IN THE SUPREME COURT OF IOWA
No. 20-0698

EMC INSURANCE GROUP INC.
Plaintiff-Appellee,
vs.

GREGORY M. SHEPARD
Defendant-Appellant.

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

DEFENDANT-APPELLANT'S FINAL OPENING BRIEF

Steve Eckley
ECKLEY LAW PLLC
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309
Phone: (515) 218-1717
Fax: (515) 218-1555
steve@SteveEckleyLaw.com

Thomas K. Cauley, Jr.*
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Phone: (312) 853-7000
Fax: (312) 853-7036
tcauley@sidley.com

*Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the list of record shareholders in the "Cede breakdown" that plaintiff-appellee EMC Insurance Group Inc. ("EMCI") received from the Depository Trust Company ("DTC") and used to send proxy voting forms to those record shareholders in connection with the proposed merger vote constituted a list of "the person in whose names shares are registered in the records of" EMCI for purposes of obtaining record shareholder consent to an appraisal under Iowa Code Section 490.1301(8)?

2. Whether EMCI waived its right to argue that defendant-appellant Gregory M. Shepard ("Shepard") failed to comply with the Iowa appraisal statute given that EMCI both affirmatively led Shepard to believe that he had complied with the appraisal statute and failed to follow the appraisal statute itself?

3. Whether EMCI is estopped from claiming that Shepard failed to obtain record shareholder consent to an appraisal by canceling Shepard's EMCI shares on the effective date of the merger, which was approximately 45 days before Shepard was required to obtain such consent– thus rendering it impossible for Shepard to have obtained any further consents or otherwise pursue his appraisal right?

ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction in this appeal. As the District Court explained, no Iowa appellate court has addressed what constitutes "records of the corporation" under Section 490.1301(8) of the Iowa Business Corporations Act ("IBCA") for purposes of defining the record shareholder whose consent is required to assert the appraisal right. A752. This case therefore raises a "substantial issue[] of first impression" that is of "broad public importance requiring prompt or ultimate determination by the Supreme Court." Iowa R. App. P. 6.1101(2)(c)-(d).

STATEMENT OF THE CASE

Shepard had been one of EMCI's largest minority stockholders, having first acquired EMCI stock in 2005. A735; A500-23. Shepard held his EMCI shares in "street name" – that is, in the name of his broker, Morgan Stanley Smith Barney LLC ("Morgan Stanley"). A735. On June 24, 2019, EMCI announced in a preliminary proxy that its Board of Directors had approved a plan to squeeze-out EMCI's minority shareholders (including Shepard) for $36 per share, subject to approval by minority shareholders. A736-38. Shepard promptly reviewed EMCI's preliminary proxy relating to the squeeze-out merger and sought more information about the proposed squeeze-out merger through a books-and-records action he

brought in the District Court pursuant to Section 490.1602(1) of the IBCA. A8-24. After successfully enforcing his right in the District Court to compel EMCI to produce to him certain of its books and records relating to the squeeze-out merger, Shepard voted against the merger and sought to exercise his right to an appraisal. A742. In an appraisal action, the court would decide the fair value of Shepard's EMCI shares as of the date of the squeeze-out merger. Iowa Code § 490.1321 (2014).

To exercise his appraisal right under Iowa law, a shareholder like Shepard, who is the beneficial owner of shares, must obtain the consent of the "record shareholder" within approximately 45 days after the effective date of the merger. Iowa Code § 490.1303 (2020). "Record shareholder" is defined under Section 490.1301(8) as "the person in whose name shares are registered in the records of the corporation." Here, the merger became effective on September 19, 2019, and Shepard was required to obtain record shareholder consent to an appraisal of his EMCI shares by November 5, 2019. A745.

Like nearly every public corporation in the United States, virtually all of EMCI's shares are held at the Depository Trust Company ("DTC'), in the name of DTC's nominee, Cede & Co. ("Cede"). A748. More than 800 banks and brokerage firms are participants in DTC. A748-49. Those banks

and brokerage firms hold their customers' shares on DTC's records in the name of the bank or brokerage firm (*i.e.* "street name"). *Id.*

Long before the vote on the squeeze-out merger, which occurred on September 18, 2019, DTC sent EMCI a list of its participant banks and brokerage firms that held EMCI shares on DTC's records, which is referred to as the "Cede breakdown." A734-35. Pursuant to its usual practice in connection with mergers, DTC sent EMCI the Cede breakdown so that EMCI could send proxy voting forms to the record shareholders listed in the Cede breakdown. *See* A750-51. DTC sent the Cede breakdown to EMCI along with an Omnibus Proxy. A737. The Omnibus Proxy formally gave the banks and brokerage firms identified on the Cede breakdown as holding EMCI shares at DTC all rights as record shareholders with respect to the merger vote. *Id.*

EMCI did, in fact, use the Cede breakdown to notify record shareholders listed on the Cede breakdown, including Morgan Stanley, of the merger vote. *See* A750. The proxy voting forms that Shepard received in connection with the shareholder vote on EMCI's squeeze-out merger expressly state on the face of the forms that Morgan Stanley was the "record holder" of Shepard's shares of EMCI shares. A385. Morgan Stanley advised Shepard in those proxy voting forms that, as the record shareholder

of his EMCI shares, Morgan Stanley would vote Shepard's shares for or against the proposed squeeze-out merger based on Shepard's instructions. *Id*.

EMCI also repeatedly explained in its pre-merger proxy statement to investors that beneficial owners of stock, like Shepard, may have their shares registered in the name of a bank or broker – that is, in "street name."[1] A209-10. The proxy explained that the bank or broker, as a "record holder," could exercise the appraisal right on behalf of the beneficial owner, stating:

> **A record holder, such as a bank, brokerage firm** or other nominee who holds shares as a nominee for several beneficial owners, **may exercise appraisal rights with respect to the shares held for one or more beneficial owners**, while not exercising this right for other beneficial owners. In that case, the written demand should state the number of shares as to which appraisal is sought. Where no number of shares expressly mentioned, the demand will be presumed to cover all shares held in the name of the record owners . . . **A person having a beneficial interest in shares of common stock held of record in the name of another person, such as a bank, brokerage firm** or other nominee, must act promptly to cause the record holder to properly follow the steps summarized herein and perfect appraisal rights in a timely manner.

A251-52.[2] Consistent with EMCI's proxy, Morgan Stanley, Shepard's broker who held Shepard's EMCI shares in "street name" on his behalf,

---

[1] To have shares registered in "street name" means in the "brokerage firm's name in which securities owned by another are registered." Street Name, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] The proxy's statements that a bank or broker could be the "record holder"

provided a letter memorializing its consent for Shepard to exercise his appraisal right.

Over the course of two months – both before and after the September 18, 2019 vote on the squeeze-out merger – Shepard notified EMCI of his intent to seek an appraisal at least *five times*. A739-41. On September 16, 2019, Shepard returned the completed voting proxy forms that EMCI had provided to Morgan Stanley – voting against the proposed merger – and included a cover letter that provided EMCI with notice of his intent to demand an appraisal of the fair value of his shares of EMCI stock, stating that he "hereby provides written notice of his intent to demand payment [under] Iowa law, if the proposed merger transaction described in the definitive proxy statement is effectuated." A740; A389.

The next day, on September 17, 2019, Shepard again wrote to EMCI that he was exercising his appraisal right and enclosed a letter from Morgan

---

of EMCI shares is plainly inconsistent with EMCI's argument that banks and brokers are not the record shareholders and that Cede was the sole record shareholder of EMCI's shares prior to the squeeze-out merger. However, the proxy's statement that banks or brokers are the "record holder[s]" and "may exercise appraisal rights" for a beneficial owner is consistent with federal law, which defines "record holder" as: "any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary power which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 17A of the Act [i.e., DTC and Cede]." 17 C.F.R. § 240.14c–1(i).

Stanley, in its capacity as the record shareholder of Shepard's EMCI shares, consenting to Shepard seeking an appraisal of his EMCI shares. A740; A397. After the merger vote occurred on September 18, 2019 (and after the merger became effective one day later, on September 19), Shepard sent EMCI *two more* letters stating that he intended to exercise his appraisal right – one on September 23 and the other on September 27. A740-41. Finally, on November 4, 2019, Shepard completed and timely returned an "Appraisal Rights Form," which EMCI had provided to him, that perfected his right to an appraisal. A741.

During this time period, EMCI *twice* acknowledged that Shepard had, in fact, exercised his right to an appraisal. A402; A45. On September 26, 2019, EMCI sent Shepard an "Appraisal Rights Notice," which enclosed the Appraisal Rights Form and acknowledged "Shepard's intent to seek appraisal rights with respect to 1,100,000 shares of Company [EMCI] stock (the 'Appraisal Shares')." A402. EMCI's September 26 letter stated that the *only* step left for Shepard to "formally assert appraisal rights" was to "[c]omplete, date and sign" the attached appraisal form and return that form to EMCI by November 5, which Shepard did. *Id.*

The September 26 letter further stated that the "Company estimates that the fair value of its shares" as of September 19 (the date of the squeeze-

out merger) "was $36 per share," and that the "Company will use this value in calculating the amount to be paid to Mr. Shepard for the Appraisal shares provided he returns the Appraisal Rights Form prior to the Response Deadline in accordance with paragraph 1 above."[3] A403. In addition, on November 8, 2019, EMCI submitted a brief to the District Court in Shepard's books-and-records action stating that Shepard had "advised [EMCI] that he intends to exercise his dissenters\appraisal rights under Iowa Code Section 490.1320 *et seq*." A45.

