IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

John A. Boris and Ann S. Boris, Plaintiffs, v. Mary S. Schaheen, Defendant, and Numoda Technologies, Inc., a Delaware Corporation, and Numoda Corporation, Inc., a Delaware Corporation, Nominal Defendants.	)	**C.A. No. 8160-VCN**

MEMORANDUM OPINION

Date Submitted: July 1, 2013
Date Decided: December 2, 2013

Richard P. Rollo, Esquire, Kevin M. Gallagher, Esquire, and J. Scott Pritchard, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Kathleen M. Miller, Esquire and Robert K. Beste, III, Esquire of Smith, Katzenstein & Jenkins LLP, Wilmington, Delaware, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

This action is to determine the validity of two stockholder written consents to remove the serving directors from, and elect new persons to, the boards of two Delaware corporations. The validity of these acts depends, in large part, on whether the corporations' past directors followed the formal requirements of the Delaware General Corporation Law (the "DGCL") when issuing stock.

Plaintiffs John Boris ("John") and Ann Boris ("Ann")[1] filed this action pursuant to 8 *Del. C.* § 225 against Defendant Mary Schaheen ("Mary") and Nominal Defendants Numoda Technologies, Inc. ("Numoda Tech.") and Numoda Corporation ("Numoda Corp."). On November 9, 2012, John and Ann acted by written consent under 8 *Del. C.* § 228 as purported majority stockholders to remove Mary from, and elect themselves to, the boards of Numoda Corp. (the "NC Written Consent") and Numoda Tech (the "NT Written Consent").[2] With this lawsuit, John and Ann have requested the Court to confirm these acts were valid.[3]

---

[1] In certain documents, Ann is referred to as Ann Vurmindi. Joint Exhibit ("JX") 81 (Ann Dep.) at 8.

In this post-trial memorandum opinion, the Court may discuss certain exhibits to which the parties have objected and certain deposition testimony beyond that presented at trial or cited in the briefs. As will be seen, the Court does so to provide context and an understandable narrative of the dispute. In addition, the information which the Court employs in this manner is ultimately not material to the Court's legal analysis.

[2] JX 62, 64.

[3] Verified Complaint Pursuant to 8 *Del. C.* § 225 ("Compl.") Prayer for Relief ¶¶ B, C.

This post-trial memorandum opinion presents the Court's factual findings and legal conclusions. For the reasons set forth below, the Court concludes that John and Ann own a majority of the validly issued voting stock of Numoda Corp. and thus validly removed Mary and elected themselves as directors by the NC Written Consent. The Court also concludes that John and Ann do not own a majority of the validly issued stock of Numoda Tech. and thus did not remove Mary or elect themselves as directors by the NT Written Consent.

II. THE PARTIES

Numoda Corp. and Numoda Tech. are Delaware corporations based in Philadelphia, Pennsylvania. They provide technology and other services to companies in the biotechnology and pharmaceutical industries.[4] The two corporations are closely related; indeed, they are "in the same location and share systems and services."[5] Their initial boards of directors were also commingled: John, Ann, and Mary were the directors of Numoda Corp. upon its incorporation in May 2000[6] and Numoda Tech. upon its incorporation in December 2000.[7] Numoda Tech. was intended to be a subsidiary of Numoda Corp. until January 1,

[4] Trial Tr. ("Tr.") 8-9 (John).
[5] *Id.* 98 (Ann).
[6] JX 1 (Boris 58). Numoda Corp. is the successor-in-interest to MCR Systems, Inc., with which it merged in June 2000. *Id.* (Boris 15-19).
[7] Pre-Trial Stipulation and Order ("Pre-Trial Stip.") ¶ 10.

2005, when its common stock was purportedly distributed pro rata to the parent's stockholders.[8]

John, Ann, and Mary are siblings.[9] Numoda Corp. was their family business: Ann, considered the founder, contributed several patents and invested the proceeds from the sale of personal assets; John invested money earned from his law practice; and Mary brought her business and management expertise.[10] Over the years, they have held various positions at Numoda Corp.: John has been Secretary and General Counsel; Ann has been Secretary and Chief Operating Officer; and Mary has been Chief Executive Officer ("CEO") and President.[11] They have generally held similar positions at Numoda Tech.[12]

As of June 2000,[13] the siblings were all Numoda Corp. stockholders: John held 1,266,667 shares; Ann held 5,100,000 shares; and Mary held 3,333,333 shares.[14] The current amount of Numoda Corp. stock owned by John, Ann, and Mary is in dispute. Also in dispute is whether any of the siblings are, or ever were, Numoda Tech. stockholders.

[8] JX 21 (MS 271-72); Tr. 69 (John), 238-39 (Mary).
[9] *Id.* 5 (John), 161 (Ann), 404 (Mary).
[10] *Id.* 95 (Ann), 5-6 (John), 178-79 (Mary).
[11] *Id.* 6-8 (John), 97 (Ann), 177 (Mary).
[12] *See, e.g.*, *id.* 8 (John), 97-98 (Ann) ("Basically the two companies work together.").
[13] JX 1 (Boris 243).
[14] Pre-Trial Stip. ¶¶ 7-9.

III. BACKGROUND

A. *Numoda Corp.*

1. The Corporate Governance System

Numoda Corp., not unlike some family-operated companies, had an informal corporate governance system. The directors gave no proper board meeting notice, held no proper board meetings, and recorded no proper board minutes.[15] The directors took no proper votes,[16] and their votes were typically not reflected in any written instruments. Although the directors acted informally, the corporation's governing documents contemplated a formal corporate governance system. More specifically, Numoda Corp.'s Secretary was charged with responsibility for giving notice for board and stockholder meetings and for recording the meetings of the directors "in a book to be kept for that purpose."[17] But, John could not remember if he ever gave notice about a board meeting as Secretary, and he testified that he did not record the minutes of any Numoda Corp. board meetings.[18]

[15] The parties dispute why minutes were not taken. John claimed that Mary, as CEO, "requested that there be no minutes." Mary denied this charge, although she did not dispute that the board normally did not keep meeting minutes. Tr. 10-11, 19 (John), 183-88 (Mary).
[16] *Id.* 187-88 (Mary) ("Q: . . . Can you tell us how a vote was taken at those meeting? A: A proposal was made and agreements were collected and any differences with the proposal made were called for. . . . If it was necessary to get clarity, we'd summarize what was going on in the conversation or paraphrase it. And then we would conclude with agreements, make a final call for any differences, and then the board's approval was given.").
[17] JX 1 (Boris 73).
[18] Tr. 33-34 (John).

One of John's other responsibilities as Numoda Corp.'s Secretary was to manage the company's stock book (the "NC Stock Book").[19] The NC Stock Book contains the corporation's governing and other important documents.[20] Included in this collection is Numoda Corp.'s original, official stock ledger (the "NC Stock Ledger") that lists, in John's handwriting, the stock issued by holder, date of issue, stock certificate number, and number of shares.[21]

2. Initial Stockholders of Numoda Corp.

Numoda Corp.'s initial certificate of incorporation authorized twenty million shares of common stock and four million shares of preferred stock.[22] As of June 2000, the NC Stock Ledger reflected six stockholders:

- Certificate 1: Philip Gerbino ("Gerbino"), 2,500 shares.
- Certificate 2: Barry Unger ("Unger"), 2,500 shares.
- Certificate 3: Ann, 5,100,000 shares.

[19] *Id.* 9, 11-12 (John).
[20] JX 1; Tr. 11 (John) ("JX 1 is a photocopy of everything that was included in the Numoda Corporation stock book, the stock ledger, the blank stock certificates, the articles of incorporation, the by-laws, stubs from issued stock, original agreements, certificates of merger, even a draft agreement, the cover, the spine, [and] the seal bag.").
[21] JX 1 (Boris 243). John also created a Numoda Corp. stock register document that includes all the information on the NC Stock Ledger except the names of the holders. *Id.* (Boris 219). John could not recall why or when he created this second document. Tr. 15, 45 (John). Because the NC Stock Ledger and the stock register are effectively duplicative, the latter is not material to the Court's analysis.
[22] JX 1 (Boris 1).

- Certificate 4: Mary, 3,333,333 shares.
- Certificate 5: John, 1,266,667 shares.
- Certificate 6: Meyer Rothbart ("Rothbart"), 300,000 shares.[23]

But, the NC Stock Ledger is, as John and Ann conceded, inaccurate and incomplete, although the parties disagree on the extent. The initial stock issued to John, Ann, and Mary was validly issued.[24] The parties believe Gerbino, Unger, and Rothbart are not stockholders[25] and that PIDC Penn Venture Fund ("PIDC") is a current voting stockholder.[26] PIDC was allegedly issued 1,016,950 shares of voting stock in November 2008 as reflected by Certificate 23.[27] Because John and Ann would hold a majority of the stock listed on the NC Stock Ledger regardless of whether any combination of Gerbino, Unger, Rothbart, and PIDC was issued

[23] *Id.* (Boris 243).
[24] Pre-Trial Stip. ¶¶ 7-9.
[25] The Gerbino and Unger stock certificates were never sent out and now include a handwritten notation of "VOID" on their face, both of which are facts that, in John's opinion, mean that these certificates and the underlying shares are void. John also claims that the stock issued to Rothbart was redeemed, as evidenced by that certificate's placement in the NC Stock Book. JX 1 (Boris 119, 121, 127); Tr. 43-44, 87-88 (John). He claimed it was unnecessary to document these developments on the NC Stock Ledger because, since the certificates were kept in the NC Stock Book, this conclusion would have been clear. *Id.* 43-44 (John) ("[W]hen you take the book as a whole, it's what the stock is that was issued and to whom it went.").

