

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

**BRIEF OF AMICUS CURIAE THE DEPOSITORY TRUST COMPANY
NOT IN SUPPORT OF ANY PARTY**

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STATEMENT OF INTEREST¹

The Depository Trust Company (“DTC”) is the nation’s central securities depository and is registered with the U.S. Securities and Exchange Commission (“SEC”) as a clearing agency pursuant to Section 17A of the Securities Exchange Act of 1934, as amended (“Section 17A”)². DTC is also a “clearing corporation” and “securities intermediary” as defined by Article 8 of the Uniform Commercial Code (“UCC”), § 8-102(a)(5)(i) and § 8-102(a)(14)(i), respectively.³ The SEC has observed that, “[b]y centralizing and automating securities settlement, by reducing the movement of publicly-traded securities in the U.S. markets, and by facilitating the prompt and

¹ Pursuant to Iowa R. App. P. 6.906 4(d), proposed amicus curiae states that no counsel for any party authored this brief in whole or in part, and no counsel or party contributed money that was intended to fund preparation or submission of this brief. DTC has reviewed Plaintiff-Appellee’s brief.

² See 15 U.S.C. §§ 78q-1, *et seq.*

³ As explained below, Article 8 of the UCC establishes uniform national standards regarding the ownership and transfer of securities, including the settlement of securities transactions, the relationships between issuers and investors, intermediaries and those for whom securities accounts are maintained, among other matters. This system is generally known as the ‘indirect holding system.’ See generally CARL S. BJERRE & SANDRA M. ROCKS, *THE ABCS OF THE UCC ARTICLE 8: INVESTMENT SECURITIES* (ABA Book Publishing, 2d ed. 2014). Article 8 has been adopted in all 50 states and is codified in Iowa at Iowa Code Ann. § 554.8. Except where otherwise noted, references in this brief to Article 8 are to the New York version (where DTC is incorporated), codified at UCC §§ 8-101, *et seq.* (VOL. 62½ MCKINNEY’S CONSOL. LAWS OF N.Y.)

accurate settlement of securities transactions, DTC serves a critical function in the National Clearance and Settlement System.” The Depository Tr. Co., Exchange Act Release No. 34-47978, 2003 WL 21288541 (June 4, 2003) (the “SEC Order”).

In his Opening Proof Brief (the “Shepard Brief”), Defendant-Appellant Gregory M. Shepard (“Shepard”), filed on August 4, 2020, repeatedly asserts that his broker, Morgan Stanley & Company (“Morgan Stanley”), was the record owner of the EMC Insurance Group Inc. (“EMCI”) shares for which Shepard has sought to exercise appraisal rights, not DTC’s nominee, Cede & Co. *See, e.g.*, Shepard Brief at 11, 14, 18, 23, 26, 28, 30, 31, 34, 44, 47. These assertions are incorrect.

While DTC takes no position on the merits of this appeal, and does not submit this brief in support of any party’s position on the merits, DTC has a strong interest in ensuring that this Court has an accurate understanding of DTC’s central role in the National Clearance and Settlement System, as established by Congress in enacting Section 17A⁴ and in the indirect holding system. It is important that any references to DTC in the Court’s decision, including the record ownership of securities on deposit at DTC, be in accord with the governing uniform national legal standards, by which the books and

⁴ 15 U.S.C.A. § 78q-1.

records of the issuing company establish the record owners of the company's shares. In this case, ECMI's books and records unequivocally identify Cede & Co. as the record owner.

The Shepard Brief, however, is inaccurate and/or ambiguous in describing what it purports to be the legal ownership of securities deposited at DTC, particularly with respect to Shepard's assertions that his broker, Morgan Stanley, was the record owner of EMCI shares in which Shepard had an interest throughout the appraisal process. This assertion is contrary to the workings of the indirect holding system. DTC therefore seeks to appear as an amicus for the limited purpose of advising the Court concerning the indirect holding system and, in particular, record ownership of securities deposited at DTC. This is particularly important because Congress, in enacting Section 17A, recognized that "uniform national standards" are essential to the "prompt and accurate" settlement of the nation's securities transactions, a system in which DTC plays a critical role.⁵ Shepard's erroneous and unprecedented