Unbeknownst to Shepard, however, on September 19, 2019 – which was the day the squeeze-out merger became effective and a week *before* EMCI sent Shepard the Appraisal Rights Notice on September 26 – EMCI had canceled Shepard's EMCI shares. A785-86. Thus, according to EMCI's argument in its petition for declaratory judgment filed on November 12, 2019, two months after it had canceled Shepard's EMCI shares, Shepard had lost his right to obtain an appraisal of his EMCI shares on the date of the

[3] On September 20, 2019, EMCI sent Shepard payment of $36 for each share of his EMCI stock, which EMCI later claimed in its declaratory judgment action was "merger consideration" that was paid in connection with the cancellation of his shares. A778-79. Shepard promptly wrote EMCI on September 23 questioning that payment, and stating that he assumed the payment represented an early payout of what EMCI believed to be the "fair value" of Shepard's EMCI shares on the date of the merger, which EMCI was required to pay Shepard as part of the appraisal process. A779-80. EMCI never responded to Shepard's September 23 letter. *Id.*

merger when his shares had been canceled. *Id.* But EMCI concealed from Shepard until it filed its declaratory judgment action its position that Shepard had lost his appraisal right on the date of the merger two months' earlier. *See* A785. Indeed, for the more than two months between when Shepard first notified EMCI on September 16 that he intended to exercise his appraisal right and when EMCI filed its declaratory judgment action on November 12, EMCI never once told Shepard that he had lost his appraisal right because his EMCI shares had been canceled. *Id.* EMCI kept quiet about the cancellation of Shepard's shares despite Shepard's numerous letters to EMCI stating he planned to assert his appraisal right. *Id.*

On November 12, 2019, EMCI filed this declaratory judgment action in Polk County District Court, seeking a declaration that Shepard had lost his right to an appraisal because his shares had been canceled. A732. EMCI argued that because Shepard had not removed his name from a list of shareholders entitled to merger consideration before the merger, it had paid Shepard "merger consideration" of $36 per share and canceled Shepard's EMCI shares as of September 19, 2019, the day the squeeze-out merger became effective, thereby causing Shepard to lose his right to obtain an appraisal. A785-86. EMCI has never identified any support for its position regarding the cancellation of Shepard's EMCI shares in the IBCA or Iowa

caselaw, and no such support exists.[4] *See id*. Iowa law did not require Shepard to remove his name from a list of shareholders entitled to merger consideration, and did not give EMCI the right to cancel Shepard's shares when the merger was effectuated. *Id.* Shepard had until early November to perfect his appraisal right – which he did by returning the Appraisal Rights Form that EMCI had sent to him on September 26 to EMCI on November 4. *Id.* In addition, EMCI argued that even though Shepard's shares had been canceled, because Shepard had not obtained a written consent from Cede, which EMCI contends is the record shareholder of Shepard's EMCI shares, Shepard had lost his appraisal right. *Id.*

Shepard moved to dismiss EMCI's petition under Iowa Rule of Civil Procedure 1.421(1)(f), arguing that: (i) Morgan Stanley was listed as the record shareholder of Shepard's EMCI shares on the Cede breakdown that DTC had provided to EMCI, and the proxy voting forms also listed Morgan

---

[4] EMCI claimed that it canceled Shepard's shares pursuant to Sections 1.4 and 1.6 of the Merger Agreement. *See* EMCI.'s Br. in Support of Mot. for Expedited Rel. p. 13. But the Merger Agreement did not give EMCI authority to cancel Shepard's shares. Section 1.4 provides that the shares of dissenting shareholders seeking an appraisal (defined as "Company Dissenting Shares") will *not* be canceled. And Section 1.6 of the Agreement similarly provides that EMCI could cancel *only* the shares of people who "have failed to perfect . . . their rights to appraisal . . . under Iowa law." At the time EMCI canceled Shepard's shares – on September 19, 2019 – it is undisputed that Shepard had two months to perfect his appraisal right. The Merger Agreement did not give EMCI the right or ability to cancel Shepard's shares on September 19.

Stanley as the "record holder" of Shepard's EMCI stock; (ii) EMCI waived strict compliance with the appraisal statute by falsely telling Shepard in its September 26 Appraisal Rights Notice that the *only* step left for Shepard to "formally assert appraisal rights" was to "complete" and return the attached appraisal form to EMCI by November 5, when in fact his shares had already been canceled; and (iii) EMCI should be estopped from arguing that Shepard failed to comply with the Iowa appraisal statute because EMCI had improperly canceled Shepard's EMCI shares on September 19 – the day the merger became effective – thus preventing him from fully complying with the appraisal statute. A733-34; A402.

In response to Shepard's motion to dismiss, EMCI moved for summary judgment. A733-34. EMCI's brief in support again argued that Shepard failed to comply with the Iowa appraisal statute because he had not removed his name from a shareholder list before the merger became effective on September 19, 2019, and therefore EMCI had canceled his shares and paid him merger consideration. A565-67. Again, EMCI failed to identify any support for this position in the IBCA or Iowa caselaw. *See Id*. EMCI further argued that Shepard had waived his appraisal right because Shepard had not obtained Cede's consent to his exercise of his appraisal

right (which, of course, was a moot point after EMCI canceled Shepard's EMCI shares on September 19). *Id.*

EMCI admits that it knew at the time of the merger vote that Shepard intended to exercise his right to an appraisal. A571 n. 35. EMCI also admits it knew Shepard's shares were purchased through his accounts held at Morgan Stanley and held in Morgan Stanley's name, that is, in "street name" at DTC. A546. The undisputed evidence also shows that EMCI affirmatively concealed from Shepard for approximately two months both the fact that it had canceled Shepard's EMCI shares and that it believed that Cede, and not Morgan Stanley, was the "record shareholder" of Shepard's shares of EMCI stock. *See* A785-86.

On April 5, 2020, the District Court for Polk County granted EMCI's motion for summary judgment. A789-90. The District Court held that Cede was the "record shareholder" of Shepard's shares of EMCI stock under the appraisal statute. *Id.* The District Court further held that, because Shepard had failed to obtain Cede's consent, Shepard had not perfected his appraisal right. A753.

The District Court recognized that its ruling "exacts a harsh result on Shepard." *Id.* Yet, the District Court completely ignored the fact that EMCI

had canceled Shepard's shares more than six weeks before record shareholder consent was required.

Notably, the District Court found that EMCI fully understood that Shepard had intended to perfect his appraisal right. A740. The District Court further acknowledged that EMCI received a letter from Morgan Stanley, through Shepard's attorneys, stating the EMCI shares Morgan Stanley held for Shepard at DTC "are held in street name and Morgan Stanley's records reflect that [Shepard] is the owner of record of the shares." *Id.* In addition, the District Court never disputed that Morgan Stanley identified itself as the "record holder" of Shepard's shares in the proxy voting forms that Morgan Stanley sent to Shepard. *Id.* Finally, the District Court acknowledged that Morgan Stanley had advised EMCI that Shepard was entitled to exercise his appraisal right. *Id.* In short, the District Court found that EMCI was fully aware of Shepard's intent to exercise his appraisal right with regard to his EMCI shares held by Morgan Stanley. *Id.*

The District Court completely ignored the fact that by canceling Shepard's shares on September 19, 2019, EMCI deprived Shepard of any ability to obtain any consents beyond the consent already provided by Morgan Stanley, including from Cede. *See* A785. EMCI had canceled Shepard's EMCI shares approximately 40-days before the record

shareholder consents were due (on November 5, 2019). *Id*. EMCI's counsel conceded during oral argument that cancellation made it impossible for Shepard to obtain Cede's consent, but the District Court went on to hold that Morgan Stanley was *not* the record shareholder of Shepard's EMCI shares because Cede's name, and not Morgan Stanley's name, appears on a shareholder list prepared by EMCI's third-party transfer agent, American Stock Transfer & Trust Co. ("AST"). A779.

The District Court concluded that only the shareholder list that AST provided to EMCI, and not the Cede breakdown that DTC provided to EMCI, constituted a "record" of EMCI for purposes of determining "the person in whose name shares are registered in the records of the corporation," which is the definition of "record shareholder" in Section 490.1301(8). A772 (finding that "the records of the corporation w[ere] the record shareholder voting list prepared by AST and given to EMCI prior to the merger vote."). The District Court also held that "[r]ecords of the corporation do not include the participants in the Cede breakdown." *Id.*

The District Court erred because the Cede breakdown was undisputedly in EMCI's possession well before the September 18, 2019 shareholder vote on the merger and constituted an EMCI record.[5] A737.

[5] Both EMCI and the District Court acknowledge that documents provided by

EMCI affirmatively used the record shareholder list in the Cede breakdown in its business operations to send proxy voting forms to record shareholders in connection with the merger. A737-38. Indeed, the District Court specifically acknowledged that EMCI had used the record shareholder list contained in the Cede breakdown for purposes of mailing proxy voting forms to Morgan Stanley. *Id.* Morgan Stanley, in turn, sent proxy voting forms to Shepard, which on the face of those forms identified Morgan Stanley as the record shareholder of Shepard's shares. *Id.* The District Court did not address the fact that Morgan Stanley was identified as the "record holder" of Shepard's shares on the proxy voting forms, and provided no basis for concluding that the Cede breakdown was not an EMCI record, which it clearly is. *Id.*

Moreover, the District Court's ruling conflicts with federal law and the federal system set up to deal with ownership and transfer of shares of public companies. *See* A749-50. Under federal law, the definition of "record holder" specifically includes "brokers [like Morgan Stanley] . . . or other entity . . . which holds securities of record in nominee name or

---

a third party for EMCI's benefit are "records of the corporation" under Iowa law. *See, e.g.*, A734, A772. EMCI argued, and the District Court agreed, that the shareholder listed created for EMCI by AST – which is a third party – is a corporate record of EMCI. A772. So too is the Cede breakdown – which was also created by a third party for EMCI's benefit.

otherwise or as a participant" in DTC. A749 (citing *In re Appraisal of Dell, Inc.*, No. 9322-VCL, 2015 WL 4313206, at *5 (Del. Ch. July 13, 2015)). Moreover, federal law affirmatively states that neither depositories (like DTC) nor their nominees (like Cede) can be record shareholders under the federal system. *Id.* The District Court refused to follow federal law, without good reason. A772.

