ORIGINAL

1/5

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COIJNTY

FRANK C. WHITTINGTON, II,

Plaintiff,

v.

THE FARM CORPORATION, THOMAS D. WHITTINGTON, JR., RICHARD WHITTINGTON, L. FAITH WHITTINGTON, DOROTHY W. MINOTTI, THE ESTATE OF DOROTHY B. WHITTINGTON, WHITTINGTON LTD., DOVE'S NEST L.L.C., and FROG HOLLOW, L.L.C.,

Defendants.

C.A. NO. 17380

CONSOLIDATED

DEFENDANTS' TRIAL BRIEF

James S. Green, Esq. DE#0481
SEITZ, VAN OGTROP & GREEN, P.A.
222 Delaware Avenue, Suite 1500
P. 0. Box 68
Wilmington, DE 19899
(302) 888-0600

and

Jeffrey M. Weiner Esq. DE#0403
1332 King Street
Wilmington, DE 19801

Attorneys for Defendants

Date: June 7, 2001

TABLE OF CONTENTS

TABLE OF CITATIONS

State Cases

State Statutes

NATURE AND STAGE OF PROCEEDINGS

This is a consolidated proceeding involving three separate actions tiled by Plaintiff Frank C. Whittington ("Frank") against his four siblings, Richard, Thomas, Dorothy and Faith and the family corporations in which they are all shareholders: Whittington, Ltd. and Farm Corporation, as well as Faith as Executrix of their mother's Estate. Defendants' have filed a counterclaim against Frank.

Trial is scheduled to commence June 11, 2001. This is Defendants' Trial Brief.

STATEMENT OF FACTS

The pertinent facts are contained in Article II of the Pretrial Stipulation filed with the Court on May 23, 2001. Additional pertinent facts are set forth in the Argument sections below.

ARGUMENT

I. THE FOUR INDIVIDUAL DEFENDANTS ARE EACH ENTITLED 'TO THE 10 ADDITIONAL LIMITED SHARES THEY PURCHASED IN-JUNE 1994

Following Mr. Whittington's death in September, 1993, Frank, Tom, Richard, Dottie and Faith became directors of Limited and Farm Corp. The five siblings and Mrs. Whittington were the only directors of these two companies. Mrs. Whittington resigned as director on June 26, 1994 (Pretrial Stipulation, Article II ("PTS II"), ¶15). Defendants contend that she was reinstated by the Board on June 27, 1994 (PX #9)(DX #13 & DX #36).

Frank worked for his father at the sand and gravel operations for several years prior to his father's death and assumed the supervision of the day-to-day activities of the sand and gravel operations after his father's death in September 1993 (PTS II, para. 16).

Defendants contend that at the March 1994 Board meeting, discussions were conducted in regard to Frank's poor performance as manager of th.e sand and gravel operation and its detrimental impact on the health of the business (DX #35).

On June 25, 1994, there was a joint meeting of the Board of Directors of the Whittington family entities. All of the directors attended this meeting. At that meeting, Tom proposed that Frank be terminated as the general manager of the sand and gravel operations (DX #13)(DX #36). Defendants contend that Tom's proposal was prompted by prior concerns expressed about Frank's performance as manager. Defendants further contend that after discussion, Tom then proposed that Frank be retained as VP and General Manager under certain conditions, including, but not limited to, Frank's working a minimum number of hours, consulting with Dick, etc., or alternatively, that Frank be placed on paid leave of

absence, and that Frank elected to resign with immediate payment of lump sum severance pay subject to leaving matters at the company in good order (Pp. 2 & 3 of DX #13 and DX #36). Frank contends that he elected to resign. The meeting was then adjourned until the next day (PTS II, para. 18).

Mrs. Whittington, Tom, Richard, Dottie, and Faith attended the meeting on June 26, 1994. The minutes do not reflect that Frank attended the meeting. The individual defendants contend that Frank was in attendance at this meeting. At the start of the meeting, Mrs. Whittington explained that she was upset with Frank's resignation, she handed out $10,000 checks to Tom, Richard, Dottie, Faith and, defendants contend, Frank, and then she resigned as a director and officer of all the family companies (P. 4 of DX #13 and DX #36). She and, defendants contend, Frank then left the meeting (PTS II, para. 19).

The remaining board members - Tom, Richard, Dottie and Faith - met for approximately thirty minutes following Mrs. Whittington's departure. The meeting was then adjourned. Defendants contend it was adjourned until the next day (PTS II, para. 20).
In a note dated June 27, 1994 regarding the $10,000 checks distributed the day before, Mrs. Whittington writes as follows:

> "Checks are my gift to you all for 1994. Suggest you put your money where your mouth is and start a Whittington Lt d [sic) bank account as W S & G will be broke after Frank's check."

Tom, Richard, Dottie and Faith met again on the following day, June 27, 1994 at Faith's home on Walther Road near the sand and gravel company (DX #13 & DX #36). Defendants contend that the Board meeting continued on June 27, 1994 at Faith's home near the sand and gravel company in order to facilitate Frank's participation. Frank did not attend

and participate. Defendants contend that Frank elected not to attend and participate. On that day, the individual defendants passed resolutions designed to implement Mr. Whittington's plan to divide Limited (f/k/a Old Sand and Gravel) into two companies - one holding the sand and gravel operations and the other holding the undeveloped land and rental properties. The individual defendants decided to implement Mr. Whittington's plan to spin-off the assets used in the sand and gravel operations to another company and to leave the undeveloped real property and rental properties in Limited. Defendants contend that the resolutions were passed, and the decision to implement Mr. Whittington's plan as set forth above was made, in their capacity as members of the Board of Directors (PTS II, para. 22). The minutes of the June 27 meeting reflect that the individual Defendants voted to spin-off from Limited "all current assets used in the production of Sand and Gravel and related activities, One Hundred Thousand Dollars ($lOO,OOO.OO) and the land, on the order of forty acres" (Pp. 5, 6, & 7 of DX #13 & DX #36). Defendants contend that the individual defendants so voted in their capacity as members of the Board of Directors (PTS II, para. 23).

