IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT D. KEYSER, JR., FRANK SALVATORE, and SCOTT SCHALK,

Plaintiffs,

vs. Civil Action No. 7109-VCN

TOM CURTIS, THOMAS HANDS, DONALD SHEK, and ALBERT POLIAK,

Defendants.

-and-

ARK FINANCIAL SERVICES, INC., a Delaware corporation,

Nominal Defendant.

- - -

Chancery Courtroom No. 11
Kent County Courthouse
Dover, Delaware
Monday, April 23, 2012
9:35 a.m.

- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor.

- - -

POST-TRIAL ARGUMENT

- - -

APPEARANCES:

MICHAEL A. PITTENGER, ESQ.
T. BRAD DAVEY, ESQ.
RYAN T. COSTA, ESQ.
Potter, Anderson & Corroon
for Plaintiffs

EDWARD M. McNALLY, ESQ.
KATHERINE J. NEIKIRK, ESQ.
Morris James LLP
for Defendants and Nominal Defendant

- - -

THE COURT: Good morning, everyone.

MR. PITTENGER: Good morning, Your Honor.

MR. McNALLY: Good morning, Your Honor.

THE COURT: So, Mr. Pittenger, your client can sit around and wait a year, pocket $400,000, make sure the company is going to be a viable entity, and then say, "Oh, I think I'm going to file a 225 action. Well, we are going to set up a 225 action by having a consent." And after waiting all that time from the bad things that happened, saw that things really got better, the company wasn't worth much at one point, and he can just go ahead and do this. Is that the way it works?

MR. PITTENGER: I don't believe -- that is certainly not how we see the facts, Your Honor.

THE COURT: It probably wasn't a fair question to start an argument with either.

MR. PITTENGER: If you would like me to start with the defenses --

THE COURT: No.

MR. PITTENGER: -- I can start there.

THE COURT: No. I just want you to get to them at some point.

MR. PITTENGER: Okay. Well, I definitely will.

I had planned to start -- I do believe there are two main issues here, the first being did Mr. Poliak breach his fiduciary duties when he issued super-voting preferred stock to himself for a penny per share for the admitted purpose of giving himself outright voting control when he was the sole director is the first issue. And the second issue, I believe, is the defenses that they have raised, those being the settlement agreement breach defense and then all of the equitable defenses.

And although defendants started their brief with the defenses, I do think that it is important, unless Your Honor wants me to proceed in a different way, to start with the actual breach, because I don't think you can fairly consider equitable defenses without having the underlying breach in mind.

THE COURT: It is your argument. I tend to agree with you. And I must confess, my reaction when I see somebody leading off with

equitable defenses, it suggests something of a desire to avoid discussing the underlying merits. But maybe I am just too cynical. I don't know.

MR. PITTENGER: That is certainly the impression that I have, that I got from their brief, that the last thing they want to do is discuss what actually happened in December 2010.

THE COURT: My money says Mr. McNally is going to stand up and tell me how much he really wants to talk about the issuance of the super-voting stock. But we can all stay tuned.

MR. PITTENGER: Well, a brief summary of the facts in that December 2010 time period. Mr. Poliak knew when Mr. Keyser delivered his option to exercise notice that stockholders might be soon taking action to remove him from office or do something else with the board composition, and that was the case whether or not the option shares were actually issued or valid. He knew that even if those option shares were not out there, that Mr. Keyser could get together with holders of enough other shares and outvote Mr. Poliak.

He issued 25,000 shares of a thousand vote per share Series B stock to himself for a penny.

Those shares were redeemable at his own option as the holder for a dollar. Mr. Poliak claims he issued the shares to himself because he perceived a threat from Mr. Keyser and the company's three principal stockholders, Mr. Steel, Lyons and Koffman. The record shows that he really did nothing to investigate that threat, that perceived threat. He didn't take any steps to ensure process.

THE COURT: What was he supposed to have investigated? Because this wasn't where some hostile party rides over the horizon. Mr. Keyser had run the company or run a division of the company in the past and had done a pretty bad job and had spent most of his summers in Missouri. Didn't Mr. Poliak have enough knowledge that a Keyser regime could be a debacle?

MR. PITTENGER: I don't believe that's the case. First of all, I think it is disputed whether his prior leadership was a debacle. Certainly, the consultant asked him to step down. They thought having two people in a high managerial capacity was not in the best interests of the company, paying those, and he was asked to step down.

Mr. Poliak could have called these

noteholders and said, "What is going on?" He could have called Mr. Keyser and said, "What is going on?" He didn't even do that. He just surmised that Mr. Keyser would be breaching his fiduciary duties in the future if he took office. He knew a couple days later that Mr. Keyser was aligned with Mr. Armstrong, so it wasn't just Mr. Keyser coming in and putting himself on the board. But he also did nothing else to consider -- to make a fair process or any kind of process. He didn't consider any alternatives.

And I do want to address the FINRA, the FINRA issue that was brought up in trial, where for the first time we heard that the reason that Mr. Poliak did not consider any other options was that you could only issue a block of 25 percent or more to someone who already had 25 percent or more because you had to be an approved holder under FINRA. Well, the first time that ever came up was at trial.

During the deposition I asked why, were there any reasons that he only considered that option. He couldn't think of anything. And I think what is particularly egregious here is that during the deposition, while I was trying to get to the bottom of what were all the reasons you did this and what was

your counsel telling you -- this is page 91 I am going to read from in the deposition transcript, 90-91, after I had asked another question. I had been asking a lot of questions about what else did counsel tell you, and Mr. Poliak couldn't remember. And finally Mr. McNally says, "This is at least the fifth time you asked him that. I think we established that. This is a 225 case. We have to move on."

I responded, "I understand. I find it bizarre that someone would assert the advice of counsel defense and have no recollection of what that advice is, and I'm trying very hard to figure out exactly what it was going to be, because I don't want any surprises when we get into that courtroom."

Mr. McNally says, "Fair enough. You have asked him the question, and he's answered the best of his recollection."

So I asked, "So your recollection, you recall anything else of the advice that Locke Lord gave you? We'll move on," but "nothing of the advice that Locke Lord gave you other than what you have testified; is that correct?"

Mr. Poliak says, "That's correct."

So after that they come into court

with this new excuse that Locke Lord supposedly advised them about.

I do think the FINRA issue is somewhat beside the point, however, because there were other options short of issuing an outright voting control. Could have adopted a rights plan, could have issued smaller blocks to neutral parties, could have issued a 24 percent block to a neutral party or to all stockholders pro rata to try to neutralize the option shares. He didn't consider any of those. Now, I am not saying any of that would not have been a breach of duty as well, but the fact that he considered nothing else shows that he did not have a fair process here.

It is clear that they never asked for a fairness opinion on the issuance price. There is a lot of trial testimony on the price being determined either arbitrarily or in an arbitrary manner. I am not sure there is a distinction. If it was arbitrary, it was arbitrary. And when Mr. Poliak issued the preferred stock, he was only vaguely aware of its terms, but he said that those terms weren't important. The redemption price, the liquidation value, they were irrelevant to him. He wasn't even aware that a defensive response had to be reasonable in relation to

the threat posed and so he took permanent and preclusive action. He admits this was done to prevent holders of a majority from removing him from the board. And I submit regardless of the standard for review, it is well settled that when a director acts in that way, taking preclusive entrenchment action of this sort, particularly when he has no process, that that's a breach of the fiduciary duty of loyalty.

The defendants still claim that entire fairness applies here. I find that somewhat shocking. I think this is a quintessential issue in which entire fairness applies. Where a director is issuing stock to himself, Packer vs. Yampol is a pretty good case that says the business judgment rule has no applicability there whatsoever.

