IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARC STENGEL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18109
	)	
GREGORY ROTMAN,	)	
RICHARD ROTMAN, and	)	
SALES ONLINE DIRECT, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 18,200 1
Date Decided: February 26, 2001

Wayne, J. Carey and Ronald A. Brown, Jr., Esquires, of PRICKETT, JONES & ELLIOTT, Wilmington, Delaware, Attorneys for Plaintiff.

Andre G. Bouchard and Joel Friedlander, Esquires, BOUCHARD MARGULES & FRIEDLANDER, Wilmington, Delaware, Attorneys for Defendants.

STRINE, Vice Chancellor

Plaintiff Marc Stengel brought this action pursuant to 8 Del. C. § 225 seeking a declaration that he was improperly removed from his office as Executive Vice President of Sales Online Direct, Inc. ("SOLD") on June 7, 2000 by SOLD's President, defendant Gregory Rotman. Stengel contended that his removal could only be accomplished by action of SOLD's board, which was then deadlocked.

The defendants initially defended the action by asserting that Stengel had not been terminated as an officer, but only as an employee. But the defendants then called a special meeting of the SOLD stockholders to elect a new board. Plaintiff Stengel agreed to stay this action pending the outcome of the election. At the meeting, a new SOLD board was elected, which promptly terminated Stengel as an officer.

In this opinion, I conclude that the undisputed facts demonstrate that: (1) the special meeting of SOLD stockholders to elect directors was authorized by the SOLD bylaws; (2) in the alternative, that Stengel's post-election challenge to a special meeting he had consented to is barred by laches and other equitable defenses; and (3) that Stengel's claim for back pay is not relevant to any live dispute regarding the composition of SOLD's board or management and should be pursued in the first-filed action pending

between the parties in Maryland or in a separate, plenary action. Therefore, I grant the defendants' motion for summary judgment.

I. Factual Backmound

A. SOLD Is Created

SOLD' is a small Delaware corporation that provides Internet services for the collectibles industry, including online auction services. SOLD resulted from a series of business decisions made by its founders: defendants Gregory Rotman and Richard Rotman, plaintiff Marc Stengel, and Stengel's aunt, Hannah Kramer.

When they decided to take SOLD public, the founders each contributed certain assets to SOLD. For their part, the Rotmans agreed to merge into SOLD a sport memorabilia and high-end collectibles business known as Rotman, Inc. Stengel and Kramer agreed to contribute to SOLD all the assets of World Wide Collectibles Digest, Inc. ("WWCD"), which was in the business of hosting Internet web sites. According to the Rotmans, the founders agreed to devote 100% of their time to SOLD.

[1] SOLD formerly operated under the name Securities Resolutions Advisers, Inc. ("SRAD"). The name of SRAD was changed to SOLD in March 1999. For the sake of simplicity, I use the name SOLD throughout the opinion, regardless of the time period involved.

The equity of SOLD was divided equally between the two founding families. Gregory and Richard Rotman together controlled 39.2% of SOLD's shares; Stengel and Kramer together controlled an identical percentage of shares. Stengel, however, held the largest number of shares of anyone on the board.[2] Following the closing of the transaction creating SOLD on February 25, 1999, Gregory Rotman, Richard Rotman, Stengel, and Kramer were each appointed to the board of directors. Gregory Rotman was appointed President. Stengel was appointed Executive Vice President.

B. Stengel Is Removed From SOLD's Payroll

The business of SOLD was conducted in two different locations. The Rotmans operated SOLD's Worcester, Massachusetts operations. Meanwhile, Stengel operated SOLD's office in Maryland at a salary in excess of $100,000. Stengel's management assignment was to develop SOLD's web site, which, among other things, was supposed to operate as a host site for sellers of collectibles.

By the spring of 2000, relations between the Rotmans and Stengel had become frayed. The Rotmans were allegedly concerned that the Maryland operations run by Stengel were draining the company of cash, and hampered

[2] According to Stengel, he owns close to 13 million shares of SOLD; Gregory Rotman owns 8.3 million; Richard Rotman owns over 10 million; Hannah Kramer owns 5.5 million.

by excessive employee turnover. Stengel attributed much of the problem to the Rotman's insistence that the company procure expensive office space instead of continuing to operate out of Stengel's home.

