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' REPLY 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

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INTRODUCTION

Over the course of decades, the Iowa Legislature and this Court have assiduously defined the relationships among a corporation, the directors who oversee it, and the shareholders who own it. Two provisions of the IBCA[1] make clear that Iowa corporate directors owe fiduciary duties only to "the corporation" *even during a corporate merger.* This statutory foundation stands in stark contrast to the "Delaware Rule" – which imposes a special duty upon corporate directors to maximize the price paid to shareholders in a merger – which Meade urges this Court to adopt now.

This Court should reject that invitation. The Legislature has rejected the theory of "shareholder maximization" upon which the "Delaware Rule" relies, and no Iowa court has ever imposed a separate regime of fiduciary duties during a merger than those imposed outside of a merger. Under *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983), the "general rule" (including for mergers) is that shareholder claims like those asserted by Meade here are derivative, and a shareholder asserting direct claims must be injured "in his capacity as an individual rather than as a shareholder." Plaintiffs' own allegations establish that if anyone were

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[1] Abbreviations here are the same as those in Appellants' Opening Brief.

purportedly hurt by the Independent Directors' actions, it was *EMCI* in the first instance, and the shareholders only secondarily.

Nor can Meade's Petition survive the protections afforded the Directors by the Director Shield. The IBCA was overhauled in the 1980s and 1990s to establish "bright line" rules requiring dismissal of insufficient claims at the pleadings stage; that overhaul required *Meade* to "establish" the inapplicability of the Shield. To hold now that Meade need not so allege would undermine both the language and the purpose of the Director Shield Statute. And, Meade's *post hoc* attempts to enhance his allegations to suggest the Independent Directors *specifically intended to harm* EMCI and its shareholders should not prevail.

To accept Meade's arguments, this Court would need to judicially repeal at least three provisions of the IBCA. It should not do so. The ramifications of Meade's approach on doing business in Iowa cannot be overstated: it would upset the settled expectations of thousands of Iowa corporations, their directors, and their respective constituencies who rely on Iowa law to govern their corporate affairs.

ARGUMENT

Meade's claims against the Independent Directors[2] should have been dismissed because (1) the claims are 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. This Court should reverse.

I. MEADE'S CLAIMS ARE DERIVATIVE.

Meade argues that his claims are direct because (1) Iowa has adopted the "Delaware Rule" to give shareholders direct claims when corporate directors allegedly breach their fiduciary duties during a corporate merger, (2) EMCI was not harmed in the merger, and (3) he and EMCI's other minority shareholders suffered a "separate and distinct" injury from EMCC. Each of Meade's arguments is misguided: the Iowa Legislature has explicitly rejected the "Delaware Rule" in the context of corporate mergers; EMCI would have suffered the primary injury from any director malfeasance; and EMCC did not participate in the transaction as a

[2] Meade repeatedly tries to re-litigate or re-characterize claims against EMCC and Bruce Kelley, which were dismissed. *E.g.*, Appellee's Brief, at 15 (accusing EMCC and Kelley of coercion), 23-24 (mischaracterizing EMCC's announcement); 25 (mischaracterizing Insurance Department meeting); 38 (accusing EMCC of shortchanging EMCI's shareholders). This Court should resist Meade's attempted do-over.

shareholder, so Meade did not suffer a "separate" injury from EMCC "as a shareholder."

A. Iowa Law Imposes on Directors Direct Fiduciary Duties to the Corporation, Not to Its Shareholders.

1. Iowa's Statutory Framework Limits Director Duties Solely to "the Corporation."

There is no dispute that Iowa Code §490.830(1)(b) provides that Iowa corporate directors owe fiduciary duties only to "the corporation," and that Iowa's Constituency Statute, *id.* §490.1108A(1), identifies only "the corporation" when specifying a director's duties in the merger context. The analysis should thus begin and end with the Legislature's policy choices, expressed in clear statutory language. *Eddy v. Casey's Gen. Store, Inc.*, 485 N.W.2d 633, 638 (Iowa 1992). Meade implicitly admits that the Legislature knew full well how to impose a duty running to "a corporation *and its shareholders*." Appellee's Brief, at 42-43. The Legislature's choice not to do so here is dispositive. *State ex rel. Halbach v. Claussen*, 250 N.W. 195, 199-200 (Iowa 1933) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe." (citation omitted)). Thus, unlike other states imposing director duties to a corporation *and its shareholders*,[3] Iowa imposes duties only to "the corporation."

