IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT D. KEYSER, JR., FRANK SALVATORE, and SCOTT SCHALK, Plaintiffs, v. TOM CURTIS, THOMAS HANDS, DONALD SHEK, and ALBERT POLIAK, Defendants, and ARK FINANCIAL SERVICES, INC., a Delaware corporation, Nominal Defendant.	:	**C.A. No. 7109-VCN**

MEMORANDUM OPINION

Date Submitted: April 23, 2012
Date Decided: July 31, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiffs Robert D. Keyser, Jr., Frank Salvatore, and Scott Schalk (collectively, the "Plaintiffs") seek a declaration, pursuant to 8 *Del. C.* § 225, that they comprise the board of directors (the "Board") of Ark Financial Services, Inc. ("Ark" or the "Company"). Whether the Plaintiffs are entitled to that declaration depends on whether a December 13, 2011 written consent (the "2011 Written Consent"), purporting to elect the Plaintiffs to the Board, was valid. The validity of the 2011 Written Consent, in turn, depends on whether one of its signatories actually owns the shares he purports to hold, and whether a December 2010 issuance of Ark super-voting stock to Ark's then-sole Board member was valid. The Court ultimately determines that the signatories to the 2011 Written Consent do own all of the stock that they purport to own, and that the December 2010 issuance of super-voting stock was invalid because it was a self-dealing transaction that fails to meet the strictures of the entire fairness test. Thus, the 2011 Written Consent is valid. The Court also determines that certain equitable defenses raised by the Defendants should not prevent the Court from giving effect to the 2011 Written Consent. Therefore, the Court will enter an order declaring that the Plaintiffs comprise the Board.

II. BACKGROUND

A. *The Parties*

Nominal Defendant Ark is a Delaware corporation with its principal place of business in Boca Raton, Florida.[1] Ark acts as a holding company for non-party Dawson James Securities, Inc. ("Dawson James"), an investment-banking firm with offices in Boca Raton and Jacksonville, Florida; Baltimore, Maryland; New York, New York; Santa Clara and San Francisco, California; and Manasquan, New Jersey.

Plaintiff Keyser purports to be the holder of 7,000,000 shares of Ark common stock.[2] Keyser is a co-founder of Ark.[3] From the founding of Ark and Dawson James until December 2009, Keyser was a director of Ark, the Chief Executive Officer ("CEO") of Dawson James, and an officer of Ark.

Plaintiff Salvatore owns 3,948,000 shares of Ark common stock. Plaintiff Schalk owns 1,186,000 shares of Ark common stock.[4] Non-parties Douglas Kaiser and John Keyser ("John")[5] own 3,948,000 and 1,072,000 shares of Ark common

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[1] Joint Pre-Trial Stipulation and Order ("Pre-Trial Stipulation " or "Pre-Trial Stip.") at 2.
[2] *Id.* at 11.
[3] Verified Complaint Pursuant to 8 *Del. C.* § 225(a) ("Complaint" or "Compl.") ¶ 7; Answer to Verified Compl. ("Answer") ¶ 7.
[4] Pre-Trial Stip. at 11.
[5] John is Plaintiff Robert D. Keyser, Jr.'s brother. Because John and Robert have the same last name, John is referred to by his first name. No disrespect is intended.

stock, respectively.[6] Kaiser and John executed the 2011 Written Consent along with the Plaintiffs.[7]

Defendant Albert Poliak is a co-founder of Ark, and a former officer and director of the Company. From the founding of Ark and Dawson James until November 6, 2011, Poliak was a director of Ark and the President of both Ark and Dawson James.[8] From December 2009 until November 6, 2011, Poliak was Ark's sole director, as well as the CEO of Dawson James. Poliak holds 7,000,000 shares of Ark common stock. He also purports to be the holder of 25,000 shares of the Company's Series B preferred stock.[9]

Defendant Thomas Hands is an officer of Ark, owing 850,000 shares of Ark common stock.[10] Defendants Donald Shek and Tom Curtis are officers of Ark.[11] Poliak, Curtis, Hands, and Shek are collectively referred to as the "Defendants." Hands, Shek, and Curtis were elected to the Board on November 1, 2011, and assert the right to continue in that role.[12]

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[6] Pre-Trial Stip. at 11.
[7] JX 170.
[8] Pre-Trial Stip. at 10.
[9] Compl. ¶ 10; Answer ¶ 10.
[10] Compl. ¶ 11; Answer ¶ 11.
[11] Compl. ¶¶ 12, 13; Answer ¶¶ 12, 13.
[12] Pre-Trial Stip. at 10.

B. *Factual Background*[13]

Keyser and Poliak founded Ark on April 18, 2002. Allan R. Lyons, Kenneth A. Steel, Jr., Burton Koffman, and their affiliates (collectively, the "Three Creditors") were a primary source of debt funding for Ark. Between July 2002 and February 2009, Ark issued at least five promissory notes (the "Notes") payable to some or all of the Three Creditors with an aggregate principal amount of $3.1 million.[14] One of the Notes, dated February 13, 2009, included an option (the "Option"), allowing the Three Creditors to acquire, during the term of the note, 24% of Ark's common stock for one dollar, as long as, when the Option was exercised, loans from the Three Creditors to Ark remained outstanding.[15]

In 2009, growing frustrated with the Company's inability to satisfy its obligations on the Notes, the Three Creditors retained an independent consultant to make recommendations to improve the Company's performance.[16] One of the consultant's recommendations was that Keyser step down as the CEO of Dawson James.[17] On December 28, 2009, Keyser resigned from his positions with Ark and Dawson James; he ceased to be the CEO of Dawson James, a director of Ark, or an officer of Ark. Upon Keyser's resignation, Poliak became the sole member of the Board. Poliak also replaced Keyser as the CEO of Dawson James.

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[13] These are the facts as the Court finds them following a two-day trial.
[14] Pre-Trial Stip. at 2-3.
[15] *Id.* at 3.
[16] *Id.*
[17] Trial Tr. 12-13 (Keyser).

After Keyser resigned from his positions at Ark and Dawson James, he maintained a business relationship with Lyons, one of the Three Creditors.[18] Keyser believed that the Three Creditors were not happy with the way that Poliak was running Ark, and, therefore, Keyser developed a plan to remove Poliak as the sole member of the Board and to elect himself and his allies to the Board. On November 29, 2010, Auxol Capital LLC ("Auxol"), a company equally owned by Keyser and R. Douglas Armstrong, entered into an agreement (the "Auxol/Three-Creditor Agreement") to purchase the Notes, along with the Option, from the Three Creditors.[19] Keyser intended to exercise the Option, which would provide him with more than eight million additional shares of Ark common stock (the "Option Shares"). Keyser anticipated that the Option Shares when combined with the shares of Ark that he already owned and the shares of Ark owned by his allies would constitute more than fifty percent of Ark's outstanding common stock. Thus, Keyser expected that after exercising the Option, he and his allies would be able to execute a shareholder consent electing a new Board.

The Auxol/Three Creditor Agreement did not call for Auxol to pay for the Notes and the Option at the time they were transferred to Auxol. Instead, Auxol was to pay off the Notes over a period of five years, and the start of the payment schedule hinged on when Auxol "gain[ed] majority control of the Ark board of

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[18] *Id.* at 14 (Keyser).
[19] Joint Exhibit ("JX") 16 ("Auxol/Three Creditor Agreement").

directors."[20] The Auxol/Three Creditor Agreement also provided that "Keyser and Armstrong, while in majority control of the Ark board of directors shall support and will not alter the distributions to . . . [the Three Creditors of] 100% of all proceeds for any Accrued Financial Value."[21]

On November 29, 2010, Keyser informed Ark that he (Keyser) now held the Option and that he was exercising it.[22] Poliak realized that if Keyser could validly exercise the Option, Keyser was likely to gain control of Ark,[23] but Poliak thought that it was in Ark's best interests to prevent Keyser from gaining control. Specifically, Poliak was afraid that Keyser might make decisions as a director or controlling shareholder, which sacrificed the best interests of Ark for either his own best interests or the best interests of the Three Creditors.[24] Poliak also believed that Keyser had done a poor job of managing the Company in the past, and he worried that if Keyser gained control of Ark, the Company could fall into even greater financial distress.[25] Thus, Poliak contacted Locke Lord Bissell & Liddell LLP ("Locke Lord") for advice as to what options were available to Ark to prevent Keyser and his allies from gaining control of Ark.

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[20] *Id.* at § 3.4(a).

[21] *Id.* at § 3.5(b). "'Accrued Financial Value' means a the [*sic*] financial value held or accrued by D[awson] J[ames] or Ark prior to December 1, 2010, for the purpose of payment to . . . [the Three Creditors] that is unrelated to the interest or principal of . . . [the] Notes." *Id.* at § 2(l) (underline omitted).

[22] JX 14.

[23] Trial Tr. 142 (Poliak).

[24] *Id.* at 143-44 (Poliak).

[25] *Id.* at 142-43 (Poliak).

The strategy that Poliak chose involved the creation and issuance of a new class of stock. In particular, on December 1, 2010, two days after Poliak received Keyser's purported exercise of the Option, Poliak executed a written consent, in his capacity as Ark's sole director, creating 50,000 shares of a new series of super-voting preferred stock designated as Series B preferred stock.[26] The Series B preferred stock votes with Ark's common stock as a single class on all matters to be voted on by Ark's shareholders. But, while each share of common stock is entitled to one vote, each share of Series B preferred stock is entitled to 1,000 votes.[27] The Series B preferred stock also has a $1.00 per share liquidation preference and is redeemable at any time, upon the demand of the holder for $1.00 per share.[28]

On December 1, 2010, the same day that the Series B preferred stock was authorized, Poliak caused Ark to issue him 25,000 shares of the Series B preferred stock for a penny per share (the "Series B Issuance").[29] Those 25,000 shares of Series B preferred stock, by themselves, provide Poliak with an overwhelming majority of the votes to be cast in any matter for which Ark's shareholders have a

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[26] JX 24.
[27] JX 28 § 4.
[28] *Id.* at § 3, 5.
[29] Pre-Trial Stip. at 5; JX 57.

vote. Poliak testified that he caused Ark to undertake the Series B Issuance to prevent Keyser and his allies from electing a new Board.[30]

In choosing to issue the Series B preferred stock to himself, Poliak, according to his testimony, relied on the advice of Locke Lord.[31] Moreover, Locke Lord did prepare the written consent, which Poliak signed, authorizing the creation of the Series B preferred stock.[32] When Christopher Pesch, Esq., then of Locke Lord, sent Poliak the written consent, however, he appeared skeptical about the validity of the written consent, explaining "[a]s we have discussed, Delaware courts don't 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."[33] Poliak also testified that he chose to make the Series B Issuance to himself because of Financial Industry Regulatory Authority ("FINRA") rules. As Poliak understood those rules, only an "approved person" could control a securities firm, such as Ark, and thus, Poliak did not believe that he could issue

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[30] *See* Trial Tr. 149:

> Counsel for Plaintiffs: "But my question was counsel advised you that the steps you were taking were intended to prevent Mr. Keyser and his group from coming over and taking control of Ark, isn't that right?"
> Poliak: "I believe so."
> Counsel for Plaintiffs: "Now, the way the Series B preferred stock prevented Mr. Keyser's group from electing a new board was that you gave yourself super voting stock so that Mr. Keyser and his group would no longer have majority voting power over Ark stock, isn't that right?"
> Poliak: "I believe so."

[31] Trial Tr. 147-48 (Poliak).

[32] JX 22.

[33] *Id.*

shares to just anyone to prevent Keyser from gaining control of Ark. As Poliak testified:

> But one thing we did know is that we could not create a change of control. Any type of change in control would have been an issue with FINRA. They could have demanded a membership meeting immediately, and they could have shut us down.
>
> So the only person, only logical person to issue those shares to that would not have a change of control issue was me.[34]

Poliak testified that, given his fear that Keyser might act to take control of Ark at any time, he felt the need to act quickly, and therefore, he did not have time to seriously consider what a fair price for the shares of Series B preferred stock, which he issued for a penny a share, would have been.[35] He admitted that the price was "arbitrary"[36] and claimed that the liquidation preference, as well as the immediately exercisable $1.00 per share redemption right, was irrelevant to his consideration of what he should pay for the shares of Series B preferred stock because the Company was in dire financial straits.[37] As Poliak explained: "Well, the company was bankrupt. It was kind of hard to put a price tag on something, on a share price, on a company that's bankrupt."[38]

Also on December 1, 2010, Armstrong sent a written consent of Ark stockholders to Ark's outside counsel (the "2010 Written Consent") purporting to

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[34] Trial Tr. 250 (Poliak).
[35] *Id.* at 155-60 (Poliak).
[36] *Id.* at 156 (Poliak).
[37] *Id.* at 160 (Poliak).
[38] *Id.* at 155 (Poliak). The Company did not seek protection under the bankruptcy laws.

remove Poliak as the Company's sole director, to expand the size of the Board to two directors, and to elect Keyser and Armstrong as directors.[39] The signatories to the 2010 Written Consent, Keyser, Schalk, John, and William Fox, purported to hold more than eighteen million shares of Ark's common stock, including more than eight million Option Shares.[40] On December 2, 2010, 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.[41] Locke Lord asserted that Keyser did not own and could not vote the Option Shares because the Option was not assignable unless Ark consented to an assignment, which it had not done.[42]

On December 3, 2010, the Three Creditors faxed a "back-up exercise" of the Option to Ark.[43] On December 9, 2010, Ark issued the Option Shares to the Three Creditors who thereafter assigned the Option Shares to Keyser.[44] On December 10, 2010, Keyser first learned, by way of an Ark shareholder list provided to him by one of the Three Creditors, that the Series B Issuance had occurred. In a December 10, 2010 email, counsel for Auxol and Keyser objected

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[39] Pre-Trial Stip. at 5.
[40] JX 32.
[41] Pre-Trial Stip. at 5.
[42] JX 34.
[43] Pre-Trial Stip. at 5.
[44] *Id.* at 6.

to the Series B Issuance.[45] In December 2010 or January 2011, Salvatore and Schalk also learned of the Series B Issuance.[46]

On December 16, 2010, Poliak, Keyser, and Armstrong met to discuss a potential settlement of their disputes regarding control of Ark and the validity of the Series B Issuance.[47] On January 5, 2011, Ark, Auxol, Keyser, Armstrong, and the Three Creditors entered into a confidentiality and standstill agreement.[48] On January 31, 2011, Ark and Auxol entered into the Confidential Agreement in Principle (the "Ark/Auxol Agreement in Principle"), pursuant to which Ark agreed in principle to purchase certain Notes, the Option Shares, and certain shares of Dawson James held by Auxol for $2.2 million.[49]

At the time the Ark/Auxol Agreement in Principle was executed, Ark did not have the funds to consummate the agreement. Ark planned to raise the necessary

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[45] *Id.*

[46] *See* JX 176 ("Pls.' Objections and Resps. To Defs.' First and Second Sets of Interrogs. Directed to Pls.") at 10 ("December 2010 or January 2011: Frank Salvatore had in person discussions with Mr. Poliak in which they discussed the fact that stockholders had undertaken action to remove Mr. Poliak as a director, and Mr. Poliak advised that in response to those efforts he had undertaken steps to, in Mr. Poliak's words, 'protect the company.' Mr. Poliak may have mentioned in one or more of those discussions that he had caused Ark to issue voting stock to himself. Douglas Kaiser may have participated in some or all of those conversations with Mr. Poliak."); *id.* at 13 ("Scott Schalk believes that he first learned about Mr. Poliak's purported issuance of additional voting stock to himself in either December 2010 or January 2011 through oral communications, but has no specific recollection of when or from whom he first learned of the purported issuance. Frank Salvatore believes that he may have first learned about Mr. Poliak's purported issuance of additional voting stock to himself during in person discussions with Mr. Poliak in either December 2010 or January 2011, but has no specific recollection of when he first learned of the purported issuance.").

[47] Pre-Trial Stip. at 6.

[48] JX 75.

[49] Pre-Trial Stip. at 6-7; JX 79.

$2.2 million by issuing Series A preferred stock in a private placement to third party investors. On March 15, 2011, Ark began distributing a subscription agreement (the "Subscription Agreement) for the Series A preferred offering.[50] The Subscription Agreement states, in bold, that one of the "Risks Related to This Offering" is that "[t]he one member of our Board of Directors is our principal stockholder and has super majority voting power in the form of Series B Preferred Stock and may take actions that may not be in the best interests of our other stockholders."[51] The Subscription Agreement also provides that the holders of Series A preferred stock are not entitled to vote in Board elections.[52] By the spring of 2011, all of the Plaintiffs were aware of the proposed private placement of Series A preferred stock.

On March 31, 2011, Ark and Auxol entered into a stock and note purchase agreement (the "Ark/Auxol Purchase Agreement"), as contemplated by the Ark/Auxol Agreement in Principle. The Ark/Auxol Purchase Agreement was intended to provide for a closing date of April 1, 2011, or such later date as agreed

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[50] Pre-Trial Stip. at 7; JX 87 ("Subscription Agreement").

[51] Subscription Agreement at ARK35 (emphasis removed).

[52] *See id.* at Ex. C ("Certificate of Designation of Preferences, Rights, and Limitations of Series A Preferred Stock") § 7 ("Except as otherwise required by law or as otherwise specifically provided herein, the Series A Holders shall have no voting rights and shall not be entitled to vote at any meeting of the stockholders of the Corporation for the election of directors or for any other purpose or otherwise to participate in any action taken by the Corporation or the stockholders thereof.").

to by the parties.[53] The Ark/Auxol Purchase Agreement stated that Ark's obligations were, at the option of Ark, conditioned on Ark's reaching an agreement with Keyser for the purchase of the seven million shares of Ark stock that Keyser owned before he exercised the Option (the "Original Shares").[54] The Ark/Auxol Purchase Agreement further provided that "[f]or 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."[55]

Ark and Auxol did not close on the Ark/Auxol Purchase Agreement on April 1, 2011, as envisioned. At that time, Auxol did not yet have the $2.2 million needed for the purchase. On April 1, 2011, when Auxol's counsel learned that Ark would not close as expected under by the Ark/Auxol Purchase Agreement, he asked Ark's counsel what issues had prevented the closing. Ark's counsel responded: "[T]he major remaining issue is the sale of the Keyser interest in Ark. Many of the investors want to know that the issues related to Mr. Keyser's interest in Ark and its affiliates . . . have been resolved prior to funding their investment."[56]

On April 15, 2011, Keyser's counsel advised Ark that if Poliak did not step down as a director, Auxol and Keyser "will have no choice but to commence an action in the Delaware Court of Chancery under Section 225 of the DGCL

[53] Pre-Trial Stip. at 7.
[54] JX 94 ("Ark/Auxol Purchase Agreement") § 7.4.
[55] *Id.* at § 6.4.
[56] JX 97.

