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 LAWRENCE P. MCLELLAN, PRESIDING

APPELLEE'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

Other Authorities

STATEMENT OF THE ISSUES

(1) Whether the Iowa District Court correctly concluded that The Depository Trust Company ("DTC"), through its nominee Cede & Co. ("Cede"; collectively, "DTC/Cede"), was the sole "record shareholder" under Iowa Code Section 490.1303(2)(a) for the 1.1 million shares of common stock of Plaintiff-Appellee EMC Insurance Group, Inc. ("EMCI" or "the Company") beneficially held by Defendant-Appellant Gregory M. Shepard ("Shepard"), where DTC/Cede was the *exclusive* registered shareholder for such shares so listed in EMCI's records;

(2) Whether the District Court correctly concluded that Shepard failed to submit the assent of the "record shareholder" by November 5, 2019 when he failed to submit the assent of DTC/Cede by that date, and thereby failed to perfect his appraisal rights against EMCI;

(3) Whether the District Court correctly concluded that summary judgment should enter for EMCI after Shepard failed to submit the assent of the record shareholder, notwithstanding Shepard's assertions of estoppel and waiver against EMCI.

ROUTING STATEMENT

EMCI agrees the Iowa Supreme Court should retain this case. Iowa Code Section 490.1303 gives "record shareholders" the right to assert

appraisal rights. Iowa Code Section 490.1301(8), in turn, defines "record shareholders" as those persons "registered in the records of the corporation."

Shepard seeks to re-define Iowa law so that Shepard's broker – who is not "registered" in EMCI's records – is nonetheless considered the "record" owner of his EMCI shares. Shepard's argument, if successful, could have fundamental repercussions for the uniform national system governing securities share ownership and transfer, which has operated in Iowa and throughout the country for decades. As such, the case presents "substantial issues of first impression" and fundamental issues of "broad public importance requiring prompt or ultimate determination by the supreme court." Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

Nature of the Case

Shepard was a beneficial shareholder of EMCI who voted against EMCI's "going-private" transaction with Employers Mutual Casualty Company ("EMCC") in September 2019. As a dissenting shareholder, Shepard notified EMCI of his desire to pursue his appraisal rights to seek more than the $36 per share price paid by EMCC to the EMCI shareholders as part of that transaction.

Under the appraisal process set by the Iowa Business Corporation Act, Iowa Code Chapter 490, Division XIII (the "Appraisal Statute"), Shepard was also required to submit the consent of the *record* shareholder by November 5, 2019. Shepard did not do so, and, as a result, he was foreclosed from pursuing his appraisal rights.

Disposition of the Case in the District Court

On November 12, 2019, EMCI filed a petition for declaratory and injunctive relief pursuant to Iowa Code Section 602.6101 and Iowa Rule of Civil Procedure 1.1101 seeking a determination that Shepard had not met the statutory requirements to pursue appraisal rights under the Appraisal Statute. A732 (District Court Order). Shepard responded by filing a motion to dismiss on December 9, 2019 and asked the District Court to consider a number of documents in conjunction with his motion. A733. On December 12, 2019, after consulting with the parties, the District Court indicated that it would treat Shepard's motion to dismiss as a motion for summary judgment and allow EMCI to file a cross-motion for summary judgment. *Id.* The District Court ruled on the parties' cross-motions for summary judgment on April 5, 2020. It ordered and declared the following:

> (1) that DTC/Cede was the record shareholder of Shepard's shares under Iowa Code Section 490.1303(2)(a), since DTC/Cede's name was registered as the legal owner of such shares on the records of EMCI;

(2) that the Security Position Report or "Cede Breakdown"[1] did not constitute the record of EMCI's registered shareholders under Iowa Code Section 490.1301(8);

(3) that Shepard's broker, Morgan Stanley Smith Barney LLC ("Morgan Stanley"), which was listed on the Cede Breakdown but not on the Company's lists of registered shareholders, was not the record shareholder of Shepard's shares;

(4) that Shepard failed to perfect his appraisal rights as required under Iowa Code Section 490.1303(2)(a) when he failed to obtain and submit written consent from the record shareholder, DTC/Cede, before November 5, 2019; and

(5) that Shepard failed to establish defenses of waiver and equitable estoppel.

A772; A789-790.

Shepard timely filed a notice of appeal in the wake of the District Court's ruling. A792.

STATEMENT OF THE FACTS

A. The "Going-Private" Transaction and Shepard's Attempt to Assert His Appraisal Rights

Immediately prior to September 18, 2019, Shepard was the beneficial owner of 1.1 million shares of EMCI common stock (the "Shepard Shares"),

[1] Although the District Court acceptably uses both terms, the document will be referred to as the "Cede Breakdown" herein to streamline terminology with Shepard's opening brief ("Open. Br.").

which he held in "street name" through his broker, Morgan Stanley. A735, ¶¶ 1, 2.

Effective September 19, 2019, the Company's majority shareholder, EMCC, purchased the remaining outstanding shares of the Company for $36/share by means of a "going-private" transaction (the "Merger"). A736, ¶ 6.[2] On September 18, 2019, the Company held a special meeting of its shareholders at which those shareholders voted on the proposed Merger (the "Shareholder Meeting"). *Id.*, ¶ 9.

Before the Shareholder Meeting, the Company obtained from its transfer agent, American Stock Transfer & Trust Company, LLC ("AST"), a list of registered shareholders[3] as of the August 8, 2019 record date entitled to vote at the Shareholder Meeting (the "Record Shareholder Voting List"). *Id.*, ¶ 10; A429, ¶ 6; CA22. The Company also then received from AST a list of record shareholders immediately before the effective date of the

[2] Citations to numbered paragraphs in the District Court Order are to the District Court's findings of "Material Facts To Which There Is No Genuine Issue." A735-A744.

[3] Throughout his brief, Shepard refers to "record" shareholders listed on a variety of documents which do not meet the definition of "record" shareholder under Iowa Code Section 490.1301(8), *i.e.*, "the person in whose name shares are registered in the records of the corporation." For clarity, EMCI refers only to "record" shareholders as those shareholders whose names were actually registered on EMCI's official stock register.

Merger (September 19, 2019 or the "Transaction Closing Date") who were eligible to be paid the $36/share merger consideration (the "Record Shareholder Payment List"). A737, ¶ 12; A742, ¶ 36; A431; CA54-CA66.

As the Company's transfer agent, AST was charged with maintaining the company's records of its registered shareholders. A737, ¶ 11. The Company relied on the Record Shareholder Voting List to determine which shareholders were entitled to vote at the Shareholder Meeting (A429; A736-A737, ¶¶ 10-11), and it relied on the Record Shareholder Payment List to determine which shareholders were entitled to receive the $36/share Merger Consideration for the transaction (A742, ¶ 36). As such, the Record Shareholder Voting List and the Record Shareholder Payment List reflected the complete and definitive lists of registered shareholders with respect to the shareholder vote and payment. A431, ¶ 13.

Neither Morgan Stanley nor Shepard appeared on either list. A737, ¶ 14. Rather, EMCI's corporate records identified "Cede & Co." as the registered owner of 9,432,555 shares, reflecting the shares held in "street name" for EMCI's beneficial shareholders like Shepard. *Id.*, ¶¶ 12-14. Morgan Stanley, in turn, maintained an account at DTC/Cede where

Shepard's shares were on deposit; such account-holders are known as DTC/Cede "Participants." A735, ¶¶ 2-3; A738, ¶ 18.[4]

Before the Shareholder Meeting, the Company also obtained from DTC/Cede an "Omnibus Proxy" and Cede Breakdown detailing all Participants in DTC/Cede's EMCI share position eligible to vote at the Shareholder Meeting. A737, ¶¶ 15-17; A498, ¶ 5; CA7-CA21.[5] Morgan

[4] "Participants" consist of banks, brokerage firms, and other financial institutions holding depository accounts with DTC/Cede for various services, such as settlement, underwriting, and tax services. Further information about the roles of DTC/Cede and its Participants is available on the DTC/Cede website. *See The Depository Trust Company*, DTCC (Oct. 28, 2020), https://www.dtcc.com/about/businesses-and-subsidiaries/dtc. As discussed more fully below, Participants are deemed beneficial owners of shares credited to their DTC/Cede accounts, and thereby possess a "security entitlement" against DTC/Cede, while customers of Participants are also deemed to be beneficial owners, and may be the "ultimate" beneficial owners, but possess a security entitlement only against their respective Participants. *See* Uniform Commercial Code ("UCC") § 8-102(a)(17) and off. cmt. 17 *and* UCC Article 8, Part 5.

[5] This report enables the issuer to, *e.g.*, comply with its federally-mandated obligation to send a broker search card to Participants when submitting a matter to stockholder vote. 17 C.F.R. § 240.14a-13(a). *See also In re Appraisal of Dell Inc.*, ("*Dell*") No. CV 9322-VCL, 2015 WL 4313206, at *7 (Del. Ch. July 13, 2015), *as revised* (July 30, 2015); Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting* ("Kahan & Rock"), 96 Geo. L.J. 1227, 1232-33, 1243 (2008).

Court decisions from Delaware, which has a well-developed body of jurisprudence on shareholder matters, are considered instructive here. *See, e.g., Davis-Eisenhart Mktg. Co. v. Baysden*, 539 N.W.2d 140, 143 (Iowa 1995) (looking to Delaware case law when considering permissibility under Iowa Appraisal Statute of fiduciary duty claims in appraisal action).