This conclusion is based on far more than "a single statutory provision," *see* Appellee's Brief, at 39; it is buttressed by Iowa's Constituency Statute and by this Court's interpretation of director duties under the common law. To the extent there was any doubt about the Legislature's intent in limiting director duties in the merger context, the Legislature put that to rest when it enacted the Constituency Statute. The Statute confirms that Iowa corporate directors analyzing a corporate merger must determine "what is in the best interest of *the corporation*," *and* that those directors can favor non-shareholder constituencies over "the financial … benefits to the corporation

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[3] Courts are split as to whether the use of the phrase "the corporation and its shareholders" in a statute defining the scope of a director's duties creates a direct duty to shareholders individually, or merely a derivative claim on behalf of the shareholders collectively (*i.e.,* the corporation). The Iowa Legislature avoided this ambiguity by omitting all reference to "shareholders" in Section 490.830. *See Rivers v. Wachovia Corp.*, 665 F.3d 610, 617 (4th Cir. 2011) (omission of term "and its shareholders" "avoid[s] an interpretation that there is a duty running directly from directors to the shareholders").

The fact that other provisions in the Iowa Code refer at times to director duties to "the corporation and its shareholders" is even less compelling. Section 490.830(1)(b) is the *only* statute which affirmatively imposes a fiduciary duty on corporate directors. Meade's other statutory cites, by contrast, merely acknowledge the fact that director/officer duties can run directly to shareholders collectively (*i.e.*, to the corporation) and indirectly to shareholders individually.

or a shareholder or group of shareholders." Iowa Code §490.1108A (emphasis added). The statute's plain words could hardly be clearer, and its origins confirm its meaning.

Iowa adopted its Constituency Statute in the wake of *Revlon*, and specifically rejected the "Delaware Rule" of shareholder value maximization in the merger context (and, consequently, the right of shareholders to bring a direct action for an inadequate merger price). This was far more than a "modifi[cation]" of *Revlon* duties to maximize share price when selling the company, as Meade contends (Appellee's Brief, at 53); it was an outright rejection of them. Appellants' Brief, at 38-41. Because Iowa directors – unlike Delaware directors – do *not* have a duty to maximize shareholder return in a merger, their alleged failure to fulfill that duty does not create a direct cause of action. Again, there can be no legal *injury* by a director without a legal *duty* to avoid that injury. *Id.*, at 27-28.

Meade's attempts to escape the conclusive force of the Constituency Statute fail. First, the Statute only *limits* duties; it does not *impose* them. Meade's argument that the Constituency Statute "contemplate[s] a 'duty of the director ***to the shareholders***'" (Appellee's Brief, at 52-53), is the very argument *Tucci* rejected and, like it, contains "logic … [that is] difficult to follow." *IBEW Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918, 924 (Mass. 2017).[4]

Second, Iowa's Constituency Statute is identical in all material respects to the Massachusetts statute in *Tucci*. Meade suggests the Massachusetts statute is distinguishable because it is not limited to the merger context. Appellee's Brief, at 47, 50-54. But the fact that Iowa's statute explicitly applies in the context of an "acquisition, merger, consolidation, or similar proposal" only makes its application here – *in the context of a merger* – even stronger.[5]

[4] Meade's insistence that the statute recognizes a duty to shareholders but not to the other listed constituencies defies logic. If directors owe duties to shareholders, they must logically owe duties to groups whose interests may *trump* shareholder interests. The statute must recognize a duty to both groups, or to neither. The best reading is that the statute recognizes no direct duty to *any* non-corporate constituencies.

Meade downplays *Tucci* by citing critiques in some academic circles. Appellee's Brief, at 43. But *Tucci* merely followed the "plain words of the statute," 70 N.E.3d at 924; and many commentators agree with the decision. *E.g.,* Richard Wolfe, *Minority Shares Under The Louisiana Business Corporation Act: Expulsion, Oppression, And Fiduciary Duty*, 64 Loy. L. Rev. 25, 97 (2018). It is perhaps not surprising that some Delaware-centric commentators have resisted *Tucci's* departure from the "Delaware Rule."

[5] Meade also argues Iowa's statute is distinguishable because it permits consideration of community interest factors "in addition to the effects of the proposed merger on shareholders." Appellee's Brief, at 52. Again, Meade fails to explain how this language creates a material difference: both statutes permit consideration of community and shareholder interests. *Compare* Mass Gen. Laws ch. 156D, §8.30(a)(3) *with* Iowa Code §490.1108A.

Third, Meade tries to explain away *Tucci* because it is based on "the general rule of Massachusetts corporate law … that a director of a Massachusetts corporation owes a fiduciary duty to the corporation itself, not its shareholders." Appellee's Brief, at 44-45. But that formulation is almost identical to this Court's test*, i.e.,* "[a]s a matter of general corporate law, 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; *see also* Parts I.A.2 and I.A.3, *infra*.

2. Iowa's Common Law Framework Does Not Change Director Duties in a Merger.

Most important, the Constituency Statute confirms that Iowa does not impose a different test for derivative claims based on whether director wrongdoing occurred in the context of a merger, versus outside of a merger. Meade concedes that pre-merger claims for impairment of corporate value are derivative. Appellee's Brief, at 37 n.10. Citing the Iowa Appeals Court in *Kelly v. Englehart Corp.*, Nos. 1-241, 99-1807, 2001 WL 855600 (Iowa App. July 31, 2001) and the Eighth Circuit in *Shepard v. EMCC*, 998 F.3d 330 (8th Cir. 2021), he stakes his entire position on Iowa's purported adoption of a different rule – the "Delaware Rule" – in merger cases. Appellee's Brief, at 18, 31, 33, 44.

As the Independent Directors explained in their opening brief, however, neither *Kelly* nor *Shepard* involved merger-related claims. Appellants' Brief, at 41 n.13.[6] As such, the only relevance of their passing references to fiduciary duties in a merger context – which was never briefed, and was never at issue in those cases – was simply to reinforce their conclusion that director duties *outside of a merger* were derivative.

Outside of his reliance on cases which did not involve mergers, Meade *cites no Iowa authority whatsoever* even suggesting that Iowa applies a different fiduciary duty rule in corporate mergers than it does elsewhere. Meade instead argues the "Delaware Rule" is "grounded in the same factors that this Court considered in *Rieff* and *Cunningham*." Appellee's Brief, at 31. Nowhere, however, does *Cunningham* (or *Rieff*) intimate in any way those factors are applied any differently in a merger. Rather, the "general rule" is that such claims are derivative, *Cunningham*, 332 N.W.2d at 883, unless the shareholder can fit within one of the exceptions to that rule.

In short, Iowa common law has never adopted a different rule for fiduciary duty claims arising from mergers than those arising from other

[6] Meade's reliance on *Shepard* is particularly weak. There, the Eighth Circuit merely reported the fact that the District Court here found merger claims can be direct. 998 F.3d at 338. That very decision is on appeal here, and thus has no persuasive force.

circumstances. Delaware does recognize such a distinction in the wake of *Revlon*, but the Iowa Legislature has rejected that approach. Iowa does not permit elevating its common law over that clear statutory language: the court cannot "formulate its own particular version of a common law [] claim, despite the specific scheme provided"; to do so "would be to judicially repeal the act." *Eddy*, 485 N.W.2d at 637.[7]

3. Iowa Cases Do Not Impose a Duty from Directors Directly to Shareholders.

Faced with the statutory and common law limits on director duties in the context of a merger, Meade cherry-picks language from various Iowa cases and authorities referring generally to director duties to "the corporation and its shareholders." *E.g.*, Appellee's Brief, at 39, 47. The use of that phrase in other cases, however, does not create a duty where none existed before.

Meade does not suggest – nor can he – that any of the authorities he cites used the phrase to create a *direct* duty owed by a director to shareholders individually, rather than to the shareholders collectively (*i.e.*, the corporation). At most, they stand for the unremarkable proposition that shareholders

[7] Meade suggests this Court's interpretations of fiduciary duties under the common law overrides the limitations on those duties imposed by the Legislature. Appellee's Brief, at 49-50. Here, the language of the Constituency Statute preempts Meade's interpretation, and must be followed. *Eddy*, 485 N.W.2d at 637.

ultimately benefit when directors fulfill their duty to the corporation. As one of those courts explained:

> An officer or director of a corporation owes a fiduciary duty to the corporation and its stockholders. This duty, however, extends only to the stockholders *collectively*. As a fiduciary in this sense, a director's first duty is to act in all things of trust wholly for the benefit of the corporation.

Cent. Iowa Power Coop. v. Consumers Energy, No. 06-1060, 2007 WL 2710841, *4 (Iowa Ct. App. Sept. 19, 2007) (emphasis in original; citations omitted); *accord Schildberg Rock Prod. Co. v. Brooks*, 140 N.W.2d 132, 136 (Iowa 1966) (directors and officers "impliedly undertake … to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity …." (internal quotes omitted)); MBCA §8.30 off. cmt. 1 (2017) ("corporation" is surrogate for "the shareholder body").

Indeed, most of the cases cited by Meade are in fact *derivative cases*.[8] If their language created a direct duty to shareholders, then these same cases misapplied the rule they supposedly pronounced; and in doing so also ignored *Cunningham*'s directive that only "special" duties to shareholders create a

[8] *See Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 448 (Iowa 1988); *Des Moines Bank & Tr. Co. v. George M. Bechtel & Co.*, 51 N.W.2d 174, 219 (Iowa 1952); *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 645 (Iowa 1979); *Midwest Mgmt. Corp.v. Stephens*, 291 N.W.2d 896, 899 (Iowa 1980).

direct claim. 332 N.W.2d at 883. The more sensible explanation is that some decisions' passing references to "the corporation and its shareholders" were, like in *Central Iowa Power,* merely references to the stockholders *collectively*.

4. EMCI's Proxy Does Not Impose a Duty from Directors Directly to Shareholders.

Meade's selective quotes from EMCI's Proxy statement fare no better. Although Meade quotes the Proxy as referring to "***the different fiduciary duties to both EMCC's policyholders and to the public shareholders***," Appellee's Brief, at 41, the Proxy in fact stated:

> EMCC's Board of Directors believed that such potential strategic alternatives would be challenging to implement given the Company's and EMCC's structure and fiduciary duties to both EMCC's policyholders and to the public shareholders and none of the potential alternatives would likely alter the dynamics and financial metrics enough to significantly increase the Company's total returns to shareholders.

Proxy at 68, 72. In addition to the fact that EMCI's language in the Proxy cannot create a duty which didn't already exist as a matter of law, the Proxy's inartful wording describes (at most) a duty from *EMCI* – and not the *Independent Directors*[9] – to its shareholders collectively.

[9] The 10-Ks which Meade cites do not refer to duties held by the Independent Directors, as opposed to EMCI or its officers. The latter are not parties here, and the Court need not consider those filings.

B. If EMCC Underpaid for EMCI, *EMCI* Was Injured, and Meade's Alleged Injury Was Not "Independent" of EMCI's.

Meade also fails to show his injury was wholly "independent" of any injury to EMCI. Although Meade asserts EMCI was not "meaningfully" injured by the Independent Directors' actions (Appellee's Brief, at 32-33, 39), he provides no legal basis for this standard, and no factual basis for this conclusion.

Iowa law requires that a shareholder asserting a direct claim possess rights "extrinsic to" and not "flow[ing] through" the corporation. *Cunningham*, 332 N.W.2d at 883, *Redeker v. Litt*, No. 04-0637, 2005 WL 1224697, at *4 (Iowa Ct. App. 2005); *see also* Appellants' Brief, at 34 (collecting authorities holding that shareholder's injuries must be "independent of any injury" to the corporation). As such, Meade must show EMCI's injury was not related in any way to his injury, rather than that it suffered no "meaningful" harm.

Meade's allegations do not meet this standard. Meade's own Petition – which he on brings behalf of all EMCI minority shareholders -- asserts the merger negotiations involved extensive analysis of EMCI's value *as a corporation* under a variety of financial scenarios. App. 008-009, ¶ 6; App. 018-019, ¶ 47; App. 021, ¶ 53; App. 029, ¶¶ 68-71. Even now, Meade pins his entire claim on the Independent Directors' alleged failure to sufficiently press the Alternative Proposal – which *he himself* asserts would have increased "EMCI's intrinsic value" and resulted in EMCC's supposed underpayment *for EMCI* by "millions of dollars," with the resulting impact on the share price paid for his shares. Appellee's Brief, at 17, 38; *see also id.* at 68, 69, 71 (discussing "intrinsic value" of EMCI).[10]

Meade also conspicuously ignores EMCI's role under the Merger Agreement. After the Alternative Proposal was rejected and the parties reached a tentative agreement over EMCI's value, they spent weeks negotiating the rest of the terms of the Merger Agreement. The Merger Agreement itself – to which Meade was not a party – was signed by *EMCC and EMCI,* and the obligations ran between those parties alone. Indeed, the agreement explicitly disclaimed any obligations to third parties like shareholders. The agreement included many elements of consideration – only one of which was the price to be paid *to EMCI* and then distributed to its shareholders.[11] The price-per-share, in turn, depended on the valuation

[10] The Independent Directors' own financial advisor analyzed the Alternative Proposal based on the financial performance of *EMCI as a company*, which then translated to various price-per-share metrics in additional to company metrics. *E.g.*, App. 757-788 (Feb. 22, 2018 Presentation at 5-8 (EMCI financial performance), 11 (market capitalization), 17 (analyzing potential growth of EMCI shareholder equity)).

[11] Meade suggests the transfer agent's role in the transaction was immaterial. Appellee's Brief, at 48. To the extent that is true, it only underscores the

ascribed by the parties to EMCI and the number of outstanding shares of stock; and the per-share payments could be adjusted based on the number of outstanding shares. *See* Appellants' Brief, at 49-50.

Any purported undervaluation *of EMCI* by the Independent Directors trickled down to the shareholders only in proportion to their fractional ownership of EMCI. It is that very type of injury that has led courts like *Tucci*, *Kadel*, and *Gusinsky* to conclude a corporation is injured in a merger where the directors allegedly undervalued it.[12] As *Tucci* explained:

> [T]he wrong alleged by the plaintiffs, undervaluing EMC to secure the merger …, qualifies as a direct injury to the 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

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point: EMCC transferred money *to EMCI* (by sending it to EMCI's transfer agent), and EMCI retained any funds not distributed to shareholders. If EMCI should have received more money in the transaction, it would have been directly harmed.

[12] Meade's attempts to distinguish *Kadel* and *Gusinsky* are unpersuasive, because Meade's allegations mirror allegations in those cases. *Compare* Pet. ¶¶88-89 (directors "failed to obtain fair consideration for EMCI shareholders in connection with the Buyout[,]" and "impede[d] superior bidders from emerging") *with Kadel v. Dayton Superior Corp.,* 731 N.E.2d 1244, 1247 (Ohio C. Pl. Montgomery Cty. 2000) ("the price is unfair and inadequate because the buyout price is not reflective of [the company's] true value") and *Gusinsky v. Flanders Corp.*, Nos. 12-CVS-337, 12-CVS-463, 2013 WL 5435788, at *3 (N.C. Super. Sept. 25, 2013) (directors "failed to take steps to maximize the value of [the company] to its public shareholders and took steps to avoid competitive bidding").

> consequence of the asserted undervaluing of EMC itself, are consequently undervalued as well.… [T]he injury posited by the plaintiffs, and the alleged wrong causing it, fit squarely within the framework of a derivative action.

Tucci, 70 N.E.3d at 927; *accord Shepard*, 998 F.3d at 337 ("A loss in share value is not a separate and distinct injury").

Inexplicably, Meade ignores this entire analysis and simply claims that "neither the Director Defendants nor *Tucci* ever explains how the corporation was injured." Appellee's Brief, at 47.[13] Meade's failure to allege facts supporting his assertion that EMCI was not injured "in any way" by the Directors' supposed mismanagement of the negotiation process – when his own allegations reflect the opposite -- is fatal.

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[13] Meade's reliance on cases from other states to suggest there was "no meaningful difference to the corporation" is misplaced. Unlike those corporate transactions, here EMCI (as the surviving corporation) continues to exist today, with obligations to (new) shareholders and to creditors, including the obligation to resolve shareholder appraisal claims. EMCI's obligations under the Merger Agreement represented more than a mere "change in ownership status," and any purported failure by the Directors when negotiating those obligations would have injured EMCI.

The cited decisions also present other challenges. *Cohen v. Mirage Resorts, Inc.,* 62 P.3d 720 (Nev. 2003) required that merger challenges be brought before the merger closed, which Meade failed to do here. *Moore v. Macquarie Infrastructure Real Assets*, 258 So. 3d 750 (La. App. 2017) involved a statute (since repealed) that expressly imposed on directors fiduciary duties to shareholders. And, Maryland's Legislature repudiated *Shenker v. Laureate Educ., Inc.,* 983 A.2d 408 (Md. 2009), by eliminating direct shareholder claims for breach of fiduciary duty. 2016 Md. Laws Ch. 170, §1.

Nor does Meade's repeated incantation that his shares are "personal property" change this result. While superficially appealing, the point is irrelevant: the value of Meade's "personal property" is simply a function of the value of *EMCI*, and therefore falls squarely under the rule that a shareholder's claims asserting injury due to the "decreased value of his stock" caused by director mismanagement are derivative. Appellant's Brief, at 34-35, 47-48.

C. Meade Did Not Suffer a "Separate and Distinct Injury" from the Other Minority Shareholders

Meade contends he satisfied *Cunningham's* "separate and distinct injury" test because he did not suffer the same injury as EMCC. Appellee's Brief, at 38. In so doing, Meade fails to address the fact that (1) EMCC never participated in the merger as a *shareholder,* but only as a *buyer;* (2) his interpretation of *Cunningham*'s test has been rejected by the very decisions he relies on[14]; and (3) if Meade's argument were accepted by this Court, every fiduciary duty claim by a minority shareholder involving a majority-shareholder-controlled corporation would be direct *per se* – which is certainly not the law in Iowa. Appellants' Brief, at 51-53. Meade's argument that

[14] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1037 (Del. 2004); *Shepard*, 998 F.3d at 337; *see also* Appellants' Brief, at 53 n.22.

EMCC "benefited" from the merger while he was harmed (Appellee's Brief, at 38) is little more than an attempt to re-litigate his now-dismissed claims against EMCC.

Recognizing the weaknesses of his argument, Meade tries to fit within another *Cunningham* exception by asserting EMCI owed him a "special duty of candor" based on this Court's decision in *Rieff v. Evans,* 630 N.W.2d 278 (Iowa 2001). Appellee's Brief, at 33-35. Meade, however, misreads the limited import of *Rieff*. There, insurance-policyholder-owners of a mutual insurance company challenged what they described as a *de facto* demutualization designed to cut them out of access to a surplus fund which they would have received if the transaction had been treated as a "demutualization." The Court found that the "alleged payout the policyholders would have received given a legal demutualization was never something the corporation was entitled to," and therefore (1) the directors owed a "special duty" to those policyholders outside of that owed to the corporation, and (2) the corporation was required to provide certain statutorily-required notices for demutualizations. 630 N.W. at 294-95. After observing the case turned on the "unusual circumstances" there (*i.e.,* required statutory notice disclosures to *policyholders* under the demutualization statutes), the Court reaffirmed the rule that "a breach of fiduciary duty is generally recognized as a derivative claim." 630 N.W.2d at 295.

