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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In Re Numoda Corporation	No. 121, 2015 Court below: Court of Chancery, Consolidated C.A. No. 9163-VCN

Appellees' answering brief

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NATURE OF PROCEEDING

In December 2012, Ann Boris ("Ann") and John Boris ("John" and with Ann, the "Borises") filed an action (the "225 Action") seeking a declaration that they removed Mary Schaheen ("Mary") from the boards of Numoda Corporation ("Numoda Corp.") and Numoda Technologies, Inc. ("Numoda Tech."), and that they constituted the boards, pursuant to stockholder written consents the Borises executed in November 2012. After trial, the court ruled that, because the disputed Numoda Corp. voting stock was not approved by a written instrument, the issuances were void. A2478. As a result, the Borises held a majority of the Numoda Corp. voting stock and, therefore, they constituted its board.[1] The court also ruled that because none of Numoda Tech.'s stock was approved by a written instrument, it had no outstanding stock. A2480. Accordingly, Mary remained the sole director of Numoda Tech. A2483. Mary appealed the 225 Action (the "225 Appeal," Case No. 13, 2014).

In December 2013, the Borises caused Numoda Corp. to file an action against Numoda Tech. to compel it to issue stock to Numoda Corp., asserting that Numoda Tech. was still a subsidiary of Numoda Corp. (Case No. 9163-VCN).

[1] The initial issuances in 2000 were not in dispute.

On April 1, 2014,[2] John Houriet ("Houriet"), Patrick Keenan ("Keenan"), and Mary (collectively, "Mary's Group") filed an amended complaint against Numoda Corp. seeking, under 8 *Del. C.* § 205, to validate and declare effective Numoda Corp. board's approval of stock issuances in 2002, 2004, and 2006 (previously found to be void) and declare the stock valid as of the time it was originally issued (Case No. 9231-VCN) ("Houriet Complaint").

Numoda Tech. was a subsidiary of Numoda Corp. until 2005, when the parties believed that the Numoda Corp. board effected a spin-off of Numoda Tech., resulting in Numoda Tech.'s capital structure mirroring Numoda Corp.'s. On April 1, 2014, Numoda Tech. filed an amended counterclaim in Case No. 9163-VCN ("NT Counterclaim") seeking the same relief as the Houriet Complaint, but with respect to the Numdoa Tech. stock issuances resulting from the spin-off and its post spin-off issuances (previously found to be void).

The Houriet Complaint and the NT Counterclaim also sought a declaration that Ann effected a give-back of 2 million shares to each company in 2006.

The court consolidated the actions (the "205 Action") and trial was held in July 2014. The 225 Action record was admitted into the 205 Action.

On September 12, 2014, this Court stayed the 225 Appeal, pending a decision in the 205 Action (ID 56027522), explaining that "[i]n making the

[2] 8 *Del. C.* §§ 204 and 205 became effective April 1, 2014.

determination of whether to provide relief under Section 205, the statute expressly allows the Court of Chancery to consider any 'factors or considerations' it 'deems just and equitable,' thus illustrating the overlap in the issues between this case and the one now pending." ID 56027522 at 2.

On January 30, 2015, the court issued its post-trial decision ("Op.") validating Numoda Corp.'s issuances in 2002 to Keenan; in 2004 to Keenan, Mary, and the Borises; and the disputed issuances to Mary and Houriet; which resulted in Mary's Group owning a majority of the voting stock of Numoda Corp.[3] The court also held that Ann returned 2 million shares to Numoda Corp.

Finally, the court ruled that "[t]here is little doubt that the Numoda Corp. board intended a spin-off of Numoda Tech. … and the Numoda Tech. board believed that further issuances occurred in parallel with issuances of Numoda Corp. stock…." Op. at 31-32. The court, however, declined to exercise its equitable powers to validate the disputed stock due to the uncertainty of some evidence. *Id.* at 33. Instead, the court ruled that Numoda Corp. retains control over the Numoda Tech. stock with the authority to direct its issuances.

The Borises appealed.[4] Numoda Tech. did not appeal.

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[3]Consistent with the final order, entered on March 10, 2015, Keenan, Houriet, and Mary executed a written consent removing the Borises as officers and directors of Numoda Corp. and electing Mary and Houriet to the board.

[4]Appellants' Opening Brief (ID 57106799) ("OB").

SUMMARY OF ARGUMENT

1. Denied. The lower court did not err in validating the disputed stock issuances because the record contains sufficient evidence that the Numoda Corp. board approved the disputed issuances, albeit defectively, as determined in the 225 Action. The Borises' arguments are based mostly on challenges to the lower court's determinations of credibility, which this Court will not disturb. In addition, the lower court did not assume, as the Borises claim, that the issuances occurred and it did not rely upon hearsay to determine the issuance date. Rather, the court established the issuance date based on John's own actions, which evidence was admitted without challenge. Finally, the approval of the disputed issuances did not comply with Chapter 8 of the Delaware Code and thus, fall within the definition of "defective corporate acts" under Section 205 and they were properly validated by the lower court.

2. Denied. The lower court properly validated the issuance to Mary and Section 205 does not mandate applying the entire fairness standard. In addition, the Borises did not assert a claim for breach of fiduciary duty and thus, the lower court properly refused to subject the issuance to an entire fairness standard of review.

3. Denied. The Borises conceded that Houriet is entitled to 5.1 million shares, although they asserted that he was entitled to non-voting stock. The lower

court's factual finding, that Houriet's stock is voting stock, is supported by the record. Finally, the lower court did not rely on hearsay but, rather, John's own actions, to establish the issuance date.

