IN THE SUPREME COURT OF IOWA
No. 20-0698

EMC INSURANCE GROUP INC.
Plaintiff-Appellee,
vs.

GREGORY M. SHEPARD
Defendant-Appellant.

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

DEFENDANT-APPELLANT'S FINAL REPLY BRIEF

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INTRODUCTION

Contrary to Iowa's appraisal statute, on September 19, 2019, the day after the shareholder vote approving the squeeze-out merger, EMCI canceled Shepard's EMCI shares. EMCI argued to the District Court that Shepard irretrievably lost his ability to seek an appraisal when his shares were canceled. However, Shepard had followed the appraisal statute before his shares were canceled, and there is no dispute that record shareholder consent was not due until November 5, 2019 – six weeks after EMCI canceled his shares. By canceling Shepard's EMCI shares immediately after the shareholder vote, EMCI foreclosed Shepard's ability to obtain consent from Cede, even if such consent was necessary (which it is not). The District Court never addressed the fact that Shepard could not have obtained consent from Cede (or from anyone else) following EMCI's cancellation of Shepard's EMCI shares immediately after the merger was approved.

Now, EMCI does an about-face, and argues that Shepard could have requested that EMCI "return" his shares after EMCI had canceled them, and then sought to obtain Cede's consent. Not only is this argument flatly inconsistent with one of EMCI's principal arguments to the District Court, there is not a shred of evidence that canceled shares can ever be "returned." In any event, EMCI hid from Shepard the fact that EMCI had canceled his

shares until after the November 5, 2019 deadline for obtaining record shareholder consent.

In any event, Shepard did not need Cede's consent to exercise his appraisal right. Shepard perfected his appraisal right by obtaining Morgan Stanley's consent, because Morgan Stanley was the record shareholder for Shepard's EMCI shares under Iowa law. Iowa law defines the "record shareholder" as "the person in whose name shares are registered in the records of the corporation." Iowa Code § 490.1301(8). The Cede breakdown that DTC provided to EMCI before the merger vote was a "record of the corporation" – it was in EMCI's possession, and was undisputedly the list of "persons in whose names shares are registered." *Id.* The Cede breakdown is the list of registered shareholders that EMCI used to notify DTC participants – the banks and brokers who held shares for the ultimate, beneficial owners – of the upcoming shareholder vote, so that those banks and brokers could send proxy voting forms to beneficial owners. Because Shepard's broker, Morgan Stanley, is identified on the Cede breakdown, EMCI contacted Morgan Stanley and advised Morgan Stanley to send Shepard a proxy voting form.

EMCI's own proxy announcing the proposed merger expressly stated that a "record holder, such as a bank [or] brokerage firm [i.e., Morgan

Stanley] . . . may exercise appraisal rights" on behalf of beneficial shareholders. A251. Moreover, the pre-printed proxy voting forms that Morgan Stanley provided to Shepard expressly stated that Morgan Stanley was the "record holder" of Shepard's EMCI shares. A385. Finally, it is undisputed that federal law plainly establishes that DTC participants such as Morgan Stanley are "record shareholders."

EMCI incorrectly argues that recognizing banks and brokers as a record shareholder will upend the share immobilization system and cause uncertainty in shareholder ownership. Shepard never makes any argument relating to shareholder *ownership*. A finding that, under the Iowa appraisal statute, the Cede breakdown is a list of "the persons in whose names shares are registered in the records [of EMCI]" will have absolutely no impact on Cede's legal ownership of shares or on the share immobilization system. Iowa Code § 490.1301(8). DTC participants, like Morgan Stanley, can consent to their customers, like Shepard, exercising their appraisal right without having any impact whatsoever on Cede's role as the legal title holder to those shares.

Indeed, it is undisputed that the very purpose of the record shareholder consent requirement is to ensure that banks and brokers, like Morgan Stanley, are able to protect any security interests they may have, or be on

notice of, concerning beneficial shareholders' stock. To protect such security interests would be among the reasons that a bank or brokerage firm may withhold consent from a beneficial owner seeking to exercise an appraisal right. Cede's role as the name in which stocks are legally held is simply a necessary part of the share immobilization system designed to facilitate the easy transfer of shares between DTC participants on DTC's bookkeeping system. Cede, however, lacks any ability to hold a security interest in shares. Therefore, obtaining Cede's consent to the exercise of appraisal rights would serve no purpose. On the other hand, obtaining appraisal consent from a beneficial owner's bank or broker, which often hold security interests in their customers' securities (or are on notice of security interests held by others), would serve the purpose of the appraisal statute.

