EFiled: Feb 26 2013 10:45AM EST
Filing ID 49796727
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, JAMES P. KAHN and EDMOND D. COSTANTINI, JR.,	:	The Honorable Vice Chancellor Sam Glasscock, III
	:	
Defendants Below, Appellees.	:	

CORRECTED
DEFENDANTS BELOW, APPELLEES' ANSWERING BRIEF

McCarter & English, LLP
Michael P. Kelly (DE# 2295)
Andrew S. Dupre (DE# 4621)
405 N. King Street, 8th Floor
Renaissance Centre
Wilmington, DE 19801
(302) 984-6300 (phone)
(302) 984-6399 (fax)

Attorneys for Defendants Below, Appellees,

Dated: February 26, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE AND STAGE OF PROCEEDINGS

As to Defendant-Appellee Edmond Costantini Jr., this was a one-count action alleging breach of the fiduciary duty of loyalty[1]. The Court of Chancery, Vice Chancellor Glasscock, held that the Complaint was time-barred on its face and dismissed based on 10 Del. C. §8106(a): Delaware's three-year statute of limitations for fiduciary claims. As explained *post*, the Complaint alleged that Mr. Costantini acting as CEO of Plaintiff-Appellant Swiss Farms Stores Acquisition LLC (hereinafter "Swiss Farms") signed two interested-party leases in 2006 and 2007, but the Complaint was not filed until 2012. Vice Chancellor Glasscock further held that the Complaint did not facially state any basis for tolling the statute of limitations. The order of dismissal was entered on October 22, 2012. A notice of appeal was filed on November 19, 2012. Appellant's opening brief was filed on January 2, 2013. This Court granted all parties' motion to extend the schedule for the answering brief on January 24, 2013. At that time, settlement of the entire dispute seemed imminent. However, the settlement collapsed on February 12, 2013, causing Mr. Costantini to timely file this Answering Brief.

[1] Defendants Below, Appellees Redemmed Properties LP, and James P. Kahn join in the Argument set forth herein

SUMMARY OF ARGUMENT

1. Plaintiff Below-Appellant's argument at paragraph 1 is denied. Mr. Costantini respectfully argues that the Chancery Court got this matter exactly right. The Complaint on its face admits that the sole claim arose in 2007 at the latest, but the Complaint was not filed until 2012 and presented no basis for tolling the relevant three-year statute of limitations. Dismissal was required and properly granted.

The ruling below was correct for at least two reasons. First, Swiss Farms knew 100% of the facts needed to make its duty of loyalty claims in 2007. It is conceded that Swiss Farms knew that Mr. Costantini was part owner of Redeemed in 2006 at the time the Swiss Farms board assigned him to negotiate the relevant leases. If *arguendo* Mr. Costantini was required to recuse himself from signing the leases (despite being assigned to negotiate the leases by the board), then the "injury" occurred the moment Mr. Costantini put pen to ink in 2006. Swiss Farms' alleged later "discovery" of a letter warning Mr. Costantini that the leases have negative economic terms is not relevant to the injury that Swiss Farms alleges it suffered: an interested-fiduciary instead of a committee of disinterested directors signed the leases. Phrased another way, Swiss Farms knew in 2007: (a) Mr. Costantini held an interest in Redeemed, (b) Mr. Costantini signed the leases, and (c) the terms of the

leases. That was all the information it needed to file a duty of loyalty claim, meaning the claim vested in 2007.

Second, the Complaint proffered nothing to suggest tolling of the statute of limitations. The Complaint does not acknowledge the limitations period or discuss any tolling theory. The Complaint contains only a single conclusory allegation that Mr. Costantini "concealed" an advisory letter, without any fact pleading of an "actual artifice". Then at oral argument, it was conceded that the letter was always sitting in Swiss Farms' corporate offices under its full custody and control. Swiss Farms, not Mr. Costantini, bore the burden to prove tolling. A single recitation of the word "concealed" supported by not a single pled fact constitutes a naked conclusion that cannot pass muster on Ch. Ct. R. 8.

