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Special Instructions to Filing Officer: Per Carlo Rey — 5/24/11 merger "VOID" due to attached documentation + 1983 Administrative Hearing decision re: case #83-282. -[illegible] 8/23/12

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August 21, 2012

VIA HAND DELIVERY

Carlos A. Rey, Assistant General Counsel
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

RE: Night Lite Pediatric Center, LLC

Dear Carlos:

Per our telephone conversation last week, I have gone back and reviewed applicable case law from Delaware on the issue of when a merger is void versus voidable. Your citation to First Union National Bank v. Quality Carriers, Inc., 2000 WL 33199269 (Pa. Ct. Cmm. Pls. 2000), was very helpful, as it also cites to several relevant Delaware cases. As you may recall, Delaware law is significant in this instance as the proposed merger was of a Florida LLC into the surviving Delaware LLC.

As noted in the First Union opinion, Delaware case law generally holds that "[a] merger that fails to comply with the statutory requirements for a merger is *void ab initio.*" *Arnold v. Society for Sav. Bancorp, Inc.*, No. 12883, 1995 WL 376919, at *2 (Del. Ch. June 15, 1995), *aff'd*, 678 A.2d 533 (Del. 1996). *See also*, *Jackson v. Turnbull,* Del. Ch., C.A. No. 13042, Berger, V.C. (Feb. 8, 1994), Mem.Op. at 6-7, *aff'd,* Del.Supr., No. 73, 1994, Holland, J. (Dec. 7, 1994). A copy of each decision is attached for your convenience at Tabs 1 and 2, respectively.

While it was also noted in First Union that not all jurisdictions recognize this interpretation, Delaware law should control in this instance, where one is looking to determine if the merger is valid under the law applicable to the surviving LLC, Delaware. In requesting the Florida Department of State recognize the merger as void under Delaware law, Night Lite Pediatric Center, LLC is not seeking to argue that the merger should be set aside because the LLC members were misinformed or mislead, although that appears to have been the case. Rather, Night Lite seeks to have the Department recognize that because the merger failed to substantively comply with both Delaware and Florida law, it was never a valid merger in the first place.

There are several instances of non-compliance involving the attempted merger that render it *void ab initio*. The first is the failure to comply with Delaware Limited Liability Company Act Title 6, §18-209(c), which provides in relevant part:

> *The certificate of merger or consolidation* ***shall state:***
>
> . . .
>
> *(2) That an agreement of merger or consolidation* ***has been approved and executed*** *by each of the domestic limited liability companies and other business entities which is to merge or consolidate;*
>
> (e.s.); See Tab 3.

While the September 29, 2005, Certificate of Merger *stated* the Agreement of Merger[1] had been approved and executed by both limited liability companies, that statement was not accurate. See Tab 4. No Agreement of Merger was ever executed. What was subsequently executed was the Plan of Merger, but that document was dated October 31, 2005, over a month after the Certificate of Merger was executed. See Tab 5. As such, no agreement of merger or consolidation had "been approved and executed" at the time the Certificate of Merger was filed, October 4, 2005. The significance of Delaware's statutory requirement is clear on its face. Prior to filing merger documents, the parties to the merger are required by law to have actually approved the merger. It is also important to note that the September 29, 2005,

[1] While Florida's LLC law requires a plan of merger be attached to the certificate of merger (§ 608.4382, F.S.), Delaware law uses the terms "agreement of merger or consolidation" and "plan of merger" interchangeably. See Title 6, § 18-209(f), De.C., attached at Tab 3.

Certificate of Merger stated the merger was to "become effective as of the date the Certificate of Merger is filed with the Delaware Department of State", which occurred on October 4, 2005. Yet, as of that date, the merger had not yet been approved. See Tab 5. Furthermore, the required Plan of Merger plainly stated the merger was to be effective when filed with the *Florida* Department of State, not the Delaware Department of State. As noted below, no merger filing was made with the Florida Department of State until 2011.

In a somewhat analogous situation, the Delaware Supreme Court held stock issued in violation of Delaware law was void, not merely voidable. *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (1991). See Tab 6. First, the court in *STAAR* noted it is a basic concept that the General Corporate Law is part of the certificate of incorporation of every Delaware company. Second, a corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders. When a corporation files a certificate of designation under § 151(g), it amends the certificate of incorporation and fundamentally alters the contract between all the parties. A party affecting these interrelated, fundamental interests, through an amendment to the corporate charter, must scrupulously observe the law. The general tenets of corporate law are essentially the same in the case of limited liability companies. As was the case in *STAAR,* the merger of Night Lite, a Florida Limited Liability Company, into Central Florida Pediatric Intensive Care Specialists, LLC, a Delaware Limited Liability Company, sought to fundamentally alter the nature and relationship of the two entities. In so doing, the filings were required to scrupulously observe the laws of both states.

Another instance of non-compliance with applicable merger law was the failure to file a certificate of merger, articles of merger or any other document relating to the alleged surviving Delaware entity with the Florida Department of State in 2005. Section 608.4382(1), Florida Statutes, states:

> *(1) After a plan of merger is approved by each limited liability company and each other business entity that is a party to the merger, the* ***surviving entity shall deliver***

> ***to the Department of State for filing a certificate of merger,*** *which shall be executed by each limited liability company and by each other business entity as required by applicable law …*
>
> (e.s.)

No certificate of merger was filed with the Florida Department of State regarding the purported Delaware merger in 2005, 2006, 2007, 2008, 2009 or in 2010. Instead, in each of those years separate annual reports were filed for Night Lite and for Central Florida Pediatric. See Tabs 7 and 8, respectively.

As previously explained, on May 24, 2011, outside counsel executed and filed a Certificate of Merger dated May 18, 2011, with the Florida Department of State. See Tab 9. That document stated the merger shall become effective as of the date the Articles of Merger are filed *with the Florida Department of State*. Section 608.438(2)(a), Florida Statutes, requires that all mergers comply with that chapter (Ch. 608) and, if the surviving entity is a foreign entity, the merger must also comply with the state laws of the foreign entity. See §608.438(2)(d), Florida Statutes. No certificate of merger or similar document was filed with the Delaware Department of State in 2011 (or since), to effectuate the merger in the surviving entity's home state. See § 608.4382(1), Florida Statutes.

Furthermore, with the May 2011 Florida filing, the same two entities have a purported merger on their books with two vastly different effective dates (October 4, 2005 vs. May 24, 2011). Because Florida law expressly states that an effective date cannot be more than 90 days after the document is filed, the initial Delaware merger filing cannot be valid, as there is a five and half year gap between the Delaware merger filing and the Florida merger filing. See § 608.409(2), F.S.

Florida administrative case law has held that a merger must be lawful under the foreign state's law to be valid in Florida. See *Thru-Container International, Inc. v. Department of State*, 1983 WL 208534 (Fla. Div. Admin. Hrgs., 1983). Under the facts and law presented in this case, the initial Delaware merger filing did not fully comply with either Delaware or Florida law. The subsequent effort to correct the filing in 2011 likewise failed to comply with both states' merger laws. No timely filing was made in Delaware to effectuate the merger in the domicile state of the surviving entity. Under these circumstances it is respectfully suggested that the purported merger is *void ab initio* and the Department has the inherent authority to place upon its records a notice that the merger is not recognized as valid and has been cancelled. Taking such action under the facts presented in this case will not open up the Department to an argument it has established a policy whereby it must cancel, upon request, previously recognized mergers in all circumstances. Each situation presented to the Department should be reviewed separately to determine if, under the laws of the applicable jurisdiction, the merger was valid in the first place. We submit that Night Lite Pediatric Center, LLC has made the case the merger is void and request the Department allow it to make a proper filing on the official records of the State of Florida that recognize the purported merger has been cancelled, and that Night Lite's certificate of formation be reinstated, *ab initio*, in full force and effect upon receipt by the Department of the filing fees and annual report for 2012.

Thank you again for your assistance in this matter. I look forward to your response.

Sincerely,

R. Terry Rigsby

Attachments

cc: Ayodeji Babatunde Otegbeye, M.D., Director
Anthony Onoriode

ATTACHMENTS

1. *Arnold v. Society for Sav. Bancorp, Inc.*
2. *Jackson v. Turnbull*
3. Delaware Limited Liability Company Act – Title 6, § 18-209
4. Certificate of Merger, September 29, 2005
5. Plan of Merger, October 31, 2005
6. *STAAR Surgical Co. v. Waggoner*
7. Night Lite Pediatric Center, LLC Annual Reports
8. Central Florida Pediatric Intensive Care Specialists, LLC Annual Reports
9. Certificate of Merger, May 18, 2011

1995 WL 376919

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Court of Chancery of Delaware, New Castle County.

Steven E. ARNOLD, Executor of the Estate of Robert H. Arnold, Plaintiff,
v.
SOCIETY FOR SAVINGS BANCORP, INC., a Delaware corporation, David T. Chase, Sanford Cloud, Jr., Lawrence Connell, Robert E. Green, Jerome H. Grossman, Betsy Henley-Cohn, Ronald D. Jarvis, Edward W. Large, Edward J. Okay, John F. Shea, Jr., Florian A. Stang, Jerry F. Stone, Jr., Bank of Boston Corporation, and BBC Connecticut Holding Corporation, Defendants.

No. 12883. | Submitted: May 4, 1995. | Decided: June 15, 1995.

Attorneys and Law Firms

William Prickett, and Ronald A. Brown, Jr., Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for plaintiff.

A. Gilchrist Sparks, III, and David J. Teklits, Morris, Nichols, Arsht & Tunnell, Wilmington, for defendants Society for Sav. Bancorp, Inc., Bank of Boston Corp. and BBC Connecticut Holding Corp.

Jesse A. Finkelstein, and Catherine G. Wagner, Richards, Layton & Finger, Wilmington, of counsel: Richard F. Ziegler, and Amy J. Wolosoff, Cleary, Gottlieb, Steen & Hamilton, New York City, for individual defendants David T. Chase, Sanford Cloud, Jr., Lawrence Connell, Robert E. Green, Jerome H. Grossman, Betsy Henley-Cohn, Ronald D. Jarvis, Edward F. Large, Edward J. Okay, John F. Shea, Jr., Florian A. Stang and Jerry F. Stone, Jr.

Opinion

MEMORANDUM OPINION

CHANDLER, Vice Chancellor.

*1 This lawsuit arose out of the merger of BBC Connecticut Holding Corporation ("BBC"), a wholly owned Connecticut subsidiary of Bank of Boston Corporation ("BoB"), a Massachusetts corporation, into Society for Savings ("Society"), a wholly owned Connecticut subsidiary of Society for Savings Bancorp, Inc. ("Bancorp"), a Delaware corporation. Pursuant to the terms of the negotiated merger, Bancorp ultimately merged with BoB. Robert H. Arnold ("Plaintiff"), a Bancorp stockholder, sought an order enjoining the merger, naming twelve of the directors of Bancorp (the "Individual Defendants"), Bancorp, BoB and BBC as defendants in this lawsuit.

On May 25, 1993, this Court denied Plaintiff's request for a preliminary injunction. The merger was effectuated on July 9, 1993. After the merger was implemented, the parties moved for summary judgment. On December 15, 1993, the Court granted summary judgment for defendants. Plaintiff appealed that decision to the Supreme Court. The Supreme Court reversed this Court's decision in part, finding that the directors of Bancorp made materially misleading partial disclosures in the proxy statement for the vote on the merger. *Arnold v. Society for Savings Bancorp*, Del.Supr., 650 A.2d 1270 (1994). The Supreme Court held that a provision in Bancorp's certificate of incorporation, adopted pursuant to 8 *Del.C.* § 102(b)(7), shielded the directors of Bancorp from liability. The Supreme Court remanded the question of whether or not a remedy is available against Bancorp, BoB or BBC (the "Corporate Defendants"). This is the Court's decision on the issues raised by the parties and by the Supreme Court's remand.

I. INDIVIDUAL DEFENDANTS

Following the Supreme Court's decision, the Individual Defendants requested this Court to enter an order dismissing the action against them with prejudice. Plaintiff opposed the request, contending that the Supreme Court's ruling does not preclude him from seeking equitable relief against the Individual Defendants. Plaintiff argues that the exemption in Bancorp's certificate of incorporation, adopted pursuant to 8 *Del.C.* § 102(b)(7), does not protect Bancorp's directors from rescissory damages or other equitable relief.

I do not consider the merits of Plaintiff's argument because the Supreme Court has already determined "that there is no liability as to any individual defendant." *Arnold,* 650 A.2d at 1290. The Supreme Court's ruling prevents Plaintiff from recovering any damages from the Individual Defendants, whether based in law or equity.

The Supreme Court's ruling is the law of the case, which this Court is bound to follow. *Insurance Corp. of America v. Barker,* Del.Supr., 628 A.2d 38, 40 (1993) (trial court is bound to strictly comply with appellate court's determination of any issues expressly or impliedly disposed of in its decision). The Individual Defendants are dismissed with prejudice.

II. THE CORPORATE DEFENDANTS

The Supreme Court remanded this case for a determination of whether any remedy is available against the Corporate Defendants. *Arnold,* 650 A.2d at 1290. Reading the Supreme Court's opinion quite differently, the parties disagree about the scope of this Court's inquiry on remand. According to Plaintiff, the Supreme Court entered summary judgment against the Corporate Defendants on the disclosure claim and then remanded the case to this Court for a determination of the appropriate remedy. Plaintiff contends that the Court must remedy the disclosure violation because "equity will not suffer a wrong without a remedy." The Corporate Defendants read the Supreme Court's decision very differently. In their view, the Supreme Court remanded the issue whether the Corporate Defendants are liable for the inadequate disclosure in Bancorp's proxy materials. They contend that this Court must find that the Corporate Defendants did something wrong before it requires them to remedy Plaintiff's injury.

***2** I agree with the Corporate Defendants that the Supreme Court did not rule on their ultimate liability. The Supreme Court found that Bancorp's *directors* violated their fiduciary duty of disclosure to Bancorp's stockholders. *Arnold,* 650 A.2d at 1277. It did not consider whether the Corporate Defendants are liable for the Bancorp directors' negligence, but remanded that issue to this Court. *Id.* at 1291. On remand, Plaintiff must provide a legal theory grounded in our law for holding the Corporate Defendants liable for the Bancorp directors' inadequate disclosure to Bancorp's stockholders. Plaintiff offers five claims to support his requests for legal and equitable relief against the Corporate Defendants. Plaintiff and the Corporate Defendants are currently before the Court on cross motions for summary judgment on *four* of these claims. Plaintiff asserts that he is entitled to remedies as a matter of law based on the following claims: BoB's conversion of his stock; quasi-appraisal; BoB's substantial role in preparing the misleading proxy statements; and *respondeat superior.* The parties agree that further discovery is necessary before the remaining claim, BoB's alleged aiding and abetting role in the disclosure violation, can be presented to the Court.

