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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| BIOLASE, INC., a Delaware corporation,<br><br>Defendant/Counterclaim Plaintiff-Below, Appellant,<br><br>v.<br><br>ORACLE PARTNERS, L.P., a Delaware limited partnership,<br><br>Plaintiff/Counterclaim Defendant-Below, Appellee. | No. 270, 2014<br><br>On Appeal from the Court of Chancery<br>C.A. No. 9438-VCN |

# APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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## SUMMARY OF ARGUMENT

Denied. Oracle's has filed a cross-appeal challenging the Court below's May 21, 2014 Order that awarded Oracle its costs pursuant to Court of Chancery Rule 54(d), but denied Oracle's request for attorneys' fees "because there is no basis for shifting such fees." (Opening Brief ("OB") Ex. A at 2). Oracle's request for attorneys' fees is untimely and has been waived. Even if the request is timely, Oracle's request for fees must fail because Oracle pursued its own interests in this Section 225 action by seeking control and running a proxy contest, rather than conferring a benefit on Biolase or its stockholders.

## STATEMENT OF FACTS REGARDING ORACLE'S CROSS-APPEAL

Oracle filed the operative complaint in this proceeding on March 11, 2014. In addition to declaratory relief, the complaint sought "[a]n award of [Oracle's] costs, including attorney fees, incurred in bringing this action." (A24). The Joint Pretrial Order, entered on April 23, 2014, reiterated Oracle's cursory request for costs, including attorneys' fees. (A94). However, Oracle's Pretrial Brief filed on April 22, 2014 was silent as to any request for attorneys' fees and failed to offer any basis for shifting fees. Oracle also did not mention any request for fees during the one-day trial held on April 24, 2014. During post-trial argument on April 25, 2014, Oracle again failed to request attorneys' fees or offer any basis to support the award of such fees. In the weeks following the post-trial argument, Oracle never raised the issue of attorneys' fees and never applied to recover its fees.

On May 21, 2014, the Court of Chancery issued its Memorandum Opinion and entered a final order that, *inter alia*, awarded Oracle its costs pursuant to Court of Chancery Rule 54(d) but denied Oracle's request for attorneys' fees "because there is no basis for shifting such fees." (OB Ex. A at 2). The next day, Biolase filed a notice of appeal and motion to stay in the Court of Chancery. At oral argument on Biolase's motion to stay, Oracle for the first time informed the Court of Chancery and Biolase that Oracle believed it was entitled to attorneys' fees

under a legal theory it admitted it "never made" to the Court. (B60). Oracle's counsel explained:

> [W]e believe that as successful Section 225 litigants, we're entitled to attorneys' fees. Not because of bad faith litigation, which I think is what Your Honor might have been talking about when you said in the order that we couldn't get attorneys' fees, but rather because of corporate benefit.

(B59-60). Although Oracle's counsel explained that Oracle "intended to move to modify the judgment because of that," it never filed that motion. (B60).

## ARGUMENT

### I. There Is No Basis To Appoint Clark To Biolase's Board of Directors.

#### A. The Chancery Court Erred in Interpreting Section 3.3 of Biolase's By-laws.

##### 1. Oracle Ignores the Plain Meaning of the By-law.

Oracle correctly states that Biolase's by-law "precisely tracks" the pre-2000 version of 8 *Del. C.* § 141(b) and that the two use "identical language," except for one important change. Answering Brief ("AB") at 30-31. In this regard, Oracle acknowledges Biolase has replaced the then-existing statutory language "upon written notice to the corporation" with the more specific passage "upon written notice to the Board, the Chairman of the Board, the Executive Vice Chairman of the Board, the CEO or the President." (AB at 27). Oracle downplays the significance of this change by arguing that the change has nothing to do with whether oral resignations are permitted. (AB at 32-33). To the contrary, this language establishes the *requirements* for a resignation to be effective—to wit, (1) that it be made to the Board or one of four enumerated corporate officials, *and* (2) that it be in writing. (A40-58).

