1975

# Harold O. Bjork, Herman A. Bjork, Beatrice A. Wilcox, and Arthur Anderson v. April Industries : Reply Brief

Utah Supreme Court


John W Lowe; Attorney for Appellants.
Kenneth W Yeates; Prince, Yeates, Ward and Geldzahler; Attorneys for Respondent.

# SUPREME COURT OF THE STATE OF UTAH



HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
*Plaintiffs-Appellants,*
vs.
APRIL INDUSTRIES, INC., a Delaware corporation,
*Defendant-Respondent.*

Case No. 14143

# REPLY BRIEF OF APPELLANTS

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Gordon R. Hall, Judge

JOHN W. LOWE, ESQ.
1011 Walker Bank Building
Salt Lake City, Utah 84111
*Attorney for Appellants*

PRINCE, YEATES, WARD & GELDZAHLER
Kenneth W. Yeates, Esq.
455 South Third East
Salt Lake City, Utah 84111
*Attorneys for Respondent*

## TABLE OF CONTENTS


Page

POINT I

Plaintiffs Desired to Sell . . . . . 2

POINT II

There Was No Waiver . . . . . 4

POINT III

The Trial Court Committed Error . . . . . 15

CONCLUSION . . . . . 19


## CASES AND AUTHORITIES CITED


Clements vs. Mueller, 41 F2d 41 (9th Circ. 1930) . . . . . 14

Galigher vs. Jones, 179 U.S. 193, 9 S.Ct. 335, 32 L.Ed 658 (1889) . . . . . 13

King vs. Firm, 3 U2d 419, 285 P2d 1114 (1955) . . . . . 11 (note 6)

Mitchell vs. Alfred Hofmann, Inc., 48 N.J. Superior 396, 137 A.2d 569,573 . . . . . 5 (note 2)

Perry vs. Woodall, 20 U2d 309, 438 P2d 813 . . . . . 19

Phoenix Insurance Company vs. Heath, 90 U 187, 61 P2d 308,311 . . . . . 4

Pitcher vs. Lauritzen, 18 U 2d 368, 423 P2d 491 (1967) . . . . . 11 (note 6)

| | Page |
|---|---|
| Reynolds vs. Texas Gulf Sulphur Company, 309 F.Supp. 548 (D.Utah 1970) . . . . . | 14 |
| Title & Trust Company vs. Durkheimer, 155 Ore. 427, 63 P2d 909,915 . . . . . | 8 |
| Voelker vs. Joseph, 62 Wash.2d 429, 383 P2d 301,305 . . . . . | 6 |
| 12 Am.Jur., Contracts, Par. 442, p. 1024 . . . . | 11 (note 6) |
| 17 Am.Jur.2d, Contracts, Par. 505 . . . . . | 12 (note 6) |
| 28 Am.Jur.2d, Estoppel and Waiver, Par. 160 . . | 7 |
| 92 CJS, Waiver 1064 . . . . . | 7 |
| Restatement of Agency, Second, Sec. 82 . . . . . | 16 |

IN THE SUPREME COURT

OF THE STATE OF UTAH

| | |
|---|---|
| HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>APRIL INDUSTRIES, INC., a Delaware corporation,<br><br>Defendant-Respondent. | CASE NO.<br><br>14143 |

REPLY BRIEF OF APPELLANTS

HAROLD O. BJORK, HERMAN A. BJORK,

BEATRICE A. WILCOX and ARTHUR ANDERSON

---

There are two obvious omissions in April's analysis of the case in its brief. First, it utterly disregards the problem its inconsistent positions created, asserting, on one hand, that the shares and the registration agreement are void, and on the other, contending plaintiffs should have sold. April does not explain how it or the

trial court could logically have required plaintiffs to sell or attempt to sell restricted shares that April said were invalid. Such a position requires plaintiffs to perform either useless or impossible acts. Second, April has shown no evidence of any intentional relinquishment of registration rights.

When April failed to register the shares, the breach of contract occurred and damage accrued. Damage would not have been avoided nor minimized by more contact by plaintiffs with April than in fact occurred, because April would not have recognized the restricted shares, nor permitted the transfer thereof.

We shall analyze April's brief in detail, giving reference to the page numbers of its brief wherein the point is asserted.

## POINT I

## PLAINTIFFS DESIRED TO SELL

The SEC gives a peculiar connotation to the term "registration." Instead of involving the type of things which unsophisticated persons might expect, such as filing the stock certificate in a registrar's office, getting a designated registration number, etc., the SEC deems stock

to be "registered" if there is a "prospectus" describing it. Such SEC parlance is hardly that with which laymen might be expected to be conversant. April states that those plaintiffs who received the preliminary and final prospectus (excluding Arthur Anderson, who didn't receive them) clearly understood them (p.4). There is no evidence nor finding to that effect. There was a finding that they were aware or should have been aware of the agreement, but none that they understood the prospectus. The evidence is to the contrary, showing lack of understanding (R.226,227,357,358,364).

April argues that the court found that plaintiffs did not really want to include their shares in the public offering (p.5). The finding of the court related to their desires to sell, rather than their desires to have their shares included in the public offering. Not only was there evidence that each subjectively had the desire to sell, there also was objective evidence of many attempts by various plaintiffs to get freely tradeable shares and to sell, such as contacting the SEC, various brokers, April's president, and April's attorney.[1] The quoted portions of some of the plaintiffs' testimony (p.9-11) simply show that the plaintiffs made no demand for dam-

[1] See plaintiffs' original brief pages 8 - 13.

ages between the time of the breach of the registration agreement and the commencement of suit; during which time, however, the contacts above referred to with brokers, the SEC, April and April's attorney were made.

April states that the fact that the plaintiffs awaited the outcome of Lowe's suit indicates that they did not care about their registration rights (p.8). To the contrary, it shows that when Lowe's case was decided, they then had some assurance that April's assertion that the directors' registration rights were void would not be sustained in court.

## POINT II

## THERE WAS NO WAIVER

This court said in Phoenix Insurance Company vs. Heath, 90 U 187, 61 P2d 308,311, cited in our original brief:

> We cannot find ... any waiver of plaintiff's rights as found by the trial court. A waiver is the intentional relinquishment of a known right, 27 R.CL. 904. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied." (emphasis added)

The court there could find no waiver and reversed, as

the court should do here.[2]

The trial court here concluded that plaintiffs were aware "or should have been aware of the scope and effect of their agreement," and that plaintiffs "were aware or are charged with an awareness of their legal rights under the agreement and they effectively waived those rights" (R. 154). These conclusions of law were in the alternative, showing that the trial court concluded that it was plaintiffs' duty to be aware of their rights and that there could be a waiver of rights of which they should have been aware, but were not. This is at odds with the rule as set forth in Phoenix.

The trial court's decision is hinged upon the premise that plaintiffs had the affirmative duty to actively assert their rights by making demand for registration prior to the commencement of suit.

The equitable part of plaintiffs' claim, wherein it is asserted that they are presently entitled to freely tradeable shares, has been decided in plaintiffs' favor. There is no cross appeal and, therefore, no issue thereon. The legal portion of plaintiffs' claim, wherein they are

---

[2]See also Mitchell vs. Alfred Hofmann, Inc., 48 N.J. Superior 396, 137 A.2d 569,573, wherein the requirements for waiver were expressed as being a "voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act showing an intent to relinquish."

claiming damages for failure of April to register is now before this court. This court, therefore, is not dealing with equitable doctrines of laches and estoppel, but only the legal doctrine of waiver.

The evidence is insufficient for the trial court to have determined that there was waiver. The trial court ignored the evidence before it of desire to sell. Mrs. Wilcox and Herman Bjork were in touch with April, trying to sell their shares.[3] The fact that there is no evidence that either Harold Bjork or Anderson contacted April would, at most, constitute silence or inaction on their part. The case of Voelker vs. Joseph, 62 Wash.2d 429, 383 P2d 301, 305, is a case involving inaction by a party and non-assertion of his rights. The language of the Washington court is applicable to this case. The court in discussing implied waiver by silence said:

> "There is, however, substantial merit in one contention of the appellant, and this requires the granting of a new trial. The trial court instructed the jury that a right may be waived impliedly by a party who neglects to insist upon it. The evidence was that the appellant did not make an immediate claim that the offsets which the respondents' customers demanded should not be deducted from the payments made to him by the respondents, and in fact indicated that he was not surprised that damaged apples had appeared, although he did not admit the responsibility for the defects. The six-year statute of limitations applied to his cause of action, and he did not file suit until nearly five of these years had elapsed. While the respondents state that they were prejudiced by this inaction, they do not state wherein the

---

[3] See plaintiffs' original brief pages 8 - 13.