New Sand and Gravel, which prior to June 1994 had been a shell entity, was the recipient of the assets spun-off from Limited. Each shareholder of Limited received shares in New Sand and Gravel as a result of the spin-off and the amount of stock each received in New Sand and Gravel was identical to the total amount of stock each held in Limited (PTS II, para. 24).

The minutes from the June 2.7 meeting also reflect that the individual defendants "resolved to accept up to $10,000 from each mernber of the Board in return for stock" (P. 7 of DX #13 & DX #36). Defendants contend that this resolution was passed in their capacity

as members of the Board of Directors and explicitly provide that "Thomas was to ask Frank for a like contribution based on a similar stock purchase". The parties are in dispute as to the timing of the issuance and the entity in which the stock was issued (PTS II, para. 25).

Frank contends that the individual defendants issued shares to themselves in New Sand and Gravel after the spin-off and that no shares of stock were issued in Limited (PTS II, para. 26).

The individual defendants contend that in accordance with Mrs. Whittington's suggestion that they invest their money in Limited, they did so invest the $10,000 they received (DX #14) and voted to issue additional shares of Limited voting stock to any member of the Board who so invested. prior to the spin-off and, as a result of the spin-off, they also received mirror image shares in New Sand and Gravel (PTS II, para. 27).

During the third day of the June 1994 meeting, Tom, Dottie and Faith each gave Richard the $10,000 check they had received from Mrs. Whittington. (PTS II, para. 28). These admitted facts are consistent with the minutes of the June 1994 meeting (DX #14). Individual defendants, however, specifically recall handling their individual $10,000 checks to Richard immediately after Mrs. Whittington gave them the checks on the second day of the June 1994 meeting. This money, along with Richard's $10,000 check, was used to purchase the additional shares of stock (PTS II, para. 28).

Frank did not invest his $10,000 for additional shares of stock (PTS II, para. 28). Instead, Frank endorsed and deposited Mrs. Whittington's $10,000 check in his Beneficial National Bank Account (DX #15). Thereafter, Defendants contend that Frank repeatedly declined offers to invest his $10,000 for a similar stock purchase.

In the days following the June 1994 meeting, Richard returned his check and the three checks his siblings had given him to Mrs. Whittington. She canceled the four checks and issued one new check to "Whittington Sand & Gravel Co. Inc." in the amount of $40,000 (DX #16). Mrs. Whittington then gave the $40,000 check to Richard (PTS II, para. 29).

On or about July 5, 1994, Richard opened a checking account at Wilmington Trust for New Sand and Gravel and deposited the $40,000 check he had received from his mother into the account (DX #16 and DX #17) (PTS II, para. 30).

Although the June 27 minutes reflect that stock would issue in exchange for the $10,000, the individual defendants did not determine how many shares would issue or the price per share during the June 1994 meeting (PTS II, para. 3 1).

Defendants contend that the task of valuing Limited pre-spin-off and determining how many shares would be issued for the $10,000 was delegated to Tom (PTS II, para. 32).

The assets held by Limited prior to the spin-off included, among other things: (i) approximately 460 acres of undeveloped land located just north of the Chesapeake & Delaware canal in New Castle County, Delaware (the **"Dragon Run Property");** (ii) approximately 115 acres of land located in Bear, Delaware; (iii) a private residence located on the Dragon Run Property; (iv) a private residence on Walther Road in New Castle County, Delaware; (v) the cash, securities, receivables and other paper assets held by Limited; and (vi) the sand and gravel business which consisted of 40 acres of land, included in the 115 acres set forth above in (ii), the buildings thereon and equipment (PTS II, para. 33).

When asked about the valuation of Limited, Tom testified that he took several discounts when valuing Limited's assets. Tom testified that his discounted valuation of

Limited demonstrated that the company's pre-spin-off assets were worth approximately $800,000. Limited had a total of 800 voting and non-voting shares of stock outstanding at the time of this valuation (PTS II, para. 34).

Based on this valuation, Tom claims he concluded that each member of the Board willing to invest $10,000 was entitled to receive 10 shares of voting stock for their $10,000 (PTS II, para. 35).

Defendants contend that as a result of the individual defendants' actions in June 1994, each of the individual defendants acquired additional shares of Limited voting stock. Defendants further contend that subsequently, 10 additional shares were issued to each Board member that invested $10,000 (increasing each individual defendant's total share holdings in Limited to 122 shares) and that as a consequence of the issuance of additional shares, Mrs. Whittington ceased to own in excess of fifty percent of the outstanding voting stock of Limited (PTS II, para. 36).

Specifically, Defendants' Exhibit #18 consists of 5 Limited Certificates - Numbers A-14, A-15, A-16, A-17 and A-18 - each for 10 Class A Cornmon Shares - each dated January 1, 1995 - each signed by Thomas as President and Faith as Secretary - to Tom, Dick, Dottie, Faith and Frank, with Frank's Certificate bearing 2 handwritten notes "Hold for check" and "Maura this was in the Jan. 20, 95 folder" (DX #18).

Likewise, the April 22, 1995 Minutes of the Meeting of the Family Companies reflect that Frank was reminded that he had not yet invested his $10,000:

> "... Frank II noted he was going for Ten, referring to the investment made by the other shareholders. Dorothy reminded him he didn't make a contribution. Tom noted. that

> the Ten was to be converted to stock to be disbursed and suggested that Frank should pay in the money . .." (DX #39).

The copy of the April 22, 1995 Meeting Minutes produced by Frank have Frank's handwritten notes all over Dorothy's reminder and Tom's suggestion (DX #40).