Oracle contends that the list of corporate officials is merely illustrative, and "[i]f the resignation is given to someone else, there could be a factual dispute about whether the notice was properly communicated to the company." (AB at 33). To reach this incorrect conclusion, Oracle violates two basic principles of contract

construction, which apply here. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). *First*, under Delaware law, where a contract lists certain items, it is assumed that other like items intentionally were excluded from the list. *Beard Research, Inc. v. Kates*, 2009 Del. Ch. LEXIS 47, *5 (Del. Ch. Mar. 31, 2009). *Second*, a contract should be interpreted to give meaning to all terms. *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). Oracle's reading of the by-law treats this directive as a mere suggestion. There is no evidence to support this interpretation. Oracle just made it up, because the language does not fit its theory.

### 2. Oracle Misinterprets 8 *Del. C.* § 141(b).

#### a. Oracle Offers No Logical Interpretation of the 2000 Amendment.

Oracle's interpretation of 8 *Del. C.* § 141(b), including the 2000 amendments, would nullify the statute, create uncertainty, and lead to more challenges to director resignations, including litigation.

*First*, Oracle points out that the amendment at issue "was part of a larger set of amendments to the numerous provisions of the DGCL enacted in 2000 to permit various notices to be made by electronic transmission." (AB at 29). While true, this does not address the amendment to 8 *Del. C.* § 141(b) specifically, or the fact that the General Assembly did not add the word "orally" to the statute.

*Second*, Oracle's attempt to impart some meaning to the 2000 amendments leads to an illogical reading of the law that must be carefully parsed. (AB at 30). According to Oracle, before 2000, there were two ways to resign—in writing or orally. Of course this interpretation assumes away the issue and policy behind the statute, which expressly authorizes written resignations. According to Oracle, in 2000 the General Assembly added the phrase "electronic transmission" to the statute to "make clear there was a third way," but chose to make this "clear" by explicitly recognizing only two ways, as oral resignations are still not mentioned. (AB at 30). Again, Oracle's explanation has no basis in legislative history, runs contrary to policy, and makes no sense.[1]

Oracle also argues that the General Assembly "is presumed to be aware of" the Court of Chancery opinions that permitted oral resignations at the time the 2000 amendment was enacted. (AB at 27). This argument does not help Oracle's position, but does demonstrate its lack of merit. If the General Assembly believed, based on the case law, that resignations could be in any form, then there was no reason for the General Assembly to add the phrase "electronic transmissions." Oracle now has had at least three opportunities to explain why this language is not

[1] The complexity of Oracle's legislative intent theory conflicts with its argument that the principle of *expression unius est exclusion alterius* should be ignored because the General Assembly's intent is sufficiently clear. (AB at 28 n.2).

mere surplusage but has failed to offer any explanation. Thus, the only conclusion that can be reached, based on the new language, is that the General Assembly intended to limit the means by which a resignation can be effective. It would have taken but a few key strokes to add the word "orally."

### b. Oracle Offers No Logical Interpretation of 8 *Del. C.* § 141(b).

Oracle says that its interpretation of 8 *Del. C.* § 141(b) "is consistent with other case law interpreting sections of the DGCL containing the language 'may' to be permissive." (AB at 26). This is beside the point—of course the word "may" is permissive. The question is what words does "may" modify in the statute?

The authorities on which Oracle relies for its argument support Biolase's position. In *Crown Emak Partners, LLC v. Kurz*, 992 A.2d 377, 399 (Del. 2010), this Court construed the provision of 8 *Del. C.* § 223(a)(1) that provides that vacancies "may be filled by a majority of the directors then in office." Oracle argues that this Court reaffirmed a longstanding rule that the permissive language of 8 *Del. C.* § 223(a)(1) specifies only one manner of filling directorships, recognizing that stockholders might elect directors to fill the vacancies as well. AB at 26. The Court will note that the word "may" modifies the closest verb, "to fill," and not the rest of the sentence. That is, the use of the word "may" in 8 *Del. C.* § 223(a)(1) does not mean that the majority vote provision is also permissive such that a board could choose to fill the vacancy by a vote of *less than the*

*majority* if it wished. The second part of the sentence imposes a procedural requirement (majority vote) on the permissive act (the board filling a vacancy). The Court's analysis of 8 *Del. C.* § 223(a)(1) is entirely consistent with reading 8 *Del. C.* § 141(b) to impose a procedural requirement (written notice) on a permissive act (resignation at any time).