At an April 2000 board meeting, Richard Rotman allegedly advocated closing the Maryland office and consolidating all company operations in Massachusetts. Stengel opposed the move. He reminded the Rotmans that he was leaving for his honeymoon, and allegedly insisted that no final decision be made until his return in May.

The Rotmans contend that several problems arose in the Maryland office when Stengel left for his honeymoon. First, SOLD's accountants needed information to prepare the company's 10-Q for the quarter ended March 31, 2000, which was due to be filed May 15, 2000. The Rotmans claim that Stengel had ignored the accountants' request for information. Second, while Stengel was gone, SOLD had difficulties with one of its Maryland web servers. But when the Rotmans attempted to remedy the problem, they allegedly discovered that Stengel had changed the passwords needed to access the web server and had instructed the Maryland office employees not to provide the new passwords to the Rotmans or SOLD's technical staff.

On April 25, 2000, the Rotmans went to the Maryland office to address these two issues. According to them, they were obstructed in these efforts by an employee who Stengel had instructed to keep them away from certain files. After working around this problem, the Rotmans were able to gain access to the files in the Maryland office. At that time, the Rotmans say they discovered evidence of serious wrongdoing on Stengel's part. For example, the Rotmans claim to have found evidence demonstrating that Stengel had been using SOLD employees and equipment to develop web sites for his new wife's public relations business and to conduct another business owned by Stengel, Whirl Wind Collaborative Design, Inc. ("Whirl Wind"), which had the same acronym — WWCD — as the World Wide Collectibles Digest business Stengel had contributed to SOLD.

During this time, an attorney who had represented all the founders in connection with the creation of SOLD allegedly got in touch with Stengel in Thailand, where Stengel was spending his honeymoon. The attorney supposedly led Stengel to believe that he would be receiving a settlement offer that would sever his relationship with SOLD on fair terms.

Instead of receiving an offer, however, Stengel received a letter from Gregory Rotman dated May 5, 2000, stating:

Dear Marc:

This is to advise you that the Maryland office of [SOLD] is being closed, and that you are being relieved of your duties at this office.

Until further notice, you are not to enter into or otherwise access the Maryland office.

Yours, .

Gregory P. Rotman,
President and Chief Executive Officer[3]

On May 30, 2000, the Rotmans noticed a board meeting for the next day, May 3 1, 2000. Unsurprisingly, neither Stengel or Kramer attended and no quorum existed.

On June 1, the Rotmans caused SOLD to bring an action against Stengel in the United States District Court for the District of Maryland (the "Maryland Action"). Among other things, the complaint in the Maryland Action alleged that Stengel had diverted corporate opportunities from SOLD and that Stengel had used SOLD's resources to conduct non-company business.

On June 7, 2000, Gregory Rotman sent Stengel another letter, stating:

[3] Compl. Ex. A.

Dear Mr. Stengel,

This letter is to notify you that your employment with [SOLD] is terminated effective immediately. Your final paycheck and COBRA information will be mailed to you separately.
Once again, we must insist that you return to [SOLD] promptly all computer equipment, intellectual property and other company property in your possession or control.

Sincerely,

Greg Rotman
President and CEO[4]

C. Stengel's § 225 Action Challenging The June 7 Termination Is Staved Pending A Special Board Election

Stengel filed this $225 action on June 16, 2000 challenging his June 7, 2000 termination (the "June 7 Termination"). The Rotmans claimed that the $225 action was unnecessary because Stengel had only been removed as a paid employee of SOLD and still maintained his unpaid positions as officer and director. At an office conference, the court permitted expedited discovery to proceed because it was unconvinced that it was clear as a matter of law that Stengel's duties as an employee and officer could be parsed in the manner the Rotmans advanced.

Soon thereafter, Stengel moved to dismiss the Maryland Action. Stengel argued that the Maryland Action had not been properly authorized

[4] Id. Ex. C.

because SOLD's board was equally divided between the Rotmans, as one faction, and Kramer and himself, as the other faction. Briefing on that motion was completed in July 2000.

On July 21, 2000, Gregory Rotman called a special meeting of the SOLD stockholder for the purpose of electing directors. Rotman issued a press release publicizing the meeting. The meeting would be the first time the SOLD stockholders had elected directors since February 25, 1999.

The same day, the Rotmans filed an amended Schedule 13D stating their intention to nominate a slate of directors consisting of themselves, Andrew Pilaro, and John Martin. The Rotmans also disclosed their retention of a proxy solicitation firm to help them secure proxies for the special meeting.

The Rotmans then moved to stay discovery in this action, arguing that if the Rotrnans prevailed at the special election, "Stengel will be removed from his position as an officer of the Company by the new board and no controversy cognizable under Section 225 will exist."[5] Stengel responded by agreeing to a stipulated order staying further proceedings in the case until after the special meeting, which was then scheduled for September 7, 2000.[6]

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[5] Bouchard Aff. Ex. 2, at ¶ 11.

[6] *Id.* Ex. 3, at ¶ 1.

Stengel would not agree that the results of the special election would moot his claims, and he reserved his rights "to challenge the results of the stockholder vote to be held at the Special Meeting."[7] Stengel, however, raised no objection to the election of directors at the special meeting.

D. A New Board Is Elected At The Special Meeting

The Rotmans gave formal notice of the nomination of their slate of director candidates on July 27, 2000. Stengel did not nominate a competing slate.

On September 19, 2000, the Special Meeting was held at SOLD's Massachusetts office. According to Stengel's counsel, Stengel and Kramer made a tactical decision not to attend, in order to try to defeat a quorum.[8] This tactic failed, however. Holders of over 56% of SOLD's shares were represented at the meeting. The Rotman's slate was elected with the vote of over 98% of the non-Rotman votes represented at the meeting.

Following the election, the new board unanimously approved resolutions removing Stengel from his position as Executive Vice President, and ratifying the June 7 Termination terminating Stengel as a paid employee. The board publicly announced its actions later that day.

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[7] *Id.* Ex. 3, at ¶ 2.

[8] Tr. at 67.

E. The Defendants Move For Summary Judgment And Amend Their Complaint In The Maryland Action

On October 10, 2000, the Rotmans moved for summary judgment in this action on the ground that the new board's termination of Stengel had mooted this case. The next day, SOLD amended its complaint in the Maryland Action to state new claims against Stengel. Stengel thereafter dropped his motion to dismiss the Maryland Action for lack of proper authorization, and filed an answer and counterclaims.[9]

Stengel, however, refused to concede that this case was rendered moot by the Special Election. Instead, Stengel's counsel raised a new argument — namely, that the SOLD bylaws did not permit the election of directors by special election. Furthermore, Stengel's counsel contended that even if the special election was valid, Stengel would continue to have a viable claim for back pay that could properly be determined in a § 225 proceeding.

II. Legal Analysis

In addressing the defendants' motion for summary judgment, I apply the familiar standard under Court of Chancery Rule 56.[10]

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[9] Adding to the flurry of filings was a separate advancement action brought by Stengel against SOLD. That action was resolved against Stengel by an award of summary judgment for the company. Stengel is now appealing that judgment.

[10] *Gilbert v. El Paso*, Del. Supr., 575 A.2d 1131, 1142 (1990).

The defendants' motion for summary judgment has two major prongs. The first is that the September 19, 2000 special election results are valid, either because the SOLD bylaws permitted the special election in the first instance or because Stengel's challenge to the election is untimely. If the election results stand, the defendants contend that it is obvious that Stengel was properly removed from his corporate office on September 19, 2000.

In the event that I conclude that Stengel was properly removed on September 19, 2000, the defendants argue that this action should be dismissed because there would be no current controversy regarding whether Stengel is an officer of SOLD. Rather, all that Stengel would have left to litigate is a claim for back pay. According to the defendants, a garden-variety back pay or employment contract claim cannot be pressed in a $225 action when the resolution of that claim is not required in order to determine who the current officers of the corporation are. Instead, such claims must be raised in a plenary action.

I address the defendants' arguments in turn.

A. The SOLD Bylaws Are Best Read As Permitting: A Special Meeting For The Election Of Directors.

Three months after stipulating to a stay of this action in deference to a special meeting for the purpose of electing directors, Stengel advanced for the first time in briefing on this motion the argument that the SOLD bylaws

do not permit directors to be elected at a special meeting. Stengel bases his new argument on §§ 3 and 4 of Article III of the SOLD bylaws:

> SECTION 3. Election; Tenure. Directors shall be elected at the annual meeting of the shareholders, except as provided in Section 4 of this Article III; and each director shall be elected to serve for a term of one year and until his successor has been elected and has qualified.
>
> SECTION 4. Vacancies. Newly created directorships resulting from an increase in the Board and all vacancies occurring in the Board may be filled by a majority of the directors then in office though less than a quorum of the Board. A director elected to fill a vacancy shall be elected for the unexpired portion of the term of his predecessor in office. A director elected to fill a newly created directorship shall serve until the next succeeding annual meeting of shareholders and until his successor shall have been elected and qualified. [11]

P.ut succinctly, Stengel's argument is that Article III, § 3 prohibits a special meeting for the election of directors except when there is a newly created directorship or vacancy. Although Article III, § 4 does not refer to special elections of directors at all, Stengel contends that it should be implicitly read as stating that the stockholders — as well as directors — may fill newly created directorships or vacancies at a special meeting. But because Article III, § 3 states that directors shall be elected at the annual meetings, "except as provided in Section 4," Stengel argues that that section bars a special meeting for the purpose of electing directors when no vacancy or newly created directorship exists.

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[11] Art III §§ 3, 4.

I agree with the defendants, however, that Article III, § 3 will not bear the weight that Stengel places upon it. Article III, § 3 was written in a very awkward manner if it was intended to limit special elections to situations when a newly created directorship or vacancy exists. In that case, one would expect that Article III, § 4 would at the very least state that a special meeting could be held to fill such seats, and then note that such seats could also be filled, alternatively, by board action. As things stand, §§ 3 and 4 of Article III never explicitly refer to special meetings for the election of directors at all. Instead, they appear to simply state that directors are usually elected by stockholders at the annual meeting, but that the board may also fill newly created directorships and vacancies. That is, §§ 3 and 4 of Article III seem to be descriptive in nature only and not designed as a limitation on the ability of stockholders to elect a new board at a special meeting.

To read §§ 3 and 4 of Article III as prohibiting special meetings for that purpose becomes even more difficult when one considers the several provisions of the SOLD bylaws expressly referring to special meetings to elect directors. Article II, § 1, for example, addresses the time and place of the "annual meeting of shareholders for the election of directors and all special meetings for that and any other purpose." Article II, § 4 concerns the process for calling special stockholder meetings, which may be called for

"any purpose or purposes, unless otherwise prescribed by statute or by the certificate of incorporation." Article II, § 10 deals with meeting notices, and includes a specific provision addressing "a special meeting of shareholders called for the purpose of electing directors . . . ." Finally, Article III, § 5 addresses director nominations and states that "[n]ominations of persons for election to the Board of Directors may be made at any annual meeting of shareholders, or at any special meeting of shareholders called for the purpose of electing directors . . . ."

It is, of course, possible that the drafters of the SOLD bylaws meant all of these references to be operative only in the very narrow circumstances for which Stengel contends. But it seems to me more probable that the frequent references to special meetings for the purpose of electing directors reflect the lack of any limitation on the stockholders' ability to select a new board of directors at any time using the special meeting process. As a general matter, moreover, ambiguities in corporate bylaws will be resolved against the reading that would disenfranchise the stockholders.[12] Given that the SOLD bylaws expressly give stockholders the right to call a special meeting for any purpose not prohibited by statute or the company's

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[12] *See, e.g., Rainbow Navigation, Inc. v. Yonge,* Del. Ch., C.A. No. 9342, 1989 Del. Ch. LEXIS 41, at *12, Allen, C. (Apr. 24, 1989).

certificate,[13] it is implausible that the drafters would have stripped the stockholders of the most important function they could exercise at a special meeting through the oblique operation of §§ 3 and 4 of Article III. It is much more natural to read §§ 3 and 4 of Article III as descriptive sections of the bylaws that have no bearing on the stockholders' power to elect directors at a special meeting.

For all these reasons, I conclude that the September 19, 2000 meeting of the SOLD stockholders to elect directors was consistent with the company's bylaws. As a result, a new board was properly elected at that meeting and had the authority to terminate Stengel as an officer that day.

B. In The Alternative, Steneel's Challenge To The Election Is Untimely

The defendants also justify their demand for summary judgment on the basis of four related equitable doctrines: laches; acquiescence; waiver; and ratification.[14] In order to prove laches, the defendants must show Stengel had knowledge that the special election was to be held, that Stengel unreasonably delayed in challenging the special election, and that the

[13] Art. II $4.

