

No. _____

In The
Supreme Court of the United States

—————◆—————
THOMAS M. HORRAS,

Petitioner,

v.

AMERICAN CAPITAL STRATEGIES, LTD.,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

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PETITION FOR WRIT OF CERTIORARI

—————◆—————
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QUESTIONS PRESENTED

Horras is an individual residing in Iowa who built a successful home health care business called Hawkeye Health Care Services, Inc. Horras agreed to merge his business with other health care providers and the new business formed as Auxi, Inc., a Delaware corporation. As a result of the merger, Mr. Horras was personally issued 417,734 shares of Auxi stock. In 2000 or 2001, ACS, a private equity fund, took an equity position in Auxi. ACS then acquired majority seats on the Board of Directors for Auxi, which gave ACS control over the company. In May of 2007, the Auxi board members voted to sell the company, including all of the shares, to Harden Health Care LLC. in an amount of over \$20 per share. Mr. Horras was neither informed of the sale, nor paid for the sale of his shares in Auxi to HHC. Upon learning of the sale of his shares without his permission or compensation, Mr. Horras filed his Complaint and the District Court granted the Defendants' Rule 12(b)(6) Motion to Dismiss and denied Horras' request to Amend his pleading.

The questions presented are:

1. Does *Iqbal/Twombly* require specific elements to be pled for fiduciary duty and contract in a diversity complaint?
2. Is a denial of a Motion for Leave to Amend a Complaint appropriate under Rule 15 when the Court unexpectedly applied a new pleading standard and granted a motion to dismiss the original complaint?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the case caption. Thomas M. Horras is an individual. American Capital Strategies, LTD. is a private equity fund.

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PETITION FOR WRIT OF CERTIORARI

Thomas M. Horras respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.



OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit reported at 729 F.3d 798 is reprinted in full in the Appendix (App.) at App.1 – App.20. The district court’s Order dismissing the original complaint is unreported, but is reprinted in full in the Appendix at App.21 – App.30.



JURISDICTION

The court of appeals entered its judgment on September 3, 2013 and denied a petition for rehearing and rehearing en banc on October 16, 2013. App.31. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides that “No person shall be . . .

deprived of life, liberty, or property, without due process of law.”



INTRODUCTION

Imagine for a moment that you owned 5% of General Motors and unbeknownst to you, the company was sold to Mercedes Benz. Nobody at G.M. notified you of the sale, Mercedes Benz claimed they purchased ALL of G.M. stock, but you were never paid for your shares. Imagine further that when you attempted to contact Mercedes Benz to inquire about the \$8 million worth of stock they claim they don't know what you're talking about and refuse to provide any further information. What would you do? Well, Mr. Horras filed a complaint in the Southern District of Iowa. The facts of the case are simple. The Defendant took control of Auxi by acquiring a large number of shares. They then sold the company, including Mr. Horras' interest (shares) to HHC. But Mr. Horras was not paid for the sale of his interest/shares. When Mr. Horras filed his Complaint, ACS moved to dismiss for failure to state a claim. Shockingly, the district court agreed and opined that Mr. Horras did not adequately plead facts in support of his claim. However, dismissal of his Complaint on a pretrial motion **precluded** Mr. Horras from discovery of evidence of the facts of this case which are in the sole possession of the defendant! Should the Defendant be allowed to escape responsibility because they can play hide the ball with the evidence? Isn't Mr. Horras entitled to

engage in discovery or fact-finding of evidence? The plain facts, as set forth by Mr. Horras in his complaint, were sufficient to put the Defendant on notice. In fact, it doesn't get any simpler: Mr. Horras owned shares of stock in a company; the company was sold by the defendant and Mr. Horras wasn't paid for his shares. Period. The district court punished Mr. Horras for failing to cite specifics regarding the purchase/sale of Auxi. However, the specifics of the purchase and contents of a contract between the defendant and Auxi are fact-finding documents which would be revealed during the discovery phase of this case. The Defendant should not be allowed to claim ignorance of the facts, when they are in sole possession of the evidence in support of such facts.

The district court and majority of an Eighth Circuit panel set aside Fed.R.Civ.P. 8 and *Iqbal/Twombly* and reinstated 65-year-old technical pleading requirements. In deviating from the current pleading standard, neither court allowed Mr. Horras to amend his complaint to conform to the "new" pleading standard in denial of Horras' Fifth Amendment rights. (See dissent).



STATEMENT OF THE CASE

Thomas Horras is an individual residing in Iowa who built a successful home health care business called Hawkeye Health Care Services, Inc. App.2. At some time prior to 2000, Mr. Horras agreed to merge

his business with other health care providers and the new business that formed was known as Auxi, Inc., a Delaware corporation. App.2. As a result of the merger, Mr. Horras was personally issued 417,734 shares of Auxi stock. App.2. At some point in 2000 or 2001, ACS, a private equity fund, bought into Auxi by purchasing a large number of shares. App.2. By becoming a majority shareholder in Auxi, ACS was able to acquire majority seats on the Board of Directors for Auxi, which gave ACS control over the company. App.2. In May of 2007, the Auxi board members voted to sell the company, including *all* of the shares, to Harden Health Care LLC. in an amount of over \$20 per share. App.3. Mr. Horras was neither informed of the sale, nor paid for the sale of his shares in Auxi. App.3. Mr. Horras' interest in Auxi was valued at approximately \$8 million through his ownership of company stock. App.3. Not only was his ownership interest in the company sold out from under him, they also failed to compensate him. App.3.

Upon learning of the sale of his shares without his permission or compensation, Thomas Horras filed a diversity complaint alleging breach of fiduciary duty and breach of contract against American Capital Strategies, Ltd., now known as American Capital, Ltd. relating to the sale of Mr. Horras' 417,734 shares of stock in a company which was sold by American Capital. American Capital filed a Rule 12(b)(6) Motion to dismiss for failure to state a claim which, following a hearing was granted by the District Court and denied Mr. Horras the opportunity to amend his

Complaint in a split decision (Judge Colloton dissenting) by the Eighth Circuit Court of Appeals.



REASONS FOR GRANTING THE WRIT

I. **Rule 8 and *Iqbal/Twombly* do not require that specific elements be pled for fiduciary duty and breach of contract in a diversity complaint.**

In affirming a Rule 12(b)(6) motion to dismiss, the majority of the Eighth Circuit panel extended *Iqbal/Twombly* to require pleadings in a diversity complaint to specifically identify each element of a cause of action for breach of fiduciary duty and breach of contract despite defendant's asymmetrical control of information and facts.

