ELECTRONICALLY FILED AUG 31, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 21-0098

KENDALL J. MEADE,
individually and on behalf of all others similarly situated,
Plaintiff

vs.

PETER S. CHRISTIE, STEPHEN A. CRANE, JONATHAN R. FLETCHER, and GRETCHEN H. TEGELER,
Defendants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE LAWRENCE P. MCLELLAN, PRESIDING

APPELLANTS' BRIEF

Michael W. Thrall, AT0007975
Mark C. Dickinson, AT0001997
Lynn C. Herndon, AT10014047
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, Iowa 50309
Telephone: (515) 283-3100
Facsimile: (515) 283-8045
E-mail: mwt@nyemaster.com
mcd@nyemaster.com
lherndon@nyemaster.com

ATTORNEYS FOR INDEPENDENT DIRECTOR DEFENDANTS-APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

ISSUES PRESENTED 10

ROUTING STATEMENT 16

STATEMENT OF THE CASE 17

STATEMENT OF THE FACTS 20

ARGUMENT 27

I. Meade's Claims Are Derivative and Should Have Been Dismissed 30

A. Error Preservation 30

B. Standard of Review 30

C. Iowa Law Requires Directors to Maintain Direct Fiduciary Duties Solely to the Corporation, Not Its Shareholders 31

1. Iowa's Constituency Statute confirms that director duties are limited to the corporation in the merger context. 37

2. Courts in other states with similar director-duty and constituency statutes conclude shareholder claims like Meade's are derivative. 41

3. Iowa law strongly protects the corporate form, especially for publicly-traded companies. 44

4. Meade's claims fit squarely within the *Cunningham* standard and are derivative under the director-duty and constituency statutes. 48

D. *Cunningham*'s "special injury" exception does not negate this result. 50

II. The District Court Erred in Not Dismissing Meade's Claims under the Director Shield Statute. 55

A. Error Preservation 55

B. Standard of Review 55

1. The current standard of review 55

2. The standard of review for a motion to dismiss ruling should be a plausibility standard for claims potentially protected by the Director Shield Statute...... 55

C. The Evolution of Director Shield Statute Protection 61

D. To Overcome the Director Shield Statute, a Shareholder Must Affirmatively Plead Facts Supporting a Specific Intent by the Director to Harm the Corporation....................... 64

E. The District Court Applied the Wrong Standard to Meade's Allegations About a Director Shield Exception. 65

CONCLUSION 74

REQUEST FOR ORAL ARGUMENT 75

CERTIFICATE OF FILING AND SERVICE 76

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS.. 77

TABLE OF AUTHORITIES

CASES

Agostino v. Hicks, No. Civ. A. 20020–NC, 2004 WL 443987 (Del.Ch. March 11, 2004) 10, 53

Ahrens v. Ahrens Agric. Indus. Co., No. 14–0564, 2015 WL 2089372 (Iowa Ct. App. May 6, 2015) 10, 52

Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013) 10, 33

Baxter v. Syntroleum, CJ-2013-5807 (Tulsa Cty. Okla. Dist. Jan. 14, 2016) 10, 44

Chur v. The Eighth Judicial District Court, 458 P.3d 336 (Nev. 2020) 13, 68

City of Riviera Beach Gen. Employees Ret. Sys. v. Mylan N.V., No. 2:15-CV-821, 2016 WL 4367549 (W.D. Pa. May 10, 2016), *report and recommendation adopted,* No. 2:15-CV-821, 2016 WL 4275822 (W.D. Pa. Aug. 12, 2016) 10, 43-44

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983) .... *passim*

Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693 (Wis. 2014) 13, 60

DCG & T ex rel. Battaglia/Ira v. Knight, 68 F. Supp. 3d 579 (E.D. Va. 2014) 10, 44

Engstrand v. W. Des Moines State Bank, 516 N.W.2d 797 (Iowa 1994) 10, 34-35, 46, 48

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994) .... *passim*

Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049 (Del. Ch. 1996) 14, 60

Grace Bros. v. Farley Indus., 450 S.E.2d 814 (Ga. 1994) 53

Gusinsky v. Flanders Corp., 2013 NCBC 46, 2013 WL 5435788 (N.C. Super. Sept. 25, 2013) 44

Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600 (Iowa 2012) 14, 60

In Re American Cap., Ltd. S'holder Litig., Case No. 422598-V (Md. Cir. Ct., Mont. Cty., Feb. 22, 2018) 14, 58

In re Estate of Kneebs, 70 N.W.2d 539 (Iowa 1955) 14, 65

In re Parametric Sound Corp. S'holders Litig., Case No. A-13-686890-B (Nev. 8th Jud. Dist., Clark Cty., filed Aug. 13, 2013) . 14, 58

In re Walgreen Co. S'holder Litig., 832 F.3d 718 (7th Cir. 2016).......... 14, 57

In re Walt Disney Co. Deriv. Litig., 906 A.2d 27 (Del. 2006) 14, 67

In re ZAGG Inc. S'holder Derivative Action, 826 F.3d 1222 (10th Cir. 2016) 14, 68

Int'l Brotherhood of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 70 N.E.3d 918 (Mass. 2017).......... *passim*

Jarackas v. Applied Signal Technology, Inc., No. 111-cv-19643, 2012 WL 9764184 (Cal. Super. Mar. 15, 2012) 11, 41

Kadel v. Dayton Superior Corp., 731 N.E.2d 1244 (Ohio C. Pl. Montgomery Cty. 2000) 11, 43

Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).......... 18-19, 22

Kelly v. Englehart Corp., Nos. 1-241 WL 855600 (Iowa App. July 31, 2001) 11, 41, 52

Kentucky State Dist. Council of Carpenters Pension Tr. Fund v. Myers, No. 4:10-CV-00332, 2010 WL 11483954 (S.D. Iowa Sept. 9, 2010).......... 11, 39-40

Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986) 11, 32

Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).......... 14, 66-67

May v. Coffey, 967 A.2d 495 (Conn. 2009).......... 11, 51

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002) 11, 30-31, 55

Odinotski v. Vazales, et al., Case No. 37-2015-00009254-CU-SL-CTL (Cal. Super. Ct., San Diego Cty., filed Mar. 18, 2015).......... 14, 58-59

Parnes v. Bally Ent. Corp., 722 A.2d 1243 (Del. 1999) 11, 41

RBC Capital Markets v. Jervis, 129 A.3d 816 (Del. 2015).................... 11, 39

Redeker v. Litt, No. 04-0637, 2005 WL 1224697 (Iowa Ct. App. May 25, 2005)... 11, 33, 34, 52

Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986)... 11, 38

Rieff v. Evans, 630 N.W.2d 278 (Iowa 2001).. 11, 35

RPC Liquidation v. Iowa Dep't of Transp., 717 N.W.2d 317 (Iowa 2006)... 11, 49

Shepard v. Employers Mutual Casualty Company, 998 F.3d 330 (8th Cir. 2021)... 11, 36, 37, 72

Shumate v. Drake Univ., 846 N.W.2d 503 (Iowa 2014)................... 11, 31, 55

Simmons v. Miller, 544 S.E.2d 666 (Va. 2001)..................................... 11, 44

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) 14, 61

Somers ex rel. EGL, Inc. v. Crane, 295 S.W.3d 5 (Tex. App. Ct. 2009) 11, 43

Sound Infiniti, Inc. v. Snyder, 237 P.3d 241 (Wash. 2010) 12, 40

Spears v. Com Link, Inc., No. 12–1223, 2013 WL 3457171 (Iowa Ct. App. July 10, 2013) 12, 35, 52

Sullivan v. Actel Corp., No. 110-CV-184257, 2012 WL 9944634 (Cal. Super. Mar. 08, 2012).. 12, 44

Taylor v. Hogan, No. 12–0898, 2013 WL 1749777 (Iowa Ct. App. Apr. 24, 2013).. 12, 35, 36, 48

Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)... 12, 34, 52, 53

Walters v. Kautzky, 680 N.W.2d 1 (Iowa 2004).................................... 12, 49

Weltzin v. Cobank, ACB, 633 N.W.2d 290 (Iowa 2001)........................ 12, 32

Young v. HealthPort Techs., Inc., 877 N.W.2d 124 (Iowa 2016) 14, 55-56

STATUTES

1987 Iowa Acts ch. 212, § 5 .... 14, 62

2016 Md. Laws Ch. 170, § 1 .... 12, 32

Iowa Code § 490.1108A .... *passim*

Iowa Code § 490.1301 .... 12, 40

Iowa Code § 490.1340.1 .... 12, 40

Iowa Code § 490.202(2)(d)(1) .... *passim*

Iowa Code § 490.742 .... 12, 18, 31

Iowa Code § 490.801(2) 12, 45

Iowa Code § 490.830(1)(b) 27, 32

Iowa Code § 490.831 .... 13, 14, 65

Iowa Code § 490.861(1) 14, 18, 72

N.R.S. § 78.138(7)(b)(2) 14, 68

S.C. Code § 33-8-300(a)(3) 12, 32

RULES

Iowa R. Civ. P. 1.279 .... 12, 18, 31

OTHER AUTHORITIES

Bryn R. Vaaler, *2.02(b)(4) or Not 2.02(b)(4): That Is the Question*, 74 Law & Contemp. Probs. 79 (2011) 15, 63

Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation* (June 2019) (*available at* https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/about-chubb/sca-litigation/documents/pdf/from-nuisance-to-menace--the-rising-tide-of-scas-ws.pdf) 14, 58

Committee on Corporate Laws, *Changes in the Revised Model Business Corporation Act-Amendment Pertaining to the Liability of Directors*, 45 Bus. Law. 695 (1990) 15, 57

Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63 (2006) 12, 53

David S. Walker, *Updating the Iowa Business Corporation Act,* Iowa State Bar Association Annual Meeting, p. 16 (2002) (*available at* http://205.209.45.153/iabar/CLEINDEX.nsf/2de34647064844cb862565330055898e/f9eb11b4d490345a86256cda005055d7?OpenDocument) 15, 71-72

J.B. Heaton, *What Injures A Corporation?*, 73 Bus. Law. 1031 (2018) 13, 45, 46, 48

James J. Hanks, Jr. and Larry P. Scriggins, *Protecting Directors and Officers from Liability--the Influence of the Model Business Corporation Act*, 56 Bus. Law. 3 (2000) 15, 57-58

Jonathan D. Springer, "*Corporate Constituency Statutes: Hollow Hopes and False Fears*" 1999 Ann. Surv. Am. L. 85 (1999) 13

Matthew G. Doré, "Duties and Liabilities of an Iowa Corporate Director," 50 Drake L. Rev. 207 (2002) 13, 45

Matthew G. Doré, Iowa Practice Series, Vol. 6: Business Organizations (Thomson West, Nov. 2020 update) § 39:4 .... 13, 31

Model Business Corporations Act § 2.02(b) 15, 63

Model Business Corporations Act § 2.02, off. cmt. 3.E (2017) 15, 67

Model Business Corporations Act § 8.31, off. cmt. 1.A. (2017) 15, 59

Richard P. Wolfe, *Minority Shares Under The Louisiana Business Corporation Act: Expulsion, Oppression, And Fiduciary Duty*, 64 Loy. L. Rev. 25 (2018) 13, 46

Ronald J. Colombo, "Duty of Care," in Law of Corp. Offs. & Dirs., § 2:8 (Wolters Kluwer, 2020-2021 update) 13, 40

Stephen A. Radin, *Director Protection Statutes After Malpiede and Emerald Partners*, Insights, Vol. 16, No. 2, 10 (February 2002) 15, 59-60

Uniform Commercial Code § 8-102(17), Off. Cmt. 17.......................... 13, 47

ISSUES PRESENTED

I. Does Iowa's standard for derivative shareholder claims – *i.e.,* that a shareholder who sues a director for breach of fiduciary duty resulting in damage to the value of the corporation has no claim for damages except as a derivative claim – apply in the merger context, particularly given the Legislature's adoption of Iowa Code § 490.830 (requiring directors to act "in the best interests *of the corporation*") and a constituency statute (the "Constituency Statute"), Iowa Code § 490.1108A (permitting directors to consider a variety of stakeholder interests when evaluating a merger)?

