

THURSDAY, NOVEMBER 3, 2016

TRANSACTIONS



Courtesy of Driscoll Strawberries Association Inc.

Thomas A. O'Brien

Senior Vice President, Governance and External Engagement and General Counsel

Driscoll Strawberry Associates Inc.
Watsonville

Size of legal department:

2 attorneys

Daily Journal: What's the corporate structure at Driscoll's?

O'Brien: The model that we use in North America is we grow primarily in California while berries can grow in California, and then in the winter we'll grow in Mexico. We duplicate that same model in other parts of the world. So in Europe we'll have varieties bred for particular locations. In the summer months, they'll be coming from the north and in the winter, they'll be down in the south of Europe and even places like Morocco.

We've got many hundreds of growers and they are independent. They grow the fruit. We market the fruit. But they get most of the revenues.

One analogy, although this may be an imperfect one, is that growers are sort of like our manufacturing plants. We make the inventions, they assemble it and then we market it, so it's not that dissimilar from Apple using someone else to do the manufacturing but they've made the invention and marketed the end product. So in a way we're kind of a tech transfer company, but we don't really think of ourselves that way.

DJ: Because of labor disputes involving your growers, there have been calls for boycotts in Washington state and Baja California. How do you handle those disputes?

O'Brien: While our growers are independent, Driscoll's has in place our worker welfare standards that apply wherever our berries grow. We believe all farmworkers have the right to be treated with respect, their workplaces are clean and healthy, and that employment with Driscoll's or our growers provides income opportunities that meet or exceed the local standards. The boycott over a Driscoll's grower in Washington has

Global Growth

CORPORATE COUNSEL | **Q&A**

GC Thomas O'Brien of Driscoll Strawberries deals with legal issues from seed to store.

Paula Lehman-Ewing
Daily Journal Staff Writer

Thomas A. O'Brien heads a new legal department at a very old company.

For 64 years, Driscoll Strawberries Association Inc., relied largely on a single outside attorney, Robert B. Pringle at Winston & Strawn LLP, for legal services. But by 2014, the company had become the largest player in the \$5.6 billion U.S. berry market and the complexities of the business required a more structured approach.

"It's a new department and we've been really trying to best identify what are the most important legal matters that we need to address and spend our time on those, often in conjunction with outside lawyers," O'Brien said.

Driscoll's is a family-owned, private company. Its founders, the Reiter

and Driscoll families, have grown berries around its headquarters in Watsonville.

But over the years, operations expanded significantly and the company has developed a global network of growers in Mexico, South America, Europe, Australia and China. That international presence has allowed for year-round production.

O'Brien said that working with a network of growers all over the world creates "a somewhat complicated structure that raises a lot of legal issues both in terms of the contractual relationships with growers and, most importantly from our standpoint, the protection of our intellectual property."

The only thing about Driscoll's that hadn't changed in its century-long history was its signature. But this summer, the company announced a new marketing campaign, letting con-

sumers in on their different varieties.

"We've grown as a company. It's sometimes hard for us to understand that we're bigger and people want to know more about us," O'Brien said.

"Telling people who we are, we decided, is important and that's what drove a lot of the marketing campaign," he added. "[A new] consumer lab may help us determine what consumers want in a berry but it's always been our purpose to have berries that delight consumers."

O'Brien acted as an outside attorney for Driscoll's when he was in private practice and started his career as an associate administrator at the Department of Agriculture. In an interview with Daily Journal staff writer Paula Lehman-Ewing, he talked about growing the company, its legal department and the berry business. Below is an edited transcript of their conversation.

been resolved. Unlike in California, Washington has no process in law to determine if farmworkers are to be represented by a union. Ultimately, the grower, Sakuma Brothers, and the labor organization, Familias Unidas por la Justicia, agreed to do by contract what in California is done by law. They adopted procedures that ended the boycott and resulted in a vote of the farmworkers, who voted in a secret ballot to have FUJ represent them.

Specific to Baja, where labor issues have been raised across the agricultural sector, in January we launched the Fair Trade Certified organic program, a pilot program with Fair Trade USA. Through this program, more than \$200,000 has been shared directly with local farmworkers to benefit their communities across Baja California. Because of this initial success, we're making plans to widen the program to include more independent growers, expand our retail distribution and increase sales of Fair Trade Certified organic and conventional strawberries, raspberries, blueberries and blackberries.

DJ: What legal issues do you deal with most frequently?

O'Brien: I would say intellectual property, just because that is sort of the heart and soul of our company.

