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February 23, 2006

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Re: Ramunno v. Capano, et al.; C.A. No. 18798-NC
Date Submitted: February 21, 2006

Dear Mr. Ramunno and Mr. Weiner:

Plaintiff L. Vincent Ramunno (the "Trustee") has moved, under Court of Chancery Rule 59(f), for reargument of the Court's memorandum opinion of February 10, 2006.[1] In order to prevail on a motion for reargument, the moving party must demonstrate that the Court's decision was based upon a misunderstanding of a material fact or a misapplication of law.[2]

The Trustee presents three contentions:

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[1] *Ramunno v. Capano*, 2006 WL 375541 (Del. Ch. Feb. 10, 2006). For convenience, the terms defined in the memorandum opinion will be used here.

[2] *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000); *see also W. Ctr. City Neighborhood Ass'n, Inc. v. W. Ctr. City Neighborhood Planning Advisory Comm., Inc.*, 2003 WL 23021929, at *1 (Del. Ch. Dec. 18, 2003).

1. *That the Court Ignored the Tax Benefits Received by Joseph and Louis as a Result of the Decision to "Write Off" the Westwoods Loan*

The Trustee argues that it would be "inequitable . . . to allow a windfall . . . especially since both experts agreed that taking the Westwood[s] loan as a deduction was illegal."[3] The task confronting the Court was to determine the fair value of Original Augustine as of the time of the merger. Whether Louis and Joseph failed to comply with the tax laws raised questions, not of value accruing to the partnership, but of their allegedly improper avoidance of tax liability. As the Court observed, that is a matter for the taxing authorities.[4] Any improper treatment of the Westwoods loan for tax purposes came at the expense of the public coffers.

2. *That the Court Improperly Calculated the Capital Contribution Owed by Thomas When it Treated the Westwoods Loan as a Contribution to Partnership Equity by Louis and Joseph*

Specifically, the Trustee contends that Louis and Joseph never advanced this approach to determining Thomas's liability. The Trustee has not questioned the Court's arithmetic. The Court concluded that the appropriate means of dealing with the Westwoods loan was to treat it as a capital contribution. Once that decision was made, the Court's calculation of the shortfall in Thomas's capital account was called for by the Partnership Agreement.

[3] Mot. for Reargument at ¶ 1.

3. *That the Westwoods Loan Could Not be Treated as a Capital Contribution Because its Collection Was Barred by the Applicable Statute of Limitations.*

This contention was addressed in the memorandum opinion,[5] and the Court's treatment of the Westwoods loan was consistent with the view of the Trustee's expert, Peter J. Winnington, CPA, who concluded that the Westwoods loan should have been treated as a capital contribution.[6]

For these reasons, the motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

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[4] *Ramunno*, 2006 WL 375541, at *7 n.49.

[5] *Id*. at *6 - *7. *See Benge v. Oak Grove Motor Court, Inc*., 2006 WL 345006, at *1 (Del. Ch. Feb. 6, 2006) ("A motion for reargument will not be granted, however, when a party merely restates its prior arguments.").

[6] Tr. 432. I note in passing that, in this equitable action, the time-bar defense is laches. Although equity regularly borrows the analogous statute of limitations as its guide for the defense of laches, it is not necessarily rigidly applied, *see, e.g., Orloff v. Shulman*, 2005 WL 3272355, at *9 - *10 (Del. Ch. Nov. 23, 2005), and the nature of this dispute—within a family partnership—could be an instance where rigidity would be inappropriate. Although the Trustee argues that it was "inequitable" for Louis and Joseph to obtain tax benefits by writing off the Westwoods loan, it is not clear why the Trustee's approach to the more than $1 million contributed by Louis and Joseph to Old Augustine would be equitable and would not constitute a windfall to the Trustee's interests.