IN THE IOWA DISTRICT COURT FOR POLK COUNTY
(BUSINESS COURT)

KENDALL J. MEADE, individually and on behalf of all others similarly situated, Plaintiff, v. EMC INSURANCE GROUP INC., PETER S. CHRISTIE, STEPHEN A. CRANE, JONATHAN R. FLETCHER, BRUCE G. KELLEY, GRETCHEN H. TEGELER, and EMCC CASUALTY COMPANY, Defendants.	CASE NO. LACL146098 **ORDER RE: MOTIONS TO DISMISS**

The court has before it motions to dismiss filed by each defendant. The plaintiff resisted the motions. The court held a video conference hearing on July 17, 2020. Juan E. Monteverde, Miles Schreiner, and Matthew Sahag appeared on behalf of plaintiff. Beth Boland, Bryan House, Phil Babler, and Mollie Pawlosky appeared on behalf of defendant, Employers Mutual Casualty Company ("EMCC"). Doug Van Zanten appeared as a corporate representative for EMCC. Michael Thrall, Lynn Herndon, and Mark Dickinson appeared on behalf of EMC Insurance Group, Inc. ("EMCI") as well as the independent directors Peter S. Christie, Stephen A. Crane, Jonathan R. Fletcher, and Gretchen H. Tegeler (referred to collectively as the "Independent Directors" or the "Special Committee"). Terri Combs and Daniel Kelley appeared on behalf of Bruce G. Kelley. The court having reviewed the written submissions of the parties and the court docket and having heard arguments of counsel finds and orders as follows.

FACTUAL BACKGROUND[1]

EMCC began in 1911 as an Iowa mutual insurance company with its principal executive office in Des Moines, Iowa.[2] As a mutual insurance company, the policyholders owned EMCC. EMCC is now a multiline insurer that employs 2,500 people.[3] Defendant Bruce Kelley, the great grandson of EMCC's founder, served as EMCC's President and Chief Executive Officer ("CEO") from 1992 until recently.[4] Kelley was also EMCI's President, CEO, and a member of its board of directors.[5]

EMCC formed EMCI in 1974 to serve as as a "downstream" subsidiary of a mutual company that acted as an insurance holding company.[6] EMCI became publicly-traded in 1982, with EMCC owning 81% of its stock immediately post-initial public offering.[7] In 2004, EMCC reduced its ownership stake in EMCI to approximately 55% through an additional stock offering.[8]

EMCI does not employ any staff to conduct its operations, nor does the company own or lease any facilities or information technology systems necessary for its operations. EMCI relies on EMCC's employees, facilities, and information technology systems to conduct its business. EMCI's property and casualty insurance operations are integrated with those of EMCC, its

---

[1] The factual background is a compilation of assertions in Meade's petition and exhibits incorporated by reference in the petition. The court is accepting these facts as true as required when considering a motion to dismiss.
[2] Class Action Petition ("Pet."), ¶ ¶ 14, 15, 30.
[3] Pet., ¶ 15; EMCC App. To Reply Brief Exhibit B, Final Proxy Statement, dated Aug. 8, 2019 ("Proxy") at 2. (Polk Cty. Dist. Ct. Apr. 27, 2020). The relevant Proxy is available to the public on the Securities and Exchange Commission's website at: https://www.sec.gov/Archives/edgar/data/356130/000104746919004645/a2239424zdefm14a.htm.
[4] Pet., ¶¶ 30, 16.
[5] *Id.* at ¶ 16.
[6] *Id.* at ¶¶ 14, 31, 53.
[7] *Id.* at ¶¶ 14, 31.
[8] *Id.* at ¶ 31.

insurance company subsidiaries, and an affiliate through participation in a reinsurance pooling arrangement under which each participant transfers all of its direct insurance business to the pool and, in exchange, receives a designated percentage of the pool's underwriting results.[9]

Since its inception, EMCI's shareholders elected its board of directors. For the period involved in this lawsuit, the EMCI board consisted of the following four directors, plus defendant, Bruce Kelley:

- Peter S. Christie joined the EMCI Board in 2017.[10] Mr. Christie served as a part of the executive management group at the St. Paul Companies, Chairman and CEO of Minet Group, Deputy Chairman of AON Group, Inc., and most recently as an independent insurance consultant.[11]

- Stephen A. Crane joined the EMCI Board in 2009 and served as its Chair.[12] Mr. Crane served as the CEO of two insurance holding companies (AlphaStar Insurance Group Limited and Gryphon Holdings, Inc.) and as the CEO of a reinsurance intermediary (G.L. Hodson & Son) over the course of 15 years.[13] He also serves on the Board of First Security Benefit Life Insurance and Annuity Company of New York.[14]

- Jonathan R. Fletcher joined the EMCI Board in 2010.[15] Mr. Fletcher is a Certified Financial Planner, who served as managing director and portfolio manager of a registered investment advisory firm and serves as director of three other companies.[16]

- Gretchen H. Tegeler joined EMCI's Board in 2007.[17] Ms. Tegeler worked in the public sector in the Iowa Department of Management and as Chief of Staff to Governor Terry Branstad. She also spent time in the private sector with a telecommunications company, and in the not-for-profit sector as former VP of the American Cancer Society and former President of Taxpayers Association of Central Iowa.[18]

---

[9] *Id*. at ¶ 32.
[10] Pet., ¶ 17.
[11] Proxy at 117.
[12] Pet., ¶ 18.
[13] Proxy at 117.
[14] *Id.*
[15] Pet., ¶ 19.
[16] Proxy at 117.
[17] Pet., ¶ 20.
[18] Proxy at 118.

In late October 2018, EMCC made the decision to purchase the publicly traded stock of EMCI it did not own in what is referred to as a "going-private" transaction.[19] In November 2018, EMCC retained Boenning & Scattergood, Inc. to provide initial financial analysis and assist the EMCC board of directors in their goal of consummating the going-private transaction.[20] On November 15, 2018, EMCC sent a non-binding proposal letter to EMCI's board offering to purchase the EMCI stock it did not already own at $30.00 per share.[21] EMCC publicly filed the letter with the Securities and Exchange Commission ("SEC") on November 16, 2018, and issued a press release announcing the $30.00 per share offer.[22] In response to the offer and its publication, EMCI established a Special Committee consisting of defendants Crane, Fletcher, Christie, and Tegeler.[23] On December 11, 2018, the Special Committee retained the law firm of Wilkie Farr & Gallagher to represent it.[24] On December 19, 2018, the Special Committee retained Sandler O'Neill to act as the financial advisor to the Special Committee.[25]

On January 9, 2019, the Special Committee directed Sandler O'Neill to initiate a due diligence investigation of EMCI, including requesting various business and financial information and setting up management meetings to discuss EMCI's business and prospects.[26] On January 24, 2019, the Special Committee received notice of an unsolicited proposal that EMCC received in mid-December 2018 from a group of investors regarding a potential joint venture transaction with EMCC. EMCC's board unanimously rejected the proposed joint venture without

[19] Pet., ¶ 38.
[20] *Id.*
[21] Pet., ¶ 39.
[22] *Id.*
[23] *Id.* at ¶ 40. *See also* EMCC's App., Exhibit B, Proxy at 24-25.
[24] *Id.* at ¶ 41.
[25] *Id.*
[26] *Id.* at 42.

discussing the proposal with EMCI.[27] The Special Committee, Wilkie Farr, and Sandler O'Neill discussed the proposed joint venture and EMCC's rejection.[28]

On January 25, 2019, EMCI received notice of a proposal from Gregory M. Shepard, a shareholder of EMCI, requesting he be nominated as a candidate for election to the company's board and made a member of the Special Committee.[29] On January 28, 2019, Mr. Shepard filed Schedule 13D with the SEC reporting that he beneficially owned approximately 5.09% of EMCI's common stock, and stated he believed the company's common stock was significantly undervalued.[30]

On January 31, 2019, EMCC publicly announced, in both an SEC disclosure and press release, that it was not willing to consider any alternative merger or transaction involving a third party whereby EMCC was merged with or into a third party.[31] The Special Committee met with Wilkie Farr and Sandler O'Neill to discuss the disclosure and press release and determined no response was necessary.[32]

Between February 1 and March 5, 2019, representatives of Sandler O'Neill sent three emails to Mr. Shepard offering to meet with him and the Special Committee to obtain his views on the going-private transaction.[33] On February 22, 2019, the Special Committee met with Wilkie Farr and Sandler O'Neill to discuss an Alternative Proposal, which would terminate EMCI's existing pooling agreement with EMCC and replace it with a quota share reinsurance agreement.[34]

---

[27] Pet., ¶ 43.
[28] EMCC's App. Exhibit B, Proxy at 27.
[29] Pet., ¶ 44; EMCC's App. Exhibit 7.4 to Exhibit K.
[30] Pet., ¶ 44; EMCC's App. Exhibit K at 4.
[31] Pet., ¶ 45; EMCC's App. Exhibit B, Proxy at 29.
[32] EMCC's App. Exhibit B, Proxy at 30.
[33] *Id.*
[34] Pet., ¶ 46; EMCC's App., Exhibit B, Proxy at 30-31.

On February 25, 2019, the Special Committee decided to present the Alternative Proposal to EMCC. On the same date, the Special Committee decided not to invite Mr. Shepard to be a member of the board of EMCI, but offered to meet with him to hear his opinions about the going-private transaction.[35] On March 5, 2019, the Alternative Proposal was presented to the EMCC board.[36] The EMCC board met on March 6-7, 2019, to discuss the Alternative Proposal.[37] On March 8, 2019, senior executives of EMCC met with the Deputy Commissioner-Supervisor of the Iowa Insurance Division regarding the Alternate Proposal. The Deputy Commissioner informed the senior executives the Alternative Proposal likely would not receive regulatory approval.[38] No members of the EMCI Special Committee met with the Deputy Commissioner.[39] EMCC's board met again and with their counsel to discuss the Alternative Proposal. The board unanimously rejected it and re-conveyed their offer to purchase EMCI's shares for $30.00 per share.[40]

On March 1, 2019, Mr. Shepard sent a letter to the Special Committee, which was filed with the SEC.[41] In his letter he told the Special Committee that Kelley wanted to keep control of the mutual company indicating that control was valuable. He requested the opportunity to meet with the Special Committee to discuss alternative transactions.[42] On March 5, 2019, legal counsel for the Special Committee, Wilkie Farr, sent a letter to Shepard's attorney inviting Shepard to meet with the Special Committee in New York.[43]

---

[35] Pet., ¶ 48-49; EMCC's App., Exhibit B, Proxy at 31.
[36] Pet., ¶ 51.
[37] EMCC's App. Exhibit B, Proxy at 31.
[38] *Id.* at 31-32.
[39] *Id.* at 32.
[40] *Id.*
[41] Pet., ¶ 50; EMCC's App. Exhibit L.
[42] *Id.*
[43] Proxy at 31.

On March 20, 2019, the Special Committee responded to the EMCC offer of $30.00 per share with a counter-offer of $40.00 per share based upon financial projections prepared by Sandler O'Neill.[44] On March 25, 2019, Mr. Shepard sent another letter to the Special Committee expressing concerns about its independence, Mr. Kelley's control, and the inadequacy of EMCC's offer.[45] In this letter, he stated he believed the fair price for EMCI's shares was $50.00 per share.[46] This letter was part of the schedule 13D Mr. Shepard filed with the SEC.[47] This filing also had an exhibit attached which consisted of a series of emails between Wilkie Farr, counsel for the Special Committee, and Eric Fogel, counsel for Mr. Shepard, discussing the possibility of Mr. Shepard meeting with the Special Committee.[48] During April 2019, the Special Committee and EMCC exchanged offers and counter-offers. Ultimately, on April 20, 2019, the Special Committee accepted EMCC's offer of $36.00 per share.[49] Thereafter, the parties began the process of negotiating and drafting a Merger Agreement.

