

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE RAVENSWOOD INVESTMENT	:	
COMPANY, L.P., individually,	:	
derivatively and on behalf of	:	
a class of similarly situated	:	
persons,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil Action
	:	No. 7048-VCN
WINMILL & CO. INCORPORATED,	:	
THE ESTATE OF BASSETT S.	:	
WINMILL, THOMAS B. WINMILL AND	:	
MARK C. WINMILL,	:	
	:	
Defendants.	:	

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Chancery Court Chambers
Dover, Delaware
Thursday, February 25, 2016
2:00 p.m.

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BEFORE: HON. JOHN W. NOBLE, Vice Chancellor

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TELECONFERENCE
RULING OF THE COURT

- - -

CHANCERY COURT REPORTERS
410 Federal Street
Dover, Delaware 19901
(302) 739-3934

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APPEARANCES:
(By telephone):

DAVID E. WILKS, ESQ.
Wilks, Lukoff & Bracegirdle LLC
for Plaintiffs

DAVID A. JENKINS, ESQ.
Smith, Katzenstein & Jenkins LLP
for Defendants

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1 THE COURT: Good afternoon. This is
2 Vice Chancellor Noble. Could I have a roll call
3 please?

4 MR. WILKS: Good afternoon, Your
5 Honor. This is David Wilks for the plaintiffs.

6 MR. JENKINS: Good afternoon, Your
7 Honor. This is David Jenkins for the defendants.
8 With me on the phone as well is Thomas Winmill who is
9 one of the individual defendants. He understands that
10 he is not to talk on the telephone call.

11 THE COURT: Thank you for gathering.
12 My intent is to deliver a bench ruling
13 regarding the pending motion to dismiss the amended
14 verified complaint and also the motion for leave to
15 amend or supplement the amended complaint.

16 I don't think there is anything that I
17 could add in a written opinion that would help the
18 parties understand my thinking any more, and as at
19 least some of you are aware, time is something of the
20 essence for me.

21 Plaintiff Ravenswood seeks leave to
22 amend or supplement its complaint. This would be its
23 second amended verified complaint. Four years ago or
24 so, the Court severed the Section 220 claim from the

1 fiduciary duty claim. The fiduciary duty claim
2 portion is what Ravenswood wants to amend.

3 Ravenswood prevailed, in part, on its
4 Section 220 claim. My concern at the time was lumping
5 fiduciary duty claims together with the summary books
6 and records inspection in a Section 220 proceeding.
7 My thought was that combining a summary proceeding and
8 a fiduciary duty proceeding needlessly complicated
9 matters.

10 On the other hand, and in fairness,
11 the fiduciary duty claims sponsored by Ravenswood
12 touch upon the nature of the books and records that
13 Winmill prepares, maintains or makes available to the
14 minority stockholders.

15 Back then, Winmill had moved to
16 dismiss the fiduciary duty claims, and that motion
17 remains. In essence, the fiduciary duty claims were
18 stayed pending resolution of the Section 220 aspect.
19 The motion to amend and the motion to dismiss overlap
20 in the sense that a motion to amend will not be
21 granted if it is futile, which is functionally the
22 equivalent of the proposed amended complaint not being
23 able to survive a motion to dismiss. With defendants'
24 motion to dismiss the fiduciary duty claims, the

1 standards turn out to be substantially the same.

2 In the four years or so, much has
3 happened, or perhaps more accurately, nothing much has
4 happened. Around the time Ravenswood brought the 220
5 action, Winmill stopped preparing the typical
6 accounting and financial reports that shareholders
7 would expect to receive, such as audited financials.
8 One would get them from publicly-traded companies,
9 which Winmill is, but Winmill is not subject to
10 reporting under SEC standards; thus, there is no
11 affirmative regulatory duty that it prepare such
12 reports.

13 In addition to Winmill's continuing
14 efforts with respect to the motion to dismiss the
15 fiduciary duty claims, Ravenswood continues with its
16 efforts to consolidate the fiduciary duty claims here
17 with claims in yet another action between
18 substantially the same parties, and that would be
19 Civil Action Number 3730.

20 Part of what Ravenswood wants to do,
21 as I have said, is to amend the complaint. That would
22 be under Rule 15(a), and perhaps subject to the
23 limitations of Rule 15(aaa). But given the passage of
24 time, it also seeks to supplement the complaint with

1 new allegations. A motion to supplement would be
2 under Rule 15(d).

3 For example, the most troubling new
4 allegation suggests that the decision not to prepare
5 audited financials can be attributed to, or be viewed
6 as a response to, the Section 220 books and records
7 inspection that Ravenswood undertook.

8 Indeed, the proposed complaint can be
9 read, and perhaps this is a charitable reading, but
10 can be read as alleging that Winmill stopped preparing
11 such reports so that they would not be available for
12 inspection under Section 220.

13 Winmill points to several reasons why
14 the fiduciary duty claims should be dismissed. It
15 uses substantially the same reasoning to argue that
16 the motion to amend would be futile.

