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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE NUMODA CORPORATION	No. 121, 2015 Court below: Court of Chancery, Consolidated C.A. No. 9163-VCN

APPELLANTS' OPENING BRIEF

Richard P. Rollo (#3994)
Kevin M. Gallagher (#5337)
J. Scott Pritchard (#5654)
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Appellants John Boris and Ann Boris

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NATURE OF PROCEEDINGS

This litigation involves a dispute over control of Numoda Corporation, Inc. ("Numoda Corp.") and Numoda Technologies, Inc. ("Numoda Tech."; collectively, the "Corporations"). In November 2012, John Boris ("John") and Ann Boris ("Ann"; collectively, the "Borises") delivered stockholder written consents to the registered agent for Numoda Corp. ("NC Written Consent") and Numoda Tech. ("NT Written Consent"; collectively, the "Written Consents"). The Written Consents, among other things, removed the Corporations' existing boards of directors ("Board") and elected the Borises as directors.

In December 2012, the Borises filed a verified complaint pursuant to 8 *Del. C.* § 225 (the "225 Action"). After a two-day trial, the Court of Chancery (the "Trial Court") issued a memorandum opinion in December 2013 (the "225 Opinion"). With respect to Numoda Corp., the Trial Court held that the Borises owned a majority of the validly issued voting stock and, therefore, the NC Written Consent was valid. With respect to Numoda Tech., the Trial Court held that no validly issued stock existed and, therefore, the NT Written Consent was not valid. The Trial Court also held that Mary Schaheen ("Mary"), a defendant in the 225 Action, was the sole director of Numoda Tech. In December 2013, the Trial Court also entered a final order in the 225 Action (the "225 Final Order"). Mary appealed.

During the 225 Action appeal, Numoda Corp. filed a complaint in the Trial Court seeking to require Numoda Tech. to issue Numoda Tech. shares to Numoda Corp. Mary, John Houriet, Jr. ("Jack") and Patrick Keenan ("Patrick"; collectively, "Mary's Group") filed counterclaims, third-party claims and a separate complaint in the Trial Court against the Borises and Numoda Corp. Mary's Group later amended their pleadings to assert claims under Section 205 of the DGCL. The actions were consolidated (the "205 Action"), and the Trial Court held a four-day trial in July 2014. The 225 Action record was made part of the 205 Action record.

In September 2014, this Court entered an order staying the 225 Action appeal until resolution of the 205 Action.

The Trial Court issued a post-trial Memorandum Opinion in the 205 Action in January 2015 (the "205 Opinion"). *See* Ex. A. In the 205 Opinion, the Trial Court, among other things, validated certain purported corporate acts under Section 205, which resulted in a change of control over Numoda Corp. The Trial Court entered a final order in the 205 Action on March 10, 2015 (the "205 Final Order"). *See* Ex. B. The Borises filed a notice of appeal on March 11, 2015.[1] This is the Borises' opening appeal brief.

[1] Numoda Corp. is a nominal-party. Mary's Group conceded in the Trial Court that the Borises have standing to pursue any appeal arguments that Numoda Corp. could have made. *See* A2405 (arguing that "even if Numoda Corp. does not file a notice of appeal, Ann and John are free to make all the arguments they made in" the Trial Court).

SUMMARY OF ARGUMENT

1. The Trial Court erred by validating "defective corporate acts" – as the term is used in Section 205 – that were never attempted. Consistent with how Mary's Group framed the issue below, the Trial Court analyzed only whether the disputed authorizations and issuances were "defective corporate acts" – *i.e.*, it did not analyze the disputed issuances as "putative stock" under Section 205. The Trial Court errors included, among other things, (i) finding that the Numoda Corp. Board attempted to authorize the disputed issuances; (ii) relying upon testimony that was unreliable, conflicting and lacked candor; (iii) validating shares that were the product of an admitted calculation error; (iv) assuming that the disputed issuances occurred; (v) relying upon inadmissible hearsay to establish issuance dates; and (vi) validating issuances that could not be ratified under Section 205 as "defective corporate acts" because the 205 Opinion held that the issuances were not "void or voidable due to a failure of authorization."

2. The Trial Court erred by applying the wrong equitable standard of judicial review to Mary's disputed stock compensation. Because the issuance was an interested transaction, it is subject to the entire fairness standard. The Trial Court erred by not applying that standard. Even if it had, the record demonstrated the disputed compensation was not entirely fair.

3. The Trial Court erred by finding that the Numoda Corp. Board authorized the issuance of 5.1 million Voting Common shares to Jack. The testimony relied upon is contradicted by the documents and mathematics (*i.e.*, 15% of the fully diluted equity is not 5.1 million shares, and never has been). Moreover, the Trial Court erred by relying upon inadmissible hearsay to establish an issuance date. Finally, there is no evidence to support the Trial Court's conclusion that Non-Voting Shares were issued as the result of an error.

4. The Trial Court erred by finding that Ann effectuated a give back of 2 million shares because there was no evidence that (i) Ann ever attempted to tender her shares to Numoda Corp. as required by the bylaws, or (ii) Ann (or anyone else) ever asked the secretary to make an entry on the stock ledger. Thus, there is no evidence from which the Trial Court could have reliably declared that the give back, in fact, occurred.

