IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DOUG VANDER WEIDE, MIKE DEE, KRIS DEE, CHARLES DEPENA, STEVE FELTZ, JAMES FOGT, MARC GILLOTTI, MATT HELGESON, KARI HELGESON, JASON HELLICKSON, SUSAN HELLICKSON, BRAD KING, JILL KING, SURESH KOTA, BHAGYALASKSHMI ARVAPALLI, DAVID LACEY, SARAH LACEY, BRYAN LAMB, THEODORE J. LARE, KERSTIN LEVY, JEFF LORENZEN, SCOTT LUKAN, KARA LUKAN, THERESA A. MCCONEGHEY, ALAN R. MCCONEGHEY, BRIAN MEHLHAUS, LAURA MEHLHAUS, MARK MEYER, ANN MEYER, BRENT MITCHELL, NAGENDRA MYNENI, TIMOTHY NEUGENT, GERALD NEUGENT, KAAREN OLESEN, MICHAEL RIGGS, JOHN RIZZI, JOANNE RIZZI, TIM STEPHANY, TONTO HOLDINGS, LLC, SCOTT VANCE, HARV VANDER WEIDE, LOIS VANDER WEIDE, RAVI VEMULAPALLI, RANI MAKKAPATI, BUDDEMEYR INVESTMENTS, LLC, MICHAEL L. MCKINNEY, TODD MILBOURN, ELIZABETH MILBOURN, MAGNOLIA PARTNERS, LLC, MARK R. SLOCOMB TRUSTEE, MICHAEL MALLOY, JOAN MALLOY, STEVE MEYER, TERESA JENSON, RON KING, NICK COLLISON, LUC DE TEMMERMAN and ANN-MARIE UYTTERSPROT Plaintiffs/Counterclaim Defendants v. SETH BURGETT, Defendant/Counterclaim Plaintiff.	Case No. LACL135549 **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESISTANCE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COME NOW the Plaintiffs/Counterclaim Defendants, by and through their undersigned attorneys, and hereby submit their Brief in Support of their Resistance to Defendant's Motion for Summary Judgment in this matter.

I. Applicable Law. 2
II. Introduction. 6
III. Standards of Law Governing a Motion for Summary Judgment. 7
IV. Undisputed and Disputed Facts. 8
V. Argument. 9
A. Burgett is not entitled to Summary Judgment on Plaintiffs' Breach of Contract Claim because the Evidence Will Show Yurbuds *did* Receive Earn-Out that He was Contractually Obligated to Re-Allocate. 10
B. Burgett is not entitled to Summary Judgment on Plaintiffs' Fraud Claims because Plaintiffs Have Specific Evidence of Burgett's Misrepresentations, Burgett's Misrepresentations Were of His Present Intent and not a Future Event, and Plaintiffs Relied on These Misrepresentations to Their Detriment. 14
1. Evidentiary support for Burgett's misrepresentations abounds. 14
2. Burgett's misrepresentations were just that. 18
3. Plaintiffs relied on Burgett's misrepresentations to their detriment (and Burgett intended they do so). 19
C. Burgett Breached His Fiduciary Duties When He Kicked Out the Only Board Members Protecting the Shareholders' Interests and Cut Himself a Check 20
1. A demand was unnecessary and would have been futile. 21
2. Defendant is misconstruing Plaintiffs' claim—here is clarification. 22
3. There is an independent basis for Plaintiffs' fiduciary duty claim. 23
D. Burgett Broke Many Promises and He Should be estopped from Doing So. 24
E. *Bristol-Myers Squibb*? 25
VI. Conclusion. 25

I. Applicable Law.

As a preliminary matter, Defendant's Brief in Support of its Motion for Summary Judgment cites to at least four different states' laws, but fails to explain why it matters. In fact, it would appear that, despite Defendant's vigorous contention that Missouri law should primarily apply, there is not actually a relevant difference between our southern neighbor's law and ours. Accordingly, Plaintiffs will cite to Iowa law in their Resistance, as that is the law that should primarily be applied, but they will respond with extrajudicial authority when Defendant prompts

them with an assertion that the result would be different under another state's—which is infrequent.

Nevertheless, in the interest of responding to each argument made, Defendant is simply incorrect. The Court is familiar with these arguments from the beginning of this case, when Defendant was arguing the comity doctrine warranted a stay, and from Defendant's Resistance to Plaintiff's Motion for Partial Summary Judgment, when he insisted that Missouri law should apply, "because." Then, as now, Defendant relied on *First Midwest Corp. v. Corporate Finance Associates*, 633 N.W.2d 888, 893 (Iowa 2003), which references the Restatement (Second) of Conflict of Laws § 188 (1971), to assert that Missouri law governs Plaintiffs' breach-of-contract action. Then, as now, Defendant is wrong (though it doesn't really matter).

Because the Re-Allocation Agreements fail to specify a choice of law, (Plaintiffs' Statement of Additional Material Facts in Resistance to Defendant's Motion for Summary Judgment ¶ 19 [hereinafter, PSAMF]), courts will consider the following factors in applying the principles of Restatement (Second) of Conflict of Laws § 6:

> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws § 188(2). Generally speaking, "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." The Re-Allocation Agreements were negotiated from the State of

Iowa and, for 38 out of 58 Plaintiffs, they will be performed in Iowa. (PSAMF ¶¶ 15, 20–21). This should resolve the matter.

