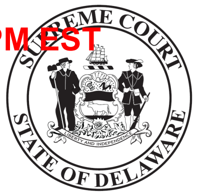
EFiled: Jan 02 2013 12:58PM EST
Filing ID 48699541
Case Number 615,2012



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SWISS FARM STORES ACQUISITION LLC,	:	
	:	No.: 615, 2012
Plaintiff Below,	:	
Appellant,	:	Court below:
	:	Chancery Court of Delaware
v.	:	In and for New Castle County
	:	
REDEEMED PROPERTIES, LP.,	:	The Honorable Vice Chancellor
JAMES P. KAHN and	:	Sam Glasscock, III
EDMOND D. COSTANTINI, JR.	:	
	:	
Defendants Below,	:	
Appellees.	:	

APPELLANT, SWISS FARM STORES ACQUISITION, LLC'S OPENING BRIEF

Dated: January 3, 2013

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EDMOND D. COSTANTINI, JR.	:	
	:	
Defendants Below,	:	
Appellees.	:	

A. NATURE OF PROCEEDINGS.

This is an appeal from Chancery Court's (Vice Chancellor Sam Glasscock, III) Written Order of October 22, 2012, and Oral Order of that same date as announced from the bench, granting the Ch. Ct. R. 12(b)(6) Motion to Dismiss of Defendant Edmund D. Costantini, Jr. ("Costantini") [1], and dismissing Plaintiff's Complaint as to *all* defendants, with prejudice, on statute of limitations grounds.

1 The Costantini Motion to Dismiss (A77) was filed pursuant to Ch. Ct. R. 12(b)(2), (3) and (6), but only 12(b)(6) was briefed and ultimately ruled upon. The remaining two defendants did not join in the Motion, but rather filed their Answer, Affirmative Defenses, and Counterclaims. (A18).

B. SUMMARY OF ARGUMENT.

The Complaint in this case pleads a case of self-dealing by a trusted fiduciary who concealed from Plaintiff evidence that he had actual knowledge of the harm that he was perpetrating upon Plaintiff by committing it to two commercial leases with an entity in which he had a financial interest. The Ch. Ct. R. 12(b)(6) Motion to Dismiss filed by that trusted fiduciary, Defendant Costantini, should not have been granted by the Chancery Court for statute of limitations reasons, because the statute of limitations was tolled during the period before Plaintiff found the concealed evidence of intentional misconduct. The tolling doctrines that apply to this are:

1. Inherently unknowable injuries;
2. Fraudulent concealment; and
3. Equitable tolling.

The Chancery Court's Orders granting the 12(b)(6) Motion to Dismiss filed by Costantini should be reversed, and this case remanded for further proceedings.

C. STATEMENT OF FACTS.

The Complaint pleads a case about self-dealing in two related-party transactions in violation of fiduciary duties owed to Swiss Farm Stores Acquisition, LLC ("Swiss Farm"), a Delaware LLC. (Complaint ¶1; A8). Swiss Farm operates drive-through convenience stores and the Complaint involves commercial leases for two such stores. The two individual defendants were on both sides of these lease deals, and both acted directly and indirectly to benefit themselves, rather than in accord with the fiduciary obligations they both owed to Swiss Farm.

The two properties involved in this case are located at 5340 Springfield Road, Upper Darby Township, Delaware County, PA (referred to and known as "Store 12"), and 1596 Paoli Pike, East Goshen Township, Chester County, Pennsylvania (referred to and known as "Store 13"). (Complaint ¶¶ 13, 14; A10, A11). The Store 12 lease is dated October 6, 2006, and the Store 13 lease is dated January 9, 2007. (Complaint ¶¶ 13, 14; A10, A11). The lessor of the two properties is Defendant Redeemed Properties, LLP ("Redeemed"), and the lessee is Plaintiff Swiss Farm. (Complaint ¶¶ 1, 2; A8). Defendant

James P. Kahn ("Kahn") acted as managing partner of Redeemed[2] (Complaint ¶¶ 2,3,9; A8, A9, A10) in negotiating and signing the leases on its behalf. (Complaint ¶¶ 12-14; A10, A11). Defendant Costantini served as Chief Executive Officer of Swiss Farms, was on the Board of Managers from 2003 to January 17, 2008, (Complaint ¶ 4; A9), and negotiated and signed the leases on behalf of Swiss Farm during that tenure. (Complaint ¶¶ 13, 14; A10, A11).