On May 9, 2019, EMCC announced the merger and issued a joint press release.[50] On September 18, 2019, EMCI held a special meeting of shareholders to vote on the going-private transaction.[51] A majority of the minority shareholders approved the transaction at $36.00 per share.[52] The minority shareholders received cash for their shares on September 19, 2019.[53]

---

[44] Proxy at 32; Petition 53.
[45] Pet., ¶ 54; EMCC's App. Exhibit 7.6 to Exhibit M.
[46] Pet., ¶ 54; EMCC's App., Exhibit 7.6 at p. 6 to Exhibit M.
[47] EMCC's App., Exhibit 7.6 to Exhibit M.
[48] EMCC's App., Exhibit 7.7 to Exhibit M.
[49] Pet., ¶ 55-62; Proxy at 33-36.
[50] *Id.* at ¶ 64; Proxy at 36-38.
[51] Pet., ¶ 8.
[52] *Id.* at ¶ 8; EMCC's App., Exhibit C at 36 defines "Required Shareholder Vote" to include the affirmative vote of a majority of the minority shareholders to adopt the agreement.
[53] Pet., ¶ 8.

PLEADINGS

Meade filed a class action petition based on the purchase by EMCC of the minority shares of stock not held by EMCC on September 19, 2019, which included all EMCI shares. Meade held a minority interest in EMCI. Meade asserted in his first cause of action that the EMCI directors including Kelley, as directors and/or officers of EMCI, breached their fiduciary duties of care, loyalty, good faith, and candor to the public shareholders of EMCI.[54] In his second cause of action, Meade asserted EMCC breached its fiduciary duties in its capacity as controlling shareholder of EMCI. Specifically, Meade alleged EMCC as a controlling shareholder of EMCI owed fiduciary duties of care, loyalty, and good faith to EMCI's minority shareholders.[55] He alleges EMCC breached these duties thus unfairly depriving Meade and other similarly situated minority shareholders of the true value of their shares.[56] In his third cause of action, Meade asserted EMCI aided and abetted the other defendants in the breach of their fiduciary duties owed to the public shareholders of EMCI, including Meade and others similarly situated.[57]

EMCC, Kelley, EMCI, and the Independent Directors each filed separate motions to dismiss on January 27, 2020.

The Independent Directors seek dismissal of the claims against them on two grounds. First, they allege the claim asserted by Meade is derivative and Meade failed to comply with Iowa's demand requirement for derivative claims. Second, they assert Meade failed to state a claim for breach of fiduciary duty against the Independent Directors based upon the requirements set forth in Iowa Code section 490.831.

---

[54] *Id.* at ¶ 87. *See also* note 177, *supra.*
[55] *Id.* at ¶ 94.
[56] *Id.* at ¶ 95.
[57] *Id.* at ¶¶ 100, 103.

EMCC seeks dismissal of Meade's second cause of action on two grounds. First, it contends Meade failed to comply with Iowa's demand requirement for derivative claims. Second, that it, EMCI, and the Independent Directors followed the factors outlined in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), and further EMCC owed no fiduciary duty to the EMCI minority shareholders and the petition should be dismissed.

EMCI seeks dismissal of Meade's third cause of action alleging aiding and abetting. EMCI asserts, as a corporation, cannot aid and abet the alleged breaches of the fiduciary duties of its own directors. Second, it contends Meade failed to state a breach of fiduciary duty against the Independent Directors and consequently his aiding and abetting claim must fail.

Kelley seeks dismissal on the claim he breached his fiduciary duty because he recused himself from the transaction that gives rise to the present lawsuit and adopted the arguments of the other defendants on the issue of whether the action was derivative or direct.

LAW APPLICABLE TO MOTIONS TO DISMISS

Rule 1.421(1)(f) of the Iowa Rules of Civil Procedure permits a party to move to dismiss for failure to state a claim upon which relief may be granted. Rule 1.403(1) requires that a petition contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

> A "petition need not allege ultimate facts that support each element of the cause of action[;]" however, a petition "must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to the claim and the general nature of the claim.[58]

[58] *U.S. Bank v. Barbour,* 770 N.W.2d 350, 354 (Iowa 2009) (citations omitted).

"A motion to dismiss is properly granted only if a plaintiff's petition on its face shows no right to recover under any state of facts."[59] Further, in determining whether the plaintiff has stated a claim upon which relief may be granted, courts consider only the facts alleged in the petition, or those of which judicial notice may be taken.[60] Courts will ordinarily consider documents incorporated into the complaint by reference.[61] Exhibits attached to the petition are regarded to be part of the pleadings.[62] Any facts relied upon outside the plaintiff's petition which cannot be judicially noticed must be disregarded by the court when considering the motion to dismiss.[63] This requires the court to generally disregard "facts contained in either the motion to dismiss or any of its accompanying attachments."[64]

A court may take judicial notice of two types of adjudicative facts.[65] The first is a fact "generally known within the territorial jurisdiction of the trial court."[66] The second is a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot

---

[59] *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003) (quoting *Ritz v. Wapello Co. Bd. of Sup.* 595 N.W.2d 786, 789 (Iowa 1999)).
[60] *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004).
[61] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L.Ed.2d 179, 193 (2007); *see also Hallett Constr. Co. v. Iowa State Highway Comm'n,* 261 Iowa 290, 295, 154 N.W.2d 71, 74 (1967) (finding that highway specifications that were incorporated in the petition by reference were deemed part of the petition and could be considered in a default proceeding).
[62] *Mormann v. Iowa Workforce Development,* 913 N.W.2d 554, 565 (Iowa 2018).
[63] *Curtis v. Bd. of Sup'rs of Clinton Co.,* 270 N.W.2d 447, 448 (Iowa 1978); *Winneshiek Mut. Ins. Ass'n v. Roach,* 257 Iowa 354, 365, 132 N.W.2d 436, 443 (1965).
[64] *Dier v. Peters,* 815 N.W.2d 1, 4 (Iowa 2012).
[65] Iowa R. Evid. 5.201.
[66] *Rhoades v. State,* 848 N.W.2d 22, 31 (Iowa 2014) (citing Iowa R. Evid. 5.201(b)). *See e.g. Emmet County State Bank v. Reutter,* 439 N.W.2d 651, 655 (Iowa 1989) (stating judicial notice taken "of the numerous farm foreclosures resulting in loss of farms that for generations were family-held"); *State v. LeGear,* 346 N.W.2d 21, 23 (Iowa 1984) (taking judicial notice that the Missouri is a boundary river); *In re N.M.W.,* 461 N.W.2d 478, 480 (Iowa Ct. App.1990) (stating judicial notice could be taken of "the health hazards of having animal fecal materials scattered throughout one's living quarters"); *State v. Ladd,* 252 Iowa 487, 489, 106 N.W.2d 100, 101 (1960) (finding it proper to take judicial notice that town was located in a particular county in Iowa).

reasonably be questioned."[67] A court is required to take judicial notice if a party makes the request and supplies the court with the necessary information, however, judicial notice can be limited.[68]

On a motion to dismiss for failure to state a claim, the court accepts as true the petition's well-pleaded factual allegations, but not its legal conclusions.[69] Therefore, "a dismissal at this stage must rest on legal grounds."[70] Nearly every case will survive a motion to dismiss under notice pleading.[71]

DOCUMENTS REFERRED TO IN PETITION OR A MATTER OF JUDICIAL NOTICE

In order to address the motions the court identifies documents referred to in Meade's petition that he did not attach to his petition. EMCC in support of its motion to dismiss prepared an appendix of documents that included:

> Exhibit A - Preliminary Proxy Statement, dated June 24, 2019, filed with SEC as Schedule 14A
> Exhibit B - Final Proxy Statement, dated August 8, 2019, filed with SEC as Schedule 14A, which included Annexes A-C
> Exhibit C - Merger Agreement, dated May 8, 2019
> Exhibits D-J - Schedule 13E Materials
> Exhibit D - Sandler O'Neill Presentation, dated January 8, 2019
> Exhibit E - Sandler O'Neill Presentation, dated February 5, 2019
> Exhibit F - Sandler O'Neill Presentation, dated February 22, 2019
> Exhibit G - Sandler O'Neill Presentation, dated March 5, 2019
> Exhibit H - Sandler O'Neill Presentation, dated March 22, 2019
> Exhibit I - Sandler O'Neill Presentation, dated May 8, 2019
> Exhibit J - Boenning & Scattergood Presentation, dated November 15, 2018

[67] *Id. See also In Interest of H.G.*, 534 N.W.2d 113, 114 (Iowa Ct. App. 1995) (concluding it was error to take judicial notice of juvenile officer's report and attachments from facility because it contained information not of common knowledge and not capable of certain verification).
[68] *Karwal v. Brookshire-Bailey,* 947 N.W.2d 685 (Table) 2020 WL 1888771, at *3 (Iowa Ct. App. Apr. 15, 2020) (quoting Iowa R. Evid. 5.201(c)) (limiting judicial notice to the agreement of the parties).
[69] *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014).
[70] *Trobaugh,* 668 N.W.2d at 580.
[71] *Barbour*, 770 N.W.2d at 353.

Gregory Shepard's Schedule 13D Materials
Exhibit K - Shepard 13D, dated January 16, 2019
Exhibit L - Shepard 13D, dated March 1, 2019
Exhibit M - Shepard 13D, dated March 25, 2019[72]

In his petition, Meade referenced a number of documents including many attached to EMCC's motion to dismiss. The documents referenced are as follows and the court has attempted to identify Meade's assertions with EMCC's exhibits based upon the contents of the exhibits and Meade's description of the referenced document in the petition.

- The merger agreement[73] - Exhibit C to EMCC's motion to dismiss
- The August 2019 proxy statement[74] - Exhibit B to EMCC's motion to dismiss
- November 15, 2018 letter from EMCC publicly filed with the SEC setting forth its $30 per share offer[75] - Exhibit J to EMCC's motion to dismiss
- Gregory M. Shepard January 25, 2019 proposal[76] - Footnote 13 of EMCI's motion to dismiss, https://www.sec.gov/Archives/edgar/data/356130/000119312519017402/d697787dsc13d.htm
- Gregory M. Shepard Schedule 13D filed with SEC, January 28, 2019[77] - Footnote 13 of EMCI's motion to dismiss, https://www.sec.gov/Archives/edgar/data/356130/000119312519017402/d697787dsc13d.htm
- January 31, 2019 EMCC SEC disclosure and press release[78] - Exhibit B at 29 of EMCC's motion to dismiss and Footnote 16 of EMCI's motion to dismiss, https://www.sec.gov/Archives/edgar/data/356130/000089706919000069/cmw44.htm
- The Alternative Proposal[79] Exhibits F and G to EMCC's motion to dismiss
- February 22, 2019 Sandler O'Neill initial valuation[80] - Exhibit F to EMCC's motion to dismiss
- March 1, 2019 letter from Shepard to Special Committee[81] - Exhibit L to EMCC's motion to dismiss

[72] EMCC's Appendix to Reply Brief ("App.").
[73] Pet., ¶ ¶3, 5, 63, 76, 77, 89, 103.
[74] *Id.* at ¶ ¶7, 73, 74, 77, 78, 79, 80, 81, 83, 103.
[75] *Id.* at ¶¶ 39.
[76] *Id.* at ¶ 44.
[77] *Id.* at ¶ 44.
[78] *Id.* at ¶ 45.
[79] *Id.* at ¶¶ 3, 43, 46, 47, 51, 71, 72.
[80] *Id.* at ¶ 69.
[81] *Id.* at ¶ 50 n.2.