The Minutes for the next meeting of the Family Companies on September 24, 1995 (DX #28) reflect that all members had copies of the April 22, 1995 Meeting Minutes and that certain corrections and additions were suggested by Frank. No correction was made as to Dorothy's reminder to Frank that he had not yet invested and Tom's suggestion to Frank that he so invest (DX #28). Again, the copy of the April 22, 1995 Minutes produced by Frank have Frank's handwritten notes on the Approval of these Minutes (DX #28).

* * *

From the perspective of the Defendants, whether each individual Defendant received ten additional Class A shares in Limited in exchange for their $10,000 contribution in June 1994, is a question of fact for the Court's resolution after weighing the conflicting documentation and testimony in connection therewith.

Alternatively, Defendants respectfully submit that arty claim by Frank in this regard is barred by the laches and/or the applicable statute of limitations. From Defendants' perspective, Frank had an equal opportunity to invest the $10,000 he received back into the Family business and receive shares equal in amount to that received by his four siblings. Thereafter, Frank was reminded by his mother and at least his brother, Tom, that he had not yet invested and suggested that he do so. Frank elected to keep the $10,000 he had. received from his mother and not invest same as his two brothers and two sisters had done. More than

5 years later, after any risks inherent in. investing the $10,000 have by and large played out are known, is simply too late for Frank to be allowed to challenge that which he rejected at the time and after his brothers and sisters had offered and suggested that he proceed and be treated in a manner identical to them.

II. FAITH PROPERLY EXERCISED HER EXECUTRIX DUTIES IN VOTING THE 55 SHARES OF WHITTINGTON, LTD. STOCK HELD BY MRS. WHITTINGTON'S ESTATE

Under the provisions of Dorothy B. Whittington's Will, the 55 shares of Whittington, Ltd. Class A Stock she owned at the tirne of her death (the "55 Shares") are to be distributed to the Revocable Trust. (PTS II, paras. 50, 51). (PX #38). The Trustees of the Trust are Mama C. Whittington, Dottie and Faith. [Frank and Mama C. Whittington were the original Trustees named in the Revocable Trust (PX #39). However, Edmund Lynch, Esquire has testified in deposition that the Trust was amended. and will testify at trial that Plaintiff was replaced as Trustee by Dottie and Faith.] Under the provisions of the Revocable Trust, the 55 Shares are to be distributed to the Plaintiff. At present, the Estate of Mrs. Whittington has not received tax clearance and is undergoing an IRS examination. (DX #56). Upon the advice of counsel for the Estate, F. Edmund Lynch, Esquire, Faith has not distributed the 55 Shares to the Revocable Trust, nor has she distributed other assets of the Estate. (PTS II, para. 52)

Frank contends that, because the 55 Shares ultimately will be his (unless needed to pay obligations of the Estate), he has the right to direct how those shares will be voted, and that the Executrix, Faith, violated her fiduciary duty as Executrix by not following his command in that regard.

In June and July, 1999, a proposal was made to amend the Certificate of Whittington, Ltd. to convert the non-voting shares into voting shares. The purpose of the proposed amendment was to allow the next generation of shareholders greater involvement in the business of the corporation. (PTS II, para. 53). Frank, through his attorney, expressed

support for the next generation becoming more involved with the management of the company, but nevertheless, voted against the amendment. All other shares were cast in favor of the amendment. (PTS II, paras. 54, 55). Subsequent to the July 9 meeting, Frank filed a lawsuit challenging, among other things, the purported amendment to the Limited certificate. Frank claimed that Faith had violated the fiduciary duties she owed Frank as the beneficiary of the 55 Shares by voting these shares in a manner contrary to Frank's interests. Frank further claimed that the individual defendants had not complied with Sections 242 and 103 of the Delaware General Corporation Law and that, therefore, the Limited certificate had not been amended by the actions taken in July 1999. (PTS II, para. 58).

During the course of these proceedings, it was determined that the July 9, 1999 Amendment of the Whittington, Ltd. Certificate was ineffective. Thereafter, a meeting of the shareholders was duly noticed for October 14, 2000 at which time a proposal to amend the Certificate of Whittington, Ltd. to convert the non-voting shares to voting shares was to be presented.

On or about October 5, 2000, Frank received notice that a meeting of the voting shareholders of Limited had been called for October 14, 2000. (PTS II, para. 60).

On October 6, 2000, counsel for Frank wrote Faith a letter advising her not to vote in favor of any proposal to amend the Limited certificate of incorporation. In pertinent part, the October 6 letter states:

> . . . it appears that one of the items that may be addressed at the meeting of Whittington Ltd. shareholders is a proposed amendment to the company's certificate of incorporation to convert the Class AA non-voting stock into voting stock. I have spoken with Frank C. Whittington, II about this issue and write to instruct you on his behalf that you are to vote

against any proposal, regardless of when presented, to amend the certificate and thereby confer voting rights on the holders of the Class AA stock.

Frank is the record and beneficial owner of a majority of the Whittington Ltd. voting stock. He owns 10 shares of Class A stock in his own name and is the beneficial owner of the 55 shares of Class A stock held by the Estate. The remaining voting stockholders own 40 shares of Class A stock. Conferring voting rights on the Class AA stock will not only deprive Frank of that controlling interest, but it will confer voting control on you and the other members of the board. You are obligated to protect Frank's interests, not advance your own. We therefore direct you not to vote the 55 shares of Class A stock held by the Estate of Dorothy B. Whittington in favor of any proposal to confer voting rights on the Class AA stock. (PTS II, para. 61).

A proposal to amend the Limited certificate of incorporation to 'convert the Limited non-voting stock into voting stock was presented to the Limited voting shareholders at the October 14, 2000 meeting (the **"October 2000 Proposal"),** having been approved on October 13, 2000 by the Board of Directors for presentation to the voting shareholders. (PTS II, para. 62).