5. The Trial court erred by declining to validate the Numoda Corp. spin-off of Numoda Tech, effective January 1, 2005. It is undisputed that the Numoda Corp. Board, and all interested parties, intended the foregoing spin-off and believed that it had been validly accomplished. Moreover, the spin-off was reported to the IRS, and the record establishes a basis to determine the Corporations' capitalizations as of that time. No contrary evidence was presented.

STATEMENT OF FACTS

A. The Parties

The Corporations are related Delaware entities, headquartered in Philadelphia, that provide technology and other services in the biotechnology and pharmaceutical industries. A2436. Numoda Corp. acts as an integrator of services and technologies to make clinical trials faster and cheaper. A1388. Numoda Tech.'s business was to hold intellectual property and patents for use in conducting the clinical trials. A1388-89. Numoda Tech. was intended to be a Numoda Corp. subsidiary – until Numoda Corp. attempted to spin it off to Numoda Corp.'s then-existing stockholders, effective January 1, 2005. A2436-37; *see also* A32-34; A223-26.

John, Ann and Mary were original Numoda Corp. stockholders and served as the initial Board. Ex. A at 2. In 2000, as part of the original common stock issuances, John received 1,266,667 shares, Ann received 5,100,000 shares, and Mary received 3,333,333 shares. *Id.* Preferred stock was never issued.

Jack and Patrick were not involved with the Corporations at the outset. Jack, who later joined Numoda Corp. as the Chief Technology Officer, owns 5.1 million shares of Numoda Corp. stock – the parties dispute whether such stock is Non-Voting Common (defined below) or Voting Common (defined below). Patrick has never been a director of either the Corporations, A855-56, but he is in a personal

relationship with Mary. A857-58. Patrick owns 1,035,000 shares of Numoda Corp. Voting Common.

B. Numoda Corp. Created Non-Voting Common

The initial Numoda Corp. certificate of incorporation ("Charter") authorized only one class of common stock. A984-89. After multiple amendments, however, the current Charter authorizes both Class A non-voting common stock ("Non-Voting Common") and Class B voting common stock ("Voting Common"). A2445; A1034-35. All stock issued prior to May 12, 2006 is Voting Common. A2445; A1034-35. All stock issued on or after that date is Non-Voting Common, unless it is specifically designated as Voting Common. A2445; A1034-35.

The 225 Opinion held that the only validly issued Voting Common shares were the following original 10,005,000 shares:

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

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

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

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

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

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

See A2439-40.

C. The Failed 2005 Spin-Off Of Numoda Tech. From Numoda Corp.

Numoda Tech. was intended to be a Numoda Corp. subsidiary; however, the 225 Opinion held that Numoda Tech. had no validly issued shares. A2481. Although there is no record that any of the necessary corporate requirements for a spin-off of Numoda Tech. were met, the 2005 Federal Income Tax Return for Numoda Corp. attached a document entitled "Reorganization Plan Effective January 1, 2005 (Summary)" (the "Reorganization Plan"), stating the following:

> "Numoda [Corp.] has **25,000,000 shares of common stock authorized**… As of December 31, 2004, **18,977,458** shares of common stock were outstanding."
>
> "On 12/18/2000, Numoda [Corp.] formed a wholly-owned subsidiary named Numoda Technologies, Inc. ('NT')."
>
> "NT was originally capitalized with $10,005 paid in capital for 10,005,000 shares of common stock (intended to mirror the capital structure of the parent, Numoda [Corp.]). As of December 31, 2004, **18,977,458** shares of common stock were outstanding…."
>
> "**Numoda [Corp.] distributed**, in a tax-free spin-off, the 18,977,458 shares of NT stock share for share (pro rata) **to the shareholders of Numoda [Corp.]**…."
>
> "At the completion of the reorganization, effective January 1, 2005, the same shareholders of Numoda [Corp.] own mirror interests in NT."

A1234-47. The 18,977,458 number in the Reorganization Plan appears in at least one excel spreadsheet contained in the record, *see* A1260, which would result in the following ownership structure for both Corporations immediately after the

January 1 effective date of the 2005 spin-off:

Ann Boris	9,745,500	51.35%
Mary Schaheen	5,109,053	26.92%
John Boris	2,812,905	14.82%
Patrick Keenan	505,000	2.66%
Thomas Duffy	500,000	2.63%
Meyer Rohtbart	300,000	1.58%
Philip P. Gerbino	2,500	0.01%
Barry Unger	2,500	0.01%

D. Disputed Additional Numoda Corp. Voting Common Issuances

Mary's Group contends that additional Voting Common issuances occurred in or after 2006, which diluted the Borises' ownership below a majority.[2] Those disputed shares were not reflected in Numoda Corp.'s stock ledger, and the 225 Opinion held that those shares had not been validly issued. A2478-79.

With respect to herself, Mary asserted that (on some unknown date(s)) she was retroactively issued an additional: (i) 1,225,000 shares as compensation for services in 2002; (ii) 2,220,000 shares as compensation for services in 2003; and (iii) 2,280,000 shares as compensation for services in 2004. Yet, as of December 4, 2007 – more than a year after Mary claims the Board authorized the issuances – the informal "Common Stock Analysis" spreadsheets prepared by John Dill ("Dill")[3] did not reflect any Voting Common issued as retroactive compensation to

[2] As discussed below, Patrick received shares of Voting Common in February 2014 for the total number of shares he sought in the 205 Action.

[3] John Dill was an independent contractor hired on an as-needed basis to do accounting and tax work for the Corporations. *See* A1903, A1845 ("I was always an independent

Mary for services rendered in 2002, 2003 or 2004. A1258 (12/4/2007). Moreover, on December 5, 2007, Dill emailed himself some of his "Common Stock Analysis" spreadsheets with a cover note stating "***Challenge: how to up MS%.***" A1248. MS is Mary. Dill's note stands in stark contrast to Mary's story – *i.e.*, that the Board determined *in July 2006*, that her percentage would be 33%. A459; A542-43; A546; A1265. Mary also asserted entitlement to an additional 400,000 undocumented shares from 2000.

With regard to Jack, Mary's Group claims that the Boards of both Corporations, in July 2006 (*i.e.*, at a time when the default issuance under the amended charter for Numoda Corp. was Non-Voting Common (A2445; A1034-35), authorized the issuance of 15% of the fully-diluted equity to Jack. A2446; A2012-13. Yet, it was more than three years later, in September 2009, before Ann and Mary signed a stock certificate for 5.1 million Non-Voting Common shares and delivered that certificate to Jack (*see* A765-66; A2448; A2013-14), which, notably, is more than 15% of the fully-diluted equity based upon the capitalization claimed by Mary's Group. Jack never received a Numoda Tech. stock certificate.

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contractor."). To be clear, Dill was not the secretary or assistant secretary for either of the Corporations, and he did not believe that it was his responsibility to maintain the stock ledger. *See* A1904 (Q. Was it your responsibility to maintain the stock ledger; yes or no? A. No."); A1554 (Q. Do you understand any of Mr. Dill's models to be an official stock ledger for Numoda Corporation? A. No, they are not official stock ledgers of Numoda Corporation.").

E. The February 2014 Numoda Corp. Voting Common Issuances

On January 28, 2014, the Numoda Corp. Board met to review and consider certain issues relating to the capital structure. *See* A38; A1946. After receiving input from counsel, and after much deliberation, the Board determined that, with regards to initial issuances of Voting Common: (i) the 2,500 shares purportedly issued to each of Gerbino and Unger, the 300,000 shares issued to Rohtbart, and the 810,255 shares issued to Pennsylvania Business Bank were no longer outstanding; (ii) the initial issuances of 5,100,000 shares to Ann, 3,333,333 shares to Mary, and 1,266,667 shares to John were valid; and (iii) the 30,000 shares issued to Patrick were validly issued and outstanding. *See* A40-43; A1949-53.

The Board also considered other purported issuances that had been the subject of the 225 Action. *See* A44; A1949-53. After receiving input from counsel, and after deliberation, the Board determined:

> (i) the additional paid-in capital of $4,288,729, reflected in the 2004 Financials should be considered validly issued shares of Voting Common as of the recorded issuance dates;
>
> (ii) the 5,100,000 "Shares of Class A Common Stock" purportedly issued to Jack, that was invalidly issued and produced by Jack during the 225 Action, which were neither recorded on the stock ledger, nor the subject of a certificate "stub" in the stock book, and which appeared to be signed by Ann and Mary hand-dated September 18, 2009, should not be considered validly issued shares of Voting Common but, instead, should be treated as validly issued shares of Non-Voting Common; and
>
> (iii) the various other purported Voting Common issuances that had been raised in connection with the 225 Action, most of which were purportedly

> issued to Mary and none of which were recorded on the stock ledger or contained corresponding certificate "stubs," should not be considered validly issued shares of Voting Common stock.

See A43-48; A1949-53.

The next day, on January 29, 2014, the Numoda Corp. Board met again to review and consider the materials prepared by counsel, as instructed at the prior Board meeting, and certain other outstanding issues relating to the capital structure of Numoda Corp. A51-52; A1960. The Board discussed the conversion rate of $0.50 per share for the additional paid-in capital of the $4,288,729 reflected in the 2003 and 2004 Financials and determined that the conversion rate of $0.50 should be used. The Board also discussed whether Jack's shares should be Voting Common or Non-Voting Common and, ultimately, confirmed its determination that such shares should be considered validly issued shares of Non-Voting Common. A46-48; A1962.

On January 31, 2014, the Numoda Corp. Board met once more to discuss issues relating to the capital structure of Numoda Corp. and to discuss matters raised in the January 28 and 29 meetings. A52-53; A1964. Further, the Board considered a spreadsheet that had been prepared and circulated prior to the meeting, which reflected the common shares that Numoda Corp. purportedly

issued and the source for the information contained therein, *see* A50-51.[4] After additional discussion and deliberation, the Board unanimously ratified the issuances described above. A1965-69. Moreover, to the extent the shares were not capable of being ratified, the Board authorized the issuance of such shares. A1964-73.

On February 3, 2014, at the direction of the Numoda Corp. Board, John sent a letter to Numoda Corp.'s stockholders that set forth the issued and outstanding shares of Voting Common, which constituted all of the authorized, issued, and outstanding shares, all of which were recorded in Numoda Corp.'s stock ledger:

Ann Boris	9,745,500	50.43%
Mary Schaheen	4,714,053	24.39%
John Boris	2,812,905	14.56%
Patrick Keenan	1,035,000	5.36%
PIDC (in 2008)	1,016,950	5.26%
Total	19,324,408	

A1974; A1983; A1992. The primary differences between the above, and the numbers reflected in the above-noted excel spreadsheet that corresponds with the 2005 Reorganization Plan, are (i) the shares of Rohtbart, Gerbino and Unger were eliminated, (ii) Patrick received his shares, the shares listed for Duffy (which Patrick purchased), and the 30,000 shares reflected on undated Certificate No. 7, (iii) the PIDC shares were included as Voting Common (based on the terms of its

[4] The sources included A978-1233, A1234.

conversion agreement), and (iv) Mary did not receive an additional 395,000 or 400,000 shares because there was no corroborating evidence or corresponding additional paid-in capital identified in the 2004 Financials.

Thus, after the February 2014 issuances, the following disputes remained to be litigated: (i) whether Mary was entitled to 5,725,000 voting shares as retroactive additional compensation for years 2002, 2003 and 2004; (ii) whether Mary was entitled to 400,000 voting shares; (iii) whether Ann gave back 2 million voting shares; and (iv) whether Jack's 5.1 million shares are voting or non-voting. At trial, Mary's Group also disputed the February 2014 issuance dates.

F. The 205 Opinion

The 205 Opinion: (i) validated certain undisputed February 2014 Voting Common issuances; (ii) validated 5,725,000 Voting Common to Mary; (iii) deemed Jack's 5.1 million shares to be Voting Common, and (iv) declared that Ann gave 2 million Voting Common shares back to Numoda Corp. sometime in 2006. Ex. A at 28-31, 33-35. Footnote 149 of the 205 Opinion identifies the Voting Common that the Trial Court concluded should be listed on Numoda Corp.'s stock ledger.[5] *Id.* at 41. With respect to Numoda Tech., the Trial Court found that "Numoda Corp. retains control over all of Numoda Tech.'s stock and has the ability

[5] The Trial Court, declined to validate an additional 400,000 shares sought by Mary in the 205 Action Mary's because there was "no corporate act to validate," and rejected multiple alternative claims for relief. Ex. A at 28-29, 35-37.

to direct its issuance." *Id.* at 39.

ARGUMENT

I. THE TRIAL COURT ERRED BY VALIDATING "DEFECTIVE CORPORATE ACTS" THAT WERE NEVER ATTEMPTED

A. Question Presented

Did the Trial Court err by validating "defective corporate acts" – as the term is used in Section 205 – that were never attempted? *See* A2315-30.

B. Scope of Review

This Court reviews questions of law *de novo*. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). "Interpretation of a statute is a question of law, which [this Court] ... review[s] *de novo*." *First Health Settlement Class v. Chartis Specialty Ins. Co.*, 2015 WL 1021443, at *4 (Del. Mar. 6, 2015). Moreover, this Court reviews "mixed questions of law and fact" *de novo*. *See, e.g.*, *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits of Argument

As framed in their opening post-trial brief in the Trial Court, Mary's Group argued that the disputed authorizations and issuances were "defective corporate acts," as that term is used in Section 205. A2256. Their opening post-trial brief did not, however, argue that the disputed issuances constituted "putative stock," as that term is used in Section 205. Although their post-trial answering brief asserted that the disputed issuances were "purported stock," that argument was not timely made and, therefore, was waived by Mary's Group. *See, e.g., Emerald P'rs v.*

Berlin, 726 A.2d 1215, 1224 (Del. 1999); *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) (TABLE); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001); (finding an argument waived when it was not included in the party's opening post-trial brief); *Zutrau v. Jansing*, 2013 WL 1092817, at *6 (Del. Ch. Mar. 18, 2013). Consistent with how Mary's Group framed the issue, the Trial Court analyzed only whether the disputed authorizations and issuances were "defective corporate acts"–*i.e.*, it did not analyze whether the disputed issuances constituted "putative stock" under Section 205. *See* Ex. A at 1, 6, 23-25 and 55. As such, the Borises need not (and do not) address whether the Trial Court had the power under Section 205 to remedy the disputed issuances as "putative stock." *See* Supr. Ct. R. 8.

1. The Trial Court Erred By Finding The Numoda Corp. Board Attempted To Authorize The Disputed Issuances

"The Court cannot determine the validity of a defective corporate act without an underlying corporate act to analyze." Ex. A at 23.[6] The Trial Court erred by finding the Numoda Corp. Board attempted to authorize the issuances.

[6] *See also* C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393, 403 (2014) ("Embedded within the definition of defective corporate act is the premise that an act, albeit defective, had occurred."); *id.* (Section 204 and 205: "implicitly preserve[] the common law rule that ratification [or court validation] 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." (footnote omitted)); *Liberis v. Europa Cruises Corp.*, 1996 WL 73567, at *8 (Del. Ch. Feb. 8, 1996), *aff 'd*, 702 A.2d 926 (Del. 1997) (TABLE) ("[C]omplete absence of board action is not an irregularity correctable by routine ratification.").

There are only two ways for a board to act: (i) by a vote at a formal board meeting as contemplated by Section 141(b), and (ii) by unanimous written board consent in lieu of a meeting, as contemplated by Section 141(f). Here, there was no contemporaneous evidence that the Numoda Corp. Board ever attempted to act in either of those ways (*e.g.*, no meeting notices, no agendas, no minutes, no meeting notes, no resolutions, no evidence of votes, no unanimous written consents, and no internal records that purport to list or summarize board decisions).

Instead of relying upon attempted (but failed) formal Board actions, Mary's Group claimed that the Board "approved" actions at informal meetings among Board members. Those purported informal decisions consisted of allegedly "working to reach a consensus" among directors. *See, e.g.*, A1563 ("We might have had informal process within the meeting...."), A1571 ("it was easy to just forego some formalities from time to time"); A1275 ("We had an informal process for taking the decisions that were approved by the Board."), A1277 ("We conducted the Board meetings with an informal process."), A1278 ("The decisions that were made in an informal process were Board decisions.").

Despite recognizing that (i) "there must be a difference between corporate acts and informal intentions or discussions"; (ii) "[c]orporate acts are driven by board meetings, at which directors make formal decisions"; and (iii) "[t]he Court looks to organizational documents, official minutes, duly adopted resolutions, and

a stock ledger, for example, for evidence of corporate acts" (Ex. A at 24-25), the Trial Court concluded that there was, at some undetermined time, "a meeting at which Ann and Mary … approved and directed the issuance of what was later calculated as 5,725,000 Numoda Corp. shares to Mary." Ex. A at 29. The Trial Court did not find – and there was no reliable/admissible evidence to support – that the Numoda Corp. Board ever authorized 5,725,000 shares to Mary.

The Trial Court observed that the "evidence of Mary's requested Numoda Corp. shares consists of [Mary's] testimony and sundry documents, none of which replaces official stock ledgers or effective resolutions." Ex. A at 28. Nevertheless, the Trial Court validated 5,725,000 shares of Voting Common under Section 205.

First, Mary testified that she believed the Corporations' boards "authorized" the issuances. But Mary's legal opinion concerning authorization is not a substitute for evidence that the Corporations' boards, in fact, attempted to authorize the issuances in any way cognizable by the DGCL. *See* A1315 ("[Q.] if we simply [sit] in a room [and] say, yep, stock is issued, does that mean the stock is issued? [A.] That's how we did it.").

Second, Mary's testimony concerning the key purported Board meetings at issue in the Section 205 Action was not credible and there were multiple instances in the record of Mary changing her testimony between her depositions and the trials, and between the earlier 225 Action and the 205 Action. *Compare* A457

(Mary testifying at trial that she recalled a July 2006 Numoda Tech. board meeting at which Jack's purported stock issuance was approved) *with* A2107 (testifying during her deposition, only a few weeks earlier, that she could not recall any meeting of the Numoda Tech. board at which any Numoda Tech. stock was approved for Jack); *compare* A457 (claiming at trial that a purported Numoda Corp. Board meeting occurred in Ann's office in July 2006) *with* A1310 (testifying, during the Section 225 action, that Mary was not able to recall where the purported meeting occurred, or when it occurred – other than some time in the summer of 2006); *see also* A2103 (despite the fact that her pretrial briefing in the Section 225 Action stated that the Corporations held ***simultaneous*** Board meetings, changing her testimony and claiming that the Board meetings were ***consecutive***.).

Third, Mary's testimony concerning the events in July 2006 was unreliable. A2103. Mary admitted to mixing up actions purportedly taken by Numoda Corp. and Numoda Tech.; Mary admitted to being confused as between the two entities; and Mary admitted to being unable to differentiate between the two entities. A2103, A2106.

Fourth, Mary's admissions also established that her testimony at trial in the 205 Action lacked candor. During the 205 Action, Mary testified about the purported board meetings in the summer of 2006 but she did not voluntarily suggest any confusion, difficulty separating the two entities, or difficulty

separating the two Boards. A590. Nor did Mary voluntarily admit, as she had during her deposition, that her recollection was fuzzy. A590. During her cross examination at trial, the foregoing was noted:

> You sat here and calmly testified specifically what happened with no qualification, no suggestion that you were fuzzy, no suggestion that you were confused, and no suggestion that you didn't recall everything with 100 percent certainty, didn't you, ma'am?

A589. And Mary responded with a question:

> I was supposed to refer to that myself? … I don't understand.

A589. That response speaks volumes about Mary. Rather than be candid with the Trial Court about what she did, or did not, recall clearly; Mary knowingly overstated what she remembered. To be more blunt, Mary's response demonstrates that she lied about her memories of the purported Board meetings that are at the heart of this dispute. Thus, any reliance on Mary's testimony is clearly erroneous.

Fifth, and finally, even Mary admitted that 5,247,917 of the 5,725,000 shares claimed by Mary (*i.e.*, 92%) are a result of a calculation error. Mary testified that the rate listed in the spreadsheets was supposed to be per year, not per month. *See* A1298. As such, the: (i) 2002 entry is overstated by 1,122,917 shares; (ii) 2003 entry is overstated by 2,035,000 shares; and (iii) 2004 entry is overstated by 2,090,000 shares. The Trial Court downplays this issue as mere "debate" (Ex. A at 8 n.35) and commits error by not squarely addressing it.

2. The Trial Court Erred By *Assuming* That Numoda Corp. Attempted To Issue The Disputed Issuances

The Trial Court did not conclude that the disputed stock issuances were, in fact, attempted by Numoda Corp. Instead, the 205 Opinion improperly *assumed* that the issuances occurred as a result of the purported approvals. Ex. A at 6 n.22 ("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*.") (emphasis added).