STATEMENT OF FACTS

I. The Iowa Business Corporation Act's Appraisal Process.

The IBCA's right to an appraisal protects minority shareholders like Shepard. Iowa Code § 490.1303 (2020). In an appraisal, a minority shareholder can obtain a judicial determination and payment of the "fair value" of the shareholders' shares of an Iowa corporation as of the date of a merger that the shareholder voted against. *Id.* The process for asserting one's right to an appraisal is contained in Chapter 490 of the IBCA.

The appraisal statute distinguishes between "beneficial shareholders," such as Shepard, and "record shareholders." Under Section 490.1301(2), the "beneficial shareholder" is the person who is "the beneficial owner of shares held . . . by a nominee on the beneficial owner's behalf." The "record shareholder" is defined as "the person in whose names shares are registered in the records of the corporation." Iowa Code § 490.1301(8).

To assert an appraisal right, before a shareholder votes on the corporate action (such as a merger), the shareholder (either the beneficial shareholder or the record shareholder) must deliver "written notice of the shareholder's intent to demand payment if the proposed action is effectuated." Iowa Code § 490.1321(1)(a). Then, the shareholder must "not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action." *Id.* § 490.1321(1)(b). A shareholder who fails to take these steps is not entitled to an appraisal of the shareholder's shares. *Id.* § 490.1321(3). Contrary to EMCI's stated reason for canceling Shepard's shares as of September 19, under the Iowa appraisal statute a shareholder exercising his appraisal right has no obligation to remove his name or his shares from any shareholder list maintained by the corporation or the corporation's transfer agent to preserve the shareholder's appraisal right.

After a shareholder notifies the corporation of the shareholder's intent to seek appraisal and votes against a merger, the corporation must send the shareholder an "appraisal notice" and "appraisal form" within ten days of the date on which the corporate action, such as a merger, becomes effective. Iowa Code § 490.1322(2). The appraisal notice and appraisal form must, among other things, provide "[t]he corporation's estimate of the fair value of

the shares," and the date by which the shareholder must return the completed appraisal form. *Id.* § 490.1322(2)(b)(2)-(3). The corporation must provide at least forty, but no more than sixty, days for the shareholder to return the completed appraisal form and thereby perfect the shareholder's right to an appraisal. *Id.* § 490.1322(2)(b)(2). Then, on or before the date on which the shareholder is required to return the completed appraisal form to the corporation (which is forty to sixty days after receiving the appraisal form) a beneficial shareholder, like Shepard, must: (a) submit the "record shareholder's written consent to the assertion of such rights"; and (b) seek appraisal for "all shares of the class . . . that are beneficially owned by the beneficial shareholder." Iowa Code § 490.1303(2)(a)-(b) (2020).

EMCI conceded that the purpose of the Iowa appraisal statute's record shareholder consent requirement is simply to satisfy a "practical informational need" to "verify the beneficial shareholder's entitlement" to exercise an appraisal right. A557 (emphasis omitted) (quoting MBCA, § 13.03, Official Comment, at 13-44 (2013)). Here, there is no dispute that Shepard was the beneficial owner of 1.1 million EMCI shares or that EMCI was fully aware both that Shepard held his EMCI shares in Morgan Stanley's "street name" and that Shepard intended to assert his appraisal right.

This case concerns whether EMCI properly canceled Shepard's EMCI shares on September 19, 2019 – the effective date of the merger – thereby depriving him of his ability to exercise his appraisal right. In particular, by canceling Shepard's shares, EMCI foreclosed Shepard's ability to obtain any consents, including from Cede, during the more than six-week period from the date of the squeeze-out merger until such consents were due on November 5.

This case also concerns who was "the person in whose name shares are registered in the records" of EMCI from whom appraisal consent was required. As discussed below, the Cede breakdown that was in EMCI's possession since before the merger vote plainly showed that Morgan Stanley was the record shareholder of Shepard's shares, and Shepard *did* obtain Morgan Stanley's consent and provided that consent to EMCI. To understand the roles of DTC, Cede and Morgan Stanley in this case, one must first understand the system that the federal government set up in the 1970s for transactions involving shares of public companies.

II. The Role of DTC, Cede and Bank and Brokers, like Morgan Stanley.

In the 1970s, the dramatic increase in stock trading led to an increase in the transference of ownership of securities, which caused a paperwork crisis. *Dell*, 2015 WL 4313206, at *5. To address this paperwork crisis, in

1975 the federal government empowered the Securities and Exchange Commission ("SEC") to "use its authority . . . to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities[.]" 1975 Amendment to Securities Act, 15 U.S.C. § 78q-1. As a result of the federal government's push for "share immobilization," "[b]rokerages and banks created [DTC] to allow them to deposit certificates centrally. . . and leave them at rest." *Dell*, 2015 WL 4313206, at *5. Today most publicly-traded shares of U.S. corporations are held by DTC, which provides a centralized ledger for stock ownership. *Id.*, at *19. (DTC "provide[s] a central facility for the storage of enormous numbers of stock certificates and provide[s] a means for the transfer of shares without the actual transfer of certificates.").

DTC is owned by its "participants," which consist of approximately 800 banks and brokerage firms, including Morgan Stanley. *Id*. Most of the country's largest banks and brokerage firms are DTC participants. *Id*, at *4. Those banks and brokerage firms hold securities at DTC, and appear as the owners of stocks on DTC's records. *Id.* "DTC . . . does not hold any shares for themselves," they "only hold shares as nominees for the participants in 'DTC'" – that is, the banks and brokerage firms, like Morgan Stanley, that are DTC participants. *Id*., at *19.

In short, DTC is a securities depository that provides safekeeping for securities issued in the United States, including for EMCI shares. *Id.*, at *7. DTC holds the shares for its participant banks and brokerage firms in the name of its nominee, "Cede & Co." *In re Color Tile Inc.*, 475 F.3d 508, 511 (3d Cir. 2007). DTC's role is purely administrative and neither DTC nor Cede has any economic interest in the shares held at DTC in the name of its nominee, Cede. When most investors purchase shares, transfer and settlement of shares involves a simple book entry in DTC's records.

Most banks and brokers that are DTC participants hold shares at DTC on behalf of their clients, who are the beneficial shareholders and own the economic interest in the shares. Those DTC participants hold their customers' shares on DTC's records in "street name" – that is, in the name of the bank or broker that is the DTC participant. *Dell*, 2015 WL 4313206, at *4 ("The vast majority of publicly traded shares in the United States . . . are commonly referred to as being held in 'street name' . . . DTC holds the shares on behalf of banks and brokers, which in turn hold on behalf of their clients (who are the underlying beneficial owners or other intermediaries).").

III. Under the Federal System, DTC's Participant Banks and Brokerage Firms are Undisputedly the Record Shareholders.

DTC maintains a list of its participant banks and brokers that hold shares of each corporation at DTC, referred to as the "Cede breakdown."

Kurz v. Holbrook, 989 A.2d 140, 153 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom. Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010). A Cede breakdown identifies by name each bank or brokerage firm that holds shares with DTC for a particular corporation. *Id.* at 153. DTC routinely provides the Cede breakdown to corporations so that corporations can deal with those banks and brokers directly. A corporation can receive a Cede breakdown "in a matter of minutes . . . by calling the DTC 'Proxy Services Hotline.'" *Id.* at 173.

In this case, EMCI received the Cede breakdown – listing all of the DTC-participant banks and brokerage firms that held EMCI stock for their customers – (along with an Omnibus Proxy) from DTC on or around September 12, 2019, before the vote on the squeeze-out merger on September 18. A737. As the District Court found:

> Thus, the Cede breakdown informed EMCI that Morgan Stanley was a record holder, as defined under the federal securities laws, for Shepard the beneficial owner.

A751.

It is undisputed that federal law requires that, in dealing with shareholders in connection with mergers, publicly traded companies must look through DTC and Cede to DTC's participant banks and brokerage firms reflected in the Cede breakdown. *Dell*, 2015 WL 4313206, at *6; 17 C.F.R.

§ 240.14a-13(a)(2) n.1 (explaining that in proxy solicitations, public companies have an obligation to "make appropriate inquiry" of DTC to identify DTC-participants that "may hold [the company's securities] on behalf of a beneficial owner"). Accordingly, under federal law, as a public company, EMCI "cannot rely on the stock ledger maintained by its transfer agent [such as, AST], pretend that Cede is a single record holder, and ignore the Cede breakdown," that identifies the banks and brokerage firms holding stock for their customers with DTC. *Dell*, 2015 WL 4313206, at *11. What EMCI did in this case is precisely what federal law prohibits – it relied upon the stock ledger maintained by its transfer agent, AST, pretended that Cede was the single record holder of all DTC participants' EMCI shares, and ignored the DTC-participant list (the Cede breakdown), which EMCI had in its possession *and* which identified Morgan Stanley as the record shareholder of Shepard's shares.

