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OF THE
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Re: *Merrill Lynch Trust Company, FSB v. Campbell*
C.A. No. 1803-VCN
Date Submitted: June 3, 2011

Dear Counsel:

One might have thought that this Court's post-trial memorandum opinion had resolved this matter when it was issued in September 2009.[1] Counterclaim Plaintiff Mary F.C. Campbell appealed. The Supreme Court recognized that this Court's decision in 2007,[2] which dismissed Campbell's challenges to the formation

[1] *Merrill Lynch Trust Co. FSB v. Campbell*, 2009 WL 2913893 (Del. Ch. Sept. 2, 2009) (the "Memorandum Opinion" or the "Mem. Op."). A few issues focused on fees remained for decision. *See Merrill Lynch Trust Co. FSB v. Campbell*, 2010 WL 1366992 (Del. Ch. Mar. 31, 2010). For convenience, defined terms from the Memorandum Opinion are used here.

[2] *Merrill Lynch Trust Co. FSB v. Campbell*, 2007 WL 2069867 (Del. Ch. July 11, 2007) (the "Letter Opinion").

of the Trust on the ground of laches, "largely controlled the remaining issues."[3] The matter was remanded to this Court for reassessment of its laches decision that had resulted in the dismissal of Count I of Campbell's Counterclaim. This Court then concluded that its earlier laches decision suffered from a failure to appreciate the "consequences of the unusual payout terms of the trust agreement" and that a factual hearing on the defense of laches should have been held.[4]

After the Court reported that conclusion, the Supreme Court vacated this Court's "Opinion and Order dated July 11, 2007" and remanded the matter to the Court "for further action in accordance with its Report on Remand."[5] Campbell now seeks to amend her counterclaim. MLTC, although acknowledging that leave

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[3] *Campbell v. Merrill Lynch Trust Co. FSB*, No. 302, 2010 (Del. Nov. 24, 2010) (ORDER) (the "Order") at 3. Stated perhaps too simplistically, the core of the balance of the Memorandum Opinion rejected Campbell's challenge to Counterclaim Defendant Merrill Lynch Trust Company, FSB's ("MLTC") investment strategies because those riskier strategies were driven by the high payout specified in the Trust Agreement for the charitable remainder trust. The order implementing the Letter Opinion, which dismissed Campbell's challenge to the process of establishing the Trust Agreement, was viewed as precluding her attack on those investment strategies.

[4] *Merrill Lynch Trust Co. FSB v. Campbell*, 2011 WL 383928, at *3 (Del. Ch. Jan. 24, 2011) (the "Report on Remand").

[5] *Campbell v. Merrill Lynch Trust Co. FSB*, 12 A.3d 1153, 2011 WL 397899 (Del. 2011) (TABLE) (the "Remand Order"). It may be worth noting that the Remand Order did not affirm, or otherwise expressly address, the balance of the Court's decisions that had been appealed.

to amend shall be "freely given when justice so requires,"[6] opposes Campbell's motion. Much of the debate turns on the meaning and intent of the Remand Order.

Some of Campbell's proposed changes clarify or expand the factual aspects of the Counterclaim.[7] Those have not elicited serious opposition. Instead, MLTC has focused its opposition on Campbell's efforts: (1) to add a consumer fraud claim under 6 *Del. C.* § 2513 to Count I challenging the CRUT formation; (2) to seek a declaration under Count I that MLTC may not invoke the Trust Agreement's high payout rate to justify its investment decisions; and (3) to assert a claim for treble damages, a consumer fraud remedy, under all three counts.

MLTC contends that the proposed amendments would be both futile and beyond the Court's jurisdiction.

First, MLTC asserts that it was not responsible (or liable) for the decisions leading up to the formation of the CRUT. It invokes the law of the case doctrine based upon the Memorandum Opinion:

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[6] Ct. Ch. R. 15(a).

[7] E.g., Proposed Second Amended Counterclaim of Mary F.C. Campbell at ¶¶ 7, 8, 9, & 23. Generally, Count I of the Counterclaim deals with the formation of the CRUT; Count II asserts a breach of a trustee's duties under the common law and 12 *Del. C.* § 3302; Count III raises breaches of fiduciary duties.

