COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

February 17, 2011

Arthur L. Dent, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801

Tracy A. Burleigh, Esquire
Marshall Dennehey Warner
Coleman & Goggin
1220 N. Market Street, 5th Floor
Wilmington, DE 19801

Re: Naughty Monkey LLC v. MarineMax Northeast LLC
C.A. No. 5095-VCN
Date Submitted: February 7, 2011

Dear Counsel:

Plaintiff Naughty Monkey LLC, an entity created and controlled by Michael Stock, purchased a boat (the "Naughty Monkey") from Defendant MarineMax Northeast LLC in July 2008. In its post-trial Memorandum Opinion,[1] the Court held that the LLC was entitled, under the July 31 Agreement,[2] to trade the Naughty Monkey back to MarineMax for a credit in the amount of $1,636,250.00, which the

[1] *Naughty Monkey LLC v. MarineMax NE LLC*, 2010 WL 5545409, at *8 (Del. Ch. Dec. 23, 2010) (the "Memorandum Opinion" or the "Mem. Op.").
[2] JX 2. For convenience, the Court continues to employ the nomenclature used in the Memorandum Opinion.

LLC may apply toward the purchase of any boat, optional equipment, or dealer installed options sold by MarineMax. Because the relationship between the parties has deteriorated, the Court directed the parties to conduct any transaction involving such a credit "in the ordinary course of business."[3] The Court held that the LLC could trade the boat back to MarineMax within four months of the date on which the order implementing the Memorandum Opinion was entered,[4] and requested counsel to confer and to submit such an implementing order.[5]

The LLC has moved for clarification of the Memorandum Opinion.[6] A motion for clarification may be granted where the meaning of what the Court has written is unclear, and such a motion is treated, procedurally, as a motion for reargument under Court of Chancery Rule 59(f).[7] A motion for clarification or reargument may not raise for the first time issues that could have been presented at

---

[3] *Id.* at *8 n.64.
[4] *Id.* at *8. The Purchase Agreement guaranteed the Naughty Monkey's trade value for eighteen months, approximately four of which remained when Stock first indicated his intention to trade the boat back to MarineMax. *Id.*
[5] *Id.* at *9.
[6] Pl.'s Mot. for Clarification (the "Motion").
[7] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *5 (Del. Ch. Oct. 11, 2006) (A motion for clarification "amounts to a motion for reargument under Rule 59(f).").

trial but were not.[8] Further, when addressing a motion for clarification or reargument, the Court is generally limited to consideration of the record.[9]

By its motion, the LLC proposes four ways in which the Memorandum Opinion might be "clarified" in order "to avoid the necessity of repeatedly appealing to the Court to 'exercise its equitable oversight' in connection with this matter in the future."[10] The LLC asks the Court to clarify that the Memorandum Opinion holds that (i) MarineMax is limited to making a profit of 7.5% on any transaction involving the Naughty Monkey's trade value; (ii) the LLC may use the credit it receives in return for the Naughty Monkey for up to three years from the date it tenders the boat to MarineMax; (iii) the credit may be assigned to a third party; (iv) the credit may be applied to multiple purchases and to purchases of items for which MarineMax serves as a broker, but which may not be held in its inventory.

---

[8] *Maldonado v. Flynn*, 1980 WL 272822, at *1 (Del. Ch. July 7, 1980) (declining to consider an issue for the first time on reargument).
[9] *See Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) (explaining that a narrow exception exists with regard to newly discovered material evidence that could not have been produced at the time of trial).
[10] Pl.'s Reply in Further Support of Mot. for Clarification ("RB") at 1 (quoting Mem. Op., 2010 WL 5545409, at *3 n.35).