DTC itself formally "assigns the voting rights of stock held by DTC to its participant banks and brokerage firms," through Omnibus Proxies. Press Release, Edward C. Kelleher, DTCC, *Omnibus Proxy Goes Electronic*, http://www.dtcc.com/news/2013/march/22/omnibus-proxy-goes-electronic (last visited Aug. 3, 2020). Consistent with federal law and its customary practice, DTC issued an Omnibus Proxy to all of the bank and brokerage

firms listed on the Cede breakdown for EMCI. A737. In the Omnibus Proxy, DTC formally transferred the right to vote with respect to the proposed squeeze-out merger to those DTC participants (including Morgan Stanley) that held positions in EMCI stock as of the record date. *Id*. The Omnibus Proxy formally acknowledged that the DTC participants on the Cede breakdown for EMCI were the record shareholders of EMCI shares. The Omnibus Proxy was provided to EMCI and all DTC participants reflected on the Cede breakdown for EMCI (including Morgan Stanley) well before the vote on the squeeze-out merger. *Id*. The Omnibus Proxy stated that

> Cede & Co. hereby appoints . . . the persons, partnerships, associations, corporations or other entities named in the attached securities position listing [the Cede breakdown], with the power of substitution in each, proxy to vote the number of shares of the security specified in the attached security position listing [the Cede breakdown] opposite his or its name, and not more … which Cede & Co. would be entitled to vote if present at the meeting . . .

The Omnibus Proxy specifically authorized Morgan Stanley to act as Shepard's record shareholder with respect to the merger vote.

The purpose of any proxy, including the Omnibus Proxy, is to provide "evidence of an agent's authority" over someone else's shares and to avoid any doubt about that authority. *Eliason v. Englehart*, 733 A.2d 944, 946

(Del. 1999). Because DTC is nothing more than a bookkeeping system, it lacks discretionary authority over the shares it holds, and inevitably must pass whatever rights it has to the DTC-participant banks and brokerage firms. *Kurz*, 989 A.2d at 161. In furtherance of the federal policy of recognizing that the bank and brokerage firms that participate in DTC are the record holders, the Omnibus Proxy made clear that Morgan Stanley has agency authority over Shepard's 1.1 million shares and that Morgan Stanley, not Cede, was the shareholder of record of those shares.

Indeed, the proxy voting forms that Morgan Stanley obtained from EMCI and submitted to Shepard expressly stated that Morgan Stanley was the "record holder" of Shepard's 1.1 million EMCI shares. Those forms, which Morgan Stanley sent to Shepard, stated "[a]s the record holder of your shares, we [Morgan Stanley] will vote your shares based on your instructions." A385. EMCI also repeatedly explained in its proxy statement to shareholders issued in advance of the merger vote that beneficial owners of stock, like Shepard, have their shares "registered in the 'street name' of a bank, broker, or other nominee" and that the bank or broker could exercise appraisal right on behalf of such beneficial owners:

> A record holder, such as a bank, brokerage firm or other nominee who holds shares as a nominee for several beneficial owners, may exercise appraisal rights with respect to the shares held for one or more beneficial owners, while not exercising this right for

> other beneficial owners. . . . A person having a beneficial interest in shares of common stock held of record in the name of another person, such as a bank, brokerage firm or other nominee, must act promptly to cause the record holder to properly follow the steps summarized herein and perfect appraisal rights in a timely manner.

A209, A251-52.[6] Shepard did exactly as the proxy instructed and obtained consent of the record holder of his EMCI shares – his broker, Morgan Stanley – to exercise his appraisal right.

IV. Shepard Properly Exercises His Right to An Appraisal.

Shepard elected to vote against the merger and pursue an appraisal of his shares of EMCI stock. A742. Over a two-month period, Shepard notified EMCI of his intent to exercise his right to appraisal at least *five*

[6] EMCI argued that Shepard was required to submit a form appraisal request available on DTC's website to "properly" allow Shepard to assert his appraisal right. As support for this claim, EMCI points to an unidentified dissenting shareholder that submitted the form on DTC's website to assert its appraisal right. A551. But EMCI does not and cannot dispute that there is no requirement in the Iowa appraisal statute for Shepard to use the form available on DTC's website to request an appraisal, and EMCI certainly did not identify any such requirement in its proxy. In some cases, there may be no other option for a beneficial owner to exercise the appraisal right other than by using the DTC form, such as where the beneficial shareholder's shares are held with a non-DTC participant, such as an "introducing broker," that would not appear on the applicable Cede breakdown. *See, e.g.*, *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 727 (S.D. Tex. 2010) ("there is a third financial institution, an 'introducing' broker, which serves as an intermediary between the retail investor and the participating broker or bank."). Here, because Morgan Stanley was a DTC participant, Shepard had no reason to use DTC's form.

times. A784-85. For its part, EMCI *twice* acknowledged that Shepard had, in fact, properly exercised his right to an appraisal of his EMCI shares. A402; A45.

Before the September 18, 2019 shareholder vote on the squeeze-out merger, DTC provided EMCI with both the Cede breakdown, which listed the DTC participants that held EMCI stock at DTC, and the Omnibus Proxy, which formally acknowledge that those DTC participants (including Morgan Stanley) were the record shareholders of EMCI shares. A737-38. EMCI then used the Cede breakdown to determine where to send proxy voting forms to record shareholders (the DTC participants) in connection with the proposed squeeze-out merger. A738.

By cover letter dated September 16, 2019, Shepard returned the proxy voting forms he had received from Morgan Stanley to EMCI, and voted all of his 1.1 million EMCI shares against the proposed squeeze-out merger. A740; A389. In his cover letter, Shepard notified EMCI of his intent to demand an appraisal of the fair value of his shares of EMCI stock, stating that he "hereby provides written notice of his intent to demand payment under Iowa law, if the proposed merger transaction described in the definitive proxy statement is effectuated." *Id.* On September 26, 2019, EMCI acknowledged receipt of Shepard's September 16 letter and

specifically acknowledged "Shepard's intent to seek appraisal rights with respect to 1,100,000 shares of Company [EMCI] stock (the 'Appraisal Shares')." A402. By that time, however, EMCI had already secretly canceled Shepard's 1.1 million EMCI shares and was secretly taking the position that Shepard had lost his appraisal right when his shares were canceled on September 19. *See* A785.

By letter dated September 17, 2019, Shepard again notified EMCI that Shepard intended seek an appraisal of his EMCI shares. Enclosed with that letter was a letter dated September 17, 2019 from Morgan Stanley – the record shareholders of Shepard's 1.1 million shares as reflected on the Cede breakdown in EMCI's possession. A740; A397. The enclosed Morgan Stanley letter confirmed that Shepard was authorized to exercise his appraisal right with respect to the 1.1 million shares of EMCI common stock that Shepard owned. A397-98. The Morgan Stanley letter stated that Shepard held 1.1 million shares of EMCI stock in two Morgan Stanley brokerage accounts. *Id.* Morgan Stanley's letter further stated that Shepard's 1.1 million shares were held in "street name and Morgan Stanley's records reflect that the Client [Shepard] is the owner of record of the shares held in each account[.]" *Id.* The Morgan Stanley letter represented that Shepard was authorized to "exercise his voting and

appraisal rights with respect to the shares of EMCI[.]" *Id*. EMCI never responded to Shepard's September 17 letter or to the enclosed letter from Morgan Stanley.

On September 18, 2019, the shareholder vote occurred and the proposed squeeze-out was approved. A736. The proposed squeeze-out merger became effective one day later, on September 19, 2019. *Id.* Despite knowing that Shepard intended to exercise his appraisal right, on September 19, 2019 EMCI canceled Shepard's 1.1 million shares of EMCI stock and, the next day, sent Shepard a check representing $36 per share in "merger consideration" for his shares (without telling Shepard that he was being paid "merger consideration," instead of being paid EMCI's estimate of the fair value of EMCI's shares on the date of the merger as required by the appraisal statute). A785; A433 ¶ 17.

When Shepard received the $36 per share payment on or about September 23, 2019, he assumed that it was an early payment of EMCI's estimate of the fair value of EMCI's shares as of the date of the merger, September 19, 2019, which EMCI was required to pay him as part of the appraisal process. *See* A740-41. EMCI's "fair value" payment was not due until after Shepard submitted his Appraisal Rights Form on November 5, 2019 – more than six weeks after EMCI made the payment to him. A400.

On September 23, 2019, the same day he received the $36 per share payment, Shepard sent EMCI a letter acknowledging receipt of EMCI's payment, and stating that he understood the payment to be an early payment of what EMCI determined to be the "fair value" of Shepard's shares as of the merger date. A740-41; A400. EMCI never responded to Shepard's September 23 letter. EMCI kept secret that its payment to Shepard of $36 per share was *not* EMCI's estimate of the fair value of Shepard's shares, but instead was "merger consideration." EMCI also kept secret from Shepard that it had also canceled Shepard's 1.1 million EMCI shares on September 19, 2019, thereby extinguishing his appraisal right. EMCI first informed Shepard that his EMCI shares had been canceled approximately eight weeks after the fact, when it filed its declaratory judgment action on November 12, 2019. A785.

On September 26, 2019, even though EMCI had already canceled Shepard's shares and was taking the position that Shepard had lost his appraisal right, EMCI sent Shepard an "Appraisal Rights Notice" acknowledging both receipt of Shepard's September 16 letter and "Shepard's intent to seek appraisal rights with respect to 1.1 million shares of Company [EMCI] stock (the 'Appraisal Shares')." A402. EMCI falsely

informed Shepard that to formally assert his appraisal right Shepard need *only* return an enclosed form by November 5, 2019, stating:

> Please be advised as follows: 1. To formally assert appraisal rights with respect to the Appraisal Shares, Mr. Shepard must proceed as follows:
>
> - Complete, date and sign the Appraisal Rights Form included with this Notice[.]
>
> - Return the completed Appraisal Rights Form . . . no later than November 5, 2019[.]

