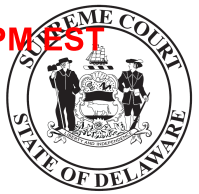
EFiled: Dec 10 2013 04:23PM EST
Filing ID 54684375
Case Number 583,2013



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELDON KLAASSEN, *Plaintiff and Counterclaim-Defendant Below, Appellant,* v. ALLEGRO DEVELOPMENT CORPORATION, RAYMOND HOOD, GEORGE PATRICH SIMPKINS, JR., MICHAEL PEHL, and ROBERT FORLENZA, *Defendants and Counterclaimants Below, Appellees.*	**No. 583, 2013** On appeal from the Court of Chancery of the State of Delaware, C.A. No. 8626-VCL

APPELLANT'S REPLY BRIEF

R. Judson Scaggs, Jr. (#2676)
Kevin M. Coen (#4775)
Frank R. Martin (#5636)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
Attorneys for Plaintiff and Counterclaim-Defendant

OF COUNSEL:

George Parker Young
Anne Johnson
Kelli Larsen Walter
HAYNES AND BOONE, LLP
201 Main Street, Suite 2200
Fort Worth, TX 76102
(817) 347-6600

December 10, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. OVERVIEW. 1

II. THE COURT OF CHANCERY INCORRECTLY HELD THAT DEFENDANTS' ACTIONS WERE VOIDABLE. 3

A. The Controlling Cases Protect Fundamental "Delaware Corporate Law Precepts" And Dictate That the Director-Defendants' Actions Are Void. 3

B. The Flawed Analysis Of The Court Of Chancery Fails To Follow Delaware Law and Proposes A New Overly Technical Approach. 8

C. The Director-Defendants' Proposed Rule Is Too Vague And Ignores Established Delaware Law. 11

D. Director-Defendants' Secret *Decisional* "Board" Meetings Violated The Bylaws. 12

III. THE COURT OF CHANCERY MISAPPLIED THE LAW OF LACHES AND ACQUIESCENCE. 15

TABLE OF AUTHORITIES

Page(s)

CASES

Adlerstein v. Wertheimer,
2002 WL 205684 (Del. Ch. Jan. 25, 2002).. Passim

Bakerman v. Sidney Frank Importing Co.,
2006 WL 3927242 (Del. Ch. Oct. 10, 2006) 18

Bay Newfoundland Co. v. Wilson & Co.,
4 A.2d 668 (Del. Ch. 1939) 17, 20

Dillon v. Berg,
326 F. Supp. 1214 (D. Del. 1971)...17

Doskocil Cos., Inc. v. Griggy,
1988 WL 81267 (Del. Ch. Aug. 4, 1988) 15

Fogel v. U.S. Energy Sys. Inc.,
2007 WL 4438978 (Del. Ch. Dec. 13, 2007).. Passim

Frank v. Wilson,
32 A.2d 277 (Del. 1943) 18

Frank v. Wilson,
9 A.2d 82 (Del. Ch. 1939),
aff'd, 32 A.2d 277 (Del. 1943) 20

Hollingsworth v. Szcesiak,
84 A.2d 816 (Del. Ch. 1951) 20

Hudak v. Procek,
806 A.2d 140 (Del. 2002) 15

In re Celera Corp. S'holder Litig.,
2012 WL 1020471 (Del. Ch. Mar. 23, 2012),
aff'd in part, rev'd in part, 59 A.3d 418 (Del. 2012) 19

Keith v. Adams,
1985 Del. Ch. LEXIS 500 (Del. Ch. Sept. 23, 1985) 19

Keyser v. Curtis,
2012 WL 3115453 (Del. Ch. July 31, 2012),
aff'd sub. nom., *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013) 15

Koch v. Stearn,
1992 WL 181717 (Del. Ch. July 28, 1992),
dismissed and remanded with direction to vacate as moot,
628 A.2d 44 (Del. 1993) .... Passim

Michelson v. Duncan,
407 A.2d 211 (Del. 1979) 9, 10, 12

Moore Bus. Forms v. Cordant Holdings Corp.,
1998 WL 71836 (Del. Ch. Mar. 5, 1998) 1, 10, 13, 14

Nevins v. Bryan,
885 A.2d 233 (Del. Ch. 2005),
aff'd, 884 A.2d 512 (Del. 2005) 11, 17, 18