<u>Cases</u>

Agostino v. Hicks, No. Civ. A. 20020–NC, 2004 WL 443987 (Del. Ch. March 11, 2004)

Ahrens v. Ahrens Agric. Indus. Co., No. 14–0564, 2015 WL 2089372 (Iowa Ct. App. May 6, 2015)

Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013)

Baxter v. Syntroleum, CJ-2013-5807 (Tulsa Cty. Okla. Dist. Jan. 14, 2016)

City of Riviera Beach Gen. Employees Ret. Sys. v. Mylan N.V., No. 2:15-CV-821, 2016 WL 4367549 (W.D. Pa. May 10, 2016)

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983)

DCG & T ex rel. Battaglia/Ira v. Knight, 68 F. Supp. 3d 579 (E.D. Va. 2014)

Engstrand v. W. Des Moines State Bank, 516 N.W.2d 797 (Iowa 1994)

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994)

Int'l Brotherhood of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 70 N.E.3d 918 (Mass. 2017)

Jarackas v. Applied Signal Technology, Inc., No. 111-cv-19643, 2012 WL 9764184 (Cal. Super. Mar. 15, 2012)

Kadel v. Dayton Superior Corp., 731 N.E.2d 1244 (Ohio C. Pl. Montgomery Cty. 2000)

Kelly v. Englehart Corp., Nos. 1-241, 99-1807, 2001 WL 855600 (Iowa App. July 31, 2001)

Kentucky State Dist. Council of Carpenters Pension Tr. Fund v. Myers, No. 4:10-CV-00332, 2010 WL 11483954 (S.D. Iowa Sept. 9, 2010)

Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986)

May v. Coffey, 967 A.2d 495 (Conn. 2009)

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

Parnes v. Bally Ent. Corp., 722 A.2d 1243 (Del. 1999)

RBC Capital Markets v. Jervis, 129 A.3d 816 (Del. 2015)

Redeker v. Litt, No. 04-0637, 2005 WL 1224697 (Iowa Ct. App. May 25, 2005)

Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986)

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

RPC Liquidation v. Iowa Dep't of Transp., 717 N.W.2d 317 (Iowa 2006)

Shepard v. Employers Mutual Casualty Company, 998 F.3d 330 (8th Cir. 2021)

Shumate v. Drake Univ., 846 N.W.2d 503 (Iowa 2014)

Simmons v. Miller, 544 S.E.2d 666, 675 (Va. 2001)

Somers ex rel. EGL, Inc. v. Crane, 295 S.W.3d 5 (Tex. App. Ct. 2009)

Sound Infiniti, Inc. v. Snyder, 237 P.3d 241 (Wash. 2010)

Spears v. Com Link, Inc., No. 12–1223, 2013 WL 3457171 (Iowa Ct. App. July 10, 2013)

Sullivan v. Actel Corp., No. 110-CV-184257, 2012 WL 9944634 (Cal. Super. Mar. 08, 2012)

Taylor v. Hogan, No. 12–0898, 2013 WL 1749777 (Iowa Ct. App. Apr. 24, 2013)

Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)

Walters v. Kautzky, 680 N.W.2d 1 (Iowa 2004)

Weltzin v. Cobank, ACB, 633 N.W.2d 290 (Iowa 2001)

Statutes

Iowa Code § 490.742

Iowa Code § 490.801(2)

Iowa Code § 490.830

Iowa Code § 490.1108A.1

Iowa Code § 490.1301, *et seq*.

Iowa Code § 490.1340.1

2016 Md. Laws Ch. 170, § 1

S.C. Code § 33-8-300(a)(3)

Rules

Iowa R. Civ. P. 1.279

Other Authorities

Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63 (2006)

Richard P. Wolfe, *Minority Shares Under The Louisiana Business Corporation Act: Expulsion, Oppression, And Fiduciary Duty*, 64 Loy. L. Rev. 25 (2018)

J.B. Heaton, *What Injures A Corporation?*, 73 Bus. Law. 1031 (2018)

Jonathan D. Springer, "*Corporate Constituency Statutes: Hollow Hopes and False Fears*" 1999 Ann. Surv. Am. L. 85 (1999)

Matthew G. Doré, "Duties and Liabilities of an Iowa Corporate Director," 50 Drake L. Rev. 207 (2002)

Matthew G. Doré, Iowa Practice Series, Vol. 6: Business Organizations (Thomson West, Nov. 2020 update) § 39:4

Ronald J. Colombo, "Duty of Care," in Law of Corp. Offs. & Dirs., § 2:8 (Wolters Kluwer, 2020-2021 update)

Uniform Commercial Code § 8-102(17), Off. Cmt. 17.

II. Does Iowa's director shield statute (the "Director Shield Statute"), Iowa Code § 490.202(2)(d) (which authorizes the articles of incorporation to exempt corporate directors from monetary damages for breach of fiduciary duty), require shareholders to plead an exception to the statute in their complaint, when Iowa Code § 490.831(1)(a)(1)(a) requires such shareholders to "establish[]" that the Director Shield Statute does not "preclude[] liability"?

Cases

Chur v. The Eighth Judicial District Court, 458 P.3d 336 (Nev. 2020)

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983)

Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693 (Wis. 2014)

Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049 (Del. Ch. 1996)

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

In re American Cap., Ltd. S'holder Litig., No. 422598-V (Md. Cir. Ct., Mont. Cty., Feb. 22, 2018)

In re Estate of Kneebs, 70 N.W.2d 539 (Iowa 1955)

In re Parametric Sound Corp. S'holders Litig., No. A-13-686890-B (Nev. 8th Jud. Dist., Clark Cty., filed Aug. 13, 2013)

In re Walgreen Co. S'holder Litig., 832 F.3d 718 (7th Cir. 2016)

In re Walt Disney Co. Deriv. Litig., 906 A.2d 27 (Del. 2006)

In re ZAGG Inc. S'holder Derivative Action, 826 F.3d 1222 (10th Cir. 2016)

Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009)

Odinotski v. Vazales, et al., No. 37-2015-00009254-CU-SL-CTL (Cal. Super. Ct., San Diego Cty., filed Mar. 18, 2015)

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)

Young v. HealthPort Techs., Inc., 877 N.W.2d 124 (Iowa 2016)

Statutes

1987 Iowa Acts ch. 212, § 5

Iowa Code § 490.202(2)(d)(1)

Iowa Code § 490.831

Iowa Code § 490.861(1)

N.R.S. § 78.138(7)(b)(2)

Other Authorities

Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation* (June 2019) (*available at* https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/about-

chubb/sca-litigation/documents/pdf/from-nuisance-to-menace--the-rising-tide-of-scas-ws.pdf)

Committee on Corporate Laws, *Changes in the Revised Model Business Corporation Act-Amendment Pertaining to the Liability of Directors*, 45 Bus. Law. 695 (1990)

James J. Hanks, Jr. and Larry P. Scriggins, *Protecting Directors and Officers from Liability--the Influence of the Model Business Corporation Act*, 56 Bus. Law. 3 (2000)

Model Business Corporations Act § 2.02(b)

Model Business Corporations Act § 2.02, off. cmt. 3.E (2017)

Model Business Corporations Act § 8.31, off. cmt. 1.A. (2017)

Stephen A. Radin, *Director Protection Statutes After Malpiede and Emerald Partners*, Insights, Vol. 16, No. 2, 10 (February 2002)

Bryn R. Vaaler, *2.02(b)(4) or Not 2.02(b)(4): That Is the Question*, 74 Law & Contemp. Probs. 79 (2011)

David S. Walker, *Updating the Iowa Business Corporation Act,* Iowa State Bar Association Annual Meeting, p. 16 (2002) (*available at* http://205.209.45.153/iabar/CLEINDEX.nsf/2de34647064844cb862565330055898e/f9eb11b4d490345a86256cda005055d7?OpenDocument).

ROUTING STATEMENT

This case presents substantial issues of first impression to this Court involving amendments to the Iowa Business Corporation Act ("IBCA") governing fiduciary duty claims against directors of a publicly-traded Iowa corporation in the context of a corporate merger, including the effect of the Iowa Legislature's adoption in 1989 of the "Constituency Statute," Iowa Code § 490.1108A, on whether the case is derivative or direct, and the scope and applicability of the "Director Shield Statute," Iowa Code § 490.202(2)(d)(1), adopted in 2002 to protect directors of Iowa corporations from the types of claims asserted in this case. Iowa R. App. P. 6.1101(2)(c). These fundamental issues are also of "broad public importance requiring prompt or ultimate determination by the supreme court." Iowa R. App. P. 6.1101(2)(d).

This Court has accepted this interlocutory appeal in light of the substantial rights involved and the fact that the issues presented would be dispositive of the entire litigation, which would otherwise be uniquely expensive to the parties and wasteful of the Court's resources. Accordingly, the Iowa Supreme Court should retain this case.

STATEMENT OF THE CASE

Nature of the Case

This case challenges one of the largest corporate transactions in Iowa history. In 2019, publicly-traded EMC Insurance Group, Inc. ("EMCI") agreed to a "going-private" transaction in which its majority shareholder, Employers Mutual Casualty Company ("EMCC"), purchased EMCI's outstanding public shares at a 50% premium for shareholders (the "Transaction"). EMCC insisted – and EMCI agreed – that the Transaction would not go forward unless it was negotiated and approved by a special committee of EMCI's independent directors (the "Special Committee" or the "Independent Directors") *and* was approved by a majority of EMCI's minority shareholders (*i.e.*, excluding EMCC and its affiliated shareholders). After lengthy negotiations, EMCC and the Special Committee reached agreement on all deal terms, and the Transaction was overwhelmingly approved by EMCI's minority shareholders.

After EMCI closed the Transaction (and paid Meade and other shareholders their *pro rata* share of the merger price), Kendall Meade, a single shareholder, sought a higher merger price. Instead of pursuing his appraisal rights available under the IBCA, Meade sued EMCI, its directors, and EMCC, alleging breaches of fiduciary duty. Meade styled his case (the "Petition" or

"Pet.") as a direct class action, and sought to represent a class of all former EMCI shareholders except for defendants. App. 013, ¶ 28. Meade sought damages reflecting what he asserted was the difference between the actual value of EMCI and the amount that EMCC paid for EMCI. *See* App. 035, ¶ 92.

In so doing, Meade did not make prior demand on EMCI before filing derivative claims on behalf of the corporation, as required by Iowa Code § 490.742 and Iowa R. Civ. P. 1.279.

Disposition in the District Court

Defendants each moved to dismiss. In particular, the Independent Directors who composed the Special Committee moved to dismiss ("Motion to Dismiss") on the grounds that (1) Meade's claims for breach of fiduciary duty against the Independent Directors are derivative in nature; and (2) Meade failed to state a claim for breach of fiduciary duty because he had not pleaded facts showing (a) that EMCI's articles of incorporation do not insulate the directors from liability under the "Director Shield Statute," Iowa Code § 490.202(2)(d)(1); (b) that the directors were not shielded from liability under the IBCA's "director conflicted interest transaction" provisions in Iowa Code § 490.861; and (c) that the business judgment rule did not apply under the conflict-avoidance procedure established by *Kahn v. M&F Worldwide*

Corp., 88 A.3d 635 (Del. 2014). The District Court dismissed all claims against EMCC, EMCI, and Bruce Kelley (a director and the CEO of each company), but denied the Independent Directors' Motion to Dismiss. *See* Dec. 23, 2020 Order Re: Motions to Dismiss, Polk Cty. Dist. Ct. Case No. LACL146098 ("Order") (App. 840-890).

The District Court concluded that Meade's claims were "direct" under this Court's precedent in *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881 (Iowa 1983). The District Court concluded that (1) based on Meade's allegations, EMCI's minority shareholders "alone suffered the injury because there was no injury to EMCI," and (2) they suffered a "separate and distinct injury" from EMCI's majority shareholder, EMCC. App. 862.