Recognizing that Morgan Stanley is indeed the record shareholder of Shepard's shares, EMCI now argues that Morgan Stanley's letter to EMCI did not in fact provide consent for Shepard to exercise his appraisal right. But the plain language of Morgan Stanley's letter to EMCI states that Shepard is "allow[ed] . . . to exercise his voting and appraisal rights with respect to the shares of EMCI." A397. Consistent with Morgan Stanley's letter, the District Court found: "[t]he consent was provided in the Morgan

Stanley Letter dated September 17, 2019." A745. In short, Morgan Stanley was the record shareholder under Iowa's appraisal statute and the District Court erred in holding otherwise.

EMCI waived any argument that Shepard was required to obtain Cede's consent. By secretly canceling Shepard's shares, EMCI made it impossible for Shepard to obtain any additional consents between the time of the shareholder vote on the merger and the November 5, 2019 deadline for obtaining record shareholder consent. By its conduct, EMCI thus waived its objection that Shepard failed to obtain Cede's consent.

EMCI should also be estopped from claiming that Shepard failed to obtain Cede's consent, because EMCI repeatedly misled Shepard. A timeline of relevant events is as follows:

- August 8 2019 – EMCI's proxy statement explains that "[a] *record holder*, such as a bank, *brokerage firm* or other nominee who holds shares as a nominee for several beneficial owners, *may exercise appraisal rights* with respect to the shares held for one or more beneficial owners, while not exercising this right for other beneficial owners." A251 (emphasis added).

- September 12, 2019 – DTC provides EMCI with the Cede breakdown, showing that Shepard's broker, Morgan Stanley, "appeared as a participant with respect to 1,123,502 shares of DTC's total position in EMCI." A737-38.

- September 16, 2019 – Shepard returns the preprinted proxy voting form he received from Morgan Stanley (which states on its face that Morgan Stanley is the "record holder" of Shepard shares) voting against the merger. Shepard also sends EMCI a cover letter

by email with the completed proxy voting form notifying EMCI of his intent to exercise his appraisal right. A740; A389.

- September 17, 2019 – Shepard again notifies EMCI by letter sent by email that he intends to exercise his appraisal right. Shepard's letter encloses a letter from Morgan Stanley – which appears on the Cede breakdown EMCI received five days earlier – consenting to Shepard's exercise of his appraisal right. A740; A397-98.

- September 18, 2019 – The shareholder vote to approve the squeeze-out merger occurs.

- September 19, 2019 – EMCI secretly cancels Shepard's EMCI shares without informing Shepard or responding to Shepard's two prior letters. A72 ¶ 40.

- September 20, 2019 – EMCI sends Shepard a check for $36 per share for Shepard's 1.1 EMCI million shares. The letter accompanying the check provides no explanation for the payment, and says nothing about merger consideration or that EMCI had canceled Shepard's EMCI shares. *See* A778-79.

- September 23, 2019 – Shepard receives the payment of $36 per share, and immediately sends EMCI a letter by email asking why it paid Shepard, given that payment of appraisal consideration was not due until December 5. Shepard further states that he understands the payment reflects the "fair value" payment required by the Iowa appraisal statute. A740-41; A400. EMCI never responded to Shepard's September 23, 2019 letter.

- September 26, 2019 – EMCI acknowledges receipt of Shepard's September 16 letter and provides Shepard with a personalized Appraisal Rights Notice. Shepard was one of only two dissenting shareholders who receives an Appraisal Rights Notice. EMCI made numerous misrepresentations to Shepard in its Appraisal Rights Notice:

    - EMCI tells Shepard that his 1.1 million EMCI shares are "Appraisal Shares," even though EMCI had already canceled those shares.

- EMCI tells Shepard that to "formally assert appraisal rights with respect to the Appraisal Shares, Mr. Shepard must proceed as follows:" complete, date, sign, and return the enclosed Appraisal Rights Form. A402. That assertion was false because EMCI had already canceled Shepard's shares, thereby foreclosing Shepard from asserting his appraisal right.

- EMCI tells Shepard that if he returned the Appraisal Rights Form by November 5, EMCI "will use [$36 per share] in calculating the amount to be paid to Mr. Shepard for the Appraisal Shares." A403. That assertion was false, because EMCI had already secretly canceled Shepard's shares.

- EMCI states that November 25, 2019 is the date by which Shepard must provide written notice to "withdraw the Appraisal Shares from the appraisal process." *Id.* That assertion was also false because EMCI had already secretly canceled Shepard's shares.

- September 27, 2019 – Shepard sends EMCI a letter by email, explaining that "EMCI clearly has not followed the appraisal process set forth in the Iowa Business Corporations Act," because it had already made the $36 per share estimated "fair value" payment to Shepard before Shepard had even returned his completed appraisal form, which was not due until November 5, 2019. A416. EMCI never responded to Shepard's September 27, 2019 letter.

- November 4, 2019 – Shepard returns his signed Appraisal Rights Form with a cover letter sent by email explaining that he has now perfected his right to an appraisal. A419. EMCI never responded to Shepard's November 4, 2019 letter.

