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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT POLIAK, Defendant-Below, Appellant, v. ROBERT D. KEYSER, JR., FRANK SALVATORE and SCOTT SCHALK, Plaintiffs-Below, Appellees, and ARK FINANCIAL SERVICES, INC. Nominal Defendant Below, Appellee.	No. 478, 2012 On appeal from the Court of Chancery of The State of Delaware in C.A. No. 7109-VCN

ANSWERING BRIEF OF PLAINTIFFS-BELOW, APPELLEES

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NATURE OF PROCEEDINGS

This is an appeal by Defendant Albert Poliak from the July 31, 2012 Memorandum Opinion ("Op.") and August 3, 2012 Order and Final Judgment ("Order") of the Court of Chancery in an action under 8 *Del. C.* § 225 to determine the composition of the board of directors of Ark Financial Services, Inc. ("Ark" or the "Company"). The holders of a majority of Ark's common stock acted by written consent on December 13, 2011 to remove the existing Ark board and to elect Plaintiffs Robert Keyser, Frank Salvatore, and Scott Schalk as Ark's directors. The Defendants – three directors removed by the written consent and Poliak, a former director and CEO of Ark – contended that the stockholder consent was ineffective because Poliak held super-voting preferred stock.

After trial, the Court of Chancery determined that Poliak, while serving as Ark's sole director in December 2010, had violated his fiduciary duty of loyalty by issuing the super-voting preferred stock to himself for the admitted purpose of thwarting holders of a majority of Ark's common stock from removing him as a director. (Op. at 1, 35-39.) Specifically, the Court of Chancery concluded that "Poliak's self-dealing was motivated by a desire to prevent Ark's shareholders from electing a new Board…," that Poliak's issuance of super-voting preferred stock "to himself at a bargain price in order to gain control of the corporation and prevent its stockholders from removing him (or those aligned with him) from office" was not entirely fair, and that the issuance of the preferred stock was therefore invalid. (Op. at 35, 36, 39; Order ¶ 1(b).) The trial court thus concluded

that holders of "a majority of Ark's common stock, the only valid and outstanding class of Ark stock entitled to vote in a Board election, executed the 2011 Written Consent, and that consent elected the Plaintiffs to the Board and removed [the prior directors]." (Op. at 39; Order ¶ 1(a).)

Poliak filed a Notice of Appeal on August 30, 2012 and an Amended Notice of Appeal on October 11, 2012.[1] Poliak is the only Defendant who appealed. He has ***not*** appealed the Court of Chancery's ruling that he violated his fiduciary duty of loyalty by issuing super-voting preferred stock to himself for the admitted purpose of preventing his own ouster. Rather, Poliak asks this Court to absolve him of culpability based on a convoluted set of equitable defenses – laches, ratification, acquiescence, and waiver – that the Court of Chancery rejected. The Court of Chancery held that "none of the equitable defenses raised by the Defendants has any merit." (Op. at 39.) That holding, which was based on the trial court's factual findings and its conclusion that Defendants had failed to carry their burden of proof, is entitled to deference and should be affirmed.

Poliak filed his Opening Brief on October 15, 2012. This is the Answering Brief of Plaintiffs-Below, Appellees.

[1] The Amended Notice of Appeal corrected a misstatement that Plaintiffs' counsel represents Nominal-Defendant, Appellee Ark in the appeal. Poliak's counsel represented Ark in the proceedings below, never filed a motion to withdraw, and has now appealed against Ark.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly concluded that laches does not bar Plaintiffs' challenge to the validity of the super-voting preferred stock. The trial court correctly concluded that Defendants had failed to show unreasonable delay and had failed to show any prejudice. Those findings are entitled to deference and should be affirmed. Plaintiffs filed suit the same day they delivered to Ark the written consent electing a new board and one year after Poliak issued the super-voting preferred stock to himself. The trial court found that Plaintiffs did not file suit sooner due to good faith efforts to negotiate a settlement. Poliak's argument that third-party investors somehow detrimentally relied on a belief that he would control Ark forever through the super-voting preferred stock is self-serving, convoluted, nonsensical, and unsupported by the record. The trial court properly rejected it.

2. Denied. The Court of Chancery correctly concluded that Plaintiffs did not ratify or acquiesce in, and had not waived the right to challenge, Poliak's self-dealing issuance of super-voting preferred stock to himself. Among other things, the trial court recognized that Keyser had repeatedly reserved the right to challenge the preferred stock issuance. The trial court also properly concluded that Defendants had failed to show that third-party investors made their investment because they wanted to have Poliak as a controlling stockholder or that they believed his self-dealing issuance of preferred stock to himself could never be invalidated.

STATEMENT OF FACTS

A. ARK CREDITORS TRANSFER AN OPTION TO KEYSER

Ark is a Delaware corporation that serves as a holding company for Dawson James, an investment-banking firm. (A17.) Keyser and Poliak founded the Company in 2002. (Op. at 4.) In December 2009, Poliak became the sole director of Ark, as well as the President and CEO of both Ark and Dawson James. (Op. at 3-4.)

By late 2010, the Company's principal creditors – Allen Lyons, Kenneth Steel, Burton Koffman, and their affiliates (the "Three Creditors") – had become frustrated with Poliak's leadership of Ark and the pace of his efforts to restructure Ark's debt. (A680-81, A687.) The Three Creditors turned to Keyser, and, on November 29, 2010, they executed a purchase and sale agreement with Auxol Capital LLC ("Auxol"), an entity owned by Keyser and one of his colleagues, Doug Armstrong. (A758-69; Op. at 5.) Among other things, that agreement transferred certain Ark promissory notes to Auxol. The Three Creditors also assigned to Keyser an option (the "Option") to acquire 24% of Ark's common stock (8,604,521 shares). (Op. at 5.)

B. KEYSER ATTEMPTS TO EXERCISE THE OPTION AND POLIAK MOVES SWIFTLY TO ENTRENCH HIMSELF

On November 29, 2010, Keyser notified Poliak and Ark's outside legal counsel that the Three Creditors had assigned the Option to him and that he was exercising it. (A19; A748-52; A123-24.) Poliak understood that his control over Ark was in jeopardy and took swift action to entrench himself. (A245-46.) Two days later, on December 1, Poliak executed a written consent that purported to approve

amendments to the Company's bylaws (the "Bylaw Amendments")[2] and create a new series of super-voting Series B Preferred Stock (the "Series B Preferred"). (A19; A866-79; A246-48.) Poliak caused Ark to issue him 25,000 shares of the Series B Preferred for a penny per share, giving him "an overwhelming majority" of the Company's voting power. (Op. at 7-8.) Poliak admits that he engaged in this self-dealing to "prevent" the holders of a majority of the Company's common stock from removing him. (Op. at 8, 31-33; A254.) He also readily admits that the issuance price was "arbitrary." (Op. at 9.) Although issued for a penny per share, the Series B Preferred had a $1.00 per share liquidation preference and was redeemable any time at Poliak's option for $1.00 per share. (Op. at 39; A897-98.)

