

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN RE EOS ENERGY ENTERPRISES,)
INC.) C.A. No. 2023-_____
)

VERIFIED PETITION FOR RELIEF UNDER 8 DEL. C. § 205

Petitioner Eos Energy Enterprises, Inc. (“Eos” or the “Company”) brings this petition (the “Petition”) for relief under Section 205 of the Delaware General Corporation Law (the “DGCL”):

NATURE OF THE ACTION

1. The Company seeks to validate a Third Amended and Restated Certificate of Incorporation that it filed in Delaware on November 16, 2020 (the “Charter”) and all amendments thereto,¹ and to validate stock (and other securities convertible into or exercisable for stock) that the Company issued in reliance on the Charter. Ex. A.

2. The Company was initially a special purpose acquisition company (the “SPAC”) formed in 2019 for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more businesses. It adopted the Charter in connection with a business combination, which resulted in the Company becoming an operating

¹ The Charter was amended on June 28, 2022.

company that manufactures safe, sustainable, low-cost, and long duration zinc hybrid cathode battery storage systems (the “Business Combination”). The Charter amended the predecessor certificate of incorporation (the “Old Charter”) to, among other things, eliminate the Class B Common Stock, leaving only one class of Common Stock, and to increase the total number of shares of Common Stock authorized for issuance. Ex. B. Viewing its Class A Common Stock and Class B Common Stock as two series of the same class of stock, the Company (then under control of SPAC management) believed no class votes were required to adopt the Charter. The Charter, therefore, was adopted by the combined affirmative vote of a majority of the voting power of the Class A Common Stock and Class B Common Stock then outstanding, voting together as a single class, though voting records clearly indicate that a majority of the Class A Common stock voted in favor of adopting the Charter.

3. The Company’s belief that a separate vote of the Class A and Class B Common Stock was not required has been called into question by the opinion in *Garfield v. Boxed, Inc.*² Applying *Boxed* to the Old Charter, it is possible that the Charter had to be approved by separate class votes of each of the Class A Common Stock and Class B Common Stock. Although a separate class vote of the

² 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

Class A Common Stock was obtained in connection with the approval of the Charter, the Company nevertheless needs to resolve any doubts about the validity of the Charter.

4. The Company respectfully submits that relief under Section 205 is warranted. Although the number of shares of Common Stock outstanding remains less than the number of authorized shares under the Original Charter, Eos respectfully submits that recourse under Section 204 of the DGCL is not practicable because it could not be accomplished quickly enough to prevent potential irreparable harm to the Company and its stockholders. The Company's annual meeting is tentatively scheduled for May 16, 2023, and the Company may not be able to issue its audited financials in advance of that meeting so long as there remains a cloud over the number of authorized shares under its Charter.

5. If the Company is unable to issue its financial statements, due to the cloud of uncertainty regarding the number of authorized shares under the Charter, and file the Form 10-K on or before March 31, 2023 or within the grace period provided by the rules and regulations of the U.S. Securities and Exchange Commission (the "SEC"), the Company will fail to meet the reporting requirements applicable to it under Section 13(a) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), which would impair certain stockholders from trading in the Company's securities and would allow the SEC to suspend trading in the

Company's stock and/or revoke the Company's registration under the 1934 Act. Accordingly, relief under Section 205 is the most timely and efficient, and perhaps only, recourse available to place the Company and its investors.

6. The Company also respectfully requests a prompt final hearing regarding this Petition. The Company is a capital-intensive business and these issues regarding the Charter come at a singularly inopportune time. As reported in the Company's Annual Report on Form 10-K for the year ended December 31, 2021, filed on February 25, 2022, the Company has had net losses and negative operating cash flows each fiscal quarter since inception of its business that casts doubt as to its ability to continue as a going concern, and it expects to continue to incur losses and experience negative operating cash flows for the foreseeable future, as it anticipates continued investment in the development and launch of its products with outside capital at the expense of short-term profitability. The Company must deliver on its potential for significant business growth and improved manufacturing processes to achieve sustained, long-term profitability and long-term commercial success, all of which depends on its ability to continue to raise capital.