Stanley appeared as a Participant with respect to 1,123,502 shares of DTC/Cede's total position in EMCI.[6] A735, ¶ 3; A738, ¶ 18; CA16. The Omnibus Proxy served as the form by which DTC/Cede, as the registered shareholder entitled to vote, granted a proxy to those Participants listed on the report to facilitate the voting of DTC/Cede's EMCI shares at the Shareholder Meeting:

> CEDE & CO. HEREBY APPOINTS EACH OF THE PERSONS, PARTNERSHIPS, CORPORATIONS OR OTHER ENTITIES NAMED IN THE ATTACHED SECURITY POSITION LISTING, WITH THE POWER OF SUBSTITUTION IN EACH, PROXY TO VOTE THE NUMBER OF SHARES OF THE SECURITY SPECIFIED IN THE ATTACHED SECURITY POSITION LISTING OPPOSITE HIS OR ITS NAME, AND NO MORE… WHICH CEDE & CO. WOULD BE ENTITLED TO VOTE IF PRESENT AT THE MEETING TO BE HELD ON THE DATE SPECIFIED BELOW…
>
> THESE APPOINTMENTS, WHETHER OR NOT COUPLED WITH AN INTEREST, ARE REVOCABLE AT ANY TIME AND IN ANY MANNER…
>
> THIS INSTRUMENT SUPERCEDES AND REVOKES ANY AND ALL APPOINTMENTS OF PROXIES HERETOFORE MADE BY CEDE & CO. WITH RESPECT TO THE VOTING OF SHARES OF THE SECURITY SPECIFIED BELOW AT SAID MEETING.

[6] Morgan Stanley's position roughly corresponds with Shepard's 1,100,000 shares. As a beneficial shareholder who is not a DTC/Cede Participant, Shepard's name does not appear on the Cede Breakdown. A735, ¶ 1; A738, ¶ 19.

A737, ¶¶ 15-17; A738, ¶ 20; CA8 (emphasis in original).[7]

At the Shareholder Meeting, 94% of all Company shareholders who voted—and 84% of the shareholders who voted other than EMCC—cast their votes in favor of the transaction. EMCI Form 8-K, at Ex. 99.1 (Sept. 18, 2019), *available at* https://www.sec.gov/Archives/edgar/data/356130/000110465919050728/a19-18665_1ex99d1.htm#Exhibit99_1_013801. A549-550.

B. EMCI's Disclosures Regarding the Appraisal Process for the Merger

The proxy materials provided to EMCI's shareholders before the Shareholder Meeting (A738, ¶ 21) advised shareholders of their rights to dissent from the proposed Merger and to pursue appraisal rights[8] under the Appraisal Statute as follows:

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[7] According to DTC/Cede's website, "DTC, the holder of record for depository-eligible securities, transfers the right to vote with respect to those securities to the DTC participants that hold record date positions via an Omnibus Proxy … Each report includes detailed share and contact information for each participant." *Omnibus Proxy*, DTCC (Oct. 28, 2020), http://www.dtcc.com/products/training/helpfiles/asset_services/spr/help/spr_omnibus_proxy.htm. A737, ¶ 17.

[8] "Iowa Code chapter 490 gives a shareholder 'appraisal rights' and the right to obtain 'fair value' for his or her shares upon the occurrence of enumerated corporate action…. The corporation must commence an action to determine the fair value of the minority shareholder's stock if the shareholder and corporation cannot agree on a price." *Nw. Inv. Corp. v. Wallace*, 741

> "Beneficial owners of shares of common stock held of record in the name of another person, such as a bank, broker or other nominee, may assert appraisal rights **only if the shareholder submits to the Company the record holder's written consent to the assertion of such rights**." A129; A204 (emphasis added).
>
> **"If you hold your shares of common stock in a bank, a brokerage account or other nominee form and wish to exercise appraisal rights, you should consult with your bank, broker or the other nominee to determine the appropriate procedures for the nominee to make a demand for appraisal. 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-A252 (emphasis in original).
>
> **"The process of demanding and exercising appraisal rights requires strict compliance with the technical prerequisites under Division XIII of the Iowa Business Corporation Act. Failure to take any required step in connection with exercising appraisal rights may result in the termination or waiver of such rights. In view of the complexity of Division XIII of the Iowa Business Corporation Act, shareholders who may wish to pursue appraisal rights should consult their legal counsel."** A254 (emphasis in original).

The DTC/Cede website provides instructions on how participants like Morgan Stanley are to exercise appraisal rights on behalf of beneficial shareholders like Mr. Shepard:

> In order to exercise such [appraisal] rights through DTC, the participant must complete and submit to DTC a letter identifying

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N.W.2d 782, 785–86 (Iowa 2007) (citing Iowa Code §§ 490.1302(1) and 1330).

> the issue and the quantity of securities involved, along with the instruction letter instructing DTC to act.

Proxy Services, DTCC (Oct. 28, 2020), http://www.dtcc.com/settlement-and-asset-services/issuer-services/proxy-services). A551; *see also* A739, ¶ 23. When a Participant (like Morgan Stanley) properly submits these forms, "DTC [causes] the issuer's transfer agent to issue a paper stock certificate for the number of shares held by the beneficial owner. The paper certificate is issued in Cede's name, so the same record holder continues to hold the shares…" *Dell*, 2015 WL 4313206, at *3.

C. Shepard's Communications with EMCI and Morgan Stanley Concerning His Appraisal Rights

By letter dated September 16, 2019, Shepard sent the Company notice of his intent to seek appraisal rights, and appended his voting instruction form voting against the Merger. A740, ¶ 27; A388. On September 17, 2019, Shepard also submitted a letter from Shepard's broker, Morgan Stanley (the "Morgan Stanley Letter"). A740, ¶ 28; A397-398.

As reflected in the Morgan Stanley Letter, Shepard maintained two accounts at Morgan Stanley: one with shares purchased with a loan from a Morgan Stanley affiliate (the "Morgan Stanley Account") and one (the "Heartland Account") with shares purchased with a loan from Heartland

Bank and Trust Company ("Heartland Bank").[9] A740, ¶ 29; A397-398. The letter stated in part: "The above referenced shares of EMCI are held in street name and Morgan Stanley's records reflect that the Client [Gregory Mark Shepard Sr.] is the owner of record of the shares held in each account." *Id.*

Shepard's loan agreement with the Morgan Stanley affiliate, and Morgan Stanley's control agreement with Heartland Bank,[10] included provisions referring to the conditions (such as, *e.g.*, a default on his loan) by which Shepard's ability to assert control over his shares would revert back to his lenders. A727, ¶ 5; CA78-CA86; CA87-CA119; CA106-CA107, § 8.11.[11] Several days before the shareholder vote, Shepard contacted

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[9] Shepard disclosed in a prior SEC filing that the "source of funding for the purchase" of his EMCI shares "was a combination of personal funds, a bank loan and margin borrowing." A497, ¶ 2; A503. The documents produced by Shepard to EMCI in the litigation below showed that Shepard borrowed money from both the Morgan Stanley affiliate and Heartland Bank in order to purchase his 1.1 million shares. A727, ¶ 5; CA78; CA87. These shares, which served as collateral for the loans, were held in two brokerage accounts: 600,000 shares in the "Morgan Stanley Account" and 500,000 in the "Heartland Account." A397.

[10] Shepard refused to produce his loan agreement with Heartland Bank, and instead produced only Morgan Stanley's control agreement with Heartland Bank. A727, ¶ 5; CA78.

[11] Once Shepard asserted the Morgan Stanley Letter constituted "consent" of Morgan Stanley as the "record shareholder," EMCI requested documents relating to that consent, but Shepard refused. A574-A576, ¶¶ 1-5. The District Court then ordered Shepard to produce the requested documents, which Shepard produced after EMCI's Statement of Undisputed Facts was submitted, and three days before EMCI's reply brief was due. A615; A617,

Morgan Stanley and Heartland Bank seeking "approval from both [lenders] to seek appraisal right [*sic*]." CA68. Shepard did not produce a letter from Heartland Bank, but did submit the Morgan Stanley Letter to EMCI with a letter from Shepard's counsel "confirming that Gregory M. Shepard is authorized to exercise appraisal rights" with respect to his shares held at the firm. A393.[12]

After asserting that *Shepard* was "the owner of record of the shares held in each account," the Morgan Stanley Letter noted its loan agreement allows Shepard "to exercise his voting and appraisal rights" over the shares in the Morgan Stanley Account so long as the various conditions triggering the reversion of such rights to Morgan Stanley had not occurred (which they had not). A397-A398. As for the shares in the Heartland Account, Morgan

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¶ 10. EMCI submitted relevant documents from that production under cover of the Declaration of Michael Thrall. A726-A731.

[12] The Morgan Stanley Letter went through several revisions before the final version sent to EMCI. *See* CA77; CA132-CA133; CA145-CA146. During that process, Shepard's counsel sent correspondence to Morgan Stanley asking:

> We are looking for a letter from Morgan Stanley that states it is the custodian of 1.1 million shares, Morgan Stanley understands *Mr. Shepard is the owner of record* for those shares, and to the extent required, Morgan Stanley consents to Mr. Shepard exercising an appraisal right with respect to the shares.

CA127-CA128 (emphasis supplied).

Stanley noted that *its* control agreement with Heartland Bank "does not restrict [Shepard's] ability to exercise his voting and appraisal rights," but "Morgan Stanley makes no representation" regarding any restrictions imposed by any other agreements, such as Shepard's loan agreement with Heartland Bank. A398.

D. Appraisal Notice from the Other Dissenter

While Shepard was undertaking his appraisal process, EMCI also received notice that another shareholder intended to dissent and assert its appraisal rights (the "Other Dissenter"). The Other Dissenter, unlike Shepard, submitted written consent from DTC/Cede on the standardized DTC/Cede appraisal dissent form. A739, ¶ 24; A429-A430, ¶ 9; A437; A439. The letter submitted by the Other Dissenter asserts that Cede is the nominee of DTC, "a holder of record of shares [of] EMC Insurance Group, Inc.," and that, "[i]n accordance with instructions received from Participant on behalf of Beneficial Owner, we hereby assert appraisal (or dissenters') rights with respect to the Shares." A739, ¶ 25; A438.[13]

[13] The Other Dissenter took the additional step of obtaining physical certificates for its shares and later depositing them with EMCI. A739, ¶ 25. As such, the shares were not cancelled upon the closure of the transaction, and were recorded with the notation "CEDE & CO FBO DISSENTER" on the Record Shareholder Payment List. *Id.*, ¶ 26; A434, ¶ 22.

