

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

MORGAN T. ZURN  
MASTER IN CHANCERY

NEW CASTLE COUNTY COURTHOUSE  
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WILMINGTON, DE 19801-3734

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Re: *Tuscan Construction, Inc. v. Scott Capaldi*  
C.A. No. 10861-MZ

Dear Counsel:

I have reviewed Defendant Scott A. Capaldi's Motion for Leave to File a Third-Party Complaint ("the Motion") with the benefit of oral argument held on May 2, 2016. For the reasons that follow, I recommend this Court deny the Motion, and invite further discussion on consolidation.

## **BACKGROUND**

Plaintiff Tuscan Construction, Inc. (“Tuscan”) filed its complaint against Capaldi on March 31, 2015, alleging conflict with and misconduct by Capaldi surrounding his termination from Tuscan. Tuscan claims Capaldi was terminated after he failed to submit vital paperwork to contractors and inspired two complaints from inspectors about Capaldi’s attitude during the inspection.<sup>1</sup> Tuscan alleges Capaldi thereafter took Tuscan paperwork, drawings, tools, office equipment, and furniture; improperly paid a Tuscan line of credit out of Tuscan’s operating account; and changed Tuscan’s banking information into his name.<sup>2</sup> Tuscan asserts Capaldi founded a new company while working for Tuscan that competed with Tuscan, and that he transferred a share of Tuscan stock to that company, thereby invalidating Tuscan’s status as an S corporation.<sup>3</sup> Tuscan served Capaldi on April 20, 2015.

At around the time Tuscan initiated this case, the same parties were litigating Capaldi’s request for Tuscan’s books and records pursuant to 8 *Del. C.* § 220.<sup>4</sup> On May 15, 2015, this Court memorialized the parties’ settlement agreement in that case, which provided Tuscan would provide Capaldi with certain books and

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<sup>1</sup> Compl. ¶¶ 11-12.

<sup>2</sup> *Id.* ¶¶ 13-15.

<sup>3</sup> *Id.* ¶¶ 16-18.

<sup>4</sup> *Capaldi v. Tuscan Constr., Inc.*, C.A. No. 10730-ML (Del. Ch.).

records in June 2015. Capaldi answered Tuscan's complaint in this case on May 26, 2015. Tuscan dissolved on June 29, 2015.

The next docketed action in this case was Capaldi's Motion, filed on December 17, 2015. Capaldi asserts Tuscan's records indicate Tuscan's majority stockholder and director, Anne Jacobi, misappropriated and misspent Tuscan's funds on her personal home mortgage, as a repayment on a nonexistent loan, as payment to herself as a shareholder without commensurate payment to Capaldi, in payments to her relatives and life partner, and for personal expenses.<sup>5</sup> Capaldi seeks leave to file a third party complaint against Jacobi, which in turn seeks an accounting, for Jacobi to repay any misappropriated funds to Tuscan, and for Jacobi to cause Tuscan to remit to Capaldi his share of Tuscan's assets, or in the alternative to appoint Capaldi as Tuscan's receiver. Tuscan opposes Capaldi's Motion.

### **ANALYSIS**

Capaldi and Jacobi were Tuscan's only stockholders and employees, and worked together running Tuscan for two years. Each co-owner is alleged to have damaged Tuscan via his/her own set of bad acts. The issue before me is whether Tuscan's claims against Capaldi are properly joined with Capaldi's claims against Jacobi under Court of Chancery Rules 14, 19, or 20.

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<sup>5</sup> Mot. Ex. A ¶ 10.

Rule 14(a) provides that a defendant, as a third-party plaintiff, may serve a nonparty “who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.” “[T]he accepted purpose (as well as the limitation) of Rule 14 is to allow a defending party an opportunity in the same litigation to ‘pass on’ all or part of the claim against it to others who might be responsible.”<sup>6</sup> A defendant’s ability to succeed on his third-party claim must be dependent upon the plaintiff’s success on his claim, and the third party’s liability must be derivative of the defendant’s liability to the plaintiff.<sup>7</sup> “A separate and independent cause of action cannot be maintained against a third party even though arising from the same factual situation.”<sup>8</sup> The parties agree that Capaldi’s claims against Jacobi are not dependent upon or derivative of Tuscan’s claims against Capaldi, and that Capaldi cannot pass on liability for his alleged malfeasance to Jacobi. Capaldi’s third party claims do not satisfy Rule 14(a)’s limitations.

While Capaldi admits he cannot pass his liability along to Jacobi, he asserts his third party claims are still intertwined with Tuscan’s claims such that joinder is proper under Rules 19 and 20. Rule 19(a) compels joinder of an indispensable party where complete relief cannot be accorded among the parties in the person’s

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<sup>6</sup> *State v. Dineen*, 1980 WL 6409, at \*2 (Del. Ch. Apr. 17, 1980).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (quoting *Nesmith v. Lynn*, 377 A.2d 352, 353 (Del. 1977) (discussing DEL. SUPER. CT. R. 14(a)).

absence, or where the person claims an interest and cannot protect that interest in their absence or that interest leaves any party subject to a substantial risk of inconsistent obligations. “A necessary party should have not only an interest in some part of the controversy but the interest must be such that a final decree cannot be made which will neither touch upon that party’s interest nor leave the controversy in such a state that the final determination would be inconsistent with equity and good conscience.”<sup>9</sup>

Capaldi argues joinder is required because Jacobi claims an interest in the Tuscan assets that Capaldi claims she misappropriated.<sup>10</sup> This argument is misfocused. The inquiry is not whether Jacobi has an interest in Capaldi’s claims against her (as clearly, she does), but rather, whether Jacobi has a separable and essential interest in the existing controversy between Tuscan and Capaldi.<sup>11</sup> She does not. Jacobi’s interest in Tuscan’s claims against Capaldi derives from her status as a Tuscan stockholder and trustee, and therefore is wholly represented by Tuscan’s interest.

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<sup>9</sup> *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1125 (Del. Ch. 1985).

<sup>10</sup> Mot. ¶ 6.

<sup>11</sup> See *Joseph*, 498 A.2d at 1125; *Banks v. Banks*, 2007 WL 135638, at \*2-3 (Del. Ch. Jan. 11, 2007) (providing that the fact that a dispute might collaterally affect assets in which a person has an interest does not render the person an indispensable party to that dispute).

As for Rule 19(a)'s other considerations, Tuscan can obtain complete relief from Capaldi's alleged bad acts without joining Jacobi.<sup>12</sup> Capaldi seeks additional and independent relief from Jacobi. Capaldi does not assert that nonjoinder leaves any party subject to a substantial risk of inconsistent obligations, and agreed at argument that Capaldi and Jacobi could each be found to have committed their own independent bad acts. Jacobi is not an indispensable party under Rule 19(a).

Rule 20(a) permits joinder "as plaintiffs" asserting a joint, several, or alternative right to relief, or "as defendants if there is asserted against them" a joint, several, or alternative right to relief. The right to relief must arise out of the same transaction, occurrence, or series of transactions or occurrences, and there must be a common question of law or fact. Rule 20 contemplates a scenario in which Capaldi and Jacobi are joined as defendants because they are jointly, severally, or in the alternative liable to Tuscan for malfeasance arising out of the same transactions or occurrences, given the existence of a common question of law or fact.

But that is not the scenario here. Capaldi and Jacobi are each accused of independent malfeasance against Tuscan, and it is possible that one, the other, or both committed their own bad acts and owe Tuscan their own relief. Their liability

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<sup>12</sup> See *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 436 (Del. Ch. April 27, 2007) ("[M]erely because a non-joined party may have a claim to a disputed amount does not inevitably deprive a court of the ability to render complete relief to the parties before it.").

is not joint, several, or in the alternative; it is independent. Further, the requested joinder is not “as plaintiffs” or “as defendants” asserting or facing the same right to relief. Tuscan seeks relief from Capaldi, who in turn seeks separate relief from Jacobi; no two parties are aligned as coplaintiffs or codefendants on the same side of the “v.” Finally, Capaldi has not asserted the claims arose out of any specific common transactions or occurrences. He points only to his general symbiosis as co-owner with Jacobi, arguing his actions were in response to hers, which in turn were motivated by her alleged embezzlement. Rule 20 does not contemplate joinder of Capaldi’s claims against Jacobi.

I appreciate that the claims against Capaldi and Jacobi arose out of the same fraught two-year relationship and ultimately seek relief for Tuscan. I have no doubt that the same stories would be told in a trial of each set of claims, and I am enticed by the efficiency of trying all the claims together. But given the parties’ interests and postures *vis a vis* each other, Rules 14, 19, and 20 cannot provide that efficiency.

The solution may be consolidation pursuant to Rule 42(a). The Court may order consolidation when separate actions present common questions of fact or law.<sup>13</sup> “[A]ll parties ... are best served by the most expeditious conclusion of

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<sup>13</sup> CT. CH. R. 42(a); *Dolphin Ltd. P’Ship I, L.P. v. Gupta*, 2007 WL 315864, at \*1 (Del. Ch. Jan. 22, 2007).

litigation consistent with justice” and consolidation is favored unless a party demonstrates some prejudice that would result.<sup>14</sup> The cases could be tried together, but remain separate and a separate judgment entered in each case.<sup>15</sup>

Tuscan’s operation and disintegration would likely present common questions of fact supporting consolidation. As this case is still in the pleading stage and no immediate relief is sought, and Jacobi has not alleged any prejudice from joinder other than being forced to address the claims against her, it is hard to imagine any prejudice from consolidation.<sup>16</sup> I ask the parties to provide their positions on consolidating *Tuscan v. Capaldi* with the claims against Jacobi<sup>17</sup> in letters of no more than two pages, to be submitted along with any exceptions to the draft report.

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<sup>14</sup> *See id.*

<sup>15</sup> *See Joseph*, 498 A.2d at 1123.

<sup>16</sup> Resp. ¶ 5.

<sup>17</sup> Capaldi asserted in his reply brief and at argument that “[t]he alternative to joinder of Jacobi would be for Capaldi to sue her derivatively on behalf of Tuscan.” (Reply ¶ 4). I make no comment on the propriety or likelihood of success of such derivative claims.



**CONCLUSION**

For the foregoing reasons, Defendant Scott A. Capaldi's Motion for Leave to File a Third-Party Complaint is denied. This is my final report in this matter, and exceptions should be taken in accordance with Rule 144.

Sincerely,

*/s/ Morgan T. Zurn*  
Master in Chancery