'In re Lordstown Motors': Providing Relief From 'Untold Chaos'

By Nathaniel J. Stuhlmiller and Daniel S. Barrow

Delaware Business Court Insider
March 1, 2023

In *In re Lordstown Motors,* the Delaware Court of Chancery provides a roadmap for former special purpose acquisition companies (SPACs) to validate capital structure uncertainties stemming from the same court's recent decision in *Garfield v. Boxed.* In *Lordstown*, the court makes clear that Section 205 of the Delaware General Corporation Law (the DGCL) is available as an equitable, efficient, and effective judicial path to validate certificates of incorporation and shares issued in reliance thereon that, following the *Boxed* opinion, were the subject of some uncertainty.

Lordstown Motors Corp. was originally incorporated in 2018 in Delaware as a SPAC and raised capital through an initial public offering. In a process known as a "de-SPAC transaction," Lordstown sought to acquire a private company with the ultimate goal of combining with the target to form a new publicly traded company. In October 2020, Lordstown completed its de-SPAC transaction by acquiring Lordstown EV Corp. As is common among SPACs, Lordstown sought to amend its charter in connection with the de-SPAC to increase the number of authorized shares of Lordstown's Class A Common Stock (the Charter Amendment) to, among other things, "provide adequate authorized share capital" to facilitate the de-SPAC transaction and to "provide flexibility for future issuances of capital stock." Lordstown sought and obtained stockholder approval of the Charter Amendment from the holders of a majority of its outstanding common stock, which at the time consisted of stock designated as "Class A Common Stock" and "Class B Common Stock." However, Lordstown did not seek or obtain approval of the Charter Amendment by the holders of a majority of the outstanding Class A Common Stock, voting as a separate class.

In mid-2021, stockholders began sending demand letters to SPACs with upcoming votes on de-SPAC transactions, contending that their failure to seek a separate Class A vote in connection with their proposed charter amendment would violate Section 242(b)(2) of the DGCL, which provides that the holders of a class of stock are entitled to vote as a separate class on any charter amendment that would increase or decrease the number of authorized shares of the class, absent a specific provision in the charter opting out of the class vote. Notably, Section 242(b)(2) does not provide a separate vote for a series of a class of stock on an amendment to increase the number of authorized shares of the class or any series of the class. While many SPACs believed, based on the wording of their charters, that their Class A common stock was a series of the class of common stock, rather than a separate class of stock—and thus a separate Class A vote was not required—many SPACs that had received a demand letter amended their disclosure documents and merger agreements to seek the separate Class A vote in order to moot the issue. Doing so was often viewed as a better alternative than putting their de-SPAC transactions at risk of delay by litigating the claims on the merits, a risk often exacerbated by the unique timing pressure on most SPACs to complete a business combination within a finite time (generally within two years following their IPO) as set forth in their charter.

Later, stockholders also began sending demand letters to former SPACs that had already closed their de-SPAC transactions and, in connection therewith, amended their charters to increase the number of authorized shares of Class A common stock (which was often redesignated simply as common stock) without seeking a separate Class A vote. In March 2022, 18 months after it had closed its de-SPAC transaction, Lordstown received such a demand letter from purported stockholders. Lordstown, in reliance on the advice and opinion of counsel, responded to the demand letter by asserting that the separate Class A vote was not required because it believed that, despite the stock's

naming convention, the Class A Common Stock at the time the Charter Amendment was adopted was a separate series of common stock, rather than a separate class of stock.

In late December 2022, the Court of Chancery issued an opinion in *Garfield v. Boxed,* which addressed the mootness fee petition filed by the attorney who had delivered, on behalf of a purported stockholder, a demand letter that resulted in the SPAC supplementing its proxy materials and ultimately obtaining a separate Class A vote. In assessing the merits of the mootness fee award request, the court analyzed the language of the SPAC's charter, which was substantively identical to the language in the charters of many SPACs, including Lordstown, and, in the process of determining whether the demand letter was meritorious when made, found that the Class A and Class B were separate classes of stock, and not series of the class of common stock. As such, the court concluded that the amendment to increase the authorized shares of Class A common stock required a separate Class A vote, and the demand had created a material benefit because if "the share Increase amendment voting structure had gone uncorrected, the new shares would have been invalidly issued."

Because Lordstown's charter, like many former SPACs, was substantively identical to the company's charter at issue in *Boxed*, Lordstown's long-held belief that the Charter Amendment had been validly approved was suddenly called into question. In the more than two years that had elapsed since the de-SPAC transaction, Lordstown had issued stock and taken numerous corporate actions in reliance on the validity of the Charter Amendment. Moreover, because shares of questionable validity had been publicly traded for years, it was difficult if not impossible to determine which stockholders held valid shares or to use the self-help remedy under Section 204 of the DGCL to ratify the Charter Amendment, as Section 204 would have required approval of the ratification by the holders of "valid stock." On Jan 26, in an effort to remedy this uncertainty, Lordstown became the first of many former SPACs to petition the Court of Chancery for relief under Section 205 of the DGCL.

Less than a month later, on Feb. 20, the Court of Chancery, in a series of bench rulings, ultimately granted the petitions of six former SPACs, including Lordstown. In its written opinion in *Lordstown* issued the next day, the Court of Chancery explained its reasoning for granting Lordstown's petition and the petitions of other similarly situated former SPACs. The court explained that Section 205 gives the court the ability to address the uncertainty generated by *Boxed* by empowering the court to validate corporate acts and putative stock. Moreover, the court reasoned that, regardless of whether the Charter Amendment and subsequent share issuances were "technically void or voidable due to a failure of authorization, [Lordstown] has encountered sudden and pervasive uncertainty as to its capitalization" and that Section 205 provides a "mechanism to eliminate equitably any uncertainty" regarding such questions of validity. After weighing a series of equitable factors—including Lordstown's good faith belief that the adoption of the Charter Amendment complied with Delaware law, Lordstown's subsequent treatment of the Charter Amendment and related share issuances as valid and effective, and the harm (or lack thereof) resulting from granting (or not granting) validation—the court granted Lordstown's petition to validate the Charter Amendment and the shares issued in reliance on its validity. Failing to do so, the court recognized, would "invite untold chaos."

While the court's decision in *Lordstown* does not eliminate the uncertainty raised by *Boxed*, it does provide a path for numerous former SPACs that may need to seek relief under Section 205. As of the date of the *Lordstown* opinion, the court indicated that at least 36 former SPACs had filed similar petitions. The Court of Chancery has crafted a sensible and efficient process for dealing with this unexpected influx of Section 205 petitions. Thus far, the SPAC petitions under Section 205 have been assigned to Vice Chancellor Lori W. Will, who authored the *Lordstown* opinion and has begun setting aside specific days on the calendar to hear these petitions in batches. Many petitions are set to be heard

less than 30 days after they were filed, demonstrating the court's unparalleled agility in dealing with critical issues facing corporate constituents in a timely manner that is nevertheless just and fair to all parties.

Nathaniel J. Stuhlmiller *(stuhlmiller@rlf.com) is a director and* ***Daniel S. Barrow*** *(barrow@rlf.com) is an associate of Richards, Layton & Finger. Their practice focuses on transactional matters involving Delaware corporations, including mergers and acquisitions, corporate governance, and corporate finance. The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.*