

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

SAM GLASSCOCK III  
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
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GEORGETOWN, DELAWARE 19947

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Date Decided: December 5, 2013

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Re: Edmond Costantini, et al. v. Swiss Farm Stores Acquisition LLC  
Civil Action No. 8613-VCG

Dear Counsel:

This action involves the indemnification rights of the Plaintiffs, Mssrs. Costantini and Kahn. This Letter Opinion addresses Plaintiff James Kahn's September 9, 2013 Motion for Reargument filed in response to my Letter Opinion, issued on September 5, 2013, denying his Motion for Judgment on the Pleadings. In his Motion for Reargument, Kahn points to my statement in the September 5 Letter Opinion that "[t]he parties concede that Kahn did not have a relationship with Swiss Farm that put him in the class of indemnitees identified in Article 14; that is, he was not a managing member, officer, employee, or agent."<sup>1</sup> As a result, I opined that Kahn, in addition to not being entitled to a Judgment on the

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<sup>1</sup> *Costantini v. Swiss Farm Stores Acquisition LLC*, 2013 WL 4758228, at \*4 (Del. Ch. Sept. 5, 2013).

Pleadings, was not entitled to indemnification as sought in his Complaint. In fact, Kahn did argue in his opening brief that the underlying action treated him as an agent of Swiss Farm, and that he was accordingly entitled to indemnification under the LLC Operating Agreement. I therefore agreed to hear oral argument on the issues of whether the pleadings demonstrated that (1) Kahn was in fact an agent of Swiss Farm, and (2) Kahn was sued in the underlying action by reason of the fact that he was Swiss Farm's agent, as required for indemnification by Article 14 of the Operating Agreement.<sup>2</sup> Argument was held on October 29, 2013; this is my decision on the Motion for Reargument.

While Mr. Kahn stated in his briefs on the Motion for Judgment on the Pleadings, peripherally, that he was Swiss Farm's agent,<sup>3</sup> Mr. Kahn submitted evidence of that agency relationship for the first time with his Motion for Reargument. Specifically, Mr. Kahn has submitted an Exclusive Brokerage Agreement between Swiss Farm and Kahn Management Corporation, and an Exclusive Developer/Development Management Agreement between Swiss Farm

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<sup>2</sup> See Operating Agreement at Art. 14 ("The Company shall indemnify any person, who was or is a party to any proceeding by or in the right of the Company to procure a judgment in its favor *by reason of the fact that the person is or was* a member of the Board of Managers, an officer, an employee, *or an agent* of the Company, or is or was serving at the request of the Company as an officer, director, employee, or agent of another corporation . . .") (emphasis added).

<sup>3</sup> See, e.g., Pls.' Op. Br. at 16 (arguing that the underlying complaint asserted Swiss Farm's "right to control Mr. Kahn's actions regarding the Mancini Letter" and right to "direct him to make a full disclosure about it," and suggesting that such claims arose out of Mr. Kahn's status as a bailee as to the Mancini letter).

and Kahn Management Corporation.<sup>4</sup> Without these documents, I would have had no basis—save for a single footnote in his opening brief asserting that Mr. Kahn was Swiss Farm’s Exclusive Real Estate Broker<sup>5</sup>—to conclude that Mr. Kahn was an agent of Swiss Farm, or that the allegations in the underlying complaint arose out of that agency relationship. This matter is before me on a Motion for Judgment on the Pleadings. Because the pleadings alone are insufficient to determine whether Mr. Kahn was an agent of Swiss Farm, and whether the underlying action was brought by reason of the fact of that relationship, Mr. Kahn’s Motion for Reargument is denied, except as qualified below.

### I. Background

In this action, Mr. Kahn seeks indemnification under Swiss Farm’s LLC Operating Agreement. That Agreement provides in relevant part:

The Company shall indemnify any person, who was or is a *party to any proceeding* by or in the right of the Company to procure a judgment in its favor *by reason of the fact that the person is or was a member of the Board of Managers, an officer, an employee, or an agent of the Company, or is or was serving at the request of the Company as an officer, director, employee, or agent of another corporation . . . .*

To the extent that a member of the Board of Managers, an officer, an employee, or an agent of the Company has been successful on the merits or *otherwise in defense of any proceeding referred to in this Article 14*, or in defense of any claim, issue, or matter therein, he

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<sup>4</sup> Pl.’s Mot. for Reargument Exs. A, B.

