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Transaction ID 35034717
Case No. 5095-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NAUGHTY MONKEY LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5095-VCN**
	:	
MARINEMAX NORTHEAST LLC,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: September 17, 2010
Date Decided: December 23, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

Unlike the Man in the Yellow Hat, Michael Stock ("Stock") quickly lost patience with his Naughty Monkey, a yacht purchased by an entity he owns, Plaintiff Naughty Monkey LLC (the "LLC"), and named in honor of Curious George.[1] Stock tried to return the boat to the Defendant MarineMax Northeast LLC ("MarineMax") under a provision of the purchase agreement that Stock believed entitled him to a partial cash refund if he returned the boat within eighteen months of its purchase. MarineMax, however, refused to allow Stock to trade the boat for anything but credit toward the purchase of a larger boat made by the same manufacturer. This post-trial memorandum opinion addresses the LLC's claims under the purchase agreement. For the reasons set forth below, the Court concludes that neither party's interpretation of the purchase agreement is entirely correct and holds that the LLC is entitled to an order of specific performance under which it may trade the Naughty Monkey for a credit of $1,636,250 toward the purchase of products sold by MarineMax.

[1] Tr. (Stock) 73. *See* Hans Agosto Rey, *Curious George* 36 (1973) ("The Firemen rushed into the house. They opened the door. NO FIRE. ONLY a naughty little monkey.").

II. BACKGROUND

A. *Parties*

MarineMax sold the Naughty Monkey, a 62-foot motorized yacht built by Azimut, to the LLC, a Delaware limited liability company owned by Stock.

MarineMax is a Delaware limited liability company that owns, among other dealerships, a boat and yacht dealership in Baltimore, Maryland. Its current or former employees involved in the Naughty Monkey transaction include Thomas J. Rose ("Rose"), the general manager of MarineMax's Baltimore facility;[2] Edgar A. Baldwin ("Baldwin"), a sales associate at that facility;[3] Darren Thurman ("Thurman"), a former sales associate;[4] and Andrew Schneider ("Schneider"), who, at the time Stock purchased the Naughty Monkey, was an independent contractor, but is now employed by MarineMax as product manager for the Azimut line of yachts.[5]

B. *The Odyssey of the Naughty Monkey*

In May 2008, Stock attended the National Harbor Boat Show near Washington, D.C.[6] Although he had no specific interest in purchasing a boat when

[2] Tr. (Rose) 14.
[3] Tr. (Baldwin) 28.
[4] Tr. (Schneider) 40.
[5] *Id.* at 37-38.
[6] Tr. (Stock) 49-50.

he went to the show, that interest quickly developed after he saw, among other models, the Azimut S line of boats on display there.[7] While still at the show, Stock asked Baldwin and Thurman questions about boating in general, including whether a sail boat or a motor yacht might be the right choice for him.[8] By the end of the conversation he had developed at least enough interest in MarineMax's products to schedule a visit to its facility in Baltimore soon after the show.[9]

Both during his first visit to MarineMax and at later meetings, he expressed concerns that any boat he might buy would lose value quickly.[10] He inquired about leasing a boat or including a down-side protection clause in a sales contract and was told such things were negotiable.[11]

Eventually, Stock enjoyed a sea trial on a 62-foot Azimut yacht that was a leftover from the previous model year. On July 7, 2008, he signed an agreement to purchase that boat, which he would name the Naughty Monkey, for $1,925,000.[12] Baldwin executed the agreement for MarineMax. The July 7 Agreement identified Stock as the purchaser of the boat. One column on the single-page agreement lists the boat's Specifications (including its overall length and its fuel capacity, for

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[7] *Id.* at 50.
[8] *Id.* at 53.
[9] *Id.* at 51.
[10] *Id.* at 52.
[11] *Id.*
[12] JX 1 (Purchase Agreement of July 7, 2008) (the "July 7 Agreement").

example) and Optional Equipment (including entries raging from curtains to audio-video equipment to a barbeque in the cockpit).[13] Next to it, another column sets out a list of "Dealer Installed Options." The entries in this column fill thirty lines of text written in all capital letters, often without punctuation. Certain entries appear to cover more than one line of text, such as the words:

> PAYMENT DUE IN FULL BY
> JUNE 30TH 2008[14]

Others sequential lines represent distinct entries:

> CAMERA FOR BILGE
> ADD INTERNET CAPABILITY TO DSS

One entry in the column specified that the boat was to be repaired per an agreed "punch list." Most importantly for this case, the column included the following lines:

> TRADE VALUE GARANTEED [sic] TO 15% LOSS
> WITH IN [sic] 18 MONTHS (PER ANDREW SCHNEIDER)
> SALE SUBJECT TO MARINE SURVEY AND FINANCEING [sic]
> DEPOSIT REFUNDABLE PER ABOVE.