Still, to resolve the matter further, the above are factors specific to breach-of-contract actions, but the goal in applying them is to meet and support:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(e). Frankly, no needs of any judicial system are met by adjudicating certain Plaintiffs' claims under a different body of laws than another's. Defendant appears to argue for Missouri law because he wants to remain consistent, but Iowa law applies. As Plaintiffs have stated before, literally none of the *First Midwest* factors would lead this Court to choose Missouri as the applicable law in this dispute. The place of negotiating the contract for all of the Plaintiffs was Iowa, (PSAMF ¶ 15), the place of performance and the place of the contract's subject matter (payment to the Plaintiffs at their place of residence) was primarily in Iowa and outside of Missouri for all but 6 Plaintiffs, (PSAMF ¶¶ 20–21, 77), and the domicile of most of the Plaintiffs is Iowa (PSAMF ¶ 76)—and Burgett himself is an Illinois resident (PSAMF 78). There is just no reason to apply another state's law to this matter.

As to Plaintiffs' fraud and breach-of-fiduciary duties actions, Defendant argues the

internal-affairs doctrine. Plaintiffs note Iowa has not actually adopted the doctrine, only that a Northern District Judge "is persuaded that Iowa courts, if presented the opportunity, would do the same." *Tyson Fresh Meats, Inc. v. Lauer Ltd., L.L.C.*, 918 F. Supp. 2d 835, 850 (N.D. Iowa 2013). Perhaps they would, and Defendant correctly notes that Iowa Code section 489.801(1)(*a*) states, "The law of the state or other jurisdiction under which a foreign limited liability company is formed governs . . . [t]he internal affairs of the company." Yet, though Plaintiffs have no reason to argue that Iowa courts would not apply the doctrine (because they will prevail under either state's law), Plaintiffs must clarify that their fraud claims are not subject to it.

Defendant cites to *MHC Investment Co. v. Racom Corp.* for the proposition that Plaintiffs fraud and breach-of-fiduciary-duty claims are subject to Delaware law, but in *Racom* the Southern District of Iowa applied Iowa law to the plaintiff's fraud claim and Delaware law to the breach-of-fiduciary duty action. 254 F. Supp. 2d 1090, 1095–96, 1097–98 (S.D. Iowa 2002). The same should occur here, as Plaintiffs' fraud claim does not arise out of issue relating to "[t]he internal affairs of the company." Burgett's fraud wasn't part of his "administration or governance of a corporation," *In re Bridge Information Systems, Inc.*, 325 B.R. 824, 830 (E.D. Mo. 2005), it was a personal attack on Plaintiffs. *See McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987) ("Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders. It is essential to distinguish between acts which can be performed by both corporations and individuals, and those activities which are peculiar to the corporate entity."); *see also VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 n. 14 (Des. 2005) ("The internal affairs doctrine does not apply where the rights of third parties external to

the corporation are at issue, *e.g.*, contracts and torts."). Defendant also cites to *380544 Canada, Inc. v. Aspen Tech., Inc.*, for the proposition that courts will apply the state of incorporation's law to fraud claims made against directors of corporations, but *380544 Canada* stands for nothing—the parties to that case *agreed* to apply Delaware law to the fraud claims. 544 F. Supp. 2d 199, 233 (S.D.N.Y. 2008).

Accordingly, Plaintiffs will apply Delaware law to their breach-of-fiduciary actions, and Iowa law to everything else. *See generally Stewart v. Wilmington Trust SP Services, Inc.*, 112 A.3d 271, 291–93 (Del. 2015) (applying internal affairs doctrine to breach-of-fiduciary duty claims and examining other contract and tort claims under Restatement (Second) of Conflicts of Laws principles). In abundance of caution, and without waiving any of the foregoing, Plaintiffs will apply other states' law when Defendant appears to assert it would matter.[1]

II. Introduction.

With this preliminary matter aside, we should refocus on what this case is about: Seth Burgett. Defendant is correct that there is some overlap in Plaintiffs' claims; this is because one person's action can be wrong for many reasons. Mr. Burgett's actions were very wrong. Burgett defrauded Plaintiffs. He breached his duties to them as their fiduciary. He breached his contracts with them. He attempted to renege on his promises with them. He took their stuff. That he was able to accomplish all of this in so many moves does not mean he is entitled to summary judgment, it just means he is efficient. That said, Plaintiffs agree that it is appropriate to clarify their claims now.

[1]Plaintiffs note Defendant applies Missouri law to Plaintiffs' promissory estoppel claims, but does not specify why he believes it should. Plaintiffs refer to their analysis on their breach-of-contract claims and assert here that Iowa law should apply.

First, Defendant has returned the money he unlawfully appropriated as severance proceeds. (PSAMF ¶ 73). This appropriation was the basis for Plaintiffs' unjust enrichment and conversion claims. Accordingly, these claims may be dismissed. Defendant also points out the claims brought by each Plaintiff may, on occasion, differ from another's. In this regard, Plaintiffs note that Doug Vander Weide is the only Plaintiff that did not sign and produce a Re-Allocation Agreement.[2] (PSAMF ¶ 22). All other Plaintiffs' claims arising from the Re-Allocation Agreements should proceed. Finally, Plaintiffs note their claim for fraud, as pled, concerns the misrepresentations made to induce their agreement to the Settlement Agreement. Plaintiffs did not plead the Re-Allocation Agreements were obtained by fraud. Therefore, Plaintiffs concede that only Plaintiffs Hellickson and King, the Plaintiffs whose agreement to the Settlement Agreement Defendant obtained, (PSAMF ¶¶ 7, 36), maintain this claim.

III. Standards of Law Governing a Motion for Summary Judgment.

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "An issue of fact is 'material' only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law." *Nelson v. Lindaman*, 867 N.W.2d 1, 6 (Iowa 2015) (quoting *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008)). "An issue is 'genuine' if the evidence in the record 'is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Wallace*, 754 N.W.2d at 857). Taken together, "[a] genuine issue of material fact exists

[2]Plaintiff Buddemeyer Investments produced a signed Re-Allocation Agreement in December 2017. (PSAMF 23). Plaintiffs understand the production has been voluminous in this case.

when reasonable minds can differ as to how a factual question should be resolved." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017).