<sup>5</sup> See Pls.’ Op. Br. at 16, n.6 (“The Swiss Farm board formally designated Mr. Kahn to be the LLC’s ‘Exclusive Real Estate Broker’ . . . .”). The Plaintiffs also briefly stated in their Reply Brief that Mr. Kahn was Swiss Farm’s “Exclusive Real Estate Broker,” but did not append the Agreement to its Reply. Pls.’ Reply Br. at 7.

or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith.<sup>6</sup>

In the underlying action, Kahn was sued by Swiss Farm and prevailed on a defense of laches by analogy to the statute of limitations. In this action, he seeks indemnification for the costs of that litigation. Because the Operating Agreement only grants indemnification to an agent who was a party to a proceeding *by reason of the fact that he was an agent*, I must determine whether Mr. Kahn was Swiss Farm's agent, and whether the allegations in the underlying complaint sought to impose liability by reason of the fact of that agency relationship. The underlying complaint alleged that a lease agreement (the "Challenged Lease")—entered into by Mr. Costantini on behalf of Swiss Farm, and Mr. Kahn on behalf of Redeemed Properties, LLC—contained terms unfavorable to Swiss Farm, and therefore constituted breaches of Mr. Costantini's and Mr. Kahn's fiduciary duties to Swiss Farm. With respect to the source of Mr. Kahn's fiduciary duties to Swiss Farm, the underlying complaint stated:

At the time of the events complained of above, Defendant Kahn was a partner in the Kahn Quinn Partnership, which in turn was a member of Swiss Farm with the right and ability to designate a member of the Board of Managers of Swiss Farm. At the time of the events complained of, the Kahn Quinn Partnership designated Hank Quinn to serve on the Board of Managers, but in effect, the Kahn Quinn Partnership itself so served and in the process assumed for all of its

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<sup>6</sup> Operating Agreement at Art. 14.

partners, including Defendant Kahn, multiple fiduciary duties to Swiss Farm.<sup>7</sup>

That is, the underlying complaint asserted the novel argument that Mr. Kahn's fiduciary relationship to Swiss Farm arose as the partner of an entity entitled to appoint a manager to the Swiss Farm board. However, in connection with this Motion for Reargument, Kahn submits an Exclusive Brokerage Agreement between Swiss Farm and Kahn Management Corporation, and an Exclusive Developer/Development Management Agreement between Swiss Farm and Kahn Management Corporation. Plaintiff's counsel represented at oral argument that Kahn Management Corporation is a sole proprietor entity with Mr. Kahn as the sole proprietor; Defendant's counsel asserted that it is a Pennsylvania corporation, but information of its ownership is not yet in the record.<sup>8</sup> According to Kahn, these Agreements were in effect at the time the Challenged Lease was signed. The brokerage agreement vests Kahn Management Corporation, as Swiss Farm's agent, with authority to "identify and locate properties that are suitable sites for [Swiss Farm's] stores . . . and to assist [Swiss Farm] with the negotiation of lease agreements for such Prospective Sites,"<sup>9</sup> and provides that Swiss Farm will pay Kahn Management Corporation a commission "for each Lease entered into during

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<sup>7</sup> *Swiss Farm Stores Acquisition LLC v. Redeemed Properties, LP*, C.A. No. 7401-VCG, at ¶ 31 (Del. Ch. Apr. 5, 2012) (Complaint).

<sup>8</sup> Oral Arg. 3:20-21, 10:5-10.

<sup>9</sup> Pl.'s Mot. for Reargument Ex. A at ¶ 1.

the term of this Agreement . . . .”<sup>10</sup> The developer agreement provides that Kahn Management Corporation shall use its best efforts to locate and identify lots available to purchase, provide information about those lots to Swiss Farm, contact owners of those lots, and “endeavor to enter into a written agreement for the purchase of such Acceptable Site . . . .”<sup>11</sup> The record, as it now exists, is silent as to whether Kahn Management Corporation was paid a commission for negotiating the Challenged Lease, or whether Kahn was an agent for Kahn Management in connection with the Challenged Lease.

## II. Analysis

This Court will grant a Motion for Reargument only where such a motion seeks to correct an issue of law or fact that is motion-dispositive.<sup>12</sup> With respect to the Plaintiffs’ Motion for Judgment on the Pleadings, this requires finding that Mr. Kahn was an agent of Swiss Farm; that he was sued by reason of the fact that he was an agent such that he is entitled to indemnification under Swiss Farm’s

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<sup>10</sup> *Id.* at ¶ 5.

<sup>11</sup> *Id.* Ex. C at ¶ 3(a)-(c).

<sup>12</sup> *See Brown v. Wiltbank*, 2012 WL 5503832, at \*1 (Del. Ch. Nov. 14, 2012) (“A motion for reargument under Rule 59(f) will be denied ‘unless the Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or facts so the outcome of the decision would be affected.’”) (internal citations omitted); *Silver Lake v. Urquhart*, 1998 WL 157370, at \*1 (Del. Ch. Mar. 20, 1998) (“A Motion for Reargument is appropriate where the Court has misapplied the law or misapprehended a fact in such a manner that affects the outcome of the case.”).

Operating Agreement; and that these determinations can be made from the undisputed facts alleged in the Complaint.<sup>13</sup>

Assuming that the Exclusive Brokerage Agreement and Exclusive Developer/Development Management Agreement were in effect at the time Swiss Farm entered into the Challenged Lease, Mr. Kahn and Swiss Farm may have had an agency relationship. Those Agreements provide that Kahn Management Corporation was to act as Swiss Farm's agent, and Mr. Kahn may have acted as Kahn Management Corporation's subagent pursuant to those Agreements. The Restatement (Third) of Agency provides that:

(1) A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency as stated in § 1.01.

(2) An agent may appoint a subagent only if the agent has actual or apparent authority to do so.<sup>14</sup>

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<sup>13</sup> See *In re Seneca Investments LLC*, 970 A.2d 259, 262 (Del. Ch. 2008) (internal quotations omitted) ("A party is entitled to judgment on the pleadings when, accepting as true the nonmoving party's well pleaded facts, there is no material fact in dispute and the moving party is entitled to judgment under the law.") (internal citations omitted). The Plaintiff makes two additional arguments in support of his Motion for Judgment on the Pleadings. First, the Plaintiff argues that he is a current manager of Swiss Farm, and is therefore entitled to indemnification under the Operating Agreement. This argument was raised for the first time at oral argument on this Motion for Reargument, and is therefore waived. Second, the Plaintiff argues that Swiss Farm's only non-frivolous basis for asserting that Mr. Kahn owed a fiduciary duty to Swiss Farm in the underlying action is agency, and that Swiss Farm should not be permitted to reap a benefit from incomprehensible or inadequate pleadings. I have already addressed this argument in my September 5 Letter Opinion, where I noted that any inequity that may result from denying indemnification is simply the "unfairness" inherent in the American rule on attorneys' fees. *Costantini*, 2013 WL 4758228, at \*5.

<sup>14</sup> Rest. (Third) of Agency § 3.15.

Kahn’s precise relationship with Kahn Management Corporation is not made clear either by the pleadings or the record submitted in connection with the current Motion: Plaintiff’s counsel represented at oral argument that Mr. Kahn was the sole proprietor of Kahn Management Corporation, but that assertion is disputed by Defendant’s counsel.<sup>15</sup> Whether Kahn Management Corporation appointed Mr. Kahn as a subagent, and whether it had actual or apparent authority to do so, are factual determinations that cannot be made from the face of the Complaint; however, if Mr. Kahn was an authorized subagent, then he did have an agency relationship with Swiss Farm such that he would be entitled to indemnification if the underlying action was brought by reason of the fact that he was an agent of Swiss Farm.

As the parties chose to import language into the Operating Agreement—“by reason of the fact”—from 8 *Del C.* § 145(a)-(b), case law interpreting that statutory provision bears on my understanding of the Operating Agreement’s language. Our Courts have explained that a legal proceeding is brought “by reason of the fact” of a defendant’s corporate position where there exists a causal connection or nexus between such proceeding and the defendant’s corporate capacity.<sup>16</sup> In *Bernstein v.*

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<sup>15</sup> Oral Arg. 3:20-21. Defendant’s counsel stated at oral argument that Kahn Management Corporation is a Pennsylvania corporation, but that he was not aware of its ownership structure. *Id.* at 10:5-10.

<sup>16</sup> See *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005) (“Accordingly, we hold that if there is a nexus or causal connection between any of the underlying proceedings contemplated



*TractManager Inc.*, this Court explained that a “nexus” exists where a defendant’s corporate powers are necessary or useful for committing the alleged misconduct.<sup>17</sup> In that case, the Court analyzed whether an underlying legal malpractice action brought against a defendant, who was both a lawyer and a director of the plaintiff corporation, was brought by reason of the fact that the defendant was a director, entitling him to advancement of legal fees. The Court determined that because, in rendering legal advice, the defendant did not rely on information obtained by virtue of his status as a director, and did not use his status as a director to cause the company to follow his legal advice, his position as a director was not useful or necessary to commit the legal malpractice alleged in the underlying complaint. The underlying complaint was therefore not brought by reason of the fact that the defendant was a director.

Here, the underlying complaint alleged that Mr. Costantini and Mr. Kahn caused Swiss Farm and Redeemed Properties, LLC to enter into a lease agreement that was unfavorable to Swiss Farm, and that such conduct constituted breaches of their fiduciary duties to Swiss Farm. If Kahn became an agent entitled to the indemnification provided under the Operating Agreement, and if that agency

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by section 145(e) and one’s official corporate capacity, those proceedings are ‘by reason of the fact’ that one was a corporate officer, without regard to one’s motivation for engaging in that conduct.”).

<sup>17</sup> See *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007) (explaining that a nexus “is established if the corporate powers were used or necessary for the commission of the alleged misconduct”).

relationship had a nexus to the complaint brought against him in the underlying action, then having prevailed in defending against that complaint he is entitled to indemnification. Looking solely at the undisputed facts in the pleadings here, I cannot determine whether Mr. Kahn's status as Swiss Farm's agent or subagent under the Exclusive Brokerage Agreement or Exclusive Developer/Development Management Agreement—if he did hold such status—was necessary or useful to commit those acts alleged in the underlying action. While Kahn has implied that his agency status under these Agreements was useful, even necessary, to place Kahn in a position where he was able to commit the acts alleged in the underlying complaint, the pleadings are insufficient for me to make that determination. Therefore, the record requires further development, and Kahn has failed to show entitlement to a Judgment on the Pleadings.

### III. Conclusion

For the reasons articulated above, Plaintiff Kahn's Motion for Reargument is denied, except where my September 5 Letter Opinion is inconsistent with my findings herein. My September 5 Letter Opinion stated that Mr. Kahn was not "an officer, employee or agent of Swiss Farm, or even a member," and that "[s]ince [Kahn] is not within that class [of indemnitees included in the Operating Agreement] . . . he cannot prevail."<sup>18</sup> With respect to my earlier determination that

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<sup>18</sup> *Costantini*, 2013 WL 4758228, at \*4; *id.* at \*5.

Mr. Kahn was not an agent of Swiss Farm and that he was not an indemnitee under the Operating Agreement, Mr. Kahn's Motion for Reargument is GRANTED, and those portions of my September 5 Letter Opinion inconsistent with the reasoning above are WITHDRAWN. The Motion for Judgment on the Pleadings with respect to Mr. Kahn's request for indemnification remains DENIED. The parties should confer and advise me how they intend to proceed.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III