STATEMENT OF FACTS

Swiss Farms is a Delaware LLC whose business is operating "drive-through grocery stores" primarily in southeast Pennsylvania. Compl. ¶1. Mr. Costantini was CEO of Swiss Farms from 2003 to 2007, and a board member from 2003 to 2008. Compl. ¶2. The Complaint alleged that Mr. Costantini acting in the capacity of CEO of Swiss Farms signed two leases in 2006 and 2007 (hereinafter "Leases"). Compl. ¶¶13-14. In the Leases, Defendant-below Redeemed Properties, LLC ("Redeemed") was the landlord and Swiss Farms was the tenant. *Id.* Mr. Costantini owns a non-controlling 10% interest in Redeemed. Compl. ¶5. He also owned a substantial equity holding in Swiss Farms. Compl. ¶4.

The Complaint alleged that the Leases favor Redeemed over Swiss Farms, and therefore that signing the Leases breached Mr. Costantini's fiduciary duty of loyalty as an officer and/or director of Swiss Farms. Compl. ¶25. The Complaint did not allege a breach of the duty of care, or that signing the Leases was an *ultra vires* act. Only the duty of loyalty was "in play".

Mr. Costantini defended on two grounds. First, Delaware's three-year statute of limitations for fiduciary claims facially barred the Complaint. Second, Swiss Farms released all possible claims against Mr. Costantini at the time he vacated his officer and board positions in 2007 and 2008, including specifically

interested-party lease claims. Vice Chancellor Glasscock only reached the first grounds - statute of limitations on the face of the Complaint - and did not consider Mr. Costantini's argument on the releases.

After Mr. Costantini moved to dismiss (but not in the Complaint), Swiss Farms requested tolling of the statute of limitations, based primarily on the doctrine of equitable tolling. The sole hook offered for that argument was that Swiss Farms allegedly "discovered" in 2011 a letter drafted by an attorney named Vincent Mancini in 2006 (hereinafter "Mancini Letter") advising Mr. Costantini of various terms and negotiating points he should consider while negotiating the Leases. Compl. ¶¶19-20. Swiss Farms did not attach the Mancini Letter to the Complaint and it is not part of the record below.[2]

Swiss Farms did not allege ignorance of that fact that Mr. Costantini owned 10% of Redeemed at the time he signed the Leases or that these Leases were interested-party transactions. At oral argument it was conceded that the Swiss Farms board in

[2] Mr. Costantini of course denies that he "ignored" the Mancini Letter. Compl. ¶20. Rather he used his best efforts to incorporate its terms into the Leases. Approximately half of the suggested terms from the Mancini Letter were incorporated, while other proffered terms were rejected by Redeemed. Mr. Costantini then used his reasonable business judgment, employing authority granted to him expressly by the Swiss Farms board, to sign the Leases.

fact knew that Mr. Costantini owned a minority interest in Redeemed:

> The Court: "Well, you have not alleged in the Complaint that the board was unaware that he was conflicted, correct?"
>
> Mr. Barrett: "That it correct. It is not alleged in the complaint. That is correct. What the evidence would show, if we got that far, is that the while the Board was aware that he had an interest in Redeemed, it was not aware of all the details[.]".[3] Transcript at A251.

Nor did the Complaint allege that Swiss Farms was ignorant of the existence of the Leases or the terms thereof. Again, the oral argument exchange on this point is telling:

> The Court: "The board was aware of what the rent payment was, correct?"
>
> Mr. Barrett: "Of course. Yes, but when things are working out, the rent payment doesn't mean that much if a store is working out. But when the store is not working out and when there is a need to close the store and we find out we can't close the store because it would result in a multi-million dollar judgment against us, that's quite a different story."[4] Transcript at A252-A253.

The Complaint also did not allege that the Mancini Letter was anywhere other than Swiss Farms' corporate offices at all relevant times, and it was conceded at oral argument that Swiss Farms in fact always possessed the Mancini Letter:

---

[3] In reality, Mr. Costantini's interest in Redeemed was disclosed to the board in writing before the Leases were negotiated.

[4] In fact, Swiss Farms CFO Alfred D'Iorio reviewed the terms of the Leases and reported his findings to the board.

> The Court: "What are the facts that [Swiss Farms] has that allow you to file a verified complaint that he [Mr. Costantini] concealed it [the Mancini Letter]?"
>
> Mr. Barrett: "That the particular letter was only found when we move, when we are in preparation for the move, and that the evidence will show that it was not where it should have been. It was not in the file. It was someplace else."
>
> The Court: "Where was it?"
>
> Mr. Barrett: "In the offices, in the filing cabinets of which there are many[.]".[5] Transcript at A254.

