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Case No. 4506-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FREDERICK H. DIRIENZO, JOHANNA C. & FREDERICK H. DIRIENZO, joint tenants, THOMAS R. PILOT JR. 1992 IRREVOCABLE TRUST FBO KATHRYN K. PILOT, CYNTHIA S. PILOT, ALYSSA C. DIRIENZO, AMARA L. DIRIENZO, DEBORA T. HOLSTEIN, and DEBORA S. LUTZ Petitioners, v. STEEL PARTNERS HOLDINGS L.P., f/k/a WEBFINANCIAL L.P., a Delaware limited partnership Respondent.	)	Civil Action No. 4506-CC

MEMORANDUM OPINION

Date Submitted: September 8, 2009
Date Decided: December 8, 2009

Michael A. Weidinger and Joanne P. Pinckney, of PINCKNEY, HARRIS & WEIDINGER LLC, Wilmington, Delaware, Attorneys for Petitioners.

John M. Seaman, of ABRAMS & BAYLISS LLP, Wilmington, Delaware, Attorneys for Respondent.

CHANDLER, Chancellor

Presently before the Court is the issue of petitioners' standing to demand appraisal of their shares under 8 *Del. C.* § 262. Petitioners and respondent have filed cross-motions for summary judgment on this issue. I conclude that petitioners are not entitled to appraisal because they failed to comply with the record holder requirement of Section 262(a). Further, I conclude that respondent did not waive its right to object to petitioners' failure to comply with the record holder requirement, nor did it acquiesce to or accept that failure. Finally, I conclude that any alleged disclosure violations of respondent or its management do not relieve petitioners of their obligation to comply with Section 262(a)'s record holder requirement in demanding appraisal.

I. BACKGROUND

On December 8, 2008, WebFinancial Corporation (the "Company") mailed a notice (the "December 8 Notice") to its stockholders of record as of November 25, 2008 informing them of a special meeting that would take place on December 29, 2008. The December 8 Notice explained that the purpose of the meeting was to vote on a proposal to merge the Company with and into a newly formed Delaware limited partnership, WebFinancial L.P. ("respondent"), pursuant to which respondent would be the surviving entity and the stockholders of the Company would become limited partners of respondent (the "Merger"). The December 8 Notice also disclosed the Merger consideration stockholders would receive, the

mechanics for paying the Merger consideration, and the possibility of a second, post-Merger business combination between respondent and another entity.

The bulk of the December 8 Notice discussed the stockholders' appraisal rights and the requisite procedures for perfecting those rights. The December 8 Notice warned stockholders that if they wished to exercise their appraisal rights they should review the appraisal rights discussion in the notice as well as an attached copy of the Delaware appraisal statute.[1] The December 8 Notice specifically informed stockholders that only the record owner of their stock could demand appraisal and encouraged beneficial owners of Company stock to contact the record owners of their shares to demand appraisal. The December 8 Notice informed stockholders of the respondent's obligation to notify stockholders when the Merger was complete and, in that regard, stated that a notice would "only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares of Common Stock in accordance with Section 262."[2]

On December 15, 2008, petitioner Frederick H. DiRienzo received and read the December 8 Notice. The next day, DiRienzo began communicating with his broker, Colin Cookson at Banc of America Investment Services, Inc. ("BofA ISI"), regarding his appraisal rights. On December 19, 2008, DiRienzo instructed his

[1] 8 *Del. C.* § 262.
[2] Seaman Aff. Ex. 5 at 4-5.

broker to demand appraisal for the shares of Company stock that DiRienzo managed and controlled on behalf of all petitioners in this action. Cookson forwarded a copy of DiRienzo's letter to Company counsel. DiRienzo also emailed and faxed a copy of his letter to Company counsel. In addition, petitioners Deborah S. Lutz, Amara L. DiRienzo and Cynthia S. Pilot wrote letters to Company counsel purporting to demand appraisal.

