IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PALISADES GROWTH CAPITAL II, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 2019-0931-JRS**
	)	
ALEX BÄCKER and RICARDO BÄCKER,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
QLESS, INC., a Delaware corporation,	)	
	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: March 12, 2020
Date Decided: March 26, 2020

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SLIGHTS, Vice Chancellor

Defendant, Alex Bäcker ("Bäcker"), is a co-founder of QLess, Inc. ("QLess" or the "Company"). He was also the Company's CEO until QLess's Board of Directors (the "Board") removed him from that position in June 2019. Bäcker appeared to accept his termination and cooperated with the Board as it searched for his replacement. While questions remained about what Bäcker's continuing role at QLess would be, the Company's investors believed Bäcker had accepted he would no longer lead QLess as CEO.

Like many early stage companies, QLess's governance documents apportion control between the Company's founder and its investors. Specifically, under QLess's certificate of incorporation (the "Charter"), Bäcker, as the majority owner of the Company's common stock, has the right to appoint two directors to QLess's Board. Plaintiff, Palisades Growth Capital II, L.P. ("Palisades"), as the majority owner of the Series A Preferred Stock, has the right to appoint one director to the Board. And non-party, Altos Hybrid 2 L.P., ("Altos"), as majority owner of the Company's Series A-1 Preferred Stock, has the right to appoint one director to the Board. Bäcker and the investors made further provisions for appointing directors to the Board in a voting agreement (the "Voting Agreement"), whereby the parties agreed to appoint one jointly designated independent director and, if Bäcker were terminated as CEO, to create a new CEO director seat to be filled with Bäcker's replacement.

At the time Bäcker was terminated as CEO, all five board seats were filled. Bäcker served as one common director; his father, Defendant, Ricardo Bäcker ("Ricardo"),[1] served as the second common director; non-party, Jeff Anderson ("Anderson"), served as Palisades's designee; non-party, Hodong Nam ("Nam"), served as Altos's designee; and non-party, Ivan Markman ("Markman"), served as the independent director.

Non-party, Kevin Grauman ("Grauman"), was hired as CEO in September 2019, with Bäcker's apparent blessing. Under the Voting Agreement, with Bäcker now terminated as CEO, Grauman was to fill the newly-created CEO Board seat.

Nam resigned his position on the Board shortly after Grauman was hired. After some dithering, Nam agreed that non-party, Paul D'Addario ("D'Addario"), a partner at Palisades, should replace him as Altos's designated director. While the Series A-1 holders have an exclusive right under the Charter to appoint a director, QLess's outside counsel advised Altos that a Board vote would be required to confirm D'Addario's appointment. With this advice in mind, the Board arranged for a telephone meeting to occur on November 15, 2019, in order formally to appoint D'Addario and Grauman to the Board, and to attend to other QLess business.

[1] I refer to Ricardo Bäcker by his first name to avoid confusion, without intending familiarity or disrespect.

Markman unexpectedly resigned his independent director seat on November 14. Believing that he held a 2-1 Board majority, Bäcker seized the moment by scheming with Ricardo (and counsel) to take control of the Company in advance of the November 15 meeting. With plan (and corresponding Board resolutions) in hand, Bäcker announced at the outset of the meeting that he held a 2-1 Board majority and then demanded that Grauman and D'Addario disconnect from the call (i.e., leave the Board meeting) since they were not members of the Board. Grauman left the meeting but D'Addario refused to disconnect. With Ricardo's support, Bäcker then fired Grauman as CEO, appointed himself to replace Grauman as CEO and fill the CEO director seat, appointed himself as CFO, ratified a new employment agreement for himself, appointed non-party, Patricio Cuestra ("Cuestra"), to fill Bäcker's now vacant common director seat and amended the Company's Bylaws to provide for a quorum of three when (or if) the Board were to be comprised of six members. This concerted action was undertaken over Anderson's dissenting vote and D'Addario's heated objection.

According to Defendants, at the conclusion of the November 15 meeting, the Board was comprised of Ricardo and Cuestra as common directors, Bäcker as CEO director, and Anderson as the Series A Director. By Defendants' lights, the Series A-1 and independent director seats were, and remain, vacant.

Palisades filed its Complaint on November 20, 2019, in which it seeks an order under 8 *Del. C.* § 225 declaring that D'Addario was validly appointed to the Board before the November 15 meeting, rendering any action taken at that meeting a nullity. The Complaint also alleges a breach of the Voting Agreement for failure to confirm Grauman to the CEO director seat. In the alternative to its statutory and contractual arguments, Plaintiff urges this Court to exercise its equitable powers to invalidate the actions taken at the contested meeting.

In this post-trial Memorandum Opinion, after careful consideration of the evidence, I find that D'Addario was never validly appointed to the Board. And, while Bäcker and Ricardo were not forthcoming with Palisades and Altos in advance of the November 15 meeting, they did not take any affirmative action to prevent Altos from exercising its rights with respect to the Series A-1 Board vacancy. As there was no deceptive action relating to the appointment of the Series A-1 director in advance of the November 15 meeting, equity cannot be invoked to turn back the clock and appoint D'Addario to the Board prior to that meeting.