Instead in sum, the Complaint alleged that Swiss Farms wanted to escape the Leases circa 2011 (Transcript at A252-A253), reviewed its files for something to facilitate that escape (Transcript at A254), and found the Mancini Letter in its own files at that time.

---

[5] Though substantial time has elapsed since these transactions occurred (hence the statute of limitations bar), Mr. Costantini believes in good faith that the Mancini Letter was in files in Swiss Farms offices titled "Clifton Heights" and/or "Paoli Park", i.e. the internal names for the stores that sit in the properties governed by the Leases. Op. Br. at 6.

QUESTION PRESENTED

A. Whether 10 Del. C. §8106(a) facially barred the Complaint as a matter of law?

Suggested Answer: Yes.

B. Whether the Complaint presented any basis to toll the applicable statute of limitations?

Suggested Answer: No.

STANDARD & SCOPE OF REVIEW

The standard and scope of review for an appeal of a dismissal based on statute of limitations is *de novo* on the full record below "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)(*de novo* review affirming statute of limitations dismissal).

The standard of review for considering a Ch. Ct. R. 12(b)(6) motion to dismiss based on statute of limitations was well explained in *State ex rel. Brady v. Pettinaro*, 870 A.2d 513, 525 (Del. Ch. 2005):

> On a motion to dismiss, the timeliness of claims can be assessed on the basis of facts pled in the complaint, and dismissal is proper when the pled facts demonstrate that the claims are untimely. A court considering timeliness as a basis for a motion to dismiss must draw the same plaintiff-friendly inferences required in a 12(b)(6) analysis. This plaintiff-friendly stance does not govern assertion of tolling exceptions to the operation of a statute of limitations (or the running of the analogous period for purposes of a laches analysis), however. A plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception.

In this case, the parties agree that the relevant statute of limitations, applicable by laches, is 10 Del. C. §8106(a) (emphasis added):

> **No action to recover damages** for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal

chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit **between parties arising out of contractual or fiduciary relations**, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant **shall be brought after the expiration of 3 years from the accruing of the cause of such action**; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

MERITS OF THE ARGUMENT

The principal problem with Swiss Farms' Complaint was that the lynchpin of its case - its alleged "discovery" of the Mancini Letter in 2011 in its own files where it always was - is irrelevant to its only claim. There is no dispute on the following facts:

- Mr. Costantini owned a 10% non-controlling interest in Redeemed at the time he signed the Leases as CEO of Swiss Farms (Compl. ¶5);

- The Swiss Farms Board knew that Mr. Costantini owned a minority interest in Redeemed yet directed him to negotiate the Leases anyway[6] (Transcript at A251);

---

[6] Though not necessary to know to decide the appeal, some context may help frame the argument. Swiss Farms runs a unique business of "drive through grocery stores". That business requires free-standing special purpose buildings that resemble an odd cross between a bank and a gas station. The Swiss Farms business model prevents it from just renting off-the-shelf space such as a store in a strip mall. In 2006 when these Leases were negotiated, Swiss Farms was heavily leveraged. Commercial property developers demanded onerous lease terms to retrofit buildings for Swiss Farms, because Swiss Farms was the only conceivable tenant for the type of buildings it needs, and if it folded the landlord would be stuck with a quirky un-rentable building. The Board thus decided to negotiate the Leases with Redeemed, because the Kahn family owned equity in Swiss Farms and therefore was willing to rent buildings to the Company to help its expansion. However, the Kahn family insisted that other owners of Swiss Farms "put skin in the game" by taking a minority interest in Redeemed, to ensure the Kahn family would not alone bear the risk of Swiss Farms defaulting on the Leases. Mr. Costantini took a 5% equity stake in Redeemed at the Board's request in order to secure Redeemed's agreement to enter the Leases. That 5% stake was later increased to 10% when another Swiss Farms board member could not complete his equity buy-in due to a marital separation. Swiss Farms knew at all relevant times that Mr. Costantini owns a small piece of Redeemed - he

- Swiss Farms knew the terms of the Leases at all relevant times and could look at the Leases any time it cared to (Compl. ¶¶13-14; Transcript at A252-A253);

- Swiss Farms duly paid on the Leases from 2006 to present (*Id.*); and,

- Swiss Farms possessed the Mancini Letter at all relevant times (Transcript at A254).