- November 8, 2019 – six weeks after EMCI secretly canceled Shepard's shares – EMCI represents to the District Court in the separate books-and-records action that Shepard had advised EMCI that he intends to exercise his appraisal right. A45.

- EMCI first disclosed Shepard's alleged failure to comply with the

> appraisal procedure after the November 5, 2019 deadline for obtaining record shareholder consent had passed, when EMCI filed its declaratory judgment action claiming it was too late for Shepard to remedy his alleged failures to follow the appraisal process by obtaining Cede's consent.

EMCI's conduct should preclude it from claiming that Shepard was required to obtain Cede's consent to perfect his appraisal right.

ARGUMENT

EMCI does not dispute that the intent of the Iowa appraisal statute is to protect minority shareholders, like Shepard. Op. Br. p. 58. Courts have interpreted appraisal statutes liberally to "afford a simple and expeditious remedy to the dissenting shareholder." *Lawson Mardon Wheaton, Inc. v. Smith*, 734 A.2d 738, 747 (N.J. 1999). Indeed, EMCI concedes that "remedial statutes like those granting appraisal rights are liberally construed." EMCI Br. p. 55.

EMCI argues that despite the liberal construction of the appraisal statute, a beneficial shareholder may exercise its appraisal right "only if" the shareholder provides the record shareholder's written consent. Record shareholder consent is indeed a prerequisite to perfecting an appraisal right, but the definition of "record shareholder" should be construed liberally to protect Shepard's appraisal right as a dissenting shareholder. EMCI undisputedly knew that Shepard sought to exercise his appraisal right before,

unbeknownst to Shepard, EMCI canceled Shepard's shares and paid him merger consideration. To protect Shepard's right to an appraisal, this Court should find that Morgan Stanley's consent was sufficient for Shepard to perfect his appraisal right.

I. Morgan Stanley Was the "Record Shareholder" of Shepard's EMCI Shares.

Before the September 18, 2019 merger vote, EMCI had two shareholder lists provided by third parties: (1) AST's shareholder list showing that Cede held 9.4 million shares of EMCI stock; and (2) DTC's Cede breakdown, which shows the banks and brokerage firms that held those 9.4 million shares for their customers, the beneficial owners of EMCI shares. As the District Court found, the Cede breakdown showed that Morgan Stanley held "1,123,502 shares of DTC's total position in EMCI[.]" A737-38.

EMCI argues, without any support, that the AST list is the exclusive list of EMCI "record shareholders."[1] EMCI Br. p. 51. To the contrary, the undisputed evidence shows that the Cede breakdown *is* the list of "person[s]

[1] EMCI falsely suggests that the AST list is the "only one used by the issuer to determine which shareholders are eligible to exercise legal rights such as, e.g., voting, receiving dividends and interest, and asserting appraisal rights." EMCI Br. p. 48. The record is clear that EMCI used the Cede breakdown to notify record shareholders listed on the Cede breakdown, including Morgan Stanley, of the merger vote. A751.

in whose name shares are registered in the records of [EMCI]." Iowa Code § 490.1301(8). EMCI used the Cede breakdown as the list of registered shareholders – the banks and brokerage firms, including Morgan Stanley – to which EMCI mailed proxy voting forms.

The authority that Shepard cited in his opening brief, which EMCI ignores, establishes that under Iowa law a corporate record encompasses "*all papers*" that a corporation maintains in the regular course of its business. Op. Br. p. 48 (collecting authorities). Indeed, EMCI was required by federal law to obtain the Cede breakdown in connection with the squeeze-out merger for this very purpose. 17 C.F.R. § 240.14a-13(a) n.1 (2007) (explaining that in connection with proxy solicitations companies like EMCI have an affirmative obligation to "make appropriate inquiry" on DTC to identify DTC-participants that "may hold [the company's securities] on behalf of a beneficial owner."). As the District Court recognized, the Cede breakdown 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 vote and tabulating votes." A750.

At the same time it received the Cede breakdown from DTC, DTC also sent EMCI an Omnibus Proxy, which granted voting rights to all the

bank or brokerage firms listed on the Cede breakdown, so they could vote for or against the upcoming merger, based upon the wishes of their customers, the beneficial owners of EMCI shares. A737. The Omnibus Proxy formally acknowledged that the DTC participants on the Cede breakdown for EMCI were the record shareholders of EMCI shares. A737-38.