Judge Colloton, in his dissent, stated:

“These criticisms of the complaint [by the majority] bring to mind the technical requirements of the code pleading regime that was superseded by the federal rules and the simplified notice pleading approach . . . under the simplified pleading standard of Rule 8(a). I think the complaint here was sufficient to give ACS fair notice of the fiduciary duty claim that Horras has amplified in his briefing.” App.19.

“The availability of information in this case is asymmetrical. ACS presumably knows what happened in the sale of Auxi shares to HHC; Horras

evidently does not know much.” Symmetry is critical to a proper analysis of the complaint under 12(b)(6). App.19.

The basic pleading guidance of Fed.R.Civ.P. 8(a)(1) states: (1) jurisdictional statement; (2) short and plain statement of the claim showing that the pleader is entitled to relief; and (3) demand for relief.

The majority extended Rule 8, and *Iqbal/Twombly*, and required Mr. Horras to plead all elements of his causes of action involving information which, ACS was not only fully knowledgeable, but in exclusive control.

At page two of the Circuit’s opinion, the court deviated from Rule 8, and *Iqbal/Twombly*, and examined the complaint’s individual counts rather than an analysis based on a short, plain statement applied to the complaint as a whole. App.3.

At page four of the opinion, the Circuit Court continued its improper review of the causes of action as opposed to a short and plain statement of the case. Despite the court’s acknowledgment of a new Iowa Supreme Court case which was decided after oral argument and continued expanding investor rights, the court continued to evaluate the causes of action without the allowance of further factual discovery by a plaintiff when the defendant is in possession of all such information. App.7. The court overlooked the short, plain statement that the defendant sold *all* shares, including Mr. Horras’ shares. The opinion clearly extended *Iqbal/Twombly* as it concluded:

“ . . . we agree with the district court that Horras pleads insufficient facts to support a claim that ACS breached its fiduciary duties as a majority shareholder.” App.10.

The court continued its analysis of the elements of a second cause of action at its opinion, page 7. “To state a claim for breach of contract, an Iowa plaintiff must plead facts showing. . . .” The court states: “Moreover, Horras pleads no facts suggesting that the alleged contract between ACS and HHC manifested an intent to benefit him . . . accordingly, we affirm the dismissal of Count II for breach of contract.” App.10. However, a review of the complaint shows (as noted by the dissenting opinion of Judge Colloton) that Mr. Horras clearly pled ACS sold all shares (including his) to HHC and the apparent value to Mr. Horras was \$8,000,000.00.

II. Justice requires that Mr. Horras be allowed to amend his complaint.

The question presented is: Whether a denial to amend is proper when the pleading standard was extended beyond current standards without notice to the plaintiff and the complaint dismissed.

Plaintiff’s complaint alleges that the defendant took control of a company in which the plaintiff held shares and sold all the shares of the company (including the plaintiff’s) to a third party without compensating the plaintiff for his shares.

The District Court dismissed the complaint under 12(b)(6) based on a failure to plead all elements of causes of action. Such reasoning is contrary to Rule 8 and *Iqbal/Twombly*. The district court denied plaintiff's motion to amend giving no reason, only that it could. The Circuit Court affirmed the denial offering only speculation for the reason, contrary to standards for freely allowing amendment in the interest of justice.

The Circuit Court affirmed the denial of Mr. Horras' Motion for Leave to Amend the Complaint. But, there was no support for such a lethal decision. A denial of leave to amend should be based on such factors of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party or futility of the amendment. *Moses.com Securities, Inc. v. Comprehensive Software Systems, Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005) and *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009). None of those items were applicable here.

The Circuit Court, at page 9 of the opinion, **speculated** that the reason for the denial of Mr. Horras' request to amend his complaint was "unexcused delay." App.12. The District Court actually gave NO reason for its denial, stating only that it didn't **have** to grant it. Fed.R.Civ.P. 15(a)(2) states: "Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's

written consent or the court's leave. The court should freely give leave when justice so requires."

The secondary guidance states: "[i]f it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1483 (3d ed. 2010). There was nothing in the record to preclude amendment to the simple discrepancies outlined by the district court. See *Nagle v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 790 F.Supp. 203, 210 (S.D. Iowa 1992) (" . . . even if the allegations are deficient, the court would allow plaintiff the opportunity to amend.").

The Eighth Circuit's own standard on amendments, prior to this case, was set forth in *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818 (8th Cir. 2009): "[W]hen a complaint is dismissed for failure to state a claim, and plaintiff files a post-judgment motion for leave to file an amended complaint, is that motion reviewed under the liberal "freely give" standard of Rule 15(a)(2), or under the more restrictive standards applicable to post-judgment motions under Rules 59(e) and 60(b)? All circuits acknowledge that post-judgment leave to amend may be granted if timely requested. That conclusion is compelled by the Supreme Court's summary reversal of the denial of such a motion in *Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). However, interests of finality

dictate that leave to amend should be less freely available after a final order has been entered.” *Id.* at 823.

The district court exercised its discretion by denying Horras’ motion to amend his complaint post-judgment. Thus, the court disregarded Rule 15 which provides that motions to amend should be freely granted when justice requires and may deny leave to amend where there are compelling reasons “such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.” *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005) (quoting *Hammer v. City of Osage Beach*, 318 F.3d 832, 844 (8th Cir. 2003)). In this case, the district court offered no reason for its denial of plaintiff’s motion and the circuit court was left to speculate.

The reason Mr. Horras never amended his complaint while the motion to dismiss was pending was because the complaint met the Rule 8 and *Iqbal/Twombly* standard. As Judge Colloton noted in his dissent: “The scenario outlined by Horras, if true, states a claim that ACS breached a fiduciary duty by failing to disclose to a minority shareholder that it was entering into a transaction to sell all shares of Auxi to HHC and by failing to account for proceeds obtained based on the purported sale of all company shares.” App.16.

In fact, the district court blindsided Horras by requiring pleadings well beyond the current Rule 8 and *Iqbal/Twombly* standard and used the surprise to deny Horras the opportunity, in the name of justice and due process (5th Amendment) an opportunity to amend his pleading to meet the district court's new standard. The district court identified that the defect in Mr. Horras' pleading regarding fiduciary duty was: (1) void of facts on scope of fiduciary duty, App.26; (2) that the court couldn't discern whether Horras' claim was devaluation or sale of his shares, App.27; and (3) no proximate cause of damage, App.28.

