IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EMC INSURANCE GROUP, INC., Plaintiff, v. GREGORY M. SHEPARD, Defendant.	CASE NO. LACL146273 **ORDER RE: PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The court has before it the plaintiff, EMC Insurance Group, Inc.'s ("EMCI" or "Company") cross-motion for summary judgment and the defendant, Gregory Shepard's ("Shepard") motion to dismiss/motion for summary judgment. A hearing was held on January 22, 2020. Plaintiff was represented by its attorneys, Beth Boland, Michael Thrall and Eric Pearson. Defendant was represented by his attorney, Thomas Cauley. The court having heard the arguments of counsel, having reviewed the written submissions of the parties and having reviewed the court file finds and orders as follows.

I. BACKGOUND FACTS AND PROCEDURAL HISTORY

On November 12, 2019 plaintiff, EMC Insurance Group, Inc. filed a petition for declaratory and injunctive relief, pursuant to Iowa Code section 602.6101 and Iowa Rule of Civil Procedure 1.1101. At the same time EMCI filed a motion for expedited relief and stay. EMCI sought a determination whether Shepard met the statutory requirements to pursue appraisal rights under chapter 490, division XIII of the Iowa Business Corporation Act ("IBCA"). The petition arises out a merger that occurred on September 18, 2019 in which Employers Mutual Casualty Company ("EMCC"), as majority owner of EMCI, purchased the stock of EMCI that was not previously owned by EMCC. Shepard at the time of the merger was the largest single minority shareholder of EMCI with 1.1 million shares.

After the filing of the petition and motion for expedited relief the parties presented a stipulated order to the court staying the statutory appraisal process and establishing a briefing schedule on the issues to be presented to the court. This order was entered on November 18, 2019. In response to the briefing schedule Shepard filed a motion to dismiss the petition on December 9, 2019. As part of the motion Shepard attached a number of documents he requested the court consider in conjunction with his motion. In a December 11, 2019 email to the court and Shepard's counsel, EMCI requested they be allowed to respond to Shepard's motion to dismiss with a motion for summary judgment and modify the briefing schedule. Shepard's counsel responded by email to the request and consented to a modification of the briefing schedule. On December 12, 2019 the court granted EMCI's request and indicated the court would treat Shepard's motion to dismiss as a motion for summary judgment and modified the briefing schedule.[1]

Prior to the hearing the parties filed their submissions in support of their respective motions. At the hearing the parties requested the court answer the questions raised in the respective motions, and stated the written submissions provided the necessary facts for the court to render a decision on the merits without the need for an evidentiary hearing. The court proceeds to address the issues raised in the motions without an evidentiary hearing.

The court finds and declares Shepard failed to obtain written consent from the record shareholder, Cede & Co., prior to November 5, 2019 and thus, failed to comply with section 490.1303(2)(a). Shepard failed to establish his defenses of waiver and equitable estoppel. The court sets forth the basis for these decisions.

[1] Order Re: Briefing Schedule and Hearing Date, (Polk Cty Dist. Ct. Dec. 12, 2019)

II. WHETHER SHEPARD MEETS THE STATUTORY REQUIREMENT UNDER SECTION 490.1303(2)(a)

The issue the court must decide is whether Shepard perfected his appraisal rights under Iowa Code section 490.1303(2)(a). EMCI contends he did not obtain permission from the legal titleholder-the record shareholder-of his shares, Cede & Co., prior to November 5, 2019, and consequently he did not perfect his right to exercise his appraisal rights. Shepard contends he did perfect his right to exercise his appraisal rights because he signed and returned, prior to November 5, 2019, the appraisal rights form sent to him by EMCI. An issue the court must address is whether the phrase "the person in whose names shares are registered in the records of the corporation," found in section 490.1301(8) refers not only to the legal titleholder but may also refer to the broker, Morgan Stanley Smith Barney, LLC ("Morgan Stanley"), who held Shepard's shares in "street name" in brokerage accounts at Morgan Stanley. EMCI asserts "records of the corporation" refers to the record shareholder voting list prepared by American Stock Transfer & Trust Company, LLC ("AST"). AST is the transfer agent retained by EMCI to handle recording and preservation of EMCI's stock transfers and stock records. They maintained EMCI's records of registered shareholders. On the record shareholder voting list Cede & Co. was the registered record shareholder.

Shepard contends "records of the corporation" includes the information found in the Depository Trust Company ("DTC") Omnibus Proxy Report (hereinafter referred to as "Security Position Report" or "Cede breakdown"[2]) which EMCI received and used for the proposed merger vote. This report

[2] *In re Appraisal of Dell, Inc.,* 2015 WL 4313206, at *6-7 (Del. Ch. July 13, 2015), *as revised,* (July 30, 2015) ("Federal regulations require that DTC 'furnish a securities position listing promptly to each issuer whose securities are held in the name of the clearing agency or its nominee.' 17 C.F.R. § 240.17Ad–8(b). The participant listing is known colloquially as the 'Cede breakdown,' and it identifies for a particular date the custodial banks and brokers that hold shares in fungible bulk as of that date along with the number of shares held.").

demonstrated Morgan Stanley was a participant in DTC with regard to Shepard's 1.1 million EMCI shares.

For purposes of answering the issues presented the court finds the following facts are not in dispute.

III. MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

1. Prior to September 18, 2019, defendant Gregory M. Shepard ("Shepard") beneficially owned 1.1 million shares of EMCI stock (the "Shepard Shares"), which he held in "street name."[3]

2. Shepard held his EMCI shares through two brokerage accounts at Morgan Stanley.[4]

3. Morgan Stanley Smith Barney LLC is listed as a Depository Trust Company ("DTC") participant, holding account number 0015, according to the DTC membership directory.[5]

4. DTC's website states:

> 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.[6]

5. EMCI has not registered a nominee certificate for Shepard.[7]

[3] Affidavit of Steven T. Walsh, Exhibits A-C (Polk Cty Dist. Ct. Dec. 23, 2019) (hereinafter "Walsh Aff.")
[4] Declaration of Thomas K. Cauley, Jr., ¶ 7, Exhibit F (Polk Cty Dist. Ct. Dec. 9, 2019) (hereinafter "Cauley Decl.")
[5] Defendant's Response to Plaintiff's Statement of Undisputed Facts, ¶ 4 (Polk Cty Dist. Ct. Jan. 10, 2020) (hereinafter "SOF")
[6] *Id.* at ¶ 5
[7] Affidavit of Todd A. Strother, ¶ 4 (Polk Cty Dist. Ct. Dec. 23, 2019) (hereinafter "Strother Aff. II")

6. Effective September 19, 2019 (the "Effective Date"), EMCI's majority shareholder Employers Mutual Casualty Company ("EMCC") purchased the remaining outstanding shares of the Company for $36 a share by means of a "going-private" transaction (the "Merger").[8]

7. The Merger was effectuated pursuant to an Agreement and Plan of Merger (the "Merger Agreement"), whereby all shares of EMCI (other than certain shares 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 in cash, without interest (the "Merger Consideration").[9]

8. The Merger Agreement stated:

> [A]ll Company Dissenting Shares held by shareholders who shall have failed to perfect … or lost their rights to appraisal … under Iowa Law shall thereupon be deemed to have been converted into, and to have become exchangeable for, as of the Effective Time, the right to receive the Merger Consideration, without any interest thereon … shall cease to be Company Dissenting Shares hereunder.[10]

9. On September 18, 2019, EMCI held a special meeting of its shareholders (the "Special Meeting"), at which the shareholders voted on the proposed Merger.[11]

10. Before the Special Meeting, EMCI obtained from its transfer agent, AST, the list of record shareholders (the "Record Shareholder Voting List") as of August 8, 2019 (the "Record Date") eligible to vote at the Special Meeting.[12]

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[8] Strother Aff. II, ¶¶ 1-2, 11
[9] *Id.* at ¶¶ 11, 15 and Ex. D
[10] Strother Aff. II, Ex. D (§ 1.6)
[11] SOF, ¶ 10
[12] Strother Aff. II, ¶ 6, Ex. A (filed under seal)

11. EMCI retained AST to act as its transfer agent to handle the recording and preservation of EMCI's stock transfers and stock records. AST was charged with maintaining EMCI's records of its registered shareholders.[13]

12. EMCI also received a spreadsheet (the "Record Shareholder Payment List") from AST listing the registered shareholders of the company immediately before the Effective Date of the transaction.[14]

13. The Record Shareholder Voting List showed Cede & Co., held 9,432,555 shares as of the Record Date for the Special Meeting.[15]

14. Neither Morgan Stanley nor Shepard appeared on the Record Shareholder Voting List or on the Record Shareholder Payment List as registered shareholders.[16]

15. On or around September 12, 2019, EMCI obtained an Omnibus Proxy and Security Position Report from DTC.[17]

16. The Security Position Report identified participants in DTC's EMCI share position as of the Record Date for the Special Meeting, August 8, 2019.[18]

17. DTC's website states:

> 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. On the day after [the] record date DTC provides the Omnibus Proxy to the issuer along with a Security Position Report. Each report includes detailed share and contact information for each participant.[19]

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[13] *Id.* at ¶ 3
[14] *Id.* at ¶ 12, Ex. E. EMCI 000001-000013 (filed under seal)
[15] Strother Aff. II, ¶ 12, Ex. A at EMCI 000096 (filed under seal)
[16] Strother Aff. II, Ex. A & E (filed under seal)
[17] SOF, ¶ 17. *See also* Cauley Decl., Ex. B and Walsh Aff., at ¶ 5
[18] SOF, ¶ 18
[19] SOF, ¶ 19

18. "Morgan Stanley Smith Barney LLC" appeared as a participant with respect to 1,123,502 shares of DTC's total position in EMCI on the Security Position Report.[20]

19. Shepard's name does not appear on the Security Position Report.[21]

20. The Omnibus Proxy states:

> CEDE & CO. HEREBY APPOINTS EACH OF THE PERSONS, PARTNERSHIPS, ASSOCIATIONS, 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…
>
> THESE APPOINTMENTS, WHETHER OR NOT COUPLED WITH AN INTEREST, ARE REVOCABLE AT ANY TIME AND IN ANY MANNER…

The meeting referred to above is noted as the meeting to be held on September 18, 2019 which was the shareholder meeting on the proposed merger.[22]

21. On August 8, 2019, EMCI mailed to the company's shareholders and filed with the Securities and Exchange Commission the "EMC Insurance Group Inc. Definitive Proxy Statement on Schedule 14A." ("Proxy Statement")[23]

22. The Proxy Statement provides:

- 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. (Cauley Decl., Ex. A at pp. 10, 85) (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**

[20] SOF, ¶ 20
[21] SOF, ¶ 21
[22] SOF, ¶ 22; Strother Aff. II, Ex. B at EMCI000044 (filed under seal)
[23] SOF, ¶ 23

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. (*Id.* at 132-33) (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.** (*Id.* at 135) (emphasis in original).[24]

23. The DTC website states:

> In order to exercise such [appraisal] rights through DTC, the participant must 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.[25]

24. On or about September 10, 2019, EMCI received a letter from Cede & Co. submitted on behalf of one of EMCI's beneficial shareholders (the "Other Dissenter"). The Other Dissenter took the additional step of obtaining certificates for its shares and depositing them with EMCI.[26]

25. The September 10, 2019 letter from Cede & Co. sent on behalf of 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."[27]

26. The shares of the Other Dissenter are recorded with the notation "CEDE & CO FBO DISSENTER" in row 587 of the Record Shareholder Payment List.[28]

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[24] SOF, ¶ 24
[25] SOF, ¶ 25
[26] Strother Aff. II, ¶ 9, Ex. B & C
[27] Strother Aff. II, Ex. B
[28] Strother Aff. II, Ex. C

27. By letter dated September 16, 2019 from Shepard's attorney, Thomas Cauley, ("Cauley") sent EMCI notice of Shepard's "intent to demand payment pursuant to Iowa law," to which was appended Shepard's voting instruction form voting against the Merger.[29]

28. On or about September 17, 2019, Cauley sent a letter to EMCI which enclosed a letter from Shepard's broker, Morgan Stanley. The letter from Cauley indicated the enclosed Morgan Stanley letter confirmed Shepard was authorized to exercise appraisal rights with respect to the 1.1 million shares of EMCI common stock he owned. The Morgan Stanley letter was dated September 17, 2019. (the "Morgan Stanley Letter").[30]

29. The Morgan Stanley Letter stated Shepard maintained two accounts at Morgan Stanley which contained a long position in EMC Insurance Group (Symbol: EMCI). One account contained 500,000 shares and the second account contained 600,000 shares. Specifically Morgan Stanley stated "[t]he above referenced shares of EMCI are held in street name and Morgan Stanley's records reflect that the Client is the owner of record of the shares held in each account." The letter also stated "[t]he control agreement between Morgan Stanley, HBTC and the Client does not restrict the Client's ability to exercise his voting and appraisal rights with respect to the shares of EMCI, however, Morgan Stanley makes no representation regarding any other agreements that may exist between HBTC and the Client."[31]

30. On September 23, 2019 Cauley sent a letter to counsel for EMCI, Michael Thrall ("Thrall"), noting EMCI paid Shepard on September 23, 2019 $36 per share for his 1.1 million shares. Cauley stated he assumed the amount paid reflected EMCI's estimate of fair value of EMCI's shares and

