

FILE

In re Mistover Acres LLC

PALKOVICH, VAN EVERY & DOOLEY
ATTORNEYS AT LAW

3034 Sutton Avenue
Banford, Franklin 33518

To: Applicant
From: Lyle Palkovich
Re: Mistover Acres LLC
Date: July 24, 2007

We have been retained by Petra Flynn, one of three members of Mistover Acres LLC (“Mistover”), a Franklin limited liability company, to review a claim made against Mistover by Genesee Trout, Inc., for damage to its trout farm caused by the aerial crop dusting of a pesticide, MU-83, on Mistover’s fields. Mistover is a well-respected grower and seller of apples, salad greens, and herbs.

We are representing Petra Flynn in her individual capacity. Mistover has its own legal counsel. Ms. Flynn has come to us because she is concerned about her potential personal liability for the harm claimed by the trout farm. She believes that Mistover’s organization completely shields her from personal liability for Mistover’s business-related activities, but she is understandably troubled by the demand letter from Genesee Trout’s counsel. Another concern I have is whether the aerial crop dusting of MU-83 constituted an ultrahazardous activity, thereby raising the possibility of strict liability. The next meeting with Ms. Flynn on this matter is scheduled for July 31, 2007.

Please prepare an objective memorandum analyzing the following questions under Franklin law:

- 1) Can Ms. Flynn be held personally liable for the damage done by the aerial crop dusting?
- 2) Did the aerial crop dusting of MU-83 constitute an ultrahazardous activity?

You need not prepare a separate statement of facts, but in each part of the memorandum you should incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. A carefully crafted subject heading should precede each discussion section. For the purpose of your analysis, assume that the aerial crop dusting caused the damage to the trout farm.

Client Interview Notes: Petra Flynn

July 17, 2007

Petra Flynn is one of three members of Mistover Acres LLC. The other two members are Petra's brother, Gilbert Flynn, and their cousin, Chip Kendall. They formed Mistover after Petra and Gil inherited two adjoining parcels of land in Sutton Township. Mistover grows apples, herbs, and unusual varieties of lettuce that have become very popular in gourmet restaurants. Under the terms of the Mistover Acres LLC Operating Agreement, Petra and Gil lease their land, about 60 acres, to the business. Petra and Gil do some work for Mistover, but as Chip has the expertise in agriculture, most of the decisions regarding planting are left to him. Petra supervises the marketing and sale of Mistover's produce.

Petra has come to the firm for advice regarding her potential personal liability for claims made by Genesee Trout, Inc., in a demand letter its attorneys sent to Mistover's office. She is concerned about Mistover being liable for such a large claim, as it has yet to turn a profit and Chip invested all the money he had in Mistover when they organized it five years ago. According to Petra, Chip "is essentially judgment proof," and Gil's financial situation has always been precarious. She fears that, because she has substantial assets of her own, any lawsuit by Genesee Trout will try to target her as a "deep-pocket" defendant.

Sutton Township is an area of rolling hills that has long been agricultural. In the 1990s, farmers experienced economic difficulties, but in recent years, small-scale, specialized producers like Mistover have been reviving the local economy. A number of these producers are devoted to organic agricultural practices. For example, across the road from Mistover is Haakon Farms, where the owner sells goat cheese made with the milk from her own herd. And, as noted in the demand letter, Genesee Trout's trout farm lies just east of Mistover.

According to Petra, the three members began Mistover to put into practice their belief that consumers deserved another option besides the bland fruits and vegetables grown by factory farms that dominate the selections in most supermarkets. Nonetheless, neither she nor Gil was particularly thrilled when Chip suggested growing new lettuce varieties. Mistover's heirloom apple varieties were selling well and the lettuce varieties could not be successfully raised in amounts needed for sale without the use of some chemical fertilizers and pesticides, which they generally try to avoid. Chip, however, persuaded them that these rare lettuces would soon be "must have" salad greens in the best restaurants, and that the price Mistover could charge would soon generate enough income to allow it to expand into other vegetable crops. Chip also argued that, as one of

the only operations offering a unique and locally grown lettuce variety, Mistover would earn a reputation for being an innovator in the gourmet produce market.