E. Payment of the Merger Consideration to Shepard

The Merger became effective the day after the Shareholder Meeting, on September 19, 2019. A736, ¶ 6. Pursuant to the associated merger agreement ("Merger Agreement"), all shares of the Company (other than those held by shareholders who demanded *and perfected* their right to appraisal, and those held by EMCC and certain EMCI-affiliated entities) were converted into the right to receive $36/share in cash. A736, ¶ 7.[14]

The Company relied on the Record Shareholder Payment List in order to determine which shareholders were to receive the $36/share Merger Consideration. A742, ¶ 36. Although Shepard had indicated his desire to dissent, his shares appeared to be included in DTC/Cede's position on the Record Shareholder Payment List. A432-A433, ¶ 16. Accordingly, the Company consulted AST to determine how it should proceed with payment

[14] The Merger Agreement was publicly filed with the SEC on May 9 and August 8, 2019. A430, ¶ 11; A441-A496. Section 1.6 of the Merger Agreement provides that the shares of dissenting shareholders "shall not be converted into, or represent the right to receive, the Merger Consideration … *except that all [shares] held by shareholders who shall have failed to perfect [their appraisal rights] … shall thereupon be deemed to have been converted into, and to have become exchangeable for … the right to receive Merger Consideration.*" A446-A447 (emphasis supplied). Section 1.13 of the Agreement provides such shares shall then be cancelled upon the effective date of the transaction. A449-A450.

of the Merger Consideration. A742, ¶¶ 37-38; A432-A434, ¶¶ 16-20.[15] AST confirmed that Shepard had not requested that his shares be removed from DTC/Cede's share position, and that DTC/Cede would not pay *any* of the 9,432,555 shares it held for the beneficial shareholders unless and until it received $36/share for *all* its shares reflected on the Record Shareholder Payment List. *Id.* As such, if the Company wished to pay the $36/share Merger Consideration to *any* of the beneficial holders of DTC/Cede's 9,432,555 shares, it had to include the Shepard Shares in that payment. *Id*. Thus, in order to ensure that all beneficial shareholders of the Company received the payments required under the Merger Agreement, the Company paid for *all* DTC/Cede's shares (including the Shepard Shares) on September 20, 2019. A743, ¶ 44.

Once the Company made that payment, all shares of the Company's common stock—other than those shares held by the Other Dissenter who had removed its shares from DTC/Cede's record ownership—were cancelled

[15] AST confirmed that the beneficial shareholders would be paid as follows: (1) the Company would make a lump sum payment to AST; (2) AST would then coordinate payment to the record shareholders (including to DTC/Cede), including for the shares held for beneficial owners; and (3) DTC/Cede would then distribute the payment received for its shares to DTC participants for distribution to the ultimate beneficial holders. A742, ¶¶ 37-38.

pursuant to Section 1.13 of the Merger Agreement. A742-A743, ¶¶ 40-41. Shepard thus received $39,600,000 on September 23, 2019. A744, ¶ 45.

F. The Post-Closing Appraisal Process

On September 23, 2019, Shepard's counsel sent a letter to counsel for EMCI in which he stated Shepard's assumption that EMCI's payment to Shepard of $36/share reflected the Company's estimate of the "fair value" of his shares; he also inquired when Shepard would receive the appraisal notice required "[p]ursuant to Section 490.1322(2) of the Iowa Business Corporations Act." A740-A741, ¶ 30; A400. On September 26, 2019, the Company responded by sending to Shepard the Appraisal Notice and Form (the "Appraisal Notice" and "Appraisal Form" (A402-A404)) required by § 490.1322(2) to be sent to all shareholders (like Shepard) who did not vote in favor of the transaction and who notified the Company of their intent to assert appraisal rights (A740, ¶ 27; A741, ¶ 31).[16] The Appraisal Notice included the information required by § 490.1322(2) to be provided to such

[16] Iowa Code Section 490.1322(1) requires that the Appraisal Notice be sent to "all shareholders who satisfied the requirements of section 490.1321," *i.e.*, those who (1) "delivered written notice of the shareholder's intent to demand payment" and (2) did not vote in favor of the transaction. Because Shepard satisfied that criteria, EMCI was required to send Shepard the Appraisal Notice.

dissenting shareholders, and appended a copy of the Appraisal Statute. A741, ¶ 31.

The next day, Shepard's counsel sent another letter to EMCI's counsel indicating Shepard's belief that the Appraisal Notice "makes no sense" because EMCI "has already paid Mr. Shepard $36 per share," and therefore EMCI "has not followed the appraisal process set forth" under the Appraisal Statute. A741, ¶ 32; A416. Shepard then outlined his interpretation of that process, and stated his "inten[tion] to follow and abide by the deadlines and other procedures identified" in the statute. A416.

On November 4, 2019, Shepard returned the completed Appraisal Form. A741, ¶ 34; A419-A421. That letter did not include written consent from DTC/Cede for Shepard's assertion of appraisal rights. A741, ¶ 35. On November 12, 2019, EMCI filed a petition seeking a determination of whether Shepard met the statutory requirements to pursue appraisal rights under the Appraisal Statute. A732.

When Shepard learned of his error, his counsel contacted Morgan Stanley to demand answers. In response, Morgan Stanley stated:

> You asked me what the relationship is between MS and Cede. Cede is the nominee for DTC. When shares are held in street name, the investor's name is listed on the broker-dealer's (in this case, MS's) books as the beneficial owner of the shares, MS's name is listed in the ownership records of DTC, and DTC's

> nominee name (Cede) is listed as the registered owner on the records of the issuer or its transfer agent.
>
> Below is also the link to the DTC/Cede website that explains this relationship.

CA148.[17]

Despite Morgan Stanley's confirmation of EMCI's position that DTC/Cede is "listed as the registered owner" of Shepard's shares in the records of EMCI and AST, and Morgan Stanley is merely "listed in the ownership records of DTC," Shepard has persisted in asserting in this litigation his theory that Morgan Stanley was nonetheless the "record shareholder" of Shepard's shares.

ARGUMENT

I. Shepard Failed To Secure The Consent Of The Record Holder As Required By The Iowa Appraisal Statute.

A. Error Preservation

EMCI agrees that Shepard has preserved error on his arguments concerning his failure to secure the consent of the record holder of his shares as required by Iowa Code Section 490.1303(2).

[17] The URL provided by Morgan Stanley leads to the same DTC/Cede website cited by EMCI in its motion for summary judgment and herein. A546.

B. Standard of Review

EMCI agrees that the Court reviews issues of statutory construction for correction of errors at law. *Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020). In questions of statutory interpretation, the Court is to use a "textual inquiry" that looks not as to what the legislature meant but rather what the statute means. *Id.*, at 610. "If the 'text of a statute is plain and its meaning clear, [the Court] will not search for a meaning beyond the express terms of the statute or resort to rules of construction.'" *Id.* (quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)).

C. The Role of DTC/Cede, Participants, and Beneficial Shareholders

Before undertaking its statutory analysis of the relevant provisions in the Appraisal Statute, it is helpful to understand the legal framework of stock ownership and transfer in place in the United States since the 1970s:

> Transfer of securities in the traditional certificate-based system was a complicated, labor-intensive process. Each time securities were traded, the physical certificates had to be delivered from the seller to the buyer, and in the case of registered securities the certificates had to be surrendered to the issuer or its transfer agent for registration of transfer.

UCC, Prefatory Note to Article 8 (amended 2017); *see also* Iowa Code §§ 554.8101 *et seq.* Because the "mechanical problems of processing the paperwork for securities transfers reached crisis proportions in the late 1960s" (*id.*), the members of the New York Stock Exchange established

DTC to serve as the record shareholder for those shareholders who wished to take advantage of the new system of "share immobilization" (*Dell*, 2015 WL 4313206, at *4-*6 (collecting sources)).[18] Under this system, "all of the shares are issued in the name of Cede"—DTC's nominee, short for "Central Depository"—and "legal title remains with Cede." *Id.*, at *2. In turn, "[o]ver 800 custodial banks and brokers are participating members of DTC" for which DTC/Cede "holds shares on their behalf . . . [such] that none of the shares are issued in the names of DTC's participants." *Id.*, at *1; *see also In re Color Tile Inc.*, 475 F.3d 508, 511 (3d Cir. 2007). Beneficial ownership interests in the shares may trade numerous times among various beneficial owners, but legal ownership remains with DTC/Cede. *Dell*, 2015 WL 4313206, at *1-2. [19] As a result, the shares remain immobilized at

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[18] *See also, e.g.*, Neal L. Wolkoff & Jason B. Werner, "*The History of Regulation of Clearing in the Securities and Futures Markets, and Its Impact on Competition*," 30 Rev. Banking & Fin. L. 313, 323 (2010) (the New York Stock Exchange founded DTC's predecessor in 1968 in order to "immobilize the massive amount of stock certificates that, up until the creation of these depositories, had to physically change hands with every transaction."); *History*, DTCC (Oct. 28, 2020), http://www.dtcc.com/annuals/museum/index.html (click on the "1970's" link).

[19] "Securities deposited at DTC are registered in the name of Cede & Co. and are held beneficially for DTC participants, who in turn may hold the securities beneficially for their customers." *In Re the Depository Tr. Co.*, Exchange Act Release No. 34–47978, 2003 WL 21288541, *7 (June 4, 2003) (June 11, 2003). The securities are "registered in the name of (i.e.,

DTC/Cede, dispensing with any need to adjust record ownership and thereby facilitating the millions of daily transactions. Customers of DTC/Cede's Participants have no rights against DTC/Cede and merely possess a security entitlement[20] against their financial institution, who in turn may possess a security entitlement against DTC/Cede. As explained in the official comments to the UCC:

> A security entitlement is not a claim to a specific identifiable thing; it is a package of rights and interests that a person [*i.e.*, Shepard] has against the person's securities intermediary [*i.e.*, Morgan Stanley] and the property held by the intermediary. The idea that discrete objects might be traced through the hands of different persons has no place in the Revised Article 8 rules for the indirect holding system.