It is the *moving* party, in this case, the Defendant, that "has the burden of showing the nonexistence of a genuine issue of material fact," *Cannon v. Bodensteiner Implement Co.*, 903 N.W.2d 322, 327 (Iowa 2017) (quotation omitted), while the *nonmoving* party, in this case, Plaintiffs, has the benefit of "every legitimate inference that can be reasonably deduced from the record," *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). In short, "[i]n ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion," *id.* at 717, and it is up to Defendant to overcome this preference for trial-on-the-merits, not to Plaintiffs to prove their claims without the opportunity to present them to a factfinder. *See Nationwide Agribusiness Ins. Co. v. PGI Intern.*, 882 N.W.2d 512, 522 (Iowa Ct. App. 2016) ("[I]t is not the role of the court on summary judgment to resolve disputes of fact and determine whether [the Plaintiff] has proven [her] case, but rather to identify whether a genuine issue of material fact exists.").

IV. Undisputed and Disputed Facts.

Defendant fails to identify the undisputed facts that would entitle him to relief. This is because very little is undisputed in this case. As will be described more fully below, the parties disagree on just about everything at issue. They agree the language of certain documents is what it is, but they disagree what the parties who drafted that language meant. They agree Burgett made a number of statements in a number of emails, but they disagree on what he intended. They agree Burgett kicked the other Board members out and allocated the final check Yurbuds would ever receive in the most Burgett-friendly way possible, but they disagree on why he did it.

This, of course, is aside from the factual matters on which they wholly and fundamentally are opposed. For example, Burgett believes he never made any misrepresentations about his intent with regard to the Settlement proceeds. Plaintiffs disagree, citing to verbal and written conversations they allege occurred. Certainly, the parties also disagree about the law (including not only which law to apply (see the below on fraud) but how to apply it (see the below on fiduciary duties)), but they *really* disagree on the facts. It will take a jury and five days to resolve these outstanding issues, because the law cannot be applied to Plaintiffs' claims in this case without first determining the facts.[3] Despite all his arguments, Defendant has failed to prove otherwise.

V. Argument.

Defendant is hoping at least some spaghetti will stick. Plaintiffs count at least 12 separate arguments made, many of them for the second or third time in these proceedings. Briefly, Burgett is not entitled to summary judgment on Plaintiffs' breach of contract claim because the evidence will show Yurbuds *did* receive Earn-out, which Burgett failed to re-allocate consistent with his contractual obligations; Burgett is not entitled to summary judgment on Plaintiffs' fraud claims because Plaintiffs have specific evidence of Burgett's misrepresentations, Burgett's misrepresentations were of his present intent and not a future event, and Plaintiffs relied on these misrepresentations to their detriment; Burgett is not entitled to summary judgment on Plaintiffs' breach-of-fiduciary-duty claims because the evidence will show he breached his fiduciary duties and Plaintiffs have a right to recover; and Burgett is not entitled to

[3]The sole exceptions relevant to Plaintiffs' claims are those matters noted in Plaintiffs' Motion for Partial (not total) Summary Judgment. Primarily, Plaintiffs consider it legally unreasonable to assert the entire Settlement proceeds are 100 percent Holdback, the position Defendant has taken in this litigation thus far.

summary judgment on his promissory estoppel claim because the relevant promise he made and broke should not be conflated with other promises he made and broke. As to Plaintiffs' unjust enrichment and conversion claims, Plaintiffs have already noted that Burgett has graciously returned the funds he stole. Finally, regarding *Bristol-Myers Squibb*, we are now scraping the bottom of this (spaghetti?) barrel. Plaintiffs note Defendant has long since appeared in this case and, therefore, consented to this Court's exercise of jurisdiction over his person.

A. Burgett is not entitled to Summary Judgment on Plaintiffs' Breach of Contract Claim because the Evidence Will Show Yurbuds *did* Receive Earn-Out that He was Contractually Obligated to Re-Allocate.

Defendant's arguments on Plaintiffs' breach-of-contract claims proceed on a false premise: that the Settlement payment was not earn out. The evidence will show it was. Burgett clearly agreed to re-allocate all payments he received that were attributable to Earn-out from the Harman Sale Transaction, but that misses the crucial question: Are any of the Harman Settlement proceeds attributable to Earn-out? If so, even Burgett would admit he breached his contracts with Plaintiffs.

Defendant wastes paper on various issues that are irrelevant to this question (and its answer). For example, no Plaintiff is arguing their Re-Allocation Agreement entitles them to a payment that was not Earn-out from the Harman Sale. And, whether an Earn-out payment is considered a condition precedent or not, Burgett's obligation to re-allocate remains the same. Plaintiffs will not address these manufactured disputes here, because they have no reason to do so. It all misses the point, which is whether the Harman Settlement proceeds were Earn-out. (This also further reinforces the point noted above—it does not matter what state's law applies to the interpretation of the Re-Allocation Agreements, because the parties don't actually disagree

about the meaning of the Re-Allocation Agreements).

To this, Defendant asserts that counsel for Harman specifically negotiated a term that he interprets as classifying the proceeds, not as hold-back, but as anything-but-Earn-out. This is his "red-line" defense, which relies on section 3 of the Settlement Agreement, amended by Harman's counsel as follows:

3. ~~2.~~ Release of Certain Payment Obligations Relating to APA. Notwithstanding anything in the APA to the contrary, the Parties hereby agree that:

a. Harman shall not owe Verto any payments of any kind under the APA, including but not limited to payments pursuant to Sections 2.2, 2.4 or 10.10 of the APA;

b. For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances;

c. ~~b.~~ Verto shall not owe Harman any payments of any kind under the APA, including but not limited to payments pursuant to Sections 2.2, 2.4, 10.1, 10.3, 10.5 or 10.6 of the APA.

(PSAMF ¶ 43). Plaintiffs have already responded to this argument in their Reply Brief in Support of their Motion for Partial Summary Judgment, but will repeat it here regardless[4]:

> The primary goal of contract interpretation is to determine the parties' intentions at the time they executed the contract. *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001); *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). Interpretation involves a two-step process. First, from the words chosen, a Court must determine "what meanings are reasonably possible." *Walsh, 622 N.W.2d at* 503 (*citing* Restatement (Second) of Contracts § 202 cmt. a, at 87 (1981)). In so doing, the Court determines whether a disputed term is ambiguous. A term is not ambiguous merely because the parties disagree about its meaning. *Hartig Drug Co.*, 602 N.W.2d at 797. A term is ambiguous if, "after all pertinent rules of interpretation have been considered," "a genuine uncertainty exists

[4]As noted above, Plaintiffs will apply Iowa law unless prompted to do otherwise by Defendant. Defendant had previously argued New York law should apply to the interpretation of the Settlement Agreement. Plaintiffs note no difference between the two states' laws on the generally accepted rules of contract interpretation, nor does, apparently, Defendant, so they cited to Iowa law in their Reply and will cite to Iowa law here.

concerning which of two reasonable interpretations is proper." *Id.* Once an ambiguity is identified, the Court must then "choos[e] among possible meanings." Restatement (Second) of Contracts § 202 cmt. a, at 87. If the resolution of ambiguous language involves extrinsic evidence, a question of interpretation arises which is reserved for the trier of fact. *Walsh 622 N.W.2d at* 503; *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 Iowa 1999).

Rules of interpretation are "used both to determine what meanings [of disputed terms] are reasonably possible as well as to choose among two reasonable meanings." *Hartig Drug Co.*, 602 N.W.2d at 797 (citing Restatement (Second) of Contracts § 202 cmt. a, at 87). Put another way, the disputed language and the parties' conduct must be interpreted "in the light of all the circumstances" regardless of whether the language is ambiguous. *Walsh, 622 N.W.2d at* 503; *Fausel*, 603 N.W.2d at 618. In this case, paragraph 3(b) of the Harman Settlement Agreement does not support Burgett's interpretation that the Settlement Proceeds are 100% Holdback.

Here, the Harman Settlement Agreement is absolutely clear that all parties agreed Harman does not owe any payments of any kind to Yurbuds, whether it constitutes Holdback or Earn-Out. Under section 10.10 of the APA, the $3.7 million Holdback was supposed to be paid back to Yurbuds within 18 months after any reductions for indemnification claims, and under section 2.4 of the APA, Earn-Out would be paid out over three years in 2015, 2016 and 2017. But instead of apportioning the settlement payment between Earn-Out and Holdback, the parties to the Harman Settlement Agreement explicitly agreed that Harman did not owe Yurbuds **any refund of the Holdback**, and did not have **any further obligation for Earn-Out**. Specifically, the Settlement Agreement states at Section 3(a) that Harman "shall not owe" any payments due under Section 2.4 or Section 10.10 of the APA.

Despite Burgett's tortured interpretation, Section 3 of the Harman Settlement Agreement does not classify the $3.5 million settlement payment as Holdback. Instead, all section 3 does is make it crystal clear that in exchange for the $3.5 million, Harman does not owe Yurbuds anything under section 2.4 and 10.10. The language contained in Section 3(b) of the Settlement Agreement merely makes it clear that Harman has no obligations to pay any future Earn-Out payments due in 2016 and 2017 after the date of the settlement. So, when considered in conjunction with the language in Section 3(a), the Harman Settlement Agreement does not in any way classify the Settlement Proceeds as Holdback or Earn-Out. On the contrary, the Settlement Agreement makes it clear that it is taking no position whatsoever on the classification of the Settlement Proceeds.

Instead, in allocating the Settlement Proceeds, the test for the finder of fact

> will be whether or not any of the Settlement Proceeds were reasonably "attributable" to "money received from Harman in respect of the Earn-Out". In reaching a decision, a Court will consider what meanings **"are reasonably possible."** *Walsh*, 622 N.W.2d at 503 (citing Restatement (Second) of Contracts § 202 cmt. a, at 87 (1981)). Once an ambiguity is identified, the Court must then "choos[e] among possible meanings." Restatement (Second) of Contracts § 202 cmt. a, at 87. Rules of interpretation are **"used both to determine what meanings [of disputed terms] are reasonably possible as well as to choose among two reasonable meanings."** *Hartig Drug Co.*, 602 N.W.2d at 797 (citing Restatement (Second) of Contracts § 202 cmt. a, at 87). Put another way, the disputed language and the parties' conduct must be interpreted "in the light of all the circumstances" regardless of whether the language is ambiguous. *Walsh, 622 N.W.2d at* 503; *Fausel*, 603 N.W.2d at 618.
>
> In this case, the Yurbuds Board made a determination 100% of the proceeds are attributable to Earn-Out, and there is overwhelming evidence the vast majority of the Settlement Proceeds are reasonably "attributable" to "money received from Harman in respect of the Earn-Out." Burgett's claim that the proceeds must be classified as 100% Holdback based on section 3(b) of the Harman Settlement Agreement is a contrived argument that should be rejected by the Court.

Plaintiffs take this opportunity to add that neither in Defendant's Resistance to Plaintiffs' Motion for Partial Summary Judgment nor in his Motion for Summary Judgment does he explain *why* Harman would care how Yurbuds classified the settlement proceeds. (PSAMF ¶ 46). Plaintiffs seriously doubt that Harman was just trying to do Burgett a favor (the only apparent justification under Defendant's interpretation). Moreover, Defendant fails to explain why, given allocation was obviously very much on the Board's mind, (PSAMF ¶¶ 37–40, 42, 51–52, 57–62, 64–69), it would proceed to approve a Settlement Agreement that took that decision away from them without any comment. In short, Defendant fails to explain why either party to the Settlement Agreement would mean what he says they must have meant.