[14] Frank v. *Wilson &* Co., Del. Supr., 32 A.2d 277,283 (1943) (noting that these equitable defenses share common elements and are "oftentimes loosely used").

defendants or third parties were injured by the delay." To establish the other defenses, by contrast, the defendants must show that Stengel essentially consented to the election of new directors at a special meeting before or after the fact,[16] or waived his right to challenge that method of proceeding.[17]

Here, I believe that the record would justify the use of any of these doctrines to bar Stengel's attempt to invalidate the September 19, 2000 meeting. For purposes of simplicity, I will focus primarily'on the doctrine of laches.

First, it is clear that Stengel knew that the Rotmans had called the special meeting for the purpose of electing a new board that would unseat Stengel and Kramer. Not only that, Stengel consented to a stay of this action pending the outcome of that meeting, and simply reserved his right to challenge the results of that election.

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[15] DONALD J. WOLFE, JR. & MICHAEL A. PITIENGER § 11-5(b), at *785 (citing* ***Wacht*** *v.* ***Continental Hosts,*** *Ltd.,* Del. Ch., C.A. No. 7954, mem. op., 1993 WL 315461, at *2, Chandler, V.C. (Aug. 5, 1993)).

[16] ***Giammalvo*** *v.* ***Sunshine Mining*** *Co.,* C.A. No. 12842, 1994 Del. Ch. LEXIS 6, at *30-*31, Berger, V.C. (Jan. 3 1, 1994) ("Generally, acquiescence occurs when one consents to a course of action, by words or conduct, when that action is taking place."); *Frank, 32* A.2d at 283 (ratification is "assent after the fact").

[17] ***Norberg*** *v. Security Storage Co. of Washington,* C.A. No. 12885, 2000 Del. Ch. LEXIS 142, at *27, Steele, J. (sitting by design.) (Sept. 19, 2000) ("conduct that imphedly expresses an intent to relinquish a known right can be designated as waiver").

Second, Stengel took no steps to challenge the process before the special meeting, even though he was at all times represented by competent counsel and had this $225 action pending. Even after the election was held, Stengel did not challenge the election. To the contrary, his behavior in the Maryland Action was consistent with his assent to the results of the election. Stengel's counsel only came up with the argument that the election was improper when determining how to respond to the defendants' summary judgment motion in early November 2000 — over a month and a half after the new board had been seated.

Indeed, at oral argument, Stengel's counsel admitted that his objection to the election is a purely tactical move designed to preserve the value of any claim for back pay his client may possess.[18] Likewise, at oral argument, Stengel's counsel could not explain why he had waited so long to challenge the election or when he would have done so in the absence of the defendants' summary judgment motion.[19]

The failure of Stengel to timely challenge the Rotmans' attempt to elect directors at a special meeting is inexcusable. Stengel consented to a stay of this action so that the election could proceed, and asked this court to

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[18] Tr. 72-73.

[19] Tr. 43-46, 65.

order that stay. He consented to the initiation of a process whereby the public stockholders of SOLD believed that they were casting valid votes to seat a new board. Given his acquiescence in the procession of an election of directors at the special meeting, Stengel acted gracelessly by waiting until after a month after the election was decided to raise a technical objection to its validity.[20]

Finally, Stengel's delay prejudiced the defendants and SOLD's other stockholders. Had Stengel raised a timely objection, the defendants had several options. They could have sought a court order requiring SOLD to hold an annual meeting, which was overdue.[21] They could have simply proposed that the first order of business of the special meeting be to amend the existing bylaws to permit the immediate election of a new board.[22] They

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[20] In *Bay Newfoundland Co., Ltd. v. Wilson & Co., inc.*, Del. Supr., 37 A.2d 59 (1944), the Delaware Supreme Court held that the doctrines of laches and acquiescence barred a challenge to a charter amendment that had been approved at a noticed annual meeting. The plaintiff knew about the meeting and the amendment but chose to wait until after the meeting to bring his suit. In rejecting his suit, the court stated: "The complainant was under duty to the corporation and the stockholders to make known its dissent at a tune when its objection might have had effect. Having elected the course of silence and inaction when it was its duty to speak or to act, equity will now withhold its aid." *Id.* at 63.

[21] 8 Del. C. § 21 l(c).