- March 22, 2019 Sandler O'Neill valuation[82] - Exhibit H to EMCC's motion to dismiss
- March 25, 2019 letter from Shepard to Special Committee "Re: Maximizing Value for EMCI Shareholders"[83] - Exhibit M to EMCC's motion to dismiss
- Management prepared financial projections dated November 2018, February 2019, and May 2019[84] - Exhibit B at 44-45 to EMCC's motion to dismiss
- May 9, 2019 press release from David Proctor, Chairman of the Board of Directors of EMCC [85] - The court found no exhibit in EMCC's appendix of exhibits.

EMCC and the other defendants request the court take judicial notice of these exhibits as they are publicly filed documents and Meade referenced many of these documents in his petition. At the hearing on the motion to dismiss, Meade raised no objection to the court taking judicial notice of these documents for purposes of the motion to dismiss, provided the court accept the contents of the documents as true for purposes of the motion. Each of these documents, along with the entire Final Proxy from August 2019, are a matter of public record and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[86] Accordingly, the court takes judicial notice of the documents and the entire Final Proxy for purposes of ruling on the motions to dismiss.

DERIVATIVE v. DIRECT ACTION

EMCC, the Independent Directors, EMCI and Kelley filed motions to dismiss asserting Meade's petition must be dismissed because the relief he seeks is derivative and he failed to comply with the statutory demand requirement. Meade resisted asserting his action was direct. The court will address this threshold question first.

[82] *Id.* at ¶ 53.
[83] *Id.* at ¶¶ 30 n.1, 35, 36, 54, 70.
[84] *Id.* at ¶ 77.
[85] *Id.* at ¶¶ 64, 67.
[86] Iowa R. Evid. 5.201(b).

Meade was an owner of EMCI common stock on September 18, 2019. The court assumes Meade voted against the merger and he received cash for his shares on September 19, 2019. The court makes this assumption since Meade asserts he was allegedly damaged by the actions of the defendants. However, he does not specifically set forth in his petition that he voted against the merger or that he received cash for his shares on September 19, 2019. During arguments on the motions, his counsel did assert Meade no longer owned shares of stock in EMCI due to his shares being cashed out.

Meade asserts the Independent Directors breached fiduciary duties they owed to him. The Independent Directors assert this claim is derivative and Meade failed to submit a prior demand to EMCI before filing suit as required under Iowa Code section 490.742.

EMCC argues the issue of derivative versus direct applies with equal force to the majority shareholder of EMCI. EMCC asserts that shareholders have fewer duties than directors or officers. While the Iowa Business Corporation Act ("IBCA") explicitly imposes on "directors" and "officers" fiduciary duties to the corporation,[87] the statute imposes no duties on shareholders.[88] EMCC further asserts, during the merger, it wore only one hat, that of a buyer, which clearly establishes it owed no fiduciary duties to the shareholders of the selling corporation.[89] Thus, Meade's claim against EMCC, like its claim against the Independent Directors, is derivative.

Kelley incorporated, as part of his motion to dismiss, the legal arguments and positions of the other defendants in his motion. However, Kelley did not assert a specific claim addressing the derivative versus direct issue. Meade's claim against Kelley appears to be for breach of fiduciary

[87] Iowa Code §§ 490.830(1)(b) and 490.842.
[88] *Id.*
[89] *See Sheehan v. Little Switzerland, Inc.*, 136 F. Supp. 2d 301, 310–11 (D. Del. 2001).

duties he owed to the minority shareholders as a member of the board of EMCI.[90] These claims appear to be in Meade's first and third causes of action.[91] Kelley's motion relies primarily upon his assertion he recused himself from any discussions or negotiations related to the merger on or about November 3, 2018, which was the date the EMCC board met to discuss potential strategic alternatives to improve the financial performance of EMCI.[92] Not only was he a director on both boards but was also the president and CEO of EMCI and EMCC.[93] He also was one of the minority shareholders in EMCI.[94] If the court determines Meade's claims are derivative, any dismissal of his claims would also include those claims against Kelley. On this issue, the court will apply its decision to all of the defendants and refer to them collectively as such.

Shareholder lawsuits challenging corporate actions for breach of fiduciary duty generally fit into two categories: direct claims or derivative claims. Though framed as direct claims, defendants argue Meade's claims are actually derivative. "[T]he general rule is that a corporation that suffers damages through wrongs committed by its officers and directors must bring the action itself to recover the losses incurred thereby."[95] If, however, a shareholder was injured by the breach of "a special duty to the shareholder outside of duties to the corporation," he or she may bring a direct claim for relief.[96] Put another way:

---

[90] Pet., ¶ 2 ("EMCC used their business influence and power as controlling shareholder to dominate the sales process and force through the Buyout for the benefit of itself, its Board (*including Individual Defendant Kelley*), and its policyholders – not EMCI shareholders to whom they owed fiduciary duties.") (emphasis added). *See also* note 177 *supra.*

[91] Pet., ¶ 87-92 (first cause of action against Independent Defendants), ¶100-103 (third cause of action asserting Independent Defendants and officers and management of EMCI had conflict with EMCC as they are employees of both companies).

[92] EMCC App., Exhibit B, Proxy at 21.

[93] *Id.* at 8.

[94] *Id.* at 123.

[95] *Redeker v. Litt,* 699 N.W. 2d 684 (Table), 2005 WL 1224697, at *4 (Iowa Ct. App. 2005).

[96] *Ezzone v. Riccardi,* 525 N.W. 2d 388, 395 (Iowa 1994); *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983). *See also Tooley v. Donaldson*, *Lufkin & Jenrette, Inc.*, 845 A.2d

> [W]hether a claim asserted by stockholders . . . is one that may be pursued directly by them against the corporation's directors or must be pursued derivatively depends on whether the harm they claim to have suffered resulted from a breach of duty owed directly to them, or whether the harm claimed was derivative of a breach of duty owed to the corporation.[97]

Because derivative claims ultimately belong to the corporation rather than to shareholders individually, the Iowa legislature mandated shareholders "shall not commence a derivative proceeding until" (1) he or she has made a written demand upon the corporation *and* (2) 90 days have expired (or the corporation has rejected the demand).[98] This statute applies universally without exception.[99] Defendants argue because Meade failed to serve a pre-suit demand, he has not complied with the mandate of Iowa Code § 490.742. Therefore, his claim must be dismissed.[100]

The defendants assert Iowa has a "multi-constituency" or "other-constituency" statute that makes clear that, even in the context of a merger, directors had a duty, only, to act "in the best interests of the corporation. Specifically, Iowa's statute states:

> 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*

1031, 1036 (Del. 2004) ("[H]as the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?") (quoting *Agostino v. Hicks,* 2004 WL 443987 *7 (Del. Ch. March 11, 2004)).

[97] *Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918, 558 (Mass. 2017).

[98] Iowa Code § 490.742.

[99] Matthew Dore, *Iowa Practice Series, Business Organizations,* (Vol. 6 2019-2020 Edition) 6 Ia. Prac. § 39:10.

[100] *See Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192,194 (Iowa 2007) (motions to dismiss may be granted for lack of "standing . . . to sue"). In fact, some courts have held that disgruntled shareholders may not even assert derivative claims at all, and that their only remedy is to bring an appraisal action to challenge the fairness of the purchase price negotiated by the seller. *See, e.g., Sound Infiniti, Inc. v. Snyder*, 169 Wash. 2d 199, 207, 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 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 sub. 2].).

> *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.[101]

Defendants urge the court adopt the rationale of the Massachusetts Supreme Judicial Court in *Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918, 924 (2017). In *Tucci* the court analyzed Massachusetts' statute to determine whether a minority shareholders' challenge to the merger price in a going-private transaction was derivative or direct. The Massachusetts' statute construed in *Tucci* provided:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
> (1) in good faith;
> (2) with the care that a person in a like position would reasonably believe appropriate under similar circumstances; and
> (3) in a manner the director reasonably believes to be in the best interests of the corporation. In determining what the director reasonably believes to be in the best interests of the corporation, a director may consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, the region and the nation, community and societal considerations, and the long-term and short-

[101] Iowa Code § 490.1108A.1 (emphasis added) The statute continues:

> 2. If on the basis of the community interest factors described in subsection 1, the board of directors determines that a proposal or offer to acquire or merge the corporation is not in the best interests of the corporation, it may reject the proposal or offer. If the board of directors determines to reject any such proposal or offer, the board of directors has no obligation to facilitate, to remove any barriers to, or to refrain from impeding, the proposal or offer. Consideration of any or all of the community interest factors is not a violation of the business judgment rule or of any duty of the director to the shareholders, or a group of shareholders, even if the director reasonably determines that a community interest factor or factors outweigh the financial or other benefits to the corporation or a shareholder or group of shareholders.

> 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.
> * * *
> (c) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.[102]

The court interpreting these duties held the only duties owed by the director were to the corporation not the shareholders.

> The plain words of the statute contradict the plaintiffs' interpretation. By its terms, § 8.30 (a) sets forth the three components of a unitary standard that is to govern a corporate director in performing all the duties and actions he or she performs as a director.[8] That is, the plaintiffs' statement that § 8.30 (a) (1) through (a) (3) are to be read conjunctively is correct: every duty and action by a director as director is to be undertaken (1) in good faith, (2) with an appropriate level of care, and (3) "in a manner the director reasonably believes to be in the best interests of the corporation." Moreover, although § 8.30 (a) (3) makes clear that a director may consider, among other interests, "the long-term and short-term interests of the corporation and its shareholders" (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 § 8.30 (a) 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 § 8.30 (a) 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.[103]

The defendants contend the language of Iowa Code section 490.830(1-2) is similar to Massachusetts G. L. c. 156D, § 8.30(a)(1-2) and Iowa Code section 490.1108A(1)(c) is similar to Massachusetts G. L. c. 156D, § 8.30(a)(3). Finally, defendants assert Massachusetts G. L. c. 156D, § 8.30(c) is similar to Iowa Code section 490.831(1). A comparison of these statutes demonstrates they are similar to each other.

In finding the action derivative, the *Tucci* court stated:

---

[102] *Tucci*, 70 N.E.3d at 924 (quoting Massachusetts Business Corporation Act, G. L. c. 156D, § 8.30).
[103] *Id.* at 924–25.