Board approval to issue stock is distinct from the subsequent corporate act of issuing stock pursuant to that approval. *See, e.g.*, 8 *Del. C.* § 102(a)(4) ("If the corporation is to be *authorized* to *issue* only 1 class of stock, the total number of shares of stock which the corporation shall have *authority* to *issue* …") (emphasis added); 8 *Del. C.* § 151(a) ("Every corporation may issue 1 or more classes of stock … as shall be stated and expressed in the [Charter] or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its [Charter]."). As observed in *Grimes v. Alteon, Inc.*, 804 A.2d 256 (Del. 2002),

> The requirement of board approval for the issuance of stock is not limited *to the act of transferring the shares of stock to the would-be stockholder*, but includes an

> *antecedent transaction* [*i.e.*, authorization] that purports to bind the corporation to do so. As noted, Section 152 requires the directors to determine the "consideration ... for subscriptions to, or the purchase of, the capital stock" of a corporation. Thus, director approval of the transaction fixing such consideration is required. Moreover, it is well established in the case law that directors must approve a sale of stock. This duty is considered so important that the directors cannot delegate it to the corporation's officers.

Grimes, 804 A.2d at 261 (emphasis added) (footnote omitted). Thus, even if there was Board authorization, there is no evidence in the record reflecting any attempt to issue Mary 5,725,000 shares of Voting Common.

Indeed, with the exception of Jack's certificate for 5.1 million Non-Voting Common shares, the record contained no admissible evidence to establish that the disputed stock issuances were ever attempted by Numoda Corp. The record contained no stock certificates; the stock ledger does not reflect the issuances; and there is no record of any request made to the Secretary to record additional issuances in the stock ledger. Mary and Jack testified that they do not know when the stock issuances occurred, and they conceded that the issuances did not occur in 2006 (when they were purportedly authorized). A2222, A2224.

3. The Trial Court Erred By Relying Upon Inadmissible Hearsay To Establish Issuance Dates

Mary's post-trial opening brief proposed certain issuance dates, without articulating the basis for those dates or citation to corroborating evidence. A2215.

Essentially, Mary asked the Trial Court to infer issuance dates based upon hearsay, and the Trial Court improperly accepted that invitation without much analysis or support. Ex. A at 28 n.112.

Mary's Group's opening post-trial brief included a section entitled "Numoda Corp. issues stock to Houriet and Mary." A2226. However, that section did not point to admissible evidence demonstrating that issuances were attempted. Instead, it simply stated that issuances were approved in July 2006 then claimed:

> Ann directed Mr. Dill (in December 2007) to update the Common Stock Analysis *to reflect the issuances* to Houriet and Mary.

A2226 (citing A1879-80); *see also* A2227 (referring to content of Dill's spreadsheets). The referenced Common Stock Analysis was to spreadsheets prepared by Dill that the Trial Court previously held were not the company's stock ledger. *Boris v. Schaheen*, 2013 WL 6331287, at *16 (Del. Ch. Dec. 2, 2013). Notwithstanding, the Dill spreadsheets were inadmissible hearsay and it was reversible error for the Trial Court to rely on them to establish that issuances occurred. *See* D.R.E. 802 ("Hearsay is not admissible except as provided by law or by these Rules."); *In re Walt Disney Co. Deriv. Litig.*, 2005 WL 407220, at *1 (Del. Ch. Feb. 4, 2005) ("To the extent, however, that the parties attempt to use hearsay statements (within documents or testimony that have been admitted) to prove the truth of the matter asserted, the Court will accord no weight to those

statements.").[7] As for the Dill testimony cited, it does not support the suggestion that stock issuances occurred. *See* A1879-80 ("Jack was to receive 15 percent of the company fully diluted.... And Mary was to have, from these agreements, roughly one-third of the company.... [A]nd it's a mathematical challenge to how do you adjust the share ownership so that Mary has her one-third and Jack had his 15 percent fully diluted.").

4. The Trial Court Erred By Finding That The Disputed Issuances Were "Defective Corporate Acts"

If the disputed issuances were authorized as the 205 Opinion concluded, then they do not fall within the definition of a "defective corporate acts" because they were not "void or voidable due to a failure of authorization." *See* 8 *Del. C.* § 204(h). Thus, the issuances could not be ratified as "defective corporate acts" under Section 205 (*i.e.*, because the 205 Opinion found that they were authorized).

[7] *See also* A2256-61; Ex. A at 11 ("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, *yet there are many reasons to question their accuracy*.") (emphasis added).

II. THE TRIAL COURT ERRED BY FAILING TO APPLY ENTIRE FAIRNESS TO MARY'S DISPUTED STOCK COMPENSATION – A STANDARD THAT MARY'S GROUP FAILED TO SATISFY

A. Questions Presented

Did the Trial Court err by applying the wrong equitable standard of judicial review to Mary's retroactive stock compensation? *See* A2372.

B. Scope of Review

This Court reviews questions of law *de novo*. *Klaassen*, 106 A.3d at 1043. "Interpretation of a statute is a question of law, which [this Court] ... review[s] *de novo*." *First Health Settlement Class*, 2015 WL 1021443, at *4. Moreover, this Court reviews "mixed questions of law and fact" *de novo*. *See, e.g.*, *Zirn*, 681 A.2d at 1055. The Trial Court's evidentiary rulings are reviewed for abuse of discretion. *Wright v. State*, 25 A.3d 747, 752 (Del. 2011).

C. Merits of Argument

Corporate acts "must be 'twice-tested' – once by the law and again by equity." *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007). Even if Mary's Group demonstrated that the issuance of 5,725,000 shares of Voting Common complied with Delaware statutory law, Mary's Group failed to demonstrate that (and the Trial Court failed to consider whether) such issuance was entirely fair.

