



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SANDRA MANNO and
MANNO ENTERPRISES LLC,

Defendants and Counterclaim-
Plaintiffs Below/Appellants,

v.

CANCAN DEVELOPMENT, LLC,
ROBERT A. GRANIERI,
ROBERT J. GRANIERI and
GEORGE TOTH,

Plaintiffs Below/Appellees.

) From the Memorandum Opinion
) and Final Order and
) Judgment
) of the Chancery Court
) of the State of Delaware
) C.A. No. 6429-VCL
)
)
)
) No. 378,2015
)
)
)

APPELLANT SANDRA MANNO'S OPENING BRIEF

JAMES S. GREEN, SR. (DE#0481)
SEITZ, VAN OGTROP & GREEN, P.A.
222 Delaware Avenue, Suite 1500
P. O. Box 68
Wilmington, Delaware 19899
(302) 888-0600
(302) 888-0606 (fax)
jgreen@svglaw.com

Attorneys for Defendant
and Counterclaim Plaintiff-Below,
Appellant Sandra Manno

Dated: September 3, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE OF PROCEEDINGS..... 1

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 4

ARGUMENT 9

 I. THE TRIAL COURT'S DAMAGE AWARD AGAINST MANNO IN FAVOR OF CANCAN IS NOT SUPPORTABLE LEGALLY OR FACTUALLY AND MUST BE REVERSED. 9

 A. Question Presented..... 9

 B. Scope of review..... 9

 C. Merits of Argument..... 9

 1. Manno's Compensation Was Overseen and Approved By Py and Presumably the Granieris and Was Not Shown to be a Breach of Fiduciary Duty..... 9

 2. The Court's holding that certain hiring decisions and corporate expenditures were a breach of Manno's fiduciary duty is erroneous and should be reversed. 22

CONCLUSION 29

TABLE OF CITATIONS

Cases

<u>Aronson v. Lewis</u> , 473 A.2d 805 (1984)	18
<u>Brehm v. Eisner</u> , 746 A.2d 244 (Del. 2000)	18
<u>Friedman v. Dolan</u> , 2015 Del. Ch. LEXIS 178 (Del. Ch. June 30, 2015)	16, 17, 18, 20
<u>Gatz Props, LLC v. Auriga Capital Corp.</u> , 59 A.3d 1206 (Del. 2012)	9
<u>In Re Emerging Communications, Inc. Shareholders Litig.</u> , 2004 Del. Ch. LEXIS 70 (Del. Ch. 2004).....	14
<u>Valeant Pharm. Int'l. v. Jerney</u> , 921 A2d 732 (Del. Ch. 2007).....	9, 19, 20
<u>Wheatley v. State</u> , 465 A.2d 1110 (Del. 1983).....	14, 15
<u>Wilderman v. Wilderman</u> , 315 A.2d 610 (Del. Ch. 1974)	19
<u>Zutrau v. Jansing</u> , 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014).....	19

NATURE OF PROCEEDINGS

This is an appeal by Defendant-Counterclaim Plaintiff below from a Memorandum Opinion and Final Judgment Order of the Delaware Court of Chancery dated May 27, 2015 and June 23, 2015, respectively. The Memorandum Opinion is attached hereto as Exhibit A (hereinafter "Op. ____") and the Final Judgment Order is attached hereto as Exhibit B.

The case below was commenced on April 27, 2011 by the filing of a Verified Complaint by Plaintiffs-Counterclaim Defendants below CanCan Development, LLC, Robert A. Granieri, Robert J. Granieri, and George Toth, against Sandra Manno and Manno Enterprises LLC (DI1)

On June 10, 2011, Manno and Manno Enterprises filed an Answer and Verified Counterclaims. (DI8) On June 14, 2011, Plaintiffs filed a Motion to Dismiss Defendants' Verified Counterclaims. (DI10) On October 4, 2011, Defendants filed Amended Verified Counterclaims. (DI31) On November 4, 2011, Plaintiffs filed a Motion to Dismiss Defendants' Amended Counterclaims. (DI32) On April 17, 2012, the Court entered an Order granting, in part, and denying, in part, Plaintiffs' Motion. (DI56) On December 19, 2014, the Court granted Defendants leave to file a Third Amended Counterclaim. (DI122) Defendants filed their Third Amended Counterclaim on January 2, 2015. (DI124)

Trial was held before the Honorable J. Travis Laster on January 12, 13, 14, and 15, 2015. Following post-trial briefing and oral argument, the Court issued its Memorandum Opinion on May 27, 2015 (DI156) and a Final Judgment Order was entered on June 23, 2015.

