



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

IN RE NUMODA CORPORATION : Consolidated  
SHAREHOLDERS LITIGATION : C.A. No. 9163-VCN

**MEMORANDUM OPINION**

Date Submitted: September 25, 2014

Date Decided: January 30, 2015

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NOBLE, Vice Chancellor

This is a dispute about the capital structures of two corporations following the Court’s decision in a related action that, incidentally, could not recognize several purported stock issuances by the corporations due to lack of compliance with corporate formalities. Resolution requires the Court to answer questions about its newly conferred powers under 8 *Del. C.* § 205. The Court sets forth its findings of fact and conclusions of law in this post-trial memorandum opinion. For the reasons below, the Court grants retroactive effect to only the interests in stock for which the moving parties have provided sufficient evidence of a corporate act for the Court to confirm fairly and with reasonable certainty. The Court also resolves disputes about the parties’ interests in the two corporations.

## **I. BACKGROUND**

It is clear that the parties had a general understanding of the two corporations’ capital structures and operated with that understanding for years; it is not clear whether that understanding has legal significance. To the extent that the Court has recounted the events that form the basis of this action in *Boris v. Schaheen* (the “225 Action”),<sup>1</sup> it will state the facts in summary fashion here.

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<sup>1</sup> 2013 WL 6331287 (Del. Ch. Dec. 2, 2013). The parties have stipulated that the record in the 225 Action is admissible in the pending action. Pretrial Stipulation and Order (“Stip.”) ¶ 36. Nonetheless, certain conclusions, particularly that the Court could not recognize a number of purported issuances, require different analysis under 8 *Del. C.* § 205 and remain open questions for the purposes of this action.

## A. *The Parties*

Ann S. Boris (“Ann”), John A. Boris (“John”), and Mary S. Schaheen (“Mary”) are siblings who served as the initial directors of Numoda Corporation (“Numoda Corp.”) and Numoda Technologies, Inc. (“Numoda Tech.”),<sup>2</sup> formed in June 2000 and December 2000, respectively.<sup>3</sup> Numoda Corp. validly issued 5,100,000 shares of voting stock to Ann; 1,266,667 shares to John; and 3,333,333 shares to Mary on June 28, 2000.<sup>4</sup> Numoda Tech. was thought to be Numoda Corp.’s subsidiary upon formation.<sup>5</sup> Ann, John, and Mary have held various positions in Numoda Corp. and Numoda Tech., although Ann and John have served as directors of Numoda Corp., and Mary as a director of Numoda Tech., since the 225 Action.<sup>6</sup> John W. Houriet, Jr. (“Houriet”) was the Chief Technology Officer of Numoda Corp.<sup>7</sup> and has served as president and a director of Numoda Tech. since at least January 2014.<sup>8</sup> Patrick J. Keenan (“Keenan”) performed legal work for the corporations and currently serves as chief counsel and a director of

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<sup>2</sup> *Boris*, 2013 WL 6331287, at \*1-2.

<sup>3</sup> Stip. ¶¶ 6, 13. Numoda Corp.’s certificate of incorporation is dated May 19 but was filed in June. Both entities are Delaware corporations with headquarters in Philadelphia, Pennsylvania.

<sup>4</sup> Stip. ¶¶ 7-9; JX 1 at BORIS00000123-25.

<sup>5</sup> *Boris*, 2013 WL 6331287, at \*1.

<sup>6</sup> *See id.* at \*16-18. Mary was found to be Numoda Tech.’s sole director, but she has since been joined by a second director.

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> Trial Tr. vol. 4, 727-28 (Houriet).

Numoda Capital Innovations LLC (“Numoda Capital”).<sup>9</sup> For convenience, the Court sometimes refers to Ann, John, and Numoda Corp. as the “Numoda Corp. Parties,” and Mary, Houriet, Keenan, and Numoda Tech. as the “Numoda Tech. Parties.”<sup>10</sup>

### B. *The Disputed Capital Structures*

The Numoda Corp. and Numoda Tech. boards used informal processes to carry out purported corporate acts, such as issuing stock. Communications ranging from tax filings to text messages show that the parties believed that, as of December 2008, Numoda Corp. had the following capital structure:

Shareholder	No. Voting Shares
John	3,045,561
Ann	7,745,500
Mary	10,839,053
Keenan	1,035,000
Houriet	5,100,000
PIDC Penn Venture Fund (“PIDC”)	1,018,950 <sup>11</sup>

The parties also assumed that there was a spin-off of Numoda Tech. that distributed stock to the shareholders of Numoda Corp., effective January 2005, and

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<sup>9</sup> *Id.* at 834-36 (Keenan). Numoda Capital, also a Delaware entity, was formed in March 2009. JX 329 (“Keenan Dep.”) at 143. Its members are Ann, John, Mary, Houriet, and Keenan.

<sup>10</sup> For the reasons set forth *infra*, at footnote 60, the claims against Numoda Capital are dismissed.

<sup>11</sup> *Boris*, 2013 WL 6331287, at \*6. John apparently sent this information to Wachovia Bank in order to set up a bank account. *See* JX 37 at MS0618. For additional records, *see Boris*, 2013 WL 6331287, at \*7.

that Numoda Tech. had a capital structure mirroring that of Numoda Corp.<sup>12</sup> However, there are no entries in Numoda Tech.’s stock ledger, and no stock certificates have been issued.<sup>13</sup>

The parties now contest several acts that they had assumed valid before the 225 Action.<sup>14</sup> First, Keenan was granted 30,000 shares of Numoda Corp. voting stock in late 2002 in exchange for a \$15,000 investment. Second, in April 2004, the Numoda Corp. board agreed to issue stock to Ann, John, Mary, and Keenan, in exchange for certain obligations, in order to help Numoda Corp. improve its

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<sup>12</sup> See, e.g., *Boris*, 2013 WL 6331287, at \*8-9; JX 21 at MS0271-72 (reorganization plan in tax return filed September 2006); JX 50 (Numoda Tech. cap table dated December 31, 2009); JX 82 (“John Dep.”) at 193-96 (explaining that investors, including PIDC and non-voting shareholders, understood that the capital structures of Numoda Corp. and Numoda Tech. were the same); JX 88 (Numoda Tech. stock transfer ledger). While John has testified to a belief that Numoda Tech. shareholders’ “classes are identical to the classes . . . in the Numoda Corporation book,” John Dep. 195, it does not appear that Numoda Tech. ever attempted to create multiple classes of common stock, and the parties have not asked the Court to find otherwise.

<sup>13</sup> Stip. ¶ 15.

<sup>14</sup> This paragraph reflects the Court’s assessment of the parties’ working understanding before the litigation. As discussed *infra*, the Court cannot substantiate all of these acts. The Numoda Tech. Parties technically acknowledge that John is entitled to an additional 232,656 shares for a \$116,328 investment in 2005. See Numoda Technologies, Inc., Numoda Capital Innovations LLC, Mary Schaheen, John Houriet, and Patrick Keenan’s Opening Post-Trial Br. (“NT Opening Post-Trial Br.”) 18 n.8 (citing, for example, JX 444 at MS0069). The Court will not act when John does not seek this award himself and no special circumstances compel this result. The 232,656 shares would not change which group of litigants has majority ownership of the two companies—the question at the heart of the 225 Action (and, to an extent, this action).

balance sheet and obtain a credit facility (the “2004 Exchange Stock”).<sup>15</sup> Third, Mary was granted 400,000 shares on a date before the anticipated spin-off of Numoda Tech.<sup>16</sup> Fourth, the board approved granting Houriet a 15% interest in Numoda Corp. “on a fully diluted basis with no contingencies in exchange for . . . debt, deferred compensation, and stock options.”<sup>17</sup> Ann facilitated this grant, fifth, by returning 2,000,000 of her own voting shares to Numoda Corp. Sixth, because she had worked without compensation for several years (and Houriet’s stock would dilute her ownership), Mary was granted 5,725,000 shares of Numoda Corp. voting stock to restore her to her original one-third ownership.<sup>18</sup> Finally, the parties assumed that changes to Numoda Tech.’s capital structure mirrored changes to Numoda Corp.’s after a January 1, 2005, spin-off—at least with respect to the number of shares held by Numoda Corp.’s voting shareholders.

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<sup>15</sup> *Boris*, 2013 WL 6331287, at \*4 (“The NC Spreadsheets reflect that John was issued 1,546,238 shares; Ann was issued 4,645,500 shares; Mary was issued 1,380,720 shares; and Keenan was issued 1,005,000 shares.”). Keenan purportedly acquired part of his interest by purchasing the interest of his then-business partner, Thomas Duffy, in November 2005 and April 2006. Trial Tr. vol. 4, 850-51 (Keenan). Informal documents include Duffy’s shares in Keenan’s total.

<sup>16</sup> The Numoda Tech. Parties thus claim that Mary is entitled to that number of both Numoda Corp. and Numoda Tech. shares. NT Opening Post-Trial Br. 6 n.2.

<sup>17</sup> *See Boris*, 2013 WL 6331287, at \*5 (citing testimony by Mary and Houriet). There is some uncertainty about the percentage, but the record shows convergence on 5,100,000 shares.

<sup>18</sup> Mary concedes that the stock was for past services. Trial Tr. vol. 3, 520 (Mary). In a manner comparable to Houriet’s, there appears to be some uncertainty about percentage, but the record converges on 5,725,000 shares.

The factual record offers varying degrees of support for the above, as the companies’ boards had a default policy of not issuing stock certificates and used informal processes.<sup>19</sup> Generally speaking, board meetings did not involve prior notice, minutes, or other features familiar to our corporation law. However, the directors “were together[,] . . . understood what role [they] were in, what was the goal of meeting together and . . . what contexts [they] were addressing in those meetings.”<sup>20</sup> Votes were taken after making proposals, finding areas of agreement and disagreement, collecting additional information and seeking clarification as necessary, and calling for final agreements and disagreements.<sup>21</sup> It is through these steps that the boards allegedly approved, and directed, stock issuances—the corporate acts the Court is asked to validate.<sup>22</sup>

Given the lack of formality, the evidence that these contested acts occurred largely exists in the form of testimony, documents prepared by independent

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<sup>19</sup> *Boris*, 2013 WL 6331287, at \*2-3, \*8. Convertible loan holders, however, were issued certificates for Numoda Corp. shares in 2008. See JX 1 at BORIS00000162-63, BORIS00000165-74.

<sup>20</sup> JX 272 (“225 Trial Tr. vol. 1”) at 184 (Mary). For example, Numoda Corp. did not hold formal meetings or keep formal minutes, but the directors knew that they were discussing “vital” corporate matters. See *id.* at 99 (Ann).

<sup>21</sup> *Id.* at 187 (Mary).

<sup>22</sup> The Numoda Tech. Parties ask the Court to validate approvals and issuances, but the Court focuses on approvals because the record is more developed on the subject of approvals, and any validation of an approval to issue produces substantially the same result as validation of an issuance here.

contractor John Dill (“Dill”),<sup>23</sup> and representations by agents of the corporations (such as tax filings) not formally adopted by the board. For example, Keenan testified to his grant of stock,<sup>24</sup> which also finds support in spreadsheets Dill prepared<sup>25</sup> and the corporate records associated with (incomplete) stock certificate number seven.<sup>26</sup> The Numoda Tech. Parties have testified about the 2004 Exchange Stock,<sup>27</sup> which has initial support in Dill’s documents and unsigned minutes of a Numoda Corp. annual stockholders meeting held in 2006.<sup>28</sup>

Mary’s claims to additional shares also find support in the record,<sup>29</sup> although there has been confusion about the exact dates and numbers involved. Specifically, the Numoda Tech. Parties’ opening post-trial brief states that Mary received 400,000 shares before the anticipated spin-off;<sup>30</sup> Mary asks for validation of 400,000 shares effective December 31, 2004;<sup>31</sup> one spreadsheet lists 395,000

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<sup>23</sup> Dill provided accounting and other services for Numoda Corp. and Numoda Tech. JX 85 (“Dill Dep.”) at 45-46, 51-52. In the 225 Action, the Court found that Dill’s records were not substitutes for an official stock ledger. *Boris*, 2013 WL 6331287, at \*16.

<sup>24</sup> Trial Tr. vol. 4, 837-38, 840 (Keenan).

<sup>25</sup> *See supra* note 11 and associated text.

<sup>26</sup> *See* JX 1 at BORIS00000128-30. Additionally, Keenan’s personal records document the investment. *See* JX 441 (photocopy from Keenan’s checkbook).

<sup>27</sup> *See* Trial Tr. vol. 4, 844 (Keenan); 225 Trial Tr. vol. 1, 193-96 (Mary).

<sup>28</sup> *Boris*, 2013 WL 6331287, at \*4.

<sup>29</sup> *See, e.g., id.* at \*6; Trial Tr. vol. 2, 436-38 (Mary); Trial Tr. vol. 3, 499 (Mary).

<sup>30</sup> NT Opening Post-Trial Br. 6 n.2.

<sup>31</sup> *Id.* at 4.



shares dated June 28, 2000;<sup>32</sup> unsigned board minutes incorporate 395,000 shares,<sup>33</sup> and Mary testified that “this 400,000, as I understand it, rolled up right into the one-third percentage number of shares that were finally calculated and recorded . . . in 2008” when asked about whether the issuance was ever authorized.<sup>34</sup> By contrast, Mary identified a board meeting (or board meetings) in July of 2006 (supported by the alleged approval of Houriet’s shares occurring in the same time frame), when she and Ann, as the Numoda Corp. and Numoda Tech. boards, agreed to issue her 5,725,000 shares in each corporation.<sup>35</sup> Based on this and other representations, Keenan claims, he decided to pledge personal assets for a loan to Numoda Corp.<sup>36</sup>

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<sup>32</sup> See JX 26 at MS0333 (including 395,000 shares awarded to “Mary Schaheen (400,000)?” dated June 28, 2000). June 28, 2000 is the same day on which Ann, John, and Mary received certificates for 5,100,000; 1,266,667; and 3,333,333 shares, respectively, in Numoda Corp.’s original issuance. See JX 1 at BORIS00000243 (record of stock issued).

<sup>33</sup> See JX 18 (listing 5,109,053 shares).

<sup>34</sup> Trial Tr. vol. 3, 499 (Mary).

<sup>35</sup> See Trial Tr. vol. 2, 436-38 (Mary). There is also debate over whether 5,725,000 is the appropriate number. Compare JX 83 (“Mary 225 Dep.”) at 130 (“My understanding [is] that this was a hundred and seventy-five thousand dollars a year. . . . Ann may have thought of it as per month. I sort of thought of it as a year.”), with Trial Tr. vol. 3, 508-09 (Mary) (“Q. Are you changing your testimony that you gave under oath previously? A. Yes.”), and Trial Tr. vol. 3, 514 (Mary) (“On the basis that the current board values future services, I’d say it’s very fair that [an arguably mistaken award of 1,050,000 shares of Numoda Corp. stock] is in there. And if they get around to the adjustment that recognizes my fully-diluted one-third ownership, then I think we’re good to go.”).

<sup>36</sup> Trial Tr. vol. 4, 853-54 (Keenan).

In addition to verbal representations that the boards issued his stock, Houriet received a signed stock certificate, indicating a grant of Numoda Corp. non-voting stock, on September 18, 2009.<sup>37</sup> Keenan was asked to prepare the certificate and believed it was for voting stock.<sup>38</sup> He testified that he filled out the certificate in “kind of a ten-minute process” and did not realize the certificate was for non-voting stock until the litigation.<sup>39</sup> There is evidence that at the time of the alleged agreement to issue Houriet’s stock, around July 2006, Numoda Corp. was only authorized to issue voting stock,<sup>40</sup> and the directors thought that Houriet “deserved to have . . . voting stock.”<sup>41</sup> Houriet testified that this ownership interest was critical to his decision to remain with the Numoda entities.<sup>42</sup>

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<sup>37</sup> Stip. ¶ 11.

<sup>38</sup> See Trial Tr. vol. 4, 866-68 (Keenan) (“I understood Class A was the voting stock.”).

<sup>39</sup> *Id.* The Numoda Tech. Parties observe that this would not have been the only instance of confusion between the Class A (non-voting) and Class B (voting) stock. See Numoda Technologies, Inc., Numoda Capital Innovations LLC, Mary Schaheen, John Houriet, and Patrick Keenan’s Answering Post-Trial Br. (“NT Answering Post-Trial Br.”) 21 n.15 (citing, for example, 225 Trial Tr. vol. 1, 64-65 (John)).