Mary largely agreed, believing the stock for Gerbino and Unger was subsequently voided. *Id.* 345 (Mary). At trial, Mary did not testify about the Rothbart certificate; at her deposition, she could not recall when it may have been redeemed. JX 83 (Mary Dep.) at 264.
[26] Tr. 21 (John), 140-41 (Ann), 236 (Mary).
[27] JX 39.

valid stock, the Court need not resolve those questions.[28] Whether the NC Stock Ledger is otherwise inaccurate and incomplete, as Mary argues, is a question the Court must answer.

By a May 2000 unanimous written consent, the Numoda Corp. directors resolved that "all shares shall be uncertificated and stock certificates shall not be issued to stockholders except upon request."[29] After the initial stock issue in 2000, none of John, Ann, or Mary requested or was issued a stock certificate for subsequently issued stock.[30] In late 2001, Numoda Corp. amended its charter to increase the number of authorized shares to twenty-five million shares of common stock and ten million shares of preferred stock.[31]

3. The Informal System for Issuing Stock

The Numoda Corp. board sought to issue stock within its informal process for making decisions. The directors would informally meet and informally vote on the stock to be issued "in terms of percentage ownership." That is, they would agree on who should own what percent of the company, leaving it "up to Ann and John [Dill] to do the calculations that translated that percentage ownership into the

[28] John and Ann would hold approximately 65.64% of just the stock listed on the NC Stock Ledger as issued to them and Mary. They would own approximately 57.76% of the sum of all the shares listed on the NC Stock Ledger plus the shares purportedly issued to PIDC.
[29] JX 1 (Boris 59).
[30] Tr. 52-53 (John).
[31] JX 1 (Boris 37-39).

amount of shares issued."[32] This process was employed to issue stock in 2004 and 2006, but the NC Stock Ledger contains no subsequent entries that might reflect an additional stock issue.[33] Instead, according to Mary, Numoda Corp. would document these purported stock issues "on the Excel stock ledger that John Dill was tasked with updating as issuances were approved" (the "NC Spreadsheets").[34] Then, the board would review and approve the NC Spreadsheets.[35]

Of the few documents in the NC Stock Book, none is a written instrument—namely, a board resolution or a unanimous written consent—evidencing board approval of a Numoda Corp. stock issue. Likewise, no written instrument or board meeting minutes show that the board intended for the NC Spreadsheets to replace

[32] Tr. 200-01 (Mary).
[33] JX 1 (Boris 243).

John would update the Stock Ledger "whenever [he] had a resolution or instruction to issue stock." From his perspective, the lack of a written instrument evidencing board approval of a stock issue in the NC Stock Book or produced in discovery meant that he was not delinquent with this obligation. Tr. 12 (John). He was asked to record additional stock on the NC Stock Ledger for "only the stock for those convertible loan agreement holders, the people who put money into the company and represented by the stubs in the stock book and also a resolution to do so." *Id.* 18 (John). But, this stock is not listed on the NC Stock Ledger.

[34] Considerable energy has been spent by the parties arguing over whether the NC Spreadsheets are hearsay. John and Ann contend that they are hearsay, if not double hearsay. *See, e.g.*, Post-Trial Oral Arg. 19-22; Pls.' Answering Post-Trial Br. 15-18; Pls.' Opening Post-Trial Br. 25-29. Mary contends they are either outside the hearsay rule or subject to an exception. *See, e.g.*, Post-Trial Oral Arg. 58-59; Mary S. Schaheen's Opening Post-Trial Br. ("Def.'s Opening Post-Trial Br.") 49-50; Def. Mary S. Schaheen's Answering Post-Trial Br. ("Def.'s Answering Post-Trial Br.") 6 n.6.

The Court need not resolve this dispute because the NC Spreadsheets are not relied upon here for the truth of the matter asserted. Rather, they are taken as an approximation of the parties' understanding as to the intended capitalization of Numoda Corp.

[35] Tr. 200, 202 (Mary).

the NC Stock Ledger—or that the board even approved what the NC Spreadsheets listed.

4. Stock Issued in 2004

For several years, Numoda Corp. was financed both by a lending institution through a line of credit and by individuals, typically employees, who loaned money to the company, deferred their compensation, or did both. John, Ann, and Mary were among this group,[36] as was Patrick Keenan ("Keenan"), an investor who loaned approximately $500,000 to Numoda Corp.[37]

In 2004, after its institutional lender declined to renew the credit line, the company needed to find another lender. To improve Numoda Corp.'s balance sheet with an eye toward receiving better financing terms, the Numoda Corp. directors informally decided to exchange some of the debt held by John, Ann, Mary, and Keenan for stock. Mary contends that the board agreed to and approved these stock issues at an informal meeting.[38]

[36] *Id.* 5-6 (John), 95-96 (Ann), 191-92 (Mary).
[37] *Id.* 193-94 (Mary).
[38] *Id.* 194-96, 198-200 (Mary).

Circumstantial evidence shows how much stock was issued. The NC Spreadsheets reflect that John was issued 1,546,238 shares; Ann was issued 4,645,500 shares; Mary was issued 1,380,720 shares; and Keenan was issued 1,005,000 shares.[39] Mary does not contest that, after adding these shares to those on the NC Stock Ledger, John and Ann would still be the majority stockholders of Numoda Corp. As further evidence of the number of shares issued, Mary points to the unsigned minutes of a Numoda Corp. annual stockholders meeting, dated June 5, 2006.[40] That document also shows John and Ann with a majority: John is listed as a holder of 3,045,561 shares; Ann of 9,745,500 shares; Mary of 5,109,053 shares; and Keenan of 1,005,000 shares. These numbers on the unsigned minutes, however, are not the sum of only the NC Stock Ledger figures and the stock issued in 2004. The numbers on the minutes reflect an additional 400,000 shares for Mary and 232,656 shares for John.

5. John Resigns from the Numoda Corp. Board

John resigned from the Numoda Corp. board by no later than April 2006. He testified that he resigned sometime in 2006, but Mary suggested the resignation may have been in 2004 or 2006.[41] It is clear that John was no longer a director as of April 21, 2006, the date when he did not execute, in his capacity as a director, a

[39] JX 60 (MS 69).
[40] JX 18.
[41] Tr. 9, 53 (John), 179-180, 302-03 (Mary).

unanimous written consent of the board.[42] When John resigned as a director, he also resigned as Secretary, and Ann generally assumed that position.[43]

6. The Charter Amendment for Two Classes of Common Stock

Ann and Mary were once again working to improve Numoda Corp.'s balance sheet during 2006. This time, they began to effect a recapitalization by exchanging outstanding convertible loans held by various investors, including both friends and institutions, for stock. They did not want to issue voting stock; they wanted to issue non-voting stock.[44] Thus, a charter amendment was required.

In an April 21, 2006, unanimous written consent, the Numoda Corp. board resolved to amend the corporation's charter to allow for two classes of common stock: Class A non-voting common stock ("Class A Non-Voting Stock") and Class B voting common stock ("Class B Voting Stock"). All common stock issued before May 12, 2006—including the shares listed on the NC Stock Ledger and those issued in 2004—would become Class B Voting Stock.[45] All stock issued after May 12, 2006, not designated by class would presumptively be Class A Non-Voting Stock.[46]

[42] JX 17.
[43] Tr. 29 (John), 160-61 (Ann), 301-02 (Mary).
[44] *Id.* 216-17 (Mary).
[45] JX 17; *see also* Pre-Trial Stip. ¶¶ 7-9.
[46] JX 17.

It would be more than a year before the charter amendment became effective when it was filed with the Delaware Secretary of State on December 27, 2007.[47] Then, because of apparent difficulty with interest calculations, it took several months to execute the conversion; the convertible loan holders were issued certificates from July 2008 through December 2008.[48]

7. Stock Issued to Jack Houriet, a Numoda Corp. Employee, in 2006

Jack Houriet ("Houriet"), the Chief Technology Officer of Numoda Corp., had invested money in the company, deferred his compensation, and also been granted stock options.[49] By 2006, he had been negotiating with the board for some time about becoming a stockholder. After Houriet rejected an offer of 10% ownership with certain contingencies,[50] the board apparently offered to him 15% stock ownership on a fully diluted basis with no contingencies in exchange for the debt, deferred compensation, and stock options. Houriet accepted.[51] Both Mary and Houriet contend that he was to receive voting stock, the only authorized class of common stock at the time.[52]

---

[47] JX 1 (Boris 48-50).
[48] Tr. 217, 220 (Mary); JX 1 (Boris 162-63, 165-74).
[49] JX 151, 158, 165; Tr. 411-17 (Houriet).
[50] JX 11; Tr. 207-08 (Mary), 420-24 (Houriet)
[51] *Id.* 210-12 (Mary), 425-27 (Houriet).
[52] *Id.* 212 (Mary), 428-29 (Houriet) ("Q: Now, you've heard discussion of the two classes of stock, voting and non-voting. What is your understanding of the type of stock that you were given at the time? A: Well, that I had the same stock that Ann had, Mary had, John Boris had and Patrick Keenan had.").