A402-03. EMCI's September 26 letter further stated that EMCI

> "estimate[d] that the fair value of its shares of common stock as of the Effective Date [September 19, 2019], was $36 per share, and the Company will use this value in calculating the amount to be paid to Mr. Shepard for the Appraisal Shares[.]"

A403.[7] Again, EMCI never advised Shepard that his EMCI shares had been canceled the previous week, and that EMCI had already concluded – but was keeping secret from Shepard – that Shepard had lost his appraisal right when his EMCI shares were canceled. To the contrary, EMCI represented to Shepard that he was properly following the process for exercising his

[7] Nowhere in its September 26, 2019 "Appraisal Rights Notice" letter did EMCI advance its claim that Shepard must provide the consent of DTC or Cede by November 5, 2019 for Shepard to exercise his appraisal right. Nor did EMCI ever suggest that the consent letter that Shepard previously provided from Morgan Stanley – the record shareholder of Shepard's EMCI stock – was somehow insufficient for Shepard to exercise his appraisal right.

appraisal right. A785.

The next day, on September 27, 2019, Shepard sent EMCI another letter, reiterating that EMCI had *already* provided him with the estimated $36 per share "fair value" on September 20. A416. Shepard also noted in that September 27 letter that "EMCI clearly has not followed the appraisal process set forth in the Iowa Business Corporations Act," because it made the $36 per share estimated "fair value" payment to Shepard *before* Shepard had even returned his completed Appraisal Notice Form, which was not due until November 5, 2019. *Id.* Shepard further explained that he "intends to follow and abide by the deadlines and other procedures identified in the Iowa Business Corporations Act." *Id*. EMCI, once again, never responded to Shepard's letter, and kept secret from Shepard that it had canceled Shepard's shares and was taking the position that the $36 per share it had paid to Shepard on September 20 was merger consideration, and not EMCI's estimate of the fair value of Shepard's shares pursuant to the appraisal statute. On November 4, 2019, Shepard returned his signed Appraisal Rights Form, and believed he had perfected his right to an appraisal of the fair value of his EMCI shares. A419.

V. Up Until EMCI Filed the Declaratory Judgment Action On November 12, 2019, EMCI Led Shepard to Believe He Was

Properly Following the Appraisal Process, Even Though EMCI Had Secretly Canceled Shepard's Shares Eight Weeks Earlier.

Up until November 12, 2019, EMCI led Shepard to believe that he had complied with the requirements necessary to assert his appraisal right. EMCI acknowledged receipt of Shepard's notice of his intent to pursue an appraisal on September 26, 2019, advised Shepard that EMCI had "estimated the fair value of its shares of common stock as of the Effective Date" of the merger at $36 per share, that EMCI "will use this [$36 per share] value in calculating the amount to be paid to Mr. Shepard for the Appraisal Shares," and that the *only* step left for Shepard to "formally assert appraisal rights" was to "[c]omplete, date and sign" the attached appraisal form and return that form to EMCI by November 5. A402. Moreover, on November 8, EMCI represented to the District Court in the separate books-and-records action that Shepard was exercising his right to an appraisal. A45. Then, less than a week later, on November 12, 2019, EMCI filed this declaratory judgment action.

EMCI's November 12, 2019 declaratory judgment petition revealed – for the first time – that EMCI had canceled Shepard's shares of EMCI stock eight weeks earlier, on September 19, 2019, which was the effective date of the merger. *See* A785. According to the Petition, EMCI canceled Shepard's shares on the effective date of the merger because Shepard had not

"submit[ted] a request to the record owner of the shares to remove" his shares from a "spreadsheet provided by [EMCI's] transfer and paying agent," AST. A70 ¶¶ 28-29. According to EMCI, as a result of its cancellation of Shepard's shares of EMCI stock, those shares "ceased to exist as of the Effective Date" of the merger – *i.e.*, September 19, 2019 – thus obviating Shepard's rights under the appraisal statute to be paid the fair value for his EMCI shares, as defined in the appraisal process. *Id*. ¶ 30.

Nothing in the Iowa Appraisal statute required Shepard to submit a request to DTC (or anyone else) to remove his shares from any AST list, or from any other document or listing for that matter.

During oral argument before the District Court, EMCI conceded that its cancellation of Shepard's shares (on September 19) precluded Shepard from being able to exercise his appraisal right. Specifically, counsel for EMCI argued that Shepard's failure to remove his name from the AST list of stockholders precluded Shepard from exercising his appraisal right, *even if he had submitted Cede's written consent to EMCI by November 5*:

> THE COURT: Let me ask, Ms. Boland: Would the effect of not taking his name off the list prior to the vote and he gets paid -- And let's assume for a moment that he did in fact get the notice to you, the dissenter's notice I'm going to call it, from Cede & Company to EMC by November 5th. Are you arguing that because he didn't take his name off the list and his shares got cancelled that he still has no appraisal rights, in that scenario?

Ms. Boland: We do, Your Honor.

A654-55 [35:21-36:5]. Counsel for EMCI also conceded that Cede could not have consented to an appraisal of Shepard's shares after EMCI had canceled those shares on September 19. *See* A699 [80:4-13]. Once EMCI canceled Shepard's EMCI's shares on September 19, Shepard was no longer a shareholder of EMCI stock and his stock ownership was no longer "registered in the records of the corporation," thus depriving him of his appraisal right. Thus, by canceling his EMCI shares on September 19 EMCI permanently deprived Shepard of the ability to obtain Cede's consent *two months* before that consent was even due under Iowa law.

Surprisingly, the District Court never addressed EMCI's baseless cancellation of Shepard's EMCI shares because Shepard had not taken steps to remove his name from AST's spreadsheet, which was EMCI's principal argument as to why Shepard could not pursue his appraisal right.

ARGUMENT

I. Error Preservation and Standard of Review.

Shepard preserved all of the arguments raised in this appeal. During the lower court proceedings, Shepard argued that: (i) EMCI improperly canceled Shepard's EMCI shares on September 19, 2019, the effective date of the merger, thereby wrongly depriving him of his appraisal right; (ii)

Morgan Stanley was the "record shareholder" of his shares of EMCI stock on the records of EMCI; (iii) by its actions, EMCI waived and is estopped from requiring strict compliance with the appraisal statute's purported requirement that he submit the Cede's written consent because EMCI misled Shepard by misrepresenting to Shepard that he was properly following the appraisal process, even though EMCI had already secretly canceled his shares, thereby rendering it impossible for Shepard to have obtained any additional consents beyond the consent he had already obtained from Morgan Stanley. A772-73.

This Court applies a mixed standard of review to orders granting summary judgment. The Court reviews the legal conclusions sustaining the judgment for errors of law. *Campbell v. Delbridge*, 670 N.W.2d 108, 110 (Iowa 2003). In particular, issues of the interpretation and application of statutes are reviewed *de novo*. *DelaMater v. Marion Civil Servs., Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996). Because "[s]ummary judgment is appropriate only when the moving party shows there are no genuine issues of material fact . . . [this Court] review[s] the record in the light most favorable to the party opposing the motion." *Campbell*, 670 N.W. at 110.

II. Shepard Properly Exercised His Right to An Appraisal Under the Iowa Appraisal Statute.

Shepard complied with the appraisal statute's procedure for seeking an appraisal of his shares of EMCI stock. There is no dispute that Shepard, as the beneficial owner of 1.1 million shares of EMCI stock, notified EMCI of his intent to seek an appraisal and voted against the squeeze-out merger, as required by Section 490.1322. A740. Shepard also obtained record shareholder consent from Morgan Stanley. Morgan Stanley was plainly "the person in whose name [Shepard's] shares are registered in the records of" EMCI, which is the definition of "record shareholder" in Iowa's appraisal statute. *See Id.* at A745. Indeed, EMCI's own proxy stated that "[a] record holder, such as a bank, brokerage firm or other nominee who holds shares as a nominee for several beneficial owners, may exercise appraisal rights with respect to the shares held for one or more beneficial owners[.]"[8] A251.

As EMCC conceded, the purpose of the Iowa appraisal statute's record shareholder consent requirement is to satisfy a "practical

[8] The proxy never defines "other nominee." However, the proxy makes clear that the "other nominee" is *not* Cede because the "other nominee" is one that acts on the shareholder's behalf. A210 ("If your shares of common stock are held by a bank, broker or other nominee *on your behalf* in 'street name'…") (emphasis added). Cede, is DTC's nominee, and acts on behalf of DTC – not the beneficial shareholders. And DTC likewise does not act on behalf of the beneficial shareholders. DTC holds the shares of a corporation *on behalf* of its bank and broker participants.

informational need" to "verify the beneficial shareholder's entitlement" to exercise an appraisal right. A557 (emphasis omitted) (quoting MBCA, § 13.03, Official Comment, at 13-44 (2013)); A744 n.47. It is undisputed that EMCI knew Morgan Stanley was the record shareholder of Shepard's 1.1 million EMCI shares. A751. Moreover, EMCI had the Cede breakdown in its possession, which it had received from DTC, well in advance of the merger vote on September 18, 2019. A737. It is undisputed that the Cede breakdown clearly showed that Morgan Stanley held over 1.1 million EMCI shares, which included the 1.1 million EMCI shares Morgan Stanley held for Shepard in street name on DTC's records (that is, in the name of Morgan Stanley). A737-38, A751.