Faith attended the October 14, 2000, shareholders' meeting and, as the executrix of the Estate, voted the 55 Shares in favor of the October 2000 Proposal. (PTS II, para. **63).**

Frank apparently takes the position that Faith, as Executrix of the Estate, must vote the shares as dictated by him and his attorney without regard to the effect that may have on the stability of the corporation and the value of the stock. Defendants submit that Faith owed an independent duty to the Estate, and her fiduciary duty required her to exercise her independent judgment to protect the Estate not only for Frank, but for all beneficiaries and

creditors.

Faith agrees that as Executrix of the Estate she stands in the position of a fiduciary, as well as the Trustees when the stock: is transferred to the Revocable Trust. See, e.g., ***Rendenburgh*** v. ***Jones,*** Del. Ch., 349 **A.2d** 22 (1975). As a fiduciary, she must protect the estate assets for the benefit of others by exercising "the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use...." 12 Del. C. $3302 (Investment Standards and Powers of Trustees). The fiduciary duty of an Executrix extends to creditors of the Estate. See ***In Re: Ortiz Estate,*** Del. Ch., 27 **A.2d** 368 (1942). Thus, the fiduciary duty of the Executrix extends not just to the beneficiaries, but to creditors as well.

An Executor has the duty to maximize the value of estate assets, and in doing so must exercise the skill and care that a prudent person would use in dealing with his own property. See, ***Bullock v. Apgar and Burris*, Del. Ch., 1984 W.L. 136930 (1984).** The true test and only test is the standard of the reasonable prudent man. ***In Re: Wheatley's Estate,*** **Del. Ch.,** 60 **A.2d 113 (1948).** It is an executor's duty to protect the estate and to do everything he can to conserve the assets for the heirs. ***Chambers v. Gallo*, Del. Super., 108 A.2d 254 (1954).**

Frank's position makes no sense. If a beneficiary could dictate how an executor or other fiduciary must exercise his or her duty, then there would be no purpose served by having a fiduciary. It could be anticipated that most beneficiaries would opt for gratification of their immediate wants, needs, or interests without regard to their own long term interests or the interests of the estate or creditors.

The testimony will show that, like Frank, Faith has no children, and, therefore, had

no personal interest in empowering the grandchildren by giving their shares voting status. The testimony will further demonstrate that when he was in charge of Whittington Sand & Gravel, Franks performance was less than satisfactory and far from being in the best interests of the Company. Frank never provided Faith with any rationale for voting against the Amendment, but relies solely on *his ipse dixit* pronouncement. Thus, he suggested no reason why expanding the vote to non-voting shareholders would not be in the best interest of the company and himself.

Faith will testify that the subject of expanding the voting power to the next generation had often been discussed and was something her mother embraced. She feels it was in the best interest of the company (and necessarily Frank) because earlier involvement by the grandchildren would eliminate the steep learning curve that she and her siblings encountered when they became involved in the business after their father's death.

Interestingly, at the time of the meeting on October 14, 2000, Frank submitted a slate of directors for consideration handwritten on a piece of Hilton Hotel stationery (D. Ex. 27) proposing himself, his girlfriend, his stockbroker, his lawyer and a woman who gives advice to the love-torn over the intemet to head the company founded by his father and mother decades earlier, and which had never had a non-Whittington on the Board. He provided no background information or business plan for his slate. This proposal raised real questions in Faith's mind about Franks plans for the Company and his ability to run the Company and preserve its assets, including his own take in the company. In sum, Frank provided no reason to Faith as to why she should vote the 55 Shares in the manner he demanded. Nor can he show that she breached her fiduciary duty in voting the shares as she did.

Faith submits that she exercised her fiduciary duties as executrix of her mother's Estate in an informed and proper manner as would a prudent person dealing with her own property, and that after considering all of the evidence, the Court will so find.

III. THE SETTLEMENT AGREEMENT DATED DECEMBER 23, 1998 HAS BEEN FULLY COMPLIED WITH

The law and facts governing this issue with regard to the Whittington, Ltd. stock have been set forth in Defendants' Motion for Partial Summary Judgment dated April 27, 2001 and the Court is respectfully referred to Defendants' Brief in Support of the Motion. It should be pointed out that it is Frank's position which actually requires the Court to rewrite the Agreement, a task which Frank agrees is wholly improper. See Plaintiffs Answering, Brief In Opposition to Defendants' Motion for Partial Summary Judgment at 1 O-l 1.

The parties' positions with regard to The Farm Corporation stock are similar, but differ because Mrs. Whittington did not own Farm Corporation stock.

On or about February 16, 1989, Thomas D. Whittington created the Thomas D. Whittington Marital Trust ("Marital Trust") and the Thomas D. Whittington Residuary Trust ("Residuary Trust").

On September 4, 1993, Thomas D. Whittington died and his 86 shares of The Farm Corporation, 50 voting and 36 non-voting, passed in equal amounts of 25 voting and 18 non-voting each to the Martial and Residuary Trusts.

Upon Dorothy's death on June 18, 1999, the Will of Thomas D. Whittington instructed that the principal assets of the Marital Trust be added to the principal assets of the Residuary Trust for distribution to the fiva children of Thomas D. Whittington and Dorothy B. Whittington, equally.

Accordingly, the 43 shares of The Farm Corporation were transferred from the Marital Trust to the Residuary Trust which when added to the 59 shares of The Farm

Corporation already held in the Residuary Trust, resulted in a total of 102 shares of The Farm Corporation for distribution by the Residuary Trust. Thereafter, 20.4 shares of The Farm Corporation were distributed to each child of Thomas D. and Dorothy B. (including 20.4 shares to Frank).

The position of the Estate of Dorothy B. Whittington and the individual Defendants is that the provisions of the Settlement Agreement have been satisfied, specifically in that the 20.4 shares of The Farm Corporation, which Frank received from the Residuary Trust satisfy the settlement provision that Frank receive 16 The Farm Corporation shares.

Parenthetically, Franks claims also suffer from mathematical errors. If 16 shares of The Farm Corporation from the Residuary Trust had to be earmarked for him, initially, the Residuary Trust would be left with 86 shares (102 - 16 = 86) and, therefore, the distribution would, based upon 86, be 17.2 (20%) shares per sibling with Frank receiving 33.2 (16 + 17.2 = 33.2) shares. Having received 20.4 shares already, Frank would, therefore, be entitled to 12.8 (33.2 - 20.4 = 12.8) additional shares in The Farm Corporation.

Defendants submit that the clear language of the Settlement Agreement provided that Frank would receive shares in amount equal to 20 shares of Limited and 16 shares of Farm. Thus, he has, or will, receive more than the number of shares to which he is entitled under the Agreement.

IV. FRANK'S DIRECTOR'S FEES WERE PROPERLY WITHHELD BY THE BOARDS OF WHITTINGTON, LTD. AND THE FARM CORP.

At a combined Board Meeting of the Whittington concerns held on April 19, 1997, a Motion was duly made and adopted by majority vote of four to zero with two directors abstaining: "to have any board member who causes unauthorized costs or expenses have those fees or expenses withdrawn from any fees or dividends the companies owe Board members." (PTS II, para 83., DX #25). At the same meeting, Frank voted in favor of a Board Resolution that provided that the recording secretary be fined. $10.00 per day for each day beyond 18 days that the minutes are not delivered. (DX #25 at p. 4). Pursuant to the former resolution, the Boards have withheld directors' fees from Frank to cover expenses incurred in litigation involving Frank. Defendants submit that the action of the Board in posing the resolution and withholding the fees were and are valid and proper actions of the Boards,

The Delaware General Corporation Law authorizes the directors to fix compensation of directors unless otherwise restricted by the Certificate of Incorporation or by-laws. 8 Del. C. § 841(h). Neither the by-laws nor the Certificates of the Farm Corp. or Whittington, Ltd. contains any restriction on the power of the Board to fix compensation of directors. (PX1, PX2, PX80).

The Resolution was not passed to increase the compensation of some directors at the expense of others or at the expense of the corporation. Indeed, the purpose of the resolution is to protect the corporation from unauthorized and unwarranted expenses, not to benefit one or more directors over another. As such, it is a proper exercise of the Director's authority

fully consistent with the General Corporation Law, the Certificates and the by-laws. It is a matter of corporate governance squarely within the Business Judgment Rule. See, e.g., ***Greenwald v. Batterson*, Del. Ch. 1999 WL 596276 (1999):**

> "The business judgment Rule is a 'presumption that directors making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest.' [citation omitted]. Therefore, 'a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose."'

The testimony will show that the Rule was not directed at Frank, and, in fact, was proposed out of concerns that Richard was contemplating actions which could (create unnecessary expense for the corporations. Moreover, the obvious import of the Rule is to protect the corporations from unwarranted and unnecessary expense. It must be presumed the directors acted in the corporations' best interests.

V. FRANK, SIMILAR TO HIS SIBLINGS, AGREED TO LOAN $125,000 TO FROG HOLLOW

At all relevant times prior to September 13, 1996, Farm Corp. held title to a 300-plus acre parcel of land near Middletown, DE (PTS II, Para. 93).

In 1995, the Farm Corp. directors decided to develop the real property into a housing and golf community. Dove's Nest was created to facilitate the development and it was anticipated that each of the individual shareholders of Farm Corp. would be members of Dove's Nest (PTS II, para. 94).

On September 13, 1996, Farm Corp. sold the parcel to Dove's Nest in exchange for a $1,000,000 note and mortgage. The note and mortgage was the Farm Corp.'s only significant asset after the resale (PTS II, para. 95).

On October 1, 1996, Dove's Nest transferred the parcel to Frog Hollow and this entity subsequently developed the parcel into a housing and golf community (PTS II, para. 96).

Tom was the manager of Dove's Nest and Frog Hollow. Members of the Whittington family are the only members of Dove's Nest. Dove's Nest is the only member of Frog Hollow (PTS II, para. 97). Following the transfers of the parcel., a dispute arose between Frank and his siblings as to whether Frank was a member of Dove's Nest (PTS II, para. 98).

In April of 2000, the individual Defendants realized that Dove's Nest would be in a position to pay the $1,000,000 note to Farm Corp. In addition, they determined, based on the advice of their accountant, that Farm Corp. should be dissolved shortly after the note was

repaid and that they each, as majority members of Dove's Nest, would loan $125,000 to Frog Hollow to provide a cushion for the Frog Hollow project represented by the value of The Farm Corporation stock of all of the shareholders, which Defendants contend reflected a prior commitment (PTS II, para. 99).

In March and April of 2000, the parties were still in dispute as to whether Frank was a member of Dove's Nest/Frog Hollow. The individual Defendants did not consider Frank to be a member and although he did not participate at that time in the discussions regarding the loans to Frog Hollow, he did participate in some discussions that led to the decision to dissolve Farm Corp. (PTS II, para. 100).

In August 2000, Dove's Nest paid Farm Corp. the $1,000,000, plus interest (PTS II, para. 101).

Thereafter, but before the Farm Corp. Board of Directors or shareholders had voted to dissolve the company, each of the individual Defendants received distributions from Farm Corp. (PTS II, para. 102).

By letter dated August 11, 2000, Tom forwarded to Dick, Dottie and Faith, Farm Corp.'s $125,000 check, requesting thal same be endorsed to Frog Hollow, L.L.C. and returned Frog Hollow's $125,000 Note (DX #21). Each individual Defendant also (later) received another check for approximately $34,000 which each retained (PTS II, para. 102).