EMCI wrongly asserts that the Cede breakdown is not a list of "registered" shareholders. EMCI Br. pp. 50-51. To the contrary, as the District Court found, "in the Cede breakdown Morgan Stanley was listed as account number 0015 as the holder of 1,123,502 shares of EMCI stock. This included Shepard's 1.1 million shares."[2] A751. Moreover, the District Court found that the Cede breakdown "informed EMCI that Morgan Stanley was a record holder, as defined under federal securities law, for Shepard the beneficial owner." *Id*. A finding that Morgan Stanley was the record shareholder is also consistent with EMCI's own publicly-filed proxy, which expressly stated:

> A *record holder, such as a* bank, *brokerage firm* . . . may exercise appraisal rights with respect to the shares held for

[2] EMCI's claim that the Iowa appraisal statute does not allow EMCI "to look through DTC/Cede's position" makes no sense. EMCI Br. pp. 50-51 (internal quotations omitted).Morgan Stanley is shown as a registered shareholder on the face of the Cede breakdown that EMCI used to send proxy voting forms. *Id.*

one or more beneficial owners.

A251-52 (emphasis added). A385.

This Court should find that Shepard perfected his appraisal right by providing EMCI with Morgan Stanley's consent.

A. Morgan Stanley's Status As The Record Shareholder Of Shepard's EMCI Shares Is Consistent With The Federal Share Immobilization System.

EMCI incorrectly argues that if this Court holds that, under Iowa law, Morgan Stanley is "the persons in whose name [Shepard's] shares are registered in the records of [EMCI]," the Court's "decision would be at odds with the very fundamentals of the share-immobilization system . . . and outlined by Morgan Stanley to Shepard." Br. pp. 37, 46-47. In its amicus brief DTC likewise incorrectly argues that Shepard is "inaccurate and/or ambiguous in describing . . . the legal ownership of securities deposited at DTC" and that if Shepard's argument is "adopted by this Court" it would "undermine that essential goal of uniformity."[3] DTC Br. pp. 7-8. Contrary

[3] Throughout its amicus brief, DTC confuses "record shareholder," as defined under the Iowa appraisal statute, with the legal owner or record owner. *E.g.*, DTC Br. p. 7 (referring interchangeably to "legal ownership" and "record ownership"). However, the Iowa appraisal statute's definition of "record shareholder" does not reference *ownership* in any way. Instead, it provides that the record shareholder is "the person in whose name shares are registered in the records of the corporation." Iowa Code § 490.1301(8). Here, the legal owner of Shepard's EMCI stock on DTC's books was Cede.

to EMCI's and DTC's argument, Morgan Stanley's status under Iowa's appraisal statute as the record shareholder of Shepard's EMCI shares has *no* impact whatsoever on the share immobilization system. The share immobilization system relies on Cede holding *legal* title to all EMCI shares so that shares can easily be transferred on DTC's books, and Shepard has never questioned that fact. Indeed, under federal law – which established the share immobilization system – Morgan Stanley *is* undisputedly the record shareholder of Shepard's shares.

EMCI points to an email that Morgan Stanley sent to Shepard's counsel months after EMCI had filed a lawsuit claiming that Shepard failed to perfect his appraisal right. Contrary to EMCI's claim, that email is entirely consistent with Shepard's argument in this case. The email from a Morgan Stanley financial advisor simply explains that "[Morgan Stanley's] name is listed in the ownership records of DTC, and DTC's nominee name (Cede) is listed as the registered *owner* on the records of the issuer." EMCI Br. p. 27 (emphasis added). Again, Shepard has never disputed that Cede is the legal *owner* of Shepard's EMCI shares. But Morgan Stanley was listed as a shareholder on the Cede breakdown, which is an EMCI record of

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Shepard is not asking this Court to make any ruling to the contrary. But under Iowa's appraisal statute and the facts of this case, Morgan Stanley was a "record shareholder."

registered shareholders. Therefore, Morgan Stanley was the "record shareholder" of Shepard's shares under Iowa law.

DTC and EMCI also point to a form available on DTC's website that a shareholder could use to cause DTC to issue a shareholder a paper stock certificate so that a shareholder can exercise its appraisal rights. EMCI Br. p. 19; DTC Br. p. 18. There is no requirement in the Iowa appraisal statute for Shepard to use a form on DTC's website to request paper stock certificates, and EMCI certainly did not identify any such requirement in its proxy or in the Appraisal Rights Notice that EMCI sent to Shepard. To the contrary, the Iowa appraisal statute allowed Shepard to perfect his appraisal right by simply obtaining record shareholder consent and returning the appraisal rights form. Iowa Code § 490.1323(1).

Both EMCI and DTC point to Part 5 of Article 8 of the UCC, which is codified in Chapter 554 of the Iowa Code. EMCI Br. pp. 43-46; DTC Br. p. 19. While the UCC has nothing to do with appraisal rights or the "record shareholder" requirement under the Iowa appraisal statute, the UCC makes clear that:

> [I]nvestors do not hold direct registered (*legal*) title to securities in which they have acquired interests in public markets, but hold their interests as 'security entitlements' against their brokers or banks[.]" . . . *The beneficial owners may then give instructions to their respective banks and brokers "without affecting the record ownership of such*

securities, which remains with Cede & Co.