4. Denied. In 2006 and thereafter, Ann admitted to the give back of shares and every document signed by the Borises since 2008 reflects, or is consistent with, the 2 million shares give back.

5. Denied. Numoda Tech. did not appeal the court's decision to not validate the Numoda Tech. issuances, and thus, the lower court's ruling with respect to Numoda Tech.'s issuances is not before this Court. In addition, the lower court's exercise of discretion to decline to validate the Numoda Tech. issuances was based upon conscience and reason, and was not capricious or arbitrary and, thus, the lower court's ruling should be affirmed.

STATEMENT OF FACTS

I. *Numoda Corp.*

A. *The Board*

Ann, Mary, and John comprised the Numoda Corp. board until John resigned by April 2006 and Ann resigned by October 2006. A2444, A2450.

John, as Secretary and General Counsel, and later Ann, as Secretary, was charged with the duty of noticing board meetings, taking minutes, and preparing resolutions, but they never did so. A2437-38. Nevertheless, Ann, Mary, and John (and later, Ann and Mary) held board meetings conducted with a process. A1479-80, 1564-67. When they met, they "'understood what role they were in, what was the goal of meeting together and … what contexts they were addressing in those meetings.'" Op. at 6. After an exchange of information regarding a proposal, a "final call for any differences" was made, and if none, board approval was given. A1564-67. The Borises never objected to this process or the lack of notice or minutes. A1564-65, A1568-69, A1580. Ann, Mary, and John also understood that board approval was necessary to issue stock. A239, A300.

B. *The Issuances*

1. *The board approved an issuance to Keenan in 2002*

On November 18, 2002, Keenan invested $15,000 in exchange for 30,000 shares. A857-58. John completed and signed a stock certificate reflecting the

issuance. A1114-17. Despite Ann and John testifying in the 225 Action that they never approved an issuance to Keenan, at trial they conceded that he is entitled to this stock. A43, A288.

2. *The board approved issuances to Ann, Mary, John, and Keenan in 2004*

In 2004, Numoda Corp. sought to strengthen its balance sheet by removing certain debt to insiders in order to secure a new credit facility. A436-38; A863. Therefore, the board (Ann, Mary, and John) approved stock issuances to Ann (4,645,500 shares), Mary (1,380,720 shares), John (1,546,238 shares) and Keenen (1,005,000 shares) in April 2004. A437-38; A865-66, *See also* A2444. Despite Ann and John testifying in the 225 Action that they never approved these issuances, at trial they conceded that these parties are entitled to this stock.

3. *The board approved an issuance to Houriet in 2006*

After years of work, Houriet insisted on having an ownership stake the same as Mary and Ann. A753; A1585-86; A1802. After some negotiation, he accepted a 15% stake in Numoda Corp. A1586-87; A1800-01; A1803-04. In July 2006, the board (Ann and Mary) approved the issuance of a 15% (fully diluted) ownership interest to him. A2446; A457, A461; A1590-92. Ann and Mary confirmed to Houriet that they had approved this issuance, which was "funded" in part by Ann giving back 2 million shares. A457-58; A1807-08. Ann explained to Houriet that

his ownership would be approximately 17%, but it would be diluted to approximately 15% with issuances to the CLA holders (defined below). A755-56.

4. *The board approved an issuance to Mary in 2006*

At the outset, Mary held approximately 33% of Numoda Corp. stock. A420. With the issuances approved in 2004, Mary's ownership was diluted and was going to be further diluted by the Houriet and the CLA holders' issuances. A2202; A438. In July 2006, in recognition of her past services, and as compensation for 2002, 2003, and 2004, the board approved an issuance to Mary that restored her ownership to approximately 33% (fully diluted). A459 ("Ann proposed to me that I should be restored my one-third ownership.... So she made that proposal, and I accepted it, very gratefully accepted it, because I appreciated being a one-third owner."). The stock was not issued to Mary at this time due to the contemplated issuances to the CLA holders. A462.

Around this time, Numoda Corp. was again searching for a replacement lender. A451. Keenan was asked to pledge over $500,000 of his personal assets to secure the new credit facility. A870-74. Keenan's concerns about pledging his assets were eased by Ann when she confirmed to him that the board had approved an issuance to restore Mary's ownership to a one-third stake.[5] A872-76. Based in

[5] At the same time, Ann told Keenan that Houriet was becoming a stockholder "in the same ranks as me, Mary, John and Ann had been" (thus, a Voting Stockholder) and that due to her

part on Ann's representation, Keenan pledged his personal assets, and the loan closed on August 1, 2006. A875; JX406.

5. *The board approved issuing Non-Voting stock to the CLA holders*

Numoda Corp. desired to convert debt evidenced by Convertible Loan Agreements (the "CLA holders") into equity. A2445. To that end, in October 2006, the directors signed a written consent, authorizing a Recapitalization Initiative to create preferred stock to offer to the CLA holders. A1048; A340. However, sometime between October 2006 and December 13, 2007, Numoda Corp. abandoned the plan to issue preferred stock and instead decided to create a non-voting class of common stock to be offered to the CLA holders. B35-36; A340-42.

On December 26, 2007, John sent John Dill ("Dill") a draft Written Consent of the Board, dated April 21, 2006, creating two classes of common stock and a draft amendment to the Certificate of Incorporation creating a class of voting common stock, designated as Class B (the "Voting Stock") and a class of non-voting common stock, designated Class A (the "Non-Voting Stock"). B37-39; A342-43. The amendment creating the two classes was filed on December 27, 2007. A1032-33.

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give-back, the issuances to Mary and Houriet would not be as dilutive to the other stockholders. A874.

Before the creation of the two classes of common stock on December 27, 2007, Numoda Corp. approved (in July 2006) and issued (on December 13, 2007) 5,100,000 shares to Houriet and 5,725,000 shares to Mary. *See* p. 11 *infra*. Thus, at the time these shares were approved and issued, Numoda Corp. had only one class of common stock - Voting Stock.

6. *Numoda Corp. issues stock to Houriet and Mary*

After the CLA holders' calculations were completed, Ann directed Dill (in December 2007) to update the Common Stock Analysis[6] to reflect the previously approved issuances to Houriet and Mary. A1879-80. Accordingly, Dill prepared a Cap Table and various spreadsheets. A1861-62; *see also* A1047; JX164; A403. The final spreadsheet - the Common Stock Ledger and Analysis 12/11/2007 - reflects the issuance of 5,725,000 and 5,100,000 shares of Voting Stock to Mary (lines 10, 11, and 18) and Houriet (line 16), respectively. A2196; A1881, A1885-86; A459; A1599-1600. Ann and Mary approved this spreadsheet in December 2007. A462 ("And Ann called me into her office and showed me on her screen the 2007 stock ledger with my ownership and the information pertaining to the calculations of the CLA.... ***And she told me I was fully restored***...."), A463; A1886 ("Yes, Ann did approve this schedule after the exercise was done, and we

[6] John Dill "worked under Ann" implementing the boards' approvals of the issuance of shares using spreadsheets titled "Common Stock Analysis" or "Common Stock Ledger and Analysis", prepared by Dill and approved by Ann and Mary. A1580-82, A1610; A1851-52, A1864, A1879-80, A1885-86; A2195; A2442 n.34 ("...they are taken as an approximation of the parties' understanding as to the intended capitalization of Numoda Corp.").

used this schedule for the next five years, and it was used in representations for the bank, the I.R.S., a lot of different reasons. It was never questioned.").

Relying on Dill's spreadsheet, which Ann and Mary approved, John signed, under penalty of perjury, and filed the 2007 Numoda Corp. Annual Franchise Tax Report. B45-46. John wrote that Numoda Corp. had 19,720,369 shares outstanding between January and December 12, 2007, and 30,702,322 shares outstanding thereafter, comprised of the following (B45-46; B32-34; A2196):

		Jan. 1- Dec. 12, 2007	Dec. 13 – Dec. 31, 2007
2000	Ann	5,100,000	5,100,000
	Mary	3,333,333	3,333,333
	John	1,266,667	1,266,667
2002	Keenan		30,000
2004	Ann	4,645,500	4,645,500
	Mary	1,380,720	1,380,720
	John	1,546,238	1,546,238
	Keenan	505,000	505,000
	Keenan	500,000	500,000
	Mary	400,000	400,000
2005	John	232,656	232,656
2006-07	Houriet		5,100,000
	Mary (2002)		1,225,000
	Mary (2003)		2,220,000
	Mary (2004)		2,280,000
2006	Ann		-2,000,000
	CLA holders		1,110,003
	PIDC		1,016,950
	PBB	810,255	810,255
	Total	19,720,369	30,702,322

Thus, Houriet's and Mary's stock was issued on December 13, 2007.

Numoda Corp.'s stock was uncertificated, unless a stockholder requested a certificate. A1043 ¶ G. None of Ann, Mary, John, or Keenan requested a stock certificate. A1432. Houriet, however, did request a certificate. At Mary's request, Keenen completed a certificate for Houriet. Keenan used a Class A form, believing it reflected Voting Stock. Op. at 30-31; A887-89. The error was not discovered until the 225 Action. A889; A1592; A1603-04.

Despite Ann and John testifying in the 225 Action that an issuance to Houriet was never approved, at trial they conceded that he is entitled to 5,100,000 shares, but they asserted that he owns Non-Voting Stock.

C. *Ann agreed to, and effected, a give-back*

Ann gave-back 2 million shares to help "fund" the issuances to Mary and Houriet, approved in July 2006. A465. She confirmed the give-back to Mary, Keenan, and Houriet in 2006 (A874-75; A1592, A1598), and reiterated it on many occasions. A1807-08 ("[T]he message was very, very clear coming from Ann wanting me [Houriet] to know that [the stock] was coming from her."); A758.

Between 2008 and November 2012, every document signed by Ann, and every Numoda Corp. representation to third parties, reflected the give-back. *See* pp. 13-14 *infra*. Moreover, Ann expressly confirmed the give-back in a January 16, 2009, email to Keenan, in which she stated: "[a]ttached is a stockholders agreement that records the fact that you own 3.62 percent of the company ***as part***

of a 'giveback' of stock I made many years ago … All of the numbers are right per J[ohn] D[ill]." B10 (emphasis added).

D. *The board's approval of the issuances is evidenced by many documents, most of which were signed or adopted by Ann and John*

Since 2008, Numoda Corp. and the parties have consistently acted with the belief that the disputed issuances were approved and effectuated in compliance with Delaware law.[7] Every representation to third parties (including taxing authorities, banks, and other stockholders) and every public filing is consistent with the capital structure above. For example:

- The 2007 Franchise Tax Report, signed by John under penalty of perjury, reflects 30,702,322 shares outstanding as of December 13, 2007. B45-46.

- In response to Wachovia Bank's July 7, 2008 request for a "Share Register," John wrote to Wachovia on July 22, 2008: "attached to this email, [is] a share register …" B1-5. The attached "Share Register as of 16 July 2008", a copy of which John kept in the stock book (A1228), provides in relevant part:

Class B Common Stock (voting)

(listed alphabetically)

Shareholder	No. of Shares
Boris, John	3,045,561
Houriet, Jack	5,100,000
Keenan, Patrick	1,035,000
Schaheen, Mary	10,839,053
Vurimindi, Ann	7,745,500

[7] It was not until John's wife was fired from Numoda Corp. and Ann wanted to assert more financial control that she and John, in November 2012, took a contrary position. A1610; JX82 at 226-27; A1340; B42-44; B45-46; A2202; A1437-38.

- Houriet was later given a copy of John's Share Register. A1825-27.

- Ann certified as "true and correct" personal financial statements, dated May 3, 2011 and June 1, 2012, showing her percentage ownership of Numoda Corp. as 25.91%. A1510, A1545; B17; B27-29.

- In March 2012, *just months* before the Borises asserted that they owned a majority of Numoda Corp.'s Voting Stock, John texted Dill:

> D (as in JD), M wants me to list up just the percentages of ownership of the 5 mgt team people. Is it M 30, A 21, J 15, JB 10.5 and P 6? (Am guessing.).
>
> **Dill responded**: These are NC pctgs BEFORE dilution...M-36.26%, AV-25.91%, JH-17.06%, JB-10.19%, PK-3.46%. Remaining 7.12% is PIDC and Class A shareholders. NT and NCI are slightly higher because no present minority interests (but warrants outstanding).
>
> **John responded**: "K. Danke! You das Mann!"

B18-20; A1456. Ann Boris was identified as "AV" at times. These numbers match the Common Stock Ledger and Analysis 12/31/2008 (A2195):

Class B Shares (voting)								Class A
AV	MS	JB	JH	PK	Other	PBB	PIDC	Nonvoting
				* * *				
7,745,500	10,839,053	3,045,561	5,100,000	1,035,000	-	-	1,016,950	1,110,003
25.91%	36.26%	10.19%	17.06%	3.46%	0.00%	0.00%	3.40%	3.71%

E. *Ann and John caused Numoda Corp. to "ratify" certain issuances*

After testifying in the 225 Action that they never approved (nor intended to approve) the disputed stock issuances, and arguing that such issuances were void

(and thus not susceptible of ratification), in January 2014 (before Section 204 became effective) the Borises purportedly caused Numoda Corp. to ratify ***most*** of the disputed issuances. They "unanimously ratified" the 2002 and 2004 issuances, as follows: Ann - 4,645,500 shares, John - 1,546,238 shares, Mary - 1,380,720 shares, Keenan - 1,035,000 shares; and Houriet's 5,100,000 shares. A69; A1969. All were Voting Shares, except for Houriet's. Ensuring that their "ratifications" did not cede control, Ann and John did not ratify Mary's final issuance of 5,725,000 shares. A1969 ("(if Houriet are Voting) AB+JB= 51.42%").

These purported ratifications prove that the Numoda Corp. board intended to, and did, approve the issuances. Indeed, as the Borises conceded, "the board cannot ratify action that never took place." ID 55655777 at 34 n.92. Moreover, minutes from the January 2014 board meeting refer to "technical defects" in the previous issuances. A1946-59; A1960-63; A1964-73. Such "technical defects" were the approval of the stock issuances without a written instrument.[8] A292.

II. *Numoda Tech.*

Numoda Tech. was formed in 2000, as a subsidiary of Numoda Corp. Ann, Mary, and John comprised the Numoda Tech. board until John resigned by April

[8]The 2004 issuances were approved by the same process the Borises attack here and the issuances were not reflected on the stock ledger. Yet, the Borises ratified those issuances. Thus, the Borises' litigation position is inconsistent with their actions.

2006 and Ann resigned by October 2006. A2482-83. The Numoda Tech. board used the same process as the Numoda Corp. to make decisions. A2454.

John signed the Numoda Corp. 2005 tax return and the attached Reorganization Plan (the "Plan"), reflecting the spin-off of Numoda Tech. The Plan provides that "[a]t the completion of the reorganization, effective January 1, 2005, the same shareholders of Numoda [Corp.] own mirror interests in NT...." A1246 ¶ 10.

Mary's Group asserted that after the spin-off, the parties believed that Ann, Mary, John, and Keenan were stockholders of Numoda Tech., holding the same number of shares they held in Numoda Corp. Mary's Group also asserted that when the Numoda Corp. board approved issuances to Houriet and Mary in 2006, the Numoda Tech. board also approved issuances to them, which were issued on December 13, 2007. A457, A459; A1806-07; B40-41.

Every representation to third parties (including taxing authorities and banks) is consistent with the above capitalization of Numoda Tech. For example:

- At a March 2010 tax planning meeting which Ann and John attended, this Cap Table (A1817-18, A1891-92; B11-14; B15-16) was reviewed:

	Numoda Corp				Numoda Technologies, Inc.	
	Class	Shares	%	Fully Diluted	Shares	%
Shareholders:						
MS	B	10,839,053	36.26%	32.97%	10,839,053	39.04%
AV	B	7,745,500	25.91%	22.72%	7,745,500	27.90%
JH	B	5,100,000	17.06%	15.51%	5,100,000	18.37%
JB	B	3,045,561	10.19%	9.26%	3,045,561	10.97%
PK	B	1,035,000	3.46%	3.15%	1,035,000	3.73%
Sub-total		**27,765,114**			**27,765,114**	
PIDC	B	1,016,950	3.40%	3.09%	-	0.00%
Other - issued (nonvoting)	A	1,110,003	3.71%	3.38%	-	0.00%
Other - CLAs not converted				0.79%		?
Employee stock option pool (3,000,000)				9.13%		?
Total shares outstanding		**29,892,067**	**100.00%**	**100.00%**	**27,765,114**	**100.00%**
Reconciliation ("Treasury Stock")		810,255				
Total shares issued per 2008 FS		**30,702,322**			**27,765,114**	

- In 2010, the parties signed, under penalty of perjury, the Numoda Tech. S-Election reflecting their percentage ownership interests as follows: Mary-39.04%, Ann-27.9%, Houriet-18.37%, John-10.97% and Keenan-3.72%. B15-16.

- Since 2010, Numoda Tech. filed federal and state tax returns, signed by Ann under penalty of perjury, and issued Schedule K-1s to the parties, reflecting their percentage ownership interests. JX267; JX270; JX417; JX265.

- Ann certified as "true and correct" personal financial statements, in 2011 and 2012, showing that she owned 27.89% of Numoda Tech. B17; B27-29.

The lower court declined to validate the Numoda Tech. issuances. However, consistent with Mary's Group's evidence, the court expects the Numoda Corp. board to issue the disputed Numoda Tech. based on the prior representations and working understanding of the mirror image capital structure. Op. at 33 n.119.

ARGUMENT

I. *The trial court found sufficient evidence of defective corporate acts*

A. *Question presented*

Does the record support the finding of defective corporate acts? A2220-30.

B. *Scope of review*

The interpretation of a statute is subject to *de novo* review. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). This Court will affirm the lower court's legal rulings "unless they represent an 'err[or] in formulating or applying legal principles.'" *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996) (citation omitted). In contrast, factual findings are entitled to "a high level of deference" and will not be set aside "unless they are clearly wrong and the doing of justice requires their overturn." *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi.*, 75 A.3d 101, 108 (Del. 2013) (citation omitted). This Court must defer to the lower court's findings of fact "as long as those facts are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Zimmerman v. Customers Bank*, 94 A.3d 739, 744 (Del. 2014) (citation omitted). When there is a mixed question of law and fact, the factual findings that provide the basis for the legal determination "will not be overturned unless they are clearly erroneous." *DV Realty*, 75 A.3d at 108.

"When the determination of facts turns on the credibility of the witnesses who testified under oath before the trial judge, this Court will not substitute its opinion for that of the trial judge." *Ames v. Ames*, 929 A.2d 783 (Del. 2007) (Order) (Table). Finally, this Court reviews evidentiary rulings for abuse of discretion, which "'occurs when 'a court has … exceeded the bounds of reason in view of the circumstances,' [or] … so ignored recognized rules of law or practice … to produce injustice." *Norwood v. State*, 95 A.3d 588, 594-95 (Del. 2014) (citation omitted).

C. *Merits of argument*

The Borises did not assert below, as they do here, that Mary's Group waived the argument that the disputed issuances constituted "putative stock." Thus, they are precluded from making the argument now. Supr. Ct. R. 8. Moreover, as the trial court recognized, Mary's Group sought validation of the approval of the issuances and the effectuation of the approval; that is, the actual issuances.[9] Op. at 6 n.22. Thus, the Borises' first argument is without merit.

[9] The trial court focused on the authorizations because validation of the issuances would produce substantially the same result. Op. at 6 n.22. This is because the claimed defect in the issuances was with respect to a lack of authorization, thus, the issuances were "putative stock." *See* 8 *Del. C.* § 204(h)(4)(a); *see also* A2215, A2227-29, A2254-59.

1. *The record supports the finding that the Numoda Corp. board authorized the disputed issuances*

The Borises argue that the lower court erred by finding that the Numoda Corp. board authorized the issuances because there are no board resolutions or written consents authorizing (or even attempting to authorize) the issuances (which by the way, are documents that Ann or John were responsible for creating, but did not do so). OB at 17. Establishing "formal" board approval, however, is not required under Section 205, and the statute itself refutes their argument. For example, a "defective corporate act" is "any act … purportedly taken by or on behalf of the corporation" that is and was, when taken, "within the power of a corporation under" the Delaware General Corporation Law ("DGCL"), "but is void or voidable due to" the "failure to authorize or effect an act … in compliance with the" DGCL. 8 *Del. C.* § 204(h)(1), (2). In other words, a "defective corporate act" is one that *failed* to comply with the DGCL regarding corporate formalities. Thus, the Borises' argument runs counter to the express definition of "defective corporate act." If the General Assembly intended Section 205 to apply *only* acts that were formally approved by a written resolution or written consent, it would have said so and not defined "defective corporate act" as it has.

STAAR Surgical and *Blades*, cases the General Assembly expressly overturned in enacting Section 205, are examples of defective corporate acts that

can be remedied under the statute.[10] In those cases, as here, there were no written resolutions or written consents approved by the board.

In *STAAR Surgical Co. v. Waggoner*, the board never formally approved, or attempted to approve, the resolution to issue preferred stock to Waggoner which was contained in the board minutes and in the certificate of designations. 588 A.2d 1130 (Del. 1991). Despite the lack of formal approval, the trial court ruled that the "general consensus" that the company would issue "some type of convertible securities" to Waggoner was sufficient to apply equity to validate issuance to him. *Id.* at 1132. By overruling the Supreme Court decision, the General Assembly implicitly sanctioned the trial court's ruling.

Similarly in *Blades v. Wisehart*, there was no evidence: (1) that the board approved a resolution proposing the stock split, (2) of when and how the stockholders approved the proposal, or (3) of the filing of a certificate of amendment certifying that the stock split had been duly adopted.[11] *Blades*, 2010

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[10] *See* H.R. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013): http://legis.delaware.gov/lis/lis147.nsf/vwlegislation/5A64A8392AC7904285257B5F0056EEF6. ("§ 204 is intended to overturn the holdings in case law, such as *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991) and *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), that corporate acts or transactions and stock found to be 'void' due to a failure to comply with the applicable provisions of the General Corporation Law...."). The synopsis of a bill is a proper source from which to glean legislative intent. *Carper v. New Castle County Bd. of Educ.*, 432 A.2d 1202, 1205 (Del. 1981).

[11] There were no written consents of stockholders or evidence of proper notice of a meeting or evidence that there was even an actual meeting held. *Blades,* 2010 WL 4638603, at *9.

WL 4638603, at *9 (Del. Ch. Nov. 17, 2010). Yet, this situation too can now be remedied under Section 205.

Kalageorgi v. Victor Kamkin, Inc., 750 A.2d 531, 533-34 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000), a case the General Assembly expressly stated still represents an effective means to ratify defective acts, is also instructive on this point. In *Kalageorgi*, after some discussions between the two directors, a written consent for the board was prepared which contemplated issuing 61 shares to be distributed to third parties. The written consent was never executed. *Id.* at 534. However, over the following six years, the parties acted consistent with the stock having been validly issued, such as filing tax returns reflecting that the previous sole stockholder no longer owned all of the stock and executing documents reflected the disputed issuances. *Id.* at 534-35.

Kalageori, who owned all of the undisputed stock, asserted that because the board had not approved the 61 shares by a formal vote at a formal board meeting as required by Section 141(b), or by a written consent as required by Section 141(f), they were not validly issued. *Id.* at 537. A majority of the directors ratified the previous approval of the 61 shares before Kalageori attempted to remove them from the board. *Id.* The court assumed, without deciding, that the original issuance of the 61 shares was defective, but held that any defect was cured by the subsequent ratification. Of course, the court could not have made that finding if

the board had not previously approved the issuances. The court did not, however, require a showing that the original attempt to issue the 61 shares was pursuant to a written resolution or a written consent. Thus, implicit in the court's ruling was a finding that, from the evidence presented, the board did in fact previously approve the issuances, albeit defectively.

Consistent with its favorable view of *Kalageorgi*, the General Assembly did not intend to grant the Court of Chancery less authority under Section 205 than afforded under the doctrine of ratification, which permits putative stock to be validated even in the absence of the formalities the Borises claim are necessary.[12]

The Borises go on to challenge the finding that the Numoda Corp. board approved the disputed issuance to Mary on five grounds, three of which attack her credibility. OB at 18-19 (second-fourth grounds). The trial court found Mary's testimony, supported by "sundry documents," Dill's testimony, and Keenan's testimony, was credible.[13] *See* Op. at 28. This Court will not disturb the trial court's credibility determination. *Ames*, 929 A.2d 783.

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[12] The Borises never addressed these cases, let alone even attempt to reconcile them with their litigation position.

[13] The Borises selective quote from Mary's testimony to claim that she is a liar. OB at 20. Mary's response after the quoted question and answer was "Actually, I didn't follow your question." A589. Read in context, Mary was explaining that she had some difficulty in her twelve hour, exceedingly contentious video deposition. A587-90. They also ignore her testimony that she misspoke when referring to Numoda Corp. instead of Numoda Tech. A2103.

The Borises' assert that Mary's "legal opinion" about the meeting at which she and Ann approved the issuance to Mary is not sufficient evidence to establish that a board meeting occurred. OB at 18 (first ground). Mary was not, however, providing a legal opinion; she was testifying to facts, which the trial court found to be credible. In addition, as the trial court found, Numoda Corp. used a process for taking board action, including the approval of stock issuances. *See* Op. at 6, 29.

The Borises misconstrue the record to assert that Mary admitted that she was issued too many shares. OB at 20 (fifth ground). In the 225 Action, the Borises' counsel misinterpreted a spreadsheet as indicating a certain level of compensation for Mary in terms of dollars per month. A1298. Mary testified that she did not understand the chart to show her compensation on a monthly basis, as suggested by counsel but, rather, that her compensation was set on an annual basis. A1298. Mary then agreed with counsel's straight-forward math calculations. Dill, who created the spreadsheet, explained that the chart did not reflect a monthly salary in dollars, but rather, in number of shares. A1884. Mary clarified these facts at trial. A526-31. Moreover, every document signed by the Borises after 2007 reflects an issuance, either explicitly or implicitly, to Mary of 5,725,000 shares. They never dispute this issuance until November 2012.

2. *The trial court did not err in finding that the disputed stock was issued*

The Borises assert that the trial court assumed that Numoda Corp. attempted to issue the disputed stock. They are wrong. John signed, under penalty of perjury, Numoda Corp.'s 2007 Annual Franchise Tax Report, which reflects in his handwriting that the stock was issued on December 13, 2007. *See* p. 11 *supra;* B45-46. The Borises never disputed this evidence.

The Borises also attempt to rely on their own failures to support their position, claiming that there was no evidence of an issuance because the issuance is not reflected on the stock ledger. OB at 22. John was charged with maintaining the stock ledger, which he failed to do. A2437-38. In addition, Numoda Corp. stock was uncertificated. Thus, the lack of certificates does not support the contention that the stock was not issued.

3. *The trial court did not reply on inadmissible evidence*

As shown in section 2, *supra*, the issuance date for Mary and Houriet's stock was established by John's actions. Thus, the trial court did not rely on the spreadsheets prepared by Dill.

In any event, the trial court ruled that while there may have been some inaccuracies in the spreadsheets, they offered a roughly contemporaneous picture

of the parties' working understanding.[14] Op. at 11. In addition, the Borises relied upon the spreadsheets. B32-34 (John relying on spreadsheet), B18-20 (John agreeing with Dill's statement of stock ownership), B17 (Ann's financial statement prepared by Dill), B108 (Ann signed tax return reflecting her ownership at 25.91%), and B10 (Ann stating that the numbers are right per John Dill). Thus, they are not hearsay. D.R.E. 801(d)(2)(A), (B), (C), (D). *See In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1105 (Del. Ch. 2003) (press releases authorized by CEO constituted admissions by party-opponent, not hearsay), *aff'd*, 847 A.2d 1121 (Del. 2004).

4. *The approval of the issuances was a defective corporate act*

The Borises argue that because the court found that the disputed issuances were approved by the board, there was no defective corporate act to validate. A "defective corporate act," however, is an act that is void or voidable for "failure of authorization." 8 *Del. C.* § 204(h)(1). "Failure of authorization" is defined as a failure to authorize an act in accordance with the DGCL. 8 *Del. C.* § 204(h)(2). The court found in the 225 Action that the issuances were void because they were not approved by a written instrument, as required by Section 151 of the DGCL. Thus, the approval of the disputed issuances falls squarely within Section 205.

[14] Any inaccuracy in the spreadsheets bears on the weight given to the evidence, not its admissibility. *See* D.R.E. 402, 403.

II. *The trial court properly refused to apply the entire fairness test*

A. *Question presented*

Did the trial court properly reject the Borises' argument that the court should apply an entire fairness standard in the context of validating Mary's issuance? Op. at 29, n.114.

B. *Scope of review*

A question of law is subject to *de novo* review. *Cede*, 634 A.2d at 360. This Court will affirm the lower court's legal rulings "unless they represent an 'err[or] in formulating or applying legal principles.'" *Zirn*, 681 A.2d at 1055 (citation omitted).

C. *Merits of argument*

Section 205 does not modify traditional fiduciary duties. Op. at 23 n.96. Thus, a defective corporate act validated under Section 205 is not insulated from a fiduciary duty challenge. Conversely, nothing in Section 205 mandates that before validating a defective corporate act, the court subject a transaction to a judicial standard of review. *See Chen v. Howard-Anderson*, 87 A.3d 648, 666 (Del. Ch. 2014) (describing the difference between directors' standard of conduct and the court's subsequent standard of review of directors' actions). The lower court did not abuse its discretion by validating Mary's issuance without subjecting it to an entire fairness standard.

Significantly, the Borises never asserted, or caused Numoda Corp. to assert, a claim for breach of fiduciary duty. The first time they raised entire fairness was in their pre-trial answering brief. ID 5566761. Thus, the award of Mary's issuance was not properly challenged.

Had the Borises' asserted a breach of fiduciary duty claim, it would have been barred because they acquiesced in the issuance for years. Op. at 29 n.114; *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5739680, at *13 (Del. Ch. Oct. 11, 2013), *aff'd*, 106 A.3d 1035 (Del. 2014) (explaining that claims for breach of fiduciary duty – even if subject to an entire fairness standard of review – are subject to equitable defenses, including acquiescence).

III. *The trial court properly determined that Houriet was issued Voting Stock*

A. *Question presented*

Have the Borises shown that the trial court's factual finding that Houriet was issued Voting Stock was not supported by the record? A2261-62.

B. *Scope of review*

Factual findings are entitled to substantial deference. *Cede*, 634 A.2d at 360.

C. *Merits of argument*

The Borises claim that Mary's testimony does not support the finding that Houriet was issued Voting Stock.[15] The Borises ignore the evidence.

With respect to the number of shares, the Borises conceded that Houriet is entitled to 5.1 million shares by ratifying this issuance in January 2014, and in doing so, they relied upon the Numoda Corp. Stock Ledger and Analysis 12-31-08, which reflects 5.1 million shares for Houriet.[16] A1970; B89.

Mary's testimony that the Numoda Corp. board approved an issuance of Voting Stock to Houriet is supported by the documents and the Borises' actions for

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[15] The Borises argue that Houriet's stock should not be Voting Stock because Mary testified that he was to receive 15% of Numoda Corp. and Numoda Tech., which is inconsistent with Houriet being issued 5.1 million shares. OB at 28-29. However, the evidence showed that Ann told Houriet that his approved ownership was approximately 17% in Numoda Corp., but it would be diluted to approximately 15% due to the contemplated issuances to the CLA holders and that his percentage in Numoda Tech. would be about 18%. A1807-08; A755-56. Because there were fewer stockholders of Numoda Tech., the percentage of ownership would be higher in Numoda Tech. than Numoda Corp. *See* A602 (Mary explaining that after the number of shares was determined for Numoda Corp., the same number of shares would be issued for Numoda Tech.).