> the prejudice lay. No doubt, they were inconvenienced, but this type of inconvenience attends the delay of any suit within the statutory period of limitations. The legislature has decreed what shall be reasonable time within which to bring suit, and it cannot be said that the mere failure to bring suit constitutes a waiver of the right of action, so long as suit is brought within the statutory period . . .
>
> Insofar as our research has disclosed, the courts invoke the doctrine of implied waiver by silence or acquiescence only where a forfeiture would otherwise result. There is no question of forfeiture before us here.
>
> In this case, there was no showing that the appellant had knowledge of all of the facts at the time the deductions were made from payments on his account or that the circumstances existing at that time required him to protest; no showing the he expressly waived the right to payment of the balance; and no showing that the respondents were prejudiced by his failure to assert this right."

As said in 92 CJS, Waiver 1064:

> "A waiver may arise or be implied from the acquiescence or silence of the party who has the power of waiving, under circumstances which require him to speak, but silence to constitute a waiver, must be deceptive silence, and it must be accompanied by an intention to defraud which amounts to a positive beguilement. Mere silence is never a waiver, when there is no duty or occasion to speak; and where such silence is unaccompanied by any act calculated to mislead, and in the absence of conduct amounting to an estoppel, there is no waiver." (emphasis added)

See also 28 Am.Jur.2d, Estoppel and Waiver, par. 160.

There was no evidence that April was prejudiced by any inaction of any plaintiff, nor that there was fraud, beguilement nor deception. In fact, insofar as deception is concerned, April stated that had it been "aware" of

the rights of plaintiffs "the company would have asserted the invalidity of both the issuance of the stock and the issuance of the registration rights" (R.109), as it in fact did.

April argues that the restrictive legend on the shares provided that they could not be sold without a registration statement or opinion of counsel, satisfactory to the issuer, that registration was not required; and concludes that, had plaintiffs wanted to sell, they should have sought advice from an attorney (p.12). The response to this varies somewhat for each of the plaintiffs. Some sought the counsel and opinion of persons familiar with stock transactions, their brokers. "Counsel" in its broader sense is not limited to attorneys. Mrs. Wilcox's broker consulted April's attorney (R.301,309), who should have been "counsel satisfactory to the issuer." However, all plaintiffs would have been unsuccessful in having April agree that the shares were tradeable, regardless of any attorney's opinion which any plaintiff might have furnished because April contended that the shares were void.(R.109).

> "The law does not require the doing of a vain or useless act, nor does the failure to do such act constitute a waiver of legal rights, or defeat a right otherwise conditioned on such act." Title and Trust Company vs. Durkheimer, 155 Ore. 427, 63 P2d 909,915.

April contends that the court was justified in thinking

that Mrs. Wilcox followed Parker's suggestion to hang on to the stock for it would be "worth a lot of money" (p.12). April is doing just what the trial court did in taking evidence out of context, because, as shown in our original brief, after that advice was given to Mrs. Wilcox, she made many attempts to have the shares made tradeable and to sell.[4]

April asserts that there is no showing that it knew about the "claimed right of any of these particular plaintiffs" (p.13). Such a contention is inconceivable. Plaintiffs and Lowe were the only officers of the predecessor company. Parker's lawyer suggested that there be a piggy-back registration. Parker became president and director and the lawyer became counsel for the company and a director.[5] Furthermore, Lowe's letter to April (Ex.13P) which the court refused to admit in one instance, but which, nevertheless was admitted in a deposition which was made a part of the record stated:

> "I notice that there is no attempt made to register the restricted shares that I have and other officers of the original company and my partner, Andrew R. Hurley, have, which by the agreement, a copy of which I sent in my letter of August 6th, were to be registered."

The company couldn't have been blissfully ignorant of its obligation to plaintiffs.

---

[4] See also Plaintiffs' original brief page 9.

[5] See also Plaintiffs' original brief page 4.

April then contends that it could reasonably have believed that plaintiffs did not wish to have their shares included in the public offering (p.13). April was hardly misled in light of the above quoted letter.