Although the July 7 Agreement was drawn up by MarineMax, the specific author of the quoted clauses is uncertain.[15]

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[13] *Id.*

[14] *Id.* The Court has preserved the spelling and format used by the parties in its first citations to the documents at issue, but has edited the language for clarity in later references.

[15] *See* Tr. (Rose) 21 (expressing uncertainty as to which provisions he authored), Tr. (Schneider) 41 (denying authorship), Tr. (Stock) 53 (denying that he had any input into the document's language).

Over the next weeks, the punch list was prepared, and a marine survey of the boat was conducted to identify additional repairs to be completed before purchase.[16] MarineMax and the LLC executed a second purchase agreement on July 31, 2008.[17] The language on the first page of the July 31 Agreement closely tracks that of the July 7 Agreement, as did the content and form of entries in the "Optional Equipment" and "Dealer Installed Options" columns, except in a few respects. Specifically, the July 31 Agreement expresses the terms for reducing the LLC's financial risk somewhat differently:

> TRADE VALUE GAURANTEED [sic] TO 15% LOSS
> WITHIN 18 MONTHS (PER ANDREW SCHNEIDER)
> SUBJ. TO MARINE SURVEY AND FINANCING.[18]

Attached to the July 31 Agreement were a page of "Additional Terms and Conditions" (including an integration clause), the punch list of repairs to the boat to be completed by MarineMax (signed by Stock and Rose), a summary of the marine survey findings, a closing statement reflecting the LLC's July 31 payment of $1,825,000 and a $0 balance due, title to the boat, and other documents relating to the sale.[19] Stock had borrowed the funds necessary to close the transaction from

[16] Tr. (Stock) 59; JX 2 at MM0003 (Punch List); JX 2 at MM0005 (Summary of Marine Survey Findings).
[17] JX 2 (Purchase Agreement of July 31, 2008) (the "July 31 Agreement").
[18] *Id.* (the "Buyer Protection Clauses").
[19] *Id.*

his parents and did not obtain permanent financing until later.[20] The sale of the Naughty Monkey generated a profit $143,981.60 for MarineMax.[21]

Stock took possession of the Naughty Monkey for the LLC on August 1, 2008. Thurman gave Stock a two-day orientation on the use of the boat, and, as a result, Stock became at least somewhat comfortable with its operation.[22] MarineMax completed additional repairs to the boat after this time, but otherwise Stock had the use of the boat in the Baltimore area for the balance of the 2008 boating season.[23]

As winter approached, Stock decided to move the Naughty Monkey to Florida instead of preparing it for a winter in the Baltimore area.[24] Stock, his fiancée, and Thurman cruised the boat to Florida around Thanksgiving, but it developed mechanical problems and had to be brought in for repairs in Jacksonville, Florida on December 1, 2008.[25] It remained for four months in Florida for repairs, and, in April 2009, Stock hired a captain to return it to Baltimore. About halfway back, the captain ran the boat aground, causing major

[20] Tr. (Stock) 96-98.
[21] JX 38 (Deal Recap Report of Aug. 1, 2008).
[22] Tr. (Stock) 122.
[23] *Id.* at 61 (Stock).
[24] *Id.*
[25] *Id.* at 70.

damage that was not fully repaired until the middle of May.[26] In July, MarineMax began a series of repairs on the boat in advance of the expiration of the one-year manufacturer's warranty.

By September, Stock decided that he no longer wanted to own the Naughty Monkey, and communicated to MarineMax his intent to trade the boat back to MarineMax for a "boat of lesser value than the contractually established value of the [Naughty Monkey]. In that case MarineMax will have to make a cash payment for the difference."[27] In fact, Stock attempted to trade the Naughty Monkey for a ten-year-old boat worth approximately $2,900 plus a cash refund of $1,633,350.[28] MarineMax refused to make the trade.

According to Baldwin, when Stock attempted to trade-in the Naughty Monkey, the boat had a cash value to MarineMax of $1.1 million.[29] Stock paid the Naughty Monkey's annual insurance premium of $12,287 on August 5, 2009;[30] he also paid $2,378.58 to have the boat winterized in advance of the winter of 2009-10.

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[26] *Id.* at 71.
[27] JX 9 (September 28, 2009 Email of Stock to Rose).
[28] Eighty-five percent of the Naughty Monkey's purchase price of $1,925,000 is $1,636,250, which is also the sum of $2,900 plus $1,633,350.
[29] Tr. (Stock) 178.
[30] JX 12 at NM 000486.