DJ: So is that work that you tend to keep in-house?

O'Brien: We outsource a lot of it. I mean, it keeps us busy here but we certainly use outside counsel for that. Our main outside intellectual property lawyer is Mike Ward at Morrison & Foerster LLP in San Francisco and he specializes in plant IP. He got a Ph.D. in plant physiology/biochemistry from Davis before going to law school so it's great because he can speak to both the legal department and breeders in our research and development teams.

DJ: What other firms or individual attorneys do you go to for outside counsel?

O'Brien: Bob [Pringle] at Winston and Strawn was and remains an important part of Driscoll's and the success they've had on a variety of issues. We use Winston & Strawn and, as I mentioned, Morrison & Foerster for intellectual property work. We use L&G in Salinas for real estate and other local matters and Davis Wright Tremaine.

DJ: Do they have to have that heightened level of scientific knowledge?

O'Brien: I mean Mike, like a lot of our outside counsel, he is really good at what he does and he's really sort of helpful on the issues that you want outside expertise. But we have others that we use that are not necessarily handling scientific issues and so we wouldn't need that same level of science knowledge. I think to some extent an in-house lawyer, at least the in-house lawyers at Driscoll's, is sort of a general practitioner and there are times when we need specialists and they've got a level of expertise that just makes things easier for us.

We've done a number of fairly complicated deals — we're in a joint venture in Australia and China, for example — and Jim Topinka at Davis Wright has helped us put together the documents. That's outside the realm of science but it takes really intricate knowledge.

It's not like we're looking for people coming from the food industry necessarily, but we want them to know how we operate and what's unique and then also what our strategic plans are and how they can help us get there. I think sometimes it's more willingness and an enthusiasm about our business that's as important as what they come in with in terms of past experience with agriculture and berries. It just makes for a much more productive relationship when they become our thought partners on the intersection between law and business.

DJ: Even though Driscoll's has its own legal team now, is there still a predisposition to go outside for legal issues since that was the model for so many years?

O'Brien: I think there is still that culture of using outside attorneys. I was an outside attorney for Driscoll's for many years. But it's a very new department and we're looking to bring more work in-house. It's been a process and we've brought a few more people on. We're trying to find ways that we can meet the business needs without pulling us away from the high impact work because otherwise it can just eat you up reviewing non-disclosure agreements all day long.

DJ: What constitutes high impact work?

O'Brien: I don't know that we have a bright line like that, but we review significant agreements and we still do a lot of work like intellectual property protection. For example, we're starting an entity to grow berries in China for Chinese consumers that's really important for the company. It raises a lot of intellectual property issues and a lot of corporate issues, a lot of contractual issues, primarily around protecting our varieties.

We've been tasked with figuring that out. We use outside counsel a lot on those issues but that's where, for the long-term success of the company, my folks need to spend a lot of their time and I do as well. If it was just another contract coming in with a vendor, that may be something we'll just immediately send to an outside attorney to review because our mission is to facilitate the success of the business.

DJ: How have you built out the legal department to accommodate the increased amount of work being done internally?

O'Brien: We have two attorneys but we've also got a compliance officer who makes sure we are following

the laws we should be following and training people on what those laws are. That includes things like foreign corrupt practices or codes of conduct. We've got a number of people working on the intellectual property area, gathering the data needed for the plant patents. We have a number of paralegals as well.

DJ: Does that mission include industry issues? For example, California is having a huge drought that affects agriculture on the whole.

O'Brien: We were actively involved in support of California's regulation of groundwater that passed in the California Legislature in 2014 and was signed by Governor Brown. For the first time there were regulations on groundwater.

Our berries grow pretty close to the coast and it's all fed by groundwater and we realize it needs to be a sustainable resource. So our chairman, Miles Reiter, whose father was one of the founders of the company, came out in support of the legislation and actually the governor asked him to speak at the bill-signing ceremony.

DJ: What was his message?

O'Brien: Miles made the point that his family has been farming berries in the Watsonville area for 100 years and he would like that legacy to continue but it's threatened by pulling too much water out of the aquifer. Even before the legislation passed, the Watsonville community had been trying to address groundwater issues — increasing recharge, being more careful about use things like that — and our local efforts really mirror what the law requires.

The community has taken efforts to create recharge spots so that more water gets into the aquifer. At a real grassroots level we've seen progress. The state law is still years away and it's a bit frustrating but those deadlines are so far out they shouldn't keep us from doing things now.