April attempts to distinguish between this case and the Lowe case by saying first that Lowe demanded that April include his and Hurley's shares in the registration statement (p.13, note 4). The demand in the Lowe case was the identical demand which was made in this case, i.e. Lowe's letter quoted above, referring to the failure to include restricted shares of all plaintiffs. The other attempted distinction is that April claims that the Lowe case is replete with contacts he made with April concerning ways to settle the controversy (p.13, note 9). There is no rule of law requiring a claimant to negotiate for settlement of any breach of an agreement.

April asserts that plaintiffs had reasons for not selling, contending that, since the stock rose from the public offering price of $13 to a later price of $14 before dropping to 75 cents, that the court could have inferred that plaintiffs did not wish to sell at $13 (p.13). It does not take such an application of hindsight to illustrate that stock prices go up and down. Of course, the quotes would fluctuate. The efforts of plaintiffs to get freely

tradeable shares and to sell their restricted shares and the sale by them of their tradeable shares negate the argument that plaintiffs did not wish to sell.

April argues that the court could have found that plaintiffs had abandoned their rights to registration (p.14). The court did not find abandonment, but based its ruling upon the related doctrine of waiver. The authorities cited by April in support of the concept of abandonment are distinguishable. They all involve affirmative inconsistent acts by the plaintiff who thereby abandons his right to enforce the contract. None involves mere delay in asserting rights, which is the most that April claims here.[6]

[6] Timpanogos Highlands, Inc. vs. Harper, ___U___, ___P2d.___, Case No. 13936 filed December 3, 1975.

In Pitcher vs. Lauritzen, 18 U2d 368, 423 P2d 491 (1967), the parties had entered into an earnest money receipt for the sale of realty, which provided that on or before a given date a contract of sale would be drawn up, which was never done. This constituted abandonment. No such situation exists here. In King vs. Firm, 3 U2d 419, 285 P2d 1114 (1955), there were two sets of notes and mortgages. The plaintiff released the earlier set, with a recitation in the release referring to the later set as being "unused papers," indicating the parties had never used the later set, nor intended that they be effective. He was held to have abandoned his rights in the later set. No such situation exists here.

The language April quotes from the superseded 12 Am. Jur., Contracts, par. 442, is taken from a section entitled "Repudiation of Contract as Grounds for Rescission." It involves the determination that if a party wrongfully repudiates a contract that the other party is then entitled to rescind. Such is not involved here. Ours is a unilateral contract. Plaintiffs had already performed and were under no further duty of performance and therefore could not

April contends that plaintiffs had essentially an "option" to have their shares included in a public offering (p.15). This is a deliberate misconstruction of the language of the agreement sued upon, which provides that the company...

> "Agrees with stockholders that if the company files a registration statement in the future for the transfer of shares other than those represented by the certificate issued to the above named stockholders, the company will include these shares in such registration statement" (Ex.2D).

There is no option involved. It is a firm obligation, not dependent upon any election to be exercised on the part of plaintiffs.

---

wrongfully repudiate.

The corresponding section in the second edition of American Jurisprudence is 17 Am.Jur.2d, Contracts, par. 505, in which it is even more clearly pointed out that what is being discussed is wrongful repudiation and refusal to perform. The quoted section now reads:

> "Repudiation or renunciation. As a general rule, the rescission of a contract by one party thereto is permitted for the other party's repudiation of the contract or any essential part of it. Thus, it is well settled that a party may so wrongfully repudiate the contract as to authorize the other to renounce and rescind it, as where the conduct of one of the parties evinces an intention no longer to be bound by the contract." (emphasis added)

Plaintiffs here did not renounce and did not wrongfully repudiate any obligation.

The cases cited by American Jurisprudence show that its quoted language refers to a situation in which there is a bilateral rather than unilateral contract. The "inconsistent" conduct referred to is the conduct of a wrongfully repudiating party, who then seeks to enforce the contract after the other party has acquiesced in the repudiation. That did not occur here.

April states that the trial court found that plaintiffs decided not to exercise their "option" (p.15). The trial court found no such thing. To the contrary, it expressly found that there was the above quoted "agreement" (R.151).

April argues that it would be bad public policy to permit plaintiffs to sue at any time within the six-year statute of limitations period for a breach of contract (p.15). If April had recognized the validity of the stock, and had there been alternative ways of making the shares saleable, of which plaintiffs should reasonably have been aware, then the principal of "cover," which April so strenuously asserts would indeed have been applicable. Plaintiffs would then have been limited in the amount of their recovery by the price at which they could have sold within a reasonable time after the breach, as set forth in the citations of April (p.16). That, however, would not, as contended by April (p.16), bar the action, which could be brought at any time during the six-year limitation period. If it is bad public policy to permit the bringing of a suit for breach of a written contract within a six-year period, the legislature, not this court, should shorten the limitation period.