Acknowledging the irony of language intended to avoid all doubt engendering so much, Plaintiffs believe the most likely explanation is that described in their Reply; Harman never

wanted to see Yurbuds again and certainly did not want a future claim for Earn-out on the horizon—particularly one for the $38 million in Earn-out to which Yurbuds had already asserted it was entitled. In sum, Defendant's red-line argument fails because is it made up; to put it in contract interpretation terms, it does not reflect the intention of the parties, which means it is not their agreement. The parties' intention was not to make the allocation decision in the Settlement Agreement, but to allow Yurbuds' Board to resolve the matter internally, consistent with the representations made by its most vocal member, Defendant.

B. Burgett is not entitled to Summary Judgment on Plaintiffs' Fraud Claims because Plaintiffs Have Specific Evidence of Burgett's Misrepresentations, Burgett's Misrepresentations Were of His Present Intent and not a Future Event, and Plaintiffs Relied on These Misrepresentations to Their Detriment.

Plaintiffs' fraud claims should proceed to trial because they have both evidentiary and legal support. Nothing more is or should be required. Burgett made misrepresentations about his intention to make the Members whole and reallocate his Settlement proceeds, as well as the Board's authority to make the allocation decision regarding the Settlement proceeds. These misrepresentations concerned what Burgett intended to do, the promises he made to the Plaintiffs, not the occurrence of some future unknown. Burgett intended Plaintiffs would, and they did, rely on Burgett's misrepresentations to their detriment of some percentage of $3.5 million.

1. Evidentiary support for Burgett's misrepresentations abounds.

Plaintiffs believe and the evidence will show that Burgett was never planning on letting any of the Harman Settlement proceeds go. It was always Burgett's intention to allocate the

entire proceeds to Aggregate Holdback Amount ("Holdback"),[5] thereby avoiding the need to honor his Re-Allocation Agreements. This means that every time Burgett told a shareholder, "Don't worry, you will be made whole if possible," every time he told a Board Member, "I will listen to your recommendation and, in fact, I will let you decide," every time he remained silent when concerns were raised about allocation—he made a misrepresentation or concealed a known fact. There *is* evidence of misrepresentation; now and which will be presented at trial. This presents an issue for the factfinder.

On July 14, 2014, Burgett emailed the Board: "Talked to Doug VW . . . : We are agreed." (PSAMF ¶ 16). Burgett had successfully convinced Plaintiffs that he would make them whole before taking a piece himself. "Seth will not participate in earn out until all shareholders get to $1 return for $1 invested thru earn out." (PSAMF ¶ 16). So, on August 25, 2014, Burgett sent the Re-Allocation Agreements in a letter. (PSAMF ¶¶ 17–18). In the letter, Burgett told the Members he "appreciate[d] that the amount distributed to you . . . is less than the aggregate amount that you initially invested," but assured them that more was coming in the form of an additional $38 million Earn-out. (PSAMF ¶ 17). He "offer[ed] to re-allocate to you money that I otherwise would receive as a shareholder of Yurbuds." (PSAMF ¶ 17). He added, however, that this only applied to money "attributable to Yurbuds' receipt of the Earn-Out Amount." (PSAMF ¶ 17). Plaintiffs now believe Burgett knew back in 2014 that things could go bad with Harman, so he intended to protect himself at all costs, or at least, up to the costs of the General Holdback Amount.

At a December 29, 2015, Board Meeting, the Board discussed options for dealing with

[5]Except for that portion he initially considered his severance, which he later returned, presumably realizing the risk associated with his position (i.e., it was theft).

potential conflicts of interest, as some were apparently already noting that Burgett's interest were not aligned with the shareholders. (PSAMF ¶ 32). The Board noted a couple options, but counsel for Gibson Dunn, with Burgett's agreement, advised there was not conflict and any conflict was not an issue; Burgett could recuse himself and, since it was a three-person board, he would never be able to control a vote himself anyway. (PSAMF ¶ 32). Burgett never informed the Board that he could, and apparently was planning on, removing them if they fought back.

In a January 14, 2016, email, Burgett again indicated he would follow the Board's decision. (PSAMF ¶¶ 38–40). He stated, "I am asking that *as a board* we follow the operating agreement and determine *as a board* that the proceeds received in this settlement are the maximizing of our already earned capital of the holdback." (Emphases added). (PSAMF ¶ 40). The issue came up again in emails sent January 23, 2016, Who has the authority to make the decision on allocation? The Board, right? (PSAMF ¶ 52). Burgett never informed the Board that even if they had the authority, he could and would just remove them. Burgett never informed the Board that he was already building his case for unilateral action, soliciting the advice of other Yurbuds leadership and cutting the Board out. (PSAMF ¶ 41). Instead, he led them on: "I think we have *as a board* to make the following decisions [regarding severance and allocation]," (sent January 23, 2016), to which Hellickson responded, "I agree . . . that we should settle with Harman first. It then allows us to make the other decisions we need to with knowledge of that actual settlement amount. Seth and Ron, please share if you agree with this strategy." (PSAMF ¶ 52). Ron confirmed—Burgett remained silent, knowing he could remove Ron and Jason if they didn't agree with him. (PSAMF ¶ 52). Instead, Burgett e-mailed on January 24, 2016, "I am committed to improve shareholder returns from my proceeds."

(PSAMF ¶ 53).

On January 26, 2016, Burgett stated he wanted to "increase[e] the settlement proceeds to all shareholders." (PSAMF ¶ 54). This was a ~~lie~~ fraudulent misrepresentation. Burgett provided the Board with a Proceeds Model, which laid out options he never intended to follow. (PSAMF ¶¶ 42, 57–58). On February 9, 2016, Burgett entertained a suggestion from a fellow Board member on allocation, (PSAMF ¶ 59), and on February 12, 2016, Burgett told the Board he wanted their recommendation on allocation,[6] (PSAMF ¶¶ 60–62). A recommendation he also had no intention of following, because on April 4, 2016, he informed the Board and the other shareholders, "This 3.5 million [is mine]." (PSAMF ¶ 68). This was only after the other Plaintiffs obtained copies of the Board Meeting Minutes that describe in summary fashion much of the above. (PSAMF ¶ 67). On April 11, 2016, he kicked out the Board, (PSAMF ¶ 72), which Plaintiffs believe was his plan all along.

In sum, there is evidence of Burgett's misrepresentations. Certainly, there is sufficient evidence to generate a question of fact for the jury. The above is all independent of Plaintiffs' testimony, including Hellickson, who has already stated for the record that Burgett made a definitive verbal statement that he was going to make things right for the shareholders by allocating them *more than 70 percent* as Earn-out. (PSAMF ¶ 79). But, Burgett never did. He

[6]Defendant argues in his footnote 15 that the Board Resolutions allocating the proceeds to Earn-out had no legal effect. It is unclear whether Defendant is moving for summary judgment on this issue or explaining his position. It would appear the latter, as the point is irrelevant to whether Burgett defrauded Plaintiffs. Nevertheless, Plaintiffs note that Defendant's argument is a bad one. Burgett asserts that Article 4 of the Operating Agreement required pro rata distribution. He then argues that the Resolutions deviated from the Operating Agreement; but they didn't. Article 4 of the Operating Agreement specifies pro rata distributions of money—it doesn't specify what the Board should call that money when it distributes it.

Burgett then argues that the Resolutions were amendments to the Settlement Agreement. This is also incorrect, because, like the Operating Agreement, the Settlement Agreement is silent on allocation. It doesn't matter if we apply Delaware, Missouri, or Martian law, Burgett's arguments fail and, as noted in the beginning of this footnote, are presently irrelevant.

allocated himself 100 percent Holdback.

Defendant relies upon his January 14, 2016 email to the Board where he recommended and requested the Board allocate the Settlement proceeds to Holdback. (PSAMF ¶ 38). This was a recommendation and a request. It was not a statement of intent, such as, "If you do not allocate the settlement proceeds 100 percent to Holdback, I intend to remove you from the board and do it myself." Instead, it indicated Burgett's continued (and false) intention to follow the Board's decision on allocation.

2. Burgett's misrepresentations were just that.

Burgett's misrepresentations were of his present intent: I *will* make you whole; I *will* follow your recommendation on allocation; "I am committed to improve shareholder returns from my proceeds." Burgett correctly notes a general statement of law that misrepresentations concerning a future event are only actionable if they are misrepresentations; that is, if they falsely imply an existing "fact, opinion, intention or law." Restatement (Second) of Torts § 525 (Am. Law. Inst. 1977) (West, Westlaw, June 2018 Update). Thus, if the speaker had no intention of performing on a promise, the speaker made a misrepresentation; but, if the speaker intended to perform when making the promise, but failed, no misrepresentation. *See id.* § 530(1) ("A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."); *see also Pollman v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405, 410 (Iowa 1997) (finding a jury issue created based on representations of defendant that it intended to give plaintiff three years to turn a business around, but then didn't). The relevant inquiry is Burgett's state of mind: what did he intend when he made the above statements? Did he truly intend to follow them, only to later change his mind? Or did he never

intend to follow them, and only make them to assuage Plaintiffs' concerns before he took the money and ran? Plaintiffs believe the evidence at trial, direct and circumstantial, will show it was the latter. Defendant asserts the former. State of mind being what it is, this is a question for the jury. *See, e.g.*, *Cozad v. Strack*, 254 Iowa 734, 742, 119 N.W.2d 266, 272 ("Of course another's state of mind is seldom capable of direct proof. Ordinarily it must be determined from the surrounding circumstances. We are not persuaded a jury question was not presented here as to [the defendant's willful intent].").

3. Plaintiffs relied on Burgett's misrepresentations to their detriment (and Burgett intended they do so).

Defendant's last line of defense on this claim is reliance. He argues he never actually intended Plaintiffs to act on his misrepresentations, and doesn't think they actually did. As noted in the introduction to this Resistance, Plaintiffs concede only Hellickson and King had the ability to take an action in response to Burgett's misrepresentations. All other Plaintiffs were, unfortunately, powerless. But, Defendant's argument that Plaintiffs never relied on his misrepresentations because they agreed to finalize the Harman Settlement first is absurd. Plaintiffs delayed on deciding the final allocation until finalizing settlement—they did not delay on making the decision *ever*. Burgett's misrepresentations necessarily included the representations that the ultimate allocation would be the Board's—i.e., Hellickson and King's—decision. He never intended to let them make that decision or follow the decisions they did make, so his representations to the contrary were false. Hellickson and King relied on these representations, because they never would have approved the Settlement Agreement had they known Burgett was planning to force them out and allocate all of the money to himself. Plainly, their detriment is the amount they should have been re-allocated as Earn-out.

C. Burgett Breached His Fiduciary Duties When He Kicked Out the Only Board Members Protecting the Shareholders' Interests and Cut Himself a Check.

