



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. \_\_\_\_\_

**VERIFIED COMPLAINT PURSUANT TO 8 Del. C. § 225(a)**

Plaintiffs Robert D. Keyser Jr., Frank Salvatore, and Scott Schalk (collectively, “Plaintiffs”), by their undersigned attorneys, hereby allege in support of their Verified Complaint pursuant to 8 Del. C. § 225(a) as follows:

**NATURE OF THE ACTION**

1. This action is brought pursuant to Section 225(a) of the Delaware General Corporation Law. On December 13, 2011, stockholders (including Plaintiffs) who collectively hold in excess of a majority of the outstanding voting power of Ark Financial Services, Inc. (“Ark” or the “Company”) delivered a written consent to the Company’s registered office in the State of Delaware, pursuant to 8 Del. C. § 228, (i) removing defendants Tom Curtis, Thomas Hands, and Donald Shek (the “Former Directors”) from Ark’s board of directors (the “Board”)

and (ii) electing Messrs. Keyser, Salvatore, and Schalk to the Board to fill the vacancies created by the removal of the Former Directors (the “Written Consent”).

2. The Written Consent is the latest effort by the holders of a majority of Ark’s stock to limit, if not eliminate, the influence of defendant Albert Poliak, a co-founder and former director and officer of the Company, over Ark. On December 1, 2010, Messrs. Keyser and Schalk, along with certain other stockholders, who collectively owned shares constituting a majority of the Company’s voting power, executed and delivered a written consent that, among other things, removed Mr. Poliak – then the Company’s sole director – from the Board (the “2010 Written Consent”).

3. Mr. Poliak refused to acknowledge the effectiveness of the 2010 Written Consent and acted promptly—and illegally—to entrench himself as the Company’s president, chief executive officer, and sole director. On the very day he received the 2010 Written Consent, Mr. Poliak purportedly created and issued super-voting Series B Preferred Stock to himself for grossly inadequate consideration. Mr. Poliak also purportedly authorized amendments to the Company’s bylaws, which, in clear violation of Delaware statutory law, purported to limit the stockholders’ ability to remove directors and to elect directors by written consent. Mr. Poliak’s sole purpose in taking these actions was to entrench himself, in blatant violation of his fiduciary duties.

4. In an effort to avoid litigation, the parties engaged in settlement efforts. Those efforts, however, were not entirely successful. In or about November 2011, Mr. Poliak resigned as a director and officer of Ark. Before doing so, however, Mr. Poliak nominated and oversaw the election of the Former Directors as his replacements on the Board at an annual meeting of stockholders held on November 1, 2011.

5. Mr. Poliak still contends that he validly holds a majority of Ark's outstanding voting power. Upon information and belief, Mr. Poliak and the Former Directors also take the position that the bylaws Mr. Poliak adopted in December 2010 are valid to preclude the removal and election of directors by written consent. Mr. Poliak's actions in issuing super-voting stock to himself and amending the bylaws were void and invalid under Delaware law. Plaintiffs, therefore, bring this action pursuant to Section 225(a) of the Delaware General Corporation Law and seek an order (i) declaring that the Written Consent removing the Former Directors and appointing Plaintiffs was valid and effective and (2) authorizing all of the officers, directors, employees and agents of Ark to take any and all actions necessary or appropriate to carry out the Written Consent.

#### **PARTIES**

6. Nominal Defendant Ark Financial Services, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Boca Raton, Florida.

7. Plaintiff Robert D. Keyser, Jr., is an individual residing in Boca Raton, Florida. Mr. Keyser is a stockholder of Ark, holding 7,000,000 shares of the Company's outstanding Common Stock. Mr. Keyser is also a co-founder of Ark. Pursuant to the Written Consent, Mr. Keyser has been duly elected as a director of the Board by holders of a majority in voting power of Ark's validly issued and outstanding stock.

8. Plaintiff Frank Salvatore is an individual residing in Gulfstream, Florida. Mr. Salvatore is a stockholder of Ark, holding 3,948,000 shares of the Company's outstanding Common Stock. Pursuant to the Written Consent, Mr. Salvatore has been duly elected as a director of the Board by holders of a majority in voting power of Ark's validly issued and outstanding stock.