At the same time, however, the District Court noted the "persuasive" authority in support of finding Meade's claims to be derivative, and observed that no Iowa appellate courts have had the opportunity to examine the issue in the context of a merger transaction since the Iowa Legislature added its "Constituency Statute," Iowa Code § 490.1108A, in 1989, after *Cunningham*. App. 861. As such, the District Court "believe[d] it is for the supreme court to determine whether amendments to the IBCA and/or the rationale [articulated by the Massachusetts Supreme Judicial Court in *Int'l Brotherhood*

of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 70 N.E.3d 918, 926–27 (Mass. 2017)] result in a modification of the *Cunningham* rule." App. 861.

The District Court also held that Meade was not required to affirmatively plead the inapplicability of the Director Shield Statute, and that, in any event, Meade had adequately plead an exception to the Director Shield by alleging that the Independent Directors "intentionally failed to act in the face of a known duty to act, demonstrating a conscious disregard for their duties." App. 862-878.[1]

On January 22, 2021, the Independent Directors sought interlocutory review of the District Court's denial of their Motion to Dismiss, on those two grounds. On March 1, 2021, the Iowa Supreme Court granted the Independent Directors' application for interlocutory review; the Court also stayed all further proceedings in the District Court.

STATEMENT OF THE FACTS

Until it went private by virtue of the Transaction, EMCI was one of the largest publicly-traded companies in Iowa, with a market capitalization of nearly $750 million and a five-member board of accomplished directors consisting of four Independent Directors – Peter Christie, Stephen Crane,

---

[1] The District Court rejected the Independent Directors' other bases for dismissal of the Petition. The Independent Directors have not sought interlocutory review of those holdings.

Jonathan Fletcher, and Gretchen Tegeler[2] – and Mr. Kelley, who served as CEO of both EMCI and EMCC. App. 011, ¶¶ 16–21; App. 841; App. 557-558.[3]

EMCI became publicly-traded in the 1980s, with EMCC as its majority shareholder. *See* App. 010-011, ¶¶ 14-15; App. 564.[4] As of 2018, EMCC owned about 54% of the over twenty million outstanding shares of EMCI. *See* App. 440, 441, 445.

On November 15, 2018, EMCC offered to buy for $30 per share the remainder of EMCI's shares not already owned by EMCC. App. 016-017,

---

[2] Peter S. Christie previously served as a part of the executive management group at the St. Paul Companies, as Chairman and CEO of Minet Group, and as Deputy Chairman of AON Group Inc. Stephen A. Crane served as CEO of two insurance holding companies (Alpha Star Insurance Group and Gryphon Holdings, Inc.) and one reinsurance intermediary. Jonathan Fletcher was a registered investment advisor and trust officer. Gretchen H. Tegeler held leadership positions in government (including Chief of Staff to the Governor), a for-profit entity (Director of Business Development for a telecommunications company), and non-profit entities (most recently President of Taxpayers Association of Central Iowa). *See* App. 842.

[3] The facts are drawn from the Petition and from documents Plaintiff agreed were subject to judicial notice and could be considered by the District Court on a motion to dismiss. App. 850-852.

[4] Although EMCC reduced its percentage ownership of EMCI through subsequent stock offerings by EMCI over the years, EMCC always retained majority ownership of EMCI. App. 014-015, ¶ 31. EMCC's status as a majority shareholder allowed EMCI to utilize EMCC's "Excellent" financial strength rating from A.M. Best Company, Inc., which permitted EMCI to sell insurance to businesses requiring such a high rating from its insurers. App. 459, 467.

¶ 39; App. 461-463. In order to ensure that the process of negotiating and voting on the Transaction was fair to the minority shareholders, EMCC conditioned its offer on the adoption of what is known as the "*MFW*" framework – so named after the Delaware case that first endorsed it, *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). Under this framework, a controlling shareholder offering to buy out the minority shareholders follows a series of procedural safeguards to remove any actual or perceived conflicts of interest:

> (i) 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.

Id. at 645. Under this framework, a negative vote by as few as 23% of EMCI's public shareholders would thwart the Transaction.

Upon receipt of EMCC's offer, the EMCI Board formed a Special Committee consisting of the four Independent Directors; Mr. Kelley recused himself from the process. App. 017, ¶ 40; App. 878-879. The Special Committee retained Willkie Farr & Gallagher LLP ("Willkie Farr"), a New York-based corporate law firm, as its independent counsel; and Sandler

O'Neill & Partners, L.P. ("Sandler"), a New York-based investment bank, as its financial adviser. App. 017, ¶ 41; App. 464.

Over the next five months, EMCI's Special Committee (assisted by its counsel and its financial advisor) gathered "detailed information regarding the Company's business, financial condition and actuarial and reserve matters" in order to negotiate with EMCC. App. 465, 468-475. Sandler prepared multiple valuation models for EMCI, and prepared various counteroffers to EMCC based on those models. App. 017, ¶¶ 41, 42; App. 018-019, ¶ 47; App. 021, ¶ 53; App. 029, ¶¶ 68, 69; App. 470-473.[5] Ultimately, the two sides reached agreement on the value of the company as reflected in the share price to be offered EMCI's minority shareholders ($36 per share), subject to negotiation of a mutually-agreeable merger agreement (the "Merger Agreement"). App. 474.

The parties then spent weeks negotiating the 42-page Merger Agreement.[6] Before finalizing its recommendation, the Special Committee

---

[5] *See also* App. 715-839 (presentations to the Special Committee of the EMCI Board by Sandler, dated January 8, February 5, February 22, March 5, March 22, and May 8, 2019). These documents were accepted by the District Court as a matter of public record appropriately considered as part of the motion to dismiss. *See* App. 850-852; *supra,* n.3.

[6] Among other sticking points were the scope of the representations and warranties; what constituted a "superior proposal" that could permit the Independent Directors to change their "yes" recommendation to shareholders;

obtained a written opinion from Sandler that the $36 per share price was fair, from a financial point of view, to EMCI's minority shareholders. App. 645, 611.

The merger price was tied to the value of the corporation as a whole so that any changes to the number of outstanding shares of stock would prompt a proportionate adjustment to the per-share payments. App. 582, § 1.4(d). The per-share payments were not made directly to EMCI's shareholders, but rather through EMCI's transfer agent, which then distributed the payments to the shareholders. *See* App. 585, § 1.12. Any portion of the purchase price that was not initially received by shareholders reverted *to EMCI,* after which time shareholders could seek payment from EMCI alone. App. 586, § 1.13(c). And to the extent any shareholder believed EMCI was worth more than the value negotiated by the Special Committee, those shareholders could seek additional compensation *from EMCI* via the statutory appraisal remedy. App. 582-583, § 1.6.

In addition to codifying the value of the corporation as translated into a price-per-share basis, the Agreement contained a number of other EMCI-friendly provisions negotiated by the Special Committee, such as:

---

and whether EMCC would be required to vote for a better offer if one materialized. App. 474-475.

- a non-waivable "majority of the minority" shareholder approval condition;
- the absence of a termination fee or a financing condition;
- limited representations and warranties from EMCI;
- a provision that the Special Committee could change its recommendation for the Transaction if a better offer emerged.

App. 602, § 6.1(a), and App. 605-612, § 8.1; App.586-590, Article II; App. 595-596, § 4.3(e); App. 474-475.

EMCC and EMCI also made various representations and undertook duties to each other regarding, *e.g.,* regulatory approvals and compliance (App. 596-600), information sharing (App. 598), public disclosures (App. 599), and EMCC's obligation to pay all costs and expenses related to the proxy statement (the "Proxy"), SEC filing fees, and the shareholder vote (App. 605).

Importantly, the Merger Agreement expressly disclaimed creating any third-party beneficiaries (except for certain indemnifications of former directors). App. 614, § 9.10. The Agreement also contained a merger clause, and constituted the entire agreement between EMCC and EMCI. App. 614, § 9.8.

The Agreement was signed on May 8, 2019, by EMCI (as seller), EMCC (as buyer), and a subsidiary formed to effect the merger; and the

Transaction was announced on May 9, 2019. App. 578-632. On September 18, 2019, approximately 68% of EMCI's 9,297,947 "minority" shares voted **for** the merger. App. 009, ¶ 8; EMC Insurance, Form 8-K (Sept. 19, 2019) at 4.[7] The shareholders were paid through EMCI's transfer agent within a few days thereafter. App. 009, ¶ 8.

On October 22, 2019, Meade filed this case against the Independent Directors, EMCC, EMCI, and Bruce Kelley for alleged breaches of fiduciary duty. Meade alleged, *inter alia*, that the Special Committee mismanaged the sale process, thereby failing to get the best price for EMCI. Meade seeks damages on behalf of the entire putative class of minority shareholders for their common injury "suffered as a result of the Defendants' wrongdoing." App. 013-014, ¶¶ 28-29; App. 037. More specifically, Meade alleged the buyout price was inadequate because it did not reflect "the value of EMCI" (App. 029, ¶ 71), and the "valuation analyses … indicate[d] that fair value for EMCI exceeds $50 per share" (App. 008-009, ¶ 6). Meade criticized the Special Committee for rejecting a proposal that would have "nearly double[d]

---

[7] Available at https://www.sec.gov/Archives/edgar/data/356130/000110465919050728/a19-18665_18k.htm.

the value of EMCI." App. 018-019, ¶ 47. This appeal follows the District Court's decision on the motions to dismiss.

ARGUMENT

Meade's claims against the Independent Directors should have been dismissed by the District Court because (1) his claims were derivative and therefore not his to bring, and (2) Meade did not – and could not – affirmatively plead that the Director Shield Statute did not protect the Independent Directors against such claims.

Under the standard for derivative claims articulated by this Court in *Cunningham*, 332 N.W.2d 881, and its progeny, a shareholder does not maintain a *direct* claim against corporate directors (1) if the fiduciary duty at issue is owed to the corporation, and (2) if the alleged injury to the shareholder was not *wholly independent* of any injury to the corporation. Meade failed his burden on both aspects of the test here.

Meade sued the Independent Directors for breaching their fiduciary duties to the corporation by allegedly mismanaging the sale process which then resulted in a lower sale price. During the sale process, under Iowa law the Independent Directors owed a fiduciary duty to one "person," and one person only: *the corporation. See* Iowa Code § 490.830(1)(b). Because the

Directors did not owe a direct *duty* to Meade outside of their duty to EMCI, there can be no legally-cognizable direct *injury* to him.

Meade concedes that if his claims were brought outside of a merger context they would be derivative. He instead asserts that because his claims were brought in the context of a merger, they are direct because they impact his "personal property" – *i.e.*, the value for his shares. The Iowa Legislature, however, adopted a "Constituency Statute," Iowa Code § 490.1108A, which makes clear that even in the context of a merger, the Independent Directors' fiduciary duties still flowed solely *to the corporation*, and that the shareholders' interests were to be weighted no more than the interests of other stakeholders like employees, vendors, and the community at large. If the Court were to hold that EMCI's shareholders like Meade could bring direct claims here, then conceivably so could the other stakeholders identified by the statute, including EMCI's employees, vendors, and other members of the community. That is not the law in Iowa.

Nor does the fact that Meade's shares were his "personal property" change the analysis at all. Meade alleged again (App. 008-009, ¶ 6) and again (App. 018-019, ¶ 47) and again (App. 029, ¶ 71) that the Independent Directors undervalued *the corporation* (EMCI), thereby impairing his *pro rata* share of EMCI's value. Meade asserts these claims in his capacity "as a

shareholder" rather than as an individual; he alleges harm which was "not independent of any injury to" EMCI; and he claims injury no different than those found by other courts to be derivative, or than that allegedly suffered by the putative class of EMCI's other minority shareholders. App. 013-014, ¶¶ 28, 29.

Meade's claims therefore belong to EMCI, and were derivative. And because Meade failed to follow the exclusive procedures for filing a derivative claim by making a prior demand on EMCI to bring such claims, the District Court erred in denying the Independent Directors' Motion to Dismiss them.