Defendants contend that Frank did not receive a distribution concurrent with the other individual Defendants because he had not surrendered his stock: certificates as requested in prior correspondence to all shareholders (PTS II, para. 102).

By letter dated September 7, 2000 (DX #57), Tom forwarded to Dick, Dottie and

Faith, Frog Hollow's revised $125,000 Note, dated August 31, 2000, reflecting the date the funds were received and available to Frog Hollow.

On or about October 13, 2000, the parties resolved their dispute over whether Frank was a member of Dove's Nest when the Defendants agreed to allow Frank to be a member *ab initio* (PTS II, para. 103).

On October 14, 2000, there was a meeting -for the members of Dove's Nest/Frog Hollow which preceded the Board of Directors and Annual Shareholders meetings for the Farm Corp. and Limited. Frank contends that Todd Schiltz, Esquire attempted to attend this meeting with him, but Tom denied him entry. Defendants contend that 'Todd Schiltz, Esquire requested permission to attend this meeting with Frank, but the members declined to grant permission (PTS II, para. 104).

Defendants contend that during the October 14, 2000 Dove's Nest/Frog Hollow meeting, Frank agreed to loan $125,000 back to Frog Hollow. Defendants contend that Frank agreed to allow them to treat $125,000 of the approximately $183,000 Frank was to receive from the Farm Corp. dissolution as a loan to Frog Hollow. Defendants contend that Frank asked to be treated exactly as all of the sibling members of Dove's Nest/Frog Hollow (PTS II, para. 105). Specifically, Dottie has testified at deposition and will testify at trial that prior to the October 14, 2000 meeting, Frank telephoned her and asked if she had reinvested her $125,000 in Frog Hollow, and she told Frank she had. Frank then asked her if Faith had reinvested her $125,000 in Frog Hollow and she told Frank that she believed Faith had also. Frank then asked her if Dick and Tom had reinvested their $125,000 each in Frog Hollow, and Dottie told Frank that he would have to ask Tom and Dick: directly.

Dottie will also testify that at the October 14, 2000 meeting, Torn explained that Frank's 4 siblings - Tom, Dick, Dottie and Faith - had each loaned $125,000 to Frog Hollow. Dottie also thinks that Frank asked about how these loans were going **1.0** be repaid and specifically recalls Dick going into detail about how they were going to be paid back with the proceeds from spray irrigation (impact fees).

Likewise, Tom has testified at deposition and will testify at trial that at the October 14, 2000 meeting, Dick explained that it was his idea that the $125,000 loans be repaid: from the cash flow with respect to the spray irrigation (impact fees). Tom then asked Frank for his $125,000 check and at this point, learned that Frank had not received any distribution because he had not sent in any of his shares. Tom recalls Frank asking if everyone had made the $125,000 loan on exactly the same terms, and was assured that had occurred. Tom then inquired of Frank if the $125,000 should be taken out of his distribution and Frank said "Well, I guess that's okay" and Tom reminded Frank he still had to send in his certificates.

By letter dated October 18, 2000 (DX #22) Tom's assistant, Maura C. Meehan, forwarded to Frank, Frog Hollow's $125,000 Note, identical in form and substance (except as to date) to that issued previously to Tom, Dick, Dottie and Faith.

By letter dated October 20, 2000 (DX #23), Frog Hollow forwarded to Frank its check in the amount of $3,643.90 (representing 10% of the $36,439.00 check Frog Hollow had just received from Middletown) towards repayment of Frank's $125,000 Note.

Faith has testified at deposition and will testify at trial, after all the discussion had occurred at the October 14, 2000 meeting, Tom looked directly at Frank and said "Frank, would you like to move your money forward from Farm Corp. or would you like to write the

company (Frog Hollow) a check for $125,000" and Frank said "Yeah, sure, I guess so" which she assumed meant move his money forward.

Lastly, Dick has testified at deposition and will testify at trial that at the October 14, 2000 meeting, after discussing the progress of the project and the $125,000 loans that each of Frank's brothers and sisters had made back to Frog Hollow, he recalls Tom asking Frank to write a check: for his $125,000 contribution and Frank responding something to the effect that Tom had to be kidding. Dick recalls that Tom explained to Frank that they were holding funds of Frank's (as a result of Frank having not yet surrendered his certificates) and inquiring whether they should take $125,000 out of that? Dick recalls Frank's response as "Uh, I guess so", which Dick understood as Frank telling Tom to take $125,000 from Prank's funds for his loan back to Frog Hollow.

On the other hand, Frank contends that he did not agree to loan the $125,000 to Frog Hollow (PTS II, para. 106). However, at his December 21, 2000 deposition, Frank recalled that he asked Dottie if she had reinvested her funds in Frog Hollow, although Frank claims Dottie did not know exactly the amount she had reinvested (DX #43, FCW Depo., p. 108-109). Likewise, Frank recalled that he had asked Faith and Faith told him that she too "had put her money in" (DX #43, FCW Depo., p. 109).

In addition, at his December 21, 2000 deposition, Frank recalled a discussion about fees being paid in connection with spray (irrigation), although he could not recall exactly (DX #43, FCW Depo., p. 114). According to Frank, he was not asked to reinvest any of his proceeds from the Farm Corp. at the October 14, 2000 meeting (DX #43, FCW Depo., p. 113-l 14).

In fact, at his December 22, 2000 deposition, Frank could not recall receiving Ms. Meehan's October 21, 2000 letter with Frog Hollow's $125,000 Note (DX #43, FCW Depo., p. 125-127) and, therefore, could not testify as to his reaction upon receiving same, although Frank did confirm that 1982 Cedar Lane Road was his mailing address in October 2000 (DX #43, FCW Depo., p. 126-129).

* * *

From Defendants' perspective, the factual dispute between the parties should be resolved based upon basic contract principles; specifically, did Frank manifest or show mutual assent to loaning $125,000 to Frog Hollow, L.L.C. on October 14, 2000, so that a legal binding contract was created thereby? Frank's mutual consent must, of course, be shown by his words or acts in a way that represents a mutually understood intent. ***George & Lynch Co. v. State,*** **Del. Supr., 197 A.2d *734,736* (1964); *Barnard v. State,* Del. Super., 642 A.2d 808 aff'd Del. Supr., 637 A.2d 829 (1992).**

Defendants respectfully submit that after all the evidence has been introduced, this Court will conclude that Frank did, indeed, on October 14, 2000, agree to loan back $125,000 of his proceeds from the Farm Corp. to Frog Hollow and that a binding agreement was formed based thereon.

VI. FRANK OWES HIS MOTHE:R'S ESTATE $190,000.00 PLUS INTEREST THEREON FROM NOVEMBER 25, 1996 TO DATE

The Artisans' Account

At all times relevant prior to November 1996, Mrs. Whittington maintained a Money Market Account at Artisans' Bank (the "Artisans' Account"). (PTS II, para. 108).

Frank never contributed any money to the Artisans' Account (PTS II, para. 109).

At all times pertinent hereto, Mrs. Whittington had preprinted checks for her Artisans' Account (DX #5).

On May 1, 1996, Mrs. Whittington wrote a preprinted check to Frank in the amount of $9,500 on the Artisans' Account, noting in the Memo thereon "gift" (DX #5).

On or about May 3, 1996, Mrs. Whittington added Frank to the Artisans' Account and this account became a joint account (PTS II, para. 109). Testimony will show that this was completed at the Midway Branch where members of the Whittington family, including Frank and Mrs. Whittington, were known to branch employees. According to Frank's sworn testimony, Mrs. Whittington wanted him to "have access to it when needed" (Emphasis Added) (DX #43, p. 32).

On or after May 18, 1996, Mrs. Whittington received the monthly statement for the Artisans' Account, placed a checkmark next to the $9,500 check to Frank that had cleared her account but entered no additional notation in connection therewith (DX #6).

On or about November 25, 1996, Frank went lo Artisans' Savings Bank, had a blank countercheck filled out, payable to himself, in the amount of $90,000.00, signed his name

thereto and withdrew the $90,000 from the Artisans' Account (PTS II, para. 110) (DX #1). In turn, Artisans' issued Frank its check in the amount of $90,000 which Frank, in turn, deposited in his National Financial Services account (DX #1). Testimony will show that this transaction occurred at the Polly Drummond branch of the Artisans' Savings Bank where Frank and his family were not known.

At his December 21, 2000 deposition, Frank could not recall ever issuing a check on the Artisans' account until presented with a copy of the $90,000 check made payable to and signed by him after which Frank indicated that he believed the signature to be his (DX #43, FCW Depo., p. 25-26).

At his December 21, 2000 deposition, Frank could not recall what he did with the $90,000 he withdrew from the Artisans' Account in November, 1996 (DX #43 FCW Depo., p. 30 and 31).

At his December 21, 2000 deposition, Frank could not recall what he told his mother about withdrawing $90,000 from the Artisans' Account before he issued the check to himself (DX #43 FCW-33). However, Frank was certain that he did not discuss with any of his siblings, Tom, Dick, Dottie or Faith - his intention to withdraw $90,000 from the Artisans' Account, either before or after doing so (DX #43, FCW Depo., p. 34 to 36).

At his December 21, 2000 deposition, Frank could not recall telling his mother that he had, in fact, taken $90,000 from the Artisans' Account (DX #43, FCW Depo., p. 37).

On her 11/16/96 Artisans' statement, Mrs. Whittington wrote "11/25/96 - Frank took 90,000 -; 12/5/97 (sic 96) " (Frank) " (took) 950. -; Left balance of 2,329.45 (DX #2). At his December 21, 2000 deposition, Frank could offer no explanation as to why his mother wrote

"1 1/25/96 - Frank took 90,000" (DX #43, FCW Depo., p. 43).

On her 12/21/96 Artisans' statement, Mrs. Whittington wrote "90,000. -, 5. (the minimum balance service charge) and 263 Int." (the latter representing 3.5% annual interest on $90,000) (DX #3). On her December 1996 calendar, on the date of December 30, 1996, Mrs. Whittington wrote "Got Artisans' state - Frank cashed check for 90,000" (DX #4) (PX #123). At his December 21, 2000 deposition, Frank could offer no explanation as to why on December 30, his mother wrote on her calendar "Got Artisans' state, Frank cashed check for $90,000" (DX #43, FCW Depo., p. 56).

On January 16, 1997, Mrs. Whittington closed the Artisans' Account (PX #129) opening a new account in her name only in January of 1997 (PTS II, para. 117).

Dick has testified in deposition and will testify at trial that in late March or early April 1999, just before his mother's death, he was transporting his mother to the Christiana Surgery Center for treatment. During the trip, Mrs. Whittington asked him (Dick) about being a trustee for her trust and Dick inquired why, because he thought that the trustees, were set. Mrs. Whittington then explained that she was going to take Frank off as a trustee, and Dick asked her why in connection with considering whether he would be willing to serve as a trustee. Mrs. Whittington finally told Dick that Frank had taken money from her accounts, that she was very unhappy about same, and that she had told him that she considered these loans and expected Frank to pay them back.

After Mrs. Whittington's death in June 1999, L. Faith Whittingtan ("Faith") and Dorothy W. Minotti ("Dottie"), in looking through their mother's papers, Faith discovered the Artisans' statements which indicated that Frank had removed $90,000 from their

mother's Artisans' Account which their mother considered a "loan". Faith showed Frank the calendar entry pertaining to the $90,000 withdrawal by Frank, but Frank could not recall any of the ensuing discussion (DX #43, FCW Depo., p. 40-41).

The Estate of Mrs. Whittington characterized and listed Frank's $90,000 withdrawal from the Artisans' Account as a loan from 1 1/25/96 (PX #49, Sched. F, p. 19).

The MBNA Account

At all times relevant prior to November 1996, Mrs. Whittington maintained a Money Market Fund at MBNA America Bank, NA (the "MBNA Account") (PTS II, para. 1 OS).

Frank never contributed any money to the MBNA Account (PTS II, para. 109).

On or about May 3, 1996, Mrs. Whittington had Frank added as a co-signor on the MBNA Account (DX #7).

At his December 21, 2000 deposition, Frank could not initially recall withdrawing funds from the MBNA Account, then recalled withdrawing money from one MBNA Account, but could not recall the amount he withdrew (DX #43, FCW Depo., p. 72 and 73).

However, the undisputed facts are that on or about November 25, 1996, Frank went to MBNA, had a counter-check made payable to himself in the amount of $100,000 (DX #59) and withdrew $100,000 from the MBNA Account (PTS II, para. 111). At his December 21, 2000 deposition, Frank could not recall why he withdrew $100,000 from the MBNA Account on November 25, 1996 (DX #43, p. 73, 77-78). On the 9/30/96 monthly statement from MBNA, (Mrs. Whittington wrote "1 1/25/96 - Frank took 100,000 -; 12/5/96 " (Frank) " (took) 950. -; Left Balance of 16.13" (DX #8).

On the 10/3 1/96 MBNA monthly statement, Mrs. Whittington wrote "1 1/25/96 -

Frank took 100,000. -; int. 1 1/25-12/25 @ 30 days 15.09 per day 452.70; 12/26/96-1/6/97; 11 days @ 15.09 165.99; 12/5/96 -Frank took 950 - (337.15 int.) total - 1/6/97; 101,568.69 (DX #9).

Mrs. Whittington closed the MBNA Account on January 6, 1997 and opened a new account in her name only in January 1997 (PTS II, para. 118) (PX #48).

Dick has testified in deposition and will testify at trial that in late March or early April 1999, just before his mother's death, he was transporting his mother to the Christiana Surgery Center for treatment. During the trip, Mrs. Whittington asked him (Dick) about being a trustee for her trust and Dick inquired why, because he thought that the trustees were set. Mrs. Whittington then explained that she was going to take Frank off as a trustee, and Dick asked her why in connection with considering whether he would be willing to serve as a trustee. Mrs. Whittington finally told Dick that Frank had taken money from her accounts, that she was very unhappy about same, and that she had told him that she considered these loans and expected Frank to pay them back.

After Mrs. Whittington's death in June 1999, Faith and Dottie, in looking through their mother's papers, Dottie discovered the MBNA statements which indicated that Frank had removed $100,000 from their mother's MBNA Account which their mother considered a "loan".

The Estate of Mrs. Whittington characterized and listed Frank's withdrawal of $100,000 from the MBNA Account as a loan from 1 1/25/96 (PX #49, Sched. F, p. 19).

* * *

Frank contends that the $190,000 was a gift from his mother (PTS II, para. 112). The

Estate of Mrs. Whittington contends that these were unauthorized withdrawals by Frank which Mrs. Whittington elected to characterize as loans upon discovering that Frank had taken the funds. Aside from Frank's absolute failure to establish any "need" on his part to justify his $190,000 withdrawals, Mrs. Whittington's contemporaneous notations upon discovery of Frank's conduct should be dispositive: "Frank took". Moreover, after Frank had withdrawn virtually all of the funds Mrs. Whittington had deposited into these accounts;, Mrs. Whittington closed these accounts bearing Frank's name as a co-signer, and opened new accounts without Frank as a co-signer. The Defendants submit that after weighing and balancing the facts, the Court will find that Frank owes his mother's Estate $190,000, plus interest thereon from November 25, 1996.

The Defendants anticipate that Frank, in addition to contending that the $190,000 was a "gift", will assert that any cause of action by his mother's Estate is barred by the statute of limitations. In response, the Defendants contend that Frank's withdrawal of the $190,000 of his mother's funds from the account constituted a "promise" on his part to repay and, therefore, a "note" payable upon demand. As such, the time for Mrs. Whittington's Estate to commence an action against Frank to enforce his obligation was within 6 years of any demand for payment or, if no demand, within 10 years if neither principal or interest had been repaid pursuant to 10 **Del. C. Section 30-118(b).**

Moreover, even if the statute of limitations arguably would bar any legal rernedy, relief still exists in equity, since this Court has historically allowed an equitable remedy where persons in a fiduciary relation have enriched themselves by fraudulent breaches of duty. ***Wise v. Delaware Steeplechase & Race Ass'n,*** **Del. Chan., 39 A.2d 212 (1944) aff'd**

Del. Supr., 45 A.2d 547 (1945).

Accordingly, Defendants respectfully submit that after all the evidence has been introduced, this Court will conclude that Frank owes his mother $190,000, plus statutory pre- and post-judgment interest thereon, pursuant to 6 **Del. C. Section 2306, from** November 25, 1996 until repaid, plus reasonable counsel fees, pursuant to 10 **Del. C. Section 5106.**

CONCLUSION

Defendants respectfully submit that upon the conclusion of the trial the Court should enter judgment in their favor on all claims.

Respectfully,

SEITZ, VAN OGTROP & GREEN, P.A.

By: _____

James S. Green, Esq. DE#0481
222 Delaware Avenue, Suite 1500
P. 0. Box 68
Wilmington, DE 19899
(302) 888-0600

and

Jeffrey M. Weiner Esq. DE#0403
1332 King Street
Wilmington, DE 19801

Attorneys for Defendants