Burgett was the CEO of Yurbuds and a Board Member. Burgett harmed Yurbuds and its shareholders individually when he kicked out the Board Members who were protecting their interests and allocated the Settlement proceeds to Holdback. Because of his position in Yurbuds, Burgett owed the shareholders certain fiduciary duties, among them, the duty not to do what he did. Defendant argues he is immune from liability because Plaintiffs never demanded he sue himself; obviously, this would never have happened, it didn't need to happen, and Defendant's claim that it should have happened ignores the timing of these events. Defendant then argues he isn't liable because, even though he claimed the entire Settlement proceeds were Holdback and not Earn-out, he never had a duty to not make this claim. Here, Defendant is simply misunderstanding Plaintiffs' claim. Plaintiffs are not, as Defendant seems to believe, asserting a cause of action for Burgett's claim (as in, his *representation* that the proceeds were all Holdback) they are asserting a cause of action for Burgett's claim (as in, his *position* that the proceeds were all Holdback). In other words, the problem isn't that Burgett stated, "I'm going to pay myself more than I am entitled to," it's that *he actually did it*. To the extent Defendant is arguing he never had a fiduciary duty to promise *not* to take the proceeds—yes, he did, and anyway, *he took the proceeds*. Defendant cannot claim that this clearly self-serving action was in the best interests of the shareholders. Finally, Defendant argues he shouldn't be liable because he is going to have to pay regardless under Plaintiffs' breach-of-contract claim. In support, Defendant cites a principle of Delaware law but ignores how it is applied. The question is not, as Defendant argues and as the very Delaware courts he cites have rejected, whether the fiduciary and

contractual claims are based on the same facts. The question is whether there is an independent basis for the fiduciary duty claims—i.e., where the duty is one of a fiduciary, not a contracting party. Burgett's had duties as both, and he failed to fulfill his duties wearing both hats. The claims should proceed.[7]

1. A demand was unnecessary and would have been futile.

Plaintiffs maintain their harm is direct—not derivative. *See First Nat. Bank of Council Bluffs v. One Craig Place, Ltd.*, 303 N.W.2d 688, 698 (Iowa 1981) (distinguishing between common direct claims, such as where shareholders are persuaded by fraudulent representations or machinations, from derivative claims, when the harm is to the corporation itself). Here, Plaintiffs' claim is not only that Burgett utterly destroyed Yurbuds for his own gain—it is, crucially, that Burgett robbed Plaintiffs' of their investment for his own gain.

However, it does not matter, because, as Defendant admits, demands are futile when the tortfeasors are in control. *Gill v. Vorhes*, No. 15–0785, 2016 WL 4051643, *10 (Iowa Ct. App., July 27, 2016); *see also Reed v. Hollingsworth*, 157 Iowa 94, 106, 135 N.W. 37, 42 (1912) ("But where these officers are themselves guilty of fraud and misfeasance is charged, it is apparent that demand upon them to bring suit against themselves would be a vain and useless thing, and in such cases no demand is necessary."). Defendant faults Plaintiffs for not including "magic words" in their Petition, but the caselaw is clear that Iowa courts "ha[ve] not imposed onerous restraints in derivative actions." *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 636

[7]Very briefly, Plaintiffs will respond to Defendant's arguments regarding paragraph 111(a) of their Petition, which alleged that Burgett breached his fiduciary duties by, "[o]nce the proceeds were received from Harman, distributing funds to himself and other members of the Yurbuds management team without approval from Yurbuds' board and prior to any distributions to the other Yurbuds members." This claim arose out of Burgett's misappropriation of the Settlement proceeds that he initially classified as his severance pay. Plaintiffs are aware that Burgett is no longer contending that any of the proceeds should be considered his severance and, therefore, do not rely on this particular affront to form the basis for their breach of fiduciary duty claim.

(Iowa 1978). In any event, Defendant's argument has already failed at the motion to dismiss stage, when it was actually relevant. Now, Plaintiffs have mustered their evidence and all parties are fully aware of the futility of any demand. Yet, Defendant persists, "Burgett's ownership did not correlate to control of the Board," insisting Plaintiffs should have made a demand. Frankly, Plaintiffs are having trouble taking this argument seriously. Burgett literally removed the other members of the Board when they refused to let him break his promises and take a severance. Is he alleging he would have kept them around had they only sued him first?

2. Defendant is misconstruing Plaintiffs' claim—here is clarification.

Plaintiffs believe Burgett breached his fiduciary duties to them when he "claim[ed] that the entire amount of funds received from Harman relate[] to Yurbuds' General Holdback claim and nothing should be allocated to the larger Earn-out Payment claim, in violation of his prior promises and commitments." Defendant vigorously argues that his misrepresentations to the shareholder—"the entire amount of funds received from Harman relate[] to Yurbuds' General Holdback claim and nothing should be allocated to the larger Earn-out Payment claim"[8]—cannot be a violation of the duty of loyalty, because he never had a duty to make this misrepresentation. Defendant misses the point: he *had a duty to allocate the funds to Earn-out* because he promised Plaintiffs he would *and* because that is what a corporate director and officer acting in the best interests of the shareholders would do. Plaintiffs were certainly upset when Defendant claimed that he was entitled to all of the Settlement proceeds in violation of his promises and commitments to them—but they were more upset when he actually took them. It is this latter action that gives rise to the claim.

[8]This is a misrepresentation because the entire amount of funds received from Harman did not relate to Yurbuds' General Holdback claim and *something* should have been allocated to the larger Earn-out Payment claim.

If Defendant is arguing that he never had a fiduciary duty not to appropriate the Settlement proceeds because he never had a fiduciary duty to promise and commit not to do so, then he is again too narrowly construing Plaintiffs' claim. Plaintiffs acknowledge that Defendant believes he only ever made misrepresentations to Hellickson and King, the other Board Members. But, that does not mean he had free reign to allocate the proceeds to himself. Burgett owed the shareholders "an uncompromising duty of loyalty." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Supr. 1939))). This duty can be violated where the director acts in bad faith, as in, "where a director intentionally pursues goals other than the best interests of the stockholders." *In re Oracle Corp.*, C.A. No. 2017-0337-SG, 2018 WL 1381331, *11 (Ct. Chanc. Del., March 19, 2018) (citations omitted); *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."). When Burgett allocated the Settlement proceeds to 100 percent holdback, he clearly had no shareholder's concerns in mind but his own. There is no other rational explanation, and therefore, Burgett breached his duty of loyalty.

3. <u>There is an independent basis for Plaintiffs' fiduciary duty claim.</u>

As stated at the beginning of this Resistance, one action can be wrong for many reasons. Defendant argues the principle of Delaware law that "a contractual claim will preclude a fiduciary claim, so long 'as the duty sought to be enforced arises from the parties' contractual

relationship.'" *PT China LLC v. PT Korea LLC*, C.A. No. 4456-VCN, 2010 WL 761145, *7 (Del. Ch., Feb. 26, 2010) (quoting *Solow v. Aspect Resources, LLC*, No. Vic. A. 20397, 2004 WL 2694916, *4 (Del. Ch., Oct. 19, 2004)). Defendant directs the Court to *PT China*, but fails to include the most relevant language from that holding, which rejected the very same argument he makes now:

> [Defendant] advances an expansive view of this approach and argues that the "key issue" is whether the fiduciary and contractual claims are based on the same facts. The case law, however, does not support this reading—the appropriate question instead is whether there exists an independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct. If so, the fiduciary duty claims will survive.

Id. Defendant's fiduciary duty arose independently of his obligations to the Plaintiffs under the Re-Allocation Agreements. The duties work in tandem, and Burgett violated them in tandem. That the claims arise out of the same set of facts, even if the relief would be the same, does not mean Plaintiffs are forced to choose one over the other.

D. Burgett Broke Many Promises and He Should be estopped from Doing So.

Plaintiffs pled enough to put Defendant on notice they were planning to hold him to his promises. Defendant asserts the only promise he made was to re-allocate *his* Earn-out distributions to Plaintiffs, which was the subject of a written contract. Defendant broke that promise, but that was not the only one. Defendant also made promises that he would allocate the Settlement proceeds to Earn-out, or at least that he would let the Board decide and follow its recommendation. Defendant broke these promises, as well. Plaintiffs respectfully request Defendant be held to all the promises he made.[9]

[9]Defendant implies Missouri law looks upon the claim of promissory estoppel with extreme mistrust, citing *Midwest Energy, Inc. v. Orion Food Sys., Inc.*, 14 S.W.3d 154, 165 (Mo. Ct. App. 2000). Assuming that is true, Plaintiffs find no similar mistrust in Iowa courts, and note the Restatement itself instructs a "flexible" application of

E. *Bristol-Myers Squibb*?

Finally, Defendant claims, in late May of 2018 and approximately two months before trial, that this Court does not have personal jurisdiction over him due to a 2017 U.S. Supreme Court case, *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773. Plaintiffs will attempt to dispense with this throwaway argument in as few words as possible, starting now: One: *Bristol-Myers Squibb* is not a change in the law, *see Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 52 (Mo. Ct. App. 2017); Two: Even if it were, Defendant is misapplying it, *see generally Bristol-Myers Squibb*, 137 S. Ct. at 1780–81; Three: Regardless, Defendant consented to the jurisdiction of this Court when he failed to challenge it in his pre-answer motion, *see* Iowa R. Civ. P. 1.421(4); *see also Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 854 (N.D. Cal. 2018). Defendant's Motion should be denied.[10]

VI. Conclusion.

After 42 pages, Defendant finally calls it. He has asserted relief from liability for a number of reasons, none of which should be successful. He cannot avoid liability for his breach of contract because the Settlement Agreement did not specify how Yurbuds should allocate the Settlement proceeds, and the evidence will show it should have been treated as Earn-Out, subject to Burgett's Re-Allocation Agreements. He cannot avoid liability for his fraud, because the evidence will show he made the misrepresentations of his intent to follow the Board's recommendation on allocation, he made those misrepresentations with the intent of inducing

---

the principle. Restatement (Second) of Contracts § 90, cmt. *b* (Am. Law. Inst. 1981) (West, Westlaw, June 2018 Update) ("The principle of this Section is flexible."). Iowa has long followed this section of the Restatement. *See Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 48 (Iowa 1999); *Miller v. Lawlor*, 245 Iowa 1144, 1152–53. 66 N.W.2d 267, 272–73 (1954).

[10]39 (not including citations).

consent to the Settlement Agreement, and the Board detrimentally relied on those misrepresentations. He cannot avoid liability for breaching his fiduciary duties, because he breached them. His actions since at least 2014 clearly show where his priorities lie: With Seth, not with the shareholders (like they should). He cannot avoid liability for reneging on his promises, because he promised he would follow the Board's recommendation and he simply did not do so. He *can* avoid liability for unjustly lining his pockets with unlawfully converted funds—but only because he returned the money. Finally, and if there was any doubt, he is definitely subject to this Court's jurisdiction, because he is here.

In sum, Defendant threw everything he had at the wall and nothing stuck. His Motion for Summary Judgment should be denied. Plaintiffs demanded a jury in this case and that jury is entitled to hear and decide these facts. These facts will establish that Seth Burgett did a lot that was wrong for a lot of reasons. Plaintiffs respectfully request this Court deny Defendant's Motion for Summary Judgment in its entirety.

/s/ *Sean P. Moore*[11]
Sean P. Moore, AT0005499
Thomas D. Story, AT0013130

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
Email: moore@brownwinick.com
story@brownwinick.com

ATTORNEY FOR PLAINTIFFS

[11]This document has been signed and filed electronically.

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to the following attorneys of record:

Thomas D. Hanson
Theodore W. Craig
Laura C. Wasson
William M. Reasoner
DICKINSON, MACKAMAN, TYLER & HAGEN. P.C.
699 Walnut Street, Suite 1600
Des Moines, Iowa 50309-3986
(515) 244-2600
(515) 246-4550 fax
thanson@dickinsonlaw.com
tcraig@disckinsonlaw.com
lwasson@dickinsonlaw.com
wreasoner@dickinsonlaw.com

/s/Emily Maier
Emily Maier