[Delaware General Corporation Law]."[57] On April 19, 2011, Locke Lord responded that:

> Ark would certainly have to supplement its offering documents in the event of new litigation in Delaware, and such disclosure would likely dissuade new investors from investing. . . . [P]otential litigation . . . would therefore likely make an agreement to satisfy the Notes impossible, and force the cessation of operations and liquidation of Ark.[58]

As of April 20, 2011, Ark and Auxol executed an extension agreement postponing the closing date in the Ark/Auxol Purchase Agreement to April 29, 2011.[59] On April 29, 2011, Ark, Poliak, and Keyser executed a separate settlement agreement pursuant to which Ark would acquire the Original Shares from Keyser (the "Ark/Keyser Settlement Agreement").[60] The Ark/Keyser Settlement Agreement, which is governed by Florida law,[61] contemplated that Ark, Poliak, and Keyser would attempt to negotiate a price for the Original Shares (the "Sale Price") and, if those negotiations failed, "then the determination of the Sale Price shall be submitted to an independent third party valuation firm to value the Shares and determine the Sale Price based upon the fair market value of Ark."[62]

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[57] JX 101 at KSS04690.
[58] JX 102.
[59] JX 111 at KSS51.
[60] JX 120 ("Ark/Keyser Settlement Agreement").
[61] *Id.* at § 10(b) ("This Agreement, including all claims concerning the validity, performance and/or enforcement, shall be governed by the laws of the State of Florida as they apply to contracts made exclusively within that state, and without giving effect to conflicts of law principles.").
[62] *Id.* at § 3(b).

The Ark/Keyser Settlement Agreement required that the valuation of the Original Shares be completed by July 31, 2011,[63] and provided that, within 30 days after that value is determined, "Ark shall pay to Keyser in cash no less than $50,000, together with a Secured Promissory Note . . . for the remaining balance."[64] Moreover, the Ark/Keyser Settlement Agreement stated that closing shall take place "no later than August 15, 2011, unless another date . . . is agreed to in writing by the parties . . . ."[65]

On May 2, 2011, Ark raised $3.2 million by issuing Series A preferred stock to investors.[66] On the same day, Ark and Auxol closed under the Ark/Auxol Purchase Agreement.[67] Ark paid Auxol $2.2 million, approximately $400,000 of which went directly to Keyser and Armstrong.[68]

In June 2011, pursuant to the Ark/Keyser Settlement Agreement, Ark, Poliak, and Keyser selected Skoda, Minotti & Co. ("Skoda Minotti") to value the Original Shares because the parties could not agree on the Sale Price.[69] On September 19, 2011, in response to Keyser's request for an update, Skoda Minotti indicated that the only open issue concerned the value of certain warrants that Ark

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[63] *Id.*
[64] *Id.* at § 3(c).
[65] *Id.* at § 4.
[66] Pre-Trial Stip. at 9.
[67] *Id.*
[68] Trial Tr. 124 (Keyser).
[69] Pre-Trial Stip. at 9.

held as a result of its work as an underwriter (the "Underwriter Warrants").[70] On October 3, 2011, Skoda Minotti e-mailed Shek, Poliak, and Keyser regarding the Underwriter Warrants.[71] Skoda Minotti noted that the value of the Underwriter Warrants "has not been included in the Company's financial statements historically since it cannot include the value of these assets in computing net capital for regulatory purposes."[72] Skoda Minotti, however, expressed that it was "necessary for . . . [Skoda Minotti] to consider the value of these warrants . . . in determining the value of the Company."[73] Skoda Minotti proposed two options for valuing the underwriter warrants: (a) Skoda Minotti could "independently determine the value of the warrants using the Black-Scholes method" or (b) the parties could "stipulate to the value of the warrants. . . ."[74] Skoda Minotti also stated that "[b]ased on our analysis to date, the [Underwriter W]arrants would need to have significant value in order for the common stock [of Ark] to have value."[75]

During an October 6, 2011 telephone call involving Keyser, Poliak, Shek, and Skoda Minotti,[76] Skoda Minotti explained that unless the value of the Underwriter Warrants exceeded $3,000,000, the Original Shares likely had no

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[70] JX 138. "Underwriter warrants are non-cash compensation received by investment banking firms in connection with financing." Trial Tr. 43 (Keyser).
[71] JX 140.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] Pre-Trial Stip. at 9.

value.[77] By letter dated October 11, 2011, Keyser's counsel informed Ark and Poliak that Keyser was rescinding the Ark/Keyser Settlement Agreement because Ark and Poliak had breached the agreement.[78] Specifically, Keyser's counsel claimed that Ark and Poliak failed to provide Skoda Minotti with sufficient information about the Underwriter Warrants to allow Skoda Minotti to value properly the Company as required by Section 3(b) of the Ark/Keyser Settlement Agreement. Counsel also observed that Section 3(b) "sets a hard and fast deadline of July 31, 2011, for the completion of the valuation . . . ,"[79] which was not met, and that Ark and Poliak had failed to cooperate with Keyser as required by Sections 6 and 10 of the Ark/Keyser Settlement Agreement.[80] Even though Keyser purported to rescind the Ark/Keyser Settlement Agreement, Skoda Minotti continued to work on a valuation of the Original Shares.

In October 2011, Poliak agreed to resign all positions that he held at Ark and Dawson James for one year as part of a settlement with FINRA.[81] On October 14, 2011, Ark sent its stockholders notice of the Company's annual meeting to be held on November 1, 2011, as well as a proxy statement. The proxy statement revealed

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[77] Trial Tr. 131-32 (Keyser).
[78] Pre-Trial Stip. at 10; JX 146.
[79] JX 146 at ARK 4471.
[80] *Id.*
[81] JX 150 at ARK119; Trial Tr. 218 (Poliak).

that Poliak, as the sole member of the Board, had nominated Shek, Hands, and Curtis to serve on the Board.[82]

On November 1, 2011, Curtis, Hands, and Shek were elected to the Board at the annual meeting of Ark's shareholders.[83] The Plaintiffs did not attend that meeting, but they did vote by proxy. Keyser voted to elect Curtis and Hands to the Board, but abstained from voting for Shek.[84] Schalk and Salvatore voted for Curtis, Hands, and Shek.[85] At the meeting, at Plaintiffs' request, Ark's counsel read into the record a statement that the Plaintiffs had provided, objecting to the Series B Issuance.[86] In tallying the results of the director elections that occurred during the November 1, 2011 meeting, the Company counted the votes that Keyser cast as the holder of the Original Shares.[87]

On November 6, 2011, Poliak resigned from all positions that he held at Ark and Dawson James.[88] On November 30, 2011, Ark raised $1 million from the sale of additional shares of Series A preferred stock.[89] Also on November 30, Skoda Minotti reported its valuation of the Original Shares, concluding that, at that time,

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[82] Pre-Trial Stip. at 10.
[83] *Id.*
[84] JX 154.
[85] *Id.*
[86] JX 155 at ARK 8807.
[87] JX 154; Trial Tr. 474 (Shek).
[88] Pre-Trial Stip. at 10.
[89] *Id.*

all of the shares of Ark's common stock were worthless.[90] At the instruction of Shek and Poliak, Skoda Minotti did not independently value the Underwriter Warrants. Rather, in issuing its report, Skoda Minotti relied exclusively on an estimate of the value of the Underwriter Warrants provided by Shek and Poliak.[91] Ark has never offered to pay Keyser anything in exchange for the Original Shares.[92]

On December 13, 2011, the Plaintiffs, Kaiser, and John executed the 2011 Written Consent and delivered a copy of the consent to Ark.[93] The 2011 Written Consent purports to elect the Plaintiffs to the Board and to remove Curtis, Hands, and Shek from the Board.[94]

III. CONTENTIONS

The Plaintiffs argue that, through the 2011 Written Consent, Ark's stockholders validly elected the Plaintiffs to the Board and removed Curtis, Hands, and Shek from the Board. The Plaintiffs assert that Keyser validly rescinded the Ark/Keyser Settlement Agreement, and, therefore, that Keyser was the holder of the Original Shares at the time he executed the 2011 Written Consent. The

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[90] JX 167.

[91] *Id.* at KSS00382 ("At the direction of management, we performed no analysis as to the value of the placement agent warrants owned by the Company as of the valuation date. As a result, we relied exclusively on management's estimate of the value of these warrants in the preparation this Report."); Trial Tr. 215-17 (Poliak).

[92] Trial Tr. 200 (Poliak).

[93] Pre-Trial Stip. at 11.

[94] JX 170.

common shares of Ark held by Salvatore, Schalk, John, and Kaiser, when combined with the Original Shares add up to 17,154,000 shares, and, as of the 2011 Written Consent, there were 27,247,650 shares of Ark common stock outstanding.[95] Thus, if the Plaintiffs are correct that Keyser held the Original Shares, stockholders holding a majority of Ark's common stock approved the 2011 Written Consent.