Meade's claims were also deficient because he failed to affirmatively plead the Independent Directors were not protected by the Director Shield Statute, Iowa Code § 490.202(2)(d)(1), which prohibits monetary damages against corporate directors unless they have engaged in "an intentional infliction of harm on the corporation or the shareholders." The Iowa Code requires a plaintiff shareholder to "establish" that the Director Shield Statute does not apply; the legislative creation of that substantive right creates with it an obligation to plead compliance with it. The statute was designed to facilitate dismissing such claims *at the motion to dismiss stage,* and the District Court erred in holding otherwise.

The District Court also applied the wrong substantive standard in its

analysis. The Director Shield Statute required Meade to plead and prove that the Independent Directors *actually knew* their conduct would harm EMCI and its shareholders, and *specifically intended* to cause that harm. The District Court, however, applied a lower standard to Meade's allegations, and erroneously determined those allegations met that standard.

* * *

Meade's failure to satisfy these statutory prerequisites should spare the courts from needlessly delving into the merits of a case that was not his to bring, and that is ultimately certain to fail. This case should have been dismissed below because Meade failed to satisfy the specific, statutorily-prescribed requirements shareholders must follow if they believe that directors have not fulfilled their duties to a corporation.

I. Meade's Claims Are Derivative and Should Have Been Dismissed.

A. Error Preservation

The Independent Directors raised the derivative nature of Meade's clams in their Motion to Dismiss. App. 040. The District Court denied the Independent Director's Motion to Dismiss on this ground. App. 862.

B. Standard of Review

The standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law. *Meier v. Senecaut*, 641 N.W.2d 532,

537 (Iowa 2002). The petition's well-pleaded factual allegations are accepted as true, but not its legal conclusions. *Shumate v. Drake Univ.,* 846 N.W.2d 503, 507 (Iowa 2014).

C. Iowa Law Requires Directors to Maintain Direct Fiduciary Duties Solely to the Corporation, Not Its Shareholders.

In order to pursue a derivative claim against corporate directors for breach of their fiduciary duty *to the corporation*, a shareholder must first make a written demand on the corporation to pursue the requested litigation, and then wait 90 days before filing suit. Iowa Code § 490.742; Iowa R. Civ. P. 1.279. Once that demand is made, "[w]hether a business organization initiates or defends litigation is a business decision" determined by the corporation, not the decision of the individual shareholder. Matthew G. Doré, Iowa Practice Series, Vol. 6: *Business Organizations* ("*Business Organizations*") (Thomson West, Nov. 2020 update) § 39:4.

Meade does not dispute that he failed to make a demand on EMCI to institute fiduciary duty claims against EMCI's Independent Directors, or to otherwise fulfill the requirements of Iowa Code § 490.742 or Iowa R. Civ. P. 1.279 before filing suit. Meade contends, however, that he need not have done so because his claims were direct, not derivative.

The analysis of whether Meade's claims are derivative begins with the fundamental question of *to whom* the Independent Directors owed a fiduciary

duty: Meade cannot sustain his burden to show a legally-cognizable injury unless the Independent Directors directly owed *him* a fiduciary duty. *See, e.g.*, *Weltzin v. Cobank, ACB*, 633 N.W.2d 290, 294 (Iowa 2001) (defendants owed no fiduciary duty; therefore, alleged harm did not give rise to breach of fiduciary duty claim against defendants); *Kurth v. Van Horn*, 380 N.W.2d 693, 698 (Iowa 1986) (reversing verdict for actual and punitive damages on breach of fiduciary duty claim where court found no fiduciary duty existed).

The Iowa Legislature takes a very limited view of the scope of the Independent Directors' duties: the IBCA requires that corporate directors act "[i]n a manner the director reasonably believes to be in the best interests *of the corporation*." Iowa Code § 490.830(1)(b) (emphasis added). Unlike in many other states,[8] the Iowa Legislature thus explicitly limited the Independent Directors' fiduciary duty to directly extend only to *the corporation*, and not also directly to the company's shareholders.

This Court has also long grappled with the scope of a corporate director's duties in the context of whether a shareholder's claims are direct

[8] By common law, Delaware does not follow this rule. *See* Part C.1, *infra*. By statute, nor do several other states. *See, e.g.,* S.C. Code § 33-8-300(a)(3) ("A director shall discharge his duties … in a manner he reasonably believes to be in the best interests of the corporation *and its shareholders*") (emphasis added); 2016 Md. Laws Ch. 170, § 1 (modifying prior statutory language limiting director duties and their enforcement solely "to the corporation or in the right of the corporation").

versus derivative in nature. In 1983, this Court adopted its current formulation of the test for making that determination. Under that test, the "general rule" is that "shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action." *Cunningham*, 332 N.W.2d at 883. In so holding, the Court also identified an exception to that general rule: "a shareholder has an individual cause of action if the harm to the corporation also damages the shareholder in his capacity *as an individual* rather than *as a shareholder*." *Id.* (emphasis supplied). Noting that "[c]ourts vary in their articulation" of this exception in ways which "usually, if not always, overlap," the Court articulated the exception as one in which (1) a "third-party owed [the shareholder] a special duty"; or (2) a shareholder "suffered an injury separate and distinct from that suffered by the other shareholders." *Id.*[9]

Over the years, this Court has also expressed these concepts in similar but slightly different terms, *i.e.,* that the shareholder must "possess[] rights

[9] Iowa courts, like those in other states, have also recognized the ability of minority shareholders to bring direct claims against corporate officers and directors – and even majority shareholders – in the context of a closely-held corporation. *See, e.g., Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 673-74 (Iowa 2013). That concept, however, does not apply to cases like this involving shareholders of publicly-traded corporations, where the corporate form remains intact and shareholders have a ready means of exiting from their investment in the corporation. *See, e.g., id.* at 676; *Redeker v. Litt*, No. 04-0637, 2005 WL 1224697, at *4–6 (Iowa Ct. App. May 25 2005).

extrinsic from the corporation," *Cunningham*, 332 N.W.2d at 884; that a "special duty to the shareholder" must exist "*outside of duties to the corporation*," *Ezzone v. Riccardi*, 525 N.W.2d 388, 395 (Iowa 1994); or that the shareholder's injuries must have *not "flowed through the corporation*." *Redeker*, 2005 WL 1224697, at *4–6 (emphasis supplied in each case). Other courts have expressed this standard as one requiring proof that "the duty breached was owed *to the stockholder"* and that he or she can prevail *without showing an injury to the corporation,"* such that the alleged injury is "*independent of any injury to the corporation*." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1038–39 (Del. 2004) (emphasis added). Regardless of how articulated, they each stand for the proposition that (1) if the fiduciary duty at issue is owed directly to the corporation, and (2) if the shareholder's alleged injury flowed in any way through the corporation, the claim is derivative in nature.

A shareholder's claims asserting injury due to the "decreased value of his stock" caused by director mismanagement are thus derivative, because a shareholder's stock ownership merely reflects his/her *pro rata* economic interest in the value of a corporation as a whole: "it is the corporation that has suffered direct injury, and any damage resulting to the stockholder is merely indirect; such damage is normally reflected only in the decreased value of his

stock." *Engstrand v. W. Des Moines State Bank*, 516 N.W.2d 797, 799-800 (Iowa 1994); *see also Ezzone*, 525 N.W.2d at 394 (the "diminution in the value of corporate shares resulting from the impairment of corporate assets" constitutes an "indirect harm which does not give the stockholder an individual right of action."); *Taylor v. Hogan*, No. 12–0898, 2013 WL 1749777, at *6 (Iowa Ct. App. Apr. 24, 2013) ("[A] mere economic loss to the value of a shareholder's stock is not a 'separate and distinct' interest allowing [a direct suit] because it is a loss suffered by all shareholders, albeit to differing extents."); *accord Cunningham*, 332 N.W.2d at 884.

These principles have led Iowa courts to observe that breach-of-fiduciary duty claims challenging director mismanagement of a corporation are **de facto derivative**. *E.g.*, *Spears v. Com Link, Inc.*, No. 12–1223, 2013 WL 3457171, at *10 (Iowa Ct. App. July 10, 2013) ("Breach of fiduciary duty is generally a derivative claim."); *accord Rieff v. Evans*, 630 N.W.2d 278, 294 (Iowa 2001) ("We also recognize that a breach of fiduciary duty is generally recognized as a derivative claim."). Indeed, *both the District Court and Meade himself acknowledge that pre-merger fiduciary duty claims for director mismanagement that result in diminution of the value of the corporation (and therefore of the corporation's share price) are derivative.* App. 862; App. 115; Resistance to Application for Interlocutory Appeal at 8.

The Eighth Circuit Court of Appeals has also now weighed in on this issue, involving this very Transaction. In *Shepard v. Employers Mutual Casualty Company,* 998 F.3d 330 (8th Cir. 2021) another EMCI shareholder[10] brought breach of fiduciary claims against Mr. Kelley and EMCC for failing "to enhance and promote EMCI's businesses and value" prior to the Transaction. *Id.* at 333. After an extensive analysis of the *Cunningham* factors, the Eighth Circuit squarely held:

> A loss in share value is not a separate and distinct injury. Under Iowa law, a "mere economic loss to the value of a shareholder's stock is not a 'separate and distinct' interest allowing intervention because it is a loss suffered by all shareholders, albeit to differing extents."
>
> * * *
>
> [The shareholder] does not plausibly plead that his injuries were unique to himself. All the other shareholders, including [EMCC] suffered the injury of EMCI's depressed value and share price. His allegations that [EMCC] and Kelley breached their duty of loyalty by favoring [EMCC] to the detriment of [EMCI's] minority shareholders is a derivative claim on behalf of EMCI.

Id., at 337-38 (citing *Taylor, Cunningham, Ezzone,* and other Iowa

---

[10] That shareholder, Gregory M. Shepard, had another matter before this Court relating to his failure to perfect his appraisal rights. *See EMC Insurance Group, Inc. v. Shepard,* 960 N.W.2d 661 (Iowa 2021).

precedent).[11] The question now posed, then, is whether this result changes merely because the alleged director mismanagement occurs in the context of a corporate *merger*. A review of relevant literature, Iowa case law, and the Iowa Legislature's passage of the Constituency Statute in 1989 yields a definitive answer: No.

1. Iowa's Constituency Statute confirms that director duties are limited to the corporation in the merger context.

This case presents the first opportunity for this Court to determine whether alleged director mismanagement in negotiating and approving a

[11] Meade will undoubtedly point to the fact that the Eighth Circuit also distinguished Shepard's pre-merger claims there from Meade's merger claims here by citing the District Court's conclusions in *Meade* that (1) EMCC did not also share in the alleged diminution of share value caused by the alleged mismanagement by EMCI's directors, and (2) EMCI did "not share[]" in the stockholder's injury "in the merger context." *Id.,* at 338. Importantly, the Eighth Circuit *did not decide* those issues there, *nor was it asked to do so* given that the claims there were for *pre-merger* misconduct; rather, it simply recited the trial court's decision here for the purpose of distinguishing this case and rejecting Shepard's reliance on it. In so doing, the Eighth Circuit also accepted in *dicta* Shepard's characterization of the Transaction as a "squeeze-out" merger; but as this Court is well aware, the Transaction was conditioned on approval of both the independent directors and a "majority of the minority" shareholders – *i.e*., the opposite of a "squeeze-out."

The purview of this Court – unlike that of the Eighth Circuit in *Shepard* – is to decide whether the District Court's treatment of Meade's claims in the context of the merger *was correct*. The error of the District Court's conclusions on the two issues cited by the *Shepard* court are addressed in Parts C and D, *infra*.

public company merger agreement transforms a shareholder's claims from "derivative" to "direct," especially in light of the Iowa Legislature's adoption of the Constituency Statute in 1989. Iowa's Constituency Statute provides:

> 1. A director, in determining what is in the best interest *of the corporation* when considering a tender offer or proposal of acquisition, merger, consolidation, or similar proposal, may consider any or all of the following community interest factors, in addition to consideration of the effects of any action on shareholders:
>
> a. The effects of the action on the corporation's employees, suppliers, creditors, and customers.
>
> b. The effects of the action on the communities in which the corporation operates.
>
> c. The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

Iowa Code § 490.1108A.1 (emphasis added).

