IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RUSTY BLADES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 5317-VCS
	)	
FRANK WISEHART, J. RICHARD BLAZER, and RICHARD D. WETZEL,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 20, 2010
Date Decided: November 17, 2010

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Richard D. Wetzel, Columbus, Ohio, *Pro Se Defendant.*

STRINE, Vice Chancellor.

I. Introduction

This is a dispute over control of the board of directors of Global Launch, Incorporated. The dispute pits the company's founder, Rusty Blades and its other initial stockholder, The Ohio Company, against their former business friends, the defendants, J. Richard Blazer, Richard D. Wetzel, and Frank Wisehart, all of whom are clinging to Global Launch directorships in the face of a written consent filed by Blades and The Ohio Company removing them from office. Blades brought this action under 8 *Del. C.* § 225, asserting three counts for declaratory relief. In his first count, Blades asks this court to declare that a unanimous written consent filed by The Ohio Company and himself validly removed the defendant directors from the board. In his second count, Blades asks this court to declare that the same written consent validly elected a new board of directors for Global Launch. Lastly, Blades asks this court to declare that the written consent ratified certain actions taken at an earlier, procedurally suspect board meeting.

Although the parties raised many arguments implicating an even greater number of issues, the case ultimately comes down to a single legal issue: whether or not a forward stock split, allegedly effected by Global Launch in order to enable transfers of post-split shares from Blades and The Ohio Company to minority investors and other parties, was validly implemented. Because I find that it was not, the only two stockholders of Global Launch are Blades and The Ohio Company, the two initial stockholders. And, because they owned the only validly issued shares of Global Launch,

Blades and The Ohio Company had the voting power to execute the written consent undertaking the actions Blades now seeks to confirm.

But, Blades and The Ohio Company must be mindful of the costs of victory. Although defendant Wetzel, the lawyer for Global Launch, is primarily responsible for making a hash out of Global Launch's capital structure, all the members of Global Launch's board and management bear responsibility for inducing outside investors and certain Global Launch employees and officers to believe they had received properly issued shares in Global Launch. Blades and the rest of the Global Launch board will now have to address the contract and equitable claims available to those third parties.

II. Factual Background

These are the facts as I find them after trial.

The business plan of Global Launch was to take advantage of Blades' idea to take the concept of layaway purchasing to the internet. This inspiring concept was the premise of a business Blades had formed. Global Launch surfaced as the vehicle by which Blades would move forward with this idea, which had attracted interest from business associates Blades knew in the state of Ohio, where Blades and most of the players in this litigation live.

From the get-go, defendant Wetzel, who apparently knew Blades and many of the people interested in investing in Global Launch, played a leading role in orchestrating the direction of the business, often acting on very general directions of client sentiment without checking back in for more formal approval of later steps or the actual, final implementing documentation.

In fact, Global Launch emerged as a Delaware corporation based on a series of documents drafted by Wetzel, who is an Ohio lawyer at the firm of Crabbe, Brown & James LLP. Rather than engage Delaware counsel to help him in forming a Delaware entity, Wetzel merged an Ohio corporation, owned by Blades, into Global Launch, an empty shell Delaware corporation, using his own expertise as an Ohio lawyer who has a general corporate, commercial and securities practice. Regrettably, the record is replete with instances in which Wetzel's lack of experience in Delaware law and his general lack of attention to detail has generated uncertainty about the capital structure of Global Launch and the legal rights of various parties. Without exaggeration, it is fair to say that a thousand hours could be spent trying to fathom the implications of the various actions Wetzel took, often unilaterally it seems, as Global Launch's counsel and one would still be left with serious questions, so pervasive were the departures from expected norms in the execution of important corporate transactions. But, for better or worse, one of the errors made by Wetzel and those he advised is so fundamental that it obviates the need for a consideration of a multitude of other issues in this case.

When the parties agreed to merge Blades' Ohio corporation into Global Launch as the surviving Delaware corporation, Blades received roughly two-thirds of Global Launch's authorized stock, or 6,499,999 shares.[1] Blades was the man with the ideas

[1] JX-8 (Agreement Between Shareholders And Global Launch Incorporated (March 1, 2008)). For purposes of simplicity, I am eliding much of the complexity in Wetzel's approach to making Global Launch a Delaware corporation. By way of example of Wetzel's style, the merger resulting in Global Launch was consummated in an agreement of merger dated February 15, 2008. JX-79 (Agreement of Merger Between MyLayaway Online, Inc. and Global Launch Incorporated (February 15, 2008)). But Wetzel waited until May 15, 2008 to cause the

behind Global Launch, and had contributed his business and its internet layaway software concepts to Global Launch. Blades was also to be the President and driving managerial force behind the company.[2]

The other one-third of the authorized shares were to go to a grandly named Ohio corporation, "The Ohio Company," in exchange for its contractual promise to infuse a half million dollars into Global Launch.[3] Through a series of two shareholders agreements,[4] Blades, the representatives of The Ohio Company, and Wetzel agreed to the initial composition of the Global Launch board.[5] The board was to be comprised of Blades, Wetzel, Blazer,[6] and third-party defendant Lindsay Borden.[7] Under the terms of the first shareholders agreement, executed on December 14, 2007 (the "December 2007 Agreement"), the board could only be changed by an affirmative vote of "80% of the shares outstanding," i.e., by both Blades and The Ohio Company acting together.[8] By a second shareholders agreement (the "March 2008 Agreement"),[9] executed around May 1, 2008, but backdated by Wetzel to March 1, 2008,[10] the parties eliminated that restriction by expressly superseding the prior agreement through an unambiguous provision drafted

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certificate of merger to be filed, which by virtue of that same document was the effective date of the merger under Delaware law. JX-80 (State of Delaware Certificate Of Merger Of Foreign Corporation Into A Domestic Corporation (May 15, 2008)).

[2] JX-8 Schedule A.

[3] JX-8; JX-59 Vesting Schedule (Consulting Services and Non-Disclosure Agreement (December 14, 2007)).

[4] JX-1 (Shareholder Rights Agreement By And Among All Of The Shareholders Of Global Launch Incorporated (December 14, 2007)); JX-8.

[5] *See* JX-1 § 3 (setting forth Global Launch's board of directors); JX-8 Schedule A (same).

[6] Defendant Blazer is one of three principals and a director of The Ohio Company.

[7] Third-party defendant Lindsay Borden is also a principal and director of The Ohio Company.

[8] December 2007 Agreement § 3.

[9] JX-8 ("March 2008 Agreement").

[10] Tr. at 211 (Wetzel).

by Wetzel.[11] But because the Global Launch certificate of incorporation contained a provision for cumulative voting,[12] The Ohio Company was still guaranteed board representation if it maintained its one-third interest.

As Global Launch moved forward in its initial year, it is clear that the intention on the part of Blades, The Ohio Company, and other members of the board was for Global Launch to sell stock to investors to raise needed capital.[13] The need for additional capital was further stimulated by the reality that The Ohio Company was apparently not willing or able to actually put up the half million dollars it had contractually promised, and instead sought to raise that amount through a sale of a portion of its own Global Launch stock.[14] For his part, Blades began considering giving certain employees gifts of his Global Launch stock to motivate and reward them.[15]

To facilitate these endeavors, the board and Wetzel appear to have subjectively intended to have Global Launch increase its authorized shares from 10,000,000 to 50,000,000, and then to engage in a stock split in which the shares held by Blades and The Ohio Company would be split 1 for 5.[16]

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[11] *See* March 2008 Agreement § 15(f) ("This [March 2008] Agreement supersedes all prior 'buy and sell' agreements or understandings between the parties or any of them respecting the Stock *[or any other matters respecting the relationship of the parties and the exercise of voting rights with respect to the Stock]*.") (emphasis in original).
[12] JX-58 (Global Launch Certificate of Incorporation (July 31, 2007)) Article 4.
[13] Tr. at 70-71 (Blades); Tr. at 269 (Wetzel).
[14] Tr. at 18 (Blades); Tr. at 190 (Wetzel) ("it became clear as we went on into the early months of 2008 that [The Ohio Company] was going to need to sell stock to investors.").
[15] Tr. at 21 (Blades); JX-64 (email from Blades to Wetzel (October 1, 2008)).
[16] Tr. at 69-71 (Blades); Tr. at 480-81 (Blazer); JX-6 (Certificate of Actions Taken By All of the Shareholders and Directors of Global Launch Incorporated To Amend the Certificate of Incorporation To Increase the Authorized Shares To 50 Million Shares Par Value $0.00010 (March 1, 2008)).

But, as will be the major focus of this decision, the only validly authorized amendment to the certificate of incorporation — *if any* — was to increase the number of authorized shares from 10 million to 50 million. To do so, on March 1, 2008, Blades and The Ohio Company, along with the directors of Global Launch, agreed in a resolution to authorize an amendment to Global Launch's certificate of incorporation (the "March 1, 2008 Resolution").[17] That resolution purports to reflect "a unanimous vote of the shareholders and directors" in favor of the following amendment to Global Launch's certificate of incorporation:

> The Certificate of Incorporation of this corporation shall be amended by changing the Article number 4 thereof so that, as amended, said Article shall be and read as follows: The total number of shares of stock which the corporation shall have authority to issue is Fifty Million (50,000,000) and the par value of each such shares [sic] is $0.00010 amounting in the aggregate to Five Thousand Dollars ($5,000), effective May 1, 2008.[18]

Although the resolution states that the amendment would be effective on May 1, 2008, Wetzel did not cause a certificate of amendment to be filed with the Delaware Secretary of State until December 8, 2008.[19] That certificate amendment is the only amendment to Global Launch's certificate of incorporation. Under our law, the amendment to the certificate only became effective when filed with the Delaware Secretary of State.[20]

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[17] *Id.* ("March 1, 2008 Resolution").
[18] *Id.*
[19] JX-81 (State of Delaware Certificate of Amendment of Certificate of Incorporation (December 8, 2008)).
[20] 8 *Del. C.* § 103(d) ("Any instrument filed in accordance with subsection (c) of this section shall be effective upon its filing date.").

By its plain terms, the March 1, 2008 Resolution did not effect a stock split. But the Global Launch board proceeded not only as if the certificate of amendment had been timely filed, but also as if a split had somehow been effected. Even Blades admits that he had subjectively agreed at some point to the concept of a split and that he thinks The Ohio Company did as well.[21] But there is no evidence of any board resolution authorizing a split or any subsequent stockholder vote or consent approving that resolution. As therefore might be expected, it is impossible to determine in what, if any sequence, the relevant players agreed on a split, or when the split was supposedly approved by the board and then the stockholders.

Throughout the rest of 2008, the Global Launch board proceeded with plans to issue stock to investors being identified by The Ohio Company. Investor presentations were made and investor materials were created by Wetzel, including a private placement memorandum to be distributed to potential investors that would enable them, if interested, to then execute a corresponding subscription agreement to purchase shares.[22] These materials strongly suggested that Global Launch[23] would be issuing stock directly to the investors.[24] Meanwhile, Blades compiled a preliminary list of employees to whom

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[21] *See* Pl. Ans. Post-Tr. Br. at 4 ("Mr. Blades does not dispute the parties intended to effect a stock split.").
[22] Tr. at 193 (Wetzel); JX-11 (Global Launch Private Placement Memorandum (April 1, 2008)).
[23] Both the private placement memorandum and the subscription agreement instruct investors to make their checks payable to Global Launch. JX-11; JX-61 (Executed Subscription Agreements between various investors and Global Launch).
[24] *See, e.g.,* JX-11 at 8 ("Subscriptions for Profit Sharing Units (the "Units") referred to as the "Interests" issued by GLOBAL LAUNCH INCORPORATED (the "Company") are offered hereby at a price of $10,000.00 per interest to persons acceptable to the Issuer, Global Launch Incorporated . . . . The Issuer is Global Launch Incorporated . . . .").

he wished to give stock and shared it with Wetzel, but left his ultimate determination of specific amounts for a later time.[25]

As of this time, all was chummy in the Global Launch family. Wetzel's inattention to detail in some ways seems attributable to the fact that the board members were gregarious with each other — buddies in business. But as is so often the case, things then took a decidedly negative turn, and the lack of formality would come to have a severe cost. In the last days of November, 2008, Blades was arrested and charged with a felony in embarrassing circumstances.[26] Although he later pled guilty to a misdemeanor and paid only a $1,000 fine, the attendant publicity was thought bad for the company and Blades resigned as President and from his post as director.[27] At this time, defendant Frank Wisehart stepped in to replace Blades as director, and, on account of his previous experience in the technology field, was appointed to the newly created position of Chief Technology Officer.[28]

Close on the heels of, and not coincidental to, Blades' departure from the board, Wetzel, working in concert with directors Blazer and Wisehart and increasingly without full or timely notice to Blades, stepped up a series of purported transfers of Global Launch stock. Many of those purported transfers were to investors identified by The

[25] JX-64 ("Later we will discuss the amount of stock.").
[26] Tr. 287 (Wetzel); Pl. Op. Post-Tr. Br. at 12.
[27] Tr. at 24 (Blades); Tr. at 287 (Wetzel); JX-65 (Letter of Resignation from Rusty Blades (December 1, 2008)).
[28] JX-16 (Global Launch Meeting of Board of Directors Minutes (December 1, 2008)); JX-72 (Certificate of Actions Taken By All of the Directors of Global Launch Incorporated (December 1, 2008)).

Ohio Company.[29] Other transfers were to some of the employees identified by Blades as likely candidates to receive gifts of stock from his share. But the cursory documentation Wetzel prepared did not accurately or reliably reflect the substance of these transactions.[30] Moreover, none of those transfers supposedly made by The Ohio Company complied with the provisions of the March 2008 Agreement granting Blades a right to notice and a right of first refusal.[31] Nor did the transfers comply with the provisions of that same agreement prohibiting any transfer of Global Launch stock within two years of its acquisition "except with an opinion of counsel to the Company"[32] — namely, an opinion from Wetzel.[33]

Furthermore, Wetzel proceeded to transfer stock from Blades to employees in amounts and at prices Wetzel did not confirm in writing with Blades. Blades contends that Wetzel acted without authority in purporting to give out his stock to others without

[29] *See* JX-55 (Stock Ledger of Global Launch).
[30] In fact, the only documentation produced at trial is the stock ledger, maintained entirely by Wetzel. Tr. at 274-75 (Wetzel). The stock ledger is beyond confusing. The documentation of supposed transfers is comprised of a series of footnotes to the originally issued Global Launch stock certificates held by Blades and The Ohio Company. These footnotes purport to implement the "5 to 1 split," as well as then evidence the transfers to various investors and donees identified by The Ohio Company, as well as people to whom Wetzel claims Blades instructed him to donate some of his shares. JX-55.
[31] March 2008 Agreement § 4(a) (governing voluntary transfers and requiring written notice and providing the non-selling stockholder a right of first refusal); *id.* § 6 (governing voluntary gift transfers and requiring written notice to the stockholder not giving the gift and providing the stockholder not giving the gift a right of first refusal).
[32] March 2008 Agreement § 2.
[33] *See* March 2008 Agreement Schedule A (providing that Wetzel is general counsel to Global Launch). At trial, Wetzel said he orally gave undated and unspecified opinions to this effect to himself. Tr. at 342-45 (Wetzel). Suffice it to say, that is not what the agreement he drafted contemplated.

finalizing the precise amounts and persons involved in the gifts.[34] I credit Blades' testimony while recognizing that the recipients were largely in accord with Blades' previous inclinations.[35] That is, I find it more likely than not that Wetzel proceeded without obtaining formal, final approval from Blades, figuring he would ask Blades for forgiveness later. To say the least, it is odd that gifts of stock would not be documented, even if for no other reason than to address the tax consequences to all concerned. More troubling, Wetzel also got the board to give his law firm a large amount of stock that supposedly came from both Blades and The Ohio Company,[36] supposedly to hold in escrow to secure payment for his firm's legal services.[37] Likewise, the remaining directors doled out several cognovit promissory notes to themselves, their friends, and their family members, all without documentation of the purported debts they were allegedly securing.[38] By these actions, Wetzel claims that Blades and The Ohio Company relinquished their sole ownership of the equity of Global Launch and were left with only 52% of the shares collectively.

Fundamental to all these supposed transfers, however, was the notion that there had been a stock split. That is, each of these transfers was supposedly not from Global Launch itself, but of post-split shares owned by either Blades or The Ohio Company. In Wetzel's efforts to document these suspect transfers, the consistent theme is that Blades,

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[34] Tr. at 47 (Blades).
[35] *Compare* JX-55 *with* JX-64.
[36] The stock ledger indicates that 1,666,667 shares from Blades and The Ohio Company each were transferred to Wetzel's law firm to hold in escrow. JX-55.
[37] JX-55 (Global Launch stock ledger).
[38] JX-25-32 (Cognovit Promissory Notes).

by way of the stock split, owned approximately 32 million shares and The Ohio Company owned 18 million shares.[39] That is, Wetzel acted as if a valid stock split had occurred and then proceeded to use that erroneous premise as the foundation on which to build more shaky transactions.[40] A board resolution adopted on December 1, 2008, the day Blades left the board, evidences this. In that resolution (the "December 1, 2008 Resolution"), the board authorized an amendment to the private placement memorandum drafted by Wetzel and already on file with the Ohio Division of Securities:

> The documents on file with the Ohio Division of Securities with respect to the offering of stock in Global Launch Incorporated shall be amended to reflect the resignation of Rusty Blades as an officer and director of the company, and the election of Frank Wisehart as an officer and director, and that the offering of stock *shall reflect the 5 to 1 split*, which will be offered to all investors subscribing prior to December 31, 2008, due to outstanding offers to investors. . . .[41]

After he left the board, Blades credibly claims to have been increasingly frozen out from receiving information about the company.[42] After unsuccessfully attempting to persuade Wetzel to cause the board to call an overdue annual meeting,[43] Blades got a remaining ally on the board, Chris Haydocy,[44] to notice such a meeting although a single member of the board lacked the authority to do so. The rump meeting was held on

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[39] Wetzel testified, that in order to figure out the post-split shares that Blades and The Ohio Company owned, he simply multiplied their initial holdings by five. Tr. at 338 (Wetzel).
[40] Tr. at 269 (Wetzel) ("All the shares on the stock ledger are – reflect transfers."); Tr. at 272 (Wetzel) ("There are no newly-issued shares on the stock ledger.").
[41] JX-72 (Certificate of Actions Taken By All of the Directors of Global Launch Incorporated (December 1, 2008)) (emphasis added).
[42] Tr. at 25-26 (Blades).
[43] Tr. at 360-61 (Wetzel). Wetzel admitted at trial that as of August, 2009, Global Launch had not held a stockholders meeting in over thirteen months. *Id.*
[44] Non-party Chris Haydocy was added to the board in September, 2008 "by agreement of the shareholders Rusty Blades and The Ohio Company and by appointment by the Board of Directors." Stip. ¶ 9.

November 18, 2009, and Blades gave notice to all those stockholders listed on the stock ledger that Wetzel maintained for the company, in part because Wetzel had denied Blades other information he had requested, including copies of any subscription agreements executed in conjunction with the private placement offering.[45]

At the meeting, the stockholders purportedly elected seven new directors for a one year term: Blades, Chris Haydocy, Doug Hart, Gerrick Doss, Bill Delord, Larry Calhoon, and P.J. Haydocy.[46] Wetzel, who had already sent a letter to the Global Launch stockholders informing them that he believed the meeting was not validly called,[47] attempted to attend the stockholders meeting, but after he had the chance to tell the stockholders who had gathered there that it was his belief that the meeting would not result in valid stockholder action,[48] he was refused further access and escorted out.[49] Immediately after the annual meeting on November 18, 2009, the newly elected board consisting of Blades and the other six individuals listed above participated in a board meeting. At this meeting, the new board purported to do the following: i) adopt bylaws for Global Launch; ii) remove any current officer of Global Launch and reinstate Blades as President and appoint Hart as secretary; iii) terminate Global Launch's representation by Wetzel's law firm; iv) cancel certain gift transfers of The Ohio Company's stock as being in violation of share transfer restrictions contained in the March 2008 Agreement;

[45] JX-67 (Letter from Haydocy and Blades' counsel to Wetzel (November 5, 2009)).
[46] JX-41 (Minutes of Annual Meeting of Shareholders of Global Launch Incorporated (November 18, 2009)).
[47] Tr. at 303 (Wetzel).
[48] Tr. at 306 (Wetzel).
[49] *Id.*

v) terminate certain cognovit promissory notes issued by the Global Launch board after Blades' resignation; vi) investigate whether The Ohio Company had in fact fulfilled its contractual obligation to invest $500,000 in Global Launch; vii) terminate an employment contract with Wisehart;[50] and viii) terminate the escrow agreement with Wetzel's law firm.[51]

In apparent recognition that the annual stockholders meeting had been called without the requisite board authority, and on the basis of a growing belief that Blades and The Ohio Company represented the only two Global Launch stockholders, Blades and The Ohio Company executed a unanimous written consent (the "Written Consent") on March 8, 2010.[52] The Written Consent purported to do two things. First, it ratified the actions taken at the board meeting of November 18, 2009.[53] Second, the stockholders resolved "that any persons claiming a right to title as director of [Global Launch], including without limitation Frank Wisehart, J. Richard Blazer, Richard D. Wetzel, Jr., and R. Lindsay Borden are hereby removed as directors of the Corporation . . . [and that] Rusty Blades, Chris Haydocy, Chris Beasley, Gerrick Doss, Bill Delord, Larry G. Calhoon, and R. Lindsey [sic] Borden are hereby elected as directors of [Global Launch]"

[50] That agreement set forth Wisehart's compensation for his role as "Technology Manager" of Global Launch and was executed the same day Blades resigned from the board. JX-18 (Technology Management Agreement (December 1, 2008)).
[51] JX-42 (Minutes of a Meeting of the Board of Directors of Global Launch Incorporated (November 18, 2009)).
[52] JX-47 (Unanimous Written Consent of the Stockholders of Global Launch Incorporated (March 8, 2010)) ("Written Consent").
[53] *Id.*

for a one year term.[54] The Written Consent was signed by Blades, and by Larry Calhoon[55] on behalf of The Ohio Company.[56]

On the same day he executed the Written Consent, Blades then brought this action under 8 *Del. C.* § 225 to confirm the election of the new board by the Written Consent, as well as to confirm the Written Consent's ratification of the actions taken at the November 18, 2009 board meeting. By the time of trial, Blades had disclaimed the validity of the November 18, 2009 stockholders meeting and the actions taken at the board meeting of the same day,[57] and based his case solely on the Written Consent. The § 225 action thus pits Blades, The Ohio Company, and the newly elected directors against an incumbent board faction led by defendants Wetzel, Blazer, and Wisehart.

With this background, I now turn to the parties' arguments in favor of their respective positions.

III. The Contending Positions Of The Parties

The parties' papers contain a confusing and evolving mix of arguments. At first, the major argument of the defendants was that the December 2007 Agreement prevented the board from being changed absent an 80% vote of the stockholders.[58] This argument, although never abandoned, flew in the face of the plain language of the March 2008

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[54] *Id.*
[55] Non-party Larry Calhoon is the third principal and director of The Ohio Company, along with Borden and Blazer.
[56] Written Consent.
[57] Pl. Op. Post-Tr. Br. at 17.
[58] *See* Def. Op. Pre-Tr. Br. at 8; Def. Ans. Pre-Tr. Br. at 5-6; Def. Op. Post-Tr. Br. at 32 ("As shown below, the factual circumstances and legal effect of the merger of Blades' predecessor company My Layaway, with and into [Global Launch], requires that the [December] 2007 Agreement survive [sic] for purposes of . . . requiring an 80% supermajority vote of the shareholders to alter the constitution of the Board of Directors.").

Agreement that plainly superseded the December 2007 Agreement. The defendants then noticed that the Global Launch certificate of incorporation contained a provision for cumulative voting and argued that Blades and The Ohio Company, although holding over 52% of the shares even in the defendants' calculation, could not remove the entire board and elect a new one without offending the minority stockholders' rights.[59]

For his part, Blades' arguments took the shape of arguing that all of the various transfers that Wetzel effected from December 15, 2008 and onward were invalid for numerous reasons, the most important of which eventually became that a stock split had never been validly accomplished. On that basis, Blades argued that the only two stockholders of Global Launch were himself and The Ohio Company, having received the only validly issued and authorized 10 million shares.

In so arguing, Blades acknowledges that he had subjectively believed that a split had occurred, knew that outside investors were contributing capital to receive shares, thought that director Haydocy had been granted shares, and that he himself intended to, but never in fact did, give gifts of some of his shares to certain employees. Likewise, Blades does not duck from recognizing that he sought, and received, proxies from some of these employees when Haydocy called the invalid November 18, 2009 stockholders meeting. But he contends that the fact that he was aware of, and in general agreement with, these things, does not cure the failure of Global Launch to effect a valid stock split. Blades also impliedly argues that the defendants, among whom Wetzel is a leader, bear as much or even more responsibility for the pervasive confusion surrounding Global

[59] Def. Ans. Post-Tr. Br. at 14-16.

Launch's capital structure than he does. In fact, Blades recognizes that one of the first responsibilities his board slate will have, upon seating, is to address the claims of various investors and employees to Global Launch stock or recompense for not receiving it validly.[60]

Both Blades and the defendants recognize the central importance of the stock split issue to this case. Although the defendants did not explicitly concede the point that if the stock split did not validly occur, Blades and The Ohio Company would be the only two stockholders of Global Launch, their arguments in favor of their position demand that they do so. The defendants maintained that every stockholder of Global Launch, outside Blades and The Ohio Company, received their shares via transfers made on or after December 15, 2008 from either The Ohio Company or from Blades.[61] Moreover, the stock ledger maintained by Wetzel indicates that the share certificates originally issued to Blades and The Ohio Company were "[c]ancelled and reissued to reflect the 5 to 1 split," and to "issue" the certificates that Wetzel then mailed to each purported stockholder on the stock ledger.[62] Indeed, all of the questionable transfers that Wetzel effected after Blades left the board were said to be of post-split shares.[63] But if there was no split, a fundamental premise of those dubious transfers was flawed — namely that the shares that were purportedly transferred never validly existed, and therefore were void.

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[60] Tr. at 34 (Blades).
[61] Tr. at 269 (Wetzel).
[62] JX-55.
[63] Def. Ans. Post-Tr. Br. at 8 ("[A]fter the Charter Amendment was filed with the Secretary of State's office, Mr. Wetzel, as corporate secretary, caused the transferred share certificates *reflecting post-split shares* to be delivered to the minority shareholders.") (emphasis added).

Yet although the defendants' arguments acknowledge this, they offer the retort that the split should nonetheless be recognized as having validly occurred because Blades and The Ohio Company admit that they supported the concept of a split. Because there is evidence that the board also supported that concept, the defendants would have me ignore the reality that there is no evidence of any specific date on which the Global Launch board approved a resolution authorizing a stock split, the Global Launch stockholders then either adopted the precise split reflected in such a resolution by vote or appropriate written consents, and the company then filed the required certificate of amendment with the Delaware Secretary of State.

For the reasons that follow, I reject the defendants' argument as being inconsistent with the established law of this state, which requires scrupulous adherence to statutory formalities when a board takes actions changing a corporation's capital structure.

IV. Legal Analysis

In analyzing the validity of the 5 to 1 forward stock split, I first set forth the required corporate formalities that must be adhered to in order to implement a stock split. Then, I address and reject the defendants' argument that they somehow accomplished these required formalities.

A. The Required Formalities For A Valid Stock Split Under The Delaware General Corporation Law

A stock split is a means by which a corporation changes the number of outstanding shares by either dividing the existing number of outstanding shares by a specified number (a reverse stock split), or multiplying the existing number of outstanding shares by a specified multiplier (a forward stock split).[64] Although there is no express use of the term "stock split" in the Delaware General Corporation Law ("DGCL"), § 242(a)(3) of the DGCL provides that "a corporation may amend its certificate of incorporation, from time to time, so as . . . [t]o . . . subdivid[e] or combin[e] the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares . . . ."[65] Thus, in order to effect a forward or reverse stock split, the corporation must follow the prescribed corporate formalities to amend its certificate of incorporation in such a manner that "splits" the outstanding shares in accordance with the corporation's intentions.[66] Specifically, § 242(b)(1) of the DGCL, which governs all amendments to the certificate of incorporation, requires that the board do three things.[67]

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[64] FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 8.5 (3d ed. 2009) ("BALOTTI & FINKELSTEIN").

[65] 8 *Del. C.* § 242(a)(3).

[66] "The final clause of Section 242(a)(3) was added by amendment in 1996 to make clear that an amendment of the certificate of incorporation is necessary in order to effect a forward stock split." BALOTTI & FINKELSTEIN § 8.4 n.35. It is often necessary, especially in the case of a reverse stock split, for the certificate amendment to specify whether and to what extent fractional shares will be delivered or exchanged under the split. 8 *Del. C.* § 155; *see also* BALOTTI & FINKELSTEIN § 8.4; 2 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 32.05[2] (2009) ("DREXLER").

[67] These three things are required not only for certificate amendments effecting a stock split, but for "[e]very amendment authorized by subsection (a)" of § 242. 8 *Del. C.* § 242(b); *see also* FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 242.3 (5th ed. 2009) ("FOLK"); BALOTTI & FINKELSTEIN § 8.10; 2 DREXLER § 32.04[2].

First, the board of directors must duly adopt a resolution "setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote . . . or directing that the amendment proposed be considered at the next annual meeting of the stockholders."[68] Alternatively, the proposed amendment may be submitted to the stockholders entitled to vote thereon for their adoption by written consent.[69]

Second, the board must give the stockholders proper notice of the proposed amendment and stockholder meeting before asking the stockholders to vote on it.[70]

Finally, if the stockholders vote to approve the amendment, in order to give effect to the amendment, "a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with . . . section [242] shall be executed, acknowledged and filed and shall become effective in accordance with § 103 [of the DGCL]."[71]

The order of these three events is temporally significant; the "sequence must be followed precisely, and may not be altered by charter provision."[72] That is, "the board is

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[68] 8 *Del. C.* § 242(b)(1).
[69] FOLK § 242.3; BALOTTI & FINKELSTEIN § 8.10; 2 DREXLER § 32.04[2].
[70] 8 *Del. C.* § 242(b)(1). The generally applicable stockholders meeting notice provisions contained in 8 *Del. C.* § 222 are expressly incorporated by reference in § 242(b)(1). *Id.* As for notice of the substance of the proposed amendment, the board must supply the stockholders with either i) a full recitation of the proposed amendment; or ii) a brief summary of the proposed amendment and its effects. *Id.*; BALOTTI & FINKELSTEIN § 8.10; 2 DREXLER § 32.04[2]; FOLK § 242.3.1.
[71] 8 *Del. C.* § 242(b)(1). Section 103(d) of the DGCL "establishes the general rule that the effective date of a filed instrument is its 'filing date.'" 1 DREXLER § 7.04.
[72] 2 DREXLER § 32.04.

statutorily required to approve the . . . stock split *before* it is submitted to the shareholders."[73]

B. The Global Launch Board's Purported Adherence To Formalities

The defendants agree, at least initially, that in order for Global Launch to have effected a valid stock split, the three requirements outlined above must have been followed in order.[74] The problem for the defendants, however, is the lack of evidence they supply in support of their contention that these three requirements were in fact met.

The first requirement to effect a stock split is that the board adopt a formal resolution proposing the amendment, declaring its advisability, and either calling for a special meeting of the stockholders or placing the matter on the agenda for the next annual meeting.[75] The defendants point to two resolutions as evidence that this requirement was met. The first of these is the March 1, 2008 Resolution, which authorized the amendment to Global Launch's certificate of incorporation that would increase the "total number of shares of stock which the corporation shall have the authority to issue [from the 10 million shares in Global Launch's original certificate of incorporation to] 50 Million" shares.[76] The second resolution to which the defendants point is the December 1, 2008 Resolution, which authorized the board to amend the

[73] *Ixcore, S.A.S. v. Triton Imaging, Inc.*, 2005 WL 1653942, at *1 n.7 (Del. Ch. July 8, 2005) (citing 8 *Del. C.* § 242(b)) (emphasis in original).
[74] Post-Tr. Tr. at 34 (counsel for defendants).
[75] 8 *Del. C.* § 242(b)(1).
[76] March 1, 2008 Resolution.

private placement memorandum on file with the Ohio Division of Securities such that "the offering of stock *shall reflect* the 5 to 1 split . . . ."[77]

The second requirement to effect a stock split is that the stockholders approve the board resolution by either voting in favor of it at a stockholders meeting or expressing approval by written consent.[78] As to this requirement, the defendants are unable to identify when either of these methods of stockholder approval were used. There is no evidence of an actual meeting at which Blades and The Ohio Company, upon proper notice and receipt of the full text or summary of the proposed amendment to the certificate of incorporation that would implement the stock split, voted to approve it. Nor is there evidence that Blades and The Ohio Company filed written consents after receiving the required notice. Instead, the defendants point to the trial testimony of Blades, and Blazer on behalf of The Ohio Company as a Global Launch stockholder, where both admit that they "approved" the concept of a 5 to 1 split.[79]

The third requirement for a valid certificate amendment is the filing of a certificate with the Secretary of State certifying that the amendment has been duly adopted in accordance with the statutory formalities and setting forth the amendment in full. To satisfy this requirement, the defendants point to the certificate of amendment that Wetzel filed with the Secretary of State on December 8, 2008 that stated, in full, the amended text of article 4 of Global Launch's certificate of incorporation:

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[77] December 1, 2008 Resolution (emphasis added).
[78] 8 *Del. C.* § 242(b)(1); FOLK § 242.3; BALOTTI & FINKELSTEIN § 8.10; 2 DREXLER § 32.04[2].
[79] Tr. at 69-71 (Blades); Tr. at 480-81 (Blazer).

> The total number of shares of stock which the corporation shall have the authority to issue is Fifty Million (50,000,000) and the par value of each of such shares is $0.00010 amounting in the aggregate to Five Thousand Dollars ($5,000).[80]

For reasons I next explain, this "evidence" is evidence of non-compliance with our law, and not of a valid stock split.

C. The Stock Split Was Not Valid

Delaware law is clear that strict compliance with statutory requirements is expected when boards change the capital structure of the corporation. If our law was ever unclear on this point, the Supreme Court's related decisions in *Waggoner v. Laster* and *STAAR Surgical Company v. Waggoner* made it plain that law trumps equity in this area of corporate decisionmaking.[81] This mandate is premised on "a sensible assumption . . . that the capital structure and ownership of corporations are matters of great importance and should be settled with clarity."[82] Although cases such as *STAAR Surgical Company v. Waggoner*, *Waggoner v. Laster, Grimes v. Alteon*, and *Liebermann v. Frangiosa* dealt with a board's issuance of stock, the same policy reasons recognized in those cases for requiring scrupulous adherence to corporate formalities are germane to a board's adoption of a stock split because both board actions involve a change in the corporation's capital structure. Indeed, adherence to formalities is even more important when, as in the

[80] JX-81 (State of Delaware Certificate of Amendment of Certificate of Incorporation (December 8, 2008)).
[81] *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991); *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990).
[82] *Liebermann v. Frangiosa*, 844 A.2d 992, 1004 (Del. Ch. 2002) (citing *Grimes v. Alteon*, 804 A.2d 256, 262 (Del. 2002); *STAAR*, 588 A.2d at 1136; *Triplex Shoe Co. v. Rice & Hutchins, Inc.*, 152 A. 342, 347 (Del. 1930)).

case of a split, the change in capital structure and ownership requires a certificate amendment.[83] This conclusion rests on the explicit reasoning found in *STAAR* itself, and the heavy weight that the Delaware Supreme Court placed on the fact that an issuance of new stock, like a stock split, requires an amendment to a corporation's certificate of incorporation, and can rightly be seen as "an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise:"[84]

> 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.*[85]

Although it is clear from the record that the directors of Global Launch and Blades and The Ohio Company subjectively wished to adopt a stock split, the reality is that Global Launch did not adhere to the requirements of § 242(b)(1) of the DGCL. As an initial matter, there is no evidence of an adequate board resolution proposing an amendment that would effect a stock split. Section 242(a) of the DGCL provides that any

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[83] 8 *Del. C.* § 242(b)(1); *Ixcore,* 2005 WL 1653942, at *1.
[84] *STAAR*, 588 A.2d at 1136.
[85] *Id.* (emphasis added). *See also Grimes*, 804 A.2d at 266 ("Certainty in investor expectations emphasizes the need for written board approval of any such transaction [involving the issuance of stock].").

amendment that would effect "a change in stock or . . . an exchange, reclassification, subdivision, combination or cancellation of stock" will be valid "so long as [the] certificate of incorporation as amended would contain . . . such provisions as may be necessary to effect such change, exchange, subdivision, combination or cancellation."[86] In this regard, it is crucial to distinguish an amendment to the certificate of incorporation that merely increases a corporation's authorized but unissued capital stock, as expressly authorized under the first clause of § 242(a)(3), from an amendment that changes the number of outstanding shares, as expressly authorized by the amended language in the last clause of § 242(a)(3) that contemplates a distinct charter amendment that would have the effect of "subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares."[87]

By its plain terms, the March 1, 2008 Resolution resolves to amend Global Launch's certificate of incorporation to increase the "total number of shares of stock which the corporation shall have the authority to issue" from 10 million to 50 million, and says nothing about implementing a forward stock split.[88] Whether this is because Wetzel believed he could simply later cause a split of Global Launch's stock without an amendment to the certificate of incorporation, as seems likely, or because he simply failed to later get an amendment to split the stock properly and timely approved, is

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[86] 8 *Del. C.* § 242(a); *cf. Chalfin v. Hart Holdings Co., Inc.*, 1990 WL 181958, at *1 (Del. Ch. Nov. 20, 1990) (observing that a company "proposed an amendment to the certificate of incorporation that *would have effected a 10 to 1 reverse stock split* . . . [by] chang[ing] the par value from $.01 per share to $1.00 per share, and convert[ing] each block of 100 'Existing Shares' into one 'New Share.'") (emphasis added).
[87] 8 *Del. C.* § 242(a)(3).
[88] March 1, 2008 Resolution.

without moment. What counts is that the March 1, 2008 Resolution plainly does not involve a board resolution approving a stock split.

The defendants' reliance on the December 1, 2008 Resolution is also unavailing, albeit for different reasons. That resolution, far from implementing a stock split, merely authorizes the board to amend the private placement memorandum such that the "offering of stock *shall reflect* the 5 to 1 split . . . ."[89] As a matter of logic, a document which purports to "reflect" a prior action, like a stock split, does not constitute an actual vote to approve the split in the first instance. Nor does this "reflection" ratify the prior defect in obtaining proper approval. To do that, and legally cure the prior defect, what was necessary was for the Global Launch board to take all the required steps: i) properly adopt a resolution with the required substantive content that would ratify the prior understanding; ii) attain the proper stockholder approval; and iii) file an implementing certificate of amendment.[90] That was never done.

Moreover, the record is devoid of any written notice to the stockholders specifying when the stockholders would vote on the proposed amendment. Likewise, nowhere in the two resolutions cited by the defendants is there any board declaration of the proposed amendment's advisability.[91]

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[89] December 1, 2008 Resolution (emphasis added).

[90] 8 *Del. C.* § 242(b)(1); FOLK §§ 242.1, 242.3; BALOTTI & FINKELSTEIN § 8.10; 2 DREXLER § 32.04[2].

[91] Putting aside the lack of any evidence in the record of a stockholders meeting, even the March 1, 2008 Resolution that purports to represent the unanimous stockholder approval of the proposed certificate amendment is not signed by a single stockholder. March 1, 2008 Resolution. Instead, the resolution is signed by Wetzel, as corporate secretary, and Borden in his capacity as CFO, as *witness* to the supposed "unanimous vote of the shareholders and directors." *Id.* Even were I to accept that the March 1, 2008 Resolution saying nothing about a stock split

Recognizing that the documentary evidence does not satisfy the requirements of § 242(b)(1), the defendants instead press a more generalized notion of fairness: because a general aura of subjective agreement existed among Blades, The Ohio Company, and the Global Launch directors with respect to the stock split, I should ignore the DGCL and find, using some unspecified judicial authority to ignore the statute, that Global Launch effected a stock split at some unspecified point anyway. To that end, the defendants' arguments have the flavor that it is just downright unfair for Blades, who admitted he was in favor of a stock split, to fall back on technicalities in an effort to "undo" that which has been, in the defendants' opinion, "done," even if done in a way not countenanced by our General Assembly.

Even if I were to weigh the equities, I am not convinced they tilt in the defendants' favor, given the primary role Wetzel played in creating pervasive uncertainty about Global Launch's ownership. Moreover, many of the actions the defendants took after Blades left the board were self-interested, poorly documented, and greatly suspect as both

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encapsulated the board's adoption of a resolution proposing an amendment to effect a stock split, the board's declaration of the amendment's advisability, adequate notice, and the stockholder vote of approval — and nothing on that document's face evidences any of those things — that resolution still does not reflect the requisite temporality, namely, that the board must adopt the resolution proposing the amendment and declaring its advisability *before* notifying the stockholders and submitting it to them for approval by vote or written consents. 8 *Del. C.* § 242(b)(1); *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) ("Like the statutory scheme relating to mergers under 8 *Del. C.* § 251, it is significant that two discrete corporate events must occur, *in precise sequence*, to amend the certificate of incorporation under 8 *Del. C.* § 242: First, the board of directors must adopt a resolution declaring the advisability of the amendment and calling for a stockholder vote. Second, a majority of the outstanding stock entitled to vote must vote in favor.") (emphasis added); *Ixcore*, 2005 WL 1653942, at *1 n.7 (citing 8 *Del. C.* § 242(b)); 2 DREXLER § 32.04. Because the March 1, 2008 Resolution clearly does not deal with a stock split, I premise my ruling on other grounds and do not address whether this temporal uncertainty compromises the certificate amendment increasing the number of authorized shares.

a legal and equitable matter. Thus, even if I were entitled to weigh equity against law, I would not rule for the defendants.

But what is more critical is that *STAAR* and other binding precedent make clear that I cannot ignore the statutory infirmity of the stock split because my equitable heartstrings have been plucked.[92] That is, in the sensitive and important area of the capital structure of the firm, law trumps equity.[93] Finally, there is no argument by the defendants that a second attempt (one adhering to the statutory formalities) at the stock split was ever made, nor is there an argument that the board or the stockholders successfully ratified the flawed amendment process.[94]

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[92] *STAAR*, 588 A.2d at 1131, 1137.

[93] *See STAAR*, 588 A.2d at 1137 (reversing the Court of Chancery's authorization, on equitable grounds, of invalidly issued shares and holding that a "court cannot imbue void stock with the attributes of valid shares."); *id.* at 1136 ("The Waggoners' attempt to trivialize the unassailable facts of this case as mere 'technicalities' is wholly unpersuasive."); *Liebermann*, 844 A.2d at 1004-05 (citing *STAAR* 588 A.2d at 1136) (noting that Delaware "case law has refused to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result."); *see also Superwire.Com, Inc. v. Hampton*, 805 A.2d 904, 909 n.17 (Del. Ch. 2002) (citing *STAAR*, 588 A.2d at 1137) (rejecting an equitable estoppel defense because the court "cannot give *any* effect to void shares even in the context of an equitable defense.") (emphasis in original).

[94] In an effort to have me excuse the invalidity of the split, the defendants point to a solitary case, *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934 (Del. Ch. 2001), to support their argument that "[t]his court has recognized that even where a corporation seeks to implement a stock split that may not have been permitted by its certificate of incorporation, a Delaware corporation may effect a *de facto* stock split through separate contracts with investors." Def. Ans. Post-Tr. Br. at 9. This argument fails for a number of reasons.

Staples arose in a very different context and this court made no ruling on the validity of the corporation's prior actions. In that extremely expedited case, the plaintiffs, stockholders of Staples, sought to preliminarily enjoin a stockholder vote on a proposed reclassification of one class of Staples common stock (Staples.com stock) into another (Staples RD stock). They did so on the basis of alleged director self-interest, various disclosure violations, and certain other arguments, including one that the vote should be enjoined because of an earlier reverse stock split of the Staples.com shares that was conducted without a specific amendment to Staples' certificate of incorporation. In that transaction, Staples, in order to achieve more favorable pricing for an anticipated Staples.com IPO, entered into a series of identical, "discrete contracts

D. Blades And The Ohio Company Are The Only Two Stockholders In Global Launch And The Court Need Not Reach The Defendants' Remaining Arguments

The parties are in agreement that initially, Global Launch had only two stockholders who together held 100% of Global Launch's authorized and outstanding stock: Blades and The Ohio Company. The disagreement centered on what happened thereafter. The defendants maintained throughout this action that other stockholders received post-split shares via transfers from Blades and The Ohio Company. But because I find that the stock split was invalid, and therefore ineffective, these transfers were of shares in Global Launch that did not exist. Put differently, from the time the first of these transfers was purportedly made, on December 15, 2008, Global Launch had only 10

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in which holders [of Staples.com shares] exchanged two shares of Staples.com for one share" of the same. *Staples*, 792 A.2d at 941. The court noted that "each of those contracts was premised on the fact that Staples' retained interest [in Staples.com] would be reduced on the same basis." *Id.* at 961. Thus, the court concluded that even if the reverse stock split was not done in conformity with Staples' certificate of incorporation, "[a]ny invalidation of the reverse split would require that the court . . . treat the individual stockholders equally with Staples . . . [and] [a]s a result, no economic differences in result could equitably ensue." *Id.* Recognizing that remedial reality, the court declined to enjoin the reclassification vote on that basis. *Id.*

The court in *Staples* did not, as the defendants contend, make a ruling on the underlying law with respect to the validity of the purported stock split. Instead, it simply reasoned that regardless of whether the stock split was proper, the economic situation facing each Staples.com shareholder vis a vis one another would be identical, and that the split was therefore no equitable reason to preliminary enjoin the vote. Moreover, the court noted that "as a purely legal matter," it was not clear that Staples' certificate did not authorize the manner in which the split was effected because the certificate "expressly state[d] that Staples' retained interest [in Staples.com] will be automatically 'adjusted in proportion to any changes in the number of outstanding shares of Staples.com Stock caused by . . . combinations (by reverse stock split, reclassification or *otherwise*) of Staples.com stock . . . .'" *Id.* n. 52 (emphasis in original). The specific, clear contracts might have satisfied the "*otherwise*" provision of the certificate. *Id.* But, in the context of an expedited preliminary injunction application, the court never answered that question.

Finally, in stark contrast to *Staples*, where the previous exchanges were absolutely clear, and so was the proposed reclassification, here Wetzel heaped uncertainty on uncertainty. Almost all of the supposed post-split transfers are deeply suspect on their own, either as a matter of law, equity, or often both. To sanction the invalid split here would therefore encourage future messes of this kind, generating precisely the uncertainty § 242 of the DGCL and Supreme Court cases like *STAAR* seek to avoid.

million authorized, issued, and outstanding shares, all of which were held by Blades and The Ohio Company alone. The stock purportedly held by minority stockholders, having never been properly authorized through a valid stock split, is, to borrow a phrase from *STAAR*, "void and a nullity."[95]

Because the only stockholders of Global Launch with validly issued shares are Blades and The Ohio Company, the other issues in the case need not be reached.[96] Having all of the current voting power, their action by Written Consent was sufficient to remove all the members of the board and elect a new board. Likewise, it was sufficient

[95] *STAAR*, 588 A.2d at 1136.

[96] For instance, the defendants' argument that the provision in the December 2007 Agreement requiring an 80% stockholder vote to alter the board of directors remained viable is without merit because that agreement was plainly superseded by the March 2008 Agreement. But because Blades and The Ohio Company had 100% of the voting shares, the Written Consent would still be sufficient even if the December 2007 Agreement was in force. Likewise, because Blades and The Ohio Company had 100% of the vote, the interesting question raised regarding whether stockholders holding less than enough votes to elect all the members to a board of a corporation having cumulative voting can take action by written consent to remove and elect an entire new slate need not be answered. *E.g.,* FRANKLIN BALOTTI ET AL., MEETINGS OF STOCKHOLDERS § 11.7 (3d ed. 2009) (noting that § 228 of the DGCL "speaks in terms of 'elections' and 'votes,'" and questioning the propriety of using written consents to remove and elect directors in a corporation that has cumulative voting). Finally, because all of the questionable transfers were of "post-split shares" that were never validly created, I need not explore the reality that i) the purported transfers by The Ohio Company violated clear provisions of the March 2008 Agreement because, among other things, no proper notice was given to Blades, no proper opinion of counsel was given by Wetzel, and no written waiver of these rights was executed as required by the Agreement; ii) the gifts of Blades' shares to programmers were executed by Wetzel without proper authorization by Blades as to the timing, amounts, and recipients; iii) the grants of shares to Wetzel's law firm and other incumbent board members may fail the entire fairness standard of review generally applicable to self-interested transactions, especially given the role of Wetzel's law firm in creating a corporate mess; iv) agreements Wetzel claims to have negotiated with Blades to give up certain other shares are suspiciously documented, of very dubious existence, and are highly questionable on equitable grounds; and v) several of the other supposed transfers and share certificate cancellations are subject to possible, perhaps even likely, invalidation on other grounds, such as lack of performance under a contract and lack of consideration.

to ratify the actions taken at the November 18, 2009 board meeting.[97] As to the last point, that does not, of course, mean that the court insulates any of the board's actions from challenge in another lawsuit. The board seated by Blades will have to face responsibility for its actions.

The fact that now Blades and The Ohio Company have sole control of Global Launch may not be the cause for celebration they may have anticipated at the outset of this litigation. Despite its name, it seems from the record that Global Launch has not impressively launched, let alone gone global. Instead, it looks as if Global Launch may need to buy office supplies on layaway itself. To make matters worse, as Blades acknowledged at trial, there are nearly fifty minority stockholders listed on the stock ledger who hold invalid Global Launch share certificates Wetzel sent them, some of whom Blades reached out to in preparation for his ineffective stockholders meeting in November, 2009.

A similar situation was encountered in the *Liebermann* case, where the defendant directors had participated in the creation and sale of preferred stock to outside investors

[97] In order for stockholder ratification to be valid, three things must exist. First, the stockholders must be fully informed of all material facts related to the act to be ratified. DONALD J. WOLFE AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.04 [a] (2009). Second, the ratification must not have been improperly coerced. *Id.* And finally, the act to be ratified must have been voidable and not void. *Michelson v. Duncan*, 407 A.2d 211, 218 (Del. 1979). The actions purportedly taken at the board meeting on November 18, 2009 are voidable acts such as terminating contracts, and initiating an investigation into whether The Ohio Company complied with its contractual obligation to invest $500,000 in Global Launch. Thus, these acts could be ratified by a fully informed, uncoerced vote, which the Written Consent represents.

that was never properly authorized in the corporation's certificate of incorporation,[98] but defended their use of a written consent to remove incumbent board members on the ground that the consents represented a majority of the *validly issued* common stock.[99] This court, in upholding the written consent and the defendants' argument with respect to the invalidly issued preferred stock, noted the Pyrrhic nature of the victory:[100]

> Although it might be galling to the plaintiffs to have Frangiosa and D'Ambrosio take advantage of a legal problem they contributed to creating, the inequity that results is no greater than that which occurred in *STAAR*, wherein a purchaser who had accepted substantial economic risk in exchange for shares was denied the benefits of the bargain he thought he made by the company with whom he had made it. . . . Even more critical, my recognition of the New Board as the proper board of MobileToys does not leave the investors [holding the invalid preferred stock] without a remedy . . . . Frangiosa and D'Ambrosio will now bear primary responsibility for directing MobileToys' response to this substantial legal problem, which exposes the company (and perhaps its directors) to rather obvious claims (*e.g.*, for equitable rescission or unjust enrichment). Another court on another day may well confront disputes arising out of the New Board's decisions, if it is unable to address the purchasers' concerns in a manner that generates consensus.[101]

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[98] Indeed, the defendant directors had purchased some of the unauthorized preferred stock for themselves. *Liebermann*, 844 A.2d at 1004.

[99] *Id.* at 1000.

[100] *E.g.,* 3 PLUTARCH'S LIVES 26 (John Langhorne & William Langhorne trans., 1st ed. Isaiah Thomas, Jr. 1804) ("Pyrrhus being wounded in the arm with a javelin, and the Samnites having plundered his baggage; and that the number of the slain, counting the loss on both sides, amounted to above fifteen thousand men. When they had all quitted the field, and Pyrrhus was congratulated on the victory, he said, 'Such another victory, and we are undone.'").

[101] *Liebermann*, 844 A.2d at 1009. In *STAAR*, the defendant director and CEO, Waggoner, in exchange for making significant personal guarantees on his company's debt, was issued 100 shares of newly created super-majority voting preferred stock, convertible to 2 million shares of common stock after a specified date if the personal guarantees were not removed by that time. *Laster v. Waggoner*, 1989 WL 126670, at *4 (Del. Ch. Oct. 24, 1989). Fearing that the other directors were about to remove him, Waggoner exercised the voting power of his convertible preferred stock to oust them through a written consent and elect himself and his wife to the board. *Id.* at *8. Waggoner and his wife, acting as the board, then approved a transaction in which the assets of his company, STAAR Surgical Company, would be sold to an acquiror. *Id.* The Court of Chancery held that the preferred stock equipped with voting rights not provided for

Global Launch and its newly elected directors will face the same difficult situation. They will have to address various claims by investors, employees, the defendants, and others if they do not straighten out the situation fairly.[102] But it is important that the capital structure of Delaware corporations be established in a reliable and certain manner. To ignore the reality that no valid split occurred would encourage a repeat of situations like this, in which uncertainty is heaped on uncertainty, with the result being a jumbled corporate mess. As noted previously, because the defendants, especially Wetzel, are as much or more responsible for this situation, no inequity is worked by seating Blades' slate. By the defendants' own acknowledgement,[103] Blades and The Ohio Company are entitled to seat a majority of the board anyway and yet the defendants have

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in STAAR's certificate of incorporation was invalid and that therefore the board of directors was not changed by Waggoner's actions. *Id.* at *9. Consequently, this court further held that Waggoner's approval of the transaction was also invalid because it lacked the requisite board authority. *Id.* The Supreme Court affirmed. *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990). The dispute continued, however, when Waggoner attempted to vote the 2 million shares of common stock which Waggoner received, before the first suit, in exchange for one of his invalidly issued shares of convertible preferred stock. *Waggoner v. STAAR Surgical Corp.*, 1990 WL 28979, at *2 (Del. Ch. Mar. 15, 1990). The Court of Chancery, although recognizing its earlier holding that the preferred stock he had converted into common stock was invalid, nonetheless concluded that Waggoner was equitably entitled to ownership and voting control of the common stock because the initial agreement under which Waggoner was given those shares in exchange for his personal guarantees of STAAR's debt was sufficiently clear and definite to warrant the grant of specific performance. *Id.* at *6. The Supreme Court reversed, holding that the Court of Chancery erred by granting "equitable relief 'akin' to specific performance after it concluded that the Waggoners' preferred shares were invalid," essentially leaving Waggoner with an ordinary contractual damages claim. *STAAR*, 588 A.2d at 1137.

[102] At trial, Blades acknowledged as much, and said that if victorious, he plans to initiate an audit of Global Launch's books to come up with a fair solution. Tr. at 34 (Blades).

[103] Def. Op. Post-Tr. Br. at 26 ("Blades and The Ohio Company own 21,433,575 shares (JX 55, line 34) and 558,335 shares (JX 55, line 67), respectively, or together, roughly 52% of [Global Launch's] 42,264,000 outstanding shares . . . ."); Stip. ¶ 15 ("According to the Stock Ledger [maintained by Wetzel], at the commencement of this action, Blades owned 21,433,575 shares of [Global Launch] common stock out of 42,264,000 outstanding and The Ohio Company owned 558,335 shares.").

clung to unilateral power for nearly a year. Blades and the new board will have a duty to respond to claims by the defendants and others regarding the questionable transfers Wetzel made.

V. Conclusion

For all of the foregoing reasons, the Written Consent of March 8, 2010 was effective to remove Wetzel, Wisehart, and Blazer as directors and to elect Rusty Blades, Lindsay Borden, Chris Haydocy, Chris Beasley, Gerrick Doss, Bill Delord, and Larry Calhoon as directors of Global Launch. The Written Consent also validly ratified the actions taken at the November 18, 2009 board meeting. The parties shall submit a final order to that effect on or before November 23, 2010. Each side to bear its own costs.