While supposedly representing the best interests of Swiss Farm during the lease negotiations, Costantini actually had direct or indirect ownership interests in Redeemed, (Complaint ¶ 5; A9), and was thus on both sides of the same transactions. Despite his obvious conflicts of interests, Costantini unilaterally made all decisions as to lease terms and conditions, including economic, that Swiss Farm would accept from Redeemed, and no disinterested member of the Swiss Farm Board of Managers was made aware of proposed lease terms or involved in the negotiations or the decision to sign the leases. (Complaint ¶16; A11). Moreover, prior to the signing of the Stores 12

2 Defendant Kahn has also served on the Board of Managers of Swiss Farm, in his case from 2007 (after the leases were signed) to the present. Additionally, Defendant Kahn, was, at all times pertinent hereto, a partner in the Kahn Quinn Partnership. The Kahn Quinn Partnership, in turn, has had ownership interests as a member in Swiss Farm since 2003, and by virtue of such status had the right to designate a representative to serve on the Swiss Farm Board of Managers. From 2003 to his death in 2007, Hank Quinn (the "Quinn" in the Partnership, and the then partner of Defendant Kahn) served on the Board of Managers of Swiss Farm on behalf of the Kahn Quinn Partnership. After Hank Quinn's death in 2007, Defendant Kahn succeeded him as a member of the Swiss Farm Board of Managers, beginning on May 15, 2007. Thus, from 2003 to the present, the Kahn Quinn Partnership has been a member of Swiss Farm and by virtue of such status has designated a representative of its choice to serve on the Swiss Farm Board of Managers. Compl. ¶¶ 2, 3, 9; A8, A9, A10.

and 13 leases,[3] Swiss Farm retained the legal services of Vincent B. Mancini, Esquire, specifically to review the terms and conditions of what had been proposed as to the Store 12 Lease. (Complaint ¶ 18; A11, A12). Mr. Mancini is a lawyer in Delaware County, Pennsylvania, who concentrates his practice on commercial real estate transactions, and as such he was familiar with the usual terms and conditions of transactions similar to those represented by the Stores 12 and 13 leases. (Complaint ¶ 18; A11, A12). Under date of October 5, 2006, Mr. Mancini wrote a letter and transmitted it that same day by facsimile to Costantini, and only Costantini, at the Swiss Farm offices. Mr. Mancini's letter analyzed the then-proposed lease terms and conditions on behalf of Swiss Farm, pointed out the many provisions thereof that were highly unfavorable to Swiss Farm, and recommended changes that would result in a fair and balanced lease. (Complaint ¶ 19; A12). Costantini ignored Mr. Mancini's letter, and then concealed it from the other members of the Swiss Farm Board of Managers. (Complaint ¶ 20; A12).

On October 6, 2006, one day after receiving Mr. Mancini's letter, Costantini signed the Store 12 Lease on behalf of Swiss Farm, thereby committing it to an economically unreasonable rent, and, even more importantly, committing Swiss Farm to terms and conditions that would later make it highly difficult for Swiss Farm to extract itself from such obligations.[4] (Complaint ¶ 21; A12). Had such terms and

3 The Store 12 and Store 13 leases are the same in all material respects. Compl. ¶17; A11.

4 Such terms in both leases include rent acceleration clauses

conditions and the Mancini letter been made known to disinterested members of the Swiss Farm Board of Managers, the transactions would have been stopped before the leases were signed (Complaint ¶ 23; A13), but Costantini and Kahn acted in concert to prevent the disinterested members of the Swiss Farm Board of Managers from learning of such leases terms until it was too late and Swiss Farm was legally committed to them. (Complaint ¶ 23; A13). Mr. Mancini's letter was not found by Swiss Farm until October of 2011, at which point Swiss Farm became aware for the first time that Mr. Mancini had warned in his letter of the very same terms and conditions that have made it financially impossible for Swiss Farm to extract itself from these commercially unreasonable leases. (Complaint ¶¶ 20-23; A12, A13). Thus, rather than Costantini having acted in good faith and having simply made a mistake, Swiss Farm learned for the first time in October of 2011 that Costantini had been specifically warned of the potentially harmful and damaging effects of the very same lease terms and conditions that have proven Mr. Mancini's letter prophetically correct, and that rather than alert disinterested members of the Swiss Farm Board, he kept that information to himself and concealed the letter (Complaint ¶ 20; A12), and in the process advanced his own financial self-interest rather than Swiss Farm's.