The Leases are the same now as the day they were signed; if they are terrible now, then they were terrible in 2006. Swiss Farms always knew the terms of the Leases, and was fine with them for five (5) years. Compl. ¶¶13-14, Transcript at A252-A253. Only after the bottom fell out of the metro-Philadelphia commercial property market, and it decided it no longer wanted to run a store in East Goshen, did Swiss Farms apparently look in its own files to try to find some way to weasel out of the Leases. Transcript at A254.

The supposed "discovery" of the Mancini Letter might have been the basis of Swiss Farms filing suit, but it was not the basis of its claim. Instead, the claim was that Mr. Costantini should not have signed the Leases because he was conflicted by his 10% ownership interest in Redeemed. Compl. ¶¶16, 23, 25. Thus, argues the Complaint, Mr. Costantini should have recused himself, despite that the Swiss Farms board knew of his interest

---

bought it because the Board asked him to, and it was a mandatory condition to the transaction embodied by the Leases.

in Redeemed but instructed him to negotiate the Leases anyway, and that the Swiss Farms CFO reviewed all leases as part of his normal duties. *Id.*, Transcript at A251.

The single fact necessary to make that claim was known to Swiss Farms the moment the Leases were signed in 2006 and 2007: Mr. Costantini had ownership interests on both sides of the transaction. Compl. ¶¶16, 23, 25, Transcript at A251. The Mancini Letter adds absolutely nothing to the claim. By the Complaint's logic, Swiss Farms could have sued Mr. Costantini over the Leases in 2007 with or without the Mancini Letter, because Mr. Costantini was required to recuse himself from signing the Leases but did not do so. This was why Vice Chancellor Glasscock granted dismissal. Transcript at A259-A262.

Secondarily, Swiss Farms (not Mr. Costantini) bore the burden of advancing a reason for tolling on a Complaint that was facially time-barred. *Pettinaro*, 870 A.2d at 525 ("A plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception."). All three Delaware tolling doctrines - inherently unknowable injury, fraudulent concealment, and equitable tolling - are potentially applicable only until a reasonably diligent plaintiff would know it was injured. The Complaint presented nothing to suggest reasonable diligence by Swiss Farms. Rather, the Complaint conclusively

showed the opposite: giving Swiss Farms the benefit of every doubt, no one bothered to question the Leases until five years after signing.[7]

I. SWISS FARMS KNEW ALL THE FACTS NEEDED TO MAKE ITS CLAIM IN 2007.

The Complaint made only one claim against Mr. Costantini: breach of the fiduciary duty of loyalty. Compl. ¶¶26-29.

This is a single element claim asking one question: did Mr. Costantini stand on both sides of the Leases transaction? The parties agree that: (a) the answer is "yes" (Compl. ¶15), and (b) everyone knew that answer was "yes" at the time the Leases were signed. Transcript at A251. The alleged "injury" thus occurred the moment that Mr. Costantini put pen to ink in 2006: Mr. Costantini allegedly "owed" a recusal obligation that he did not meet. Compl. ¶¶15-16. Had Swiss Farms sued Mr. Costantini in 2007 on these Leases, he would have presented evidence both that the Leases were a rational exercise of his business

[7] Mr. Costantini finds his inclusion in this litigation to be a surprising showing a malice by the current Swiss Farms board. Swiss Farms cannot win against Mr. Costantini in this action; even if it had survived dismissal on statute of limitations, it would have lost on the contractual releases the parties signed in 2008. The point of the case appears to be to put an unwarranted, frivolous discovery expense onto Mr. Costantini as a negotiating point to get a lease concession from Redeemed.

judgment and that the Swiss Farms board ratified them.[8] But he was not required to present that evidence in 2012 because the Complaint was facially time-barred.

A simple hypothetical proves why this must be so. Assume *arguendo* that the Leases actually are terrible for Swiss Farms and charge "highly inflated rents", as the Complaint alleged. Compl. ¶¶21, 24. In month #1 of the Leases, Swiss Farms' CFO could have notified the board that the rents on these two Leases were "substantially higher than commercially available" (Compl. ¶24) and that something was clearly wrong. The board could then have reviewed the Leases, decided they were unfair on their face as the Complaint alleges, and sued Mr. Costantini on a duty of care or duty of loyalty claim. Only the Leases were necessary to make the claim.

To continue the hypothetical, Mr. Costantini would have defended a duty of loyalty claim on the business judgment rule, because the entire board including the disinterested directors ordered him to negotiate the Leases as part of his normal duties as CEO. Transcript at A251. But assume *arguendo* that for some reason Mr. Costantini instead had to prove entire fairness. The process was obviously fair because there is no dispute that the board knew in advance of Mr. Costantini's interest in Redeemed,

[8] In reality, the Swiss Farms CFO specifically informed the board of the relevant "go dark" clause of which Swiss Farms now complains.

but directed him to negotiate the Leases anyway. Transcript at A251. Presume further that Swiss Farms preserved its ability to complain about fair price by suing in month #1 of the Leases, without ratifying them by conduct. The parties then would have argued about what constitutes a contextually fair price for special-purpose building Leases in the metro-Philadelphia market given Swiss Farms' finances in 2006. Again, that argument could have happened with or without the Mancini Letter, and most likely would have presented a battle of expert testimony.

The above hypothetical shows why dismissal was proper. The Mancini Letter is not integral to Swiss Farms' duty of loyalty claim, and its "discovery" did not create or trigger the claim. Instead, the Mancini Letter, at best, is one possible piece of evidence on a potential claim that vested in 2007, but that Swiss Farms either never investigated or actively eschewed.

Vice Chancellor Parsons recently decided a very similar argument on equitable tolling of 10 Del. C. §8106(a) in favor of dismissal in *Microsoft Corp. v. VADEM, LTD*, 2012 WL 1564155 (Del. Ch. Apr. 27, 2012). In that case, Microsoft alleged that it knew an interested-party transaction had occurred, but the statute of limitations should be tolled to the later date of when it discovered the "bad financials" of the transaction due to the actions of an allegedly self-dealing fiduciary. Compare Compl. ¶16, to Microsoft, 2012 WL 1564155 at *3. Vice

Chancellor Parsons rejected that attempt to in essence double the statute of limitations period, holding the date of notice of the supposedly self-interested transaction is the correct start date for a statute of limitations analysis. *Id.* at *10.

The Complaint's confusion on what type of fiduciary claim it leveled also is important. The Opening Brief argues as if this was a duty of disclosure case, in which Mr. Costantini asked the shareholders for a vote on the Leases but fraudulently concealed the Mancini Letter from the disclosure packet. But that is not what the Complaint said - instead, the Complaint alleged that Mr. Costantini just signed the Leases himself as CEO. Compl. ¶¶13-14. And Swiss Farms disclaimed a negligence theory, presumably because the point of the case is to reach the landlord defendant Redeemed on an abetting claim.

That confusion left the Complaint pleading nothing. Mr. Costantini signed two interested-party Leases in 2006 and 2007. Compl. ¶¶13-14. Swiss Farms knew that, but did nothing until 2011. Transcript at A251. To the contrary, the Swiss Farms board ratified the Leases by paying rent on them for five years without complaint.[9] The statute of limitations expired in 2010,

[9] Swiss Farms is complaining, in essence, that the Leases are hard to breach. Breach of the duty of loyalty by Mr. Costantini is not the most likely explanation for that fact. Instead the most likely explanation is that Redeemed knew there was a substantial danger that Swiss Farms would try to breach the Leases, and demanded terms that prevented Redeemed from being left "holding

but the Complaint was filed in 2012. Nothing in the Complaint presented any reason why the Mancini Letter affected that analysis, and Vice Chancellor Glasscock correctly held that it did not.

II. THE COMPLAINT ADVANCED NO BASIS FOR TOLLING THE STATUTE OF LIMITATIONS

Somewhat oddly given its clear statement that the claims vested in 2007, the Complaint on its face did not mention tolling of the statute of limitations or any tolling doctrine. Instead, the Complaint seemed to rest all hope of tolling on the following sentence:

> Defendant Costantini ignored Mr. Mancini's letter, and concealed it from the disinterested members of the Swiss Farms Board of Managers. Compl. ¶20.

Unfortunately for Swiss Farms, that single sentence comes nowhere near the standard for a good faith showing on any tolling theory, and particularly on the element of reasonable diligence inherent in all three Delaware tolling doctrines. *See In re Dean Witter Partnership Litg.*, 1998 Del. Ch. LEXIS 133 at *19 (Del. Ch. Jul. 17, 1998).