⁵ See, e.g., 15 U.S.C.A. § 78q-1(f)(2) (A)(ii) ("in the absence of a uniform rule, the safe and efficient operation of the national system for clearance and settlement of securities transactions will be, or is, substantially impeded"); see also, e.g., 1997 Sess. Law News of N.Y. Ch. 566 (A. 6619-C) (McKinney 1997), available at [https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID\(I8E992C10CF-E54B2298B69-0F3A32A1160\)&originatingDoc=N30425A80A84E11D888D1DD16F9990A84&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=\(sc.Search\)#sk=4.jcizAw](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I8E992C10CF-E54B2298B69-0F3A32A1160)&originatingDoc=N30425A80A84E11D888D1DD16F9990A84&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#sk=4.jcizAw) (the amended Article 8 was designed "to provide clarity and

assertions that his broker was the record owner of his EMCI shares, if adopted by this Court, would undermine that essential goal of uniformity.

INTRODUCTION

Shepard's argument that Morgan Stanley was the record owner of the EMCI shares for which Shepard sought to assert appraisal rights, simply because Morgan Stanley was listed on the "Securities Position Report" ("SPR")⁶ that DTC provided to EMCI, fundamentally misconstrues the concept of "ownership" under the modern indirect holding system.

Under the indirect holding system, the major banks and brokerage firms that constitute DTC's "Participants," acting for themselves or their respective customers, deposit securities into their DTC accounts for "book-entry" services; i.e., transfer of beneficial ownership interests by means of automated credits and debits to securities accounts, rather than actual transfer of record ownership. Securities deposited at DTC for book-entry services are registered on the books and records of the issuer in the name of DTC's nominee, Cede & Co., which becomes the record (legal) owner of the shares. As explained below, the Participants retain the beneficial ownership rights in the deposited

certainty regarding the rules that govern how interests in securities are evidenced and how they are transferred in the current securities market").

⁶ The SPR is referred to by the parties in this case as the "Cede breakdown."

shares, including the right to seek appraisal, which they may exercise on behalf of themselves or as instructed by their customers, on whose behalf they may be acting.

Here, Shepard alleges he held his beneficial ownership interest in EMCI shares through his broker, Morgan Stanley. As such, Morgan Stanley (a DTC Participant), in turn, was deemed the beneficial owner of the EMCI shares credited to its DTC account, including the shares Morgan Stanley held for the beneficial interest of Shepard (and any of its other customers having positions in EMCI). DTC rules and procedures established the mechanisms for Morgan Stanley to provide Shepard with the rights attendant to his beneficial ownership interest, including with respect to appraisal. At all relevant times, and central to the indirect holding system, Cede & Co.—not Morgan Stanley nor any other DTC Participants—remained the record owner of the EMCI shares deposited at DTC.⁷

DTC submits this brief to clarify four principles. First, under the indirect holding system, shares deposited at DTC for book-entry processing

⁷ It should be noted that in certain cases, not relevant here, investors deposit securities at DTC for custody purposes, not book-entry processing. In such cases, the securities are not registered in the name of Cede & Co. For purposes of this appeal, DTC is referring to shares deposited for book-entry processing, which it understands to include the shares for which Shepard seeks to exercise appraisal rights.

are registered in the name of DTC's nominee, Cede & Co. Participants depositing those shares are not record owners. Accordingly, the records of EMCI and DTC identify DTC/Cede & Co. as the record owner of the EMCI shares at issue. Second, the relevant case law, including precedents that Shepard relies upon, are wholly consistent with the principle that Cede & Co. was the record owner of the EMCI shares at issue. Third, for the purposes of the indirect holding system, the SPR does not list the "record owners" of the issuer's stock. Rather, it simply identifies the Participants who have deposited an issuer's shares at DTC, principally to enable issuers to provide Participants with information in compliance with the requirements of the federal securities laws. Fourth and finally, the dicta in the cases Shepard cites in support of his argument that the Participants listed on the SPR are record owners does not support his argument and, in any event, is inconsistent with prior and subsequent authority.