DTC Br. pp. 13-15 (emphasis added). This is precisely Shepard's argument. Cede held *legal* title to Shepard's EMCI stock, but his broker, Morgan Stanley, was the *record shareholder* for purposes of the appraisal statute. And by granting its consent to an appraisal, Morgan Stanley did not affect the record ownership of Shepard's EMCI shares, which at all times remained with Cede.

B. Shepard's Argument Is Consistent With Federal Law – Which Undisputedly Recognizes Morgan Stanley as the Record Shareholder.

It is crystal clear that "[f]ederal law . . . looks through DTC when determining a corporation's record holders," meaning that "the custodial banks and brokers remain the record holders." *In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2015 WL 4313206, at *6 (Del. Ch. July 30, 2015); *see also Kurz v. Holbrook*, 989 A.2d 140, 161 (Del. Ch. 2010) ("For purposes of federal law, the banks and brokers . . . [are] the record holders of the shares held by the depositories."), *aff'd in part, rev'd in part Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010). EMCI agrees that Morgan Stanley and other DTC participants were the "Federal Record Holders" under federal law. EMCI Br. at 32, 47. *See also* DTC Br. at 25 n.22 (noting that 17 C.F.R. § 240.14c-1(i) "defines record holders to include

participants" of DTC, like Morgan Stanley). Thus, a finding that Morgan Stanley, a DTC participant listed on the Cede breakdown, was a record shareholder under the Iowa appraisal statute would be consistent with federal law and promote uniformity between federal and Iowa law.

C. Shepard's Argument is Consistent with the Purpose of the Record Shareholder Consent Requirement.

As EMCI correctly recognizes, the purpose of obtaining "record shareholder" consent is to "permit the protection of any security interest in the shares." Br. p. 37 (emphasis omitted). It is undisputed that DTC and Cede do *not*, and cannot, hold security interests in any shares, nor would they be on notice of any such security interests. DTC is nothing more than a bookkeeping system where all shares are held in Cede's name so shares can be transferred internally on DTC's books from one DTC participant to another. DTC Br. p. 16. The Cede breakdown that DTC provides to issuers, like EMCI, identified to EMCI the DTC participants that could actually hold security interests in EMCI's shares or be on notice of such security interests held by others. *Id.* at 24 ("[I]n order to facilitate the transfer of information, DTC provides the issuer with [the Cede breakdown] that identifies each DTC Participant that holds the issuer's shares so that the issuer may contact those Participants directly.").

Here, the purpose of the record shareholder consent requirement was

satisfied when, on September 17, 2019 (two days before EMCI cancelled Shepard's shares), Morgan Stanley provided its written consent for Shepard to exercise his appraisal right. Morgan Stanley confirmed that Shepard held 1.1 million shares in two Morgan Stanley brokerage accounts. A393. Morgan Stanley further acknowledged that those shares had been purchased with loaned money, but Shepard was not restricted from exercising his appraisal right with respect to those 1.1 million shares. *Id.* Thus, the Cede breakdown enabled EMCI to confirm that Morgan Stanley – which held a security interest in Shepard's EMCI shares – consented to Shepard exercising his appraisal right with respect to those shares.

EMCI now argues that Morgan Stanley's letter "did not consent to Shepard's assertion of appraisal rights." EMCI Br. pp. 51-52. But the District Court correctly found that "[t]he consent was provided in the Morgan Stanley Letter dated September 17, 2019." Order p. 14. Indeed, the Morgan Stanley letter plainly states that Shepard is "allow[ed] . . . to exercise his voting and appraisal rights with respect to the shares of EMCI." A397. To "allow" means to "give consent to; to approve" or "[t]o grant permission." BLACK'S LAW DICTIONARY (11th Ed. 2019).

D. The Authority EMCI Cites Does Not Support EMCI's Argument.

EMCI incorrectly argues that if this Court holds that Morgan Stanley

is the record shareholder, "it would render Iowa law uniquely at odds with the law in states adopting identical or similar provisions from the MBCA." EMCI Br. p. 42. EMCI cites no authority holding that DTC participants are not deemed record shareholders under other states' statutes modeled on the MBCA. To the contrary, the comments to the MBCA appraisal provision that EMCI cites make clear that the record shareholder *may* be a broker, i.e., a "house nominee."[4] EMCI Br. at 44 (citing MBCA commentary) ("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 . . . .)."). Moreover, EMCI directed shareholders to obtain consent from their banks and brokers, stating that a "record holder, *such as a bank*, [or] *brokerage firm* . . . may exercise appraisal rights with respect to the shares held for one or more beneficial owners." A251 (emphasis added).