17 First, Winmill is correct that this is
18 not a derivative action. Ravenswood's claim is about
19 information provided to the shareholders, or at least
20 the information available to the shareholders. This
21 is a direct claim.

22 The argument that the lack of public
23 financial information depresses the price of Winmill's
24 stock is simply too attenuated, at least on the facts

1 that have been alleged, to demonstrate that the claim,
2 as a derivative claim, is not futile.

3 As an aside, I would note that the
4 factual allegations which would form the basis for a
5 derivative claim lack the particularity that one
6 expects of such allegations. Thus, to the extent the
7 proposed amendment purports to state a derivative
8 claim, that would be denied as futile.

9 Next, Winmill is not seeking
10 shareholder approval of anything. Winmill is not
11 subject to any federal or other formal financial
12 reporting requirements which ordinarily would be
13 expected to resolve the question.

14 That brings us to Delaware disclosure
15 law which generally does not require disclosures to
16 shareholders unless shareholder action is sought.
17 Winmill seeks no such action. Thus, the failure to
18 provide financial reporting, by itself, does not state
19 a claim. Whether that is good policy or bad policy is
20 not my task to resolve today.

21 The failure to provide the audited
22 annual financial reports, without more, does not state
23 a claim under Delaware law, especially because it
24 appears that accounting records are maintained, bills

1 are being paid, and one presumes tax returns are being
2 filed. The amendment to address the failure to
3 provide financial reporting, as such, and without
4 more, is denied. That involves applying the
5 reasonable conceivability standard.

6 The motion to dismiss the balance of
7 the complaint, or the proposed supplemental complaint,
8 raises a question that must be evaluated under the
9 reasonable conceivability standard, and under that
10 standard I cannot say that there is no reasonably
11 conceivable way in which Ravenswood could eventually
12 prevail with respect to the final aspect of its claim.

13 Fiduciaries who seek to deprive
14 shareholders of access to the financial statements or
15 audited financials of a Delaware corporation in which
16 they are investors are clearly not meeting the
17 standards we would hope to be achieved. But the
18 failure to prepare those records alone is not the
19 determinative aspect here. What matters is the
20 linkage that Ravenswood can make between its efforts
21 under Section 220 and the board's decision not to
22 prepare such reports or to pay to prepare such
23 reports.

24 Where a board, at least under the

1 reasonably conceivable standard, decides not to
2 prepare financial reporting, as the board has done
3 here, and its financial reporting which it has
4 provided in the past, as do most other companies,
5 simply, again, taking allegations of the proposed
6 amended complaint, because of a troublesome
7 shareholder's use of its Section 220 rights, persuades
8 me that there may be a fiduciary duty claim here that
9 should be pursued.

10 The directors are family members and
11 controlling shareholders. There are allegations of
12 decisions by those directors to benefit themselves at
13 the expense of the minority shareholders. The
14 argument is whether the decision not to prepare the
15 financial reports, or the audited reports, was an
16 effort to save money for the company. And that might
17 well be justified under the business judgment rule.
18 But that can also be contrasted with the decision not
19 to prepare such records in an effort to keep the
20 shareholders in the dark.

21 The self-interest of the directors, or
22 at least the allegations of self-interest, would
23 preclude the Court from dismissing a damages claim
24 under Section 102(b)(7) at this point, and it is also

1 possible that some form of injunctive relief would
2 turn out to be appropriate, and that would not be
3 burdened by a Section 102(b)(7) defense anyway.

4 In sum, the fiduciary duty claims
5 asserted by Ravenswood do not survive in as broad a
6 fashion as they have been brought, but an aspect does
7 survive. That involves the timing or potential
8 motivation for stopping the preparation of those
9 audited financial reports and perhaps other financial
10 information.

11 This decision could be implemented in
12 one of two ways. First, the motion to amend or
13 supplement could be granted in full with the
14 derivative aspect and the mandatory financial
15 reporting aspect dismissed. Or the motion to amend
16 could be granted except with respect to those two
17 aspects. I don't see that it makes much difference,
18 but I will enter an order implementing this decision
19 that follows what I have described as the first
20 option.

21 Also pending, and it's been around for
22 a while, is plaintiffs' motion to consolidate the
23 fiduciary duty claims here with the other action. I
24 would ask that counsel confer on a brief schedule so

1 that that will be ready for my successor to deal with
2 when he assumes his job.

3 As I said, I thank you very much for
4 gathering this afternoon. It certainly facilitated
5 what I needed to get done, and I appreciate it.

6 With that, that's all I can accomplish
7 this afternoon, and I thank you very much.

8 MR. WILKS: Your Honor. Thank you
9 very much.

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11 (The teleconference concluded at
12 2:15 p.m.)

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CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 11 contain a true and correct transcription of the proceedings as stenographically reported by me at the teleconference 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 Dover, this 25th day of February, 2016.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware