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Re: Friendly Ghost Enterprises, LLC v. McWilliams, et al.
C.A. No. 2935-VCN
Date Submitted: July 2, 2007

Dear Counsel:

This action involves disputes between Plaintiff Friendly Ghost Enterprises, LLC ("Friendly Ghost") and Defendant David G. McWilliams ("McWilliams"), the two owners of Nominal Defendant Stamack, Inc., a Delaware corporation ("Stamack"), over the management of Stamack. Friendly Ghost seeks to resolve the controversies in this Court. McWilliams has invoked the arbitration provisions of Shareholders Agreement, as amended, governing their relationship with respect to Stamack.

On June 26, 2007, the Court addressed the competing forum arguments of the parties. As a result, it concluded, as set forth in its bench ruling of that date and as supplemented by a letter of June 27, 2007, that the disputes should proceed in two fora at the same time, even though that approach would be burdensome and inefficient. The Court, relying upon *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002), *cert. denied*, 538 U.S. 1032 (2003) ("*Parfi I*"), concluded that its discretion as to matters of efficient administration of the judicial process were limited in this context and, thus, certain claims integral to the governance of Stamack needed to go forward here. Specifically, that portion of Count One of Friendly Ghost's Verified Complaint (Injunctive Relief) dealing with fiduciary duty claims, Count Three (Appointment of a Custodian), and Count Four (Dissolution) would be dealt with in this forum. Count One, except for the fiduciary duty claims, and Count Two, characterized as the "declaratory judgment" claim, would be resolved in the arbitration forum. Count Five, which seeks an accounting, sets forth no cause of action; instead, it describes a remedy which either forum could provide.

McWilliams thereafter filed a timely motion for reargument under Court of Chancery Rule 59(f). He relies upon *Parfi Holding AB v. Mirror Image Internet,*

Inc., 842 A.2d 1245 (Del. Ch. 2004) ("*Parfi II*"), *aff'd in pertinent part*, 2007 WL 1451506 (Del. May 17, 2007) ("*Parfi III*"), to support his contention that this matter should be stayed in its entirety pending arbitration in New York.

The standard for reargument is a familiar one:

> A court may grant reargument when it appears that the court overlooked or misapprehended facts or principles of law that would have had a controlling effect on the outcome of a particular decision. It is not an opportunity, however, to rehash arguments already made or to raise new ones.[1]

The Court concludes that it construed *Parfi I* too narrowly. Indeed, the Supreme Court in *Parfi III* expressly instructed: "*Parfi I* did not address, directly or indirectly, the trial court's inherent authority to control its docket or the propriety of its staying the Delaware action."[2] As this Court, in *Parfi II*, framed it:

> [I]t seems to me to be more efficient for all concerned, including the Delaware courts, for the arbitration to be finally completed before this Court further considers this matter. Once the arbitration is entirely completed, Plenteous will either be fully satisfied or not. The possibility exists that it may not even continue as a plaintiff in this action if it is satisfied with the arbitrators' final decision. At the very least, any contractual recovery Plenteous receives will have to be considered if this Court is called upon to shape a remedy for the plaintiffs in this case. Likewise, deferring this litigation until the

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[1] *MetCap Secs. LLC v. Pearl Sr. Care, Inc.*, 2007 WL 1954442, at *1 (Del. Ch. June 29, 2007) (internal punctuation and citations omitted).
[2] *Parfi III*, 2007 WL 1451506, at *3.

> arbitration is final will permit me to determine the collateral effect, if any, of any findings made by the arbitrators on a complete record. Because of these and other related concerns, it makes sense to stay this litigation until the arbitration is completed.[3]

Friendly Ghost argues that McWilliams did not fairly cite to *Parfi II* or *Parfi III* before he filed his motion for reargument,[4] and, thus, it is too late to consider that authority. Although new arguments are not appropriate for consideration in the context of a motion for reargument, *Parfi III* does not set forth new law. Instead, it informs the Court that its previous reading of *Parfi I* was misguided. At issue is whether the Court applied *Parfi I* correctly. Thus, the question of the proper application of *Parfi I* is present now as it was before.

More substantively, Friendly Ghost also argues that, even with the greater flexibility confirmed by *Parfi II* and *Parfi III*, this Court's decision to stay arbitration of certain claims and to handle those certain claims directly should be sustained. The Court, with the benefit of a proper understanding of *Parfi I*, therefore, returns to the question of whether any portion of this action should proceed at the same time as the arbitration proceeding.

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[3] *Parfi II*, 842 A.2d at 1263.

[4] McWilliams did cite to *Parfi II* in his opening brief in support of his motion to stay this proceeding in favor of arbitration.

The contract claims and the fiduciary duty claims asserted within Count One depend upon the same facts and are premised upon related or parallel legal theories. No practical reason exists for administering the claims separately. Accordingly, as a matter of prudent case management, the Court will stay the fiduciary duty claims in this action pending resolution of the corresponding contract claims by the arbitrators.

The Court also concluded earlier that the application for appointment of a custodian and the application for dissolution should proceed here. That conclusion was animated both by the Court's understanding of its discretion and by acknowledgment that the appointment of custodians and the ordering of dissolution lie at the core of this Court's responsibilities under the Delaware General Corporation Law and that the arbitration provision of the Shareholders Agreement is not as clear as one might hope.

Friendly Ghost's reasons for seeking both appointment of a custodian and dissolution are based on McWilliams' conduct which will be thoroughly explored, developed, and assessed during the course of the arbitration of the related claims. The Court has considered and denied an expedited application by Friendly Ghost for a temporary restraining order that would have limited McWilliams in his day-to-day

operations role.[5] Appointment of a custodian is considered a rare event in our jurisprudence. Before dissolution can be implemented—assuming that it would be a proper remedy—the substantive claims of Friendly Ghost challenging McWilliams' conduct logically should be first resolved. Depending upon the outcome, dissolution either would not be appropriate or would be a remedy ready for prompt implementation. In sum, given the nature of the dispute between Friendly Ghost and McWilliams, the efficient arbitration proceedings in progress in New York, and the inefficiency that would result if the disputes were litigated simultaneously in different venues, the Court concludes that because it misapprehended a material principle of law, *i.e.*, its understanding of the impact of *Parfi I*, McWilliams' motion for reargument should be granted.[6]

For the foregoing reasons, this action is stayed pending arbitration between the parties in New York, where the claims may first be considered. Any party, for

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[5] *See Friendly Ghost Enter. LLC v. McWilliams*, C.A. No. 2935-VCN, Transcript of Oral Argument and Bench Ruling, May 17, 2007, at 38-46.

[6] Actions seeking the appointment of a custodian or the dissolution of an entity are said to be summary proceedings. *See, e.g.*, DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8-11[a]2 at 8-178 & § 8-9[a] at 8-148 (2007). As such, they may be found at the heart of this Court's corporate jurisdiction. Although that is a factor that may militate against granting a stay in favor of other litigation, the important nature of the relief sought does not defeat an obligation to arbitrate, especially when significant considerations of judicial administration also are involved. *See, e.g.*, *Terex Corp. v. STV USA, Inc.*, 2005 WL 2810717 (Del. Ch. Oct. 20, 2005) (deferring to arbitration in a matter seeking dissolution).

cause, may move to vacate the stay. The limited stay of the arbitration in New York, ordered by the Court on June 26, 2007, is vacated.[7]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[7] With these conclusions, the Court understands McWilliams' pending motion to stay discovery to be moot.