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Chancery grants judicial validation of SPACs' potentially defective charter amendments and share issuances effected without a separate vote of Class A common shares — Lordstown

By Gail Weinstein, Esq., Andrew B. Barkan, Esq., Brian Hecht, Esq., and John M. Bibona, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP*

MARCH 9, 2023

Many SPACs, in connection with de-SPAC mergers, have approved charter amendments authorizing an increase in the number of their authorized shares of Class A Common Stock to facilitate the issuance of shares required for the merger. Based on widely accepted legal advice at the time, such amendments typically were approved by vote of the Class A and Class B Common Stock voting together.

However, in a December 2022 decision, *Garfield v. Boxer*, which came as a surprise to corporations and legal practitioners, the Delaware Court of Chancery indicated that such amendments require, in addition, a separate vote of the Class A common shares.

Following Garfield*, many SPACs have filed petitions to the court under DGCL Section 205 seeking judicial validation of their Authorized Share Amendments and the shares they issued thereunder.*

In response to the uncertainty created by *Garfield* as to the validity of such charter amendments that were approved only by a joint vote, and the uncertainty as to the validity of the billions of shares that have been issued based on such amendments, the court now has indicated, in *In re Lordstown Motors Corp.* (Feb. 22, 2023), that, absent unusual circumstances, it will grant requests, made pursuant to DGCL Section 205, for judicial validation of such amendments and share issuances.

In bench rulings (Feb. 20, 2023), the court granted Section 205 petitions on this issue that had been submitted by Lordstown and five other companies; hearings on the additional 30 such petitions the court has received are being scheduled for the coming weeks; and the court expects to receive more such petitions.

Key Points

- **Many SPACs (and potentially other Delaware corporations) may not have validly adopted charter amendments increasing their authorized Class A common shares, nor have validly issued Class A common shares, if such amendment was approved by a combined vote of all common shares and not a separate vote by the Class A shares.** Approval only by a combined vote has been the norm, based on widely accepted legal advice, prior to *Garfield*, that a separate vote of the Class A shares was not required.
- **In *Lordstown*, the court has indicated that, to resolve the uncertainty for companies that took such potentially defective corporate acts, the court is likely to grant requests under DGCL Section 205 for judicial validation of these acts, absent unusual circumstances.** Section 205, which has not been utilized frequently, provides a route to validate defective corporate acts. The court has viewed Section 205 as an appropriate route to resolution where a company has taken an act with the intent and belief that it is valid and later discovers a technical defect and seeks a court remedy to avoid incidental harm.
- **We note that the issue potentially extends to other corporate acts as well that were taken based on charter amendments approved only by a joint vote of common shares** — such as amendments providing for officer exculpation from liability (see "Practice Points" below).

Background. In several cases filed in the Court of Chancery, stockholders have challenged de-SPAC mergers on the basis that the SPAC's charter amendment, prior to a de-SPAC merger, to increase the authorized number of Class A common stock (an "Authorized Share Amendment") was not validly authorized, and that the shares issued based on such amendments were not validly issued.

These challenges have been made on the basis that the Authorized Share Amendments involved a change in the number of authorized shares of a *class* of stock ("Class A Common Stock") and thus, under Section 242(b)(2), a separate vote of the holders of the Class A common shares was required.

Most lawyers had believed that a SPAC's Class A and Class B common shares represented two *series* (A and B) of a single *class* of stock (the Common Stock) — even though they were labeled as "Class" A and B.

In some situations, auditors have raised concerns about the effect on a company's financial statements of the uncertainty arising from this issue.

The thinking was that, nomenclature aside, there could not be separate *classes* of stock within a single class of stock (*i.e.*, the Common Stock), thus a SPAC's "Class A Common Stock" and "Class B Common Stock" were actually different *series* of the *single class* of Common Stock.

Lordstown, for example, disclosed that it had relied on the advice of several law firms including a legal opinion of Delaware counsel that a separate class vote of the Class A common shares was not required for its Authorized Share Amendment.

In some cases, SPACs sought a separate vote of Class A common shares to avoid litigation over whether a separate vote was required; however, in most cases, SPACs' Authorized Shares Amendments were approved only by the Class A and Class B common shares voting together.

In *Garfield v. Boxed* (Dec. 27 2022), Vice Chancellor Morgan Zurn indicated that the Class A and Class B common shares of the SPAC at issue were separate "classes," not separate series of a single class, and thus the separate vote of the Class A common shares had been required.

Following *Garfield*, many SPACs have filed petitions to the court under DGCL Section 205 seeking judicial validation of their Authorized Share Amendments and the shares they issued thereunder.

In *Lordstown*, Vice Chancellor Lori Will has indicated that the court likely will grant judicial validation requests under Section 205 by other companies facing similar circumstances with respect to their Authorized Share Amendments and shares issued thereunder.

Discussion

De-SPAC mechanics. When a SPAC (special purpose acquisition company) is organized, it typically has Class A Common Stock, which is ordinary common stock held by public investors, and Class B Common Stock, which is typically acquired for nominal consideration and held by the SPAC's sponsor.

In a de-SPAC transaction (this is, the merger pursuant to which the SPAC's acquisition target becomes a public company), typically, a wholly-owned subsidiary of the SPAC is merged with and into the target company, with the target company's equity being converted into the right to receive shares of the SPAC's Class A common stock.

Also, in the de-SPAC merger, typically, the Class B Common Stock is converted into Class A Common Stock (thus the Class A Common Stock is the only type of common stock left outstanding after the de-SPAC). Before the de-SPAC merger, the SPAC's charter is amended to increase the authorized shares of Class A Common Stock to accommodate these issuances.

DGCL Section 242(b). Section 242(b)(1) of the DGCL requires that most charter amendments be approved by (i) the holders of a majority in voting power of outstanding stock entitled to vote on the amendment and (ii) any additional vote required by Section 242(b)(2).

Section 242(b)(2) provides that a charter amendment to change the number of authorized shares of a *class of stock* requires a separate vote of the affected class. Section 242(b)(2) does *not* state that a change in the authorized number of shares of a *series of stock* within a class requires any separate vote.

The court stated: "Ratification will restore confidence in the company's capital stock and assuage market fears," while "[a] contrary ruling would invite untold chaos."

Section 242(b)(2) states that companies may opt out of a separate class vote for adding authorized shares to a class — but (although the National Venture Capital Association form charter contains an opt-out provision), many SPACs' charters have not included an opt-out provision.

DGCL Sections 204 and 205. These provisions of the DGCL (which became effective in 2014 and have been little-utilized since then) provide two statutory methods that can be used to fix defective (or potentially defective) corporate acts that might otherwise be void.

- ***Section 204*** allows a board (without judicial involvement) to validate a defective corporate act by following specified procedures.
- ***Section 205*** allows identified parties to petition the Court of Chancery to enter an order validating or invalidating a defective corporate act — if self-help under Section 204 is unavailable or the board seeks to ensure that a validity determination is not subject to challenge.
- ***Sections 205(a)(3) and (a)(4).*** Section 205(a)(3) provides that the court may determine the validity and effectiveness of any defective corporate act not ratified (or not ratified effectively) pursuant to Section 204. Section 205(a)(4) provides that the court may determine "the validity of any corporate act or transaction and any stock, rights or options to acquire stock."

Garfield v. Boxed. In *Garfield*, Vice Chancellor Zurn granted an award of fees ($850,000) to the attorneys for a SPAC stockholder who had challenged an Authorized Share Amendment. In response to the stockholder's challenge, the SPAC had changed course and put the Amendment to a separate vote of Class A holders.

The court viewed the Class A and Class B Common Stock as separate classes of common stock, not separate series of common stock, and therefore viewed a separate class vote as having been required. As a result, the court held, the stockholder had provided a "substantial benefit" to the company by raising the issue and procuring the separate vote — thus, its attorney was entitled to a fee award. In *Garfield*, the court emphasized that the SPAC's charter used the word "class" rather than "series."

Also, the court noted that DGCL Section 102(a)(4) requires that if a corporation has authority to issue more than one *class* of shares, the charter must set forth the number of shares of each class and whether the shares are par or no-par — and, in this SPAC's charter, the number of authorized shares, and their par value, was set forth for the Class A common shares and for the Class B common shares, apparently to comply with the statute's requirements for authorized *classes* of shares.

Further, the court observed that the charter provided authority to the board to issue one or more "series" of preferred stock, but not "series" of common stock. The court concluded that the charter, read as a whole and together with the DGCL, granted the SPAC authority to issue "only classes of common stock — not series."

The aftermath of *Garfield*. Following *Garfield*, several companies (including Lordstown Motors Corp.) filed petitions with the court, under Section 205, for judicial validation of Authorized Share Amendments that had been approved only by a joint vote of Class A and Class B common shares.

They also generally filed Form 8-Ks to disclose the issue and that the Section 205 petition was filed; and suspended use of existing registration statements pending resolution by the court. Law firms that had provided Exhibit 5 validity opinions with respect to shelf registration statements generally did not withdraw the opinions but relied on the client's suspension of the shelf registration statement and the anticipated judicial resolution under the Section 205 petition.

In some situations, auditors have raised concerns about the effect on a company's financial statements of the uncertainty arising from this issue.

***Lordstown* opinion.** The court granted Lordstown's request for judicial validation of its Authorized Share Amendment and its issuance of Class A common shares thereunder. The court granted the validation under Section 205(a)(4) (and, in a footnote, stated that Section 205(a)(3) also appeared to be applicable).

The court held that ratification of the charter amendment under Section 204 was not a practical alternative because it was not clear which stockholders would be entitled to vote on a ratification proposal, as the shares issued based on the Authorized Share Amendment had been actively traded on NASDAQ.

Vice Chancellor Will reasoned that: (i) the company had filed and effected the Authorized Share Amendment with the good faith belief that it was adopted in accordance with Delaware law and the company's charter; (ii) the company and third parties (including market participants, financing sources, business partners, stockholders, employees, and directors) had treated the charter amendment as valid and had acted in reliance on its validity; (iii) the company had issued over 115 million shares of Class A Common Stock in reliance on the effectiveness of the Authorized Share Amendment and had described those shares as issued and outstanding in its SEC filings, financial statements, and third-party agreements; (iv) no persons would be harmed by validating the Authorized Share Amendment; and (v) absent relief, the company, its stockholders, and other parties "would face substantial damage."

Other cases. The court stated in the *Lordstown* opinion that it has received 36 Section 205 petitions seeking validation of SPACs' Authorized Share Amendments — and that the court expects to receive more such petitions. The court stated that its reasoning in the *Lordstown* opinion "should prove instructive to other companies seeking the court's assistance to validate similar corporate acts."

The court wrote that whether or not Authorized Share Amendments and the shares issued thereunder were "defective as a technical matter" (either due to (i) shares having been issued without the requisite approval or (ii) notwithstanding approval by the requisite number of votes, the wrong voting standard having been disclosed), these companies "are experiencing the same pervasive uncertainty and risk of harm."

The court stated: "Ratification will restore confidence in the company's capital stock and assuage market fears," while "[a] contrary ruling would invite untold chaos."

Practice points

- **Companies with multi-class common stock should keep in mind that, based on *Garfield v. Boxer*, a separate class vote is required to increase the number of authorized shares of the class.** Based on *Garfield*, generally, under Section 242(b)(2), a SPAC (or other Delaware company with multi-classes of common stock, such as Class A and Class B common stock) must have a separate vote of the affected class to approve an increase in the authorized number of shares of that class (such as a vote of the Class A common shares, voting separately, to authorize a charter amendment increasing the number of Class A authorized shares) — unless, as noted below, the charter contains a Section 242(b)(2) opt-out provision. Companies that have authorized such a charter amendment only by a combined vote of different classes of common shares should consider whether, under the specific circumstances, validation of the increase and the related issuance of shares should be sought under DGCL 205. Even where a sufficient number of shares of a class, as part of the combined vote, approved such a charter amendment, it may be advantageous to seek Section 205 validation to provide certainty.

- **A separate class vote to authorize increased shares is not required if the charter contains a Section 242(b)(2) opt-out provision.** Companies going public, adopting new charters, or considering charter amendments for other purposes should consider including such an opt-out provision. A separate class vote also may not be required, based on the reasoning in *Garfield*, if the charter supports a reading that, for example, "Class A" and "Class B" Common Stock are two *series* of common stock rather than two *classes*. For example, the charter may have language referring to "series" of common stock; and/or the charter may not set forth the number of authorized shares and the par value for each of Class A and Class B common shares as would be required under the DGCL if they were "classes" of stock.
- **Until a potentially defective act such as that involved in *Lordstown* is validated, issues may arise, at least for public companies, with respect to accountants' audit and review of financial statements, registration statements, and legal opinions provided in connection with registration statements.** Pending validation, a public company should consider publicly disclosing these issues, and, as appropriate, also disclosing that the use of any existing shelf registration statement has been suspended, that a Section 205 petition has been or will be filed, and that validation under Section 205 is expected in light of the *Lordstown* decision.
- **Cayman Islands law.** Many SPACs are organized under the laws of the Cayman Islands. It appears that these SPACs do not face the same issue regarding potentially defective charter amendments and share issuances, as, according to Cayman law practitioners, there is no provision under Cayman law that is similar to Delaware's requirement for a separate class vote on issues that may adversely affect the class.
- **Similar issue with respect to officer exculpation charter amendments.** We note that there are lawsuits pending in Delaware in which the plaintiff shareholders are claiming that a separate class vote of Class A common shares was required for charter amendments providing for exculpation of liability for officers. In these cases, the plaintiffs have challenged the charter amendment on the grounds that it violated Section 242's grant of the right to vote on charter amendments that would "alter or change the powers, preferences, or special rights of the shares" of that class. The plaintiffs have argued that the exculpation amendment adversely affects the company's Class A common shares, given that, previously, officers were not exculpated. (Charter provisions providing exculpation of liability for officers under certain circumstances is now permitted under recent amendments to DGCL Section 102(b)(7).) No decisions have yet been issued in these cases.

About the authors



Gail Weinstein (L) is senior counsel at **Fried, Frank, Harris, Shriver & Jacobson LLP**, where she advises companies, private equity firms and investment banks on mergers and acquisitions strategy, defense preparedness, shareholder activism, and governance. She can be contacted at gail.weinstein@friedfrank.com. **Andrew B. Barkan** (C), a partner at the firm, aids clients on corporate finance and capital markets transactions, including U.S. and international public offerings and private placements. He can be contacted at andrew.barkan@friedfrank.com. **Brian Hecht** (R), a partner at the firm, focuses on capital markets transactions, mergers and acquisitions, restructurings, and corporate governance matters. He can be contacted at brian.hecht@friedfrank.com. **John M. Bibona** (not pictured), a partner at the firm, handles transactions with a focus on joint ventures, private equity investments, acquisitions and dispositions, and complex restructuring transactions. He can be contacted at john.bibona@friedfrank.com. All of the authors are based in New York. This article was originally published Feb. 24, 2023, on the firm's website. Republished with permission.

This article was published on Westlaw Today on March 9, 2023.