III. CONTENTIONS

Stock contends that the clause addressing the Naughty Monkey's trade value was included in both Purchase Agreements "to allow me to exit the Naughty Monkey and to trade it for anything that MarineMax had, irrespective of size," cash, or anything else.[31] He claims that he employed the strategy of trading the Naughty Monkey for a $2,900 boat and $1,633,350 in cash because he believed it would have been more acceptable to MarineMax than a straight exchange of the boat for $1,636,250 in cash. He argues that MarineMax breached the July 31 Agreement by refusing to accept this proposal, and that he is entitled to specific performance of the contract, plus damages consisting of the interest paid on the loan to finance the purchase, the cost of insuring the boat for an additional year, and the cost of winterizing the boat for another season. He also seeks damages under the Maryland Consumer Protection Act.[32]

MarineMax responds that the Buyer Protection Clauses were intended only to set a lower limit on the Naughty Monkey's value in the event Stock decided to trade it in toward the purchase of a newer, larger Azimut yacht from MarineMax's Baltimore facility. Rose, Baldwin, and Schneider all testified that the clauses were

[31] Tr. (Stock) 55, 76.
[32] Md. Code Ann., Com. Law § 13-101, et seq.

meant to carry that meaning.[33] MarineMax contends that the absence of language expressly limiting the clauses' application to trades for larger Azimuts was an "oversight," but that the limitations were within the spirit of the parties' understanding of how the clause would function.[34] Further, MarineMax argues that the July 31 Agreement is not susceptible to an interpretation that would allow the LLC to exchange the Naughty Monkey for cash. Finally, MarineMax asserts that the LLC has failed to mitigate its damages.[35]

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[33] Tr. (Rose) 25, Tr. (Baldwin) 32, Tr. (Schneider) 43-45.

[34] *See* Tr. (Rose) 26, Tr. (Baldwin) 32.

[35] In its answer, MarineMax raised the affirmative defense that the Court lacks subject matter jurisdiction over this action. Amended Answer, Second Affirmative Defense. MarineMax has not addressed this argument in its brief, and has thus abandoned this defense. *Oakwood Acceptance Corp. v. Penn*, C.A. 92C-11-008, 1994 WL 150864 (Del. Super. Mar. 4, 1994) (holding that the defendant had waived three affirmative defenses by failing to provide any basis for asserting them in his briefs). This does not relieve the Court of its independent obligation to consider whether it has subject matter jurisdiction. The LLC's claim for specific performance of the July 31 Agreement is sufficient to invoke the Court's equitable jurisdiction, but the question is a closer one than it may appear because the LLC's prayer for relief is concerned primarily with the question of how much cash it will receive. Nonetheless, the fact that a complaint seeks a quantifiable award does not mean "that a legal remedy is adequate and that this court is therefore without jurisdiction." *Bird v. Lida, Inc.*, 681 A.2d 399, 402 (Del. Ch. 1996); 10 *Del. C.* §§ 341-42.

The unique nature of this dispute requires that the Court use its equitable powers to fashion an appropriate remedy. Thus, ordering specific performance of the July 31 Agreement would not entail simply awarding damages to the LLC; it would require that the Court direct MarineMax to accept title to the Naughty Monkey (subject to the LLC's decision to tender), a used, customized boat, and provide the LLC something in return. In effect, the LLC seeks an order forcing MarineMax to engage in a transaction with it under terms specified in the July 31 Agreement. In light of the current relationship between the parties, the Court may need to exercise equitable oversight over such a transaction in order to enforce the anticipated remedy. Because both the subject matter of the contract at issue and the circumstances in which the parties now find themselves are unique, the Court has subject matter jurisdiction over the LLC's claim for specific performance; it has jurisdiction to resolve the LLC's remaining claims under the clean-up doctrine. *See Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964).

IV. DISCUSSION

A. *The Meaning of the Buyer Protection Clauses*

The Court first seeks to determine the meaning of the disputed clauses of the July 31 Agreement. The parties agree that Maryland law governs this contract.[36] Maryland adheres to the objective theory of contracts under which the Court must give "effect to the clear terms of agreements, regardless of the intent of the parties at the time of contract formation."[37] Courts consider the "customary, ordinary and accepted meaning of the language used" in the contract.[38] Extrinsic or parol evidence is not admissible to vary the meaning of unambiguous contractual language, but if the language is ambiguous, "the court must consider any extrinsic evidence which sheds light on the intentions of the parties at the time of the execution of the contract."[39]

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[36] JX 2 at MM0002 ("10. Governing Law: The parties agree that this agreement shall be governed by the laws of the state in which Seller's location designated on the front of this order is situated.").

[37] *Myers v. Kayhoe*, 892 A.2d 520, 526 (Md. 2006).

[38] *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.* 952 A.2d 275, 283 (Md. 2008).