BACKGROUND

A. The National Clearance and Settlement System for Securities Transactions

Congress adopted Section 17A in 1975 in order to remove impediments to, and perfect the mechanism of a uniform national system for, the prompt and accurate clearance and settlement of securities transactions (the "National Clearance and Settlement System"). Congress acted in the wake of the

“Paperwork Crisis” of the 1960s and early 1970s, which resulted from the inefficient and manual clearance and settlement of an ever-growing volume of securities transactions. These manual and duplicative processes were wholly inadequate to keep pace with the number of daily transactions and nearly brought the industry to a standstill. *See* SEC Order, 2003 WL 21288541, at *6, n.52. In adopting Section 17A, Congress set forth its finding that the prompt and accurate clearance and settlement of securities transactions is necessary for the protection of investors and those acting on behalf of investors. 15 U.S.C. § 78q-1(a)(1)(A); SEC Order, 2003 WL 21288541, at *6, n.48.

In establishing the National Clearance and Settlement System, Congress anticipated that advances in computer technology would be important in establishing an efficient system and contemplated that clearing agencies, using that technology and subject to rigorous SEC oversight, would centralize the clearance, settlement and securities handling processes. Thus, pursuant to Section 17A(b)(3)(F) (15 U.S.C. § 78q-1(b)(3)(F)), Congress required that Clearing Agencies adopt rules, subject to SEC approval following a public comment period, designed to promote increases in efficiency and reduction in risk as mandated by Congress in adopting Section 17A.

DTC is a clearing agency, registered with the SEC, serving a “critical” role in the National Clearance and Settlement System. More recently, DTC has also been designated a Systemically Important Financial Market Utility (“SIFMU”) by the Financial Stability Oversight Council.⁸

B. The Uniform Commercial Code Was Amended to Comport with the National Clearance and Settlement System

Although Section 17A provided that the functions of clearing agencies would be subject to federal regulatory standards and oversight, the underlying property interests in securities remained subject to state law. Recognizing that under the National Clearance and Settlement System, securities were increasingly held in “street name” through intermediaries, rather than evidenced by physical certificates registered in the name of individual investors, Article 8 of the UCC was amended in 1994 (adopted in Iowa in 1997) to provide a uniform legal framework under state law governing the

⁸ See TITLE VII OF THE DODD FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010, 12 U.S.C. § 5463; U.S. DEPARTMENT OF THE TREASURY, APPENDIX A, DESIGNATION OF SYSTEMICALLY IMPORTANT FINANCIAL MARKET UTILITIES, FINANCIAL STABILITY OVERSIGHT COMMITTEE ANNUAL REPORT (2012) <https://www.treasury.gov/initiatives/fsoc/Documents/2012%20Appendix%200A%20Designation%20of%20Systemically%20Important%20Market%20Utilities.pdf>.

indirect holding system.⁹ As discussed in greater detail below, in establishing the uniform legal framework for the indirect holding system, the amended Article 8 was designed “to provide clarity and certainty regarding the rules that govern how interests in securities are evidenced and how they are transferred in the current securities market.” 1997 Sess. Law News of N.Y. Ch. 566 (A. 6619–C) (McKinney 1997).¹⁰ Article 8’s drafters intended that Article 8 would simply “deal[] with the mechanism by which interests in securities are transferred, and the rights and duties of those involved in the transfer process.” *Id.*

Central to Article 8 is the concept of “securities entitlements.” That is, in the indirect holding system investors do not hold direct registered (legal) title to securities in which they have acquired interests in public markets, but hold their interests as “security entitlements” against their brokers or banks (“securities intermediaries”). Correspondingly, DTC Participants, holding interests in securities for their own accounts or for their customers, hold

⁹ *See, e.g.*, UCC § 8-501, off. cmt. 4 (“Part 5 of Article 8 sets out a carefully designed system of rules for the indirect holding system”). The Official Comments to Article 8 cited in this brief may be found at: [https://www.westlaw.com/Browse/Home/StatutesCourtRules/UniformLawsAnnotatedULA/UniformLawsAnnotated160?guid=NA542567000BD11DD8320AE42787FBF1D&transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Browse/Home/StatutesCourtRules/UniformLawsAnnotatedULA/UniformLawsAnnotated160?guid=NA542567000BD11DD8320AE42787FBF1D&transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