The Court acknowledges the need for additional guidance with regard to the credit contemplated by the Purchase Agreement, and it will clarify certain language in the Memorandum Opinion so that the Court's intended holding is conveyed more precisely. On the other hand, the Memorandum Opinion does not address, and was not intended to address, several issues raised for the first time by the LLC's motion. With regard to contract terms that remain open, not because the Memorandum Opinion is unclear, but instead because the issues involved were never tried to the Court, the Court must deny the motion for clarification.[11] The Court addresses each of the issues presented by the LLC in turn.

The LLC asks the Court to limit the profit MarineMax may make on any transaction involving a trade of the Naughty Monkey to the profit margin earned on

[11] *See Cannon v. Denver Tramway*, 1977 WL 9563, at *1-*2 (Del. Ch. Jan. 24, 1977) (denying a motion for clarification and explaining that the parties had not raised an issue presented by the motion previously: "Accordingly, there is no justiciable controversy pertaining to the issue of expenses. Consequently, no detailed instructions on this issue were given, the Court not being amenable to giving instructions only upon matters which are not of present exigency."); *see also Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (explaining Delaware courts do not decide issues, "unless they are 'ripe for judicial determination,' consistent with a well established reluctance to issue advisory or hypothetical opinions.").

the initial sale of the boat to the LLC. The LLC fixes that profit margin at 7.5%, a figure MarineMax disputes.[12]

Although the record includes evidence from which one may estimate the profit MarineMax was willing to accept when it sold the Naughty Monkey,[13] then a left-over from the previous model year,[14] the parties presented no evidence or argument regarding the amount of profit MarineMax might make on any trade involving the Naughty Monkey. The terms of the Purchase Agreement governing the sale of Naughty Monkey do not address the price of any vessel that might be purchased with a trade-in credit, much less the profit that MarineMax might earn on such a trade. The Court had no basis when it issued the Memorandum Opinion to conclude that the profit margin on the sale of the Naughty Monkey was so typical of MarineMax's dealings that the Court could, without being asked to do so, simply impose it as a contract term in a future transaction involving a different boat. Further, there is no basis to decide this newly raised issue now, and to the extent the LLC asks the Court to do so, the motion for clarification is denied.

---

[12] Motion Hr'g Tr., 2-3, 15-6, Feb. 7, 2011.
[13] *See* Trial Tr. (Rose) 194, Aug. 3, 2010.
[14] Mem. Op., 2010 WL 5545409, at *1.

In contrast, the Court will clarify, somewhat, its holding regarding the time the LLC has in which to use a credit for the Naughty Monkey's trade value. The Memorandum Opinion provides that the LLC may elect to trade the Naughty Monkey back to MarineMax credit within four months of date on which the order implementing that opinion is entered, but it does not specify the period during which that credit may be used.[15] The LLC asks the Court to clarify that the credit may be used for a "reasonable time"—it suggests three years.[16] MarineMax argues that the LLC must trade the Naughty Monkey, if at all, in contemplation of purchasing other merchandise, and thus the trade and the acquisition of that merchandise must be completed within four months.

The parties took several weeks to complete their first transaction involving the Naughty Monkey.[17] Under what remains of the trade window prescribed by the July 31 Agreement, the LLC may exercise its right to trade the Naughty Monkey back to MarineMax until the last day of the four month period, and it would be inequitable and impracticable, in light of the parties' past dealings, to require that

[15] Mem. Op., 2010 WL 5545409, at *8.
[16] Motion ¶¶ 6-7.
[17] JX 1 (the July 7 Agreement); JX 2 (the July 31 Agreement).

the LLC either complete a transaction that very day or lose the value of its credit. Thus, the Court clarifies that the LLC, so long as it tenders the Naughty Monkey back to MarineMax within four months of entry of the implementing order, has a reasonable period after it tenders the boat to complete a transaction involving its credit. The Court has no basis upon which it may decide to fix that "reasonable period" at any specified length of time, and it declines to do so. The reasonableness and good faith of the parties, unfortunately, can only be assessed in a specific factual context.