[39] *John L. Mattingly Const. Co., Inc. v. Hartford Underwriters Ins. Co.*, 999 A.2d 1066, 1074 (Md. 2010). MarineMax cites a pair of century-old cases to show that parol evidence is admissible when a plaintiff seeks the equitable remedy of specific performance. These cases do not indicate any relaxation of the parol evidence rule, per se. Instead, these cases teach that evidence that would be inadmissible as parol when offered to vary a contract's meaning is admissible if it is instead offered to show that the balance of the equities tips for or against granting specific performance: "There is a broad difference between an attempt to vary by parol the terms of a written contract and an effort to prove by parol the existence of extrinsic circumstances which, if true, would cause a court to hesitate in ordering that contract to be performed." *Dixon v. Dixon*, 48 A. 152, 155 (Md. 1901). *See also Ginther v. Townsend*, 78 A. 908 (Md. 1910). Thus, after it has resolved the substantive issue of a contract's meaning, a

The parties' chief point of contention concerns the meaning of the trade value clause of the July 31 Agreement: "trade value guaranteed to 15% loss (per Andrew Schneider)." MarineMax, asks the Court to read the words "only toward the purchase of a larger Azimut and only if MarineMax approves the trade" into that clause. By contrast, the LLC asks the Court to interpret the words as specifying that the LLC may return the Naughty Monkey to MarineMax in exchange for cash. The Court determines that a reasonable person could not read the July 31 Agreement and conclude that either party's position is fully compatible with the text.

1. MarineMax Construes the Buyer Protection Clauses

MarineMax contends that both parties understood that Stock was concerned about his ability to trade the Naughty Monkey for a larger boat, and that it was also understood that the larger boat would be another Azimut. If the parties had such understandings it would have been easy to write them into a purchase agreement, but the July 31 Agreement simply contains no language limiting the products to

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Maryland court could consider parol evidence in addressing the question of whether specific performance is the appropriate remedy.

which the LLC could apply its trade.[40] It is not ambiguous in this regard, and, under the objective theory of contracts, the Court must conclude that no such limitations exist.

MarineMax also argues, however, that the words "Subj. to marine survey and financing" are part of the provision guaranteeing the Naughty Monkey's trade value. Under this construction of the Buyer Protection Clauses, MarineMax would not be required to accept the Naughty Monkey as a trade-in for the specified value unless it passed a marine survey and unless Stock qualified for financing for the boat he would acquire in the proposed trade. MarineMax contends that this construction is consistent with the parties' alleged understanding that Stock would trade the Naughty Monkey only for a larger, presumably more expensive, boat, since new financing would not be required if Stock were to trade for a cheaper boat. By contrast, the LLC contends that the financing and marine survey conditions comprise a provision that is independent of the trade value clause and that therefore these conditions applied only to the original sale of the Naughty Monkey and not to any future trade-in.

[40] MarineMax cites the parenthetical explanation "(per Andrew Schneider)" as proof that the trade must have been restricted to another Azimut (given that Schneider dealt only in Azimuts), but this does not necessarily follow. The only message the words themselves unequivocally convey is that Schneider approved the boat's trade value through eighteen months, which would be important for MarineMax to know given that it would need to sell the boat if the trade value clause were exercised. They indicate nothing about the nature of the consideration the LLC agreed to take in exchange for the boat in the event Stock decided to trade it in.

That the three lines in question constitute two separate and independent provisions, as argued by the LLC, is reasonably clear from an objective reading of the text. Because, however, those three lines are typed in capital letters and because no punctuation separates them, MarineMax's construction may not be rejected out of hand as unreasonable. The Court, thus, concludes that the three lines suffer from at least some marginal ambiguity, and it must therefore consider the relevant extrinsic evidence.

The July 7 Agreement, which used the words "Sale subject to marine survey and financing," indicates that weeks before the July 31 Agreement, the parties considered those words to be a provision independent of the trade value clause because the "sale" had to be that of the Naught Money to the LLC. It is clear, then, that the July 7 Agreement provided a guarantee of the Naughty Monkey's value that was not explicitly subject to further conditions. Thus, although it may be hard to believe that MarineMax would ever agree to take a trade back without making it subject to an inspection,[41] that is exactly what the July 7 Agreement allowed.

MarineMax's stronger argument is that the three lines in question must represent a single clause in the July 31 Agreement because the two conditions identified had already been satisfied by July 31, 2008, as to the initial purchase of

[41] Tr. (Baldwin) 192.

the Naughty Monkey. Specifically, MarineMax notes that a marine survey had been completed before that date and that a summary of the survey's findings had been incorporated into the July 31 Agreement.[42] Further, it had been fully paid for the Naughty Monkey as of July 31; thus, it contends, the initial purchase could not then have been conditioned on financing. Accordingly, it argues that the financing and marine survey clauses in the July 31 Agreement would be reduced to surplusage under the LLC's interpretation.