NTC Grp., Inc. v. West Point-Pepperell, Inc.,
1990 WL 143842 (Del. Ch. Sept. 26, 1990)..20

Poliak v. Keyser,
65 A.3d 617 (Del. 2013) (TABLE) 16

Prizm Grp. v. Anderson,
2010 WL 1850792 (Del. Ch. May 10, 2010)..11

STAAR Surgical Co. v. Waggoner,
588 A.2d 1130 (Del. 1991) 11

Stengel v. Rotman,
2001 WL 221512 (Del. Ch. Feb. 26, 2001),
aff'd sub. nom., *Stengel v. Sales Online Direct, Inc.*,
783 A.2d 124 (Del. 2001) 11, 16

Superwire.com, Inc. v. Hampton,
805 A.2d 904 (Del. Ch. 2002) 11

VGS, Inc. v. Castiel,
2000 WL 1277372 (Del. Ch. Aug. 31, 2000),
aff'd, 781 A.2d 696 (Del. 2001) .... Passim

Wechsler v. Abramowitz,
1984 WL 8244 (Del. Ch. Aug. 30, 1984) 17

Whittington v. Dragon Grp., L.L.C.,
2010 WL 692584 (Del. Ch. Feb. 15, 2010),
aff'd and remanded, 998 A.2d 852 (Del. 2010) 15

STATUTES

8 *Del. C*. § 204 9

8 *Del. C.* § 205 9

ARGUMENT

I. OVERVIEW.

One of the most, if not the most, important aspects of any decision is who makes it. A corporation's right to the judgment and participation of a fully-informed board is essential to any rational notion of board governance and, unquestionably, a fundamental part of Delaware law.[1] *Koch*, *Moore*, *VGS*, *Adlerstein*, and *Fogel* protect the foundational integrity of corporate decisions and prohibit director factions from acting with stealth and deception to engineer critical corporate actions, especially when notice to and full participation by the excluded director could have resulted in a different outcome. This Court should confirm that actions taken in violation of these bedrock principles are void.

Here, Director-Defendants completely shut out a fellow director from two critical decisions—removal and replacement of the CEO—and subverted Allegro's structure for determining who is on the Board when it makes those decisions. By keeping their plans and meetings secret from Klaassen, Director-Defendants denied him "meaningful participation," and prevented him from exercising his contractual right to alter the composition of the Board, so as to ensure that independent directors, untainted by conflict of interest, voted on the CEO choice.

---

[1] See *Moore Bus. Forms v. Cordant Holdings Corp.*, 1998 WL 71836 (Del. Ch. Mar. 5, 1998) (finding that denial to board member of full information and participation violates fundamental "corporate law precepts" and renders the purported board action void *ab initio*).

Director-Defendants also violated Allegro's bylaws by holding secret special "BOD" or "Board" meetings at which they made the decisions to fire Klaassen and hire Hood. Their backfill excuse that those meetings were only informal "discussions" cannot work. They now admit—and the Court of Chancery found—that they "agreed" to fire Klaassen and hire Hood well before the November 1 meeting. AB 10; Op. 22. They even took definitive action before November 1 on behalf of Allegro: offering Hood a job and incentives, and "Hood agreed to take the job." Op. 20. These actions, taken in violation of bylaws, are void.

Separately, the Court of Chancery's findings of laches and acquiescence on the facts presented here are an unwarranted extension of Delaware law. The few months Klaassen spent trying to avoid litigation through buyout negotiations was entirely reasonable, as was the short delay that resulted from being forced by Allegro to change counsel. Defendants do not point to any prejudice they suffered as a result of any specific period of delay, and there is none. As for acquiescence, the conduct listed in the Opinion (Op. 42-43) consists of actions to stay informed and involved, in order to prevent further harm to Allegro, while Klaassen sought a non-litigation resolution. The bottom line is that Defendants knew Klaassen had "not accepted" their ambush, and treated him as adverse the entire time. Given the totality of the circumstances, an appropriate application of the law requires reversal on laches and acquiescence.

II. THE COURT OF CHANCERY INCORRECTLY HELD THAT DEFENDANTS' ACTIONS WERE VOIDABLE.

The Opinion and the Defendants offer different approaches to the void-voidable analysis, but both ignore the case law which undisputedly contains the most analogous facts.

A. The Controlling Cases Protect Fundamental "Delaware Corporate Law Precepts" And Dictate That the Director-Defendants' Actions Are Void.

The ambush cases, each decided by a preeminent Delaware jurist, hold that when a faction of a board (1) deceives or deliberately keeps a director uninformed, (2) disadvantages a board member so that he cannot exercise his contractual right to alter the composition of the board in a manner that could have changed the decision, and/or (3) deprives the corporation of that board member's meaningful participation in a critical corporate decision, then the deciding faction was comprised of the wrong persons. *See Fogel v. U.S. Energy Sys. Inc.*, 2007 WL 4438978, at *3 (Del. Ch. Dec. 13, 2007); *Adlerstein v. Wertheimer*, 2002 WL 205684, at *9-12 (Del. Ch. Jan. 25, 2002); *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *3-5 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.2d 696 (Del. 2001); *Koch v. Stearn*, 1992 WL 181717, at *5 (Del. Ch. July 28, 1992), *dismissed and remanded with direction to vacate as moot,* 628 A.2d 44 (Del. 1993). Fundamental precepts of Delaware law render those actions void.

Koch is directly on point. A faction of the Board secretly made a decision to fire the CEO, Stearn, and intentionally did not inform him of that intent. 1992 WL 181717, at *5. The Court spoke in terms of the ousted CEO, Stearn, being "disadvantaged" by the secrecy. *Id.* The "disadvantage" element is critical to rendering the action void. Stearn was denied the ability to change the composition of the Board and "participate meaningfully" in the decision, so the wrong persons made the decision—a defect certainly as foundational as a failure to give proper notice of a meeting. The Court declared that the challenged board actions "were void and of no effect." *Id.* *Koch* did not acknowledge that equitable defenses could apply (Appellant's Corrected Answering Brief ("AB") 17); rather, it stated that actions will not be invalidated where the deceived director "suffers no disadvantage in his ability to participate meaningfully." *Id.* at *4.

Adlerstein followed *Koch* and *VGS* to hold director actions void. 2002 WL 205684; *VGS*, 2000 WL 1277372, at *5. The Court in a footnote distinguished between the advance notice rights of a stockholder, which could produce a "voidable" action if "improperly motivated," and a stockholder-director with the ability to alter the composition of the board. *Adlerstein*, 2002 WL 205684 at *9 n.28. The Court relied on the "disadvantage" occurring due to the "other directors' failure to communicate their plans to [the director]," even in the absence of a

bylaw requiring notice and even given the dire financial circumstances and good faith of the defendants. *Id*. at *11.

Fogel, in addition to relying on the "meaningful participation" concepts running through all of these cases, held that when a faction of a board uses deceit to disadvantage another board member by thwarting an opportunity to change the composition of the board, the act is void. 2007 WL 4438978. Chancellor Chandler held that Fogel's termination was "*void ab initio*." *Id*. at *4. Although Fogel was not able to unilaterally change the board, he was denied the *opportunity* to call a special stockholder meeting, which *might have* resulted in a change in the board. *Id*. This ruling confirms the overarching importance in Delaware law of ensuring that a properly composed board makes decisions.

The Defendants attempt to distinguish the ambush cases on the ground that they were premised on "boards acting in bad faith" and that the Court of Chancery found that the Director-Defendants acted in "good faith and did not rely on deception." AB 27. Defendants are wrong on both counts. In *Fogel*, the Court found that the board acted "in good faith" in taking an action that they believed "was in the best interests of the Company." 2007 WL 4438978, at *3-4. In *Adlerstein*, the defendants had "a good faith belief" that Adlerstein should be removed. 2002 WL 205684, at *9. In *VGS*, the defendants "conscientiously believed" that they acted in the best interest of the LLC. 2000 WL 1277372, at *4.

In this case, the Court of Chancery expressly declined to "rule on Klaassen's theories" that the defendants acted in bad faith because of its ruling that equitable defenses defeated Klaassen's claims. Op. 30.