Poliak claims to have relied on the legal advice of Locke Lord & Bissell ("Locke Lord") in issuing the Series B Preferred. (A252; Appellant's Opening Brief ("OB") dated Oct. 15, 2012, at 9-10.) Poliak, however, does not recall the specific (or even much of the general) legal advice he claims to have received (A255-56; *see* Op. at 38), and Defendants chose not to call as a trial witness the Locke Lord attorney, Christopher Pesch, who prepared the Series B Preferred documentation. (A599.) The only contemporaneous written evidence "suggests that Locke Lord was (rightly) skeptical of the validity of [the Series B Preferred]." (Op. 38.) In a December 1, 2010 email, Mr. Pesch reminded Poliak: "As we discussed, Delaware courts don't

[2] The Bylaw Amendments were entrenchment-motivated changes that plainly violated Delaware law – namely, to permit removal of directors only "for cause," only at meetings of stockholders (and not by written consent), and only by a supermajority (75%) stockholder vote. (A866-79.) At trial, Poliak did not contest the invalidity of these bylaws.

like provisions that look like self[-]dealing. The courts especially don't like provisions that appear to take away or reduce the voting power of the common stockholders." (A847-52; A19; A1590-93, A1594-1621, 1622.) Thus, Poliak issued the Series B Preferred to himself ***despite*** the advice of counsel.

After trial, Vice Chancellor Noble inquired why Mr. Pesch did not testify. His counsel responded that "we didn't present him as a witness largely because we don't contend that there is some sort of advice of counsel defense that is a show stopper here." (A600.) It thus comes with considerable ill grace – at best – for Poliak to emphasize the purported advice of counsel repeatedly throughout his opening brief in an effort to justify his self-dealing, particularly when he has not appealed the trial court's finding of disloyalty.[3]

Poliak was not content to simply entrench himself. He also misappropriated Company assets. In December 2010, still fearing Keyser might obtain control of Ark, Poliak unilaterally assigned to himself 1,000,000 underwriter warrants for Elephant Talk Communications that belonged to the Company and its employees (the "Elephant Talk Warrants"). (A313-16.) Poliak claims he later returned the Elephant Talk Warrants (A315), but he failed to produce any documentary evidence corroborating his testimony.

[3] To make things worse, Poliak contends it is "clear" that the written record supports that Locke Lord "advised that [he was] permitted under Delaware law to issue the Series B Preferred Stock." (OB at 10 n.2.) This statement is false. The only written evidence of Locke Lord's advice ever produced was the December 1 email.

C. POLIAK CONCEALS HIS SELF-INTERESTED ENTRENCHMENT

On December 1, 2010, Armstrong emailed a written consent of stockholders (the "2010 Written Consent") to Ark's outside counsel. (A20; A899-902; A125.) The 2010 Written Consent attempted to remove Poliak as the Company's sole director and elect Keyser and Armstrong to the Board. (Op. at 9-10; A899-902; A125-26.) The 2010 Written Consent was signed by Keyser and three other Ark stockholders, including Schalk, who believed they held a majority of Ark's common stock, including the 8,604,521 shares Keyser requested be issued upon exercise of the Option (the "Option Shares"). (Op. at 10; A899-902.)

On December 2, Locke Lord sent a letter to Keyser and Armstrong on behalf of Ark contesting the assignment and exercise of the Option and the validity of the 2010 Written Consent. (A20; Op. at 10; A903-04.) Specifically, "Locke Lord asserted that Keyser did not own and could not vote the Option Shares because the Option was not assignable unless Ark consented …, which it had not done." (Op. at 10; A903-04.) Locke Lord chose not to mention Poliak's purported issuance of the Series B Preferred to himself. (A903-04.)

After Locke Lord sent its letter insisting Keyser could not exercise the Option, the Three Creditors submitted a "back-up exercise" of the Option to Ark on December 3, 2010. (Op. at 10; A20; A1024-27.) After more stalling, Locke Lord finally confirmed on December 8 that Ark would issue the Option Shares. (A21; A974-83.) That same day, Locke Lord advised for the first time that, notwithstanding the issuance of the Option Shares, Keyser and the

Three Creditors would not have voting control of the Company, but still did not mention the Series B Preferred. (*Id.*)

On December 9, 2010, Ark issued a certificate for the Option Shares to the Three Creditors, instead of to Keyser as the Three Creditors had requested. (A21; B2-25.) The Three Creditors subsequently assigned the Option Shares to Keyser. (A21.) Thus, the Option Shares had not yet been issued and were not held by Keyser at the time of the 2010 Written Consent. That consent was therefore not effective, and Poliak remained in office.

Poliak also circulated a new capitalization table on December 9. This disclosed for the first time the existence of the Series B Preferred. (B1; Op. at 10.) Knox Bell, counsel to Auxol and Keyser, immediately sent an email to Locke Lord objecting to the self-dealing issuance of the Series B Preferred. (A989-95; A21; Op. at 10-11.)

D. THE SETTLEMENT AGREEMENTS AND THE SERIES A FINANCING

In an effort to avoid litigation, Keyser and Armstrong commenced settlement discussions with Poliak. (A139-40; Op. at 11.) On January 5, 2011, Ark and Auxol entered into a confidentiality and standstill agreement (the "Standstill Agreement"). (Op. at 11; A1028-33.) The parties agreed to defer litigation to provide time to negotiate a transaction whereby Ark would purchase the Notes and other Ark securities held by Auxol. (A1028-33.) Because Keyser and Auxol were allowing Poliak to remain as Ark's sole director and were deferring any litigation over the Series B Preferred to facilitate a settlement, the Standstill Agreement also contained a "Status Quo" provision. It prohibited Ark from taking "any actions outside the ordinary course of

business," including amending the charter or bylaws, the issuance of stock or other securities, changes in corporate structure, and sales of significant assets. (*Id.* at § 6.)