The strongest extrinsic evidence that the financing and marine survey conditions comprised an independent clause and retained independent legal significance under the LLC's interpretation comes from the deposition testimony of Thurman, who was one of MarineMax's sales associates when the July 31 Agreement was signed. According to Thurman, when conditions such as "subject to marine survey and financing" are included in a purchase agreement, these words indicate that the purchase would not be complete, but would remain cancellable for failure of the conditions, until the purchaser signed a separate acceptance of the boat.[43] In fact, on the same day that he signed the July 31 Agreement, Stock, on the LLC's behalf, signed the Acceptance of Vessel which read, in relevant part: "I hereby acknowledge that all conditions entered into on [the July 31 Agreement]

[42] JX 2 at MM0005; Tr. (Stock) 90-94.
[43] Dep. of Darren Thurman at 54-55.

have either been performed or are hereby waived."[44] Under the interpretation of the July 31 Agreement advanced by the LLC, the clause subjecting the sale of the Naughty Monkey to financing and a marine survey would thus have had legal significance from the time the parties signed the purchase agreement until the time Stock signed the Acceptance of Vessel.

Other extrinsic evidence also supports the LLC's interpretation that the two clauses were independent provisions of the July 31 Agreement. First, the Court accepts Stock's testimony that the parties did not discuss the differences between the two clauses as they appeared in the July 7 Agreement and the July 31 Agreement, respectively.[45] Under MarineMax's interpretation, the "subject to" language of the July 7 Agreement pertained to the sale of the Naughty Monkey, but the similar language in the July 31 Agreement would pertain to a future trade-in. It is unlikely that the parties would have intended to change the meaning of both clauses so dramatically without discussing the change. Regarding the financing condition, Stock was still working to obtain permanent financing for the Naughty Monkey as of July 31 because the money he paid to MarineMax on that day was a temporary loan from his parents.[46] Although MarineMax was, understandably,

[44] JX 2 at MM0008, ("Acceptance of Vessel" signed by MarineMax and Naughty Monkey LLC on July 31, 2010).
[45] Tr. (Stock) 167-68.
[46] *Id.* at 96.

unconcerned with where the purchase money had come from once it had cash in hand, conditioning the sale on his ability to obtain permanent financing could have been important to Stock. Thus, MarineMax's argument that the financing condition had no meaning under Stock's interpretation of the trade value clause is not persuasive.

Regarding the marine survey clause, because MarineMax still had the obligation to make the repairs prescribed by the marine survey and because these repairs were in addition to those appearing on the punch list,[47] it makes sense that a satisfactory marine survey would have remained a condition of the final sale, the fact that the LLC may have waived this condition perhaps minutes later by way of the Acceptance of Vessel notwithstanding.

Thus, the Court holds that, as they appear in the July 31 Agreement, the phrases "Trade value guaranteed to 15% loss (per Andrew Schneider) within 18 months" and "Subj. to marine survey and financing" are separate and independent clauses. Under the clause guaranteeing the Naughty Monkey's trade value, the LLC is entitled to trade the Naughty Monkey back to MarineMax, and MarineMax must value the boat at 85% of the purchase price, or $1,636,250, without any requirement that the trade be applied to the purchase of a newer, larger, Azimut.[48]

[47] Dep. of Darren Thurman at 45.

[48] MarineMax did not prove any diminution in the Naughty Monkey's value because of the various unfortunate events the vessel had experienced.

2. The LLC Construes the Buyer Protection Clauses

The question remains, however, whether Stock may, as he argues, exchange the Naughty Monkey "without limitation and regardless of what [the LLC] sought in return, i.e., a smaller boat or even cash."[49] Stock testified that the parties understood that the trade value clause was intended to provide him an escape from the acquisition altogether, and that both he and MarineMax knew that he would have the option to trade the Naughty Monkey back to MarineMax for cash, and that they had discussed this possibility from his initial visit to the National Harbor Boat Show.[50] He also explained his belief that unless he could trade the boat for cash, the word "guaranteed" in the clause would have no meaning.[51] To support the claim that it could trade its $1.1 (then-present value) million dollar yacht for a $2,900 boat plus more than $1.6 million in cash, the LLC directs the Court to *Runkles v. State*,[52] in which the Court of Special Appeals considered, among others, a definition of "trade" from *Black's Law Dictionary* that reads:

> Trade: The act or the business of buying and selling for money; traffic; barter . . . used in three senses: (1) in that of exchanging commodities by barter or by buying and selling for money; (2) in that

[49] Pl.'s Post Trial Reply Br. at 3.
[50] Tr. (Stock) 155.
[51] Tr. (Stock) 108.
[52] 590 A.2d 552, 555 (Md. Ct. Spec. App. 1991), *rev'd on other grounds*, 605 A.2d 111 (Md. 1992).