Oracle argues that "may" cannot refer only to the verb "resign" because "[r]esignation is by definition a voluntary act." (AB at 32). This is sophistry. The word "may" modifies the verb "to resign" in accordance with *Kurz*. It gives the director a choice instead of waiting until the end of his or her term or being voted out by stockholders.

### 3. This Court Should Not Follow the Court of Chancery Interpretation of 8 *Del. C.* § 141(b).

Oracle devotes many pages to reviewing what it calls the "unbroken line of at least five Court of Chancery cases spanning nearly thirty years" that has permitted oral resignations.[2] (AB at 20-26). Five cases (or any number of trial court decisions) do not alter the fact that *this* Court has never considered the issue of oral resignations under 8 *Del. C.* § 141(b).

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[2] Oracle includes in this list a case on which the court below did not rely, *Rypac Packaging Machinery Inc. v. Coakley*, 2000 WL 567895 (Del. Ch. May 1, 2000). In *Rypac Packaging*, it is unclear whether the opposing party argued that Section 141(b) requires a written resignation, and the court did not consider the issue. *Id.*

Oracle brushes aside Biolase's policy arguments about the benefits of certainty concerning director resignations. (OB at 25). Certainly, Oracle cannot dispute that, in the age of "smart" phones and laptop computers, the burden on directors to resign in writing, especially considering the gravity of the action, is minimal. (OB at 25). In contrast, the benefits to requiring written resignations are great, particularly in providing more certainty about board composition.

Oracle argues that a failure to enforce the intentions of the parties could lead to absurd results, (AB at 25 n.1), but Oracle fails to acknowledge that appropriate exceptions to the rule could be made. If an exception must be recognized, it should be narrow, limited in application, and require strict (or "unequivocal") proof. For example, the exception could apply where the company or stockholder or other constituent tries to impose liability against a director who thought he or she had resigned orally. *See, e.g., General Video Corp. v. Kertesz*, 2008 WL 5247120 (Del. Ch. Dec. 17, 2008).

Oracle does not contest Biolase's assertion that this Court may apply equitable principles in future cases to avoid an illogical result as noted above.[3]

[3] The Court should, however, reject *Boris v. Schaheen*, 2013 WL 6331287 (Del. Ch. Dec. 2, 2013), *General Video Corp. v. Kertesz*, 2008 WL 5247120 (Del. Ch. Dec. 17, 2008), *Dionisi v. DeCampli*, 1995 WL 398536 (Del. Ch. June 28, 1995), and *Bachmann v. Ontell*, 1984 WL 8245 (Del. Ch. Nov. 27, 1984), to the extent that any of these cases suggests that Section 141(b) generally permits directors to resign orally or in writing.

(OB at 25). If the Court does so, however, it should adopt a very high standard of proof for determining that a resignation has actually occurred, as discussed in the Section I.B, *infra*. Such a rule would appropriately balance the benefits of certainty in board composition with the arguable need to prevent absurd results.

### B. If Oral Resignations Are Permitted, the Evidence Must Be "Unequivocal."

Oracle disagrees with imposing an "unequivocal" standard on oral resignations. Because the record does not support a higher standard, Oracle asks this Court to apply a lower standard for finding the existence of an oral resignation. In an effort to avoid the unequivocal standard, it contends that not all of the cases concerning director and officer resignations require an unequivocal statement of intent to resign, and the case law does not define what the term "unequivocal" means in this context. (AB at 39-40). But Oracle does not explain what it believes the standard should be. It also fails to address Biolase's argument that the need for certainty and the gravity of the act of resigning demand an extremely high standard, such as an unequivocal expression of intent to resign. Anything less creates a breeding ground for litigation.