On March 31, 2011, Ark and Auxol entered into a Stock and Note Purchase Agreement (the "Purchase Agreement"). (A22.) The Purchase Agreement provided that Ark would purchase the Option Shares, as well as the Ark Notes and certain shares of Dawson James held by Auxol. (A22; A1267-93.)[4] Ark chose to deal separately with the 7,000,000 shares of Ark common stock owned personally by Keyser (the "Original Shares"), and Ark's obligations to close under the Purchase Agreement were conditioned, at Ark's option, on the parties reaching agreement for Ark to purchase the Original Shares. (Op. 13; A1275.) Sections 6.2 and 6.3 of the Purchase Agreement contained releases from Ark, Auxol, and their respective affiliates. (A1274.) Section 6.4, however, made very clear that the releases are not applicable to Keyser for so long as he owns the Original Shares. (Op. at 13, 45.) Specifically, it provided:

> For the avoidance of doubt, so long as Keyser retains ownership of some or all of the Original Shares, ***he is not releasing any rights or claims*** he has as the owner of such Original Shares.

(A1274 (emphasis added).)

To raise funds for the transaction contemplated by the Purchase Agreement, the Company began marketing the sale of a new series of

[4] The Purchase Agreement formally documented the concepts from an earlier agreement in principle (the "Agreement in Principle"). (Op. at 11-12.) It also continued the status quo provision from the Agreement in Principle, which restricted Ark from taking action outside the ordinary course. (A1038; A1279.)

preferred stock (the "Series A Preferred"). (Op. at 11-12; A22.) The private placement memorandum produced by the Company in connection with the Series A offering (the "PPM") disclosed, ***as a risk factor***, Poliak's control over the Company through his ownership of the Series B Preferred. (Op. at 44; A1053-146.) It also disclosed that "[t]here can be no assurance that we will be successful in retaining the services of our key executives." (A1081.)

None of the Appellees was involved in drafting the PPM. Poliak never requested their input on its content, and did not give them an opportunity to review the PPM before it was distributed. (A154-55; A406-07; A438.) In fact, Poliak was disinclined to provide any details to Keyser about the financing and did so only reluctantly at the end of April 2011. (*See* A1297-98; A1299-304; A1315-17; A1321-22; B26-39.) Even then, he did not provide Keyser with a copy of the PPM. Nor did he ever provide the PPM to Schalk and Salvatore.[5]

The Company failed to close under the Purchase Agreement by April 1, 2011, the closing date specified in the agreement. (A22.) In view of Ark's breach and its failure to be forthcoming about financing efforts, Delaware counsel to Keyser and Auxol sent a letter to Locke Lord reiterating that Poliak's issuance of Series B Preferred to himself was invalid and void and that Keyser, Armstrong, and Auxol intended to commence litigation. (*Id.* at ¶ 38; A1305-09.) Locke Lord responded on April 19, claiming that litigation would force Ark to

[5] In his brief, Poliak insinuates that Ark contemporaneously provided Appellees with copies of the PPM. (OB at 14.) It did not. Both Keyser and Schalk eventually received copies of the PPM through third parties. (A162-63; A405-07.) Salvatore received a copy of the PPM from Keyser in late 2011. (A437-38.)

liquidate and imploring Auxol to give Ark more time. (A23; A1310-11; Op. at 14.) Auxol reluctantly agreed to give Ark more time and, on April 20, executed an Extension Agreement postponing the Closing Date to April 29, 2011. (A23; A1322.)[6]

On April 29, 2011, Ark, Poliak, and Keyser executed a separate settlement agreement contemplating that Ark would buy Keyser's Original Shares (the "Keyser Settlement Agreement"). (A24; A1323-31.) The Keyser Settlement Agreement provided that the parties would negotiate a price for the Original Shares and, if those negotiations failed, they would select an independent valuation firm to determine the sale price based on Ark's fair market value. (A1323-24; Op. at 14.) Regardless of the ultimate valuation, the Keyser Settlement Agreement provided that "Ark shall pay Keyser in cash no less than $50,000, together with a Secured Promissory Note for the remaining balance." (A1324; Op. at 15.)

Under the Keyser Settlement Agreement, at closing, Keyser would "relinquish all of his right, title and interest in and to Ark and any of the rights, privileges, duties, responsibilities and authority therewith shall be automatically transferred to Ark." (A1323.) Until that time, however, Keyser expressly reserved all claims he had against Poliak. The Keyser Settlement Agreement provided "nothing in this Agreement constitutes a waiver by any party of any claim the party may have against the other parties." (*Id.* at § 5.)

[6] After Locke Lord's April 19 letter, Mr. Bell continued to make clear to Locke Lord that Keyser and Auxol still contested the validity of the Series B Preferred. (A1318-20.)

E. THE PARTIES FAIL TO CLOSE ON THE KEYSER SETTLEMENT AGREEMENT AND KEYSER RETAINS HIS ORIGINAL SHARES

Ark closed the Series A Preferred offering on May 2, 2011, and on the same day closed under the Purchase Agreement with Auxol. (Op. at 15.) Keyser continued to own the Original Shares pending closing of the Keyser Settlement Agreement. Poliak and Keyser were unable to agree upon the sale price for the Original Shares, and the Company therefore engaged an accounting firm, Skoda Minotti, to value the Company and determine the sale price. (A24.)

For several months, Keyser engaged in unsuccessful efforts to get Poliak and Ark to provide him and Skoda Minotti with sufficient information to value Ark, as required by provisions of the Keyser Settlement Agreement. (A1325, A1327; A1432.1-.2; A169-79; A564-65, A569-70.) In particular, Keyser repeatedly sought information concerning underwriter warrants held by the Company, including information about the total amount of warrants received and whether any had been transferred out of the Company (the "Warrant Information"). (A1432.1-.2; A1519.1-.3; A169-73; A176-79, A186.) Keyser requested the Warrant Information because he believed the underwriter warrants were a critical component of the Company's value, and he was concerned that Poliak was trying to deflate the value of the Company (and thus the sale price of the Original Shares) by concealing information about the warrants and improperly transferring warrants to himself and others. (A173, A178-79, A186; A1519.1-.3.)

Keyser repeatedly expressed to Skoda Minotti his concerns that Poliak was concealing information about underwriter warrants to distort Ark's value. (A1519.1-.3; A176-77.) Based on public records,

Keyser had identified underwriter warrants the Company received as a result of recent investment banking transactions and had discovered that Poliak transferred the Elephant Talk Warrants to himself in December 2010. (A1519.1-.3; A177-79.) Ark eventually provided Keyser the information it had provided to Skoda Minotti, and it eventually provided both Keyser and Skoda Minotti some information about underwriter warrants. But that information was incomplete (*e.g.*, it did not list warrants Keyser knew Ark had received) and did not include information Keyser had specifically requested, such as details about any distributions of warrants to Poliak and other employees. (A1480-82; A1489-510; A1519.1-.3; A185-88.) During a call on October 6, Poliak acknowledged that the information about underwriter warrants was incomplete and inaccurate. (A188; A312.)

At this point, Keyser was exasperated. The contractual deadlines for completing the valuation and closing the sale had long since passed (A168; A188; A1323-24, A1325), and Poliak and Ark were still stonewalling on providing complete information about the underwriter warrants. (A168, A185-86, A188, A571.)[7] On October 11, 2011, Keyser's counsel gave notice that Keyser was rescinding the Keyser Settlement Agreement. (A1517-18.) Counsel explained that Ark and Poliak had breached the agreement by, among other things, failing to complete the valuation by the contractual deadline, failing to cooperate in Keyser's requests for information as required by Sections 6 and 10 of the agreement, and failing to provide sufficient information about the

[7] At trial, Shek admitted he had not provided the information Keyser requested because "I don't work for Bob." (A571.)

underwriter warrants to allow Skoda Minotti to value Ark, as required by Section 3(b) of the agreement. (A25; A1323-24, A1325, A1326-1328; A1517-18; Op. at 17.)

Although Skoda Minotti continued to prepare a valuation report, the report it ultimately delivered to Ark did not contain an independent valuation of the underwriter warrants, as would have been required by the Keyser Settlement Agreement. (Op. at 19; A1631; A320-22.) Instead, Skoda Minotti relied exclusively on an estimate of warrant value provided by Poliak and Shek. (*Id.*)[8] As a result of Poliak's insistence that Skoda Minotti use his warrant valuation, rather than its own independent valuation, Skoda Minotti determined that Ark's common stock had no value. (A1625-1703.) Even if the valuation had been independent, as required by the Settlement Agreement, the agreement required Ark to pay Keyser no less than $50,000 for the Original Shares. (A1324; Op. at 30.)

It is undisputed that the Company never offered to pay Keyser any consideration in exchange for his 7,000,000 Original Shares. (Op. at 19, 30.) Accordingly, the trial court found that Keyser owned the Original Shares at the time of the 2011 Written Consent and continues to own those shares. (Op. at 30.) Poliak has not appealed that ruling. The parties, of course, expressly agreed that "so long as Keyser retains ownership of some or all of the Original Shares, he is

[8] In addition, trial revealed that revised warrant information Ark provided to Skoda Minotti was still incomplete and did not include the Elephant Talk Warrants and certain other valuable underwriter warrants. (A575-77.)

not releasing any rights or claims he has as the owner of such Original Shares." (A1274.)

F. THE 2011 ANNUAL MEETING AND THE VOTING AGREEMENT

In October 2011, Poliak learned that the Financial Industry Regulatory Authority ("FINRA") intended to sanction him and that he would be required to resign as a director and officer of Ark and Dawson James. (A1535; Op. at 17; A25; A323.)[9] Before resigning, Poliak nominated and oversaw the election of Curtis, Hands, and Shek as his replacements on the board. (A25; Op. 17-18). Curtis, Hands, and Shek were elected at Ark's annual meeting on November 1, 2011. (Op. at 18.) Keyser, Salvatore, Schalk, and another stockholder, Douglas Kaiser, voted by proxy, and each included in his proxy form a written objection to the issuance of the Series B Preferred. (A191-94; A1600-04.) The Company's counsel read into the meeting record a statement confirming their objection. (A1561-66; Op. at 18; A192-93.)

After the annual meeting, Poliak engaged in negotiations with Salvatore, Schalk, and Kaiser concerning a potential purchase of their Ark shares. (A442-45; A1567.) They soon became concerned that once Poliak acquired either their shares or Keyser's shares, the stock Poliak did not purchase would "become[] much more meaningless" and Poliak could treat the remaining stockholders unfairly. (A444-46; A195.) As a result, Salvatore, Schalk, and Kaiser decided to work with Keyser to present a unified front to combat Poliak's apparent divide-and-conquer strategy. (A446.)

[9] The FINRA sanctions were not related to Poliak's disloyal issuance of the Series B Preferred.

On November 10, 2011, Keyser, Salvatore, Schalk, and Kaiser executed a voting agreement, in which they agreed to vote their respective shares to elect a new board consisting of Keyser, Salvatore, and Schalk (the "Voting Agreement"). (A1568.) Keyser's counsel mailed a copy of the Voting Agreement to Ark, which Ark received by November 15, 2011. (A1590-93.)

On November 30, 2011, Ark sold additional shares of Series A Preferred. (A25.) Before doing so, Defendants did not supplement the PPM to disclose that Keyser had terminated the Keyser Settlement Agreement, that Plaintiffs had again raised objections to the validity of the Series B Preferred, or that Plaintiffs had entered into a voting agreement to replace Ark's Board. (A479-80, A551.)

G. STOCKHOLDERS ACT BY WRITTEN CONSENT TO ELECT A NEW BOARD

On December 13, 2011, Keyser, Salvatore, Schalk, Kaiser, and another Ark stockholder, John Keyser, executed and delivered a written consent to remove Curtis, Hands, and Shek as directors and to elect Keyser, Salvatore, and Schalk as a new board (the "2011 Consent"). (A26; Op. at 19; A1704-06.) The signatories to the 2011 Consent collectively own approximately 63% of Ark's outstanding common stock. (Op. at 30; A26-27.) Knowing that Poliak would assert his purported ownership of the super-voting Series B Preferred to challenge the validity of the 2011 Consent, Plaintiffs commenced an action under 8 *Del. C.* § 225 the same day they delivered the 2011 Consent. (B135-48; A1704-06.)