UCC § 8-503 off. cmt. 2 (emphasis added); *see also* UCC § 8-102 off. cmt. 17 ("A security entitlement is not … a specific property interest in any financial asset [*i.e.*, EMCI shares] held by the securities intermediary [*i.e.*, Morgan Stanley] or by the clearing corporation [*i.e.*, DTC/Cede] through

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legally owned [by]) Cede & Co." *Id.*, at *8 (emphasis in original). *See also, e.g.*, *In re Petrobras Sec. Litig.*, 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015) (When "DTC, or its nominee Cede & Co., holds legal title…, and Cede & Co.'s name is listed as the registered owner of these securities[,]" DTC/Cede retains legal title irrespective of beneficial ownership transfers.).

[20] *See* UCC § 8-102(a)(17); Iowa Code § 554.8102(1)(q).

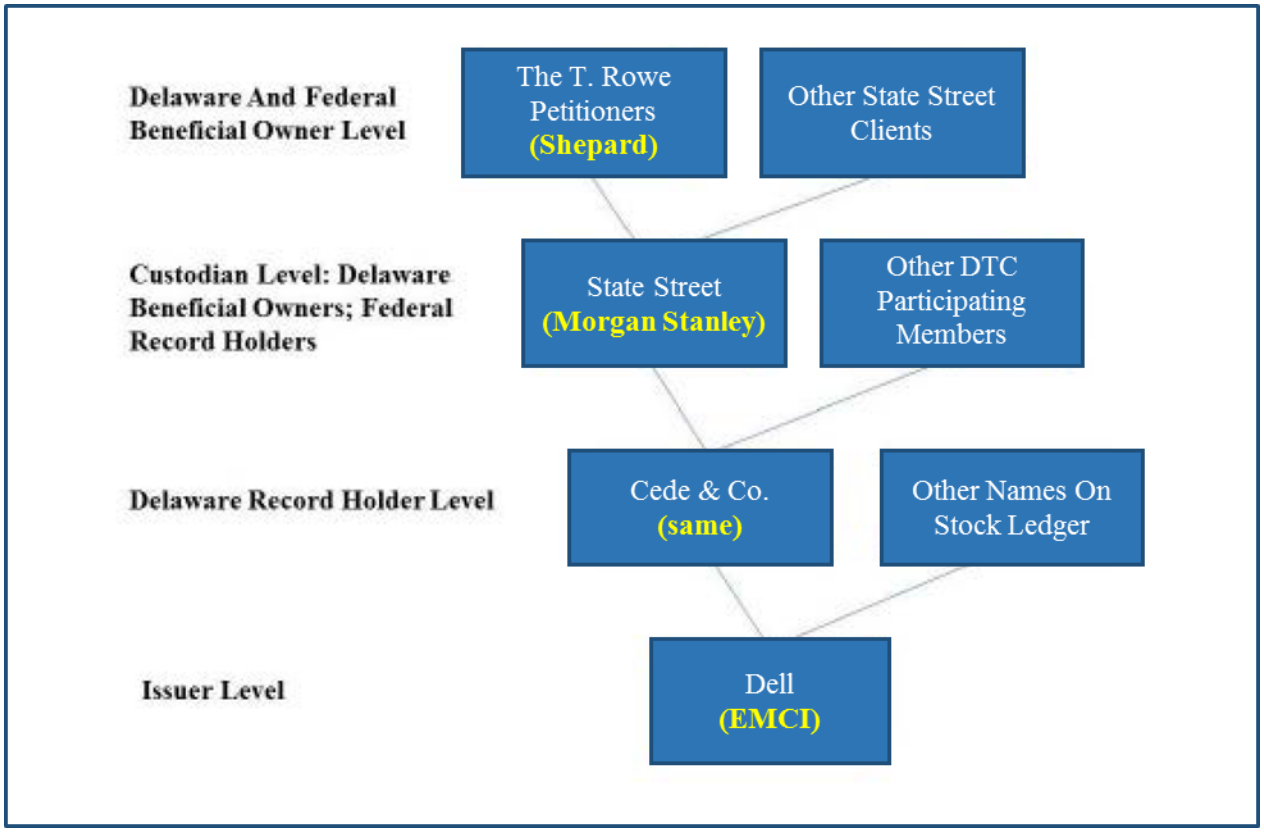
which the securities intermediary holds the financial asset."); UCC Prefatory Note to Article 8 (amended 2017).

Beneficial holders, as opposed to record holders, of publicly-traded shares are said to hold them in "street name." *Id*., at *4. "The vast majority of publicly traded shares in the United States are registered on the companies' books not in the name of beneficial owners… but rather in the name of [DTC/Cede]." Lisa A. Fontenot et al., *"Street Name" Registration & the Proxy Solicitation Process*, in A Practical Guide To SEC Proxy And Compensation Rules ("SEC Proxy Rules") § 11.01 (Wolters Kluwer 6th ed. 2019). DTC/Cede's website explains the chain of ownership for shares held in street name as follows:

> When an investor holds shares [in street name], the investor's name is listed on its brokerage firm's books as the beneficial owner of the shares. The brokerage firm's name is listed in DTC's ownership records. DTC's nominee name (Cede & Co.) is listed as the registered owner on the records of the issuer maintained by its transfer agent. DTC holds legal title to the securities and the ultimate investor is the beneficial owner.

How Issuers Work with DTC, DTCC (Oct. 28, 2020), http://www.dtcc.com/settlement-and-asset-services/issuer-services/how-issuers-work-with-dtc); *see also* A735, ¶ 4. *Dell* illustrated the relationship among issuers, record shareholders, participants, and ultimate beneficial

shareholders as follows (adding in parentheses below the names of the parties herein for their counterparts in *Dell*):



In re Appraisal of Dell Inc., No. 9322–VCL, 143 A.3d 20, 25 (Del. Ch. May 11, 2016).

Shepard held his shares in "street name" as an ultimate beneficial owner of EMCI shares, which allowed him to more easily hold his shares on margin with Morgan Stanley and with the proceeds of the Heartland Bank loan. A497-A498; A500-A506; A397-398.[21] Such beneficial shareholders

[21] Holding shares in street name allows active traders to expedite stock transfers and subsequent re-registration; it allows for better safekeeping of

bear the burden of complying with the statutory requirements for "record" shareholder actions notwithstanding their decision to hold shares in street name:

> The use of security depositories by brokerage firms now is a common practice. The decision in that regard, however, is a matter which is strictly between the broker and its clients .... In making that choice, ***the burden must be upon the stockholder to obtain the advantages of record ownership .... The legal and practical effects of having one's stock registered in street name cannot be visited upon the issuer.*** The attendant risks are those of the stockholder, and where appropriate, the broker .... ***If an owner of stock chooses to register his [or her] shares in the name of a nominee, he takes the risks attendant upon such an arrangement,*** including the risk that he may not receive notice of corporate proceedings, or be able to obtain a proxy from his nominee.[22]

Enstar Corp. v. Senouf, 535 A.2d 1351, 1354-55 (Del. 1987) (emphasis added); *see also Kohler Co. v. Sogen Int'l Fund, Inc.*, No. 99-2115, 2000 WL 1124233, *1 (Wis. Ct. App., Aug. 9, 2000) (beneficial holder who did not receive notice of the merger failed to perfect appraisal rights arising

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shares, instead of requiring individuals to store and transfer share certificates; and it facilitates the purchase of shares on margin. SEC Proxy Rules § 11.01.

[22] Ultimate beneficial owners have the right at any time to obtain certificates registered in their name by providing instructions to their DTC/Cede Participant bank or broker to request DTC/Cede to direct the transfer agent for the issuer to cancel a Cede & Co. certificate for the issue and issue a new certificate registered as instructed by the Participant. *See* UCC § 8-508; Iowa Code § 554.8508.

from the merger, since "the deficiency would be visited upon the [beneficial holders] or their agent, CEDE, not upon [the issuer]").

D. The District Court Correctly Held That Shepard Failed to Perfect His Appraisal Rights under Iowa Law.

The Appraisal Statute details the process shareholders wishing to assert appraisal rights must follow. Iowa Code § 490.1301 *et seq.* *Before* the vote on the proposed corporate action, the Appraisal Statute requires a dissenting shareholder to (1) provide written notice of the shareholder's intent to assert appraisal rights, and (2) not vote in favor of the proposed action. § 490.1321(1). *After* the vote, the statute provides an additional set of deadlines to be adhered to, including:

- Signing and returning an appraisal form by the date (40-60 days hence) set forth in the appraisal notice enclosing the form (§ 490.1323(3));
- Depositing the shareholder's share certificates, by the date specified in the appraisal notice (§ 490.1323(1));[23]

[23] The District Court concluded that the Appraisal Statute did not require Shepard to submit his uncertificated shares on November 5, 2019 when he returned his Appraisal Form. A780. Iowa Code Section 490.1323(1), however, requires a dissenting shareholder to "sign and return the [appraisal] form sent by the corporation" and treats uncertificated dissenting shares as having been surrendered by the shareholder through the act of returning the appraisal form. *Id.* ("Once a shareholder deposits that shareholder's certificates or, *in the case of uncertificated shares, returns the signed forms*, that shareholder loses all rights as a shareholder[.]") (emphasis added). Shepard's uncertificated shares had been converted into Merger Consideration and ceased to be Company Dissenting Shares under § 1.6 of

- Notifying the company of the shareholder's own estimate of the "fair value" of his/her shares within 30 days of receipt of payment or offer of payment of fair value by the company (§ 490.1326(2));

- Submitting the record shareholder's written consent to the assertion of appraisal rights, by the return date for the appraisal form specified in the appraisal notice (§ 490.1303(2)(a)); and

- Notifying the company in writing of the intent to withdraw from the appraisal process within 20 days after signing and returning the appraisal form (§§ 490.1322(2)(b)(5), 1323(2)).[24]

Although Shepard complied with some of these deadlines, he failed to submit the consent of the record shareholder – DTC/Cede, the legal owner of his shares – by the November 5, 2019 deadline.[25] Iowa Code Section 490.1303 governs this requirement.[26] Given the system of share

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the Merger Agreement *effective as of the Transaction Closing Date* by virtue of his failure to submit the consent of the record holder, so Shepard's return of his Appraisal Form could not have the effect of surrendering his uncertificated shares.