---

requiring payment for the entire unexpired terms of the leases (the initial terms are for fifteen years) with no duty upon the landlord to re-let. Moreover, the leases contain cognovit provisions, permitting Redeemed to confess judgment against Swiss Farm for the accelerated rent, plus add-ons, and place Swiss Farm in total financial jeopardy if it does not continue to pay unreasonably high rents to Redeemed. Compl. ¶21; A12.

Thus, Costantini violated multiple fiduciary duties he owed to Swiss Farm by virtue of his position as CEO and as a member of its Board of Managers, including the duties of loyalty, candor and full disclosure of all details involved in the related-party lease transactions involved in this case. (Complaint ¶ 27; A14).

D. ARGUMENT.

1. <u>Questions presented</u>.

Are Swiss Farm's claims against all defendants barred by the applicable statute of limitations?

a. Suggested answer: No, because of the operation of Delaware tolling doctrines.

b. Preservation of issue: The issue was preserved in the Response of Swiss Farm Stores Acquisition, LLC To Defendant Edmond D. Costantini, Jr's Opening Brief (A 188) and in the argument made at the Chancery Court Hearing on the Motion (A 233).

c. Standard of Appellate Review: Whether the Chancery Court properly decided the Rule 12(b)(6) motion to dismiss is a question of law, and is subject to *de novo* review by this Court. *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995); *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995).

d. Standard of Decision: The standard the Chancery Court must use in determining a 12(b)(6) Motion to dismiss was summarized in

Branson v. Exide Elecs. Corp., 1994 Del. LEXIS 129, *4-5 (Del. 1994):

> In considering a defendant's motion to dismiss, all allegations in the complaint are taken as true. *Delaware State Troopers Lodge v. O'Rourke*, Del. Ch., 403 A.2d 1109, 1110 (1979). In addition, the complaint must be read in its entirety and the facts included in the complaint, together with all the inferences to be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Harman v. Masoneilan Int'l, Inc.,* Del. Supr., 442 A.2d 487, 489 (1982). Therefore, under Court of Chancery Rule 12(b)(6), a motion to dismiss a complaint for failure to state a claim cannot be granted unless the moving party can demonstrate that the plaintiff cannot prevail under any set of facts that could be proved to support his claim. *Weinberger v. Rio Grande Indus., Inc.,* Del. Ch., 519 A.2d 116, 119 (1986). *See also Delaware State Troopers Lodge v. O'Rourke,* 403 A.2d 1109 at 1110.

See also CML V, LLC v. Bax, 28 A.3d 1037, 1040 (Del. 2011) (grant of a motion to dismiss will be upheld only when trial court (i) accepts as true all well-pleaded factual allegations, (ii) accepts even vague factual allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) dismisses the Complaint only if the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.)

E. MERITS OF ARGUMENT.

1. The law applicable to the underlying breach of fiduciary duty claims.

Managers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC, unless the parties expressly modify or eliminate those duties in the operating agreement. *William Penn Partnership v. Saliba*, 13 A.3d 749 (Del. 2011). The Swiss Farm Operating Agreement does not modify or eliminate these fiduciary duties, and the Motion to Dismiss does not claim that it does.

William Penn Partnership, supra, dealt with a related party transaction involving the sale of a motel, and claims of breaches of fiduciary duties in connection therewith. The Opinion summarizes Delaware law with respect to related-party transactions:

> The parties here agree that managers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC, unless the parties expressly modify or eliminate those duties in the operating agreement. The Del Bay Operating Agreement did not purport to modify or eliminate fiduciary duties and it

> named the Lingos as the managers of the LLC. Therefore, as fiduciaries the parties here agree that the Lingos owe fiduciary duties of loyalty and care to the members of Del Bay. The Lingos here acted in their own self interest by orchestrating the sale of Del Bay's sole asset, the Beacon Motel, on terms that were favorable to them. By standing on both sides of the transaction--as the seller, through their interest in and status as managers of Del Bay, and the buyer, through their interest in JGT--they bear the burden of demonstrating the entire fairness of the transaction.
>
> The concept of entire fairness consists of two blended elements: fair dealing and fair price. Fair dealing involves analyzing how the transaction was structured, the timing, disclosures, and approvals. Fair price relates to the economic and financial considerations of the transaction. We examine the transaction as a whole and both aspects of the test must be satisfied; a party does not meet the entire fairness standard simply by showing that the price fell within a reasonable range that would be considered fair.
>
> . . .
>
> While fair dealing and fair price are distinct concepts, the burden to establish them is not bifurcated. Rather, this Court must evaluate a transaction as a whole to determine if the interested party has met his burden of establishing entire fairness.