On December 23, 2008, after receiving the forwarded demand letter from BofA ISI, Company counsel wrote an acknowledgement letter to BofA ISI that read, in its entirety, as follows:

> Dear [Mr. Cookson]:
>
> This letter is to acknowledge receipt of the request for appraisal rights for the following stockholders of [the Company]:

Frederick H. DiRienzo SEP	Account…	7,000 Shares
Johanna C. & Frederick H. DiRienzo	Account…	2,000 Shares
1992 Irr. Tr. FBO Kathryn K. Pilot	Account…	1,500 Shares
Cynthia S. Pilot	Account…	10,000 Shares
Alyssa C. DiRienzo	Account…	1,250 Shares
Amara L. DiRienzo	Account…	500 Shares
Deborah T. Holstein SEP	Account…	2,000 Shares
Deborah S. Lutz Roth	Account…	2,000 Shares

> Please contact me . . . with any questions.
>
> Regards,
> Jason S. Saltsberg[3]

[3] Seaman Aff. Ex. 17.

On December 22, 2008, the Company mailed a supplemental notice (the "Supplemental Notice") to stockholders with additional information regarding the Merger. The Supplemental Notice summarized the partnership agreement and related documents that would govern respondent post-Merger, disclosed financial information regarding the Company, and discussed risk factors that stockholders should consider before deciding whether to approve the Merger. The Supplemental Notice explained that many of the post-Merger details, including the partnership agreement, were "still being negotiated" and could differ materially from the details disclosed in the Supplemental Notice.[4] It also informed stockholders that the Company's board had not yet decided whether to approve the Merger and that the Merger would not be put to a stockholder vote on December 29 unless the board first approved the Merger. The board ultimately approved the Merger, and on December 29 it was put to a stockholder vote. It appears that the board never informed stockholders why they believed the Merger would be good for the Company. Petitioners received the Supplemental Notice on January 2, 2009, two days after the Merger was effectuated.

The Merger was approved by stockholders on December 29, 2008 and became effective December 31, 2008. On January 7, 2009, respondent's counsel

[4] Seaman Aff. Ex. 7 at 2.

sent DiRienzo a letter "on behalf of the following stockholders[5] of [the Company] who have demanded appraisal rights"[6] to inform them that the Merger was effective. Attached to this letter was a document titled "Notice of Merger of [the Company] with and into [respondent]"[7] (the "Effectiveness Notice"). The salutation in the Effectiveness Notice read: "To the Former Stockholders of Common Stock of [the Company] Who Are Entitled to Appraisal Rights and Who Have Demanded Appraisal."[8] The body of the Effectiveness Notice informed recipients that the Merger had been completed and that record holders of the Company's common stock might be entitled to appraisal rights. The last paragraph of the Effectiveness Notice explained that record holders who wished to exercise appraisal rights must have made a written demand on the Company prior to December 29—the date that stockholders approved the Merger—and specifically referred stockholders to the December 8 Notice "for a description of the procedures *that must be followed* to perfect appraisal rights."[9]

Thereafter, on January 30, 2009, petitioners' counsel made a request pursuant to Section 262(e) for a statement setting forth the aggregate number of shares not voted in favor of the Merger and with respect to which demands for

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[5] The phrase "the following stockholders" was followed by the same list of petitioners and their beneficially owned shares as was included on the December 23, 2008 acknowledgment letter.
[6] Seaman Aff. Ex. 18.
[7] DiRienzo Aff. Ex. E.
[8] *Id.*
[9] *Id.* (emphasis added).

appraisal had been made. On February 12, 2009, respondent's counsel replied 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."[10]

On April 13, 2009, petitioners filed an appraisal petition pursuant to Section 262 asking the Court to appraise their beneficially owned shares of the Company's common stock. On May 15, 2009, respondent filed an answer. In its answer respondent asserted as an affirmative defense that petitioners had failed to comply with the requirement of Section 262(a) that a demand for appraisal be made by a holder of record.

Petitioners were, at all times prior to the Merger, beneficial owners of the Company's common shares. They were not record holders listed on the Company's stock ledger. Petitioners' broker, BofA ISI, was not a record holder of the Company's shares either. The record owner of petitioners' shares at all relevant times prior to the Merger was Cede & Company, a central security depository.

To address the parties' dispute concerning petitioners' standing to assert an appraisal claim and the validity of petitioners' appraisal demand, counsel for the parties agreed to an entitlement hearing process contemplated by 8 *Del. C.*

[10] Seaman Aff. Ex. 20.

§ 262(g). The parties agreed to stay discovery on the merits of petitioners' appraisal claims and exchanged discovery only on the issue of standing and the sufficiency of the appraisal demands. Once discovery was complete, petitioners and respondent filed cross-motions for summary judgment on the issue of standing. I now address those motions.