[16] When the Borises copied this Common Stock Ledger and Analysis into the board minutes, they conveniently cut off the line showing Houriet's 5.1 million shares.

more than five years. For example: (1) John prepared the Share Register that reflects Houriet owning Voting Shares. A1228; (2) the Borises participated in a 2010 tax planning meeting at which the 2010 Cap Table prepared by Dill was discussed, reflecting Houriet owning Voting Stock. B14; (3) the Common Stock Ledger and Analysis 12-31-08 reflects that Houriet owns Voting Stock:

Class B Shares (voting)								Class A
AV	MS	JB	JH	PK	Other	PBB	PIDC	Nonvoting
				* * *				
7,745,500	10,839,053	3,045,561	5,100,000	1,035,000	-	-	1,016,950	1,110,003
25.91%	36.26%	10.19%	17.06%	3.46%	0.00%	0.00%	3.40%	3.71%

A2195; (4) John signed the PIDC Conversion Agreement, effective as of November 20, 2008, in which Numoda Corp. represented that it had 28,575,369 shares of Voting Stock outstanding. B49 ¶ 5; B88. For this to be true, Houriet's stock has to be included in the Voting Stock number. A347-48, A351; and (5) Numoda Corp. only had Voting Stock when Houriet's shares were issued on December 13, 2007. *See* pp. 9-10 *supra*.

In addition, Keenan "credibly testified" that he completed a Class A certificate under the belief that it represented Voting Stock. Op. at 30.

IV. *The trial court properly declared that Ann effected a share give-back*

A. *Question presented*

Was Ann's admission that she effected a shares give-back and the five years of corroborating documents sufficient to find that the give-back occurred? Op. at 33-35.

B. *Scope of review*

This court reviews the trial court's evidentiary rulings for abuse of discretion. *Norwood*, 95 A.2d at 594-95. Factual findings are entitled to substantial deference. *Cede*, 634 A.2d at 360.

C. *Merits of argument*

Ann argues that there was insufficient evidence for the lower court to declare that the shares give-back occurred. Ann is wrong.

Ann ignores the many documents that reflect, or are consistent with, the give-back.[17] Without the give-back, Ann would own 9,745,500 shares. The 2010 Cap Table and John's Share Register, however, list Ann holding 7,745,000 shares. A1228; B14. The Common Stock Ledger and Analysis 12/31/2008 also lists Ann holding 7,745,500 shares. A2195. In addition, tax filings and financial statements reflect Ann's percentage ownership in Numoda Corp. as 25.9%, which could only be true if she owned 7,745,500 shares. *Supra* pp. 13-14. The number of

[17] Because John, admittedly, failed to keep the stock ledger, Ann's reliance on the lack of entry on the ledger as evidence that she did not transfer her shares was unconvincing.

outstanding shares reflected in the Annual Franchise Tax Reports is consistent with Ann's give-back of 2 million shares. B45-46; *see supra* p. 11.

Furthermore, Keenan and Houriet testified that Ann admitted to them that she effected the give-back. The most telling evidence, however, is Ann's own words. In 2009, she emailed Keenan about the "***'giveback' of stock I made many years ago...***" B10 (emphasis added). Ann's response when asked what she meant by this email speaks volumes: "That is a good question. I'm sorry I can't help you." A1529.

Ann's reliance on *Blades v. Wisehart*, is misplaced because unlike in *Blades*, here, the transferor of the stock admitted to the transfer and signed documents reflecting her post-transfer holdings.

V. *The trial court's exercise of discretion to decline to validate the Numoda Tech. issuances was not arbitrary or capricious*

A. *Question presented*

Was the trial court's decision to decline to validate the Numoda Tech. issuances arbitrary and capricious? Op. 31-33.

B. *Scope of review*

Where the Court of Chancery is vested with discretionary authority by statute, its exercise of that discretion is entitled to substantial deference. *Wal-mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1271-72 (Del. 2014); *Chavin v. Cope,* 243 A.2d 694, 695 (Del. 1968) ("When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.") (citation omitted).

C. *Merits of argument*

Attempting to gain control of Numoda Tech., the Borises seek to validate the spin-off of Numoda Tech. (but not the post spin-off issuances). Neither the Borises, nor Numoda Corp., however, asserted a claim to validate the 2005 spin-off of Numoda Tech. Rather, they asserted that Numoda Tech. should be compelled to issue its stock to Numoda Corp. ID 54710473.

Numoda Tech. sought to validate the issuances resulting from the 2005 spin-off and post-spin off issuances, which the trial court declined to grant. Numoda Tech. did not appeal that ruling and, thus, the trial court's ruling with respect to Numoda Tech. is not before this Court. Accordingly, the Borises' argument should be rejected. If the Court reaches the Borises' argument, it should be rejected because the Borises failed to show that the trial court's ruling was arbitrary or capricious.

Section 205 confers equitable jurisdiction on the Court of Chancery, pursuant to which it ***may*** validate defective corporate acts or putative stock, among other things. 8 *Del. C.* § 205(b), (e). Here, while there was evidence of corporate acts to effect the spin-off and issue Numoda Tech. stock post spin-off, due to the uncertainty of some evidence, the trial court declined to validate the issuances. Op. at 32. The parties will not be significantly harmed, the court ruled, because Numoda Corp. has the authority to issue Numoda Tech. stock and the court cautioned that Numoda Corp.'s board must exercise its good faith judgment when issuing the stock, which is to be guided by the parties' prior understanding of the mirror-image capital structure. Op. at 33 n.119. Thus, all of the parties' prior understandings, not just the spin-off, will be effectuated. Accordingly, the trial court's ruling should be affirmed.

CONCLUSION

The Borises have failed to show any ground on which the trial court's rulings should be reversed. Accordingly, the lower court's ruling should be affirmed.

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