William Penn Partnership, 13 A.3d at 756-757 (internal citations and footnotes omitted).

Costantini, as CEO and a member of the Board of Managers of Swiss Farm, owed duties of loyalty and care to it, and under the circumstances presented in the Complaint that duty encompasses the concept of entire fairness in related-party transactions. The entire fairness doctrine imposes the burden on Costantini to demonstrate fair dealing and fair price. At the very least, fair dealing required Costantini to keep his fellow Board members fully informed of the negotiations with Redeemed and fully involve them in the decision to

commit Swiss Farm to the leases in question and their unfairly high costs and unfair terms and conditions. Moreover, the entire fairness doctrine required Costantini to circulate copies of the Mancini letter to disinterested members of the Board of Managers, so that they would know of the risks of the deals, before he legally committed Swiss Farm to the leases.

2. The Chancery Court's reasoning in dismissing the Complaint.

The Chancery Court's reasoning for granting the Motion to Dismiss and dismissing the Complaint was announced in open court at the end of the Motion Hearing. The Chancery Court's reasoning was as follows:

> But I don't think I need to make that decision because the breaches here arose from the interested nature of the transaction and the terms of the lease. And nowhere does the complaint allege concealment of those facts. Those are the facts that gave rise to a breach of duty claim. Those facts were known by the board, and their concealment is not alleged even in a conclusory fashion. And, therefore, the complaint does not allege an inherently unknowable injury. It doesn't allege an act of concealment supporting a finding of fraudulent concealment based on the lease itself or the interested nature of the transaction, and the complaint does not allege reasonable reliance on the actions of a fiduciary covertly self-interested because the board was aware, or at least it's not alleged that they weren't aware, that the officer charged with negotiating this lease was self-interested. So equitable tolling is not supported here, and therefore, it seems to me the complaint must be dismissed with prejudice.

Motion Hearing Transcript, A233 .

The flaw in this reasoning is that the breaches here arose not merely from 1) the interested nature of the transaction, and 2) the terms of the lease, but also from a *third* factor: the fact that Costantini *knew* – because the Mancini letter told him so – that the

terms of the then merely proposed lease were not only highly unfavorable and risky to Swiss farm, but he also knew the very reasons why they were unfavorable and risky, and consequently he was actually aware of the financial peril to which he was exposing Swiss Farm by signing the leases and committing Swiss Farm to them, and yet did so anyway because of his own self-interests. According to the Complaint:

> 19. Under date of October 5, 2006, Mr. Mancini wrote a letter to Defendant Costantini and transmitted it that day by facsimile to Costantini at the Swiss Farm offices. Mr. Mancini's letter analyzed the then-proposed lease terms and conditions on behalf of Swiss Farm and pointed out the many provisions thereof that were highly unfavorable to Swiss Farm and recommended changes that would result in a fair and balanced lease.
>
> 20. Defendant Costantini ignored Mr. Mancini’s letter, and concealed it from the disinterested members of the Swiss Farm Board of Managers. Mr. Mancini’s letter was not found until October of 2011, at which point Swiss Farm became aware of the wrongs perpetrated upon it.

Complaint (A24).

Thus, assuming the facts stated in the Complaint to be true, together with all inferences to be drawn therefrom, Swiss Farm did not know until it found the Mancini letter in October of 2011 – the letter Costantini had concealed from it — that Costantini had actual knowledge of the harm he would do to Swiss Farm by signing the leases, but then did so anyway in order to further his own self-interests.

3. Statute of Limitations.

The Delaware statute of limitations applicable to a claim of breach of fiduciary duties is three years. 10 Del. C. § 8106(a) (2012). However, the running of a statute of limitations is tolled

under three doctrines: (1) inherently unknowable injuries; (2) fraudulent concealment; and (3) equitable tolling.