Defendants also claim that the *Koch* rationale only applies if the stockholder-director could have stopped the board's action. AB 28. Not true. In *Koch*, *VGS* and *Adlerstein*, the plaintiffs could have replaced directors. They could not have dictated how those new directors would vote, so they could not have unilaterally stopped the board's actions. In *Fogel*, the CEO "lacked the votes necessary to protect his employment" and there was no assurance that any of the directors would have been replaced if Fogel had the opportunity to call a stockholder's meeting. 2007 WL 4438978, at *4.

Defendants argue that Klaassen lacked the ability to remove the independent directors unilaterally. Wrong again. The CEO was entitled to appoint a common director and remove the two independent directors under Section 9.2(d) of the Stockholders' Agreement against the wishes of the Series A Investors. A51. The Series A Investors would need to agree to the replacements for Hood and Simpkins.[2] But their consent could not be unreasonably withheld so Klaassen

[2] The Defendants are incorrect when they say that Klaassen could only "elect" one director. AB 4. He could "elect" the common director, and his vote was required to "elect" the two Independent Directors. A51, at § 9.2. The Court below correctly found that the Series A Investors and Klaassen "shared control" of the Board. Op. 3.

could have designated (and elected) any reasonable replacements. A51, at § 9.2(d). After replacing Hood and Simpkins, if the new Outside Directors agreed that Klaassen should remain CEO, the vote would have been 3-2 [or 4-3] in Klaassen's favor (contrary to AB 28). Klaassen could have replaced Hood or Simpkins with new directors, but he could not entrench. Those new directors—unlike Hood—would have made the CEO decision without a conflict of interest. Of course, after becoming fully informed, they could decide to vote with the Series A Investors to fire Klaassen.

Finally, the weakness of Defendants' attempts to distinguish the ambush cases is betrayed by their tactic of attacking Klaassen's performance as CEO. AB 6-8. As those cases made abundantly clear, Klaassen's performance is irrelevant to the claim at issue here, which is based on the Director-Defendants' secret plan and meetings that subverted Klaassen's ability to change the board. *See, e.g., Fogel*, 2007 WL 4438978, at *1 n.3 (lamenting "copious and unnecessary testimony" on CEO performance submitted at trial, which was irrelevant to legal analysis). Further, Defendants' assertions concerning Klaassen are wrong. The Great Recession was a major factor in Allegro's financial difficulties, which improved dramatically during 2010 to 2012. A390-408; A548; A2380-82 (Allegro had 3 quarters of record revenue in 2012); A2988-90 (Hood admitted Allegro "turned around" by the end of 2010); AR1-10. The attempt to blame Klaassen for the

departure of three executives is after-the-fact spin. A2662; A3349-50 (board knew of problems with Friedman for over a year before termination); *compare* Op. 22 *with* AR11-13 *and* AR14-16 (Musier left due to his compensation *after* three of the Defendant-Directors had already agreed to replace Klaassen); A2374-75 (board agreed to Larsen's termination for poor performance).

B. The Flawed Analysis Of The Court Of Chancery Fails To Follow Delaware Law and Proposes A New Overly Technical Approach.

The rule created by the trial court's opinion is: failure to give notice of a board meeting in compliance with the bylaws renders board actions void; but when the lack of notice violates core Delaware corporate law principles, board actions are merely voidable. Op. 38. The Court of Chancery decision does not view the protections provided in the ambush cases as upholding the foundational principles of candor to other directors and the integrity of the corporation's director removal and selection methodology. The Court of Chancery views all of those cases as deeply flawed, believing that they somehow create a "super director" status that conflicts with a "director-centric" model of governance. Op. 29-30 & n.6. This Delaware board-centric governance scheme, however, functions only with the proper persons making the decision. There is no precedent for a "CEO exception" to meaningful participation by all directors. A formulation of board-centricity making some directors subordinate to others by secrecy and deceit cannot trump

the right to decide who is a member of the board. *Who* exercises their business judgment as a director is obviously much more fundamental than giving deference to a faction's business judgment.[3]

The Opinion discounts the *Koch* line of cases because they do not expressly cite to *Michelson v. Duncan*, 407 A.2d 211 (Del. 1979). Op. 34-35 n.9. Appellees state their "process" distinction comes from *Michelson*, AB 21; however, that case does not even contain the term. *Michelson* involved ratification of options allegedly granted in violation of the terms of the option plan.[4] It did not involve a complete circumvention of the company's mechanism for placing directors on the board, as was the case in *Koch*, *VGS*, *Fogel* and *Adlerstein*—and here. *Solomon v. Armstrong*, decided 20 years after *Michelson*, elucidates the void/voidable test, adding that "acts that are fundamentally contrary to public policy" or that are "contrary to basic principles of fiduciary law" are void. 747 A.2d 1098, 1114, n.45. *Koch*, decided before *Solomon*, and *VGS*, *Adlerstein* and *Fogel*, decided after *Solomon*, apply fundamental principles to void actions that are engineered in secret

[3] Defendants' discussion of the business judgment afforded to board decisions (AB 24-26) is not relevant to the void/voidable issue in this appeal. The Court of Chancery assumed liability and the Director-Defendants' violation of fundamental precepts of corporate law is obvious from how closely the facts here tract the facts in *Koch* and the other ambush cases.

[4] This highlights another major flaw in Defendants' "process" distinction for void/voidable: according to the Defendants' authorities, it is mainly derived from the confusing case law from ratification Delaware stock issuance cases, which the Delaware legislature recently addressed. *See* AB 21-22; *see also* 8 *Del. C.* §§ 204, 205 (effective April 1, 2014).

to avoid a director's meaningful participation and changes in board composition. The Court of Chancery's proposed rule, on the other hand, would fail the *Michelson* test. *Michelson* holds that fraudulent acts are void, not voidable. 407 A.2d at 218-19. A defect in, or absence of, notice that also constitutes fraud would be void under *Michelson*, but merely voidable under the trial court's, or Defendants', disparate tests.[5]

Defendants discount use of the word "void" in three of the ambush cases (*Koch, Moore and Fogel*), and "invalid" and "illegal" in two others, as "loose" language and "imprecise." AB 17; AR30. This is doubtful given the identity of the authors, but certainly *Moore*, cited in *Fogel*, considered whether the exclusion of a director was susceptible to an affirmative defense of "ratification," applied the *Michelson* test, and declared the action "void." *Moore*, 1998 WL 71836, at *9.

The Court of Chancery's formulaic rule places more importance on a faction of the board managing the corporation than on the fully informed, correctly composed board managing the corporation, and should not be adopted.

---

5 Contrary to Appellees' Brief, the Court below did not make a finding on the actual reasons for the postponements of the November 1 meeting. *Compare* Op. 23-24 *with* AB 10. It is undisputed that one of the reasons was to allow more time to prepare the ambush. A2458-59; A688-691. Pehl deliberately did not call a special meeting, with required notice of the topic, and so avoided telling Klaassen what was coming. A2778-79. The deception was not in obtaining Klaassen's attendance, but preventing his input or any defensive action.

C. The Director-Defendants' Proposed Rule Is Too Vague And Ignores Established Delaware Law.

The Director-Defendants offer another rule: an undefined category of "process-based" claims are voidable and only an undefined category of authority-based claims are void. AB 21-22. Defendants' amorphous rule conflicts with the rule espoused by the Court of Chancery: actions taken in violation of bylaws are void. Op. 38 & n.10. The Director-Defendants cite three cases supposedly standing for the proposition that technical violations of bylaw notice provisions are voidable.[6] None of the cases cited by the Director-Defendants, however, implicate the fundamental precepts of corporate law that are present in the ambush cases. AB 21-22. Those cases involve not only questions of proper notice, but the disadvantage suffered by the deceived directors whose right to effect the proper board composition is hamstrung by the deception.

Moreover, Defendants' rule is too vague to be workable. The Director-Defendants fail to define "process-based" claims and nowhere do they distinguish "process-based" from "authority-based" claims. For example, the notion that "process-based" claims are merely voidable conflicts with the well-established rule

---

[6] *Nevins v. Bryan*, 885 A.2d 233 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005); *Prizm Grp. v. Anderson*, 2010 WL 1850792 (Del. Ch. May 10, 2010); *Stengel v. Rotman*, 2001 WL 221512 (Del. Ch. Feb. 26, 2001); *aff'd sub. nom.*, *Stengel v. Sales Online Direct, Inc.*, 783 A.2d 124 (Del. 2001). Of course, other cases provide that violations of bylaws, or other governing documents, render the action void. *See, e.g.*, *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991); *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 909 n.17 (Del. Ch. 2002).

in Delaware that fraud and waste—which are certainly claims based on a process—render actions void. *Michelson*, 407 A.2d at 218-219.

Respectfully, the decision in this case should make clear that regardless of whether all technical bylaw violations render board actions void, violations of fundamental precepts of Delaware law that go to the heart of who makes corporate decisions—like the ones in this case—render board actions void.

D. Director-Defendants' Secret *Decisional* "Board" Meetings Violated The Bylaws.

The Director-Defendants sidestep this key question: did their pre-November 1 *decisional* board meetings excluding Klaassen violate the Allegro bylaw on special meeting notice? AB 2, 19-21. Similarly, the Opinion incorrectly states that Klaassen "does not contend that the Board violated a mandatory bylaw." Op. 39. In fact, Klaassen repeatedly urged below that what the *Director-Defendants* called "Board" or "BOD" meetings, where major CEO-related decisions were made, violated Allegro's bylaw requiring notice of special meetings to all directors. A93; A1523; A1539; A2253; A2261-62; A2315; A3436; A3457-58.

Despite the Opinion's findings that fundamental corporate decisions were made by the four Director-Defendants prior to November 1 while deliberately excluding Klaassen (Op. 18-24), and despite the overwhelming evidence to that effect, Defendants contend that what occurred prior to November 1 were mere "side conversations" and "discussions." AB 10, 20. But Director-Defendants now

admit that prior to November 1 they "agreed" to terminate Klaassen. AB 11; *see also* Op. 22- 23. They also took action based on that decision. They made specific promises to Hood and offered him the CEO position, which he "agreed to take" (Op. 20)—before November 1 and without a properly noticed board meeting or other notice to Klaassen.

In *Moore*, the court rejected the contention that an advance meeting of some board members could not have been a "board meeting," but was a mere non-board meeting discussion (a "gathering"). 1998 WL 71836, at *5 n.16. Since "it was at this meeting that ***they decided to terminate***," then-Vice Chancellor Jacobs held there was a board meeting. *Id*. (emphasis added). Because a board member was not told of the meeting, and did not participate, the resulting termination was "void" as violating fundamental Delaware "corporate law precepts." *Id*. at *6-7, 9. And that pre-meeting decision could not later be "ratified."[7] *Id*. at *6. Klaassen does not urge a rule prohibiting informal board discussions, even those about the CEO, and even with the CEO absent. But when those "Board" meetings become ***decisional***, and a faction of the board acts on those decisions on behalf of the corporation, there is a bylaw violation that is far more than a procedural misstep.

---

[7] Contrary to Appellee's Brief (AB 18, n.12), the Court in *Moore* expressly rejected the equitable defenses of "ratification" and equitable estoppel. 1998 WL 71836, at *6, 8-9. The reference to "the by-laws" on page 7 and note 29 of *Moore* is from the cases quoted, though *Moore* leaves no doubt that a violation of an express bylaw on special meetings would be void.

This is especially true when, as here, the ensuing regularly-scheduled meeting follows a rehearsed script devoid of any meaningful discussion because the outcome has been pre-ordained by the prior bylaw-violating meetings. The resulting removal of Klaassen as CEO is “void *ab initio*,” and could not have been “ratified” on November 1. *Id*. at *6-7 & n.29.

III. THE COURT OF CHANCERY MISAPPLIED THE LAW OF LACHES AND ACQUIESCENCE.

The Court of Chancery's unprecedented dismissal of Klaassen's claims for laches and acquiescence, based on misapplication of Delaware law and ignoring the totality of circumstances, is an independent basis for reversal. *See generally Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002).

Defendants ignore that a three-year statute of limitations guides determination of unreasonable delay absent exceptional circumstances missing here. *See* OB 27-28. Instead, they assert that Klaassen neither engaged in settlement negotiations nor communicated that his removal was invalid and that he would file suit if buyout efforts failed. AB 32. Klaassen *did* engage in settlement negotiations, as the Vice Chancellor found: "Klaassen tried to *negotiate* a buyout with the Series A Investors" for several months. Op. 41 (emphasis added). A successful buyout moots this suit. A744-45; A3187. Such settlement negotiations are exactly the type Delaware law encourages. *See*, *e.g.*, *Whittington v. Dragon Grp., L.L.C.*, 2010 WL 692584, at *7, 9 (Del. Ch. Feb. 15, 2010) (plaintiff sought to settle dispute for several years), *aff'd and remanded*, 998 A.2d 852 (Del. 2010); *Keyser v. Curtis*, 2012 WL 3115453, at *15 n.141 (Del. Ch. July 31, 2012), *aff'd sub. nom.*, *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013); *cf. Doskocil Cos., Inc. v. Griggy*, 1988 WL 81267, at *3 (Del. Ch. Aug. 4, 1988). During the same time period, Klaassen gave the Series A Investors numerous reasons why replacing him