Defendants-Counterclaim Plaintiffs filed a Joint Notice of Appeal to this Court on July 20, 2015.

This is Appellant Sandra Manno's Opening Brief in Support of her Appeal.

SUMMARY OF ARGUMENT

The court ruled that Manno breached her duty of loyalty to CanCan by paying herself compensation and expense reimbursement in excess of her entitlement, and by incurring excessive corporate expenses for personnel, travel, entertainment, and the like. However, the record is clear that all but a relatively small portion of CanCan's expenditures which Manno incurred with a debit card issued to her, were approved and paid by Joseph Py, who was installed as Lead Manager by Plaintiffs Robert J. Granieri and Robert A. Granieri. Py's decisions in paying Manno and CanCan's expenses should have been presumed to have been made on an informed basis, in good faith, and the honest belief that they were made in the best interests of CanCan. Py did not testify and there was no evidence to rebut that presumption. Therefore, because Manno did not and could not make the payments she was held responsible for, and Py's presumption of independence and good faith was not rebutted, the court's holding that she breached her duty of loyalty is legally and factually wrong, and the award of \$970,123 against her in favor of CanCan must be reversed.

STATEMENT OF FACTS¹

This case involves the conception and development of a soon to be opened casino in D'Iberville Mississippi (the "Project"). The Project was conceived by Sandra Manno ("Manno") in the aftermath of Hurricane Katrina which devastated the Gulf Coast. Beginning in 2008, Manno single-handedly negotiated with the Mayor and Council of D'Iberville to lay the groundwork for the first ever casino in D'Iberville. She successfully negotiated with the Catholic Diocese of Biloxi to obtain an option on a prime five-acre parcel owned by the Diocese (the "Church Property"), and negotiated with private land owners to acquire the rights to approximately 50 surrounding parcels for the Project. She spearheaded the approval process before the Mississippi Gaming Commission and local authorities to pave the way for the Scarlet Pearl Casino which is scheduled to be opened later this year, under the ownership of Land Holdings I, LLC ("LHI"), a company wholly owned by RGJunior.

Manno worked seven days a week, many hours a day, to bring the Project to fruition. (A311) Despite the trial court's observation that: "she has failed at moving her ventures beyond the planning stage" (Op. 1), by all accounts, her efforts in D'Iberville were extremely successful. The properties (including the

¹ The names of the parties, witnesses, places, and things used by the trial court in its Opinion will be repeated herein.

Church Property), which she assembled for the Project, had a combined contract purchase price of just over \$16 million, but had an appraised fair market value of more than \$21 million as of October 2010. After Manno had been terminated by the Granieris without cause pursuant to the supermajority ownership they held, RGSenior and Toth were installed as CanCan's managers. On June 3, 2011, Toth, the President of CanCan wrote to RGJunior:

"CanCan...is a unique project. Stable market, low tax rate, opportunity to become the #1 property, one of the best sites for land, high visibility, and a well-designed thought out project...."

(A208)(Emphasis added.)

It was Manno who designed and thought out the Project. This tribute to Manno's efforts was echoed throughout RGJunior's new company's (LHI) promotional efforts for the Scarlet Pearl Casino being built on the Church Property and the other parcels CanCan secured through Manno's efforts. The Confidential Information Memorandum issued by UBS on behalf of LHI to secure financing for the casino, touts the Project site as follows:

"Prime Location

The Resort will be located in a highly attractive location for the Biloxi market. All traffic traveling to and from Biloxi on I-110 will encounter the Casino, showcasing its fresh design, attracting visitors seeking a new and modern product...."

(JX329, p.12)

After Manno investigated the D'Iberville market and laid the groundwork with the City Fathers, she formed CanCan as a Mississippi, LLC. She then turned to Joseph Py ("Py"), a businessman from suburban Philadelphia, for Project financing. Py, in turn, contacted two long-time family friends, RGSenior and RGJunior, to invest in the Project. They agreed to do so in late 2009 and began investing – primarily by RGJunior – in September 2009. Py was installed by the Granieris to be in charge of the finances of CanCan. (A312-314) He was their longtime friend and they trusted him. (A340) From the very beginning of their investment in September 2009 until Manno was terminated in March 2011, all investment monies went from the Granieris to Py, and only Py had check signing authority for CanCan. (A312-313, 371) Although Manno was issued a debit card by Py, she never had check signing authority for CanCan. (A314, 371) Traci Havelin, the controller for CanCan, would prepare checks and send them to Py to sign. (A366) The bank statements always went to Py. (A368-370) Py arranged for CanCan's accounts to be audited in 2009 and 2010 by Isdner & Company, and Isdner issued "clean" audits for both years. (A156-186, 305-309)

On December 20, 2010, the Members of CanCan executed an Operating Agreement (A55-123) The Operating Agreement formalized Py's role – Lead Manager responsible for the overall operational activities of the Company, and Manno's subordinate role responsible for the day-to-day operations of the

Company. (Id. at §3.5 A67) The Operating Agreement also provides that each Manager "has or will enter into a consulting agreement with the Company on terms mutually acceptable to the parties... (Id. §3.9 A71) The Operating Agreement does not specify that the Consulting Agreement must be in writing.

Manno worked on the Project from late 2008 to September 2009 for no compensation. Starting in September 2009, she was being paid \$10,000 per month plus expenses. In April of 2010, according to RGJunior's personal notes, in a discussion with Py he approved a \$15,000 monthly consulting fee for Manno, and a \$30,000 monthly consulting fee for Joseph Manno, then President of CanCan. (JX338, p. CAN010046) (A324) RGJunior wrote: "2010-04-05...both Joe and Sandra getting salary 30/month 15/month." In September, Toth was hired to replace Joseph Manno as President of CanCan at a monthly fee of \$35,000 plus expenses (A47-54), and Py increased Manno's monthly consulting fee to \$35,000. RGJunior was aware of this at the time and, although he testified at trial that he was not happy about it, and despite his majority ownership, he never took any steps to reduce her compensation. (A324-325)

During the course of running the day-to-day affairs of CanCan in D'Iberville, Manno retained attorneys, accountants, marketing and advertising firms and consultants in the gaming industry, as well as office staff. All were approved and paid for by Py. Those hires were part of her job duties and many of the

professionals and staff she retained are still working for Land Holdings, including Toth and, until recently, Havelin. However, Plaintiffs challenged several of the hiring decisions Manno made, and the lower court ordered her to repay substantial sums that CanCan paid to these individuals, certain operating and marketing expenses of CanCan, as well as to repay CanCan for fees and expenses that CanCan paid her through Py as part of her consulting agreement. In toto the court ordered Manno to reimburse CanCan \$970,123 for breach of fiduciary duty. Importantly, except for the relatively small amounts transacted with the debit card issued to Manno, all challenged amounts were approved and paid by Py with monies RGJunior invested through Py.

It is these rulings that Manno challenges in this Appeal.

ARGUMENT

I. THE TRIAL COURT'S DAMAGE AWARD AGAINST MANNO IN FAVOR OF CANCAN IS NOT SUPPORTABLE LEGALLY OR FACTUALLY AND MUST BE REVERSED.

A. QUESTION PRESENTED.

Is the court's holding that Manno breached her fiduciary duties to CanCan and must repay CanCan for monies approved and paid by CanCan's Lead Manager, Joseph Py, erroneous? This issue was raised in Plaintiffs' Complaint and in Manno's Answer and litigated through trial and post-trial briefing. Manno's Post-Trial Answering Brief at 22-35.

B. SCOPE OF REVIEW.

This issue raises issues of contract interpretation and legal issues relating to fiduciary duties, both of which are reviewed "de novo" by the Court, as well as factual findings which are governed by a "clearly erroneous" standard. Gatz Props, LLC v. Auriga Capital Corp., 59 A.3d 1206 (Del. 2012). Damage awards are reviewed for abuse of discretion. Id.

C. MERITS OF ARGUMENT.

1. *Manno's Compensation Was Overseen and Approved By Py and Presumably the Granieris and Was Not Shown to be a Breach of Fiduciary Duty.*

The trial court cites Valeant Pharm. Int'l. v. Jerney, 921 A2d 732, 745 (Del. Ch. 2007) to support its holding that Manno's compensation was self-interested and made without independent protection. However, Valeant actually supports Manno.

The court's ruling ignores the oversight that Py, and RGJunior as majority owner, had over Manno's compensation. There was independent protection. The court simply did not consider it.

Pursuant to the CanCan Operating Agreement, Manno was entitled to a consulting agreement with the Company. The Operating Agreement does not require that the consulting agreement be in writing, but does require that it be on mutually acceptable terms. Manno's compensation was set and paid by Py, the Lead Manager of CanCan. RGJunior and RGSenior together owned 53% of CanCan as of June 8, 2010 and RGJunior alone owned 55% as of August 23, 2010. (A45) The Operating Agreement permitted removal of a manager without cause by a member supermajority (70%) or with cause by a simple majority. (A68) Therefore, at any time after June 8, 2010 the Granieris together could have removed Manno for cause, and RGJunior could have done so on his own as of August 23, 2010. RGJunior was aware of her compensation and took no steps (prior to her termination without cause) to change it, or to seek her removal as manager.

Manno's total compensation and expense reimbursement while running the day-to-day operations of CanCan was \$721,000 (including \$98,000 of ATM withdrawals with the debit card).

The Court ruled that Manno was only entitled to receive \$10,000 per month consulting fee plus \$1,500 per month for one half of her monthly rent, but the only support for these figures is what Plaintiff's conceded in argument. Based only on Plaintiffs' concessions, and contrary to the evidence, the Court held that Manno was entitled to only \$207,000 in compensation and expense reimbursement for her service to CanCan which spanned more than two years although she was only paid for 19 months. The record evidence, to the contrary, is that at least from April 2010 to September 2010 (5 months) her consulting fee was \$15,000 per month, and from September 2010 to mid-March 2011 (7 months) it was \$35,000 per month. Py paid the monthly fee and RGJunior was well aware of it and did nothing to have it changed. The only conclusion to be reached is that it was mutually agreeable. Thus, at a minimum, the undisputed evidence shows that, even assuming \$10,000 per month was appropriate from September 2009 to April 2010 (\$70,000) the fee from April 2010 to September 2010 was \$15,000 per month (\$90,000) and from September 2010 to March 2011, \$35,000 per month (\$245,000) for a total of at least \$405,000. Manno testified that Py agreed to reimburse her for rent at \$3,000 per month. (A318) She is entitled to at least another \$27,000 credit for 18 months at \$1,500 per month. Therefore, her compensation plus rent reimbursement should have totaled \$432,000 - \$225,000 more than the court credited her. This does not

take into account the many company expenses Manno incurred for which she was reimbursed by Py. (A315)

The trial court's opinion is premised upon factual conclusions which are not supported by the evidence. For example, the court states, "Manno also began paying herself. Before the Granieris invested, Manno had not received any compensation. Afterwards, Manno began paying herself \$10,000 per month." (Op. 9) The evidence was unchallenged that Manno had no control over the checking account, and that Py made all payments from his office in Pennsylvania, either by direct deposit or with checks Havelin prepared and sent to him.

The court found that "Py wrote whatever checks Manno asked for without any meaningful review or oversight" (Id.), and that "Py did not make a business judgment, he simply rubber stamped the larger checks. Plus, Py and Manno's relationship was sufficiently close that Py cannot be regarded as independent." (Op. 37) Because Mr. Py never testified, there is no way the court could reach these conclusions based upon the evidence. No one knows what review or oversight Py engaged in – except perhaps the Granieris. And, the presumption must be that, as Lead Manager, he undertook whatever oversight was required.

The court also found "In April, Manno increased her consulting fee to \$15,000 per month," and "In September, Manno increased her fee to \$30,000 per month." (Op. 13) Again, the evidence was unrefuted that Py made all payments,

with the exception of \$98,000 in cash withdrawals Manno executed with the debit card, and that Manno never had check writing authority.

The trial court concluded without any factual basis that the Lead Manager Py did not make any business judgment and should not be regarded as independent. Py never testified and Plaintiffs never deposed him. It is significant that not only did Plaintiffs not call Py to testify, but that in March 2011 Py transferred all of his membership interests in CanCan to RGJunior for \$10.00. (A187) So, instead of suing him for \$970,000 that Manno allegedly misspent which he approved and paid, Py walked away never to be heard from. Notably, Py paid himself more than \$320,000 in addition to the amounts the court ordered Manno to repay. (A188) The testimony was unrefuted that he was the Granieris' trusted friend and handled all financial matters (except for Manno's debit card transactions). The appropriate inference is that Py was independent and acted with the knowledge and implicit, if not explicit, approval of the Granieris. Py controlled the bank accounts and signed all checks for CanCan after they were prepared and sent to him with supporting documentation by the in-house controller, Havelin. (A366) Manno was never a signer on any CanCan account. Py and Havelin, not Manno, received the monthly bank statements which reflected all activity, including ATM withdrawals. (A370) Any cash withdrawals which did not have adequate documentation were treated as 1099 income to Manno. (A368) Both Py

and Havelin received and presumably reviewed statements each month. Py ratified Manno's withdrawals by failing to register any objection or seek a return of any funds after reviewing the monthly statement. Further, issuing the 1099s to Manno and taking the deduction on its own returns, was ratification by CanCan.

RGJunior testified that he learned in fall of 2010 at a meeting with Py that Manno's compensation was \$35,000 per month. (A324) He testified that he was not happy about that. (A325) However, he did not take any action or even register any written disapproval, perhaps because, by then, Toth was on the payroll at \$35,000 a month plus his expenses (which were averaging about \$15,000 per month)(A155), and RGJunior realized that was the industry norm. In any event, after that meeting, Py continued to pay Manno as he had been doing.

If Py were in a position to contradict that he authorized and made any of the challenged payments or that he did not engage in any meaningful review and was controlled by Manno, (as the court ruled) surely Plaintiffs would have called him to testify, or, at a minimum, taken his deposition. The only inference to be drawn is that Py's testimony would have been unfavorable to Plaintiffs. In Re Emerging Communications, Inc. Shareholders Litig., 2004 Del. Ch. LEXIS 70 *90 (Del. Ch. 2004) (Justice Jacobs sitting by designation). A missing witness inference is permissible where it would be "natural" for the party to produce the witness if his testimony would be favorable. Wheatley v. State, 465 A.2d 1110, 1111 (Del.

1983). In this case, it would have been natural for Plaintiffs to call Py if his testimony would have been favorable. He was the Granieris' trusted friend, RGJunior made a deal with him to acquire his interests in CanCan, and he was the Lead Manager. It would not be "natural" for Manno to call him. She named him as a co-defendant in a New Jersey lawsuit (JX251) charging him inter alia with fraud and civil conspiracy. Moreover, she did not need to call him because, as Lead Manager, his acts and statements were admissible against CanCan, and support and ratify the payments to her.

The Court's holding that Manno's receipt of compensation and expense reimbursement (over which she had no control) was a breach of fiduciary duty is not supported by the evidence, because all payments were approved and made by Py, and implicitly, if not explicitly, approved by the Granieris. Contrary to the court's holding, there is no evidence that "Py did not make a business judgment, he simply rubber stamped the larger checks. Plus Py and Manno's relationship was sufficiently close that Py cannot be regarded as independent." (Op. 36-37) Not only is evidence to support this not in the record, the evidence is to the contrary. Py was the Granieris' longtime trusted friend, and was selected by RGJunior to handle the financial affairs as Lead Manager. In that capacity, he was given responsibility for the overall operational activities of CanCan (A67), including the

authority to ratify actions previously taken by Manno or any other person on behalf of cancan. (A65)

Moreover, the Isdaner Audits, should have been considered by the court and show that Manno's compensation was not wrongful, wasteful, or otherwise improper. This includes all of the compensation and undocumented cash withdrawals which were Manno's responsibility for income tax purposes. The CanCan tax returns were prepared by Isdaner and the tax partner responsible for filing the 2010 returns was RGSenior. All of Manno's compensation and expenses were taken as legitimate tax deductions by CanCan. (A305-309)

The recent decision of the Court of Chancery in Friedman v. Dolan, 2015 Del. Ch. LEXIS 178 (Del. Ch. June 30, 2015) is instructive in this case. In Friedman, in the court's words..."a board dominated by members of the controlling family approved non-executive director compensation, which accrued to three family member directors....Nonetheless, compensation decisions are not the expertise of trial judges, and the court should not second-guess an independent compensation committee's business decisions that are not irrational." Id. at *1. In Friedman, two executives were paid compensation totaling more than \$40 million each from 2010-2012. Significantly, one of the executives was directly involved in the process by which his compensation was determined. Id. at *6. Plaintiff alleged that the two executives breached their fiduciary duties of loyalty and good faith by

causing the company to award and for accepting the compensation. Defendants argued, inter alia, that they could not have breached fiduciary duties by accepting compensation awarded that was within the compensation committee's business judgment.

The court ruled that because the decision to award compensation is protected by the business judgment rule, the Plaintiff must show that the board or committee that approved the compensation lacked independence, or lacked good faith, in which case the burden shifts to the defendant to show that the transaction was entirely fair. Id. at *16. This is where the trial court in this case erred. There was no evidence to show that Py did not act independently or lacked good faith in compensating Manno for her tireless efforts on behalf of CanCan.

The court observed that the test for independence generally asks whether, based on the alleged conflict, "the director is unable to base his or her decisions on the corporate merits of the issue before the board." The test for good faith is "whether [any] person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty." Id. at *21 (Emphasis in original) In this case, there was no evidence that Py was not independent, and, in fact, he was the Plaintiffs' trusted friend whom they put in charge of their investments. As to good faith, Manno's compensation was not only consistent with what CanCan paid Joseph Manno and Toth with RGJunior's full knowledge and blessing, it was

consistent with the compensation paid to several employees hired by Toth and RGSenior after Manno (and Py) were terminated.

In Friedman, the court dismissed the complaint observing that:

Delaware courts are hesitant to scrutinize executive compensation decisions, recognizing that it is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money. Entire fairness is not the default standard for compensation awarded by an independent board or committee, even when a controller is at the helm of the company.

As this Court held in Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000), a case cited and relied upon by the Friedman court, "it is a presumption that in making a business decision the directors ... acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." (citing Aronson v. Lewis, 473 A.2d 805 (1984)). This Court noted that it is the essence of business judgment to determine if an individual is entitled to large amounts of money whether in salary or severance. Brehm, supra. at 262.

Here, all of the evidence pointed to Py's independence. He was the Granieris' friend. He was the Lead Manager. He handled all finances. RGJunior communicated with him about financial issues. He was a neighbor of the Granieris in suburban Philadelphia, and he never visited the CanCan office in D'Iberville. The trial court simply had no basis to rule that he was not independent, much less that he did not act in good faith in authorizing and paying the amounts on behalf of CanCan which it ordered Manno to repay.

The trial court erred in concluding that Py was not independent without evidence to support such a finding. To the contrary, the court should have drawn an adverse inference against Plaintiffs for failing to call Py. Without Py's testimony, there was no evidence to rebut Manno's testimony as to what she was entitled to be paid for consulting fees and expense reimbursement. The trial court relied solely on Plaintiffs' argument (not evidence) and its own subjective belief that she was paid too much.

In any event, Manno's compensation was entirely fair to CanCan. Assuming, arguendo, that Manno's acceptance of payment by Py of her salary and expenses was the product of an unfair process, it should be considered, collectively, as her compensation and found to be entirely fair. A court's finding that director compensation was the result of an unfair process does not end the inquiry because it is possible to show that the pricing terms were so fair that the transaction was entirely fair. Valeant Pharms. Int'l v. Jerney, 921 A.2d 732, 748-49 (Del. Ch. 2007). "Among the factors a Court may consider in determining whether salary is reasonable are whether it bears a reasonable relation to salary received in the past and how the amount of challenged salary compares to other salaries paid by the employer." Zutrau v. Jansing, 2014 Del. Ch. LEXIS 156 *76 (Del. Ch. July 31, 2014) (citing Wilderman v. Wilderman, 315 A.2d 610, 615 (Del. Ch. 1974)).

It is significant that Valeant involved the payment of about \$50,000,000 in bonuses to interested directors of the company. In Friedman the questioned compensation was over \$40,000,000. Manno's total compensation plus expenses, as found by the court, for 19 months was \$721,000. Therefore, her average monthly fees plus expenses was \$37,947. If it were averaged over the period she received no compensation, an additional 9-10 months, it would of course, be much lower. Thirty-seven thousand nine-hundred forty-seven dollars (\$37,947) per month in fees and expenses is entirely fair for a manager in charge of day-to-day operations of a casino project working long hours seven days a week when viewed relative to the compensation of other employees of CanCan, all of whom worked under Manno, and the results achieved – a \$5 million paper gain on properties she assembled for the unique, well-designed, well-thought-out, Project she created which will open in December as the first casino in D'Iberville, Mississippi. Toth's consultant fee was \$35,000 per month plus expenses that were approximately \$15,000 per month. (A47-54, 155, 362) Toth's entire month's rent was paid by CanCan, not just half. Toth's agreement required him to work 20 hours per month. Manno, according to RGJunior, was a hard worker who sent volumes of work product and answered emails at all hours of the day. (A342-343, 346) Albo Antenucci, hired by Toth, was paid \$25,000 per month as a construction consulting fee. (A344-345) To earn his \$25,000, he flew to D'Iberville twice a month for

meetings for two or three days. (A363) Notably, construction did not begin until 2014. Similarly, Fine Point Consulting was paid \$35,000 per month. (A345) Steve Overly, hired by Toth, was paid \$25,000 a month as a legal consultant. Id. Mark Norton, who worked under Toth, was paid between \$23,000 and \$35,000 per month, plus expenses. CanCan has not questioned nor challenged any of these fees and expenses. Joe Manno, explicitly approved by RGJunior, was paid \$30,000 per month. By viewing Manno's \$37,947 per month in fees and expenses next to the compensation of other employees and consultants of CanCan, it is clear that it was the going rate in the casino industry for high level consultants and executives. Manno was the Manager and in charge of on-the-ground day-to-day operations and was entitled to be compensated accordingly.

It is noteworthy that after Manno was terminated, and RGSenior and Toth were put in charge, and RGJunior took a more active role, CanCan's operating expenses increased. (A352-353)

The court's holding that Manno made self-interested compensation decisions without independent protections is not supported by the record and should be reversed. In any event, the amounts paid to Manno by Py were entirely fair to CanCan.

2. *The Court's holding that certain hiring decisions and corporate expenditures were a breach of Manno's fiduciary duty is erroneous and should be reversed.*

The Court awarded damages against Manno and in favor of CanCan totaling \$970,123. Of that amount, \$514,000 was for excessive compensation which is addressed in Argument 1. supra, the balance of \$456,123 was for miscellaneous corporate expenditures, each of which, like Manno's fees and rent were approved and paid by Py and were considered and found appropriate by CanCan's auditors. Accordingly, Manno should have been insulated from liability because of Py's role in approving and paying all corporate expenditures.

The only testimony offered by CanCan attacking Manno's expenditures was through Havelin, the CanCan controller who worked with Py to document and pay all corporate expenditures. In addition, Plaintiffs' accounting expert Richard Rowland, CPA relied entirely on Havelin for documentation regarding CanCan's expenditures, and he unilaterally relied upon her opinions as to which expenses were legitimate and which were unsupported. However, after trial, and after all post-trial briefing was completed, it was disclosed that Havelin had been allowed to resign from LHI for failing to withhold the correct amount of taxes from her paychecks. (DI154) Post-trial briefing was completed on March 20, 2015 and oral argument had been scheduled for March 30, 2015. On March 24, 2015, Plaintiffs' counsel wrote:

We write to inform the Court and counsel about a recent incident that at least arguably might be relevant to this action . . . Recently LHI learned that Ms. Havelin and another employee were failing to withhold the correct amount of taxes from her own paychecks [sic]. . . LHI allowed Ms. Havelin to resign, and will be paying the IRS any amounts that should have been withheld from Ms. Havelin's paychecks but were not.

The letter goes on to observe that "obviously the tax situation suggests that Havelin might have had more-than-normal need for her job, while her failure to withhold the required tax amounts could call into question her general credibility." (DI154) There is no explanation as to why she was permitted to resign, rather than be terminated, nor why LHI would be paying the unpaid taxes. Nevertheless, the matter does go to the heart of her credibility, and if not her credibility, certainly her competence. A controller who is not properly withholding her own taxes is dishonest or incompetent, or both, and her testimony should be viewed in that light. The possibility that Havelin tailored her testimony to favor CanCan under the circumstances, is a genuine concern, inasmuch as she was the only witness supporting CanCan's damage claims. This also calls into question Havelin's selection of documentation provided to Mr. Rowland.

Given Manno's lack of authority to pay any bills, and Py's role as Lead Manager, the court should have found that Py insulated Manno from the breach of fiduciary duty that the court found.

Not only did Py's oversight and control of the CanCan checking accounts insulate Manno from liability for overspending, the court's factual findings are not supported by the evidence. Without burdening the Court with every expenditure the trial court required Manno to repay, the examples of Joseph and Patricia Manno are illustrative.

Joseph Manno

RGJunior liked Joseph Manno and knew he was being paid \$30,000 per month. (A324, 341) He worked for CanCan from September 2009 until July 2010, when he was fired by Manno. That totals nine months at \$30,000 a month or \$270,000. He was paid a total of \$283,090.50, including expenses. Although Plaintiffs argued that Manno should be responsible to repay two months' of Joseph's salary (even though they conceded that it is not clear whether his work was valuable or not), they then calculate two months to be \$92,778. They provided no explanation as to how two months' salary of \$30,000 a month totaled \$92,778, but the court accepted that figure, and ordered Manno to repay \$92,778.

Plaintiffs' concession that they did not know whether Joseph Manno's work was valuable or not should have ended the discussion. The fact that Manno fired her own brother when he did not perform as she expected destroyed their thesis that she hired relatives and friends without regard to the Company's interests. Both

RGJunior and Toth agreed that it makes sense to retain people you know and can rely on and feel comfortable with. (A344-345, 360)

The trial court's decision that Manno is liable for \$92,778 of Joseph Manno's salary is not supported by any credible evidence, especially since Plaintiffs only sought two months at \$30,000 per month.

Patricia Manno

Patricia Manno, like her brother and sister, had extensive experience in the gaming industry. Patricia Manno held a key gaming license with Caesars in Atlantic City. As Toth explained, a key license is a heavily investigated license issued to the top executives and ownership of a company. (A359) She served as executive director of Caesar's Palace Casino and Hotel operations. (A288-289) Patricia taught ten years at Atlantic Community College's Casino Career Institute. She taught upper management and executive management courses and lectured at different casinos for executives. (A290) Patricia began working on the CanCan Project in 2009. (A291) Both she and her sister Sandra worked seven days a week, many hours a day. (A292) She was in D'Iberville with Sandra helping to look for site locations, trying to come up with a theme, etc. (A293) Patricia worked without pay from 2009 until June 1, 2010 (A294-297), when she began receiving \$5,000 a month.

At CanCan, Patricia Manno worked on marketing, advertising layouts, construction, VIP cards, research, baccarat, a Miss CanCan pageant idea, and website design, among other tasks. (A298-299) Patricia spent a lot of time working on setting up internal procedures for the casino which had to be approved by the Gaming Commission. (A300-304) Patricia's hiring was approved by Py and all payments to Patricia Manno were approved and paid by Py. The only evidence to the contrary was Havelin's testimony that she never saw Patricia's work product. (A365) Yet the court ordered Manno to repay 100% of the \$66,392 CanCan, through Py, paid to her.

Similarly each of the expenditures challenged by Plaintiffs and awarded against Manno to CanCan was processed by Havelin and approved and paid by Py. Only Havelin speculated that they did not provide value to CanCan.

Even Toth, President of CanCan and a named Plaintiff, testified: "I did not say Ms. Manno was overspending." (A364)

All of Manno's decisions, be they employee hires or marketing expenses, need to be approached with the notion that she was in charge of day-to-day operations of a multimillion dollar project which the court observed had an implicit value of \$15.3 million in early 2011. (Op. 24) The work done by, and the decisions made by Manno (with approval from Py) increased the value of CanCan,

promoted the Project, and laid the necessary groundwork of what is now LHI's casino.

The balance of the award against Manno (other than her compensation) was based primarily upon the testimony of Havelin. Significantly, the court makes no mention of Py's role as Lead Manager and keeper of CanCan's checkbook in approving and making the payments, or Havelin's role as controller, in sending the invoices and payroll (as well as checks) to Py for approval and payment, or her credibility. Nor does the court consider, or even mention, the fact that none of these expenditures were questioned by CanCan's auditors, nor that they were all taken as legitimate business expenditures on their tax returns.

While the issue of credibility is for the trier of fact, the trial court clearly did not consider Manno a credible witness. Unfortunately, it appears that disbelief colored the court's consideration of the expenditures which CanCan challenged after her termination even though Manno did not have final control or decision making authority over the expenditures at issue. Whether the court believed her or not, Py and Havelin were responsible for processing, approving, and making the payments. Manno created not only a concept for a successful casino, but assembled the land, the governmental framework and the team to bring it to fruition. The court was so dis-enamored of Manno that it did not give credit where credit was due and it blamed her for expenditures, which she not only did not

make, but could not. Without any evidence from or concerning Py to the contrary, the spending decisions he made must be presumed to have been independent and in good faith. Therefore, the damage award should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Sandra Manno respectfully requests that the judgment against her in favor of CanCan Development, LLC be reversed and judgment entered in her favor.

Dated: September 3, 2015

SEITZ, VAN OGTROP & GREEN, P.A.

/S/James S. Green, Sr.

JAMES S. GREEN, SR. (DE0481)

222 Delaware Avenue, Suite 1500

P. O. Box 68

Wilmington, DE 19899

(302) 888-0600

jgreen@svglaw.com

Attorneys for Defendant
and Counterclaim Plaintiff-Below,
Appellant Sandra Manno