Even if Keyser did not hold the Original Shares when the 2011 Written Consent was executed, the Plaintiffs still contend that stockholders holding a majority of Ark's common stock approved the 2011 Written Consent. According to the Plaintiffs, if Keyser should have relinquished the Original Shares pursuant to the Ark/Keyser Settlement Agreement, then those shares would have been acquired by Ark, and they would have become treasury shares. The Plaintiffs then argue that, as treasury shares, the Original Shares are not entitled to vote in a Board election. Thus, the Plaintiffs contend that if Keyser should have relinquished the Original Shares pursuant to the Ark/Keyser Settlement Agreement, Ark only had 20,247,650 shares of common stock outstanding for purposes of a Board election, and even without the Original Shares, Salvatore, Schalk, John, and Kaiser hold 10,154,000 shares of Ark common stock.

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[95] Pre-Trial Stip. at 11.

The Plaintiffs then assert that Ark's common stock is the only valid outstanding class of Ark stock entitled to vote in a Board election. Specifically, the Plaintiffs argue that the Series B Issuance was a self-dealing transaction that was not entirely fair, and therefore, that it was invalid.

In response, the Defendants argue that Keyser materially breached the Ark/Keyser Settlement Agreement by not tendering the Original Shares to Ark for their fair market value of $0.00 as determined by Skoda Minotti. The Defendants contend that, because Keyser breached the Ark/Keyser Settlement Agreement before he executed the 2011 Written Consent, it would be inequitable to count the Original Shares as approving the 2011 Written Consent. Moreover, the Defendants maintain that "[i]f Keyser had transferred his 7,000,000 shares to Ark as required by the [Ark/Keyser] Settlement Agreement, Ark would have issued those shares to new and existing stockholders."[96] Specifically, Poliak testified that the plan was to give the Original Shares to members of Ark's management—"We had people like Mr. Shek, Like Mr. Curtis . . . Mr. Shapiro and some of the new people on our team that deserved equity in the company, and we knew that it was very difficult to issue them any equity until such time [as] we could gather Keyser's stock . . . ."[97] Therefore, the Defendants argue that the Court should view the Original Shares as outstanding but not held by Keyser at the time the 2011 Written Consent was

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[96] Defs.' Post Trial Br. at 49 (citing JX 177; Trial Tr. 265-66 (Poliak), 370 (Curtis)).
[97] Trial Tr. 265 (Poliak).

executed and delivered. Were that the case, the stockholders who validly approved the 2011 Written Consent only held 10,154,000 shares of Ark common stock out of 27,247,650 outstanding common shares, which is not a majority.

Even if shareholders holding a majority of Ark's outstanding common stock had approved the 2011 Written Consent, the Defendants contend that the Series B Issuance was valid. Thus, according to the Defendants, a majority of Ark's common stock cannot, by itself, elect a Board through written consent. The Defendants further argue that, even if the Series B Issuance was invalid, laches, ratification, acquiescence, waiver, equitable estoppel, and unclean hands independently bar the Plaintiffs from challenging the issuance.

IV. ANALYSIS

"A Section 225 proceeding is summary in character, and its scope is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer."[98] Both the Plaintiffs and the Defendants have raised issues that the Court need not decide in order to determine who comprises the Board, and thus, those issues will not be addressed. The Court only reaches four issues. First, the 2011 Written Consent was executed by Ark stockholders holding a majority of Ark's outstanding common stock. Second, Ark's common stock is the only class of Ark stock that is outstanding and entitled to vote in a Board election because the

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[98] *Genger v. TR Investors, LLC*, 26 A.3d 180, 199 (Del. 2011) (citations omitted).

Series B Issuance was invalid—that issuance was a self-dealing transaction that was not entirely fair. Third, none of the equitable defenses raised by the Defendants bars the Plaintiffs from challenging the Series B Issuance. The result of those three determinations is that Ark stockholders holding a majority of all of the Ark stock entitled to vote in a Board election executed the 2011 Written Consent, and therefore, that consent, which elects the Plaintiffs to the Board and removes Shek, Hands, and Curtis from the Board, is valid. The fourth issue decided by the Court is that the Plaintiffs are entitled to an award of costs, but neither the Plaintiffs nor the Defendants are entitled to an award of attorneys' fees.

A. *The 2011 Written Consent Was Executed by Ark Stockholders Holding a Majority of Ark's Outstanding Common Stock*

There is some appeal to the Plaintiffs' argument that even if Keyser did not hold the Original Shares when the 2011 Written Consent was executed, that consent is, nonetheless, valid. The Plaintiffs are correct that, under the Ark/Keyser Settlement Agreement, Ark would acquire the Original Shares.[99] Thus, if Keyser had provided Ark with his shares under that agreement, those shares would presumably have become treasury shares, which would not have been entitled to vote in a Board election.[100] In that case, there would only have been

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[99] *See* Ark/Keyser Settlement Agreement § 2 ("Keyser covenants and agrees to sell and convey the [Original] Shares to Ark . . . .").

[100] *See* 8 *Del. C.* § 160 (c) ("Shares of its own capital stock belonging to the corporation or to another corporation, if a majority of the shares entitled to vote in the election of directors of such

20,247,650 shares of Ark common stock entitled to vote, and thus, even without the Original Shares, Ark shareholders (Salvatore, Schalk, John, and Kaiser) holding a majority of Ark's common stock (10,154,000 shares) executed the 2011 Written Consent.

The Defendants counter this logic by contending that if Keyser had transferred his seven million shares to Ark as required by the Ark/Keyser Settlement Agreement, then Ark would have issued those shares to its management team. The Court finds this unlikely because on May 2, 2011, through the Ark/Auxol Purchase Agreement, Ark acquired the Option Shares—over eight million shares of Ark common stock—and those shares became treasury shares.[101] If Ark (or, perhaps more accurately, Poliak) wanted to provide common stock to its management team, why not dole out the Option Shares? Thus, the Court accepts

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other corporation is held, directly or indirectly, by the corporation, shall neither be entitled to vote nor be counted for quorum purposes.").

[101] *See* Trial Tr. 473:

> Counsel for Plaintiffs: "[Y]ou state that as of the record date [October 31, 2011] there were 27,247,650 shares of common stock issued and outstanding entitled to vote, correct?"
> Shek: "Correct."
> Counsel for Plaintiffs: "Now, that figure does not include the 8,604,521 option shares, right?"
> Shek: "Correct."
> Counsel for Plaintiffs: "They were not issued and outstanding as of the record date, correct?"
> Shek: "Correct."
> Counsel for Plaintiffs: "They were not issued and outstanding because they had been repurchased by the company, correct?"
> Shek: "Yes."

that if Keyser had transferred the Original Shares to Ark, those shares would have become treasury shares.[102]

Nevertheless the Court is wary of deciding this case based on a hypothetical; trying to determine what would have happened if certain events, which did not occur, had occurred. Therefore, the Court also proceeds to determine whether Keyser was required to transfer the Original Shares to Ark by the Ark/Keyser Settlement Agreement.

The Defendants contend that, under the Ark/Keyser Settlement Agreement, which is governed by Florida law, Keyser was obligated to transfer the Original Shares to Ark for $0.00 on November 30, 2011 when Skoda Minotti issued its report. Keyser, on the other hand, claims that he validly rescinded the Ark/Keyser Settlement Agreement by letter dated October 11, 2011. The reasons for rescission listed in that letter were: (1) Ark did not provide Skoda Minotti with sufficient information to value the Underwriter Warrants; (2) Skoda Minotti's valuation was not completed within the time provided for by the agreement; and (3) Ark and Poliak failed to cooperate with Keyser.

Under Florida law, a party may rescind a contract if the other party to the contract has committed a substantial breach.[103] None of Keyser's purported

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[102] This finding provides an alternative basis for the Court's determination that the 2011 Written Consent was executed by Ark stockholders holding a majority of Ark's outstanding common stock.

grounds for rescission constitutes a substantial breach. Although Ark may not have provided Skoda Minotti with sufficient information to value the Underwriter Warrants by October 11, 2011, there is no reason it should have. On October 3, 2011, Skoda Minotti e-mailed Shek, Poliak, and Keyser explaining that it had yet to value the Underwriter Warrants, and asking them if they wanted Skoda Minotti to perform its own valuation (which would have been expensive) or if they wanted to stipulate to a value.[104] Before one of those avenues was even chosen, Keyser purported to rescind the Ark/Keyser Settlement Agreement. Keyser may be correct that the Ark/Keyser Settlement Agreement contemplates an independent determination of the value of the Underwriter Warrants, but when Keyser purported to rescind the Ark/Keyser Settlement Agreement, Skoda Minotti had not even asked for any information on the Underwriter Warrants.[105] When Keyser attempted to rescind the Ark/Keyser Settlement Agreement, Skoda Minotti did not even know if the parties wanted it to value the Underwriter Warrants. Thus, at the time of Keyser's rescission effort, Ark had not substantially breached the

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[103] *See, e.g.*, *Jackson v. Riley*, 427 So. 2d 255, 256 (Fla. Dist. Ct. App. 1983) ("Generally, upon substantial breach of a contract, the injured party may elect to either rescind the contract and recover the value of his performance, or treat the contract as broken and seek recovery for the breach.") (citation omitted).

[104] JX 140.

[105] To the extent Keyser argues that Ark should have known everything Skoda Minotti would need to value the Company and should have simply provided it to Skoda Minotti as soon as Skoda Minotti was retained, that argument is rejected.

Ark/Keyser Settlement Agreement by failing to provide Skoda Minotti with sufficient information.