They try to establish fairness through the advice of counsel defense. While that can be a factor in a fair process, I have never seen a case where it is the only factor in a fair process. There are the cases -- we cited these in our pretrial brief -- Valeant Pharmaceuticals and the Boyer case -- that say that directors who are interested in a transaction can't rely on 141(e) standing on its own to insulate the transaction.

They didn't call Mr. Pesch from Locke Lord as a trial witness. I think the adverse inference that you can draw from that is that his testimony would not have been helpful. Locke Lord is -- the only written record of Locke Lord's advice we have is that they were very skeptical of the papers they were drafting up. There was no record that they recommended these. They did draft them, clearly, but they told Mr. Poliak ". . .Delaware courts don't like provisions that look like self-dealing. Courts especially don't like provisions that appear to take away or reduce the voting power of the common stockholders."

Now, defendants try to brush over Mr. Poliak's deposition testimony where he candidly admits that he wasn't paying very close attention to Locke Lord talking about fiduciary duties. In Poliak's head, the lawyers were sort of drilling on, and just like Charlie Brown's teacher, blah, blah, blah was what he heard. That is at page 87 of his deposition.

The defendants also say that because Ark was insolvent, duties were owed to creditors. And I can't really tell if they are saying entire fairness

doesn't apply or what they are saying there, but I am not aware of any case saying that entire fairness doesn't apply when limited duties to creditors kick in. I think Giammalvo makes clear that those duties are limited and you still owe duties to stockholders. I am also not aware of any case saying that stockholders no longer have a right to exercise voting power or bring fiduciary duty claims for self-dealing just because duties are owed to creditors.

The other argument they make as to why entire fairness doesn't apply is the stockholder ratification argument. That argument is conclusively defeated by the Supreme Court's Gantler vs. Stephens case, at 965 A.2nd 695. In Gantler the Supreme Court made very clear that the doctrine of stockholder ratification can only reinstitute business judgment rule review only in circumstances -- this is a quote -- "circumstances where a fully informed shareholder vote approves director action that does not legally require shareholder approval in order to become legally effective," and also, and again, quote, only where, quote, "the only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve." Here

there was no stockholder vote to ratify the Series B preferred. Stockholders were never specifically asked to vote on a ratification, and the stockholders never had full information about everything that Mr. Poliak did anyway. Now, Mr. Keyser did. He had the documents, but the other stockholders that were shown in trial did not.

Tellingly, defendants don't even mention Gantler in their post-trial brief. I think that's very telling. Instead, what they try to do is mush together the doctrine of equitable ratification, which is a doctrine that prevents a particular party who has ratified an act from challenging that act if they have accepted it, and stockholder ratification, which can reinstitute business judgment rule review. They are completely different doctrines. So again, I submit that entire fairness is applicable here, and they can't show a fair process or a fair price.

Even if enhanced scrutiny were the standard of review, I refer Your Honor to the Johnston vs. Pedersen case. Very similar facts but less, I think, less egregious. The Court found that the directors had a good-faith belief that they needed to ensure a period of stability. They were concerned

that a director or the founder who was trying to come back in had previously breached duties, exactly what Mr. Poliak alleges Mr. Keyser was planning to do here, and the Court still said no way. You cannot issue stock even into friendly hands, which they did here, not to themselves, for the purpose of preventing a majority from acting.

With respect to Unocal, it is very clear that if action makes it mathematically possible to run a proxy or consent contest to change the board, that it is preclusive. Mr. Poliak's actions made that mathematically impossible. I don't think anyone disputes that. What defendants argue in their brief -- and I think this is at page 43 -- is, this is why they say it is not preclusive. "In light of the serious threat posed by Keyser's hostile takeover attempt, issuance of the Series B preferred stock was not preclusive or coercive." I had to read that several times, because Unocal requires, if there is a threat, then it can't be preclusive or coercive. They are saying here because there was a threat, it is necessarily not coercive or preclusive. It simply makes no sense to me.

So we submit that they have come

nowhere close to satisfying their burden either under entire fairness or enhanced scrutiny and that Mr. Poliak was in flagrant breach of the duty of loyalty when he issued the shares.

Turning to the defenses, the first defense that the defendants bring up is the breach of the settlement agreement defense. And I think it is important to talk about that first because it sort of permeates some of their equitable defenses as well. They do appear to assert that Keyser breached the settlement agreement both as part of an unclean hands defense but also to try to show that the 2011 written consent on December 13, 2011 was not signed by holders of a majority of Ark's outstanding stock.

Now, I will get to the merits of the breach defense in a moment, but as an initial matter, I think it is important that the Court doesn't even need to reach this defense for a variety of reasons. As an unclean hands defense, there is no nexus between what Mr. Keyser did in October of 2011 and what Mr. Poliak did in December of 2010, and the courts -- and we have cited these in our papers -- have required some temporal proximity to have such a nexus. Also, you would have to assert an unclean hands defense

against all defendants, and they just don't do that. Johnston vs. Pedersen makes that very clear.

THE COURT: Let's stop right there. Why shouldn't I conclude that Mr. Keyser and the other plaintiffs were all working together, or more specifically, this really is a battle between Mr. Keyser and Mr. Poliak and each one has his own lieutenants? I use that word. I can think of other words, but they are probably more pejorative. Why shouldn't Mr. Keyser's conduct be imputed to those who were flying with him?

MR. PITTENGER: I don't think it should be. The record shows that they didn't decide to work together until late October, when it became clear to all of them -- they were all trying to negotiate a buyout with Poliak. They all had disputes with Poliak. Recall in December 2010 Mr. Salvatore and Mr. Kaiser didn't sign the consent and weren't willing to be in Mr. Keyser's camp at that point in time. In October of 2011, when it became clear to all of them that Mr. Poliak was trying to pit them against each other and use a divide and conquer strategy and that once he bought out any of the big blocks, even if the preferred stock was valid for some reason,

Mr. Poliak can do whatever he wants to the other ones, I think under those -- there is no evidence throughout the year that they are working together until that October time period, when they all realized that Mr. Poliak was pursuing a divide and conquer strategy. There is no evidence of communications that Mr. Salvatore, Schalk or Kaiser were involved in the settlement negotiations. They kind of knew about them. That evidence just isn't in the record, Your Honor.

The other reason I think that the breach of settlement agreement argument is a red herring is the mathematical analysis. With respect to defendants' efforts to show that the consent was not signed by holders of sufficient shares, that argument is just inconsistent with the DGCL equity and math. Even if the Court assumes that Keyser breached the settlement agreement and that the remedy should be to treat his shares as having been repurchased by the company, which they argue, consent was still signed by sufficient holders. That is JX-182, which we had up here at trial, where it showed that the signatories other than Keyser had 10,154,000 shares and that if Keyser's shares were repurchased, the outstanding

shares would be 20,247,650. So the consent would still represent a majority.

Defendants make this argument that Keyser's shares should be treated as having been repurchased by Ark but should nevertheless stay in the denominator when you are trying to figure out if the shares constituted a majority. And they argue that the shares themselves were entitled to vote; it is just that Ark wouldn't have been able to vote them. This Court has never held such a thing. Section 160(c) of the DGCL makes it very clear that "Shares of. . .capital stock" -- that's a quote -- "shares of. . .capital stock belonging to the corporation" dot dot dot. There is a bunch of language about subsidiaries -- "shall neither be entitled to vote nor be counted for quorum purposes."

Section 228 says you have the consent, the vote that you need in a consent if it is a consent of not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.