9. Plaintiff Scott Schalk is an individual residing in Royal Palm Beach, Florida. Mr. Schalk is a stockholder of Ark, holding 1,186,000 shares of the Company's outstanding Common Stock. Pursuant to the Written Consent, Mr. Schalk has been duly elected as a director of the Board by holders of a majority in voting power of Ark's validly issued and outstanding stock.

10. Defendant Albert Poliak is an individual residing in Parkland, Florida. Mr. Poliak is a stockholder and former officer and director of Ark. Mr. Poliak was a co-founder of Ark, along with Plaintiff Keyser. Mr. Poliak owns 7,000,000 shares of the Company's outstanding Common Stock. He also purports to be the holder of 25,000 shares of Series B Preferred Stock, which for the reasons explained herein are invalid and were not properly issued.

11. Defendant Thomas Hands is an individual residing in Boca Raton, Florida. Mr. Hands is a stockholder and officer of Ark, and served as a director of Ark until removed by the Written Consent. Mr. Hands owns 850,000 shares of the Company's outstanding Common Stock.

12. Defendant Donald Shek is an individual residing in Boca Raton, Florida. Mr. Shek is an officer of Ark, and served as a director of Ark until removed by the Written Consent.

13. Defendant Tom Curtis is an individual residing in Baltimore, Maryland. Mr. Curtis is an officer of Ark, and served as a director of Ark until removed by the Written Consent.

### **JURISDICTION**

14. This Court has subject matter jurisdiction over this action pursuant to 8 *Del. C.* § 225(a), as well as 8 *Del. C.* § 111, and, 10 *Del. C.* §§ 341, 342, and 6501 *et seq.*

15. This Court has personal jurisdiction over the Defendants pursuant to 10 *Del. C.* § 3114, and jurisdiction over Ark pursuant to 8 *Del. C.* § 225(a).

## **BACKGROUND**

### **A. Ark is Formed.**

16. Robert Keyser and Albert Poliak founded the Company on April 18, 2002. Ark acts as a holding company for Dawson James Securities (“Dawson James”), an investment-banking firm based in Boca Raton, Florida and having offices in Boca Raton, Jacksonville, and West Palm Beach, Florida; Baltimore, Maryland; New York, New York; Santa Clara and San Francisco, California; and Manasquan, New Jersey.

17. On February 13, 2009, Ark issued a promissory note for \$300,000 payable by Ark to Kenneth A. Steel, Jr., Allan R. Lyons, and Burton Koffman (the “Promissory Note”). The Promissory Note included an option allowing the note holders to acquire 24% ownership of Ark (the “Option”).

18. In December of 2009, Mr. Keyser stepped down as an officer and director of the Company. Upon Mr. Keyser’s doing so, Mr. Poliak became the sole member of the Board, as well as the Company’s President and Chief Executive Officer.

### **B. Mr. Poliak Defies the Will of the Stockholders and Wrongfully Entrenches Himself at the Company.**

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19. During 2010, Messrs. Steel, Lyons, and Koffman (holders of the Promissory Note), reached out to Mr. Keyser to express certain concerns regarding Mr. Poliak’s management of the Company and the fact that the Company was delinquent on its debt payments. They suggested to Mr. Keyser that they would like him to formulate a debt settlement plan and replace Mr. Poliak at the Company.

20. By Assignment Agreement dated November 29, 2010, Messrs. Steel, Lyons, and Koffman assigned their Option to Mr. Keyser. By notice dated that same day, Mr. Keyser exercised the Option and delivered a check to Ark in the amount of the aggregate purchase price for the 8,604,521 shares issuable upon exercise of the Option (the “Option Shares”). Mr. Keyser thereafter was the holder of the 8,604,521 Option Shares, in addition to the 7,000,000 shares of Common Stock he already owned.

21. On December 1, 2010, Mr. Keyser and other stockholders, who collectively held in excess of a majority of Ark’s outstanding stock, executed the 2010 Written Consent and delivered it to Mr. Poliak. Pursuant to the 2010 Written Consent, the stockholders, (i) removed Mr. Poliak from the Board, (ii) set the size of the Board at two directors, and (iii) elected Messrs. Keyser and R. Douglas Armstrong as Ark’s new directors. That same day, Messrs. Keyser and Armstrong executed a Written Consent Action of Board of Directors to (i) immediately remove Mr. Poliak as Chief Executive Officer and President of Ark, and as a director and officer, in all positions held by him, of Dawson James and (ii) elect and appoint: Mr. Keyser as a director and as Chief Executive Officer and President of Dawson James.