Additionally, it is not at all clear that Bäcker breached the Voting Agreement by refusing to recognize Grauman as a duly appointed member of the Board. While the evidence clearly demonstrates that the parties to the Voting Agreement intended that Grauman would take the newly created CEO Board seat in advance of the

November 15 meeting, the specific means by which that Board vacancy was to be filled are not at all clear in either the Bylaws or the Voting Agreement itself.

The inquiry regarding the propriety of the Bäckers' conduct in advance of, and at, the November 15 meeting does not end with an assessment of their compliance with the operative QLess governance documents. The Bäckers were fiduciaries and must conduct themselves accordingly. While they took no steps to interfere with Altos's right to elect its Board designee, they did affirmatively deceive the other QLess directors into attending the November 15 meeting on the belief that the Bäckers would honor the Voting Agreement by appointing Grauman to the vacant CEO director seat. As Grauman should have been appointed to the Board as of, or at, the November 15 meeting, the actions taken at that meeting lacked approval by a majority of the Board and are, therefore, voided, regardless of whether *vel non* Bäcker breached the Voting Agreement.

I. BACKGROUND

I have drawn the facts from the parties' pretrial stipulation and the evidence admitted at trial.[2] The trial record consists of eight lodged depositions, 495 joint trial exhibits and the arguments of counsel presented at a trial on a paper record on

[2] I cite to the trial arguments of counsel as "Tr.__", the Joint Pre-Trial Stipulation and Order as "PTO ¶ __", the joint trial exhibits as "JX__" and Depositions as "Name Dep. __."

January 7, 2020. The following facts were proven by a preponderance of the competent evidence.[3]

A. The Parties and Relevant Non-Parties

Plaintiff, Palisades, is a private equity firm that first invested in QLess in August 2017.[4] Per the Charter, Palisades controls the Series A Director seat through its ownership of the majority of the Company's Series A preferred stock.[5]

Defendant, Alex Bäcker, co-founded QLess in 2009 and served as the Company's CEO until June 7, 2019.[6] Bäcker owns the majority of the Company's common stock.[7] As majority common stockholder, he controls the two common director seats of the Board.[8]

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[3] Elements of Plaintiff's claims appear to rest on a prayer for specific performance of the Voting Agreement. While I ultimately do not grant that relief, I did consider the evidence during deliberations with the burden of proof applicable to a decree of specific performance in mind. *See Pipkin v. Johnston*, 1977 WL 9570, at * (Del. Ch. Apr. 15, 1977) ("It is well established that specific performance will not be decreed unless the evidence and terms of the contract to be enforced are established by that high degree of proof which has been variously characterized as 'clear,' 'clear and convincing,' 'clear and satisfactory' or other equivalent expressions.") (citations omitted).

[4] PTO ¶ 4; JX 458 (Anderson Dep.) 14:25–15:4.

[5] PTO ¶ 4.

[6] JX 457 (Bäcker Dep.) 14:2–5; PTO ¶ 5.

[7] PTO ¶ 5.

[8] *Id.*

Defendant, Ricardo Bäcker, is Alex Bäcker's father.[9] He holds a small amount of preferred stock in the Company and was elected as the second common director by Alex Bäcker on March 31, 2019.[10]

Nominal Defendant, QLess, is a privately held Delaware corporation headquartered in Pasadena, California.[11] QLess produces and licenses a virtual queue management system that reduces the time retail customers have to wait in line for service.[12]

Non-party, Altos, is an investment firm that first invested in QLess in November 2018.[13] Per the Charter, Altos controls the Series A-1 Director seat through its ownership of the majority of the Company's Series A-1 preferred stock.[14]

[9] PTO ¶ 6.

[10] *Id.*

[11] PTO ¶ 3, JX 5 ("Charter") at 1.

[12] PTO ¶ 14.

[13] PTO ¶ 7.

[14] *Id.*

Non-party, Grauman, was hired as QLess's CEO in September 2019.[15] His purported firing at the November 15, 2019 Board meeting is at issue in this litigation.[16]

Non-party, Anderson, is a partner at Palisades. He was Palisades's initial designee to the Series A Director seat and still serves in that role.[17]

Non-party, Nam, is a co-founder of Altos.[18] He was Altos's designee to the QLess Board from when Altos first invested in QLess until his resignation on September 30, 2019.[19]

Non-party, D'Addario, is a Senior Managing Director of Palisades.[20] He was Nam's choice to take Altos's Series A-1 Director seat after Nam's resignation.[21]

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[15] PTO ¶ 8.

[16] *Id.*

[17] PTO ¶ 4: Anderson Dep. 16:12–18.

[18] JX 453 ("Nam Dep.") 14:13–15:5.

[19] PTO ¶¶ 18, 26.

[20] PTO ¶ 9.

[21] PTO ¶ 28; JX 254 at 2–3.

Non-party, Markman, served as the independent director of QLess from November 27, 2018 until his resignation on November 14, 2019.[22] The parties agree that the independent director seat remains vacant.