Here, unlike in *Rieff*, the only source of payment to EMCI's shareholders was that derived from the Directors' valuation of EMCI as a whole; and EMCI did, in fact submit voluminous disclosures to the shareholders before their vote on the transaction. Iowa law has never recognized the type of "duty of candor" claim Meade tries to create here, nor did *Rieff* create such a claim.[15]

This case has never (until, apparently, now) been cast as one for damages caused by purported misrepresentations in the Proxy, as opposed to those caused by the diminution of share price. Nor did Meade seek supplemental Proxy disclosures prior to the shareholder vote. Meade suggests

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[15] None of Meade's other cases recognizes a direct claim against Iowa directors for an alleged violation of a duty of candor. *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986) (claim by depositor against bank); *Weltzin v. Cobank, ACB*, 633 N.W.2d 290 (Iowa 2001) (derivative claim; court found no duty); *Mitchellville Coop v. Indian Creek Corp.*, 469 N.W.2d 258, 263 (Iowa Ct. App. 1991) (claim against co-op); *Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76 (Iowa 1984) (derivative claim).

Many other courts reject such duty-of-candor claims outright, *e.g., Solfanelli v. Mainwaring*, No. 91–6249, 1992 WL 332223, at *4 (E.D. Pa. Nov. 4, 1992), or recognize the claim but hold it is not direct. *E.g., DCG & T ex rel. Battaglia/Ira v. Knight*, 68 F. Supp.3d 579, 582 (E.D. Va. 2014). Iowa should, too.

the Directors actively "concealed" material information from the Proxy, Appellee's Brief, at 26, but says very little about what information was allegedly concealed.[16] Nor does he explain how he was harmed *by the omissions* or contend that he or the other shareholders – much less enough shareholders to stop the merger – would have voted differently if they had the "omitted" information.

Finally, even if the Court were to impose a new direct duty of candor here, such a claim would be precluded by the Director Shield statute. *See* Part II, *infra*; *Dixon v. ATI Ladish LLC*, 667 F.3d 891, 895 (7th Cir. 2012) ("Th[e director immunity] statute . . . is as applicable to a 'duty of candor' as to the general duty of care."). Meade simply does not have a direct claim.

II. THE DISTRICT COURT ERRED IN NOT DISMISSING MEADE'S CLAIMS UNDER THE DIRECTOR SHIELD STATUTE.

Meade's argument that the Director Shield Statute does not preclude his claims against the Independent Directors is equally unavailing. Again, Meade resists the application of Iowa law, and repeatedly turns to Delaware

[16] Meade alludes to the value of the Alternative Proposal, *id.,* at 68, but the Alternative Proposal was fully disclosed with the Proxy, and the Independent Directors' *full* analysis of the value of the Alternative Proposal was publicly filed. App. 180-181.

law. Whatever the merits of Meade's position under *Delaware* law, they do not apply to this *Iowa* corporation.

A. The Court Can Consider and Should Adopt a Plausibility Standard for Claims Potentially Protected by the Director Shield Statute.

Meade concedes the Independent Directors preserved error in challenging the sufficiency of Meade's allegations under the Director Shield Statute, but asserts they did not do so with respect to the "plausibility" standard to be applied to those allegations. Appellee's Brief, at 54-55. The Directors, however, did raise that issue below: they repeatedly challenged the sufficiency of the "reasonable inferences" to be drawn from Meade's factual allegations, and they outlined in detail how those inferences did not plausibly support a finding that the Directors intended to harm the public shareholders.[17] Meade himself acknowledged the Independent Directors' position;[18] and the District Court addressed the sufficiency of Meade's factual allegations in its Order. App. 871-872, 877.

[17] *See, e.g.,* Motion to Dismiss, at 3 ("Meade has not alleged – nor could he allege sufficient facts to *reasonably* infer – the statutory elements required to pursue a claim"), 16 ("Meade fails to plead facts giving rise to a *reasonable* inference that any acts or omissions by the Independent Directors, collectively or individually, were 'intentional or knowing'") (emphases supplied).

[18] App. 088.

The Directors thus preserved error on the adoption of a "plausibility" standard overlay on plaintiffs' allegations. And even if they had not, the Court should still consider adopting the standard here because the objectives of the Court's error preservation rules have been met. *Lee v. State, Polk Cty. Clerk of Ct.*, 815 N.W.2d 731, 739 (Iowa 2012).

B. The Inapplicability of the Director Shield Is an Element of a Plaintiff Shareholder's Claim and Not an Affirmative Defense.

Meade asserts the Director Shield is an "affirmative defense," and therefore outside the scope of a motion to dismiss. This position, however, ignores the clear language and purpose of Section 490.831.

First, a true affirmative defense is "one resting on facts not necessary to support plaintiff's case." *Erickson v. Wright Welding Supply, Inc.,* 485 N.W.2d 82, 86 (Iowa 1992). The Director Shield is not such a defense. Section 490.831 expressly requires "the party asserting liability" to "establish" the Director Shield does not preclude liability; and the burden of *pleading* and of *proving* an issue are inseparable. Appellants' Brief at 64-66. Far from being "entirely formalistic," as Meade contends (Appellee's Brief, at 61), the inapplicability of the Director Shield is a foundational element of his claim. As Professor Matthew Doré has observed, establishing the Director Shield does not preclude liability is one of the "key elements" that a plaintiff must establish for director liability. Matthew G. Doré, Iowa Practice Series, Vol. 6: Business Organizations (Thomson West, Nov. 2020 update) §28:1.

Second, the Legislature intended that the shareholders' adoption of a Director Shield would enable the directors to achieve early dismissal at the motion to dismiss stage. Appellant's Brief at 59-60. As the drafters explained, "[a]bsent [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). To cast the Director Shield as an "affirmative defense" not to be addressed by a court until after lengthy and costly discovery would eviscerate those very protections.

Meade fails to address this fatal flaw, and instead cites cases which are easily distinguishable because they arise in states with no statutory counterpart to Section 490.831.[19] Indeed, Meade's cases acknowledge that even under Delaware law (which also has no counterpart to Section 490.831), "'courts routinely examine' [Delaware's Director Shield] exculpatory provisions on motions to dismiss." *In re Trib. Co. Fraudulent Conv. Litig.*,

[19] *Kurlander v. Kaplan*, No. 8:19-cv-00644, 2019 WL 3944335 (M.D. Fla. Aug 21, 2019) (applying Maryland law); *Frederick v. Corcoran*, 2013 WL 10069700 (Cir. Ct. Md. Aug. 14, 2013) (applying Maryland law); *Marsalis v. Wilson*, 778 N.E.2d 612, 616 (Ohio 2002) (applying Ohio law); *Winkler v. Price*, No. 8:13CV52, 2013 WL 3776540 (D. Neb. July 17, 2013) (applying Nebraska law prior to adoption of MBCA §8.31).

No. 11MD2296(DLC), 2019 WL 294807, at *17 (S.D.N.Y. Jan. 23, 2019) (quoting *In re Merck & Co. Sec., Derivative & ERISA Litig.*, 493 F.3d 393, 402 n.5 (3d Cir. 2007)).[20]

Regardless, the Director Shield was "interposed" by the Directors as demonstrated by the fact the District Court took judicial notice of the Director Shield provision and addressed it in its Order. App. 869-872.

C. Meade Failed to Sufficiently Plead[21] Facts Supporting a Specific Intent by the Independent Directors to Harm the Corporation.

Meade concedes he must prove a "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." *See* Appellee's Brief at 62-63. Although Meade elsewhere acknowledges this more stringent standard imposed by cases like *Nesler* (Appellee's Brief, at 63), he nonetheless persists in arguing this standard can be met via a "conscious disregard" of one's duties as a director. *Id.,* at 65. It

[20] To the extent Meade's cases (such as *In re Tower Air, Inc. v. Nach*, 416 F.3d 229 (3d Cir. 2005) and *In re Taser Int'l S'holder Derivative Litig.*, No. CV–05–123–PHX–SRB, 2006 WL 687033 (D. Ariz. Mar. 17, 2006)) apply Delaware law but fail to acknowledge this fact, they are of dubious value.

[21] While the public policy underlying Section 490.831 compels the adoption of a "plausibility" standard, Meade's allegations are insufficient even if the "notice pleading" standard is applied. Appellant's Brief, at 56-61.

cannot.

The IBCA requires a shareholder plaintiff to establish a *specific intent to harm* to the corporation and its shareholders – *i.e.*, the "quintessential" bad faith discussed in *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009). Appellants' Brief, at 66-73. *See also* Official Comment to MBCA Section 8.31(a) (1990) ("No public policy should permit the shareholders to eliminate or limit the liability of directors for conduct intended to cause harm to the corporation"). Under this standard, a "conscious disregard" of one's duties is not enough.

Although Meade acknowledges the categories of "bad faith" recognized in *Lyondell*, he argues these categories are not "exclusive," and attempts to craft an additional category of bad faith – not recognized by any Iowa court – which does not meet this high bar. Far from supporting his position on this point, Meade's reference to *Nesler v. Fisher and Co., Inc.,* 452 N.W.2d 191 (Iowa 1990) actually supports the Directors' position by requiring a *motive* or "purpose on the defendant's part to financially injure or destroy the plaintiff." *Id.* at 199 (citation omitted). There, the Iowa Supreme Court observed that plaintiffs asserting claims for "intentional interference" torts must show their harm

> [W]as either ***desired by the actor*** *or known by him to be a substantially certain result of his conduct*. Intent alone, however,

> may not be sufficient to make the interference improper, especially when it is supplied by the actor's knowledge that the interference was a necessary consequence of his conduct rather than by his *desire to bring it about*. In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.
>
> The desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances. On the other hand, if there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.

Nesler, 452 N.W.2d at 197 (emphasis supplied; quotations and citations omitted).