H. APPELLEES INITIATE LITIGATION AND RECEIVE A FAVORABLE JUDGMENT FROM THE COURT OF CHANCERY

Trial was held March 14 and 15, 2012, and the Court of Chancery issued its memorandum opinion on July 31, 2012. The trial court declared that the 2011 Written Consent was valid and effective in removing Curtis, Hands, and Shek and electing Plaintiffs to the Ark board. (Op. at 52.) The trial court held that Keyser continued to own his Original Shares, but that even if they had been repurchased by Ark pursuant to the Keyser Settlement Agreement, the remaining 2011 Consent Signatories nevertheless held a majority of Ark's outstanding common stock. (Op. at 24-25, 30.) Poliak has ***not*** appealed those findings. The Court of Chancery also held that in issuing the super-voting Series B Preferred to himself for nominal consideration, Poliak engaged in "self-dealing," was "motivated by a desire to prevent Ark's shareholders from electing a new Board…," and had failed to show that the issuance of the Series B Preferred was entirely fair. (Op. at 1, 35-39.) Poliak also has ***not*** appealed from those rulings. Finally, the Court of Chancery concluded that "none of the equitable defenses raised by the Defendants has any merit." (Op. at 39.) This is the only ruling Poliak has appealed and, of all the Defendants, only Poliak has appealed. While he no longer disputes that he engaged in egregious self-dealing to entrench himself, Poliak nonetheless asks this Court to excuse his wrongdoing on the basis of his non-meritorious equitable defenses.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT POLIAK'S EQUITABLE DEFENSES HAVE NO MERIT

A. Question Presented

Did the Court of Chancery correctly conclude that Poliak's equitable defenses of laches, ratification, acquiescence, and waiver were unsupported by the record and did not provide a basis to excuse Poliak's self-dealing issuance of super-voting stock to himself?

B. Scope of Review

This Court will "review the Court of Chancery's conclusions of law *de novo* and its factual findings with deference," and the Court "will not set aside the Court of Chancery's factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 209-10 (Del. 2011). Application of the equitable defenses of laches, ratification, acquiescence, and waiver turns on questions of fact, such as the reasonableness of any delay or the existence of prejudice.[10] Contrary to his assertion that the facts are "undisputed," Poliak takes issues with many of the trial court's factual findings. All those findings are entitled to deference.

[10] *See, e.g., Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002) (citation omitted) ("What constitutes unreasonable delay and prejudice are questions of fact that depend upon the totality of the circumstances."); *Julin v. Julin*, 787 A.2d 82, 84 (Del. 2001) (citation omitted) ("Application of the standards underlying the defense of acquiescence is fact intensive, often depending, as here, on an evaluation of the knowledge, intention and motivation of the acquiescing party.").

C. Merits of Argument

Poliak has not appealed the Court of Chancery's ruling that he engaged in self-dealing conduct, in violation of his fiduciary duty of loyalty, when he issued super-voting preferred stock to himself for nominal consideration to prevent other stockholders from removing him as a director. Instead, Poliak asks this Court to absolve him of culpability for that wrongful conduct on the basis of four equitable defenses: laches, ratification, acquiescence, and waiver. As the Court of Chancery correctly concluded, "none of the equitable defenses raised by the Defendants has any merit." (Op. at 39.)

1. The Court of Chancery Correctly Concluded That Laches Did Not Bar Plaintiffs' Claims

A defense of laches requires the defendant to establish "first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, prejudice to the defendant." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005). The Court of Chancery correctly concluded that Defendants had not proved unreasonable delay and had not shown prejudice. (Op. at 41.)

a. Plaintiffs Did Not Delay Unreasonably In Commencing Suit

The Court of Chancery properly concluded that Plaintiffs had not engaged in unreasonable delay. Plaintiffs commenced the action the same day they delivered the 2011 Written Consent electing a new board. This was approximately one year after Poliak issued the Series B Preferred to himself and was well before the expiration of the three-year limitations period that is presumptively applicable by analogy where laches is invoked with respect to a breach of fiduciary duty

claim. (Op. at 41.) The trial court held that "Defendants have not demonstrated any extraordinary circumstance that warrants curtailing that presumptively valid limitations period" and that "Defendants have not shown that Plaintiffs unreasonably delayed by challenging the Series B Issuance approximately one year after that issuance occurred." (*Id.*) Those factual findings are supported by the record and are entitled to deference. *See IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 178 (Del. 2011) (affirming Court of Chancery's conclusion that action was not time-barred by laches because trial court "must exercise its discretion, after considering all relevant facts," when it assesses whether extraordinary circumstances exist to warrant a limitations period shorter than the presumptive period).

The Court of Chancery also found that Plaintiffs did not file suit earlier because they were engaged in "a good faith attempt to negotiate a settlement." (Op. at 41 n. 141.) The trial court elaborated on that finding when assessing a similar delay argument that Defendants made as part of their ratification defense. Specifically, the trial court explained that Keyser's decision not to file suit in April 2011 "can properly be viewed as a decision by Keyser not to take action that could potentially interfere with the Ark/Auxol Purchase Agreement while reserving his rights as the holder of the Original Shares." (Op. at 45.) Keyser did not pursue a lawsuit in the ensuing months because the parties "were involved in negotiations for the purchase and sale of the Original Shares." (Op. at 46.) "Only after those negotiations eventually fell apart, did Keyser assert claims as the holder of the Original Shares. Thus,

properly viewed, Keyser's decision to wait until after the completion of the Series A offering to challenge the Series B Issuance was not inequitable." (Op. at 46.). Delaware law favors voluntary settlement, and time spent engaged in good faith settlement efforts does not give rise to unreasonable delay. (Op. at 41 n. 141.)[11]

b. Purchasers of Series A Preferred Stock Did Not Invest Based On A Belief That Poliak Would Control Ark Indefinitely

In the court below, Poliak argued that the issuance of Series B Preferred was a "structural" change, equivalent to a public corporation merger, that would be hard to unwind. The Court of Chancery correctly found that Poliak's issuance of super-voting preferred stock to himself, by which "Poliak became Ark's controlling stockholder and every other Ark Shareholder lost power," did not involve "'structural' issues that are hard to undo." (Op. at 41.) Poliak does not appear to appeal that ruling.