Next, the LLC asks the Court to declare that, in the event it decides to trade the Naughty Monkey back to MarineMax, it may assign the credit it receives to a third party. As MarineMax points out, the July 31 Agreement provides that the agreement itself may not be assigned to a third party.[18] The issue of whether the prohibition on assignment applies to any credit resulting from a trade made pursuant

[18] JX 2 at MM0002 ("11. ASSIGNMENT. This Agreement may not be assigned by the Buyer without the express written approval of the Seller.").

to the Purchase Agreement, however, has not been presented to the Court in a justiciable form. The Court thus denies the motion for clarification in this regard.[19]

Finally, the LLC asks the Court to clarify the nature of the merchandise to which it may apply its potential credit. The LLC acknowledges that the Memorandum Opinion was "clear" that the LLC "may apply the credit toward any boat, optional equipment, or dealer installed options sold by MarineMax,"[20] but it seeks clarification that "boats . . . sold by MarineMax" includes not only new and used boats in MarineMax's inventory but also boats for which MarineMax serves as a broker. Further, the LLC argues that it is allowed to apply its credit to multiple transactions over a period of time, and not just to a single transaction.

MarineMax appears to have no objection to allowing the credit to be used on multiple items,[21] and the Court clarifies that the Memorandum Opinion holds that the LLC may use the credit to purchase multiple items in multiple transactions so

---

[19] MarineMax identified one possible solution to this issue during the hearing on this motion: "If the Plaintiff wants to . . . assign or sell or give away whatever he opts [to use] that credit for, that's his prerogative . . . ." Motion Hr'g Tr. 18. The Court does not resolve whether the LLC may have other rights with regard to assigning the credit to a third party.
[20] Motion at ¶ 11 (quoting Mem. Op., 2010 WL 5545409, at *8).
[21] Motion Hr'g Tr. 18-19.

long as the transactions are all completed within a reasonable time from the date when the LLC tenders the Naughty Monkey back to MarineMax.

The Court also clarifies that the credit may be applied to any new or used boat that MarineMax sells, but that the LLC has no right to insist that it be applied to a boat for which MarineMax serves merely as a broker. At the time it issued the Memorandum Opinion, the Court did not fully appreciate the fact that MarineMax both sells boats for its own account and acts as a facilitator for transactions in which a third party seller conveys a boat to a buyer. The Court could not force a third party to accept a credit from the LLC in such a transaction, and, for some of the same reasons that the Court held the LLC was entitled to a credit instead of cash,[22] it would be inequitable to force MarineMax to accept a credit from the LCC and then to pay the cash value of the brokered boat a third party. Accordingly, the Court clarifies that the Memorandum Opinion does not require MarineMax to apply a credit the LLC receives in exchange for the Naughty Monkey to a brokered transaction between the LLC and a third party seller.

[22] *See* Mem. Op., 2010 WL 5545409, at *8.

In sum, the Court grants the LLC's motion in part and clarifies that (i) the LLC may tender the Naughty Monkey to MarineMax for a credit within four months from the date the order implementing the Memorandum Opinion is entered, and the LLC may use the credit within a reasonable period that begins when the boat is returned; (ii) the credit may be applied to multiple items in multiple transactions until the value of the credit is exhausted, so long as the transactions are completed within that same reasonable period of time; and (iii) the LLC is entitled to apply the credit toward the purchases of any new or used boat, optional equipment, or dealer installed options sold by MarineMax, but not toward the purchase of a boat for which MarineMax serves only as a broker. The motion is denied in all other respects.

The Court acknowledges that the clarifications it has provided do not resolve all the issues likely to remain between the parties. With regard to the issues that do remain, the Memorandum Opinion provides the parties with the most direction the Court was able to provide in light of the evidence and arguments presented at trial:

"The parties will conduct any transaction involving a credit generated by trading-in the Naughty Monkey in the ordinary course of business."[23]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[23] *Id.* at *8 n.64. Stated differently, the parties will comply with the covenant of good faith and fair dealing which they implicitly gave on entering into the July 31 Agreement.