By Mary's recollection, Ann and she, as Numoda Corp.'s board, approved this issue in July 2006.[53] Ann offered contradicting testimony. Not only did she assert that Houriet was not issued Numoda Corp. stock in July 2006, but she also could not recall ever participating in any meeting during which the granting of 15% stock ownership to him was discussed.[54] The approval was informal, not in a written instrument. Stock was not issued to Houriet in 2006 because the actual number of shares to be issued still had to be calculated.[55]

Making Houriet the holder of 15% of Numoda Corp.'s stock would dilute the stock ownership percentages of others. Mary had refused to be diluted since she had already been diluted by the 2004 issue. She testified that Ann offered to facilitate the issue to Houriet by returning a portion of her own Numoda Corp. stock to the company.[56] The give-back was contemplated by a draft Memorandum of Agreement dated December 2007 and a related Stockholders Agreement, although these documents were not executed.[57]

[53] *Id.* 211-12 (Mary).
[54] *Id.* 143-45 (Ann).
[55] *Id.* 218 (Mary).
[56] *Id.* 212-14 (Mary).
[57] JX 31.

Again, Ann disagreed with this account, maintaining that she never returned any stock. For example, she described the agreements as "not finalized," and, when shown a 2009 email sent from her Numoda Corp. account to Keenan that references "a 'giveback' of stock I made many years ago," she could not explain what that language might have meant.[58]

Houriet had repeatedly asked for a stock certificate[59] before receiving Certificate 33 for 5,100,000 shares of Numoda Corp. on September 18, 2009. Both the printed front and a handwritten note on the reverse of the certificate stated that the shares were Class A Non-Voting Stock, and Ann and Mary each signed it.[60]

8. Additional Stock Issued to Mary in 2006

Finally, Ann and Mary purportedly discussed issuing additional stock to Mary in the "[s]ame time frame, 2006," as the issue to Houriet. Neither John nor Ann testified at trial about this issue. Mary testified that she was to be issued an additional 5,725,000 shares of voting common stock to restore her to, in her words, her "rightful ownership percentage." The consideration was to be several years of deferred compensation.[61] This stock issue was also informally approved by the board, but it was not approved in a written instrument.

---

[58] JX 40; Tr. 104, 146-49 (Ann). Ann could not even tell if the email was sent by her because "others" at Numoda Corp.—including a group as broad as "the support staff, the legal staff, [and] the accounting staff"—had generally unsupervised access to the account. *Id.* 147 (Ann).
[59] *Id.* 221 (Mary).
[60] JX 47; Tr. 222-24 (Mary).
[61] JX 60 (MS 62); Tr. 213-14 (Mary).

9. The Capitalization After the 2004 and 2006 Stock Issues

According to Mary, the current Class B Voting Stock holders and their holdings are listed both on a document entitled "Share Register as of 16 July 2008" (the "NC Share Register")[62] and on the NC Spreadsheet dated December 31, 2008.[63] These documents present the stock ownership as:

- John: 3,045,561 shares;
- Ann: 7,745,500 shares;
- Mary: 10,839,053 shares;
- Keenan 1,035,000 shares;
- Houriet 5,100,000 shares; and
- PIDC 1,018,950 shares.[64]

That is, based on these figures, John and Ann do not hold a majority. It is disputed who prepared the NC Share Register,[65] but it is clear that the document was sent by John to a bank, in connection with opening an account, as a statement of Numoda Corp.'s current share register.[66]

[62] JX 36.
[63] JX 60 (MS 62).
[64] PIDC is only listed on the NC Spreadsheets, as it was not a stockholder by the date of the NC Share Register.
[65] John denied creating the content of the NC Share Register, but he did concede that whoever sent it from his corporate email account would have been authorized to do so. JX 82 (John Dep.) at 146-49; Tr. 66-67 (John).
[66] JX 37.

10. The NC Ratification Consent

Although the directors did not approve the 2004 and 2006 stock issues in a contemporaneous written instrument, Mary maintains that they did subsequently ratify them with a unanimous written consent of the board, dated October 2, 2006 (the "NC Ratification Consent").[67] In relevant part, the NC Ratification Consent provides that the Numoda Corp. directors "hereby accept, adopt, ratify, and approve of all prior acts, business and transactions of the Company . . . as having been done by, on behalf of, and in the best interest of the Company."[68] It specifically mentions ratification of a "Recapitalization Initiative," which would "create [a] new series of convertible preferred stock," and the corresponding certificate of designation.[69] But, other than this new series of preferred stock, the NC Ratification Consent does not mention, in any general or specific terms, board approval or ratification of any past, contemporaneous, or future stock issues.

11. Ann Resigns from the Numoda Corp. Board

Ann resigned from the Numoda Corp. board by no later than the end of 2006. At her deposition, Ann testified that she believed she resigned from the Numoda Corp. board, but she could not recall the date or circumstances.[70] She did

[67] *See, e.g.*, Tr. 291, 315-16, 349-50, 365 (Mary). Mary claims that she did not identify this written instrument at her deposition because she did not recall it. *Id.* 289-91, 406 (Mary); JX 83 (Mary Dep.) at 35.
[68] JX 22.
[69] *Id.*
[70] JX 81 (Ann Dep.) at 204.

not contradict this statement at trial. Mary testified that Ann resigned in 2006.[71] Because she is not listed as a director on the 2006 Numoda Corp. annual franchise tax report, Ann must have resigned by the end of the year.[72]

12. Other Representations of Numoda Corp.'s Capitalization

Mary cites a series of representations made throughout this period that suggest not only that Numoda Corp. issued stock in 2004 and 2006, but also that John and Ann no longer held a majority of the Class B Voting Stock. These representations include:

- The 2006 Numoda Corp. annual franchise tax report listing the number of issued shares as 19,720,369;[73]
- A July 2006 email from Dill to John noting that Numoda Corp. was "bumping" the "ceiling" of twenty-five million authorized shares of common stock and that it had "used up" its initial twenty certificates;[74]
- A December 2006 charter amendment that increased the number of authorized shares of common stock from twenty-five million to fifty million;[75]

[71] Tr. 180, 239 (Mary).
[72] JX 196.
[73] *Id.*
[74] JX 170.
[75] JX 1 (Boris 44-45).

- The 2007 Numoda Corp. annual franchise tax report listing the number of issued shares as 30,702,322;[76]
- A December 2007 charter amendment authorizing ten million shares of Class A Non-Voting Stock, fifty million shares of Class B Voting Stock, and ten million shares of preferred stock;[77]
- A December 31, 2009, capitalization table (the "Cap Table") prepared by Dill[78] for a Numoda Tech. tax planning meeting in March 2010, reflecting that John held 10.19% and Ann held 25.91% of Numoda Corp.[79]
- Ann's signed personal financial statements from 2011 and 2012 listing her ownership percentage of Numoda Corp. at 25.91%;[80]
- A document John prepared in advance of this action as "a chart of everything that was in the stock book"[81] (the "NC Litigation Chart") reflecting that PIDC owned 1,016,958 shares of Class B Voting Stock, despite PIDC's not being listed on the NC Stock Ledger;[82] and

[76] JX 197.
[77] JX 1 (Boris 48-50).
[78] Tr. 165 (Ann), 244-45 (Mary), 511-12 (Dill).
[79] JX 51 (MS 81).
[80] JX 57, 59 (MS 213-15)
[81] Tr. 15 (John).
[82] JX 86. But, of the Class B Voting Stock listed as issued on the NC Litigation Chart, John and Ann held a majority.

- An exchange of text messages between John and Dill in 2012 listing John and Ann as owning less Class B Voting Stock than Mary, Keenan, and Houriet.[83]

John and Ann question the authenticity of some of these documents. For example, Ann testified that she had no recollection if a tax planning meeting was held in March 2010, let alone whether such a meeting involved discussing the Cap Table.[84] She was also not convinced that her personal financial statements and tax filings were accurate; in her opinion, they merely reflected that she owned "at least" that much stock, not only that much stock.[85]

13. The NC Written Consent

Under the Numoda Corp. bylaws, stockholders can act by written consent.[86] As purported majority stockholders, John and Ann delivered the NC Written Consent to the company's registered agent on November 9, 2012, and then filed it with the company's books and records.[87] Then, on November 11, 2012, as the purported directors of Numoda Corp., John and Ann executed a unanimous written consent in which they resolved, among other actions, that "no officer of [Numoda

[83] JX 58.
[84] Tr. 162-62 (Ann).
[85] *Id.* 164-68 (Ann).
[86] JX 1 (Boris 67).
[87] Tr. 27 (John).

Corp.] shall take any action on behalf of the Company without the prior written consent of the Board."[88]

B. *Numoda Tech.*

Numoda Tech. was incorporated in 2000 to be a wholly-owned subsidiary of Numoda Corp. John, Ann, and Mary comprised its initial board of directors.[89] They appear to have thought of Numoda Corp. and Numoda Tech. as one entity. That board meetings for the two corporations were not held separately—in Mary's words, "for efficiency sake, we combined"[90]—may be the foremost example of this conception.

1. The Corporate Governance System

The Numoda Tech. board followed the Numoda Corp. board's informal meeting and voting system, to which, according to Mary, neither John nor Ann objected.[91] With Numoda Corp. as a model, it may be unsurprising that Numoda Tech.'s corporate acts were largely not documented in its stock book (the "NT Stock Book").[92] For instance, the NT Stock Book contains no board or stockholder

[88] JX 66.
[89] Pre-Trial Stip. ¶ 10. They were named directors by consent of the incorporator. JX 2 (MS 797).
[90] Tr. 240 (Mary).
[91] *Id.* 239-42 (Mary).
[92] JX 2; Tr. 21-22 (John) ("JX 2 is a photocopy of the Numoda Technologies stock book, including the cover and the payments to Delaware for filing, the filing cover sheet which I did, and articles of incorporation, articles of amendment, by-laws, stock certificates in blank, stock specimen, and the stock ledger.").

meeting notices or minutes. It also does not contain any written instruments evidencing board approval of any corporate acts.

2. Initial Stockholders of Numoda Tech.

The parties understood Numoda Tech. to be a wholly-owned subsidiary of Numoda Corp. In line with a restructuring, and as disclosed in a federal tax filing, the Numoda Corp. board intended to distribute its Numoda Tech. stock to Numoda Corp. stockholders on a pro rata basis effective January 1, 2005.[93] But, the current capitalization of Numoda Tech. is in dispute. In fact, whether Numoda Tech. *ever* issued stock—that is, from the time it was incorporated to be a subsidiary of Numoda Corp.—is in dispute.

Numoda Tech.'s charter authorized twenty-five million shares of common stock and four million shares of preferred stock.[94] The corporation's original, official stock ledger (the "NT Stock Ledger") has no entries.[95] No Numoda Tech. stock certificates were issued; all the certificates the company ever ordered are in the NT Stock Book, and they are all blank.[96] According to John, it was not necessary to issue certificates because of an "understanding" that "the ownership amounts and levels and names were the same as are in the [NC Stock Book]."[97]

[93] JX 21 (MS 271-72); Tr. 69 (John), 238-39 (Mary).
[94] JX 2 (MS 776).
[95] *Id.* (MS 812-18).
[96] *Id.* (MS 800-03, 806-09).
[97] JX 82 (John Dep.) at 195.

The Numoda Tech. board did not approve the issue of Numoda Tech. stock to Numoda Corp. in a written instrument. It should also be noted that neither the NC Stock Book nor the NT Stock Book contains any written instrument or other document by which the Numoda Corp. board issued its Numoda Tech. stock as a dividend.

John and Ann initially asserted that they were majority stockholders of Numoda Tech. But, after their review of the NT Stock Book, they took the position at trial that no Numoda Tech. stock had ever been issued.[98] Thus, in their opinion, Numoda Tech. is a corporation with no stockholders.

Mary did not specifically address whether Numoda Tech. issued stock to Numoda Corp., but she implies that it must have done so. Mary also has not specified who received exactly how much stock in the purported spin-off on January 1, 2005. The best approximation appears to be the unsigned minutes of the 2006 Numoda Corp. annual stockholder meeting listing John and Ann as majority stockholders.[99]

[98] Tr. 23 (John), 134 (Ann). John was unable to locate the NT Stock Book for more than a year before initiating this action. He and Ann were only able to review it after it was produced in discovery. *Id.* 22-23 (John).
[99] JX 18

3. Stock Issued in 2006

Mary also contends that additional Numoda Tech. stock has been issued. When the Numoda Corp. board informally approved the stock issues to Mary and Houriet in 2006, so too did the Numoda Tech. board informally approve similar, proportionate stock issues.[100] When questioned at trial about whether the board authorized these issues in a written instrument, Mary initially identified the NC Ratification Consent, claiming that "[i]t was understood that what we approved for Numoda Corp. was also corresponded with Numoda Tech." But, when pressed to identify a written instrument executed by the board of Numoda Tech., Mary was unable to identify one.[101]

4. Other Representations of Numoda Tech.'s Capitalization

Other documents, however, support Mary's position that John and Ann are not majority stockholders of Numoda Tech. These documents include:

- The 2006 Numoda Tech. annual franchise tax report listing the number of issued shares as 18,910,114;[102]

[100] Tr. 241 (Mary), 426-28 (Houriet).
[101] *Id.* 393-94 (Mary).
[102] JX 194.

- Dill's July 2006 email to John suggesting that Numoda Tech. should increase the number of authorized shares and order new certificates;[103]
- A December 2006 charter amendment increasing the number of authorized shares of common stock from twenty-five million to fifty million;[104]
- The 2007 Numoda Tech. annual franchise tax report listing the number of issued shares as 28,065,114;[105]
- The Cap Table reflecting that John held 10.97% and Ann held 27.90% of Numoda Tech;[106]
- A March 2010 federal corporate tax form, signed by John and Ann under penalty of perjury, reporting that that John held 10.97% and Ann held 27.90%;[107] and
- Ann's signed personal financial statements listing her stock holdings in Numoda Tech. at 27.89%.[108]

[103] JX 170.
[104] JX 2 (MS 752-53).
[105] JX 195.
[106] JX 51 (MS 81).
[107] JX 52.
[108] JX 57, 59 (MS 213-15)

Again, John and Ann challenge what some of these documents state. For instance, John could not recall if the March 2010 tax form was filled out before he signed it, and Ann claims she "didn't know what was the thinking behind this number" listing her stock ownership at approximately 27.90%.[109]

5. The Board of Numoda Tech.

The identity of the Numoda Tech. directors immediately preceding delivery of the NT Written Consent is in dispute. No written resignation of any director was included in the NT Stock Book or otherwise produced in discovery.[110] The parties have also made inconsistent statements on this question of fact.

At Mary's deposition, she suggested that neither John nor Ann had resigned from the Numoda Tech. board.[111] At trial, Mary repeatedly testified that both John and Ann resigned from the board of Numoda Tech. when each resigned from the board of Numoda Corp.—John in 2004 or 2006, and Ann in 2006.[112] A statement in discovery and several documents support Mary's position. In response to an interrogatory about the directors of Numoda Tech., John and Ann answered, in relevant part, "Plaintiffs, to the best of their knowledge, believe that Mary

[109] Tr. 75-76 (John), 108-09 (Ann).
[110] *See, e.g.*, *id.* 405 (Mary).
[111] JX 83 (Mary Dep.) at 91 ("Q: Do you think Ann Boris was the Director from the beginning as well of Numdoa Tech? A: I don't recall. Q: How about John Boris? A: Yes. Actually yes to both from the beginning.").
[112] *See, e.g.*, Tr. 179-80, 183, 238-39, 302-03 (Mary).

Schaheen is and has been the sole director."[113] Consistent with this response are the 2006 through 2009 Numoda Tech. annual franchise reports, signed by either John or Ann under penalty of perjury and filed with the State of Delaware, that list only Mary as a director.[114]

Contrary to the weight of this evidence, John and Ann took the position at trial that they had never resigned from the board of Numoda Tech.[115] They again claim the change in position is due to their review of the NT Stock Book after initiating this action.[116] That the reports did not list either of them as directors, John and Ann claim, does not necessarily mean that they were no longer directors. John believed he was not required to list all of the directors; Ann could not recall whether these forms were filled out before she signed them.[117]

6. The NT Written Consent

Under the Numoda Tech. bylaws, stockholders can act by written consent.[118] John and Ann, as purported majority stockholders, delivered the NT Written Consent to the company's registered agent on November 9, 2012, and then filed it with the company's books and records.[119] On November 11, 2012, just as they did as the directors of Numoda Corp., John and Ann executed a unanimous written

[113] JX 75 (Pls.' Resps. and Objections to Def.'s Interrogs. to Pls.) at Resp. to Req. No. 9.
[114] JX 194, 195, 211, 212.
[115] Tr. 26 (John), 98 (Ann).
[116] *See, e.g., id.* 22 (John).
[117] *Id.* 24-26 (John), 123-125 (Ann).
[118] JX 2 (MS 782-83).
[119] Tr. 27-28 (John).

consent as the purported directors of Numoda Tech. in which they resolved, among other actions, that "no officer of [Numoda Tech.] shall take any action on behalf of the Company without the prior written consent of the Board."[120]

IV. CONTENTIONS

A. *Numoda Corp.*

John and Ann request the Court to find that the NC Written Consent validly removed Mary from, and elected them to, the board of Numoda Corp. [121] Based on their position that only the NC Stock Book, and not the NC Share Register or NC Spreadsheets, is the official stock ledger, John and Ann contend they are the presumptive majority stockholders of Numoda Corp.[122] According to John and Ann, Mary has failed to carry her burden to establish that any additional stock not listed on the NC Stock Ledger and not represented by a certificate for Class B Voting Stock is, in fact, validly issued stock because the stock was not issued pursuant to a written instrument evidencing board approval.[123]

[120] Compl. Ex. F.
[121] Compl. Prayer for Relief ¶¶ B, C; Pre-Trial Stip. ¶ 16.
[122] Post-Trial Oral Arg. 16-17; Pls.' Opening Post-Trial Br. 15.
[123] Pls.' Answering Post-Trial Br. 8-9; Pls.' Opening Post-Trial Br. 18-19.

They largely dismiss the documents upon which Mary relies as insufficient to satisfy this strict requirement. For example, John and Ann contend the NC Spreadsheets are insufficient because the calculations were not based on any written instruments.[124] Likewise, they dismiss the NC Ratification Consent as inapplicable because the document "does not even reference a prior board authorization of the issuance of stock, let alone memorialize it."[125]

Thus, that the Numoda Corp. board did not approve the stock issues by a written instrument, John and Ann contend, renders that stock void as a matter of law.[126] If the stock is void, then the Court should be unable to apply equity directly to remedy this defect or indirectly through equitable defenses, including ratification and estoppel.[127] John and Ann further argue that the Court need not determine the exact ownership percentages to find that they hold a majority of Numoda Corp.'s Class B Voting Stock and thus to confirm the validity of the NC Written Consent.[128]

[124] Post-Trial Oral Arg. 16-17, 19-22.
[125] Pls.' Answering Post-Trial Br. 22.
[126] Pls.' Opening Post-Trial Br. 40.
[127] Pls.' Answering Post-Trial Br. 23-24; Pls.' Opening Post-Trial Br. 41-43.
[128] Post-Trial Oral Arg. 28.

In response, Mary offers arguments based in fact, law, and equity. First, she asks the Court to accept either, if not both, of the NC Spreadsheets and the NC Share Register as the company's stock ledger. That John and Ann have admitted that the NC Stock Ledger is inaccurate, at least with respect to PIDC, Mary contends, is support for finding these additional documents, on which PIDC is listed as a stockholder, to be a part of the official ledger. Moreover, she claims they are "internally consistent with every other document after 2008 that reflects upon the capitalization of these companies."[129]

Second, Mary argues that, for the Court to find stock issued in compliance with the DGCL, it need only find sufficient "evidence [that] corroborates the issue of stock."[130] That is, she contends that Delaware law does not require a written instrument evidencing board approval to issue stock.[131] Mary claims that the Court should look to the NC Spreadsheets and the NC Share Register, in addition to her testimony, to find that John and Ann were not the holders of a majority of Numoda Corp.'s Class B Voting Stock when they delivered the NC Written Consent.[132]

[129] *Id.* 35-36.
[130] *Id.* 47.
[131] *Id.* 45-46; Def.'s Opening Post-Trial Br. 42-43.
[132] *Id.* 29-31, 48-49.

But, to the extent a written instrument is required, Mary contends that the lack of a one merely renders the stock voidable such that the Numoda Corp. board could ratify this defect by the NC Ratification Consent.[133] In addition, Mary claims John and Ann would not be majority stockholders if the Court just finds that Ann returned two million shares and that Houriet was issued Class B Voting Stock.[134]

Third, if the defective stock is voidable, Mary argues that the Court can and should apply equitable estoppel here.[135] Although she concedes that the Court lacks the specific equitable power "to validate improperly issued shares,"[136] Mary maintains that the Court nonetheless still has the general equitable power "to prevent two specific people—Ann and John—from challenging long-settled matters in which they played a critical role [and] then repeatedly confirmed after the fact."[137] She lists as evidence the documents predating the delivery of the NC Written Consent in which John and Ann represented that they did not own a majority of Numoda Corp.'s Class B Voting Stock.[138] Under this equitable estoppel argument, Mary suggests that the Court need not determine that the

[133] Post-Trial Oral Arg. 54-55; Def.'s Opening Post-Trial Br. 45-48.
[134] *Id.*
[135] Def.'s Opening Post-Trial Br. 34-36.
[136] Def.'s Answering Post-Trial Br. 18.
[137] Def.'s Opening Post-Trial Br. 39.
[138] Post-Trial Oral Arg. 31 ("They repeatedly confirmed them under oath in tax filings, in filings with the Secretary of State which are under oath, in representations to banks and representations to third parties, including Numoda's other stockholders."); Def.'s Opening Post-Trial Br. 18-27 (listing the alleged representations).

disputed stock was validly issued to her, Keenan, and Houriet.[139] For these reasons, Mary contends that John and Ann have not demonstrated, and cannot demonstrate, that they were majority stockholders of Numoda Corp. when they delivered the NC Written Consent.

B. *Numoda Tech.*

John and Ann initially requested the Court to find that the NT Written Consent validly removed Mary from, and elected them to, the board of Numoda Tech.[140] But, based on evidence adduced in discovery and at trial—primarily the NT Stock Book—they now argue that Numoda Tech. never validly issued stock.[141] Thus, they now request the Court to confirm they and Mary comprise the board of Numoda Tech.[142]

That the NT Stock Ledger is blank and that the Numoda Tech. board never approved a stock issue in a written instrument is conclusive evidence, John and Ann argue, that no Numoda Tech. stock was ever validly issued.[143] By implication, they contend that no stock was even issued to Numoda Corp., meaning

---

[139] Post-Trial Oral Arg. 51, 54.
[140] Compl. Prayer for Relief ¶¶ B, C.
[141] John and Ann deny any inconsistency between the NT Written Consent, in which they asserted they owned a majority of Numoda Tech.'s stock, and their current litigation position, in which they assert that no Numoda Tech. stock was ever validly issued, because they were unable to review the NT Stock Book prior to trial. Pls.' Answering Post-Trial Br. 11-12.
[142] Pre-Trial Stip. ¶ 16. In the event the Court finds that Numoda Tech. stock was validly issued, John and Ann request the Court to find that acts taken pursuant to the NT Written Consent to be valid. *Id.*
[143] Pls.' Opening Post-Trial Br. 12-13.

that Numoda Tech. was never a subsidiary, so the purported spin-off could not have occurred. In other words, they believe Numoda Tech. "exists and has a board of directors but no stockholders . . . regardless of what [Mary] or [they] believe the capitalization of Numoda Tech. was intended to be."[144]

In addition, John and Ann contend that they have never resigned as directors of Numoda Tech., and, therefore, they and Mary comprise the current board.[145] As evidence, they note that Mary has failed to produce a document evidencing either of their resignations.[146] Conversely, they claim their interrogatory response identifying only Mary as a director was not disingenuous because that response was provided before the NT Stock Book was produced in discovery.[147] John and Ann also argue that Mary should be found to have agreed with their position at her deposition.[148]

In opposition, Mary asserts similar arguments as she presented with respect to Numoda Corp. Because the NT Stock Ledger is blank, she argues the Court must look to other evidence to determine stock ownership.[149] She claims everyone understood Numoda Tech.'s stock profile was to mirror that of Numoda Corp., an understanding that may, in part, explain why no Numoda Tech. stock certificates

[144] Pls.' Answering Post-Trial Br. 26.
[145] Pls.' Opening Post-Trial Br. 11.
[146] Pls.' Answering Post-Trial Br. 25.
[147] Post-Trial Oral Arg. 61-62.
[148] Pls.' Answering Post-Trial Br. 25; Pls.' Opening Post-Trial Br. 18 n.61.
[149] Def.'s Opening Post-Trial Br. 33.

were ever issued.[150] At the time of the spin-off in 2005, she does not claim John and Ann were not majority stockholders. Rather, she contends that, with the additional stock issued to her and Houriet in 2006, John and Ann were no longer majority stockholders of Numoda Tech.[151]

Mary is unable to offer a written instrument of Numoda Tech.'s board that is comparable to the NC Ratification Consent. But, to the extent merely written evidence is necessary for the Court to find the stock issues valid, she identifies several documents—among them the Cap Table—that she argues are sufficient for this purpose.[152] Again, interpreting any defect as rendering the issued stock voidable, not void, Mary further argues that these documents are sufficient for the Court to apply equitable estoppel to prevent John and Ann from taking a position in this action that contradicts their past representations.[153]

Separately, Mary contends the preponderance of the evidence shows that both John and Ann had resigned from the Numoda Tech. board before delivering the NT Written Consent. She also describes her deposition testimony as a misstatement and instead emphasizes her trial testimony—which is corroborated by John and Ann's interrogatory response and other documents.[154] Finally, Mary

[150] *Id.* 16.
[151] Def.'s Answering Post-Trial Br. 17.
[152] Post-Trial Oral Arg. 56-57; Def.'s Opening Post-Trial Br. 33-34.
[153] *Id.* 34-36.
[154] Post-Trial Oral Arg. 57-58.

argues that any attempt to disclaim the interrogatory response is unreasonable and thus unpersuasive.[155]

V. ANALYSIS

Pursuant to Section 225 of the DGCL, any stockholder or director may petition the Court to determine the validity of a removal or appointment of a director.[156] The petitioning party must prove that the removal or appointment was valid by a preponderance of the evidence.[157] A Section 225 action is a summary proceeding that should be limited in scope to determine "those issues that pertain to the validity of [the] act[s]."[158] To ascertain whether the acts effected by the NC Written Consent and the NT Written Consent were valid, the Court must determine whether John and Ann held a respective majority of the voting common stock of Numoda Corp. and Numoda Tech.

The DGCL contemplates, in large part, a formal approach to corporate governance, particularly for changes to the corporation's capital structure. Because the DGCL implies "an affirmative duty to maintain a stock ledger,"[159] the Court may look to the ledger to determine the stockholders entitled to vote or act

[155] *Id.*; Def.'s Answering Post-Trial Br. 15-16.
[156] 8 *Del. C.* § 225(a).
[157] *See Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 453 (Del. Ch. 2012).
[158] *Genger v. TR Investors, LLC*, 26 A.3d 180, 199 (Del. 2011).
[159] *Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc.*, 535 A.2d 1357, 1359 (Del. 1987).

by written consent.[160] If the corporation does not have a stock ledger, or if the stock ledger is non-existent, then the Court may consider extrinsic evidence to determine stock ownership.[161] "[P]ossession of a certificate does not itself constitute ownership of shares, [but] such possession is strong evidence that a person is a shareholder."[162] Where the dispute centers on the plaintiff's ownership percentage, the plaintiff bears the burden to establish its percentage based on the stock ledger, stock certificates, or other extrinsic evidence, and then the defendant may rebut that position by establishing that additional, or less, stock has been validly issued.[163] Stock is not validly issued "unless the board of directors exercises its power [to issue stock] in conformity with statutory requirements."[164] Two related questions of law are implicated here: (i) whether the DGCL requires a written instrument evidencing board approval to issue common stock; and (ii) whether, if a written instrument is required, the lack of such approval by written

---

[160] 8 *Del. C.* § 219(c) ("The stock ledger shall be the only evidence as to who are the stockholders entitled by this section . . . to vote in person or by proxy at any meeting of stockholders."); *Testa v. Jarvis*, 1994 WL 30517, at *6 (Del. Ch. Jan. 12, 1994, revised Jan. 12, 1994) ("Where the company's ledgers show record ownership, no other evidence of shareholder status is necessary.").

[161] *Rainbow Navigation*, 535 A.2d at 1361. ("Our holding is limited to situations in which the stock ledger is blank or nonexistent.").

[162] *Testa*, 1994 WL 30517, at *6; *see also Viele v. Devaney*, 679 A.2d 993, 996-98 (Del. Ch. 1996) (finding a corporation's official stock ledger to be unreliable and concluding it was appropriate to examine whether the disputed stock was validly issued by the board).

[163] *Cf. Eluv Hldgs. (BVI) Ltd. v. Dotomi, LLC*, 2013 WL 1200273, at *6 (Del. Ch. Mar. 26, 2013) ("Where a stock ledger does not reflect ownership and the plaintiff possesses no certificate, however, the burden is on the plaintiff to prove its shareholder status.") (citing *Testa*, 1994 WL 30517, at *6).

[164] *Liebermann v. Frangiosa*, 844 A.2d 992, 1004 (Del. Ch. 2002).

instrument renders the issued stock void or voidable. Delaware courts have previously answered these questions for preferred stock,[165] convertible preferred stock,[166] and stock transferred after a stock split,[167] but the parties have not identified any case involving a common stock issue. Nonetheless, those precedents

[165] *See id.* at 1009 (finding preferred stock sold to investors, including board members, to be invalid because the issue was in excess of the number of shares authorized in the charter).

[166] *See STAAR Surgical Co. v. Waggoner*, 558 A.2d 1130, 1137 (Del. 1991) (holding that convertible preferred stock purportedly issued to an executive was invalid because the board never adopted the certificate of designation, or approved the stock issue, by a written instrument).

[167] *See Blades v. Wisehart*, 2010 WL 4638603, at *10, (Del. Ch. Nov. 17, 2010), *aff'd sub nom. Wetzel v. Blades*, 35 A.3d 420 (Del. 2011) (TABLE) (determining that transfers of stock fundamentally based on a purported stock split were invalid because the board failed to follow the DGCL's charter amendment procedure, which requires a written instrument evidencing board approval of the amendment).

are instructive in the Court's analysis of current Delaware law[168] governing the issue of stock, particularly Section 151(a).[169]

Under Section 151(a), the voting powers, rights, and preferences of stock to be issued "shall be stated and expressed in the certificate of incorporation . . . or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors." That is, stock is valid only if it is issued pursuant to a written

---

[168] This memorandum opinion seeks to reflect, and to apply, current Delaware law. But, "our corporate law is not static." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985) (explaining how Delaware corporate law "must grow and develop in response to, indeed in anticipation of, evolving concepts and needs"). Indeed, the Delaware General Assembly regularly amends the DGCL. *See generally* Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1599-1602 (2005) (describing the process by which the Delaware legislature amends the DGCL and noting that proposed amendments "are often instigated by lawyers who have encountered an ambiguity or a technical problem in the statute that they want to have clarified or corrected"). The Court is cognizant that the most recent DGCL amendments—Sections 204 and 205—will influence this Court's analysis of future disputes involving stock that was not issued pursuant to a written instrument evidencing board approval. *See* H.B. 127, 147th Gen. Assembly, 79 Del. Laws, c. 72, §§ 4, 5 (2013).

It has been suggested that these new statutes, at least in part, are "intended to overturn cases such as *STAAR Surgical Company v. Waggoner* and *Blades v. Wisehart*." Edward P. Welch et al., *Legislative Solutions to Practitioner Problems: Important Amendments to the Delaware General Corporation Law*, 17 M & A Law., July/Aug. 2013, at 1. More generally, they may provide some desired clarity in disputes over defective corporate acts because "the distinction under Delaware law between void and voidable can sometimes be confusing." Bruce E. Jameson, *Delaware Insider: Proposed Amendments to the Delaware General Corporation Law*, Bus. L. Today, June 2013, at *1.

Section 204 provides a process by which a corporation, through the board of directors, can ratify certain defective corporate acts, including a stock issue. 8 *Del. C.* § 204. Similarly, Section 205 grants equitable jurisdiction to this Court to determine the validity of these defective corporate acts, both those that have been ratified under Section 204 and those that have not. 8 *Del. C.* § 205. Because Sections 204 and 205 are not effective until April 1, 2014, it remains to be seen how this Court will interpret and apply them.

[169] "The statutes relating to the issuance of stock . . . are 8 *Del. C.* §§ 151, 152, 153, 157, 161 and 166. Taken together, these provisions confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure." *Grimes v. Alteon, Inc.*, 804 A.2d 256, 260-61 (Del. 2002).

instrument evidencing board approval of the stock issue. This reading of Section 151(a) comports with that in *STAAR Surgical Company v. Waggoner*, a case in which the Supreme Court reviewed the effect of a board's failure to adopt a formal resolution to approve a certificate of designation for convertible preferred stock and the subsequent stock issue. That the board failed to comply with Section 151(a) by not approving the certificate or issue in a written instrument meant that the issued stock was void.[170] Consequently, compliance with Section 151(a) requires a written instrument.

The DGCL's strict requirement of a written instrument for a stock issue implicated by Sections 151(a), among other provisions,[171] has strong public policy support. First, the formality maintains the integrity of the stockholder franchise, a bedrock principle of Delaware corporate law,[172] in that issuing stock is kept within the exclusive control of those who are both charged with managing and directing

---

[170] *See STAAR Surgical*, 558 A.2d at 1136; *see also* 8 *Del. C.* §§ 141(b), 141(f).

[171] For example, under Section 157, "every corporation may create and issue . . . rights or options . . . , such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors." 8 *Del. C.* § 157. An agreement for an individual to receive rights to purchase is only valid if the issuing of the rights is approved by the board in a written instrument. This interpretation comports with that articulated in *Grimes v. Alteon, Inc.*, in which the Supreme Court considered whether an agreement between an executive and a stockholder for rights to buy stock from the corporation was valid. That the board did not approve the agreement by a majority vote, evidenced in a resolution, or by a unanimous written consent as required by Section 157 rendered that agreement invalid and the rights to buy stock void. *See Grimes*, 804 A.2d at 263. Thus, Section 157 also contemplates a written instrument.