The Iowa Legislature adopted the Constituency Statute in response to the rise of the "shareholder primacy" strain of jurisprudence gaining popularity in Delaware and other states in the 1980s. The "shareholder primacy" model – which provides the foundation for the "shareholder maximization" theory on which Meade relies – was catalyzed by the Delaware Supreme Court decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986). There, the court ruled that once the board of a Delaware corporation determines to sell control of a company, the duty of the board shifts from determining the best interests of the corporation to the

"maximization of the company's value at a sale for the stockholders' benefit." 506 A.2d at 182; *see also RBC Capital Markets v. Jervis*, 129 A.3d 816, 849-57 (Del. 2015) ("*Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.") (citation and internal quotation marks omitted).

In the wake of this decision, a number of state legislatures – including the Iowa Legislature – enacted so-called "constituency statutes" that rejected the *Revlon* approach and specifically adopted a "director primacy" approach which protected a board's ability to consider a far wider range of stakeholder interests than just shareholder return maximization when selling a company. *See Business Organizations,* 6 Ia. Prac. § 28:9 (Iowa's constituency statute was enacted "[t]o counter possible limitations on directors' discretion" in the *Revlon* context).

Such constituency statutes provide that, even in the context of a merger, a director's duties continue to run solely "to the corporation"; and also that a shareholder's interests are no more weighty than those of other constituencies. In the only case to date interpreting Iowa's Constituency Statute, the court in *Kentucky State Dist. Council of Carpenters Pension Tr. Fund v. Myers*, No. 4:10-CV-00332, 2010 WL 11483954 (S.D. Iowa Sept. 9, 2010) observed: "Iowa law places the interest of corporate shareholders and other corporate

constituencies on equal footing, allowing directors to reject an offer under a community interest analysis, even if the offer would maximize shareholder value." *Id.* at *5.

Legal commentators echo this conclusion: the Constituency Statute ensures that in the merger context a director can "allow the interests of other corporate constituencies to *trump* the interests of shareholders." *Business Organizations*, 6 Ia. Prac. § 28:9 (emphasis in original); Jonathan D. Springer, "*Corporate Constituency Statutes: Hollow Hopes and False Fears*," 1999 Ann. Surv. Am. L. 85, 98 (1999) (Iowa's constituency statute "specif[ies] that no single interest may dominate over other interests, and that consideration of constituency interests fits within directors' duty of care, … [and] defeat[s] the shareholder primacy norm" in Delaware law); Ronald J. Colombo, "*Duty of Care*," in Law of Corp. Offs. & Dirs., § 2:8 (Wolters Kluwer, 2020-2021 update) ("Iowa's statute is notable in that it explicitly permits a board to consider various stakeholder interests even at the potential expense of corporate shareholders.").[12]

---

[12] Meade also had a statutory appraisal remedy if he believed the Transaction price was too low. Iowa Code § 490.1301, *et seq*.; App. 447-448. Some courts have held that such appraisal rights are the *exclusive* remedy when a shareholder is dissatisfied with the fairness of the purchase price negotiated by a seller. *See, e.g., Sound Infiniti, Inc. v. Snyder*, 237 P.3d 241, 244 (Wash. 2010); *see also* Iowa Code § 490.1340.1 ("The legality of a proposed or completed corporate action … shall not be contested, nor may the corporate

2. Courts in other states with similar director-duty and constituency statutes conclude shareholder claims like Meade's are derivative.

The Iowa Legislature's decision to adopt a "director primacy" rather than Delaware's "shareholder primacy" model thus creates a stark contrast in the direct-versus-derivative debate: while Delaware has long held that shareholders may assert a direct claim when they challenge a merger, *see Parnes v. Bally Ent. Corp.*, 722 A.2d 1243, 1245 (Del. 1999), that approach has never been adopted in Iowa,[13] and is "peculiar to Delaware law." *Jarackas v. Applied Signal Technology, Inc.*, No. 111-cv-19643, 2012 WL 9764184, at *3 (Cal. Super. Mar. 15, 2012).

Rather, courts in other jurisdictions with comparable statutory frameworks as that adopted in Iowa consistently find that fiduciary duty claims against directors challenging the merger price negotiated by those

---

action be enjoined, set aside, or rescinded, in a legal or equitable proceeding by a shareholder after the shareholders have approved the corporate action [except as provided in subsection 2]."). The Court need not decide whether appraisal is an exclusive remedy under the IBCA in order to resolve this case in favor of the Independent Directors.

[13] *Kelly v. Englehart Corp.*, Nos. 1-241, 99-1807, 2001 WL 855600 (Iowa App. July 31, 2001), on which Meade relies, did not analyze a merger challenge to determine whether it was derivative. While *Kelly* includes dicta from Delaware cases like *Parnes* (that have since been refined) about merger claims, *Kelly* merely held that the mismanagement claims at issue were derivative.

directors are derivative. The Massachusetts Supreme Judicial Court undertook one of the most extensive analyses of the interplay between this statutory framework and the common law in *Int'l Brotherhood of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918 (Mass. 2017). There, like here, the legislature had adopted both a "corporation-only" fiduciary duty statute, and also a "constituency" statute. And there, like here, a putative class of shareholders brought direct claims against the EMC[14] directors challenging the merger price negotiated by those directors in a "going-private" transaction.

In deeming the shareholders' claims derivative, the Court held:

> [A]lthough [the Massachusetts constituency statute] makes clear that a director may consider, among other interests, "the long-term and short-term interests of the corporation <u>and its shareholders</u>" (emphasis added), it first specifies that the director may do so only in the context of "determining what the director reasonably believes to be in the best interests of the corporation." Particularly in light of this specification, the plaintiffs' proposed interpretation of [the constituency statute] as implicitly imposing or recognizing a fiduciary duty owed by a corporate director directly to the shareholders must fail. Rather, both the language and structure of [the statute] persuade us that if the Legislature had wished to impose or recognize such a duty owed to shareholders, it would have inserted into the statute an explicit provision to that effect. …
>
> ***[T]he wrong alleged by the plaintiffs, undervaluing EMC to secure [its merger and sale], qualifies as a direct injury to the***

[14] The target company in *Tucci* was unrelated to EMCI, despite the similarities in their names.

> ***corporation, the entity to which the directors clearly owed a fiduciary duty of good faith and loyalty. Flowing from that alleged injury is a claimed derivative injury to each shareholder, whose individual shares, as a consequence of the asserted undervaluing of EMC itself, are consequently undervalued as well.*** We agree with the motion judge that the injury posited by the plaintiffs, and the alleged wrong causing it, ***fit squarely within the framework of a derivative action***.

Id. at 924-25, 927 (citations omitted) (emphasis added).[15]

Many other courts have found challenges to the adequacy of the merger price derivative, particularly where – like in Iowa – there is a constituency statute and the director fiduciary statute specifies the director's duties run "to the corporation" alone. *See, e.g.*, *Somers ex rel. EGL, Inc. v. Crane*, 295 S.W.3d 5, 12 (Tex. App. Ct. 2009) (so holding, in the context of a management-led buyout); *Kadel v. Dayton Superior Corp.*, 731 N.E.2d 1244, 1247 (Ohio C. Pl. Montgomery Cty. 2000) (challenge to adequacy of merger price was derivative); *City of Riviera Beach Gen. Employees Ret. Sys. v. Mylan N.V.*, No. 2:15-CV-821, 2016 WL 4367549, at *16 (W.D. Pa. May 10,

---

[15] *Tucci* thus squarely rejected the argument, which Meade also made below, that constituency statutes imply that shareholders have a direct cause of action when such statutes refer to (or, more precisely, reject) liability to shareholders. *Id.* at 924 (the "proposed interpretation of [a constituency statute] as implicitly imposing or recognizing a fiduciary duty owed by a corporate director directly to the shareholders must fail" because directors may consider other constituencies "only in the context of 'determining what the director reasonably believes to be in the best interests of the corporation.'").

2016), *report and recommendation adopted,* No. 2:15-CV-821, 2016 WL 4275822 (W.D. Pa. Aug. 12, 2016) (same).[16]

3. Iowa law strongly protects the corporate form, especially for publicly-traded companies.

This Court should follow the precedent established in *Cunningham* and the dictates imposed by the Iowa Legislature's adoption of the "corporation-only" director duty statute and the Constituency Statute, to conclude that shareholder actions alleging breaches of fiduciary duty by corporate directors approving a merger transaction are derivative. The Iowa Legislature's approach – and that of other states with similar statutory frameworks –

[16] Courts have reached the same conclusion even in states without constituency statutes, on the ground that the harm to the shareholders was derivative of a breach of duty owed to the corporation. *See, e.g., Baxter v. Syntroleum*, CJ-2013-5807 at p.4 (Tulsa Cty. Okla. Dist. Jan. 15, 2016) ("[A]ny alleged harm to Plaintiffs was derived from the alleged injury to [the] Corporation" concerning inadequate consideration, too few deal protections, and too many deal concessions) (https://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CJ-2013-5807 - #1032075147); *Gusinsky v. Flanders Corp.*, 2013 NCBC 46, 2013 WL 5435788, at *6 (N.C. Super. Sept. 25, 2013) ("[T]he harm of inadequate consideration . . . is a harm to the corporation itself."); *Sullivan v. Actel Corp.*, No. 110-CV-184257, 2012 WL 9944634, at *5 (Cal. Super. Mar. 08, 2012) ("[T]he loss in value of [the shareholders'] investments in the corporation, were merely incidental to the alleged harm inflicted upon the corporation and all its shareholders.") (internal quotation marks and alterations omitted); *DCG & T ex rel. Battaglia/Ira v. Knight*, 68 F. Supp. 3d 579, 585 (E.D. Va. 2014) (quoting *Simmons v. Miller*, 544 S.E.2d 666, 675 (Va. 2001)) (dismissing direct claims against directors relating to merger).

The argument that Meade's claims are derivative is even stronger where, as here, the Legislature has adopted a "corporation-only" director duty statute.

reinforces the fundamental importance of maintaining the corporate form intact when determining a shareholder's ability to directly challenge a merger negotiated by the board. Under Iowa law, "all corporate powers" are exercised by or under the authority of the board of directors. Iowa Code § 490.801(2). In exercising such powers,

> Corporate directors in Iowa and other American jurisdictions do not take orders from shareholders or from any other constituency in the corporation. Rather, the board of directors is empowered by statute to manage the corporation largely free from any restrictions or right of intervention by others.

Matthew G. Doré, "*Duties and Liabilities of an Iowa Corporate Director*," 50 Drake L. Rev. 207, 210 (2002); *see also* J.B. Heaton, *What Injures A Corporation?*, 73 Bus. Law. 1031 (2018) (corporate directors must "mediate the various and often conflicting interests of shareholders" and the interests of "customers, suppliers, employees, and other stakeholders whose specific investments contribute to the firm's success.").

This separation between the interests of the corporation versus those of its shareholders is fundamental to the corporation's very cause for existence: it allows the corporation to enter into binding contracts which survive the turnover of shareholders;[17] it "prevent[s] the impairment of creditors' rights"

---

[17] *See, e.g.,* Heaton, *What Injures a Corporation?*, 73 Bus. Law. at 1044 (Recognizing corporate interests and injury distinct from shareholders "cabins the set of interests that may suffer injury from conduct by the corporation's

and retains in the board its "prerogative to use recovered damages for any legitimate business purpose";[18] and it "prevents a multiplicity of suits by the various stockholders and assures that the corporation will be bound by the result of the litigation." *Engstrand*, 516 N.W.2d at 800. *See also Cunningham,* 332 N.W. 2d at 885 (same); *Ezzone,* 525 N.W.2d at 394 (allowing shareholders direct litigation rights on behalf of the corporation "would authorize multitudinous litigation and ***ignore the corporate entity***") (emphasis supplied).