with Hood was invalid, and specifically threatened "shareholder litigation" if the buyout negotiations failed. A237-39; A243-72; A2469-77; A2781-86.

As for the three months between the collapse of negotiations in early March (Op. 26) and filing this case, no Delaware court has dismissed a 225 action based on laches for a ***three-month delay***. *See Poliak v. Keyser*, 65 A.3d 617, at *2-3 (Del. 2013) (TABLE) (finding that a one-year delay in filing a Section 225 action did not constitute laches). Defendants cite one case for laches based on delay of less than three months, where the court dismissed on the merits, noting *in the alternative* that plaintiff consented to stay his lawsuit to allow for the very process that he later challenged. *Stengel*, 2001 WL 221512, at *1-2, 6-7. Unlike *Stengel*, Klaassen provided an undisputed explanation for those three months and Defendants offered no arguable prejudice linked to that three-month period. *See* OB 28; A294-96; A793-98; A2480-82; A3364; A3584.

The vague, general "prejudice" Defendants and the Opinion reference concerning new hires and non-specific customer relationships—unanchored to any timeframe in the seven months—admittedly arises from the *fact* that Klaassen filed suit, not from the timing of it. AB at 32; *see also* Op. 41; A3237-38; A3345-46; A3356-57. For example, Hood was assembling his new management team well before November 1, so according to Defendants, Klaassen's suit would be barred even if filed one week after the ambush. *See*, *e.g.*, A203; A733. Defendants do

not dispute that the "super-vice president" management hires were improper under the bylaws, so those cannot constitute prejudice. *See* OB 14.

Appellees' Brief does not identify a single thing they would have done differently had Klaassen proclaimed every day that he was still the CEO. Defendants took all the actions they now call prejudice despite knowing that Klaassen had not "accepted his fate," had objected to the ambush, and would sue absent a buyout. A237-39; A240-42; A243-72; A2469-77; A2781-86; *see also Bay Newfoundland Co. v. Wilson & Co.*, 4 A.2d 668, 673 (Del. Ch. 1939) (denying laches and acquiescence, noting no change in position); *Wechsler v. Abramowitz*, 1984 WL 8244, at *4 (Del. Ch. Aug. 30, 1984) (finding no prejudice because no claim that defendants would have discontinued transaction had they been warned of lawsuit).

As for acquiescence, the Opinion improperly placed the burden on Klaassen to defeat this affirmative defense and then ignored the totality of the circumstances. *See* Op. 43. Unlike the director in *Dillon v. Berg*, 326 F. Supp. 1214, 1221 (D. Del. 1971), it is undisputed that Klaassen's conduct at the November 1 meeting did not show acquiescence or participation. A209-12; A1497-99; A2467-68. Klaassen never signed a resolution expressly approving the Defendants' actions, unlike *Nevins v. Bryan*, in which the plaintiff *officially ratified the specific actions* he later

challenged. 885 A.2d at 238.[8] The Defendants do not challenge that "[a]cquiescence properly speaks of assent . . . during the progress of a transaction . . . ." *Frank v. Wilson*, 32 A.2d 277, 283 (Del. 1943).

In addition, Klaassen's post-November 1 actions could not rationally suggest that he "***unequivocal[ly]*** approv[ed] of the transaction." *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006) (emphasis added). Telling is Defendants' heavy reliance on an unconsummated stay-on contract that was never "approved," much less signed. *See* AB 12. Klaassen imposed written preconditions that were never met and which Klaassen never withdrew. A226-28; A236; A243-72; A2645-46. And Klaassen struck out the substantive reference to Hood as "CEO" in the first draft. A215-16. The early breakdown in discussions ended with an email from Hood reporting that Klaassen "has *not accepted* his fate." A240-42 (emphasis added). Klaassen was viewed as "undermin[ing]" Hood from this point forward. Op. 25-26.