So the "entitled to vote" language is in both 160(c) and 228. I am not aware of any case in

which this Court, counting votes, has ever said, "I am going to count treasury shares in the denominator as if they are outstanding."

THE COURT: Well, there was some noise -- maybe it is more than noise -- that the plan was that those shares would have quickly moved through the treasury and been issued to other employees, and if you use the equity treats that which should have been done or would have been done as done, then those shares, had your client not refused to turn them over, would have been issued to employees, so they really would have been outstanding and, therefore, appropriately in the denominator.

MR. PITTENGER: Well, I think that is, first, pure speculation. Second, it is contrary to Section 219, which says only record stockholders can vote. They allowed Mr. Keyser to vote at the meeting on November 1, after he terminated the settlement agreement, and now they come in and say he is not allowed to vote? What, where -- I don't see the difference in the two situations.

In addition to it being pure speculation, they brought out this document that Mr. Poliak starts testifying all about that this is a

document we were doing, you know, later in the year to issue these shares to employees; by the way, diluting the other stockholders, so it is entrenchment yet again. But then we get out the metadata, and the document was created before the Keyser settlement agreement was ever entered into. So I think based on --

THE COURT: He was forward-thinking.

MR. PITTENGER: He was forward-thinking. But based on that -- and I think it is fair to say that there were many other aspects of Mr. Poliak's credibility that came into question at trial. And based on all of that, I don't believe they have carried their burden of showing that there was a concrete enough plan to issue the shares to overcome Section 219 and to overcome the fact that they allowed those shares to be voted at the November 1, 2011 meeting.

With respect to -- finally, turning to the merits of the settlement agreement defense, the defendants tend to mischaracterize how things played out. The important place to start is the terms of the settlement agreement, which not only had dates by which certain things had to happen, and admittedly,

Mr. Keyser allowed things to continue, hoping that he would get a settlement to go on past those dates, but it clearly provided that -- and this is Section 3(b), and it is Joint Exhibit 120 -- that if the parties could not agree on a purchase price, then an independent valuation firm would determine the sale price. That firm that the parties appointed was Skoda Minotti. Nowhere in the settlement agreement does it provide that Ark and Poliak can unilaterally determine an important aspect of the valuation and direct the independent valuation firm to use their valuation. It was the independent valuation firm that was supposed to do the valuation.

The agreement also thought that cooperation amongst the parties with the valuation was so important that they included two provisions in there about cooperation. Section 10(a), the parties have to take such actions as may reasonably be requested by another party, and that section is headed "Cooperation." I believe there are all sorts of other things in there. And there is also a provision 6.5(i), another cooperation provision, that requires the parties deliver documents that are reasonably requested.

Mr. Keyser was very concerned about the underwriter warrant issue, and the company had a lot of underwriter warrants other than these Elephant Talk warrants that there was a lot of talk about. But with respect to those, he found out through public filings that Poliak had taken some, put them in his own hands. And so he started getting very concerned that, you know, what is the company doing with these underwriter warrants that might be trying to undermine value, and he asked for information. He asked not just for a list of underwriter warrants and their terms but for the warrants that the company had received and had distributed out to various people so that he could see if they were trying to do fishy things, trying to undermine the value of the company. And he kept asking for it over and over and over again. Never was forthcoming. They never provided it. And the reason why, Shek admitted at trial, "Well, the reason I didn't provide it is I do not work for Bob." Well, there were cooperation provisions in there that required him to cooperate with Bob, with Mr. Keyser.

THE COURT: Well, I understand your argument that Mr. Poliak and Mr. Poliak's affiliates

were not as forthcoming as you might have liked them to have been in providing information to Skoda. But as I look at it, no matter how I spin the numbers, I can't see how you get -- that collection of information about the warrants that weren't subjected to Black-Scholes analysis, that the Elephant Talk and the like, a lot of them had already expired and were worthless. I don't see how you get to $3 million, which I think is the delta that we are all struggling with. And if you can't get above $3 million, yes, the process wasn't perfect, but there is no substance to your concerns.

MR. PITTENGER: I don't think that's right. There again, there is no expert testimony here on what these were worth. The company refused to allow Black-Scholes to be done. In the final Skoda report, they go way out of their way to say, "Hey, by the way, we didn't value these warrants." And keep in mind, there were a lot of them --

THE COURT: Well, accountants tend to be really, really good about putting liability disclaimers in every piece of paper they generate, so that's not going to take me too far.

MR. PITTENGER: Okay. Understood.

And they certainly do. They are probably second to lawyers in that regard.

THE COURT: I try not to bash lawyers from the podium.

MR. PITTENGER: But Mr. Keyser said, listen, if they would have been willing to allow Skoda to do this valuation, and if Skoda would have said it doesn't get us there, he would have been willing to live with that. But they never let Skoda do that. That is what the contract required. And this is not a no harm/no foul situation. That wasn't the only issue. There was a lot of talk about whether the altered minutes were favorable to Keyser or not favorable to Keyser. At the end of the day, he had a lot of concerns finding out that they were withholding information, slow to hand over information, and in the meantime, the dates had long gone. He finally got fed up and he terminated.

But even if he had not terminated, he still owns the shares. The company has never offered to pay even a dime for them. Instead they say we get to pay zero. That's not what the contract says. The contract says in Section 3(c) that "Ark shall pay Keyser in cash no less than $50,000 together with a

secured promissory note for the remaining balance." Now, defendants argue for the first time in their brief that that doesn't require Ark to pay at least $50,000. Well, I don't understand the argument. It is inconsistent with the express and unambiguous language of the settlement agreement. And they offered no evidence at trial on this purported new construction.

It is undisputed that Ark has never offered to pay anything, let alone at least $50,000, to Keyser. Ark has never purchased Keyser's stock. And Keyser remains the record holder of those shares, as they recognized in connection with the November 1 meeting.

I will say it is odd that they keep saying that the stock was worth zero, because they can't have it both ways. There are a lot of other instances where with respect to -- and we will get to that in the equitable defenses -- with respect to Salvatore, Kaiser and Schalk, they keep saying their shares would have been worthless if not for Poliak, and therefore, they are estopped because he made their shares valuable. You can't have it both ways.

Turning then to the equitable

defenses --

THE COURT: It is interesting how we can all read the same piece of paper and come away with somewhat different impressions.

I read the 50,000 and the balance to be paid by a note to be what do we do if it turns out -- I think it is fair that people thought that it might well turn out to be worth $50,000 or more and this is how we are going to deal with it if it is more than that, but that's not really where the valuation was set. The valuation was to be done by Skoda, and Skoda, if it had had all the information which it was supposed to have and there were no process problems with what Skoda did, your position is that there would have had to have been at least $50,000 paid, as I understand it.

But what is the purpose of a Skoda valuation if it is less than 50,000? You are saying 50,000 was a floor regardless of whatever Skoda came up with.

MR. PITTENGER: I believe that's what the "no less than $50,000" means. Maybe Your Honor believes it is ambiguous. If it is, there is no evidence at trial. They are trying to overcome

Section 219, which says that the only evidence of stockholders who can vote is the record stockholders. Mr. Keyser is the record stockholder. It is their burden to overcome that statute, in my view.

Turning to the equitable defenses, there are a lot of them. I believe they all boil down to four main arguments. The first is the plaintiffs waived their rights to challenge the Series B. The second is plaintiffs somehow acquiesced or ratified the Series B by allowing Poliak to remain in office and issue stock. The third is that plaintiffs are guilty of laches because they inequitably delayed, and the fourth is that defendants or purchasers of Series A preferred stock have been prejudiced. And the prejudice argument is going to permeate a lot of their different equitable defenses.

As an initial matter, two points to keep in mind with respect to the equitable defenses. First, defendants bear their burden of proving these elements, and they bear the burden of showing that the plaintiffs acted so inequitably or in an inequitable manner such that the Court should deny relief even though Mr. Poliak has breached his fiduciary duty of loyalty.

And also, defendants have to prove some combination of these defenses against all three plaintiffs. They can't just prove them against Mr. Keyser. Most of their arguments are about Mr. Keyser. Plaintiffs just can't satisfy their burdens on these defenses.

With respect to waiver, Mr. Schalk and Salvatore never knew all the material facts regarding Mr. Poliak's breach. They make a big deal out of their interrogatory responses where both of them say, "Well, we kind of knew from Poliak himself that he issued voting stock in the December time period, but we didn't know all the terms." They didn't know the terms of the preferred, how many shares Poliak issued, what the price he issued it for, et cetera.

But possibly more importantly, defendants really don't identify a single act or unequivocal expression on the part of Schalk or Salvatore that waived their rights. They also don't show that Keyser waived his rights. Keyser made very clear in December 2010 that he challenged the issuance, and all the documents that got signed in connection with the two different separate settlements leading up to them all preserved his rights. It is

important that there were two settlements here, and until both were done -- the parties weren't done until both settlements were closed.

In the stock and note purchase agreement, there has been a lot said about this "for the avoidance of doubt" provision, Section 6.4. I don't think that can be more clear. After it talks about the releases given by Auxol, it says, "For the avoidance of doubt, so long as Keyser retains ownership of some or all of the Original Shares, he is not releasing any rights or claims he has as the owner of" the "Original Shares."

There is a footnote in defendants' brief where they say, "Oh, well, that doesn't mean what it says." They argue that it is just a provision meaning Keyser was preserving a monetary damages claim based on his ownership of Ark stock. That is Footnote 16. I don't even know what that means. The language doesn't say that. And in all events, it specifically says he is preserving all rights and claims. There is no monetary damages claim. I guess what they might be talking about is he is preserving his right to get monetary damages if they don't buy his stock. Well, keep in mind he hadn't entered into the Keyser

settlement agreement at the time the stock and note purchase agreement was entered into, and the condition of Ark buying his stock was waivable by Ark, so there was no obligation on Ark's part at this time to buy the shares. So I just don't get how they ignore that provision.

The settlement agreement similarly had a preservation of claims provision. Section 5 states, "Nothing in this agreement constitutes a waiver by any party even of any claim the party may have against the other party," yet they claim that by entering into the settlement agreement he somehow waived his rights. Well, again, this does go back to the settlement agreement issue was it validly terminated or not, but he preserved all of his claims in writing, and when it finally became clear that Ark and Poliak had no intent to honor the settlement agreement, Keyser terminated it. Weeks later he put an objection in his proxy at the annual meeting.

There is just no evidence that he waived his rights here. In fact, Poliak admitted in his deposition that he couldn't think of a single instance where Keyser or plaintiffs clearly articulated a waiver. And Mr. Shek, when asked

whether he knew it was possible that Keyser might challenge the Series B at any time, quote, prior to resolving it -- that's the repurchase of the stock -- and closing out the settlement agreement, Shek said legally he always knew it was a possibility. So there is just no waiver here.

Defendants have all sorts of arguments about why the plaintiffs acquiesced or ratified. Importantly, again, Schalk and Salvatore never even had knowledge of all material facts important to both acquiescence and ratification. None of the plaintiffs ever acted in a way that amounted to recognition of the validity of Poliak's issuance of the B stock. I just mentioned how Keyser consistently and repeatedly reserved his rights throughout the course of 2011.

So what defendants argue is that plaintiffs did not challenge Poliak remaining as the sole director in 2011. During that time he authorized certain agreements and issued the Series A stock; therefore -- this is defendants' argument -- plaintiffs necessarily approved and ratified the issuance of the Series B. It is really a non sequitur. There is no connection. And I think we have to go through why Poliak remained in office back

in December 2010.

Keep in mind that after Mr. Keyser tried to exercise the option, then delivered the consent, defendants and their counsel took the position that the exercise of the option was invalid because it couldn't be assigned, and therefore, the consent was invalid, they said. Keyser and the noteholders realized those are legitimate concerns, and so the noteholders exercised the option. That's several days later, after the consent was dropped. They exercise the option. Ark issues the shares to the noteholders, not to Keyser. Keyser is the one who had signed the December 1 consent. The shares aren't issued till well after that. Keep in mind during this whole time defendants have never, ever told Keyser or his counsel about the Series B preferred stock.

Keyser determines and Auxol and the noteholders determine that they need to do another exercise because there is a good argument that everything is invalid, and they never dropped another consent. Instead they went into settlement discussions. And so Poliak was never removed and had nothing to do with the Series B preferred stock. What they seem to argue is that if you have disputes and

you could remove a director and you don't and you instead try to settle with the company, that you are approving all the breaches of fiduciary duty the director ever had. I have never heard of such a case. And people settle disputes all the time. And if it were the law that before you can settle a self-dealing claim you have to try to remove the director or you have waived your right or acquiesced, that would be really bad law.

And so it really just doesn't follow that the reason Poliak was in office and still had authority to issue the stock or to issue the Series A preferred stock and to sign the various settlement agreements had anything to do with the Series B stock. As noted, Keyser kept reserving his rights all along. And, in fact, in all of the agreements that were signed there were standstill provisions that specifically recognized that Mr. Poliak's hold on office was tenuous at best and made him -- restricted his ability to take action outside of the ordinary course. So I just don't get -- there is no cause and effect here between the Series B preferred stock and all of this other stock. So allowing him to remain in office, whether it was Schalk and Salvatore that

allowed him to remain or whether it was Keyser that allowed him to remain is just not acquiescence or ratification.

They also talk -- defendants also talk in their briefs that Schalk and Salvatore received health insurance and payment of certain registration fees and benefits while Poliak was in office, and therefore, they have acquiesced. Well, there is no evidence that they wouldn't have received those under any other agreement. That argument just doesn't make sense.

Now, my personal favorite argument that defendants make as to why Salvatore and Schalk should be barred in equity from challenging Poliak's self-dealing and they should be estopped or they have acquiesced is because -- and this is from page 34 of their brief -- "If Keyser and the creditors had taken over Ark and looted it for their own benefit, Salvatore, Schalk, John Keyser and Kaiser would have suffered as Ark stockholders." It is circular. It is pure speculation. There was no evidence at trial that Keyser was going to loot the company. And even if it were all true, it has nothing to do with whether Salvatore and Schalk should be estopped from bringing

these claims.

What they are essentially arguing, because then they go on to say, "And oh, by the way" -- this is where they argue that the value of the company improved under Poliak's regime, and therefore, Salvatore and Schalk should be estopped or they have acquiesced or whatever the defense is because their shares would have been worthless. Now, of course, they are arguing that Keyser's shares are worthless. But Schalk's and Salvatore's would have been worthless but for Poliak. Well, this is just an argument that if a faithless fiduciary serves during a time that the company's performance improves, the stockholders can never challenge self-dealing. That's simply not our law.

With respect to laches, plaintiffs brought their suit well within the three-year limitations period. The trial record shows Keyser was negotiating and working towards a settlement agreement during much of 2011, and also there was a tolling agreement in place for part of that time. As I noted, Keyser preserved his rights in writing in the stock and note purchase agreement and in the settlement agreement, and when it became clear that Ark and

Poliak had no intention of honoring the terms of the settlement agreement, he terminated. Within two or three weeks he submitted his written objection in his proxy statement. He didn't engage in any unreasonable delay. Neither did Schalk or Salvatore. One year is not unreasonable delay, particularly when they were trying to negotiate their own buyouts during that time.