Skoda Minotti's valuation was completed on November 30, 2011, and the Ark/Keyser Settlement Agreement provides that the "valuation determination shall be completed no later than July 31, 2011"[106] Under Florida law, however, a failure to meet a contractual deadline is not a substantial breach unless the contract provides that the deadline is essential to the parties' bargain.[107] Although the time between the deadline set in the Ark/Keyser Settlement Agreement (July 31, 2011) and the completion of performance (November 30, 2011) is substantial, throughout September and October 2011, Keyser acted as if Skoda Minotti was performing the valuation pursuant to the Ark/Keyser Settlement Agreement. Keyser sent e-mails about the valuation and participated in conference calls.[108] After a contractual time limit has lapsed, a party may not, for months, act as if the contract remains in effect and then suddenly treat the time limit as critical and the contract as void when performance under the contract is not rendered as that party had hoped.[109]

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[106] Ark/Keyser Settlement Agreement § 3(b).

[107] *See, e.g.*, *Command Sec. Corp. v. Moffa*, 84 So. 3d 1097, 1100 (Fla. Dist. Ct. App. 2012). ("Placing in the contract the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract.") (citation and internal quotations omitted).

[108] JX 136; Trial Tr. 131-32 (Keyser).

[109] Even "time [is] of the essence provisions may be waived by the conduct of the parties." *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521 (Fla. Dist. Ct. App. 1991) (citing *Coppola Enters., Inc. v. Alfone*, 531 So. 2d 334 (Fla. 1988)).

Therefore, Skoda Minotti's failure to complete its valuation by October 11, 2011, was not a substantial breach of the Ark/Keyser Settlement Agreement.

Although during the summer and fall of 2011 Poliak and Ark did not immediately provide Keyser with everything he requested, the evidence suggests that they were reasonably cooperative. Poliak and Ark, on the one hand, and Keyser, on the other, were essentially dealing at arm's length. They were trying to negotiate a purchase and sale of the Original Shares. Moreover, Keyser was continually threatening Poliak and Ark with litigation. In those circumstances, Keyser could not expect Poliak and Ark to be at his beck and call. The evidence indicates that Poliak and Ark were reasonably cooperative when Keyser sought information, and that is all that was required of them. In sum, Keyser has failed to show that Ark or Poliak substantially breached the Ark/Keyser Settlement Agreement on or before October 11, 2011, when Keyser sought to rescind that agreement, and thus, Keyser did not effectively rescind the Ark/Keyser Settlement Agreement.

Nevertheless, in order for Ark to be able to show that it is entitled to the Original Shares, as opposed to just damages for breach of the Ark/Keyser Settlement Agreement, Ark must demonstrate that it is entitled to specific performance of that agreement. Under Florida law, "[i]n order for a purchaser to obtain specific performance of a . . . contract, [the purchaser] must allege and

prove that [it] has either paid the balance, tendered the balance [or] was ready, willing and able to pay such balance or has been excused from such performance."[110]

The Ark/Keyser Settlement Agreement provides that, in exchange for the Original Shares, "Ark shall pay to Keyser in cash no less than $50,000, together with a Secured Promissory Note . . . for the remaining balance."[111] Keyser argues that this means that, at a minimum, he was entitled to $50,000 for his shares. The Defendants contend that "[t]his language does not obligate Ark to pay . . . [Keyser] $50,000 if his stock is valued at $0. Instead, this language contemplates a cash payment of $50,000 and a promissory note for any excess if Keyser's shares are ascribed a value of at least $50,000."[112]

Keyser has the better argument. The Ark/Keyser Settlement Agreement provides that "[i]n consideration of the premises and mutual covenants set forth in this Agreement and contemplated by the Settlement, Keyser covenants and agrees to sell and convey the [Original] Shares to Ark on the Closing Date . . . for the purchase price to be determined pursuant to Section 3 . . . ."[113] Section 3 of the agreement provides that the purchase price shall be either the price agreed to by Keyser and Poliak or, if they cannot agree on a price, the price determined by an

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[110] *Lusignan v. Lusignan*, 972 So. 2d 1076, 1077 (Fla. Dist. Ct. App. 2008) (citations omitted).
[111] Ark/Keyser Settlement Agreement § 3(c).
[112] Defs.' Post Trial Br. at 45 n.30.
[113] Ark/Keyser Settlement Agreement § 2.

independent valuation firm. Section 3 then provides that "Ark shall pay to Keyser in cash no less than $50,000, together with a Secured Promissory Note . . . for the remaining balance."[114] The statement "Ark shall pay to Keyser in cash no less than $50,000" is absolute. The Ark/Keyser Settlement Agreement contemplated that the value of the Original Shares would be more than $50,000, and suggested that there would be a remaining balance, but $50,000 was a floor.[115] There is no dispute that Ark has never offered to pay Keyser anything in exchange for the Original Shares. Thus, Ark is not entitled to specific enforcement of the Ark/Keyser Settlement Agreement, and Keyser is, and was, at the time the 2011 Written Consent was executed and delivered, the holder of the Original Shares.

Because Keyser owned the Original Shares when the 2011 Written Consent was executed and delivered, Ark stockholders holding a majority of Ark's outstanding common stock executed that consent. Moreover, even if Keyser had transferred the Original Shares to Ark, those shares would have become treasury shares. In that case, there would only have been 20,247,650 shares of Ark common stock entitled to vote at the time the 2011 Written Consent was executed

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[114] *Id.* at § 3(c).

[115] Ark's interpretation of the Ark/Keyser Settlement Agreement also potentially presents a consideration problem. Ark seeks to require Keyser to relinquish the Original Shares in exchange for something even less than a peppercorn--$0.00. *See FCD Dev., LLC v. South Fla. Sports Comm., Inc.*, 37 So. 3d 905, 911 (Fla. Dist. Ct. App. 2010) ("Nothing was presented to show any consideration, and as such, OCO could not be considered a ready, willing, and able buyer."); *Lester v. Kahn-McKnight Co., Inc.*, 521 So. 2d 312, 313 (Fla. Dist. Ct. App. 1988) ("Lester's post-employment written promise was supported by no consideration and was therefore unenforceable as a matter of law.").

and delivered, and thus, even without the Original Shares, Ark shareholders (Salvatore, Schalk, John, and Kaiser) holding a majority of Ark's common stock (10,154,000 shares) executed the 2011 Written Consent.

The certificate of designations of the Series B preferred stock, however, provides that the Series B preferred stock votes with Ark's common stock as a single class on all matters to be voted on by Ark's shareholders, and each share of Series B preferred stock is entitled to 1,000 votes per share. If the Series B Issuance was valid, then the 17,154,000 shares of Ark common stock represented in the 2011 Written Consent would not be anywhere near "the minimum number of votes that would be necessary to . . . [elect a Board] at a meeting at which all shares entitled to vote thereon were present and voted."[116] Therefore, in order to determine if the 2011 Written Consent effectively appointed a new Board, the Court must assess the Series B Issuance.

B. *The Series B Issuance Was Invalid*

As an initial matter, the standard under which to review the Series B Issuance is not readily apparent. Poliak testified that he caused Ark to issue the Series B shares in order to prevent Keyser and his cohorts from electing a new Board,[117] which suggests that Poliak's actions are subject to review under the

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[116] 8 *Del. C.* § 228(a).
[117] *See* Trial Tr. 149:

standard set forth in *Blasius Industries, Inc. v. Atlas Corp.*[118] Unlike *Blasius*, however, the Series B Issuance was a self-dealing transaction—as soon as Poliak issued himself 25,000 shares of Series B preferred stock for $0.01 a share he instantly had the right to redeem those shares for $1.00 per share, and the Series B Issuance provided Poliak (who, before the issuance, had been a minority stockholder) with an overwhelming majority of the votes to be cast in any matter for which Ark's shareholders have a vote[119]—and self-dealing transactions are typically reviewed for entire fairness.[120] The Court ultimately concludes that the Series B Issuance is subject to entire fairness review, but that that review should be informed by the fact that Poliak's admitted objective in causing Ark to undertake

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> Counsel for Plaintiffs: "But my question was counsel advised you that the steps you were taking were intended to prevent Mr. Keyser and his group from coming over and taking control of Ark, isn't that right?"
> Poliak: "I believe so."
> Counsel for Plaintiffs: "Now, the way the Series B preferred stock prevented Mr. Keyser's group from electing a new board was that you gave yourself super voting stock so that Mr. Keyser and his group would no longer have majority voting power over Ark stock, isn't that right?"
> Poliak: "I believe so."

[118] 564 A.2d 651, 661 (Del. Ch. 1988) (Where a board of directors acts "for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action.").

[119] The Defendants argue that the Series B Issuance was not a self-dealing transaction because, at the time the issuance occurred, Ark was insolvent, and thus, the Series B preferred stock was worthless. Control of an insolvent corporation, however, is worth something because there is a chance that it will become solvent. Moreover, even if Ark had absolutely no money, it was self-dealing for Poliak to pay $250 for an option to demand $25,000 from Ark in the event it became solvent.

[120] *See, e.g.*, *Chaffin v. GNI Group, Inc.*, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999) (A transaction is subject to entire fairness if the director who approved it "either stood on both sides of the transaction and dictated its terms in a self-dealing way, or . . . received in the transaction a personal benefit that was not enjoyed by the shareholders generally.") (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1988)).

the Series B Issuance was to diminish common stockholder voting power in a contest for Board control.