This risk is particularly pronounced where, as here, EMCI's minority shareholders held *millions* of shares, the vast majority of which cast votes in

---

counterparty, allowing a third party considerable comfort in contracting with the corporation."); Richard P. Wolfe, *Minority Shares Under The Louisiana Business Corporation Act: Expulsion, Oppression, And Fiduciary Duty*, 64 Loy. L. Rev. 25, 97 (2018) ("[T]he corporation[] [is] a juridical entity with its own patrimony, separate and apart from its shareholders. The identity of shareholders and their relative ownership is subject to change at any time; the corporation retains its separate legal personality regardless of who owns its shares.").

[18] *Cunningham,* 332 N.W. 2d at 885; *see also, e.g.,* Doré, *Business Organizations*, 6 Ia. Prac., § 39:4 ("Prohibiting individual owner direct actions for injuries to the organization … respects the rights of creditors of the organization who have claims to the organization's assets that are prior to claims of the organization's owners."); Heaton, *What Injures A Corporation?*, 73 Bus. Law. at 1043 ("Allowing individual creditor and shareholder lawsuits for corporate injuries could destroy creditor priority. Individual suits by shareholders or creditors might exhaust the assets of a wrongdoer who injured the assets otherwise intended to generate returns to repay debt.").

favor of the Transaction. Defendants contend that none of them has a legitimate claim. But if Meade's claim can proceed, millions of meritless claims by EMCI's other shareholders – and by extension its other stakeholders (such as creditors, employees, and vendors)[19] – could, too.

Meade nonetheless countered – and the District Court agreed – that the Independent Directors' actions created a direct claim by Meade for impairment of the value of his "personal property," *i.e.,* his shares. App. 104; App. 859-860, 862. The fact that Meade's interest in EMCI might be considered "personal property," however, is irrelevant: the point is that he maintained a mere fractional economic interest in the value of EMCI *as a whole* which was not wholly "independent" of the corporation.[20] Indeed, "a corporation's loss of asset value or profits through [a director's] wrongful action is a pass-through event that we can trace, dollar-for-dollar, to its impact

---

[19] If Iowa's Constituency Statute allowed a direct fiduciary duty claim by shareholders, there would seem no principled reason not to also extend that duty to the other corporate stakeholders (vendors, employees, etc.) whom the statute puts on an equal footing with shareholders. Because the Legislature did not intend any such stakeholders to be owed a direct fiduciary duty in a merger, no such direct rights should be found by this Court, either.

[20] Meade does not assert he was a registered shareholder of EMCI. As a beneficial shareholder, he did not hold "a specific property interest in any financial asset" of EMCI, but rather a mere "security entitlement" to a package of personal rights against an intermediary (like a broker) which included the value of such a fractional economic interest in the corporation. *See* Uniform Commercial Code § 8-102(17), Off. Cmt. 17.

on shareholders, creditors, employees, and others." Heaton, *What Injures A Corporation?*, 73 Bus. Law. at 1031. The fact that such injury might "pass through" to such stakeholders does not somehow transform a corporation's claim against its directors for diminishing the value of a corporation into a direct shareholder claim against those directors. Quite the opposite is true: Meade's interest here in his *pro rata* share of EMCI's economic value is no different than that consistently found to be derivative by Iowa courts in *Engstrand*, *Ezzone*, *Taylor*, and many other cases. *See* Part C above.

4. Meade's claims fit squarely within the *Cunningham* standard and are derivative under the director-duty and constituency statutes.

Applying the above principles to the pleaded facts considered by the District Court, Meade's claims are derivative and should have been dismissed by the District Court.

Here, Meade asserts that the Independent Directors mismanaged the sale process, and that their mismanagement reduced the total deal value ultimately paid by EMCC to EMCI, the cash portion of which was then paid to those shareholders – a classic derivative claim. The merger negotiations were conducted by EMCI's Independent Directors and involved extensive analysis of EMCI's value *as a corporation* under a variety of financial scenarios. *See* App. 008-009, ¶ 6; App. 018-019, ¶ 47; App. 021, ¶ 53; App.

029, ¶¶ 68, 69, 71; App. 715-839. These negotiations resulted in a heavily-negotiated 42-page merger agreement which embodied myriad rights and obligations undertaken by EMCI as part of the entire merger package.

The Merger Agreement was signed by EMCI, not by the minority shareholders. The buyer's various obligations under the contract – including payment of the agreed-upon merger consideration – were owed directly to EMCI, and not to the shareholders. Indeed, the Agreement explicitly disavowed the grant of any rights or remedies to anyone other than EMCI or the other parties to the Agreement. App. 659, § 9.10; App. 692, § 1.13(c). "When a contract expressly negates the creation of third-party beneficiaries," this Court has "rejected the claim that such status exists." *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 320 (Iowa 2006); *Walters v. Kautzky*, 680 N.W.2d 1, 3 (Iowa 2004) (upholding disclaimer of third party beneficiaries).

Consistent with the obligations running to the buyer and seller under the contract, EMCC paid the cash portion of the merger consideration first to EMCI's transfer agent, who then disbursed that money to the shareholders; and any portion of the cash payment not distributed to shareholders reverted back to EMCI. Nor was even the per-share price immovably fixed at $36; the price could change in direct proportion to any changes in the number of

outstanding shares of stock prior to the closing of the Transaction. App. 582, § 1.4(d).

As such, the Independent Directors' alleged undervaluation of EMCI and their alleged failure to negotiate a higher share price would have directly injured *EMCI* in the first instance, and the shareholders only secondarily as a result of their fractional interest in the economic value of the corporation. Meade's injuries were thus not wholly "independent" from any injury to the corporation, *Cunningham*, 332 N.W.2d at 885, and "fit squarely within the framework of a derivative action." *Tucci,* 70 N.E.3d at 927.

The District Court's reliance on Meade's allegations that EMCI was not injured (App. 860-862), missed the mark. Regardless of Meade's (mis)characterization of EMCI's supposed lack of injury, the District Court erred by failing to analyze (1) whether the Independent Directors owed a fiduciary duty directly to Meade as an individual "outside of [their] duties to the corporation," and (2) whether Meade affirmatively alleged facts demonstrating that his alleged injury was wholly *independent of any injury* to EMCI under the Merger Agreement or otherwise, as required under *Cunningham*. *See* Parts C, C.1, above.

D. *Cunningham*'s "special injury" exception does not negate this result.

The District Court also erred in concluding Meade had a direct cause of

action because he allegedly experienced a "separate and distinct injury" from EMCC. The *only* EMCI shares that were the subject of the Transaction were those of its minority shareholders; EMCC did not purchase its own EMCI shares from itself.[21] EMCC thus participated in the Transaction solely as *buyer* rather than as *shareholder*. All of EMCI's minority shareholders were treated exactly the same vis-à-vis the merger consideration, and Plaintiffs admit as much in their class allegations. *See* App. 013-014, ¶¶ 28, 29. Each shareholder's economic payout – including Meade's payout – was merely a function of the bargain reached by the Special Committee *about the value of the company as a whole*. Meade clearly failed the "separate and distinct injury" test articulated by this Court in *Cunningham.*

Taken to its logical extreme, the District Court's interpretation of *Cunningham's* "separate and distinct injury" test would mean that every fiduciary duty claim brought by a minority shareholder involving a majority-shareholder-controlled corporation would be direct *per se* – which is certainly

---

[21] The folly of Meade's analysis can also be illustrated by the fact that his "separate and distinct injury" argument would be unavailable if EMCC had bought back its own shares, since then he would have been treated no differently than any other shareholder, including EMCC. *See, e.g., May v. Coffey*, 967 A.2d 495 (Conn. 2009) (court must separate the majority shareholder's role *qua* buyer from its status *qua* shareholder when analyzing injury). The fact that EMCC did not pursue such a nonsensical approach does not change the analysis here.

not the law in Iowa. *See, e.g., Kelly*, 2001 WL 855600, at *10 (minority shareholder's breach of fiduciary duty claims were derivative); *Redeker*, 2005 WL 1224697, at *5 (claim against majority shareholder derivative); *Spears*, 2013 WL 3457171, at *10 (same); *Ahrens v. Ahrens Agric. Indus. Co*., No. 14–0564, 2015 WL 2089372, at *5 (Iowa Ct. App. May 6, 2015) (same).

Indeed, *every* claim by a shareholder against a *director* who also holds shares in the company – which most directors of public companies do – would also be direct, since those directors would be impacted differently than other shareholders. For these very reasons, the "separate and distinct injury" test has since been called "confusing," "inaccurate," "not helpful," and "erroneous" by the Delaware Supreme Court itself; [22] and this Court should

---

[22] *Tooley*, 845 A.2d at 1033, 1037-38. As the Delaware Supreme Court elaborated:

> Experience has shown this concept [of "separate and distinct injury"] to be confusing and inaccurate. It is confusing because it appears to have been intended to address the fact that an injury to the corporation tends to diminish each share of stock equally because corporate assets or their value are diminished. In that sense, the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings. It does not arise out of any independent or direct harm to the stockholders, individually. That concept is also inaccurate because a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim.

not adopt an interpretation of *Cunningham* which would perpetuate that confusion and inaccuracy.[23]

* * *

In short: This Court has adopted the "general rule" that shareholders have no claim for injuries to their corporations unless within the context of a derivative action. Only if (1) the corporate directors owe the shareholder a "special duty" outside of that owed directly to the corporation, and (2) the

---

Id. at 1037. Iowa commentators have thus suggested that *Cunningham's* "separate and distinct injury" language should be revisited in the wake of *Tooley*. *See* Doré, *Business Organizations*, 6 Ia. Prac. § 39:5.

For an excellent overview of the vicissitudes of the "separate and distinct injury" test, *see Agostino v. Hicks*, No. Civ. A. 20020–NC, 2004 WL 443987 (Del.Ch. March 11, 2004) *and* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 95 (2006).

[23] In support of his reliance on an outmoded interpretation of the "separate and distinct injury" test, the District Court cited decisions from other courts holding minority shareholder claims against majority-shareholder buyers to be direct. App. 859-860, fn. 109. In addition to the fact that such cases failed to analyze the (in)appropriateness of the "separate and distinct injury" test when applied rotely to majority-shareholder acquisitions, they also involved either closely-held corporations with different rules regarding minority shareholder rights, and/or transactions where the majority shareholder did not follow the *MFW* framework as did EMCC here. Indeed, one of the cases cited by the District Court ultimately held that the minority shareholders were precluded from seeking *any* claim for breach of fiduciary because their appraisal remedy was "exclusive" such that those shareholders "must pursue their statutory remedies; they cannot collaterally attack the merger." *Grace Bros. v. Farley Indus.,* 450 S.E.2d 814, 817 (Ga. 1994) *See also* n.10 above.

shareholder's alleged injury was *wholly independent* of any injury to the corporation, can the claim be direct.

Meade failed his burden to show he satisfied that exception to the rule. First, the Independent Directors did not owe him a direct duty in negotiating the terms of the Merger Agreement. Under Sections 830(1)(b) and 1108A of the IBCA, the Iowa Legislature has limited the fiduciary duties of Iowa corporate directors to *the corporation* – and the corporation alone – even in the context of a corporate merger. Iowa's legal framework distinguishes it from many other states, including Delaware, which hold that corporate directors owe direct fiduciary duties to the corporation's shareholders to maximize the share price when selling the company.

Second, Meade's alleged injuries were not wholly independent of those to EMCI. When the Independent Directors allegedly mismanaged the sale process and undervalued EMCI, it would have hurt the corporation first and foremost, if not entirely. Meade was not a party to the Merger Agreement through which he was ultimately paid, and that contract disclaimed any obligations to persons who were not signatories thereto. Under established precedent and under Iowa's distinctive statutory framework, his claims were therefore derivative, and the District Court erred in not dismissing them.

II. The District Court Erred in Not Dismissing Meade's Claims under the Director Shield Statute.

A. Error Preservation

The Independent Directors raised Meade's failure to sufficiently plead an exception to the Director Shield Statute in their Motion to Dismiss. App. 045-046. The District Court denied the Independent Director's Motion to Dismiss on this ground. App. 865-872.

B. Standard of Review

1. The current standard of review

The standard of review for a ruling on a motion to dismiss is for correction of errors at law. *Meier*, 641 N.W.2d at 537. The petition's well-pleaded factual allegations are accepted as true, but not its legal conclusions. *Shumate,* 846 N.W.2d at 507.