Indeed, EMCI affirmatively used the Cede breakdown to determine where to send proxy voting forms for the proposed squeeze-out merger. A737-38. Because Morgan Stanley was listed on the Cede breakdown, EMCI notified Morgan Stanley of the proxy vote. *Id*. The proxy voting forms Shepard received from Morgan Stanley specifically state that Morgan Stanley was the "record holder" of Shepard's 1.1 million shares. A388-98. The proxy voting forms are also consistent with the proxy statement that EMCI issued to its shareholders in advance of the merger vote, which states that beneficial owners of stock, like Shepard, have their shares "registered in

the 'street name' of a bank, broker, or other nominee" and "[a] record holder, such as a bank, brokerage firm or other nominee who holds shares as a nominee for several beneficial owners, may exercise appraisal rights with respect to the shares held for one or more beneficial owners[.]" A209, A251.

III. Morgan Stanley Was The "Record Shareholder" of Shepard's 1.1 Million Shares Under Iowa Law.

Under Section 490.1303(2) of the IBCA, a beneficial owner of stock (like Shepard) must "[s]ubmit[] to the corporation the record shareholder's written consent to the assertion of such [appraisal] rights no later than the date" for returning a complete Appraisal Rights Form, which in this case was November 5, 2019. Iowa Code § 490.1303(2) (2020). The Iowa appraisal statute defines the "record shareholder" as "the person in whose name shares are registered in the records of the corporation[.]" Iowa Code § 490.1301(8) (2019). The undisputed facts show that Morgan Stanley was the "record shareholder" of Shepard's shares of EMCI stock. The District Court erred by holding otherwise.

Before EMCI abruptly canceled Shepard's shares on September 19, 2019, the "records of the corporation" – which included the Cede breakdown – undisputedly showed that Morgan Stanley was the "record shareholder" of over 1.1 million shares of EMCI, and EMCI knew 1.1 million of those

shares belonged to Shepard. A734. According to the Cede breakdown, Morgan Stanley held 1,123,502 shares of EMCI stock as of August 8, 2019. A738. There is no dispute that Morgan Stanley's position included Shepard's 1.1 million shares of EMCI stock. A751. Accordingly, as the District Court found, "EMCI knew through the Cede breakdown Shepard's shares were held in 'street name' by Morgan Stanley." *Id*. That is because EMCI's records, which included the Cede breakdown, showed that Morgan Stanley was the record shareholder of Shepard's EMCI stock.

The District Court incorrectly held that Cede, not Morgan Stanley, was the "record shareholder" of Shepard's EMCI stock, but never explained how that holding squares with the definition of record shareholder as "the person in whose name shares are registered in the records of the corporation." The "records of the corporation" encompass "*all papers*" in the corporation's possession. *Lehman v. Nat'l Ben. Ins. Co.*, 53 N.W. 2d 872, 876 (Iowa 1952) (emphasis added); Matthew G. Dore, *Iowa Practice Series on Business Organizations*, § 33:8 (Nov. 2019) (explaining that, at common law, "corporate records" includes "*all business records of the corporation*") (emphasis added); *see also Amalgamated Bank v. Yahoo!, Inc.*, 132 A.3d 752, 790 (Del. Ch. 2016) (noting that "corporate records" are "[a]ny records maintained by a corporation in the regular course of its

business"); *State ex rel. Jones v. Ralson Purina Co.*, 358 N.W.2d 772, 777 (Mo. 1962) (finding a corporation's "records" include "all papers . . . or other instruments" in their possession).

There can be no dispute that the Cede breakdown was a "record of" EMCI because it was undisputedly in the possession of EMCI, and EMCI used the Cede breakdown to determine where to send proxy voting forms. The undisputed facts showed that EMCI had the Cede breakdown *before* the shareholder vote on September 18, 2019. A737. EMCI's own records, therefore, showed that Morgan Stanley was the "record shareholder" of Shepard's 1.1 million shares of EMCI stock.

Not only did the District Court fail to explain why it concluded the Cede breakdown was not an EMCI "record," the District Court ignored settled law that "[s]tatutory provisions giving dissenting stockholders the right to have their stock appraised and sold to the corporation under specified circumstances are generally construed liberally in favor of the dissenting shareholders[.]" Am. Jur. 2d § 679 (May 2020); *see also In re Fair Value of Shares of Bank of Ripley*, 399 S.E.2d 678, 682 (W. Va. 1990) ("dissenter's rights statutes are construed favorably toward the shareholder, particularly where there is no prejudice to the corporation"); *Greco v. Tampa Wholesale Co.*, 417 So.2d 994, 998 (Fla. Dist. Ct. App. 1982) ("the

procedure by which a dissenting shareholder enforces his rights should be liberally construed in circumstances where no prejudice is shown to the corporation"). Indeed, Iowa enacted the shareholder appraisal statute to give a remedy to minority shareholders like Shepard who oppose merger transactions like this one by controlling shareholders. Matthew G. Dore, *Iowa Practice Series on Business Organizations*, § 34:1 and 34:5 (Nov. 2019) (explaining that at the same time the Iowa legislature lessened shareholder approval requirements for "fundamental changes" of a corporation it expanded the availability of a dissenter's rights to seek appraisal and payment for his shares in order to provide an adequate remedy).

The District Court incorrectly held that the relevant "records of the corporation" are limited to the spreadsheet that AST, EMCI's transfer agent, provided to EMCI before the merger, which the court called the "record shareholder voting list." A772 ("In this case the records of the corporation was the record shareholder voting list prepared by AST and given to EMCI prior to the merger vote."). The District Court's holding does not rest on any factual finding; it is undisputed that EMCI had possession of *both* the Cede breakdown and the AST list – both of which were provided by third parties prior to the merger vote on September 18, 2019. Moreover, EMCI

had affirmatively used the Cede breakdown to determine where to mail proxy voting forms to record shareholders, including to Morgan Stanley. The District Court's holding also cannot possibly rest on the language of the Iowa appraisal statute, because "records of the corporation" includes *all* of the corporation's records, not just certain corporate records.

A. The District Court's Decision Conflicts With Federal Law.

The District Court ruling is directly contrary to federal law, and must yield to federal law, which has developed a unified system relating to stock ownership and stock transfers. *Cf. Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362-63 (Iowa 2014) (When "state and federal law directly conflict, state law must give way."). If the District Court's decision were allowed to stand, DTC participants (like Morgan Stanley) would be "record shareholders" for purposes of federal law, but not "record shareholders" for purposes of the Iowa appraisal statute.[9] Far from achieving the Model Act drafters' aim of "simplifying and clarifying the appraisal process," so that the appraisal process does not become "difficult, expensive, and risky," the District

[9] If the District Court's decision were allowed to stand, further confusion and complexity would be created, because "record shareholder" would have different meanings for purposes of voting and exercising an appraisal right. Banks and brokers would be record shareholders for voting purposes, but not for appraisal purposes.

Court's holding does exactly the opposite. 2013 Model Business Corporation Act Ann. 13-6, 13-7.

It cannot be disputed that under federal law, it is "banks and brokers, not the depositories [like DTC], who are record holders of the securities for purposes of federal law." *Kurz*, 989 A.2d at 169. Accordingly, SEC rules require publicly traded companies—including EMCI—to affirmatively look through DTC to its participant banks and brokers in connection with events requiring a shareholder vote, like EMCI's squeeze-out of EMCI's minority shareholders. *Dell*, 2015 WL 4313206, at *6; 17 C.F.R. § 240.14a-13(a) n.1 (2007) (explaining that in connection with proxy solicitations companies like EMCI have an affirmative obligation to "make appropriate inquiry" on DTC to identify DTC-participants that "may hold [the company's securities] on behalf of a beneficial owner."); *see also* 17 C.F.R. § 240.14a-8(b)(2) (2011) ("If like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder or how many shares you own. In this case . . . you must . . . submit to the company . . . a written statement from the 'record' holder of your securities (***usually a bank or broker***)" (emphasis added)).

Accordingly, federal law required DTC to "furnish [to EMCI] a securities position listing . . . known colloquially as the 'Cede breakdown,'"

which identified the "custodial banks and brokers that hold shares" of EMCI. *See Dell*, 2015 WL 4313206, at *19. The Omnibus Proxy that DTC furnished with the Cede breakdown formally recognized that the banks and brokers on the Cede breakdown are "record holders" of shares for purposes of the shareholder vote. *See* A750-51. And federal law was followed to that extent in this case: DTC sent EMCI the Cede breakdown showing Morgan Stanley was the record shareholder of Shepard's shares well before the shareholder vote on September 18, 2019. Morgan Stanley, in turn, sent Shepard proxy voting forms indicating that it was the "record holder" of Shepard's EMCI shares, Shepard voted against the merger by returning those forms to EMCI, and Shepard's votes were included in the official vote tabulations for the merger.

Under federal law a public company like EMCI "cannot rely on the stock ledger maintained by its transfer agent [such as AST], pretend that [DTC] is a single record holder, and ignore the [Cede Breakdown]" that identifies the banks and brokerage firms holding stock for their customers with DTC. *Dell*, 2015 WL 4313206, at *11. That is precisely EMCI did here: Though EMCI had an affirmative obligation to "make appropriate inquiry" of DTC to identify the banks and brokerage firm participants of DTC that "may hold [EMCI's stock] on behalf of a beneficial owner," 17

C.F.R. § 240.14a-8(b)(2), EMCI ignored the Cede breakdown in its possession.