¹⁰ *See, supra* n. 5 for Westlaw cite.

securities entitlements against DTC (which is a securities intermediary, as well as a clearing agency). *See* UCC § 8-102(17), off. cmt. 17 (“A security entitlement is both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary. A security entitlement is not, however, a specific property interest in any financial asset held by the securities intermediary or by the clearing corporation through which the securities intermediary holds the financial asset.”).¹¹

In other words, those having interests in securities in the indirect holding system, whether individual investors (like Shepard) or brokers acting on their behalf (like Morgan Stanley), are not the record owner of securities deposited at DTC; rather, as “entitlement holders” with respect to such securities, they have the right to exercise their beneficial ownership interests to give “entitlement orders” (instructions) to their respective securities intermediaries with respect such deposited securities, without affecting the

¹¹ There may be several tiers of brokers or banks between the actual investor and the central securities depository where the securities are “immobilized” (deposited). From the investor’s standpoint, however, once he obtains a securities entitlement against *his* intermediary, it is of no consequence to his beneficial ownership interests how many securities intermediaries there are between the investor and the record owner, DTC.

record ownership of such securities, which remains with Cede & Co. *See* UCC § 8-505, off. cmt. 1.

C. DTC and the Indirect Holding System

DTC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation, a holding company whose other wholly owned clearing agency subsidiaries include the National Securities Clearing Corporation and the Fixed Income Clearing Corporation. DTC is the nation's central securities depository and is registered with the SEC as a clearing agency.¹²

Utilizing automated systems for the “book-entry” (computerized) movements of interests in securities, DTC operates a centralized system for processing transactions in securities deposited by the major brokers and banks who have accounts at DTC and constitute its Participants. 15 U.S.C. § 78(b); SEC Order, 2003 WL 21288541, at *6.¹³ Individual investors (such as Shepard) do not have accounts at DTC.

¹² *See* Clearing Agencies, SEC, <https://www.sec.gov/divisions/marketreg/mrclearing.shtml>, at n.2 (last modified Oct. 16, 2014).

¹³ References in this brief to brokers and banks assume that such institutions are DTC Participants, although that is not necessarily the case. Brokers or banks may not be DTC Participants, but they may maintain accounts at other institutions that are Participants and that deposit securities at DTC on behalf of non-Participant financial institutions that are, in turn, acting for their own institutional or retail customers.

As the district court in this case correctly described (see April 5, 2020 District Court Order, at 3), securities deposited at DTC for book-entry services are registered on the issuer's books in the name of DTC's nominee, Cede & Co., making Cede & Co. the registered (legal) owner of the deposited securities.¹⁴ Establishing and maintaining record ownership in the name of Cede & Co. is designed to "immobilize" deposited securities at DTC, a key feature of the indirect holding system. This avoids the need to change paper or electronic indicia of record ownership (the process that created the "paperwork crisis" of the 1960s) when interests are bought and sold, thereby facilitating the enormous daily trading volumes that characterize the modern securities marketplace.¹⁵

¹⁴ Securities deposited at DTC may be evidenced by a single physical "global certificate" or separate physical certificates registered in the name of Cede & Co., or no physical certificate at all (known as "book-entry only issues"). DTC understands that EMCI was a book-entry only issue for which there was no physical securities certificate. Cede & Co.'s record ownership of EMCI shares was otherwise recorded on EMCI's books and records as well as DTC's records. *See, infra* at 16.

¹⁵ DTC holds over 3.5 million certificated and uncertificated securities deposited by its Participants, including equity issues, corporate and municipal debt issues, and money market instruments (from over 100 countries). Securities on deposit at DTC are valued at approximately \$37 trillion. It processes approximately 1.5 million settlement related transactions per day.

