IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FORE NEW CASTLE COUNTY

KIRKWOOD FITNESS AND RACQUETBALL CLUBS, INC. Plaintiff,	)	
v.	)	C.A. N11C-02-073-JRJ
TIMOTHY P. MULLANEY, SR., DIRECTOR OF THE FRAUD DIVISION STATE OF DELAWARE DEPARTMENT OF JUSTICE and	)	
IAN R. MCCONNEL, DIRECTOR OF CONSUMER PROTECTION DIVISION STATE OF DELAWARE DEPARTMENT OF JUSTICE Defendants.	)	

ORDER

AND NOW TO WIT, this 31st day of August, 2011, the Court having heard Plaintiff's Motion for Reargument regarding the Court's June 28, 2011 Decision and Order and Defendants' opposition thereto, **IT IS HEREBY ORDERED** as follows:

1. Plaintiff seeks reargument of the Court's March 11, 2011 Order granting Defendants' Motion to Dismiss. The Court held that it lacked subject matter jurisdiction because an actual controversy does not exist between Plaintiff and Defendants. This Court held: "a judicial officer has no cognizable interest in seeking to have his rulings or legal interpretations sustained. Because the Defendants in this case have no interest which would be affected by the declaration, there is no actual controversy, and thus, a declaratory judgment would be inappropriate." [1]

[1] *See Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney*, 2011 WL 2623949, at *2 (Del. Super. June 29, 2011).

2. "Under Delaware law, reargument will usually be denied unless it is shown that the Court overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision."[2] A motion for reargument should not be used merely to "rehash the arguments already decided by the court."[3]

3. Plaintiff argues that an actual controversy exists between it and Defendants because the "Director of Consumer Protection Division, Ian R. McConnel and Director of Fraud Division, Timothy P. Mullaney, Sr., are named as Defendants in their official State capacities, and therefore, are adverse to Kirkwood fitness."[4] Further, Plaintiff contends that because 6 *Del. C.* § 4219 creates a private right of action for health spa members, Defendants are acting as advocates for private citizens, and thus, Defendants' interest are adverse to Plaintiff.[5] Plaintiff submits that because it and the Defendants have a fundamental disagreement as to the correct legal interpretation of the Health Spa Regulation, and whether 29 *Del. C.* § 2523[6] or 6 *Del. C.* § 4204 applies to such regulation, there is an actual controversy for which the Parties' interests are adverse.[7] Plaintiff complains that without a substantive judicial adjudication Plaintiff will be deprived of the opportunity for an impartial review, and the alleged constitutional deficiencies in the Health Spa Act will go without redress.[8] Finally, Plaintiff argues the

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[2] *Cunningham v. Horvath*, 2004 WL 2191035, at *1 (Del. Super. Jul. 30, 2004) (*citing Monsanto Co. v. Aetna Cas. And Sur. Co.*, 1994 WL 46726, at *2 (Del. Super. Jan. 14, 1994).
[3] *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91, at *1 (Del. Nov. 24, 1992)(TABLE).
[4] *See* Plaintiff's Motion for Reargument (Trans. ID. 38443361).
[5] *Id.*
[6] Plaintiff's Motion for Reargument actually addresses 29 *Del. C.* § 2528. This appears to be a typographical error because as there is no "29 *Del. C.* § 2528," and § 2523 pertains to Administrative Appeals; *see* Plaintiff's Motion for Reargument at 2.
[7] *Id.*
[8] *Id.*

Court did not rule on its request for injunctive relief. The Court will address Plaintiff's arguments *in seriatum*.[9]

4. The fact that a party is named as a defendant does not mean that its interests are adverse to the Plaintiff. If this were the case, simply naming a party as a defendant would bestow jurisdiction on the Court and the "actual controversy" requirement would be meaningless.

5. Plaintiff is correct that the Health Spa Act creates a private right of action for spa members who have allegedly been aggrieved by their health spa. However, the State acts in a neutral, "quasi-judicial" capacity to enforce the Health Spa Act and oversee complaints related to the Act. The Defendants do not have an interest in seeing their decisions related to enforcing the Health Spa Act upheld.[10] Because Defendants have no interest which would be affected by the declaration, there is no "actual controversy."

6. Plaintiff argues that it and Defendants have a fundamental disagreement as to the interpretation of the Health Spa Act. Again, "a judicial officer has no cognizable interest in seeking to have his rulings or *legal interpretations* sustained."[11] With respect to the driving distance issue, Defendant McConnel interpreted the Health Spa Act as he believed the Legislature intended the Act to be interpreted. McConnel has no interest in seeing his "legal interpretations sustained."[12] With respect to Plaintiff's contention that administrative hearings for claims under the Health Spa Act are required to comply with

[9] The Court notes that Plaintiff's Motion cites but one legal authority in its entire motion, and does so in conclusory fashion with no analysis as to why the case supports its proposition.
[10] Defendant Mullaney also has no interest in seeing Defendant McConnel's rulings upheld, and thus, there is no actual controversy between Plaintiff and Mullaney.
[11] *Wilmington Trust Co. v. Barron*, 470 A.2d 257, 262 (Del. 1983) (emphasis added).
[12] *Id.*

the parameters set forth in 29 *Del. C.* §2523, Plaintiff should re-file for an extraordinary writ for review of whether 29 *Del. C.* § 2523 applies to the Health Spa Act.[13]

7. Finally, Plaintiff argues that the Court did not rule on its request for injunctive relief. For the same reasons discussed above, the Court does not have jurisdiction to issue an injunction in this case. If an actual controversy does not exist between the Parties then the Court does not have jurisdiction to issue an injunction.[14]

WHEREFORE, Defendants' Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, J.

[13] "The State has not disputed that [Plaintiff] could challenge the conclusions of law in Superior Court with an extraordinary writ." *See* Defendants' Response to Plaintiff's Motion for Reargument at p. 2 (Trans. ID. 38466003).

[14] Defendants maintain and Plaintiff does not refute that the Plaintiff and Kirkwood members have agreed to refund amounts, and the only dispute Plaintiff has is interpretation of the Health Spa Act's driving distance requirement.