Although Poliak caused Ark to make the Series B Issuance in order to prevent Keyser and his allies from electing a new Board, which is the quintessential *Blasius* trigger, this Court and our Supreme Court have intimated that *Blasius*' main role, to the extent it has one,[121] is as a specific iteration of the intermediate standard of review laid out in *Unocal Corp. v. Mesa Petroleum Co.*[122]

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[121] *See Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 788 (Del. Ch. 2007) ("[C]onsistent with the directional teaching of cases like *MM Companies, Inc. v. Liquid Audio, Inc.,* [813 A.2d 1118 (Del. 2003),] *In re MONY Group, Inc. S'holders Litig.,* [853 A.2d 661 (Del. Ch. 2004),] and *Chesapeake Corp. v. Shore,* [771 A.2d 293 (Del. Ch. 2000),] the *Blasius* standard should be reformulated in a manner consistent with using it as a genuine standard of review that is useful for the determination of cases, rather than as an after-the-fact label placed on a result."); William T. Allen, et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law,* 56 BUS. LAW. 1287, 1315 (2001) ("*Function Over Form*") ("[T]he question for us is whether . . . [the potential benefits of *Blasius* justify] the added doctrinal complexity created by continuing *Blasius* as a separate review standard. In the current legal environment, where courts have shown their readiness to protect the integrity of the voting process under the *Unocal/Unitrin* structure, the Delaware courts have indicated that the answer should be no.").

[122] 493 A.2d 946, 954 (Del. 1985). *See Liquid Audio*, 813 A.2d at 1129 ("This Court and the Court of Chancery have recognized the substantial degree of congruence between the rationale that led to the *Blasius* 'compelling justification' enhanced standard of judicial review and the logical extension of that rationale *within* the context of the *Unocal* enhanced standard of judicial review. Both standards recognize the inherent conflicts of interest that arise when a board of directors acts to prevent shareholders from effectively exercising their right to vote either contrary to the will of the incumbent board members generally or to replace the incumbent board members in a contested election.") (citations omitted); *Mercier*, 929 A.2d at 809 ("The Delaware Supreme Court's relatively recent decision in *MM Companies, Inc. v. Liquid Audio, Inc.* can be read as signaling that Court's recognition that a clearer approach to corporate election disputes was necessary, and that the stringency of the *Blasius* approach should be reserved largely for director election contests or election contests having consequences for corporate control. In that case, the Supreme Court strove to bring the *Blasius* and *Unocal* standards together in a workable manner.") (citations omitted); *Function over Form* at 1316 ("Since the early 1990s, the court of chancery and the Delaware supreme court began gradually to 'fold' the *Blasius* standard into *Unocal*, effectively making the former a subset of the latter.").

Moreover, the *Blasius* standard was established in a case where this Court could not "conclude that the board was acting out of a self-interested motive."[123] A standard of review that was established to review selfless conduct is, by definition, ill-suited to serve as a standard of review for self-dealing conduct. Thus, the issuance of the Series B preferred stock is not subject to review under *Blasius*; it is subject to review under the standard usually applicable to self-dealing conduct—entire fairness.

Entire fairness, however, is a flexible standard, "requiring an examination of all aspects of the transaction to gain a sense of whether the deal in its entirety is fair,"[124] and one aspect of the Series B Issuance is the reason it was undertaken. Poliak caused Ark to make the Series B Issuance in order to prevent Keyser and his allies from electing a new Board. Therefore, the Court should (and will) take that fact into account in determining whether Poliak's actions were entirely fair.

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the . . . [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. . . . However, the test for fairness is not a bifurcated

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[123] 564 A.2d at 658.
[124] *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995) (citation omitted).

> one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.[125]

"Thus, the entire fairness standard requires the board of directors to establish 'to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price.'"[126] The burden of proving entire fairness is initially on the Defendants.[127] Although the Defendants could shift the burden of proving entire fairness onto the Plaintiffs by showing that certain procedural safeguards were used before the Series B Issuance was made,[128] there has been no suggestion that Poliak employed any procedural safeguards. Thus, the Defendants have the burden of proving that the Series B Issuance was entirely fair.

Where, as here, a corporation's sole director issues corporate 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, there is little, if any, chance that it would be possible to show that he acted fairly. The only way that showing might be made would be if it could be proved that the director

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[125] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (citations omitted).

[126] *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)) (emphasis in original).

[127] *See, e.g.*, *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness.") (citing *Weinberger*, 457 A.2d at 710).

[128] 8 *Del. C.* § 144. *See also Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002) ("[P]rocedural safeguards may be put in place that shift the burden to the plaintiff to prove the unfairness of the . . . [transaction] (*i.e.,* the negotiation and approval of the transaction by a special committee of independent and disinterested directors or the requirement of approval by a majority of the company's minority shareholders) . . . .").

had a very powerful justification for issuing the stock.[129] This specific application of entire fairness arises from the primacy that Delaware law places on the shareholder franchise in the context of director elections.[130] Again, the standard to be applied is entire fairness. As stated above, however, that standard is flexible, and because Poliak's self-dealing was motivated by a desire to prevent Ark's shareholders from electing a new Board—a motive that is inherently suspect under Delaware law—the Defendants must show that Poliak undertook a considerably robust process in order for the Court to come to the conclusion that Poliak's actions were entirely fair.

The Defendants contend that Poliak caused Ark to make the Series B Issuance for two principal reasons. First, Ark had not performed well under Keyser's leadership, and therefore, Poliak thought that if Keyser and his allies gained control of Ark, the Company would suffer even greater financial distress. Second, Poliak feared that if Keyser gained control of Ark, then he (Keyser) might make decisions as a director or controlling stockholder which sacrificed the best

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[129] A similar application of the entire fairness doctrine has been advocated by a member of this Court, although not in a judicial opinion. *See* Leo E. Strine, Jr., et al, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 676 n.174 (2010) ("In our view, one might consider *Blasius* as involving a specialized form of the entire fairness doctrine, whereby even if directors are acting in subjective good faith, they cannot act to prevent their own unseating without demonstrating a very powerful justification for their self-serving conduct.").

[130] *See, e.g.*, *EMAK Worldwide, Inc. v. Kurz*, 2012 WL 1319771, at *3 (Del. Apr. 17, 2012) ("Shareholder voting rights are sacrosanct. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm.") (citation omitted).

interests of Ark for either his own best interests or the best interests of the Three Creditors. Moreover, the Defendants argue that their fear has been confirmed by the Auxol/Three-Creditor Agreement. According to the Defendants, Keyser, in that agreement, "agreed that as a member of the Ark board of directors he would pay the . . . [Three Creditors] whatever they claimed Ark had previously agreed to pay them."[131] The Defendants also contend that the FINRA rules are relevant to Poliak's decision to issue shares of Series B preferred stock to himself as opposed to someone else, and that his reliance on the advice of Locke Lord and the fact that Ark was insolvent are relevant to the entire fairness analysis.

Even if all of the Defendants' contentions are accepted as true, they still cannot show that the Series B Issuance was entirely fair. With regard to fair dealing, the Court accepts Poliak's testimony that if he was going to prevent Keyser and his allies from ousting him from office, he had to act fast. The problem is that the Defendants have not shown that Poliak was entitled to try to prevent the Plaintiffs from removing him as a director. The evidence produced at trial suggests that Ark faltered under Keyser, and that Poliak has, at least to some extent, started to turn the Company around.[132] Moreover, the terms of the Auxol/Three-Creditor Agreement may be favorable to the Three Creditors and

[131] Defs.' Post Trial Br. at 42.

[132] It should be noted, however, that Poliak had been the sole director of Ark since December 2009, and the economy in general had gotten rosier since the 2008-2009 time period.

harmful to Ark. Those facts, however, provide little, if any, justification for giving control of the Company to Poliak for $250, and they certainly do not provide the powerful justification necessary to uphold self-dealing conduct which intentionally impinged on the right of Ark's stockholders to determine who should comprise the Board. "The notion that directors know better than the stockholders about who should be on the board is no justification at all."[133]

As to Poliak's reliance on the FINRA rules, the record is sparse as to which rules he invokes. Nevertheless, the issue of to whom Poliak could permissibly issue shares for the purpose of preventing his ouster would only be relevant if Poliak could validly attempt to entrench himself, and he has not provided a sufficient justification for entrenchment. Poliak did not have a sufficient justification for issuing shares of Series B preferred stock to anyone, and thus, regardless of to whom he chose to issue the shares, the issuance is invalid. Although Poliak claims to have relied on advice from Locke Lord in deciding to cause Ark to issue the Series B preferred stock, the evidence suggests that Locke Lord was (rightly) skeptical of the validity of that issuance.[134] Thus, Locke Lord's advice provides no help to Poliak.

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[133] *Mercier*, 929 A.2d at 811.

[134] *See* JX 22 ("As we have discussed, Delaware courts don't 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.").

With regard to fair price, Poliak paid $250 for a controlling interest in Ark and for the immediate right to $25,000. The Defendants argue that at the time of the Series B Issuance, Ark was insolvent, and thus, the Series B preferred stock was worthless. The burden is on the Defendants to show that the control of Ark was only worth $250, and they cannot meet that burden by simply stating that Ark was insolvent. Control of an insolvent corporation is worth something because there is always a chance that it will become solvent. Moreover, even if Ark had no money, it was unfair for Poliak to pay $250 for an option to demand $25,000 from Ark in the event it ever became profitable. In sum, the Defendants have failed to show that the Series B Issuance was entirely fair; therefore, that issuance was invalid. Accordingly, Ark shareholders holding 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 Shek, Curtis, and Hands from the Board.

C. *None of the Equitable Defenses Raised by the Defendants Bars the Plaintiffs From Challenging the Series B Issuance*

The Defendants argue that laches, ratification, acquiescence, waiver, equitable estoppel, and unclean hands independently bar the Plaintiffs from challenging the Series B Issuance. The Court concludes that none of the equitable defenses raised by the Defendants has any merit.

1. Laches

"The affirmative defense of laches generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, prejudice to the defendant."[135] With regard to unreasonable delay, "[a]lthough the limitations of actions applicable in a court of law are not controlling in equity, the Court of Chancery ordinarily will follow the applicable statute of limitations."[136] Nevertheless, "[i]f defendants demonstrate that unusual or extraordinary circumstances exist which make it inequitable to give a plaintiff the full filing time provided in the analogous statute of limitations, an equity court may decide that equity and justice require a plaintiff to file suit more quickly."[137]

The Defendants contend that the Plaintiffs' decision not to bring an action challenging the Series B Issuance, which occurred in December 2010, until December 2011 constitutes unreasonable delay. According to the Defendants, Ark's capital structure materially changed between the spring of 2011 and December 2011—"[d]espite the impact of the Series B Preferred Stock and Series A Preferred Stock on Ark's capital structure, governing structure and

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[135] *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005) (citation omitted).

[136] *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011) (citation and internal quotations omitted). *See also Whittington v. Dragon Group L.L.C.*, 2010 WL 692584, at *6 (Del. Ch. Feb. 15, 2010) ("Although courts of equity are not bound by statutes of limitations, they still look to analogous statutes of limitations, if any, as evidence of what constitutes a reasonable delay.") (citation omitted), *aff'd and remanded*, 998 A.2d 852 (Del. 2010).

[137] *Whittington*, 2010 WL 692584, at *6 (citing *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009)).

investors, Plaintiffs stood silently by while Poliak controlled Ark for a year and Ark told potential new investors that Poliak controlled Ark through the Series B Preferred Stock."[138]

At least in certain instances, this Court and our Supreme Court have required that claims challenging a merger or a director election be brought with alacrity.[139] The Plaintiffs' challenge to the Series B Issuance, however, is a challenge to a self-dealing transaction. The only effects the Series B Issuance had on Ark's "structure" were that Poliak became Ark's controlling shareholder and every other Ark shareholder lost power. Those are not "structural" issues that are hard to undo. "Under Delaware law, a three-year statute of limitations applies to claims for breach of contract or breach of fiduciary duty,"[140] and the Defendants have not demonstrated any extraordinary circumstance that warrants curtailing that presumptively valid limitations period. Therefore, the Defendants have not shown that the Plaintiffs unreasonably delayed by challenging the Series B Issuance approximately one year after that issuance occurred.[141]

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[138] Defs.' Post Trial Br. at 27.

[139] *See, e.g.*, *Fed. United Corp. v. Havender*, 11 A.2d 331, 344 (Del. 1940) (determining that a claim challenging a merger was barred by laches); *Khanna v. McMinn*, 2006 WL 1388744, at *31 (Del. Ch. May 9, 2006) ("The Court cannot permit the Plaintiffs . . . [who] have stood effectively idle until more than a year after the 2002 annual meeting to bring their challenge before this Court.").

[140] *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999) (citing 10 *Del. C.* § 8106).

[141] Moreover, much of the Plaintiffs' delay appears to have been the result of a good faith attempt to negotiate a settlement. JX 134; JX 135; JX 136. "Our law favors the voluntary settlement of contested lawsuits," *Snug Harbor Condo. Council v. Sullivan*, 2011 WL 567453, at

2. Ratification

"Ratification is an equitable defense that precludes a party who [has] accept[ed] the benefits of a transaction from thereafter attacking it. Ratification may be either express or implied through a party's conduct, but it is always a voluntary and positive act."[142] There has been no suggestion that the Plaintiffs expressly ratified the Series B Issuance. Thus, the primary issue with regard to ratification is whether the Plaintiffs impliedly ratified that issuance.

> Implied ratification occurs [w]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, [and] his ratification is implied through his acquiescence. Ratification of an unauthorized act may be found from conduct which can be rationally explained *only* if there were an election to treat a supposedly unauthorized act as in fact authorized. Ratification may also be found where a party receives and retains the benefit of [that transaction] without objection, [ ] thereby ratify[ing] the unauthorized act and estop[ping] itself from repudiating it . . . .[143]

The Defendants argue that the Plaintiffs ratified the Series B Issuance because they did not object to Poliak's capacity to execute certain documents on behalf of Ark, including the Ark/Auxol Purchase Agreement, the Ark/Keyser

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*3 (Del. Ch. Feb. 7, 2011), and this Court has suggested that time spent attempting to negotiate a settlement constitutes reasonable delay. *See, e.g.*, *Whittington*, 2010 WL 692584, at *7 ("As for whether Frank's conduct was reasonable under the circumstances, I find that it was. . . . With twenty years to file under the analogous statute of limitations, Frank had no reason to rush back to court before exhausting the possibility of an out-of-court settlement with his siblings. Rather, he tried on several occasions between mid-2003 and late-2005 to settle the matter with Defendants and filed his claim only after those settlement negotiations failed.").

[142] *Genger*, 26 A.3d at 195 (citations and internal quotations omitted).

[143] *Id.* (citations and internal quotations omitted).

Settlement Agreement, and certain documents relating to the sale of Ark's Series A preferred stock. According to the Defendants, "[i]f the Series B Preferred Stock was invalid *ab initio* as Keyser now claims, then Poliak did not control Ark and could not have caused Ark to enter into the . . . [Ark/Auxol Purchase Agreement] or Series A Preferred Offering."[144] The Defendants further argue that the Plaintiffs (or at least Keyser) benefitted from the Series A preferred offering, and that that offering only occurred because Poliak controlled Ark.

Until November 6, 2011, Poliak was Ark's President, and, in that capacity, he could enter into contracts on Ark's behalf.[145] Thus, the fact that Keyser did not object to Poliak's authority to enter into the Ark/Auxol Purchase Agreement, the Ark/Keyser Settlement Agreement, or certain documents relating to the sale of Ark's Series A preferred stock does not suggest that Keyser ratified the Series B Issuance. Poliak could enter into agreements on Ark's behalf regardless of whether he controlled a majority of its voting power.

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[144] Defs.' Post Trial Br. at 34.

[145] *See, e.g.*, *Leung v. Feldman*, 1982 WL 116999, at *2 (Del. Ch. Apr. 28, 1982) ("The point as to whether or not the president of a corporation is required to have a formal written authorization to enter into . . . a contract is a novel one in this State. We think, however, that no such written authorization is required for the president of a small, closely held corporation which has habitually operated its business without any formal authorization to its president. Furthermore, since a corporation can act only through its officers and agents, a statutory requirement that the authority to act be in writing does not apply to the corporation's principal executive officers. Their action is that of the corporation, itself, and no express authority in writing is required to justify their acts.") (quoting *Hessler, Inc. v. Farrell*, 226 A.2d 708, 712 (Del. 1967)).

Although the Defendants are correct that Keyser benefitted from the Series A preferred offering,[146] they have not shown that the purchases of Series A preferred stock occurred because the purchasers thought that Poliak controlled Ark. In the Subscription Agreement, Poliak's control is disclosed in bold under the bold heading "Risks Related to This Offering."[147] A controlling stockholder may not be viewed as a positive,[148] and the Defendants have not offered sufficient evidence to suggest that the purchasers of Series A preferred stock had an atypical view of controlling stockholders. Thus, the Defendants have not shown that Keyser (or the other Plaintiffs) received a benefit as a result of the Series B Issuance. Specifically, the Defendants have not shown that investors purchased shares of Ark's Series A preferred stock because of the Series B Issuance.[149]

[146] *See* Trial Tr. 365 (Curtis) ("Well, when you're buying into a company, especially a small cap company or young growing company, the most important thing that you're betting on, you're betting your money on that management team, and if they do their job, then you're going to make money on that investment. If you get a bad management team, you're going to lose your money.").

[147] Subscription Agreement at ARK35 (emphasis removed).

[148] *See, e.g.*, *Kahn*, 638 A.2d at 1116 ("The controlling stockholder relationship has the potential to influence, however subtly, the vote of [ratifying] minority stockholders in a manner that is not likely to occur in a transaction with a noncontrolling party. . . . Even where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder. For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation. At the very least, the potential for that perception, and its possible impact upon a shareholder vote, could never be fully eliminated.") (quoting *Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990)).

[149] Although, as stated above, the purchasers of the Series A preferred stock likely relied on the makeup of Ark's management team in deciding to invest, investors knew that that team would not exist in perpetuity—managers quit, they get fired. Moreover, the argument that Keyser received a benefit through the Series B Issuance because Poliak, through his control of Ark, was

The Court recognizes that in the spring of 2011 Keyser threatened to bring a lawsuit against Poliak to invalidate the Series B Issuance, that Keyser was warned that a lawsuit might disrupt the Series A offering, that Keyser waited to pursue a lawsuit until after the Series A offering had been completed, and that the Series A offering netted Auxol, Keyser's company, $2.2 million. At first glance, that conduct appears inequitable. It is important to remember, however, that regardless of whether Ark acquired sufficient funds through the Series A offering to close under the Ark/Auxol Purchase Agreement, Keyser would still hold the Original Shares. The Ark/Auxol Purchase Agreement went so far as to specify that "[f]or 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."[150] Thus, Keyser's decision, as a holder of the Original Shares, to wait to bring litigation against Ark and Poliak until after the Series A offering was completed can properly be viewed as a decision by Keyser not to take actions that could potentially interfere with the Ark/Auxol Purchase Agreement while reserving his rights as the holder of the Original Shares.