The cases cited by April on mitigation of damages are distinguishable: In Galigher vs. Jones, 179 U.S.

193, 9 S.Ct. 335, 32 L.Ed 658 (1889) there was conversion of stock which the court required the plaintiff to replace within a reasonable time, awarding damages based on the price of the stock within said reasonable time period. In Clements vs. Mueller, 41 F2d 41 (9th Circ. 1930) damages were claimed for refusal of defendant to sell its stock to plaintiff. Plaintiff could have covered by buying other stock within said reasonable time and damages were based upon prices within said reasonable time period. Reynolds vs. Texas Gulf Sulphur Company, 309 F.Supp. 548 (D.Utah 1970) involved a false news release which minimized the importance of a publicized ore strike, relying on which the plaintiffs sold. Plaintiff could have repurchased other shares within a reasonable time and damages were based on prices within said reasonable time period. The distinction is that, in those cases the plaintiffs had the ability to mitigate, whereas in the instant case, plaintiffs, wanting to sell, had no means to do so because April would not recognize the validity of their stock.

April says that it:

> "Presented considerable evidence of how plaintiffs might have minimized their damages through the use of either an opinion letter or of Rule 144" (p.16).

April completely ignores, and makes no attempt to rebut, the showing in our original brief that both an opinion letter and Rule 144 were and are unavailable to plaintiffs so long

as April asserts that plaintiffs' stock is void.[7]

## POINT III

## THE TRIAL COURT COMMITTED ERROR

April argues that it was not error to refuse to admit into evidence Exhibit 13P (p.17). It characterizes the letter as one demanding that April include the shares of Lowe and Hurley in a public offering, again ignoring the fact that the letter referred to shares of "other officers of the original company" (Ex.13P). April contends that "there is nothing in the language of the letter to indicate that it was written on behalf of any of the plaintiffs" (p.18). The language of Ex.13P, referring to stock owned by the "other officers," shows that is just not so. April's contention that none of the plaintiffs knew of the existence of the letter and that they had not authorized nor approved thereof (p.18), is only true as of the date the letter was written. They offered to prove their subsequent knowledge of it and their approval thereof (R.210-215,237,266,289), which offer was rejected.

April argues that the letter should not have been admitted because there was "no proof offered that Mr.

---

[7] See also Plaintiffs' original brief pages 26 and 32.

Lowe was acting on behalf of the plaintiffs at the time he wrote the letter" (p.18). The letter speaks for itself, that he was purporting to act on their behalf.

April contends that there was no evidence that "plaintiffs understood the letter to be sent on their behalf" (p.18). They cite the Restatement of Agency, Second 82. The Restatement does not require evidence of the principal's "understanding." The letter was expressly written on plaintiffs' behalf. The letter is clear and was obviously intended to remind April that plaintiffs' shares should be registered. Since the court did not permit plaintiffs' testimony as to ratification to be introduced, it erroneously ignored the effect of ratification.

There is no "implausible" theory of agency, as contended by April (p.19), but a logical feeling on the part of plaintiffs, that if a reminder had already been given to April on their behalf prior to the issuance of the final prospectus, there would be nothing gained by further complaints to April, after it had breached the agreement by refusing to register.

Plaintiffs tendered their shares into court for delivery to April and proffered to treat April's conduct as a conversion, thereby giving up their shares. The court sustained April's objection thereto (R.381). This left plaintiffs in possession of their unsaleable shares. April argues that the fact that plaintiffs still have their restricted shares

puts them in an unconscionable position. True, as April points out, the shares may go up, but they may also go down further. April is only showing one side of the coin in saying if the stock goes up, plaintiffs will be subsequently benefited. If it goes down before they can sell, they will have lost more than the amount prayed for in this action, because there has to be some cut-off point for ascertaining damages for breach of the agreement to register. We fail to see how April can say that plaintiffs were "unwilling" to give up their stock when they tendered it into court and defendant refused to take it. Nor, can we see how April can logically argue that such "unwillingness" was "the reason the trial court judge felt that they had waived their rights" (p.20).