[172] *See, e.g., MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003) (citing *Blasius Indus., Inc.v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)); *Grimes*, 804 A.2d at 261 ("To ensure certainty, these provisions [of the DGCL] contemplate board approval and a written instrument evidencing the relevant transactions affecting issuances of stock and the corporation's capital structure.").

the corporation and answerable to stockholders through the election process.[173] Second, such a "'bright line' rule" creates certainty that facilitates investment in stock, which has been "a critical component for creating both institutional and individual wealth that may affect the economic well-being of entire societies."[174] Third, without a proper incentive to follow the requirements, noncompliance may undermine this statutory scheme—or, from another perspective, to conclude otherwise may "encourage a repeat of situations . . . in which uncertainty is heaped on uncertainty, with the result being a jumbled corporate mess."[175]

It is a well-established principle of current Delaware law that "[s]tock issued without authority of law is void and a nullity"[176]—and this includes stock that is not issued pursuant to a written instrument evidencing board approval. That the stock is void means that it cannot be remedied by equity; "[a] court cannot imbue void stock with the attributes of valid shares."[177] This Court must "refuse[] to overlook the statutory invalidity of stock even in situations when that might

[173] 8 *Del. C.* § 141(a).
[174] *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 538 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (TABLE); *see also Grimes*, 804 A.2d at 261 ("To ensure certainty, these provisions contemplate board approval and a written instrument evidencing the relevant transactions affecting issuance of stock and the corporation's capital structure.").
[175] *Blades*, 2010 WL 4638603, at *13.
[176] *STAAR Surgical*, 588 A.2d at 1136.
[177] *Id.* at 1137.

generate an inequitable result."[178] Put simply, for changes to the corporation's capital structure, "law trumps equity."[179]

Mary contends that, although *STAAR Surgical* and subsequent decisions conclude that the Court lacks equitable power to remedy void stock, this case law does not necessarily restrict equity completely. She argues that the Court still has the general equitable power to prevent specific individuals, such as John and Ann, from asserting positions in litigation that contradict their past representations.[180] In particular, she notes that *Grimes* did not address this type of equitable argument,[181] and she argues that neither it nor *STAAR Surgical* expressly overruled what she describes as a "venerable and unbroken line of cases starting with *Finch v. Warrior Cement Corp.*" applying equitable principles in this area.[182] John and Ann, in response, argue that the recent Supreme Court decisions must be read to restrict, even if only by implication, this Court's general equitable power in disputes over stock issues not authorized by a written instrument.[183] Were the Court to apply estoppel here, they contend it would come to an untenable conclusion that "the

[178] *Liebermann*, 844 A.2d at 1004.
[179] *Blades*, 2010 WL 4638603, at *12.
[180] Def.'s Answering Post-Trial Br. 17-23.
[181] Def.'s Opening Post-Trial Br. 37.
[182] *Id.* at 34 (quoting *Morente v. Morente*, 2000 WL 264329, at *2 (Del. Ch. Feb. 29, 2000); *see also Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch. 1928).
[183] Pls.' Answering Post-Trial Br. 23-24; Pls.' Opening Post-Trial Br. 41-43.

proper capitalization of a company could differ depending on the person who asks the question."[184] Ultimately, the Court agrees with John and Ann.[185]

The Court thus concludes as a matter of law that, under *Waggoner v. Laster*[186] and the current DGCL, it may not apply estoppel in this context. Equitable estoppel may apply "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to

[184] Post-Trial Oral Arg. 68.

[185] Much energy has been spent by the parties trying to resolve the potential confusion over Delaware law.

On the one hand, a line of Court of Chancery opinions, starting with *Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch. 1928) and continuing through *Danvir Corp. v. Wahl*, 1987 WL 16507 (Del. Ch. Sept. 8, 1987), *Testa*, and *Morente*, has held that "[a]cquiescence and participation in an issuance of stock, without consideration or for an insufficient consideration, will bar the right of the assenting stockholder to complain against its issuance." *Testa*, 1994 WL 30517, at *8 (quoting *Finch*, 141 A. at 61-62). The *Finch* doctrine has held, by analogy, that "[t]his same doctrine prevents a party to the transfer from arguing that the transaction should be set aside for failure to comply with corporate formalities, such as a failure to secure formal approval by the board of directors." *Morente*, 2000 WL 264329, at *2 (citing *Danvir*, 1987 WL 16507, at *5).

On the other hand, a line of Supreme Court and Court of Chancery cases, starting with *Triplex Shoe Co. v. Riche & Hutchins, Inc.*, 152 A. 342 (Del. 1930) and continuing through *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990), *STAAR Surgical*, *Grimes*, *Liebermann*, and *Blades*, teaches that "stock cannot be validly issued and sold by a company . . . unless the board of directors exercises its power in conformity with statutory requirements." *Liebermann*, 844 A.2d at 1004 (citing *Grimes*, 804 A.2d at 256). The *Triplex Shoe* doctrine concludes that stock not issued in compliance with the DGCL is void and not subject to equitable defenses. *STAAR Surgical*, 588 A.2d at 1137 (citing *Waggoner*, 581 A.2d at 1137-38).

For present purposes, this doctrinal tension can be resolved by applying the most recent, binding statements of Delaware law. The three most recent Supreme Court decisions in this area—*Waggoner* (1990), *STAAR Surgical* (1991), and *Grimes* (2002)—are in accord in following *Triplex Shoe*. That this Court's opinions issued between these Supreme Court decisions—*Testa* (1994) and *Morente* (2000)—apply rules from *Finch* (1928) and *Danvir* (1987) does not lessen the binding effect of the Supreme Court's decisions, which must control here. Indeed, after the principles of *STAAR Surgical* were reaffirmed in *Grimes*, this Court has looked to the *Triplex Shoe* doctrine, as seen in both *Liebermann* (2002) and *Blades* (2010).

[186] *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990).

his detriment."[187] In *Waggoner*, the Supreme Court addressed a stockholder's equitable argument that a board, which had previously issued preferred stock with super-majority voting rights, should be prohibited under equitable estoppel from contesting the validity of the voting rights, even though they were void for want of authorization in the corporation's charter. In conclusive terms, the Supreme Court held that estoppel "has no application in cases where the corporation lacks the inherent power to issue certain stock or where the corporate contract or action approved by the directors or stockholders is illegal or void."[188] Neither can a board ratify void stock.[189] Only voidable acts are susceptible to these equitable defenses.[190] In brief, because equity cannot directly remedy void stock, neither should equity be able to indirectly remedy void stock.[191]

---

[187] *Id.* at 1136-37 (quoting *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903-04 (Del. 1965)).
[188] *Id.* at 1137.
[189] *See id.* ("If the stock issue was void, a nullity, there was nothing to validate . . . .") (quoting *Triplex Shoe Co.*, 152 A. at 348).
[190] *See Harbor Finance Pr's v. Hulzenga*, 751 A.2d 879 896 (Del. Ch. 1999) (noting the traditional definition of a voidable act as one that "the corporation can lawfully accomplish if [the board] does so in the appropriate manner").
[191] For the Court to apply estoppel to prevent a party from arguing, contrary to its past statements, that stock is void because it was not issued pursuant to a written instrument would, as a practical matter, be applying equity to remedy the void stock. That is, instead of the Court's determining that the disputed stock was valid, the Court would merely be preventing a party from arguing that the stock was void.

Moreover, the DGCL amendment to add Sections 204 and 205 tends to support the Court's analysis of current Delaware law. That the Delaware legislature has granted equitable jurisdiction for this Court to apply equity to ratify a defective stock issue may suggest that this Court would otherwise lack such authority without the statute.

A. *Numoda Corp.*

1. The Class B Voting Stock Holders

John and Ann have established that Numoda Corp. has only one stock ledger—the NC Stock Ledger, not the NC Spreadsheets or the NC Share Register. At no point did the board resolve, by written instrument, to replace or to supplement the NC Stock Ledger with any other document. Because the parties agreed by pre-trial stipulation that John, Ann, and Mary were issued the stock reflected on the NC Stock Ledger, the validity of that stock is not in dispute.[192] Conversely, because the Class A Non-Voting Stock is not entitled to vote, the Court need not determine whether that stock was validly issued. Thus, based on the NC Stock Ledger, John and Ann are presumptively the holders of a majority of the Class B Voting Stock.[193]

Based on the parties' testimony that the NC Stock Ledger is incomplete and inaccurate because it at least does not list PIDC, the Court will look beyond it to determine whether additional stock was issued.[194] Mary bears the burden to establish that the disputed stock issued to her, Keenan, and Houriet in 2004 and 2006 was validly issued.[195]

---

[192] *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 528 (Del. 1999).
[193] 8 *Del. C.* § 219(c); *see also Viele*, 679 A.2d at 997; *Testa*, 1994 WL 30517, at *6.
[194] *See Rainbow Navigation*, 535 A.2d at 1361.
[195] *Cf. Eluv Hldgs.*, 2013 WL 1200273, at *6.

Mary has failed to demonstrate by a preponderance of the evidence that the Numoda Corp. board approved, by written instrument, any Class B Voting Stock issue.[196] The Numoda Corp. board may well have informally decided to issue stock, and the directors and purported stockholders may have conducted themselves as if the stock has been issued. But, even a shared understanding of what was intended is insufficient to satisfy the DGCL's strict requirement of a written instrument. That Numoda Corp. amended its charter to increase the number of authorized shares is not a written instrument for a valid stock issue, and neither are the statements and documentary evidence cited by Mary.

Therefore, the NC Class B Voting Stock not issued pursuant to a written instrument is void.[197] The void stock includes: (i) the stock issued to John, Ann, Mary, and Keenan in 2004 in exchange for company debt and deferred compensation; (ii) the stock issued to Mary in 2006 in exchange for deferred compensation; and (iii) the stock issued to Houriet in 2006, assuming it was to be Class B Voting Stock, in exchange for company debt, deferred compensation, and stock options.

This analysis further assumes the Court may look beyond Houriet's certificate for Class A Non-Voting Stock in light of Mary and Houriet's testimony that he was to receive Class B Voting Stock.

[196] 8 *Del. C.* § 151(a).

[197] *See STAAR Surgical*, 588 A.2d at 1136.

That all this Class B Voting Stock is void for want of a written instrument means that the Court lacks the equitable power to remedy the defect,[198] despite how persuasive the evidence is that the Numoda Corp. board sought to issue the stock.[199] Moreover, the Court cannot apply ratification or equitable estoppel in this action because the Class B Voting Stock is void,[200] even though the beneficiaries of these subsequent stock issues being void—John and Ann—are likely the Numoda Corp. directors most responsible for the circumstances leading to this finding. Assuming that the NC Ratification Consent could be construed to apply to the issues of Class B Voting Stock—which is unlikely since it does not reference, even in general terms, any stock issue—this board ratification cannot not apply to the void Class B Voting Stock.[201]

Finally, Mary has not established by a preponderance of the evidence that, assuming Ann did return some stock to Numoda Corp., it was to be from her original grant of 5,100,000 shares in 2000 as opposed to the void issue of 4,645,500 shares in 2004 or even some combination of the two. There is no evidence on this point. As a result, John and Ann hold a majority of the validly issued Numoda Corp. Class B Voting Stock.

---

[198] *See id.* at 1137.
[199] *See Liebermann*, 844 A.2d at 1004.
[200] *See Waggoner*, 581 A.2d at 1137.
[201] *See id.*

2. The Directors

The Numoda Corp. bylaws permit a majority of stockholders to act by written consent. Mary has not otherwise challenged the validity of the NC Written Consent. Accordingly, the Court concludes that the NC Written Consent and the acts taken pursuant to it are valid.

B. *Numoda Tech.*

1. The Stockholders

Because the NT Stock Ledger is blank, the Court must look beyond it to determine the corporation's stockholders.[202] John and Ann have established by a preponderance of the evidence that no Numoda Tech had been validly issued.[203] Mary has failed to rebut this position because the Numoda Tech. board never approved, by written instrument, any stock issue to Numoda Corp. in 2000, or to Mary and Houriet in 2006.[204]

Just as the Court previously determined that the disputed Numoda Corp. Class B Voting Stock was void, so too must the Court now conclude that all Numoda Tech. stock is void. The Court thus need not determine whether the Numoda Corp. board validly distributed its Numoda Tech. stock as a dividend because Numoda Corp. was never validly issued stock. Again, equity cannot

[202] *See Testa*, 1994 WL 30517, at *6; *see also Viele*, 679 A.2d at 997.
[203] *Cf. Eluv Hldgs.*, 2013 WL 1200273, at *6.
[204] *See* 8 *Del. C.* § 151(a); *see also STAAR Surgical*, 588 A.2d at 1136.

remedy this defect in this context,[205] and neither are equitable defenses applicable.[206] The professed intent to have the capitalization of Numoda Tech. mirror that of Numoda Corp.—as persuasively suggested by weight of the deposition testimony and the documentary evidence presented—does not satisfy the DGCL's strict requirement of a written instrument. Again, that Numoda Tech. amended its charter to increase the number of authorized shares does not satisfy this requirement, and neither do the representations Mary cites in support of her position.

In sum, because the Court concludes that Numoda Tech. is a corporation with no stockholders, the NT Written Consent, based on the proposition that John and Ann were majority stockholders, is invalid.

2. The Directors

The Court must determine the directors of Numoda Tech. It is undisputed that Mary was a director immediately preceding delivery of the NT Written Consent. John and Ann contend that they have never resigned such that the current Numoda Tech. board is comprised of them and Mary; meanwhile, Mary contends that both John and Ann have resigned, leaving her as the sole director.

[205] *See id.* at 1137.
[206] *See Waggoner*, 581 A.2d at 1137

Under Section 141(b) of the DGCL, "[a]ny director may resign at any time upon notice given in writing or by electronic transmission to the corporation."[207] First in dicta, and then twice as a legal conclusion, this Court has interpreted the use of "may" in this statute to mean that it is permissive, rather than mandatory, for a director to resign with written notice.[208] The Court concurs; a director may resign orally. Subsequent actions consistent with an oral resignation can support finding a resignation without written notice.[209]

Here, there is no written notice of resignation for either John or Ann. Nonetheless, a preponderance of the evidence demonstrates that they did resign. Under penalty of perjury, John signed the Numoda Tech. annual franchise tax reports for 2006 and 2007 in which only Mary is listed as a director.[210] Similarly, under penalty of perjury, Ann signed the Numoda Tech. annual franchise tax reports for 2008 and 2009 in which only Mary is listed as a director and the total

---

[207] 8 *Del. C.* § 141(b).

[208] *See General Video Corp. v. Kertesz*, 2008 WL 5247102, at *17 (Del. Ch. Dec. 17, 2008) ("The question then is whether these statutory provisions require written notice to the corporation before a resignation can take effect. They do not."); *Dionisi v. DeCampli*, 1995 WL 398536, at *9 (Del. Ch. June 28, 1995), *amended*, 1996 WL 39680 (Del. Ch. Jan. 23, 1996) (concluding that the previously suggested interpretation is correct and finding an oral resignation valid); *Bachmann v. Ontell*, 1984 WL 8245, 10 Del. J. Corp. L. 149, 151 (Del. Ch. Nov. 27, 1984) ("Were I required to rule on [whether Section 141(b) requires written notice,] my inclination would be to hold [it does not]. . . . I can conceive of circumstances where a completely illogical result would follow from the refusal of the law to recognize an oral resignation clearly given.").

[209] *See, e.g.*, *Dionisi*, 1995 WL 398536, at *9 (finding the lack of participation in management after the oral resignation as support for the resignation being effective as of that date and not the later date written notice was given).

[210] JX 194, 195.

number of directors is listed as one.[211] The Court finds their attempts to discredit these documents at trial to be unreasonable and thus not credible.

The Court likewise finds John and Ann's interrogatory response, in which they expressly identified Mary as the "sole director" of Numoda Tech., to be more credible than their trial testimony.[212] The proffered reason for the change in position—that John and Ann did not have an opportunity to review the NT Stock Book before responding to the interrogatory—is not persuasive given that written notice is not required for a director to resign. Finally, the Court finds Mary's trial testimony that John and Ann resigned by no later than 2006 to be credible, especially when Mary's potentially conflicting deposition testimony is properly viewed as a response to a question about whether John and Ann were directors from the incorporation of Numoda Tech., not about whether they have been or have remained directors since that time.[213]

In sum, even if the testimony were equally credible, the documentary evidence does not support John and Ann's position. Therefore, the Court concludes that John and Ann resigned from the board and that Mary is the sole director of Numoda Corp.

---

[211] JX 211, 212.
[212] JX 75 (Pls.' Resps. and Objections to Def.'s Interrogs. to Pls.) at Resp. to Req. No. 9.
[213] JX 83 (Mary Dep.) at 91.

* * *

This Section 225 action is limited to determining the validity of the actions pursuant to the NC Written Consent and the NT Written Consent. To determine whether John and Ann held a majority of the Class B Voting Stock of Numoda Corp. and the common stock of Numoda Tech., the Court, in part, has had to determine whether certain stock was validly issued. The analysis and conclusions should similarly be interpreted as limited to the narrow questions framed by the pleadings and presented to the Court.

It should be noted that the only claims before the Court were those brought by John and Ann, and the only parties to this action were John, Mary, and Ann. Nothing should prevent a purported stockholder of either Numoda Corp. or Numoda Tech., upon learning that certain stock has been found void because it was not issued pursuant to a written instrument, from asserting "rather obvious claims" against Numoda Corp. or Numoda Tech.[214] Put simply, the Court's findings should not "insulate" Numoda Corp., Numoda Tech., or their boards "from challenge in another lawsuit" by a stockholder to whom invalid stock may have been issued.[215]

[214] *Liebermann*, 844 A.2d at 1009.
[215] *Blades*, 2010 WL 4638603, at 12.

Indeed, as John and Ann recognized at post-trial oral argument, "many of the issues flowing from the lack of formality or stock issuances that are disputed that may or may not be valid . . . are going to be an issue for the board . . . . They're going to have to resolve it."[216]

VI. CONCLUSION

The Court confirms the validity of the NC Written Consent because John and Ann hold a majority of the validly issued Class B Voting Stock. John and Ann comprise the board of Numoda Corp. The Court concludes that the NT Written Consent is invalid because Numoda Tech. has no validly issued stock. Mary is the sole director of Numoda Tech. because John and Ann had previously resigned.[217]

Counsel are requested to confer and to submit an implementing form of order.

[216] Post-Trial Oral Arg. 28.

[217] The Court reserved decision on whether to award attorneys' fees in the context of Plaintiffs' Motion to Enforce *Status Quo* Order. Upon further reflection, the Court concludes that an award is not warranted. This case has been marked by a series of squabbles that resulted from conduct of both sides and probably could (and should) have been avoided. To single one instance out for an award of attorneys' fees would not be appropriate.