[4] "House nominee" refers to the brokerage houses that are DTC participants. *See DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005) (noting that "brokerage houses . . . h[o]ld . . . shares only as 'nominees' while the entities' clients held the beneficial title to the shares, also known as holding shares in 'street name.'"); *see also Nominee Account*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Nominee Account to be "a brokerage account in which the securities are owned by an investor but registered in the name of [a] brokerage firm" and noting that "[t]he certificate and the records of the issuing company show the brokerage as the holder of record").

EMCI argues that the District Court "followed" the Court's holding in *Graeser v. Phoenix Fin. Co. of Des Moines*, 254 N.W. 859 (Iowa 1934). EMCI Br. at 38. But *Graeser* was published decades before the Iowa legislature even enacted the appraisal statute and long before DTC was established, and involves a completely unrelated issue. In *Graeser*, the Iowa Supreme Court considered whether "the plaintiff, as [an] equitable owner, without having acquired the legal title by . . . transfer of the certificates of stock upon the books of the corporation, has the right to" sue the corporation to recover the value of her shares. *Id*. at 862. The Court held that an equitable holder "does have the right" to sue the corporation, despite the fact that their certificates "have not been transferred upon the books of the corporation." *Id*. *Graeser* deals with legal ownership under the pre-DTC system and has nothing to do with the list of "persons in whose names shares are registered" under Iowa's appraisal statute. Iowa Code § 490.1301(8).

EMCI's reliance on Delaware caselaw is also misplaced, and EMCI misstates the holdings of Delaware cases. Unlike the Iowa appraisal statute, the Delaware appraisal statute is not based on the MBCA. *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 371 & n.131 (Del. 2017). Moreover, as the court explained in *Dell*, no Delaware court has "address[ed] whether DTC participants should be regarded as record holders

for purposes of Delaware law, as they are for federal law." *Dell*, 2015 WL 4313206, at *22. Accordingly, "the question of whether DTC participants should be regarded as holders of record remains open for the Delaware Supreme Court to decide, should it wish to do so." *Id*., at *23.

DTC is off the mark in arguing that the "proposition that Shepard cites from *Crown EMAK* that 'the Cede breakdown should be considered part of the stock ledger' (Shepard Brief at 55), was squarely rejected by the Delaware Supreme Court." DTC Br. at 25. The Delaware Supreme Court expressly *declined* to rule on that question in *Crown EMAK*. The Delaware Supreme Court first acknowledged that "[t]he parties have extensively briefed and argued both sides of the issue of whether the Cede breakdown is (or is not) part of the 'stock ledger'" for purposes of Delaware law, then found "*it is unnecessary for this Court to decide that issue*, because a decision either way would not alter the result we have reached."[5] *Crown EMAK*, 992 A.2d at 398 (emphasis added). Thus, as Vice Chancellor Laster correctly observed several years after the *Crown EMAK* decision, "the question of whether DTC participants should be regarded as holders of record remains open for the Delaware Supreme Court to decide, should it

[5] The issue in *Crown EMAK* was whether sufficient shareholder votes had been obtained to amend the company's bylaws. *Crown EMAK*, 992 A.2d at 398. The assertion of appraisal rights was not at issue in *Crown EMAK*.

wish to do so." *Dell*, 2015 WL 4313206, at *23; *see also In re Dole Food Co., Inc.*, C.A. No. 8703-VCL, 2017 WL 624843, at *6 n.5 (Del. Ch. Feb. 15, 2017) (Laster, V.C.) ("I have therefore posited that Delaware law should . . . treat[] DTC participants as record holders for purposes of Delaware law, just as they are for purposes of federal law.").

EMCI's reliance on two cases from states other than Delaware is equally unavailing. EMCI Br. p. 41. As Shepard explained in his opening brief, both *Smith* and *Nelson* support Shepard's argument because they deal with situations where the court recognized that *brokers* can be the record shareholders. *Smith v. Kisorin USA, Inc.*, 254 P.3d 636, 637 (Nev. 2011) (recognizing that "those holding the stock in street name" may be "record [share]holders"); *Nelson v. R-B Rubber Prods., Inc.*, No Civ. 03-656-HA, 2005 WL 1334538, at *4-5 (D. Or. June 3, 2005) (beneficial shareholders failed to obtain and submit the "written consent of Mutual Securities, *their broker (and the record shareholder*) not later than the time the beneficial shareholder asserts dissenters' rights." (emphasis added)).

The treatises EMCI cites stand for the unremarkable and undisputed proposition that a demand for an appraisal by the beneficial owner of the stock without the consent of the record shareholder is insufficient to perfect an appraisal right. EMCI Br. p. 41 & n.28. Here, however, Shepard's

appraisal demand was accompanied by the consent of the record shareholder, Morgan Stanley. In fact, one of the sources EMCI cites states, consistent with Shepard's argument, that the record shareholder can be a beneficial owner's bank or brokerage firm. JAMES C. SEIFFERT, 17 KY. PRAC. CORP. LAW W FORMS § 3:124 (2019) ("If, however, the record shareholder serves as a nominee (e.g., in street name, or by depository or brokerage firm) for one or more beneficial shareholders, he may assert dissenters' rights as to a portion of the shares registered in his name.").

