

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>GREGORY M. SHEPARD, Plaintiff, v. EMC INSURANCE GROUP INC., Defendant.</p>	<p>Case No. CVCV058747 ORDER RE: PETITION FOR EXPEDITED RELIEF COMPELLING INSPECTION OF BOOKS AND RECORDS</p>
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The court has before it plaintiff, Gregory Shepard's ("Shepard") petition for expedited relief filed on August 22, 2019 pursuant to Iowa Code section 490.1601 *et. seq* seeking certain books and records of defendant, EMC Insurance Group, Inc. ("EMCI"). Concurrent with the filing of the petition Shepard filed a motion to transfer the case to the Iowa Business Specialty Court ("Business Court"). EMCI consented to the motion to transfer to the Business Court on August 26, 2019. Accordingly, the case was transferred to the Business Court on August 28, 2019.

Specifically Shepard filed the petition to compel inspection of books and records for the purpose of determining whether to vote in favor of a going private transaction with Employers Mutual Casualty Company ("EMCC"). EMCC owns 54% of the stock of EMCI. EMCC proposes to purchase the remaining outstanding shares of stock from the minority shareholders. A shareholder vote on the proposed transaction is scheduled for September 18, 2019.

A hearing was held on the petition on September 6, 2019. Appearing on behalf of Sheperd were his counsel, Thomas K. Cauley, Jr. and Matthew L. Preston. Appearing on behalf of the EMCI were their counsel, Michael W. Thrall and Mark C. Dickinson. Todd Strother, Senior VP and Chief Legal Officer for EMCI, was also present as the as the company

representative. The court having reviewed the written submissions of the parties and heard argument of counsel, finds and orders as follows:

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

EMCI is an insurance holding company that was incorporated in Iowa in 1974 by EMCC and became a public company in 1982 following the initial public offering of its common stock.¹ EMCC owns approximately 54% of the common stock of EMCI.² Property and casualty insurance is the most significant segment of EMCI's business.³

EMCC is a multiple-line property and casualty insurance company organized as an Iowa mutual insurance company in 1911.⁴ EMCC is the parent company of a group of subsidiary companies known as the EMC Insurance Companies, which are licensed in all 50 states and the District of Columbia.⁵

On November 15, 2018, EMCI received a proposal from EMCC to purchase all of the outstanding common stock of the company not already owned by EMCC.⁶ EMCC proposed to purchase the stock for \$30 a share.⁷ On November 16, 2018, EMCC filed a Schedule 13D with the SEC and issued a press release that it had submitted the going private proposal to EMCI.⁸ The closing price of EMCI stock on November 14, 2018 was \$23.83 a share.⁹

On November 20, 2019, the EMCI Board of Directors formed a Special Committee composed of EMCI's four independent directors to review, evaluate and negotiate the terms and

¹ Verified Petition to Compel Inspection of Books and Records ("Petition"), Ex. G, p. 88.

² Petition, Ex. G, p. 88.

³ Petition, Ex. G, p. 88.

⁴ Petition, Ex. G, p. 88.

⁵ Petition, Ex. G, p. 88.

⁶ Petition, Ex. G, p. 23-24.

⁷ Petition, Ex. G, p. 24. It should be noted Shepard objected to this price.

⁸ Petition, Ex. G, p. 26.

⁹ Petition, Ex. G, p. 23.

conditions of a proposed transaction with EMCC, to provide a recommendation with respect to whether a possible transaction with EMCC is fair to, and in the best interests of the public shareholders, and to retain such advisors, consultants and agents as the Special Committee deemed appropriate.¹⁰ The Special Committee retained the law firm of Willkie Farr & Gallagher LLP to represent the Special Committee.¹¹ The Special Committee retained Sandler O’Neill & Partners, L.P. (“Sandler O’Neill”) to act as independent financial advisor to the Special Committee.¹² The Special Committee met twenty three times.¹³ The Special Committee negotiated with EMCC, ultimately obtaining agreement from EMCC to increase the purchase price of the shares from \$30 to \$36 a share.¹⁴ The Special Committee determined that the merger agreement, the merger and the other transactions contemplated by the merger agreement were fair, advisable and in the best interests of EMCI’s public shareholders and recommended its approval by the EMCI Board.¹⁵ The EMCI Board reviewed the proposed transaction and also determined that the merger agreement, the merger and the other transactions contemplated by the merger agreement were fair, advisable and in the best interests of the public shareholders and recommended its approval by the public shareholders.¹⁶ On or about June 24, 2019, EMCI filed a Preliminary Proxy Statement pursuant to Section 14(a) of the Securities Exchange Act of 1934 which has been available to members of the public, including Shepard, since June 24, 2019. The Preliminary Proxy was reviewed by the SEC. A Final Proxy Statement, containing requested

¹⁰ Petition, Ex. G, p. 26.

¹¹ Petition, Ex. G, p. 26.

¹² Petition, Ex. G, p. 26.

¹³ Petition, Ex. G, p. 38.

¹⁴ Petition, Ex. G, p. 36.

¹⁵ Petition, Ex. G, p. 37.

¹⁶ Petition, Ex. G, p. 37.

clarifications, was filed with the SEC and mailed to EMCI shareholders on or about August 14, 2019.¹⁷

On or about June 24, 2019, EMCC and EMCI also filed a transaction statement on Schedule 13E-3 with the SEC that contained detailed financial analyses prepared by Sandler O'Neill that previously was provided to the Special Committee including:

- Presentation to the Special Committee dated January 8, 2019
- Presentation to the Special Committee dated February 5, 2019
- Presentation to the Special Committee dated February 22, 2019
- Presentation to the Special Committee dated March 5, 2019
- Presentation to the Special Committee dated March 22, 2019
- Presentation to the Special Committee dated May 8, 2019

In addition, the transaction statement on the Schedule 13E-3 included a Presentation of Financial Analysis of Boenning & Scattergood, Inc. presented to the Board of Directors of EMCC dated November 15, 2018.

The proposed transaction was also reviewed by the two largest independent proxy advisory firms, Institutional Shareholders Services (“ISS”) and Glass Lewis & Company, both of whom also recommended approval of the proposed transaction by the EMCI public shareholders. Based upon comments from counsel during the hearing, these recommendations from these entities would be relied upon by investors in making their decision. These entities noted Shepard had not objected to the proposed transaction at the offer of \$36.00 per share. For this reason Shepard further argues he should be allowed to review the documents he requested.

Shepard is the beneficial owner of 1,100,000 shares of EMCI representing approximately 5% of the EMCI shares. Shepard began acquiring stock in EMCI in 2016. He is the single largest individual minority shareholder. Because ISS and Glass Lewis note he did not object to the present transaction offer and because he is the largest individual minority shareholder he should

¹⁷ Petition, Ex. G.

be allowed to review the documents he requested to make an informed decision regarding the proposal.

On July 9, 2019, Shepard, through counsel, made a demand for books and records of EMCI (the “Demand”).¹⁸ The Demand was made specifically under sections 490.1601, 490.1602 and 490.1603 of the Iowa Business Corporation Act.¹⁹ Upon receipt of the Demand EMCI requested and Shepard executed a Confidentiality Agreement.²⁰

In response to Shepard’s statutory demand, EMCI provided him with copies of EMCI’s restated articles of incorporation, and all amendments to them currently in effect as well as EMCI’s restated bylaws and all amendments to them currently in effect. In addition, EMCI provided Shepard with the minutes of the EMCI Board of Directors and Special Committee meetings relating to the going private transaction for EMCI.

EMCI provided Shepard with excerpts of the minutes from the following meetings of the EMCI Board of Directors related to the going private transaction:

November 20, 2018 Minutes of a Special Meeting of the Board of Directors
December 27, 2018 Minutes of a Special Meeting of the Board of Directors
May 8, 2019 Minutes of a Special Meeting of the Board of Directors

EMCI provided Shepard with the minutes of all twenty-three (23) meetings of the Special Committee considering the transaction, including:

November 20, 2018 Minutes of a Meeting of the Special Committee
December 11, 2018 Minutes of a Meeting of the Special Committee
December 17, 2018 Minutes of a Meeting of the Special Committee
December 19, 2018 Minutes of a Meeting of the Special Committee
January 8, 2019 Minutes of a Meeting of the Special Committee
January 24, 2019 Minutes of a Meeting of the Special Committee
January 28, 2019 Minutes of a Meeting of the Special Committee
January 31, 2019 Minutes of a Meeting of the Special Committee

¹⁸ Petition, Ex. A.

¹⁹ Petition, Ex. A.

²⁰ Petition, Ex. B, D.

February 5, 2019 Minutes of a Meeting of the Special Committee
February 22, 2019 Minutes of a Meeting of the Special Committee
February 25, 2019 Minutes of a Meeting of the Special Committee
March 20, 2019 Minutes of a Meeting of the Special Committee
March 26, 2019 Minutes of a Meeting of the Special Committee
March 27, 2019 Minutes of a Meeting of the Special Committee
April 3, 2019 Minutes of a Meeting of the Special Committee
April 11, 2019 Minutes of a Meeting of the Special Committee
April 16, 2019 Minutes of a Meeting of the Special Committee
April 19, 2019 Minutes of a Meeting of the Special Committee
April 20, 2019 Minutes of a Meeting of the Special Committee
April 30, 2019 Minutes of a Meeting of the Special Committee
May 6, 2019 Minutes of a Meeting of the Special Committee
May 8, 2019 Minutes of a Meeting of the Special Committee
May 8, 2019 Minutes of a Meeting of the Special Committee

Shepard was also provided with a copy of the attachments to those Special Committee Meetings that included, an unsolicited proposal received by EMCC from NEO Holdings, Ltd. EMCI confirmed that neither EMCI nor EMCC received any offer or indication of interest within the past five years from any person or entity to acquire shares of EMCI or to otherwise engage in a transaction with either EMCI or EMCC that would result in a merger or similar change of control of either entity apart from the NEO Holdings proposal.

After receiving these documents by letter dated August 7, 2019, Shepard, through counsel, requested additional documents he asserted he was entitled to review under Iowa common law.²¹

A special meeting of the shareholders of EMCI is scheduled for September 18, 2019 (“Special Meeting”).²² At the Special Meeting, the shareholders will be asked to vote on a proposal to adopt the Agreement and Plan of Merger.

For the proposed merger to move forward, the proposal requires approval from a majority of all shareholders (in this case such a majority would be satisfied by the affirmative vote of the

²¹ Petition, Ex. E.

²² Petition, Ex. G, Notice of Special Meeting.

shares currently owned by EMCC alone), but also requires an affirmative vote of “the holders of at least a majority of the outstanding common stock owned by the Company’s shareholders, other than EMCC, Merger Sub, the company or any subsidiary of EMCC or the company and the executive officers and directors of the company.”²³ This group is referred to throughout this opinion as “minority shareholders”.

Shepard through this action seeks the production of additional documents he believes he is entitled to as a shareholder. These documents essentially are documents the Special Committee and/or the EMCI Board reviewed prior to recommending the proposed merger and referenced in the Proxy Statement. EMCI objected to the production of these additional documents arguing they provided all the documents they were required to produce pursuant to their statutory obligations under sections 490.1601-490.1603. Further the documents produced are sufficient for Shepard to make a decision whether he wants to vote for or against the proposed merger.

At the hearing Shepard’s counsel appeared to narrow the documents Shepard sought for review.²⁴ As explained by Shepard’s counsel, he is essentially seeking the documents referenced in the Proxy Statement and/or which were relied upon by the Special Committee and/or EMCI Board in recommending the proposed going private transaction.²⁵ These would be documents that might have been alternative proposals to the going private proposal. Documents where other strategies were discussed that would enhance the value of EMCI. This would include documents that predated the creation of the Special Committee dating back to June 2016. He has also specifically requested documents referenced in the Proxy Statement.

II. APPLICABLE LAW

²³ Petition, Ex. G, Notice of Special Meeting.