As stated in *In re Dean Witter Partnership Litig.*, No. 14816, 1998 Del. Ch. LEXIS 133 (Del. Ch. Ct. July 17, 1998):

> Under the doctrine of **inherently unknowable injuries**, the running of the statute of limitations is tolled while the discovery of the existence of a cause of action is a practical impossibility. For the limitations period to be tolled under this doctrine, there must have been no observable or objective factors to put a party on notice of an injury, and plaintiffs must show that they were blamelessly ignorant of the act or omission and the injury. Often, plaintiffs can establish "blameless ignorance" by showing justifiable reliance on a professional or expert whom they have no ostensible reason to suspect of deception. This doctrine tolls the limitations period until a plaintiff had "reason to know" that a wrong has been committed.
>
> . . .
>
> The statute of limitations will also be tolled if a defendant engaged in **fraudulent concealment** of the facts necessary to put a plaintiff on notice of the truth. Unlike the doctrine of inherently unknowable injuries, fraudulent concealment requires an affirmative act of concealment by a defendant-an "actual artifice" that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry. "Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute [of limitations]." Where there has been fraudulent concealment from a plaintiff, the statute is suspended until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence.
>
> . . .
>
> Under the theory of **equitable tolling**, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary. Underlying this doctrine is the idea that "even an attentive and diligent [investor] relying, in complete propriety, upon the good faith of [fiduciaries] may be completely ignorant of transactions that . . .

> constitute self-interested acts injurious to the [Partnership]." This doctrine tolls the limitations period until an investor knew or had reason to know of the facts constituting the wrong.

Id. at *19 (footnotes with internal citations omitted; emphasis supplied.)

Viewing the transactions described in the Complaint, and giving every favorable inference to Swiss Farm, results in a scenario whereby Costantini, as CEO and Board Member, was entrusted by Swiss Farm to negotiate two commercial leases for new Swiss Farm stores, and he used this position of trust not to faithfully represent Swiss Farm's interests, but rather to enrich himself by colluding with the other Defendants to foist unreasonably high rents onto Swiss Farm and placing lease terms and conditions on Swiss Farm that make it realistically impossible for Swiss Farm to extract itself from the leases except at extreme financial peril (thus requiring it as a practical matter to continue paying those unreasonably high rents), and that he did so with full knowledge of what he was doing. In the process of doing this, Costantini – acting along with the other Defendants - - (Complaint ¶ 23; A13) kept disinterested Board Members in the dark, and actively concealed *i.e.*, hid, the Mancini letter which warned against doing exactly what he did: commit Swiss Farm to those leases. The Mancini letter was discovered by Swiss Farm in October of 2011, and the Complaint in this case was filed within months of its discovery, well within the statute of limitations (assuming its running was tolled).

(A) Tolling - Inherently unknowable injuries.

Under the doctrine of inherently unknowable injuries, the running of the statute of limitations is tolled while the discovery of the existence of a cause of action is a practical impossibility. Often, plaintiffs can establish "blameless ignorance" by showing justifiable reliance on a professional or expert whom they have no ostensible reason to suspect of deception. This doctrine tolls the limitations period until a plaintiff had "reason to know" that a wrong has been committed.[5] Here, Swiss Farm had no reason to know that a wrong was committed against it until it discovered the Mancini letter, which Costantini, a fiduciary in whom Swiss Farm justifiably relied to represent its best interests in the lease negotiations, had concealed, and which provided evidence that Costantini had actual knowledge that the terms and conditions to which he was binding Swiss Farm by signing the leases on its behalf were commercially unreasonable and could have financially disastrous consequences to Swiss Farm. Thus, the running of the statute of limitations should be tolled until the Mancini letter was found by Swiss Farm.

(B) Tolling - Fraudulent concealment.

The statute of limitations will also be tolled if a defendant engaged in fraudulent concealment of the facts necessary to put a plaintiff on notice of the truth. Unlike the doctrine of inherently unknowable injuries, fraudulent concealment requires an affirmative act of concealment by a defendant - an "actual artifice" that prevents a plaintiff from gaining knowledge of the facts or some

---

5 In re Dean Witter Partnership Litig., 1998 Del. Ch. LEXIS 133, * 20.

misrepresentation that is intended to put a plaintiff off the trail of inquiry.[6] The Swiss Farm Complaint specifically alleges that Costantini not only ignored the warnings in the Mancini letter against agreeing to the lease terms and conditions to which Costantini committed Swiss Farm - warnings given by an attorney experienced in the field who was retained by Swiss Farm for precisely that purpose - but also actually *concealed* those warnings from disinterested Members of the Swiss Farm Board (Complaint ¶¶ 18-20; A11, A12), along with the details of the lease negotiations. Paragraph 20 of the Complaint alleges that:

> Defendant Costantini ignored Mr. Mancini's letter, and concealed it from the disinterested members of the Swiss Farm Board of Managers. Mr. Mancini's letter was not found until October of 2011, at which point Swiss Farm became aware of the wrongs perpetrated upon it.

