



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  
 : Sam Glasscock, III  
 :  
 JAMES P. KAHN and :  
 EDMOND D. COSTANTINI, JR. :  
 :  
 :  
 Defendants Below, :  
 Appellees. :

PLAINTIFF BELOW, APPELLANT'S REPLY BRIEF

Dated: March 5, 2013

REGER RIZZO & DARNALL LLP

By: /s/ Louis J. Rizzo, Jr.  
Louis J. Rizzo, Jr.  
(No. 3374)  
1001 Jefferson Street,  
Suite 202  
Wilmington, Delaware 19801  
(302) 652-3611  
*Attorney for Plaintiff  
Below-Appellant, Swiss Farm  
Stores Acquisition, LLC*

and

John J. Barrett, Jr.,  
(Admitted *pro hac vice*)  
Cira Centre, 13<sup>th</sup> Floor  
2929 Arch Street  
Philadelphia, PA 19104  
(215) 495-6500  
*Attorney for Plaintiff  
Below-Appellant, Swiss Farm  
Stores Acquisition, LLC*

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ARGUMENT

Defendants' Answering Brief is replete with factual arguments inappropriate for consideration on a motion to dismiss and is in reality a thinly-disguised argument for summary judgment without Swiss Farm having had the opportunity to conduct discovery. Moreover, the Answering Brief makes erroneous references to the Complaint when it states at page 5 that:

The sole hook offered for that argument [Swiss Farm's tolling argument] was that Swiss Farms [sic] 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.

Actually, the allegations in question are contained in paragraphs

19 and 20 of the Complaint and state as follows:

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.

What the Complaint (¶¶ 19-20, plus ¶¶ 18 and 20) actually says is that (1) Mr. Mancini, a lawyer experienced with commercial leases, wrote a letter to Mr. Costantini analyzing the then-proposed Lease terms and conditions on behalf of Swiss Farm, and pointed out the many provisions thereof that were highly unfavorable, and potentially financially catastrophic, to Swiss Farm; and, (2), that Costantini not only ignored the letter, but that he then concealed it from the disinterested members of the Swiss Farm Board of Managers.<sup>1</sup> These allegations are significant because the Complaint goes on to allege claims of breach of a duty of loyalty against the individual defendants, Costantini and Kahn, and aiding and abetting such breaches against entity-defendant Redeemed Properties. The allegations deal with an essential element of a breach of the duty of loyalty claim - intent. The Mancini letter shows that Defendant Costantini *knew*

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<sup>1</sup> Paragraph 20 continues by alleging that Mr. Mancini's letter was not found until October of 2011, at which point Swiss Farm

the harm he was causing Swiss Farm, because the Mancini letter told him so, before he committed Swiss Farm to the leases. The significance of the letter is far more than merely raising "negotiating points."

In *Feeley v. NHAOCG, LLC*, 2012 Del. Ch. LEXIS 274,\*24 (Del. Ch. Nov. 28, 2012), the Chancery Court noted:

As the Delaware Supreme Court recognized in *Gatz*, the long line of Chancery precedents holding that default fiduciary duties apply to the managers of an LLC are not binding on the Supreme Court, but are appropriately viewed as *stare decisis* by this Court [Chancery Court]. *Gatz*, 2012 Del. LEXIS 577, 2012 WL 5425227, at \*10. [\*25] Although the Delaware Supreme Court determined that the Chancellor should not have reached the question of default fiduciary duties, his explanation of the rationale for imposing default fiduciary duties remains persuasive, at least to me. In citing the Chancellor's discussion I do not treat it as precedential, but rather afford his views the same weight as a law review article, a form of authority the Delaware Supreme Court often cites. See, e.g., 2012 Del. LEXIS 577, [WL] at \*10 n.73, \*12 n.89.

For reasons that were explained at greater length by the Chancellor, the Delaware Limited Liability Company Act (the "LLC Act") contemplates that equitable fiduciary duties will apply by default to a manager or managing member of a Delaware LLC. Section 18-1104 states that "[i]n any case not provided for in this chapter, the rules of law and equity . . . shall govern." 6 Del. C. § 18-1104. Like the Delaware General Corporation Law, the LLC Act does not explicitly provide for fiduciary duties of loyalty or care; consequently, the traditional rules of law and equity govern. See *Auriga*, 40 A.3d at 849-56. "A fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment [\*26] of another or where a special duty exists on the part of one person to protect the interests of another." *Metro Ambulance, Inc. v. E. Med. Billing, Inc.*, 1995 Del. Ch. LEXIS 84, 1995 WL 409015, at \*2 (Del. Ch. July 5, 1995) (quoting *Cheese Shop Int'l, Inc. v. Steele*, 303 A.2d 689, 690 (Del. Ch. 1973), rev'd on other grounds 311 A.2d 870 (Del. 1973)). The managing member of an LLC "is vested with discretionary power to manage the business of the LLC" and "easily fits the definition of a fiduciary." *Auriga*, 40 A.3d at 850-51.

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became aware of the wrongs perpetrated against it.

The Complaint alleges that Defendant Costantini acted as the managing member of Swiss Farm (Complaint, ¶4; he was referred to as the Swiss Farm Chief Executive Officer) and he was entrusted by the Swiss Farm Board of Managers to act in the best interests of Swiss Farm. Costantini clearly took on the role of a fiduciary to Swiss Farm when he acted on its behalf.

In addition, The Delaware LLC Act provides:

A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; *provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.*

6 Del. C. § 18-1101(e); Emphasis supplied.

At the very least, therefore, Costantini had the duty to act with good faith and fair dealing in representing the best interests of Swiss Farm when he entered into the two related-party lease transactions for new Swiss Farm stores.

Contrary to the reasoning of the Court below, and the argument in the Answering Brief, the elements of Swiss Farm's cause of action for breach of the duty of loyalty were more than knowing merely that (1) Costantini had an ownership interest in Redeemed, and (2) that the terms of the leases to which he bound Swiss Farm were commercially unreasonable. There is also a third element that is required: the Costantini was not acting in good faith. Making bad deals and signing leases harmful to Swiss Farm

do not alone indicate bad faith and disloyalty.<sup>2</sup>

When Swiss Farm discovered the Mancini letter that Costantini had hidden from it, it then had reason to know that Costantini *had actual knowledge* (because the Mancini letter told him so) that what he was doing was so potentially harmful to Swiss Farm and was contrary to the usual lease terms and conditions, and it was only then that Swiss Farm had reason to know that Costantini was not acting in good faith and was being disloyal to Swiss Farm. It was not until that missing third element was known or knowable to Swiss Farm that the statute of limitations should begin to run.<sup>3</sup> The Mancini letter provided the required third element, but Costantini concealed that letter from Swiss Farm and therefore concealed the existence of that third element from it.

The Complaint alleges Costantini "ignored Mr. Mancini's letter, and concealed it from the disinterested members of the Swiss Farm Board of Managers." Complaint, ¶20. While ignoring the letter may be a passive action, concealing it from the disinterested members of the Swiss Farm Board is an affirmative act to keep it from the attention of a Board that would have stopped the transactions before the leases were signed. Complaint, ¶23.

#### **CONCLUSION**

The Complaint pleads a claim of breach of the duty of

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<sup>2</sup> Among other possibilities, they may simply indicate incompetence.

<sup>3</sup> The Complaint alleges, in ¶20, that the Mancini letter was not found by Swiss Farm until October of 2011.



loyalty by a defendant who was clearly acting in a fiduciary capacity to Swiss Farm, and who violated his duty of loyalty by colluding with the remaining defendants to extract personal gain from Swiss Farm, and bind it to commercially unreasonable leases with financially fatal consequences for breach (elimination of the landlord's duty to re-let, and confession of judgment clauses for accelerated rents). Costantini acted affirmatively to conceal from Swiss Farm the evidence of his intentional wrongful acts. The statute of limitations should be tolled until Swiss Farm found that letter in October of 2011 (Complaint, ¶20).

Dated: March 5, 2013

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr.  
Louis J. Rizzo, Jr.  
(No.3374)  
1001 Jefferson Street,  
Suite 202  
Wilmington, Delaware 19801  
(302) 652-3611  
*Attorney for Plaintiff  
Below-Appellant, Swiss Farm  
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John J. Barrett, Jr.,  
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Cira Centre, 13<sup>th</sup> Floor  
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify on this 5th day of March, 2013, that I caused a copy of **Plaintiff Below, Appellant Swiss Farm Stores Acquisition, LLC's Reply Brief** to be served via electronic and/or first-class mail, postage pre-paid upon the following counsel:

Kathleen St. J. McCormick  
1000 North King Street  
Wilmington, DE 19801

Michael P. Kelly, Esquire  
Andrew S. Dupre, Esquire  
McCarter & English  
405 North King Street, 8<sup>th</sup>  
Floor  
Wilmington, DE 19801

Dated: March 5, 2013

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr., Esquire  
Louis J. Rizzo, Jr. (No.3374)  
1001 Jefferson Street, Suite 202  
Wilmington, Delaware 19801  
(302) 652-3611  
Attorney for Plaintiff Below-  
Appellant, Swiss Farm Stores  
Acquisition, LLC