A. The Complaint Made No Proffer Of Reasonable Diligence.

The gravamen of the Complaint was that sometime in 2011 Swiss Farms wanted to breach the Leases, realized that the

---

the bag" on a Swiss Farms breach. In other words, sophisticated real estate developer Redeemed presciently anticipated a Swiss Farms breach of contract and prudently protected itself.

penalties in the Leases are harsh, searched its files for some excuse to justify a breach, and there found the Mancini Letter. Transcript at A252-A255.

Swiss Farms, not Mr. Costantini, bears the burden of showing lack of inquiry notice:

> As the party asserting that tolling applies, plaintiffs bear the burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled. Significantly, if the limitations period is tolled under any of these theories, it is tolled only until the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury. Thus, the limitations period begins to run when the plaintiff is objectively aware of the facts giving rise to the wrong, i.e., on inquiry notice.

Dean Witter, 1998 Del. Ch. LEXIS 133 at *23.

The Complaint expressly alleges that the rents required by the Leases are "economically unreasonable", "unreasonably high", "substantially higher than commercially available, unreasonable and unfair", and "highly inflated". Compl. ¶¶21, 24. If that were true (it is not), a reasonably diligent Swiss Farms board would not have merrily paid such exorbitant rents from 2006 to 2011, especially when the Leases supposedly "plac[ed] Swiss Farms in complete and total financial jeopardy" if their terms were enforced. Compl. ¶21. Instead, a reasonably diligent board would have investigated the Lease files immediately to determine why it was paying such exorbitant rents in comparison to all of its other stores. The Complaint's repeated, express

allegations of exorbitant rents facially disproves any proffer of reasonable diligence, which the Complaint anyway did not even attempt to allege or discuss.

Phrased another way, the Complaint's allegations of "economically unreasonable" rents constituted an admission that Swiss Farms was on inquiry notice of its supposed claims on the date of the first Lease payment in 2006. That admission was not rebutted by anything else Swiss Farms alleged and is fatal to all of its tolling arguments.

B. The Alleged Injury Was Not Inherently Unknowable.

The standard for inherently unknowable injuries in fiduciary duty cases was stated in *In re: Tyson Foods Consol. S'holder Litg.*, 919 A.2d 563, 585 (Del. Ch. 2007):

> Under the doctrine of inherently unknowable injuries, the statute will not run where it would be practically impossible for a plaintiff to discover the existence of a cause of action. No objective or observable factors may exist that might have put the plaintiffs on notice of an injury, and the plaintiffs bear the burden to show that they were "blamelessly ignorant" of both the wrongful act and the resulting harm.

The Complaint offered no allegation that the injury in this case - being stuck in two bad Leases - was "practically impossible" for Swiss Farms to find. *Id.* Nor does the Complaint suggest lack of "objective or observable factors may exist that might have put the plaintiffs on notice of an injury." *Id.* Instead, the Complaint on its face showed that

Swiss Farms knew of the Leases, operated stores in the leased premises, and paid allegedly exorbitant rent on them for five (5) years. Compl. ¶¶13-14, 21, 24. An injury is not "inherently unknowable" just because a party did not bother to read or review a contract that it signed. For example in *Moore v. O'Connor*, 2006 Del. Super. LEXIS 336 at *13 (Del. Super. Ct. Aug. 23, 2006)(internal punctuation and citations omitted):

> One of the basic tenets of contract law is that a party is responsible for the terms of a contract they sign, even if unaware of the terms. A party to a contract cannot silently accept its benefits and then object to its perceived disadvantages, nor can a party's failure to read a contract justify its avoidance. To modify a quote to include the facts of our case; if [Plaintiff's] argument were followed to its logical extreme, a contracting party could radically redefine a contract simply by proving that he had not been informed of its stated terms in advance.