The district court had predetermined the result in this case. At footnote 5, page 5 of the decision the district court stated: "At the hearing, Horras clearly articulated the theory that ACS sold Horras' shares. Mindful that the court must accept all factual allegations as true, even ones, as here, that **the Court finds improbable** given that Horras did not supply the Court with any facts to show how ACS sold Horras' shares without authorization, the Court need not consider this theory because Horras failed to allege this fact *in his Complaint*." (Emphasis added). App.27.

The court disregarded the fact that the defendant **had all** of the information that it claimed was necessary to plead. See Judge Colloton's dissent: "The availability of information in this case is asymmetrical. ACS (defendant) personally knows what happened in the sale of Auxil shares to HHC; Horras evidently does not know much. The litigation likely

would entail simple, relatively inexpensive discovery about the Auxi corporation and the transaction with HHC, after which a motion for summary judgment may well be in order if there is insufficient evidence to support Horras' theory. But at this early stage of the proceedings, I would reverse the judgment dismissing the fiduciary duty claim and remand for further proceedings." App.19.

In this case, the defendant failed to pay the plaintiff for his shares totaling approximately \$8,000,000.00 and justice compelled the opportunity for plaintiff to amend his complaint. The case has denied Horras basic constitutional rights, including and not limited to, the Fifth Amendment right to due process.



CONCLUSION

The Eighth Circuit and the district court rejected Rule 8 and *Iqbal/Twombly* pleading standards and adopted the old technical pleading standards of 65 years ago (see dissent – Judge Colloton). Further, upon adopting a “new” pleading standard the courts denied Horras the Rule 15 opportunity to amend his Complaint to meet the “new” standard. The radical change of standard and denial of right to amend was a complete failure of due process as required by the United States Constitution – Fifth Amendment.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 8, 2014

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 12-3886

Thomas M. Horras

Plaintiff-Appellant

v.

American Capital Strategies, Ltd.

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Iowa – Des Moines

Submitted: June 10, 2013

Filed: September 3, 2013

Before COLLOTON, GRUENDER, and BENTON,
Circuit Judges.

GRUENDER, Circuit Judge.

Thomas Horras filed this lawsuit against American Capital Strategies, Ltd. (“ACS”), making claims for breach of fiduciary duty and breach of contract.

The district court¹ granted ACS's motion to dismiss, *see* Fed. R. Civ. P. 12(b)(6), and denied Horras's subsequent motion for relief from judgment, *see* Fed. R. Civ. P. 60(b), and motion to alter or amend the judgment, *see* Fed. R. Civ. P. 59(e), in which he sought leave to amend the complaint as an alternative remedy. Horras appeals the dismissal and the denial of his request for post-judgment leave to amend. We affirm.

I.

Horras's complaint sets forth the following facts. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002) ("Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint."). Sometime prior to 2000, Horras, an Iowa citizen, built a successful home health care business and agreed to merge his business with other home health care providers to form Auxi, Inc. ("Auxi"), a Delaware corporation. As a result of the merger, Horras received 417,734 shares of Auxi stock. At some time during 2000 or 2001, ACS acquired control of Auxi. In 2007, ACS initiated the sale of Auxi to Harden Health Care ("HHC"). Auxi did not inform Horras of the sale, and Horras received no compensation for his shares.

¹ The Honorable James E. Gritzner, Chief Judge, United States District Court for the Southern District of Iowa.

In Count I, for breach of fiduciary duty, Horras pleads that: (1) “ACS controlled Auxi Inc. at the time of its sale in 2007”; (2) “ACS, through its Auxi Board Members, initiated the sale of Auxi to HHC”; (3) “ACS was paid for its shares of Auxi in 2007”; (4) “ACS breached its fiduciary responsibility to plaintiff by failing to notify him of corporate activity [a]ffecting his shares”; (5) “Neither ACS nor Auxi has paid plaintiff for his shares”; (6) “Auxi shares sold for over \$20.00 per share”; and (7) “Plaintiff was damaged by the failure to pay him for his shares.”

In Count II, for breach of contract, Horras pleads that: (1) “ACS controlled Auxi Inc. through its Board Members”; (2) “ACS and/or Auxi represented all shares of Auxi would be sold to HHC”; (3) “Neither ACS nor Auxi, Inc. had authority to sell the plaintiff’s shares”; (4) “Plaintiff has not been compensated for his shares”; (5) “Plaintiff has been damaged by defendant’s failure to compensate him for his shares”; and (6) “Auxi shares were sold for over \$20.00 per share.”

ACS filed a motion to dismiss, arguing that Horras (1) failed to allege facts plausibly suggesting that ACS owed him or breached any fiduciary duties and (2) failed to allege facts demonstrating the existence of a contract between ACS and himself. Before a hearing on ACS’s motion to dismiss, the district court distributed a memorandum to both parties identifying its concerns about the complaint. The memorandum asked Horras to identify at the hearing the source of ACS’s alleged duty to Horras, whether

Horras alleged anything other than ACS's failure to notify him of the sale, and whether a contract existed between ACS and Horras. Responding to these concerns, which the court reiterated at the hearing, Horras's counsel stated, "[T]here are more than an adequate amount of facts that have been alleged in this claim. I would request the court to . . . allow this case to move on with some speed. . . . [I]t has been delayed for three months on a matter that confounds me with the simplicity given that the defendant purports to be a sophisticated financially based firm." On June 25, 2012, the court granted ACS's motion to dismiss, determining that Horras (1) failed to plead facts showing that ACS breached any fiduciary duty and (2) failed to plead facts establishing the existence of a contract.

Horras then filed motions for post-judgment relief under Rules 59(e) and 60(b), which the court denied. With those motions, Horras sought leave to amend as alternative relief and submitted a proposed First Amended Complaint. Noting that Horras never sought leave to amend prior to judgment, the district court held that it was not required to grant leave to amend post-judgment, alternatively denying Horras's motion for leave to amend on the basis of futility.

Horras appeals the grant of ACS's motion to dismiss and the denial of his request for leave to amend the complaint.

II.

We review the dismissal of a complaint for failure to state a claim *de novo*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009), affirming dismissal if the complaint “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that states a claim for relief must contain: a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). The complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration in original).

A.

