

WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: May 31, 2005
Decided: October 13, 2005 (*date revised only*)
Revised: October 14, 2005

Alan J. Stone
R. Judson Scaggs, Jr.
James G. McMillan, III
Jerry C. Harris, Jr.
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, DE 19899

Kevin R. Shannon
Brian C. Ralston
Joseph B. Cicero
Potter Anderson & Corroon LLP
P.O. Box 951
Wilmington, DE 19899

John L. Reed
Daniel V. Folt
Gary W. Lipkin
Matt Neiderman
Duane Morris LLP
1100 N. Market Street
Wilmington, DE 19801

Re: *Gatz v. Ponsoldt*
Civil Action No. 174-N

Dear Counsel:

After careful consideration of the parties' submissions with respect to defendants' motion to dismiss, the Court hereby grants defendant's motion and dismisses plaintiffs' claim without prejudice. Plaintiffs' complaint fails to state a claim upon which relief can be granted. Nevertheless, plaintiffs come close to pleading such a case, and I invite plaintiffs to refocus their

arguments, limit their verbiage, and file a new complaint that pinpoints the factual grounds for the last remaining of their original claims.

On November 8, 2004, this Court issued a Memorandum Opinion dismissing all of plaintiffs' claims other than a single claim relating to the December 2001 sale of a cache of previously quarried and piled aggregate rock (the "Aggregate") between two Regency subsidiaries (the "Aggregate Sale"). Defendants later filed a motion to dismiss plaintiffs' remaining claim as moot on the ground that the Aggregate Sale had been unwound. Unwinding the Aggregate Sale returned Regency to the position it had been in before the transaction, with one important discrepancy: During the interim, Regency underwent a recapitalization.

Plaintiffs' position, loosely articulated in their reply brief, is that the Aggregate Sale damaged the public shareholders by inflating the liquidation value of a class of preferred shares known as the Series C shares. This inflated liquidation value allowed the Series C shareholder to receive more in the recapitalization than it otherwise would have. Because Regency's recapitalization redistributed benefits to the Series C shareholder at the expense of the public shareholders, plaintiffs' claim is alleged to be a direct claim, not a derivative claim. On this basis, plaintiffs argue they need not plead demand futility.

The problem with plaintiffs' complaint is that it fails to articulate facts that show *how* the inflated liquidation value permitted the Series C shareholder to receive more in the recapitalization than it would have received otherwise. The closest plaintiffs come to pleading sufficient facts in this regard is in connection with the amendment to the Series C shares.¹ Plaintiffs' brief implies that were it not for the Aggregate Sale, the Series C shareholder (Statesman Group, Inc.) could not have bargained for the three year option or the \$2,730,000 "fee," and could not have benefited from the later cancellation of its \$2.4 million in debt. Whether the Series C shareholder's bargaining power in this context was increased as a result of the Aggregate Sale depends on the particular facts of this case and plaintiffs do not assert any facts supporting their conclusions. Given the multitude and complexity of the transactions underlying this case, plaintiffs should walk the Court through the essential parts of the recapitalization, fact-by-fact, and explain by what mechanism the inflated liquidation value permitted the Series C shareholder to receive more in the recapitalization than it otherwise would have.

Plaintiffs' brief supplies the Court with several conclusory statements asserting that the inflated liquidation value permitted the Series C

¹ Pls.' Reply Br. at 13-16.

shareholder to obtain more in the recapitalization. Unfortunately for plaintiffs, conclusory statements without supporting factual averments will not be accepted as true for purposes of a motion to dismiss.² In accordance with this standard, I am dismissing plaintiffs' claim because it fails to plead facts showing how the inflated liquidation value benefited the Series C shareholder in the recapitalization. Nonetheless, I will permit plaintiffs to re-file their complaint as I find that a dismissal with prejudice would not be "just under all the circumstances."³

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line under the name.

William B. Chandler III

WBCIII:wbg

² *Grimes v. Donald*, 673 A.2d 1207, 1214 (Del. 1996).

³ CT. CH. R. 15(aaa).