7. Since the Business Combination, the Company has raised capital through a combination of sales of Common Stock and debt convertible into Common Stock. Equity financing is a key means for the Company to raise funds, and adequate

access to capital may not be available unless the Company can issue shares of Common Stock using the increased number of shares provided in the Charter.

8. The Company also has currently outstanding a convertible note that can be converted by its holder, at its election. If the note holder decides to convert, the Company would be required to immediately issue and sell to the holder registered shares in order to offset the amounts owed by the Company under the outstanding convertible note. Ex. C. But it is unclear whether the Company would be able to fulfill its obligation to issue those shares absent relief under Section 205 to validate the Charter. The Company's current long term debt facility also includes financial covenants such as liquidity covenants. The Company could eventually be in default under such covenants if it is unable to maintain access to capital, including equity financings.

9. For these reasons and the reasons set forth below, the Company respectfully request prompt adjudication of its request for relief under Section 205.

BACKGROUND

10. *SPAC Formation.* The Company was incorporated in June 2019 as a SPAC. The Company amended and restated its initial charter through a filing in Delaware May 19, 2020.³ The May 19, 2020 second amended and restated charter

³ The amendments are not material to this Petition.

is the “Old Charter” that was in effect at the time the Company sought stockholder approval of the current Charter at issue in this Petition. *See* Ex. B.

11. *Business Combination.* The Company entered into the Business Combination with a third-party entity that owned the Eos business operations (“Private Eos”). The transaction structure was common for a so-called “de-SPAC.” The Company’s wholly-owned subsidiary was merged with and into Private Eos, with Private Eos surviving the merger as a wholly-owned subsidiary of the Company.

12. *Charter Amendments.* At the same special meeting of Company stockholders called to approve the Business Combination, the Company’s stockholders were asked to approve a proposal to amend the Old Charter (the “Charter Amendment”), to among other things:

- a. Eliminate the Class B Common Stock Classification and provide for a single class of common stock
- b. Increase the number of shares of stock that the Company was authorized to issue (the “Authorized Share Amendment”), which would (i) increase the authorized capital stock of the Company from 126,000,000, consisting of 100,000,000 shares of Class A Common Stock, 25,000,000 shares of Class B Common Stock and 1,000,000 shares of preferred stock, to 201,000,000 shares, which would consist of 200,000,000 shares of common stock and 1,000,000 shares of preferred stock.⁴

⁴ On June 28, 2022, the Company amended the Charter pursuant to 8 *Del. C.* 242 to increase the number of authorized shares of the Company’s stock to

13. *Voting Standard Disclosed to Stockholders.* The proxy materials transmitted to Company stockholders to solicit their approval of the Business Combination and the Charter Amendment stated that the Charter Amendment required “the affirmative vote for the proposal by the holders of a majority of the Class A common stock and Class B common stock who, being present and entitled to vote at the special meeting to approve the business combination proposal, vote at the special meeting, voting as a single class.”⁵

14. *Stockholder Adoption and Votes Obtained.* The Company stockholders voted on these matters at a special meeting held on November 12, 2020. Consistent with the voting standard described in the Proxy Statement, the Charter Amendment was approved by a majority of the shares of Class B Common Stock and Class A Common Stock, voting together as single class. The Company has since determined that a majority of the Class A Common Stock also voted in favor of the Charter Amendment, even though it was not disclosed that such vote was required and the Company did not believe such vote was required.⁶

301,000,000 shares, consisting of 300,000,000 shares of Common Stock and 1,000,000 shares of preferred stock. Ex. D.

⁵ Ex. E at pg. 87.

⁶ Out of a total of 17,500,000 shares of Class A Common Stock entitled to vote 10,707,807 shares voted “for” the Authorized Share Proposal.

