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VIA LEXIS NEXIS FILE & SERVE AND HAND DELIVERY

The Honorable Leo E. Strine, Jr.
Court of Chancery of the State of Delaware
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

Re: *Auriga Capital Corp., et al. v. Gatz Properties, LLC, et al.*, C.A. No. 4390-CS

Dear Chancellor:

Plaintiffs read Footnote 184 of the Court's January 27, 2012 Opinion as establishing a process that was at least intended to avoid further litigiousness and promptly bring this action to a conclusion. Unfortunately, that has not happened, and while Plaintiffs do not want to needlessly incur additional expense if Defendants are simply going to file for bankruptcy, they are eager to do whatever the Court wants in order to get a Final Order and Judgment entered. Plaintiffs were not trying to play "gotcha" when they submitted their February 20, 2012 letter; and the Court is entitled to an explanation of what occurred beyond what is haphazardly set forth in Mr. Caponi's February 21, 2012 letter (cited as "Caponi Letter"). We apologize for the length of this response but as the Court knows, facts and details do matter.

Footnote 184 of the Court's Opinon clearly stated:

> The Minority Members' counsel shall submit an affidavit setting forth this amount to Gatz within five days of this decision. Unless Gatz's counsel fully produces their own billing records in full in support of an argument that the Minority Members' bills are too high, I shall consider the Minority Members' amount sought to be reasonable. In objecting to the amount of the fee, Gatz and his counsel should remember that it is more time-consuming to clean up the pizza thrown at a wall than it is to throw it.

Mr. Caponi begins by noting "the absence of any detail provided in Mr Reed's Affidavit." (Caponi Letter, p. 1.) Mr. Seitz and the undersigned conferred on the contents of the "Reed Affidavit" prior to its due date, agreed that it should contain a single amount representing the total attorneys' fees, expert fees and other costs incurred by Plaintiffs, and that it should be

submitted to both Mr. Seitz and Mr. Caponi. The Reed Affidavit complied with the Court's directive.

The Reed Affidavit was timely submitted on February 3, 2012. Mr. Caponi's letter then skips ahead ten days, stating that "[n]ot wanting to pre-judge the amount of Plaintiffs' fees and expenses, on February 13, 2012, Ms. Sloan contacted Mr. Reed, expressed Defendants' concerns and requested . . . the DLA invoices." (*Id*.) "Not wanting to pre-judge"? Promptly after receipt of the Reed Affidavit, Mr. Seitz informed Plaintiffs' counsel that Defendants intended to challenge the reasonableness of Plaintiffs' fees and costs and that they intended to file for bankruptcy "anyway." Moreover, three days before reaching out on February 13th, Ms. Sloan sent a letter dated February 10, 2012, stating that if Plaintiffs did not "agree" to accept "half of the amount of ***Defendants***' invoices, or $327,503.94," Defendants would "be forced to file an opposition to your proposed fee amount." To reiterate, that determination was based solely on a comparison of the different totals incurred by each side, and it was certainly a "pre-judgment" despite what Mr. Caponi now says in his letter.

Returning to the Court's Opinion, the way Plaintiffs read Footnote 184 was that upon review of the Reed Affidavit, the price for initiating a challenge to the amount set forth therein was that Defendants had to "fully" provide all of their fees and expenses "in full." Footnote 184 clearly states that unless Defendants' counsel "***fully*** produces their own billing records ***in full*** in support of an argument that the Minority Members' bills are too high, I shall consider the Minority Members' amount sought to be reasonable." (Opinion, p. 73, n. 184 (emphasis added).) Even Defendants agreed that was the price of admission to start the fee challenge process, though Mr. Caponi now suggests otherwise when he states that "Defendants even provided their invoices to Plaintiffs, despite not yet having challenged Plaintiffs' fees and expenses." (Caponi Letter, p. 1.) Indeed, the opening sentence of Ms. Sloan's February 10th letter, enclosing what was supposed to be all the fees and costs incurred by Defendants, states that it is being done "[p]ursuant to the Court's January 27, 2012 Opinion." Instead of suggesting that Defendants' promptly went above and beyond what the Court ordered, Mr. Caponi should simply admit that their actions were deficient and obstreperous.

Following receipt of Ms. Sloan's letter (e-mailed after the close of business on a Friday) and review of the enclosures, the undersigned contacted Mr. Seitz and inquired about the absence of the Seitz Ross bills and was told that the bills should have been provided. Mr. Seitz then said that Plaintiffs would have to get his bills from Blank Rome. Plaintiffs respected that request and thereafter treated Blank Rome as the gatekeeper. Plaintiffs' counsel was out of town February 13-14 and, upon return, responded to Ms. Sloan's request for Plaintiffs' bills. It is true that the undersigned stated that Plaintiffs "will produce information sufficient for your client and the

Court to determine the reasonableness of our fees," but the issue did not end with that statement. What Mr. Caponi's letter leaves out is that that statement was qualified with the next sentence: "Before we do that however, we need (1) the Seitz Ross bills and (2) a representation that all of the invoices provided represent each firms' respective standard billing rates in effect at the time the services were performed and that the clients were not provided with other discounts (*e.g.*, at the rate or bill level, or write-offs prior to final billing, etc)." In response, Defendants refused to produce the Seitz Ross invoices. Ms. Sloan's February 16, 2012 e-mail unequivocally stated that Defendants "will not be producing such invoices."