<sup>40</sup> Although the Numoda Corp. board had voted to amend the charter to create a class of non-voting stock, the amendment was not filed with the Secretary of State until December 27, 2007. See *Boris*, 2013 WL 6331287, at \*5.

<sup>41</sup> Trial Tr. vol. 2, 440 (Mary).

<sup>42</sup> Trial Tr. vol. 4, 732, 737 (Houriet).

Evidence of Ann’s giveback includes testimony,<sup>43</sup> the documents discussed in the 225 Action, and a January 16, 2009, email to Keenan, in which Ann wrote of “a ‘giveback’ of stock [she] made many years ago . . . in order to allocate ownership to you.”<sup>44</sup> Ann contests the significance of this email, as well as the conclusion that she effected a giveback.<sup>45</sup>

Finally, although the Court found in the 225 Action that Numoda Tech. had not validly issued any stock, testimony from both sides supports the conclusion that the capital structures of Numoda Tech. and Numoda Corp. were intended to be mirror images after a spin-off.<sup>46</sup> A document filed with the Internal Revenue Service states that “Numoda [Corp.] formed a wholly-owned subsidiary named Numoda [Tech.]” on December 18, 2000,<sup>47</sup> and an unofficial stock transfer ledger shows an initial distribution of 100,000 shares of Numoda Tech. stock to Numoda

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<sup>43</sup> See, e.g., Trial Tr. vol. 2, 436-37 (Mary); 225 Trial Tr. vol. 1, 212-14 (Mary); JX 273 (“225 Trial Tr. vol. 2”) at 427-28 (Houriet).

<sup>44</sup> JX 40 at MS0701. It is unclear why Ann referred to allocating stock for Keenan rather than Houriet, but perhaps she was referring to returning shares so that Keenan (and Mary) would not be diluted. See Trial Tr. vol. 4, 854 (Keenan) (“I think the take-away I was getting is that [Houriet’s and Mary’s awards] wouldn’t be dilutive to what I had . . .”).

<sup>45</sup> See, e.g., 225 Trial Tr. vol. 1, 149 (Ann) (“Q. Doesn’t this email, in fact, confirm that you gave back stock to Numoda Corporation? A. I can’t say that it does.”).

<sup>46</sup> See *supra* note 12.

<sup>47</sup> JX 21 at MS0271.

Corp. on December 8, 2000.<sup>48</sup> Both documents assume a subsequent spinoff.<sup>49</sup> Numoda Corp. and Numoda Tech. amended their certificates of incorporation in 2006 to increase the number of authorized shares from 25,000,000 to 50,000,000.<sup>50</sup> The companies maintained a close relationship. They shared board members, and there has been testimony that the companies' board meetings were held simultaneously<sup>51</sup>—or perhaps “consecutively.”<sup>52</sup>

It bears repeating that Dill's records and other related account representations may offer a consistent and roughly contemporaneous picture of the parties' working understanding,<sup>53</sup> yet there are many reasons to question their accuracy. The Numoda Corp. Parties emphasize that the records Dill created were “not necessarily based on actual physical pieces of paper . . . but rather [his] understanding of the intent of the parties as explained or represented or described to [him].”<sup>54</sup> In December 2007, Dill even sent himself an email noting,

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<sup>48</sup> JX 88.

<sup>49</sup> See JX 21 at MS0271 (“Numoda [Corp.] distributed, in a tax-free spin-off, the 18,977,458 shares of [Numoda Tech.] stock share for share (pro rata) to the shareholders of Numoda [Corp.]”); JX 88 (indicating that “certificate” number one was cancelled for the purpose of “effecting reorg.” on January 1, 2005, at which point “certificates” number two through six transferred stock from Numoda Corp. to individual shareholders).

<sup>50</sup> See JX 1 at BORIS00000044-45; JX 2 at MS 752-53.

<sup>51</sup> *Boris*, 2013 WL 6331287, at \*8.

<sup>52</sup> JX 328 (“Mary 205 Dep.”) at 204-05.

<sup>53</sup> Dill's testimony was also consistent at trial.

<sup>54</sup> Dill Dep. 134-35.

“Challenge: how to up MS%.”<sup>55</sup> The Numoda Corp. Parties also question the reliability of the tax filings and other representations they made over the years.<sup>56</sup>

### *C. The Litigation and Purported Ratification*

Ann and John filed the 225 Action in December 2012,<sup>57</sup> which resulted in a finding that Ann and John were the directors of Numoda Corp. and that Mary was the sole director of Numoda Tech. In reaching those conclusions, the Court decided that stock not formally issued pursuant to a written instrument had not been issued as a matter of law.<sup>58</sup> Therefore, Ann and John held a majority of Numoda Corp.’s voting stock, and Numoda Tech. had not issued any stock. The Court also cautioned that “[n]othing should prevent a purported stockholder of either Numoda Corp. or Numoda Tech., upon learning that certain stock has been found void because it was not issued pursuant to a written instrument, from asserting rather obvious claims against Numoda Corp. or Numoda Tech.”<sup>59</sup>

Shortly thereafter, Numoda Corp. filed a complaint against Numoda Tech. and Numoda Capital, primarily seeking to compel Numoda Tech. to issue its shares to Numoda Corp.<sup>60</sup> Numoda Tech. filed an answer and counterclaim and

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<sup>55</sup> JX 26 at MS0321. “MS” refers to Mary.

<sup>56</sup> See *Boris*, 2013 WL 6331287, at \*7, \*9.

<sup>57</sup> Stip. ¶ 16.

<sup>58</sup> *Boris*, 2013 WL 6331287, at \*16-17.

<sup>59</sup> *Id.* at \*18 (internal quotation marks omitted).

<sup>60</sup> Numoda Capital presumably was made a party because, “upon information and belief, assets of Numoda Corp. and Numoda Tech[,] have been wrongfully

third-party complaint against Ann and John. Mary, Houriet, and Keenan subsequently filed a complaint seeking stock consistent with their understanding of the corporations' capital structures or damages under a number of theories. The Numoda Tech. Parties later filed amended and supplemental complaints seeking relief under 8 *Del. C.* § 205. The Court consolidated these actions. Mary also appealed the Court's post-trial opinion and order in the 225 Action to the Supreme Court. The Supreme Court stayed the appeal pending this decision. In doing so, the Supreme Court wrote that this Court "may exercise its discretion to consolidate [the 225 Action] and [the pending action]"<sup>61</sup> because of the possibility that the outcome in this action could "moot all the issues before [the Supreme Court]."<sup>62</sup>

In the meantime, on January 31, 2014, the Numoda Corp. board "unanimously ratified" issuances of 30,000 shares of Numoda Corp. voting stock to Keenan; the 2004 Exchange Stock; and 5,100,000 shares of Numoda Corp. non-voting stock to Houriet, among other issuances (the "January Ratification").<sup>63</sup> The

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transferred to [Numoda Capital]." Verified Compl. of Numoda Corp. ¶ 5. Because the Numoda Corp. Parties have not presented evidence that Numoda Capital has wrongfully taken assets of Numoda Corp. or Numoda Tech., the Court dismisses the claims against Numoda Capital.

<sup>61</sup> *Schaheen v. Boris*, No. 13, 2014, at 3 (Del. Sep. 12, 2014) (ORDER).

<sup>62</sup> *Id.* at 2-3.

<sup>63</sup> *See* JX 291 at NC00000193-98. The Numoda Corp. Parties' references to issuances in February 2014 refer to the same underlying events.

board was motivated by a desire to minimize litigation risk and disruption to Numoda Corp.’s business.<sup>64</sup>

## II. CONTENTIONS

The Numoda Corp. Parties frame this action as a narrow one with only five disputes remaining after the January Ratification: (1) Ann’s giveback; (2) Mary’s 5,725,000 shares; (3) Mary’s 400,000 shares; (4) the type (voting or non-voting) of Houriet’s shares; and (5) Numoda Tech.’s stock.<sup>65</sup> They submit that the Numoda Tech. Parties cannot obtain additional recovery under 8 *Del. C.* § 205 because the provision can only save corporate acts (not the informal agreements and assumptions made by the corporations’ boards), and their complaints did not plead equitable theories in support. They further contend that the Numoda Tech. Parties have not substantiated their claims for relief under their other theories and that they should not be able to seek equitable remedies because they have unclean hands. With respect to their affirmative case, the Numoda Corp. Parties ask the Court to “order Numoda Tech. to issue shares to Numoda Corp., with instructions that Numoda Corp. effect the spin-off as originally intended.”<sup>66</sup>

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<sup>64</sup> *Id.* at NC00000194; Answering Post-Trial Br. of Numoda Corp., Ann Boris and John Boris (“NC Answering Post-Trial Br.”) 37-38.