Klaassen's email about holding Hood accountable emphasized he was *against* Hood being CEO, and gave reasons Hood should be judged "a failure." B95-98. As for attendance at audit and compensation committee meetings, Klaassen was dealing with the *de facto* situation that the Director-Defendants had

---

[8] The *Nevins* plaintiff knew the board would be discussing his employment status at a board meeting and did not contest his removal when it happened. *Id.* at 242-43.

allowed Hood to act as CEO, and while buyout discussions were ongoing, Klaassen was trying to mitigate the damage Hood could do to Allegro in the interim. That cannot amount to acquiescence, particularly where Klaassen (1) attended the December audit committee meeting as an "invitee," and all directors, including Hood, attended the only other audit meeting (A278; A298; A3046-50); and (2) he did not vote in any committee meeting.[9] A2490.

Defendants misquote the Opinion as stating that Klaassen never objected that his removal was "illegal" before filing suit, *compare* AB 12-13, *with* Op. 25-26, and also ignore their acknowledgment that Klaassen told them of the "risk of: . . . shareholder litigation" and that they discussed that possibility themselves. *See*; A237-39; A240-42; A272; A729; A1192; A2469-75. Defendants admit they considered Klaassen "adverse" to them from November 1 on, and they fail to identify a single change in position resulting from any alleged act of acquiescence.[10] Klaassen did not benefit from the Defendants' ambush actions.

---

[9] One Compensation committee meeting minute reflects that Klaassen attended and approved the hiring of Melanie Ofenlach; in reality, the entire board interviewed her since it had to approve her hiring as a Vice President under the bylaws, and Klaassen as director agreed she was a good hire by email, not by attendance and vote at that meeting. *Compare* B129 *with* B130-31.

[10] While some Delaware acquiescence cases expressly hold that a change in position or prejudice is not required, others indicate that like laches, some change in position in reliance on the contended acquiescence is required. *Compare In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012), *with Keith v. Adams*, 1985 Del. Ch. LEXIS 500 (Del. Ch. Sept. 23, 1985), *and*

(Continued . . .)

See NTC Grp., Inc. v. West Point-Pepperell, Inc., 1990 WL 143842, at *5 (Del. Ch. Sept. 26, 1990) ("Acquiescence will clearly bar an action when a plaintiff has shown his approval of the challenged act *by sharing in its benefits*.") (emphasis added). The facts relied upon by the Court of Chancery do not show, as a matter of law, a "definite apparent assent to the acts complained of . . . ." *Frank v. Wilson*, 9 A.2d 82, 86-87 (Del. Ch. 1939), *aff'd*, 32 A.2d 277 (Del. 1943).

* * * * * * * * *

Appellants respectfully submit that based on the errors of law committed below, no remand is necessary and this Court should reverse and enter judgment declaring that the actions purportedly taken at the November 1 board meeting are void or invalid.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/S/ R. JUDSON SCAGGS, JR.
R. Judson Scaggs, Jr. (#2676)
Kevin M. Coen (#4775)
Frank R. Martin (#5636)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
Attorneys for Plaintiff-Below, Appellant

OF COUNSEL:

George Parker Young
Anne Johnson
Kelli Larsen Walter
HAYNES AND BOONE, LLP
201 Main Street
Fort Worth, TX 76102

December 10, 2013

(. . . continued)

Hollingsworth v. Szcesiak, 84 A.2d 816, 821 (Del. Ch. 1951), *and Bay Newfoundland*, 4 A.2d at 671.

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2013, the foregoing was caused to be served upon the following counsel of record by File and Serve*Xpress*:

Peter J. Walsh, Esq.
Ryan T. Costa, Esq.
Potter Anderson & Corroon, P.A.
Hercules Plaza
1313 North Market Street 6th Floor
Wilmington, Delaware 19801

Gregory P. Williams, Esq.
Lisa A. Schmidt, Esq.
A. Jacob Werret, Esq.
Adrian D. Boddie, Esq.
Richards Layton & Finger
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

/s/ Frank R. Martin
Frank R. Martin (#5636)