> [T]he wrong alleged by the plaintiffs, undervaluing EMC to secure [its merger and sale], 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 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.* Because the plaintiffs did not bring their claim as a derivative action, their complaint was properly dismissed.
>
> . . . The plaintiffs have a response, however, which is that we should change our approach and follow those corporate law jurisdictions, including in particular Delaware, that treat the plaintiffs' type of claim—a challenge to the fairness of a merger transaction on the ground that the consideration is inadequate—as a direct rather than a derivative claim. We decline to do so. Delaware's [fiduciary duty common law] differs from the [Massachusetts statute], and has no equivalent of [the Massachusetts multi-constituency statute]. Delaware also has a history of asserting that directors stand in a fiduciary relation to stockholders of the company, in contrast to our own precedent.[104]

Defendants also assert other courts with similar statutes have more closely analyzed their statutes to determine whether challenges to the adequacy of the merger price are derivative in nature. Those courts have said that the Delaware-driven line of cases holding such a claim to be "direct simply because it challenges the validity of a merger" is "peculiar to Delaware law."[105] Instead, these courts are finding challenges to the adequacy of the merger price are derivative, particularly where the director fiduciary statute specifies the director's duties run "to the corporation" alone.[106]

In response Meade asserts Iowa recognizes a widely used common law test for distinguishing direct from derivative claims that is applied by courts across the country—a

---

[104] *Id.* at 926-27 (emphasis added).
[105] *Jarackas v Applied Signal Technology, Inc*., No. 111CV19643, 2012 WL 9764184, at *3 (Cal. Super. Mar. 15, 2012).
[106] *E.g., id*.; *Tucci*, 70 N.E.3d at 926--27; *Sullivan v Actel Corp*., No. 110-CV-184257, 2012 WL 9944634, at *4 (Cal. Super. Mar. 08, 2012); *Gusinsky v. Flanders Corp*., 2013 NCBC 46, 2013 WL 5435788, *4 (N.C. Super. Business Ct. 2013); *Kadel v. Dayton Superior Corp*., 731 N.E.2d 1244, 1247 (Ohio C. Pl. Montgomery Cty. 2000).

minority shareholder or class of minority shareholders may maintain a direct action when they allege they have suffered an "injury separate and distinct" from that suffered by a majority or controlling shareholder.[107] He asserts it is beyond dispute that he and the class of minority EMCI shareholders, he seeks to represent, suffered an injury that was separate and distinct from that suffered by EMCI's controlling shareholder, EMCC. Thus, Meade contends he satisfied the "separate and distinct injury" test recognized by the Iowa Supreme Court in *Cunningham*. He further asserts EMCC did not suffer any injury at all because it was able to use its power as a controlling shareholder to acquire the shares owned by EMCI's minority shareholders for grossly inadequate consideration, shortchanging them for their own personal property (their shares) by millions of dollars aggregately.[108] Other courts that apply the "separate and distinct injury" test consistently hold that claims such as those at issue here, where a group of minority shareholders allege they have been harmed in a separate and distinct manner by a majority shareholder, are direct claims.[109]

---

[107] *See Cunningham*, 332 N.W.2d at 883 (Meade does not argue he can pursue his claim because a third party owed him a special duty.).

[108] *See* 12B Fletcher Cyclopedia of the Law of Corporations § 5924 ("The exception to the rule forbidding direct shareholder suits against management is most compelling where the alleged wrong unfairly affected the minority shareholders but did not work an injury either to the corporation or its majority shareholders.").

[109] *See, e.g., Norman v. Nash Johnson & Sons' Farms, Inc.*, 537 S.E.2d 248, 260-61 (N.C. Ct. App. 2000) (applying the same "separate and distinct" injury test and concluding that plaintiff stockholders sufficiently alleged a separate and distinct injury where defendant majority-stockholders and officers diverted corporate assets to themselves and, therefore, "suffered no injuries at all"); *Grace Bros. v. Farley Indus*., 450 S.E.2d 814, 816 (Ga. 1994) ("One of plaintiffs' claims – that defendants breached their fiduciary duty to minority shareholders by failing to seek consummation of the original merger agreement – meets this test. That claim asserts an injury separate and distinct from any injury to the corporation or the majority shareholders because only the minority shareholders stood to receive $58 per share upon consummation of the merger agreement."); *Kim v. Grover C. Coors Tr.*, 179 P.3d 86, 89-90 (Colo. Ct. App. 2007), *cert. denied*, 2007 Colo. LEXIS 896 (2007) (holding a shareholder bringing suit "individually, *and on behalf of similarly situated shareholders*" had standing when he alleged that the injury he and the other similarly situated shareholders suffered was "*based upon his status as a non-controlling*

Meade also argues his petition satisfies the "*Parnes*" test that the Iowa Court of Appeals cited in *Kelly*.[110] Even before *Kelly*, shareholders of Iowa corporations could bring direct rather than derivative claims by pleading a direct injury rather than a harm that occurs to the corporation.[111] Moreover, here, Meade asserts the corporate entity EMCI was not "wronged" or harmed by the merger, EMCI's minority shareholders who had their own personal property (their shares) taken from them for inadequate consideration were the ones harmed.[112]

Meade contends the merger agreement negotiated by the Independent Directors was not fair. He claims the price per share should have been higher. He faults the Independent Directors for failing to speak to the insurance commissioner regarding the alternative proposal they made. He claims the Independent Directors did not adequately inform the minority shareholders of certain facts that he believes were material to the decision whether to accept the share price accepted by the Special Committee. He contends the Independent Directors' failures were a breach of their fiduciary duties to the minority shareholders. This is a situation where Meade contends he and others similarly situated suffered an injury separate and distinct from that suffered by the majority shareholder, EMCC. There was no injury to the corporation due to the nature of the merger. EMCI

---

shareholder and derived from the actions of" individuals who controlled the corporation) (emphasis added)).

[110] *Kelly v. Englehart Corp.,* 2001 WL 855600 (Iowa Ct. App. July 31, 2001).

[111] *Engstrand v. W. Des Moines State Bank*, 516 N.W.2d 797, 799-800 (Iowa 1994) (explaining shareholders may not bring a direct action if they were only "indirectly" harmed by "a wrong against the corporation").

[112] *See Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 732 (Nev. 2003) ("A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property—his or her interest in a specific corporation."); *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 425 (Md. 2009) ("[W]here a shareholder is cheated through misrepresentation and fraud during a sale of stock, no right of action accrues to the corporation because the stock is the personal property of the stockholder.").

went from being a public corporation with the majority of its shares owned by EMCC to a private corporation with EMCC owning all of the shares of the corporation.

There are no Iowa cases adopting the *Tucci* rationale. The court recognizes our appellate court has not have had an opportunity to examine Iowa's common law and its interplay with some of the amendments to the IBCA since *Cunningham*, particularly as it influences this issue, and/or the court's rationale in *Tucci.* The court notes the amendments to the IBCA may also impact other issues raised in this case which our appellate courts have not confronted. Likewise, much of Iowa's common law involved closely held corporations. While Massachusetts' statute and Iowa's are very similar and the rationale set forth in *Tucci* is persuasive in light of the statutory language, the allegations asserted by Meade meet the separate and distinct test outlined in *Cunningham* and relied upon by our appellate courts since. In light of the long-standing rule in *Cunningham* this court believes it is for the supreme court to determine whether amendments to the IBCA and/or the rationale in *Tucci* result in a modification of the *Cunningham* rule.

Likewise, the court finds instructive a Delaware decision in which the court asserted the proper analysis for determining whether the suit is derivative or direct is for the court to

> look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."[113]

Here Meade's allegations are the defendants' breached duties owed to him and other minority shareholders, they alone suffered the injury since there was no injury to EMCI. While a federal district court examining a claim arising out of the same going-private transaction, found another EMCI minority shareholder's claim was derivative. The federal court made this determination

[113] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A.2d 1031, 1039 (Del. 2004).

because the minority shareholder, Shepard, alleged mismanagement by the defendants prior to the going-private transaction, which resulted in depressing the value of EMCI's stock.[114] As the court noted Shepard was seeking recovery for an injury to the corporation that was shared indirectly by the shareholders, which did not meet the separate and distinct injury test.[115]

At this stage, the court does not see based upon Meade's allegations how the actions of the defendants injured EMCI. Also Meade is not asserting a claim that the defendants mismanaged EMCI causing the stock to be undervalued. Meade alleges the defendants to the extent they owed fiduciary duties to the minority shareholders caused damage directly to them by breaching their fiduciary duties resulting in an inadequate price for their stock to their detriment not EMCI's.

For these reasons the court concludes Meade's claims are direct not derivative. Thus, the defendants' motions to dismiss based upon this argument are denied.

INDEPENDENT DIRECTORS' MOTION TO DISMISS

Meade asserted in count I of the petition:

> The Individual Defendants have breached their fiduciary duties of care, loyalty, good faith and candor owed to the public shareholders of EMCI.[116]
>
> . . . the Individual Defendants failed to exercise the care required, and breached their duties of loyalty an [sic] good faith owed to the shareholders of EMCI because, among other reasons, they: (i) facilitated and oversaw a conflicted sales process and agreed to the conflicted Buyout with the Company's controlling shareholder for inadequate consideration; (ii) failed to obtain fair consideration for EMCI shareholders in connection with the Buyout; (iii) agreed to unfair provisions in the Merger Agreement that impede superior bidders from emerging; and (iv) authorized the filing of the materially incomplete and misleading Proxy.[117]

---

[114] *Shepard v. Employers Mut. Cas. Co.*,_____ F.Supp.3d _____, 2020 WL 5267911, at *8 (S.D. Iowa Aug. 3, 2020) ("Here, Shepard has represented that his claim is not related to the merger, or "squeeze-out" as he calls it, but to failure to enhance the value of EMCI in the years prior to the merger.").
[115] *Id.* at *9
[116] Pet. ¶ 87.
[117] Pet. ¶ 89.

The Individual Defendants include the directors of EMCI who are referred to in defendants' brief as the Independent Directors. These directors are Peter S. Christie, Stephen A. Crane, Jonathan R. Fletcher, and Gretchen H. Tegeler, These directors also comprised the Special Committee. The other individual defendant was Bruce Kelley who was the other director of EMCI. The court will address in this portion of its ruling the claims against the Independent Directors since Bruce Kelley filed his own motion to dismiss.

Generally, corporate directors' fiduciary duties are "twofold, consisting of a duty of care and a duty of loyalty."[118] At the time of the supreme court's decision in *Cookies* these duties were codified at Iowa Code section 496A.34 (1987). Specifically, the statute provided:

> A director shall perform the duties of a director, including the duties as a member of any committee of the board upon which such director may serve, in good faith, in a manner such director reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.[119]

These duties are now codified in Iowa Code section 490.830 which provides:

> 1. Each member of the board of directors, when discharging the duties of a director, shall act in conformity with all of the following:
> *a.* In good faith.
> *b.* In a manner the director reasonably believes to be in the best interests of the corporation.
> 2. The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

"The director's duties under Section 490.830 to become informed, devote attention, and to form a 'reasonable belief' about certain matters correspond most closely to the standard of care

---

[118] *Cookies Food Products, Inc., Rowedder v. Lakes Warehouse Distributing, Inc.,* 430 N.W.2d 447, 451 (Iowa 1988).
[119] Iowa Code § 496A.34 (1988).

component of the director's fiduciary duty of care."[120] In other words, the "duty to manage the corporation is sometimes described as the 'substantive' component of a director's duty of care."[121] The director's duty to discharge duties in "good faith" and "best interests of the corporation" "relate most directly to the director's fiduciary duty of loyalty."[122] Here Meade challenges the Independent Directors performance of their duties of care and loyalty as members of the EMCI board and the Special Committee established to evaluate, negotiate and recommend to the minority shareholders of EMCI whether the proposal by EMCC to purchase the minority shareholders' stock in EMCI was in the best interests of the corporation.

