

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

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: May 19, 2006

Decided: May 26, 2006

Alan J. Stone
R. Judson Scaggs, Jr.
Jerry C. Harris, Jr.
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P. O. Box 1347
Wilmington, DE 19899

Kevin R. Shannon
Brian C. Ralston
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899

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

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

Dear Counsel:

Having considered your briefing on this matter, I have concluded that oral argument is not needed. The facts underlying this case were recounted in detail in this Court's November 5, 2004 Memorandum Opinion.¹ Plaintiffs, shareholders of Regency Affiliates, Inc. ("Regency"), argue they have a direct claim in connection with the "sham" transaction they allege to

¹ *Gatz v. Ponsoldt*, 2004 WL 3029868 (Del. Ch. Nov. 5, 2004).

have taken place between two of Regency's subsidiaries. This transaction was unwound in February 2005. Plaintiffs concede that the transaction was unwound, but assert that before it was unwound, defendants took advantage of the conditions created by the sham transaction in order to orchestrate a recapitalization of Regency. This recapitalization allegedly benefited William R. Ponsoldt, Sr. (at all relevant times Regency's CEO and Chairman) and his affiliates at the expense of the minority shareholders. Defendants counter that plaintiffs' claim is derivative because the alleged harm was suffered by Regency and because Regency would receive the benefit of any recovery or other remedy.² Plaintiffs have not attempted to make demand on the board; nor have they argued that demand is excused.

Plaintiffs' claim is clearly derivative under *Tooley*.³ The sham transaction did not itself cause any harm to plaintiffs or to Regency. The harm that plaintiffs seek to remedy flows from the terms of the recapitalization. If plaintiffs were to succeed at proving their case at trial, the remedy would be to unwind the recapitalization and return to Regency some or all of the funds that were allegedly distributed through the

² *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) (the question whether a claim is derivative turns "solely on the following questions: (i) who suffered the alleged harm (the corporation or the suing shareholders, individually); and (ii) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"

³ *Id.*

recapitalization. Plaintiffs would participate in this remedy *pro rata*, according to their holdings of Regency. This remedy would not benefit the plaintiff shareholders individually.⁴

For the above stated reasons, defendants' motion to dismiss the amended complaint is granted. An Order has been entered implementing this decision.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:wbg

⁴ In this Court's November 5, 2004 opinion, the plaintiffs' claim in connection with the sham transaction, as then pled, was held to be direct and not derivative. That claim is different from the claim the plaintiffs now seek to assert. The plaintiffs' direct claim alleged that the sham transaction itself caused harm to the shareholder plaintiffs individually. Any such harm was undone by the unwinding of the sham transaction. To the extent the recapitalization caused any harm, those harms were done to Regency, and not the plaintiffs individually.