<sup>65</sup> Opening Post-Trial Br. of Numoda Corp., Ann Boris and John Boris (“NC Opening Post-Trial Br.”) 1, 32-33.

<sup>66</sup> *Id.* at 57. A request for a constructive trust in the Numoda Corp. Parties’ complaint was not developed in their briefs.

The Numoda Tech. Parties, on the other hand, emphasize that the Numoda Corp. board in January 2014 could not ratify void acts and ask the Court to use its powers under 8 *Del. C.* § 205 to validate the boards' approvals of the following issuances:

Numoda Corp. Shares

Stockholder	No. Voting Shares	Effective Date
Keenan	30,000	Nov. 18, 2002
Ann	4,645,500	Apr. 23, 2004
Mary	1,380,720	Apr. 23, 2004
John	1,546,238	Apr. 23, 2004
Keenan	1,005,000	Apr. 23, 2004
Mary	400,000	Dec. 31, 2004
John	232,656	Dec. 14, 2005
Houriet	5,100,000	Dec. 13, 2007
Mary	5,725,000	Dec. 13, 2007

Numoda Tech. Shares

Stockholder	No. Shares	Effective Date
Ann	9,745,500	Jan. 1, 2005
Mary	5,114,053	Jan. 1, 2005
John	2,812,905	Jan. 1, 2005
Keenan	1,035,000	Jan. 1, 2005
John	232,656	Dec. 14, 2005
Houriet	5,100,000	Dec. 13, 2007
Mary	5,725,000	Dec. 13, 2007 <sup>67</sup>

Additionally, they ask the Court to declare that Ann returned 2,000,000 shares of Numoda Corp. stock, which would be mirrored in Numoda Tech. stock. Alternatively to their request for ratification under 8 *Del. C.* § 205, Mary, Houriet,

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<sup>67</sup> These numbers have been reproduced from the Numoda Tech. Parties' opening post-trial brief, with the exception of Mary's initial Numoda Tech. shares and the final two figures for Houriet and Mary. NT Opening Post-Trial Br. 4, 6.



and Keenan ask for relief under theories of breach of contract, unjust enrichment, promissory estoppel, intentional misrepresentation, and negligent misrepresentation.<sup>68</sup> Numoda Tech. asks for declaratory judgment with respect to its capital structure.

### III. ANALYSIS

#### A. *What Was the Effect of the January Ratification?*

The Numoda Corp. Parties argue that their acts to ratify certain stock issuances leave only a few matters for decision here, and the Numoda Tech. Parties counter that the Numoda Corp. board could not ratify void acts. Before proceeding to the Section 205 analysis, the Court observes that the January Ratification did not moot or narrow the Numoda Tech. Parties' claims to the degree presented by the Numoda Corp. Parties. Ratification can occur under authority provided by common law and, since April 2014, statute. While a board generally can ratify its own acts, Delaware law—at least historically—required unanimous shareholder approval to ratify void acts.<sup>69</sup>

Here, the Numoda Corp. board purported to ratify select issuances in late January 2014, before the Delaware General Corporation Law (“DGCL”) expanded

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<sup>68</sup> *Id.* at 7.

<sup>69</sup> *See, e.g., Gantler v. Stephens*, 965 A.2d 695, 713 n.54 (Del. 2009). “[A] validly accomplished shareholder ratification relates back to cure otherwise unauthorized acts of officers and directors.” *Michelson v. Duncan*, 407 A.2d 211, 219 (Del. 1979).

a board's ability to ratify both void and voidable acts. The ratification resolution also stated that "if the issuance of such shares is not capable of being ratified, the Board hereby authorizes the issuance of such shares in exchange for the Consideration."<sup>70</sup> In *Boris v. Schaheen*, this Court could not recognize as valid Numoda Corp. voting stock "not issued pursuant to a written instrument" and Numoda Tech. stock under then-existing Delaware law.<sup>71</sup> It follows that the Numoda Corp. board could not retroactively validate the contested stock in January—and there certainly was not a unanimous vote of the shareholders. Nonetheless, the board's acts in January did have some effect on Numoda Corp.'s capital structure, and all of the stock not contested in this action was validly issued as of the January meeting.<sup>72</sup> All of the shares contested by the Numoda Tech. Parties, however, remain for resolution because (at the very least) the effective dates are significant to the parties' rights.<sup>73</sup>

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<sup>70</sup> JX 291 at NC00000194. The "Consideration" refers to eliminating claims for various obligations, as well as avoiding litigation expenses.

<sup>71</sup> 2013 WL 6331287, at \*16-17.

<sup>72</sup> For the actions taken, see, for example, JX 291 at NC00000197, NC00000200.

<sup>73</sup> The Court recognizes that board action taken under authority of law as of January 31, 2014, and complying with corporate formalities at least could have newly issued shares. Determining the effect of the January Ratification on the contested stock is not necessary, however, because Section 205 allows the Court to resolve the relevant disputes.

B. *What Powers Do 8 Del. C. §§ 204 and 205 Confer?*

DGCL Sections 204 and 205, effective April 1, 2014, provide that “no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization if ratified . . . or validated”<sup>74</sup> pursuant to the sections and that the Court may “[d]etermine the validity of any corporate act or transaction and any stock, rights or options to acquire stock.”<sup>75</sup> Section 204 provides a roadmap for a board to remedy what would otherwise be void or voidable corporate acts and stock. The legislation facilitates self-help, but it also provides Section 205 for situations where judicial intervention is preferable or necessary—such as when the sitting board has questionable status.<sup>76</sup>

Section 205 allows the Court to “[d]eclare that a defective corporate act validated by the Court shall be effective as of the time of the defective corporate act”<sup>77</sup> and to “[m]ake such other orders regarding such matters as it deems proper under the circumstances.”<sup>78</sup> A defective corporate act includes “any act or transaction purportedly taken by or on behalf of the corporation that is, and at the

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<sup>74</sup> 8 Del. C. § 204(a).

<sup>75</sup> 8 Del. C. § 205(a)(4).

<sup>76</sup> See Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* (“Wolfe & Pittenger”) § 8.03A[b], at 8-72, 8-77 (2014); see also *In re Trupanion, Inc.*, C.A. No. 9496, at 6-7 (Del. Ch. Apr. 28, 2014) (TRANSCRIPT) (appealing to the Court because of questions about the board’s validity).

<sup>77</sup> 8 Del. C. § 205(b)(8).

<sup>78</sup> 8 Del. C. § 205(b)(10).

time . . . would have been, within the power of a corporation . . . , but is void or voidable due to a failure of authorization.”<sup>79</sup> In deciding whether to exercise this authority, the Court may consider:

- (1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation;
- (2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;
- (3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;
- (4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and
- (5) Any other factors or considerations the Court deems just and equitable.<sup>80</sup>

The legislation thus empowers the Court to grant an equitable remedy for corporate acts that once would have been void at law and unreachable by equity.<sup>81</sup>

The statutory language appears to confer substantial discretion on the Court and, absent obvious procedural requirements, does not set a rigid outer boundary on the Court’s power to validate defective corporate acts. Guidance on how to

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<sup>79</sup> 8 *Del. C.* § 204(h)(1).

<sup>80</sup> 8 *Del. C.* § 205(d).

<sup>81</sup> See *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991) (“Neither logic nor equity compel the validation of a legally void act.”).

apply these new provisions in a contested situation is not developed in detail,<sup>82</sup> and the Court proceeds with caution, keeping in mind that “[t]he goal of statutory construction is to determine and give effect to legislative intent.”<sup>83</sup> The legislative synopsis for Section 204 explains that the section “provides a safe harbor procedure” to fix acts that would otherwise be void or voidable.<sup>84</sup> It elaborates that:

[Section] 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 or the corporation’s organizational documents may not be ratified or otherwise validated on equitable grounds.<sup>85</sup>

The legislative synopsis also reflects intent to allow ratification or validation of stock in the hands of a good faith purchaser for value and stock in an over-issue, consistent with Sections 8-202 and 8-210 of the Delaware Uniform Commercial Code.<sup>86</sup>

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<sup>82</sup> Cf. *In re Trupanion, Inc.*, C.A. No. 9496, at 25-31 (explaining steps taken by the company to gain board and shareholder approval before presenting a Section 205 action to the Court).