1. Entire Fairness Applies to Mary's Self-Interested Compensation Decisions

Section 204 and 205 did not modify traditional fiduciary duties. *See* Ex. A at 23 n.96; Ex. A at 29 n.114. As such, because Mary's disputed stock compensation was an interested transaction, it is subject to the entire fairness standard. *See, e.g., Telxon Corp. v. Meyerson*, 802 A.2d 257, 265 (Del. 2002) ("Like any other interested transaction, directoral self-compensation decisions lie outside the business judgment rule's presumptive protection, so that, where properly challenged, the receipt of self-determined benefits is subject to an affirmative showing that the compensation arrangements are fair to the corporation."); *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 745 (Del. Ch. 2007) ("Self-interested compensation decisions made without independent protections are subject to the same entire fairness review as any other interested transaction."). Nevertheless, the Court expressly did not apply that standard. Ex. A at 29 n.114. Accordingly, the Trial Court committed reversible error.

2. Although Mary's Group Bore The Burden, Mary's Disputed Compensation Was Not Entirely Fair

At trial, Mary's Group did not attempt to prove entire fairness. Yet, even if they had, the record demonstrated that the purported retroactive compensation for Mary was not fair to the other stockholders or Numoda Corp. For example, if you assume the shares were worth $0.50 each – which is the conversion ratio used for

cash contributed to Numoda in 2003 – Mary sought $2.86 million in additional compensation for her services during 2002, 2003 and 2004.[8] During that same period of time, Numoda Corp. lost more than $1.15 million as a result of its operations.

To further put Mary's purported retroactive compensation into perspective, in December 2007 – *i.e.*, when the shares were issued according to the 205 Opinion – the parties were telling investors that Numoda Corp. was worth $100 million. A1915. At that valuation, Mary's purported retroactive compensation was worth approximately $18.5 million.[9] Again, Mary's Group did not even attempt to establish that compensation of that magnitude would be fair. Delaware law does not permit an interested director to obtain material compensation to the detriment of other stockholders without a finding that such transaction is entirely fair. Here, the Court should reverse the Trial Court's decision not to impose entire fairness scrutiny.

[8] It is additional compensation because Mary's original undisputed issuance of 3.33 million shares – worth approximately $1.7M at the same 2003 conversion rate – was in consideration for Mary's future services. A1216 ("Mary S. Schaheen … will meaningfully participate in the pursuit of the business of the company, at a level of time and commitment agreed upon in their contracts…. Mary S. Schaheen [currently performs] the duties of President and Chief Executive Officer.").

[9] Assuming, arguendo, 30,912,461 total shares outstanding, comprised of 18,977,458 shares as of the spin-off + 5,725,000 (Mary's alleged comp) + 6,210,003 non-voting shares (including Jack's 5.1 million).

III. THE TRIAL COURT ERRED BY FINDING THAT THE NUMODA CORP. BOARD AUTHORIZED THE ISSUANCE OF 5.1 MILLION SHARES OF VOTING COMMON TO JACK

A. Questions Presented

Did the Trial Court err by finding that the Numoda Corp. Board authorized the issuance of 5.1 million Voting Common shares to Jack? *See* A2315-30.

B. Scope of Review

This Court reviews questions of law and mixed questions of law and fact *de novo*. *See Klaassen*, 106 A.3d at 1043; *Zirn*, 681 A.2d at 1055. The Trial Court's evidentiary rulings are reviewed for abuse of discretion. *Wright*, 25 A.3d at 752.

C. Merits of Argument

1. Mary's Group's Testimony Is Contrary To The Documents

Mary testified that the Corporations' Boards each separately authorized Jack to receive 15% on a fully-diluted basis. The number of shares might differ as between Numoda Corp. and Numoda Tech., but the Boards never authorized the issuance of more than 15%. A2123, A2124, A2126, A2115. But, Mary's testimony simply does not support the Trial Court's conclusion. If you divide 5.1 million by 15%, you get 34 million. So, to constitute 15%, the total fully diluted capitalization must be exactly 34 million shares. Yet, ***none*** of the spreadsheets or other capitalization documents entered into evidence reflects a total fully diluted capitalization of 34 million shares for either company. *See* A623-25. In fact, the spreadsheet relied upon by Mary's Group, shows that the 5.1 million shares

claimed by Jack would constitute 18.37% of Numoda Tech. and 15.38% of Numoda Corp., respectively, on a fully diluted based. A2194. Neither of those numbers is consistent with Mary's testimony concerning what the Boards purportedly authorized in the summer of 2006 (*i.e.*, 15% and no more). Separately, it is noteworthy that Mary's Group claims that Jack is entitled to 5.1 million shares of Numoda Corp. and 5.1 million shares of Numoda Tech, despite the fact that the two companies have a different number of shares outstanding (due to the non-voting Numoda Corp. shares). That, too, is inconsistent with Mary's testimony concerning what the Boards purportedly authorized in the summer of 2006 (*i.e.*, 15% of Numoda Corp. and 15% of Numoda Tech.). Accordingly, the testimony presented at trial does not support the Trial Court's conclusions.

2. The Trial Court Relied Upon Inadmissible Hearsay

In holding that Jack's 5.1 million shares were Voting Common, the Trial Court relied upon "an informal stock ledger" – *i.e.*, one of Dill's spreadsheets. Ex. A at 31. As discussed above, the Dill spreadsheets were inadmissible hearsay, and any reliance thereon by the Trial Court was reversible error.

3. The Trial Court Erred By Finding Jack's Non-Voting Shares Were Issued As The Result Of An Error

Mary's Group failed to prove their claim that Jack's stock certificate for Non-Voting Common was issued in error. In support of their claim, Mary's Group relied only on the testimony of Patrick and Jack. Ex. A at 30. At best, the record

establishes that Jack and Patrick *assumed* that Jack would be issued Voting Common, but neither could testify that they were told – at any time – that Jack's shares would be Voting Common. *See* A803; A888. Moreover, there is no record that the Numoda Corp. Board ever authorized the issuance of Voting Common to Jack. The record, however, contains a stock certificate for Non-Voting Common shares. A1263-64. Thus, the only reliable evidence here is the stock certificate signed by Ann and Mary, which is undeniably for Non-Voting Common shares.

This Court should reverse the Trial Court's decision with respect to Jack's 5.1 million shares.

IV. THE TRIAL COURT ERRED BY DECLARING THAT ANN GAVE BACK 2,000,000 SHARES

A. Questions Presented

Did the Trial Court err by finding that Ann effectuated a give back of 2 million shares? *See* A2315-30.

B. Scope of Review

This Court reviews questions of law and mixed questions of law and fact *de novo*. *See Klaassen,* 106 A.3d at 1043; *Zirn*, 681 A.2d at 1055. The Trial Court's evidentiary rulings are reviewed for abuse of discretion. *Wright*, 25 A.3d at 752.

C. Merits of Argument

The Trial Court held that "[t]he 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." Ex. A at 34. There was no evidence presented below, however, that Ann attempted to tender her shares to Numoda Corp. (as required by the bylaws). There is no evidence that anyone asked the secretary to make an entry on the stock ledger, or that any such entry was ever attempted. In fact, there is no evidence from which the Trial Court could have reliably declared that the give back, in fact, occurred.

At trial, Mary stated that she could not recall Ann ever signing or executing a document that required or obligated her to give back 2 million shares. A1315 (unable to identify any contemporaneous writing associated with that alleged

transaction, or any piece of paper signed by Ann indicating that she agreed to such a transaction). Without any documentation, Mary's Group had no alternative but to rely on a one-page email, written three years after any purported "give-back" as evidence of its legitimacy. A2269; *see Blades v. Wisehart*, 2010 WL 4638603, at *4 (Del. Ch. Nov. 17, 2010) ("To say the least, it is odd that gifts of stock would not be documented, even if for no other reason than to address the tax consequences to all concerned."), *aff'd sub nom. Wetzel v. Blades*, 35 A.3d 420 (Del. 2011) (TABLE). The email is insufficient, standing alone, to support a finding that Ann gave back 2 million shares. Accordingly, the Trial Court abused its discretion by declaring that Ann effectuated a give back of 2 million shares.

V. THE TRIAL COURT ERRED BY DECLINING TO VALIDATE THE 2005 NUMODA TECH. SPIN-OFF

A. Questions Presented

Did the Trial Court err by failing to validate the 2005 Numoda Tech. Spin-Off? *See* A2336-38.

B. Scope of Review

This Court reviews questions of law *de novo*. *Klaassen*, 106 A.3d at 1043. "Interpretation of a statute is a question of law, which [this Court] ... review[s] *de novo*." *First Health Settlement Class*, 2015 WL 1021443, at *4. Moreover, this Court reviews "mixed questions of law and fact" *de novo*. *See, e.g.*, *Zirn*, 681 A.2d at 1055.

C. Merits of Argument

The Trial Court concluded that "[t]here is little doubt that the Numoda Corp. board intended a spin-off of Numoda Tech. on January 1, 2005" and the Trial Court further found "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." *See* Ex. A at 31, 32. Yet, the Trial Court determined not to validate the 2005 spin-off under Section 205.

The Trial Court record, however, reflects that it is undisputed that the parties intended the 2005 spin-off of Numoda Tech. to be effective January 1, 2005. *See*,

e.g., A1234-47; A1260. Indeed, the Reorganization Plan provides reliable (and undisputed) evidence concerning capitalization of the Corporations. *See* A1234-47. This conclusion is further supported by the Dill spreadsheet that tracks the composition of that capitalization immediately following the 2005 spin-off. A1260. Thus, the Trial Court should have validated 2005 spin-off, and held that the individuals identified in the Dill spreadsheet held shares in the amounts identified.[10] The Trial Court's refusal to validate the undisputed 2005 spin-off of Numoda Tech. should be reversed.

At a minimum, if there was not enough evidence presented for the Trial Court to validate the 2005 spin-off of Numoda Tech, then there was not enough evidence for the Trial Court to validate the disputed Numoda Corp. stock issuances discussed above. The converse is also true. If there was sufficient evidence for the Trial Court to validate the disputed Numoda Corp. stock issuances, then there was more than sufficient evidence for the Trial Court to validate the 2005 spin-off of Numoda Tech.

[10] The later stock issuances by Numoda Corp. are not relevant here because the Trial Court did not find sufficient evidence to establish that Numoda Tech. ever authorized or issued additional shares of Numoda Tech. stock. *See* Ex. A at 31-32 & n.117.

CONCLUSION

For the foregoing reasons, John and Ann respectfully request that this Court reverse the 205 Opinion and the 205 Final Order.

/s/ Richard P. Rollo
Richard P. Rollo (#3994)
Kevin M. Gallagher (#5337)
J. Scott Pritchard (#5654)
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Appellants John Boris and Ann Boris

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