Instead, Poliak's prejudice argument now centers around his contentions that the Series A investors relied on representations that Poliak controlled Ark through ownership of the Series B Preferred and that those purchasers were somehow prejudiced by Plaintiffs' not filing suit earlier in 2011. Poliak made a similar argument below in connection with his ratification, acquiescence, and estoppel defenses,

[11] *See Whittington v. Dragon Group L.L.C.*, 2010 WL 692584, at *6-7 (Del. Ch. Feb. 15, 2010) (no laches where plaintiff brought suit within presumptive limitations period and engaged in negotiations during the period between injury and filing suit), *aff'd & remanded on other grounds*, 998 A.2d 852 (Del. 2010) (TABLE); *Bay Newfoundland Co. v. Wilson & Co.*, 4 A.2d 668, 673 (Del. Ch. 1939) (no laches where plaintiff delayed filing suit during pendency of settlement negotiations).

and the Court of Chancery correctly rejected it. The trial court held that Poliak and the other Defendants had not shown that Series A purchasers bought shares because they believed Poliak had voting control over Ark. (Op. at 44.) The trial court explained that the Series A PPM described Poliak's control as a risk factor, that investors typically would not view a risk factor concerning the existence of a controlling stockholder as a "positive," and that "Defendants have not offered sufficient evidence to suggest that the purchasers of Series A preferred stock had an atypical view of controlling stockholders." (Op. at 44.) The trial court's findings are entitled to deference.[12]

Defendants did not call any third-party Series A investors as trial witnesses to testify about their reasons for investing, let alone to testify that they would not have invested if they had known Poliak's issuance of Series B Preferred to himself would be invalidated. Absent such testimony, Defendants failed to show detrimental reliance by investors. *Cf. Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992) (citations omitted) (holding that a class action cannot be maintained for fraud claims because the issue of justifiable reliance requires an individual-by-individual assessment of factual and legal issues, including the knowledge possessed by each investor). Moreover, even if Defendants had called third-party witnesses to testify concerning their alleged reliance, any such reliance would not have been reasonable. As the trial court noted,

[12] Poliak presented no evidence at trial to support his new contention that his control is a "positive" because the investment community views him as a "Warren Buffet[] of business." (OB at 25.)

investors knew that the Ark management team "would not exist in perpetuity – managers quit, they get fired." (Op. at 25 n. 149.) In fact, the Series A PPM included as another risk factor that "[t]here can be no assurance that we will be successful in retaining the services of our key executives." (B68.)

Having failed to present any evidence at trial as to what third-party Series A investors actually believed or relied upon, Poliak now argues that it was Plaintiffs' burden to prove that "the new investors did not care who controlled Ark" and that "the Series A investors failed to view Poliak as 'a positive.'" (Op. at 24.) This argument is unavailing because Defendants had the burden at trial of establishing their affirmative defenses. *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 920-21 (Del. 2004); *Hudak v. Procek*, 806 A.2d 140, 154 & n.38 (Del. 2002). It was not Plaintiffs' burden to disprove them.

Poliak also argues that Defendant Curtis purchased some of the Series A Preferred and would not have invested unless Poliak controlled Ark. (OB at 29). Curtis's self-serving testimony was not credible and, in all events, his alleged reliance is untethered to anything Plaintiffs purportedly did. Curtis was a member of Poliak's inner circle. He presumably knew that Keyser had repeatedly threatened litigation, had contractually reserved all rights and claims, and had not yet completed a settlement regarding his Original Shares. Moreover, Curtis purchased more Series A shares at the end of November, knowing that Keyser had terminated the Keyser Settlement Agreement and that Plaintiffs had submitted objections to the Series B Preferred at the November 2011 annual meeting. Plaintiffs had even

delivered to Ark a voting agreement to elect a new board. Those facts establish that Curtis did not rely on a belief that Poliak would have perpetual control or, at least, that any such reliance was not reasonable. The trial court correctly concluded that Defendants "have not shown that the purchases of Series A preferred stock occurred because the purchasers thought that Poliak controlled Ark." (Op. at 44.)

For these reasons, the Court of Chancery correctly concluded that laches did not bar Plaintiffs' challenges to Poliak's self-dealing.

2. The Court of Chancery Correctly Concluded That Poliak's Defenses of Ratification, Acquiescence, and Waiver Did Not Bar Plaintiffs' Claims

The equitable defenses of ratification and acquiescence are similar and differ only in respect to the time at which the alleged acceptance of wrongdoing occurred.[13] To establish after-the-fact ratification of, or during-the-fact acquiescence in, Poliak's wrongdoing, Poliak was required to show that Plaintiffs had "full knowledge of [their] rights and the material facts and (1) remain[ed] inactive for a considerable time; or (2) freely [did] what amounts to recognition of the complained of act; or (3) act[ed] in a manner inconsistent with the subsequent repudiation, [leading] the other party to believe the act has been approved." *NTC Group, Inc. v. W. Point-Pepperell, Inc.*, 1990 WL 143842, at *5 (Del. Ch. Sept. 26, 1990,

[13] *See Giammalvo v. Sunshine Min. Co.*, 1994 WL 30547, at *10 (Del. Ch. Jan. 31, 1994) ("The equitable defenses of ratification and acquiescence are closely related. . . . Generally, acquiescence occurs when one consents to a course of action, by words or conduct, while that action is taking place ... . Ratification suggests an assent after the fact."), *aff'd*, 651 A.2d 787 (Del. 1994) (TABLE).

rev. Oct. 17, 1990); *see also Genger v. TR Investors, LLC*, 26 A.3d 180, at 195 (Del. 2011) ("Ratification may be either express or implied through a party's conduct, but it is always a voluntary and positive act."). To establish waiver, Defendants were required to show a "voluntary and intentional relinquishment of a known right." *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 465 (Del. 1982).

Poliak's ratification, acquiescence, and waiver defenses are intertwined and convoluted. He argues that Plaintiffs affirmatively or implicitly waived the right to challenge, and ratified or acquiesced in, his self-dealing issuance of the Series B Preferred through some combination of the following alleged conduct: (1) delaying unreasonably in filing suit; (2) implicitly accepting the validity of the Series B Preferred; (3) leading purchasers of Series A stock to believe that Plaintiffs did not contest Poliak's ownership of the Series B Preferred Stock; and (4) benefitting from Poliak's issuance of the Series B Preferred to himself.

None of those contentions is meritorious, and the Court of Chancery correctly rejected each one. As discussed above, the Court of Chancery properly concluded that Plaintiffs did not unreasonably delay before filing suit. Poliak's other arguments in support of his ratification, acquiescence, and waiver defenses are equally unavailing, as discussed below.