[24] The Merger Agreement – which was available to the public and extensively cited in the Proxy Statement – incorporated many of these statutory deadlines: the shares of any dissenting shareholders who "shall have failed to perfect" their appraisal rights "shall thereupon be deemed to have been converted into, and to have become exchangeable for … the right to receive Merger Consideration" and "shall cease to be Company Dissenting Shares." A446-A447, § 1.6.

[25] He also failed to surrender his shares by the November 5, 2019, deadline.

[26] The Proxy Statement explicitly warned shareholders about this requirement as well:

> Beneficial owners who do not also hold the shares of common stock of record may assert appraisal rights ***only if*** the shareholder submits to the Company the record holder's written consent to

immobilization described above, the statute makes separate provision for how such assent should be tendered for record versus beneficial shareholders:

> 1. A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name … only if … the record shareholder … notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted.
>
> 2. A beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if the shareholder does both of the following:
>
> a. Submits to the corporation the record shareholder's written consent to the assertion of such rights no later than [the date on which the shareholder returns the appraisal form to the corporation].
>
> b. Does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder.

Section 490.1303. Section 490.1301(2) defines a "beneficial shareholder" as "a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's behalf." Section 490.1301(8), by contrast, defines a "record shareholder" as "the person *in whose name shares are registered in the records of the corporation* …." (Emphasis supplied).

> the assertion of such rights and does so with respect to all shares that are beneficially owned by the beneficial shareholder.

A251 (emphasis supplied).

Section 490.1303's bifurcated system for perfection of appraisal rights by "record" versus the "beneficial" shareholders derives from both a legal and a practical informational need. "The beneficial shareholder is required to submit … a written consent by the record shareholder to the assertion of appraisal rights *to verify the beneficial shareholder's entitlement and to permit the protection of any security interest in the shares*." Model Business Corporation Act ("MBCA"), § 13.03, Official Comment, at 13-44 (2013) (emphasis added).[27]

Iowa law requires an Iowa corporation to maintain a list of its registered shareholders "in a form that permits preparation of a list of the names and addresses of all shareholders in alphabetical order by class of shares showing the number and class of shares held by each." Iowa Code § 490.1601(3). The definition of "shareholder" under this section is identical to that under the Appraisal Statute, *i.e.*, "*the person in whose name*

[27] Section 490.1303 is drawn from the MBCA. According to the Official Comment to that section "[t]he beneficial shareholder is required to submit… a written consent by the record shareholder to the assertion of appraisal rights to verify the beneficial shareholder's entitlement." MBCA, § 13.03, Official Comment, at 13-44 (2013). *See also id.*, § 1.40 (defining "record shareholder" as "the person in whose name shares are registered in the records of the corporation") & § 7.23, Official Comment ("[A] corporation recognizes only the person in whose name shares are registered as the owner of the shares.").

shares are registered in the records of a corporation." *Compare* Iowa Code § 490.140(32) *with* § 490.1301(8).

The District Court thus correctly held that DTC/Cede "was the record shareholder under section 490.1303(2)(a) since Cede & Co.'s name was registered on the records of EMCI, for Shepard's 1.1 million shares, prior to the merger vote." A790. The Record Shareholder Voting List and the Record Shareholder Payment List, the District Court held, were "the records of the corporation" reflecting the names of the registered shareholders as required by Section 490.1601(3). A772. In so holding, the District Court correctly followed this Court's precedent in *Graeser v. Phoenix Finance Co. of Des Moines*, 254 N.W. 859 (Iowa 1934), which held that "until [an equitable shareholder] has caused a transfer to made upon the books of the corporation, his title, as between the corporation and himself, is not perfected, and he neither has the rights nor is subject to the liabilities of membership." *Id.*, at 862.

The Iowa Supreme Court's approach in *Graeser*, in turn, mirrored that of other states, including Delaware, around that time. For example, in *Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583 (Del. 1945), the Supreme Court of Delaware explained:

> With respect to matters intracorporate affecting the internal economy of the corporation, or involving a change in the

> relationship with the members bear to the corporation, there must be order and certainty, and a sure source of information, so that the corporation may know who its members are and with whom it must treat, and that the members may know … who their associates are. Especially is this true in a merger proceeding which is essentially an intracorporate affair. The merging corporations are entitled to know who the objecting stockholders are so that the amount of money to be paid to them may be provided. … The corporation ought not to be involved in possible misunderstandings or clashes of opinion between the non-registered and registered holders of shares. It may rightfully look to the corporate books as the sole evidence of membership.

Id., at 589. This concept has been carried forward after the system of share immobilization, most notably in *Dell*:

> From the corporation's standpoint, the stock ledger identifies all of the legally relevant transactions in the corporations' shares, including the date when any person acquires shares and the number of shares acquired, and the date when any person transfers shares and the number of shares sold. If a holder transfers shares without notifying the corporation, the corporation is not required to discover that fact, nor need the corporation voluntarily treat the new holder as the *legal owner*. The corporation can rely on its records until a stockholder takes proper steps to transfer title to the shares. Under this system, a paper stock certificate is not actually a share of stock. It is only evidence of ownership of a share of stock.
>
> If the corporation needs to determine who its current stockholders are as of a particular date, the corporate secretary uses the stock ledger to prepare a stock list. The stock list identifies those stockholders who own stocks on a given date, together with the number and type of shares owned, based on the records.

2015 WL 4313206, at *8-9 (emphasis added).

The importance of legal certainty afforded an issuer's list of "registered shareholders" is now embodied in the MBCA's (and Iowa's) definition of "record shareholder," which refers solely to "registered shareholders" as those entitled to assert the rights of legal titleholders from the perspective of the company. Courts interpreting the MBCA definition thus consistently hold that a beneficial owner forfeits his/her appraisal rights when he/she fails to comply with the statutory requirements for actions to be taken by the "record shareholder." *See, e.g.*, *Dirienzo v. Steel Partners Holdings L.P.*, No. CIV.A. 4506-CC, 2009 WL 4652944, at *3 (Del. Ch. Dec. 8, 2009) (granting summary judgment because "[t]o be entitled to appraisal, the beneficial owner must ensure that the record holder of his or her shares makes the demand."); *Konfirst v. Willow CSN Inc.*, No. CIV.A. 1737-N, 2006 WL 3803469, at *2 (Del. Ch. Dec. 14, 2006) (rejecting claims of beneficial holders who were not listed as a stockholder of record in the company's stock register); *Neal v. Alabama By-Prod. Corp.*, No. CIV. A. 8282, 1988 WL 105754, at *2 (Del. Ch. Oct. 11, 1988) (same); *Carico v. Mccrory Corp*, No. 5160, 1978 WL 2501, at *1 (Del. Ch. July 13, 1978) (same); *Engel v. Magnavox Co.*, C.A. No. 4896, 1976 WL 1705 (Del. Ch. Apr. 21, 1976) (same); *Smith v. Kisorin USA, Inc.*, 254 P.3d 636, 640, n.3 (Nev. 2011) (affirming dismissal, where dissenting shareholders failed to

submit consent from the record holder, Cede); *Nelson v. R-B Rubber Prod., Inc.*, No. CIV. 03-656-HA, 2005 WL 1334538, at *5 (D. Or. June 3, 2005) (same, where dissenting shareholders failed to submit written consent from the record holder to whom record ownership had been transferred); *see also, e.g.*, Jesse A. Finkelstein & John D. Hendershot, *Appraisal Rights in Mergers & Consolidations*, 38-5th C.P.S., A-22, (2010) (BNA) ("The written demand must be signed by the stockholder of record… [A] demand letter sent by a beneficial owner of stock registered in street name is not sufficient to trigger appraisal rights.").[28]

In order for Shepard to assert appraisal rights, he was required to either register the shares in which he had a beneficial ownership interest

[28] This result is also echoed in other state treatises interpreting MBCA section 13.03. *See, e.g.*, Paul J. Galanti, 20 *Ind. Prac., Business Organizations* § 43.4 (2018 Supp.) ("[P]ersons whose shares are held in street or nominee name do not qualify as shareholders of record for appraisal purposes"); James C. Seiffert, 17 *Ky. Prac. Corp. Law w Forms*, § 3:124 (2019 supp.) ("The written consent of the record shareholder is to verify the beneficial shareholder's right to dissent"); Wendell H. Holmes and Glenn G. Morris, 8 *La. Civ. L. Treatise, Business Organizations*, § 38:5 (2019 supp.) ("If the beneficial shareholder … wishes to continue with the appraisal process, he must, by the stated deadline, complete and return … the record owner's written consent[.]").

Shepard argues that the District Court erroneously relied on some of these cases (*see* Open. Br. 60-62), but each stands for the fundamental proposition that the consent of the record holder – and the record holder alone – is required to assert appraisal rights.

through Morgan Stanley in his own name on the official stock register maintained by EMCI, or to submit the consent of the record shareholder (DTC/Cede), by no later than November 5, 2019. He failed to do so, and the District Court properly entered summary judgment against him. Permitting Shepard to proceed without the consent of the actual record holder of the shares (namely, DTC/Cede) would not only depart from the system of record ownership chosen by the Iowa legislature in Chapter 490, but it would render Iowa law uniquely at odds with the law in states adopting identical or similar provisions from the MBCA.

E. The District Court Correctly Held DTC/Cede, Not Morgan Stanley or Shepard, Was the Record Holder.

To avoid the consequences of the above authorities, Shepard contends that the District Court should have (1) recognized *his broker*, *Morgan Stanley* – and not DTC/Cede – as the "record" shareholder for his shares, and (2) found that Morgan Stanley submitted its consent to Shepard's exercise of appraisal rights in its September 17, 2019 letter. Open. Br., at 14-15. Both propositions are unavailing, and the District Court's rejection of them should be affirmed.

First, it is undisputed that Morgan Stanley's sole role with respect to the chain of legal title here was as a DTC/Cede "Participant." As such, it had a beneficial ownership interest in the EMCI shares credited to its DTC

account, just as Shepard had a (ultimate) beneficial ownership in the shares credited to his Morgan Stanley account. As Morgan Stanley itself informed Shepard, as a DTC/Cede Participant "[Morgan Stanley's] name is listed in the ownership records of DTC, and DTC's nominee name (Cede) is listed as the registered owner on the records of the issuer or its transfer agent." CA148.

