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

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: May 20, 2008
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Re: *Fisk Ventures, LLC v. Andrew Segal and Genitrix, LLC*
Civil Action No. 3017-CC

Dear Counsel:

On May 7, 2008, this Court issued a memorandum opinion denying Andrew Segal's counterclaims against Fisk Ventures and third-party claims against Stephen Rose, William Freund, and H. Fisk Johnson.[1] Segal has now moved for reargument pursuant to Rule 59(f).[2] The standard for such a motion is "well settled."[3] To succeed and "obtain reargument, 'the moving party must demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law.'"[4] This misunderstanding of fact or misapplication of law "must be such that 'the outcome of the decision would be affected.'"[5] A motion for reargument is "not a mechanism for litigants to relitigate claims already considered by the court."[6] On the contrary, relief under Rule 59 "is available to

[1] *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008).
[2] Ct. Ch. R. 59(f).
[3] *E.g.*, *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, C.A. No. 2502-VCP, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).
[4] *Forsyth v. ESC Mgmt. Co. (U.S.), Inc.*, C.A. No. 1091-VCL, 2007 WL 3262205, at *1 (Del. Ch. Oct. 31, 2007) (quoting *Deloitte & Touche U.S.A., LLP v. Lamela*, C.A. No. 1542, 2006 WL 345007, at *2 (Del. Ch. Feb. 7, 2006)).
[5] *Bernstein v. TractManager, Inc.*, C.A. No. 2763-VCL, 2007 WL 5212033, at *1 (Del. Ch. Dec. 20, 2007) (quoting *Deloitte & Touche*, 2006 WL 345007, at *2).
[6] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 (Del. Ch. 2005).

prevent injustice"—not to offer a forum for disgruntled litigants to recast their losing arguments with new rhetoric.[7]

In his motion, Segal seeks reargument on two issues: (1) the sufficiency of his claim that Rose and Freund, as Representatives of Genitrix LLC (Genitrix or the "Company"), breached their fiduciary duties; and (2) the claim of tortious interference with Segal's employment contract by Rose and Freund. I will address each issue below.

I. ALLEGED BREACH OF FIDUCIARY DUTY

The facts underlying Segal's allegations that Rose and Freund breached their fiduciary duties have been explained in this Court's earlier decision,[8] and I need not repeat them here. Segal contends that the Court "base[d] its dismissal of [the] breach of fiduciary duty claims on the conclusion that Members of Genitrix owe no duties to each other."[9] The gist of Segal's motion for reargument on this point is that Rose and Freund were Representatives of Genitrix, and, thus, had different duties under the LLC Agreement than Members. Segal argues that the Court ignored this distinction and therefore erred.

The Court's opinion did no such thing. Specifically, the Court concluded that "[b]ecause the Agreement does not expressly articulate fiduciary obligations, they are eliminated."[10] The Genitrix LLC Agreement has much in the way of discussion on duties, but all of that discussion is about their elimination or restriction. This conclusion was compelled by section 9.1 of the LLC Agreement, which states, in relevant part:

> No Member shall have any duty to any Member of the Company except as expressly set forth herein or in any other written agreements. No Member, Representative, or Officer of the Company shall be liable to the Company or to any Member for any loss or damage sustained by the Company or to any Member, unless the loss or

[7] *Sutherland v. Sutherland*, C.A. No. 2399-VCL, 2008 WL 2221770, at *1 (Del. Ch. May 29, 2008).
[8] *See Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *1–6, *11 (Del. Ch. May 7, 2008).
[9] Segal's Mot. For Reargument at 2.
[10] *Fisk Ventures*, 2008 WL 1961156, at *10.

> damage shall have been the result of gross negligence, fraud or intentional misconduct by the Member, Representative, or Officer in question.

The second sentence of that excerpt makes explicitly clear that the Genitrix Representatives owe no fiduciary duties.

At most, section 9.1 states that Representatives may be liable only for damage caused by gross negligence, fraud, or intentional misconduct. The Court addressed this point in several places throughout its earlier decision. Specifically, the Court wrote, "Segal has not alleged facts sufficient to support a reasonable inference that . . . Rose or Freund acted with gross negligence, willful misconduct, in bad faith, or by knowingly violating the law."[11] Later in its opinion, the Court reiterated, "even if Segal were correct that in the LLC Agreement there remained a fiduciary duty not to act in bad faith or with gross negligence, Segal has manifestly failed to allege facts sufficient to support a claim that anyone had breached such a hypothetical duty."[12]

Segal's current argument that the Court somehow misunderstood the LLC Agreement and concluded that it only eliminated duties with respect to Members is without merit. The Court's earlier opinion clearly addressed the duties of Representatives, and Segal's motion for reargument on this point amounts to nothing more than an attempt to throw the same legal darts at the Court's proverbial wall hoping that this time they will stick. Because Segal has failed to demonstrate "that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law," his motion for reargument on the fiduciary duty claim is denied.

II. ALLEGED TORTIOUS INTERFERENCE WITH CONTRACT

Segal's second basis for reargument is that the Court misunderstood facts and misapplied the law with respect to his claim of tortious interference with contract. As with Segal's first claim, the relevant facts are given in the Court's earlier decision,[13] but the claim may be briefly summarized. In the spring of 2006, Genitrix tottered precariously on the edge of breaching certain financing

[11] *Id.*
[12] *Id.* at *11.
[13] *Id.* at *5.

covenants.[14] A provision of the LLC Agreement authorized H. Fisk Johnson to replace Segal's board representatives if the Company failed to adhere to those very covenants *while* Segal served as CEO.[15] In an effort to dodge the blunt end of that provision, Segal submitted to the board in March 2006 a proposal to remove himself as CEO.[16] The Class B board Representatives, who by that time constituted more than 50% but less than 75% of the board, happily took the bait.[17] Nevertheless, instead of approving the Segal-drafted proposal, they circulated and approved their own resolution, which replaced Segal with Chris Pugh as an "interim" CEO.[18]

Section 2(c) of Segal's Employment Agreement with Genitrix provides:

> At any time after the second anniversary of the date hereof . . . the Company, with the approval of at least 50% of the Member Representatives on the Board . . . may replace [Segal] as chief executive officer. Upon the decision by the Board to replace [Segal] as chief executive officer, the Company shall contract with a professional search firm to present to the Board qualified candidates within six months. . . . If no candidate acceptable to 75% of the Representatives is identified within the initial six-month period, the search shall be extended for an additional six months.

Segal argues that the second sentence of this provision prevented the Class B Representatives from unilaterally replacing him with Pugh. Specifically, Segal argues that the Court misunderstood the limitations imposed by that second sentence or otherwise misapplied the law by choosing between two reasonable interpretations of the contract.

Segal's motion for reargument on this issue is denied because Segal has failed to meet the requirements of Rule 59(f). To successfully earn reargument, the

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[14] Segal's Amended Verified Answer, Affirmative Defenses, Counterclaims and Third Party Claims in Response to Petition for Judicial Dissolution ¶ 180 [hereinafter "Answer at ¶__"]; *Fisk Ventures*, 2008 WL 1961156, at *5.
[15] Answer at ¶ 180; *Fisk Ventures*, 2008 WL 1961156, at *5.
[16] Answer at ¶ 180; *Fisk Ventures*, 2008 WL 1961156, at *5.
[17] Answer at ¶ 181; *Fisk Ventures*, 2008 WL 1961156, at *5.
[18] Answer at ¶ 181; *Fisk Ventures*, 2008 WL 1961156, at *5.

movant must demonstrate that "the outcome of the decision would be affected" by the Court's misapprehension of fact or misapplication of the law.[19] Here, even if the Court did misapply law or misunderstand facts with respect to the construction of section 2(c) of the Employment Agreement, Segal's claim of tortious interference would still have been dismissed. In its earlier opinion, the Court specifically noted that a claim of tortious interference requires that the defendants be strangers to the contract in question,[20] and "Rose and Freund were manifestly not strangers to the business relationship giving rise to and underpinning the contract."[21] Further, the Court refuted Segal's contention that the stranger doctrine did not apply because Rose and Freund exceeded the scope of their authority, holding that "Segal has failed to plead facts showing that such was the case here."[22]

Segal has failed to meet the requirements of Rule 59(f) with respect to either of his requests for reargument. Consequently, his motion is denied in its entirety.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[19] *Brandywine River Props., LLC v. Maffett*, C.A. No. 2655-VCN, 2007 WL 2894053, at *1 (Del. Ch. Sept. 28, 2007) ("the moving party must demonstrate that the Court 'overlooked a decision or principle of law that would have had a controlling effect or that the Court misapprehended the law or the facts so that the outcome of the decision would be affected.'" (quoting *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, C.A. No. 2921-VCN, 2007 WL 2565566, at *1 (Del. Ch. Aug. 29, 2007)).

[20] *Fisk Ventures*, 2008 WL 1961156, at *12.

[21] *Id.* at *12 n.56.

[22] *Id.*