To state a claim for breach of a fiduciary duty under Iowa law, the plaintiff must plead facts showing that “(1) [the defendant] owed a fiduciary duty to [the plaintiff]; (2) [the defendant] breached the fiduciary duty . . . ; (3) the breach of fiduciary duty was

a proximate cause of damage to [the plaintiff]; and (4) the amount of damages, if any.” *Top of Iowa Co-op. v. Schewe*, 149 F. Supp. 2d 709, 717 (N.D. Iowa 2001) *aff’d*, 324 F.3d 627 (8th Cir. 2003).² A fiduciary duty exists between two entities “when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation[ship].” *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (quoting Restatement (Second) of Torts, § 874 cmt. a (1979)).

Iowa law suggests that ACS, Auxi’s controlling shareholder according to Horras’s complaint, had a fiduciary relationship with Horras. The Iowa Supreme Court has held that “majority shareholders do owe a fiduciary duty to minority shareholders.” *Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 194 (Iowa 1980); *see also Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988) (noting that Iowa law imposes the same fiduciary responsibilities on majority shareholders that it does on corporate directors). *Linge*, however, did not address how a majority shareholder might breach its duties. Rather, it noted that the majority shareholder’s status as a fiduciary to minority shareholders eased the minority-shareholder-plaintiff’s burden of proof in a fraud action. *Id.* at 195. The court explicitly declined to address whether breach of fiduciary duty constituted a tort independent of fraud. *Id.* at 196-97.

² The parties agree that Iowa law applies to Horras’s claims.

In *Cookies*, the court again announced that majority shareholders owe fiduciary duties to the minority, but it analyzed the case in terms of the traditional directorial duties of care and loyalty because the defendant majority shareholder in that case also was a director and officer of the corporation. *Cookies*, 430 N.W.2d at 451-53.

In *Baur v. Baur Farms, Inc.*, ___ N.W.2d ___, 2013 WL 2710449 (Iowa June 14, 2013), the state court clarified a majority shareholder's fiduciary duty to a minority shareholder: "This fiduciary duty encompasses a duty of care and a duty of loyalty to the corporation. The fiduciary duty also mandates that controlling directors and majority shareholders conduct themselves in a manner that is not oppressive to minority shareholders." *See Baur*, 2013 WL 2710449, at *10 (internal citation omitted). The oppression determination "must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances." *Id.* The court concluded that "majority shareholders act oppressively when . . . they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value." *Id.* The court did not, however, determine "all the categories of conduct and circumstances that will constitute oppression." *Id.*

Unlike the minority shareholder in *Baur*, Horras requested neither dissolution of the company nor that ACS purchase his shares at fair market value. *See id.*

at *1. Thus, we must determine whether Horras’s complaint pleads facts sufficient to establish that ACS breached duties owed to Horras in its capacity as majority shareholder. Horras alleges that ACS sold its stock to HHC and that ACS failed to notify him of “corporate activity [a]ffecting his shares.” Because the Iowa Supreme Court has not defined that this constitutes a breach of a majority shareholder’s fiduciary duties, “we must determine what rule the Iowa Supreme Court would apply.” *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 407 (8th Cir. 2004). “Statements made by the Iowa Supreme Court are instructive.” *Id.* “So, too, are rulings by inferior state appellate courts.” *Id.*

The parties have not pointed us to, and we have been unable to locate, any Iowa authority holding that a majority shareholder must disclose to minority shareholders its intent to sell a controlling stake in a corporation. However, in determining that majority shareholders owe fiduciary duties to minority shareholders, the Iowa Supreme Court relied on the *Cyclopedia of the Law of Corporations*, see *Cookies*, 430 N.W.2d at 451, 454, and we are persuaded that it would consult that treatise again if asked to determine what constitutes a breach of a majority shareholder’s duties. The treatise instructs that majority shareholders are “entitled to sell or not sell their stock as they see fit” and only breach a fiduciary duty to minority shareholders “if the purchasers will loot or mismanage the corporation, or if the sale involves fraud, misuse of confidential information, wrongful

appropriation of corporate assets, or personal use of a business advantage that rightly belongs to the corporation.” 12B William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 5805 (2012). See also *Cookies*, 430 N.W.2d at 454 (“[T]he law has long recognized the right of majority shareholders to control the affairs of a corporation, if done so lawfully and equitably, and not to the detriment of minority stockholders.” (citing Fletcher, *supra*, § 5783)).³

As Horras alleges only that ACS controlled Auxi, initiated its sale to HHC, and failed to notify Horras of corporate activity affecting his shares, we agree

³ For the first time on appeal, Horras argues that he and ACS had a fiduciary relationship similar to that shared by partners in a partnership due to the fact that Auxi was a closely held corporation. See *Jochimsen v. Wapsi Hunting Club, Inc.*, 803 N.W.2d 672, *5 (Iowa Ct. App. 2011) (unpublished table opinion) (“Some authorities equate the fiduciary duties of those in a close corporation with the fiduciary duties that partners in a partnership owe to one another.”). “Ordinarily, we do not consider an argument raised for the first time on appeal.” *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 (8th Cir. 2002). In any event, Horras’s complaint does not allege that Auxi was closely held nor does it contain sufficient facts for us to infer that Auxi was closely held. Moreover, even if we did view Horras and ACS as having a fiduciary relationship similar to one shared between partners, Horras’s complaint fails to sufficiently allege how ACS breached such a duty. See *Iqbal*, 556 U.S. at 678 (requiring the plaintiff to “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”). We cannot infer, as Horras now argues, that his shares were actually sold from his singular allegation that ACS failed to notify him of “corporate activity [a]ffecting his shares.”

with the district court that Horras pleads insufficient facts to support a claim that ACS breached its fiduciary duties as majority shareholder.

B.

To state a claim for breach of contract, an Iowa plaintiff must plead facts showing

(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998).

Although Horras's complaint alleges damages, it contains no facts identifying the existence of a contract between ACS and Horras or its terms. The complaint also fails to demonstrate that Horras performed the terms and conditions required of him by the purported contract. He argues that he is a third-party beneficiary to a contract between ACS and HHC and that he suffered damages when ACS sold his shares to HHC without his permission. However, the complaint does not state that ACS actually sold his shares, it merely states that "ACS and/or Auxi *represented* all shares of Auxi would be sold to HHC" (emphasis added). Moreover, Horras pleads no facts suggesting that the alleged contract between ACS

and HHC manifested an intent to benefit him. *See Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988) (noting that the “primary question [in a third-party beneficiary action] is whether the contract manifests an intent to benefit a third party”). Accordingly, we affirm the dismissal of Count II for breach of contract.

III.