[22] *Dieleuterio v. Cavaliers of Delaware, Inc.*, C.A. No. 880 1, 1987 Del. Ch. LEXIS 381, at * 17 n.2, Allen, C. (Feb. 9, 1987) (noting that a bylaw limiting the ability of stockholders to elect directors at a special meeting is of "limited practical importance" because that bylaw can itself be amended by the stockholders at the same special meeting at which the stockholders can later elect directors assuming the amendment prevails).

could have sought to remove Stengel and Kramer from the board by stockholder vote.[23]

Because Stengel stayed silent, the defendants had no reason to use these equally effective means of affording the SOLD stockholders the opportunity to choose another board. The defendants spent money on proxy solicitation efforts that Stengel would now have them repeat. It would be inequitable to reward Stengel's indolence by imposing on the defendants the cost of another meeting. Nor would it be equitable to set aside the clear mandate'of SOLD's public stockholders as expressed in the meeting vote. Stengel was afforded every opportunity to participate in the special meeting and to present his side of the question. In lieu of telling his story, he remained silent and absented himself from the meeting, hoping to defeat a quorum. Stengel is therefore ill-positioned to ask that the public stockholders of SOLD, a very small Internet start-up, bear the risk of an additional period of managerial uncertainty until another meeting can be held. Instead, Stengel alone should bear the cost of his failed strategy.[24]

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[23] 8 Del. C. § 141(k); SOLD Bylaws Art. III § 6.

[24] In analogous circumstances, this court refused to set aside a fair union election based on an after-the-vote objection to the listing of the winning union on the ballot. The court held that the late objections were barred by the doctrine of laches. *Vo-Tech Education Ass 'n v. Delcastle Teachers Ass 'n*, C.A. No. 4974, 1976 Del. Ch. LEXIS 143, at *7-*8, Quillen, C. (May 12, 1976), *rearg. denied.*, 1976 Del. Ch. LEXIS 144, *aff'd*, Del. Supr., 365 A.2d 138 (1976).

C. Does Stengel's Unasserted Claim For Back Pay Justify This Court's Exercise Of Its Judicial Authority Under 8 Del. C. § 225?

In his complaint, Stengel sought a declaration that the June 7 Termination was improper. Stengel contended that his duties as an officer and an employee could not be arbitrarily severed, and that his removal from the SOLD payroll was improper because it had not been authorized by the SOLD board of directors.

While I have concluded that Stengel was properly removed as an officer on September 19, 2000, Stengel argues that his subsequent valid removal does not cure his earlier allegedly invalid removal. He therefore contends that I should now: (1) decide that the June 7 Termination's attempt to remove him solely as an "employee" rather than an officer was invalid and constituted an effective removal of him as an officer; and (2) issue him an appropriate award of back pay.

In support of his position that his claim for back pay can properly be decided in the context of a § 225 case, Stengel cites *Essential Enterprises Corp. v. Automatic Steel Products, Inc.*[25] In that case, Chancellor Seitz awarded back pay to directors, whose earlier improper removal had been

[25] Del. Ch., 164 A.2d 437 (1960).

cured by later action. The defendants did not object to the determination of that back pay issue in the $225 action.

Stengel therefore argues that it is proper for this court to award a remedy to an officer who had been wrongly removed in a $225 action, even when that officer has later been validly removed and there is no current dispute about his officer status. He advances the notion that such remedial relief can also be considered an appropriate exercise of this court's jurisdiction under the so-called clean-up doctrine.[26]

I decline Stengel's invitation to extend this § 225 action in the manner he desires. In so ruling, I am conscious of the careful limitations this court has imposed on itself in adjudicating $225 actions, limitations that the *Essential Enterprises* case did not consider due to the lack of any objection by the defendants. As our Supreme Court has said:

> The purpose of section 225 is to provide a quick method for review of the corporate election process to prevent a Delaware corporation from being immobilized by controversies about whether a given officer or director is properly holding office. To preserve an expedited remedy, a proceeding pursuant to section 225 is a summary proceeding, and the Court of Chancery has consistently limited section 225 trials to

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[26] *See, e.g., Garrett v. Brown*, Del. Ch., CA. 'No. 8423, 1988 WL 71245, at *2, Berger, V.C. (July 6, 1988) (purporting to apply this doctrine in a § 225 case). As defendants note, the clean-up doctrine is usually applied only to permit this court to address "legal" claims that are related to claims over which the court's broad equitable jurisdiction applies. It is unusual to think of this doctrine as sweeping in claims incidental, rather than necessary to, the resolution of a claim brought pursuant to a statute, particularly a statute which contemplates summary proceedings to accomplish its important but narrowly defined purpose.