In order to protect itself from the risk of financial loss in the event that a Participant were to default in its settlement obligations to DTC in connection with the securities it has on deposit at DTC, DTC's SEC-approved rules

While DTC's nominee, Cede & Co., is recognized on the issuers' books as the registered owner of securities deposited at DTC, DTC's Participants, as noted, are deemed to hold beneficial ownership interests in the securities credited to their respective securities accounts at DTC, which they hold on behalf of themselves or their respective customers, who are also beneficial owners vis-à-vis the Participants. *See* SEC Order, 2003 WL 21288541, at *7 (“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.”). As beneficial owners vis-a-vis DTC, Participants are entitled to instruct DTC with respect to the disposition (e.g., sale, pledge or withdrawal) of securities in their accounts at DTC, and are entitled to the benefits of those securities (e.g., voting, payment of dividends, interest, and participation in corporate actions such as mergers and acquisition activities, and the exercise of appraisal rights). DTC passes those benefits through to the applicable Participants to whose accounts securities are

require, *inter alia*, that Participants deposit funds into a “Participants Fund” from which DTC may draw upon to the extent necessary to eliminate an outstanding financial obligation, as authorized by the rules. *See, e.g.*, DTC RULES, RULE 4 (PARTICIPANTS FUND AND PARTICIPANTS INVESTMENT), *available at* <https://www.dtcc.com/legal/rules-and-procedures>.

credited and who, in turn, pass those benefits on to their respective customers, as instructed by those customers (the ultimate beneficial owners).¹⁶

With respect to exercising appraisal rights under state law, the subject matter of this case, the mechanism for transmitting instructions are detailed on DTC's website. In short, the Participant's customer must instruct the Participant to "complete and submit to DTC a letter identifying the issue and the quantity of securities involved, along with the instruction letter instructing DTC to act."¹⁷ Upon receiving this instruction from a DTC Participant, DTC will cause Cede & Co. to issue a letter asserting its appraisal right with respect to the appropriate shares in that Participant's securities account—the shares which are ultimately beneficially owned by the Participant's customer.

To facilitate certain transactions, such as solicitation of proxies from beneficial owners, DTC makes SPRs available to issuers. The SPR identifies the Participants that have positions in in each issue and the number of shares

¹⁶ See UCC § 8-505, off. cmt. 1 ("One of the core elements of the securities account relationships for which the Part 5 rules were designed is that the securities intermediary passes through to the entitlement holders the economic benefit of ownership of the financial asset, such as payments and distributions made by the issuer").

¹⁷ Proxy Services, DTCC (Dec. 23, 2019), *available at* <https://www.dtcc.com/settlement-and-asset-services/issuer-services/proxy-services>.

of that issue credited to their respective DTC accounts. That provides the means for issuers to communicate directly with Participants.¹⁸

In sum, the indirect holding system, governed by UCC Article 8, constitutes a uniform national structure of tiered securities ownership interests in which each beneficial interest holder has a security entitlement only against its own securities intermediary. In order for the ultimate beneficial owner at the top of the chain (here, Shepard) to exercise any rights with respect to the securities in which he has a beneficial interest, he must instruct the Participant against which he holds a security entitlement to act, who will then instruct the record owner at the bottom of the chain—DTC—(either directly or through the securities intermediary through which it acts) to take the requested action.¹⁹

¹⁸ See Security Position Reports, DTCC, available at <https://www.dtcc.com/settlement-and-asset-services/issuer-services/security-position-reports> (“DTC’s Security Position Reports (SPR) is a web service that enables issuers, trustees and authorized third-party agents to see the position holdings of DTC participants in the issuer’s security as of a specified time period. The position reports also include contact information, through which issuers can notify DTC participants regarding corporate-related events such as annual meetings.”).

¹⁹ It should be noted that if an investor, holding a beneficial ownership in shares through a DTC Participant, wishes to obtain a certificate registered in its own name and thereby be listed on the issuers books as the registered owner, it instructs the Participant (its broker) to instruct DTC to direct the transfer agent for the issuer to issue a new certificate registered in the name of the customer for the applicable number of shares. The transfer agent’s

ARGUMENT

CEDE & CO. IS THE RECORD OWNER OF SECURITIES DEPOSITED AT DTC FOR BOOK-ENTRY PROCESSING; PARTICIPANTS ARE BENEFICIAL OWNERS

There is no legal or factual basis to support Shepard's contention that by virtue of appearing on the SPR, DTC Participants are actually the record owners of shares deposited at DTC, rather than Cede & Co. Shepard's argument is fundamentally inconsistent with the most basic principles underlying the uniform the indirect holding system. However the Court determines to apply Iowa's appraisal statute to the facts of this case, DTC respectfully urges the Court not to accept Shepard's contention that the SPR serves to establish record ownership of shares deposited at DTC for book-entry services.