Horras next argues that the district court should have granted his postjudgment request for leave to amend the complaint. “We review the district court’s denial of [Horras’s] motion for leave to amend for an abuse of discretion.” *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 602 (8th Cir. 2011), *cert. denied*, 565 U.S. ___, 132 S. Ct. 244 (2011).

Although a district court “may not ignore the [Federal Rule of Civil Procedure] 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits,” it has “considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored.” *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009). “A district court may appropriately deny leave to amend ‘where there are compelling reasons “such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.”’” *Moses.com Sec., Inc. v. Comprehensive Software Sys.*,

Inc., 406 F.3d 1052, 1065 (8th Cir. 2005) (quoting *Hammer v. City of Osage Beach*, 318 F.3d 832, 844 (8th Cir. 2003)). “Unexcused delay is sufficient to justify the court’s denial . . . if the party is seeking to amend the pleadings after the district court has dismissed the claims it seeks to amend, particularly when the plaintiff was put on notice of the need to change the pleadings before the complaint was dismissed, but failed to do so.” *Id.*

The district court exercised its discretion in this case to deny Horras’s motion, stating simply that it “[was] not required to give Horras an opportunity to amend his Complaint post judgment.” The ruling was not accompanied by additional explanation, but because it was placed in a footnote to the district court’s analysis of Horras’s Rule 59(e) and Rule 60(b) motions, we construe the basis for the denial of leave to amend to be Horras’s unexcused delay. *See, e.g., Horras v. American Capital Strategies, Ltd.*, No. 4:11-cv-00553-JEG-CFB, slip op. at 3 (S.D. Iowa Nov. 16, 2012) (“Horras made a conscious decision to refrain from filing an amended complaint . . . at any time prior to dismissal.”); *id.* at 3-4 (“Horras could have moved for leave to amend his Complaint at any time before the Court granted Defendant’s Motion to Dismiss; Horras failed to take any such action.”); *id.* at 4-5 (“Horras had every opportunity to request leave to amend pre-dismissal. . . . The Court held a hearing regarding the Motion to Dismiss on March 26, 2012. At that hearing, Horras’s attorney stated the initial Complaint was a model of pleading that did not

require any further factual support.”). The record makes clear that Horras never sought to amend the complaint until after dismissal, despite being “put on notice” of the need to amend by both the district court and ACS. *Moses.com*, 406 F.3d at 1065. We therefore hold that the district court did not abuse its “considerable discretion,” *Hypoguard*, 559 F.3d at 824, in concluding that it was not required to allow Horras to amend the complaint post judgment.

IV.

For the foregoing reasons, we affirm.

COLLTON, Circuit Judge, concurring in the judgment in part and dissenting in part.

Thomas Horras alleges that in 2007, he was a shareholder of a corporation named Auxi, Inc. According to his complaint, another shareholder, American Capital Strategies, Ltd. (“ACS”), controlled Auxi through ACS’s seats on the board of directors. Horras asserts that when ACS initiated the sale of Auxi, Inc., to Harden Health Care LLC (“HHC”) in 2007, without notice or accounting to Horras, ACS breached a fiduciary duty that it owed to him and caused him

damages. The district court dismissed the complaint, and Horras appeals.⁴

Horras's theory on the fiduciary duty claim is that ACS owed the duties of a majority shareholder to a minority shareholder in a closely-held corporation, that ACS purported to sell all shares of Auxi to HHC (even though Horras owned shares that were overlooked or deliberately ignored), and that ACS breached a fiduciary duty to Horras by failing to notify him of the sale and by failing to compensate him for a portion of the proceeds that ACS received from HHC in exchange for a purported sale of all Auxi shares.

If Horras could prove this series of events, then it is likely that the Iowa Supreme Court would recognize a breach of fiduciary duty. Iowa law recognizes that "majority shareholders do owe a fiduciary duty to minority shareholders," *Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 193, 194 (Iowa 1980), and that duty is heightened in the context of close corporations because of the vulnerability of minority shareholders. *See Cookies Food Prods., Inc. v. Lakes Warehouse*

⁴ Horras also alleged a breach of contract, and I would affirm the dismissal of that claim. Horras did not plead that the contract between ACS and HHC manifests an intent to benefit Horras, *see Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988); to the contrary, his theory is that ACS intended to squeeze him out and deprive him of any benefit. The district court then did not abuse its discretion by denying leave to amend based on undue delay.

Distrib., Inc., 430 N.W.2d at 451-52; 12B William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 5811.05 (2012). The Iowa court has not elaborated on the scope of this duty, but there is no reason to expect it would disagree with other jurisdictions that the duty “encompasses the obligation to act in good faith, to enter into transactions that are fair, and to fully disclose material facts.” *Knaebel v. Heiner*, 663 P.2d 551, 552-53 (Alaska 1983) (citing cases). The Iowa Court of Appeals, consistent with courts in several other jurisdictions, has suggested that the fiduciary duties of those in a close corporation are analogous to duties that partners in a partnership owe to one another, *Jochimsen v. Wapsi Hunting Club, Inc.*, No. 10-1430, 2011 WL 2695272, at *5 (Iowa App. 2011), including a duty of “utmost good faith and loyalty.” *S.E.C. v. Sargent*, 229 F.3d 68, 76 (1st Cir. 2000) (applying Massachusetts law); see *In re Cumberland Farms, Inc.*, 284 F.3d 216, 227 (1st Cir. 2002) (applying Massachusetts law); *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 241 (Ind. 2001); *Lawton v. Nyman*, 327 F.3d 30, 39 (1st Cir. 2003) (applying Rhode Island law); *Adams v. Catrambone*, 359 F.3d 858, 866 (7th Cir. 2004) (applying Illinois law); *Harris v. Mardan Bus. Sys., Inc.*, 421 N.W.2d 350, 353 (Minn. App. 1988); see generally 18 C.J.S. Corporations § 379.

A controlling shareholder may not use its controlling position to secure a pecuniary benefit without ensuring that such benefit “is made proportionally available to the other similarly situated shareholders

or is derived only from the use of controlling position and is not unfair to other shareholders.” See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 5.11 (1994); see generally 1 F. Hodge O’Neal & Robert B. Thompson, *Oppression of Minority Shareholders and LLC Members* § 4:7 (Thompson/West 2005). There is debate in the law about whether a majority shareholder has a duty to share with the minority a “premium” that the majority receives for selling *its own* controlling block. O’Neal & Thompson, *supra*, § 4:7. But there is no authority suggesting that a majority shareholder may retain a premium received for purporting to sell *all* shares of the company when the majority does not in fact own the entire company. The scenario outlined by Horras, if true, states a claim that ACS breached a fiduciary duty by failing to disclose to a minority shareholder that it was entering into a transaction to sell all shares of Auxi to HHC and by failing to account for proceeds obtained based on the purported sale of all company shares.

