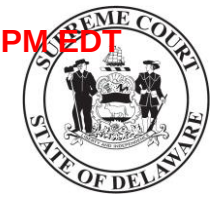
EFiled: Mar 27 2014 04:49PM EDT
Filing ID 55204717
Case Number 13,2014



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Mary S. Schaheen,	)	
	)	
Defendant below, Appellant	)	
	)	
v.	)	No. 13, 2014
	)	
John A. Boris and Ann S. Boris,	)	Court below: Court of Chancery
Plaintiffs below, Appellees	)	of the State of Delaware
	)	C.A. No. 8160-VCN
and	)	
	)	
Numoda Technologies, Inc., a Delaware Corporation, and Numoda Corporation, Inc., a Delaware Corporation,	)	
	)	
Nominal defendants below.	)	

APPELLEES' ANSWERING BRIEF

Richard P. Rollo (#3994)
Kevin M. Gallagher (#5337)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for plaintiffs-below, appellees John A. Boris and Ann S. Boris

Dated: March 27, 2014

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NATURE OF PROCEEDINGS

As of June 2000, plaintiffs-below, appellees John Boris ("John") and Ann Boris ("Ann"; together, "Plaintiffs") collectively held 6,366,667 of the 10,005,000 shares (*i.e.*, 63.66%) of the voting common stock of Numoda Corporation, Inc. ("Numoda Corp.").[1] Opinion at 5-6; A910; B3-B4. Defendant-below, appellant Mary S. Schaheen ("Mary" or "Defendant") concedes that the foregoing shares were validly issued to (and are still owned by) John and Ann. Op. Br. at 5 ("The issuances to Ann, Mary, and John are not disputed for purposes of this appeal."); *see also* B3-B4. No additional Numoda Corp. voting common stock has been validly issued. Opinion at 43-44. Prior to this litigation, John and Ann understood that they held similar amounts of voting common stock of Numoda Technologies, Inc. ("Numoda Tech."; together with Numoda Corp., the "Corporations"). Opinion at 22.

On November 9, 2012, John and Ann delivered written consents of stockholders to the registered agent for Numoda Corp. (the "NC Written Consent") and Numoda Tech (the "NT Written Consent"; together the "Written Consents"), which complied with the requirements contained in Section 228 of the Delaware General Corporation Law ("DGCL") and the Corporations' bylaws. Opinion at 1, 19, 26; A21-A31. The Written Consents, among other things, removed the

[1] For ease of reference, Plaintiffs use the terms defined in the Opinion (defined below).

existing board members, set the number of directors at two, and elected John and Ann as directors. A21-A31.

On December 28, 2012, Plaintiffs filed a verified complaint pursuant to 8 *Del. C.* § 225, A16-A19, and expedited discovery commenced thereafter in the Court of Chancery ("Trial Court"). In the middle of depositions during April 2013 – after the deposition of plaintiff-below Ann, but before the deposition of plaintiff-below John – Mary produced the Numoda Tech. stock book. Opinion at 22. After having an opportunity to review that stock book, Plaintiffs learned that Numoda Tech. stock had never been properly issued. Opinion at 22. As such, the NT Written Consent was invalid. Opinion at 51.

After a two-day trial, post-trial briefing and post-trial oral argument, the Trial Court issued a 51-page memorandum opinion on December 2, 2013 (the "Opinion"). Op. Br., Ex. A. With regards to Numoda Corp., the Trial Court held that Plaintiffs owned a majority the validly issued voting stock and, therefore, the NC Written Consent was valid. Opinion at 51. With regards to Numoda Tech., the Trial Court held that no validly issued stock existed and, therefore, the NT Written Consent was not valid. Opinion at 51. The Trial Court also held that Mary is the sole director of Numoda Tech. Opinion at 51.

On December 10, 2013, the Trial Court entered the final order in this action (the "Final Order"). Op. Br., Ex. B. Mary filed a notice of appeal on January 8,

2014, and an opening appeal brief ("Opening Brief") on February 24, 2014. This is Plaintiffs' answering brief.

SUMMARY OF ARGUMENT

1. *Denied*. The Trial Court followed well-established Delaware law and held that the purported stock issuances were void as a matter of law because they were not approved by the boards in a written instrument.

2. *Denied*. The Trial Court followed well-established Delaware law and concluded that Defendant's equitable arguments could not validate the purported stock issuances, which were void as a matter of law.

STATEMENT OF FACTS[2]

A. The Parties.

The Corporations are related Delaware entities, headquartered in Philadelphia, that provide technology and other services to companies in the biotechnology and pharmaceutical industries. Opinion at 2; A104. Numoda Corp. acts as an integrator of services and technologies, including software for the conduct of clinical trials, for biotechnology and pharmaceutical companies to make clinical trials faster and cheaper. A104. Numoda Tech.'s business is to hold intellectual property and patents for use in conducting clinical trials. A104-A105.

Appellee John is a stockholder and has held various positions with the Corporations, including as a director, general counsel and secretary. Opinion at 3. John invested money earned from his law practice in Numoda Corp. at its inception. Opinion at 3; A102. In 2000, John received 1,266,667 shares of common stock in Numoda Corp. Opinion at 3; A104; B3-B4.