B. Bäcker's Termination as CEO

In early 2019, only a few months after Altos invested in QLess, the Company's employees began to report to the Board that Bäcker's leadership was creating a toxic work environment.[23] Senior executives told Anderson that Bäcker was becoming "increasingly withdrawn and unhinged, either totally absent and disconnected or hyper micromanaging and combative," and the Board grew worried that the Company was at risk of a mass employee exodus.[24] Exasperating the situation, Bäcker terminated the Company's Vice President of Engineering in March 2019, a move that drew considerable ire from the QLess investors.[25]

At this point, Anderson thought Bäcker should be relieved of his duties as CEO, but Nam and Markman were more hesitant, expressing a preference that Bäcker receive leadership coaching before the Board gave further thought to

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[22] PTO ¶ 10.

[23] Anderson Dep. 159:15–160:6; JX 451 ("Markman Dep.") 26:7–28:23; Nam Dep. 174:16–175:17.

[24] JX 45; Anderson Dep. 26:20–27:2.

[25] Nam Dep. 35:16–17; JX 21; Anderson Dep. 145:4–147:20.

termination.[26] The Board, sans Markman, met on March 28, 2019.[27] At Nam's request, two outside consultants were invited to provide coaching (and counseling) to Bäcker and the Board.[28] The meeting was not productive and ended with a majority of the Board concluding that Bäcker should be terminated as CEO.[29] Nam informed Bäcker soon after that the Board believed he should step down.[30]

Three days later, Nam and Anderson called a special meeting of the Board to discuss Bäcker's status with the Company.[31] Unwilling to resign, Bäcker took action to secure his role as CEO. He fired QLess's President and Corporate Secretary and replaced Michael Bell, Bäcker's initial designee as common director who now supported Bäcker's termination, with Ricardo.[32] While there was some dispute among the Board members as to the legal validity of Bäcker's replacement of Bell with Ricardo, Nam, Anderson and Bell eventually acknowledged the change after

[26] Anderson Dep. 69:22–70:15; JX 21; Anderson Dep. 90:14–20.

[27] JX 24.

[28] *Id.* at 1–2.

[29] *Id.*; Nam Dep. 155:14–156:4.

[30] Nam Dep. at 259:14–260:1.

[31] JX 34 at 2–3.

[32] JX 58; Anderson Dep. 69:22–70:25; JX 81 at 2; JX 456 ("Ricardo Dep.") 32:15–33:4.

being advised by QLess's outside general counsel, Scott Alderton ("Alderton"), that the replacement was valid.[33]

With Ricardo staunchly in Bäcker's camp and Markman on the fence, firing Bäcker no longer had majority Board support.[34] In the following weeks, unrest at QLess increased with a key employee resigning and members of the management team detailing their objections to Bäcker's leadership in a letter to the Board.[35] In response, the Board voted to form a Special Committee, comprising Anderson, Nam and Markman, to investigate the complaints lodged against Bäcker.[36] The Special Committee hired counsel who conducted a month and a half long investigation.[37]

On May 29, 2019, counsel sent its report of the investigation to the Special Committee.[38] The report substantiated many of the employee complaints about Bäcker, including that staff reasonably believed he "retaliated" against employees, "made demeaning comments or used demeaning language," and "made comments

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[33] *See* JX 37; JX 53; JX 42; JX 104.

[34] *See* JX 73.

[35] JX 119; JX 111.

[36] JX 129.

[37] JX 149.

[38] While QLess has asserted privilege over the full report, a summary of the report was admitted into evidence without objection. *See* Tr. 13:9–20; JX 149.

about (or to) women" that were offensive.[39] In response, the Special Committee recommended to the full Board that Bäcker be terminated.[40] On June 8, the Board met and voted to remove Bäcker as CEO.[41]

C. The Events Leading to the November 15 Meeting

After Bäcker's termination, the Board conducted an extensive search for a new CEO, eventually hiring Grauman on September 7, 2019.[42] While Bäcker supported Grauman's appointment as CEO, their relationship soon became "strained" as Grauman sensed that Bäcker was not comfortable relinquishing the CEO role.[43]

On September 30, 2019, Nam resigned as Series A-1 Director.[44] Anderson quickly reached out to Nam requesting that Altos designate a Palisades party to serve as Series A-1 Director rather than leaving the seat vacant.[45] After some

[39] *Id.*

[40] JX 166 at 11.

[41] *Id.* at 1. It is undisputed this event constituted a "Bäcker Termination Event" as defined by the Voting Agreement. *See* JX 7 at § 1.1.

[42] JX 196.

[43] *Id.*; JX 454 ("Grauman Dep.") 36:12–38:16.

[44] JX 212.