The majority does not suggest that the Iowa courts would find no breach of duty in that situation, but affirms the dismissal on the ground that Horras did not adequately plead the scenario that he argues. *Ante*, at 7 n.3.⁵ In my view, this conclusion overstates

⁵ The majority, *ante*, at 7 n.3, also says that Horras argues “[f]or the first time on appeal” that ACS’s fiduciary duty was analogous to that of a partner in a partnership, and that “ordinarily” the court does not consider an argument raised for the

(Continued on following page)

the effect of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). To be sure, *Twombly*, 550 U.S. at 561-63, overruled *Conley v. Gibson*, 355 U.S. 41 (1957), and the old “no set of facts” standard under which virtually any complaint survived a motion to dismiss unless the plaintiff affirmatively pleaded himself out of court. *E.g.*, *Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994). *Twombly* makes clear that a plaintiff must plead “more than labels and conclusions,” and “[f]actual allegations must be enough to raise a right to relief above the speculative level.” 550 U.S. at 555. Rule 8(a) requires that there must be “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

This is an important development, but we must be careful not to embellish it. The Court pointedly reminded us in a summary reversal issued two weeks after *Twombly* that the federal rules require only notice pleading through “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)

first time on appeal. As noted, a partner owes his partners a duty of “utmost good faith and loyalty.” Horras argued in the district court that ACS, as a controlling shareholder, owed a duty of “complete loyalty, honesty, and good faith.” R. Doc. 9-1, at 4. That Horras cited additional authority, *Jochimsen*, to bolster the argument he made in the district court is not a ground for refusing to consider the argument. In any event, the majority ultimately does not rely on a waiver by Horras, but proceeds to the merits.

(quoting Fed. R. Civ. P. 8(a)(2)). “Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Id.* (internal quotation omitted). *Iqbal* says that *Twombly* applies to all civil actions, 556 U.S. at 684, but *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), reaffirmed by *Twombly*, 550 U.S. at 555-56, provides that the simplified notice pleading standard of Rule 8(a) likewise applies to all civil actions (with limited exceptions not applicable here), and “relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” 534 U.S. at 512.

Horras’s complaint alleged that ACS controlled Auxi at the time of its sale in 2007, initiated the sale of Auxi to HHC, and received payment for its shares, but failed to notify Horras of corporate activity affecting his shares or to pay Horras for his shares. The majority’s footnote three deems this pleading insufficient notice of the claim outlined above, because it did not specifically allege that Auxi was closely held (only that it was “a Delaware corporation”) and did not specifically assert that ACS purported to sell “all” shares of Auxi. The complaint was insufficient on this view, because Horras’s Count I on breach of fiduciary duty said only that ACS initiated “corporate activity [a]ffecting his shares,” even though Count II on breach of contract alleged that ACS “represented *all* shares of Auxi would be sold to HHC.” So the defendant supposedly was not on fair notice that Count I

alleged a purported sale of all shares or that Auxi was closely held.

These criticisms of the complaint bring to mind the technical requirements of the code pleading regime that was superseded by the federal rules and the simplified notice pleading approach. *See* Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 *Law & Contemp. Probs.* 144, 154-55 (1948); Charles E. Clark, *Simplified Pleading*, 2 *F.R.D.* 456, 458-60 (1943). Since 1948, after all, it has been sufficient to allege a negligence claim in one sentence: “On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.” Fed. R. Civ. P. 84 & App., Form 11. Would the majority say that this “singular allegation” fails to state a claim because it does not specify that the defendant ran through a red light? Under the simplified pleading standard of Rule 8(a), I think the complaint here was sufficient to give ACS fair notice of the fiduciary duty claim that Horras has amplified in his briefing.

The availability of information in this case is asymmetrical. ACS presumably knows what happened in the sale of Auxi shares to HHC; Horras evidently does not know much. The litigation likely would entail simple, relatively inexpensive discovery about the Auxi corporation and the transaction with HHC, after which a motion for summary judgment may well be in order if there is insufficient evidence to support Horras’s theory. But at this early stage of the proceeding, I would reverse the judgment

dismissing the fiduciary duty claim and remand for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THOMAS M. HORRAS, Plaintiff, vs. AMERICAN CAPITAL STRATEGIES, LTD., Defendant.	No. 4:11-cv-00553 – JEG ORDER
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This matter is before the Court on Defendant American Capital Strategies, Ltd.'s (ACS), Motion to Dismiss Plaintiff Thomas M. Horras' (Horras) Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Horras resists. A non-evidentiary hearing was held on March 26, 2012. Attorney Gail E. Boliver represented Horras, and attorneys Stanley J. Thompson and Brian K. Condon represented ACS. The matter is fully submitted and ready for disposition.

I. BACKGROUND¹

Horras is a citizen of Iowa who built a home health care business named Hawkeye Health Services, Inc.

¹ The facts are taken from the Complaint. The Court accepts as true all facts alleged in the Complaint for purposes of a Rule 12(b)(6) motion to dismiss. *See Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010).

Horras agreed to merge Hawkeye Health Services, Inc., with other health care providers to form Auxi, Inc. (Auxi), a Delaware corporation. Horras was personally issued 417,734 shares of Auxi stock. In 2000 or 2001, ACS, a private equity fund, took an equity position in Auxi. ACS then acquired seats on the Board of Directors for Auxi, which gave ACS control over the company. In May of 2007, Harden Health Care LLC (HHC) purchased shares of Auxi for over \$20 per share after ACS, through Auxi board members, initiated the sale of Auxi to HHC; Horras was not informed of this sale nor compensated for his shares by ACS or Auxi.

Horras filed a Complaint alleging breach of fiduciary duty and breach of contract claims against ACS on November 23, 2011. ACS filed its Motion to Dismiss Horras' Complaint for failure to state a claim under Rule 12(b)(6) on January 9, 2012. The motion was timely resisted.