> narrow issues. Thus, a section 225 action is not to be used for trying purely collateral issues . . . .[27]

A claim is collateral to a § 225 proceeding if it would not help "the court determine the proper composition of the corporation's board or management."[28] In this case, there are no remaining issues that bear on the appropriate composition of SOLD's board or management. That composition is settled.

What is left is Stengel's argument that he could not have been validly terminated before September 19, 2000 because the board was deadlocked before that date, While Stengel considers it a mundane exercise of core $225 jurisdiction for the court to address his termination claim, I disagree with him.

At this point, Stengel has a damages claim for improper termination, and nothing more. This claim creates no uncertainty about who the current officers of SOLD are.

As a result, Stengel should press his claim in a plenary action. While Stengel contends that his claim is a simple one that will not require an extended factual inquiry, that contention seems quite improbable. Unlike

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[27] *Box v. Box,* Del. Supr., 697 A.2d 395,398 (1997).

[28] *Agranoff v. Miller,* Del. Ch., C.A. No. 16795, 1999 Del. Ch. LEXIS 78, at *57, Strine, V.C. (Apr. 9, 1999), *aff'd,* Del. Supr., 737 A.2d 530 (1999).

the situation the court faced in the *Essential Enterprises* case, the resolution of Stengel's back pay claim does not turn solely on the basis of already-determined facts. Far from it. In the Maryland Action, SOLD has advanced very serious allegations of wrongdoing against Stengel. If true, these allegations might support the conclusion that Gregory Rotman acted appropriately in taking immediate steps to ensure that Stengel could no longer act as an employee of SOLD and have access to its premises.

To adjudicate Stengel's back pay claim would force the court to do one of two things, neither of which is efficient. Stengel's preferred option is that I would simply declare that his status as an officer could not be separated from his status as an employee, and that his June 7 Termination from the SOLD payroll was improper because it was not accomplished by board action. Based on this rote application of the SOLD bylaws, Stengel would be awarded his pay from June 7 until September 19, 2000 without reference to whether his conduct merited the action Gregory Rotman took to remove him. Put simply, Stengel would have me order SOLD to pay him money, even though SOLD may have claims that at the very least offset any back pay award. Even more, Stengel would have me suppose that there is no possible jurisprudential basis that might sustain a later holding that the September 19, 2000 ratification of the June 7 Termination would be

effective if Stengel was proven to have committed wrongdoing supporting his'termination as an officer as of the earlier date.[29]

In the alternative, Stengel would have me address the merits of the misconduct charges leveled at him and the possible effect that this misconduct has on the validity of the June 7 Termination, irrespective of the fact that the grounds of misconduct against Stengel form the basis for several counts of the first-filed Maryland Action. Under this second approach, I would be delving into matters already pending before a sister court of competent jurisdiction.

Thus, under Stengel's first approach, this court would adjudicate his claim while blinding itself to possibly relevant facts. Under his second approach, the court would address facts that are the subject of a first-filed action. Neither is an optimal or necessary method to protect Stengel's legitimate interests.

Because the adoption of either of these inefficient options is irrelevant to any live dispute regarding the identity of SOLD's officers, I decline to entertain Stengel's claim for back pay. That claim can be pressed in the

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[29] Stated bluntly, the question that could arise would be this: Does a corporation have to pay back wages to an officer who misappropriated corporate opportunities and resources simply because the officer was first taken off the payroll by a chief executive officer who acted without the requisite board vote because of a board deadlock? I am not sure that the question admits of an easy answer, especially if the CEO is found to have acted to prevent further, imminent harm to the corporation.

Maryland Action in which Stengel has already asserted counterclaims under the Delaware General Corporation Law, or in a new plenary action.[30]

III. Conclusion

For the foregoing reasons, the defendants' motion for summary judgment is granted. The defendants shall submit a conforming order, upon 'approval as to form by Stengel, within seven days.

[30] Any new action may be subject to threat of dismissal or stay pursuant to the *McWane* doctrine. See *Mc Wane Cast Iron Pipe Corp.* v. *McDowell- Wellman Eng.* Co., Del. Supr., 263 A.2d 281 (1970).