[29] SOF, ¶ 30
[30] SOF, ¶ 30; Cauley Decl., Ex. F
[31] Cauley Decl., Ex. F; Plaintiff's Reply Brief in Support of Plaintiff's Cross-Motion for Summary Judgment, Declaration of Michael W. Thrall, Exhibit 9 (filed under seal) at SHEPARD00042-43 (Polk Cty Dist. Ct. Jan. 29, 2020)

was paid pursuant to sections 490.1324 and 490.1322(2). He requested information as to when Shepard would receive his appraisal notice.[32]

31. On September 26, 2019, EMCI sent the Appraisal Rights Notice to Shepard which included the Appraisal Rights Form and a copy of Iowa Code sections 490.1301-490.1340 and sections 490.1401-490.1402.[33]

32. On September 27, 2019 Cauley sent another letter to Thrall. This letter was in response to the September 26, 2019 appraisal rights notice sent by EMCI. In that letter Cauley indicated that he assumed EMCI would not pay Shepard a second time for his shares since they already paid him. Cauley also indicated he did not believe EMCI had followed the appraisal deadlines and procedures outlined in the IBCA. He indicated Shepard would return his appraisal rights form on or before November 5, 2019. If Shepard returned the form by that date Cauley acknowledged Shepard would need to provide EMCI with his estimate of EMCI's fair value. He further noted Shepard did not agree the $36 per share that EMCI paid Shepard reflected the fair value of EMCI's stock at the time of the merger. Finally, he indicated Shepard had no obligation to provide his estimate of fair value within 30 days of September 23, 2019 since it did not comply with the timetable set forth in the IBCA.[34]

33. Thrall did not respond to Cauley's September 23 or September 27, 2019 letters.

34. On November 4, 2019, Shepard returned the completed Appraisal Rights Form enclosed in a letter from Cauley.[35]

35. The letter sent by Cauley on November 4, 20019 did not include written consent from DTC/Cede & Co. for Shepard's assertion of his appraisal rights.[36]

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[32] Cauley Decl., Ex. G
[33] Cauley Decl., Ex. H
[34] Cauley Decl., Ex. I
[35] SOF, ¶ 34; Cauley Decl., Ex. J
[36] Strother Aff. II, ¶ 25

36. EMCI relied on the Record Shareholder Payment List to determine which shareholders were to receive the $36/share Merger Consideration.[37]

37. Prior to payment of the Merger Consideration, Todd Strother, the Senior Vice President-Chief Legal Officer and Secretary of EMCI, spoke with AST by phone, during which AST confirmed EMCC, through AST, was to pay Cede & Co. for the 9,270,528 shares beneficially owned through it, which included Shepard's shares (the "DTC Payment"). The AST representative further confirmed that Cede & Co. would then distribute the DTC Payment to its participants for distribution to the ultimate beneficial holders of EMCI's common stock (the "Distribution").[38]

38. During this call, AST confirmed that Shepard had not requested that his shares be removed from Cede & Co.'s record ownership and that Cede & Co. would not make the distribution payment to any of the beneficial shareholders unless and until it received $36/share for all of its shares reflected on the Record Shareholder Payment List.[39]

39. At the time of the call with AST, Strother had Cauley's September 16, 2019 letter which stated Shepard was voting "no" on the merger and included Shepard's voting forms in which he voted "no." Strother also received Cauley's letter of September 17, 2019 letter which included Morgan Stanley's September 16, 2019 letter consenting to Shepard voting "no" to the merger and asserting his appraisal rights.[40]

40. The Merger Agreement provided EMCC would provide the funds for payment of Merger Consideration and be sent to the Exchange Agent. EMCC was to deposit into the Exchange Fund an

[37] Strother Aff. II, ¶¶ 3, 12-14
[38] Strother Aff. II, ¶¶ 14, 16-18
[39] Strother Aff. II, ¶¶ 16-19
[40] Strother Aff. II, ¶ 10, (Ex. E & F to Cauley Decl.)

amount sufficient to pay the Merger Consideration for the shares that were converted into the right to receive the Merger Consideration.[41]

41. The Merger Agreement provided:

> As promptly as practicable following the Effective Time, and in any event not later than two Business Days following the Effective Time, EMCC shall cause the Exchange Agent to mail to each holder of record of a certificate (***"Certificate"***) or book-entry share (***"Book-Entry Share"***) that, immediately prior to the Effective Time, represented a share or shares of Common Stock to be converted into the Merger Consideration pursuant to *Section 1.4*: (i) a letter of transmittal (which . . ., shall specify delivery shall be effected, and risk of loss and tile to the Certificate shall pass, only upon delivery of the Certificate to the Exchange Agent and, in the case of a Book-Entry Share, shall specify that delivery shall be effected, and risk of loss and title to the Book-Entry Share shall pass, only upon adherence to the procedures set forth in the letter of transmittal); and (ii) instructions for use in effecting the surrender of the Certificate or Book Entry Share in exchange for the Merger Consideration. Upon proper surrender of a Certificate or Book-Entry Share for exchange and cancellation to the Exchange Agent, together with properly completed letter of transmittal, duly completed and executed, and such other documents or information as may be reasonably required by the Exchange Agent, the holder of such Certificate or Book Entry-Share shall receive the amount of Merger Consideration to which such holder is entitled pursuant to *Section 1.4*, and the Certificate or Book-Entry Share so surrendered shall forthwith be cancelled. Until surrendered as contemplated by the *Section 1.13* and at any time after the Effective Time, each Certificate or Book Entry Share (other than Company Dissenting Shares and Excluded Shares) will be deemed to represent only the right to receive upon such surrender the Merger Consideration allocable to such Book-Entry Share or the shares represented by such Certificate, as contemplated by *Section 1.4*."[42]

42. ***"Book-Entry Shares"*** shall have the meaning stated in *Section 1.13(a).*[43]

43. ***"Certificates"*** shall have the meaning stated in *Section 1.13(a).*[44]

44. On September 20, 2019, EMCC submitted payment of the Merger Consideration to the registered shareholders of EMCI's common stock.[45]

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[41] Strother Aff. II, Ex. D, § 1.12 at A-5
[42] Strother Aff. II, Ex. D, § 1.13(a) at A-5 (emphasis in original)
[43] Strother Aff. II, Ex. D, § 8.1 at 26
[44] Strother Aff. II, Ex. D, § 8.1 at 26
[45] SOF, ¶ 39

45. On or about September 23, 2019, Shepard received $36 for each of his 1.1 million shares.[46]

IV. ANALYSIS OF LAW – RECORD SHAREHOLDER

A. Iowa Statute-Iowa Business Corporation Act

Chapter 490 of the Iowa Business Corporation Act details the process beneficial or record shareholders must follow to assert their appraisal rights. Specifically, the Act provides:

> 1. A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder only if the record shareholder objects with respect to all shares . . . owned by the beneficial shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted. The rights of the record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.
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> 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.[47]

Iowa's statute defines the "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."[48] "Record shareholder" is

[46] Cauley Decl., Ex. G; Strother Aff., ¶ 21

[47] Iowa Code § 490.1303(1-2) (emphasis added). Section 490.1303 is drawn from § 13.03 of the Model Business Corporation Act (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).

[48] Iowa Code § 490.1301(2)

defined as: "the person in whose name shares are registered in the records of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with the corporation."[49] A "shareholder" can be either "a record shareholder [or] a beneficial shareholder."[50]

There is no dispute that Shepard had authority to vote the shares of stock held in "street name" by Morgan Stanley against the merger and that he voted against the merger. There is no dispute that Shepard was not the record shareholder on the day he voted against the merger. There is no dispute that Shepard returned the appraisal rights form required under section 490.1323 prior to November 5, 2019. The question is whether Shepard had the consent of the record shareholder to assert the appraisal rights required under section 490.1303(2)(a) when his attorney sent the appraisal rights form to EMCI on November 4, 2019.

This inquiry involves a review of the phrase "registered in the records of the corporation" found in the definition of "record shareholder" in section 490.1301(8). EMC argues Cede & Co. was the registered record shareholder on the date of the merger vote. Cede & Co. was the registered shareholder on EMCI's corporate records maintained by AST at that time. Shepard argues that "records of the corporation" should include the Cede breakdown which demonstrates his shares were held in his Morgan Stanley accounts by a DTC participant. By including the Cede breakdown as part of the "records of the corporation" Shepard argues EMCI knew Morgan Stanley was a "record holder" as that term is defined under the federal securities law and that Morgan Stanley provided consent to him to assert his appraisal rights. The consent was provided in the Morgan Stanley Letter dated September 17, 2019.

[49] Iowa Code § 490.1301(8)
[50] Iowa Code § 490.1301(10)

B. History of Stock Trading

To understand this dispute the court first addresses the historical manner in which shares of stock are held and traded. This history impacts the issues in this case. This history is chronicled in the Delaware Chancery Court decision *In re Appraisal of Dell Inc*.[51] Shepard relies on an argument posited in *Dell* and earlier asserted in *Kurz v. Holbrook*[52] to argue he had consent to assert his appraisal rights. A review of the position espoused in *Kurz* and *Dell* sets the stage for this court's analysis of the legal issues presented here.

The *Dell* court noted, historically, in a simplified corporate model shares of stock were recorded on the records of the corporation by its treasurer. This recordation formed the legal relationship between the corporation and the shareholder and how the transfer of shares impacted that relationship.

> 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 the 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. *See* 8 *Del. C.* § 219(a) (c).[53]

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[51] 2015 WL 4313206 (Del. Ch. July 13, 2015), *revised,* (July 30, 2015). *See generally* Matthew Doré, *Iowa Practice Series, Business Organizations,* 6 IAPRAC § 32:13 at 373 (2019-2020 Edition) (overview of indirect system of holding securities).

[52] 989 A.2d 140, 167-75 (Del. Ch. 2010), *aff'd in part, rev'd on other grounds sub nom. Crown EMAK Partners, LLC v. Kurz,* 992 A.2d 377 (Del. 2010))

[53] *In re Appraisal of Dell Inc.,* 2015 WL 4313206 at *8-9 (emphasis added). *See also In re Appraisal of Dell, Inc.,* 143 A.3d 20, 28 (Del. Ch. 2016) ("The stock ledger 'is a compilation of the transfers by and to each individual stockholder, with each transaction separately posted to separately maintained stockholder accounts.' 2 David A. Drexler et al., *Delaware Corporation Law and Practice* § 25.03, at 25-7 (2015).")

The *Dell* court also noted that "[p]rior to 1970 negotiation was the most common method used to transfer stock in the United States."[54]

> The owner would endorse the physical certificate to the name of the assignee on the back of the certificate. This endorsement instruct[ed] the corporation, upon notification, [about] the change in ownership of the shares on its corporate books. If the parties used the services of a broker, the seller would transfer the certificate to his brokerage firm. The brokerage firm representing the customer buying the security would receive the physical certificate and transfer it to the buyer as the new record owner of the security. Occasionally, the new owner might request that the physical certificate remain at the street address of the brokerage firm to facilitate the transfer of the certificate in a subsequent sale.[55]

However, the transfer of shares in this manner was complicated and labor intensive.[56] This process resulted in

> [s]tock certificates and related documents . . . piled "halfway to the ceiling" in some offices; clerical personnel were working overtime, six and seven days a week, with some firms using a second or even a third shift to process each day's transaction. Hours of trading on the exchange and over the counter were curtailed to give back offices additional time after the closing bell. Deliveries to customers and similar activities dropped seriously behind, and the number of errors in brokers' records, as well as the time to trace and correct these errors, exacerbated the crisis.[57]

Trading holidays occurred so brokers could get the new certificates issued.[58] The difficulty in keeping their records, due to the heavy volume of trading, caused many brokerage firms to declare bankruptcy.[59]

In the 1970's due to the increasing volume of trading and the difficulty of completing the paperwork of stock transfers, Congress requested the Securities Exchange Commission ("SEC") address the problem. In response the SEC recommended discontinuance of the physical movement of stock

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[54] *In re Appraisal of Dell, Inc.,* 2015 WL 4313206, at *4
[55] *Id.,* at *4
[56] *Id.,* at *4
[57] *Id.,* at *5.
[58] *Hatleigh Corp. v. Lane Bryant, Inc.,* 428 A.2d 350, 353-54 (Del. Ch. 1981)
[59] *In re Appraisal of Dell, Inc.,* 2015 WL 4313206, at *5

certificates and adopting a depository system.[60] The creation of the depository system ushered in the federal policy of share immobilization which eliminated the registering of shares in the name of the beneficial owner.[61]

To implement share immobilization the SEC placed a new entity, the depository institution, at the bottom of the stock ownership chain.[62] After operating with several depositories for a period of time the "Depository Trust Company" ("DTC") emerged as the lone domestic depository.[63] DTC is an association of more than 800 brokerage houses and financial institutions which was formed for the purpose of holding shares held in street name for the beneficial interest of customers of the brokerage firms and financial institutions."[64] As DTC's nominee, Cede & Co.'s name appears on the corporate stock ledger and thus holds legal title to the shares purchased by investors referred to as beneficial shareholders.[65] The implementation of share immobilization eliminated the need for the issuance of new stock certificates since legal ownership remained with Cede & Co.[66]

> Because of the federal policy of share immobilization, **it is now Cede—not the ultimate beneficial owner and not the DTC-participant banks and brokers—that appears on the stock ledger of a . . . corporation. Cede is typically the largest holder on the stock ledger of most publicly traded . . . corporations.**[67]

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[60] *Id.*
[61] *Id. See generally* Matthew Doré, *Iowa Practice Series, Business Organizations,* 6 IAPRAC § 32:13 at 373 (2019-2020 Edition) (overview of indirect system of holding securities).

[62] *Id.,* at *2. *See also In re Appraisal of Dell, Inc.,* 143 A.3d 20, 25 (Del. Ch. 2016) (chart illustrating ownership chain where Cede & Co. is at the Delaware Record Holder Level)
[63] *In re Appraisal of Dell Inc.,* 2015 WL 4313206, at *1
[64] *Hatleigh Corp. v. Lane Bryant, Inc.,* 428 A.2d at 353–54; *In re Appraisal of Dell, Inc.,* 2015 WL 4313206, at *1
[65] *Hatleigh Corp. v. Lane Bryant, Inc.,* 428 A.2d at 353-54
[66] *Id. See also Apache Corp. v. Chevedden,* 696 F.Supp.2d 723, 726 (S.D. Tex. 2010) (Cede is shareholder of record for a substantial majority of the outstanding shares of all publicly traded companies)
[67] *In re Appraisal of Dell Inc.,* 2015 WL 4313206, at *6 (emphasis added) (estimated that Cede holds three quarters of all shares traded in its name)

As a result the stock ledger of a corporation will not have the name of the brokerage house or the beneficial owner of the shares.[68] The *Dell* court posited that "[a]lthough the depository system solved the paperwork crisis, it complicated other aspects of the legal system. Appraisal is one of those areas."[69]

The *Dell* court was concerned about instances which precluded beneficial shareholders from exercising their appraisal rights due to the definition of "stockholder of record" as defined under Delaware law.[70] At the time of the *Kurz* and *Dell* decisions Delaware courts defined "stockholder of record" as the shareholder who held legal title in other words Cede & Co.[71] The court believed the incorporation of federal securities law which defined record holder to include custodial banks and brokers was the solution.

> A different approach is possible and, in my view, preferable. Federal law looks through Cede and **recognizes the custodial banks and brokers as record holders**, just as before the federal mandate. If Delaware law took a similar approach, the [beneficial owners] would retain their appraisal rights, because ownership by the relevant DTC participants never changed. Were I writing on a blank slate, I would account for the federal policy of share immobilization by interpreting the term "stockholder of record" as used in Section 262(a) to parallel its content under the federal securities laws. In other words, the term **"stockholder of record" would include a DTC participant**.[72]

Federal securities law defines "record holder" as:

> "any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 17A of the Act." 17 C.F.R. § 240.14c–1(i). . . . DTC does not count as a single holder of record. Each DTC participant member counts as a holder of record. Michael K. Molitor, *Will More Sunlight Fade the Pink Sheets?.* 39 Ind. L. Rev. 309, 315-16 (2006) (citing SEC interpretive releases).[73]

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[68] *Hatleigh Corp. v. Lane Bryant, Inc.,* 428 A.2d at 353-54
[69] *In re Appraisal of Dell Inc.,* 2015 WL 4313206, *1-2
[70] *See generally Id.,* at *8-25
[71] *Id.,* at *16 (citing *Schneck v. Salt Dome Oil Corp.,* 34 A.2d 249 (Del. Ch. 1943), *rev'd,* 41 A.2d 583, 585 (1945)).
[72] *In re Appraisal of Dell Inc.,* 2015 WL 4313206, at *16 (emphasis added)
[73] *Id.* at *6

The *Dell* court believed its rationale for incorporating the federal securities law definition of "record holder" was appropriate since corporations when managing corporate actions requiring shareholder votes must recognize share immobilization and use DTC's records and not rely solely on the corporate stock ledger.

> Federal law requires that when submitting a matter for a stockholder vote, an issuer must send a broker search card at least twenty business days prior to the record date to any "broker, dealer, voting trustee, bank, association, or other entity that exercises fiduciary powers in nominee name" that the company "knows" is holding shares for beneficial owners. 17 C.F.R. § 240.14a–13(a). Rule 14a–13 provides that "[i]f the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to Section 17A of the Act (e.g., 'Cede & Co.,' nominee for Depository Trust Company), the registrant *shall make* appropriate inquiry of the clearing agency and thereafter of the participants in such clearing agency." *Id.* § 240.14a–13(a) n.1 (emphasis added). An issuer cannot look only at its own records and treat Cede as a single, monolithic owner.[74]

This approach, the *Dell* court felt, was likewise practical since it was relatively easy to obtain the Cede breakdown. The information can be obtained by calling the DTC's "Proxy Services Hotline."[75] The process only took a few minutes.[76] Additionally, the information is reliable since corporations use it to obtain information regarding their stockholder profile, proxy solicitors use it when advising clients and it can be used as a document for determining shares entitled to vole and tabulating votes.[77]

The *Dell* court's proposition was prompted by its question "[w]hat are the records of the corporation for the purpose of determining legal ownership?"[78] Presently and at the time of the *Dell* decision Delaware's statue defined "stockholder" to be the holder of record stock in the corporation. However, the statute did not define what it meant to be a "holder of record." The statute only allowed

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[74] *Id.* at *6-7
[75] *Id.* at *6
[76] *Id.*
[77] *Id.*
[78] *Id.,* at *8

appraisal rights to be exercised by the stockholder of record and this definition existed prior to implementation of share immobilization. The court noted that previously only the person appearing on the corporate records as the owner of stock could qualify for appraisal.[79]

That brings us to the issue in this case. Shepard in his Morgan Stanley accounts held 1.1 million shares of stock of EMCI. These stocks were not registered in his name on the stock records of EMCI. Rather, Cede & Co. was the registered owner of the EMCI shares.

However, the undisputed facts establish EMCI knew Shepard voted against the merger. EMCI knew through the Cede breakdown Shepard's shares were held in "street name" by Morgan Stanley. Specifically, in the Cede breakdown Morgan Stanley was listed as account number 0015 as the holder of 1,123,502 shares of EMCI stock.[80] This included Shepard's 1.1 million shares. Thus, the Cede breakdown informed EMCI that Morgan Stanley was a record holder, as defined under the federal securities law, for Shepard, the beneficial owner.

Since "records of the corporation" is not defined in Iowa's statute Shepard argues this court should recognize the realities of public trading today and follow the *Dell* court's rationale and read into Iowa's definition of record shareholder the federal securities law definition of a record holder. By doing so the Cede breakdown would become part of the records of the corporation. Under his argument Morgan Stanley is the "record shareholder" since their name appeared in the "Cede breakdown." Thus, he had consent to assert his appraisal rights from the record shareholder in the September 17, 2019 letter from Morgan Stanley.

While the *Dell* court wanted to include the Cede breakdown as part of the records of the corporation the court recognized prior precedents of the Delaware Supreme Court and other Delaware

[79] *Id.* (citing *Engel v. Magnavox Co.,* 1976 WL 1705, at *1 (Del. Ch. Apr. 22, 1976))
[80] *Id.*

Chancery courts precluded the court's ability to do so.[81] These precedents held Cede as the stockholder of record.[82]

Here our appellate courts have not defined "records of the corporation." There are no precedents where this issue was addressed as it pertains to the ICBA that would guide this court in framing the interpretation. Likewise, our appellate courts have not interpreted record shareholder under the IBCA. Thus, this task requires this court to determine the legislature's intent when the law was enacted.

C. Statutory Analysis

"The purpose of statutory interpretation is to determine legislative intent."[83] To determine legislative intent the courts are to look at the language the legislature chose.[84] The courts are to consider the legislative history which includes prior enactments.[85] The courts are also to assess the statute in its entirety to give it a "plain and obvious meaning, a sensible and logical construction, which does not create an impractical or absurd result."[86] In making this determination courts are to follow prior decisions of our appellate courts.[87] Courts may consider the ordinary and common meaning of the terms

[81] *In re Appraisal of Dell Inc.,* 2015 WL 4313206, at *3
[82] *Id.* at *9. *See In re Appraisal of Transkaryotic Therapies, Inc.,* 2007 WL 1378345, at *2 (Del. Ch. May 2, 2007) ("Securities deposited at DTC as part of its book-entry system are generally registered in the name of DTC's nominee, Cede & Co. ("Cede"), making DTC's nominee the registered owner or record holder of these securities. . . .and no investor who might ultimately have a beneficial interest in securities registered to Cede, has any *ownership rights* to any particular share of stock reflected on a certificate held by Cede.") (emphasis added). *See also In re Ancestry.Com, Inc.,* 2015 WL 66825, *5 (Del. Ch. Jan. 5, 2015). *See also Enstar Corp. v. Senouf,* 535 A.2d 1351, 1353-56 (Del. 1987); *Raynor v. LTV Aerospace Corp.,* 331 A.2d 393, 393-94 (Del. Ch. 1975); *Neal v. Alabama By-Products Corp.,* 14 Del. J. Corp. L. 804, 807-12, 1988 WL 105754, at *1-5 (Del. Ch. 1988); *Engel v. Magnavox Co.,* 1976 WL 1705, at 1-6 (Del. Ch. Apr. 22, 1976).
[83] *State v. Lindell,* 828 N.W.2d 1, 5 (Iowa 2013)
[84] *In re Det. Of Swanson,* 668 N.W.2d 570, 574-75 (Iowa 2003)
[85] *State v. Lindell,* 828 N.W.2d. at 5
[86] *In re Det. of Swanson,* 668 N.W.2d at 574
[87] *In re Det. of Swanson,* 668 N.W.2d at 574

chosen;[88] judicial interpretations of similar statues in other jurisdictions;[89] dictionary definitions and common usage;[90] and comments to model acts.[91]

While it may be tempting to adopt the *Dell* court's position since adoption of EMCI's position exacts a harsh result on Shepard particularly when there was no dispute EMCI was aware Shepard beneficially owned 1.1 million shares of EMCI stock prior to November 5, 2019 and he voted against the merger. However, this court is not inclined to adopt the *Dell* court's position due to the history of appraisal rights and share immobilization, other courts' interpretation of similar statutory language, the comments and history of the model act and the language of Iowa's statute.

1. Prior Iowa law

Prior to share immobilization the Iowa Supreme Court addressed a dissenter's right to obtain the value of the shares she held beneficially under Delaware law. In *Graeser v. Phoenix Finance Co. of Des Moines,*[92] the plaintiff received shares of stock by inheritance.[93] The corporations in *Graeser* were incorporated under Delaware law. The Delaware law provided that shares of stock in a corporation were personal property and transferable on the books of the corporation in the manner provided under the regulations and as the by-laws provided. The articles of incorporation of the corporations required transfers of stock be made only on the books of the corporation by surrender of the old certificate. Delaware law also provided that the corporation was entitled to treat the holder of record as owner and

[88] *Harvey v. Care Initiatives, Inc.,* 634 N.W.2d 681, 685 (Iowa 2001)
[89] *Davis –Eisenhart Mktg. Co. v. Baysden,* 539 N.W.2d 140, 143 (Iowa 1995). *See generally Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.,* 606 N.W.2d 359, 366 (Iowa 2000)
[90] *In re Det. of Swanson,* 668 N.W.2d at 575
[91] *Nw. Inv. Corp. v. Wallace,* 741 N.W.2d 782, 787 (Iowa 2007) (reviewing comments to model business corporation act); *Office of Citizens' Aide/Ombudsman v. Edwards,* 825 N.W.2d 8, 16 (Iowa 2012); *State v. Lindell,* 828 N.W.2d at 7-8
[92] 218 Iowa 1112, 254 N.W. 859 (1934)
[93] 218 Iowa at ____, 254 N.W. at 861

were not bound to recognize any equitable claim. In this case no transfer of the shares of stock was ever made on the books of the corporation and plaintiff never requested a transfer.[94] The court found the original owner of the stock was the stockholder of record since his name was registered on the corporate records.[95]

The court acknowledged the plaintiff was an equitable owner and as such had the right to have her name transferred to the corporate records as the stockholder of record and to sue to protect her corporate property.[96] The question before the court was whether the plaintiff as a dissenting equitable shareholder, without having acquired the legal title by the transfer of the certificates of stock upon the books of the corporation, had the right to maintain the right to dissent.[97] The court found that until the transfer on the books of the corporation occurred she was not the stockholder of record.[98]

In reaching this conclusion the court relied upon other cases in which courts held equitable owners of stock could not assert the rights of a legal owner of stock until their names were registered on the corporate records.[99] Further in justifying its conclusion the *Graeser* court quoted approvingly from a Maine decision in which the court stated: "[w]hen a right is created by statute, and a specific remedy is

