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Re: *Naughty Monkey LLC v. MarineMax Northeast LLC*
C.A. No. 5095-VCN
Date Submitted: September 15, 2011

Dear Counsel:

This case demonstrates the obvious: a poorly drafted contract between parties who appear unable or reluctant to find a compromise may lead to distasteful results. Defendant MarineMax Northeast LLC ("MarineMax") has moved for reargument, under Court of Chancery Rule 59(f), of the Court's latest efforts to bring this dispute to closure.[1]

[1] *Naughty Monkey LLC v. MarineMax NE LLC*, 2011 WL 4091851 (Del. Ch. Aug. 31, 2011) ("*Naughty Monkey III*").

* * *

A cryptic recitation of how the parties reached their current resting place cannot be avoided. The controversy grows out of Plaintiff Naughty Monkey LLC's ("Naughty Monkey") purchase of a boat from MarineMax under an agreement (the "July 31 Agreement") which obligated MarineMax to give a substantial credit if a trade-in occurred within eighteen months. Following trial, the Court concluded that MarineMax was obligated to grant a credit of $1,636,250 to Naughty Monkey in exchange for the vessel.[2] Naughty Monkey promptly moved for "clarification." In substance, it was striving to recover the equivalent of cash and not a trade-in credit. The underlying problem, or so it seems, is that cash and a trade-in credit are not functionally equivalent, even though they may both carry the same number. As a general matter, a seller will deal more favorably (from the buyer's perspective) with a cash tender than with the use of a trade-in credit. The Court, in response to Naughty Monkey's motion for clarification, concluded that it would have four months within which to tender the vessel and a

[2] *Naughty Monkey LLC v. MarineMax NE LLC*, 2010 WL 5545409, at *9 (Del. Ch. Dec. 23, 2010) ("*Naughty Monkey I*"). The order implementing this memorandum opinion was entered on February 28, 2011.

reasonable time to apply the resulting credit to another vessel or to certain items offered for sale by MarineMax.[3]

Not long thereafter, Naughty Monkey retained an undisclosed, third-party representative to negotiate the purchase of a vessel from an affiliate of MarineMax. After successfully insisting upon an assignability provision and otherwise reaching agreement (the "Agreement") on the acquisition of the vessel, a Ferretti, the third-party representative informed MarineMax that the "real" purchaser was Naughty Monkey which would be applying its credit against the purchase price. As MarineMax has emphasized, that effort had the effect of essentially converting the credit into a cash-equivalent. Naughty Monkey moved to obtain the benefit of the Agreement and, despite MarineMax's invocation of familiar equitable principles, the Court found that Naughty Monkey was entitled to use the credit awarded in *Naughty Monkey I* for the acquisition of the new vessel.

More specifically, Naughty Monkey sought to enforce the Court's Order of February 28, 2011. The Court, after an evidentiary hearing, did not direct[4]

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[3] *Naughty Monkey LLC v. MarineMax NE LLC*, 2011 WL 684626, at *3 (Del. Ch. Feb. 17, 2011) ("*Naughty Monkey II*").
[4] No implementing order has yet been entered as the result of *Naughty Monkey III*.

MarineMax to close under the Agreement. Instead, it merely confirmed that MarineMax was required to treat the credit that had previously been awarded as payment under the Agreement. It did not go as far as specifically enforcing the Agreement.

* * *

In order to prevail on its motion for reargument, MarineMax must demonstrate that the "Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[5] MarineMax argues that the Court made two fundamental mistakes. First, it asserts that the Court did not pay close enough attention to the law of the case doctrine. Second, it contends that the Court failed to give appropriate consideration to the equitable principles that MarineMax invoked.

[5] *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (citation and internal quotations omitted).

* * *

In order to "promote[] efficiency and fundamental fairness[,]"[6] the law of the case doctrine "bars re-litigation of any claim that has been previously decided by this Court in the same proceeding."[7] The doctrine is subject to limited exceptions: a clear error in the previous ruling, important changes in circumstances, or the "equitable concern of preventing injustice."[8] A fundamental problem is ascertaining what "issue" MarineMax claims to have been previously determined and subject to the law of the case doctrine. MarineMax suggests that the relief prescribed by the Court has shifted from being grounded in equity to being premised on legal principles.[9] Although the line may be fine, nothing in the Court's most recent decision would necessarily result in an ordering of MarineMax to close under the Agreement, and the fundamental nature of the relief accorded Naughty Monkey has not been materially changed. The Court, in substance, held

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[6] *Gonsalves v. Straight Arrow Publishers, Inc.*, 793 A.2d 312, 317 (Del. Ch. 1998), *aff'd in part and rev'd in part*, 725 A.2d 442, 1999 WL 87280 (Del. Jan. 5, 1999) (TABLE).
[7] *Gunn v. U.S. Bank Nat'l Ass'n*, 23 A.3d 865, 2011 WL 2090203, at *1 (Del. May 26, 2011) (TABLE) (citation omitted).
[8] *Izquierdo v. Sills*, 2004 WL 2290811, at *4 n.28 (Del. Ch. June 29, 2004) (quoting *Hamilton v. State*, 831 A.2d 881, 887 (Del. 2003)).
[9] Def.'s Mot. for Rearg. at ¶¶ 19-21.

that the credit could be applied as payment under the Agreement. That is not inconsistent with any prior decision. Moreover, the question of whether the credit could be applied was framed in the context of new facts—those happening after the February 28 Order.[10]

It may be that MarineMax compares the Court's conclusion that the July 31 Agreement did not require MarineMax to pay cash to Naughty Monkey on return of the vessel, with the Court's conclusion that the credit could be applied toward the purchase price of the new vessel at face value, despite the Court's view that cash and credit may not, in a commercial setting, be of equal value, even though they are of equal amount. First, the Court in no way specified any discount that would burden the credit. That, perhaps improvidently, was left to a negotiation process. Second, it seems that the parties do not trust one another. Indeed, they are openly skeptical of each other's motives. Neither party has explained how normal negotiations can realistically occur in these circumstances. Ordinarily, a party will have the choice of simply of not doing business with someone. In this instance, however, MarineMax and Naughty Monkey are stuck with each other.

[10] It is perhaps worth noting that the Court was aware of MarineMax's invocation of equitable principles. *See infra* note 12 and accompanying text.

The difficulties with their negotiations became even more apparent as time went by. Although the underpinning for the remedy has not been changed, the particular factual circumstances have evolved and the context in which the remedy may be carried out is different. Thus, even if the "issue" had been revisited by the Court in its last decision, it is not clear that the differing factual scenario would even allow for application of the law of the case doctrine.

* * *

A motion for reargument is not "a mechanism for litigants to relitigate claims already considered by the [C]ourt."[11] That, in substance, is what MarineMax seeks with respect to its equitable objections or defenses to the relief awarded to Naughty Monkey. The Court dealt with equitable precepts in *Naughty Monkey III*. It was—and still is—troubled by the conduct of Naughty Monkey's representatives. Rightly or wrongly, the Court concluded that the conduct did not reach a level that thwarted Naughty Monkey's transactional efforts.[12] Both

[11] *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000) (citation omitted).

[12] The Court did not ignore the specifically-negotiated assignability provision. The question presented to the Court was whether the credit, at face value, could be applied under the Agreement.

the facts and the principles were understood. Merely being wrong in the ultimate conclusion—if that is what occurred—does not lead to relief on reargument.[13]

* * *

Accordingly, for the foregoing reasons, MarineMax's motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[13] Although MarineMax is understandably annoyed by the tactics employed by Naughty Monkey, it needs to recognize its own shortcomings. For example, the inability of its witness at the evidentiary hearing to offer any sort of a cogent explanation of how MarineMax would deal with the credit was troubling. *See Naughty Monkey III*, 2011 WL 4091851, at *2-3 (citation omitted). It, unfortunately, seems likely that, without additional judicial effort, the parties would not likely have been able to reach resolution. Indeed, because specific performance of the agreement has not been adopted by the Court as its remedy, some degree of uncertainty remains.