Under the current case law, *Kertesz* and *Dionisi* impose an "unequivocal" standard; *Boris* and *Bachmann* are silent on the issue. Biolase urges this Court to adopt the highest standard possible.[4]

[4] Oracle argues that Biolase has not shown that the Court below applied a lower standard than the "unequivocal" standard. (AB at 40). However, this Court must take the Court of Chancery at its word for what standard was applied, and the Court below nowhere used the term "unequivocal" in its discussion of the applicable standard.

### C. Arrow's Purported Oral Resignation Was Not Unequivocal.

Oracle argues that Biolase is asking this Court to weigh the evidence about Arrow's purported resignation differently than the trial court. (AB at 36). This is incorrect. Biolase contends that if the evidence must be weighed and one could plausibly reach two different conclusions, as in this case, then the threshold showing has not been met. Here, after a long discussion, Arrow said "Okay, I agree, I go along with that." (A354; A672 at 110-111). The lower Court took that statement to mean, "I resign," even though Arrow believed terminations needed to be in writing to be effective. Arrow argued with the Chairman/CEO after the meeting about why he should not have to resign, and Arrow later submitted a written resignation effective after the meeting.

In reviewing the facts, Oracle argues incorrectly that Biolase "attempts to confuse the factual record" by discussing Arrow's stock options. (AB at 36). Rather, Biolase is supplying necessary context. Arrow testified that he engaged in a long discussion about his stock options with Pignatelli (Chairman/CEO) and sought his fellow director Moll's counsel on the issue. (A385; A670-72). The

draft minutes also reflect this conversation.[5] It was after this long discussion that Arrow said, "Okay, I agree…" (A1395-A1401). Oracle cannot point to any evidence that calls into question whether such an exchange actually took place or the sequence of events.

Stuck with an adverse factual record, Oracle contends that Arrow's options were only an issue if he were actually resigning from the Board. AB at 37. Oracle is incorrect—it is an issue if he were considering resigning. An immediate resignation is far from the only conclusion to draw from Arrow's words. Arrow could have agreed to any number of arrangements with respect to his stock options that did not require him to resign from the Board (*e.g.,* let his term lapse), or that did not require him to resign from the Board at that time (*e.g.,* wait for the optimal time to resign for tax planning purposes). The record simply does not reflect what Arrow actually agreed to, and this is not sufficient to find an unequivocal (or clear manifestation) of intent to resign.

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[5] Oracle's accusation that the minutes of February 28 Meeting were improperly altered during the course of litigation (*see* AB at 36 n. 5) is without citation to any evidence in the record. To support its assertion, Oracle improperly relies on the fact that Biolase did not catch Oracle's sleight-of-hand dating the document as March 21, 2014 before signing off in the midst of expedited litigation on a joint trial exhibit list containing 274 exhibits. If Oracle had raised this issue before its cross-examination of Fred Furry at trial, Biolase would have submitted conclusive evidence showing that the minutes were not altered after the start of litigation.

Oracle also attempts to harmonize Arrow's testimony that, on the one hand, he thought that he could only be fired in writing, but, on the other hand, he thought he could resign orally. (AB at 38-39). With the help of his attorneys, Arrow tried to reconcile these positions at deposition and at trial. But his actions at the time (before he lawyered up) suggest that Arrow did not believe his purported oral resignation to be effective—namely that (1) he continued to vote at the meeting even after his purported oral resignation, and (2) after the meeting, he continued to argue against resigning. Again, this Court need not reweigh the evidence. It merely needs to review the record to confirm that, if the correct standard were applied, the evidence regarding Arrow's resignation was in dispute and his purported resigatnosn was not unequivocal. *See Unitrin, Inc. v. Am. Gen. Corp. (In re Unitrin, Inc.)*, 651 A.2d 1361 (Del. 1994) (reversing where court below applied incorrect legal standard). If the bar is set at "unequivocal," the standard was not met.

