

National University of Ireland, Maynooth

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BRIEF: Noe v. Kropf: Plaintiffs' Memorandum of Law -- Filed November 12, 2008 -- in the Delaware Court of Chancery citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law

Seth Barrett Tillman, *None*



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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM M. NOE and
O. RUSSELL CRANDALL,

Plaintiffs,

v.

ROBERT KROPF, JAMES R.
HERBERT, TRACY GNAGY,

Defendants,

and

AMERISTAR NETWORK, INC.,

Nominal Defendant

and

TURNAROUND ADVISORS, LLC,

Intervenor

C.A. No. 4050-CC

MOTION FOR DEFAULT JUDGMENT,
MOTION FOR JUDGMENT ON THE PLEADINGS
AND MOTION FOR ATTORNEYS' FEES AND COSTS

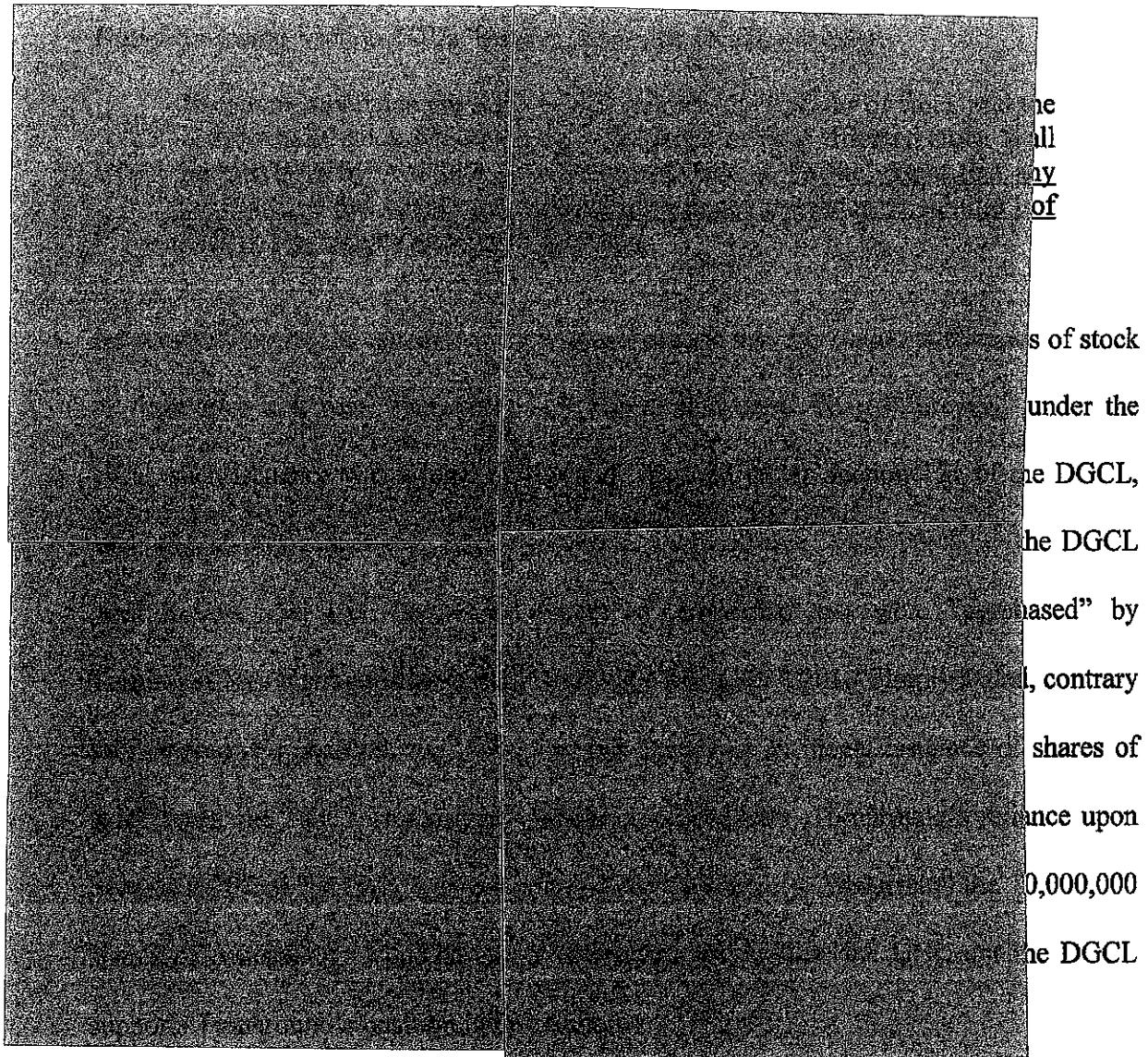
Plaintiffs hereby move (a) for the entry of default judgment pursuant to Court of Chancery Rule 55(b) against defendants Robert Kropf ("Kropf"), James R. Herbert ("Herbert") and Tracy Gnagy ("Gnagy," together with Kropf and Herbert, "Defendants") in connection with Count I of the Verified Complaint Pursuant To Section 225 And Section 227 Of The Delaware General Corporation Law (the "Complaint" or "Compl.," Filing ID No. 26366611) filed in the above-captioned action ("Action"), which seeks relief under Section 225 of Delaware's General Corporation Law (the "DGCL"), and (b) for the entry of judgment on the pleadings pursuant to Court of Chancery Rule 12(c) in connection with Count II of the Complaint filed in this Action, which seeks relief under

Section 227 of the DGCL. In addition, if this Court grants Plaintiffs' motion for the entry of default judgment, then Plaintiffs respectfully request that this Court enter an Order directing Defendants to reimburse Plaintiffs for the attorneys' fees and costs incurred by Plaintiffs in connection with the prosecution of Count I of the Complaint, and if this Court grants Plaintiffs' motion for the entry of judgment on the pleadings, then Plaintiffs respectfully request that this Court enter an Order directing Defendants to reimburse Plaintiffs for the attorneys' fees and costs incurred by Plaintiffs in connection with the prosecution of Count II of the Complaint. The grounds for this motion are as follows:

Background

1. Plaintiffs filed the Complaint on September 19, 2008, seeking an Order (a) declaring that Plaintiffs are the sole directors of AmeriStar Network, Inc. ("AmeriStar"), (b) declaring that Kropf, Herbert and Gnagy are not directors of AmeriStar, (c) declaring that Kropf is not the Chief Executive Officer of AmeriStar, (d) declaring that the shares of voting common stock of AmeriStar issued to entities indirectly controlled by Kropf were not validly issued, (e) declaring that all actions authorized by Kropf, Herbert and/or Gnagy as directors and/or officers of AmeriStar were void as a matter of law, and (f) awarding attorneys' fees and costs in favor of Plaintiffs and against Kropf, Herbert and Gnagy, jointly and severally, in connection with the attorneys' fees and costs incurred by Plaintiffs in this action. Compl. ¶ 1.

2. Upon filing of the Complaint, Plaintiffs promptly served Defendants with process pursuant to Section 225, Section 227 and 10 Del. C. § 3114 by serving Defendants with copies of the Complaint and related documents at the registered agent of AmeriStar. Proofs of service of process was filed with this Court on September 24, 2008.



19. Turnaround likely will argue that “Delaware law is moving away from this rigid rule articulated by Plaintiffs and toward [sic] a position that ‘where stock is held by an innocent third-party purchaser, technical defects relating to statutory formalities should not lead to a finding of void stock, but at worst to a finding of voidable stock.’” Reply at ¶ 10 (quoting C. Stephen Bigler and Seth Barrett Tillman, Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law. 1109, 1148-49 (2008)). Such argument, however, fails for a variety of reasons. First, there is no evidence that Delaware courts are “moving away from this rigid rule” as suggested by

Turnaround. Indeed, the Delaware Supreme Court, as recently as 2007, recognized that shares of stock issued in violation of Section 151 were void and legal nullities as a matter of law, and affirmed the decisions in Staar Surgical and Triplex. See Hildreth v. Castle Dental Centers, Inc., 939 A.2d 1281, 1283 (Del. 2007). Moreover, in 2002, this Court in Superwire.com recognized that “[t]he Supreme Court held that strict compliance with the technical requirements of Section 151 of the DGCL was necessary for the issuance of stock: ‘Stock issued without authority of law is void and a nullity.’” 805 A.2d at 909 (quoting Staar Surgical, 588 A.2d at 1136). Second, Turnaround’s argument would “gut” Section 151 of the DGCL and would result in this Court improperly amending Section 151 and Section 201 of the DGCL. See Royal Indus., Inc. v. Monogram Indus., Inc., 366 A.2d 839, 842 (Del. Ch.) (“[a] statute may not be amended by this Court, such function being the prerogative of the Legislature”), rev’d on other grounds, 367 A.2d 650 (Del. 1976). Third, even assuming that the shares of stock issued to Turnaround were voidable rather than void (which they were not), such result would not validate the shares because a separate corporate action -- ratification -- is necessary to make voidable stock validly issued stock and neither the Board nor the valid stockholders of AmeriStar would ratify the stock issuance to Turnaround.