Similarly, Meade's citation to various criminal cases actually supports the Directors' position. "Specific intent is present when from the circumstances *the offender must have subjectively desired* the prohibited result." *State v. Redmon,* 244 N.W.2d 792, 797 (Iowa 1976) (emphasis supplied; quotation omitted).

Meade's allegations in the Petition – as opposed to those recounted in his Brief here[22] – do not meet this standard. The Independent Directors' willing adoption of the *MFW* framework; their hiring of experienced legal and financial advisors; and their reliance on the fairness opinion of their financial advisor militate against Meade's ability to credibly allege the Directors *desired and intended* to harm EMCI and its shareholders.[23] Meade's

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[22] Meade overstates what was in fact alleged in the Petition. For example, the Petition does not allege (as Meade now suggests, Appellee's Brief at 63-64) that the Independent Directors "knew EMCC's 'senior executives' undermined them" or had "actual knowledge that such a flawed process would produce inadequate consideration and thus harm EMCI's public shareholders." Such statements of fact not included in the Petition should be disregarded. *Ritz v. Wapello Cnty. Bd. of Supervisors,* 595 N.W.2d 786, 789 (Iowa 1999).

[23] Nor do the few disclosures Meade alleges should have also been made. While conceding the Proxy referenced the Alternative Proposal and its rejection by EMCC and the Iowa Insurance Division, Meade alleges the Proxy should have included Sandler's financial analysis of the rejected alternative. App. 030. Meade concedes the Proxy disclosed three sets of management prepared financial projections, each reflecting a downward revision. *Id*. Meade does not allege the projections are inaccurate, only that the Proxy "failed to disclose the reasoning or justification for such downward revision." App. 031. Similarly, while conceding the Proxy reflected the discount rates used by Sandler, Meade alleges the Proxy should have disclosed the sinister ulterior motive he attempts to ascribe to the change. App. 031-032. Finally, with regard to Shepard's interest in purchasing EMCI, Meade again acknowledges its disclosure but alleges it was inadequate because it failed to disclose Mr. Shepard requested a confidentiality agreement and the sinister ulterior motives Meade attempts to ascribe to the Special Committee. App. 032-033. These alleged omissions are not material or significant as a matter of law. More importantly, they simply do not reflect an "intentional infliction of harm." *See* Appellants' Brief, at 71-72.

interpretation of "intentional infliction of harm" would permit shareholders to bypass the appraisal process and subject directors to personal liability for simply accepting an offer less than what had been initially sought during the negotiations. And although Meade focuses on the Directors' inability to convince EMCC to adopt the Alternative Proposal, he fails to allege any factual basis for concluding the Proposal would have been adopted if the Directors had been more persistent.[24] Appellee's Brief at 67-68.[25]

At bottom, Meade's fundamental failure was that he plead a claim under *Delaware* law under a standard that was rejected and significantly narrowed by the *Iowa* Legislature. He in essence now contends the Directors should have walked away from a transaction which represented an approximately 50% premium over the then-market price – and which would have sent the stock price plunging back to that pre-deal price. App. 452. Their failure to do so cannot constitute a *specific desire to harm* EMCI and its

[24] EMCC's significant regulatory, structural, and business reasons for rejecting the Alternative Proposal as not fair to or in the interests of EMCC and its policyholders were articulated in the Proxy. App. 470.

[25] The facts in *Bronner v. Duggan*, 317 F.Supp.3d 284 (D. D.C. 2018), on which Meade relies, are readily distinguishable from those here. In contrast to the Petition in this case, the *Bronner* complaint contained specific factual allegations of the directors' specific intent to harm the corporation. *Id*., at 293. Such allegations are far different than the vague allegations of intentional harm asserted by Meade here.

shareholders, as required by the IBCA.

D. Meade Has Waived Any Ability to Amend His Petition to Attempt to Save His Claim.

Meade concludes by seeking leave to amend his Petition to attempt to save his claim. Appellee's Brief, at 69-70. He has waived his right do so.

Meade could have amended his Petition at any time from the filing of the Independent Director's Motion to Dismiss on January 27, 2020 until the Application for Interlocutory Appeal was granted and a stay was entered on March 1, 2021. He chose not to do so, and has waived his right to correct the deficiencies in his Petition.

Apparently recognizing this fact, Meade attempts to tie his request to new information allegedly obtained during "very limited discovery that took place during the brief period between the District Court denying the Director Defendants' motion to dismiss [on December 23, 2020] and this Court accepting this interlocutory appeal [on March 1, 2021]." *Id.*, at 69. Meade fails, however, to identify any material information he gleaned from that "limited discovery" which would necessitate an amendment. Indeed, if that discovery yielded such highly-probative information, Meade would have undoubtedly immediately sought to amend his Petition. He did not, and instead elected to stand on his pleading. He has waived any ability he may have had to amend to avoid the dismissal of his case.

CONCLUSION

The Court should reverse that part of the District Court's decision denying the Independent Directors' 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

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of *Appellants' Reply 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

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Michael W. Thrall, AT0007975