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[94] 218 Iowa at ___, 254 N.W. at 862
[95] *Id.*
[96] *Id.* (citing *Becher v. Wells Flouring-Mill Co.,* 1 McCrary 62, 1 F. 276, 277 (C.C.D. Minn. 1880) (equitable shares were muniments of title and shareholders had right to request transfer onto corporation books); *Fitchett v. Murphy,* 46 A.D. 181, 61 N.Y.S. 182, 185 (1899) (court found plaintiff's case was derivative and the allegations do not demonstrate the plaintiff was a stockholder at the time of the institution of the action since the pleadings state he was a stockholder "up to about the 1st day of May 1897," a period of one month before his death. Court found this did not demonstrate he was a stockholder of record on date of suit.); *Brown v. Duluth, M. & N. Ry. Co.,* 53 F. 889, 894 (C.C.D. Minn. 1893) ("A membership in this corporation consists in the ownership of shares thereof recognized by the corporation. The complainant claims membership by acquiring corporate stock by transfer, but, not having registered his stock, and obtained recognition by the corporation as a stockholder, he can claim no other rights than those which the assignment vests in him.")
[97] *Graeser,* 218 Iowa at ___, 254 N.W. at 863
[98] *Id.* at ___, 254 N.W. at 862
[99] *See* note 95, *supra*

provided, the right can be vindicated in no other way than by pursuing the prescribed course, step by step."[100] Thus, prior to share immobilization, the Iowa Supreme Court recognized that the record stockholder was the individual whose name was registered on the corporation's books. Our supreme court has not addressed the issue in *Graeser* since.[101]

2. Prior Delaware law

Based upon the court's review the courts in Delaware have addressed this issue more than any other jurisdiction. When addressed the Delaware courts have consistently held the record shareholder is the party that holds the legal title.[102] Starting in *Schneck v. Salt Dome* the Delaware Supreme Court stated the "term 'stockholder', ordinarily, is taken to apply to the holder of the legal title to shares of stock."[103] "The record owner may be but the nominal owner, and, technically, a trustee for the holder of the certificate, but legally he is still a stockholder, and may be treated as the owner by the corporation."[104] "To hold otherwise would lead to corporate chaos."[105] The court concluded that two equitable owners of stock could not exercise appraisal rights since they were unregistered stockholders and "stockholder" for purposes of the Delaware corporate law referred to a registered stockholder.[106]

In *Olivetti Underwood Corp. v. Jacques Coe & Co.,*[107] the Delaware Supreme Court citing its decision in *Salt Dome* held the registered stockholder who has followed the statutory requirements for asserting appraisal rights need not establish that its exercise of those rights were with the consent of the

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[100] *Graeser*, 218 Iowa ____, 254 N.W. at 867 (quoting *Johnson v. C. Brigham Co.,* 126 Me. 108, 136 A. 456 (Mem) (1927))
[101] *See, e.g., Andrew v. Citizens' Bank of Mt. Vernon,* 220 Iowa 219, ___, 261 N.W. 810, 815 (1935) (court found records of the bank more credible on issue of ownership of stock than testimony of the shareholder)
[102] *See* note 81, *supra*.
[103] 28 Del. Ch. 433, 437, 41 A.2d 563, 585 (Del. 1945)
[104] *Id.* at 437, 41 A.2d at 585
[105] *Id.*
[106] *Id.* at 447, 41 A.2d at 589
[107] 42 De. Ch. 588, 217 A.2d 683 (Del. 1966)

beneficial shareholders.[108] An equitable stockholder is not a stockholder for purposes of Delaware's appraisal statute.[109]

Subsequent chancery court decisions repeated this general rule of law. Thirty years later after the implementation of share immobilization, the *Raynor* court followed *Salt Dome.* In *Raynor* the broker was the registered holder of the shares.[110] When the beneficial owner attempted to assert his appraisal rights the court held he could not since the registered owner was the broker, however, the broker had not filed a timely objection. In reaching this decision the court quoted approvingly from *Salt Dome* finding that an unregistered holder of stock was not a "stockholder" entitled to intervene in intracorporate matters; this power was only for the registered holder of stock.[111] The *Raynor* court construed an amended definition of "stockholder" yet the *Raynor* court concluded "even before the revision of the statute, the law required the result reached in this case" and the interpretation of "stockholder" reached in *Salt Dome* was "confirmed by statute in 1967."[112]

A year after *Raynor* another chancery court held equitable owners of stock whose stock was held in the name of their brokers and where the brokers made no objection or demand for payment, were found not to have perfected their appraisal rights.[113] Failure to timely inform the corporation who was the record holder of the shares resulted in a court disallowing a claim for appraisal rights even though

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[108] *Id.* at 596, 217 A.2d at 688
[109] *Id.* at 593, 217 A.2d at 686
[110] *Raynor v. LTV Aerospace Corp.,* 331 A.2d 393, 393 (Del. Ch. 1975)
[111] *Id.*, at 393-94 (Del. Ch. 1975) (quoting *Schenck v. SaltDome Oil Corp.,* 28 Del. Ch. 433, 447, 41 A.2d 583, 589 (1945))
[112] *Raynor,* 331 A.2d at 394
[113] *Engel v. Magnavox Co.,* 1976 WL 1705, at *3-6 (Del. Ch. Apr. 22, 1976) (claims asserted by Pettey, Culbertson, Borgstrom – appraisal claim limited to the 300 shares registered with corporation not 400 claimed, Croft, Johnson, Fry, and Jones)

the beneficial owner sent a letter to corporation prior to the merger vote.[114] The same result was reached in *Neal v. Alabama By-Products Corp.*[115]

In between *Carico* and *Neal* the Delaware Supreme Court held that a demand for payment under section 262(a) must be properly and formally signed by the stockholder of record.[116] Where spouses held stock as joint owners both had to sign demand for payment.[117] Failure of both spouses signing precluded exercise of appraisal rights. Also demands for payment not made by the stockholders of record were disallowed.[118]

In a post share immobilization case the Delaware Supreme Court, while interpreting the phrase "stockholder of record" stated the claimants shares were in the name of CEDE "the actual holder of record."[119] In *Senouf* the claimants demand for appraisal were filed by their brokers. As to one claimant the chancery court found the demand for appraisal was not "made by or on behalf of CEDE, the actual holder of record."[120] As to the second the chancery court stated "the demand was not made by, or on behalf of, the stockholder of record, CEDE."[121] In both instances the chancery court allowed the claims since the corporations had constructive notice the claimants' shares "were listed on the corporation records under the name "CEDED & Co."[122]

The supreme court reversed the chancery court's decisions holding the term "stockholder" found in section 262 of the Delaware corporation statute had consistently been defined as a "holder of

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[114] *Carico v. McCory Corp.,* 4 Del. J. Corp. L. 595, 598, 1978 WL 2501, at *2 (Del. Ch. July 13, 1978)
[115] 14 Del. J. Corp. L. 804, 809-12, 1988 WL 105754, at *3-5 (Del. Ch. 1988)
[116] *Raab v. Villager Industries, Inc.,* 355 A.2d 888, 892 (Del.1976)
[117] *Id.*
[118] *Id.* at 894-95
[119] *Enstar Corp. v. Senouf,* 535 A.2d 1351, 1352 (Del. 1987)
[120] *Id.* at 1353
[121] *Id.*
[122] *Id.*

record."[123] The court found that if the claimants wished to hold their stock in "street name" it was incumbent upon the beneficial owner "to obtain the advantages of record ownership" and the failure of the nominee or broker to correctly perfect appraisal rights for the beneficial owner is a matter between the beneficial owner and his/her broker.[124] In reaching its conclusion the court noted that several other brokers properly instructed CEDE & Co. to demand appraisal on behalf of their clients.[125]

In *Konfirst v. Willow CSN Inc.*[126] the court held that individuals not named on the corporation's stock register could not present a demand for appraisal.[127] In rejecting other claims where the statutory requirements of Delaware's appraisal statute were not met the court stated

> The statutory requirements, however, are just that: they are strict and can only be avoided, if ever, in extraordinary circumstances. . . .Appraisal rights are created by statute and, in order to partake in those rights, strict compliance with the precise statutory standards is essential.[128]

The *Transkaryotic* court held:

> Securities deposited at DTC as part of its book-entry system are generally registered in the name of DTC's nominee, Cede & Co. ("Cede"), making DTC's nominee the registered owner or record holder of these securities. . . .and no investor who might ultimately have a beneficial interest in securities registered to Cede, has any ownership rights to any particular share of stock reflected on a certificate held by Cede.[129]

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[123] *Id.* at 1354 (citing *Salt Dome Oil Corp. v. Schenck,* Del. Supr., 41 A.2d 583, 589 (1945); *Carl M. Loeb Rhoades & Co. v. Hilton Hotels Corp.,* Del Supr., 222 A.2d 789 (1966); *Olivetti Underwood Corp. v. Jacques Coe & Co.,* Del. Supr., 217 A.2d 683 (1966))
[124] *Id.* at 1354
[125] *Id.* at 1355
[126] 2006 WL 3803469, at *2 (Del. Ch. Dec. 14, 2006)
[127] *Id.*
[128] *Id.*
[129] *In re Appraisal of Transkaryotic Therapies, Inc.,* 2007 WL 1378345, at *2 (Del.Ch. May 2, 2007); *See also In re Ancestry .Com, Inc.,* 2015 WL 66825, *5 (Del. Ch. Jan. 5, 2015) (court noted Cede was holder of record as to the shares voted against the transaction and made the appraisal demand for the shares owned by the beneficial shareholder)

The Delaware Supreme Court in *Kurz* refused to address the issue of whether the Cede breakdowns were part of the "stock ledgers." The court found the chancery court's interpretation of "stock ledger," in *Kurz v. Holbrook,* where the court asserted the Cede breakdown should be considered part of the stock ledger to be regarded as *obiter dictum* and without precedential effect.[130]

Just prior to *Kurz,* another Delaware court held that beneficial shareholders who made demand for appraisal failed to follow statutory requirements since the demand was not made by the record holder. The court found Cede & Company was the record owner.[131]

In construing the Delaware statute after a 2007 amendment a chancery court noted a beneficial owner could file the petition for appraisal but only if the stockholder of record provided the written demand for appraisal.[132] The statute previously required the stockholder of record to provide the written demand for appraisal and file the appraisal petition on behalf of the beneficial owner.[133] The court further noted while the amendment allowed a beneficial owner to file the appraisal petition the statute did not allow beneficial owners to perfect appraisal rights this was left to the "'stockholders' still defined as 'record owners.'"[134]

From *Salt Dome* to the present Delaware courts have consistently recognized for purposes of its statute that the stockholder who is entitled to exercise appraisal rights is the registered stockholder or the legal title holder. This was true prior to share immobilization and thereafter. The Delaware Supreme Court and the chancery courts that have addressed this issue consistently state the corporation is entitled to look only at their stock ledger to determine who the registered stockholder of the company is. The

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[130] *Crown EMAK Partners, LLC v. Kurz,* 992 A.2d at 389
[131] *Dirienzo v. Steel Partners Holdings L.P.,* 2009 WL 4652944, at *3 (Del. Ch. Dec. 8, 2009)
[132] *In re Ancestry.Com, Inc.,* 2015 WL 66825, at *4 (Del. Ch. Jan. 5, 2015)
[133] *Id.*
[134] *Id.* at *6

Delaware Supreme Court has not adopted the *Dell* court's position that records of the corporation should include the Cede breakdown.

3. Other state law

Decisions from other states are similar. In *Nelson v. R-B Rubber Prod., Inc.*[135] the court found the beneficial shareholders transferred their record ownership to their broker sometime prior to the merger vote.[136] At the time of the vote the court found the broker was the record shareholder.[137] The beneficial shareholders voted against the merger but failed to obtain written consent from their broker, the record shareholder when they asserted their dissenter's rights.[138] The court rejected their demand for appraisal.[139]

Shepard argues this case is similar to his because his argument is that Morgan Stanley was his record shareholder. The facts in *Nelson,* however, differ significantly because prior to the transfer of their shares the plaintiffs were the record shareholders. They transferred their record ownership to their broker. There is no indication the shares were held by Cede & Co.

The Pennsylvania Supreme Court held a shareholder who limited its objection to the merger to 900 shares even though the shareholder held 2800 shares as registered owner, could only obtain demand for payment for the 900 shares.[140] "Shareholder" under Pennsylvania law at that time was the registered owner of shares in a business corporation. The record indicated the broker, A.M. Kidder, was the registered owner of the shares.[141]

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[135] 2005 WL 1334538 (D. Or. June 3, 2005)
[136] *Id.* at *3 (Oregon's statute virtually identical to Iowa's)
[137] *Id.*
[138] *Id.* at *3-4
[139] *Id.* at *5
[140] *Petition of Kreher,* 379 Pa. 313, ___, 108 A.2d 708, 712 1954)
[141] *Id.* at 710

The petitioners included beneficial owners of the 2800 shares. Since Kidder, as the registered shareholder, limited its objection to 900 shares the remaining shares were not entitled to participate in the appraisal because the demand for payment was not signed by the shareholder, Kidder. The demand for payment was signed by the beneficial shareholders.[142] The court held that signatures of the beneficial owners did not constitute a proper demand for payment.[143] The registered owner, in this case Kidder, was required to make the demand for payment.[144]

In addition, in another claim Kreher asserted he was the beneficial owner of 3,600 shares registered in the name of 26 different individuals who were the registered shareholders. The court disallowed these shares from appraisal since there was no evidence the registered owners of these shares made the demand for payment or voted against the merger.[145]

In a Connecticut case where the plaintiffs challenged the tabulations of proxies in a vote for directors, the court in analyzing the actions of the inspectors who tabulated the votes relied on who had the right to vote. The court found the record holder to be CEDE who had the right to vote and did not examine the subjective intent of the beneficial shareholders.[146] The court recognized that if mistakes occurred as to the disputed proxies they were made by the record holders and the "[b]eneficial owners could have avoided this mistake by obtaining legal proxies to vote their own shares."[147]

The Nevada Supreme Court concluded under its statute the corporation is not required to send notice of dissenter's rights to stockholders who hold the stock in street name or to beneficial stockholders but only to the record stockholders.[148] In this case notice was sent to Cede & Co. where

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[142] *Id.* at 712
[143] *Id.* at 712
[144] *Id.* at 710
[145] *Id.* at 712
[146] *Von Seldeneck v. Great Country Bank,* 1990 WL 283729, *8 (Conn. Super. Ct. Oct. 5, 1990)
[147] *Id.* at *8
[148] *Smith v. Kisorin USA, Inc.,* 127 Nev. 444, 445, 254 P.3d 636, 637 (2011)

plaintiff's shares were held in street name by Cede & Co. The court found Cede & Co. the stockholder of record.[149]

Wisconsin similarly concluded that the corporation could rely on the actions of the record holder, Cede, in determining whether a beneficial shareholder could assert appraisal rights.[150] When the corporation sent notice of the shareholder meeting to Cede, the corporation met its statutory requirements. The fact the beneficial shareholders did not receive the notice from Cede was an issue between the beneficial shareholder and Cede.[151] The court held the beneficial shareholders could not participate in any dissenter's rights.