The Morgan Stanley Letter and the underlying documents produced by Shepard reflect exactly what one would expect from a broker like Morgan Stanley whose relationship with Shepard was that of a securities intermediary[29] rather than legal titleholder: that (1) according to Morgan Stanley's (not EMCI's) records, *Shepard* was the "record owner" of the shares in the two brokerage accounts, (2) its loan agreement with Shepard conveyed a secured interest in the bundle of rights retained by Shepard after purchasing shares with funds lent by its affiliate, and (3) *as between the two parties,* Shepard still maintained those bundle of rights unless certain conditions under their loan agreement were triggered and thereby caused those rights to revert back to Morgan Stanley. Indeed, Morgan Stanley itself—and Shepard's attorneys themselves—repeatedly disclaimed any

[29] UCC Article 8, Part 5; Iowa Code § 554.8501 *et seq.*

"record ownership" by Morgan Stanley of the shares, instead referring to *Shepard* as the "record owner" and Morgan Stanley as "only act[ing] as lienholder[]." CA123; *see also* CA126-CA128; CA129-CA133; CA141-146.

The Official Comment to the MBCA provides guidance in exactly this situation: "In practice, a broker's customer who wishes to assert appraisal rights may request the broker to supply the customer with the name of the record shareholder (which may be a house nominee or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder." MBCA, § 13.03, Official Comment, at 13-44 (2013).[30] Shepard provides no evidence that he made such a demand to Morgan Stanley, or that Morgan Stanley provided the name of the record shareholder DTC/Cede or the form of consent to be signed by DTC/Cede.

At bottom, Shepard's attorneys clearly failed to grasp—at the time and to this day—that *they had asked the wrong entity for consent*.[31]

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[30] *See Proxy Services*, DTCC (Oct. 28, 2020), http://www.dtcc.com/settlement-and-asset-services/issuer-services/proxy-services) (providing instructions and standardized forms to request consent from DTC/Cede).

[31] The confusion created by this disconnect is reflected in the multiple versions of the letter exchanged between the parties at the time, and Shepard's attorneys and Morgan Stanley's attorneys communicating at cross-purposes as those versions were drafted. Indeed, one of Morgan

Shepard's failure to do so stands in contrast to the efforts of the Other Dissenter. The Other Dissenter, unlike Shepard, obtained DTC/Cede's standard Appraisal Dissent Form and requested that DTC/Cede issue it to EMCI, which DTC/Cede did. A739, ¶¶ 24-25. That letter correctly asserts that Cede is the nominee of DTC, "a ***holder of record*** of shares [of] EMC Insurance Group Inc.," and that, "[i]n accordance with instructions received from Participant on behalf of Beneficial Owner, we hereby assert appraisal [or dissenters'] rights with respect to the shares." A739, ¶ 25.

It is thus entirely appropriate that Morgan Stanley appeared on DTC/Cede's Cede Breakdown, which identified the DTC/Cede Participants that had securities entitlements in EMCI shares credited to their respective DTC/Cede accounts. As the District Court found, the Cede Breakdown is *not* the list of EMCI's "record shareholders"; that distinction belongs solely to the Record Shareholder Voting List and the Record Shareholder Payment List. A790. This conclusion is bolstered by decisions from other courts, which routinely recognize that DTC/Cede, not a broker/Participants like Morgan Stanley, is the exclusive record shareholder of shares held in street

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Stanley's private bankers expressed puzzlement over Shepard's request: "Any idea what to do here? I would think that we only act as lienholders, meaning if the shares are held in the client's name shouldn't he be voting the proxy (with or without our permission)?" CA123.

name. *Dell*, 2015 WL 4313206, at *1;[32] *Kisorin*, 254 P.3d at 640, n.3; *Kohler*, 2000 WL 1124233, *1; *In re Kaiser Steel Corp.*, 110 B.R. 514, 522-23 (D. Colo. 1990), *aff'd sub nom. Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846 (10th Cir. 1990); *Enstar*, 535 A.2d at 1354 ("[A] corporation 'may treat the *registered owner* as the person *exclusively* entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner.'") (quoting UCC; emphasis in original). If this Court were to hold otherwise, its decision would be at odds with the very fundamentals of the share-immobilization system described above, and outlined by Morgan Stanley to Shepard.

Second, the fact that some federal regulations define "record shareholder" to include brokers like Morgan Stanley for specifically-designated purposes does not change this result, and in fact supports the

[32] Shepard's efforts to contort *Dell*'s holding into the exact opposite of what *Dell* in fact held (*see, e.g.*, Open Br., at 55-56) are unavailing. Although Vice Chancellor Laster explored "the possibility of a different approach … were [he] writing on a blank slate," 2015 WL 4313206, at *11, he himself acknowledged and repeatedly held "Cede was the stockholder of record," and "the only relevant records are those maintained by Dell [the issuer] or the Transfer Agent." *Id.*, at *6, *9. Indeed, the Delaware Supreme Court previously rejected Vice Chancellor Laster's "different approach," noting that it would require "a legislative cure." *Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010).

conclusion that state law recognizes *only* registered shareholders as the exclusive owners "of record."

Unlike state law—which is focused on determining the legal ownership of shares—the federal securities regime is focused on regulating the process, completeness, and distribution of the issuer's disclosures to those shareholders who actually determine *how* to vote their shares, *i.e.*, the ultimate beneficial shareholders of shares held in street name.[33] J. Robert Brown, Jr., *Corporate Communications and the Federal Securities Laws*, 53 Geo. Wash. L. Rev. 741, 741-42 (1985) ("In enacting the federal securities laws, Congress sought to protect investors by ensuring the availability of information necessary to make informed investment decisions. Thus, the federal securities laws regulate securities primarily through disclosure."). Because ultimate beneficial shareholders are often positioned several rungs away from the issuer, a complex regulatory structure has arisen to facilitate the transfer of instructions from the ultimate beneficial owner regarding his or her interests in the securities.

[33] Only the person with *legal* title to the shares (*i.e.*, DTC/Cede) has the exclusive legal authority to vote those shares, but often delegates to the *beneficial* shareholder the right to decide *how* to vote. Kahan & Rock, 96 Geo. L.J. at 1243-44.

The communications chain starts with the issuer's registered shareholder list; that list is the *only* list of title shareholders visible to the issuer, and is the *only* one used by the issuer to determine which shareholders are eligible to exercise legal rights such as, *e.g.*, voting, receiving dividends and interest, and asserting appraisal rights. The registered shareholder list, however, does not reflect the names of the *customers* of DTC/Cede's Participants, such as Shepard.[34] The task of identifying the (ultimate) beneficial owners in order to solicit their vote thus begins with the Participants listed in the Cede Breakdown, who in turn identify and pass issuer communications to the beneficial shareholders. Kahan & Rock, 96 Geo. L.J. at 1243-44, 1247. The Cede Breakdown thus enables the issuer to, *e.g.*, comply with its obligation to send a broker search card to Participants when submitting a matter to stockholder vote, and

[34] As the Prefatory Note to UCC Article 8 explains:

> [T]he DTC depository system for corporate equity and debt securities can be described as an 'indirect holding' system, that is, the issuer's records do not show the identity of all of the beneficial owners. Instead, a large portion of the outstanding securities of any given issue are recorded on the issuer's records as belonging to a depository. The depository's records in turn show the identity of the banks or brokers who are its members, and the records of those securities intermediaries show the identity of their customers.

UCC, Prefatory Note to Article 8, § I.D. (amended 2017).

therefore more easily distribute proxy materials and solicit votes from beneficial shareholders. Once identified, the beneficial shareholders receive proxy materials and submit instructions to their broker as to how their vote should be cast (*see, e.g.*, A385), and DTC/Cede, in turn, grants the Participants the (revocable) legal authority to submit the voting instructions in DTC/Cede's stead. CA8.[35]

Simply stated, although the federal regulations Shepard cites may well require issuers to "look through" DTC/Cede's position for purposes of communicating with the ultimate beneficial shareholders,[36] the Iowa legislature – and courts in other states with identical statutes – chose not to

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[35] *See also* Kahan & Rock, 96 Geo. L.J. at 1247 (beneficial shareholder does not "vote" his or her shares directly with the issuer, since only the record shareholder, DTC/Cede, has the legal power to vote the shares).

Shepard argues that DTC/Cede's proxy granted to Participants like Morgan Stanley not only delegated authority to vote as instructed by the beneficial owners, but also to consent to appraisal rights. Open. Br., at 52. This is patently wrong: DTC/Cede's delegation, however, is expressly limited to the two shareholder votes presented at the Shareholder Meeting.

[36] For example, one of the federal regulations Shepard cites (*see* Open. Br., at 51-52) concerns a registrant's obligations to communicate with beneficial shareholders before a shareholder vote, 17 C.F.R. § 240.14a-13(a); and another provision addresses when a company must include a shareholder's proposal in its proxy statement. *Id.*, § 240.14a-8. By adopting a different definition of "record holder" than that adopted by Iowa Code Section 490.1301(8), and by limiting that definition solely to that particular regulation (§ 240.14a-1(i)), these federal regulations in fact bolster the conclusion that they are to be interpreted differently than the Iowa statute.

do so *for purposes of perfecting appraisal rights*. Shepard does not assert his appraisal rights under any of the federal statutes he cites, but rather under the Appraisal Statute. The Iowa Legislature, like the drafters of the MBCA, chose "[t]o protect the corporation in determining who its shareholders are," by enacting a statutory framework that allows a corporation to rely on "the record ownership as shown in the record of shareholders" such that "record ownership is accepted as conclusive and binding on the courts." H. Henn & J. Alexander, *Laws of Corporations and Other Business Enterprises* (3d ed. 1983). The Appraisal Statute defines "record shareholder" *solely by reference to those registered shareholder lists*, and unlike certain federal statutes does not require – or even allow – the issuer to "look through" DTC/Cede's position. Iowa Code § 490.1301(8).

