 15.5% moisture content. App. Vol. II 911, 915-16 at 95:7-22, 99:9-100:4. The problem is, historical sales data showed that Hora Farms' corn consistently lost moisture in storage. App. Vol. II 908-10, 914-15 at 85:10-87:9, 98:1-99:3; App. Vol. V 533, 537, 541, 543, 545, 547, 549, 551, 553. Less moisture means lighter corn, and lighter corn means when you sell by weight, you have less corn. So much less, in fact, that Darren Hora testified that shrink and monitor error alone contributed to a 12% difference between reported and sold bushels at Hora Farms. App. Vol. II 1015-18 at 120:22-123:17; App. Vol. V 680-682.

It bears mentioning that Brian and Gregg never cared about any of the foregoing explanations, particularly those offered by Kurt. They were given the opportunity to meet and discuss Kurt's documents but chose instead to continue with their accusations. App. Vol. II 832-837 at 158:11-

163:4. Brian admitted that he did not look through Hora Farms' scale tickets which document shrink for thousands of bushels. App. Vol. II 1020-1021 at 151:12-152:7; App. Vol. V 15-679.

Plaintiffs instead endeavor to transform these explanations into a buzz saw that operates in both directions. In filings pre-trial, Plaintiffs' said "Hora Farms' financial records were sloppy at best." App. Vol. I 350. "[T]here was no record of the amount of corn Kurt took from Hora Farms to feed his hogs" save "only a few, difficult-to-decipher, sheets of paper." *Id.* At trial, however, Plaintiffs' experts were able to decipher them into a conclusion that Kurt stole precisely 212,877 bushels of corn. P-Brief 38-39. But Kurt did not steal corn. App. Vol. II 838-39 at 164:25-165:7 ("[Q] Well, did you do it? [A] No."). And Plaintiffs' experts were not found credible in comparison to other testimony offered at trial. App. Vol. I 556 (hereinafter "Trial Ruling").

The discrepancy at the outer margin of Hora Farms' yield gave Plaintiffs' the opportunity to claim that Kurt stole corn to put themselves in control. But the evidence showed Hora Farms produces upwards of 150,000 to 200,000 bushels of corn per year. Subtract from that sales and corn legitimately traded with Kurt, and what remains are single digit percentages of "missing" corn. Add back the evidence of monitor error,

damage and shrink—a known margin of error—and what results is the reason why the District Court made no finding that Kurt stole corn. Plaintiffs did not prove their case.

II. THE EVIDENCE SUPPORTS AFFIRMING THE DISMISSAL OF ALL FIDUCIARY CLAIMS AGAINST KEITH.

A. Preservation of Error.

Plaintiffs have not fully preserved error. Plaintiffs offered three claims for the District Court to rule upon: (1) that Keith was liable for his oversight which allowed Kurt to steal corn; (2) that Keith failed to comply with the tax code; and (3) that Keith engaged in approximately $190,000 of self-dealing. Plaintiffs' Post-Trial Brief at 21-24. Keith agrees these claims have been preserved for appeal. *See* P-Brief Sections II(C)(1)(b)(i), (ii), and (v).

However, Plaintiffs add new claims on appeal in Sections II(C)(1)(b)(i) (final sentences), (iii), (iv), and (vi) of their opening brief.

Plaintiffs likewise add new and different liability theories on appeal. P-Brief Sections II(C)(1)(c)(ii)-(iv) (newly citing Iowa Code subsections 490.831(1)(b)(1), (b)(2)(b), and (b)(5)).

Finally, except the $190,000 for self-dealing, Plaintiffs' damage calculations and figures are totally new. *Compare* Plaintiffs' Post-Trial

Brief at 34-35, 41, *with* P-Brief 70-72.

Because these new claims, liability theories, and damages were not presented by Plaintiffs for decision and therefore not ruled upon by the District Court, they are not preserved for appeal. *E.g. City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018). Keith objects to their consideration.

B. Scope of Review.

Keith agrees that review is *de novo*. *See supra* Section I(B).

C. Argument.

1. Standard for Director and Officer Liability Under Iowa Law, and The Distinction Between The Duty Of Care And The Duty Of Loyalty.

The District Court accurately stated that "[t]he governing fiduciary framework and relative burdens are [] explained in *Van Horn v. R.H. Van Horn Farms, Inc.*, 919 N.W.2d 768 (Table), 2018 WL 3060240 (Iowa Ct. App. 2018), and in the *Cookies* decision and Iowa Business Corporations Act sections 490.830-31, and 490.842." Trial Ruling, App. Vol. I 565. That framework grows from two types of farm management decisions: (i) business judgments where the corporate officer does not personally benefit; and (ii) those where he does, which implicate his duty of loyalty.

Beginning with the duty of care, the rule in Iowa and elsewhere

recognizes that it is inappropriate to second-guess the choices made by shareholder-elected individuals. "[Courts] defer to the strategic decisions made by the farm corporate directors under the business judgment rule," which "presumes directors' 'decisions are informed, made in good faith, and honestly believed by them to be in the best interests of the company.' " *Van Horn*, 2018 WL 3060240 at *7; *see also* Iowa Code § 490.831(1) (defaulting to no liability "for any decision as director to take or not to take action, *or any failure to take any action*" (emphasis added)); Iowa Code § 490.842(4) (same); *F.D.I.C. v. Castetter*, 184 F.3d 1040, 1046 (9th Cir. 1999) (explaining the rule "*protect[s] well-meaning directors who are misinformed, misguided, and honestly mistaken*" (emphasis supplied)). In light of the presumption, Plaintiffs carry the burden to prove otherwise. *Van Horn*, 2018 WL 3060240 at *7. If carried, and as with ordinary civil actions, Plaintiffs also must meet the preponderance standard for causation and damage. Iowa Code § 490.831(2); Iowa Code § 490.842(4) (incorporating "applicable law" and standards of section 490.831 for officer conduct).

A different formula calculates liability when a director or officer engages in self-dealing. When a director transacts business with his corporation, the director has the burden to establish that he entered into

each transaction in good faith, with honesty and fairness because that proof is no longer presumed under the business judgment rule. *Cookies Food Prod., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452-53 (Iowa 1988). The rule here—coined absolute fairness—stems from the premise that as a director, "one may not secure for oneself a business opportunity that in fairness belongs to the corporation." *Id.*

In such a case, the plaintiff bears the burden to prove "receipt of a financial benefit," Iowa Code § 490.831(1)(b)(5), and the director bears the burden of proving that his self-dealing—his "receipt"—was on terms fair to the corporation. *Cookies*, 430 N.W.2d at 452; Iowa Code § 490.831(3)(a) (fairness burden); *accord* Iowa Code § 490.861(2) (prohibiting equitable relief or damages where a transaction "judged according to the circumstances at the relevant time, is established to have been fair to the corporation."). Where the fairness standard is unmet, the director is liable for breach of his duty of loyalty. *Id.* The plaintiff retains his burden to prove causation and an amount of damage. Iowa Code § 490.831(2); Iowa Code § 490.842(4).[1]

[1] States with the most developed corporate laws also keep the burden to prove causation and damages on plaintiffs in loyalty cases. *E.g. OptimisCorp v. Waite*, No. CV 8773-VCP, 2015 WL 5147038, at *82 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) ("It is true that this Court shows solicitude for plaintiffs with respect to the difficulty of precise

2. Keith Overwhelmingly Established Fairness In His Transactions With Hora Farms.

At no point in this case has Keith shied from his burden to establish that the benefits he received from Hora Farms were provided on fair terms. *Cookies*, 430 N.W.2d at 452; Iowa Code § 490.831(3)(a). Keith does not retreat here—proving fairness is exactly what Keith did.

Plaintiffs challenge the practice started at the time of Hora Farms' incorporation under which Keith received a small salary and the corporate payment of larger fringe benefits in exchange for his services. App. Vol. II 858-861 at 28:17-31:9; App. Vol. IV 16 ($10,000 salary in 2010) and 17 (same salary in 2018). "Such expenditures were consistent practices of all Hora family members who were employed by and/or involved in the operation of Hora Farms over the years." Trial Ruling, App. Vol. I 569; *see also* App. Vol. II 264 at 190:2-9 (Brian: "Part of [my] compensation was

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damages in certain circumstances and that damages in duty of loyalty cases serve the dual purposes of compensating for injury and deterring future breaches of the duty of loyalty. It remains the law, however, that when acting as the fact finder, this Court may not set damages based on mere 'speculation or conjecture' where a plaintiff fails adequately to prove damages. Here, Plaintiffs' damages calculation is not merely uncertain, it is speculative and unreliable. Even giving Plaintiffs the benefit of the doubt, the Projections do not provide an appropriate basis from which to determine damages and any damages award based on them would be mere conjecture." (internal quotation omitted)).

part of the house. That's correct"); App. Vol. II 457 at 29:4-25 (Gregg agreeing that he used Hora Farms' corn to feed his pigs, but being conveniently unable to remember if it was part of his compensation); App. Vol. IV 249-50, 251-255; App. Vol. VI 69-75 (Brian's work agreements)).

Brian and Gregg hired former IRS examiner Kerry Bolt to opine against this practice and to identify personal expenses that Hora Farms paid over a period of nine years, 2010 through 2018. It was not a very hard task because nothing was hidden. Keith segregated and tracked these expenses "to the penny" in the farms' accounting program. App. Vol. II 862 at 32:8-14, 863 at 34:10-11, 864 at 35:2-14; App. Vol. III 544-47. Mr. Bolt opined that $193,223 of those expenses were personal, not corporate. App. Vol. II 546 at 52:3-5. This amounts to $21,111.11 per year in living expenses that Keith could have taken as salary—which Plaintiffs and Mr. Bolt did not oppose—but instead chose to deduct directly under forty years of accounting advice. App. Vol. II 584-85 at 111:2-112:7 (taking as salary "would remedy the problem"); App. Vol. II 850 at 19:8-17, 858 at 28:24-15, 864-67 at 35:11-38:18 (accounting advice); App. Vol. VI 26 ("All the costs of operating the house are 100% deductible by the corporation and tax-free to the family.").

To Brian and Gregg the form of the transaction is what was wrong,

not the non-extravagant benefit amount. P-Brief at 59-60; App. Vol. II 584-85 at 111:2-112:7.[2] They say the "improper payment" is what gives rise to damages, P-Brief at 71, never arguing or providing evidence that Keith was over-compensated and thus "caused" "damage." *But see* Iowa Code § 490.831(2)(a) (burden on plaintiff to prove causation and damages).

Iowa courts have already ruled that a farm director and officer does not abuse his position through receipt of a modest salary and fringe employee benefits under long-standing farm practices. *Heidecker Farms, Inc. v. Heidecker*, 791 N.W.2d 429 (Table), 2010 WL 3894199, at *11-12 (Iowa Ct. App. 2010) (deeming as fair an annual salary of $30,000, plus periodic bonus, plus employee benefits including housing, gas, and health insurance); *Van Horn*, 2018 WL 3060240, at *7 ("Critically, [the farmers] do not draw large salaries."). On the face of the evidence alone—$21,111.11/year plus a $10,000 salary—the Court could conclude Keith carried his burden of fairness.

But Keith went further. He called farm accounting veteran Russ

[2] Disinterested, fair shareholders would not advance a form over function claim, particularly when they themselves directly participated in the challenged practice. Iowa Code § 490.741; *see infra* Section VI(C)(2) (detailing participation and knowledge facts).

Thompson to the stand to share his perspectives from forty-three years of accounting for "[b]asically just farmers." App. Vol. II 917-20 at 104:21-107:9. Mr. Thompson's testimony explained that he compared area farm management fees to the personal benefits that Keith received, calculated from conservative assumptions to avoid line-item disputes. App. Vol. II 936-38 at 123:11-125:14, 939-41 at 126:12-128:25. Mr. Thompson testified that he selected an 8% management fee on gross revenues, which could be higher in practice given the scope of work that Keith undertook for marketing grain. App. Vol. II 936-38 at 123:23-125:14. In the end, Mr. Thompson concluded that highest possible benefit Keith received from 2012 to 2018 was at least $96,270 less than the cost of comparable outside management. App. Vol. II 940 at 127:2-10; Ex. 525. Keith's receipts were fair and reasonable to Hora Farms.

To further the point of fairness, Mr. Thompson explained not only the benefits Keith received, but also the benefits Keith conveyed upon Hora Farms. Hora Farms row crops land that it owns, and rents approximately 634 acres from Keith individually and through Keith's position as Trustee of Celeste's Trust, and from an entity that Keith owns with his brother and sister, KGM Hora, LLC. App. Vol. II 870-75 at 43:19-48:3; App. Vol. V 685.

Mr. Thompson examined Hora Farms' rental rates and provided opinions on the net benefit to the corporation and detriment to Keith. His method involved calculating a baseline "market" or "fair" rent with CSR and CSR2 values reported by Iowa State University. App. Vol. II 922-23 at 109:10-110:1, 924-31 at 111:12-118:1. This is the same method Plaintiffs spelled out when asked to provide their position on "fair market rent." App. Vol. II 125 (interrogatory answer). He then compared the market rent to the rent Hora Farms actually paid. The result, Mr. Thompson found, was that from 2010 to 2018 Hora Farms benefited by paying $783,000 below market value through its rental arrangements with Keith (and related entities). App. Vol. II 931-36 at 118:2-123:10; App. Vol. V 683. Apart from dwarfing the personal benefits figure Keith's sons paid Mr. Bolt to pick out of well-kept accounting statements, the analysis by Mr. Thompson firmly proves Keith's concern for Hora Farms' interests and a complete lack of intent to take advantage of Hora Farms or defraud anyone. If Keith needed, or wanted, more money, Hora Farms could simply pay Keith market rent.

For good reasons the District Court concluded the credibility and experience of Mr. Thompson rendered his opinions more valuable than those of Plaintiffs' experts, including Mr. Bolt. Trial Ruling, App. Vol. I

556. Mr. Thompson has done little else but advise farmers for forty-three years on subjects like the analyses and opinions he presented to the District Court. App. Vol. II 917-20 at 104:21-107:9. By contrast, "[b]oth Mr. Schnurr and Mr. Bolt testified they have no farm experience or experience managing a farm." Trial Ruling, App. Vol. I 556; App. Vol. II 498-99 at 162:11-163:4 (Mr. Schnurr); App. Vol. II 566-68 at 79:23-81:5 (Mr. Bolt). Worse, Mr. Bolt opined about Keith and Kurt, but got his fact information from Brian and Gregg and their attorneys. App. Vol. II 568 at 81:12-25. Mr. Bolt's meeting notes are so heavily redacted[3] that it could be hard to conclude how he came to have such a detailed understanding and so many opinions. App. Vol. VI 81-90; App. Vol. II 569-79 at 83:6-93:19. But then, Mr. Bolt was given Brian and Gregg's lengthy interrogatory answers to follow. App. Vol. II 580-83 at 102:8-105:25.

The District Court was therefore kind in saying that Mr. Bolt and Mr. Schnurr were "less credible than other expert[s] [] in the case." Trial Ruling, App. Vol. I 556. The truth is they were more akin to partisans than

[3] Mr. Bolt testified the heavy redactions contain "things that [Mr. Bolt] wrote down that are unrelated to this lawsuit in the preparation of [his] report." App. Vol. II 574-75 at 88:24-89:3; App. Vol. VI 81-90. He said the redactions were "my notes to myself." App. Vol. II 574 at 88:13-16. Mr. Bolt did not explain why he chose to write totally irrelevant and unrelated information on the notes of his conversations with Brian and Gregg.

experts, and their opinions should have been excluded entirely. *Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992) ("If the underlying evidence is furnished by a biased witness, [the opinion] probably will be excluded."); *accord Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 696–97 (Iowa 2010) (expert testimony constructed to advance only the plaintiff's position is not credible). Still, even with Brian and Gregg and their experts, Keith established that the benefits he received from Hora Farms, "judged according to the circumstances at the relevant time," were "fair to the corporation." Iowa Code § 490.861(2)(c). Keith at all times upheld his duty of loyalty to Hora Farms.

3. "The Court Does Not Find That Keith Acted In Bad Faith, Dishonestly Or With Intention To Harm HFI."

Setting aside employee benefits, all of Plaintiffs' other alleged wrongs concern Keith's decision-making at Hora Farms and thus implicate only his duty of care. Plaintiffs bore the burden of proof in all respects for these challenges under the business judgment rule. Iowa Code § 490.831; *Van Horn*, 2018 WL 3060240 at *7.

i. Plaintiffs Failed To Overcome The Business Judgment Rule In Their Protests To Keith's Management.

Plaintiffs' first preserved challenge involves Keith's oversight of

Kurt and a claim that Keith's management and recordkeeping practices allowed Kurt to steal corn. P-Brief at 55-57, 62-63, 70-72. Brian and Gregg frame this challenge to the business judgment rule under section 490.831(1)(b)(4) as an unreasonable sustained failure to devote attention.

To start, Keith takes issue with any characterization that Hora Farms' records were "missing or inadequate in connection with corn" and "woefully inadequate." P-Brief at 55, 63. It is flat wrong to insinuate that records were ill-kept. Keith preserved yield records, App. Vol. II 97-115, scale tickets for inventory sales, App. Vol. V 15-679, grain financials in the PC Mars accounting program, App. Vol. III 436-37 (fiscal 2012 data), and required annual settlement statements with Gregg, Brian, and Kurt, App. Vol. II 259 at 173:14-17, 643-44 at 52:24-53:13, 888 at 61:8-21, 890-91 at 63:4-64:15; App. Vol. IV 182-235.

From 2006 to 2016 Hora Farms was "ISO Certified" and voluntarily submitted itself to records and traceability audits from third-party quality manager Mike Delaney. App. Vol. II 782-96 at 100:14-114:2. In Mr. Delaney's experience there were "two farms out of 26 [he audited] that were, in [his] mind, above and beyond the level of traceability, and Horas were one of them." App. Vol. 787 at 105:16-19. Explanations may have been given to tie all of these records together and show that Kurt did

not steal corn, which is entirely acceptable. There is no law that to be "attentive" a director or officer must show contemporaneously-kept corporate records which resolves the case again him.

Expanding on that point, neither of Plaintiffs' two experts offered or were qualified to opine on the applicable standard of care for a "reasonably attentive director" on an Iowa family farm. Iowa Code § 490.831(1)(b)(4). Nor did Plaintiffs establish that a standard different from what Keith abided by would result in a conclusion different from the conclusion Keith reached: there never was stolen corn. Plaintiffs' say their father was not a reasonably attentive director, P-Brief at 62, but saying so does not make it so.

Keith tracked the grain monitor inflows and sale outflows at Hora Farms. App. Vol. II 97-115; App. Vol. II 53-54; App. Vol. III 398-555 (PC Mars codes 301 and 302); App. Vol. V 15-679. Without personal knowledge, Brian and Gregg account for the difference as Kurt's converted corn. App. Vol. II 829-31 at 155:6-157:21; *cf.* P-Brief at 51. With personal knowledge, Keith accounts for the difference as a combination of in-kind trades due to Hora Farms' relationship with Kurt, and internal errors or losses due to yield monitor calibration, damaged corn, and shrink. *E.g.*, App. Vol. II 754-59 at 56:10-61:2 (excerpt of Kurt explaining

where the corn went); App. Vol. II 1015-18 120:22-123:17 (Darren's corroboration); App. Vol. IV 128-130; App. Vol. V 15-679.

Brian and Gregg say Kurt was wrong to use a 9 bushels/hog figure from his Big Gain feed rations to track corn consumption. *E.g.*, P-Brief at 25. Big Gain witnesses backed the feed ration that Kurt used. App. Vol. II 607-08 at 114:22-115:16 ("[a]bout 8.75 bushels" per hog). Gregg also testified that Kurt's formula was within the bounds of reason, adding "[Question] that's a business decision that [a] farmer is entitled to make? "[Answer] [t]hat is correct." App. Vol. II 461-63 at 48:4-50:4. By considering known relationships, existing grain problems, and third party statements as Keith has done, he has as the "reasonably attentive director" accounted for Plaintiffs' "missing" corn without any additional work.

Finally, even if the trial record were re-weighed to find that Plaintiffs' overcame the business judgment rule, they failed to causally connect liability to non-speculative damages. The breach within section 490.831(1)(b)(4) occurs "when particular facts and circumstances of significant concern materialize." When did that happen? Plaintiffs never have said. They identify no date, no incident, which created liability and damages moving forward. Was it the first year banker Alan Buckert asked about corn sales, or the second, or the last, or three years after that? The

standard by which Plaintiffs measure their father does not provide an answer. Plaintiffs want the clock to start sometime after Brian quit in 2000, App. Vol. II 292 at 68:4-10; P-Brief at 71, meaning that when damages began to accrue is totally arbitrary. Iowa law does not allow for such speculation.

All this goes to show that the District Court was ultimately correct in holding "Plaintiffs have not met their burden of establishing that Keith's actions and decisions were not so informed, were not made in good faith, and were not honestly believed by Keith to be in the best interests of the company." Trial Ruling, App. Vol. I 571; *cf.* App. Vol. II 294 at 129:21-25, 317-21 at 92:5-96:2, 959-60, 959-60 at 200:2-201:7. Plaintiffs did not establish a standard of care that their father regularly erred in upholding in connection with particular facts warranting concern that ultimately caused a different outcome and harm to Hora Farms. Iowa Code § 490.831(1)(b)(4).

ii. Plaintiffs Failed To Prove Keith Acted With Favoritism Towards Kurt When Applying Hora Farms' Policies.

Brian and Gregg re-package their attentiveness claim against Keith as a preferential treatment allegation, effectively arguing that Keith's lack of attentiveness in the annual settlement process shows that Keith favored

Kurt. The process "consisted of and resulted from a lack of objectivity due to [Keith's] father-son relationship with Kurt." P-Brief at 65.

The burden was theirs to first prove that Keith's annual settlement practice "lack[ed] [] objectivity." Iowa Code § 490.831(1)(b)(3). Second, Plaintiffs had to establish a causal link between missing impartiality and Kurt. *Id.* (misfeasance must be "due to" the familial relationship). And then third, Plaintiffs needed to evidence, as opposed to argue, that Kurt's familial relationship "could reasonably be expected to have affected [Keith's] judgment respecting the challenged conduct in a manner adverse to [Hora Farms]." Iowa Code § 490.831(1)(b)(3)(a).

Keith's decision to use annual settlements with Brian and Gregg in the same manner as was done with Kurt repels Plaintiffs' conclusions on all three prongs. Gregg for his part just couldn't remember at trial how his compensation worked at Hora Farms. Gregg knew he used Hora Farms' corn to feed his pigs, but in terms of compensation: "I do not recall. I had a salary, as you've described and we've seen in front of us, but the documentation of 38 years ago I do not recall at this time." App. Vol. II 457 at 29:4-13; *but see* App. Vol. VI 78 (Gregg telling Hora Farms' lenders "I have an excellent memory."). Gregg "could not recall" how he kept track of the Hora Farms' corn fed to his pigs either. App. Vol. II 457 at

29:14-19. He knew "[i]t was not a gift," settling on his relationship with Hora Farms as a "business arrangement that my dad and I would probably have worked together." App. Vol. II 457-58 at 29:20-30:3. Contrary to Gregg's selective, poor memory of facts that go against his case, he was able to remember very specific facts about his 1980's farm in the same line of questioning:

- "I borrowed $4,500 for 20 breeding livestock females, one male boar. And on the note as collateral I put an engagement ring that I bought for my wife of $500. That was the $5,000 note, sir." App. Vol. II 455 at 27:4-11.
- "[Question] 38 years ago. Do you remember the interest rate you paid? [Answer] In the early '80's the interest rate was 15 or 16 percent." App. Vol. II 455-56 at 27:23-28:1.
- "I left Washington County August 8th, 1985." App. Vol. II 46-57 at 28:23-29:3.

Luckily for Gregg, his 82-year-old father was able to remember what Gregg could not: yes, the corn was part of Gregg's compensation, and yes, Keith required Gregg to track his benefits and provide annual settlements. App. Vol. II 842-43 at 179:19-180:6, 888-87 at 61:8-62:22; App. Vol. II 129 (Gregg's work agreement).

Brian testified that he wrote his work agreements with Hora Farms. App. Vol. II 253-54 at 165:3-166:20 ("I went to Keith's place and wrote this agreement on his computer"). Those agreements show that he could receive compensation "through bushels of grain for use or for sales" and that "it [was] Brian's job to keep track of compensation totals from year to year." App. Vol. IV 251-55; App. Vol. IV 249-50; App. Vol. VI 69-75; App. Vol. II 251-52 at 163:7-164:2, 254-56 at 166:21-168:14, 257-58 at 171:24-172:9. In fact, Brian wrote the work agreement for Kurt, and "imagine[d] [Kurt's] work agreement was very similar to [Brian's]." App. Vol. II 253 at 165:3-10, 254 at 166:17-20; App. Vol. II 633-36 at 35:17-38:6. He knew that at Hora Farms, "it's the employee's job to keep track of [compensation totals]." App. Vol. II 258 at 172:5-9.

Now, two plus decades later, Gregg objects to Kurt receiving benefits and responsibilities under policies that were in place during Gregg's time in the 1980's. Brian cries foul because of the settlement practice that he wrote and operated under, and that he drafted into Kurt's work agreement which continued after Brian quit the farm in 2000. *But see* Iowa Code § 490.741 (lack of standing); Iowa Code § 490.746(2) (consequences for maintaining suit with "improper purpose"). Brian and Gregg's actions reveal that nothing about Keith's resort to annual

settlements "lacked objectivity" or was "due to" Kurt. Keith treated everyone the same, *e.g.*, App. Vol. II 638-40 at 47:7-49:9, 899-901 at 72:20-74:4 (Brian quit and Keith *fired* Kurt for fighting during the 2000 harvest), and Plaintiffs admitted no evidence that Keith played favorites. They do not even make that argument in their brief.

Moreover, the evidence showed Keith relied on Kurt because he "reasonably believed" that reliance "to be in the best interests of the corporation." Iowa Code § 490.831(1)(b)(3)(b). Brian oversaw Kurt for over a decade, *see* App. Vol. II 630-31 at 15:18-16:7, but did not testify that Kurt ever lied to him or falsified records. Kurt observed Hora Farms' practices under Brian, had significant experience with Hora Farms' facilities and equipment, and utilized trustworthy information from Big Gain. *E.g.* App. Vol. II 607-08 at 114:22-115:16, 900 at 72:5-13. When Brian quit, who else but Kurt was Keith to turn to during subsequent years? Plaintiffs do not say.

In sum, Plaintiffs failed to present evidence showing that Keith's reliance on Kurt was unwarranted or that his decisions were impacted because of ("due to") a familial relationship. This was Plaintiffs' burden, and regardless, Keith proved otherwise.

iii. Hora Farms Received Tax Advice From Professionals And Has Suffered No Harm.

Iowa law recognizes that officers will and should seek the advice of professionals, and immunizes decisions made in reliance on that advice. Similar to reliance placed in employees, an officer:

> [W]ho does not have knowledge that makes reliance unwarranted, is entitled to rely on any of the following:
>
> . . . c. Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the officer reasonably believes are matters within the particular person's professional or expert competence, or as to which the particular person merits confidence.

Iowa Code § 490.842(2); *accord* Iowa Code § 490.830(6). Plaintiffs brush aside this law and Keith's reliance on his accountant, Dean Phelps, saying that "Keith ignored tax requirements." P-Brief at 57-58, 64, 70. There was, however, no evidence that someone made Keith aware of a "requirement" which he ignored. If anything is ignored with respect to this claim, it's Plaintiffs' effort to establish causation and damages.

At trial Keith validated his reliance on Dean Phelps to ask questions and provide appropriate tax advice for Hora Farms. Keith explained the advice that professor Neil Harl, accountant Jim Johnson, and attorney Jim Lloyd gave him concerning challenged practices when the corporation was formed in the mid-1970's—no problem. App. Vol. II 848-

57 at 17:3-26:11, 858-59 at 28:17-29:15, 864-65 at 35:15-36:17. He testified that in-kind trades were occurring at Hora Farms when the IRS conducted an audit later that decade—no problem. App. Vol. II 875-86 at 48:10-59:1. Gregg did not object when he received corn compensation, nor did Brian about his employee benefits—no problem. *See* App. Vol. II 994 at 72:3-20. When Plaintiffs now argue that Mr. Phelps was not given information about corn transactions, P-Brief at 70, what they miss is Keith did not have a reason to give it and Mr. Phelps did not ask him to. App. Vol. II 886 at 59:22-24.

At deposition Mr. Phelps fielded questions about his tax advice and the practices at Hora Farms, yet, Mr. Phelps did not pull Keith aside to initiate changes later. App. Vol. II 886 at 59:2-24. Notably, Mr. Phelps is Brian's accountant too, and Brian did not testify that he fired Mr. Phelps or amended his tax returns as a result of information learned in this lawsuit. App. Vol. II 271-72 at 202:24-203:17. In this way Brian trusts Mr. Phelps over his own expert, Mr. Bolt, who is not a CPA and has no farming experience. App. Vol. II 504-05 at 10:7-11:4, 566-68 at 79:23-81:5. Brian's trust shows that Keith's reliance on Dean Phelps was and is warranted.

The Iowa Business Corporations Act further sets forth Plaintiffs'

burden to establish causation and damages. Iowa Code § 490.831(2)(a). No fines or other harms have been assessed against Hora Farms, and Keith would not expect his family to pay for them in any event. App. Vol. II 886-87 at 59:25-60:13. With that being the extent of the trial record on damages, Keith is not surprised that his sons' failure to identify damages below continues in their appeal. It is sufficient to observe that if Plaintiffs do not know how Hora Farms was harmed, it wasn't.

iv. None Of The Other Theories That Plaintiffs Failed To Preserve For Appeal Have Merit Either, Including Changed Damages.

The other theories that Plaintiffs include in their opening appeal brief are undeveloped conclusions about their father's intentions and management practices. They say Keith acted in bad faith, was not reasonably informed, and as a general matter "fail[ed] to deal fairly with [Hora Farms] and its shareholders." P-Brief at 63-65. The claims are largely re-purposed conclusions drawn from other parts of their brief, and, regardless, utilize liability theories under Iowa Code subsections 490.831(1)(b)(1), (b)(2)(b), and (b)(5) that were not raised for a ruling below.

Plaintiffs' ever-evolving ideas on causation and damage also deserve mention. Post-trial Brian and Gregg thought the evidence proved one set

of figures. They said "Kurt owes $1,415,972" from 2001 through 2018, and "$786,597" from "August 18, 2012 forward." App. Vol. I 473. "[Keith] should be ordered to make Hora Farms whole by paying up to a total of $3.263 million" including "$2.66 million" of gains to shareholder equity had Keith decided to rent Hora Farms' land to others. *Id.* at 474.

On appeal, Brian and Gregg assert the evidence proved something different. None of these damage figures they claimed post-trial appear in their opening brief. Now the total claimed against Keith, via Kurt, is $958,000 for corn (all times), $131,534 for inputs, and $97,990 for labor. P-Brief at 71. While Keith is appreciative that Plaintiffs reduced damages by $228,448 (from $1,415,972 to $1,187,524) and dropped $2.66 million for share opportunity costs, he still should not face calculations that Plaintiffs did not disclose in discovery or present for decision at the District Court. App. Vol. I 161-69 (interrogatory damage disclosures). Least of all should Keith be responding to Plaintiffs' new math on appeal.

There is, however, a takeaway from Brian and Gregg's changed damages which doubles as a microcosm of their case: it simply does not add up, not even to them.

III. THE STATUTE OF LIMITATIONS TRUNCATED PLAINTIFFS' ALLEGATIONS AND DID NOT CAUSE PREJUDICIAL ERROR.

A. Preservation of Error.

Keith agrees that any error with the District Court's limitations orders were preserved.

B. Scope of Review.

Appellate review is *de novo*, as Plaintiffs state.

C. Argument.

Keith asked the District Court to align the timeframe of his sons' claims with applicable statutes of limitation. Because Plaintiffs filed suit on August 18, 2017 and agree their claims are governed by the five-year limitations within Iowa Code § 614.1(4), P-Brief at 73, prior claims were barred unless Plaintiffs' proved otherwise. *Franzen v. Deere & Co.*, 334 N.W.2d 730, 732 (Iowa 1983). They did not. The District Court granted summary judgment in Defendants' favor and then, after considering all the evidence at trial, affirmed that ruling. Trial Ruling; App. Vol. I 560-562.

Nevertheless, the District Court allowed Plaintiffs to present their evidence at trial and granted Defendants a standing objection thereto.

App. Vol. II 182-84 at 11:20-13:12. The barred claims presented the same challenge to business judgments and "converted" corn as existed after 2012, but extended those allegations across the prior decade. App. Vol. II 292 at 68:4-10; App. Vol. I 161-69. Because these assertions were as unproven outside of the limitations period as they were within it, Plaintiffs were not harmed by the District Court's limitations ruling and there is no prejudicial error to review. *E.g.*, *Struve*, 930 N.W.2d at 377 ("It is well-settled that nonprejudicial error is never ground for reversal on appeal."). Indeed, Plaintiffs do not argue that key evidence was excluded, or that if evidence pre-dating 2012 were considered differently it would have altered the trial outcome. P-Brief at 73-74. Like Keith's practices, Plaintiffs' speculations were consistent across time.

Switching to the merits, Plaintiffs' emphasis on claim accrual and whether Keith's mom, Marie Hora, had sufficient notice of farm activities is beside the point because the family knew how Keith was managing the farm, Brian and Gregg included. None of the cases Plaintiffs string cite (sans analysis) reach the situation presented here: when the family shareholder asserting derivative claims "has actual or imputed knowledge" of challenged conduct, even participating in it, but the disinterested family director of the corporation supposedly does not. P-

Brief at 73-74. Worse, Plaintiffs' argument suggests the knowledge that Gregg had as a shareholder in the 1990's was an insufficient trigger, but that when he became a Hora Farms' director in August 2015, it suddenly was. *See* P-Brief at 74. The law in Iowa should not be so easily cheated.

First, Hora Farms at the very least had inquiry notice. Keith openly discussed management practices during meetings with his children in the 1990's, and applied them consistently to himself and with Gregg, Brian, and Kurt. *E.g.*, App. Vol. VI 67-68 (Brian's 1994 meeting notes). He discussed farm operations with fellow-director and mother, Marie Hora. App. Vol. II 904 at 79:8-21. He opened corporate records to Hora Farms lenders and other third-parties, even Brian. App. Vol. II 295-96 at 133:13-134:3, 317-18 at 92:5-93:3, 787 at 105:16-19. All anyone had to do was ask.[4]

Second, the legal inquiry into whether a disinterested director or officer has notice for purposes of claim accrual presupposes that shareholders are diffuse and do not, such that the corporation does not have an agent ready to protect its interests. If the shareholders of a closely held family company know the facts, however, there is no sound reason

[4] Plaintiffs have dropped their claims for fraud and that Keith fraudulently concealed information, which the District Court rejected anyway. Trial Ruling, App. Vol. I 560.

to not impute the company with the same knowledge. *Hart v. Mt. Pleasant Park Stock Co.*, 66 N.W. 190, 192 (Iowa 1896) (barring derivative claims where the shareholder "acquiesced in what was done, and of which he now complains, and, as to some matters now complained of, he lent his active approval"); *Kelly v. Englehart Corp.*, 2001 WL 855600, at *3 n.7 (Iowa Ct. App. July 31, 2001) (rejecting limitations tolling and adverse domination theory because shareholders had notice); *see Rieff v. Evans*, 630 N.W.2d 278, 291 (Iowa 2001) (finding the onset of limitations in dispute where derivative plaintiffs pleaded "facts of inability for discovery" "coupled with allegations of fraud.").

"Once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that *an informed shareholder* or director could have induced the corporation to sue." 3A William Meade Fletcher, Fletcher Cyc. Corp. § 1306.20 (emphasis added). As shareholders Brian and Gregg participated in and possessed the facts necessary to bring this lawsuit at least two decades ago. If nothing else, that notice confirms the District Court's limitations rule was accurate.

IV. THE EVIDENCE AT TRIAL FELL WELL SHORT OF THE EQUITABLE REMEDIES THAT PLAINTIFFS SEEK.

A. Preservation of Error.

Keith agrees that his sons preserved error in their requests for multiple equitable remedies.

B. Scope of Review.

Keith agrees that review is *de novo*. *Struve*, 930 N.W.2d at 371.

C. Argument.

In light of Plaintiffs' burdens and the evidence at trial, it is hard to envision a scenario where the equities on appeal would ban Keith and appoint his sons or an expensive custodian at Hora Farms' helm. Many remedies are defeated for the reasons briefed above—no liability, causation, or non-speculative damage. Keith will not re-trod that ground here. Others, like for removal as trustee, are additional theories based on the same old song. Each is addressed concisely below.

1. Removing Keith As A Director, Enjoining His Service, And Appointing Custodial Management Is Unfounded.

Plaintiffs want to remove and enjoin Keith as a director and officer of Hora Farms despite their shortcomings of proof that Keith violated his corporate duties. The standard for removal is higher than the bar that

Plaintiffs fail to clear with their fiduciary claims, first requiring gross abuse and/or intentionally deceptive or harmful conduct. Iowa Code § 490.809(1)(a). Then requiring a finding that the conduct is ongoing or a high risk to continue, such that legal remedies are insufficient and removal is in the best interests of the corporation. Iowa Code § 490.809(1)(b). Plaintiffs' mention neither of these standards in their brief, or the extraordinary reasons necessary to justify a permanent injunction. *In re Langholz*, 887 N.W.2d 770, 779 (Iowa 2016).

Plaintiffs quote Mr. Bolt's expert report as proof that "Keith knowingly filed false tax returns for [Hora Farms] each year." P-Brief at 75. What they do not quote, is how Mr. Bolt entered Keith's head to determine Keith's "know[ledge]" "each year" from "2010 to 2017." Of course, Mr. Bolt did no such thing, nor did Keith do what Mr. Bolt claims. The District Court doubted the credibility and weight of Mr. Bolt's work, and rejected the fraud that Plaintiffs' push via Mr. Bolt on appeal. Trial Ruling, App. Vol. I 556, 572.

Standing against a claim of intentionally deceptive and harmful conduct is a trial record chocked-full of ways in which Keith provides benefits to Hora Farms. Keith allows Hora Farms to rent land at rates significantly below fair market value. App. Vol. II 931-36 at 118:2-123:10;

App. Vol. V 683. Plaintiffs reference Hora Farms' "debt accumulation," P-Brief at 76, but forget that Keith has personally guaranteed Hora Farms' loans—Keith isn't racking up debt to his benefit and the farms' detriment. App. Vol. IV 261-67, 268-73; App. Vol. II 302 at 163:9-25, 321-23 at 96:8-98:16. Moreover, with respect to this debt, the evidence proved alterations in the past five years to give better transparency with grain, operations, and the pay-down of $460,000 in corporate debt. App. Vol. II 1002-05 at 90:23-93:2, 1006-08 at 101:23-103:3, 1009-11 at 108:5-110:25, 1012 at 117:18-23; App. Vol. V 680-682 (new grain inventory system). With Keith at the helm, shareholders have enjoyed a return on equity of 29.3%—"a pretty darn good return on our investment." App. Vol. II 942-47 at 134:23-139:15; App. Vol. V 686. These are not reasons to remove Keith from the farm he incorporated forty-five years ago. Iowa Code § 490.809(1)(a).

Forcing Hora Farms into custodial care is likewise without support. Iowa Code § 490.748. Plaintiffs state that fraud is afoot and that "[i]rreparable injury is threatened," P-Brief at 76, but the evidence is against them, including that cited above. Hora Farms is worth millions and far from bankrupt, App. Vol. V 686, has the continuing support of its lenders (who support Keith), App. Vol. II 300-01 at 160:5-161:24, 319 at 94:11-25, 323 at 98:19-24, and farms in ways that management finds

acceptable. The greatest irreparable injury inflicted upon Hora Farms is Plaintiffs' lawsuit. Still, the sky is not falling at Hora Farms.

2. "Plaintiffs Have Not Satisfied Their Burden Of Establishing A Basis For Removal Of Keith As Trustee, In Consideration Of Celeste's Expressed Wishes."

Plaintiffs argue for Keith's removal as trustee without once mentioning the intentions of their mother, Celeste Hora. P-Brief at 77-78. Like most testamentary issues, the polestar inquiry remains "to ascertain and give effect to the intention of [Celeste]," *Hollenbeck v. Gray*, 185 N.W.2d 767, 769 (Iowa 1971), and her instruction that Keith serve as her trustee and manage the trust's farm assets, *see* App. Vol. II 120 (Will and trustee nomination).

In these circumstances, "the power to remove a trustee should be used only when the objects of the trust are endangered." *Heidecker Farms*, 2010 WL 3894199, at *5 (quoting *Schildberg v. Schildberg*, 461 N.W.2d 186 (Iowa 1990)). Indeed, "[a] court is less likely to remove a trustee named by a settlor, as opposed to one appointed by the court . . . and the court will not ordinarily remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor." *Schildberg*, 461 N.W.2d at 191. By these standards the District Court

correctly rejected Plaintiffs' removal claim. Trial Ruling, App. Vol. I 573-75.

Plaintiffs cast aside what their mother's Will and the trial record proves: that Celeste always intended that Hora Farms' stock would stay in trust, under Keith's control, and in the family. Celeste wanted her husband to serve as her trustee, and manage farm assets intended for his lifetime benefit, with any residuary to their six children. *See* App. Vol. II 891-97 at 64:18-70:8; App. Vol. II 118 (directing the Trustee to "manage and control the property and collect the income and distribute to [Keith Hora] the income . . . at least annually, until his death . . ."). As in *Schildberg*, Celeste "knew [her] family and the [Hora] business, yet [she] placed [Keith] in control of both." 461 N.W.2d at 192. Similarly, Celeste surely contemplated exactly what occurred here: "that [Keith] would control the companies and the voting stock in the trust."[5] *Id.* One step further, that contemplation included personal knowledge of Keith's corporate management practices, including the trades in-kind and comingling grain, which have not materially changed since her passing. *See Heidecker Farms*, 2010 WL 3894199 at *7. Plaintiffs did not overcome

[5] If Plaintiffs want evidence of investment performance, then they should recall Russ Thompson's testimony that the average annual return on equity at Hora Farms is 29.36%. App. Vol. II 942-47 at 134:23-139:15.

their mother's intent and demonstrated cause to remove Keith as her trustee.

V. STATUTORY PLAIN MEANING REFUTES PLAINTIFFS' FEE-RELATED REQUESTS.

A. Preservation of Error.

Keith does not dispute that Plaintiffs preserved error with respect to their fee-related claims.

B. Scope of Review.

Keith agrees that review is *de novo*. *Struve*, 930 N.W.2d at 371.

C. Argument.

1. Hora Farms' Bylaws Require It To Indemnify Keith.

This appeal is the third time that Keith has told Plaintiffs that they are citing the wrong standard for corporate indemnification. Iowa allows a corporation to "obligate itself" to "advance funds to pay for or reimburse expenses in accordance with section 490.853" if included in the corporations bylaws. Iowa Code § 490.858(1). "Any such obligatory provision shall be deemed to satisfy the requirements for authorization" and "shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses." *Id.* Plaintiffs continue to cite "requirements for authorization," Iowa Code § 490.853, that are inapplicable here. P-

Brief at 79.

Hora Farm's bylaws expressly provide for the indemnification of its directors "against expenses incurred by them in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been such director or officer . . ." *See* App. Vol. II 24 (Section 14 – Indemnification). Keith's requests for expense payments were made in reliance upon Hora Farms' bylaws, are authorized by Iowa Code, and are not grounds for any remedial award.

2. Brian And Gregg's Fee Request Demonstrates A Self-Interested View Of What Actions "Substantial[ly] Benefit" Hora Farms.

Plaintiffs' last argument is a request for Hora Farms to flip their bill. Citing no evidence they conclude "[t]his proceeding has substantially benefited [Hora Farms]". P-Brief at 79. Plaintiffs must confuse "substantial benefit" with "no benefit" under Iowa Code § 490.746, because the District Court dismissed every derivative claim they raised. By definition, Plaintiffs' efforts in this "proceeding" "resulted in" no "benefit to the corporation [Hora Farms]." Iowa Code § 490.746(1). In their minds Plaintiffs might justify the significant family conflicts and costs that they have caused as creating benefit, but like so much of this case reality strongly opposes them.

VI. LACHES AND ESTOPPEL BAR PLAINTIFFS' CLAIMS.

A. Preservation of Error.

Keith pleaded his equitable defenses, raised them at trial, and requested and received a ruling from the District Court. Answer to Petition (filed 10/9/2017); Answer to Amended Petition (filed 11/30/2018); Defendant Keith Hora's Post-Trial Brief (filed 10/8/2020); Defendant Keith Hora's Post-Trial Reply Brief (filed 10/22/2020).

B. Scope of Review.

Review is conducted *de novo*. Iowa R. App. P. 6.907; *see supra* Section I(B).

C. Argument.

> "And 26 years ago the problem existed, just like it did in 2015, in traceability, no measurables, and obviously from 1994 to 2015 nothing had changed."
>
> Gregg Hora, App. Vol. II 446 at 173:12-14.

The District Court sided with Keith on every claim that Plaintiffs raised, but could have applied Keith's laches and estoppel by acquiescence defenses. Keith raises these defenses now as alternative and additional grounds to affirm on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 540 n.1 (Iowa 2002) ("A prevailing party may support the district court judgment on any ground contained in the record.").

1. Laches And Estoppel Defenses Are Not Superseded By The Statute Of Limitations.

The District Court properly articulated the general scope of laches and estoppel in Iowa and the inequity created when a party reaps benefits from their unreasonable delay. Trial Ruling, App. Vol. I 562 (quoting *McMillan v. Harker's Distribution, Inc.*, 759 N.W.2d 2 (Table), 2008 WL 4525770, at *2 (Iowa Ct. App. 2008), *Davidson v. Van Lengen*, 266 N.W.2d. 436 (Iowa 1978), and *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242 (Iowa 1998)). It also found convincing evidence that Brian and Gregg knew of the general management practices of Hora Farms through their employment and from family meetings in the 1990's. Trial Ruling, App. Vol. I 545, 547, 569.

The District Court believed that equity could not, however, interfere with claims growing from those practices if actions thereunder occurred within the limitations period. *Id.* at 563. In this way the District Court grafted a "discrete acts" analysis, applicable to Iowa limitation laws, to corporate practices which Plaintiffs acquiesced in for years, applicable to Keith's defenses. *Id.* The result is a holding that laches and estoppel apply only when the statute of limitations bars claims anyway.

Iowa does not so strictly handcuff these equitable defenses,

particularly when it comes to corporate practices and derivate actions. *E.g. Davidson*, 266 N.W.2d at 439 ("Each case is governed chiefly by its own circumstances."). While yes, practices which both arise and are challenged within the limitations period are not ordinarily barred by delay alone, *Chadek v. Alberhasky*, 111 N.W.2d 297, 301 (Iowa 1961), such basic observations do not end the analysis, particularly here, where the practices were established long ago. If there is "a showing that the defendant has suffered injury or prejudice thereby or some change in conditions making enforcement of the plaintiff's right inequitable," then equity steps in. *Id.*; *cf. Life Invs. Ins. Co. of Am. v. Est. of Corrado*, 838 N.W.2d 640, 645 (Iowa 2013); *Lovlie v. Plumb*, 250 N.W.2d 56, 63 (Iowa 1977) ("[P]laintiffs remained aloof and silent for more than four years" and were barred by laches).

These predicate findings are common in derivative suits where shareholder delay allows injury and prejudice to occur and compound unimpeded:

> Perhaps the most common defense to an action by a minority shareholder, standing in the place of the corporation, is the shareholder's delay in suing. If a shareholder, with knowledge of wrongful acts on the part of the directors or a majority of the shareholders, stands by for an unreasonable time without taking any steps to set the acts aside or otherwise interfere, and rights are acquired by others, that shareholder's right to

> sue is barred by laches, however clear that shareholder's right to relief would have been had they moved promptly.

12B William Meade Fletcher, Fletcher Cyc. Corp. § 5874 (citing cases from 27 states as support). Iowa has recognized this rule in derivative actions for almost 150 years: "The stockholder of a corporation who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be *swift* to make known his desires and assert his rights through the tribunals appointed for that purpose." *Thompson v. Lambert*, 44 Iowa 239, 247–48 (1876) (emphasis in original). After all, "equity aids the vigilent." *Lovlie*, 250 N.W.2d at 63.

2. This Case Was Tailor-Made For Laches And Estoppel.

Laches and estoppel by acquiescence address the *exact* situation present here. Decades of consistent corporate practices, known by the Hora household, that continued until one day Brian and Gregg renew their interest and decide to file a lawsuit alleging those corporate practices were "gross financial and general mismanagement," "fraudulent," and wrong. App. Vol. I 212.

Brian and Gregg were acutely aware of their claims in the 1990's. Their concerns led to a family meeting in 1994 attended by Keith and his six shareholder-children. Brian testified about the discussions they had

during this meeting and with various farm consultants engaged to help, covering back then the same subjects of Plaintiffs' suit. App. Vol. II 265-67 at 191:9-193:8, 279-84 at 6:23-11:3, 285 at 15:5-24, 286-88 at 33:11-35:23; App. Vol. VII 8-13 at 19:23-24:25; App. Vol. VI 67-68 (Brian's 1994 meeting notes); App. Vol. IV 256-260 (Brian's 2000 survey responses). Gregg again, conveniently, couldn't remember much about the family meeting:

- [Corporate debt?] "Sir, this is 26 years ago. I don't remember if I objected or not." App. Vol. II 443 at 165:3-10.
- [Problems with communications?] "From the meeting of February 5, 1994, 26 years ago, I do not recall anything." App. Vol. II 445 at 172:1-7.
- [Personal expenses?] "I do not recall 26 years ago what was said." App. Vol. II 447 at 174:2-11

But see App. Vol. VI 78 (Gregg saying "I have an excellent memory."); App. Vol. II 397 at 73:8-9.

Gregg was able to remember that "26 years ago the problem existed, just like it did in 2015," yet Gregg did nothing. App. Vol. II 446 at 173:12-14; *see also* App. Vol. II 448 at 176:19-23. Brian explained on the stand that there was a better way, more accurate way, more profitable way, but Keith

just kept doing what he did. App. Vol. VII 14-15 at 41:8-42:8. To Brian, Keith typified as far back as the 1990's not just "poor farm management" but "no management." App. Vol. VII 17 at 48:13-21. But when Brian left Hora Farms in 2000 he just "minded [his] own business." App. Vol. II 289-91 at 57:19-59:4.

Plaintiffs now sue their father for management practices that they claim were notorious on the farm twenty-six years ago. Their primary theory turns on Keith's failure to supervise and implement inventory controls for Kurt's annual settlements. But even if accurate, Plaintiffs' admissions proved these complaints mirrored what existed in the 1990s:

> During the meeting in February 1994, Brian Hora also objected to Keith and Kurt about the process used by Kurt to determine the amount of corn he took from HFI for feeding his own hogs. The estimated use of bushels did not take into account any actual figures other than what he said were the number of pigs that he sold. Neither Kurt nor Keith were willing to look at other criteria for determination of bushels used.

App. Vol. II 148. The same is true of Keith's consistent approach to in-kind grain compensation. Gregg knew in the mid-80's that grain was comingled and traded without tax documentation, because he was Keith's first son to receive grain. App. Vol. VII 21 at 31:6-9; App. Vol. II 888-89 at 61:8-62:22, 994 at 72:3-20. Brian was Hora Farms' operations manager—he knew how the grain tracking worked, because it was his

responsibility to oversee it (and he had the same accountant). App. Vol. II 251 at 163:3-23, 271-72 at 202:24-203:17; App. Vol. IV 251-255; App. Vol. II 148. And as for Keith's alleged self-dealing, Keith's compensation is not extravagant and has not effectively changed since he and his father founded the company. *E.g.*, App. Vol. IV 249-250; App. Vol. IV 259; App. Vol. II 148.

The critical point is decades of legal inaction communicated to Keith that his management practices were condoned at Hora Farms and amongst the Hora Family. App. Vol. II 902 at 77:3-8. In one instance that communication was explicit. In June 2015 Brian sent an email to Keith proposing two "solutions" including to maintain the "status quo." App. Vol. VI 64. So Keith continued doing what he did. A year later, Brian joined Gregg and broke fifteen plus years of silence and threatened suit. App. Vol. II 459-60 at 46:20-47:7 (Gregg saying, "It shook him, [Keith]").

This evidence establishes the inequity of Plaintiffs' challenge to management practices that Keith consistently followed. Plaintiffs' delay allowed their alleged problems to accrue and increase. They now request seven-figure judgments against their father and brother all because Plaintiffs chose to not interfere in the 1990's. Keith respectfully asks for recognition that laches and estoppel preclude his sons' claims.

VII. PLAINTIFFS FAILED TO PASS THE STATUTORY TEST FOR DERIVATIVE STANDING.

A. Preservation of Error.

Keith preserved error and challenged Plaintiffs' derivative standing in his pleadings, at trial, and requested and received a ruling from the District Court. Answer to Petition (filed 10/9/2017); Answer to Amended Petition (filed 11/30/2018); Defendant Keith Hora's Post-Trial Brief (filed 10/8/2020); Defendant Keith Hora's Post-Trial Reply Brief (filed 10/22/2020).

B. Scope of Review.

Review is conducted *de novo*. Iowa R. App. P. 6.907; *see supra* Section I(B).

C. Argument.

1. The Requirements For Derivative Standing Are Established By Plain Meaning.

Iowa excludes derivative actions unless a shareholder proves two things, including fair and adequate representation of corporate interests. Iowa Code § 490.741. Trial displayed Plaintiffs' conflicts of interest, ulterior motives, and family bitterness. As an alternative reason to affirm on appeal, Keith asserts that his sons did not prove derivative standing. *Meier v. Senecaut*, 641 N.W.2d 532, 540 n.1 (Iowa 2002).

In interpreting section 490.741 the District Court was writing on a clean slate. Three Iowa cases have cited the statute but none have substantively interpreted it. Trial Ruling, App. Vol. I 559. Consequently, the starting point is the text of the statute. *E.g.*, *Borst Bros. Constr., Inc. v. Fin. of Am. Com., LLC*, 975 N.W.2d 690, 699 (Iowa 2022).

The words of section 490.741 filter out shareholders like Brian and Gregg. In the introductory clause the legislature precludes shareholders from both "commenc[ing]" and "maintain[ing]" a derivative proceeding "unless the shareholder satisfies" (meaning proves) two things. First, that the shareholder was a shareholder during the alleged conduct. Iowa Code § 490.741(1). And second, that the shareholder "[f]airly and adequately represents the interests of the corporation in enforcing the right of the corporation." Iowa Code § 490.741(2). Keith agrees that Plaintiffs' are long-time shareholders. Keith disagrees, however, that Plaintiffs "fairly" represent Hora Farms' interests in this action.

The operative phrasing is grammatically clear. In section 490.741(2) "[f]airly" means "fair": "[c]haracterized by honesty, impartiality, and candor" and "[f]ree of bias or prejudice." FAIR, Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster, https://www.merriam-webster.com/dictionary/fair (last visited Aug. 23, 2022) ("Fair" "marked

by impartiality and honesty: free from self-interest, prejudice, or favoritism."). The surrounding words reinforce this plain meaning. They explain that impartiality and candor is needed because the shareholder is to "represent[]" "corporate" interests and rights, and not his or her own. Iowa Code § 490.741(2); *Read v. Read*, 556 N.W.2d 768 (Wis. Ct. App. 1996) (identical statute and discussion of corporate as opposed to shareholder interests).

Even in states where shareholder class interests are the preeminent concern, "conflicts of interest between derivative plaintiffs and the corporation they purport to represent or, alternatively, cases where representative plaintiffs are using derivative litigation as leverage for some other end" are grounds for disqualification and dismissal. *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 130 (Del. Ch. 1999) (providing other factors that can also result in disqualification). The effect is to deputize qualified shareholders as stand-in corporate fiduciaries, and, where not qualified, prevent such service. *See Koster v. Harvest Bible Chapel-Quad Cities*, 959 N.W.2d 680, 688 (Iowa 2021) (general disinterestedness principles); *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994) (fiduciary disqualification in analogous setting). Neither Plaintiff proved that they are "fairly" and free from conflicts representing

the interests of Hora Farms.

2. Brian and Gregg Are Acting Upon Conflicts Of Interests And Ulterior Motives.

To start, several of Plaintiffs' theories advance shareholder as opposed to corporate interests. Plaintiffs both "commenced" and "maintained" an action to dissolve Hora Farms through trial. App. Vol. I 213 ("[Unless Keith cedes to demands] . . . Plaintiffs believe the best option for Hora Farms and its shareholders is to judicially dissolve Hora Farms pursuant to Iowa Code 490.1430 . . ."); App. Vol. I 300; App. Vol. I 379. On appeal, Plaintiffs continue a "*shareholder action* to appoint [a] custodian" under Iowa Code section 490.748 (emphasis added). *See* P-Brief at 75-76.

Dissolution and custodial control are neither "interests of [Hora Farms]" nor "right[s] of [Hora Farms]" under section 490.741. *Accord Read v. Read*, 556 N.W.2d 768, 771-72 (Wis. Ct. App. 1996) (under statute identical to Iowa's, finding the "[shareholder's] requests for dissolution and receivership . . . reflect[] the fact that he cannot adequately or fairly represent the corporation.").[6] Rather, these actions advance the personal

[6] Keith maintains his position that *Read* is highly applicable despite the District Court characterizing his reliance as "misplaced if not misleading." Trial Ruling, App. Vol. I 559. *Read* examined "whether [the] plaintiff is an appropriate shareholder to maintain a derivative action" under Wis.

interests of Brian and Gregg Hora as shareholders. *Id.*; *see* Iowa Code §§ 490.748, 490.1430 (judicial dissolution is "[a] proceeding by a shareholder . . ."). Factually, dissolution goes against the founding purposes of Hora Farms as Keith explained at trail. App. Vol. II 850 at 19:18-21, 856-57 at 25:20-26:9. Similarly, Plaintiffs attempt to elevate their non-voting share position on par with voting, Class A shares through the appointment and selection of a custodian. *See* App. Vol. I 225 ¶ 11. These actions personally benefit Plaintiffs and directly conflict with the interests and purpose of Hora Farms.

Plaintiffs have acted in conflict with Hora Farms' interests in other ways too. They both personally benefited from the management actions that they now challenge. *See supra* Section II(C)(3)(ii) (Keith's consistent treatment of Gregg, Brian, and Kurt). For years Brian took advantage of Hora Farms through land that he rented at below market rates. App. Vol. III 100 (Gregg saying "the undervalued rent of the past years that has been

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Stat. § 180.0741 ("Standing"), with the first of two holdings being that the plaintiff/son/minority shareholder lacked standing and was not. *Read*, 556 N.W.2d at 769-772 (also noting that the companies, like Hora Farms, were "non-public corporations, predominantly owned by members of the Read family"). The District Court rightfully identified the second holding in *Read* about futility of amendment to direct shareholder claims. Trial Ruling, App. Vol. I 559; *cf. Read*, 556 N.W.2d at 772-74. But Keith expressly argued *Read's* first holding on derivative standing, not the second futility holding, and continues those arguments in this appeal.

a benefit to Brian and Kurt."); App. Vol. V 683-85 (farm rent analysis). After Keith sent a lease termination notice, Brian sued for interference with that "long-standing agreement." App. Vol. I 214-15 ¶¶ 87-94; App. Vol. I 301-02 ¶¶ 82-89.

During his stint as a Hora Farms director pre-suit, Gregg was brazen in his attempt to takeover control. For example, Gregg's corporate "resolutions" included "turn over management of HFI to Gregg," "the resignation of Keith Hora as the president of HFI and as a member of the BOD," and that "Keith will assign his voting rights for Class A stock for all future election to BOD member to be split 50/50 to Gregg and Brian." App. Vol. II 51-52. Gregg was secretive in the same period, and engaged in private communications with Hora Farms' lenders to such an extent it made them feel "uncomfortable." App. Vol. II 314-15 at 88:16-89:20; App. Vol. II 297-99 at 153:8-155:20; App. Vol. II 44-50; App. Vol. IV 236-37; App. Vol. IV 238-39; App. Vol. IV 240; App. Vol. IV 241-46; App. Vol. VI 65-66; App. Vol. VI 76-77; App. Vol. VI 78-80; *see also* App. Vol. VI 55-63 (Gregg's wife's anonymous letter to Farm Credit). His adversity to Hora Farms was so extreme that Gregg asked Sue Basten at Washington State Bank to cut off Hora Farms' financing:

> Q. And you said on direct that Gregg Hora asked you to send this letter [Ex. 94]?

A. Yes.

. . .

Q. So you understood, then, that this was a board member of the farm asking you to send a letter that said the Washington State Bank would not be able to offer financing for operations in 2016?
A. Yes.

App. Vol. II 316 at 90:3-23. In hindsight, Ms. Basten questions Gregg's intent to help Hora Farms. App. Vol. II 329 at 118:6-20. Coincidentally, Gregg heard but then denied that Ms. Basten's testimony was accurate. App. Vol. II 420 at 109:2-10; *but see* App. Vol. II 951-56 at 165:15-170:8 (testimony illustrating Gregg's prior knowledge of the financing issue, and Brian and Gregg's blueprint to cash rent Hora Farms' land as a result). These are not shareholders acting in the interests of their family's closely held farming corporation.

The trial record also contains evidence of deeply rooted family conflict. Darren Hora testified that he stood between physical blows in 1989, and moved off the farm because of the hostility between Brian and Kurt. App. Vol. II 995-96 at 73:21-74:14. The older/younger brothers erupted again in 2000, resulting in Brian quitting and Keith firing Kurt. App. Vol. II 899-901 at 72:20-74:4. Then, when Brian began to again question recordkeeping practices in 2015, one of his "solutions" was to "fire Kurt and rent me the entire farm." App. Vol. VI 64.

Emails admitted at trial also illustrated the resentment Plaintiffs' harbored towards their father. App. Vol. VI 65-66 (Gregg writing, "Dad, LoRee, and Brian with his wife Theresa had a 4 hour intense confrontation meeting 1 week ago. Attack and accusations made at full throttle against my dad," and adding that "[t]he implementation of structure changes needs to be forced upon Keith as manager and majority shareholder."). In September 2016, Gregg composed an email to a Hora Farms' loan officer at Farm Credit stating:

> I have been advised by legal counsel and my banking and financial professionals that this is of upmost importance under the family circumstances regarding the uncooperative nature and defiance to the realities of Keith and Kurt. The financial unaccountability and destruction of family relationships has only gotten worse due to the fact that Keith and Kurt have an absence of the truth. I have a farm business and numerous family financial situations to consider with my request.

App. Vol. III 59.

Stated simply, Plaintiffs are not "fairly and adequately" representing the "interests of [Hora Farms]" through this proceeding. Iowa Code § 490.741. They assert claims against corporate interests as found in *Read*, and nearly every factor in the totality test used elsewhere is present here. *See Fuqua Indus.*, 752 A.2d at 130. The trial record has undisputed evidence of conflicts of interest, vindictiveness towards

defendants, and the support of no other Hora Farms shareholder. And at the peak of this evidentiary mountain, the District Court for good reason questioned Brian and Gregg's credibility. Trial Ruling, App. Vol. I 548, 551, 553 (finding Brian not credible on forgotten rental rates, and finding Sue Basten credible, not Gregg). Dismissal for want of standing is the correct decision on appeal. Derivative actions are not a forum for family grievances and hostile takeovers.

VIII. ON CROSS-APPEAL, PLAINTIFFS SHOULD BEAR THE COST OF THEIR SUIT.

A. Preservation of Error.

Keith preserved error and requested an award of cost and fees below. Defendant Keith Hora's Application for Costs and Fees and Supporting Brief (filed 2/25/2022); App. Vol. I 689-91.

B. Scope of Review.

Review is conducted *de novo*. Iowa R. App. P. 6.907; *see supra* Section I(B).

C. Argument.

1. Corporate Code Section 490.746 Allows Keith to Recover Attorneys' Fees.

Losing on each count at trial coupled with the evidence admitted against them means that Brian and Gregg are responsible for the defense

costs and fees that their lawsuit generated. Iowa Code section 490.746 permits a court, "[o]n termination of [a] derivative proceeding," to "[o]rder the plaintiff to pay any defendant's expenses incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose." Iowa Code § 490.746(2). "Expenses" are "reasonable expenses of any kind" and include attorneys' fees. Iowa Code § 490.140(19); *Gill v. Vorhes*, 885 N.W.2d 829 (Table), 2016 WL 4051643, at *14 (Iowa Ct. App. 2016).

i. Plaintiffs Commenced And Maintained This Proceeding With Improper Purposes.

"Improper" neatly defines Plaintiffs' attempts to use well-known, well-aged practices that they participated in as grounds to later gain control of and expel their family from Hora Farms. The term embraces action "not in accord with propriety, modesty, good manners, or good taste" and "not suited to the circumstances, design, or end." Merriam-Webster, https://www.merriam-webster.com/dictionary/improper (last visited Aug. 24, 2022). The intent being to protect derivative defendants from overzealous plaintiff-shareholders or those clouded by ulterior motives. *Highland Select Equity Fund, L.P. v. Motient Corp.*, No. CIV.A. 2092-VCL, 2007 WL 907650, *1-*2 (Del. Ch. Mar. 14, 2007) (finding the

plaintiff's stated corporate purpose was "pretextual," and that the "extreme overbreadth" of demands on "a wide variety of issues" and the manner in which it conducted litigation showed its actual purpose was an improper attack on management to enhance its position in a proxy contest); *Moody v. Nat'l W. Life Ins. Co.*, 634 S.W.3d 256, 285 (Tex. Ct. App. 2021) ("personal animus" is an improper purpose for a derivative suit).

The evidence shows that Brian and Gregg commenced and maintained this derivative proceeding with "improper purpose." Much like the impropriety found in *Highland Select Equity Fund, L.P.* (parenthetically summarized above), Plaintiffs issued demands to Keith and other shareholders of "such extreme overbreadth that it is impossible to conclude that it was drawn in a good faith." *Compare* App. Vol. II 57 and App. Vol. III 174-187, *with* 2007 WL 907650, at *1. They followed this with a 25-page petition that contained wide-ranging and disparaging allegations over an extensive duration. App. Vol. I 194-218.

Trial showed that the substance of these claims was rooted in practices at Hora Farms that Plaintiffs accepted and gained from. Trial Ruling, App. Vol. I 546, 547, 569; *see supra* Sections II(C)(3)(ii) and VI(C)(2). Adapting these family farm management practices into

derivative claims was the pretext Plaintiffs' used to attempt to gain control of Hora Farms as minority shareholders. *See supra* VII(C)(2); App. Vol. II 951-56 at 165:15-170:8 (Brian and Gregg's blueprint to cash rent Hora Farms' land); App. Vol. II 51-52 (resolutions to "turn over management of [Hora Farms] to Gregg"); App. Vol. VI 64; App. Vol. VI 65-66. These predicates are "not suited to the circumstances" of derivative claims which means that Plaintiffs purposes should be identified as "improper" under Iowa Code section 490.746.

ii. "Reasonable Cause" Does Not Exist Because The Statute of Limitations, Laches, And Estoppel Plainly Bar Claims.

Iowa Code section 490.746 also instructs to shift fees if ". . . the proceeding was commenced or maintained without reasonable cause . . ." If a shareholder was aware of defenses to its claims and "could have determined that reasonable cause did not exist to commence a derivative action on [its] claims," then an award of attorneys' fees is appropriate. *Kelly v. Englehart Corp.*, No. 1-241, 2001 WL 855600, at *10 (Iowa Ct. App. July 31, 2001) (affirming award of attorneys' fees against plaintiffs after their claims were dismissed on summary judgment).

The District Court thrice denounced Plaintiffs' efforts to establish claims as far back as 2000 under a "straightforward application" of the

statute of limitations. *See* App. Vol. I 371; Trial Ruling, App. Vol. I 560-62; App. Vol. I 656-660. Like the plaintiffs in *Kelly*, Brian and Gregg "could have determined" that their derivative claims would not be successful, particularly given their direct participation in challenged practices and a "straightforward" statute of limitations defense. No. 1-241, 2001 WL 855600, at *10.

Finally, as asserted *supra* Section VI, estoppel and laches are an insuperable obstacle to all of Plaintiffs' claims. Plaintiffs' undeniable familiarity with and profit from the substance of their allegations for more than fifteen years before filing suit presents a clear defense and casts their improper purpose in commencing this action in bright sunlight. Therefore, Keith is entitled to an award of his attorneys' fees pursuant to Iowa Code section 490.746.

2. Iowa Code Section 633A.4507 Also Provides For Fee Recovery.

Plaintiffs should also be responsible for Keith attorneys' fees in this action due to Plaintiffs' prosecution of claims involving Celeste's Trust. Attorneys' fees for trust proceedings are governed by Iowa Code section 633A.4507, which permits the Court to award attorneys' fees as "justice and equity may require" under five non-exclusive guidelines. *In re Trust*

No. T-1 of Trimble, 826 N.W.2d 474, 491 (Iowa 2013). Because these criteria are used to "arrive at what is fair on a case by case basis," fees can be awarded where one or more of the criteria is not met, and the importance of each criteria is context-dependent. *Id.*; *see Cooper v. Jordan*, No. 14-0157, 2015 WL 1815996, at *4 (Iowa Ct. App. Apr. 22, 2015).

Like their corporate malfeasance claims, Plaintiffs' request to remove Keith as trustee of Celeste's Trust dissolved on basic examination. The Court roundly denied the removal request, explaining it "is clear that Celeste intended" that Keith would "control" Hora Farm's stock and "manage [the farm] assets," and that Celeste's "wishes presumably were made with knowledge of Keith's corporate management practices, including the trades in-kind and comingling grain, which have not materially changed since well before her passing." Trial Ruling, App. Vol. I 574-575; *see id.* at 574 ("Celeste surely contemplated exactly what occurred here . . . "). Paired with their intimate knowledge and ulterior motives detailed at length above, and failure to even cite Celeste's Will in arguments to remove Keith on appeal, P-Brief at 77-78, the sum of applicable criteria tips the scales of equity heavily in Keith's favor. Fees incurred in defending this action should be awarded to Keith.

CONCLUSION

For all the foregoing reasons, Defendant Keith Hora respectfully requests that the judgment dismissing all of Plaintiffs Brian and Gregg Hora's claims be affirmed. On further *de novo* review, Keith additionally requests that the judgment denying his fee application be reversed, with all sums requested therein assessed against Plaintiffs.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellee/Cross-Appellant Keith Hora requests oral argument on all matters herein.

Dated: October 5, 2022

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on October 5, 2022, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

John Lorentzen
Sarah Gayer
Joseph Younker
Matthew Barnd

/s/ Abram V. Carls

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 13,817 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the type-face requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Calisto MT.

/s/ Abram V. Carls