The common meaning of that paragraph is that Costantini took active measures – an "actual artifice" – that prevented Swiss Farm from gaining knowledge of the facts, thus demonstrating an intent to put Swiss Farm off the trail of inquiry. Therefore, the running of the statute of limitations should be tolled until the Mancini letter was found by Swiss Farm.

(C) Equitable Tolling.

In *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. Ct. 2008), the Court explained the doctrine of equitable tolling thusly:

> Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good

6 In re Dean Witter Partnership Litig., 1998 Del. Ch. LEXIS 133, *21.

> faith of a fiduciary. Underlying this doctrine is the idea that even an attentive and diligent investor may rely, in complete propriety, upon the good faith of fiduciaries.

The purpose of the doctrine of equitable tolling was explained by the Court in *In re Am. Int'l Group Inc.*, 965 A.2d 763, 813 (Del. Ch. Ct. 2009), as follows:

> The obvious purpose of the equitable tolling doctrine is to ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing.
>
> * * *
>
> Many of the worst acts of fiduciary misconduct have involved frauds that personally benefited insiders as an indirect effect of directly inflating the corporation's stock price by the artificial means of cooking the books. To allow fiduciaries who engaged in illegal conduct to wield a limitations defense against stockholders who relied in good faith on those fiduciaries when their disclosures provided no fair inquiry notice of claims would be inequitable.

The Complaint in this case alleges facts that completely satisfy the "obvious purpose" of the equitable tolling doctrine and call for its application here. Costantini was acting as a fiduciary – presumptively in good faith and competently – when he signed the leases and committed Swiss Farm to them. In reality, however, he was not, because the Mancini letter shows that he had actual knowledge of the financially disastrous consequences to which he was committing Swiss Farm. Costantini successfully kept the information disclosed by the Mancini letter from disinterested members of the Swiss Farm Board by concealing it. The fact that he was successful in his concealment should not be permitted to reward his actions by letting him wield a limitations defense against the very plaintiff that relied in good

faith on him. The doctrine of equitable tolling should apply to toll the running of the statue of limitations until the Mancini letter was found by Swiss Farm in October of 2011.

F. CONCLUSION

To withstand a Motion to Dismiss, a Plaintiff is only required to state a claim, not to plead the evidence upon which the claim is based. *Branson v. Exide Elecs. Corp.*, 1994 Del. LEXIS 129 at *7. Here, the Complaint states a claim of breach of fiduciary duties under circumstances facially sufficient for the tolling of the statute of limitations, making the Complaint in this case timely filed. Whether Swiss Farm can support its claims (and the applications of the tolling doctrine) with sufficient evidence can be determined only after Swiss Farm has had the opportunity to conduct discovery. The dismissal of this entire case at this stage of the proceedings, before Swiss Farm has even had the chance to take discovery, was incorrect, and the Chancery Court's granting of the motion to dismiss should be reversed and this case remanded for further proceedings.

Dated: January 3, 2013

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SWISS FARM STORES ACQUISITION LLC,	:	
	:	**No.: 615, 2012**
Plaintiff Below,	:	
Appellant,	:	**Court below:**
	:	**Chancery Court of Delaware**
v.	:	**In and for New Castle County**
	:	
REDEEMED PROPERTIES, LP.,	:	**The Honorable Vice Chancellor**
JAMES P. KAHN and	:	**Sam Glasscock, III**
EDMOND D. COSTANTINI, JR.	:	
	:	
Defendants Below,	:	
Appellees.	:	

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify on this 3rd day of January, 2013, that **Appellant Swiss Farm Stores Acquisition, LLC's Opening Brief and Appellant Swiss Farm Stores Acquisition, LLC's Appendix to Opening Brief, Volume I and Volume II** will be hand delivered on January 3, 2013 to the following counsel:

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