Shepard argued two state courts rendered opinions that support his position. Those cases are *Petition of Bowman*[152] a New York court of appeals decision and *Sarrouf v. New England Patriots Football Club, Inc.*[153] a Massachusetts Supreme Court decision. This court does not find they are applicable here.

The court finds *Bowman* is inapposite since the New York statute allowed either a record shareholder or a beneficial shareholder to participate in dissenter's rights.[154] The statute provided that a shareholder of a corporation had the right to receive fair value of his shares if they were entitled to vote and did not vote for the merger.[155] The court noted that prior New York cases allowed beneficial shareholders to participate in appraisal rights.[156] The court approvingly quoted the following language from a 1919 decision.

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[149] *Id.* at 445, 254 P.3d at 638
[150] *Kohler v. Sogen Intern. Fund, Inc.,* 238 Wis.2d 841, ___, 2000 WL 1124233, at *2 (Wis. Ct. App. 2000)
[151] *Id.*
[152] 98 Misc.2d 1028, 414 N.Y.S.2d 951 (N.Y. App. Div. 1978)
[153] 397 Mass. 542, 492 N.E.2d 1122 (1986)
[154] 98 Misc.2d 1028, 414 N.Y.S.2d 951 (N.Y. App. Div. 1978)
[155] *Id.,* at 1030, 414 N.Y.S.2d at 953 (citing Business Corporation Law s 623)
[156] *Id.,* at 1031, 414 N.Y.S.2d at 953

> I think a fair interpretation of the section in question is that any stockholder who owns stock in a stock corporation, whether registered or not, if he brings himself within the provisions of the section as to time of demand of payment for his shares and objection to sale, is entitled to an appraisement of his stock, not only with reference to stock actually registered in his name, but also with reference to stock which he owns absolutely even though not yet registered.[157]

The defendants argued that the amendment to the statue which now limited appraisal rights to stockholders "entitled to vote" which previously was not in the statute meant only stockholders of record had the right of appraisal. The court noted that even though the statute was amended to limit stockholders who were "entitled to vote" the court believed there was nothing in the legislative history to suggest the legislature intended to change the longstanding law that either record or beneficial shareholders had the right to seek appraisal.[158] The court stated that if it was the intent of the legislature to create the drastic change advocated by defendants "it is reasonable to assume that it would be reflected in the legislative history."[159] It is clear the history of New York law is different from many of the states, including Iowa that require the record shareholder to give consent before the beneficial shareholder can assert appraisal rights. For this reason the court finds *Bowman* is not persuasive or dispositive here.

Likewise, the court finds the decision in *Sarrouf v. New England Patriots Football Club, Inc.*[160] equally inapposite since the Massachusetts' statute was different from Iowa's. The Massachusetts statute did not define who the stockholder was for purposes of perfecting a right to appraisal.[161] Since the statue did not differentiate between the beneficial and record shareholders for the exercise of appraisal rights

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[157] *Id.,* at 1032, 414 N.Y.S.2d at 953–54 (quoting *Matter of Rowe,* 107 Misc. 549, 552, 176 N.Y.S. 753, 754 (N.Y. App. Div. 1919))
[158] *Id.,* at 1032, 414 N.Y.S.2d at 954
[159] *Id.,* at 1033, 414 N.Y.S.2d at 954
[160] 397 Mass. 542, 492 N.E.2d 1122 (1986)
[161] *Id.* at 552, 492 N.E.2d at 1129

the court found limiting appraisal rights to record shareholders was too restrictive and was an unduly strict interpretation of the statute.[162]

Shepard also points to several cases where the courts in their opinions refer to the broker as the record holder. Shepard argues these references reinforce his argument that brokers have been deemed to be the record holder for appraisal purposes. A review of the facts in these cases demonstrates they do not support his position.

Shepard's assertion that *In re Kaiser Steel Corp.*[163] supports his argument is inaccurate. In *Kaiser* the district court reviewed the bankruptcy court's conclusion that Schwab was a transferee for purposes of bankruptcy law. In the bankruptcy decision the court stated Schwab was the record shareholder for the beneficial owner of Kaiser's stock and based upon that finding held Schwab liable as a transferee relying upon the law of agency.[164] The bankruptcy court did not reach its conclusion by reviewing the Colorado appraisal statute. The district court, however, rejected the bankruptcy court's use of agency law taking to task the bankruptcy court's finding that Schwab was the record holder of its clients' stock. The district court found based upon the affidavits submitted that Schwab's clients' shares in Kaiser were actually registered in the name of Cede & Co. not Schwab.[165] "Consequently, if anything, Kaiser's records would indicate that it was dealing with Cede & Co. not Schwab."[166] Thus, the district court correctly understood Cede & Co. was the record shareholder and not Schwab and Cede & Co.'s name and not Schwab's would appear on the corporate records of Kaiser.

Shepard also relies on a number of federal court decisions where he argues the federal courts recognized brokers as record holders. The court does not find these cases persuasive.

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[162] *Id.*
[163] 110 B.R. 514, 518 (D. Colo. 1990)
[164] *In re Kaiser Steel Corp.,* 105 B.R. 639, 649-50 (Bankr. D. Colo. 1989)
[165] *In re Kaiser Steel Corp.,* 110 B.R. at 522-23
[166] *Id.* at 523

Shepard relies on a federal district court case where the court indicated "a 'record' holder is 'usually a broker or bank."[167] A review of this case demonstrates Shepard's flawed analysis. In *Apache* the defendant Chevedden wanted to submit a proposed proxy statement for shareholder consideration to Apache.[168] The SEC rule 14a-8(b)(2) required that a shareholder submitting a proposal to the corporation for shareholder consideration had to include proof he was eligible to do so, in other words establish he was a shareholder. The question the court faced was whether Chevedden met the requirements of the SEC rule.[169] The registered owner of his shares was Cede & Co.[170] He sent letters from his introducing broker and a master custodian which certified he was a beneficial owner of the Apache shares.[171] Apache argued he had to have a letter from Cede & Co.[172] In granting Apache's petition for declaratory judgment, the court did not rule on the question of what was required under rule 14a-8(b)(2) but granted Apache's petition on the basis that what Chevedden submitted did not meet the rule's requirements.[173]

Based upon the type of proxy Chevedden wanted to submit the court noted he needed to comply with the following SEC rule which required:

> If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, *if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own.* In this case, at the time you submit your proposal, *you must prove your eligibility* to the company in one of two ways [only the first of which is relevant]:

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[167] *Apache Corp. v. Chevedden,* 696 F.Supp.2d 723, 734 (S.D. Tex. 2010)
[168] *Id.* at 724, 727
[169] *Id.* at 724
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

> (i) The first way is to submit to the company a *written statement from the "record" holder of your securities (usually a broker or bank)* verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders....17 C.F.R. § 240.14a–8(b)(2) (emphasis added)[174]

The court noted that the SEC previously stated that letters from an introducing broker met the rule's requirements. However, there was also evidence presented by Apache that indicated this was not sufficient. The court stated:

> Chevedden's interpretation of the Rule would require companies to accept *any* letter purporting to come from an introducing broker, that names a DTC participating member with a position in the company, regardless of whether the broker was registered or the letter raised questions. Chevedden's interpretation of Rule 14a–8(b)(2) would not require the shareholder to show anything. It would only require him to obtain a letter from a self-described "introducing broker," even if, as here, there are valid reasons to believe the letter is unreliable as evidence of the shareholder's eligibility. By contrast, a separate certification from a DTC participant allows a public company at least to verify that the participant does in fact hold the company's stock by obtaining the Cede breakdown from the DTC, as Apache did in May 2009 and March 2010.[175]

Because of these conflicting positions the court declined to determine what was necessary to meet the rule's requirements. Instead, the court determined the letters from the introducing broker and master custodian were not timely and decided Chevedden had not met the rule's requirements.[176] Thus, the analysis by the *Apache* court was not concerned with the assertion of appraisal rights and whether under the applicable state appraisal statute Chevedden could assert those rights. The concern was whether he complied with the applicable federal securities law for submitting a proxy statement. The court does not find *Apache* helpful or dispositive in its analysis for these reasons.

[174] *Id.* at 728
[175] *Id.* at 740
[176] *Id.* at 741

The language Shepard quotes from *Blum v. BankAtlantic Fin. Corp.,*[177] provides no support for his position. In *Blum* the court was concerned with the adequacy of the notice sent to a potential class of shareholders. The language Shepard relies upon is contained in a footnote in the court's decision that pertained to the court's discussion which explained how beneficial owner's shares were held by brokers under the federal securities law. The *Blum* court did not engage in an analysis of record holder or record owner under any state appraisal statute. Interestingly in this case, the defendant noted the class notice was defective because it failed to inform the record owners to send notice to the beneficial owners. The new notice was drafted to instruct Cede & Co. how to notice the beneficial owners.[178] There is nothing in this case to suggest the court determined that brokers were record holders for appraisal purposes.

Shepard's reliance on *In re Victor Tech, Sec. Litig.,*[179] also provides no support for his position. There is no analysis by the court regarding its definition of record holders.[180] Shepard points out and argues that the federal securities law holds the brokerage houses are record holders. The issue here was a class action lawsuit involving securities. The court could have determined the brokers were record owners under the federal securities law. There is no analysis of any state appraisal law in this case.

The court finds more persuasive and analogous to the issues before this court the Delaware decisions and the other state court decisions which recognize the general rule that the record shareholder for appraisal purposes is the one who has the legal authority to act on the shares registered in its name.

4. Legislative actions

More importantly, the state legislatures who are authorized to enact appraisal rights legislation have done so knowing share immobilization permeated the industry. Yet, at least the Delaware and Iowa

[177] 925 F.2d 1357, (11th Cir. 1991)
[178] *Id.* at 1359
[179] 792 F.2d 862 (9th Cir. 1986)
[180] *Id.* at 863

legislatures have not seen fit to amend their statutes to incorporate the federal securities law definition of record holder urged by Shepard.[181] The *Kurz* court in reversing the chancery court's decision to include the Cede breakdown as part of the stock ledger of the corporation believed a legislative fix was the proper avenue of redress.[182] More importantly, the Delaware legislature has not amended its statute to include the Cede breakdown as part of the stock ledger of the corporation after the *Kurz* and *Dell* decisions.[183]

5. Iowa Legislature – Iowa Business Corporation Act

Chapter 490 of the Iowa Code is modeled after the ABA's Model Business Corporation Act (1984) (hereinafter "Model Act").[184] In 1989 Iowa adopted the revised model business corporation act of 1984.[185] This revised act was the first revision in thirty years.[186] Since that time the Iowa legislature has consistently distinguished between a beneficial shareholder and the record shareholder both by definition and how appraisal rights are to be exercised.[187] Since the act was amended in 1989, the definition of beneficial shareholder and record shareholder remained relatively constant. The record

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[181] The court assumes this is true for the other states since Shepard cited to no state laws that incorporate the federal securities law definition of record holder into their definition of record shareholder.
[182] *Crown EMAK Partners, LLC v. Kurz,* 992 A.2d 377, 398 (Del. 2010)
[183] *In re Appraisal of Dell,* 2015 WL 4313206, at *16, *23 ("As I see it, the question of whether DTC participants should be regarded as holders of record remains open for the Delaware Supreme Court to decide if it wish to do so.")
[184] Matthew Doré, *Iowa Practice Series, Business Organizations,* 5 IAPRAC § 1.2(2) at 4 (2019-2020 Ed.)
[185] Donald J. Brown & M. Daniel Waters, *Dissenters Rights and Fundamental Changes Under the New Iowa Business Corporation Act,* 40 Drake L. Rev. 733, 734 (1991)
[186] Matthew Doré, *Iowa Practice Series, Business Organizations,* 5 IAPRAC § 17.3 at 511 n.9 (2015-2016 Ed.)
[187] *See also* American Bar Association, Corporate Laws Committee of the Business Law Section, Model Business Corporation Act Annotated (4th Ed. 2013 Revision), Vol. 3 at 13-16 ("The specifically defined terms 'record shareholder' and 'beneficial shareholder' appear primarily in section 13.01, which establishes the manner in which beneficial shareholders and record shareholders who are acting on behalf of beneficial shareholders, perfect appraisal rights. The word 'shareholder' is used generally throughout chapter 13 in order to permit both record and beneficial shareholders to take advantage of the provisions of this chapter, subject to their fulfilling the applicable requirements of this chapter.")

shareholder has been "the person in whose name shares are registered in the records of a corporation."[188] A beneficial shareholder has been "the person who is a beneficial owner of shares held by a nominee as the record shareholder."[189] Both recognize the procedure provided under section 490.723 that allows a beneficial shareholder whose shares are registered in the name of a nominee to be recognized by the corporation. The section 490.723 registration process allows a beneficial owner to be recognized as the legal owner of the shares on the corporation's records. In addition, the Iowa statute consistently provides a shareholder can be a record shareholder or the beneficial shareholder which further denotes that these shareholders can be different entities.[190] These definitions demonstrate the legislature's recognition of the interplay that exists when the record shareholder may be holding shares for the beneficial shareholder.