[45] JX 220.

consideration of alternate arrangements, Nam agreed.[46] Altos General Counsel, Rick Arnold, sent an email to Alderton on October 28 requesting that Alderton "draft and circulate the necessary stockholder consent to elect Paul D'Addario . . . to the QLess Board as the Altos designee[.][47] The email continued, "[w]e would like to fill the vacancy left by [Nam's] resignation with [D'Addario] as soon as possible."[48]

Unfortunately, Company counsel misunderstood the mechanics of how a Series A-1 Director vacancy is filled. Even though the Charter gives the Series A-1 preferred stockholders the exclusive right to elect a director by vote or written consent, Alderton advised Nam and Anderson that a Board resolution presented at a duly called Board meeting would be required to place D'Addario in Nam's vacant Series A-1 Board seat.[49] Relying on this advice, Altos took no further action to elect

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[46] JX 276. Defendants' arguments that Nam did not have a firm intent to appoint D'Addario to the Board border on frivolous. Although Nam did initially discuss other options with Bäcker, he quickly settled on D'Addario as his choice. *Id*; JX 254, JX 292; JX 293.

[47] JX 254 at 2.

[48] *Id.*

[49] Charter § 3.2; *see* JX 254 at 1 ("It is mechanics [Nam]. Your appointment is contractual, in other words you have the contractual right to designate who the Series A-1 director will be, but that person still needs to be either elected by the stockholders under Delaware law, **or in this case since it is filling a vacancy, appointed by the Board**.") (emphasis added). There is no evidence that Bäcker had anything to do with the incorrect advice Alderton gave to Altos. I say incorrect advice because, as discussed below, the Charter allows the Series A-1 stockholders the exclusive right to elect their Board designee, and the Bylaws expressly defer to the Charter with respect to filling Board vacancies. JX 8 ("Bylaws") § 3.2.

D'Addario, though Nam reiterated his desire that D'Addario be appointed to the Board on numerous occasions.[50]

On October 27, Bäcker requested that the Board convene for a meeting, and the parties agreed to meet telephonically on November 15.[51] As the parties were scheduling this meeting, Anderson realized Grauman was not on the email thread and inquired as to why he was not included.[52] Bäcker responded, "Kevin [Grauman] is on the thread, assuming [the Board] now includes him, *which I requested it does*."[53] On November 11, per Bäcker's request, Grauman circulated proposed resolutions for the meeting.[54] The resolutions included, among other items, replacing Nam on the Board with D'Addario and confirming Grauman's role as the CEO director.[55] Neither of the Bäckers objected to these agenda items.[56]

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[50] JX 292; JX 293.

[51] JX 246.

[52] JX 224 at 1.

[53] *Id.* (emphasis added).

[54] JX 268; JX 289.

[55] JX 289 at 1–2; *see* JX 303.

[56] Bäcker did inform Alderton that there was an issue with an option grant to Ricardo in the proposed resolutions and requested new resolutions correcting the error. *See* JX 290 at 1; JX 452 ("Alderton Dep.") 110:24–112:18; JX 700.

On the morning of November 14, just one day before the meeting, Markman unexpectedly resigned his position as independent director.[57] Markman made this decision after a phone call with Bäcker that led Markman to believe Bäcker would try to reinstate himself as CEO.[58] In explaining his resignation, Markman stated, "I decided I just didn't have time" for continuing as a Board member.[59]

Believing that Markman's resignation allowed him to make the case that he enjoyed a 2-1 majority on the Board, Bäcker leapt into action in advance of the November 15 meeting. After discussing the matter with his own counsel, Bäcker circulated alternate proposed resolutions to Ricardo and Cuestra.[60] This set of proposed resolutions differed radically from the set Grauman had circulated a few days earlier. Among other actions, the resolutions purported to: terminate Grauman's appointment as CEO; reappoint Bäcker as CEO and appoint him CFO; appoint Bäcker to the CEO director Board seat; appoint Cuestra to Bäcker's newly vacant common director seat; ratify an employment agreement for Bäcker; and amend the Bylaws to provide for a quorum of three members when the Board is six

[57] JX 425.

[58] Markman Dep. 68:12–69:6. His resignation notice did not include any reason as to why he resigned. JX 425.

[59] Markman Dep. 70:14–19.

[60] JX 304; Tr. 124:5–13. Cuestra had been consulting for QLess for several months prior to the November 15 meeting. Bäcker Dep. 267:8–20.

members.[61] These moves, in total, would essentially lock in Bäcker's control of QLess.

Bäcker, with Ricardo's support, executed his plan at the November 15 meeting. The meeting's participants included Bäcker, Ricardo, Anderson, D'Addario, Grauman and Alderton.[62] After calling the meeting to order, Bäcker demanded Grauman and D'Addario leave the call. Grauman agreed but D'Addario refused.[63] With Ricardo's support, Bäcker proceeded to vote through each of his proposed resolutions over the objections of Anderson and D'Addario.[64]

D. Procedural History

Palisades filed its Verified Complaint on November 20, 2019. The Complaint asserts four counts: Count I seeks a declaratory judgment pursuant to 8 *Del. C.* § 225 that the QLess Board comprises Anderson, D'Addario, Bäcker and Ricardo; Count II seeks a declaratory judgment pursuant to 8 *Del. C.* § 225 that Grauman is the QLess CEO; Count III seeks specific performance of the Voting Agreement, which would require the parties to elect Grauman to the CEO director seat; and Count IV alleges direct and derivative breach of fiduciary duty claims against Alex

[61] JX 304.

[62] JX 402 at 4.

[63] *Id.*

[64] *Id.*

and Ricardo Bäcker.[65] Given the expedited nature of Section 225 proceedings, the parties agreed to bifurcate the fiduciary duty claims from the Section 225 Action.[66]

II. ANALYSIS

Our General Corporation Law vests power in the Court of Chancery to review contested elections of officers and directors.[67] A Section 225 proceeding is "summary in character, and its scope is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer."[68]

Palisades advances two arguments as to why D'Addario was validly elected to the QLess Board in advance of the November 15 meeting such that all actions taken at that meeting are void. First, it argues that an October 28 email from Altos's general counsel to QLess's outside general counsel reflects a "vote" of the Series A-1 Preferred Stockholders to place D'Addario on the Board.[69] Second, it argues that if the email was not a vote, then it was a written consent.[70]

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[65] JX 435 ("Compl.") ¶¶ 35–61.

[66] PTO ¶ 2.

[67] 8 *Del. C.* § 225(a)

[68] *Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 199 (Del. 2011).

[69] Pl.'s Pretrial Br. ("PB") 46.

[70] *Id.*

Palisades next argues that the Bäckers breached the Voting Agreement by failing to appoint Grauman to the open CEO director seat on the Board.[71] As the Voting Agreement contains a stipulation of irreparable harm and a consent to specific performance provision, Palisades argues Grauman must be appointed to the Board immediately.[72]

Last, Palisades argues that even if D'Addario and Grauman were not elected to the Board, this Court should invoke its equitable powers to invalidate all actions undertaken by the Bäckers at the November 15 meeting.[73] In this regard, it appears Palisades is arguing that Bäcker utilized trickery and deceit to call the November 15 meeting and to secure the presence of other Board members at that meeting.

Defendants counter that the October 28 email relating to D'Addario is neither a vote nor a written consent under Delaware law.[74] They next argue they did not breach the Voting Agreement because Grauman was validly terminated at the November 15 meeting and there was no action taken by a stockholder prior to that meeting to appoint Grauman to the open CEO director seat.[75] Last, they argue that

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[71] *Id.* at 58.

[72] *Id.* at 58–59; JX 7, § 4.3.

[73] PB 52.

[74] Defs.' Pretrial Br. ("DB") 31.

[75] *Id.* at 57–68; D.I. 86 ("Defs.' Post-Trial Letter Mem.") 1–3.

equity cannot be invoked to invalidate the actions taken at the contested meeting because Plaintiff has not provided any evidence that Defendants affirmatively acted to deceive Plaintiff or prevent any party from exercising its voting rights.[76] I address each contested issue in turn.

A. D'Addario Was Not Validly Elected to the Board

The QLess Charter gives the A-1 Preferred Stockholders the exclusive right to fill the Series A-1 Director seat.[77] The Charter provides two mechanisms for the A-1 Preferred Stockholders to exercise that right: "by vote or written consent in lieu of a meeting . . . ."[78] While the QLess Bylaws allow Board vacancies to be filled by a majority vote of the directors, the Charter is unequivocal that each class of stockholders has an exclusive right to appoint specified directors.[79] When presented with a conflict or inconsistency between the documents, as required by the DGCL, the Bylaws make clear that the Charter controls.[80]

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[76] DB 43–47.

[77] Charter § 3.2.

[78] *Id.*

[79] *Compare* Bylaws § 3.2 *with* Charter § 3.2.

[80] *See* Bylaws § 3.2 (prefacing the Board vacancy provision with, "[u]nless otherwise provided in the corporation's certificate of incorporation . . ."); 8 *Del. C.* § 109(b).

1. The October 28 Email Is Not a Vote

Plaintiff would have me find that Arnold's October 28 email, where he asked Alderton to prepare a stockholder consent for Altos to elect D'Addario to the Board, actually reflects a vote of the Series A-1 stockholders to that effect. To state the conclusion succinctly, an email requesting that QLess counsel take action to facilitate a stockholder consent is not a stockholder "vote" under our law. The DGCL is clear that stockholders vote at meetings.[81] Palisades has not attempted to argue there was a meeting of the Series A-1 Preferred stockholders where votes were cast to seat the Series A-1 Director. Instead, it cites to case law it claims supports the proposition that an email can constitute a vote.[82] The cases cited by Plaintiff for that proposition are inapposite.[83]

The DGCL is not alone in providing a basis to conclude there was no vote with respect to D'Addario. The QLess Charter makes clear that every Series A-1

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[81] *See* 8 *Del. C.* §§ 212(b), 213(a), (b), 216, 219(a).

[82] PB 46 (*citing A & J Capital, Inc. v. Law Office of Krug*, 2019 WL 367176, at *8 (Del. Ch. Jan. 29, 2019); *Gassis v. Corkery*, 2014 WL 2200319, at *7 (Del. Ch. May 28, 2014)).

[83] *A & J Capital, Inc. v. Law Office of Krug* involved members of an LLC improperly removing the manager of that LLC without cause. *A & J Capital*, 2019 WL 367176, at *1. While certain "votes" by members were purportedly cast by email, the question of whether that means of voting was legally effective was not at issue in the case. *Id*. at *10. And, of course, the requirements of the DGCL were not in play since the entity involved was a Delaware LLC. Similarly, *Gassis v. Corkery* involved a Delaware nonstock, charitable corporation. *Gassis*, 2014 WL 2200319, at *1. And the dispute there related to the contested removal of a director by other directors, not a stockholder vote. *Id.*

Preferred Stockholder is entitled to vote to elect the Series A-1 Director.[84] Plaintiff's counsel noted at trial that Altos does not hold 100% of the Series A-1 Preferred Stock.[85] A holding that an email from Altos's general counsel constituted a "vote" of the entire Series A-1 Preferred would disregard the minority Series A-1 shareholders' right to exercise their franchise. While Altos's status as majority Series A-1 stockholder would render the results of the vote a foregone conclusion, that fact does not alter the right of the minority Series A-1 stockholders to cast a vote for their Board designee should they so choose.[86]

2. The October 28 Email Is Not a Written Consent

Palisades next claims the October 28 email sent by Altos's general counsel is a written consent.[87] The language of that email clearly shows otherwise. In the email, Altos's general counsel writes, "[w]ould *you please draft* and circulate the *necessary* stockholder consent to elect Paul D'Addario . . . to the QLess Board as the Altos designee? *We would like* to fill the vacancy left by [Nam's] resignation

[84] Charter § 3.2.

[85] Tr. 9:23–10:24.

[86] Charter § 3.2; *see Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholders' electoral rights.").

[87] PB 46.

with Paul as soon as possible."[88] A request that somebody else draft a written consent, under any sensible reading, cannot be construed, itself, as a written consent.

The email also cannot be deemed a consent as a matter of law. 8 *Del. C.* § 228 governs stockholder consents. While electronic transmissions may suffice to meet the statutory requirements, such transmissions still must "[set] forth the action *so taken*" by the stockholder giving the consent.[89] Section 228's technical requirements must be "strictly complied with[,]" even in the case of a controlling stockholder.[90] Thus, although the intent to act may have been clear, the formalities embedded in Section 228 still must be followed.[91] The October 28 email did not comply with those formalities because it did not "set forth the action *so taken*"; it merely expressed a request that certain action *be taken*.[92] A mere expression of intent, without executory language, is not a written consent.

[88] JX 225 (emphasis added).

[89] 8 *Del. C.* §§ 228(a), (d) (emphasis added).

[90] *Espinoza v. Zuckerberg*, 124 A.3d 47, 57 (Del. Ch. 2015).

[91] *Id.* at 64.

[92] 8 *Del. C.* § 228(a) (emphasis added); JX 225.

B. QLess's Corporate Documents Lack Clarity With Respect to the Authorized Size of the Board

8 *Del. C.* § 141(b) provides that "[t]he number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors . . . ."[93] QLess's Charter does not set the number of directors; it only provides that the common and preferred stockholders shall be entitled to elect certain directors.[94] In the absence of direction in the Charter, the Court must look to the Bylaws.[95]

Section 3.1 of the Bylaws states, "[t]he number of directors that shall constitute the whole Board of Directors . . . shall [] be determined from time to time *by resolution of the Board of Directors or by the stockholders at the annual meeting of the stockholders*, except as provided in Section 3.2 of this Article . . . ."[96] Section 3.2 provides, "vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office . . . and the directors so chosen shall hold office until the next

[93] 8 *Del. C.* § 141(b).

[94] Charter § 3.2. As noted earlier, each preferred class is entitled to elect one director, with the common stockholders entitled to elect two. *Id.*

[95] Neither party substantively addressed how the Bylaws govern director appointments in their briefing or at trial.

[96] Bylaws § 3.1 (emphasis added).

annual election and until their successors are duly elected and shall qualify, unless sooner displaced."[97]

There is no evidence in the record that, at any point, an annual stockholder meeting was held to set the size of the Board. The Bylaws allow that the size of the Board may also be set by Board "resolution."[98] But, again, the parties' trial presentations paid no attention to this requirement. Instead, they focused their analysis on the provisions of the Voting Agreement and assumed that the provisions in that agreement addressing expansion of the Board were valid.[99] I, therefore, do the same.[100]

C. The Voting Agreement and the CEO Director Seat

Section 1.1 of the Voting Agreement requires its signatories to vote their shares "in whatever manner as shall be necessary" to expand the Board to six members within eighteen months of Bäcker's termination as CEO.[101] Section 1.2 of

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[97] Bylaws § 3.2.

[98] Bylaws § 3.1.

[99] The Voting Agreement authorizes an expansion of the Board to either five or six members. Voting Agreement §§ 1.1, 1.2.

[100] While it is unclear if the Voting Agreement is consistent with 8 *Del. C.* § 141(b), neither party has questioned the agreement's validity. The Court, therefore, assumes, without deciding, that the Voting Agreement is consistent with the DGCL, the Charter and the Bylaws.