Not only does federal law make clear that the banks and brokerage firms that are DTC participants are the record shareholders of public corporations that use DTC, federal law *affirmatively precludes* DTC or Cede from being the record shareholders. Under federal regulations, the record shareholder of stock includes brokers and banks, but *not* DTC and its nominee, Cede. 17 C.F.R. § 240.14c-1(i). Thus, federal law clearly reflects the reality that "Cede merely acts as an intermediary" and that "the banks and brokers [have] actual economic rights to the stock." Brandon Ferrick, *Modernizing The Stockholder Shield: How Blockchains and Distributed Ledgers Could Rescue the Appraisal Remedy*, 60 B.C. L. Rev. 621 631 (2019). DTC's and Cede's sole function is to "provide a central facility for the storage of enormous numbers of stock certificates and to provide a means for the transfer of shares without the actual transfer of certificates." *Dell*, 2015 WL 4313206, at *19. "Neither the Depository Trust Company nor C[ede] & Co. hold any shares for themselves," they "only hold shares as nominees for the participants in 'DTC'"—which are banks or brokerage firms, such as Morgan Stanley. *Id*.

For these reasons, DTC gives all the voting powers of a record shareholder to its bank and broker participants (like Morgan Stanley) via an Omnibus Proxy. The Omnibus Proxy is DTC's formal acknowledgement that banks and brokers who are DTC participants should communicate directly with the beneficial owners of the shares relating to matters concerning the beneficial owners (like Shepard) – which is precisely what happened in this case. *See e.g.*, CA7-21.

To hold, as the District Court did, that Cede is the "record shareholder" for all shares purchased by its participants would stand this federal system on its head. Under the federal system, DTC and Cede serve merely an administrative function, and the brokerage firms and banks that participate in DTC are the record shareholders, not DTC or its nominee, Cede. The District Court's ruling creates a clear conflict between state and federal law. Under the District Court's interpretation, the "record shareholder" of the *same* shares will be *different* under Iowa law than under the unified federal system specifically designed to address all issues relating to stock ownership and stock transfers of public companies.

B. The District Court Misinterpreted Delaware Law

Contrary to the District Court's statements, no Delaware courts "address[ed] whether DTC participants should be regarded as record holders

for purposes of Delaware law" because "[n]o one seems to have made the argument, and [no] court considered it." *Dell*, 2015 WL 4313206, at *22. As Vice Chancellor Laster stated in *Dell*, . . . the question of whether DTC participants should be regarded as holders of record remains open for the Delaware Supreme Court to decide. *Id.*

That said, Vice Chancellor Laster has made crystal clear that he views the bank and brokerage firm participants in DTC, not DTC itself (or its nominee, Cede), as the record holder of securities on the DTC system. In *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 397 (Del. 2010), Vice Chancellor Laster held that the "Cede breakdown should be considered part of the stock ledger for purposes of Section 219(c)," which governs the "records administered by or on behalf of the corporation in which the names of all of the corporation's stockholders of record . . .are recorded[.]"[10]

Vice Chancellor Laster stated in *Dell*:

> An issuer cannot rely on the stock ledger maintained by its transfer agent [here, AST] and ignore the Cede breakdown. For purposes of federal law, Cede is *not* a record holder. 15 U.S.C. § 783c(23)(A). The record holders are the bank and brokers on the DTC participant list [i.e., the

[10] The Delaware Supreme Court reviewed Vice Chancellor Laster's holding and found that it "is unnecessary for this Court to decide that issue" of whether the Cede breakdown constituted the list of record shareholders. *Kurz*, 992 A.2d at 398.

> Cede breakdown]. 17 C.F.R. § 240.14c-1.

2015 WL 4313206, at *11. Vice Chancellor Laster went on to state:

> Viewed pragmatically, the federal policy of share immobilization compelled publicly traded Delaware corporations to outsource one part of the stock ledger – the DTC participant list – to DTC, just as Delaware corporations have chosen to outsource other parts of stock ledgers to transfer agents [like AST]…. Just as Delaware law treats the outsourced stock ledger as a record of the corporation, albeit one maintained by a third party, Delaware law likewise should treat the outsourced DTC participant list [i.e., the Cede breakdown] as a record of the corporation, albeit one maintained by DTC.

Id.

In short, Delaware courts have never addressed whether the banks and brokerage firms that participate in DTC are the record shareholders of public companies that use DTC, but recent Delaware decisions emphatically state that Delaware should follow federal law and recognize those banks and brokerage firms as the record shareholders.

C. The Iowa Appraisal Statute Is Designed to Protect Minority Shareholders, Like Shepard.

The District Court stated that because "our appellate courts have not interpreted record shareholder under the IBCA" the District Court must "determine the legislature's intent when the law was enacted."[11] A752. But

[11] Under the heading, "Prior Iowa law," the District Court summarizes the

there is no legislative history discussing what the Iowa legislature intended "record shareholder" to mean when it first enacted Iowa's appraisal statute containing this provision in 1989.

The District Court drew from commentary to the 2013 and 2016 revisions of the MBCA, while acknowledging that the version of the Model Act enacted by the Iowa legislature was drafted decades earlier in 1984. A768-72. Commentary that post-dates the relevant enactment is simply irrelevant for purposes of discerning legislative intent. *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part) ("Subsequent legislative history—which presumably means the post-enactment history of a statute's consideration and enactment—is a contradiction in terms"). And there is no indication that the Iowa legislature adopted the MBCA's commentary—either when it initially enacted the IBCA or in its subsequent amendments to the statute in 1991. *See* A769.

Moreover, the intent the Iowa appraisal statute is to protect the rights of minority shareholders, like Shepard.[12] Matthew G. Dore, *Iowa Practice*

Graeser court's 1934 decision. A753. That decision from more than 80 years ago is irrelevant because it was issued decades before the federally-enacted policy of share immobilization that led to the creation of DTC and Cede. Moreover, that decision did not interpret the Iowa appraisal statute, which was enacted in 1989, more than fifty years later.

[12] Among the provisions of the appraisal statute that provides protection to a

Series on Business Organizations, § 34.1 and 34:5; *see also Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W. 2d 884, 889 (Iowa 1996). Therefore, the appraisal statute should be interpreted liberally in favor of the dissenting shareholder to effect the purpose of the statute. *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) ("The polestar of statutory interpretation is to give effect to the legislative intent of a statute"); *see also Lawson Mardon Wheaton, Inc. v. Smith*, 734 A.2d 738 (N.J. 1999) ("[S]tatute providing for appraisal of dissenting shareholders' shares 'is designed to afford a simple and expeditious remedy to the dissenting shareholder.' . . . Accordingly, the statute should be liberally construed in favor of the dissenting shareholder."); *Welch v. Via Christi Health Partners, Inc*., 133 P.3d 122, 129 (Kan. 2006) ("Appraisal statutes should be liberally construed for the protection of the dissenting shareholders. . ."); *Hunter v. Vercellotti*, 649 N.E.2d 557, 560 (Ill. App. 1995) (noting that appraisal statute "was enacted to protect rights of dissenting shareholders" and "[s]uch remedial legislation should be construed liberally to effect its purpose."); Am. Jur. 2d § 679 ("[s]tatutory provisions giving dissenting shareholder the right to have their

---

shareholder is the provision that requires the company to pay a dissenting shareholder the company's estimate of "fair value" before the judicial appraisal proceeding even commences rather than at the end of the appraisal proceeding, thus ensuring that the shareholder receives prompt payment. *See* Iowa Code § 490.1324(1).

stock appraised and sold to the corporation under specified circumstances are generally construed liberally in favor of the dissenting shareholders[.]").

Interpreting record shareholder to include the banks and brokers who hold shares in "street name" on behalf of the beneficial shareholder also satisfies the purposes for requiring record shareholder consent to an appraisal. As EMCI conceded in the trial court, one purpose of the Iowa appraisal statute's record shareholder consent requirement is merely to satisfy a "practical informational need" to "verify the beneficial shareholder's entitlement" to exercise an appraisal right. A557 (emphasis omitted) (quoting MBCA, § 13.03, Official Comment, at 13-44 (2013)). When a bank or broker verifies a beneficial shareholder's entitlement to exercise the shareholder's appraisal right, as Morgan Stanley undisputedly did here, that informational need is satisfied.

According to the drafters of the Model Act, another purpose of the record shareholder requirement is to "permit the protection of any security interest in the shares." *Id*. DTC and its nominee Cede do not hold security interests in the stock; DTC simply holds those shares for the benefit of its participant banks and brokerages. The banks and brokers, however, may have security interests or other rights in shares that would prevent the beneficial owner from exercising an appraisal right with respect to certain

shares of stock. For example, a bank or broker may have extended credit for the shareholder to purchase the shares, and hold a security interest in the shares to secure that loan, which was the case with Shepard's shares here. A544 n.1. Accordingly, the consent of the bank or broker (here, Morgan Stanley) is necessary to protect any security interest the bank or broker may have in the shares.

For these reasons, the Court should interpret record shareholder to include banks and brokers that hold shares in "street name" on behalf of beneficial shareholders, like Morgan Stanley in this case.

D. The Other State Law the District Court Cited is Similarly Inapplicable.

On pages 29 through 31 of its Order the District Court cited a number of cases outside of Iowa to support its holding. None of those cases are relevant to this dispute, because none of those cases addressed the issue presented in this litigation: Whether the consent by a DTC-participant bank or broker identified in the Cede breakdown, on behalf of a beneficial shareholder, may be considered "record shareholder" consent.

The cases the District Court cited do not support the District Court's holding. In *Smith v. Kisorin USA, Inc.*, 254 P.3d 636, 637 (Nev. 2011) the court held that under Nevada law a corporation was not required to provide an appraisal rights notice to beneficial shareholders, but instead, was

required to send an appraisal rights notice to "record shareholders," "including those holding the stock in street name." Here, the Iowa appraisal statute requires the corporation to send an appraisal rights notice to all shareholders who have indicated their intent to seek an appraisal of their shares, so this case is irrelevant. Iowa Code § 490.1322(1). Moreover, to the extent that *Smith* recognizes that those who hold stock in "street name" for a beneficial shareholder – like Morgan Stanley did here for Shepard – are "record shareholders," *Smith* actually supports Shepard's position.