(1)

Record ownership is determined by the books and records of the issuing company. And indeed, Iowa law requires Iowa corporations to maintain a list of their record owners of shares. Iowa Code Ann. § 490.1601(3). EMCI's corporate records identified Cede & Co. as the registered owner of the EMCI shares at issue at the time of the merger. *See* April 5, 2020 District Court

records with respect to Cede & Co.'s remaining record ownership is adjusted accordingly.

Order, at 3 (“On the record shareholder voting list Cede & Co. was the registered record shareholder”²⁰). Shepard does not dispute this fact. With respect to the shares for which Shepard seeks to exercise appraisal rights, DTC is not aware of any document prepared pursuant to § 490.1601(3) that identifies any person other than Cede & Co. as the record owner with respect to the shares at issue.

The lower court’s undisputed finding that Cede & Co. was the registered owner of the EMCI shares deposited at DTC is wholly consistent with the principles underlying the Article 8 indirect holding system, which, as explained above, require that the depository (or its nominee) remain the record owner in order to immobilize the securities, thereby permitting beneficial ownership interests to be transferred electronically without adjusting record ownership positions, reflecting millions of daily transactions.²¹ As further

²⁰ The court further stated, "EMCI also received a spreadsheet (the 'Record Shareholder Payment List') from AST [EMCI’s transfer agent] listing the registered shareholders of the company immediately before the Effective Date of the transaction. The Record Shareholder Voting List showed Cede & Co., held 9,432,555 shares as of the Record Date for the Special Meeting." *Id.* at 6.

²¹ Iowa’s adoption of UCC Article 8 (as well as its adoption by the other 49 states) reflects that ownership of securities (like other tangible and intangible property interests) is fundamentally a matter of state law: “[Article 8 was designed] to provide clarity and certainty regarding the rules that govern how interests in securities are evidenced and how they are transferred in the current

explained above, the indirect holding system recognizes DTC Participants as having beneficial ownership interests; they are not record owners. *See supra* at 9-10, 12-14.

(2)

The case law, including the cases Shepard relies upon, uniformly concludes that under the indirect holding system, Cede & Co. remains the record owner of shares deposited at DTC for book-entry services. *See, e.g., In re Appraisal of Dell Inc.*, 143 A.3d 20, 22 (Del. Ch. 2016) (holding that “[f]or purposes of [state] law, Cede [& Co.] was the holder of record) (“*Dell I*”); *In re Appraisal of Dell Inc.* No. CV 9322-VCL, 2015 WL 4313206, at *1 (Del. Ch. July 13, 2015), *as revised* (July 30, 2015) (holding that the shares at issue “were registered in the name of Cede & Co., which is the nominee of the Depository Trust Company.”) (“*Dell I*”); *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 397 (Del. 2010) (noting that “the established understanding among practitioners, evidenced by our case law [is] ... that DTC (through Cede [& Co.]) is the record holder and that everyone above DTC is a beneficial holder” and noting that both standard practice and Delaware law recognize Cede & Co. as the record owner) (“*Crown EMAK*”); *In re Color*

securities market.” 1997 Sess. Law News of N.Y. Ch. 566 (A. 6619–C) (McKinney 1997).

Tile Inc., 475 F.3d 508, 511 (3d Cir. 2007) (“[t]he Depository Trust Company . . . was formed pursuant to Congressional mandate for the purpose of owning shares for the beneficial interest of customers”); *In re Kaiser Steel Corp.*, 110 B.R. 514, 517 (D. Colo.), *aff’d sub nom. Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846 (10th Cir. 1990) (noting that the indirect holding system “permits DTC to record the transfer of stock between participants' customers by book entry, without the need to change the registration on the issuer's books in order to transfer the securities”).