[101] Voting Agreement § 1.1. If the parties decide not to expand the Board during this eighteen-month period, the Board remains at five directors. *Id.*

the Voting Agreement obligates the signatories to "vote, or cause to be voted, all Shares owned by such Stockholder . . . in whatever manner as shall be necessary to ensure that . . . the following persons shall be elected to the Board: . . . [f]rom after a Bäcker Termination Event, the Company's Chief Executive Officer . . . ."[102] Assuming entering into this agreement was a valid act of the QLess shareholders to authorize an expansion of the Board, the question, then, is how any such expansion is to be executed.

The Voting Agreement calls for an expansion of the Board, as specified therein, to be effectuated by stockholders voting their shares.[103] There is no evidence in the record that any QLess stockholder voted its shares to expand the Board prior to the November 15 meeting.[104] The Bylaws, as mentioned, mandate that any Board *expansion* be effected by stockholder vote at an annual meeting or by Board

[102] Voting Agreement § 1.2.

[103] Voting Agreement § 1.1 ("Each Stockholder agrees to vote, or cause to be voted, all Shares . . . from time to time and at all times, in whatever manner as shall be necessary to ensure that the size of the Board shall be set and remain at five (5) directors. Notwithstanding the foregoing, in the event . . . [of] a 'Bäcker Termination Event,' each Stockholder agrees to vote, or cause to be voted, all Shares . . . from time to time during the eighteen (18) month period following a Bäcker Termination Event . . . to ensure that the size of the Board shall be set and remain at six (6) directors.").

[104] The parties, again, gave short shift to the mechanics of the Voting Agreement in their arguments. It is, therefore, far from clear how any party breached by not voting their shares when no party formally requested such a vote (assuming the Voting Agreement was triggered).

"resolution."[105] It further provides that any Board *vacancy* properly created can be filled by Board resolution unless otherwise provided for in the Charter.[106]

It appears from the evidence that at least a majority of the QLess Board believed Grauman had been appointed to the Board prior to the November 15 meeting, and stated as much in writing.[107] Whether these expressions are sufficient to constitute a Board "resolution," as referenced (but not defined) in the Bylaws, however, was not addressed by the parties in their briefing or at trial.[108] The only

[105] Bylaws § 3.1. Apparently, the QLess Charter, Bylaws and Voting Agreement were drafted based on model documents provided by the National Venture Capital Association. Alderton Dep. 14:20–16:6. While I appreciate that startup companies frequently lack the resources or inclination to draft constitutive documents from scratch, and that model documents can be important resources for these companies, blind reliance on forms, without any effort to harmonize them, can be problematic. Such is the case here. QLess's constitutive documents were haphazardly slapped together. This sloppiness has made what is frequently a straightforward exercise of contract construction substantially more difficult.

[106] Bylaws § 3.2.

[107] *See* JX 298 (Anderson noting on 11/14 "[w]ith Kevin [Grauman] added to board, 3:2 is good for now"; JX 224 at 1 (Bäcker expressing his belief that Grauman had been added to the Board, per his request).

[108] The lack of guidance offered by the parties on the inner workings of the QLess constitutive documents has been frustrating. This Court requested and received post-trial submissions that did clarify some of the gaps left by the parties' briefs and trial arguments, albeit on issues that ultimately are not relevant to the outcome. *See* D.I. 84, D.I. 86, D.I. 87, D.I. 96, D.I. 110 and D.I. 101. But the parties have offered virtually no guidance with respect to other key issues, including: (1) whether the Voting Agreement conforms with the requirements of 8 *Del. C.* § 141(b); (2) how the Company's Charter, Bylaws and Voting Agreement interact and operate; (3) what constitutes a "resolution" of the Board based on QLess's past practices, or otherwise, and whether any such resolution would have to be unanimous; and (4) exactly how the CEO director seat was to be filled by the Voting Agreement's signatories. In the interest of proceeding expeditiously in a case that is

evidence in the record of a QLess Board vacancy being created and filled was Markman's appointment to the Board by a formal, executed "Unanimous Written Consent of the Board of Directors."[109] With that in mind, I would hesitate to find less formal actions sufficed to evidence a Board "resolution" that Grauman be seated to fill the newly created CEO director position on the Board in advance of the November 15 meeting. For reasons discussed below, however, I need not decide the issue.

D. The Actions Taken at the November 15 Meeting Are Invalid as a Matter of Equity

Palisades last argues that, even if D'Addario or Grauman were not validly elected or appointed to the QLess Board, equity requires that the Court declare the actions taken by the Bäckers at the November 15 meeting void.[110] Specifically, it maintains that the Bäckers acted inequitably by formulating a secret plan, after Markman's resignation, to seize control of QLess at the November 15 meeting, and then by securing Anderson's presence at that meeting by means of deception.[111]

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summary by statute, and because I have determined that the case can be decided as a matter of equity, I have elected not to request yet another round of briefing.

[109] JX 11.

[110] PB 52.

[111] Tr. 47:20–48:19; D.I. 84 Pl.'s Post-Trial Letter Mem. at 6–7. With the exception of actions to amend the Bylaws, the QLess Bylaws require no advance notice of "the business to be transacted at, nor the purpose of, any regular or special meeting of the Board of Directors." Thus, Plaintiff must ground its charge that the Bäckers acted improperly

It is bedrock doctrine that this Court will not sanction inequitable action by corporate fiduciaries simply because the act is legally authorized.[112] In this vein, corporate acts are voidable when "board action [is] carried out by means of deception . . . ."[113] As our case law makes clear, however, there must be *some* affirmative deception before equity will intervene; if the Bäckers had simply acted in secret to plot their boardroom coup d'état without any affirmative action to mislead other members of the Board, Plaintiff's call to equity would rest on softer ground.[114]

But that is not what Defendants did. To be sure, Defendants did nothing to interfere with Altos's right to fill the Series A-1 vacancy on the Board.[115] Altos was

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leading up to, and at, the November 15 meeting in equity rather than contract. Bylaws § 3.7.

[112] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439–40 (Del. 1971).

[113] *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014).

[114] *See Klaassen*, 106 A.3d at 1047; *Koch v. Stearn*, 1992 WL 181717, at *4 (Del. Ch. July 28, 1992) (*overruled on other grounds Klaassen*, 106 A.3d at 1047); *Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at *3 (Del. Ch. Dec. 13, 2007) (*overruled on other grounds Klaassen*, 106 A.3d at 1047); *Hockessin Cmty. Ctr. v. Swift*, 59 A.3d 437, 458 (Del. Ch. 2012).

[115] *See* Nam Dep. 138:7–13 (Q: What, if anything, did [Bäcker] do to prevent Altos from delivering a stockholder written consent appointing Paul D'Addario to the board of QLess? A: Nothing. I don't think Alex could do anything for or against such a motion.); Alderton Dep. 211:20–23 (Q: What, if anything, did [Bäcker] do to prevent Altos from signing and delivering a stockholder consent? A: Nothing to my knowledge); Anderson Dep. 133:22–24 (same).

the recipient of some erroneous legal advice and Bäcker sat silent as a beneficiary of the misinformation. If that were the end of the story, there would be no basis to invoke equity. But the Bäckers did not stay silent in all matters related to the November 15 meeting. Instead, Bäcker affirmatively misrepresented to Anderson and others that he wanted Grauman on the Board, and that he assumed Grauman had already joined the Board, noting, "Kevin [Grauman] is on the thread, assuming [the Board] now includes him, *which I requested it does*."[116] Ricardo responded that Bäcker's message "[l]ooks good to me."[117] When Grauman circulated a "high-level agenda" for the November 15 meeting, Bäcker responded by thanking him and asking him to "circulate any proposed resolutions," further giving the impression that Bäcker had no issue with Grauman joining the Board.[118] On the day before the contested meeting, Bäcker emailed Grauman, copying the QLess Board, requesting that Grauman circulate board materials "so that *we* may all do *our* homework and be

[116] JX 224 at 1. *See* JX 500 (Nam noting, "[w]hen I did speak to [Bäcker] about a week ago, I specifically asked him how he thought Kevin was doing. I also asked him how the relationship was between him and [Grauman]. He said everything was fine."). Grauman also understood this email to mean he was now a member of the Board. Grauman Dep. 52:11–53:5.

[117] JX 224 at 1.

[118] JX 293 at 3.

prepared to spend *our* time together most productively," again giving the impression that Bäcker approved of Grauman's Board membership.[119]

When Alderton circulated draft Board resolutions that would formalize Grauman's appointment to the Board, as requested by Grauman and Bäcker, neither Ricardo nor Bäcker gave any indication that their position had changed.[120] After having affirmatively represented to Anderson (and Markman) that Defendants supported Grauman's appointment to the Board, keeping mum as they planned their ambush was inequitable.[121] If Anderson had known of Defendants' change of plans, he would have refused to participate in the meeting, defeating a quorum and thwarting the coup.[122] As Anderson's presence at the meeting was secured under deliberately false pretenses, any action taken at that meeting is void.[123]

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[119] JX 296 (emphasis added).

[120] *See* JX 318.

[121] *See Klaassen*, 106 A.3d at 1046 ("Our courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs . . . ."); *Koch*, 1992 WL 181717, at *4 ("The validity of the board action taken [at the meeting] . . . depends upon whether [Plaintiff] was tricked or deceived into attending the meeting.") (*overruled on other grounds Klaassen*, 106 A.3d at 1047).

[122] Anderson Dep. 105:23–109:17 (Discussing that he considered not attending the meeting to defeat a quorum, but decided against it because he believed Bäcker did not control a Board majority.).

[123] *Klaassen*, 106 A.3d at 1046. Defendants have not raised any equitable defenses that would save the contested Board actions.

III. CONCLUSION

For the foregoing reasons, all actions taken at the contested November 15 meeting are void. The QLess Board comprises Alex Bäcker and Ricardo Bäcker as common directors and Jeff Anderson as the Series A Director. The Series A-1 Director, independent director and CEO director seats remain vacant. Kevin Grauman remains as QLess's CEO. The parties shall confer and submit a conforming order and final judgment within ten (10) days.