Swiss Farms comes nowhere near the standard of a blamelessly ignorant *Layton* plaintiff on the facts as stated by the Complaint. *Layton v. Allen*, 246 A.2d 794 (Del. 1968). Notably, Op. Br. at 18 argues the wrong standard for a *Layton* claim. The relevant inquiry is not, as the Opening Brief argues, when the Plaintiff "had reason to know a wrong had been committed". Op. Br. 18. Rather, the correct standard is when the Plaintiff was on inquiry notice <u>of his injury</u>. *Tyson Foods*, 919 A.2d at 585 ("No objective or observable factors may exist that might have put the plaintiffs on notice of an injury[.]");

Dean Witter, 1998 Del. Ch. LEXIS 133 at *23 (same). Were the Opening Brief correct, a party could sit on a known injury forever without conducting diligent investigation that would reveal its cause. That is not the law of Delaware. *See e.g. Morton v. Sky Nails*, 884 A.2d 480, 482 (Del. 2005)("the statute of limitations began to run on the date that the alleged negligence first manifests itself and becomes physically ascertainable".); *citing Greco v. University of Delaware*, 619 A.2d 900 (Del. 1993).[10]

C. The Complaint Pled No "Actual Artifice" To Support A Fraudulent Concealment Theory.

Delaware requires that fraud, including fraudulent concealment, be pled with particularity. Ch. Ct. R. 9. That

---

[10] The Opening Brief seems to offer this standard by misinterpreting the following sentence in *Dean Witter*, 1998 Del. Ch. LEXIS 133 at *22: "This [*Layton*] doctrine tolls the limitations period until a plaintiff had 'reason to know' that a wrong has been committed.". Chancellor Chandler cited *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. Ct. 1985) as the basis for that sentence, without further comment. *Pack & Process* was a roofing instillation malpractice case. The plaintiff warehouse owner had a bond from the roof manufacturer by which a third party repair company made normal wear-and-tear repairs. The third-party made numerous repairs that it incorrectly attributed to normal wear-and-tear. Once the bond was exhausted, the plaintiff hired a different company to make other repairs. That second company discovered defective roofing materials and improper installation. The Superior Court analogized the case to medical malpractice, considering the plaintiff unable to know whether the roof was leaking due to ordinary wear in which case there was no injury, or due to negligence, until he received a professional diagnosis from a new roofer. Thus, both *Dean Witter* and *Pack & Process* fit squarely within the original *Layton* standard for time of discovery based on notice of injury, not notice of wrongdoing.

standard is still more particular when attempting to plead fraudulent concealment to defeat an otherwise clear statute of limitations bar:

> Similarly, the statute of limitations may be disregarded when a defendant has fraudulently concealed from a plaintiff the facts necessary to put him on notice of the truth. Under this doctrine, a plaintiff must allege an affirmative act of "actual artifice" by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth.

Tyson Foods, 919 A.2d at 585 (internal citations omitted).

The Complaint offered no such pleading. Again, the entire tolling argument appears to rest on a single sentence: "Defendant Costantini ignored Mr. Mancini's letter, and concealed it from the disinterested members of the Swiss Farms Board of Managers." Compl. ¶20. No particulars were proffered, and even now none are apparent. For example, Mr. Costantini obviously did not destroy the Mancini Letter or take it home with him when he resigned as CEO in 2007, because it was found sitting in Swiss Farms' files in 2011. Transcript at A254.

Vice Chancellor Glasscock correctly held that hollow recitation of the word "concealed" in one sentence of the Complaint constitutes a naked conclusion, not pleading of an "actual artifice" with particularity as required by Ch. Ct. R. 9. Transcript at A261 (The Court: "So the allegations that I read are the only ones relevant to tolling, in a conclusory

fashion allege that Costantini concealed lawyer Mancini's letter from the disinterested board. Now, that is a conclusory allegation."). Naked conclusions do not survive motions to dismiss. *Id.*, *see also* Ch. Ct. R. 8; *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006)("A trial court is not, however, required to accept as true conclusory allegations without specific supporting factual allegations. Moreover, a trial court is required to accept only those reasonable inferences that logically flow from the face of the complaint and is not required to accept every strained interpretation of the allegations proposed by the plaintiff.").

D. The Complaint Did Not Establish Equitable Tolling

Finally, the Complaint did not even attempt to establish equitable tolling. As described in *Tyson Foods*, 919 A.2d at 586 (internal citations and punctuation omitted):

> [T]he doctrine of equitable tolling stops the statute from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary. No evidence of actual concealment is necessary in such a case, but the statute is only tolled until the investor knew or had reason to know of the facts constituting the wrong. … [A] plaintiff bears the burden of showing that the statute was tolled, and relief from the statute extends only until the plaintiff is put on inquiry notice. That is to say, no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong. Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the

dilatory plaintiff who was not or should not have been fooled.