In *Kohler Co. v. Sogen Int'l Fund, Inc.*, No. 99-2115, 2000 WL 1124233, at *2 (Wis. Ct. App. Aug. 9, 2000) (per curiam), the beneficial shareholders' request for an appraisal was found to be untimely, which is not the case here.

In *Petition of Kreher*, 108 A.2d 708, 712 (Pa. 1954) the court found that the beneficial shareholders' demand for an appraisal was insufficient to perfect an appraisal right, because the consent of the record owner of the shares – which were "26 different persons" who held 3,600 shares on behalf of the beneficial owner, not Cede or DTC – was required. Likewise, in *Nelson v. R-B Rubber Prods., Inc.*, No. Civ. 03-656-HA, 2005 WL 1334538, at *4 (D. Or. June 3, 2005) the beneficial shareholders failed to obtain and submit the "written consent of Mutual Securities, *their broker* (*and the*

record shareholder) not later than the time the beneficial shareholder asserts dissenters' rights[.]" (emphasis added.) In contrast here, Shepard obtained record shareholder consent from his broker, Morgan Stanley, which held Shepard's shares in street name on his behalf.[13]

In short, Shepard properly obtained record shareholder consent from Morgan Stanley to assert his appraisal right. Morgan Stanley was plainly "the person in whose name [Shepard's] shares are registered in the records of" EMCI, because Morgan Stanley held Shepard's share in "street name" on Shepard's behalf, which EMCI undisputedly knew when Shepard demanded an appraisal of his shares and which was reflected in the Cede breakdown that EMCI had in its records. Shepard – a longtime holder of EMCI shares – complied with the appraisal statute and should be entitled to an appraisal of his shares.

IV. EMCI Waived Its Right To Strict Compliance With The Iowa Appraisal Statute.

Even if EMCI's interpretation of the IBCA were correct (and it is not), the District Court erred in rejecting Shepard's argument that EMCI

[13] The District Court's reliance on *Von Seldeneck v. Great Country Bank*, No. CV89 02 98 86S, 1990 WL 283729 (Conn. Super. Ct. Oct. 5, 1990) is likewise misplaced because that case involved claims regarding the effect of certain proxies relating to a shareholder vote and the proper tabulation of votes at a shareholder meeting.

waived its right to strict compliance with the Iowa appraisal statute. "Waiver applies when a party voluntarily relinquishes a known right." *IBP, Inc. v. Al–Gharib*, 604 N.W.2d 621, 629 (Iowa 2000). By its conduct, EMCI clearly waived its right to insist that Shepard strictly comply with the Iowa appraisal statute.

After receiving Shepard's letters notifying EMCI that Shepard was exercising his appraisal right and providing record shareholder consent from Morgan Stanley, EMCI sent Shepard an "Appraisal Rights Notice," which enclosed the Appraisal Rights Form and acknowledged "Shepard's intent to seek appraisal rights with respect to 1,100,000 shares of Company [EMCI] stock (the 'Appraisal Shares')." EMCI affirmatively represented to Shepard in the Appraisal Rights Notice that the *only* step left for Shepard to "formally assert appraisal rights" was to "complete, date and sign" the attached appraisal form and return that form to EMCI by November 5, which Shepard did.[14] EMCI further represented to Shepard in the Appraisal Rights Notice that the "Company estimates that the fair value of its shares" as of September 19 "was $36 per share," and the "Company will use this value in

[14] Three days later, on November 8, 2019, EMCI submitted a brief to the District Court in Shepard's books-and-records action stating that Shepard had "advised [EMCI] that he intends to exercise his dissenters\appraisal rights under Iowa Code Section 490.1320 *et seq*." A45.

calculating the amount to be paid to Mr. Shepard for the Appraisal shares" – which amount EMCI had paid to Shepard several days earlier. Thus, EMCI waived any right to require consent from Cede to perfect Shepard's appraisal right.

Moreover, instead of waiting for Shepard to submit the written consent of Cede, as EMCI claims was required for Shepard to perfect his appraisal right, EMCI paid Shepard "merger consideration" and "canceled" Shepard's shares so that Shepard's EMCI shares "ceased to exist" on September 19, 2019 – 45 days before the due date for consents under the Iowa appraisal statute. A72 ¶ 40. There is nothing in the Iowa appraisal statute that justifies EMCI's payment of merger consideration and cancellation of Shepard's EMCI shares. At the time EMCI paid Shepard merger consideration and canceled his EMCI shares, it knew that Shepard had already submitted the consent of Morgan Stanley to an appraisal, but still had approximately 45 days to submit additional consents if they were required (which they were not). EMCI also knew that canceling Shepard's shares would "adversely impact Shepard's ability to assert his appraisal rights." A779. By canceling Shepard's shares on September 19, 2019, EMCI precluded Shepard from performing any of the steps necessary to perfect his appraisal right after that date.

For these reasons, EMCI waived its right to demand Shepard's strict compliance with the Iowa appraisal statute by obtaining consent from Cede for Shepard to exercise his appraisal right (which consent was not required in any event).

V. EMCI Should Be Estopped From Arguing Shepard Failed to Comply with the IBCA.

EMCI should also be estopped from contending that Shepard failed to comply with the Iowa appraisal statute's purported requirement that he needed Cede's consent to exercise his appraisal right. Equitable estoppel prevents "one party who has made certain representations from taking unfair advantage of another." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004). The District Court held that Shepard had not established the first element of equitable estoppel—a "false representation or concealment of material fact."[15] That conclusion was clearly erroneous.

EMCI made a number of false and misleading representations to Shepard during the parties' correspondence regarding Shepard's right to appraisal that prejudiced his ability to exercise his appraisal right. EMCI

[15] To establish equitable estoppel, one must show "(1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury." *Markey v. Garney*, 705 N.W.2d 13, 21 (Iowa 2005).

told Shepard in its September 26, 2019 Appraisal Rights Notice that he would perfect his appraisal right by returning the appraisal form by November 5, which Shepard did. That same notice from EMCI informed Shepard that EMCI would pay Shepard $36 per share "for the Appraisal shares" – which amount EMCI had paid to Shepard several days earlier.

EMCI's statements and conduct were plainly misleading. EMCI never revealed to Shepard between September 16, 2019, when Shepard first notified EMCI that he intended to exercise his appraisal right, and November 12, 2019, when EMCI filed its Petition for a declaratory judgment, that the $36 per share that EMCI had paid Shepard was "merger consideration" (and not EMCI's payment of its estimate of the "fair value" of Shepard's EMCI shares, as required). Nor did EMCI reveal to Shepard that EMCI had "canceled" his EMCI shares or that Shepard's stock "ceased to exist," thus precluding him from pursuing his appraisal right. A72 ¶ 40. EMCI concealed these facts and was lying in wait, hoping that Shepard would not discover these facts, so that EMCI could seek to deprive Shepard of his appraisal right.

Moreover, despite knowing that Shepard believed that Morgan Stanley's consent was sufficient to perfect his appraisal right, EMCI never told Shepard that EMCI believed that Cede, rather than Morgan Stanley, was

the "record shareholder," which prejudiced Shepard's ability to perfect his appraisal right. If EMCI had simply alerted Shepard to the fact that it believed Cede was the "record shareholder" of Shepard's EMCI stock (and not canceled Shepard's shares on September 19, 2019), Shepard would have easily obtained Cede's consent well in advance of the November 5 deadline (had EMCI not canceled his EMCI shares). Instead, EMCI canceled Shepard's shares on September 19, 2019 – making it impossible to obtain Cede's consent – and then, again, lied in wait until after the November 5 deadline hoping that Shepard would rely upon the consent from Morgan Stanley, before arguing Cede's consent was necessary.

Accordingly, the District Court erred when it rejected Shepard's equitable estoppel defense.

CONCLUSION

For these reasons, Shepard respectfully requests that the Court reverse the District Court's judgment, remand this case with instructions to enter summary judgment in favor of Shepard, and award Shepard such other relief as the Court deems just and proper.

REQUEST FOR ORAL SUBMISSION

Appellant respectfully requests oral argument.

/s/Thomas K. Cauley, Jr.

Steve Eckley
ECKLEY LAW PLLC
666 Walnut Street, Suite 2308
Des Moines, IA 50309
Telephone: (515) 218-1717
Facsimile: (515) 218-1555
E-Mail: steve@SteveEckleyLaw.com

Thomas K. Cauley, Jr. (*pro hac vice*)
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036
E-Mail: tcauley@sidley.com

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,765 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: October 28, 2020

/s/Thomas K. Cauley, Jr.

PROOF OF SERVICE

I hereby certify that on the 28th day of October, 2020, I electronically filed the foregoing Defendant-Appellant's Final Opening Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

Michael W. Thrall
Lynn C. Herdon
NYEMASTER GOODE PC
700 Walnut Street, Suite 1600
Des Moines, IA 50309
mwt@nyemaster.com
lherndon@nyemaster.com

Beth L.Z Boland (admitted *pro hac vice*)
Eric G. Pearson (admitted *pro hac vice*)
Joseph S. Harper (admitted *pro hac vice*)
FOLEY & LARDER, LLP
111 Huntington Avenue
Boston, MA 02199
bboland@foley.com
epearson@foley.com
jharper@foley.com

/s/Thomas K. Cauley, Jr.