Equally or more importantly, the legislature since it adopted the revised model business corporation act, has consistently required the record shareholder to be the person who has the power to exercise or consent to the exercise of appraisal rights. In 1991 the Code gave the record shareholder the authority to assert dissenter's rights.[191] Today the record shareholder has the authority to assert appraisal rights.[192]

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[188] *Compare* Iowa Code § 490.1301(5) (1991) *with* Iowa Code § 490.1301(8) (2019). *See also* Matthew Doré, *Iowa Practice Series, Business Organizations,* 6 IAPRAC § 33:2 at 394 (2019-2020 Edition) (Corporations are required to "maintain what is commonly referred to as a 'shareholder list'-'a record of its shareholders in a form that permits preparation of a list of 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(1) and (3))

[189] *Compare* Iowa Code § 490.1301(6) (1991) *with* Iowa Code § 490.1301(2) (2019) (". . . means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owners behalf.")

[190] *Compare* Iowa Code § 490.1301(7) (1991) *with* Iowa Code § 490.1301(10) (2019) (. . . means both a record shareholder and a beneficial shareholder.")

[191] Iowa Code § 490.1303(1) (1991)

[192] Iowa Code § 490.1303(1) (2019)

The statute has also consistently provided a method by which a beneficial shareholder could exercise appraisal rights. In 1991 a beneficial shareholder could exercise dissenter's rights but only if the beneficial owner submitted to the corporation the record shareholder's written consent to the dissent.[193] Today a beneficial shareholder may assert appraisal rights but the requirement to submit to the corporation the record shareholder's written consent is still present.[194] This language recognizes the concept of share immobilization, the different authority a record shareholder and a beneficial shareholder have and the legislature's intent that if the beneficial shareholder is not the record shareholder the beneficial shareholder must obtain consent from the record shareholder in order to perfect her/his appraisal rights. The record shareholder is the one whose name is registered on the records of the corporation. To incorporate the federal securities law definition, of record holder" into the statute's definition of record shareholder would lead to an absurd result since the intermediary broker, in this case, Morgan Stanley, is not the registered shareholder on the records of the corporation. Including the Cede breakdown as part of the records of the corporation would rewrite the traditional understanding that records of the corporation better left for the legislature.

6. The Model Business Corporation Act

The adoption of the federal securities law definition of record holder would also be contrary to the Model Act. This is an act that has been adopted by over 30 states.[195] The Model Act recognizes the role DTC and Cede & Co. play in the exchange of publicly traded corporate shares. The drafters of this Act have not seen fit to incorporate the federal securities law definition of record holder into the Act's definition of record shareholder or records of the corporation. There were revisions to the Model Act in

[193] Iowa Code § 490.1303(2)(a) (1991)
[194] Iowa Code § 490.1303(2)(a) (2019)
[195] Matthew Doré, *Iowa Practice Series, Business Organizations,* 5 IAPRAC § 17:3 at 511 n.9 (2015-2016 Edition)

2013 and again in 2016. These revisions make no reference to the issues raised by the *Kurz* or *Dell* courts. In fact its 2013 Official Comments recognizes the role DTC/Cede plays as the registered owner of the corporate shares as set forth in section 13.03.

> It would be foreign to the premises underlying nominee and street name ownership to require these record shareholders to forward demands and participate in litigation on behalf of their clients. In order to make appraisal rights effective without burdening record shareholders, beneficial shareholders should be allowed to assert their own claims as provided in this subsection. The beneficial shareholder is required to submit, no later than the date specified in section 13.22(b)(2)(ii), a written consent by the record shareholder to the assertion of appraisal rights to verify the beneficial shareholder's entitlement and to permit protection of any security interest in the shares. 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. At the same time, the customer may want to obtain certificates for the shares so they may be deposited pursuant to section 13.23. After the corporation has received the form of consent, the corporation must deal with the beneficial shareholder.[196]

The action outlined in the Model Act above was the process followed by the other dissenter to the EMCI merger proposal. The other dissenter was able to follow the process outlined above by obtaining from Cede the necessary document which it provided to EMCI indicating it had the written consent of Cede (the record shareholder) to assert its appraisal rights. Further, the comments to the 2016 revision of section 13.03 succinctly affirm the 2013 comments.

> To make appraisal rights effective without burdening record shareholders, beneficial shareholders. . .are allowed to assert their own claims as provided in section 13.02(b). After the corporation has received the form of consent required by section 13.03(b)(1), the corporation must deal with the beneficial shareholder."[197]

The Model Act consistently requires the beneficial shareholder, if not the record shareholder, obtain the record shareholder's consent in order to exercise appraisal rights.

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[196] *See also* American Bar Association, Corporate Laws Committee of the Business Law Section, Model Business Corporation Act Annotated (4th Ed. 2013 Revision), Vol. 3, Official Comments to Section 13.03

[197] Model Business Corporation Act, § 13.03, Official Comment at 316 (2016 Revision Dec. 9, 2016)

While the SEC adopted a rule that expands the definition of record holder to include brokers, dealers and others who hold securities in nominee name or otherwise or as a participant in DTC the state legislatures and the drafters of the Model Business Corporations Act have not incorporated that definition into the Model Act. Iowa's insistence that the beneficial shareholder submit the written consent of the record shareholder to the corporation before the beneficial shareholder can assert her/his appraisal rights demonstrates the legislature wanted the beneficial shareholder to establish it has the registered owner's consent before allowing assertion of appraisal rights. This is consistent with the requirement that the beneficial shareholder assume the risk of having shares she/he purchased and held in a form other than the purchaser's name. Courts consistently hold the beneficial shareholder has a duty to establish they have the authority to exercise appraisal rights from the record shareholder; the legal owner of the shares.[198]

V. CONCLUSION

The court finds based upon the record presented the record shareholder is the person whose name is registered in the records of the corporation. In this case the records of the corporation was the record shareholder voting list prepared by AST and given to EMCI prior to the merger vote. By practice and law since the 1970's and after the creation of share immobilization the trading industry and the courts consider Cede & Co. to be the legal title owner or record shareholder. Records of the corporation do not include the participants in the Cede breakdown. The court finds Cede & Co. was the record shareholder prior to November 5, 2019 and during the time Shepard was the beneficial owner of his shares in EMCI. Consequently, the court finds Shepard prior to November 5, 2019 did not obtain written consent to assert his appraisal rights from Cede & Co. and thus did not receive consent from the record shareholder. The

[198] *In re Appraisal of Dell, Inc.,* 2015 WL 4313206, at *17 (citing *Olivetti Underwood Corp. v. Jacques & Co.,* 217 A.2d 683, 686, 687 (Del. 1966), *Enstar Corp. v. Senouf,* 535 A.2d 1351, 1354 (Del. 1987) and *Schenck v. Salt Dome Oil Corp.,* 27 Del. Ch. 234, 34 A.2d 249, *rev'd,* 41 A.2d 583 (Del. 1945))

failure to obtain this consent means Shepard failed to perfect his appraisal rights as required under sections 490.1303(2)(b) and 490.1301(8). On this issue summary judgment is entered in favor of EMCI.

VI. WHETHER EMCI WAIVED OR IS EQUITABLY ESTOPPED FROM ASSERTING SHEPARD'S FAILURE TO PERFECT HIS APPRAISAL RIGHTS

With regard to his failure to obtain Cede & Co.'s written consent to assert his appraisal rights, Shepard asserts EMCI is equitably estopped from arguing he failed to comply with the strict requirements of the appraisal statute for two reasons. The first is EMCI did not strictly comply with the statute and second, EMCI concealed material facts which Shepard relied upon to his detriment.

As to the first argument Shepard argues that since EMCI did not comply with the appraisal statute when it paid him the merger consideration months before it was due they cannot demand strict compliance with the statute's requirements regarding consent from the record shareholder. Thus, EMCI, by its failure to comply with the appraisal statute waived its right to assert he must strictly comply. In making this argument Shepard relies on cases where the court found strict compliance by shareholder not required when corporation does not strictly comply.[199]

His second argument is that EMCI concealed its belief Morgan Stanley's consent was insufficient for Shepard to perfect his appraisal rights and for that reason EMCI is equitably estopped from asserting Shepard failed to obtain consent from the record shareholder.

A. Applicable Law

1. Waiver

Waiver is an intentional relinquishment of a known right.[200]

> The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right. Waiver can be express, shown by

[199] Shepard's Combined Reply in Support of his Motion for Summary Judgment and Opposition to EMCI's Summary Judgment Motion, at 19-21 (Polk Cty Dist. Ct. Jan. 10, 2020)
[200] *Huisman v. Miedema,* 644 N.W.2d 321, 324 (Iowa 2002)

> the affirmative acts of a party, or implied, inferred from conduct that supports the conclusion waiver was intended.[201]

Generally, the issue of waiver is a jury question particularly where the conduct relied upon is the basis for the waiver, however, if the facts are undisputed the issue can be determined by the court as a matter of law.[202]

2. Equitable Estoppel

The defense of equitable estoppel is:

> . . . based upon the idea that one who has made a certain representation or taken a certain position, should not thereafter be permitted to change his position to the prejudice of one who has relied thereon. (citations omitted) Therefore, to establish estoppel, a party must show a promise, reliance upon that promise, and circumstances which make it unjust not to enforce the promise. [203]

To establish equitable estoppel the moving party must prove by clear and convincing preponderance of the evidence the following elements:

> (1) [Non-moving party] made a false representation or has concealed material facts; (2) [moving party] lacks knowledge of the true facts; (3) [non-moving party] intended [moving party] to act upon such representations; and (4) [moving party] did in fact rely upon such representations to his prejudice.[204]

With regard to the first element Shepard must prove that EMCI affirmatively made a false representation or concealed material facts.[205] However, proof of an affirmative act may be relaxed when there is a confidential or fiduciary relationship.[206]

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[201] *In re Estate of Warrington,* 686 N.W.2d 198, 202 (Iowa 2004) (quoting *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.,* 596 N.W.2d 546, 552 (Iowa 1999))
[202] *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.,* 596 N.W.2d at 552. *See also Scheetz v. IMT Ins. Co. (Mut.),* 324 N.W.2d 302, 304 (Iowa 1982)
[203] *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.,* 596 N.W.2d at 552
[204] *Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.,* 859 N.W.2d 182, 191 (Iowa 2015); *McKee v. Isle of Capri Casinos, Inc.,* 864 N.W.2d 518, 531 (2015).
[205] *Christy v. Miulli,* 692 N.W.2d 694, 702 (Iowa 2005)
[206] *Skadburg v. Gately,* 911 N.W.2d 786, 798 (Iowa 2018)

> When . . . one of the parties has superior knowledge or a special situation, such as an attorney-client relationship . . . we have required the party to make a full and truthful disclosure of all material facts within that party's knowledge.[207]

"When a fiduciary relationship exists, mere silence supplies the affirmative-act requirement."[208] However, silence alone is not sufficient unless there is a special duty to disclose.[209]

Our supreme court held an officer of a corporation had a fiduciary relationship to a corporate shareholder when the sale of stock is involved. The court held:

> * * * it is the recognized rule in Iowa that if a fiduciary relationship exists which makes it the duty of the defendant to speak, mere silence on his part may constitute or take the place of fraudulent concealment and no affirmative acts are necessary to postpone the running of the statute to the time of discovery or the time when discovery should have been made in the exercise of diligence.[210]

This fiduciary relationship was found in disputes regarding the assertion of the statute of limitations defense.[211] In these cases the allegedly defrauded shareholder argued the defendant by their acts of fraud concealed information about the appropriate value of the stock sold. The defrauded shareholder typically argued that had the information not been concealed they would have acted differently by filing her/his lawsuit earlier. Also some of these cases involve situations where directors or officers defrauded the shareholder regarding the true value of the shares of stock they sold to the director or officer. In these instances the defrauded shareholder sought to void the sale.