Also, they didn't know all the material facts about the extent of Poliak's wrongdoing. And while I will concede they were on inquiry notice, I think it is important that the three-year presumptive period hadn't run. We are not talking about equitable tolling here. We are talking about should they have acted quicker. And you can't say in equity whether they should have acted quicker when Poliak himself didn't tell them the full facts.

And another element of laches, also an element of all the or most of their equitable defenses is prejudice. And defendants fall far short of showing any prejudice here. They try to argue that they themselves have been prejudiced but really don't say why other than this reorganization argument, that the company went through a reorganization with the

issuance of the Series A shares and the plaintiffs waited too long. They rely on cases like Federal United Corp. vs. Havender. That case doesn't support the proposition. It is an unscramble-the-eggs case. The Court found that it would be difficult, if not impossible, to restore the status quo ante there. Plaintiffs had known about the recapitalization for a very long time. They didn't challenge it despite the fact they knew that numerous holders had donated their shares back to the company, had their shares canceled. They knew that a considerable -- this is very important -- a considerable number of the new shares had been trading in the markets and there were bona fide purchasers for value. And the plaintiffs allowed three separate large dividends over a period of months to be paid on the new shares. And the Court said, "You just can't unscramble the eggs. You sat by far too long."

This is not a case where you can't unscramble the eggs. We are not challenging the issuance of the Series A preferred stock, as defendants seem to insinuate. We are not. Poliak, we concede, remained in office and had the power to issue the Series A preferred stock. We are challenging the

Series B preferred stock. The party that issued that to himself, Mr. Poliak, is before the Court, and there is no reason that can't be unwound.

THE COURT: What about the rights of the Series A holders. They bought into a either Poliak regime or presumably Poliak would come back, and now they are going -- if I rule the way you want me to, they are going to wake up one day and find out the company they invested in is a very different company. Do I consider their rights at all or their interests at all, or am I just speculating mindlessly again?

MR. PITTENGER: I don't believe you are speculating mindlessly. I believe the defendants are speculating mindlessly. It is hearsay that the Series A holders relied on this. The prospectus or the offering memorandum specifically has a provision that there is no guarantee they can retain management and the like. And the way that the defendants addressed that at trial is to say -- is to have -- I can't remember if it was Poliak or Shek who said, "Oh, we went out and we had meetings with these guys and we were telling them, 'Hey, we are in control. We are going to be here forever.'" Huh? My guys didn't know

about that. Even if it was said, my guys didn't know about it. And they don't have a single Series A holder saying, "I relied on that." Reliance is very, very holder-specific. The class action case law, Gaffin and other cases I believe are very important here, where reliance in the context of fraud or equitable fraud, you can't have a class action because it is so shareholder-specific. And they just don't put any evidence -- they could have called a Series A holder. Instead they rely on the testimony of their own clients.

But more importantly, I think what is very telling, and it should bar them from making this argument, is that in November 2011 the defendants know three things. They know that Keyser has terminated his settlement agreement in October. They know that Keyser, Schalk, Salvatore and Kaiser had put on their proxy statements at the November 1 meeting that they objected to the Series B, they believed it was invalid, they believed it was issued in violation of fiduciary duty. And they received a copy of a stockholders agreement signed by Mr. Keyser, Salvatore, Schalk and Kaiser to remove the current board and elect a new board, and that was sent to

them. And they knew that they were going to do this, and yet they went out without telling these A holders about any of that and issued more Series A stock.

They should be estopped from making this argument. That's just outlandish to argue that who is in control is material when they didn't even bother to disclose that there was at least a dispute about whether they would remain in office. And so I don't think you can rely on the reliance by the Series A holders at all. Again, they have the burden here, and they just didn't prove that.

For all of these reasons and those that we have put forth in our brief and that we argued at trial, we do ask the Court to enter an order finding that the Series B preferred stock is invalid and void, the December 13, 2011 removal consent was valid, that Mr. Shek, Curtis and Hands have been validly removed, and that Mr. Keyser, Schalk and Salvatore have been validly elected directors, effective December 13, 2011.

The board composition at Ark has been in limbo now for several months, since December 13. I think all the parties agree that Ark is still in a precarious financial condition. The impact of this

uncertainty -- the uncertainty is having an impact on employees and presumably clients as well. It is very important that we get this dispute resolved as soon as possible, and so I respectfully request that the Court issue a decision as soon as possible, and I will even reiterate my request from trial. If you are able to enter a bench ruling today, we would certainly appreciate that.

Last but not least, we do request an order requiring the company to reimburse our clients for the fees and expenses in this case. It is a Section 225 action. It is for the benefit of the company and the stockholders as a whole, and invalidation of the Series B will be a benefit for all of the stockholders and will uphold the rights of majority stockholders. And so we believe that having the company pay fees is appropriate. That doesn't mean that my clients are waiving the right to in a later suit for breach of fiduciary duty against Mr. Poliak to seek to recoup all fees in this action.

Unless Your Honor has any more questions, that's all I had.

THE COURT: I do not have any other questions. Thank you very much.

MR. PITTENGER: Thank you, Your Honor.

THE COURT: Good morning, Mr. McNally.

MR. McNALLY: Good morning, Vice Chancellor. Today I have to admire Mr. Pittenger's chutzpah. After having waited a year to file suit, he asks you to rule today. But there is a lot of arguments --

THE COURT: No. He wants me to rule this morning.

MR. McNALLY: I think you will let me talk until I get to that. But there is a lot of arguments that were made today that really aren't my arguments, and if I don't respond to them, it is because I never made the argument to begin with.

Today I want to talk about, I think, common sense a little bit and just a few thoughts about how I see the facts in the case and where common sense leads us. Certainly this case is just these plaintiffs versus Ark and Mr. Poliak, Shek, et cetera. And if some stockholders who are not as barred as these other stockholders are want to challenge the Series B at some point, they are free to do so.

Now, today I think we had a toned-down version of the brief. That is to say, the brief

accuses Mr. Poliak of all these terrible things. Enriching himself is the phrase they like to use. But the facts are that in December of 2010 Ark was not only just insolvent but it actually lost lawsuits and judgments had been entered against it. Others like Keyser, Salvatore and Kaiser had left the sinking ship in 2009 and 2010 to take jobs elsewhere, but Poliak stayed on to try to save the sinking ship. And no one else wanted to be a director on this sinking ship.

Now, they questioned the means which Mr. Poliak employed to ward off their takeover attempts, but I don't think anyone can really dispute that it was Poliak and his team that sold $3 million of Series A preferred stock in April 2011. It was Poliak and his team that sold another million dollars in December of 2011. It was Poliak and his team that convinced the three big creditors led by Mr. Lyons to compromise their claims when they found out they could not take over Ark in December of 2010.

Now, just because Mr. Poliak saved the common stockholders whatever potential equity they might have had, saved the creditors' investment where they converted the Series A preferred and saved the Ark employees doesn't mean that the means he used was

the right means to go about it. But I don't think it is fair to say that Mr. Poliak is some awful person, given the conduct of these plaintiffs in particular.

Now, Mr. Lyons, for example, he chose to sell out because he knew that they could not do better with Keyser at the helm. And so it is simply, I think, wrong to attack Mr. Poliak's motives. If it wasn't for Poliak, there wouldn't be an Ark today.

Now, there are three, I think, central factual disputes that the Court has to resolve. The first is what did the plaintiffs know and when did they know it about the Series B preferred stock. Second, did Poliak and Ark and the Series A investors rely on the plaintiffs' acquiescence when they purchased the Series A stock. And third, did Ark commit a material breach of the settlement agreement so as to somehow excuse Keyser from walking away from it.

The first one I want to talk about is what did the plaintiffs know and when did they know it. Now, of course, under our law, inquiry notice triggers the obligation to take action. Otherwise, you can be guilty of laches, even if you don't know every single fact. Now, we know Keyser knew by the

1st of January in 2011 of the Series B stock, and he certainly knew by April 7, when the Series A stock was about to be sold. After all, he got offering memorandum. Schalk in his interrogatory answers says that he was on notice in January of 2011. Nobody is denying that today. He says he got a Series A subscription agreement in March of 2011, and he knew that Poliak was in control, because after all, he had effectively lost his job when the prior takeover attempt didn't work, and Poliak was still in control.

Now, what did these two guys know? These aren't two people just off the street. They knew that when that Series A stock was going to be sold, that it would disclose to the potential investors that Mr. Poliak was in control of Ark and had issued to himself the Series B stock. That is set forth in the subscription agreement in bold, in italics. Everybody knew that. And they knew it even if they didn't read the agreement that that had to be in there. And, of course, the same is true of Salvatore. As Mr. Keyser said, Salvatore was in constant contact with Poliak.

Now, I recognize that these folks took the witness stand and testified contrary to the

testimony of Poliak and Shek. Poliak and Shek said they told them about the Series A, they told them what was going on, and they claim -- that is, Schalk and Salvatore. Kaiser didn't even take the witness stand. He sat through the trial and didn't deny any of that testimony. They claim they couldn't remember. They never had such conversations. And here is where I think, you know, common sense gives us some guidance. At the beginning of 2011 everybody involved knew that Ark was in deep, deep financial trouble. Schalk, Salvatore, Kaiser, even Keyser had large stockholdings in that company, and they don't deny that they had regular meetings with Poliak.

What did they talk about at those meetings? Now, Schalk, when I pressed him, said that he never talked about the details of what was going on at Ark. Now, if you ask me what did I talk to somebody about a year ago, I can't remember what I talked to them about, but I know one thing is for sure: I couldn't take the witness stand and testify that the topic never came up after waiting 14 months after these conversations took place. It is just not believable and it was not believable because this was of vital interest to all of them. So unless they had

an overriding interest in, you know, the latest football scores, presumably they discussed Ark. And there is really no credible testimony, therefore, that rebuts the testimony of Poliak and Shek that all four of these folks, all five of these folks understood what was going on at Ark.

Now, therefore, I think the Court really should find that they were either on inquiry notice or essentially fully informed at the beginning of 2011 about what the plans were to save Ark. And these were the same plans, only modified, that had been going on for a year: Issue preferred stock, get the creditors to convert.

Second issue of fact, did Poliak and Ark and the Series A investors rely on the apparent acquiescence of Mr. Keyser and the others. Now, of course, there is unanimous testimony that the Series A investors did rely on the material that was in that subscription agreement. Mr. Pittenger says there is no such testimony. He completely ignores what Mr. Curtis said. Now, Curtis was totally believable. He said that the investors who purchased the Series A preferred stock were buying a management team. This Ark isn't some sort of Microsoft or Google with some

great product to offer. What it has are people and a management team to offer. That's what was being sold. And Curtis testified as the person who bought $250,000 worth of that Series A preferred stock that he relied on that management team. And he didn't believe even as late as November of 2011 that Keyser and the others were serious about trying to take over, having waited so long. He thought it was simply a negotiating ploy.

Now, the various documents that the parties signed, the confidential agreement, the notes agreement, all of those -- and by the way, the notes agreement is attached to the preferred purchase memorandum -- all talk about settling all of the claims. Clearly, the parties expected and understood that once this deal was done and the Series A stock was issued, that Ark would go forward under the basis set forth in that agreement without attacks on the Series B preferred stock being out there. And again, doesn't common sense tell us that that's what people believed and thought? I think it does. And I think that it is just common sense that people buy stock based upon the management of this tiny company.

Now, the third factual issue here is did Ark commit a material breach of the settlement

agreement so as to excuse Mr. Keyser from walking away. Now, of course, Florida law governs, requires that if he is going to, quote, terminate the agreement, he show a prior breach by Ark. There is no doubt that he waived any claims dealing with delay. And I think that the fact is that in March or so that folks valued the Elephant Talk warrants for purposes of coming up with the escrow at an amount that shows that it was worth far, far less than $3 million, and there is simply no testimony that is even credible that the stock was worth more enough to put Ark back in a positive position.

THE COURT: You raise Florida law. At my operating level, is there any difference between Florida law and Delaware law with respect to contract matters like this?

MR. McNALLY: Your Honor, I don't think there is. I thought I had to put it in the brief because the agreement says it is Florida law.

THE COURT: I am not criticizing you. I just want to know whether this is something I really need to spend a lot of time worrying about or whether I can just trust my knowledge of Delaware law. And what I think I am hearing is that I need to cite

Florida cases if it is Florida law, but the answer is going to be the same regardless.

MR. McNALLY: Yes, sir. That's what I believe.

Now, why should the defendants win this lawsuit? Your Honor observes that we began our post-trial brief with the affirmative defenses and reached an inference that perhaps that displayed a certain uneasiness on my part with the issuance of the Series B preferred stock. Of course, that's true. I am intensely aware that management of a Delaware corporation cannot take control from the stockholders by simply issuing themselves stock. But there are two really competing principles that I think make this case an interesting case. The first is what I just said, which is directors should not interfere with stockholder democracy. But the second is that the plaintiffs should not wait to assert claims when the rights of others can be affected by their doing so. And that's particularly the case of issuing stock.

Delaware corporations every day issue stock based upon what is in the offering memorandum. People should not be allowed to lie in the weeds waiting to see if the company improves and then try to

take it over months later.

THE COURT: But Mr. Poliak either knew or, I would suggest, should be charged with knowledge that what was done when he got his voting control was subject to some uncertainty. And the question I have is why wasn't it his duty to advise the buyers of the Series A stock that there is still some uncertainty about the management based on the issuance of the Series B.

MR. McNALLY: I think that he was not under that duty to do so because that dispute was effectively resolved by the agreements entered into and by Keyser, Salvatore -- not Salvatore. Of course, he didn't enter. By Keyser and the creditors. And they were the only ones that were going to object.

Now, would it have been better had the subscription agreement added a caution that there is some stockholder out there who has not signed the settlement agreement, has not signed the agreement with the creditors and Auxol and Keyser? Maybe. But for whatever reason, they were advised that they had enough disclosures in there and that was sufficient.

Now, I don't think that absolves these plaintiffs from the delay. And here is how I would

reconcile these two conflicting principles or problems we have. I think I would say that the issuance of the Series B was here, in this case, ratified by a majority of the stock held by persons other than Poliak. We know that Keyser, along with his 24 percent option, thereby had a majority of the outstanding Ark stock other than the shares held by Poliak, and the effect of that ratification really in this case is to invoke the business judgment rule, and that takes us to what I think is correct, which is that there was enough justification here for Poliak to do what he did under the business judgment rule, certainly not waste. He was authorized to do that. He paid more for his stock, by the way, than Keyser paid for his stock.

There is a second way to reconcile these two conflicting principles about stockholder democracy being important but at the same time not countenancing delay, and that is I think that a delay bringing claims is particularly improper when third-party rights intervene. The rights of common stockholders in this company are certainly to be respected. but it is not to be ignored that there was no dispute that this company was insolvent. This is a

unique case never yet presented to this Court of what happens when a company is clearly insolvent and what should the directors do under those circumstances.

Now, we hear a lot about what Mr. Poliak should have done and should have gone out in the 24 hours he had to get an investment banker to tell him that the company was $7 million in debt and it has got judgments against it, what is the value of the stock. That is, of course, I have to say, frankly, just unrealistic. He could have issued different kinds of securities or rights plan, he could have done this, he could have done that in the short period of time he had. But at the time it was he didn't have enough time. He did the best he could. And when the stockholders of the common stock are clearly under water, they really don't have a stake in the game.

Under these circumstances I suggest that the proper reconciliation of these conflicting interests under Delaware law is that Your Honor doesn't even need to get to the duties of a director in an insolvent corporation under these circumstances. This case could be decided on the basis of the laches argument.

THE COURT: Well, there are two ways of looking at value. And I am not trying to separate the entire fairness test too rigidly. But there is value because today it is worth X dollars a share. But there is also we have an entity, and simply having control over that entity has some value. And if Mr. Poliak thought that this was an absolutely doomed venture no matter what was happening, then that would suggest he should just have thrown up his arms and walked away. Instead he said, "Not only do I think it is worth my time to keep this entity alive; I want to have control of it." And I suspect we could just pick the pockets of the people in the room and come up with $250. So he puts almost nothing out and he ends up with control. Isn't there something offensive about that under these circumstances?

MR. McNALLY: Yes. That's the direct answer. It is. It is a problem.

THE COURT: And then how do I get around it? I mean, I don't mean to be -- I hope you don't think I was being overly dramatic. I was just trying to marshal my own thoughts on this. And I just look at this. And I have an incredible amount of respect, as I have had for a long time, for your

skills as an advocate, because when I looked at this, I thought I was going to have a case where I would be shooting fish in a barrel. Given my aim, it might be harder than what it would be for some people. But you have raised some really interesting issues. But I keep coming back to my initial reaction was no, you can't do this. And I don't much care about anything else because this is so egregious.

MR. McNALLY: Well, let me say a couple of things and then -- but I am prepared to directly address that question. And that's the point I talked about trying to reconcile different principles of Delaware law. But let me say first that with respect to what Poliak did, yes, he took, quote, control. I think the better way to look at it is he didn't want Keyser and the creditors to have control. That's what was going on in his mind. I also have to say that Poliak invested his time and his effort into saving this company, and what is it worth? It is worth a lot. Keyser didn't do that. Salvatore didn't do that. Kaiser didn't do that. They left. They ran. They left Poliak there to take care of the 60 or 70 employees. And that's not an easy task to come to work every day and think that you may be out of

business that day and to look out for the people in your office who are looking to you to keep their jobs going during the Great Recession. So I don't want to minimize that.

Now I am going to turn to what Your Honor said. That to me is the biggest problem I have in this case, which is that it just feels wrong to take control of a Delaware corporation the way this particular set of circumstances came out. What am I going to do about that? I think that the way this case comes out is that it turns on the facts. If this case were being litigated in January of 2011, the struggle that I would have would be to convince Your Honor that Blasius and all those other cases don't apply in the case of an insolvent Delaware corporation. I would have to show that there is a good reason to disregard all that. The stockholders are under water. Their rights don't count; that since Mr. Poliak was, he felt, protecting the creditors, that should count better, more, et cetera. But that's not this case. That's not this case because of, A, the Series A was issued to innocent investors with the full representation that Mr. Poliak's Series B stock gave him control of their investment and that these

plaintiffs knew that, agreed to it, and they got something out of it. And Keyser got $400,000 on April 1, 2011 for his consent to it. And Salvatore and Kaiser, who were negotiating to try to get their stock bought, knew that if they could get rid of the creditors' pressure on Ark, their stock would be worth more, so they got something out of it. And as a result, they are stuck with the fact that they agreed to this transaction and they waited a year to litigate it. That's how we get past the problem that I have in this case with the issuance of the Series B preferred.

I don't think, by the way, that that's somehow an unfair result when you take into account the gloss that is important to remember, which was that Ark was insolvent during this whole period of time. So this is not a situation where valuable voting rights of common stockholders in an ongoing prosperous company had been taken from them by a disloyal management; far from it. It is just the opposite of that. Therefore, Your Honor should feel comfortable that in the unique circumstances of this case and in the unconscionable delay -- let's think about that delay. Suppose for a moment that these stockholders, Keyser, Schalk, Kaiser, walk into any

Delaware lawyer's office first day of March 2011. They say, "We think this guy issued him stock, Series B preferred. It is wrong. But he is going to sell 3 million shares of Series A preferred stock in just a couple of weeks. Should we -- do we have an obligation to speak up, to object, to say that the Series B is improperly issued when we know that the offering materials that these innocent stockholders are being given specifically say the Series B stock gives Poliak" -- there is not a Delaware lawyer who practices Delaware law that wouldn't say to them, "You have to act now." No one would take that position. Yet that's exactly what these people did. And they did it because there were economic interests; they were going to profit from it. So it isn't just the normal laches kind of delay. This is laches plus; laches to try to get a benefit.

Now, they didn't get all they wanted, so that in December of 2011 they try again because Ark and Poliak won't give them everything they want and because Keyser, you know, who has been told that his stock is worthless, terminates the agreement that he signed to sell his stock.

THE COURT: Could Keyser raise issues

that might impede the Series A financing with impunity, because isn't he at that point almost interfering with the company's efforts to raise money that it really needs, and presumably, one could infer if it didn't raise the money, it might not be around much longer? And don't you incur some potential liability from interfering with the financing like that if that's how it is perceived?

MR. McNALLY: No. He is privileged to do that. He is not required to overlook the issuance of the Series B preferred stock because it is going to result in money being raised. He certainly had the right to insist -- this would be different if he didn't have a legal right. Then that's interference. But when one has a legal right, as he certainly did, and as his lawyers in the March 2011 letter make very clear -- by the way, he didn't have any problem asserting his rights then, did he? It was only when he found out that the deal was going to close in two weeks and he decided that maybe that lawyer letter wasn't going to be acted upon and he would just sit there and let it happen. So to say that he didn't assert his rights, of course, he did. He didn't assert it to the Series A stockholders because he

wanted their money. So I think that under those circumstances certainly all the elements of laches are present here, too.

Now, I will close with just a brief comment on a couple of the other issues. With respect to ratification and whether that should trigger the business judgment rule here, certainly the Grier and PNC Holdings case say that. We are very confident that the Supreme Court's 2011 decision trumps the authority that the other side relies upon when they talk about what constitutes effective ratification. Let's think about it. In April 1, 2011 Keyser is signing all these documents. Had he signed another piece of paper that says, "I hereby vote to issue the Series A preferred," then we would have a, quote, vote by him. Does that make any difference? Of course, it doesn't.

Now, finally, I want to talk about the Keyser breach of his agreement and where that takes us. I think under 228 you look at the stock that is outstanding, you see whether that stock is entitled to be voted, and that's the number of stock that you count for purposes of determining whether there is a majority. He can't vote his stock, but just like the

disabled person, the stock is still capable of being voted, and therefore, it should count.

Unless Your Honor has some other questions, I think I have tried to be perfectly direct in answering what I perceive is the principal problem with my side of the case and why we should prevail nonetheless.

THE COURT: I have no other questions. Thank you.

MR. McNALLY: Thank you, Your Honor.

THE COURT: Mr. Pittenger?

MR. PITTENGER: Your Honor, I will try not to eat too many dead horses. Mr. McNally made a big point about Ark being insolvent, employees leaving, and said Mr. Poliak wasn't buying because no one else wanted to be a director. Two people that wanted to be a director: Mr. Keyser and Mr. Armstrong. Never considered the alternative of expanding the board, putting them on, seeing if maybe having other people on the board might open up opportunities and make some independent directors more willing to come on the board. He had these grand plans for this company that he thought would make it succeed. I suspect he could have found some

independent directors. The fact is he never considered it. He never spoke to Keyser or Armstrong about some other alternative such as expanding the board to put one of them on, maybe Shek on or anything like that, never considered any of it.

Along the same lines, Mr. McNally said numerous times that if it wasn't for Poliak, there would be no Ark, that these guys all sat by and let Poliak run the show and get Ark on its feet. There is no evidence that Keyser and Armstrong, had they taken office in December, could not have got this company back on its feet, no evidence whatsoever. That's pure speculation.

The issue of inquiry notice that Mr. McNally raised, it is very important: That is only relevant to laches; that doctrines of waiver, acquiescence, ratification, require knowledge of all material facts.

Mr. McNally said, made a big point and they made a big point about this in their brief, too, that there should be negative inferences drawn because we didn't call Mr. Kaiser as a trial witness. If you looked at the pretrial stipulation and order, we did. We called him as a trial witness by deposition. The

pretrial order says that we are calling him -- let me find the paragraph number. Part VII, paragraph 1j, we are calling him by deposition. Paragraph Eb states that we can use Mr. Kaiser's deposition for any purpose. We did that because we had a two-day trial in a summary proceeding. We were trying to expedite things. I think it is completely unfair for them for the first time in their post-trial brief to argue we should have called Mr. Kaiser at trial when they agreed to that.

Mr. McNally also said that Mr. Poliak talked about how Mr. Poliak testified that he told Mr. Schalk and Mr. Salvatore about the Series B preferred stock. Mr. Poliak never told him he told them the terms, how much he had issued, or the prices, never told them the price, never told them the process. There is no evidence they knew any of that until shortly before this litigation started.

With respect to acquiescence, they go to Mr. Curtis's testimony that the buyers were buying in reliance on a management team. Again, that's hearsay. I don't see how that's anything but hearsay. They also rely on Curtis's self-serving testimony that he relied on the management team. I don't see how he

could have relied on the management team, knowing that Mr. Keyser had reserved his rights all along in writing, knowing what had gone on before, knowing when he bought stock in November, when he bought stock in November, he knew there was a challenge to the board. He knew they had objected at the meeting. He knew Keyser had terminated the settlement agreement. He knew they had a voting agreement.

Mr. McNally talked about the Elephant Talk warrants, and it keeps coming back to acting as if those are the only warrants of value. There is no evidence that none of the other warrants had value. But there is evidence that even after the company provided the list of warrants, even though it wasn't what Mr. Keyser kept demanding, it was incomplete. Mr. Poliak admitted there were inaccuracies in it, but then on cross-examination Mr. Shek at page 470 admitted that the ImmunoCellular warrants weren't on there and he couldn't say why. And that was a problem Mr. Keyser found in public information about the company. And so when he terminated, he had every reason to believe that he was getting inaccurate information and the company wasn't cooperating in providing full and accurate information to Skoda.

Your Honor asked why wasn't it Mr. Poliak's duty to advise the Series B holders about the dispute about the Series B, and I think that's very important because they keep trying to shift the blame to my clients for disclosures that were in the complete control of Mr. Poliak and his team. Along those lines, I think it is very important to keep in mind that Mr. Poliak -- and we saw this at trial -- didn't disclose the Series A offering materials to Mr. Keyser, withheld them purposely; not only that, used them as a bargaining chip. Mr. Keyser and his counsel were pointing out we need these, we want to see these, and he said, "No way. Not until you sign an extension agreement. No way." They had already signed the stock and note purchase agreement, and he is refusing to give them these materials. By the time they sign the extension agreement and the Keyser settlement agreement at the end of April, most of the Series A had already been sold and the money was sitting in escrow. So they had relied without ever -- you know, purposely excluding Mr. Keyser from the process, he never had a chance to comment or anything on these. Excluding him from the process, they had sold most of the Series A without ever telling the

holders about this dispute, without ever telling the holders that they missed the deadline and Mr. Keyser's counsel had sent him a letter challenging the Series B stock.

Once Mr. Keyser -- now, he did receive -- there is a document from someone else, a third party, and there is testimony whether or not -- how much attention he paid to it, but it is important from an equitable perspective, because these are equitable defenses, that Mr. Poliak was refusing to give him the offering materials and then claims that after he signed the extension agreement and therefore was bound to close on the Auxol settlement, as soon as the company paid him the money, they gave him the materials after that, that he was supposed to do something about it, come and say, "No, no, no. You need to disclose my dispute"?

Well, read the letter. Locke Lord sends a letter saying you can't tell people about your dispute. A parade of horribles is going to happen if you sue us. You know, Mr. Keyser presumably can rely that, you know, Locke Lord is telling its client what needs to be materially disclosed to the holders. That was not Mr. Keyser's job to figure out what went in

the offering materials. It was not Mr. Schalk's or Mr. Salvatore's job.

And in evaluating this equitable defense, it is very important, as Your Honor pointed out, to keep in mind that it was Mr. Poliak's job and his management team's job. And if they misdisclosed or misdescribed things in these documents, it is not my clients' fault.

With respect to Gantler -- I assume the 2011 decision Mr. McNally referred to was Gantler. I am not sure how you pronounce it. Again, that was talking about the equitable doctrine of ratification, talking about barring individual defendants who have acquiesced from bringing a claim. It was not talking about the doctrine of stockholder ratification addressed in Gantler that reinstitutes business judgment rule review.

Mr. McNally said it doesn't make a difference if it was a formal vote. Well, one, that's not what the Court said in Gantler, but two, it does make a difference. Stockholder ratification, that doctrine, that shifts the burden back to business judgment rule, applies to all stockholders, whether they knew about it or not. It binds all stockholders,

not just the individual who ratified. They are completely separate doctrines. I have yet to hear a coherent excuse for how they can be mushed together.

Mr. McNally said that once you have insolvency, stockholders no longer have a stake in the game. That's false. There is a case, Saxon Industries, I believe it is called -- I can find out and get a cite and send it to the Court after this. But that's a case where there was a bankruptcy, and stockholders tried to get a meeting under I think it was Section 211, and the defense was "No. We are insolvent. Stockholders no longer have a say." The Court said, "No way. No way. You are stockholders. You still have a say." Insolvency case law is very clear that while there are limited duties to creditors, you still owe duties to stockholders. And I submit that the most fundamental of those duties is not to self-deal. And the most fundamental right of stockholders that remains is the right to elect directors.

The Saxon case is 488 A.2nd 1298, Saxon Industries vs. NKFW Partners.

Your Honor, unless you have any other questions, that's all I have.

THE COURT: I don't. Thank you.

MR. PITTENGER: Thank you.

THE COURT: Mr. McNally, do you have anything further?

MR. McNALLY: Only to point out that the stock that was the Series A was held in escrow until all of the documents were signed, so Mr. Keyser got his $400,000 after he got the subscription agreement. That's all, Your Honor.

THE COURT: I am going to reserve decision. Thank you all very much. The arguments were interesting and helpful, and I appreciate all your efforts. Safe travels back north. With that, recess.

MR. McNALLY: Thank you, Your Honor.

MR. PITTENGER: Thank you, Your Honor.

- - -

(Court adjourned at 10:59 a.m.)

- - -

CERTIFICATE

I, LORRAINE B. MARINO, Registered Diplomate Reporter and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 69 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 25th day of April, 2012.

/s/Lorraine B. Marino, RDR
Registered Diplomate Reporter
and Delaware Notary Public