> of an occupation generally; (3) in that of a mechanical employment, in contradistinction to the learned professions, agriculture, or the liberal arts.[53]

In response, MarineMax contends that the July 31 Agreement does not explicitly require it to accept the Naughty Monkey and to pay cash in return. Instead, it argues that the clause in dispute merely establishes a "guaranteed minimum, or floor value, in the event that" the LLC traded its boat back to MarineMax.[54] To support its view that the clause does not impose or imply an obligation to take the Naughty Monkey back in exchange for cash, MarineMax offers a competing dictionary definition of "trade": "an act or instance of trading: transaction; also, an exchange of property usually without use of money."[55]

The LLC's reading of the term "trade value" stretches the natural meaning of that phrase, which the Court finds, based on the definitions of "trade" offered by the parties, generally does not encompass a straight cash transaction, or even a transaction with the bulk of the consideration in the form of cash. Even the authority the LLC cites for its definition of trade included alternate definitions, such as one from *Webster's Third International Dictionary* that suggests an exchange of things, instead of a sale for cash: "'To trade: *To give in exchange for*

[53] Black's Law Dictionary 1492 (6th ed. 1990).
[54] Def.'s Responsive Post Trial Br. at 11.
[55] *Id.* (quoting *Merriam Webster's Collegiate Dictionary* 748 (10th ed. 1997)).

another commodity; to buy and sell (as stock) regularly; *to give one thing in return for another*.'"[56] At most, there is some ambiguity in the term, and the Court may thus consider whether the extrinsic evidence favors one party's reading of the term over the other's.

First, the Court looks to the words used by the parties in the earlier July 7 Agreement. That document provided that Stock's deposit on the boat was "refundable," a term that explicitly contemplates returning cash to Stock if he decided to cancel the deal. The word "refund" leaves no doubt as to whether cash was involved, while the use of "trade" alongside "refundable" in the July 7 Agreement may tend to indicate something other than a cash exchange was intended in the event of a "trade." The Court accepts that the parties attached the same meaning to "trade" in the July 31 Agreement as in the July 7 Agreement. Thus, just as MarineMax could have easily included the words "bigger, newer Azimut" in the contract if it had really wanted to impose those restrictions, so could Stock have insisted on using the words "refund of purchase price less 15% guaranteed" or "cash value guaranteed to 15% loss" if the option to return the boat for a cash refund was important to him. Instead, the clause guaranteeing the Naughty Monkey's "trade value" lacks any allusion to "cash."

[56] *Runkles*, 590 A.2d at 554 (quoting *Webster's Third New International Dictionary* (3d ed. unabr. 1986)) (emphasis added).

Second, whether or not Stock believed at some time that the clause entitled him to receive a cash refund upon trading the boat back to MarineMax, he nonetheless acknowledged at trial that he had been told between July 7 and July 31 that the "purpose of this clause was to allow [him] to exit the Naughty Monkey and trade it for anything that MarineMax had regardless of size . . . ."[57] This implies his knowledge when he signed the July 31 Agreement that the clause allowed him to trade for merchandise instead of an opportunity to escape boat ownership completely and receive cash back. There is also evidence that Stock was investigating the possibility of trading the Naughty Monkey for a larger boat as late as September 13, 2009.[58]

The evidence before the Court, which includes the language used in the July 7 and July 31 Agreements, the testimony, the actions of Stock and MarineMax's representatives, as well as dictionary definitions reflecting common understanding, is together clear and convincing evidence that the LLC is entitled under its trade value claim to trade the Naughty Monkey back to MarineMax not for cash, but rather for a credit toward a future purchase from MarineMax in the amount of $1,636,250, without limitations on the merchandise to which the credit can be applied.

[57] Tr. (Stock) 55.
[58] Tr. (Baldwin) 195.

B. *Count I: Specific Performance*

Under Maryland law,[59] "[a] court of equity will decree specific performance almost as a matter of course if the terms of the contract are clear and unobjectionable, and although such relief is addressed to the sound discretion of the court, that discretion is not arbitrary."[60] The court may grant specific performance of a contract that contains latent ambiguities if relevant extrinsic

[59] Although the parties have assumed that Maryland law governs this question, it is at least arguable that Delaware law should determine whether specific performance is an available remedy in this case because "'[i]t is well established that the law of the forum governs questions of remedial or procedural law.'" *Maloney-Refaie v. Bridge at School, Inc*., 2008 WL 2679792, at *4, n.16 (Del. Ch. July 9, 2008) (quoting *Lutz v. Boas*, 176 A.2d 853, 857 (Del. Ch. 1961). With regard to such questions, "the law of Delaware should be applied 'unless the primary purpose of the relevant rule of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.'" *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 54 (Del. Ch. 2001) (quoting Restatement (Second) of Conflicts § 133 (1971)). In *IBP*, the Court applied New York law regarding the remedy of specific performance based on its determination that New York had adopted a more lenient burden of proof in specific performance cases based on a public policy decision to make that remedy easily available, and that New York's public policy differed from that of Delaware in this regard. *Id.* at 54, n.98.