* * *

In summary, Shepard's position that Morgan Stanley is the record shareholder is consistent with the purpose of requiring record holder consent, with federal law and with case law in other states. Shepard's argument in no way conflicts with the policy of share immobilization, because Shepard agrees that Cede at all times held *legal title* to all EMCI shares. This Court should reverse the District Court's finding that Morgan Stanley's consent was not sufficient for Shepard to perfect his appraisal right and allow Shepard to adjudicate in an appraisal proceeding whether the $36 per share he received in the squeeze-out merger reflected the "fair value" of his EMCI stock.

II. By Canceling Shepard's Shares, EMCI Waived Any Objection that Shepard Was Required to Obtain Cede's Consent.

"[W]aiver can be shown by the affirmative acts of a party or can be inferred from conduct that supports the conclusion waiver was intended." *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982) (citation omitted). Here, it is undisputed that the deadline for Shepard to perfect his appraisal right was November 5, 2019. EMCI Br. p. 11. EMCI waived its argument that Shepard was required to obtain Cede's consent to an appraisal by secretly canceling Shepard's shares six weeks earlier, on September 19, 2019, which was the day after the vote of the squeeze-out merger. EMCI made it impossible for Shepard to obtain Cede's, or anyone else's, consent after his shares were canceled. Indeed, EMCI argued to the District Court that Shepard lost his appraisal right on September 19, 2019, when his shares were canceled. The District Court never addressed how Shepard could possibly have obtained Cede's consent (even if such consent was necessary, which it was not) given EMCI canceled his shares immediately after the merger vote.

EMCI argues that the Merger Agreement allowed EMCI to cancel Shepard's shares on September 19. As an initial matter, EMCI cannot modify or amend Iowa's appraisal statute. Under the Iowa appraisal statute, Shepard had six weeks, until November 5, 2019, to obtain record

shareholder consent – which EMCI took away by canceling Shepard's shares immediately after the merger vote. In any event, the Merger Agreement did *not* give EMCI the right to cancel Shepard's shares on September 19. A597. Under the Merger Agreement, cancellation of the shares could only occur if the shareholder "failed to perfect" its appraisal right. A446-47. The undisputed deadline to perfect an appraisal right was November 5. In short, EMCI's cancelation of Shepard's EMCI shares on September 19 was completely unjustified.

EMCI argues that Shepard "could have contacted EMCI to complain that the cancellation contravened the Agreement, and sought the return of his shares in order to perfect his appraisal rights." EMCI Br. p. 59. But EMCI concealed its cancellation of Shepard's shares until after the November 5, 2019 deadline for record shareholder consent. Moreover, EMCI provides no authority allowing it to "return" publicly-traded shares to a beneficial owner after those shares had been canceled. Indeed, one of EMCI's principal arguments to the District Court was that Shepard irretrievably lost the ability to pursue his appraisal rights because his shares had been canceled the day after the merger vote. Op. Br. pp. 17-18. *See also* EMCI Br. at 35 n.23 (arguing that Shepard's shares were "converted into Merger Consideration" on September 19, 2019, "so Shepard's return of his Appraisal Form" on

November 4, 2019, could not perfect his appraisal right).

EMCI also argues that Shepard was required to deposit share certificates to perfect his appraisal right. *Id.* at 34. However, as EMCI recognizes, the District Court rejected that argument, and rightly so. *Id.* at 34 n.23. Section 1323 of the Iowa appraisal statute allows a shareholder to perfect its appraisal right by obtaining record shareholder consent and returning the corporation's appraisal form – which is exactly what Shepard did on November 4, 2019.

In summary, EMCI's affirmative conduct in canceling Shepard's shares on September 19, 2019 (and paying him merger consideration), precluded him from obtaining Cede's consent before November 5, 2019. EMCI has therefore waived its objection that Shepard was required to obtain Cede's consent to perfect his appraisal right.

III. EMCI is Estopped From Objecting that Shepard Failed to Obtain Cede's Consent.

Equitable estoppel prevents "one party who has made certain representations from taking unfair advantage of another." *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 606 (Iowa 2004). EMCI made numerous misrepresentations to Shepard that Shepard relied upon to his detriment.

In its proxy, EMCI represents that "[a] record holder, such as a bank,

brokerage firm . . . may exercise appraisal rights." A251. That statement was false to the extent EMCI now claims that Cede, and only Cede, may consent to an appraisal right for a beneficial shareholder – a position that EMCI nowhere explained in its proxy or in response to Shepard's five letters. If at any point prior to November 5, 2019 EMCI had told Shepard that EMCI believed that Shepard was required to obtain Cede's consent to perfect his appraisal right, Shepard would have readily obtained such consent. There can be no dispute that Cede would have provided such consent, because Cede holds no security interests in stock and has no interest in whether a beneficial owner exercises its appraisal right.

EMCI incorrectly argues that it "never told Shepard his assertion of appraisal rights was sufficient; it never told Shepard he had shares [that] were available for the appraisal process; and it never indicated any intent to honor Shepard's demands." EMCI Br. p. 64. EMCI did precisely those things in the September 26, 2019 personalized Appraisal Rights Notice EMCI sent to Shepard – one week after it had canceled Shepard's shares. In the Appraisal Rights Notice EMCI:

- Acknowledges that "Shepard's intent to seek appraisal rights with respect to 1,100,000 shares of Company [EMCI] stock (the 'Appraisal Shares')." A402.
- EMCI expressly tells Shepard his 1.1 million shares were "Appraisal Shares." *Id.*

- EMCI clearly indicates its intent to honor Shepard's prior appraisal demand by telling Shepard that he need only complete, date, sign and return the appraisal form to "formally assert appraisal rights." *Id.*
- EMCI further states that it "will use [$36 per share] in calculating the amount to be paid to Mr. Shepard for the Appraisal Shares." A403.
- EMCI also tells Shepard that he had Appraisal Shares available, stating that November 25, 2019 was the date by which Shepard must provide written notice to "withdraw the Appraisal Shares from the appraisal process." *Id.*

Each of EMCI's statements in the Appraisal Rights Notice was utterly false. Unbeknownst to Shepard, EMCI had already canceled Shepard's shares, paid him merger consideration and foreclosed his ability to participate in the appraisal process prior to sending him the Appraisal Rights Notice. Importantly, the Appraisal Rights Notice that EMCI sent to Shepard was not a mass mailing. EMCI sent it to just two dissenting shareholders. EMCI plainly knew what it was doing.

EMCI's argument that Shepard "did not exercise reasonable care and diligence in pursuing his rights," EMCI Br. p. 64, is belied by the record. Shepard wrote to EMCI's in-house and outside counsel concerning the assertion of his appraisal right *five* times between September 2019 and November 4, 2019. Aside from simply acknowledging receipt of Shepard's September 16 letter requesting an appraisal, EMCI ignored all Shepard's letters. It was only after the November 5, 2019 deadline had come and gone

did EMCI disclose that Shepard's shares had been canceled six weeks earlier, and that EMCI believed Cede's consent was necessary.

EMCI's argument that Shepard "raised no actual questions about his subsequent receipt" of merger consideration strains credibility. *Id.* at 65. As soon as Shepard received the $36 per share payment from EMCI, Shepard immediately sent two letters to EMCI by email questioning the payment and stating that Shepard understood the payment to be an early payment of appraisal consideration. EMCI never responded to Shepard that the payment was merger consideration and that his shares had been canceled on September 19. Instead, EMCI kept quiet until the November 5 deadline had passed.

EMCI also incorrectly argues that *Dirienzo v. Steel Partners Holdings L.P.*, Civil Action No. 4506-CC, 2009 WL 4652944 (Del. Ch. Dec. 8, 2009) is a similar case to this one. In *Dirienzo*, a beneficial shareholder did not dispute that his broker failed to provide any consent for an appraisal. *Id.*, at *1. Rather, the beneficial shareholder claimed that the company waived and was estopped from objecting that the beneficial shareholder failed to properly obtain such consent. *Id.*, at *1, *4. The court recognized that "a company may waive its right to object to a defective appraisal demand." *Id.*, at *4. However, unlike EMCI's letters in this case, the court in *Dirienzo*

found that the company's letters did not constitute an express or implied waiver or estoppel because they did "not in any way indicate intent to honor the [plaintiff's appraisal] demand[]." *Id.* at *5, *7. Here, by contrast, EMCI *did* expressly indicate its intent to honor Shepard's appraisal demand. EMCI told Shepard in no uncertain terms that if he signed and returned the appraisal form that EMCI had provided to him by November 5, he was entitled to the payment of $36 for his "Appraisal Shares," and that he could only withdraw from the appraisal process by providing written notice to EMCI by November 25. Of course, neither of EMCI's representations to Shepard was true because EMCI had already canceled Shepard's shares.

In short, EMCI is estopped from arguing that Cede's consent was required for Shepard to perfect his appraisal right.

CONCLUSION

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

/s/Thomas K. Cauley Jr.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,699 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

Dated: October 28, 2020

/s/Thomas K. Cauley, Jr.

PROOF OF SERVICE

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

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