Before turning to those arguments, it warrants mention that Poliak says little in his brief about what Plaintiffs Salvatore or Schalk did or did not do to ratify or acquiesce in Poliak's wrongdoing

or to waive their right to challenge it. In nearly all instances, Poliak tries to lump Salvatore and Schalk together with Keyser, even though they had no involvement in the two settlements, did not learn relevant facts until much later than Keyser, and did not start working with Keyser to defend against Poliak's machinations until October 2011. Because Poliak has failed to prove his equitable defenses against Schalk and Salvatore, none of those defenses can bar relief. *See Johnston v. Pedersen*, 28 A.3d 1079, 1092 (Del. Ch. 2011) (holding that, to bar relief, equitable defense must apply to all plaintiffs).

a. Defendants Did Not Ratify Or Waive Their Right to Challenge the Series B Preferred Issuance

The Court of Chancery flatly rejected the notion that any of the Plaintiffs had somehow accepted or ratified, affirmatively or implicitly, the validity of the Series B Preferred, or had voluntarily abandoned their right to challenge it. (Op. at 45-46, 47, 48.)

(1) Keyser Repeatedly Reserved the Right To Challenge The Series B Preferred Issuance

Poliak's ratification, acquiescence, and waiver defenses all invoke the absurd notion that he was completely shocked by Plaintiffs' challenge to the Series B Preferred issuance, and that he believed Plaintiffs had ratified and consented to his wrongdoing. This argument finds no support in the record, and the Court of Chancery correctly rejected it. (Op. at 48.)

When Keyser first learned on December 10, 2010 that Poliak had issued super-voting stock to himself, he objected immediately. (Op. at 10; A21; A996-1003.) Concerned that "it could jeopardize [Ark] and cause it to go out of business," Keyser decided not to initiate

litigation immediately but to try to reach a settlement. (A139-40.) Ultimately, Ark and Poliak insisted upon separate settlements with Auxol and with Keyser: one in which Ark would purchase notes and stock from Auxol and another in which Ark would purchase Keyser's Original Shares. (Op. at 12-13; A145-47.) Keyser was careful to reserve his rights in connection with each settlement.

On March 31, 2011, Ark and Auxol entered into the Purchase Agreement, which expressly provided: "[f]or the avoidance of doubt, so long as Keyser retains ownership of some or all of the Original Shares, **he is not releasing any rights or claims he has as the owner of such Original Shares.**" (A1274 (emphasis added); Op. at 13, 45, 47.)[14] As the trial court held, this provision shows that Keyser had "expressly reserved his right to challenge [the Series B Preferred] in March 2011" and had "not voluntarily and intentionally relinquished a right to challenge" that issuance. (Op. at 47, 48.)

In mid-April, after Ark failed to close under the Purchase Agreement, Keyser's counsel sent a letter to Locke Lord threatening litigation and articulating that the Series B Preferred issuance was a "flagrant breach of fiduciary duty." (A1307; Op. at 13-14.) After Ark's counsel urged that the Company would be forced to liquidate if Keyser filed suit (A23; A1310-11), Keyser and Auxol decided to defer litigation. They hoped doing so would provide time for Ark to close under the Purchase Agreement and for the parties to negotiate a

[14] Poliak's argument that this provision merely means that Keyser was reserving his right to assert monetary damages claims (OB at 32) finds no support in the contract language itself, the record, or logic.

separate agreement for the sale of Keyser's Original Shares. (Op. at 46; A142.)

When the parties entered into the separate Keyser Settlement Agreement later in April, Keyser again expressly reserved his rights. That agreement provided "**nothing in this Agreement constitutes a waiver by any party of any claim the party may have against the other parties.**" (A1334 (emphasis added).) Defendant Shek admitted that in view of the reservations of rights in the Purchase Agreement and the Keyser Settlement Agreement, he had been aware all along of the possibility that Keyser might challenge the Series B Preferred any time "prior to resolving it and closing out the [Keyser] settlement agreement…." (A593.)

Poliak identifies nothing that Keyser (or Salvatore or Schalk) supposedly did after April 2011 that resulted in acceptance of the Series B Preferred issuance. In fact, when Keyser, Salvatore, and Schalk delivered their proxies to Ark in connection with the November 1, 2011 annual meeting, they included language in their proxy forms objecting to the Series B Preferred, and their objections were read into the record of the meeting. (Op. at 18; A1543-60; A1561-66.)

In view of this extensive record, the Court of Chancery correctly concluded that:

> Defendants ***did know*** that Plaintiffs intended to challenge the Series B Issuance. Keyser had threatened litigation ever since he learned of the Series B issuance, and … he expressly reserved his right to challenge it in March 2011, roughly a month before the Series A offering occurred.

(Op. at 48 (emphasis added).) The trial court's findings are well supported by the record, and are entitled to deference. They belie

any notion that Plaintiffs somehow ratified, or waived their right to challenge, Poliak's issuance of Series B Preferred to himself.

(2) Plaintiffs Did Not Ratify The Series B Preferred Issuance By Allowing Poliak To Remain A Director

Despite Keyser's persistent reservation of rights, Poliak contends that Keyser and the other Plaintiffs ratified the Series B Preferred issuance by allowing Poliak to remain a director and to act on behalf of Ark (including by permitting him to authorize the settlement agreements and the issuance of the Series A Preferred). Specifically, Poliak argues that "the sole reason [he] was still the only director of Ark in 2011 was because he had issued the Series B Preferred Stock." (Op. at 30.) He further argues that, but for the Series B Preferred issuance, the 2010 Written Consent would have removed him as a director. (*Id.*) Those arguments are disingenuous.

Poliak's issuance of the Series B Preferred to himself was not the reason he remained in office. While Keyser did attempt to remove Poliak as a director by the 2010 Written Consent, Poliak and Locke Lord took the position that the 2010 Written Consent was ineffective. They did not base that position on the existence of the Series B Preferred, which they were still concealing from Keyser. Rather, they asserted that "Keyser did not own and could not vote the Option Shares [when he signed the consent] because the Option was not assignable unless Ark consented to an assignment, which it had not done." (Op. at 10; A903-04.) In fact, Ark did not issue the Option Shares until 9 days after delivery of the 2010 Written Consent, and it issued them to the Three Creditors, not Keyser. (Op. at 10.) Because Keyser did not

own the Option Shares on December 1, 2010, the 2010 Written Consent was not signed by holders of a majority of the common stock. Thus, the lack of effectiveness of the 2010 Written Consent had nothing to do with Poliak's issuance of the Series B Preferred to himself.

Later in December 2010, Keyser and Armstrong considered delivering a new consent to remove Poliak after Ark issued the Option Shares. They ended up not delivering a new removal consent and instead entered into the settlement process. To be sure, one result of that process was that Keyser and Auxol permitted Poliak to remain in office and did not take further steps to try to remove him. But Keyser and Auxol insisted on including status quo provisions in the Standstill Agreement, the Purchase Agreement, and the Keyser Settlement Agreement. (A142, A147, A161; A1030; A1038; A1279; A1324.) They thus ensured that Poliak could not cause Ark to take actions outside of the ordinary course of business without their consent while the parties endeavored to consummate two separate settlements. As discussed at length above, Keyser made it well known throughout this time that he had not waived or abandoned his right to challenge Poliak's issuance of the Series B Preferred.

Under these circumstances, there is no logical or factual basis for concluding that Keyser's decision to allow Poliak to stay in office in order to facilitate a settlement amounted to a ratification of the Series B Preferred issuance. The Court of Chancery thus did not err in concluding that Poliak had the power to enter into the settlement agreements and to issue the Series A Preferred "on Ark's behalf regardless of whether he controlled a majority of its voting

power." (Op. at 43.) Likewise, the trial court correctly held that "the fact … Keyser did not object to Poliak's authority to enter into [those transactions] does not suggest that Keyser ratified the Series B Issuance." (Op. at 43.)

b. Plaintiffs Did Not Take Any Action That Could Have Caused Any Series A Investor To Reasonably Believe Plaintiffs Would Not Challenge The Series B Preferred Stock

Poliak also contends that Plaintiffs ratified the Series B Preferred because, by allowing him to remain in office and not filing suit sooner, Plaintiffs contributed to the alleged belief on the part of Series A Preferred purchasers that Poliak would control Ark forever through the Series B Preferred. This argument is essentially a mish-mash of Poliak's other arguments. As discussed above, Poliak failed to prove at trial that any Series A purchaser relied on his representations of permanent control or bought their stock because they wanted to own shares of a company in which he was the controlling stockholder. Even if Defendants had presented such evidence, however, any reliance could not be attributed to anything Plaintiffs did. As also shown above, the trial court correctly concluded that Plaintiffs did not unreasonably delay in commencing suit and did not ratify the Series B Preferred issuance by allowing Poliak to remain in office while the parties attempted to settle their differences.

To the extent Poliak is suggesting that Plaintiffs should be held responsible for disclosures in the Series A PPM and for representations that Poliak himself made to investors, he is mistaken. Poliak admitted at trial that "Mr. Keyser was not involved in soliciting customers to purchase the Series A preferred…." (A294-95;

see also A154-55.) Nor were Salvatore and Schalk. (A295; A405-07; A437-39.) Poliak never gave Keyser, Salvatore, or Schalk an opportunity to comment on disclosures made in the Series A PPM. (A154-55, A294-95, A406-07.) Plaintiffs likewise are not responsible for statements Poliak and Shek claim to have made to potential investors during in-person meetings. Poliak simply cannot craft an equitable defense against Plaintiffs based on disclosures over which he prevented Plaintiffs from having any influence.

In all events, the conduct of Poliak and the other Defendants in November 2011 shows they did not believe the dispute over the validity of the Series B Preferred was material to investors. By mid-November, Defendants knew that Keyser had terminated the Keyser Settlement Agreement; they knew that Keyser, Schalk, Salavatore, and Kaiser had objected to the validity of the Series B Preferred in connection with the November 1 stockholders meeting; and they knew that Keyser, Schalk, Salvatore, and Kaiser had entered into a voting agreement to elect a new board. (A25; Op. at 17-18; A1590-93; A480.) Yet Defendants issued another round of Series A Preferred at the end of November without making any supplemental disclosure. (A461.) If Poliak and the other Defendants truly believed that Series A purchasers were relying on Poliak and his management team remaining in control of Ark, they had an obligation to make supplemental disclosure. Poliak's decision not to do so belies his contention that Series A investors were relying on him to control Ark forever.

c. Plaintiffs Did Not Benefit From Poliak's Issuance of Super-Voting Preferred Stock To Himself

Poliak also argues that Plaintiffs should be deemed to have ratified his issuance of Series B Preferred to himself because, he contends, they benefited from that issuance. Poliak does not explain how Schalk and Salvatore supposedly benefited. It is difficult to imagine how stockholders can be said to benefit from a sole director's entrenchment-motivated self-dealing that results in the director acquiring outright voting control for nominal consideration, while "every other shareholder lost voting power." (Op. at 41.)

Poliak contends Keyser benefited from the Series B Preferred because it enabled Poliak to remain in control of Ark and to authorize the issuance of the Series A Preferred and the Auxol Purchase Agreement, through which Mr. Keyser benefited as a principal of Auxol. This convoluted argument is no more than a rehash of the argument that Keyser ratified the Series B Preferred by allowing Poliak to remain in office. As discussed above, that argument has no merit. Poliak did not remain in office due to his ownership of the Series B Preferred. He remained in office because Keyser did not yet own the Option Shares when he delivered the 2010 Written Consent and because, rather than attempt to remove Poliak again after Keyser acquired the Option Shares, Keyser and Auxol chose instead to work toward a settlement. The Court of Chancery properly concluded that "Defendants have not shown that Keyser (or the other Plaintiffs) received a benefit as a result of the Series B Issuance." (Op. at 44.)

Poliak's argument that Plaintiffs benefited from his wrongdoing essentially boils down to a contention that any time a director

breaches the fiduciary duty of loyalty and stockholders do not immediately remove him, they should be forever barred from challenging the loyalty breach if the director thereafter authorizes any corporate action that stockholders might deem beneficial. That has never been the law of Delaware and would be astoundingly bad policy if it were.

* * *

For all the foregoing reasons, Poliak's defenses of ratification, acquiescence, and waiver have no merit and cannot absolve him of culpability for his egregious breach of the fiduciary duty of loyalty.

CONCLUSION

For the reasons set forth herein, this Court should affirm the Court of Chancery's July 31, 2012 Memorandum Opinion and August 3, 2012 Order and Final Judgment declaring that the Series B Preferred was invalid and that the 2011 Consent was valid and effective to remove Curtis, Hands, and Shek as directors of Ark and to elect Plaintiffs to the Ark board.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2012, a copy of the within document was electronically served via *LexisNexis File & Serve* on the following counsel of record at the address indicated:

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