Mistover first grew lettuce two years ago and the crop did well. Last year, however, Chip discovered leaf slugs on the plants. If nothing had been done about the leaf slugs, they could have destroyed one-third of the crop. Chip proposed using a pesticide, but Petra expressed concerns about the marketing consequences, as they had always emphasized that Mistover's produce was locally grown with minimal chemicals. They researched pesticides together and ultimately selected MU-83, a new pesticide. Petra then ordered it last year through an agricultural supplier; MU-83 is not available to the general public. Chip walked through the fields with some of Mistover's seasonal help and sprayed the lettuce crop with MU-83. It was effective, but the labor costs of the pesticide application were high.

When Chip found the leaf slugs again this season, he determined that the slugs were more numerous than last year and that hand spraying would involve even higher labor costs. Before joining Mistover, when he lived in Columbia, Chip had worked one growing season using his small airplane to dust large corn and wheat fields with pesticides and herbicides. He and Petra decided to use aerial crop dusting, and Petra ordered more MU-83. The Franklin Environmental Code requires posting for aerial crop dusting, and Petra ensured that the proper notice was posted on the Sutton Township website, at the Town Hall, and at three other public places.

Chip sprayed the fields with MU-83 on March 28, 2007. Petra was at Mistover that afternoon and watched Chip take off in his airplane, circle the farm buildings, and then fly over the plants at a height of about 20 feet to apply the MU-83. She did not observe the yellow cloud described in the letter from Genesee Trout's attorneys, but does recall that there was a light breeze blowing from the west, which possibly could have carried MU-83 in the direction of the trout ponds. Two days later she and Chip walked through the fields and verified that the MU-83 had killed any visible leaf slugs.

The lettuce, Mistover's best crop yet, was picked and sold at a prime price. Until the letter from Genesee Trout's attorneys arrived, none of the LLC members had heard any complaints about the MU-83 aerial crop dusting or their farming activities in general. Petra will come in next week to discuss the situation.

FRENCH & ISENBERG, LLP
Attorneys at Law
222 Sheffield Ave
Centralia, Franklin 33530

July 17, 2007

Ms. Petra Flynn
Mistover Acres LLC
P.O. Box 572
Derby, Franklin 38440

Re: Genesee Trout, Inc.

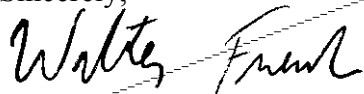
Dear Ms. Flynn:

We represent Genesee Trout, Inc., the owner of the trout farm that abuts Mistover Acres on its eastern edge. On March 28, 2007, our client's employees observed a crop-dusting airplane flying over the fields of Mistover Acres, spraying a yellow-colored substance. They then observed a yellow cloud drifting over Genesee Trout's fish ponds. In the months since that date, a higher-than-expected percentage of our client's trout stock has died, and the number of successful egg hatchings has substantially declined. The water in the fish ponds has been tested and has been found to contain significant levels of the pesticide MU-83. The cost to clean the ponds and restock the trout will exceed \$1 million. Genesee Trout is also concerned that MU-83 will leech into the local water supply.

The presence of MU-83 in the Genesee Trout fish ponds, the resulting decline in the trout stock and egg hatchings, and the potential damage to the water supply were caused by Mistover Acres LLC's aerial crop dusting on March 28, 2007.

Genesee Trout, Inc., is willing to settle its claims against Mistover Acres LLC. However, if a settlement cannot be reached, our client has instructed us to pursue legal action against Mistover Acres LLC and its members. If you are willing to discuss settlement, please respond to this letter within two weeks of its receipt.

Sincerely,

A handwritten signature in black ink that reads "Walter French". The signature is written in a cursive style and is positioned to the right of a vertical line that extends from the "Sincerely," text.

Walter French

OPERATING AGREEMENT OF MISTOVER ACRES LLC

This OPERATING AGREEMENT is entered into by Petra Flynn, Gilbert Flynn, and Chip Kendall for the purpose of organizing a limited liability company pursuant to the Franklin Limited Liability Company Act, § 601 *et seq.*

- 1. Name and Purpose:** The limited liability company shall be known as MISTOVER ACRES LLC (hereinafter “the LLC”). Its purpose is to grow and market apples and other produce for sale at farmers’ markets and to restaurants and other commercial establishments.
- 2. Members:** The members of the LLC are Petra Flynn, Gilbert Flynn, and Chip Kendall.
- 3. Capital Contributions:** The capital contributions of the respective members shall be as follows:
 - a. Chip Kendall: \$50,000 (fifty thousand dollars).
 - b. Petra Flynn: \$10,000 (ten thousand dollars).
 - c. Gilbert Flynn: \$10,000 (ten thousand dollars).
- 4. Lease of Agricultural Land:** On or before the date of filing of the Articles of Organization, leases will be entered into between the LLC and Petra Flynn, and the LLC and Gilbert Flynn, for the two adjoining 30-acre parcels on Schmidt Road, Derby, Franklin, identified as Tracts 37 and 38 of Sutton Township Certified Survey 2713. The LLC shall have the exclusive right to lease these parcels for as long as the LLC continues in existence or until such time as the members agree to terminate the leases.
- 5. Management:** With respect to acquisition of capital assets by the LLC, or the addition of new members or employees of the LLC, the undersigned members shall in all cases act as a group, with a majority vote or consent of the members required to take action. Day-to-day decisions regarding planting and harvesting are delegated to Chip Kendall until the members agree otherwise. The marketing and sale of the LLC’s produce shall be supervised by Petra Flynn.

6. **Sharing in Distributions and Profits:** For the first five (5) years of the LLC's existence, the profits, if any, will be reinvested into the LLC's operations. If any profit is realized in subsequent years, 50 percent (50%) will be reinvested into the LLC, and the remainder will be distributed in equal shares to the members.
7. **Accounting:** Members shall receive annual financial reports containing the LLC's balance sheet and a statement showing the net capital appreciation or depreciation.
8. **Applicable Law:** All questions concerning the construction, validity and interpretation of this agreement and the performance of the obligations imposed by this agreement shall be governed by the laws of the State of Franklin.

Dated: February 15, 2002

Petra Flynn

Petra Flynn

Gilbert Flynn

Gilbert Flynn


Chip Kendall

USER'S GUIDE FOR MU-83 APPLICATION

Thank you for selecting an AgriShield, Inc., product to protect your crops! MU-83 is an effective pesticide for use on all crops, including those intended for human consumption. Studies by the University of Franklin Agricultural College have demonstrated that it is 98% successful in completely eradicating pests such as rootworm, boll weevils, and leaf slugs, when applied according to directions. It is suitable for application by hand, tractor-pulled spraying rig, or aerial dusting by airplane. Aerial dusting should occur at a distance no higher than 30 feet from the intended target area.

* * * *

As with all pesticides, persons applying MU-83 should use caution and be aware that pesticide “drift” (the movement of pesticide droplets or particles in the air from the targeted field to non-target areas) is always a risk of pesticide application. Drift and runoff may be toxic to aquatic organisms in neighboring areas. Drift will occur with every application. The amount of drift is subject to various controllable and uncontrollable factors, such as time of application, concentration, wind gusts, weather changes, and the physical characteristics of pesticide droplets or aerosols. Apply this product only in accordance with application instructions found on the label.

WARNING: Improper use or application of MU-83 may cause serious injury or death.

SUTTON TOWNSHIP
PUBLIC NOTICE

In accordance with the Franklin Environmental Code, § 22(1), Mistover Acres LLC hereby gives public notice that it will conduct aerial crop dusting of the following pesticide on the date indicated:

Pesticide: MU-83

The pesticide application will occur on March 28, 2007 on the following described property in Sutton Township:

The two adjoining 30-acre parcels identified as Tracts 37 and 38 of Sutton Township Certified Survey 2713, according to the records of the Clerk and Recorder of Washington County, Franklin, and also known as Mistover Acres LLC, 200 W. Schmidt Rd.

For further information, contact: Petra Flynn
200 W. Schmidt Road
Derby, Franklin 33510
(920) 555-1085

Dated this 25th day of March, 2007

Mistover Acres LLC

by *Petra Flynn*
Petra Flynn, its authorized representative