15. *The Company responds to the Boxed ruling.* The Company’s regular outside counsel reviewed the *Boxed* ruling, and the Company thereafter retained Delaware counsel to review the Company’s Charter in light of the *Boxed* ruling and to advise on potential remedial actions. The Old Charter resembled the charter at issue in *Boxed*, at least with respect to the provisions relevant to whether the Old Charter established two classes of stock for purposes of Section 242(b)(2) of the DGCL.⁷

16. Applying the *Boxed* decision, the Old Charter could be read to have designated the Class A Common Stock and Class B Common Stock as two separate classes. If that is the case, then the Charter Amendment required approval by the holders of Class A Common Stock, voting as a separate class. Accordingly, the Company is seeking the validation of the Charter to remedy any defect that might have resulted from the failure to disclose that a separate class vote of the Class A

⁷ Section 4.1 of the Old Charter provided that “The total number of shares of all classes of capital stock . . . which the Corporation is authorized to issue is 126,000,000 shares, consisting of (a) 125,000,000 shares of common stock . . . including (i) 100,000,000 shares of Class A common stock . . ., and (ii) 25,000,000 shares of Class B common stock, and (b) 1,000,000 shares of preferred stock” Similar to *Boxed*, Section 4.1 of the Old Charter stands in contrast to Section 4.2, which expressly enables the Company to designate preferred stock in “one or more series.”

Common Stock was required, if that vote was required by Section 242(b)(2) of the DGCL.⁸

17. *Calculating the number of clearly valid shares.* If the Charter did not validly increase the number of shares of Class A Common Stock authorized for issuance, then (absent validation by this Court) the Company is limited to validly issuing only 100,000,000 shares of Class A Common Stock (the maximum number fixed in the Old Charter). To determine the number of shares that a corporation may issue on a given date, Section 161 of the DGCL requires the Company to deduct from its total number of authorized shares the number of shares that have already been issued and the number of shares that have been subscribed for or are otherwise committed to be issued. Applying that calculation, the Company currently has 116,542,534 shares outstanding.

**CONSIDERATIONS WARRANTING EXPEDITED
RELIEF UNDER SECTION 205**

⁸ A class vote of the Class A Common Stock may have been required if the Charter is viewed as having renamed the Class A Common Stock as Common Stock, and increasing the authorized number of shares of that class from 100 million to 200 million. Perhaps more likely, a class vote was required by Section 242(b)(2) because the Charter reclassified the Class A Common Stock into Common Stock. A reclassification might be viewed as adversely affecting the rights, powers or preferences of the Class A Common Stock for purposes of Section 242(b)(2).

18. The Company is mindful that the Court has considered as a factor in granting relief under Section 205, whether a corporation can otherwise ratify an act using the “out of court” procedures in Section 204. The shares of Common Stock currently outstanding may likely be valid, and therefore the Company considered whether it could seek recourse using Section 204. However, the Company believes expedited relief under Section 205 is warranted here for several reasons:

19. First, to obtain a stockholder vote pursuant to Section 204, the Company would need to issue a proxy statement soliciting proxies in favor of the Section 204 ratification, which would likely take approximately three months. In addition, under Section 204, whether approved solely by the Board or by the stockholders as well, the Company would be required to file a certificate of validation with the Delaware Secretary of State to effectively ratify the Charter. 8 *Del. C. § 204(e)(3)*. The Company understand that processing times for certificates of validation can take as long as 3-4 months, and that while a certificate of validation is being processed, the Company would not be able to obtain certificates of good standing, pay its annual franchise taxes or make any other filings with the Delaware Secretary of State. During that time period, the Company would remain subject to the cloud over its Charter and likely would be unable to issue its financial statements and file the Form 10-K in a timely manner. If the Company is unable to issue its financial statements and file the Form 10-K on or before March 31, 2023 or within

the grace period provided by SEC rules, the Company will fail to meet the reporting requirements applicable to it under Section 13(a) of the 1934 Act, which would impair certain stockholders from trading in the Company's securities and would allow the SEC to suspend trading in the Company's stock and/or revoke the Company's registration under the 1934 Act.

20. Second, as explained in detail in paragraph 6 above, the Company's current financial situation makes it imperative that the Company be able to issue equity and securities convertible into equity. For so long as a cloud remains over its stock, the Company may be unable to issue additional equity or equity-linked securities.

21. Third, as explained in paragraph 8, *supra*, the Company has currently outstanding a convertible note that can be converted by its holder, at its election. If the note holder decides to convert, the Company would be required to immediately issue and sell to the holder registered shares in order to offset the amounts owed by the Company under the outstanding convertible note. But it is unclear whether the Company would be able to fulfill its obligation to issue those shares absent relief under Section 205 to validate the Charter.

22. Finally, a new referendum stockholder vote under Section 204 is unnecessary where, as here, the Company obtained the Class A Common Stock Vote.