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[207] *Cornell v. Wunschel,* 408 N.W.2d 369, 375 (Iowa 1987)
[208] *Skadburg v. Gately,* 911 N.W.2d at 798
[209] *Id.* (quoting *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409, 424 (2d Cir. 1999))
[210] *Higbee v. Walsh,* 229 Iowa 408, 294 N.W. 597, 604 (1940)
[211] *Higbee v. Walsh,* 229 Iowa 408, ___, 294 N.W. 597, 609 (1940); *Dawson v. National Life Ins. Co.,* 176 Iowa 362, ___, 157 N.W. 929, 934, 937-38 (1916); *Schettler v. Iowa Dist. Court for Carroll County,* 509 N.W.2d 459, 466 (Iowa 1993) ("Our case law is clear that a fiduciary relationship exists between a managing officer of a corporation and a stockholder regarding the stockholder's shares of stock.")). *See also Humphrey v. Baron,* 223 Iowa 735, ___, 273 N.W. 856, 858 (1937)

The court views Shepard's argument here to be similar to those cases where the plaintiff asserted equitable estoppel because the defendant engaged in either a false representation or concealment of facts that had plaintiff known would have caused him to act differently by timely filing the lawsuit. The use of the doctrine is well-recognized in statute of limitations cases.[212] The doctrine "is designed to prevent fraud and injustice and may come into play whenever a party cannot in good conscience gainsay his prior acts or assertions."[213] In addition, to the four elements above the courts when addressing equitable estoppel in a statute of limitations case state:

> [P]laintiff is under a duty to exercise reasonable care and diligence.[214]
>
> * * *
>
> "(O)ne 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."[215]
>
> * * *
>
> 'A person whose own conduct or default got him into his predicament cannot successfully urge estoppel. 28 Am.Jur.2d, Estoppel & Waiver, s 79 at 719; 31 C.J.S. Estoppel s 75 at 452—455.'[216]

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[212] *L & W Construction Co., Inc. v. Kinser,* 251 Iowa 56, 66-67, 99 N.W.2d 276, 282 (1959); *Holman v. Omaha & C.B. Ry & Bridge Co.,* 117 Iowa 268, 90 N.W. 833 (1902); *In re Estate of Carpenter,* 210 Iowa 553, 231 N.W. 376 (1930); *Swift v. Petersen,* 240 Iowa 715, 37 N.W.2d 258 (1949)

[213] *DeWall v. Prentice,* 224 N.W.2d 428, 431 (Iowa 1974) (citing *Dart v. Thompson,* 261 Iowa 237, 243-44, 154 N.W.2d 82, (1967)). "Gainsay" means to contravene or deny.

[214] *DeWall v. Prentice,* 224 N.W.2d at 430 (quoting 53 C.J.S. Limitations of Actions, s 25 at 962, 965)

[215] *DeWall v. Prentice*, 224 N.W.2d 428, 431 (Iowa 1974) (quoting *Shellhorn v. Williams,* 244 Iowa 908, 918-919, 58 N.W.2d 361, 367 (1953))

[216] *DeWall v. Prentice,* 224 N.W.2d at 431 (quoting *Johnson v. State Bank,* 195 N.W.2d 126, 130 (Iowa 1972))

3. Summary Judgment

Shepard has the burden to establish there are no material facts at issue and he is entitled as a matter of law to judgment on the defenses of waiver and equitable estoppel.[217] In other words, summary judgment on his defenses means EMCI would be precluded from asserting he cannot participate in appraisal rights since he did not obtain written consent from Cede & Co. prior to November 5, 2019. The burden of proof that either of these defenses is applicable remains with Shepard.[218] The record presented to the court must be viewed in the light most favorable to the non-moving party and the court is to consider every legitimate inference reasonably deduced from the record in favor of EMCI.[219] A fact issue is "genuine" if "the evidence in the record 'is such that a reasonable jury could return a verdict for EMCI.'"[220] "An issue of fact is 'material' only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law."[221] "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions."[222]

B. Applicable Facts

With this law in mind the court summarizes the undisputed facts relevant to these inquiries.

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[217] *Slaughter v. Des Moines University College of Osteopathic Medicine,* 925 N.W.2d 793, 800 (Iowa 2019)
[218] *Id.* at 819
[219] *Id.*
[220] *Nelson v. Lindaman,* 867 N.W.2d 1, 6 (Iowa 2015) (quoting *Wallace v. Des Moines Indep. Comty. Sch. Bd. of Dirs.,* 754 N.W.2d 854, 857 (Iowa 2008))
[221] *Id.* (quoting *Wallace v. Des Moines Indep. Comty. Sch. Bd. of Dirs.,* 754 N.W.2d at 857)
[222] Slaughter v. Des Moines University College of Osteopathic Medicine, 925 N.W.2d at 819 (quoting *Banwart v. 50th Street Sports, L.L.C.,* 910 N.W.2d 540, 544 (Iowa 2018)). *Cf. Negrele-Pule v. James Harmeyer, Inc.,* 810 N.W.2d 24, 2011 WL 6079122, *4 (Iowa Ct. App. Dec. 7, 2011) ("When the evidentiary matter tendered in support of the motion does not affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied even if no opposing evidentiary matter is presented." *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994), *overruled on other grounds, Winger v. CM Holdings, L.L.C.,* 881 N.W.2d 483 (Iowa 2016)

The proxy statement sent to the shareholders of EMCI indicated how parties could assert their appraisal rights. Specifically, the proxy statement informed beneficial shareholders:

- 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. (Cauley Decl., Ex. A at pp. 10, 85) (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.** (*Id.* at 132-33) (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.** (*Id.* at 135) (emphasis in original).[223]

The proxy statement provided a complete copy of the Iowa Code provisions related to appraisal rights.[224]

The appraisal statute required EMCI to pay Shepard, its estimate of fair value thirty days after the appraisal rights form was received from Shepard. In this case the appraisal rights form was due on November 5, 2019. EMCI was required to pay Shepard EMCI's estimate of fair value by December 5, 2019.[225] Instead, EMCI's payment to Shepard occurred on or about September 23, 2019.[226] EMCI

[223] SOF, ¶ 24
[224] Affidavit of Todd Strother, Ex. A, Annex B at B-1 to B-10 (Polk Cty Dist. Ct. Nov. 12, 2019) (hereinafter "Strother Aff. I")
[225] Iowa Code § 490.1324(1)
[226] Cauley Decl., Ex. G

asserts the payment was merger consideration because Shepard failed to remove his shares from the Cede records prior to the merger vote and it is undisputed that he did not remove his shares from the Cede records prior to the merger vote. It is the payment of fair value prior to December 5, 2019 that Shepard asserts was not in strict compliance with the statute because the statute did not require the dissenting shareholder to give his estimate of fair value until thirty days after payment of fair value by the corporation.[227] Shepard assumed the payment made by EMCI on September 23, 2019 was its fair value payment and EMCI could not accelerate the period of time for him to provide his estimate of fair value since he had until November 5, 2019 to perfect his right to seek appraisal rights.[228]

Further, EMCI knew on September 16, 2019 Shepard was voting his shares against the proposed merger.[229] EMCI received from Shepard the Morgan Stanley Letter which purportedly gave Shepard authority to exercise appraisal rights with respect to 1.1 million shares held in two accounts at Morgan Stanley.[230] EMCI knew on August 8, 2019 based upon the Record Shareholder Voting List received from AST that neither Morgan Stanley nor Shepard were identified on the list as registered shareholders.[231] EMCI knew his shares were not certificated. The Cede breakdown informed EMCI Morgan Stanley was a participant with respect to 1,123,502 shares of DTC's position in EMCI.[232]

After the merger vote and prior to the distribution payment to all minority shareholders who had not dissented, EMCI knew Shepard failed to remove his shares from the Cede & Co.'s records.[233] EMCI knew this failure could adversely impact Shepard's ability to assert his appraisal rights as provided

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[227] Iowa Code § 490.1326(1)
[228] Cauley Decl., Ex. I
[229] Cauley Decl., Ex. F (letter indicating his "no" votes and the proxy form showing he voted "no" were emailed to company on September 16, 2019 and the hard copies were sent federal express to the company the same date)
[230] *See* notes 32-33, *supra* & Findings of Fact associated with these notes
[231] *See* notes 9-13, *supra* & Findings of Fact associated with these notes
[232] *See* notes 16, 18, *supra* & Findings of Fact associated with these notes
[233] *See* notes 37-39, *supra* & Findings of Fact associated with these notes

under the terms of the merger agreement.[234] This is the position EMCI asserted in its petition[235] and its cross-motion for summary judgment.[236] EMCI's officer, Strother, knew when he spoke to AST prior to the distribution payment, Shepard failed to remove his shares from the Cede records. EMCI knew Shepard was paid merger consideration when EMCI's counsel, Thrall, received Cauley's letter of September 23, 2019.[237] Contrary to EMCI's position, the statute does not require Shepard to submit his uncertificated shares on November 5, 2019 when he returned the appraisal rights form.[238] Likewise, the merger agreement did not require Shepard to return his shares.

VII. ANALYSIS

A. Waiver

The court finds instructive the court's decision in *Dirienzo v. Steel Partners Holding L.P.*[239] The facts in *Dirienzo* are very similar to the facts and arguments Shepard makes here. Dirienzo, was a beneficial shareholder of the company's stock. When he received notice of the proposed merger he contacted his broker and instructed him to demand appraisal. The broker forwarded Dirienzo's letter to the company. Dirienzo also emailed and faxed a copy of his letter to the company's counsel. In addition,

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[234] Strother Aff. I, Ex. A, Annex A, § 1.6(a)
[235] Petition, ¶¶ 2-4
[236] Plaintiff's Combined Brief in Resistance to Shepard's Motion to Dismiss, and in Support of Plaintiff's Cross-Motion for Summary Judgment, at 24-26 (Polk Cty Dist. Ct. Dec. 23, 2019)
[237] Cauley Decl., Ex. G (letter sent by email)
[238] Iowa Code §§ 490.1323(1) & (3) ("In addition, a shareholder who wishes to exercise appraisal rights must execute and return the form and, in a case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 490.1322, subsection 2, paragraph *"b"*, subparagraph (2). 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, unless the shareholder withdraws pursuant to subsection 2." * * * (3) "A shareholder who does not sign and return the form and, *in the case of certificated shares, deposit the shareholder's share certificates where required*, each by the date set forth in the notice described in section 490.1322, subsection 2, shall not be entitled to payment under this subchapter") (emphasis added)
[239] 2009 WL 4652944 (Del. Ch. Dec. 8, 2009)

other petitioners, who were beneficial shareholders wrote to the company demanding appraisal. The company's counsel responded to the letters by simply acknowledging receipt of the letters and the amount of shares each petitioner held.[240]

After the merger was approved the company's counsel sent a letter referred to as the "Effectiveness Letter" indicating "they might be entitled to appraisal rights."[241] The letter also referred the shareholders to the initial notice of the merger "for a description of the procedures *that must be followed* to perfect appraisal rights."[242] After the petitioners filed an action to assert appraisal rights the company challenged their ability to pursue these rights since Cede & Co., the record owner of the shares did not make the demand for appraisal.[243]

In response petitioners argued the company waived its ability to challenge petitioners' standing to assert appraisal rights because of the three letters sent to them by the company. The first letter was the December 23, 2008 letter from the company's counsel acknowledging receipt of Dirienzo's and the other petitioners written demand for appraisal.[244] The second letter sent on January 7, 2009 informed Dirienzo, and other shareholders, the merger was approved and attached to the letter was the Effectiveness Letter which indicated they might be entitled to appraisal rights.[245] The third letter was sent on February 12, 2009 in response to petitioners' counsel request for information as to the shareholders who dissented. In the February 12th letter the company's counsel indicated that "nine stockholders representing an aggregate of 26,970 shares of common stock of [the Company] did not vote in favor of the merger and have made a demand for appraisal rights."[246]

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[240] *Id.* at *1-*2
[241] *Id.* at *2
[242] *Id.* (emphasis in original)
[243] *Id.* at *3
[244] *Id.* at *2
[245] *Id.*
[246] *Id.* at *3

The court recognized a company could waive its right to object to a defective appraisal demand as provided in an earlier chancery court decision.[247] The court found the *Reid* decision was consistent with the Delaware law on waiver.[248] The Delaware law on waiver is very similar to Iowa's recognizing a waiver could be express or implied.[249] With regard to an express waiver, the court determined there was nothing in the language of the letters sent to the beneficial shareholders which "expressly and unequivocally waive[d] respondent's right to challenge petitioners' demands" for appraisal.[250]

The court also examined whether the company's actions constituted an implied waiver. The Delaware law on implied waiver is also similar to Iowa's.[251] The court summarized the petitioner's argument in this manner:

> Petitioners' argument, at heart, is that respondent impliedly waived its right to object to petitioners' appraisal demand by sending the three letters. The crux of petitioners' argument appears to be that respondent waived its objection rights by sending petitioners the Effectiveness Notice on January 7, as required by Section 262(d)(1), and by sending petitioners a statement of shares not voted in favor of the Merger on February 12, as required by Section 262(e). Both sections placed similar requirements on respondent, in that they required respondent to send such correspondence to stockholders who had complied with Section 262 and properly perfected their appraisal rights. According to petitioners, under Section 262 respondent was only required to send these letters to stockholders who had properly perfected appraisal rights and thus respondent's sending of the letters to petitioners was tantamount to an acknowledgement that petitioners' appraisal demands would be treated as having met Section 262's requirements.[252]

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[247] *Id.* at *4 (citing *Reid v. Century Mining & Development Corp.,* 156 WL 54223, at *1 (Del. Ch. Dec. 19, 1956))
[248] *Id.*
[249] *Id.* (Waiver is "the voluntary and intentional relinquishment of a known right." "A waiver may be express or implied, but either way, it must be unequivocal. An express waiver exists where it is clear from the language used that the party is intentionally renouncing a right that it is aware of.")
[250] *Id.*
[251] *Id.* *5 ("an implied waiver of a right is possible, but only if there is "a clear, unequivocal, and decisive act of the party demonstrating relinquishment of the right." "A waiver will not be implied based on ambiguous acts. Further, a party's silence is never sufficient to establish a waiver where the party had no duty to speak.")
[252] *Id.* at *5

Shepard argues EMCI waived its right to challenge his assertion of appraisal rights because they sent him the appraisal rights notice and appraisal rights form on September 26, 2019. In addition, the notice stated they were using the "$36 per share as the 'value in calculating the amount to be paid to Mr. Shepard for the Appraisal shares provided he returns the Appraisal Rights Form prior to the Response Deadline in accordance with paragraph 1 above,' *i.e.,* November 5, 2019."[253] Shepard states he did exactly as he was told when he returned the appraisal rights form prior to November 5, 2019.