[2] Although this appeal is limited to two purported errors of law, Plaintiffs note that the Opening Brief is larded with assertions of fact that were contested below. Nonetheless, as set forth in more detail herein, the Trial Court concluded overall that "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." Opinion at 44. "To the extent that the Court of Chancery's decision rests on a finding of fact, we will not set aside its factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012) (quoting *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)).

Appellee Ann is a stockholder and has held various positions with the Corporations, including as a director, chief operating officer and secretary. Opinion at 3. Ann is John's sister, and was the founder of Numoda Corp. Opinion at 3. Ann contributed several patents and invested the proceeds from the sale of her personal assets in order to start Numoda Corp. Opinion at 3; A191. In 2000, Ann received 5,100,000 shares of common stock in Numoda Corp. Opinion at 3; A192; B3-B4.

Appellant Mary is a stockholder and has held various positions with the Corporations, including as a director, president and chief executive officer. Opinion at 3; A273. In 2000, Mary received 3,333,333 shares of Numoda Corp. common stock. Opinion at 3; A910; B3-B4. Mary is the sister of both John and Ann. Opinion at 3.

B. Capital Structure Of The Corporations.

1. Numoda Corp.

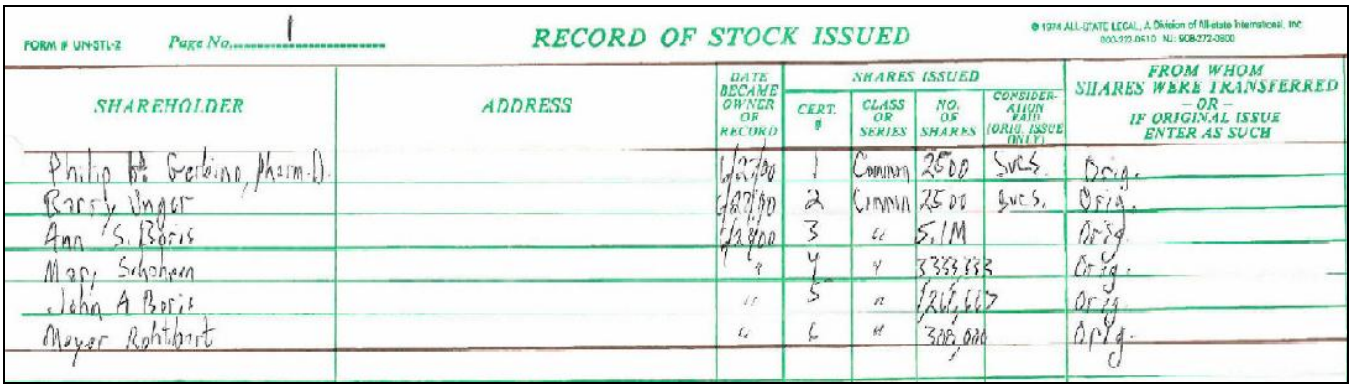
Numoda Corp. was incorporated in 2000 and the initial board of directors consisted of John, Ann and Mary. A725-A729; A192-A193. Through a unanimous written consent, the board of directors elected Mary as the president and CEO, John as secretary and chief counsel, and Ann as chief technical architect. A725-A729. That unanimous written consent of the board of directors also approved and adopted Numoda Corp.'s bylaws. A725-A729; A732-A744.

The initial certificate of incorporation for Numoda Corp. authorized one class of common stock. A668. After multiple amendments, however, the current certificate of incorporation authorizes both Class A non-voting common stock (the "Class A Non-Voting Stock") and Class B voting common stock (the "Class B Voting Stock"). Opinion at 11; A718-A719. All common stock issued prior to May 12, 2006 is Class B Voting Stock. Opinion at 11; A718. Any common stock issued on or after that date is Class A Non-Voting Stock, unless it is specifically designated as Class B Voting Stock. Opinion at 11; A718. Although the certificate of incorporation authorizes preferred stock, no such shares have been issued. A668-A669.

During the entire existence of Numoda Corp., either John or Ann has acted as the secretary. *See* Opinion at 4; A125; A619-A620; A400-A401. In that capacity, they (mostly John) maintained the stock book (the "NC Stock Book"). A105; A108; A620-A621; Opinion at 5. A copy of the entire NC Stock Book was admitted into evidence at trial (A662-A913), and it contains the original official stock ledger (the "NC Stock Ledger"), various stock certificates and receipts, and other organizational documents. *See* Opinion at 5; A107 ("JX 1 is a photocopy of everything that was included in the Numoda Corp. 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, the seal bag.").

The NC Stock Ledger is entitled "STOCK TRANSFER LEDGER" and contains the following entries under the heading "RECORD OF STOCK ISSUED":



FORM # UN-STL-2 Page No. 1

RECORD OF STOCK ISSUED

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SHAREHOLDER	ADDRESS	DATE BECAME OWNER OF RECORD	SHARES ISSUED				FROM WHOM SHARES WERE TRANSFERRED — OR — IF ORIGINAL ISSUE ENTER AS SUCH
			CERT. #	CLASS OR SERIES	NO. OF SHARES	CONSIDERATION PAID (ORIG. ISSUE ONLY)	
Philip P. Gerbino, Pharm.D.		6/2/00	1	Common	2500	Svcs.	Orig.
Barry Unger		6/2/00	2	Common	2500	Svcs.	Orig.
Ann S. Boris		6/2/00	3	"	5.1M		Orig.
Mary Schaheen		"	4	"	3333333		Orig.
John A Boris		"	5	"	1266667		Orig.
Meyer Rohtbart		"	6	"	300,000		Orig.

A910; *see also* Opinion at 5-6 & n.20; A109 ("This is the stock ledger, and it lists the names of the shareholder in whose name the stock was issued, the date of issuance, the stock number, the type of stock and the amount of stock and its general comment on, you know, whether the original was sent."). The above reflects six issuances of Class B Voting Stock in June 2000:

Certificate No. 1: 2,500 shares to Philip P. Gerbino Pharm. D.

Certificate No. 2: 2,500 shares to Barry Unger

Certificate No. 3: 5,100,000 shares to Ann S. Boris

Certificate No. 4: 3,333,333 shares to Mary Schaheen

Certificate No. 5: 1,266,667 shares to John A. Boris

Certificate No. 6: 300,000 shares to Meyer Rohtbart

Opinion at 5-6; A910; *see also* A110 ("Doctor Philip Gerbino, number one, cert number one, 2500 shares. Doctor Barry Unger, cert number two, 2500 shares. Ann S. Boris 5.1 million shares, cert number three. Mary Schaheen, cert number four, 3,333,333 shares. Myself, cert five, 1,266,667 shares, and Meyer Rothbart, 300,000 shares, cert number six.").

Mary does not contest the validity of the above-listed original stock issuances for Numoda Corp. *See* Opinion at 6; Op. Br. at 5; B3-B4; A441-A442. Accordingly, as of June 2000, with 10,005,000 shares outstanding, John and Ann collectively held 63.66% of the shares of Class B Voting Stock validly issued and outstanding. *See* Opinion at 6-7. On April 1, 2004 John transferred his shares to Philadelphia Industrial Development Corporation as security for a loan, but those shares were returned to him in January 2009. A793.

The NC Stock Book also contains a hand-written stock register for Numoda Corp., entitled "IMPROVED STOCK AND TRANSFER LEDGER," containing the following entries under the heading "REGISTER of SHARES of STOCK ISSUED and OUTSTANDING":

Numoda

(NAME OF CORPORATION)

REGISTER of SHARES of STOCK ISSUED

TOTAL AUTHORIZED CAPITAL STOCK ..... Class ..... Par Value ..... Class

	DATE of ISSUE	NUMBER of SHARES ISSUED	CONSIDERATION PAID		* CUMULATIVE TO OUTSTAN	
			CASH	PROPERTY or SERVICES	CLASS: COMMON	CLASS:
1	6/27/00	2500		✓	2500	
2	6/27/00	2500		✓	2500	
3	6/28/00	5100000			5100000	
4	6/28/00	3733333			3733333	
5	6/28/00	1266667			1266667	
6	6/28/00	300000			300000	
7						

A886. The above entries are consistent with the NC Stock Ledger discussed above. Because the above register document and the NC Stock Ledger are "effectively duplicative," the Trial Court determined that the above document was not material to the Trial Court's analysis. Opinion at 5, n.21.

Throughout the course of Numoda Corp.'s existence, Mary contends that various additional stock issuances occurred, which diluted Plaintiffs' ownership percentage below majority control. *See* Op. Br. at 6-10. Mary, however, failed to demonstrate at trial that the Numoda Corp. board approved, by written instrument, any Class B Voting Stock issued following the initial issuances. Opinion at 44; A346-A348. Indeed, in her Opening Brief on appeal, Mary concedes that "[t]he boards of [Numoda Corp.] and [Numoda Tech.] did not approve the challenged issuances by a contemporaneous written instrument; namely, a written board resolution or a written consent." Op. Br. at 3.

The Trial Court held that "[o]f the few documents in the [Numoda Corp.] 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." Opinion at 8. Mary does not challenge this – or any other – Trial Court finding of fact on appeal. Op. Br. at 3. Rather, Mary asserts that (i) Patrick Keenan received Class B Voting Stock in exchange for debt in 2004 (Op. Br. at 6); (ii) Jack Houriet received 5.1 million Class B Voting Stock shares in 2006 (Op. Br. at 7)[3]; and (iii) Mary was given 5,725,000 Class B Voting Stock shares in recognition of her past services (Op. Br. at 8). The Trial Court held, however, that Mary "failed to demonstrate by a preponderance of the evidence that the Numoda Corp. board approved, by written instrument, any Class B Voting Stock issue." Opinion at 44.[4]

Moreover, despite conceding on appeal that no written instrument evidencing board approval exists, Mary attempted at trial to rely on an October 2, 2006 Numoda Corporation Unanimous Written Consent of Directors in Lieu of

[3] Houriet's stock certificate, issued in 2009, clearly indicates on the face of the certificate that it is Class A Non-Voting Stock. *See* B51-B52; *see also* Opinion at 14 ("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.").

[4] Mary does not attack this factual finding on appeal. Instead, she claims that the Trial Court erred in holding that the issuance of stock must be reflected in a written instrument evidencing board approval. Op. Br. at 16.

Meeting to cure the stock issuance defects (the "NC Ratification Consent"). Opinion at 16; A731; *see also* A411. In relevant part, the NC Ratification Consent states:

> RESOLVED, that the Directors of the Company hereby accept, adopt, ratify and approve of all prior acts, business and transactions of the Company, of its predecessors, of its affiliates, and of its subsidiaries as having been done by, on behalf of and in the best interest of the Company, including
>
> 1. The Recapitalization Initiative, which is an initiative to create new series of convertible preferred stock so that existing holders of convertible debt wishing to do so, may convert their debt into stock
> 2. The Certificate of Designation in regard to item 1, and;

See, e.g., Opinion at 16; A731. Mary contends that the vague NC Ratification Consent, signed by Mary and Ann, satisfies the statutorily required formalities associated with any (alleged) prior ratified stock issuances. Op. Br. at 9; A445 ("I identify the October unanimous written consent as ratifying all prior acts."); A446; A458; A476; A486-A488; A490. Yet, the NC Ratification Consent does not mention any prior stock issuances, or otherwise establish that Numoda Corp. had, in fact, attempted to issue any additional voting stock prior to October 2006. Opinion at 16 ("[T]he NC Ratification Consent does not mention, in any general or specific terms, board approval or ratification of any past, contemporaneous, or future stock issues.").[5]

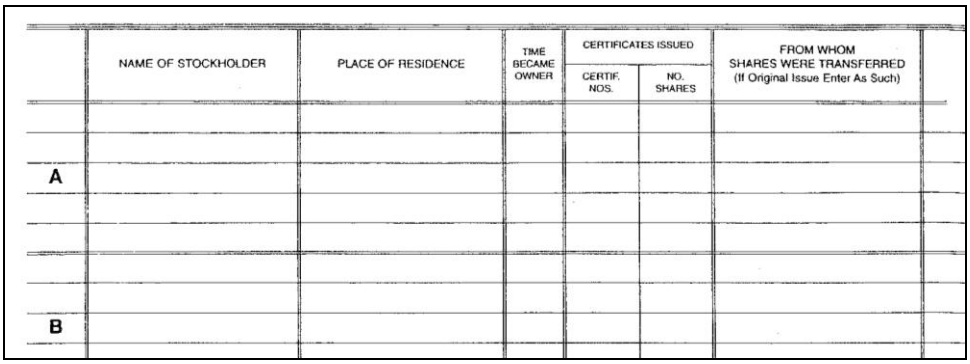
[5] Nonetheless, even if arguendo the NC Ratification Consent somehow satisfies the statutorily required formalities associated with the stock issuances that Mary claims occurred as of October 2, 2006, John and Ann would still own a majority of the Class B Voting Stock. *See*

[Footnote cont'd]

2. Numoda Tech.

Numoda Tech. was incorporated in 2000. Opinion at 20; A949-A952. The Numoda Tech. bylaws were approved and adopted by written consent of the incorporator pursuant to Section 107 and 108 of the DGCL. A971; A954-A969. That written consent also elected the initial board of directors, which consisted of John, Ann and Mary. Opinion at 20; A971; A120; A489.

The entire Numoda Tech. stock book (the "NT Stock Book") was admitted into evidence at trial. *See* Opinion at 20-21; A917-A918. The stock ledger contained therein (the "NT Stock Ledger"), entitled "STOCK TRANSFER LEDGER (SHARE REGISTER)," has no entries:



	NAME OF STOCKHOLDER	PLACE OF RESIDENCE	TIME BECAME OWNER	CERTIFICATES ISSUED		FROM WHOM SHARES WERE TRANSFERRED (If Original Issue Enter As Such)
				CERTIF. NOS.	NO. SHARES	
A						
B						

Opinion at 20-21; A986-A992. Although the parties believed that they owned Numoda Tech. shares, it is not reasonably contested that Numoda Tech. shares have never been issued. A489. In fact, Mary did not identify any stock certificate

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[Footnote cont'd]
B14-B16 (63.63%); B18 (63.63%); B23 (54.09%); B24 (54.09%); B30 (57.27%); B31 (57.27%); B48 (66.17%); B47 (63.89%); B46 (64.76%).

or unanimous written board consent authorizing the issuance of Numoda Tech. shares. Opinion at 23, 33; A489-A490. At trial, Mary attempted to rely on the October 2, 2006 Numoda ***Corp***. written consent as support for her position that Numoda ***Tech***. stock was validly issued. *See* A489-A490. Mary, however, could not identify a Numoda Tech. written consent authorizing the issuance of any shares of Numoda Tech. stock. Opinion at 23, 33; A491. Mary further changed her testimony between her deposition and trial regarding which document she believed was the NT Stock Ledger. *See* A492-A497. Nevertheless, Mary failed to point to any board authorization or writing authorizing the issuance of Numoda Tech. stock. Opinion at 23, 33. As for stock certificates, the NT Stock Book contains specimens for common (No. C-0) and preferred (No. P-0) shares, Opinion at 21; A974; A980, and the remaining stock certificates (starting with No. C-1 and P-1, respectively) are blank. Opinion at 21; A976; A982.

Accordingly, the Trial Court held that Numoda Tech. is a corporation with no stockholders. Opinion at 47.

C. The Written Consents.

On November 9, 2012, John and Ann delivered the Written Consents to the registered agent for the Corporations, *see* Opinion at 19, 26; A21-A23; A25-A27; A29; A31; A123; A213-A215, which complied with the requirements contained in

Section 228 of the DGCL and the Corporations' bylaws.[6] The Written Consents, among other things, removed all of the existing board members, set the number of directors for each board at two, and elected John and Ann as directors to each board. Opinion at 19-20, 26-27; A21-A23; A25-A27. Following Plaintiffs' execution of the Written Consents, John delivered the Written Consents to the Corporations' registered agents and filed the Written Consents with the Corporations' books and records. Opinion at 19-20, 26-27; A123-A124.

D. The Opinion and Final Order.

On December 2, 2013, the Trial Court, following a two-day trial, post-trial briefing and post-trial oral argument, issued its Opinion. *See* Op. Br., Ex. A. The Trial Court held 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 of Numoda Corp. Opinion at 2. In reaching its conclusion, the Trial Court held that "stock is valid only if it is issued pursuant to a written instrument evidencing board approval of the stock issue" and that "compliance with Section 151(a) requires a written instrument." Opinion at 37-38. The Court also

[6] Directors of Numoda Corp. are elected by plurality vote, and the bylaws permit action by written consents of stockholders. A746-A747. Numoda Tech. has similar provisions. *See* A931-A934. Opinion at 19 ("Under the Numoda Corp. bylaws, stockholders can act by written consent."); Opinion at 26 ("Under the Numoda Tech. bylaws, stockholders can act by written consent.").

concluded, based on well-established Delaware law, that improperly issued stock is void and that "as a matter of law … [the Trial Court] may not apply estoppel in this context." Opinion at 38-41. That is, the Trial Court stated that "[i]n 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.'" Opinion at 42 (quoting *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990)).

Accordingly, the Trial Court held that "Mary … failed to demonstrate by a preponderance of the evidence that the Numoda Corp. board approved, by written instrument, any Class B Voting Stock issue." Opinion at 44. As a result, the Court held that the Numoda Corp. voting stock "not issued pursuant to a written instrument is void." Opinion at 44. Thus, John and Ann held a majority of Numoda Corp.'s validly issued stock and the NC Written Consent removing Mary was valid. Opinion at 46.

The Trial Court also held that Numoda Tech. does not have any validly issued stock outstanding and, therefore, the NT Written Consent was invalid. Opinion at 47. The Court also held that Mary is the sole director of Numoda Tech. Opinion at 49.

On December 10, 2013, the Trial Court entered the final order. Op. Br., Ex. B.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT AN ISSUANCE OF COMMON STOCK MUST BE SET FORTH IN A WRITTEN INSTRUMENT EVIDENCING BOARD APPROVAL.

A. Question Presented

Did the Trial Court correctly hold that Delaware law requires a written instrument evidencing board approval in order to validly issue common stock of a Delaware corporation?

B. Scope of Review

This Court reviews questions of law *de novo*. *Klaassen v. Allegro Dev. Corp.*, --- A.3d ---, 2014 WL 996375, at *6 (Del. Mar. 14, 2014). "To the extent that the Court of Chancery's decision rests on a finding of fact, we will not set aside its factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012) (quoting *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)).

C. Merits of Argument

Mary contends on appeal that the Trial Court "erred in its determination that, under *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991), "'[common] stock that is not issued pursuant to a written instrument evidencing board approval …' is void." Op. Br. at 16. Mary further argues that "[t]he court erred in reaching that conclusion because, ***even though Mary admitted that the boards did not***

approve the challenged common stock by a contemporaneous 'written instrument,' 8 *Del. C.* § 151(a) does not require that a board of directors do so." Op. Br. at 16-17 (emphasis added). Mary's arguments ignore this Court's well-established precedent, which the Trial Court correctly applied. Indeed, the Trial Court relied principally on this Court's decisions in *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991) and *Grimes v. Alteon Inc.*, 804 A.2d 256, 266 (Del. 2002). Opinion at 35-39. Accordingly, this Court should affirm the Trial Court's decision.

The issuance of stock requires board approval memorialized in a written instrument. *See* 8 *Del. C.* §§ 152, 157; *Grimes v. Alteon Inc.*, 804 A.2d 256, 266 (Del. 2002) ("Delaware General Corporation Law requires board approval and a written instrument evidencing an agreement obligating the corporation to issue stock either unconditionally or conditionally."). Indeed, issuing stock is an act that "can rightly be seen as 'an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise.'" *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). Thus, the DGCL makes clear that it is the board – not any officers or stockholders – that holds the exclusive authority to issue stock. Specifically, Section 161 provides, in part, that "[t]he *directors may* … if all of the shares of capital stock

which the corporation is authorized … to issue have not been issued, subscribed for, or otherwise committed to be issued, *issue* … *additional shares of its capital stock* up to the amount authorized in its certificate of incorporation." 8 *Del. C.* § 161.

Under Delaware law, there are only two ways for a board to validly act: (i) by a vote of the majority of the directors present at a board meeting at which a quorum is present, *see* 8 *Del. C.* § 141(b), or (ii) by unanimous written board consents in lieu of a board meeting, *see* 8 *Del. C.* § 141(f). In this case, Mary concedes that there are no notices of board meetings, no board minutes, no board resolutions, no formal board votes and no unanimous written board consents associated with any of the disputed stock issuances. *See, e.g.*, Op. Br. at 3, 16. Stated differently, the board could not have validly approved the disputed stock issuances pursuant to the requirements of either § 141(b) or (f), as a matter of law.

Nonetheless, in support of her position, Mary takes a narrow view of Section 151(a) and this Court's decisions in *STAAR Surgical* and *Grimes*. *See* Op. Br. at 18-25. In *Grimes v. Alteon Inc.*, 804 A.2d 256 (Del. 2002), this Court *reiterated* the fact that strict compliance with corporate formalities (*i.e.*, board approval *and* a writing) is required when boards issue stock. As then-Vice Chancellor Strine stated in 2002:

> As recently as this year, the Delaware Supreme Court reaffirmed that stock cannot be validly issued and sold by

> a company unless the board of directors is empowered to take those actions and unless the board of directors exercises its power in conformity with statutory requirements. That decision, *Grimes v. Alteon, Inc.*, represents no innovation in our law, but instead reiterates settled principles, recognized in cases like *STAAR Surgical Co. v. Waggoner* and *Triplex Shoe Co. v. Rice & Hutchins, Inc.* All of these cases are premised on a sensible assumption, which is that the capital structure and ownership of corporations are matters of great importance and should be settled with clarity, and it is, therefore, fitting and efficient to require strict conformity with the statutory requirements for the issuance and sale of stock.

Liebermann v. Frangiosa, 844 A.2d 992, 1004 (Del. Ch. 2002) (footnotes omitted). Accordingly, the Trial Court's reliance on well-settled Delaware Supreme Court precedent and its relevant progeny should be affirmed.

This Court in *Grimes* reached its conclusion "based on the statutory scheme of the Corporation Law pertaining to stock issuance, with particular emphasis on Sections 152 and 157." *Grimes*, 804 A.2d at 259-60. Although this Court emphasized Sections 152 and 157, the holding is not limited to those sections. That is, in *Grimes*, the Court stated that "[o]ne must read *in pari materia* the relevant statutory provisions of the Corporation Law" and began its analysis with Section 141. *Id.* at 260. Before reaching any substantive discussion of Sections 152 and 157, this Court concluded, based on prior Supreme Court precedent, that "the 'issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital

structure of the enterprise.' … *This statutory scheme consistently requires board approval and a writing*." *Id.* (quoting *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991)); *see also Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *13 (Del. Ch. Nov. 1, 2002) (citing *Grimes* as authority of the fact that "Delaware's statutory ... *scheme consistently requires board approval and a writing*"), *aff'd*, 826 A.2d 298 (Del. 2003) (TABLE); *Finnegan v. Baker*, 2012 WL 6629636, at *22 (Mass. Super. Ct. Oct. 19, 2012) (stating, in the context of a stock issuance pursuant to a share conversion, that under *Grimes* "the relevant provisions of the statutory scheme [of the DGCL] … contemplate board approval and a written instrument evidencing the relevant transactions affecting issuance of stock and the corporation's capital structure" (internal quotation marks omitted)); *Duvall v. EcoQuest Int'l, Inc.*, 2008 WL 4890570, at *3 (E.D. Mo. Nov. 12, 2008) (finding, in the context of the issuance of, among other things, stock, that "Delaware law requires that the issuance of stock 'must be approved by the board of directors and evidenced by a written instrument'" (citation omitted)); *Anderson v. Dobson*, 2007 WL 2462675, at *15 (W.D.N.C. Mar. 22, 2007) (concluding, in the context of an issuance of stock pursuant to Section 161 of the DGCL, that the Court in *Grimes* "requires not only board approval, but 'a written instrument evidencing the relevant transactions affecting issuance of stock …'" (citation omitted)).

Moreover, in *Grimes*, this Court observed that the relevant statutes governing the issuance of stock "that provide the policy context that is relevant here are 8 *Del. C.* §§ 151, 152, 153, 157, 161 and 166." *Grimes*, 804 A.2d at 260-61. "Taken together, these provisions confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure. 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*." *Id.* at 261 (emphasis added). Accordingly, to issue stock properly under Delaware law, regardless of whether it is common or preferred, there must be board approval and a written instrument evidencing the relevant transactions affecting the issuance of stock and the corporation's capital structure.

Mary, however, misconstrues the Trial Court's reliance on *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991), by arguing that "*STAAR Surgical* did not address whether Section 151(a) mandates that a board approve a common stock issuance by a written instrument." Op. Br. at 18. Here, the Trial Court observed that *STAAR Surgical* involved invalid preferred stock, and not common stock. Opinion at 36-38. The Trial Court, nonetheless, relied on *STAAR Surgical* and this Court's decision in *Grimes*, among others, to hold that "stock is valid only if it is issued pursuant to a written instrument evidencing board approval of the stock issue." Opinion at 37-38. That is, the Trial Court relied on this Court's clear

precedent to hold that any stock, regardless of whether it is common or preferred, must be authorized by a written instrument evidencing board approval.

Finally, Mary's argument that Section 151(a) does not require a written instrument (i) ignores this Court's precedent as set forth above and (ii) flouts important public policy and would lead to great uncertainty as to the capital structure of Delaware corporations. *See* Op. Br. at 19-23. The Trial Court recognized each consideration in its well-reasoned decision. Opinion at 38-39. Indeed, the Trial Court recognized that:

> First, the formality maintains the integrity of the stockholder franchise, a bedrock principle of Delaware corporate law, in that issuing stock is kept within the exclusive control of those who are both charged with managing and directing the corporation and answerable to stockholders through the election process. 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." 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."

Opinion at 38-39 (footnotes omitted). This Court has previously recognized these important policy implications, which provide foundational support for this Court's conclusion that stock issuances must be authorized by a written instrument evidencing board approval. *See, e.g., Grimes*, 804 A.2d at 261. Thus, Delaware

law requires "scrupulous adherence to statutory formalities when a board takes actions changing a corporation's capital structure." *Blades*, 2010 WL 4638603, at *8. In fact, as this Court has previously held, "[t]o 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." *Grimes*, 804 A.2d at 261.

Mary concedes that the boards of Numoda Corp. and Numoda Tech. "did not approve the challenged stock issuances by a contemporaneous written instrument; namely, a written board resolution or a written consent." Op. Br. at 3. Thus, John and Ann owned a majority of Numoda Corp.'s validly issued common stock and the NC Written Consent was valid. Accordingly, the Trial Court's well-reasoned opinion and order should be affirmed.

II. THE TRIAL COURT CORRECTLY HELD THAT STOCK PURPORTEDLY ISSUED IN VIOLATION OF DELAWARE LAW IS VOID.

A. Questions Presented

Did the Trial Court correctly hold that a purported issuance of common stock that fails to comply with the strict requirements of the DGCL is void and, therefore, not susceptible to equitable arguments?

B. Scope of Review

This Court reviews questions of law *de novo*. *Klaassen v. Allegro Dev. Corp.*, --- A.3d ---, 2014 WL 996375, at *6 (Del. Mar. 14, 2014). "To the extent that the Court of Chancery's decision rests on a finding of fact, we will not set aside its factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012) (quoting *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)).

C. Merits of Argument

Mary contends that the Trial Court "erred by refusing to consider [her] equitable defenses." Op. Br. at 26. In support of her argument, Mary relies on a line of cases that this Court and the Trial Court have long since abandoned. *See* Op. Br. at 27-29. That is, the development of Delaware law on this issue supports the Trial Court's holding and its holding should be affirmed. Opinion at 41 n.185.

Under Delaware law, even "a general aura of subjective agreement" among the parties to alter a corporation's capital structure is insufficient. *Blades*, 2010 WL 4638603, at *11. That is, even if the parties "subjectively wished" to alter a corporation's capital structure, they must strictly comply with Delaware's General Corporation Law or run the risk that a court may invalidate their actions. *Id.* at *10. Delaware law is clear that "law trumps equity in this area of corporate decisionmaking." *Id.* Indeed, that "mandate is premised on 'a sensible assumption ... that the capital structure and ownership of corporations are matters of great importance and should be settled with clarity.'" *Id.* (quoting *Liebermann*, 844 A.2d at 1004).

Thus, any equitable argument that the failures by the board to authorize the additional voting shares Mary claims to hold fails under well-established Delaware law. *See STAAR Surgical*, 588 A.2d at 1137 ("[A] board's failure to adopt a resolution and certificate of designation, amending the fundamental document which imbues a corporation with its life and powers, and defines the contract with its shareholders, cannot be deemed a mere 'technical' error."); *id.* ("Neither logic nor equity compel the validation of a legally void act."); *Liebermann*, 844 A.2d at 1009 ("*STAAR* ... forecloses the assertion of equitable claims to validate stock that was not issued and sold in conformity with statutory requirements."); *Blades*, 2010

WL 4638603, at *11-12 ("I cannot ignore the statutory infirmity of the stock split because my equitable heartstrings have been plucked.").

"Consistent with our law's insistence on adherence to statutory prerequisites to the issuance and sale of stock, our case law has refused to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result." *Liebermann*, 844 A.2d at 1004. Even if John and Ann *had* intended that Mary own the amount of shares she claims to own, that intent does not outweigh the failure of corporate formalities. *See Blades*, 2010 WL 4638603, at *11. Thus, the Trial Court properly declined to consider Mary's equitable defenses.

The weight of *Grimes* is further underscored by the clear development of Delaware law on this issue. Mary's estoppel defense relies on *Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch. 1928), *Danvir Corp. v. Wahl*, 1987 WL 16507 (Del. Ch. Sept. 8, 1987), *Testa v. Jarvis*, 1994 WL 30517 (Del. Ch. Jan. 12, 1994), and *Morente v. Morente*, 2000 WL 264329 (Del. Ch. Feb. 29, 2000).[7] While each

[7] Then Vice Chancellor Strine decided *Morente* (2000), relied upon by Mary, before the Supreme Court's decision in *Grimes*. Following the Supreme Court's decision in *Grimes*, then Vice Chancellor Strine decided both *Liebermann* (2002) and *Blades* (2010). In *Blades*, the Court held that Delaware law "requires scrupulous adherence to statutory formalities when a board takes actions changing a corporation's capital structure." *Blades*, 2010 WL 4638603, at *8. *Blades* marks a stark departure from the Court's prior ruling in *Morente* where the Court observed that acquiescence "prevents a party to the transfer from arguing that the transaction

[Footnote cont'd]

of those cases is distinguishable on its facts, the equitable theory set forth therein did not survive *Grimes*.[8] Indeed, here the Trial Court correctly "appl[ied] the most recent, binding statements of Delaware law." Opinion at 41 n.185.[9]

The Trial Court's post-*Grimes* decisions, including *Blades v. Wisehart* and *Liebermann v. Frangiosa*, highlight the certainty required when it comes to a corporation's capital structure. In *Blades v. Wisehart*, the Trial Court observed that "what is more critical is that *STAAR* and other binding precedent [*e.g.*, *Grimes*]

[Footnote cont'd]
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.

[8] Indeed, since *Grimes* (2002), *Finch* has not been cited for the point relied upon by Mary that equitable estoppel can be invoked to cure a defective issuance. In fact, it has only been cited once since that time, in *MBKS Co. v. Reddy*, where the Court noted that it contributes to an area of law regarding whether stock issued without consideration is void or voidable. 924 A.2d 965, 973 (Del. Ch. 2007), *aff'd*, 945 A.2d 1080 (Del. 2008). That area of Delaware law is "not as clear as it could be." *Id*. As for the other cases cited by Mary, neither *Testa*, *Morente*, or *Danvir* have been cited post-*Grimes* (2002) for the proposition that equity can trump statutory compliance with the DGCL with respect to stock issuances.

[9] The Trial Court correctly held that "[f]or 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)." Opinion at 41 n.185.

make clear that [the Court] cannot ignore the statutory infirmity of the stock split because [the Court's] equitable heartstrings have been plucked. That is, in the sensitive and important area of the capital structure of the firm, law trumps equity." 2010 WL 4638603, at *12 (footnote omitted). Moreover, in *Liebermann v. Frangiosa*, as noted above, the Trial Court observed that:

> [c]onsistent with our law's insistence on adherence to statutory prerequisites to the issuance and sale of stock, our case law has refused to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result. *That is, to the extent that stock is invalid, equitable claims - such as equitable estoppel - will not help a claimant seeking to vote or to validate that stock.*

Liebermann, 844 A.2d at 1004-05 (emphasis added).

Finally, Mary's attempt to label the board's failure to issue stock in the manner required under Delaware law as voidable – and not void – is unavailing. Op. Br. at 29-34. Mary contends that "[i]f the Court nonetheless finds that the stock issuances challenged below are somehow infirm, those infirmities would only render the stock voidable because the alleged infirmities did not involve a charter violation; that is, the challenged issuances did not violate the charters, and they were not taken without charter authority where express charter authority is required." Op. Br. at 29. This argument, however, ignores *STAAR Surgical*, *Blades*, and *Liebermann* – all of which are directly on point.

Here, as in *STAAR*, the disputed stock issuance was without authority and, therefore, "is void and a nullity." *STAAR*, 588 A.2d at 1136. Equity cannot validate an invalid act. As this Court held in *STAAR*, a "court cannot imbue void stock with the attributes of valid shares." *Id*. at 1137; *see also Liebermann*, 844 A.2d at 1004-05 (citing *STAAR*, 588 A.2d at 1136) (noting that Delaware "case law has refused to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result"). Thus, this Court should affirm the Trial Court's opinion and order.

CONCLUSION

For the foregoing reasons, plaintiffs-below, appellees respectfully request that this Court affirm the Opinion and Final Order.

/s/ Richard P. Rollo
Richard P. Rollo (#3994)
Kevin M. Gallagher (#5337)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for plaintiffs-below, appellees John A. Boris and Ann S. Boris

Dated: March 27, 2014