Again, the parties agree that it was known to all that Mr. Costantini had ownership interests on both sides of the Leases transaction (with a far more substantial holding in Swiss Farms than Redeemed) at the time of signing. Transcript at A251. The relevant question on equitable tolling thus is whether a reasonably diligent plaintiff - in this case the Swiss Farms board - would have bothered to read the Leases at any time during the three-year limitations period. *Tyson Foods*, 919 A.2d at 586. In other words, would Swiss Farms have any chance of proving reasonable reliance on the facts as alleged in the Complaint? *Id.* The Complaint's allegation that Swiss Farms was writing an extortionate rent check on these Leases every month for five years also must color that analysis. Compl. ¶¶21, 24.

Swiss Farms undid itself on this argument without any help from Mr. Costantini. The filings below and the Opening Brief on appeal repeatedly state that Swiss Farms thought Mr. Costantini acted negligently in signing the Leases, but did nothing about it for five (5) years:

> "Thus, rather than Costantini having acted in good faith and having simply made a mistake, Swiss Farms learned for the first time in 2011 that Costantini had been specifically warned of potentially harmful and damaging effects of the very same lease terms and conditions that have proven Mr. Mancini's letter prophetically correct[.]". Op. Br. at 9.

***

"Thus, rather than Costantini being merely incompetent, Swiss Farms learned for the first time in October 2011 that Costantini had been specifically warned of the potentially harmful and damaging effects of the very same lease terms[.]". Answering Br. at *4.

***

Mr. Barrett: "We could very well have believed, and we did believe, that all right he [Mr. Costantini] made a bad deal. We put him out there to do the deal, and he did a bad deal. We are big boys. We can stand it." Transcript at *17.

***

Mr. Barrett: "[I]n the stage of the proceeding, I think we are entitled to the presumption that we thought he was simply incompetent, made a bad deal. Nothing nefarious about that." Transcript at *19.

***

The Court: "Well, you have not alleged in the Complaint that the board was unaware that he was conflicted, correct?"

Mr. Barrett: "That it correct. It is not alleged in the complaint. That is correct. What the evidence would show, if we got that far, is that the while the Board was aware that he had an interest in Redeemed, it was not aware of all the details[.]". Transcript at *19.

***

The Court: "The board was aware of what the rent payment was, correct?"

Mr. Barrett: "Of course. Yes, but when things are working out, the rent payment doesn't mean that much if a store is working out. But when the store is not working out and when there is a need to close the store and we find out we can't close the store because

> it would result in a multi-million dollar judgment against us, that's quite a different story." Transcript at *20-21.

Swiss Farms did not allege that it "reasonably relied upon the competence and good faith of a fiduciary" such that equitable tolling applies. *Tyson Foods*, 919 A.2d at 586. Swiss Farms has represented on at least five (5) occasions that it always thought the Leases on their face showed Mr. Costantini to be "incompetent". *Ante*. Taking its allegations at face value, Swiss Farms thought the Leases were a "mistake" and a "bad deal" the moment they were signed, but simply did not think that "mistake" was worth suing over until it decided it wanted to breach the Leases for other business reasons in 2011. Transcript at A252-A253. That is not Mr. Costantini's fault or problem, and is not a legitimate basis for equitable tolling.

CONCLUSION

The maxim "Equity aids the vigilant, not those who slumber on their rights" clearly applies to this case. *IAC / InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011). Appellees respectfully request that this honorable Court AFFIRM the judgment of the Court of Chancery in this matter.

McCARTER & ENGLISH, LLP

/s/ Michael P. Kelly
Michael P. Kelly (DE# 2295)
Andrew S. Dupre (DE# 4621)
405 N. King Street, 8th Floor
Renaissance Centre
Wilmington, DE 19801
(302) 984-6300 (phone)
(302) 984-6399 (fax)

Attorneys for Defendants Below, Appellee, Edmond D. Constantini, Jr.

Joining in the Argument set forth herein:

Young, Conaway Stargatt & Taylor LLP

/s/ Kathaleen St. J. McCormick
Danielle Gibbs (No. 3698)
Kathaleen McCormick (No. 4579)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600 (phone)
(302) 576-3556 (fax)

Attorneys for Defendants Below, Appellees Redeemed Properties LP and James P. Kahn