April objects that plaintiffs "wanted to keep the stock and obtain damages" for failure to include the shares in the offering (p.19). Such a position is not unusual. Had the agreement here been one for sale of the stock, in an action for damages for breach thereof, plaintiffs would keep their shares while suing for damages. The shares might go up or down. In that case, damages would be determined by the difference between the agreed price and the price for which the seller would have resold within a reasonable time after the breach, thus limiting the time within which market flucuation might add to or dimin-

ish the amount of damages. Here, where the agreement involved is to make the shares saleable, April's breach (which prevents plaintiffs from having marketable shares) prevents the application of a "reasonable time period" in which to dispose of the shares, thereby lengthening the time until the date of trial in which market fluctuation might increase or decrease damages.

April argues that it is not presently refusing to recognize plaintiffs' position as shareholders, despite its rejection of plaintiffs' second tender of shares to accomplish the exchange for tradeable shares as ordered in the decree. April's response to this second tender was to the effect that it won't recognize plaintiffs' shares because plaintiffs have appealed (R.123-124). Plaintiffs have not appealed from the only favorable part of the lower court's judgment; that they are entitled to freely tradeable shares. On the other hand, April in its brief, could have cross appealed, asserting that the court erred in ruling that the shares were valid and that plaintiffs were entitled to tradeable shares. April states that:

> "Though it has reservations about the propriety of the order requiring it to issue the shares without restrictive legends, defendant will comply with that order as soon as all appeal periods have expired." (p.2).

Even now that it has not cross appealed, and there is, therefore, no issue as to whether or not the court's order

that the shares be recognized is binding, April is contending that plaintiffs should not presently have tradeable shares and that they must await the decision on this appeal, which decision will have nothing to do with the validity of the order to make the shares tradeable. In other words, April is still refusing to recognize that plaintiffs are entitled to valid, tradeable shares.

April states that if plaintiffs presently sold their shares, plaintiffs would probably be violating "applicable provisions of the Securities Act of 1933 through improper public sale of restricted stock" (p.20, note 11), thus recognizing that even now plaintiffs can't sell.

This court held in the Lowe case that if April were going to rescind because of alleged fraud, etc., it had to act promptly. April, in its conclusion, argues that plaintiffs here are in a similar position to that of April, there (p.21). It is an equitable rule which requires prompt election to rescind or affirm upon discovery of fraud, as held in Perry vs. Woodall, 20 U2d 309, 438 P2d 813. Such rule of equity is inapplicable in an action at law for damages for breach of contract.

## CONCLUSION

One of April's few valid contentions is that plain-

tiffs did not, after the agreement to register was breached and before suit, complain to April nor attempt to negotiate a compromise solution. But no such duties to complain or negotiate are imposed upon one claiming damages for breach of contract. Plaintiffs must bring an action within the period of the statute of limitation, which period should not be shortened by an argument that public policy will best be served by requiring them to act sooner.

Lowe had asked for performance of the obligation to register plaintiffs' shares. Lowe, in his suit, had been met with the defense that directors' shares were void. Plaintiffs knew that. If Lowe's shares were void, plaintiffs' shares were void. Consultations by two of the plaintiffs with April as to how to sell the shares accomplished nothing. Awaiting the outcome of Lowe's suit as to validity of the shares and of the agreement to register, and deciding to sue when April's contention of invalidity was rejected by the court, was reasonable action on plaintiffs' part.

There was no indication that plaintiffs knowingly and intentionally waived any right, and even less, was there clear and convincing evidence thereof. Plaintiffs, although in like positions in that they each had restricted shares, were not acting in concert. The attempts to sell were through their separate brokers, each plaintiff using his own. Contacts with the SEC, with April's officers, and with April's

attorney were separate and different. Waiver cannot be based on negligence, inattention, or inadvertence. There is no evidence that any one of the plaintiffs knowingly and intentionally relinquished his rights, much less that each one of them did. It is unlikely that anyone would want to give up the valuable right to get marketable shares. It is highly unlikely that four persons, acting independently, with different contacts, would each come to a decision that he wanted to waive his valuable rights. The evidence is to the contrary, that each wanted to sell.

The court should remand, with instructions, to award damages.

Respectfully submitted,

John W. Lowe
Brayton, Lowe & Hurley
Attorney for Plaintiffs-Appellants