Similarly, Maryland and Delaware require plaintiffs seeking specific performance to meet different burdens. Under Delaware law, courts may grant specific performance only if the terms of the contract are established by clear and convincing evidence, and only where the plaintiff has no adequate remedy at law. *See E.I. du Pont de Nemours & Co. v. Bayer CropScience L.P.*, 958 A.2d 245, 252 (Del. Ch. 2008). In addition, the Court must determine whether the 'balance of equities' tips in favor of specific performance." *Morabito v. Harris,* 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002). The law of Maryland seems to allow courts to grant specific performance somewhat more freely: "If a contract is fair, reasonable and certain, specific performance may be granted almost as a matter of course." *Steele v. Goettee*, 542 A.2d 847, 853 (Md. 1988) (quotations omitted).

The varying standards reflect differences between the public policies of Delaware and Maryland that are comparable to those that animated the Court's choice of law decision in *IBP*. Following that line of reasoning, the Court concludes that Maryland law should inform its decision whether to grant specific performance.

[60] *Damazo v. Neal*, 363 A.2d 252, 256 (Md. Ct. Spec. App. 1976).

evidence resolves those ambiguities and renders the meaning of the contract certain.[61]

Here, the Court, after taking into account the relevant extrinsic evidence and employing applicable principles of construction, finds that the July 31 Agreement is clear and unobjectionable. The parties negotiated terms that reflected their respective goals: MarineMax wanted to sell a year-old boat to Stock, and, to secure that sale, it agreed to Stock's request for provisions that would protect him in the event he decided to trade that boat in for something else. Regardless of whether the language of the contract reflects the parties' subjective intentions, it is fair to hold the parties to the bargain they actually struck. Thus, the July 31 Agreement is susceptible to an order of specific performance.

Further, granting such an order would be the most effective way to give each party the benefit of its bargain without creating an undeserved windfall for one party at the expense of the other. An objective reading of the July 31 Agreement shows that the parties bargained for a clause that would allow the LLC to trade the

[61] *Kobrine, L.L.C. v. Metzger*, 824 A.2d 1031, 1042-43 (Md. Ct. Spec. App. 2003) *vacated on other grounds*, 846 A.2d 403 (Md. 2004) ("As we stated above, the circuit court resolved the ambiguity using extrinsic evidence. It was within the power of the circuit court to grant specific performance so long as it was fair, reasonable, 'definite and certain in its terms.'" (citations omitted)); *Vary v. Parkwood Homes*, 86 A.2d 727, 731 (Md. 1952) (stating, in the context of a suit for specific performance, that "where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.").

Naughty Monkey for credit of $1,636,250 toward a future purchase from MarineMax. The contract does not reflect an agreement that MarineMax would pay $1,636,250 in cash to buy the Naughty Monkey back from the LLC, and forcing MarineMax to do so would be inequitable.

The wholesale cost to MarineMax of whatever it would trade to the LLC would be materially less than the retail price of that merchandise. Compelling MarineMax to pay cash under this clause would deprive MarineMax of the benefit of its bargain by requiring it to incur a higher cost than it had contracted to accept. Conversely, converting the Naughty Monkey's contractual trade value into a cash award would provide the LLC with a more liquid (and therefore more valuable) asset than it had bargained to receive in exchange for the Naughty Monkey. Calculating a monetary figure that fairly accounts for these and other factors would be impracticable, and thus, awarding the LLC a legal remedy (such as a monetary judgment) would fail to do complete justice.

Accordingly, the Court will enter an order that MarineMax specifically perform the July 31 Agreement by accepting the Naughty Monkey if the LLC offers it for trade. In return, LLC will receive a credit toward purchase from

MarineMax in the amount of $1,636,250. The LLC may apply the credit toward any boat, optional equipment, or dealer installed options sold by MarineMax.[62]

The July 31 Agreement guaranteed the Naughty Monkey's trade value for eighteen months from the purchase date and only approximately four of those eighteen months remained when Stock notified MarineMax of his intent to make a trade.[63] Thus, the LLC's right to trade the Naughty Monkey for the credit described above will terminate if not exercised within four months of the date on which the order implementing this memorandum opinion is entered.[64]

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[62] Although the reasoning underlying the Court's decision would differ marginally if it were to apply Delaware law the outcome would be the same. Under Delaware law, "specific performance is an extraordinary remedy, appropriate where assessing money damages would be impracticable or would fail to do complete justice," and where the balance of the equities favors enforcement of the contract. *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009). It may be granted only if the terms of a contract are proven by clear and convincing evidence. *E.I. du Pont de Nemours & Co.*, 958 A.2d at 252. The Court is satisfied that the terms of the July 31 Agreement have been proven by clear and convincing evidence, and as discussed above, a remedy at law would fail to do complete justice in this case. There is no evidence that it would be unfair to hold the parties to their bargain: "Equity respects the freedom to contract, and dictates that [the parties] should receive the benefit of their bargain through specific performance." *See Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999).

In addition, although the parties have not addressed the issue, the outcome would be the same if the Court were to analyze the question under the Article 2 of the Uniform Commercial Code, which has been adopted in both Delaware and Maryland. Under the U.C.C., "a party seeking specific performance of a contract for the sale of goods needs only to establish only by a preponderance of the evidence that the goods at issue are unique or the circumstances are such that specific performance is appropriate." 6 *Del. C.* § 2-716, cmt. 1.; Md. Code Ann., Com. Law § 2-716, cmt. 1. The circumstances of this case are such that specific performance of the July 31 Agreement would be the appropriate remedy under the U.C.C.

[63] Both parties share roughly equal responsibility for the failure to implement the trade provision. It would be inequitable to deny the LLC the benefit of its bargain merely because of the passage of time.

[64] The Court recognizes that there is customarily a difference between a vessel's sticker price and the price at price at which it will eventually change hands. The parties will conduct any

C. *Count II: Breach of Contract*

The Court rejects the LLC's claim for related damages based on MarineMax's breach of the July 31 Agreement. The LLC asserts that MarineMax's decision to refuse its trade-in offer caused it to incur costs from depreciation, storage, continued financing, insurance, and winterization. All of these are costs associated with financing the purchase of a nearly $2 million boat. Under the July 31 Agreement, the LLC is entitled only to choose from items that MarineMax may sell in exchange for the Naughty Monkey: even if MarineMax had performed the contract at an earlier time, the LLC would have incurred similar costs with respect to its newly acquired boat. Thus, the LLC has not proved that it was damaged by MarineMax's failure to perform beyond the harm the award of specific performance now remedies. Moreover, MarineMax was justified in refusing the LLC's exchange proposal because it did not comply with the terms established by the July 31 Agreement for a trade.

D. *Count III: Violation of Maryland's Consumer Protection Act*

The LLC contends that MarineMax violated Maryland's Consumer Protection Act (the "CPA") by failing to make the limitations on the trade value clause that it has advanced in this case explicit in the July 31 Agreement.[65] The

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transaction involving a credit generated by trading-in the Naughty Monkey in the ordinary course of business.

[65] Md. Code Ann., Com. Law § 13-101 et seq.

CPA prohibits sellers from using unfair or deceptive practices to induce a customer to make a purchase. The CPA protects only purchasers of consumer goods that are intended to be used "primarily for personal, household, family, or agricultural purposes."[66] A limited liability company apparently may be a "consumer" for purposes of receiving protection under the CPA,[67] but the LLC has failed to prove that MarineMax violated the CPA. If MarineMax intended all along to limit application of the Naughty Monkey's trade value to the future purchase of a larger, newer Azimut from its Baltimore facility and failed to include such limiting language in the July 31 Agreement, it did not engage in deceptive trade practices; instead, it simply engaged in sloppy contract drafting. Because the LLC has not adequately proven conduct that would amount to a violation of the CPA, the Court denies the LLC's claims for damages, including costs, interest, and attorneys' fees, under that act.

V. CONCLUSION

For the reasons discussed, the Court awards Naughty Monkey LLC specific performance of the July 31 Agreement, and orders MarineMax to accept the Naughty Monkey (if offered by the LLC) and to grant a credit of $1,636,250

[66] *Id.* at § 13-101(d).

[67] *Id.* at § 13-101(c) (defining "Consumer" as "an actual or prospective purchaser . . . of consumer goods . . . ."). A yacht may be a consumer good within the meaning of the CPA. *Boatel Indus., Inc. v. Hester*, 550 A.2d 389, 399 (Md. Ct. Spec. App. 1988) (holding that the CPA did not apply to protect a plaintiff who had purchased the boat for resale).

toward the purchase of its merchandise, as set forth above.[68] The Court denies all of the LLC's remaining claims. Each party shall bear its own costs.

Counsel are requested to confer and to submit an implementing form of order.

[68] MarineMax moved to strike certain exhibits attached to the Plaintiff's Opening Post Trial Brief. Because the Court has not relied upon those exhibits in reaching its decision, the motion to strike is denied as moot.