Accordingly, the District Court correctly concluded neither Morgan Stanley nor Shepard were "registered shareholders" of EMCI, and therefore neither could satisfy the requirement for supplying the record shareholder's consent. *See* A752-773.

Third, Shepard's assertion that the DTC/Cede Breakdown is a corporate "record" does not somehow transform it into a list of the "person[s] in whose name shares are registered." The DTC/Cede Breakdown is a *DTC/Cede* record, not an EMCI record. More to the point, it

is not the list of "registered shareholders" which Iowa corporations are required to maintain under Iowa Code Section 490.1301(8), any more than would be, *e.g.*, a list of accounts receivable or a list of customers.

Fourth, irrespective of Morgan Stanley's legal status vis-à-vis Shepard's shares, it did not consent to Shepard's assertion of appraisal rights by November 5, 2019—or at any time. Although Shepard contends that the Morgan Stanley Letter "authorized Shepard to seek an appraisal of [his EMCI] shares" (Open. Br., at 17), that is not actually what the letter says. Rather, the only thing it does is delineate the circumstances by which Shepard's appraisal and voting rights for the shares held in the Morgan Stanley Account would revert back to Morgan Stanley under the terms of their loan agreement (such as, for example, if Shepard defaulted on the loan collateralized by his shares). And, Morgan Stanley did not even attempt to provide consent for the 500,000 shares held in the Heartland Account, over which it did not maintain a secured interest.[37] The correspondence between Shepard and Morgan Stanley thus merely represents "custodial arrangements … solely between shareholders and their agents, which do not involve the [issuer]" (Kahan & Rock, 96 Geo. L.J. at 1233), and is therefore irrelevant.

[37] "No security interest or collateral rights in [the Heartland Account] are being granted to any party other than [Heartland Bank]." A398.

II. The District Court Correctly Concluded Shepard Failed To Establish Defenses Of Waiver And Equitable Estoppel In His Motion For Summary Judgment

A. Error Preservation

EMCI agrees that Shepard has preserved error on his arguments concerning estoppel and waiver, except to the extent that Shepard argues that "[t]he Merger Agreement did not give EMCI the right or ability to cancel Shepard's shares on September 19." Open Br., at 17 n.4, 42. Shepard did not argue this issue in the District Court, but merely noted it tangentially in a footnote. Opp. Br., at 7, n.7. Error was thus not preserved. *See, e.g., Cruz v. Cent. Iowa Hosp. Corp.,* No. 12-0374, 2012 WL 6194230 *4, (Iowa Ct. App. 2012) (Where "argument was tangentially raised… [but] it was not ruled upon or even mentioned by the district court[,] [e]rror was thus not preserved on the issue."); *see also Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Standard of Review

EMCI agrees that the Court reviews orders granting summary judgment for correction of errors at law. *Green v. Racing Ass'n of Central Iowa,* 713 N.W.2d 234, 238 (Iowa 2006).

C. Shepard's Waiver and Estoppel Theories Do Not Excuse His Failure to Submit the Consent of the Record Shareholder.

Shepard bears the burden of proving he is entitled to summary judgment on his defenses of waiver and estoppel. *In re Estate of Warrington*, 686 N.W.2d 198, 202 (Iowa 2004); *Dierking v. Bellas Hess Superstore, Inc.*, 258 N.W.2d 312, 315 (Iowa 1977); *see also* A777.

"[A]ppraisal rights ... are *not* determined by reference to a stockholder's purpose," but rather solely by reference to *strict compliance* with the statutory requirements regardless of whether the stockholder justifiably failed to comply. *Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650, 653 (Del. Ch. 1989) (emphasis added). Accordingly, beneficial shareholders who do not submit the written consent of the record owner of their shares in accordance with statutory requirements are routinely held to forfeit their appraisal rights *even if* the company knows the identity of the beneficial shareholder;[38] or the company is aware of the shareholder's intent

[38] *See, e.g.*, *Enstar*, 535 A.2d at 1356 ("demands for appraisals made by the beneficial owners of stock, rather than the stockholders of record, [are] invalid[], even [if] the identity of the holder of record [i]s known"); *Engel*, 1976 WL 1705 (rejecting claims of beneficial owners, even though the identity of the holder of record was known); *Raynor v. LTV Aerospace Corp.*, 331 A.2d 393, 393 (Del. Ch. 1975) (beneficial holder failed to perfect appraisal rights, because although he "made a timely objection in writing," the record owner did not).

to assert his/her appraisal rights;[39] or the shareholder's agent mistakenly failed to perfect the shareholder's rights.[40]

Shepard contends that courts must liberally construe the requirements of Iowa Code Section 490.1303.[41] Open Br., at 48-49; 58-59. This is not exactly so. While as a general matter it is true that remedial statutes like those granting appraisal rights are liberally construed, the clear language of Section 1303 prevents this Court from broadening the definition of "record shareholder" beyond that supplied by the statute itself. More to the point,

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[39] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 668 (Del. Ch. 1988) ("[T]he law does not inquire into the subjective intent of either the record owner or the beneficial owner[.]"); *Era Co. v. Pittsburgh Consolidation Coal Co.*, 49 A.2d 342, 343 (Penn. 1946) (rejecting sufficiency of letter from bank, where bank was not the record holder).

[40] *E.g., Kohler*, 2000 WL 1124233, *1-*2 (beneficial shareholders' noncompliance with statutory requirements for appraisal rights is "dispositive," even where their agent never sent them notice of the merger, since "the deficiency would be visited upon the [beneficial holders] or their agent, CEDE, not upon [the issuer]"); *Von Seldeneck v. Great Country Bank*, No. CV89 02 98 86S, 1990 WL 283729, at *4 (Conn. Super. Ct. Oct. 5, 1990) (where DTC/Cede participant bank made mistake with respect to voting/consent actions taken on behalf of its clients/beneficial holders, corporation could not look to extrinsic evidence to determine beneficial holders' intent, "even if the corporation had actual knowledge of the facts").

[41] He also states, incorrectly, that the District Court "ignored settled law" that appraisal statutes should be construed liberally. Open Br., at 49 (discussing *In re Ripley*, 399 S.E.2d 678 (W. Va. 1990), and *Greco v. Tampa Wholesale Co.*, 417 So. 2d 994 (Fla. Dist. Ct. App. 1982)). In fact, the District Court acknowledged Shepard's reliance on these cases in its waiver analysis (A773; *id.*, n.199), but it did not find them persuasive (and for good reason, as discussed below).

the Iowa Legislature specified that particular language was to be construed narrowly, by providing that "[a] beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder *only if* the shareholder… [s]ubmits to the corporation the record shareholder's written consent." Iowa Code § 490.1303(2) (emphasis supplied). The phrase "only if" flags that that requirement must be read narrowly and technically. *See, e.g., Fed. Labor Relations Auth. v. Aberdeen Proving Ground, Dep't of the Army*, 485 U.S. 409, 412, 108 S. Ct. 1261, 1262 (1988) ("The phrase 'only if' denotes exclusivity; it does not suggest one of multiple options."); *see also Nationwide Advantage Mortg. Co. v. Ortiz*, 776 N.W.2d 111 (Iowa Ct. App. 2009) (district court "had no justification, in equity, to scrap the statute and leap to a remedy that negates [it]").[42] Thus, even though Shepard may have *attempted* to assert appraisal

[42] The cases cited by Shepard on this point are either from states with very different statutory language (*e.g., Ripley,* S.E.2d at 682 n.11 (applying statute which explicitly provided the court with discretion to excuse the stockholder's noncompliance) and *Greco*, 417 So. 2d at 996 nn.1-2 (same)), or relate to provisions of the appraisal process *other than the requirement for record shareholder approval* (*e.g., Security State Bank, Hartley, Iowa v. Ziegeldorf,* 554 N.W.2d 884 (Iowa 1996) (broadly interpreting definition of "fair value" in appraisal valuation proceedings). Indeed, some of the cases cited by Shepard do not involve appraisal rights at all. *See, e.g., State v. Schultz,* 604 N.W.2d 60 (Iowa 1999) (interpreting intent of statute prohibition operating a vehicle while under the influence of alcohol). Shepard also selectively cites other authorities, such as omitting the remainder of the quote from Am. Jur. 2d, which in fact reads: "Statutory

rights, his failure to *actually comply* with the Appraisal Statute is fatal even if that failure was the result of an error made by himself or his broker or his lawyer.

D. Even If Waiver and Estoppel Were Available as Defenses, the Undisputed Facts Show That Shepard Cannot Meet the Standard.

Shepard's waiver and estoppel argument also fails on the merits. "Waiver is an intentional relinquishment of a known right." *In re Estate of Warrington*, 686 N.W.2d at 202 (alternations omitted). "The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right." *Id.* (quoting *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.*, 596 N.W.2d 546, 552 (Iowa 1999)). Equitable estoppel requires proof that "(1) [t]he [non-moving party] has made a false representation or has concealed material facts; (2) [movant] lacks knowledge of the true facts; (3) [non-moving party] intended [movant] to act upon such representations; and (4) [movant] did in fact rely upon such representations to his prejudice." *Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.*, 859

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provisions [for appraisal rights] are generally construed liberally in favor of the dissenting shareholders, *at least if no prejudice to the corporation is shown*." 18A Am. Jur. 2d Corporations § 679 (emphasis included to show omitted language).

N.W.2d 182, 191 (Iowa 2015). Furthermore, "[t]he person raising the defense of equitable estoppel has a duty to exercise reasonable care and diligence in asserting his claim." *White v. Taintor Co-op. Co.*, No. 00-2099, 2002 WL 100486, at *2 (Iowa Ct. App. Jan. 28, 2002) (citing *DeWall v. Prentice*, 224 N.W.2d 428, 430 (Iowa 1974)). "One may not omit to avail himself of readily accessible sources of information concerning particular facts, and thereafter plead as an estoppel the silence of another who has been guilty of no act calculated to induce the party claiming ignorance to refrain from investigating." *DeWall*, 224 N.W.2d at 430 (internal quotation marks omitted).

Shepard provides two general arguments in support of his waiver/estoppel theories. First, he contends that his shares were cancelled in contravention of (1) the Appraisal Statute (*i.e.*, EMCI paid the "fair value" too early) (Open. Br., at 39, 41-42, 64); (2) the Merger Agreement (*id.*, at 17, n.4, 42);[43] and (3) the Proxy Statement (*id.*, at 44-45). Second, he contends that EMCI ignored his letters and sent him an affirmatively-misleading appraisal notice. *Id.*, at 34-40, 63-64, 66-67.

[43] As noted above, the Court need not reach this issue, because Shepard has not preserved error to argue that his share cancellation violated the Merger Agreement.

First, EMCI's cancellation of Shepard's shares cannot serve as a basis to conclude that EMCI intended to relieve Shepard of his obligations under the Appraisal Statute (as required for waiver), or concealed any material information (as required for estoppel). To the contrary, EMCI cancelled Shepard's shares pursuant to the express terms of the Merger Agreement, which provides that all shares of dissenting shareholders "who shall have failed to perfect" their appraisal rights would be cancelled upon the Merger's closure. A446-A447, § 1.6; A449-A450, § 1.13. The Proxy Statement also accurately described this section almost *verbatim*. *See* A250-A251.

Nor did Shepard's share cancellation contravene the Appraisal Statute: the statute does not mandate a specific date *on or after* which a company must pay its estimate of "fair value" to dissenting shareholders, but only specifies a date *by or before* which such payment must be made (*i.e.*, December 5, 2019 here). *See* Iowa Code § 490.1324(1); A567.

If Shepard had any doubts about whether his shares had properly been cancelled under the Merger Agreement when he received $39,600,000 from EMCI on September 23, 2019, he could have contacted EMCI to complain that the cancellation contravened the Agreement, and sought the return of his

shares in order to perfect his appraisal rights.[44] He did not, and cannot now blame EMCI for his error. *See Enstar*, 535 A.2d at 1354 ("The legal and practical effects of having one's stock registered in street name cannot be visited upon the issuer. The attendant risks are those of the stockholder, and where appropriate, the broker.").

Second, neither the Appraisal Notice nor any of EMCI's responses to Shepard's correspondence reflect a material misrepresentation of fact or demonstrate an intentional relinquishment of EMCI's rights, as required for Shepard's waiver and estoppel claims.

The Appraisal Notice

The Appraisal Statute required EMCI to provide the Appraisal Notice to any shareholders who (a) delivered to EMCI before the Shareholder Meeting written notice of the shareholder's intent to demand payment if the Merger was effectuated, and (b) voted against the Merger. Iowa Code

[44] EMCI also did not "preclude[e] Shepard from performing any of the steps necessary to perfect his appraisal right after that date" by cancelling his shares, as Shepard claims. Open. Br., at 65, 66. The Other Dissenter was able to avoid that fate by requesting the shares before they were cancelled upon the deal's closure. Nor was EMCI prevented from returning Shepard's shares to him (in exchange for Shepard returning the $39,600,000) after the deal closed, if he had asked them to do so. *See* A715-A717.

§§ 4090.1321, 1322. Shepard satisfied both requirements, so EMCI sent him the required Appraisal Notice and form.

Shepard repeatedly and inaccurately claims that "EMCI affirmatively represented to Shepard in the Appraisal 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…" Open. Br., at 63 (emphasis in original); *id.*, at 15, 18, 40. The Notice, however, contains no such representation. That is for good reason. The return of the Appraisal Form was but one of many steps that a dissenting shareholder was required to take under the Appraisal Statute, as discussed in Section I.D. above. Indeed, the very first substantive paragraph of the notice took pains to *limit the scope of the notice to the requirements contained in Section 1322* – as opposed to other sections – of the statute. A402.

In short: on September 23, 2019, Shepard's counsel inquired when he could expect to receive the appraisal notice "[p]ursuant to Section 490.1322(2) of the Iowa Business Corporations Act." A400. On September 26, 2019, EMCI responded by sending to Shepard the Appraisal Notice (as it was required to do under Section 1322), which made clear it was being sent pursuant to that same section, and made no affirmative statement concerning the sufficiency of Shepard's assertion of appraisal. There are *other* appraisal

perfection requirements contained in *other* sections of the Appraisal Statute, which EMCI also provided to Shepard along with the Appraisal Notice. *See* Section I.D above. EMCI had already warned in the Proxy Statement that beneficial shareholders may assert appraisal rights "only if" they submit the consent of the record shareholders; that the process of asserting appraisal rights is "complex"; and that "failure to take any required step . . . may result in the termination or waiver of such rights." A204; A254. It had no duty to specifically point out to Shepard those other requirements or whether he had failed to satisfy them.[45] The District Court's conclusion that the Appraisal Notice complied with the Appraisal Statute, did not "expressly and unequivocally" waive EMCI's rights, and did not contain a false representation or concealment of material fact (A783; A788), was supported by the substantial evidence below.

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[45] *See Neal*, 1988 WL 105754, at *4 (it is not a corporation's responsibility to "interpret ambiguous demand letters to determine whether they were made on behalf of record stockholders."). *See also Dirienzo*, 2009 WL 4652944, at *7 ("[I]t is perfectly appropriate for a company to wait until a petition is filed to begin analyzing and objecting to insufficient appraisal demands so long as the company makes no express or implied waiver in its correspondence with stockholders that it will not later object to their demands.").

The District Court also correctly concluded EMCI is not a fiduciary to Shepard, and therefore had no affirmative duty to point out Shepard's deficiencies. A787; A789.

In its essence, Shepard's objection to the transmission and content of the Appraisal Notice is an objection to the procedure established under Section 1322 of the Appraisal Statute. As such, the appropriate forum for his grievance is the legislature, not this Court. *See, e.g., Heartland Exp. v. Gardner*, 675 N.W.2d 259, 270 (Iowa 2003) ("[W]e are bound by the separate and distinct roles of our three branches of government and our fundamental and essential respect for the law-making function of the legislative branch.").

EMCI's Responses to Shepard's Other Communications

Nor did EMCI's responses to Shepard's other communications – *i.e.*, his letters of September 16, 2019 (A389), September 17, 2019 (A393), September 27, 2019 (A416-A417), and November 4, 2019 (A419-A420) – constitute an intentional waiver by EMCI of its rights, or include an affirmative material misrepresentation.

The District Court correctly found that none of these letters sought any response (other than for statutorily-required information which EMCI then provided), but rather merely laid out Shepard's position with respect to EMCI's actions and/or indicated Shepard's own intentions vis-à-vis the appraisal process. A788-A789; A740-A741, ¶¶ 30, 32. Indeed, as recently as September 27, 2019, Shepard represented that his pursuit of his rights was

uncertain. A416 (emphasis added) ("*if* Mr. Shepard decides to continue to exercise his appraisal rights…").

Dirienzio is particularly instructive under the facts here. There, the beneficial shareholders failed to submit the required written consent of the record shareholder (Cede), and merely submitted demands themselves and from their broker. 2009 WL 4652944, at *1, *3. The court granted the company summary judgment, holding that the beneficial holders did not perfect their appraisal rights in the absence of the record holder's consent. *Id*., at *3. In so holding, the court found no waiver or estoppel by the issuer even though the company had sent three letters to the beneficial holders over the course of three months, in which it did not mention that the beneficial holders' demands were deficient. *Id*., at *5-*7.

So too here. EMCI never told Shepard his assertion of appraisal rights was sufficient; it never told Shepard he had shares available for the appraisal process; and it never indicated any intent to honor Shepard's demands or to refrain from later challenging them. Nor did it have a duty to do so. Such absence of communication does not constitute waiver or estoppel as a matter of law, and the District Court correctly concluded as much.

Third, Shepard himself did not exercise reasonable care and diligence in pursuing his rights, which precludes his equitable estoppel defense.

Shepard ignored numerous red flags that his "assum[ptions]" about the appraisal process were incorrect. A400; A416. He ignored the Proxy Statement's warnings about "the complexity of the procedures for exercising the right to seek appraisal" (A129) and the need to submit the record holder's written consent (A204), and its encouragement to review the Appraisal Statute "carefully and in its entirety" (A129; A204).[46] Likewise, Shepard ignored the Merger Agreement's disclosures that Shepard's shares would be cancelled on September 19, 2019 (A446-A447, § 1.6; A449-A450, § 1.13), and he raised no actual questions about his subsequent receipt of $39,600,000 in accordance with the Merger Agreement's provisions for payment of the Merger Consideration. Nor did Shepard question Morgan Stanley's assertion that *Shepard* was the owner "of record" (CA120-CA133), despite Shepard's current insistence that *Morgan Stanley* was the

[46] It appears neither Shepard nor his counsel read Section 490.1303 of the Appraisal Statute or made an effort to comprehend the nature of Shepard's beneficial ownership of EMCI's shares until well after November 5, 2019. Three weeks after that deadline, Shepard was still asking Morgan Stanley about its relationship to DTC/Cede. CA148 (Nov. 25, 2019 Morgan Stanley email).

'record shareholder.[47] Shepard's failure to exercise diligence precludes his argument. *Mays v. Montgomery Kone, Inc.*, No. 0-315, 2000 WL 1421446, at *1 (Iowa Ct. App. Sept. 27, 2000) (rejecting even meritorious equitable estoppel defense where plaintiff failed to exercise due diligence); *White*, 2002 WL 100486 (same).

CONCLUSION

For the reasons set forth above and in the record, the Court should affirm the District Court's ruling in its entirety.

Dated: October 28, 2020

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[47] To add even further confusion, Morgan Stanley also refers to itself as the "record holder" on one of the proxy forms submitted by Shepard, but another proxy form contains no such assertion. *Compare* A385 *with* CA70.

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REQUEST FOR ORAL ARGUMENT

Although the law requiring a beneficial shareholder to submit the consent of the record holder is well-settled in other states, including those that, like Iowa, have adopted the MBCA this Court has not addressed the issues presented in this case since the implementation of share immobilization. EMCI, therefore, believes that oral argument is warranted.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Appellee's Proof Brief was filed with the Clerk of the Iowa Supreme Court on October 28, 2020, via the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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