22. Mr. Poliak refused to surrender control. He spuriously challenged the effectiveness of the assignment and exercise of the Option and, unbeknownst to the other stockholders, rapidly took a number of actions designed to entrench himself as Ark’s president, chief executive officer, and sole director, to usurp voting control over Ark for himself, and to thwart the stockholders’ exercise of their franchise.

23. On the same day that he received notice of his removal, Mr. Poliak maneuvered to purportedly create a new Series B Preferred Stock, having 1,000 votes per share and a \$1.00 per share redemption right that could be exercised at any time at the sole option of

the holder. (Exhibit A hereto). Mr. Poliak then authorized the issuance of the Series B Preferred Stock for “no less than \$.01 per share” and, upon information and belief, thereafter issued 25,000 shares of that stock to himself for nominal consideration. (*Id.*) There was no valid corporate purpose for the issuance of the Series B Preferred Stock, and Mr. Poliak issued the shares to himself at a grossly inadequate price for the sole purpose of usurping control, entrenching himself, and thwarting the will of the holders of a majority of the common stock. Acting as the Company’s sole director, Mr. Poliak made no effort to ensure the fairness of the transaction to Ark and its stockholders. As a result of this purported issuance, Mr. Poliak claims to have acquired a majority of Ark’s voting power.

24. On the same day he purported to create the Series B Preferred Stock, Mr. Poliak also purported to amend Ark’s bylaws to entrench himself further. (Exhibits A and B hereto). He purported to amend Section 412 of the bylaws to permit the removal of directors only “for cause,” only at a meeting of stockholders (and not by written consent), and only by a supermajority (75%) stockholder vote. Mr. Poliak also purportedly amended Section 402 of the bylaws to require nominations for directors to be elected, other than nominations submitted by the incumbent Board, to be submitted *ninety days* in advance of the stockholders’ meeting. The advance notice provision had previously required only thirty days advance notice of nominations in connection with director elections at a meeting. The bylaw amendments violate the Delaware General Corporation Law, including Section 102(b)(4) (which requires any provision mandating a greater than majority vote to remove directors to be set forth in the certificate of incorporation), Section 141(a) (which specifies, in the case of a corporation without a staggered board, that stockholders may remove directors “with or without cause” by vote of the holders of a majority), and Section 228 (which requires that elimination of, or the imposition of any material restrictions

on, the right of stockholders to act by written consent be set forth in the certificate of incorporation). Even though the bylaw amendments violate the Delaware General Corporation Law and were adopted in violation of Mr. Poliak's fiduciary duties, Mr. Poliak contends that the bylaw amendments were effective to preclude stockholder action by written consent to remove and elect directors. Mr. Poliak also contends that the advance notice bylaw applies to stockholder action by written consent to elect directors (even though it applies by its express terms only to stockholder actions at meetings).

25. At or about the same time that he purportedly issued the Series B Preferred Stock and amended the bylaws, Mr. Poliak took other improper actions designed to entrench himself and thwart the will of the stockholders. Such actions included (i) instructing the officers of Ark and Dawson James not to recognize the stockholders' actions, (ii) hiring a security firm to keep the dissenting stockholders and certain employees off the Company's premises; and (iii) causing the Company to engage legal counsel to advise it on additional ways to buttress his control and frustrate the stockholders efforts to exercise their rights.

26. Having entrenched himself, Mr. Poliak used his control over Ark and Dawson James to enrich himself at the expense of the Company and its stockholders. For instance, it was discovered that in December 2010, he caused the Company to distribute to him (Poliak) warrants in another company for which Dawson James had served as an investment banker. Although Mr. Poliak would have been entitled to receive a small percentage of these warrants in accordance with past practices, the majority of the warrants should have been issued to and held by Dawson James. Through this and similar self-dealing conduct, Mr. Poliak stripped the Company of significant assets and misappropriated that value for himself.

27. While maintaining that their assignment of the Option to Mr. Keyser on November 29 was effective, out of an abundance of caution, Messrs. Steel, Lyons, and Koffman submitted a “back-up exercise” of the Option to Ark on December 2, 2010. On December 9, 2010, Ark issued a certificate for the 8,604,520 Option Shares in the names of Messrs. Steel, Lyons, and Koffman, which Messrs. Steel, Lyons, and Koffman assigned to Mr. Keyser. Although Mr. Poliak initially refused to recognize the assignment, he eventually acknowledged that Mr. Keyser owned the Option Shares. Even so, Mr. Poliak maintained the position that the Series B Preferred Stock he issued to himself was valid and afforded him voting control.

**C. Messrs. Keyser and Poliak Reach a Settlement Agreement, Which Mr. Poliak Then Breaches.**

28. While Mr. Keyser opposed the actions taken by Mr. Poliak, the various parties eventually reached an agreement in principle, whereby, among other things, Ark would purchase certain promissory notes, the Option Shares, and certain shares of Dawson James from an affiliate of Mr. Keyser (which had acquired the ownership rights to those notes and shares). Ark in fact purchased the promissory notes, the 8,604,521 Option Shares, and the Dawson James shares. Ark, Mr. Poliak, and Mr. Keyser also entered into a separate Settlement Agreement as of April 29, 2011 that provided for Ark’s repurchase of Mr. Keyser’s remaining 7,000,000 shares of common stock. Ark and Mr. Poliak breached the Settlement Agreement, however, by, among other things, providing misleading financial information to the valuation firm engaged pursuant to the agreement. Because of their breaches, on October 11, 2011, Mr. Keyser rescinded the Settlement Agreement. He continues to own 7,000,000 shares of Ark’s common stock.

29. In or about November of 2011, Mr. Poliak was forced to resign as a director and officer of both Ark and Dawson James, in order to comply with sanctions imposed

by the Financial Industry Regulatory Authority, Inc. (“FINRA”). As detailed on FINRA’s website, Mr. Poliak was:

fined \$30,000 and suspended from association with any FINRA member in any capacity for one year for acting unethically in his capacity as a principal of [Dawson James] in that he facilitated the improper and obscured commission recapture arrangement between his firm and a customer and cause[d] his firm to fail to comply [with] NASD Rule 1017, in violation of FINRA Rule 2010 and NASD Rule 2110; participating in the receipt and deposit of customer funds in an account other than a special reserve account, as required by Exchange Act Rule 15C3-3(E)(1), in violation of FINRA Rule 2010 and NASD Rule 2110; participating in his firm’s holding of customer funds in violation of Exchange Act Rule 15C3-3 and causing his firm’s net capital and books and records violations, in violation of FINRA Rule 2010 and NASD Rules 2110 and 3110(A); and failing to document the basis upon which research analyst compensation was established, in violation of FINRA Rule 2010 and NASD Rules 2110 and 2711(D)(2).

Financial Industry Regulatory Authority, <http://www.finra.org> (follow “FINRA BrokerCheck” hyperlink; then follow the “Start Search” hyperlink directions) (all caps omitted).

30. Before resigning, Mr. Poliak nominated and oversaw the election of the Former Directors as his replacements on the Board. At Ark’s annual meeting of stockholders, held on November 1, 2011, the Former Directors were elected to the Board. Mr. Keyser and the other plaintiffs voted their shares in the election by proxy, but did not attend the meeting. Plaintiffs requested that the Company’s counsel read into the record at the meeting a reservation of rights – specifically, with respect to the shares of the Series B Preferred Stock Mr. Poliak professed to own, that Plaintiffs did “not recognize or believe that the issuance of Mr. Poliak’s, or any, Series B Preferred Stock, was proper or valid, and [demanding] that Mr. Poliak not vote these improper shares so that the proper and valid shareholders have an effective vote representing their ownership interests.” Other stockholders who did not attend or vote their shares at the meeting concur with Plaintiffs’ objection and reservation of rights.

31. On December 13, 2011, stockholders (including Plaintiffs), who collectively hold approximately 63% of Ark's valid, outstanding Common Stock (and therefore approximately 63% of the valid, outstanding voting power), delivered the Written Consent to the Company's registered office in the State of Delaware, pursuant to 8 *Del C.* § 228. The Written Consent removed the Former Directors from the Board and elected Messrs. Keyser, Salvatore, and Schalk to fill the vacancies on the Board created by the removal of the Former Directors. A copy of the Written Consent is attached hereto as Exhibit C.

### COUNT I

#### **(Declaratory Judgment Validating the Election of Messrs. Keyser, Salvatore, and Schalk to the Board)**

32. The allegations of paragraphs 1 through 31 above are incorporated by reference as if fully set forth herein.

33. Pursuant to the Written Consent, which was executed by the holders of a majority of the Company's outstanding Common Stock, the Former Directors have been effectively removed as directors of the Board and Messrs. Keyser, Salvatore, and Schalk have been duly and properly elected as the directors of the Board. Having been effectively removed from office, the Former Directors have no legal right to remain on the Board or continue to act as directors for the Company.

34. Nevertheless, Mr. Poliak and, upon information and belief, the Former Directors deny the effectiveness of the Written Consent. Upon information and belief, this position is predicated upon (i) Mr. Poliak's contention that he validly holds shares of Series B Preferred Stock, which, together with his shares of Common Stock, he claims vest him with control over a majority of Ark's outstanding voting power, and (ii) the purported restrictions on

the stockholder franchise imposed by the bylaw amendments Mr. Poliak claims to have put in place. Both assertions are meritless.

35. First, Mr. Poliak does not lawfully own the Series B shares and, therefore, does not control a majority of Ark's outstanding voting power. Mr. Poliak created the super-voting Series B Preferred Stock and issued shares of such stock to himself for grossly inadequate consideration and without taking any steps to ensure the fairness of the transaction to Ark or its stockholders. There was no valid corporate purpose for Mr. Poliak's issuance of shares of Series B Preferred Stock to himself and Mr. Poliak caused Ark to issue those shares solely for the purposes of usurping voting control over Ark, entrenching himself, and disenfranchising Ark's other stockholders. Such action constitutes a flagrant breach of Mr. Poliak's fiduciary duties, including the fiduciary duty of loyalty. Accordingly, the issuance is invalid and void under Delaware law.

36. Similarly, Mr. Poliak enacted the purported amendments to the Company bylaws on December 1, 2010 for no purpose other than his own entrenchment. These amendments purportedly permit the removal of directors only "for cause," only at a meeting of stockholders (and not by written consent), and only by a supermajority (75%) stockholder vote. Their adoption not only violates Mr. Poliak's fiduciary duties, but also the Delaware General Corporation Law (including 8 *Del C.* §§ 102, 141(k), and 228). Accordingly, the purported bylaw amendments are invalid and void under Delaware Law.

37. Plaintiffs are therefore entitled to a declaration that the Written Consent effectively removed Messrs. Curtis, Hands, and Shek from the Board and validly elected Messrs. Keyser, Salvatore, and Schalk to fill the resulting vacancies, and that Messrs. Keyser, Salvatore, and Schalk are the duly elected directors of Ark.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully seek an Order:

- (i) Declaring that the Written Consent is valid and effective;
- (ii) Declaring that Messrs. Keyser, Salvatore, and Schalk are the duly elected directors of the Board.
- (iii) Declaring that Messrs. Curtis, Hands, and Shek have no right or claim to hold seats on the Board.
- (iv) Declaring that the purported creation and issuance to Mr. Poliak of the Series B Preferred Stock was invalid, void, and of no legal effect;
- (v) Declaring that the December 1, 2010 amendments to the Company bylaws were invalid, void, and of no legal effect;
- (vi) Authorizing all of the officers, directors, employees and agents of Ark to take any and all actions necessary or appropriate to carry out the Written Consent.
- (vii) Granting Plaintiffs their costs and fees incurred in this action, including attorneys' fees; and
- (viii) Granting such other relief as the Court deems just and equitable.

POTTER ANDERSON & CORROON LLP

By /s/ Michael A. Pittenger  
Michael A. Pittenger (No. 3212)  
T. Brad Davey (No. 5094)  
Ryan T. Costa (No. 5325)  
Hercules Plaza, 6th Floor  
1313 North Market Street  
P.O. Box 951  
Wilmington, Delaware 19899-0951  
(302) 984-6000

Dated: December 13, 2011  
1037158

*Attorneys for Plaintiffs Robert Keyser, Frank Salvatore, and Scott Schalk.*