23. *The Company and third parties have treated the Charter as valid.*

The Private Eos stockholders relied on the validity of the Charter because it set forth the terms of the securities that they received as a result of the Business Combination. These terms included the headroom to authorize up to 200,000,000 shares of Common Stock, which was subsequently amended to 300,000,000. Since the Business Combination, the Company has issued additional shares of Common Stock and other securities convertible or exercisable for Common Stock:

Date	Securities	Total Shares Issued or Issuable
Various	Securities issued under the Company's 2020 Incentive Plan. Note, all employees of Eos are issued equity upon hire, which vests over time.	8,715,836
Various	Certain Convertible Notes	13,690,881
Various	Issuances under the Company's Standby Equity Purchase Agreement	8,725,653
Various	Issuances under the Company's At-the-market program	20,539,603
Various	Public and private warrants	7,326,654

The Company and these security holders relied on the Charter, which authorized for issuance a sufficient number of shares of Common Stock to enable the Company to perform these transactions.

24. The Company is not aware of any harm that will result from the validation of the Charter. Far from harming anyone, the validation of the Charter

will place the Company and its security holders in the position they have always thought they were in vis-à-vis the Charter and the Company's capitalization table. Indeed, unlike the other SPACs, the Company never received a single demand letter complaining about the proper stockholder vote necessary to approve any components of the Business Combination before it closed.

25. For all of these reasons, the Company respectfully requests the relief it seeks here pursuant to Section 205.

COUNT ONE
(Validation of the Amendment Under 8 *Del. C.* § 205)

26. The Company repeats and reiterates the allegations above as if set forth fully herein.

27. Because of the potential defects described above, there is uncertainty as to the validity of the Charter and the shares of capital stock and securities convertible into or exercisable for capital stock thereunder, each of which is a potentially defective corporate act.

28. This Court has the authority under Section 205(a)(4) to determine the validity of any corporate act, which includes the filing and effectiveness of the Charter.

29. The Company effected the Charter with a good faith belief that it was validly approved by the stockholders of the Company.

30. The Company has treated the Charter as valid, and has, among other things, issued securities in reliance thereon.

31. On information and belief, following the public disclosure of the voting results of the special meeting called to approve the Business Combination and the filing of the Charter, market participants and other third parties, including purchasers of shares of Common Stock and other securityholders, have relied on the validity of the Charter, and no persons would be harmed by the validation thereof.

32. The Company and its stockholders will be irreparably harmed absent relief from this Court.

33. The Company has no adequate remedy at law.

COUNT TWO
(Validation of Issuances of Securities Under 8 *Del. C.* § 205)

34. The Company repeats and reiterates the allegations above as if set forth fully herein.

35. Because of the potential defects described above, there is uncertainty as to the validity of the Charter and the shares of capital stock and securities convertible into or exercisable for capital stock thereunder, each of which is a potentially defective corporate act.

36. This Court has the authority under Section 205(a)(4) to determine the validity of any “stock, rights or options to acquire stock.”

37. As stated above, the Company has treated the Charter as valid, and has issued securities in reliance thereon.

38. On information and belief, purchasers and recipients of the securities relied on the validity of such securities, and no persons would be harmed by the validation of the issuances thereof.

39. The Company and its stockholders will be irreparably harmed absent relief from this Court.

40. The Company has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the Company respectfully requests that this Court enter a proposed Final Order Granting Relief Under 8 *Del. C.* § 205 in the form attached hereto:

- A. Validating and declaring effective the Charter, retroactive to the date of its filing with the Office of the Secretary of State of the State of Delaware on November 16, 2020, and all amendments effected thereby;
- B. Validating and declaring effective the securities (and the issuance of the securities) described herein and any other securities issued in reliance on the validity of the Charter; and
- C. Granting such other and further relief as this Court deems proper.

MORRIS, NICHOLS, ARSHT
& TUNNELL LLP

/s/ Kevin M. Coen

Kevin M. Coen (#4775)

Sara Barry (#6703)

Evan D. Sweeney (#6930)

1201 N. Market Street

Wilmington, DE 19801

(302) 658-9200

*Attorneys for Petitioner Eos Energy
Enterprises, Inc.*

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