II. ANALYSIS

A. The summary judgment standard

A motion for summary judgment should be granted when the record establishes that, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact and it is clear that the moving party is legally entitled to judgment.[11]

B. The record holder requirement in an appraisal proceeding

Delaware's appraisal statute enumerates specific requirements that a stockholder must strictly comply with to be legally entitled to an appraisal remedy. Included in these requirements is the condition that the person or entity demanding appraisal must be a "holder of record" of the stock for which appraisal is sought.[12]

[11] *Haft v. Haft*, 671 A.2d 413, 414-15 (Del. Ch. 1995) (citing *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991)); *see also* CH. CT. R. 56.
[12] 8 *Del. C.* § 262(a).

This Court has repeatedly held that only stockholders of record have standing to pursue an appraisal.[13] Consistent with that principle, the Court has held that a *beneficial owner* of shares has no right to demand appraisal under Section 262.[14] To be entitled to appraisal, the beneficial owner must ensure that the record holder of his or her shares makes the demand.[15] This requirement has been strictly enforced by Delaware courts. For example, an appraisal demand made by a beneficial owner's broker has been deemed defective when the shares were actually held of record by the broker's nominee.[16] In fact, Delaware courts have held appraisal demands to be invalid where they were made by a beneficial owner *even in instances where the identity of the record holder was known* by the respondent corporation.[17]

It is undisputed that petitioners in this action were not record holders of the Company's stock when the demand for appraisal was made. Accordingly, the technical requirements of Section 262 were not met. Petitioners argue, however, that their failure to comply with Section 262 should be excused because of

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[13] *E.g., Enstar Corp. v. Senouf*, 535 A.2d 1351, 1352 (Del. 1987).
[14] *Id.* at 1352-53; *Engel v. Magnavox Co.*, 1976 WL 1705, at *1 (Del. Ch. Apr. 22, 1976) ("a purported [demand] letter . . . is void if it is not written by the owner of record, even if written by the beneficial owner.").
[15] *Enstar Corp.*, 535 A.2d at 1352-53 ("If the stock is owned of record in a fiduciary capacity, such as by a trustee, guardian or custodian, the demand should be made in that capacity . . . .").
[16] *Neal v. Alabama By-Products Corp.*, 1988 WL 105754 (Del. Ch. Oct. 11, 1988).
[17] *See Enstar Corp.*, 535 A.2d at 1356 ("demands for appraisals made by the beneficial owners of stock, rather than the stockholders of record, [are] invalid[], even [if] the identity of the holder of record [is] known.") (citing *Raynor v. LTV Aerospace Corp.*, 331 A.2d 393 (Del. Ch. 1975) and *Engel v. Magnavox Co.*, 1976 WL 1705 (Del. Ch. Apr. 22, 1976)).

respondent's conduct. Specifically, petitioners argue (i) that respondent waived its right to object to the sufficiency of petitioners' appraisal demands in the letters respondent sent to petitioner on December 23, 2008, January 7, 2009, and February 12, 2009, (ii) that respondent acquiesced in petitioners' demands for appraisal by behaving as though it had no objection to the efficacy of petitioners' demands prior to this litigation, (iii) that respondent should be estopped from objecting to petitioners' standing to seek appraisal because the notices sent to inform stockholders of the special meeting to approve the Merger contained inadequate or defective disclosures, and (iv) that respondent should be estopped from objecting to petitioners' standing to seek appraisal because petitioners relied on respondent's letters of December 23, 2008, January 7, 2009, and February 12, 2009 as an acknowledgement that respondent would treat petitioners' appraisal demands as legally sufficient. I address each of petitioners' contentions in turn.

C. Respondent did not waive its right to object to petitioners' defective appraisal demands

Petitioners argue, correctly, that a company may waive its right to object to a defective appraisal demand. In support of this proposition they cite *Reid v. Century Mining & Development Corporation*.[18] In that case, the stockholder-petitioner's attorney sent a letter to an authorized agent of the respondent-corporation explaining the various steps taken by the stockholder to demand

[18] 1956 WL 54223 (Del. Ch. Dec. 19, 1956).

appraisal. The agent's response to the attorney stated that the stockholder would "be recognized by the corporation as an objector to the Agreement of Merger as defined by Section 262 of the Delaware Corporation Law."[19] Later, during the appraisal litigation, the corporation argued that the stockholder's appraisal demand was defective and that the statement of its agent did not waive the corporation's right to object to the adequacy of the stockholder's demand. This Court disagreed, concluding that the agent's representation that the stockholder would be treated as having made a valid demand under Section 262 was binding on the corporation.[20]

The result in *Reid* is consistent with general principles of waiver. Under Delaware law, a waiver is "the voluntary and intentional relinquishment of a known right."[21] A waiver may be express or implied, but either way, it must be unequivocal.[22] 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. In *Reid*, the corporation's agent made an express, unequivocal representation that the stockholder would be treated as having made an adequate appraisal demand under

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[19] *Id.* at *1 (internal citations omitted).
[20] *Id.* at *2. Petitioners also argue that *Christen v. Trados Inc.*, C.A. No. 1512-CC (Weidinger Aff. Ex. B, May 1, 2008 Tr. at 30, 56-57), supports the rule that the right to object to a defective appraisal demand can be waived. I note here that *Christen* didn't address a defective appraisal at all, but rather dealt with a questionable shareholders' agreement in which parties to the agreement purportedly waived their right to demand appraisal. Thus, petitioners' reliance on *Christen* is misplaced, though it remains a correct proposition that the right to object to a defective appraisal can be waived.
[21] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982).
[22] *Rose v. Cadillac Fairview Shopping Ctr. Properties (Del.), Inc.*, 668 A.2d 782, 786 n.1 (Del. Super. Ct. 1995).

Section 262. This was an express waiver of the corporation's right to object to the stockholder's noncompliance with Section 262.

In this case, respondent did not expressly waive its right to object to petitioners' demands. As described previously, respondent sent three letters of correspondence to petitioners on December 23, 2008, January 7, 2009, and February 12, 2009. None of the language respondent used in these letters expressly and unequivocally waives respondent's right to challenge petitioners' demands. None of the language is akin to the language used by the respondent in *Reid.*

Where no express language is used, 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."[23] A waiver will not be implied based on ambiguous acts.[24] Further, a party's silence is never sufficient to establish a waiver where the party had no duty to speak.[25]

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

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[23] 28 AM JUR. 2D *Estoppel and Waiver* § 209 (2009); *accord Realty Growth Investors*, 453 A.2d at 456.
[24] *Vechery v. Hartford Accident & Indem. Ins. Co.*, 121 A.2d 681, 685 (Del. 1956).
[25] *Faill v. Faill*, 303 A.2d 679, 682 (Del. Super. Ct. 1973).

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.[26] 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.

I am not convinced that respondent impliedly waived its right to object to petitioners' appraisal demands by sending the letters. Petitioners are correct that respondents were legally required to send the Effectiveness Notice and the statement of shares only to those stockholders who had properly perfected appraisal rights. But it does not follow that by sending such notices to stockholders who had not properly perfected appraisal rights respondent impliedly

[26] 8 *Del. C.* § 262(d)(1) reads, in relevant part: "Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation *shall notify each stockholder of each constituent corporation who has complied with this subsection* . . . that the merger or consolidation has become effective . . . ." (emphasis added). 8 *Del. C.* § 262(e) reads, in relevant part: "any stockholder *who has complied with the requirements of subsections (a) and (d) of [Section 262]*, upon written request, *shall be entitled* to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares." (emphasis added).

waived its right to later object to the improper perfection.[27] Sections 262(d)(1) and (e) are both silent regarding respondent's obligation to refrain from sending such correspondence to stockholders who have made a defective appraisal demand. Thus, these sections cannot be read to have required respondent to immediately determine the insufficiency of petitioners' demands and refrain from sending them the letters or risk waiving the right to later object to the insufficiencies in a formal appraisal proceeding.[28]

A brief analysis of the content of each of the three letters makes plain that they were not an implied waiver of respondent's objection right. The December 23, 2008 letter simply acknowledges receipt of a demand for appraisal by petitioners and identifies the number of shares for which a demand was purportedly made. The letter does not comment on the sufficiency of the demands received and does not in any way indicate intent to honor the demands or to refrain from later challenging them. This letter is insufficient to establish an implied waiver.

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[27] Of course, if respondent had expressly and unequivocally waived its right to object to petitioners' defective appraisal demands in the letters, it would be bound by that waiver. But none of the letters contained such a waiver.

[28] This is consistent with prior decisions of this Court which have held that it is not an implied waiver to include defective appraisal demands on the verified list of stockholders demanding appraisal that *8 Del. C.* § 262(f) requires to be filed with the Court. E.g., *Raynor v. LTV Aerospace Corp.*, 317 A.2d 43, 46 n.5 (Del. Ch. 1974); *In re Universal Pictures Co.*, 37 A.2d 615, 623 (Del. Ch. 1944), *overruled on other grounds by Zeeb v. Atlas Powder Co.*, 87 A.2d 123, 128 (Del. 1952). If this is not an implied waiver, it stands to reason that the mere fact that Section 262(d)(1) and (e) notices were sent to all parties who made a demand, including those with defective demands, also should not be an implied waiver.

The January 7, 2009 letter, with the Effectiveness Notice attached, was sent to DiRienzo on behalf of all petitioners in this action to notify them of the Merger's completion. Petitioners lean heavily on the salutation in the Effectiveness Notice as evidence that respondent agreed to treat petitioners as having properly perfected appraisal rights. The salutation reads: "To the Former Stockholders of Common Stock of [the Company] Who Are Entitled to Appraisal Rights and Who Have Demanded Appraisal."[29] On its face and standing alone, this statement could be construed as an acknowledgment by respondent that it was sending the Effectiveness Notice only to stockholders who had properly perfected appraisal rights. But it could also be construed as a conditional salutation indicating that the Effectiveness Notice is addressed to *only* those stockholders who have complied with Section 262 (*i.e.*, "who are entitled to appraisal rights").[30] Thus, on its face and standing alone, the meaning of the salutation is ambiguous and insufficient to demonstrate an implied waiver. In any event, when the salutation is read in conjunction with the entire Effectiveness Notice it is clear that it is not an implied waiver. The body of the Effectiveness Notice clearly referred petitioners to Section 262's requirements. Specifically, the last paragraph of the Effectiveness Notice referred stockholders to the December 8 Notice "for a

[29] DiRienzo Aff. Ex. E.

[30] Conditional salutations are common in business correspondence. The frequently used "To Whom It May Concern" is an example.

description of the procedures [in Section 262] *that must be followed* to perfect appraisal rights."[31] Thus, respondent plainly stated in the Effectiveness Notice that Section 262's requirements had to be complied with to be entitled to appraisal rights.

Admittedly, there is one problematic issue related to the Effectiveness Notice. The December 8 Notice sent by respondent to inform stockholders of the Merger contained a paragraph that stated "the Effectiveness Notice will only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares of Common Stock in accordance with Section 262."[32] Petitioners argue that respondent waived its right of objection by sending them the Effectiveness Notice after including this paragraph in the December 8 Notice. If I were permitted to view these two facts—the paragraph from the December 8 Notice and petitioners' receipt of the Effectiveness Notice—in a vacuum, I would be inclined to agree that this was an implied waiver by respondent. But in evaluating whether an implied waiver has occurred, I must look at all of respondent's relevant conduct. For example, the December 8 Notice contained a thorough discussion of the procedures a stockholder must comply with to perfect appraisal rights and specifically warned that "[a]ny holder of common stock who wishes to exercise appraisal rights . . . should review the following

[31] DiRienzo Aff. Ex. E (emphasis added).
[32] Seaman Aff. Ex. 5 at 4-5.

discussion and the attached statute carefully because failure to timely and properly comply with the procedures specified will result in loss of appraisal rights under the DGCL."[33] Moreover, as I've already noted, in the Effectiveness Notice respondent referred recipient stockholders to the discussion in the December 8 Notice and asserted that those procedures "*must be followed* to perfect appraisal rights."[34] If I view respondent's sending of the Effectiveness Notice to petitioners as an act of waiver I cannot reconcile that with the language in the Effectiveness Notice that reaffirms the necessity of stockholders complying with Section 262. Thus, I must conclude that respondent's actions in sending the Effectiveness Notice were equivocal and ambiguous. It is not clear from respondent's acts that a waiver was intended and so one must not be inferred.

The February 12, 2009 letter was sent in response to a letter from petitioners' counsel requesting a statement of shares not voted in favor of the Merger. The entire substance of the letter was 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."[35] Again, this letter does not comment on the sufficiency of the demands received and does not in

[33] *Id.* at 3.
[34] DiRienzo Aff. Ex. E (emphasis added).
[35] Seaman Aff. Ex. 20.

any way indicate intent to honor the demands or to refrain from later challenging them.[36] This letter is insufficient to establish an implied waiver.

In sum, nothing in Section 262 requires a company to notify dissenting stockholders prior to the filing of an appraisal petition that they failed to comply with Section 262. The court determines those who are entitled to appraisal *after* an appraisal petition has been filed.[37] And in making this determination, Delaware law places the burden of persuasion on the petitioner stockholder to demonstrate compliance with Section 262, not on the respondent company.[38] Thus, it is perfectly appropriate for a company to wait until a petition is filed to begin analyzing and objecting to insufficient appraisal demands so long as the company makes no express or implied waiver in its correspondence with stockholders that it will not later object to their demands.

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[36] Petitioners also seek to buttress their argument that respondent impliedly waived its objection right by arguing that because Sections 262(d)(1) and (e) only require that notices be sent to "stockholders"—defined by the statute as "holders of record"—respondent treated petitioners as "holders of record" when sending them the Effectiveness Notice and statement of shares (for purposes of Sections 262(d)(1) and (e)) and therefore implicitly waived its objection to claim that they are not "holders of record" for purposes of making an appraisal demand under Section 262(a). Petitioners are correct that Sections 262(d)(1) and (e) only required that the Effectiveness Notice and statement of shares be sent to "holders of record," but it does not follow that sending such correspondence to beneficial owners such as petitioners was an implicit waiver. Again, Section 262 did not require respondent to refrain from sending the Effectiveness Notice and statement of shares to stockholders who made defective appraisals, including appraisals like petitioners that were defective for failure to comply with the "holder of record" requirement.

[37] *See* 8 *Del. C.* §§ 262(f) and (g).

[38] *Engel v. Magnavox Co.*, 1976 WL 1705, at *1 (Del. Ch. Apr. 22, 1976) ("Our decisional law makes clear that the burden is on the person claiming the right to an appraisal to prove that he is a stockholder who has perfected his right to valuation by complying with each of the statutory prerequisites . . . .") (citing *Carl M. Loeb Rhoades & Co. v. Hilton Hotels Corp.*, 222 A.2d 789 (Del. 1966)).

D. Respondent did not acquiesce to petitioners' defective appraisal demands

Petitioners argue that in sending the three letters respondent acquiesced to petitioners' defective appraisal demands. Under Delaware law, acquiescence occurs "where a complainant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved."[39]

There can be no serious contention that respondent remained inactive for a considerable time before objecting to petitioners' appraisal demands. As discussed, respondent was under no obligation to object to the sufficiency of petitioners appraisal demand before the appraisal petition was filed. Thus, any inactivity on respondent's part would have to be measured beginning with the date the appraisal petition was filed. But respondent actively objected to petitioners' failure to comply with Section 262 in its answer, a short time after the petition was filed. Thus, respondent did not acquiesce by being inactive.

Nor did respondent freely recognize petitioners' inadequate demand. This prong of the acquiescence doctrine is similar to implied waiver concepts. As discussed above in the implied waiver context, respondent's actions did not clearly

[39] *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *24 (Del. Ch. Mar. 13, 2000).

demonstrate intent to accept petitioners' appraisal demands as sufficient. In the same vein, respondent's actions did not amount to a free recognition that petitioners' demands were sufficient.

Finally, respondent's actions pre-petition were not inconsistent with objecting to the sufficiency of the appraisal demand post-petition. Pre-petition, respondent did not express a belief that petitioners' demands were sufficient and did not represent that it would treat the demands as sufficient. Had respondent expressed such beliefs or made such representations it would have been reasonable for petitioners to believe respondent had accepted their demand as well as inconsistent for respondent to later claim that petitioners' demands were defective. But no such thing occurred.

E. Respondent is not estopped from objecting to the sufficiency of petitioners' appraisal demands because of respondent's alleged disclosure violations

Petitioners argue that respondent failed to make adequate disclosures in the December 8 Notice and the Supplemental Notice. Specifically, petitioners assert that both notices failed to disclose the board's recommendation regarding the Merger as well as the actions the special committee took to ensure minority stockholder interests were protected. Moreover, petitioners allege that respondent failed to timely disclose the terms of the partnership agreement that stockholders would be subject to post-Merger if they chose not to seek appraisal. Petitioners

assert that respondent should be estopped from objecting to the sufficiency of their appraisal demands because they "relied upon [this] lack of material information and lack of time afforded them to exercise appraisal rights . . . to bring this action."[40]

Petitioners correctly acknowledge in their briefs that a stockholder's traditional remedy for failed disclosures in connection with a merger is a class action for breach of fiduciary duty, not an appraisal action.[41] Nevertheless, petitioners ask the Court to allow them to proceed in this appraisal action, despite their failure to comply with Section 262, on the grounds that respondent's alleged disclosure violations should estop respondent from objecting to petitioners' failures to make appropriate demands. I decline to do this. If fiduciary duties were breached due to inadequate disclosure that does not relieve petitioners of the obligation to comply with Section 262 in seeking appraisal. If petitioners wish to vindicate their assertion that disclosure violations occurred, they are free to proceed in a separate action for breach of fiduciary duty.

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[40] Petitioners' Combined Opening Brief in Support of Motion for Partial Summary Judgment and Answering Brief in Opposition to Respondent's Motion for Summary Judgment at 17.

[41] *Id.* at 16; *accord Cede & Co. v. Technicolor*, 542 A.2d 1182, 1187 (Del. 1988) ("To summarize, in a section 262 appraisal action the only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares. In contrast, a fraud action [for breach of fiduciary duty] asserting fair dealing and fair price claims affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require.").

Appraisal actions and breach of fiduciary duty actions are separate channels for seeking relief with distinct objectives. Appraisal is a statutory remedy designed to protect minority stockholders who disagree with the offering price in a merger from being forced to accept the price approved by the majority stockholders.[42] The focus of an appraisal action is narrow; it is designed to ensure that minority stockholders receive "fair value" for their shares. Fiduciary duty related questions such as the adequacy of disclosure, the entire fairness of the transaction, and so forth are not relevant in an appraisal action. Accordingly, to allow petitioners to use allegations of inadequate disclosure to circumvent the requirements of Section 262 would unnecessarily muddy the doctrinal waters of appraisal actions. This would be an undesirable result because it would obscure the current clarity of the appraisal statute.

F. Respondent is not estopped from objecting to the sufficiency of petitioners' appraisal demands because of respondent's three letters to petitioners

Petitioners argue that they understood respondent's letters of December 23, 2008, January 7, 2009, and February 12, 2009, to be acknowledgments that respondent would treat petitioners' appraisal demands as sufficient and therefore relied upon those letters in filing this appraisal petition. Petitioners allege they

[42] *Id.* at 1186 ("An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings.").

have incurred costs in bringing this petition that they would not have incurred if respondent had not sent its letters and therefore respondent should be estopped from challenging their standing because of their reliance on respondent's letters.

In Delaware, to assert estoppel "it must appear that the party claiming the estoppel lacked knowledge and the means to acquire knowledge of the truth of the facts in question, that he relied on the conduct of the party against whom the estoppel is claimed, and that he suffered a prejudicial change in position in consequence thereof."[43]

I fail to see how petitioners demonstrate estoppel. Specifically, I do not see how petitioners prejudicially changed their position based on respondent's letters. If respondent had only sent the December 8 Notice and the Supplemental Notice to petitioners it is not at all clear that petitioners would have refrained from filing an appraisal petition. It is apparent that petitioners have desired an appraisal of their shares from the beginning. The day after petitioners received the December 8 Notice they began efforts to make an appraisal demand. To get what they desired petitioners would have had to file an appraisal petition and incur the expenses of these proceedings, including establishing to the Court's satisfaction that they were entitled to appraisal, regardless of respondent's correspondence with them. Thus, I

[43] *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 535 (Del. Super. Ct. 1990) (citing *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 904 (Del. 1965)).

conclude that petitioners did not change their position based on respondent's three letters and therefore cannot establish estoppel.

III. CONCLUSION

Petitioners failed to comply with the record holder requirement of Section 262(a) and, accordingly, are not entitled to have their shares appraised. Respondent did not waive its right to object to the sufficiency of petitioners' appraisal demands and did not acquiesce to the insufficiency of the demands. Moreover, if respondent and its management failed to make appropriate disclosures in connection with the Merger, an appraisal action is not the appropriate channel of relief through which to vindicate inadequate disclosure claims. Accordingly, respondent's motion for summary judgment is GRANTED and petitioners' motion for partial summary judgment is DENIED.

IT IS SO ORDERED.