### D. Clark Was Arbitrarily Selected to Fill the Vacancy Left by Arrow's Alleged Resignation.

Oracle concedes that the Court of Chancery's decision to appoint Clark to the Board was not based on any legal principle. (AB at 41). Oracle does not attempt to articulate a legal principle that could be applied to determine how to select one of two newly appointed directors to fill a single vacant board seat. Oracle argues that the Court of Chancery "reasonably concluded" that "[a] board's appointing two directors where there is legally only one vacancy cannot mean that neither nominee was duly appointed[.]" (AB at 42). This is not a principled or reasoned conclusion. It is result oriented at best. It would authorize the Court to arbitrarily determine which of two directors should be appointed to the Board, essentially by coin-flip—precisely what happened here. Oracle's admission is fatal to its claim that Clark was properly elected to the Board. Indeed, nothing in the record supports the notion that, if there is only one vacancy, Clark was the one who should fill it. Affirmance of such an arbitrary method of filling board vacancies would set a dangerous precedent.

Oracle's new policy argument—that the Court's selection of either of Clark or Nugent to fill the single purported vacancy is better than neither of them being appointed because of the deadlock that may otherwise result—is irrelevant and does not support validating an otherwise invalid director election. Indeed, if a deadlock did exist, Delaware law provides a specific remedy under 8 *Del. C.* §

226. However, it does not supply sufficient justification to hand control to a 16% stockholder (without a stockholder vote) who intends to change management, change the governance structure, and engage in self-dealing financing transactions all before the annual meeting.

## II. The Court of Chancery's Decision to Deny Attorneys' Fees Should Be Affirmed, and Oracle's Cross-Appeal Should be Denied.

### A. Questions Presented

Whether the Court of Chancery's denial of Oracle's request for attorneys' fees should be affirmed where Oracle (i) failed to preserve its request for an award of attorneys' fees in its pre-trial brief, at trial, or during the post-trial argument; (ii) never articulated any basis for such an award before entry of judgment; (iii) never moved to amend the judgment to include an award of attorneys' fees; (iv) requested fees for its own self-interest; and (v) is not the type of stockholder the "corporate benefit" doctrine was designed to benefit.

### B. Standard of Review

The Court of Chancery has broad discretion in determining whether to award attorneys' fees. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998). This Court will overturn the Court of Chancery's denial of attorneys' fees only where the ruling is arbitrary and capricious. *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788, 795 (Del. 1982).

### C. Merits of the Argument

#### 1. Oracle's Request for Fees Is Untimely and Waived.

Although Oracle devotes the bulk of its cross-appeal to addressing the merits of its "corporate benefit" fee-recovery theory, this Court need not, and should not, consider those arguments. The Court of Chancery denied Oracle's request for an

award of attorneys' fees "because there is no basis for shifting such fees." (OB Ex. A at 2). Having failed to articulate any basis for the award of attorneys' fees—including Oracle's new "corporate benefit" theory—before the entry of final judgment, Oracle cannot now argue that this Court should vacate the Court of Chancery's ruling and remand the issue for reconsideration because, under Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review." Sup. Ct. R. 8.

Even if remanded, the Court of Chancery likely will find that Oracle waived its right to request attorneys' fees on the basis of the "corporate benefit" doctrine. Delaware trial courts consistently hold that a party waives its ability to recover attorneys' fees when it fails to assert the basis for its claim in pre- or post-trial briefing or at trial. *Kosachuk v. Harper*, 2002 WL 1767542, at *8 n.51 (Del. Ch. July 25, 2002) (finding that defendant waived claim for attorneys' fees by failing to raise claim at trial or post-trial briefing, despite having identified claim for attorneys' fees and costs in pretrial order); *Case Fin., Inc. v. Alden*, 2011 WL 1849126, at *28 (Del. Ch. May 11, 2011) (stating that defendant "arguably . . . waived" claim for attorneys' fees included in pre-trial order but not mentioned, explained, or supported in pretrial brief, post-trial brief, or proposed findings of fact); *SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *21 n.123 (Del. Ch. June 16, 2009) (holding that plaintiff's failure to ask for attorneys'

fees on basis of bad faith litigation in opening post-trial brief waived request on that basis); *cf. Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