The court's review of the September 26, 2019 appraisal rights notice and appraisal rights form leads the court to the same conclusion reached by the *Dirienzo* court. There is nothing in the language of the letter that suggests EMCI expressly and unequivocally waived its right to challenge Shepard's assertion of appraisal rights at a later date. The appraisal rights notice and form were sent as required by Iowa Code section 490.1322.

Specifically, section 490.1322(1) requires the appraisal rights notice and appraisal rights form be sent to any shareholder who provided "written notice to the corporation of the shareholder's intent to demand payment if the proposed action is effectuated" and the shareholder did not vote for the merger.[254] Shepard complied with section 490.1322(1) with the letters sent to the company on September 16, 2019, September 17, 2019 and the return of his proxy vote where he voted against the merger. Accordingly, EMCI was required to send the appraisal rights notice and appraisal rights form to Shepard as mandated by section 490.1322(1). There is no language in the notice or form which suggests EMCI was waiving any challenges it may have to his assertion of appraisal rights.

[253] Shepard's Combined Reply in Support of his Motion for Summary Judgment and Opposition to EMCI's Summary Judgment Motion, at 17 (Polk Cty Dist. Ct. Jan. 10, 2020)
[254] Iowa Code § 490.1321(1)(a-b)

A comparison of the appraisal rights notice and form sent to Shepard with the statute indicates EMCI complied with the mandates of the statute.[255] The statute does not mandate EMCI inform Shepard of the requirements of section 490.1303(2)(b) in the appraisal rights notice or the form. Additionally, as required by section 490.1322(2)(c) EMCI provided another copy of the provisions of the statute.

Likewise, the court does not find the action of sending Shepard the notice and appraisal rights form created an implied waiver of their right to challenge any appraisal rights asserted by Shepard. As the court found in *Dirienzo* complying with the statute's mandate to send notice to the beneficial shareholders of their ability to assert appraisal rights was not an implied waiver of the company's right to challenge a beneficial shareholder's assertion of her/his appraisal rights.[256] As in Delaware statute's, Iowa's statute is silent as to whether EMCI had an "obligation to refrain from sending the appraisal rights notice and form to a shareholder who may have made a defective appraisal demand."[257]

Also the language used in the notice does not suggest a waiver. The notice acknowledges EMCI's receipt of the September 16, 2019 letter from Thomas Cauley indicating Shepard's intent to seek appraisal rights. The notice proceeds to tell Shepard it is being sent in accordance with the requirements under section 490.1322 and then advises him what he needs to do as mandated by section 490.1322. The final sentence of the notice tells him that a copy of the appraisal statute is provided. There is nothing in this language that suggests EMCI impliedly waived any challenge to Shepard's assertion of his appraisal rights. Accordingly, the court finds Shepard's motion for summary judgment on his waiver defense should be denied.

[255] *Compare* Iowa Code §§ 490.13.22(2)(a-c) *with* Cauley Decl., Ex. H (Polk Cty Dist. Ct. Dec. 9, 2019)
[256] *Dirienzo v. Steel Partners Holding L.P.,* 2009 WL 4652944, at *5
[257] *Id.*

B. Equitable Estoppel

With regard to his equitable estoppel defense Shepard argues EMCI intentionally concealed its position that Morgan Stanley's consent was insufficient for Shepard to perfect his appraisal right and concealed the cancellation of his shares for failing to remove them from the Cede records. EMCI concealed these facts until after his time to perfect appraisal rights expired.

His contention here is that EMCI knew he intended to exercise his appraisal rights before the vote. EMCI knew he voted against the merger, yet when his attorney sent a letter after he received payment about why Shepard received payment the only response he received was the appraisal rights notice and appraisal rights form. After his attorney sent another letter on September 27, 2019 asserting EMCI had not properly followed the statute by paying him for his shares on September 23, 2019 instead of by December 5, 2019, he never received any indication from EMCI his assertion of his appraisal rights through the Morgan Stanley Letter was insufficient. Nor did EMCI tell him his shares had been cancelled in September when he received payment. Shepard also argues the September 26th appraisal rights notice misled him into believing all he had to do to perfect those rights was to return the appraisal rights form. Further, EMCI never told him the $36 per share he received on September 23, 2019 was actually merger consideration but suggested he would receive $36 per share as EMCI's estimate of fair value in the appraisal rights notice.

The record is undisputed that EMCI did not respond to Cauley's letters of September 23 and 27, 2019. It is undisputed that EMCI never told Shepard the September 17, 2019 letter from Morgan Stanley was not sufficient to perfect his appraisal rights prior to November 5, 2019. It is undisputed that EMCI never informed Shepard the payment he received on September 23 of $36 per share for his 1.1 million shares was merger consideration. It is undisputed EMCI never told Shepard his shares were cancelled when he received the merger consideration payment.

As to the first element of the defense Shepard must establish EMCI did an affirmative act to conceal material facts. The court may relax this requirement if a fiduciary relationship existed between Shepard and EMCI.

The first question is whether EMCI made a false representation or concealed material facts. There is no dispute the proxy statement informed Shepard if his shares were held in the name of another person he needed to submit to EMCI the record holder's written consent to the assertion of these rights. In the same paragraph Shepard was informed he needed to review the IBCA statute "carefully and in its entirety" "due to the complexity of the procedures for exercising the right to seek appraisal."[258] He was also advised to seek the advice of legal counsel. Finally he was told his failure to comply with the statutory provision may result in the loss of the right of appraisal.[259]

The merger agreement also informed him that he needed to properly demand appraisal in writing in accordance with sections 490.1303 and section 490.1320-490.1326.[260] In the same paragraph he was told that if appraisal rights were not perfected properly the shareholder loses his right to appraisal and those shares are converted to merger consideration.[261] The merger agreement also informed Shepard that within two business days of the merger vote the merger consideration would be paid to the holder of record of a book-entry share. He was also informed any book-entry shares receiving merger consideration would be canceled.[262]

The court finds that EMCI prior to September 18, 2019 did not make any false representation or conceal any material facts from Shepard. Up to September 18, 2019 Shepard's defense of equitable estoppel is not applicable and his motion for summary judgment should be denied.

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[258] Strother Aff. I, Ex. A, at 10.
[259] *Id.*
[260] Strother Aff. II, Ex. D, § 1.6 at A-2
[261] *Id.* at A-2 to A-3
[262] FOF ¶ 41, Strother Aff. II, Ex. D, § 1.13 at A-5

Likewise, there was no affirmative false representation or concealment of material fact by EMCI after September 18, 2019. EMCI never told Shepard his assertion of appraisal rights was sufficient and never told him he had shares available for the appraisal process. The court finds there was no affirmative act by EMCI which would establish the first element of his defense.

The court's analysis, however, does not end here. If a fiduciary relationship existed between EMCI and Shepard the court must determine whether the proof under the first element should be relaxed since EMCI never responded to Cauley's letters of September 23 and 27, 2019.

In his motion Shepard does not argue that a fiduciary relationship existed on September 23, 2019 or thereafter. He presents no facts that demonstrate a fiduciary relationship existed. In the cases previously cited by the court in which our supreme court indicated a fiduciary relationship can exist between a corporate officer and a shareholder do not exist here. The only corporate officer, identified in the record before the court, would be Todd Strother. Strother was not negotiating with Shepard for the purchase of Shepard's shares for himself. There is nothing in the record that indicates Strother had any communication with Shepard regarding his shares or the exercise of his appraisal rights. There is nothing in the record that indicates Cauley had any communication with Strother regarding Shepard's shares or the exercise of Shepard's appraisal rights. Presuming Thrall, as counsel for EMCI, communicated with Strother there is no communication from Thrall to Shepard or his attorney that created any fiduciary relationship between Shepard and EMCI.

Cauley's September 23rd letter was to Thrall, a private attorney retained by EMCI, to represent it in a dispute between EMCI and Shepard regarding documents Shepard was entitled to receive prior to the merger vote.[263] The court presumes Thrall, as counsel for EMCI, informed Strother or an EMCI

[263] *Shepard v. EMC Insurance Group, Inc.,* Case No. CVCV058747, Order Re: Petition for Expedited Relief Compelling Inspection of Books and Records (Polk Cty Dist. Ct. Sep. 10, 2019)

representative of Cauley's September 23rd and 27th letters so Strother and/or EMCI was most likely aware of them shortly after they were received by Thrall. As a result did EMCI have a fiduciary relationship with Shepard requiring it to respond to Cauley's September 23rd and 27th letters?

Shepard complains since the only response he received response to the September 23rd letter was the September 26, 2019 appraisal rights notice and appraisal rights form he was led him to believe EMCI found his demand for appraisal rights on September 17, 2019 was proper. A review of the September 23rd Cauley letter does not lead to this conclusion.

In Cauley's letter, he informs Thrall, Shepard voted against the merger and exercised his right to an appraisal. He states EMCI paid Shepard $36 per share for Shepard's shares which he assumed was EMCI's estimate of the fair value. He understood EMCI would provide Shepard with an appraisal notice and inquired when it might be received. He makes no other inquiry nor does ask Thrall to confirm his assumption. The court finds the only request Cauley made was when Shepard would receive his appraisal notice.

The record demonstrates the appraisal rights notice was sent on September 26, 2019 by federal express to Shepard and Cauley and they acknowledged receipt on September 27, 2019 confirmed by Cauley's letter of September 27th letter.

The appraisal rights notice does not acknowledge Cauley's letter of September 23rd only his letter of September 16th noting Shepard voted against the merger. As noted above the appraisal was sent in compliance with the appraisal statute and makes no affirmative statement concerning the sufficiency of Shepard's assertion of appraisal. A review of the appraisal rights notice demonstrates there is no language in it that can be construed as a false representation or concealment of material facts. Furthermore, the statute does not require EMCI to comment on its perception of Shepard's assertion of his appraisal rights or whether he could seek appraisal because of the cancellation of his shares.

In response to the September 26th appraisal rights notice, Cauley sends his September 27th letter to Thrall. In that letter Cauley requests no response from Thrall or EMCI. Instead, Cauley outlines his belief EMCI did not comply with the statute when it paid Shepard its fair value too early. He states the early payment by EMCI does not require Shepard to accelerate his obligation to inform EMCI of his fair value estimate. He also tells Thrall Shepard intends to comply with all aspects of the IBCA. Cauley does not pose any question to Thrall. Rather he states "***if*** Mr. Shepard decides to continue to exercise his appraisal right by returning his appraisal rights form he will do so on or before November 5, 2019."[264] Under the statute if a shareholder votes against a merger she/he is not required to proceed to appraisal. The shareholder can either not return the appraisal rights form or withdraw their dissent.[265] Cauley's letter does not seek a reply from Thrall. It informs Thrall/EMCI of Shepard's intentions based upon the payment he received.

Under this record, EMCI concealed no material facts. The court does not find a fiduciary relationship existed between EMCI and Shepard when Cauley sent his letters and the letters do not make inquiry of EMCI instead they state Shepard's positions. Thus, EMCI's silence to these letters does not constitute an affirmative act of concealing material facts from Shepard. The court finds Shepard did not establish as a matter of law EMCI made a false representation or concealed any material facts. Since he cannot meet the first element necessary to establish equitable estoppel the court must deny his motion for summary judgment on this defense.

IT IS THEREFORE ORDERED AND DECLARED Shepard failed to perfect his appraisal rights as required under section 490.1303(2)(b) when he failed to obtain and submit written consent

[264] Cauley Decl., Ex. I (emphasis added)
[265] Iowa Code §§ 490.1322(2)(b)(2) and 490.1323(2)

from Cede & Co., the record shareholder, whose name the EMCI's shares were registered on the records of EMCI prior to November 5, 2019.

IT IS FUTHER ORDERED AND DECLARED Cede & Co. 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.

IT IS FURTHER ORDERED AND DECLARED the Security Position Report or "Cede breakdown" do not constitute records of the corporation under section 490.1303(8).

IT IS FURTHER ORDERED AND DECLARED Shepard failed to establish his defenses of waiver and equitable estoppel in his motion to dismiss/summary judgment. His motion on these defenses is denied.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL146273	EMC INSURANCE GROUP INC VS GREGORY M SHEPARD

So Ordered

L. P. McLellan

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