2. The standard of review for a motion to dismiss ruling should be a plausibility standard for claims potentially protected by the Director Shield Statute.

Under the current notice pleading standard, "the allegations in a petition comply with th[e] fair-notice requirement if the petition informs the defendant of the general nature of the claim and the incident giving rise to it." *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 128 (Iowa 2016).

While the District Court's ruling should be reversed even under the existing dismissal standard, the unique protections against shareholder

lawsuits afforded directors of Iowa corporations under the IBCA compel the adoption of a "plausibility" standard when reviewing shareholder suits seeking monetary damages against corporate directors. As discussed in greater detail below, the Director Shield Statute was intended to provide bright-line rules guiding the duties of directors of corporations incorporated under Iowa law and to provide procedural requirements and safe harbors to shield directors from lawsuits just like this one. Those protections would be undermined if a shareholder plaintiff were only required to generically plead the statutory standards without pleading facts sufficient to plausibly show that he or she is entitled to relief.

Since the mid-1980s, the drafters of the Model Business Corporation Act ("MBCA"), adopted by the Iowa Legislature as the IBCA, made significant changes to the MBCA in response to a growing number of shareholder "strike suits,"[24] the surging cost of D&O insurance coverage, and

---

[24] For many years, "strike suits" challenging the sufficiency of the disclosures in the proxy statement were filed prior to the meeting of the shareholders held to consider a proposed merger. Those suits have fallen out of favor and have been routinely criticized by the courts. As Judge Posner observed in *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718 (7th Cir. 2016):

> In merger litigation the terms "strike suit" and "deal litigation" refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the

resulting difficulty in retaining outside directors on corporate boards. *See* Committee on Corporate Laws, *Changes in the Revised Model Business Corporation Act-Amendment Pertaining to the Liability of Directors*, 45 Bus. Law. 695, 696 (1990) (*"Committee Article"*). The protections were not only designed to protect directors from personal liability but also to protect them "against the costs, i.e. attorneys' fees and other expenses, of defending themselves against claims based on their managerial acts or omissions." James J. Hanks, Jr. and Larry P. Scriggins, *Protecting Directors and Officers from Liability--the Influence of the Model Business Corporation Act*, 56 Bus. Law. 3, 4 (2000) ("*Protecting Directors"*).

> sole purpose of obtaining fees for the plaintiffs' counsel. Often the suit asks primarily or even exclusively for disclosure of details of the proposed transaction that could, in principle at least, affect shareholder approval of the transaction. But almost all such suits are designed to end—and very quickly too—in a settlement in which class counsel receive fees and the shareholders receive additional disclosures concerning the proposed transaction. The disclosures may be largely or even entirely worthless to the shareholders, in which event even a modest award of attorneys' fees ($370,000 in this case) is excessive and the settlement should therefore be disapproved by the district judge.

Id. at 721. This case represents the next generation of strike suits or deal litigation where the shareholder foregoes a pre-shareholder meeting challenge and bypasses statutory dissenter's rights and an appraisal action to wait until after the merger has been completed to allege the disclosures in the proxy statement were insufficient or the negotiated merger consideration inadequate.

Those costs are, indeed, staggering: litigation costs alone for shareholder lawsuits such as this can easily reach several millions of dollars apiece for plaintiffs and defendants alike.[25] Furthermore, the judicial resources involved in overseeing such onerous cases are considerable: a typical post-merger shareholder litigation, for example, may involve hundreds of docket entries involving scores of motions over many years.[26]

The Director Shield Statute was one of a number of changes to the MBCA and the IBCA as part of this overhaul, designed so that *a corporation's*

---

[25] *See, e.g.*, Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation*, (June 2019) (*available at* https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/about-chubb/sca-litigation/documents/pdf/from-nuisance-to-menace--the-rising-tide-of-scas-ws.pdf) at 4-5 (costs to defend merger-related shareholder suits averaged $3.8 million). The costs incurred by class shareholders' lead counsel like Meade's counsel here often exceed many millions of dollars as well. *See, e.g.,* Order, *In Re American Cap., Ltd. S'holder Litig.*, Case No. 422598-V (Md. Cir. Ct., Mont. Cty., Feb. 22, 2018), (order awarding attorneys' fees and expenses of $5,895,270.03) (http://casesearch.courts.state.md.us/casesearch/inquiryByCaseNum.jis – Case Number 422598-V, Docket No. 190).

[26] *Id. See also, e.g., In re Parametric Sound Corp. S'holders Litig.*, Case No. A-13-686890-B (Nev. 8th Jud. Dist., Clark Cty., filed Aug. 13, 2013) (456 docket entries over almost 7 years of litigation) (https://www.clarkcountycourts.us/Portal/Home/WorkspaceMode?p=0); *Odinotski v. Vazales, et al.*, Case No. 37-2015-00009254-CU-SL-CTL (Cal. Super. Ct., San Diego Cty., filed Mar. 18, 2015) (352 docket entries over almost 4 years) (https://roa.sdcourt.ca.gov/roa/faces/CaseSearch.xhtml).

adoption of a Director Shield would enable its directors to achieve early dismissal of shareholder claims ***at the motion to dismiss*** *stage*.

The drafters of the MBCA also contemplated that failure to plead the unavailability of the Director Shield would result in dismissal at the motion to dismiss stage. The Official Comment to MBCA Section 8.31(a), which establishes the statutory framework for the imposition of director liability under the MBCA, states that if the prerequisites of the section have not been met,

> [T]here is no need to consider further the application of section 8.31's standards of liability. In that event, the court would presumably grant the defendant director's ***motion for dismissal*** or summary judgment (or the equivalent) and the proceeding would be ended. … Absent [a challenge to the availability of a Director Shield], the relevant shelter provision is self-executing and the individual director's exoneration from liability is automatic.

MBCA, § 8.31, off. cmt. 1.A. (2017) (emphasis added). As one commentator has observed,

> [T]he usefulness of director protection statutes turns in large measure on the ability of directors to rely on charter provisions adopted in accordance with these statutes in the context of motions to dismiss filed at the outset of litigation and before discovery. Requiring directors to defend such litigation beyond the motion to dismiss stage eviscerates the protection provided by director protection statutes and thus undermines the policy behind the statutes.

Stephen A. Radin, *Director Protection Statutes After Malpiede and Emerald*

Partners, Insights, Vol. 16, No. 2, 10, 14 (February 2002); *cf. Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1054 (Del. Ch. 1996) ("It is rational and good policy for the law to filter [derivative cases] at an early stage more finely than the Rule 12(b)(6) test permits."). As such, other courts have adopted a plausibility standard in reviewing petitions alleging an exception to a director shield statute. *See Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693, 696 (Wis. 2014) (holding, under a similar statute, that "a party challenging the decision of a director must plead facts sufficient to plausibly show that he or she is entitled to relief, *i.e.*, facts that show the director's actions constitute [an exception to the director shield statute].").

While the Independent Directors acknowledge the Court has declined to adopt a plausibility standard in other cases,[27] the unique protections against shareholder lawsuits afforded directors of Iowa corporations under the IBCA compel the adoption of a plausibility standard here, when reviewing shareholder suits seeking monetary damages against corporate directors. Accordingly, the Independent Directors urge this Court to do so, and to thereby carry out the public policy underlying the Director Shield protections.

---

[27] *See Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.,* 812 N.W.2d 600, 607-08 (Iowa 2012).

C. The Evolution of Director Shield Statute Protection

The Delaware Supreme Court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), sent "shock waves" through the corporate world. As Professor Matthew Doré observed,

> The Delaware Supreme Court's famous, or infamous, decision in *Smith v. Van Gorkom*, which withheld business judgment rule protection and imposed liability on the board of directors of a prominent national corporation, sent shock waves through the American business community in the mid-1980s. The decision prompted resignations on the part of some directors and caused others to decline service as directors. Moreover, the decision came at a time when premiums for director and officer (D & O) insurance had become dramatically more expensive. The threat of liability for persons serving on corporate boards suddenly appeared very real.

Business Organizations, 6 Ia. Prac. § 28:14. In response, several states, including Delaware, amended their corporate codes to include provisions limiting the personal liability of directors for certain monetary claims. *Id.* These provisions, known as "charter-option" or "Director Shield" statutes, enabled corporations to include provisions in their articles of incorporation that would limit or eliminate the personal liability of directors for decisions made in managing the corporation.

Iowa followed this trend in 1987 with its own statute modeled on the flagship Delaware statute. The original IBCA provision contemplated the following Director Shield provision in the articles of incorporation:

> A provision which eliminates or limits the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as director, provided that the provision shall not eliminate or limit the liability of a director for a breach of the director's duty of loyalty to the corporation or its shareholders, for acts or omissions not in good faith or which involve the intentional misconduct or knowing violation of the law, for a transaction from which the director derives an improper personal benefit, or under section 496A.44. A provision shall not eliminate or limit the liability of a director for an act or omission occurring prior to the date when the provision in the articles of incorporation becomes effective.

1987 Iowa Acts ch. 212, § 5.

The statutory references to ambiguous concepts of "duty of loyalty" and "good faith," however, provided fertile ground for shareholder litigation and soon proved unsatisfactory. *Committee Article*, 45 Bus. Law. at 696-98. In response to these concerns, the Committee on Corporate Laws developed a series of refinements to eliminate that ambiguity:[28]

Reflecting the Committee's concern over the potential breadth

---

[28] For example, one of the first attempts to make the Director Shield less ambiguous contemplated:

> (7) a provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for (i) the amount of a financial benefit received by a director to which the director is not entitled; *(ii) an intentional infliction of harm on the corporation or the shareholders*; (iii) a violation of section 8.32; or (iv) an intentional violation of criminal law

MBCA, § 2.02(b) (1990) (emphasis supplied).

> and vagueness of the Delaware exceptions, the four exceptions to section 2.02(b)(4) are fewer and narrower than the exceptions to the Delaware statute: receipt of a financial benefit to which the director is not entitled, intentional infliction of harm on the corporation or the shareholders, payment of an lawful distribution, and intentional violation of criminal law.

Protecting Directors, 56 Bus. Law. at 26. In particular, the MBCA's "exclusion for 'intentional infliction of harm on the corporation or its shareholders' draws a much firmer state-of-mind liability line than 'good faith' or 'duty of loyalty' [under Delaware's statute] for those cases in which directors should be open to compensatory damages even though they have not necessarily derived an immediate financial benefit themselves." Bryn R. Vaaler, *2.02(b)(4) or Not 2.02(b)(4): That Is the Question*, 74 Law & Contemp. Probs. 79, 91 (2011).

In 2002, the Iowa Legislature adopted the narrower MBCA version of the Director Shield Statute. Iowa's statute now provides:

> 2. The articles of incorporation may set forth any or all of the following:
>
> * * *
>
> (d) (1) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for any of the following:
>
> (a) The amount of a financial benefit received by a director to which the director is not entitled.

(b) An intentional infliction of harm on the corporation or the shareholders.

(c) A violation of section 490.833.

(d) An intentional violation of criminal law.

Iowa Code § 490.202(2)(d)(1). As Professor Doré has observed, the section "tightens the exception language to eliminate much of [the ambiguity created by Delaware's good faith and duty of loyalty exceptions]." *Business Organizations*, 6 Ia. Prac. § 28:14.

D. To Overcome the Director Shield Statute, a Shareholder Must Affirmatively Plead Facts Supporting a Specific Intent by the Director to Harm the Corporation.

It is undisputed that EMCI's articles of incorporation included a Director Shield provision eliminating the liability of its directors for monetary damages under Section 490.202(2)(d)(1); and that Meade did not affirmatively plead the inapplicability of the Director Shield. App. 870. Nonetheless, the District Court denied the Independent Directors' Motion to Dismiss on grounds that (1) Meade was not required to *affirmatively* plead that the Director Shield did not apply here, and (2) Meade's allegations that the Independent Directors "intentionally failed to act in the face of a known duty to act, demonstrating a conscious disregard for their duties," satisfied the exception to the statute. App. 871. In so doing, the District Court misinterpreted the pleading standards imposed by Section 490.831, and

applied an incorrect legal standard for the exception to the Director Shield Statute.