<sup>83</sup> *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

<sup>84</sup> H.R. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

<sup>85</sup> *Id.* (italics added).

<sup>86</sup> *Id.* (citing a contrary “suggestion of the Court of Chancery” in *Noe v. Kropf*, C.A. No. 4050, at 12-13 (Del. Ch. Jan. 15, 2009) (TRANSCRIPT)).

Reference to *STAAR Surgical* and *Blades* sheds some light on the legislative objective. In *STAAR Surgical*, the Supreme Court found error in an award of an equitable remedy to shareholders after this Court assumed that their preferred shares had not been issued validly.<sup>87</sup> There was certainly reliance<sup>88</sup> in addition to documentation in the form of a board resolution authorizing the shares, board minutes (referencing a successful board vote), and a certificate of designation.<sup>89</sup> However, the board failed to adopt these documents formally, violating 8 *Del. C.* § 151. In *Blades*, this Court held former directors to “scrupulous adherence to statutory formalities when a board takes actions changing a corporation’s capital structure.”<sup>90</sup> Defendants needed to prove a valid stock split to show that a written consent removing them from the board was ineffective. They emphasized a resolution to amend the company’s certificate of incorporation; a corresponding certificate of amendment increasing the number of authorized shares from 10,000,000 to 50,000,000; a later resolution referencing a split; and the company’s stock ledger documenting the purported split.<sup>91</sup> The Court recognized the harm to investors whose stock it found void but held that the board failed to effect the

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<sup>87</sup> *STARR Surgical*, 588 A.2d at 1134.

<sup>88</sup> *See Waggoner v. STAAR Surgical Co.*, 1990 WL 28979, at \*5 (Del. Ch. Mar. 15, 1990) (“[T]he consideration given by the Waggoners for STAAR’s promise to issue the two million common shares[] was hardly illusory.”), *rev’d*, 588 A.2d 1130 (Del. 1991).

<sup>89</sup> *STAAR Surgical*, 588 A.2d at 1132-33.

<sup>90</sup> *Blades*, 2010 WL 4638603, at \*8.

<sup>91</sup> *Id.* at \*3, \*5, \*7.

split.<sup>92</sup> The board had not adopted a resolution proposing the split, achieved official shareholder approval, or filed a certificate of amendment specifically about the split—when it needed to do all three, in order, under 8 *Del. C.* § 242.<sup>93</sup> Legislatively overturning these cases would seem to allow equity to act even in situations where corporate formalities are barely recognizable.

The legislative synopsis, therefore, suggests that the General Assembly drafted the law in hopes of creating an adaptable, practical framework for corporations and their counsel. An important goal was to facilitate correction of mistakes made in the context of a corporate act without disproportionately disruptive consequences.<sup>94</sup> Part of this effort was to eliminate hyper-technical distinctions and the uncertain divide between void and voidable acts.<sup>95</sup> The drafters, however, did not set a clear limit on the Court’s power to remedy defective corporate acts. Although they might have anticipated fixing a host of minor, technical mistakes, their chosen statutory language can be read to give the

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<sup>92</sup> *See id.* at \*12-13 (“To make matters worse, as Blades acknowledged at trial, there are nearly fifty minority stockholders listed on the stock ledger who hold invalid Global Launch share certificates . . .”).

<sup>93</sup> *Id.* at \*8-9.

<sup>94</sup> C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware’s Legislative Cure for Defects in Stock Issuances and Other Corporate Acts* (“Bigler & Zeberkiewicz”), 69 *Bus. Law.* 393, 393-94, 399-401 (2014).

<sup>95</sup> Wolfe & Pittenger § 8.03A[a], at 8-72-74.

Court wide latitude to fashion equitable remedies.<sup>96</sup> The Numoda Tech. Parties add that the Court’s powers under Section 205 cannot be narrower than the scope of “the general doctrine of ratification.”<sup>97</sup> While the Court does not disagree, it also does not read the legislation as a license to cure just any defect. To do so could create greater uncertainty. As one article notes,

Embedded within the definition of defective corporate act is the premise that an act, albeit defective, had occurred. Thus, section 204 implicitly preserves the common law rule that ratification operates to give original authority to an act that was taken without proper authorization, but may not be used to authorize retroactively an act that was never taken but that the corporation now wishes had occurred, or to “backdate” an act that did occur but that the corporation wishes had occurred as of an earlier date.<sup>98</sup>

This reasoning is persuasive—if not self-evident. The Court cannot determine the validity of a defective corporate act without an underlying corporate act to analyze.<sup>99</sup>

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<sup>96</sup> If there was a defective corporate act, the framing of an appropriate remedy becomes a question for the Court’s exercise of its equitable discretion. The legislative synopsis clarifies, however, that the legislation is not intended to preclude “traditional fiduciary and equitable review.” H.R. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (“Ratification . . . under § 204 is designed to remedy the technical validity of the act or transaction; it is not intended to modify the fiduciary duties applicable to either the approval or effectuation of a defective corporate act or transaction or any ratification of such act or transaction.”).

<sup>97</sup> NT Answering Post-Trial Br. 8-10 (citing *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531 (Del. Ch. 1999), *aff’d*, 748 A.2d 913 (Del. 2000) (TABLE)).

<sup>98</sup> Bigler & Zeberkiewicz at 403 (footnote omitted).

<sup>99</sup> It follows that before reaching Section 205(d), the Court must first determine whether there was a defective corporate act. Section 205(d) provides a non-exclusive list that informs the decision to validate a defective corporate act. The



The legislation’s definition of “defective corporate act” anticipates that a corporate act is an act within a corporation’s power and “purportedly taken by or on behalf of the corporation.”<sup>100</sup> There does not appear to be a separate statutory definition of a “corporate act,” but the DGCL provides that “every corporation . . . shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto.”<sup>101</sup> The Numoda Tech. Parties correctly observe that Delaware law allows boards to act despite some technical defects, such as lack of notice of a board meeting.<sup>102</sup> Even an *ultra vires* act can be a corporate act.<sup>103</sup> However, there must be a difference between corporate acts and informal intentions or discussions. Our law would fall into disarray if it recognized, for example, every conversational agreement of two of three directors as a corporate act. Corporate acts are driven by board meetings, at which directors make formal decisions.<sup>104</sup> The Court looks to organizational documents, official minutes, duly

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Court recognizes that Section 205 addresses corporate acts, transactions, and stock. The relevant analysis in this case, however, involves several corporate acts (for example, purported board agreements to issue stock).

<sup>100</sup> 8 *Del. C.* § 204(h)(1).

<sup>101</sup> 8 *Del. C.* § 121(a).

<sup>102</sup> See NT Opening Post-Trial Br. 45 n.30.

<sup>103</sup> 8 *Del. C.* § 124 (“No act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act . . .”).

<sup>104</sup> See *Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at \*3 (Del. Ch. Dec. 13, 2007) (“Such a hasty, unhelpful gathering cannot satisfy section 141’s conception of a meeting, the primary vehicle that drives corporate action.”), *overruled on*

adopted resolutions, and a stock ledger, for example, for evidence of corporate acts.

The new legislation creates a flexible standard that the Court can use to fix a range of defective corporate acts, but the Court exercises its powers carefully. After all, the Supreme Court previously emphasized equity's limited ability to correct defective corporate acts because of the importance of predictability and certainty in our corporate law.<sup>105</sup> Furthermore, it is unlikely that the General Assembly intended the legislation to extend far beyond failures of corporate governance features. The Court does not now draw a specific limiting bound on its powers under Section 205, but it looks for evidence of a bona fide effort bearing resemblance to a corporate act but for some defect that made it void or voidable.

### *C. Are There Any Corporate Acts to Validate?*

#### 1. Should the Court Validate the Grants of Contested Stock Involved in the January Ratification?

Although the January Ratification was not dispositive, the Numoda Tech. Parties ask the Court to validate many of the same grants. The record contains stock certificates for Keenan and Houriet (albeit with alleged defects) and unsigned minutes of a board meeting reflecting the 2004 Exchange Stock, among other evidence that the Numoda Corp. board had reached agreements to issue these

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*other grounds by Klaassen v. Allegro Dev. Corp.*, 2014 WL 996375 (Del. Mar. 14, 2014).

<sup>105</sup> See *STAAR Surgical*, 588 A.2d at 1136, 1137 & n.2.

contested shares. The Numoda Corp. Parties, by their actions and arguments, have shown that they accept the issuances of Keenan’s Numoda Corp. shares, the 2004 Exchange Stock, and 5,100,000 Numoda Corp. non-voting shares to Houriet.<sup>106</sup> As a preliminary matter, the Court will not set aside the parties’ agreement absent countervailing concerns. In January, the Numoda Corp. board discussed the disputed issuances, considered advice from legal counsel,<sup>107</sup> and resolved, by a unanimous vote, to “ratify” several.<sup>108</sup> The combination of the formal ratification attempt and other evidence in the record provides sufficient proof to find that the underlying board approvals of issuing Keenan’s Numoda Corp. shares and the 2004 Exchange Stock were corporate acts.<sup>109</sup>

In deciding whether to validate these corporate acts, the Court is guided by the factors listed in 8 *Del. C.* § 205(d). The second, fourth, and fifth factors are perhaps the most significant in this situation. The parties operated for years assuming the capital structure described above and made consistent representations

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<sup>106</sup> Even taking the Numoda Corp. Parties’ word that the January Ratification was not a “concession” about the original issuances, the Numoda Corp. board has attempted to grant these shares with an earlier effective date, which is essentially what the Numoda Tech. Parties seek.

<sup>107</sup> See JX 287; JX 290; JX 291.

<sup>108</sup> JX 291 at NC00000193-95. For Numoda Corp.’s stock ledger and share register reflecting these purported changes, see JX 343.

<sup>109</sup> The January Ratification is also relevant to Houriet’s disputed stock, which is addressed separately, *infra*. It bears mention that ratification (or issuance) of non-voting stock would not preclude the Court’s ability to determine the type of stock to which Houriet is entitled.

to outsiders.<sup>110</sup> Keenan could lose a significant voting interest absent validation (although failure to validate these contested acts would primarily impact parties who contributed to this confusion). It is also important that the Numoda Corp. board members purported to take official action, and the stock involved in the January Ratification fundamentally is no longer disputed (with the exception of the nature of Houriet's shares). The other factors do not tip the scales significantly either way. The Numoda Corp. directors subjectively—but unreasonably—believed that their earlier acts had been effective. At the same time, they knew that they were not complying with the DGCL. Judicial intervention would not cause material harm; validation would put the shareholders where they expected to be.

Section 205 does not require the Numoda Tech. Parties to plead general equitable theories, such as waiver and laches, because the statute itself permits an equitable remedy for otherwise void and voidable acts. With the enactment of Sections 204 and 205, it is the legislation, not broad equitable theories, that instructs interested parties of the steps and requirements for ratification and validation of defective corporate acts and putative stock. The Numoda Tech. Parties' complaints properly include basic pleadings invoking the Court's powers under Section 205, such as that the Numoda Corp. board believed and acted as if it

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<sup>110</sup> For example, Ann, John, and Mary made certain representations to banks and public authorities.

had approved issuances of stock.<sup>111</sup> Thus, the Court deems valid the Numoda Corp. board's decisions to issue the 2004 Exchange Stock and Keenan's Numoda Corp. stock effective as of their original intended dates of issue.<sup>112</sup>

## 2. Should the Court Validate Any Other Grants of Contested Stock?

Given the above analysis, the remaining disputed issuances are the 400,000 and 5,725,000 Numoda Corp. shares for Mary; the 5,100,000 Numoda Corp. voting shares for Houriet; and the Numoda Tech. shares. The Numoda Corp. Parties base their opposition on the argument that there were no corporate acts to ratify due to the two boards' informal processes and the unreliability of the evidence upon which the Numoda Tech. Parties rely.

The evidence of Mary's requested Numoda Corp. shares consists of testimony and sundry documents, none of which replaces official stock ledgers or effective resolutions. Mary has not been able to establish when any board approved an issuance of 400,000 shares to her. The Court, accordingly, has no

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<sup>111</sup> See Am. and Suppl. Verified Compl. of John Houriet, Jr., Patrick Keenan, and Mary Schaheen ¶¶ 55-59; Answer and Am. and Suppl. Verified Countercl. and Third Party Compl. of Numoda Technologies, Inc. ¶¶ 29-31. At a minimum, a plaintiff seeking validation of a corporate act should identify the corporate act, how it was done wrong, and reasons for the Court to validate the act. A factual foundation for the equitable considerations is useful.

<sup>112</sup> The Court accepts the effective issue dates as presented by the Numoda Tech. Parties in the charts *supra*. These dates generally postdate the dates used in the Numoda Corp. Parties' January Ratification and, more importantly, predate November 9, 2012 (purported effective date of the disputed written consents in the 225 Action).

corporate act to validate for those shares. The Section 205 analysis for the 400,000 shares proceeds no further. The evidence, however, supports the conclusion that there was a meeting of the Numoda Corp. board at which Ann and Mary, in their capacity as directors, approved and directed the issuance of what was later calculated as 5,725,000 Numoda Corp. shares to Mary. Although the directors of the two corporations, as a matter of practice, did not hold formal meetings, take minutes, or issue certificates, this was not “a case of a passing conversation at the water cooler.”<sup>113</sup> Ann and Mary met with an intent to discuss board business, one item of which was retaining Houriet by granting him significant ownership in the companies.

An analysis of the five factors of Section 205(d) supports validating the board’s decision to issue Mary’s 5,725,000 Numoda Corp. shares. Essentially all of the representations made by the Numoda Corp. Parties until the litigation show that they accepted (and did not question the validity of) a capital structure incorporating these shares. Mary and Keenan relied on representations that she had been issued these 5,725,000 Numoda Corp. shares, and Mary would be hurt significantly if the Court did not validate the grant.<sup>114</sup> On the other hand, the

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<sup>113</sup> NT Answering Post-Trial Br. 6.

<sup>114</sup> As acknowledged in post-trial oral argument, “commentary to the statute says a validation under 205 is not to insulate any action from common law fiduciary duties.” Post-Trial Args. Tr. 40. The Court does not determine the appropriateness of the amount of Mary’s compensation here but notes that the current record does

Numoda Corp. Parties will be put in a position where their representations have long reflected they were. The equities will not permit Ann and John to renege on a prior commitment in order to enhance their personal interests.

The grant of Houriet's Numoda Corp. shares will also be validated. The Numoda Corp. Parties attempt to cast doubt on whether 5,100,000 shares is the number to which Houriet is entitled.<sup>115</sup> This argument is of little moment because Numoda Corp. issued Houriet a certificate in 2009 and later took action to award 5,100,000 shares through its January Ratification (although it was not a "concession"). The stock certificate, in combination with testimony and other documents in the record, provides sufficient evidence of board approval for the Court to recognize a corporate act. The more difficult question is whether Houriet is entitled to voting stock or non-voting stock, as his certificate indicates.

A preponderance of the evidence shows that Houriet negotiated for an ownership interest in the companies and had no reason to believe that his interest would be qualitatively different from that of the directors. He otherwise would have left the companies. Keenan, the person charged with preparing Houriet's certificate, credibly testified that he thought he had completed a certificate for voting stock and did not realize the mistake until Houriet's ownership was

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not indicate that validation would be inequitable. Ann participated in the compensation decision, and Ann and John have acquiesced in the grant for years.

<sup>115</sup> See NC Answering Post-Trial Br. 31-34.

questioned in litigation. Furthermore, an informal stock ledger from December 11, 2007, suggests that Houriet's 5,100,000 shares were approved by at least that date,<sup>116</sup> and Numoda Corp. was not able to issue non-voting stock until it filed a charter amendment on December 27, 2007.

The five factors in 8 *Del. C.* § 205(d) also weigh in favor of validating an approval to issue voting stock. The Numoda Corp. board acted as though a valid issuance had occurred and had even more of a basis for believing that there had been compliance with corporate formalities given the (albeit erroneously completed) stock certificate. Again, validating the grant of voting stock will put the parties closer to their long-represented capital structure, Houriet would lose a substantial benefit of his bargain without some remedy, and no other factor sways the Court in the opposite direction. Section 205 certainly allows the Court to fix a ministerial error when the evidence supports the underlying corporate act. Thus, the Court finds that Houriet is entitled to Numoda Corp. voting stock and uses 8 *Del. C.* § 205 to validate the stock grant as of December 13, 2007.

Next, the Numoda Tech. Parties ask the Court to validate grants of Numoda Tech. stock to the individual shareholders allegedly approved by the two boards. There is little doubt that the Numoda Corp. board intended a spin-off of Numoda Tech. on January 1, 2005, and the Numoda Tech. board believed that further

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<sup>116</sup> See JX 444 at MS0063. The Numoda Tech. Parties claim that the stock was issued on December 13, 2007. NT Opening Post-Trial Br. 15.



issuances occurred in parallel with issuances of Numoda Corp. stock until the litigation.<sup>117</sup> The Court has some evidence of corporate acts—an alleged issuance of Numoda Tech. stock to Numoda Corp., as well as purported agreements reached by the Numoda Corp. board to effectuate a spin-off and by the Numoda Tech. board to issue Numoda Tech. stock post-spin-off. However, the record (particularly the uncertainty about Numoda Tech.’s board meetings and the absence of any completed stock certificates) at most suggests that the boards vaguely agreed that issuances would be effectuated at some point in the future.<sup>118</sup>

To the extent that there were bare-minimum corporate acts, the equitable factors in Section 205(d) also do not persuade the Court to validate grants of Numoda Tech.’s stock to Numoda Corp. or to Numoda Corp.’s shareholders directly. The Court notes that declining to award ownership to the shareholders, as opposed to finding that Numoda Tech.’s stock is controlled by Numoda Corp. itself (discussed

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<sup>117</sup> This assumption is complicated by the lack of evidence that Numoda Tech. ever approved a non-voting class of common stock. As explained *infra*, however, the Court need not resolve this issue.

<sup>118</sup> A May 2000 written consent of the Numoda Corp. directors resolved that certificates generally would not be issued. JX 1 at BORIS00000059. There does not appear to be a corresponding document for Numoda Tech., but it is possible that the Numoda Tech. board was operating under the same assumption. Regardless, it is significant that Numoda Corp. was seeking financing at the time the board reached many of the alleged approvals and that Houriet persisted to obtain a certificate for his Numoda Corp. stock but not any Numoda Tech. stock. The Court’s inference in a pretrial letter that Numoda Tech. stock had been issued to Numoda Corp. is not controlling due to the record developed at trial. *See* Letter from the Court 1, July 7, 2014.

*infra*), will not significantly harm any of the parties, Numoda Corp.'s other shareholders, or outsiders to whom the parties made representations.<sup>119</sup> Under these circumstances, the uncertain evidence<sup>120</sup> and variable equitable factors do not convince the Court to exercise its powers under Section 205.

D. *Did Ann Give Back 2,000,000 Shares to Numoda Corp.?*

The Numoda Tech. Parties seek declaratory judgment that Ann returned 2,000,000 shares to Numoda Corp., which would conform Numoda Corp.'s records with what they claim happened in 2006.<sup>121</sup> They rely primarily on their own recollections, documents purporting to reflect Numoda Corp.'s capital structure, and an email in which Ann refers to a giveback. Ann denies committing to that giveback and emphasizes the lack of formal documentation. This Court has the power to grant declaratory relief pursuant to 10 *Del. C.* § 6501 when a litigant presents an actual controversy meeting the following requirements:

- (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief;
- (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim;
- (3) the controversy must be between parties whose interests are real

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<sup>119</sup> The Numoda Corp. board must exercise its good faith judgment to distribute Numoda Tech.'s stock. The Court's findings regarding the parties' prior representations and working understanding of mirror-image capital structures should be informative.

<sup>120</sup> The uncertainty is magnified by doubts about whether Numoda Tech. has two classes of common stock.

<sup>121</sup> Ann could not have given back Numoda Tech. stock that she did not have.

and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.<sup>122</sup>

Exercise of this power is discretionary<sup>123</sup> and the Court assumes that the party requesting relief should bear the burden of persuasion.<sup>124</sup>

The individual parties do not dispute that there is an actual controversy regarding their personal interests in Numoda Corp., which necessarily involves questions of Ann's ownership. As in the 225 Action, the Court has reviewed persuasive evidence that the parties conducted their business for years with the understanding of Numoda Corp.'s capital structure as documented in unofficial records reflecting a giveback by Ann. The Court does not have evidence of a returned certificate, but the parties made representations to outsiders, including the State of Delaware. The fact that a certificate for Houriet's 5,100,000 Numoda Corp. shares was issued is additional supporting evidence. Moreover, Keenan relied on such representations in pledging personal assets to benefit Numoda Corp. The testimony and documentation in the record are sufficient to convince the Court that Ann intended to, and did, turn in 2,000,000 shares to Numoda Corp.<sup>125</sup> Here,

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<sup>122</sup> *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989).

<sup>123</sup> 10 *Del. C.* § 6506.

<sup>124</sup> *See Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at \*6 (Del. Ch. Dec. 21, 2007) (noting a split of authority).

<sup>125</sup> The draft memorandum of agreement cited by the Numoda Corp. Parties in their answering brief, *see* JX 31, does not lead the Court to conclude that Mary waived a right to her 5,725,000 shares. The document is dated December 31, 2007.

the Court is not ratifying a corporate act or untangling void and valid acts<sup>126</sup>—the Court has validated the grant of stock to Ann in 2004. Thus, the Court declares that Ann effected a giveback of Numoda Corp. stock in 2006.

*E. Is Mary Entitled to the 400,000 Shares Under Any Other Theory?*

In the alternative, Mary asks for relief under theories of breach of contract, unjust enrichment, promissory estoppel, intentional misrepresentation, and negligent misrepresentation.<sup>127</sup> The Court prefaces this analysis with the observation that if Section 205 does not support a grant of equitable relief for a defective corporate act or putative stock, a plaintiff in these circumstances will frequently find it difficult to succeed on an alternative equitable theory.<sup>128</sup> Regardless, starting with the breach of contract argument, Mary seeks specific performance. This remedy requires her to prove, among other elements, “the existence and terms of an enforceable contract by clear and convincing evidence.”<sup>129</sup> Mary’s cited evidence, “the Share Register, the 2010 Cap Table, the

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<sup>126</sup> *Cf. Boris*, 2013 WL 6331287, at \*16 (“Finally, Mary has not established by a preponderance of the evidence that, assuming Ann did return some stock to Numoda Corp., it was to be from her original grant . . . as opposed to the void issue . . . or even some combination of the two.”).

<sup>127</sup> Keenan and Houriet cannot (and do not) seek double recovery. To the extent that there is a choice of law issue here, Delaware and Pennsylvania law do not conflict materially.

<sup>128</sup> This observation does not limit entitlement to an equitable remedy where resolution is not based on fixing a defective corporate act.

<sup>129</sup> *Certainseed Corp. v. Celotex Corp.*, 2005 WL 217032, at \*6 n.29 (Del. Ch. Jan. 24, 2005) (internal quotation marks omitted).

Annual Franchise Tax Reports, the PIDC Cap Table, . . . corporate tax return[s], the personal financial statements, John’s text message to Mr. Dill, the Common Stock Ledger and Analysis, and Keenan’s testimony,”<sup>130</sup> however, is not clear and convincing evidence of a contract generally—not to mention the terms of a contract. The Court thus cannot award Mary specific performance for an alleged breach of contract.<sup>131</sup>

Mary next seeks a constructive trust as a remedy for unjust enrichment. The elements of an unjust enrichment claim are: “(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.”<sup>132</sup> The Numoda Corp. Parties argue that Mary cannot establish that her actions to “enrich” Numoda Corp. were directly related to her mistaken belief that she was issued stock.<sup>133</sup> Moreover, they submit that Mary’s claims of impoverishment are moot because of the January Ratification. Perhaps Mary continued to work for Numoda Corp. because she believed that she had been issued stock, but the Court lacks evidence that the Numoda Corp. board promised Mary 400,000 shares and that she was impoverished by continuing to work in

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<sup>130</sup> NT Opening Post-Trial Br. 60.

<sup>131</sup> Perhaps Keenan relied on this understanding before pledging his own assets, but a third party’s reliance does not establish Mary’s rights to 400,000 shares against Numoda Corp.

<sup>132</sup> *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012).

<sup>133</sup> NC Answering Post-Trial Br. 48-49.

reliance—the Court cannot even identify when this alleged conduct occurred.<sup>134</sup>

The same problems plague Mary’s promissory estoppel argument.<sup>135</sup>

Mary requests, in the alternative, damages “in an amount to be proved at trial.”<sup>136</sup> Unfortunately for Mary, the parties have not focused on damages, and the Court will not, without that guidance, conduct its own valuation. As she has not proved damages, Mary cannot recover under her misrepresentation claims.<sup>137</sup> Thus, Mary is not entitled to relief under her additional theories.