Moreover, the evidence suggests that when Keyser declined to pursue a lawsuit against Poliak in 2011, Keyser, Ark, and Poliak were involved in

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more likely to pick managers who would appeal to the investors who purchased Series A preferred stock is not supported by sufficient evidence to be accepted by the Court.

[150] Ark/Auxol Purchase Agreement § 6.4.

negotiations for the purchase and sale of the Original Shares. Those negotiations culminated in the Ark/Keyser Settlement Agreement, which was executed on April 29, 2011. Thus, when Keyser agreed to hold off on a lawsuit, the Court finds that his decision was based, in significant part, on the fact that he was trying to negotiate a sale of the Original Shares to Ark. 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.

3. Acquiescence

"Acquiescence occurs when a party 'has knowledge of an improper act by another, yet stands by without objection and allows the other party to act in a manner inconsistent with the claimant's property rights.'"[151] The Defendants base their acquiescence defense on the same arguments that undergirded their ratification defense: namely, that the Plaintiffs did not object to Poliak's execution of certain documents on Ark's behalf and that the Plaintiffs benefitted from the Series A preferred offering, which, the Defendants contend, only occurred because Poliak controlled Ark. Those arguments fail for the reasons listed above. Poliak's execution of documents on Ark's behalf was a proper exercise of his authority as

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[151] *TR Investors, LLC v. Genger*, 2010 WL 2901704, at *15 (Del. Ch. July 23, 2010) (quoting *Brandywine Dev. Group, L.L.C. v. Alpha Trust*, 2003 WL 241727, at *4 (Del. Ch. Jan. 30, 2003)), *aff'd*, 26 A.3d 180 (Del. 2011).

Ark's President regardless of whether he controlled Ark, and the Defendants have failed to show that Poliak's control of Ark was the reason for the success of the Series A offering.

4. Waiver

"Waiver is the voluntary and intentional relinquishment of a known right."[152] The Plaintiffs brought their challenge to the Series B Issuance approximately a year after it occurred, well within the three year statute of limitations that this Court often applies by analogy. Moreover, in March 31, 2011, Ark acknowledged that "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."[153] Those facts show that the Plaintiffs have not voluntarily and intentionally relinquished their right to challenge the Series B Issuance, and thus, there has been no waiver.

5. Equitable Estoppel

In order for the Defendants to invoke the doctrine of equitable estoppel they must show that: "(i) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) they suffered a prejudicial change

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[152] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982) (citation omitted).
[153] Ark/Auxol Purchase Agreement § 6.4.

of position as a result of their reliance."[154] The Defendants claim that they did not know that the Plaintiffs would challenge the Series B Issuance. Regardless of whether that lack of knowledge could even support an equitable estoppel claim, the Defendants did know that the Plaintiffs intended to challenge the Series B Issuance. Keyser had threatened litigation ever since he learned of the Series B Issuance, and, again, he expressly reserved his right to challenge it in March 2011, roughly a month before the Series A offering occurred.

6. Unclean Hands

"[H]e who comes into equity must come with clean hands."[155] For a defense of unclean hands to lie, "the plaintiff's inequitable conduct must have an 'immediate and necessary' relation to the claims for which the plaintiff seeks relief."[156] With regard to Salvatore and Schalk, the Defendants contend that they stood "silently by while Poliak caused Ark to undertake the Series A Preferred Offering."[157] As discussed above, the Court does not find that the Series B Issuance directly affected the issuance of the Series A preferred stock. Thus, the Defendants cannot claim that the Plaintiffs' actions with regard to the Series A preferred stock provide a defense of unclean hands in a challenge to the Series B Issuance. The Defendants also raise several arguments in support of their unclean

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[154] *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005) (citations omitted).
[155] *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *11 (Del. Ch. Aug. 18, 2005) (quoting *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947)).
[156] *Kousi v. Sugahara*, 1991 WL 248408, at *2 (Del. Ch. Nov. 21, 1991).
[157] Defs.' Post Trial Br. at 38.

hand defense which relate solely to Keyser. Regardless of the merits of those arguments, they fail to support a defense of unclean hands because the Defendants do not even argue that they apply to Salvatore and Schalk.[158]

D. *The Plaintiffs Are Entitled to an Award of Costs, But Neither the Plaintiffs Nor the Defendants Are Entitled to an Award of Attorneys' Fees*

In the Pre-Trial Stipulation, the Plaintiffs and the Defendants each requested an award of attorneys' fees, costs, and expenses ("litigation expenses"). The Defendants lost this action, and they do not seem to have made any arguments in favor of their request for their litigation expenses. Thus, their request for those expenses is denied in its entirety.

The Plaintiffs argue that they have achieved a benefit for Ark, and thus, Ark should reimburse them for all of their litigation expenses. "In the realm of corporate litigation, the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in the creation of a common fund . . . or the conferring of a corporate benefit."[159] "One of . . . [the] purposes [of the common fund and corporate benefit doctrines] is 'to prevent persons who obtain the benefit of a lawsuit without contributing to its cost [from being] unjustly

[158] *See Johnston v. Pedersen*, 28 A.3d 1079, 1092 (Del. Ch. 2011) ("The factual underpinnings for these assertions [of unclean hands] were hotly disputed at trial. Whatever the merit of these arguments, I need not reach them because they do not apply to Rose or Holt, the other two plaintiffs in this action. Their participation as plaintiffs supports relief regardless of any defense against Johnston.").
[159] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).

enriched at the successful litigant's expense.'"[160] Thus, when an action brought pursuant to 8 *Del. C.* § 225 achieves a benefit for the corporation, the Court may award attorneys' fees to the person(s) who brought that action.[161]

Although, through this case, the Plaintiffs have benefitted Ark—Ark now knows who owns its shares and that the Series B Issuance was invalid—the principal beneficiaries of this action are the Plaintiffs, and in particular Keyser. Keyser now knows that he owns the Original Shares, and he and his allies control the Board. Moreover, although the Series B Issuance no longer dilutes the rights of Ark's common stockholders, which presumably is a benefit to those stockholders, Keyser and his allies now likely constitute a control group at Ark. Thus, the ultimate effect of this action may merely be to substitute one controller for another—hardly a thrilling victory from the point of view of the Ark stockholders who are not Keyser's allies.

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

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[160] *Julian v. E. States Constr. Serv., Inc.*, 2009 WL 154432, at *3 (Del. Ch. Jan. 14, 2009) (quoting *Korn v. New Castle County*, 922 A.2d 409, 412 (Del. 2007)).

[161] *See, e.g.*, *Baron v. Allied Artists Pictures Corp.*, 395 A.2d 375, 383 (Del. Ch. Nov. 28, 1978) ("[A]n award of counsel fees and expenses on behalf of the plaintiff's efforts [in an action brought pursuant to 8 Del. C. § 225] is in order."), *aff'd*, 413 A.2d 876 (Del. 1980).

for an award of attorneys' fees. Thus, the Plaintiffs are not entitled to an award of their attorneys' fees under the common fund or corporate benefit doctrines.

The Plaintiffs also argue that the Defendants acted in bad faith by suggesting that they were going to rely on an advice of counsel defense, and then not following through with that suggestion. According to the Plaintiffs, the Defendants knew all along that their advice of counsel defense was frivolous, and yet they allowed the Plaintiffs to spend time and money preparing to attack it. The Plaintiffs contend that the Defendants' conduct entitles them to an award of the litigation expenses they incurred in responding to the Defendants' advice of counsel defense.

"Delaware follows the 'American Rule,' whereby a prevailing party is generally expected to pay its own attorney's fees and costs. This Court has recognized limited equitable exceptions to that rule, including the exception for 'bad faith' conduct during the litigation."[162] The Defendants mentioned their advice of counsel defense in the Answer and in their interrogatory responses.[163] The Defendants, however, did not list the advice of counsel defense in the Pre-Trial Stipulation, nor did they mention it in their trial briefs or at trial. That course of conduct suggests that the Defendants were exploring an advice of counsel defense, but then decided not to pursue it. There is nothing necessarily wrong with

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[162] *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).
[163] Trial Tr. 498 (Plaintiffs' Counsel).

that. The decision-making of counsel would certainly be chilled if she could not explore all claims and defenses available to her client through discovery, and then decide not to pursue some of them. In sum, the Defendants did not act in bad faith in the defense of this action, and thus, the Plaintiffs are not entitled to an award of attorneys' fees under the bad faith exception to the American Rule. The Plaintiffs are, however, entitled to an award of their costs as the prevailing party in this action.[164]

V. CONCLUSION

For the foregoing reasons, the 2011 Written Consent, which elects the Plaintiffs to the Board and removes Shek, Hands, and Curtis from the Board, is valid and effective. The Plaintiffs are entitled to an award of costs, but neither the Plaintiffs nor the Defendants are entitled to an award of attorneys' fees. Counsel are requested to confer and to submit an implementing form of order.

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[164] *See* Ct. Ch. R. 54(d) ("Except when express provision therefor is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs. The costs in any action shall not include any charge for the Court's copy of the transcript of the testimony or any depositions.").