II. DISCUSSION

Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” However, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original). “To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A complaint that offers “‘naked assertion[s]’ devoid of ‘further factual enhancement’” is not sufficient. *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557). Although the Court must accept all factual allegations as true, the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

A. Breach of Fiduciary Duty²

² Horras is a citizen of Iowa, Auxi is a corporation incorporated in Delaware, and ACS is incorporated and has a principal place of business outside of Iowa. This Court applies Iowa choice-of-law rules to determine which state’s laws apply. *See Am. Guarantee & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 668 F.3d 991, 996 (8th Cir. 2012). Though both parties argued their respective positions under Iowa law, at the hearing, ACS asserted that it believed Delaware law would ultimately apply to this action because Auxi is a Delaware corporation. ACS conceded, however, that the law in Delaware is not materially different from Iowa. The Court agrees that Delaware law likely applies under Iowa choice-of-law rules to the fiduciary duty claim given that Auxi is a Delaware corporation. *See MHC Inv. Co. v. Racom Corp.*, 254 F. Supp. 2d 1090, 1097-98 (S.D. Iowa 2002). However, because both parties argued their positions under Iowa law, ACS conceded that there is no material difference

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To establish a breach of fiduciary duty under Iowa law, Horras must prove “(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached this fiduciary duty; (3) the breach of the fiduciary duty was a proximate cause of the plaintiff’s damages; and (4) the amount of damages.” *Reed v. Monroe*, No. C09-4026-MWB, 2009 WL 2222855, at *3 (N.D. Iowa July 22, 2009) (applying Iowa law). A fiduciary duty is a relationship that “exists between two persons [or entities] when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.” *Gunderson v. ADM Investor Servs. Inc.*, 85 F. Supp. 2d 892, 920 (N.D. Iowa 2000) (quoting *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986)).

In the context of closely-held corporations, Iowa law recognizes the principle that “majority shareholders do owe a fiduciary duty to minority shareholders,” *Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 193, 194 (Iowa 1980), but the *Linge* court did not elaborate on what that duty entailed. Horras,

between Iowa and Delaware law, and the Court is satisfied that the result would be the same under either state’s laws due to the failure to satisfy federal pleading standards, the Court will apply Iowa law for purposes of this Order. See *Phillips v. Marist Soc’y of Wash. Province*, 80 F.3d 274, 276 (8th Cir. 1996) (“[B]efore entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.” (internal quotation marks omitted)); *id.* (“In the absence of a true conflict, *lex fori* controls.” (internal quotation marks omitted)).

however, does not provide facts from which the Court can conclude whether Auxi was a closely-held corporation, nor did Horras elaborate about the relationship between the parties. 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. Nonetheless, given the control ACS is alleged to have had over Auxi due to its status as a majority shareholder, the Court will assume that Iowa law would recognize that ACS owed a fiduciary duty to Horras under some circumstances.³

However, the second element – that ACS breached its fiduciary duty – is fatal to Horras’ Complaint because the minimal factual allegations are not sufficient to allow the Court to reasonably infer that ACS breached any fiduciary duty owed to Horras. In his Complaint, Horras alleges that “[Auxi] shares were sold to [HHC].” Compl. ¶ 10, ECF No. 1. Later, Horras alleges that “ACS, through its Auxi Board Members, initiated the sale of Auxi to HHC.” Compl. ¶ 15. Horras further alleges that “ACS breached its fiduciary responsibility to [Horras] by failing to notify him of corporate activity effecting [sic] his shares.”

³ Delaware law also recognizes that a majority shareholder owes a minority shareholder a fiduciary duty in some circumstances. *See, e.g., Singer v. Magnavox Co.*, 380 A.2d 969, 976 (Del. 1977), *overruled on other grounds, Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

Compl. ¶ 17. Horras also alleges that he was not compensated for his shares.

Thus, Horras asserts a legal conclusion that ACS breached its fiduciary duty to Horras; the factual allegation leading to that legal conclusion is that ACS did not notify Horras of the activity affecting his shares. Yet Horras has alleged no facts to show that ACS – a majority shareholder⁴ – owed this duty to Horras, nor has Horras provided any authority that would support this theory of liability based solely on ACS’s status as a majority shareholder. The Complaint is void of facts that would be helpful in determining the scope of the fiduciary duty, such as how Auxi was structured and what the bylaws and articles of incorporation provided. Based on the facts alleged in the Complaint, Horras “has failed to allege sufficient factual matter, accepted as true, to ‘state a claim to relief [for breach of a fiduciary duty] that is plausible on its face.’” *Iqbal*, 556 U.S. at 678.

⁴ In his response brief, Horras cites cases that show that directors and officers of a corporation also owe a fiduciary duty to shareholders. Horras does not discuss these cases nor explain to the Court why this is a relevant proposition, as the facts alleged in the Complaint, and basic corporate law, do not allow the Court to draw the reasonable inference that ACS itself was a board member or officer of Auxi. *See, e.g.*, Iowa Code § 490.803(1) (“A board of directors must consist of one or more *individuals*. . . .” (emphasis added)); Del. Code Ann. tit. 8, § 141(b) (“The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person.”).

To the extent that Horras' Complaint can be read to allege a claim for breach of fiduciary duty based on Horras not being compensated for his shares, the Court finds he fails to state a claim under this theory as well. From the facts alleged, the Court cannot discern whether Horras is alleging that ACS sold its own shares of stock which somehow devalued Horras' shares, or whether ACS sold all shares of Auxi to HHC, including Horras' shares,⁵ or whether some other form of sale was initiated by ACS that included the sale of stock. Horras does not provide facts that show why he should be compensated for his shares or how his shares were affected. Without adequately pleading facts alleging what transpired, the Court cannot draw a reasonable inference that ACS breached a fiduciary duty owed to Horras.

At the hearing, Horras repeatedly asserted that he was unsure of the details as to what happened. This uncertainty is consistent with Horras' Complaint. Although this admission explains why the Complaint is vague and confusing with minimal details and very few factual allegations, it does not save Horras' Complaint. The Court is sensitive to Horras' assertion that he does not have some of the

⁵ At the hearing, Horras clearly articulated the theory that ACS sold Horras' shares. Mindful that the Court must accept all factual allegations as true, even ones, as here, that the Court finds improbable given that Horras did not supply the Court with any facts to show how ACS sold Horras' shares without his authorization, the Court need not consider this theory because Horras failed to allege this fact *in his Complaint*.

information that would provide some factual enhancement to his claims because the information is in the hands of ACS. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009). However, it is implausible that Horras – with allegedly more than \$8 million worth of stock in Auxi and who allegedly played a significant role in the formation of Auxi – was unable, due to lack of access to information, to provide further factual enhancement, or at least sufficiently stated allegations in his Complaint to survive a Rule 12(b)(6) motion. Without adequately alleging a breach of a fiduciary duty, the Complaint also fails to show that such a breach was the proximate cause of Horras’ damages.

Accordingly, the Court finds that Horras has failed to state a claim upon which relief can be granted as to his breach of fiduciary duty claim.

B. Breach of Contract

To establish a breach of contract under Iowa law, Horras must prove the following:

- (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that [he] has performed all the terms and conditions required under the contract; (4) [ACS’s] breach of the contract in some particular way; and (5) that [Horras] has suffered damages as a result of the breach.

Adam v. Stonebridge Life Ins. Co., 612 F.3d 967, 971 (8th Cir. 2010) (quoting *Molo Oil Co. v. River City*

Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998)).

Regarding the first element, Horras, in his Complaint, states that “ACS and/or Auxi represented all shares of Auxi would be sold to HHC.” Compl. ¶ 23. This is the closest Horras comes to alleging the existence of a contract; nonetheless, that alleges a representation Auxi made to HHC, not to Horras. Further, it was not until the hearing that Horras revealed that his theory of recovery for breach of contract was based on Horras being a third-party beneficiary to a contract between Auxi and HHC. The Court, however, is to determine the sufficiency of the Complaint, and the Court finds that Horras did not adequately allege in his Complaint sufficient facts to show that he is entitled to relief on a breach of contract claim.

Horras did not allege the existence of any contract to which he was a party or allege that or how he was a third-party beneficiary to any other contract to which he was not a party, did not provide the Court with the terms of a contract, did not allege that any terms or conditions were performed as required by the contract, and does not allege how ACS’s failure to compensate him for his shares constitutes a breach of a contract. Contrary to Horras’ assertion that his Complaint is “a model of skillful efficiency and specific factual notice,” Pl.’s Resp. Mot. Dismiss 5, ECF No. 9-1, the Court finds that it is plainly deficient. Therefore, the Court concludes that Horras has failed to

state a claim for breach of contract upon which relief can be granted.

III. CONCLUSION

For the reasons stated, ACS's Motion to Dismiss Horras' Complaint, ECF No. 8, must be **granted**. The above-entitled action is **dismissed**.

IT IS SO ORDERED.

Dated this 25th day of June, 2012.

/s/ James E. Gritzner
JAMES E. GRITZNER,
Chief Judge
U.S. DISTRICT COURT

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 12-3886

Thomas M. Horras

Appellant

v.

American Capital Strategies, Ltd.

Appellee

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:11-cv-00553-JEG)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Bye would grant the petition for rehearing en banc.

October 16, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THOMAS M. HORRAS,

Plaintiff,

vs.

AMERICAN CAPITAL
STRATEGIES, LTD.,

Defendant.

CASE NO. _____

COMPLAINT

and

JURY DEMAND

(Filed Nov. 23, 2011)

COMES NOW, Mr. Thomas M. Horras, by and through the undersigned, and for his cause of action states as follows:

PARTIES

1. Plaintiff, Mr. Thomas M. Horras, is an individual, citizen of the State of Iowa.
2. Defendant, American Capital Strategies, LTD. (hereinafter "ACS") is a private equity fund with principle offices in a state other than Iowa.

JURISDICTION

3. This Court has jurisdiction pursuant to 28 U.S.C. §1332. The amount in controversy is greater than \$75,000. Plaintiff is a citizen of the State of Iowa

and Defendant is a corporation, incorporated under the laws of a state other than Iowa, having its principal place of business in a state other than Iowa.

4. Venue is proper in this district under 28 U.S.C. § 1391.

BACKGROUND

5. Mr. Horras built a successful home health care business in the State of Iowa named Hawkeye Health Services, Inc.

6. Mr. Horras agreed to merge his business with other home health care providers in other states to form a Delaware corporation named Auxi, Inc.

7. Mr. Horras was issued 417,734 shares of Auxi, Inc.

8. Upon information and belief, sometime in either 2000 or 2001, the defendant put monies into Auxi, Inc. and took an equity position in the company.

9. The defendant acquired control of Auxi, Inc. by acquiring seats on the Board of Directors.

10. In May, 2007, Auxi, Inc. shares were sold to Harden Health Care LLC (hereinafter "HHC") out of Austin, Texas.

11. Mr. Horras was not informed of the sale.

12. Mr. Horras was not compensated for his shares by either ACS nor Auxi, Inc.

**COUNT I
BREACH OF FIDUCIARY DUTY**

13. Plaintiff repleads paragraphs 1-12 as if fully set forth herein.

14. Upon information and belief, ACS controlled Auxi Inc. at the time of its sale in 2007.

15. Upon information and belief, ACS, through its Auxi Board Members, initiated the sale of Auxi to HHC.

16. Upon information and belief, ACS was paid for its shares of Auxi in 2007.

17. Upon information and belief, ACS breached its fiduciary responsibility to plaintiff by failing to notify him of corporate activity effecting his shares.

18. Neither ACS nor Auxi has paid plaintiff for his shares.

19. Upon information and belief, Auxi shares sold for over \$20.00 per share.

20. Plaintiff was damaged by the failure to pay him for his shares.

WHEREFORE, plaintiff prays for a judgment against the defendant for compensatory damages, punitive damages, interest at the legal rate from the legal date, costs, and such other and further relief as the Court may deem just and equitable in this cause.

COUNT II
BREACH OF CONTRACT

21. Plaintiff repleads paragraphs 1-12 as if fully set forth herein.

22. Upon information and belief, ACS controlled Auxi Inc. through its Board Members.

23. Upon information and belief, ACS and/or Auxi represented all shares of Auxi would be sold to HHC.

24. Neither ACS nor Auxi, Inc. had authority to sell the plaintiff's shares.

25. Plaintiff has not been compensated for his shares.

26. Plaintiff has been damaged by defendant's failure to compensate him for his shares.

27. Upon information and belief, Auxi shares were sold for over \$20.00 per share.

WHEREFORE, plaintiff prays for a judgment against the defendant for compensatory damages, interest at the legal rate from the legal date, costs, and such other and further relief as the Court may deem just and equitable in this cause.

DEMAND FOR JURY

COMES NOW the Plaintiff in the above cause of action and requests trial by jury of all issues in this cause.

Respectfully submitted,
Thomas M. Horras, Plaintiff

By: /s/ Gail E. Boliver

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