#### *F. Does Any Other Theory Resolve Numoda Tech.’s Capital Structure?*

Numoda Tech., also in the alternative, asks for a declaration that its capital structure is as the parties have assumed for years prior to the litigation. The Numoda Corp. Parties differ in that they ask for an order requiring Numoda Tech. to distribute its stock to Numoda Corp. for subsequent distribution to shareholders

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<sup>134</sup> There might be an argument that the 400,000 shares should be included in Mary’s one-third ownership grant, but the evidence surrounding these shares is sparse, and the equities do not weigh in favor of awarding these shares. For one, control does not hinge on the 400,000 shares.

<sup>135</sup> See, e.g., *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000) (noting that, among other elements, “a plaintiff must show by clear and convincing evidence that . . . a promise was made” to succeed on a promissory estoppel claim).

<sup>136</sup> Numoda Technologies, Inc., Numoda Capital Innovations LLC, Mary Schaheen, John Houriet, and Patrick Keenan’s Opening Pre-Trial Br. (“NT Opening Pre-Trial Br.”) 51 n.26.

<sup>137</sup> Intentional and negligent misrepresentation claims both require a showing of resulting damages. See, e.g., *Metro. Life Ins. Co. v. Tremont Gp. Hldgs., Inc.*, 2012 WL 6632681, at \*16, \* 17 (Del. Ch. Dec. 20, 2012). It also is not clear that Mary, as a director and officer, could satisfy the justifiable reliance aspect.

in accordance with records of Numoda Corp.’s ownership as of January 1, 2005.<sup>138</sup>

As explained above, this Court has the power to issue a declaratory judgment pursuant to 10 *Del. C.* § 6501.

Here, Ann, John, Mary, Houriet, and Keenan have been entangled in litigation for years over interests in two companies in which they have been deeply involved. The outcome of this action has the potential to change which “group” has control over Numoda Tech. There is no doubt that there is an actual, ripe controversy, and the Court is in as good of a position as any of the parties to resolve the confusion.

As a preliminary matter, the Court declined to provide the Numoda Tech. Parties’ requested relief under Section 205 and does not find a declaratory judgment appropriate to accomplish the same result. Nonetheless, the Court does have evidence relating to ownership of Numoda Tech.’s stock, such as certificates of incorporation, documents signed by John, and testimony. Certificates of incorporation show that Numoda Tech. was incorporated on December 18, 2000,<sup>139</sup> several months after Numoda Corp. was incorporated.<sup>140</sup> Relatively contemporaneous documents reflect an understanding of a spin-off in 2005 and

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<sup>138</sup> See NC Answering Post-Trial Br. 41-44.

<sup>139</sup> See JX 430 at NC00000382-85.

<sup>140</sup> See *id.* at NC00000376-81.

mirrored structures thereafter.<sup>141</sup> “The two corporations . . . are in the same location and share systems and services,” and they generally shared directors.<sup>142</sup> A preponderance of the evidence establishes that Numoda Tech. was set up as Numoda Corp.’s subsidiary and functioned that way for years. Thus, Numoda Corp., as the parent corporation, had initial control over Numoda Tech.’s stock. The Numoda Corp. board could have directed the issuance of this stock, but the evidence does not establish that the Numoda Corp. board (or the Numoda Tech. board) ever effected an issuance of Numoda Tech. stock.<sup>143</sup> Given the above, the Court finds that Numoda Corp. retains control over all of Numoda Tech.’s stock and has the ability to direct its issuance.

G. *Do the Numoda Tech. Parties Have Unclean Hands?*

The final issue for the Court is whether the affirmative defense of unclean hands precludes the Numoda Tech. Parties from recovering in a court of equity. The Numoda Corp. Parties argue that the Numoda Tech. Parties should not be granted equitable relief because they have been competing with Numoda Corp., filed suit against Numoda Corp. in a different court, and squandered the resources of Numoda Tech. after this Court found Mary to be its sole director in the 225

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<sup>141</sup> See, e.g., JX 2 at MS 752-53; JX 21 at MS0271-72.

<sup>142</sup> *Boris*, 2013 WL 6331287, at \*1 (internal quotation marks omitted).

<sup>143</sup> The parties’ assumption of issuances does not compel the Court to declare that issuances occurred here. If any issuance did occur, it was to Numoda Corp. upon Numoda Tech.’s formation.



Action. “The doctrine of unclean hands permits a court of equity to close its doors to applicants for equitable relief who have acted in violation of any fundamental concept of equity in connection with the matter in controversy.”<sup>144</sup> The Court does not invoke this doctrine liberally and usually requires “some kind of intentional conduct on the part of the plaintiff” before denying recovery on the merits.<sup>145</sup>

Both the Numoda Corp. and Numoda Tech. Parties’ actions in this matter have been less than ideal. From the outset, Ann, John, and Mary did not follow basic corporate formalities as directors of Numoda Corp. and Numoda Tech. Arguably John and Ann were more responsible for keeping records while serving as secretary of Numoda Corp.<sup>146</sup> The failure to comply with the DGCL and the Numoda entities’ foundational documents created uncertainty for others, including investors and clients. The parties suggest that the conflict worsened after the 225 Action, though those allegations are not determinative here.<sup>147</sup> While the Court does not condone the parties’ conduct, the evidence in the record ultimately does

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<sup>144</sup> Wolfe & Pittenger § 11.07[a], at 11-83.

<sup>145</sup> *Id.* § 11.07[b], at 11-86.

<sup>146</sup> *See Boris*, 2013 WL 6331287, at \*5 (“When John resigned as a director, he also resigned as Secretary, and Ann generally assumed that position.”).

<sup>147</sup> The Court acknowledges allegations that both sides took actions to alter the status quo, at least during the pendency of a motion for a status quo order. *See* NC Opening Post-Trial Br. 51-55; NT Answering Post-Trial Br. 33-39. In evaluating an unclean hands argument, this Court focuses on actions with “immediate and necessary relation to the equity that [the plaintiff] seeks in respect of the matter in litigation,” not just general misdeeds. *E. States Petroleum Co. v. Universal Oil Prods. Co.*, 8 A.2d 80, 82 (Del. 1939) (internal quotation marks omitted).

not show that the parties acted with improper intent outweighing the benefit of a resolution on the merits.

H. *Impact on the 225 Action*

Based on the above findings of fact and conclusions of law, Ann and John did not hold a majority of either Numoda Corp.’s or Numoda Tech.’s voting stock at the time they purported to sign the written consents removing Mary and electing themselves to the two corporations’ boards. Ann and John, solely, executed those documents as “stockholders of [the corporations], . . . representing a majority in voting power of the issued and outstanding shares of the [voting] Stock.”<sup>148</sup> The findings in this action mean that Ann and John held (and continue to hold) 37.51% of Numoda Corp.’s voting shares.<sup>149</sup> To the extent that the 225 Action found the Numoda Corp. written consent effective, it is now the wrong result.

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<sup>148</sup> See JX 62; JX 64.

<sup>149</sup> By comparison, the Numoda Tech. Parties collectively held 58.88% and PIDC held 3.61%.

For clarification, the Numoda Corp. stock ledger, thus, should reflect the following ownership structure:

Shareholder	No. Voting Shares
Ann	7,745,500
John	2,812,905
Mary	10,439,053
Keenan	1,035,000
Houriet	5,100,000
PIDC	1,016,950

#### IV. CONCLUSION

For the reasons discussed above, the Court validates the corporate acts resulting in the capital structure of Numoda Corp. set forth above.<sup>150</sup> It also finds that Ann returned 2,000,000 shares to Numoda Corp. The Court cannot validate the grant of an additional 400,000 shares to Mary or provide an alternative remedy in lieu. Numoda Tech.'s shares are under the control of Numoda Corp.

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

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Shareholder	No. Non-Voting Shares
Al & Leslie Boris	416,226
Holy Redeemer Health System	250,000
Bernadette Yench	85,102
Rick & Bonnie Stys	82,557
LuAnn Boris	81,630
Deborah Kaplan	51,665
Scott Zelov	44,150
Susan Boris	28,896
Bonnie Stys	19,378
Alexander Boris	17,645
Katherine Boris	17,645
Steve Stys	15,109

<sup>150</sup> See *supra* note 149.