The burden of pleading and proving an issue are inseparable. *In re Estate of Kneebs*, 70 N.W.2d 539, 542 (Iowa 1955). Section 831 of the IBCA incorporates the Director Shield protections into the director liability framework of the IBCA by providing that a director "shall not be liable" unless a claimant "establishes" that "no defense interposed by the director" under the Director Shield Statute "precludes liability." *Id.,* § 490.831(1)(a)(1)(a). The statute further places the burden of establishing that the Director Shield does not apply on "the party asserting liability." *Id.*, § 490.831(1).

Accordingly, Meade had the burden to plead an exception to the Director Shield to be able to even proceed with his lawsuit; and the District Court erred by not holding that his failure to do so was fatal to his claim.

E. The District Court Applied the Wrong Standard to Meade's Allegations About a Director Shield Exception.

The District Court also erred in concluding that Meade's allegations satisfied the "intentional infliction of harm" exception to the Director Shield by alleging that the Independent Directors "intentionally failed to act in the face of a known duty to act, demonstrating a conscious disregard for their duties." App. 871 (emphasis omitted). In so doing, Meade (and the District

Court) merely parroted the director liability language from Delaware cases like*, e.g., Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). However, the Iowa Legislature's adoption of the term "intentional infliction of harm" was intended to set a much higher standard than the "conscious disregard for their duties" language adopted in Delaware and some other director shield statutes. Specifically, the IBCA requires *a specific intent to harm the corporation or its shareholders.*

The *Lyondell* court itself explained the difference in the standards as follows:

> [A]t least three different categories of fiduciary behavior are candidates for the "bad faith" pejorative label. The first category involves so-called "subjective bad faith," that is, fiduciary conduct motivated by an actual intent to do harm. … [S]uch conduct constitutes classic, quintessential bad faith. …
>
> The second category of conduct, which is at the opposite end of the spectrum, involves lack of due care—that is, fiduciary action taken solely by reason of gross negligence and without any malevolent intent. ... [W]e address the issue of whether gross negligence (including failure to inform one's self of available material facts), without more, can also constitute bad faith. The answer is clearly no. …
>
> [T]he third category of fiduciary conduct [*i.e.,* an "intentional dereliction of duty, a conscious disregard for one's responsibilities"] falls in between the first two categories. … The question is whether such misconduct is properly treated as a non-exculpable, nonindemnifiable violation of the fiduciary duty to act in good faith. In our view, it must be …

Id., 970 A.2d at 240 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64-66 (Del. 2006)). The "subjective bad faith" standard identified by the Delaware court is the equivalent of the "intentional infliction of harm" standard under the IBCA version of the director shield and is a more malevolent level of conduct that the mere "conscious disregard of duty" alleged by Meade.

The narrowness of the "intentional infliction of harm" exception to the Director Shield Statute was further highlighted by the drafters of the MBCA:

> *Intentional Infliction of Harm*
>
> There may be situations in which a director intentionally causes harm to the corporation even though the director does not receive any improper benefit. *The use of the word "intentional," rather than a less precise term such as "knowing," is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act,* ***will*** *cause harm*, rather than a general intent to perform the acts which cause the harm.

MBCA § 2.02, off. cmt. 3.E (2017) (emphasis added).

The Nevada Supreme Court recently addressed similar language[29] in the context of an exculpatory statute limiting the liability of corporate

[29] The Nevada statute provides that a director is not individually liable to the corporation or its shareholders for any damages as a result of any act or failure to act constituting a breach of fiduciary duty unless "such breach involved intentional misconduct, fraud or a knowing violation of the law." N.R.S. § 78.138(7)(b)(2).

directors in *Chur v. The Eighth Judicial District Court*, 458 P.3d 336 (Nev. 2020). The Nevada Supreme Court held that a shareholder plaintiff must establish directors *knew* their actions were *wrongful*, rather than merely knowing what their actions *were*:

> [U]nder the narrower interpretations of *intentional* and *knowing* that do not require knowledge of wrongfulness, a director would not be protected so long as the director knew what his or her actions were—such as signing a document with knowledge of its contents. But that state of mind would be present for virtually any conduct that could lead to the director's liability to the corporation or its stockholders or creditors. The exculpatory statute would be an empty gesture. To give the statute a realistic function, it must protect more than just directors (if any) who did not know what their actions were; it should protect directors who knew what they did but not that it was wrong.

Id. at 341-42 (quoting *In re ZAGG Inc. S'holder Derivative Action,* 826 F.3d 1222, 1233 (10th Cir. 2016)).

Under these standards, Meade's allegation that the Independent Directors "consciously disregarded" their duties was not sufficient. Meade was required to plead that the Independent Directors had *actual knowledge* their conduct would cause harm and *a specific intent* to cause that harm – *i.e.,* the "classic, quintessential bad faith" cited by *Lyondell* as the highest level of director culpability. The District Court simply applied the wrong standard in determining that Meade had sufficiently pled an exception to the Director Shield contained in EMCI's Articles of Incorporation.

The District Court further erred in concluding that the facts alleged by Meade satisfied this standard. Indeed, the facts alleged by Meade establish the contrary. The decision of EMCC to offer to purchase the publicly-traded stock of EMCI it did not already own was made unilaterally by EMCC, not by EMCI. Upon receipt of that offer, EMCI's Board adopted the *MFW* framework – requiring, *inter alia*, approval of the Transaction by both a special committee of independent directors and by a "majority of the minority" shareholders – to eliminate the influence of EMCI's majority shareholder. As part of that process, EMCI's Board immediately authorized the formation of the Special Committee composed of the Independent Directors, which was advised by highly-experienced legal counsel (Willkie Farr) and financial advisors (Sandler). Over the next six months, the Special Committee (assisted by its counsel and its financial advisor) negotiated with EMCC, forcing a purchase price 20% higher than EMCC's initial offer. The parties also negotiated a 42-page Merger Agreement which included a non-waivable "majority of the minority" shareholder approval condition and also other EMCI-friendly terms, such as the absence of a termination fee or a financing condition; the inclusion of limited representations and warranties from EMCI; and a provision that the Special Committee could change its recommendation in support of the Transaction if a better offer emerged.

In addition to this process, the IBCA itself provided additional protections to the minority shareholders, including the ability to dissent from the Transaction and exercise appraisal rights to obtain what a court would ultimately rule to be the fair value of the shares. These undisputed factual allegations simply cannot support an allegation the Independent Directors *actually knew* their conduct would cause harm and *specifically intended* to harm the corporation or its shareholders.

The District Court nonetheless identified three allegations by Meade against the Independent Directors – *i.e.,* (1) their purported "failure" to reject EMCC's offer and maintain EMCI as a standalone company, (2) their "failure" to exercise care over the proxy statement disclosures, and (3) their "failure" to obtain a higher sale price by engaging in a "conflicted and flawed sales process" – to support its conclusion that Meade adequately pleaded the directors "intentionally failed to act in the face of a known duty to act, demonstrating a conscious disregard for their duties." App. 871 (emphasis omitted). These allegations, however, were insufficient to meet the *higher* legal standard required by the Director Shield Statute.

First, the Independent Directors' purported "failure" to maintain EMCI as a standalone company cannot establish an "intentional infliction of harm."

If it did, directors of a corporation would be liable in virtually every merger transaction that was closed.

Second, Meade's allegations that the Independent Directors "failed to scrutinize the proxy statement" is insufficient. As David Walker, former Dean and Professor Emeritus of Law of the Drake University Law, observed:

> [i]n general, [the 2002 Director Shield Statute)] makes the intention of the liability shield clearer and less susceptible to dispute and litigation. In Delaware, for example, there was extended litigation of the issue whether an alleged failure by directors to provide sufficient disclosure was a breach of duty of care, from which the directors would have been shielded from liability, or a breach of the duty of loyalty, in which event the directors would not have been shielded from liability. The revision to Iowa's Business Corporation Act should make clear that a judgment as to the amount of disclosure required would be an action taken for which the articles may eliminate or limit liability except in the narrow and explicit circumstances stated.

David S. Walker, *Updating the Iowa Business Corporation Act,* Iowa State Bar Association Annual Meeting, p. 16 (2002).[30]

Third, Meade's allegations that the Independent Directors failed to properly engage Sandler in order to inform themselves of EMCI's true

---

[30] Iowa State Bar Association, CLE Index; http://205.209.45.153/iabar/CLEINDEX.nsf/2de3464706484 4cb862565330055898e/f9eb11b4d490345a86256cda005055d7?OpenDocument

value,[31] engaged in a "conflicted[32] and flawed sales process," and failed to disclose the interest of EMCI's largest minority shareholder, Gregory Shepard, in making an offer for EMCI,[33] again are at best allegations that could support a lack of care, not an intentional infliction of harm to EMCI. The fact that Meade chose to characterize these acts or failure to act as a "conscious disregard for their duties" as opposed to an "intentional infliction of harm" is telling, and determinative of Meade's failure to meet the statutory standard.

* * *

[31] Meade alleges Sandler used different discount rates in its valuation models at the end of the valuation process than those used earlier in the process. App. 031-032, ¶ 78. At the same time, Meade concedes the rates were disclosed in the Proxy (App. 031-032, ¶ 78), and were a matter of public record (App. 715-839).

[32] A director cannot be liable to a shareholder on the ground that a director has an interest respecting the transaction, *i.e.* a conflict, unless it is a director's conflicted interest transaction ("DCIT") as defined in the IBCA. Iowa Code § 490.861(1). The District Court properly found Meade had failed to allege any of the Independent Directors were a party to a DCIT and failed to allege the Independent Directors were precluded from utilizing the DCIT safe harbor. App. 873.

[33] Meade alleges only that the Proxy failed "to provide **adequate** disclosure of Mr. Shepard's interest in purchasing the Company." App. 032, ¶ 80 (emphasis added). Not only did the Proxy disclose Shepard's interest in making an offer for EMCI (App. 032-033, ¶ 81), but Shepard himself did so in a series of public SEC filings (App. 020, ¶ 50).

Meade's claims against the Independent Directors should have been dismissed.

CONCLUSION

For the reasons set forth above, and in the record, the Court should reverse that part of the District Court's decision that denied the Motion to Dismiss, and should remand with directions to enter an order dismissing this case in its entirety, with prejudice, and on the merits.

Dated: August 31, 2021

/s/ *Michael W. Thrall*
Michael W. Thrall, AT0007975
Mark C. Dickinson, AT0001997
Lynn C. Herndon, AT10014047
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, Iowa 50309
Telephone: (515) 283-3100
Facsimile: (515) 283-8045
E-mail: mwt@nyemaster.com
mcd@nyemaster.com
lherndon@nyemaster.com

ATTORNEYS FOR INDEPENDENT DIRECTOR DEFENDANTS

REQUEST FOR ORAL ARGUMENT

This case presents substantial issues of first impression under the IBCA involving fiduciary duty claims against directors of a publicly-traded Iowa corporation in the context of a corporate merger. The Independent Directors, therefore, believe that oral argument is warranted and would be of benefit to the Court.

/s/ *Michael W. Thrall*
Michael W. Thrall, AT0007975

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of *Appellants' Brief* was filed with the Clerk of the Iowa Supreme Court on August 31, 2021, via the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

Gary Dickey
Matthew M. Sahag
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 E. Walnut Street, Ste 1
Des Moines, IA 50309

Attorneys For Plaintiff-Appellee Kendall J. Meade

Juan E. Monteverde
Miles D. Schreiner
MONTEVERDE & ASSOCIATES PC
The Empire State Building
350 Fifth Avenue, Suite 4405
New York, NY 10118

Attorneys For Plaintiff-Appellee Kendall J. Meade

/s/ *Michael W. Thrall*
Michael W. Thrall, AT0007975

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [X] This brief contains 13,621 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] This brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [X] This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point or

   [ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ *Michael W. Thrall*
Michael W. Thrall, AT0007975