(3)

The SPR does not list the “record owners” of the issuer’s stock; rather it is a tool to provide the issuers with information necessary to process certain transactions, including those governed by the federal securities laws. For example, when an issuer seeks to solicit a shareholder vote, the federal proxy regulations require the issuer to take certain steps to identify the beneficial owners in order to provide them with the information necessary to vote. *See* 17 C.F.R. § 240.14c-7. In the context of the indirect holding system, where Cede & Co. is listed as the registered owner on the issuer’s books, DTC only knows which of its Participants have positions in the particular issue; it does not know if its Participants are acting on behalf of customers and, if so, who those customers are. It is only the DTC Participants who have the necessary

information to identify the ultimate beneficial owners (*e.g.*, the Participants' customers). Thus, in order to facilitate the transfer of information, DTC provides the issuer with an SPR that identifies each DTC Participant that holds the issuer's shares so that the issuer may contact those Participants directly. *See id.* (“[i]f the registrant's list of security holders indicates that some of its securities are registered in the name of . . . Cede & Co. . . . the registrant shall make appropriate inquiry of the clearing agency [DTC] and thereafter of the participants”); *see also Crown EMAK* at 396 (“When preparing for a meeting of stockholders or a consent solicitation, issuers are required by federal law to go through DTC to identify the participant banks and brokers for purposes of distributing voting cards and solicitation materials”). Thus, the SPR is merely a mechanism to allow the issuer to identify the beneficial owners; *i.e.*, DTC Participants having positions in their issue. *See supra* p. 18 & n. 18. It is not a “competing” list of record owners that supplements or conflicts with the issuer's list of registered shareholders required by Iowa Code Ann. § 490.1601(3).

(4)

Shepard's argument that Vice Chancellor Laster in *Dell I* and *Crown EMAK* effectively recognized that Participants listed on the SPR are the record owners, is erroneous for several reasons. As an initial matter, *Dell I* repeatedly

recognized that Cede & Co. was the record owner of the shares at issue. *See supra* at 17-18. In any event, the portions of *Dell I* upon which Shepard relies are dicta. Shepard Brief at 56, citing *Dell I* at 11. While Vice Chancellor Laster opined that Delaware law “*should* treat the [SPR] as a record of the corporation,” and that if he were “writing on a blank slate,” he would interpret the term “stockholder of record” to parallel its definition under the federal securities laws, he recognized this was not the law, and that “for purposes of the DGCL” the record holder is “the person that appeared on the stock ledger” (*i.e.*, Cede & Co.).²² *Dell I* at 3 (emphasis added). Similarly, the proposition that Shepard cites from *Crown EMAK* that “the Cede breakdown should be considered part of the stock ledger” (Shepard Brief at 55), was squarely rejected by the Delaware Supreme Court, and found to be inconsistent with “well-established prior precedents.” *Crown EMAK* at 397 (noting that the lower court in *Crown EMAK* “declined to follow well-established prior

²² Nor should there be any confusion based on 17 C.F.R. § 240.14c-1(i). This provision, cited in *Dell I* and *II*, defines record holders to include participants, but only “[f]or purposes of” that regulation, which pertains to the federal proxy rules (emphasis added). Shepard’s effort to convert this narrowly defined reference, targeted at the mechanics of the federally regulated proxy process, into a pronouncement of share ownership is in derogation of the documentary record and governing state law, is without basis, and should be soundly rejected. *See also Dell I* at 3 (recognizing that the federal interpretation of record owner “is not how our cases have interpreted the statutory term, and this court is bound by those precedents” (recognizing Cede & Co. as the record owner)).

precedents construing the meaning of the term ‘record holder,’” and that “the established understanding among practitioners, evidenced by our case law [is] ... that DTC (through Cede [& Co.]) is the record holder and that everyone above DTC is a beneficial holder”).

CONCLUSION

However it determines to apply the Iowa appraisal statute to the facts of this case, the Court should recognize (1) that record ownership of the shares of Iowa corporations is established by the books and records of the issuing company, which, in this case identify Cede & Co. as the record owner; and (2) that the SPR does not establish record ownership by the Participants that appear on the Report.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Amicus Curiae was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on September 10, 2020, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt and contains 5,010 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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