A. *Conversion*

Plaintiff seeks damages from BoB for conversion of his Bancorp stock. Plaintiff claims that BoB converted his stock by wrongfully exercising control over it through an unlawfully consummated merger. Corporate Defendants respond that Plaintiff's conversion theory is premised on the fact that Plaintiff has a current interest in his Bancorp stock, which cannot be true unless the BoB-Bancorp merger was *void ab initio.* Corporate Defendants contend that the directors' good faith disclosure violation did not prevent the merger from becoming a valid legal event. Plaintiff disagrees with Corporate Defendants' depiction of the prima facie elements of conversion. He believes he only needs to show that he *had* a property interest in Bancorp stock and that BoB took control of that stock through an improperly consummated merger.

Plaintiff's argument fails because he misstates the prima facie elements of conversion. Conversion is the "wrongful exercise of dominion over the property of another, in denial of his right, or inconsistent with it." *Drug, Inc. v. Hunt,* Del.Supr., 168 A. 87, 93 (1933). In a conversion action, the plaintiff seeks to vindicate his superior title to the property in the defendant's possession. *See Mastellone v. Argo Oil Co.,* Del.Super., 76 A.2d 118, 120 (1950). To establish conversion, Plaintiff must show that he has a post-merger property right to the stock of Bancorp and that BoB holds that stock in contravention of his property right. *See Drug, Inc.,* 168 A. at 93. Plaintiff's conversion claim turns on whether Plaintiff retains a post-merger property interest in the stock of Bancorp.

The parties agree that if the directors' inadequate disclosure renders the merger *void ab initio,* then Plaintiff has a current property interest in Bancorp stock. A merger that fails to comply with the statutory requirements for a merger is *void ab initio. Jackson v. Turnbull,* Del.Ch., C.A. No. 13042, Berger, V.C. (Feb. 8, 1994), Mem.Op. at 6-7, *aff'd,* Del.Supr., No. 73, 1994, Holland, J. (Dec. 7, 1994). Plaintiff believes that the Corporate Defendants failed to comply with 8 *Del.C.* §§ 252(c) and 251(c) because the stockholder vote approving the merger was uninformed and, therefore, meaningless.

***3** The majority of the stockholders of Bancorp voted in favor of the merger, as required by 8 *Del.C.* § 251(c). Section 251(c) does not require the directors of a corporation to inform the stockholders of all material facts prior to the vote on the merger. 8 *Del.C.* § 251(c) (requiring notice to stockholders containing time, place and purpose of meeting, as well as copy or brief description of merger agreement). A separate fiduciary duty of disclosure, derived from the common law, obligates the directors to fully inform the stockholders about the merger. *See Stroud v. Grace,* Del.Supr., 606 A.2d 75, 87 (1992). The Corporate Defendants complied with all of the statutory requirements for a valid merger. Thus, the merger is not void. *See Jackson, supra,* Mem.Op. at 7.

Although the merger is not *void ab initio,* Plaintiff may be able to recover his former interest in the stock of Bancorp. The directors' breach of fiduciary duty renders the BoB-Bancorp merger voidable at the discretion of this Court. *See Weinberger v. UOP,* Del.Supr., 457 A.2d 701, 714 (1983) (acknowledging Chancellor's power to rescind a merger under appropriate circumstances). *Cf. Mills v. Electric Auto-Lite,* 396 U.S. 375, 388 (1970) (suggesting that court of equity can set aside merger approved by misleading proxy process). If the Court rescinded the merger, Plaintiff could demand a return of his stock. If BoB refused delivery, then Plaintiff could sue for conversion. *Drug, Inc.,* 168 A. at 94 (requiring demand and refusal to deliver when defendant's original possession was lawful). Of course, Plaintiff has no ripe claim for conversion until the Court rescinds the merger.

Plaintiff will never have a claim for conversion of his Bancorp stock because this Court cannot feasibly undo the completed merger of BoB and Bancorp. Plaintiff acknowledges the impossibility of rescinding this merger because he requests rescissory damages as a remedy for some of his claims. Where rescission of a merger is impractical, the Supreme Court has directed this Court to consider awarding rescissory damages in lieu of rescission. *Weinberger,* 475 A.2d at 714; *Cede & Co. v. Technicolor,* Del.Supr., 634 A.2d 345, 371 (1993). *But see Cinemera, Inc. v. Technicolor,* Del.Ch., C.A. No. 8358, Allen, C. (Oct. 12, 1994) (appeal pending) (stating that rescissory damages should never be awarded for breach of duty of care). Yet, for the purposes of a conversion action, rescissory damages are not equivalent to rescission. An action for conversion is premised on the plaintiff's superior title to the property in the defendant's possession. *See Mastellone,* 76 A.2d at 120. Thus, Plaintiff cannot sue BoB for conversion unless the Court actually rescinds the merger that gave BoB the legal right to control the stock of Bancorp. An award of rescissory damages against any of the parties involved in the merger, even BoB, will not reinstate Plaintiff's right to his former Bancorp stock. Plaintiff will never have a claim for conversion of his Bancorp stock.

*4 Practical considerations make rescission impossible, but I would decline to rescind the merger for another reason as well. The equities in this case do not justify the extraordinary remedy of rescission. Rescission of the merger would unduly harm the acquiror, BoB, who has relied on the finality of the merger. Plaintiff has yet to demonstrate that BoB engaged in any unlawful or improper activities in carrying out the merger. BoB did not ignore Plaintiff's claims and pursue an improper merger. Before BoB completed the merger, this Court had ruled that Plaintiff's claims lacked a reasonable probability of success on the merits. Until Plaintiff demonstrates otherwise, I consider BoB an innocent party who acquired Bancorp in good faith in an arms-length transaction. A court of equity should protect the rights of an innocent acquiror, just as commercial law protects the rights of a good faith purchaser. *Jebwab v. MGM Grand Hotels, Inc.,* Del.Ch., 509 A.2d 584, 600 n. 12 (1986). *Cf.* 6 *Del.C.* § 8-302(3). On the present record, I believe it would be manifestly unfair to BoB for the Court to rescind the merger. If Plaintiff can prove his aiding and abetting claim against BoB, then the balance of the equities may change. Nevertheless, practical obstacles would still prevent rescission of the merger.

Plaintiff transferred his legal rights to his Bancorp stock to BoB as a result of the merger. This Court cannot rescind that merger. Accordingly, Plaintiff has no claim against BoB for conversion of his Bancorp stock. Corporate Defendant's motion for partial summary judgment on Plaintiff's conversion claim is granted.

B. *Quasi-Appraisal*

Plaintiff asserts that he can seek a quasi-appraisal from the surviving corporation on two grounds. First, he contends that the Corporate Defendants conceded to a quasi-appraisal proceeding in their arguments before this Court and the Supreme Court. Plaintiff also asserts that this Court can use its broad equitable powers to require Bancorp to provide Plaintiff with a quasi-appraisal, even without Corporate Defendant's alleged concession. The Corporate Defendants respond that they never conceded to providing Plaintiff with a quasi-appraisal remedy for a good faith disclosure violation by Bancorp's board of directors. They describe quasi-appraisal as a remedy, not a cause of action. Therefore, they contend that Plaintiff must prove some cause of action against the Corporate Defendants before he receives a quasi-appraisal remedy.

1. The Corporate Defendants' Concession of the Applicability of Quasi-Appraisal Remedy

Plaintiff contends that Bancorp or BoB conceded to the applicability of a quasi-appraisal remedy on three occasions: twice before this Court in opposition to Plaintiff's motion for a preliminary injunction and once on appeal. Plaintiff asserts that the Corporate Defendants are bound by these concessions of the applicability of a quasi-appraisal remedy. Plaintiff cites the following examples of Corporate Defendants' concessions. Corporate Defendants first purported concession came in Bancorp's sur-reply brief in opposition to Plaintiff's motion for preliminary injunction:

> ***5** Plaintiff argues that these cases [denying injunctions because of risk of losing the proposed transaction], and others cited in Society's opening brief at 41-43, do not apply because (a) Plaintiff has alleged non-disclosures in the Proxy Statement and (b) Plaintiff has no appraisal remedy if he is vindicated at trial. This Court has directly rejected such arguments holding that even in the context of an exchange offer, the courts may fashion a non-statutory "quasi-appraisal remedy ... [for] tendering shareholders" if they are proven correct with respect to their non-disclosure or other fiduciary duty claims. *In Re Ocean Drilling & Exploration Co. Sh. Litig.*, De.Ch. C.A. No. 11898, Chandler, V.C. (Apr. 30, 1991), slip op. at 17-18.
>
> While such a remedy involves a significant expenditure in terms of time and legal fees, the "irreparability" of any harm caused by defendants' conduct is limited to a large extent by the availability of the quasi-appraisal remedy.

Id., slip op. at 18.

> Because Plaintiff will thus not suffer any injury from the denial of the injunction which this Court does not have the power to redress, ... Plaintiff's motion should be denied.

Plaintiff contends that Bancorp's counsel reiterated this concession at the preliminary injunction hearing. At the hearing, counsel for Bancorp stated that the Court could use a quasi-appraisal proceeding to remedy disclosure violations. Corporate Defendants purportedly made the concession for a third time on appeal. As proof of the third concession, Plaintiff cites the following excerpt from the Supplement Answering Brief filed by all defendants:

> Importantly, defendants noted in their briefs that the trial court could fashion appropriate quasi-appraisal or other remedies in the event plaintiff proved its case, but simultaneously stated that Section 102(b)(7) protected the directors from monetary damages. Contrary to plaintiff's contention, these positions are not inconsistent, since if plaintiff were to prove the proper elements of a cause of action (which he has not done), the remedies may run against the corporate defendants. *Gaffin v. Teledyne, Inc.*, Del.Supr., 611 A.2d 467, 472 (1992) (relied upon by plaintiff recognizing that a corporation may be liable for disclosure violations if the elements of equitable or legal fraud are established); *In Re Ocean Drilling & Exploration Co. Sh. Litig.*, De.Ch. C.A. No. 11898, Chandler, V.C. (Apr. 30, 1991) (the case cited by defendants at oral argument and in briefs below, noting the availability of quasi-appraisal remedy against the corporate tender offeror).

These excerpts, Plaintiffs argue, show that the Corporate Defendants represented that a quasi-appraisal remedy would be available for Plaintiff should he prove his disclosure claim.

Corporate Defendants respond that they never conceded to a quasi-appraisal remedy for a good faith disclosure violation by the directors of Bancorp. Corporate Defendants assert that Plaintiff has taken the statements in the briefs and the preliminary injunction hearing out of context. They explain their previous statements in the following manner. They have consistently viewed the quasi-appraisal remedy as a *remedy*, not a cause of action. In the statements made during the preliminary injunction proceedings, Bancorp was responding to all of Plaintiff's then pending claims, which included duty of loyalty claims against the directors, fraud claims against Bancorp, and an aiding and abetting claim against BoB. Bancorp was stating that "quasi-appraisal" was a possible remedy for these claims. In the excerpt from their appellate brief, defendants were explaining that they viewed "quasi-appraisal" as a possible remedy against Bancorp, but only if Plaintiff proved the elements of a cause of action against Bancorp, such as equitable fraud. The Corporate Defendants assert that they never conceded that a quasi-appraisal remedy against Bancorp was an appropriate remedy for a disclosure violation by the directors of Bancorp.

***6** After reviewing the disputed excerpts listed above, I find that the Corporate Defendants did not concede to a quasi-appraisal remedy. At each stage in this lawsuit, Corporate Defendants have consistently characterized quasi-appraisal as a remedy, not a cause of action. Corporate Defendants never stated that Plaintiff can receive a quasi-appraisal remedy from them without proving a cause of action against them.

Plaintiff also contends that Corporate Defendants must provide him with a quasi-appraisal remedy on the grounds of waiver and judicial estoppel. Because I find that the Corporate Defendants never stated that a quasi-appraisal remedy is appropriate under the present circumstances, Plaintiff's waiver and judicial estoppel arguments have no merit.

2. Quasi-Appraisal

Even though the Corporate Defendants did not concede to a quasi-appraisal, Plaintiff believes the Court should remedy the stockholders' misinformed approval of the merger by requiring the surviving corporation in the merger to provide him with a quasi-appraisal to determine the fair value of his shares. Corporate Defendants respond that quasi-appraisal is not a cause of action, but a remedy this Court uses against a fiduciary who breaches his fiduciary duties in connection with cashing out minority stockholders.

In several decisions denying preliminary injunctions, this Court noted that stockholders did not face irreparable harm in a merger because the Court could calculate their damages in a post-merger quasi-appraisal proceeding. *See, e.g., Steiner v. Sizzler Restaurants Int'l, Inc.,* Del.Ch., C.A. No. 11994, Allen, C. (March 19, 1991), Mem.Op. at 6-7; *In re Ocean Drilling & Exploration Co. Shareholders Litig.,* Del.Ch., C.A. No. 11898, Chandler, V.C. (April 30, 1991). *Steiner* and *Ocean Drilling* involved majority shareholders who owed fiduciary duties to the minority shareholders. In both cases, the Court reasoned that if the majority stockholder breached its fiduciary duties, then the Court could assess damages, calculated through a quasi-appraisal proceeding. Used in this manner, the quasi-appraisal is not an equitable remedy, but a method of calculating legal damages for a fiduciary's breach of his duties. *Steiner, supra,* Mem.Op. at 6; *See Wacht v. Continental Hosts, Ltd,* Del.Ch., C.A. No. 7954, Chandler, V.C. (Sept. 16, 1994, modified Dec. 23, 1994) (using quasi-appraisal method to calculate damages for directors' breach of duty of disclosure). I cannot use a quasi-appraisal remedy to assess damages against the Corporate Defendants for breach of fiduciary duty because they did not owe fiduciary duties to Bancorp's stockholders. *See In re Wheelabrator Technologies, Inc. Shareholders Litig.,* Del.Ch., Cons. C.A. No. 11495, Jacobs, V.C. (Sept. 1, 1992), Mem.Op. at 18.

Plaintiff contends that this Court used the quasi-appraisal remedy for purposes other than to calculate damages for breach of fiduciary duty. Plaintiff relies on *Tsivelekidis v. On-Line Software Int'l, Inc.,* Del.Ch., C.A. No. 12268, Chandler, V.C. (Sept. 20, 1991) (ORDER), to support his contention that the Court can remedy the board of director's failure to adequately inform the stockholders by providing the stockholders with the equivalent of appraisal rights. In *Tsivelekidis,* the Court could not have premised the applicability of the quasi-appraisal remedy on a breach of fiduciary duty because the merger did not involve a majority stockholder. This Court's suggestion that a quasi-appraisal remedy was available in *Tsivelekidis* was meant to ensure that the stockholders would not lose their statutory appraisal rights if they accepted the merger as a result of the board of directors' inadequate disclosure of material facts.

*7 Where a misinformed stockholder could lose his right to a statutory appraisal, this Court may provide a quasi-appraisal remedy to place those stockholders in the position they would have been in but for the board of directors' inadequate disclosure of material facts. *See Steiner, supra,* Mem.Op. at 4. The stockholders do not have to prove a cause of action against the surviving corporation because the surviving corporation is already statutorily obligated to provide dissenting stockholders with appraisal rights.

Plaintiff cannot rely on *Tsivelekidis* to support his request for quasi-appraisal because he had no statutory right to appraisal as a result of the merger of Bancorp and BoB. The board of directors' inadequate disclosures did not prevent Plaintiff from making a fully informed decision about whether to exercise his right to an appraisal. Plaintiff does not seek an equitable remedy that will recreate his statutory right to an appraisal.

Plaintiff's request for a quasi-appraisal is actually a request for an award of compensatory damages against the Corporate Defendants. *See Steiner, supra,* Mem.Op. at 6. But Plaintiff cannot collect damages from the Corporate Defendants without proving a cause of action against them. If Plaintiff successfully proves a cause of action, such as aiding and abetting, against the Corporate Defendants, then I may employ the quasi-appraisal remedy as a *method* of establishing Plaintiff's loss. The Corporate Defendants' motion for summary judgment on Plaintiff's quasi-appraisal *claim* is granted.

C. *BoB's Substantial Role in Preparation of Proxy Materials*

Plaintiff contends that BoB is liable for any misleading statements in the proxy materials because it played a "substantial role" in the development of these materials. Plaintiff cites *Shell Petroleum, Inc. v. Smith,* Del.Supr., 606 A.2d 112 (1992) ("*Shell* ") in support of the "substantial role" standard. In *Shell,* the Supreme Court held that a parent corporation, SPNV Holdings, Inc. ("Holdings"), was liable for material misrepresentations in its subsidiary's proxy materials because it played a substantial role in the preparation of those materials. 606 A.2d at 116. In this action, Plaintiff seeks to recover damages from BoB under the same theory. The Corporate Defendants argue that the Supreme Court applied the "substantial role" standard in *Shell* because of the parent-subsidiary relationship between the corporations. Because BoB was a third party, Corporate Defendants contend, Plaintiff must prove his aider and abettor theory to hold BoB liable for Bancorp's directors' breach of their duty of disclosure.

I agree with the Corporate Defendants that the "substantial role" standard does not apply to an unaffiliated third party acquiror. In *Shell,* the Supreme Court noted that Holdings, as a majority stockholder, owed fiduciary duties to the other stockholders of its subsidiary. *Id.* at 115. The Supreme Court did not find Holdings liable "solely" on that basis, but it was integral to the Court's adoption of the "substantial role" standard. *See id.* at 115-116. In contrast, BoB owed no duty, fiduciary or otherwise, to ensure that the proxy solicitation fully disclosed material facts to Bancorp's stockholders. The directors of Bancorp had sole responsibility to fully disclose material facts to the stockholders.

*8 Plaintiff contends that BoB assumed a duty to the stockholders of Bancorp because it volunteered to participate in the preparation of the proxy materials. Regardless of the role BoB played in the drafting of the materials, it owed no duty to provide accurate information. Bancorp's stockholders cannot hold BoB liable for negligently omitting material facts in a proxy statement that BoB gratuitously drafted for Bancorp's directors. Restatement (Second) of Torts § 552 (1977) (premising liability for negligent misrepresentation on a pecuniary obligation to provide accurate information). Plaintiff will have to prove his aiding and abetting claim to hold BoB liable for inadequate disclosures to Bancorp's stockholders by Bancorp's directors.

D. *Respondeat Superior*

Lastly, Plaintiff claims that Bancorp is responsible for its directors' and officers' breach of their fiduciary duties to Bancorp's stockholders on the basis of *respondeat superior. Respondeat superior* imposes liability upon a principal for the torts of his agent committed within the scope of their agency relationship. *Fields v. Synthetic Ropes, Inc.,* Del.Supr., 215 A.2d 427, 432 (1965). Plaintiff contends that the directors of Bancorp are agents of the corporation, so the corporation is liable for the directors' breach of their fiduciary duty of disclosure.

Instead of directly alleging that the corporation breached its fiduciary duties, Plaintiff relies on the theory of *respondeat superior* because he concedes that a corporation does not owe fiduciary duties to the stockholders. *See In re Wheelabrator Technologies, Inc. Shareholders Litig., supra,* Mem.Op. at 18. *Respondeat superior,* however, does not provide a basis for imputing the fiduciary duties of the directors to the corporation. The corporation and, therefore, any of its agents acting on its behalf, owe no fiduciary duties to the stockholders. *See id.* The directors and officers of a corporation independently owe fiduciary duties directly to the stockholders. *See Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858, 890 (1985). Because Bancorp owed no fiduciary duty to its stockholders, either directly or vicariously, it cannot be held liable for its directors' failure to act as fiduciaries.

III. CONCLUSION

I grant the Individual Defendants' request for an order dismissing them from this lawsuit because the Supreme Court already has determined that there is no liability as to them. In addition, I grant partial summary judgment to the Corporate Defendants on Plaintiff's conversion, quasi-appraisal, substantial role and *respondeat superior* claims, which leaves only the aiding and abetting claim for trial.

One more brief observation needs to be made. Should Plaintiff fail in the end to prove his aiding and abetting claim, I expect he will complain that he has suffered a wrong without a remedy. He has not. Plaintiff, and all other Bancorp stockholders, chose to immunize Bancorp's directors from liability for good faith breaches of fiduciary duty. Plaintiff has no right to expect compensation from innocent parties just because he immunized the persons who do owe him a remedy. He must prove a cause of action against the Corporate Defendants before he is entitled to a remedy from them. If he fails in this effort, he cannot be heard to say that a court of equity allowed a wrong to go unremedied. The stockholders of Bancorp gave up their right to compensation for good faith breaches of duty by their directors. That was their choice.

*9 An Order has been entered consistent with this decision.

ORDER

For the reasons set forth in this Memorandum Opinion entered in this case on this date, it is

ORDERED:

1). All claims asserted in this action against the directors of Defendant Society for Savings Bancorp, Inc., are dismissed with prejudice;

2). Summary Judgment is entered against Plaintiff and in favor of Defendants BBC Connecticut Holding Corporation, Bank of Boston Corporation and Society for Savings Bancorp, Inc., as to Plaintiff's conversion, quasi-appraisal, substantial role and *respondeat superior* claims; and

3). The only claim remaining for disposition is Plaintiff's claim that Defendant Bank of Boston Corporation is liable to Plaintiff for having aided and abetted the directors of Society for Savings Bancorp, Inc., in breaching their fiduciary duty of disclosure.

Parallel Citations

21 Del. J. Corp. L. 157

End of Document

1994 WL 174668

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Court of Chancery of Delaware, New Castle County.

Martin F. JACKSON, John J. Salvucci, Mimaroba, Inc. and Bernard A. Magdovitz, Plaintiffs,
v.
Mark A. TURNBULL, Alex Pearl, Brad Barry, Richard Hevner, Restorative Care of America, Inc., a Delaware corporation, and L'Nard Restorative Concepts, Inc., a Delaware corporation, Defendants.

Civ. A. No. 13042. | Submitted: Oct. 6, 1993. | Decided: Feb. 8, 1994.

Attorneys and Law Firms

Michael Hanrahan, Elizabeth M. McGeever, and Ronald A. Brown, Jr., of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for plaintiffs.

Mark Minuti, of Saul, Ewing, Remick & Saul, Wilmington, for defendants.

Opinion

MEMORANDUM

BERGER, Vice Chancellor.

***1** This is the decision on cross motions for summary judgment in an action brought pursuant to 8 *Del.C.* § 225 to determine the rightful directors and officers of L'Nard Restorative Concepts, Inc. ("L'Nard").1 This suit is one of several pending in federal and state courts between and among the eight stockholders of L'Nard. Plaintiffs claim that a merger between Restorative Care of America, Inc. ("Restorative") and L'Nard was invalid. As a result, plaintiffs maintain that L'Nard was never merged out of existence and that the written consents they exercised, as stockholders of L'Nard approximately six weeks after the merger, effectively removed all of L'Nard's directors except plaintiff, Martin Jackson ("Jackson"). For the reasons that follow, I conclude that the merger was invalid. Accordingly, there being no dispute as to the validity of the exercise of consents, I find that Jackson was the sole director of L'Nard as of July 12, 1993.2

I.

L'Nard, prior to the merger in question, was engaged in the manufacturing and marketing of a medical product line that included various orthotic devices. Plaintiffs, Jackson and Bernard Magdovitz ("Magdovitz") and defendant, Mark Turnbull ("Turnbull") were part of an investor group that acquired L'Nard in the middle of 1989. Jackson was the company's president and treasurer, a director and a 31.8% stockholder. Magdovitz and Mimaroba, Inc. ("Mimaroba"), a corporation affiliated with him, owned 24.8% of the stock. The third individual plaintiff, John Salvucci ("Salvucci"), owned 1.4% of the stock. The individual defendants also were stockholders, directors and officers of L'Nard: Turnbull owned 35.6% of the stock and was chairman of the board and chief executive officer; Alex Pearl ("Pearl") owned 1.4% of the stock and was a director, secretary and general counsel; Brad Barry ("Barry") also owned 1.4% of the stock and was a director; and Richard Hefner was a director.

On May 24, 1993, the directors of L'Nard approved an agreement for the merger of L'Nard into newly-formed Restorative. The merger agreement was approved by L'Nard's stockholders through a written consent. Jackson approved the merger both in his capacity as a director and stockholder, although he now claims that his approval was based upon false representations. The merger agreement provided that Messrs. Turnbull, Pearl, Barry and Jackson were to have their L'Nard common stock converted into the common stock of Restorative. The remaining L'Nard stockholders (Magdovitz, Mimaroba, Salvucci and another stockholder, F. Scott Kellman) were to have each of their shares "converted into ... the right to receive $1,501.19 per share in cash (or if the final appraisal of Ambient Capital Group, Inc. is a higher amount per share, then such higher amount as determined by such appraisal) payable to the holder thereof...." Agreement of Merger at 1.

L'Nard stockholders who did not vote in favor of the merger were advised of their right to an appraisal pursuant to 8 *Del.C.* § 262 in a certified letter dated May 26, 1993 (the "May 26 letter"). It was printed on L'Nard stationery and signed by Turnbull in his capacity as L'Nard's chairman. The May 26 letter explained how to perfect appraisal rights as follows:

> ***2** For purposes of determining the time periods in which a Minority Stockholder

> may dissent from the Merger and seek his appraisal rights pursuant to Section 262 of the Delaware General Corporation Law, such time periods shall be deemed to commence upon the date that the Corporation sends to each Minority Stockholder a copy of the Ambient Capital valuation and the per share amount resulting therefrom (which is anticipated to be sent by June 18, 1993). The Corporation will also send to Minority Stockholders financial and other information relating to the Corporation to enhance their ability to determine whether to pursue appraisal rights. Thus, any Minority Stockholder who desires to exercise dissenters' appraisal rights in connection with the Agreement of Merger must (i) file with the Corporation, within 20 days after the date of the mailing of the Ambient Capital valuation, a demand in writing for the appraisal of his or its shares, and (ii) file a petition in the Delaware Court of Chancery, within 120 days after the date of mailing of the Ambient Capital valuation, demanding a determination of the value of the stock of all dissenting stockholders. Any Minority Stockholder who does not so act within the designated time periods will not be able to exercise his or its dissenters' appraisal rights.

Complaint, Ex. A at 2.

As noted earlier, the merger was approved on May 24, 1993, and a Certificate of Merger was filed with the Delaware Secretary of State on May 26, 1993. On July 9 and 10, 1993 the holders of slightly more than 60% of L'Nard's common stock,3 acting as if the merger had not occurred, executed written consents (the "July consents") to remove Turnbull, Pearl, Barry and Hefner from L'Nard's board of directors. Thereafter, Jackson, acting as the sole remaining director, executed a written consent removing defendants Turnbull and Pearl (and Richard Frazier, another officer who is not named as a defendant) as officers of L'Nard.

II.

Although the complaint seeks a determination of the rightful members of L'Nard's board of directors, that decision is inextricably tied to the claim that the merger was invalid. According to plaintiffs, if the Court finds that the merger violated Delaware law, then the transaction must be declared void *ab initio*. In that case, the merger was a legal nonevent, L'Nard and its stockholders still existed in July, and the July consents were effective.

Defendants argue that § 225 is a summary proceeding, the limited purpose of which is "to grant a quick review of the corporate election process in order to prevent a corporation from being immobilized by controversies as to who are its proper officers or directors." *Bossier v. Connell,* Del.Ch., C.A. No. 8624, Hartnett, V.C. (October 7, 1986) Letter Op. at 5. Although I am not unmindful of the limited scope of a § 225 proceeding, it is frequently the case that, in order to determine the rightful directors of a company, underlying transactions must be analyzed and resolved. *See, e.g., Garrett v. Brown,* C.A. Nos. 8423, 8427 Cons., Berger, V.C. (June 13, 1986). Here, the question of whether the merger was void *ab initio* is critical to the § 225 decision and must be resolved. *See Bossier, supra* at 6 (noting that a § 225 action cannot be narrowed to the point where a "manifest injustice would result").

III.

*3 Before addressing the statutory claims, it seems appropriate to consider defendants' estoppel argument. Defendants say that Jackson is estopped from challenging the merger since he approved it both as a director and a stockholder. This argument might be persuasive with respect to fiduciary duty claims. However, estoppel will not bar consideration of statutory violations such as those at issue here. *See Staar Surgical Co. v. Waggoner,* Del.Supr., 588 A.2d 1130, 1137 (1991) (explaining that "the equitable doctrine of estoppel is inapplicable to agreements or instruments that violate either express law or public policy"); *accord Stroud v. Grace,* Del.Supr., 606 A.2d 75, 87 (1992) (stating "that the Court of Chancery must act with caution and restraint when ignoring the clear language of the General Corporation Law in favor of other legal or equitable principles"); *Appon v. Belle Isle Corp.,* Del.Ch., 46 A.2d 749, 760 (1946) (citing 3 *Pomeroy's Equity Jurisprudence* (5th ed.)), *aff'd sub nom. Belle Isle Corp. v. Corcoran,* Del.Supr., 49 A.2d 1 (1946); *Fletcher Cyc. Corp.,* § 5862 (1993) ("if a contract is illegal and void because in violation of an express prohibition, or contrary to public policy ... the fact that a shareholder voted for it as a director or otherwise consented or participated does not estop that shareholder

from attacking its validity") (citations omitted).
Plaintiffs argue that the merger violated Delaware law in several respects: (1) the board impermissively delegated to Ambient Capital the directors' responsibility to determine the consideration payable to the minority stockholders; (2) the board violated § 251(c)(7) by refusing to provide a copy of the Merger Agreement to stockholders who requested it; (3) the board failed to provide appraisal rights as prescribed by § 262; (4) stockholders having the same class of stock were forced to accept different forms of consideration in violation of § 251(b)(5); and (5) the merger was not validly approved because Jackson voted in favor of it on the basis of defendants' misrepresentations. The final two claims do not really address a statutory violation and the latter would need a greater factual development to decide. However, the other three deficiencies are more than enough to invalidate the merger.4

Plaintiffs begin by arguing that 8 *Del.C.* § 251(b) does not permit directors to approve a merger agreement unless the agreement expressly states the consideration stockholders are to receive.5 The relevant portions of § 251(b) provide as follows:

> The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger.... The Agreement shall state: ... (5) the manner of converting the shares of each constituent corporations into shares ... of the corporation surviving ... the merger ... and, if any of the constituent corporations are not to be converted solely into shares or other securities of the surviving ... corporation, the cash, property, rights or securities ... which the holders of such shares are to receive ... upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities ... may be in addition to or in lieu of shares ... of the surviving ... corporation....

***4** Here, the merger agreement does not specify the amount of cash the stockholders will receive. Instead, it leaves the final determination to Ambient Capital. This delegation, according to plaintiffs, is impermissible in light of 8 *Del.C.* § 141(c), which does not allow the board to delegate its responsibilities under § 251 to a committee of board members, let alone outside advisors.

Defendants contend that Ambient Capital's role in setting the merger consideration was not an unlawful delegation of the directors' statutory duties. They argue that L'Nard's directors did set the merger consideration. They determined that it should be $1,501.19 per share. However, as a protection to the cashed-out stockholders, the directors agreed to pay a higher amount as determined by Ambient Capital's final appraisal. Thus, all the directors did was enhance the intrinsic fairness of the merger; they did not improperly delegate their responsibilities.

Defendants rely on the decision in *Rabkin v. Philip A. Hunt Chemical Corp.*, Del.Supr., 498 A.2d 1099 (1985), as having approved a merger procedure that was "indistinguishable" from the one used by L'Nard. Def.Br., p. 15. That simply is not accurate. In *Rabkin,* the majority stockholder of Philip A. Hunt Chemical Corporation ("Hunt") sold its Hunt stock to Olin Corporation ("Olin") for $25 per share. The stock purchase agreement provided that if Olin acquired the remaining minority stock of Hunt within one year, Olin would pay at least $25 per share. Nothing about that agreement involved a board of directors of a company agreeing to a merger at a price to be established by an investment banker.

Other authority, that is relevant, holds that a board of directors may not delegate a task that it is required by statute to perform. In *Field v. Carlisle Corp.,* Del.Ch., 68 A.2d 817 (1949), this Court held that directors may not delegate to an independent third party the responsibility for determining the value of consideration to be received for the issuance of stock. The Court reasoned:

> I do not believe the power to delegate this vitally important duty can be fairly implied from the language of the statute. This is particularly true where the statute imposes the duty on the directors to deal with a particular subject matter. The importance to the corporation of the subject matter-ownership of the corporation-tends also to negative any implication that the directors might delegate it in a manner not explicitly authorized by statute.

Id. at 820.

In *Rosenblatt v. Getty Oil Co.,* Del.Supr., 493 A.2d 929 (1985), by contrast, the Supreme Court upheld the directors' decision to delegate an asset valuation in connection with merger negotiations. The delegation there involved only one of the company's several categories of assets and, more importantly, "the parties did not delegate the weighting task under the Delaware Block method, nor did they bind themselves to merge in the first instance." *Id.* at 943. In short, the directors in *Rosenblatt* did *not* allow a third party to set the merger consideration. Rather, they agreed to use an expert's asset valuation in negotiating the merger terms.
***5** The method of determining the merger consideration

here was closely analogous to the method found deficient in *Carlisle.* The L'Nard directors set a floor merger price, but left the final decision as to any higher price to a third party. In fact, Ambient Capital did wind up setting the merger price. In an opinion dated July 2, 1993, Ambient Capital stated that the "fair market value" of L'Nard's common stock as of May 26, 1993 was $2,127.66 per share. This delegation of the directors' statutory responsibility is impermissible.6

L'Nard also violated § 251(c)(7) by failing to provide copies of the merger agreement to stockholders. Section 251(c) requires the filing and recording of the merger agreement in the counties in which each of the merging corporations is registered. Alternatively, the surviving corporation may file a certificate of merger, as was done in this case. However, when a certificate of merger is filed instead of the merger agreement itself, the surviving corporation must, among other things, furnish a copy of the agreement without charge to any stockholder upon request.

Defendants do not dispute the fact that stockholders of L'Nard were not furnished copies of the merger agreement upon request.7 In fact, defendants do not even address this issue. Perhaps they believe that this particular requirement is so insignificant that the failure to comply with it is of no consequence. Although this violation might be less important than some of the others addressed here, it seems inappropriate to overlook it entirely. The alternative filing provisions in § 251 serve the dual purpose of avoiding the expense of filing a lengthy merger agreement and avoiding public disclosure of all of the merger terms. However, the certificate of merger alternative was not designed to avoid disclosure of all merger terms to the stockholders of the constituent corporations. They are expressly given the right to obtain a copy of the merger agreement. *See* Balotti & Finkelstein, 1 *The Delaware Law of Corporations and Business Organizations* § 9.9. While defendants' failure to comply with § 251(c)(7) might not be enough, on its own, to warrant invalidation of the merger, here it is one of a series of violations that, collectively, mandate that result.

Finally, I examine L'Nard's treatment of appraisal rights, which deviates from the requirements of § 262 in several respects. The schedule for stockholder action that was included in the May 26 letter is inconsistent with two of the statutorily prescribed time periods. Pursuant to § 262(d), appraisal rights "shall be perfected" by demanding appraisal within 20 days after the date of mailing of the notice of the effective date of the merger. Thereafter, within 120 days after the effective date of the merger, a stockholder seeking appraisal must file his petition in this Court. § 262(e). The May 26 letter purported to vary both of these statutory time periods by advising stockholders that they must file their demand and petition within 20 and 120 days, respectively, after the date of mailing of the Ambient Capital valuation. The May 26 letter included a copy of § 262, with its contrary provisions. As a result, the L'Nard stockholders were given two different sets of rules to choose between at their own peril.

*6 Defendants' only response is that because all the cashed-out stockholders have begun the appraisal process, there is no longer any issue with respect to the requirements of § 262. They seem to view the Delaware General Corporation Law as a set of guidelines that may be altered or ignored by a corporation, such as this one, that has only a few stockholders. I am aware of no such exemption. Our Supreme Court has emphasized the need for stockholders to strictly comply with the formalities of § 262 when seeking to exercise their appraisal rights. *Enstar Corp. v. Senouf,* Del.Supr., 535 A.2d 1351, 1355-56 (1986). Corporations should be held to the same standard.

Based upon the foregoing, I find that the L'Nard/Restorative merger is void and that the consents exercised on July 12, 1993 validly removed all of L'Nard's directors except Jackson. IT IS SO ORDERED.

Parallel Citations

19 Del. J. Corp. L. 1222

Footnotes

1 Defendants' motion to dismiss is treated as a motion for summary judgment because the Court is considering matters outside of the Complaint.

2 While these motions were pending, a second written consent was executed by certain of the plaintiffs and defendants pursuant to which Jackson was removed as a director of L'Nard and the four individual defendants were elected. Jackson has indicated an intention to challenge that action and I am not ruling on the second consent at present.

3 In addition to plaintiffs, who own 58% of L'Nard's common stock, this group included F. Scott Kellman.

4 In *Staar Surgical Co. v. Waggoner,* 588 A.2d at 1137, the Supreme Court declared that "[s]tock issued in violation of 8 *Del.C.* §

151 is void and not merely voidable." The violation of Delaware's General Corporation Law that the Court referred to was the failure of a board of directors to adopt the appropriate resolution and amendment to the corporate charter required by § 151. The *Waggoner* Court expressly rejected the argument that the board's failure to comply with the law would be deemed a technical error when the statutory provisions violated were fundamental aspects of our corporation law. I am satisfied that the issues addressed above fall into this category.

5 Plaintiffs acknowledge the statutory exception where the price is "dependent upon facts ascertainable outside of [the merger] agreement," 8 *Del.C.* § 251(b), but are not seriously opposed in their argument that the exception is inapplicable here.

6 Defendants suggest that the potentially higher amount available to L'Nard's stockholders as the result of the Ambient Capital valuation was a "right" within the meaning of § 251. Under this theory, L'Nard's stockholders received cash (e.g., $1,501.19 per share) plus the *right* to receive more if the Ambient Capital appraisal was higher. Defendants offer no support for this argument and I find it to be without merit. The meaning of the term "right" is, "a right to receive shares of the resulting or surviving corporation, or a parent thereof, in the future upon the happening of specified events, whether or not that right is evidenced by a 'security.' " Arsht & Stapleton, *Analysis of the 1969 Amendments to the Delaware General Corporation Law* 355 (1969).

7 A copy of the merger agreement was sent to plaintiffs in response to a discovery request. This, clearly, is not the method by which the statute envisions a stockholder obtaining the document.

End of Document

West's Delaware Code Annotated
Title 6. Commerce and Trade
Subtitle II. Other Laws Relating to Commerce and Trade
Chapter 18. Limited Liability Company Act
Subchapter II. Formation; Certificate of Formation

6 Del.C. § 18-209

§ 18-209. Merger and consolidation

Effective: August 1, 2012

Currentness

(a) As used in this section and in § 18-204 of this title, "other business entity" means a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust, or any other unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), and a foreign limited liability company, but excluding a domestic limited liability company. As used in this section and in §§ 18-210 and 18-301 of this title, "plan of merger" means a writing approved by a domestic limited liability company, in the form of resolutions or otherwise, that states the terms and conditions of a merger under subsection (i) of this section.

(b) Pursuant to an agreement of merger or consolidation, 1 or more domestic limited liability companies may merge or consolidate with or into 1 or more domestic limited liability companies or 1 or more other business entities formed or organized under the laws of the State of Delaware or any other state or the United States or any foreign country or other foreign jurisdiction, or any combination thereof, with such domestic limited liability company or other business entity as the agreement shall provide being the surviving or resulting domestic limited liability company or other business entity. Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation or a plan of merger shall be approved by each domestic limited liability company which is to merge or consolidate by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members or by the members in each class or group, as appropriate. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a domestic limited liability company or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting domestic limited liability company or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting limited liability company or other business entity in the merger or consolidation or may be cancelled. Notwithstanding prior approval, an agreement of merger or consolidation or a plan of merger may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation or plan of merger.

(c) Except in the case of a merger under subsection (i) of this section, if a domestic limited liability company is merging or consolidating under this section, the domestic limited liability company or other business entity surviving or resulting in or from the merger or consolidation shall file a certificate of merger or consolidation executed by 1 or more authorized persons on behalf of the domestic limited liability company when it is the surviving or resulting entity in the office of the Secretary of State. The certificate of merger or consolidation shall state:

(1) The name, jurisdiction of formation or organization and type of entity of each of the domestic limited liability

companies and other business entities which is to merge or consolidate;

(2) That an agreement of merger or consolidation has been approved and executed by each of the domestic limited liability companies and other business entities which is to merge or consolidate;

(3) The name of the surviving or resulting domestic limited liability company or other business entity;

(4) In the case of a merger in which a domestic limited liability company is the surviving entity, such amendments, if any, to the certificate of formation of the surviving domestic limited liability company to change its name, registered office or registered agent as are desired to be effected by the merger;

(5) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation;

(6) That the agreement of merger or consolidation is on file at a place of business of the surviving or resulting domestic limited liability company or other business entity, and shall state the address thereof;

(7) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting domestic limited liability company or other business entity, on request and without cost, to any member of any domestic limited liability company or any person holding an interest in any other business entity which is to merge or consolidate; and

(8) If the surviving or resulting entity is not a domestic limited liability company, or a corporation, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or statutory trust organized under the laws of the State of Delaware, a statement that such surviving or resulting other business entity agrees that it may be served with process in the State of Delaware in any action, suit or proceeding for the enforcement of any obligation of any domestic limited liability company which is to merge or consolidate, irrevocably appointing the Secretary of State as its agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service hereunder upon the Secretary of State, the procedures set forth in § 18-911(c) of this title shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in the certificate of merger or consolidation provided for in this section and any other address which the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify such surviving or resulting other business entity at all such addresses furnished by the plaintiff in accordance with the procedures set forth in § 18-911(c) of this title.

(d) Unless a future effective date or time is provided in a certificate of merger or consolidation, or in the case of a merger under subsection (i) of this section in a certificate of ownership and merger, in which event a merger or consolidation shall be effective at any such future effective date or time, a merger or consolidation shall be effective upon the filing in the office of the Secretary of State of a certificate of merger or consolidation or a certificate of ownership and merger.

(e) A certificate of merger or consolidation or a certificate of ownership and merger shall act as a certificate of cancellation for a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation. A certificate of merger that sets forth any amendment in accordance with subsection (c)(4) of this section shall be deemed to be an amendment to the certificate of formation of the limited liability company, and the limited liability company shall not be required to take any further action to amend its certificate of formation under § 18-202 of this title with respect to such amendments set forth in the certificate of merger. Whenever this section requires the filing of a certificate of merger or consolidation, such requirement shall be deemed satisfied by the filing of an agreement of merger or consolidation containing the information required by this section to be set forth in the certificate of merger or consolidation.

(f) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may:

(1) Effect any amendment to the limited liability company agreement; or

(2) Effect the adoption of a new limited liability company agreement, for a limited liability company if it is the surviving or resulting limited liability company in the merger or consolidation.

Any amendment to a limited liability company agreement or adoption of a new limited liability company agreement made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation and shall be effective notwithstanding any provision of the limited liability company agreement relating to amendment or adoption of a new limited liability company agreement, other than a provision that by its terms applies to an amendment to the limited liability company agreement or the adoption of a new limited liability company agreement, in either case, in connection with a merger or consolidation. The provisions of this subsection shall not be construed to limit the accomplishment of a merger or of any of the matters referred to herein by any other means provided for in a limited liability company agreement or other agreement or as otherwise permitted by law, including that the limited liability company agreement of any constituent limited liability company to the merger or consolidation (including a limited liability company formed for the purpose of consummating a merger or consolidation) shall be the limited liability company agreement of the surviving or resulting limited liability company.

(g) When any merger or consolidation shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of each of the domestic limited liability companies and other business entities that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of said domestic limited liability companies and other business entities, as well as all other things and causes of action belonging to each of such domestic limited liability companies and other business entities, shall be vested in the surviving or resulting domestic limited liability company or other business entity, and shall thereafter be the property of the surviving or resulting domestic limited liability company or other business entity as they were of each of the domestic limited liability companies and other business entities that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the State of Delaware, in any of such domestic limited liability companies and other business entities, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said domestic limited liability companies and other business entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the said domestic limited liability companies and other business entities that have merged or consolidated shall thenceforth attach to the surviving or resulting domestic limited liability company or other business entity, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Unless otherwise agreed, a merger or consolidation of a domestic limited liability company, including a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation, shall not require such domestic limited liability company to wind up its affairs under § 18-803 of this title or pay its liabilities and distribute its assets under § 18-804 of this title, and the merger or consolidation shall not constitute a dissolution of such limited liability company.

(h) A limited liability company agreement may provide that a domestic limited liability company shall not have the power to merge or consolidate as set forth in this section.

(i) In any case in which (i) at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by § 251(g)(7)(i) of Title 8), of which class there are outstanding shares that, absent § 267(a) of Title 8, would be entitled to vote on such merger, is owned by a domestic limited liability company, (ii) 1 or more of such corporations is a corporation of the State of Delaware, and (iii) any corporation that is not a corporation of the State of Delaware is a corporation of any other state or the District of Columbia or another jurisdiction, the laws of which do not forbid such merger, the domestic limited liability company having such stock ownership may either merge the corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such corporations, into 1 of the other corporations, pursuant to a plan of merger. If a domestic limited liability company is causing a merger under this subsection, the domestic limited liability company shall file a certificate of ownership and merger executed by 1 or more authorized persons on behalf of the domestic limited liability company in the office of the Secretary of State. The certificate of ownership and merger shall certify that such merger was authorized in accordance with the domestic limited liability company's limited liability company agreement and this chapter, and if the domestic limited liability company shall not own all the outstanding stock of all the corporations that are parties to the merger, shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving domestic limited liability company or corporation upon surrender of each share of the corporation or corporations not owned by the domestic limited liability company, or the cancellation of some or all of such shares. If a corporation surviving a merger under this subsection is not a corporation organized under the laws of the State of Delaware, then the terms and conditions of the merger shall obligate such corporation to agree that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of the domestic limited liability company or any obligation of any constituent corporation of the State of Delaware, as well as for enforcement of any obligation of the surviving corporation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to § 262 of Title 8, and to irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or other proceedings, and to specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving corporation thereof by letter, directed to such surviving corporation at its address so specified, unless such surviving corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

Credits

68 Laws 1992, ch. 434, § 1; 69 Laws 1994, ch. 260, §§ 12, 13; 70 Laws 1995, ch. 75, §§ 16, 17, eff. Aug. 1, 1995; 71 Laws 1998, ch. 341, §§ 3-7, eff. Aug. 1, 1998; 72 Laws 2000, ch. 389, § 7, eff. Aug. 1, 2000; 73 Laws 2001, ch. 83, § 11, eff. Aug. 1, 2001; 73 Laws 2002, ch. 329, §§ 27, 28, eff. Sept. 1, 2002; 74 Laws 2004, ch. 275, §§ 2-4, eff. Aug. 1, 2004; 75 Laws 2006, ch. 317, § 6, eff. Aug. 1, 2006; 76 Laws 2007, ch. 105, §§ 15-18, eff. Aug. 1, 2007; 77 Laws 2009, ch. 58, §§ 3-5, eff. Aug. 1, 2009; 77 Laws 2010, ch. 287, §§ 9-16, eff. Aug. 2, 2010; 78 Laws 2012, ch. 270, § 3, eff. Aug. 1, 2012.

6 Del.C. § 18-209, DE ST TI 6 § 18-209

Current through 78 Laws 2012, chs. 204 - 327. Revisions by the Delaware Code Revisors were unavailable at the time of publication. End of Document

COVER SHEET

523943

INCORPORATING SECTION
P.O. BOX 898
FRANCHISE TAX SECTION
P.O. BOX 7040
UNIFORM COMMERCIAL CODE
P.O. BOX 793
DOVER, DELAWARE 19903

STATE OF DELAWARE
DEPARTMENT OF STATE
Jeffrey W. Bullock, Secretary
DIVISION OF CORPORATIONS
JOHN G. TOWNSEND BUILDING
DUKE OF YORK STREET
DOVER, DELAWARE 19901

INCORPORATING SECTION
GENERAL INFORMATION
302/739-3073
NAME RESERVATION
302/739-9900
900/420-8042
FRANCHISE TAX SECTION
302/739-4225
UNIFORM COMMERCIAL CODE
302/739-4279

****

SRV#: 120910915 Agent: 9030670 File#: Package#: 000523943
Priority: 7 Mail Code R Date: 08/07/12

User: SCACSHS

Comments:

Attn:

Agent: AGENTS AND CORPORATIONS, INC.
1201 ORANGE STREET, SUITE 600
ONE COMMERCE CENTER
WILMINGTON DE 19801

Items Included:	Item Type	Copies	
	Invoice	001	
	Image	001	

****

75910

CERTIFIED
The Florida Bar
WILLS, TRUSTS & ESTATES

LAW OFFICE OF JAMES J. FLICK, P.L.

112 Lake Avenue
Orlando, Florida 32801
(407) 426-8818

PLEASE REPLY TO:
P.O. BOX 592036 ORLANDO, FL 32859-2036

9474396
Kdk

September 30, 2005

RECEIVED
DEPARTMENT OF STATE
2005 OCT -4 PM 12:00
DIVISION OF
CORPORATIONS

Delaware Division of Corporations
401 Federal Street, Suite 4
Dover, DE 19901
302-739-3073

Re: Nite Lite Pediatric Center, LLC and
Central Florida Pediatric Intensive Care Specialists, LLC

397272l

Gentlemen:

Enclosed is the original Certificate of Merger for the above referenced entities. Please file the original and return a certified copy to:

Law Office of James J. Flick, P.L.
P.O. Box 592036
Orlando, Florida 32859-2036
407-426-8818

Also, enclosed is a check covering the fees and charges for the items listed below:

1.	Filing fee - Certificate of Merger		$100.00
2.	Certified copy fee	CK# 4086	$30.00
	Total Fees		$130.00

Thank you for your cooperation.

Very truly yours,

James J. Flick

James J. Flick

Enclosures

CERTIFICATE OF MERGER

OF

NIGHT LITE PEDIATRIC CENTER, LLC

AND

CENTRAL FLORIDA PEDIATRIC INTENSIVE CARE SPECIALISTS, LLC

The following Certificate of Merger is submitted pursuant to the provisions of Title 6, Section 18-209 of the Delaware Limited Liability Company Act.

1. The names and jurisdictions of formation or organization of the entities which are parties to the within merger are Central Florida Pediatric Intensive Care Specialists, LLC, a Delaware Limited Liability Company, and Night Lite Pediatric Center, LLC, a Florida Limited Liability Company.

2. The Agreement of Merger has been approved and executed by both Limited Liability Companies.

3. The name of the surviving Limited Liability Company is Central Florida Pediatric Intensive Care Specialists, LLC.

4. The merger shall become effective as of the date the Certificate of Merger is filed with the Delaware Department of State.

5. The executed Agreement of Merger is on file at 844 N. Thornton Avenue, Orlando, FL 32803, the principal place of business of the surviving Limited Liability Company.

6. A copy of the Agreement of Merger will be furnished by the surviving Limited Liability Company on request, without cost, to any member of the Limited Liability Company or any person holding an interest in any other business entity which is to merge or consolidate.

IN WITNESS WHEREOF, said Limited Liability Company has caused this Certificate to be signed by an authorized person, this 29 day of September, 2005

James J. Flick

By: James J. Flick

State of Delaware
Secretary of State
Division of Corporations
Delivered 12:00 PM 10/04/2005
FILED 12:00 PM 10/04/2005
SRV 050812046 - 3972721 FILE

PLAN OF MERGER

OF

CENTRAL FLORIDA PEDIATRIC INTENSIVE CARE SPECIALISTS, LLC

AND

NIGHT LITE PEDIATRIC CENTER, LLC

This Plan of Merger is entered into by and between Central Florida Pediatric Intensive Care Specialists, LLC and Night Lite Pediatric Center, LLC on this 31 day of October, 2005.

RECITALS:

A. Central Florida Pediatric Intensive Care Specialists, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal office at 844 N. Thornton Avenue, Orlando, Florida 32803.

B. Night Lite Pediatric Center, LLC is a limited liability company organized and existing under the laws of the State of Florida with its principal office at 844 N. Thornton Avenue, Orlando, Florida 32803.

C. Central Florida Pediatric Intensive Care Specialists, LLC and Night Lite Pediatric Center, LLC have each elected to be taxed as an S corporation.

E. The Managers and members of Central Florida Pediatric Intensive Care Specialists, LLC and the Managers and members of Night Lite Pediatric Center, LLC deem it desirable and in the best business interests of the business entities and their members that Night Lite Pediatric Center, LLC be merged into Central Florida Pediatric Intensive Care Specialists, LLC pursuant to the provisions of Florida Statutes Section 608.438 and Title 6, Section 18-209 of the Delaware Limited Liability Company Act in order that the transaction qualify as a "reorganization" within the meaning of Section 368(a)(1)(A) of the Internal Revenue Code of 1986, as amended.

In consideration of the mutual covenants, and subject to the terms and conditions set forth below, the parties agree as follows:

Section 1. Merger. Night Lite Pediatric Center, LLC shall merge with and into Central Florida Pediatric Intensive Care Specialists, LLC, which shall be the surviving entity.

Section 2. Terms and Conditions. On the effective date of the merger, the separate existence of the absorbed limited liability company shall cease, and the surviving entity shall succeed to all the rights, privileges, immunities, and franchises, and all the property, real, personal, and mixed of the absorbed limited liability company, without the necessity for any separate transfer. The surviving entity shall then be responsible and liable for all liabilities and obligations of the absorbed limited liability company, and neither the rights of creditors nor any liens on the property of the absorbed limited liability company shall be impaired by the merger.

Section 3. Conversion of Membership Interests. The manner and basis of converting the membership interests of the absorbed limited liability company into membership interests of the surviving entity is as follows:

(a) Each one percent (1%) unit of the membership interests of Night Lite Pediatric Center, LLC issued and outstanding on the effective date of the merger shall be converted into a one percent (1%) unit of the membership interest in Central Florida Pediatric Intensive Care Specialists, LLC, Series B, which membership interests of the surviving entity shall then be issued and outstanding.

(b) The conversion shall be effected as follows: After the effective date of the merger, each holder of certificates for membership interests in the absorbed limited liability company shall surrender them to the surviving entity or its duly appointed agent, in the manner that the surviving entity shall legally require. On receipt of the membership interests, the surviving entity shall issue and exchange certificates for membership interests in the surviving entity, representing the percentage of membership interests to which the holder is entitled as provided above.

Section 4. Changes in Articles of Organization. The Articles of Organization of the surviving entity shall continue to be its Articles of Organization following the effective date of the merger.

Section 5. Changes in Operating Agreement. The Operating Agreement of the surviving entity shall continue to be its Operating Agreement following the effective date of the merger.

Section 6. Managers. The names and addresses of the Manager of the surviving entity are:

Ayodeji Otegbeye, Vivek Desai, and Oludapo Soremi, all having an address at 880
N. Thornton Avenue, Orlando, Florida 32803.

Section 7. Prohibited Transactions. Neither of the parties shall, prior to the effective date of the merger, engage in any activity or transaction other than in the ordinary course of business, except that the absorbed and surviving entities may take all action necessary or appropriate under the laws of the State of Florida to consummate this merger.

Section 8. Approval by Members. This plan of merger shall be submitted for the approval of the members of Central Florida Pediatric Intensive Care Specialists, LLC and the members of Night Lite Pediatric Center, LLC in the manner provided by the applicable laws of the States of Florida and Delaware at meetings to be held on or before October 15, 2005 or at such other time as to which the managers of the parties may agree.

Section 9. Effective Date of Merger. The effective date of this merger shall be the date the Articles of Merger are file with the Florida Department of State.

Section 10. Abandonment of Merger. This plan of merger may be abandoned by action of the managers of Central Florida Pediatric Intensive Care Specialists, LLC or the managers of Night Lite Pediatric Center, LLC at any time prior to the effective date on the happening of either of the following events:

(a) If the merger is not approved by the members of Central Florida Pediatric Intensive Care Specialists, LLC or the members of Night Lite Pediatric Center, LLC on or before October 15, 2005; or

(b) If, in the judgment of the managers of Central Florida Pediatric Intensive Care Specialists, LLC or the managers of Night Lite Pediatric Center, LLC, the merger would be impracticable because of the number of dissenting members asserting appraisal rights under the laws of the State of Florida.

Section 11. Execution of Agreement. This plan of merger may be executed in any number of counterparts, and each counterpart shall constitute an original instrument.

Executed on behalf of the parties by their managers pursuant to the authorization of their respective managers on the date first above written.

In the presence of:

Vivek Desai
print:

Vivek Desai
print:

Central Florida Pediatric Intensive Care Specialists, LLC

Vivek Desai, Manager

Night Lite Pediatric Center, LLC

Vivek Desai, Manager

588 A.2d 1130
Supreme Court of Delaware.

STAAR SURGICAL COMPANY, Defendant Below, Appellant,
v.
Thomas R. WAGGONER and Patricia L. Waggoner, Plaintiffs Below, Appellees.

Submitted: Nov. 21, 1990. | Decided: April 8, 1991. | Rehearing Denied April 29, 1991.

Shareholders brought action to determine validity of common shares of stock. The Chancery Court, New Castle County, granted shareholders equitable relief. Corporation appealed. The Supreme Court, Moore, J., held that: (1) common shares of stock which were derived from invalid preferred stock were void, and (2) trial court erred in granting shareholders equitable relief.

Reversed.

West Headnotes (8)

[1] **Appeal and Error**
⚬Findings of fact and conclusions of law

Supreme Court exercises plenary review of trial court's determination of purely legal conclusions including proper legal standard to judge validity of shares of corporate stock in action seeking order determining right to vote disputed shares. 8 Del.C. § 227.

4 Cases that cite this headnote

[2] **Corporations and Business Organizations**
⚬Irregular or erroneous issue
Corporations and Business Organizations
⚬Operation and effect; exercise

Shares of common stock issued to former president/CEO and his wife were invalid where preferred shares of stock had been found invalid because of corporation's failure to issue them in conformity with statutory law and former president/CEO and his wife received their common stock through exercise of their conversion options attached to preferred shares. 8 Del.C. § 151.

7 Cases that cite this headnote

[3] **Corporations and Business Organizations**
⚬Original purchasers or holders

Trial court erred in ruling that even though shareholders' preferred shares were invalid, they were entitled as a matter of equity to own and vote disputed common shares which were derived from invalid preferred stock.

15 Cases that cite this headnote

[4] **Corporations and Business Organizations**
⚬Power and authority to issue in general
Corporations and Business Organizations
⚬Irregular or erroneous issue

Stock issued without authority of law is void and a nullity.

5 Cases that cite this headnote

[5] **Corporations and Business Organizations**
⚬Preferred or Other Special Stock

In the absence of clear agreement to the contrary, preferred stock rights are in derogation of common law and must be strictly construed.

2 Cases that cite this headnote

[6] **Corporations and Business Organizations**
⚬Proceedings for amendment in general
Corporations and Business Organizations
⚬Increase of capital stock

Board of directors' failure to adopt resolution and certificate of designation, amending fundamental document which imbues corporation with its life and powers, and defines contract with its shareholders, cannot be deemed a mere "technical" error.

21 Cases that cite this headnote

[7] **Corporations and Business Organizations**
←Rights and Remedies as to Invalid Stock

If stock is voidable, then court may grant that form of relief that is to be most in accord with all equities of case.

1 Cases that cite this headnote

[8] **Equity**
←Equity follows the law

Courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law.

4 Cases that cite this headnote

***1131** On appeal from the Court of Chancery. REVERSED.

Attorneys and Law Firms

David C. McBride (argued), Josy W. Ingersoll, Bruce L. Silverstein and Vincent J.X. Hedrick, II of Young, Conaway, Stargatt & Taylor, Wilmington, Todd E. Gordinier, Elizabeth W. Sachs and Joel F. McIntyre, of Paul, Hastings, Janofsky & Walker, Los Angeles, Cal., of counsel, for appellant.

Lawrence A. Hamermesh (argued), and Alan J. Stone of Morris, Nichols, Arsht & Tunnell, Wilmington, Frederick R. Dettmer and Thomas Fenerty of LeBoeuf, Lamb, Leiby & MacRae, New York City, of counsel, for appellees.

Before CHRISTIE, C.J., MOORE and HOLLAND, JJ.

Opinion

MOORE, Justice.

In this latest dispute between the parties we determine the validity of two million shares of STAAR Surgical Company ("STAAR") common stock issued to STAAR's former President and CEO, Thomas R. Waggoner and his wife, Patricia Waggoner ("Waggoner" or "Waggoners"). This is a continuation of the controversy between Waggoner and STAAR. We have already ruled that a provision of the preferred stock STAAR issued to Waggoner, purportedly giving him super-majority voting control of the company, was invalid. *See Waggoner v. Laster,* Del.Supr., 581 A.2d 1127 (1990) ("*Waggoner I* "). In *Waggoner I,* we did not otherwise decide the validity of the Waggoners' preferred and common shares.

In this action, the Court of Chancery assumed that the Waggoners' preferred shares were technically invalid because STAAR failed to issue them in conformity with 8 *Del.C.* § 151. *See Waggoner v. STAAR Surgical Co.,* Del.Ch., C.A. No. 11185, Jacobs, V.C., slip op. at 14 n. 7, 1990 WL 28979 (March 15, 1990) ("*Waggoner II* "). The trial court nonetheless determined that the Waggoners were equitably entitled to ownership and voting control of their common shares. *Id.* at 15–16.

We find that the Court of Chancery erroneously granted equitable relief. The Waggoners received their common stock through the exercise of their conversion options attached to the preferred shares. Since the preferred shares were invalid, the trial court had no basis to ignore established principles of Delaware corporate law and should not have invoked equitable remedies to resuscitate plainly void stock. Accordingly, we reverse.

***1132 I.**

We will only summarize the pertinent sections of the record in view of our extensive treatment of the facts underlying the dispute between Waggoner and STAAR in *Waggoner I,* 581 A.2d at 1128–33. STAAR was facing severe financial difficulties in 1987. At that time, STAAR had an open line of credit with the Bank of New York ("BONY") secured by certain of STAAR's account receivables and inventory. In September, 1987, STAAR's accountants caused the company to write-down its accounts receivables. The write-down left the BONY line of credit undercollateralized by almost two million dollars.

At approximately the same time, certain STAAR shareholders were concerned about the financial performance of the company. The stockholders conferred in November 1987, and later that month discussed their concerns directly with Waggoner. On December 13, 1987, the shareholders met with the STAAR directors in New York City. STAAR's outside counsel, Elliot Lutzker, informed the shareholders at the meeting that among other things, STAAR was overdrawn on its BONY line of credit and that BONY had "demanded" Waggoner's personal guarantee to secure all of STAAR's debt to the bank. The shareholders were outraged and demanded Waggoner's immediate resignation. The STAAR board and the shareholders reached a compromise providing for the election of two new outside directors.

The STAAR board then formally convened after the meeting on December 13, 1987. Waggoner told the board that BONY had demanded his personal guarantee of STAAR's debts. Waggoner advised the board that he would guarantee the debts only if he was given voting control of the company while the guarantees were outstanding. Waggoner and the board generally concluded at the end of the meeting that STAAR would issue some type of convertible securities to Waggoner in exchange for his guarantee. The two sides did not formally adopt or memorialize their understanding.

BONY then sent a formal letter to Waggoner three days later, on December 16, 1987, requesting his "immediate attention" to the matter of a personal guarantee. The letter required Waggoner to respond no later than noon on December 18, 1987. Lutzker informed both Waggoner and Lamar T. Laster, STAAR's Chief Financial Officer, that BONY could shut STAAR down if it did not receive Waggoner's personal guarantee.

Waggoner then called a special board meeting for December 17, 1987 to consider BONY's "demand." The meeting was hastily summoned and poorly organized. We previously described the meeting in *Waggoner I*, quoting the trial court's finding that:

> The December 17 meeting was conducted by telephone with little or no advance notice, and lasted for approximately 25 minutes. Dr. Utrata, a Board member of only four days' standing, participated between performing surgical operations. Mr. Ford, a trial attorney, participated while speaking from his car phone and while traveling between court appearances. According to the minutes, Mr. Silverman was absent for a portion of the discussion, and Mr. Sodero, a fourth director, intended to (and did) resign at the conclusion of that meeting, to be replaced by Dr. Brown.
>
> *Waggoner I*, 581 A.2d at 1131–32 (quoting *Laster v. Waggoner*, Del.Ch., C.A. Nos. 11063, 11067, Jacobs, V.C., slip op. at 8, 1989 WL 126670 (Oct. 24, 1989)).

Waggoner informed the board of BONY's "demands" and reaffirmed his commitment to guarantee the debts in return for control of the company while the guarantee was outstanding. The directors discussed Waggoner's requests and the minutes of the meeting reflect that Laster proposed:

> [T]hat a convertible preferred stock be issued to Mr. Waggoner to enable him to have voting control as long as all of his guarantees are in effect. The guarantees would consist of all of the approximately $3.5 million of debt of STAAR and Frigitronics to BONY, the $1.8 million ***1133** IPPI guaranty and the $1.1 million owed to Maurry Brothers.... If all of the personal guarantees and stock pledges are removed within the next 30 days, or there is a binding agreement to such effect, Waggoner would not receive any compensation. If all guarantees were not removed within 30 days, Waggoner would receive 2 million shares of Common Stock as compensation for the personal risk assumed. During the period of time that certain of the Company's stockholders were trying to remove Tom Waggoner from the Company's debt they will have to agree in writing not to take any action detrimental to the Company or to Tom Waggoner.

The minutes of the December 17, 1987 STAAR Board meeting also state that the board formally adopted the following resolution:

> RESOLVED, that pursuant to the authority granted to the Board of Directors in the Certificate of Incorporation, as amended, the Board hereby authorizes the creation of a series of Convertible Preferred Stock, all of which shall be held by Tom Waggoner, or his designees, which shall be converted into two million shares of Common Stock after January 16, 1988, unless all of the personal guarantees and stock pledges of Common Stock by Tom Waggoner now or hereafter in effect are removed, or a binding agreement to such effect is in place by January 16, 1988. In the event that all of the Waggoner guarantees are removed by January 16, 1988, all of the shares of Convertible Preferred

> Stock shall be redeemed by the Company at $.01 per share. In the event that the two million shares of Common Stock are issued to Tom Waggoner, all of the remaining Convertible Preferred and stock pledges are removed. Holders of the Convertible Preferred Stock shall be entitled to elect a majority of the Company's directors and to otherwise vote a majority of the Shares of Common Stock outstanding at any time. The shares of Convertible Preferred Stock, in accordance with the provision of the SEC's safe-harbor rule, shall have a liquidation preference however, [sic] not entitle the holder to any dividends.
>
> *See Waggoner I,* 581 A.2d at 1132 (quoting *Laster,* slip op. at 9–10).

In fact, the trial court found, and we affirmed in *Waggoner I,* that the board *never formally adopted* the resolution and only Waggoner signed the minutes. *See id.* at 1132.

After the board meeting, Lutzker prepared a certificate of designation pursuant to 8 *Del.C.* § 151(g), at some time between December 18, 1987 and December 24, 1987. The certificate allegedly established the rights, powers and preferences of the convertible preferred shares pursuant to the December 17, 1987 "resolution." The certificate also recited that it included the December 17, 1987 board resolution. The certificate was six pages long and contained detailed, comprehensive language regarding the voting, conversion and redemption rights of the preferred shares not mentioned in the December 17 resolution. *See Laster v. Waggoner,* Del.Ch., C.A. No. 11063, 11067, Jacobs, V.C., slip op. at 11–12 & n. 5, 1989 WL 126670 (Oct. 24, 1989). Furthermore, like the December 17 "resolution," the STAAR board never *formally adopted the certificate of designation. See id.* at 11. STAAR actually issued the preferred shares to Waggoner on December 18, 1987.

Some STAAR board members were dissatisfied with the terms of the preferred stock transaction and called a board meeting for January 11, 1988. At that meeting, the board attempted to delay the conversion feature of the preferred stock. On January 19, 1988, however, Waggoner exercised his conversion option and received two million shares of STAAR common stock. Allegedly, Waggoner's action was authorized pursuant to the resolution and the certificate of designation because STAAR failed to replace Waggoner's guarantee within the prescribed time limits.

In August, 1989, the Waggoners attempted to exercise the voting provisions of the remainder of their preferred shares by removing STAAR's board. The directors, aided by two shareholders, contested ***1134** the election under 8 *Del.C.* § 225. On October 24, 1989, the Court of Chancery ruled that the super voting provisions of the preferred shares were invalid. *See Laster,* slip op. at 39–40. We affirmed that decision. *See Waggoner I,* 581 A.2d at 1137–38.

The Waggoners then filed an action pursuant to 8 *Del.C.* § 211 to compel STAAR to convene a shareholders meeting. STAAR answered the Waggoners' § 211 claim denying that the Waggoners even owned the two million STAAR shares. The Waggoners then moved pursuant to 8 *Del.C.* § 227(a) for an order determining their right to vote the disputed shares. On March 15, 1990, the Court of Chancery ruled that even though the Waggoners' preferred shares were invalid, they were entitled as a matter of equity to own and vote the disputed two million common shares which were derived from the invalid preferred stock. *See Waggoner II,* slip op. at 15–16.

II.

The Court of Chancery specifically assumed that the *preferred shares* "were invalidly issued" because the board failed to formally adopt both the December 17 resolution and the certificate of designation as required by 8 *Del.C.* § 151. *See Waggoner II,* slip op. at 14 n. 7. Nonetheless, the trial court found that the Waggoners were entitled to an order "akin to specific performance" authorizing the issuance of the *common shares* and declaring them eligible to vote. *Id.* at 9. The court reasoned that Waggoner was equitably entitled to receive the two million shares of common stock as consideration for his personal guarantee of STAAR's debts. *Id.* at 9–10.

A.

[1] The question of the validity of the Waggoners' common shares presents a mixed issue of law and fact. This Court, however, exercises plenary review of the trial court's determination of purely legal conclusions including the proper legal standard to judge the validity of shares in a 8 *Del.C.* § 227 action. *See Triplex Shoe Co. v. Rice & Hutchins, Inc.,* Del.Supr., 152 A. 342, 346 (1930).

[2] [3] STAAR asserts two basic errors. First, it contends that the Court of Chancery erred in deciding that the Waggoners were entitled to vote their common shares despite the assumption that their preferred shares were "technically" invalid. Second, STAAR claims that the

Court of Chancery erred in its award of "specific performance" to the Waggoners, even assuming that they were entitled to some form of equitable relief. STAAR specifically contends that: (1) the trial court lacked the authority to grant specific performance pursuant to 8 *Del.C.* § 227; (2) the Court of Chancery improperly found that STAAR had adequate notice of the Waggoners' equitable claim for specific performance and denied STAAR its right to develop a factual record in opposition to the claim; (3) there was an insufficient evidentiary basis for the trial court to conclude that the Waggoners lacked an adequate legal remedy; and (4) the Court of Chancery failed to consider Waggoner's alleged misconduct, including breaches of his fiduciary duties to the company. The Waggoners dispute all of STAAR's allegations.

It is unnecessary for us to address the merits of the trial court's application of the equitable remedy of something akin to "specific performance." Instead, we find that it was error to award any type of equitable relief after the trial court essentially concluded that the preferred shares were invalid. Waggoner obtained his common shares only after converting one share of his preferred stock into the common. If the preferred shares were void, it follows *a fortiori* that the common shares, which purportedly derived from the preferred, also were invalid.

B.

We start with basic and clearly applicable provisions of the Delaware General Corporation Law. A corporation can issue more than one class of stock, including preferred shares with a conversion feature. ***1135** *See, e.g.,* 8 *Del.C.* §§ 151(a), (e) & (g). The powers, preferences, rights and other characteristics of such shares must be fixed in either the certificate of incorporation or through a board resolution adopted pursuant to an explicit grant of authority in the certificate of incorporation. *See* 8 *Del.C.* §§ 102(a)(4), 151(a). There is no dispute that the STAAR certificate of incorporation authorized the board to issue, by resolution, "blank check" preferred stock with such terms and conditions, including:

> [T]he rights, if any, of holders of the shares of the particular series to convert the same into shares of any other series or class or other securities of the corporation....

The Delaware General Corporation Law mandates adoption of a board resolution, when such new shares of so-called "blank check" preferred, are issued. Section 151(a) of the General Corporation Law requires, in part, that all new stock voting powers, designations, preferences and other special rights must either be in the certificate of incorporation or:

> [I]n 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 certificate of incorporation. 8 *Del.C.* § 151(a) (emphasis added).

Section 151(e), which specifically authorizes a company to issue convertible securities, requires, in part, that the corporation issue the new shares:

> [A]t such price or prices or at such rate or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock *adopted by the board of directors as hereinabove provided.* 8 *Del.C.* § 151(e) (emphasis added).

Finally, Section 151(g) requires a corporation to file a certificate of designation when the certificate of incorporation permits the board to issue new securities through a resolution "adopted by the board." The statute provides:

> When any corporation desires to issue any shares of stock of any class or of any series of any class of which the powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof, if any, shall not have been set forth in the certificate of incorporation or in any amendment thereto but shall be provided for in *a resolution or resolutions adopted by the board* of directors pursuant to authority expressly vested in it by the certificate of incorporation or any amendment thereto, a *certificate of designations setting forth a copy of such resolution* or resolutions and the number of shares of stock of such class or series as to which the resolution or resolutions apply shall be executed, acknowledged,

> filed, recorded and shall become effective, in accordance with § 103 of this title.... 8 *Del.C.* § 151(g) (emphasis added).

Waggoner concedes that the STAAR board never formally adopted either the board resolution on December 17, 1987, or the certificate of designation. Finally, the trial court found in *Laster* that the certificate of designation did not "set forth" a copy of the December 17, 1987 resolution. Slip op. at 11–12. Indeed, the court ruled that the certificate of designation contained materially different language from that in the resolution. *Id.* at 11 n. 5.

C.

The parties' arguments seem to pass like two ships in the night. STAAR contends that the board's failure to adopt the resolution or the certificate of designation rendered the preferred shares void, thus invalidating the common stock. STAAR relies on *Triplex Shoe Co. v. Rice Hutchins, Inc.*, Del.Supr., 152 A. 342 (1930), for the proposition that illegally issued stock is void and, regardless of the equities, cannot be transferred or voted. The Waggoners, in contrast, focus on the common stock and not the preferred shares. They assert that even if the board failed to technically conform to the clear corporate law, the ***1136** STAAR directors all agreed at the December 17, 1987 board meeting to issue Waggoner two million shares of common stock as compensation for his guarantee of the BONY loans. Therefore, Waggoner claims, it was clear to all of the parties that he would eventually receive the two million shares if STAAR could not find alternate financing for the loan.

The Waggoners also contest STAAR's interpretation of *Triplex*, claiming that it is distinguishable on its facts. The Waggoners argue that the certificate of incorporation in *Triplex*, and the then current corporate law, did not authorize the board to issue new shares of a certain type of stock. Therefore, they contend, the stock in *Triplex* was void and subsequent board action could not have validated those shares. In contrast, the Waggoners argue that the STAAR certificate of incorporation at all times authorized the board to issue new shares of common stock and thus *Triplex* is not dispositive.

D.

[4] We must reject the Waggoners' attempt to separate the common shares from the preferred stock. We also reject their very limited interpretation of *Triplex*. Stock issued without authority of law is void and a nullity.

It is undisputed that Waggoner could not receive his common stock without exercising the conversion option of at least one preferred share. The December 17, 1987 resolution and the certificate of designation purportedly authorized the issuance of the preferred shares. Without validly issued preferred stock, there was simply no other legal mechanism by which the common shares could be issued. Simply stated, if the preferred shares were void, as the Court of Chancery assumed, then the common stock could not be created out of whole cloth.

Based on the trial court's findings, it is clear that the preferred convertible shares originally issued to the Waggoners were invalid and void under Delaware law. There was no compliance with the terms of 8 *Del.C.* § 151. The directors never formally adopted either the December 17, 1987 resolution or the certificate of designation.

The Waggoners' attempt to trivialize the unassailable facts of this case as mere "technicalities" is wholly unpersuasive. The issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters.

There are many interacting principles of established law at play here. First, it is a basic concept that the General Corporation Law is a part of the certificate of incorporation of every Delaware company. *See* 8 *Del.C.* § 394. Second, a corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders. *See Lawson v. Household Finance Corp.*, Del.Supr., 152 A. 723, 727 (1930). The charter is also a contract among the shareholders themselves. *See Morris v. American Public Utilities Co.*, Del.Ch., 122 A. 696, 700 (1923). When a corporation files a certificate of designation under § 151(g), it amends the certificate of incorporation and fundamentally alters the contract between all of the parties. *See* 8 *Del.C.* §§ 104, 151(g). A party affecting these interrelated, fundamental interests, through an amendment to the corporate charter, must scrupulously observe the law.1

[5] Finally, it is a basic concept of our corporation law that in the absence of a clear agreement to the contrary, preferred stock rights are in derogation of the common law and must be strictly construed. *See generally* ***1137** *Goldman v. Postal Telegraph, Inc.*, 52 F.Supp. 763, 767 (D.Del.1943); *Garrett v. Edge Moor Iron Co.*, Del.Ch.,

194 A. 15, 18 (1937), *aff'd sub nom., Pennsylvania Co. For Ins. On Lines & Granting Annuities v. Cox,* Del.Supr., 199 A. 671, 673 (1938); *Penington v. Commonwealth Hotel Const. Corp.,* 151 A. 228, 234 (1930), *rev'd in part,* 155 A. 514 (1931); *Gaskill v. Gladys Belle Oil Co.,* Del.Ch., 146 A. 337, 340–41 (1929).

[6] This principle of "strict construction" applies with equal force to the creation of preferred stock and its attendant rights, powers, designations and preferences. Accordingly, a board's failure to adopt a resolution and certificate of designation, amending the fundamental document which imbues a corporation with its life and powers, and defines the contract with its shareholders, cannot be deemed a mere "technical" error.

Thus, we must reject the trial court's authorization of the two million shares of common stock on equitable grounds. Stock issued in violation of 8 *Del.C.* § 151 is void and not merely voidable. *See Triplex,* 152 A. at 347; D. DREXLER, L. BLACK & A. SPARKS, DELAWARE CORPORATION LAW AND PRACTICE § 17.02 at 17–23 n. 89 (1990). A court cannot imbue void stock with the attributes of valid shares.

E.

The Waggoners argue that the board's failure to ratify its resolution to issue the convertible preferred shares merely rendered the common stock voidable, not void. The Waggoners claim that, unlike *Triplex,* where this Court found that the corporation did not have the power or authority to issue no par stock, STAAR's charter specifically authorized the issuance of their two million shares of common stock. Therefore, the Waggoners conclude that the issuance of the two million shares of common stock was merely a voidable act.

[7] The Court of Chancery has correctly recognized that the available form of equitable relief depends on the facts of each case. If the stock is indeed void, then "cancellation is the proper remedy." However, if the stock is voidable then a court may grant " 'that form of relief [that] is to be most in accord with all of the equities of the case.' " *See Diamond State Brewery, Inc. v. De La Rigaudiere,* Del.Ch., 17 A.2d 313, 318 (1941) (quoting *Blair v. F.H. Smith Co.,* Del.Ch., 156 A. 207, 213 (1931)).

We have already rejected the Waggoners' narrow reading of *Triplex* in *Waggoner I,* 581 A.2d at 1137–38. We cited to *Triplex* in *Waggoner I* for the proposition that the equitable doctrine of estoppel is inapplicable to agreements or instruments that violate either express law or public policy. *Id.* We also rejected the Waggoners' argument that *Triplex* was limited only to instances where a corporation illegally issued stock. *Id.* Accordingly, we ruled that the Waggoners could not invoke the equitable doctrine of estoppel to validate the super-majority voting rights associated with their preferred shares after the court had already declared those rights void under the corporation law. *Id.*

[8] Parity of reason compels us to reach a similar result here. Under the present circumstances, the Court of Chancery had no basis to grant equitable relief "akin" to specific performance after it concluded that the Waggoners' preferred shares were invalid. Neither logic nor equity compel the validation of a legally void act.2

The judgment of the Court of Chancery is

REVERSED.

Footnotes

1 We put aside the wholly inapplicable circumstances of correcting mistakes under § 103(f), or the reformation of corporate instruments to reflect the actual intention of the parties. *See, e.g., In re Farm Industries, Inc.,* Del.Ch., 196 A.2d 582, 592 (1963); *Waggoner I,* 581 A.2d at 1135–36. However, the failure of STAAR's Board to approve the December 17 resolution and subsequent certificate of designation was not a mere mistake but reflected a total failure to conform with the corporation law.

2 Again, we emphasize that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law. *See Alabama By-Products Corp. v. Neal,* Del.Supr., 588 A.2d 255, 258 (1991).

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Detail by Entity Name

Florida Limited Liability Company

NIGHT LITE PEDIATRIC CENTER, LLC

Filing Information

Document Number	L02000028969
FEI/EIN Number	270034858
Date Filed	10/30/2002
State	FL
Status	INACTIVE
Last Event	MERGED
Event Date Filed	05/24/2011
Event Effective Date	NONE

Principal Address

844 N. THORNTON AVENUE
ORLANDO FL 32803 US

Changed 04/30/2004

Mailing Address

PO BOX 533374
ORLANDO FL 32853 US

Changed 05/05/2003

Registered Agent Name & Address

DESAI, VIVEK S M.D.
844 N. THORNTON AVENUE
ORLANDO FL 32803 US

Name Changed: 05/05/2003

Address Changed: 05/05/2003

Manager/Member Detail

Name & Address

Title D

OTEGBEYE, AYODEJI B
844 NORTH THORNTON AVENUE
ORLANDO FL 32803

Title D

DESAI, VIVEK S
844 NORTH THORNTON AVENUE

ORLANDO FL 32803

Title D

SOREMI, OLUDAPO F
844 NORTH THORNTON AVENUE
ORLANDO FL 32803

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Foreign Limited Liability Company

CENTRAL FLORIDA PEDIATRIC INTENSIVE CARE SPECIALISTS, LLC

Filing Information

Document Number	M05000003364
FEI/EIN Number	593213412
Date Filed	06/21/2005
State	DE
Status	ACTIVE
Last Event	MERGER
Event Date Filed	05/24/2011
Event Effective Date	NONE

Principal Address

844 N. THORNTON AVENUE
ORLANDO FL 32803

Mailing Address

844 N. THORNTON AVENUE
ORLANDO FL 32803

Registered Agent Name & Address

FLICK, JAMES J
3700 S CONWAY ROAD
SUITE 100
ORLANDO FL 32812 US

Address Changed: 04/16/2009

Manager/Member Detail

Name & Address

Title MGR

DESAI, VIVEK
844 N. THORNTON AVENUE
ORLANDO FL 32803

Title MGR

OTEGBEYE, AYODEJI
844 N. THORNTON AVENUE
ORLANDO FL 32803

Title MGR

SOREMI, OLUDAPO
844 N. THORNTON AVENUE
ORLANDO FL 32803

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Central Florida Pediatric Intensive Care Specialists

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CERTIFICATE OF MERGER

OF

NIGHT LITE PEDIATRIC CENTER, LLC

AND

CENTRAL FLORIDA PEDIATRIC INTENSIVE CARE SPECIALISTS, LLC

The following Certificate of Merger is being submitted in accordance with Florida Statutes Section 608.4382.

__FIRST:__ The exact name, street address of its principal office, jurisdiction, and entity type for each merging party are as follows:

Name and Street Address	Jurisdiction	Entity Type
1. Night Lite Pediatric Center, LLC 844 N. Thornton Avenue Orlando, FL 32803	Florida	Limited Liability Company
Florida Document/Registration Number: L02000028969		FEI Number: 27-0034858
2. Central Florida Pediatric Intensive Care Specialists, LLC 844 N. Thornton Avenue Orlando, FL 32803	Delaware	Limited Liability Company
Florida Document/Registration Number: M05000003364		FEI Number: 59-3213412

__SECOND:__ The exact name, street address of its principal office, jurisdiction, and entity type of the surviving party are as follows:

Name and Street Address	Jurisdiction	Entity Type
Central Florida Pediatric Intensive Care Specialists, LLC 844 N. Thornton Avenue Orlando, FL 32803	Delaware	Limited Liability Company
Florida Document/Registration Number: M05000003364		FEI Number: 59-3213412

__THIRD:__ The attached Plan of Merger meets the requirements of Florida Statutes Section 608.438, and was approved by each domestic limited liability company that is a party to the merger in accordance with Chapter 608 of the Florida Statutes.

(((H11000389603)))

FOURTH: The attached Plan of Merger was approved by the other business entity that is a party to the merger in accordance with the applicable laws of the state of Delaware.

FIFTH: The surviving entity agrees to pay the dissenting members of each domestic limited liability company that is a party to the merger the amount, if any, to which they are entitled under Florida Statutes Section 608.4384.

SIXTH: The merger is permitted under the respective laws of all applicable jurisdictions and is not prohibited by the regulations or articles of organization of any limited liability company that is a party to the merger.

SEVENTH: The merger shall become effective as of the date the Articles of Merger are filed with Florida Department of State

EIGHTH: The Certificate of Merger complies with and was executed in accordance with the laws of each party's applicable jurisdiction.

IN WITNESS WHEREOF, I have signed this Certificate as an authorized representative of a Member of Night Lite Pediatric Center, LLC and acknowledge it to be my act this 18 day of May, 2011.

James J. Flick

James J. Flick

IN WITNESS WHEREOF, I have signed this Certificate as an authorized representative of a Member of Central Florida Pediatric Intensive Care Specialists, LLC and acknowledge it to be my act this 18 day of May, 2011.

James J. Flick

James J. Flick

PLAN OF MERGER

OF

CENTRAL FLORIDA PEDIATRIC INTENSIVE CARE SPECIALISTS, LLC

AND

NIGHT LITE PEDIATRIC CENTER, LLC

This Plan of Merger is entered into by and between Central Florida Pediatric Intensive Care Specialists, LLC and Night Lite Pediatric Center, LLC on this 31 day of October, 2005.

RECITALS:

A. Central Florida Pediatric Intensive Care Specialists, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal office at 844 N. Thornton Avenue, Orlando, Florida 32803.

B. Night Lite Pediatric Center, LLC is a limited liability company organized and existing under the laws of the State of Florida with its principal office at 844 N. Thornton Avenue, Orlando, Florida 32803.

C. Central Florida Pediatric Intensive Care Specialists, LLC and Night Lite Pediatric Center, LLC have each elected to be taxed as an S corporation.

B. The Managers and members of Central Florida Pediatric Intensive Care Specialists, LLC and the Managers and members of Night Lite Pediatric Center, LLC deem it desirable and in the best business interests of the business entities and their members that Night Lite Pediatric Center, LLC be merged into Central Florida Pediatric Intensive Care Specialists, LLC pursuant to the provisions of Florida Statutes Section 608.438 and Title 6, Section 18-209 of the Delaware Limited Liability Company Act in order that the transaction qualify as a "reorganization" within the meaning of Section 368(a)(1)(A) of the Internal Revenue Code of 1986, as amended.

In consideration of the mutual covenants, and subject to the terms and conditions set forth below, the parties agree as follows:

Section 1. Merger. Night Lite Pediatric Center, LLC shall merge with and into Central Florida Pediatric Intensive Care Specialists, LLC, which shall be the surviving entity.

Section 2. Terms and Conditions. On the effective date of the merger, the separate existence of the absorbed limited liability company shall cease, and the surviving entity shall succeed to all the rights, privileges, immunities, and franchises, and all the property, real, personal, and mixed of the absorbed limited liability company, without the necessity for any separate transfer. The surviving entity shall then be responsible and liable for all liabilities and obligations of the absorbed limited liability company, and neither the rights of creditors nor any liens on the property of the absorbed limited liability company shall be impaired by the merger.

Section 3. Conversion of Membership Interests. The manner and basis of converting the membership interests of the absorbed limited liability company into membership interests of the surviving entity is as follows:

(a) Each one percent (1%) unit of the membership interests of Night Lite Pediatric Center, LLC issued and outstanding on the effective date of the merger shall be converted into a one percent (1%) unit of the membership interest in Central Florida Pediatric Intensive Care Specialists, LLC, Series B, which membership interests of the surviving entity shall then be issued and outstanding.

(b) The conversion shall be effected as follows: After the effective date of the merger, each holder of certificates for membership interests in the absorbed limited liability company shall surrender them to the surviving entity or its duly appointed agent, in the manner that the surviving entity shall legally require. On receipt of the membership interests, the surviving entity shall issue and exchange certificates for membership interests in the surviving entity, representing the percentage of membership interests to which the holder is entitled as provided above.

Section 4. Changes in Articles of Organization. The Articles of Organization of the surviving entity shall continue to be its Articles of Organization following the effective date of the merger.

Section 5. Changes in Operating Agreement. The Operating Agreement of the surviving entity shall continue to be its Operating Agreement following the effective date of the merger.

Section 6. Managers. The names and addresses of the Manager of the surviving entity are:

Ayodeji Otegbeye, Vivek Desai, and Oludapo Soremi, all having an address at 880 N. Thornton Avenue, Orlando, Florida 32803.

Section 7. Prohibited Transactions. Neither of the parties shall, prior to the effective date of the merger, engage in any activity or transaction other than in the ordinary course of business, except that the absorbed and surviving entities may take all action necessary or appropriate under the laws of the State of Florida to consummate this merger.

Section 8. Approval by Members. This plan of merger shall be submitted for the approval of the members of Central Florida Pediatric Intensive Care Specialists, LLC and the members of Night Lite Pediatric Center, LLC in the manner provided by the applicable laws of the States of Florida and Delaware at meetings to be held on or before October 15, 2005 or at such other time as to which the managers of the parties may agree.

Section 9. Effective Date of Merger. The effective date of this merger shall be the date the Articles of Merger are file with the Florida Department of State.

Section 10. Abandonment of Merger. This plan of merger may be abandoned by action of the managers of Central Florida Pediatric Intensive Care Specialists, LLC or the managers of Night Lite Pediatric Center, LLC at any time prior to the effective date on the happening of either of the following events:

(a) If the merger is not approved by the members of Central Florida Pediatric Intensive Care Specialists, LLC or the members of Night Lite Pediatric Center, LLC on or before October 15, 2005; or

(b) If, in the judgment of the managers of Central Florida Pediatric Intensive Care Specialists, LLC or the managers of Night Lite Pediatric Center, LLC, the merger would be impracticable because of the number of dissenting members asserting appraisal rights under the laws of the State of Florida.

Section 11. Execution of Agreement. This plan of merger may be executed in any number of counterparts, and each counterpart shall constitute an original instrument.

Executed on behalf of the parties by their managers pursuant to the authorization of their respective managers on the date first above written.

In the presence of:

Vivek Desai
print:

Vivek Desai
print:

Central Florida Pediatric Intensive Care Specialists, LLC

Vivek Desai, Manager

Night Lite Pediatric Center, LLC

Vivek Desai, Manager

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1983 WL 208534 (Fla.Div.Admin.Hrgs.)

Division of Administrative Hearings
State of Florida

*1 THRU-CONTAINER INTERNATIONAL, INC., Petitioner,
v.
DEPARTMENT OF STATE, DIVISION OF CORPORATIONS, Respondent.

Case No. 83-282

May 25, 1983

RECOMMENDED ORDER

This cause came before the undersigned upon the parties waiving their right to a formal hearing, and submitting a stipulated record and memoranda of law in support of their respective positions.

The proceeding was initiated when Petitioner, Thru- Container International, Inc., filed a request for a formal hearing pursuant to Subsection 120.57(1), Florida Statutes, on December 9, 1982, seeking Respondent, Department of State, Division of Corporations, to invalidate articles of merger previously approved for Petitioner and two other corporations and to issue a certificate of good standing for Petitioner. The matter was referred to the Division of Administrative Hearings by Respondent on January 31, 1983, with a request that a hearing officer be assigned to conduct a formal hearing. By notice of hearing dated March 11, 1983, the matter was scheduled for a final hearing on April 13, 1983, in Tampa, Florida. At the request of Petitioner, the matter was continued on April 8, 1983. Thereafter, the parties agreed to waive a formal hearing and submit a stipulated record and memoranda of law. Such were filed on May 17 and 20, 1983, and have been considered by the undersigned in the preparation of this order.

On March 21, 1983, Petitioner filed a motion for leave to amend its petition. This motion was granted by order dated March 31, 1983. As reflected in the amended petition, the issues herein are (1) whether the purported merger of Petitioner and two other corporations was unlawful and therefore invalid, and (2) whether Petitioner should be issued a certificate of good standing in its name alone.

Based upon the stipulated record and pleadings filed herein, the following Findings of Fact are determined:

FINDINGS OF FACT

1. On December 26, 1980, Petitioner, Thru-Container International, Inc., a Florida corporation, entered into an agreement of merger with Imperial Van Lines, Inc., West ("IVL"), a Washington corporation, and Thru-Container Movers, Inc. ("TCM") a Maryland corporation, providing for the merger of the three corporations. Under the terms of the agreement IVL would be the surviving corporation.

2. When the agreement was executed by the corporations, TCM lacked the power to enter into the transaction.

This was because its charter had been annulled by the State of Maryland on January 25, 1975, for failure to file required reports and pay taxes as required by Maryland law. The charter had not been reinstated as of March, 1983. Petitioner and IVL were apparently not aware that TCM's charter had been annulled when they executed the agreement.

3. Paragraph 13 of the agreement of merger provides that the merger may be abandoned or terminated (a) by mutual consent of the Board of Directors of the corporations, or (b) by the Board of Directors of any one of the corporations in the event of failure or inability to obtain necessary authorization and approvals of any governmental agencies.

*2 4. IVL and TCM failed to file articles of merger with their respective states of incorporation, and therefore failed to obtain the necessary authorizations to merge.

5. On August 26, 1981, Petitioner filed articles of merger with Respondent, Department of State, Division of Corporations, which became effective in the State of Florida that date.

6. On a later undisclosed date, the Board of Directors of the three corporations elected to exercise their rights under paragraph 13 of the agreement of merger and to terminate the merger.

7. By letter dated December 9, 1982, Petitioner requested Respondent to invalidate the articles of merger previously filed and to issue a certificate of good standing for Petitioner. Respondent declined to do so on the ground it had no legal authority to do so. The denial prompted the instant proceeding.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes.

9. Subsection 607.234, Florida Statutes, prescribes the conditions and requirements for merging a Florida corporation with a foreign (non-Florida) corporation. It reads as follows:

607.234 Merger or consolidation of domestic and foreign corporations.--

(1) One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is organized:

(a) Each domestic corporation shall comply with the provisions of this chapter with respect to the merger or consolidation, as the case may be, of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the laws of the jurisdiction under which it is organized.

(b) If the surviving or new corporation, as the case may be, is to be governed by the laws of any jurisdiction other than this state, it shall comply with the provisions of this chapter with respect to foreign corporations if it is to transact business in this state, and in every case it shall file with the Department of State of this state an agreement that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of this chapter with respect to the rights of dissenting shareholders.

(2) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations if the surviving or new corporation is to be governed by the laws of this state. If the surviving or new corporation is to be governed by the laws of any jurisdiction other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of do-

mestic corporations except insofar as the laws of such other jurisdiction provide otherwise.
*3 (3) At any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

10. Respondent has denied the request because it contends (a) Florida law does not allow it to reverse a merger once it is lawfully filed, and (b) if an abandonment is to be valid, it must be done prior to the filing of the agreement with the Department. Petitioner counters that the relief requested is appropriate because (a) the merger was prohibited by Florida law since it was also prohibited by Maryland law, (b) the affected corporations have validly terminated and abandoned the merger, and (c) the foreign corporations cannot comply with the laws of their respective states which is a condition precedent to the effectiveness of any merger under Florida law.

11. Petitioner should prevail for two reasons. First, Subsection 607.234(1), Florida Statutes, provides that domestic and foreign corporations may be merged "if such merger... is permitted by the laws of the jurisdiction under which each such foreign corporation is organized."Therefore, the merger in question must be lawful under both Maryland and Washington law in order to be valid in Florida. Here the legal existence of the Maryland corporation had ceased, and TCM had no power to merge under Maryland law. Moreover, it was without legal authority to enter into any contract or take any other action pertaining to the merger. Atlantic Mill & Lumber Realty, Co. v. Keefer, 179 Md. 496,20 A.2d 178 (1941). Because Subsection 607.234(1) allows a merger to occur only if the conditions precedent therein are complied with, and such conditions were not met, there could be no lawful merger in the case at bar.

12. Secondly, paragraph (a) of Subsection 607.234(1), Florida Statutes, requires that "each foreign corporation... comply with the applicable provisions of the laws of the jurisdiction under which it is organized."Accordingly, a foreign corporation must comply with the laws of its own state in order to accomplish a merger, including the filing of articles of merger with that state. Such compliance with the laws of one's own state is clearly a condition precedent to the effectiveness of any merger under Florida law. Here, neither TCM nor IVL has filed articles of merger with its respective state. As such, the requirement prescribed in paragraph (a) has not been met, and the merger has never occurred.

13. Such a construction of Subsection 607.234(1) is required in order to avoid the incongruity of having a merger become effective in one state while articles of merger have not yet been filed and taken effect in the other states. To hold otherwise would permit foreign corporations to abandon a merger without leaving any remedy available to the Florida corporation. Respondent's contention that it has no authority to reverse a merger is rejected. Such a view creates a vacuum in the administration of the statute. While the Department cannot remove the articles of merger from its official records, it clearly has the inherent authority to place upon the records a notice that the purported merger has been cancelled, and that Petitioner's certificate of incorporation has been reinstated in full force and effect. Therefore, it is concluded that the request of Petitioner should be granted, and notice of such relief filed in the official records of the State.

RECOMMENDATION

*4 Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Division of Corporations file a notice in its records reflecting that the purported merger of Thru-Container International, Inc., Imperial Van Lines, Inc., West add Thru-Containers Movers, Inc. approved on August 26, 1981, has been cancelled, and Petitioner's certificate of incorporation reinstated in full force and effect.

DONE and RECOMMENDED this 25th day of May, 1983, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301

Filed with the Clerk of the Division of Administrative Hearings this 25th day of May, 1983.

1983 WL 208534 (Fla.Div.Admin.Hrgs.)

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