Here, Oracle never raised the issue of attorneys' fees in its Pretrial Brief or during post-trial arguments, and it concedes that it never informed the Court of Chancery before entry of final judgment that it would seek fees under a "corporate benefit" theory. (B60). The first time Oracle substantively addressed its attorneys' fees claim was at the May 23, 2014 hearing on Biolase's motion to stay, but, even then, Oracle never formally applied for fees. (*Id.*). Oracle's cursory statement in the Pretrial Order that it intended to seek recovery of "costs, including attorneys' fees" did not preserve its claim. Delaware courts repeatedly have found that disclosing an intent to seek attorneys' fees in a pretrial order is not sufficient. *Kosachuk*, 2002 WL 1767542, at *8 n.51; *Case Fin., Inc.*, 2011 WL 1849126, at *28; *cf. Filasky v. Schnurbein*, 1992 WL 187619, at *1, (Del. Ch. July 29, 1992); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001).

Finally, even if Oracle's claim for attorneys' fees did not ripen until after it succeeded on the merits, Oracle had every opportunity—from pretrial briefing to the hearing on Biolase's motion to stay—to disclose its theory for recovery. But, as Oracle's counsel conceded, Oracle "never made" the argument to the Court of

Chancery. (B60). The Court was not required to anticipate the arguments that Oracle might have made in support of its fee request. *Cf. Filasky*, 1992 WL 187619, at *1 ("To relieve the plaintiffs from that obligation would place the Court in the unreasonable posture of having to advocate for the plaintiff positions that they themselves elected not to advance.").

Because Oracle failed to preserve a request for attorneys' fees on the basis of the "corporate benefit" doctrine, this Court should affirm the Court of Chancery's denial of Oracle's request for attorneys' fees.

### 2. Oracle Is Not Entitled to Fees under the "Corporate Benefit" Doctrine

Even if a plaintiff is entitled to make a post-judgment request for attorneys' fees on the basis of a theory it never before disclosed, Oracle should not be afforded that opportunity because its claim does not meet the standard for recovery under the "corporate benefit" doctrine. Oracle has conferred no "corporate benefit" on Biolase. Rather, it has used this proceeding as an attempt to shift control of the company to a 16% stockholder *without a stockholder vote*. Oracle claims to be rescuing the Company from corporate governance gridlock, but in reality it has done nothing more than involve the courts unnecessarily in issues that will be decided soon enough in the proxy contest Oracle initiated. Thus, remanding the issue for consideration of fees would be futile. *Solomon v. Pathe Comm'cns Corp.*, 672 A.2d 35, 40 (Del. 1996) (holding that where complaint

failed to state a claim, judicial economy counseled against remand that would "serve no purpose").

As Oracle concedes, under the American Rule, the "prevailing party is responsible for the payment of his own counsel fees in the absence of statutory authority or contractual undertaking." *Tandycrafts, Inc. v. Initio P'ship*, 562 A.2d 1162, 1164 (Del. 1989). However, in limited circumstances, attorneys' fees may be awarded to "a plaintiff whose efforts result in the creation of a common fund or the conferring of a corporate benefit." *Id.* The plaintiff bears the burden to show that the litigation "specifically and substantially" benefited the company and its stockholders. *See Chrysler Corp. v. Dunn*, 223 A.2d 384, 286 (Del. 1966); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990). The benefit must be "substantial" in the sense that its value to the company "is immediately discernible rather than speculative in character." *Richman v. Deval Aerodynamics, Inc.*, 185 A.2d 884, 885 (Del. Ch. 1962).

Ultimately, recovery of attorneys' fees pursuant to the "corporate benefit" doctrine is "predicated on the conferring of some benefit on the interested class and not merely on petitioner himself." *Id.* Applying this rule, the Delaware Court of Chancery denied attorneys' fees to a successful plaintiff in an 8 *Del. C.* § 225 action, as the "principal beneficiaries" of the action were the plaintiffs, who had successfully gained control of the company. *Keyser v. Curtis*, 2012 WL 3115453,

at *19 (Del. Ch. July 31, 2012). In *Keyser*, one of the plaintiffs had maneuvered to have himself and his allies elected to the board of directors, which elections then were confirmed by the Court of Chancery. *Id.* at *8, 19. In denying the plaintiffs' request for attorneys' fees, the Court explained:

> This case was primarily about Keyser's efforts to gain control of the Company. The Court finds that, in bringing this action, Keyser was principally motivated by a desire to benefit himself, not a desire to benefit [the Company]. There is nothing wrong with that, but it does not present the type of situation that calls out for an award of attorneys' fees.