The duty of care requires a director to exercise "the care a person in a like position would reasonably believe appropriate under similar circumstances."[123] The duty of care has not been interpreted to impose a reasonable care standard similar to the negligence standards of tort law.[124] "Many jurisdictions impose a 'reasonable care' standard but few decisions purport to hold directors liable for a mere failure to exercise such care."[125]

The duty of loyalty requires the "director must always be honest in dealing with the corporation and cannot, while serving as a director, advance the director's own self-interest or the interests of any party *other than* the corporation."[126] This duty requires "the director to act in the best interests of the corporation in all 'matters affecting [its] general well-being.'"[127] This duty prohibits "the misappropriation of corporate assets, conflict of interest transactions, competition

[120] Doré, 6 IAPRAC § 28:3 at 85
[121] Doré, 6 IAPRAC § 28:4 at 86
[122] Doré, 6 IAPRAC § 28:3 at 85
[123] Doré, 6 IAPRAC § 28:5 at 93. *See also* Iowa Code § 490.830(2).
[124] Doré, 6 IAPRAC § 28:5 at 93.
[125] *Id.* at 94. *See also id.* n.13 (Delaware requires this duty be evaluated under a gross negligence standard).
[126] Doré, 6 IAPRAC § 28:8 at 119.
[127] *Id.* at 120 (citing *Midwest Management Corp. v. Stephens,* 353 N.W.2d 76, 80 (Iowa 1984)).

with the corporation, or taking a corporate business opportunity without the corporations' consent."[128] In the context of an acquisition, the Delaware courts hold the board of directors are to obtain the best possible price for the shareholders.[129] However, Iowa's statute, referred to as a constituency statute, allows the directors the flexibility in an acquisition "to consider the 'effects' of the action on the corporation's employees, suppliers, creditors, and customers, and on communities in which the corporation operates, as well as 'long-term [and] 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.'"[130] "The director can, in the acquisition context at least, allow the interests of other corporate constituencies to *trump* the interests of shareholders."[131]

The Independent Directors assert their liability for actions as corporate directors is limited. Iowa Code section 490.831 outlines when a director can be liable for monetary damages.[132] The statute provides:

> 1. A director shall not be liable to the corporation or its shareholders for any decision as director to take or not to take action, or any failure to take any action, unless the party asserting liability in a proceeding establishes both of the following:
> a. That any of the following apply:
> (1) No defense interposed by the director based on any of the following precludes liability:
> (a) A provision in the articles of incorporation authorized by section 490.202, subsection 2, paragraph "d".
> (b) The protection afforded by section 490.861 for action taken in compliance with section 490.862 or 490.863.

[128] *Id.* at 120 (citations omitted)
[129] *Id.* at 123 (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del. 1986)).
[130] *Id.* at 124 (discussing Iowa Code section 490.1108A).
[131] *Id.* (emphasis original).
[132] *See also* Doré, 6 IAPRAC § 28:4 at 86 ("A new IBCA provision, Section 490.831, which defines liability standards for directors . . . .").

(c) The protection afforded by section 490.870.

(2) The protection afforded by section 490.870 does not preclude liability.

b. That the challenged conduct consisted or was the result of one of the following:

(1) Action not in good faith.

(2) A decision that satisfies one of the following:

(a) That the director did not reasonably believe to be in the best interests of the corporation.

(b) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances.

(3) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct, which also meets both of the following criteria:

(a) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation.

(b) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation.

(4) A sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need for such oversight, attention, or inquiry.

(5) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

2. a. A party seeking to hold the director liable for money damages shall also have the burden of establishing both of the following:

(1) That harm to the corporation or its shareholders has been suffered.

(2) The harm suffered was proximately caused by the director's challenged conduct.

b. A party seeking to hold the director liable for other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances.

c. A party seeking to hold the director liable for other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, shall also have whatever persuasion burden may be called for

> to establish that the equitable remedy sought is appropriate in the circumstances.
>
> 3. This section shall not do any of the following:
> a. In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under section 490.861, subsection 2, paragraph "c", alter the burden of proving the fact or lack of fairness otherwise applicable.
> b. Alter the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under section 490.833 or a transactional interest under section 490.861.
> c. Affect any rights to which the corporation or a shareholder may be entitled under another statute of this state or the United States.
>
> Summarizing section 490.831, the Independent Directors assert the
>
> statute places the burden on a shareholder plaintiff to establish that (1) a director committed, or failed to perform, some act detrimental to the corporation; (2) said director's conduct was the legal cause of monetary harm to the corporation; and (3) said director is not shielded from liability by *any* of the *numerous* statutory prerequisites delineated by, at least, Iowa Code §§ 490.202, 490.861, or 490.870.[133]

The Independent Directors argue a plaintiff, to survive a motion to dismiss, must plead they do not have available *any* of the following defenses under section 490.831(1)(a)(1(a-c):

1. *Articles of incorporation limitations (the "Director Shield Defense")*: If a corporation's articles of incorporation expressly limit director liability for money damages, except in certain circumstances required by law, such limitations will eliminate director liability.[134]

2. *Director's conflicting interest transaction safe harbor*: If a director is alleged to be involved in a "director's conflicting interest transaction,"[135] the director is not

---

[133] Independent Directors' Brief, at 13 (Polk Cty Dist. Ct. Jan. 27, 2020) (citing Model Business Corporation Act (2016 Revision) (Dec. 9, 2016), hereinafter "MBCA," at § 8.31, Official Cmt., noting, "Boards of directors and corporate managers make numerous decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to have been unwise or the result of a mistake of judgment, it is not reasonable to impose liability for an informed decision made in good faith which with the benefit of hindsight turns out to be wrong or unwise. Therefore, as a general rule, a director is not exposed to personal liability for injury or damage caused by an unwise decision and conduct confirming with the standards of section 8.30 will almost always be protected regardless of the end result.").
[134] Independent Director's Brief, at 13, *See also* Iowa Code § 490.202(2)(d)
[135] *See* Iowa Code § 490.860(2) (defining "director conflicting interest transaction").

subject to director liability for money damages if the corporation or the director implements a safe harbor procedure, as such procedure will eliminate director liability.

3. *Business judgment rule*: If the prior two statutory prerequisites are inapplicable to shield director liability, "the presumptions, standards of judicial review and procedural matters related to the business judgment rule may insulate the director from liability for conduct in connection with a corporate decision."[136]

The Independent Directors argue that Meade must plead in his petition that all of these defenses are unavailable to a director defendant in order for him to successfully assert a claim for breach of fiduciary duty and successfully defeat a motion to dismiss. They assert that if any of these defenses are available, Meade cannot pursue a claim for monetary damages against a director. The Independent Directors contend Meade has failed to plead that any of these statutory defenses are unavailable to them. As such, they assert the claim against them for breach of fiduciary duties should be dismissed for failure to state a claim for relief which can be granted, because the statutory defenses are available to the Independent Directors.

In addressing this issue, the court disagrees with the Independent Directors' assertion for two reasons. First, Iowa is a notice pleading state. The court does not believe the statute requires the plaintiff must set forth facts in its petition that ultimately establishes the unavailability of each of these defenses to the Independent Directors. Second, a review of the statutory language supports this conclusion.

Under section 490.831, in order to obtain a money judgment against a director a plaintiff must establish two conditions. The first is none of the defenses *interposed* by the defendant precludes liability.[137] Many times at the motion to dismiss stage, the defendants have not interposed any defenses to the plaintiff's claims. These defenses do not exist until the defendant

[136] Independent Director's Brief, at 13-14.
[137] Iowa Code § 490.831(1)(a)(1).

asserts them. Here no defenses were interposed. Second, plaintiff must prove both conditions. The second is found in section 490.832(1)(b) which requires a showing that the director's action was not in good faith, was not in the best interests of the corporation, or the director was not reasonably informed about the transaction.

Here plaintiff has pled the following. The actions were not in good faith, was not in the best interests of the corporation, and the directors were not reasonably informed. The court's review of a motion to dismiss is whether the facts asserted if accepted as true would allow a factfinder to find in favor of the plaintiff. While the court does not believe Meade must assert facts that establishes the statutory defenses are not available, the court believes a discussion of the defenses is important in addressing the parties' arguments. Accordingly, the court addresses each of the statutory defenses in light of Meade's allegations.

Director shield defense

The first defense is the "director shield defense." Iowa Code section 490.202(2)(d) codifies this defense. So long as a corporation's articles of incorporation contain provisions limiting director liability, the provisions in the articles of incorporation will shield directors except in a very narrow set of circumstances. Likewise, the defense only protects a director from monetary damages; it does not affect the director's fiduciary duties or protect the director from non-monetary relief (e.g., injunctive relief).[138]

The exceptions, where director liability may be established, are: (a) receipt of a financial benefit to which a director is not entitled; (b) intentional infliction of harm on the corporation or shareholders; (c) unlawful distribution under section 490.833; or (d) an intentional violation of

[138] Doré, 6 IAPRAC § 28:14 at 154

criminal law.[139] If a plaintiff establishes one of these exceptions, the director will not benefit from the "director shield defense."

Meade's petition makes no reference to EMCI's articles of incorporation. However, they are filed with the Iowa Secretary of State and the Independent Directors request the court take judicial notice of them. Because the articles are capable of accurate and ready determination from a source that cannot be reasonably questioned, the court takes judicial notice of them.[140]

The relevant articles are the restated articles of incorporation of EMC Insurance Group Inc. filed on June 9, 2004.[141] Article VIII provides:

> A director of the corporation shall not be liable 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: (1) the amount of a financial benefit received by a director to which the director is not entitled; (2) an intentional infliction of harm on the corporation or the shareholders; (3) a violation of section 490.833 of the Iowa Business Corporation Act; or (4) an intentional violation of criminal law. If the Iowa Business Corporation Act is hereafter amended to authorize the further elimination or limitation of the liability of directors, then the liability of a director of the corporation, in addition to the limitation on personal liability provided herein, shall be eliminated or limited to the extent to of such amendment, automatically and without any further action, to the fullest extent permitted by law. Any repeal or modification of this Article by the shareholders of the corporation shall be prospective only and shall not adversely affect any limitation on the personal liability or any other right or protections of a director of the corporation with respect to any state of facts existing at or prior to the time of such repeal or modification.[142]

The Independent Directors assert Meade pled no facts that would eliminate the director defense shield. A review of Meade's petition demonstrates he made no allegations the Independent Directors received a financial benefit to which they were not entitled, violated section 490.833, or

---

[139] *See* § 490.202(2)(d)(1).
[140] *See* Iowa R. Evid. 5.201(b).
[141] Independent Directors' Brief, at 16 n.14
[142] https://sos.iowa.gov/search/business/search.aspx, Restated Articles of Incorporation of EMC Insurance Group Inc. (June 9, 20104)

engaged in criminal activity. That leaves only whether the Independent Directors intentionally inflicted harm on the corporation or shareholders.

Review of the petition indicates Meade believed the Independent Directors breached their fiduciary duties by failing to reject EMCC's offer and maintain EMCI as a standalone company.[143] In addition, he contends the Independent Directors failed to scrutinize the proxy statement sent to the shareholders by failing to include the financial analysis Sandler O'Neill performed for EMCI regarding the alternative proposal. This Meade alleges led to the presentation of misrepresented or omitted material information, which led to uninformed shareholders.[144] Meade also alleged the Independent Directors inadequately questioned Sandler O'Neill regarding its financial analysis to determine which projections provided by EMCC and Sandler O'Neill increased the discount rate. Meade asserts the Independent Directors "either failed to inform itself as to valuation and properly engage Sandler O'Neill or were aware of this substantial alteration of the discount rate and chose to conceal it from the shareholders."[145] Meade further charged the Independent Directors failed to disclose Shepard's interest in making an offer for EMCI, which further led to inadequate disclosure to the shareholders.[146] Meade alleges the Independent Directors engaged in a conflicted and flawed sales process resulting in inadequate compensation to the minority shareholders.[147] Meade also alleged the Individual Directors "*intentionally* failed to act in the face of a known duty to act, demonstrating *conscious disregard* for their duties."[148] As the court is required to accept as true the allegations of the petition, it concludes Meade has stated a claim that the Independent Directors

[143] Pet., ¶ 66, 67.
[144] *Id.* at ¶¶ 73-76.
[145] *Id.* at ¶ 79.
[146] *Id.* at ¶¶ 80-85.
[147] Pet., ¶¶ 66, 85.
[148] Pet., ¶ 88 (emphasis added).

may have engaged in an intentional infliction of harm on the shareholders. Thus, at this stage Meade has stated sufficient facts that may preclude the Independent Director's use of the director's shield defense and lead to all or some of the relief requested.

Director's Conflicting Interest Safe Harbor

Second, the Independent Directors assert Meade failed to allege any facts precluding the Independent Directors from utilizing the safe harbor for a director's conflicted interest transaction ("DCIT") under Iowa Code section 490.861(1), which states:

> A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, *shall not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director* of the corporation, *in a proceeding by a shareholder* or by or in the right of the corporation, *on the ground that the director has an interest respecting the transaction, if it is not a director's conflicting interest transaction*. (Emphasis added).

The definition of a DCIT is:

> 2. "Director's conflicting interest transaction" means a transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation to which, or respecting which, any of the following applies:
> a. To which, at the relevant time, the director is a party.
> b. Respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director.
> c. Respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.[149]

Meade did not allege that any of the Independent Directors were a party to a DCIT. Under section 490.860(2)(b), a DCIT exists if the director is not a party but knows about the transaction and has a material financial interest in the transaction.[150] "Material financial interest is a financial interest in a transaction that would reasonably be expected to impair the objectivity of the director's

[149] Iowa Code § 490.860(2).
[150] Dore, 6 IAPRAC § 28.11, at 136

judgment when participating in action on the authorization of the transaction."[151] The only assertion Meade makes that could be construed as a "material financial interest," is the Independent Directors "engaged in self-dealing and/or obtained for themselves benefits, not shared equally by Plaintiff or the Company's other shareholders."[152] However, Meade makes no factual assertions how the Independent Directors engaged in self-dealing or what benefits they received that were greater than what he or the other shareholders received. Finally, Meade did not allege that any of the Independent Directors knew that a related person was a party or had a material financial interest. Thus, the court concludes Meade has not made factual allegations that would allow this court to determine whether the Independent Directors are precluded from utilizing the DCIT safe harbor.

Business Judgment Rule

The next argument urged by the Independent Directors is that the business judgment rule is applicable here and Meade failed to adequately plead it is unavailable to them to bar liability. In order to facilitate corporate decision-making and to "severely limit second guessing of business decisions which have been made by those whom the corporation has chosen to make them," Iowa's courts adopted the "business judgment rule." [153]

> Generally, the decisions of directors are presumed to be informed, made in good faith, and believed to be made in the best interests of the company. This presumption is known as the business judgment rule. In light of this presumption,

[151] *Id.* (citing Model Business Corp. Act Ann. § 8.60, cmt. 4 (3d ed. 1985 & Supp.) "That is, materiality does not turn on a director's 'assertion . . . that the [financial] interest in question would not impair his or her objectivity' but instead on 'whether the objectivity of a reasonable director in similar circumstances would reasonably be expected to have been impaired by the financial interest when voting on the matter.'"). *See also* Iowa Code § 490.860(4).
[152] Pet., ¶ 27.
[153] *Hanrahan v. Kruidenier*, 473 N.W.2d 184, 186 (Iowa 1991).

> the burden of proving a violation of a duty of care rests with the [parties challenging corporate action].[154]

However, in conflicted-fiduciary transactions with a corporation, the Iowa Supreme Court has applied the "entire fairness" standard or review.[155] In such cases, the burden shifts to the self-interested director to show the director acted honestly, in good faith, and fairly to the shareholders.[156]

Until recently, Delaware courts typically applied the "entire fairness" standard to conflicted-fiduciary transactions.[157] However, in 2014, the Delaware Court of Chancery and the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.,* 88 A.3d 635 (Del. 2014) (hereinafter *MFW*) approved a procedure whereby conflicted parties to a "going-private" transaction could (a) eliminate the conflict of interest; and (b) provide additional procedural protections to minority shareholders, such that the business judgment rule, and *not* the "entire fairness" standard, would apply to such transactions.[158] In *MFW*, MacAndrews & Forbes Holdings, Inc., a 43% stockholder in M&F Worldwide Corp., offered to purchase M&F Worldwide's remaining shares.[159] Delaware's Court of Chancery and Supreme Court held that the business judgment rule, and not the "entire fairness" standard, should apply because the transaction satisfied the following six factors:

---

[154] *Cent. Iowa Power Co-op. v. Consumers Energy*, 41 N.W.2d 822 (Table) 2007 WL 2710841, at *3 (Iowa Ct. App. Sept. 19, 2007). *See also Oberbillig v. W. Grand Towers Condo. Ass'n*, 807 N.W.2d 143, 156 (Iowa 2011) (applying business judgment rule).
[155] *Cookies Food Products, Inc. v. Lakes Warehouse Dist., Inc.*, 430 N.W.2d 447, 452 (Iowa 1988) (quoting *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.,* 51 N.W.2d 174, 216 (Iowa 1952)).
[156] *Id.* at 452–53.
[157] The court is not making a determination that this transaction was a conflicted-fiduciary transaction from the perspective of the Independent Directors.
[158] *MFW*, 88 A.3d at 645 (*emphasis added)*, overruled on other grounds by *Flood v. Synutra Int'l, Inc.,* 195 A.3d 754 (Del. 2018).
[159] *Id.* at 638.

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[160]

However, the court further held that if a minority shareholder "can plead *a reasonably conceivable* set of facts showing that *any or all of*" the conditions for applying the business judgement standard of review to a going-private merger between a controlling stockholder and its corporate subsidiary *do not exist*,

> that complainant would state a claim for relief that would entitle the plaintiff to proceed and conduct discovery. If, after discovery, triable issues of fact remain about whether either or both of the dual procedural protections were established, or if established were effective, the case will proceed to a trial in which the court will conduct *an entire fairness review*.[161]

After reviewing the transaction under the business judgment rule, the Delaware court in *MFW* granted summary judgment to the defendants.[162]

One court explained that the *MFW* framework was designed to facilitate motions to dismiss when transactions followed the six steps outlined in the case. "[T]he whole point of encouraging [the *MFW*] structure was to create a situation where defendants could effectively structure a transaction so that they could *obtain a pleading-stage dismissal against breach of fiduciary duty claims*."[163] In the wake of *MFW,* courts in other states have granted motions to dismiss cases

---

[160] *Id.* at 645. *See also id* n.14 (court noted that if this issue had been raised in a motion to dismiss the court would have allowed the case to proceed since the plaintiffs asserted sufficient facts questioning the adequacy of the Special Committee's negotiations).
[161] *Id.* at 645-46 (emphasis added).
[162] *Id.* at 638-39.
[163] *Swomley v. Schlecht,* 2014 WL 4470947, at *19 (Del. Ch. Aug. 27, 2014) (emphasis added).

challenging conflicted-fiduciary going-private transactions where the parties followed the *MFW* protocols.[164]

The Independent Directors urge this court to adopt the *MFW* framework, even though it has not been adopted in Iowa. They contend the linchpin of the decision, requiring approval of the transaction by both the disinterested directors and a majority of the minority shareholders, has been recognized under the IBCA as providing adequate safeguards to preclude judicial challenges to an "interested transaction," which they concede would include the transaction at issue here.[165]

Here, it is undisputed the transaction was conditioned on the approval of both a special committee (the Independent Directors) and a majority of the minority shareholders. It is also not in dispute that the Independent Directors were empowered to and did freely select its own advisors. However, Meade contends the Special Committee was not independent because EMCC could dismiss the committee members at will and they received "millions of dollars in fees" from their work as EMCI directors.[166] He also contends the Independent Directors did not meet their duty of care in negotiating a fair price.[167] Finally, Meade alleges the minority shareholders were not fully informed in the Proxy and as such their vote was uninformed and coerced.[168]

---

[164] *E.g.*, *In re Kenneth Cole Prods., Inc.*, 52 N.E.3d 214 (N.Y. Ct. App. 2016); *In re Books-A-Million, Inc. Stockholders Litig.*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016), *aff'd*, 164 A.3d 56 (Del. 2017); *In re Baltic Trading Stockholders Litig.*, 160 A.D.3d 599 (N.Y. App. Div. 2018); *In re Synutra Intern., Inc.*, 2018 WL 705702, at *6 (Del. Ch. Feb. 02, 2018), *aff'd sub nom. Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018); *Stein v. BBX Capital Corp.,* 216 WL 11486212, at *2 (Fla. Cir. Ct. Nov. 21, 2016), *aff'd,* 241So. 2d 874 (Fla. Dist. Ct. App. 2018).

[165] *See generally* Iowa Code §§490.1301(6) and 1340.

[166] As noted above the petition failed to establish how the Independent Directors received benefits for which they were not entitled. However, Meade's brief asserts they received "millions of dollars in fees. *See* Meade's Brief at 7. The information for the assertion in the brief the court assumes came from Shepard's March 25, 2019 letter to the Special Committee which was attached to EMCC's brief as Exhibit M. Specifically, Shepard asserted the Special Committee received $2.5 million in fees during their tenures as board members. Ex. M at 2 of 7.

[167] Pet., ¶¶ 27, 50, 54, 66, 69, 71, 72

[168] Pet., ¶¶ 73-84

More specifically, he alleges the EMCI shareholders: (1) did not get full disclosure of the amount of value potentially created under the Alternative Proposal or Sandler O'Neill's full financial projections and preliminary valuation analyses,[169] (2) the Proxy did not disclose the reasoning and justifications for certain downward revisions in the Company Projections between November 2018 and May 2019,[170] (3) the Proxy did not inform the EMCI shareholders about why there was an alteration of the discount rate,[171] and (4) the Proxy mislead the minority shareholders into not looking for Shepard's March 25, 2019 letter because it did not disclose that the letter included allegations of conflicts of interest and breaches of fiduciary duty.[172]

The court notes the *MFW* court granted the defendants relief ruling on a motion for summary judgment with a fully developed record.[173] The impact of *MFW* is that the business judgment rule becomes the standard of review that governs mergers between a controlling shareholder and its corporate subsidiary. While it may be appropriate for the court to implement the *MFW* analysis during a later stage in the case, the court cannot do so at this time. The court finds Meade has sufficiently plead at least *a reasonably conceivable* set of facts showing at least *some* of the *MFW* factors are lacking.[174] Specifically, he alleged the Independent Directors failed to protect the minority shareholders from an undervalued price, and by allowing the Proxy to be mailed to the shareholders without material financial analyses performed by Sandler O'Neill, which prevented EMCI shareholders from casting an informed vote. Meade also pled that the minority shareholders were not fully informed of all material information regarding the buyout,

[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *MFW,* 88 A.3d at 638-39.
[174] *See MFW*, 88 A.3d at 645-46.

the Independent Directors were directly appointed by EMCC and thus EMCC could potentially dismiss each of them, and they received millions in fees during their tenures. As set forth above, nearly every case will survive a motion to dismiss under notice pleading and a "court should grant a motion to dismiss only if the petition on its face shows no right of recovery under any state of facts."[175] Accordingly, the court concludes the Independent Directors' motion to dismiss must be denied.

BRUCE KELLEY'S MOTION TO DISMISS

Meade alleges in his first cause of action that Kelley as an Individual Defendant in connection with the going-private transaction, breached his fiduciary duties of care, loyalty, good faith, and candor to the public shareholders of EMCI.[176] While not explicitly making this allegation, a review of Meade's petition demonstrates Meade asserts Kelley engaged in these actions in his role as a member of the board of directors of EMCI.[177] Kelley seeks dismissal on the basis he recused himself from any discussion of the going-private transaction before EMCC made its proposal to EMCI. Further, he asserts there are no allegations that he was involved in any discussions involving the going-private transaction after his recusal other than lumping him with the Independent Defendants.

The Proxy states on November 3, 2018,

> EMCC's Board of Directors (other than Mr. Kelley who voluntarily recused himself from the meeting and all future meetings of EMCC's Board of Directors, the Finance Committee, and [EMCI's] Board regarding the potential going-private transaction in order to avoid any potential conflict of interest) met to discuss potential strategic alternative to improve the financial performance of [EMCI] and to review the recommendation of the Finance Committee.[178]

---

[175] *Id.*; *see also Young*, 877 N.W.2d at 132 (explaining that under the applicable pleading rules even "dismissals of many of the weakest cases must be reversed on appeal.").
[176] Pet. ¶¶ 87-91
[177] *See* Pet. ¶¶ 5, 7, 22, 24, 27, 66, 68, 73, &79.
[178] Proxy at 21.

This is just one of 15 times it is stated throughout the Proxy that Kelley recused himself from all aspects of the buyout.[179] The Proxy specifically states that Kelley recused himself of "all of [EMCI's] and EMCC's Board of Director's respective discussions, considerations, recommendations and votes for the proposed transaction."[180]

As set forth above, per the consent of Meade the court has taken judicial notice of the Proxy and takes the facts set forth therein as true. Based on the statements in the Proxy, the court concludes Kelley recused himself before any wrongful acts alleged by Meade occurred. The first wrongful act alleged by Meade was when EMCC publicly announced its offer to buyout EMCI "with an inadequate offer" of $30.00 per share on November 16, 2018.[181] At that time, Kelley was not involved in the transaction or any of the decisions surrounding it. Moreover, the Proxy on numerous occasions informed the minority stockholders Kelley was not involved in any of the decisions or discussions surrounding the going-private transaction.

The court notes that in his resistance to defendants' motions to dismiss Meade speculates as to various other actions Kelley was involved where he breached his fiduciary duty to EMCI's public shareholders, including that Kelley may have been present at meetings regarding the Alternate Proposal and he authorized dissemination of the misleading Proxy. However, as set forth above, this court cannot rely on facts not alleged in the petition, except those of which judicial notice is taken, nor be aided by any information provided at an evidentiary hearing.[182] It is well established a complaint may not be amended by briefs filed in opposition to a motion to

[179] Proxy at Table of Contents, 2, 5, 8, 17, 37, 38, 42, 69-70, 76, 78, 89.
[180] *Id.*
[181] Pet., ¶ 3.
[182] *See Berger,* 268 N.W.2d at 637; *Rush v. Reynolds,* 946 N.W.2d 543 (Table), 2020 WL 825953 at *7 (Iowa Ct. App. Feb. 19, 2020).

dismiss."[183] Meade did not plead any of these allegations with regard to Kelley in his petition and consequently this court cannot consider them.

Accordingly, the court concludes Kelley recused himself from the transaction and all decisions surrounding it before any of the wrongful actions alleged by Meade occurred. As such, because he was not involved in the process he could not have breached any fiduciary duties he may potentially owed to the public shareholders of EMCI. Therefore, Kelley's motion to dismiss must be granted as to all causes of action against him.

EMCC'S MOTION TO DISMISS

Meade asserts EMCC, as the majority-controlling shareholder of EMCI owed fiduciary duties of care, loyalty, good faith, and candor to EMCI's minority shareholders, which included himself, and other minority shareholders.[184] EMCC argues it should be dismissed because Iowa courts have not recognized a majority shareholder has a fiduciary duty to a minority shareholder in a publicly traded corporation such at EMCC.

> [T]he Iowa Supreme Court has recognized principles "protecting the interests of minority shareholders *in closely held corporations.*" *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 673 (Iowa 2013) (emphasis added). Thus, "[m]anagement-controlling directors and majority shareholders *of such corporations*," that is, closely-held corporations, "have long owed a fiduciary duty to the company and its shareholders." *Id.* at 673-74 (citing *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988)). As the Iowa Supreme Court explained,
>
> > This fiduciary duty encompasses a duty of care and a duty of loyalty to the corporation. [*Cookies*, 430 N.W.2d at 451.] The fiduciary duty also mandates that controlling directors and majority shareholders conduct themselves in a manner that is not oppressive to minority shareholders. *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013).[185]

---

[183] *See Fisher v. Minneapolis Pub. Schs.*, 792 F.3d 985, 990 n.4 (8th Cir. 2015).
[184] Pet. ¶¶ 23, 26, 33, 52, 65, 84, 93-98.
[185] *Shepard v. Employers Mut. Cas. Co.*_____ F.Supp.3d _____, 2020 WL 5267911, at *12 (S.D. Iowa Aug. 3, 2020).

The court notes that all but one of the cases cited by Meade in support of his argument that Iowa law does recognize a fiduciary duty by the majority shareholder to the minority shareholders are in the context of closely-held corporation, which include *Cookies,*[186] *Linge,*[187] *and Baysden.*[188]

Meade argues that the Iowa Supreme Court recognized that a majority shareholder does have a fiduciary duty to a minority shareholder in *Des Moines Bank & Trust Co. v. Bechtel & Co.*[189] The company in *Bechtel,* Iowa Southern Utilities Company of Delaware, was a publicly-traded company. The court held,

> [P]romoters, officers and directors of a corporation are the agents of and act for it, and indirectly for its stockholders, and they are the trustees or quasi trustees, at least, of the property of the corporation for the company and its stockholders. They occupy a fiduciary relation to the corporation on which relation to the stockholders may rely. The corporate entity and the stockholder, in particular, may presume that these trustees will perform their duties with the diligence, honesty, and the utmost good faith, inherent and implicit in their functions.[190]

Later in *Bechtel* the court held, "Where a person has control of a corporation, however it may be effected, he will be held to the most rigid good faith in any transaction with the corporation or its property."[191] However, this court does not find the *Bechtel* court holding that a majority shareholder owes a legal fiduciary duty to minority shareholders.

It is important to note this case was a derivative action brought by shareholders of the company on behalf of Iowa Southern Utilities Company.[192] The defendants included George M. Bechtel & Co. and George Bechtel. George M. Bechtel & Co. was the name George Bechtel used

---

[186] *Cookies Food Products, Inc. v. Lakes Warehousing Distributing, Inc.,* 430 N.W.2d 447 (Iowa 1988).
[187] *Linge v. Ralston Purina Co.,* 293 N.W.2d 191 (Iowa 1980).
[188] *Davis-Eisenhart Marketing Company, Inc. v. Baysden,* 539 N.W.2d 140 (Iowa 1995).
[189] 243 Iowa 1007, 51 N.W.2d 174 (1952).
[190] *Bechtel,* 243 Iowa at 1081, 51 N.W.2d at 216.
[191] *Id.* at 1082-83, 51 N.W.2d at 217.
[192] *Id.* at 1083, 51 N.W.2d at 217.

when he began his business of buying and selling bonds in 1891.[193] This became a partnership in 1926 between George Bechtel and his son Harold R. Bechtel.[194] This partnership ultimately underwent an involuntary bankruptcy proceeding and was discharged in 1934.[195]

It is not stated explicitly, however, it appears from a review of the court's decision many of the transactions the court found George Bechtel liable were either transactions he engaged in as a majority shareholder of Iowa Southern Utilities of Delaware or actions of George M. Bechtel & Co., which may have held the shares in its name for George M. Bechtel. In either event, it is clear at all times relevant to the improper transactions either George Bechtel or George M. Bechtel & Co. was the majority shareholder of Iowa Southern Utilities of Delaware. Also for a substantial period, George Bechtel was either an officer or director of Iowa Southern Utilities of Delaware.

The history recounted by the court indicates George M. Bechtel, in 1922, held a majority of the common stock in a Maine company known as Iowa Southern Utilities of Maine. This company was the predecessor to Iowa Southern Utilities Company of Delaware ("ISU of Delaware") the damaged corporation.[196] His majority ownership in the Maine company led him to become majority shareholder of ISU of Delaware.

The plaintiffs were individuals living in the service territory of ISU of Delaware and who purchased "their preferred stock from employees of the company or others, all of whom were selling as agents of Bechtel & Co."[197] The plaintiffs alleged the following

> . . . that George M. Bechtel and Harold R. Bechtel, in conspiracy, cooperation and connivance with others of the defendants, *fraudulently and wrongfully and in breach of their fiduciary relations to the Delaware company*, in the acquisition of property for said company, secretly obtained it at prices greatly less than the

[193] *Id.* at 1016, 51 N.W.2d at 180.
[194] *Id.* at 1017, 51 N.W.2d at 181.
[195] *Id.*
[196] *Id.* at 1022, 51 N.W.2d at 184.
[197] *Id.* at 1014, 51 N.W.2d at 179-80.

> prices at which it was turned into the company, and that the Bechtels and J. Ross Lee and other defendants wrongfully appropriated the excess consideration.
>
> . . . that the Bechtels *wrongfully took from the company large sums of money* as operating or management fees in connection with the company, and approximately $700,000 in dividends on the common stock paid out of capital assets, and wrongful commissions and expenditures.

. . . that the defendants, Edward L. Shutts, E. F. Bulmahn and others, without the authority or knowledge of the directors, wrongfully appropriated by means of a secret account in the Harris Trust & Savings Bank of Chicago many thousands of dollars of the *company's funds*.[198]

It is clear from the court's painstaking review of the district court record the Bechtels (George and Harold) and other individual defendants were held liable to the corporation because they either dealt fraudulently with the company or breached their duties to the corporation and thus to the other shareholders by their fraudulent dealings with the corporation. There was no finding by the court nor was the case prosecuted under the theory that the majority shareholder owed a fiduciary duty to the minority shareholders and because of a breach of this duty the minority shareholders were entitled to relief. This was a derivative action to recover damages suffered by Iowa Southern Utilities Company of Delaware.

Without discussing all of the findings the court made regarding the improper dealings the defendants engaged in to the detriment of the company, the *Bechtel* court noted the following regarding one transaction where George Bechtel was involved as the majority shareholder. The court noted George Bechtel was not an officer or director of either the selling company or the buying company. He was the majority shareholder of ISU of Maine when he purchased property in Creston, Iowa. This property was later sold to ISU of Delaware at a time he was not an officer

[198] *Id.* at 1015, 51 N.W.2d at 180 (emphasis added).

or director but the majority shareholder. In finding him liable to Iowa Southern Utilities Company of Delaware, the court noted:

> The President [of the Delaware company], Fisher, was under contract to do his [George Bechtel] bidding. His son, Harold [Bechtel], an employee of his father, was a director and secretary. He knew what the property cost his father and what Day & Zimmerman said its sound value was. J. Ross Lee, a director had the same knowledge. The record amply sustains a finding that Bulmahn, Nyemaster and Payne were under the control and domination of Geo. M. Bechtel. When he compelled the Board of Directors to accept his proposal of $802,500, *he was not dealing at arm's length with the Company, but he was cheating and defrauding the corporation* in the amount of the difference between the Day & Zimmerman appraisal of $376,665, the fair valuation of a competent, disinterested appraiser, and the inflated price of Geo. M. Bechtel, or the sum of $425,835.[199]

There was no finding by the court that as majority shareholder, either George M. Bechtel & Co. and/or George Bechtel owed a duty to the minority shareholders directly. The duty they owed was to the corporation. This becomes more evident when it is noted the Iowa Supreme Court in reversing the district court's dismissal of the plaintiffs' suit entered judgment in favor of Iowa Southern Utilities Company of Delaware against George M. Bechtel and the other individual defendants.[200] Thus, *Bechtel* does not stand for the proposition asserted by Meade that majority shareholders have a fiduciary duty to minority shareholders. This was a derivative action and the defendants one of which had majority control of Iowa Southern Utilities was held liable to the

[199] *Id.* at 1023, 51 N.W.2d at 184 (emphasis added).

[200] *Id.* at 1100, 51 N.W.2d at 227 ("It is the conclusion and opinion of this Court that: 1. The Iowa Southern Utilities Company of Delaware have Judgment and Decree rendered and entered in the District Court of Appanoose County, Iowa, in the amount of $2,211,549.68 with legal interest, in its favor and against George M. Bechtel, Harold R. Bechtel, and the Estate of J. Ross Lee and De Elda Lee as Executrix of said Estate. 2. The Iowa Southern Utilities Company of Delaware have Judgment rendered and entered in the District Court of Appanoose County, Iowa, in its favor and against the defendant, Edward L. Shutts, in the amount of $46,728.39 with interest as provided by law.")

corporation for damages and not liable for damages to the individual minority shareholders who brought the suit on behalf of Iowa Southern Utilities Company of Delaware.

Recently, two federal courts construing Iowa law also concluded Iowa only recognizes a majority shareholder has fiduciary duties to minority shareholders in the context of a closely-held corporation. In *Horras v. Am. Capital Strategies, Ltd.,* the federal district court stated the plaintiff cited no Iowa authority that showed majority shareholders owed a fiduciary duty to minority shareholders and indicated the court found none.[201] The court in *Shepard* also determined that the Iowa Supreme Court has *only* recognized a fiduciary duty from a majority shareholder to a minority shareholder under Iowa law in the context of *closely-held corporations*.[202] The claim in *Shepard* arose out of the going-private transaction before the court here.

---

[201] *Horras*, 2012 WL 12895646, at *2 ("Horras has not provided, and the Court has not found, any Iowa authority that shows majority shareholders of all corporations owe a fiduciary duty to minority shareholders.").

[202] *Shepard,* 2020 WL 5267911, at *12 (citing *Baur,* 832 N.W.2d at 674 (finding fiduciary duty in the context of a closely-held corporation); *Davis-Eisenhart Mktg. Co. v. Baysden*, 539 N.W.2d 140, 143 (Iowa 1995) (stating, in the context of a closely-held corporation, "Of course, a majority shareholder may not favor himself to the detriment of the minority. If such wrongdoing occurs, the shareholders may seek recovery for breach of fiduciary duty." (citations omitted)); *Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988) (stating, in the context of a closely-held corporation, that an officer and director who was also a majority shareholder owed a fiduciary duty to the company and its shareholders); *Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 194 (Iowa 1980) (holding, in the context of a closely-held corporation, "that majority shareholders do owe a fiduciary duty to minority shareholders"); *accord Spears v. Com Link, Inc.*, 837 N.W.2d 680 (Iowa Ct. App. 2013) (stating, in the context of a closely-held corporation, "Generally, a majority shareholder also owes a fiduciary duty to the corporation and shareholders."); *Redeker v. Litt*, 699 N.W.2d 684 (Iowa Ct. App. 2005) (noting that shareholders in a closely-held corporation "have very direct obligations to one another"); *see also Horras v. Am. Capital Strategies, Ltd.*, No. 4:11-CV-00553-JEG, 2012 WL 12895646, at *2 (S.D. Iowa June 25, 2012) (Gritzner, Dist. J.) ("In the context of closely-held corporations, Iowa law recognizes the principle that 'majority shareholders do owe a fiduciary duty to minority shareholders.'" (quoting *Linge*, 293 N.W.2d at 193, 194), *aff'd*, 729 F.3d 798 (8th Cir. 2013)).

In *Shepard* the court concluded that a claim for breach of a fiduciary duty of a majority shareholder of a publicly-traded corporation to a minority shareholder is not recognized or legally cognizable under Iowa law. The court noted that a distinction between closely-held and publically-traded corporations in this respect is appropriate.[203]

> [T]he rationale for recognizing a fiduciary duty from a majority shareholder to minority shareholders in a closely-held corporation is the following:
>
> [O]pportunistic behavior in public corporations may be constrained by the market; by definition, close corporations lack a market, and therefore lack this monitor. Finally, the impact of ordinary business decisions is felt more directly and disproportionately in a close corporation than in a public corporation. Routine events in a corporation, such as not declaring dividends and not employing a shareholder, may, in a close corporation, be involuntary, disguised wealth transfers to the controlling shareholder as the financially-starved minority shareholders may feel pressure to sell their stock for a low value. Such financial deprivation is particularly untenable given that close-corporate shareholders often have invested a disproportionately high percentage of their wealth in their corporation.
>
> Mary Seigel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 383-84 (2004). The Iowa Supreme Court recognized this situation with closely-held corporations in *Baur*, 832 N.W.2d at 676, albeit in the context of minority shareholder oppression.[204]

The court further held that Shepard did not plead and fell "well short" of proving he had no market for his EMCI shares while it was publicly traded.[205] The court notes that although the claims in *Shepard* related to the pre-merger period, the lack of Iowa law recognizing majority shareholders have a fiduciary duty to minority shareholders in publicly-traded corporations is equally relevant and applicable in the case at bar.

---

[203] *Id.*
[204] *Id.* at *13.
[205] *Id.*

Accordingly, the court concludes the claim against EMCC for breach of a fiduciary duty of a majority shareholder of a publicly-traded corporation to a minority shareholder is not recognized or legally cognizable under Iowa law. Therefore, EMCC's motion to dismiss is granted.

EMCI'S MOTION TO DISMISS

Finally, Meade claims that EMCI aided and abetted Kelley, EMCC, and the Independent Directors in their respective alleged breaches of fiduciary duties owed to the public shareholders of EMCI, including Meade and the other members of the purported Class. More specifically, he alleges EMCI facilitated the filing and dissemination of the materially incomplete and misleading Proxy that was used to solicit shareholders to vote in favor of the merger that was entered into between EMCI and EMCC. EMCI contends Meade has failed to state a claim upon which relief can be granted and as such all claims against it should be dismissed.

To recover on a claim of "aiding and abetting" against EMCI, Meade must establish (1) a wrong to a primary party, (2) knowledge of the wrong on the part of the aider, and (3) substantial assistance by the aider in the achievement of the primary wrong.[206] "Knowledge" of the principal's act, under the federal securities cases, has been interpreted to be less than actual knowledge; a general awareness has been held to be sufficient.[207] Our supreme court has adopted this federal standard and concluded that "general awareness" by an alleged aider and abettor is sufficient to constitute knowledge.[208]

A corporation is managed by or under the direction of its board of directors, whose basic function is to manage the property of the corporation.[209] Such duties can be conducted by the board

[206] *Ezzone,* 525 N.W.2d at 398.
[207] *Tubbs v. United Cent. Bank, N.A., Des Moines*, 451 N.W.2d 177, 183 (Iowa 1990) (citing *Federal Deposit Ins. Corp. v. First Interstate Bank,* 885 F.2d 423, 430–31 (8th Cir. 1989).
[208] *Id.*
[209] Iowa Code § 490.801.

itself, or partly by the corporation's officers, employees, and other agents.[210] Thus, a corporation only acts by and through its directors. Though not previously addressed by Iowa courts, Delaware courts and other states recognized that a "corporation cannot aid and abet violations by the fiduciaries who serve it."[211] The fiduciaries who serve the entity owe fiduciary duties; the entity that is served does not.[212] This is consistent with other "secondary-type" claims, such as conspiracy. The United States Supreme Court has held that "corporations cannot conspire with their own officers."[213] The Eighth Circuit has also consistently determined that "a corporation and its agents are a single person in the eyes of the law, and a corporation cannot conspire with itself."[214]

The court concludes that Meade's claim that EMCI aided and abetted its own Independent Directors breach of fiduciary duty is tantamount to alleging EMCI aided and abetted itself. It is axiomatic that a corporation cannot aid and abet itself.

As set forth above, the court determined Kelley recused himself well before any of the asserted wrongdoing and therefore he could not have been involved in any alleged breach of fiduciary duty. As such, EMCI could not have aided and abetted him in any non-existent breach. Further, Meade sued Kelley in his role as a director of EMCI and thus any claim of aiding abetting

---

[210] *Id.*
[211] *In re Orchard Enterprises, Inc. Stockholder Litig.,* 88 A.3d 1, 54 (Del. Ch. 2014); *Arnold v. Soc'y for Sav. Bancorp, Inc. (Arnold IV),* 678 A.2d 533, 539 (Del. 1996). *See also In re Draw Another Circle,* 602 B.R. 878, 905 (Bankr. D. Del. 2019) (finding operative compliant failed because could not aid and abet "claims against parties that already stand in direct fiduciary relationship.").
[212] *In re Wayport, Inc. Litig.,* 76 A.3d 296, 322–23 (Del. Ch. 2013); *see also A.W. Fin. Servs., S.A. v. Empire Res., Inc.,* 981 A.2d 1114, 1127 n. 36 (Del. 2009).
[213] *Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752, 769, 104 S. Ct. 2731, 2741 n.15 (1984).
[214] *Cross v. Gen. Motors Corp.,* 721 F.2d 1152, 1156 (8th Cir. 1983); *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, Inc.,* 838 F.2d 268, 277 (8th Cir. 1988).

could not stand against Kelley for the same reasons it is not proper for the Independent Directors. Finally, also as set forth above, the court determined EMCC did not owe its minority shareholders any fiduciary duty. Therefore, as there was no possible breach by EMCC, there was no possible breach for EMCI to aid and abet EMCC.

Accordingly, the court concludes EMCI's motion to dismiss must be granted as it could not have aided and abetted any of the named defendants.

CONCLUSION AND ORDER

IT IS THEREFORE ORDERED the defendants' motions to dismiss asserting the claims made by Meade are derivative are denied.

IT IS FURTHER ORDERED the Independent Directors' motion to dismiss is denied.

IT IS FURTHER ORDERED Bruce Kelley's motion to dismiss is granted.

IT IS FURTHER ORDERED EMCC's motion to dismiss is granted.

IT IS FURTHER ORDERED EMCI's motion to dismiss is granted.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL146098	KENDALL J MEADE VS EMC INSURANCE GROUP ET AL

So Ordered

L. P. McLellan

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa