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NO. 21-0098

IN THE SUPREME COURT OF IOWA

KENDALL J. MEADE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff–Appellee

v.

PETER S. CHRISTIE, STEPHEN A. CRANE, JONATHAN R. FLETCHER, AND GRETCHEN H. TEGELER
Defendants–Appellants

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY, CASE NO. LACL146098
THE HONORABLE LAWRENCE P. MCLELLAN, PRESIDING

BRIEF OF AMICUS CURIAE THE IOWA ASSOCIATION OF BUSINESS INDUSTRY AND THE IOWA BUSINESS COUNCIL IN SUPPORT OF DEFENDANTS–APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

IDENTITY AND INTEREST OF AMICUS CURIAE 5

RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP 6

ARGUMENT 7

I. Iowa should adopt the U.S. Supreme Court's pleading standards set forth in *Bell Atlantic v. Twombly* with respect to shareholder claims of breach of fiduciary duty of directors. 13

II. Iowa should adopt the Delaware Supreme Court's approach in *Kahn v. M & F Worldwide Corp.* to majority purchases of minority interests. 16

III. The *Kahn v. M & F Worldwide Corp.* Approach is Consistent with Iowa Code sections 490.830 and 490.831. 18

IV. Since Iowa Code section 490.831 places the burden of proof on the Plaintiff with respect to establishing the inapplicability of any of the provisions of subsection 1(a) and the application of one of the provisions of subsection 1(b), Plaintiff should be required to allege facts to support this burden to avoid Defendants' Motion to Dismiss. 20

V. Plaintiff failed to plead facts sufficient to survive Defendants' Motion to Dismiss if the principles of *Kahn v. M & F Worldwide Corp.* are applied in this case. 24

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 34

CERTIFICATE OF FILING AND SERVICE 35

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 15

Bell Atlantic v. Twombly, 550 U.S. 544 (2007) 15

Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp. 812 N.W.2d 600 (Iowa 2012) 15

In re Trulia, Inc. Stockholder Litigation, 129 A.3d 884 (Del. Chancery Ct. 2014) 11

Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014) 16, 17, 18, 25

Statutes

Iowa Code § 490.830(2) 18

Iowa Code §§ 490.1301 through 490.1329 20

Iowa Code section 490.811 26

Iowa Code section 490.831 20

Other Authorities

Axis Insurance Blog, *The Cost of D&O Litigation*. Blog.axis.com 12

Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation* (June, 2019) 7, 8

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Koumrian, *Review of 2013 M & A Litigation* 10

Litigation Cost Survey of Major Companies, U.S. Chamber Institute for Legal Reform, 2010 7

Meade v. EMC Insurance Group, CASE NO. LACL146098, at p. 3 (Polk County District Court 2019) 26

Model Business Corporation Act (2016 Revision) (Dec. 9, 2016) 13

Olga Koumrian, Research, *Settlements of Shareholder Litigation Involving Merger and Acquisitions – Review of 2013 M & A Litigation*, note 42 at 1 (2014). https://www.cornerstone.com./Publications/Reports/Settlements-of-M-and-A-Shareholder-Litigation 10

Private Securities Litigation Reform Act of 1995 ..... 8, 9

Robert B. Thompson and Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions,* 57 Vanderbilt Law Review 133, at 137 (January 2004) 10

IDENTITY AND INTEREST OF AMICUS CURIAE

The amicus curiae in this case are the Iowa Association of Business and Industry ("ABI") and the Iowa Business Council ("IBC"). The interests of the amicus curiae are to advocate for judicial decisions in cases involving Iowa businesses to be fair and impartial and to appropriately limit the use of judicial resources in the resolution of such cases.

ABI has been the voice of Iowa business since 1903. ABI is the largest business network in the state and has a long legacy of advocating for a competitive business climate in Iowa. As members of ABI, business leaders are able to help influence public policy, engage with other corporate leaders and learn from experts on how to address the top challenges facing Iowa businesses. ABI has 1,500-plus members employing 330,000 Iowans.

IBC is a nonpartisan, nonprofit organization whose membership consists of 22 of Iowa's largest employers. The board of directors consists of the CEO or top executive of each member company. In the aggregate, IBC members employ more than 172,000 Iowans and have a combined payroll of more than $9 billion. IBC's primary mission is to serve as a catalyst for economic growth in Iowa through global thought leadership, research, and advocacy.

RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP

This amicus curiae brief was authored entirely by counsel for ABI and IBC. No party or party's counsel contributed money to fund the preparation or submission of the brief, and no person other than ABI and IBC contributed money to fund the preparation or submission of the brief.

ARGUMENT

Litigation defense costs have become an increasing problem for corporations in the United States in the new millennium. A 2010 survey by the U.S. Chamber Institute for Legal Reform indicates that average litigation costs among responding Fortune 200 companies as a percentage of corporate revenue had increased by seventy-eight percent in the period from 2000 through 2008.[1] Among respondents to the survey, average annual litigation costs increased from $66 million in 2000 to $115 million in 2008 – a rate of growth of approximately nine percent per year.[2] According to the U.S. Chamber research, litigation costs in the U.S. are four to nine times higher than outside of the United States.[3]

The magnitude of this problem has only increased in subsequent years. A June 2019 study by Chubb, the largest publicly traded insurer in the United States, reported that the volume of securities class action lawsuits had more than doubled in the previous four years.[4] The study also indicates that in the prior five years, a staggering two-thirds of the enormous costs of merger-

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[1] "Litigation Cost Survey of Major Companies", U.S. Chamber Institute for Legal Reform, 2010

[2] *Id.*

[3] *Id.*

[4] Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation* (June, 2019).

objection lawsuits have been paid to the lawyers.[5] In eighty-five percent of such cases that were settled, the shareholders received no payout.[6] Frequently, the only winners in these cases are the lawyers. And since individual plaintiffs often only have a small financial interest in the litigation, there is frequently no effective supervision of the plaintiffs' attorneys by the actual parties in interest.

The growth in securities class action lawsuits dates back to the 1990's. At that time, most of these lawsuits were in the federal courts claiming inadequate disclosure in proxy materials associated with the proposed transaction.

In 1995, Congress responded by enacting the Private Securities Litigation Reform Act ("PSLRA"),[7] applicable to class action securities litigation in federal courts. The most significant provisions in the PSLRA created the presumption that the lead plaintiff in the case be the shareholder

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[5] *Id.* This includes both fees of the plaintiffs' attorneys and the defense attorneys.
[6] *Id.* This is no doubt largely due to cases in which inadequate disclosure to shareholders is alleged and the parties settle with modifications to the disclosure and the payment of substantial legal fees to the plaintiffs' attorneys.
[7] Private Securities Litigation Reform Act of 1995, §101, 15 U.S.C. §78u-4(b)(2) (2012).

with the largest financial stake in the matter[8] and required the lead plaintiff to select and retain counsel to represent the class, subject to court approval.[9] However, this law also heightened the pleading requirements, thereby making it more difficult for plaintiffs to survive a motion to dismiss.[10] For a time, these changes decreased the incidence of such litigation by increasing the role of institutional investors, who had large financial stakes in the litigation and thus a substantial incentive to effectively monitor their attorneys and reduce the plaintiffs' attorneys fee awards in the litigation.[11]

However, after the dot-com bubble at the beginning of the new millennium, such cases began to increase again. Much of that increase was attributable to the emergence of more class action merger-objection lawsuits.[12] Unlike the litigation governed by the PSLRA, which is only

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[8] *Id.,* §78u-4(a)(3)(B)(iii)(I)(bbb). Unfortunately, this presumption does not always result in the largest minority shareholder being the lead plaintiff since such a lead plaintiff is not mandatory.
[9] *Id.*, §78u-4(a)(3)(B)(v).
[10] 15 U.S.C. §78u-4(b)(1)(B) (2012). Because of the high discovery costs in these cases borne disproportionately by the defendants, resolving cases at the Motion to Dismiss stage has become increasingly important in managing litigation costs.
[11] A substantial part of the problem with such litigation is the absence of a plaintiff with a sufficient financial interest in the litigation to be enticed to aggressively oversee the litigation and the fee awards. As a result, the plaintiffs' attorneys run the show and are the principal party with an interest in the litigation because of the relative size of the attorney fee awards.
[12] *See* Olga Koumrian, Research, *Settlements of Shareholder Litigation Involving Merger and Acquisitions – Review of 2013 M & A Litigation*, note

applicable in federal court proceedings, in merger-objection litigation, plaintiffs could often forum shop and file in any number of state courts. One author indicates that eighty percent of the class action suits in Delaware, in which most publicly traded corporations are organized, were actions challenging corporate acquisitions, such as in this case.[13] Moreover, in a review of 2013 mergers and acquisitions litigation, it was reported that ninety-three percent of all public company mergers were subject to litigation.[14]

The incidence of class action securities lawsuits has continued to increase later in the second decade of the new millennium. In 2019, despite the reduction in the number of public companies, there were more class action securities lawsuits filed than in any previous year.[15] There were also nearly twice as many such cases filed during that year as the average number of

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42 at 1 (2014).
https://www.cornerstone.com./Publications/Reports/Settlements-of-M-and-A-Shareholder-Litigation.

[13] Robert B. Thompson and Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions,* 57 Vanderbilt Law Review 133, at 137 (January 2004). While this case does not involve the acquisition of control as in many acquisitions, it is nevertheless a corporate acquisition in the sense that it results in 100% corporate ownership rather than just a controlling interest.

[14] See Koumrian, *Review of 2013 M & A Litigation, supra*, note 42, at 1.

[15] Cornerstone Research, *Securities Class Action Filings, 2019 in Review*, https://www.cornerstone.com./Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.pdf, at p.1.

annual cases filed in the period from 1997 through 2018.[16] Also in 2019, 7.2% of S&P 500 companies were subject to such litigation in federal courts.[17]

The Delaware Chancery Court responded to cases benefitting only the lawyers in 2014 in *In re Trulia, Inc. Stockholder Litigation*[18] by refusing to approve a settlement which provided for only increased disclosures and no payments to the class members. As a result of the *Trulia* decision, plaintiffs are now shifting to filing in other jurisdictions which may or may not apply *Trulia* and which have substantially less experience in handling such cases than the Delaware courts.

While certainly access to the courts for fair resolution of disputes is an important part of our civil justice system, that objective should be balanced against the effects of the explosion of such litigation on our economic system and the extreme burden it has put on courts in this country, which deprives other litigants of their access to fair and timely court resolution of their disputes. This has particularly been a concern for public companies, whose insurance premiums for Directors and Officers Liability insurance have

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[16] *Id.*
[17] *Id.*
[18] *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Chancery Ct. 2014).

skyrocketed.[19] Further aggravated by the pandemic, insurance broker Gallagher has reported that some public companies have seen Directors and Officers Liability insurance premiums increase by as much as two thousand percent.[20] Shareholder litigation has also had an adverse impact on the recruitment of independent outside directors of large companies, since the threat of such directors becoming embroiled in lengthy and time-consuming litigation has increased exponentially. Independent outside directors in corporations owned by a diverse group of shareholders (whether publicly traded or not) serve a critically important function to help protect the interests of minority shareholders and shareholders who have purchased their stock in the public securities markets.

Litigation costs not only adversely affect the owners and directors of these companies, they also result in increased consumer prices for their

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[19] One blogger in the insurance industry in 2018 reported that 44% of private companies have experienced a loss according to the Chubb 2013 Private Company Risk Survey. Axis Insurance Blog, *The Cost of D&O Litigation*. Blog.axis.com. This not only results in significant increases in D&O insurance rates, it threatens the insurance industry as increased litigation results in losses outpacing premium increases. See also a December 28, 2020, article in Insurance Magazine, www.insurancebusinessmag.com/us/news/professional-litigation-and-related-costs-puts-pressure-on-dando-242467.as[x.

[20] "Directors and Officers Insurance Rates Surge on Fears of Coronavirus Litigation", Insurance Journal 8/11/2020, Carolyn Cone.

products and decreased global competitiveness of those companies. The ripple effect on the economy is staggering.

I. Iowa should adopt the U.S. Supreme Court's pleading standards set forth in *Bell Atlantic v. Twombly* with respect to shareholder claims of breach of fiduciary duty of directors.

In an effort to stem the tsunami of increasing corporate litigation defense costs and to provide greater certainty to corporations and their shareholders, there have been ongoing efforts to revise the Model Business Corporation Act, upon which Iowa's corporate law is based, to stringently limit the liability of directors for their actions. As noted in the Official Comment to the 2016 Revision of the Model Business Corporation Act:

> Boards of directors and corporate managers make numerous decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to have been unwise or the result of a mistake of judgment, it is not reasonable to impose liability for an informed decision made in good faith which with the benefit of hindsight turns out to be wrong or unwise. Therefore, as a general rule, a director is not exposed to personal liability for injury or damage caused by an unwise decision and conduct conforming with the standards of section 8.30 will almost always be protected regardless of the end result.[21]

While it is appropriate to give heightened review to transactions in which directors have a conflict of interest, the Model Business Corporation

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[21] See Model Business Corporation Act (2016 Revision) (Dec. 9, 2016), at § 8.31, Official Comment.

Act has addressed these transactions primarily by providing safe harbor procedures which the corporation can follow to assure that the transaction is approved only by directors without such a conflict. If the directors do not have such a conflict, the Act envisions that the action will only be reviewed under the business judgment standard.

Iowa has followed this lead. For instance, in 2013, the Iowa legislature added provisions to Chapter 490 which provide a safe harbor protective procedure to approve transactions with directors who have certain types of financial interests in the transactions.[22] The MBCA Official Comment states that the provisions "provide that a director's transaction that is not within the statutory definition of a director's conflicting interest transaction *is not subject to judicial review for fairness* on the ground that it involved a conflict of interest" if the stated procedure for approving the transaction is followed. Under this protective procedure, the transaction must be approved by a majority of *either* "qualified" directors *or* "qualified" shareholders, i.e., directors *or* shareholders without a conflicting interest in the transaction. As noted in the MBCA Official Comment, "if a director's conflicting interest transaction is properly approved by disinterested (or "qualified") directors or

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[22] 2013 Acts, chapter 31, sections 29 and 30, adding sections 490.861, 490.862, 490.863 and 490.870, as well as modifying the provisions of sections 490.830 and 490.831.

shareholders, the conflicted director may not be subject to an award of damages or other sanctions."[23]

In light of these provisions, it is appropriate to require a plaintiff to plead and prove the failure to follow such special procedures in order to prevail in litigation. In addition, in evaluating the plaintiff's pleadings, the court should review the factual allegations to determine whether they present facts which plausibly create director liability, rather than conclusory statements alleging a legal violation. While this Court has declined to apply the plausibility standard of *Bell Atlantic v. Twombly*[24] in evaluating pleadings in a contract case involving the state's Area Education Agencies,[25] the intent of the legislature in severely limiting the liability of directors under the Iowa Business Corporation Act should require the use of such a standard in

[23] As noted in the Official Comment to Subchapter F of the MBCA, "Bright-line provisions of any kind represent a trade-off between the benefits of certainty and the danger that some transactions or conduct that fall outside the area circumscribed by the bright-lines may be so similar to the transactions and conduct that fall within the area that different treatment may seem anomalous. Subchapter F reflects the judgment that in corporate matters, where planning is critical, the clear and important efficiency gains that result from certainty through defining director's conflicting interest transactions exceed any potential and uncertain efficiency losses that might follow from excluding other director's transactions from judicial review for fairness on conflict-of-interest grounds."

[24] 550 U.S. 544 (2007). The U.S. Supreme Court later elucidated the pleading standard of *Twombly* in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[25] *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.* 812 N.W.2d 600 (Iowa 2012).

assessing a motion to dismiss in a case involving independent directors - particularly where, as here, special procedures were utilized.

II. Iowa should adopt the Delaware Supreme Court's approach in *Kahn v. M & F Worldwide Corp.* to majority purchases of minority interests.

The Delaware Supreme Court in *Kahn v. M & F Worldwide Corp.*[26] adopted a more stringent conceptual framework in the context of a majority owner purchase of minority interests in a public company than in the approval of directors' conflicting interest transactions. In *Kahn*, the court was presented with determining what standard of review to applies when the transaction was expressly conditioned on *both* (i) the approval of a majority of independent disinterested directors, and (ii) the approval of a majority of the minority shareholders. The court succinctly summarized its holding as follows:

> We hold that business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned ab initio upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders.[27]

This approach gives shareholders even greater protection than the provisions of the Model Act adopted in Iowa Code sections 490.861 through

[26] 88 A.3d 635 (Del. 2014).
[27] 88 A.3d at 644.

490.863 regarding approval of director conflicted transactions, since it requires approval by *both* a majority of disinterested directors *and* shareholders rather than approval only by *either* of such groups.

In explaining the reason for adopting this rule, the court stated:

> …[E]ntire fairness is the highest standard of review in corporate law. It is applied in the controller merger context as a substitute for the dual statutory protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the controller. However, as this case establishes, that undermining influence does not exist in every controlled merger setting, regardless of the circumstances. The simultaneous deployment of the procedural protections employed here create a countervailing, offsetting influence of equal—if not greater—force. That is, where the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard.[28]

Thus, if the predicates for applying this rule are present, the transaction remains subject to judicial review, but under the "business judgment" standard rather than the "entire fairness" standard.

Here, the District Court attempted to distinguish this case from *Kahn* by noting that *Kahn* was decided on a motion for summary judgment and this case arises in the context of a motion to dismiss. However, this ignores the clear intent of the court in *Kahn*, which stated:

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[28] 88 A.3d at 644.

> If a plaintiff that [*sic*] can plead a reasonably conceivable set of facts showing that any or all of those enumerated conditions did not exist, that complaint would state a claim for relief that would entitle the plaintiff to proceed and conduct discovery.[29]

Thus, although the court in *Kahn* decided a motion for summary judgment, it was quite clear that it nevertheless envisioned that a complaint could be dismissed on a motion to dismiss if the plaintiff fails to plead facts which would indicate that the *Kahn* conditions were met.

III. The *Kahn v. M & F Worldwide Corp.* Approach is Consistent with Iowa Code sections 490.830 and 490.831.

The Court in this case is faced with applying the statutory provisions of the Iowa Code addressing the standards applicable to director conduct and the associated nonliability provision which protects directors from suit. Iowa Code section 490.830 requires that directors "discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances."[30] The general standard for director action is encompassed within the business judgment rule. That standard is appropriately raised to an "entire fairness" standard with respect to conflicted directors who are not independent and with respect to a majority purchase of minority interests in which no special protective procedures are employed.

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[29] 88 A.3d at 645.

[30] Iowa Code § 490.830(2).

However, when special procedures which protect the interests of minority shareholders are employed, the "entire fairness" standard is an inappropriate standard of review both in transactions with conflicted directors and a majority purchase of minority interests.

Actions taken by independent directors who meet the criteria set forth in *Kahn* are discharging their duties in a manner consistent with the statutory standards, since predicating their decision on meeting those criteria would constitute such care as would be reasonably believed by such independent directors to be appropriate under the circumstance of a majority purchase of minority shares.

This conclusion is buttressed by the director nonliability provisions of Iowa Code section 490.831, which provide an absolute bar against director liability unless the plaintiff establishes *both* the non-applicability of any of the three prongs of subsection 1(a) *and* that the challenged conduct consisted or was a result of one or more of the five prongs of subsection 1(b). It is noteworthy that two of the provisions of subsection 1(a) specifically reference the safe harbor provisions of Iowa Code sections 490.861, 490.862, 490.863, and 490.870 with respect to director conflicted transactions and business opportunities. These provisions are based on a conceptual framework similar to the *Kahn* criteria.

In addition to the protective procedures of *Kahn* employed here, since the transaction was structured as a long-form merger, shareholders also enjoyed the availability of appraisal rights.[31] Thus, not only were procedural protections in place to assure a fair and independent evaluation of the proposed transaction, but shareholders were also given the substantive protection of obtaining a fair price through the exercise of appraisal rights. In light of these appraisal rights, compliance with the *Kahn* procedural requirements should result in any breach of fiduciary duty claims to be resolved under the "business judgment" standard rather than the "entire fairness" standard.

IV. <u>Since Iowa Code section 490.831 places the burden of proof on the Plaintiff with respect to establishing the inapplicability of any of the provisions of subsection 1(a) and the application of one of the provisions of subsection 1(b), Plaintiff should be required to allege facts to support this burden to avoid Defendants' Motion to Dismiss.</u>

Iowa Code section 490.831 begins by proclaiming:

> A director ***shall not be liable*** to the corporation or its shareholder for any decision as a director to take or not take action, or the failure to take any action, ***unless the party asserting liability*** in a proceeding ***establishes***…" (emphasis added).

[31] Iowa Code §§ 490.1301 through 490.1329.

As worded, it is apparent that establishing what follows is a predicate to any director liability.[32] Based on the plain language of the statute, the party asserting liability bears the burden of proof of the inapplicability of the defenses under section 1(a), unlike with an affirmative defense in which the defendant would bear the burden of proof. When a party bears the burden of proof, that party also bears the burden of pleading facts which, if established, would sustain that burden of proof.

The District Court disagreed with the independent directors' assertion that Plaintiff must plead the absence of the availability of defenses to director liability. The District Court's conclusion is based on both Iowa's liberal notice pleading requirements and the language in Iowa Code section 490.831(1)(a)(1), which references defenses *interposed* by the director. However, notice pleading still imposes an obligation to plead facts which establish liability, a standard which cannot be satisfied until the provisions of Iowa Code section 490.831(1)(a) and (b) are first met.[33] Moreover, the idea

[32] It is noteworthy that the legislature broke out the director duty provisions of section 490.830 from the director nonliability provisions of section 490.831.

[33] Without further explanation or reasoning, the District Court summarily concludes "[t]he court does not believe the statute requires the plaintiff must set forth facts in its petition that ultimately establishes the unavailability of each of these defenses to the Independent Directors," basing its entire conclusion on the word "interposed" contained in only one of the

that Defendants must plead the director shield in their answer as an affirmative defense is wholly inconsistent with the burden of proof which this section clearly establishes. Unlike an affirmative defense, in which the burden of proof is placed on the defendant, thus requiring the defendant to assert such a defense,[34] here there is no liability imposed in the first instance under the statute unless the plaintiff establishes that such defense does not exist. To conclude otherwise is to impose a pleading requirement on the defendant for a matter that is a condition precedent to the defendant's liability in the first instance. Under the statute, the director shield protection exists whether or not plead as an affirmative defense since the burden of *establishing* the unavailability of that defense is on Plaintiff under the express terms of the statute.

If a defendant must assert the director shield or the other defenses in section 490.831(1)(a) as a defense instead of requiring the plaintiff to plead the unavailability of such defense, no motion to dismiss could ever be granted in a director liability case. Such a result flies in the face of the legislature's

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subparagraphs – all of which must be unavailable in order for Plaintiff's case to proceed.

[34] And which can be waived unless plead as a defense – here the director shield provisions are not waivable by failure to assert them pursuant to the express terms of the statute.

apparent intent to preclude liability unless the requirements of section 490.831 are first met.[35]

In an effort to justify the denial of the independent directors' motion to dismiss on other grounds (likely because of the weakness of its initial point with respect to subsection (1)(a) as set forth above), the District Court continued to analyze the pleadings to determine whether Plaintiff made allegations to satisfy the requirements of subsection (1)(b). Ultimately, the District Court incorrectly concluded that Plaintiff had alleged "intentional infliction of harm" so as to make inapplicable the nonliability provisions in the EMCI Articles of Incorporation under Iowa Code section 490.202(2)(d)(1)(b).

This conclusion is in error because the allegations do not meet the definition of "intentional infliction of harm" within the meaning of section 490.202(2)(d)(1)(b). In that regard the District Court relied entirely on the allegations in paragraph 88 of the Petition, which alleged that the independent directors "intentionally failed to act in the face of a known duty to act,

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[35] In addition, under §490.831(1)(a)(1), Plaintiff must establish the unavailability of all three defenses – those contained in the articles of incorporation (subparagraph (a), those contained in §§490.861, .862 and .863 (subparagraph (b)), and the exemption contained in §490.870 (subparagraph (c)). Plaintiff's pleadings make no effort to plead the unavailability of any of these provisions.

demonstrating conscious disregard for their duties." The law has always distinguished between the concept of gross negligence, which Plaintiff alleges in paragraph 88 of the Petition, and an intent to cause or inflict harm, which is what the statute requires. The term "intentional" in connection with the word "inflict" implies the specific intent to cause harm and not just harm resulting from an intentional act, as paragraph 88 of the Petition alleges. It is quite clear that the extensive protective procedures which the independent directors required, including compliance with the *Kahn* criteria, the negotiation of termination provisions in the Merger Agreement, and requiring a transaction structure that gave rise to appraisal rights for the shareholders, negate any assertion that their actions intended to cause harm within the meaning of the statute.

V. Plaintiff failed to plead facts sufficient to survive Defendants' Motion to Dismiss if the principles of *Kahn v. M & F Worldwide Corp.* are applied in this case.

If this Court adopts the criteria set forth in *Kahn v. M & F Worldwide Corp.*, it becomes clear that the allegations of Plaintiff's Petition are not sufficient to defeat Defendants' motion to dismiss. Those criteria are particularly summarized by the Delaware Supreme Court as follows:

> To summarize our holding, in controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the

> approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

In this case, it is clear that these six criteria have been met and that the Plaintiff has not and could not allege facts which would establish the absence of these criteria. Addressing these criteria in order:

- First, it is undisputed that the transaction was expressly conditioned on the approval of *both* the Special Committee *and* a majority of the minority stockholders.
- Second, while Plaintiff attempts by inuendo to question the independence of the Special Committee by reference to compensation received by such independent directors, Plaintiff does not allege that those directors were not independent in the sense contemplated by Iowa corporate law.[36] It is axiomatic that independent directors would not

[36] In fact, in *Kahn,* the court rejected far more substantial prior relationships between the members of the Special Committee and the controller as establishing a lack of independence of such directors. 88 A.3d at 647-50. Since this case arises under the Iowa Business Corporation Act, which is based on the Model Business Corporation Act rather than under the Delaware Corporation Act, the independence of the directors should be analyzed by reference to whether or not they are "qualified" directors within the meaning of Iowa Code sections 490.861, 490.862 and 490.863.

serve as such without compensation because of the significant time commitment involved and the potential liability that can be incurred on a corporate board, but such compensation alone does not compromise independence.[37] Moreover, the Special Committee here was exceptionally well-qualified to serve in that capacity, as evidenced by the trial court's detailed recitation of each independent director's impressive qualifications.[38]

- Third, clearly the Special Committee was empowered to freely select its advisors and to say no definitively and Plaintiff's Petition does not assert otherwise. Moreover, the Special Committee negotiated terms which would enable EMCI to rescind its approval recommendation to the shareholders if the Board of Directors received a better offer. In fact, the Committee did engage both well-qualified attorneys to

[37] Iowa Code section 490.811 specifically empowers the board of directors to set the compensation of its members unless the Articles of Incorporation provide otherwise. It is undisputed that there is no provision of the Articles that does so here.

[38] *Meade v. EMC Insurance Group*, CASE NO. LACL146098, at p. 3 (Polk County District Court 2019). Most of these directors had served as such for a number of years before EMCC's offer was presented - one going back as far as 2007. So, Plaintiff's allegations of "millions of dollars" of fees being paid to these directors misrepresents and distorts their compensation associated with addressing this offer since in some cases the fees were paid for over 10 years of service. In fact, three of the directors were paid $80,000 for their service in connection with addressing the EMCC offer and one was paid $100,000 – not the millions in fees Plaintiff implies.

represent them and a well-qualified investment banker to independently estimate the value of the stock of the corporation and to deliver a fairness opinion with respect to the transaction. Plaintiff does not allege otherwise. And not only did the independent directors engage such professionals, the independent directors actively used those professionals to negotiate a significantly higher price than initially offered by the majority, which represented a substantial premium over the market price for the stock.[39] Plaintiff's own allegations in the Petition clearly indicated the extensive actions the Special Committee took to determine value and to successfully negotiate a higher price for the stock.

- Fourth, as noted above, the satisfaction of the procedural protections set forth in *Kahn v. M & F Worldwide Corp.* should be regarded by this Court as meeting the duty of care under the business judgment standard in negotiating the price for the stock purchased in the transaction. Plaintiff fails to allege any violation of the business judgment standard, and likewise fails to allege facts from which it could reasonably be concluded that Defendants violated the business judgment standard.

[39] Not only did the members of the Special Committee actively work to increase the offered price, on its own volition it developed and presented the Alternative Transaction to the EMCC board.

These independent directors obtained a fairness opinion from their financial advisor in connection with the transaction. As noted in the District Court ruling, these directors diligently attended 23 separate meetings in connection with their evaluation of the majority offer and the negotiation of a substantially higher price.[40]

- Fifth, the minority shareholders were properly informed with respect to the transaction by means of a proxy statement filed and subject to review by the United States Securities Exchange Commission. The Plaintiff's principal allegation of inadequate proxy statement disclosure was the failure to include the Sandler O'Neill financial analysis if the Alternative Proposal had been accepted, even though the proxy statement had extensive discussion about the work of Sandler O'Neill and also included accurate information about the Alternative Proposal. The Alternative Proposal was dependent upon financial projections which assumed a significant reduction in the underwriting expenses because of a proposed termination of the longstanding insurance pooling arrangement – a change which EMCC would have to agree to and to which the Iowa Insurance Commissioner would have to consent

[40] It is noteworthy that in *Kahn* the Special Committee met only 8 times, yet the Delaware Chancery Court determined that they had satisfied their duty of care.

to in order to implement. However, as the majority and controlling shareholder, EMCC had no obligation to agree to enter into the Alternative Proposal and the Iowa Insurance Commission had in any event indicated it was unlikely that the changes envisioned by the Alternative Proposal would be approved.[41] Thus, this financial analysis would not be relevant to what was presented to the shareholders. The SEC took no action to contest the effectiveness of the proxy statement, as it would have if it deemed the representations therein to be materially deficient.

- Finally, Plaintiff's allegations of coercion are based entirely on the refusals of EMCC to comply with Plaintiff's wishes in actions proposed by Mr. Shepard and to agree to the Alternative Proposal. EMCC had every right to specify the terms of its offer and what alternative course of action would be acceptable to it, and the independent directors had no power to declare otherwise.[42] Thus, the independent directors had

[41] The Insurance Commissioner indicated that the Alternative Proposal would likely not be approved because of the adverse effect it would have on EMCC's policyholders, to whom as a mutual insurance company EMCC owed fiduciary duties.

[42] Plaintiff seems to ignore EMCC's fiduciary duties to its policyholders in suggesting that these actions were coercive. Because of the Insurance Commissioner's supervision of EMCC, the EMCC board had no choice but to reject the Alternative Proposal and to not agree to actions proposed by Mr. Shepard that would have an adverse impact on its policyholders.

the choice to either accept those terms or say no – which they had every right to do. Moreover, the independent directors took a number of other affirmative actions to protect the interests of the minority shareholders, including negotiating provisions in the merger agreement which would enable EMCI to terminate the agreement or rescind its approval recommendation to the shareholders upon the occurrence of certain contingencies which would adversely affect the minority shareholders and to structure the transaction so as to provide dissenters' appraisal rights to shareholders who were unhappy with the price. After months of negotiations, in the exercise of their business judgment, the Special Committee properly determined that accepting the offer was preferable to the minority shareholders compared to the future uncertainty of rejecting the offer knowing that they might never be able to match that offer in the future and the likely resulting adverse impact on stock price which would have accompanied such a rejection.

As a result, the transaction should be reviewed under the "business judgment" standard. It is readily apparent from Plaintiff's Petition that he is not asserting a violation of that standard but instead is alleging a violation of the "entire fairness" standard since the entire emphasis of Plaintiff's pleadings relates to the price at which the transaction was consummated. If "entire

fairness" were the applicable standard, the allegations in Plaintiff's Petition likely would survive a motion to dismiss, but here Plaintiff fails to allege facts sufficient to remove the review from the "business judgment" standard and also fails to allege any violation of that standard. Hence, the District Court erred in denying the independent directors' motion to dismiss.

CONCLUSION

The Defendants utilized every conceivable procedural protection available to protect the interests of the minority shareholders here. Some of those procedural protections, such as use of the long form merger, also provided substantive protection to these shareholders by virtue of the availability of appraisal rights to dissenting shareholders.[43] It is simply impossible to imagine what further action they could have taken to protect the minority shareholders' interests.

This litigation is entirely focused on a Plaintiff who feels that the final price for his stock was not fair, despite the independent directors jumping through every protective hoop available. Plaintiff had the availability of

[43] Some courts have held that appraisal rights are the exclusive remedy of shareholders in such mergers. While the Iowa Supreme Court may appropriately choose to adopt this position when special procedures such as were used here to ensure fairness are employed, it need not do so here in light of the failure of Plaintiff's pleadings to allege a claim upon which relief can be granted.

appraisal rights to obtain a higher price and chose not to assert those rights. Instead, attorneys chose to pursue a merger objection class action suit to maximize their fees, which likely would have been much smaller in individual appraisal rights cases.

While Plaintiff's allegations likely would be sufficient to survive the independent directors' motion to dismiss if these procedural protections were not utilized and an "entire fairness" standard were applied, they are not sufficient to survive a motion to dismiss when such extreme procedural protections have been implemented by the independent directors and hence a "business judgment" standard should be applied.

The District Court's approach would prevent any case involving a merger objection to be dismissed on a motion to dismiss by independent directors by virtue of its decision that inapplicability of the defenses set forth in section 490.831(1)(a) need not be plead by plaintiffs, in direct contravention of the legislative intent of the nonliability provisions of Iowa Code section 490.831. Denying the independent directors' motion to dismiss in this context would exacerbate the concerns raised in the studies cited above and reinforce the incentives of the plaintiffs' bar to pursue unmeritorious class action litigation in public company mergers, with the principal objective being large plaintiff attorney fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa R. App. P. 6.903 (1)(d), 6.903(1)(e)(1), and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, in font size 14 and contains 6,262 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *William C. Brown*
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court using the Electronic Document Management System, which will send notification of such filing to the following counsel of record.

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