²⁴ Transcript of Proceedings-Plaintiff’s Motion for Expedited Relief at 7:2-7 (Sept. 6, 2019)

²⁵ Transcript of Proceedings-Plaintiff’s Motion for Expedited Relief at 7:8-12 (Sept. 6, 2019)

The Iowa Business Corporation Act requires the production of documents to shareholders maintained by the corporation.²⁶ A shareholder is entitled to the following corporate documents upon demand:

- a. Its articles or restated articles of incorporation, all amendments to them currently in effect, and any notices to shareholders referred to in section 490.120, subsection 12, paragraph “e”, regarding facts on which a filed document is dependent.
- b. Its bylaws or restated bylaws and all amendments to them currently in effect.
- c. Resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding.
- d. The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years.
- e. All written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under section 490.1620.
- f. A list of the names and business addresses of its current directors and officers.
- g. Its most recent biennial report delivered to the secretary of state under section 490.1622.²⁷

“[W]hen a shareholder is wrongfully denied access to corporate records, Iowa law provides for court-ordered inspection of the corporate records and for court-ordered reimbursement by the corporation of the “shareholder's costs, including reasonable counsel fees, incurred to obtain the order.”²⁸

Section 490.1602 sets forth a shareholder’s right to examine the corporation’s records and provides:

²⁶ Iowa Code § 490.1601(5) (2019).

²⁷ Iowa Code § 490.1601(5).

²⁸ See Iowa Code § 490.1604 (2005); *Menke v. Conrad Livestock & Grain, Inc.*, No. 3:06-CV-85, 2006 WL 8436560, at *4 (S.D. Iowa Dec. 7, 2006).

A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 490.1601, subsection 5, if the shareholder gives the corporation signed written notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.²⁹

A shareholder is also entitled to inspect

[E]xcerpts from minutes of any meeting of the board of directors or a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders, board of directors, or a committee of the board without a meeting, to the extent not subject to inspection under [§ 490.1602(1)]; accounting records of the corporation; [and] the record of shareholders.³⁰

In order to inspect records under this statute, the shareholder must establish:

- a. The shareholder's demand is made in good faith and for a proper purpose.
- b. The shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect.
- c. The records are directly connected with the shareholder's purpose.³¹

Further, Iowa courts have held that there is a common law right to the inspection of records. The Iowa Supreme Court has stated:

Statutes providing for the inspection by stockholders of corporation records are salutary. They are generally regarded not as abridging the stockholder's common-law right of inspection but as conferring rights supplemental thereto by removing some of the common-law restrictions. Such statutes should be liberally construed in favor of stockholders. 22 A.L.R. 31; 18 C.J.S., Corporations, § 502, p. 1177; 13 Am.Jur. 483, Corporations, section 434; *Ellsworth v. Dorwart*, 95 Iowa 108, 110, 63 N.W. 588, 58 Am.St.Rep. 427. The right to inspect extends to all papers, contracts, books or other instruments from which the stockholder can derive any information which will enable him to protect his interests. 13 Am.Jur. 485, Corporations, section 437; *Ellsworth v. Dorwart*, 95 Iowa 108, 63 N.W. 588, 58 Am.St.Rep. 427.³²

The common law right of inspection was limited in *Lehman* where the court held, “[t]his common law right is qualified and will be enforced only where the stockholder’s motive is to use

²⁹ Iowa Code § 490.1602(1).

³⁰ Iowa Code § 490.1602(3)(a).

³¹ Iowa Code § 490.1602(3), (4).

³² *Lehman v. Nat'l Ben. Ins. Co.*, 243 Iowa 1348, 1355, 53 N.W.2d 872, 876 (1952).

the information for some proper and legitimate object, germane to his interest as a stockholder.”³³ The court declined to find that a shareholder’s common law right to inspect a corporation’s books and records was “absolute and unqualified” but confirmed that a shareholder must have a proper purpose.³⁴ The court did find a demand to review books and records to evaluate the value of stock is a proper purpose.³⁵ When making a demand for inspection our supreme court determined that the shareholder has no burden to establish a proper purpose. There is a presumption that the shareholder’s request is proper. It is for the defendant corporation to establish the shareholder’s purpose is not appropriate.³⁶

The United States Supreme Court has emphasized the importance of the common law right of inspection noting, “[t]he right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property.”³⁷ The Court went on to state that in these situations it is proper for the court to use its discretion to determine which documents must be produced holding,

“[t]he court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes.”³⁸

³³ *Id.* at 875.

³⁴ *Id.* at 876-77.

³⁵ *See Becker v. Le Mars Loan & Tr. Co.*, 217 Iowa 17, 17, 250 N.W. 644, 646 (1933).

³⁶ *Ontjes v. Harrer*, 208 Iowa 1217, 1217, 227 N.W. 101, 103 (1929) (“There was no burden resting upon the plaintiff to establish his motive or purpose as a stockholder in demanding the inspection and examination of the records of the defendant corporation. . . . There is no presumption that a stockholder seeking information does so with a bad motive, or with intent to inflict injury upon the corporation. This is a matter of defense to be pleaded and proved.”). *Contra UnitedHealth Grp. Inc. v. Amalgamated Bank as Tr. for Longview Largecap 500 Index Fund*, 196 A.3d 885 (Del. 2018) (The burden to prove that disclosure of certain books and records is necessary rests on the requesting shareholder.)

³⁷ *Guthrie v. Harkness*, 199 U.S. 148, 155, 26 S. Ct. 4, 6, 50 L. Ed. 130 (1905).

³⁸ *Id.* at 156.

The need for a proper purpose under Iowa law is commensurate with the Delaware law with respect to its statutory inspection right in section 220 of the Delaware General Corporation Law, which authorizes inspection of a corporations “books and records” upon stating a proper purpose.

Both Shepard and EMCI agreed that Delaware law was more developed on the issue before the court and both cited to Delaware caselaw in their written submissions to the court. Both parties suggested the court consider the proclamations from the Delaware courts.

In a recent Delaware Supreme Court case, the court noted that the inspection of books and records “are not tantamount to “comprehensive discovery, [and] the [court] must tailor its order for inspection to cover only those books and records that are ‘essential and sufficient to the stockholder's stated purpose.’”³⁹ The court noted that in previous decisions courts have referred to the set of books and records that are both necessary and sufficient as “those that are necessary.”⁴⁰

The standard for inspection of books and records grants significant discretion to the trial court. The court in *KT4 Partners LLC* noted that “[u]ndergirding th[e] discretion [granted to courts] is a recognition that the interests of the corporation must be harmonized with those of the

³⁹ *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 751–52 (Del. 2019) (noting that the court should “give the petitioner everything that is ‘essential,’ but stop at what is ‘sufficient’”); see also *In re Facebook, Inc. Section 220 Litig.*, No. CV 2018-0661-JRS, 2019 WL 2320842, at *13 (Del. Ch. May 30, 2019), as revised (May 31, 2019), *judgment entered sub nom. In re Facebook, Inc.* (Del. Ch. 2019) (noting that the requesting shareholder must demonstrate that “each category of books and records” is essential and sufficient to its stated purpose).

⁴⁰ *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d at 752; see also *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016), *abrogated by Tiger v. Boast Apparel, Inc.*, No. 23, 2019, 2019 WL 3683525 (Del. Aug. 7, 2019) (Subtle connotations aside, the terms ‘necessary’ and ‘essential’ are functionally synonymous for purposes of Section 220.” (quoting *Sanders v. Ohmite Hldgs., LLC*, 17 A.3d 1186, 1194 n.2 (Del. Ch. 2011))); *Mudrick Capital Mgmt., L.P. v. Globalstar, Inc.*, No. CV 2018-0351-TMR, 2018 WL 3625680, at *7 (Del. Ch. July 30, 2018) (“Documents are ‘necessary and essential’ pursuant to a Section 220 demand if they address the ‘crux of the shareholder's purpose’ and if that information ‘is unavailable from another source’”).

inspecting stockholder.”⁴¹ The court in *Amalgamated Bank v. Yahoo! Inc.* noted that a shareholder can obtain any books and records if the information “is unavailable from another source.”⁴²

The Delaware Supreme Court in *KT4 Partners LLC* held that “in an action for inspection of a corporation’s books and records, the Court of Chancery should not order e-mails to be produced when other materials (e.g., traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose, but if non-e-mail books and records are insufficient, then the court should order e-mails to be produced.”⁴³ In that case, the court required that email messages be produced where corporate formalities were not respected and no minutes covering the relevant subject matter existed.⁴⁴

In another Delaware case, the court permitted a shareholder to inspect certain emails as they were the only source of the relevant information related to the request’s purpose.⁴⁵ In *Facebook, Inc. Section 220 Litig.*, the court ordered the production of email correspondence where in response to a books and records request the corporation produced only a “compilation of highly redacted Board minutes that contain[ed] essentially no information” regarding the

⁴¹ *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d at 748; see *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563 (Del. 1997) (noting that it is the responsibility of the trial court to tailor inspection to the requesting shareholder’s stated purpose).

⁴² *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016), *abrogated by Tiger v. Boast Apparel, Inc.*, No. 23, 2019, 2019 WL 3683525 (Del. Aug. 7, 2019) (noting that whether the documents meeting the necessary and sufficiency test is “fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises.”).

⁴³ *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d at 752.

⁴⁴ *Id.*

⁴⁵ See *Lavin v. W. Corp.*, No. CV 2017-0547-JRS, 2017 WL 6728702, at *14 (Del. Ch. Dec. 29, 2017), judgment entered, (Del. Ch. 2018) (permitting the inspection of certain email correspondence related to the proper purpose of the demand for inspection).

information requested by the shareholder.⁴⁶ In an earlier case, a Delaware court ordered the disclosure of email correspondence and internal memorandum where no other materials were available to allow the shareholder to determine “whether [certain] transactions [were] acts of corporate waste or mismanagement.”⁴⁷

The court in *Amalgamated Bank* made clear that the court has the power to order “production of documents prepared by officers and employees as part of an inspection of corporate books and records” so long as the documents are essential to fulfilling the shareholder’s purpose.⁴⁸ The court noted that “the starting point—and often the ending point—for a sufficient inspection will be board level documents evidencing the directors’ decisions and deliberations, as well as the materials that the directors received and considered.”⁴⁹

The court examines the petition and request from Shepard with these legal standards in mind.

EMCI also argued Shepard has a remedy at law which protects him if he believes the shares of EMCI are undervalued. Iowa Code section 490.1302 provides for appraisal rights for a shareholder who is dissatisfied with the offer in a proposed transaction.

The idea behind such rights is that if a shareholder votes against a fundamental transaction that is nonetheless approved, the shareholder may dissent from the

⁴⁶ *In re Facebook, Inc. Section 220 Litig.*, No. CV 2018-0661-JRS, 2019 WL 2320842, at *13 (Del. Ch. May 30, 2019), as revised (May 31, 2019), *judgment entered sub nom. In re Facebook, Inc.* (Del. Ch. 2019) (noting that “the Company’s production of redacted Board minutes hardly ‘buttresses’ its claim that these books and records are sufficient ‘to accomplish [Plaintiffs]’ purpose.”).

⁴⁷ *Dobler v. Montgomery Cellular Holding Co.*, No. CIV.A. 18105 NC, 2001 WL 1334182, at *5 (Del. Ch. Oct. 19, 2001).

⁴⁸ *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016), *abrogated by Tiger v. Boast Apparel, Inc.*, No. 23, 2019, 2019 WL 3683525 (Del. Aug. 7, 2019).

⁴⁹ *Id.* (noting that in many cases the records properly maintained by the corporate Secretary in the corporate minute book, which would typically include both the minutes of the board and board materials, contain sufficient information); *see also Mudrick Capital Mgmt., L.P. v. Globalstar, Inc.*, No. CV 2018-0351-TMR, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018).

transaction and require the corporation to repurchase his shares. The purchase is generally required to be at a “fair value” that reflects the corporation's net worth immediately before the approved fundamental transaction takes effect.⁵⁰

While this right exists it does not cure the problem raised by Shepard since in order to take advantage of this protection he must provide notice to the corporation of his intent to demand payment under these appraisal rights before the vote is taken.⁵¹