At this point, it became apparent that Defendants' desire to present a fee challenge meant that a proposed final order and judgment could not yet be agreed to and that the Court's timetable for submission of same could not be satisfied. Unfortunately, the undersigned lost four decades-long family friends to a car accident and had to leave town for a funeral. Ms. Sloan was asked to contact Chambers, inform the Court that Defendants intended to challenge Plaintiffs' fees and that the parties would propose a process. However, the first step in the process was to have Defendants comply with the Court's Opinion and, importantly, the request that Ms. Sloan contact Chambers was *not* the last time Defendants heard from Plaintiffs. (Caponi Letter, p. 2 ("As requested, Ms. Sloan contacted Chambers and relayed that information. Defendants were, therefore, shocked to receive Plaintiffs' February 20, 2012 letter").) Shocked? Mr. Caponi's letter fails to mention that on February 19th, the undersigned again requested of Ms. Sloan and Mr. Caponi "that the Seitz Ross bills be produced." (Ex. A hereto.) Defendants' counsel never responded. That is a fact that should not have been left out of Mr. Caponi's letter. When the Court's assistant called on February 20, 2012 to inquire about the status of the Final Order and Judgment, she was told that the parties were supposed to work out a process per Ms. Sloan's call to Chambers, but that something had occurred (*i.e.*, Defendants' *third* denial of a request for a production of Defendants' bills "in full") and that Plaintiffs would promptly submit a proposal. Plaintiffs' letter and [Proposed] Final Order and Judgment were submitted later that day. Defendants were certainly entitled to challenge Plaintiffs' fees, but to do so they were obligated to follow the Court's instructions and did not. The meaning of "fully produce … in full" is clear.

Nonetheless, Plaintiffs also acknowledge that the Court has complete discretion here and can now "consider the Minority Members' amount sought to be reasonable" or approve a process for going forward. If the Court chooses the latter, Plaintiffs respectfully request that a process be established that prevents the Plaintiffs from being victimized further. The Plaintiffs were victimized by both a faithless fiduciary and bad faith litigation tactics. If what Blank Rome represents to the world regarding its Delaware Court of Chancery practice is true, then the defense advanced here was not the product of inexperience but was indisputably intentional, lawyer-driven bad faith designed to win a war of attention. If Defendants are going to go down

the road of a fee challenge because Defendants' bills (which represent the less time-consuming actions of throwing pizza at the wall) are smaller than Plaintiffs' bills (which represent the more time-consuming actions of cleaning up the pizza), the process should be a reasonable one designed to preserve the intent of the Court's findings and award. In this regard, Plaintiffs have enclosed an alternate form of order which directs Defendants to promptly produce the Seitz Ross bills and to pay that portion of Plaintiffs' fees and costs they deem reasonable ($327,503.94) before proceeding with their fee challenge.

In evaluating the competing proposals, Plaintiffs respectfully request that the Court be mindful of several things. First, the steps and process urged by Plaintiffs are consistent with requirements the Court has imposed in other cases involving fiduciary breaches. Second, Mr. Caponi's letter never denies that Defendants have twice indicated that they intend to file for bankruptcy, making this a useless endeavor for Plaintiffs. Third, Mr. Caponi never denies that the Court's supervision instruction in December 2010 was not adequately satisfied, which certainly affected the amount of Defendants' bills. And fourth, defense counsel let their client do his own critical document production, which lessened the defense costs, but increased Plaintiffs' fees by causing them to have to initiate third-party subpoenas, initiate miscellaneous actions to enforce the subpoenas, and to thereby obtain highly relevant documents Mr. Gatz either destroyed or failed to produce. (Note: Upon review of Defendants' bills, the Court may even wish to consider whether defense counsel's actions and/or inactions were such that it warrants a finding of joint and several liability by the lawyers for the fee portion of the award.)

In conclusion, Plaintiffs will make a good faith effort to negotiate a lesser fee demand in order to avoid burdening the Court further, but half of Defendants' fees and costs is certainly below what is reasonable and equitable. In the meantime, we respectfully request that the Court enter one of Plaintiffs' proposals and we remain available at the Court's convenience.

Respectfully submitted,

/s/ John L. Reed

John L. Reed (I.D. No. 3023

Exhibit and Enclosure
cc: Steven L. Caponi (w/ exhibit and enclosure)
Elizabeth A. Sloan (w/ exhibit and enclosure)
Collin J. Seitz (w/ exhibits and enclosure)