> As distasteful as the facts are, none of the decisions surrounding the formation of the Trust can now be fairly charged to MLTC. . . . While the specter of incentivized cross-selling can be gleaned from the record, no evidence has been developed showing that the relationship between Pierce and MLTC was improper, or misrepresented. Most importantly, any claims Campbell may have had concerning the formation of the Trust are time-barred.[8]

The law of the case doctrine teaches "that issues already decided by the same court should be adopted without relitigation, and once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears."[9] In this instance, the Court, in noting that MLTC would not be held liable for the formation of the charitable remainder unitrust, placed primary reliance upon MLTC's time-bar defense.[10] Moreover, the question of MLTC's responsibility for the formation of the CRUT, as encapsulated in Count I, was not fairly addressed at trial because Count I had, by that time, been dismissed. The only stage where the question of MLTC's liability for the matters alleged in

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[8] Mem. Op., 2009 WL 2913893, at *6 (internal citation omitted).
[9] *Whittington v. Dragon Group L.L.C.*, 2011 WL 1457455, at *7 n.56 (Del. Ch Apr. 15, 2011) (citing *Taylor v. Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 25, 2006)).
[10] MLTC's laches defense has not been rejected. That defense, however, needs to be tested in a trial setting.

Count I was "addressed in a procedurally appropriate way" was in the Letter Opinion, which, as noted, focused on laches. It may turn out that the Court's conclusion as to MLTC's responsibility was correct; it is not now, however, precluded by the law of the case doctrine.

Second, MLTC questions the appropriateness of combining common law fraud and statutory consumer fraud in the same count. It, not inaccurately, argues that the two are distinct theories and may not fully parallel one another. The Supreme Court set aside the Court's determination that the common law fraud claim was time-barred. That claim has been revived and nothing forbids its expansion to include statutory consumer fraud as well. Under the generally flexible standard governing amendments, this poses no insurmountable obstacle.

Third, MLTC argues that any amendment of Count II or Count III of Campbell's Counterclaim would be futile because this Court already adjudicated those claims in the Memorandum Opinion, and the Remand Order did not disturb those dismissals. MLTC makes a plausible argument based on the wording of the Remand Order but ignores the greater context. The Supreme Court noted in the Order that the dismissal of Count I had a corollary impact on Campbell's pursuit of

Count II and Count III at trial. Moreover, the Supreme Court held in that same order that it would "defer consideration of th[e] appeal until the Court of Chancery has considered and ruled upon the laches defense."[11] This Court has not ruled on the laches defense; it merely concluded that the record did not support the answer given based on the methodology used. With that, this Court's ultimate resolution of that defense remains to be decided. What effect the proposed amendment would have necessarily depends upon the ultimate fate of the laches defense. Whether the time-bar is reinstituted, or whether the record at trial would support the Court's conclusion then, even without factoring in the time-bar, may be questions that need answering.

Finally, MLTC asserts that treble damages are not attainable because they may only be awarded for a violation of subchapter 8 of 6 *Del. C.* ch. 25.[12] The subchapter which MLTC cites does not have separate violations. Instead, it simply assists in determining what appropriate penalty should be imposed. Thus, the subsection upon which MLTC has relied cannot be construed to limit its application to a subchapter that contains no definition of a remediable violation.

[11] Order at 3.
[12] 6 *Del. C.* § 2583(b).

The "violation of the subchapter" subsumes other portions of the subchapter which impose sanctions for conduct and those other provisions clearly incorporate harm suffered as the consequence of a violation of the "chapter," i.e., 6 *Del. C.* ch. 25.

Consumer fraud claims may be based on an "unlawful practice" arising out of the use of deception in the "sale" of "any merchandise."[13] MLTC asserts that alleged fiduciary breaches and trustee shortcomings under Title 12 of the Delaware Code are beyond the reach of the consumer fraud statute. Perhaps MLTC's conduct will not cause imposition of consumer fraud liability, but, under a futility standard, it suffices to note that "merchandise" is defined to include "services."[14] For current purposes, the Court cannot conclude from the pleadings that MLTC has not been brought within the ambit of the consumer fraud statute.[15]

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[13] 6 *Del. C.* § 2513(a).
[14] 6 *Del. C.* § 2511(6).
[15] Futility for Court of Chancery Rule 15(a) purposes tracks the familiar standard found in Court of Chancery Rule 12(b)(6). *See Zimmerman v. Braddock*, 2005 WL 2622698, at *1 n.1 (Del. Ch. Oct. 6, 2005) ("As a matter of substance and not of form, whether the motion was one to amend or one to dismiss would seem to make little difference.").

Accordingly, for the foregoing reasons, Campbell's motion to amend is granted, and she may file and serve her Second Amended Counterclaim.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K