*Id.* at *19 (noting "the ultimate effect of this action may merely be to substitute one controller for another—hardly a thrilling victory from the point of view of the Ark stockholders who are not Keyser's allies"). *Keyser* was consistent with earlier decisions denying attorneys' fees to unsuccessful hostile bidders, which reasoned that (a) even as a stockholder, a bidder's interests inherently conflict with those of the target's public stockholders, and (b) the policy rationale for fee-shifting—namely, that it encourages stockholders to act on behalf of "a large and diffused class of shareholders who do not have the organizational ability or funds to seek redress themselves"—does not apply to bidders, who are "not organizationally disadvantaged" and are also well-financed. *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1224-25 (Del. Ch. 2001) (quoting *In re Dunkin' Donuts*, 1990 WL 189120, at *10).

As in *Keyser*, Oracle will be unable to show entitlement to attorney' fees under the "corporate benefit" doctrine. Oracle's goal in investing in Biolase and initiating the underlying lawsuit was to control Biolase and thus, improve Oracle's return on its investment. (*See, e.g.*, A1274; A1211; A1215; A1306; A274-75; A312). Although improvement to Biolase's financial condition could benefit other stockholders, Oracle was "principally motivated by a desire to benefit [itself]," not Biolase. *Keyser*, 2012 WL 3115453, at *19. Indeed, Oracle was willing to take action to the detriment of the Company to gain control. *See, e.g.*, A1211 (discussing plan to "add on weakness [then] go hostile"). Moreover, that Oracle is unable to point to an alleged "corporate benefit" aside from the appointment of a single director—the validity of whose appointment is at issue in this appeal—shows that, on remand, Oracle would fall well short of its burden to prove a "specific and substantial" benefit to the Company. Finally, that Oracle is well-organized and well-financed confirms that a fee award would be inappropriate here. *Mentor Graphics*, 789 A.2d at 1225.

The cases on which Oracle relies do not compel a different result. *Niehenke v. Right O Way Transportation*, in which the court awarded attorneys' fees to a successful plaintiff in a 8 *Del. C.* § 226 action seeking to have custodian appointed to end a board deadlock, is distinguishable. 1995 WL 767348, at *11-12 (Del. Ch. Dec. 28, 1995). There, the plaintiff sought to have the court appoint a custodian—

one nominated by both parties—to end a harmful deadlock, thereby conferring a real benefit to the company. *Id.* Here, by contrast, Oracle seeks simply to control the Company through the appointment of a hand-selected ally. Oracle's reliance on *Baron v. Allied Artists Pictures Corp.*, 395 A.3d 375 (Del. Ch. 1978), is also misplaced. There, the plaintiff's lawsuit to divest the company's preferred stockholders of voting control and "return the power to elect the board of directors to the common shareholders" resulted in a clear, valuable benefit to the company's stockholders: a merger that led to "voting control being placed in its common shareholders." *Id.* at 382. Here, by contrast, the only "benefit" Oracle claims to have conferred upon Biolase is the appointment of an Oracle supporter to the Board—"hardly a thrilling victory" for Biolase's stockholders. *Keyser*, WL 3115453, at *19.

Because Oracle would be unable to establish entitlement to attorneys' fees under the "corporate benefit" doctrine on remand, this Court should deny that request as futile and affirm the portion of the judgment below denying fees. *See Solomon*, 672 A.2d at 40.

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision below. Oracle's cross-appeal points should be rejected.

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Dated: June 4, 2014
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2014 a copy of the herewith document was served electronically via *File & ServeXpress* on the following counsel of record:

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