III. ANALYSIS

The court finds Shepard’s request for the documents requested are for a proper purpose and are necessary for him to review in order to determine whether he should vote for or against the proposed merger. It appears from the court’s review of the Proxy Statement these documents requested were reviewed by the Special Committee and/or EMCI’s Board. Since they were noted in the Proxy Statement the court finds EMCI felt the public should know they were considered and thus important to the decision made by the Special Committee and/or the Board. The court does not find Shepard’s request tantamount to a broad discovery request but appears tailored to those documents the Special Committee and Board relied upon. If these bodies relied upon them, the minority shareholders should likewise have access to them so they can formulate an informed decision on the proposed merger. Accordingly, the court finds the following documents must be produced by EMCI for Shepard’s review. These documents must be produced by noon (central daylight time) on Friday, September 13, 2019. The documents are as follows:

1. A November 14, 2018 email from Stephen Jacobs to Stephen Crane regarding strategic options for the company. The documents or memoranda referenced in the Proxy Statement, the minutes of the prior two meetings of EMCI Board referenced in the Proxy Statement and any other documents referenced by Jacobs. (Proxy Statement, p. 22 (Petition, Ex. G)).

⁵⁰ § 34:5.Appraisal rights, 6 Ia. Prac., Business Organizations § 34:5.

⁵¹ Iowa Code § 490.1321.

2. Mr. Crane's email to Mr. Jacobs replying to the November 14, 2018 email and forwarding "several memoranda that had been previously prepared and discussed by the independent members of the Company's Board regarding possible strategies for enhancing the Company's value" including the memoranda mentioned. (Proxy Statement, p. 22 (Petition, Ex. G)).
3. An April 16, 2019, email from Mr. Crane to Mr. Jacobs "indicating that the Special Committee needed additional time to consider EMCC's best and final offer of \$36 a share." (Proxy Statement, p. 35 (Petition, Ex. G)).
4. An April 20, 2019, email from Mr. Jacobs to representatives from Sandler O'Neill and Mr. Crane "detailing the Finance Committee's rejection of the Special Committee's counter-proposal of \$37 per share" and any documents referenced in the email indicating they were relied upon in reaching this decision. (Proxy Statement, p. 35 (Petition, Ex. G)).
5. The "past correspondence between the Company's Board and EMCC in which the independent members of the Company's Board had communicated various ideas for improving the Company's return on equity" considered by the Special Committee at its meeting on January 8, 2019. (Proxy Statement, p. 27 (Petition, Ex. G)).
6. The Alternative Proposal presented by Mr. Crane and a representative from Sandler O'Neill to Ronald Jean, a member of EMCC's Board of Directors. (Proxy Statement, p. 31 (Petition, Ex. G)).
7. Minutes of the EMCI Board of Directors for the past three (3) years in which strategic alternatives were discussed. (Proxy Statement, p. 21 (Petition, Ex. G)).
8. Correspondence (including emails) between EMCI Board and EMCC Board for the past three (3) years in which strategic alternatives were discussed to enhance the value of EMCI.
9. Letter from David Proctor explaining EMCC's reasons for rejecting the "unsolicited proposal that EMCC received in mid-December 2018 from a group of investors" and a copy of the unsolicited proposal if not already produced. (Proxy Statement, p. 27 (Petition, Ex. G)).
10. "Financial projections prepared by Company management" on which Sandler O'Neill's preliminary valuation analysis was based and discussed at the Special Committee Meeting on February 22, 2019 (Proxy Statement, p. 30 (Petition, Ex. G)).

11. Documents that set forth strategic alternatives for EMCI to improve performance and maximize value for public shareholders. (Petition ¶ 18, Ex.G. at 21).
12. The alternatives Sandler O’Neill referenced in their report dated February 5, 2019 and referenced on page 4 of the report and the documents related to those alternatives.
13. The “obvious program outlined” mentioned by Sandler O’Neill in the February 5, 2019 minutes of the meeting of the Special Committee and Board specifically mentioned on the last page titled “Conclusion.”

IT IS SO ORDERED



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV058747
Case Title GREGORY M SHEPARD V EMC INSURANCE GROUPS INC

So Ordered

A handwritten signature in black ink, appearing to read "L. P. McLellan". The signature is written in a cursive, flowing style.

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa